

1 TO THE HOUSE OF REPRESENTATIVES:

2 The Committee on Energy and Technology to which was referred Senate
3 Bill No. 289 entitled “An act relating to protecting consumers and promoting
4 an open Internet in Vermont” respectfully reports that it has considered the
5 same and recommends that the House propose to the Senate that the bill be
6 amended by striking out all after the enacting clause and inserting in lieu
7 thereof the following:

8 * * * Legislative Findings * * *

9 Sec. 1. FINDINGS

10 The General Assembly finds and declares that:

11 (1) Our State has a compelling interest in preserving and promoting an
12 open Internet in Vermont.

13 (2) As Vermont is a rural state with many geographically remote
14 locations, broadband Internet access service is essential for supporting
15 economic and educational opportunities, strengthening health and public safety
16 networks, and reinforcing freedom of expression and democratic, social, and
17 civic engagement.

18 (3) Indeed, the accessibility and quality of communications networks in
19 Vermont, specifically broadband Internet access service, will critically impact
20 our State’s future.

1 (4) In 1996, Congress recognized that “[t]he Internet and other
2 interactive computer services offer a forum for a true diversity of political
3 discourse, unique opportunities for cultural development, and myriad avenues
4 for intellectual activity” and “[i]ncreasingly Americans are relying on
5 interactive media for a variety of political, educational, cultural, and
6 entertainment services.” 47 U.S.C. § 230(a)(3) and (5).

7 (5) Many Vermonters do not have the ability to choose easily between
8 Internet service providers (ISPs). This lack of a thriving competitive market,
9 particularly in isolated locations, disadvantages the ability of consumers and
10 businesses to protect their interests sufficiently.

11 (6) Without net neutrality, “ISPs will have the power to decide which
12 websites you can access and at what speed each will load. In other words,
13 they’ll be able to decide which companies succeed online, which voices are
14 heard – and which are silenced.” Tim Berners-Lee, founder of the World Wide
15 Web and Director of the World Wide Web Consortium (W3C), December 13,
16 2017.

17 (7) The Federal Communications Commission’s (FCC’s) recent repeal
18 of the federal net neutrality rules pursuant to its *Restoring Internet Freedom*
19 *Order*, WC Docket No. 17-108, FCC 17-166, manifests a fundamental shift in
20 policy.

1 (8) The FCC anticipates that a “light-touch” regulatory approach under
2 Title I of the Communications Act of 1934, rather than “utility-style”
3 regulation under Title II, will further advance the Congressional goals of
4 promoting broadband deployment and infrastructure investment.

5 (9) As explained by the FCC, “We reverse the Commission’s abrupt
6 shift two years ago to heavy-handed utility-style regulation of broadband
7 Internet access service and return to the light-touch framework under which a
8 free and open Internet underwent rapid and unprecedented growth for almost
9 two decades. We eliminate burdensome regulation that stifles innovation and
10 deters investment, and empower Americans to choose the broadband Internet
11 access service that best fits their need.” Order at para. 1.

12 (10) It is not likely the FCC’s regulatory approach will achieve the
13 intended results in Vermont. This is because the policy does little, if anything,
14 to overcome the financial challenges of bringing broadband service to hard-to-
15 reach locations with low population density. It is more likely, however, to
16 result in the degraded quality of Internet service.

17 (11) The economic theory advanced by the FCC in 2010 known as the
18 “virtuous circle of innovation” seems more relevant to the market conditions in
19 Vermont. See *In re Preserving the Open Internet*, 25 F.C.C.R. 17905, 17910-
20 11 (2010).

1 (12) As explained in the FCC’s 2010 Order, “The Internet’s openness...
2 enables a virtuous circle of innovation in which new uses of the network –
3 including new content, applications, services, and devices – lead to increased
4 end-user demand for broadband, which drives network improvements, which
5 in turn lead to further innovative network uses. Novel, improved, or lower-
6 cost offerings introduced by content, application, service, and device providers
7 spur end-user demand and encourage broadband providers to expand their
8 networks and invest in new broadband technologies.” 25 FCC Rcd. at 17910-
9 11, upheld by *Verizon v. FCC*, 740 F.3d 623, 644-45 (D.C. Circuit 2014).

10 (13) As affirmed by the FCC five years later, “[t]he key insight of the
11 virtuous cycle is that broadband providers have both the incentive and the
12 ability to act as gatekeepers standing between edge providers and consumers.
13 As gatekeepers, they can block access altogether; they can target competitors,
14 including competitors in their own video services; and they can extract unfair
15 tolls.” *Open Internet Order* at 30 FCC Rcd at para. 20.

16 (14) Therefore, the State must step in and exercise its traditional role in
17 protecting consumers from potentially unfair and anticompetitive business
18 practices. Doing so will provide critical protections for Vermont individuals,
19 entrepreneurs, and small businesses that do not have the financial clout to
20 negotiate effectively with commercial providers, some of whom may provide

1 services and content that directly compete with Vermont companies or
2 companies with whom Vermonters do business.

3 (15) The benefits of State measures designed to protect the ability of
4 Vermonters to have unfettered access to the Internet far outweigh the benefits
5 of allowing ISPs to manipulate Internet traffic solely for their own
6 pecuniary gain. [HOLD]

7 (16) Consistent with the FCC’s 2015 *Open Internet Order*, WC Docket
8 No. 14-28, 30 FCC Rcd. 5601, the State should require ISPs to adhere to
9 bright-line rules that protect consumers from past and future tactics that
10 threaten the open Internet – namely, no blocking; no throttling; and no paid
11 prioritization – as well as a “no-unreasonable interference/disadvantage
12 standard” (also referred to as the “General Conduct Rule”) and a disclosure
13 requirement pertaining to a provider’s network management practices.

14 (17) In its most recent order, the FCC preempts states from enacting
15 local net neutrality rules. However, it is not clear that the FCC has such
16 preemption authority. This is one of several legal issues raised in a
17 consolidated lawsuit pending in the United States District Court of Appeals.

18 (18) In the *Restoring Internet Freedom Order*, the FCC indicates its
19 intention to restore the Federal Trade Commission (FTC) as the federal
20 regulatory entity with oversight and enforcement authority over broadband
21 Internet access service.

1 (19) As explained by the FCC: “In the unlikely event that ISPs engage
2 in conduct that harms Internet openness... we find that utility-style regulation
3 is unnecessary to address such conduct. Other legal regimes – particularly
4 antitrust law and the FTC’s authority under Section 5 of the FTC Act to
5 prohibit unfair and deceptive practices – provide protections to consumers.”
6 Para. 140.

7 (20) The consumer protection and net neutrality requirements put
8 forward in this act do not conflict with the FCC’s policy of nonregulation. The
9 FCC has chosen to deregulate broadband Internet access service to promote
10 broadband investment and deployment. As previously stated, a nonregulation
11 policy is unlikely to advance those goals in Vermont. Whereas the State
12 standards proposed in this act will simultaneously protect consumers from
13 unfair and anticompetitive business practices; promote innovation and Internet
14 usage; and, consistent with the FCC’s policy objectives, likely promote
15 broadband investment and deployment in our State.

16 (21) The proposals in this act represent State efforts to address the issue
17 of Internet openness in a manner that is consistent with the FCC preemption of
18 local net neutrality rules.

19 (22) For example, the requirement that ISPs certify compliance with
20 consumer protection and net neutrality standards in order to obtain a

1 government contract for broadband Internet access service falls within the
2 “market participant” exception to a dormant Commerce Clause challenge.

3 (23) As explained by the Vermont Supreme Court, “When acting as a
4 market participant, the government should enjoy the unrestricted power to...
5 determine those with whom it will deal.” With respect to government
6 contracts, specifically, the Court held, [p]rocurement laws are for the benefit of
7 the state, not prospective bidders... [and, therefore] no one has a right to sell to
8 the government that which the government does not wish to buy.” *Hinesburg*
9 *Sand & Gravel Co., Inc. v. State*, 166 Vt. 337, 343 (1997).

10 (24) With respect to the mandated disclosure required by this act,
11 wherein an ISP must report to the State whether it is or is not in compliance
12 with net neutrality standards, this requirement and the transparency it affords is
13 a reasonable exercise of the State’s traditional police powers and such
14 disclosures will support the State’s efforts to monitor consumer protection and
15 economic factors in Vermont, particularly with regard to competition, business
16 practices, and consumer choice.

17 (25) Net neutrality is clearly an important topic for many Vermonters.
18 Nearly 50,000 comments were submitted to the FCC during the *Notice of*
19 *Proposed Rulemaking* regarding the *Restoring Internet Freedom Order*. Thus,
20 transparency with respect to the network management practices of ISPs doing

1 business in Vermont will likely be of great interest to many Vermonters going
2 forward.

3 (26) In short, Vermont, more so than the FCC, is in the best position to
4 decide for itself what the needs of its constituencies are and what policies best
5 serve the public interest. Internet consumer protection and net neutrality
6 standards are needed in Vermont. Any incidental burden on interstate
7 commerce that results from the requirements of this act is far outweighed by
8 the compelling interests the State is advancing here.

9 * * * Certificate of Net Neutrality Compliance * * *

10 Sec. 2. 3 V.S.A. § 348 is added to read:

11 § 348. INTERNET SERVICE PROVIDERS; NET NEUTRALITY

12 COMPLIANCE

13 (a) The Secretary of Administration shall develop a process by which an
14 Internet service provider may certify that it is in compliance with the consumer
15 protection and net neutrality standards established in subsection (b) of this
16 section.

17 (b) A certificate of net neutrality compliance shall be granted to an Internet
18 service provider that demonstrates and the Secretary finds that the Internet
19 service provider, insofar as the provider is engaged in the provision of
20 broadband Internet access service:

21 (1) Does not engage in any of the following practices in Vermont:

1 (A) Blocking lawful content, applications, services, or nonharmful
2 devices, subject to reasonable network management.

3 (B) Impairing or degrading lawful Internet traffic on the basis of
4 Internet content, application, or service or the use of a nonharmful device,
5 subject to reasonable network management.

6 (C) Engaging in paid prioritization, unless this prohibition is waived
7 pursuant to subsection (c) of this section.

8 (D) Unreasonably interfering with or unreasonably disadvantaging
9 either a customer’s ability to select, access, and use broadband Internet access
10 service or lawful Internet content, applications, services, or devices of the
11 customer’s choice or an edge provider’s ability to make lawful content,
12 applications, services, or devices available to a customer. Reasonable network
13 management shall not be considered a violation of this prohibition.

14 (E) Engaging in deceptive or misleading marketing practices that
15 misrepresent the treatment of Internet traffic or content to its customers.

16 (2) Publicly discloses to consumers accurate information regarding the
17 network management practices, performance, and commercial terms of its
18 broadband Internet access services sufficient for consumers to make informed
19 choices regarding use of such services and for content, application, service,
20 and device providers to develop, market, and maintain Internet offerings.

1 (c) The Secretary may waive the ban on paid prioritization under
2 subdivision (b)(1)(C) of this section only if the Internet service provider
3 demonstrates that the practice would provide some significant public interest
4 benefit and would not harm the open nature of the Internet in Vermont.

5 (d) As used in this section:

6 (1) “Broadband Internet access service” means a mass-market retail
7 service by wire or radio in Vermont that provides the capability to transmit
8 data to and receive data from all or substantially all Internet endpoints,
9 including any capabilities that are incidental to and enable the operation of the
10 communications service, but excluding dial-up Internet access service. The
11 term also encompasses any service in Vermont that the Secretary finds to be
12 providing a functional equivalent of the service described in this subdivision,
13 or that is used to evade the protections established in this chapter.

14 (2) “Edge provider” means any person in Vermont that provides any
15 content, application, or service over the Internet and any person in Vermont
16 that provides a device used for accessing any content, application, or service
17 over the Internet.

18 (3) “Internet service provider” or “provider” means a business that
19 provides broadband Internet access service to any person in Vermont.

20 (4) “Paid prioritization” means the management of an Internet service
21 provider’s network to favor directly or indirectly some traffic over other

1 traffic, including through the use of techniques such as traffic shaping,
2 prioritization, resource reservation, or other forms of preferential traffic
3 management, either in exchange for consideration, monetary or otherwise,
4 from a third party or to benefit an affiliated entity, or both.

5 (5) “Reasonable network management” means a practice that has a
6 primarily technical network management justification but does not include
7 other business practices and that is primarily used for and tailored to achieving
8 a legitimate network management purpose, taking into account the particular
9 network architecture and technology of the broadband Internet access service.

10 (e) It is the intent of the General Assembly in enacting this section to
11 incorporate into statute certain provisions of the Federal Communications
12 Commission’s 2015 Open Internet Order, “Protecting and Promoting the Open
13 Internet,” WC Docket No. 14-28, Report and Order on Remand, Declaratory
14 Ruling and Order, 30 FCC Rcd 5601. The terms and requirements of this
15 section shall be interpreted broadly and any exceptions interpreted narrowly,
16 using the 2015 Open Internet Order and relevant FCC advisory opinions,
17 rulings, and regulations as persuasive guidance.

18 * * * Executive, Legislative, Judicial Branches; Contracts for Internet Service;

19 Certification of Net Neutrality Compliance * * *

20 Sec. 3. 3 V.S.A. § 349 is added to read:

21 § 349. STATE CONTRACTING; INTERNET SERVICE

1 § 754. CONTRACTS FOR INTERNET SERVICE

2 Every contract for broadband Internet access service, as defined in 3 V.S.A.
3 § 348(d)(1), for the Legislative Branch shall include terms and conditions
4 requiring that the Internet service provider certify that it is in compliance with
5 the consumer protection and net neutrality standards established in 3 V.S.A.
6 § 348.

7 Sec. 6. 4 V.S.A. § 27a is added to read:

8 § 27a. CONTRACTS FOR INTERNET SERVICE

9 Every contract to provide broadband Internet access service, as defined in
10 3 V.S.A. § 348(d)(1), for the Judicial Branch shall include terms and
11 conditions requiring that the Internet service provider certify that it is in
12 compliance with the consumer protection and net neutrality standards
13 established in 3 V.S.A. § 348.

14 Sec. 7. APPLICATION; GOVERNMENT CONTRACTS

15 The requirements of Secs. 3 – 6 of this Act shall apply to all government
16 contracts for Internet service entered into or renewed on or after July 1, 2018.

17 * * * Consumer Protection; Disclosure; Net Neutrality Compliance * * *

18 Sec. 8. 9 V.S.A. § 2466c is added to read:

19 § 2466c. INTERNET SERVICE; NETWORK MANAGEMENT

20 DISCLOSURE; NET NEUTRALITY COMPLIANCE

1 (a) Beginning on January 31, 2019, an Internet service provider that
2 provides broadband Internet access service, as defined in 3 V.S.A. § 348(d)(1),
3 shall disclose whether or not its practices comply with the consumer protection
4 and net neutrality standards in 3 V.S.A. § 348(b)(1) and (2). The disclosure
5 shall be in a form and manner prescribed by the Attorney General. The
6 [Attorney General or DPS] shall post the disclosures required by this section
7 on a publicly available, easily accessible website maintained by his or her
8 office.

9 (b) A violation of this section constitutes an unfair and deceptive act in
10 trade and commerce under section 2453 of this chapter.

11 **Sec. 9. NET NEUTRALITY STUDY**

12 On or before December 15, 2018, the Attorney General, in consultation
13 with the Commissioner of Public Service and with input from industry and
14 consumer stakeholders, shall submit findings and recommendations in the form
15 of a report or draft legislation to the Senate Committees on Finance and on
16 Economic Development, Housing and General Affairs and the House
17 Committees on Energy and Technology and on Commerce and Economic
18 Development reflecting whether and to what extent the State should enact net
19 neutrality rules applicable to Internet service providers offering broadband
20 Internet access service in Vermont. Among other things, the Attorney General
21 shall consider:

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7 (Committee vote: _____)

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Representative _____

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FOR THE COMMITTEE