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House Bill 4266 (Substitute H-2 as passed by the House)  
House Bill 5266 (as passed by the House)  
Sponsor: Representative Triston Cole  
House Committee: Communications and Technology  
Ways and Means  
Senate Committee: Energy and Technology

Date Completed: 2-18-20

### **CONTENT**

**House Bill 5266** would amend the Electric Cooperative Member-Regulation Act to do the following:

- Require a cooperative electric utility that was member-regulated under the Act to provide a video service provider, broadband provider, wireless provider, or other telecommunication provider with nondiscriminatory access to its poles upon just reasonable rates, terms, and conditions for their attachments.
- Specify circumstances under which a cooperative electric utility could deny a telecommunication provider access to its poles on a nondiscriminatory basis.
- Require attachment or facilities on poles to comply with the most recent nondiscriminatory safety and reliability standards adopted by the cooperative electric utility.
- Require the costs of modifying a facility to be borne by all parties that obtained access to the facility as a result of the modification and by all parties that directly benefitted from the modification.
- Require an attaching party to obtain any necessary authorization before occupying public ways or private rights-of-way with its attachment.
- Specify the courts that would have jurisdiction to determine all disputes arising from the bill's provisions and to grant remedies.
- Specify the circumstances under which a cooperative electric utility would be liable for damages in law or equity.
- Specify the circumstances under which a complainant or a cooperative electric utility would have the burden of establishing a prima facie case related to the legality of a rate, term, or condition.
- Specify the actions a court could take if it determined that a rate, term, or condition complained of was not just and reasonable.

**House Bill 4266 (H-2)** would amend the Revised Judicature Act to do the following:

- Specify, in a trespass, unjust enrichment, or other action relating to an easement held by a Michigan electric cooperative, the circumstances under which there would be a rebuttable presumption that there was no unreasonable or material increase in the burden on a property subjected to an easement.

- **Specify the circumstances under which a Michigan electric cooperative would not be liable in a trespass, unjust enrichment, or other action relating to an easement held by the cooperative.**
- **Specify that evidence of revenue realized from services using a new or additional facility would be inadmissible for purposes of providing damages in a trespass, unjust enrichment, or other action relating to an easement held by the cooperative.**
- **Limit damages awarded in a trespass, unjust enrichment, or other action relating to an easement held by a cooperative to \$3 per linear foot.**

The bills are tie-barred.

### **House Bill 5266**

#### **Definitions**

"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 service or telecommunications service upon any pole owned or controlled, in whole or in part, by one or more cooperative electric utilities that are member-regulated under the Act. The term would include a micro wireless facility or small cell wireless facility as those terms are defined in the Small Wireless Communications Facility Deployment Act, if either of the following were met:

- The facility was installed in the communications space, as that term was defined in the National Electrical Safety Code published by the Institute of Electrical and Electronics Engineers as of the date of the installation.
- The facility was installed in or above the electrical space, as that term was defined in the National Electrical Safety Code published as of the date of the installation, and it was installed and maintained by either a cooperative electric utility that was member-regulated or a qualified contractor that met requirements specified in the bill.

(The National Electrical Safety Code published by the Institute of Electrical and Electronics Engineers provides standards for safety and reliability with the installation of electric equipment and electric supply and communications lines.)

"Broadband provider" would mean a person that provides broadband internet access transport services as that term is defined in Section 2 of the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act: 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.

"Telecommunication provider" would mean that term as defined in Section 102 of the Michigan Telecommunications Act: a person that for compensation provides one or more telecommunication services.

"Video service provider" would mean that term as defined in Section 1 of the Uniform Video Services Local Franchise Act: a person authorized under the Uniform Video Services Local Franchise Act to provide video service.

"Wireless provider" would mean that term as defined in Section 9 of the Small Wireless Communications Facilities Deployment Act: a wireless infrastructure provider or a wireless services provider. The term does not include an investor-owned utility whose rates are regulated by the Michigan Public Services Commission.

## Pole Access for Attachments

The bill would amend the Electric Cooperative Member-Regulation Act to require a cooperative electric utility that was member-regulated to provide a video service provider, broadband provider, wireless provider, or any telecommunication provider with nondiscriminatory access to its poles upon just reasonable rates, terms, and conditions for their attachments.

A cooperative electric utility that was member-regulated could deny a video service provider, broadband provider, wireless provider, or any telecommunication provider access to its poles on a nondiscriminatory basis for either of the following:

- If there was insufficient capacity.
- For reasons of safety, reliability, or generally applicable engineering standards.

A video service provider, broadband provider, wireless provider, or any telecommunication provider and the member-regulated cooperative electric utility would have to comply with the process for make-ready work under 47 USC 224 and the orders and regulations implementing 47 USC 224 adopted by the Federal Communications Commission (FCC). A good faith estimate established by the cooperative electric utility that was member-regulated for any make-ready work for poles would have to include pole replacement if necessary. All make-ready costs would have to be based on actual costs not recovered through the annual recurring rate, with detailed documentation provided.

(47 USC 224 generally governs pole attachments and the just and reasonable space, term, and rate for the attachments.)

A member-regulated cooperative electric utility could require a video service provider, broadband provider, wireless provider, or any telecommunication provider to execute an agreement for attachments on reasonable terms and conditions if that agreement were required of all others.

The attachment of facilities on poles of a member-regulated cooperative electric utility by a video service provider, broadband provider, wireless provider, or any other telecommunication provider would have to comply with the most recent applicable, nondiscriminatory safety and reliability standards adopted by the cooperative electric utility and with the National Electric Safety Code in effect on the date of the attachment.

A request for access to the poles of a member-regulated cooperative electric utility by a video service provider, broadband provider, wireless provider, or any telecommunication provider would have to be in writing. Access would have to be granted or denied within the time frame established by Federal regulations. If access were denied, the cooperative electric utility would have to confirm the denial in writing. The denial of access would have to 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.

The costs of modifying a facility would have to be borne by all parties that obtained access to the facility as a result of the modification and by all parties that directly benefitted from the modification. Each party that obtained access to the facility as a result of the modification and each party that directly benefitted from the modification would have to share proportionately in the cost of the modification. Except as otherwise provided, a party with a preexisting attachment to the modified facility would be considered to benefit directly from a modification if, after receiving notification of that modification, it added to or modified its attachment.

A party with a preexisting attachment to a pole would not have to bear any of the costs of rearranging or replacing its attachment if that rearrangement or replacement was necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party, unless the modification was necessitated by the cooperative electric utility that was member-regulated for an electric service, that included, but was not limited to, smart grid technologies. If a party made an attachment to the facility after the completion of the modification, that party would have to share proportionately in the cost of the modification if that modification rendered the added attachment possible.

### Claims & Disputes

Under the bill, claims in law or equity for disputes arising from the provisions proposed above would be governed by the following provisions.

The Marquette County Circuit Court, the Ingham County Circuit Court, or the circuit court of the county where the member-regulated cooperative electric utility had located its headquarters would have jurisdiction to determine all disputes arising from the bill's provisions and to grant remedies.

In a dispute governed by the bill, the member-regulated cooperative electric utility would not be liable for damages in law or equity unless the complainant established that a rate, term, or condition complained of was not just and reasonable or that a denial of access was unlawful. In addition, the complainant would have to establish one of the following:

- That the rate, term, or condition complained of 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 bill's effective date.
- That there had been an unreasonable denial of access or unreasonable refusal to enter into a new, amended, or renewed, or replacement pole attachment agreement on or after the effective date of the bill.

The complainant would have the burden of establishing a prima facie case that the rate, term, or condition was not just and reasonable or that the denial of access was unlawful. If, however, a member-regulated cooperative electric 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. In a case involving a denial of access, the utility would have the burden of establishing that the denial was lawful, once a prima facie case was established by the complainant.

In a dispute governed by the bill, there would be a rebuttable presumption that the charged rate was just and reasonable if the member-regulated cooperative electric 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). If the court determined that the rate, term, or condition complained of was not just and reasonable, it could prescribe a just and reasonable rate, term, or condition and could do any of the following:

- Terminate the unjust and unreasonable rate, term, or condition.
- Require entry into a pole attachment agreement on reasonable rates, terms, and conditions.
- Require access to poles as provided under the bill.
- Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the court.
- Order a refund, or payment, if appropriate, neither of which could exceed the difference between the actual amount paid under the unjust and unreasonable rate, term, or condition and the just and reasonable rate, term, or condition.

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 not to exceed two years.

### **House Bill 4266 (H-2)**

The bill would amend the Revised Judicature Act to specify that in a trespass, unjust enrichment, or any other action arising from or relating to an easement held by a Michigan electric cooperative and brought against the holding cooperative, 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 cooperative could show one of the following:

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

"Michigan electric cooperative" would include entities engaged in the transmission or distribution of electric service and that are either of the following:

- An electric cooperative headquartered in the State organized as a cooperative corporation under Section 98 to 109 of Public Act 327 of 1931 (which governs cooperative corporations in the State.) serving primarily members of the cooperative electric utility.
- Another cooperative corporation headquartered in the State.

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

In a trespass, unjust enrichment, or any other action arising from or relating to an easement held by a Michigan electric cooperative and brought against the holding cooperative, the cooperative would not be liable unless the plaintiff established that one of the following applied to the new or additional facility installed on the existing easement:

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

In a trespass, unjust enrichment, or any other action arising from or relating to an easement held by a Michigan electric cooperative and brought against the holding cooperative, evidence of revenue realized by the cooperative from services using the new or additional facility would be inadmissible for purposes of proving damages. Any damages would have to be determined by actual diminution of value of the property subject to the easement and directly related to the installation of the additional facility. However, damages awarded could not exceed \$3 per linear foot.

Proposed MCL 600.2979 (H.B. 4266)  
Proposed MCL 460.38a & 460.38b (H.B. 5266)

Legislative Analyst: Tyler VanHuyse

## **FISCAL IMPACT**

### **House Bill 4266 (H-2)**

The bill would have no fiscal impact on State or local government.

### **House Bill 5266**

The bill would not have a significant fiscal impact on State government or local units of government. The bill could result in an increase in litigation activities, but the associated administrative costs to court systems likely would be funded sufficiently by existing appropriations.

Fiscal Analyst: Elizabeth Raczkowski

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.