

LEGISLATIVE BILL 61

Approved by the Governor March 18, 2024

Introduced by Brandt, 32; DeKay, 40; Dorn, 30; Wayne, 13.

A BILL FOR AN ACT relating to dark fiber; to amend sections 18-419, 70-704, 70-1409, 86-416, and 86-575, Reissue Revised Statutes of Nebraska, and sections 70-625 and 86-577, Revised Statutes Cumulative Supplement, 2022; to authorize the licensing of dark fiber by any agency or political subdivision of the state as prescribed; to change and eliminate provisions relating to leasing and licensing of dark fiber; to define terms; to harmonize provisions; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 18-419, Reissue Revised Statutes of Nebraska, is amended to read:

18-419 In addition to the powers authorized by sections 18-401 to 18-418 and any ordinances or resolutions relating to the provision of electric service, any city or village owning or operating electric generation or transmission facilities may sell, ~~or~~ lease, or license its dark fiber pursuant to sections 86-574 to 86-578.

Sec. 2. Section 70-625, Revised Statutes Cumulative Supplement, 2022, is amended to read:

70-625 (1) Subject to the limitations of the petition for its creation and all amendments to such petition, a public power district has all the usual powers of a corporation for public purposes and may purchase, hold, sell, and lease personal property and real property reasonably necessary for the conduct of its business. No district may sell household appliances at retail if the retail price of any such appliance exceeds fifty dollars, except that newly developed electrical appliances may be merchandised and sold during the period of time in which any such appliances are being introduced to the public. New models of existing appliances shall not be deemed to be newly developed appliances. An electrical appliance shall be considered to be in such introductory period of time until the particular type of appliance is used by twenty-five percent of all the electrical customers served by such district, but such period shall in no event exceed five years from the date of introduction by the manufacturer of the new appliance to the local market.

(2) In addition to its powers authorized by Chapter 70 and specified in its petition for creation, as amended, a public power district may sell, lease, and service satellite television signal descrambling or decoding devices, satellite television programming, and equipment and services associated with such devices and programming, except that this section does not authorize public power districts (a) to provide signal descrambling or decoding devices or satellite programming to any location (i) being furnished such devices or programming on April 24, 1987, or (ii) where community antenna television service is available from any person, firm, or corporation holding a franchise pursuant to sections 18-2201 to 18-2206 or a permit pursuant to sections 23-383 to 23-388 on April 24, 1987, or (b) to sell, service, or lease C-band satellite dish systems or repair parts.

(3) In addition to the powers authorized by Chapter 70 and specified in its petition for creation as amended, the board of directors of a public power district may apply for and use funds available from the United States Department of Agriculture or other federal agencies for grants or loans to promote economic development and job creation projects in rural areas as permitted under the rules and regulations of the federal agency from which the funds are received. Any loan to be made by a district shall only be made in participation with a bank pursuant to a contract. The district and the participating bank shall determine the terms and conditions of the contract. In addition, in rural areas of the district, the board of directors of such district may provide technical or management assistance to prospective, new, or expanding businesses, including home-based businesses, provide assistance to a local or regional industrial or economic development corporation or foundation located within or contiguous to the district's service area, and provide youth and adult community leadership training.

(4) In addition to the powers authorized by Chapter 70 and specified in its petition for creation as amended, a public power district may sell, ~~or~~ lease, or license its dark fiber pursuant to sections 86-574 to 86-578.

(5) In addition to the powers authorized by Chapter 70 and specified in its petition for creation as amended, a public power district may develop, manufacture, use, purchase, or sell at wholesale advanced biofuels and biofuel byproducts and other fuels and fuel byproducts so long as the development, manufacture, use, purchase, or sale of such biofuels and biofuel byproducts and other fuels and fuel byproducts is done to help offset greenhouse gas emissions.

(6) Notwithstanding any law, ordinance, resolution, or regulation of any political subdivision to the contrary, each public power district may receive funds and extend loans pursuant to the Nebraska Investment Finance Authority Act or pursuant to this section. In addition to the powers authorized by

Chapter 70 and specified in its petition for creation, as amended, and without the need for further amendment thereto, a public power district may own and operate, contract to operate, or lease energy equipment and provide billing, meter reading, surveys, or evaluations and other administrative services, but not to include natural gas services, of public utility systems within a district's service territory.

Sec. 3. Section 70-704, Reissue Revised Statutes of Nebraska, is amended to read:

70-704 Each corporation shall have power: (1) To sue and be sued, complain, and defend, in its corporate name; (2) to have perpetual succession unless a limited period of duration is stated in its articles of incorporation; (3) to adopt a corporate seal, which may be altered at pleasure, and to use it or a facsimile thereof, as required by law; (4) to generate, manufacture, purchase, acquire, and accumulate electric energy and to transmit, distribute, sell, furnish, and dispose of such electric energy; (5) to acquire, own, hold, use, exercise and, to the extent permitted by law, to sell, mortgage, pledge, hypothecate, and in any manner dispose of franchises, rights, privileges, licenses, rights-of-way, and easements necessary, useful, or appropriate; (6) to purchase, receive, lease as lessee, or in any other manner acquire, own, hold, maintain, sell, exchange, and use any and all real and personal property or any interest therein for the purposes expressed herein; (7) to borrow money and otherwise contract indebtedness, to issue its obligations therefor, and to secure the payment thereof by mortgage, pledge, or deed of trust of all or any of its property, assets, franchises, revenue, or income; (8) to sell and convey, mortgage, pledge, lease as lessor, and otherwise dispose of all or any part of its property and assets; (9) to have the same powers now exercised by law by public light and power districts or private corporations to use any of the streets, highways, or public lands of the state or its political subdivisions in the manner provided by law; (10) to have and exercise the power of eminent domain for the purposes expressed in section 70-703 in the manner set forth in sections 76-704 to 76-724 and to have the powers and be subject to the restrictions of electric light and power corporations and districts as regards the use and occupation of public highways and the manner or method of construction and physical operation of plants, systems, and transmission lines; (11) to accept gifts or grants of money, services, or property, real or personal; (12) to make any and all contracts necessary or convenient for the exercise of the powers granted herein; (13) to fix, regulate, and collect rates, fees, rents, or other charges for electric energy furnished by the corporation; (14) to elect or appoint officers, agents, and employees of the corporation and to define their duties and fix their compensation; (15) to make and alter bylaws not inconsistent with the articles of incorporation or with the laws of this state for the administration and regulation of the affairs of the corporation; (16) to sell, ~~or lease, or license~~ its dark fiber pursuant to sections 86-574 to 86-578; and (17) to do and perform, either for itself or its members or for any other corporation organized under the Electric Cooperative Corporation Act or for the members thereof, any and all acts and things and to have and exercise any and all powers as may be necessary, convenient, or appropriate to effectuate the purpose for which the corporation is organized. Notwithstanding any law, ordinance, resolution, or regulation of any political subdivision to the contrary, each corporation may receive funds and extend loans pursuant to the Nebraska Investment Finance Authority Act.

Sec. 4. Section 70-1409, Reissue Revised Statutes of Nebraska, is amended to read:

70-1409 Each joint authority shall have all the rights and powers necessary or convenient to carry out and effectuate the purposes and provisions of the Joint Public Power Authority Act including, but not limited to, the right and power:

(1) To adopt bylaws for the regulation of the affairs and the conduct of its business and to prescribe rules, regulations, and policies in connection with the performance of its functions and duties;

(2) To adopt an official seal and alter the same at pleasure;

(3) To maintain an office at such place or places as it may determine;

(4) To sue and be sued in its own name and to plead and be impleaded;

(5) To receive, administer, and comply with the conditions and requirements respecting any gift, grant, or donation of any property or money;

(6) To acquire by purchase, lease, gift, or otherwise, or to obtain options for the acquisition of, any property, real or personal, improved or unimproved, including an interest in land less than an interest in fee;

(7) To sell, lease, exchange, transfer, or otherwise dispose of, or to grant options for any such purposes with respect to, any real or personal property or interest in such property;

(8) To pledge or assign any money, rents, charges, or other revenue and any proceeds derived by the joint authority from the sales of property, insurance, or condemnation awards;

(9) To issue bonds of the joint authority for the purpose of providing funds for any of its corporate purposes;

(10) To authorize the construction, operation, or maintenance of any project or projects by any person, firm, or corporation, including political subdivisions and agencies of any state or of the United States;

(11) To acquire by negotiated purchase or lease an existing project, a project under construction, or other property, either individually or jointly, with one or more public power districts in this state or with any political subdivisions or agencies of this state or any other state or with other joint

authorities created pursuant to the Joint Public Power Authority Act;

(12) To dispose of by negotiated sale or lease an existing project, a project under construction, or other property, either individually or jointly, with one or more public power districts in this state, with any political subdivisions or agencies of this state or any other state or, with other joint authorities created pursuant to the Joint Public Power Authority Act, except that no such sale or lease of any project located in this state shall be made to any private person, firm, or corporation engaged in the business of generating, transmitting, or distributing electricity for profit;

(13) To fix, charge, and collect rents, rates, fees, and charges for electric power or energy, hydrogen, or ethanol and other services, facilities, and commodities sold, furnished, or supplied through any project;

(14) To generate, produce, transmit, deliver, exchange, purchase, or sell for resale only electric power or energy, to produce, store, deliver, or distribute hydrogen for use in fuel processes, or to produce, deliver, or distribute ethanol and to enter into contracts for any or all such purposes, subject to sections 70-1410 and 70-1413;

(15) To negotiate and enter into contracts for the purchase, exchange, interchange, wheeling, pooling, or transmission of electric power and energy with any public power district, any other joint authority, any political subdivision or agency of this state or any other state, any electric cooperative, or any municipal agency which owns electric generation, transmission, or distribution facilities in this state or any other state;

(16) To negotiate and enter into contracts for the sale or use of electric power and energy, hydrogen, or ethanol with any joint authority, electric cooperative, any political subdivision or agency or any public or private electric utility of this state or any other state, any joint agency, electric cooperative, municipality, public or private electric utility, or any state or federal agency or political subdivision, subject to sections 70-1410 and 70-1413;

(17) To make and execute contracts and other instruments necessary or convenient in the exercise of the powers and functions of the joint authority under the Joint Public Power Authority Act, including contracts with persons, firms, corporations, and others;

(18) To apply to the appropriate agencies of the state, the United States, or any other state and to any other proper agency for such permits, licenses, certificates, or approvals as may be necessary to construct, maintain, and operate projects in accordance with such licenses, permits, certificates, or approvals, and to obtain, hold, and use the same rights granted in any licenses, permits, certificates, or approvals as any other person or operating unit would have under such documents;

(19) To employ engineers, architects, attorneys, appraisers, financial advisors, and such other consultants and employees as may be required in the judgment of the joint authority and to fix and pay their compensation from funds available to the joint authority. The joint authority may employ technical experts and such other officers, agents, and employees as it may require and shall assess their qualifications, duties, compensation, and term of office. The board may delegate to one or more of the joint authority's employees or agents such powers and duties as the board may deem proper;

(20) To make loans or advances for long-term, supplemental, short-term, and interim financing for both capital projects and operational purposes to those member districts on such terms and conditions as the board of directors of the joint authority may deem necessary and to secure such loans or advances by assignment of revenue, receivables, or other sums of the member district and such other security as the board of directors of the joint authority may determine; and

(21) To sell, ~~or lease,~~ or license its dark fiber pursuant to sections 86-574 to 86-578.

Any joint authority shall have the same power of eminent domain as the public power districts have under section 70-670.

Sec. 5. Section 86-416, Reissue Revised Statutes of Nebraska, is amended to read:

86-416 (1) Notwithstanding any other provision of Nebraska law, any city, county, village, public power district, or fire protection district may enter into a service agreement with any joint entity created pursuant to the Interlocal Cooperation Act or any joint public agency created pursuant to the Joint Public Agency Act which owns or operates or proposes to own or operate any public safety communication project for obtaining communication services, including the use or right to use real or personal property included in any such project. This subsection shall not be construed to authorize any service agreements that conflict with the provisions for the sale, ~~or lease,~~ or license of dark fiber pursuant to sections 86-574 to 86-578.

(2) Any such service agreement may provide for the following:

(a) The payment of fixed or variable periodic amounts for service or the right to obtain service, including the use or right to use real or personal property;

(b) That such service agreement may extend for a term of years as determined by the governing body of the city, county, village, public power district, or fire protection district and be binding upon such city, county, village, public power district, or fire protection district over such term of years;

(c) That fixed or variable periodic amounts payable may be determined based upon any of the following factors:

(i) Operating, maintenance, and management expenses, including renewals and replacements for facilities and equipment;

(ii) Amounts payable with respect to debt service on bonds or other obligations, including margins of coverage if deemed appropriate; and

(iii) Amounts necessary to build or maintain operating reserves, capital reserves, and debt service reserves;

(d) That any such service agreement may require payment to be made in the agreed fixed or variable periodic amounts irrespective of whether such public safety communication project or regional communication system is completed or operational and notwithstanding any suspension, interruption, interference, reduction, or curtailment of the services of such project or system; and

(e) Such other provisions as the parties to the service agreement deem appropriate in connection with providing and obtaining public safety communication service, including the acquisition of real and personal property, the construction of facilities, and the operation, maintenance, and management of services, property, and facilities.

(3) In order to provide for the payments due under such service agreement:

(a) Any city, county, village, or fire protection district may provide that payments may be made from a special tax levied for such purpose upon all taxable property within such city, county, village, or fire protection district, if determined appropriate by the governing body by a vote of three-fourths of the members of the governing body, if there are four or more members of such body, or by a vote of two-thirds of the members of the governing body, if there are less than four members of such body. The special tax shall for all purposes of Nebraska law, including limitations upon tax levies, budgets, revenue, and expenditures of public funds, have the same status as a tax levied for the purpose of paying the bonded indebtedness of such city, county, village, or fire protection district; and

(b) Any public power district may pledge the revenue of the district, subject to any existing pledges made for bonded indebtedness or borrowings from the United States or any other party and existing conditions relating to issuance of additional bonds or other indebtedness, and, if deemed appropriate by the governing body, the service agreement may have the status of revenue bond indebtedness issued pursuant to sections 70-631 to 70-635.

Sec. 6. Section 86-575, Reissue Revised Statutes of Nebraska, is amended to read:

86-575 (1) Any agency or political subdivision of the state may:

(a) Own dark fiber;

(b) Sell dark fiber pursuant to section 86-576; and

(c) Lease or license dark fiber pursuant to section 86-577.

(2) Any agency or political subdivision which sells, ~~or leases,~~ or licenses its dark fiber pursuant to sections 86-574 to 86-578 shall not be deemed to be providing telecommunications services as defined in section 86-593.

Sec. 7. Section 86-577, Revised Statutes Cumulative Supplement, 2022, is amended to read:

86-577 (1) For purposes of this section:

(a) Enforceable commitment means a binding legal agreement between an Internet service provider and the federal government or this state by which the Internet service provider receives a grant of federal or state funds in exchange for the Internet service provider deploying broadband service infrastructure to one or more unserved locations and which includes administrative or other penalties if the Internet service provider fails to meet the terms of such agreement; and

(b) Unserved location means a location, as determined in accordance with the Nebraska location fabric broadband access map created by the Nebraska Broadband Office pursuant to section 86-333, where:

(i) Broadband is not available by fiber-optic technology or cable modem or hybrid fiber-coaxial technology at speeds of at least one hundred megabits per second for downloading and at least twenty megabits per second for uploading with a latency sufficient to support real-time, interactive applications; and

(ii) No Internet service provider has an enforceable commitment to make broadband service available at speeds of at least one hundred megabits per second for downloading and at least twenty megabits per second for uploading with a latency sufficient to support real-time, interactive applications.

~~(a) Served location means a location receiving, or at the time the lease is filed with the Public Service Commission able to receive, communications service at a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second or higher speeds, as determined by the Public Service Commission; and~~

~~(b) Unserved location means a location not receiving, and at the time the lease is filed with the Public Service Commission not able to receive, communications service at a minimum download speed of twenty-five megabits per second and a minimum upload speed of three megabits per second or higher speeds, as determined by the Public Service Commission.~~

(2) Any agency or political subdivision of the state may lease or license its dark fiber and related infrastructure under such terms as determined by such agency or political subdivision pursuant to its duly adopted and promulgated rules and regulations, issued orders, written policies, enacted ordinances, or adopted resolutions if:

(a) The lessee or licensee is a certificated telecommunications common carrier or a permitted telecommunications contract carrier pursuant to section 86-128 or an Internet service provider;

(b) The lease or license terms are fair, reasonable, and nondiscriminatory; and

(c) All locations where service will be made available pursuant to the lease or license are, at the time the lease or license is filed pursuant to subsection (3) of this section, unserved locations; and

(d) ~~(c)~~ The lease or license complies with this section.

(3)(a) Before a lease or license of dark fiber under this section becomes effective, it shall be filed by the lessee or licensee with the commission, and the which shall expeditiously cause notice of the lease, including lease rates, to be published. (b)(i) The lease or license shall become effective upon such filing. The lease or license rate shall be within or above the safe harbor range of market rates established pursuant to subdivision (4)(a) of this section fourteen business days after the date of the published notice unless a protest is filed with the commission, in which event the commission shall consider the lease as a contested matter and consider the contested lease according to the commission's rules of procedure.

(b) Within five days after a lease or license is filed, the commission shall provide notice of the lease or license to all Internet service providers providing service in the counties where any unserved locations subject to the lease or license are located.

(c) Any Internet service provider may challenge a lease or license filed with the commission pursuant to this subsection alleging that such lease or license does not serve an unserved location in violation of subdivision (2)(c) of this section. A provider shall file such challenge with the commission within thirty days after receipt of the notice described in subdivision (b) of this subsection. The commission shall make a determination regarding such alleged violation within thirty days after the challenge is filed.

(d) If an Internet service provider files a challenge under subdivision (c) of this subsection alleging that a location is not an unserved location and the commission finds that it is an unserved location, the Internet service provider filing such challenge may be prohibited from filing any other challenge pursuant to subdivision (c) of this subsection for a period of two years from the date such challenge was filed.

(ii) ~~If the allocation of served location and unserved location in the lease is contested, the commission shall determine such allocation under the lease as a contested matter and consider the contested lease according to the commission's rules of procedure.~~

(4)(a) ~~(4)~~ For the lease or license of dark fiber under this section, the : (a) The commission shall establish a safe harbor range of market rates for all dark fiber leases or licenses using a competitive price determination comparison. When conducting a competitive price determination comparison, the commission, in its discretion, shall use rate schedules, interconnection agreements, or other documents within its regulatory oversight and shall gather other market rate information as deemed necessary. If a lease or license utilizes rates within or above the safe harbor range, such rates shall be deemed approved. Any other term of the lease may be contested pursuant to subdivision (3)(b) of this section; and

(b) Revenue obtained by any agency or political subdivision from the lease or license of dark fiber under this section shall only be used for billing, construction, operation, and maintenance costs associated with the lease or license of such dark fiber or for any existing dark fiber or fiber-related infrastructure.

(c) Revenue obtained by any agency or political subdivision from the sale or delivery of electricity shall not be used for billing, construction, operation, or maintenance costs associated with the lease or license of dark fiber under this section.

~~Fifty percent of the profit earned by the agency or political subdivision under a lease of dark fiber leased to serve a served location shall be remitted to the State Treasurer for credit to the Nebraska Telecommunications Universal Service Fund. For purposes of this subdivision, profit earned by the agency or political subdivision means the lease price less the cost of infrastructure deployment. This subdivision does not apply to a lease or portion of a lease of dark fiber leased to exclusively serve unserved locations.~~

(5)(a) If a dispute arises between an Internet service provider claiming an enforceable commitment for a location and an Internet service provider seeking to utilize a dark fiber lease or license to serve such location, either party may file a request with the state entity with which there is an enforceable commitment to verify the enforceable commitment. Upon the filing of the request, such state entity shall require, and the Internet service provider claiming the enforceable commitment shall provide, documentation related to the enforceable commitment. The state entity shall review the documentation and make a finding as to the Internet service provider's compliance with the enforceable commitment and the reasonable likelihood of meeting its deployment obligations under the enforceable commitment. All documentation submitted to the state entity under this subdivision shall be deemed confidential and not subject to public disclosure pursuant to sections 84-712 to 84-712.09.

(b) There is no enforceable commitment and a location is considered an unserved location when:

(i) A grant of federal or state funds is forfeited by the Internet service provider for such location;

(ii) The Internet service provider is disqualified by the granting governmental entity from receiving a grant of federal or state funds to deploy broadband service infrastructure to such location; or

(iii) After reviewing documentation submitted pursuant to this subsection, the state entity verifying the enforceable commitment finds that the Internet service provider is not in compliance with the enforceable commitment or will fail to meet the terms of the enforceable commitment for such location.

~~(5) The lessee shall make every reasonable effort to activate the maximum amount of the leased fiber as is possible, within one year after entering into the lease, unless good cause is shown.~~

Sec. 8. Original sections 18-419, 70-704, 70-1409, 86-416, and 86-575, Reissue Revised Statutes of Nebraska, and sections 70-625 and 86-577, Revised Statutes Cumulative Supplement, 2022, are repealed.