June 4, 2024

The Honorable Steven Bradford, Chair
Senate Energy, Utilities & Communications Committee
Members, Senate Energy, Utilities & Communications Committee
1021 O Street, Room 3350
Sacramento, CA 95814

The Honorable Thomas Umberg, Chair
Senate Judiciary Committee
Members, Senate Judiciary Committee
1021 O Street, Room 3240
Sacramento, CA 95814

Re: AB 2239 (Bonta) – OPPOSE

Dear Chair Bradford and Chair Umberg,

The California Broadband & Video Association (CalBroadband), California Communications Association (CalCom), the Wireless Infrastructure Association (WIA), California Chamber of Commerce (CalChamber), the Civil Justice Association of California (CJAC), and our members share 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 consume 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, AB 2239 is not a workable solution to achieve Internet for all—and is, in fact, counter-productive for the reasons discussed below. There is a better path to establish a workable and more effective digital discrimination framework in California.

AB 2239 Would Discourage ISPs from Undertaking New Deployments and Upgrading to the Latest Technologies

AB 2239 incorporates a disparate impact standard, rather than a disparate treatment standard, that will almost certainly be challenged in court and is contrary to good public policy. AB 2239 is vulnerable to challenge because it purports to regulate an overly broad set of practices under a very open-ended standard of liability. AB 2239 is poor public policy because it sets an unworkable standard for ISPs that would leave them exposed to potential liability relating to new network investments and thus would impede broadband deployment and upgrades to existing infrastructure.

The disparate impact standard would lead to frivolous claims and unnecessary investigations where no credible evidence of discrimination exists. Perhaps even worse, it would divert government resources away from investigating legitimate claims of discrimination. As a result, internet service providers (ISPs) would expend money and time addressing allegations targeting legitimate business practices, instead of putting resources toward broadband deployment and expanded broadband access. The government would instead devote limited resources toward addressing baseless allegations. Such a framework would benefit only lawyers and consultants.

Our members strive 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 their success. At the same time, our members face deployment barriers such as low population density, inability to access buildings and poles, limited spectrum, topographical challenges, and permitting issues.[1] These challenges vary from place to place and represent legitimate operational challenges unrelated to discrimination.[2]

Under a disparate impact standard, an ISP could apply for CASF, FFA, or BEAD funds, have the California Public Utilities Commission (CPUC) approve the area for buildout, and still be held liable for digital discrimination for building out to one area rather than another. Such liability risks would discourage participation in any of the public purpose grant programs, and Californians would be the ones paying the price. By utilizing a disparate impact standard, rather than a disparate treatment standard, AB 2239 could cause unintentional negative consequences in the marketplace. Beyond deployment concerns, our members could not offer promotional discounts or run targeted ads in response to a competitor's offers without risking a potential finding of unlawful discrimination. For example, a complaint could allege that ISPs' discounted offerings for low-income households or other groups of consumers, such as college students, are impermissible under the law if uniform application of those offers led to different enrollment rates among a particular race or other protected characteristics under the statute. Our members could not engage in common business practices without subjecting themselves to potential liability. Routine and nondiscriminatory business practices like marketing, billing arrangements, or even uniform pricing may be deemed unlawful if they have a disparate impact on particular groups of consumers.

And our members would face potential liability no matter which unserved or underserved neighborhood they chose to build out first. A complaint could also allege that failure to upgrade or deploy new technologies in all communities simultaneously has a disparate impact even if our

[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).

[2] For instance, both the FCC 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 help overcome these challenges.

members demonstrated that a phased rollout plan must be instituted for operational efficiencies. Broadband providers cannot deploy everywhere at once. An ISP's deployment inevitably will reach certain neighborhoods earlier than others. Because this situation could create disparate impact liability, it may undermine the willingness of providers to undertake new deployments – or new providers to enter the market.

Instead of a disparate impact standard, AB 2239 should include a far more common disparate treatment standard. A disparate treatment standard is intent-based and would ensure that AB 2239 creates a workable and enforceable framework in California without relying on disputed aspects of the Federal Communications Commission (FCC or Commission) order that is currently being challenged in federal court. Under a disparate treatment standard, broadband providers will not hesitate to undertake new deployments or upgrades or run consumer-friendly promotions for fear that they would be subject to frivolous claims and unwarranted liability.

Under this standard, broadband providers will be held to account for actual discriminatory policies that purposefully disadvantage consumers based upon race, ethnicity or another protected status. A disparate treatment standard provides an important enforcement mechanism against actual and intentional discriminatory conduct. Unlike a disparate impact standard, a disparate treatment standard would not penalize ordinary-course business decisions and so would preserve incentives to deploy and modernize broadband infrastructure.

A Federal Court Case Challenging the FCC's Digital Discrimination Rules Is Pending

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 disparate impact liability. California cannot make this same mistake.

A broad array of industry groups petitioned the United States Court of Appeals to review the FCC's Digital Discrimination 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. The appeal is pending before the U.S. Court of Appeals for the Eighth Circuit, and briefing is underway.

These challenges to the FCC's rules focus primarily on the FCC's adoption of a disparate impact standard, contrary to statutory text and 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 rules are still awaiting court review and resolution, it would be imprudent for California to make effectively the same FCC rules California law.

Overview of Missteps in the FCC's Digital Discrimination Rules

We disagree with the premise of AB 2239 that the FCC rules that are being disputed within the courts should also be California law. Below are other reasons why the FCC rules are unconstitutional, beyond its (or any other locality's) authority, and unworkable. It is important to note that these legal issues are the same issues, if not exacerbated more by the lack of specificity with AB 2239 but may change dependent on whether the liability standard is changed.

1. Scope

It has been our contention throughout the FCC rulemaking and now with AB 2239 that the scope of any equal access mandate should be limited to broadband deployment.[3] The FCC wrongly chose to define an "equal access" obligation as covering effectively any aspect of a broadband provider's service. California has an opportunity to learn from the FCC's missteps and focus on deployment.

To eliminate confusion for both broadband providers and Californians, AB 2239 should define "equal access" as "the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics for comparable terms and conditions across similarly situated service areas." Terms and conditions should not be construed to include price or other non-deployment characteristics of a service offering. "Other quality of service metrics" should be defined as "technical aspects of broadband internet access service that are meaningful and material to a customer's decision to subscribe." "Similarly situated service areas" should refer to "locations with consistent terrain, population density, and costs of deployment."

As part of this deployment focus, there should be a requirement that any complaint alleging discriminatory treatment use an appropriate comparator when reviewing the deployment at issue. If a complainant asserts that deployment in one area is substantially different than in another area, 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. 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, population density 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 in this context requires a showing that similarly situated parties are afforded materially disparate treatment without adequate or legitimate business justification.

2. Defenses

[3] *See, e.g.*, Comments of U.S. Chamber of Commerce, GN Docket No. 22-69, at 2 (Feb. 21, 2023); ("Congress specifically applied this provision to the *deployment* of broadband, so the Commission should reject proposals to open the door to broadband rate regulation . . . .") (emphasis in original); Comments of Competitive Enterprise Institute, GN Docket No. 22-69, at 6 (Mar. 17, 2023) (noting that affordability, for example, is a different "consideration[] than availability alone"); Comments of Jeffrey Westling, GN Docket No. 22-69,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.").

Respondent providers must be afforded an opportunity to raise legitimate business justifications as defenses, including technical and economic feasibility, in response to any complaint alleging digital discrimination. AB 2239 does not adequately account for these defenses.

California must recognize that providers face technical and economic challenges that can lead to differences in broadband availability that are not caused by discriminatory intent. Based on court precedent, "feasibility" is not an impossibility standard, and such a standard recognizes that differences in deployment explained by providers' reasonable business judgment are not discrimination. Further, AB 2239 should recognize that "economic feasibility" encompasses a range of legitimate, non-discriminatory considerations, such as population density and other deployment costs, compared with the opportunity for a reasonable return on investment. For example, if deployment costs are the *same* between two area and the population density is significantly lower in one (i.e. 5 homes per mile of network built versus 50 homes), the opportunity to recoup those investments through customer acquisition is significantly *different*. Conversely, if the population density is the *same* in two areas, but the deployment costs *differ* considerably (based upon underground verses aerial construction or topography) it similarly impacts business feasibility and the opportunity for a reasonable return on investment.

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."[4] Even in the disparate-impact context, the U.S. Supreme Court has noted the importance of a robust causation requirement that takes account of other nondiscriminatory reasons for a particular outcome. For instance, mere "statistical evidence" of disparities 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."[5]

Defenses in response to a digital discrimination of access complaint could 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 a reasonable return on investment.

If the respondent provides a legitimate business justification or otherwise establishes a defense, 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, as is consistent with U.S. Supreme Court precedent.[6]

3. Safe Harbors

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

[5] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities*, 576 U.S. 519, 543 (2015).

[6] *Id*.

There should be safe harbors to give regulatory certainty to good-faith actors who might otherwise be subject to liability for reasonable business practices and factors beyond their reasonable control, and to ensure that finite government resources are spent combatting meaningful cases of disparate treatment. Safe harbor examples could include:

a. 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.
b. Applies if a broadband provider has not had a reasonable timeframe to complete build-out or network-upgrading projects throughout its footprint.
c. Applies to broadband providers that are bound by existing nondiscrimination standards and in compliance with those standards, such as the BEAD Program, Rural Digital Opportunity Fund (RDOF) requirements, and any other similar state or federal programs.
d. Applies to compliance with a local franchise authority's direction or density requirements. In the absence of such requirements, applies to 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. Procedural Safeguards

In addition, AB 2239 should introduce reasonable time limits for resolving complaints. Anti-discrimination laws typically limit the window in which a party may file a complaint. For example, the Americans with Disabilities Act (ADA), Age Discrimination in Employment Act (ADEA), and Title VII of the Civil Rights Act all require complainants to file complaints within a prescribed period of the adverse action. For purposes of digital discrimination complaints, an actionable discriminatory conduct should be something concrete, such as completion of a build or service deployment in a new area. 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.

Eliminate Potential Overreach by California Public Utilities Commission

AB 2239 presents concerns about potential overreach by the CPUC. Although AB 2239 places enforcement with the Attorney General and other public prosecutors and limits the CPUC to specific administrative actions only in the CASF context, the CPUC could wrongly view this specific set of tasks as an invitation to go further. Given this ambiguity, the CPUC should be expressly precluded from pursuing any general investigations or rulemakings on digital discrimination of access.

Address Lingering Concerns about Private Right of Action

AB 2239 creates enforcement risk for providers even though it does not explicitly include a private right of action. California courts generally limit private rights of action to statutes that clearly evince an intent to create one.[7] Even assuming AB 2239 does not itself allow a private right of

[7] *See Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 601, 236 P.3d 346, 351-52 (2010); *see also City of Lancaster v. Netflix, Inc.*, 99 Cal. App. 5th 1093, 318 Cal. Rptr. 3d 423, 431–37 (2024)*; Mayron v. Google LLC*, 54 Cal. App. 5th 566, 571, 269 Cal. Rptr. 3d 86, 88 (2020); *Julian v. Mission Cmty. Hosp.*, 11 Cal. App. 5th 360, 378-79, 218 Cal. Rptr. 3d 38, 55-56 (2017), as modified on denial of reh'g (May 23, 2017).

action; California's Unfair Competition Law may offer an avenue for overly aggressive trial lawyers to find financial opportunities to pursue frivolous claims. To avoid this uncertainty, AB 2239 should include an express statement that it does not create a private right of action under its own terms or any other statute, as is the case in California Digital Equity Bill of Rights.

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

Sincerely,

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