FCC 2015 Open Internet Order vs Senate Bill 822 (Wiener)

FCC 2015 Open Internet Order	SB 822 (Wiener)	Commentary
47 CFR PART 8 **§8.2 Definitions**	**SECTION 2.** **1775. Definitions:** For purposes of this chapter, the following definitions apply: (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) "Application-specific differential pricing" means 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.	1775 (a) and (b) were not included in the definitions in the 2015 Rules.
(a) *Broadband Internet access service.* A mass-market retail service by wire or radio that provides the capability to transmit data to and receive data	(c) "Broadband Internet access service" means a mass-market retail service by wire or radio provided to customers in California that provides the capability to	In its 2010 *Open Internet Order,* the FCC included in the definition of "Broadband Internet Access Service" services it found were the "functional equivalent" of such

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. This term also encompasses any service that the Commission finds to be providing a functional equivalent of the service described in the previous sentence, or that is used to evade the protections set forth in this Part.	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 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.	services to ensure the efficacy of the rules in a dynamically changing market. The Commission made clear that the "functional equivalent" standard encompassed only services that could be used as a substitute for internet access, and expressly carved out specialized services, such as video programming services, VPN services, content delivery networks, and others. SB 822 includes no carve out for specialized or other non-BIAS services provided over broadband connections. Nor does it provide clear limits on the types of services covered by the "functional equivalent" standard. The lack of any clear guidance regarding the scope of the "functional equivalent" test, particularly when coupled with the lack of any limit on the entities that can seek to enforce the bill's requirements, ensures that this provision will be a recipe for confusion and litigation.
	(d) "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	These definitions, 1775 (d) and (e), are not in the 2015 Rules, and are so broad they could easily be read to apply to almost anything an ISP does.

	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. (e) "Content, applications, or services" means 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.	
(b) *Edge provider.* 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) "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.	No difference
(c) *End user.* Any individual or entity that uses a broadband Internet access service.	(g) "End user" means any individual or entity that uses a broadband Internet access service.	No difference
(d) *Fixed broadband Internet access service.* A broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes fixed wireless		Not included in SB 822.

services (including fixed unlicensed wireless service), and fixed satellite services.		
(e) *Mobile broadband Internet access service.* A broadband Internet access service that services end users primarily using mobile stations.		Not included in SB 822.
	(h) "Internet service provider" means a business that provides broadband Internet access service to an individual, corporation, government, or other customer in California.	
	(i) "ISP traffic exchange" means the exchange of Internet traffic destined for, or originating from, an Internet service provider's end users between the Internet service provider's network and another individual or entity, including, but not limited to, an edge provider, content delivery network, or other network operator.	This definition was not officially codified in the CFR, but largely follows the definition contained in the text of the FCC 2015 Order. However, as discussed below, SB 822 goes much further in regulating ISP traffic exchange than the FCC 2015 Order.
	(j) "Mass market" means 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 also includes broadband Internet access services purchased with support of the E-rate and	The 2015 FCC Order expressly carved out enterprise and special access services from the definition of mass market: "The term 'mass market' does not include enterprise service offerings which are typically offered to larger organizations through customized or individually negotiated arrangements, or special

	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 broadband Internet access service offered using networks supported by the Connect America Fund or similar programs at the federal and state level.	access services. [2015 FCC Order, 189, fn 879.] SB 822, however, does not exempt enterprise and special access services from the prohibitions in its bill. Apparently SB 822 intends to regulate those services like any other broadband service even though the Wheeler FCC did not.
(f) *Reasonable network management.* 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.	(k) "Network management practice" means a practice that has a primarily technical network management justification, but does not include other business practices. (l) "Reasonable network management practice" means 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 broadband Internet access service, and that is as application-agnostic as possible.	The highlighted phrase in SB 822 is not found in the 2015 Rules. The concept was discussed in paras. 221 of the 2015 Order as **one** factor in determining whether an ISP's network management practice was reasonable: "We maintain the guidance underlying the guidance underlying the *2010 Open Internet Order*'s case-by-case analysis that a network management practice is more likely to be found reasonable if it is transparent, and either allows the end user to control it or is application-agnostic." Unlike SB 822, the FCC Order does not require a network management practice to be as "application-agnostic as possible" to be reasonable. The FCC eschewed a more detailed definition of reasonable network management

		because it could "quickly becoming outdated as technology evolves." [2105 FCC Order, para. 222.] SB 822 does not allow that type of flexibility. Also, some types of reasonable network management would not be application agnostic in any event. To require application agnostic management in every case would require ISPs to ignore different bandwidth and latency requirements of different types of applications in managing their networks. For example, network congestion will have a much greater impact on video or voice services than on downloading a batch file, but the "application-agnostic" requirement would prevent ISPs from taking that into account in managing their network – to the detriment of consumers. In addition, both definitions incorporate the concept of "technical network management justification." The problem is that most network management decisions combine a technical and economic rationale. Taken to an extreme, if the only consideration that matters under the statute is a "technical" one, an ISP could be held to a standard that does not account for the expense

		associated with implementing a different technical solution. For example, it could be technically possible to add more capacity to a cell site, but it may be more economical to use other techniques to manage transitory congestion. If economic considerations are not part of the analysis to determine whether network management is reasonable, a regulator could demand the most expensive solution that is technically possible
	(m) "Third-party 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.	Mirrors Definition of "paid prioritization" in FCC 2015 rules; 47 CFR 8.9 (see below).
	(n) "Zero-rating" means exempting some Internet traffic from a customer's data limitation.	Also called "sponsored data plans."

2015 FCC RULES **47 CFR PART 8**	**1776. Prohibitions.** It shall be unlawful for an Internet service provider, insofar as the provider is engaged in providing broadband Internet access service, to engage in any of the following activities.	
§8.5 No Blacking. A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or non-harmful devices, subject to reasonable network management.	(a) Blocking lawful content, applications, services, or nonharmful devices, subject to reasonable network management practices.	No difference.
§8.7 No throttling. A person engaged in the provision of broadband internet access service, insofar as such person is so engaged, 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.	(b) 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.	The 2015 FCC "no throttling" rule is a clear and well-understood prohibition on the impairment or degradation of Internet traffic. SB 822 goes well beyond that concept by adding additional and confusing language to the rule including a prohibition on *any kind* of differential treatment. It is unclear what, if anything, that would mean in this context; i.e. a ban on the degradation of traffic.
	(c) Requiring consideration from edge providers, monetary or otherwise, in exchange for access to the Internet service provider's end users, including,	This prohibition is not in the 2015 Order. The language is very problematic as most edge providers today pay an ISP to be connected to the Internet. Peering,

	but not limited to, requiring consideration for either of the following: (1) Transmitting Internet traffic to and from the Internet service provider's end users. (2) Refraining from the activities prohibited in subdivisions (a) and (b).	which is a market-based arrangement between two ISPs to agree to exchange traffic as a barter transaction without the exchange of money, is not the most prevalent form of interconnection in the Internet. In fact, most edge providers pay an ISP to "connect" to the Internet and only a few of the biggest edge providers, like Google, Amazon and Netflix, have negotiated special arrangements. This provision, read literally, seems to completely up-end the market for interconnection and could be read to mandate "free" interconnection or prohibit negotiated arrangements. Although the 2015 FCC Order subjected the Internet traffic exchange arrangement of ISPs to oversight, it did not make any conclusive findings about the market or adopt substantive rules. This is another area where SB 822 goes well beyond the 2015 FCC Order and threatens significant regulation over an area that heretofore has been unregulated.
§8.9 No paid prioritization. (a) A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization.	(d) Engaging in third-party paid prioritization.	Recognizing that there may be instances in which paid prioritization is beneficial, the FCC could waive the ban if the petitioner demonstrated the practice would provide some significant public

(b) "Paid prioritization" 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. (c) The Commission may 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.		interest benefit and would not harm the open nature of the Internet. [47 CFR 8.9(c).] SB 822 does not provide for any waiver of the ban.
	(e) Engaging in application-specific differential pricing or zero-rating in exchange for consideration, monetary or otherwise, by third parties. (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.	SB 822 goes much farther than the FCC 2015 Order in this area as well. The FCC did not ban zero-rating or sponsored data plans, but stated instead it would review them under the internet conduct rule on a case-by-case basis: "Given the unresolved debate concerning the benefits and drawbacks of data allowances and usage-based pricing plans, we decline to make blanket findings about these practices and will

		address concerns under the no-unreasonable interference/disadvantage on a case-by-case basis." [FCC 2015, para. 152.] This provision in SB 822 would effectively ban any zero-rating. Consumers in California have been enjoying the benefits of zero rating since before the 2015 Order without evidence of any threat to an open Internet or to competition.
	(g) Engaging in application-specific differential pricing.	Because it is a unique rule and not subsumed by the general prohibitions against blocking and throttling, this is another area where SB 822 goes beyond the 2015 FCC Order. Moreover, it is not in the interest of consumers to ban outright any differentiation among applications when different applications have different bandwidth and latency requirements.
§8.11 No unreasonable interference or unreasonable disadvantage standard for Internet conduct. Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or	(h) 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,	SB 822(h) mirrors the FCC 2015 "Internet Conduct Rule." Unlike the 2015 Order, SB 822(h), however, does not include the "non-exhaustive" list of factors that the FCC used to assess Internet conduct to "enable flexibility in business

unreasonably disadvantage (i) an 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.	services, or devices available to an end user, subject to reasonable network management practices.	arrangements and ensure that innovation in broadband and edge provider business models is not unduly curtailed." [See FCC 2015 Order, 144, fn 344.] Instead, what constitutes unreasonable Internet conduct in California will be subject to interpretation by multiple jurisdictions and private parties leading to litigation, delay, and expense. Regardless, the general conduct standard was the most problematic substantive rule in the 2015 FCC Order. Having no boundaries, it gave broad discretion to the FCC to engage in a constant evolving standard of judgment. In effect, it fundamentally changed specific open Internet obligations to a Rorschach test, creating a "Mother-May-I" regime. Importing this regime to California would be a disaster. Also, this is clearly a common carriage requirement. Since the FCC has defined BIAS as an information service, common carrier rules cannot be applied, according to the DC Circuit's opinion in Verizon v. FCC. The FCC is the expert agency that has classified BIAS as an information service. The state does not have

		independent authority to classify it differently or to apply rules that are conflict with that classification.
	(i) 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.	The vague and overbroad language in SB 822 (i) would bring Internet traffic exchange agreements under the microscope and certain practices that benefit all parties could be prohibited when (i) is read together with (b). ISP Interconnection arrangements have always been the product of commercial negotiations. If an interconnecting carrier or an edge provider's ISP demands unreasonable interconnection terms and, as a result, the edge provider's traffic is degraded, SB 822 could force the ISP to accept those terms. Again, this provision goes beyond the 2015 FCC Order as the Wheeler FCC declined to directly regulate interconnection arrangements: "At this time, we believe that a case-by-case approach is appropriate regarding Internet traffic exchange arrangements between broadband Internet access service providers and edge providers or intermediaries—an area that historically has functioned without significant

		Commission oversight. Given the constantly evolving market for Internet traffic exchange, we conclude that at this time it would be difficult to predict what new arrangements will arise to serve consumers' and edge providers' needs going forward, as usage patterns, content offerings, and capacity requirements continue to evolve. Thus, we will rely on the regulatory backstop prohibiting common carriers from engaging in unjust and unreasonable practices. Our 'light touch' approach does not directly regulate interconnection practices." 2015 FCC Order, para. 203.] See also comments for SB 822, subsection (c), above.
	(j) Engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic, content, applications, services, or devices by the Internet service provider, or that misrepresent the performance characteristics or commercial terms of the broadband Internet access service to its customers. (k) Advertising, offering for sale, or selling broadband Internet access service	Not in 2015 Order. Not in 2015 Order. Overbroad. No materiality threshold.

	without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold. (l) 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.	Similar to 2017 FCC Transparency rule.
	(m) Offering or providing services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service, if those services satisfy any of the following conditions: (1) They are marketed, provide, or can be used as a functional equivalent of broadband Internet access service. (2) They have the purpose or effect of circumventing or undermining the effectiveness of this section. *(3) They negatively affect the performance of broadband Internet access service.*	This provision goes far beyond the FCC's 2015 Order. It could implicate enterprise services that are essentially like a BIAS service but subject to individually negotiated agreements. It could also affect specialized services like U-verse TV that are logically separated from BIAS service but are delivered over the last mile broadband infrastructure. The language in (m)(3) is so broad it could support a claim that reserving broadband capacity for things like U-verse TV is taking it away from BIAS

		and is therefore prohibited. Reserving bandwidth for driverless cars would also be prohibited under that logic. While the 2015 Order discusses ways in which non-broadband Internet access data service could have the effect of degrading BIAS service, the Order was clear that enterprise services and specialized services not included. [FCC 2015 Order, paras. 207, 208.]
	1777. Different Treatment (a) (1) An Internet service provider may offer different types of technical treatment to end users as part of its broadband Internet access service, without violating Section 1776, if all of the following conditions exist: (A) The different types of technical treatment are equally available to all Internet content, applications, services, and devices, and all classes of Internet content, applications, services, and devices, and the Internet service provider	"Technical treatment" is not defined in the bill giving the CPUC unfettered freedom to adopt the broadest possible interpretation of that phrase. For example, the CPUC could decide that the offering of different broadband speeds at different prices to end users is a "different type of technical treatment" subject to their regulatory scrutiny. In addition, because network management is a defined term in SB 822, technical treatment must mean something different and distinct. Does technical treatment mean tools that an ISP can provide to end users to help manage their own traffic? If so, why

	does not discriminate in the provision of the different types of technical treatment on the basis of Internet content, application, service, or device, or class of Internet content, application, service, or device. (B) The Internet service provider'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 type of technical treatment. (C) The Internet service provider charges only its own broadband Internet access service customers for the use of the different types of technical treatment.	would such heavy-handed approval by the CPUC be required since net neutrality has largely focused on how an ISP treats everyone's traffic, not on how end users choose to treat their own traffic. Or does technical treatment intend to cover forms of prioritization other than "third party paid prioritization" which is a defined term and banned under section 1776(d)? Subsections (A) through (C) are common carrier obligations, subjecting BIAS service to the same type of regulation that was once applied to monopoly telephone service.
	(2) Any Internet service provider offering different types of technical treatment pursuant to this subdivision shall notify the Public Utilities Commission and provide the commission with a specimen of any service contract that it offers to customers in California. (3) If an Internet service provider offers different types of technical treatment pursuant to this subdivision, the Public Utilities Commission shall monitor the quality of the basic default service and	Once the CPUC approves the "different type of treatment," it would have carte blanche to monitor the ISP's basic BIAS service and set service quality standards with no limitations, placing a severe constraint on Internet innovation in California. What ISP would want to subject its product and services to such scrutiny? And for what purpose? Aside from the impact on innovation and the uncertainty it creates, this provision

	establish minimum quality requirements if the offering of the different types of technical treatment degrades the quality of the basic default service.	effectively makes the CPUC the "ground regulator" of the Internet in California. This is something that Senator Weiner said he did not want to happen.
	(b) An Internet service provider may 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 provider's decision to zero-rate or to not zero-rate traffic.	This is effectively a complete ban on zero-rating, a service that consumers currently enjoy. Application-agnostic is defined so broadly in the bill that it is unclear, as a practical matter, how an ISP could zero-rate any particular traffic since it seems like any distinction would be based on either "content application, service, service or device, or class of internet content, application, service or device" which is prohibited under SB 822. What's left?