June 10, 2022

The Honorable Ben Hueso
Chair, Senate Energy, Utilities, and
Communications Committee
1021 O Street, Room 3350
Sacramento, CA 95814

The Honorable Brian Dahle
Vice Chair, Senate Energy, Utilities, and
Communications Committee
1021 O Street, Room 3350
Sacramento, CA 95814

RE: A.B. 2749 (Quirk-Silva) - OPPOSE

Dear Chair Hueso and Vice Chair Dahle:

We write to you to express our concerns with A.B. 2749, legislation that would interfere with the state's ability to require affordable future-proof broadband access as part of the state's broadband infrastructure effort that was launched under SB 156. By way of background, the Electronic Frontier Foundation (EFF) is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development. With over 35,000 dues-paying members (with several thousand California members) and well over 1 million followers on social networks, we focus on promoting policies that benefit both creators and users of technology. EFF has been at the forefront of studying the future of broadband access in the high-speed market and has conducted in-depth research and produced both legal and technical publications on the issue.

The bill as currently drafted raises several concerns on affordability, future proofing grants, and the state's ability to coordinate its infrastructure efforts with the new Biden Administration's Notice of Funding Opportunity. Without remedying these issues, A.B. 2749 will also undermine the Newsom administration's long-standing effort to lower the cost of broadband access and keep it down in unserved communities. The unanimous passage of S.B. 156 marked the first time any state had invested enough resources to deliver future-proof fiber broadband access to every single resident. However, those resources can be diverted and squandered under A.B. 2749, hampering progress to end the digital divide, and requiring the state to invest additional billions of dollars in the future construction efforts as community needs expand.

A.B. 2749 Unnecessarily Limits the State's Ability to Ensure Affordable Access for All Unserved Californians Who Will be Facing a State Subsidized Monopoly ISP

The California Advanced Services Fund's (CASF) Federal Funding Account will be providing grants for a provider to deliver last-mile access in a previously unserved area, as eligibility to access the funds is currently limited to areas lacking 25/3 mbps service. That grantee will be the first and only broadband option for Californians living in such areas, and the entirety of the broadband network delivering access will have been paid for by the taxpayer. That means, in essence, in order to provide broadband access to the unserved, the state of California is fully financing a monopoly provider. This monopoly provider will have enormous power to charge

very high prices despite taxpayers having already paid their largest costs—the one-time sunk costs to construct the network—inasmuch as demand for broadband access is today roughly on par with that for electricity and water.[1]

A.B. 2749 would subject unserved Californians who will receive state financed monopoly access to uncontrolled price hikes with provisions 6(A) and 6(B). Under 6(A), the California Public Utilities Commission (CPUC) is prohibited from requiring these monopoly providers to "*offer a service at a fixed price for more than five years*." Under 6(B) the CPUC is further prohibited from regulating the rates for a monopoly provider in its entirety with the exception of low-income access for those five years.

Read together, this means that grantees will be free to charge all residents, both low-income and middle-income, ***any*** price they wish under a monopoly scenario—despite the fact that taxpayers paid their costs to build the network. To put this in perspective, the price tag of construction could make up ***nearly 60 to 80 percent of the entire cost of the network*** of which the grant will cover in its entirety.[2] In a recent paper, Paul De Sa, the FCC's former Chief of the Office of Strategic Planning under the Obama Administration cautioned states to carefully analyze the balance between subsidies and expectations of recipients to avoid over subsidization and ensure taxpayers receive the full benefit of their public investment.[3] If AB 2749 were to become law, EFF predicts this would mean prices could reach or exceed $100 a month for users with the ability to pay despite low operations and maintenance costs. This would result in an enormous windfall for the monopoly provider even as industry trends clearly show the cost of delivering broadband is dropping rapidly.

Lastly, even the 5-year coverage of low-income access is exceedingly limited. The term "low-income households" is undefined in A.B. 2749. Yet even its most generous interpretation would mean a family of 4 making more than $55,000[4] a year would receive zero protection from ever rising price hikes by a monopoly provider. If the state of California wants to ensure that all Californians have internet access and is investing billions of tax dollars to deliver that result, the state must ensure that the prices remain predictably affordable for all residents. EFF recommends removing all components of this ban on affordable access from the bill.

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[1] Jonathan Schwantes, *Time to Treat Broadband Like the Essential Service It Is*, TECHDIRT GREENHOUSE (Nov. 2, 2020), available at https://www.techdirt.com/2020/11/02/time-to-treat-broadband-like-essential-service-it-is.

[2] EUROPEAN COMMISSION, *Analysys Mason: Support for the Preparation of an Impact Assessment to Accompany an EU Initiative on Reducing the Costs of High-Speed Broadband Infrastructure Deployment* at 36, http://ec.europa.eu/digital-agenda/en/news/support-preparation-impact-assessment-accompany-eu-initiative-reducing-costs-high-speed; *See also* INTERNATIONAL TELECOMMUNICATION UNION, *Cost Analysis for Fiber to the Home*, http://www.ictregulationtoolkit.org/en/toolkit/notes/PracticeNote/2974.

[3] Paul De Sa, Broadband Financials: A Practical Primer, (May 2022), available at https://www.quadrapartnersllc.com/_files/ugd/259809_1c83772535b149728b043d65d1c16d85.pdf.

[4] EFF predicts $55,000 as the highest possible interpretation of low-income status based on existing California low-income support programs, such as Lifeline, establishing that metric.

A.B. 2749 Interferes with Long-Term Planning to Deliver Future Proof Infrastructure

The bill's 180-day shot clock provision for grants will drastically limit the potential of S.B. 156. EFF has worked with many local broadband public and private broadband providers to inform its research on delivering 21st century access. Not a single provider has indicated that it has a problem with the state's CASF program that a shot clock would remedy.

On the contrary, a notable, consistent complaint was a lack of sufficient funding to deliver long-term solutions to communities through fiber optic infrastructure. S.B. 156 addressed this problem by setting aside enough finding to deliver broadband access able to keep up with community needs for ***decades*** into the future. In fact, the passage of S.B. 156 has set off a broad range of local efforts to develop long-term infrastructure plans. But these will take time to develop as the state deploys middle-mile infrastructure and implements the loan-loss reserve fund.

For example, multiple county governments have formed a new entity called the Golden State Connect Authority with the explicit mission to deliver open access fiber infrastructure to all rural Californians.[5] San Diego has started its feasibility studies this year to deliver long term solutions to its residents in order to fully utilize the potential of S.B. 156 funding.[6] Los Angeles County is currently conducting its own feasibility study to deploy universal fiber broadband access noting that 10,000s of the County's residents are unserved.[7] EFF's own cost model study of Los Angeles County (which used the state government's cost model data) has found that while only 40% of the county's 10 million residents are served with future-proof fiber-based infrastructure when a total of 95% of the residents could be served on a commercially feasible basis ***without any subsidies,*** indicating an enormous amount of unmet demand if a public or private provider were to deliver 21st century ready access to them.[8] S.B. 156, which was opposed by every major private provider that is sponsoring A.B. 2749, has kicked off a massive response of new local alternatives due to the state's willingness to invest.

The listed efforts above are just a small sample of what is happening across California that the legislature should embrace as the product of its work under S.B. 156. More will occur as the state's middle-mile infrastructure begins to deploy because it will drastically reduce the cost of deploying local services, making even more new local efforts financially feasible. The implementation of the loan-loss reserve fund, which will unlock potentially up to $7 billion in long term financing for tribes, non-profits, and the public sector, will also trigger another wave of local efforts. But all of this takes time. Expedited shot clocks will only favor pre-existing industry players with plans to incrementally expand their networks but no plan to serve ***all*** of the unserved.

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[5] Golden State Connect Authority Mission Statement, available at https://goldenstateconnect.org/about-us/.
[6] *See* San Diego Association of Governments, SANDAG INFOBITS, *available at* https://www.sandag.org/uploads/projectid/projectid_614_29513.pdf
See Also San Diego Association of Governments, The Digital Divide in the San Diego Region available at https://storymaps.arcgis.com/stories/f204b9b88ea4483b8a0d46c8d099c3a7.
[7] Infrastructure Financing Plan Prepared for The City of Palmdale and the County of Los Angeles (Jul. 2021), available at https://file.lacounty.gov/SDSInter/ceo/agendas/1114088_10.20.21OperationsAgenda.pdf. Pg. 281-298.
[8] Diffraction Analysis on behalf of the Electronic Frontier Foundation, *Wholesale Fiber is the Key to Broad US FTTP Coverage, available at* https://www.eff.org/document/wholesale-fiber-key-broad-us-fttp-coverage. Pg. 32

The Biden Administration's Notice of Funding Opportunity Requires States to Develop 5-Year Fiber Infrastructure Plans, Not Wireless

The recently published Notice of Funding Opportunity (NOFO) by the Biden Administration tasks states with developing 5-year infrastructure plans that prioritize fiber deployment. In the bipartisan infrastructure law, Congress set a priority for federal funds to deploy networks that can "easily scale speeds over time" while meeting "evolving connectivity needs" and support "deployment of 5G" and "other advanced services" under Section 60102(a)(1)(I) of the bill. It may be perplexing that a preference for fiber wireline infrastructure would deploy 5G wireless services, but 5G in rural markets requires an enormous investment in fiber infrastructure in the ground to deliver the necessary capacity to wireless towers.[9] The Wireless Infrastructure Association, which includes major ISPs such as AT&T, said it clearly when it stated "one of the most important components of 5G wireless networks is not wireless at all. It's fiber."[10] The Biden Administration's NOFO requirements for state broadband plans states that only in an "extremely high cost per location threshold" should a state contemplate an alternative to fiber solution such as fixed wireless.

Under S.B. 156, California is well situated to leverage its state program to maximize the impact of the Biden infrastructure program by matching state investments with new federal investments into unserved and underserved areas. A.B. 2749, however, interferes with that by requiring the state to treat wireless broadband as an equivalent to wireline infrastructure. This would inhibit the state's ability to coordinate with the Biden Administration's fiber infrastructure effort because the state could not prioritize fiber infrastructure as outlined by the NOFO.

It is critical for the committee and legislature to understand that there is wide engineering consensus that fiber is the only means of delivering long-term multi-generational infrastructure to people that will meet 21st century needs. For this reason, the Biden Administration concluded that "only end-to-end fiber[11]" can meet the congressional priorities of delivering infrastructure that can handle evolving connectivity needs.

EFF recommends amending the wireless provision under subsection 9 that states, "*A wireless internet service provider may apply for and receive funding from the Federal Funding Account"* to include the same prioritization language in the federal infrastructure law, which will then harmonize S.B. 156 with the new Biden Administration's NOFO. This will ensure that any wireless service receiving funding meets federal long-term objectives and pushes fiber infrastructure into an unserved community to offer long-term solutions. Absent clear long-term goals as a condition of receiving state funding for a wireless grant, the state could squander funds

[9] Wireless Infrastructure Association, *Fiber: Inextricably Linked with 5G Connectivity* (Aug. 19, 2020), available at https://wia.org/fiber-inextricably-linked-with-5g-connectivity.
[10] *Id.*
[11] National Telecommunications Information Administration Notice of Funding Opportunity, Broadband Equity, Access, and Deployment Program, available at https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf. page 42

on short-term wireless plans or speculative deployments that will reach their capacity limits as soon as 2028.[12]

EFF recommends the following language to effectuate this result, which is found under Section 60102(a)(1)(I) of the bipartisan infrastructure law:

(I) Priority Broadband Project - The term "priority broadband project" means a project designed to -
(i) provider broadband service that meets speed, latency, reliability, consistency in quality of service, and related criteria as the Assistant Secretary shall determine; and
(ii) ensure that the network built by the project can easily scale speeds over time to -
(I) meet the evolving connectivity needs of households and businesses; and
(II) support the deployment of 5G, successor wireless technologies, and other advanced services.

Sincerely,

Ernesto Falcon
Senior Legislative Counsel
Electronic Frontier Foundation

[12] Cartesian, *Starlink RDOF Assessment Final Report,* Cartesian (February 8, 2021), https://ecfsapi.fcc.gov/file/10208168836021/FBA_LEO_RDOF_Assessment_Final_Report_20210208.pdf