

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Engrossed

Committee Substitute

for

Senate Bill 270

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND

PREZIOSO (BY REQUEST OF THE EXECUTIVE)

[Originating in the Committee on Government

Organization; Reported on January 25, 2019]

1 A BILL to amend and reenact §17-2A-17a of the Code of West Virginia, 1931, as amended; and
2 to amend and reenact §17-2E-2, §17-2E-3, §17-2E-5, and §17-2E-6 of said code, all
3 relating to the use of state-owned rights-of-way; modifying requirements related to
4 accommodation leases; providing for the determination of fair market value and
5 compensation for accommodation leases; amending procedures and requirements of the
6 state's dig once policy; modifying definitions; providing for the determination of fair market
7 value and compensation to Division of Highways relating to dig once policy; modifying
8 notice requirements for permit applicants; amending procedures for the adjudication of
9 disputes between telecommunications carriers; providing certain exemptions from dig
10 once requirements; and authorizing the Division of Highways to, upon approval of the
11 Governor, transfer or assign the ownership, control, or any rights related to any in-kind
12 compensation received by the division to any other state agency.

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 ~~de~~ does not adversely affect highway or traffic safety or otherwise impair
4 the highway or its aesthetic quality, and ~~de~~ does not conflict with the provisions of federal, state,
5 or local laws, legislative rules, or agency policies. Utilities provide ~~an~~ essential ~~service~~ services to
6 the general public and, as a matter of sound economic public policy and law, utilities have used
7 state road rights-of-way for transmitting and distributing their services. ~~Such~~ The accommodation
8 of utility facilities on the ~~right-of-way~~ rights-of-way of state highways serves an important public
9 purpose by increasing public access to utility services.

10 (b) "Utility" means, for purposes of this chapter, any privately, publicly, or cooperatively
11 owned 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, or
17 those facilities which are owned or leased by a local exchange carrier, as defined by 150 CSR 6.

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

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

38 ~~moneys received from utility accommodation leases shall be paid into the state Treasury and~~
39 ~~credited to the State Road Fund. The provisions of this subsection are completely voluntary and~~
40 ~~shall not be interpreted to require any utility to lease any real property, or any interest or right in~~
41 ~~the property, from the commissioner: Provided, however, That for any utility which is not subject~~
42 ~~to the jurisdiction of the Public Service Commission, the lease shall not contain any exclusivity~~
43 ~~provisions~~ The execution and governance of such accommodation leases are subject to the
44 following:

45 (1) The term of any accommodation lease authorized by this section may not exceed 30
46 years;

47 (2) Neither competitive bids nor public solicitations are required prior to entering into a
48 utility accommodation lease;

49 (3) Any utility accommodation lease shall require the utility to pay fair market value for the
50 real property interest as determined by the commissioner: *Provided*, That because the social,
51 environmental, and economic benefits from such use of state highway rights-of-way is of
52 overwhelming value to the citizens of this state and is in the overall public interest, the division
53 shall establish the fair market value for purposes of this article at \$0 in monetary compensation:
54 *Provided, however*, That a utility accommodation lease may include provisions that convey the
55 state in-kind compensation if the lease includes multiple districts of the Division of Highways;

56 (4) For any utility which is not subject to the jurisdiction of the Public Service Commission,
57 an accommodation lease may not contain any exclusivity provisions;

58 (5) The provisions of this subsection do not require any utility to lease any real property,
59 or any interest or right in the property, from the commissioner; and

60 (6) The ownership, control, or any rights related to any in-kind compensation received by
61 the division may, upon written approval of the Governor, be transferred or assigned to any other
62 state agency.

ARTICLE 2E. DIG ONCE POLICY.

§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
3 optic 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) "Direct bury" means the burying of telecommunications wire or cable directly into the
7 ground by means of plowing or direct insertion without the opening of a trench and without the
8 installation of conduit or innerduct.

9 ~~(4)~~ (5) "Division" means the Division of Highways.

10 ~~(5)~~ (6) "Longitudinal access" means access to or the use of any part of a right-of-way that
11 extends generally parallel to the traveled right-of-way.

12 ~~(6)~~ (7) "Permit" means an encroachment permit issued by the ~~Commissioner~~
13 ~~commissioner of the division of Highways~~ under the authority of this code, and pursuant to the
14 Accommodation of Utilities on Highway Right-of-Way and Adjustment and Relocation of Utility
15 Facilities on Highway Projects Policy, or equivalent policy, as may be currently enforced by the
16 ~~division, of Highways~~ that specifies the requirements and conditions for performing work in a right-
17 of-way and where such work involves the creation or opening of a trench for the installation of
18 telecommunications facilities in a right-of-way.

19 ~~(7)~~ (8) "Right-of-way" means land, property, or any interest therein acquired or controlled
20 by the ~~West Virginia division of Highways~~ for transportation facilities or other transportation
21 purposes or specifically acquired for utility accommodation.

22 ~~(8)~~ (9) "Telecommunications carrier" means a telecommunications carrier:

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

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

26 ~~(9)~~ (10) "Telecommunications facility" means any cable, line, fiber, wire, conduit, innerduct,
27 access manhole, handhole, tower, hut, pedestal, pole, box, transmitting equipment, receiving
28 equipment, power equipment, or other equipment, system, or device that is used to transmit,
29 receive, produce or distribute a signal for telecommunications purposes via wireline, electronic,
30 or optical means.

31 ~~(40)~~ (11) "Utility facility" has the meaning ascribed to it in §17-2A-17a of this code.

32 ~~(44)~~ (12) "Wireless access" means access to, and use of, a right-of-way for the purpose
33 of constructing, installing, maintaining, using, or operating telecommunications facilities for
34 wireless telecommunications.

**§17-2E-3. Use of rights-of-way; ~~Broadband~~ 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~~ a permit for longitudinal access or wireless access to a right-
5 of-way, the 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; and

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)~~ (c) Unless specifically provided for in an agreement entered into pursuant to subsection
- 19 (a) of this section, the division of ~~Highways~~ may not grant a property interest in a right-of-way
- 20 pursuant to this article.
- 21 ~~(e)~~ (d) A telecommunications carrier shall compensate the division of ~~Highways~~ for access
- 22 ~~to a right-of-way for the construction, installation, and maintenance of telecommunication facilities,~~
- 23 the use of spare conduit or related facilities of owned or controlled by the division of ~~Highways~~ as
- 24 part of any longitudinal access or wireless access granted to a right-of-way pursuant to this
- 25 section. The compensation must be, without limitation:
- 26 (1) At fair market value: Provided, That because the social, environmental, and economic
- 27 benefits from such use of state highway rights-of-way is of overwhelming value to the citizens of
- 28 this state and is in the overall public interest, the division shall establish the fair market value for
- 29 purposes of this article at \$0 in monetary compensation;
- 30 (2) Competitively neutral;
- 31 (3) Nondiscriminatory;
- 32 (4) Open to public inspection;
- 33 (5) ~~Calculated~~ Determined based on the geographic region of this state, taking into
- 34 account the population and the impact on private right-of-way users in the region; and once
- 35 ~~calculated~~ determined, set at an amount that encourages the deployment of digital infrastructure
- 36 within this state; and
- 37 (6) ~~Paid in monetary compensation or with in-kind compensation, or a combination of~~
- 38 ~~monetary compensation and in-kind compensation; and~~

39 ~~(7) Paid in a lump-sum payment or in annual installments, as agreed to by the~~
40 ~~telecommunications carrier and the division of Highways~~

41 ~~(d)~~ (e) The division may consider adjustments for areas the division, in conjunction with
42 the council, determines are underserved or unserved areas of the state and may consider the
43 value to such areas for economic development, enhancing the transportation system, expanding
44 opportunities for digital learning, and telemedicine.

45 ~~(e)~~ (f) For the purpose of determining the amount of in-kind compensation a
46 telecommunications carrier must pay the division of ~~Highways~~ for the use of spare conduit or
47 excess conduit or related facilities of the division of ~~Highways~~ as part of any longitudinal access
48 or wireless access granted to a right-of-way pursuant to this section, the division may:

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

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

55 ~~(f) The value of in-kind compensation, or a combination of money and in-kind~~
56 ~~compensation, must be equal to or greater than the amount of monetary compensation that the~~
57 ~~division of Highways would charge if the compensation were paid solely with money.~~

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

§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)~~ (a) Upon application for a permit, the applying telecommunications carrier ~~will~~ shall
7 notify, by email, the ~~West Virginia Broadband Enhancement~~ council and all other
8 telecommunications carriers on record with the ~~West Virginia Broadband Enhancement~~ council
9 of the application. Other telecommunications carriers have ~~30~~ 15 calendar days to notify the
10 applicant ~~if they wish~~ of their interest to share the applicant's trench. This requirement extends to
11 all underground construction technologies.

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

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

22 (b) If no competing telecommunications carrier provides notice of interest to share the
23 applicant's trench within 15 calendar days of notice of the project, the carrier applying for the
24 permit shall affirm that fact to the division prior to being issued a permit.

25 ~~(2)~~ (c) If a competing telecommunications carrier ~~expresses~~ provides notice of interest in
26 ~~participating in the project to share the applicant's trench,~~ an agreement between the two (or
27 more) telecommunications carriers ~~will~~ shall be executed by those entities within 30 days of the
28 notice of interest, outlining the responsibilities and financial obligations of each, with respect to
29 the installation within the right-of-way. The financial obligations of each carrier shall be based on
30 the proportionate sharing of costs between each carrier for joint trenching or trench sharing based
31 on the amount of conduit innerduct space or excess conduit that is authorized in the agreements
32 entered into pursuant to this article. If the division uses a trench, it shall also pay its proportional
33 share unless it is utilizing the trench as in-kind payment for use of the right-of-way. A copy of the
34 executed agreement shall be provided to the division. ~~of Highways~~

35 ~~(3)~~ ~~The telecommunications carrier that placed the legal advertisement is responsible for~~
36 ~~resolving in good faith all disputes between any competing telecommunications carriers that~~
37 ~~timely responded to the advertisement and that wishes to install facilities within the same portion~~
38 ~~of the rights-of-way to be occupied~~

39 (d) Should a dispute arise between the initial applying telecommunications carrier and a
40 competing telecommunications carrier, including a failure to execute an agreement required by
41 subsection (c) of this section, the initial telecommunications carrier ~~will attempt to mediate the~~
42 ~~dispute. Any dispute that is not resolved by the telecommunications carriers~~ dispute shall be
43 adjudicated by the Public Service Commission. All disputes brought to the Public Service
44 Commission under this article shall be adjudicated within 45 days.

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

49 ~~(e) (f)~~ The ~~Commissioner~~ commissioner of the division of Highways shall promulgate rules
50 governing the relationship between the telecommunications carriers, as hereinafter provided in
51 this article.

52 (g) The provisions of this section do not apply to the following projects:

53 (1) Projects where the trench is less than 1,000 feet in length;

54 (2) Projects that use the direct bury of cable or wire facilities;

55 (3) Projects that are solely for the service of entities involved in national security matters
56 or where the disclosure or sharing of a trench location would be against federal policy; or

57 (4) Projects where the telecommunications carrier installs an amount of spare conduit or
58 innerduct equal to what is being installed for its own use and which is made available for lease to
59 competing telecommunications carriers on a nondiscriminatory basis at rates established by the
60 rules of the Federal Communications Commission. All carriers installing spare conduit or
61 innerduct shall notify the council of the location and capacity of such spare conduit and innerduct
62 upon completion of the project, and the council shall make such information publicly available for
63 competing telecommunications carriers.

§17-2E-6. ~~Monetary and in-kind~~ 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) (a)~~ 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 ~~(e)~~ (b) 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)~~ (c) In-kind compensation paid to the division of ~~Highways~~ may be disposed of if both
17 of the following conditions are met:

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

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

22 ~~(e)~~ (d) 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.

28 (e) Notwithstanding the provisions of subsections (c) and (d) of this section, the division
29 may, upon written approval of the Governor, transfer or assign the ownership, control, or any
30 rights related to any in-kind compensation received by the division to any other state agency.