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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his Official Capacity, and XAVIER BECERRA, Attorney General of California, in his Official Capacity, Defendants.	Case No. **NOTICE OF MOTION AND MOTION FOR PRELIMINARY INJUNCTION**

NOTICE

Notice is hereby given that the United States of America makes the following motion, which it proposes to notice for a hearing on a date 28 days from the date of service or as soon thereafter as the matter can be heard at a yet to be determined courtroom.

MOTION

The United States hereby moves for a preliminary injunction enjoining enforcement of certain provisions of the California Internet Consumer Protection and Net Neutrality Act of 2018, Cal. Civ. Code §§ 3100-3104, enacted through Senate Bill 822. As detailed in the accompanying proposed order, the United States respectfully requests that this Court preliminary enjoin Section 3100(j), (r), (t) and Section 3101(a)(1)-(a)(7), (a)(9) of the California Civil Code. The United States also respectfully requests that this Court preliminarily enjoin the application of those provisions through Section 3101(b) of the California Civil Code. Further, the United States respectfully requests that this Court preliminarily enjoin Section 3102(a), (b) of the California Civil Code.

This motion is based on the memorandum filed herewith, and the pleadings on file.

Dated: September 30, 2018

Respectfully submitted,

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA,

Plaintiff,

v.

THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his Official Capacity; and XAVIER BECERRA, Attorney General of California, in his Official Capacity,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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In order to avoid ongoing, irreparable harm to the United States and its interests, the United States moves this Court under Federal Rule of Civil Procedure 65 to preliminarily enjoin enforcement of the California Internet Consumer Protection and Net Neutrality Act of 2018, Cal. Civ. Code §§ 3100-3104, enacted through Senate Bill 822 ("SB-822"). As detailed in the accompanying proposed order, the United States respectfully requests that this Court preliminarily enjoin Defendants (collectively, "California") from enforcing Sections 3100, 3101 and 3102 of the California Civil Code.

INTRODUCTION

This case involves California's attempt to nullify the Federal Government's regulatory scheme for interstate broadband communications. The Constitution resolves this dispute. Pursuant to the Supremacy Clause and federal statutes, the Federal Communications Commission ("FCC" or "Commission") sets uniform, national policies governing interstate communications, and contrary state laws—like the one challenged here—are preempted.

In 2018, the FCC released an order establishing a new regulatory framework for the Internet and repealing the rules governing broadband Internet access it had adopted in 2015. *Restoring Internet Freedom*, 33 FCC Rcd 311 (2018) ("2018 Order"). Invoking multiple sources of authority, the 2018 Order expressly preempted "any state or local measures that would effectively impose rules or requirements that [the FCC] ha[d] repealed or decided to refrain from imposing in this order or that would impose more stringent requirements." 2018 Order ¶ 195. Despite the plain text of the 2018 Order, California enacted legislation that both "codif[ies] portions of the recently-rescinded [FCC] rules," and imposes additional bright-line rules that not even "the FCC opted" to embrace in 2015. Cal. S. Comm. on Judiciary, SB 822 Analysis 1, 19 (2018) ("Judiciary Analysis"). This enactment is part of a pattern of recent actions by the State that purport to nullify federal law and have been challenged as being preempted. *See* Compl. ¶ 53, *United States v. California*, No. 2:18-cv-721-WBS-DB (E.D. Cal. Apr. 2, 2018), ECF No. 1; Compl. ¶ 3, *United States v. California*, No: 2:18-cv-490-JAM-KJN (E.D. Cal. Mar. 6, 2018), ECF No. 1.

California is currently challenging the 2018 Order, including its preemption provision, in the D.C. Circuit, which has "exclusive jurisdiction" under the Hobbs Act to "determine the validity" of that order, 28 U.S.C. § 2342(1). But the State was not content to await final judgment in that matter and proceeded to enact this preempted legislation, thereby creating a collateral—and entirely needless—constitutional controversy. Because the Hobbs Act and Ninth Circuit precedent require this Court to presume here that the 2018 Order is valid, the only question before the Court is whether SB 822 conflicts with the 2018 Order—a point that California has admitted.

California thereby has countermanded the FCC's decision—by itself reason to preliminarily enjoin SB-822. Indeed, this Court recently recognized the injury suffered by the United States when, as here, its "federal authority [is] undermined by impermissible state regulations." *United States v. California*, 314 F. Supp. 3d 1077, 1112 (E.D. Cal. 2018). The attendant "[f]rustration of federal statutes and prerogatives are not in the public interest." *Id.* And here, due to its size and weighty impact on the Internet economy, California effectively has dictated a broadband Internet access policy for the entire Nation. Given the nature of Internet communications, which frequently straddle multiple jurisdictions, Internet Service Providers ("ISPs") cannot apply two separate and conflicting legal frameworks to Internet communications—one for California and one for everywhere else. This means that California's rules in this area, for all practical purposes, are the only ones that matter. California's nullification of federal law—with the concomitant regulatory uncertainty and instability of the Internet marketplace created—is not in the public's interest, not otherwise justified, and thus should be immediately enjoined.

BACKGROUND

I. History of Federal Internet Regulation

A. Broadband Internet Access Service

Internet users generally connect to "backbone networks"—"interconnected, long-haul fiber-optic links and high-speed routers capable of transmitting vast amounts of data"—via local access providers "who operate the 'last-mile' transmission lines." *Verizon v. FCC*, 740 F.3d 623,

628-29 (D.C. Cir. 2014). In the early days of the Internet, most users relied on dial-up connections via local telephone lines to connect. *Id.* at 629. Today, however, users generally access the Internet "through 'broadband,' i.e., high-speed communications technologies, such as cable modem service." *Id.* Both "edge providers" ("those who, like Amazon or Google, provide content, services, and applications") as well as "end users" ("those who consume edge providers' content, services, and applications") usually rely on broadband Internet access service. *Id.* Over the past two decades, the FCC has issued a series of orders addressing the appropriate regulatory treatment of broadband Internet access service.

B. The Commission's Historic Approach to Internet Regulation

In the Telecommunications Act of 1996 ("1996 Act"), Congress comprehensively reformed and amended the Communications Act of 1934 ("Communications Act") to "promote competition and reduce regulation" so as to "secure lower prices and higher quality services for American telecommunications consumers" and to "encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104 (preamble), 110 Stat. at 56. As amended, the Communications Act distinguishes between lightly regulated "information services" and more heavily regulated "telecommunications services." 47 U.S.C. § 153(24), (53); *see National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 973, 975-76 (2005) ("*Brand X*"); 2018 Order ¶ 9. It further established that "[i]t 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"—including any "information service"—"unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2), (f)(2). For much of the next two decades, the FCC therefore "repeatedly adopted a light-touch approach to the Internet that favored discrete and targeted actions over pre-emptive, sweeping regulation of Internet service providers." 2018 Order ¶ 9; *see id.* ¶¶ 9-16. In 1998, for instance, the FCC informed Congress that Internet access service should be classified as an information service, not a telecommunications service. *In re Federal-State Joint Bd. on Universal Serv.*, 13 FCC Rcd 11,501, 11,536 (1998). In 2002, consistent with that conclusion, the Commission classified broadband Internet access service over cable systems as an

"interstate information service" rather than a "telecommunications service." 2018 Order ¶ 10. In 2005, the Supreme Court upheld that classification, concluding that it was based on a permissible reading of ambiguous language in the Telecommunications Act's definitional provisions. *Brand X*, 545 U.S. at 986-1000. The FCC later classified broadband Internet access service via other channels, such as wireline facilities and power lines, as information services as well. 2018 Order ¶¶ 12-13. The thriving, rapidly expanding, and ubiquitous Internet that we know today was created in this regulatory environment.

Starting in 2008, the FCC asserted certain regulatory authority over broadband Internet access providers. *Id.* ¶¶ 14-17. With the exception of a 2010 transparency rule, which required providers of broadband Internet access services to disclose their network-management practices, the D.C. Circuit rejected these efforts as falling outside of the Commission's authority over information services. *See Verizon*, 740 F.3d at 627; *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010). At no point during this time did the FCC seek to justify these actions by invoking its Title II authority over telecommunications services. *See* 2018 Order ¶¶ 14-17.

C. The 2015 Order

In 2015, in a sharp (but brief) departure, the FCC issued an order classifying, for the first time, broadband Internet access service, whether fixed or mobile, as a telecommunications service subject to the Commission's Title II authority. *Protecting & Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("2015 Order").

Relying on this authority, the FCC adopted several rules. To start, it banned broadband Internet access service providers from engaging in the following conduct:

1) *Blocking*: A provider "shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management." *Id.* ¶ 15.

2) *Throttling*: A provider "shall not impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management." *Id.* ¶ 16.

> 3) *Paid Prioritization*: A provider "shall not engage in paid prioritization," which "refers to the management of a broadband provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise) from a third party, or (b) to benefit an affiliated entity." *Id.* ¶ 18.

The 2015 Order also adopted the following Internet conduct standard, directing that providers "shall not unreasonably interfere with or unreasonably disadvantage" either:

> (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule.

Id. ¶¶ 21, 136. In addition to these new substantive rules, the 2015 Order "enhance[d]" the transparency rule adopted by the FCC in 2010 by imposing additional reporting requirements. *Id.* ¶¶ 24, 162-71.

The FCC declined, however, to impose "bright-line" prohibitions on "other practices" to which some commentators objected. *Id.* ¶¶ 151-52. For example, the Commission refused to ban "zero-rating"—the practice of exempting certain Internet traffic from users' data "usage allowances," *id.* ¶ 151—because some uses of this practice "could benefit consumers and competition," *id.* ¶ 152. Similarly, the Commission did not apply any bright-line rules to so-called interconnection or Internet traffic exchange agreements—generally, commercial arrangements between ISPs and edge providers concerning Internet traffic at connections between the backbone networks and the last-mile transmission lines (although it asserted authority to review interconnection disputes under Title II on a case-by-case basis). *Id.* ¶¶ 30-31, 202-06. And the Commission declined to apply the rules to separate non-Internet services—sometimes referred to as "specialized services"—offered by a broadband provider, such as "facilities-based VoIP offerings, heart monitors, or energy consumption sensors," except for narrow circumstances where it could be subject to limited oversight under the Internet conduct standard. *Id.* ¶¶ 35, 207-13.

The FCC also promised that it would "exercise [its] preemption authority to preclude states from imposing obligations on broadband service that are inconsistent with [its] carefully tailored regulatory scheme." *Id.* ¶ 433. As it observed, "[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation." *Id.* ¶ 433 n.1286 (quoting *Minnesota Pub. Utilities Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007) ("*Minnesota PUC*")).

In 2016, a divided panel of the D.C. Circuit upheld the 2015 Order against legal challenges. *United States Telecom Ass'n v. FCC*, 825 F.3d 674 (D.C. Cir. 2016). Petitions for certiorari remain pending before the Supreme Court.

D. The 2018 Order

In May 2017, the FCC issued a proposal to restore the information services classification and return to a light-touch, market-based framework for regulating broadband Internet access. *Restoring Internet Freedom*, Notice of Proposed Rulemaking, 32 FCC Rcd 4434 (2017). Following public comment, the FCC released in January its 2018 Order, which reestablished its longstanding regulatory framework of classifying broadband Internet access service as an "information service," 2018 Order ¶ 20, and its historic practice of less intrusive forms of Internet governance, *see id.* ¶ 207. In doing so, the FCC repealed the 2015 Order's bans on blocking, throttling, and paid prioritization, *id.* ¶ 239; the Internet conduct standard, *id.*; oversight of Internet traffic exchange agreements, *id.* ¶¶ 246-52; and enhancements to the transparency rule, *id.* ¶ 225. The 2018 Order instead opted for a more tailored regulatory approach that relied on a combination of disclosure requirements, market forces, and enforcement of pre-existing antitrust and consumer protection laws. *See, e.g.*, *id.* ¶¶ 140-54, 240-45.

First, the FCC reinstated its 2010 transparency rule, with limited modifications, but eliminated the additional reporting requirements of the 2015 Order. *Id.* ¶¶ 215-31. The FCC recognized that "transparency substantially reduces the possibility that ISPs will engage in harmful practices, and it incentivizes quick corrective measures by providers if problematic conduct is identified." *Id.* ¶ 209; *see also id.* ¶¶ 217, 237, 240-44. In addition, "[a]ppropriate disclosures" can "help consumers make informed choices about their purchase and use of broadband Internet

access services." *Id*. ¶ 209; *see also id*. ¶¶ 216-18, 237. At the same time, the FCC concluded that the additional disclosure requirements had "significantly increased the burdens imposed on ISPs without providing countervailing benefits to consumers or the Commission." *Id.* ¶ 215. The current transparency rule requires broadband Internet access service providers to "publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient to enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings." *Id.* The rule also provides that "[s]uch disclosure shall be made via a publicly available, easily accessible website or through transmittal to the Commission." *Id.*

Second, the FCC recognized that "[o]ther legal regimes—particularly antitrust law and the [Federal Trade Commission's ("FTC")] authority under Section 5 of the FTC Act to prohibit unfair and deceptive practices—provide protection for consumers, *id*. ¶ 140; *see id*. ¶¶ 141-54, and that these protections are especially potent because the transparency rule "amplifies the power of antitrust law and the FTC Act to deter and where needed remedy behavior that harms consumers," *id*. ¶ 244. To that end, the FCC entered into a memorandum of understanding with the FTC enabling the two agencies to share information, thereby facilitating the FTC's ability to police specific unfair or deceptive practices. *Restoring Internet Freedom Memorandum of Understanding* (Dec. 14, 2017), https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf. In the FCC's view, these preexisting laws are better suited to address violations of net-neutrality principles, in part because "antitrust and consumer protection laws . . . apply to the whole of the Internet ecosystem, including edge providers," and draw "guidance from [an] ample body of precedent" from across industries, thereby avoiding "economic distortions by regulating only one side of business transactions on the Internet." *Id.* ¶ 140.

As the FCC explained, this shift from the 2015 Order was necessary for several independent reasons. First, based on its comprehensive review of the administrative record and its

policy expertise, the FCC concluded that "the costs of [the repealed] rules to innovation and investment outweigh any benefits they may have," *id.* ¶ 4, and thus their elimination "is more likely to encourage broadband investment and innovation, furthering [the] goal of making broadband available to all Americans and benefitting the entire Internet ecosystem," *id*. ¶ 86; *see also id*. ¶ 245 ("[T]he substantial costs [of the 2015 rules]—including the costs to consumers in terms of lost innovation as well as monetary costs to ISPs—are not worth the possible benefits" (footnote omitted)). Second, the FCC found that the repealed rules were "unnecessary," *id*. ¶ 4, because "the transparency rule . . . in combination with [market forces] and the antitrust and consumer protection laws, obviates the need for conduct rules by achieving comparable benefits at lower cost," *id*. ¶ 239; *see id*. ¶¶ 240-66. Third, separate and apart from these policy considerations, the Commission also independently concluded that its prior approach was "legally flawed" because it had "not identified any sources of legal authority that could justify the comprehensive conduct rules governing ISPs adopted in the [2015 Order]." *Id.* ¶¶ 2, 4; *see id.* ¶¶ 267-96. In the Commission's view, its "legal analysis concluding that broadband Internet access service is best classified as an information service" thus "is sufficient grounds alone" for repealing the 2015 rules. *Id.* ¶ 86.

Like the 2015 Order upheld by the D.C. Circuit, the 2018 Order also included a preemption provision. Specifically, it expressly preempted "any state or local measures that would effectively impose rules or requirements that [the FCC] ha[d] repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that [it] address[ed] in this order." *Id.* ¶ 195. This includes "any so-called 'economic' or 'public utility type' regulations, including common-carriage requirements akin to those found in Title II of the [Communications] Act and its implementing rules, as well as other rules or requirements that [the FCC] repeal[ed] or refrain[ed] from imposing" in the 2018 Order. *Id*. (footnote omitted). The 2018 Order was careful to provide, however, that it did "not disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial

dealings," and noted that "the continued applicability of these general state laws is one of the considerations" for why "ISP conduct regulation is unnecessary." *Id.* ¶ 196.[1]

As the FCC explained, this preemption provision was necessary given its conclusion that "regulation of broadband Internet access service should be governed principally by a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements." *Id.* ¶ 194; *see id.* ¶¶ 197-204. As it noted, "[a]llowing state and local governments to adopt their own separate requirements, which could impose far greater burdens" than the 2018 Order's "calibrated federal regulatory regime," would threaten to "significantly disrupt the balance" the FCC has struck. *Id.* In addition, permitting "state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with … separate and potentially conflicting requirements across all of the different jurisdictions in which it operates." *Id.* Given the interstate nature of Internet communications, ISPs may be forced to adopt a lowest-common-denominator approach whereby they apply the strictest jurisdiction's approach to all of its operations nationwide. *Cf. id.* ¶ 127 ("Accordingly (and unsurprisingly), most ISPs actively try to minimize the discrepancies in their terms of service, network management practices, billing systems, and other policies").

Multiple parties challenged the validity of the 2018 Order, which took effect on June 11, 2018, by petitioning for review in the D.C. Circuit. Among them was a coalition of various state and local entities, the District of Columbia, and 20 States, including California. Last month, the

[1] As the FCC observed, the preemption provision rests on multiple independent sources of authority. *See* 2018 Order ¶¶ 197-204. First, the "'impossibility' exception" to state jurisdiction, allows the Commission "to preempt a state regulation" of a service that would otherwise be subject to both federal and state regulation "where it is 'not possible to separate the interstate and intrastate components'" of the particular service. *California v. FCC*, 75 F.3d 1350, 1359 (9th Cir. 1996) (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 376 n.4 (1986)). Second, the FCC has authority to preempt any conflicting state effort to regulate the "information service" of broadband Internet access service. *See, e.g.*, *Charter Advanced Servs. (MN), LLC v. Lange*, No. 17-2290, 2018 WL 4260322, at *2 (8th Cir. Sept. 7, 2018) ("'[A]ny state regulation of an information service conflicts with the federal policy of nonregulation,' so that such regulation is preempted by federal law.") (quoting *Minnesota PUC*, 483 F.3d at 580)). Here, the Court need not and cannot address these issues because the D.C. Circuit has exclusive jurisdiction to resolve these questions under the Hobbs Act.

coalition filed a brief contending that the entire 2018 Order, including its preemption provision, should be vacated as unlawful. Br. for the Govt. Pets., *Mozilla v. FCC*, Nos. 18-1051 et al. (D.C. Cir. Aug. 20, 2018), Doc. 1746554 ("States Br."). Briefing is set to end by late November 2018, and oral argument is scheduled for February 1, 2019.

II. California's Internet Regulation Law

While California's challenge to the 2018 Order was pending before the D.C. Circuit, the State Legislature passed SB-822 on August 31, 2018. California's Governor signed it into law on September 30, 2018. SB-822 will take effect on January 1, 2019. Cal. Gov't Code § 9600(a). As the legislative history expressly acknowledges, SB-822 "codif[ies] portions of the recently-rescinded [FCC] rules." Judiciary Analysis 1; *see also* Cal. S. Comm. on Energy, Utils., & Commc'ns, SB 460 Analysis 1 (2018) ("Energy Analysis") (noting that it "adopts the main components of the net neutrality rules repealed by [the FCC]"). Like the repealed 2015 Order, SB-822 renders it "unlawful" for a provider of broadband Internet access service "to engage in":

1) *Blocking*: "Blocking lawful content, applications, services, or nonharmful devices, subject to reasonable network management." Cal. Civ. Code § 3101(a)(1); *see also id.* § 3101(a)(3)(B) (prohibiting charges to avoid blocking).

2) *Throttling*: "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." *Id.* § 3101(a)(2); § 3100(j); *see also id.* § 3101(a)(3)(C) (prohibiting charges to avoid throttling).

3) *Paid Prioritization*: "Engaging in paid prioritization," *id.* § 3101(a)(4), which "means the management of an Internet service provider's network to directly or indirectly favor some traffic over other traffic, including, but not limited to, 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," *id.* § 3100(r).

SB-822 also reinstates the 2015 Order's general Internet conduct standard by prohibiting:

> 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 the end user's choice, or an edge provider's ability to make lawful content, applications, services, or

> devices available to end users. Reasonable network management shall not be a violation of this paragraph.

Id. § 3101(a)(7).

And although the 2018 Order eliminated the 2015 Order's oversight of Internet traffic exchange agreements, "return[ing] Internet traffic exchange to the longstanding free market framework," 2018 Order ¶¶ 163-73, SB-822 appears to regulate such exchanges by prohibiting ISPs from charging edge providers for delivering traffic to end users and by prohibiting any traffic-exchange agreements that could be construed as having the purpose or effect of evading other prohibitions, Cal. Civ. Code §§ 3101(a)(3)(A), (a)(9).

In addition, SB-822 categorically prohibits conduct that not even the 2015 Order reached. To start, it outlaws "zero-rating"—which "means exempting some Internet traffic from a customer's data usage allowance," *id.* § 3100(t)—either (1) "in exchange for consideration, monetary or otherwise, from a third party," *id.* § 3101(a)(5), or (2) "some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category," *id.* § 3101(a)(6). Similarly, SB-822 bars offering or providing other services "that are delivered over the same last-mile connection as the broadband Internet access service" if they "have the purpose or effect of evading" its prohibitions or "negatively affect the performance of broadband Internet access service." *Id.* § 3102(a). Through such measures California legislators "establish[ed] additional bright-line rules that prohibit preferential treatment to some services but not others, including prohibiting ISPs from charging website fees for access to users and incorporating net-neutrality protections at the point of interconnection," even though in the 2015 Order, "the FCC [had] opted to adopt a case-by-case approach" in these areas. Cal. Assembly Comm. on Commc'ns & Conveyance, SB 822 Analysis 9 (2018) ("Assembly Analysis").

SB-822 also contains a transparency rule that prohibits ISPs from "[f]ailing 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 use of those services and for content, application, service, and device

providers to develop, market, and maintain Internet offerings." *Id.* § 3101(a)(8). Although this language resembles a portion of the FCC's transparency rule, 47 C.F.R. § 8.1(a), it conspicuously omits the 2018 Order's specific guidance addressing what disclosures are and are not required, *see* 2018 Order ¶¶ 215-31.

SB-822 is expected to be enforced through litigation under California's Unfair Competition law, which authorizes courts to issue an injunction against and impose civil penalties of up to $2,500 per violation on anyone who "engages, has engaged, or proposes to engage in unfair competition," which is defined to "include any unlawful, unfair or fraudulent business act or practice." Cal. Bus. & Prof. Code §§ 17200, 17203; *see id.* § 17206(a). "[B]y making the various practices unlawful," SB-822 "automatically provide[s] a right of action under the Unfair Competition Law." Judiciary Analysis 21. The California Attorney General, among others, is authorized to bring such enforcement actions, Cal. Bus. & Prof. Code § 17204, and he has promised that "preserving net neutrality protections for California's consumers" will be "a priority for his office," Judiciary Analysis 22.

In adopting this regime, California legislators were put on notice of criticisms that SB-822 "would create a patchwork of regulation that could stymie the marketplace since California would have rules that are different from other states and the federal government." Energy Analysis 14. They likewise were advised that, "[d]ue to the nature of the internet traffic travelling across state lines, it would be ideal to have one rule to address the issue of net neutrality." *Id.* They also were notified that the 2018 Order's "provision concerning preemption" on its face "explicitly preempt[s] state attempts to restore net neutrality, such as this [law]," and thus expected that "[l]itigation would likely result from any attempt to enforce the provisions of this bill pursuant to the Restoring Internet Freedom Order." Judiciary Analysis 23-24. Nevertheless, California proceeded with enacting SB-822's preempted measures.

LEGAL STANDARD

A preliminary injunction is warranted if the movant establishes that: (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the

balance of equities tips in its favor; and (4) a preliminary injunction is in the public interest. *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). Generally, when the United States has shown a likelihood of success on the merits in a preemption challenge, the equities similarly favor an injunction. *See, e.g., id.*; *United States v. Arizona*, 641 F.3d 339, 366 (9th Cir. 2011), *aff'd in part, rev'd in part on other grounds*, 567 U.S. 387 (2012).

ARGUMENT

I. The United States is Likely to Prevail on the Merits.

A. The 2018 Order preempts virtually all of SB-822.

The preemption analysis here is straightforward. When a state law "conflict[s] or [is] at cross-purposes" with a federal exercise of authority, "[t]he Supremacy Clause [of the U.S. Constitution, art. VI, cl. 2,] provides a clear rule that federal law '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.'" *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting U.S. Const., art. VI, cl. 2). It is thus settled that valid FCC orders can "pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof." *City of New York v. FCC*, 486 U.S. 57, 64 (1988); *see* Judiciary Analysis 23 ("[F]ederal regulations may also supersede state law.").

It is also beyond dispute that the 2018 Order directly preempts virtually all of SB-822. That order explicitly "preempt[s] any state or local requirements that are inconsistent with the federal deregulatory approach [it] adopt[s]," including "any state or local measures that would effectively impose rules or requirements that [it] ha[s] repealed or decided to refrain from imposing … or that would impose more stringent requirements for any aspect of broadband service that [it] address[ed]." 2018 Order ¶¶ 194-95. That language unquestionably covers SB-822, which not only

codifies the federal requirements the 2018 Order eliminated, but goes so far as to ban conduct that not even the repealed 2015 Order prohibited.[2]

To start, SB-822 resurrects the vague Internet conduct standard and the bans on blocking, throttling, and paid prioritization that the 2015 Order created and the 2018 Order abolished, *compare* 2015 Order ¶¶ 15, 16, 18, 21, *and* 2018 Order ¶ 239, *with* Cal. Civ. Code § 3101(a)(1), (a)(2), (a)(3)(B), (a)(3)(C), (a)(4), & (a)(7)—one of SB-822's primary objectives. *See* Judiciary Analysis 1 (noting that SB-822 "codif[ies] portions of the recently-rescinded [FCC] rules"). Further, SB-822 apparently reinstates oversight of Internet traffic exchange agreements, which the 2018 Order eliminated in returning to "the longstanding free market framework." *Compare* Cal. Civ. Code §§ 3101(a)(3)(A), (a)(9), *with* 2018 Order ¶¶ 163-73. By seeking to recodify under state law many of the same regulatory requirements that the FCC eliminated, these provisions "effectively impose rules or requirements that [the 2018 Order] repealed," 2018 Order ¶ 195, and therefore should not be given effect under the Supremacy Clause.

SB-822 also "impose[s] rules or requirements that [the FCC] . . . decided to refrain from imposing" in the 2018 Order, including "more stringent requirements for any aspect of broadband service" that the order "address[ed]." *Id.* Most starkly, SB-822 prohibits "zero-rating"—"exempting some Internet traffic from a customer's data usage allowance"—either in "exchange for consideration … from a third party" or only a subset of "Internet content, applications, services, or devices in a category." Cal. Civ. Code §§ 3100(t), 3101(a)(5), (a)(6). But not even the 2015 Order went so far, as it refused to ban "zero-rating" because some uses of this practice "could benefit consumers and competition." 2015 Order ¶ 152. Similarly, SB-822 appears to subject specialized services to all of the bright line "prohibitions in Section 3101," Cal. Civ. Code § 3102 (a)(1), and to prohibit outright any specialized services perceived to "negatively affect the

[2] These conclusions apply equally to fixed or mobile broadband Internet access services. *Compare* 2018 Order ¶¶ 65, 82 (making clear that "broadband Internet access service, regardless of whether offered using fixed or mobile technologies, is an information service under the Act," and that such information services should "develop free from common carrier regulations") *with* SB-822 §§ 3101(b), 3102(b) (applying same common carrier rules to providers of mobile broadband Internet access service as apply to fixed broadband Internet access service).

performance of broadband Internet access service," *id.* § 3102(a)(2), but the 2015 Order expressly declined to apply these rules to specialized services, *see* 2015 Order ¶¶ 35, 207-13. By categorically outlawing zero-rating and applying its bright-line rules to specialized services, SB-822 reflects a decision to impose "more stringent requirements" than those in either the 2015 or 2018 Orders, 2018 Order ¶ 195, by "establishing additional bright-line rules" in areas where "the FCC opted" for "a case-by-case approach" in its 2015 Order. Assembly Analysis 9.

In addition, contrary to the 2018 Order's decision to eliminate the 2015 Order's oversight of Internet traffic exchange agreements and "return Internet traffic exchange to the longstanding free market framework," 2018 Order ¶¶ 163-73, SB-822 appears to regulate traffic exchange by prohibiting ISPs from charging edge providers for delivering traffic to end users and by prohibiting any traffic-exchange agreements that could be construed as having the purpose or effect of evading other prohibitions, Cal. Civ. Code § 3101(a)(3)(A), (a)(9).

In sum, SB-822 consists almost entirely of "state . . . requirements that are inconsistent with the federal deregulatory approach" the 2018 Order adopted. 2018 Order ¶ 194. California cannot dispute this fact. Indeed, its legislators knew that SB-822 "codif[ies] portions of the recently-rescinded [FCC] rules"; that the terms of the 2018 Order's "provision concerning preemption" would "explicitly preempt state attempts to restore net neutrality, such as this [law]"; and that "[l]itigation would likely result from any attempt to enforce the provisions of this bill pursuant to the Restoring Internet Freedom Order." Judiciary Analysis 1, 23-24. Under the Supremacy Clause, the State thus cannot enforce most of SB-822's provisions. *See, e.g.*, *Charter Advanced Servs. (MN), LLC*, 2018 WL 4260322, at *2, 4 (holding state regulation preempted because it was an "attempted regulation of an information service [that] conflicts with the federal policy of nonregulation").[3]

[3] Although SB-822's transparency rule, Cal. Civ. Code § 3101(a)(8), facially mirrors the 2018 Order's transparency rule, the United States reserves the right to challenge the former if, in application, that section is inconsistent with the 2018 Order. *Cf. Arizona*, 567 U.S. at 415 ("At this stage, without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law.").

B. The Court must presume the validity of the 2018 Order in this proceeding.

It is well settled that the 2018 Order's legal validity cannot be adjudicated in this Court. Instead, under the Hobbs Act, this Court must presume that the 2018 Order, including its preemption provision, is valid and resolve only whether SB-822 violates the 2018 Order. The Hobbs Act vests "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to *determine the validity* of . . . all final orders of the Federal Communications Commission" in "[t]he court of appeals" sitting in direct review of the challenged order—here, the D.C. Circuit. 28 U.S.C. § 2342(1) (emphasis added). Because the Hobbs Act provides that "'parties seeking to challenge the validity of FCC orders must do so through actions in the circuit courts,'" *Wilson v. A.H. Belo Corp.*, 87 F.3d 393, 396 (9th Cir. 1996) (brackets omitted), "[p]roperly promulgated FCC regulations currently in effect must be presumed valid" in district court actions such as this one, as district courts "lack[] jurisdiction to pass on the validity" of such rules, *US West Commc'ns, Inc. v. Jennings*, 304 F.3d 950, 958 n.2 (9th Cir. 2002); *accord Fober v. Mgm't & Tech. Consultants, LLC*, 886 F.3d 789, 792 n.2 (9th Cir. 2018); *Western Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 976 (9th Cir. 2012). In short, "[l]itigants may not evade" the Hobbs Act by contending that an "FCC action is ultra vires" in a district court. *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 468 (1984).

The Hobbs Act's protections fully apply to the FCC's preemption determinations as well. In *Wilson*, for example, various political candidates advanced state-law claims against television stations that the FCC had determined were preempted. *Wilson*, 87 F.3d at 395. The Ninth Circuit held that the district court lacked jurisdiction under the Hobbs Act to address these claims, even though the candidates insisted that the Commission's "ruling on preemption" was "unauthorized." *Id.* at 400. As the Ninth Circuit explained, "[i]f the district court disagreed" with the FCC, "the effect of the proceeding would have been to enjoin, set aside, or suspend" the Commission's ruling in contravention of the Hobbs Act. *Id.* Conversely, "[e]ven if the district court agreed with" the FCC, "that result would have required a determination of the validity" of its ruling, "which also would violate § 2342." *Id.* If the candidates believed the FCC's preemption ruling was illegitimate,

the Ninth Circuit explained, they should have "follow[ed] the statutory procedure for obtaining review" of that decision in the court of appeals. *Id.*

Nor does it matter that any challenge by California to the Order's validity in this case would be a *defensive* one. By its terms, the Hobbs Act deprives district courts of jurisdiction "to determine the validity" of an FCC order, 28 U.S.C. § 2342(1), whether they are asked to do so by the plaintiff or the defendant. Accordingly, "[a] defensive attack on the FCC regulations is as much an evasion of the exclusive jurisdiction of the Court of Appeals as is a preemptive strike by seeking an injunction." *United States v. Dunifer*, 219 F.3d 1004, 1007 (9th Cir. 2000) (quoting *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 463 (8th Cir. 2000)). In *Dunifer*, for instance, the United States sought an injunction prohibiting an individual from engaging in unlicensed radio broadcasting. *Id.* at 1005. In response, the broadcaster "challenge[d] the statutory validity and constitutionality of FCC licensing regulations as a defense to the government's action." *Id.* The Ninth Circuit held that "[w]hile the district court had jurisdiction to entertain the government's action for injunctive relief, it lacked jurisdiction to adjudicate [the broadcaster's] affirmative defenses." *Id.* at 1009. As the Ninth Circuit explained, the Hobbs Act's "jurisdictional limitations apply as much to affirmative defenses as to offensive claims"; in either situation, a party cannot "contest the validity of the [FCC's] implementing regulations" in district court. *Id.* at 1007.[4]

California therefore cannot challenge the validity of the 2018 Order—including its preemption provision—in this proceeding. Indeed, the State urged the D.C. Circuit to vacate the Order for this reason, explaining that, absent such relief, one "could argue that the Hobbs Act's jurisdictional limitations preclude state and local governments from contesting conflict preemption in challenges to individual laws and enforcement actions." States Br. 49 (internal citation omitted).

[4] Other circuits agree that under the Hobbs Act the validity of an FCC order cannot be challenged regardless of posture. *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 464-66 (4th Cir. 2018); *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1120 (11th Cir. 2014); *Nack v. Walburg*, 715 F.3d 680, 685-86 (8th Cir. 2013); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 448 (7th Cir. 2010).

Nevertheless, California chose to adopt SB-822 while its challenge in the D.C. Circuit remains pending. That decision comes with consequences under the Hobbs Act. Because California did not wait until its challenge in the D.C. Circuit had ended, its preempted legislation must "be subjected to injunctive relief" in the interim. *Dunifer*, 219 F.3d at 1009 ("Dunifer decided to evade this carefully crafted [judicial review] process by concededly violating the regulatory framework implemented by the FCC."). California cannot short-circuit the Hobbs Act's framework by passing legislation that undisputedly conflicts with an FCC order under review in the D.C. Circuit and then question that order's validity in this Court.

II. The Equitable Factors Strongly Militate in Favor of Injunctive Relief.

The remaining preliminary-injunction factors—irreparable injury, the balance of the equities, and the public interest—weigh strongly in favor of injunctive relief here. The enforcement of SB-822 would irreparably injure both the United States and the public interest, whereas California will suffer no cognizable harm from being unable to disrupt the status quo by enforcing an invalid law.

A. SB-822's enforcement would irreparably harm the government and the public interest.

Because its regulatory approach directly conflicts with the FCC's, SB-822 inflicts irreparable harm on both the United States as well as the public interest more generally. As this Court recently noted, "[t]he United States suffers injury when its valid laws in a domain of federal authority are undermined by impermissible state regulations," and "[f]rustration of federal statutes and prerogatives are not in the public interest." *California*, 314 F. Supp. 3d at 1112 (quoting *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012)); *cf. New Orleans Pub. Serv., Inc. v. Council of City of New Orleans*, 491 U.S. 350, 366-67 (1989) (suggesting that irreparable injury inherently results from enforcement of preempted state law). After all, "an alleged constitutional infringement will often alone constitute irreparable harm," and that is no less true when a State attempts "to violate the requirements of federal law" in the face of "the Supremacy Clause." *Arizona*, 641 F.3d at 366 (citations omitted). Accordingly, courts have recognized that enjoining

the enforcement of preempted laws is necessary to protect the United States from actions by States that undermine its sovereignty. *See id.*; *Alabama*, 691 F.3d at 1301; *California*, 314 F. Supp. 3d at 1112.

Here, SB-822 does not merely "undermine[]" or "frustrate[e]" the 2018 Order, *California*, 314 F. Supp. 3d at 1112; it effectively negates it. In the 2018 Order, the FCC expressly adopted an affirmative "deregulatory policy" and "deregulatory approach" to Internet regulation. *E.g.*, 2018 Order ¶¶ 39, 61, 194-96. The 2018 Order does not constitute an absence of regulation for States to fill; it is a uniform, national regulatory framework, the metes and bounds of which were carefully considered by the Commission in exercising its lawfully delegated authority. Effectuating its preference for a single, national framework, the Commission not only repealed the rules it adopted in 2015, but also "preempt[ed] any state or local measures that would effectively impose rules or requirements that [it had] repealed or decided to refrain from imposing in this order." *Id.* ¶ 195; *see id.* ¶¶ 194-204. In the face of this clear exercise of federal authority, California has tried not only to reinstate the same rules the FCC repealed, but to impose new requirements that have never existed at the federal level. And given that ISPs cannot realistically comply with one set of standards in this area for California and another for the rest of the Nation—especially when Internet communications frequently cross multiple jurisdictions—the effect of this state legislation would be to nullify federal law across the country. Only an injunction from this Court can address that unlawful result.

Indeed, this case is in important respects like *Federal Home Loan Bank Board v. Empie*, 778 F.2d 1447 (10th Cir. 1985), in which the Tenth Circuit affirmed an injunction sought by a federal agency (the Bank Board) against a state "statute . . . expressly forbidding something that the federal regulations expressly permit"—in that case, the use of the word "bank" in advertising by federally chartered savings institutions. *Id.* at 1454. As the court explained, "the Bank Board's concern with protecting its turf from inroads by state regulation is a legitimate expression of the public interest," as that agency "properly may be concerned that its own authority is being undermined and that all entities in its regulatory domain, as well as the general public, may suffer

from the regulatory uncertainty created." *Id.* at 1450. The Tenth Circuit thus confirmed that an injunction was necessary so that parties who oppose "the federal scheme will not have a colorable claim to bring vexatious lawsuits" *Id.* at 1454. So too in this case—which likewise concerns "the stability and smooth operation of a nationwide network" (specifically, the Internet rather than a group of savings institutions). *Id.* at 1452.

In sum, "[i]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law"; instead, "the interest of preserving the Supremacy Clause is paramount." *California*, 314 F. Supp. 3d at 1111 (quoting *Arizona*, 641 F.3d at 366). And that is particularly true here given the significant public interest in having the FCC maintain its federal "deregulatory approach" to Internet regulation, which it could not do if California (and others) enacted measures that contradict the Commission's judgment in this area. *See* 2018 Order ¶¶ 39, 61, 194-96; *see also id.* ¶¶ 194, 200 (explaining that states and local governments could impose far greater burden, disrupt the balance struck by 2018 Order, and interfere with the FCC's regulation of interstate traffic); *cf. California*, 314 F. Supp. 3d at 1112 ("Frustration of federal statutes and prerogatives are not in the public interest.") (quoting *Alabama*, 691 F.3d at 1301)).[5]

B. A preliminary injunction would not cause California any harm.

California, by contrast, will not suffer any legitimate injury if SB-822's enforcement is preliminarily enjoined. As this Court has explained, there is "no harm from the state's nonenforcement of invalid legislation." *California*, 314 F. Supp. 3d at 1112 (quoting *Alabama*, 691 F.3d at 1301); *see also Arizona*, 641 F.3d at 366 ("[I]t is clear that it would not be equitable or in the public's interest to allow the state to violate the requirements of federal law, especially

[5] In addition to undermining the federal deregulatory scheme, allowing California and other separate state and local jurisdictions "to impose separate regulatory requirements on [broadband providers]" would not be in the public interest because it "could inhibit broadband investment and deployment and would increase costs to consumers." 2018 Order ¶ 194 n.727. Requiring broadband providers to track and adhere to a patchwork of separate state and local requirements in every individual jurisdiction in which they operate would "place an undue burden on the provision of broadband Internet access service." *Id.* ¶ 195; *cf. id.* ¶ 127 ("Accordingly (and unsurprisingly), most ISPs actively try to minimize the discrepancies in their terms of service, network management practices, billing systems, and other policies").

when there are no adequate remedies available.") (citations, ellipses, and emphasis omitted)). Instead, an injunction here simply would maintain the status quo that has existed since the 2018 Order took effect and preserve the framework that successfully governed this area for more than a decade before 2015. Indeed, that California chose to forgo requesting a stay of the 2018 Order from the D.C. Circuit further demonstrates that it would not "be irreparably injured absent a stay." *Nken v. Holder*, 556 U.S. 418, 434 (2009). Against that background, California should not be permitted to effectively shift its burden by enacting preempted legislation while its D.C. Circuit challenge is pending and then argue that the equities cut against an injunction.

In short, a preliminary injunction against the enforcement of SB-822 is warranted. Granting such relief would not deprive California of an opportunity to contest the validity of the entire 2018 Order, including its preemption provision, in a judicial proceeding. Indeed, the State already has availed itself of that opportunity in the D.C. Circuit, just not to its conclusion. If California ultimately prevails in that litigation, the State can ask this Court to dissolve the injunction at that time. But in the interim, California should not be allowed to circumvent settled principles of equity, the jurisdictional framework of the Hobbs Act, and the Supremacy Clause of the Constitution.[6]

CONCLUSION

The Court should grant the United States' motion for a preliminary injunction.

[6] While the effective date of SB-822 is January 1, 2019, *see* Cal. Gov't Code § 9600(a), the United States moves for preliminary injunctive relief at this time so that this issue can be fully briefed, argued, and decided before the law is to take effect.

DATED: September 30, 2018

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Cal. S. Comm. on Judiciary, SB 822 Analysis (2018)

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2017-2018 Regular Session

SB 822 (Wiener)
Version: April 19, 2018
Hearing Date: April 24, 2018
Fiscal: Yes
Urgency: No
CK

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 Internet service providers (ISPs) from engaging in certain practices, including blocking lawful content, applications, services, or nonharmful devices, discriminating between lawful Internet traffic on specified bases, engaging in "third-party paid prioritization," engaging in application-specific differential pricing, and engaging in deceptive or misleading marketing practices. This bill would provide the parameters within which ISPs could offer different levels of quality of service to end users or to "zero-rate" certain Internet traffic.

The Attorney General would be authorized to investigate certain violations on its own motion or in response to complaints and to bring an action to enforce these provisions, pursuant to the Unfair Practices Act and the False Advertising Law. This bill would also prohibit state agencies from purchasing, or providing funding for the purchase of broadband Internet access services from an ISP in violation of these provisions.

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 Internet access services," high-speed communication technologies such as cable modem service. 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 Apr. 17, 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 "third-party paid prioritization," in which ISPs 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 ISP 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) Washington Post <http://www.washingtonpost.com/wpdyn/content/article/2007/10/19/AR2007101900842.html> [as of Apr. 17, 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 Apr. 17, 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 Apr. 17, 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 Apr. 17, 2018].)

The Federal Communications Commission (FCC), 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, earlier this year, the FCC, under the current President, released its order rescinding these rules and again exposing end users and edge providers to these troubling practices.

In response, 28 states have introduced their own legislation to protect net neutrality. (National Conference of State Legislatures, *Net Neutrality Legislation in States* (Apr. 4, 2018) < http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx> [as of Apr. 17, 2018].) The governors of Hawaii, New Jersey, New York, Vermont, and Montana have all signed executive orders in response to the FCC's repeal. In California, Senator Kevin de León has introduced SB 460 (de León, 2018), which would restore some of the protections of the 2015 Order, prohibit state agencies from contracting with ISPs unless they commit to net neutral practices, and provides enforcement mechanisms to ensure those harmed by violations are able to seek redress. This bill is currently in the Assembly Rules Committee.

The author has introduced this bill in order to recast and implement the "bright line rules" regarding net neutrality established in the 2015 Open Internet Order for ISPs providing broadband Internet access services within California. The bill would prohibit state agencies from purchasing, or providing funding for the purchase of broadband Internet access services from an ISP in violation of these provisions. The Attorney

General would be authorized to investigate certain violations on its own motion or in response to complaints and to bring an action to enforce these provisions, pursuant to the Unfair Practices Act and the False Advertising Law.

This bill passed out of the Senate Energy, Utilities, and Communications Committee on an 8-3 vote.

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, any 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 state that it is adopted pursuant to the police power inherent in the State of California to protect and promote the safety, life, public health, public convenience, general prosperity, and well-being of society, and the welfare of the state's population and economy, that are increasingly dependent on an open and neutral Internet.

This bill would define "broadband Internet access service" (BIAS) to mean a mass-market retail service by wire or radio provided to customers 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 would also encompass any service provided to customers in California that provides a functional equivalent of that service or that is used to evade the protections set forth in this chapter. "Mass market" would be defined to mean a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-use customers, including, but not limited to, schools, institutions of higher learning, and libraries. The term would also include BIAS purchased with support of the E-rate and Rural Health program and similar programs at the federal and state level, regardless of whether they are customized or individually negotiated, as well as any BIAS offered using networks supported by the Connect America Fund or similar programs at the federal and state level.

This bill would provide definitions for the following terms:

- "Internet service provider" would mean a business that provides BIAS to an individual, corporation, government, or other customer in California;
- "end user" would be defined to mean any individual or entity that uses BIAS;
- "edge provider" would be defined 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;
- "content, applications, or services" would be defined to include all Internet traffic transmitted to or from end users of a broadband Internet access service, including traffic that may not fit clearly into any of these categories;
- "ISP traffic exchange" would mean the exchange of Internet traffic destined for, or originating from, an ISP's end users between the ISP's network and another individual or entity, including, but not limited to, an edge provider, content delivery network, or other network operator;
- "application-agnostic" would mean not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device;
- "class of Internet content, application, service, or device" would be defined as Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical

characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay;
- "application-specific differential pricing" would mean charging different prices for Internet traffic to customers on the basis of Internet content, application, service, or device, or class of Internet content, application, service, or device, but does not include zero-rating";
- "zero-rating" would mean exempting some Internet traffic from a customer's data limitation;
- "third-party paid prioritization" would 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, monetary or otherwise, from a third party, or (2) to benefit an affiliated entity; and
- "network management practice" would be defined to mean a practice that has a primarily technical network management justification, but does not include other business practices. A "reasonable network management practice" would mean a network management practice that is primarily used for, and tailored to, achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the BIAS, and that is as application-agnostic as possible.

This bill would add Section 1776 to the Civil Code to make it unlawful for an ISP engaging in the provision of BIAS to engage in any of the following activities:
- blocking lawful content, applications, services, or nonharmful devices, subject to reasonable network management practices;
- 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 requiring consideration for transmitting Internet traffic to and from the ISP's end users or for the ISP to refrain from the prohibited activities above;
- engaging in third-party paid prioritization, application-specific differential pricing, and application-specific differential pricing or zero-rating in exchange for consideration, monetary or otherwise, by third parties;
- zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category;
- unreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the end user's choice, or an edge

provider's ability to make lawful content, applications, services, or devices available to an end user, subject to reasonable network management practices;
- 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;
- engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic, content, applications, services, or devices by the ISP, or that misrepresent the performance characteristics or commercial terms of the BIAS to its customers;
- advertising, offering for sale, or selling broadband Internet access service 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 broadband Internet access services 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; and
- offering or providing services other than BIAS that are delivered over the same last-mile connection as the BIAS, if those services are marketed, provide, or can be used as a functional equivalent of BIAS, have the purpose or effect of circumventing the effectiveness of this bill, or negatively affect BIAS performance.

This bill would provide certain exceptions to these prohibitions. It would authorize an ISP to zero-rate Internet traffic in application-agnostic ways, without violating Section 1776, provided that no consideration, monetary or otherwise, is provided by any third party in exchange for the ISP's decision to zero-rate or to not zero-rate traffic. This bill would also allow an ISP to offer different levels of quality of service to end users as part of its BIAS, without violating Section 1776, where the following conditions exist:
- the different levels of quality of service are equally available to all Internet content, applications, services, and devices, and all classes of Internet content, applications, services, and devices, and the ISP does not discriminate in the provision of the different levels of quality of service on the basis of Internet content, application, service, or device, or class of Internet content, application, service, or device;
- the ISP's end users are able to choose whether, when, and for which Internet content, applications, services, or devices, or classes of Internet content, applications, services, or devices, to use each level of quality of service;
- the ISP charges only its own BIAS customers for the use of the different level of quality of service; and
- the provision of the different levels of quality of service does not degrade the quality of the basic default service that Internet traffic receives if the customer does not choose another level of quality of service.

This bill would authorize the Attorney General to bring an action to enforce Section 1776, pursuant to the False Advertising Law or the Unfair Competition Law. The Attorney General would be required to review complaints on a case by case basis to

determine if an ISP's actions violate Section 1776 or the provisions regarding the provision of different levels of quality of service. The Attorney General would be authorized to investigate and enforce violations of those sections on its own motion or in response to complaints.

This bill would prohibit a public entity, as defined, from purchasing, or providing funding for the purchase of, any fixed or mobile BIAS from an ISP that is in violation of Section 1776. Every contract between a public entity and an ISP for BIAS would need to include a provision requiring that the service be rendered consistent with the requirements of Section 1776. The public entity would be authorized to declare such a contract void and require repayment if it determines that the ISP has violated Section 1776 in providing service to the public entity. These remedies would be in addition to any remedy available pursuant to the Unfair Competition Law. This bill would provide an exception for a public entity in a geographical area where Internet access services are only available from a single broadband Internet access service provider.

This bill would require an ISP that provides fixed or mobile BIAS purchased or funded by a public entity to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its BIAS that is sufficient to enable end users of those purchased or funded services, including a public entity, to fully and accurately ascertain if the service is conducted in a lawful manner pursuant to Section 1776.

This bill would make clear that nothing therein supersedes or limits any obligation, authorization, or ability of an ISP to address the needs of emergency communications or law enforcement, public safety, or national security authorities.

This bill would make its provisions severable.

COMMENT

1. Stated need for the bill

According to the author:

> Senate Bill 822 puts California at the national forefront of ensuring an open internet. It establishes comprehensive and enforceable net neutrality standards to ensure that all California residents have the right to choose whether, when, and for what purpose they use the internet.
>
> SB 822 stands for the basic proposition that the role of internet service providers (ISPs) is to provide neutral access to the internet, not to pick winners and losers by deciding (based on financial payments or otherwise) which websites or applications

will be easy or hard to access, which will have fast or slow access, and which will be blocked entirely.

Under the state's police power, SB 822 prohibits any practice that hinders or manipulates consumer access to the Internet to favor certain types of content, services, or devices over others. This includes prohibiting all of the following: blocking or speeding up or slowing down of favored data, paid prioritization, charging services (whether businesses, nonprofits, government agencies, advocacy organizations, etc.) access fees to reach certain consumers, and economic discrimination practices that distort consumer choice.

SB 822 also prohibits misleading marketing practices and enacts strong disclosure requirements to better inform consumers. The bill further requires that any ISP that contracts with the State of California, receives public infrastructure grants to build out broadband service, or applies for or holds a state franchise for video service must comply with these standards.

Without net neutrality, ISPs have the power to manipulate which business, media, nonprofit, or political websites are accessible and by whom. SB 822 contains strong, comprehensive, and enforceable policies that will position California as a leader in the fight for net neutrality.

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.
>
> 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.

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 ISPs. As the D.C. Circuit Court found, without these rules, "broadband providers represent a threat to Internet openness." This bill would seek to fill the void in order to respond to that threat. This bill would add Section 1776 to the Civil Code to make it unlawful for an ISP engaging in the provision of BIAS to engage in any of the following activities:

- blocking lawful content, applications, services, or nonharmful devices, subject to reasonable network management practices;
- 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 requiring consideration for transmitting Internet traffic to and from the ISP's end users or for the ISP to refrain from the prohibited activities above;
- engaging in third-party paid prioritization, application-specific differential pricing, and application-specific differential pricing or zero-rating in exchange for consideration, monetary or otherwise, by third parties;
- zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category;
- unreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the end user's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to an end user, subject to reasonable network management practices;
- 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;
- engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic, content, applications, services, or devices by the ISP, or that misrepresent the performance characteristics or commercial terms of the BIAS to its customers;
- advertising, offering for sale, or selling broadband Internet access service 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 broadband Internet access services 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; and
- offering or providing services other than BIAS that are delivered over the same last-mile connection as the BIAS, if those services are marketed, provide, or can be used as a functional equivalent of BIAS, have the purpose or effect of circumventing the effectiveness of this bill, or negatively affect BIAS performance.

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.

Similar to the 2015 Open Internet Order, this bill would still allow for "reasonable network management practices" in several of its provisions, including the prohibitions on blocking or throttling lawful content. However, this bill would also require such practices to be "as application-agnostic as possible." This would ensure that such practices do not interfere with an end user's freedom to choose which content, applications, services, or devices to use.

3. Narrow exceptions to the bright line rules

This bill would provide two exceptions to the general prohibitions laid out in Section 1776. The first relates to "zero-rating," which is the practice of exempting some Internet traffic from a customer's data limitation. In the 2015 Open Internet Order, the FCC discussed the benefits and drawbacks of allowing such a practice:

> Sponsored data plans (sometimes called zero-rating) enable broadband providers to exclude edge provider content from end users' usage allowances. On the one hand, evidence in the record suggests that these business models may in some instances provide benefits to consumers, with particular reference to their use in the provision of mobile services. Service providers contend that these business models increase choice and lower costs for consumers. Commenters also assert that sophisticated approaches to pricing also benefit edge providers by helping them distinguish themselves in the marketplace and tailor their services to consumer demands. Commenters assert that such sponsored data arrangements also support continued investment in broadband infrastructure and promote the virtuous cycle, and that there exist spillover benefits from sponsored data practices that should be considered. On the other hand, some commenters strongly oppose sponsored data plans, arguing that "the power to exempt selective services from data caps seriously distorts competition, favors companies with the deepest pockets, and prevents consumers from exercising control over what they are able to access on the Internet," again with specific reference to mobile services. In addition, some commenters argue that sponsored data plans are a harmful form of discrimination. The record also reflects concerns that such arrangements may hamper innovation and monetize artificial scarcity.

Ultimately, the FCC opted not to include an explicit allowance or prohibition on zero-rating, but rather expressed its intent to "look at and assess such practices under the no-unreasonable interference/disadvantage standard, based on the facts of each individual case, and take action as necessary."

This bill would prohibit zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category. However, it would allow ISPs to zero-rate Internet traffic in application-agnostic ways, without violating Section 1776, so long as there is no consideration provided by any third party in exchange for the decision to zero-rate or to not zero-rate traffic. By ensuring that such zero-rating does not discriminate based on

the basis of source, destination, Internet content, application, service, or device, this bill would enable end users to receive the benefits of the practice, while putting clear limitations on it to prevent abuse.

The other exception would allow an ISP to offer different levels of quality of service to end users as part of its BIAS, without violating Section 1776, where the following conditions exist:

- the different levels of quality of service are equally available to all Internet content, applications, services, and devices, and all classes of Internet content, applications, services, and devices, and the ISP does not discriminate in the provision of the different levels of quality of service on the basis of Internet content, application, service, or device, or class of Internet content, application, service, or device;
- the ISP's end users are able to choose whether, when, and for which Internet content, applications, services, or devices, or classes of Internet content, applications, services, or devices, to use each level of quality of service;
- the ISP charges only its own BIAS customers for the use of the different level of quality of service; and
- the provision of the different levels of quality of service does not degrade the quality of the basic default service that Internet traffic receives if the customer does not choose another level of quality of service.

By allowing for such tiers of service, there is concern the bill may create two worlds, with those able to afford the higher "quality of service" given easy access to the Internet, and those who cannot are given another barrier to access.

The author asserts that this section "allows Internet service providers to offer a new kind of Internet service product that can be beneficial to consumers – where Internet service customers can choose different levels of service for specific activities, instead of receiving the same kind of service for everything they do online."

The author states:

> This kind of product lets consumers choose whether they want to pay extra to use a different level of service for some of their traffic. Subscribers get to choose which activity gets a different level of service, which could be a game from an indie computer game developer, a streaming video feed of their local school board meeting, or watching the NBA Finals on Hulu.
>
> Under the FCC's 2015 Open Internet Order, these kinds of products would have been evaluated case-by-case under the general conduct rule. This bill is less restrictive, since it allows ISPs to offer this kind of product as long as it meets four conditions, creating a clear standard for what is legal. The first two conditions ensure that consumers remain in control of their Internet experience and prevent ISPs from using the different levels of service to distort competition and interfere with user choice.

However, the author does acknowledge that "this kind of product creates an inherent incentive for ISPs to degrade the regular level of service in order to encourage consumers to buy the better level of service for more of their Internet traffic." However, they contend the bill prohibits this from happening.

4. Enforcement mechanisms

Section 1776 would make various practices by ISPs unlawful. This bill would charge the Attorney General with reviewing complaints on a case by case basis to determine if an ISP's actions violate that section or the sections regarding the provision of different levels of quality of service. The Attorney General would be authorized to investigate and enforce violations on its own motion or in response to complaints. In order to carry out that enforcement function, the bill would authorize the Attorney General to bring an action to enforce Section 1776, pursuant to the False Advertising Law or the Unfair Competition Law.

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.)

However, by making the various practices unlawful, this bill would have automatically provided a right of action under the Unfair Competition Law, and where applicable, the False Advertising Law, without this provision. In fact, the bill would likely be limiting the ability to bring an Unfair Competition Law claim to only the Attorney General, whereas such actions can generally be brought by any 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.)

This enforcement mechanism would curtail the ability to enforce the principles of net neutrality codified in this bill. Writing in support, Attorney General Xavier Becerra communicates that preserving net neutrality protections for California's consumers is a priority for his office. However, he urges the author "to consider adding a provision that would allow consumers who are harmed by a violation of SB 822 to bring an action under the existing provisions of the Consumer Legal Remedies Act to protect their right to an open Internet."

Such an amendment would greatly increase the likelihood and incidence of violations being checked. The Consumer Legal Remedies Act (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.) With such an amendment, these "strong remedial provisions" would be extended to end users in California when ISPs fail to follow the bright line rules laid out in Section 1776. 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, with such an amendment, 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.) For these reasons, the following Committee amendment is suggested:

Amendment

Insert as Section 1779(b) the following provision: "Violation of Section 1776 or 1777 shall be subject to the remedies and procedures established pursuant to Chapter 4 (commencing with Section 1780)."

With this amendment, this bill would place power in the hands of consumers, and even edge providers, to hold BIAS providers responsible for violations of net neutrality.

5. 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. Litigation would likely result from

any attempt to enforce the provisions of this bill pursuant to the Restoring Internet Freedom Order. 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 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." In addition, the Restoring Internet Freedom Order provides its own demise. By determining that the FCC does not have authority to regulate BIAS, and handing that authority to the Federal Trade Commission, the order has undermined the FCC's own ability to preempt state-level regulation.

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

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[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.)

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-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 further undercut any challenges to this bill based on federal preemption.

Many stakeholders have weighed in on this issue. The California Cable and Telecommunications Association writes in opposition:

> SB 822's proposal to establish 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 majority of the provisions the bill proposes would be equally preempted by the 2015 Open Internet Order (until it is superseded by the RIF Order), as it, too, recognized that state-level regulation of the Internet is unworkable.
>
> Allowing state or local regulation of broadband Internet access service could impair the provision of such service by requiring each ISP to comply with a patchwork of potentially conflicting requirements across all of the different jurisdictions in which it operates.

An article from the Stanford Center for Internet and Society analyzes this issue with respect to the bill and comes to the following conclusion:

> The bill is on firm legal ground.

> While the FCC's 2017 Order explicitly bans states from adopting their own net neutrality laws, that preemption is invalid. According to case law, an agency that does not have the power to regulate does not have the power to preempt. That means the FCC can only prevent the states from adopting net neutrality protections if the FCC has authority to adopt net neutrality protections itself.
>
> But by re-classifying ISPs as information services under Title I of the Communications Act and re-interpreting Section 706 of the Telecommunications Act as a mission statement rather than an independent grant of authority, the FCC has deliberately removed all of its sources of authority that would allow it to adopt net neutrality protections. The FCC's Order is explicit on this point.
>
> Since the FCC's 2017 Order removed the agency's authority to adopt net neutrality protections, it doesn't have authority to prevent the states from doing so, either.

(Barbara van Schewick, *SB 822 would secure net neutrality for California* (March 14, 2018) Stanford Center for Internet and Society Blog <https://cyberlaw.stanford.edu/blog/2018/03/sb-822-would-secure-net-neutrality-california> [as of Apr. 17, 2018].)

6. 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 a public entity, as defined, from purchasing, or providing funding for the purchase of, any fixed or mobile BIAS from an ISP that is in violation of Section 1776. Every contract between a public entity and an ISP for BIAS would need to include a provision requiring that the service be rendered consistent with the requirements of Section 1776. The public entity would be authorized to declare such a contract void and require repayment if it determines that the ISP violated Section 1776 in providing service to the public entity subsequent to the contract's formation.

The bill would make clear that these remedies are in addition to any remedy available pursuant to the Unfair Competition Law. This enforcement mechanism would not be limited to the Attorney General, as with general enforcement of Section 1776. This bill would provide an exception for a public entity in a geographical area where Internet access services are only available from a single broadband Internet access service provider.

As a further protection for public entities and other end users, this bill would require an ISP that provides fixed or mobile BIAS purchased or funded by a public entity to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its BIAS that is sufficient to enable end users of those purchased or funded services, including a public entity, to fully and accurately ascertain if the service is conducted in a lawful manner pursuant to Section 1776. This essentially puts knowledge in end users' hands alerting them to when their rights are being violated. In conjunction with the amendment above regarding the remedies of the CLRA, this provision would further ensure that net neutrality is maintained and all violations thereof appropriately addressed.

These provisions 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 or expend funds in order to protect the principles of net neutrality.

Many other states are looking to implement net neutrality at the state level, with a number of states, such as New York and Tennessee, including 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 Apr. 17, 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 sections of this bill that make it unlawful for ISPs to engage in certain practices directly conflict with the preemption clause of the Restoring Internet Freedom Order and would therefore be more susceptible to arguments regarding federal preemption, the section governing purchasing or funding the purchase of BIAS would be far 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 the former sections are 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.) These provisions of the bill would specifically target the use of state funds for any fixed or mobile BIAS from an ISP. These provisions would not regulate the industry, but simply place parameters for entities purchasing these services.

7. Arguments for and against net neutrality in California

The California Labor Federation writes in support of the bill, expressing the importance to its members:

> Fair and equal access to information is vital to our democracy. It is important to union members and to the millions of workers who do not have unions who may want to learn about their rights at work or how to seek help with labor violations. In this climate, so many Californians turn to the Internet to learn how to get politically active and make a difference.
>
> We use apps to find marches and to meet other activists, to learn about candidates, and to find a movement where we feel represented. All of this depends upon unfiltered access to the information we seek. That is all this bill will provide.

The National Hispanic Media Coalition explains its support for the bill: "These strong Net Neutrality protections are necessary to ensure that every Californian can connect, innovate, and organize online no matter the size of their wallets or the color of their skin."

A coalition of groups, including New America's Open Technology Institute and Free Press, write in support of specific provisions of the bill:

> Including oversight of ISP traffic exchange in SB 822 is also critical. In recent years, some of the most egregious network discrimination by ISPs occurred at the points where they interconnect with transit providers, content delivery networks, and edge services. Based largely on research from OTI, which documented significant and sustained end-user harms as a result of interconnection disputes from 2013 to 2014, the FCC developed a strong body of evidence to support its conclusions about interconnection in the 2015 Open Internet Order. Interconnection points between ISPs' access networks and other entities' transit networks are a vulnerable and manipulable part of the internet's architecture. The impact interconnection disputes have on internet users is devastating: when interconnection disputes arise, millions of people end up not receiving the broadband service they paid for, in some past disputes experiencing speeds that fell to nearly unusable levels for months on end.

Writing in opposition, the San Gabriel Valley Economic Partnership states: "SB 822 is unlawful, discriminatory and unnecessary. It would increase costs to ISPs and broadband customers and would stifle or delay investments for Internet development and innovation." The California Communications Association writes in opposition to the bill:

> A national regulatory framework and enforcement policy is better suited for a service that crosses state boundaries. The Federal Communications Commission has preserved the core principles of no blocking and no throttling, and the Federal Trade Commission actively investigates and punishes discriminatory and anticompetitive behavior by all actors in the Internet ecosystem, not just ISPs. Both of these federal regulators are in a better position to provide regulatory oversight of interstate broadband service delivery.

In their letter of opposition, Frontier Communications states:

> SB 822 would dampen broadband investment in rural California. SB 822 would introduce significant compliance costs for service providers operating in California. Given that providers have finite budgets, and rural areas are generally the most expensive in which to deploy broadband with challenging payback economics, increased regulatory expenditures necessarily drain the capital available for rural broadband deployment.

Support: 3scan; 8 Circuit Studios; 18MillionRising.org; Access Humboldt; AD Hoc Labs; AdRoll; ADT Security Services; Agribody Technologies, Inc.; Aixa Fielder, Inc.; Alameda Motor; American Civil Liberties Union of California; American Sustainable Business; Analysis of Motion; Angel Investment Capital; appliedVR; Barnes Insurance; BentonWebs; Bioeconomy Partners; Brian Boortz Public Relations; Brightline Defense Project; C, Wolfe Software Engineering; Califa; California Alarm Association; California Association of Competitive Telecommunications Companies; California Association of Realtors; California Attorney General Xavier Becerra; California Common Cause; California Freedom Coalition; California Labor Federation; CALPIRG; Cartoonland; CCTV Center for Media & Democracy; Center for Democracy & Technology; Center for Media Justice; Center for Rural Strategies; Change Beings With ME; Cheryl Elkins Jewelry; Chris Garcia Studio; Chute; City and County of San Francisco; City of Emeryville; City of Los Angeles; City of Oakland; City of Sacramento; City of San Jose; Climate Solutions Net; Coalition for Humane Immigrant Rights; Cogent Communications; Color Of Change; Common Cause; Community Tech Network; Computer-Using Educators; Corporate Host Services; Constituent Records; Consumer Action; Consumer Attorneys of California; Consumers Union; Contextly; County of Santa Clara; Courage Campaign; Creative Action Network; CREDO Action; CreaTV San Jose; Cruzio Internet; Daily Kos; David's Amusement Company; Degreed; Demand Progress Action; Democracy for America; Digital Deployment; Disability Rights Education & Defense Fund; DLT Education; Dragon's Treasure; DroneTV.com; dsherman design; Electronic Frontier Foundation; Engine; Evensi; EveryLibrary; Equal Rights Advocates; Faithful Internet; Former Federal Communications Commission Commissioners Michael Copps, Gloria Tristani, and Tom Wheeler; Fight for the Future; Founder Academy; FREE GEEK; Free Press; Friends of the Millbrae Public Library; Gabriel Quinto, Mayor, City of El Cerrito; Girl Groove; GitHub; GoGo Technologies; Gold Business & IP Law; Golden; Goodlight Natural Candles; Grass Fed Bakery; Greenpeace USA; Grocery Outlet of Lompoc; Gusto; Hackers/Founders; Heartwood Studios; HelloSign; High Fidelity; Homebrew; Horticultrist; Iam Bloom; iFixit; iHomefinder, Inc.; Indivisible CA: StateStrong; Indivisible Sacramento; Indivisible SF; Indivisible Sonoma County; Inflect; inNative; Intex Solutions, Inc.; IR Meyers Photography; Johnson Properties; Kahl Consultants; Kaizena Karma+; Langlers WebWorks; Lat13; Leatherback Canvas; Leet Sauce Studios, LLC; Leverata, Inc.; Libib, Inc.; Lisa LaPlaca Interior Design; Logical Computer Solutions; LoungeBuddy; Lyft; Magical Moments Event Planning & Coordinating; Mallonee&Associates; Manargy; May First/People Link; Mechanics' Institute Library; Media Alliance; Media Mobilizing Project; Medium; Melbees; Merriman Properties LLC; MGCC; Milked Media; Milo Magnus; Mindhive; MinOps; Mixt Media Art; MM Photo; Mobile Citizen; Mogin Associates; NARAL Pro-Choice California; Narrow Bridge Candles; National Consumer Law Center; National Digital Inclusion Alliance; National Hispanic Media Coalition; New American's Open Technology Institute; New Media Rights; Nobody Cares Media; Nonprofit Technology Network; Oakland Privacy; Obscure Engineering; Office of Ratepayer Advocates; Onfleet; OpenMedia; Oregon Citizens' Utility Board; Orthogonal, LLC; Pacific Community Solutions, Inc.; Pactio; Paper Pastiche; Patreon; Patty's Cakes and Desserts; PEN America; People Demanding

Action; Personhood Press; Pilotly; Point.com; Pony Named Bill Tack; Pretty Me Store; Progressive Technology Project; Prosenergy; Public Knowledge; Reddit; REELY; Reid Case Management; RI Lopez Interpreter Services; RootsAction.org; Silicon Harlem; Silver Lining Unlimited; SNAP Cats; Sonic.net, LLC; Sonos; spamedfit.com; Spiral; Starsky Robotics; Stauter Flight Instruction; Sternidae Industries; SumOfUs; Suzi Squishies; SV Angel; Tarragon Consulting Corporation; Tech Goes Home; Tesorio; The Butcher Shop; The Greenlining Institute; The Monger; The Radio Doctor; The Run Experience; The Utility Reform Network; Thinkshift Communications; Tostie Productions; Trader Ann's Attic; Tribd Publishing Co.; TWB & Associates; Twilio; UHF; Underdog Media; Unwired; Upgraded; UX Consulting; Vic DeAngelo IT Consulting; Venntive; Voices for Progress; Wallin Mental Medical; Western Center on Law & Poverty; Whoopie Media; Wonderlandstudios; Words 2 Wow Life Science Marketing; World Wide Web Foundation; Writers Guild of America West; XPromos Marketing Mastery, LLC; 3 individuals

Opposition: 2-1-1 Humboldt Information and Resource Center; Asian Pacific Islander American Public Affairs Association; AT&T; Athletes and Entertainers For Change; Benefit Tomorrow Foundation; Black Business Association; Black Chamber of Orange County; Black Women Organized for Political Action; Boys and Girls Club of El Dorado County; Brotherhood Crusade; California Cable & Telecommunications Association; California Communications Association; California State Conference of the National Association for the Advancement of Colored People; Camp Fire Inland Southern California; Chambers of Commerce of Alhambra, California Asian Pacific Islander, California Black, California Hispanic, El Dorado County, Escondido, Fresno, Fresno Metro Black, Greater Coachella Valley, Greater Los Angeles African American, InBiz Latino/North County Hispanic, Korean American Central Mariposa County Oceanside, Orange County Hispanic, Sacramento Asian Pacific Islander, Sacramento Black, Sacramento Hispanic, Sacramento Metropolitan, Slavic American; Coachella Valley Economic Partnership; Community Women Vital Voices; Computing Technology Industry Association; Concerned Black Men of Los Angeles; Concerned Citizens Community Involvement; Congress of California Seniors; CONNECT; Consolidated Board of Realtists; DeBar Consulting; Entrepreneurs of Tomorrow Foundation Eskaton; Fresno Area Hispanic Foundation; Fresno County Economic Development Corp.; Frontier Communications; Guardians of Love; Hacker Lab; Hispanic 100; Inland Empire Economic Partnership; International Leadership Foundation; International Leadership Foundation Orange County Chapter; KoBE Government Contracting Alliance; Krimson and Kreme; Latin Business Association; Latino Service Providers; LightHouse Counseling & Family Resource Center; LIME Foundation; Mandarin Business Association; Merced Lao Family Community, Inc.; National Association for the Advancement of Colored People, Ventura County; North Bay Leadership Council; North Orange County Chamber; OCA East Bay Chapter; OCA Sacramento Chapter; OCA Silicon Valley; OCA National; Orange County Business Council; Puertas Abiertas Community Resources Center; RightWay Foundation; San Gabriel Valley Economic Partnership; Sierra College Foundation; Society for the Blind;

TechNet; The Fresno Center; UFCW Local 648; USTelecom; Valley Industry and Commerce Association; Young Visionaries Youth Leadership Academy

HISTORY

Source: Author

Related Pending Legislation: SB 460 (de León, 2017) 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. This bill is currently in the Assembly Rules Committee.

Prior Legislation: None Known

Prior Vote: Senate Energy, Utilities, and Communications Committee (Ayes 8, Noes 3)

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Cal. S. Comm. on Energy, Utils., & Commc'ns, SB 460 Analysis (2018)

SENATE COMMITTEE ON ENERGY, UTILITIES AND COMMUNICATIONS
Senator Ben Hueso, Chair
2017 - 2018 Regular

Bill No:	SB 460	**Hearing Date:**	1/11/2018
Author:	De León		
Version:	1/3/2018 As Amended		
Urgency:	Yes	**Fiscal:**	Yes
Consultant:	Nidia Bautista		

SUBJECT: Guidelines: Broadband Internet access service

DIGEST: This bill adopts the main components of the net neutrality rules repealed by a vote of the Federal Communications Commission (FCC) in December 2017. This bill would prohibit internet service providers (ISPs) in the state from taking certain actions to interfere with a customer's ability to access content on the internet, namely actions such as impairing or degrading, blocking, or paid prioritization, of lawful internet traffic. This bill requires the California Public Utilities Commission (CPUC) to adopt an order by July 1, 2018 to implement the provisions of this bill.

ANALYSIS:

Existing law:

1) 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.

   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.

   Defines "telecommunications carrier" to mean any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter 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 United States Code §153)

2) Authorizes the FCC, with some exceptions, to forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, 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 subsection. (47 United States Code §160)

3) Requires that all charges, practices, classifications, and regulations for and in connection with such 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. Authorizes the FCC to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter. (47 United States Code §201) 332(c)(1)(A))

4) Prohibits any common carrier to make 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 United States Code §202)

5) Requires every telecommunications carrier to protect the confidentiality of proprietary information of its customers, with some specified exemptions. (47 United States Code §222)

6) Requires the FCC to ensure that, with respect to common carriers, interstate and intrastate telecommunications relay services are available, to the extent possible and in the most efficient manner, to hearing-impaired and speech-impaired individuals in the United States. Provides that any state desiring to establish

a state program under this section shall submit documentation to the FCC that makes available to hearing-impaired and speech-impaired individuals, either directly, through designees, through a competitively selected vendor, or through regulation of intrastate common carriers, intrastate telecommunications relay services in such state in a manner that meets or exceeds the requirements of regulations prescribed by the FCC. (47 United States Code §225)

7) Requires a utility to provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Authorizes, with some exceptions, a utility providing electric service to deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes. (47 United States Code §226)

8) States 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. (47 United States Code §230)

9) Establishes duties on telecommunications carriers regarding interconnection to other telecommunications carriers, among other duties and responsibilities. (47 United States Code §251)

10) Establishes procedures for negotiation, arbitration, and approval of interconnection agreements among telecommunications carriers. (47 United States Code §252)

11) 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. States that only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific federal universal service support. Authorizes a state to adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that state. (47 United States Code §254)

12) 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 United States Code §1302 *(§706 of the 1996 Federal Telecommunications Act)*

13) Finds and declares that the policies for telecommunications in California include, among others: universal service commitment by assuring the continued affordability and widespread availability of high-quality telecommunications services to all Californians; encouraging the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services; assisting in bridging the "digital divide" by encouraging expanded access to state-of-the-art technologies for rural, inner-city, low-income, and disabled Californians; promoting lower prices, broader consumer choice, and avoidance of anticompetitive conduct; encouraging fair treatment of consumers through provision of sufficient information for making informed choices, establishment of reasonable service quality standards, and establishment of processes for equitable resolution of billing and service problems. (California Public Utilities Code §709)

14) Prohibits the CPUC from exercising regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol-enabled services, except as required or expressly delegated by federal law or expressly directed to do so by statute or as set forth in statute, including enforcement of 47 United States Code §§251 and 252, and several other requirements. (Public Utilities Code §710)

15) States the CPUC is the sole franchising authority for a state franchise to provide video service under this division. Neither the CPUC nor any local franchising entity or other local entity of the state may require the holder of a state franchise to obtain a separate franchise or otherwise impose any requirement on any holder of a state franchise except as expressly provided in this division. Sections 53066, 53066.01, 53066.2, and 53066.3 of the Government Code shall not apply to holders of a state franchise. (Public Utilities Code §5840 (a))

16) Authorizes the State Attorney General to prosecute for unfair business competition, false advertising, or fraudulent business practices any business that violates any of California's privacy protection laws. (Business & Professions Code §17200)

17) Authorizes actions for relief provisions to be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county, as specified, as a result of the unfair competition. (Business and Professions §17204)

18) Establishes laws prohibiting the use of untrue or misleading in advertisements by any person, firm, corporation or association selling a product or service. (Business & Professions Code §17500)

19) 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 which give rise to a claim, as set forth. (15 United States Code §45 (a)(1))

This bill:

1) Finds and declares that the FCC has repealed net neutrality rules intended to protect consumers and to ensure fair and reasonable access to the internet.

2) States the intent of this bill 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.

3) States the intent of the Legislature to ensure the specified principles are met regarding the deployment of new technologies and equitable provisions of service, among others.

4) Defines "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. Provides that the definition encompass any service in California that provides a functional equivalent of that service or is used to evade the protections set forth in this division, as determined by the CPUC.

5) Defines "edge provider" 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.

6) Defines "Internet service provider" to mean a business that provides BIAS to an individual, corporation, government, or other customer in California.

7) Defines "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, monetary or otherwise, from a third party, or (2) to benefit an affiliated entity.

8) Prohibits an ISP from engaging in the following activities:
   a) Blocking lawful content.
   b) Impairing or degrading lawful internet traffic.
   c) Engaging in paid prioritization.
   d) Unreasonably interfering with, or unreasonably disadvantaging, either a customer's ability to select, access, and use BIAS or lawful internet content.
   e) Engaging in deceptive or misleading marketing practices that misrepresent the treatment of internet traffic or content to its customers.

9) Authorizes the Attorney General, a district attorney, or a city attorney to enforce any violation of this division.

10) Requires the CPUC to adopt an order on or before July 1, 2018, with specified requirements, including:
   a) Establishing rules to implement this bill and by which the CPUC shall enforce the provisions of this bill.
   b) Identifying this state government's role as an internet customer and uses that customer power to ensure implementation of this division.
   c) Establishing statewide consumer protection rules and guidelines that can be easily accessed by the public and that include "ground truth" testing for broadband internet speeds to create a single objective statewide internet speed test, which permits customers to test their own broadband internet speed and submit its results to the CPUC.
   d) Ensuring that public purpose program funding, such as funding under the lifeline service program, California Advanced Services Fund, and others, is expended in a manner that will maximize internet neutrality and ensure the fair distribution of service to low-income individuals and communities.
   e) Amending CPUC rules pertaining to eligible telecommunications carrier status which is necessary to participate as a provider in the lifeline

service program and to receive other federal funding, to ensure compliance with consumer protection and internet neutrality standards provided by this bill.

f) Establishing a process whereby an ISP shall certify to the CPUC that it is providing BIAS in accordance with the requirements set forth in this division.

11) States that the provisions of the division are severable, so that if any provision or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

12) States this is an urgency statute necessary for the immediate preservation of the public peace, health, or safety and shall go into immediate effect.

Background

This bill adopts the main components of the FCC's 2015 Open Internet rules which have been subsequently repealed by a vote of the FCC in December 2017.

Oversight of Communications Service: To inform the discussion, below is an overview of the government agencies with roles related to regulation and enforcement of communications-related service.

The FCC is an independent federal agency overseen by Congress to regulate interstate and international communications by radio, television, wire, satellite and cable in the United States. The agency is directed by five commissioners who are 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. Among its duties, the FCC regulates all interstate and foreign communications by wire and radio, with nearly exclusive authority, in combination with state commissions, communications services that are classified as common carriers under Title II of the Federal Telecommunications Act, specifically those classified as "telecommunication services."

The FTC is a bipartisan federal agency with a dual mission to protect consumers and promote competition. The agency is directed by five commissioners who are 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 FTC protects consumers by stopping unfair, deceptive or fraudulent practices in the marketplace. By enforcing antitrust laws, the FTC helps ensure markets are

open and free. Federal law empowers the FTC to prevent corporations from using unfair methods of competition and unfair or deceptive acts of practices affecting commerce. However, federal law explicitly exempts the FTC's authority as it relates to various classes of businesses, including common carriers, which telecommunications services. FTC can only take enforcement action once harm has occurred and been demonstrated.

In California, the CPUC is the main state agency responsible for oversight and regulation of the telecommunications industry by developing and implementing policies to ensure fair, affordable universal access to necessary services, developing rules and regulatory tools, removing barriers that prevent a competitive market, and reducing or eliminating burdensome regulations, as authorized by federal statute and rules, or authorized by the California Constitution or directed by state statutes.

The Attorney General and local district attorney (as specified in statutes) can take enforcement action against corporations for deceptive and misleading advertisement and other violations of unfair business competition statutes.

Broadband Internet Access Service (BIAS). BIAS is generally high-speed internet access that is faster than the traditional "dial-up" service. This service includes transmission over digital subscriber line, cable modem, and fiber. The companies that provide the access are known as ISPs (also BIAS providers). ISPs range in size from well-known companies like AT&T, Comcast, Frontier and Verizon to smaller, regional firms like Pacific Internet and Sonic. ISP companies provide the "on-ramp" to the internet, usually with a required monthly subscription fee for the service.

About the Internet. As explained in *U.S. Telecom v. FCC*:

> The internet has four major participants: end users, broadband providers, backbone networks, and edge providers. Most end users connect to the internet through a broadband provider, which delivers high-speed internet access using technologies such as cable modem service, digital subscriber line (DSL) service, and fiber optics. Broadband providers interconnect with backbone networks – "long haul fiber-optic links and high speed routers capable of transmitting vast amounts of data." Edge providers, such as Netflix and Google, "provide content, services, and applications over the Internet." To bring this all together, when an end user wishes to check last night's baseball scores on ESPN.com, his computer sends a signal to his broadband provider, which in turn transmits it across the backbone to ESPN's broadband provider, which transmit the signal to ESPN's computer. Having received the scores into packets of information which travel back

across ESPN's broadband provider network to the backbone and then across the end user's broadband provider network to the end user. In recent years, some edge providers, such as Netflix and Google, have begun connecting directly to broadband provider's networks, thus avoiding the need to interconnect with the backbone, and some providers, such as Comcast and AT&T have begun developing their own backbone networks.

Net Neutrality & Open Internet Access. Net neutrality, also known as an open internet, is the principle that ISPs should not discriminate against lawful content and should, instead, treat all internet traffic the same regardless of source. Proponents of internet openness and net neutrality principles worry about the relationship between broadband providers and edge providers. These proponents generally express concerns that ISPs will limit, block, or degrade the quality of the content being transmitted to the end-user. Under net neutrality principles, ISPs cannot block, impair or degrade access, or create special "fast lanes" for the ISP's preferred content. For example, net neutrality runs counter to an ISP blocking or slowing down traffic of TV shows streamed by a competitor video company over its broadband service as compared to TV shows from one of its own content companies.

Obama Administration 2015 Open Internet Order. In February 2015, the FCC adopted Open Internet rules which established three "bright-line" rules banning certain practices that the FCC considers to harm open access to the internet. The bright-line rules include:

a) No Blocking: Broadband providers may not block access to legal content, applications, services, or non-harmful devices.

b) No Throttling: Broadband providers may not impair or degrade lawful internet traffic on the basis of content, applications, services, or non-harmful devices.

c) No Paid Prioritization: Broadband providers may not favor some lawful internet traffic over other lawful traffic in exchange for consideration of any kind.

In adopting the Open Internet Order, the FCC classified ISPs as "telecommunications service providers" subject to Title II of the Telecommunications Act of 1996, instead of "information service" under Title I, as they had historically been classified. The classification under Title II of the Telecommunications Act provides the FCC with authority to regulate the service as a common carrier, as they might with telephone service. However, when the FCC adopted the 2015 Open Internet rules it exercised its authority to forbear provisions of law, specifying that many provisions of Title II would not apply to broadband

services, these included those related to rate regulation. The Order also included additional transparency requirements.

A Brief History: Classification of Broadband Service. ISPs have historically, mostly, been classified as "information services" and, therefore, subject to Title I of the Communications Act.

1996 Telecommunications Act. In enacting the 1996 Telecommunications Act, Congress borrowed heavily from the 1980 Computer II Order which distinguished between "basic services" and "enhanced services." Basic services, such as telephone service, offered "pure transmission capability over a communication path that is virtually transparent in terms of its interaction with customer supplied information." Enhanced services consisted of any offering over the telecommunications network which is more than a basic transmission service. The rules subjected basic services, but not enhanced services, to common carrier treatment under Title II of the Communications Act. The rules also recognized a third category of services, adjunct-to-basic services, such as speed-dialing, that facilitated use of basic services. The FCC treated them as basic because of their role in facilitating basic services.[1] Under the Telecommunications Act, "basic service" was now succeeded by "telecommunications service" as a common carrier regulated service and "enhanced service" was succeeded by "information service" not subject to common carrier Title II.

FCC Takes Varied Approaches. In subsequent years, the FCC took varied action on adjunct-to-basic service, in 1998 it classified a portion of DSL service as a telecommunications service and in 2002 the FCC classified cable modem service as solely an information service. The FCC's classification of cable modem service as an information service was upheld by the Supreme Court in *National Cable & Telecommunications Association v. Brand X Internet Services,* 545 U.S. 967, 986 (2005). In that decision, the court stated the FCC would need to define what the word "offering" means in the definition of telecommunications service, whether the information service and telecommunications components are functionally equivalent or separate. The court, utilizing *Chevron v. NRDC,* deferred to the FCC to resolve the question based on the FCC's investigation of the factual particulars of who the technology works.

Open Internet Principles. In the following years, the FCC generally spared broadband providers from Title II common carrier obligations. However, the FCC made clear it would seek to preserve principles of internet openness. These principles, embodied in the *Internet Policy Statement,* were incorporated as

[1] United States Telecom Association v. FCC, 825 F.3d 674 (D.C. Cir. 2016) reh'g denied, 855 F.3d 381

conditions by the FCC into several merger orders and a key 700MHz license, including the SBC/AT&T, Verizon/MCI, and Comcast/NBCU mergers where FCC approval of these transactions was expressly conditioned on compliance with the *Internet Policy Statement*. [*Open Internet Order 2015*, p. 20]

Comcast v. FCC. In 2007, customers accused Comcast of interfering with their ability to access certain content. The FCC took action against Comcast for violating the open internet polices. Comcast subsequently filed suit. The Circuit decision invalidated the FCC's exercise of ancillary authority to provide consumers basic protections in using broadband internet services. The Court noted the FCC failed to tie its assertion of ancillary authority to any statutory mandated responsibility.

2010 Notice of Inquiry. Following the D.C. Circuit decision, the FCC initiated a *Notice of Inquiry* to seek comment on the framework for broadband internet service. The Notice of Inquiry recognized that the "current legal classification of broadband internet service is based on a record that was gathered a decade ago." It sought comment on three separate alternative legal frameworks for classifying and regulating broadband internet service: (1) as an information service, (2) as a telecommunications service "to which all the requirements of Title II of the Communications Act would apply," and (3) solely as to the "Internet connectivity service," as a telecommunication service with forbearance from most Title II obligations.

2010 Open Internet Order. In December 2010, the FCC adopted the 2010 Open Internet Order, a codification of the policy principles contained in the Internet Policy Statement. The Order adopted three fundamental rules governing ISPs: (1) no blocking; (2) no unreasonable discrimination; and (3) transparency. The anti-discrimination rule operated on a case-by-case basis. The order did not entirely rule out the possibility of paid prioritization arrangements. However, it made clear that such pay for priority deals were likely to be problematic in a number of respects. The Order maintained BIAS under the classification of information service.

Verizon v. FCC. A 2014 U.S. Court of Appeals for the D.C. Circuit case vacating portions of the FCC Open Internet Order 2010 that the court determined could only be applied to common carriers. The court ruled that the FCC did not have the authority to impose the order in its entirety. Since the FCC had previously classified broadband providers under Title I of the Communications Act of 1934, the court ruled that the FCC had relinquished its right to regulate them like common carriers. Of the three orders that make up the FCC Open Internet Order 2010, two were vacated (no blocking and no unreasonable discrimination)

and one was upheld (transparency). The case was largely viewed as a loss for network neutrality supporters and a victory for the cable broadband industry. However, the court sustained the FCC's findings that "absent rules such as those set forth in the Open Internet Order, the broadband providers represent a threat to internet openness and could act in ways that would ultimately inhibit the speed and extent of the future broadband deployment."

2015 Open Internet Order. Following the D.C. Circuit's ruling, in May 2014, the FCC issued a Notice of Proposed Rulemaking (2014 Open Internet NPRM) to respond to the lack of conduct-based rules to protect and promote an open internet. The public submitted an unprecedented 3.7 million comments by the close of the reply comment period in September 2014. In February 2015, the FCC voted to adopt the *2015 Open Internet Order* and reclassified ISPs as "common carriers" – much like other utilities – subject to Title II of the Telecommunications Act, but with forbearance of many common carrier requirements, including those related to tariffs and rate regulation. The 2015 Open Internet rules were challenged and upheld by the courts in *United States Telecommunications v. FCC*.

*2016 Presidential Election***.** During the Presidential election campaign, then-candidate Donald Trump commented on his desire to do away with Obama-era net neutrality rules. As such, after the 2016 Presidential election, the tide quickly shifted on the issue of net neutrality and most experts believed the privacy rules adopted in late 2016, and the Open Internet Order, were vulnerable to a repeal by the Trump Presidential Administration. In March of 2017, the process for repealing the privacy rules began with the introduction of Senate Joint Resolution (SJR) 34 introduced by Senator Jeff Flake pursuant to the Congressional Review Act (CRA), which gives Congress an expedited means to review and overrule new federal regulations. The CRA also prohibits agencies from issuing a new rule substantially similar to the revoked one unless specifically authorized by Congress – which has highly significant implications for ongoing FCC authority in this area. By the end of March, SJR 34 had been passed, and on April 3, 2017 the measure was signed by President Trump – revoking the FCC ISP privacy rules and preventing the FCC from regulating further on the matter.

Restoring Internet Freedom Order. In May 2017, the FCC issued a notice of proposed rulemaking to repeal the 2015 Open Internet rules that classified ISPs under Title II and revert the classification of the service back to an "information service" under Title I of the Telecommunications Act. In December 2017, the FCC voted, in another partisan vote, on a framework to repeal the rules. The FCC argued for a "light-touch framework" for broadband service, support for FTC oversight of anti-trust and anti-competitive behavior instead of FCC common

carrier regulation, and largely revert to the 2010 Open Internet transparency rules with some modifications.

Voted, ordered, but not, yet, taken effect. Just last week, on January 4th, the FCC issued the full order – 200+ pages. However, the new order is pending review by the Office of Management and Budget and pending final publishing of the order in the Federal Register at which time it would then officially take effect. The future legal obligations of ISPs remain in flux at the federal level as it is highly expected the courts will be asked to weigh-in on the merits of the order and assess whether the action meets the standard for agency review or whether the action is "capricious and arbitrary." Already the New York state attorney general has filed a lawsuit challenging the integrity of the public comment process. There have been news reports and statements by FCC Commissioners that the public comment system may have been compromised. More lawsuits are expected once the order takes official effect, including potential challenges to the preemption provisions. Perhaps less likely, although possible, is a Congressional repeal of the new order via the Congressional Review Act that authorizes Congress to overrule actions taken by federal agencies by a simple majority in the Senate and House within 60 legislative days of the order going into effect.

The Net Neutrality Debate. Proponents of net neutrality argue that the FCC needs to reclassify ISPs as common carriers (e.g. a private company that is required to sell their services to everyone under the same terms) under Title II of the Act in order to prevent anticompetitive behaviors. As noted above, previous court cases have limited the FCC's regulation of the issues related to unfair blocking and discrimination when the internet service has been classified under Title I as an "information service." The lack of success in those court cases promulgated the FCC to reclassify the service under Title II as a telecommunications service. Opponents of the FCC's decision argue that although they are not opposed to the general principles of net neutrality, they believe the FTC already has the authority to prevent anticompetitive business practices and that Title II is an archaic provision created to regulate telecommunications services long before the internet existed. Opponents of the Open Internet rules also argue that regulating ISPs under Title II would have the opposite effect of impeding innovation and investment. Those against a Title II classification, including the current majority of the FCC, argue for a "light-touch regulatory framework."

Not likely to be resolved. This bill proposes to adopt the net neutrality rules for California intrastate internet traffic. The language of this bill largely reflects the rules adopted in the 2015 Open Internet Order concerning no blocking, no throttling, and no paid prioritization, as well as, conduct rules, which were repealed by the Trump FCC in December. Under the Order that was just issued, the FCC

states they "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." As such, the success of implementing this bill is largely hinged on the new order being repealed or rejected, in whole or in part. Considering the high likelihood that the courts will be asked to weigh in, it seems within the realm of possibilities that the new order may not withstand a court challenge. However, the issue is not resolved prior to this committee hearing this bill.

CPUC: Spread too thin? This bill proposes to have the CPUC adopt rules by July 1, 2018 that include new responsibilities for the agency. As this committee knows, in recent years there have been questions raised concerning whether the CPUC is spread too thin and handling too many varied areas. Just last year, the legislature passed SB 19 (Hill, 2017) which removed some of the transportation-related functions away from the CPUC to other agencies. This bill would expand to the CPUC's existing responsibilities. While it is not immediately clear whether it is feasible for the CPUC to take on these responsibilities, in terms of staff and resources, the responsibilities are potentially consistent with the CPUC's role in regulating utility-style services. While existing statute, Public Utilities Code §710, prohibits the CPUC from exercising regulatory jurisdiction or control over Internet Protocol-enabled services, it only does so in so far as not directed by federal or state statute. Therefore, the Legislature retains the opportunity to pass statute to direct the CPUC in this space, granted such statutes are able to withstand any legal challenges, particularly those regarding federal preemption.

Patchwork of regulation. One of the criticisms of this bill by the opponents is that this bill would create a patchwork of regulation that could stymie the marketplace since California would have rules that are different from other states and the federal government. Due to the nature of the internet traffic traveling across state lines, it would be ideal to have one rule to address the issue of net neutrality. However, the FCC's vote in December has resulted in other states also proposing action to institute their own net neutrality rules, including Washington State. In this case, California may not be alone in adopting its own net neutrality rules.

Feasibility. This bill requires a uniform and customer-accessible internet speed test. Currently, the CPUC utilizes CalSpeed testing at nearly 2000 points in the state to test mobile broadband internet speeds. Conceivably, this test might satisfy the requirements of this bill for one uniform test. However, the CPUC would need to ensure the test can be utilized for fixed broadband service and ensure the integrity of the test can not be manipulated by providers. This bill also requires the CPUC to adopt rules to ensure that public purpose program funding is expended in a manner that will maximize internet neutrality and ensure the fair distribution of services to low-income individuals and communities. Many of these programs

already include criteria directing funding to low-income individuals and communities, such as the Lifeline Program and California Advanced Services Fund. This bill's efforts to leverage these funds in order to incentivize ISPs to commit to net neutrality rules seems very reasonable and an important leveraging opportunity for the state.

Amendments needed. In order to maintain consistency with the Open Internet Order, the bill needs some clarifying amendments, including some related to reasonable network management. Additionally, in order to establish a more realistic timeline for CPUC action, the deadline by which the CPUC would adopt the rules required by this bill should be moved to no earlier than December 31, 2018.

- Replace "customer" with "end-user" throughout as noted in the original FCC rules.
- Add language from FCC rules related to Reasonable Network Management (FCC Open Internet Rule Section 8.2 Definitions (f)).
- Add the exception provided in the FCC rules to authorize the CPUC to waive the ban on paid prioritization "only if the petitioner demonstrates that the practice would provide some significant public interest benefit and would not harm the open nature of the Internet." (FCC Open Internet Rules Section 8.9 No paid prioritization (c)) - Add to SB 460. Section 5982 (c).
- Add "Reasonable network management shall not be considered a violation of this rule." Per FCC Open Internet Rules Section 8.11. Add to SB 460 Section 5982 (d)
- Move the date from July 1, 2018 to December 31, 2018.
- Technical clean-up replacing "network" with "internet" in the urgency section and other technical clean-up

Prior/Related Legislation

SB 822 (Wiener, 2018) the bill would state the intent of the Legislature to enact legislation to effectuate net neutrality in California utilizing the state's regulatory powers and to prevent ISPs from engaging in practices inconsistent with net neutrality, including through four specified means. The bill was introduced on January 4, 2018 and is awaiting referral.

AJR 7 (Mullin, Chapter 151, Statutes of 2017) urged the President of the United States and Members of the United States Congress to protect specified broadband communications-related policies and rules, including: net neutrality and open internet access, however, with no reference to Title II regulation. The resolution also calls on the President to support the Federal Lifeline Program that provides

discounted telephone service for qualifying low-income consumers, and the E-Rate program's discounted telecommunication and internet access services for schools and libraries.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT:

ADT Security Services
The Greenlining Institute
The Utility Reform Network

OPPOSITION:

AT&T
Black Business Association
California Cable & Telecommunications Association
California Chamber of Commerce
California Manufacturers & Technology Association
Central City Association of Los Angeles
Consolidated Communications
CTIA
Greater Los Angeles African American Chamber of Commerce
Frontier Communications
Sprint
T Mobile
TechNet
Tracfone
Valley Industry & Commerce Association
Verizon

ARGUMENTS IN SUPPORT: The author states:

> We cannot allow the profits and political interests of internet service providers to outweigh the public interest in a free and open internet – it's too important to our economy and our way of life. And if the Trump Administration won't protect consumers, the State of California will. SB 460 will prevent ISP's from using deceptive, discriminatory or anti-competitive business practices. It preserves the heart of the FCC's net neutrality rules and prohibits ISP's from blocking, throttling, and paid prioritization. And it gives consumers greater transparency about the services we all depend on in

everyday life. Net Neutrality is just common sense. It's good for consumers and protects a level playing field for internet companies.

ARGUMENTS IN OPPOSITION: Opponents generally express concerns that this bill would result in a patchwork of state regulations that will stymie innovation. Many express concerns about the appropriateness of placing the responsibility to implement this bill on the CPUC. Many of the opponents also express concerns that this bill is inconsistent with the federal regulatory framework governing ISPs, is federally preempted, and will likely result in costly litigation.

ISPs, including CCTA, AT&T, Frontier Communications, generally express support for net neutrality principles, but share the concerns stated above and, therefore, oppose the bill. Additionally, CCTA states that "ISPs are required to keep consumers clearly informed of their open internet practices and will be held accountable for any harmful conduct." Some of the opponents state their concerns that the bill is being rushed through the legislative process.

-- END --

Cal. Assembly Comm. on Commc'ns & Conveyance, SB 822 Analysis (2018)

Date of Hearing: August 22, 2018

ASSEMBLY COMMITTEE ON COMMUNICATIONS AND CONVEYANCE
Miguel Santiago, Chair
SB 822 (Wiener) – As Amended August 20, 2018

SENATE VOTE: 23-12

SUBJECT: Communications: broadband Internet access service

SUMMARY: Establishes net neutrality rules by prohibiting Internet Service providers (ISPs) from engaging in activities that interfere with a user's ability to access content on the internet. Specifically, **this bill**:

1) Makes it unlawful for a fixed and mobile ISP, insofar as the provider is engaged in providing fixed broadband Internet access service (BIAS), to engage in any of the following activities:

   a) Blocking lawful content, applications, services, or nonharmful devices, subject to reasonable network management;

   b) 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;

   c) Requiring consideration, monetary or otherwise, from an edge provider, including, but not limited to, in exchange for any of the following:

      i) Delivering Internet traffic to, and carrying Internet traffic from, the ISP's end users;

      ii) Avoiding having the edge provider's content, application, service, or nonharmful device blocked from reaching the ISP's end users; or,

      iii) Avoiding having the edge provider's content, application, service, or nonharmful device impaired or degraded;

   d) Engaging in paid prioritization;

   e) Engaging in zero-rating in exchange for consideration, monetary or otherwise, from a third party;

   f) Zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category;

   g) Unreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use BIAS or the lawful Internet content, applications, services, or devices of the end user's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to end users. Specifies that reasonable network management is not a violation, as specified;

a) Specifies that zero-rating Internet traffic in application-agnostic ways is not a violation, as specified, provided that no consideration, monetary or otherwise, is provided by any third party in exchange for the ISP's decision whether to zero-rate traffic;

h) 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; and,

i) Engaging in practices, including, but not limited to, agreements, with respect to, related to, or in connection with, ISP traffic exchange that have the purpose or effect of evading specified prohibitions. Specifies that nothing in the specified provision shall be construed to prohibit ISPs from entering into ISP traffic exchange agreements that do not evade specified prohibitions.

2) Prohibits a fixed and mobile ISP to offer or provide services other than BIAS that are delivered over the same last-mile connection as the BIAS, if those services satisfy either of the following conditions:

a) They have the purpose or effect of evading specified prohibitions; or,

b) They negatively affect the performance of BIAS.

3) Specifies that nothing in the specified provision shall be construed to prohibit a fixed or mobile ISP from offering or providing services other than BIAS that are delivered over the same last-mile connection as the BIAS and do not violate specified provisions.

4) Specifies that nothing in this bill supersedes any obligation or authorization a fixed or mobile ISP 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.

5) Specifies that nothing in this bill prohibits reasonable efforts by a fixed or mobile ISP to address copyright infringement or other unlawful activity.

6) Defines the following terms:

a) "Application-agnostic" means not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device.

b) "Broadband Internet access service" means a mass-market retail service by wire or radio provided to customers in California that provides the capability to transmit data to, and receive data from, all or substantially all Internet endpoints, including, but not limited to, any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. "Broadband Internet access service" also encompasses any service provided to customers in California that provides a

functional equivalent of that service or that is used to evade the protections set forth in this title.

c) "Class of Internet content, application, service, or device" means Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay.

d) "Content, applications, or services" means all Internet traffic transmitted to or from end users of a BIAS, including, but not limited to, traffic that may not fit clearly into any of these categories.

e) "Edge provider" means 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.

f) "End user" means any individual or entity that uses a BIAS.

g) "Enterprise service offering" means an offering to larger organizations through customized or individually negotiated arrangements or special access services.

h) "Fixed broadband Internet access service" means a BIAS that serves end users primarily at fixed endpoints using stationary equipment. Fixed BIAS includes, but is not limited to, fixed wireless services including, but not limited to, fixed unlicensed wireless services, and fixed satellite services.

i) "Fixed Internet service provider" means a business that provides fixed BIAS to an individual, corporation, government, or other customer in California.

j) "Impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service, or use of a nonharmful device" means impairing or degrading any of the following: (1) particular content, applications, or services; (2) particular classes of content, applications, or services; (3) lawful Internet traffic to particular nonharmful devices; or (4) lawful Internet traffic to particular classes of nonharmful devices. The term includes, without limitation, differentiating, positively or negatively, between any of the following: (1) particular content, applications, or services; (2) particular classes of content, applications, or services; (3) lawful Internet traffic to particular nonharmful devices; or (4) lawful Internet traffic to particular classes of nonharmful devices.

k) "Internet service provider" means a business that provides BIAS to an individual, corporation, government, or other customer in California.

l) "ISP traffic exchange" means the exchange of Internet traffic destined for, or originating from, an ISP's end users between the ISP's network and another individual or entity, including, but not limited to, an edge provider, content delivery network, or other network operator.

m) "ISP traffic exchange agreement" means an agreement between an ISP and another individual or entity, including, but not limited to, an edge provider, content delivery network, or other network operator, to exchange Internet traffic destined for, or originating from, an ISP's end users between the ISP's network and the other individual or entity.

n) "Mass market" service means a service marketed and sold on a standardized basis to residential customers, small businesses, and other customers, including, but not limited to, schools, institutions of higher learning, and libraries. "Mass market" services also include BIAS purchased with support of the E-rate and Rural Health Care programs and similar programs at the federal and state level, regardless of whether they are customized or individually negotiated, as well as any BIAS offered using networks supported by the Connect America Fund or similar programs at the federal and state level. "Mass market" service does not include enterprise service offerings.

o) "Mobile broadband Internet access service" means a BIAS that serves end users primarily using mobile stations. Mobile BIAS includes, but is not limited to, BIAS that use smartphones or mobile-network-enabled tablets as the primary endpoints for connection to the Internet, as well as mobile satellite broadband services.

p) "Mobile Internet service provider" means a business that provides mobile BIAS to an individual, corporation, government, or other customer in California.

q) "Mobile station" means a radio communication station capable of being moved and which ordinarily does move.

r) "Paid prioritization" means the management of an ISP's network to directly or indirectly favor some traffic over other traffic, including, but not limited to, 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.

s) "Reasonable network management" means a network management practice that is reasonable. 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 BIAS, and is as application-agnostic as possible.

t) "Zero-rating" means exempting some Internet traffic from a customer's data usage allowance.

7) Makes the following findings and declarations:

a) This act is adopted pursuant to the police power inherent in the State of California to protect and promote the safety, life, public health, public convenience, general prosperity, and well-being of society, and the welfare of the state's population and economy, that are increasingly dependent on an open and neutral Internet;

b) Almost every sector of California's economy, democracy, and society is dependent on the open and neutral Internet that supports vital functions regulated under the police power of the state, including, but not limited to, each of the following:

i) Police and emergency services;

ii) Health and safety services and infrastructure;

iii) Utility services and infrastructure;

iv) Transportation infrastructure and services, and the expansion of zero- and low-emission transportation options;

v) Government services, voting, and democratic decision-making processes;

vi) Education;

vii) Business and economic activity;

viii) Environmental monitoring and protection, and achievement of state environmental goals; and,

ix) Land use regulation.

c) This act shall be known, and may be cited, as the California Internet Consumer Protection and Net Neutrality Act of 2018.

EXISTING LAW:

1) Specifies policies for telecommunications in California including; to promote lower prices, broader consumer choice, and avoidance of anticompetitive conduct; to remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice; and to encourage fair treatment of consumers through provision of sufficient information for making informed choices, establishment of reasonable service quality standards, and establishment of processes for equitable resolution of billing and service problems. (Public Utilities Code (PUC) Section 709)

2) Prohibits the California Public Utilities Commission (CPUC) from exercising regulatory jurisdiction or control over Voice over Internet Protocol and Internet Protocol enabled services except as required or expressly delegated by federal law or expressly directed to do so by statute, as specified. (PUC Section 710)

3) Establishes the Digital Infrastructure and Video Compeition Act of 2006 which specifies that the CPUC is the sole franchising authority for a state franchise to provide video service, as specified. (PUC Section 5800 et seq.)

4) 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, as specified. (Business and Professions Code (BPC) Section 17200)

5) Specifies that any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction, as specified. (BPC Section 17203)

6) Authorizes actions for relief provisions to be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or a district attorney or by a county, as specified, as a result of the unfair completion. (BPC Section 17204)

7) Prohibits the use of untrue or misleading advertisements by any person, firm, corporation or association selling a product or service, as specified. (BPC Section 17500)

FISCAL EFFECT: Unknown. This bill is keyed non-fiscal by the Legislative Counsel.

COMMENTS:

1) **Authors Statement:** According to the author, "As of June 11th, 2018 the federal government under Donald Trump's FCC has abandoned net neutrality protections and abdicated it's responsibility to protect all Americans. When the federal government decides to walk away from this duty and its authority to regulate this industry, it is up to the states to protect their residents. Senate Bill 822 steps in and puts California at the national forefront of ensuring an open internet. It establishes comprehensive and enforceable net neutrality standards to ensure that all California residents have the right to choose whether, when, and for what purpose they use the internet. SB 822 stands for the basic proposition that the role of internet service providers is to provide neutral access to the internet, not to pick winners and losers by deciding (based on financial payments or otherwise) which websites or applications will be easy or hard to access, which will have fast or slow access, and which will be blocked entirely."

2) **Background:** There are a number of federal and state agencies that play a role in the regulation and enforcement of communications-related services including the Federal Communications Commission (FCC), the Federal Trade Commission (FTC), and the CPUC. The FCC is an independent federal agency overseen by Congress to regulate interstate and international communications by radio, television, wire, satellite and cable in the United States. The FCC is tasked with promoting the development of competitive networks, as well as ensuring universal service, consumer protection, public safety, and national security.

   In addition, the FTC is an independent federal agency tasked with promoting consumer protection and preventing anticompetitive business practices. The FTC enforces antitrust laws, and protects consumers by stopping unfair, deceptive or fraudulent practices in the marketplace. In California, the CPUC regulates the telecommunications industry by developing and implementing policies to ensure fair, affordable universal access to necessary services, developing rules and regulatory tools, removing barriers that prevent a competitive market, and reducing or eliminating burdensome regulations.

3) **Net Neutrality & the Internet:** There are several major players in the operation of the Internet for data to be delivered from one point to another. Edge providers, such as Amazon, Google, and Facebook, develop and provide content, services, and applications over the Internet. End users are internet customers that consume content from edge providers. In order for products to be delivered from an edge provider to an end user, the product travels through backbone networks which are capable of transmitting vast amounts of data. End users and edge providers typically connect to these backbone networks through local ISPs, such as AT&T, Comcast, or Verizon. Such ISPs serve as the gatekeepers and provide the "on-ramp" to the internet.

   Net neutrality is the principle that ISPs should not discriminate against legal content and applications, by charging edge providers different delivery speeds to deliver their content. Hence, ISPs cannot block, throttle, or create special "fast lanes" for certain content. Net neutrality rules serve the purpose of maintaining open access to the internet and limited the degree to which ISPs can interfere with a customer's ability to access legal content on the internet. It can also serve to promote greater competition between content providers by limiting the degree in which better resourced companies can pay to have their content prioritized and distributed to consumers at optimal speeds. Maintaining competition in the internet marketplace provides greater choices and reduced cost to consumers and new services entering the marketplace.

4) **Bright-line Rules and the 2015 Open Internet Order:** After a series of court cases in which the FCC attempted to enforce net neutrality rules were overturned, in May 2014 the FCC began a rulemaking to respond to the lack of conduct-based rules to protect and promote an open internet. In February 2015, the FCC adopted the Open Internet Order which established three "bright-line" rules banning certain practices that the FCC considers to harm open access to the Internet. The bright-line rules include:

   a) No Blocking: ISPs may not block access to legal content, applications, services, or non-harmful devices;

   b) No Throttling: ISPs may not impair or degrade lawful Internet traffic on the basis of content, applications, services, or non-harmful devices; and,

   c) No Paid Prioritization: ISPs may not favor some lawful Internet traffic over other lawful traffic in exchange for consideration of any kind.

   In addition, recognizing that there may exist other current or future practices that cause the type of harms the bright-line rules are intended to address, the 2015 Open Internet Order also included a no unreasonable interference or unreasonable disadvantage Standard for Internet Conduct rule. The Internet Conduct Standard servers as a catch-all by prohibiting practices that unreasonably interferes with, or unreasonably disadvantages, an end users ability to access, or an edge providers ability to deliver, content over the internet. Furthermore, the Order also reaffirmed the importance of ensuring transparency and adopted enhanced transparency rules so that consumers would have accurate information sufficient for them to make informed choices of available services.

   Within the FCC's 2015 Open Internet rules included provisions to reclassify ISPs from an "information service" under Title I of the Telecommunications Act of 1996 (the Act), to a

"telecommunications service" under Title II of the Act. This would allow the FCC to regulate ISPs similar to traditional public utilities, which may include rate of return regulation. However, when the FCC adopted the 2015 Open Internet rules it specified that certain provisions of Title II would not apply to broadband services. Proponents of net neutrality argue that the FCC needs to reclassify ISPs as common carriers (e.g. a private company that is required to sell their services to everyone under the same terms) under Title II of the Act, in order to prevent anticompetitive behaviors. While opponents argue that the FTC already has the authority to prevent anticompetitive business practices and that Title II is an archaic provision created to regulate telecommunications services long before the Internet existed.

5) **2017 Restoring Internet Freedom Order & State Response:** In December 2017, following the election of President Trump, the FCC adopted the Restoring Internet Freedom Order which repealed the 2015 Open Internet Order. The new FCC argued that net neutrality rules were unnecessary because ISPs have publicly stated their opposition to violating such principles, and if an ISP were to engage in such activities, consumer expectations, market incentives, and the deterrent threat of enforcement actions by antitrust and consumer protection agencies, such as the FTC, will constrain such practices ex ante. To enact such changes the FCC reclassified ISPs under Title I of the Act and asserted significant preemption over state and local regulations, and laws. In June 2018, the repeal took effect.

   In response to the 2017 Restoring Internet Freedom Order, Legislators in 29 states have introduced over 65 bills requiring ISPs to ensure various net neutrality principles. In 13 states and the District of Columbia, 23 resolutions have been introduced expressing opposition to the FCCs repeal of net neutrality rules and urging the U.S. Congress to reinstate and preserve net neutrality. In California, the Legislature passed AJR 7 (Mullin) Chapter 151, Statutes of 2017, which urged the President and Members of Congress to continue to protect net neutrality, open Internet access, the federal Lifeline program, and the E-rate program.

   Currently, Governors in six states have signed executive orders and three states have enacted net neutrality legislation, including Oregon, Vermont, and Washington. Legislation introduced typically includes one or more of the following:

   - Prohibiting blocking, throttling and paid prioritization of internet traffic, usually by invoking state consumer protection laws;

   - Requiring ISPs to be transparent about their network management practices; or,

   - Requiring state contractors for ISP service to abide by net neutrality rules.

6) **2015 Open Internet Final Rules vs. Order:** The 2015 Open Internet Order included with it prescribed final rules, as well as the attached larger report which includes debates on specific issues, guidance and elaborations, and the FCC assertions and expectations. The mere assertion of jurisdiction over such matters was enough to serve as a deterrent for ISPs to avoid violations of the prescribed final rules.

   Recognizing competing narratives, the FCC opted to prescribe rules for some issues while taking a case-by-case approach on others. The FCC did however stipulate that it could enforce other violations under one of the bright-line rules or the Internet Conduct Standard if it does have the effect of circumventing the intent of the prescribed rules. However, there are

always inherent difficulties when trying to implement a federal regulation into state law. Absent placing the final rules under a comparable state agency that has the expertise to prescribe additional regulations to conform to the Order, significant details may be necessary to ensure that the Attorney General has the additional clarity necessary to enforce such provisions in litigation.

This bill seeks to codify the prescribed rules and provide additional clarity by establishing additional bright-line rules that prohibit preferential treatment to some services but not others, including prohibiting ISPs from charging website fees for access to users and incorporating net-neutrality protections at the point of interconnection. The bill seeks to capture the intent of the Order by prescribing additional provisions based on the narratives that were debated and the FCC's assertions and expectations.

Interconnection: The connection points between and among the various groups that allows for the flow of information through the internet have many names: peering, transit, proxy services, interconnection, or traffic exchange. On the one hand some edge and transit providers assert that large ISPs are creating artificial congestion by refusing to upgrade interconnection capacity at their network entrance points, thus forcing edge providers to agree to paid peering arrangements. On the other hand, large ISPs assert that edge providers are imposing a cost on ISPs who must constantly upgrade their infrastructure to keep up with the demand, especially as the demand for products that require large quantity of data such as online streaming services continue to increase.

While the FCC opted to adopt a case-by-case approach in dealing with interconnection agreements, this bill prohibits an ISP from engaging in practices that evade net neutrality protections at the point of interconnection. The bill does not prohibit interconnection agreements, but seeks to ensure that net neutrality protections are not circumvented and are applied throughout the Internet highway.

Zero-Rating: Sponsored data plans, sometimes called zero-rating, allows ISPs to exclude certain edge provider content from end user's data usage allowances. The Order states that on the one hand, evidence in the record suggests that these business models may in some instances provide benefits to consumers, with particular reference to their use in the provision of mobile service. On the other hand, some commenters strongly oppose sponsored data plans, arguing that the power to exempt selective services from data caps seriously distort competition, favors companies with deepest pockets, and prevents consumers from exercising control over what they are able to access on the Internet, again with specific reference to mobile services.

The FCC also opted to adopt a case-by-case approach to zero-rating, but specified that it would assess such practices under the Internet Conduct Standard. According to the author, the FCC was preparing to enforce anti-competitive zero-rating plans before it reversed course following the 2016 election. This bill prohibits an ISP from zero-rating some internet content, applications, services or devices in a category, but not the entire category. The bill allows an ISP to zero-rate in application-agnostic ways, provide that no consideration, monetary or otherwise, is provide by any third party in exchange for the provider's decision whether to zero-rate traffic.

7) **Arguments in Support:** According to the ACLU of California, "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 'pay to play,' to leverage the Internet to build communities and create societal change."

8) **Arguments in Opposition:** According to a coalition of industry groups, "Despite characterizations that SB 822 is intended to align with the FCC's 2015 Open Internet Order, this legislation still establishes requirements that go well beyond the Order's net neutrality principles. The amended bill continues to create policies that will have negative impacts on both investment and consumers […] The uncertainty, conflicts, and confusion caused by SB 822 would harm consumers and stifle innovation in California's broadband infrastructure. In addition, such unpredictability raises the cost of compliance for all ISPs, regardless of size, and will likely have a negative effect on consumers, including public agencies.

9) **Related Legislation:** AB 1999 (Chau) of 2018 establishes net neutrality rules for local agencies that provide broadband services and expands the types of local agencies that may provide broadband infrastructure and/or services. *Status: Pending on the Senate Floor.*

   SB 460 (De Leon) of 2018 prohibits a state agency from contracting with an ISP for the provision of BIAS unless the ISP certifies in writing that it is in full compliance with, and the service provided to the state agency is rendered consistent with, specified net neutrality rules. *Status: Pending in the Assembly Communications and Conveyance Committee.*

10) **Previous Legislation:** AJR 7 (Mullin) of 2017 urged the President of the United States and Members of the United States Congress to continue to protect net neutrality, open Internet access, the federal Lifeline program, and the E-rate program. *Status: Chaptered by the Secretary of State, Resolution Chapter 151, Statutes of 2017.*

REGISTERED SUPPORT / OPPOSITION:

Support

Access Humboldt
ACLU of California
ADT Security Services
California Association of Competitive Telecommunications Companies
California Association of Realtors
California Clean Money Campaign
California Common Cause
CallFire
CALPIRG
Center for Media Justice
Color of Change

Communications Workers of America, District 9
Computer-Using Educators
Consumer Federation of California
Consumer Union
Contextly
Electronic Frontier Foundation
Engine
Etsy
Eventbrite
Expa
Fight for the Future
Founder Academy
Foursquare
GitHub
Greenlining Institute
Gusto
Hellosign
Honorable Dave Jones, State Insurance Commissioner
Indivisible CA: StateStrong
Mapbox
Media Alliance
Medium
New America's Open Technology Institute
NextGen California
Oakland Privacy
Patreon
Placer Independent Resource Services
Public Knowledge
Reddit
Sonos
The Utility Reform Network
Twilio
Vimeo
Vivid Seats
Voices for Progress
Writers Guild of America West
Numerous Individuals

Opposition

100 Black Men of Long Beach
Actiontec Electronics
Affordable Living for the Aging
African American Male Education Network and Development Organization
Alhambra Chamber of Commerce
American Legion Post 290
Asian Pacific Islander American Public Affairs Association – Greater Sacramento
Asian Pacific Islander American Public Affairs Association – Solano County
Asian Resources Inc.

AT&T
Athletes and Entertainers for Change
Brotherhood Crusade
Burbank Chamber of Commerce
CalCom
California Asian Pacific Chamber of Commerce
California Cable & Telecommunications Association
California Chamber of Commerce
California Hispanic Chamber of Commerce
California League of United Latin American Citizens
California Manufacturers & Technology Association
California State Conference of the NAACP
CenturyLink
Chinese American Association of Solano County
Civil Justice Association of California
Community Women Vital Voices
CompTIA
Concerned Citizens Community Involvement
Congress of California Seniors
CONNECT
Consolidated Communications Inc.
CTIA
East Bay Leadership Council
Frontier Communications
Gamma Zeta Boule Foundation
Greater Coachella Valley Chamber of Commerce
Greater Los Angeles African American Chamber of Commerce
Greater Riverside Chamber of Commerce
Inglewood / South Bay NAACP
Inland Empire Economic Partnership
Janet Goeske Foundation
Korean American Central Chamber of Commerce
Korean American Seniors Association of Orange County
La Canada Flintridge Chamber of Commerce and Community Association
Los Angeles African American Women's Public Policy Institute
Los Angeles NAACP
Marjaree Mason Center
Mexican American Opportunity Foundation
Monterey County Business Council
Monterey County Hospitality Association
Mother Lode Rehabilitation Enterprises Inc.
Music Changing Lives
NAACP – Venture County
National Asian American Coalition
National Diversity Coalition
Oceanside Chamber of Commerce
Orange County Business Council
Organization of Chinese Americans – Sacramento
Organization of Chinese Americans – San Mateo County

Organization of Chinese Americans – Silicon Valley
Pasadena Chamber of Commerce
PulsePoint Foundation
Sacramento Asian Pacific Chamber of Commerce
Sacramento Black Chamber of Commerce
Sacramento Metro Chamber
San Diego Regional Chamber of Commerce
San Gabriel Valley Economic Partnership
San Marcos Chamber of Commerce
San Ysidro Chamber of Commerce
Solano Community College Educational Foundation
Sprint
T-Mobile
Tracefone
Tulare Kings Hispanic Chamber of Commerce
Valley Industry and Commerce Association
Verizon
Vietnamese American Chamber of Commerce

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Br. for the Govt. Pets., *Mozilla v. FCC*,
Nos. 18-1051 et al. (D.C. Cir. Aug. 20, 2018)

NOT YET SCHEDULED FOR ORAL ARGUMENT

18-1051(L)

Consolidated Cases: 18-1052, 18-1053, 18-1054, 18-1055, 18-1056, 18-1061, 18-1062, 18-1064, 18-1065, 18-1066, 18-1067, 18-1068, 18-1088, 18-1089, 18-1105

United States Court of Appeals for the District of Columbia Circuit

MOZILLA CORPORATION, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

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Dated: August 20, 2018

(*Complete counsel listing appears on signature pages.*)

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), petitioners the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, the County of Santa Clara, Santa Clara County Central Fire Protection District, and the California Public Utilities Commission (Government Petitioners) certify as follows:

A. Parties and Amici

The Government Petitioners are the State of New York et al. (No. 18-1055), the County of Santa Clara and the Santa Clara County Central Fire Protection District (No. 18-1088), and the California Public Utilities Commission (No. 18-1089). In addition to the Government Petitioners, the following are petitioners in the consolidated petitions for review: Mozilla Corporation (No. 18-1051), Vimeo, Inc. (No. 18-1052), Public Knowledge (18-1053), Open Technology Institute at New America (No. 18-1054), National Hispanic Media Coalition (No. 18-1056), NTCH, Inc. (No. 18-1061), Benton Foundation (No. 18-1062), Free Press (18-1064),

Coalition for Internet Openness (No. 18-1065), Etsy, Inc. (No. 18-1066), Ad Hoc Telecom Users Committee (No. 18-1067), Center for Democracy and Technology (No. 18-1068), and INCOMPAS (No. 18-1105).

Respondents in these consolidated cases are the Federal Communications Commission and the United States of America.

More than twenty million companies, organizations, and individuals participated in the underlying rulemaking proceeding (WC Docket 17-108, FCC No. 17-166). The Commission did not include in its *Order* a listing of the parties that participated in the underlying proceeding. Below is a representative, but not comprehensive, list of companies and organizations that filed comments or reply comments during the rulemaking according to the Commission's Electronic Comment Filing System:

18MillionRising.org (Voices Coalition)
AARP
Access Now
Ad Hoc Telecommunications Users Committee
ADT Corporation
ADTRAN, Inc.
Advanced Communications Law & Policy Institute at New York Law School
Akamai Technologies, Inc.
Alamo Broadband
Alarm Industry Communications Committee
Alaska Communications
ALEC
Amazon

American Association of Community Colleges
American Association of Law Libraries et al.
American Association of State Colleges and Universities et al.
American Cable Association
American Civil Liberties Union
American Consumer Institute
American Library Association
American Sustainable Business Council
Americans for Tax Reform and Digital Liberty
Apple Inc.
AppNexus
Asian Americans Advancing Justice | AAJC
Association of Research Libraries
AT&T Services, Inc.
Benton Foundation
Black Women's Roundtable
California Public Utilities Commission
CALinnovates
Cause of Action
CCIA
Center for Democracy & Technology
Center for Individual Freedom
Center for Media Justice et al. (Voices Coalition)
CenturyLink
Charter Communications, Inc.
Cisco Systems, Inc.
Citizens Against Government Waste
City of Boston, Massachusetts
City of Portland, Oregon
City of San Francisco, California
Coalition for Internet Openness
Cogent Communications Group, Inc.
Color of Change (Voices Coalition)
Comcast Corporation
Common Cause
Communications Workers of America
Commonwealth of Massachusetts
Competitive Enterprise Institute

CompTIA
Community Technology Advisory Board
Consumers Union
County of Santa Clara, California
Cox Communications, Inc.
CREDO Mobile
CTIA – The Wireless Association
Daily Kos
Data Foundry
Digital Policy Institute
Directors Guild of America
District of Columbia
Electronic Frontier Foundation
Electronic Gaming Foundation
Engine
Entertainment Software Association
Electronic Privacy Information Center
Ericsson
Etsy, Inc.
European Digital Rights
Farsight Security
Fiber Broadband Association
FreedomWorks
Free Press
Free State Foundation
Friends of Community Media
Frontier Communications
FTC Staff
Future of Music Coalition
Golden Frog
Greenlining Institute
Hispanic Technology and Telecommunications Partnership
Home Telephone Company
INCOMPAS
Independent Film & Television Alliance
Information Technology Industry Council
Inmarsat
Institute for Local Self-Reliance

Interisle Consulting Group LLC
Internet Association
Internet Freedom Coalition
Internet Innovation Alliance (IIA)
ITIF
ITTA – The Voice of Midsize Communications Companies
Level 3 Communications, LLC
Judicial Watch
Massillon Cable Comments
Media Alliance (Voices Coalition)
MediaFreedom.org
Meetup, Inc.
Microsoft Corporation
M-Lab
Mobile Future
Mobilitie, LLC
Motion Picture Association of America
Mozilla
NAACP
National Association of Realtors
National Association of Regulatory Utility Commissioners
National Association of State Utility Consumer Advocates
National Cable & Telecommunications Association
National Exchange Carrier Association
National Grange
National Hispanic Media Coalition
National Newspaper Publishers Association
National Venture Capital Association
Netflix, Inc.
New America Foundation (Open Technology Institute)
New Media Rights
Nokia
Nominum
NTCA – The Rural Broadband Association
Oracle Corp
Presente.Org (Voices Coalition)
Public Knowledge
QUALCOMM Incorporated

R Street
Sandvine Incorporated
Software and Information Industry Alliance
Sprint Corporation
State of California
State of Connecticut
State of Hawai‘i
State of Illinois
State of Iowa
State of Maine
State of Maryland
State of Mississippi
State of New York
State of Oregon
State of Rhode Island
State of Vermont
State of Washington
Techdirt
Tech Knowledge
Telecommunications for the Deaf and Hard of Hearing, Inc. (TDI), et al.
Telecommunications Industry Association
T-Mobile USA, Inc.
TracFone Wireless
Twilio
Twitter
United Church of Christ (Voices Coalition)
United States Telecom Association
Verizon
Vimeo, Inc.
Voices for Internet Freedom Coalition
Volo
Wikimedia Foundation
Wireless Internet Service Providers Association
Writers Guild of America, West, Inc.
WTA – Advocates for Rural Broadband
Y Combinator

The following entities have intervened in support of Petitioners: City and County of San Francisco, National Association of Regulatory Utility Commissioners, Internet Association, Computer and Communications Industry Association, National Association of State Utility Consumer Advocates, Writers Guild of America, West, Inc., and Entertainment Software Association. The following entities have moved to intervene in support of Respondents: NCTA - The Internet & Television Association, CTIA - The Wireless Association, USTelecom – The Broadband Association, American Cable Association, Leonid Goldstein, and Wireless Internet Service Providers Association. The following entity has intervened in support of neither side: Digital Justice Foundation.

As of the time of this filing, there are no *amici curiae*.

B. Ruling Under Review

The ruling under review is the Commission's *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311 (2018) (the "*Order*").

C. Related Cases

The *Order* has not previously been the subject of a petition for review by this Court or any other court. All petitions for review of the *Order* have been consolidated in this Court.

The following cases previously before this Court involved review of earlier, related Commission decisions that raised issues substantially similar to those raised in this case: *United States Telecom Association v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), *reh'g denied* 855 F.3d 381 (D.C. Cir. 2017), and *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014). The following petitions for certiorari seeking review of the *United States Telecom Association* decision are currently pending before the Supreme Court of the United States: *Daniel Berninger v. FCC*, S.Ct. No. 17-498; *AT&T Inc. v. FCC*, S.Ct. No. 17-499; *American Cable Association v. FCC*, S.Ct. No. 17-500; *CTIA-The Wireless Association v. FCC*, S.Ct. No. 17-501; *NCTA-The Internet & TV Association v. FCC*, S.Ct. No. 17-502; *TechFreedom v. FCC*, S.Ct. No. 17-503; *U.S. Telecom Association v. FCC*, S.Ct. No. 17-504.

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GLOSSARY OF TERMS AND ABBREVIATIONS

1996 Act	Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56
2015 Order	*In re Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015), *aff'd sub nom. United States Telecom Association v. FCC*, 825 F.3d 674
BIAS	Broadband Internet Access Service
Cable Act of 1984	Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2279
California I	*California v. FCC*, 905 F.2d 1217 (9th Cir. 1990)
California III	*California v. FCC*, 39 F.3d 919 (9th Cir. 1994)
CCIA	Computer and Communications Industry Association
Commission or FCC	Federal Communications Commission
CPUC	California Public Utilities Commission
Communications Act	Communications Act of 1934, as amended, 47 U.S.C. § 151 et seq.
County	County of Santa Clara
County Fire	Santa Clara County Central Fire Protection District
Edge provider	Entity providing content, applications, and services over the Internet to end users
Government Petitioners	States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia, the County of Santa Clara, Santa Clara County Central Fire Protection District, and the California Public Utilities Commission
Kabai Decl.	Declaration of Imre Kabai [Addendum 13-15]

Lifeline	Federal and state programs that provide a monthly discount for low-income subscribers of certain communication services
Maryland PSC	*Public Serv. Comm'n of Maryland v. FCC*, 909 F.2d 1510 (D.C. Cir. 1990)
McSweeny	Commissioner Terrell McSweeny, Federal Trade Commission
Minnesota PUC	*Minnesota Pub. Util. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007)
NARUC II	*National Ass'n of Regulatory Utility Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976)
Non-Government Petitioners	Mozilla Corporation, Vimeo, Inc., Public Knowledge, Open Technology Institute, National Hispanic Media Coalition, NTCH, Inc., Benton Foundation, Free Press, Coalition for Internet Openness, Etsy, Inc., Ad Hoc Telecom Users Committee, Center for Democracy and Technology, and INCOMPAS
NGP Br.	Brief for Non-Government Petitioners
NYAG	New York Attorney General's Office
Open Internet	The principle that broadband providers must treat all Internet traffic the same regardless of source
OTI	New America's Open Technology Institute
Order	Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd. 311 (2018) [JA __-__]
Sandoval	Professor Catherine Sandoval, Santa Clara University School of Law
State Petitioners	States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and the District of Columbia
Transparency Rule	Disclosures mandated by the *Order* ¶¶ 215-231

PRELIMINARY STATEMENT

The Government Petitioners are the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, the District of Columbia (the State Petitioners); the County of Santa Clara (the County), the Santa Clara County Central Fire Protection District (County Fire), and the California Public Utilities Commission (CPUC).[1] The Government Petitioners share a strong interest in preserving the open Internet as a vital resource for the health and welfare of our residents.

For more than fifteen years, the Federal Communications Commission has agreed that an open Internet free from blocking, throttling, or other interference by service providers is critical to ensure that all Americans have access to the advanced telecommunications

[1] Intervenor City and County of San Francisco also joins this brief.

services that have become essential for daily life.[2] The recent *Order* represents a dramatic and unjustified departure from this long-standing commitment. The *Order* is invalid and must be vacated for the many reasons raised by the Non-Government Petitioners. In addition, as this brief explains, the *Order* is arbitrary and capricious because it failed to reconcile the Commission's abdication of regulatory authority with the inevitable harms that the *Order* will cause to consumers, public safety, and existing regulatory schemes. Indeed, the *Order* entirely ignored many of these issues, including public safety, in violation of the agency's statutory mandate.

The *Order* compounded its devastating impact on millions of Americans by purporting to preempt state and local laws that would protect consumers and small businesses from abuses by service providers. The Commission identified no valid authority for such preemption. The *Order*'s attempt to preempt state and local laws thus must be invalidated.

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[2] The "open Internet" refers to "the principle that broadband providers must treat all internet traffic the same regardless of source." *United States Telecom Ass'n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). The *Order* was released on January 4, 2018, and a summary of the *Order* was published on February 22, 2018. *See* 83 Fed. Reg. 7,852 (Feb. 22, 2018). The petitions were timely filed.

ISSUES PRESENTED

1. Whether the *Order* is arbitrary and capricious.

2. Whether the Commission's purported preemption of state and local regulation of broadband service is invalid.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the Addendum.

STATEMENT OF THE CASE[3]

A. The Role of State and Local Governments in Regulating Communications and Protecting Public Safety

State and local governments "traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of their residents." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). The Federal Communications Act of 1934 (Communications Act), as amended by the Telecommunications Act of 1996 (1996 Act), recognizes that communications are central to this authority and thus establishes "a system of dual state and federal regulation." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 359 (1986).

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[3] This Statement of the Case supplements the Statement contained in the Brief for the Non-Government Petitioners (NGP Br.), which the Government Petitioners hereby join. As stated *infra* at 11, the Government Petitioners also join the legal arguments made by the Non-Government Petitioners.

B. Order on Review

In the *Order*, the Commission reversed its prior regulatory treatment of broadband Internet access service (BIAS) in several pertinent respects.[4] *See Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order,* WC Docket No. 17-108, FCC 17-166, 33 FCC Rcd. 311 (2018) (*Order*) [JA __-__]. The *Order* (1) reclassified BIAS from a telecommunications service (regulated under Title II's common-carrier provisions) to an information service (governed by Title I); (2) eliminated "bright-line" rules prohibiting BIAS providers from blocking, throttling, and imposing paid prioritization; (3) eliminated the "general conduct" rule, which had prohibited "unreasonable interference or disadvantage" to end users' access to, or edge providers' offering of, online services;[5] (4) disavowed regulation of broadband privacy and data

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[4] For a complete background of the Commission's regulatory approach to broadband, including its long history of promoting the open Internet through policy, enforcement, and regulations, *see* NGP Br. at Statement(A).

[5] An edge provider is an entity that provides online content to end users, such as Netflix, Google, Etsy, or Kickstarter.

security practices; and (5) eliminated numerous transparency requirements, while preserving a narrow and discrete set of mandatory federal disclosures (the Transparency Rule). *See Order* ¶¶ 21-64, 86-161, 181-184, 209-238, 239-296 [JA __-__, __-__, __-__, __-__, __-__].

The Commission justified the elimination of its existing bright-line and general conduct rules by concluding that it had no statutory authority to impose those rules. The Commission reasoned that its reclassification decision eliminated Title II authority to regulate broadband; that § 706 of the 1996 Act and § 230 of the Communications Act were "hortatory" or "policy" statements that did not grant the Commission any "regulatory authority"; and that various provisions in Titles II, III, and VI of the Communications Act also did not confer regulatory authority. *Id.* ¶¶ 268-292 [JA __-__].

In evaluating the impact of these changes, the Commission did not perform any analysis of the public safety risks that several parties (including Government Petitioners) had identified in the record, despite its statutory mandate to consider such safety concerns. The Commission also summarily dismissed record evidence of serious reliance interests

on the Commission's long-standing protection of an open Internet, mistakenly asserting that no such interests exist. *Id.* ¶ 159 [JA __].

Despite disavowing any statutory authority to affirmatively impose the bright-line and general conduct rules, the Commission declared that it was nonetheless preempting "any state or local measures that would effectively impose rules or requirements that [the Commission] ha[s] repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service" addressed in the *Order*, including disclosure requirements.[6] *Id.* ¶¶ 194-196 [JA __-__]. The *Order* predominantly relied on "the impossibility exception to state jurisdiction" as authorizing preemption. *Id.* ¶ 198 [JA __]. The *Order* further relied on the Commission's "independent authority to displace state and local regulation in accordance with the longstanding federal policy of nonregulation for information services." *Id.* ¶ 202 [JA __]. The Commission purported to derive such authority from (1) § 230's policy

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[6] The Commission provided a nonexclusive list of preempted laws and regulations, including "'economic regulation' and 'public utility-type regulation.'" *Id.* ¶ 195 n.730 [JA __].

statement regarding a "vibrant and competitive free market" for Internet services, notwithstanding the *Order*'s earlier disavowal of the statute as a source of regulatory power; (2) § 153(51)'s definition of a "telecommunications carrier"; and (3) the 1996 Act's forbearance provision, which allows the Commission to forbear from imposing certain Title II regulations on common carriers. *Id.* ¶¶ 202-204 [JA__-__] (citing 47 U.S.C. §§ 230(b)(2), 153(51), 160).

C. The Government Petitioners

1. The State Petitioners

The State Petitioners collectively represent over 165 million people—approximately fifty percent of the United States population—who rely on broadband Internet for personal, business, and other services on a daily basis. The States promulgate and enforce numerous laws and regulations applicable to BIAS providers, including laws protecting consumers from deceptive and unfair business practices.

Following the *Order*, multiple State Petitioners took legislative or executive action to protect consumers and edge providers from harmful

practices by BIAS providers.[7] Many other States have introduced legislation to address such practices.[8]

2. The County of Santa Clara and the Santa Clara County Central Fire Protection District

The County provides its 1.9 million residents with essential services such as law enforcement, health care, and social services. The County also oversees most regional public health and safety functions, including emergency planning and services, disease control and prevention, and criminal justice administration. County Fire provides fire services both within and outside Santa Clara County.

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[7] *See* Haw. Exec. Order No. 18-02 (Feb. 5, 2018); Exec. Order No. 9 (Feb. 5, 2018), 50 N.J. Reg. 931(a) (Mar. 5, 2018); Exec. Order No. 175 (Jan. 24, 2018), 9 N.Y.C.R.R. § 8.175; Ch. 88, 2018 Or. Laws (Apr. 9, 2018); R.I. Exec. Order No. 18-02 (Apr. 24, 2018); No.169, 2018 Vt. Acts (May 22, 2018); Exec. Order No. 2-18 (Feb. 17, 2018), 326 Vt. Govt. Reg. 2 (Mar. 2018); Wash. Rev. Code ch. 19.385. *See also* Mont. Exec. Order No. 3-2018 (Jan. 22, 2018). The State of Montana is not a party to this action.

[8] *See* National Conference of State Legislatures, *Net Neutrality Legislation in States* (as of July 18, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx.

Over the past several years, the County has made significant investments to modernize its systems. Many of the services developed through these investments are web-based and rely on high-bandwidth, latency-sensitive exchanges of information with the public. County Fire likewise relies on Internet-based systems to provide crucial public safety services.

3. California Public Utilities Commission

The CPUC is a constitutionally created agency empowered to regulate industries deemed critical to the public welfare, including gas, electricity, telecommunications, and water. Cal. Const., art. XII. The agency is charged with ensuring that public utilities furnish safe and reliable service to promote the safety, health, and comfort of the public, at just and reasonable rates. The CPUC oversees and regulates numerous programs that are affected by the *Order*, including California's energy grid, public utility infrastructure, and universal service programs.

STANDARD OF REVIEW

The *Order* should be set aside if this Court determines that the Commission's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

An "agency's conclusion that state law is preempted" is entitled to deference only if Congress has expressly "authorized" the agency "to pre-empt state law directly." *Wyeth v. Levine*, 555 U.S. 555, 576 (2009). Absent such express authorization, the weight accorded an "agency's explanation of a state law's impact on the federal scheme depends on its thoroughness, consistency, and persuasiveness." *Id.* at 577.

SUMMARY OF ARGUMENT

The Government Petitioners join the legal arguments made by the Non-Government Petitioners. This brief provides several additional reasons that the *Order* is invalid and must be vacated.

I. The Commission acted arbitrarily and capriciously in crediting industry promises to refrain from harmful practices, notwithstanding substantial record evidence showing that BIAS providers have abused

and will abuse their gatekeeper roles in ways that harm consumers and threaten public safety. The Commission's failure to address the impact of the *Order* on public safety is particularly egregious given the agency's statutory mandate to consider this issue. The *Order* also failed to reconcile its abrupt abandonment of the Commission's long-standing protection of the open Internet with the substantial reliance interests of parties (including the Government Petitioners) that have invested in Internet-based services that depend on nondiscriminatory access by consumers to be effective. Finally, the Commission wrongly declined to address the effect of reclassification on universal service programs and other state regulatory structures.

II. Even if the *Order* were otherwise lawful, the Commission exceeded its authority by purporting to preempt state and local governments from taking action to protect consumers and edge providers from abuses by BIAS providers. Having disavowed Title II authority over broadband, the Commission's preemption order can be rooted only in Title I ancillary authority, which in turn must be based on some separate statutorily mandated responsibility. The *Order* identified no such mandate, and instead relied on a purported federal policy of deregulation

unmoored from any specific statutory command. But as this Court held in *Comcast Corp. v. FCC*, policy alone cannot provide the basis for the Commission's exercise of ancillary authority, and hence cannot support the *Order*'s attempt to preempt here. 600 F.3d 642, 658 (D.C. Cir. 2010).

Nor can the Commission rely on conflict preemption to support the *Order*. The Commission did not specifically identify conflict preemption as a basis for its *Order*, and any assertion of conflict preemption as a facial matter—divorced from consideration of a specific law or regulation—would be premature and invalid. In any event, there is no conflict between state regulation of broadband service and the Communications Act, which expressly contemplates and relies on active state supervision in this area.

STANDING

The *Order* injures the Government Petitioners in several ways.[9] First, the *Order* authorizes BIAS providers to interfere with the Government Petitioners' ability to provide crucial Internet-based services to their residents on a nondiscriminatory basis.[10] Second, by abdicating federal regulatory authority, the *Order* imposes substantial costs on the Government Petitioners by shifting the burden of policing BIAS providers to state and local law enforcement. Third, the *Order* purports to preempt state laws, thus causing injury to the States' "sovereign power to enforce state law." *Alaska v. U.S. Dep't of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989). Fourth, the *Order* interferes with state public utility regulators' ability to comply with federal statutory mandates to promote universal service and protect public safety. The Government Petitioners participated in the proceedings below.[11]

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[9] For the legal standard for standing, *see* NGP Br. at Standing.

[10] In an excess of caution, the County offers two supporting declarations in addition to the record evidence demonstrating this injury. See Addendum at 1-15.

[11] While Minnesota, New Jersey, and New Mexico did not submit comments or join the December 2017 letter submitted by nineteen

ARGUMENT

POINT I

THE *ORDER* IS ARBITRARY AND CAPRICIOUS

An agency's decision is arbitrary and capricious if it "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n. of U.S., Inc. v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983). "A statutorily mandated factor, by definition, is an important aspect of any issue before an administrative agency." *Public Citizen v. Federal Motor Carrier Safety Admin.*, 374 F.3d 1209, 1216 (D.C. Cir. 2004).

To survive review under the arbitrary-and-capricious standard, an agency's decision must be based on "substantial evidence," and "take into account whatever in the record fairly detracts from its weight." *AT&T Corp. v. FCC*, 86 F.3d 242, 247 (D.C. Cir. 1996). While an agency may depart from a prior policy, "'a reasoned explanation is needed for

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Attorneys General (JA __-__), these States suffer the same injuries as the other State Petitioners.

disregarding facts and circumstances that underlay or were engendered by the prior policy,'" including reliance interests. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009)).

The Government Petitioners join the Non-Government Petitioners' arguments with respect to the arbitrary and capricious nature of the *Order*. See *supra* at 11. The *Order* is also arbitrary and capricious for the following reasons.

A. The Commission Disregarded the Serious Risk That Providers Will Engage in Abusive Practices That Undermine the Open Internet.

"One of the fundamental premises of a regulatory scheme such as that established by the Communications Act is that the free market cannot always be trusted to" advance the public good. *Telocator Network of Am. v. FCC*, 691 F.2d 525, 549 (D.C. Cir. 1982). Just a few years ago, the Commission reiterated its long-standing recognition of the need to protect consumers through affirmative rules ensuring access to an open Internet. *See, e.g.*, *In re Protecting and Promoting the Open Internet* (*2015 Order*), 30 FCC Rcd. 5601 (2015). Numerous commenters, including the Government Petitioners, urged the Commission to

preserve these prophylactic rules to prevent abusive practices by BIAS providers that will harm consumers and undermine public safety. *See, e.g.*, NYAG Comments at 13-14 [JA __-__]; Attorneys General Comments at 18-22 [JA __-__]; Public Knowledge Comments at 101-27 [JA __-__].

The *Order* unreasonably disregarded these concerns and disavowed the Commission's prior analysis of the likelihood that BIAS providers will engage in abusive practices. First, the Commission concluded that the record evidence of harm was "sparse" and "speculative." *Order* ¶¶ 109-116 [JA __-__]. Next, the Commission determined that its prior rules were unnecessary because BIAS providers "have strong incentives to preserve Internet openness" and have voluntarily "committed to refrain from blocking or throttling." *Id.* ¶¶ 117-129 [JA __-__]. Finally, the Commission decided that "the transparency rule . . . coupled with existing consumer protection and antitrust laws" would minimize the risk of future harm. *Id.* ¶ 116, 140-154 [JA __, __-__].

The Commission's analysis is deeply flawed. *See* Br. for Non-Government Petitioners (NGP Br.) at V(A)-(B). The Commission's assertion (*Order* ¶¶ 109-110, 117 [JA __, __-__]) that BIAS providers will

voluntarily refrain from blocking, throttling, and similar practices incorrectly assumes that providers historically displayed such self-restraint. But it was the Commission's long-standing enforcement of open Internet policies that *compelled* BIAS providers to refrain from harmful practices that injure consumers and undermine public safety. The relatively minimal evidence of such harms in the United States is the result of the protective rules that the Commission has abandoned, rather than evidence that those rules are unnecessary.

The Commission also unreasonably disregarded (*Order* ¶¶ 165, 168 [JA __, __-__]) evidence showing that BIAS providers intentionally engaged in harmful conduct when protective regulations were not in place. *See, e.g.*, NYAG Comments at 3-10 [JA __-__]; OTI Reply Comments at 47-50 [JA __-__]; INCOMPAS Comments at 60-61 [JA __-__] (describing interconnection disputes affecting millions of consumers). The Commission likewise improperly dismissed as irrelevant (*Order* ¶ 115 & n.426 [JA __]) record evidence of harms in foreign countries—where there were no open Internet protections—including specific examples of blocking and throttling by Canadian and European BIAS providers. *See* Engine Comments at 20-21 [JA __-__].

The Commission provided no reason that the same incentives that led providers to engage in such practices in the Canadian and European markets would not apply to the United States market if the Commission were to abandon its regulatory responsibilities.

Equally flawed is the Commission's misguided assumption (*Order* ¶¶ 116, 141-142 [JA __, __-__]) that providers' voluntary commitments coupled with existing consumer protection laws provide sufficient protection.[12] The Commission offered no meaningful defense of its decision to uncritically accept industry promises that are untethered to any enforcement mechanism. Nothing in the *Order* would stop a BIAS provider from abandoning its voluntary commitments, revising its Transparency Rule disclosures, and beginning to block, throttle, or engage in paid prioritization, subject only to the Transparency Rule's limited disclosure requirements—leading to the very harms to consumer interests and public safety that the Commission's long-standing commitment to protecting the open Internet was intended to prevent.

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[12] The *Order* also relied on antitrust laws as a potential remedy for future consumer harm. *See Order* ¶¶ 143-154 [JA __-__]. Antitrust law is insufficient to address the harms at issue. *See* NGP Br. at V(A)(2).

The *Order* also failed to identify how consumers or state law enforcement could police BIAS provider's compliance with their voluntary commitments. The Commission merely stated that "the transparency rule allows us to reject the argument that antitrust and consumer protection enforcers cannot detect problematic conduct." *Order* ¶ 142 & n.515 [JA __]. But nothing in the Transparency Rule's generalized disclosures allows a consumer or a state law enforcement agency to evaluate the causes underlying real-time performance and service quality, let alone to attribute any observed service degradation to an undisclosed decision by the provider, without additional investigation. *See* CCIA Reply Comments at 19-21 [JA __-__]; McSweeny Comments at 6 [JA __]; OTI Reply Comments at 28 [JA __]. *See also United States Telecom Ass'n v. FCC*, 855 F.3d 381, 389 (D.C. Cir. 2017) (Srinivasan, J.) (concurring in denial of rehearing en banc). Without such information, it will be difficult for consumers or the States to meaningfully police whether BIAS providers have reneged on their promises.

Even if such information were available, consumer protection laws would provide only an imperfect, ex post remedy. As the Commission

explained in the *2015 Order*, prophylactic rules are especially necessary for BIAS because consumers have limited provider options, face high switching costs, and are at a substantial informational disadvantage. *2015 Order* ¶¶ 80-82, 97-99. Allowing only after-the-fact remedies removes a critical consumer protection and imposes substantial investigative and litigation costs on consumers and state law enforcement alike. Moreover, consumer protection laws may not be able to remedy the harms caused by interfering with individuals' access to public safety systems.

Finally, the Commission failed to address the conflict between its embrace of state laws (as a justification for withdrawing federal regulation) and its subsequent declaration that such laws are purportedly preempted. See *infra* Point II. While the Commission touted "state laws proscribing deceptive trade practices" as a way to minimize consumer harm (*Order* ¶ 142 & n.517 [JA __-__]), the agency simultaneously attempted to preempt state regulation of "any aspect of broadband service" addressed in the *Order* (*id.* ¶ 195 [JA __]). Unsurprisingly, BIAS providers have already cited to this preemption language to shield themselves from traditional state enforcement and

regulatory actions. *See, e.g.*, *People v. Charter Commc'ns, Inc.*, 162 A.D.3d 553 (N.Y. App. Div. 2018); Mot. for Summary Judgment, *MetroPCS Cal., LLC v. Picker*, No. 17-cv-5959, Dkt. No. 63 (N.D. Cal. Apr. 6, 2018).

B. The Commission Violated Its Statutory Mandate to Consider Public Safety.

Congress created the Commission to "promot[e] safety of life and property through the use of wire and radio communications." 47 U.S.C. § 151. "The Commission is required to consider public safety by . . . its enabling act." *Nuvio Corp. v. FCC*, 473 F.3d 302, 307-08 (D.C. Cir. 2006). Notwithstanding this express mandate to consider public safety and record evidence showing substantial public safety concerns associated with abusive BIAS provider practices that violate open Internet principles but are permitted by the *Order*, the Commission did not consider public safety at all. "[T]he complete absen[c]e of any discussion of a statutorily mandated factor" renders the *Order* arbitrary and capricious. *Public Citizen*, 374 F.3d at 1216.

As with many private-sector services, large portions of critical infrastructure used by governments and utilities have moved to the

Internet. This modernization enables more robust, responsive, and efficient service delivery. Consumers' access to the open Internet is essential to the effective provision of these online services. There is no evidence that it is possible to isolate and preferentially prioritize communications important to public health and safety, given the diversity of platforms and endpoints. Santa Clara Comments at 3-4 [JA __-__]. *See also* Sandoval Reply Comments at 31-32 [JA __-__].

In addition, BIAS providers have shown every indication that they will prioritize their economic interests, even in situations that implicate public safety. See *supra* at 17-19. For example, a BIAS provider recently throttled the connection of a County Fire emergency response vehicle involved in the response to the largest wildfire in California history and did not cease throttling even when informed that this practice threatened public safety.[13] Declaration of Anthony Bowden ¶¶ 9-11

[13] Government Petitioners do not contend that this throttling would have violated the *2015 Order*. However, BIAS providers have not prioritized public safety over economic interests and should not be expected to; nor does the Order require them to.

[Addendum 3-4]. In light of these points, the *Order*'s total silence on the issue of public safety is arbitrary and capricious.

The energy grid. As part of the effort to modernize the nation's electrical grid, electric utilities in California and other States have invested ratepayer funds in integrated systems of smart meters, communications networks, and data management systems that enable two-way communication between utilities and customers. Sandoval Reply Comments at 51 [JA __]. Instant communication between customers, suppliers, energy generators, contractors, regulators, and safety personnel is essential to maintaining a safe and reliable grid, and must thus remain free from blocking or delay due to throttling or deprioritization.[14]

California has relied on demand response services offered by utilities and third parties to directly balance load, manage congestion, and satisfy state and federal reliability standards. Sandoval Supp. Reply Comments, Ex. C at 34-35 [JA __-__]. The grid operator also dispatches demand response to achieve immediate load reduction when high temperatures, wildfire, or other emergencies make conservation urgent.

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[14] 42 U.S.C. § 5195c; Sandoval Reply Comments at 47 [JA __].

Since demand response relies on instantaneous communication with the customer, the absence of open Internet rules jeopardizes the ability to reduce load in times of extreme energy grid stress. Consequently, the *Order* threatens the reliability of the electric grid, and the safety and welfare of California's residents.[15]

Public health and safety systems. Similarly, state and local governments have modernized their public health and safety systems by moving such systems online. These systems depend on the public's access to BIAS on nondiscriminatory terms. *See e.g.*, Santa Clara Comments at 2-14 [JA __-__]; Sandoval Reply Comments at 25-27, 30-32 [JA __-__, __-__]; Ohio Counties Comments at 3-4, 8 [JA __-__, __]; West Virginia Counties Comments at 3-4 [JA __-__].

The County of Santa Clara's emergency and public health services are particularly likely to be affected by the repeal of the open Internet rules. *See* Santa Clara Comments at 2-14 [JA __-__]. The County has

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[15] Other States have adopted similar programs and would be equally affected. *See, e.g.*, Mass. Gen. L. c. 25, § 21(b) (mandating energy efficiency plans that include demand response programs); *In re Rockland Electric Co.*, Case No. ER16060524 (N.J. Bd. of Pub. Util., Aug. 23, 2017).

established a web-based emergency operations center to facilitate coordination internally with other agencies and with first responders in case of emergency. *Id.* at 6-7 [JA __-__]. This tool relies on instant communication among emergency responders without regard to the users' BIAS provider. *Id.* Particularly in such emergencies, where networks are already stressed, delays, deprioritization, or blocking could render an emergency responder or victim using her own device unable to communicate, resulting in the loss of important situational information.

Instant communication is also essential to the proper functioning of the County's public health systems. For example, the County uses web-based public alert systems to distribute time-sensitive safety information to the public, including evacuation orders, shelter-in-place orders, and disease outbreak information. *Id.* at 8-9 [JA __-__]. This online information is widely used and of critical importance to the public—during the 2009 H1N1 emergency, for example, a County system was so heavily used that it became overloaded. Significant delays from blocking, throttling, or deprioritization could impede effective notification and jeopardize safety in public-health emergencies. *Id.* During an emergency, meaningful (that is, timely) access to public-

health information should not be limited to those who have paid for priority or access.

The County's hospital also relies upon, and has plans to expand, web-based systems that are latency-sensitive and bandwidth-intensive. The County is in the planning stages of an expansion of its telemedicine capabilities, which will include a high-definition video solution that will allow clinicians to treat patients using a broadband connection. Using the system, doctors will be able to perform triage and improve outcomes in time-sensitive situations (such as strokes or vehicular accidents) where immediate diagnosis can mean the difference between life and death. The system will also allow providers to avoid high-risk situations such as in-person treatment of jail inmates. The hospital also uses systems like Citrix, which allows doctors to access important clinical applications and its records system, which transfers more than two million patient records annually among thousands of clinics, hospitals, and emergency departments. *Id.* at 10-11 [JA __-__]. Access to an open Internet is essential for these tools to be reliable and beneficial.

Because of the unique functions of entities that provide public health and safety services, the providers that serve them are often small,

niche businesses. Declaration of Imre Kabai (Kabai Decl.) ¶¶ 8-9 [Addendum 14-15]; Santa Clara Comments at 3-4 [JA __-__]. Open Internet rules promoted the trend toward more effective public health and safety systems by allowing these niche providers to develop systems to serve the public sector. Santa Clara Comments at 3, 6 [JA __, __]. Because governments are obligated to be cost conscious, neither governments nor the businesses that serve them are likely to pay to prioritize their traffic.[16] *Id.* Accordingly, the *Order* could stifle the growth of niche providers and limit the effectiveness of government entities that rely on their services. The Commission's unexplained failure to address this concern is an additional reason the *Order* is arbitrary and capricious.

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[16] The County has also heavily invested in Internet-based solutions to promote civic engagement, including, for example, live broadcast of public meetings and web publication of its law. The *Order* likewise threatens to make such innovative systems for connecting citizens to their governments available only to those who can pay, or to those whose governments pay for access. Santa Clara Comments at 4-6 [JA __-__].

C. The *Order* Failed to Consider Significant and Long-Standing Reliance Interests.

"In explaining its changed position, an agency must also be cognizant that longstanding policies may have 'engendered serious reliance interests that must be taken into account.'" *Encino*, 136 S. Ct. at 2126 (quotation marks omitted). Commenters, including the Government Petitioners, submitted substantial evidence of reliance on open Internet principles, including millions of dollars of investment. Sandoval Reply Comments at 51-52 [JA __-__]; Santa Clara Comments at 3, 14 n.17 [JA __, __]; Kabai Decl. ¶¶ 5-8 [Addendum 14]. The *Order's* analysis of this evidence consists of a three-sentence paragraph that does not come close to satisfying the Commission's obligation. *See Order* ¶ 159 [JA __].

The Commission brushed aside evidence of reliance interests by erroneously asserting that it need not analyze "[a]ssertions in the record regarding absolute levels of edge investment" because commenters "do not meaningfully attempt to attribute particular portions of that investment to any reliance on the *Title II Order*." *Id.* Investments, however, are made in reliance on many factors, and courts have never required a precise allocation of portions of an investment to preexisting

conditions.[17] *See, e.g.*, *Encino*, 136 S. Ct. 2126 (finding serious reliance interest on "background understanding" of a policy without demanding allocation of the value of that reliance).

The Commission also incorrectly assumed that commenters must show reliance specifically on the *2015 Order*. But the open Internet did not begin in 2015. Rather, the Commission has enforced these principles since 2005, engendering reasonable reliance that whole time. *See U.S. Telecom*, 825 F.3d at 693; NGP Br. at Statement(A). The *Order* vitiated these principles, doing far more than revert to the status quo in 2014. Many commenters, including the Government Petitioners, explicitly and reasonably relied not only on the *2015 Order*, but also on the rules and enforcement actions taken by the Commission for over a decade.[18] Santa

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[17] In contrast, the Commission found that BIAS providers had halted or limited infrastructure investment due solely to the *2015 Order* despite overwhelming evidence to the contrary. *See Order* ¶¶ 89-98 [JA __-__].

[18] The Commission is wrong to state that reliance would not have been reasonable because of "the lengthy prior history of information service classification of broadband Internet access service." *Order* ¶ 159 [JA __]. Reasonable reliance was based on the Commission's regulatory protection of the open Internet, which it had maintained for over a decade irrespective of how BIAS was classified.

Clara Comments at 3, 14 n.17 [JA __, __]; Kabai Decl. ¶¶ 5-8 [Addendum 14]. The Commission cannot avoid its obligation to analyze and weigh record evidence by artificially limiting the analysis to reliance on its most recent rules, when the *Order* overturned a much longer history of open Internet protections maintained by the Commission under both Title I and II.

The County, in particular, submitted evidence of its reliance on the Commission's protection of the open Internet in making decisions to invest in systems for protecting public safety, public health, and patient health and safety; publication of its law; compliance with its public notice and access requirements; and facilitating civic participation. Santa Clara Comments at 3, 10, 14 n.17 [JA __, __, __]; Kabai Decl. ¶¶ 5-8 [Addendum 14]. For example, in reliance on the open Internet, the County invested more than a million dollars in its medical records system and is investing hundreds of thousands of dollars in its telemedicine systems. Santa Clara Comments at 10-11 [JA __-__].

Similarly, the modern energy grid was developed in reliance on the open Internet. See *supra* at 24-25.

Having decided that it need not analyze record evidence of reliance, the Commission stated that it was "not persuaded that there were reasonable reliance interests" on the *2015 Order*. *Order* ¶ 159 [JA __]. Such a "conclusory . . . statement cannot substitute for a reasoned explanation." *American Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 241 (D.C. Cir. 2008). The Commission's inaccurate summary of the record and its failure to address the ample evidence of industry, governmental, and public safety reliance on an open Internet renders the *Order* arbitrary and capricious.

D. The Commission Failed to Properly Consider the Effect of Reclassification on Universal Service and Pole Attachment Rights.

The Commission's decision to reclassify BIAS cannot be reconciled with the States' statutory obligations to advance universal service and provide nondiscriminatory utility pole access. The Commission also disregarded the effect of reclassification on the States' ability to enforce important safety regulations for pole attachments. The *Order* must be reversed because the Commission

failed to properly consider the implications of its reclassification decision on important regulatory schemes.

Lifeline Programs. The 1996 Act obligates the Commission and the States to ensure the affordability and widespread availability of safe, reliable, high-quality telecommunications services. 47 U.S.C. §§ 253(b), 254(c), (e)-(f). The federal Lifeline program promotes universal service by enabling discounts on telecommunications services for low-income Americans. In 2015, the Commission modernized the federal Lifeline program to include broadband.[19] Many States have also enacted state universal service programs to enable low-income citizens' access to high-quality telecommunications.[20]

Under 47 U.S.C. § 214(e)(1), federal universal service support is available only for common carriers designated by a State or the Commission as an "eligible telecommunications carrier." Title II common carriage thus forms the legal underpinning to provide Lifeline

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[19] *See generally In re Lifeline & Link Up Reform and Modernization*, 31 FCC Rcd. 3962 (2016).

[20] *See, e.g.*, Cal. Pub. Util. Code § 871; Conn. Gen. Stat. § 16-247e; 220 Ill. Comp. Stat. § 5/13-301; Md. Code Ann., Pub. Util. § 8-201; Minn. Stat. § 237.70 (2017).

subsidies for standalone broadband service—i.e., Internet connection unbundled from other services such as phone. *See Direct Commc'ns Cedar Valley, LLC v. FCC*, 753 F.3d 1015, 1049 (10th Cir. 2014). Similarly, only telecommunications providers are required to contribute to the Universal Service Fund. *See* 47 U.S.C. § 254(d).

Several commenters noted that reclassification of BIAS would eliminate the statutory basis for including standalone broadband in universal service programs. *See* CPUC Comments at 13 [JA __]; Public Knowledge Comments at 95-97 [JA __-__]; Free Press Comments at 71-72 [JA __-__]; Voices Coalition Comments at 53-62 [JA __-__]; National Consumer Law Center Comments at 5-8 [JA __-__]. As these commenters noted, universal service programs cannot fulfill their purpose unless they include broadband Internet access. While the Commission asserted in the *Order* that it need not address its legal authority to continue supporting BIAS in the Lifeline program until later proceedings (*Order* ¶¶ 192-193 [JA __-__]), this regulatory punt missed the point because classification determines eligibility for universal service support under § 214(e). The Commission thus could—

and should—have addressed the impact of reclassification on the federal Lifeline program.

The *Order* also failed to consider the effect of reclassification on the States' ability to include standalone broadband in state universal service programs. The 1996 Act preserves state authority to implement "requirements necessary to preserve and advance universal service [and] ensure the continued quality of *telecommunications services*." 47 U.S.C. § 253(b) (emphasis added); *see id.* § 254(f). If BIAS is not classified as a telecommunications service, the States could arguably be precluded from requiring standalone BIAS in their respective Lifeline programs.[21] Although the Commission recognized that reclassification would affect the Lifeline program, the Commission ultimately failed to address, much less resolve, how it or the States could mandate standalone broadband in Lifeline programs given these statutory limitations.

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[21] The Commission's assertion that § 706 of the 1996 Act is "hortatory" impermissibly eliminates an alternate source of regulatory authority to include standalone BIAS in universal service programs. *Accord* NGP Br. at IV.

Pole Attachments. In the *2015 Order*, the Commission recognized the critical importance of pole attachments to deploying communications networks, and acknowledged that Title II ensures BIAS providers' access to, among other things, utilities' poles at just, reasonable, and nondiscriminatory rates. *2015 Order* ¶¶ 56, 413, 478 [JA __, __, __]. In the current *Order*, the Commission reversed course but failed to recognize—much less reconcile—the *Order*'s effect on the States' ability to ensure nondiscriminatory pole access and to adopt and enforce pole attachment safety regulations.

The Commission concluded that Title II classification was not necessary to promote broadband deployment. *Order* ¶185 [JA __]. However, the Commission failed to acknowledge the federal requirement that utilities extend nondiscriminatory access to poles and rights-of-way *only* to "cable television systems or *telecommunications carriers*." 47 U.S.C. § 224(f)(1) (emphasis added). Once BIAS providers are classified as information services providers, they lose the statutory right to access utility infrastructure.

The Commission further failed to explain how the States could enforce safety regulations for pole attachments by standalone BIAS

providers in the absence of Title II classification. Pursuant to § 224, States can elect to regulate the rates, terms, and conditions for pole attachments under state law, and certify to the Commission that they will do so. More than twenty States, including California, have so certified, and thus have reverse-preempted the Commission from exercising jurisdiction over pole attachments in those States.[22] This reverse-preemption, however, applies to nondiscriminatory access by telecommunications carriers. *See* 47 U.S.C. § 224(c), (f). The Commission did not explain how States can enforce terms and conditions on BIAS providers under this statute—including regulations relating to "safety, reliability and generally applicable engineering purposes," *id.* § 224(f)(2), if those providers are not deemed to provide telecommunications services.

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[22] *See* Decision No. 98-10-058, 82 CPUC2d 510, 1998 Cal. PUC LEXIS 879 (adopting pole attachment and rights-of-way rules); *see also* 25 FCC Rcd. 5541 (May 19, 2010) (complete list of States that have reverse-preempted).

This omission has real-world implications for public safety.[23] Unauthorized, and sometimes hazardous, attachments to the millions of poles in any given State are regular occurrences. The ability to enforce safety regulations for pole attachments is paramount in States like California, which has recently suffered unprecedented wildfires and windstorms that have wreaked havoc on utility infrastructure. *Cf.* CPUC Comments at 9 [JA __]. A standalone BIAS provider might pledge compliance with a State's safety regulations to obtain access to utility infrastructure, yet subsequently commit a major safety violation with impunity. The *Order* does not explicitly preclude such a provider from arguing that, as a provider of information services, it is exempt from a State's authority to investigate the incident or impose fines, sanctions, or other remedies. Although the Commission acknowledged (rightly) that its *preemption* determination does not interfere with States' authority to address safety issues in rights-of-way (*see Order* ¶ 196 n.735

[23] The Commission's failure to consider public safety concerns violated its express mandate to consider public safety. See *supra* at 22.

[JA __]), it failed to address the effect of *reclassification* on the States' ability to regulate utility pole attachments by BIAS providers.

POINT II

THE COMMISSION'S PREEMPTION ORDER IS INVALID

A. The Commission May Not Preempt Absent Statutory Authority.

In the *Order's* preemption provisions, the Commission purported to rely on a "federal policy of nonregulation" and asserted that "an affirmative policy of deregulation is entitled to the same preemptive effect as a federal policy of regulation."[24] *Order* ¶¶ 194, 202 [JA __, __]. This justification fundamentally misstates the law.

An agency that deems itself to lack statutory authority to regulate a particular practice altogether cannot rely on the same absence of authority to preempt state regulation. This Court has long held that "the allowance of wide latitude in the exercise of *delegated* powers is not the equivalent of untrammeled freedom to regulate activities over which the

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[24] The Notice of Proposed Rulemaking (JA __-__) did not seek comments on the Commission's intention to preempt state law or provide notice of what statutory authority the Commission intended to rely on in order to preempt state law.

statute fails to confer, or explicitly denies, Commission authority." *National Ass'n of Regulatory Utility Comm'rs v. FCC* (*NARUC II*), 533 F.2d 601, 617 (D.C. Cir. 1976) (emphasis added). There is a "vital difference between a refusal to use granted power, and an attempt to prevent regulation by others in an area where no" agency authority exists. *Id.* at 620 n.113. Here, the Commission interpreted the Communications Act to prevent the agency from exercising affirmative authority to regulate broadband. That position necessarily eliminated the agency's authority to preempt as well.

Under controlling case law, the Commission has no power to preempt state action unless its action is either directly authorized by statute or ancillary to the effective performance of its statutorily mandated responsibilities. As this Court has made clear, the Commission "cannot regulate (let alone preempt state regulation of) any service that does not fall within its Title II jurisdiction over common carrier services [the pertinent statutory authority] or its Title I jurisdiction over matters 'incidental' [or ancillary] to communication by wire." *Public Serv. Comm'n of Maryland v. FCC* (*Maryland PSC*), 909 F.2d 1510, 1515 n.6 (D.C. Cir. 1990); *see also* 47 U.S.C. § 154(i). The

Commission emphatically disavowed Title II authority. See *supra* at 5-6. And none of the three grounds asserted in the *Order* provide the Commission with "independent authority to displace state and local regulations." *Order* ¶ 202 [JA __].

First, the Commission appeared to rely on its ancillary authority under Title I to preempt state and local laws pursuant to a purported "federal policy of nonregulation for information services." *Id.* But "Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities." *California v. FCC (California I)*, 905 F.2d 1217, 1240 (9th Cir. 1990). Regulations pursuant to ancillary authority are thus permissible only when they "are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *American Library Ass'n v. FCC*, 406 F.3d 689, 703 (D.C. Cir. 2005).

"Policy statements alone cannot provide the basis for the Commission's exercise of ancillary authority" because policy is not a delegation of regulatory authority. *Comcast*, 600 F.3d at 654. Instead, only a statutorily mandated responsibility derived from "express delegated

authority" can justify the exercise of ancillary jurisdiction. *Id.* at 658.[25] Thus, "it is Title II, III, or VI to which the [Commission's exercise of] authority must ultimately be ancillary." *Id.* Here, the Commission purported to identify a "federal policy of nonregulation for information services" in a policy statement and a definitional provision. But neither source is sufficient to assert ancillary authority under *Comcast* and *NARUC II*.

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[25] There is no merit to the Commission's assertion that the Eighth and Ninth Circuits have authorized agency preemption based on a generic federal policy of deregulation alone. *See Order* ¶¶ 194, 198 & nn.726, 738 [JA __-__, __] (citing *Minnesota Pub. Util. Comm'n v. FCC* (*Minnesota PUC*), 483 F.3d 570 (8th Cir. 2007), and *California v. FCC* (*California III*), 39 F.3d 919 (9th Cir. 1994)). These courts did not have to resolve the question presented here—whether the Commission failed to properly assert ancillary authority. In *Minnesota PUC*, the parties did not contest the Commission's assertion of ancillary authority. And in *California III*, the Ninth Circuit had previously held that the FCC had ancillary authority to establish a regulatory regime for enhanced services. *See California III,* 39 F.3d at 932 (citing *California I*, 905 F.2d at 1240 n.35). In any event, to the extent that *Minnesota PUC* and *California III* may be read to stand for the proposition that the Commission may link its ancillary authority to preempt solely based on a "federal policy of nonregulation," such a holding would be flatly inconsistent with this Court's precedent. *See Comcast*, 600 F.3d at 651-58.

The Commission initially relied on § 230(b)(2) (*Order* ¶ 203 [JA __]), which provides, in relevant part, that "[i]t 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." 47 U.S.C. § 230(b)(2). That provision, standing alone, cannot be construed to furnish the Commission with the necessary authority to preempt state laws because this Court has already held that the policy statements contained in § 230 do not support ancillary authority. *See Comcast*, 600 F.3d at 652-55. Indeed, the Commission itself acknowledged that § 230(b) is "hortatory." *Order* ¶ 284 [JA __-__].

The Commission also cited to § 153(51), the statutory definition of "telecommunications carrier," which provides that the Commission may impose common carrier regulations on such an entity "only to the extent that [a carrier] is engaged in providing telecommunications services." *See id.* ¶ 203 [JA __] (citing 47 U.S.C. § 153(51)). No court has held that the Commission can derive ancillary authority from a definitional statute that, by its plain terms, limits only the agency's authority to act and says nothing about state authority.

The Commission further mistakenly asserted (*see id.* ¶ 202 nn.748-749 [JA __-__]) that legal precedent permits the exercise of ancillary authority even without specific delegated powers. In *Computer & Communications Industry Association v. FCC*, this Court permitted preemption only after holding that the Commission had properly exercised its Title I ancillary authority over enhanced services offered by common carriers. 693 F.2d 198, 214 (D.C. Cir. 1982). As this Court later explained in *Comcast*, the order at issue in *CCIA* had properly "linked [the Commission's] exercise of ancillary authority to its Title II responsibility over common carrier rates—just the kind of connection to statutory authority missing here." 600 F.3d at 656.

The Commission was equally incorrect to rely on *City of New York v. FCC*, 486 U.S. 57 (1988). At issue in that case was the Commission's preemption of local technical standards for cable television signals following the Cable Act of 1984. The Supreme Court upheld the Commission's decision, holding that the text and legislative history of the Cable Act showed that Congress enacted the statute as a "straightforward endorsement" of the Commission's prior regulatory approach, which had included preemption of technical standards

regulation. *Id.* at 67-70. In doing so, the Court identified a specific statutory provision in the Cable Act to which the Commission's preemption order was ancillary. *Id.* at 66-67 (citing 47 U.S.C. § 544(a)-(e)). Here, the Commission failed to identify any comparable statutory provision to which its purported preemption is ancillary.

Second, and for similar reasons, the Commission cannot assert stand-alone authority to preempt state law under the "impossibility exception to state jurisdiction." *Order* ¶¶ 198-201 [JA __-__]. The so-called "impossibility exception" allows the Commission to exercise jurisdiction over intrastate practices that the agency otherwise would be prohibited from regulating under § 152(b). The Commission has authority to regulate such intrastate practices if and only if "(1) the matter to be regulated has both interstate and intrastate aspects; (2) FCC preemption is necessary to protect a valid federal regulatory objective; and (3) state regulation would negate the exercise by the FCC of its own *lawful authority*." *Maryland PSC*, 909 F.2d at 1515 (emphasis added) (citations and alteration marks omitted). Under the last prerequisite, the impossibility exception likewise requires the Commission to identify an independent source of statutory authority to support any given

preemption decision. *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 422-423 (5th Cir. 1999)*; National Ass'n of Regulatory Utility Comm'rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989).

Third, and last, the Commission contended that its preemption authority "finds further support in the Act's forbearance provision." *See Order* ¶ 204 [JA __] (citing 47 U.S.C. § 160(e)). Section 160 allows the Commission to "forbear from applying any regulation or any provision of [Title II] to a telecommunications carrier or telecommunications service" if the Commission determines that such regulation is not necessary or that forbearance is consistent with public interest. 47 U.S.C. § 160(a). In turn, state public utility commissions "may not continue to apply or enforce any provision [of Title II] that the Commission has determined to forbear from applying." *Id.* § 160(e).

As the Commission appeared to acknowledge, the forbearance provision is not directly applicable here because it applies only to telecommunication services regulated by Title II, and not to information services as the Commission has reclassified BIAS to be. Instead, the Commission asserted that "[i]t would be incongruous if state and local regulation were preempted" pursuant to a Title II forbearance decision,

but not when the Commission has determined that Title II is inapplicable. *Order* ¶ 204 [JA __]. But the starting premise of the Commission's reasoning is mistaken. Section 160(e) does not by its own terms "limit or preempt State enforcement of State statutes or regulations"; instead, it forbids the States only from "continu[ing] to apply or enforce any provision of the *Communications Act* that the Commission has determined to forbear from applying." S. Conf. Rep. No. 104-458, at 185 (1996) (emphasis added). Because Title II's forbearance provision does not authorize preemption, it creates no incongruity that would justify the *Order*'s further attempt to preempt state and local laws.

The Commission thus failed to identify any statutory mandate to which its preemption of state laws is ancillary. Absent that authority, the Commission cannot "confer power upon itself" to "take action which it thinks will best effectuate a federal policy." *Louisiana Pub. Serv.*, 476 U.S. at 374; *see also EchoStar Satellite L.L.C. v. FCC*, 704 F.3d 992, 999 (D.C. Cir. 2013).

B. The Commission's Reference to Conflict Preemption Is Premature and Erroneous in Any Event.

1. Conflict preemption must be raised on a case-by-case basis, not suggested in an order opining in advance that all state laws are preempted.

Because the Commission did not cite conflict preemption as a legal basis for its preemption order, *see Order* ¶¶ 197-204 [JA __-__], the *Order* cannot be upheld on that basis.[26] To the extent that the *Order* nevertheless suggested (*see id.* ¶¶ 194-196) that state laws are preempted because they conflict with the Commission's deregulatory agenda, the Commission's effort to find conflict preemption as a facial matter, over a broad swath of unidentified state and local laws, is premature and without legal effect, and this Court should hold as much.

"[W]hether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract." *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984). Conflict preemption analysis is fact-driven and requires review of the specific state statute or regulation under review, its interplay with the federal regime, and

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[26] *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Comcast*, 600 F.3d at 660 ("[T]he Commission must defend its action on the same grounds advanced in the *Order*.").

the nature of the regulated service or practice. *See id.* Moreover, agency assertions of conflict preemption are not entitled to deference as a blanket matter; rather, the weight given to such a declaration depends on the persuasiveness of the agency's analysis of the specific state and federal laws at issue. *See Wyeth*, 555 U.S. at 576-77. Accordingly, conflict preemption must be raised in individual cases challenging specific state laws—not in a broad pronouncement suggesting that state laws are preempted as a class regardless of their individual features.

The Commission's premature suggestion of conflict preemption could have substantial consequences for the Government Petitioners if this Court does not vacate the *Order*. Without such relief, BIAS providers could argue that the Hobbs Act's jurisdictional limitations, *see* 28 U.S.C. § 2342(1); *see also* 47 U.S.C. § 402(a), preclude state and local governments from contesting conflict preemption in challenges to individual laws and enforcement actions, and thus hamper state efforts to enforce duly enacted laws.[27]

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[27] *See, e.g.*, Br. for Appellant at 25-26, *People v. Charter Commc'ns, Inc.*, No. 450318/17 (N.Y. App. Div. 2018) (BIAS provider arguing that

2. The *Order* fails to identify a valid basis for conflict preemption.

In any event, there is no merit to the Commission's suggestion (*Order* ¶¶ 194-196 [JA __-__]) that broad swaths of state laws and disclosure requirements impermissibly conflict with federal law. "[B]ecause the States are independent sovereigns in our federal system," preemption analysis must begin "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic v. Lohr*, 518 U.S. 470, 486 (1996). The presumption against preemption applies with equal force where the purported conflict derives from an agency regulation. *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715-16 (1985). Moreover, where, as here, "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal

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New York's state-law consumer protection action should be dismissed on the ground that it implicitly challenges the *Order*'s legal validity).

pre-emption becomes a less persuasive one."[28] *New York State Dep't. of Soc. Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

Federal law endorses state regulation of communications services. *See generally* Philip Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. Rev. 1692, 1694 (2001). The Communications Act preserves all state remedies available "at common law or by statute," 47 U.S.C. § 414, and embraces state authority in areas of traditional state concern—including state-law "requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." 47 U.S.C. § 253(b); *see also id.* § 332(c)(3), (7).

Congress underscored its intent to preserve a substantial role for state and local regulation of communications by carefully cabining federal preemption in this area. Thus, although the 1996 Act authorized

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[28] The Commission's assertion that the presumption against preemption does not apply here is baseless. *Order* ¶ 202 n.749 [JA __]. The presumption against preemption is built into the Communications Act, which preserves and welcomes state regulation. *Global Tel*Link v. FCC*, 866 F.3d 397, 403 (D.C. Cir. 2017).

preemption of some state laws, *see e.g.*, *id.* § 253(a); Pub. L. No. 104-104, § 602(a), 110 Stat. 56, 144 (1996), Congress required all such provisions to be construed narrowly. To that end, § 601(c) of the 1996 Act provides that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments." 47 U.S.C. § 152 note. As then-Commissioner Ajit Pai noted in 2015, "section 601(c) counsels against any broad construction of the 1996 Act that would create an implicit conflict with state law." *In re City of Wilson*, 30 FCC Rcd. 2408, 2512 (Mar. 12, 2015) (dissenting statement) (alteration marks omitted), *pet. for review granted Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

Sovereign States are not required to take an *ex post* approach to consumer protection law and may prohibit specific industry practices *ex ante* in order to protect consumers and the general public.[29] Such laws

[29] *See, e.g.*, Conn. Gen. Stat. § 21a-217 (health club contracts); 6 Del. Code ch. 24A (debt management services); N.J. Stat. Ann. § 49:3-53 (investment advisers); Md. Code Ann., Com. Law § 14-3301 et. seq. (immigration consultants); 940 Mass. Code Regs. § 19.01 et seq. (retail marketing and sale of electricity); Minn. Stat. § 325F.693 (2017)

fall well within the ambit of traditional State police powers. Accordingly, States are entitled to take legislative and regulatory action to protect consumers and small businesses and address unfair business practices in the BIAS industry.[30]

The Commission nevertheless asserted that state laws addressing specific BIAS practices could be contrary to the agency's decision to reclassify BIAS as an information service and would therefore interfere with the "pro-competitive, deregulatory goals of the 1996 Act." *Order* ¶ 194 [JA __-__]. To be sure, this Court has interpreted the 1996 Act to bar the *Commission* from imposing regulations under Title I on information services that would prohibit blocking, throttling, and paid prioritization. *See Verizon v. FCC*, 740 F.3d 623, 656 (D.C. Cir. 2014). But Congress's choice to bar the Commission from promulgating certain

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(prohibiting telephone companies from slamming); Or. Rev. Stat. § 646A.800 (regulating late fees for cable service); 37 Pa. Code § 301.1 et seq. (automotive industry trade practices).

[30] *See, e.g.*, Wash. S. Bill Rep. on SHB 2282 (Feb. 27, 2018) (making a violation of Washington's law enforceable under the Consumer Protection Act). State laws and executive orders involving the States' purchasing authority are likewise not subject to preemption. *See Building & Constr. Trades Council of Metro Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 226-230 (1993).

types of regulations under Title I does not, standing alone, prohibit the States from acting. "Although federal agencies have only the authority granted to them by Congress, states are sovereign." *Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1190 (11th Cir. 2017). A "clear and manifest purpose" to preempt the States' sovereign powers cannot be inferred from a congressional decision to strip a federal agency of jurisdiction. *Id.* at 1190-91.

No other provision of the 1996 Act clearly expresses Congress's intent to preempt state regulation of information services. For example, while the 1996 Act expressly authorizes preemption with respect to certain types of state regulation of *telecommunications* services, *see, e.g.*, 47 U.S.C. §§ 253(a), 332(c)(3), the Act includes no similar provision regarding information services. To the contrary, Congress expressly preserved state regulation of *all* communications services through consumer protection, tort, or other state law remedies, and warned against implied preemption. See *supra* at 51-52. Indeed, the Commission admitted (*Order* ¶ 196 n.732 [JA _]), that the classification of BIAS as an information service cannot altogether preclude state regulation.

Nor is there merit to the Commission's argument that the 1996 Act implicitly "embraced" the Commission's policy of preemption by adopting the Commission's deregulatory approach to enhanced services (the predecessor to information services). *Order* ¶ 202 & n.749 [JA __-__]. A national policy of deregulation cannot be enacted silently. "Without a text that can . . . plausibly be interpreted as *prescribing* federal preemption, it is impossible to find that a free market was mandated by federal law." *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988).

Finally, there is no basis for the Commission's effort to preempt state-law disclosure requirements exceeding the narrowed Transparency Rule. *Order* ¶ 195 n.729 [JA __-__]. In the absence of clear congressional intent to displace state law, the States have the authority (and in many cases, the obligation) to exercise their own judgment concerning the types of disclosures that are necessary to regulate the businesses operating in their States. Here, Congress has actively encouraged state efforts to collect data about BIAS service and providers, indicating that Congress intended to support, rather than displace, the States' ability to compel regulatory disclosures from

providers. *See, e.g.*, 47 U.S.C. § 1304 (setting aside federal funds for state studies regarding broadband deployment); *see also id.* § 1302(a). In addition, mandating public disclosures to protect consumers from being cheated based on their ignorance of material facts is a classic form of consumer protection well within the States' historic police powers.

CONCLUSION

The *Order* should be vacated and reversed.

Dated: New York, New York
August 20, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Megan Chu, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 9,966 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

/s/ Megan Chu

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the accompanying Proof Brief for Government Petitioners by using the CM/ECF system on August 20, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: August 20, 2018
New York, NY

/s/ Ester Murdukhayeva

18-1051(L)

Consolidated Cases: 18-1052, 18-1053, 18-1054, 18-1055, 18-1056, 18-1061, 18-1062, 18-1064, 18-1065, 18-1066, 18-1067, 18-1068, 18-1088, 18-1089, 18-1105

United States Court of Appeals for the District of Columbia Circuit

MOZILLA CORPORATION, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of the Federal Communications Commission

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FOR THE DISCTICT OF COLUMBIA CIRCUIT

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DECLARATION OF FIRE CHIEF ANTHONY BOWDEN

I, Anthony Bowden, declare:

1. I make this declaration in support of the Brief of the County of Santa Clara ("County") in the matter referenced above. I know the facts herein of my own personal knowledge and if called upon to do so, I could competently testify to them under oath.

2. I was recently appointed the Fire Chief for the Santa Clara County Central Fire Protection District ("County Fire"). As Fire Chief, I also serve as Fire Marshal for Santa Clara County and as the California Office of Emergency Services (OES) Operational Area Fire and Rescue Coordinator. In these roles, I am responsible for the coordination of mutual aid resources in Santa Clara County. This includes the coordination of all fire resources to significant events, such as wildfires, throughout the State, when those resources are requested from Santa Clara County's operational area. I have worked in fire protection for more than two decades, and in that time, I have held every rank at County Fire.

3. Established in 1947, County Fire provides fire services for Santa Clara County and the County's communities of Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Monte Sereno, and Saratoga. The department also provides protection for the unincorporated areas adjacent to those cities. Wrapping in an approximately 20-mile arc around the southern end of Silicon Valley, County Fire has grown to include 15 fire stations, an administrative headquarters, a maintenance facility, and several other support facilities, and covers 128.3 square miles. The department employs almost three hundred fire prevention, suppression, investigation, administration, and maintenance personnel; daily emergency response consists of more than sixty employees. County Fire also contributes resources to all-hazard response outside Santa Clara County and around the state. For example, County Fire has deployed equipment and personnel in response to the ongoing Mendocino Complex Fire, the largest fire in California's history.

4. County Fire relies upon Internet-based systems to provide crucial and time-sensitive public safety services. The Internet has become an essential tool in providing fire and emergency response, particularly for events like large fires which require the rapid deployment and organization of thousands of personnel and hundreds of fire engines, aircraft, and bulldozers. During these events, resources are marshaled from across the state and country—in some cases, even from other countries. In these situations, a key responsibility of emergency responders, and of County Fire in particular, is tracking those resources and ensuring they get to the right place as quickly and safely as possible. County Fire, like virtually all other emergency responders, relies heavily on the Internet to do both of these things.

5. As I explain below, County Fire has experienced throttling by its ISP, Verizon. This throttling has had a significant impact on our ability to provide emergency services. Verizon imposed these limitations despite being informed that throttling was actively impeding County Fire's ability to provide crisis-response and essential emergency services.

6. Only a few weeks ago, County Fire deployed OES Incident Support Unit 5262 ("OES 5262"), to the Mendocino Complex Fire, now the largest fire in state history. OES 5262

is deployed to large incidents as a command and control resource. Its primary function is to track, organize, and prioritize routing of resources from around the state and country to the sites where they are most needed. OES 5262 relies heavily on the use of specialized software and Google Sheets to do near-real-time resource tracking through the use of cloud computing over the Internet.

7. Resources tracked across such a large event include personnel and equipment supplied from local governments across California; the State of California; federal agencies including the Department of Defense, the Bureau of Land Management, the U.S. Forest Service; and other countries. As of Monday, August 13, 2018, the response effort for the wildfires burning across California included 13,000 firefighters, multiple aircraft, dozens or hundreds of bulldozers, and hundreds of fire engines. The wildfires have resulted in over 726,000 acres burned and roughly 2,000 structures destroyed. With several months left in what is a "normal" fire season, we fully expect these numbers to rise.

8. OES 5262 also coordinates all local government resources deployed to the Mendocino Complex Fire. That is, the unit facilitates resource check-in and routing for local government resources. In doing so, the unit typically exchanges 5-10 gigabytes of data per day via the Internet using a mobile router and wireless connection. Near-real-time information exchange is vital to proper function. In large and complex fires, resource allocation requires immediate information. Dated or stale information regarding the availability or need for resources can slow response times and render them far less effective. Resources could be deployed to the wrong fire, the wrong part of a fire, or fail to be deployed at all. Even small delays in response translate into devastating effects, including loss of property, and, in some cases, loss of life.

9. In the midst of our response to the Mendocino Complex Fire, County Fire discovered the data connection for OES 5262 was being throttled by Verizon, and data rates had been reduced to 1/200, or less, than the previous speeds. These reduced speeds severely interfered with the OES 5262's ability to function effectively. My Information Technology staff

communicated directly with Verizon via email about the throttling, requesting it be immediately lifted for public safety purposes. That email exchange is attached here as Exhibit A. We explained the importance of OES 5262 and its role in providing for public and first-responder safety and requested immediate removal of the throttling. Verizon representatives confirmed the throttling, but, rather than restoring us to an essential data transfer speed, they indicated that County Fire would have to switch to a new data plan at more than twice the cost, and they would only remove throttling after we contacted the Department that handles billing and switched to the new data plan.

10. In the interim, County Fire personnel in were forced to use other agencies' Internet Service Providers and their own personal devices to provide the necessary connectivity and data transfer capability required by OES 5262. While Verizon ultimately did lift the throttling, it was only after County Fire subscribed to a new, more expensive plan.

11. In light of our experience, County Fire believes it is likely that Verizon will continue to use the exigent nature of public safety emergencies and catastrophic events to coerce public agencies into higher cost plans ultimately paying significantly more for mission critical service—even if that means risking harm to public safety during negotiations.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 17, 2018 at San José, California.

Anthony Bowden

1825293

EXHIBIT A

Zimbra daniel.farrelly@sccfd.org

Re: [E] Verizon Account for OES 5262

From : Silas Buss <silas.buss@verizonwireless.com> Mon, Jul 30, 2018 01:50 PM
Subject : Re: [E] Verizon Account for OES 5262 1 attachment
To : daniel farrelly <daniel.farrelly@sccfd.org>

Hi Dan,

Just left you a message. The below plans are what I would suggest - it's $99.99 for the first 20GB and $8/GB thereafter. To get the plan changed immediately, I would suggest calling in the plan change to our customer service team at 800-922-0204. Let me know if you have any questions - I'll be available by phone for at least the next hour or so.

Public Sector Mobile Broadband Share Plans: Government Subscribers Only			
The calling plans below reflect the monthly access fee discount. No additional discounts apply.			
Public Sector Mobile Broadband	**5 Gigabytes**	**10 Gigabytes**	**20 Gigabytes**
Monthly Access Fee	$39.99 (90239)	$69.99 (90240)	$99.99 (90241)
Shared Domestic Data Allowance	5GB	10GB	20GB
Overage Per Gigabyte	$8.00 Per Gigabyte		

Note: This plan is available for domestic data only devices, on the Verizon Wireless network only. **Data Sharing**: At the end of each bill cycle, any unused data allowances for lines sharing on the same account will be applied to the overages of the other lines on the same account beginning with the line with the lowest overage need. Plan changes may not take effect until the billing cycle following the change request. Current NationalAccess and Mobile Broadband coverage details can be found at www.verizonwireless.com. New activations on these service plans require 4G LTE devices. Existing customers transitioning to one of these service plans are able to utilize existing 3G devices. The 5GB, 10GB, and 20GB Public Sector Mobile Broadband Plans are able to share with each other.

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verizon

On Mon, Jul 30, 2018 at 10:00 AM Daniel Farrelly <daniel.farrelly@sccfd.org> wrote:

> Silas,
>
> Please work with us. All we need is a plan that does not offer throttling or caps of any kind.
>
> Dan

From: "Daniel Farrelly" <daniel.farrelly@sccfd.org>
To: "Silas Buss" <silas.buss@verizonwireless.com>
Cc: "tony bowden" <tony.bowden@sccfd.org>, "Justin Stockman" <justin.stockman@sccfd.org>, "Todd Garde" <todd.garde@sccfd.org>, "Garrett Chan" <garrett.chan@verizonwireless.com>
Sent: Sunday, July 29, 2018 9:38:28 PM
Subject: Re: [E] Verizon Account for OES 5262

Silas,

Remove any data throttling on OES5262 effective immediately.

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e: daniel.farrelly@sccfd.org

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Subject: Re: [E] Verizon Account for OES 5262

Chief Bowden,

I just wanted to provide an update to those who were involved in this originally. OES 5262 is deployed again, now to the Mendocino Complex (CA-MEU-008674), and is still experiencing the same throttling. As I understood it from our previous exchange regarding this device, the billing cycle was set to end 7/23, which should have alleviated the throttling. In a side by side comparison, a crew members personal phone using verizon was seeing speeds of 20Mbps/7Mbps. The department verizon device is experiencing speeds of 0.2Mbps/0.6Mbps, meaning it has no meaningful functionality.

I've sent an email to Dan trying to identify a rapid solution for OES 5262.

Thank you,

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Hi Dan,

I'll give the short response below to some of your questions, but I would certainly suggest we follow-up with a call to discuss in greater detail. Here's my availability this week: **Tues: 1PM, Weds 3PM, Thurs 9AM-11:30AM**

In short, Verizon has always reserved the right to limit data throughput on unlimited plans. All unlimited data plans offered by Verizon have some sort of data throttling built-in, including the $39.99 plan. Verizon does offer plans with no data throughput limitations; these plans require that the customer pay by the GB for use beyond a certain set allotment. Attached is the list of public sector plans, see pgs. 10-18 for data plans. Also attached is the State of CA plans which offers the $37.99 unlimited data plan (pg. 1). We can talk about these plans to find the solution that best fits the needs of your department.

To my knowledge, there have not been any large scale changes to the price plans for the fleet as requested by SCC Fire. As I recall, there were some plan changes made on about 10 of the 400 or so mobile broadband lines from the $39.99 plan to the $37.99 - this was back in January or February. I'd just like to point out that Verizon will never change plans/service without advance customer consent and/or notice. If you'd like to know what those changes were, we can reach out to Asa Pierce, your account advisor, to see what was done at the time.

Service will not disconnect on the unlimited plans after 25GB of use. Depending on which plan is active, after 25GB of use, the data throughput is limited to 200Kbps or 600Kbps.

Silas Buss
Major Accounts Manager - Govt.
201 Spear St. Suite 700 San Francisco, CA 94105
M 408.204.6611 | silas.buss@verizonwireless.com
verizon

On Fri, Jul 6, 2018 at 11:54 AM Daniel Farrelly <daniel.farrelly@sccfd.org> wrote:

> Silas,
>
> Can confirm that after using 25GB of data, our service drops to zero. This is unacceptable and needs to be fixed. Let me know when you are available.
>
> Dan
>
> ---
>
> **From:** "Daniel Farrelly" <daniel.farrelly@sccfd.org>
> **To:** "Silas Buss" <silas.buss@verizonwireless.com>
> **Cc:** "tony bowden" <tony.bowden@sccfd.org>, "steve prziborowski" <steve.prziborowski@sccfd.org>, "FRED SCHULENBURG" <fred.schulenburg@sccfd.org>, "tamera haas" <tamera.haas@sccfd.org>, "justin stockman" <justin.stockman@sccfd.org>, "todd garde" <todd.garde@sccfd.org>, "dave morrisey" <dave.morrisey@sccfd.org>, "Maggie Eddy" <maggie.eddy@sccfd.org>, "Garrett Chan" <garrett.chan@verizonwireless.com>
> **Sent:** Thursday, July 5, 2018 10:23:47 AM
> **Subject:** Re: [E] Verizon Account for OES 5262
>
> Silas,
>
> I am back at County Fire full-time and would like to discuss the plans we have with Verizon.

As [illegible] caps or throttling...

However, when I look up the same device on the Verizon portal, there seems to be a 25GB limitation...

I am assuming this is what Justin ran into on OES 5262. Yes, there may be unlimited data, but after 25GB speeds throttle down.

My major concern is that there may have been changes to the data plans we use for public safety, and that these changes might start adversely affecting our fleet. As I mentioned earlier, none of our devices should have any sort of data caps or throttling. Also, speed is essential for the services we utilize. Moving OES 5262 to a $34.99 plan offering 600Kbps is not an adequate solution for devices that require 4G access to data.
With that said, please provide a list of all applicable public safety plans that provide 4G data without any caps or data throttling limitations. Our goal is to have all our devices on one plan that offers both unlimited use and unlimited bandwidth and no data throughput limitations.

If you would like talk direct, feel free to contact me at any time,

Santa Clara County Fire Department

Daniel Farrelly - Systems Analyst
o: 408.341.4468 | c: 408.966.6156
e: daniel.farrelly@sccfd.org

From: "Silas Buss" <silas.buss@verizonwireless.com>
To: "steve prziborowski" <steve.prziborowski@sccfd.org>
Cc: "Garrett Chan" <garrett.chan@verizonwireless.com>, "justin stockman" <justin.stockman@sccfd.org>, "todd garde" <todd.garde@sccfd.org>, "dave morrisey" <dave.morrisey@sccfd.org>, "tony bowden" <tony.bowden@sccfd.org>, "Maggie Eddy" <maggie.eddy@sccfd.org>, "daniel farrelly" <daniel.farrelly@sccfd.org>, "FRED SCHULENBURG" <fred.schulenburg@sccfd.org>, "tamera haas" <tamera.haas@sccfd.org>
Sent: Friday, June 29, 2018 2:17:56 PM
Subject: Re: [E] Verizon Account for OES 5262

Hello Steve,

As Garrett mentioned, we have a call set at 2:30 to discuss, I hope you'll join.

The short of it is, public safety customers have access to plans that do not have data throughput limitations. However, the current plan set for all of SCCFD's lines does have data throttling limitations. We will need to talk about making some plan changes to all lines or a selection of lines to address the data throttling limitation of the current plan.

Silas Buss
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M 408.204.6611 | silas.buss@verizonwireless.com
verizon✓

On Fri, Jun 29, 2018 at 1:31 PM Steve Prziborowski <steve.prziborowski@sccfd.org> wrote:

Thanks,

Justin Stockman made me aware of the Internet bandwidth challenges we are having for our apparatus (OES 5262).

Before I give you my approval to do the $2.00 a month upgrade, the bigger question is why our public safety data usage is getting throttled down? Our understanding from Eric Prosser, our former Information Technology Officer, was that he had received approval from Verizon that public safety should never be gated down because of our critical infrastructure need for these devices. Justin articulates that quite well below in his forwarded email.

The unit we are discussing is basically a fire engine (minus the water, hoses and ladders) but with tools and equipment that is used to support incident operations at major emergencies and/or disasters. It is currently assisting the Incident Command Team at the Pawnee Fire in Lake County, to ensure that all of the apparatus and personnel can effectively mitigate that major wildfire.

If I need to talk to a supervisor or account manager to not have to pay the extra $2 per month and instead, have our account be unlimited and protected from being gated down, please let me know who that person would be.

Thanks for any assistance you can offer us, I look forward to hearing back from you.

Steve

= = =

Steve Prziborowski
Deputy Chief / Training
Santa Clara County Fire Department
14700 Winchester Blvd.
Los Gatos, CA 95032-1818

- 408-341-4476 (office)
- 408-896-6890 (cellular)
Email: steve.prziborowski@sccfd.org
Website: www.sccfd.org

From: "Justin Stockman" <justin.stockman@sccfd.org>
To: "Steve Prziborowski" <steve.prziborowski@sccfd.org>
Sent: Friday, June 29, 2018 12:15:59 PM
Subject: Fwd: [E] Throttled Device

Chief,

We're having an issue with 5262. 5262 has a device that connects to the internet using a verizon sim card. Data usage on the device is supposed to be unlimited. The reason for this need is that 5262 performs an important public safety function by supporting CalOES region chiefs at large disasters. This device spends months where it sits unused and uses zero data. When it does get used it uses a tremendous

"unlimited devices" around 23 gigabytes. Throttling means that the device that can normally act like a modern broadband internet connection is slowed to the point of acting more like an AOL dial up modem from 1995. Verizon is currently throttling OES 5262 so severely that it's hampering operations for the assigned crew. This is not the first time we have had this issue. In December of 2017 while deployed to the Prado Mobilization Center supporting a series of large wildfires we had the same device with the same sim card also throttled. I was able to work through Eric Prosser at the time to have service to the device restored and Eric communicated that Verizon had properly re-categorized the device as truly "unlimited".

In the email below Verizon is stating that they can restore the device for an extra $2/month. I obviously lack the authority to make such an approval. If we could get Verizon that approval I would appreciate it.

Respectfully,

Justin Stockman
Fire Captain
B Shift Relief
650-465-2485
Justin.Stockman@sccfd.org

From: "Silas Buss" <silas.buss@verizonwireless.com>
To: "Justin Stockman" <justin.stockman@sccfd.org>
Cc: "Garrett Chan" <garrett.chan@verizonwireless.com>
Sent: Friday, June 29, 2018 11:35:46 AM
Subject: Re: [E] Throttled Device

Hi Justin,

To get the data speeds restored on this device, will you please reply that you approve moving the plan on line 408-438-4844 from the $37.99 (84356) plan to the $39.99 (84357) plan?

We'll talk about what's going on here in the call this afternoon.

Silas Buss
Major Accounts Manager - Govt.
201 Spear St. Suite 700 San Francisco, CA 94105
M 408.204.6611 | silas.buss@verizonwireless.com
verizon

> ---------- Forwarded message ---------
> From: **Justin Stockman** <justin.stockman@sccfd.org>
> Date: Fri, Jun 29, 2018 at 9:05 AM
> Subject: [E] Throttled Device
> To: Garrett M Chan <garrett.chan@verizonwireless.com>
>
> Hi Garrett,

The device we're having an issue with is a Cradlepoint AER 2100. It is deployed on the Pawnee fire as part of an OES support unit that is providing essential operational coverage for mutual aid resources deployed on that fire. The challenge of this device is that it is normally off, and consumes little to no data on a monthly basis. When the unit gets deployed it used a decent amount of data for a few days to a few weeks. On the order of 5-10gb a day. The crew was getting around 50/10mbps and is current getting 30/130kbps.

Info I have for the device is:
MEID A000005A866927
IMEI 353547064027397
NAI 6692210322@vzims.com
ICCID 89148000002567273591
Mobiel Subscriber ID 4084384844
IMSI 311480257790168
PRI ID 9903437
Cell ID 7844630 (0x77b316)

Hopefully that's more info than you need. Sorry if i'm over supplying, i'm not familiar with a lot of this info.

Justin Stockman
Fire Captain
B Shift Relief
650-465-2485
Justin.Stockman@sccfd.org

--

Verizon

Garrett Chan
Manager Solutions Engineer
Silicon Valley - Northern California/Nevada

2870 Zanker Road, Suite 100
San Jose, CA 95134

O 925.872.0620 | M 925.872.0620
Garrett.Chan@verizonwireless.com

24 hrs DATA TECHNICAL ASSISTANCE
contact the BGCO **1-800-922-0204**

Product Information:

IoT Private Network Overview

IoT Private Network White Paper

IoT Security Services | Verizon Enterprise Solutions

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISCTICT OF COLUMBIA CIRCUIT

MOZILLA CORPORATION, et al., Petitioners, v. FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	Case No. 18-1051 (Lead) Consolidated with Nos. 10-1052, 18-1053, 18-1054, 18-1055, 18-1056, 18-1061, 18-1062, 18-1064, 18-1065, 18-1066, 18-1067, 18-1068, 18-1088, 18-1089, 18-1105

DECLARATION OF IMRE KABAI

I, Imre Kabai, declare:

1. I make this declaration in support of the Brief of the County of Santa Clara ("County") in the matter referenced above. I know the facts herein of my own personal knowledge and if called upon to do so, I could competently testify to them under oath.

2. I have worked in information technology and architecture for more than twenty-five years. I am currently the Chief Technology Officer ("CTO") for the County. Before I held this position, I was the Chief Architect and Director of Platforms and Enterprise Architecture for Granite Construction, a $2.5 billion construction company employing approximately 5,400 employees across the United States. Before I held that position, I was the Chief Architect for the Stanford Linear Accelerator Laboratory at Stanford University, and an Enterprise Architect for the Stanford University Medical Center. Before I held those positions, I was a Senior Enterprise Architect and Senior Manager for Life Technologies.

3. I have a B.S. in Computational Mathematics and an MSc in Geophysics from Eötvös Loránd University, one of the top universities in Hungary.

4. Santa Clara County, home to Silicon Valley, has roughly 1.9 million residents. With a $250B GDP it is the world's 43rd largest economy. The County Administration serves the residents and businesses of Santa Clara by providing environmental, safety-net, infrastructure, law enforcement, justice, and healthcare services.

5. The County is heavily dependent upon internet-based technology systems for service delivery and has invested millions of dollars in these systems over the last decade

6. For example, the County's safety-net hospital, Valley Medical Center, has invested in excess of a hundred million dollars in a medical records system, EPIC, that exchanges medical records between the County and thousands of clinics, hospitals, and emergency departments. While the system is capable of reduced functionality in a disaster scenario in which it is completely cut off from those endpoints, a large portion of the value of the system comes from high-volume, speedy records exchange that is free from blocking, throttling, or discriminatory practices.

7. The County has also invested in providing key civic engagement systems via the internet. These services include publication of County law through a niche provider called Municode, and live-streaming of its governing board meetings through Accela, a niche provider of government civic engagement systems. To function properly, these systems require residents to be able to access them without blocking, throttling, or deprioritization that degrades their function.

8. Generally, the County's investments in web-based systems were made in reliance on the idea that they would continue to function as intended because the public would continue to have access to an internet free from discriminatory practices like blocking, throttling, or deprioritization. The County's information technology design principles do not include such scenarios.

9. In addition, because the County's functions are unique to government entities and,

like most government entities, its budget is constrained, the businesses that develop innovative technologies for the County are largely niche businesses that do not have significant resources. It is unlikely that governmental entities or the niche providers who host their services will have the resources to pay the ISPs of any possible user of the County's systems to avoid blocking, throttling, or deprioritization of their traffic. It is also unlikely that the County's users will pay more for the basic governmental access afforded by the County's systems. As a result, in a regime where traffic can be subjected to discriminatory practices by ISPs, it is quite likely that the kind of innovative systems developed by these providers will become much less effective and useful, and, ultimately, it is likely that development of these systems will slow dramatically, or the providers will be unable to continue developing them.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on 8-16-2018 at San José, California.

Imre Kabai

Imre Kabai

1825293

28 U.S.C.
United States Code, 2016 Edition
Title 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART VI - PARTICULAR PROCEEDINGS
CHAPTER 158 - ORDERS OF FEDERAL AGENCIES; REVIEW
Sec. 2342 - Jurisdiction of court of appeals
From the U.S. Government Publishing Office, www.gpo.gov

§2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) all rules, regulations, or final orders of—

(A) the Secretary of Transportation issued pursuant to section 50501, 50502, 56101–56104, or 57109 of title 46 or pursuant to part B or C of subtitle IV, subchapter III of chapter 311, chapter 313, or chapter 315 of title 49; and

(B) the Federal Maritime Commission issued pursuant to section 305, 41304, 41308, or 41309 or chapter 421 or 441 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42;

(5) all rules, regulations, or final orders of the Surface Transportation Board made reviewable by section 2321 of this title;

(6) all final orders under section 812 of the Fair Housing Act; and

(7) all final agency actions described in section 20114(c) of title 49.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

42 U.S.C.
United States Code, 2016 Edition
Title 42 - THE PUBLIC HEALTH AND WELFARE
CHAPTER 68 - DISASTER RELIEF
SUBCHAPTER IV-B - EMERGENCY PREPAREDNESS
Sec. 5195c - Critical infrastructures protection
From the U.S. Government Publishing Office, www.gpo.gov

§5195c. Critical infrastructures protection

(a) Short title

This section may be cited as the "Critical Infrastructures Protection Act of 2001".

(b) Findings

Congress makes the following findings:

(1) The information revolution has transformed the conduct of business and the operations of government as well as the infrastructure relied upon for the defense and national security of the United States.

(2) Private business, government, and the national security apparatus increasingly depend on an interdependent network of critical physical and information infrastructures, including telecommunications, energy, financial services, water, and transportation sectors.

(3) A continuous national effort is required to ensure the reliable provision of cyber and physical infrastructure services critical to maintaining the national defense, continuity of government, economic prosperity, and quality of life in the United States.

(4) This national effort requires extensive modeling and analytic capabilities for purposes of evaluating appropriate mechanisms to ensure the stability of these complex and interdependent systems, and to underpin policy recommendations, so as to achieve the continuous viability and adequate protection of the critical infrastructure of the Nation.

(c) Policy of the United States

It is the policy of the United States—

(1) that any physical or virtual disruption of the operation of the critical infrastructures of the United States be rare, brief, geographically limited in effect, manageable, and minimally detrimental to the economy, human and government services, and national security of the United States;

(2) that actions necessary to achieve the policy stated in paragraph (1) be carried out in a public-private partnership involving corporate and non-governmental organizations; and

(3) to have in place a comprehensive and effective program to ensure the continuity of essential Federal Government functions under all circumstances.

(d) Establishment of national competence for critical infrastructure protection

(1) Support of critical infrastructure protection and continuity by National Infrastructure Simulation and Analysis Center

There shall be established the National Infrastructure Simulation and Analysis Center (NISAC) to serve as a source of national competence to address critical infrastructure protection and continuity through support for activities related to counterterrorism, threat assessment, and risk mitigation.

(2) Particular support

The support provided under paragraph (1) shall include the following:

(A) Modeling, simulation, and analysis of the systems comprising critical infrastructures, including cyber infrastructure, telecommunications infrastructure, and physical infrastructure, in order to enhance understanding of the large-scale complexity of such systems and to facilitate

modification of such systems to mitigate the threats to such systems and to critical infrastructures generally.

(B) Acquisition from State and local governments and the private sector of data necessary to create and maintain models of such systems and of critical infrastructures generally.

(C) Utilization of modeling, simulation, and analysis under subparagraph (A) to provide education and training to policymakers on matters relating to—

(i) the analysis conducted under that subparagraph;

(ii) the implications of unintended or unintentional disturbances to critical infrastructures; and

(iii) responses to incidents or crises involving critical infrastructures, including the continuity of government and private sector activities through and after such incidents or crises.

(D) Utilization of modeling, simulation, and analysis under subparagraph (A) to provide recommendations to policymakers, and to departments and agencies of the Federal Government and private sector persons and entities upon request, regarding means of enhancing the stability of, and preserving, critical infrastructures.

(3) Recipient of certain support

Modeling, simulation, and analysis provided under this subsection shall be provided, in particular, to relevant Federal, State, and local entities responsible for critical infrastructure protection and policy.

(e) Critical infrastructure defined

In this section, the term "critical infrastructure" means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.

(f) Authorization of appropriations

There is hereby authorized for the Department of Defense for fiscal year 2002, $20,000,000 for the Defense Threat Reduction Agency for activities of the National Infrastructure Simulation and Analysis Center under this section in that fiscal year.

47 U.S.C.
United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER I - GENERAL PROVISIONS
Sec. 151 - Purposes of chapter; Federal Communications Commission created
From the U.S. Government Publishing Office, www.gpo.gov

§151. Purposes of chapter; Federal Communications Commission created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter.

47 U.S.C.
United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER I - GENERAL PROVISIONS
Sec. 152 - Application of chapter
From the U.S. Government Publishing Office, www.gpo.gov

§152. Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V–A.

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V–A, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C.
United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER I - GENERAL PROVISIONS
Sec. 153 - Definitions
From the U.S. Government Publishing Office, www.gpo.gov

§153. Definitions

For the purposes of this chapter, unless the context otherwise requires—

[*Sections 1-23 omitted*]

(24) Information service

The term "information service" means 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.

[*Sections 25-49 omitted*]

(50) Telecommunications

The term "telecommunications" means 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.

(51) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

[*Section 52 omitted*]

(53) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

[*Remaining sections omitted*]

47 U.S.C.
United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER I - GENERAL PROVISIONS
Sec. 154 - Federal Communications Commission
From the U.S. Government Publishing Office, www.gpo.gov

§154. Federal Communications Commission

[*Sections a-h omitted*]

(i) Duties and powers

The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

[*Remaining sections omitted*]

47 U.S.C.
United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER I - GENERAL PROVISIONS
Sec. 160 - Competition in provision of telecommunications service
From the U.S. Government Publishing Office, www.gpo.gov

§160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3), the Commission shall consider whether 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. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation

Except as provided in section 251(f) of this title, the Commission may not forbear from applying the requirements of section 251(c) or 271 of this title under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State enforcement after Commission forbearance

A State commission may not continue to apply or enforce any provision of this chapter that the Commission has determined to forbear from applying under subsection (a).

47 U.S.C.
United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER II - COMMON CARRIERS
Part I - Common Carrier Regulation
Sec. 214 - Extension of lines or discontinuance of service; certificate of public convenience and necessity
From the U.S. Government Publishing Office, www.gpo.gov

§214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

(a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Notification of Secretary of Defense, Secretary of State, and State Governor

Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) Approval or disapproval; injunction

The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and

not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) Order of Commission; hearing; penalty

The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $1,200 for each day during which such refusal or neglect continues.

(e) Provision of universal service

(1) Eligible telecommunications carriers

A common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—

(A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers

A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas

If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) "Service area" defined

The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to State commission jurisdiction

In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

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Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER II - COMMON CARRIERS
Part I - Common Carrier Regulation
Sec. 224 - Pole attachments
From the U.S. Government Publishing Office, www.gpo.gov

§224. Pole attachments

(a) Definitions

As used in this section:

(1) The term "utility" means any person who is a local exchange carrier or an electric, gas, water, steam, or other public utility, and who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications. Such term does not include any railroad, any person who is cooperatively organized, or any person owned by the Federal Government or any State.

(2) The term "Federal Government" means the Government of the United States or any agency or instrumentality thereof.

(3) The term "State" means any State, territory, or possession of the United States, the District of Columbia, or any political subdivision, agency, or instrumentality thereof.

(4) The term "pole attachment" means any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility.

(5) For purposes of this section, the term "telecommunications carrier" (as defined in section 153 of this title) does not include any incumbent local exchange carrier as defined in section 251(h) of this title.

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. For purposes of enforcing any determinations resulting from complaint procedures established pursuant to this subsection, the Commission shall take such action as it deems appropriate and necessary, including issuing cease and desist orders, as authorized by section 312(b) of this title.

(2) The Commission shall prescribe by rule regulations to carry out the provisions of this section.

(c) State regulatory authority over rates, terms, and conditions; preemption; certification; circumstances constituting State regulation

(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that—

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and

conditions for pole attachments—

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

(B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter—

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

(d) Determination of just and reasonable rates; "usable space" defined

(1) For purposes of subsection (b) of this section, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way.

(2) As used in this subsection, the term "usable space" means the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment.

(3) This subsection shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service. Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system or any telecommunications carrier (to the extent such carrier is not a party to a pole attachment agreement) to provide any telecommunications service.

(e) Regulations governing charges; apportionment of costs of providing space

(1) The Commission shall, no later than 2 years after February 8, 1996, prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services, when the parties fail to resolve a dispute over such charges. Such regulations shall ensure that a utility charges just, reasonable, and nondiscriminatory rates for pole attachments.

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the usable space among entities so that such apportionment equals two-thirds of the costs of providing space other than the usable space that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing usable space among all entities according to the percentage of usable space required for each entity.

(4) The regulations required under paragraph (1) shall become effective 5 years after February 8, 1996. Any increase in the rates for pole attachments that result from the adoption of the regulations required by this subsection shall be phased in equal annual increments over a period of 5 years beginning on the effective date of such regulations.

(f) Nondiscriminatory access

(1) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.

(2) Notwithstanding paragraph (1), a utility providing electric service may deny a cable television system or any telecommunications carrier access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory [1] basis where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes.

(g) Imputation to costs of pole attachment rate

A utility that engages in the provision of telecommunications services or cable services shall impute to its costs of providing such services (and charge any affiliate, subsidiary, or associate company engaged in the provision of such services) an equal amount to the pole attachment rate for which such company would be liable under this section.

(h) Modification or alteration of pole, duct, conduit, or right-of-way

Whenever the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way, the owner shall provide written notification of such action to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. Any entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit, or right-of-way accessible.

(i) Costs of rearranging or replacing attachment

An entity that obtains an attachment to a pole, conduit, or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment, if such rearrangement or replacement is required as a result of an additional attachment or the modification of an existing attachment sought by any other entity (including the owner of such pole, duct, conduit, or right-of-way).

[1] *So in original. Probably should be "nondiscriminatory".*

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Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER II - COMMON CARRIERS
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Sec. 230 - Protection for private blocking and screening of offensive material
From the U.S. Government Publishing Office, www.gpo.gov

§230. Protection for private blocking and screening of offensive material

(a) Findings

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) 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;

(3) 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;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" blocking and screening of offensive material

(1) Treatment of publisher or speaker

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil liability

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others

the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of interactive computer service

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on other laws

(1) No effect on criminal law

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, or any other Federal criminal statute.

(2) No effect on intellectual property law

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State law

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No effect on communications privacy law

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions

As used in this section:

(1) Internet

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive computer service

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information content provider

The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access software provider

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

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Sec. 253 - Removal of barriers to entry
From the U.S. Government Publishing Office, www.gpo.gov

§253. Removal of barriers to entry

(a) In general

No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) State regulatory authority

Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this title, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) State and local government authority

Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) Preemption

If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

(e) Commercial mobile service providers

Nothing in this section shall affect the application of section 332(c)(3) of this title to commercial mobile service providers.

(f) Rural markets

It shall not be a violation of this section for a State to require a telecommunications carrier that seeks to provide telephone exchange service or exchange access in a service area served by a rural telephone company to meet the requirements in section 214(e)(1) of this title for designation as an eligible telecommunications carrier for that area before being permitted to provide such service. This subsection shall not apply—

(1) to a service area served by a rural telephone company that has obtained an exemption, suspension, or modification of section 251(c)(4) of this title that effectively prevents a competitor from meeting the requirements of section 214(e)(1) of this title; and

(2) to a provider of commercial mobile services.

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Sec. 254 - Universal service
From the U.S. Government Publishing Office, www.gpo.gov

§254. Universal service

(a) Procedures to review universal service requirements

(1) Federal-State Joint Board on universal service

Within one month after February 8, 1996, the Commission shall institute and refer to a Federal-State Joint Board under section 410(c) of this title a proceeding to recommend changes to any of its regulations in order to implement sections 214(e) of this title and this section, including the definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for completion of such recommendations. In addition to the members of the Joint Board required under section 410(c) of this title, one member of such Joint Board shall be a State-appointed utility consumer advocate nominated by a national organization of State utility consumer advocates. The Joint Board shall, after notice and opportunity for public comment, make its recommendations to the Commission 9 months after February 8, 1996.

(2) Commission action

The Commission shall initiate a single proceeding to implement the recommendations from the Joint Board required by paragraph (1) and shall complete such proceeding within 15 months after February 8, 1996. The rules established by such proceeding shall include a definition of the services that are supported by Federal universal service support mechanisms and a specific timetable for implementation. Thereafter, the Commission shall complete any proceeding to implement subsequent recommendations from any Joint Board on universal service within one year after receiving such recommendations.

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

(5) Specific and predictable support mechanisms

There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

(7) Additional principles

Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this chapter.

(c) Definition

(1) In general

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

(A) are essential to education, public health, or public safety;

(B) have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

(C) are being deployed in public telecommunications networks by telecommunications carriers; and

(D) are consistent with the public interest, convenience, and necessity.

(2) Alterations and modifications

The Joint Board may, from time to time, recommend to the Commission modifications in the definition of the services that are supported by Federal universal service support mechanisms.

(3) Special services

In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The Commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

(e) Universal service support

After the date on which Commission regulations implementing this section take effect, only an eligible telecommunications carrier designated under section 214(e) of this title shall be eligible to receive specific Federal universal service support. A carrier that receives such support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended. Any such support should be explicit and sufficient to achieve the purposes of this section.

(f) State authority

A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a

manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

(g) Interexchange and interstate services

Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3), provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall—

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules—

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; and

(B) to define the circumstances under which a telecommunications carrier may be required to connect its network to such public institutional telecommunications users.

(3) Terms and conditions

Telecommunications services and network capacity provided to a public institutional telecommunications user under this subsection may not be sold, resold, or otherwise transferred by such user in consideration for money or any other thing of value.

(4) Eligibility of users

No entity listed in this subsection shall be entitled to preferential rates or treatment as required by this subsection, if such entity operates as a for-profit business, is a school described in paragraph (7)(A) with an endowment of more than $50,000,000, or is a library or library consortium not eligible for assistance from a State library administrative agency under the Library Services and Technology Act [20 U.S.C. 9121 et seq.].

(5) Requirements for certain schools with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), an elementary or secondary school having computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C);

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the school under subsection (l); and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a school that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

An elementary or secondary school described in clause (i), or the school board, local educational agency, or other authority with responsibility for administration of the school, shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy. In the case of an elementary or secondary school other than an elementary school or a secondary school as defined in section 7801 of title 20, the notice and hearing required by this clause may be limited to those members of the public with a relationship to the school.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety for minors that includes monitoring the online activities of minors and the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;

(II) child pornography; or

(III) harmful to minors;

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors; and

(iii) as part of its Internet safety policy is educating minors about appropriate online behavior, including interacting with other individuals on social networking websites and in chat rooms and cyberbullying awareness and response.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the school, school board, local educational agency, or other authority with responsibility for administration of the school—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or
(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any school covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Schools with Internet safety policy and technology protection measures in place

A school covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Schools without Internet safety policy and technology protection measures in place

A school covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any school that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such school comes into compliance with this paragraph.

(III) Waivers

Any school subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year program may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding

requirements prevent the making of the certification otherwise required by such subclause. A school, school board, local educational agency, or other authority with responsibility for administration of the school shall notify the Commission of the applicability of such subclause to the school. Such notice shall certify that the school in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the school is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any school that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any school that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse any funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A school that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the school shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A school that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the school shall be eligible for services at discount rates under this subsection.

(6) Requirements for certain libraries with computers having Internet access

(A) Internet safety

(i) In general

Except as provided in clause (ii), a library having one or more computers with Internet access may not receive services at discount rates under paragraph (1)(B) unless the library—

(I) submits to the Commission the certifications described in subparagraphs (B) and (C); and

(II) submits to the Commission a certification that an Internet safety policy has been adopted and implemented for the library under subsection (l); and

(III) ensures the use of such computers in accordance with the certifications.

(ii) Applicability

The prohibition in clause (i) shall not apply with respect to a library that receives services at discount rates under paragraph (1)(B) only for purposes other than the provision of Internet access, Internet service, or internal connections.

(iii) Public notice; hearing

A library described in clause (i) shall provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(B) Certification with respect to minors

A certification under this subparagraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene;
(II) child pornography; or
(III) harmful to minors; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers by minors.

(C) Certification with respect to adults

A certification under this paragraph is a certification that the library—

(i) is enforcing a policy of Internet safety that includes the operation of a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are—

(I) obscene; or
(II) child pornography; and

(ii) is enforcing the operation of such technology protection measure during any use of such computers.

(D) Disabling during adult use

An administrator, supervisor, or other person authorized by the certifying authority under subparagraph (A)(i) may disable the technology protection measure concerned, during use by an adult, to enable access for bona fide research or other lawful purpose.

(E) Timing of implementation

(i) In general

Subject to clause (ii) in the case of any library covered by this paragraph as of the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certification under subparagraphs (B) and (C) shall be made—

(I) with respect to the first program funding year under this subsection following such effective date, not later than 120 days after the beginning of such program funding year; and

(II) with respect to any subsequent program funding year, as part of the application process for such program funding year.

(ii) Process

(I) Libraries with Internet safety policy and technology protection measures in place

A library covered by clause (i) that has in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C) shall certify its compliance with subparagraphs (B) and (C) during each annual program application cycle under this subsection, except that with respect to the first program funding year after the effective date of this paragraph under section 1721(h) of the Children's Internet Protection Act, the certifications shall be made not later than 120 days after the beginning of such first program funding year.

(II) Libraries without Internet safety policy and technology protection measures in place

A library covered by clause (i) that does not have in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C)—

(aa) for the first program year after the effective date of this subsection in which it is applying for funds under this subsection, shall certify that it is undertaking such actions, including any necessary procurement procedures, to put in place an Internet safety policy and technology protection measures meeting the requirements necessary for certification under subparagraphs (B) and (C); and

(bb) for the second program year after the effective date of this subsection in which it

is applying for funds under this subsection, shall certify that it is in compliance with subparagraphs (B) and (C).

Any library that is unable to certify compliance with such requirements in such second program year shall be ineligible for services at discount rates or funding in lieu of services at such rates under this subsection for such second year and all subsequent program years under this subsection, until such time as such library comes into compliance with this paragraph.

(III) Waivers

Any library subject to subclause (II) that cannot come into compliance with subparagraphs (B) and (C) in such second year may seek a waiver of subclause (II)(bb) if State or local procurement rules or regulations or competitive bidding requirements prevent the making of the certification otherwise required by such subclause. A library, library board, or other authority with responsibility for administration of the library shall notify the Commission of the applicability of such subclause to the library. Such notice shall certify that the library in question will be brought into compliance before the start of the third program year after the effective date of this subsection in which the library is applying for funds under this subsection.

(F) Noncompliance

(i) Failure to submit certification

Any library that knowingly fails to comply with the application guidelines regarding the annual submission of certification required by this paragraph shall not be eligible for services at discount rates or funding in lieu of services at such rates under this subsection.

(ii) Failure to comply with certification

Any library that knowingly fails to ensure the use of its computers in accordance with a certification under subparagraphs (B) and (C) shall reimburse all funds and discounts received under this subsection for the period covered by such certification.

(iii) Remedy of noncompliance

(I) Failure to submit

A library that has failed to submit a certification under clause (i) may remedy the failure by submitting the certification to which the failure relates. Upon submittal of such certification, the library shall be eligible for services at discount rates under this subsection.

(II) Failure to comply

A library that has failed to comply with a certification as described in clause (ii) may remedy the failure by ensuring the use of its computers in accordance with such certification. Upon submittal to the Commission of a certification or other appropriate evidence of such remedy, the library shall be eligible for services at discount rates under this subsection.

(7) Definitions

For purposes of this subsection:

(A) Elementary and secondary schools

The term "elementary and secondary schools" means elementary schools and secondary schools, as defined in section 7801 of title 20.

(B) Health care provider

The term "health care provider" means—

(i) post-secondary educational institutions offering health care instruction, teaching hospitals, and medical schools;

(ii) community health centers or health centers providing health care to migrants;

(iii) local health departments or agencies;
(iv) community mental health centers;
(v) not-for-profit hospitals;
(vi) rural health clinics;
(vii) skilled nursing facilities (as defined in section 395i–3(a) of title 42); and
(viii) consortia of health care providers consisting of one or more entities described in clauses (i) through (vii).

(C) Public institutional telecommunications user

The term "public institutional telecommunications user" means an elementary or secondary school, a library, or a health care provider as those terms are defined in this paragraph.

(D) Minor

The term "minor" means any individual who has not attained the age of 17 years.

(E) Obscene

The term "obscene" has the meaning given such term in section 1460 of title 18.

(F) Child pornography

The term "child pornography" has the meaning given such term in section 2256 of title 18.

(G) Harmful to minors

The term "harmful to minors" means any picture, image, graphic image file, or other visual depiction that—

(i) taken as a whole and with respect to minors, appeals to a prurient interest in nudity, sex, or excretion;

(ii) depicts, describes, or represents, in a patently offensive way with respect to what is suitable for minors, an actual or simulated sexual act or sexual contact, actual or simulated normal or perverted sexual acts, or a lewd exhibition of the genitals; and

(iii) taken as a whole, lacks serious literary, artistic, political, or scientific value as to minors.

(H) Sexual act; sexual contact

The terms "sexual act" and "sexual contact" have the meanings given such terms in section 2246 of title 18.

(I) Technology protection measure

The term "technology protection measure" means a specific technology that blocks or filters Internet access to the material covered by a certification under paragraph (5) or (6) to which such certification relates.

(i) Consumer protection

The Commission and the States should ensure that universal service is available at rates that are just, reasonable, and affordable.

(j) Lifeline assistance

Nothing in this section shall affect the collection, distribution, or administration of the Lifeline Assistance Program provided for by the Commission under regulations set forth in section 69.117 of title 47, Code of Federal Regulations, and other related sections of such title.

(k) Subsidy of competitive services prohibited

A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition. The Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services.

(l) Internet safety policy requirement for schools and libraries

(1) In general

In carrying out its responsibilities under subsection (h), each school or library to which subsection (h) applies shall—

(A) adopt and implement an Internet safety policy that addresses—

(i) access by minors to inappropriate matter on the Internet and World Wide Web;

(ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications;

(iii) unauthorized access, including so-called "hacking", and other unlawful activities by minors online;

(iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and

(v) measures designed to restrict minors' access to materials harmful to minors; and

(B) provide reasonable public notice and hold at least one public hearing or meeting to address the proposed Internet safety policy.

(2) Local determination of content

A determination regarding what matter is inappropriate for minors shall be made by the school board, local educational agency, library, or other authority responsible for making the determination. No agency or instrumentality of the United States Government may—

(A) establish criteria for making such determination;

(B) review the determination made by the certifying school, school board, local educational agency, library, or other authority; or

(C) consider the criteria employed by the certifying school, school board, local educational agency, library, or other authority in the administration of subsection (h)(1)(B).

(3) Availability for review

Each Internet safety policy adopted under this subsection shall be made available to the Commission, upon request of the Commission, by the school, school board, local educational agency, library, or other authority responsible for adopting such Internet safety policy for purposes of the review of such Internet safety policy by the Commission.

(4) Effective date

This subsection shall apply with respect to schools and libraries on or after the date that is 120 days after December 21, 2000.

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United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER III - SPECIAL PROVISIONS RELATING TO RADIO
Part I - General Provisions
Sec. 332 - Mobile services
From the U.S. Government Publishing Office, www.gpo.gov

§332. Mobile services

[*Sections a-b omitted*]

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208 of this title, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of this title. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this chapter.

(C) As a part of making a determination with respect to the public interest under subparagraph (A)(iii), the Commission shall consider whether the proposed regulation (or amendment thereof) will promote competitive market conditions, including the extent to which such regulation (or amendment) will enhance competition among providers of commercial mobile services. If the Commission determines that such regulation (or amendment) will promote competition among providers of commercial mobile services, such determination may be the basis for a Commission finding that such regulation (or amendment) is in the public interest.

(D) The Commission shall, not later than 180 days after August 10, 1993, complete a rulemaking required to implement this paragraph with respect to the licensing of personal communications services, including making any determinations required by subparagraph (C).

(2) Non-common carrier treatment of private mobile services

A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this chapter. A common carrier (other than a person that was treated as a provider of a private land mobile service prior to August 10, 1993) shall not provide any dispatch service on any frequency allocated for common carrier service, except to the extent such dispatch service is provided on stations licensed in the domestic public land mobile radio service before January 1, 1982. The Commission may by regulation terminate, in whole or in part, the prohibition contained in the preceding sentence if the Commission determines that such termination will serve the public interest.

(3) State preemption

(A) Notwithstanding sections 152(b) and 221(b) of this title, no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services. Nothing in this subparagraph shall exempt providers of commercial mobile services (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates. Notwithstanding the first sentence of this subparagraph, a State may petition the Commission for authority to regulate the rates for any commercial mobile service and the Commission shall grant such petition if such State demonstrates that—

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State.

The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition. If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such periods of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

(B) If a State has in effect on June 1, 1993, any regulation concerning the rates for any commercial mobile service offered in such State on such date, such State may, no later than 1 year after August 10, 1993, petition the Commission requesting that the State be authorized to continue exercising authority over such rates. If a State files such a petition, the State's existing regulation shall, notwithstanding subparagraph (A), remain in effect until the Commission completes all action (including any reconsideration) on such petition. The Commission shall review such petition in accordance with the procedures established in such subparagraph, shall complete all action (including any reconsideration) within 12 months after such petition is filed, and shall grant such petition if the State satisfies the showing required under subparagraph (A)(i) or (A)(ii). If the Commission grants such petition, the Commission shall authorize the State to exercise under State law such authority over rates, for such period of time, as the Commission deems necessary to ensure that such rates are just and reasonable and not unjustly or unreasonably discriminatory.

After a reasonable period of time, as determined by the Commission, has elapsed from the issuance of an order under subparagraph (A) or this subparagraph, any interested party may petition the Commission for an order that the exercise of authority by a State pursuant to such subparagraph is no longer necessary to ensure that the rates for commercial mobile services are just and reasonable and not unjustly or unreasonably discriminatory. The Commission shall provide reasonable opportunity for public comment in response to such petition, and shall, within 9 months after the date of its submission, grant or deny such petition in whole or in part.

(4) Regulatory treatment of communications satellite corporation

Nothing in this subsection shall be construed to alter or affect the regulatory treatment required by title IV of the Communications Satellite Act of 1962 [47 U.S.C. 741 et seq.] of the corporation authorized by title III of such Act [47 U.S.C. 731 et seq.].

(5) Space segment capacity

Nothing in this section shall prohibit the Commission from continuing to determine whether the provision of space segment capacity by satellite systems to providers of commercial mobile services shall be treated as common carriage.

(6) Foreign ownership

The Commission, upon a petition for waiver filed within 6 months after August 10, 1993, may waive the application of section 310(b) of this title to any foreign ownership that lawfully existed before May 24, 1993, of any provider of a private land mobile service that will be treated as a common carrier as a result of the enactment of the Omnibus Budget Reconciliation Act of 1993, but only upon the following conditions:

(A) The extent of foreign ownership interest shall not be increased above the extent which existed on May 24, 1993.

(B) Such waiver shall not permit the subsequent transfer of ownership to any other person in violation of section 310(b) of this title.

(7) Preservation of local zoning authority

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof—

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or

instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.

(C) Definitions

For purposes of this paragraph—

(i) the term "personal wireless services" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;

(ii) the term "personal wireless service facilities" means facilities for the provision of personal wireless services; and

(iii) the term "unlicensed wireless service" means the offering of telecommunications services using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v) of this title).

(8) Mobile services access

A person engaged in the provision of commercial mobile services, insofar as such person is so engaged, shall not be required to provide equal access to common carriers for the provision of telephone toll services. If the Commission determines that subscribers to such services are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity, then the Commission shall prescribe regulations to afford subscribers unblocked access to the provider of telephone toll services of the subscribers' choice through the use of a carrier identification code assigned to such provider or other mechanism. The requirements for unblocking shall not apply to mobile satellite services unless the Commission finds it to be in the public interest to apply such requirements to such services.

[*Section d omitted*]

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Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV - PROCEDURAL AND ADMINISTRATIVE PROVISIONS
Sec. 402 - Judicial review of Commission's orders and decisions
From the U.S. Government Publishing Office, www.gpo.gov

§402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1), (2), (3), (4), and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

(10) By any person who is aggrieved or whose interests are adversely affected by a determination made by the Commission under section 618(a)(3) of this title.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from and shall, unless

otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5.

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

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Title 47 - TELECOMMUNICATIONS
CHAPTER 5 - WIRE OR RADIO COMMUNICATION
SUBCHAPTER IV - PROCEDURAL AND ADMINISTRATIVE PROVISIONS
Sec. 414 - Exclusiveness of chapter
From the U.S. Government Publishing Office, www.gpo.gov

§414. Exclusiveness of chapter

Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

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Title 47 - TELECOMMUNICATIONS
CHAPTER 12 - BROADBAND
Sec. 1302 - Advanced telecommunications incentives
From the U.S. Government Publishing Office, www.gpo.gov

§1302. Advanced telecommunications incentives

(a) In general

The Commission and each State commission with regulatory jurisdiction over telecommunications services shall 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.

(b) Inquiry

The Commission shall, within 30 months after February 8, 1996, and annually thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Demographic information for unserved areas

As part of the inquiry required by subsection (b), the Commission shall compile a list of geographical areas that are not served by any provider of advanced telecommunications capability (as defined by subsection (d)(1)) [1] and to the extent that data from the Census Bureau is available, determine, for each such unserved area—

(1) the population;
(2) the population density; and
(3) the average per capita income.

(d) Definitions

For purposes of this subsection: [2]

(1) Advanced telecommunications capability

The term "advanced telecommunications capability" is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools

The term "elementary and secondary schools" means elementary and secondary schools, as defined in section 7801 of title 20.

47 U.S.C.
United States Code, 2016 Edition
Title 47 - TELECOMMUNICATIONS
CHAPTER 12 - BROADBAND
Sec. 1304 - Encouraging State initiatives to improve broadband
From the U.S. Government Publishing Office, www.gpo.gov

§1304. Encouraging State initiatives to improve broadband

(a) Purposes

The purposes of any grant under subsection (b) are—

(1) to ensure that all citizens and businesses in a State have access to affordable and reliable broadband service;

(2) to achieve improved technology literacy, increased computer ownership, and broadband use among such citizens and businesses;

(3) to establish and empower local grassroots technology teams in each State to plan for improved technology use across multiple community sectors; and

(4) to establish and sustain an environment ripe for broadband services and information technology investment.

(b) Establishment of State broadband data and development grant program

(1) In general

The Secretary of Commerce shall award grants, taking into account the results of the peer review process under subsection (d), to eligible entities for the development and implementation of statewide initiatives to identify and track the availability and adoption of broadband services within each State.

(2) Competitive basis

Any grant under subsection (b) shall be awarded on a competitive basis.

(c) Eligibility

To be eligible to receive a grant under subsection (b), an eligible entity shall—

(1) submit an application to the Secretary of Commerce, at such time, in such manner, and containing such information as the Secretary may require;

(2) contribute matching non-Federal funds in an amount equal to not less than 20 percent of the total amount of the grant; and

(3) agree to comply with confidentiality requirements in subsection (h)(2) of this section.

(d) Peer review; nondisclosure

(1) In general

The Secretary shall by regulation require appropriate technical and scientific peer review of applications made for grants under this section.

(2) Review procedures

The regulations required under paragraph (1) shall require that any technical and scientific peer review group—

(A) be provided a written description of the grant to be reviewed;

(B) provide the results of any review by such group to the Secretary of Commerce; and

(C) certify that such group will enter into voluntary nondisclosure agreements as necessary to prevent the unauthorized disclosure of confidential and proprietary information provided by broadband service providers in connection with projects funded by any such grant.

(e) Use of funds

A grant awarded to an eligible entity under subsection (b) shall be used—

(1) to provide a baseline assessment of broadband service deployment in each State;
(2) to identify and track—
(A) areas in each State that have low levels of broadband service deployment;
(B) the rate at which residential and business users adopt broadband service and other related information technology services; and
(C) possible suppliers of such services;

(3) to identify barriers to the adoption by individuals and businesses of broadband service and related information technology services, including whether or not—
(A) the demand for such services is absent; and
(B) the supply for such services is capable of meeting the demand for such services;

(4) to identify the speeds of broadband connections made available to individuals and businesses within the State, and, at a minimum, to rely on the data rate benchmarks for broadband service utilized by the Commission to reflect different speed tiers, to promote greater consistency of data among the States;
(5) to create and facilitate in each county or designated region in a State a local technology planning team—
(A) with members representing a cross section of the community, including representatives of business, telecommunications labor organizations, K–12 education, health care, libraries, higher education, community-based organizations, local government, tourism, parks and recreation, and agriculture; and
(B) which shall—
(i) benchmark technology use across relevant community sectors;
(ii) set goals for improved technology use within each sector; and
(iii) develop a tactical business plan for achieving its goals, with specific recommendations for online application development and demand creation;

(6) to work collaboratively with broadband service providers and information technology companies to encourage deployment and use, especially in unserved areas and areas in which broadband penetration is significantly below the national average, through the use of local demand aggregation, mapping analysis, and the creation of market intelligence to improve the business case for providers to deploy;
(7) to establish programs to improve computer ownership and Internet access for unserved areas and areas in which broadband penetration is significantly below the national average;
(8) to collect and analyze detailed market data concerning the use and demand for broadband service and related information technology services;
(9) to facilitate information exchange regarding the use and demand for broadband services between public and private sectors; and
(10) to create within each State a geographic inventory map of broadband service, including the data rate benchmarks for broadband service utilized by the Commission to reflect different speed tiers, which shall—
(A) identify gaps in such service through a method of geographic information system mapping of service availability based on the geographic boundaries of where service is available or unavailable among residential or business customers; and
(B) provide a baseline assessment of statewide broadband deployment in terms of households with high-speed availability.

(f) Participation limit

For each State, an eligible entity may not receive a new grant under this section to fund the activities described in subsection (d) within such State if such organization obtained prior grant awards under this section to fund the same activities in that State in each of the previous 4 consecutive years.

(g) Reporting; broadband inventory map

The Secretary of Commerce shall—

(1) require each recipient of a grant under subsection (b) to submit a report on the use of the funds provided by the grant; and

(2) create a web page on the Department of Commerce website that aggregates relevant information made available to the public by grant recipients, including, where appropriate, hypertext links to any geographic inventory maps created by grant recipients under subsection (e)(10).

(h) Access to aggregate data

(1) In general

Subject to paragraph (2), the Commission shall provide eligible entities access, in electronic form, to aggregate data collected by the Commission based on the Form 477 submissions of broadband service providers.

(2) Limitation

Notwithstanding any provision of Federal or State law to the contrary, an eligible entity shall treat any matter that is a trade secret, commercial or financial information, or privileged or confidential, as a record not subject to public disclosure except as otherwise mutually agreed to by the broadband service provider and the eligible entity. This paragraph applies only to information submitted by the Commission or a broadband provider to carry out the provisions of this chapter and shall not otherwise limit or affect the rules governing public disclosure of information collected by any Federal or State entity under any other Federal or State law or regulation.

(i) Definitions

In this section:

(1) Commission

The term "Commission" means the Federal Communications Commission.

(2) Eligible entity

The term "eligible entity" means—

(A) an entity that is either—

(i) an agency or instrumentality of a State, or a municipality or other subdivision (or agency or instrumentality of a municipality or other subdivision) of a State;

(ii) a nonprofit organization that is described in section 501(c)(3) of title 26 and that is exempt from taxation under section 501(a) of such title; or

(iii) an independent agency or commission in which an office of a State is a member on behalf of the State; and

(B) is the single eligible entity in the State that has been designated by the State to receive a grant under this section.

(j) No regulatory authority

Nothing in this section shall be construed as giving any public or private entity established or affected by this chapter any regulatory jurisdiction or oversight authority over providers of broadband services or information technology.

TITLE VI—EFFECT ON OTHER LAWS

47 USC 152 note.

SEC. 601. APPLICABILITY OF CONSENT DECREES AND OTHER LAW.

(a) APPLICABILITY OF AMENDMENTS TO FUTURE CONDUCT.—

(1) AT&T CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the AT&T Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(2) GTE CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the GTE Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(3) MCCAW CONSENT DECREE.—Any conduct or activity that was, before the date of enactment of this Act, subject to any restriction or obligation imposed by the McCaw Consent Decree shall, on and after such date, be subject to the restrictions and obligations imposed by the Communications Act of 1934 as amended by this Act and subsection (d) of this section and shall not be subject to the restrictions and the obligations imposed by such Consent Decree.

(b) ANTITRUST LAWS.—

(1) SAVINGS CLAUSE.—Except as provided in paragraphs (2) and (3), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

(2) REPEAL.—Subsection (a) of section 221 (47 U.S.C. 221(a)) is repealed.

(3) CLAYTON ACT.—Section 7 of the Clayton Act (15 U.S.C. 18) is amended in the last paragraph by striking "Federal Communications Commission,".

(c) FEDERAL, STATE, AND LOCAL LAW.—

(1) NO IMPLIED EFFECT.—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

(2) STATE TAX SAVINGS PROVISION.—Notwithstanding paragraph (1), nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or supersession of, any State or local law pertaining to taxation, except as provided

in sections 622 and 653(c) of the Communications Act of 1934 and section 602 of this Act.

(d) COMMERCIAL MOBILE SERVICE JOINT MARKETING.—Notwithstanding section 22.903 of the Commission's regulations (47 C.F.R. 22.903) or any other Commission regulation, a Bell operating company or any other company may, except as provided in sections 271(e)(1) and 272 of the Communications Act of 1934 as amended by this Act as they relate to wireline service, jointly market and sell commercial mobile services in conjunction with telephone exchange service, exchange access, intraLATA telecommunications service, interLATA telecommunications service, and information services.

(e) DEFINITIONS.—As used in this section:

(1) AT&T CONSENT DECREE.—The term "AT&T Consent Decree" means the order entered August 24, 1982, in the antitrust action styled United States v. Western Electric, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982.

(2) GTE CONSENT DECREE.—The term "GTE Consent Decree" means the order entered December 21, 1984, as restated January 11, 1985, in the action styled United States v. GTE Corp., Civil Action No. 83–1298, in the United States District Court for the District of Columbia, and any judgment or order with respect to such action entered on or after December 21, 1984.

(3) MCCAW CONSENT DECREE.—The term "McCaw Consent Decree" means the proposed consent decree filed on July 15, 1994, in the antitrust action styled United States v. AT&T Corp. and McCaw Cellular Communications, Inc., Civil Action No. 94–01555, in the United States District Court for the District of Columbia. Such term includes any stipulation that the parties will abide by the terms of such proposed consent decree until it is entered and any order entering such proposed consent decree.

(4) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13 et seq.), commonly known as the Robinson-Patman Act, and section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition.

SEC. 602. PREEMPTION OF LOCAL TAXATION WITH RESPECT TO DIRECT-TO-HOME SERVICES.

(a) PREEMPTION.—A provider of direct-to-home satellite service shall be exempt from the collection or remittance, or both, of any tax or fee imposed by any local taxing jurisdiction on direct-to-home satellite service.

(b) DEFINITIONS.—For the purposes of this section—

(1) DIRECT-TO-HOME SATELLITE SERVICE.—The term "direct-to-home satellite service" means only programming transmitted or broadcast by satellite directly to the subscribers' premises without the use of ground receiving or distribution equipment,

except at the subscribers' premises or in the uplink process to the satellite.

(2) PROVIDER OF DIRECT-TO-HOME SATELLITE SERVICE.—For purposes of this section, a "provider of direct-to-home satellite service" means a person who transmits, broadcasts, sells, or distributes direct-to-home satellite service.

(3) LOCAL TAXING JURISDICTION.—The term "local taxing jurisdiction" means any municipality, city, county, township, parish, transportation district, or assessment jurisdiction, or any other local jurisdiction in the territorial jurisdiction of the United States with the authority to impose a tax or fee, but does not include a State.

(4) STATE.—The term "State" means any of the several States, the District of Columbia, or any territory or possession of the United States.

(5) TAX OR FEE.—The terms "tax" and "fee" mean any local sales tax, local use tax, local intangible tax, local income tax, business license tax, utility tax, privilege tax, gross receipts tax, excise tax, franchise fees, local telecommunications tax, or any other tax, license, or fee that is imposed for the privilege of doing business, regulating, or raising revenue for a local taxing jurisdiction.

(c) PRESERVATION OF STATE AUTHORITY.—This section shall not be construed to prevent taxation of a provider of direct-to-home satellite service by a State or to prevent a local taxing jurisdiction from receiving revenue derived from a tax or fee imposed and collected by a State.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

THE UNITED STATES OF AMERICA, Plaintiff, v. THE STATE OF CALIFORNIA; EDMUND GERALD BROWN JR., Governor of California, in his Official Capacity, and XAVIER BECERRA, Attorney General of California, in his Official Capacity, Defendants.	Case No. **[Proposed] ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

This matter is before the Court on Plaintiff the United States' Motion for a Preliminary Injunction. Having considered the motion, including Plaintiff's Memorandum of Law and Defendants' opposition thereto, and having further considered: (1) the likelihood that the United States will succeed on the merits of its claims; (2) the likelihood that the United States will suffer irreparable injury absent an injunction; (3) whether injunctive relief would substantially harm Defendants; and (4) whether the public interest would be furthered by an injunction, this Court concludes that Plaintiff is entitled to preliminary injunctive relief. THEREFORE pursuant to Federal Rule of Civil Procedure 65, Plaintiff's Motion is GRANTED.

The Court FINDS that Plaintiff is likely to succeed on its claims that Section 3100(j), (r), (t), Section 3101(a)(1)-(a)(7), (a)(9) of the California Civil Code, the application of those provisions through Section 3101(b) of the California Civil Code, and Section 3102(a), (b) of the California Civil Code, all violate the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and are therefore invalid.

The Court also FINDS that Plaintiff has made a strong showing that it suffers and will continue to suffer irreparable harm caused by these provisions of the California Civil Code, and that the balance of harms and the public interest favor an injunction.

Accordingly, Defendants are HEREBY ENJOINED: from enforcing Section 3100(j), (r), (t), Section 3101(a)(1)-(a)(7), (a)(9) of the California Civil Code; from enforcing those provisions through Section 3101(b) of the California Civil Code; and from enforcing Section 3102(a), (b) of the California Civil Code, until such time as the Court enters judgment on the United States' claims for relief.

DONE AND ORDERED this __ day of _____, 2018,

_____

Hon. _____

UNITED STATES DISTRICT JUDGE