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ELECTRIC COOPERATIVE MEMBER-REGULATED POLE ATTACHMENTS

House Bill 5266 as introduced
Sponsor: Rep. Tristan Cole
Committee: Communications and Technology
Revised 12-4-19

SUMMARY:

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.

[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.

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).

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.

[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].

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 that a denial of access was unlawful. In a case involving a denial of access, the utility would then 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.

The bill is tie-barred to House Bill 4266, which means this bill would not take effect unless House Bill 4266 is enacted.

Proposed MCL 460.38a and 460.38b

FISCAL IMPACT:

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.

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