

BILL ANALYSIS

Senate Research Center

H.B. 1505
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Transportation
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

One of the biggest barriers to new broadband deployment is the cost of replacing utility poles in order to install new broadband infrastructure. These poles, which are the backbone of this infrastructure, have often outlived their useful life or have deficiencies that can discourage investment in unserved areas. This has led to uncertainty when broadband companies attempt to build out new service. H.B. 1505 seeks to address this uncertainty and establish a modernized pole attachment regime that applies to Texas's electric cooperatives and promotes consistency, transparency, and fairness in the deployment of broadband service to all Texans.

The bill creates the broadband pole replacement fund, and directs \$75 million in available federal Coronavirus Capital Projects Funds to that new fund. Under this fund, the Comptroller of Public Accounts of the State of Texas will reimburse up to the lesser of \$5,000 or 50 percent of the costs incurred or paid by a broadband provider or pole owner to replace a pole in order to accommodate broadband facilities used to deploy retail broadband service at speeds of 25mbps/3mbps or faster to areas that currently lack such service. This program would be open to parties paying such pole replacement costs in areas served by ALL pole owners in the state—including investor-owned electric utilities, electric cooperatives, and municipal utilities. Providers will be eligible to apply for reimbursements for a portion of the costs of eligible pole replacements—those necessary to accommodate the deployment of retail broadband facilities into unserved areas—until the federal funds are exhausted. Pole owners receiving funds must agree not to pass along costs reimbursed by the fund to their electric and broadband customers.

Broadband providers will get access to electric cooperative poles where reasonable make-ready activities can facilitate access consistent with safety, reliability, and generally applicable engineering purposes. Electric cooperatives are free to continue to set their pole attachment rates.

The bill also applies to broadband providers all the same easement, abandoned pole attachment, and pole transfer provisions in existing law that apply to cable operators.

H.B. 1505 amends current law relating to attachments for broadband service on utility poles owned by an electric cooperative and establishing and funding a pole replacement program for deployment of certain broadband facilities.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Comptroller of Public Accounts of the State of Texas in SECTION 1 (Section 403.503, Government Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Chapter 403, Government Code, by adding Subchapter R, as follows:

SUBCHAPTER R. INFRASTRUCTURE AND BROADBAND FUNDING

Sec. 403.501. DEFINITIONS. Defines "pole replacement fund" and "pole replacement program."

Sec. 403.502. BROADBAND POLE REPLACEMENT FUND. (a) Provides that the broadband pole replacement fund is created as a fund in the state treasury outside the general revenue fund.

(b) Requires the Comptroller of Public Accounts of the State of Texas (comptroller), notwithstanding any other law and except as provided by federal law, to make a one-time transfer of \$75 million from money received by this state from the federal government from the Coronavirus Capital Projects Fund established under Section 9901 of the American Rescue Plan Act of 2021 (Pub. L. No. 117-2) to the credit of the pole replacement fund. Requires the comptroller to make the transfer described by this subsection as soon as practicable following receipt by this state of a sufficient amount to make the transfer.

(c) Authorizes money deposited to the credit of the pole replacement fund to be used only for the purpose of supporting the pole replacement program under Section 403.503, including the costs of program administration and operation. Requires that money in the pole replacement fund be used in a manner consistent with federal law.

(d) Provides that interest earned on money deposited to the credit of the pole replacement fund is exempt from Section 404.071 (Disposition of Interest on Investments). Requires that interest earned on money in the fund be retained in the pole replacement fund.

(e) Authorizes the comptroller to issue guidelines for state agencies regarding the implementation of this section.

Sec. 403.503. TEXAS BROADBAND POLE REPLACEMENT PROGRAM. (a) Defines "eligible broadband facility," "eligible pole replacement cost," "qualifying broadband service," "unserved area," "pole," and "pole owner."

(b) Establishes the Texas Broadband Pole Replacement Program for the purpose of speeding the deployment of broadband to individuals in rural areas by reimbursing a portion of eligible pole replacement costs incurred by certain persons.

(c) Requires the comptroller to administer, prescribe rules for, and provide administrative support for the pole replacement program. Authorizes the comptroller to take any action necessary or convenient to implement the pole replacement program.

(d) Authorizes a pole owner or a provider of qualifying broadband service who pays or incurs the costs of removing and replacing an existing pole in an unserved area for the purpose of accommodating the attachment of an eligible broadband facility to apply to the comptroller for a reimbursement award for an amount equal to:

(1) 50 percent of the eligible pole replacement costs paid or incurred by the applicant or \$5,000, whichever is less, for the pole replaced; and

(2) the documented and reasonable administrative expenses incurred by the applicant in preparing and submitting the reimbursement application, including expenses charged by a pole owner under Subsection (m).

(e) Prohibits the amount reimbursed under Subsection (d)(2) from exceeding five percent of the eligible pole replacement costs in the application.

(f) Provides that, for purposes of Subsection (d), a pole is considered to be located in an unserved area if:

(1) at the time of the request by a retail broadband service provider to attach facilities to the pole, the pole is in a location that, according to the latest broadband availability data made available by the Federal Communications Commission, is in an unserved area; or

(2) the pole is located in an area that is the subject of a federal or state grant to deploy broadband service, the conditions of which limit the availability of a grant to unserved areas.

(g) Requires the comptroller to require each applicant for reimbursement to provide:

(1) information sufficient to establish the number, cost, and eligibility of pole replacements and the identity of the retail broadband service provider attaching the eligible broadband facilities;

(2) documentation sufficient to establish that the pole replacements have been completed or will be completed not later than the 90th day after the award of program reimbursement;

(3) the amount of reimbursement requested and any grant funding or accounting information required to justify the amount of the request;

(4) a notarized statement from an officer or agent of the applicant that the contents of the application are true and accurate and that the applicant accepts the requirements of Subsections (j), (k), and (l) as a condition of receiving an award of program reimbursement; and

(5) any other information the comptroller considers necessary for final review, award, and payment of program reimbursements.

(h) Requires the comptroller, not later than the 60th day after the date that the comptroller receives a completed application for reimbursement, to review the application and, if the pole replacement fund includes enough money to pay the award amount, to issue a reimbursement award. Requires that the award be paid not later than 30 days after the date of issuance.

(i) Requires the comptroller to provide notice of a reimbursement award to the pole owner and the retail broadband service provider attaching the eligible broadband facility.

(j) Requires an applicant, as a condition of receiving an award of program reimbursement, to certify the applicant's compliance with the requirements of this section.

(k) Prohibits a pole owner, if the owner receives a reimbursement award under this section, from including in any rates or fees charged for the owner's services an eligible pole replacement cost reimbursed by the program, paid for by a qualifying broadband provider, or funded by another grant source.

(l) Authorizes the comptroller, if the comptroller finds on substantial evidence after notice and opportunity to respond that a recipient of funds under this section has materially violated the requirements of this section with respect to reimbursements or portions of reimbursements, to direct the recipient to refund the reimbursement or a portion of the reimbursement with interest at the applicable federal funds rate as specified by Section 4A.506(b) (relating to calculating the amount of interest a receiving bank is obliged to pay if the amount is not determined by a certain agreement or rule), Business & Commerce Code, to the pole replacement fund or the state general fund.

(m) Requires the pole owner, if a retail broadband service provider incurs eligible pole replacement costs relating to a pole replacement performed by the owner, to coordinate with the provider to supply all information necessary for the provider to promptly complete and submit an application under this section. Authorizes a pole owner to charge the provider the documented and reasonable administrative expenses incurred by the pole owner for assistance, in an amount not to exceed five percent of eligible pole replacement costs. Authorizes the provider to seek reimbursement of costs in accordance with Subsection (d)(2).

(n) Provides that if the pole replacement fund does not have money sufficient to pay an award, the application for the award is considered denied. Authorizes the application to be refiled if sufficient funds are later made available in the pole replacement fund.

(o) Requires the comptroller, not later than the 60th day after the date the pole replacement fund receives money for the pole replacement program, to maintain and publish on the comptroller's Internet website:

(1) statistics on the number of applications received, processed, and rejected by the program;

(2) statistics on the size, number, and status of reimbursements awarded by the program, including the retail broadband service providers and pole owners receiving reimbursements; and

(3) the estimated amount of money remaining in the pole replacement fund.

(p) Requires the state auditor, not later than the first anniversary after the pole replacement fund receives funds for the purpose of providing pole replacement reimbursements, to audit the fund and the administration of the pole replacement program.

(q) Requires the comptroller, not later than one year after the date that the amount transferred to the pole replacement fund under Section 403.502(b) is exhausted, to identify, examine, and report on the deployment of broadband infrastructure and technology facilitated by the pole reimbursements the comptroller has awarded.

SECTION 2. Amends the heading to Chapter 252, Utilities Code, to read as follows:

CHAPTER 252. CABLE ATTACHMENTS TO ELECTRIC COOPERATIVE'S
DISTRIBUTION POLES

SECTION 3. Amends Title 5, Utilities Code, by adding Chapter 253, as follows:

CHAPTER 253. BROADBAND ATTACHMENTS TO ELECTRIC COOPERATIVE'S
DISTRIBUTION POLES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 253.0001. DEFINITIONS. Defines "broadband provider," "broadband service," "pole," and "pole attachment."

Sec. 253.0002. APPLICABILITY. Provides that this chapter applies to a pole attachment that is used wholly or partly to provide broadband service and affixed by a broadband provider to a pole owned and controlled by an electric cooperative. Provides that this chapter does not apply to a pole attachment regulated by the Federal Communications Commission under 47 U.S.C. Section 224.

Sec. 253.0003. CONSTRUCTION OF CHAPTER. (a) Provides that this chapter does not abrogate or affect a right or obligation of a party to a pole attachment contract entered into by a broadband provider and an electric cooperative before September 1, 2021.

(b) Provides that this chapter does not limit a right of a party to a pole attachment contract to request modification, amendment, or renewal of such contract to conform it to the provisions of this chapter.

Sec. 253.0004. NO STATE CERTIFICATION; NO REGULATORY AUTHORITY. (a) Provides that this chapter does not constitute state certification under 47 U.S.C. Section 224. Provides that if a court determines that this chapter constitutes certification under that section, this chapter is not enforceable and has no effect.

(b) Prohibits this chapter from being construed to subject an electric cooperative to regulation by the Federal Communications Commission under 47 U.S.C. Section 224.

(c) Provides that this chapter does not authorize a department, agency, or political subdivision of this state to exercise enforcement or regulatory authority over attachments to electric cooperative poles.

Sec. 253.0005. CONSTRUCTION OF TERMS AND PHRASES. Requires that technical terms and phrases in this chapter, other than those defined by Section 253.0001, be construed using the term's or phrase's usual and customary meanings in the electric and broadband industries.

Sec. 253.0006. COST-BASED NONRECURRING CHARGES. Requires that nonrecurring charges authorized by this chapter be cost-based.

SUBCHAPTER B. ACCESS TO POLES

Sec. 253.0101. APPLICATION FOR POLE ACCESS. Prohibits a broadband provider from accessing a pole owned by an electric cooperative for the purpose of placing a pole attachment unless the provider applies for that access.

Sec. 253.0102. USE OF POLE ATTACHMENTS FOR MULTIPLE SERVICES. Authorizes a broadband provider that attaches a pole attachment under this chapter to use the attachment for any service delivered over the provider's facilities, including cable service.

Sec. 253.0103. NONDISCRIMINATORY ACCESS; MODIFICATION OR REPLACEMENT TO ACCOMMODATE ATTACHMENT. (a) Requires an electric cooperative, except as provided by this chapter, to provide a broadband provider with nondiscriminatory access to a pole that the cooperative owns or controls.

(b) Authorizes an electric cooperative, except as provided by Subsection (c), to deny a broadband provider access to a pole if there is insufficient capacity or for reasons of safety, reliability, and generally applicable engineering purposes.

(c) Prohibits an electric cooperative from denying a broadband provider access to a pole if the basis for denial may be remedied by rearranging facilities on the pole through reasonable make-ready activities.

(d) Provides that, except as provided by Subsection (e), if a pole is required to be replaced to accommodate a new pole attachment applied for by a broadband provider:

(1) the electric cooperative and broadband provider are required to determine, through good faith negotiations, a reasonable date by which the pole replacement will occur; and

(2) the broadband provider is required to pay the actual costs of replacing the pole, including the cost to remove and dispose of the existing pole, to purchase and install a replacement pole, and to transfer any existing facilities to the new pole.

(e) Provides that an electric cooperative is responsible for the costs of removing and replacing under Subsection (d) a pole:

(1) with recorded conditions or defects that would reasonably be expected to endanger human life or property and which should be promptly corrected; or

(2) that must be replaced for safety or reliability as a result of normal wear and tear or other natural causes and not on account of a pole attachment or the action of a broadband provider or third party.

SUBCHAPTER C. POLE ATTACHMENT CONTRACTS

Sec. 253.0201. CONTRACTS FOR POLE ATTACHMENTS. (a) Authorizes an electric cooperative that owns a pole to require a broadband provider that attaches a pole attachment to the pole under this chapter to enter into a contract for access to the pole.

(b) Requires that the terms and conditions of a contract under Subsection (a) be consistent with this chapter.

Sec. 253.0202. RATES, TERMS, AND CONDITIONS FOR POLE ATTACHMENT. (a) Requires a broadband provider and an electric cooperative to establish the rates, terms, and conditions for pole attachments by a written pole attachment contract executed by both parties.

(b) Requires that the rates, terms, and conditions of a contract under this chapter be just, reasonable, and nondiscriminatory, and comply with this chapter.

(c) Requires that the following factors be considered in determining whether rates, terms, and conditions are just and reasonable:

(1) the interests of and benefits to the consumers and potential consumers of the electric cooperative's services;

(2) the interests of and benefits to the subscribers and potential subscribers to broadband services offered through the pole attachments;

(3) the interests of and benefits to third parties from the availability of electric services and broadband services offered through the pole attachments;

(4) compliance with applicable safety standards; and

(5) the maintenance and reliability of both electric distribution and broadband services.

(d) Requires a broadband provider and an electric cooperative to negotiate a pole attachment contract and any amendment, modification, or renewal thereof in good faith.

(e) Requires that a request to negotiate a new pole attachment contract or to amend, modify, or renew a contract pertaining to pole attachments by a broadband provider or an electric cooperative be made in writing.

Sec. 253.0203. CONTRACT NEGOTIATIONS AND MEDIATION. (a) Provides that if a broadband provider and an electric cooperative are unable to agree to a new pole attachment contract before the expiration date of an existing contract, the rates, terms, and conditions of the existing contract and the terms and conditions of the electric cooperative's application and permitting processes remain in force:

(1) during the 90-day negotiation period described by Subsection (b) and during the period of any agreed extension;

(2) during the 60-day mediation period described by Subsection (b) and during the period of any agreed extension; and

(3) pending final disposition of any litigation commenced under Subsection (c).

(b) Requires the broadband provider and electric cooperative, if a broadband provider and an electric cooperative are unable to agree to a new pole attachment contract before the 91st day after the expiration date of an existing contract, and are unable to agree to an extension of the negotiation period for a certain number of days, to attempt to resolve any disagreement over the rates, terms, or conditions by submitting the contract negotiations to a mediation process. Prohibits the mediation process from extending later than the 60th day after the end of the initial 90-day negotiation period and any agreed extension of that period unless the broadband provider and electric cooperative agree to an extension of the mediation period for a certain number of days. Requires that the mediation process be conducted in a county in which the electric cooperative has distribution poles. Requires the broadband provider and electric cooperative share equally the expenses for the mediator.

(c) Authorizes the broadband provider or electric cooperative, if the mediation process under Subsection (b) does not resolve the disagreement over the rates, terms, or conditions of a new pole attachment agreement, to file suit in a district court to resolve the disagreement or dispute.

SUBCHAPTER D. ADDITIONAL POLE ATTACHMENT REQUIREMENTS

Sec. 253.0401. TRANSFER OF ATTACHMENTS. (a) Requires an electric cooperative, before the cooperative installs a new pole to replace an existing pole due to the rerouting, maintenance, or upgrading of the electric distribution system, to provide notice of the replacement to each broadband provider with a pole attachment on the existing pole.

(b) Requires that the notice required under Subsection (a) specify a date by which the broadband provider is required to remove the pole attachment from the existing pole and transfer the attachment to the new pole.

(c) Authorizes the electric cooperative, if a broadband provider does not transfer a pole attachment to the new pole before the 31st day after the date specified in the notice, to transfer the pole attachment to the new pole at the broadband provider's expense, including the cost for the electric cooperative to return to the site.

(d) Requires a broadband provider to indemnify, defend, and hold harmless an electric cooperative and the cooperative's members, directors, officers, agents, and employees from and against all liability for the removal and transfer of a pole attachment subject to this section, except for personal injury or property damage arising from the gross negligence or wilful misconduct of the electric cooperative during the removal and transfer process.

Sec. 253.0402. ABANDONED POLE ATTACHMENTS; REMOVAL. (a) Requires a broadband provider that receives a written request from an electric cooperative to remove an abandoned pole attachment owned by the provider from a pole owned by the

cooperative to remove the attachment not later than the 60th day after the date the provider receives the request.

(b) Authorizes a broadband provider to request, and authorizes an electric cooperative to grant, before the deadline under Subsection (a), a reasonable extension of that deadline. Requires that a request for an extension under this subsection be in writing.

(c) Authorizes the electric cooperative, if a broadband provider does not remove a pole attachment by the deadline under Subsection (a) or an extended deadline under Subsection (b), to remove, use, sell, or dispose of the pole attachment at the broadband provider's expense.

(d) Authorizes an electric cooperative to require that a broadband provider post a security instrument in an amount reasonably sufficient to cover the potential cost to the electric cooperative of removal and disposal of abandoned pole attachments.

(e) Requires a broadband provider to indemnify, defend, and hold harmless an electric cooperative and the cooperative's members, directors, officers, agents, and employees from and against all liability for the removal, use, sale, or disposal of abandoned pole attachments, except for personal injury or property damage arising from the gross negligence or wilful misconduct of the electric cooperative during the removal and disposal process.

Sec. 253.0403. EASEMENTS; INDEMNITY. (a) Provides that a broadband provider is responsible for obtaining all rights-of-way and easements necessary for the installation, operation, and maintenance of the provider's pole attachments.

(b) Provides that an electric cooperative is not required to obtain or expand a right-of-way or easement to accommodate a pole attachment requested by a broadband provider.

(c) Provides that an electric cooperative is not liable if a broadband provider is prevented from placing or maintaining a pole attachment because the broadband provider did not obtain a necessary right-of-way or easement.

(d) Requires a broadband provider to indemnify, defend, and hold harmless the electric cooperative and the cooperative's members, directors, officers, agents, and employees from and against any liability resulting from the broadband provider's failure to obtain a necessary right-of-way or easement for a pole attachment.

SECTION 4. Requires the comptroller to establish rules for the Texas Broadband Pole Replacement Program, as established by Section 403.503, Government Code, as added by this Act, not later than March 1, 2022.

SECTION 5. Effective date: September 1, 2021.