

Date of Hearing: June 20, 2018

ASSEMBLY COMMITTEE ON COMMUNICATIONS AND CONVEYANCE

Miguel Santiago, Chair

SB 460 (De León) – As Amended January 22, 2018

SENATE VOTE: 21-12

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) Specifies that it shall be unlawful for an ISP that provides 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 practices;
 - 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 practices;
 - c) Engaging in paid prioritization, or providing preferential treatment of some Internet traffic to any Internet customer;
 - d) Unreasonably interfering with, or unreasonably disadvantaging, either a customer's ability to select, access, and use BIAS or lawful Internet content, applications, services, or devices of the customer's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to a customer;
 - e) Engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic or content to its customers; or,
 - f) Advertising, offering for sale, or selling BIAS service without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.
- 2) Specifies that a specified violation shall be subject to the remedies and procedures established under the Consumer Legal Remedies Act.
- 3) Prohibits a state agency from contracting with an ISP for the provision of BIAS unless that provider certifies, under penalty of perjury, that it will not engage in any of the following activities:
 - a) Blocking lawful content, applications, services, or nonharmful devices for any customer, subject to reasonable network management practices;

- b) Impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service for, or use of a nonharmful device by, any customer, subject to reasonable network management practices;
 - c) Engaging in paid prioritization, or providing preferential treatment of some Internet traffic to any Internet customer;
 - d) Unreasonably interfering with, or unreasonably disadvantaging, either a customer's ability to select, access, and use BIAS or lawful Internet content, applications, services, or devices of the customer's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to a customer;
 - e) Engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic or content to its customers; or,
 - f) Advertising, offering for sale, or selling BIAS to any customer without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.
- 4) Defines "Broadband Internet access service" to mean a mass-market retail service by wire or radio in California that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. "Broadband Internet access service" also encompasses any service in California that provides a functional equivalent of that service or that is used to evade the protections as specified.
- 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) Specifies that the Legislature finds and declares that the Federal Communications Commission (FCC) has repealed net neutrality rules intended to protect consumers and to ensure fair and reasonable access to the Internet.
- 9) Specifies that is the intent of this act to ensure that corporations do not impede competition or engage in deceptive consumer practices, and that they offer service to residential broadband Internet customers on a nondiscriminatory basis.

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 Competition 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)
- 8) Establishes the Consumers Legal Remedies Act to protect consumers against unfair and deceptive business practices and provides procedures to secure such protections. (Civil Code Section 1750 et seq.)
- 9) Requires specified State department 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. (Public Contract Code (PCC) Section 10162)
- 10) Specifies that a specified bid may be rejected on the basis of a bidder, any officer of such bidder, or any employee of such bidder who has a proprietary interest in such bidder, having

been disqualified, removed, or otherwise prevented from bidding on, or completing a federal, state, or local project because of a violation of law or a safety regulation. (PCC Section 10162)

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

COMMENTS:

- 1) **Authors Statement:** According to the author, “In today’s world, open access to the internet is critical to free expression, free speech, and democracy. Americans of every income level and of political persuasion depend on the internet. That’s why the FCC’s partisan decision to repeal net neutrality rules is so dangerous. The FCC’s action directly contradicts the will of the vast majority of Americans. It gives internet service providers unfettered power to sabotage the competition by throttling the internet speeds for competing content. The FCC action lets companies pay for priority to gain an unfair advantage in the race for our time, attention, and business. That’s also why this bill is so important. SB 460 prevents ISP’s from using deceptive, discriminatory or anti-competitive business practices related to the internet. It preserves the heart of the FCC’s net neutrality rules and prohibits ISP’s from blocking, throttling, and paid prioritization. SB 460 also makes net neutrality violations subject to enforcement under the consumer protection and unfair business practices laws. It also prohibits state agencies from contracting with ISPs unless the ISPs certify under penalty of perjury that they are abiding by net neutrality rules.
- 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 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 agency is directed by five commissioners who are appointed by the President of the United States and confirmed by the United State Senate. 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. Furthermore, the Attorney General and local district attorneys can take enforcement actions against corporations for deceptive and misleading advertisement and other unfair business competition violations.

- 3) **Net Neutrality & the Internet:** There are several major players in the operation of the Internet for information and 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 but 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. After receiving over 3 million comments, 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 Block:** 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 serves as a catch-all for consumers and edge providers by prohibiting practices that would unreasonably interfere with or unreasonably disadvantages to access or deliver products 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 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 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 voted to repeal 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 FCC's 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 that ISPs are transparent about their network management practices; or,
- Requiring state contractors for ISP service to abide by net neutrality principles.

This bill seeks to follow a similar approach by establishing net neutrality rules prohibiting ISPs from engaging in activities that interfere with a user's ability to access content on the internet, similar to the Final Rules in the 2015 Open Internet Order. The bill prohibits a state agency from contracting with an ISP for service unless that provider certifies, under penalty of perjury, that it will not violate the specified net neutrality rules.

The author may wish to consider an amendment to better maintain consistency with the 2015 Open Internet Order's Final Rules.

- 6) **Arguments in Support:** According to The Utility Reform Network, "Recent action by the FCC to rescind the Obama era rules on net neutrality have led state legislatures from New York to Washington to consider state laws on this issue. Most big city mayors and local government officials have publicly opposed the recent FCC action and urged their states to respond. SB 460 is built on the same or similar platform as other state legislation in this area. California must act on net neutrality and ensure that there are comprehensive consumer protections that prohibit broadband [ISPs] from restrict access to the internet, imposing

discriminatory charges for internet access, or otherwise inhibiting open access to internet services.”

- 7) **Arguments in Opposition:** According to a coalition of industry groups, “SB 460 would create regulations that will disrupt the function of the Internet, make network management untenable, and ultimately harm consumers [...] SB 460 will not promote or protect an open Internet. Instead, it opens the door to a patchwork of unworkable state regulations that will stymie innovation, and potentially undermine the backbone of California’s Internet economy. Despite virtually no showing of harms or violations of any rules, and regardless of the strong federal and state regulatory and enforcement safeguards currently in place, SB 460 goes beyond the previous 2015 Net Neutrality Rules, including creation of untenable procurement requirements, and enforcement by multiple forums.”
- 8) **Suggested Amendments:**

SECTION 1. The Legislature finds and declares all of the following:

(x) This bill 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.

(x) 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:

(1) Police and emergency services.

(2) Health and safety services and infrastructure.

(3) Utility services and infrastructure.

(4) Transportation infrastructure and services, and the expansion of zero- and low-emission transportation options.

(5) Government services, voting, and democratic decisionmaking processes.

(6) Education.

(7) Business and economic activity.

(8) Environmental monitoring and protection, and achievement of state environmental goals.

(9) Land use regulation.

(a) ~~The Legislature finds and declares that~~ the Federal Communications Commission has repealed net neutrality rules intended to protect consumers and to ensure fair and reasonable access to the Internet.

(b) It is the intent of this act to ensure that corporations do not impede competition or engage in deceptive consumer practices, and that they offer service to residential broadband Internet customers on a nondiscriminatory basis.

(x) It is the intent of this act to protect and promote the Internet as an open platform enabling consumer choice, freedom of expression, end-user control, competition, and the freedom to innovate without permission, and thereby to encourage the deployment of advanced telecommunications capability and remove barriers to infrastructure investment.

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

1775. For purposes of this chapter, the following definitions apply:

(x) “End user” means any individual or entity that uses a broadband Internet access service.

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

1776. It shall be unlawful for an Internet service provider, insofar as the provider is engaged in providing that provides broadband Internet access service, to engage in any of the following activities:

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

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

(c) ~~Engaging in paid prioritization, or providing preferential treatment of some Internet traffic to any Internet customer.~~

(d) ~~Unreasonably interfering with, or unreasonably disadvantaging, either an end users’ customer’s ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of the customer’s their choice, or an edge providers’ ability to make lawful content, applications, services, or devices available to a end users. Reasonable network management shall not be considered a violation of this paragraph.~~

(e) ~~Engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic or content to its customers.~~

(f) ~~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.~~

(x) A Internet service provider engaged in the provision of broadband Internet access service shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband internet access services sufficient for consumers to make informed choices regarding uses of such services and for content, application, service, and device providers to develop, market, and maintain internet offerings.

(x) Nothing in this Section supersedes any obligation or authorization a provider of broadband Internet access service 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.

(x) Nothing in this Section prohibits reasonable efforts by an Internet service provider of broadband Internet access service to address copyright infringement or other unlawful activity.

1777. (a) A violation of this chapter shall be subject to the remedies and procedures established pursuant to Chapter 4 (commencing with Section 1780).

~~(b) This chapter does not preclude enforcement of the rights specified herein under Chapter 5 (commencing with Section 17200) of Part 2 of, or Article 1 (commencing with Section 17500) of Chapter 1 of Part 3 of, Division 7 of the Business and Professions Code.~~

~~**12121.** For purposes of this chapter, the following definitions apply:~~

~~(a) "Broadband Internet access service" means 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. "Broadband Internet access service" also encompasses any service in California that provides a functional equivalent of that service or that is used to evade the protections set forth in this chapter.~~

~~(b) "Edge provider" means 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.~~

~~(c) "Internet service provider" means a business that provides broadband Internet access service to an individual, corporation, government, or other customer in California.~~

~~(d) "Paid prioritization" means the management of an Internet service provider'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.~~

12122. No state agency may contract with an Internet service provider for the provision of broadband internet access service unless that provider certifies, under penalty of perjury, that it is in full compliance with Civil Code Section 1775 and 1776 ~~will not engage in any of the following activities.~~

~~(a) Blocking lawful content, applications, services, or nonharmful devices for any customer, subject to reasonable network management practices.~~

~~(b) Impairing or degrading lawful Internet traffic on the basis of Internet content, application, or service for, or use of a nonharmful device by, any customer, subject to reasonable network management practices.~~

~~(c) Engaging in paid prioritization, or providing preferential treatment of some Internet traffic to any Internet customer.~~

~~(d) Unreasonably interfering with, or unreasonably disadvantaging, either a customer's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the customer's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to a customer.~~

~~(e) Engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic or content to its customers.~~

~~(f) Advertising, offering for sale, or selling broadband Internet access service to any customer without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.~~

- 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 in the Senate Committee on Governance and Finance.*

SB 822 (Wiener) of 2018 establishes net neutrality rules by prohibiting ISPs from engaging in activities that interfere with a user's ability to access content on the internet. *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.*

- 11) **Double-referral:** This bill is double referred, and if passed by this Committee, will be referred to the Assembly Committee on Privacy and Consumer Protection.

REGISTERED SUPPORT / OPPOSITION:

Support

California Association of Realtors
City of Santa Monica
Media Alliance
Office of Ratepayer Advocates – CPUC
Sierra Business Council
The Utility Reform Network

Opposition

AT&T
BizFed
California Cable & Telecommunications Association
California Chamber of Commerce
California Communications Association
California Manufacturers & Technology Association
CenturyLink
Civil Justice Association of California
CompTIA
Consolidated Communications
CTIA
Frontier Communications
Greater Coachella Valley Chamber of Commerce
Los Angeles Area Chamber of Commerce
Orange County Business Council
San Diego Regional Chamber of Commerce
San Gabriel Valley Economic Partnership
Sprint
T-Mobile
Tracfone
USTelecom
Verizon

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