

California Senate Bill 822 Overreach of the 2015 Open Internet Order

California Senate Bill 822 ("Bill") adopts a full set of net neutrality rules that are **more restrictive** than the rules the FCC adopted in its 2015 Open Internet Order ("2015 Order").

New Requirements Inconsistent with the FCC 2015 Order.

SB 822 would add a series of explicit new requirements or prohibitions above and beyond the FCC's 2015 Order requirements. These include:

- **Reasonable Network Management Practices.** The 2015 Order prohibited Internet Service Providers (ISP's) from impairing or degrading lawful Internet traffic (content, application, or service, or use of a non-harmful device) subject to reasonable network management.

SB 822 goes well beyond that concept by adding additional and confusing language prohibiting *any kind* of differential treatment. It is unclear what, if anything, that would mean in this context. The 2015 FCC Order includes a clear and well-understood prohibition on the impairment or degradation of Internet traffic. SB 822 does not.

- **No Paid Prioritization.** SB 822 provides that an ISP shall not engage in paid prioritization.

The FCC 2015 Order provided a waiver of this ban if the practice would provide some significant public interest benefit and would not harm the open nature of the Internet. SB 822 does not provide for any such waiver of the ban.

- **Unreasonably Impedes Business Flexibility and Innovation.** Unlike the FCC 2015 Order, SB 822 does not include the "non-exhaustive" list of factors that the FCC used to assess Internet conduct to "enable flexibility in business arrangements and ensure that innovation in broadband and edge provider business models is not unduly curtailed." Under SB 822, what constitutes unreasonable Internet conduct in California will be subject to interpretation by multiple jurisdictions and private parties leading to litigation, delay, and expense.

Loss of Benefits to Consumers:

- **Application-Specific Differential Pricing & Zero Rating.**

Although the FCC investigated zero-rating practices under the general conduct standard adopted in the 2015 Order, it never adopted formal or *per se* limitations on these practices or application-specific differential pricing. In contrast, SB 822 would prohibit providers outright from:

- Engaging in **application-specific differential pricing** or **zero-rating** in exchange for consideration, monetary or otherwise by third parties, except that an ISP may zero-rate Internet traffic “in application-agnostic ways . . . provided that no consideration, monetary or otherwise, is provided by any third party in exchange for the provider’s decision to zero-rate or not zero-rate traffic.”

- **Prohibits Business to Business Interconnection Agreements.**

SB 822 goes well beyond the 2015 Order’s framework for regulating interconnection arrangements. The 2015 Order did not establish any *ex ante* rule for traffic exchange and did not prohibit ISPs from entering into direct connections or compensation arrangements with edge providers or their agents for transmitting traffic to end users. The 2015 Order merely asserted authority to adjudicate traffic exchange disputes on a case-by-case basis.

SB 822 goes well beyond the 2015 FCC Order and threatens significant regulation over an area that heretofore has been unregulated.

The language is very problematic as most edge providers today pay an ISP to be connected to the Internet. Some 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 seems to mandate “free” interconnection or prohibit negotiated arrangements.

- **Transparency.**

SB 822 would adopt a transparency rule that is substantively the same as the rule the FCC reaffirmed in the 2015 Order but goes further in establishing a vague and overly broad standard that prohibits ISPs from 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.

- **Procurement.**

SB 822 prohibits “public entities” from purchasing, or providing funds for the purchase of, service from an ISP that is in violation of the rules listed above, unless the ISP is the only provider in the geographic area. The 2015 Order did not seek to impose any such requirement for federal agencies or other public entities.

- **Franchising.**

While the 2015 Order did not address franchising issues, SB 822 would amend California’s **video** franchising rules to require that a franchising applicant include in its initial or renewal application that the “applicant or its affiliates” agree to comply with SB 822’s net neutrality and transparency rules, which the bill codifies in the California Public Utilities Code as additional prohibitions applicable to cable operators or video service providers granted a California state video franchise.

- **Enforcement Mechanisms**

The substantive requirements in SB 822 purport to apply to all ISP’s in California, enforced by the threat of an enforcement action by the California Attorney General’s Office and/or by suits filed by a city or district attorney. As the FCC’s *Restoring Internet Freedom Order* has expressly preempted most substantive regulation of the Internet by state and local governments, those generally-applicable substantive requirements are very likely to be preempted unless the *Restoring Internet Freedom Order* is itself reversed by the courts.

SB 822 creates two additional, severable enforcement mechanisms for its substantive requirements:

First, it would require all public contracts with ISPs (and for broadband infrastructure projects) to incorporate net neutrality provisions, rendering those contracts voidable in the event of a violation.

Second, it would amend the California Digital Infrastructure and Video Competition Act (“DIVCA”) to condition the grant of state *video* franchises (which are awarded exclusively by the California Public Utilities Commission) upon an applicant’s commitment to abide by the bill’s substantive internet neutrality requirements, and makes that commitment widely enforceable (by the CPUC, by the Attorney General, and/or by suits filed by a city or district attorney).

