

1 HB400
2 199941-2
3 By Representatives Shedd and Ledbetter
4 RFD: Urban and Rural Development
5 First Read: 09-APR-19

1 ENGROSSED

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3
4 A BILL
5 TO BE ENTITLED
6 AN ACT
7

8 Relating to broadband services; to authorize the
9 placement, construction, installation, operation, and use of
10 broadband and other advanced communication capabilities and
11 related facilities within electric easements by electric
12 providers; to authorize electric providers to engage in, and
13 to permit electric providers to authorize others to engage in,
14 operating broadband systems or providing broadband services
15 through advanced communications capabilities within electric
16 easements; to grant the right to electric providers to condemn
17 easements and rights-of-way for advanced communications
18 capabilities; and to permit consents through service
19 agreements, licenses, leases, and membership agreements to
20 place, construct, install, operate, and use advanced
21 communication capabilities within an electric easement.

22 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

23 Section 1. Chapter 16 is added to Title 37 of the
24 Code of Alabama 1975, to read as follows:

25 §37-16-1.

26 This chapter shall be known and may be cited as the
27 Broadband Using Electric Easements Accessibility Act.

1 §37-16-2.

2 (a) The Legislature finds and declares the
3 following:

4 (1) More advanced communication capabilities,
5 broadband facilities, and services are needed in many rural
6 and underserved areas of the state.

7 (2) Electric providers in those rural and
8 underserved areas are capable of providing infrastructure for
9 such advanced communications capabilities and providing,
10 directly or indirectly, broadband facilities or services.

11 (3) The investment in and development of advanced
12 communications capabilities for providing broadband facilities
13 and services are necessary to better serve the public in those
14 rural and underserved areas.

15 (4) The continued lack of advanced communication
16 capabilities, broadband facilities, and services in rural and
17 underserved areas deprives citizens residing in these areas
18 from access to opportunities such that the state needs to take
19 action to correct and eliminate these discrepancies.

20 (5) It is the public policy of this state to
21 encourage and facilitate the development and investment in
22 advanced communications capabilities and broadband facilities
23 and services in those rural and underserved areas in the
24 state, as this development is vital and necessary to induce,
25 create, and promote industrial and economic development in
26 those rural and underserved areas of the state and to create

1 job opportunities, enhance health care, and enhance
2 educational advancement in those areas.

3 (6) It is the public policy of the state to promote
4 the authorization of advanced communications capabilities to
5 be installed by electric providers within existing easements
6 and other rights-of-way.

7 (7) It is the intent of this chapter to authorize
8 electric providers to engage in arrangements, contracts, and
9 other collaborative activities with public or private persons
10 to facilitate the investment in or development of advanced
11 communications capabilities and broadband services and
12 broadband systems in this state. It is also the intent of the
13 chapter for such authorization to apply regardless of whether
14 competition is displaced, stifled, or interrupted in the
15 development or provision of broadband services and broadband
16 systems.

17 (8) The furtherance of the goals and purposes of
18 this chapter advance the public interest in this state to a
19 greater extent than would the application of federal and state
20 antitrust laws to the arrangements, contracts, and activities
21 authorized under this chapter.

22 (9) The limited grant of authorization to electric
23 providers in this chapter is reasonably related to the
24 proposed legislative objective of providing advanced
25 communications capabilities, broadband facilities, and
26 ~~services in rural and underserved areas.~~ services in rural,
27 underserved, and unserved areas.

1 (b) Except as provided in subsection (a), nothing
2 contained in this chapter is intended to exempt, except, or
3 exclude providers that engage in the provision of broadband
4 facilities or services through advanced communications
5 capabilities from complying with any provisions of federal law
6 which may at any time apply to the electric providers or their
7 broadband facilities or services.

8 §37-16-3.

9 As used in this chapter, the following terms shall
10 have the following meanings:

11 (1) ADVANCED COMMUNICATIONS CAPABILITIES. The
12 communications capabilities defined from time to time as
13 advanced telecommunications capabilities by the Federal
14 Communications Commission (FCC) through regulations, statutes,
15 or other written guidance or orders. The term also includes
16 broadband systems and broadband services.

17 (2) BROADBAND AFFILIATE. A person that is at least
18 10 percent owned by an electric provider, controlled by way of
19 ownership interests therein, directly or indirectly, by the
20 electric provider, or under common control with the electric
21 provider, and which is formed to provide, among other
22 services, utility support services or nonutility support
23 services.

24 (3) BROADBAND OPERATOR. A person that owns or
25 operates a broadband system within an electric easement,
26 including the electric provider if the electric provider is
27 operating the broadband system and including a person that

1 provides broadband services on a wholesale basis to another
2 broadband operator or broadband service provider.

3 (4) BROADBAND SERVICE PROVIDER. A person that
4 provides broadband services on a retail basis to end-use
5 customers.

6 (5) BROADBAND SERVICES. The provision of
7 connectivity to a high-speed, high-capacity transmission
8 medium or to a technology supporting, in the
9 provider-to-consumer (downstream) direction, a speed, in
10 technical terms ("bandwidth"), with minimum download speeds of
11 25 megabits per second and minimum upload speeds of 25
12 megabits per second for either of the following:

13 a. To provide access to the Internet.

14 b. To provide computer processing, information
15 sharing, information storage, information content, or protocol
16 conversion, including any service application or information
17 service over the electric delivery system of an electric
18 provider, and includes any advanced communications
19 capabilities that enable users to originate, send, and receive
20 high-quality voice, data, graphics, video programming, and
21 video communications using any technology including a
22 broadband system.

23 (6) BROADBAND SYSTEM. Any of the following that may
24 be used to facilitate, directly or indirectly, the provision
25 or transmission of broadband services, whether utility support
26 services or nonutility support services, or both: Materials;
27 wires; cables, including fiber optic and copper cables,

1 whether such cables are dark or lit, and whether such cables
2 are in use or dormant; conduits; antennas; equipment;
3 fixtures; switching multiplexers; poles; routers; switches;
4 servers; appurtenances; facilities; and ancillary or auxiliary
5 equipment.

6 (7) COMMISSION. The Alabama Public Service
7 Commission.

8 (8) ELECTRIC DELIVERY SYSTEM. Any product, fixture,
9 equipment, or technology, or part thereof, necessary or useful
10 in supporting the generation, transmission, transformation, or
11 distribution or delivery of electricity, including, but not
12 limited to, generators, electric transmission facilities and
13 lines, distribution facilities and lines, wires, cables, fiber
14 optic cables, poles, transformers, antennas, anchors, guys,
15 grounding systems, communications systems, insulators,
16 conduits, and any other related or ancillary facilities or
17 materials used by an electric provider to generate, transmit,
18 transform, deliver, or distribute electric energy, as such
19 lines and facilities may exist from time to time and whether
20 such lines or facilities are aboveground or underground.

21 (9) ELECTRIC EASEMENT. Any recorded or unrecorded
22 easement or right-of-way in favor of an electric provider that
23 permits the siting and use of an electric delivery system on,
24 over, under, or across the land of a property owner,
25 regardless of whether the easement or right-of-way is for the
26 exclusive benefit of the electric provider or for use in
27 connection with the provision of other services, and

1 regardless of whether the electric provider provides the other
2 services. Electric easements include, but are not limited to,
3 easements obtained under a law of this state, or by any of the
4 following methods: Negotiation, condemnation, prescription, or
5 grant, including, but not limited to, a grant pursuant to a
6 bylaw provision, service agreement, or membership agreement,
7 rate schedule, tariff, rule, regulation, practice, act,
8 requirement, or privilege.

9 (10) ELECTRIC PROVIDER. A utility, as defined under
10 Section 37-4-1(7)a., or a cooperative nonprofit, membership
11 organization formed, incorporated, or reincorporated under
12 Chapter 6 of Title 37, that produces, generates, transmits,
13 delivers, distributes, or furnishes electricity, or any board,
14 authority, or public corporation incorporated or organized
15 under Article 9, Article 15, or Article 16 of Chapter 50 of
16 Title 11, for the operation of an electric distribution system
17 or a municipal corporation that operates an electric
18 distribution system.

19 (11) NONUTILITY SUPPORT SERVICES. Broadband services
20 and related services that support services, uses, or purposes
21 other than utility support services.

22 (12) PERSON. An individual, trust, estate,
23 corporation, partnership, limited partnership, limited
24 liability partnership, or limited liability company having a
25 separate legal existence under state law.

26 (13) UTILITY SUPPORT SERVICES. Broadband services
27 and related services, uses, or purposes that support the

1 operational performance and service reliability of the
2 electric delivery system of an electric provider, including,
3 but not limited to, all of the following:

- 4 a. Automated meter reading.
- 5 b. Real-time or other system monitoring.
- 6 c. Remote service control.
- 7 d. Outage detection and restoration.
- 8 e. Predictive maintenance and diagnostics.
- 9 f. Monitoring and enhancement of power quality, load
10 control, voltage control, and flow.
- 11 g. Supervisory control and data acquisition.
- 12 h. Management and flow of electricity.
- 13 i. Internal communications.
- 14 j. Dispatch, start-up, ramping, shutdown,
15 curtailment, scheduling, or control of electric generation,
16 transmission, or distribution of resources or ancillary
17 services relating thereto, including, but not limited to,
18 generator imbalance, spinning and non-spinning reserves, and
19 reserve sharing.
- 20 k. All other uses supporting the reliability,
21 resilience, and security of the electric delivery system.

22 §37-16-4.

23 (a) To the extent not otherwise authorized by law,
24 and in addition to all other purposes, powers, and authority
25 currently granted to electric providers under the laws of this
26 state, an electric provider may do all of the following:

1 (1) Own, operate, maintain, construct, install, and
2 replace a broadband system on, over, under, or across the
3 electric provider's electric easements, whether used for or
4 supporting utility support services or used for or supporting
5 nonutility support services, whether on a wholesale or retail
6 basis.

7 (2) Allow a broadband affiliate or an unaffiliated
8 person to own, lease, manage, construct, superintend, install,
9 operate, maintain, and replace a broadband system on, over,
10 under, or across the electric provider's electric easements,
11 on such terms and conditions as specified by the electric
12 provider, whether used for or supporting utility support
13 services or used for or supporting wholesale or retail
14 nonutility support services, including the power and authority
15 to apportion the electric easement, to grant licenses, and to
16 grant other usage or operational rights to other broadband
17 operators for the broadband system located within the electric
18 easements.

19 (3) Provide broadband services, whether used for or
20 supporting utility support services or for wholesale or retail
21 nonutility support services.

22 (4) Allow a broadband affiliate or an unaffiliated
23 person to provide broadband services over or through a
24 broadband system within the electric easements of an electric
25 provider, on such terms and conditions as specified by the
26 electric provider, whether used for or supporting utility

1 support services or used for or supporting wholesale or retail
2 nonutility support services.

3 (b) In furtherance of its authority under subsection
4 (a), an electric provider shall have the sole authority to
5 determine which broadband affiliate or unaffiliated person,
6 including a broadband operator or broadband service provider,
7 may have access to the broadband system within its electric
8 easements and on its electric delivery system and to determine
9 the terms and conditions on which the broadband affiliate or
10 unaffiliated person may access the broadband system,
11 including, without limitation, whether the access will be on
12 an exclusive or non-exclusive basis.

13 (c) This chapter does not require or obligate an
14 electric provider to install or implement a broadband system
15 or advanced communications capabilities, to provide broadband
16 services, or to allow others to install a broadband system or
17 facilities or use the electric provider's electric easements
18 and electric delivery system to provide broadband services.

19 (d) An electric provider may not require any person
20 to purchase broadband services from the electric provider, a
21 broadband affiliate, or unaffiliated broadband operator or
22 broadband service provider as a condition of receiving or
23 continuing to receive electric energy from the electric
24 provider.

25 §37-16-5.

26 In no event does this chapter authorize any electric
27 provider to provide retail electric service outside of its

1 electric service territory as determined under the applicable
2 provisions of Chapter 14 of this title. Nothing in this
3 chapter is intended to amend, repeal, enlarge, or otherwise
4 affect Chapter 14 of this title.

5 §37-16-6.

6 An electric provider may charge a broadband
7 affiliate or an unaffiliated person, including a broadband
8 operator or broadband service provider, for the costs of the
9 construction, installation, replacement, operation, use, and
10 maintenance of the broadband system or of those parts of its
11 electric delivery system that are used or may be reserved for
12 use by the broadband affiliate or unaffiliated broadband
13 operator or broadband service provider for the provision of
14 broadband services. No electric provider shall be required to
15 construct, install, replace, operate, or maintain a broadband
16 system or to provide broadband services. An electric provider,
17 broadband affiliate, or unaffiliated broadband operator or
18 broadband services provider may charge for broadband services
19 or any other uses of the broadband system, whether wholesale
20 or retail, at rates determined by the provider thereof.

21 §37-16-7.

22 (a) If the owner of an interest in real property
23 subject to an electric easement contends that the owner's
24 property has been taken, injured, or destroyed by the
25 construction, installation, use, or enlargement of broadband
26 systems within the electric easement on the owner's property
27 and the electric easement does not expressly provide for such,

1 the owner may file a civil action in the circuit court for the
2 county in which the property is located to recover damages as
3 specified by this section. All such actions must be brought
4 within three years after the later of: (1) The effective date
5 of the act adding this section; or (2) the date broadband
6 systems are first constructed or installed within the electric
7 easement on the owner's real property. Nothing in this chapter
8 shall revive any right or remedy which may have become barred
9 by lapse of time, or by any law of this state, prior to the
10 effective date of the act adding this section.

11 (b) (1) In any action under subsection (a), the
12 measure of damages shall be an amount equal to the difference,
13 if any, between the following:

14 a. The fair market value of the owner's real
15 property immediately before the construction or installation
16 of broadband systems within the electric easement on the
17 owner's real property.

18 b. The fair market value of the owner's real
19 property immediately after the construction or installation of
20 broadband systems within the electric easement on the owner's
21 real property and taking into account the incidental benefits
22 to the owner's property resulting from the availability of the
23 broadband services to the property.

24 (2) The damages, if any, shall be fixed and shall
25 not be deemed to continue, accumulate, or accrue. The judgment
26 in any such action for the plaintiff shall include the
27 plaintiff's costs and litigation expenses. Costs and

1 litigation expenses authorized by this section may be claimed,
2 taxed, and awarded under the same procedures that apply to
3 costs in other civil actions. Payment of the judgment in any
4 such action shall vest in the electric provider all property
5 rights necessary to construct, use, install, operate, replace,
6 and maintain, from time to time, the broadband systems within
7 the electric easement on the owner's real property and the
8 electric easement shall be thereafter permanently expanded to
9 include the right to construct, use, install, operate,
10 replace, and maintain the broadband system and broadband
11 services. The judgment shall have the same effect as a
12 conveyance executed by the owner in due form under applicable
13 law and shall run with the land. A certified copy of the
14 judgment may be filed by the electric provider, a broadband
15 affiliate, or other broadband operator in the land records of
16 the county in which the subject property is located, but is
17 not required to make such broadening of the electric easement
18 effective. The expansion for the broadband system shall
19 include the broadband system within the maintenance, egress,
20 and ingress provisions of the electric easement.

21 (c) The civil action and measure of damages
22 authorized by this section shall be the exclusive remedy for
23 any and all claims that the owner's property has been taken,
24 or the scope of the electric easement exceeded, by the
25 construction, installation, use, or enlargement of broadband
26 systems within the electric easement on the owner's property,
27 and the owner may not assert any other theory, claim, or cause

1 of action, either at law or in equity, nor recover any other
2 damages, including, without limitation, consequential,
3 compensatory, and punitive damages, or equitable relief.

4 (d) An owner bringing an action under this section
5 may not bring an action on behalf of a class. The limitation
6 in this subsection is a substantive limitation and allowing an
7 owner to bring a class action or other representative action
8 for a violation of this chapter would abridge, enlarge, or
9 modify the substantive rights created by this section.

10 (e) An electric provider may acquire by condemnation
11 ways, rights-of-way, and easements, without limitation as to
12 width, on, over, under, or across the lands or easements of
13 others, to erect, construct, replace, use, install, operate,
14 and maintain advanced communications capabilities. Such
15 condemnation is to be conducted in accordance with the
16 procedures of Chapter 1A of Title 18, except as otherwise
17 provided in this chapter.

18 (f) An electric provider, broadband affiliate, or
19 unaffiliated broadband operator or broadband service provider
20 may receive such rights from an owner of real property by
21 service agreement or service regulation, membership agreement,
22 license agreement, or other agreement to serve the property
23 with advanced communications capabilities without granting an
24 easement or right-of-way. The grant or agreement may permit
25 the construction, installation, replacement, operation, use,
26 and maintenance of the advanced communications capabilities on

1 the property without the requirement of further consent of any
2 other tenant, concessionaire, or occupant of that property.

3 (g) With respect to the installation of broadband
4 systems within an electric easement in effect prior to the
5 effective date of the act adding this section, the electric
6 provider shall provide the same notice as is required by the
7 express terms of the electric easement, if any, or as required
8 by other applicable law for the construction or installation
9 of the electric delivery system within the electric easement.
10 With respect to the installation of broadband systems within
11 an electric easement that is acquired other than by
12 condemnation after the effective date of the act adding this
13 section, the electric provider shall provide such notice as is
14 required by the express terms of the document creating the
15 electric easement, if any; or if there is no written document
16 creating the electric easement or no express terms in the
17 document, then the electric provider shall provide notice to
18 the owner of the real property subject to the electric
19 easement by informing such owner of the installation of the
20 broadband system within the electric easement prior to
21 installation. Notice shall be sufficient if mailed to the name
22 and address of the owner or owners listed in the real property
23 ad valorem tax records for the county where the real property
24 is located. Nothing in this section shall require the notice
25 from the electric provider when the electric easement is
26 acquired by condemnation or pursuant to an expansion of the
27 electric easement by civil action commenced by the owner.

1 (h) Nothing in this chapter shall be deemed to
2 relieve the broadband operator, broadband service provider, or
3 electric provider from liability for bodily injury or physical
4 damage to real or personal property located adjacent to the
5 electric easement.

6 §37-16-8.

7 Nothing in this chapter shall interfere with the
8 commission's authority to regulate public utilities under this
9 title. Nothing in this chapter shall provide a basis for
10 creating or granting jurisdiction to the commission over any
11 electric providers or any broadband affiliate that are
12 otherwise exempt or are otherwise not subject to the
13 jurisdiction of the commission. Nothing in this chapter shall
14 affect, abrogate, or eliminate in any way any obligation of an
15 electric provider to comply with any applicable safety and
16 permitting requirements of any railroad company or any state
17 governmental body or agency with respect to property that is
18 held or controlled by such railroad company or state
19 governmental body or agency, as the case may be, and in, on,
20 over, or across which an easement is located. Any broadband
21 system that encumbers the right-of-way of the Department of
22 Transportation shall require a permit from the department
23 regardless of whether the broadband system is within a
24 currently permitted electric easement or an electric delivery
25 system. Nothing in this chapter shall provide an exemption
26 from an existing applicable regulation regarding access to
27 county rights-of-way. Nothing in this chapter is intended to

1 expand or contract an electric provider's rights and
2 obligations with regard to applicable laws in connection with
3 pole attachments to its electric delivery system, or the terms
4 of any pole attachment agreement in effect with its electric
5 delivery system.

6 An electric provider shall not use its electric
7 sales revenue, and shall properly account for its expenses
8 incurred, for non-utility support services on its broadband
9 systems except as in accordance with federal and state laws,
10 regulations, and rules applicable to the electric provider. In
11 no event is an electric provider prevented from making
12 investments in broadband affiliates otherwise permitted by
13 applicable law, making loans to broadband affiliates otherwise
14 permitted by applicable law which have a repayment obligation
15 from the affiliate, entering into capital or operating leases
16 with the broadband affiliate, or entering into guarantees or
17 other security arrangements for the benefit of a broadband
18 affiliate, all on such terms and subject to such conditions as
19 the board approves in the case of member cooperatives which
20 are electric providers or as determined to be prudent or
21 appropriate under applicable law in the case of other electric
22 providers.

23 Section 2. In no event shall funds be appropriated
24 from the Education Trust Fund under this act.

25 Section 3. If any part or provision of this act or
26 its application to any person or circumstances is held
27 invalid, the invalidity does not affect other parts,

1 provisions, or applications of this act which can be given
2 effect without the invalid provision or application, and to
3 this end, the parts and provisions of this act are severable.

4 Section 4. This act shall become effective on the
5 first day of the third month following its passage and
6 approval by the Governor, or its otherwise becoming law.

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House of Representatives

Read for the first time and re-
ferred to the House of Representa-
tives committee on Urban and Rural
Development..... 09-APR-19

Read for the second time and placed
on the calendar with 1 substitute
and..... 25-APR-19

Read for the third time and passed
as amended..... 02-MAY-19

Yeas 92, Nays 2, Abstains 1

Jeff Woodard
Clerk