

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR
2 SENATE BILL 143

3 **53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017**

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10 AN ACT

11 RELATING TO PUBLIC PROJECTS; ENACTING THE NEW MEXICO
12 INFRASTRUCTURE INVESTMENT ACT; ALLOWING THE STATE AND LOCAL
13 GOVERNMENTS TO ENTER INTO LONG-TERM PARTNERSHIPS WITH PRIVATE
14 SECTOR PARTNERS TO FACILITATE PUBLIC PROJECTS; PROVIDING POWERS
15 AND DUTIES.

16
17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

18 SECTION 1. [NEW MATERIAL] SHORT TITLE.--This act may be
19 cited as the "New Mexico Infrastructure Investment Act".

20 SECTION 2. [NEW MATERIAL] DEFINITIONS.--As used in the
21 New Mexico Infrastructure Investment Act:

22 A. "department" means the general services
23 department;

24 B. "force majeure" means an uncontrollable force or
25 natural disaster not within the power of a public or private

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1 partner;

2 C. "local government" means a municipality; a
3 county; or a regional entity created by a joint powers
4 agreement between one or more public agencies;

5 D. "material default" means a failure of a private
6 partner to perform any duties under a public-private
7 partnership, which failure jeopardizes delivery of adequate
8 service to the public and remains unsatisfied after a
9 reasonable time and after the private partner has received
10 written notice from the public partner of the failure;

11 E. "private partner" means one or more persons who
12 have entered into a public-private partnership with a public
13 partner and who are not the federal government or any agency or
14 instrumentality of the federal government; another state or
15 territory of the United States; a sovereign or foreign
16 government; or the state or an agency, branch, institution,
17 instrumentality or political subdivision of the state;

18 F. "public partner" means a local government, state
19 agency, state institution or an instrumentality of the state;

20 G. "public-private partnership" means an agreement
21 between one or more public partners and one or more private
22 partners for the design, development, financing or
23 construction of a public project;

24 H. "public project":

25 (1) means:

1 (a) telecommunications, broadband and
2 other communications infrastructure that is ancillary to the
3 development or operation of a public project; and

4 (b) a project in a public building or
5 infrastructure in a public building that involves conservation
6 of natural resources; and

7 (2) does not include a project that changes
8 the franchise rights or territory of a regulated public
9 utility; and

10 I. "user fee" means a rate, fee or other charge
11 imposed by a partner for use of all or part of a public
12 project.

13 SECTION 3. [NEW MATERIAL] PROJECT DELIVERY METHODS--
14 PROPOSALS.--A public partner may provide for the development of
15 a public project using a variety of project delivery methods,
16 which methods shall be documented in written agreements. The
17 methods may include:

- 18 A. predevelopment agreements leading to other
- 19 implementing agreements;
- 20 B. design-build agreements;
- 21 C. design-bid-build agreements;
- 22 D. design-build-finance agreements;
- 23 E. construction manager at risk;
- 24 F. agreements that provide for the private partner
- 25 to design, build or lease a public project; or

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1 G. other project delivery methods or agreements or
2 combination of methods or agreements that the public partner
3 determines is most advantageous to the public interest.

4 SECTION 4. [NEW MATERIAL] PROJECT DEVELOPMENT--
5 PROCUREMENT.--

6 A. A public partner may:

7 (1) procure a public project using any of the
8 following:

9 (a) a request for proposals in which the
10 public partner describes a class of public project or a
11 geographic area in which a person is invited to submit a
12 proposal to develop a public project;

13 (b) a solicitation using a request for
14 qualifications, short-listing of qualified proposers, a request
15 for proposals, negotiations or other procurement procedures;

16 (c) a procurement seeking development
17 and finance plans that are most advantageous to the public
18 partner and suitable for the public project;

19 (d) a best-value selection procurement
20 based on price or a financial proposal, or both, or other
21 factors; and

22 (e) other procedures that the public
23 partner determines may further the implementation of the New
24 Mexico Infrastructure Investment Act; and

25 (2) consider an unsolicited proposal if the

1 public partner determines that there is sufficient merit to
2 pursue the unsolicited proposal and a reasonable opportunity
3 for other persons to submit competing proposals for
4 consideration to ensure maximum competition among proposals
5 submitted and the best value for the public partner.

6 B. For a procurement in which the public partner
7 issues a request for qualifications or similar solicitation
8 document or following a public partner's decision to consider
9 an unsolicited proposal, the public partner shall issue a
10 request that sets forth the factors that will be evaluated and
11 the manner in which responses will be evaluated.

12 C. In evaluating proposals, the public partner, and
13 the department if required, shall:

14 (1) consider a range of factors deemed
15 appropriate to obtain the best value for the state or local
16 government; and

17 (2) require specific justification and support
18 for a proposal that may affect:

19 (a) public employees' employment; or

20 (b) the cost of public service delivery.

21 D. The public partner may charge and retain a
22 reasonable administrative fee for the evaluation of an
23 unsolicited proposal and for the cost of experts that are
24 consulted pursuant to Subsection E of this section; provided
25 that the administrative fee shall not exceed the reasonable

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1 cost of evaluating the proposal.

2 E. The public partner shall consult with in-house
3 or contracted financial, legal, architectural or other experts
4 and advisors to assist in the design, evaluation, negotiation,
5 construction administration and development of a public-private
6 partnership agreement for a public project.

7 F. If contractor insurance is required for services
8 procured pursuant to this section, the insurance shall be
9 placed with an insurer authorized to transact insurance in New
10 Mexico or with a surplus lines insurer approved by the office
11 of superintendent of insurance or its successor agency.

12 G. In addition to making proposals available to the
13 public pursuant to Subsection H of this section and providing
14 the opportunity for written comments from the public, the
15 public partner shall hold at least one public hearing and may
16 hold additional public hearings prior to entering into a
17 public-private partnership, all of which shall be preceded by
18 at least thirty days' notice. The meetings shall be subject to
19 the Open Meetings Act.

20 H. A request for proposals issued pursuant to the
21 New Mexico Infrastructure Investment Act shall require the
22 proposer to include with its proposal an executive summary
23 covering the major elements of its proposal that do not address
24 the proposer's price, financing plan or other confidential or
25 proprietary information or trade secrets that the proposer

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1 intends to be exempt from disclosure. Any unsolicited proposal
2 shall also include a similar executive summary. After the
3 public-private partnership is awarded and after the conclusion
4 of any challenge to the award, the Inspection of Public Records
5 Act applies to any release of any part of the proposals.

6 I. A solicited or unsolicited proposer shall
7 identify those portions of a proposal or other submission that
8 the proposer, with the public partner's concurrence, considers
9 to be a trade secret or confidential commercial, financial or
10 proprietary information. For trade secrets and confidential
11 and proprietary information to be exempt from disclosure, the
12 proposer must do all of the following:

13 (1) invoke exclusion upon submission of the
14 information or materials for which protection is sought;

15 (2) identify with conspicuous labeling the
16 information or materials for which protection is sought;

17 (3) state the reasons why protection is
18 necessary; and

19 (4) fully comply with any applicable state law
20 with respect to information or materials that the proposer
21 contends should be exempt from disclosure.

22 J. A public partner shall consider a proposer's
23 request to withhold certain information in a proposal from
24 disclosure and shall issue a written determination either
25 accepting or rejecting the proposer's request. Following the

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1 public partner's determination, any portions of the proposal
2 not withheld from disclosure shall be made available to the
3 public by request and the public partner shall maximize public
4 access to the disclosed portions of the proposal through
5 reasonable means available to the public partner.

6 SECTION 5. [NEW MATERIAL] PROCUREMENTS--RESTRICTIONS.--

7 The resident preferences provided in Sections 13-1-21 and
8 13-1-22 NMSA 1978 apply to procurements pursuant to the New
9 Mexico Infrastructure Investment Act. The construction of a
10 public project is a public works for the purposes of the Public
11 Works Minimum Wage Act, the Subcontractors Fair Practice Act,
12 any other provisions of Chapter 13, Article 4 NMSA 1978 and the
13 Public Works Apprentice and Training Act.

14 SECTION 6. [NEW MATERIAL] DEPARTMENT--POWERS AND DUTIES--
15 ASSISTANCE WITH DUTIES.--

16 A. The department shall:

17 (1) in consultation with the state purchasing
18 agent, the New Mexico finance authority, the economic
19 development department, the department of finance and
20 administration, the office of the state engineer and any other
21 person that the department deems necessary, develop a minimum
22 set of guidelines to implement the provisions of the New Mexico
23 Infrastructure Investment Act, including guidelines on the
24 process that the department shall follow with respect to those
25 public-private partnership agreements that the department is

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1 required to review and approve and the information that is
 2 required to be included in a requested or unsolicited proposal;

3 (2) before a public-private partnership may be
 4 established, review and approve all public-private partnership
 5 agreements that include:

6 (a) a total public project cost that is
 7 greater than fifty million dollars (\$50,000,000); or

8 (b) a public-private partnership term
 9 that is longer than thirty-five years;

10 (3) establish an evaluation process to
 11 determine whether projects should be developed as public-
 12 private partnerships or using traditional procurement and
 13 funding methods prior to the initiation of contract
 14 negotiations with a private partner;

15 (4) manage public communication and education,
 16 including public hearings, regarding the scope, cost and
 17 impacts of proposed public-private partnerships to maximize the
 18 opportunity for public input on proposals;

19 (5) encourage maximum competition among
 20 private entities to pursue the development and operation of
 21 public projects;

22 (6) serve as a resource for the legislature
 23 and its staff regarding the policy and financial impacts of
 24 public project proposals and the implications of proposed or
 25 pending public project agreements on the state's credit or

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1 other obligations;

2 (7) provide technical assistance to local
3 governments and regional entities on the use of public-private
4 partnerships to meet their needs; and

5 (8) with respect to public-private partnership
6 agreements that the department is required to review and
7 approve, on or before December 1 of each year, submit a report
8 to the legislature on any proposed or pending agreements and
9 any agreements completed during the preceding year. The report
10 shall specifically name each proposed, pending or completed
11 public project and include a summary of the project, a
12 description of the project's scope and finance plan and the
13 status of any related permitting or land acquisition under way.

14 B. The department or a local government may:

15 (1) in accordance with Subsection D of Section
16 4 of the New Mexico Infrastructure Investment Act, retain, as
17 necessary, financial, legal and other experts to assist it in
18 carrying out its duties pursuant to the New Mexico
19 Infrastructure Investment Act, including assistance with the
20 review of public-private partnership agreements;

21 (2) solicit the expertise of state agencies,
22 state institutions, state instrumentalities and local
23 governments to assist the department or local government in
24 carrying out its duties pursuant to the New Mexico
25 Infrastructure Investment Act, including reviewing public-

1 private partnership proposals; and

2 (3) receive appropriations and money from any
 3 other source, including other state agencies or local
 4 governments, regional organizations or the federal government,
 5 to carry out its duties pursuant to the New Mexico
 6 Infrastructure Investment Act.

7 C. All state agencies, state institutions, state
 8 instrumentalities and local governments, as appropriate, shall
 9 cooperate with the department or a local government and assist
 10 it in carrying out its duties by providing technical
 11 assistance, analysis and other services as requested by the
 12 department or local government.

13 SECTION 7. [NEW MATERIAL] DEPARTMENT--ADVICE AND
 14 ASSISTANCE--REVIEW AND APPROVAL OF AGREEMENTS.--With respect to
 15 public-private partnership agreements that the department is
 16 required to review and approve, and before approving a public-
 17 private partnership, the department shall:

18 A. assist the public partner in negotiating
 19 agreements;

20 B. assist the public partner in preparing any
 21 documents related to a specific agreement;

22 C. identify, and advise the public partner
 23 regarding, any relevant federal securities or other laws and
 24 related disclosure requirements; and

25 D. identify, and advise the public partner

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1 regarding, accounting, investment and tax requirements
2 applicable to the specific public project.

3 SECTION 8. [NEW MATERIAL] EVALUATION CRITERIA.--Before
4 entering into a public-private partnership, a public partner,
5 and the department if required, shall consider:

6 A. the ability of the public project to meet the
7 needs of the community in which it is to be located, including
8 improving and streamlining services to the public; providing or
9 enhancing educational, cultural and recreational opportunities;
10 promoting economic growth or job creation; or otherwise serving
11 a public purpose;

12 B. the proposed cost and financial plan for the
13 public project;

14 C. the performance benchmarks contained in the
15 proposal;

16 D. the estimated operating costs of the public
17 project;

18 E. the financial commitment of the private partner;

19 F. risk associated with the project's proposed
20 financing;

21 G. the general reputation, qualifications, industry
22 experience and financial capacity of the proposer;

23 H. the compatibility of the public project with
24 local and regional land and water plans or other infrastructure
25 plans;

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1 I. the feasibility and proposed design and
2 management of the public project;

3 J. the degree of innovation; efficiency; and
4 technical, scientific, technological and socioeconomic merit of
5 the proposal;

6 K. comments from potential users, local citizens,
7 affected jurisdictions and other interested persons;

8 L. benefits to the public, including improvements
9 in economic growth, job creation, public safety and quality of
10 life;

11 M. the proposer's safety record;

12 N. efforts to be made through the public-private
13 partnership to retain and train New Mexico residents in
14 occupations and professions related to planning, design,
15 construction, project management, general management,
16 administration, legal, accounting and other areas of the public
17 project over the life of the public-private partnership;

18 O. the proposer's commitment to use New Mexico
19 building materials and manufactured goods and local services to
20 the extent possible;

21 P. green building design and construction
22 certification by a nationally recognized organization;

23 Q. innovations in energy efficiency or generation;
24 and

25 R. other criteria that the public partner and the

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1 department deem appropriate for consideration.

2 SECTION 9. [NEW MATERIAL] PUBLIC-PRIVATE PARTNERSHIP
3 AGREEMENTS--REQUIREMENTS.--

4 A. The public partner, and the department with
5 respect to public-private partnership proposals that it
6 reviews, shall require a public-private partnership agreement
7 to include provisions that:

8 (1) require operations and maintenance of a
9 public project, except a public project that is broadband
10 infrastructure, to be performed by the public partner;

11 (2) if applicable, authorize the public
12 partner or the private partner to establish and collect user
13 fees, rents, advertising and sponsorship charges, service
14 charges or other charges allowed in the agreement, including
15 provisions that:

16 (a) specify how revenue will be
17 collected, accounted for and audited;

18 (b) establish circumstances under which
19 the public partner may receive all or a share of revenue from
20 such charges; and

21 (c) govern enforcement of user fees,
22 including provisions for mechanisms to ensure that users are
23 identified and notified of fees owed;

24 (3) require a maximum negotiated rate of
25 return on the private partner's investment, including:

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1 (a) fees and charges that may be
2 collected directly by the private partner or a third party
3 engaged by the private partner for that purpose;

4 (b) a formula for the adjustment of user
5 fees and other charges during the term of the public-private
6 partnership;

7 (c) for an agreement that does not
8 include a formula described in Subparagraph (b) of this
9 paragraph, provisions regulating the private partner's return
10 on investment; or

11 (d) other strategies that the public
12 partner or the department deems appropriate;

13 (4) if applicable, allow for payments to be
14 made by the public partner to the private partner, including
15 availability payments or performance-based payments;

16 (5) if applicable, allow the public partner to
17 accept payments from and share revenue with the private
18 partner;

19 (6) describe how the public and private
20 partners will share management of the risks of the public
21 project;

22 (7) specify how the public and private
23 partners will share the costs of development of the public
24 project;

25 (8) allocate financial responsibility for cost

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1 overruns to the partner or partners that are responsible for
2 the cost overruns;

3 (9) establish the damages to be assessed for a
4 partner's nonperformance;

5 (10) establish performance criteria or
6 incentives, or both;

7 (11) address the acquisition of property
8 interests that may be required, including provisions that allow
9 the public or private partner to acquire real property,
10 including acquisition by exchange of other real property that
11 is owned by the state, a local government or the federal
12 government;

13 (12) establish recordkeeping, accounting and
14 auditing standards to be used for the public project;

15 (13) establish how the condition and
16 maintenance level of a public project will be measured and
17 require a public project to meet a condition and maintenance
18 level measurement of eighty-five percent when the public
19 project reverts to the public partner;

20 (14) for a public project with a term that is
21 longer than twenty-five years, address responsibility for
22 reconstruction or renovations that are required so that the
23 public project meets all applicable government standards before
24 the public project reverts to the public partner;

25 (15) provide for responsibilities for law

1 enforcement on public projects;

2 (16) identify public partner specifications
3 that must be satisfied, including provisions allowing the
4 private partner to request and receive authorization to deviate
5 from the specifications on a showing satisfactory to the public
6 partner that the deviation is necessary;

7 (17) require a private partner to provide,
8 either directly or through the principal contractor who is in
9 charge of the project, performance and payment bonds as
10 required by Section 13-4-18 NMSA 1978 for those components of a
11 public project that involve construction. For components that
12 do not involve construction, require parent company guarantees,
13 letters of credit or other acceptable forms of security or a
14 combination of any of these, the penal sum or amount of which
15 may be less than one hundred percent of the value of the
16 contract involved based on the public partner's or the
17 department's determination of what is required to adequately
18 protect the public partner, made on a project-by-project basis;

19 (18) provide clawback or recapture provisions
20 that protect public investment in the public project; and

21 (19) specify dispute resolution procedures to
22 be followed and remedies available to the partners.

23 B. A public-private partnership agreement may
24 include a provision for public workers to be trained on the
25 operation and maintenance of the public project.

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1 C. The public-private partnership agreement shall
2 include a clear statement of when a public project will revert
3 to the public partner and which partner will own any real
4 property pertaining to the public project when the project
5 reverts to the public partner based on the terms of the
6 agreement.

7 D. The term of initial agreements entered into
8 pursuant to the New Mexico Infrastructure Investment Act may be
9 for a term not to exceed fifty years, and such agreements may
10 be extended for additional terms; provided that an extension
11 shall be subject to the same review and negotiation process as
12 the original agreement.

13 E. The public-private partnership agreement shall
14 contain a provision by which the private partner expressly
15 agrees that it is prohibited from seeking injunctive or other
16 equitable relief to delay, prevent or otherwise hinder the
17 public partner or any other jurisdiction from developing,
18 constructing or maintaining a public project that was planned
19 and that would or might affect the revenue that the private
20 partner would or might derive from the public project developed
21 pursuant to the New Mexico Infrastructure Investment Act,
22 except that the agreement may provide for reasonable
23 compensation to the private partner for the adverse effect
24 resulting from the public partner's development, construction
25 and maintenance of an unplanned facility that affects the

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1 public project's revenue.

2 F. The state board of finance shall approve the
3 assignment, transfer or sale of assets or investment in a
4 public project that creates debt obligation of the public
5 partner.

6 SECTION 10. [NEW MATERIAL] FUNDING AND FINANCING.--

7 A. Any lawful source of funding may be used for the
8 development or management of a public project, including:

9 (1) proceeds of grant anticipation revenue
10 bonds, private activity bonds, revenue bonds or other bonds
11 allowed by federal or state law;

12 (2) grants, loans, loan guarantees, lines of
13 credit, revolving lines of credit or other arrangements as
14 allowed by federal or state law;

15 (3) other federal, state or local revenues;

16 (4) user fees, lease payments, availability
17 payments, gross or net receipts from sales, proceeds from the
18 sale of development rights, franchise charges, permit charges,
19 advertising and sponsorship charges, service charges or any
20 other lawful form of consideration; and

21 (5) other available forms of public and
22 private capital.

23 B. As security for the payment of financing
24 described in this section, the revenues from a public project
25 may be pledged, but no pledge of revenues or property

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1 constitutes in any manner or to any extent a general obligation
2 of the state or local government, unless explicitly agreed to
3 by the state or local government. Financing may be structured
4 on a senior, parity or subordinate basis to any other
5 financing.

6 C. The public partner may accept money from the
7 United States or any of its agencies to carry out the
8 provisions of the New Mexico Infrastructure Investment Act,
9 whether the money is made available by grant, loan or other
10 financing arrangement. The public partner assents to any
11 federal requirements, conditions or terms of any federal
12 funding accepted by the public partner pursuant to this
13 subsection. The public partner may enter into agreements or
14 other arrangements with the United States or any of its
15 agencies as may be necessary to carry out the provisions of
16 that act.

17 D. The public partner may accept from any source
18 any grant, donation, gift, conveyance of land, other real or
19 personal property or other thing of value made to the public
20 partner for the purposes of a public project.

21 E. A public project may be funded in whole or in
22 part by contributions of money or property made by a private
23 person, a private entity or the state or any agency,
24 institution, instrumentality or political subdivision of the
25 state.

1 F. Federal, state and local money may be combined
 2 with private sector money for public project purposes as
 3 allowed by law or by the provisions of a grant, gift or
 4 donation.

5 G. Any revenue bonds issued as a result of the New
 6 Mexico Infrastructure Investment Act are not general
 7 obligations of this state or any local government and are not
 8 secured by or payable from any money or assets of the state or
 9 any local government other than the money and revenues
 10 specifically pledged to the repayment of the revenue bonds.

11 SECTION 11. [NEW MATERIAL] USER FEES AT END OF AGREEMENT
 12 PERIOD.--The public partner may continue or cease collection of
 13 user fees after the end of the term of the public-private
 14 partnership agreement, based on a determination of the public
 15 project's future operations.

16 SECTION 12. [NEW MATERIAL] REVERSION OF PUBLIC PROJECT TO
 17 PUBLIC PARTNER.--If a public-private partnership is terminated,
 18 the powers and duties of the private partner cease, except for
 19 any duties and obligations that extend beyond the termination
 20 as provided in the public-private partnership agreement, and
 21 the public project reverts to the public partner and shall be
 22 dedicated for public use.

23 SECTION 13. [NEW MATERIAL] MATERIAL DEFAULT--REMEDIES.--

24 A. Upon the occurrence and during the continuation
 25 of material default by the private partner, not related to an

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1 event of force majeure, the public partner may:

2 (1) elect to take over the public project,
3 including the succession of all right, title and interest in
4 the public project, subject to any liens on revenue previously
5 granted by the private partner; and

6 (2) terminate the public-private partnership
7 and exercise any other rights and remedies that may be
8 available.

9 B. If the public partner elects to take over a
10 public project pursuant to Subsection A of this section, the
11 public partner:

12 (1) shall collect and pay any revenue that is
13 subject to lien to satisfy an obligation; and

14 (2) may develop and operate the public
15 project, impose user fees for the use of the public project and
16 comply with any service contracts.

17 SECTION 14. [NEW MATERIAL] POLICE POWERS--VIOLATIONS OF
18 LAW.--State or local government law enforcement officers have
19 the same powers and jurisdiction within the limits of the
20 public project as they have in their respective areas of
21 jurisdiction and access to the public project at any time to
22 exercise such powers and jurisdictions.

23 SECTION 15. [NEW MATERIAL] UTILITY CROSSINGS.--Subject to
24 the requirements of federal and state laws, contractual
25 agreements and land conveyance documents, a public or private

1 partner and any utility whose facility is to be crossed or
2 relocated shall cooperate fully in planning and arranging the
3 manner of the crossing or relocation of the utility facility.

4 SECTION 16. EFFECTIVE DATE.--The effective date of the
5 provisions of this act is July 1, 2017.

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