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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/07/22

SPONSOR STBTC LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Utility Easements for Broadband Act SB 42/STBTCS

ANALYST Hitzman

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY22	FY23	FY24	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	See Fiscal Implications	See Fiscal Implications	See Fiscal Implications			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files  
NCSL ([ncsl.org](http://ncsl.org))

#### Responses Received From

Department of Information Technology (DoIT)  
Public Regulation Commission (PRC)  
Public School Facilities Authority (PSFA)  
Public Education Department (PED)

### SUMMARY

#### Synopsis of Bill

The Senate Tax, Business and Transportation Substitute for Senate Bill 42 creates a new chapter of statute, to be cited as the Utility Easements for Broadband Act (UEBA). The section provides for definitions of communications infrastructure and service, including middle mile service, broadband affiliates, public utilities, and utility easements.

An additional section, Use of Utility Easements, notes that, under certain circumstances, a public utility can acquire, construct, and maintain communication infrastructure in areas subject to utility easements for the purposes of providing middle mile broadband service as well as lease and license infrastructure and enter and access the area for related purposes. Further, under SB42, a public utility, or third party acting pursuant to a lease, license, or right to use any of the utility's public infrastructure in a utility easement, shall deliver notice of installation or construction at least 10 days prior to the start of the project and within 45 days of activities not involving construction or installation. The notice shall include a point of contact for the utility or third party. The bill provides further detail on the requirements of the notice and provides for optional recording of notice.

The bill further provides that the PRC shall allow a public utility that constructs, removes, or upgrades communications infrastructure to recover its reasonable costs through a tariff rider, in base rates, or both. The bill provides for a time limit on calculation of damages.

The bill defines other provisions regarding utility easements, noting powers of eminent domain and notes that the bill is not intended to obligate restrictions on public utility's ability to undergo contracting nor to obligate a public utility to provide any service to any person.

Lastly, the bill notes that a public utility offering middle mile broadband service shall charge fees and impose reasonable and nondiscriminatory conditions among providers and not discriminate among providers in offering or granting middle mile broadband service. Nothing in the bill shall be interpreted to impair a utility's ability to comply with federal and state requirements regarding safety, security, and reliability of the infrastructure. The effective date of this bill is July 1, 2022.

### **FISCAL IMPLICATIONS**

The bill does not contain an appropriation. The fiscal impact of the STBTC substitute for SB42 will most likely be realized from the PRC's ratemaking activities and will potentially result in an increase in revenues for the commission if allowed to undergo cost recovery related to broadband infrastructure. However, the commission did not provide an estimate for this potential revenue increase nor an estimate of potential workload changes resulting from the provisions of SB42.

As noted by DoIT, SB42 could improve efficiency of broadband deployment, which can result in additional cost savings. However, these cost savings are difficult to determine given the number of broadband entities, providers, and stakeholders that could benefit from the provisions in SB42.

### **SIGNIFICANT ISSUES**

As noted by the PRC:

Rates for such retail utility service are subject to approval of the Commission. The UEBA provides for these same public utilities to develop and own communications infrastructure across utility easements even if such easements do not specifically allow for such infrastructure. Unlike the development of public utility plant, public utility development of communications infrastructure can take place without NMPRC approval. The development of communications infrastructure owned by the public utility appears to be inconsistent with the definition of a public utility in the [Public Utilities Act (PUA)].

Broadband service is not subject to rate regulation by the PRC. However, rates developed under SB42 would support infrastructure developed and owned by the utility that might be necessary to provide broadband service, without requiring utility rate payers to benefit from broadband service made available by that communications infrastructure. Further, the commission notes inconsistencies regarding ratemaking, where SB42 would provide for the PRC to recover reasonable costs from utility rate-payers "through tariff riders or base rates, whose Commission-approved riders or rates support the provision of electric, gas or water service by the public utility." The commission notes that the ratemaking treatment approach for cost recovery is inconsistent with the definition of a rate in the PUA. Further, the bill "allows for utility ratepayers to provide capital for the development of non-utility infrastructure through Commission-approved riders or rates without a mechanism to compensate utility ratepayers for the provision of such capital."

## **PERFORMANCE IMPLICATIONS**

Since the bill provides for changes to easements, which are contracts that also impact property interests, the bill may present constitutional takings issues and contract impairment concerns, as noted by DoIT.

However, streamlining uses of easements can have a positive impact on the state's ability to maximize federal funding and provide for broadband expansion and deployment. Policy considerations that make installation of broadband infrastructure easier will likely result in some level of benefit to the state and to those in need of broadband service. This is also noted by the PSFA, who cites the roughly 75 percent of wired broadband infrastructure (on average) that uses attachments to existing utility poles to expedite deployments. By extending existing rights-of-way and easements for communications infrastructure, New Mexico can follow states like Minnesota, Mississippi, Oklahoma, and Wyoming that have all introduced or passed legislation related to streamlining utility easements for broadband (see [NCSL 2021 Broadband Legislation](#)). Further, PSFA note the potential for increased competition through the provisions in SB42.

## **ADMINISTRATIVE IMPLICATIONS**

As noted by DoIT, SB42 could improve efficiency of broadband deployment and could lead to increased purchasing power for the Connect New Mexico Broadband Grant Program.

## **TECHNICAL ISSUES**

As noted by the PRC, “In Section 1, the definition of “burdened parcel” excludes land under the custody and control of the Commissioner of Public Lands or the State Transportation Commission and the Department of Transportation. The limits of this exclusion may raise uncertainty about land under other forms of control and access to those utility easements.”

The PSFA further notes that the ability of electric utilities to charge ratepayers for the installation of communication infrastructure they may not benefit from may come into question, potentially giving the electric utilities an unfair advantage if involved in communication industry activities.

Additionally, the bill does not contain definitions for the term “communications service provider.” However, the bill does provide for a definition of “broadband affiliate” that refers to commercial broadband suppliers that are separate from but under the control of a public utility.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Without utility-grade easement access as provided for in SB42, broadband services and providers, as well as other stakeholders, will continue to face uncertainty in cost and time for broadband deployments that require land access permissions and will not receive the benefit of broader access to utility easements.