

FACILITIES IN RAILROAD RIGHTS-OF-WAY

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House Bill 4422 (proposed substitute H-1)

Sponsor: Rep. Michele Hoytenga

Committee: Communications and Technology

Complete to 6-9-21

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 4422 would amend the Railroad Code to provide procedures under which a person could construct or install communications or utility facilities in a railroad right-of-way.

Currently under the act, a corporation or person may not string any wire, electrical or other, across a railroad or street railway right-of-way unless specified procedures are followed. Unless agreed otherwise, for crossings in the right-of-way of a public street, notification must be given to the railroad 30 days before any work is done. For other locations, the railroad must give or deny permission for the work within 90 days after getting notification of it. The Michigan Department of Transportation (MDOT) has authority to settle a dispute between parties, and a court of competent jurisdiction may issue an order to enjoin and violation of or failure to comply with the procedures.

Application to construct facilities

Under the bill, a **person** could construct or install **facilities** under, over, adjacent to, or across a railroad or street railway if the person submits an application to the railroad 30 calendar days before beginning construction of the facilities. Any facilities constructed would have to be constructed in accordance with the national electric safety code and federal laws and rules.

Person would mean an individual, partnership, association, corporation, limited liability company, trust, and any other legal entity.

Facilities would mean a conductor, pipe, or structure, including a conduit, duct, line, pipe, wire, or other device and its appurtenances used to produce, store, transmit, or distribute a utility service (which includes communications, data, cable television, electricity, heat, natural or manufactured gas, oil, petroleum products, steam, sewage, video, and water).

An application would have to include all of the following:

- The planned location of the facilities that are to be installed within the right-of-way.
- The engineering designs and specifications for the proposed project.
- The anticipated date the project will commence.
- The anticipated length of time until the project is completed.
- The designated crossing areas where the individuals working on the project will work.
- The areas where the equipment for working on the project will be stored.
- The name, phone number, and email address of the individual responsible for the project.
- The name, phone number, and email address of the individual responsible for on-site supervision of the project.
- Proof of insurance.

Notification regarding application

The railroad would have to notify the person within 30 days whether the application is complete or incomplete. If it is incomplete, the railroad would have to clearly and specifically identify the information needed to make it complete. The railroad would also have to notify the person within 30 days if the application cannot be completed in 30 days because of special circumstances. If the railroad does not notify the person within 30 days that the application is complete, incomplete, or involves special circumstances, the application would be considered complete and the person could begin construction.

Special circumstances would mean a segment of a railroad right-of-way that necessitates additional terms and conditions or compensation for engineering or construction costs associated with a **crossing** due to either of the following:

- The railroad right-of-way segment's location in urban or other developed areas, the existence of unique topography or natural resources, or other characteristics or dangers inherent in the particular crossing or segment of the railroad right-of-way.
- Variances from the standard specifications requested by a person.

Crossing would mean either the physical intersection between a railroad's **facilities** and a person's facilities **within** a right-of-way or where the railroad's facilities and a person's facilities are adjacent to each other within a right-of-way. Crossing would include all of a person's facilities, regardless of the number or size of the facilities at the location, and would include the aerial and underground facilities of a person.

Within would mean across, intersecting, on, over, perpendicular to, or under.

Notification of incompleteness

If the railroad makes a timely notification that an application is incomplete, the person could supplement the application with additional information to complete it. A railroad would have to notify the person within 15 days after the supplemental information is submitted whether the application is complete, incomplete, or involves special circumstances. If the railroad does not notify the person within those 15 days, the application would be considered complete and the person could begin construction.

Notification of special circumstances

If the railroad notifies the person filing an application that the proposed work involves special circumstances, the person and the railroad would have 30 days after that notification to negotiate whether an increased application fee or additional time for review of the application is warranted. Any increased application fee could not exceed \$2,000, and any additional time for the railroad to review the application could not exceed an additional 45 days.

If the person filing the application and the railroad cannot agree that special circumstances exist or an increased fee or additional time is warranted, either party could submit the dispute for resolution as described below. If the dispute concerns only the compensation associated with a crossing, the person filing the application could proceed with installation of the facilities while the dispute resolution process is pending.

The railroad could not dispute the planned location of a person's facilities provided in the application unless the location of the facilities would directly interfere with the railroad's safe operation.

Compensation for crossing

A person that locates its facilities under, over, adjacent to, or across a railroad or street railway would have to compensate the railroad \$1,000 for each crossing. The payment would be a one-time payment, in lieu of any license fees or other fees, costs, or charges, to reimburse the railroad for all **direct expenses** incurred by the railroad as a result of the construction of the facilities, except for **extraordinary direct expenses**. (A railroad could not collect a payment or fee for crossings in existence on the effective date of the bill.) MDOT would have to adjust this fee for inflation every three years as described in the bill.

Direct expenses would not include a contribution to profit but could include any of the following:

- The cost of inspecting the crossing site before, during, or after construction.
- Administrative costs, such as those for entering a new crossing on the railroad's books, maps, and property records, the processing of the application, and the preparation of related documents.
- The cost of flagging during construction.
- The cost of reviewing engineering plans.
- The costs associated with having an employee observe the construction of facilities.
- Any other costs incurred due to actual construction.

Extraordinary direct expenses would mean expenses not included in direct expenses that are directly incurred as a result of construction of facilities within the railroad right-of-way.

Petition for increased compensation

A railroad could initiate a dispute as described below to request MDOT for compensation greater than that described above if the railroad and the person cannot agree on compensation and the railroad incurs extraordinary direct expenses as a result of the construction of the facilities. In such a case, MSOT would have to determine whether extraordinary direct expenses have been incurred and the amount of compensation to be paid to the railroad.

Damage to property and scope of liability

If grade crossing markings or signs are damaged during construction, the party responsible for the damage would have to pay the replacement costs.

Unless otherwise agreed, a railroad and a person would each determine for itself the amount and scope of the general liability and railroad protective liability insurance the railroad or person must carry to cover its respective risks associated with property owned by the railroad or facilities owned by the person within the right-of-way. A railroad and a person would have to each indemnify the other for damages resulting from the railroad's or person's own negligence related to the presence of facilities owned by the person within the right-of-way. A railroad or a person would not be liable to the other party or the other party's customers for any special damages, including consequential or punitive damages.

Notices of maintenance, emergencies, or repair

Unless otherwise agreed, a railroad or person would each, at its own expense, have to notify the other of planned repair or maintenance of existing facilities within the right-of-way not less than days 30 before the planned repair or maintenance.

Unless otherwise agreed, a railroad or person would have to establish, at its own expense, a mechanism for receiving notice of emergencies 24 hours per day, 7 days per week. For facilities owned by a person that are located under, over, adjacent to, or across a railroad or street railway within the right-of-way, each railroad or person would have to inform the other of an emergency telephone number and any other information necessary for dealing with an emergency situation.

Unless otherwise agreed, a railroad or person would have to each repair and maintain its own property or facilities located within a right-of-way. The railroad or person could not perform regular or emergency maintenance, modification, or repair of the other's property or facilities.

Reimburse other expenses.

Unless otherwise agreed, a railroad or person would have to reimburse the other for necessary and reasonable expenses incurred due to emergencies caused by its property or facilities that are located within the right-of-way. A railroad or a person would also have to reimburse the other for reasonable and necessary expenses actually incurred by one party at the other's request.

Description of additions or alterations

Except for routine maintenance, a person would have to provide a railroad with a physical description of any alterations or additions to its property or facilities located under, over, adjacent to, and across a railroad or street railway in the area of the facilities owned by the person.

Appointment of mediator

If a railroad or a person are unable to agree on disputes under the Railroad Code, MDOT would have to appoint a mediator within seven days after receiving an application providing notice of the dispute. The mediator appointed by MDOT would have to make recommendations for a resolution of the dispute to MDOT within 30 days after the date of the application. If a party to the dispute disagrees with the mediator's recommendation, that party could, within 30 days after receipt of the recommendation, request MDOT for a review and determination of a resolution of the dispute. MDOT would have to issue a final determination within 60 days or, if a railroad demonstrates that the public health, safety, and welfare require a determination before 60 days, within 15 days after the date of the request. The parties to the dispute could agree to an extension for up to 30 days of the 60-day requirement.

A dispute submitted for resolution would not be a contested case under the Administrative Procedures Act.

Miscellaneous provisions

The bill would not apply to changing, modifying, or terminating existing easements between a person and the railroad or to existing crossings covered by an agreement or easement in effect before the effective date of the bill.

An application to construct facilities could be submitted to the entity that owns the railroad tracks located in the crossing. Applications would not have to be submitted to each entity that owns or controls an interest in the railroad.

MCL 462.265 and 462.441 and proposed MCL 462.111 et seq.

FISCAL IMPACT:

House Bill 4422 would amend the state Railroad Code to provide for the construction of “facilities” by “persons” within railroad rights-of-way. (As described above, “facilities” and “persons” are defined terms in the bill.) Specifically, the bill states that “a person may construct or install facilities under, over, adjacent to, or across a railroad or street railway” if the person follows a process defined in the bill. In effect, the bill allows use of railroad rights-of-way by utilities and telecommunication companies. The bill would establish a process under which a utility could install service lines or a telecommunication company could install lines or cable within railroad rights-of-way.

The bill would require a person constructing or installing a facility in railroad rights of way to pay the railroad a one-time payment of \$1,000 per crossing to reimburse the railroad for all direct expenses incurred by the railroad as a result of the construction of the facilities, except for extraordinary direct expenses.

The bill also appears to provide for an application fee, although the bill does not specify the amount of the fee—only that an increased application fee, as a result of special circumstances, could not exceed \$2,000.

With respect to private railroads and persons, the bill does not appear to have a direct fiscal impact on the state or local units of government. However, the bill gives to MDOT responsibility as mediator of disputes between railroads and persons with respect to construction and installation of facilities within railroad rights-of-way. This dispute mediation function represents a new program activity for MDOT that would require additional resources.

The bill could have a direct fiscal impact on MDOT as owner of 665 miles of rail line in Michigan, including 135 miles of rail on a higher speed rail passenger corridor between Kalamazoo and Battle Creek. In effect, MDOT is also a railroad. To the extent that the bill limits the reimbursement of railroad owner costs, the bill has a potential fiscal impact on MDOT. If MDOT engineering and project oversight costs were greater than the amounts authorized for reimbursement under the bill, MDOT would have to absorb those additional costs from current resources

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.