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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.

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

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

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

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

(b) Except as provided in subsection (a), nothing contained in this chapter is intended to exempt, except, or 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.

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

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

a. To provide access to the Internet.

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

(6) BROADBAND SYSTEM. Any of the following that may be used to facilitate, directly or indirectly, the provision or transmission of broadband services, whether utility support services or nonutility support services, or both: Materials; wires; cables, including fiber optic and copper cables, whether such cables are dark or lit, and whether such cables 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.

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

(c) An electric provider engaged in providing retail nonutility support services shall apply the same rate methodology to determine pole attachment rates, and shall require the same terms and conditions of access, for pole attachments to its electric delivery system for its broadband services, with such methodology and terms of access to be determined at the time of the applicable pole attachment request, as the provider applies for pole attachments to its electric delivery system by persons not affiliated with the electric provider. Nothing in this subsection shall apply to an electric provider that is a Tennessee Valley Authority distributor or to an electric provider that is a utility as defined under paragraph a. of subdivision (7) of Section

(d) This chapter does not require or obligate an electric provider to install or implement a broadband system 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.

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

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

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

(g) With respect to the installation of broadband 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.

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

§37-16-9.

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

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

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

§37-16-10.

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

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

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