

## **BILL ANALYSIS**

C.S.H.B. 3853  
By: Anderson  
State Affairs  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

In many areas of Texas, access to modern, reliable Internet service has not kept pace with the growing need for online connectivity. The increasing reliance on high-speed Internet for school, work, and personal needs has raised concerns that rural Texans are being left behind in terms of access. To ensure that these unserved areas receive the broadband access they so desperately need, all relevant parties must be involved in finding innovative solutions to delivering this service. It has been noted that electric utilities often have excess fiber capacity on their electric delivery systems that could be used to increase two-way flows of data and energy without requiring new infrastructure to be built. This bill would allow those utilities to partner with Internet service providers who agree to lease this capacity as a way to then deliver broadband service to the end consumer. C.S.H.B. 3853 seeks to provide for the deployment of such a middle mile broadband delivery system in Texas.

### **CRIMINAL JUSTICE IMPACT**

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

### **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.

### **ANALYSIS**

C.S.H.B. 3853 amends the Utilities Code to remove provisions providing for the use of broadband over power lines (BPL) systems for the delivery of broadband service. The bill sets out provisions which provide instead for the furnishing of middle mile broadband service by electric utilities, which is the provision of excess fiber capacity on the utility's electric delivery system to an Internet service provider (ISP) to deliver broadband service. Middle mile broadband service does not include the provision of Internet service to end-use customers on a retail basis.

C.S.H.B. 3853 authorizes an electric utility to own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service. A utility that owns and operates a middle mile broadband system may lease excess fiber capacity on the utility's electric delivery system to an ISP on a wholesale basis and must charge the ISP for the use of the system for all costs associated with that use. The bill establishes that the rates, terms, and conditions of a lease of this excess capacity must be nondiscriminatory and that a utility may not lease excess capacity to an affiliated ISP.

C.S.H.B. 3853 authorizes an electric utility to determine, on a nondiscriminatory basis, which ISPs may have access to excess fiber capacity on the utility's electric delivery system and

provide access points to allow connection between the delivery system and the Internet service provider systems of those ISPs. The utility may provide access to their excess capacity only on reasonable and nondiscriminatory terms and conditions.

C.S.H.B. 3853 establishes that, because broadband systems provide benefits to electric delivery systems, the installation of a middle mile broadband system on an electric delivery system does not require the utility or an electric cooperative to obtain, modify, or expand easements or other rights-of-way for the system or to give additional consideration as a result of the installation or the operation of the system on the utility's or cooperative's electric delivery system. The bill establishes requirements for the provision of advance notice to affected property owners by an electric utility that intends to use an easement or other property right for middle mile broadband service and provides for a 60-day period during which an affected property owner may submit to the utility a written protest of that intended use. A utility that receives a timely written protest may not use the easement or other property right for middle mile broadband service unless the protestor later agrees in writing to that use or that use is authorized by law. If a property owner fails to submit a timely written protest, the utility may proceed without modifying or expanding the easement for that property owner. A utility that receives a timely written protest regarding a proposed project may cancel the project at any time. These requirements do not apply to an existing easement that permits the installation of a third-party middle mile broadband system on an electric delivery system.

C.S.H.B. 3853 authorizes an electric utility also to install and operate a middle mile broadband system on any part of its electric delivery system for ISPs but prohibits the construction of new electric delivery facilities for the purpose of the utility's middle mile service. A utility that owns and operates a middle mile broadband system may lease excess fiber capacity on its electric delivery system to an ISP on a wholesale basis but may not provide Internet service to end-use customers on a retail basis.

C.S.H.B. 3853 requires an electric utility that installs and operates a middle mile broadband system to employ all reasonable measures to ensure that the operation of that system does not interfere with or diminish the reliability of the utility's electric delivery system. If a disruption in the provision of electric service occurs, the utility is governed by the terms and conditions of the retail electric delivery service tariff. The bill authorizes the utility to take all necessary actions regarding its middle mile broadband system to address emergency circumstances that may pose health, safety, or reliability concerns and establishes that, at all times, the provision of broadband service is secondary to the reliable provision of electric delivery services. The bill exempts a utility from liability to any person, including an ISP, for any direct, indirect, or consequential damages, including loss of business, loss of profits or revenue, or loss of production capacity caused by a fluctuation, disruption, or interruption of middle mile broadband service that is caused in whole or in part by force majeure or the utility's provision of electric delivery services.

C.S.H.B. 3853 prohibits the Public Utility Commission of Texas (PUC) or a state or local government or a regulatory, quasi-governmental, or quasi-regulatory authority from doing any of the following:

- requiring an electric utility to install a middle mile broadband system or offer middle mile broadband service on its electric delivery system;
- requiring an electric utility to allow others to install a middle mile broadband system on its electric delivery system; or
- prohibiting an electric utility from installing a middle mile broadband system or offering middle mile broadband service on its electric delivery system.

The bill prohibits the installation, operation, and use of a middle mile broadband system, the provision of middle mile broadband service, and the lease of excess fiber capacity by ISPs from an electric utility from being regulated by any state agency, a municipality, or local government other than as provided by the bill.

C.S.H.B. 3853 authorizes the state or a municipality to impose a charge on the provision of middle mile broadband service in an amount not to exceed the lowest charge that the state or municipality imposes on other providers of broadband service for use of the public rights-of-way in its respective jurisdiction. However, the bill prohibits a municipality or local government that is already collecting a charge or fee from an electric utility for the use of the public rights-of-way for the delivery of electricity to retail electric customers from requiring a franchise or an amendment to a franchise or requiring an additional charge, fee, or tax from the utility for use of the public rights-of-way for a middle mile broadband system.

C.S.H.B. 3853 requires an electric utility that plans a project to deploy middle mile broadband to submit a written plan to the PUC that provides certain information pertaining to the project, including the proposed project route, an estimate of potential broadband customers that would be served by the ISP, and a cost estimate. The PUC must approve, modify, or reject the plan not later than the 181st day after the date the plan is submitted. The bill requires the PUC, after notice and hearing if required, to approve the plan if it finds that the plan will allow for the provision and maintenance of adequate, efficient, safe, reliable, and reasonably priced middle mile broadband service. An approved plan may be updated or amended, subject to PUC approval.

C.S.H.B. 3853 provides that, for purposes of any rate setting proceeding, an electric utility's investment in the installation of a middle mile broadband system is eligible for inclusion in the utility's invested capital and any fees or operating expenses that are reasonable and necessary are eligible for inclusion as operating expenses. In such a proceeding, all revenue received from an ISP for the use of a middle mile broadband system must be applied as a revenue credit to customers in proportion to the customers' funding of the underlying infrastructure. The bill authorizes the PUC to allow a utility to recover investment in a middle mile broadband system outside of a comprehensive base rate proceeding.

C.S.H.B. 3853 requires an electric utility that owns and operates a middle mile broadband system to comply with all applicable federal laws. The bill clarifies that its provisions do not prohibit an electric cooperative from providing broadband service or owning and operating a broadband system as otherwise permitted by law and establishes minimum download and upload speeds for Internet service to constitute broadband service. The bill clarifies the applicability of its provisions and sets out certain legislative findings regarding the importance of ensuring access to quality, high-speed broadband Internet service and the ways in which broadband development in unserved areas of Texas can be facilitated by the participation of electric utilities, including by utilizing excess fiber facility on existing utility infrastructure in place throughout the state to provide middle mile broadband service in unserved areas.

C.S.H.B. 3853 repeals Section 33.001(b), Utilities Code.

### **EFFECTIVE DATE**

On passage, or, if the bill does not receive the necessary vote, September 1, 2021.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

While C.S.H.B. 3853 may differ from the original in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute revises the legislative findings to limit the areas within Texas for which the bill is intending to facilitate the development of broadband service to those that are unserved by broadband.

The substitute revises the definition of "middle mile broadband service" to limit that service to the provision of excess fiber capacity on an electric utility's electric delivery system for purposes of an ISP providing broadband service. The substitute clarifies that "broadband service" is retail Internet service that is provided by a commercial ISP.

The substitute requires that an electric utility's determination of which ISPs may have access to the utility's excess fiber capacity be made on a nondiscriminatory basis and requires the terms and conditions of such access to be reasonable and nondiscriminatory.

The substitute clarifies that the costs for which a utility charges an ISP that leases excess fiber capacity on the utility's electric delivery system are the costs associated with the ISP's use of that system. The substitute requires the rates, terms, and conditions of a lease of excess fiber capacity on a utility's middle mile broadband system to be nondiscriminatory.

The substitute prohibits a utility from leasing excess fiber capacity on its middle mile broadband system to an affiliated ISP.

The substitute includes provisions requiring a utility that intends to use an easement or other property right for middle mile broadband service to provide advance notice to affected property owners and giving such a property owner an opportunity to protest that intended use. The substitute includes provisions detailing the effect of such a protest or the lack thereof, including a prohibition against a utility using an easement or other property right for middle mile broadband service if the utility receives a timely written protest unless the property owner later agrees in writing or that use is authorized by law.

The substitute includes a provision specifying that the requirements with respect to easements or other considerations do not apply to existing easements that permit the installation of a third-party middle mile broadband system on an electric delivery system.

The substitute includes a prohibition against the construction of new electric delivery facilities for the purpose of an electric utility's middle mile service.

The substitute includes a prohibition against a state agency, municipality, or local government regulating the lease of excess fiber capacity by ISPs other than as provided by the bill.

The substitute does not include a requirement for the PUC to issue a certain finding after approving a plan for a middle mile broadband plan.

The substitute does not include provisions authorizing a utility to recover invested capital and any fees or operating expenses associated with a middle mile broadband system on a periodic basis. The substitute includes a provision that authorizes the PUC instead to allow a utility to recover investments in such a system outside of a comprehensive base rate proceeding.

The substitute includes a requirement that the revenue credit applied to customers from the revenue received by a utility from an ISP for the use of a middle mile broadband system be applied in proportion to the customers' funding of the underlying infrastructure.