



HOUSE BILL 387: Electric Co-Op Rural Broadband Services.

2019-2020 General Assembly

Committee: House Energy and Public Utilities. If **Date:** April 25, 2019
favorable, re-refer to Judiciary. If favorable,
re-refer to Rules, Calendar, and Operations of
the House

Introduced by: Reps. Arp, Szoka, Lewis, Hunter **Prepared by:** Jennifer McGinnis
Analysis of: PCS to First Edition Committee Counsel
H387-CSRI-8

OVERVIEW: *The Proposed Committee Substitute (PCS) for H387 would do all of the following:*

- *Eliminate certain restrictions on the formation and operation of separate business entities (subsidiaries) by Electric Membership Corporations (EMCs) that provide or support high speed broadband services.*
- *Provide that the terms of any easement held or otherwise used by an EMC for the provision of electrification may be expanded to allow use by the EMC or a subsidiary of the EMC for the purpose of supplying high-speed broadband service.*
- *Prohibit class action suits against an EMC or a wholly-owned subsidiary of the EMC in a suit in trespass or inverse condemnation based on a claim of expanded use of an easement.*
- *Establish a measure of damages to be paid to a landowner, if, in a suit in trespass or inverse condemnation based on a claim of expanded use of an easement, the landowner prevails over an EMC or a wholly-owned subsidiary of the EMC. Among other limitations, the damages could not exceed the difference between the fair market value of the property owner's entire property immediately before the taking and the fair market value of the property owner's property immediately after the taking. Upon payment of damages, the EMC or a wholly-owned subsidiary of the EMC would be granted a permanent easement for the trespass that was the subject of the claim.*

[As introduced, this bill was identical to H387, as introduced by Reps. Arp, Szoka, Lewis, Hunter, which is currently in House Energy and Public Utilities.]

SECTION 1

CURRENT LAW:

Under current law, EMCs are non-profit organizations and are tax exempt. The EMCs are authorized, but not required, to form, organize, acquire, hold, dispose of, and operate any interest, up to and including full controlling interest, in separate business entities that provide energy services and products, telecommunications services and products, water, and wastewater collection and treatment. These are referred to as a subsidiary of the EMC, even though under the statutes these subsidiaries must be separate

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for-profit corporations, subject to all taxes (including income taxes), and must comply with the following additional conditions:

- The subsidiary is not financed with loans or grants from the Rural Utilities Service of the United States Department of Agriculture (USDA).
- The subsidiary fully compensates the EMC for the use of personnel, services, equipment, or tangible and intangible property.
- The subsidiary does not receive from an EMC any investment, loan, guarantee, or pledge of assets in an amount that, in the aggregate, exceeds 10% of the assets of that EMC.

BILL ANALYSIS:

Section 1 of the PCS would authorize subsidiary business entities of EMC's that provide or support "high speed broadband services to one or more households, businesses, or community anchor points in an unserved area" to do both of the following:

- Finance with loans or grants from the Rural Utilities Service of the United States Department of Agriculture (USDA).
- Compensate the EMC at less than full compensation for the use of personnel, services, equipment, or tangible and intangible property.

For purposes of the subsection:

- The term "anchor points" includes schools, libraries, community colleges, community centers, and other similar places.
- The term "high speed broadband services" means Internet transmission speeds of a minimum of 25 megabits per second (Mbps) downstream and 3 Mbps upstream.
- The term "unserved area" means a location where inhabitants or businesses do not have access to high-speed broadband services.

BACKGROUND:

The Rural Utilities Service at the USDA houses three ongoing assistance programs exclusively created and dedicated to financing broadband deployment: the Rural Broadband Access Loan and Loan Guarantee Program, the Community Connect Grant Program, and the ReConnect Program.

SECTION 2

CURRENT LAW

Article 2 of Chapter 117 of the General Statutes authorizes formation of EMCs "for the purpose of promoting and encouraging the fullest possible use of electric energy in the rural section of the State by making electric energy available to inhabitants of the State at the lowest cost consistent with sound economy and prudent management of the business of such corporations." The statutes currently authorize EMCs to "exercise the right of eminent domain for the purposes of constructing, operating and maintaining electric generating, transmission, distribution and related facilities, individually and solely in their own names, pursuant to the provisions of Chapter 40A of the General Statutes...."

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BILL ANALYSIS:

Section 2 of the PCS would:

- Provide that any easement held or otherwise used by an EMC for the purpose of electrification may also be used by the EMC or a wholly-owned subsidiary of the EMC for the purpose of supplying high-speed broadband service where that use does not require additional construction and is ancillary to the electrification purposes.
- Prohibit class action suits against an EMC or a wholly-owned subsidiary of the EMC in a suit in trespass or inverse condemnation based on a claim of expanded use of an easement.
- Provide that if, in a suit in trespass or inverse condemnation based on a claim of expanded use of an easement, an individual property owner prevails over an EMC or a wholly-owned subsidiary of the EMC, the trespass would be deemed permanent and the actual damages awarded would be the fair market value, which would always be greater than zero but must not exceed the difference between the fair market value of the property owner's entire property immediately before the taking and the fair market value of the property owner's property immediately after the taking. In addition, calculation of the damages would be subject to the following conditions:
 - Evidence of revenues or profits derived or the rental value of an assembled communications corridor would not be admissible in determining fair market value.
 - A property owner's actual damages would be fixed at the time of the initial trespass and could not be deemed to continue, accumulate, or accrue.

Upon payment of damages, the EMC or a wholly-owned subsidiary of the EMC would be granted a permanent easement for the trespass that was the subject of the claim.

BACKGROUND:

Easements are typically created by conveyance in a deed or other written document and are generally considered contracts in North Carolina. In limited circumstances, a court will imply an easement as a matter of law. Easements may be acquired through the power of eminent domain under the statutes. The terms of the easement are considered the terms of the contract once entered into.

The transferability of an easement from one individual or entity to another is dependent on the nature of the easement – whether the easement is considered "appurtenant" or "in gross." "Easements appurtenant and appurtenant are always owned in connection with other real estate and as incidents to such ownership, while easements in gross are purely personal and usually end with the death of the grantee. However, an easement in gross designated as a profit à prendre, by which the right to take something from the land does not end with the death of the grantee necessarily, but may pass to his heirs or assigns." *Davis v. Robinson*, 189 N.C. 589, 127 S.E. 697 (1925). "If an easement is in gross there is no dominant tenement; an easement is in gross and personal to the grantee because it is not appurtenant to other premises. *ibid.*, pp. 626-7. An easement in gross attaches to the person and not to land." *Shingleton v. State*, 260 N.C. 451 (1963), citing 17A Am. Jur., Easements, ss. 9, 11, pp. 624, 625, 627.

With regard to changes in the parties to an easement, courts in North Carolina have held:

Grimes v. Virginia Elec. & Power Co., 245 N.C. 583, 96 S.E.2d 713 (1957). In *Grimes*, the plaintiff granted an express easement by contract to the defendant for power lines. *Id.* at 583, 96 S.E.2d at 713-14. The defendant later granted a license to the City of Washington to add additional lines on the same poles. *Id.* at 584, 96 S.E.2d at 714. The plaintiff sued for compensation for the additional

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servitude on his land, while the defendant contended that "the plaintiff's grant was to the Virginia Electric & Power Company ["VEPC"] and to its -25- successors and assigns, and permitted it to make the assignment to the City of Washington." *Id.* (emphasis in original). The Supreme Court rejected the defendant's argument stating:

The answer to the defendant's contention is that the Virginia Electric & Power Company has not assigned anything. It still retains its right to maintain its full complement of wires and other facilities and to transmit electricity within the full limits of its grant. The contract between the defendants permits the power company to retain all its facilities and, in addition, permits the City of Washington to transmit its own current by means of its own wires attached to the power company's poles. The plaintiff was not a party to the contract between the defendants. The additional lines of the city, with the right to enter upon the lands for maintenance purposes, place an additional burden on plaintiff's land without his consent. Two power companies enjoy an easement over his land. He granted only one.

City of Charlotte v. BMJ of Charlotte, 196 N.C. App. 1 (2009), citing *Grimes v. Virginia Elec. & Power Co.*, 245 N.C. 583, 96 S.E.2d 713 (1957)

With regard to changes in the scope or purpose of an easement, the North Carolina courts have stated the following with respect to evaluating whether an undue burden exists:

"The following rules apply when overburdening or misuse of an easement is at issue:

First, the scope of an express easement is controlled by the terms of the conveyance if the conveyance is precise as to this issue. Second, if the conveyance speaks to the scope of the easement in less than precise terms (i.e., it is ambiguous), the scope may be determined by reference to the attendant circumstances, the situation of the parties, and by the acts of the parties in the use of the easement immediately following the grant. Third, if the conveyance is silent as to the scope of the easement, extrinsic evidence is inadmissible as to the scope or extent of the easement. However, in this latter situation, a reasonable use is implied."

City of Charlotte v. BMJ of Charlotte, 196 N.C. App. 1 (2009)

As easements are generally considered contracts, legislation that alters the existing terms of that real property contract, including legislation that changes the purpose for which the easement may be exercised or the parties that may use the easement, may give rise to constitutional considerations, including:

- Article I, Section 10, Clause 1 of the United States Constitution, which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts"
- The 5th Amendment to the United States Constitution, which states that private property shall not "be taken for public use without just compensation."
- Section 1 of the 14th amendment to the United States Constitution, which provides that no state may "deprive any person of life, liberty, or property, without due process of law."
- Article I, Section 19 of the State's Constitution, which provides "No person shall be...in any manner deprived of his ... property, but by the law of the land."

EFFECTIVE DATE: The PCS would be effective when it becomes law and apply to all claims filed on or after that date.