STATE OF NEW YORK

8321

IN SENATE

May 1, 2018

Introduced by Sen. HOYLMAN -- read twice and ordered printed, and when printed to be committed to the Committee on Energy and Telecommunications

AN ACT to amend the public service law, in relation to Internet neutrality; and to amend the state finance law, the general municipal law, the public authorities law and the economic development law, in relation to requiring that procurement contracts require compliance with Internet neutrality requirements

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative intent. The legislature finds and declares the following:

(a) This act is adopted pursuant to the police power inherent in the state of New York to protect and promote the safety, life, public health, public convenience, general prosperity, and well-being of society, and the welfare of the state's population and economy, that are increasingly dependent on an open and neutral Internet.

(b) Almost every sector of New York's economy, democracy, and society is dependent on the open and neutral Internet that supports vital functions regulated under the police power of the state, including, but not limited to, each of the following:

(1) police and emergency services;

(2) health and safety services and infrastructure;

(3) utility services and infrastructure;

(4) transportation infrastructure and services, and the expansion of zero- and low-emission transportation options;

(5) government services, voting, and democratic decision making processes;

(6) education;

(7) business and economic activity;

(8) environmental monitoring and protection, and achievement of state environmental goals; and

(9) land use regulation.

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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§ 2. The public service law is amended by adding a new article 12 to read as follows:

ARTICLE 12

PROVISIONS RELATING TO INTERNET SERVICE PROVIDERS

Section 250. Definitions.
251. Internet neutrality.
252. Broadband Internet access evaluation.
253. Infrastructure awards.
254. Enforcement.
255. Application.

§ 250. Definitions. For purposes of this article, the following definitions apply:

1. "Application-agnostic" means not differentiating on the basis of source, destination, Internet content, application, service, or device, or class of Internet content, application, service, or device.

2. "Application-specific differential pricing" means charging different prices for Internet traffic to customers on the basis of Internet content, application, service, or device, or class of Internet content, application, service, or device, but does not include zero-rating.

3. "Broadband Internet access service" means a mass-market retail service by wire or radio provided to customers in New York that provides the capability to transmit data to, and receive data from, all or substantially all Internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up Internet access service. "Broadband Internet access service" also encompasses any service provided to customers in New York that provides a functional equivalent of that service or that is used to evade the protections set forth in this chapter.

4. "Class of Internet content, application, service, or device" means Internet content, or a group of Internet applications, services, or devices, sharing a common characteristic, including, but not limited to, sharing the same source or destination, belonging to the same type of content, application, service, or device, using the same application- or transport-layer protocol, or having similar technical characteristics, including, but not limited to, the size, sequencing, or timing of packets, or sensitivity to delay.

5. "Content, applications, or services" means all Internet traffic transmitted to or from end users of a broadband Internet access service, including traffic that may not fit clearly into any of these categories.

6. "Edge provider" means any individual or entity that provides any content, application, or service over the Internet, and any individual or entity that provides a device used for accessing any content, application, or service over the Internet.

7. "End user" means any individual or entity that uses a broadband Internet access service.

8. "Internet service provider" or "ISP" means a business that provides broadband Internet access service to an individual, corporation, government, or other customer in New York.

9. "ISP traffic exchange" means the exchange of Internet traffic destined for, or originating from, an Internet service provider's end users between the Internet service provider's network and another individual or entity, including, but not limited to, an edge provider, content delivery network, or other network operator.

10. "Mass market" means a service marketed and sold on a standardized basis to residential customers, small businesses, and other end-use

customers, including, but not limited to, schools, institutions of higher learning, and libraries. The term also includes broadband Internet access services purchased with support of the E-rate and Rural Health program and similar programs at the federal and state level, regardless of whether they are customized or individually negotiated, as well as any broadband Internet access service offered using networks supported by the Connect America Fund or similar programs at the federal and state level.

11. "Network management practice" means a practice that has a primarily technical network management justification, but does not include other business practices.

12. "Reasonable network management practice" means a network management practice that is primarily used for, and tailored to, achieving a legitimate network management purpose, taking into account the particular network architecture and technology of the broadband Internet access service, and that is as application-agnostic as possible.

13. "Third-party paid prioritization" means the management of an Internet service provider's network to directly or indirectly favor some traffic over other traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either: (a) in exchange for consideration, monetary or otherwise, from a third party; or (b) to benefit an affiliated entity.

14. "Zero-rating" means exempting some Internet traffic from a customer's data limitation.

§ 251. Internet neutrality. 1. It shall be unlawful for an Internet service provider, insofar as the provider is engaged in providing broadband Internet access service, to engage in any of the following activities:

(a) Blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management practices.

(b) Speeding up, slowing down, altering, restricting, interfering with, or otherwise directly or indirectly favoring, disadvantaging, or discriminating between lawful Internet traffic on the basis of source, destination, Internet content, application, or service, or use of a non-harmful device, or of class of Internet content, application, service, or non-harmful device, subject to reasonable network management practices.

(c) Requiring consideration from edge providers, monetary or otherwise, in exchange for access to the Internet service provider's end users, including, but not limited to, requiring consideration for either of the following:

(i) transmitting Internet traffic to and from the Internet service provider's end users.

(ii) refraining from the activities prohibited in paragraphs (a) and (b) of this subdivision.

(d) Engaging in third-party paid prioritization.

(e) Engaging in application-specific differential pricing or zero-rating in exchange for consideration, monetary or otherwise, by third parties.

(f) Zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category.

(g) Engaging in application-specific differential pricing.

(h) Unreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use broadband Inter-

net access service or lawful Internet content, applications, services, or devices of the end user's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to an end user, subject to reasonable network management practices.

(i) Engaging in practices with respect to, related to, or in connection with, ISP traffic exchange that have the purpose or effect of circumventing or undermining the effectiveness of this section.

(j) Engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic, content, applications, services, or devices by the Internet service provider, or that misrepresent the performance characteristics or commercial terms of the broadband Internet access service to its customers.

(k) Advertising, offering for sale, or selling broadband Internet access service without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.

(l) Failing to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of those services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

(m) Offering or providing services other than broadband Internet access service that are delivered over the same last-mile connection as the broadband Internet access service, if those services satisfy any of the following conditions:

(i) they are marketed, provide, or can be used as a functional equivalent of broadband Internet access service.

(ii) they have the purpose or effect of circumventing or undermining the effectiveness of this section.

(iii) they negatively affect the performance of broadband Internet access service.

2. (a) An Internet service provider may offer different types of technical treatment to end users as part of its broadband Internet access service, without violating the provisions of subdivision one of this section, if all of the following conditions exist:

(i) The different types of technical treatment are equally available to all Internet content, applications, services, and devices, and all classes of Internet content, applications, services, and devices, and the Internet service provider does not discriminate in the provision of the different types of technical treatment on the basis of Internet content, application, service, or device, or class of Internet content, application, service, or device.

(ii) The Internet service provider's end users are able to choose whether, when, and for which Internet content, applications, services, or devices, or classes of Internet content, applications, services, or devices, to use each type of technical treatment.

(iii) The Internet service provider charges only its own broadband Internet access service customers for the use of the different types of technical treatment.

(b) Any Internet service provider offering different types of technical treatment pursuant to this subdivision shall notify the commission and provide the commission with a specimen of any service contract that it offers to customers in New York.

(c) If an Internet service provider offers different types of technical treatment pursuant to this subdivision, the commission shall monitor the quality of the basic default service and establish minimum quality

requirements if the offering of the different types of technical treatment degrades the quality of the basic default service.

3. An Internet service provider may zero-rate Internet traffic in application-agnostic ways, without violating the provisions of subdivision one of this section, provided that no consideration, monetary or otherwise, is provided by any third party in exchange for the provider's decision to zero-rate or to not zero-rate traffic.

§ 252. Broadband Internet access evaluation. The commission, in consultation with the power authority of the state of New York, the NYS Broadband Program Office and electrical corporations, shall evaluate the role broadband Internet access and tools, especially as they relate to private consumers, will play in the future operation of the state's power grid. The evaluation should consider at least the following:

1. the reliance of electrical corporations on consumer broadband services to manage energy resources;

2. the impact that paid prioritization, throttling, and blocking in consumer broadband Internet service would have on resource management and grid reliability; and

3. the future cost to the state and agencies if state agencies need to enter into long-term paid prioritization contracts if net neutrality principles are no longer in place.

§ 253. Infrastructure awards. 1. An award of moneys by the NYS Broadband Program Office for the building of infrastructure for broadband communications shall require the awardee to prevent any Internet service provider that provides broadband Internet access service utilizing that infrastructure from violating the provisions of section two hundred fifty-one of this article.

2. An award of moneys by the NYS Broadband Program Office for access to the Internet shall prohibit any Internet service provider that receives those moneys from violating the provisions of section two hundred fifty-one of this article.

§ 254. Enforcement. In addition to the authority granted to the commission pursuant to this chapter, the attorney general may enforce the provisions of this article to the extent permitted under section sixty-three of the executive law.

§ 255. Application. Nothing in this article supersedes or limits any obligation, authorization, or ability of an Internet service provider to address the needs of emergency communications or law enforcement, public safety, or national security authorities.

§ 3. Section 219 of the public service law is amended by adding a new subdivision 4 to read as follows:

4. (a) For purposes of this section, "application-agnostic," "application-specific differential pricing," "broadband Internet access service," "class of Internet content, application, service, or device," "content, applications, or services," "edge provider," "end user," "Internet service provider," "ISP," "ISP traffic exchange," "mass market," "network management practice," "reasonable network management practice," "third-party paid prioritization," and "zero-rating" have the same meanings as defined in section two hundred fifty of this chapter.

(b) A cable operator or video service provider that has been granted a franchise, and any affiliate, insofar as the provider is engaged in providing broadband Internet access service, shall not engage in any of the following activities:

(i) Blocking lawful content, applications, services, or non-harmful devices, subject to reasonable network management practices.

(ii) Speeding up, slowing down, altering, restricting, interfering with, or otherwise directly or indirectly favoring, disadvantaging, or discriminating between lawful Internet traffic on the basis of source, destination, Internet content, application, or service, or use of a non-harmful device, or of class of Internet content, application, service, or non-harmful device, subject to reasonable network management practices.

(iii) Requiring consideration from edge providers, monetary or otherwise, in exchange for access to the Internet service provider's end users, including, but not limited to, requiring consideration for either of the following:

(A) transmitting Internet traffic to and from the Internet service provider's end users; and

(B) refraining from the activities prohibited in subparagraphs (i) and (ii) of this paragraph.

(iv) Engaging in third-party paid prioritization.

(v) Engaging in application-specific differential pricing or zero-rating in exchange for consideration, monetary or otherwise, by third parties.

(vi) Zero-rating some Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices, but not the entire category.

(vii) Engaging in application-specific differential pricing.

(viii) Unreasonably interfering with, or unreasonably disadvantaging, either an end user's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the end user's choice, or an edge provider's ability to make lawful content, applications, services, or devices available to an end user, subject to reasonable network management practices.

(ix) Engaging in practices with respect to, related to, or in connection with, ISP traffic exchange that have the purpose or effect of circumventing or undermining the effectiveness of this subdivision.

(x) Engaging in deceptive or misleading marketing practices that misrepresent the treatment of Internet traffic, content, applications, services, or devices by the Internet service provider, or that misrepresent the performance characteristics or commercial terms of the broadband Internet access service to its customers.

(xi) Advertising, offering for sale, or selling broadband Internet access service without prominently disclosing with specificity all aspects of the service advertised, offered for sale, or sold.

(xii) Failing to publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access services sufficient for consumers to make informed choices regarding use of those services and for content, application, service, and device providers to develop, market, and maintain Internet offerings.

(xiii) Offering or providing services other than broadband Internet access services that are delivered over the same last-mile connection as the broadband Internet access service, if those services satisfy any of the following conditions:

(A) they are marketed, provide, or can be used as a functional equivalent of broadband Internet access service; or

(B) they have the purpose or effect of circumventing or undermining the effectiveness of this section; or

(C) they negatively affect the performance of broadband Internet access service.

(c) (i) An Internet service provider may offer different types of technical treatment to end users as part of its broadband Internet access service if it meets the conditions specified in paragraph (a) of subdivision two of section two hundred fifty-one of this chapter.

(ii) An Internet service provider may zero-rate Internet traffic in application-agnostic ways, provided that no consideration, monetary or otherwise, is provided by any third party in exchange for the provider's decision to zero-rate or to not zero-rate traffic.

(d) In addition to the authority granted the commission pursuant to this chapter, the attorney general may enforce the provisions of this article to the extent permitted under section sixty-three of the executive law.

§ 4. Section 119-a of the public service law, as added by chapter 703 of the laws of 1978, is amended to read as follows:

§ 119-a. Attachments to utility poles; use of utility ducts, trenches and conduits. 1. The commission shall prescribe just and reasonable rates, terms and conditions for attachments to utility poles and the use of utility ducts, trenches and conduits. A just and reasonable rate shall assure the utility of the recovery of not less than the additional cost of providing a pole attachment or of using a trench, duct or conduit nor more than the actual operating expenses and return on capital of the utility attributed to that portion of the pole, duct, trench or conduit used. With respect to cable television or internet service attachments and use, such portion shall be the percentage of total usable space on a pole or the total capacity of the duct or conduit that is occupied by the facilities of the user. Usable space shall be the space on a utility pole above the minimum grade level which can be used for the attachment of wires and cables.

2. No permission shall be granted to a cable television or Internet service provider for attachments on utility poles as provided in this section unless such Internet service provider is in compliance with the provisions of section two hundred fifty-one of this chapter.

§ 5. Section 165 of the state finance law is amended by adding a new subdivision 9 to read as follows:

9. Internet neutrality. a. For purposes of this subdivision:

(i) "broadband Internet access service," "Internet service provider," "network management practice," and "reasonable network management practice" shall have the same meanings as defined in section two hundred fifty of the public service law; and

(ii) "the state" includes the state and any governmental agency or political subdivision or public benefit corporation of the state.

b. (i) The state shall not purchase any fixed or mobile broadband Internet access services from an Internet service provider that is in violation of the provisions of section two hundred fifty-one of the public service law.

(ii) The state shall not provide funding for the purchase of any fixed or mobile broadband Internet access services from an Internet service provider that is in violation of the provisions of section two hundred fifty-one of the public service law.

c. (i) Every contract between the state and an Internet service provider for broadband Internet access service shall require that the service be rendered consistent with the requirements of section two hundred fifty-one of the public service law.

(ii) If, after execution of a contract for broadband Internet access service the state determines that the Internet service provider has violated the provisions of section two hundred fifty-one of the public

service law in providing service to the state, the state may declare the contract void from the time it was entered into and require repayment of any payments made to the Internet service provider pursuant to the contract. The remedies available pursuant to this section are in addition to any remedy available pursuant to article twenty-two-A of the general business law.

d. It shall not be a violation of this article for the state to purchase or fund fixed or mobile broadband Internet access services in a geographical area where Internet access services are only available from a single broadband Internet access service provider.

e. An Internet service provider that provides fixed or mobile broadband Internet access service purchased or funded by the state shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access service that is sufficient to enable end users of those purchased or funded services, including the state, to fully and accurately ascertain if the service is conducted in a lawful manner pursuant to the provisions of section two hundred fifty-one of the public service law.

§ 6. The general municipal law is amended by adding a new section 104-d to read as follows:

§ 104-d. Internet neutrality. 1. For purposes of this section, "broadband Internet access service," "Internet service provider," "network management practice," and "reasonable network management practice" shall have the same meanings as defined in section two hundred fifty of the public service law.

2. a. A municipal corporation shall not purchase any fixed or mobile broadband Internet access services from an Internet service provider that is in violation of the provisions of section two hundred fifty-one of the public service law.

b. A municipal corporation shall not provide funding for the purchase of any fixed or mobile broadband Internet access services from an Internet service provider that is in violation of the provisions of section two hundred fifty-one of the public service law.

3. a. Every contract between a municipal corporation and an Internet service provider for broadband Internet access service shall require that the service be rendered consistent with the requirements of section two hundred fifty-one of the public service law.

b. If, after execution of a contract for broadband Internet access service, a municipal corporation determines that the Internet service provider has violated the provisions of section two hundred fifty-one of the public service law in providing service to the municipal corporation, the municipal corporation may declare the contract void from the time it was entered into and require repayment of any payments made to the Internet service provider pursuant to the contract. The remedies available pursuant to this section are in addition to any remedy available pursuant to article twenty-two-A of the general business law.

4. It shall not be a violation of this article for a municipal corporation to purchase or fund fixed or mobile broadband Internet access services in a geographical area where Internet access services are only available from a single broadband Internet access service provider.

5. An Internet service provider that provides fixed or mobile broadband Internet access service purchased or funded by a municipal corporation shall publicly disclose accurate information regarding the network management practices, performance, and commercial terms of its broadband Internet access service that is sufficient to enable end users of those purchased or funded services, including a municipal corpo-

ration, to fully and accurately ascertain if the service is conducted in a lawful manner pursuant to the provisions of section two hundred fifty-one of the public service law.

§ 7. Subdivision 3 of section 2879 of the public authorities law is amended by adding a new paragraph (n-1) to read as follows:

(n-1) Requirements to conduct procurements in a manner that complies with the provisions of section two hundred fifty-one of the public service law.

§ 8. Section 143 of the economic development law is amended by adding a new subdivision 5 to read as follows:

5. Each agency shall conduct procurements in a manner that complies with the provisions of section two hundred fifty-one of the public service law.

§ 9. Severability. If any provision of this act, or the application thereof to any person or circumstances, is held invalid or unconstitutional, that invalidity or unconstitutionality shall not affect other provisions or applications of this act that can be given effect without the invalid or unconstitutional provision or application, and to this end the provisions of this act are severable.

§ 10. This act shall take effect on the sixtieth day after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.