

Requested by Representative MARSH

**PROPOSED AMENDMENTS TO
HOUSE BILL 2654**

1 On page 1 of the printed bill, delete lines 4 through 30 and delete page
2 2 and insert:

3 **“SECTION 1. (1) As used in this section and sections 2 and 3 of this**
4 **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**
8 **broadband service that is not affiliated with or a division of an electric**
9 **cooperative.**

10 **“(d) ‘Electric cooperative’ has the meaning given that term in ORS**
11 **757.600.**

12 **“(e) ‘Electric easement’ means any recorded or unrecorded ease-**
13 **ment or license, including easements created by operation of law, held**
14 **or used by an electric cooperative for the installation and maintenance**
15 **of electric facilities, regardless of whether the easement is for the ex-**
16 **clusive benefit of the electric cooperative or is also for use in con-**
17 **nection with other utility services that may or may not be provided**
18 **by the electric cooperative.**

19 **“(f) ‘Electric facilities’ means any line, wire, pipe, conduit, main,**
20 **pump, pole, tower, fixture, manhole, handhole or other similar facility**
21 **or facilities, and any other related or ancillary materials, which are**

1 owned or controlled, in whole or in part, by one or more electric co-
2 operatives.

3 “(g) ‘Property owner’ means a person with a recorded fee simple
4 interest in land upon which an electric easement is located.

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

8 “(B) If use of an electric easement in the provision of broadband
9 services as authorized under this paragraph would result in an expan-
10 sion of the uses for which the easement is granted or acquired, the
11 electric cooperative shall, no later than 60 days prior to the expansion
12 of use, provide written notice to the property owner pursuant to sub-
13 section (3) of this section.

14 “(C) A commercial broadband service provider may request for an
15 electric cooperative to send notice to a property owner as required by
16 this subsection. A commercial broadband service provider shall include
17 in a request under this subparagraph the addresses of subject poles
18 and the pole numbers if labeled on the pole, and the names and ad-
19 dresses of the property owners to whom the commercial broadband
20 service provider requests notice to be sent. Absent unusual circum-
21 stances such as an outage or similar emergency, an electric cooper-
22 ative shall send notice to a property owner as requested under this
23 subparagraph no later than 10 days after receipt of the request from
24 a commercial broadband service provider.

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

30 “(B) If an electric easement is an unrecorded easement, license or

1 easement created by operation of law, the electric easement must be
2 in current use by the electric cooperative for the installation and
3 maintenance of electric facilities in order for the electric cooperative
4 to exercise the authority granted under this section. For purposes of
5 this section, the location and extent of an unrecorded easement, li-
6 cense or easement created by operation of law is limited to:

7 “(i) The location of the electric easement as it was in use prior to
8 commencement of use of the electric easement in the provision of
9 broadband services; and

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

12 “(3)(a) Written notice as required by subsection (2) of this section
13 must be sent by certified mail to the last known address of the prop-
14 erty owner, according to publicly available records of the county
15 assessor. The notice must contain:

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

17 “(B) The mailing address, telephone number and electronic mail
18 address for a representative of the electric cooperative;

19 “(C) A summary statement of the purpose and character of the ex-
20 pansion of the use of the electric easement; and

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

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

25 “(A) The name and mailing address of the commercial broadband
26 service provider; and

27 “(B) The mailing address, telephone number and electronic mail
28 address for a representative of the commercial broadband service pro-
29 vider.

30 “(4) If the activities necessary to expand use of the electric ease-

1 **ment for provision of broadband services will require trenching or**
2 **other underground work that is not included in the uses for which the**
3 **easement is granted or acquired:**

4 **“(a) The notice provided under subsection (3) of this section must**
5 **also include:**

6 **“(A) A summary statement describing the activities to be conducted**
7 **during the trenching or other underground work; and**

8 **“(B) The approximate dates when the trenching or other under-**
9 **ground work will start and end;**

10 **“(b) Any new conduit must be installed in a location that is adja-**
11 **cent to and as close to existing conduit as allowed under applicable**
12 **code requirements or regulations;**

13 **“(c) To the extent allowed under any applicable code requirements**
14 **or regulations, the property owner may choose which side of the ex-**
15 **isting conduit to install any new conduit; and**

16 **“(d) Any surface area disturbed during trenching or other under-**
17 **ground work must be restored to its condition prior to the trenching**
18 **or other underground work.**

19 **“(5) In installing and maintaining facilities necessary to provide**
20 **broadband services, the provider of broadband services that is making**
21 **use of an electric easement as authorized pursuant to this section**
22 **must:**

23 **“(a) Make reasonable accommodations to prevent disruption to ac-**
24 **tive agricultural and forest operations;**

25 **“(b) Employ best practices to prevent the introduction of noxious**
26 **weeds onto the property upon which the electric easement is located;**

27 **“(c) Provide compensation to the property owner for property**
28 **damage or crop loss caused by the installation or maintenance of the**
29 **facilities; and**

30 **“(d) Upon the request of the property owner, provide at least seven**

1 days advance notice before the commencement of any installation or
2 routine maintenance activities.

3 “(6) An expansion of use described in subsection (2) of this section
4 is deemed vested in the electric cooperative and shall run with the
5 land as of the date that the property owner receives notice from the
6 electric cooperative.

7 “(7) Except as provided in section 2 (1) of this 2021 Act, a property
8 owner that receives notice under subsection (3) of this section may
9 bring a cause of action, in the circuit court of the county where the
10 electric easement is located, against the provider of broadband services
11 for damages relating to a decrease in the value of the property owner’s
12 real property caused by the use of the easement in the provision of
13 broadband services. A cause of action authorized by this subsection
14 must be brought no later than 18 months after the date that the
15 electric cooperative provided notice under subsection (3) of this sec-
16 tion. The cause of action provided for in this subsection shall be the
17 exclusive remedy in law or equity with respect to use of the electric
18 easement for the provision of broadband services.

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

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

22 “(i) The fair market value of the entire parcel of real property upon
23 which the electric easement is located immediately before the ex-
24 panded use; and

25 “(ii) The fair market value of the entire parcel of real property
26 immediately after the expanded use;

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

30 “(C) Evidence of the increase in fair market value due to the

1 availability of broadband services is admissible in determining fair
2 market value.

3 (b) Prior to the commencement of trial in an action brought under
4 subsection (7) of this section, the defendant shall make at least one
5 offer of compensation to the property owner. If the property owner
6 obtains a judgment that exceeds the offer of compensation made by
7 the defendant, the property owner shall be entitled to an additional
8 award for trial costs, disbursements, reasonable attorney fees and ex-
9 penses as defined in ORS 35.335 (2).

10 (c) At any point not later than 10 days before the trial of the action,
11 after making an initial offer of compensation pursuant to paragraph
12 (b) of this subsection, the defendant may serve an offer of compromise
13 on the plaintiff in the action, as provided in ORS 35.300. If the plaintiff
14 accepts the offer of compromise, the plaintiff shall be entitled to an
15 award for costs and disbursements, attorney fees and expenses in-
16 curred by the plaintiff before service of the offer on plaintiff. If the
17 plaintiff rejects the offer of compromise and fails to obtain a judgment
18 more favorable than the offer, the plaintiff may not recover prevailing
19 party fees or costs and disbursements, attorney fees and expenses that
20 were incurred on and after service of the offer.

21 “(9) The electric cooperative may include required reimbursement
22 for expanded use compensation awards and litigation costs in any at-
23 tachment license agreement with a provider of broadband services that
24 is not the electric cooperative and that is directly benefited by the
25 expanded use.

26 “(10) A class action may not be maintained against a provider of
27 broadband services in any action for damages based on a claim of ex-
28 panded use for broadband services.

29 **SECTION 2.** (1) Section 1 of this 2021 Act does not alter the rights
30 of an electric cooperative or commercial broadband service provider

1 to acquire the rights to use real property for broadband services
2 through any other means authorized by law.

3 “(2) Section 1 of this 2021 Act does not authorize an expanded use
4 that is expressly prohibited by the terms of a written electric ease-
5 ment.

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

8 “(a) Change the legal relationship between the electric cooperative
9 as the easement holder and the property owner;

10 “(b) Create an easement right for any third party, including but not
11 limited to a commercial broadband service provider or a broadband
12 division or affiliate of the electric cooperative; or

13 “(c) Expand the footprint of the existing easement.

14 “(4) An expanded use of an electric easement authorized under
15 section 1 of this 2021 Act may not alter or interfere with any easement
16 rights held by parties other than the electric cooperative that existed,
17 within or outside the area of the electric easement, prior to the ex-
18 panded use.

19 “(5)(a) Nothing section 1 of this 2021 Act requires an electric coop-
20 erative that does not have a broadband division or affiliate to offer or
21 authorize the access or use of an electric easement or to use attach-
22 ments or electric service infrastructure owned or controlled by the
23 electric cooperative for provision of broadband services in a manner
24 that would, in the electric cooperative’s reasonable discretion, mate-
25 rially interfere with the electric cooperative’s construction, mainte-
26 nance or use of any electric cooperative attachments or infrastructure
27 for the provision of electric service.

28 “(b) Subject to subsection (2) of this section, if an electric cooper-
29 ative has a broadband division or affiliate, the electric cooperative may
30 withhold authorization for a commercial broadband service provider

1 to access or use an electric easement or to use attachments or electric
2 service infrastructure owned or controlled by the electric cooperative
3 for provision of broadband services only if:

4 “(A) There is insufficient capacity for attachments necessary for
5 the provision of broadband service; or

6 “(B) Concerns of safety or reliability or generally applicable engi-
7 neering purposes weigh against granting the authorization.

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

18 “SECTION 3. (1) An electric cooperative that exercises the author-
19 ity granted under section 1 of this 2021 Act for the provision of
20 broadband services:

21 “(a) For as long as the electric cooperative maintains an exclusive
22 right to provide electric service to customers within its exclusive ser-
23 vice territory, may provide broadband service only through a
24 broadband affiliate or through a separate broadband division within
25 the electric cooperative; and

26 “(b) If the electric cooperative has a broadband affiliate or separate
27 broadband division:

28 “(A) Shall maintain or cause to be maintained an accounting sys-
29 tem for the broadband affiliate or division that is separate from the
30 accounting system for the electric cooperative’s electric division;

1 “(B) Shall cause, within two years after commencement of com-
2 mercial operation by the electric cooperative’s broadband affiliate or
3 division and at least once every two years thereafter, a financial audit
4 to be performed by an independent certified public accountant with
5 respect to the broadband affiliate’s or division’s provision of retail
6 broadband service, including an audit of the allocation of costs for
7 property and services that are used in both the provision of broadband
8 service and the electric cooperative’s provision of electric service; and

9 “(C) May not provide the broadband affiliate or division of the
10 electric cooperative a right to install maintain, own, operate, or use
11 attachments at rates, terms or conditions that are more favorable
12 than the rates, terms or conditions provided to commercial broadband
13 service providers.

14 “(2)(a) An electric cooperative may not use its exclusive right to
15 provide electric service within its exclusive territory to cross-subsidize
16 a broadband affiliate of the electric cooperative or a separate
17 broadband division within the electric cooperative, or to cross-
18 subsidize a broadband affiliate’s or division’s provision of broadband
19 service through:

20 “(A) Below fair market pricing;

21 “(B) Payment of capital or operating costs properly charged to the
22 broadband affiliate or division under applicable accounting rules; or

23 “(C) Use of any revenue from or subsidy for the provision of electric
24 service to provide broadband service below market value, except in
25 connection with the electric cooperative’s provision of electricity.

26 “(b) An electric cooperative may:

27 “(A) Enter into transactions with the broadband affiliate or division
28 of the electric cooperative on terms and conditions that are substan-
29 tially similar to the terms and conditions that would be agreed to be-
30 tween two similarly situated parties in an arm’s-length commercial

1 **transaction;**

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

5 **“(C) Provide for reduced-cost broadband service to low-income cus-**
6 **tomers;**

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

10 **“(E) Offer broadband service through a broadband affiliate or divi-**
11 **sion at below market pricing on a temporary basis for promotional**
12 **purposes.**

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

19 **“(b) If a dispute arises between an electric cooperative or its**
20 **broadband affiliate or division and a commercial broadband service**
21 **provider regarding matters addressed in this subsection, the parties**
22 **to the dispute have standing to file a claim or cause of action in any**
23 **court of competent jurisdiction in the state. The following are**
24 **discoverable and admissible as evidence in court regarding compliance**
25 **by the electric cooperative and the broadband affiliate or division of**
26 **the electric cooperative compliance with this section:**

27 **“(A) Any certification requested and produced pursuant to this**
28 **subsection; and**

29 **“(B) Any audit required to be performed pursuant to subsection (1)**
30 **of this section, except that the court shall provide appropriate re-**

1 **strictions upon the disclosure of any trade secret, as that term is de-**
2 **fin ed in ORS 192.345 (2), that may be included in the audit.”.**

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