

Date of Hearing: April 10, 2024

ASSEMBLY COMMITTEE ON COMMUNICATIONS AND CONVEYANCE

Tasha Boerner, Chair

AB 2239 (Bonta) – As Amended March 18, 2024

SUBJECT: Digital discrimination of access: definition

SUMMARY: This bill expressly prohibits an internet service provider (ISP) from engaging in digital discrimination of access (“digital discrimination”), as defined. This bill also requires the California Public Utilities (CPUC) to take specified actions to integrate and update existing processes and rules to implement the prohibition into the CPUC’s programs and functions.

Specifically, **this bill:**

- 1) Establishes definitions for key terms:
 - a. “Digital discrimination of access” to mean policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers’ access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin, or that are intended to have a differential impact
 - b. “Broadband internet access service” to mean a mass-market retail service by wire or radio provided to customers in California that provides the capability to transmit data to, and receive data from, all or substantially all Internet endpoints, including, but not limited to, 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 California that provides a functional equivalent of that service or that is used to evade the protections set forth in this title.
 - c. “Internet service provider” to mean a business that provides broadband Internet access service to an individual, corporation, government, or other customer in California.
 - d. “Differential impact” or “disparate impact” in relation to digital discrimination of access to mean policies or practices that meet specified criteria.
 - e. “Economically feasible” to mean reasonably achievable as evidenced by covered entities under similar circumstances or demonstrated new economic conditions clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and used.
 - f. “Technically feasible” to mean reasonably achievable as evidenced by prior success by covered entities under similar circumstances or demonstrated technological advances clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and used.
- 2) Requires the CPUC to ensure that rules for specified broadband programs include guidance prohibiting digital discrimination of access by taking at a minimum, three specified actions:
 - a. Modifying required attestations.

- b. Modifying grant program points for projects that help remedy documented digital discrimination of access.
 - c. Adjusting required reporting to confirm compliance.
- 3) Requires the CPUC to update processes, reporting requirements, and investigative procedures within existing mechanisms and staff structures to enable California residents, consumer advocates, and local governments to make complaints regarding any activity that results in digital discrimination of access.

EXISTING LAW:

- 1) Establishes an identical, but separate, definition of “broadband internet access service” and “internet service provider” under the Internet Neutrality statutes. (Civil Code § 3100)
- 2) Establishes a definition of “fixed broadband Internet access service” to mean a broadband Internet access service that serves end users primarily at fixed endpoints using stationary equipment. Fixed broadband Internet access service includes, but is not limited to, fixed wireless services including, but not limited to, fixed unlicensed wireless services, and fixed satellite services.
- 3) Prohibits an internet service provider, insofar as the provider is engaged in providing fixed broadband Internet access service, to engage in specified activities that violate the neutrality of internet traffic. (Civil Code § 3101).
- 4) Vests the Public Utilities Commission (PUC) with regulatory authority over public utilities. (Public Utilities Code § 216; California Constitution Article XII).
- 5) Authorizes the CPUC to impose a fine ranging from \$500 to \$50,000 per offense, against any person or entity, other than a public utility, that fails to comply with a utility law or commission requirement, or who aids or abets a public utility in the violation of the same. (Public Utilities Code § 2111)
- 6) Establishes a misdemeanor penalty for every person either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, if they violate any utility law or commission requirement, or aid or abet a public utility in the violation of the same, in a case in which a penalty has not otherwise been provided for such person. The penalty is up to one year in jail and/or a \$1,000 fine. (Public Utilities Code § 2112)

FISCAL EFFECT: Unknown. This bill is keyed as fiscal by the Legislative Counsel.

COMMENTS:

- 1) *Author’s Statement.* According to the author, “Despite historic public investments to close the digital divide, low-income communities of color across the state remain disproportionately disconnected, stranded on the wrong side of the digital divide. To the extent that there are policies and practices that serve to exacerbate this persistent inequity – even when that is not the intent – we must put an end to them. AB 2239 will put every Californian on equal footing to access high quality broadband services.”

- 2) *Framing this bill in the context of state and federal efforts to expand broadband access.* Especially since 2020 in the wake of the COVID-19 pandemic, both the federal and state government have passed ambitious pieces of legislation to expand broadband access to more people. At the federal level Congress appropriated billions of pandemic relief dollars to states and local entities through a series of bills including the Coronavirus Aid Relief, and Economic Security (CARES) Act in 2020, the American Rescue Plan Act in (ARPA) in 2021, and subsequently the bipartisan Infrastructure Investment and Jobs Act (IIJA) also in 2021. In response, California has also committed significant sums of money to expand broadband infrastructure through legislation such as SB 156 (Committee on Budget and Fiscal Review, Chapter 112, Statutes of 2021) and policy bills that required a statewide digital equity plan and also established a Digital Equity Bill of Rights. In turn, this bill continues the federal and state government’s comprehensive strategy of expanding equitable access to broadband internet service by also addressing digital discrimination as part of the suite of policies passed over the last several years.

Specifically, under the IIJA, Congress directed the Federal Communications Commission (FCC) to “adopt rules to facilitate equal access to broadband internet access service.” Further, the law directed the FCC to develop rules “preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin; and identifying necessary steps for the Commission to take to eliminate discrimination.”¹ According to the FCC’s interpretation of those statutes, which are reflected in this bill, the text of the IIJA means that the FCC’s rules would miss the mark if they only covered discriminatory intent because that would fall short of meeting the statutory obligation to “facilitate equal access” to broadband². As a result of that interpretation, the FCC defined digital discrimination to include disparate treatment and disparate impact, which this bill also proposed to incorporate.

- 3) *The FCC’s rules for digital discrimination are currently being challenged in court.* Notably, the FCC’s Rules to prevent and eliminate digital discrimination are currently being challenged in several lawsuits by a number of different business-aligned groups, including the U.S. Chamber of Commerce, NCTA – The Internet & Television Association, ACA Connects, and wireless trade groups. CalBroadband, in their letter of opposition to this bill, characterizes the various lawsuits as follows:

“These challenges to the FCC’s rules will focus in part on the rule’s inclusion of a disparate impact standard and overly broad extension of its rules, contrary to congressional intent. The FCC’s attempt to impose a disparate impact standard and to regulate every aspect of broadband, including the price of broadband services, also implicates the “major questions” doctrine.”

In summary, many of the petitioners challenging the FCC’s rules argue that they are unconstitutional, overly broad, and exceeded the authority granted in the IIJA by adopting a disparate impact standard. Given the legal challenges, the opposition to this bill would argue that California should not push for the same policy in this state. However, there is more to

¹ § 60506 of the Infrastructure Investment and Jobs Act, Public Law No. 117-58.

² FCC. (2024). *Statement of FCC Chair Jessica Rosenworcel*. p. 217. <https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf>

consider with this bill than simply whether the FCC's rule is being challenged in federal courts.

First and foremost, there is precedent in California for adopting state broadband policies modeled from FCC decisions, even while litigation is pending. For example, in 2018 after President Trump's FCC Chair abdicated open internet rules and principles entirely, California adopted into law net neutrality legislation³ that applied to internet service providers in our state. The bill passed despite concerns about ongoing litigation regarding the role of the FCC, particularly the agency's authority to preempt state regulation of broadband service. The truth is, under our system of law, the courts are often and appropriately asked to evaluate the legality of a public policy, often when certain parties have a fundamental opposition to the outcome. There is a high likelihood that, if this bill should pass, it will be challenged in court, just as the FCC decision is being challenged. The legal challenges are not without risk, both to the implementation of this bill and to the state's broadband deployment goals. Nonetheless, there is also a clear potential benefit to broadband customers and the public under this legislation, should it pass legal muster.

The second point to consider regarding this bill in light of pending federal litigation, is that the underlying legal challenges to the FCC's rules and this bill would be fundamentally different. Petitioners against the FCC's Rules are making specific arguments that the FCC exceeded its authority under the IJJA, specifically by adopting a disparate impact standard. The clear difference with this bill is that the California Legislature, in passing this bill, would not be acting under the authority of the IJJA to pass it and therefore could not exceed its own authority in that particular manner. While there are other credible legal arguments that could be made against this bill, particularly regarding constitutional limitations on regulating interstate commerce, the relevant legal precedent would suggest that there is a role for states to regulate broadband internet access service. For example, in 2022 the U.S. Court of Appeals for the Ninth Circuit upheld⁴ California's net neutrality law, concluding that the FCC's deregulatory approach to net neutrality did not preempt California's regulatory approach. The specific facts in this instance in regards to that precedent are clearly different, in particular because in this instance the FCC has chosen to adopt its own rules; however, the existence of the FCC regulations prohibiting digital discrimination are not a given. Just as a court may toss the rules out completely if the current legal challenges are successful, the FCC itself may choose to repeal the rules under different political leadership.

In summary, it is true that there are extensive legal questions that arise because of this bill, and therefore significant reason to believe that this bill will be challenged in court. On the other hand, the outcome of such a challenge is difficult to predict or accurately characterize because there are a multitude of variable factors to consider. What is more certain from a public policy perspective, is that consumers would benefit from being protected from digital discrimination of access just as the public has benefitted from other anti-discrimination laws.

- 4) *Disparate treatment vs disparate or differential impact.* The definition established by this bill for the term "digital discrimination of access" includes a consideration of differential impact or disparate impact, consistent with the definition adopted by the FCC. While this bill also

³ SB 822 (Wiener. Chapter 976, Statutes of 2018).

⁴ *ACA Connects v. Bonta*. Case No. 21-15430 <https://cdn.ca9.uscourts.gov/datastore/opinions/2022/01/28/21-15430.pdf>

establishes specific criteria to understand the term differential impact and disparate impact, the terms are generally understood to cover unintentional acts of discrimination. In other words, in addition to intentional discrimination, under this bill an internet service provider would also be prohibited from engaging in unintentional acts that have a discriminatory impact. The idea that unintentional acts could also be considered discrimination is not a novel idea, but has precedent in employment⁵ and housing law⁶.

For decades, this country's civil rights laws have recognized that equal opportunity to achieve economic and social benefits can be denied intentionally because of the personal characteristics or status of the person seeking the opportunity or benefit. The prohibition of disparate treatment discrimination has, at least more recently, not typically been a controversial public policy. Also consider that our nation's civil rights laws have also recognized that equal opportunity, or in this case equal access, may also be denied unintentionally because of seemingly neutral policies or practices that disproportionately exclude certain persons based on protected characteristics or status. The latter has always been more controversial, even for organizations that may legitimately intend not to discriminate. Unsurprisingly then, the inclusion of a disparate impact standard in this bill has awakened a similar discussion among the stakeholders advocating for and against it.

For the proponents, a disparate treatment standard alone would not be sufficient to remedy the alleged harm and unequal access to broadband services experienced by protected classes. In FCC comments, advocates of the disparate impact standard argue that the rule must encompass disparate impact claims because most discrimination in broadband access stems from business practices having discriminatory effect, and not necessarily discriminatory intent. Therefore, only considering disparate treatment would render the prohibition on digital discrimination of access essentially meaningless. The opponents, on the other hand, argue that the inclusion of a disparate treatment standard would stifle further investment and make the goal of universal broadband deployment more difficult to achieve. Some opponents have also gone as far as arguing that digital discrimination does not exist at all. However, Congress' findings in the IJJA, evidence submitted to the FCC, and studies conducted in California demonstrate that people who live in neighborhoods of predominantly low-income residents and people of color are disproportionately disconnected from the internet. Therefore, the question this bill raises in the face of clear and convincing evidence of unequal outcomes is: how far we are willing to go to remedy the problem?

- 5) *Enforcement of this bill.* While the definition portions of this bill mirror the FCC's digital discrimination decision, the enforcement of this bill raises significant issues for consideration. Under the IJJA, the FCC would have the enforcement authority for its own rules. To that end, the FCC adopted procedures for how the agency will consider allegations of digital discrimination. First, the FCC requires that any determination of differential impact that relies on observed disparity must point to a specific policy or practice that is causing the disparity. This causality requirement ensures that any statistical imbalance does not on its own establish liability and thus protects covered entities from being held liable for disparities they did not create. Secondly, covered entities have an opportunity to present justifications

⁵ 42 U.S.C. § 2000e-2(a) (making it unlawful for employers to act "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee").

⁶ 42 U.S.C. Section 3604(a); 24 C.F.R. Sections 100.50(b)(1) and 100.60. "It is unlawful to make unavailable or deny a dwelling to any person because of their sex, race and national origin."

for discriminatory policies and practices, in particular to distinguish between genuine issues of technical and economic feasibility. This bill does not directly attempt to require such procedures, although it does require the CPUC to take specified actions, as follows:

“[The CPUC] shall update processes, reporting requirements, and investigative procedures within existing mechanisms and staff structures to enable California residents, consumer advocates, and local governments to make complaints regarding any activity that results in digital discrimination of access.”

This language, which is vague yet sweeping, could be read to suggest the CPUC should implement a similar a process to the FCC. If so, then the CPUC would be required to update its administrative functions to both accept complaints and make investigations against ISPs in order to enforce the rules adopted by the agency. Although this bill does not specifically mention enforcement against ISPs by the CPUC, existing law in the Public Utilities Code makes clear that the CPUC would have the authority to enforce any rules it adopts including issuing significant fines. Such a regulatory scheme would be a significant and unprecedented expansion of the CPUC’s current regulatory jurisdiction over broadband service. Given the ambiguity in regard the CPUC’s enforcement authority, the author may wish to revise this bill to provide more detail in regards to the CPUC’s role in implementing this bill.

Without further direction in this bill, or if the CPUC is removed, enforcement of this bill would be left to the courts. While the courts may be qualified to adjudicate allegations of digital discrimination of access, this bill provides little guidance except that both technical and economic feasibility should be considered. Under the latest round of author’s amendments definitions for both “economic feasibility” and “technical feasibility” were included in this bill, which are also based on the FCC decision. However, even the definitions currently in this bill would provide the courts with significant discretion to interpret the terms and decide any case brought against an ISP. Moving forward, if this bill should pass this committee and proceed to the Assembly Judiciary Committee, the author may wish to continue refining what enforcement ought to look like in California. Doing so would hedge against courts potentially undermining the intent of the law, or also may serve to encourage ISPs doing business in California to follow specific best practices and procedures.

6) *Related/previous legislation.*

- a. AB 414 (Reyes. Chapter 436, Statutes of 2023), among other things, established the policy of the state that broadband internet subscribers benefit from equal access to broadband internet service within the service area of a broadband provider.
- b. AB 2751 (Bonta. Chapter 597, Statutes of 2022) requires the Department of Technology, by January 1, 2024, to develop a state digital equity plan.
- c. SB 156 (Committee on Budget and Fiscal Review. Chapter 112, Statutes of 2021) provides the statutory framework to implement the broadband provisions contained in the 2021 Budget Package, including last-mile and middle-mile broadband infrastructure programs.
- d. SB 822 (Wiener. Chapter 976, Statutes of 2018) established net neutrality rules by prohibiting Internet Service providers (ISPs) from engaging in activities that interfere with a user’s ability to access content on the internet.

7) *Committee amendments.* The committee may wish to adopt the following amendments:

- a. Expand the definition of an “internet service provider” to include any entity that provides broadband Internet access service to an individual, corporation, government, or other customer in California.
- b. Revise proposed Section 281.3(a) of the Public Utilities Code to instead require that the CPUC’s revised rules for existing programs explicitly prohibit digital discrimination of access and require the CPUC only to take specified actions in implementing that section.
- c. Strike proposed Section 281.3(b) of the Public Utilities Code, pertaining to a complaint and enforcement scheme to be administered by the CPUC.

REGISTERED SUPPORT / OPPOSITION:

Support

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A Place Called Home
Access Humboldt
Alliance for A Better Community
Arts for La
Boys & Girls Clubs of The Los Angeles Harbor
California Alliance for Digital Equity
California Community Foundation
California Emerging Technology Fund
Center for Powerful Public Schools
Citizen Schools
Common Sense Media
Communities in Schools of Los Angeles (CISLA)
Community Coalition of The Antelope Valley
Destination Crenshaw
Diversity in Leadership Institute
Educare Foundation
Electronic Frontier Foundation
Everyoneon
Families in Schools
Fresno Coalition for Digital Inclusion
Gpsn
Hack the Hood
Healing and Justice Center
Innercity Struggle
Innovate Public Schools
Institute for Local Self-reliance
Insure the Uninsured Project
Kapor Center
Latino Equality Alliance
Lighthouse Community Public Schools

Media Alliance
Michelson Center for Public Policy
Nextgen California
Oakland NAACP
Our Voice: Communities for Quality Education
OUSD Tech Repair Program
Para Los Ninos
Parent Engagement Academy
Parent Institute for Quality Education
Parent Organization Network
Southern California College Attainment Network
Teach Plus - California
Tech Exchange
The Angeleno Project
The Children's Partnership
The Green Lining Institute
The Unity Council
Unite-la
United Parents and Students
Watts of Power Foundation

Opposition

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