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FISCAL IMPACT REPORT

SPONSOR Padilla ORIGINAL DATE 02/18/21
LAST UPDATED 03/04/21 HB _____

SHORT TITLE Utility Easements for Broadband SB 360/aSTBTC

ANALYST Fischer/Hitzman

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY21	FY22	FY23	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Regulation Commission (PRC)

Department of Information Technology (DoIT)

Department of Transportation (DOT)

State Land Office (SLO)

SUMMARY

Synopsis of STBTC Amendment

The Senate Tax, Business, and Transportation Committee amendment to Senate Bill 360 excludes towers from the definition of “communications infrastructure.”

Synopsis of Original Bill

Senate Bill 360 creates a new section of electric, gas and water utility statute called the Utility Easements from Broadband Act, which allows a public utility to acquire, construct, install, maintain, operate, own, remove or upgrade communications infrastructure across, in, on, over or under any of their existing utility easements, in addition to allowing third parties to do so on the utility’s behalf. This new allowance is still subject to state and local ordinances governing zoning and locating underground utilities. The bill also provides directions for a public utility to provide notice to the landowner that the utility is exercising its new authority.

The effective date of this bill is July 1, 2021.

SIGNIFICANT ISSUES

The PRC notes that public utility development of communications infrastructure can take place without PRC approval or consent, unlike the development of public utility plants, and appears to

be inconsistent with the definition of a public utility in the “Public Utilities Act” (PUA). In addition, the bill does not appear to provide compensation to utility rate payers for provision of communications infrastructure capital. The bill provides for approval by the commission for the recovery of reasonable costs incurred by public utilities for the development of communications infrastructure from utility ratepayers through tariff riders or base rates, but PRC notes that the ratemaking approach for cost recovery for the communication infrastructure is inconsistent with the definition of “rate” in the PUA.

Under SB360/aSTBTC, SLO noted that a landowner bringing an action within one year of receiving the utility’s notice would be entitled to compensation for the fair market value of the reduction in the value of the land, taking into account any increase in the fair market value to the land attributable to the availability of communications service. Any other landowner claim for damages or compensation would be precluded, and class actions would be precluded. However, the limitations on claims would not apply to claims for physical damage to property or injury to natural persons.

SLO also noted that the bill would not obligate a public utility to provide any rights or access to a communications service provider or impose any obligations or restrictions on the terms and conditions on which a public utility may contract with a communications service provider regarding communications infrastructure in a utility easement. Nor would the law obligate a public utility to provide any communications service to any person.

A 2019 broadband evaluation by LFC program evaluators noted that Internet service providers have to deal with a cumbersome process of navigating right-of-way issues with multiple government and tribal jurisdictions. Municipalities in New Mexico can impose franchise fees on utilities that cross into their jurisdictions, and counties and tribes can require right-of-way fees. Gaining the necessary approvals and permits can be a costly and lengthy endeavor. This bill would lessen this burden significantly by allowing electric and other public utilities with preexisting property easements to install, maintain, or own broadband facilities (including fiber lines) within the easement. This bill is similar to legislation passed by Colorado in 2019.

DOT also noted the potential for falling into non-compliance with the Federal Highway Administration if broadband infrastructure entities fail to pay fair market value for the use of DOT rights-of-way, required under 23 U.S.C.A. § 156(a) and 23 C.F.R. 710.403(e). Use of DOT rights-of-way or property without payment of fair market value may also constitute a violation of Article 9, Section 14 of the New Mexico State Constitution (anti-donation clause) as a form of subsidizing private broadband businesses.

The bill also does not distinguish between utility easements held on public-owned property and those on private property. Utility easements in this bill would apply to DOT rights-of-way and property which would allow third-party access without DOT prior approval, and the bill does not otherwise compensate DOT for the fair market value associated with the private use of the utility easement. In addition, having unpermitted communications service infrastructure in its rights-of-way may impact the DOT’s ability to perform multi-modal transportation construction projects requiring utility easement and infrastructure relocations in a timely manner. DOT has the authority to require relocation of utility facilities in conflict with DOT rights-of-way and, as a result, may incur costs associated with relocation of broadband facilities.

ADMINISTRATIVE IMPLICATIONS

DoIT notes that though SB360 activities are directed at PRC, coordination with DoIT would be advisable in order to track and map infrastructure buildouts within utility easements throughout the state. These data would include the easement route, type of communications technology, the capacity of the technology, and ownership of infrastructure and would assist DoIT's continued planning and implementation of the state's broadband efforts.

SLO noted that the U.S. Enabling Act likely precludes the state from exercising eminent domain to take state trust lands or delegating eminent domain authority to public utilities or anyone else on state trust lands. Specifically, the SLO noted that the U.S. Supreme Court has held that the Enabling Act precludes anyone, including the state, from acquiring an interest in state trust lands without complying with the requirements for a state trust land disposition, including paying full true value for the interest. The court specifically held that the Enabling Act requires "actual compensation, meaning thereby monetary compensation, payable to the trust," undiminished by "the amount of any enhancement in the value of the remaining trust lands."

TECHNICAL ISSUES

DoIT noted that the bill refers to providing the "parcel number" or "tax identification number" of the burdened parcel. The parcel number may not be specific for this request. Instead, the department suggested that it may be more appropriate to ask for "parcel number (uniform property code) and the tax identification number" as the first identifies the property the second identifies the owners more specifically.

As written, the bill does not amend statute governing public utilities (cited as Chapter 62 by DOT) and related utility easements to define communications service as an essential utility. In addition, DOT notes that legislation allowing the taking of easements from real (public or private) property owners for private businesses, could be considered an unconstitutional "taking," even if benefiting public consumers.

The SLO suggests an amendment to exempt state trust lands from this legislation as follows:

Page 2, line 5, after "easement" insert ", other than land under the custody and control of the commissioner of public lands."

Hence:

A. "burdened parcel" means a parcel of real property subject to a utility easement, other than land under the custody and control of the commissioner of public lands;

JH/MF/sb/al