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FISCAL IMPACT REPORT

ORIGINAL DATE 02/09/10
 SPONSOR HBIC LAST UPDATED 02/12/10 HB 269/HBICS
 SHORT TITLE Utility Right-of Way Access Fees SB _____
 ANALYST Lucero

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	None		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Finance and Administration (DFA)

Public Regulation Commission (PRC)

New Mexico Association of Counties

SUMMARY

Synopsis of Bill

House Business and Industry Committee Substitute for House Bill 269 proposes to enact a new section of Chapter 5 stating that municipal and county franchise and other agreements with public utilities that provide access to public rights of way that were in effect as of January 1, 2010 are valid and enforceable agreements, including those that provide for a payment of fees by the public utility expressed as a percentage of the public utility's revenues or otherwise.

The provisions contained in the bill also extend to expired agreements that have continued to be honored by both the public utility and the local government according to their terms, regardless of the expiration date of the agreements, if both the public utility and the local government continue to abide by the terms of the expired agreement.

As used in the bill, a "public utility" is defined by Subsection G of Section 62-3-3 NMSA 1978.

The bill contains an emergency clause.

FISCAL IMPLICATIONS

Recently, the Public Regulation Commission (PRC) issued an order regarding franchise fees outside of municipal boundaries. The finding eliminates the ability of counties to charge a franchise fee. The order required El Paso Electric to refund \$5.3 million to residents in Dona Ana and Otero counties that live outside of the municipal boundary who were charged a 2 percent franchise fee for a number of years.

The potential loss of revenue from franchise fees for counties due to the PRC ruling may reduce county budgets. This bill would clarify the ability for counties to collect revenues for the use of public rights of way.

SIGNIFICANT ISSUES

Most municipalities have a system to collect from public utilities for their occupation of the right-of-way. In some cases, it is paid directly to the city, often in the form of a franchise fee. In other states, the fee may be paid directly to the state and then allocated back to the locals through a revenue sharing agreement, or apportionment agreement.

According to the Attorney General's Office (AGO):

The bill would put on hold several disputes between parties to franchise agreements, and declare franchise agreements valid and enforceable if the agreement was in effect as of January 1, 2010, even if previously expired. If a franchise is valid, it is assumed that the two parties would have to perform under the terms of the agreement. It leaves open questions such as whether a county can charge more for a franchise than necessary to cover administrative costs (see section 62-1-3 NMSA), which was addressed by the original version of the bill, and how the PRC should treat any costs paid for county franchise fees if such payment exceeds the county's administrative cost, although there might be a presumption that a utility could collect such costs from customers if the agreement were declared valid by the law.

ADMINISTRATIVE IMPLICATIONS

Proper calculation and collection of these fees would need to be verified in PRC proceedings, through tariff filings or general rate cases.

TECHNICAL ISSUES

The PRC notes that the bill may contravene Article IV, Section 25 of the New Mexico Constitution, which provides, in relevant part, that "No law shall be enacted legalizing the unauthorized or invalid act of any officer. . ."

The bill makes no provision for the validity and enforceability of expired agreements if either party discontinues abiding by their terms.

OTHER SUBSTANTIVE ISSUES

The New Mexico Association of Counties notes:

There were only a few counties benefiting from the collection of franchise fees recently. The basis for collecting these fees is the State of New Mexico anti-donation clause and case law prohibiting local governments from even abandoning property unless they are compensated for that property. There is an existing system that apparently is not favored by most of the parties. Many existing agreements have not been renegotiated and are now operating on a month to month basis.

ALTERNATIVES

The PRC suggests the term “lease” could be used instead of “right of way access fee.”

DUPLICATION

Duplicates SB256

DL/mt