

Legislative Analysis



ACTIONS RELATING TO AN EASEMENT HELD BY A MICHIGAN ELECTRIC COOPERATIVE

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House Bill 4266 (H-2) as referred to second committee
Sponsor: Rep. Triston Cole

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1st Committee: Communications and Technology
2nd Committee: Ways and Means
Complete to 1-15-20

BRIEF SUMMARY: House Bill 4266 would add section 2979 to the Revised Judicature Act to address trespass, unjust enrichment, or other actions arising from or relating to an easement held by a Michigan electric cooperative and brought against the holding electric cooperative.

House Bill 5266 would add sections 8a and 8b to the Electric Cooperative Member-Regulation Act to require a cooperative electric utility to provide access to its poles to certain service providers, as well as provide a pathway for resolving disputes.

FISCAL IMPACT: House Bill 4266 would not have a significant fiscal impact on state or local government.

House Bill 5266 would not have an appreciable fiscal impact on the Department of Licensing and Regulatory Affairs (LARA). The bill would have an indeterminate fiscal impact on local court funding units. Costs could be incurred depending on how provisions of the bill affected court caseloads and related administrative costs.

THE APPARENT PROBLEM:

According to committee testimony, House Bill 4266 is intended to codify existing Michigan case law pertaining to the use of existing easements for broadband infrastructure to ensure that the law is applied uniformly across the state, and House Bill 5266 is intended to encourage development by offering consistent standards for pole attachments. It is believed that if consistent standards are upheld, electric cooperatives will be encouraged to extend broadband access to rural areas, thereby promoting connectivity and creating jobs.

THE CONTENT OF THE BILLS:

House Bill 4266 would add section 2979 to the Revised Judicature Act to address trespass, unjust enrichment, or other actions arising from or relating to an easement held by a *Michigan electric cooperative* and brought against the holding electric cooperative.

Michigan electric cooperative would include an entity engaged in the transmission or distribution of electric service that is either an electric cooperative headquartered in this state organized as a cooperative corporation under sections 98 to 109 of 1931 PA 327, serving primarily members of the cooperative electric utility, or another cooperative corporation headquartered in this state.

Under the bill, in an action brought against an electric cooperative in relation to an easement, there would be a rebuttable presumption that there was no unreasonable or material increase in the burden on the property subjected to the easement if the electric cooperative could show one of the following:

- The new or additional *facility* was installed above the electric space, as provided in the National Electric Safety Code in effect on the date of installation.
- The new facility replaced a previously existing facility in the same or substantially similar location on the pole or poles.
- The new or additional facility was installed within the electric space or within the communication space, as provided in the National Electric Safety Code in effect on the date of installation.
- The new or additional facility was placed underground along the same or a substantially similar location of existing underground electric facilities.

Facility would mean new or expanded broadband fiber infrastructure used, at least partially, for electric service purposes.

The cooperative would not be liable unless the plaintiff established that one of the following applied to the new or additional facility installed on an existing easement:

- The facility was installed outside of the geographic bounds of the express or prescriptive easement granted or obtained.
- The facility's purpose and use were expressly and specifically prohibited by the terms of the easement.
- The facility unreasonably or materially increased the burden on the land.

Evidence of revenue realized by the cooperative from services using the new or additional facility would be inadmissible for proving damages. Any damages would be determined by an actual diminution of value of the property subjected to the easement and directly related to the installation of the new facility. However, if damages were awarded, they could not exceed \$3 per linear foot.

Proposed MCL 600.2979

House Bill 5266 would add sections 8a and 8b to the Electric Cooperative Member-Regulation Act to require a cooperative electric utility to provide access to its poles to certain service providers, as well as provide a pathway for resolving disputes.

Section 8a would require a cooperative electric utility that is member-regulated under the act ("utility") to provide a *video service provider, broadband provider, wireless provider*, or any *telecommunication provider* (collectively, "provider") with nondiscriminatory

access to its poles upon just and reasonable rates, terms, and conditions for their *attachments*. A utility could require a provider to execute an agreement for attachments on reasonable terms and conditions, but only if that agreement was also required of all others.

Video service provider would mean a person authorized under the Uniform Video Services Local Franchise Act to provide video service, as defined in MCL 484.3301.

Broadband provider would mean a person that provides *broadband internet access transport services*, as further defined under the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act (MCL 484.3102).¹

Wireless provider would refer to a *wireless infrastructure provider*² or a *wireless services provider*,³ as further defined in the Small Wireless Communications Facilities Deployment Act (MCL 460.1309). It would not include an investor-owned utility whose rates are regulated by the Michigan Public Service Commission.

Telecommunication provider would mean a person who, for compensation, provides one or more telecommunication services, as defined in the Michigan Communications Act (MCL 484.2102). It would not include a provider of a *commercial mobile service*, as further defined in the Telecommunications Act of 1996 in 47 USC 332.⁴

Attachment would mean any wire, cable, antennae facility, or apparatus for the transmission of writing, signs, signals, pictures, sounds, or other forms of information installed by or on behalf of a provider of cable or telecommunications service upon any pole owned or controlled by one or more cooperative electric utilities that are member-regulated under the act. [The bill would further define what an attachment includes.]

Request for access and denial

A request for access to the utility poles would have to be in writing. Access would have to be granted or denied within the time frame established by the regulations implementing 47 USC 224 adopted by the adopted by the Federal Communications Commission (FCC).

¹ MCL 484.3102: “Broadband internet access transport services” means the broadband transmission of data between an end-user and the end-user’s internet service provider’s point of interconnection at a speed of 200 or more kilobits per second to the end-user’s premises.

² MCL 460.1309: “Wireless infrastructure provider” means any person, including a person authorized to provide telecommunications services in this state but not including a wireless services provider, that builds or installs wireless communication transmission equipment, wireless facilities, or wireless support structures and who, when filing an application with an authority under this act, provides written authorization to perform the work on behalf of a wireless services provider.

³ MCL 460.1309: “Wireless services provider” means a person that provides wireless services.

⁴ 47 USC 332(d)(1): “Commercial mobile service“ means any mobile service (as defined in section 153 of this title) that is provided for profit and makes interconnected service available (A) to the public or (B) to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the [FCC].

A utility would be able to deny a provider access on a nondiscriminatory basis if there were either insufficient capacity or other reasons regarding safety, reliability, or generally applicable engineering standards. If access was denied, the utility would have to confirm the denial in writing, which must be specific, include all relevant evidence and information supporting the denial, and explain how that evidence and information related to a denial of access for reasons of insufficient capacity, safety, reliability, or generally applicable engineering standards.

Make-ready work and compliance

A provider and the utility would have to comply with the process for make-ready work under 47 USC 224 as well as the orders and regulations implementing 47 USC 224 adopted by the FCC. Estimates for any make-ready work for poles would have to include pole replacement if necessary. Make-ready costs would have to be based on actual costs not recovered through the annual recurring rate.

An attaching party would be required to obtain any necessary authorization before occupying public ways or private rights-of-way with its attachment.

Safety and reliability

The attachment of facilities on the poles of a utility by a provider would have to comply with the most recent applicable, nondiscriminatory safety and reliability standards adopted by the utility and with the National Electric Safety Code, as published by the Institute of Electrical and Electronics Engineers, in effect on the date of the attachment.

Modification of facilities

The costs of modifying a facility would have to be borne by all parties that obtain access to the facility as a result of the modification and by all parties that directly benefit from the modification. Each party that obtains access would share the modification costs proportionately.

However, a party with a preexisting attachment may or may not be required to share the modification costs. If a party added or modified its attachment after notification of modification, or if modification was necessitated by the utility for an electric service, then the party would be liable for modification costs. A party would not be liable for costs of rearranging or replacing its attachment if it were necessary solely as a result of an additional attachment or the modification of an existing attachment sought by another party.

Section 8b would govern claims in law or equity for disputes regarding any of the above. Specifically, the Marquette County Circuit Court, the Ingham County Circuit Court, or the circuit court of the county where the utility has its headquarters would have jurisdiction to determine all disputes arising under section 8a as well as grant remedies.

Liability

In a dispute, the utility would not be liable for damages in law or equity unless the complaint established both of the following:

- That a rate, term, or condition was not just and reasonable or that a denial of access was unlawful.
- One of the following:
 - That the rate, term, or condition was contained in a new pole attachment agreement or in a previously existing pole attachment agreement that was amended, renewed, or replaced by executing a new agreement on or after the effective date of the bill.
 - That there was an unreasonable denial of access or refusal to enter into a new, amended, renewed, or replacement agreement on or after the effective date of the bill.

Burden of proof

The complainant would have the burden of establishing that the rate, term, or condition was not just and reasonable or a denial of access was unlawful. In a case involving a denial of access, the utility would have the burden of establishing that the denial was lawful.

If a utility argued that the proposed rate was lower than its incremental costs, the utility would have the burden of establishing that the proposed rate was below the statutory minimum just and reasonable rate.

There would be a rebuttable presumption that the charged rate was just and reasonable if the utility could show that its charged rate did not exceed an annual recurring rate permitted under rules and regulations adopted by the FCC under 47 USC 224(d).

Remedies

If a court determined that the rate, term, or condition was not just and reasonable, it could prescribe a just and reasonable rate, term, or condition, as well as doing any of the following:

- Terminating the unjust and unreasonable rate, term, or condition.
- Requiring entry into a pole attachment agreement on reasonable rates, terms, and conditions.
- Requiring access to poles, as provided under section 8a, described above.
- Substituting in the pole attachment agreement the just and reasonable rate, term, or condition, as established by the court.
- Ordering a refund or payment, not to exceed the difference between the actual amount paid under the unjust and unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the court for the period at issue, but up to two years.

Proposed MCL 460.38a and 460.38b

The bills are tie-barred to one another, which means that neither could be enacted unless both are enacted.

BACKGROUND INFORMATION:

The question of whether utility companies can augment the function of an easement by adding new cables has been the subject of several court cases in Michigan and other states. In *Mumaugh v Diamond Lake Area Cable TV Co.*, the Michigan Court of Appeals ruled that the attachment of television cables to the company's poles did not increase the burden on the property and the use of the easement effectively remained unchanged.⁵ The court came to a similar ruling in *Heydon v MediaOne*.⁶

However, in Missouri, a federal district court ruled in *Barfield v Sho-Me Power Elec. Coop.* that Sho-Me Power Electric Cooperative breached the easement agreement by adding fiber optic cables to the company's poles through several properties without the property owners' consent or due compensation. The plaintiffs were awarded damages relating to the breach of easements and trespass.⁷

The Texas legislature is currently considering SB 14,⁸ which would allow electric cooperatives to expand the use of their easements to include broadband infrastructure. Other states have enacted legislation to encourage electric cooperatives to extend broadband into rural areas, such as Indiana's FIBRE Act,⁹ which allows electric cooperatives to add broadband infrastructure to existing easements, but does not apply to new easements or new facilities.

ARGUMENTS:

For:

Supporters of the bills argue that the bill protects Michigan electric cooperatives from lawsuits by codifying court decisions that support electric cooperatives that would like to extend broadband into rural areas. Committee testimony specifically highlighted *Barfield v Sho-Me Power Elec. Coop.* as a cautionary tale in which a Missouri federal district court ruled that the cooperative breached the easement agreement by adding fiber optic cables to the company's existing poles throughout several properties without the property owners' consent or due compensation. The plaintiffs were awarded a \$78.0 million settlement. Supporters believe that the proposed legislation proposed would offer enough protection to Michigan electric cooperatives to encourage further investment in rural broadband.

Supporters further argue that HB 5266 would continue the expansion of connectivity and broadband to rural areas in Michigan by ensuring a consistent process and rate methods for pole attachments.

Against:

No arguments opposing the bills were offered in committee.

⁵ 183 Mich App 597 (1990)

⁶ 275 Mich App 267 (2007)

⁷ 852 F3d 795 (8th Cir. 2017)

⁸ <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=86R&Bill=SB14>

⁹ <http://iga.in.gov/legislative/2017/bills/senate/478#document-92ab6a12>

POSITIONS:

A representative of the Michigan Electric Cooperative Association testified in support of the bills. (12-4-19)

The following organizations indicated support for the bills:

- Frontier Communications (12-4-19)
- AT&T (12-4-19)
- Telecommunications Association of Michigan (12-4-19)
- Comcast (12-11-19)
- Michigan Farm Bureau (12-11-19)

The following organizations indicated support for HB 4266 (5-8-19):

- Wolverine Power
- Michigan Electric Cooperative Association

The Michigan Internet and Telecommunications Alliance indicated support for HB 5266. (12-11-19)

The Telecommunications Association of Michigan indicated opposition to HB 4266. (5-8-19)

Legislative Analyst: Emily S. Smith
Fiscal Analyst: Marcus Coffin

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.