BILL ANALYSIS

S.B. 21
By: Fraser
Regulated Industries
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Significant technological changes have occurred in the communications industry since 1995 when the current version of the Public Utility Regulatory Act, with regard to telecommunications, was adopted. To encourage and accelerate the development of a competitive and advanced services environment and infrastructure, new rules, policies, and principles must be formulated consistent with the understanding that, as new technologies become available, all public policy must be driven by free market principles for the benefit of consumers in Texas consistent with the public interest.

S.B. 21 promotes competition among and investment in advanced networks by authorizing broadband over power line systems, reducing regulations on telecommunications providers, and establishing a state-issued franchise to provide cable or video services in the state of Texas.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the Public Utility Commission of Texas in SECTIONS 15 and 24 of this bill.

ANALYSIS

Broadband Over Power Line

Section 2 of S.B. 21 creates new Chapter 43, "Use of Electric Delivery System for Access to Broadband and Other Enhanced Services, Including Communications," to the Utilities Code. The bill states the Legislature's findings with respect to broadband over power line (BPL) systems and defines key terms. New Chapter 43 applies to an electric utility whether or not it is offering customer choice under Chapter 39, Utilities Code. Chapter 43 controls in the event of a conflict with another provision of Title 2, Utilities Code. Electric utilities shall not be obligated to implement BPL, provide broadband services, or allow others to install a BPL system or use the electric utility's facilities to provide broadband services.

The bill authorizes 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 new Chapter 43, Utilities Code. An electric utility may elect to allow an affiliate or an unaffiliated entity to own or operate a BPL system or provide Internet access service over a BPL system. The BPL operator and the electric utility shall determine which BPL Internet service providers (ISP) may have access to broadband capacity on the BPL system. An electric utility may pay a BPL owner, a BPL operator, or a BPL ISP for the use of the BPL system required to operate BPL utility applications. The owner of a BPL system shall pay a telecommunications utility an annual fee consistent with usual and customary charges if all or part of a BPL system is installed on poles or other structures of a telecommunications utility. An electric utility must charge the BPL system owner for use of its electric delivery system, and any amount charged to an affiliate must not be less than what would be charged to an unaffiliated entity. Any amount paid to an affiliate must not be more than what would be paid to an unaffiliated entity, and an electric utility or an affiliate of an electric utility may not discriminate against an unaffiliated retail electric provider in terms of the availability of BPL services. New section 43.151, Utilities Code, permits an electric utility may have an ownership interest in a BPL operator or BPL ISP, though neither would be considered a competitive affiliate pursuant to Section 39.157, Utilities Code.

An electric utility shall employ all reasonable measures to ensure a BPL system does not interfere with or diminish the electric delivery system's reliability. At all times, the provision of broadband service is secondary to the reliable provision of electric delivery services.

New Section 43.102, Utilities Code, permits an electric utility to include investments in a BPL system, and any reasonable fees or operating expenses associated with it, with any ratemaking proceeding under Chapter 36, Utilities Code.

No additional easements or other rights-of-way would be required to install or operate a BPL system, and no additional consideration would be given as a result of the installation or operation of a BPL system. The state or a municipality may impose a charge on the provision of BPL services, but it may not be greater than the lowest charge imposed on other broadband providers for use of public rights-of-way in the respective jurisdiction. A municipality may not charge a fee for the use of public rights-of-way for a BPL system if it already collects a fee for the electric delivery system. The bill amends Section 33.001, Utilities Code, to provide that the governing body of a municipality shall not have jurisdiction over a BPL system, BPL services, telecommunications using BPL services, and related matters.

A BPL system may be installed or operated in any part or all of an electric utility's certificated service area. The bill prohibits the state, a local government, a regulatory authority, or a quasi-governmental or quasi-regulatory authority from requiring an electric utility to install a BPL system in any part of a certificated service area, to allow others to install a BPL system, or to prohibit the installation of a BPL system. BPL operators must comply with all applicable federal laws.

Telecommunications Competition

S.B. 21 adds new Chapter 65, "Deregulation of Certain Incumbent Local Exchange Company Markets," to the Utilities Code and establishes the policy of the state to provide for full rate and service competition in the telecommunications market. The bill defines key terms; affirms the authority of the Public Utility Commission of Texas (PUC) to adopt rules, conduct proceedings, and collect information to administer, implement, and enforce this chapter; and preserves a customer's right to file a complaint with the PUC.

The bill provides that all markets of an incumbent local exchange company (ILEC) in which the population is at least 100,000 are deregulated on January 1, 2006. The PUC is required to determine which ILEC markets in which the population is at least 30,000 but less than 100,000 should remain regulated on and after January 1, 2006, through the application of a market test. In addition to the ILEC, a market must have at least three competitors as follows to be classified as a deregulated market:

- at least one is a certificated telecommunications provider offering residential local exchange telephone service in the market;
- at least one is an entity providing residential telephone service in the market using facilities owned by the entity or its affiliate; and
- at least one is a commercial mobile service provider, which is not affiliated with the ILEC, offering service in the market.

The PUC shall develop a market test to be applied to markets in which the population is less than 30,000 to determine which of those markets should remain regulated on or after January 1, 2007. After July 1, 2007, an ILEC may petition the PUC to deregulate a market which the PUC has previously determined should remain regulated. On its own motion or on a meritorious complaint, the PUC may determine that a previously deregulated market should again be subject to regulation if the population within the market is less than 100,000. The PUC shall by rule prescribe the procedures and standards applicable to a determination to reregulate a market.

If none of an ILEC's markets remain regulated, the ILEC is classified as a deregulated company and is regulated as a nondominant carrier. A deregulated company may petition the PUC to relinquish its certificate of convenience and necessity and receive a certificate of operating authority. A deregulated company retains its provider of last resort (POLR) obligations, remains subject to several enumerated statutory requirements, and may not raise the rate it charges for stand-alone residential local exchange voice service before the PUC has the opportunity to revise the monthly per line support under the Texas High Cost Universal Service Plan. In each market,

a deregulated company must make available to all residential customers uniformly throughout that market the same price, terms, and conditions for all basic and non-basic services, consistent with any pricing flexibility available to such company on or before August 31, 2005.

If some but not all of an ILEC's markets remain regulated, the ILEC is classified as a transitioning company and is regulated under Chapter 65 and the provisions of the law previously applicable to the company before its designation as a transitioning company. The provisions of new Subchapter D of new Chapter 65 control if there is a conflict between that subchapter and other applicable provisions of Title 2, Utilities Code. A transitioning company may exercise pricing flexibility or introduce a new service in any market one day after providing an informational notice to the PUC. Transitioning companies may not be required to comply with exchange-specific retail quality of service standards or reporting requirements in its deregulated markets. In a deregulated market, a transitioning company must price any service, other than basic local telecommunications service, at any price above its long run incremental cost. In a deregulated market, a transitioning company must price basic local telecommunications service at any price higher than the lesser of its long run incremental cost or the tariffed price on the date the market was deregulated. However, a transitioning company may not raise the rate it charges for stand-alone residential local exchange voice service in a deregulated market before the PUC has the opportunity to revise the monthly per line support under the Texas High Cost Universal Service Plan. In each deregulated market, a transitioning company must make available to all residential customers uniformly throughout that market the same price, terms, and conditions for all basic and non-basic services, consistent with any pricing flexibility available to such company on or before August 31, 2005. In its regulated markets, a transitioning company must price its retail services in accordance with the provisions that applied to the company immediately before the date the company was classified as a transitioning company. In all markets, a transitioning company may not establish a retail rate, term, or condition that is anticompetitive or unreasonably preferential, prejudicial, or discriminatory; establish a retail rate for a basic or non-basic service in a deregulated market that is directly or indirectly subsidized by a basic or non-basic service in an exchange that is not deregulated; or engage or attempt to engage in predatory pricing.

If all of an ILEC's markets remain regulated, the ILEC is classified as a regulated company and is subject to the provisions of Title 2, Utilities Code, which applied to the ILEC on September 1, 2005. An ILEC may elect to have all of its markets remain regulated on and after January 1, 2006, by filing an affidavit with the PUC no later than December 1, 2005.

S.B. 21 provides specific mechanisms, timelines, and limitations for achieving required reductions of switched access rates for deregulated companies, transitioning companies with more than 3 million access lines, transitioning companies with not more than 3 million access lines, and newly designated transitioning companies. Once switched access rates have been reduced to parity with federal switched access rates, ILECs must maintain parity with federal switched access rates, unless another rate is applicable.

The bill adds new Section 52.156 to the Utilities Code to prohibit certain practices with respect to a retail rate, term, or condition offered by a telecommunications utility. The bill amends Section 58.051, Utilities Code, to include within the price of basic network service the fees and charges for any mandatory extended area service arrangements, mandatory expanded toll-free service, and any other basic service as basic network services for certain ILECs at the company's election. Non-permanent expanded toll-free calling service surcharges are also considered part of basic network service. The bill amends Sections 58.051 and 58.151, Utilities Code, to reclassify residential call waiting as a nonbasic service, effective July 1, 2006, and to end the requirement that the first three calls to local directory assistance be provided free of charge, effective July 1, 2006, for certain ILECs.

The bill adds new Section 56.029 to the Utilities Code to require the PUC to study the Texas Universal Service Fund (TUSF) to evaluate whether it accomplishes its purposes, whether it should be eliminated or phased out, whether it should be brought within the state treasury, and whether entities receiving TUSF funds are using those funds for intended purposes. The bill specifies the responsibilities and duties of all parties involved with the study. Information provided to the PUC for this study is not subject to disclosure under the Open Records Act. The PUC shall issue reports to the Legislature by January 5, 2007. Not later than December 31,

2005, each telecommunications provider receiving universal service fund money shall file with the PUC an affidavit attesting that the money from the fund has been used in a manner that is consistent with the purposes of TUSF. New section 56.030, Utilities Code, requires each telecommunications provider which receives disbursements from the universal service fund to file an affidavit with the PUC certifying that the provider is in compliance with the requirements for receiving TUSF funds.

The bill adds new Section 56.031 to the Utilities Code to permit the PUC to revise the monthly per line support amounts made available from the Texas High Cost Universal Service Plan and the Small and Rural Incumbent Local Exchange Company Universal Service Plan at any time after September 1, 2007, after notice and opportunity for hearing. The PUC must consider the adequacy of basic rates to support universal service when determining appropriate per line support amounts. Sections 11 and 12 of the bill repeal current law requiring the PUC to expand TUSF support for certain telecommunications providers in certain circumstances (current Section 56.025, Utilities Code) and prohibiting the PUC from reducing TUSF disbursements for certain telecommunications providers (current Section 56.026(c) and (d), Utilities Code), effective August 31, 2007.

The bill amends Section 54.251, Utilities Code, to permit a certificate holder to meet its provider of last resort (POLR) obligations using any available technology, provided that it meets certain quality standards, including those for 911 service. Prices for POLR services delivered via alternative technologies must be comparable to those charged for wireline service in that exchange or a nearby exchange. The PUC may adjust disbursements from the TUSF for providers using alternative technologies to meet POLR obligations. The bill amends Section 56.021 and adds new Section 56.301 to the Utilities Code to provide TUSF support for an audio newspaper assistance program.

Section 14 of the bill adds new Section 56.032 to the Utilities Code to require the PUC to study distance learning discounts for private network services offered to certain public entities. The report is due to the Legislature by November 15, 2006. Sections 18, 19, 20, and 21 of the bill require companies electing under Chapters 58 or 59 of the Utilities Code to continue to comply with infrastructure commitments and discounted rates for private network and related services to certain public entities until January 1, 2012.

Section 22 of the bill adds new Subchapter J, "Wholesale Code of Conduct," to Chapter 60, Utilities Code, to establish a duty to negotiate and obligations relating to minimum service requirements, interconnection, number portability, dialing parity, right-of-way access, reciprocal compensation, and access to certain services. A provision of this new subchapter applies only to the extent it has not been preempted by federal law or a rule, order, or regulation of the Federal Communications Commission (FCC).

Section 23 of the bill adds new Section 62.003 to the Utilities Code to require providers of advanced services and certain local exchange companies which offer localized audio or video programming to provide their subscribers access to the signals of local broadcast television, radio, and qualified low power stations licensed by the FCC to serve those subscribers over the air. A station may be granted mandatory carriage or request retransmission consent, and consideration is not required in exchange for carriage. Providers covered by this section must follow applicable federal non-duplication or syndicated exclusivity rules. Providers may not degrade the signal; delete, change, or alter a copyright identification; or discriminate against broadcast stations.

The bill amends Section 54.202, Utilities Code, to clarify that municipally owned utilities (MOUs) may provide certain energy-related services to its customers. The bill amends Section 54.204, Utilities Code, to require municipalities and MOUs to charge uniform pole attachment and underground conduit rates to all unaffiliated entities, directly or indirectly. The bill amends Section 283.002, Local Government Code, to clarify the types of voice services (adding voice over Internet protocol) which are required to pay access line fees to local governments.

Section 9 of the bill adds new Section 55.1735 to the Utilities Code to require that a charge or surcharge imposed for an access line used to provide pay telephone service cannot exceed the amount imposed for an access line used for business purposes in that exchange.

Section 27 of the bill repeals portions of the Utilities Code relating to the provision of certain information technology standards (Chapter 61, Utilities Code), carriage of broadcast signals by certain telecommunications companies (Subchapters B through F, Chapter 62, Utilities Code), and electronic publishing (Chapter 63, Utilities Code). The bill makes other conforming amendments to various sections of the Utilities Code consistent with the bill's provisions.

The bill requires the PUC to study whether customer choice for Internet-enabled applications associated with broadband service is adequately protected by current law. A report is due to the Legislature by January 1, 2007.

State-Issued Cable and Video Franchise

Section 25 of S.B. 21 adds new Chapter 66, "State-Issued Cable and Video Franchise," to the Utilities Code to establish a state-issued certificate of franchise authority for the provision of cable or video services and designate the PUC as the franchising authority for the state. The bill defines key terms, including "gross revenues," and establishes the procedures an entity or person must follow to apply for a state-issued certificate of franchise authority. The PUC shall issue a certificate of franchise authority if the applicant follows the specified requirements, including signing an affidavit affirming that the applicant will timely file all forms required by the FCC; comply with all applicable federal, state, and local requirements; and provide a description of the service area it intends to serve. The description of a service area may be updated as needed. Certificates of franchise authority are fully transferable and may be terminated by the recipient.

An entity that currently has, or previously had, a locally issued franchise to provide cable or video service may seek a state-issued certificate of franchise authority on the later of January 1, 2008, or the date the existing franchise expires. The bill clarifies that certain contractual duties of a cable or video service provider to certain other entities under an existing locally issued franchise are not affected by the receipt of a state-issued certificate of franchise authority.

Holders of a state-issued certificate of franchise authority shall pay each municipality in which they provide service a franchise fee equal to 5 percent of gross revenues. The bill specifies the payment arrangement and other responsibilities of providers and municipalities with respect to franchise fees. The bill affirms that providers may recover any franchise fee from its customers.

S.B. 21 requires holders of state-issued certificates of franchise authority to make cash payments to municipalities equal to, on a pro rata basis, such in-kind payments made by incumbent cable operators within the municipality, until the later of January 1, 2008, or the date the incumbent cable operator's locally issued franchise expires. Afterward, holders of state-issued certificates of franchise authority will pay an amount equal to 1 percent of gross revenues or, at the municipality's option, a per subscriber fee paid under the expired locally issued franchise, in lieu of in-kind payments. The bill specifies the payment arrangement and other responsibilities of providers and municipalities with respect to in-kind payments. The bill requires incumbent cable operators to continue to provide institutional network capacity and cable services to certain community buildings until the later of January 1, 2008, or the date the incumbent cable operator's locally issued franchise expires. Afterward, providers may deduct from the franchise fee an amount equal to the actual incremental cost of the services the municipality receives.

The bill requires holders of a state-issued certificate of franchise authority to provide no fewer public, educational, and governmental (PEG) access channels than are provided by an incumbent cable operator providing service in the municipality as of September 1, 2005. If a municipality does not have any PEG channels as of that date, the bill requires the furnishing of up to three PEG channels, depending on the population of the municipality. The bill delineates the obligations and responsibilities of municipalities and holders of state-issued certificates of franchise authority with respect to PEG channels. Municipalities may establish reasonable guidelines regarding the use of PEG channels.

The bill specifies that the holder of a state-issued certificate of franchise authority shall not be required to comply with mandatory build-out provisions. The holder of a state-issued certificate of franchise authority may not deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides.

An affected person or a municipality may seek enforcement of this law by initiating a proceeding with the PUC. Holders of a state-issued certificate of franchise authority shall have a reasonable period of time to become capable of providing service to all households within a designated franchise area, and this requirement may be satisfied through alternative technologies providing comparable content, service, and functionality. The PUC is authorized to monitor the deployment of cable and video services, and the PUC may make determinations regarding the comparability of technologies and the services provided.

S.B. 21 clarifies that municipalities retain the authority to enforce police-power regulations in the management of public rights-of-way, provided that those regulations are competitively neutral and reasonable. Municipalities may not discriminate against holders of state-issued certificates of franchise authority with respect to use of rights-of-way, building access, or pole attachment terms. The bill places additional limitations on municipalities' authority with respect to office location requirements, reports, inspections, transfer of ownership, or insurance requirements. Municipalities may continue to require construction permits. The PUC shall have no jurisdiction to review municipalities' police-power regulations to manage rights-of-way.

Holders of a state-issued certificate of franchise authority must comply with certain customer service requirements until there are two or more providers offering service, excluding direct-to-home satellite service, in the municipality. Municipalities may require the filing of customer service reports if providers are subject to customer service requirements. The PUC shall receive quality complaints and post complaint information on its website. Holders of a state-issued certificate of franchise authority shall indemnify and hold harmless a municipality, its officers, and city employees for a variety of claims, subject to certain exceptions for negligence.

If the holder of a state-issued certificate of franchise authority is found by a court of competent jurisdiction to be in noncompliance with the law, and it does not cure such noncompliance, then it is subject to penalties as the court shall impose, up to revocation of its certificate of franchise authority. A voice provider, cable service provider, video service provider, or a municipality may seek clarification of its rights and obligations under federal law.

Oversight Committee

S.B. 21 establishes the Telecommunications Competitiveness Legislative Oversight Committee, comprised of the chairs of the House Committee on Regulated Industries and the Senate Committee on Business and Commerce, three members of the House and Senate appointed by the respective presiding officers, and the chief executive of the Office of Public Utility Counsel. The bill specifies the oversight committee's duties and responsibilities.

The bill requires the oversight committee to issue a biennial report to the Governor, Lieutenant Governor, and the Speaker of the House of Representatives on telecommunications competition. The bill also requires the oversight committee to conduct a joint interim study with the PUC to study alternative forms of competitively neutral compensation for municipalities, right-of-way access and fees, the transition from local to state-issued franchises, and related matters, with a report due to legislative leaders by December 31, 2006.

Section 29 of the bill provides that if any provision of the bill or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the bill that can be given effect without the invalid provision. To this end, the provisions of the bill are declared to be severable.

EFFECTIVE DATE

September 1, 2005, or, if the Act does not receive the necessary vote, the Act takes effect the 91st day after the last day of the legislative session.