March 29, 2024

The Honorable Tasha Boerner, Chair
Assembly Communications & Conveyance Committee
Members, Assembly Communications & Conveyance Committee
1020 N Street, Room 169
Sacramento, CA 95814

Re: AB 2239 (Bonta) – OPPOSE

Dear Chair Boerner,

The California Broadband & Video Association (CalBroadband), USTelecom-The Broadband Association, and our members share the Federal Communications Commission's (FCC) and Assemblymember Bonta's commitment to preventing digital discrimination of access to broadband. Ensuring universal access to broadband is an extremely important issue given broadband's essential role in our lives, impacting how we work, study, engage in civic life and even entertainment. In addition, access to reliable broadband can transform the lives of Californians based on its positive impacts on education, workforce development, economic development, healthcare, and public safety. However, while we understand the goals, AB 2239, as introduced by Assemblymember Mia Bonta, is not a workable solution because it simply codifies a decision by the FCC, without the definitions in the rulemaking and makes it California law. We do not want to repeat the FCC's mistakes in California, which would risk provoking costly litigation and delaying the deployment in California, thus we must oppose AB 2239.

Our members are striving to advance universal connectivity and have been actively engaged in the implementation of the broadband access, affordability, and adoption programs in the California Advanced Services Fund (CASF), the Federal Funding Account (FFA) and the Broadband, Equity, Access and Deployment (BEAD) program and are committed to the success of these and other programs. At the same time, our members face the challenging realities of network buildout. These challenges include technical and economic feasibility barriers to deployment such as low population density, workforce and supply limitations, inability to access buildings, limited spectrum, long line drops, topographical challenges, and permitting issues.[1] While these

[1] See Comments of NCTA–The Internet & Television Association, GN Docket No. 22-69, at 4-8, 30-32 (Feb. 21, 2023) ("NCTA Comments"); Comments of NTCA–The Rural Broadband Association, GN Docket No. 22-69, at 6-8, 15-16 (Feb. 21, 2023) ("NTCA Comments"); Letter from Diana Eisner, Vice President, Policy & Advocacy, USTelecom, to Marlene Dortch, Secretary, FCC, GN Docket No. 22-69, at 1-2 (Sept. 12, 2023) ("USTelecom Sept. 12, 2023 Ex Parte"); Letter from Thomas Cohen, Counsel to ACA Connects – America's Communications Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 22-69, at 3-4 (Sept. 29, 2023); Reply Comments of CTIA, GN Docket No. 22-69, at 1-2, 11- 13 (Apr. 20, 2023).

challenges are common to all, they vary from place to place and often result in different deployment levels that are unrelated to discrimination.[2]

Unfortunately, the FCC digital discrimination rules implementing Section 60506 of the Infrastructure Investment and Jobs Act ("IIJA") are unworkable and currently mired in legal challenges, because the FCC chose to regulate a very broad set of practices under a very open-ended standard of liability, including entities other than broadband providers. California cannot make this same mistake. There are unprecedented federal funds coming to California that cannot be hindered with the uncertainty that AB 2239 would place on the deployment of broadband.

Federal Court Case Pending

NCTA – The Internet Television Association; ACA Connects – America's Communications Association petitioned the United States Court of Appeals to review, pursuant to 5 U.S.C. § 706, 47 U.S.C. § 402(a), 28 U.S.C. §§ 2342-2344, and Federal Rule of Appellate Procedure 15, the order of the FCC captioned *In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Report and Order, GN Docket No. 22-69, FCC 23-100 (released Nov. 20, 2023). The petitioners seek review of the Order on the grounds that it exceeds the FCC's statutory authority; is arbitrary, capricious, and an abuse of discretion within the meaning of the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq.; and is otherwise contrary to law.

Nine other appeals similar to the one noted above regarding the FCC rules have been filed across the country, and the U.S. Court of Appeals for the Eighth Circuit will hear the cases.

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. The Supreme Court has held that an administrative agency does not possess the authority to promulgate rules addressing matters of great economic and political significance unless Congress provided clear congressional authorization to do so. Such clear congressional authorization is missing from IIJA Section 60506.

Since questions regarding the validity of the FCC rule are still awaiting court review and resolution, California should not push that same FCC rule into statute.

No New State Authority Granted

Commenters during the FCC process called for an expansive role for state and local governments in implementing the FCC's digital discrimination framework—and/or in regulating broadband services more generally— but they misconstrue applicable law and undermine sound public policy.

---

[2] For instance, both the Commission and Congress have recognized that technical and economic conditions make it difficult for providers to deploy broadband to hard-to-serve locations and, as a result, have provided billions of dollars in broadband deployment funding needed to overcome these challenges.

Neither states nor localities have the authority to regulate interstate information services (or, for that matter, interstate telecommunications services). Unlike the "dual" regime under which states regulate intrastate telephone services and the Commission regulates interstate and international services, broadband has long been classified as a jurisdictionally interstate service,[3] and thus subject exclusively to federal authority and communications law.[4]

There should not be a situation where states and localities impose conflicting regulatory obligations related to digital discrimination. If broadband providers are subject to a patchwork of state and local rules that differ from those adopted by the FCC, such a framework would raise significant new barriers to broadband deployment and ultimately undermine the nation's digital equity efforts.

The FCC did see a role for states and local governments in their Rule. The FCC states in the Rule that they "adopt as guidelines for states and localities the best practices to prevent digital discrimination and promote digital equity recommended by the Communications Equity and Diversity Council (CEDC)."[5] Nowhere in that report is the recommendation for states or localities to adopt the FCC's rule and create its own enforcement mechanisms separate and distinct from the FCC's. California should review the CEDC report and work towards implementation of those recommendations that have been thoroughly vetted already.

Overview of Disputes with the FCC Rule

We disagree with the premise of placing the FCC Rule that is being disputed within the courts currently into statute. Below is a list of reasons why the FCC Rule is unconstitutional, beyond it's (or any other locality's) authority, and unworkable and perhaps even harmful to the goal of Broadband for All.

1. **Deployment Focus**

---

[3] See, e.g., NARUC Petition for Clarification or Declaratory Ruling, 25 FCC Rcd. 5051, ¶ 8 n.24 (2010) (broadband "is properly considered jurisdictionally interstate for regulatory purposes"); USTelecom Ass'n v. FCC, 825 F.3d 674, 730 (D.C. Cir. 2016) (same); Restoring Internet Freedom, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, ¶ 199 (2018), petitions for review denied in pertinent part, Mozilla Corp. v. FCC, 940 F.3d 1 (D.C. Cir. 2019) ("Restoring Internet Freedom Order") (same); 2015 Open Internet Order, ¶ 431 (same).

[4] See, e.g., N.Y. State Telecomms. Ass'n v. James, 544 F.Supp.3d 269, 285 (E.D.N.Y. 2021), appeal pending, No. 21-175 (2d Cir.) (finding state broadband regulation subject to field preemption); Ivy Broad. Co. v. AT&T Co., 391 F.2d 486, 491 (2d Cir. 1968) (holding that "questions concerning . . . . interstate communications service are to be governed solely by federal law," such that "the states are precluded from acting in this area"). While the Ninth Circuit in ACA Connects v. Bonta upheld California's adoption of net neutrality rules for broadband service, it did not hold that states have unlimited authority to regulate broadband service, and it had no occasion to pass on digital discrimination obligations. See ACA Connects v. Bonta, 24 F.4th 1233, 1241 (9th Cir. 2022). Under that analysis, the expansive state and local regulation proposed in the Local Governments Comments would be preempted because it would encroach on this Commission's authority over interstate broadband and conflict with federal law in other respects.

[5] See FCC Rule Paragraph 175: https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf

The definition of "digital discrimination of access" must comply with the Infrastructure Act's textual limitations—principally the statute's focus on broadband deployment.[6]

Also, there should be a requirement when reviewing the deployment that any complaint alleging discriminatory treatment use an appropriate comparator. If a complainant asserts that deployment in one area is substantially different than in another, the two areas must be similar enough in aspects other than the prevalence of the protected class to make the comparison valid. For example, the two areas must be in close geographic proximity to one another and have similar population densities and topography, or the comparison would not be reasonable.

There should be recognition of the further limitation that cable providers may only deploy and offer broadband services within their cable franchise areas, meaning that a comparison with a nearby out-of-franchise area where they lack the necessary right-of-way access offers no meaningful insight and would be unreasonable. It would be inappropriate to compare a provider's broadband offerings in one city or county with those in another city or county, if there are significant differences in terrain, costs of deployment, or other important characteristics. It would also be inappropriate to compare a core urban or dense suburban area to a rural area, or vice versa, even in the same metropolitan area. A finding of discrimination requires a showing that similarly situated parties are afforded materially disparate treatment without adequate or legitimate business justification.

2. Disparate Impact Standard

The FCC's order imposes overbroad liability standards that impede further broadband investment and are legally vulnerable by adopting a disparate impact rather than a disparate treatment liability approach. Applying a disparate impact standard to a remarkably expansive list of covered service elements would expose broadband providers to liability for many legitimate nondiscriminatory business practices.

Government action can amplify private investment and enhance its impact on closing the digital divide, or it can make achieving that goal more difficult. The record shows that a disparate impact standard would hinder efforts to close the digital divide.[7]

---

[6] See, e.g., U.S. Chamber of Commerce Comments at 2 ("Congress specifically applied this provision to the deployment of broadband, so the Commission should reject proposals to open the door to broadband rate regulation . . . ."); Competitive Enterprise Institute Reply at 6 (noting that affordability, for example, is a different "consideration[] than availability alone"); Jeffrey Westling Comments at 2, 4 (proposing that the Commission frame its focus on deployment), 5 ("Congress clearly meant for the FCC to target intentional discrimination in the deployment of broadband services.").

[7] See Comments of AT&T, GN Docket No. 22-69, at 14 (Feb. 21, 2023); Comments of T-Mobile USA, Inc., GN Docket No. 22-69, at 20 (Feb. 21, 2023); NTCA Comments at 1, 16; USTelecom Comments at 34; Verizon Comments at 16-17. Regardless of the standard the Commission adopts, it may not mandate "buildout requirements." See, e.g., Letter from Amy E. Bender, Vice President, Regulatory Affairs, CTIA, to Marlene Dortch, Secretary, FCC, GN Docket No. 22-69, at 3 (Oct. 13, 2023); NCTA Reply Comments at 15-16; Reply Comments of TechFreedom, GN Docket No. 22-69, at 11 (Apr. 20, 2023); USTelecom Reply Comments at 36; see also 47 U.S.C. § 254(b)(5), (e). But see NTIA Ex Parte at 6 n.15.

The Legislature should consider that the text of Section 60506, as well as relevant court precedent, supports the adoption of a disparate-treatment approach. At the same time, we understand the concerns of civil rights and other advocacy groups that a disparate treatment approach applied too narrowly might not capture disparities that ought to be addressed. Therefore, we have supported the adoption of a disparate-treatment standard that can be met with a combination of direct and circumstantial evidence, such as statistics demonstrating a pattern of discriminatory intent, the sequence of events leading to a challenged decision, departures from normal procedures, and a consistent pattern of actions imposing much greater harm on the protected class that is unexplainable except on discriminatory grounds.[8]

Also there should be adoption of a burden-shifting framework for assessing formal complaints, in which providers could defend against any credible, well-supported allegations of discrimination by identifying legitimate and non-discriminatory business reasons that support a challenged deployment decision, as well as other appropriate defenses.[9] Procedures like these are necessary both from a practical perspective and to avoid the serious constitutional questions that too broad an approach could raise.[10] The *Arlington Heights* framework offers a well-established model for resolving complaints of discrimination and urged its adoption for formal complaints of discrimination under Section 60506. Importantly, the framework permits complainants to establish disparate treatment through "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available,"[11] while allowing providers to respond to allegations of discriminatory intent with legitimate, nondiscriminatory explanations for any disparities in service deployment.[12] Both *Arlington Heights* and *McDonnell Douglas* "provide useful and complementary frameworks for assessing circumstantial evidence in different types of factual scenarios."[13] *Arlington Heights* is appropriate when assessing disparate treatment of a group or class, and *McDonnell Douglas* is appropriate when assessing disparate treatment of individuals by comparing them to other similarly situated individuals. These frameworks present the best structure for the resolution of most formal complaints.

The FCC should have followed Congress's direction to "facilitate equal access" and take into account technical and economic feasibility by adopting solely a disparate treatment standard.

3. Safe Harbors

There should be safe harbors to ensure that resources are targeted at significant and realistic possibilities of digital discrimination. For example, the following should be utilized:

a. A safe harbor that applies where a broadband provider's deployment rate to a given area with a significant percentage of consumers within one of the protected categories does not meaningfully vary from the provider's deployment rate in nearby areas.

[8] Cf. Comments of the Multicultural Media, Telecom and Internet Council and the U.S. Black Chambers, GN Docket No. 22-69, at 7 (filed Feb. 21, 2023) ("MMTC Comments"). Unless otherwise noted, all comments cited to herein were filed in GN Docket No. 22-69 on or around February 21, 2023.
[9] NCTA Comments at 28–32
[10] T-Mobile Comments at 19 (quoting Inclusive Communities, 576 U.S. at 540, 543) (quotation omitted).
[11] Vill. of Arl. Hts. v. Metro Hous. Devel. Corp., 429 U.S. 252, 266 (1977).
[12] NCTA Comments at 29–30 (discussing the Arlington Heights framework).
[13] Lawyers' Committee Comments at 17

b. A safe harbor that applies if a broadband provider has not had a reasonable timeframe to complete build-out or network-upgrading projects throughout its footprint.
c. A safe harbor for broadband providers that are bound by existing nondiscrimination standards and comply with those standards, such as the Broadband, Equity, Access and Deployment (BEAD) Program and Rural Digital Opportunity Fund ("RDOF") requirements, and any other state or federal programs.
d. A safe harbor for compliance with a local franchise authority's direction or density requirements (or, in the absence of such requirements, a safe harbor for deployment to a residential density of 35 homes-per-mile of aerial plant, measured from the nearest reasonable tie-in point as determined by the provider).

4. Defenses

The opportunity for respondents to raise legitimate business justifications as defenses, including technical and economic feasibility, as Congress intended as evidenced by its inclusion in the statute. Such defenses may include:

a. Lack of access to required infrastructure, such as poles and conduits, or unreasonable restrictions on permitting, building access, or zoning.
b. Low household densities or challenging topography leading to very high deployment costs.
c. Locations that require very long line drops.
d. Competition-based reasons that prohibit profitable deployment.
e. Availability of alternative practices with less discriminatory effect: If the respondent provides a legitimate business justification or otherwise establishes a defense, a requirement that the complainant, in order to prevail, must demonstrate that the respondent's interests could be adequately served by another practice that has a less discriminatory effect.

5. Procedural Issues

First, a pre-filing notice requirement for formal digital discrimination complaints would need to be implemented. This has worked well in other contexts to ensure a reasonable process, focus on non-frivolous complaints, and to facilitate settlements. A notice period of at least 30 days would allow the parties to review the relevant facts and confer in good faith to determine whether specific issues or entire claims can be resolved prior to the filing of a formal complaint.

Also, there should be reasonable time limits for bringing and resolving complaints. Anti-discrimination laws typically limit the window in which a party may file a complaint. For example, the Americans with Disabilities Act, ADEA, and Title VII all require aggrieved employees to file complaints with the Equal Employment Opportunity Commission within 180 days of the adverse action. For purposes of digital discrimination complaints, an "adverse action" should be something concrete, such as completion of a build or service deployment in a new area, so that all parties have a clear understanding of the applicable deadline. Similarly, both Section 208 of the Communications Act and numerous civil rights statutes impose investigation or decision deadlines. There should be similar deadlines to ensure that complaints are timely addressed and do not interfere with business operations over an extended period of time.

A requirement that complaints alleging digital discrimination must demonstrate causation and statistical significance, and rely on an appropriate comparator.

Lastly, pleading requirements should be adopted to ensure that formal complaints against providers alleging discriminatory broadband deployment proceed only where reasonable threshold conditions have been satisfied. For example, a formal complaint should proceed only if the complainant can demonstrate that deployment rates in a given area are substantially different than the provider's deployment rate in similar nearby areas, based on the FCC's Broadband DATA map. The use of nearby areas as the basis for such a comparison is essential to avoid inapt comparisons between areas that have meaningfully different extrinsic factors impacting technical and economic feasibility, such as infrastructure or labor costs. Such an approach would inform potential complainants by providing a framework for is expected while also providing clarity to regulated parties and reducing the risk that overbroad regulation will discourage investment. Other related components that should have been adopted include the requirement under Inclusive Communities for "robust causality" and the need for a threshold requirement of statistical significance, which would take into account industry-wide baselines in setting the threshold requirement and thus also ensure that complaints are properly focused and most likely to achieve the statute's key objectives in serving the intended beneficiaries.

6. Technical and Economic Feasibility

Accounting for "technical and economic feasibility" does not mean broadband providers must deploy exactly the same services everywhere unless doing so is "impossible."[14]

Congress specifically recognized, and California should recognize, that providers face technical and economic challenges that can lead to differences in broadband availability that are not the result of discrimination. The FCC and the state of California cannot, and must not, minimize this directive. In addition, relying on court precedent, it should be recognized that Congress did not intend for "feasibility" to be an impossibility standard, and instead should determine that differences in deployment explained by providers' reasonable business judgment are not discrimination. Further, it should be recognized that "economic feasibility" encompasses a range of legitimate, non-discriminatory considerations, such as population density, and should determine that density considerations reflect a legitimate and non-discriminatory way of interpreting "economic feasibility."

The Commission's implementation of the Cable Act provides a useful model for the consideration of technical and economic feasibility. There must be recognition that broadband providers may make reasonable technical and economic judgments when deploying their networks, as it has recognized in interpreting the non-discrimination provisions of the Cable Act. Section 621 of the Cable Act requires that, "[i]n awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."[15] This requirement is effectuated through individual negotiations with each franchise authority, and "it manifestly does not require universal service."[16] Likewise, the Cable Act requirement that franchising authorities give cable operators "a reasonable period of time to

[14] See NCTA Comments at 30; T-Mobile Comments at 27–28.
[15] 47 U.S.C. § 541(a)(3).
[16] NCTA Comments at 22 (quoting ACLU v. FCC, 823 F.2d 1554, 1580 (D.C. Cir. 1987)) (quotation omitted).

become capable of providing cable service to all households in the franchise area"[17] is "subject to [the Cable Act's] directive to assess reasonableness while taking into account the cost of such requirements."[18]

Additionally, cable providers and franchise authorities often negotiate a specific density metric to incorporate providers' reasonable economic judgments into buildout requirements. Likewise, density considerations reflect a legitimate and non-discriminatory way of interpreting "economic feasibility." Such an approach would also be consistent with precedent allowing for providers' exercise of business judgment in the provision of services in other contexts.[19] For example, the FCC implemented Congress's directive to account for technical and economic feasibility in the Satellite Television Extension and Localism Act's reauthorization by giving substantial weight to arguments made by providers that even though providing new stations was technically possible, it would be an "inefficient use of resources" and introduce numerous other technical challenges.[20]

Civil rights statutes do not impose impossibility standards in other contexts. In the employment discrimination context, for example, an employer may rebut a prima facie case by "producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason."[21] Even in the disparate-impact context, the Supreme Court has noted the importance of a meaningful causation standard that takes account of other nondiscriminatory reasons for a particular outcome. For instance, mere "statistical evidence" of discrimination is not enough to prove disparate-impact liability in housing. As the Court explained, "the decision of a private developer to construct a new building in one location rather than another will not easily be able to show this is a policy causing a disparate impact [and] [i]t may also be difficult to establish causation because of the multiple factors that go into investment decisions about where to construct or renovate housing units."[22]

---

[17] 47 U.S.C. § 541(a)(4)(A).

[18] Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, Third Report and Order, 34 FCC Rcd. 6844, ¶ 21 n.101 (2019) ("2019 Cable Third R&O").

[19] See, e.g., Implementation of Section 17 of the Cable Television Consumer Prot. & Competition Act of 1992 et al., First Report & Order, 9 FCC Rcd. 1981, ¶ 48 (1994) (promulgating rules that only identified "general types of supplemental hardware to be offered and the types of compatibility problems" to be addressed, instead of specifying a particular hardware "package" or its "performance characteristics," so as to provide cable operators with "latitude to tailor supplemental hardware to the needs of individual subscribers"); Implementation of Section 17 of the Cable Television Consumer Prot. & Competition Act of 1992 et al., Memorandum Opinion & Order, 11 FCC Rcd. 4121, ¶¶ 7, 10 (1996) (agreeing with cable television equipment manufacturers that a rule requiring cable operators to offer set-top devices with dual descramblers could be satisfied using alternate equipment that had "the same functionality" and was potentially more cost-effective and "administrative[ly] efficien[t]"); Transition from TTY to Real-Time Text Technology et al., Report & Order & Further Notice of Proposed Rulemaking, 31 FCC Rcd. 13568, ¶¶ 43–44 (2016) (refraining from prescribing how 911 calls via real-time text technology should reach a public safety answering point, given "a variety of existing options for configuring PSAP systems to receive RTT calls," and instead encouraging wireless service providers and 911 authorities to resolve any technical issues together).

[20] Amendment to the Commission's Rules Concerning Market Modification, Report and Order, 30 FCC Rcd. 10406, ¶¶ 1, 32 (2015) (noting that "Congress recognized that satellite carriage of additional stations might be technically or economically infeasible in some circumstances").

[21] Texas Dep't. of Cmty. Affs. v. Burdine, 450 U.S. 248, 254 (1981)

[22] Inclusive Communities, 576 U.S. at 543.

7. No Authorization to Regulate Non-Technical Quality of Service Metrics

Congress did not authorize the FCC's nor the state's regulation of non-technical quality of service metrics. Congress provided a list of quality of service metrics to consider in analyzing equal access: "speeds, capacities, [and] latency."[23] This list limits the "other quality of service metrics" to those that are similarly technical and easily quantifiable.[24] Non-technical considerations, such as marketing and advertising practices and customer service measures, are inconsistent with the statute and inappropriate as metrics for analyzing equal access.

Section 60506 does not authorize the FCC nor the States to engage in price regulation of broadband services. Congress omitted from Section 60506 any reference to price or affordability. Instead, it specifically enacted comprehensive new funding mechanisms to address affordability issues elsewhere in the Infrastructure Act and expressly prohibited broadband price regulation in connection with those initiatives.[25] Price regulation of broadband services by the Commission or a State would usher in unprecedented change in federal communications policy— a "major question" that certainly was not contemplated by the statute, is inconsistent with Commission or State authority, and would undermine broadband deployment. As the National Urban League notes, broadband providers' discounted low-cost broadband offerings, as well as the Federal Affordable Connectivity Program ("ACP"), have helped to ensure affordable broadband pricing for consumers and are important solutions going forward.[26]

For the above reasons, we respectfully must oppose AB 2239 (Bonta) and request a "NO" vote. Thank you.

Sincerely,

Amanda Gualderama
California Broadband & Video Association
Legislative Director

Audra Hartmann, Legislative Advocate
For California Communications Association

Ben Golombek
Executive Vice President and Chief of Staff for Policy
California Chamber of Commerce

[23] See 47 U.S.C. § 1754(a)(2).
[24] See 47 U.S.C. § 1754(a)(2).
[25] See id. § 1702(h)(5)(D) (providing that "[n]othing in this subchapter may be construed to authorize [the National Telecommunications and Information Administration] to regulate the rates charged for broadband service").
[26] See Comments of the National Urban League, et al. at 5–6 ("NUL Comments").