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FISCAL IMPACT REPORT

ORIGINAL DATE 2/14/2018

SPONSOR Morales LAST UPDATED _____ HB _____

SHORT TITLE Broadband Access Unfair Trade Practices SB 155

ANALYST Torres

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY18	FY19		
\$250.0		Nonrecurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to/ Duplicates SB 39, HB 144, and HB 95.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (NMAG)
 Regulation and Licensing Department (RLD)
 Public Regulation Commission (PRC)

Responses Not Received From

Department of Information Technology (DoIT)

SUMMARY

Synopsis of Bill

SB 155 would adopt the Federal Communications Commission’s (“FCC”) 2015 Open Internet Order providing for “net neutrality” by adding a new section to the Unfair Practices Act, 1978 NMSA 57-12-1 (“the UPA”), that would define certain acts by broadband internet access service (“BIAS”) providers as unfair and deceptive trade practices within the meaning of the UPA.

In Section 1(A), the Bill outlines the practices by BIAS providers that would be considered to be unfair and deceptive under the UPA and therefore prohibited. These acts include:

- Blocking, impairing or degrading lawful content, applications, services or use of non-harmful devices
- Engaging in paid prioritization

- Unreasonably interfere with or unreasonably disadvantage and end users ability to select access and use broadband internet access
- Fail to disclose upon request accurate information regarding network practices and performance so consumers can make an informed choice regarding services.

SB 155 also adds a \$250 thousand appropriation to the NMAG to use in FY18 and 19 to review the FCC's December 2017 decision to repeal the 2015 Open Internet Order and file or join a lawsuit to challenge the FCC's decision.

FISCAL IMPLICATIONS

The NMAG estimates that “this appropriation would support one lawyer, one support staff and related litigation costs for approximately one and a half years; as the appropriation is for the remainder of fiscal year 2018 and fiscal year 2019 (dependent upon remaining funds).” The entirety of the appropriation would be used for litigating the FCC's recent decision.

SIGNIFICANT ISSUES

The Public Regulation Commission provided the following thorough analysis of SB 155:

The New Mexico Public Regulation Commission is not implicated at all in this proposed bill because the Attorney General is required by statute to enforce the Unfair Trade Practices Act. However, the NMPRC offers the following background of the issues in this bill to assist legislators in understanding previous and current FCC actions.

On December 14, 2017, the FCC issued an order reversing its decision in a prior Order of March 2015 classifying broadband internet access services as telecommunications services subject to common carriage regulation under Title II. Previously, the FCC classified broadband internet access services as an information service subject to regulation under Title I. The FCC decided to forbear in its 2015 Open Internet Order from applying the majority of the Sections of Title II regulation, but did move to enforce rules to prevent internet access providers from engaging in behavior that would block, throttle, or allow paid prioritization of broadband internet access services as outlined in this bill.

The FCC's prior Open Internet Order of 2015 was challenged by a number of interests, including most of the major internet access provider (large local and wireless telecommunications providers and cable providers), and was upheld by the D.C. Circuit Court.

It anticipated that those parties that supported the FCC's Open Internet Order of 2015 (Content providers such as Google, Amazon, and consumer groups) will challenge the FCC's current December 2017 Order Restoring Internet Freedom removing the Title II designation of broadband internet access services.

Those that support the classification of broadband internet access services as a telecommunications service argue that it will protect content providers in accessing consumers with their content, and will protect consumers freedom to choose the content of their choice without threat of blocking, throttling, or paying more for the content of

their choosing. Proponents fear that internet service providers will use their “gatekeeper” role to control the flow of information to consumers. They also argue that it will not deter network investment by the internet network providers.

Those that support the repeal of Title II regulation of broadband internet access services argue that Title II regulation imposes costly regulation on internet service providers and disincentivizes those providers from investing in expanding their networks and developing cutting edge services. They also argue that internet service providers do not have the incentive to abuse their gatekeeper roles due to competition, and the FCC’s complaint procedures are adequate to prevent those abuses which Title II proponents fear will come to pass.

Like New Mexico, many states are introducing net neutrality legislation in order to maintain or restore those Title II protections rescinded by the FCC in its December 2017 Internet Freedom Order. Given the fact that the FCC has determined that broadband internet access services are interstate in nature, there is a question whether state legislation would provide adequate protections for the blocking or throttling of internet access services, or for preventing paid prioritization of internet services.

A number of state attorneys general have sued the FCC over the rollback of net neutrality rules, including the New Mexico Attorney General. This legislation would provide additional funding to assist the New Mexico Attorney General in prosecuting its case against the FCC.

The NMAG also notes that SB 155 omits some key definitions. These are “1) lawful content; 2) lawful internet traffic and 3) non-harmful device.” Enforcement of SB 155 may be difficult to implement without the guidance and intervention of a court, which could also lead to varying readings of the meaning of the law and protracted litigation.

PERFORMANCE IMPLICATIONS

As drafted, SB 155 expands the scope of UPA violations that the Attorney General has jurisdiction over. The NMAG has noted its support of this expansion.

DUPLICATION, COMPANIONSHIP

Companion to SB 39 and HB 95, and a duplicate of SB 155.

TECHNICAL ISSUES

The Bill has a definition of “mobile” BIAS, but the words “mobile” or “mobile BIAS” do not appear anywhere in the text of the draft. It is unclear whether this was intentional, an oversight, or a placeholder for later legislation.

OTHER SUBSTANTIVE ISSUES

The ability of the state to enforce net neutrality rules through legislation may be questionable because the FCC has determined that broadband internet access service is interstate in nature, leaving the state with limited to no jurisdiction over those services.

ALTERNATIVES

Alternatives to accomplishing the intent of SB 155 would be to require state contracts only with internet providers that have been certified to meet or follow net neutrality requirements and standards.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo – this action by BIAS providers will not be regulated by the state.

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