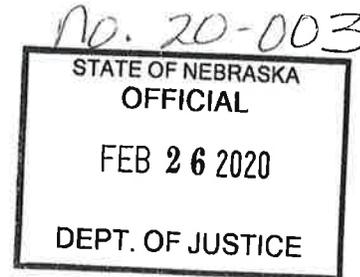




STATE OF NEBRASKA  
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**DOUGLAS J. PETERSON**  
ATTORNEY GENERAL



**SUBJECT:** LB 992 – Constitutionality of Authorizing the Use of Electric Utility Easements to Furnish Commercial Broadband Service

**REQUESTED BY:** Senator Curt Friesen  
Nebraska State Legislature

**WRITTEN BY:** Douglas J. Peterson, Attorney General  
Lynn A. Melson, Assistant Attorney General

### INTRODUCTION

You have requested an opinion from this office concerning the constitutionality of LB 992. Sections 1 to 5 of LB 992 would be known as the Broadband Internet Service Infrastructure Act [“BISIA” or the “Act”]. You describe the bill as allowing an electric utility that holds an electric utility easement, or a commercial broadband supplier designated by the electric utility, to take certain actions without the consent of an interest holder in the real property subject to the easement. The Act would require that notice be provided thirty days prior to taking action with regard to broadband service to the real property owner or other interest holders that have requested notice. It would also establish a two year statute of limitations for claims against an electric utility or commercial broadband supplier and set forth the measure of damages for such claims.

Your specific question is “are the notice provisions relating to due process and the limitation of damages that could be awarded to a property owner constitutional in light of Article 1, Section 3 of the Nebraska constitution . . . .”

## ANALYSIS

### I. Provisions of LB 992

You have introduced LB 992 to implement the recommendations of the Rural Broadband Task Force. Section 1 of LB 992 states that sections 1 to 5 of the act constitute the Broadband Internet Service Infrastructure Act. Section 6 of the act, while not part of the BISIA, expresses the intent of the Legislature “to encourage local and regional broadband planning, and to encourage public-private partnerships to enhance broadband services in unserved and underserved areas of the state.” It appears that the general intent of the BISIA is to facilitate the use of existing electric utility easements to provide commercial broadband service.

Specifically, subsection (1) of section 3 provides that, if certain notice and filing requirements are met, an electric utility holding an electric utility easement may:

- (a) Install, maintain, or own, or permit any commercial broadband supplier to install, maintain, or own, an attached facility for operation by a commercial broadband supplier in providing commercial broadband service; and
- (b) Lease or otherwise provide to a commercial broadband supplier any excess capacity of attached facilities for purposes of providing commercial broadband service.

An “attached facility” is defined at section 2 of LB 992 to mean a broadband facility located substantially “aboveground and attached to an electric utility’s electric service infrastructure” or “underground in an electric utility easement and existing before the delivery of notice pursuant to section 3 . . . .”

The electric utility may take the actions described above without the consent of an interest holder in the real property subject to the electric utility easement. However, in order to do so, subsection (2) of section 3 requires that the electric utility or its designated commercial broadband supplier must first send notice to each property owner and to any other interest holder that has recorded a request for notice with the county clerk. That notice must be sent by certified mail at least thirty days before taking the actions described in subsection (1) of section 3. In addition, the electric utility or its designated commercial broadband supplier must record a memorandum in the office of the county clerk.

Section 4 provides a two year statute of limitations for claims brought by an interest holder against an electric utility or commercial broadband supplier concerning the exercise of an action under section 3 of the act. That statute of limitations does not apply to claims based on physical damage to property, injury to natural persons or breach of the terms and conditions of a written electric easement.

Section 4 also contains provisions relevant to your inquiry about damages. As will be discussed below, subsection (3) pertains to the measure of damages for all trespass claims, inverse condemnations claims or other claims brought by interest holders and sets out some limitations on damages which may be recovered.

## II. Article I, § 3 And Article I, § 21

You have inquired about Neb. Const. art. I, § 3 which provides: "No person shall be deprived of life, liberty, or property, without due process of law, nor be denied equal protection of the law." The answer to your questions also concerns Neb. Const. art. I, § 21 which provides: "The property of no person shall be taken or damaged for public use without just compensation therefor." This provision is often referred to as the "takings" clause. A like guarantee is found at U.S. Const. amend. XIV which provides, as is relevant: "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." We note that the protection afforded a property owner under the Nebraska Constitution is broader than that provided in the United States Constitution as it protects against state action taking *or damaging* private property. For purposes of this opinion, we will discuss these constitutional provisions together.

We begin with a general discussion of eminent domain. The Nebraska Supreme Court, referring to *Thompson v. Heineman*, 289 Neb. 798, 857 N.W.2d 731 (2015), described eminent domain as follows:

Eminent domain is the State's inherent power to take private property for a public use. The State's eminent domain power resides in the Legislature and exists independently of the Nebraska Constitution. But the constitution has limited the power of eminent domain, and the Legislature can limit its use further through statutory enactments. Under Neb. Const. art. I, § 21, the State can take private property only for a public use and only if it pays just compensation. Only the Legislature can authorize a private or public entity to exercise the State's power of eminent domain. *Estermann v. Bose*, 296 Neb. 228, 240, 892 N.W.2d 857, 867 (2017) (citations omitted).

The state's power of eminent domain may be delegated by the Legislature. Eminent domain power "belongs to the state and may be exercised either directly by the Legislature or through the medium of corporate bodies, which includes municipalities, or of individual enterprises to whom it sees fit to delegate such power in the public's interest." *In re Condemnation of Blocks 13, 14, 15, Koehler's Subdivision, City of Grand Island*, 144 Neb. 67, 69, 12 N.W.2d 540, 541 (1943). As noted by the Nebraska Supreme Court in *Estermann*, the Legislature has delegated the power of eminent domain to natural resource districts, which are political subdivisions of the state. *Id.* at 240, 892 N.W.2d at 867. Private entities, such as railroads, have also been delegated the statutory authority to acquire land through eminent domain. *Burlington Northern and Santa Fe Ry. Co. v. Chaulk*, 262 Neb. 235, 631 N.W.2d 131 (2001) [*"Burlington Northern"*].

LB 992 concerns existing electrical utility easements held by an electric utility. LB 992, § 2(4). The takings clause applies to takings of real property, including easements. *In re Petition of Omaha Public Power District*, 268 Neb. 43, 680 N.W.2d 128 (2004) (public power district filed a petition for condemnation to condemn a permanent right-of-way easement to construct an electric powerline); *Liberty Development Corp. v. Metropolitan Utilities Dist. Of Omaha*, 276 Neb. 23, 751 N.W. 2d 608 (2008).

Finally, under art. I, § 21, any private property which is taken must be taken for a public use. "It is essential that property taken under the power of eminent domain be for a public use and not a private one." *Burlington Northern*, 262 Neb. at 242, 631 N.W.2d at 137. However, the definition of public use is a broad one. The use of the power of eminent domain to build public highways, to acquire land for public buildings or to install electrical and telephone lines are examples of public uses. It has long been held that the generation and transmission of electricity for the purpose of furnishing electrical power to the public is a public use for which the power of eminent domain may be exercised. *Lucas v. Ashland Light, Mill & Power Co.*, 92 Neb. 550, 138 N.W. 761 (1912). In our view, broadband service has become as essential a part of the infrastructure as electrical and telephone service and the provision of broadband service to the public would be found to constitute a public use.

### III. Due Process In The Context of Eminent Domain

You have inquired whether the notice provisions of LB 992 are constitutional in light of Neb. Const. art. I, § 3, which mandates that no person shall be deprived of property without due process of law. Because you have referred to the notice provisions, we assume you are referring to the principle of procedural due process which generally entails notice and an opportunity for a hearing. However, due process does not guarantee any particular form or method of procedure in the context of eminent domain, and, in some situations, it may be sufficient that the landowner has an opportunity for a hearing on the issue of just compensation.

Specifically, if eminent domain authority is exercised without first instituting condemnation proceedings, a landowner may file a claim for inverse condemnation. "Inverse condemnation is a shorthand description for a landowner suit to recover just compensation for a governmental taking of the landowner's property without the benefit of condemnation proceedings." *Cappel v. State Department of Natural Resources*, 298 Neb. 445, 452, 905 N.W.2d 38, 46 (2017). "While the property owner cannot compel the return of the property taken, because of the eminent domain power of the condemner, he has a constitutional right, as a substitute, to just compensation for what was taken." *Krambeck v City of Gretna*, 198 Neb. 608, 614, 254 N.W.2d 691, 695 (1977). And, the Nebraska statutes which set forth the procedures applicable to eminent domain actions recognize that a landowner may initiate the proceedings. "If any condemner shall have taken or damaged property for public use without instituting condemnation proceedings, the condemnee, in addition to any other available remedy, may file a petition with the county judge of the county where the property or some part thereof is situated to have the damages ascertained and determined." Neb. Rev. Stat. § 76-705 (2018).

The Court did find a violation of due process in an inverse condemnation case brought by the owner of an unoccupied home which had been demolished by the city. *Blanchard v. City of Ralston*, 251 Neb. 706, 559 N.W.2d 735 (1997). There, a notice posted on the house which gave Blanchard three days to remedy the unsafe home and ten days to appeal the decision to demolish was insufficient. The Court noted that three days was not a reasonable time to take necessary steps to make the house safe and that the notice failed to adequately notify Blanchard of the City's safety concerns. In addition, although a notice of appeal was filed by the property owner, demolition of the home began prior to the time of the hearing. However, in general, when there has been a deprivation of a significant property interest, "due process requires notice and an opportunity to be heard *that is appropriate to the nature of the case.*" *Prime Realty Development, Inc. v. City of Omaha*, 258 Neb. 72, 76, 602 N.W.2d 13, 16 (1999) (emphasis added). And, in *May v. City of Kearney*, 145 Neb. 475, 17 N.W.2d 448 (1945), the Court upheld a statutory scheme which provided for limited hearings on the issue of just compensation.

Here, LB 992 provides that an electric utility with an existing electric utility easement may install, maintain, or own an attached facility, or lease excess capacity of attached facilities for purposes of providing commercial broadband service only if, at least thirty days before taking action, it mails notice to each property owner and to any other interest holder that has recorded a request for notice in the office of the county clerk. LB 992 § 3(2). This notice provision appears adequate under the Nebraska cases discussed above. The bill also recognizes that an interest holder may bring a claim against an electric utility or a commercial broadband supplier after that entity has taken action pursuant to section 3. Section 4 refers to a statute of limitations for claims against the electric utility or commercial broadband supplier, specifies the measure of damages which may be awarded to an interest holder, and refers to that interest holder bringing "a trespass claim, inverse condemnation claim, or any other claim or cause of action." Therefore, although there is no requirement under LB 992 that the electric utility first institute condemnation proceedings, a landowner or other interest holder retains the right to initiate proceedings and to be heard.<sup>1</sup>

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<sup>1</sup> LB 992, § 4(1)(a) provides a two year period for bringing a claim against an electric utility or commercial broadband supplier under the Act. Section 4(1)(b) provides that this two year statute of limitations does not apply to claims based on physical damage to property, injury to natural persons or breach of the terms of a written electric easement. While you have not inquired about the statute of limitations, we note that the Nebraska Supreme Court has held that actions commenced under art. I, § 21 are governed by the ten year statute of limitations in Neb. Rev. Stat. § 25-502 (2016). *Krambeck v. City of Gretna*, 198 Neb. 608, 254 N.W.2d 691 (1977). An exception is an inverse condemnation claim against the State for which the two year statute of limitations in Neb. Rev. Stat. § 25-218 applies. LB 992 would provide another exception.

#### IV. Damages Pursuant to LB 992

You also inquire about the constitutionality of LB 992's limitation of damages that a landowner may request. LB 992, § 4(3) contains several provisions which would govern the damages which may be awarded to a landowner or other interest holder. The measure of damages is defined at § 4(3) (a) as "the fair market value of the reduction in value of the interest holder's interest in the real property." This compares to the Nebraska Supreme Court's holding that "the measure of damages for the taking of an easement is the difference in the reasonable market value of the property before and after the taking of the easement." *In re Petition of Omaha Public Power District*, 268 Neb. 43, 51, 680 N.W.2d 128, 136 (2004) (citing *Ward v. Nebraska Electric G. & T. Co-op, Inc.*, 195 Neb. 641, 240 N.W.2d 18 (1976)).

However, § 4(3)(a)(i) then provides that neither evidence of profits or revenue derived from the attached facilities nor evidence of the rental value of the real property interest or electric easement are admissible in a judicial proceeding. Section 4(3)(a)(ii) requires that "[c]onsideration must be given to any increase in value to the real property interest resulting from the availability of commercial broadband service to the real property ...." Section 4(3)(c) provides further restrictions on damages, including the provision that "an interest holder is not entitled to reimbursement ... for the cost of any appraisal, attorney fees, or award for special, consequential, indirect, or punitive damages." Also, currently, a landowner who prevails in an inverse condemnation action would generally be entitled to an award of costs and expenses, which may include reasonable attorney's, appraisal, and engineering fees. Neb. Rev. Stat. § 76-726 (2018).

To the extent that LB 992 places these restrictions on damages that may be recovered, it creates some uncertainty whether the bill is consistent with the constitutional requirement of just compensation.<sup>2</sup> We cannot say that the damages limitations are facially invalid. However, as applied in a particular case, the limitations may not satisfy the just compensation requirement of art. I, § 21.

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<sup>2</sup> LB 992 is based on a bill enacted by Colorado in 2019 and codified at Colo. Rev. Stat. §§ 40-15-601 to 40-15-604. The Colorado statutes include notice and damages provisions substantially similar to those in LB 992. Indiana adopted similar changes in its laws in 2017. Ind. Code §§ 32-30-16-1 to 32-30-16-17. Other states which adopted laws in 2019 to facilitate the use of existing electric easements for broadband purposes include Georgia and Maryland. Ga. Code Ann. § 46-3-205; Md. Code Ann. Corp. & Ass'ns § 5-607 and § 5-641.1. Because these statutes were enacted so recently, we have not found any reported decisions pertaining to the constitutionality of their notice and damages provisions.

## CONCLUSION

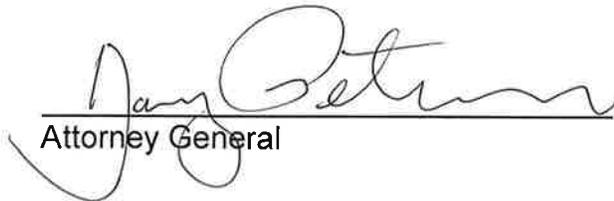
In summary, we do not believe that the proposed legislation would contravene the procedural due process requirements required by Neb. Const. art. I, § 3. LB 992 does require notice to landowners and interest holders and provides an opportunity for a hearing. While the constitutionality of the bill's limitations on damages is less clear, we cannot say those provisions plainly violate Neb. Const. art. I, § 3 or art. I, § 21.

Sincerely,

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Approved by:

  
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pc. Patrick J. O'Donnell  
Clerk of the Nebraska Legislature