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H.B. No. 3853

A BILL TO BE ENTITLED

AN ACT

relating to middle mile broadband service provided by an electric utility.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Chapter 43, Utilities Code, is amended to read as follows:

CHAPTER 43. PROVISION [USE] OF MIDDLE MILE [ELECTRIC DELIVERY SYSTEM FOR ACCESS TO] BROADBAND SERVICE BY ELECTRIC UTILITIES [AND OTHER ENHANCED SERVICES, INCLUDING COMMUNICATIONS]

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 43.001. LEGISLATIVE FINDINGS. (a) 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 [~~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. BPL services can also be used to enhance existing electric delivery systems, which can result in improved service and reliability for electric customers~~].

(b) [~~The legislature finds that access to quality, high speed broadband services is important to this state. BPL deployment in Texas has the potential to extend broadband service~~

1 ~~to customers where broadband access is currently not available and~~
2 ~~may provide an additional option for existing broadband consumers~~
3 ~~in Texas, resulting in a more competitive market for broadband~~
4 ~~services.]~~ The legislature [~~further~~] finds that broadband [BPL]
5 development in unserved and underserved areas of Texas can be
6 facilitated by [~~is fully dependent upon~~] the participation of
7 electric utilities in this state that own and operate [~~power lines~~
8 ~~and related~~] facilities that may be useful [~~are necessary~~] for the
9 full deployment of broadband service by Internet service providers
10 throughout this state [~~construction of BPL systems and the~~
11 ~~provision of BPL services~~].

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

17 (d) The [~~(c) Consistent with the goal of increasing options~~
18 ~~for telecommunications in this state, the~~] legislature finds that
19 it is in the public interest to encourage the deployment of
20 broadband service in unserved and underserved areas [BPL] by
21 permitting electric utilities to own or operate facilities
22 providing middle mile broadband service to lease excess fiber
23 capacity [~~affiliates of the electric utility, or permitting~~
24 ~~unaffiliated entities, to own or operate all or a portion of such~~
25 ~~BPL systems~~]. The purpose of this chapter is to provide the
26 appropriate framework to facilitate the leasing of excess fiber
27 capacity on electric utility facilities [~~support the deployment of~~

1 ~~BPL~~].

2 (e) [~~(d)~~] The legislature finds that an electric utility
3 may choose to implement middle mile broadband service to lease
4 excess fiber capacity to Internet service providers [~~BPL~~] under the
5 procedures set forth in this chapter, but is not required to do so.
6 The electric utility shall have the right to decide, in its sole
7 discretion, whether to implement middle mile broadband service
8 [~~BPL~~] and may not be penalized for deciding to implement or not to
9 implement that service [~~BPL~~].

10 Sec. 43.002. APPLICABILITY. (a) This chapter applies to an
11 electric utility whether or not the electric utility is offering
12 customer choice under Chapter 39.

13 (b) If there is a conflict between the specific provisions
14 of this chapter and any other provisions of this title, the
15 provisions of this chapter control.

16 (c) Except as otherwise provided by this title, no [~~No~~]
17 provision of this title imposes [~~shall impose~~] an obligation on an
18 electric utility to construct or operate a middle mile system, to
19 [~~implement BPL, to~~] provide middle mile broadband service
20 [~~services~~], or to allow others to install [~~BPL~~] facilities or use
21 the electric utility's facilities for the provision of broadband
22 service [~~services~~].

23 Sec. 43.003. DEFINITIONS. In this chapter:

24 (1) "Broadband service" means retail Internet service
25 provided by a commercial Internet service provider with the
26 capability of providing a download speed of 25 megabits per second
27 or faster and an upload speed of 3 megabits per second or faster

1 ~~["BPL," "broadband over power lines," and "BPL services" mean the~~
2 ~~provision of broadband services over electric power lines and~~
3 ~~related facilities, whether above ground or in underground~~
4 ~~conduit].~~

5 (2) "Middle mile broadband service" means the
6 provision of excess fiber capacity on an electric utility's
7 electric delivery system to an Internet service provider to provide
8 broadband service. The term does not include provision of Internet
9 service to end-use customers on a retail basis ~~["BPL access" means~~
10 ~~the ability to access broadband services via a BPL operator or BPL~~
11 ~~Internet service provider].~~

12 (3) "Internet ~~["BPL operator" means an entity that~~
13 ~~owns or operates a BPL system on the electric power lines and~~
14 ~~related facilities of an electric utility.~~

15 ~~[(4) "BPL Internet] service provider" means a~~
16 commercial ~~[and "BPL ISP" mean an]~~ entity that provides Internet
17 services ~~[to others on a wholesale basis or]~~ to end-use customers on
18 a retail basis.

19 (4) ~~[(5) "BPL system" means the materials, equipment,~~
20 ~~and other facilities installed on electric utility property to~~
21 ~~facilitate the provision of BPL services.~~

22 ~~[(6) "BPL electric utility applications" means~~
23 ~~services and technologies that are used and useful and designed to~~
24 ~~improve the operational performance and service reliability of an~~
25 ~~electric utility including, but not limited to, automated meter~~
26 ~~reading, real time system monitoring and meter control, remote~~
27 ~~service control, outage detection and restoration, predictive~~

1 ~~maintenance and diagnostics, and monitoring and enhancement of~~
2 ~~power quality.~~

3 ~~(7)~~ "Electric delivery system" means the power lines
4 and related transmission and distribution facilities constructed
5 ~~[used by an electric utility]~~ to deliver electric energy to the
6 electric utility's customers.

7 (5) ~~(8)~~ "Electric utility" includes ~~[shall include]~~
8 an electric utility and a transmission and distribution utility as
9 defined in Section 31.002(6) or (19).

10 SUBCHAPTER B. DEVELOPMENT OF MIDDLE MILE BROADBAND ~~[BPL]~~ SYSTEMS

11 Sec. 43.051. AUTHORIZATION FOR MIDDLE MILE BROADBAND ~~[BPL]~~
12 SYSTEM. (a) An ~~[affiliate of an]~~ electric utility ~~[or a person~~
13 ~~unaffiliated with an electric utility]~~ may own, construct,
14 maintain, and operate fiber optic cables and other facilities for
15 providing middle mile broadband service ~~[a BPL system and provide~~
16 ~~BPL services on an electric utility's electric delivery system]~~
17 consistent with the requirements of this chapter. Nothing in this
18 chapter prohibits ~~[shall prohibit]~~ an entity defined in Section
19 11.003(9) from providing broadband ~~[BPL]~~ service to an Internet
20 service provider or owning and operating a broadband ~~[BPL]~~ system
21 as otherwise permitted by law.

22 (b) The electric utility may determine on a
23 nondiscriminatory basis which Internet service providers may have
24 access to excess fiber capacity on the electric utility's electric
25 delivery system and provide access points to allow connection
26 between the electric utility's electric delivery system and the
27 Internet service provider systems of those Internet service

1 providers. The electric utility may provide access to excess fiber
2 capacity on the electric utility's middle mile broadband system
3 only on reasonable and nondiscriminatory terms and conditions.

4 ~~[Nothing in this chapter shall prohibit an electric utility from~~
5 ~~providing construction or maintenance services to a BPL operator or~~
6 ~~BPL ISP provided that the costs of these services are properly~~
7 ~~accounted for between the electric utility and the BPL operator or~~
8 ~~BPL ISP.]~~

9 Sec. 43.052. ~~[OWNERSHIP AND OPERATION OF BPL SYSTEM. (a)~~

10 ~~An electric utility may elect to:~~

11 ~~[(1) allow an affiliate to own or operate a BPL system~~
12 ~~on the utility's electric delivery system;~~

13 ~~[(2) allow an unaffiliated entity to own or operate a~~
14 ~~BPL system on the electric utility's electric delivery system; or~~

15 ~~[(3) allow an affiliate or unaffiliated entity to~~
16 ~~provide Internet service over a BPL system.~~

17 ~~[(b) The BPL operator and the electric utility shall~~
18 ~~determine what BPL Internet service providers may have access to~~
19 ~~broadband capacity on the BPL system.~~

20 [Sec. 43.053. FEES AND] CHARGES. [(a)] An electric utility
21 that owns and operates a middle mile broadband system may lease
22 excess fiber capacity on the electric utility's electric delivery
23 system to an Internet service provider on a wholesale basis and
24 ~~[allows an affiliate or an unaffiliated entity to own a BPL system~~
25 ~~on the electric utility's electric delivery system]~~ shall charge
26 the Internet service provider ~~[owner of the BPL system]~~ for the use
27 of the electric utility's ~~[electric delivery]~~ system for all costs

1 associated with that use. The rates, terms, and conditions of a
2 lease of excess fiber capacity on an electric utility's middle mile
3 broadband system must be nondiscriminatory. An electric utility
4 may not lease excess fiber capacity on the electric utility's
5 middle mile broadband system to an affiliated Internet service
6 provider.

7 ~~[(b) An electric utility may pay a BPL owner, a BPL~~
8 ~~operator, or a BPL ISP for the use of the BPL system required to~~
9 ~~operate BPL utility applications.]~~

10 ~~[(c) If all or part of a BPL system is installed on poles or~~
11 ~~other structures of a telecommunications utility as that term is~~
12 ~~defined in Section 51.002, the owner of the BPL system shall be~~
13 ~~required to pay the telecommunications utility an annual fee~~
14 ~~consistent with the usual and customary charges for access to the~~
15 ~~space occupied by that portion of the BPL system so installed.]~~

16 ~~[(d) Notwithstanding Subsections (a)-(c):~~

17 ~~[(1) an electric utility may not charge an affiliate~~
18 ~~under this section an amount less than the electric utility would~~
19 ~~charge an unaffiliated entity for the same item or class of items,~~

20 ~~[(2) an electric utility may not pay an affiliate~~
21 ~~under this section an amount more than the affiliate would charge an~~
22 ~~unaffiliated entity for the same item or class of items, and~~

23 ~~[(3) an electric utility or an affiliate of an~~
24 ~~electric utility may not discriminate against a retail electric~~
25 ~~provider that is not affiliated with the utility in the terms or~~
26 ~~availability of BPL services.]~~

27 Sec. 43.053 [~~43.054~~]. NO ADDITIONAL EASEMENTS OR

1 CONSIDERATION REQUIRED. (a) Because broadband [~~BPL~~] systems
2 provide benefits to electric delivery systems, the installation of
3 a middle mile broadband [~~BPL~~] system on an electric delivery system
4 does [~~shall~~] not require the electric utility [~~or the owner of the~~
5 ~~BPL system~~] or an entity defined in Section 11.003(9) to obtain,
6 modify, or expand easements or other rights-of-way for the middle
7 mile broadband [~~BPL~~] system or to give additional consideration as
8 a result of the installation or the operation of a middle mile
9 broadband [~~BPL~~] system on the electric delivery system of the
10 electric utility or entity, unless the property owner protests the
11 use as provided by this section.

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

19 (c) Notice under this section must:

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

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

27 (d) Not later than the 60th day after the date an electric

1 utility mails notice under this section, a property owner entitled
2 to the notice may submit to the electric utility a written protest
3 of the intended use of the easement or other property right for
4 middle mile broadband service. An electric utility that receives a
5 timely written protest may not use the easement or other property
6 right for middle mile broadband service unless the protestor later
7 agrees in writing to that use or that use is authorized by law. If a
8 property owner fails to submit a timely written protest, an
9 electric utility may proceed under Subsection (a) without modifying
10 or expanding the easement for that property owner.

11 (e) An electric utility that receives a timely written
12 protest under Subsection (d) regarding a proposed middle mile
13 broadband project may cancel the project at any time.

14 (f) The requirements of this section do not apply to an
15 existing easement that permits the installation of a third-party
16 middle mile broadband system on an electric delivery system. [~~For~~
17 purposes of this section, installation of a BPL system shall be
18 deemed to be consistent with installation of an electric delivery
19 system.]

20 Sec. 43.054 [~~43.055~~]. RELIABILITY OF ELECTRIC SYSTEMS
21 MAINTAINED. An electric utility that installs [~~allows the~~
22 ~~installation~~] and operates [~~operation of~~] a middle mile broadband
23 [~~BPL~~] system [~~on its electric delivery system~~] shall employ all
24 reasonable measures to ensure that the operation of the middle mile
25 broadband [~~BPL~~] system does not interfere with or diminish the
26 reliability of the utility's electric delivery system. If [~~Should~~]
27 a disruption in the provision of electric service occurs [~~occur~~],

1 the electric utility is [~~shall be~~] governed by the terms and
2 conditions of the retail electric delivery service tariff. The
3 electric utility may take all necessary actions regarding its
4 middle mile broadband system to address emergency circumstances
5 that may pose health, safety, or reliability concerns. At all
6 times, the provision of broadband service is [~~services shall be~~]
7 secondary to the reliable provision of electric delivery services.
8 An electric utility is not liable to any person, including an
9 Internet service provider, for any direct, indirect, or
10 consequential damages, including loss of business, loss of profits
11 or revenue, or loss of production capacity caused by a fluctuation,
12 disruption, or interruption of middle mile broadband service that
13 is caused in whole or in part by:

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

20 SUBCHAPTER C. IMPLEMENTATION OF MIDDLE MILE BROADBAND [~~BPL~~] SYSTEM
21 BY ELECTRIC UTILITY

22 Sec. 43.101. PARTICIPATION BY ELECTRIC UTILITY. (a) An
23 electric utility [~~, through an affiliate or through an unaffiliated~~
24 ~~entity,~~] may [~~elect to~~] install and operate a middle mile broadband
25 [~~BPL~~] system on any part of its electric delivery system for
26 Internet service providers but may not construct new electric
27 delivery facilities for the purpose of the electric utility's

1 middle mile service [~~some or all of its electric delivery system in~~
2 ~~any part or all of its certificated service area~~].

3 (b) The installation, operation, and use of a middle mile
4 broadband [BPL] system and the provision of middle mile broadband
5 service and the lease of excess fiber capacity by Internet service
6 providers from an electric utility may [~~BPL services shall~~] not be
7 regulated by any state agency, a municipality, or local government
8 other than as provided by [~~for in~~] this chapter.

9 (c) An electric utility that owns and operates a middle mile
10 broadband system:

11 (1) may lease excess fiber capacity on the electric
12 utility's electric delivery system to an Internet service provider
13 on a wholesale basis; and

14 (2) may not provide Internet service to end-use
15 customers on a retail basis.

16 (d) [~~(c)~~] The commission or a state or local government or a
17 regulatory or quasi-governmental or a quasi-regulatory authority
18 may not:

19 (1) require an electric utility[~~, either through an~~
20 ~~affiliate or an unaffiliated entity,~~] to install a middle mile
21 broadband [BPL] system [~~on its power lines~~] or offer middle mile
22 broadband service on the utility's electric delivery system [~~BPL~~
23 ~~services in all or any part of the electric utility's certificated~~
24 ~~service area~~];

25 (2) require an electric utility to allow others to
26 install a middle mile broadband [BPL] system on the utility's
27 electric delivery system [~~in any part or all of the electric~~

1 ~~utility's certificated service area]; or~~

2 (3) prohibit an electric utility from installing a
3 middle mile broadband system or offering middle mile broadband
4 service on the utility's electric delivery system [~~having an~~
5 ~~affiliate or unaffiliated entity install a BPL system or offering~~
6 ~~BPL services in any part or all of the electric utility's~~
7 ~~certificated service area]~~.

8 (e) [~~(d)~~] If a municipality or local government is already
9 collecting a charge or fee from the electric utility for the use of
10 the public rights-of-way for the delivery of electricity to retail
11 electric customers, the municipality or local government may not
12 require [~~is prohibited from requiring~~] a franchise or an amendment
13 to a franchise or require an additional [~~from requiring a~~] charge,
14 fee, or tax from the electric utility [~~any entity~~] for use of the
15 public rights-of-way for a middle mile broadband [~~BPL~~] system.

16 (f) [~~(e)~~] The state or a municipality may impose a charge on
17 the provision of middle mile broadband service [~~BPL services~~], but
18 the charge may not be greater than the lowest charge that the state
19 or municipality imposes on other providers of broadband service
20 [~~services~~] for use of the public rights-of-way in its respective
21 jurisdiction.

22 Sec. 43.102. COMMISSION REVIEW OF UTILITY MIDDLE MILE PLAN.

23 (a) An electric utility that plans a project to deploy middle mile
24 broadband shall submit to the commission a written plan that
25 includes:

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

1 (2) the number of fiber strands and any other
2 facilities that would be used in connection with the project and
3 dedicated to an Internet service provider;

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

6 (4) the capacity or number of fiber strands and any
7 other facilities of the middle mile that will be available to lease
8 to Internet service providers and other third parties on completion
9 of the project;

10 (5) the name of at least one Internet service provider
11 that has committed to leasing access to the middle mile broadband
12 assets constructed as part of the project;

13 (6) an estimate of potential broadband customers that
14 would be served by the Internet service provider;

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

19 (8) the proposed schedule of construction for the
20 project;

21 (9) the method of attachment and connection of the
22 middle mile broadband assets by the Internet service provider to
23 the electric utility's electric delivery system;

24 (10) testimony, exhibits, or other evidence that
25 demonstrates the project will allow for the provision and
26 maintenance of adequate, efficient, safe, reliable, and reasonably
27 priced middle mile broadband service; and

1 (11) any other information that the applicant
2 considers relevant or that the commission requires.

3 (b) The commission, after notice and hearing if required by
4 the commission, shall approve the plan if the commission finds that
5 the plan will allow for reasonably priced middle mile broadband
6 service.

7 (c) The commission must approve, modify, or reject a plan
8 submitted to the commission under this section not later than the
9 181st day after the date the plan is submitted under Subsection (a).

10 (d) An approved plan may be updated or amended subject to
11 commission approval in accordance with this section.

12 Sec. 43.103 [~~43.102~~]. COST RECOVERY FOR DEPLOYMENT OF
13 MIDDLE MILE BROADBAND FACILITIES [~~BPL AND UTILITY APPLICATIONS~~].

14 (a) Where an electric utility installs a middle mile broadband
15 system [~~permits the installation of a BPL system on its electric~~
16 ~~delivery system~~] under Section 43.051 [~~43.052(a)~~], the electric
17 utility's investment in that middle mile broadband [~~BPL~~] system is
18 [~~to directly support the BPL electric utility applications and~~
19 ~~other BPL services consumed by the electric utility that are used~~
20 ~~and useful in providing electric utility service shall be]~~ eligible
21 for inclusion in the electric utility's invested capital, and any
22 fees or operating expenses that are reasonable and necessary are
23 [~~shall be~~] eligible for inclusion as operating expenses for
24 purposes of any proceeding under Chapter 36. The commission may
25 allow an electric utility to recover investment in a middle mile
26 broadband system outside of a comprehensive base rate proceeding
27 [~~The invested capital and expenses described in this section must~~

1 ~~be allocated to the customer classes directly receiving the~~
 2 ~~services].~~

3 (b) In a [any] proceeding under Chapter 36, revenue received
 4 by an electric utility from an Internet service provider for the use
 5 of a middle mile broadband system must be applied as a revenue
 6 credit to customers in proportion to the customers' funding of the
 7 underlying infrastructure [~~just and reasonable charges for the use~~
 8 ~~of the electric utility's electric delivery system by a BPL owner or~~
 9 ~~operator shall be limited to the usual and customary pole~~
 10 ~~attachment charges paid to the electric utility for comparable~~
 11 ~~space by cable television operators].~~

12 [~~(c) The revenues of an affiliated BPL operator or an~~
 13 ~~affiliated BPL ISP shall not be deemed the revenues of an electric~~
 14 ~~utility for purposes of setting rates under Chapter 36.]~~

15 SUBCHAPTER D. MISCELLANEOUS PROVISIONS

16 Sec. 43.151. [~~AFFILIATES OF ELECTRIC UTILITY. (a) Subject~~
 17 ~~to the limitations of this chapter, an electric utility may have a~~
 18 ~~full or partial ownership interest in a BPL operator or a BPL~~
 19 ~~ISP. Whether a BPL operator or a BPL ISP is an affiliate of the~~
 20 ~~electric utility shall be determined under Section 11.003(2) or~~
 21 ~~Section 11.006.~~

22 [~~(b) Neither a BPL operator nor a BPL ISP shall be~~
 23 ~~considered a "competitive affiliate" of an electric utility as that~~
 24 ~~term is defined in Section 39.157.~~

25 [Sec. 43.152.] COMPLIANCE WITH FEDERAL LAW. An electric
 26 utility that owns and operates a middle mile broadband system [~~BPL~~
 27 ~~operators]~~ shall comply with all applicable federal laws[~~7~~

1 ~~including those protecting licensed spectrum users from~~
2 ~~interference by BPL systems. The operator of a radio frequency~~
3 ~~device shall be required to cease operating the device upon~~
4 ~~notification by a Federal Communications Commission or Public~~
5 ~~Utilities Commission representative that the device is causing~~
6 ~~harmful interference. Operation shall not resume until the~~
7 ~~condition causing the harmful interference has been corrected].~~

8 SECTION 2. Section 33.001(b), Utilities Code, is repealed.

9 SECTION 3. The Public Utility Commission of Texas is
10 required to implement a provision of this Act only if the
11 legislature appropriates money specifically for that purpose. If
12 the legislature does not appropriate money specifically for that
13 purpose, the commission may, but is not required to, implement a
14 provision of this Act using other appropriations that are available
15 for that purpose.

16 SECTION 4. This Act takes effect immediately if it receives
17 a vote of two-thirds of all the members elected to each house, as
18 provided by Section 39, Article III, Texas Constitution. If this
19 Act does not receive the vote necessary for immediate effect, this
20 Act takes effect September 1, 2021.