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FISCAL IMPACT REPORT

SPONSOR <u>SHPAC</u>	LAST UPDATED <u>03/17/23</u>
	ORIGINAL DATE <u>03/15/23</u>
	BILL <u>CS/Senate Bill</u>
SHORT TITLE <u>Broadband Changes</u>	NUMBER <u>452/SHPACS/aSJC</u>
	ANALYST <u>Hitzman</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
DoIT Hearing Fees		\$0 - \$20.0	\$0 - \$20.0	\$0 - \$40.0	Recurring	General Fund
AHO Hearing Officer FTE		\$0 -146.1	\$0 -146.1	\$0 -\$292.2	Recurring	General Fund
DoIT Admin & Operations		\$230.0	\$230.0	\$460.0	Recurring	Enterprise Fund
Total	Indeterminate	\$396.1	\$396.1	\$792.2		

Parentheses () indicate expenditure decreases.
*Amounts reflect most recent analysis of this legislation.

Relates to Senate Bill 280
Relates/Conflicts with Senate Bill 269

Sources of Information

LFC Files

Responses to Substitute Bill Received From

Department of Public Safety (DPS)
State Land Office (SLO)
Children, Youth and Families Department (CYFD)
Attorney General (NMAG)

Responses Received From

Department of Information Technology (DoIT)
Department of Corrections (NMCD)
Department of Public Safety (DPS)
State Land Office (SLO)
Children, Youth and Families Department (CYFD)
Attorney General (NMAG)

No Response Received

Administrative Hearings Office (AHO)
Department of Finance and Administration (DFA)
Economic Development Department (EDD)

SUMMARY

Synopsis of SJC Amendments to Senate Bill 452

Senate Judiciary Committee amendments to Senate Bill 452 (SB452) amends sections regarding the duties of the secretary to apply to all agencies, not just executive ones. In particular, the secretary will not have to approve all agency IT requests for proposals and other requests subject to the procurement code, approve agency IT contracts, monitor agency compliance with the state agency and state IT strategic plans, but the bill maintains that the secretary will not have to review requests for IT funding except for executive agencies. The amendments also require all agencies, not just executive ones, to submit an IT plan to the secretary and conduct background checks on prospective employees that will have administrative access to IT systems or hardware. Any agency, not just a state agency, which received an invoice for department services shall have 30 days to pay.

The bill amends the definition of “public educational institution” to now mean any agency, not just a state one, which provides administrative, funding, or technical support to schools and school districts.

The bill also notes that the broadband office can enter into joint powers agreements and memorandums of understanding with agencies, removing the “state” qualifier, for the design, development, or implementation of a regional broadband plan.

Synopsis of SHPAC Substitute for Senate Bill 452

Senate Health and Public Affairs Committee substitute and Senate Bill 452 (SB452) amends the Department of Information Technology (DoIT) Act, providing new or updated definitions for “agency,” to include all executive branch agencies, and “cybersecurity,” meaning acts, practices, or systems that eliminate or reduce the risk of loss of critical assets or loss of sensitive information. The bill amends the definition of “information technology” to include storage media, networking equipment, physical devices, infrastructure, processes and code, firmware, software, and ancillary products and services, including designs, information storage and retrieval systems, data communication systems, network, hosting, and cloud-based systems, and interactions between a user and an information system, among others.

The bill adds that the secretary shall acquire, hold, and maintain real or personal property to meet customer or department obligations.

The bill specifies the chief information officer’s discretionary authorities and transfers authorities to the secretary that were previously exercised by the Information Technology Commission. Newly added authorities include (1) making state-owned broadband internet service available on a competitively neutral bases at established rates, (2) offer cybersecurity risk prevention and IT mitigation and response solutions for users of agency-operated or –owned IT, including compliance standards for broadband infrastructure projects, and (3) establishing an administrative hearings process in coordination with the Administrative Hearings Office to support the department’s private sector regulatory activities.

The bill allows DoIT to receive and apply for funds on behalf of those administratively attached office or public bodies, which would include the OBAE. Further, the bill extends the

department's rulemaking authority to include rules for administratively attached offices and bodies.

Regarding rates, the bill requires the committee to ensure compliance with federal directives in regard to expenditure of federal grant awards.

Regarding lease of radio communications, the bill adds "services" as an allowable exchange of equivalent value in addition to money or property.

Regarding telecommunications, the bill adds new material allowing the department to enter into agreements where feasible to provide telecommunication network and related facilities to all branches and may provide a telecommunications network to educational institutions and other entities. Further, the bill allows DoIT to establish price agreements with vendors or IT services, which any public body may directly procure under a departmental price agreements other than an agreement for enterprise services. By July 1, 2023 and by July 1 each year thereafter, the department shall catalog and provide a list of services with approved rates. The bill also allows the secretary discretion to provide services to additional non-agency customers and may require compliance with all rules and guidance but shall not require a non-agency customer to comply with any other law administered by the department unless otherwise provided for in law.

The bill clarifies references to an agency-owned or -operated broadband networks, rather than a statewide network, when it comes to exchange of mutually agreed upon right of way and service agreements.

The bill updates definitions of "broadband infrastructure," to include facilities and equipment used to provide internet service, excluding telecommunications equipment owned, controlled or operated by a public or private end user, "end user," "facilities-based provider," "internet," "open access," "state-owned broadband network," "unserved" and "underserved."

The bill requires all facilities-based providers to report semiannually to the broadband office each year on or before March 1 or September 1 depending on the data source in the same format as reported to the Federal Communications Commission. The bill notes all information reported by a facilities-based provider is critical infrastructure security-sensitive data for which the broadband office shall maintain confidentiality in accordance with applicable state and federal law. The reporting requirements do not apply to tribal corporations federally chartered by the bureau of Indian affairs. The broadband office may adopt rules requiring facilities-based providers to report data in addition to the data required.

The bill also amends the Broadband Access and Expansion Act to allow the broadband office to make recommendations to the department regarding proposals to use the state-owned broadband network to connect unserved and underserved population. The office can lease a portion of the network or provide services to facilities-based providers offering fixed wire broadband pursuant to the following conditions:

- (a) The services are provided in areas where at least 50 percent of the residential and business locations are underserved or unserved;
- (b) The broadband office shall post a notice on its website at least 45 days prior to the execution of the lease or internet service agreement, to include the name of the facilities-based provider, a statement describing the boundaries of the geographical area that will

be served, the specifications of the broadband infrastructure or internet service, and the price;

(c) Within the 45-day posting period, no private facilities-based provider has notified the broadband office in writing that it can provide the same broadband infrastructure or internet service identified in the notice, as applicable, at a price that does not exceed 110 percent of the price being offered by the department; and

(d) If the lease exceeds 10 years, the lease is first approved by the state board of finance.

The department may sell or otherwise transfer ownership of a portion of the state-owned broadband network provided that the department and any successor in interest shall not transfer ownership of any portion of the state-owned broadband network to any wholly private entity for at least 20 years after construction of the broadband infrastructure to be sold was completed. The bill also clarifies that the department shall not sell or otherwise deliver internet service directly to a non-governmental end user. The bill also requires the department to adopt and implement rules to govern the sale or lease of state-owned broadband network capacity to the private sector, including processes to enable a facilities-based provider to challenge a determination that an area is able to receive state-owned broadband network capacity.

The effective date of this bill is July 1, 2023.

FISCAL IMPLICATIONS

DoIT notes:

OBAE is administratively tied to the Department of Information Technology (DoIT), which handles all administrative functions and program support. If SB452 is enacted, DoIT may have increased administrative services responsibilities with respect to the acquisition, maintenance and management of broadband assets. OBAE conservatively estimates a \$230 thousand annual impact for two additional FTE (project managers) and other costs such as equipment, office supplies, and HCM fees. These costs may be offset with revenue derived from leasing some of the assets although it is difficult to estimate the likely offset at this point.

There will also be costs associated with implementing an administrative hearings process. If DoIT does work with AHO, there would be a fiscal impact to both agencies. AHO, in a similar bill, noted the following related to hearing costs:

AHO has had agreements (memorandums of understanding) with five other agencies in the past years to conduct those agencies administrative hearings. Under those agreements, AHO charges a \$100 case referral time for initial staff time in creating a new hearing file/case assignment/scheduling and \$50 per hour for any required travel time for conducting the hearing. Additionally, under those agreements, AHO charges \$100 per hour for hearing officer time in preparation for the hearing, in conducting the hearing, and in writing a hearing officer report or orders on the case.

As noted by AHO previously, it is unknown what the potential volume of hearings would be under SB452, but AHO assumed a caseload of 5-10 cases per year, which would generate \$10 thousand to \$20 thousand, paid by DoIT to AHO. However, DoIT may implement their own hearing processes and may choose to not go with AHO services, so the fiscal impact for hearing fees could be zero. If DoIT does go with AHO services but has more than the expected 10 cases

annually, the office may not have enough hearing officer capacity to meet demand, and therefore there may be a need for additional hearing officer FTE. Therefore, the fiscal impact related to administrative hearings could range from \$0 to \$20 thousand annually if AHO is chosen and is able to meet demand, plus up to an additional \$146 thousand for additional FTE if exceeding that expected demand. Both costs would be a recurring cost to the general fund.

Further, the Children, Youth and Families Department notes:

CYFD currently has 38 sites, of which only two (2) meet the new standard; and only six (6) do not meet the definition of being underserved. Moving to a new standard will improve telecommunications performance significantly. Additionally, as CYFD's Eagle Nest Reintegration Center is still operating on a legacy technology circuit, this bill will help secure federal funding to reduce the cost of providing broadband to the location.

CYFD notes any administrative costs for meeting these new requirements could be absorbed into its existing budget.

SIGNIFICANT ISSUES

In analysis of a similar bill, DoIT provided the following history:

The regulatory roles and responsibilities of OBAE and the Connect New Mexico Council (CNMC) materially altered and expanded the administrative responsibilities of the department. Prior to the creation of OBAE and the CNMC in 2021, the department's mission was limited to providing enterprise services for public sector customers. OBAE and the council are charged with significant grant making and award oversight in both the public and private sector. As regulators in the private sector, OBAE and the CNMC owe duties of transparency and due process that are under the administrative responsibility of the department. To fulfill those responsibilities, the department must promulgate public facing rules, organize and manage open meeting processes, and establish administrative hearing procedures. Because the existing DoIT Act does not expressly authorize the department to administer processes that regulate in the private sector, changes to the Act are necessary to ensure appropriate authority.

In analysis of a similar bill, DFA noted the "creation of Administrative Hearing Office within DoIT...presents conflict of interest as DoIT becomes both regulatory and enforcement thus consolidating power to a single entity and power at Secretary's discretion and removes accountability from public scrutiny." Further, SLO notes it is unclear what "powers, duties, or jurisdiction this new tribunal would have and how it would be structured."

AHO noted in an analysis of a similar bill:

Typically, AHO issues final decisions and orders subject to appeal either to the District Court or the Court of Appeals. However, many agencies conduct hearings with recommended decisions for the cabinet secretary to adopt. This is usually determined by statute. This bill is silent on who makes the final decision and order in an administrative proceeding. This bill is also silent on the venue of an appeal. While these items can certainly be addressed by rulemaking, typical administrative hearing statutes in other areas of state statute specify these provisions.

The bill states that DoIT could offer broadband infrastructure or internet service to connect underserved or unserved communities "at the department's established rates on a competitively

neutral basis.”

The bill requires DoIT to list its services with approved rates but does not require agencies to procure or adopt those services, maintaining some level of independence among agencies who may have specialized IT needs or may receive better pricing elsewhere.

HSD notes if DoIT includes cybersecurity in the service catalog, then HSD, and likely other agencies, may or may not choose to procure those services from DoIT depending on other limitations or regulations in federal law, noting:

It is possible that HSD compliance with IRS Publication 1075 standards for Federal Tax Information (FTI), compliance with Health Insurance Portability and Accountability (HIPAA) for Personally Identifiable Information (PII) and Protected Health Information (PHI), and compliance with Minimum Acceptable Risk Standards for Exchanges (MARS-E) may already be more rigorous than what DoIT would provide, raising the question of whether or not HSD IT security will be enhanced as a result.

The State Land Office (SLO) notes that the bill “focuses on the state-owned broadband network under DoIT’s authority, which appropriately does not include the State Land Office, [so] the proposed legislation would not have any performance implications [for the office]. Furthermore, in accordance with the direction of the Commissioner of Public Lands, the State Land Office currently coordinates with the broadband office and works with individual applicants to expedite and advance broadband access to underserved areas on state trust lands within the control of the agency.”

The Department of Public Safety notes some of the more obvious executive-branch agencies not included within the scope of the substitute version are:

- Attorney General’s Office
- Commissioner of Public Lands
- State Auditor
- Secretary of State
- New Mexico Finance Authority
- New Mexico Mortgage Finance Authority
- State Investment Council
- Office of the State Engineer
- Interstate Stream Commission
- Public Regulation Commission
- Administrative Office of the District Attorneys
- Public Defender Department
- Public Employees Retirement Association
- Public School Insurance Authority
- New Mexico Sentencing Commission
- State Ethics Commission
- State Lottery
- Office of the Superintendent of Insurance

If the intention is for the bill to apply to any of these entities, there may need to be adjustments made to the language to include them directly.

Further, SJC amendments to the bill remove the term “executive” from several sections. It is

unclear if the intention behind the amendment was to allow the secretary to have greater oversight over all agencies, not just executive ones, or if the intention was to remove redundant references to an “executive” agency, since the definition of “agency” in the bill refers just to executive branch cabinet agencies and their administratively attached agencies, offices, boards and commissions. Therefore, it is unlikely that the changes will require DoIT to provide these oversight and compliance services to other agencies that do not fall under this definition, such as the courts.

The SJC amended bill amends the definition of “public educational institution” to now mean any agency, not just a state one, which provides administrative, funding, or technical support to schools and school districts. However, it is unclear if this definition is in line with other definitions of public educational institution in other areas of statute.

ADMINISTRATIVE IMPLICATIONS

DoIT will likely need to stand up administrative systems for private sector regulatory processes, administrative hearing processes, and other staff for managing activities and ensuring compliance. DoIT provides estimated costs of 5 needed FTE above.

HSD notes the agency currently uses DoIT as an internet service provider (ISP) and are therefore already using DoIT to provide the majority of HSD internet connectivity. Similarly, the State Land Office (SLO) is currently a DoIT customer for broadband services in its Santa Fe main office and for its field offices where the service is available and cost competitive. As a customer of DoIT-operated broadband services, SLO “follows defined standards for the services and will continue to do so.”

If other agencies change from agency-led IT services to DoIT-provided services, the agencies would likely experience administrative changes. This could result in a need to re-organize existing divisions or departments related to IT functions. However, the bill does not require agencies to move from agency-led to DoIT-led services, so this impact is limited to the extent that agencies choose to procure new services with DoIT.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

SB280 would establish a cybersecurity advisory committee and a cybersecurity office, both of which would be attached to and supported by the department. This could impact the organization and duties of the department if passed.

SB269 proposes to make similar, and in some cases, duplicative changes to the DoIT Act but does not address a majority of the broadband related provisions as written in SB452. Both bills would need to be reconciled to prevent duplication of authorities or responsibilities.

The bill’s definition of “information technology system” is the same as that provided in House Bill 262, which provides public record exemptions for certain information technology system information. However, both bills do not specify the type of “infrastructure” that is included in that definition.

OTHER SUBSTANTIVE ISSUES

The Corrections Department (NMCD) notes concerns regarding the definitions provided in the bill:

In SB0452 Section 1.E, an information technology project is defined as “the purchase, replacement, development or modification of a hardware or software system”. This is an extremely broad definition that would define the purchase of any hardware or software as a project. Should the proposed new language remain as-is, NMCD believes it will lead to unnecessarily higher costs and longer timeframes for routine matters as they may inadvertently and inappropriately require review of the Project Certification Committee for every IT purchase.

The Project Management Institute (PMI) defines a project as a temporary endeavor that is unique and differs from routine operations. (PMI, n.d.) A project by this accepted definition carries a measure of risk and opportunity and often is transformational and warrants management separate from daily operations. The currently proposed definition in Section 1.E to include any hardware or software system purchase is overly broad, could be construed to include routine operations and does not conform to the definition established by the worldwide authority on project management.

To address this concern, NMCD recommends the following language modifications for the definition of an information technology project.

E. “Information technology project” or “project” means a temporary information technology endeavor with an established beginning and end time that has a set of defined tasks and assigned resources, undertaken to develop a unique product, service or result that:

- (1) establishes a new technology-based system or service;
- (2) facilitates a significant business process transformation using technology; or
- (3) includes a major change in technology architecture or a system migration beyond that considered as general maintenance, enhancement, or refresh activity.

SLO also notes the definitions of “underserved” and “unserved” in the bill could be more consistent, noting “unserved” refers to speeds “per second” while the definition language of “underserved” does not. SLO notes “if the speeds are both calculated on a per second basis, the ‘underserved’ definition should include this language as well.”

WHAT WILL BE THE CONSEQUENCE OF NOT ENACTING THIS BILL

DoIT provides the following:

OBAE/DoIT will not be able to develop and operate a “state-owned broadband network,” which is a critical component in connecting underserved and unserved populations of New Mexico and in otherwise enhancing the adoption of broadband technologies statewide in order to improve access to essential services, education, healthcare, and to

promote economic development.

DoIT will not be expressly permitted to enter into agreements to provide telecommunication network and related facilities to all executive, legislative and judicial branches and to educational institutions and other entities, when capacity to do so exists.

OBAE will not have access to critical data from facilities based providers which the office needs in order to provide connectivity to individuals and entities statewide given the changing technologies, markets and availability of service.

Outdated definitions will persist in the law, many of which do not conform with the constitutional change enacted after the passage of Constitutional Amendment 2. This will hinder the provision of broadband, especially in rural areas.

AMENDMENTS

SLO notes:

The bill would amend NMSA 1978, Section 9-27-6 to establish an administrative hearing and enforcement process “internal to the department or in coordination with the administrative hearings office to support private sector regulatory activities of the department or any administratively attached office or body.” It is unclear what powers, duties, or jurisdiction this new tribunal would have and how it would be structured.

However, the substituted bill specifies that the hearings office shall support *the department's* private sector regulatory activities, which may help clarify jurisdiction.

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