

Enrolled House Bill 2654

Sponsored by Representatives SMITH DB, MARSH, Senators BEYER, FINDLEY; Representatives ALONSO LEÓN, BOSHART DAVIS, BYNUM, CAMPOS, CATE, DEXTER, FAHEY, GOMBERG, HOLVEY, HUDSON, KOTEK, KROPF, LEIF, LEVY, MORGAN, NATHANSON, NOBLE, OWENS, PHAM, PRUSAK, REARDON, SALINAS, SCHOUTEN, SMITH G, VALDERRAMA, WILDE, WILLIAMS, WRIGHT, Senator FREDERICK (Pre-session filed.)

CHAPTER

AN ACT

Relating to use of easements for provision of broadband.

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

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

- (a) "Attachment" has the meaning given that term in ORS 757.270.
 - (b) "Broadband" has the meaning given that term in ORS 276A.406.
 - (c) "Commercial broadband service provider" means a provider of broadband service that is not affiliated with or a division of an electric cooperative.
 - (d) "Electric cooperative" has the meaning given that term in ORS 757.600.
 - (e) "Electric easement" means any recorded or unrecorded easement or license, including easements created by operation of law, held or used by an electric cooperative for the installation and maintenance of electric facilities, regardless of whether the easement is for the exclusive benefit of the electric cooperative or is also for use in connection with other utility services that may or may not be provided by the electric cooperative.
 - (f) "Electric facilities" means any line, wire, pipe, conduit, main, pump, pole, tower, fixture, manhole, handhole or other similar facility or facilities, and any other related or ancillary materials, which are owned or controlled, in whole or in part, by one or more electric cooperatives.
 - (g) "Property owner" means a person with a recorded fee simple interest in land upon which an electric easement is located.
- (2)(a)(A) Except as provided in paragraph (b) of this subsection, an electric cooperative may use or allow for the use of an electric easement in the provision of broadband services.
- (B) If use of an electric easement in the provision of broadband services as authorized under this paragraph would result in an expansion of the uses for which the easement is granted or acquired, the electric cooperative shall, no later than 60 days prior to the expansion of use, provide written notice to the property owner pursuant to subsection (3) of this section.
- (C) A commercial broadband service provider may request for an electric cooperative to send notice to a property owner as required by this subsection. A commercial broadband service provider shall include in a request under this subparagraph the addresses of subject poles and the pole numbers if labeled on the pole, and the names and addresses of the prop-

erty owners to whom the commercial broadband service provider requests notice to be sent. Absent unusual circumstances such as an outage or similar emergency, an electric cooperative shall send notice to a property owner as requested under this subparagraph no later than 10 days after receipt of the request from a commercial broadband service provider.

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

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

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

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

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

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

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

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

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

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

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

(B) The mailing address, telephone number and electronic mail address for a representative of the commercial broadband service provider.

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

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

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

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

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

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

(d) Any surface area disturbed during trenching or other underground work must be restored to its condition prior to the trenching or other underground work.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) Expand the footprint of the existing easement.

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

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

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

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

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

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

SECTION 3. (1) An electric cooperative that exercises the authority granted under section 1 of this 2021 Act for the provision of broadband services:

(a) For as long as the electric cooperative maintains an exclusive right to provide electric service to customers within its exclusive service territory, may provide broadband service only through a broadband affiliate or through a separate broadband division within the electric cooperative; and

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

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

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

the provision of broadband service and the electric cooperative's provision of electric service; and

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

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

(A) Below fair market pricing;

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

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

(b) An electric cooperative may:

(A) Enter into transactions with the broadband affiliate or division of the electric cooperative on terms and conditions that are substantially similar to the terms and conditions that would be agreed to between two similarly situated parties in an arm's-length commercial transaction;

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

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

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

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

(3)(a) Upon request from a commercial broadband service provider, an electric cooperative subject to this section and any broadband affiliate or division of the electric cooperative shall cause an officer of the electric cooperative and the broadband affiliate or division, respectively, to certify that both the electric cooperative and the broadband affiliate or division are in compliance with this section.

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

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

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

Passed by House April 16, 2021

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Timothy G. Sekerak, Chief Clerk of House

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Tina Kotek, Speaker of House

Passed by Senate May 20, 2021

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Peter Courtney, President of Senate

Received by Governor:

.....M.,....., 2021

Approved:

.....M.,....., 2021

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Kate Brown, Governor

Filed in Office of Secretary of State:

.....M.,....., 2021

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Shemia Fagan, Secretary of State