

SENATE TAX, BUSINESS AND TRANSPORTATION
COMMITTEE SUBSTITUTE FOR
SENATE BILL 42

55TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2022

AN ACT

RELATING TO PUBLIC UTILITIES; ENACTING THE UTILITY EASEMENTS
FOR BROADBAND ACT; AUTHORIZING THE USE AND SHARING OF UTILITY
EASEMENTS FOR THE PROVISION OF COMMUNICATIONS SERVICE
THROUGHOUT THE STATE; REQUIRING NOTICE OF USE OF UTILITY
EASEMENTS TO THE PROPERTY OWNER; PROVIDING FOR OPTIONAL
RECORDING OF SUCH NOTICE; ESTABLISHING CLAIMS PURSUANT TO THE
USE OF UTILITY EASEMENTS; ALLOWING COST RECOVERY FOR
COMMUNICATIONS INFRASTRUCTURE PROJECTS; PROVIDING DEFINITIONS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. A new section of Chapter 62 NMSA 1978 is
enacted to read:

"[NEW MATERIAL] SHORT TITLE.--This act may be cited as the
"Utility Easements for Broadband Act"."

SECTION 2. A new section of Chapter 62 NMSA 1978 is

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1 enacted to read:

2 "[NEW MATERIAL] DEFINITIONS.--As used in the Utility
3 Easements for Broadband Act:

4 A. "broadband affiliate" means a commercial
5 broadband supplier that is a separate legal entity from any
6 public utility but is controlled by, controls or is under
7 common control with a public utility;

8 B. "burdened parcel" means a parcel of real
9 property subject to a utility easement, other than land under
10 the custody and control of the commissioner of public lands or
11 the state transportation commission and the department of
12 transportation;

13 C. "commission" means the public regulation
14 commission;

15 D. "communications infrastructure" means any
16 wireline or wireless facilities and equipment, including
17 amplifiers, antennae, cable, conduits, ducts, fiber,
18 optronics, poles, structures, towers, transmitters, wires or
19 other facilities or equipment owned by a public utility and
20 used in connection with the provision of communications
21 service;

22 E. "communications service" means any technology
23 having the capacity to transmit data or other signals to enable
24 a user of the service to originate and receive graphics, data,
25 video, voice or other modes of communication;

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1 F. "middle mile broadband service" means the
2 provision of excess fiber capacity on a public utility's
3 communications infrastructure to a communications service
4 provider for the purpose of broadband service to retail
5 customers, but does not include the public utility providing
6 communications service directly to end-use customers on a
7 retail basis;

8 G. "notice address" means the mailing address of
9 the owner of a burdened parcel, or holder of record of an
10 exclusive interest in the burdened parcel for any form of
11 communications service, as listed in the records of the
12 applicable county assessor fourteen days prior to delivery of
13 notice;

14 H. "public utility" means "public utility" as
15 defined in the Public Utility Act; and

16 I. "utility easement" means a franchise, easement,
17 whether recorded or unrecorded, license, right of way or
18 similar right in real property, including a prescriptive right
19 or any right of way acquired pursuant to Chapter 62, Article 1
20 NMSA 1978 held by a public utility."

21 SECTION 3. A new section of Chapter 62 NMSA 1978 is
22 enacted to read:

23 "[NEW MATERIAL] USE OF UTILITY EASEMENTS.--

24 A. For a burdened parcel with a utility easement
25 that does not already provide for or permit the installation,

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1 maintenance, removal or use of communications infrastructure,
2 upon complying with the notice provisions in Section 4 of the
3 Utility Easements for Broadband Act and without approval or
4 consent of the commission, a public utility may:

5 (1) acquire, construct, install, maintain,
6 operate, own, remove or upgrade its communications
7 infrastructure across, in, on, over or under the portion of a
8 burdened parcel that is subject to a utility easement for the
9 purpose of providing middle mile broadband service and may
10 permit third parties to do so if they have acquired a right to
11 do so from the public utility;

12 (2) lease, license, provide a right to use or
13 transfer in whole or in part any of its communications
14 infrastructure located in a utility easement; and

15 (3) enter and access the burdened parcel for
16 the purposes or actions as may be reasonably necessary or
17 desirable in connection with actions pursuant to this
18 subsection.

19 B. A public utility's exercise of its rights under
20 Subsection A of this section is limited to the provision of
21 middle mile broadband service. A public utility shall not
22 directly provide retail commercial broadband service to end
23 users but may cause or allow a broadband affiliate to offer
24 retail commercial broadband service to end-user customers.

25 C. A public utility's exercise of rights under

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1 Subsection A of this section is subject to a generally
2 applicable requirement on the burdened parcel to locate
3 utilities underground if otherwise required to do so by:

4 (1) an ordinance regarding subdivision plats
5 pursuant to Chapter 3, Articles 19 and 20 NMSA 1978, or Chapter
6 47, Articles 5 and 6 NMSA 1978, as applicable; or

7 (2) rules promulgated by a zoning authority
8 pursuant to Chapter 3, Article 21 NMSA 1978.

9 D. Upon a public utility's exercise of rights under
10 Subsection A of this section, such rights run with the land and
11 are valid and binding on successors-in-interest of the owner
12 and any holder of an interest in the burdened parcel regardless
13 of a lack of privity of estate or contract."

14 SECTION 4. A new section of Chapter 62 NMSA 1978 is
15 enacted to read:

16 "[NEW MATERIAL] NOTICE REGARDING USE OF UTILITY
17 EASEMENT.--

18 A. A public utility, or other third party acting
19 pursuant to a lease, license or right to use any of the public
20 utility's communications infrastructure located in a utility
21 easement, shall deliver a notice that substantially contains
22 the information required in Subsection B of this section to the
23 notice address by certified or registered mail or by regional
24 or national delivery service, without requirement for signature
25 upon delivery:

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1 (1) for an exercise of rights pursuant to
2 Subsection A of Section 3 of the Utility Easements for
3 Broadband Act that involves installation or construction, at
4 least ten days prior to the start of such installation or
5 construction; or

6 (2) for an exercise of rights under Subsection
7 A of Section 3 of the Utility Easements for Broadband Act not
8 involving any installation or construction, within forty-five
9 days following such exercise of rights.

10 B. The notice required under Subsection A of this
11 section shall:

12 (1) identify the public utility or party
13 deriving rights from a public utility under Subsection A of
14 Section 3 of the Utility Easements for Broadband Act and
15 provide contact information for a point of contact at the
16 public utility or party deriving rights from a public utility
17 pursuant to that act;

18 (2) furnish a general description of the
19 utility infrastructure already existing in the utility easement
20 as of the date of notice or a general description of the
21 location of the utility easement, which shall not require any
22 legal description, land title survey or any other description
23 of the exact boundaries of the utility easement;

24 (3) provide the parcel number or tax
25 identification number of the burdened parcel, as set forth in

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1 the county assessor's records; and

2 (4) reference the Utility Easements for
3 Broadband Act and state that the public utility or party
4 deriving rights from a public utility pursuant to that act is
5 exercising its rights pursuant to that act.

6 C. The notice required under Subsection A of this
7 section:

8 (1) shall be deemed delivered on the third
9 business day after being deposited in the United States mail or
10 with a delivery service to the notice address; and

11 (2) is required to be sent only once, and no
12 subsequent exercise of rights with respect to the burdened
13 parcel by a public utility or anyone deriving rights through a
14 public utility under Subsection A of Section 3 of the Utility
15 Easements for Broadband Act shall require additional notice."

16 **SECTION 5.** A new section of Chapter 62 NMSA 1978

17 is enacted to read:

18 "[NEW MATERIAL] OPTIONAL RECORDING OF NOTICE.--A public
19 utility may, but is not obligated to, record a notice delivered
20 pursuant to the Utility Easements for Broadband Act, or a
21 recording memorandum of one or more notices in the applicable
22 county clerk's office against all or any portion of a parcel
23 that is subservient to the utility easement, containing the
24 information set forth in Paragraphs (2), (3) and (4) of
25 Subsection B of Section 4 of the Utility Easements for

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1 Broadband Act. Recording a memorandum of notice shall be
2 effective to perfect the rights exercised under Subsection A of
3 Section 3 of the Utility Easements for Broadband Act against
4 all estates and persons holding any interest in the burdened
5 parcel or real property appurtenant thereto, except that a
6 crossing of the right of way of another public utility shall be
7 effected in the manner provided in Section 62-1-4 NMSA 1978."

8 SECTION 6. A new section of Chapter 62 NMSA 1978 is
9 enacted to read:

10 "[NEW MATERIAL] COST RECOVERY.--The commission shall,
11 after notice and hearing, allow a public utility that acquires,
12 constructs, installs, removes or upgrades communications
13 infrastructure pursuant to the Utility Easements for Broadband
14 Act to recover its reasonable costs through a commission-
15 approved tariff rider, in base rates, or both. The public
16 utility shall include a mechanism for the return of costs
17 recovered to customers from profits as a result of leasing,
18 licensing or other transfer of a right to use of the
19 communications infrastructure by a third party in a future rate
20 case. The commission shall within six months determine, and
21 allow cost recovery of, reasonable utility expenditures on
22 communications infrastructure projects. Failure to issue an
23 order approving or denying cost recovery within six months
24 shall be deemed to be approval."

25 SECTION 7. A new section of Chapter 62 NMSA 1978 is

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1 enacted to read:

2 "[NEW MATERIAL] CLAIMS--TIME LIMIT--CALCULATION OF
3 DAMAGES.--

4 A. No claim or cause of action against a public
5 utility exercising its rights pursuant to the Utility Easements
6 for Broadband Act may be brought by any person more than one
7 year after:

8 (1) in the case of a claim or cause of action
9 brought by or on behalf of a person to whom notice under
10 Section 4 of the Utility Easements for Broadband Act was
11 required, the date of delivery of notice; or

12 (2) in the case of a claim or cause of action
13 brought by or on behalf of an interest holder in real property
14 subject to the utility easement, other than a person to whom
15 notice under Section 4 of the Utility Easements for Broadband
16 Act was required, the date of recording of the notice or a
17 memorandum of notice.

18 B. For any claim or cause of action that is brought
19 or may be brought by or on behalf of a person holding an
20 interest in the burdened parcel or real property appurtenant
21 thereto, whether in trespass, inverse condemnation or
22 otherwise, with respect to a public utility's exercise of the
23 rights set forth in Subsection A of Section 3 of the Utility
24 Easements for Broadband Act, the following shall apply:

25 (1) the measure of damages for any and all

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1 such claims or causes of action, taken together, is the fair
2 market value of the reduction in the value of the estate held
3 by such interest holder, as contemplated by Section 42A-1-24
4 NMSA 1978;

5 (2) the following shall not be used and are
6 not admissible as evidence in any proceeding: profits, fees or
7 revenue derived from any such communications infrastructure;
8 the rental value of the real property, utility easement or
9 communications infrastructure; or the value of any
10 communications corridor consisting of easements or similar
11 rights over multiple parcels of real property;

12 (3) consideration shall be given to any
13 increase in the fair market value to the property of the
14 availability of communications service that arises from the
15 installation or use of communications infrastructure in the
16 utility easement;

17 (4) the interest holder bringing a claim or
18 cause of action shall make reasonable accommodations to allow
19 the public utility to conduct an appraisal of the real property
20 within ninety days following a written request by the public
21 utility. If an interest holder fails to make such
22 accommodations, the public utility shall have no further
23 liability to such interest holder with respect to the public
24 utility's exercise of rights under Subsection A of Section 3 of
25 the Utility Easements for Broadband Act;

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1 (5) any claim, cause of action or damages
2 shall be deemed to occur at the time of the public utility's
3 initial exercise of rights, shall be fixed and shall not be
4 deemed to continue, accrue or accumulate;

5 (6) except in the case of another party's
6 gross negligence or willful misconduct, no party to any such
7 claim or cause of action shall be entitled to attorney fees or
8 costs, reimbursement of the cost of any appraisal or any award
9 of special, indirect, consequential, punitive or exemplary
10 damages; and

11 (7) by accepting a damage award in respect of
12 a public utility's exercise of rights under Subsection A of
13 Section 3 of the Utility Easements for Broadband Act, an
14 interest holder in the burdened parcel shall be deemed to have
15 granted a permanent easement or right of way to the public
16 utility for all of the rights set forth in that subsection.

17 C. A claim or cause of action under this section
18 shall not be brought on behalf of a class.

19 D. The limitations on claims and causes of action
20 set forth in Subsections A and B of this section shall not
21 apply to a claim or cause of action based on physical damage to
22 property or injury to natural persons.

23 E. Nothing in the Utility Easements for Broadband
24 Act extends the statute of limitations for any claim or cause
25 of action or shall be deemed to revive an expired claim or

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1 cause of action."

2 SECTION 8. A new section of Chapter 62 NMSA 1978 is
3 enacted to read:

4 "[NEW MATERIAL] OTHER PROVISIONS REGARDING UTILITY
5 EASEMENTS.--

6 A. A public utility's power of eminent domain
7 pursuant to Section 62-1-4 NMSA 1978 shall include the power to
8 enter upon the burdened parcel and appropriate the rights set
9 forth in Subsection A of Section 3 of the Utility Easements for
10 Broadband Act within the utility easement.

11 B. A public utility's exercise of rights under
12 Subsection A of Section 3 of the Utility Easements for
13 Broadband Act shall not be deemed to dedicate a utility
14 easement for public or compatible use.

15 C. Subject to the provisions of Subsection E of
16 this section, nothing in the Utility Easements for Broadband
17 Act shall be deemed to obligate a public utility to provide any
18 rights or access to a communications service provider or to
19 impose any obligations or restrictions on the terms and
20 conditions on which a public utility may contract with a
21 communications service provider regarding communications
22 infrastructure in a utility easement.

23 D. Nothing in the Utility Easements for Broadband
24 Act shall be deemed to obligate a public utility to provide any
25 communications service to any person, but a public utility's

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1 broadband affiliate may provide communications service subject
2 to such laws and rules as may be generally applicable to other
3 communications service providers.

4 E. A public utility offering middle mile broadband
5 service shall:

6 (1) charge fees and impose conditions that are
7 reasonable and nondiscriminatory among communications service
8 providers, including the public utility's broadband affiliates,
9 for similar rights; and

10 (2) not discriminate among communications
11 service providers, including the public utility's broadband
12 affiliates, in offering or granting middle mile broadband
13 service.

14 F. Nothing in the Utility Easements for Broadband
15 Act shall impair a public utility's ability to comply with and
16 enforce all applicable federal and state requirements regarding
17 the safety, reliability and security of its communications
18 infrastructure."

19 SECTION 9. EFFECTIVE DATE.--The effective date of the
20 provisions of this act is July 1, 2022.