HB400

198702-1

By Representatives Shedd and Ledbetter

RFD: Urban and Rural Development

First Read: 09-APR-19
SYNOPSIS: This bill would authorize the placement, construction, installation, operation, and use of broadband and other advanced communication capabilities and related facilities within electric easements by electric providers.

This bill would authorize electric providers to engage in, and to permit electric providers to authorize others to engage in, providing broadband services through advanced communications capabilities within electric easement.

This bill would grant the right to electric providers to condemn easements and rights-of-way for advanced communications capabilities.

This bill would also permit consents through service agreements, licenses, leases, and membership agreements to place, construct, install, operate and use advance communication capabilities within an electric easement.

A BILL
Relating to broadband services; to authorize the placement, construction, installation, operation, and use of broadband and other advanced communication capabilities and related facilities within electric easements by electric providers; to authorize electric providers to engage in, and to permit electric providers to authorize others to engage in, providing broadband services through advanced communications capabilities within electric easements; to grant the right to electric providers to condemn easements and rights-of-way for advanced communications capabilities; and to permit consents through service agreements, licenses, leases, and membership agreements to place, construct, install, operate, and use advance communication capabilities within an electric easement.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

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

§37-16-1.

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

§37-16-2.

(a) The Legislature finds and declares the following:
(1) More advanced communication capabilities, broadband facilities, and services are needed in many rural and underserved areas of the state.

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

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

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

(5) It is the public policy of this state to encourage and facilitate the development and investment in advanced communications capabilities and broadband facilities and services in those rural and underserved areas in the state, as such development is vital and necessary to induce, create, and promote industrial and economic development in these rural and underserved areas of this state, to create job opportunities in these areas, to enhance health care, and to enhance educational advancement in those areas.

(6) Permitting advanced communications capabilities to be installed by electric providers within existing
easements and other rights-of-way furthers the public policy of the state.

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

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

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

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

§37-16-3.

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

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

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

(3) BROADBAND OPERATOR. A person that owns or operates a broadband system on an electric delivery system, including the electric provider if the electric provider is operating the broadband system and including a person that provides broadband services on a wholesale basis to another broadband operator or broadband service provider.

(4) BROADBAND SERVICE PROVIDER. A person that provides broadband services on a retail basis to end-use customers.
(5) BROADBAND SERVICES. The provision of connectivity to a high-speed, high-capacity transmission medium or to a technology supporting, in the provider-to-consumer (downstream) direction, a speed, in technical terms ("bandwidth"), with minimum download speeds of 25 megabits per second and minimum upload speeds of 25 megabits per second for either of the following:

a. To provide access to the Internet.

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

(6) BROADBAND SYSTEM. Any of the following that may be used to facilitate, directly or indirectly, the provision or transmission of broadband services, whether utility support services or nonutility support services, or both: Materials; wires; cables, including fiber optic and copper cables, whether such cables are dark or lit, and whether such cables are in use or dormant; conduits; antennas; equipment; fixtures; switching multiplexers; poles; routers; switches; servers; appurtenances; facilities; and ancillary or auxiliary equipment.
(7) COMMISSION. The Alabama Public Service Commission.

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

(9) ELECTRIC EASEMENT. Any recorded or unrecorded easement or right-of-way in favor of an electric provider that permits the siting and use of an electric delivery system on, over, under, or across the land of a property owner, regardless of whether the easement or right-of-way is for the exclusive benefit of the electric provider or for use in connection with the provision of other services, and regardless of whether the electric provider provides the other services. The easement may be obtained under a law of this state, or by any of the following methods that in any way relate to the services of the electric provider: Negotiation; condemnation; prescription; grant, including, but not limited
to, a bylaw provision, service agreement or membership
agreement; rate schedule; tariff; rule; regulation; practice;
act; requirement; or privilege.

(10) ELECTRIC PROVIDER. A utility, as defined under
Section 37-4-1, or a cooperative nonprofit, membership
organization formed, incorporated, or reincorporated under
Chapter 6 of Title 37, that produces, generates, transmits,
delivers, distributes, or furnishes electricity.

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

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

(13) UTILITY SUPPORT SERVICES. Broadband services
and related services, uses, or purposes that support the
operational performance and service reliability of the
electric delivery system of an electric provider, including,
but not limited to, all of the following:

a. Automated meter reading.
b. Real-time or other system monitoring.
c. Remote service control.
d. Outage detection and restoration.
e. Predictive maintenance and diagnostics.
f. Monitoring and enhancement of power quality, load
control, voltage control, and flow.
g. Supervisory control and data acquisition.

h. Management and flow of electricity.

i. Internal communications.

j. Dispatch, start-up, ramping, shutdown, scheduling, curtailment, or control of electric generation, transmission or distribution of resources or ancillary services relating thereto, including, but not limited to, generator imbalance, spinning and non-spinning reserves, and reserve sharing.

k. All other uses supporting the reliability, resilience, and security of the electric delivery system.

§37-16-4.

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

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

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

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

(4) Allow a broadband affiliate or an unaffiliated person to provide broadband services over or through a broadband system within the electric easements of an electric provider, on such terms and conditions as specified by the electric provider, whether used for or supporting utility support services or used for supporting wholesale or retail nonutility support services.

(b) In furtherance of its authority under subsection (a), an electric provider shall have the sole authority to determine which broadband affiliate or unaffiliated person, including a broadband operator or broadband service provider, may have access to the broadband system within its electric easements and on its electric delivery system and to determine the terms and conditions on which the broadband affiliate or unaffiliated person may access the broadband system, including, without limitation, whether the access will be on an exclusive or non-exclusive basis.
(c) This chapter does not require or obligate an electric provider to install or implement a broadband system or advanced communications capabilities, to provide broadband services, or to allow others to install a broadband system or facilities or use the electric provider's electric easements and electric delivery system to provide broadband services.

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

§37-16-5.

In no event does this chapter authorize any electric provider to provide retail electric service outside of its electric service territory as determined under the applicable provisions of Chapter 14 of Title 37. Nothing in this chapter is intended to amend, repeal, enlarge, or otherwise affect Chapter 17 of Title 37.

§37-16-6.

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

§37-16-7.

(a) If the owner of real property subject to an electric easement contends that the owner's property has been taken, injured, or destroyed by the construction, installation, use, or enlargement of broadband systems within the electric easement on the owner's property and the electric easement does not expressly provide for such, the owner may file a civil action in the circuit court for the county in which the property is located to recover damages as specified by this section. All such actions must be brought within two years after the later of: (1) The effective date of this chapter; or (2) the date broadband systems are first constructed or installed within the electric easement on the owner's real property. Nothing in this chapter shall revive any right or remedy which may have become barred by lapse of time, or by any law of this state, prior to the effective date of this act.

(b) (1) If the court determines that the construction, installation, use, or enlargement of a broadband
system exceeds the scope of the rights granted by the electric easement on the owner's real property, the measure of damages shall be an amount equal to the difference, if any, between the following:

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

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

(2) The damages, if any, shall be fixed and shall not be deemed to continue, accumulate, or accrue. Payment of the judgment in any such action shall vest in the electric provider all property rights necessary to construct, use, install, operate, replace, and maintain, from time to time, the broadband systems within the electric easement on the owner's real property and the electric easement shall be thereafter permanently expanded to include the right to construct, use, install, operate, replace, and maintain the broadband system and broadband services. The judgment shall have the same effect as a conveyance executed by the owner in due form under applicable law and shall run with the land. A certified copy of the judgment may be filed by the electric
provider, a broadband affiliate, or other broadband operator
in the land records of the county in which the subject
property is located, but is not required to make such
broadening of the electric easement effective.

(c) The civil action and measure of damages
authorized by this section shall be exclusive and the owner
may not assert any other theory, claim, or cause of action,
either at law or in equity, nor recover any other damages,
punitive damages, costs, attorney's fees, or equitable relief.
Evidence of past, current, or future revenues, profits, or any
other fees derived by an electric provider, broadband
affiliate, or other broadband operator from the construction,
installation, use, enlargement, or operation of a broadband
system within the electric easement on the owner's real
property is not admissible for any purpose in any civil action
under this section.

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

(e) An electric provider may acquire by condemnation
ways, rights-of-way, and easements, without limitation as to
width, on, over, under, or across the lands or easements of
others, to erect, construct, replace, use, install, operate,
and maintain advanced communications capabilities. Such
condemnation is to be conducted in accordance with the procedures of Chapter 1A of Title 18, Code of Alabama 1975, except as otherwise provided in this chapter.

(f) An electric provider, broadband affiliate, or unaffiliated broadband operator or broadband service provider may receive such rights from an owner of real property by service agreement or service regulation, membership agreement, license agreement, or other agreement to serve the property with advanced communications capabilities without granting an easement or right-of-way. The grant or agreement may permit the construction, installation, replacement, operation, use, and maintenance of the advanced communications capabilities on the property without the requirement of further consent of any other tenant, concessionaire, or occupant of that property. Any grant or agreement shall preclude the owner from any action for relief under this section.

§37-16-8.

Nothing in this chapter shall interfere with the commission's authority to regulate public utilities under this title. Nothing in this chapter shall provide a basis for creating or granting jurisdiction to the commission over any electric providers or any broadband affiliate that are otherwise exempt or are otherwise not subject to the jurisdiction of the commission.

Section 2. The provisions of this act are severable.

If any part of this act is declared invalid or
unconstitutional, that declaration shall not affect the part
which remains.

Section 3. This act shall become effective on the
first day of the third month following its passage and
approval by the Governor, or its otherwise becoming law.