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3 LIVINGSTON SUBSTITUTE FOR HB400, AS ENGROSSED
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8 SYNOPSIS: This bill would authorize the placement,
9 construction, installation, operation, and use of
10 broadband and other advanced communication
11 capabilities and related facilities within electric
12 easements by electric providers.

13 This bill would authorize electric providers
14 to engage in, and would permit electric providers
15 to authorize others to engage in, operating
16 broadband systems or providing broadband services
17 through advanced communications capabilities within
18 electric easements.

19 This bill would grant the right to electric
20 providers to condemn easements and rights-of-way
21 for advanced communications capabilities.

22 This bill would also permit consents through
23 service agreements, licenses, leases, and
24 membership agreements to place, construct, install,
25 operate, and use advanced communication
26 capabilities within an electric easement.

1 This bill would provide for the rates and
2 the terms and conditions of access for certain pole
3 attachments.

4 This bill would provide for the allocation
5 and accounting of certain costs associated with the
6 provision of nonutility support services.

7
8 A BILL
9 TO BE ENTITLED
10 AN ACT

11
12 Relating to broadband services; to authorize the
13 placement, construction, installation, operation, and use of
14 broadband and other advanced communication capabilities and
15 related facilities within electric easements by electric
16 providers; to authorize electric providers to engage in, and
17 to permit electric providers to authorize others to engage in,
18 operating broadband systems or providing broadband services
19 through advanced communications capabilities within electric
20 easements; to grant the right to electric providers to condemn
21 easements and rights-of-way for advanced communications
22 capabilities; to provide for the rates and the terms and
23 conditions of access for certain pole attachments; to provide
24 for the allocation and accounting of certain costs associated
25 with the provision of nonutility support services; and to
26 permit consents through service agreements, licenses, leases,
27 and membership agreements to place, construct, install,

1 operate, and use advanced communication capabilities within an
2 electric easement.

3 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

4 Section 1. Chapter 16 is added to Title 37 of the
5 Code of Alabama 1975, to read as follows:

6 §37-16-1.

7 This chapter shall be known and may be cited as the
8 Broadband Using Electric Easements Accessibility Act.

9 §37-16-2.

10 (a) The Legislature finds and declares the
11 following:

12 (1) More advanced communication capabilities,
13 broadband facilities, and services are needed in many rural
14 and underserved areas of the state.

15 (2) Electric providers in those rural and
16 underserved areas are capable of providing infrastructure for
17 such advanced communications capabilities and providing,
18 directly or indirectly, broadband facilities or services.

19 (3) The investment in and development of advanced
20 communications capabilities for providing broadband facilities
21 and services are necessary to better serve the public in those
22 rural and underserved areas.

23 (4) The continued lack of advanced communication
24 capabilities, broadband facilities, and services in rural and
25 underserved areas deprives citizens residing in these areas
26 from access to opportunities such that the state needs to take
27 action to correct and eliminate these discrepancies.

1 (5) It is the public policy of this state to
2 encourage and facilitate the development and investment in
3 advanced communications capabilities and broadband facilities
4 and services in those rural and underserved areas in the
5 state, as this development is vital and necessary to induce,
6 create, and promote industrial and economic development in
7 those rural and underserved areas of the state and to create
8 job opportunities, enhance health care, and enhance
9 educational advancement in those areas.

10 (6) It is the public policy of the state to promote
11 the authorization of advanced communications capabilities to
12 be installed by electric providers within existing easements
13 and other rights-of-way.

14 (7) It is the intent of this chapter to authorize
15 electric providers to engage in arrangements, contracts, and
16 other collaborative activities with public or private persons
17 to facilitate the investment in or development of advanced
18 communications capabilities and broadband services and
19 broadband systems in this state.

20 (8) The limited grant of authorization to electric
21 providers in this chapter is reasonably related to the
22 proposed legislative objective of providing advanced
23 communications capabilities, broadband facilities, and
24 services in rural, underserved, and unserved areas.

25 (b) Except as provided in subsection (a), nothing
26 contained in this chapter is intended to exempt, except, or
27 exclude providers that engage in the provision of broadband

1 facilities or services through advanced communications
2 capabilities from complying with any provisions of federal law
3 which may at any time apply to the electric providers or their
4 broadband facilities or services.

5 §37-16-3.

6 As used in this chapter, the following terms shall
7 have the following meanings:

8 (1) ADVANCED COMMUNICATIONS CAPABILITIES. The
9 communications capabilities defined from time to time as
10 advanced telecommunications capabilities by the Federal
11 Communications Commission (FCC) through regulations, statutes,
12 or other written guidance or orders. The term also includes
13 broadband systems and broadband services.

14 (2) BROADBAND AFFILIATE. A person that is at least
15 10 percent owned by an electric provider, controlled by way of
16 ownership interests therein, directly or indirectly, by the
17 electric provider, or under common control with the electric
18 provider, and which is formed to provide, among other
19 services, utility support services or nonutility support
20 services.

21 (3) BROADBAND OPERATOR. A person that owns or
22 operates a broadband system within an electric easement,
23 including the electric provider if the electric provider is
24 operating the broadband system and including a person that
25 provides broadband services on a wholesale basis to another
26 broadband operator or broadband service provider.

1 (4) BROADBAND SERVICE PROVIDER. A person that
2 provides broadband services on a retail basis to end-use
3 customers.

4 (5) BROADBAND SERVICES. The provision of
5 connectivity to a high-speed, high-capacity transmission
6 medium or to a technology supporting, in the
7 provider-to-consumer (downstream) direction, a speed, in
8 technical terms ("bandwidth"), with minimum download speeds of
9 25 megabits per second and minimum upload speeds of 25
10 megabits per second for either of the following:

11 a. To provide access to the Internet.

12 b. To provide computer processing, information
13 sharing, information storage, information content, or protocol
14 conversion, including any service application or information
15 service over the electric delivery system of an electric
16 provider, and includes any advanced communications
17 capabilities that enable users to originate, send, and receive
18 high-quality voice, data, graphics, video programming, and
19 video communications using any technology including a
20 broadband system.

21 (6) BROADBAND SYSTEM. Any of the following that may
22 be used to facilitate, directly or indirectly, the provision
23 or transmission of broadband services, whether utility support
24 services or nonutility support services, or both: Materials;
25 wires; cables, including fiber optic and copper cables,
26 whether such cables are dark or lit, and whether such cables
27 are in use or dormant; conduits; antennas; equipment;

1 fixtures; switching multiplexers; poles; routers; switches;
2 servers; appurtenances; facilities; and ancillary or auxiliary
3 equipment.

4 (7) COMMISSION. The Alabama Public Service
5 Commission.

6 (8) ELECTRIC DELIVERY SYSTEM. Any product, fixture,
7 equipment, or technology, or part thereof, necessary or useful
8 in supporting the generation, transmission, transformation, or
9 distribution or delivery of electricity, including, but not
10 limited to, generators, electric transmission facilities and
11 lines, distribution facilities and lines, wires, cables, fiber
12 optic cables, poles, transformers, antennas, anchors, guys,
13 grounding systems, communications systems, insulators,
14 conduits, and any other related or ancillary facilities or
15 materials used by an electric provider to generate, transmit,
16 transform, deliver, or distribute electric energy, as such
17 lines and facilities may exist from time to time and whether
18 such lines or facilities are aboveground or underground.

19 (9) ELECTRIC EASEMENT. Any recorded or unrecorded
20 easement or right-of-way in favor of an electric provider that
21 permits the siting and use of an electric delivery system on,
22 over, under, or across the land of a property owner,
23 regardless of whether the easement or right-of-way is for the
24 exclusive benefit of the electric provider or for use in
25 connection with the provision of other services, and
26 regardless of whether the electric provider provides the other
27 services. Electric easements include, but are not limited to,

1 easements obtained under a law of this state, or by any of the
2 following methods: Negotiation, condemnation, prescription, or
3 grant, including, but not limited to, a grant pursuant to a
4 bylaw provision, service agreement, or membership agreement,
5 rate schedule, tariff, rule, regulation, practice, act,
6 requirement, or privilege.

7 (10) ELECTRIC PROVIDER. A utility, as defined under
8 paragraph a. of subdivision (7) of Section 37-4-1; or a
9 cooperative nonprofit, membership organization formed,
10 incorporated, or reincorporated under Chapter 6 of Title 37,
11 that produces, generates, transmits, delivers, distributes, or
12 furnishes electricity; or any board, authority, or public
13 corporation incorporated or organized under Article 9, Article
14 15, or Article 16 of Chapter 50 of Title 11, for the operation
15 of an electric distribution system; or a municipal corporation
16 that operates an electric distribution system.

17 (11) NONUTILITY SUPPORT SERVICES. Broadband services
18 and related services that support services, uses, or purposes
19 other than utility support services.

20 (12) PERSON. An individual, trust, estate,
21 corporation, partnership, limited partnership, limited
22 liability partnership, or limited liability company having a
23 separate legal existence under state law.

24 (13) UTILITY SUPPORT SERVICES. Broadband services
25 and related services, uses, or purposes that support the
26 operational performance and service reliability of the

1 electric delivery system of an electric provider, including,
2 but not limited to, all of the following:

- 3 a. Automated meter reading.
- 4 b. Real-time or other system monitoring.
- 5 c. Remote service control.
- 6 d. Outage detection and restoration.
- 7 e. Predictive maintenance and diagnostics.
- 8 f. Monitoring and enhancement of power quality, load
9 control, voltage control, and flow.
- 10 g. Supervisory control and data acquisition.
- 11 h. Management and flow of electricity.
- 12 i. Internal communications.
- 13 j. Dispatch, start-up, ramping, shutdown,
14 curtailment, scheduling, or control of electric generation,
15 transmission, or distribution of resources or ancillary
16 services relating thereto, including, but not limited to,
17 generator imbalance, spinning and non-spinning reserves, and
18 reserve sharing.
- 19 k. All other uses supporting the reliability,
20 resilience, and security of the electric delivery system.

21 §37-16-4.

22 (a) To the extent not otherwise authorized by law,
23 and in addition to all other purposes, powers, and authority
24 currently granted to electric providers under the laws of this
25 state, an electric provider may do all of the following:

26 (1) Own, operate, maintain, construct, install, and
27 replace a broadband system on, over, under, or across the

1 electric provider's electric easements, whether used for or
2 supporting utility support services or used for or supporting
3 nonutility support services, whether on a wholesale or retail
4 basis.

5 (2) Allow a broadband affiliate or an unaffiliated
6 person to own, lease, manage, construct, superintend, install,
7 operate, maintain, and replace a broadband system on, over,
8 under, or across the electric provider's electric easements,
9 on such terms and conditions as specified by the electric
10 provider, whether used for or supporting utility support
11 services or used for or supporting wholesale or retail
12 nonutility support services, including the power and authority
13 to apportion the electric easement, to grant licenses, and to
14 grant other usage or operational rights to other broadband
15 operators for the broadband system located within the electric
16 easements.

17 (3) Provide broadband services, whether used for or
18 supporting utility support services or for wholesale or retail
19 nonutility support services.

20 (4) Allow a broadband affiliate or an unaffiliated
21 person to provide broadband services over or through a
22 broadband system within the electric easements of an electric
23 provider, on such terms and conditions as specified by the
24 electric provider, whether used for or supporting utility
25 support services or used for or supporting wholesale or retail
26 nonutility support services.

1 (b) In furtherance of its authority under subsection
2 (a), an electric provider shall have the sole authority to
3 determine which broadband affiliate or unaffiliated person,
4 including a broadband operator or broadband service provider,
5 may have access to the broadband system within its electric
6 easements and on its electric delivery system and to determine
7 the terms and conditions on which the broadband affiliate or
8 unaffiliated person may access the broadband system,
9 including, without limitation, whether the access will be on
10 an exclusive or non-exclusive basis.

11 (c) An electric provider engaged in providing retail
12 nonutility support services shall apply the same rate
13 methodology to determine pole attachment rates, and shall
14 require the same terms and conditions of access, for pole
15 attachments to its electric delivery system for its broadband
16 services, with such methodology and terms of access to be
17 determined at the time of the applicable pole attachment
18 request, as the provider applies for pole attachments to its
19 electric delivery system by persons not affiliated with the
20 electric provider. Nothing in this subsection shall apply to
21 an electric provider that is a Tennessee Valley Authority
22 distributor or to an electric provider that is a utility as
23 defined under paragraph a. of subdivision (7) of Section
24 37-4-1.

25 (d) This chapter does not require or obligate an
26 electric provider to install or implement a broadband system
27 or advanced communications capabilities, to provide broadband

1 services, or to allow others to install a broadband system or
2 facilities or use the electric provider's electric easements
3 and electric delivery system to provide broadband services.

4 (e) An electric provider may not require any person
5 to purchase broadband services from the electric provider, a
6 broadband affiliate, or unaffiliated broadband operator or
7 broadband service provider as a condition of receiving or
8 continuing to receive electric energy from the electric
9 provider.

10 (f) An electric provider shall not disconnect any
11 customer from receiving electric services pursuant to its
12 electric delivery system due to the customer's failure to pay
13 for broadband services provided to the customer by the
14 electric provider or its broadband affiliate.

15 (g) By June 30 of each year, an electric provider
16 engaged in providing retail nonutility support services
17 directly or through a broadband affiliate shall provide a
18 report to the Legislature detailing its pole attachment rates.
19 This subsection does not apply to an electric provider that is
20 a Tennessee Valley Authority distributor or to an electric
21 provider that is a utility as defined under paragraph a. of
22 subdivision (7) of Section 37-4-1.

23 §37-16-5.

24 In no event does this chapter authorize any electric
25 provider to provide retail electric service outside of its
26 electric service territory as determined under the applicable
27 provisions of Chapter 14 of this title. Nothing in this

1 chapter is intended to amend, repeal, enlarge, or otherwise
2 affect Chapter 14 of this title.

3 §37-16-6.

4 An electric provider may charge a broadband
5 affiliate or an unaffiliated person, including a broadband
6 operator or broadband service provider, for the costs of the
7 construction, installation, replacement, operation, use, and
8 maintenance of the broadband system or of those parts of its
9 electric delivery system that are used or may be reserved for
10 use by the broadband affiliate or unaffiliated broadband
11 operator or broadband service provider for the provision of
12 broadband services. No electric provider shall be required to
13 construct, install, replace, operate, or maintain a broadband
14 system or to provide broadband services. An electric provider,
15 broadband affiliate, or unaffiliated broadband operator or
16 broadband services provider may charge for broadband services
17 or any other uses of the broadband system, whether wholesale
18 or retail, at rates determined by the provider thereof.

19 §37-16-7.

20 (a) If the owner of an interest in real property
21 subject to an electric easement contends that the owner's
22 property has been taken, injured, or destroyed by the
23 construction, installation, use, or enlargement of broadband
24 systems within the electric easement on the owner's property
25 and the electric easement does not expressly provide for such,
26 the owner may file a civil action in the circuit court for the
27 county in which the property is located to recover damages as

1 specified by this section. All such actions must be brought
2 within three years after the later of: (1) The effective date
3 of the act adding this section; or (2) the date broadband
4 systems are first constructed or installed within the electric
5 easement on the owner's real property. Nothing in this chapter
6 shall revive any right or remedy which may have become barred
7 by lapse of time, or by any law of this state, prior to the
8 effective date of the act adding this section.

9 (b) (1) In any action under subsection (a), the
10 measure of damages shall be an amount equal to the difference,
11 if any, between the following:

12 a. The fair market value of the owner's real
13 property immediately before the construction or installation
14 of broadband systems within the electric easement on the
15 owner's real property.

16 b. The fair market value of the owner's real
17 property immediately after the construction or installation of
18 broadband systems within the electric easement on the owner's
19 real property.

20 (2) The damages, if any, shall be fixed and shall
21 not be deemed to continue, accumulate, or accrue. The judgment
22 in any such action for the plaintiff shall include the
23 plaintiff's costs and litigation expenses. Costs and
24 litigation expenses authorized by this section may be claimed,
25 taxed, and awarded under the same procedures that apply to
26 costs in other civil actions. Payment of the judgment in any
27 such action shall vest in the electric provider all property

1 rights necessary to construct, use, install, operate, replace,
2 and maintain, from time to time, the broadband systems within
3 the electric easement on the owner's real property and the
4 electric easement shall be thereafter permanently expanded to
5 include the right to construct, use, install, operate,
6 replace, and maintain the broadband system and broadband
7 services. The judgment shall have the same effect as a
8 conveyance executed by the owner in due form under applicable
9 law and shall run with the land. A certified copy of the
10 judgment may be filed by the electric provider, a broadband
11 affiliate, or other broadband operator in the land records of
12 the county in which the subject property is located, but is
13 not required to make such broadening of the electric easement
14 effective. The expansion for the broadband system shall
15 include the broadband system within the maintenance, egress,
16 and ingress provisions of the electric easement.

17 (c) The civil action and measure of damages
18 authorized by this section shall be the exclusive remedy for
19 any and all claims that the owner's property has been taken,
20 or the scope of the electric easement exceeded, by the
21 construction, installation, use, or enlargement of broadband
22 systems within the electric easement on the owner's property,
23 and the owner may not assert any other theory, claim, or cause
24 of action, either at law or in equity, nor recover any other
25 damages, including, without limitation, consequential,
26 compensatory, and punitive damages, or equitable relief.

1 (d) An owner bringing an action under this section
2 may not bring an action on behalf of a class. The limitation
3 in this subsection is a substantive limitation and allowing an
4 owner to bring a class action or other representative action
5 for a violation of this chapter would abridge, enlarge, or
6 modify the substantive rights created by this section.

7 (e) An electric provider may acquire by condemnation
8 ways, rights-of-way, and easements, without limitation as to
9 width, on, over, under, or across the lands or easements of
10 others, to erect, construct, replace, use, install, operate,
11 and maintain advanced communications capabilities. Such
12 condemnation is to be conducted in accordance with the
13 procedures of Chapter 1A of Title 18, except as otherwise
14 provided in this chapter.

15 (f) An electric provider, broadband affiliate, or
16 unaffiliated broadband operator or broadband service provider
17 may receive such rights from an owner of real property by
18 service agreement or service regulation, membership agreement,
19 license agreement, or other agreement to serve the property
20 with advanced communications capabilities without granting an
21 easement or right-of-way. The grant or agreement may permit
22 the construction, installation, replacement, operation, use,
23 and maintenance of the advanced communications capabilities on
24 the property without the requirement of further consent of any
25 other tenant, concessionaire, or occupant of that property.

26 (g) With respect to the installation of broadband
27 systems within an electric easement in effect prior to the

1 effective date of the act adding this section, the electric
2 provider shall provide the same notice as is required by the
3 express terms of the electric easement, if any, or as required
4 by other applicable law for the construction or installation
5 of the electric delivery system within the electric easement.
6 With respect to the installation of broadband systems within
7 an electric easement that is acquired other than by
8 condemnation after the effective date of the act adding this
9 section, the electric provider shall provide such notice as is
10 required by the express terms of the document creating the
11 electric easement, if any; or if there is no written document
12 creating the electric easement or no express terms in the
13 document, then the electric provider shall provide notice to
14 the owner of the real property subject to the electric
15 easement by informing such owner of the installation of the
16 broadband system within the electric easement prior to
17 installation. Notice shall be sufficient if mailed to the name
18 and address of the owner or owners listed in the real property
19 ad valorem tax records for the county where the real property
20 is located. Nothing in this section shall require the notice
21 from the electric provider when the electric easement is
22 acquired by condemnation or pursuant to an expansion of the
23 electric easement by civil action commenced by the owner.

24 (h) Nothing in this chapter shall be deemed to
25 relieve the broadband operator, broadband service provider, or
26 electric provider from liability for bodily injury or physical

1 damage to real or personal property located adjacent to the
2 electric easement.

3 §37-16-8.

4 (a) Nothing in this chapter shall interfere with the
5 commission's authority to regulate public utilities under this
6 title. Nothing in this chapter shall provide a basis for
7 creating or granting jurisdiction to the commission over any
8 electric providers or any broadband affiliate that are
9 otherwise exempt or are otherwise not subject to the
10 jurisdiction of the commission.

11 (b) Nothing in this chapter shall affect, abrogate,
12 or eliminate in any way any obligation of an electric provider
13 or any broadband affiliate or broadband operator to comply
14 with any applicable safety and permitting requirements of any
15 railroad company or any state governmental body or agency with
16 respect to property that is held or controlled by such
17 railroad company or state governmental body or agency, as the
18 case may be, and in, on, over, or across which an easement is
19 located.

20 (c) Any broadband system that encumbers the
21 right-of-way of the Department of Transportation shall require
22 a permit from the department regardless of whether the
23 broadband system is within a currently permitted electric
24 easement or an electric delivery system. Nothing in this
25 chapter shall provide an exemption from an existing applicable
26 regulation regarding access to county rights-of-way.

1 (d) Except as provided in this section, nothing in
2 this chapter is intended to expand or contract an electric
3 provider's rights and obligations with regard to applicable
4 laws in connection with pole attachments to its electric
5 delivery system, or the terms of any pole attachment agreement
6 in effect with its electric delivery system.

7 §37-16-9.

8 (a) An electric provider providing broadband
9 services shall fully allocate and properly account for all
10 marginal costs, including the internal imputation of such
11 costs when the electric provider does not provide broadband
12 services through an affiliate, related to the provision of
13 nonutility support services, including any transactions
14 provided for in subsection (b), and shall not use its electric
15 services sales revenues for the subsidization of such
16 nonutility support services. No transaction treated in
17 accordance with subsection (b) shall be considered a
18 cross-subsidy. Nothing in this subsection shall apply to an
19 electric provider that is a Tennessee Valley distributor or an
20 electric provider that is a utility as defined under paragraph
21 a. of subdivision (7) of Section 37-4-1.

22 (b) Nothing in this section shall prevent an
23 electric provider from making investments in broadband
24 affiliates otherwise permitted by applicable law, making loans
25 to broadband affiliates otherwise permitted by applicable law
26 which have a repayment obligation from the affiliate, entering
27 into capital or operating leases with the broadband affiliate,

1 or entering into guarantees or other security arrangements for
2 the benefit of a broadband affiliate, all on such terms and
3 subject to such conditions as the board approves in the case
4 of member cooperatives which are electric providers or as
5 determined to be prudent or appropriate under applicable law
6 in the case of other electric providers. An electric provider
7 that is not a Tennessee Valley distributor or a utility as
8 defined under paragraph a. of subdivision (7) of Section
9 37-4-1 shall separately allocate and account for all
10 transactions described in this subsection as set forth in
11 subsection (a).

12 §37-16-10.

13 In no event shall funds be appropriated from the
14 Education Trust Fund under this act.

15 Section 2. If any part or provision of this act or
16 its application to any person or circumstances is held
17 invalid, the invalidity does not affect other parts,
18 provisions, or applications of this act which can be given
19 effect without the invalid provision or application, and to
20 this end, the parts and provisions of this act are severable.

21 Section 3. This act shall become effective on the
22 first day of the third month following its passage and
23 approval by the Governor, or its otherwise becoming law.