

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Originating

Senate Bill 445

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[Originating in the Committee on Transportation and
Infrastructure; Reported on January 31, 2018]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §17-2A-17a; and to amend and reenact §17-4-17b of said code, all relating to
3 utility relocation; stating legislative findings; defining term; authorizing the Division of
4 Highways to acquire real or personal property for utility accommodation; authorizing the
5 division to lease real property to utilities; allowing the division to pay for utility relocation
6 costs subject to reimbursement agreement; specifying methods of preliminary engineering
7 design work completion and utility relocation construction work payment; and providing
8 legislative and emergency rule-making authority.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2A. WEST VIRGINIA COMMISSIONER OF HIGHWAYS.

§17-2A-17a. Acquisition of property for utility accommodation purposes; utility defined.

1 (a) The Legislature finds that it is in the public interest for utility facilities to be
2 accommodated on the right-of-way of state highways when such use and occupancy of the
3 highway right-of-way do not adversely affect highway or traffic safety, or otherwise impair the
4 highway or its aesthetic quality, and do not conflict with federal, state, or local laws, rules, and
5 regulations or agency policies. Utilities provide an essential service to the public, and as a matter
6 of sound economic public policy and law, utilities have used state road right-of-way for transmitting
7 and distributing their services. Such accommodation of utility facilities on the right-of-way of state
8 highways serves an important public purpose by increasing public access to utility services.

9 (b) "Utility" means, for purposes of this chapter, privately, publicly, or cooperatively-owned
10 line, facility, or system for producing, transmitting, or distributing communications, data,
11 information, video services, power, electricity, light, heat, gas, oil, crude products, water, steam,
12 waste, storm water not connected with highway drainage, or any other similar commodity,
13 including any fire or police signal system or street lighting system, which directly or indirectly
14 serves the public. The term "utility" also includes those similar facilities that are owned or leased
15 by a government agency for its own use or otherwise dedicated solely to governmental use.

16 (c) In addition to all other powers given and assigned to the commissioner in this chapter,
17 the commissioner may acquire, either temporarily or permanently, in the name of the Division of
18 Highways, all real or personal property, public or private, or any interests or rights therein,
19 including any easement, riparian right, or right of access, determined by the commissioner to be
20 necessary for present or future utility accommodation purposes.

21 (d) Notwithstanding any provision of this article, the commissioner may lease real property
22 held by the Division of Highways, or any interest or right in the property, including airspace rights,
23 if any, to accommodate any utility if the commissioner finds, in his or her sole discretion, that
24 entering into the lease agreement with the utility is in the public interest. Neither competitive bids
25 nor public solicitations are required prior to entering into a utility accommodation lease. Any utility
26 accommodation lease shall require the utility to pay fair-market value for the real property interest
27 as determined by the commissioner using common valuation methods. All moneys received from
28 utility accommodation leases shall be paid into the State Treasury and credited to the State Road
29 Fund.

ARTICLE 4. STATE ROAD SYSTEM.

§17-4-17b. Relocation of public utility lines on highway construction projects.

1 (a) Whenever the division reasonably determines that any public utility line or facility
2 located upon, across, or under any portion of a state highway needs to be removed, relocated, or
3 adjusted in order to accommodate a highway project, the division shall give to the utility
4 reasonable notice in writing as mutually agreed, but not to exceed 18 months, directing it to begin
5 the physical removal, relocation, or adjustment of such utility obstruction or interference at the
6 cost of the utility, including construction inspection costs and in compliance with the rules of the
7 division and the provisions of §29A-3-1 *et seq.* of this code.

8 (b) If the notice is in conjunction with a highway improvement project, it will be provided at
9 the date of advertisement or award. Prior to the notice directing the physical removal, relocation,

10 or adjustment of a utility line or facility, the utility shall adhere to the division's utility relocation
11 procedures for public road improvements which shall include, but not be limited to, the following:

12 (1) The division will submit to the utility a letter and a set of plans for the proposed highway
13 improvement project;

14 (2) The utility must within a reasonable time submit to the division a written confirmation
15 acknowledging receipt of the plans and a declaration of whether or not its facilities are within the
16 proposed project limits and the extent to which the facilities are in conflict with the project;

17 (3) If the utility is adjusting, locating, or relocating facilities or lines from or into the division's
18 right-of-way, the utility must submit to the division plans showing existing and proposed locations
19 of utility facilities.

20 (4) The utility's submission shall include with the plans a work plan demonstrating that the
21 utility adjustment, location, or relocation will be accomplished in a manner and time frame
22 established by the division's written procedures and instructions. The work plan shall specify the
23 order and calendar days for removal, relocation, or adjustment of the utility from or within the
24 project site and any staging property acquisition or other special requirements needed to complete
25 the removal, relocation, or adjustment. The division shall approve the work plan, including any
26 requests for compensation, submitted by a utility for a highway improvement project if it is
27 submitted within the established schedule and does not adversely affect the letting date. The
28 division will review the work plan to ensure compliance with the proposed improvement plans and
29 schedule.

30 (c) If additional utility removal, relocation, or adjustment work is found necessary after the
31 letting date of the highway improvement project, the utility shall provide a revised work plan within
32 30 calendar days after receipt of the division's written notification of the additional work. The
33 utility's revised work plan shall be reviewed by the division to ensure compliance with the highway
34 project or improvement. The division shall reimburse the utility for work performed by the utility
35 that must be performed again as the result of a plan change on the part of the division.

36 (d) Should the utility fail to comply with the notice to remove, relocate, or adjust, the utility
37 is liable to the division for direct contract damages, including costs, fees, penalties, or other
38 contract charges, for which the division is proven to be liable to a contractor caused by the utility's
39 failure to timely remove, relocate, or adjust, unless a written extension is granted by the division.
40 The utility shall not be liable for any delay or other failure to comply with a notice to remove,
41 relocate, or adjust that is not solely the fault of the utility, including, but not limited to, the following:

42 (1) The division has not performed its obligations in accordance with the division's rules;

43 (2) The division has not obtained all necessary rights-of-way that affect the utility;

44 (3) The delay or other failure to comply by the utility is due to the division's failure to
45 manage schedules and communicate with the utility;

46 (4) The division seeks to impose liability on the utility based solely upon oral
47 communications or communications not directed to the utility's designated contact person;

48 (5) The division changes construction plans in any manner following the notice to remove
49 or relocate and the change affects the utility's facilities; or,

50 (6) Other good cause, beyond the control of and not the fault of the utility, including, but
51 not limited to, labor disputes, unavailability of materials on a national level, act of God, or extreme
52 weather conditions.

53 (e) In order to avoid construction delays and to create an efficient and effective highway
54 program, the division may schedule program meetings with the public utility on a quarterly basis
55 to assure that schedules are maintained.

56 (f) If a utility that is required by law to bear its own relocation costs provides the division
57 with sufficient evidence to demonstrate that the utility is not adequately staffed, equipped, or
58 capitalized to perform such relocation work with its own forces or contractors at a time convenient
59 to and in coordination with the associated highway project, the division may pay for the associated
60 relocation costs, including, but not limited to, design engineering, design review, construction, and
61 inspection costs, out of the State Road Fund: *Provided*, That the utility shall reimburse the division

62 in full for such relocation costs within two years of the completion of the highway project. The
63 division shall deduct from the utility's reimbursement amount any costs resulting from work
64 performed because of plan changes made by the division. Before the division may pay any
65 relocation costs, the division and the utility shall enter into a written reimbursement agreement.

66 (1) Preliminary engineering design work associated with utility relocations to be paid for
67 by the division pursuant to a reimbursement agreement shall be completed by any of the following
68 methods:

69 (A) The division's or the utility's internal forces;

70 (B) A consultant selected by the division with the contract administered by the division:
71 Provided, That the selected consultant is pre-approved by the utility and the utility's pre-approval
72 process does not unreasonably limit competition or project completion; or

73 (C) Inclusion as part of the highway construction contract let by the division as agreed to
74 by the utility.

75 (2) Utility relocation construction work paid for by the division pursuant to a reimbursement
76 agreement shall be completed by either of the following methods:

77 (A) A contract awarded by the division to the lowest qualified and mutually pre-approved
78 bidder based on an appropriate competitive solicitation: Provided, That the utility's pre-approval
79 process does not unreasonably limit competition or project completion; or

80 (B) Inclusion as part of the highway construction contract let by the division as agreed to
81 by the utility.

82 (3) All design and construction work paid for by the division pursuant to a reimbursement
83 agreement is subject to the reasonable inspection and acceptance of the utility, whose
84 acceptance shall not be unreasonably withheld.

85 (4) All relocation work performed pursuant to a reimbursement agreement shall conform
86 to applicable state and federal laws, rules, and regulations.

87 (5) The division may propose rules for legislative approval in accordance with the
88 provisions of §29A-3-1 et seq. of this code, and the division may promulgate emergency rules
89 pursuant to the provisions of §29A-3-15 of this code to implement this subsection.

NOTE: The purpose of this bill is to allow the Division of Highways to acquire and lease interest in real property for utility accommodation upon agency right of way and increase public access to utility services, and to permit the division to advance the cost of utility relocation for those utilities which must bear their own utility relocation costs, whereby allowing timely utility relocation and road construction, and exponentially reducing division contract costs. Utility companies' limited staff and financial resources place timely and cost-effective delivery of road construction projects at risk, as utility companies struggle to relocate their facilities within strict road construction timeframes. This bill establishes a completely voluntary process whereby a utility company may choose to enter into a reimbursement agreement with the division to lease right of way space.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.