



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Nora Frimann
City Attorney

SUBJECT: Amicus brief in support of
Defendants-Appellees in *ACA
Connects – America’s
Communications Association
vs. Rob Bonta, in his official
capacity as Attorney-General of
California*

DATE: May 7, 2021

COUNCIL DISTRICT: Citywide

RECOMMENDATION

Direct the City Attorney to join an amicus brief being drafted by the County of Santa Clara to provide the perspective of local governmental entities in support of the California Attorney General in defending a challenge to S.B. 822 which provides net neutrality protections.

BACKGROUND

In 2017, the Federal Communications Commission issued regulations that effectively limited net neutrality protections that had been in place for many years. In response, the California Legislature enacted S.B. 822 which, in part, provides protections that allow local governments unblocked internet access to fulfill their core missions of protecting the public health and safety. The net neutrality rules found in S.B. 822 prohibit certain blocking, throttling, impairing, or otherwise degrading internet traffic based on its source or content.

The County Counsel of Santa Clara County is drafting an amicus curiae brief in support of the defendant-appellee Attorney General in a case challenging and seeking to enjoin the enforcement of S.B. 822, *ACA Connects – America’s Communications Association vs. Rob Bonta, in his official capacity as Attorney-General of California*. The County Counsel has invited the City of San Jose, along with other local entities, to join the brief. The brief will be filed with the Ninth Circuit Court of Appeals on Tuesday, May 11, 2021, and will focus on the need of local governments for net neutrality.

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ANALYSIS

In a world increasingly dependent on near-instant communications over broadband internet, local governments, including the City of San Jose, depend on their own and their residents' reliable and unfettered internet access to perform many of their core functions. The City of San Jose and other local public entities have invested millions of dollars in modern, broadband-based communications systems, used for critical, time-sensitive, and information-intensive operations. Interference with these systems impairs—in profound, sometimes life-risking ways—local governments' ability to respond to and recover from emergencies and natural disasters, conduct public health operations, provide healthcare, and perform effective law enforcement and other public safety functions. S.B. 822 protects the neutrality of the Internet by prohibiting Internet service providers (ISPs) providing mass-market broadband Internet access service (BIAS) from blocking, throttling, impairing, or degrading Internet traffic based on that traffic's source or content, or based on a content provider's payment or refusal to pay for favorable treatment (the "Net Neutrality Rules").¹

As local California jurisdictions, cities and counties are responsible for protecting the health and wellbeing of tens of millions of Californians, including by operating emergency operations centers, public health departments, health and hospital systems, communications systems and other public services. Local public entity investments in broadband-based communications systems to exchange information with the public underscore their reliance on a *neutral* Internet—that is, an Internet in which the public can reliably access critical information from the governments that serve and protect them. S.B. 822's net neutrality protections target one particularly harmful set of entirely avoidable practices that interfere with these systems and that are, as a result, of special importance to local public entities.

COORDINATION

The City Attorney's Office has coordinated with the City Manager's Office in bringing this matter to Council for direction.

CEQA

¹ The Net Neutrality Rules most directly at issue in the brief are those that prohibit ISPs from blocking, throttling, impairing, or otherwise degrading lawful Internet traffic, engaging in pay-to-play schemes such as paid prioritization, or otherwise interfering with lawful Internet traffic, on the basis of the traffic's source or content. See Civ. Code § 3101(a)(1), (2), (3), (4), (7) (describing and prohibiting these practices).

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Pursuant to the provisions and requirements of the California Environmental Quality Act of 1970, together with related State CEQA Guidelines and Title 21 of the San José Municipal Code, the Director of Planning, Building and Code Enforcement has determined that a legal brief of this nature does not constitute a project, under File No. PP17-008 (General Procedure and Policy Making resulting in no changes to the physical environment).

NORA FRIMANN, City Attorney

/s/ Nora Frimann

NORA FRIMANN
City Attorney

cc: Dave Sykes