

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~~The accessibility and quality of communications
19 networks in Vermont, specifically broadband Internet access service, will
20 critically impact our State’s future.

21 ~~(4)~~

1 (4) Net neutrality is an important topic for many Vermonters. Nearly
2 50,000 comments attributed to Vermonters were submitted to the FCC during
3 the Notice of Proposed Rulemaking regarding the Restoring Internet Freedom
4 Order. Transparency with respect to the network management practices of
5 ISPs doing business in Vermont will continue to be of great interest to many
6 Vermonters.

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

13 (56) Many Vermonters do not have the ability to choose easily between
14 Internet service providers (ISPs). This lack of a thriving competitive market,
15 particularly in isolated locations, disadvantages the ability of consumers and
16 businesses to protect their interests sufficiently.

17 (67) Without net neutrality, “ISPs will have the power to decide which
18 websites you can access and at what speed each will load. In other words,
19 they’ll be able to decide which companies succeed online, which voices are
20 heard – and which are silenced.” Tim Berners-Lee, founder of the World Wide

1 Web and Director of the World Wide Web Consortium (W3C), December 13,
2 2017.

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

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

11 ~~(9) As explained by the FCC, "We reverse the Commission's abrupt~~
12 ~~shift two years ago to heavy handed utility style regulation of broadband~~
13 ~~Internet access service and return to the light touch framework under which a~~
14 ~~free and open Internet underwent rapid and unprecedented growth for almost~~
15 ~~two decades. We eliminate burdensome regulation that stifles innovation and~~
16 ~~deters investment, and empower Americans to choose the broadband Internet~~
17 ~~access service that best fits their need." Order at para. 1.~~

18 ~~(10) It is not likely the~~The FCC's regulatory approach ~~will~~is unlikely to
19 achieve the intended results in Vermont. ~~This is because the~~The policy does
20 little, if anything, to overcome the financial challenges of bringing broadband
21 service to hard-to-reach locations with low population density. ~~It is more~~

1 ~~likely, however, to~~ However, it may result in ~~the~~ degraded Internet quality ~~of~~
2 ~~service. The state has a compelling interest in preserving and protecting~~
3 ~~consumer access to high quality~~ Internet service.

4 ~~(4110)~~ The economic theory advanced by the FCC in 2010 known as the
5 “virtuous circle of innovation” seems more relevant to the market conditions in
6 Vermont. See *In re Preserving the Open Internet*, 25 F.C.C.R. 17905, 17910-
7 11 (2010).

8 ~~(4211)~~ As explained in the FCC’s 2010 Order, “The Internet’s
9 openness... enables a virtuous circle of innovation in which new uses of the
10 network – including new content, applications, services, and devices – lead to
11 increased end-user demand for broadband, which drives network
12 improvements, which in turn lead to further innovative network uses. Novel,
13 improved, or lower-cost offerings introduced by content, application, service,
14 and device providers spur end-user demand and encourage broadband
15 providers to expand their networks and invest in new broadband technologies.”
16 25 FCC Rcd. at 17910-11, upheld by *Verizon v. FCC*, 740 F.3d 623, 644-45
17 (D.C. Circuit 2014).

18 ~~(4312)~~ As affirmed by the FCC five years later, “[t]he key insight of the
19 virtuous cycle is that broadband providers have both the incentive and the
20 ability to act as gatekeepers standing between edge providers and consumers.
21 As gatekeepers, they can block access altogether; they can target competitors,

1 including competitors in their own video services; and they can extract unfair
2 tolls.” *Open Internet Order* at 30 FCC Rcd at para. 20.

3 ~~(14) Therefore, the~~(13) The State ~~must step in and may~~ exercise its
4 traditional role in protecting consumers from potentially unfair and
5 anticompetitive business practices. Doing so will provide critical protections
6 for Vermont individuals, entrepreneurs, and small businesses that do not have
7 the financial clout to negotiate effectively with commercial providers, some of
8 whom may provide services and content that directly compete with Vermont
9 companies or companies with whom Vermonters do business.

10 ~~(14) The FCC’s most recent order expressly contemplates state exercise~~
11 ~~of traditional police powers on behalf of consumers: “we do not disturb or~~
12 ~~displace the states’ traditional role in generally policing such matters as fraud,~~
13 ~~taxation, and general commercial dealings, so long as the administration of~~
14 ~~such general state laws does not interfere with federal regulatory objectives.”~~
15 ~~*Restoring Internet Freedom Order*, WC Docket No. 17-108, FCC 17-166,~~
16 ~~para. 196.~~

17 (15) The benefits of State measures designed to protect the ability of
18 Vermonters to have unfettered access to the Internet far outweigh the benefits
19 of allowing ISPs to manipulate Internet traffic ~~solely for their own~~
20 pecuniary gain. **HOLD!**

1 ~~(16) Consistent with the FCC's 2015 *Open Internet Order*, WC Docket~~
2 ~~No. 14-28, 30 FCC Red. 5601, the State should require ISPs to adhere to~~
3 ~~bright line rules that protect consumers from past and future tactics that~~
4 ~~threaten the open Internet—namely, no blocking; no throttling; and no paid~~
5 ~~prioritization—as well as a “no-unreasonable interference/disadvantage~~
6 ~~standard” (also referred to as the “General Conduct Rule”) and a disclosure~~
7 ~~requirement pertaining to a provider's network management practices.~~

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

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

16 ~~(19) As explained by the FCC(16) The most recent order of the FCC~~
17 ~~contemplates federal and local enforcement agencies preventing harm to~~
18 ~~consumers: “In the unlikely event that ISPs engage in conduct that harms~~
19 ~~Internet openness... we find that utility-style regulation is unnecessary to~~
20 ~~address such conduct. Other legal regimes – particularly antitrust law and the~~
21 ~~FTC's authority under Section 5 of the FTC Act to prohibit unfair and~~

1 deceptive practices – provide protections to consumers.” Para. 140. The
2 Attorney General enforces antitrust violations or violations of the Consumer
3 Protection Act in Vermont.

4 (2017) The consumer protection and net neutrality
5 requirements disclosure and procurement policies put forward in this act do not
6 conflict are consistent with federal law and fall squarely within the FCC’s
7 policy of nonregulation state’s police powers. The FCC has chosen to
8 deregulate broadband Internet access service to promote broadband investment
9 and deployment. As previously stated, a nonregulation policy is unlikely to
10 advance those goals in Vermont. Whereas the State standards proposed in this
11 act will simultaneously protect consumers from unfair and anticompetitive
12 business practices; promote innovation and Internet usage; and, consistent with
13 the FCC’s policy objectives, likely promote promote consumer confidence in
14 broadband investment and deployment in our State.

15 (2118) The proposals in this act represent State efforts to address the
16 issue state of Internet openness in a manner that is consistent Vermont has a
17 compelling interest in knowing with the FCC preemption of local net neutrality
18 rules.

19 (22) For example, the requirement that ISPs certify compliance with
20 certainty what services it receives pursuant to state contracts. Accordingly, a
21 state procurement policy extending consumer protection and/or net neutrality

1 ~~certification to ISPs complying with state standards in order to obtain~~so the
2 ~~state may know with certainty the services it will receive as a government~~
3 ~~contract for purchaser of broadband Internet access service falls within the~~
4 ~~protects its status as a “market participant” exception to a dormant Commerce~~
5 ~~Clause challenge~~or consumer of goods and services.

6 ~~(23) As explained by the Vermont Supreme Court, “When~~(19)
7 ~~Procurement laws are for the benefit of the state. And, when acting as a market~~
8 ~~participant, the government should enjoy the~~joys unrestricted power to ~~---~~
9 ~~determine contract with whoever it deems appropriate and purchase only those~~
10 ~~with whom it will deal.” With respect to government contracts, specifically,~~
11 ~~the Court held, “[p]rocurement laws are for the benefit of the state, not~~
12 ~~prospective bidders... [and, therefore] no one has a right to sell to the~~
13 ~~government that which the government does not wish to buy.” *Hinesburg*~~
14 ~~*Sand & Gravel Co., Inc. v. State*, 166 Vt. 337, 343 (1997);~~goods or services it
15 ~~desires.~~

16 ~~(24) With respect to the mandated~~(20) Consumer disclosure required by
17 ~~this act, wherein an ISP must report to the State whether it is or is not in~~
18 ~~compliance with net neutrality standards, this requirement and the transparency~~
19 ~~it affords~~ is a reasonable exercise of the State’s traditional police powers and
20 ~~such disclosures will support the State’s efforts to monitor consumer protection~~

1 and economic factors in Vermont, particularly with regard to competition,
2 business practices, and consumer choice.

3 ~~(25) Net neutrality is clearly an important topic for many Vermonters.~~
4 ~~Nearly 50,000 comments were submitted to the FCC during the Notice (21)~~
5 ~~The State of Proposed Rulemaking regarding the Restoring Internet Freedom~~
6 ~~Order. Thus, transparency with respect to the network management practices~~
7 ~~of ISPs doing business in Vermont will likely be of great interest to many~~
8 ~~Vermonters going forward.~~

9 ~~(26) In short, Vermont, more so than the FCC, is in the best position to~~
10 ~~decide for itself what balance the needs of its constituencies are and what with~~
11 ~~policies that best serve the public interest. The state has a compelling interest~~
12 ~~in promoting Internet consumer protection and net neutrality standards are~~
13 ~~needed in Vermont. Any incidental burden on interstate commerce that~~
14 ~~results resulting from the requirements of this act is far outweighed by the~~
15 ~~compelling interests the State is advancing here advances.~~

16 * * * Certificate of Net Neutrality Compliance * * *

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

18 § 348. INTERNET SERVICE PROVIDERS; NET NEUTRALITY
19 COMPLIANCE

20 (a) The Secretary of Administration shall develop a process by which an
21 Internet service provider may certify that it is in compliance with the consumer

Formatted: Font: Not Italic

1 protection and net neutrality standards established in subsection (b) of this
2 section.

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

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

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

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

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

15 (D) Unreasonably interfering with or unreasonably disadvantaging
16 either a customer's ability to select, access, and use broadband Internet access
17 service or lawful Internet content, applications, services, or devices of the
18 customer's choice or an edge provider's ability to make lawful content,
19 applications, services, or devices available to a customer. Reasonable network
20 management shall not be considered a violation of this prohibition.

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

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

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

12 (d) As used in this section:

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

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

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

7 (4) “Paid prioritization” means the management of an Internet service
8 provider’s network to favor directly or indirectly some traffic over other
9 traffic, including through the use of techniques such as traffic shaping,
10 prioritization, resource reservation, or other forms of preferential traffic
11 management, either in exchange for consideration, monetary or otherwise,
12 from a third party or to benefit an affiliated entity, or both.

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

18 ~~(e) It is the intent of the General Assembly in enacting this section to~~
19 ~~incorporate into statute certain provisions of the Federal Communications~~
20 ~~Commission’s 2015 Open Internet Order, “Protecting and Promoting the Open~~
21 ~~Internet,” WC Docket No. 14-28, Report and Order on Remand, Declaratory~~

1 ~~Ruling and Order, 30 FCC Red 5601. The terms and requirements of this~~
2 ~~section shall be interpreted broadly and any exceptions interpreted narrowly,~~
3 ~~using the 2015 Open Internet Order and relevant FCC advisory opinions,~~
4 ~~rulings, and regulations as persuasive guidance.~~

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

6 Certification of Net Neutrality Compliance * * *

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

8 § 349. STATE CONTRACTING; INTERNET SERVICE

9 The Secretary of Administration shall include in Administrative Bulletin 3.5
10 a requirement that State procurement contracts for broadband Internet access
11 service, as defined in subdivision 348(d)(3) of this title, include terms and
12 conditions requiring that the Internet service provider certify that it is in
13 compliance with the consumer protection and net neutrality standards
14 established in section 348 of this title.

15 Sec. 4. 22 V.S.A. § 901 is amended to read:

16 ~~§ 901. DEPARTMENT OF INFORMATION AND INNOVATION~~

17 AGENCY OF DIGITAL SERVICES

18 (a) The ~~Department of Information and Innovation~~ Agency of Digital
19 Services, created in 3 V.S.A. § 2283b, shall have all the responsibilities
20 assigned to it by law, including the following:

21 * * *

1 (15) To ensure that any State government contract for broadband
2 Internet access service, as defined in 3 V.S.A. § 348(d)(1), contains terms and
3 conditions requiring that the Internet service provider certify that it is in
4 compliance with the consumer protection and net neutrality standards
5 established in 3 V.S.A. § 348.

6 (b) As used in this section, “State government” means the agencies of the
7 Executive Branch of State government.

8 Sec. 5. 2 V.S.A. § 754 is added to read:

9 § 754. CONTRACTS FOR INTERNET SERVICE

10 Every contract for broadband Internet access service, as defined in 3 V.S.A.
11 § 348(d)(1), for the Legislative Branch shall include terms and conditions
12 requiring that the Internet service provider certify that it is in compliance with
13 the consumer protection and net neutrality standards established in 3 V.S.A.
14 § 348.

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

16 § 27a. CONTRACTS FOR INTERNET SERVICE

17 Every contract to provide broadband Internet access service, as defined in
18 3 V.S.A. § 348(d)(1), for the Judicial Branch shall include terms and
19 conditions requiring that the Internet service provider certify that it is in
20 compliance with the consumer protection and net neutrality standards
21 established in 3 V.S.A. § 348.

1 Sec. 7. APPLICATION; GOVERNMENT CONTRACTS

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

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

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

6 § 2466c. INTERNET SERVICE; NETWORK MANAGEMENT

7 DISCLOSURE; NET NEUTRALITY COMPLIANCE

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

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

19 Sec. 9. NET NEUTRALITY STUDY

20 On or before December 15, 2018, the Attorney General, in consultation
21 with the Commissioner of Public Service and with input from industry and

1 consumer stakeholders, shall submit findings and recommendations in the form
2 of a report or draft legislation to the Senate Committees on Finance and on
3 Economic Development, Housing and General Affairs and the House
4 Committees on Energy and Technology and on Commerce and Economic
5 Development reflecting whether and to what extent the State should enact net
6 neutrality rules applicable to Internet service providers offering broadband
7 Internet access service in Vermont. Among other things, the Attorney General
8 shall consider:

9 (1) ~~the extent~~ The scope and status of federal law related to which
10 Vermont is preempted from enacting net neutrality rules, particularly with
11 respect to the proposals in H.860 as Introduced (2018); and ISP regulation;

12 (2) the ~~status of litigation concerning implementation of the FCC's~~
13 *Restoring Internet Freedom Order, WC Docket No. 17-108, as well as the*
14 *2015 Open Internet Order, WC Docket No. 14-28;*

15 (3) ~~the scope and status of net neutrality rules proposed or enacted in~~
16 ~~other~~ state and local jurisdictions;

17 (43) methods for and recommendations pertaining to the enforcement of
18 net neutrality requirements;

19 (5)(4) the economic impact of federal or state changes to net neutrality
20 policy, including to the extent practicable methods for and recommendations

1 pertaining to tracking broadband investment and deployment in Vermont and
2 otherwise monitoring market conditions in the State;

3 (65) proposed courses of action that balance the benefits to society that
4 the communications industry brings with actual and potential harms the
5 industry may pose to consumers; and

6 (76) any other factors and considerations the Attorney General deems
7 relevant to making recommendations pursuant to this section.

8 * * * Effective Date * * *

9 Sec. 10. EFFECTIVE DATE

10 This act shall take effect on passage.

Formatted: No underline

Formatted: Indent: First line: 0.2"

11
12
13
14
15
16
17 (Committee vote: _____)

18 _____

19 Representative _____

20 FOR THE COMMITTEE