

AN ACT

relating to middle mile broadband service provided by an electric utility.

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

SECTION 1. Chapter 43, Utilities Code, is amended to read as follows:

CHAPTER 43. PROVISION [USE] OF MIDDLE MILE [ELECTRIC DELIVERY SYSTEM FOR ACCESS TO] BROADBAND SERVICE BY ELECTRIC UTILITIES [AND OTHER ENHANCED SERVICES, INCLUDING COMMUNICATIONS]

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 43.001. LEGISLATIVE FINDINGS. (a) The legislature finds that access to quality, high-speed broadband Internet service is important to this state, is a necessary prerequisite for enabling economic development and improving education, health care, public safety, and government services in this state, and provides other benefits to its citizens [~~broadband over power lines, also known 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 service and reliability for electric customers~~].

(b) [~~The legislature finds that access to quality, high speed broadband services is important to this state. BPL deployment in Texas has the potential to extend broadband service~~

1 ~~to customers where broadband access is currently not available and~~
2 ~~may provide an additional option for existing broadband consumers~~
3 ~~in Texas, resulting in a more competitive market for broadband~~
4 ~~services.]~~ The legislature [~~further~~] finds that broadband [BPL]
5 development in unserved and underserved areas of Texas can be
6 facilitated by [~~is fully dependent upon~~] the participation of
7 electric utilities in this state that own and operate [~~power lines~~
8 ~~and related~~] facilities that may be useful [~~are necessary~~] for the
9 full deployment of broadband service by Internet service providers
10 throughout this state [~~construction of BPL systems and the~~
11 ~~provision of BPL services~~].

12 (c) The legislature finds that electric utilities have
13 existing infrastructure in place throughout this state and that
14 excess fiber capacity on that infrastructure could be used to
15 provide middle mile broadband service in unserved and underserved
16 areas.

17 (d) The [~~(c) Consistent with the goal of increasing options~~
18 ~~for telecommunications in this state, the~~] legislature finds that
19 it is in the public interest to encourage the deployment of
20 broadband service in unserved and underserved areas [BPL] by
21 permitting electric utilities to own, construct, or operate fiber
22 facilities for the support of electric service and to lease excess
23 fiber capacity for the provision of middle mile broadband service
24 [~~affiliates of the electric utility, or permitting unaffiliated~~
25 ~~entities, to own or operate all or a portion of such BPL systems~~].

26 The purpose of this chapter is to provide the appropriate framework
27 to facilitate the leasing of excess fiber capacity on electric

1 utility facilities [~~support the deployment of BPL~~].

2 (e) [~~(d)~~] The legislature finds that an electric utility
3 may choose to implement middle mile broadband service to lease
4 excess fiber capacity to Internet service providers [BPL] under the
5 procedures set forth in this chapter, but is not required to do so.
6 The electric utility shall have the right to decide, in its sole
7 discretion, whether to implement middle mile broadband service
8 [BPL] and may not be penalized for deciding to implement or not to
9 implement that service [BPL].

10 Sec. 43.002. APPLICABILITY. (a) This chapter applies to an
11 electric utility whether or not the electric utility is offering
12 customer choice under Chapter 39.

13 (b) If there is a conflict between the specific provisions
14 of this chapter and any other provisions of this title, the
15 provisions of this chapter control.

16 (c) Except as otherwise provided by this title, no [No]
17 provision of this title imposes [~~shall impose~~] an obligation on an
18 electric utility to construct or operate facilities to [~~implement~~
19 ~~BPL, to~~] provide middle mile broadband service [~~services~~], or to
20 allow others to install [BPL] facilities or use the electric
21 utility's facilities for the provision of broadband service
22 [~~services~~].

23 Sec. 43.003. DEFINITIONS. In this chapter:

24 (1) "Broadband service" means retail Internet service
25 provided by a commercial Internet service provider with the
26 capability of providing a download speed of at least 25 megabits per
27 second and an upload speed of at least 3 megabits per second ["BPL,"

1 ~~"broadband over power lines," and "BPL services" mean the provision~~
2 ~~of broadband services over electric power lines and related~~
3 ~~facilities, whether above ground or in underground conduit].~~

4 (2) ~~"Internet ["BPL access" means the ability to~~
5 ~~access broadband services via a BPL operator or BPL Internet~~
6 ~~service provider.~~

7 ~~[(3) "BPL operator" means an entity that owns or~~
8 ~~operates a BPL system on the electric power lines and related~~
9 ~~facilities of an electric utility.~~

10 ~~[(4) "BPL Internet] service provider" means a~~
11 ~~commercial [and "BPL ISP" mean an] entity that provides Internet~~
12 ~~services [to others on a wholesale basis or] to end-use customers on~~
13 ~~a retail basis.~~

14 (3) ~~[(5) "BPL system" means the materials, equipment,~~
15 ~~and other facilities installed on electric utility property to~~
16 ~~facilitate the provision of BPL services.~~

17 ~~[(6) "BPL electric utility applications" means~~
18 ~~services and technologies that are used and useful and designed to~~
19 ~~improve the operational performance and service reliability of an~~
20 ~~electric utility including, but not limited to, automated meter~~
21 ~~reading, real time system monitoring and meter control, remote~~
22 ~~service control, outage detection and restoration, predictive~~
23 ~~maintenance and diagnostics, and monitoring and enhancement of~~
24 ~~power quality.~~

25 ~~[(7)] "Electric delivery system" means the power lines~~
26 ~~and related transmission and distribution facilities constructed~~
27 ~~[used by an electric utility] to deliver electric energy to the~~

1 delivery system or other facilities and provide access points to
2 allow connection between the electric utility's electric delivery
3 system or other facilities and the systems of those Internet
4 service providers. The electric utility shall provide access to
5 excess fiber capacity only on reasonable and nondiscriminatory
6 terms and conditions that assure the electric utility the
7 unimpaired ability to comply with and enforce all applicable
8 federal and state requirements regarding the safety, reliability,
9 and security of the electric delivery system. [~~Nothing in this~~
10 ~~chapter shall prohibit an electric utility from providing~~
11 ~~construction or maintenance services to a BPL operator or BPL ISP~~
12 ~~provided that the costs of these services are properly accounted~~
13 ~~for between the electric utility and the BPL operator or BPL ISP.]~~

14 Sec. 43.052. [~~OWNERSHIP AND OPERATION OF BPL SYSTEM. (a)~~
15 ~~An electric utility may elect to:~~

16 [~~(1) allow an affiliate to own or operate a BPL system~~
17 ~~on the utility's electric delivery system;~~

18 [~~(2) allow an unaffiliated entity to own or operate a~~
19 ~~BPL system on the electric utility's electric delivery system; or~~

20 [~~(3) allow an affiliate or unaffiliated entity to~~
21 ~~provide Internet service over a BPL system.~~

22 [~~(b) The BPL operator and the electric utility shall~~
23 ~~determine what BPL Internet service providers may have access to~~
24 ~~broadband capacity on the BPL system.~~

25 [Sec. 43.053. FEES AND] CHARGES. [~~(a)~~] An electric utility
26 that owns and operates facilities to provide middle mile broadband
27 service may lease excess fiber capacity on the electric utility's

1 electric delivery system or other facilities to an Internet service
2 provider on a wholesale basis and [~~allows an affiliate or an~~
3 ~~unaffiliated entity to own a BPL system on the electric utility's~~
4 ~~electric delivery system~~] shall charge the Internet service
5 provider [~~owner of the BPL system~~] for the use of the electric
6 utility's [~~electric delivery~~] system for all costs associated with
7 that use. The rates, terms, and conditions of a lease of excess
8 fiber capacity described by this section must be nondiscriminatory.
9 An electric utility may not lease excess fiber capacity to provide
10 middle mile broadband service to an affiliated Internet service
11 provider.

12 [~~(b) An electric utility may pay a BPL owner, a BPL~~
13 ~~operator, or a BPL ISP for the use of the BPL system required to~~
14 ~~operate BPL utility applications.~~

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

21 [~~(d) Notwithstanding Subsections (a)-(c):~~

22 [~~(1) an electric utility may not charge an affiliate~~
23 ~~under this section an amount less than the electric utility would~~
24 ~~charge an unaffiliated entity for the same item or class of items,~~

25 [~~(2) an electric utility may not pay an affiliate~~
26 ~~under this section an amount more than the affiliate would charge an~~
27 ~~unaffiliated entity for the same item or class of items, and~~

1 ~~[(3) an electric utility or an affiliate of an~~
2 ~~electric utility may not discriminate against a retail electric~~
3 ~~provider that is not affiliated with the utility in the terms or~~
4 ~~availability of BPL services.]~~

5 Sec. 43.053 [~~43.054~~]. NO ADDITIONAL EASEMENTS OR
6 CONSIDERATION REQUIRED. (a) Because broadband [~~BPL~~] systems
7 provide benefits to electric delivery systems, the installation of
8 facilities to provide middle mile broadband service [~~a BPL system~~]
9 on an electric delivery system or other facilities does [~~shall~~] not
10 require the electric utility [~~or the owner of the BPL system~~] or an
11 entity defined in Section 11.003(9) to obtain, modify, or expand
12 easements or other rights-of-way for the middle mile broadband
13 service [~~BPL system~~] or to give additional consideration as a
14 result of the installation or the operation of middle mile
15 broadband service on the electric delivery system or other
16 facilities of the electric utility or entity, unless the property
17 owner protests the use as provided by this section [~~a BPL system~~].

18 (b) Not later than the 60th day before the date an electric
19 utility begins construction in an easement or other property right
20 of fiber optic cables and other facilities for providing middle
21 mile broadband service, the electric utility shall provide written
22 notice to the owners of the affected property of the electric
23 utility's intent to use the easement or other property right for
24 middle mile broadband service.

25 (c) Notice under this section must:

26 (1) be sent by first class mail to the last known
27 address of each person in whose name the affected property is listed

1 on the most recent tax roll of each county authorized to levy
2 property taxes against the property; and

3 (2) state whether any new fiber optic cables used for
4 middle mile broadband service will be located above or below ground
5 in the easement or other property right.

6 (d) Not later than the 60th day after the date an electric
7 utility mails notice under this section, a property owner entitled
8 to the notice may submit to the electric utility a written protest
9 of the intended use of the easement or other property right for
10 middle mile broadband service. An electric utility that receives a
11 timely written protest may not use the easement or other property
12 right for middle mile broadband service unless the protestor later
13 agrees in writing to that use or that use is authorized by law. If a
14 property owner fails to submit a timely written protest, an
15 electric utility may proceed under Subsection (a) without modifying
16 or expanding the easement for that property owner.

17 (e) An electric utility that receives a timely written
18 protest under Subsection (d) regarding proposed middle mile
19 broadband service may cancel the project at any time.

20 (f) The requirements of this section do not apply to an
21 existing easement that permits the provision of third-party middle
22 mile broadband service on an electric delivery system. [~~For~~
23 purposes of this section, installation of a BPL system shall be
24 deemed to be consistent with installation of an electric delivery
25 system.]

26 Sec. 43.054 [~~43.055~~]. RELIABILITY OF ELECTRIC SYSTEMS
27 MAINTAINED. An electric utility that installs [~~allows the~~

1 ~~installation]~~ and operates facilities to provide middle mile
2 broadband service [~~operation of a BPL system on its electric~~
3 ~~delivery system]~~ shall employ all reasonable measures to ensure
4 that the operation of the middle mile broadband service [~~BPL~~
5 ~~system]~~ does not interfere with or diminish the reliability of the
6 utility's electric delivery system. If [~~Should~~] a disruption in
7 the provision of electric service occurs [~~occur~~], the electric
8 utility is [~~shall be~~] governed by the terms and conditions of the
9 retail electric delivery service tariff. The electric utility may
10 take all necessary actions regarding its middle mile broadband
11 service and the facilities required in the provision of that
12 service to address circumstances that may pose health, safety,
13 security, or reliability concerns. At all times, the provision of
14 broadband service is [~~services shall be~~] secondary to the reliable
15 provision of electric delivery services. Except as provided by
16 contract or tariff, an electric utility is not liable to any person,
17 including an Internet service provider, for any damages, including
18 direct, indirect, physical, economic, exemplary, or consequential
19 damages, including loss of business, loss of profits or revenue, or
20 loss of production capacity caused by a fluctuation, disruption, or
21 interruption of middle mile broadband service that is caused in
22 whole or in part by:

23 (1) force majeure; or

24 (2) the electric utility's provision of electric
25 delivery services, including actions taken by the electric utility
26 to ensure the reliability and security of the electric delivery
27 system and actions taken in response to address all circumstances

1 that may pose health, safety, security, or reliability concerns.

2 SUBCHAPTER C. IMPLEMENTATION OF MIDDLE MILE BROADBAND SERVICE [~~BPL~~
3 ~~SYSTEM~~] BY ELECTRIC UTILITY

4 Sec. 43.101. PARTICIPATION BY ELECTRIC UTILITY. (a) An
5 electric utility [~~, through an affiliate or through an unaffiliated~~
6 ~~entity,~~] may [~~elect to~~] install and operate facilities to provide
7 middle mile broadband service [~~a BPL system~~] on any part of its
8 electric delivery system or other facilities for Internet service
9 providers but may not construct new electric delivery facilities
10 for the purpose of expanding the electric utility's middle mile
11 broadband service [~~some or all of its electric delivery system in~~
12 ~~any part or all of its certificated service area].~~

13 (b) The installation, operation, and use of middle mile
14 broadband service and the lease of excess fiber capacity by
15 Internet service providers from an electric utility may [~~a BPL~~
16 ~~system and the provision of BPL services shall~~] not be regulated by
17 any state agency, a municipality, or local government other than as
18 provided by [~~for in~~] this chapter.

19 (c) An electric utility that owns and operates middle mile
20 broadband service:

21 (1) may lease excess fiber capacity on the electric
22 utility's electric delivery system or other facilities to an
23 Internet service provider on a wholesale basis; and

24 (2) may not provide Internet service to end-use
25 customers on a retail basis.

26 (d) [~~(c)~~] The commission or a state or local government or a
27 regulatory or quasi-governmental or a quasi-regulatory authority

1 may not:

2 (1) require an electric utility~~[, either through an~~
3 ~~affiliate or an unaffiliated entity,]~~ to install ~~[a BPL system on~~
4 ~~its power lines]~~ or offer middle mile broadband service on the
5 utility's electric delivery system or other facilities ~~[BPL~~
6 ~~services in all or any part of the electric utility's certificated~~
7 ~~service area];~~

8 (2) require an electric utility to allow others to
9 install middle mile broadband service ~~[a BPL system]~~ on the
10 utility's electric delivery system or other facilities ~~[in any part~~
11 ~~or all of the electric utility's certificated service area];~~ or

12 (3) prohibit an electric utility from installing or
13 offering middle mile broadband service on the utility's electric
14 delivery system or other facilities ~~[having an affiliate or~~
15 ~~unaffiliated entity install a BPL system or offering BPL services~~
16 ~~in any part or all of the electric utility's certificated service~~
17 ~~area].~~

18 (e) ~~[(d)]~~ If a municipality or local government is already
19 collecting a charge or fee from the electric utility for the use of
20 the public rights-of-way for the delivery of electricity to retail
21 electric customers, the municipality or local government may not
22 require ~~[is prohibited from requiring]~~ a franchise or an amendment
23 to a franchise or require an additional ~~[from requiring a]~~ charge,
24 fee, or tax from the electric utility ~~[any entity]~~ for use of the
25 public rights-of-way for middle mile broadband service ~~[a BPL~~
26 ~~system].~~

27 (f) If the state or a municipality or local government is

1 not already collecting a charge or fee from the electric utility for
2 the use of the public rights-of-way, the [~~(e) The~~] state or a
3 municipality or local government may impose a charge on the
4 provision of middle mile broadband service [~~BPL services~~], but the
5 charge may not be greater than the lowest charge that the state or
6 municipality imposes on other providers of broadband service
7 [~~services~~] for use of the public rights-of-way in its respective
8 jurisdiction.

9 Sec. 43.102. COMMISSION REVIEW OF UTILITY MIDDLE MILE PLAN.

10 (a) An electric utility that plans a project to deploy middle mile
11 broadband service shall submit to the commission a written plan
12 that includes:

13 (1) the route of the middle mile broadband service
14 infrastructure proposed for the project;

15 (2) the location of the electric utility's
16 infrastructure that will be used in connection with the project;

17 (3) an estimate of potential broadband customers that
18 would be served by the Internet service provider;

19 (4) the capacity, number of fiber strands, and any
20 other facilities of the middle mile broadband service that will be
21 available to lease to Internet service providers;

22 (5) the estimated cost of the project, including
23 engineering costs, construction costs, permitting costs,
24 right-of-way costs, and a reasonable allowance for funds used
25 during construction;

26 (6) the proposed schedule of construction for the
27 project;

1 (7) testimony, exhibits, or other evidence that
2 demonstrates the project will allow for the provision and
3 maintenance of middle mile broadband service; and

4 (8) any other information that the applicant considers
5 relevant or that the commission requires.

6 (b) The commission, after notice and hearing if required by
7 the commission, shall approve the plan if the commission finds that
8 the plan includes all the items required by Subsection (a) and by
9 commission rule.

10 (c) The commission must approve, modify, or reject a plan
11 submitted to the commission under this section not later than the
12 181st day after the date the plan is submitted under Subsection (a).

13 (d) An approved plan may be updated or amended subject to
14 commission approval in accordance with this section.

15 Sec. 43.103 [~~43.102~~]. COST RECOVERY FOR DEPLOYMENT OF
16 MIDDLE MILE BROADBAND FACILITIES [~~BPL AND UTILITY APPLICATIONS~~].

17 (a) Where an electric utility installs facilities used to provide
18 middle mile broadband service [~~permits the installation of a BPL~~
19 ~~system on its electric delivery system~~] under Section 43.051
20 [~~43.052(a)~~], the electric utility's investment in those facilities
21 is [~~that BPL system to directly support the BPL electric utility~~
22 ~~applications and other BPL services consumed by the electric~~
23 ~~utility that are used and useful in providing electric utility~~
24 ~~service shall be~~] eligible for inclusion in the electric utility's
25 invested capital, and any fees or operating expenses that are
26 reasonable and necessary are [~~shall be~~] eligible for inclusion as
27 operating expenses for purposes of any proceeding under Chapter 36.

1 The commission may allow an electric utility to recover investment
2 and associated costs in middle mile broadband service if the plan
3 for the service has been submitted and approved under Section
4 43.102 [~~The invested capital and expenses described in this section~~
5 ~~must be allocated to the customer classes directly receiving the~~
6 ~~services~~].

7 (b) In a [~~any~~] proceeding under Chapter 36, revenue received
8 by an electric utility from an Internet service provider for the use
9 of middle mile broadband service must be applied as a revenue credit
10 to customers in proportion to the customers' funding of the
11 underlying infrastructure [~~just and reasonable charges for the use~~
12 ~~of the electric utility's electric delivery system by a BPL owner or~~
13 ~~operator shall be limited to the usual and customary pole~~
14 ~~attachment charges paid to the electric utility for comparable~~
15 ~~space by cable television operators~~].

16 [~~(c) The revenues of an affiliated BPL operator or an~~
17 ~~affiliated BPL ISP shall not be deemed the revenues of an electric~~
18 ~~utility for purposes of setting rates under Chapter 36.~~]

19 SUBCHAPTER D. MISCELLANEOUS PROVISIONS

20 Sec. 43.151. [~~AFFILIATES OF ELECTRIC UTILITY. (a) Subject~~
21 ~~to the limitations of this chapter, an electric utility may have a~~
22 ~~full or partial ownership interest in a BPL operator or a BPL~~
23 ~~ISP. Whether a BPL operator or a BPL ISP is an affiliate of the~~
24 ~~electric utility shall be determined under Section 11.003(2) or~~
25 ~~Section 11.006.~~

26 [~~(b) Neither a BPL operator nor a BPL ISP shall be~~
27 ~~considered a "competitive affiliate" of an electric utility as that~~

1 ~~term is defined in Section 39.157.~~

2 ~~[Sec. 43.152.] COMPLIANCE WITH FEDERAL AND STATE LAW. An~~
3 ~~electric utility that owns and operates facilities for the~~
4 ~~provision of middle mile broadband service [BPL operators] shall~~
5 ~~comply with all applicable federal and state laws[~~, including those~~~~
6 ~~~~protecting licensed spectrum users from interference by BPL~~~~
7 ~~~~systems. The operator of a radio frequency device shall be~~~~
8 ~~~~required to cease operating the device upon notification by a~~~~
9 ~~~~Federal Communications Commission or Public Utilities Commission~~~~
10 ~~~~representative that the device is causing harmful~~~~
11 ~~~~interference. Operation shall not resume until the condition~~~~
12 ~~~~causing the harmful interference has been corrected].~~~~

13 SECTION 2. Section 33.001(b), Utilities Code, is repealed.

14 SECTION 3. Not later than the 270th day after the effective
15 date of this Act, the Public Utility Commission of Texas shall adopt
16 any rules necessary to implement Chapter 43, Utilities Code, as
17 amended by this Act.

18 SECTION 4. The Public Utility Commission of Texas is
19 required to implement a provision of this Act only if the
20 legislature appropriates money specifically for that purpose. If
21 the legislature does not appropriate money specifically for that
22 purpose, the commission may, but is not required to, implement a
23 provision of this Act using other appropriations that are available
24 for that purpose.

25 SECTION 5. This Act takes effect immediately if it receives
26 a vote of two-thirds of all the members elected to each house, as
27 provided by Section 39, Article III, Texas Constitution. If this

H.B. No. 3853

1 Act does not receive the vote necessary for immediate effect, this

2 Act takes effect September 1, 2021.

President of the Senate

Speaker of the House

I certify that H.B. No. 3853 was passed by the House on April 27, 2021, by the following vote: Yeas 147, Nays 0, 1 present, not voting; and that the House concurred in Senate amendments to H.B. No. 3853 on May 28, 2021, by the following vote: Yeas 145, Nays 0, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 3853 was passed by the Senate, with amendments, on May 22, 2021, by the following vote: Yeas 30, Nays 0.

Secretary of the Senate

APPROVED: _____

Date

Governor