

Date of Hearing: April 24, 2024

ASSEMBLY COMMITTEE ON COMMUNICATIONS AND CONVEYANCE

Tasha Boerner, Chair

AB 1826 (Holden) – As Amended April 16, 2024

**SUBJECT:** Digital Equity in Video Franchising Act of 2024

**SUMMARY:** This bill makes comprehensive changes to state law pertaining to cable operators and state video franchising including revising the renewal process for a state-issued video franchise, updating anti-discrimination requirements, requiring holders of a video franchise (“holders”) to provide equal access to service, and increasing the limit on penalties.

Specifically, **this bill:**

- 1) Renames existing law, The Digital Infrastructure and Video Competition Act of 2006, to the Digital Equity in Video Franchising Act (DEVFA) of 2023.
- 2) Makes various findings and declarations regarding the purpose of DIVCA, evidence why it has fallen short, and the need for further legislation to accomplish state goals.
- 3) Strikes existing law prohibiting the California Public Utilities Commission (CPUC) from regulating the terms and conditions of video service.
- 4) Strikes existing law that prohibits the CPUC from imposing any requirement on any holder of a state franchise beyond what is explicitly authorized in DIVCA.
- 5) Authorizes the CPUC to exercise the authority, jurisdiction, and powers granted to it by the Federal Cable Communications Policy Act of 1984.
- 6) Authorizes CPUC to require supplementary information on applications for a state franchise.
- 7) Revises and recasts the timelines by which the CPUC must review and dispense of applications for a state franchise.
- 8) Adds a requirement that a public hearing must be held for renewals of a state franchise.
- 9) Authorizes the CPUC to impose additional terms on a franchise holder as a condition of holding the state franchise, including requiring upgrades to the cable system.
- 10) Establishes the policy of the state that subscribers and potential subscribers of a state video franchise holder should benefit from equal access to service within the service area.
- 11) Revises existing law related to prohibitions on income discrimination by holders.
- 12) Increases the limits on various penalties for violations.
- 13) Revises existing law requiring any penalty assessed to be remitted to the local entity, which shall remit half to the Digital Divide Account.

- 14) Authorizes the CPUC to enforce customer service requirements for holders of a state franchise.
- 15) Requires the Public Advocate's Office of the CPUC to conduct an independent evaluation of a state franchise holder seeking renewal of its franchise, to document how the holder has met its obligations.

**EXISTING LAW:**

- 1) Defines "franchise" as an authorization, issued by a franchising authority, which permits the construction or operation of a cable system. [47 United States Code (US Code) § 522(9)]
- 2) Provides that a state-issued franchise is valid for a period of 10 years, and requires a holder to apply for a renewal every 10 years if they wish to continue providing service.
- 3) Defines "franchising authorities" as any governmental entity empowered by Federal, State, or local law to grant a franchise. Existing state provides that the CPUC is the sole franchising authority in California. [47 USC § 522(10); Pub. Util. Code § 5840(a)]
- 4) Provides that franchise terms may require cable operators to build their systems to cover certain localities in a franchise area and that those costs are borne by the operator or subscribers. [47 US Code §541(a)(2)-(3)]
- 5) Requires that a local franchising authority must allow a cable operator a reasonable period of time to build out cable service to all households in the franchise areas. [47 US Code §541(a)(4)(A)]
- 6) Prohibits discrimination against potential residential cable subscribers because of the income of the residents in that local area. [47 USC § 541(a)(3); Pub. Util. Code § 5890(a)]
- 7) Establishes criteria for determining whether a video service provider has discriminated against residential subscribers. Existing law establishes different criteria for demonstrating compliance with non-discrimination prohibitions for franchise holders providing telephone service to more than one million Californians and those franchise holders providing telephone service to less than one million Californians. [Pub. Util. Code § 5890 (a-f)]
- 8) Prohibits any cable system or cable operator from being subject to regulation as a common carrier or utility as a result of providing video service. [47 USC § 541(c); Pub. Util. Code § 5810(a)(3); PUC § 5820(c)]
- 9) Clarifies that federal law does not prohibit a local franchising authority from prohibiting discrimination among subscribers and potential subscribers to cable service. [ 47 USC § 543(e)]
- 10) Expressly preempts any provision of state law that is inconsistent with the terms of federal law concerning cable service. [47 USC § 556(c)].
- 11) Requires every cable franchise holder to submit specified data to the CPUC by April 1st each year. Existing law requires franchisees to submit specified broadband, video, telephone, and low-income service metrics to the CPUC on a census tract basis. Existing law permits a

franchise holder to “reasonably estimate” the number of households to which it provides broadband service in the state if the provider does not maintain broadband service information on a census tract basis. Existing law prohibits the CPUC from publicly disclosing any of the data reported by franchise holders unless the CPUC orders the disclosure of the data through a proceeding. Any current or former CPUC employee or officer who discloses data outside of an order is guilty of a misdemeanor under existing law. (Pub. Util. Code §5960 & Pub. Util. Code § 583)

- 12) Prohibits the CPUC from exercising authority over cable operators beyond what is explicitly provided for in state law, and establishes the particular requirements for video service providers applying for a state franchise, and specifies the information franchise holders must provide to the CPUC to obtain and retain a state franchise. [Pub. Util. Code § 5840 et. seq.]
- 13) Allows local governments to bring complaints to the CPUC regarding cable franchises that are not offering video service required by this section. Existing law authorizes the CPUC to initiate an investigation on its own, regardless of whether it has received a complaint from a local government. The CPUC may suspend or revoke the license of a video service provider that fails to comply with the requirements for its franchise. Existing law also specifies fines that the CPUC or court may assess on violating franchisees. [Pub. Util. Code § 5890 (g-i)]
- 14) Requires the CPUC to adopt customer service requirements for a holder of a state and adjudicate any customer complaints. (Pub. Util. Code § 5895)

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

**BACKGROUND:**

- 1) *DIVCA Background.* The Digital Infrastructure and Video Competition Act (DIVCA) established the process and procedures by which cable television providers were granted authorization, via a state video franchise, to operate. Prior to DIVCA, cable television providers were franchised at the local level by cities and counties (“local entities”). DIVCA shifted this responsibility away from local entities, and established a ministerial review process with CPUC as the sole franchising authority. Although existing local franchises were allowed to remain in effect until their expiration, companies with locally-issued franchises were allowed to opt out of them and procure a state-issued franchise if another state-issued franchisee began to compete with them, or if the Local Entity agreed.

DIVCA was enacted at a time when the incumbent local telephone companies (primarily AT&T and Verizon) wanted to begin to offer video services and compete with traditional cable companies, which had begun to provide competitive local telephone service. By establishing ministerial process with low-barriers to entry into the market, DIVCA was intended to provide for rapid entry into the video business by the incumbent telephone companies through a single, state-issued franchise. The DIVCA process replaced the need to negotiate and secure hundreds of franchises from Local Entities. DIVCA also required video service connections to provide the ability to receive internet access service. Thus, DIVCA was intended both to foster competition in the provision of video services and to promote the deployment of broadband capable infrastructure.

In addition to its provisions requiring state video franchises, DIVCA required franchise holders to submit certain data to the CPUC each year, on a census tract basis. That

information included the number of households offered video and broadband services; the number subscribing to broadband services; as well as the number of low-income households in the video service area and the number of low-income households that were offered video service. DIVCA required this information to be aggregated and reported by the CPUC to the Governor and Legislature on an annual basis. DIVCA also contained certain deployment obligations, including a provision that holders may not discriminate against or deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides. However, the deployment obligations established under DIVCA created a low bar for holders to meet, and thusly reduced their incentive to expand service in low-income areas.

- 2) *DIVCA separated the franchising task from consideration of performance issues.* A key construct of DIVCA video franchising was the separation of the franchising task from the consideration of network performance issues. Under local franchising, performance was regulated by local entities, and acceptable levels of past performance were required for franchise renewals. DIVCA transferred franchising authority to the CPUC, while local entities remained in the role of adopting and enforcing customer service-related performance by state video franchise holders. DIVCA required the CPUC to grant a franchise upon determination that an application for a video franchise was “complete”. Further, DIVCA required the CPUC to renew a franchise upon receipt of a completed renewal application unless the applicant had been found by a final court decision to have violated consumer protection rules (in suits brought by Local Entities) and had failed to cure its violation. To date, no enforcement action has been brought against any franchise holders

The lack of sufficient oversight by local entities is likely explained by the transition of local franchising to state franchising. Prior to DIVCA, many local entities had dedicated staff to carry out cable franchising, enforce customer service standards contained in local franchises, and adjudicate customer complains. After DIVCA shifted franchising responsibilities to the CPUC, many local entities generally disbanded their staff dedicated to cable television matters, and enforcement activities generally ceased. Nonetheless, holders continued to pay local entities a franchise fee require by state law which could have continued to pay those staff salaries. More recently, SB 28 (Caballero. Chapter 673, Statutes of 2021) authorized the CPUC to set customer service requirements for cable providers. The CPUC recently opened a proceeding to implement SB 28, which remains ongoing.

- 3) *Federal law protects holders from unfair denials of their applications.* In 1984 Congress passed the Cable Communication Act which aimed to delineate the jurisdictional boundaries between federal, state, and local governments regarding the regulation of cable operators. Another key tenet of the Act, as expressly stated in federal law, was to protect cable operators against unfair denials of renewal. Congress updated the Act in 1992, by passing the Cable Television Consumer Protection and Competition Act of 1992. Under the 1992 law, while local authorities retained the power to grant cable franchises, the law provided that “a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.”

The federal Cable Act reflects the free-market political philosophy of Republican administrations. Not coincidentally, it was originally signed into law by President Ronald Regan and updated in 1992 under President George H. W. Bush. The logic underpinning most of its provisions validate the belief that that a light-touch regulatory approach would

improve service for consumers through increased competition in the marketplace. In the case of California law, DIVCA was also signed by a Republican Governor and it goes a step further than federal law by placing additional restrictions on the CPUC's authority beyond what is required by the Cable Act. For example, under DIVCA the CPUC is required to review and approve renewal applications within 44 days, which primarily advantages the interests of the applicant. The CPUC is also prohibited from requiring cable operators to expand their infrastructure footprint to unserved households, which the Cable Act does not prohibit. As a result, the regulatory scheme set-up by DIVCA leaves little opportunity for the CPUC - the sole franchising in the state – to exercise oversight this industry.

Has the light-touch regulatory approach inherent in DIVCA helped the state reach any of its goals regarding access? The evidence suggests it has not. For example, in most service territories of existing franchise holders there is little to no competition for video service and the companies operate essentially as a monopoly on video service. Additionally, there are hundreds of thousands of households across the state within the existing service territories of franchise holders that lack access to video service.

#### COMMENTS:

- 1) *Fourth time is the charm?* This is the fourth time in four sequential legislative sessions that a bill has been introduced to fundamentally reform DIVCA. The insistence to address the issue arguably reflects the glaring deficiencies in existing law that fails to meet the needs of consumers, fails to provide robust competition as was originally intended, protects franchise holders from requirements to expand their networks to unserved and low-income communities, and generally has not served the public interest. Nonetheless, comprehensive reform has not yet been achieved for a myriad of policy and political reasons. In 2021 when Governor Newsom signed SB 28 (Caballero) into law, which for the first time authorized the CPUC to establish customer service standards, he encouraged the Legislature to go further<sup>1</sup>. Last year, in vetoing AB 41 (Holden), the Governor reiterated his message stating plainly that “[the] bill does not go far enough.” The decision to veto AB 41 was lauded by consumer advocacy organizations that also sought a stronger legislation that address anti-discrimination, community participation, and regulatory processes. Towards that end, this bill once again attempts to take a comprehensive approach to reforming DIVCA. The changes include strengthening the anti-discrimination and equal access provisions of this bill, requiring an independent evaluation of a franchise holder's performance as part of the renewal process, requiring public hearings as part of the renewal process, and increasing fines.
- 2) *Unpacking anti-discrimination and equal access to service.* Both federal and state law under DIVCA prohibit cable operators from discriminating against or denying access to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides. In the Cable Act, the prohibition on income discrimination is stated quite plainly and open-ended. However, under DIVCA the anti-discrimination statute includes several qualifiers and sets an unreasonably low floor for holders to meet to show they are not discriminating. As a result, franchise holders are not encouraged to expand their infrastructure to low-income households, even within their existing service territories. To put

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<sup>1</sup>Governor Newsom SB 28 (Caballero) signing letter. October 8, 2021. <https://www.gov.ca.gov/wp-content/uploads/2021/10/SB-28-Signing-Message.pdf>

the issue in context, based on CPUC data, there are potentially thousands of households in donut holes of service within the existing service territories of state franchise holders. A “donut hole” is a colloquial term used to describe an area with no service which is completely surrounded by areas that do have access to service. Often times donut holes of service are low-income areas such as trailer parks or public housing developments, which may exist even in higher income areas.

To address the deficiencies with existing law regarding discrimination and access to service, this bill proposes to take two notable actions. First this bill proposes to strengthen the existing anti-discrimination statute by increasing the percent of low-income households that must have access to the holder’s service to meet the presumption that the franchise holder is not discriminating. Specifically, this bill increases the threshold from 30% of households to 100% of households. Secondly, this bill strengthens the existing access requirement to instead require that franchise holders do not deny “equal” “access” to service, as the two terms are defined. In conjunction, the effect of these two changes in this bill would likely be that franchise holders would upgrade existing infrastructure in low-income areas to facilitate equal access to service, or risk anti-discrimination enforcement from the CPUC. In turn, by upgrading the infrastructure, some households would also benefit from expanded access to broadband since the two services are provided over the same infrastructure.

Requiring equal access to service is aligned with ongoing state and federal efforts to address digital discrimination. For example, pursuant to the federal Infrastructure Investment and Jobs Act (IIJA), the Federal Communications Commission (FCC) adopted rules to eliminate digital discrimination and facilitate equal access to broadband internet access service. Even more relevant, this committee just approved a bill – AB 2239 authored by Assemblymember Bonta – that would prohibit internet service providers in the state from engaging in digital discrimination. While that bill specifically applies to internet service providers regarding the provision of broadband internet access, there is considerable overlap in the specific companies it would apply to and certainly the goal of facilitating equal access to service. The truth is that holders of a state video franchise are among the largest internet service providers in the state, and thus will be required to comply with both bills.

Given the overlap, it is prudent to be mindful that the standards of equal access and discrimination are aligned in each bill; currently they are not. While this bill proposes a standard that 100% of low-income households have access to video service to meet the anti-discrimination requirement, AB 2239 was not as specific. Instead, AB 2239 proposes to establish an open-ended disparate impact standard that is not dependent on a specific amount of access being available in low-income communities, unlike the standards first established in DIVCA and proposed to be strengthened under this bill. While it is possible that the Legislature may wish to establish different standards for video service compared to broadband service, granted that they are distinct services, it is arguably more reasonable to establish similar standards given the great amount of overlap between the two. To put the overlap into perspective, a “franchise holder” that is also an “internet service provider” provides video and broadband service over literally the same physical cables that connect to an end user. In turn, if different standards were established, there would be two different legal standards that applied to the same physical infrastructure depending on the service that is being delivered. Moving forward, the author may wish to amend this bill’s provisions related to equal access to ensure consistency.

- 3) *Unpacking the renewal process for franchise holders.* Federal law<sup>2</sup> establishes a renewal process that authorizes a franchising authority to initiate a proceeding to receive public input and assess franchise holder's renewal application. Specifically, federal law authorizes a franchising authority, such as the CPUC, to assess whether a franchise holder has substantially complied with the material terms of the existing franchise and whether the franchise holder's application is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests. However, under the structure and procedures of DIVCA, the CPUC has neither enough time nor the authority to substantively evaluate whether a holder has met its obligations under the law when considering the renewal of a franchise agreement. This structure arguably fails to meet the public interest particularly because there is limited analysis to inform the decision whether to grant a franchise renewal.

To address this issue, this bill proposes that a holder of a state franchise shall undergo an independent evaluation by the Public Advocate's Office of the Public Utilities Commission to document how the holder has met its obligations under this division. Such an evaluation could provide useful information to the CPUC about unserved households, documentation of compliance or potential noncompliance with franchise terms, or other relevant information that could be considered during the renewal process. Notably, under existing law the Public Advocate's Office is already authorized to advocate on behalf of video subscribers regarding renewal of a state-issued franchise and enforcement of existing anti-discrimination requirements in DIVCA.

- 4) *DIVCA does not support robust public participation in the renewal process.* As was stated above, the federal Cable Act envisions a renewal process that provides adequate public notice and opportunity for public participation. Nonetheless, DIVCA establishes renewal procedures and timelines that arguably are not conducive to robust public participation. For example, existing law has no requirement for a public participation hearing as part of the renewal process. Further, DIVCA requires the CPUC to issue the franchise before the 14<sup>th</sup> calendar day after a completed application is submitted. It is inconceivable how such a timeline could support robust public participation, especially when some franchise holder's service territories span multiple counties with millions of customers. As a result, the public rarely has an opportunity to engage on a regulatory decision with considerable impact to the state's economy, their access to services such as video or broadband, and the use of the public right-of-way. Understandably, creating more venues for public participation in the renewal process has been a goal of supporters of changes to DIVCA.

To address the issue with a lack of public participation, this bill requires that the CPUC hold in-person, public hearings in the franchise service territory of a renewal application. This bill also authorizes virtual public meetings in some circumstances, or telephone and written comments for holders with fewer than 50,000 subscribers. Nonetheless, this bill lacks clarity on a particular number of public hearings that are required for franchise holders with larger amounts of subscribers. To provide more specificity, the committee may wish to amend this bill to establish specific guidelines around the number of hearings, whether they are in-person or virtual, and written comments.

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<sup>2</sup> 47 U.S. Code § 546

- 5) *This bill would increase fines for violations.* Current law establishes limitations on civil penalties for violations of existing anti-discrimination requirements and other breaches of a state franchise. Depending on the violation, the civil penalties are capped at particular rates of gross revenue or dollar amounts. For example, if a court or the commission finds that a franchise holder has violated the anti-discrimination provisions of existing law, either is prohibited from issuing a fine greater than 1% of the holder's monthly gross revenue. This bill repeal the limitation on maximum fines. Additionally, for civil penalties that can be assessed by a local entity, the dollar amount increases vary but are also significant. Historically, there have not been widespread allegations of violations; however, recent changes under recent legislation and this bill would raise the standards of operation and franchise holders could be more susceptible to enforcement actions. Given the significant increase in fines and limited history of documented violations, the committee may wish to revise the fine amounts.
- 6) *Arguments in support.* The California Emerging Technology Fund (CETF) argues that this bill is "an opportunity to strengthen DEVFA to accelerate progress on ubiquitous deployment and universal adoption to achieve Digital Equity."
- 7) *Arguments in opposition.* This bill is opposed by various industry-aligned organizations, including the California Broadband & Video Association (CalBroadband). CalBroadband writes that this bill "would impose arbitrary and complex new requirements on video service providers and remove video service providers' incentives to expand their service areas."
- 8) *Similar/related legislation.*
  - a. AB 2239 (Bonta) of this session would expressly prohibits an internet service provider (ISP) from engaging in digital discrimination of access ("digital discrimination"), as defined. The bill is pending a hearing in the Assembly Judiciary Committee.
  - b. AB 41 (Holden) would have made comprehensive changes to DIVCA, similarly to this bill. That bill was vetoed by the Governor.
  - c. AB 2748 (Holden) would have made comprehensive changes to DIVCA, similarly to this bill. That bill was held by the author in Senate Energy, Utilities & Communications Committee.
  - d. SB 28 (Caballero) Chapter 673, Statutes of 2021 expanded the authority of the CPUC to collect data to enforce requirements for cable franchises and authorized the CPUC to set customer service requirements for cable providers
- 9) *Committee amendments.* The committee may wish to adopt the following amendments:
  - a. Strike findings related to competition in the broadband market.
  - b. Revise requirements on public hearings, as follows:
    - i. For holders with over 1,000,000 subscribers, the commission shall convene 4 public hearings in in the franchise territory. At least one of the public hearings shall held virtually or telephonically.
    - ii. For holder with less than 1,000,000 subscribers but more than 250,000, the commission shall convene two public hearings. At least one of the public hearings shall be held virtually or telephonically.



- iii. For holders with less than 250,000 subscribers, the commission is not required to convene a virtual or telephonic public hearings.
  - iv. The commission shall accept telephone or written comments on all franchise renewal applications.
- c. Strike Section 5890 (c) of the Public Utilities Code and this bill, relating to discrimination and outlining particular metrics of access for low-income communities.
- d. Revise the fine amounts in Section 5900 of the Public Utilities Code and this bill.

**REGISTERED SUPPORT / OPPOSITION:**

**Support**

California Emerging Technology Fund

**Opposition**

CalBroadband

CalChamber

USTelecom

The Broadband Association

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