



BROADBAND EASEMENTS

HOUSE COMMERCE COMMITTEE

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QUICK DRILL ON BROADBAND EASEMENTS

- ALL COMPETITORS SHOULD PLAY BY THE SAME RULES, INCLUDING COOPS
- COMPETITIVE ISSUES REGARDING COOP ENTRY INTO BROADBAND MARKET HAVE BEEN NEGOTIATED IN OTHER STATES AND SHOULD BE WORKED OUT AMONG STAKEHOLDERS IN MINNESOTA AS WELL



All broadband providers, including cable providers, presumably have rights to use dedicated PUBLIC utility easements. These easements have been in place or granted by state law for decades.



All broadband providers must negotiate their own PRIVATE easements. Under HF686, coops ask the state to force property owners to expand the scope of coop PRIVATE easements without negotiation. This provides coops a major competitive advantage in serving rural areas. It also raises serious constitutional Takings issues.



Coops and municipally owned utilities are the only (monopoly) owner of utility poles not subject to pole attachment rate regulation. In many rural areas, coop owned poles are the ONLY way to access the rural broadband customer. In other words, coops already have a leg up on the competition.

ACTUAL COOP POLE ATTACHMENT RATES REPORTED BY MCCA MEMBERS

	Investor Owned (IO)	Coop
Rates Paid by MCCA Members	\$2.01 – \$8.81	\$8.00 – 24.10
SAME POLES, DIFFERENT OWNERS!!	\$4.81	\$13.50



THE COOP “BROADBAND EASEMENT” BILL

- HF0686 (As introduced February 4, 2021)
 - Allows a rural electric cooperative the use of any land easement it holds for the purpose of providing electric service to also provide broadband service
 - No need to compensate landowner
- Author’s Amendment (February 23, 2021)

BACKGROUND

BARFIELD V. SHO-ME POWER ELECTRIC COOPERATIVE (8TH CIR. 2018)



3,000 private landowners in Missouri sued the subsidiaries of two electric cooperatives for using existing easements to provide telecommunications (broadband) services.



The existing easements only allowed for providing electricity or functions related to providing electricity to consumers.



The Court held that providing commercial telecommunications services was not allowed under the terms of the existing easements and ordered that the landowners be compensated for the use of the easements for telecommunications services. The litigation resulted in a \$25,000,000 settlement used to compensate landowners and pay for administrative and counsel fees.

PITFALLS FACING THE COOP BROADBAND EASEMENT BILL

- Takings Claims. Coop bill grants electric coops easement rights so broad that it runs risk of Missouri-like Takings Clause claims under U.S. and Minnesota Constitution against the State of Minnesota.
- Shifting Liability to State. Unlike the *Sho-Me* case, Takings claims in this case could be against the State of Minnesota in addition to or instead of the electric coops. In other words, the bill could shift liability and litigation costs to the State of Minnesota and away from coops.
- Hornet's Nest? If adequate caution is not exercised and due diligence performed on this issue, *Sho-Me* demonstrates that this issue has the potential to be very messy (class action lawsuit) and expensive. In other words, it has the potential to be anything but a reduction of a barrier to broadband deployment.

AUTHOR'S
AMENDMENT
VIOLATES
ESTABLISHED
EMINENT DOMAIN
LAW IN
MINNESOTA

- Take Land Now, Pay Later (Maybe)?
 - Under the Minnesota Constitution, land may only be condemned after a determination of “public purpose” and “necessity.” *In re Award of Damages to Rapp*, 621 N.W.2d 781 (Minn. App. 2001).
 - The author’s amendment allows electric coops to use underlying land before a determination of “public purpose” and “necessity” is made.
- Daisy Chain Easements?
 - Eminent domain power can’t be delegated to private parties who do not themselves possess eminent domain authority. *Minnesota Canal Power v. Koochiching*, 97 Minn. 429 (1906).
 - The author’s amendment grants electric coops the ability to contract with anyone to use the coops’ electric easement.



COOP POLE ATTACHMENT RATES – ANTI COMPETITIVE BARRIERS TO RURAL BROADBAND DEPLOYMENT

- All broadband providers that want to provide wireline broadband service to electric cooperative service areas need to attach facilities to poles owned by electric cooperatives.
- Electric cooperatives are exempt from Federal Communications Commission pole attachment rate regulations.
- Negotiating pole attachments with electric cooperatives can be extremely difficult, time consuming and expensive. See Table below.
- With many electric cooperatives entering the broadband business, unregulated pole attachment rates become more than a barrier to broadband deployment; it also becomes anticompetitive.
- Competitive issues regarding coop entry into broadband market have been negotiated in other states and should be negotiated in Minnesota.

Average Pole Attachment Rates by State (2017)					
State	Investor Owned (IO)	Coop	Muni	Coop/IO	Muni/IO
MN	6.02	13.89	9.06	2.31	1.51

Source: Michelle Connolly, *The Economic Impact of 224 Exemption of Municipal and Cooperative Poles*, July 12, 2019, Table 2.



Photo by Scott Robinson

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THANK YOU