

A-Engrossed
House Bill 2654

Ordered by the House April 10
Including House Amendments dated April 10

Sponsored by Representatives SMITH DB, MARSH, Senators BEYER, FINDLEY; Representatives BOSHART DAVIS, CATE, GOMBERG, KROPP, LEIF, LEVY, MORGAN, OWENS, PRUSAK, SMITH G, WILDE, WILLIAMS (Presession filed.)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Authorizes electric [*utility*] **cooperative** to use or allow for use of electric easement in provision of broadband services, **subject to certain conditions and exceptions**. Provides process for property owner to bring action for damages if use in provision of broadband services results in expanded use of easement.

A BILL FOR AN ACT

1
2 Relating to use of easements for provision of broadband.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1. (1) As used in this section and sections 2 and 3 of this 2021 Act:**

5 (a) **"Attachment" has the meaning given that term in ORS 757.270.**

6 (b) **"Broadband" has the meaning given that term in ORS 276A.406.**

7 (c) **"Commercial broadband service provider" means a provider of broadband service that**
8 **is not affiliated with or a division of an electric cooperative.**

9 (d) **"Electric cooperative" has the meaning given that term in ORS 757.600.**

10 (e) **"Electric easement" means any recorded or unrecorded easement or license, including**
11 **easements created by operation of law, held or used by an electric cooperative for the in-**
12 **stallation and maintenance of electric facilities, regardless of whether the easement is for**
13 **the exclusive benefit of the electric cooperative or is also for use in connection with other**
14 **utility services that may or may not be provided by the electric cooperative.**

15 (f) **"Electric facilities" means any line, wire, pipe, conduit, main, pump, pole, tower, fix-**
16 **ture, manhole, handhole or other similar facility or facilities, and any other related or an-**
17 **cillary materials, which are owned or controlled, in whole or in part, by one or more electric**
18 **cooperatives.**

19 (g) **"Property owner" means a person with a recorded fee simple interest in land upon**
20 **which an electric easement is located.**

21 (2)(a)(A) **Except as provided in paragraph (b) of this subsection, an electric cooperative**
22 **may use or allow for the use of an electric easement in the provision of broadband services.**

23 (B) **If use of an electric easement in the provision of broadband services as authorized**
24 **under this paragraph would result in an expansion of the uses for which the easement is**
25 **granted or acquired, the electric cooperative shall, no later than 60 days prior to the expan-**
26 **sion of use, provide written notice to the property owner pursuant to subsection (3) of this**

NOTE: Matter in **boldfaced** type in an amended section is new; matter [*italic and bracketed*] is existing law to be omitted. New sections are in **boldfaced** type.

1 section.

2 (C) A commercial broadband service provider may request for an electric cooperative to
3 send notice to a property owner as required by this subsection. A commercial broadband
4 service provider shall include in a request under this subparagraph the addresses of subject
5 poles and the pole numbers if labeled on the pole, and the names and addresses of the prop-
6 erty owners to whom the commercial broadband service provider requests notice to be sent.
7 Absent unusual circumstances such as an outage or similar emergency, an electric cooper-
8 ative shall send notice to a property owner as requested under this subparagraph no later
9 than 10 days after receipt of the request from a commercial broadband service provider.

10 (b)(A) The provisions of this section do not authorize an electric cooperative to use or
11 allow for the use in the provision of broadband services any electric easements that are
12 granted on property owned, managed or operated by a city, including but not limited to public
13 rights of way within the boundaries of the city.

14 (B) If an electric easement is an unrecorded easement, license or easement created by
15 operation of law, the electric easement must be in current use by the electric cooperative
16 for the installation and maintenance of electric facilities in order for the electric cooperative
17 to exercise the authority granted under this section. For purposes of this section, the lo-
18 cation and extent of an unrecorded easement, license or easement created by operation of
19 law is limited to:

20 (i) The location of the electric easement as it was in use prior to commencement of use
21 of the electric easement in the provision of broadband services; and

22 (ii) A width of no more than 10 feet on each side from the center line of the electric
23 easement.

24 (3)(a) Written notice as required by subsection (2) of this section must be sent by certi-
25 fied mail to the last known address of the property owner, according to publicly available
26 records of the county assessor. The notice must contain:

27 (A) The name and mailing address of the electric cooperative;

28 (B) The mailing address, telephone number and electronic mail address for a represen-
29 tative of the electric cooperative;

30 (C) A summary statement of the purpose and character of the expansion of the use of
31 the electric easement; and

32 (D) An offer for an onsite meeting prior to commencement of any installation activities
33 associated with the expanded use.

34 (b) If the notice is sent by an electric cooperative on behalf of a commercial broadband
35 service provider, the notice must also contain:

36 (A) The name and mailing address of the commercial broadband service provider; and

37 (B) The mailing address, telephone number and electronic mail address for a represen-
38 tative of the commercial broadband service provider.

39 (4) If the activities necessary to expand use of the electric easement for provision of
40 broadband services will require trenching or other underground work that is not included in
41 the uses for which the easement is granted or acquired:

42 (a) The notice provided under subsection (3) of this section must also include:

43 (A) A summary statement describing the activities to be conducted during the trenching
44 or other underground work; and

45 (B) The approximate dates when the trenching or other underground work will start and

1 end;

2 (b) Any new conduit must be installed in a location that is adjacent to and as close to
3 existing conduit as allowed under applicable code requirements or regulations;

4 (c) To the extent allowed under any applicable code requirements or regulations, the
5 property owner may choose which side of the existing conduit to install any new conduit; and

6 (d) Any surface area disturbed during trenching or other underground work must be re-
7 stored to its condition prior to the trenching or other underground work.

8 (5) In installing and maintaining facilities necessary to provide broadband services, the
9 provider of broadband services that is making use of an electric easement as authorized
10 pursuant to this section must:

11 (a) Make reasonable accommodations to prevent disruption to active agricultural and
12 forest operations;

13 (b) Employ best practices to prevent the introduction of noxious weeds onto the property
14 upon which the electric easement is located;

15 (c) Provide compensation to the property owner for property damage or crop loss caused
16 by the installation or maintenance of the facilities; and

17 (d) Upon the request of the property owner, provide at least seven days advance notice
18 before the commencement of any installation or routine maintenance activities.

19 (6) An expansion of use described in subsection (2) of this section is deemed vested in the
20 electric cooperative and shall run with the land as of the date that the property owner re-
21 ceives notice from the electric cooperative.

22 (7) Except as provided in section 2 (1) of this 2021 Act, a property owner that receives
23 notice under subsection (3) of this section may bring a cause of action, in the circuit court
24 of the county where the electric easement is located, against the provider of broadband ser-
25 vices for damages relating to a decrease in the value of the property owner's real property
26 caused by the use of the easement in the provision of broadband services. A cause of action
27 authorized by this subsection must be brought no later than 18 months after the date that
28 the electric cooperative provided notice under subsection (3) of this section. The cause of
29 action provided for in this subsection shall be the exclusive remedy in law or equity with
30 respect to use of the electric easement for the provision of broadband services.

31 (8)(a) In an action brought under subsection (7) of this section:

32 (A) The court or jury shall ascertain and assess the decrease in value of property, if any,
33 based on the difference between:

34 (i) The fair market value of the entire parcel of real property upon which the electric
35 easement is located immediately before the expanded use; and

36 (ii) The fair market value of the entire parcel of real property immediately after the ex-
37 panded use;

38 (B) Evidence of revenues or profits derived from the expanded use or related attachment
39 rates is not admissible in determining fair market value; and

40 (C) Evidence of the increase in fair market value due to the availability of broadband
41 services is admissible in determining fair market value.

42 (b) Prior to the commencement of trial in an action brought under subsection (7) of this
43 section, the defendant shall make at least one offer of compensation to the property owner.
44 If the property owner obtains a judgment that exceeds the offer of compensation made by
45 the defendant, the property owner shall be entitled to an additional award for trial costs,

1 disbursements, reasonable attorney fees and expenses as defined in ORS 35.335 (2).

2 (c) At any point not later than 10 days before the trial of the action, after making an
3 initial offer of compensation pursuant to paragraph (b) of this subsection, the defendant may
4 serve an offer of compromise on the plaintiff in the action, as provided in ORS 35.300. If the
5 plaintiff accepts the offer of compromise, the plaintiff shall be entitled to an award for costs
6 and disbursements, attorney fees and expenses incurred by the plaintiff before service of the
7 offer on plaintiff. If the plaintiff rejects the offer of compromise and fails to obtain a judg-
8 ment more favorable than the offer, the plaintiff may not recover prevailing party fees or
9 costs and disbursements, attorney fees and expenses that were incurred on and after service
10 of the offer.

11 (9) The electric cooperative may include required reimbursement for expanded use com-
12 pensation awards and litigation costs in any attachment license agreement with a provider
13 of broadband services that is not the electric cooperative and that is directly benefited by
14 the expanded use.

15 (10) A class action may not be maintained against a provider of broadband services in any
16 action for damages based on a claim of expanded use for broadband services.

17 **SECTION 2.** (1) Section 1 of this 2021 Act does not alter the rights of an electric coop-
18 erative or commercial broadband service provider to acquire the rights to use real property
19 for broadband services through any other means authorized by law.

20 (2) Section 1 of this 2021 Act does not authorize an expanded use that is expressly pro-
21 hibited by the terms of a written electric easement.

22 (3) Exercise of the authority granted in section 1 of this 2021 Act does not:

23 (a) Change the legal relationship between the electric cooperative as the easement holder
24 and the property owner;

25 (b) Create an easement right for any third party, including but not limited to a com-
26 mercial broadband service provider or a broadband division or affiliate of the electric coop-
27 erative; or

28 (c) Expand the footprint of the existing easement.

29 (4) An expanded use of an electric easement authorized under section 1 of this 2021 Act
30 may not alter or interfere with any easement rights held by parties other than the electric
31 cooperative that existed, within or outside the area of the electric easement, prior to the
32 expanded use.

33 (5)(a) Nothing in section 1 of this 2021 Act requires an electric cooperative that does not
34 have a broadband division or affiliate to offer or authorize the access or use of an electric
35 easement or to use attachments or electric service infrastructure owned or controlled by the
36 electric cooperative for provision of broadband services in a manner that would, in the elec-
37 tric cooperative's reasonable discretion, materially interfere with the electric cooperative's
38 construction, maintenance or use of any electric cooperative attachments or infrastructure
39 for the provision of electric service.

40 (b) Subject to subsection (2) of this section, if an electric cooperative has a broadband
41 division or affiliate, the electric cooperative may withhold authorization for a commercial
42 broadband service provider to access or use an electric easement or to use attachments or
43 electric service infrastructure owned or controlled by the electric cooperative for provision
44 of broadband services only if:

45 (A) There is insufficient capacity for attachments necessary for the provision of

1 **broadband service; or**

2 **(B) Concerns of safety or reliability or generally applicable engineering purposes weigh**
3 **against granting the authorization.**

4 **(6) Nothing in this section or section 1 of this 2021 Act imposes any duty or liability on**
5 **a property owner in addition to any liability provided for in an electric easement for unin-**
6 **tentional damage by the property owner to facilities necessary for the provision of broadband**
7 **that are installed in an electric easement pursuant to an expanded use authorized under**
8 **section 1 of this 2021 Act. An electric cooperative that exercises the authority granted under**
9 **section 1 of this 2021 Act shall indemnify and hold harmless the property owner against**
10 **damage to existing easement holders resulting from activities related to the installation or**
11 **maintenance of facilities described in this subsection.**

12 **SECTION 3. (1) An electric cooperative that exercises the authority granted under sec-**
13 **tion 1 of this 2021 Act for the provision of broadband services:**

14 **(a) For as long as the electric cooperative maintains an exclusive right to provide electric**
15 **service to customers within its exclusive service territory, may provide broadband service**
16 **only through a broadband affiliate or through a separate broadband division within the elec-**
17 **tric cooperative; and**

18 **(b) If the electric cooperative has a broadband affiliate or separate broadband division:**

19 **(A) Shall maintain or cause to be maintained an accounting system for the broadband**
20 **affiliate or division that is separate from the accounting system for the electric cooperative's**
21 **electric division;**

22 **(B) Shall cause, within two years after commencement of commercial operation by the**
23 **electric cooperative's broadband affiliate or division and at least once every two years**
24 **thereafter, a financial audit to be performed by an independent certified public accountant**
25 **with respect to the broadband affiliate's or division's provision of retail broadband service,**
26 **including an audit of the allocation of costs for property and services that are used in both**
27 **the provision of broadband service and the electric cooperative's provision of electric service;**
28 **and**

29 **(C) May not provide the broadband affiliate or division of the electric cooperative a right**
30 **to install maintain, own, operate, or use attachments at rates, terms or conditions that are**
31 **more favorable than the rates, terms or conditions provided to commercial broadband ser-**
32 **vice providers.**

33 **(2)(a) An electric cooperative may not use its exclusive right to provide electric service**
34 **within its exclusive territory to cross-subsidize a broadband affiliate of the electric cooper-**
35 **ative or a separate broadband division within the electric cooperative, or to cross-subsidize**
36 **a broadband affiliate's or division's provision of broadband service through:**

37 **(A) Below fair market pricing;**

38 **(B) Payment of capital or operating costs properly charged to the broadband affiliate or**
39 **division under applicable accounting rules; or**

40 **(C) Use of any revenue from or subsidy for the provision of electric service to provide**
41 **broadband service below market value, except in connection with the electric cooperative's**
42 **provision of electricity.**

43 **(b) An electric cooperative may:**

44 **(A) Enter into transactions with the broadband affiliate or division of the electric coop-**
45 **erative on terms and conditions that are substantially similar to the terms and conditions**

1 that would be agreed to between two similarly situated parties in an arm's-length commer-
2 cial transaction;

3 (B) Loan funds to the broadband affiliate or division of the electric cooperative if the
4 interest rate on the loan is no less than the electric cooperative's lowest cost of capital;

5 (C) Provide for reduced-cost broadband service to low-income customers;

6 (D) Conduct and fund due diligence, operational analysis, entity set-up, and associated
7 noncapital expenditures relating to and prior to the establishment of a broadband affiliate
8 or division; or

9 (E) Offer broadband service through a broadband affiliate or division at below market
10 pricing on a temporary basis for promotional purposes.

11 (3)(a) Upon request from a commercial broadband service provider, an electric cooper-
12 ative subject to this section and any broadband affiliate or division of the electric cooperative
13 shall cause an officer of the electric cooperative and the broadband affiliate or division, re-
14 spectively, to certify that both the electric cooperative and the broadband affiliate or division
15 are in compliance with this section.

16 (b) If a dispute arises between an electric cooperative or its broadband affiliate or divi-
17 sion and a commercial broadband service provider regarding matters addressed in this sub-
18 section, the parties to the dispute have standing to file a claim or cause of action in any
19 court of competent jurisdiction in the state. The following are discoverable and admissible
20 as evidence in court regarding compliance by the electric cooperative and the broadband af-
21 filiate or division of the electric cooperative compliance with this section:

22 (A) Any certification requested and produced pursuant to this subsection; and

23 (B) Any audit required to be performed pursuant to subsection (1) of this section, except
24 that the court shall provide appropriate restrictions upon the disclosure of any trade secret,
25 as that term is defined in ORS 192.345 (2), that may be included in the audit.

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