

- SUBJECT:** Limiting liability of electric utilities that allow recreational use of land
- COMMITTEE:** State Affairs — committee substitute recommended
- VOTE:** 12 ayes — Solomons, Menendez, Cook, Farabee, Gallego, Geren, Harless, Hilderbran, Lucio, Maldonado, Swinford, S. Turner
- 0 nays
- 3 absent — Craddick, Jones, Oliveira
- WITNESSES:** For — (*Registered, but did not testify:* Sylvia Borunda Firth, City of El Paso)
- Against — Nelson Roach, Texas Trial Lawyers Association
- On — (*Registered, but did not testify:* Barry Smitherman, Public Utility Commission)
- BACKGROUND:** Civil Practices and Remedies Code, ch. 75, the Texas Recreational Use Statute, limits the tort liability of certain landowners who allow access to their premises for recreational purposes. The statute provides immunity from most property damage and personal injury claims except those arising from a premises owner who has been grossly negligent or has acted with malicious intent or in bad faith. The class of protected landowners includes public and private owners, lessees, and occupants of agricultural land and other real property.
- The statute applies to public utilities that own or lease land, including electric utilities. Utilities Code, sec. 31.002 defines an electric utility as a person or river authority that owns or operates for compensation equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in Texas.
- DIGEST:** CSHB 783 would limit the tort liability of a public utility that, as the owner, occupant, or lessee of land, signed an agreement with a municipality, county, or other political subdivision of the state to allow public access to the utility's premises for recreation. The bill would provide that a public utility allowing public access or recreational use

would not guarantee the safety of its premises for recreation. In addition, a public utility would not incur liability for any claim of property damage, personal injury, or death of a person who entered the premises for recreation or accompanied another person who did so. The bill would specifically bar any claims of injury, death, or other damage resulting from:

- an act of a third party that occurred on the premises, whether intentional or unintentional;
- contact with power lines or exposure to electromagnetic fields;
- a premises defect or other condition relating to the premises; or
- any negligence or gross negligence of the public utility.

CSHB 783 would define "public utility" to mean only an electric utility.

The bill would apply only to a public utility located in a county with a population of 600,000 or more and located on the international border (El Paso County).

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2009. It would apply only to a claim on or after the effective date. Existing law would continue to govern claims prior to the effective date.

**SUPPORTERS
SAY:**

CSHB 783 would increase the availability of public recreational space in cities and rural areas in El Paso County. Recent public interest in urban renewal and neighborhood beautification has prompted requests for public utilities to allow public access to certain properties, such as electric transmission rights-of-way. Unfortunately, public utilities have been reluctant to permit recreational use of their properties because the current law does not provide adequate protections from exposure to costly litigation, even in cases where utilities prevail. As a result, many utility premises that could be used for beneficial purposes remain unused and unimproved.

CSHB 783 would address the litigation concerns of utilities by expanding liability protections to include features unique to utility premises, such as exposure to power lines and electromagnetic fields. These protections would not grant unduly broad immunity — like other landowners under the Recreational Use Statute, utilities would remain liable for their own

acts if committed maliciously or in bad faith. Furthermore, the committee substitute would apply the added protections only to an electric utility that signed an agreement with a municipality, county, or other local governmental entity. The proposed legislation would balance the public's desire for additional recreational space with public utilities' need for sufficient safeguards against expensive litigation.

The suggested inclusion of a provision allowing or forcing a governmental entity to indemnify any liability of a public utility would be unconstitutional. It would violate Art. 3, secs. 50-52 of the Texas Constitution, which prohibits that state from giving or granting public money or lending or pledging its credit to any person, association, or corporation without express constitutional authority. As interpreted by the First Court of Appeals in *Texas & N.O.R. Co. v. Galveston County*, 161 S.W.2d 530 (Tex. Civ. App.-Galveston 1942), *affirmed*, 141 Tex. 34, 169 S.W.2d 713 (1943), this provision forbids the state from indemnifying a third party, including a public utility, for any expenses associated with defending a claim against the third party.

**OPPONENTS
SAY:**

CSHB 783 would drastically reduce the standard of care owed by a public utility to the public-at-large and grant sweeping immunity protections from almost all personal injury and property damage claims, regardless of the circumstances. Public utilities already have sufficient liability protections since the current Recreational Use Statute treats public utilities like any other premises owner, yet CSHB 783 would grant them special expanded protection from liability. The proposed legislation would exempt public utilities even from claims arising from a utility's gross negligence, a protection that other landowners do not have. CSHB 783 effectively would make public utilities a special class of landowner uniquely unaccountable to the public.

Encouraging landowners to allow public access to unused or underused land is a legitimate, laudable public policy. However, it should not come at the expense of the equally important goal of holding landowners responsible for personal injuries or property damage caused by a landowner's gross negligence.

**OTHER
OPPONENTS
SAY:**

The bill also lacks any provision that would guarantee relief to an injured party who pursued legal action against a public utility that subsequently went out of business. The bill would be improved if it at least allowed a

governmental entity to indemnify a public utility for any injury or damage it caused.

NOTES:

The committee substitute differs from the original bill by defining “public utility” to include only an electric utility, while the bill as filed would have included a telecommunications provider, a cable or video service provider, a gas utility, and a water and sewer utility. The substitute also would condition a public utility’s immunity on the signing of an agreement with a municipality, county, or other political subdivision allowing public access to or use of the premises, rather than on the public utility giving permission to a person to enter the premises, as in the original.

Under the committee substitute, a public utility would not assume responsibility for damage to any property, while the original bill provided only that a utility would not have assumed responsibility for damage to property of a person who entered the utility’s premises or accompanied another person. The substitute also specifically would exempt public utilities from liability under any claim of personal injury, death, or property damage arising from contact with power lines or exposure to an electromagnetic field, a premises defect or other condition relating to the premises, or from any negligence or gross negligence of the public utility.

Finally, the committee substitute would apply only to a public utility located in a county with a population of 600,000 or more and located on an international border (El Paso), while the original bill would have applied statewide.