

ONE HUNDRED SIXTH LEGISLATURE - SECOND SESSION - 2020
COMMITTEE STATEMENT
LB992

Hearing Date: Monday February 03, 2020
Committee On: Transportation and Telecommunications
Introducer: Friesen
One Liner: Adopt the Broadband Internet Service Infrastructure Act and provide for certain broadband and Internet-related services

Roll Call Vote - Final Committee Action:
Advanced to General File with amendment(s)

Vote Results:

Aye: 8 Senators Albrecht, Bostelman, DeBoer, Friesen, Geist, Hilgers, Hughes, Cavanaugh
Nay:
Absent:
Present Not Voting:

Oral Testimony:

Proponents:

Senator Curt Friesen
Eric Carstenson
Zachary Hunnicutt
John Idoux
Beth Bezyn Ferrell
Danny DeLong
Dan Nerud
Rod Wagner
Linda Duckworth
John Hansen

Representing:

Introducer
NE Telecommunications Bureau
NE Farm Bureau
CenturyLink
NACO
Volunteer AARP NE
NE Corn Growers
NE Library Commission
League of Women Voters of NE
NE Farmers Union

Opponents:

Seth Voyles

Representing:

OPPD

Neutral:

Gregory Dynek
Phil Burke
Kristensen Gottschalk
Mary Ridder
Chris Elliot
Kristen Hassenbrook
Justin Brady
Lash Chaffin

Representing:

Bluestem Network
Polk County RPPD & NE Rural Electric Assoc
NE Power Assoc & NE Rural Elect Assoc
NE Public Service Commission
NE Public Power District
NE Chamber of Commerce & Industry
NE Cable Communications Assoc
League of NE Municipalities

Summary of purpose and/or changes:

LB 992 incorporates the recommendations of the Nebraska Rural Broadband Task Force for statutory changes in areas of Nebraska telecommunications law, electric easements, support for public libraries, creation of a State Broadband

Coordinator position, and improving the process for leasing of dark fiber by electric utilities. The bill also provides for length of terms of appointments for members of the Rural Broadband Task Force.

Sections 1 through 5 create the Broadband Internet Service Infrastructure Act. The provisions provide a process for providing broadband rights over existing electric easements.

Section 2 provides definitions used in the act. Key definitions include "Attached facility", which means a broadband facility or portion of a broadband network located aboveground and attached to an electric utility's electric service infrastructure, or underground in an electric utility's easement and existing before the delivery of notice required in Section 3; "Commercial broadband service", which means broadband service defined in federal law or broadband Internet service; "Commercial broadband supplier", which means (a) a provider of commercial broadband service, or (b) a person that sells, leases, or transfers a facility or a right to install, operate, maintain or use an attached facility for another person's provision of commercial broadband service, or a person that intends to sell, lease, or transfer an attached facility or a right to install, operate, maintain, or use an attached facility. A commercial broadband supplier does not include an electric utility; "Electric utility easement" is an easement held for the siting of electric service infrastructure or for the purpose of delivering electric service. The easement is exclusively for the provision of electric service or for use in connection with commercial broadband service, telecommunications service, or another purpose, or the easement is used to provide commercial broadband service; and "Electric utility" which means an entity described in Section 70-601(8), and which includes all entities providing electric service in Nebraska.

Section 3 describes the notice and filing requirements that relate to an electric utility expanding its electric easement to include the right to (a) install, maintain or own an attached broadband facility or allow a commercial broadband supplier on the utility's behalf to install, maintain, or own an attached facility to provide commercial broadband service; or (b) lease or otherwise provide to a commercial broadband supplier any excess capacity of attached facilities in order to provide commercial broadband service. All of these actions could be taken without the consent of the owner of the property.

The electric utility or its designated commercial broadband supplier would provide at least 30 days notice to the property owner that holds an interest in the property subject to the easement of its proposed action. Notice must be sent by certified mail to the property owner and must include contact information of the electric utility or the broadband supplier relating to the proposed action. The notice also include a general description of the existing electric service infrastructure and the approximate location of the existing easement. The notice must also include: (a) a reference to the Act; and (b) a copy of the statutory provisions allowing the action, and an indication of the type of action being taken. The notice would also include an estimated time for the start of installation or construction, and the right of the utility or supplier to record a memorandum, which is a written instrument including the name and address of the utility, the date of which notice was mailed, and information required to be included in the notice, and include a statement regarding the statute of limitations for the interest holder to file a claim with respect to the utility's action.

An interest holder in the property could file in the office of the county clerk a desire to obtain notice at a specific address, which would include contact information, the instrument granting the interest holder's interest in the property, and recording number of the instrument.

Upon execution of the utility's or commercial provider's action in this section, such action runs with the land and is assignable by the electric utility.

The electric utility would be subject to the terms and conditions of its electrical easement, except for those terms allowing the broadband easement to be executed. If aboveground easements were prohibited by the instrument, no aboveground easement would be granted by the action taken in this Section. Any notice requirements relating to construction in the electrical easement would have to be complied with.

Nothing in this section would compel the electric utility to comply with the section if the action was allowed under its current easement. Unless expressly prohibited by the terms of its existing easement, an electric utility easement shall be deemed to allow a third party to install, maintain, own, or provide telecommunications facilities and equipment for use

by the electric facility in the provision of electrical service.

Section 4 relates to claims and the process for recovering damages for broadband easements over existing electrical easements.

It provides that no claims may be brought against an electric utility or commercial broadband supplier more than two years after the later of (a) the effective date of the act; (b) the date of delivery of notice pursuant to Section 3; or (c) the date of the recording of the memorandum pursuant to Section 3. This provision would not apply to physical damage to the property, injury to persons, or breach of a term of a written electric easement as provided in Section 3. Not claim or cause of action could be brought by an interest holder against a commercial broadband supplier relating to the notice provided by the supplier on behalf of an electric utility.

If an interest holder brings an action or claim relating to the value of a broadband facility over an existing electric easement, the following applies to the calculation of damages: (a) profits, fee, or revenue derived from the attached facilities may not be used; and (b) the rental value of the real property interest or electric easement, including the rental value of attached facilities or an assembled broadband corridor, may not be used. Consideration must also be given to the increase in value to the real property interest resulting from the availability of commercial broadband service that arises from the installation of attached facilities.

An interest holder must make reasonable accommodation for an appraisal within 90 days following a request. If no accommodation for an appraisal is made, there is no liability. An electric utility or commercial broadband service must make appraisal results available to the interest holder without undue delay.

Damages would be limited to those existing at the time the electric utility or commercial broadband service first performed the actions, and would be deemed not to continue, accrue, or accumulate.

Except for negligence, willful misconduct, or violations of the act, an interest holder would not be entitled to reimbursement for appraisals, attorney fees, or awards for special, consequential, indirect, or punitive damages.

Any action or failure to act to install or maintain broadband facilities by an electric utility or commercial broadband service would not be considered negligence or willful misconduct. Acceptance of a damage award will be deemed to have granted an increase in the scope of the electric utility easement equal in term to the duration of the existing easement.

Section 5 relates to authority and discretion of the electric utility in partnering with a commercial broadband service.

An electric utility shall (a) not discriminate against a commercial broadband service in offering or granting rights to install or attach facilities; or (b) charge nondiscriminatory fees for substantially similar leases or use, but only to the extent that the electric utility, in its sole discretion, chooses to offer the lease or use to a particular commercial broadband service.

Nothing in this section would require an electric utility to offer or grant a right to use an easement relating to electric service infrastructure in a manner that would interfere with the infrastructure for the provision of electric services.

Nothing in the Act is intended to subject the electric utility to regulation by the Federal Communications Commission, regulation by the state of pole attachment fees or regulation, or prevents a party from filing a claim or cause of action pursuant to the Broadband Internet Service Infrastructure Act.

Section 6 relates to the creation of the position of state broadband coordinator. This person, who would be located in the office of the Chief Information Officer, would (a) encourage counties or regions to appoint a broadband coordinator; (b) encourage those counties and regions to work with stakeholders on broadband issues; (c) assist counties, regions, and stakeholders in determining the availability of broadband assets, areas for improvement, and strategies to improve broadband availability and use; and (d) explore the creation of broadband cooperatives in unserved or underserved areas of the state.

Section 7 relates to the creation of four regional technician positions to assist public libraries. The positions would be located in the Library Commission, and would assist libraries in providing Internet and computer access to students and the general public in unserved or underserved areas or which have high percentages of students who have limited or no access to the Internet. In addition, the technicians would assist public libraries in their need for technical support, upgrades, digital literacy training, and E-Rate filings.

Section 8 would require the Public Service Commission to establish the Nebraska E-Rate Special Construction Matching Fund Program for the support of fiber optic cable installation at public libraries. The funds would come from the Nebraska Telecommunications Universal Service Fund.

Section 9 provides an internal reference in Section 75-109.01 to a provision being repealed in the bill.

Sections 10 and 11 relate to changes in the provisions relating to provision of retail telecommunications service by public entities. Section 10 provides that money that would otherwise be transferred to the Nebraska Internet Enhancement Fund be instead be transferred to the Nebraska Telecommunications Universal Service Fund. The Internet Enhancement Fund would be repealed. Currently, 50 percent of profits from the lease of excess capacity dark fiber by public entities goes into the Internet Enhancement Fund. Section 11 amends Section 86-577 relating to the lease of dark fiber by a public entity. It would change the provision by allowing the Public Service Commission to establish a safe harbor range of market rates for the leases, and delete the requirement that a public entity file a request with the PSC for a competitive price comparison to determine a market rate. If the lease submitted by the public entity utilizes rates within the safe harbor, the PSC would publish the application within five business days and allow 14 business days for objections to be filed. If no objection is filed, the PSC shall deem the lease approved. If an objection is filed, a hearing would be held for the PSC to determine whether the lease meets the market rate. Language is stricken that any lease would require the public entity to be solely responsible for maintenance of the dark fiber.

Section 12 provides for termination of the Nebraska Internet Enhancement Fund on June 30, 2021. Any unencumbered money would be transferred to the Nebraska Telecommunications Universal Service Fund.

Section 13 provides for terms for membership on the Rural Broadband Task Force. It would provide two-year terms for the members the Governor appoints, and allows for reappointment of those members.

Sections 14 and 15 are repealers, with Section 15 outright repealing Section 86-580 relating to the Nebraska Internet Enhancement Fund.

Explanation of amendments:

The committee amendment AM 3055 strikes the original sections and inserts language that accomplishes the following:

The Broadband Internet Service Infrastructure Act is contained in Sections 1-7 of the amendment. Intent language is added in Section 2.

New definitions in Section 3 (original section 2) include "broadband facility agreement", which is an agreement between an electric utility and a commercial broadband supplier, and "electric utility infrastructure", which clarifies that facilities for electric transmission service are not included. The definition of "electric utility easement" is clarified. The defined terms "request for notice" and "memorandum" are eliminated.

Section 4 (original bill section 3) is amended to provide that notice must be given only to the property owner and not to any other property interest holders. Provisions relating to delivery of notice are also clarified. The duty of recording a memorandum of notice in the office of the County Clerk is deleted. A property owner must respond within 90 days for compensation relating to the use of an electric utility easement in connection with a broadband facility agreement. The electric utility would not be required to enter into a broadband facility agreement until one of the following has occurred: (a) 90 days after notice to a property owner who has not filed a claim; (b) a claim filed within the 90 days has been

resolved; or (c) the statute of limitations has expired.

The amendment also provides that Section 4 shall not apply to railroad rights-of-way, and that crossings of railroad rights-of-way by telecommunications carriers are governed by Section 86-164.

Section 5 (original section 4 of the bill), which relates to the statute of limitations and measure of damages, is clarified by striking internal references to memorandum recording and property interest holders.

Section 6 (original section 5 of the bill) is amended to provide that it is in the electric utility's sole discretion to offer or grant a right of access or use to an easement that would interfere with the utility's provision of electric service. Language is added that, outside the requirements of the Act, nothing limits the electric utility's authority to enter into agreements relating to the use of its easements or electric system facilities.

Section 7 of the amendment is new language providing that the Act does not apply to railroad rights-of-ways.

Section 7 of the original bill related to staffing increases at the Nebraska Library Commission is eliminated in the amendment.

Section 8 (original section 6 of the bill), which relates to the creation of the state broadband coordinator, is unchanged, but Section 15 of the amendment makes Section 8 operative on July 1, 2022.

Section 9 (original section 8 of the bill) eliminates the requirement that entities eligible for the PSC' E-rate Special Construction Matching Fund support for libraries must be eligible telecommunications carriers.

Sections 10 and 11 (original sections 9 and 10 of the bill) are unchanged.

Section 12 (original section 11 of the bill) relates to leasing of dark fiber by state agencies or political subdivisions. The defined terms of "served location" and "unserved location" are added. A served location is a location receiving, or at the time the lease is filed with the PSC, able to receive communications service at 25 upload and 3 download speeds, as determined by the PSC. An unserved location is one not receiving or unable to receive service at those speeds.

Language is added that lease terms must be fair, reasonable, and nondiscriminatory. Before a lease becomes effective, it must be filed with the PSC for publication and comment. The lease becomes effective in 14 days unless a protest is filed. If the protest relates to the allocation of served location and unserved location, the PSC shall determine such allocation as a contested matter. For a lease of dark fiber, the PSC shall establish a safe harbor range of market rates using a competitive price determination comparison. If the lease utilizes rates within the safe harbor range, the lease shall be deemed approved. Any other term of the lease may be contested.

For leases in served locations, 50 percent of the profit from the lease shall be remitted to the Nebraska Universal Service Fund. Profit means the lease price less the cost of infrastructure development. If the lease is for an unserved location, no profits shall be remitted to the NUSF.

Sections 13 and 14 of the amendment (sections 12 and 13 of the bill) are unchanged.

Section 15 of the amendment provides the operative date of July 1, 2022 for Section 8.

Sections 16 and 17 of the amendment (repealer and outright repealer) are unchanged from the original bill.

Curt Friesen, Chairperson