
**SENATE COMMITTEE ON ENERGY, UTILITIES AND
COMMUNICATIONS**

**Senator Steven Bradford, Chair
2023 - 2024 Regular**

Bill No:	AB 2239	Hearing Date:	7/2/2024
Author:	Bonta		
Version:	4/29/2024 Amended		
Urgency:	No	Fiscal:	Yes
Consultant:	Sarah Smith		

SUBJECT: Digital discrimination of access: prohibition

DIGEST: This bill establishes a definition of digital discrimination of access, prohibits internet service providers (ISPs) from engaging in this digital discrimination, and requires the California Public Utilities Commission (CPUC) to take certain steps to incorporate the prohibition on digital discrimination of access into various broadband deployment, adoption, and technical assistance programs.

ANALYSIS:

Existing law:

- 1) Establishes California's universal telecommunications service policy, which specifies that it is the state's policy to provide affordable and accessible high-quality telecommunications services to all Californians. This policy also encourages the closure of the digital divide and the removal of barriers to market competition and greater consumer choice. (Public Utilities Code §709)
- 2) Establishes a process for issuing video franchises through the CPUC and prohibits video franchise holders from discriminating against or denying access to their services on the basis of a potential subscriber's income. Existing law 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. (Public Utilities Code §5890 (a-f))
- 3) Establishes the California Advanced Services Fund (CASF) to support the deployment of broadband infrastructure in the state. Existing law establishes various accounts within the CASF to address specific broadband deployment and adoption efforts, including, but not limited to the Broadband Public Housing Account. Existing law also establishes the Federal Funding Account within the

CASF to provide broadband infrastructure grants using one-time federal moneys allocated for this purpose. (Public Utilities Code §281)

- 4) Defines broadband internet access service as a mass market retail communications service capable of transmitting data to and from all Internet endpoints, including any functional equivalent of broadband service. Existing law specifies that this definition does not include dial-up Internet access service. (Civil Code §3100)
- 5) Establishes net neutrality requirements by prohibiting ISPs from engaging in blocking or throttling internet traffic, requiring consideration to transmit internet traffic, engaging in paid prioritization, and zero-rating certain internet content. (Civil Code §3101)
- 6) Establishes a digital equity bill of rights, which states that it is the policy of the state that, to the extent technologically feasible, broadband subscribers shall benefit from equal access to broadband internet service within the service area of a broadband ISP. (Civil Code §3120)
- 7) Prohibits discrimination against protected classes in programs or activities that are funded directly by the state or receive state financial assistance. (Government Code §11135)
- 8) Establishes personal rights against discrimination by stating that all individuals within the state are entitled to full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever, regardless of their sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. (Civil Code §51)

This bill:

- 1) Establishes a definition of “digital discrimination of access,” which means policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers’ access to broadband internet access service based on their race, ethnicity, color, religion, or national origin, or that are intended to have a differential impact.
- 2) Adopts an existing definition of broadband internet access service, and defines an “internet service provider” as any entity that provides broadband service to an individual, corporation, government, or other customer in California.

- 3) Makes various other definitions for the purpose of this bill, including, but not limited to the following definitions:
 - a) “Differential impact” or “disparate impact” means policies or practices that cause a disparate impact on a prohibited basis, are not justified by genuine technical or economic feasibility, and occur where other reasonably achievable and less discriminatory alternatives exist.
 - b) “Economic feasibility” means reasonably achievable as evidenced by prior success by covered entities under similar circumstances or demonstrated new economic conditions clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and used.
 - c) “Technical feasibility” means reasonably achievable as evidenced by prior success by covered entities under similar circumstances or demonstrated technological advances clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and used.
- 4) Prohibits an ISP from engaging in digital discrimination of access.
- 5) Authorizes the following public attorneys to bring a civil action against an ISP for violating this bill:
 - a) The California Attorney General.
 - b) A district attorney, county counsel or city attorney for the jurisdiction in which the violation occurred.
 - c) A city prosecutor in any city with a full-time city prosecutor, with the consent of the district attorney.
- 6) Authorizes a court to award the following as part of a judgement in civil actions brought under this bill:
 - a) Injunctive relief.
 - b) Reasonable attorney fees and litigation costs.
- 7) Requires the CPUC to ensure that rules for grants from the following CASF accounts prohibit digital discrimination of access: the Adoption Account, Infrastructure Grant Account, line extension grants within the Infrastructure Grant Account, the Public Housing Account, Consortia Account, and the Tribal Technical Assistance grants. This bill also requires all applicants and recipients of these funds to submit an attestation that they will not engage in digital discrimination of access.

- 8) Requires the CPUC to integrate remedies for digital discrimination of access into CASF application scoring criteria and adjust reporting requirements.

Background

Status of the Federal Communications Commission (FCC) digital discrimination rules. This bill seeks to codify a portion of the FCC's recently adopted digital discrimination rules at the state level. The FCC adopted these standards pursuant to direction in the Infrastructure Investment and Jobs Act (IIJA). The IIJA required the FCC and United States Attorney General to ensure that federal policies promote equal access to internet services by prohibiting discrimination of infrastructure deployment based on the following:

- The income of an area
- The predominant race or ethnicity of an area
- Other factors that the FCC determines to be relevant as part of a rulemaking.

The IIJA also directed the FCC to recommend model policies and best practices for states. Based on this direction, the FCC undertook a rulemaking to set a standard for prohibiting digital discrimination. In November 2023, the FCC adopted its final rules prohibiting digital discrimination. Since the FCC adopted these rules, multiple parties have filed lawsuits to limit the application of the order. Groups have argued that the FCC overstepped its authority and adopted requirements that are too broad and too vague to enable reasonable compliance. These lawsuits are still pending.

The FCC's Digital Discrimination Standard: Higher Bars, Fewer Protected Groups. As part of the process to adopt the digital discrimination order, the FCC solicited comments on the extent to which the FCC should consider expanding the classes protected by the order's anti-discrimination provisions. Multiple groups, including advocates for LGBTQ+ rights, advocates for disability rights, state-level broadband offices, and a coalition of advocates, including sponsors of this bill, urged the FCC to expand the list of classes protected by the digital discrimination standard to include more groups that have been historically excluded. In its adopted order, the FCC declined to expand the list of protected classes. The FCC stated the following as its justification for adopting a more narrow list of groups protected from digital discrimination under the order:

Congress must be presumed to have deliberately limited the list of protected characteristics in section 60506(b) to income level, race, ethnicity, color, religion, and national origin. While we acknowledge the strong record support for extending the rule to cover persons with other characteristics, federal

antidiscrimination laws often vary in terms of the protected classes they cover. For instance, Title VII of the Civil Rights Act protects against discrimination based on “race, color, religion, sex, or national origin,” whereas the FHA goes further and includes additional protections for “disability and familial status.” Here, Congress chose the six listed, protected characteristics and not others. We have no discretion to overrule the choice made by Congress in this regard, at least as it applies to our rules implementing section 60506(b).

California is one of several states that have enacted anti-discrimination laws protecting a larger range of protected classes than those included in federal law. This bill codifies a federal definition of digital discrimination that protects a more narrow set of classes than those generally protected under California law. California’s *Unruh Civil Rights Act* prohibits discrimination on the bases of the following classes: sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status. In contrast, this bill more narrowly prohibits discrimination on the bases of race, ethnicity, color, religion, or national origin. As a result, this bill’s standard may only apply to a subset of the classes that are generally protected under existing California anti-discrimination law.

While the scope of classes protected under this bill is narrow, the standard of protection applied to these classes may be higher than other anti-discrimination standards. This bill and the FCC order adopt a “disparate impact” standard for prohibiting discrimination. Unlike a “disparate treatment” standard, disparate impact does not rely on a party proving that the discrimination was intentional. Under disparate impact, a party may be liable if a practice that appears to be neutral has the unintended effect of disproportionately disadvantaging a protected class. The FCC’s order acknowledges that application of a disparate impact standard generally requires an analysis of a specific practice or policy to determine the impact of the policy or practice and whether the practice or policy derives from a substantial, legitimate business interest. The FCC’s order states:

Under traditional disparate impact analysis, once a policy or practice is shown to have a meaningful adverse impact on a protected group, the covered entity may affirmatively produce evidence that the challenged policy or practice is justified by a substantial, legitimate business interest. If the covered entity does so, it may still be liable if there is a less discriminatory alternative to the challenged policy or practice. Congress’s directive that the Commission take into account issues of technical and economic feasibility represents a formulation of this traditional test as tailored to the specific context of section 60506 and the issues it aims to address.

While the IIIA directed the FCC to consider issues of technical and economic feasibility in adopting a digital discrimination standard, the FCC clarified that technical and economic feasibility are factors it intends to analyze when determining if a policy or practice is justified by a substantial, legitimate business interest. This bill incorporates language from the IIIA in defining a disparate impact; however, it does not include language from the subsequent FCC order clarifying a disparate impact is a policy or practice not justified by a substantial, legitimate business interest.

Bill's scope does not match the FCC order. While this bill adopts a definition of “digital discrimination of access” that closely mirrors the definition adopted by the FCC, the scope of entities prohibited from engaging in digital discrimination under this bill is more narrow than those covered by the FCC order. This bill specifically prohibits ISPs from engaging in digital discrimination; however, the FCC’s list of entities prohibited from engaging in this discrimination extends to ISPs and other entities whose services and actions impact consumers’ access to broadband service. The FCC’s order states: “Therefore, we find that our rules and, in particular, our prohibition against digital discrimination of access, extend not only to broadband providers, but also to entities that provide services that facilitate and meaningfully affect consumer access to broadband internet access service.”

Both this bill and the FCC order are aimed at addressing the extent to which digital redlining has created disparate impacts between communities based on the income, race and ethnicity of those communities. While digital discrimination has multiple interpretations, the concept of “digital redlining” largely evolved from an understanding of the impacts from historically exclusionary housing, lending, and zoning policies known as “redlining.” These policies created a legacy of default segregation and disinvestment in predominantly non-white and lower income communities. A number of parties, including federal, state and local governments played a role in developing and perpetuating redlining policies. The scope of entities covered by the FCC’s digital discrimination order reflects the extent to which redlining did not originate with ISPs, and ISPs are not the only parties that play a role in limiting the extent to which broadband services are accessible. Permitting restrictions, lack of access to facilities by property owners, financing limitations, and other factors can contribute to practices that disproportionately impact lower income and non-white communities. By applying its prohibition against digital discrimination of access to only ISPs, this bill’s prohibition on digital discrimination does not fully match that of the FCC’s order, and it may not go as far as the FCC’s order in addressing the factors that led to digital redlining of certain communities.

Double Jeopardy: should the state seek to duplicate FCC efforts? This bill seeks to codify a portion of the FCC’s digital discrimination order by establishing definition

of digital discrimination that is substantially similar to the definition adopted by the FCC. The FCC's order included a set of best practices for states. While these best practices did not recommend that states codify the FCC's prohibition on digital discrimination, the FCC did not expressly pre-empt states from adopting their own digital discrimination standards.

While portions of this bill are substantially similar to the FCC order, this bill establishes an enforcement mechanism that differs from the FCC's complaint investigation process. In addition to adopting a standard prohibiting digital discrimination, the FCC's order also created a federal-level enforcement framework. This framework enables the FCC to collect complaints on a formal and informal basis (including cases brought by states), investigate those complaints, and provide remedies for violations. This bill establishes a litigation framework for enforcing the bill's provisions. Risks associated with extensive litigation under this bill may lead ISPs to reconsider certain broadband infrastructure investments if the ISP believes that such an investment may trigger a lawsuit from a local attorney regarding the construction plans. While the FCC may prescribe remedies for digital discrimination that still reflect the overall goal of continuing to support broadband deployment, courts may not necessarily provide injunctive relief with the aim of supporting that deployment.

To the extent that parties use both the FCC's rules and this bill to pursue a digital discrimination case for the same violation, it is unclear how courts and the FCC would prevent conflicts between prescribed remedies. Since this bill's prohibition applies to a more limited group of parties than the FCC's prohibition on digital discrimination, this bill may also not provide the same scope of remedies that can be achieved through complaints to the FCC.

Net neutrality and Digital Discrimination: Contexts Differ. While California previously enacted net neutrality requirements by codifying a portion of an FCC standard, the contexts between this bill and California's net neutrality law differ. When California enacted SB 822 (Weiner, Chapter 976, Statutes of 2018), the Trump FCC had declined to adopt net neutrality requirements and attempted to block states from adopting state-level standards. California enacted net neutrality requirements because the federal government expressly declined to do so. This bill adopts a prohibition against digital discrimination when the FCC has already adopted a similar standard and created a framework for enforcing that standard on a broader scope of parties at the federal level. Generally, when states act to establish standards that differ from federal regulation, they do so by adopting standards that are more strict than federal rules. This bill adopts a standard similar to the FCC's prohibition; however, it applies that standard more narrowly. As a result, this bill could be

interpreted as establishing a more permissive rule at the state level for addressing digital discrimination practices that are not those of an ISP.

Bill's CPUC provisions may create unnecessary burdens for grant applicants. This bill requires the CPUC to incorporate this bill's prohibition against digital discrimination into existing broadband grant programs by requiring applicants for those grants to submit an attestation that they will comply with this bill. Additionally, this bill requires the CPUC adjust program rules and reporting requirements for these grant programs; however, this bill does not specify how rules and reporting should be adjusted to reflect the need to prohibit digital discrimination of access. Some of the grant programs to which this bill seeks to apply its provisions are technical assistance programs and grants that do not necessarily subsidize mass market broadband infrastructure or service. In certain cases, these requirements may create unnecessary work for programs specifically aimed at addressing broadband inequities experienced by low-income and non-white populations. For example, this bill would require applicants for the Public Housing Account and the Tribal Technical Assistance Grant program to submit an affidavit that they will not engaging in digital discrimination of access; however, these grant programs are only available to entities that are aiming to address existing broadband gaps experienced by low-income and tribal populations. To the extent that an ISP participates in the CPUC's broadband grant programs, this bill's prohibition against digital discrimination would already prohibit the ISP from engaging in digital discrimination.

Need for Amendments. As currently written, this bill's prohibition against digital discrimination of access does not fully match the prohibition established by the FCC.

To the extent that the author and committee wish to ensure that the prohibition against digital discrimination of access in this bill matches the definition adopted by the FCC, the author and committee may wish to amend this bill to clarify the following:

- *The bill's prohibition on digital discrimination applies to the same scope of "covered entities" included in the FCC's order.*
- *The bill's definition of disparate impact does not include policies and practices justified by a substantial, legitimate business interest.*

Additionally, Section 2 of this bill establishes requirements for the CPUC's broadband deployment programs that are vague and unnecessary. As a result, the author and committee may wish to amend this bill to delete Section 2 of the bill.

Dual referral. Should this bill be approved by this committee, it will be re-referred to the Senate Committee on Judiciary.

Prior/Related Legislation

SB 1383 (Bradford, 2024) would modify eligibility criteria for the Broadband Public Housing Account, explicitly authorize the use of Public Housing Account Funds for devices such as range extenders, and clarify that projects receiving Public Housing Account funds must offer either an affordable or free broadband plan as a condition of receiving those funds. The bill is currently pending in the Assembly.

AB 41 (Holden, 2023) would have made various changes to California's cable video franchise regulation laws, including, but not limited to, clarifying the CPUC's cable franchise regulatory authority, extending timelines for the franchise renewal process at the CPUC, prohibiting franchises from denying potential subscribers equal access to services based on the community income of those subscribers, and updating certain maximum fines for customer service violations to reflect inflation rates. The bill was vetoed.

AB 414 (Reyes, Chapter 436, Statutes of 2023) established a digital equity Bill of Rights in statute to support consumers' right to equal access for broadband internet service within a broadband provider's service territory.

SB 4 (Gonzalez, Chapter 671, Statutes of 2021) and AB 14 (Aguiar-Curry, Chapter 658, Statutes of 2021) revised and extended the CASF by increasing speed standards for CASF-funded infrastructure to 100/20 Mbps, expanded eligibility to communities that lack broadband service meeting federal standards, expanded local governments' eligibility for CASF grants, and extended CASF's operation and funding until 2032.

SB 822 (Weiner, Chapter 976, Statutes of 2018) defined broadband internet access service and established California's net neutrality policy by prohibiting ISPs from engaging in certain acts that limit internet traffic and favor certain applications over others.

FISCAL EFFECT: Appropriation: No Fiscal Com.: Yes Local: Yes

SUPPORT:

#OaklandUndivided, Co-sponsor
California Alliance for Digital Equity, Co-sponsor
California Community Foundation, Co-sponsor
NextGen California, Co-sponsor
The Children's Partnership, Co-sponsor
Mayor Karen Bass, City of Los Angeles
Councilmember Eric Ohlsen, City of Palmdale

A Place Called Home
Access Humboldt
Alliance for a Better Community
AltaMed Health Services
Arts for LA
Boys & Girls Clubs of the Los Angeles Harbor
California Emerging Technology Fund
California Family Resource Association
California Teachers Association
Campesinas Unidas Del Valle De San Joaquin
Center for Powerful Public Schools
Central Valley Empowerment Alliance
Chamber of Commerce: Coalition of Filipino American, San Francisco Filipino
American, Santa Monica, and Vietnamese American
Child Abuse Prevention Center and
Children's Defense Fund-California
Chinese for Affirmative Action
Citizen Schools
Coalition for Humane Immigrant Rights
Common Sense Media
Communities in Schools of Los Angeles
Community Clinic Association of Los Angeles County
Community Coalition of The Antelope Valley
Destination Crenshaw
Diversity in Leadership Institute
Dolores Huerta Foundation
EduCare Foundation
Electronic Frontier Foundation
Everychild Foundation
everyoneon
Families in Schools
Fresno Coalition for Digital Inclusion
GPSN
Hack the Hood
Healing and Justice Center
InnerCity Struggle
Innovate Public Schools
Institute for Local Self-reliance
Insure the Uninsured Project
Kapor Center
Latino Equality Alliance
Lighthouse Community Public Schools

Los Angeles Unified School District
Media Alliance
MediaJustice
Michelson Center for Public Policy
National Association for the Advancement of Colored People, Oakland
Oakland Youth Commission
Our Voice: Communities for Quality Education
OUSD Tech Repair Program
Para Los Niños
Parent Engagement Academy
Parent Institute for Quality Education
Parent Organization Network
SEIU California
Southeast Community Development Corporation
Southern California College Attainment Network
Teach Plus - California
Tech Exchange
The Angeleno Project
The Greenlining Institute
The Unity Council
UNITE-LA
United Parents and Students
Urban Montessori Charter School
Valley Onward
Vermont Slauson Economic Development Corporation
Voice for Our Children
Watts of Power Foundation
Youth Uprising
Three Individuals

OPPOSITION:

African American Farmers of California
Asian Business Association Orange County
Biola Community Services District
California Broadband & Video Association
California Building Industry Association
California Communications Association
California Manufacturers & Technology Association
Central Valley Business Federation
Chamber of Commerce: California, California Asian Pacific, California Hispanic,
Fairfield-Suisun, Long Beach Area, Los Angeles Area, Orange County Black,

Orange County Hispanic, Palo Alto, Sacramento Metropolitan, and San Mateo County
Civil Justice Association of California
County of Fresno
CTIA
Glad Tidings International Church of God in Christ, unless amended
Nisei Farmers League
North Bay Leadership Council, unless amended
Orange County Business Council
San Gabriel Valley Economic Partnership
San Mateo County Economic Development Association, unless amended
USTelecom - The Broadband Association
Valley Industry and Commerce Association
Wireless Infrastructure Association
An Individual

ARGUMENTS IN SUPPORT: According to the author:

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

ARGUMENTS IN OPPOSITION: In opposition, a coalition of telecommunications associations and the Civil Justice Association of California states:

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.

-- END --