



**New England Cable & Telecommunications Association, Inc.**  
**Ten Forbes Road • Suite 440W • Braintree, MA 02184**  
**TEL: 781.843.3418 • FAX 781.849.6267**

*New England Cable & Telecommunications Association, Inc.*

## **H.297 Analysis**

Although there are other issues with Draft 4.1 (the “Draft Bill”), the following are of principal concern from the standpoint of telecommunications law and policy:

A state Telecommunications Plan is to be developed by the Agency of Administration, with the assistance of the Department of Public Service, the Department of Innovation and Information, and the Agency of Commerce and Community Development. As required by new § 2226(c), the Telecommunications Plan thereby developed would conform with the policies and goals of proposed new §§ 2225 and 2226. Those policies and goals include the following:

- Open access among competitive service providers on nondiscriminatory terms to networks over which broadband and telecommunications services are delivered. § 2225(b)(6).
- Deployment of broadband infrastructure that: (A) uses the best commercially available technology, and (B) does not negatively affect the ability of Vermont to take advantage of future improvements in broadband technology or result in widespread installation of technology that becomes outmoded within a short period after installation. § 2225(b)(8).
- Minimum technical service characteristics [that] ought to be available as part of broadband services commonly sold to residential and small business users throughout the State.” § 2226(b).

The Draft Bill’s proposal for the planning of broadband deployment and development of telecommunications services in the state, as well as the foregoing policies and goals, are reiterations of existing Vermont law and, thus, are not new concepts. *See* 30 V.S.A. §§ 202c (State communications; policy and planning), 202d (Telecommunications plan) and 8077 (Establishment of minimum technical service characteristic objectives). Existing Vermont law also refers to consistency with some of the foregoing policies and goals as an objective for facilities-based telecommunications service providers in the state. *See* 30 V.S.A. § 248a(a).

What is new is that the Draft Bill would confer the Public Service Board (the “Board”) jurisdiction to apply the Telecommunications Plan, including, potentially, the Plan’s objectives pertaining to open access, nondiscrimination, service characteristics and best available technology,

to broadband Internet access service when an applicant requests authority from the Board to offer telecommunications service authority:

§ 248a Certificate of Good for Communications Facilities - The Draft Bill would give the Board authority to grant such a certificate “if it finds that the facilities will promote the general good of the State consistent “with the State Telecommunications Plan.”

§ 231 Certificate of Good - the Draft Bill would give the Board authority to grant such a certificate if the business will promote the general good of the State “and conforms with the State Telecommunications Plan, if applicable.”

In addition, the Department of Public Service, which represents the public interest in utility and telecommunications service-related proceedings before the Board, would acquire authority to administer the broadband funding subsidies of the Vermont Universal Service Fund (the “VUSF”) as authorized by the Draft Bill, and, in so doing, enforce the objectives of the Telecommunications Plan. *See new § 7516(b)(7)*

Therefore, and as explained below, the administration of the Telecommunications Plan’s requirements of open access, nondiscrimination, service characteristics and best available technology, potentially subjects broadband Internet access services to common carrier service regulation. In particular, the requirements of the Telecommunications Plan pertaining to broadband Internet access service could be taken into account not only with regard to awarding grants under the VUSF, but also with regard to the Board’s decisions to award or deny certifications to provide telecommunications service in Vermont. To subject broadband Internet access services to state regulation associated with the telecommunications services of an applicant for certification before the Board would violate federal law.

Regulation of telecommunications service in Vermont, as elsewhere, is done through a partnership between federal and state authorities. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 2013 VT 23 (Vt. Sup. Ct. March 29, 2013), para. 6 (citing *In re Verizon New England Inc.*, 173 Vt. 327, 332, 795 A.2d 1196, 1200-01 (2002)). The Vermont Legislature has delegated authority to the Board by authorizing it to regulate companies “offering telecommunications service to the public on a common carrier basis.” 30 V.S.A. § 203(5). “Telecommunications service” is defined by Vermont law as “the transmission of any interactive two-way electromagnetic communications, including voice, image, data and information.” *Id.* The statute provides that transmission of electromagnetic communications “includes the use of any media such as wires, cables, television cables, microwaves, radio waves, light waves or any combination of those or similar media.” *Id.* While Vermont’s statutory definition of “telecommunications service” is broad, Vermont’s authority to regulate telecommunications within the state may not be inconsistent with federal law. *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, 2013 VT 23 (Vt. Sup. Ct. March 29, 2013), para. 7 (citing *Verizon New England, supra*, 173 Vt. at 332, 795 A.2d at 1200-01).

In 2005, the United States Supreme Court upheld the Federal Communications Commission's (the "FCC") determination that broadband Internet access – specifically, cable modem service – is not a "telecommunications service," but an "information service." See *National Cable & Telecommunications Association et al. v. Brand X Internet Services et al.* ("Brand X Internet Servs."), 545 U.S. 967, 972 (2005). As explained by the Board in its October 28, 2010 Order *In re Investigation into Regulation of Voice Over Internet Protocol (VoIP) Services*, Docket No. 7316:

The [federal Telecommunications Act of 1996 ("1996 Act")] defines two categories of regulated entities: telecommunications carriers and information-service providers. The 1996 Act regulates telecommunications carriers, but not information-service providers, as common carriers. Telecommunications carriers, for example, must charge just and reasonable, non-discriminatory rates to their customers, 47 U.S.C. §§ 201-209, design their systems so that other carriers can interconnect with their communications networks, § 251(a)(1), and contribute to the federal "universal service" fund, § 254(d). Information-service providers, by contrast, are not subject to mandatory common-carrier regulation under the 1996 Act, though the FCC has jurisdiction to impose additional regulatory obligations if it so chooses. *Brand X Internet Servs.*, 545 U.S. at 975-76.

Under the United States Court's decision, cable modem service is exempt from the common carrier obligations that apply under the 1996 Act to providers of "telecommunications services." Subsequently, the FCC determined that where a telephone company provides broadband DSL Internet access, that also is purely an information service, not a telecommunications service. *In the Matters of Appropriate Framework For Broadband Access to the Internet Over Wireline Facilities, et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14911 (rel. Sept. 23, 2005). Thus, the United States Court of Appeals for the District of Columbia Circuit recently vacated and remanded the FCC's attempt to impose "net neutrality" requirements – specifically, anti-blocking and anti-discrimination conditions similar to the draft bill's open access and nondiscrimination requirements – on broadband providers, finding that such requirements were akin to common carrier regulation associated with telecommunications services. *Verizon v. FCC, Independent Telephone & Telecommunications Alliance, et al.*, No. 11-1355 (Jan. 14, 2014).

As a matter of law, therefore, Vermont should not mandate open access, nondiscrimination, service characteristics and best available technology, all of which are aspects of common carrier service regulation associated with telecommunications service, for broadband Internet access service.