

TO: Colorado Association of Realtors **VIA E-MAIL**

FROM: Brian Connolly
Andy Peters

DATE: April 11, 2019

RE: Summary and Analysis of Amended Senate Bill 107—**REVISED**

The Colorado Association of Realtors (“**CAR**”) has asked our firm to analyze an amended version of Senate Bill 19-107 (“**SB 107**” or the “**Bill**”), dated April 2, 2019 currently pending before the state Senate. CAR has provided us with the most recent version of the Bill. The revised version of SB 107 remains aimed at expanding rural broadband internet access, but in other respects represents a substantial departure from the original proposal. This revised Memorandum supplements our earlier analysis, delivered to you on March 29, 2019, analyzing a prior version of the Bill.

The Bill operates in four primary ways: (1) it allows electric cooperatives, or commercial broadband providers, to install, maintain, and lease above-ground broadband infrastructure within electric utility easements; (2) it requires notice to landowners before the installation of that infrastructure; (3) it provides limited remedies to landowners whose properties are damaged or affected by the infrastructure; and (4) the Bill also prohibits electric cooperatives from discriminating among broadband providers when granting access to the electric utility easements. At your request, we have reviewed SB 107’s revised text in addition to the materials reviewed for our original memorandum. Below, we have updated that memorandum to reflect the amended provisions and their potential impact.

Bill Summary

SB 107 consists of four principal components. First, the Bill authorizes electric cooperatives (no longer any electric utility), or their designated broadband internet service providers (“**ISPs**”) to install, maintain, operate, and lease broadband facilities attached to electric utility service infrastructure within an electric utility easement. The Bill also clarifies that electric cooperatives cannot offer internet service themselves but may do so through an affiliate, subject to certain additional requirements.

Second, the Bill requires notice to affected landowners before any infrastructure install can commence. Notice must consist of a letter mailed to all parties with an interest in the affected property, at least thirty days before work begins. The utility or ISP must also record a memorandum with the county clerk and recorder that includes the utility’s name and address and confirms the date of notice. After providing notice, the utility or ISP must commence work within one year. If it does not, it must again follow the notice procedures.

Third, the Bill offers landowners affected by the new broadband infrastructure a limited remedy. Landowners may file a claim within two years of the latest of the Bill’s effective date, mailed notice, or the recording of the notice memorandum. For trespass and inverse condemnation (i.e., eminent domain) claims, landowners’ damages will be limited to any reduction in property value. Landowners are also entitled to damages in the amount of any damage to property caused by a broadband provider’s exercise of rights under the Bill.

1770996.3

1770996.1

Landowners may not however, introduce evidence regarding the profits, fees or revenues from the infrastructure—or of the rental value of the easement area or broadband infrastructure—and any compensation award must account for the benefit conferred by the new access to broadband internet. Moreover, landowners are not entitled to recover the cost of an appraisal or any attorney fees.

Fourth and finally, the revised Bill deletes the requirement that ISPs that wish to construct infrastructure within electric cooperatives' easements to enter a contract with the landowner. The previous version of the Bill did not require landowner consent when an electric utility added broadband infrastructure, but required such consent if an ISP chooses to construct and use the same infrastructure. Thus, under the newest version of the Bill, ISPs would not be required to negotiate separate contracts for every affected property. Moreover, the revision limits the ability of electric cooperatives to discriminate against broadband providers who wish to locate within the cooperative's easement. This provision is intended to avoid the problem of an electric cooperative with a broadband affiliate from exercising monopoly control over easements, thus prohibiting third-party broadband providers from utilizing such easements.

Context and Purpose

SB 107 is presumptively intended to eliminate a major obstacle to rural broadband expansion—namely, the significant time and cost associated with renegotiating electric utility easements to support broadband infrastructure. It also avoids the problem of broadband providers having to obtain new easements.

While we have not located any public statements regarding SB 107's purpose, media coverage of similar legislation and judicial decisions strongly supports our conclusion. Much of that coverage focuses on a 2010 Missouri case, in which the court ruled that an electric utility misused its existing easements when, without seeking landowners' consent, it located broadband infrastructure in easements dedicated for electric transmission infrastructure.¹ The court concluded that utilities could not use easements created for one purpose, i.e. electric lines, for a new and different purpose, i.e. broadband, without first receiving the affected property owners' permission. A jury then awarded the affected landowners nearly \$80 million.²

Media coverage of similar statutes confirms that they aim to prevent the outcome from that Missouri case. A bill similar to SB 107 is current being considered by the Texas legislature,³ and in 2017, Indiana enacted similar legislation.⁴ Missouri and Tennessee also recently enacted analogous legislation with similar aims.⁵ Notably, however, these other bills applied to electric cooperatives, not every electric utility, as is the case in SB 107.

¹ *E.g.*, Thomas J Dougherty, II, *Major verdict in electric utility easement case*, LIMITLESS ENERGY BLOG, (Feb. 13, 2015), <https://www.lexology.com/library/detail.aspx?g=c4d888-e09e-4de8-b51f-0cd9d8da9e35>

² A subsequent appeal cast doubt on the propriety of that amount, but did not alter the fundamental conclusion that the utility was in some way liable for misusing the easement. *See Barfield v. Sho-Me Power Elec. Coop.*, 852 F.3d 795 (8th Cir. 2017).

³ Donna McCollum and Jeff Wright, *Lawmaker files bill to increase access to high-speed internet in rural areas of Texas*, KLTV, (February 28, 2019, 8:27 PM), <http://www.kltv.com/2019/02/28/lawmaker-files-bill-increase-access-high-speed-internet-rural-areas-texas/>.

⁴ Lisa Gonzalez, *Indiana Eases Easements for Electric Cooperatives, Allows Fiber Infrastructure Investments*, INSTITUTE FOR LOCAL SELF-RELIANCE, (June 14, 2017), <https://ilsr.org/indiana-eases-easements-for-electric-cooperatives-allows-fiber-infrastructure-investments/>.

⁵ *Missouri, Tennessee Pass Easement Laws Helpful to Rural Broadband*, America's Electric Cooperatives, (May 22, 2018), <https://www.electric.coop/missouri-tennessee-pass-easement-laws-helpful-rural-broadband/>.

CAR has inquired as to other states' experiences with these statutes, i.e. whether they have generally worked to expand rural broadband, their impacts on property owners, etc. Unfortunately, there appears to be relatively little reporting on these states' efforts and their relative success or failure. We suspect that the lack of reporting on these matters is indicative of the fact that these legislative efforts impose a relatively minor burden on property owners, thus avoiding significant litigation or public outcry.

Analysis of Impact

We expect that SB 107 will generally be adequate to accomplish the aim of expanding rural broadband access, at a relatively minimal burden on landowners whose properties are encumbered by existing utility easements.

The most recent version of the Bill contains several improvements over the introduced version:

- The notice provisions that have been incorporated into the Bill will offer landowners access to more information regarding the installation of broadband infrastructure in electric cooperatives' easements, provides contact information for utilities (which might prompt or aid in negotiations between landowners, utilities, and broadband providers), and appraises landowners of their rights to compensation and damages.
- The addition of remedies to the Bill alleviates our prior concern about the lack of any compensation process for landowners who are required to give up property rights as a result of broadband expansion. That being said, we find it highly unlikely that landowners will receive anything more than nominal compensation as a result of the installation of broadband infrastructure in electric easements. The Bill severely limits the type of evidence that may be introduced in determining compensation, limiting compensation awards to any reduction in fair market value of the property taken, and offsetting any award with property value increases resulting from broadband access. Given the limited nature of the fair market value of a broadband easement that overlays an existing utility easement, we would expect compensation to nominal—the offset resulting from value increases associated with broadband service to the subject property would likely zero out most compensation awards. The provision for damage awards resulting from physical damage to property is a benefit to landowners whose properties will be the site of construction work as rural broadband is installed.

Although the Bill now applies solely to electric cooperatives, our analysis of the geographic coverage of electric cooperatives indicates that the Bill will have its greatest impact in rural areas of the state.⁶ It is clear that the amendment withdrawing other electric utilities from its coverage was intended to avoid requiring electric service providers in urban areas, where broadband is plentiful, from accommodating broadband providers within their easements.

Two of our prior concerns have gone unaddressed by the revision to the Bill:

- The Bill does not include provisions concerning the construction of the broadband infrastructure. Construction may to some extent interfere with landowners' use and enjoyment of their property. That interference is typically the subject of a separate construction easement. While some of the existing electric utility easements may provide the terms on which construction may occur, SB 107 does not

⁶ COLORADO RURAL ELECTRIC ASSOCIATION, *Co-Op Map of Colorado*, <https://crea.coop/co-op-map-of-colorado/> (last viewed April 10, 2019).

address this topic and therefore potentially creates uncertainty for landowners whose properties will be affected.

- SB 107 applies to all electric utility easements and is not limited to easements existing at the time of the Bill's enactment. Thus, perhaps intentionally, the Bill requires that all future electric utility easements authorize the construction and maintenance of broadband internet infrastructure as well.

Although any of these items could be resolved through judicial interpretation, we identify them now in the event CAR wishes to influence how the draft Bill addresses them.

Conclusion

SB 107 is an apparent effort to expand rural broadband access by reducing or eliminating the time and cost associated with renegotiating electric utility easements to support broadband infrastructure. We generally believe the legislation as drafted can accomplish that aim, and the revision is much friendlier to ISPs that might undertake broadband expansion independently from utility providers. Recent revisions to the Bill have also resolved some of our concerns about compensation to affected landowners and provision for damage awards in the event of property damage.

We hope CAR finds this synopsis and analysis useful as it weighs its approach to SB 107. Please let us know if we can provide any additional information.