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FISCAL IMPACT REPORT

SPONSOR STBTC **ORIGINAL DATE** 02/23/21
LAST UPDATED 03/15/21 **HB** _____
SHORT TITLE Regional Broadband Franchise Act **SB** 413/STBTCS
ANALYST Hitzman/Fischer

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Indeterminate	Indeterminate			

(Parenthesis () Indicate Expenditure Decreases)

Relates to HB10 HTPWC/s, HB85, HB86, HB141, SB93, SB144, SB361, and SB366

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Information Technology (DoIT)
 Department of Finance and Administration (DFA)
 General Services Department (GSD)
 Regulation and Licensing Department (RLD)
 Indian Affairs Department (IAD)
 Public School Facilities Authority (PSFA)
 New Mexico Finance Authority (NMFA)
 Department of Transportation (DOT)

No Response Received

Public Regulation Commission (PRC)
 Public Education Department (PED)

SUMMARY

Synopsis of Bill

The Senate Tax, Business, and Transportation Committee's substitute for Senate Bill 413 establishes the statutory framework for governmental entities to form regional broadband franchises (partnerships) to develop broadband infrastructure throughout the state. Once formed, the regional broadband franchises would have broad powers to construct and finance projects, but would not have the power of eminent domain.

The bill also adds provisions to compensate the agency that owns the broadband infrastructure for the maintenance costs incurred due to the lease of such infrastructure and clarifies the definition of a franchise to include two “or more” public agencies and replaces the line providing that franchises not be subject to the general laws of the state, and instead provisions the franchise to “effectuate the separation of the state and member entities from the franchise.” The bill also requires any other laws of the state to reference the “regional broadband franchise” specifically by name if referring to the franchise.

The bill also includes clarification that franchises may not provide retail internet or other services directly to consumers, provided that the lease ensures service providers maintain cybersecurity protocols and data transmission speeds defined by federal standards.

Lastly, the bill strikes the ability of a franchise to borrow money. The effective date of this bill is July 1, 2021.

FISCAL IMPLICATIONS

Senate Bill 413/STBTCS does not contain an appropriation, but likely has workload implications for existing state agency leadership. The bill allows for the creation of broadband franchises, governed by a board made up of one appointee from each member agency, the secretary of DFA or their designee, and the chief broadband officer. Depending on the number of broadband franchises established, the bill could add significant duties for the employees of DFA and DoIT. Further, this bill authorizes a franchise board to hire employees, agents, and an executive director but does not identify or authorize funding to pay for the board staff. Therefore, the bill may result in additional, undetermined operating costs. DoIT also noted the need for “legal, financial, engineering and right of way expertise” to manage the additional responsibilities placed on the department as a result of the provisions in this bill, but did not provide cost estimates for hiring or establishing an expert in these areas.

SB413/STBTCS would allow franchises—partnerships of governmental entities—to develop operating and capital financing plans to ensure the entity would earn sufficient revenue to meet its ongoing financial needs. Revenues generated from lease payments to the franchise would support capital costs. The bill authorizes a regional broadband franchise to issue revenue bonds for its capital projects for up to 40 years. The bonds may be sold through a negotiated or competitive-bid sale process, which is exactly the same authority held by other governmental entities. The bonds would be tax-exempt from state and local taxes. However, federal IRS regulations would govern the taxability of the bonds against federal income tax. A bifurcated bond—federally taxable but state tax-free—may cause confusion in the market and could lower investor willingness to purchase the bonds.

SB413/STBTCS allows broadband franchises to lease infrastructure to third-party Internet or data service provider for retail service but only goes so far as to define net income from the lease of that infrastructure as “pledgeable revenue” to pay off the debt service of the bonds. The bill, as amended, does contain provisions for the public agencies that own the broadband infrastructure to be compensated for its use, particularly for state agencies that would incur additional maintenance costs due to the third-party leases. The bill does not, however, provide direction regarding minimum considerations for lease terms which could allow for the franchise to lease the infrastructure to private companies at sub-market rates.

SIGNIFICANT ISSUES

Generally, development programs similar to that proposed by the bill would include a “but for” test, where a franchise would be required to show that “but for” their investment, broadband service would not develop in the service area because private companies are unwilling to offer the service. As amended, the bill establishes that minimum standards of service or speeds to be provided by the regional broadband franchise must conform to federal standards and includes additional cybersecurity safeguard measures. However, while speed is based on federal standards, cybersecurity protocols are to be determined by the franchise.

The Department of Transportation (DOT) noted that SB413 gives the power of eminent domain to regional broadband franchise partnerships to acquire property or rights of way for broadband infrastructure projects with no exclusion prohibiting a regional franchise from taking publically owned property or rights of way, such as state transportation property and existing rights of way. This may create issues as both DOT and the Indian Affairs Division (IAD) noted that federal law and regulations require DOT to collect fair market value for non-transportation use of federal-aid highway rights of way. *See* 23 CFR 710.403 and 23 CFR 710.405. The fees collected are required to be put to use on the state highway system, and as a result, go into the state road fund.

PERFORMANCE IMPLICATIONS

There are some performance reporting requirements included in SB413/STBTCS. A franchise board must submit reports to the chief broadband officer outlining the progress made toward implementing its mission statement, financial obligations, and projected revenues no later than July 1 each year. By November 30 of each year, the chief broadband officer must also create a report on the development of franchises and franchise service areas to be sent to the “appropriate legislative interim committee.”

ADMINISTRATIVE IMPLICATIONS

Under this bill, a broadband franchise is considered a public corporate entity pursuant to state law, but is not subject to the general laws of the state and is similarly not considered an agency or department of the state or other government. As amended, however, the bill provisions the franchise to “effectuate the separation of the state and member entities from the franchise,” and requires any other laws of the state to reference the “regional broadband franchise” specifically by name if referring to the franchise.

The bill also limits the board from providing retail Internet or other services directly to consumers so long as service providers maintain cybersecurity protocols and federal speed standards, which seems to align with provisions in Section 14 of Article IX of the New Mexico Constitution (the “Anti-Donation Clause”) which prohibits the state or local governments to provide direct or indirect donations or aid to any person or organization. However, the bill does allow for a financing arrangement between a third-party provider and a “public agency,” which, according to PSFA may constitute a debt prohibited by Article IX, Section 10, 11 and 12 of the state Constitution.

According to the bill, board members are public officers subject to provisions of the Governmental Conduct Act. The bill also prevents members of the franchise board, by penalty of felony criminal sanctions, from being employed by an entity that benefits or has benefitted from

activity with the franchise prior to two years after vacating the franchise board position.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill relates to Senate Bill 93/aSFC and House Bill 10 HAFC/s, both of which appropriate funds to create an office of broadband access and expansion at DoIT. In addition, the bill relates to House Bill 85, which appropriates funds to establish tribal IT departments and infrastructure on tribal lands, and House Bill 86, which appropriates capital funding for tribal broadband infrastructure.

The bill also relates to Senate Bill 144 and House Bill 141, both of which expand the definition of education technology infrastructure in the Public School Capital Outlay Act to include services used to interconnect students, teachers, school districts, and school buildings to broadband and remote learning. Senate Bill 144 also requires the Public School Capital Outlay Council to develop guidelines for a statewide education technology infrastructure network and necessary technology projects for education.

The bill also relates to Senate Bill 204 and Senate Bill 361, both of which amends the Rural Telecommunications Act of New Mexico. SB204 defines additional provisions under which carriers can apply and receive support from the State Rural Universal Services Fund (SRUSF), and would allow additional carriers to receive support from the SRUSF. SB361 allows for the use of the SRUSF for consumer broadband-only loops.

The bill also relates to Senate Bill 366, which appropriates \$20 million from the general fund to the Economic Development Department for the purposes of funding the Economic Development Commission to evaluate and enter into 10-year leases or service agreements for high-altitude or satellite broadband transmission for New Mexico residents.

JH/sb/al