

## **BILL ANALYSIS**

Senate Research Center  
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C.S.H.B. 3853  
By: Anderson et al. (Perry)  
Transportation  
5/19/2021  
Committee Report (Substituted)

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Rural Texans with no or slow Internet connections lack equitable access to online education, telemedicine, agriculture, and business technologies as experienced in more densely populated regions of Texas. This has been made even more critical during the COVID-19 pandemic. Unfortunately, outsized capital and construction costs have limited the expansion of broadband access to sparsely populated areas through traditional delivery methods.

In order to meet the increasing demand for two-way flows of data and energy along the utility infrastructure, many Texas utilities have deployed fiber-optic communications technology across the existing electric infrastructure for their own internal purposes. As utilities continue to install fiber across their existing utility network, the opportunity to combine efforts with initiatives to expand rural broadband is now present. The fiber infrastructure used for broadband Internet is divided into three categories: first mile—the local Internet service provider's (ISP) in-town assets; middle mile—the backbone of the broadband fiber system; and last mile—connections to schools, medical offices, businesses, and homes.

The purpose of this bill is to allow electric utilities the ability to partner with ISPs who agree to lease capacity on existing middle mile fiber or future fiber expansion. With oversight by the Public Utility Commission of Texas (PUC), electric utilities would develop and lease middle mile fiber assets. The PUC will determine the terms, conditions, and pricing for middle mile assets through rulemaking, with guidance from the legislature. Electric utilities will continue to utilize the same cost recovery mechanisms used today when building out their internal fiber network. Electric utilities will determine the method of attachment and connection to transmission, distribution, and fiber assets.

(Original Author's/Sponsor's Statement of Intent)

C.S.H.B. 3853 amends current law relating to middle mile broadband service provided by an electric utility.

### **RULEMAKING AUTHORITY**

Rulemaking authority is expressly granted to the Public Utility Commission of Texas in SECTION 3 of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Chapter 43, Utilities Code, as follows:

CHAPTER 43. New heading: PROVISION OF MIDDLE MILE BROADBAND SERVICE BY  
ELECTRIC UTILITIES

#### SUBCHAPTER A. GENERAL PROVISIONS

Sec. 43.001. LEGISLATIVE FINDINGS. (a) Provides that the legislature finds that access to quality, high-speed broadband Internet service is important to this state, is a necessary prerequisite for enabling economic development and improving education, health care, public safety, and government services in this state, and provides other

benefits to its citizens. Deletes existing text providing that the legislature finds that broadband over power lines, also known as BPL, is an emerging technology platform that offers a means of providing broadband services to reach homes and businesses and that BPL services can also be used to enhance existing electric delivery systems, which can result in improved service and reliability for electric customers.

(b) Provides that the legislature finds that broadband development in unserved and underserved areas of Texas can be facilitated by the participation of electric utilities in this state that own and operate facilities that may be useful for the full deployment of broadband service by Internet service providers (ISPs) throughout this state. Deletes existing text providing that the legislature finds that access to quality, high speed broadband services is important to this state and providing that BPL deployment in Texas has the potential to extend broadband service to customers where broadband access is currently not available and may provide an additional option for existing broadband consumers in Texas, resulting in a more competitive market for broadband services. Deletes existing text providing that the legislature further finds that BPL development in Texas is fully dependent upon the participation of electric utilities in this state that own and operate power lines and related facilities that are necessary for the construction of BPL systems and the provision of BPL services.

(c) Provides that the legislature finds that electric utilities have existing infrastructure in place throughout this state and that excess fiber capacity on that infrastructure could be used to provide middle mile broadband service in unserved and underserved areas.

(d) Creates this subsection from existing text. Provides that the legislature finds that it is in the public interest to encourage the deployment of broadband service in unserved and underserved areas by permitting electric utilities to own, construct, or operate fiber facilities for the support of electric service and to lease excess fiber capacity for the provision of middle mile broadband service. Provides that the purpose of Chapter 43 is to provide the appropriate framework to facilitate the leasing of excess fiber capacity on electric utility facilities, rather than to support the deployment of BPL. Deletes existing text providing that, consistent with the goal of increasing options for telecommunications in this state, the legislature finds that it is in the public interest to encourage the deployment of BPL by permitting affiliates of the electric utility, or permitting unaffiliated entities, to own or operate all or a portion of such BPL systems. Makes a nonsubstantive change.

(e) Creates this subsection from existing text. Provides that the legislature finds that an electric utility is authorized to choose to implement middle mile broadband service to lease excess fiber capacity to ISPs, rather than to implement BPL, under the procedures set forth in Chapter 43, but is not required to do so. Provides that the electric utility is required to have the right to decide, in its sole discretion, whether to implement middle mile broadband service, rather than BPL, and is prohibited from being penalized for deciding to implement or not to implement that service, rather than BPL. Makes a nonsubstantive change.

Sec. 43.002. APPLICABILITY. (a) and (b) Makes no changes to these subsections.

(c) Provides that, except as otherwise provided by Title 2 (Public Utility Regulatory Act), no provision of Title 2 imposes an obligation on an electric utility to construct or operate facilities to provide middle mile broadband service, or to allow others to install facilities or use the electric utility's facilities for the provision of broadband service. Makes conforming and nonsubstantive changes.

Sec. 43.003. DEFINITIONS. Defines "broadband service," "Internet service provider," and "middle mile broadband service." Redefines "electric delivery system" and "electric utility." Deletes existing text defining "BPL," "broadband over power lines," "BPL

services," "BPL access," "BPL operator," "BPL Internet service provider," "BPL ISP," "BPL system," and "BPL electric utility applications." Makes nonsubstantive changes.

SUBCHAPTER B. New heading: DEVELOPMENT OF MIDDLE MILE  
BROADBAND SERVICE

Sec. 43.051. New heading: AUTHORIZATION FOR MIDDLE MILE BROADBAND SERVICE. (a) Creates this subsection from existing text. Authorizes an electric utility to own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service in unserved and underserved areas consistent with the requirements of Chapter 43. Provides that nothing in Chapter 43 prohibits an entity defined in Section 11.003(9) (relating to the definition of "electric cooperative") from providing broadband service to an ISP or owning and operating a broadband system as otherwise permitted by law. Deletes existing text authorizing an affiliate of an electric utility or a person unaffiliated with an electric utility to own, construct, maintain, and operate a BPL system and provide BPL services on an electric utility's electric delivery system consistent with the requirements of this chapter. Makes conforming changes.

(b) Requires the electric utility to determine on a nondiscriminatory basis which ISPs are authorized to access excess fiber capacity on the electric utility's electric delivery system or other facilities and provide access points to allow connection between the electric utility's electric delivery system or other facilities and the systems of those ISPs. Requires the electric utility to provide access to excess fiber capacity only on reasonable and nondiscriminatory terms and conditions that assure the electric utility the unimpaired ability to comply with and enforce all applicable federal and state requirements regarding the safety, reliability, and security of the electric delivery system. Deletes existing text requiring that nothing in Chapter 43 prohibit an electric utility from providing construction or maintenance services to a BPL operator or BPL ISP provided that the costs of these services are properly accounted for between the electric utility and the BPL operator or BPL ISP.

Sec. 43.052. New heading: CHARGES. Creates this section from existing text of Section 43.053 and redesignates it as Section 43.052. Provides that an electric utility that owns and operates facilities to provide middle mile broadband service is authorized to lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an ISP on a wholesale basis and is required to charge the ISP for the use of the electric utility's system for all costs associated with that use. Requires that the rates, terms, and conditions of a lease of excess fiber capacity described by this section be nondiscriminatory. Prohibits an electric utility from leasing excess fiber capacity to provide middle mile broadband service to an affiliated ISP.

Deletes existing text of Section 43.052 authorizing electric utilities to elect to allow certain entities to operate a BPL system or to provide Internet service over a BPL system and requiring the BPL operator and the electric utility to determine what BPL ISPs are authorized to have access to broadband capacity on the BPL system.

Deletes existing text of redesignated Section 43.053 requiring an electric utility that allows an affiliate or an unaffiliated entity to own a BPL system on the electric utility's electric delivery system to charge the owner of the BPL system for certain usage costs. Deletes existing text of redesignated Section 43.053 relating to authorizing an electric utility to pay a BPL owner, operator, or ISP for the use of the BPL system required to operate BPL utility applications. Deletes existing text requiring the owner of a BPL system, if all or part of the BPL system is installed on poles or other structures of a telecommunications utility as that term is defined in Section 51.002, to be required to pay the telecommunications utility an annual fee consistent with the usual and customary charges for access to the space occupied by that portion of the BPL system so installed.

Deletes existing text of redesignated Section 43.053 providing that, notwithstanding certain subsections of this section, an electric utility is prohibited from charging an

affiliate under this section an amount less than the electric utility would charge an unaffiliated entity for the same item or class of items; providing that an electric utility is prohibited from paying an affiliate under this section an amount more than the affiliate would charge an unaffiliated entity for the same item or class of items; and providing that an electric utility or an affiliate of an electric utility is prohibited from discriminating against a retail electric provider that is not affiliated with the utility in the terms or availability of BPL services.

Sec. 43.053. NO ADDITIONAL EASEMENTS OR CONSIDERATION REQUIRED. Creates this section from existing text of Section 43.054 and redesignates it as Section 43.053.

(a) Creates this subsection from existing text. Provides that because broadband systems provide benefits to electric delivery systems, the installation of facilities to provide middle mile broadband service on an electric delivery system or other facilities does not require the electric utility or an entity defined in Section 11.003(9), rather than shall not require the electric utility or the owner of the BPL system or an entity defined in Section 11.003(9), to obtain, modify, or expand easements or other rights-of-way for the middle mile broadband service or to give additional consideration as a result of the installation or the operation of middle mile broadband service on the electric delivery system or other facilities of the electric utility or entity, unless the property owner protests the use as provided by this section. Deletes existing text providing that for purposes of this section, installation of a BPL system is required to be deemed to be consistent with installation of an electric delivery system. Makes conforming changes.

(b) Requires the electric utility, not later than the 60th day before the date an electric utility begins construction in an easement or other property right of fiber optic cables and other facilities for providing middle mile broadband service, to provide written notice to the owners of the affected property of the electric utility's intent to use the easement or other property right for middle mile broadband service.

(c) Requires that notice under this section:

(1) be sent by first class mail to the last known address of each person in whose name the affected property is listed on the most recent tax roll of each county authorized to levy property taxes against the property; and

(2) state whether any new fiber optic cables used for middle mile broadband service will be located above or below ground in the easement or other property right.

(d) Authorizes a property owner entitled to the notice, not later than the 60th day after the date an electric utility mails notice under this section, to submit to the electric utility a written protest of the intended use of the easement or other property right for middle mile broadband service. Prohibits an electric utility that receives a timely written protest from using the easement or other property right for middle mile broadband service unless the protestor later agrees in writing to that use or that use is authorized by law. Authorizes an electric utility, if a property owner fails to submit a timely written protest, to proceed under Subsection (a) without modifying or expanding the easement for that property owner.

(e) Authorizes an electric utility that receives a timely written protest under Subsection (d) regarding proposed middle mile broadband service to cancel the project at any time.

- (f) Provides that the requirements of this section do not apply to an existing easement that permits the provision of third-party middle mile broadband service on an electric delivery system.

Sec. 43.054. RELIABILITY OF ELECTRIC SYSTEMS MAINTAINED. Creates this section from existing text of Section 43.055 and redesignates it as Section 43.054. Requires an electric utility that installs and operates facilities to provide middle mile broadband service, rather than that allows the installation and operation of a BPL system on its electric delivery system, to employ all reasonable measures to ensure that the operation of the middle mile broadband service does not interfere with or diminish the reliability of the utility's electric delivery system. Provides that if a disruption in the provision of electric service occurs, the electric utility is governed by the terms and conditions of the retail electric delivery service tariff. Authorizes the electric utility to take all necessary actions regarding its middle mile broadband service and the facilities required in the provision of that service to address circumstances that may pose health, safety, or reliability concerns. Provides that at all times, the provision of broadband service is secondary to the reliable provision of electric delivery services. Provides that an electric utility, except as provided by contract or tariff, is not liable to any person, including an ISP, for any damages, including direct, indirect, physical, economic, exemplary, or consequential damages, including loss of business, loss of profits or revenue, or loss of production capacity caused by a fluctuation, disruption, or interruption of middle mile broadband service that is caused in whole or in part by:

- (1) force majeure; or
- (2) the electric utility's provision of electric delivery services, including actions taken by the electric utility to ensure the reliability of the electric delivery system and actions taken in response to address all circumstances that may pose health, safety, or reliability concerns.

Makes conforming and nonsubstantive changes.

#### SUBCHAPTER C. New heading: IMPLEMENTATION OF MIDDLE MILE BROADBAND SERVICE BY ELECTRIC UTILITY

Sec. 43.101. PARTICIPATION BY ELECTRIC UTILITY. (a) Provides that an electric utility is authorized to install and operate facilities to provide middle mile broadband service on any part of its electric delivery system or other facilities for ISPs but is prohibited from constructing new electric delivery facilities for the purpose of expanding the electric utility's middle mile broadband service. Deletes existing text authorizing an electric utility, through an affiliate or through an unaffiliated entity, to elect to install and operate a BPL system on some or all of its electric delivery system in any part or all of its certificated service area.

- (b) Prohibits the installation, operation, and use of middle mile broadband service and the lease of excess fiber capacity by ISPs from an electric utility from being regulated by any state agency, a municipality, or local government other than as provided by Chapter 43. Makes conforming and nonsubstantive changes.

- (c) Provides that an electric utility that owns and operates middle mile broadband service is authorized to lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an ISP on a wholesale basis, and is prohibited from providing Internet service to end-use customers on a retail basis.

- (d) Creates this subsection from existing text. Prohibits the Public Utility Commission of Texas (PUC) or a state or local government or a regulatory or quasi-governmental or a quasi-regulatory authority from:

- (1) requiring an electric utility, rather than an electric utility either through an affiliate or an unaffiliated entity, to install or offer middle mile

broadband service on the utility's electric delivery system or other facilities, rather than offering BPL services in all or any part of the electric utility's certificated service area;

(2) requiring an electric utility to allow others to install middle mile broadband service on the utility's electric delivery system or other facilities, rather than to install a BPL system on the utility's electric delivery system in any part or all of the electric utility's certificated service area; or

(3) prohibiting an electric utility from installing or offering middle mile broadband service on the utility's electric delivery system or other facilities, rather than prohibiting an electric utility from having an affiliate or unaffiliated entity install a BPL system or offering BPL services in any part or all of the electric utility's certificated service area.

Makes conforming and nonsubstantive changes.

(e) Creates this subsection from existing text and makes conforming and nonsubstantive changes.

(f) Authorizes the state or a municipality or local government, if the state or a municipality or local government is not already collecting a charge or fee from the electric utility for the use of the public rights-of-way, to impose a charge on the provision of middle mile broadband service, but prohibits the charge from being greater than the lowest charge that the state or municipality imposes on other providers of broadband service, rather than services, for use of the public rights-of-way in its respective jurisdiction.

Sec. 43.102. COMMISSION REVIEW OF UTILITY MIDDLE MILE PLAN. (a) Requires an electric utility that plans a project to deploy middle mile broadband service to submit to the PUC a written plan that includes:

(1) the route of the middle mile broadband service infrastructure proposed for the project;

(2) the location of the electric utility's infrastructure that will be used in connection with the project;

(3) an estimate of potential broadband customers that would be served by the ISP;

(4) the estimated cost of the project, including engineering costs, construction costs, permitting costs, right-of-way costs, and a reasonable allowance for funds used during construction;

(5) the proposed schedule of construction for the project;

(6) testimony, exhibits, or other evidence that demonstrates the project will allow for the provision and maintenance middle mile broadband service; and

(7) any other information that the applicant considers relevant or that the PUC requires.

(b) Requires the PUC, after notice and hearing if required by the PUC, to approve the plan if the PUC finds that the plan includes all the items required by Subsection (a) and by PUC rule.

(c) Requires the PUC to approve, modify, or reject a plan submitted to the PUC under this section not later than the 181st day after the date the plan is submitted under Subsection (a). Requires the PUC, notwithstanding any other provision of this title, if the PUC approves a plan under this section, to issue a finding on the approved middle mile broadband service that the service is used and useful to the electric utility, the costs associated with the service are reasonable, and the service is prudent and may be included in the electric utility's rate base.

(d) Authorizes an approved plan to be updated or amended subject to PUC approval in accordance with this section.

Sec. 43.103. New heading: COST RECOVERY FOR DEPLOYMENT OF MIDDLE MILE BROADBAND FACILITIES. Creates this section from existing text of Section 43.102 and redesignates it as 43.103.

(a) Provides that where an electric utility installs facilities used to provide middle mile broadband service under Section 43.051, the electric utility's investment in those facilities is eligible for inclusion in the electric utility's invested capital, and any fees or operating expenses that are reasonable and necessary are, rather than are required to be, eligible for inclusion as operating expenses for purposes of any proceeding under Chapter 36 (Rates). Authorizes the PUC to allow an electric utility to recover investment and associated costs in middle mile broadband service if the plan for the service has been submitted and approved under Section 43.102.

Deletes existing text providing that where an electric utility permits the installation of a BPL system on its electric delivery system under Section 43.052(a) (relating to authorizing an electric utility to elect to allow an affiliated or unaffiliated entity to operate or provide certain BPL or Internet services), the electric utility's investment in that BPL system to directly support the BPL electric utility applications and other BPL services consumed by the electric utility that are used and useful in providing electric utility service are required to be eligible for inclusion in the electric utility's invested capital, and any fees or operating expenses that are reasonable and necessary are required to be eligible for inclusion as operating expenses for purposes of any proceeding under Chapter 36. Deletes existing text requiring that the invested capital and expenses described in this section be allocated to the customer classes directly receiving the services.

(b) Requires that revenue received by an electric utility from an ISP for the use of middle mile broadband service, in a proceeding under Chapter 36, be applied as a revenue credit to customers in proportion to the customers' funding of the underlying infrastructure. Deletes existing text requiring that in any proceeding under Chapter 36, just and reasonable charges for the use of the electric utility's electric delivery system by a BPL owner or operator be limited to the usual and customary pole attachment charges paid to the electric utility for comparable space by cable television operators.

Deletes existing text prohibiting the revenues of an affiliated BPL operator or an affiliated BPL ISP from being deemed the revenues of an electric utility for purposes of setting rates under Chapter 36.

#### SUBCHAPTER D. MISCELLANEOUS PROVISIONS

Sec. 43.151. New heading: COMPLIANCE WITH FEDERAL AND STATE LAW. Transfers existing text from Section 43.152 to Section 43.151. Requires an electric utility that owns and operates facilities for the provision of a middle mile broadband service to comply with all applicable federal and state laws.

Deletes existing text of Section 43.151 authorizing an electric utility, subject to the limitations of Chapter 43, to have a full or partial ownership interest in a BPL operator or a BPL ISP and providing that whether a BPL operator or a BPL ISP is an affiliate of the

electric utility is required to be determined under certain sections. Deletes existing text of Section 43.151 providing that neither a BPL operator nor a BPL ISP is required to be considered a "competitive affiliate" of an electric utility as that term is defined under a certain section.

Deletes existing text of former Section 43.152 relating to BPL operators complying with federal laws and certain federal agencies and state entities.

SECTION 2. Repealer: Section 33.001(b) (relating to prohibiting a governing body of a municipality from having jurisdiction over certain BPL services), Utilities Code.

SECTION 3. Requires the PUC, not later than the 270th day after the effective date of this Act, to adopt any rules necessary to implement Chapter 43, Utilities Code, as amended by this Act.

SECTION 4. Provides that the PUC is required to implement a provision of this Act only if the legislature appropriates money specifically for that purpose. Provides that if the legislature does not appropriate money specifically for that purpose, the PUC is authorized, but not required to, implement a provision of this Act using other appropriations that are available for that purpose.

SECTION 5. Effective date: upon passage or September 1, 2021.