

Broadband Using Electric Easements Accessibility Act

Section § 37-16-1

Short title.

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

(Act 2019-326, § 1.)

Section § 37-16-2

Legislative findings.

(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 those 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 these 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 this development is vital and necessary to induce, create, and promote industrial and economic development in those rural and underserved areas of the state and to create job opportunities, enhance health care, and enhance educational advancement in those areas.
- (6) It is the public policy of the state to promote the authorization of advanced communications capabilities to be installed by electric providers within existing easements and other rights-of-way.
- (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.
- (8) 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, underserved, and unserved 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.

(Act 2019-326, § 1.)

Section § 37-16-3

Definitions.

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. The term also includes 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 within an electric easement, 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, send, 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, communications 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. Electric easements include, but are not limited to, easements obtained under a law of this state, or by any of the following methods: Negotiation, condemnation, prescription, or grant, including, but not limited to, a grant pursuant 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 paragraph a. of subdivision (7) of 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; or any board, authority, or public corporation incorporated or organized under Article 9, Article 15, or Article 16 of Chapter 50 of Title 11, for the operation of an electric distribution system; or a municipal corporation that operates an electric distribution system.

(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, curtailment, scheduling, 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.

(Act 2019-326, § 1.)

Section § 37-16-4

Powers of electric providers; access to broadband system; rate methodology and terms of access; limitations; annual report.

(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 or 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) An electric provider engaged in providing retail nonutility support services shall apply the same rate methodology to determine pole attachment rates, and shall require the same terms and conditions of access, for pole attachments to its electric delivery system for its broadband services, with such methodology and terms of access to be determined at the time of the applicable pole attachment request, as the provider applies for pole attachments to its electric delivery system by persons not affiliated with the electric provider. Nothing in this subsection shall apply to an electric provider that is a Tennessee Valley Authority distributor or to an electric provider that is a utility as defined under paragraph a. of subdivision (7) of Section 37-4-1.

(d) 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.

(e) 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.

(f) An electric provider shall not disconnect any customer from receiving electric services pursuant to its electric delivery system due to the customer's failure to pay for broadband services provided to the customer by the electric provider or its broadband affiliate.

(g) By June 30 of each year, an electric provider engaged in providing retail nonutility support services directly or through a broadband affiliate shall provide a report to the Legislature detailing its pole attachment rates. This subsection does not apply to an electric provider that is a Tennessee Valley Authority distributor or to an electric provider that is a utility as defined under paragraph a. of subdivision (7) of Section 37-4-1.

(Act 2019-326, § 1.)

Section § 37-16-5

Effect of chapter on service territories for electric suppliers.

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. Nothing in this chapter is intended to amend, repeal, enlarge, or otherwise affect Chapter 14.

(Act 2019-326, § 1.)

Section § 37-16-6

Costs charged for construction, installation, maintenance, etc., of broadband system.

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.

(Act 2019-326, § 1.)

Section § 37-16-7

Civil action by owner of interest in real property subject to easement; damages; condemnation; receipt of rights by grant or agreement; notice of installation; liability.

(a) If the owner of an interest in 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 three years after the later of: (1) August 1, 2019; 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 August 1, 2019.

(b)(1) In any action under subsection (a), 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.
- (2) The damages, if any, shall be fixed and shall not be deemed to continue, accumulate, or accrue. The judgment in any such action for the plaintiff shall include the plaintiff's costs and litigation expenses. Costs and litigation expenses authorized by this section may be claimed, taxed, and awarded under the same procedures that apply to costs in other civil actions. 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. The expansion for the broadband system shall include the broadband system within the maintenance, egress, and ingress provisions of the electric easement.
- (c) The civil action and measure of damages authorized by this section shall be the exclusive remedy for any and all claims that the owner's property has been taken, or the scope of the electric easement exceeded, by the construction, installation, use, or enlargement of broadband systems within the electric easement on the owner's property, 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, including, without limitation, consequential, compensatory, and punitive damages, or equitable relief.
- (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, 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.
- (g) With respect to the installation of broadband systems within an electric easement in effect prior to August 1, 2019, the electric provider shall provide the same notice as is required by the express terms of the electric easement, if any, or as required by other applicable law for the construction or installation of the electric delivery system within the electric easement. With

respect to the installation of broadband systems within an electric easement that is acquired other than by condemnation after August 1, 2019, the electric provider shall provide such notice as is required by the express terms of the document creating the electric easement, if any; or if there is no written document creating the electric easement or no express terms in the document, the electric provider shall provide notice to the owner of the real property subject to the electric easement by informing such owner of the installation of the broadband system within the electric easement prior to installation. Notice shall be sufficient if mailed to the name and address of the owner or owners listed in the real property ad valorem tax records for the county where the real property is located. Nothing in this section shall require the notice from the electric provider when the electric easement is acquired by condemnation or pursuant to an expansion of the electric easement by civil action commenced by the owner.

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

(Act 2019-326, § 1.)

Section § 37-16-8

Construction of chapter.

(a) 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.

(b) Nothing in this chapter shall affect, abrogate, or eliminate in any way any obligation of an electric provider or any broadband affiliate or broadband operator to comply with any applicable safety and permitting requirements of any railroad company or any state governmental body or agency with respect to property that is held or controlled by such railroad company or state governmental body or agency, as the case may be, and in, on, over, or across which an easement is located.

(c) Any broadband system that encumbers the right-of-way of the Department of Transportation shall require a permit from the department regardless of whether the broadband system is within a currently permitted electric easement or an electric delivery system. Nothing in this chapter shall provide an exemption from an existing applicable regulation regarding access to county rights-of-way or be construed to abrogate, limit, expand, or otherwise affect the authority of a municipality to regulate the use of municipal streets and rights-of-way.

(d) Except as provided in this section, nothing in this chapter is intended to expand or contract an electric provider's rights and obligations with regard to applicable laws in connection with pole attachments to its electric delivery system, or the terms of any pole attachment agreement in effect with its electric delivery system.

(Act 2019-326, § 1.)

Section § 37-16-9

Allocation and accounting of marginal costs related to nonutility support services; investments in, loans to, leases with broadband affiliates.

(a) An electric provider providing broadband services shall fully allocate and properly account for all marginal costs, including the internal imputation of such costs when the electric provider does not provide broadband services through an affiliate, related to the provision of nonutility support services, including any transactions provided for in subsection (b), and shall not use its electric services sales revenues for the subsidization of such nonutility support services. No transaction treated in accordance with subsection (b) shall be considered a cross-subsidy. Nothing in this subsection shall apply to an electric provider that is a Tennessee Valley distributor or an electric provider that is a utility as defined under paragraph a. of subdivision (7) of Section 37-4-1.

(b) Nothing in this section shall prevent an electric provider from making investments in broadband affiliates otherwise permitted by applicable law, making loans to broadband affiliates otherwise permitted by applicable law which have a repayment obligation from the affiliate, entering into capital or operating leases with the broadband affiliate, or entering into guarantees or other security arrangements for the benefit of a broadband affiliate, all on such terms and subject to such conditions as the board approves in the case of member cooperatives which are electric providers or as determined to be prudent or appropriate under applicable law in the case of other electric providers. An electric provider that is not a Tennessee Valley distributor or a utility as defined under paragraph a. of subdivision (7) of Section 37-4-1 shall separately allocate and account for all transactions described in this subsection as set forth in subsection (a).

(Act 2019-326, § 1.)

Section § 37-16-10

Limitation of source of funds.

In no event shall funds be appropriated from the Education Trust Fund under this chapter.

(Act 2019-326, § 1.)