

Date of Hearing: April 24, 2024

ASSEMBLY COMMITTEE ON COMMUNICATIONS AND CONVEYANCE

Tasha Boerner, Chair

AB 2575 (Boerner) – As Amended April 17, 2024

SUBJECT: Broadband: state oversight

SUMMARY: This bill establishes the Department of Broadband and Digital Equity (“Department”) in the Government Operations Agency (GovOps), and the Broadband and Digital Equity Commission (“Commission”), as specified. This bill provides that on July 1, 2027 specified programs under the administration of the California Public Utilities Commission (CPUC) and California Department of Technology (CDT) would come under the administration of the Department.

Specifically, **this bill:**

- 1) Provides that on and after July 1, 2027, the Department is the centralized state department for broadband and digital equity activities within the state and, notwithstanding any other law, is the only state agency authorized to establish rules or regulations for broadband internet access service and internet service providers.
- 2) Provides that on and after July 1, 2027 the Department shall administered the following programs currently under the administration of the CPUC:
 - a. California Advanced Services Fund (CASF)
 - b. The Broadband Loan Loss Reserve Account program.
 - c. The California Interactive Broadband Map
- 3) Provides that on and after July 1, 2027 the Department shall oversee the acquisition and management of contracts for the development and construction of a statewide open-access middle-mile broadband network.
- 4) Provides that, on and after July 1, 2027, the California Broadband Council (CBC) and its members collectively shall become a committee under the administration of the Commission.
- 5) Provides that the Commission shall consist of 11 members, 7 of which are appointed by the Governor and 2 each by the Speaker of the Assembly and Senate Rules Committee. Provides that certain slots are to be reserved for particular members, including those representing consumer advocates, industry, a California tribe, and labor.
- 6) Provides that the Commission shall advise and assist the Department, GovOps, and the Legislature in formulating and evaluating state policies and plans for broadband and digital equity programs in the state.
- 7) Requires the Department to establish a process to enable California residents, consumer advocates, and local governments to make complaints regarding any activity that may result in digital discrimination of access.
- 8) Authorizes the CPUC to impose surcharges on VoIP customers to fund the CASF program, to be administered by the Department.

- 9) Authorizes the CPUC to impose a surcharge until December 31, 2032 to fund the CASF program, to be administered by the Department.

EXISTING LAW:

- 1) Establishes the California Public Utilities Commission, with specified authority and structure. (California Constitution Article XII)
- 2) Establishes the California Advanced Services Fund (CASF) program, under the administration of the CPUC, which consists of multiple subaccounts including the Infrastructure Investment Account (IGA), Broadband Public Housing Account (BBPH), and Federal Funding Account (FFA). (Public Utilities Code § 281)
- 3) Authorizes the CPUC, until December 31, 2032, to impose a surcharge to fund the CASF. (Public Utilities Code § 281.1)
- 4) Requires the CPUC, on or before April 1, 2023 and biennially thereafter, to conduct a fiscal and performance audit of the implementation and effectiveness of the California Advanced Services Fund. (Public Utilities Code § 912.2)
- 5) Establishes the Loan Loss Reserve Fund program under the administration of the CPUC. (Public Utilities Code §281.2)
- 6) Requires the CPUC to maintain and update a statewide, publicly accessible, and interactive map showing the accessibility of broadband service in the state. (Public Utilities Code § 281.6)
- 7) Requires the CPUC to impose surcharges on interconnected Voice over Internet Protocol (VoIP) service to ensure that VoIP customers contribute to the public purpose program funds specified, which include: CASF, California High-Cost Fund A/B, Lifeline, and the California Teleconnect Fund.
- 8) Establishes the Office of Broadband and Digital Literacy (OBDL) under the Department of Technology (CDT). (Gov. Code § 11549.51)
- 9) Provides that the OBDL shall oversee the acquisition and management of contracts for the deployment and construction of a statewide open-access middle-mile broadband network. This program is known as the Middle-Mile Broadband Initiative (MMBI).
- 10) Establishes the California Broadband Council (CBC). (Gov. Code §8885)
- 11) Authorizes specified joint-powers authorities to issue mortgage revenue bonds for the deployment of broadband infrastructure by a public entity or nonprofit entity that are supported in whole in part by the Loan Loss Reserve Fund program. (Gov. Code § 6547.7)
- 12) Authorizes the Department of General Services (DGS) to lease real property in support of broadband infrastructure deployment at an amount less than fair market value, under specified circumstances. (Gov. Code § 11011.2)
- 13) Requires the Department of Technology, by January 1, 2024, in consultation with the CPUC and CBC, to develop a state digital equity plan. (Gov. Code § 11546.46)

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

COMMENTS:

- 1) *Need for this bill.* The purpose of this bill is to establish the Department within state government to serve as the centralized state office for broadband and digital equity activities within the state. According to the author, “Broadband policy in California is a complicated web of different policies and programs that are failing consumers and leaves broadband providers with unequal levels of regulatory oversight. The Department will bring ALL of the state’s broadband initiatives – infrastructure grant making, consumer protection, and digital equity - under one structure of governance to achieve better outcomes for consumers by addressing the state’s broadband challenges head-on from a centralized office.”

California is one of the only states in the nation without a dedicated state agency or department to implement broadband programs in the state. Under the current administrative structure for broadband programs, essential duties are split between the Public Utilities Commission (CPUC) and Department of Technology (CDT). This separation has created issues with interagency coordination, stakeholder engagement, and caused delays that have made the goal of universal and ubiquitous broadband service difficult to attain.

- 2) *Public participation is a challenge under the current structure.* Implementation and decision making authority for the state’s broadband programs is split between the CPUC and CDT. Each agency’s process, or lack thereof, has presented a challenge for effective public participation.

Due in part to the CPUC’s arcane and complicated regulatory procedures, and ex-parte communications rules that make direct communication with Commissioners difficult, the CPUC’s regulatory process has had limited involvement from grassroots advocacy groups, tribes, and local governments. In order to formally participate in the CPUC’s proceeding, which is required to submit public comments that are part of the evidentiary record and not merely referential, an individual or organization must formally file a motion to be ruled upon by an administrative law judge. The motion, which is essentially a quasi-judicial legal filing, must conform to strict guidelines and requirements. Given that barrier to entry, many organizations engaged in advocacy before the commission hire attorneys and consultants to file comments on their behalf. The CPUC also has a program, called the Intervenor Compensation Program (I-COMP) that is intended to help less savvy and resourced organizations navigate the process. However, even participating in the program requires an organization to cross significant administrative and procedural barriers to be eligible, and local governments and tribal entities are not eligible. As a result, in the telecommunications space, most of the funding has gone to a select few organizations which may not represent the diversity of perspective on policy matters.

This negative impact on public participation by the Commission’s processes is well illustrated in a recent example. In the CPUC’s rulemaking for the \$1.86 billion dollar Broadband, Equity Access and Deployment (BEAD) program only 32 parties¹ formally participate in the rulemaking process, providing 67 on the record comments. However, the CPUC also reported receiving 450 other comments that seemingly would not become a part of the formal record. While those additional comments might not have swayed a final

¹ BEAD Initial Proposal Volume II. Section 4.6
<https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M520/K763/520763574.PDF>

decision in one way or another, arguably those individuals who took their time to submit comments have had their voice diluted because of a complicated regulatory process that by-design is intended to privilege formal parties over comments from a lay-person or group.

While the process for public participation at CDT, and just about every other public agency in California, provides a lower barrier to entry, CDT has had challenges of its own. Until SB 156, CDT was not an agency that had any direct public engagement roles. CDT was primarily responsible for internal management of state technology policy, and IT contracts management and procurement. Pursuant to SB 156, the Middle-Mile Advisory Commission (MMAC) was established, but it did not initially include any public members. Additionally, since the creation of the MMAC stakeholders have complained that the format is not constructive for genuine public engagement because the only opportunity the public has to speak is during public comment. As a result, both consumer advocates and industry stakeholders have raised concerns that significant funding and programmatic decisions were made with little public input. For example, in 2023, as it became clear that the state's initial \$3.75 billion dollar investment in the MMBI would not be sufficient to deliver the entire 10,000 mile network, the LA Times Editorial Board published an article titled: "Newsom throws South L.A. under the broadband bus"² Among the grievances raised in the piece were that major decisions were made without public input, which negatively impacted the neediest communities that the state investment was intended to help.

Both these examples at the CPUC and CDT illustrate how a lack of public engagement and stakeholder involvement in the decision making process can lead to challenges and delays.

- 3) *Broadband and Digital Equity Commission*. The current structure of the decision making process regarding broadband funding, infrastructure investments, grant program rules, and other related matters either falls into the hands of the 5 CPUC Commissioners or an opaque process at CDT. As a result, stakeholder groups that are closest to the issue have been given a formalized "seat at the table" of decision making. Under this bill, the Broadband and Digital Equity Commission would be established to help vest more decision-making power closer to impacted communities.

Such a solution would not be possible under the CPUC because the CPUC's composition is established in the state Constitution. Accordingly, the CPUC is limited to only 5 commissioners who must regulate a breadth of large industries including investor-owned electric and gas utilities, private water utilities, railroad crossing safety, transportation network companies, and telecommunications. Given the expansiveness of a Commissioner's portfolio, their time must be split between an array of important proceedings, and formal duties are often relegated to administrative law judges. For example, in 2023 the CPUC reported that out of 75 days of hearings where a Commissioner was present (Commissioners aren't required to attend all hearings), a Commissioner only formally presided over the meeting on 2 days!³ Further, the Commission's own rules⁴ only require a Commissioner to be present at no less than half of all hearings days. In effect, Commissioners are often not

² <https://www.latimes.com/opinion/story/2023-09-08/newsom-billion-dollar-plan-broadband-equity-leave-behind-low-income-communities>

³ *2023 Resolution of Proceedings and Commissioner Presence at Hearings*. <https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/reports/annual-reports/2023-annual-report-with-assignment.pdf>

⁴ Rule 13.1 – CPUC Rules of Practice and Procedure

present while the public is attending a proceeding hearing to provide evidence and participate in the process. While CPUC certainly has challenges, CDT is not necessarily better. Unlike CPUC, CDT does not even have a decision making board. The MMAC, which was established under SB 156, is advisory only.

By consolidating the state's broadband grant programs and initiatives under one department, to be overseen by a commission, this bill may help overcome some of the challenges with the existing structure. Most importantly, the Commission would be a decision-making body with representatives from a breadth of stakeholder groups including consumer advocacy, industry, labor, tribes, and others. The appointed Commissioners of the Broadband and Digital Equity Commission would be likely to have more experience working in the broadband and digital equity space than CPUC Commissioners, who typically have had extensive knowledge and experience in the energy and utility policy sector.

- 4) *Interagency coordination.* In addition to challenges with public engagement and decision-making power under the current structure of the state's broadband programs, interagency coordination has also been a visible challenge. This has been especially apparently when considering the state's broadband map, and the administration of the last-mile and middle-mile infrastructure programs.

Under existing law, the CPUC is required to maintain a statewide broadband map that shows the availability of broadband service across the state. The map also includes interactive features for crowdsourcing data from end-users. While the map has been continuously improved over the last several years, even the CPUC has admitted it is not completely accurate. Nonetheless, the CPUC's maps were used to inform the network design of the state's middle-mile broadband network. Throughout the process, local advocates⁵ raised concerns about how faulty data was negatively impacting both initiatives. An additional challenge arose when it became evident that later decisions regarding the MMBI network were made without reference to any pending last-mile applications. As a result, there is a significant risk that last-mile applicants who applied to CPUC programs and planned to rely on the MMBI being available may not be able to complete their projects. This could have been avoided if there were more close interagency coordination to ensure the state's middle-mile and last-mile programs would maximize the benefit to each initiative.

- 5) *The California Broadband Council.* The California Broadband Council (CBC) was established by SB 1462 (Chapter 338, Statutes of 2010) to promote broadband deployment in unserved and underserved areas of the state as defined by the Public Utilities Commission, and broadband adoption throughout the state. The Council identifies state resources, encourages public and private partnerships, and recommends strategic policy to establish effective structures for providing world class high speed Internet access throughout California. The 12-member CBC is run by the California Department of Technology's Office of Broadband and Digital Literacy which provides support by managing the statewide ecosystem of individuals and organizations dedicated to closing the digital divide.

This bill proposes to make the CBC a permanent committee of the Broadband and Digital Equity Commission. This proposal is reasonable considering that, if the Commission is established, that entity would be capable of convening the work of the CBC. While the CBC

⁵ <https://www.oaklandundivided.org/fixthemap>

is primarily representatives of state agencies, those agencies would be able to assist the Commission achieve their goals.

- 6) *More federal funds!* Pursuant to the Infrastructure Investment and Jobs Act (IIJA), California is slated to receive two additional funding sources for broadband and digital equity programs. Specifically, California was awarded \$1.86 billion dollars from the Broadband Equity, Access and Deployment Program (BEAD), which the CPUC is actively implementing. Additionally, California will be receiving about \$70 million dollars under the Digital Equity Capacity Grant Program. Because both programs are administered primarily at the federal level, with a block grant awarded to the state, neither pot of funding could be covered by this bill. However, the existence of both programs will inherently raise the questions: which agency in California is suited to administer these funds? Clearly, CPUC is qualified to administer BEAD given that agency's experience with CASF. As for the Digital Equity funds, a reasonable argument might be made for and against either the CPUC or CDT. Under the structure proposed by this bill, considering a tradeoff between two agencies would not even be a question because all of the state's expertise, capacity, and authority would be under one administration.
- 7) *Regulation of broadband service.* This bill includes provisions which provide that the Department would be the only state agency authorized to establish rules or regulations for broadband internet access service and internet service providers. Under current law, the explicit authority for a state agency to establish rules or regulations for broadband service is not vested with any particular agency, even the CPUC. Nonetheless, under its own authority to regulate telecommunications and in response to a petition filed by stakeholder groups, the CPUC is currently considering adopting service quality metrics for broadband service⁶. However, the CPUC's authority to take such an unprecedented action would likely be challenged in court, as would the authority of any state agency including the Department of Broadband and Digital Equity. Nonetheless, there is some legal precedent for the state imposing requirements on internet service providers after the passage of California's net-neutrality law⁷. That law was also challenged in court under federal preemption rules, but the 9th Circuit Court of Appeals upheld the law in a narrow ruling.

While this bill as currently drafted does not explicitly direct the Department to adopt any regulations for broadband internet access service, this bill does move in that direction by incorporating duties related to digital discrimination that would work in tandem with pending legislation (AB 2239, Bonta). Under the provisions of this bill, the Department would be required to accept complaints from the public regarding digital discrimination of access, building off the provisions of the Bonta bill. In the future, if one or both bills are enacted, the Legislature may wish to enact an enforcement scheme under the Department. Again, while such an action might be challenged in court under preemption grounds, the CPUC would certainly face the same legal hurdle. However, unlike the CPUC, establishing the Department as the agency to regulate broadband service would provide more direct legislative oversight and accountability for whatever regulations are promulgated. Such oversight and legislative control of the CPUC is difficult, because the CPUC is a constitutionally-independent agency that by-design is intended to operate outside of the direct control of the Governor and Legislature.

⁶ Rulemaking R. 22-03-06.

⁷ SB 822 (Winer, 2018).

8) *Similar/related legislation.*

- a. AB 2239 (Bonta) of this session would prohibit an internet service provider from engaging in digital discrimination of access.
- b. AB 768 (Boerner) would have established within state government the Office of Broadband and Digital Equity, to serve as a centralized state office for broadband and digital activities within the state. The bill was never set for hearing.
- c. AB 2750 (Bonta. Chapter 597, Statutes of 2022) required CDT, in consultation with CPUC and CBC, to develop a state digital equity plan.
- d. SB 156 (Committee on Budget and Fiscal Review. Chapter 112 of 2021) established the Federal Funding Account, within the CASF, and required the CPUC to allocate \$1 billion in funding each for rural and urban counties.
- e. AB 14 (Aguiar-Curry. Chapter 658, Statutes of 2021) extended the goal of the CASF program from 2026 to 2032, and authorized the CPUC to continue imposing a surcharge to fund the program through December 31, 2032.
- f. SB 4 (Gonzalez. Chapter 671, Statutes of 2021) increased the annual funding cap for the CASF to \$150 million and expanded projects eligible for CASF grants by revising the definition of an unserved household.

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

None on file.

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