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SFA BILL ANALYSIS

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Senate Bill 446 (as enrolled)
Sponsor: Senator Mat J. Dunaskiss
Committee: Technology and Energy

Date Completed: 5-10-01

RATIONALE

Statutory provisions for alternative electric suppliers were first enacted by Public Act 141 of 2000, which created the Customer Choice and Electricity Reliability Act. In conjunction with several other measures, Public Act 141 is designed to restructure the electric industry in Michigan in a number of ways. One of these is to give customers the opportunity to choose their electricity provider. Public Act 141 requires the Public Service Commission (PSC) to license alternative electric suppliers and to issue orders establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier (AES). The Act also validated orders issued by the PSC before the Act's effective date (June 5, 2000) that allow customers of an electric utility to choose an AES.

Under the Act, an AES is a person selling electric generation service to retail customers in Michigan; an AES does not include a person who physically delivers electricity to retail customers in the State. This means, then, that while an AES can sell electricity to residential and business customers, the electricity must be transmitted over the existing power lines of the local public utility. This raises the issue of whether an AES must obtain a franchise under Article 7, Section 29 of the State Constitution. Under that section, no person operating a public utility may use a local government's rights of way without first obtaining the consent of the local unit, and must obtain a franchise from the local unit before conducting business in it. Some people believe that the Act should specify that an AES is not a public utility, thus exempting alternative electric suppliers from the constitutional franchise requirement.

CONTENT

The bill would amend the Customer Choice and Electricity Reliability Act to specify that an alternative electric supplier would not be a public utility.

MCL 460.10g

BACKGROUND

The issue of deregulating or restructuring the electric industry has been the subject of review and debate within individual states and at the Federal level since the early to mid-1990s. To date, approximately half of the states, including Michigan, have taken legislative and/or administrative steps to restructure the electric industry within their jurisdictions.

Traditionally, the provision of electricity has been considered a natural monopoly that is subject to governmental regulation. (A natural monopoly typically arises when one provider in a market can serve customers more efficiently than competing providers could do so.) The question that many states have been addressing is whether to transform this regulated monopoly into a competitive market that allows retail customers to choose their supplier. Though the process often is called "deregulation", which would remove virtually all governmental control of the industry or components of it, the term "restructuring" more accurately describes the steps that states have taken. As a rule, in a restructured environment, the providers of some services--particularly the generation of electricity--compete for retail customers and may or may not be subject to some degree of regulation, while the providers of other services--transmission and distribution of electricity--remain regulated monopolies.

Unless restructuring is implemented, electric utilities usually provide a "bundled" product; that is, they generate the electricity and transmit it to customers connected to power lines owned by the utilities. When the industry is restructured and customers are given a choice of providers--also referred to as "open access" and "retail wheeling", a utility's generation, transmission, and distribution services effectively are "unbundled". In order for customers to purchase electricity from third-party suppliers, those suppliers must have access to the utilities' transmission lines. When this takes place, the utilities are said to "wheel" the electricity across their power lines.

On June 19, 2000, the PSC issued an order approving a licensing procedure for alternative electric suppliers. According to a PSC report dated February 1, 2001, "Status of Electric Competition in Michigan", the Commission had issued 10 alternative supplier licenses as of that date.

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The Act represents an effort to inject competition into the electric industry, in order to lower electricity costs for residents and businesses and to assure the reliability of the State's electric system. One of the key components of the Act is to give customers a degree of choice in selecting an electricity provider; thus, the Act provides for the licensure and operation of alternative electric suppliers. It has been pointed out that an issue left unresolved may create an impediment to the viability of alternative suppliers. Some people contend that since the Act does not specifically preclude them from being considered public utilities, then an AES must obtain a franchise from each local unit in which it wishes to provide electricity, pursuant to Article 7, Section 29 of the State Constitution. The process of getting a franchise can be cumbersome, time-consuming, and costly, particularly when a number of local units are involved. Since there are over 1,800 local jurisdictions in Michigan, requiring an AES to obtain franchises likely will be a barrier to the development of alternative suppliers. This will restrict competition and reduce the likelihood of enhanced service and reduced costs for electricity. The bill would eliminate these problems, by specifying that an AES would not be a public utility.

Opposing Argument

The bill would interfere with the rights of local units to determine how a vital service industry, electricity suppliers, uses public rights of way and conducts its business within a local unit's boundaries. Article 7, Section 29 of the State Constitution clearly states that no person operating a public utility has the right to use the highways, streets, or other public places of a local unit without that local unit's consent, and that a person must obtain a franchise from the local unit before conducting business. The bill would violate these restrictions.

Response: Article 7, Section 29 also states that, "*Except as otherwise provided in this constitution* the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government" (emphasis added). An exception is provided in Article 7, Section 22, which states, in part, "Each such city and village shall have power to adopt resolutions and ordinances relating to its municipal concerns, property and government, subject to the constitution and law". This indicates that the Legislature may pass laws by which local units must abide. If a statute specifies that an AES is not a public utility, then the requirement in Article 7, Section 29 that a public utility obtain a franchise does not apply.

Furthermore, the bill would do nothing to change the way in which local units currently award franchises to public utilities within their jurisdictions. The physical structures that deliver electricity would still be subject to the right-of-way agreements that have been granted by locals to electric utilities. Thus, a local unit would not incur new costs and should not have additional concerns about the safety of its residents. What the bill would do is prevent a form of double taxation, because it would preclude a local unit from charging a public utility for its electricity transmission over the utility's rights of way and also charging an AES for transmission over the same lines.

Opposing Argument

Organizations that represent local units reportedly have been meeting with the PSC to address right-of-way issues regarding other utilities. Rather than addressing one issue pertaining to electricity, perhaps the bill should be postponed so that the results of the PSC discussions can be evaluated. In the end, what is needed is expanded legislation that would address the issue of access to all areas of the State for all public utilities.

Response: While such an effort may be worthy of discussion, no one knows how long such discussions will last or if they will produce any results. In the meantime, if franchise requirements effectively terminate the economic viability of alternative electric suppliers, then little progress will be made in expanding competition in the electric industry.

Legislative Analyst: G. Towne

FISCAL IMPACT

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

Fiscal Analyst: M. Tyszkiewicz

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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.