

WEST VIRGINIA LEGISLATURE

2019 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 270

BY SENATORS CARMICHAEL (MR. PRESIDENT) AND PREZIOSO

(BY REQUEST OF THE EXECUTIVE)

[Passed February 21, 2019; in effect from passage]

1 AN ACT 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 does not adversely affect highway or traffic safety or otherwise impair the
4 highway or its aesthetic quality, and does not conflict with the provisions of federal, state, or local
5 laws, legislative rules, or agency policies. Utilities provide essential services to the general public
6 and, as a matter of sound economic public policy and law, utilities have used state road rights-of-
7 way for transmitting and distributing their services. The accommodation of utility facilities on the
8 rights-of-way of state highways serves an important public purpose by increasing public access
9 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, and
20 adjacent to public roadways or highways, all real or personal property, public or private, or any
21 interests or rights therein, including any easement, riparian right, or right of access, determined
22 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 or any interest or right in the property, including airspace
26 rights, if any, for the purpose of accommodating any utility providing telecommunications or
27 broadband services that has requested a lease if the commissioner finds, in his or her sole
28 discretion, that entering into the lease agreement with such utility is in the public interest. The
29 execution and governance of such accommodation leases are subject to the following:

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

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

34 (3) Any utility accommodation lease shall require the utility to pay fair market value for the
35 real property interest as determined by the commissioner: *Provided*, That because the social,
36 environmental, and economic benefits from such use of state highway rights-of-way is of
37 overwhelming value to the citizens of this state and is in the overall public interest, the division

38 shall establish the fair market value for purposes of this article at \$0 in monetary compensation:

39 *Provided, however,* That a utility accommodation lease may include provisions that convey the
40 state in-kind compensation if the lease includes multiple districts of the Division of Highways;

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

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

45 (6) The ownership, control, or any rights related to any in-kind compensation received by
46 the division may, upon written approval of the Governor, be transferred or assigned to any other
47 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 (5) "Division" means the Division of Highways.

10 (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 (7) "Permit" means an encroachment permit issued by the commissioner of the division
13 under the authority of this code, and pursuant to the Accommodation of Utilities on Highway Right-
14 of-Way and Adjustment and Relocation of Utility Facilities on Highway Projects Policy, or

15 equivalent policy, as may be currently enforced by the division, that specifies the requirements
16 and conditions for performing work in a right-of-way and where such work involves the creation
17 or opening of a trench for the installation of telecommunications facilities in a right-of-way.

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

21 (9) "Telecommunications carrier" means a telecommunications carrier:

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

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

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

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

31 (12) "Wireless access" means access to, and use of, a right-of-way for the purpose of
32 constructing, installing, maintaining, using, or operating telecommunications facilities for wireless
33 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 a permit for longitudinal access or wireless access to a right-of-way,
5 the division 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 shall comply with all applicable federal regulations with respect to approval of an
11 agreement, including, but not limited to, 23 C.F.R. §710.403 and 23 C.F.R. §710.405. The
12 agreement shall be approved by the Commissioner of Highways in order to be effective and,
13 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 (c) Unless specifically provided for in an agreement entered into pursuant to subsection
19 (a) of this section, the division may not grant a property interest in a right-of-way pursuant to this
20 article.

21 (d) A telecommunications carrier shall compensate the division for the use of spare conduit
22 or related facilities owned or controlled by the division as part of any longitudinal access or
23 wireless access granted to a right-of-way pursuant to this section. The compensation must be,
24 without limitation:

25 (1) At fair market value: *Provided*, That because the social, environmental, and economic
26 benefits from such use of state highway rights-of-way is of overwhelming value to the citizens of
27 this state and is in the overall public interest, the division shall establish the fair market value for
28 purposes of this article at \$0 in monetary compensation;

29 (2) Competitively neutral;

30 (3) Nondiscriminatory;

31 (4) Open to public inspection;

32 (5) Determined based on the geographic region of this state, taking into account the
33 population and the impact on private right-of-way users in the region; and once determined, set
34 at an amount that encourages the deployment of digital infrastructure within this state; and

35 (6) Paid with in-kind compensation.

36 (e) The division may consider adjustments for areas the division, in conjunction with the
37 council, determines are underserved or unserved areas of the state and may consider the value
38 to such areas for economic development, enhancing the transportation system, expanding
39 opportunities for digital learning, and telemedicine.

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

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

47 (2) Determine the fair market value of the in-kind compensation based on the incremental
48 costs for the installation of conduit and related facilities.

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

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

1 (a) Upon application for a permit, the applying telecommunications carrier shall notify, by
2 email, the council and all other telecommunications carriers on record with the council of the
3 application. Other telecommunications carriers have 15 calendar days to notify the applicant of

4 their interest to share the applicant's trench. This requirement extends to all underground
5 construction technologies.

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

9 (c) If a competing telecommunications carrier provides notice of interest to share the
10 applicant's trench, an agreement between the two (or more) telecommunications carriers shall be
11 executed by those entities within 30 days of the notice of interest, outlining the responsibilities
12 and financial obligations of each, with respect to the installation within the right-of-way. The
13 financial obligations of each carrier shall be based on the proportionate sharing of costs between
14 each carrier for joint trenching or trench sharing based on the amount of conduit innerduct space
15 or excess conduit that is authorized in the agreements entered into pursuant to this article. If the
16 division uses a trench, it shall also pay its proportional share unless it is utilizing the trench as in-
17 kind payment for use of the right-of-way. A copy of the executed agreement shall be provided to
18 the division.

19 (d) Should a dispute arise between the initial applying telecommunications carrier and a
20 competing telecommunications carrier, including a failure to execute an agreement required by
21 subsection (c) of this section, the dispute shall be adjudicated by the Public Service Commission.
22 All disputes brought to the Public Service Commission under this article shall be adjudicated
23 within 45 days.

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

28 (f) The commissioner of the division shall promulgate rules governing the relationship
29 between the telecommunications carriers, as hereinafter provided in this article.

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

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

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

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

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

§17-2E-6. In-kind compensation.

1 (a) In-kind compensation paid to the division under an agreement entered into pursuant
2 to this article may include, without limitation:

3 (1) Conduit or excess conduit;

4 (2) Innerduct;

5 (3) Dark fiber;

6 (4) Access points;

7 (5) Telecommunications equipment or services;

8 (6) Bandwidth; and

9 (7) Other telecommunications facilities as a component of the present value of the
10 trenching.

11 (b) The division shall value any in-kind compensation based on fair market value at the
12 time of installation or review, and may also consider any valuation or cost information provided
13 by the telecommunications carrier.

14 (c) In-kind compensation paid to the division may be disposed of if both of the following
15 conditions are met:

16 (1) The telecommunications facility received as in-kind payment has not been used within
17 10 years of its installation; and

18 (2) The commissioner of the division determines that the division does not have an
19 immediately foreseeable need for the telecommunications facility.

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

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

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

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Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

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Day of, 2019.

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Governor