

## **BILL ANALYSIS**

C.S.S.B. 1748  
By: Fraser  
Regulated Industries  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Broadband over power lines (BPL) is an emerging technology platform that offers a means of providing broadband services to reach homes and businesses. BPL services may also be used to enhance existing electric delivery systems, which may result in improved customer service and reliability for electric customers. Access to broadband services is important to this state and BPL deployment in Texas has the potential to extend broadband service where broadband access is currently not available. Additionally, BPL deployment may provide an additional option for existing broadband consumers in Texas, resulting in a more competitive market for broadband services, and BPL development in Texas is fully dependent upon the participation of electric utilities in this state, who own and operate the power lines and related facilities that are necessary for the construction of BPL systems and the provision of BPL services.

It is in the public interest to encourage the deployment of BPL by permitting affiliates of the electric utilities, or permitting unaffiliated entities to own and/or operate all or a portion of such BPL systems. The purpose of C.S.S.B. 1748 is to encourage the deployment of BPL, and to provide a framework for the deployment of BPL in Texas by authorizing affiliates of electric utilities, or unaffiliated entities, to own and operate BPL systems. An electric utility may choose to implement BPL under this new statute, but is not required to do so. The decision of whether or not to permit the deployment of BPL is within the sole discretion of the electric utility, which may not be penalized for its decision regarding the deployment of BPL.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Subtitle B, Title 2 of the Utilities Code ("PURA") by adding a new Chapter 43, as follows:

A new Section 43.001 containing legislative findings and the purpose of the bill.

A new Section 43.002 providing that the bill applies to an electric utility (which includes both electric utilities and transmission and distribution utilities as defined in PURA Section 31.002) that owns or operates an electric delivery system, regardless as to whether it provides customer choice under Chapter 39 of Subtitle B, Title 2 of the Utilities Code. This section also provides that this Chapter 43 shall control in the event of a conflict with other chapters in Title 2, and that no provision of Title 2 shall impose an obligation on an electric utility to implement BPL, to allow others to install BPL, or to provide broadband services.

A new Section 43.003 containing definitions for the following terms: "BPL," "broadband over power lines," and "BPL services"; "BPL access"; "BPL operator"; "BPL Internet service provider" and "BPL ISP"; "BPL system"; "BPL electric utility applications"; "electric delivery system"; and "electric utility." The definition of "electric utility" includes an electric utility and a transmission and distribution utility as defined in Section 31.002(6) or (19) of Title 2, and effectively identifies the primary entities that are subject to the bill.

A new Section 43.051 providing that an affiliate of an electric utility or an unaffiliated entity may own, construct, maintain, and operate a BPL system and provide BPL services on the electric utility's electric delivery system. Nothing in this chapter shall prohibit (i) an "electric cooperative" as defined in Section 11.003(9) of Title 2 from providing BPL service or owning  
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and operating a BPL system or (ii) 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.

A new Section 43.052 providing that an electric utility may (i) allow an affiliate or unaffiliated entity to own or operate a BPL system on the electric utility's electric distribution system, or (ii) allow an affiliate or unaffiliated entity to provide Internet service over a BPL system. The BPL operator and the electric utility shall determine what Internet service providers will have access to broadband capacity on its BPL system.

A new Section 43.053 providing that an electric utility shall charge fees to the owner of a BPL system for the use of its electric delivery system and may pay fees for use of the BPL system required to operate BPL utility applications. If all or part of a BPL system is installed on facilities of a telecommunications utility, the BPL owner shall pay an annual fee to the telecommunications utility consistent with the usual and customary charges for access to the space occupied by that portion of the BPL system so installed. An electric utility (i) may not charge 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, (ii) may not pay an affiliate under this section an amount more than the affiliate would charge an unaffiliated entity for the same item or class of items. An electric utility or its affiliate may not discriminate against a retail electric provider that is not affiliated with the utility in the terms or availability of BPL services.

A new Section 43.054 providing that because BPL systems provide benefits to electric delivery systems, the installation of a BPL system on an electric delivery system shall not require the electric utility or the owner of the BPL system or an entity defined in Section 11.003(9) of Title 2 to obtain or expand easements or other rights of way for the BPL system or to give additional consideration as a result of the installation or the operation of a BPL system. For purposes of this new section, installation of a BPL system shall be deemed to be consistent with installation of an electric delivery system.

A new Section 43.055 requiring an electric utility to employ reasonable measures to ensure that the operation of a BPL system does not interfere with or diminish the reliability of the electric utility's electric delivery system, providing that an electric utility's tariff shall govern in the event of a disruption in the provision of electric service, and providing that broadband services will always be secondary to the reliable provision of electric delivery services.

A new Section 43.101 providing (i) that an electric utility, through an affiliate or unaffiliated entity, may elect to install and operate a BPL system on some or all of its electric delivery system in any part of all of its certificated service area; (ii) that the installation, operation, and use of a BPL system and the provision of BPL services shall not be regulated by the state, a municipality, or local government other than as provided for in this new chapter; and (iii) that neither the commission nor any state or local government or regulatory or quasi-government or quasi-regulatory authority shall require an electric utility, either through an affiliate or an unaffiliated entity, to install a BPL system on its power lines or offer BPL services in all or any part of the electric utility's certificated service area, require an electric utility to allow others 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 prohibit 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.

New Section 43.101 also provides that if a municipality or local government is already collecting a charge or fee from the electric utility for the use of a municipal street, alley, or public way for the delivery of electricity to retail electric customers, the municipality or local government is prohibited from requiring a franchise or an amendment to a franchise or from requiring a charge, fee, or tax from any entity for use of a municipal street, alley, or public way for a BPL system or for the provision of BPL services.

New Section 43.101 also provides that the state, a municipality, or a local government may not impose any charge on the provision of BPL services that is greater than the lowest charge that entity imposes on other providers of Internet services in its respective jurisdiction.

A new Section 43.102 providing that an electric utilities investment in a BPL system to directly support BPL electric utility applications and other BPL services consumed by the electric utility that are used and useful in providing electric utility service shall be eligible for inclusion in the electric utility's invested capital, and any fees or operating expenses that are reasonable and necessary shall be eligible for inclusion as operating expenses for purposes of any electric utility rate proceeding. The invested capital and expenses described in this section must be allocated to the customer classes directly receiving the services.

New Section 43.102 also provides that in any electric utility rate proceeding, just and reasonable charges for the use of the electric utility's electric delivery system by a BPL owner or operator shall be limited to the usual and customary pole attachment charges paid to the electric utility for comparable space by cable television operators, and that revenues of an affiliated BPL operator or an affiliated BPL ISP shall not be deemed the revenues of an electric utility for purposes of setting rates.

A new Section 43.151 providing that, subject to the limits of Chapter 43, an electric utility may have full or partial ownership in a BPL operator or ISP, that affiliates should be determined consistent with existing affiliate definitions under Sections 11.003(2) and 11.006 of Title 2, and that a BPL operator or ISP shall not be considered "competitive affiliates" of the electric utility as that term is defined in Section 39.157 of Title 2.

A new Section 43.152 requiring BPL operators to comply with all federal laws, including those protecting licensed spectrum users from interference by BPL systems. The operator of a radio frequency device shall be required to cease operating the device upon notification by an FCC representative that the device is causing harmful interference. Operation shall not resume until the condition causing the harmful interference has been corrected.

SECTION 2. Amends Section 33.001 of the Utilities Code by making the current language subsection (a) and by adding a new subsection (b) which states that a municipality will not have jurisdiction over the BPL system, BPL services, or the rates, operations, or services of the electric utility or transmission and distribution utility to the extent that such rates, operations, or services are related, in whole or in part, to the construction, maintenance, or operation of a BPL system used to provide BPL services to affiliated or unaffiliated entities.

SECTION 3. Effective date: upon passage or September 1, 2005.

### **EFFECTIVE DATE**

This Act takes effect September 1, 2005, unless it receives the votes necessary for immediate effect.

### **COMPARISON OF ORIGINAL TO SUBSTITUTE**

In SECTION 1 of the bill, in new Section 43.001(a), the legislative findings were modified to state that BPL services can result in improved services, rather than just customer services.

In new Section 43.001(c), the legislative findings were modified to remove wording encouraging each electric utility to construct, maintain, and operate BPL systems. The findings now just state 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 and/or operate all or a portion of such BPL systems. In addition, modifications were made to the text to state that the purpose of new Chapter 43 is provide the appropriate framework, rather than regulatory certainty for utilities, to support the deployment of BPL.

In new Section 43.001(d), the legislative findings were modified to provide that an electric utility may choose to implement BPL under the procedures set forth in this section.

In new Section 43.002, consistent with the changes to Section 43.001, the applicability section of the new chapter has been modified to remove language that referred to an electric utility constructing a BPL system.

In new Section 43.003, the definition of BPL customer has been removed because a definition for that term is not needed, and the remaining definitions have been renumbered accordingly. The definition of BPL electric utility applications has been changed to include services as well as technologies, and to include the concept of “used and useful” in the definition. Language has also been added to that definition to clarify that BPL electric utility applications are not limited to the specific applications listed.

In new Sections 43.051 and 43.052, the provisions relating to the authorization for a BPL system and the ownership and operation of a BPL system, modifications to the text have been made to reflect the fact BPL systems are to be directly owned and/or operated by affiliates of an electric utility or unaffiliated entities and not directly owned by the electric utility itself. However, language has been inserted to make it clear that electric cooperatives may own and operate a BPL system or provide BPL services. Language has also been inserted to allow electric utilities to provide construction and maintenance services to a BPL operator or a BPL internet service provider (ISP) provided those services are properly accounted for between the electric utility and the BPL operator or BPL ISP. In addition, a provision has been added to allow either an affiliate of the electric utility or an unaffiliated entity to provide Internet service over a BPL system. Finally, the provision that allowed the BPL operator to determine what BPL ISPs may have access to broadband capacity on the BPL system has been modified to have both the BPL operator and the electric utility make that determination.

In new Section 43.053, modifications to the text have been made to make it clear that an electric utility as well as an affiliate of an electric utility may not discriminate against a retail electric provider that is not affiliated with the utility in the terms or availability of BPL services.

In new Section 43.054, the section that provides that no additional easements or payments are required for the placement of a BPL system, modifications to the text have been made to clarify that additional consideration is not required as a result of the installation or the operation of a BPL system.

In new Section 43.055, the section that provides that the reliability of electric systems be maintained, modifications to the text have been made to state that an electric utility that allows the installation and operation of a BPL system on its electric delivery system shall employ *all* reasonable measures to ensure that the operation of the BPL system does not interfere with or diminish the reliability of the utility’s electric delivery system.

In new Section 43.101, changes have been made to the text to carry forward the concept that BPL systems are to be directly owned and/or operated by affiliates of an electric utility or unaffiliated entities and not directly owned by the electric utility itself. A change has also been made in the provision that prohibits the state, a municipality, or a local government from imposing any charge on the provision of BPL services that is greater than the lowest charge the state, the municipality, or the local government imposes on other providers of Internet services to clarify that the charge referred to is the charge in the respective jurisdiction.

In new Section 43.102, substantial changes have been made regarding cost recovery for deployment of BPL and utility applications. The Senate engrossed version of the bill provided only that the provision of BPL utility applications and BPL services consumed by the electric utility were eligible for inclusion in the utility’s operating expenses for purposes of a proceeding under Chapter 36 of the Utilities Code. The revised section allows the electric utility’s investment in the BPL system to directly support the BPL utility applications and other BPL services consumed by the electric utility that are used and useful in providing electric utility service to be eligible for inclusion in the electric utility’s invested capital, and any fees or operating expenses that are reasonable and necessary to be eligible for inclusion as operating expenses for purposes of any proceeding under Chapter 36 of the Utilities Code. The revised section also provides that the invested capital and expenses referred to above must be allocated to the customer classes directly receiving the services. The provision that allowed the Public Utility Commission to determine just and reasonable charges for access to space on poles for space occupied by the BPL system and the use of other utility facilities by the BPL system has been modified to require that the 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.

Finally, a provision has been added that the revenues of an affiliated BPL operator or an affiliated BPL ISP shall not be deemed the revenues of an electric utility for purposes of setting rates under Chapter 36 of the Utilities Code.

In new Section 43.151, the section of the bill that allows an electric utility to have a full or partial ownership interest in a BPL operator or a BPL ISP, modifications have been made to the text to clarify that the ownership interest is subject to the limitations of the new chapter.

In new Section 43.152, the section dealing with compliance with Federal law, the text has been expanded and modified to provide that the operator of a radio frequency device shall be required to cease operating the device upon notification by a Federal Communications Commission representative that the device is causing harmful interference, and that operation shall not resume until the condition causing the harmful interference has been corrected.

Other stylistic changes have been made to the provisions of the bill.

In SECTION 2, Section 33.001 of the Utilities Code related to municipal jurisdiction has been modified to remove the word ownership to reflect the fact BPL systems are to be directly owned and/or operated by affiliates of an electric utility or unaffiliated entities and not directly owned by the electric utility itself.

There is no change to SECTION 3 in the substitute compared to the original.