

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS.

Subchapter I. TRANSMISSION AND DISTRIBUTION.

Division 2. Transmission and Distribution Applicable to All Electric Utilities.

§25.218. Middle Mile Broadband Service.

- (a) **Purpose and application.** This section implements Public Utility Regulatory Act (PURA) Chapter 43, permitting an electric utility to implement middle mile broadband service for excess fiber capacity. This section applies to an electric utility, including a transmission and distribution utility, regardless of whether the utility is offering customer choice under PURA Chapter 39.
- (b) **Definitions.** The following terms, when used in this section, have the following meanings unless the context indicates otherwise.
- (1) **Affected property owner** -- an owner of real property that is burdened by an easement or other property right owned or leased by an electric utility that will be affected by the installation or operation of middle mile broadband service on an electric delivery system or other facilities of the electric utility. A state or local government body that owns a public right of way and a property owner whose real property is burdened by an existing easement or other property right that permits the provision of third-party middle mile broadband service on an electric utility delivery system are not affected property owners.
 - (2) **Affiliated internet service provider** -- an internet service provider that is an affiliate of the electric utility that provides or intends to provide a plan for middle mile broadband service under this section.
 - (3) **Broadband service** -- retail internet service provided by a commercial internet service provider with the capability of providing a download speed of at least 25 megabits per second and an upload speed of at least 3 megabits per second.
 - (4) **Electric delivery system** -- the power lines and related transmission and distribution facilities constructed to deliver electric energy to the electric utility's customers.
 - (5) **Excess fiber capacity** -- fiber capacity neither utilized nor reserved for current or planned electric utility operations.
 - (6) **Internet service provider** -- a commercial entity that provides internet services to end-user customers on a retail basis.
 - (7) **Middle mile broadband service** -- the provision of excess fiber capacity on an electric utility's electric delivery system or other facilities to an internet service provider to provide broadband service. The term does not include provision of internet service to end-use customers on a retail basis.
 - (8) **Underserved area** -- means one or more census blocks that are not an unserved area and in which 80 percent or more of end-user addresses in each census block either lack access to broadband service with a download speed not less than 100 megabits per second and an upload speed not less than 20 megabits per second, or lack access to reliable broadband service with those speeds as determined using Federal Communications Commission mapping criteria, if available.
 - (9) **Unserved area** -- means one or more census blocks, in which 80 percent or more of the end-user addresses in each census block either have no access to broadband service, or lack access to reliable broadband service as determined using Federal Communications Commission mapping criteria, if available.
- (c) **Authorization for middle mile broadband service.**
- (1) An electric utility may own, construct, maintain, and operate fiber optic cables and other facilities for providing middle mile broadband service to an internet service provider for the purpose of providing broadband service in unserved and underserved areas consistent with the requirements of this section. The electric utility has the right to decide, in its sole discretion, whether to implement middle mile broadband service and may not be penalized for deciding to implement or not to implement that service.
 - (2) An electric utility that elects to provide middle mile broadband service must determine on a nondiscriminatory basis which internet service providers may access excess fiber

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- capacity on the electric utility's electric delivery system or other facilities and provide access points to allow connection between the electric utility's electric delivery system or other facilities and the systems of those internet service providers. An electric utility is prohibited from leasing excess fiber capacity to provide middle mile broadband service to an affiliated internet service provider.
- (3) The electric utility must provide access to excess fiber capacity only on reasonable and nondiscriminatory terms and conditions that assure the electric utility the unimpaired ability to comply with and enforce all applicable federal and state requirements regarding the safety, reliability, and security of the electric delivery system.
- (4) Nothing in this section is intended to restrict an electric utility from owning, constructing, maintaining, or operating fiber optic cables or a broadband system for the electric utility's own use to support the operation of the electric utility's electric delivery system or for other lawful purposes.
- (d) **Charges.** An electric utility that owns and operates facilities to provide middle mile broadband service may lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an internet service provider on a wholesale basis and must charge the internet service provider for the use of the electric utility's system for all costs directly attributable to providing middle mile broadband service. The rates, terms, and conditions of a lease of excess fiber capacity described by this section must be nondiscriminatory. An electric utility may not lease excess fiber capacity to provide middle mile broadband service to an affiliated internet service provider.
- (e) **Participation by electric utility.**
- (1) An electric utility may install and operate facilities to provide middle mile broadband service on any part of its electric delivery system or other facilities for internet service providers but may not construct new electric delivery facilities for the purpose of expanding the electric utility's middle mile broadband service.
- (2) An electric utility that owns and operates middle mile broadband service:
- (A) may lease excess fiber capacity on the electric utility's electric delivery system or other facilities to an internet service provider on a wholesale basis; and
- (B) may not provide internet service to end-use customers on a retail basis.
- (f) **Commission review of electric utility middle mile broadband service plan.**
- (1) **Filing requirements.** An electric utility that plans to deploy middle mile broadband service must submit to the commission a written plan that includes:
- (A) a demonstration that the middle mile broadband service will be used only for unserved and underserved areas based on a broadband availability map developed by the Broadband Development Office or Federal Communications Commission, to the extent that such a broadband availability map is available, accurate, and developed using criteria reasonably consistent with this section; in the absence of an appropriate map, an electric utility may demonstrate that an area is unserved or underserved using other available and necessary information;
- (B) a sworn statement by a cybersecurity expert attesting that the electric utility's cybersecurity has been properly addressed for implementing and providing middle mile broadband service, a copy of the cybersecurity expert's resume or curriculum vitae, and a description of the expert's cybersecurity expertise;
- (C) the route of the middle mile broadband service infrastructure proposed for the project;
- (D) the location of the electric utility's infrastructure that will be used in connection with the project;

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- (E) an estimate of potential unserved or underserved broadband customers that would be served by the internet service provider;
- (F) the capacity, number of fiber strands, and any other facilities of the middle mile broadband service that will be available to lease to internet service providers;
- (G) the estimated cost of the project, including an itemization of engineering costs, construction costs, permitting costs, right-of-way costs, a reasonable allowance for funds used during construction, and all other costs associated with the lease and use of the electric utility's system for middle mile broadband service by internet service providers;
- (H) the proposed schedule of construction for the project;
- (I) a copy of the lease with the internet service provider for middle mile broadband service and a statement attesting that the lease is in compliance with subsections (c)(2) and (3), and subsection (d) of this section;
- (J) a copy of the final order and the docket number for the electric utility's last comprehensive base-rate case proceeding;
- (K) a disclosure of all state and federal funds, including but not limited to, subsidies, grants, and tax benefits, credits, or deductions, utilized by the electric utility and internet service provider in association with the provision of middle mile broadband service;
- (L) a demonstration that the revenues received from the provision of middle mile broadband service under the plan offset all costs directly attributable to the middle mile broadband service, including but not limited to, construction, maintenance, operations, taxes, other costs, and return;
- (M) testimony, exhibits, and other evidence that demonstrate the project will allow for the provision and maintenance of middle mile broadband service to unserved and underserved areas with a sworn statement attesting compliance with subsection (e) of this section;
- (N) unless otherwise specified, testimony, exhibits, or other evidence that fully support the information required by subparagraphs (A)-(M) of this paragraph; and
- (O) any other information that the applicant considers relevant.

(2) **Notice and intervention deadline.** On or before the day after an electric utility files its plan, the electric utility must provide notice in accordance with this paragraph. The notice must include the docket number assigned to the electric utility's filed written plan. Within 10 days of the date service of notice is completed, an electric utility must file, in the docket assigned to its written plan, proof of notice to the persons or entities specified under subparagraphs (A) and (B) of this paragraph and a list of such parties by name specifying whether the person or entity qualifies as an affected property owner under subsection (b)(1) of this section. Failure by an electric utility to provide timely notice, as determined by the presiding officer, will toll the intervention deadline under subparagraph (E) of this paragraph until the date timely notice is issued. Affected property owners automatically qualify as intervenors for proceedings under this section.

- (A) Notice to affected property owners under this section must:
 - (i) Be sent by first class mail to the last known address of each affected property owner whose property is listed on the most recent tax roll of each county authorized to levy property taxes against the property and, if available, by electronic service.
 - (ii) Conspicuously state in plain language:
 - (I) that the electric utility has determined the recipient is an affected property owner as defined under 16 Texas Administrative Code §25.218(b)(1) and that the mailing is a notice of intent to use the utility's easement for middle mile broadband implementation;

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- (II) the recipient's status as an affected property owner means the utility's easement or other property right planned by the utility for the provision of third-party middle mile broadband service does not include language permitting middle mile broadband service;
 - (III) that under PURA Chapter 43 and 16 Texas Administrative Code §25.218, a utility may implement middle mile broadband service without modifying or expanding the easement if the affected property owner does not submit a timely written protest;
 - (IV) that a written protest may be submitted electronically in the docket for the middle mile broadband proceeding using the interchange on the commission's website or mailed with reference to the docket to Commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326;
 - (V) the project number for the filing of notice of written plans and the docket number for utility's specific middle mile broadband plan;
 - (VI) that a written protest can be filed for any reason;
 - (VII) that a written protest is considered timely if submitted not later than the 60th day from the postmarked date of the notice;
 - (VIII) that a submitted written protest can be retracted at any time by the recipient through a mailed or electronic filing with the commission in the specified docket, or resolved by written agreement with the electric utility;
 - (IX) that other legal authorization could override the written protest;
 - (X) an estimated schedule for construction with a statement that the schedule is subject to change;
 - (XI) the recipient qualifies as an intervenor and may seek to intervene in the docket, and that intervention is not the same as a written protest;
 - (XII) specify the intervention deadline in accordance with subparagraph (E) of this paragraph; and
 - (XIII) a link or website address for the commission website for public participation.
- (iii) State whether any new fiber optic cables used for middle mile broadband service will be located above or below ground in the easement or other property right.
- (B) Notice to the following persons or entities must be sent by first class mail to the last known address of the person or entity or by electronic service:
- (i) all parties in the electric utility's last comprehensive base-rate proceeding;
 - (ii) property owners whose property is listed on the most recent tax roll of each county authorized to levy property taxes against the property and whose real property is burdened by an existing easement, right-of-way or other property right that permits the provision of third-party middle mile broadband service on an electric utility delivery system;
 - (iii) the Office of Public Utility Counsel; and

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- (iv) municipalities crossed by or within five miles of the planned project and counties that are crossed by the planned project.
- (C) Notice to the parties described under subparagraph (B) of this paragraph must conspicuously state in plain language:
 - (i) that the electric utility has determined the recipient is not an affected property owner as defined under Chapter 16, Texas Administrative Code §25.218(b)(1), that the mailing is a notice of intent to use the utility's easement for implementation of middle mile broadband service, and that the electric utility's determination may be challenged in the docket listed in the notice if the person or entity files a motion to intervene in the proceeding and that motion to intervene is granted by the presiding officer;
 - (ii) the intervention deadline in accordance with subparagraph (E) of this paragraph; and
 - (iii) a link or website address for the commission website for public participation.
- (D) The electric utility must file a notice of written middle mile broadband plan proceeding and must include in the notice the docket number for the proceeding. The commission will designate a project number for the filing of notice of plans under this section. This filing serves as notice to all other interested parties.
- (E) The intervention deadline is 45 days from the date the utility files its notice of written middle mile broadband plan proceeding in accordance with subparagraph (D) of this paragraph. The lapse of the intervention deadline does not prevent an affected property owner from submitting a written protest under subparagraph (F) of this paragraph.
- (F) Protest by affected property owner.
 - (i) Not later than the 60th day after the postmarked date an electric utility mails notice to affected property owners in accordance with subparagraph (A) of this paragraph, an affected property owner may submit to the electric utility a written protest of the intended use of the easement or other property right for middle mile broadband service by filing the protest with the commission in the docket assigned to the middle mile broadband plan proceeding. For purposes of this section, an electric utility is deemed to have received a written protest filed with the commission in the appropriate docket number.
 - (ii) If an electric utility receives a written protest directly from an affected property owner, the electric utility must file the protest with the commission within three working days of receipt.
 - (iii) An electric utility that receives a timely written protest from an affected property owner must not use the easement or other property right for middle mile broadband service unless that use is authorized by law or the protester later retracts its protest or agrees in writing to that use.
 - (iv) An electric utility that receives a timely written protest from an affected property owner regarding the proposed middle mile broadband plan may cancel the project at any time.
 - (v) An electric utility that receives any timely written protests must file an update with the commission that any applicable protests have been resolved in accordance with clause (iii) of this subparagraph before implementing its middle mile broadband plan.
 - (vi) If an affected property owner fails to submit a timely written protest, an electric utility may proceed with a commission-approved plan to provide middle mile broadband service without modifying or expanding the easement for the property owner.

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(3) Commission processing of electric utility's plan.

(A) The commission must approve, modify, or reject an electric utility's middle mile broadband plan submitted to the commission under this section not later than the 181st day after the date all information necessary for the plan to be deemed materially sufficient was filed.

(B) Following the filing of a plan by an electric utility under this section, the commission may review the electric utility's plan for middle mile broadband service under subsection (f) of this section or refer the application to the State Office of Administrative Hearings (SOAH). Upon referral to SOAH:

(i) The commission delegates authority to the presiding officer to deem plans sufficient, approve plans, and modify approved plans filed under this subsection through a notice of approval under §22.35(b)(1) (relating to Informal Disposition) of this title.

(ii) The presiding officer will review for sufficiency the electric utility's plan for middle mile broadband service under paragraph (1) of this subsection and notice to potential intervenors under paragraph (2) of this subsection.

(iii) The presiding officer must establish a procedural schedule that will enable the commission to, approve, modify, or reject the plan not later than the 181st day after the date all information necessary for the plan to be deemed materially sufficient was filed.

(C) A motion to find a plan filing materially deficient must be filed no later than seven days after the intervention deadline. The motion must specify the nature of the deficiency, the relevant portions of the plan, and cite the particular requirement under paragraph (1) of this subsection with which the plan is alleged not to comply. The electric utility's response to a motion to find a plan materially deficient must be filed no later than five working days after such motion is received.

(D) An approved plan may be updated or amended subject to commission approval in accordance with this subsection.

(g) Cost recovery for deployment of middle mile broadband facilities.

(1) An electric utility's investment in facilities installed by that electric utility to provide middle mile broadband service under a plan approved by the commission under this section is eligible for inclusion in the electric utility's invested capital.

(2) In a proceeding under PURA Chapter 36, revenue received by an electric utility from an internet service provider for the use of middle mile broadband service must be applied as a revenue credit to customers in proportion to the customers' funding of the underlying infrastructure. For purposes of this paragraph, the term 'customers' refers to 'rate classes.'

(3) An electric utility submitting a plan must ensure that revenues received by the electric utility from the provision of middle mile broadband service offset all costs directly attributable to the middle mile broadband service, including but not limited to, construction, maintenance, operations, taxes, other costs, and return.

(4) If revenues received by an electric utility from an internet service provider for the use of middle mile broadband service are insufficient to offset the costs under paragraph (3) of this subsection, the utility must ensure that its regulated rates prevent ratepayer cross-subsidization.

(h) Reliability of electric systems maintained.

(1) An electric utility that installs and operates facilities to provide middle mile broadband service must employ all reasonable measures to ensure that the operation of the middle mile broadband service does not interfere with or diminish the reliability of the electric utility's electric delivery system.

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- (2) If a disruption in the provision of electric service occurs, the electric utility is governed by the terms and conditions of the retail electric delivery service tariff.
- (3) The electric utility may take all necessary actions regarding its middle mile broadband service and the facilities required in the provision of that service to address circumstances that may pose health, safety, security, or reliability concerns.
- (4) At all times, the provision of broadband service is secondary to the reliable provision of electric delivery services.
- (5) Except as provided by contract or tariff, an electric utility is not liable to any person, including an internet service provider, for any damages, including direct, indirect, physical, economic, exemplary, 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:
 - (A) force majeure; or
 - (B) the electric utility's provision of electric delivery services, including actions taken by the electric utility to ensure the reliability and security of the electric delivery system and actions taken in response to address all circumstances that may pose health, safety, security, or reliability concerns.