

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the Legislature. LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

FISCAL IMPACT REPORT

SPONSOR <u>Padilla</u>	LAST UPDATED <u>2/11/24</u>	ORIGINAL DATE <u>2/6/24</u>
SHORT TITLE <u>Broadband Infrastructure</u>	BILL NUMBER <u>Senate Bill 45/aSTBTC</u>	ANALYST <u>Hilla/Ortega</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT*

(dollars in thousands)

Agency/Program	FY24	FY25	FY26	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
DoIT	No fiscal impact	\$1,053.8	\$1,065.9	\$2,119.7	Recurring	General Fund
DoIT	No fiscal impact	Up to \$10,000.0	Up to \$10,000.0	Up to \$20,000.0	Recurring	Other State Funds
PSCOC	No fiscal impact	Up to (\$10,000.0)	Up to (\$10,000.0)	Up to (\$20,000.0)	Recurring	Other State Funds
Total	\$300.0	\$11,353.8	\$11,365.9	\$23,019.7	Recurring	General Fund

Parentheses () indicate expenditure decreases.

*Amounts reflect most recent analysis of this legislation.

Relates to Appropriation in the General Appropriation Act

Sources of Information

LFC Files

Agency Analysis Received From

Taxation and Revenue Department (TRD)
 Department of Finance and Administration (DFA)
 Department of Information Technology (DoIT)
 Office of Broadband Access and Expansion (OBAE)
 Public Regulation Commission (PRC)
 State Land Office (SLO)
 Public School Facilities Authority (PSFA)
 Higher Education Department (HED)
 Legislative Education Study Committee (LESC)
 Department of Transportation (NMDOT)
 Public Education Department (PED)

SUMMARY

Synopsis of STBTC Amendment to Senate Bill 45

The State Tax Business and Transportation Committee amendment to Senate Bill 45 amends the Severance Tax Bonding Act as opposed to the Tax Administration Act. The amendment removes the regulation of utility pole attachments by the Public Regulation Commission.

Synopsis of Original Senate Bill 45

Senate Bill 45 (SB45) amends statutes encompassing the Office of Broadband Access and Expansion (OBAE)'s work with education technology infrastructure and general broadband. The bill:

- Amends the Tax Administration Act;
- Allows OBAE to issue up to \$10 million in supplemental severance tax bonds per year for education technology infrastructure;
- Amends the Procurement Code; service contracts may exceed the four-year limit typically associated with government contracts;
- Strips Public School Capital Outlay Council's (PSCOC) authority to spend up to \$10 million on the education technology deficiencies correction program; the education technology deficiencies correction program oversight will be transferred from PSCOC to OBAE;
- Gives the Public Regulation Commission (PRC) regulation authority over utility pole attachments not regulated by federal law;
- Gives power to New Mexico to have authority over issuing fees, charging providers, and monitoring wireless providers' implementation of infrastructure;
- Amends the Connect New Mexico Act to remove membership of the Public School Facilities Authority (PSFA) from the Connect New Mexico Council and replaces that member with the secretary of the Public Education Department or the secretary's designee;
- Transfers all functions, personnel, money, appropriations, records, furniture, equipment, and supplies related to the broadband deployment and connectivity program from PSFA to OBAE; and
- Transfers all broadband infrastructure owned, leased, or operated by the Department of Information Technology.

The effective date of this bill is July 1, 2024.

FISCAL IMPLICATIONS

The bill divests the Public School Capital Outlay Fund (PSCOF) of the \$10 million that may be expended by the Public School Capital Outlay Council (PSCOC) for education technology deficiency correction initiatives and instead gives authority to the Office of Broadband Access and Expansion (OBAE) to directly request the \$10 million from the Department of Finance's Board of Finance (BOF) by certification of the sale of supplemental severance tax bonds proceeds per fiscal year for expenditures related to education technology infrastructure pursuant to the Broadband Access and Expansion Act. Following an analysis from the Public School Facilities Authority (PSFA), the \$10 million would not be subject to use for only capital expenditures as deemed necessary by the PSCOC pursuant to Section 22-24-4 (B) NMSA 1978, nor would the funds be subject to the provisions of Section 22-24-5 NMSA 1978 related to the state and local match grant requirements. The changes in SB45 are designed to be financially neutral, meaning they would not adversely affect PSCOC's capability to fund construction projects for public schools.

For this analysis, the fiscal impact includes the impact on OBAE and Program Support at the

Department of Information Technology (DoIT). SB45 would impact the overall budget of DoIT as OBAE is administratively attached to DoIT pursuant to Section 63-9J-2 NMSA 1978. For similar reasons, the fiscal impact is geared towards DoIT for the “Other State Funds” line. OBAE says the bill includes a wholesale move of an existing program from the PSFA to OBAE. Following the LFC recommendation for OBAE, there is a transfer of \$650 thousand from PSCOF and 4 FTE transfer from PSFA to OBAE, which is in the House Appropriations and Finance Committee (HAFC) Substitute for House Bill 2 for the General Appropriation Act of 2024, thus the fiscal analysis includes this \$650 thousand transfer from the PSCOF. The estimated additional operating budget impact on DoIT is related to the recurring expenses for needed additional staff in DoIT’s Program Support and OBAE.

It is important to note that PSFA does not receive general fund, rather operational funds are derived from the PSCOF, thus PSFA says adjustments and approvals from DFA are needed rather than a transfer of salary costs from PSFA to OBAE.

All functions, personnel, money, appropriations, records, furniture, equipment, supplies, and other property pertaining to PSFA’s Broadband Deficiency Correction Program (BDCP) are to be transferred to OBAE.

SIGNIFICANT ISSUES

The New Mexico Broadband Deficiency Correction Program (BDCP) was created to assist K-12 public schools with corrected technology infrastructure deficiencies. Following current statute, the PSCOC may spend up to \$10 million annually over five years to correct broadband infrastructure problems in public schools as the Council has oversight of the broadband deficiency correction program. BDCP funding is limited just to public school districts and charter schools; libraries, private schools, and Bureau of Indian Education (BIE) Tribal Schools are not eligible for BDCP funding. PSCOC has had difficulty in spending the full \$10 million allowance each year, thus SB45 suggests moving this money over to OBAE in the form of the supplemental severance tax bonds to continue the work of implementing the BDCP.

A majority of what the bill does is outlined in OBAE’s legislative requests in their Three-Year Broadband Plan published in early January of 2024. OBAE is currently in charge of overseeing certain aspects of an education technology infrastructure project’s expenses, operating under the supervision of PSCOC.

OBAE and PSFA already have a Memorandum of Understanding (MOU) to transfer a \$10 million annual allowance from the Public School Capital Outlay Fund (PSCOF) to OBAE for the purposes outlined in this bill. There is also an existing Intergovernmental Agreement (IGA) between PSFA, PSCOC, DoIT, and OBAE, which precipitates the proposed amendments and changes of the bill. OBAE states transferring BDCP from PSFA will allow the office to move faster and more efficiently to deploy the State Education Network with other federal and state broadband programs. OBAE states there has been difficulty within the Office to execute the State Education Network despite the office’s MOU and IGA with PSFA due to lack of funding and differing procurement rules. Despite this, OBAE placed the first nodes needed for connectivity under contract. PSFA says they and PSCOC do not object to the transfer of the BDCP staff, but PSFA states that collaboration with PSFA and OBAE is still necessary.

OBAE is expected to assume responsibilities related to the certification of necessary elements

and funding. However, for this transition, collaboration with the State Board of Finance within the Department of Finance and Administration (DFA) is crucial. The coordination involves determining the certification criteria, ensuring compliance with state and, if applicable, federal tax laws, and establishing the procedures for reimbursement of expenditures. Although this represents a new procedure for OBAE, it aligns with the established process for capital project expenditures, mirroring the funding flow currently in place for PSCOC and other capital outlay allocations.

The bill proposes the creation of a grant program, overseen by OBAE, dedicated to funding education technology infrastructure, in addition to continuing the construction of the State Education Network. The State Education Network aims to establish a comprehensive connection among all interested public schools and public libraries. Aligned with the OBAE's three-year plan, the goal is for all eligible institutions to be part of the State Education Network by 2027. Eligible institutions do not include charter, private, or tribal schools. SB45 outlines several key elements that OBAE is required to develop, including adequacy standards, cost considerations, project prioritization methodologies, criteria for education technology infrastructure projects, district cost-sharing methods, and guidelines for the State Education Network, among others. This legislative initiative aims to enhance and expand education technology infrastructure while adhering to established standards and systems.

PERFORMANCE IMPLICATIONS

OBAE notes if the BDCP fails to transition from the PSFA to the OBAE, OBAE will terminate the MOU. The complexity of procurement processes and associated administrative tasks spanning both agencies is deemed too time-consuming and energy-draining, posing a distraction from OBAE's statutory obligations in the absence of sufficient funding or authority. Although OBAE intends to maintain collaboration with PSFA on the State Education Network, retaining the BDCP team at PSFA could hinder operational efficiencies in broadband program deployment. This situation may significantly impact the provision of e-rate services to schools, potentially resulting in substantial financial losses for educational institutions. Moreover, the deployment of the State Education Network could face delays, with an unclear timeline for implementation.

ADMINISTRATIVE IMPLICATIONS

Both PSFA and OBAE note that relocating the PSFA program necessitates transferring employees to the classified service. OBAE states it has initiated communication with the State Personnel Office (SPO) to establish a procedural framework for this transition. Additionally, the modification in procurement practices allowing for multi-term contracts is in harmony with the industry norm of providing services for periods exceeding four years in network operations.

The State Land Office (SLO) says the proposed legislation may lead to a rise in the allocation of rights of way on state trust lands, potentially triggering a variable number of additional tasks for archaeological, environmental, and other internal assessments. Furthermore, this could generate an uncertain level of extra revenue.

SB45 aims to streamline this process by creating specific supplemental severance tax bond

revenue for education technology infrastructure, granting OBAE direct authority over fund expenditure. The bill also introduces a new grant program, imposing significant administrative responsibilities on OBAE, such as developing adequacy standards, creating a methodology for project prioritization, and assessing the condition of schools' education technology infrastructure. This workload raises questions about OBAE's readiness for the new program. SB45 additionally proposes changes to the Connect New Mexico Council (Council), granting membership to the PED while removing the PSFA representative.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Relates to appropriation in the General Appropriation Act of \$650 thousand from the public school capital outlay fund to the Department of Information Technology. Relates to \$25 million appropriation in the GAA to DoIT for broadband implementation.

TECHNICAL ISSUES

The State Land Office (SLO) references Senate Bill 43, a related broadband bill, which includes explicit language excluding state trust land from the bill's provisions. SLO says that a similar exclusion in SB45 would bring both bills in harmony and avoid potential conflict with the Enabling Act. Further, the definition of "authority" in the bill violates the Enabling Act. Section 8 of the bill amends the definition of "authority" to include the State of New Mexico, but the Telecommunications Act requires an "authority" to allow co-location of broadband infrastructure on pre-existing utility poles. SLO says that the extent companies would be allowed to "piggyback" off existing utility rights of way on state trust lands "without seeking authorization from the Commission of Public Lands, this would also violate the Enabling Act." SLO suggests that the definition of "authority" should be amended to include the state of New Mexico with "lands under the custody or control of the commissioner of public lands."

The STBTC amendment addresses SLO's concerns of the pole attachments because the amendment removes the regulation of the utility pole attachments that are not regulated by federal law.

PSFA comments on the following:

- On page 43, lines 24 and 24 reference is made to the broadband office and for consistency. It should be changed to the office of broadband access and expansion.
- The definition of education technology infrastructure is limited to equipment may want to make it inclusive of software and software as a service.
- On pages 47 and 48, SBX proposes funding for charter schools. This may be inconsistent with the Anti-donation clause.
- Sections 17 and 18 are titled, Temporary Provisions; however, SB45 proposes to repeal.
- Section 22-24-4.5 NMSA 1978 related the PSCOCs duties related to education technology infrastructure deficiency corrections.

The Public Education Department (PED) says:

The bill includes a temporary provision that proposes to deem all statutory references to "the broadband deployment and connectivity program" as references OBAE, yet that program is referred to in statute as, "the educational technology deficiencies correction

program.” The term, “broadband deployment and connectivity program” does not actually appear in current statute.

OTHER SUBSTANTIVE ISSUES

The bill removes authority from DoIT to the director of OBAE, as well as changes the limits on the use of the \$10 million severance bonds that PSCOC currently has. The bill would allow OBAE to have a longer period to expend the money, as well as change authority from the Council to the director of OBAE to delegate the amount and recipients of the connect New Mexico fund.

The bill amends the Connect New Mexico Act to remove membership of the Public School Facilities Authority (PSFA) from the Connect New Mexico Council and replace that member with the secretary of the Public Education Department or the secretary’s designee. Though the bill would remove membership of PSFA from the Council, PSFA says that their involvement on the Council is pertinent to the development of new school construction. OBAE says that they would continue to collaborate with PSFA on the State Education Network.

OBAE reports “The Wireless Consumer Advanced Infrastructure Investment Act amendment proposed in SB45 allows for the state to allow for small cell sites on state land. This will help deployment of 5G towers for cell phones which have increased speed but require more cell sites to provide similar coverage to 4G. This also benefits wireless internet providers with similar capabilities.”

Regarding Enabling Act Restrictions and State Trust Lands, SLO reports:

The Enabling Act of 1910 confirmed this foundational principle guiding the management of the state trust lands, and provides that that leases and other conveyances or contracts involving state trust lands or their resources must be appraised at and sold for “true value,” and that leases or other transactions “not made in substantial conformity with the ... [A]ct shall be null and void.” Act June 20, 1910, § 10, 36 Stat. 557.

The New Mexico Constitution vests the Commissioner of Public Lands with the “direction, control, care and disposition of all public lands,” that is, the state trust lands conveyed by the United States to New Mexico. N.M. Const., art. XIII, § 2; see also N.M. Const., art. V, § 1 (creating the office of Commissioner of Public Lands); NMSA 1978, § 19-1-1 (creating State Land Office as agency through which the Commissioner maintains “jurisdiction over all lands owned [in trust] by the state”). The Commissioner’s core statutory duty is as a fiduciary for the land trust, which includes “maximizing revenues and profits” for New Mexico’s schools and other public beneficiaries. *King v. Lyons*, 2011-NMSC-004, ¶ 103, 149 N.M. 330.

In *State ex rel. State Highway Commission v. Walker*, the New Mexico Supreme Court considered whether the Commissioner could be required to waive right of way fees for the state Highway Department (now DOT), which intended to construct a public highway across state trust land. 1956-NMSC-080, 61 N.M. 374. Although the Court recognized that the highway provided a public benefit, it determined that the Enabling Act requires the Commissioner to administer state trust lands “solely for the purpose of the trust imposed – that is, for the benefit of the various state institutions for which the lands were granted.” *Id.*, ¶ 5. Rejecting the Highway Department’s argument that “an agency of the

state [should not] be charged for the use of state property,” the Court held that the Enabling Act “permit[s] no license of construction” for free use of state trust land or resources, and that the Highway Department “must ... compensate the trust for rights-of-way...” Id., ¶¶ 12, 29. Walker makes clear that easements or rights of way across state trust land cannot be obtained without consideration. There is a further consideration that to the extent easements or rights-of-way are intended for private party use, obtaining state land (including state trust land) for such use without consideration would violate the Anti-Donation Clause of the New Mexico Constitution.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to DoIT, if the proposed bill is not implemented, several adverse outcomes may arise. Resource limitations are likely to persist, affecting OBAE, PSFA, and DoIT itself. Additionally, procurement contracts may deviate from industry standards, leading to potential inefficiencies. The control and management of broadband infrastructure, whether leased, owned, or operated, will continue to rest within the jurisdiction of DoIT.

Furthermore, according to OBAE, if the PSFA BDCP team is not relocated, it could lead to a disruption in e-rate services provided to schools. The support from the PSFA for the program has been slow-moving, lacking sufficient resources for the State Education Network. Without the enactment of SB45, the MOU with the OBAE may be terminated due to ongoing strain on OBAE staff and mission programs. This could result in an extended deployment time for the State Education Network, and managing operational efficiencies within OBAE's broadband programs across a non-executive agency and an executive agency may become challenging. Lastly, according to PSFA, if the relocation of the PSFA BDCP team and its functions does not occur, PSFA will need to allocate additional resources to successfully carry out all broadband initiatives, including those related to the State Education Network.

POSSIBLE QUESTIONS

The Connect New Mexico Council comprises members representing or appointed by legislative, tribal, and executive leadership; would transferring control of the connect New Mexico fund from the Connect New Mexico Council to OBAE diminish the balance of interests that currently inform use of the fund?

EH/AO/ss/ne/hg