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SENATE BILL 256

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

Stephen H. Fischmann

AN ACT

RELATING TO UTILITIES; PROVIDING FOR LOCAL RIGHT-OF-WAY ACCESS FEES; AMENDING AND ENACTING SECTIONS OF THE NMSA 1978.

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

Section 1. A new section of Chapter 5 NMSA 1978 is enacted to read:

"~~[NEW MATERIAL]~~ RIGHT-OF-WAY ACCESS FEE.--

A. Municipalities and counties may by ordinance impose a right-of-way access fee on a public utility, as "public utility" is defined by Subsection G of Section 62-3-3 NMSA 1978, as compensation for access to or use of public roads, streets, alleys, highways, structures, places and other public rights of way for construction, installation, operation, removal, replacement, repair and maintenance of the public utility's property and equipment on, above or under the public

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1 right of way. The ordinance may include mutually agreed-upon
2 terms and conditions regarding the process for and the timing
3 of payment of right-of-way access fees, verifying the accuracy
4 of the amounts paid and assuring the utility's ability to abide
5 by its obligations regarding access to and use of public rights
6 of way.

7 B. The right-of-way access fee shall be expressed
8 as a percentage or as an annual flat fee equivalent to such
9 percentage, of the public utility's gross revenues derived from
10 its public utility business conducted within the municipal
11 boundaries or, in the case of counties, the county's
12 unincorporated areas. The right-of-way access fee shall be no
13 larger than four percent of gross revenues, unless otherwise
14 mutually agreed upon by the public utility and the municipality
15 or county.

16 C. For purposes of this section, "gross revenues"
17 means the total monthly revenues actually collected by the
18 public utility for providing the public utility service to
19 customers located within the municipal boundaries or within the
20 unincorporated areas of the county, pursuant to tariffs
21 approved by the public regulation commission. "Gross revenues"
22 does not include any taxes, fees, assessments or other charges
23 billed directly to customers and paid to any governmental body
24 or agency and shall exclude revenues received from customers
25 located on the land of a federally recognized Indian nation,

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1 tribe or pueblo or that are governing bodies or agencies or
2 public educational institutions.

3 D. The fee imposed pursuant to this section shall
4 be in lieu of all other fees, taxes, assessments, charges and
5 any other form of consideration or compensation related,
6 directly or indirectly, to access to or use of public rights of
7 way except for general ad valorem property taxes, special
8 assessments for local improvements and locally adopted gross
9 receipts tax increments.

10 E. No ordinance imposing a right-of-way access fee
11 shall become effective until at least thirty days after its
12 adoption, during which time the ordinance shall be twice
13 published in full, not less than seven days apart."

14 Section 2. A new section of Chapter 5 NMSA 1978 is
15 enacted to read:

16 "[NEW MATERIAL] CONDITIONS FOR USE OF PUBLIC RIGHTS OF
17 WAY.--A municipality or a county may impose by ordinance
18 conditions for the use of public rights of way that may be
19 necessary to assure that the use does not unnecessarily
20 obstruct public travel and to require public utilities to
21 comply with zoning laws and applicable building codes,
22 ordinances and regulations."

23 Section 3. [NEW MATERIAL] EFFECT ON EXISTING FRANCHISE
24 AGREEMENTS.--This 2010 act shall not be construed as
25 invalidating any existing franchise agreement, including any

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1 existing franchise fees or charges, between a public utility
2 and a municipality or county; provided, however, that the
3 municipality or county and the public utility may agree to
4 terminate the existing franchise agreement and proceed under
5 this 2010 act. Upon expiration of existing franchise
6 agreements, access to public rights of way by public utilities
7 shall be governed by this 2010 act.

8 Section 4. Section 3-42-1 NMSA 1978 (being Laws 1965,
9 Chapter 300, Section 14-43-1) is amended to read:

10 "3-42-1. FRANCHISES--AUTHORIZATION.--

11 A. A municipality may grant by ordinance a
12 franchise to any person, firm or corporation for the
13 construction and operation of any public utility; provided that
14 this section shall not apply to a public utility as defined in
15 Subsection G of Section 62-3-3 NMSA 1978 and which public
16 utility's access to public rights of way is granted by statute
17 and not by franchise agreements.

18 B. No franchise ordinance shall become effective
19 until at least thirty days after its adoption, during which
20 time the franchise ordinance shall be twice published in full,
21 not less than seven days apart.

22 C. If during the thirty-day period a petition,
23 signed by bona fide adult residents of the municipality equal
24 in number to twenty percent of the number of those who voted at
25 the last regular municipal election, and objection to the

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1 granting of the franchise is presented to the governing body of
2 the municipality, the governing body of the municipality shall
3 submit the question of granting the franchise to a vote of the
4 qualified electors at a regular or special municipal election.
5 If the date for the next regular municipal election is not more
6 than ninety days after the date the petition is filed, the
7 question shall be submitted at the regular municipal election;
8 otherwise, a special municipal election shall be held.

9 D. If a majority of the qualified electors voting
10 on the question favor the granting of a franchise, the
11 franchise ordinance becomes effective. If a majority of the
12 qualified electors voting on the question do not favor granting
13 the franchise, the ordinance is repealed and the applicant for
14 the franchise acquires no rights or privileges.

15 E. The expense of publishing the franchise
16 ordinance and of holding a special election shall be paid by
17 the applicant for the franchise.

18 F. No franchise ordinance shall be in effect for
19 more than twenty-five years. The municipality may contract
20 with the public utility for such services as are necessary for
21 the health and safety of the municipality and may pay a sum
22 agreed upon by the contracting parties for such services."

23 Section 5. Section 62-1-3 NMSA 1978 (being Laws 1909,
24 Chapter 141, Section 3, as amended) is amended to read:

25 "62-1-3. USE OF HIGHWAYS AND STREETS--POWER OF COUNTY

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1 COMMISSIONERS.--The boards of county commissioners of the
2 several counties are authorized to permit [~~corporations~~
3 ~~organized pursuant to Section 62-1-1 NMSA 1978, public~~
4 ~~utilities under the Public Utility Act and]~~ companies that
5 provide public telecommunications service pursuant to the New
6 Mexico Telecommunications Act to use the public highways and
7 the streets and alleys of unincorporated towns for their pipes,
8 poles, wires, cables, conduits, towers, transformer stations
9 and other fixtures, appliances and structures; provided that
10 such use shall not unnecessarily obstruct public travel; and
11 provided further that the boards of county commissioners and
12 municipal authorities of incorporated cities and towns are
13 authorized to grant franchises not exceeding twenty-five years'
14 duration to corporations for such purposes within their
15 respective jurisdictions. A board of commissioners is
16 authorized to impose charges for reasonable actual expenses
17 incurred in the granting of any franchise pursuant to this
18 section."

19 Section 6. Section 62-6-4.5 NMSA 1978 (being Laws 2003,
20 Chapter 336, Section 4) is amended to read:

21 "62-6-4.5. BILLING--~~[FRANCHISE]~~ RIGHT-OF-WAY FEES--GROSS
22 RECEIPTS TAXES.--

23 A. A [~~franchise~~] right-of-way fee or similar charge
24 shall be stated as a separate line entry on a bill sent by a
25 public utility or a distribution cooperative utility to a

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1 customer and shall only be recovered from a customer located
2 within the jurisdiction of the government authority imposing
3 the [~~franchise~~] right-of-way fee or similar charge.

4 B. Any gross receipts taxes collected on [~~electric~~]
5 public utility services received by a retail customer in the
6 state shall be stated as a separate line entry on a bill for
7 [~~electric~~] public utility service sent to the customer by a
8 public utility or distribution cooperative utility."

9 Section 7. Section 62-9-6 NMSA 1978 (being Laws 1967,
10 Chapter 96, Section 8) is amended to read:

11 "62-9-6. CERTIFICATES--APPLICATION--ISSUANCE.--

12 A. Before any certificate may be issued under
13 [~~Sections 68-7-1 through 68-7-4 New Mexico Statutes Annotated,~~
14 ~~1953 Compilation~~] Chapter 62, Article 9 NMSA 1978, a certified
15 copy of its articles of incorporation or charter, if the
16 applicant [~~be~~] is a corporation, shall be on file in the office
17 of the commission. Every applicant for a certificate shall
18 give such reasonable notice of its application as the
19 commission may require, [~~and shall file in the office of the~~
20 ~~commission such evidence as shall be required by the commission~~
21 ~~to show that such applicant has received the consent and~~
22 ~~franchise from the~~] including notice to any county or
23 municipality wherein construction and operation is proposed.
24 The commission shall have power, after hearing, to issue [~~said~~]
25 the certificate [~~as prayed for~~] or to refuse to issue [~~the~~

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1 ~~same~~] it, or to issue it for the construction or operation of a
2 portion only of the contemplated facility, line, plant or
3 system, or extension thereof, or for the partial exercise only
4 of said rights or privilege [~~and~~]. The commission may attach
5 to the exercise of the rights granted by [~~said~~] the
6 certificates such terms and conditions in harmony with the
7 Public Utility Act, as amended, as in its judgment the public
8 convenience and necessity may require. Except as otherwise
9 provided in Section [~~68-7-1.1 New Mexico Statutes Annotated,~~
10 ~~1953 Compilation~~] 62-9-2 NMSA 1978, in determining whether any
11 certificate shall [~~issue as prayed for~~] be issued, the
12 commission shall give due regard to public convenience and
13 necessity, including but not limited to any reasonable service
14 agreement between the applicant and another utility and
15 unnecessary duplication and economic waste.

16 B. Whenever a public utility is engaged or is about
17 to engage in construction or operation without having secured a
18 certificate of public convenience and necessity as required by
19 the provisions of the Public Utility Act, as amended, any
20 interested person may file a complaint with the commission.
21 The commission may, with or without notice, make its order
22 requiring the public utility complained of to cease and desist
23 from [~~such~~] the construction or operation until the commission
24 makes and files its decision on [~~said~~] the complaint or until
25 the further order of the commission. The commission may, after

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1 hearing after reasonable notice, make such order and prescribe
2 such terms and conditions in harmony with the Public Utility
3 Act, as amended, as are just and reasonable."

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