87R8812 BRG-F

By:  Hancock S.B. No. 1283

A BILL TO BE ENTITLED

AN ACT

relating to attachments for broadband service on utility poles owned by an electric cooperative.

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

SECTION 1.  The heading to Chapter 252, Utilities Code, is amended to read as follows:

CHAPTER 252. CABLE ATTACHMENTS TO ELECTRIC COOPERATIVE'S DISTRIBUTION POLES

SECTION 2.  Title 5, Utilities Code, is amended by adding Chapter 253 to read as follows:

CHAPTER 253. BROADBAND ATTACHMENTS TO ELECTRIC COOPERATIVE'S DISTRIBUTION POLES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 253.0001.  DEFINITIONS. In this chapter:

(1)  "Broadband provider" means an entity that provides broadband service either directly or through an affiliate that uses the entity's communications facilities, regardless of whether the entity:

(A)  provides additional services in addition to broadband service; or

(B)  uses its facilities in whole or in part to provide broadband service.

(2)  "Broadband service" means Internet service with the capability of providing:

(A)  a download speed of 25 megabits per second or faster; and

(B)  an upload speed of three megabits per second or faster.

(3)  "Communications space" means the lower usable space on a pole that is typically reserved for low-voltage communications equipment.

(4)  "Large order application" means an application submitted by a broadband provider under this subchapter requesting access to attach pole attachments to a number of poles:

(A)  that exceeds the lesser of 300 poles or a number equal to 0.5 percent of the electric cooperative's poles; and

(B)  that is not more than the lesser of 3,000 poles or a number equal to five percent of the electric cooperative's poles.

(5)  "Pole" has the meaning assigned by Section 252.001.

(6)  "Pole attachment" means an affixture of cables, strands, wires, and associated equipment used in the provision of a broadband provider's services attached to a pole directly or indirectly or placed in a right-of-way owned or controlled by an electric cooperative.

(7)  "Simple make-ready activities" means work to accommodate a new pole attachment on a pole and includes work where existing attachments in the communications space are moved without any reasonable expectation of:

(A)  service outage or facility damage;

(B)  a need to splice an existing communications attachment; or

(C)  a need to relocate an existing wireless attachment.

Sec. 253.0002.  APPLICABILITY AND CONSTRUCTION OF CHAPTER. (a) This chapter applies to a pole attachment affixed by a broadband provider to a pole owned and controlled by an electric cooperative. This chapter does not apply to a pole attachment regulated by the Federal Communications Commission under 47 U.S.C. Section 224.

(b)  This chapter does not abrogate or affect a right or obligation of a party to a pole attachment contract entered into by a broadband provider and an electric cooperative before September 1, 2021.

(c)  A broadband provider that attaches a pole attachment to a pole owned by an electric cooperative under the terms of this chapter is subject to Sections 252.006, 252.007, and 252.008 in the same manner as if the broadband provider were a cable operator.

(d)  This chapter does not limit a right of a party to a pole attachment contract to request modification, amendment, or renewal of such contract to conform it to the provisions of this chapter.

Sec. 253.0003.  NO STATE CERTIFICATION; NO REGULATORY AUTHORITY. (a) This chapter does not constitute state certification under 47 U.S.C. Section 224. If a court determines that this chapter constitutes certification under that section, this chapter is not enforceable and has no effect.

(b)  This chapter may not be construed to subject an electric cooperative to regulation by the Federal Communications Commission under 47 U.S.C. Section 224.

(c)  This chapter does not authorize a department, agency, or political subdivision of this state to exercise enforcement or regulatory authority over attachments to electric cooperative poles.

Sec. 253.0004.  CONSTRUCTION OF TERMS AND PHRASES. Technical terms and phrases in this chapter, other than those defined by Section 253.0001, shall be construed using the term's or phrase's usual and customary meanings in the electric and broadband industries.

Sec. 253.0005.  COST-BASED NON-RECURRING CHARGES. Non-recurring charges authorized by this chapter must be cost-based.

SUBCHAPTER B. APPLICATION FOR ACCESS TO POLES

Sec. 253.0101.  APPLICATION FOR POLE ACCESS. (a) A broadband provider may not access a pole owned by an electric cooperative for the purpose of placing a pole attachment unless the provider applies for that access in accordance with this subchapter.

(b)  An electric cooperative shall:

(1)  establish a timeline for a broadband provider to apply for and obtain access to poles for placing a pole attachment under this chapter; and

(2)  make available an explanation of the information reasonably required for an application for access to poles for placing a pole attachment under this chapter to be considered complete.

Sec. 253.0102.  REVIEW OF APPLICATION FOR COMPLETENESS. (a) An electric cooperative shall review an application for completeness before the cooperative reviews the application on the merits.

(b)  An electric cooperative shall notify an applicant whether an application is complete not later than:

(1)  the 10th business day after the date the cooperative receives the application;

(2)  the 25th business day after the date the cooperative receives a large order application;

(3)  the fifth business day after the date the cooperative receives a resubmitted application; or

(4)  the 20th business day after the date the cooperative receives a resubmitted large order application.

Sec. 253.0103.  TREATMENT OF MULTIPLE APPLICATIONS BY SAME APPLICANT. For purposes of this chapter, an electric cooperative may treat as a single application for pole access an application the cooperative receives from the same applicant before the 31st day after the cooperative receives that applicant's most recent previous application.

Sec. 253.0104.  GRANT OR DENIAL OF APPLICATION. (a) Except as provided by Sections 253.0204 and 253.0302, an electric cooperative shall grant or deny an application for pole access under this chapter and provide to the applicant a survey of the poles affected by the application not later than:

(1)  the 45th day after the date the cooperative receives a complete application; or

(2)  the 60th day after the date the cooperative receives a complete large order application.

(b)  An electric cooperative may deny an application for access to a pole under this chapter if:

(1)  generally applicable safety, reliability, or engineering requirements established for the protection of public health, safety, or welfare prevent granting access; or

(2)  the pole lacks sufficient capacity.

(c)  Notwithstanding Subsection (b)(1), an electric cooperative may not deny access to a pole if the capacity, safety, reliability, or engineering consideration may be remedied by rearranging, expanding, replacing, or otherwise safely reengineering the pole or pole attachments through make-ready activities.

(d)  An electric cooperative's denial of an application to access a pole under this chapter must:

(1)  be specific;

(2)  include all relevant evidence and information that supports the denial; and

(3)  explain how the evidence and information relate to the denial.

Sec. 253.0105.  DEADLINES NOT APPLICABLE TO CERTAIN APPLICATIONS. (a) An electric cooperative is not required to meet the deadlines under this subchapter for an application for pole access to place pole attachments on more than 3,000 poles or more than 5 percent of the electric cooperative's poles.

(b)  An electric cooperative may not act under Subsection (a) to delay an application unreasonably and shall negotiate in good faith with the applicant regarding the time required to fulfill the cooperative's duties.

SUBCHAPTER C. MAKE-READY ACTIVITIES

Sec. 253.0201.  DEADLINES FOR MAKE-READY ACTIVITIES. (a) Not later than the 15th day after the date an electric cooperative grants an application, the electric cooperative shall provide to the broadband provider a detailed and itemized estimate of the expected costs of all necessary make-ready activities.

(b)  An electric cooperative shall complete all make-ready activities in the communications space and send a detailed, itemized final invoice to the broadband provider not later than:

(1)  the 30th day after the date the electric cooperative receives payment of the estimated make-ready cost from the broadband provider; or

(2)  for a large order application, the 75th day after the date the electric cooperative receives payment of the estimated make-ready cost from the broadband provider.

(c)  An electric cooperative shall complete all make-ready activities above the communications space, including pole replacements, and send a detailed, itemized final invoice to the broadband provider not later than:

(1)  the 90th day after the date the electric cooperative receives payment of the estimated make-ready cost from the broadband provider; or

(2)  for a large order application, the 135th day after the date the electric cooperative receives payment of the estimated make-ready cost from the broadband provider.

Sec. 253.0202.  EXTENSION OF MAKE-READY ACTIVITIES DEADLINE. (a) An electric cooperative may extend a deadline under Section 253.0201(b) or (c) for a cause that renders the deadline infeasible. A cooperative that chooses to extend a deadline shall:

(1)  immediately and in writing notify the broadband provider and each person with an affected existing pole attachment about the delay; and

(2)  identify the affected poles and provide a detailed explanation of the reason for the delay and an estimated new completion date to the broadband provider and each person with an affected existing pole attachment.

(b)  An electric cooperative may not extend a deadline under this section for a period longer than is necessary to complete make-ready activities on affected poles.

(c)  An electric cooperative may not extend a deadline under this section because of a preexisting violation on an affected pole caused by a person other than the broadband provider. The cooperative shall correct a preexisting violation as part of the make-ready process and before the applicable deadline at the cost of the responsible person.

(d)  An electric cooperative shall resume make-ready activities without discrimination when the cooperative returns to routine operations.

Sec. 253.0203.  DEADLINES NOT APPLICABLE TO CERTAIN APPLICATIONS. (a) An electric cooperative is not required to meet the deadlines under this subchapter for an application to place pole attachments on more than 3,000 poles or more than five percent of the electric cooperative's poles.

(b)  An electric cooperative may not act under Subsection (a) to delay an application unreasonably and shall negotiate in good faith with the applicant regarding the time required to fulfill the cooperative's duties.

Sec. 253.0204.  CONTRACTORS FOR MAKE-READY ACTIVITIES. (a) A broadband provider may hire a contractor approved by the electric cooperative to complete a survey under Section 253.0104 or perform a make-ready activity under this subchapter that is not timely completed by the electric cooperative or a person with an existing pole attachment.

(b)  The broadband provider shall provide reasonably timely notice to the electric cooperative and each person with an existing pole attachment on an affected pole that the provider intends to hire a contractor as authorized by Subsection (a).

(c)  The broadband provider shall provide reasonably timely notice to the electric cooperative and each person with an existing pole attachment on an affected pole of the contractor's completion of the make-ready activities.

(d)  An electric cooperative may not act under Subsection (a) unreasonably to withhold approval of a contractor for purposes of this section.

(e)  Not later than the 90th day after the date a broadband provider provides notice as provided by Subsection (c), the cooperative or person may inspect the make-ready work.

(f)  Not later than the 14th day after the date that an electric cooperative or person completes an inspection under Subsection (e), the cooperative or person may notify the broadband provider of any damage or code violations caused by such work. The notice must include specific documentation.

(g)  The electric cooperative or person that completes an inspection may:

(1)  remedy any defective make-ready work at the cost of the broadband provider; or

(2)  require the provider to remedy the defect not later than the 14th day after the provider receives the notice under Subsection (f).

Sec. 253.0205.  LIST OF APPROVED CONTRACTORS. (a) An electric cooperative shall maintain and make available a list of approved contractors for work above the communications space and pole replacements. An electric cooperative may require any work above the communications space and pole replacements to be performed by contractors on this list, including work performed by a contractor hired under Section 253.0204.

(b)  An electric cooperative may not act unreasonably to withhold consent for a requested addition of a qualified contractor to the list described by Subsection (a).

SUBCHAPTER D. OPTION FOR SIMPLE MAKE-READY ACTIVITIES

Sec. 253.0301.  OPTION: SIMPLE MAKE-READY. A broadband provider may choose to perform simple make-ready activities using one-touch make-ready procedures in place of the process outlined under Subchapter C.

Sec. 253.0302.  GRANT OR DENIAL OF APPLICATION: SIMPLE MAKE-READY. (a) A broadband provider that chooses to perform simple make-ready activities as described by Section 253.0301 must indicate that choice and describe the work to be performed as part of the provider's initial application under Subchapter B.

(b)  An electric cooperative shall grant or deny an application for simple make-ready activities under this section not later than:

(1)  the 15th day after the date the cooperative receives a complete application; or

(2)  the 30th day after the date the cooperative receives a complete large order application.

Sec. 253.0303.  SIMPLE MAKE-READY ACTIVITIES PERFORMED BY CONTRACTOR. (a) If an application for activities under Section 253.0302 is granted, a contractor hired by the broadband provider shall perform all necessary surveys.

(b)  The broadband provider and contractor shall provide a reasonable opportunity for the electric cooperative and a person with an existing pole attachment on an affected pole to be present for any field inspections.

(c)  A contractor hired by the broadband provider may perform all simple make-ready activities. Not later than the 15th day before the date the contractor begins performing simple make-ready activities, the contractor shall provide to the electric cooperative and a person with an existing pole attachment on an affected pole written notice that:

(1)  identifies the contractor performing the activities; and

(2)  sets out reasonable opportunities for the cooperative and person to be present for the activities.

Sec. 253.0304.  INSPECTION OF WORK AND REMEDIATION OF DAMAGES. (a) A broadband provider immediately shall notify the electric cooperative and a person with an existing pole attachment on an affected pole of any damage to the cooperative's or person's facilities reasonably likely to interrupt the entity's service.

(b)  An electric cooperative or person that receives notice under Subsection (a) may:

(1)  complete any remedial work at a reasonable cost to the broadband provider; or

(2)  require the broadband provider immediately to remedy the damage at the provider's own expense.

(c)  Not later than the 15th day after the date a broadband provider or contractor hired by the provider completes simple make-ready activities on a pole, the provider shall notify the electric cooperative and a person with an existing pole attachment on the pole of the completed work.

(d)  Not later than the 90th day after the date an electric cooperative or person receives notice under Subsection (c), the cooperative or person may inspect the work. Not later than the 14th day after the date of the inspection, the cooperative or person may provide notice to the broadband provider, with specific documentation, of any damage or code violations caused by the work.

(e)  An electric cooperative or person that provides notice under Subsection (d) may:

(1)  remedy any defective make-ready work at the cost of the broadband provider; or

(2)  require the provider to remedy the defect not later than the 14th day after the date the provider received the notice under Subsection (d).

SUBCHAPTER E. POLES AND POLE ATTACHMENTS

Sec. 253.0401.  DUTIES OF ELECTRIC COOPERATIVE. An electric cooperative shall rearrange, expand, replace, or otherwise safely reengineer any pole at the request of a broadband provider whose application for access to a pole is granted if the change is:

(1)  consistent with the National Electrical Safety Code; and

(2)  reasonably necessary to safely accommodate a pole attachment.

Sec. 253.0402.  RECOVERY OF COSTS FOR REPLACING POLES. (a) If an electric cooperative is required under Section 253.0401 to replace a pole that has been in service for longer than 75 percent and less than 100 percent of the average service life of a pole owned by the cooperative, the cooperative may not require reimbursement of costs associated with replacing the pole from the broadband provider that exceed the cooperative's reasonable costs of advancing the retirement of the existing pole.

(b)  The costs under Subsection (a) shall be determined by adding:

(1)  the remaining undepreciated value of the existing pole;

(2)  any interest expense of advancing the replacement of the pole relative to replacing the pole at the end of the average service life of a pole owned by the electric cooperative; and

(3)  any reasonable incremental cost of increasing the capacity of the replacement pole relative to the installation cost of the average new pole installed by the electric cooperative.

(c)  If an electric cooperative is required under Section 253.0401 to replace a pole that has been in service for the average service life of a pole owned by the electric cooperative or longer, the cooperative may not require reimbursement of costs associated with replacing the pole from the broadband provider that exceed any reasonable incremental cost of increasing the capacity of the replacement pole relative to the installation cost of the average new pole installed by the electric cooperative.

(d)  An electric cooperative shall determine the average service life of a pole as the period of time during which an electric cooperative's books maintained for tax and accounting purposes consider an average pole to have positive value, after depreciation.

Sec. 253.0403.  SHARING COSTS OF MODIFICATION TO POLE. (a) The following entities must share proportionately in the costs of modifying a pole under Section 253.0401:

(1)  the broadband provider who obtains access to a pole through a modification to the pole; and

(2)  a person who directly benefits from a modification, including:

(A)  the electric cooperative;

(B)  a person with an existing attachment on the pole who adds to or modifies the person's attachment after receiving notice of the modification; and

(C)  a party that makes an attachment to a pole after the completion of a modification that made the attachment possible.

(b)  This section does not affect the responsibility of the electric cooperative under Sections 253.0401 and 253.0402.

Sec. 253.0404.  EXTENSION ARMS AND TEMPORARY POLE ATTACHMENTS. (a) A broadband provider may use extension arms and temporary attachments pending the completion of make-ready activities if use of extension arms and temporary attachments complies with the National Electrical Safety Code or other applicable safety codes.

(b)  An electric cooperative may require a broadband provider to convert a temporary attachment to a permanent attachment not later than the 60th day after the date of the completion of make-ready activities and may require the provider to comply with the National Electrical Safety Code or other applicable safety codes.

Sec. 253.0405.  POLE ATTACHMENT SPECIFICATIONS. (a) A broadband provider may not be required to meet pole attachment specifications that exceed the specifications in the National Electrical Safety Code, applicable fire safety codes, and any building code or similar code of general applicability for the protection of public health, safety, or welfare a political subdivision adopted before the provider submitted an application to the cooperative.

(b)  This section may not be construed to expand the power of any local government jurisdiction.

Sec. 253.0406.  OVERLASHING. (a) A broadband provider with an existing pole attachment may not be required to obtain advance approval from an electric cooperative to overlash or permit a third party to overlash the provider's existing wires.

(b)  An electric cooperative may require a broadband provider to provide notice before and after overlashing. The cooperative may not require notice before overlashing to be provided before the 15th day before the date of the overlashing activities.

(c)  An electric cooperative may require a broadband provider to modify an overlashing proposal to address specific and identified capacity, safety, reliability, or engineering issues. The cooperative may not prohibit the provider from overlashing because of a preexisting violation caused by another person.

(d)  An electric cooperative may require a broadband provider to remedy damage or code violations caused by overlashing if the electric cooperative:

(1)  inspects the overlash not later than the 90th day after the date the cooperative receives notice that an overlash is complete; and

(2)  informs the provider of the damage or violation not later than the 14th day after the date of the inspection.

Sec. 253.0407.  USE OF POLE ATTACHMENTS FOR MULTIPLE SERVICES. A broadband provider that attaches a pole attachment under this chapter may use the attachment for any service delivered over the provider's facilities, including cable service.

SUBCHAPTER F. POLE ATTACHMENT CONTRACTS

Sec. 253.0501.  POLE ATTACHMENT CONTRACTS WITH BROADBAND PROVIDERS. (a) A broadband provider and an electric cooperative shall establish the rates, terms, and conditions for pole attachments by a written pole attachment contract executed by both parties. The rates, terms, and conditions for attachments by a broadband provider on an electric cooperative's poles must be just, reasonable, and nondiscriminatory.

(b)  In determining whether rates, terms, and conditions are just and reasonable, the following factors must be considered:

(1)  the interests of and benefits to the consumers and potential consumers of the electric cooperative's services;

(2)  the interests of and benefits to the subscribers and potential subscribers to broadband services offered through the pole attachments;

(3)  the interests of and benefits to third parties from the availability of broadband services offered through the pole attachments;

(4)  compliance with the specifications in the National Electrical Safety Code, applicable fire safety codes, and any building code or similar code of general applicability for the protection of public health, safety, or welfare applicable to the pole attachments; and

(5)  the maintenance and reliability of both electric distribution and broadband services.

(c)  A broadband provider and an electric cooperative shall negotiate a pole attachment contract and any amendment, modification, or renewal thereof in good faith.

(d)  A request to negotiate a new pole attachment contract or to amend, modify, or renew a contract pertaining to pole attachments by a broadband provider or an electric cooperative must be made in writing.

Sec. 253.0502.  CONTRACT NEGOTIATIONS AND MEDIATION. (a) If a broadband provider and an electric cooperative are unable to agree to a new pole attachment contract before the expiration date of an existing contract, the rates, terms, and conditions of the existing contract and the terms and conditions of the electric cooperative's application and permitting processes remain in force:

(1)  during the 90-day negotiation period described by Subsection (b) and during the period of any agreed extension;

(2)  during the 60-day mediation period described by Subsection (b) and during the period of any agreed extension; and

(3)  pending final disposition of any litigation commenced under Subsection (c).

(b)  If a broadband provider and an electric cooperative are unable to agree to a new pole attachment contract before the 91st day after the expiration date of an existing contract, and are unable to agree to an extension of the negotiation period for a certain number of days, the broadband provider and electric cooperative shall attempt to resolve any disagreement over the rates, terms, or conditions by submitting the contract negotiations to a mediation process. The mediation process may not extend later than the 60th day after the end of the initial 90-day negotiation period and any agreed extension of that period unless the broadband provider and electric cooperative agree to an extension of the mediation period for a certain number of days. The mediation process must be conducted in a county in which the electric cooperative has distribution poles. The broadband provider and electric cooperative must share equally the expenses for the mediator.

(c)  If the mediation process under Subsection (b) does not resolve the disagreement over the rates, terms, or conditions of a new pole attachment agreement, or if a dispute arises under the terms of an existing agreement or the requirements of this chapter, the broadband provider or electric cooperative may file suit in a district court to resolve the disagreement or dispute, including to enforce the terms of the agreement or of this chapter.

SECTION 3.  This Act takes effect September 1, 2021.