

LOOSEN RESTRICTIONS ON JOINT ACTION AGENCIES FORMED BY MUNICIPAL UTILITIES

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House Bill 5384 (Substitute H-1)
Sponsor: Rep. Mike Nofs
Committee: Energy and Technology

Second Analysis (2-13-08)

BRIEF SUMMARY: The bill would revise the Michigan Energy Employment Act of 1976 (MCL 460.801 et seq.), which authorizes certain municipalities to form joint action agencies to build or buy into electricity generation, distribution, or transmission facilities with other governmental or regulated private partners. Among other things, the bill would allow joint action agencies to enter into projects and contracts with a broader range of entities, including private unregulated entities, inside and outside of Michigan, under privately-determined terms. The bill would also allow municipal electric utilities and joint action agencies to exempt many of their books and records from public disclosure.

FISCAL IMPACT: A fiscal impact statement is in process.

THE APPARENT PROBLEM:

In 1976, the Legislature passed Public Act 448 to allow municipalities to form joint action agencies to participate in projects to produce or purchase electricity. At least three municipal joint action agencies were formed as a result of Public Act 448, including the Michigan Public Power Agency, the Michigan South Central Agency, and the Michigan Upper Peninsula Power Agency. That legislation, however, limited municipalities to undertaking projects with certain governmental (including Canadian) and regulated utility partners. With the state of Michigan reportedly short of baseload capacity, proponents of the bill say that it would be reasonable to allow municipal utilities to examine all possibilities when it comes to selecting a partner for building a new plant or deciding from whom to purchase electricity. Under the bill, municipal joint action agencies could enter into projects with unregulated private entities.

The utility industry has changed substantially since 1976, when all owners of generation plants were regulated. Plant construction is no longer limited to regulated utilities. Federal law has changed to allow wholesale generators and independent power producers to construct plants, and the Federal Energy Regulatory Commission (FERC) allows these unregulated entities non-discriminatory access to the transmission grid.

More changes to the electricity industry loom on the horizon. For instance, the Legislature is considering bills that would impose renewable energy, conservation, or efficiency standards on utilities, including municipal utilities. To the extent renewable portfolio standards are imposed, municipalities may need flexibility to meet these obligations through ownership or purchase of renewable energy sources with entities other than other governmental entities or regulated utilities.

For these reasons, proponents contend that the rules pertaining to membership in a joint action agency and the parties with whom joint action agencies may undertake projects need to be updated.

THE CONTENT OF THE BILL:

The bill would:

- Allow a municipality to enter into projects and contracts with a broader range of entities, with contract terms and, in some cases, ownership percentages, to be determined by the contract between the parties.
- Allow a municipality not engaged in electricity operations as of January 13, 1977 [the effective date of the act] to participate in a joint agency.
- Limit public disclosure of the records of a municipal electric utility system or a joint agency.
- Allow a joint agency to create one or more classes of associate membership, and to take in new members by a resolution.
- Authorize contract provisions that would impose liability for payments on a joint agency (not just its member municipalities) and make other changes to the section authorizing contract provisions that require payments regardless of performance, disallow reductions, and require non-defaulting parties to pay for and accept the capacity and output of a defaulting party.
- Require that payments by a municipality for the purchase of capacity and output from a joint agency or other power utility be made (1) only from revenues from its electric system and (2) as a part of the operating and maintenance costs of the municipality's or agency's system, subject to any debt or indentures.
- Eliminate a ban on sale or exchange of excess capacity or output between a joint agency and a municipality that was not engaged in generating, transmitting, or distributing electricity as of January 13, 1977.
- Allow a joint agency to transfer functional control of its transmission facilities.

A "municipality" within the meaning of the act is a "city, county, incorporated township, or metropolitan district of this state, or a board, agency, or commission thereof, owning a system or facility for the generation, transmission, or distribution of electric power and energy for public or private use, or proposing to own such a system or facility."

A "municipal electric utility system" within the meaning of the act is "a system owned by a municipality or combination of municipalities to furnish heat, power, and light." The bill would not change these definitions.

More details are provided below.

Definitions. The bill would make changes to terms defined in the act:

"Governmental unit" would mean "a municipality or a joint agency," instead of a "municipality or a joint agency venture project." The current definition of "joint venture" would be deleted. ("Joint venture" currently means "a project undertaken by 2 or more

municipalities, or 1 or more municipalities in conjunction with 1 or more joint agencies, electric power cooperatives, publicly or privately owned utilities, authorities, or other public or private bodies organized in accordance with article 2 [MCL 460.821].")

"Joint agency" would mean "a public body corporate and politic consisting of a combination of two or more municipalities, authorities, or other public bodies organized under article 3 [MCL 460.831]." (The bill's change to this definition is stylistic only.)

"Project" would mean "a system or facility, inside or outside the state, or service related to a system or facility inside or outside the state, for the generation, transmission, or transformation of electricity, in whole or part, or for sale to or use by a municipal electric utility system or joint agency by any means. Project also means stock, membership units, contractual interests, or any other interest in a system or facility, inside or outside of the state, for the generation, transmission, or transformation of electricity or in a multistate regional transmission system organization approved by the federal government and operating in this state or a transmission-owning entity which is a member of a multistate regional transmission system organization approved by the federal government and operating in this state."

The definition of "power utility" would be expanded to mean "any person engaged or that may engage, inside or outside the state, in generating, transmitting, or distributing or furnishing electricity." (Currently, "power utility" means specified governmental units and agencies that are engaged in the generating, transmitting, or distributing of electricity and regulated cooperative or investor owned utilities. The new definition would appear to include more types of entities, including non-regulated companies involved in the electricity industry.) The bill would also add a new definition of "person" as "an individual, corporation, association, partnership, governmental entity, or any other legal entity."

Contract terms established by parties. Section 9 of the act provides that the governing body of a municipal electric utility system may, among other things, contract for the purchase, sale, exchange, interchange, wheeling, pooling, or transmission of electric energy with another power utility. The bill would add language to the effect that when a municipal electric utility contracts for the purchase or transmission of electric energy, the consideration, period, and other terms and conditions would be determined by the parties to the agreement.

Ownership percentage in facilities mostly publicly owned or controlled. The bill would eliminate the current requirement found in Section 11 that a municipality's ownership percentage in a common facility arising from a joint endeavor authorized by the act must be equal to the percentage of the money furnished or the value of property supplied by the municipality for the acquisition and construction of the facility. Under the bill, in cases where the facility is at least two-thirds owned or controlled by specified public entities, such as states, provinces, and governmental agencies, the municipality's ownership percentage would be established by the parties' contract and would not necessarily bear a direct relationship to the municipality's investment of money or property in the facility.

Undivided interests in joint venture agreements. Under current Section 21, a governmental unit may join in a joint venture agreement concerning a project with one or more municipalities, joint agencies, or power utilities. The bill would amend language that allows governmental units to "maintain an undivided interest as a tenant in common" in a joint venture to simply "maintain an undivided interest" without specifying as a tenant in common.

Allow municipalities participating in a joint project to contract to buy and sell electricity produced by the project and to contract with a broader range of parties. Section 24(3) of the act allows municipalities participating in joint projects to enter into contracts for the exchange, interchange, wheeling, pooling, or transmission of electric power and energy produced by the projects. The bill would also allow these municipalities to purchase and sell the electric power and energy produced by the project or projects.

Currently, a municipality can only make such a contract with: (1) a municipality of this state or another state owning electric distribution facilities; (2) an electric membership corporation; or (3) a state, federal, or municipal agency that owns electric generation, transmission, or distribution facilities in this state or another state. The bill would allow the municipality to contract with any "power utility," defined in the bill as "any person engaged or that may engage, inside or outside the state, in generating, transmitting, or distributing or furnishing electricity."

Allow additional municipalities to participate in joint agencies. The bill would eliminate the current rule found in Section 31 that only municipalities engaged in generation, transmission, or distribution of electricity as of the effective date of the act [January 13, 1977] could participate in joint agencies.

Limit public disclosure of the records of a joint agency or municipal electric system. The bill would add a new Section 33a to limit the public disclosure of the books, records, and papers, including those maintained electronically, of a joint agency or municipal electric system. The board of a joint agency or governing body of a municipal electric utility could exempt its books and records if (1) they contain pricing or other confidential or proprietary information; (2) they pertain to the development, construction, financing, or leasing of a project; or (3) they contain information that is subject to a confidentiality agreement. Upon a showing of good cause, a court could order records disclosed subject to confidentiality restrictions.

Declare that joint agencies perform essential public functions. The bill would make stylistic changes to Section 34 which declares that a joint agency formed for purposes provided in Article 3 is a public body politic and corporate and its powers conferred by the act are considered to be the performance of an essential public function.

New members of a joint agency, including associate members. The bill would allow the board of commissioners of a joint agency to authorize the establishment of one or more classes of associate membership in the joint agency by adoption of a resolution that would also specify the rights and obligations of an associate member. In addition, the bill would allow a municipality that did not join in the original incorporation of a joint agency to become a member or associate member with the approval of both the

municipality (by adoption of a resolution) and the joint agency (by a resolution unanimously adopted by all members of its board of commissioners). The joint agency's resolution could approve the addition of a new member or associate member as of a future date or upon the occurrence of a future event and could make the board's decision irrevocable without the consent of the governing body of the municipality. The joint agency's articles of incorporation would later be conformed by the board of commissioners to reflect the new member, and if the municipality is added as an associate member, to specify its rights and obligations. This type of conforming amendment would not have to be published.

Rights and powers of a joint agency. The bill would amend Section 37 which sets forth the rights and powers of a joint agency. Changes would include allowing a joint agency to:

- Participate in a project, as defined in the bill, "by contract or otherwise."
- To negotiate and enter into contracts for the generation, production, and delivery of electric power and energy (in addition to contracts for the purchase, sale, exchange, interchange, wheeling, pooling, transmission, or use of electric power and energy, as is currently allowed), and to make such a contract with any "power utility," not just currently specified entities.

Allowable contract provisions. The bill would amend Section 43(1) to allow member municipalities to contract to buy power and energy *and transmission or other related rights* from the joint agency *or from any other power utility*. The municipality could buy power from another power utility on its own or through the joint agency, including the capacity or output from one or more specified projects. The bill would specifically authorize contracts that:

- Require the member municipality, joint agency, or both, to make payments regardless of project's completion or operability and not subject to reductions. A contract could provide that the member municipality or the joint agency, or both, would be obligated to make payments required by the contract regardless of whether a project is completed or operable or not and that payments could not be reduced even if the output of a project or the power and energy contracted for is suspended, reduced, or curtailed. The act previously only allowed such an obligation to be imposed on the member municipality.
- Make payment obligations unconditional. A contract could also provide that payments would not be conditioned upon the performance or non-performance of the joint agency, *power utility*, another member of the joint agency, *or any other participant in a project within or outside the state* under the contract or other instrument. Changes made by the bill are indicated in italics.
- Require other parties to make payments of a defaulting party. A contract could also provide that if one or more of the members of the joint agency or other participants in a project (instead of "one or more municipalities" as is currently the case) default on their payments for purchasing capacity or output, remaining member municipalities and other participants would have to accept and pay for a

proportionate share of the capacity or output that was to be purchased by the defaulting municipality or participant, subject to limitations, if any, in the contract.

Payments for contracts for purchase of capacity and output. Section 43(2) currently requires that a municipality's payments under a contract for the purchase of capacity and output from a joint agency be made solely from revenues derived from the ownership and operation of the electric system of the municipality. The bill would likewise require that a municipality's payments to another power utility be made solely from revenues derived from its electric system. In addition, the bill would add a new requirement that these payments be made as a part of the operating and maintenance costs of the municipality's or agency's system, subject to any debt or debt-related contracts or indentures of a municipality or joint agency.

Eliminate ban on certain sales or exchanges of excess capacity. The bill would eliminate a ban on a joint agency sale or exchange of excess capacity to a municipality that was not engaged in generating, transmitting, or distributing electricity as of January 13, 1977 that is currently contained in Section 44.

Transfer of functional control of transmission facilities. Section 44(2) currently permits a joint agency to transfer all or part of its interest in transmission facilities to a multistate regional transmission system or to one or more of its transmission-owning members. The bill would also allow a joint agency to transfer all or part of its functional control of transmission facilities to a regional system or a transmission-owning member.

Tie Bar Information. House Bill 5384 is not tie-barred to any other bills. However, numerous bills in the energy package currently under consideration by the House are tie-barred to House Bill 5384, meaning that the following bills would not go into effect unless House Bill 5384 is also enacted:

- House Bill 5525 (Angerer) (energy efficiency)
- House Bills 5548 & 5549 (Mayes/Palsrok) (renewable portfolio standards)
- House Bill 5520 (Miller) (limited PSC review of generation asset sales)
- House Bill 5521 (Gaffney) (certificates of need)
- House Bill 5522 (LaJoy) ("deskewing")
- House Bill 5523 (Clemente) (implement rate increases after 90 days)
- House Bill 5524 (Accavitti) (modify choice program)

ARGUMENTS:

For:

Municipal joint action agencies need more flexibility. Given the changes that have taken place in the electric industry since the law was first passed, and current challenges facing the industry, municipal joint action agencies need more flexibility to undertake projects with different types of parties, including unregulated private electricity providers. In particular, municipalities may need additional flexibility in connection with renewable portfolio standards or efficiency requirements.

Additional municipalities should be allowed to join municipal joint action agencies. The law currently restricts membership in joint action agencies to municipalities that were in the electricity business in 1977. These provisions should be updated and expanded to allow additional municipalities to participate.

Against:

Municipal utility and joint action agency records should not be exempt from public disclosure. Municipal electric utilities are local units of government and are established to serve the public. As such, their books and records should be open to the public and transparent. The bill would allow municipal utility companies and joint agencies to exempt many of their books and records from public disclosure. Although joint ventures and municipalities may need to make some confidentiality promises to their private partners with respect to proprietary information, the bill's confidentiality provision goes too far.

POSITIONS:

The Michigan Municipal Electric Association testified in support of the bill. (11-7-07)

The Michigan Public Power Agency indicated its support for the bill. (11-7-07)

The Michigan South Central Power Agency indicated its support for the bill. (11-7-07)

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