

California Enacts the Nation’s Strictest Net Neutrality Law, Defying the FCC

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On September 30, 2018, Governor Jerry Brown of California signed the California Internet Consumer Protection and Net Neutrality Act of 2018, making California the fourth state to enact a state-level net neutrality law since the FCC repealed its nationwide regulations earlier this year.¹ Six states have issued executive orders forbidding state agencies from contracting with ISPs that do not adhere to net neutrality guidelines.² The new law makes California the second state, after Washington, to mandate that all ISPs operating in the state must provide broadband services in accordance with state net neutrality requirements. In passing the law, California has directly defied the FCC, which claimed to preempt all state-level net neutrality regulations in its *Restoring Internet Freedom* order.³ Within hours of the California law’s enactment, the U.S. Department of Justice filed suit in the Eastern District of California, arguing that federal law preempts the new California statute. DOJ also filed a motion for preliminary injunction to prevent the California law from going into effect.

What’s in the California Net Neutrality Act?

The California law imposes net neutrality requirements that were previously a part of the FCC’s rules, including bans on blocking, throttling, paid prioritization, and other practices that unreasonably interfere with consumers’ ability to access content. The California Net Neutrality Act also prohibits paid and application-specific “zero-rating” of internet traffic—banning fixed and mobile ISPs from accepting payment and exempting certain applications or websites from data caps. It also applies to network interconnection and forbids traffic exchange practices

¹ Washington enacted legislation requiring all Internet Service Providers (ISPs) operating in the state to adhere to provisions like those in the 2015 FCC order on net neutrality. *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015). Oregon and Vermont have enacted legislation requiring ISPs that contract with the state to abide by similar net neutrality rules.

² They are Hawaii, Montana, New Jersey, Rhode Island, Vermont, and New York.

³ *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108, FCC 17-166, 117–123 ¶¶ 194–204 (released Jan. 4, 2018) (“Restoring Internet Freedom Order”).

that have the effect of blocking, throttling, or unreasonably interfering with broadband service.⁴ California is the first jurisdiction to address both practices with up-front rules.

Additionally, the California law includes an explicit ban on ISPs requiring access fees from edge providers that is separate from, but works in tandem with, the provisions on paid prioritization and interconnection. It further forbids ISPs from offering other services over the same last-mile connection as broadband services if the additional service is intended to evade the net neutrality law or “negatively affect[s] the performance” of the broadband services. ISPs are also required to publicly disclose information sufficient to inform consumers about the network practices, performance, and commercial terms of their broadband service offerings. The law applies to both fixed and mobile broadband services. Absent an injunction, the California law will take effect on January 1, 2019.⁵

How Will the California Net Neutrality Act be Enforced?

The California Net Neutrality Act does not contain a specific enforcement provision or private right of action, but is expected to be enforced under the California Unfair Competition Law.⁶ The Unfair Competition Law allows the Attorney General and other state and local officials to seek an injunction and/or civil damages of up to \$2500 per violation.

What About Preemption?

When the FCC repealed the 2015 nationwide net neutrality requirements earlier this year, it stated that it was “preempt[ing] any state or local requirements that are inconsistent with the federal deregulatory approach.”⁷ In the pending D.C. Circuit lawsuit against the FCC’s decision, several parties, including 22 State Attorneys General, have argued that FCC preemption decision is unlawful. Among other arguments, these states stress that given the FCC’s view that it lacks authority to regulate ISPs, the FCC cannot claim authority to stop states from doing so.

⁴ The law does not prevent ISPs from entering into interconnection agreements, including paid peering or transit arrangements, however, so long as the goal of the agreement is not to “evade the prohibitions” of the law.

⁵ See Cal. Gov’t Code § 9600(a).

⁶ Cal. Bus. & Prof. Code § 17200 *et seq.*

⁷ Restoring Internet Freedom Order at 117–118 ¶ 194.

Whether the FCC can lawfully preempt state net neutrality actions—either across-the-board or with respect to specific state net neutrality laws—remains uncertain.⁸ Within hours of the California law’s enactment, DOJ filed a lawsuit and preliminary injunction in the Eastern District of California to block it. DOJ argues that federal law preempts the California law and that the Eastern District of California court must presume the validity of the FCC’s preemption decision and stop the law from going into effect until the D. C. Circuit rules on the challenge to the FCC’s order.

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For more information on the impact of the California Internet Consumer Protection and Net Neutrality Act of 2018 please contact [Stephanie Weiner](#), [Austin Bonner](#), or the HWG lawyer with whom you regularly work.

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⁸ To date, no lawsuits have been brought with respect to Washington’s net neutrality law, which went into effect in June, or with respect to the laws and executive orders preventing state governments from contracting with ISPs that fail to follow net neutrality guidelines.