

By: Fraser

S.B. No. 1748

A BILL TO BE ENTITLED

AN ACT

relating to the development and provision of broadband over electric delivery systems and the development of enhanced electric delivery systems.

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

SECTION 1. Subtitle B, Title 2, Utilities Code is amended by adding Chapter 43 to read as follows:

CHAPTER 43. USE OF ELECTRIC DELIVERY SYSTEM FOR ACCESS TO BROADBAND AND OTHER ENHANCED SERVICES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 43.001. LEGISLATIVE FINDINGS. (a) The Legislature finds that broadband over power lines, also know 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 customer service and reliability for electric customers.

(b) The Legislature finds that access to broadband services is important to this state. 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. The Legislature further finds that BPL development in Texas is fully dependent upon

1 the participation of electric utilities, municipally owned
2 utilities, electric cooperatives, and transmission and
3 distribution utilities in this state, who own and operate the power
4 lines and related facilities that are necessary for the
5 construction of BPL systems and the provision of BPL services.

6 (c) The Legislature finds that it is in the public interest
7 to encourage the deployment of BPL and to encourage each electric
8 utility, municipally owned utility, electric cooperative, and
9 transmission and distribution utility to construct, maintain, and
10 operate BPL systems, either as part of the utility's property or as
11 non-utility property owned and operated by affiliates of the
12 utility, or to permit unaffiliated entities to develop such BPL
13 systems. The purpose of this chapter is to provide regulatory
14 certainty and rate stability for utilities to support the
15 deployment of BPL.

16 (d) The Legislature finds that an electric utility,
17 municipally owned utility, electric cooperative, or transmission
18 and distribution utility may choose to implement BPL, but is not
19 required to do so. The electric utility, municipally owned
20 utility, electric cooperative, or transmission and distribution
21 utility shall have the right to decide, in its sole discretion,
22 whether to implement BPL and may not be penalized for deciding to
23 implement or not to implement BPL.

24 Sec. 43.002. APPLICABILITY. (a) This chapter applies to
25 an electric utility, a municipally owned utility, an electric
26 cooperative, or a transmission and distribution utility that owns
27 or operates for compensation in this state equipment or facilities

1 to transmit or distribute electricity, whether or not the utility,
2 municipally owned utility, or electric cooperative is offering
3 customer choice under Chapter 39, 40, or 41 of this subtitle.

4 (b) If there is a conflict between the specific provisions
5 of this chapter and any other provision of this title, the
6 provisions of this chapter control.

7 (c) No provision of this title shall impose an obligation on
8 an electric utility or transmission and distribution utility to
9 implement BPL or to provide broadband services.

10 Sec. 43.003. DEFINITIONS. In this chapter:

11 (1) "BPL," "broadband over power lines," and "BPL
12 services" mean the provision of broadband services over electric
13 power lines and related facilities, whether above ground or in
14 underground conduit.

15 (2) "BPL access" means the ability to access broadband
16 services via a BPL operator or BPL Internet service provider.

17 (3) "BPL customer" means a person who contracts with
18 and receives BPL services from a BPL operator or a BPL Internet
19 service provider.

20 (4) "BPL operator" means an entity that operates a BPL
21 system on the electric power lines and related facilities of a
22 utility.

23 (5) "BPL Internet service provider" and "BPL ISP" mean
24 an entity that provides Internet services to others on a wholesale
25 basis or to end-use customers on a retail basis.

26 (6) "BPL system" means the materials, equipment, and
27 other facilities installed on utility facilities that allow for the

1 provision of BPL services.

2 (7) "BPL utility applications" means technologies
3 that are designed to improve the operational performance and
4 service reliability of a utility including, but not limited to,
5 automated meter reading, real time system monitoring and meter
6 control, remote service control, outage detection and restoration,
7 predictive maintenance and diagnostics, and monitoring and
8 enhancement of power quality.

9 (8) "Electric cooperative" shall have the meaning
10 defined in Section 11.003 of this title.

11 (9) "Electric delivery system" means the power lines
12 and related transmission and distribution facilities used by a
13 utility to deliver electric energy.

14 (10) "Electric utility" shall have the meaning defined
15 in Section 31.002 of this title.

16 (11) "Municipally owned utility" shall have the
17 meaning defined in Section 11.003 of this title.

18 (12) "Transmission and distribution utility" shall
19 have the meaning defined in Section 31.002 of this title.

20 (13) "Utility" means an electric utility, a
21 municipally owned utility, an electric cooperative, or a
22 transmission and distribution utility.

23 SUBCHAPTER B. DEVELOPMENT OF BPL SYSTEMS

24 Sec. 43.051. AUTHORIZATION FOR A BPL SYSTEM. A utility may
25 own, construct, maintain, and operate a BPL system and provide BPL
26 services or allow others to do so on its electric delivery system
27 consistent with the requirements of this chapter.

1 Sec. 43.052. OWNERSHIP AND OPERATION OF BPL SYSTEM. (a) A
2 utility may elect to:

3 (1) own or operate a BPL system on its electric
4 delivery system as utility property;

5 (2) allow an affiliated entity to own or operate a BPL
6 system on the utility's electric delivery system;

7 (3) allow an unaffiliated entity to own or operate a
8 BPL system on the utility's electric delivery system;

9 (4) provide Internet service over a BPL system; or

10 (5) participate in any combination of the forms of
11 ownership listed in Subparagraphs (1) through (4) of this
12 subsection.

13 (b) Regardless of who owns the BPL system or systems on a
14 utility's electric delivery system, the utility may act as a BPL
15 operator. If the utility owns the BPL system or systems on its
16 electric delivery system, the utility may allow one or more
17 affiliated or unaffiliated entities to act as BPL operators.

18 (c) The BPL operator shall determine what BPL Internet
19 service providers may have access to broadband capacity on the BPL
20 system except that if the BPL operator is not the utility, the
21 utility and the BPL operator for that specific system shall
22 determine what Internet service providers shall have access to the
23 BPL system.

24 Sec. 43.053. FEES AND CHARGES. (a) A utility that elects
25 to own a BPL system as utility property shall charge a BPL operator
26 for the use of its BPL system.

27 (b) A utility that acts as a BPL operator shall charge a BPL

1 ISP for the use of the BPL system.

2 (c) A utility that allows an affiliated entity or an
3 unaffiliated entity to own a BPL system on the utility's electric
4 delivery system shall charge the owner of the BPL system for the use
5 of the utility's electric delivery system.

6 (d) A utility that allows an affiliated entity or an
7 unaffiliated entity to own a BPL system on the utility's electric
8 delivery system may pay the owner of the BPL system for the right to
9 be the BPL operator.

10 (e) A utility may pay a BPL owner or a BPL operator for the
11 use of the BPL system required to operate BPL utility applications.

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

18 (g) Notwithstanding Subsections (a) through (f) of this
19 section:

20 (1) a utility may not charge an affiliated entity
21 under this section an amount less than the utility would charge an
22 unaffiliated entity for the same item or class of items; and

23 (2) a utility may not pay an affiliated entity under
24 this section an amount more than the affiliate would charge an
25 unaffiliated entity for the same item or class of items.

26 Sec. 43.054. NO ADDITIONAL EASEMENTS OR PAYMENTS REQUIRED.
27 The installation of a BPL system on an electric delivery system

1 shall not require the utility or the owner of the BPL system to
2 obtain easements or other right of way for the BPL system or to make
3 payments for easements in addition to payments made by the utility
4 for the placement of its electric delivery system.

5 Sec. 43.055. RELIABILITY OF ELECTRIC SYSTEMS MAINTAINED. A
6 utility that allows the installation and operation of a BPL system
7 on its electric delivery system shall employ reasonable measures to
8 ensure that the operation of the BPL system does not interfere with
9 or diminish the reliability of the utility's electric delivery
10 system. Should a disruption in the provision of electric service
11 occur, the utility shall be governed by the terms and conditions of
12 the retail electric delivery service tariff. At all times, the
13 provision of broadband services shall be secondary to the reliable
14 provision of electric delivery services.

15 SUBCHAPTER C. IMPLEMENTATION OF A BPL SYSTEM BY A UTILITY

16 Sec. 43.101. PARTICIPATION BY A UTILITY. (a) A utility,
17 either on its own, through an affiliate, or through an unaffiliated
18 entity, may elect to install and operate a BPL system on some or all
19 of its electric delivery system in any part or all of its
20 certificated service area.

21 (b) The installation, operation, and use of a BPL system and
22 the provision of BPL services shall not be regulated by the state, a
23 municipality, or local government other than as provided for in
24 this chapter.

25 (c) Neither the commission nor any state or local government
26 or regulatory or quasi-government or quasi-regulatory authority
27 shall:

1 (1) require a utility to install a BPL system on its
2 power lines or offer BPL services in all or any part of the
3 utility's certificated service area, either directly or indirectly
4 through an affiliated or unaffiliated entity;

5 (2) require a utility to allow others to install a BPL
6 system on the utility's electric delivery system in any part or all
7 of the utility's certificated service area; or

8 (3) prohibit a utility from installing a BPL system or
9 offering BPL services in any part or all of the utility's
10 certificated service area, either directly or indirectly through
11 and affiliated or unaffiliated entity.

12 (d) If a municipality or local government is already
13 collecting a charge or fee from the electric utility, electric
14 cooperative, or transmission and distribution utility for the use
15 of a municipal street, alley, or public way for the delivery of
16 electricity to retail electric customers, the municipality or local
17 government is prohibited from requiring a franchise or an amendment
18 to a franchise and is prohibited from imposing or collecting a
19 charge, fee, or tax from a BPL operator, an electric utility, an
20 electric cooperative, a transmission and distribution utility, an
21 affiliate of an electric utility, or an unaffiliated entity
22 operating a BPL system on a utility's electric delivery system for a
23 franchise to use a municipal street, alley, or public way for a BPL
24 system or for the provision of BPL services.

25 (e) Notwithstanding Subsection (d) of this section, the
26 state, a municipality, or local government may impose reasonable
27 charges, other than charges for the use of streets, alleys, an

1 public ways, on the provision of retail BPL Internet services that
2 are no greater than the charges the state, the municipality, or the
3 local government impose on other providers of Internet services.

4 Sec. 43.102. INCENTIVES AND COST RECOVERY FOR DEPLOYMENT OF
5 BPL AND UTILITY APPLICATIONS. (a) A utility that owns or allows
6 another entity to own a BPL system installed on its electric
7 delivery system shall make an election under this section or under
8 Section 43.103.

9 (b) Where a utility owns or permits the installation of a
10 BPL system on its electric delivery system under Section
11 43.052(a)(1)-(4), the utility's investment in that BPL system,
12 which is incurred to support, in whole or in part, the provision of
13 BPL utility applications and other BPL services consumed by the
14 utility, shall be deemed used and useful in providing service and
15 included in the utility's invested capital at original cost, and
16 any fees or operating expenses related to that BPL system shall be
17 deemed reasonable and necessary operating expenses for the purposes
18 of any rate proceeding under Chapter 36.

19 (c) Where a utility has elected to neither own nor operate a
20 BPL system, but pays fees to an affiliated or unaffiliated entity
21 for the use of BPL utility applications, those fees shall be deemed
22 reasonable and necessary operating expenses for the purposes of any
23 rate proceeding under Chapter 36.

24 (d) In any rate proceeding under Chapter 36, 40 percent of
25 the revenues received by a utility owning or operating a BPL system
26 or providing BPL services, or allowing the provision of BPL
27 services, shall be considered revenue to the utility and applied to

1 reduce the total revenue requirement of the utility. To encourage
2 the utility to develop and deploy BPL systems, the remaining 60
3 percent of the revenues received by the utility shall not be
4 considered in determining a revenue requirement or rates for the
5 utility, but shall be wholly outside the jurisdiction of any
6 regulatory authority.

7 (e) In any rate proceeding under Chapter 36, the utility
8 must demonstrate that any affiliated BPL operator or BPL ISP is
9 paying just and reasonable compensation to the utility. For an
10 affiliated BPL operator, just and reasonable compensation shall be
11 the usual and customary charges for access to the space occupied by
12 the BPL system. For an affiliated BPL ISP, just and reasonable
13 compensation shall be the usual and customary charges that are paid
14 by other Internet service providers for equivalent broadband
15 capacity. The commission may reduce the utility's total revenue
16 requirement by an amount equal to the difference between the amount
17 actually paid to the utility and the amount that would be just and
18 reasonable only upon finding that the compensation paid to the
19 utility by an affiliated BPL operator or an affiliated BPL ISP is
20 not just and reasonable.

21 (f) In any rate proceeding, costs that are incurred to
22 support, in whole or in part, the provision of BPL utility
23 applications and other BPL services consumed by the utility shall
24 be borne by the utility. Incremental costs that are incurred solely
25 to support the provision of BPL services to affiliated or
26 unaffiliated third parties shall be borne by the BPL operator.

27 Sec. 43.103. ALTERNATIVE INCENTIVE MECHANISM. (a) A

1 utility that installs or allows the installation of a BPL system on
2 its electric delivery system may elect to provide electric
3 transmission and distribution delivery services under the terms and
4 condition and at the rates it had in effect on July 1, 2005. The
5 utility shall notify the commission of its election on or before
6 December 31, 2005, and thereafter shall not be subject to the other
7 provisions of Subchapters C and D of Chapter 36 until September 1,
8 2009, and shall not be permitted to include its investment in the
9 BPL system in rates or otherwise seek to change its rates except as
10 permitted by this section.

11 (b) An electric utility or transmission and distribution
12 utility making the election under subsection (a) may seek an
13 increase in its electric rates or in its transmission and
14 distribution delivery rates for reasons of force majeure. For
15 purposes of this paragraph, "force majeure" means a major event or
16 combination of events, including new or expanded state or federal
17 statutory or regulatory requirements; hurricanes, tornadoes, ice
18 storms, or other natural disasters; or acts of war, terrorism, or
19 civil disturbance, beyond the control of an electric utility or a
20 transmission and distribution utility that the regulatory
21 authority finds increases the electric utility's or transmission
22 and distribution utility's total reasonable and necessary costs or
23 decreases the electric utility's or transmission and distribution
24 utility's total revenues related to the delivery of electricity by
25 more than 10 percent for any calendar year during the period ending
26 September 1, 2009. The term "force majeure" does not include any
27 changes in general economic conditions such as inflation, interest

1 rates, or other factors of general application.

2 (c) During the period ending September 1, 2009, the
3 commission shall allow a utility that has made the election under
4 Subsection (a) to:

5 (1) make adjustments to its distribution service
6 provider transmission cost recovery factors;

7 (2) make adjustments to its transmission cost of
8 service rates to reflect changes in the cost of providing such
9 service;

10 (3) implement, adjust, or discontinue a competition
11 transition charge, transition charge, or system benefit fun fee to
12 the extent necessary to effectuate the purposes of Chapter 39; and

13 (4) implement additional tariffs for new or expanded
14 electric delivery or utility services.

15 SUBCHAPTER D. MISCELLANEOUS PROVISION

16 Sec. 43.151. AFFILIATES OF A UTILITY. (a) A utility may
17 have a full or partial ownership interest in a BPL operator or a BPL
18 ISP. Whether a BPL operator or a BPL ISP is an affiliate of the
19 utility shall be determined under Section 11.003(2) and Section
20 11.006.

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

24 Sec. 43.152. NO CROSS-SUBSIDIZATION. A utility that
25 provides BPL services to BPL customers is prohibited from
26 cross-subsidizing its BPL services with utility revenues.
27 Contracts and ownership arrangements that are permitted by this

1 chapter do not constitute cross-subsidization for purposes of this
2 section.

3 SECTION 2. Section 33.001, Utilities Code, is amended to
4 read as follows:

5 Sec. 33.001. MUNICIPAL JURISDICTION. (a) To provide fair,
6 just, and reasonable rates and adequate and efficient services, the
7 governing body of a municipality has exclusive original
8 jurisdiction over the rates, operations, and services of an
9 electric utility in areas in the municipality, subject to the
10 limitations imposed by this title.

11 (b) Notwithstanding subsection (a), the governing body of a
12 municipality shall not have jurisdiction over the BPL system, BPL
13 services, or the rates, operations, or services of the electric
14 utility or transmission and distribution utility to the extent that
15 such rates, operations, or services are related, in whole or in
16 part, to the ownership, construction, maintenance, or operation of
17 a BPL system used to provide BPL services to affiliated or
18 unaffiliated entities.

19 SECTION 3. The Act takes effect immediately if it receives a
20 vote of two-thirds of all the members elected to each house, as
21 provided by Section 39, Article III, Texas Constitution. If this
22 Act does not receive the vote necessary for immediate effect, this
23 Act takes effect September 1, 2005.