

April 11, 2018

The Honorable Ben Hueso
Chair, Senate Energy, Utilities and Communications Committee
State Capitol, Room 4035
Sacramento, CA 95814

RE: Support for SB 822 (Wiener) As Amended on March 13, 2018

Dear Senator Hueso,

We, the undersigned organizations, write to express strong support for SB 822. The bill comprehensively restores the net neutrality protections embodied in the Federal Communications Commission's 2015 *Open Internet Order* for Californians.

We have long supported strong, enforceable net neutrality protections to ensure an open internet for consumers, free of interference by internet service providers (ISPs) that Americans pay to get online. Net neutrality is the simple principle that consumers—and not their ISPs—get to choose what apps, services and websites they want to use. Net neutrality ensures that competition and the free market, not backroom agreements and self-dealing by ISPs, determine winners and losers online, and that all voices, including those of speakers without deep pockets, have a fair chance to be heard online.

In 2015, after years of challenges by ISPs to the FCC's work to protect consumers, the FCC passed the *2015 Open Internet Order*, which adopted critical consumer and business protections using a sustainable legal underpinning. These protections were formulated based upon an extensive rulemaking record and the support of millions of consumers, and have survived ISP court challenges twice.

All of this changed last December when the FCC, under new leadership, voted to approve an order (ironically titled the *Restoring Internet Freedom Order*) that, for all intents and purposes, repealed the Commission's very own net neutrality rules. This action will undo decades of FCC work by commissioners of both parties to ensure the internet remained open for free speech and innovation.

The 2017 net neutrality repeal will go into effect soon, leaving Americans unprotected from interference by their ISPs. We believe states are both wise and well within their authority to enact measures that restore net neutrality. Therefore, we support and applaud California's SB 822, which will re-establish, at least for California consumers, the vital net neutrality protections for consumers that were in the 2015 net neutrality order.

The California bill successfully translates these protections into legislative language. Importantly, the bill does not merely copy the text of the actual net neutrality rules, but

incorporates critical protections included in the text of the 2015 Order. This is essential in order for the bill to restore all of the protections in the 2015 Order. An agency can clarify aspects of its rules in the text of the Order adopting a rule. Legislators do not have that luxury.

Like the *2015 Open Internet Order*, the bill prevents ISPs from blocking, slowing down or speeding up websites, apps, and classes of apps; charging websites for access to the ISPs' customers or for prioritized access to those customers; and circumventing net neutrality rules through interconnection practices.

As Americans learned the hard way, preventing ISPs from circumventing net neutrality protections through interconnection practices is a critical component of an effective net neutrality regime. (Interconnection means the point where data enters the ISP's network.) Excluding interconnection from the scope of the bill would re-create a loophole that ISPs have exploited before. The FCC's 2010 net neutrality rules were not thought to cover interconnection. Applying an empirical analysis of the widely-reported interconnection disputes of 2013 and 2014, New America's Open Technology Institute first uncovered interconnection congestion practices by ISPs in a groundbreaking 2014 report.¹ And, as the New York Attorney General further explained in its comments in the FCC's 2017 proceeding, its investigation of major ISPs also unearthed documentary evidence that:

“[F]rom at least 2013 to 2015, major BIAS providers made the deliberate business decision to let their networks' interconnection points become congested with Internet traffic and used that congestion as leverage to extract payments from backbone providers and edge providers, despite knowing that this practice lowered the quality of their customers' Internet service. This practice was not limited to a single instance or locality: NYOAG has found that this practice was used for years by at least two of the country's biggest BIAS [Broadband Internet Access Service] providers who operate in New York and in many other states.”²

This behavior directly harmed consumers who had paid their ISPs for good connections to the internet. Internet applications, content, and services coming into the ISPs' networks through these congested connections became effectively unusable in the evening. These problems were widespread, well-documented, and affected more than three-quarters of American broadband consumers for more than a year. It was in response to these problems that the FCC in its *2015 Open Internet Order* decided to ensure that ISPs cannot circumvent net neutrality protections through interconnection practices by adopting oversight over interconnection with last-mile ISPs under Sections 201 and 202 of the Communications Act.

¹ Open Technology Institute, New America, *Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes*, (November 14, 2014), available at <https://www.newamerica.org/oti/policy-papers/beyond-frustrated-the-sweeping-consumer-harms-as-a-result-of-isp-disputes/>.

² Comments of The People of the State of New York by Attorney General Eric T. Schneiderman (NY Attorney General), *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, at 2. (filed Jul. 17, 2017). available at <https://www.fcc.gov/ecfs/filing/10717583023587>.

These problems only ended either when companies started to pay for interconnection, or for those that did not pay, when the FCC's *2015 Open Internet Order* went into effect. Thus, before 2015, consumers had to suffer slow, clogged connections to edge providers who refused to pay the consumer's ISP, or faced higher costs passed onto them by edge providers who chose to pay ISPs. Therefore, if interconnection practices are left unaddressed by California's efforts to restore net neutrality, we fear this anti-consumer nightmare will be repeated in the future.

In addition to codifying the general conduct rule that was part of the 2015 net neutrality rules, SB 822 establishes additional bright-line rules that prohibit certain forms of zero-rating that run afoul of net neutrality principles, while explicitly allowing zero-rating practices that do not raise net neutrality concerns. California is correct to enact strong rules that prohibit harmful forms of economic discrimination. Without such a ban, ISPs would be granted a loophole to flout net neutrality principles.

Consumers understand the importance of net neutrality for their internet experience. In a survey last summer, Consumers Union, in partnership with its publication, Consumer Reports, asked more than a thousand consumers about the role of the internet in their everyday lives, and whether they supported the FCC's current net neutrality rules.³

The survey results demonstrate how important access to the internet has become in our everyday lives. When consumers were asked how often it is necessary for them to access the internet or use other services provided by their ISP without disruption to carry out their daily activities, 79 percent of those with an ISP responded that they rely on the internet five or more days a week and more than two-thirds needed access to the internet every day. Moreover, more than 60 percent of American consumers equate the importance of internet service to that of water or electricity service.

Surveys also show that Americans overwhelmingly support the FCC's existing net neutrality protections. Our survey asked consumers whether or not they supported the FCC's net neutrality rules. We specifically used the FCC's description of those rules. More than half of consumers—57 percent—responded that they supported the FCC's net neutrality rules. Only 16 percent said they either strongly opposed or somewhat opposed the rules. Other surveys conducted last year corroborate and show even stronger support for net neutrality. A recent University of Maryland survey, which first briefed respondents on what net neutrality rules required of ISPs and then asked them to evaluate arguments for and against the rules, demonstrated that a bipartisan majority of 83 percent opposed the repeal of the FCC's net

³ See Appendix, Reply Comments of Consumers Union, *In the Matter of Restoring Internet Freedom*, WC Docket No. 17-108, (filed Aug. 30, 2017), available at <http://consumersunion.org/wp-content/uploads/2017/09/FINAL.NN-NPRM-reply-comment-CU.830.17.pdf>.

neutrality protections, including three out of four Republicans.⁴ Nonetheless, the FCC ignored this widespread support for net neutrality and chose to deregulate ISPs over protecting consumers and preserving an open internet.

California consumers and businesses alike need and will benefit from the protections that SB 822 would provide, and we fully endorse your efforts. This pro-consumer legislation would preserve net neutrality principles and the internet as we know it, and maintain an open internet that is vital to consumers' everyday experience. Consumers benefit when the internet is a level playing field and not a place where ISPs can pick winners and losers by blocking or throttling competitors, or by charging websites and services access fees that will harm startups and small businesses and ultimately will be passed on to consumers.

We urge you and your colleagues to resist attempts by ISPs or others to amend SB 822, as we fear such tactics will only serve to dilute a full restoration of net neutrality in California. Net neutrality protections work as a whole. Removing some protections makes the whole regime meaningless by allowing ISPs to reach the same result in a different way.

Please do not hesitate to contact us should you need any further assistance in seeing SB 822 enacted into law.

Sincerely yours,

18MillionRising.org
Access Humboldt
Califa
CCTV Center for Media & Democracy
Center for Democracy and Technology
Center for Media Justice
Center for Rural Strategies
Color Of Change
Common Cause
Consumers Union
CreaTV San Jose
CREDO Action
Daily Kos
Demand Progress Action
Democracy for America
Disability Rights Education & Defense Fund

⁴ Univ. of Maryland, School of Public Policy Program for Public Consultation, *Overwhelming Bipartisan Majority Opposes Repealing Net Neutrality*, (Dec. 12, 2017), available at <https://www.publicconsultation.org/united-states/overwhelming-bipartisan-majority-opposes-repealing-net-neutrality/>.

EveryLibrary
Faithful Internet
Fight for the Future
Friends of the Millbrae Public Library
Greenpeace USA
Indivisible CA: StateStrong
Indivisible SF
Indivisible Sonoma County
May First/People Link
Mechanics' Institute Library
Media Alliance
Media Mobilizing Project
National Consumer Law Center, on behalf of its low-income clients
National Hispanic Media Coalition
Oakland Privacy
OpenMedia
PEN America
People Demanding Action
Progressive Technology Project
Public Knowledge
RootsAction.org
SumOfUs
The Greenlining Institute
TURN - The Utility Reform Network
World Wide Web Foundation
Writers Guild of America West

cc: Members of the Senate Energy, Utilities and Communications Committee
Nidia Bautista, Consultant, Senate Energy, Utilities and Communications Committee
Kerry Yoshida, Consultant, Senate Republican Caucus