

LEGISLATIVE BILL 827

Approved by the Governor May 25, 2001

Introduced by Bromm, 23; Wickersham, 49; Dw. Pedersen, 39; Kristensen, 37

AN ACT relating to telecommunications; to amend sections 18-2701 to 18-2703, 18-2705, 18-2709, 70-704, and 70-1409, Reissue Revised Statutes of Nebraska, and sections 70-625, 75-132.01, and 75-604, Revised Statutes Supplement, 2000; to provide for the sale or lease of dark fiber by public entities; to define and redefine terms; to provide conditions; to provide duties for the Public Service Commission; to create a fund and provide for use of money in the fund; to authorize qualifying businesses to obtain funding for certain telecommunications services; to harmonize provisions; to provide a duty for the Revisor of Statutes; and to repeal the original sections.

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

Section 1. For purposes of sections 1 to 7 of this act, dark fiber means any unused fiber optic cable through which no light is transmitted or any installed fiber optic cable not carrying a signal.

Sec. 2. (1) Any agency or political subdivision of the state may:

(a) Own dark fiber;

(b) Sell dark fiber pursuant to section 3 of this act; and

(c) Lease dark fiber pursuant to section 4 of this act.

(2) No agency or political subdivision of the state shall provide telecommunications services for a fee, except as authorized in sections 79-1319, 81-1120.01 to 81-1120.28, 85-401 to 85-418, and 85-1501 to 85-1542, or be issued a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier. Any agency or political subdivision which sells or leases its dark fiber pursuant to sections 1 to 7 of this act shall not be deemed to be providing telecommunications services for a fee.

Sec. 3. Any agency or political subdivision of the state may sell its dark fiber by any method, including auction, sealed bid, or public sale, which it deems to be most advantageous to the public. The sales agreement may require that the agency or political subdivision be solely responsible for the maintenance of the dark fiber and that the buyer is responsible, on a pro rata basis, for any such maintenance costs.

Sec. 4. Any agency or political subdivision of the state may lease its dark fiber if:

(1) The lessee is a certificated telecommunications common carrier or a permitted telecommunications contract carrier pursuant to section 75-604 or an Internet service provider;

(2) The lease price and profit distribution is approved by the Public Service Commission as follows:

(a) The commission shall not approve any lease price which is less than the market rate for leasing such fiber as determined by the commission. The market rate is the price associated with similar unbundled network elements that may be available from the incumbent local exchange carrier or the price of any other private entity leasing dark fiber optic facilities serving the same or similar territory where the leased equipment is located. Before entering into a lease, each agency or political subdivision shall file a request with the commission for a competitive price comparison to determine the market rate. When conducting a competitive price 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;

(b) The commission shall not approve any lease price which is agreed upon by the agency or political subdivision and the lessee unless the lease requires that the agency or political subdivision be solely responsible for the maintenance of its dark fiber and that the lessee be responsible, on a pro rata basis, for any such maintenance costs; and

(c) The commission shall not approve any lease unless fifty percent of the profit earned by the agency or political subdivision under the lease is remitted to the Nebraska Internet Enhancement Fund. Profit earned by the agency or political subdivision is the lease price less the cost of infrastructure overbuilding. Before entering into a lease, each agency or political subdivision shall file a request with the commission to determine the cost of overbuilding its fiber optic infrastructure. For purposes of this

subdivision, cost of infrastructure overbuilding means the cost of each leased optic fiber, including the cost, on a pro rata basis, associated with the agency's or political subdivision's installation of such fiber;

(3) Any interconnection agreement subject to subsection (2) of section 75-109 is approved by the commission; and

(4) The lessee makes 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. 5. An original action or appeal concerning a violation of any provision of sections 1 to 7 of this act by an agency or political subdivision of the state shall follow the procedures set forth in section 75-132.01.

Sec. 6. The Nebraska Internet Enhancement Fund is created. The fund shall be used to provide financial assistance to install and deliver broadband or other advanced telecommunications infrastructure and service throughout the state. It is the intent of the Legislature that two hundred fifty thousand dollars shall be appropriated to the fund to be used for startup costs and seed money for FY2001-02. The Public Service Commission may receive gifts, contributions, property, and equipment from public and private sources for purposes of the fund. The fund shall consist of money appropriated by the Legislature and gifts, grants, or bequests from any source, including federal, state, public, and private sources. Money in the fund shall be distributed by the commission pursuant to section 7 of this act. Any money in the fund available for investment shall be invested by the state investment officer pursuant to the Nebraska Capital Expansion Act and the Nebraska State Funds Investment Act.

Sec. 7. (1) The Public Service Commission shall establish an application process through which any county or municipality in the state may apply for financial assistance from the Nebraska Internet Enhancement Fund. The process shall allow the county or municipality to obtain a service provider for broadband or other advanced telecommunications services in an exchange or other area defined by the county or municipality where such telecommunications services are to be delivered at rates of service agreed upon between the service provider and county or municipality. The application shall state the projected cost, identify the service provider, describe the process for selection of the service provider, list terms and considerations of any agreement between the applicant and the service provider, and include other information as required by the commission.

(2) The commission shall not provide assistance unless (a) the service provider is an eligible service provider of telecommunications, video, Internet, or other related services as determined by rule and regulation of the commission and (b) the applicant can provide matching funds of at least twenty-five percent of the total projected cost.

(3) The commission shall establish a system to prioritize applications. Highest priority shall be given to applicants based on high-cost factors, including population scarcity and location remoteness. Other factors, including financial need, may be considered by the commission as deemed necessary.

(4) Funds for financial assistance to counties and municipalities may be distributed by the commission on and after January 1, 2002. Funds committed for future use are deemed to be used in the year committed.

Sec. 8. 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 its dark fiber pursuant to sections 1 to 7 of this act.

Sec. 9. Section 18-2701, Reissue Revised Statutes of Nebraska, is amended to read:

18-2701. Sections 18-2701 to 18-2738 and section 12 of this act shall be known and may be cited as the Local Option Municipal Economic Development Act.

Sec. 10. Section 18-2702, Reissue Revised Statutes of Nebraska, is amended to read:

18-2702. The Legislature finds that:

(1) There is a high degree of competition among states and municipalities in our nation in their efforts to provide incentives for businesses to expand or to locate in their respective jurisdictions;

(2) Municipalities in Nebraska are hampered in their efforts to effectively compete because of their inability under Nebraska law to respond quickly to opportunities or to raise sufficient capital from local sources to provide incentives for the provision of new services or business location or expansion decisions which are tailored to meet the needs of the local community;

(3) The ability of a municipality to encourage the provision of new services or business location and expansion has a direct impact not only upon the economic well-being of the community and its residents but upon the whole state as well; and

(4) There is a need to provide Nebraska municipalities with the opportunity of providing assistance to business enterprises in their communities, whether for expansion of existing operations, ~~or~~ the creation of new businesses, or the provision of new services, by the use of funds raised by local taxation when the voters in the municipality determine that it is in the best interest of their community to do so.

Sec. 11. Section 18-2703, Reissue Revised Statutes of Nebraska, is amended to read:

18-2703. For purposes of the Local Option Municipal Economic Development Act, the definitions found in sections 18-2704 to 18-2709 and section 12 of this act shall be used.

Sec. 12. Advanced telecommunications capability shall mean high-speed, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

Sec. 13. Section 18-2705, Reissue Revised Statutes of Nebraska, is amended to read:

18-2705. Economic development program shall mean any project or program utilizing funds derived from local sources of revenue for the purpose of providing direct or indirect financial assistance to a qualifying business or the payment of related costs and expenses or both, without regard to whether that business is identified at the time the project or program is initiated or is to be determined by specified means at some time in the future. An economic development program may include, but shall not be limited to, the following activities: Direct loans or grants to qualifying businesses for fixed assets or working capital or both; loan guarantees for qualifying business; grants for public works improvements which are essential to the location or expansion of, or the provision of new services by, a qualifying business; grants or loans for job training; the purchase of real estate, options for such purchases, and the renewal or extension of such options; the issuance of bonds as provided for in the Local Option Municipal Economic Development Act; and payments for salaries and support of city staff to implement the economic development program or the contracting of such to an outside entity. For cities of the first and second class and villages, an economic development program may also include grants or loans for the construction or rehabilitation for sale or lease of housing for persons of low or moderate income. An economic development program may be conducted jointly by two or more cities after the approval of the program by the voters of each participating city.

Sec. 14. Section 18-2709, Reissue Revised Statutes of Nebraska, is amended to read:

18-2709. Qualifying business shall mean any corporation, partnership, limited liability company, or sole proprietorship which derives its principal source of income from any of the following: The manufacture of articles of commerce; the conduct of research and development; the processing, storage, transport, or sale of goods or commodities which are sold or traded in interstate commerce; the sale of services in interstate commerce; headquarters facilities relating to eligible activities as listed in this section; telecommunications activities, including services providing advanced telecommunications capability; or tourism-related activities. In cities of the first and second class and villages, a business shall also be a qualifying business if it derives its principal source of income from the construction or rehabilitation of housing. In cities with a population of more than two thousand five hundred inhabitants and less than ten thousand inhabitants, a business shall also be a qualifying business if it derives its principal source of income from retail trade, except that no more than forty percent of the total revenue generated pursuant to the Local Option Municipal Economic Development Act for an economic development program in any twelve-month period and no more than twenty percent of the total revenue generated pursuant to the act for an economic development program in any five-year period, commencing from the date of municipal approval of an economic development program, shall be used by the city for or devoted to the use of retail trade businesses. For purposes of this section, retail trade shall mean a business which is principally engaged in the sale of goods or commodities to ultimate consumers for their own use or consumption and not for resale. In cities with a population of two thousand five hundred inhabitants or less, a business shall be a qualifying business even though it derives its principal source of income from activities other than those set out in this section.

If a business which would otherwise be a qualifying business employs people and carries on activities in more than one city in Nebraska or will do so at any time during the first year following its application for participation in an economic development program, it shall be a qualifying business only if, in each such city, it maintains employment for the first two years following the date on which such business begins operations in the city as a participant in its economic development program at a level not less than its average employment in such city over the twelve-month period preceding participation.

A qualifying business need not be located within the territorial boundaries of the city from which it is or will be receiving financial assistance.

Sec. 15. Section 70-625, Revised Statutes Supplement, 2000, 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 its dark fiber pursuant to sections 1 to 7 of this act.

(5) 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. 16. 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 its dark fiber pursuant to sections 1 to 7 of this act; and ~~(16)~~ (17) to do and perform, either for itself or its members or for any other corporation organized under ~~sections 70-701 to 70-738~~ 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. 17. 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 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 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 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; ~~and~~

(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 its dark fiber pursuant to sections 1 to 7 of this act.

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

Sec. 18. Section 75-132.01, Revised Statutes Supplement, 2000, is amended to read:

75-132.01. (1) Notwithstanding the provisions of section 75-131, the commission shall have exclusive original jurisdiction over any action concerning a violation of any provision of (a) section 75-109, 75-604, 75-609, 75-609.01, or 86-801 to 86-810 by a telecommunications company or (b) sections

1 to 7 of this act by an agency or political subdivision of the state.

(2) After all administrative remedies before the commission have been exhausted, any interested party to an action may appeal in accordance with the Administrative Procedure Act.

~~(2)~~ (3) If the commission enters an order declining jurisdiction under subsection (1) of this section, any interested person may petition the district court of the county in which such alleged violation has occurred. If it appears to the court, after a hearing, that a provision of such sections has been violated, the court may issue an injunction or other proper process to restrain the telecommunications company and its directors, officers, employees, or agents or the agency or political subdivision of the state from continuing such violation and may order additional relief. Any party to the case shall have the right to appeal the decision of the district court to the Court of Appeals under the rules provided by law for appeals in civil cases.

~~(3)~~ (4) For purposes of this section, telecommunications company has the same meaning as in section 86-802.

Sec. 19. Section 75-604, Revised Statutes Supplement, 2000, is amended to read:

75-604. (1) Except as provided in section 86-805, no person, firm, partnership, limited liability company, corporation, cooperative, or association shall offer any telecommunications service or shall construct new telecommunications facilities in or extend existing telecommunications facilities into the territory of another telecommunications company for the purpose of providing any telecommunications service as either a telecommunications common carrier or telecommunications contract carrier without first making an application for and receiving from the commission a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier, after due notice and hearing under the rules and regulations of the commission. The required certificate for telecommunications common carriers and required permit for telecommunications contract carriers are necessary to preserve the integrity of a ubiquitous network, to preserve and advance universal service, and to ensure the delivery of essential and emergency telecommunications services.

(2) If a telecommunications company holds a certificate of convenience and necessity as a telecommunications common carrier, it shall not be required to obtain a permit as a telecommunications contract carrier.

(3) The commission may waive applicability of subsection (1) of this section as to the provision of intra-LATA interexchange services by duly adopted and promulgated rules and regulations applicable to all telecommunications companies providing such services, and after such waiver, certification for and provision of intra-LATA interexchange services shall be governed by the statutes, rules, and regulations for certification for and provision of inter-LATA interexchange services.

(4) The commission may establish such just and reasonable classifications of groups of telecommunications common carriers and telecommunications contract carriers taking into consideration the special nature of the services performed by such carriers. The commission may adopt and promulgate such just and reasonable rules, regulations, and requirements to be observed by a carrier so classified or grouped as the commission deems necessary or desirable and in the public interest.

(5) The commission shall not issue a certificate of convenience and necessity as a telecommunications common carrier or a permit as a telecommunications contract carrier to an agency or political subdivision of the state.

Sec. 20. The Revisor of Statutes shall assign section 8 of this act to Chapter 18, article 4.

Sec. 21. Original sections 18-2701 to 18-2703, 18-2705, 18-2709, 70-704, and 70-1409, Reissue Revised Statutes of Nebraska, and sections 70-625, 75-132.01, and 75-604, Revised Statutes Supplement, 2000, are repealed.