

Date of Hearing: June 23, 2021

ASSEMBLY COMMITTEE ON COMMUNICATIONS AND CONVEYANCE
Miguel Santiago, Chair
SB 28 (Caballero) – As Amended May 4, 2021

SENATE VOTE: 36-0

SUBJECT: Rural Broadband and Digital Infrastructure Video Competition Reform Act of 2021

SUMMARY: This bill would expand the authority of the California Public Utilities Commission (CPUC) to regulate cable video franchises, require the CPUC to consult with local governments regarding franchise violations, and require the CPUC to evaluate a franchisee's service obligations. This bill requires the California Department of Technology (CDT) to compile an inventory of state-owned resources that may be available for use in the deployment of broadband. Specifically, **this bill:**

- 1) Requires CDT, in collaboration with DGS, the State Department of Education (CDE), the Department of Transportation (Caltrans), and other relevant state agencies to:
 - a. Compile an inventory of state-owned resources that may be available for use in the deployment of broadband networks in rural, unserved, and underserved communities.
 - b. Develop a standardized agreement to enable state-owned resources to be leased or licensed for the purpose described above, as specified.
- 2) Requires CDT to post on its internet website the inventory of state-owned resources and the standardized agreement described above, and to update them as necessary. CDT shall provide technical assistance to state departments and agencies for the purposes of this bill.
- 3) Deletes existing prohibitions that limit the state's ability to treat video franchises as public utilities and eliminates restrictions on the CPUC's ability to regulate the rates, terms, and conditions of video franchise service.
- 4) Deletes existing prohibitions that limit the CPUC's ability, as the franchising authority, to exercise authority beyond what is explicitly provided for in state law.
- 5) Requires the CPUC to consult with local governments within a video service franchisee's service territory regarding remedies for violations of franchise requirements when those violations trigger a proceeding to consider revocation of the holder's franchise.
- 6) Deletes existing data collection requirements for video service franchisees and instead requires the CPUC to do the following:
 - a. Collect granular data on the actual locations served by the holder of a state franchise, as specified.
 - b. Adopt customer service requirements for a holder of a state franchise and adjudicate any customer complaints.
 - c. Assess the build out obligations of a holder of a state franchise to further competition and expansion of video service, as specified.

- 7) Requires the holder of a state franchise to submit the following information to the CPUC by April 1st of each year:
 - a. Information relative to the locations that the holder made broadband service available and that received broadband service during the previous year, as specified. For each location, the information shall show, among other things, the upload and download speeds, the technology or technologies used to provide broadband service at each location, the price at which broadband service was offered at each upstream and downstream speed combination.
 - b. Information relative to the locations that the holder made video service available and that received video service during the previous year, as specified.
 - c. The bill would prohibit CPUC from disclosing any personally identifiable information collected.
- 8) Defines “state-owned resources” to mean, but not be limited to, state-owned real properties, rights-of-way, spectrums, facilities and structures, infrastructure, programs, and other resources suitable for that purpose. The term does not include any state-owned resources that, if used for that purpose, would be inimical to public health, safety, or welfare.
- 9) Includes legislative findings and declarations relating to inequality caused by California’s persistent digital divide.

EXISTING LAW:

- 1) Defines “franchise” as an authorization, issued by a franchising authority, which permits the construction or operation of a cable system. [47 USC §522(9)]
- 2) Defines “franchising authorities” as any governmental entity empowered by Federal, State, or local law to grant a franchise. Existing state provides that the CPUC is the sole franchising authority in California. [47 USC §522(10); PUC §5840(a)]
- 3) Provides that franchise terms may require cable operators to build their systems to cover certain localities in a franchise area and that those costs are borne by the operator or subscribers. [47 USC §541(a)(2)-(3)]
- 4) Requires that a local franchising authority must allow a cable operator a reasonable period of time to build out cable service to all households in the franchise areas. [47 USC §541(a)(4)(A)]
- 5) Prohibits discrimination against potential residential cable subscribers because of the income of the residents in that local area. [47 USC §541(a)(3); PUC §5890(a)]
- 6) 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. [PUC §5890 (a-f)]

- 7) Prohibits any cable system or cable operator from being subject to regulation as a common carrier or utility as a result of providing video service. [47 USC §541(c); PUC § 5810(a)(3); PUC § 5820(c)]
- 8) Clarifies that federal law does not prohibit a local franchising authority from prohibiting discrimination among subscribers and potential subscribers to cable service. [47 USC §543(e)]
- 9) Expressly preempts any provision of state law that is inconsistent with the terms of federal law concerning cable service. [47 USC §556(c)].
- 10) Requires every cable franchise holder to submit specified data to the CPUC by April 1st each year. Existing law requires franchisees to submit specified broadband, video, telephone, and low-income service metrics to the CPUC on a census tract basis. Existing law permits a franchise holder to “reasonably estimate” the number of households to which it provides broadband service in the state if the provider does not maintain broadband service information on a census tract basis. Existing law prohibits the CPUC from publicly disclosing any of the data reported by franchise holders unless the CPUC orders the disclosure of the data through a proceeding. Any current or former CPUC employee or officer who discloses data outside of an order is guilty of a misdemeanor under existing law. (PUC §5960 & PUC §583)
- 11) Prohibits the CPUC from exercising authority over cable operators beyond what is explicitly provided for in state law, and establishes the particular requirements for video service providers applying for a state franchise, and specifies the information franchise holders must provide to the CPUC to obtain and retain a state franchise. [PUC §5840 et. seq.]
- 12) Allows local governments to bring complaints to the CPUC regarding cable franchises that are not offering video service required by this section. Existing law authorizes the CPUC to initiate an investigation on its own, regardless of whether it has received a complaint from a local government. The CPUC may suspend or revoke the license of a video service provider that fails to comply with the requirements for its franchise. Existing law also specifies fines that the CPUC or court may assess on violating franchisees. [PUC §5890 (g-i)]

FISCAL EFFECT: According to the Senate Appropriations Committee, the CPUC estimates ongoing costs of at least \$1.44 million to undertake the new work required by this bill such as: the adjudication of customer service complaints, performing ongoing assessment of build out obligations; consulting with local governments; collecting, mapping, and analyzing granular data. CDT reports unknown costs to undertake the new work required by the bill.

COMMENTS:

- 1) *Double referral and committee jurisdiction.* This bill will be referred to the Assembly Committee on Privacy & Consumer Protection should it pass this committee. That committee’s jurisdiction includes oversight of CDT, and therefore analysis of provisions of this bill relating to CDT will not be reflected in this analysis.

- 2) *Author's Statement* Over 2 million Californians struggle to participate in the 21st Century way of life - children required to learn remotely, employees required to work from home, and businesses forced to conduct online sales and services – because of inferior or non-existent broadband. Rural communities with low population density and low-income residents still lack broadband, as do urban low-income communities. SB 28 provides a solution, without new fees or taxes, by ensuring that digital video franchise license holders meet their license obligations in a non-discriminatory manner.
- 3) *Background:* In 1984 Congress passed the Cable Communication Act which aimed to delineate the jurisdictional boundaries between federal, state, and local governments regarding the regulation of cable operators. The Act established the local franchising process for states or local governments to administer, but also gave the Federal Communications Commission (FCC) ultimate authority over the regulation of cable and video service. Congress updated the Act in 1992, by passing the Cable Television Consumer Protection and Competition Act of 1992. Under the 1992 law, while local authorities retained the power to grant cable franchises, the law provided that “a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.”

In 2006, the California Legislature passed, and Governor Schwarzenegger signed into law Assembly Bill 2987 (Nuñez, Chapter 700, Statutes of 2006), or the Digital Infrastructure and Video Competition Act of 2006 (“DIVCA”). Prior to AB 2987 (Nuñez, 2006), cable television franchises were issued by cities and counties; however, under DIVCA franchises are issued on a statewide basis solely by the CPUC.

Although the Cable Communication Act and DIVCA were both primarily about the regulation of video and cable service, both Congress and the California Legislature realized the potential for expanded consumer access to advanced services, like broadband, through increased competition and better regulation of the cable market. Today, DIVCA licensee holders play a significant role in providing internet in the state of California. In fact, 96.9% of California subscribers receive internet from 5 providers which hold state issued DIVCA licenses: AT&T, Charter, Comcast, Cox, and Frontier.¹

Despite the prolific expansion of broadband service and access across California in the last several decades, California still has a persistent digital divide. The digital divide in California is most stark when comparing rural households in the state to urban households. For example, the CPUC estimates² that over 17% of rural households do not have access to even the slowest speeds of internet, whereas in urban areas the figure is only 2%. The divide only widens the higher the speed benchmark, for example, less than 50% of rural households are served with speeds above 100mbps download.

- 4) *Cable service and broadband service: same wires, different regulation.* Various opponents of the bill, including the California Cable & Telecommunications Association,

¹ Based on data provided by the CPUC and compiled in October 1, 2018 from MediaCensus broadband data as of second quarter 2018.

² California Advanced Services Fund Annual Report, 2020
https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/About_Us/Organization/Divisions/Office_of_Governmental_Affairs/Legislation/2021/2020%20CASFF%20Annual%20Report.pdf

have written in opposition expressing their perspective that the bill's provisions constitute an unlawful expansion of the state's video franchising authority that would be preempted under federal law. To support their position, opponents cite various sections of federal law, recent FCC decisions, and various court cases.

Although the opponents of the bill are correct that federal law and recent FCC decisions are quite clear about the jurisdiction states have over broadband – very little - the strict limitations are made complicated by the fact that broadband service is often delivered to households over the very same cable systems and wires that deliver video service. The seemingly paradoxical regulatory structure over different services that travel over the same wires has been the subject of much litigation and was the impetus behind a 2019 FCC order³ which aimed to clarify the regulatory jurisdictions of local franchising authorities over services other than cable or video service. In its order, the FCC sharply limited state and local authority over products offered by video service providers other than video programming, such as broadband, but affirmed that build-out requirements and customer service requirements for cable service can be lawful. The distinction between the two services is noteworthy, as it does not preclude states from obligating franchise holders to expand cable service.

Nonetheless, the language in the bill does not explicitly require cable system operators to build out their cable system (or broadband). Rather, the bill requires the CPUC to assess the build out obligations of a state franchise holder, including whether the franchise holder offers service to all households within their franchise territory. Further, by removing certain provisions of current law that limit the CPUC's ability to negotiate the terms of a franchise, the bill creates a pathway for the CPUC to require build-out of the cable system to unserved locations as a condition of the franchise agreement.

- 5) *Digital Redlining and Antidiscrimination Statutes.* Existing federal and state law prohibits video franchises from discriminating against or denying access to service to potential subscribers on the basis of a person's income. Existing state law also establishes specific benchmarks that cable providers must meet to demonstrate compliance with the non-discrimination requirements. This bill modifies the existing prohibitions on discrimination by deleting the existing standards by which a cable provider can demonstrate compliance with prohibitions against discrimination and instead simply prohibits providers from discriminating against any potential subscriber or community. Additionally, the bill expands the definition of "access" to include a requirement that the holder is capable of providing services at the household level to all households in a census block.

Removing the existing standards for nondiscrimination, the bill could eliminate the presumption that a cable provider is not discriminating against a community or subscriber on the basis of income or other protected classifications. However, The Utility Reform Network (TURN) points out in their letter supporting the bill that "the deletions now leave the state franchising authority with little meat to use to implement non-discrimination rules or standards". Additionally, by expanding the definition of access it could make it easier to make a finding that a cable operator is discriminating against a

³ 2019 FCC Order - <https://ecfsapi.fcc.gov/file/08021612121059/FCC-19-80A1.pdf>

particular community, especially if not every house within a census block in that community is capable of being provided with service. Nonetheless, federal law prohibits regulation of a cable system or cable operator as a common carrier or utility, which do have an obligation to serve all households.

- 6) *Granular data collection.* Current law under DIVCA requires franchise holders to annually report to the CPUC, on a census tract basis, various pieces of information, including broadband information, video information, and low-income household information. However, census tract and census block information is not granular enough to fully understand the extent of broadband deployment in particular areas because a census block or tract could be counted as served even if service is offered to only one household in that area.

Coincidentally, the FCC is already moving towards collecting more granular data on broadband deployment following the signing of the Broadband Deployment Accuracy and Technological Availability (DATA) Act in 2020. Under the new law, the FCC will collect granular service availability data from wired, fixed wireless, and satellite broadband providers. Notably, the data reporting requirements under this bill would only apply to DIVCA franchise holders, but who serve about 97% of the state. Further, the DATA Act also creates a process for consumers, and state and local governments, to challenge FCC maps with their own data.

In their letter of opposition, the California Cable & Telecommunications Association expressed support for aligning state data collection with federal data collection, because it could “create efficiencies between state and federal broadband funding streams and help California maximize its draw of federal broadband funds.” On the other hand, aligning the state’s data collection exactly with the FCC could potentially tie the state’s hands from collecting supplemental information about broadband service, which could, in turn make, it more difficult to challenge the FCC’s maps if the state data relies on the same information submitted by cable providers to the FCC.

- 7) *Need for amendments.* Although the DIVCA related sections of this bill are fundamentally about lawful regulation of cable systems and cable operators, the drafting in various sections of the bill could be more clear. To avoid misinterpretation of the bill’s provisions and to more closely align the bill with the author’s intent, the author and committee may wish to amend the bill to:

- a. Revise and recast Section 2 to remove explicit mentions of broadband regulation.
- b. Reinsert provisions of existing law in Section 6, to provide that that a franchise holder shall not be deemed a public utility.
- c. Clarify in Section 7 that the CPUC, in considering state franchise applications, may act to the extent authorized by federal cable laws.
- d. Reinsert provisions of existing law in Section 11 prohibiting discrimination on access to service because of income.
- e. Revise the definition of “access” in Section 11 to align it with the wording of 47 CFR §541(a)(4)(A) regarding the capability of “providing service to all households in the franchise area.”
- f. Revise Section 12 to direct the CPCUC to review whether a state franchise may reasonably build out service to “unserved locations” instead of explicitly “areas outside of their franchise territories”.

REGISTERED SUPPORT / OPPOSITION:

Support

Access Humboldt
Association of California School Administrators
California Association of Nonprofits
California Association of School Business Officials (CASBO)
California Forward Action Fund
California Medical Association
California School Boards Association
California State Association of Counties
California State Pta
City of Gonzales
City of Kerman, CA
City of King
City of Madera
City of San Juan Bautista
Communities in Schools of Los Angeles (CISLA)
Community Television of Santa Cruz County
Consumers for Auto Reliability and Safety
County of Santa Clara
Dolores Huerta Foundation
Educators for Excellence - Los Angeles
Electronic Frontier Foundation
Families in Schools
Green DOT Public Schools California
Innovate Public Schools
L.a. Coalition for Excellent Public Schools
League of California Cities
Merced; City of
Nextgen California
Our Turn
Our Voice: Communities for Quality Education
Parent Revolution
Partnership for Los Angeles Schools
Rural Caucus, California Democratic Party
San Benito County
Stanislaus County
The Education Trust - West
The Greenlining Institute
The Utility Reform Network (TURN)
United Parents and Students
Valley Vision

Oppose

Bizfed Central Valley
Black Chamber of Orange County

Calcom Association
California Cable & Telecommunications Association
California Latino Leadership Institute
Consolidated Communications Services Co. Dba Surewest
Frontier Communications Corporation
Long Beach Area Chamber of Commerce
Los Angeles County Business Federation (BIZFED)
Orange County Business Council
San Gabriel Valley Economic Partnership
Valley Industry & Commerce Association

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