

SENATE BILL 360

55TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2021

INTRODUCED BY

Michael Padilla

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This document may incorporate amendments proposed by a committee, but not yet adopted, as well as amendments that have been adopted during the current legislative session. The document is a tool to show amendments in context and cannot be used for the purpose of adding amendments to legislation.

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AN ACT

RELATING TO PUBLIC UTILITIES; ENACTING THE UTILITY EASEMENTS FOR BROADBAND ACT; AUTHORIZING THE USE AND SHARING OF UTILITY EASEMENTS FOR THE PROVISION OF COMMUNICATIONS SERVICE THROUGHOUT THE STATE; REQUIRING NOTICE OF USE OF UTILITY EASEMENTS TO THE PROPERTY OWNER; PROVIDING FOR OPTIONAL RECORDING OF SUCH NOTICE; ESTABLISHING CLAIMS PURSUANT TO THE USE OF UTILITY EASEMENTS; ALLOWING COST RECOVERY FOR COMMUNICATIONS INFRASTRUCTURE PROJECTS; PROVIDING DEFINITIONS.

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

SECTION 1. A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] SHORT TITLE.--This act may be cited as the "Utility Easements for Broadband Act"."

SECTION 2. A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] DEFINITIONS.--As used in the Utility Easements for Broadband Act:

- A. "burdened parcel" means a parcel of real property subject to a utility easement;
- B. "commission" means the public regulation commission;
- C. "communications infrastructure" means any wireline or wireless facilities and equipment, including amplifiers, antennae, cable, conduits, ducts, fiber, optronics, poles, structures, STBTC→towers,←STBTC transmitters, towers, wires or other facilities or equipment owned by a public utility and used in connection with the provision of communications service;
- D. "communications service" means any technology having the capacity to transmit data or other signals to enable a user of the service to originate and receive graphics, data, video, voice or other modes of communication;
- E. "notice address" means the mailing address of

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the owner of a burdened parcel, or holder of record of an exclusive interest in the burdened parcel for any form of communications service, as listed in the records of the applicable county assessor fourteen days prior to delivery of notice;

F. "public utility" means "public utility" as defined in the Public Utility Act; and

G. "utility easement" means a franchise, easement, whether recorded or unrecorded, license, permit, right of way or similar right in real property, including a prescriptive right or any right of way acquired pursuant to Chapter 62, Article 1 NMSA 1978 held by a public utility."

SECTION 3. A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] USE OF UTILITY EASEMENTS.--

A. For a burdened parcel with a utility easement that does not already provide for or permit the installation, maintenance, removal or use of communications infrastructure, upon complying with the notice provisions in Section 4 of the Utility Easements for Broadband Act and without approval or consent of the commission, a public utility may:

(1) acquire, construct, install, maintain, operate, own, remove or upgrade its communications infrastructure across, in, on, over or under the portion of a burdened parcel that is subject to a utility easement and may

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permit third parties to do so on behalf of the public utility;

(2) lease, license, provide a right to use or transfer in whole or in part any of its communications infrastructure located in a utility easement; and

(3) enter and access the burdened parcel for the purposes or actions as may be reasonably necessary or desirable in connection with actions pursuant to this subsection.

B. A public utility's exercise of rights under Subsection A of this section is subject to a generally applicable requirement on the burdened parcel to locate utilities underground if provided by:

(1) an ordinance regarding subdivision plats pursuant to Chapter 3, Articles 19 and 20 NMSA 1978, or Chapter 47, Articles 5 and 6 NMSA 1978, as applicable; or

(2) rules promulgated by a zoning authority pursuant to Chapter 3, Article 21 NMSA 1978.

C. Upon a public utility's exercise of rights under Subsection A of this section, such rights run with the land and are valid and binding on successors-in-interest of the owner and any holder of an interest in the burdened parcel regardless of a lack of privity of estate or contract."

SECTION 4. A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] NOTICE REGARDING USE OF UTILITY

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EASEMENT.--

A. A public utility shall deliver a notice that substantially contains the information required in Subsection B of this section to the notice address by certified or registered mail or by regional or national delivery service, without requirement for signature upon delivery:

(1) for an exercise of rights pursuant to Subsection A of Section 3 of the Utility Easements for Broadband Act that involves installation or construction, at least ten days prior to the start of such installation or construction; or

(2) for an exercise of rights under Subsection A of Section 3 of the Utility Easements for Broadband Act not involving any installation or construction, within forty-five days following such exercise of rights.

B. The notice required under Subsection A of this section shall:

(1) identify the public utility and provide contact information for a point of contact at the public utility;

(2) furnish a general description of the utility infrastructure already existing in the utility easement as of the date of notice or a general description of the location of the utility easement, which shall not require any legal description, land title survey or any other description

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of the exact boundaries of the utility easement;

(3) provide the parcel number or tax identification number of the burdened parcel, as set forth in the county assessor's records; and

(4) reference the Utility Easements for Broadband Act and state that the public utility is exercising its rights pursuant to that act.

C. The notice required under Subsection A of this section:

(1) shall be deemed delivered on the third business day after being deposited in the United States mail or with a delivery service; and

(2) is required to be sent only once, and no subsequent exercise of rights with respect to the burdened parcel by a public utility or anyone deriving rights through a public utility under Subsection A of Section 3 of the Utility Easements for Broadband Act shall require additional notice."

**SECTION 5.** A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] OPTIONAL RECORDING OF NOTICE.--A public utility may, but is not obligated to, record a notice delivered pursuant to the Utility Easements for Broadband Act, or a recording memorandum of one or more notices in the applicable county clerk's office against all or any portion of a parcel that is subservient to the utility easement, containing the

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information set forth in Paragraphs (2), (3) and (4) of Subsection B of Section 4 of the Utility Easements for Broadband Act. Recording a memorandum of notice shall be effective to perfect the rights exercised under Subsection A of Section 3 of the Utility Easements for Broadband Act against all estates and persons holding any interest in the burdened parcel or real property appurtenant thereto, except that a crossing of the right of way of another public utility shall be effected in the manner provided in Section 62-1-4 NMSA 1978."

SECTION 6. A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] COST RECOVERY.--The commission shall, after notice and hearing, allow a public utility that acquires, constructs, installs, removes or upgrades communications infrastructure pursuant to the Utility Easements for Broadband Act to recover its reasonable costs through a commission-approved tariff rider, in base rates, or both. The public utility may include a mechanism for the return of costs recovered to customers from revenue as a result of leasing, licensing or other transfer of a right to use of the communications infrastructure by a third party in a future rate case. The commission shall within six months determine, and allow cost recovery of, reasonable utility expenditures on communications infrastructure projects. Failure to issue an order approving or denying cost recovery within six months

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shall be deemed to be approval."

SECTION 7. A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] CLAIMS--TIME LIMIT--CALCULATION OF DAMAGES.--

A. No claim or cause of action against a public utility exercising its rights pursuant to the Utility Easements for Broadband Act may be brought by any person more than one year after:

(1) in the case of a claim or cause of action brought by or on behalf of a person to whom notice under Section 4 of the Utility Easements for Broadband Act was required, the date of delivery of notice; or

(2) in the case of a claim or cause of action brought by or on behalf of an interest holder in real property subject to the utility easement, other than a person to whom notice under Section 4 of the Utility Easements for Broadband Act was required, the date of recording of the notice or a memorandum of notice.

B. For any claim or cause of action that is brought or may be brought by or on behalf of a person holding an interest in the burdened parcel or real property appurtenant thereto, whether in trespass, inverse condemnation or otherwise, with respect to a public utility's exercise of the rights set forth in Subsection A of Section 3 of the Utility

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Easements for Broadband Act, the following shall apply:

(1) the measure of damages for any and all such claims or causes of action, taken together, is the fair market value of the reduction in the value of the estate held by such interest holder, as contemplated by Section 42A-1-24 NMSA 1978;

(2) the following shall not be used and are not admissible as evidence in any proceeding: profits, fees or revenue derived from any such communications infrastructure; the rental value of the real property, utility easement or communications infrastructure; or the value of any communications corridor consisting of easements or similar rights over multiple parcels of real property;

(3) consideration shall be given to any increase in the fair market value to the property of the availability of communications service that arises from the installation or use of communications infrastructure in the utility easement;

(4) the interest holder bringing a claim or cause of action shall make reasonable accommodations to allow the public utility to conduct an appraisal of the real property within ninety days following a written request by the public utility. If an interest holder fails to make such accommodations, the public utility shall have no further liability to such interest holder with respect to the public

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utility's exercise of rights under Subsection A of Section 3 of the Utility Easements for Broadband Act;

(5) any claim, cause of action or damages shall be deemed to occur at the time of the public utility's initial exercise of rights, shall be fixed and shall not be deemed to continue, accrue or accumulate;

(6) except in the case of another party's gross negligence or willful misconduct, no party to any such claim or cause of action shall be entitled to attorney fees or costs, reimbursement of the cost of any appraisal or any award of special, indirect, consequential, punitive or exemplary damages; and

(7) by accepting a damage award in respect of a public utility's exercise of rights under Subsection A of Section 3 of the Utility Easements for Broadband Act, an interest holder in the burdened parcel shall be deemed to have granted a permanent easement or right of way to the public utility for all of the rights set forth in that subsection.

C. A claim or cause of action under this section shall not be brought on behalf of a class.

D. The limitations on claims and causes of action set forth in Subsections A and B of this section shall not apply to a claim or cause of action based on physical damage to property or injury to natural persons.

E. Nothing in the Utility Easements for Broadband

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Act extends the statute of limitations for any claim or cause of action or shall be deemed to revive an expired claim or cause of action."

SECTION 8. A new section of Chapter 62 NMSA 1978 is enacted to read:

"[NEW MATERIAL] OTHER PROVISIONS REGARDING UTILITY EASEMENTS.--

A. A public utility's power of eminent domain pursuant to Section 62-1-4 NMSA 1978 shall include the power to enter upon the burdened parcel and appropriate the rights set forth in Subsection A of Section 3 of the Utility Easements for Broadband Act within the utility easement.

B. A public utility's exercise of rights under Subsection A of Section 3 of the Utility Easements for Broadband Act shall not be deemed to dedicate a utility easement for public or compatible use.

C. Nothing in the Utility Easements for Broadband Act shall be deemed to obligate a public utility to provide any rights or access to a communications service provider or to 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.

D. Nothing in the Utility Easements for Broadband Act shall be deemed to obligate a public utility to provide any

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communications service to any person, but a public utility may provide communications service subject to such laws and rules as may be generally applicable to other communications service providers."

**SECTION 9. EFFECTIVE DATE.**--The effective date of the provisions of this act is July 1, 2021.

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