

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

Senate Bill 445

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RUCKER, MARONEY, PLYMALE, MAYNARD, AND BEACH
[Originating in the Committee on Government
Organization; reported on February 23, 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; to amend said code by adding thereto two new sections,
3 designated §17-4-17b and §17-4-17e; and to amend said code by adding thereto a new
4 section, designated §24-2-20, all relating to public utilities; creating new legislative
5 findings; defining a new term; establishing a method by which the Commissioner of the
6 Division of Highways may acquire certain rights-of-way and easements for the purpose of
7 increasing public access to utilities; establishing a procedure for the Division of Highways
8 to lease acquisitions to utilities for fair market value; and establishing a cost-sharing
9 procedure for determining how relocation costs are to be paid by the utility.

Be it enacted by the Legislature of West Virginia:

CHAPTER 17. ROADS AND HIGHWAYS.

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 the provisions of federal, state, or local
5 laws, legislative rules, or agency policies. Utilities provide an essential service to the general
6 public and, as a matter of sound economic public policy and law, utilities have used state road
7 rights-of-way for transmitting and distributing their services. Such accommodation of utility
8 facilities on the right-of-way of state highways serves an important public purpose by increasing
9 public access to utility services.

10 (b) "Utility" means, for purposes of this chapter, privately, publicly, or cooperatively owned
11 line, facility, or system for producing, transmitting, or distributing communications, data,
12 information, video services, power, electricity, light, heat, gas, oil, crude products, water, steam,

13 waste, stormwater not connected with highway drainage, or any other similar commodity,
14 including any fire or police signal system or street lighting system, which directly or indirectly
15 serves the public. The term “utility” also includes those similar facilities which are owned or leased
16 by a government agency for its own use, or otherwise dedicated solely to governmental use.

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

22 (d) Notwithstanding any provision of this article, the commissioner may lease real property
23 held by the Division of Highways or any interest or right in the property, including airspace rights,
24 if any, for the purpose of accommodating any utility that has requested a lease if the commissioner
25 finds, in his or her sole discretion, that entering into the lease agreement with the utility is in the
26 public interest. The term of any accommodation lease authorized by this section shall not exceed
27 30 years. Neither competitive bids nor public solicitations are required prior to entering into a
28 utility accommodation lease. Any utility accommodation lease shall require the utility to pay fair
29 market value for the real property interest as determined by the commissioner using common
30 valuation methods, which shall include consideration of the use of the property for utility
31 accommodation purposes: *Provided*, That amounts paid for property damage by the division in a
32 condemnation case shall not be considered in the commissioner’s determination of fair market
33 value. The commissioner shall have the option to charge and collect a one-time lease payment
34 or fixed installment lease payments from a utility in connection with an accommodation lease. All
35 moneys received from utility accommodation leases shall be paid into the state Treasury and
36 credited to the State Road Fund. The provisions of this subsection are completely voluntary and
37 shall not be interpreted to require any utility to lease any real property, or any interest or right in
38 the property, from the commissioner.

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 all or a portion of its own relocation costs elects
57 to pursue a reimbursement agreement with the division pursuant to this subsection and provides
58 the division with sufficient evidence to demonstrate that the utility is not adequately staffed,
59 equipped, or capitalized to perform such relocation work with its own forces or contractors at a
60 time convenient to and in coordination with the associated highway project, the division may pay
61 for the associated relocation costs, including but not limited to design engineering, design review,
62 construction, and inspection costs, out of the State Road Fund: *Provided*, That the utility shall
63 reimburse the division in full for such portion of the relocation costs that it is required by law to
64 bear within two years of the completion of the highway project. The division shall deduct from the
65 utility's reimbursement amount any costs resulting from work performed as a result of plan
66 changes made by the division. Before the division may pay any relocation costs, the division and
67 the utility shall enter into a written reimbursement agreement containing terms that are mutually
68 acceptable to the division and the utility seeking the reimbursement agreement.

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

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

73 (B) A consultant selected by the division if the contract is administered by the division;
74 *Provided*, That the selected consultant shall be pre-approved by the utility; or

75 (C) Inclusion as part of the highway construction contract let by the division as agreed to
76 by the utility: *Provided*, That the subcontractor performing the preliminary engineering design work

77 associated with the relocation is pre-approved by the utility.

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

80 (A) A contract awarded by the division to the lowest qualified bidder based on an
81 appropriate competitive solicitation: *Provided*, That the lowest qualified bidder for utility relocation
82 construction work is pre-approved by the utility; or

83 (B) Inclusion as part of the highway construction contract let by the division as agreed to
84 by the utility: *Provided*, That the subcontractor performing the utility relocation construction work
85 is pre-approved by the utility.

86 (3) All design and construction work paid for by the division pursuant to a reimbursement
87 agreement is subject to the reasonable inspection and acceptance of the utility, whose
88 acceptance shall not be unreasonably withheld, and shall be performed in accordance with the
89 specifications and standards required by the utility.

90 (4) All relocation work performed pursuant to a reimbursement agreement shall conform
91 to applicable state and federal laws or regulations.

92 (5) The provisions of this subsection are completely voluntary and shall not be interpreted
93 to require any utility to enter into a reimbursement agreement with the division or avail itself of the
94 options authorized by this subsection.

95 (6) The division may propose rules for legislative approval in accordance with the
96 provisions of §29A-3-1 *et seq.* of this code, and the division may promulgate emergency rules
97 pursuant to the provisions of §29A-3-15 of this code in order to comply with this subsection.

**§17-4-17e. Utility relocation on state highway construction projects financed by proceeds
of bonds or notes issued before July 1, 2021.**

1 Subject to the provisions of §17-4-17d of this code, and notwithstanding any other
2 provisions to the contrary, whenever the Commissioner of Highways determines that any utility
3 facility located upon, across, above, or under any portion of a state highway needs to be relocated

4 in order to accommodate a highway project funded, in whole or in part, with proceeds of bonds or
5 notes issued by the division, commissioner, West Virginia Parkways Authority, or the State of
6 West Virginia on or after January 1, 2018, and on or before July 1, 2021, the commissioner shall
7 notify the utility owning or operating the facility, which shall relocate the facility in accordance with
8 this article and in accordance with the cost-sharing provisions of this section. The utility shall bear
9 85 percent of any such relocation costs, and the Division of Highways shall bear 15 percent of
10 any such relocation costs. The division's share shall be paid out of the State Road Fund or paid
11 with other eligible funds, and shall be considered a cost of the highway project: *Provided, That*
12 nothing in this section shall alter or amend the responsibility of the division to pay for the cost of
13 utility facilities relocation when such costs are incurred to accommodate a highway project and
14 such utilities maintain pre-existing property rights in their facilities' present location.

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.

§17-2A-17a and §17-4-17e are new; therefore, these sections have been underscored in their entirety.