

HOUSE BILL NO. 285

INTRODUCED BY R. BITNEY

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A BILL FOR AN ACT ENTITLED: "AN ACT DEFINING WHICH FEES MAY BE RECOVERED FROM A UTILITY OCCUPYING A PUBLIC RIGHT-OF-WAY; REQUIRING THAT DISPUTES REGARDING UTILITY USE OF OR ACCESS TO A PUBLIC RIGHT-OF-WAY MUST BE SETTLED THROUGH ARBITRATION IF BOTH PARTIES AGREE TO ARBITRATION IN A WRITTEN AGREEMENT; DESCRIBING THE METHOD FOR SELECTION OF THE ARBITRATOR OR ARBITRATORS; AMENDING SECTION 7-1-111, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

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WHEREAS, the Legislature finds that economic development depends in part on the availability of and access to public infrastructure, including among other things, advanced energy, transportation, and telecommunications facilities; and

WHEREAS, it is in the public interest to facilitate the deployment of telecommunications and other utility infrastructure for the benefit of Montana's business and residential consumers; and

WHEREAS, unreasonable restrictions on a utility's access to public rights-of-way can restrict the deployment of infrastructure and retard economic development of Montana and its political subdivisions; and

WHEREAS, all users of public rights-of-way should be allowed reasonable and timely access to public rights-of-way on a competitively neutral and nondiscriminatory basis; and

WHEREAS, federal statute (47 U.S.C. 253(c)) preserves the authority of a state or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis for use of public rights-of-way if the compensation required is publicly disclosed by the government.

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BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

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NEW SECTION. **Section 1. Definitions.** Unless the context requires otherwise, the following definitions apply to [sections 1 through 7]:

(1) (a) "Management costs" means the reasonable, direct, and actual administrative costs that a

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1 political subdivision incurs in managing the public rights-of-way under its jurisdiction, notwithstanding the
2 rights granted to utilities under 35-18-105 and 69-4-101.

3 (b) Management costs do not include payment by a right-of-way user for the use of the public
4 right-of-way, the fees and cost of litigation relating to the interpretation of this section or any ordinance
5 enacted under this section, or the political subdivision's fees and costs related to appeals taken.

6 (2) "Political subdivision" means any subdivision, agency, or entity of state or local government,
7 including but not limited to state departments and agencies, a county, a city and county, a city, a town,
8 a school district, a local improvement district, or any other kind of municipal, quasi-municipal, or public
9 corporation organized pursuant to law.

10 (3) "Utility" means any public utility, as defined in 69-3-101, or any rural electric or telephone
11 cooperative organized under Title 35, chapter 18.

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13 **NEW SECTION. Section 2. Assessment and recovery of management fees.** (1) Subject to Article
14 X, section 11, of the Montana constitution, a political subdivision may not impose a fee to recover from
15 a utility for the use of its right-of-way other than a fee for its management costs.

16 (2) A political subdivision may not require a right-of-way user to obtain a franchise or pay for the
17 use of the right-of-way.

18 (3) A political subdivision may recover from a utility only those fair and reasonable management
19 costs caused by the utility's activity in the public right-of-way.

20 (4) A fee imposed under this section must be based on actual, direct administrative costs incurred
21 and must be imposed on a competitively neutral basis.

22 (5) When a political subdivision's management costs cannot be attributed to only one entity, those
23 costs must be allocated among all users of the public right-of-way, including the political subdivision. The
24 allocation must reflect proportionately the costs incurred by the political subdivision as a result of the
25 various types of users of the public right-of-way.

26 (6) This section does not prohibit the collection of franchise fees for cable franchises as permitted
27 under 47 U.S.C. 542. A political subdivision that collects a franchise fee under this section may not
28 collect a management fee under [sections 1 through 7].

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30 **NEW SECTION. Section 3. In-kind compensation -- restriction.** A political subdivision may not:

1 (1) require or accept in-kind services or other contributions or compensation by a utility or
2 right-of-way user in lieu of a fee imposed under [section 2]; or

3 (2) require or accept in-kind services or other forms of compensation as a condition of the use of
4 the political subdivision's public right-of-way.

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6 **NEW SECTION. Section 4. Cost recovery by utility.** A utility subject to the jurisdiction of the
7 department of public service regulation that is assessed a management fee under [section 2] is entitled to
8 recover those costs directly from end users without further approval of the commission. If the utility,
9 subject to jurisdiction of the commission, serves customers within the boundaries of the political
10 subdivision imposing the fees for its right-of-way management costs, the fees may be recovered only from
11 those customers.

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13 **NEW SECTION. Section 5. Arbitration -- preferred method of settlement.** (1) A utility that is
14 denied the use of or access to a political subdivision right-of-way, that has its right-of-way permit revoked,
15 or that believes that the fees imposed on that utility by the political subdivision do not conform to the
16 requirements of [sections 1 through 7] may request in writing that the denial, revocation, or fee imposition
17 be reviewed by the governing body of the political subdivision. The governing body of the political
18 subdivision shall act within 30 days of the request.

19 (2) A decision by the governing body affirming or amending the denial, revocation, or fee
20 imposition must be in writing and must be supported by written findings establishing the reasonableness
21 of the decision.

22 (3) Upon affirmation or amendment by the governing body of the denial, revocation, or fee
23 imposition, the utility may submit a letter to the political subdivision requesting that the matter be decided
24 through arbitration. In order to settle the matter through arbitration both parties shall agree in the form
25 of a written agreement. Binding arbitration must be before an arbitrator selected by the political subdivision
26 and the utility. Arbitration is subject to the Uniform Arbitration Act contained in Title 27, chapter 5.

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28 **NEW SECTION. Section 6. Selection of arbitrator.** (1) If all parties subject to the binding
29 arbitration agree to an arbitrator within 15 days of submitting the decision to final arbitration, that person
30 shall serve as arbitrator for the binding arbitration.

1 (2) If all parties are unable to agree to an arbitrator within that 15-day period, the final arbitration
2 must be conducted by an arbitration panel.

3 (3) The arbitration panel must be made up of three individuals. One arbitrator must be selected
4 by the political subdivision. One arbitrator must be selected by the utility. The third arbitrator is the
5 presiding officer and must be selected by the two arbitrators previously selected. However, if the two
6 arbitrators fail to make the choice at the time of their selection, then the selection must be made by a
7 district court judge in the county from whom the other arbitrators request an appointment.

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9 NEW SECTION. **Section 7. Arbitration -- payment of costs.** The cost of a single arbitrator must
10 be paid equally by the political subdivision and the utility. If a three-person arbitration panel is selected,
11 each party shall pay the cost of its own arbitrator, and the parties shall jointly pay the cost for the third
12 arbitrator and the costs of the arbitration. Each party to the arbitration shall pay its own costs,
13 disbursements, and attorney fees.

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15 **Section 8.** Section 7-1-111, MCA, is amended to read:

16 **"7-1-111. Powers denied.** A local government unit with self-government powers is prohibited from
17 exercising the following:

18 (1) any power that applies to or affects any private or civil relationship, except as an incident to
19 the exercise of an independent self-government power;

20 (2) any power that applies to or affects the provisions of 7-33-4128 or Title 39 (labor, collective
21 bargaining for public employees, unemployment compensation, or workers' compensation), except that
22 subject to those provisions, it may exercise any power of a public employer with regard to its employees;

23 (3) any power that applies to or affects the public school system, except that a local unit may
24 impose an assessment reasonably related to the cost of any service or special benefit provided by the unit
25 and shall exercise any power that it is required by law to exercise regarding the public school system;

26 (4) any power that prohibits the grant or denial of a certificate of public convenience and
27 necessity;

28 (5) any power that establishes a rate or price otherwise determined by a state agency;

29 (6) any power that applies to or affects any determination of the department of environmental
30 quality with regard to any mining plan, permit, or contract;

1 (7) any power that applies to or affects any determination by the department of environmental
2 quality with regard to a certificate of environmental compatibility and public need;

3 (8) any power that defines as an offense conduct made criminal by state statute, that defines an
4 offense as a felony, or that fixes the penalty or sentence for a misdemeanor in excess of a fine of \$500,
5 6 months' imprisonment, or both, except as specifically authorized by statute;

6 (9) any power that applies to or affects the right to keep or bear arms, except that a local
7 government has the power to regulate the carrying of concealed weapons;

8 (10) any power that applies to or affects a public employee's pension or retirement rights as
9 established by state law, except that a local government may establish additional pension or retirement
10 systems;

11 (11) any power that applies to or affects the standards of professional or occupational competence
12 established pursuant to Title 37 (professions and occupations) as prerequisites to the carrying on of a
13 profession or occupation;

14 (12) any power that applies to or affects Title 75, chapter 7, part 1 (streambeds), or Title 87 (fish
15 and wildlife);

16 (13) any power that involves charging a fee in excess of the fee allowed in [section 2] for use of
17 the public right-of-way."

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19 NEW SECTION. Section 9. Codification instruction. [Sections 1 through 7] are intended to be
20 codified as an integral part of Title 69, chapter 4, and the provisions of Title 69, chapter 4, apply to
21 [sections 1 through 7].

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23 NEW SECTION. Section 10. Effective date. [This act] is effective on passage and approval.

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