

# **WEST VIRGINIA LEGISLATURE**

**2018 REGULAR SESSION**

**ENROLLED**

**Committee Substitute**

**for**

**House Bill 4447**

BY DELEGATES SHOTT, HANSHAW, MOORE, C. MILLER,  
HARSHBARGER, FAST, LANE, HOLLEN, CAPITO, SUMMERS AND BYRD

[Passed March 10, 2018; in effect ninety days from passage.]



1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
2 designated §17-2E-1, §17-2E-2, §17-2E-3, §17-2E-4, §17-2E-5, §17-2E-6, §17-2E-7,  
3 §17-2E-8, and §17-2E-9, all relating to providing a uniform and efficient system of  
4 broadband conduit installation coinciding with the construction, maintenance, or  
5 improvement of highways and rights-of-way under the oversight of the Division of  
6 Highways; making legislative findings; defining terms; providing procedures for broadband  
7 conduit installation in rights-of-way; providing for highway safety guidelines; establishing  
8 a procedure for joint use between telecommunications carriers; setting forth a procedure  
9 for monetary and in-kind compensation; providing a method for Division of Highways to  
10 offer excess conduit to a telecommunications carrier; setting forth standards to be utilized  
11 in agreements entered into by the Division of Highways and two or more  
12 telecommunications carriers in a single trench; providing that existing rules, policies, and  
13 procedures of the Division of Highways and United States Code shall control; and  
14 providing that the Commissioner of the Division of Highways may promulgate rules.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 2E. DIG ONCE POLICY.**

**§17-2E-1. Legislative findings.**

1 (a) The Legislature finds that it is in the public interest to accommodate  
2 telecommunications facilities on Division of Highways right-of-way when the use of the right-of-  
3 way does not adversely affect the safety of the traveling public or impair the highway or its  
4 aesthetic quality or conflict with any federal, state, or local laws, rules, regulations, or policies.

5 (b) The Legislature further finds that a broadband connection is an essential part of  
6 developing the state and local economies, enhancing the transportation system and creating a  
7 safer and more secure environment for our citizens.

8 (c) The Legislature further finds that expanding telecommunication facilities will allow the  
9 state to participate in the E-Rate Program of funding for digital education in America to provide  
10 reliable services opportunities for education and training.

11 (d) The Legislature further finds that fast, reliable broadband connections enhance  
12 telemedical opportunities for our rural doctors and hospitals, linking them to our major medical  
13 centers. Thereby overcoming distance barriers, and improving access to medical services that  
14 often are not consistently available in rural communities.

15 (e) The Legislature further finds that instituting a dig once policy encourages  
16 telecommunications carriers to coordinate installation of broadband conduit to minimize costs to  
17 the carriers and minimize disruption and inconvenience to the traveling public.

**§17-2E-2. Definitions.**

1 In this article, unless the context otherwise requires:

2 (1) "Broadband conduit" or "conduit" means a conduit, innerduct or microduct for fiber optic  
3 cables that support facilities for broadband service.

4 (2) "Broadband service" has the same meaning as defined in §31G-1-2 of this code.

5 (3) "Council" means the Broadband Enhancement Council.

6 (4) "Division" means the Division of Highways.

7 (5) "Longitudinal access" means access to or the use of any part of a right-of-way that  
8 extends generally parallel to the traveled right-of-way.

9 (6) "Permit" means an encroachment permit issued by the Commissioner of the Division  
10 of Highways under the authority of this Code, and pursuant to the "*Accommodation of Utilities On  
11 Highway Right Of Way and Adjustment and Relocation Of Utility Facilities On Highway Projects  
12 Policy*", or equivalent policy, as currently enforced by the Division of Highways, that specifies the  
13 requirements and conditions for performing work in a right-of-way.

14 (7) "Right-of-way" means land, property, or any interest therein acquired or controlled by  
15 the West Virginia Division of Highways for transportation facilities or other transportation purposes  
16 or specifically acquired for utility accommodation.

17 (8) "Telecommunications carrier" means a telecommunications carrier:

18 (A) As determined by the Public Service Commission of West Virginia; or

19 (B) That meets the definition of telecommunications carrier with respect to the Federal  
20 Communications Commission, as contained in 47 U.S.C. §153.

21 (9) "Telecommunications facility" means any cable, line, fiber, wire, conduit, innerduct,  
22 access manhole, handhole, tower, hut, pedestal, pole, box, transmitting equipment, receiving  
23 equipment, power equipment or other equipment, system or device that is used to transmit,  
24 receive, produce or distribute a signal for telecommunications purposes via wireline, electronic or  
25 optical means.

26 (10) "Utility facility" has the meaning ascribed to it in §17-2A-17a of this Code.

27 (11) "Wireless access" means access to and use of a right-of-way for the purpose of  
28 constructing, installing, maintaining, using, or operating telecommunications facilities for wireless  
29 telecommunications.

**§17-2E-3. Use of rights-of-way. Broadband conduit installation in rights-of-way; permits;  
agreements; compensation; valuation of compensation.**

1 (a) Before obtaining a permit for the construction or installation of a telecommunications  
2 facility in a right-of-way, a telecommunications carrier must enter into an agreement with the  
3 Division consistent with the requirements of this article.

4 (b) Before granting permitted longitudinal access or wireless access to a right-of-way, the  
5 Division of Highways shall

6 (1) First enter into an agreement with a telecommunications carrier that is competitively  
7 neutral and nondiscriminatory as to other telecommunications carriers.

8 (2) Upon receipt of any required approval or concurrence by the Federal Highway  
9 Administration the Division may issue a permit granting access under this section: *Provided*, That  
10 the Division of Highways shall comply with all applicable federal regulations with respect to  
11 approval of an agreement, including but not limited to 23 C.F.R. §710.403 and 23 C.F.R.  
12 §710.405. The agreement shall be approved by the Commissioner of Highways in order to be  
13 effective and, without limitation:

- 14 (A) Specify the terms and conditions for renegotiation of the agreement;
- 15 (B) Set forth the maintenance requirements for each telecommunications facility;
- 16 (C) Be nonexclusive; and
- 17 (D) Be for a term of not more than 30 years.
- 18 (b) Unless specifically provided for in an agreement entered into pursuant to §17-2E-3(a)
- 19 of this code, the Division of Highways may not grant a property interest in a right-of-way pursuant
- 20 to this article.
- 21 (c) A telecommunications carrier shall compensate the Division of Highways for access to
- 22 a right-of-way for the construction, installation, and maintenance of telecommunication facilities,
- 23 the use of spare conduit or related facilities of the Division of Highways as part of any longitudinal
- 24 access or wireless access granted to a right-of-way pursuant to this section. The compensation
- 25 must be, without limitation:
- 26 (1) At fair market value;
- 27 (2) Competitively neutral;
- 28 (3) Nondiscriminatory;
- 29 (4) Open to public inspection;
- 30 (5) Calculated based on the geographic region of this state, taking into account the
- 31 population and the impact on private right-of-way users in the region; and once calculated, set at
- 32 an amount that encourages the deployment of digital infrastructure within this State:
- 33 (6) Paid in monetary compensation or with in-kind compensation, or a combination of
- 34 monetary compensation and in-kind compensation; and
- 35 (7) Paid in a lump-sum payment or in annual installments, as agreed to by the
- 36 telecommunications carrier and the Division of Highways.
- 37 (d) The Division may consider adjustments for areas, the Division in conjunction with the
- 38 Council, determines are underserved or unserved areas of the state and may consider the value

39 to such areas for economic development, enhancing the transportation system, expanding  
40 opportunities for digital learning, and telemedicine.

41 (e) For the purpose of determining the amount of compensation a telecommunications  
42 carrier must pay the Division of Highways for the use of spare conduit or excess conduit or related  
43 facilities of the Division of Highways as part of any longitudinal access or wireless access granted  
44 to a right-of-way pursuant to this section, the Division may:

45 (1) Conduct an analysis once every five years, in accordance with the rules, policies, or  
46 guidelines of the Division of Highways, to determine the fair market value of a right-of-way to  
47 which access has been granted pursuant to this section; and

48 (2) If compensation is paid in-kind, determine the fair market value of the in-kind  
49 compensation based on the incremental costs for the installation of conduit and related facilities.

50 (f) The value of in-kind compensation, or a combination of money and in-kind  
51 compensation, must be equal to or greater than the amount of monetary compensation that the  
52 Division of Highways would charge if the compensation were paid solely with money.

53 (g) The provisions of this article shall not apply to the relocation or modification of existing  
54 telecommunication facilities in a right-of-way, nor shall these provisions apply to aerial  
55 telecommunications facilities or associated apparatus or equipment in a right-of-way. Relocation  
56 of telecommunications facilities within rights-of-way for state highways shall be in accordance with  
57 the provisions of §17-4-17b of this code.

**§17-2E-4. Highway safety.**

1 (a) The Division of Highways, in its sole discretion, may deny any longitudinal access or  
2 wireless access if such access would compromise the safe, efficient, and convenient use of any  
3 road, route, highway, or interstate in this state for the traveling public.

4 (b) Any longitudinal access or wireless access to a right-of-way granted by the Division of  
5 Highways pursuant to this article does not abrogate, limit, supersede, or otherwise affect access  
6 granted or authorized pursuant to the Division's rules, policies, and guidelines related to

7 accommodation of utilities on highways' rights-of-way and adjustment and relocation of utility  
8 facilities on highway projects.

**§17-2E-5. Telecommunications carrier initiated construction and joint use.**

1 (a) The Division of Highways shall provide for the proportionate sharing of costs between  
2 telecommunications carriers for joint trenching or trench sharing based on the amount of conduit  
3 innerduct space or excess conduit that is authorized in the agreements entered into pursuant to  
4 this article. If the Division plans to use the trench, it shall pay its proportional share unless it is  
5 utilizing the trench as in-kind payment for use of the right-of-way.

6 (b) Upon application for a permit, the carrier will notify, by email, the West Virginia  
7 Broadband Enhancement Council and all other carriers on record with the West Virginia  
8 Broadband Enhancement Council of the application. Other carriers have 30 calendar days to  
9 notify the applicant if they wish to share the applicant's trench. This requirement extends to all  
10 underground construction technologies.

11 (c) The carrier shall also meet the following conditions for a permit:

12 (1) The telecommunications carrier will be required to place, at its sole expense, a Class  
13 II legal advertisement, in accordance with §59-3-2(a) of this code, and of a form and content  
14 approved by the Division of Highways, in the local project area newspaper, in the Charleston  
15 newspaper, on industry and the Division of Highways' websites, and within other pertinent media,  
16 announcing the general scope of the proposed installation within the right-of-way and providing  
17 competing telecommunications carriers the opportunity to timely express an interest in installing  
18 additional telecommunication facilities during the initial installation. The legal advertisement is to  
19 run at least two consecutive weeks, and the telecommunications carrier is to notify the Division of  
20 any interest of other parties received.

21 (2) If a competing telecommunications carrier expresses interest in participating in the  
22 project, an agreement between the two (or more) telecommunications carriers will be executed  
23 by those entities, outlining the responsibilities and financial obligations of each, with respect to

24 the installation within the right-of-way. A copy of the executed agreement shall be provided to the  
25 Division of Highways.

26 (3) The telecommunications carrier that placed the legal advertisement is responsible for  
27 resolving in good faith all disputes between any competing telecommunications carriers that  
28 timely responded to the advertisement and that wishes to install facilities within the same portion  
29 of the rights-of-way to be occupied. Should a dispute arise between the initial telecommunications  
30 carrier and a competing telecommunications carrier, the initial telecommunications carrier will  
31 attempt to mediate the dispute. Any dispute that is not resolved by the telecommunications  
32 carriers shall be adjudicated by the Public Service Commission.

33 (d) If two or more telecommunications carriers are required or authorized to share a single  
34 trench, each carrier in the trench must share the cost and benefits of the trench in a fair,  
35 reasonable, competitively neutral, and nondiscriminatory manner. This requirement extends to all  
36 underground construction technologies.

37 (e) The Commissioner of the Division of Highways shall promulgate rules governing the  
38 relationship between the telecommunications carriers, as hereinafter provided in this article.

**§17-2E-6. Monetary and in-kind compensation.**

1 (a) All monetary compensation collected by the Division of Highways pursuant to this  
2 article shall be deposited in the State Road Fund.

3 (b) In-kind compensation paid to the Division of Highways under an agreement entered  
4 into pursuant to this article may include, without limitation:

- 5 (1) Conduit or excess conduit;
- 6 (2) Innerduct;
- 7 (3) Dark fiber;
- 8 (4) Access points;
- 9 (5) Telecommunications equipment or services;
- 10 (6) Bandwidth; and

11 (7) Other telecommunications facilities as a component of the present value of the  
12 trenching.

13 (c) The Division of Highways shall value any in-kind compensation based on fair market  
14 value at the time of installation or review, and may also consider any valuation or cost information  
15 provided by the telecommunications carrier.

16 (d) In-kind compensation paid to the Division of Highways may be disposed of if both of  
17 the following conditions are met:

18 (1) The telecommunications facility received as in-kind payment has not been used within  
19 10 years of its installation; and

20 (2) The Commissioner of the Division of Highways determines that the Division does not  
21 have an immediately foreseeable need for the telecommunications facility.

22 (e) Upon determining that it is appropriate to dispose of the telecommunications facility,  
23 the Division shall determine its current fair market value. The Division shall offer the provider or  
24 providers who made the in-kind payment the option to purchase any telecommunications facility  
25 obtained from such provider. If the provider or providers do not purchase the telecommunications  
26 facility, it shall be offered for public auction in the same manner as the Division auctions excess  
27 rights-of-way.

**§17-2E-7. Multiple carriers in a single trench.**

1 (a) If the Division of Highways enters into an agreement with two or more  
2 telecommunications carriers, a consortium or other entity whose members, partners or other  
3 participants are two or more telecommunications carriers, or, if the Division requires or allows two  
4 or more telecommunications carriers to share a single trench, the agreements entered into  
5 pursuant to this article shall require that the telecommunications carriers share the obligation of  
6 compensating the Division of Highways on a fair, reasonable and equitable basis, taking into  
7 consideration the proportionate uses and benefits to be derived by each telecommunications  
8 carrier from the trench, conduits, and other telecommunications facilities installed under the  
9 agreements.

10 (b) The provisions of §17-2E-7(a) of this code do not prevent the Division of Highways  
11 from requiring every participating telecommunications carrier to bear joint and several liability for  
12 the obligations owed to the Division of Highways under the agreements.

13 (c) Any agreement requiring two or more telecommunications carriers to share the  
14 obligation of compensating the Division of Highways shall provide the Division the right to review  
15 and audit the records and contracts of and among the participating carriers to ensure compliance  
16 with §17-2E-7(a) of this code.

**§17-2E-8. Existing policies.**

1 (a) The requirements set forth in this article do not alter existing rules, policies, and  
2 procedures relating to other utility facilities within a right-of-way or for accommodating utility  
3 facilities or other facilities under the control of the Division of Highways.

4 (b) The Division of Highways may consider the financial and technical qualifications of a  
5 telecommunications carrier when determining specific insurance requirements for contractors  
6 authorized to enter a right-of-way to construct, install, inspect, test, maintain, or repair  
7 telecommunications facilities with longitudinal access or wireless access to the right-of-way.

8 (c) If the Division of Highways authorizes longitudinal access, wireless access, or the use  
9 of, and access to, conduit or related facilities of the Division for construction and installation of a  
10 telecommunications facility, the Division may require an approved telecommunications carrier to  
11 install the telecommunications facility in the same general location as similar facilities already in  
12 place, coordinate their planning and work with other contractors performing work in the same  
13 geographic area, install in a joint trench when two or more telecommunications carriers are  
14 performing installations at the same time and equitably share costs between such carriers.

15 (d) The placement, installation, maintenance, repair, use, operation, replacement, and  
16 removal of telecommunications facilities with longitudinal access or wireless access to a right-of-  
17 way or that use or access conduit or related facilities of the Division shall be accommodated only  
18 when in compliance with this code and Division of Highways rules, policies and guidelines.

19           (e) Access to a right-of-way must be administered in compliance with the  
20 Telecommunications Act of 1996, 47 U.S.C. §151, *et seq.*, as amended.

**§17-2E-9. Rule-making authority.**

1           The Commissioner of the Division of Highways may promulgate rules pursuant to the  
2 provisions of §29A-3-15 of this code as may be necessary to carry out the purpose of this  
3 article, and as may have been specifically delineated within this article.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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*Chairman, House Committee*

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*Chairman, Senate Committee*

Originating in the House.

In effect ninety days from passage.

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*Clerk of the House of Delegates*

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*Clerk of the Senate*

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*Speaker of the House of Delegates*

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*President of the Senate*

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The within ..... this the.....  
day of ....., 2018.

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*Governor*