



April 10, 2018

Senator Ben Hueso
Chairman
Senate Committee on Energy, Utilities & Communications
CA State Capitol, Room 4035
Sacramento, CA 95814

Re: SB 822 (Weiner) – OPPOSE

Dear Chairman Hueso:

On behalf of USTelecom’s members, broadband providers of all sizes investing billions of dollars each year to deliver high speed internet service to connect businesses and consumers, I appreciate the opportunity to share some thoughts with you on net neutrality and the negative impact that SB 822 is likely to have on consumers and businesses in California.

The Internet Has Thrived Outside of Utility-Style Regulation

To be perfectly clear, all of USTelecom’s members support an open internet and net neutrality: the principle that consumers should be able to access all legal content and applications, regardless of the source. Our members, large and small, have adhered to the principles of net neutrality for years and are committed to continuing to do so.

The current net neutrality debate is not about whether we should have an open internet, but rather what is the best legal framework for keeping the internet open. The basic legal framework that was put into place by the Communications Act of 1934, for voice telephone service has never been the right framework for broadband. Fortunately, under the leadership of President Bill Clinton and Vice President Al Gore, Congress passed an update to the Act in 1996. The internet was in its infancy then, but there was a strong bipartisan consensus that it should not be regulated under the existing 1934 public utility framework. Congress declared emphatically and with bipartisan support that “it is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet ... unfettered by State or Federal regulations.” 47 U.S.C. §230(b)(2).

Federal Communications Commission Chairman Bill Kennard, a California native and Stanford graduate, appointed by President Clinton, noted that “the best decision government ever made with respect to the internet was ... not to impose regulation on it.” Kennard’s future-focused and pro-consumer philosophy became the lodestar for internet policy, allowing the internet to thrive under a single federal framework that did not impose a rigid set of rules.

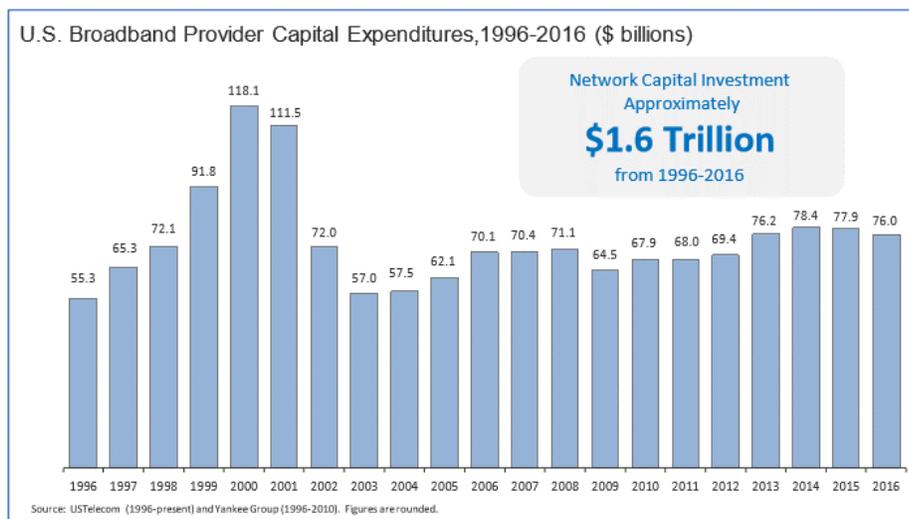
This progressive, balanced, and pro-consumer internet policy — the belief the internet should be allowed to grow and innovate outside of a rigid bureaucratic framework — was a bipartisan success for two decades, bringing countless new opportunities and transformative services to

American consumers, and creating millions of good jobs along the way. A number of good things resulted: broadband providers invested over 1.5 trillion dollars building broadband networks, innovation thrived and new internet content, applications and business models became part of our daily lives. Consumers accessed the content they wished — as they wanted to. And entrepreneurs built internet companies from tiny start-ups to giant economic forces that all of us use. Among the principal beneficiaries of this light touch, pro-innovation, and pro-consumer approach have been California’s economy and citizens, along with its countless, world-leading technology companies, innovators, and investors that call California their home, from Imperial Beach to Crescent City.

In 2015, and despite the manifestly open and thriving internet we have all been experiencing, the FCC undertook a major change of course. Breaking with years of success, and the forward-looking, pro-innovation policy approach put in place under President Clinton and supported by President Obama and his FCC Chair for the first six years of his Administration, the FCC adopted net neutrality rules that placed internet access under the outdated public utility framework of the 1934 Act.

Although we support net neutrality, our concern was that this heavy-handed public utility framework would inevitably chill investment and innovation. And it appears to have done so, with investment in broadband infrastructure declining by about \$2 billion dollars from its recent peak in 2014 of roughly \$78 billion. (USTelecom analysis available at: <https://www.ustelecom.org/broadband-industry-stats/investment/historical-broadband-provider-capex>). It also increased the long-term risks to further development and growth of the internet and internet economy. Further, the reclassification greatly increased uncertainty as companies tried to develop new consumer-friendly options like free or sponsored data.

Competing Broadband Providers Have Invested \$1.6 Trillion in Capital since 1996

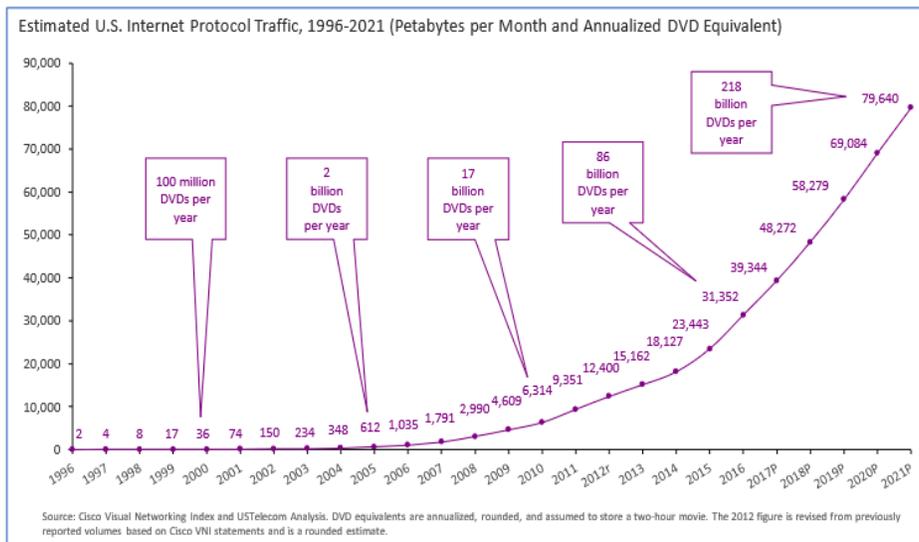


Data includes wireline, wireless, and cable providers.

The FCC's Recent Action Restores the Historic Light-Touch Approach to Encourage Investment

In 2017, the FCC rescinded this decision and returned the internet to the light touch approach that had been so successful in the preceding years. We support the FCC's recent action because of the harmful effect the 2015 public utility framework had on investment and the potential long-term impact it will have on consumers. Without high and rising levels of broadband investment and innovation, we will never be able to connect more Americans to the internet, and we will not be able to reduce the barriers to adopting and using the internet that keep too many people from reaping the benefits of connecting to the internet. Similarly, without rising investment and innovation, broadband networks will not be able to meet the skyrocketing demand — as shown below — from already connected consumers for more and faster access to higher quality content and services delivered 24/7.

Internet Protocol Traffic Continues Rapid Growth



U.S. IP traffic is projected to grow 2.5x in the next five years

The FCC's recent action restores a pre-2015 framework that long supported and will now continue to support more investment and innovation, which will be necessary to help meet the growing needs of consumers and small businesses, while putting in place a strong consumer protection framework. The FCC requires providers to be transparent with their customers about the services they provide and how they run their networks. If they are not, the FCC has pledged to take action. Further, the FCC's recent decision puts the Federal Trade Commission firmly back in the driver's seat when it comes to consumers and their expectations about their broadband service.

The two agencies have signed an agreement to work together in this area creating a unified federal framework. The FTC is the nation's leading consumer protection agency — committed to preventing unfair and deceptive acts and practices — and shares authority with the Department of Justice over preventing anti-competitive actions that threaten harm to consumers or competition. Practices by internet service providers, websites, search engines or others that threaten to harm or deceive consumers, or that may be unfair to consumers are subject to FTC review and action. The FTC's vast experience with enforcing consumer and competition protections, coupled with strong coordination with the FCC, puts two federal agencies on the consumer protection beat. And, the FCC has recognized that enforcement of general consumer protection laws by state Attorneys General adds another layer of protection.

States Should Not Undermine Efforts to Increase Investment and Innovation

But state laws such as SB 822 will undermine these pro-investment and pro-innovation changes. By explicitly attempting to impose a broad set of dictates on internet network operations, and by giving the state PUC broad authority to define obligations and micromanage technical aspects of internet service not only in California, but in other states as well, SB 822 will harm California consumers and businesses that depend on the internet.

The proposed state net neutrality rules on the operation of internet access service are also in direct contravention of the FCC's recently adopted framework. Whether these mandates on operating broadband networks are proposed to be implemented through regulating broadband internet service directly or through state purchasing or through video service franchising, they are subject to preemption.

The internet is an inherently interstate or international service, and has always been viewed as such by the FCC and the courts. When a single webpage loads on a computer in California it can bring with it bits and pieces of content from dozens of computers located in different states and possibly different countries. It would be impossible to separate out traffic that might somehow flow only within a particular state. Given how internet traffic flows between, among and across states, a patchwork of state laws attempting to regulate how content and services are delivered over the internet would simply be unworkable. Separate California laws attempting to regulate the same conduct through different avenues interpreted by different state bodies including the PUC and public agency purchasing entities would create an overlapping patchwork even within the state.

Some of the threats to the operation of the internet in the proposed legislation are particularly worth highlighting both because of the way they would interfere with providing internet service to consumers and because of the virtually unlimited authority they would grant the CPUC over the operation of the internet both in California and outside of it. For example, Section 1776(i) would for the first time establish state oversight through the CPUC over internet interconnection, specifically over practices relating to "traffic exchange" between an internet service provider and other networks. The internet is a series of interconnected networks exchanging traffic all over the United States and the world at locations scattered around the globe. The practices around exchanging traffic have developed outside of regulatory oversight, constantly evolving to take into account the growth of the internet and new technologies. In addition, traffic exchange agreements that the proposed legislation appears to include typically cover traffic flows between providers on a

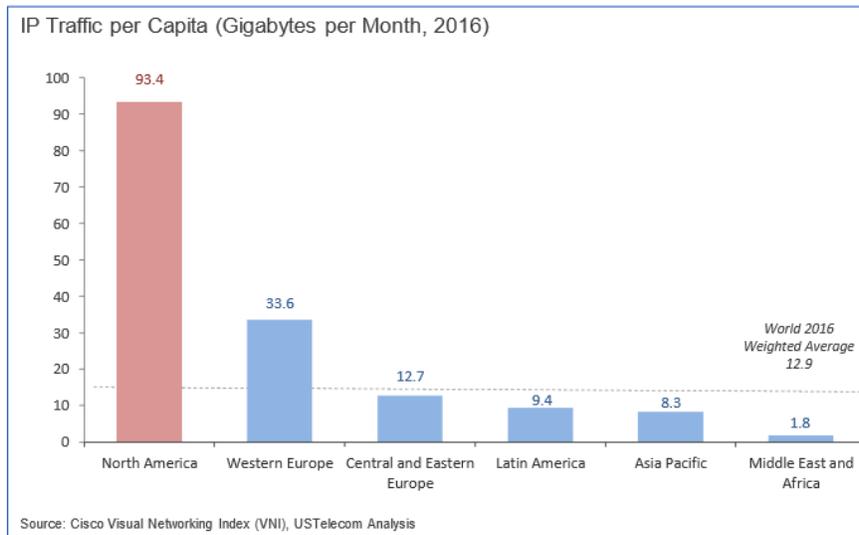
regional, national or global basis. The agreements do not separate out traffic flowing to particular states. California has led the world in innovations around internet networks and rethinking of old ways of connecting and exchanging traffic. Granting the CPUC authority to oversee and manage how traffic flows over the internet is unlikely to help maintain California's lead.

In addition, section 1777 creates a wholly new set of restrictions around "technical treatment" of broadband internet access service offered to end users. This term has not appeared in FCC orders and is wholly undefined. In fact, SB 822 would go far beyond even the misguided FCC 2015 order in other respects as well. Section 1776(h) appears to prohibit any conduct that "unreasonably" disadvantages any consumer or edge provider. Internet providers that are investing billions of dollars annually in order to upgrade networks and push internet connectivity deeper into rural areas will be left to guess whether their internet access services may not be providing the right "technical treatment" or may somehow be "disadvantaging" an edge provider somewhere, somehow. It is up to the CPUC to interpret these terms. Providers are required to provide notifications to the CPUC and the CPUC is empowered to "monitor the quality" of internet service and to set minimum quality standards. Again, creating legal hurdles to offering innovative internet services will not serve the internet and those who depend on it well. Further, granting the PUC authority to set standards for network operations, to define the "quality" of how the internet operates and to decide on "technical" issues is far more likely to slow or stop the growth of the internet in California than to help it.

In addition to being unwise, state efforts to regulate the internet that are directly inconsistent with federal policies, as these would be, would also be preempted by federal law. As detailed above, the FCC has put into place a carefully calibrated framework to both protect consumers and competition on the internet and to encourage the investment and innovation we need to broaden the reach of our networks and increase their capacity. This federal policy cannot be overridden by separate state laws or regulations, whether directly or indirectly, for example, through state purchasing of video franchising. This proposed legislation would put in place a system of state regulation of providing internet access service that the FCC has explicitly rejected. By doing this, the bill would run directly counter to the FCC's recent order and is unlikely to withstand legal review.

USTelecom members and other broadband providers have invested \$1.5 trillion dollars over the last twenty years building the best – as measured by usage – internet networks in the world, as we show below. These networks will flourish best when governed by a single, efficient set of rules, rather than a patchwork of state and local regulations.

North America Leads in IP Traffic per Capita



To help maintain our nation's — and California's — global internet lead, we support Congress putting into place permanent, enforceable federal net neutrality rules that reflect a modern pro-consumer approach to broadband and the internet. These rules should guarantee consumers a clear, single set of protections that will be in force as they use the internet wherever they are. A permanent federal legislative framework, rather than countless state or local laws, will provide consumers with the internet protections they deserve and broadband providers with the clarity they need to continue investing billions to deliver internet service across the country.

Sincerely,

Jonathan Spalter

cc: Senator Scott D. Wiener
Senator Mike Morrell (Vice Chair)
Senator Steven Bradford
Senator Anthony Cannella
Senator Robert M. Hertzberg
Senator Jerry Hill
Senator Mike McGuire
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