

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 4619

BY DELEGATES HANSHAW (MR. SPEAKER), CAPITO,
ATKINSON, WESTFALL, QUEEN, NELSON, SUMMERS, J. KELLY,
BARRETT, BOGGS AND MILEY

[Passed March 7, 2020; in effect ninety days from passage.]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §24-2-1o; to amend and reenact §31G-4-5 of said code; and to amend said
3 code by adding thereto a new section, designated §31G-4-5a, all relating to broadband
4 enhancement; excepting certain middle-mile fiber broadband infrastructure from
5 consideration as a public utility; making legislative findings; defining terms; establishing
6 the Middle-Mile Fiber Broadband Infrastructure Expansion Program; authorizing certain
7 electric utilities to participate in said program; setting forth powers and duties of the Public
8 Service Commission in reviewing and considering written plans and amendments thereto
9 submitted pursuant to said program; requiring certain electric utilities to file written plans
10 and application with the Public Service Commission upon a determination by the
11 Broadband Enhancement Council that a proposed project is feasible; establishing that
12 such a written plan and application is in lieu of a proceeding pursuant to §24-2-11; setting
13 forth the required contents of said written plan and application; requiring that an electric
14 utility publish in certain publication areas the anticipated monthly and yearly electric rate
15 increase, if any, and actual rates under the proposal, as a Class I legal advertisement in
16 compliance with the provisions of §59-3-1, *et seq.* of this code; requiring that a public
17 hearing be held within 90 days of the publication of said notice; setting forth instances
18 when no such public hearing is necessary; requiring that the Public Service Commission
19 issue a final order within 150 days of the application filing date; setting forth instances
20 when the Public Service Commission must approve such a written plan; authorizing an
21 electric utility to implement such a plan upon approval by the Public Service Commission;
22 setting forth project costs that an electric utility is entitled to recover as part of the
23 implementation of an approved project; authorizing an electric utility to make certain
24 accounting accruals; providing that electric utilities shall control the scope, scheduling and
25 execution of a project; authorizing an electric utility to reestablish electric service and
26 assure safety of its workers prior to restoration of middle-mile fiber broadband service;

27 authorizing electric utilities to use contractors chosen by the electric utility to construct,
28 install, operate, maintain and repair middle-mile fiber assets; providing an electric utility
29 with sole control of the location and method of attachment and connection of certain
30 middle-mile fiber infrastructure; requiring electric utilities to manage and document the
31 entities that lease middle-mile fiber assets for last-mile operations; allowing an electric
32 utility to own, manage, or control certain broadband capacity, fiber strands, equipment and
33 electronics; allowing an electric utility to lease certain broadband capacity, fiber strands,
34 equipment and electronics to certain Internet service providers and other third parties;
35 allowing an electric utility to provide access points that are outside the electric utility's
36 power supply zone to allow connection between the electric utility's broadband capacity
37 system or fiber strands and non-governmental Internet service provider's or other third
38 party's system; removing certain references to underserved areas of the state from
39 feasibility studies of proposed broadband projects; and authorizing certain electric
40 cooperatives to utilize their distribution system, poles, or rights of way to provide for critical
41 infrastructure.

Be it enacted by the Legislature of West Virginia:

CHAPTER 24. PUBLIC SERVICE COMMISSION.

ARTICLE 2. POWER AND DUTIES OF PUBLIC SERVICE COMMISSION.

§24-2-1o. Middle-Mile Fiber Broadband Infrastructure Expansion Program.

1 (a) *Legislative findings.* The Legislature finds:

2 (1) That access to broadband services is of critical importance to and a necessary
3 prerequisite for enabling economic development in the state and for improving education, health
4 care, public safety and government services, among other benefits to its citizens;

5 (2) That broadband expansion into unserved rural areas of the state continues to be an
6 issue of importance to the Legislature, and progress is hindered by lack of full development of
7 middle-mile broadband fiber infrastructure within the state;

8 (3) That the issues which have hindered the provision of broadband access to rural areas
9 of the state especially disadvantage the elderly and low-income households;

10 (4) That it continues to be a primary goal of the Legislature to make every municipality,
11 community, and rural area in this state accessible to Internet communications through the
12 expansion, extension, and general availability of broadband services and technology;

13 (5) That regulated electric utilities have existing distribution infrastructure in place
14 throughout the state, and that their existing and new infrastructure could be utilized in connection
15 with construction of middle-mile broadband fiber assets;

16 (6) That it is in the public interest to expedite construction of middle-mile broadband fiber
17 infrastructure to provide the necessary architecture to facilitate additional broadband Internet
18 access to individuals and institutions in unserved areas of the state; and

19 (7) That it is appropriate to establish a program to allow electric utilities to construct middle-
20 mile fiber broadband assets within the power supply zone utilizing existing and new electric utility
21 distribution assets in a manner that addresses the needs of the public and is consistent with the
22 operational concerns of the electric utilities that may participate in this program.

23 (b) *Definitions.* For purposes of this section:

24 "Commission" means the Public Service Commission of West Virginia.

25 "Council" means the Broadband Enhancement Council, as defined in §31G-1-1, *et seq.* of
26 this code.

27 "Electric utility" means any electric utility operating within this state that is regulated by the
28 commission: *Provided*, That an electric utility that has installed middle-mile fiber broadband
29 infrastructure pursuant to this section shall not be considered a public utility engaged in the

30 transmission of messages by telephone, telegraph or radio for purposes of §24-2-1(a) of this
31 code.

32 “Program” means the Middle-mile fiber Broadband Expansion Program established
33 pursuant to subsection (c) of this section.

34 “Project” means one or more middle-mile fiber infrastructure expansion projects, including
35 any portion of such projects to be used for the electric utility’s communication needs, proposed
36 by an electric utility and approved by the commission pursuant to subsection (e) of this section as
37 part of the program.

38 “Served” means any area with broadband service as defined in §31G-1-2 of this code.

39 “Unserved” means any area without broadband service as defined in §31G-1-2 of this
40 code.

41 (c) *Establishment of program.* Commencing July 1, 2020, the Middle-Mile Fiber Broadband
42 Infrastructure Expansion Program is hereby authorized and established.

43 (d) *Authorizing participation.* An electric utility having distribution infrastructure in this state
44 may participate in the program pursuant to the provisions of this section.

45 (e) *Powers and duties of Public Service Commission to act on written plans and*
46 *amendments to written plans.* The commission shall have the following powers and duties in
47 connection with the program:

48 (1) Review, approve, or reject each written plan submitted by an electric utility pursuant to
49 subsection (f) of this section. A written plan shall be approved if the commission determines that
50 the proposed plan is reasonable, prudent, useful, and is not contrary to the public interests,
51 considering the interests of the potential broadband users and the electric utility customers.

52 (2) Review, approve, or reject amendments to written plans submitted by an electric utility
53 pursuant to subsection (f) of this section. Amendments to a written plan shall be approved if the
54 commission determines that the proposed amendments to a written plan are reasonable, prudent,

55 useful and not contrary to the public interest considering the interests of the potential broadband
56 users and the electric utility customers.

57 (3) Perform any other duties necessary to effectuate the provisions of this section.

58 (f) *Written plan.* Following the council's determination that construction, installation,
59 operation, and repair of a middle-mile broadband infrastructure expansion project by an electric
60 utility is feasible pursuant to §31G-4-5 of this code, the electric utility shall file a written plan and
61 application seeking the commission's approval of the project and its associated cost recovery.
62 The written plan and application is in lieu of a proceeding pursuant to §24-2-11 of this code and
63 shall contain the following:

64 (1) The route of the middle-mile fiber infrastructure proposed for the project, the number
65 of fiber strands that would be utilized in connection with the proposed project and dedicated to
66 serve as the middle-mile, the location of the electric utility's distribution infrastructure that will be
67 utilized in connection with the proposed project, the capacity or number of fiber strands of the
68 middle-mile that will be available to lease to non-governmental last-mile broadband Internet
69 providers and other third parties upon completion of the proposed project, and the commitment
70 of at least one non-governmental last-mile broadband Internet provider that will lease access to
71 the middle-mile fiber assets constructed as part of the proposed project, and an estimate of
72 potential broadband customers, determined in consultation with the council, that would be served
73 by the middle-mile infrastructure;

74 (2) The estimated cost of the proposed project, including, but not limited to, engineering
75 costs, construction costs, permitting costs, right of way costs and a reasonable allowance for
76 funds used during construction;

77 (3) Proposed schedule of construction of the proposed project;

78 (4) Method of attachment and connection of the middle-mile broadband fiber assets to the
79 electric utility's distribution infrastructure;

80 (5) Testimony, exhibits or other evidence that demonstrates the project is reasonable,
81 prudent, useful and not contrary to the public interest;

82 (6) A cost recovery mechanism that allocates all net costs to be recovered under this
83 section on a distribution-level basis; and

84 (7) Other information the applicant considers relevant or the commission requires.

85 (g) The electric utility shall publish, in the form the commission directs, which form shall
86 include, but not be limited to, the anticipated monthly and yearly electric rate increase, if any, and
87 actual rates under the proposal, by average percentage and dollar amount for customers within
88 a class of service, as a Class I legal advertisement in compliance with the provisions of §59-3-1
89 *et seq.* of this code, the publication area to be each county in which service is provided by the
90 electric utility, a notice of the filing of the application and that the commission shall hold a hearing
91 on the application within 90 days of the notice; unless no opposition to the plan or the rate change
92 is received by the commission within the time limits established by the commission, in which case
93 the hearing can be waived, and the commission shall issue a final order within 150 days of the
94 application filing date: *Provided*, That upon the request of any interested person or entity, the
95 commission shall allow for the submission of comments on the feasibility of the plan.

96 (h) Upon notice and hearing, if required by the commission, the commission shall approve
97 the plan and allow expedited recovery of costs related to the expenditures as provided in
98 subsection (f) of this section if the commission finds that the expenditures and the associated rate
99 requirements are just, reasonable, not contrary to the public interest, and will allow for the
100 provision and maintenance of adequate, efficient, safe, reliable and reasonably priced middle-
101 mile fiber broadband service.

102 (i) The council or the commission may not act to limit the number of last-mile broadband
103 Internet providers eligible to be contracted to utilize the middle-mile fiber infrastructure
104 constructed as part of a project proposed pursuant to this section. No board, commission, agency,
105 or other governmental body may regulate the costs extended to a broadband customer from any

106 last-mile broadband Internet service provider. Nothing in this subsection shall prevent the
107 commission from reviewing, modifying, and approving or denying the cost or means of providing
108 a middle-mile fiber proposed project pursuant to this section.

109 (j) Upon commission approval, an electric utility will be authorized to implement the plan
110 and to recover related project costs, net of any middle-mile broadband revenues or contributions
111 in aid of construction, as provided in the following:

112 (1) An allowance for return shall be calculated by applying a rate of return to the planned
113 net incremental increase to rate base attributable to the project for the coming year, considering
114 the projected amount and timing of expenditures under the project, plus any expenditures in
115 previous years of the project. The rate of return shall be determined by utilizing the rate of return
116 on equity authorized by the commission in the electric utility's most recent rate case proceeding
117 or in the case of a settled rate case, a rate of return on equity as determined by the commission,
118 and the projected cost of the electric utility's debt during the period of the project to determine the
119 weighted cost of capital based upon the electric utility's capital structure.

120 (2) Income taxes applicable to the return allowed on the project shall be calculated for
121 inclusion in rates at the federal and state statutory rates.

122 (3) Depreciation and property tax expenses directly attributable to the project shall be
123 estimated for the upcoming year.

124 (4) Operation and maintenance expense specifically and directly related to operation and
125 maintenance of the middle-mile fiber broadband facilities.

126 (5) Following commission approval of the project and related cost recovery mechanism,
127 an electric utility shall place into effect a commission approved reconcilable rate surcharge that
128 recovers the revenue requirement of the allowance for return, related income taxes, operation
129 and maintenance expenses, depreciation, property tax expenses associated with the electric
130 utility's estimated project investments for the upcoming year, net of middle-mile revenue or
131 contributions in aid of construction recovery of those costs provided by last mile broadband

132 Internet providers upon completion of the project, if any (“middle-mile cost recovery rates”). In
133 each year subsequent to the order approving the project and middle-mile cost recovery rates, the
134 electric utility shall file a petition with the commission setting forth new proposed middle-mile cost
135 recovery rates that recover the revenue requirement of the project investments previously
136 installed and projected costs of the project based on investments to be made in the subsequent
137 year, plus any under-recovery or minus any over-recovery of actual costs attributable to the
138 project, for the preceding year.

139 (k) The electric utility may make any accounting accruals necessary to establish a
140 regulatory asset or liability through which actual costs incurred and costs recovered through the
141 rate mechanism are tracked.

142 (l) *Construction, installation, operation, maintenance, and repair of middle-mile fiber*
143 *expansion projects.* Subject to continuing authority of the commission to determine the
144 reasonableness of acts and practices, for all projects contained in a written plan approved by the
145 commission pursuant to subsection (e) of this section, and constructed, installed, operated,
146 maintained, and repaired by an electric utility pursuant to this section, the electric utility shall have
147 control of the scope, scheduling and execution of the project to construct, install, operate, maintain
148 and repair middle-mile fiber assets, including fiber build route selection and build and splice
149 schedules. The electric utility shall be entitled to reestablish electric service and assure safety of
150 its workers prior to restoration of middle-mile fiber broadband service in order to ensure
151 operational safety matters of the shared infrastructure. Additionally, the electric utility shall be
152 entitled to use contractors chosen and approved by the electric utility to construct, install, operate,
153 maintain, and repair middle-mile fiber assets pursuant to this section because of its or electric
154 utility’s knowledge of hazards in the power supply zone and the associated controls to reduce the
155 risks involved. Nothing in this section confers any rights to work in the power supply space except
156 by the electric utility and its designated contractors.

157 (m) *Attachment and connection of middle-mile fiber assets.* An electric utility participating
158 in the program shall have sole control of the location and method of attachment and connection
159 of middle-mile fiber assets to the electric utility's distribution infrastructure, unless otherwise
160 ordered by the commission.

161 (n) *Management of fiber projects.* In order to manage operations, an electric utility
162 participating in the program shall manage and document the entities that lease middle-mile fiber
163 assets for last-mile operations, including, but not limited to, outage notification and management.

164 (o) Notwithstanding anything in this code or in the articles of incorporation of an electric
165 utility to the contrary, an electric utility may, either directly or indirectly or through an affiliate or
166 subsidiary, pursuant to a written plan approved by the commission:

167 (1) Own, manage or control any broadband capacity, number of fiber strands, equipment
168 and electronics, including any plant, works, system, lines, facilities or properties, or any part or
169 parts thereof, together with all appurtenances thereto, used or useful in connection with the
170 provisions and extension of such broadband services;

171 (2) Lease such broadband capacity, number of fiber strands, equipment, or electronics to
172 non-governmental Internet service providers and other third parties, on a nonexclusive basis; and

173 (3) Provide access points that are outside the electric utility's power supply zone to allow
174 connection between the electric utility's broadband capacity system or fiber strands, and any non-
175 governmental Internet service provider's or other third party's system.

CHAPTER 31G. BROADBAND ENHANCEMENT AND EXPANSION

POLICIES.

ARTICLE 4. MAKE-READY POLE ACCESS.

**§31G-4-5. Electric power utilities; feasibility study for providing broadband services;
Public Service Commission to assist; proposed legislation to be developed; report.**

1 (a) For purposes of this section:

2 (1) "Commission" shall mean the West Virginia Public Service Commission.

3 (2) "Council" shall mean the Broadband Enhancement Council, as defined in §31G-1-1 of
4 this code.

5 (3) "Electric utility" shall mean any electric utility operating within this state that is regulated
6 by the commission.

7 (4) "Project" shall mean a middle-mile broadband infrastructure expansion project
8 proposed by an electric utility.

9 (b) Each electric utility may investigate the feasibility of constructing and operating a
10 project within the electric utility distribution system and, if it so elects, may submit a feasibility
11 study of a proposed project to the council on or before December 1, 2019. Additional feasibility
12 studies may be submitted to the council after December 1, 2019, without penalty.

13 (c) The council and the commission shall assist each such electric utility in its preparation
14 of such a feasibility study.

15 (d) The feasibility study shall include an evaluation of the following:

16 (1) The scope of the proposed project for which the feasibility study is conducted, which
17 shall include, but not be limited to:

18 (A) The route of the middle-mile infrastructure proposed for the project, the number of fiber
19 strands that would be utilized in connection with the proposed project and dedicated to serve as
20 the middle-mile, the location of the electric utility's distribution infrastructure that will be utilized in
21 connection with the proposed project, the capacity of the middle-mile broadband infrastructure
22 that will be available to lease to last-mile broadband Internet providers upon completion of the
23 proposed project;

24 (B) The estimated cost of the proposed project, including but not limited to engineering
25 costs, construction costs, permitting costs, materials and labor, right-of-way costs, and a
26 reasonable rate of return to the electric utility;

27 (C) The proposed schedule of construction of the proposed project; and

28 (D) The method of attachment and connection of the middle-mile broadband fiber assets
29 to the electric utility's distribution infrastructure;

30 (2) The regulatory and legal barriers to an electric utility constructing a project and
31 operating middle-mile broadband infrastructure to provide access to unserved areas of the state,
32 as defined in §31G-1-2 of this code, and proposed legislation to address such regulatory barriers;

33 (3) Whether it is in the public interest and the interest of the electric utility to make
34 improvements to the distribution grid in furtherance of providing such middle-mile broadband
35 Internet services in conjunction with its program of electric distribution projects;

36 (4) Whether it is in the public interest and the interest of the electric utility to operate
37 middle-mile broadband Internet assets to provide access to unserved areas of the state;

38 (5) Whether it is in the public interest and the interest of the electric utility to permit a third
39 party to lease such capacity to provide last-mile broadband Internet services to unserved areas
40 of the state;

41 (6) Whether construction of middle-mile broadband Internet infrastructure utilizing electric
42 utility distribution systems is feasible with respect to the maturity of the relevant technology, the
43 compatibility of such services with existing electric services, and the financial requirements to
44 undertake such project;

45 (7) The anticipated level of rate adjustment necessary to allow the electric utility to recover
46 its costs associated with the proposed project, and a reasonable rate of return, on an expedited
47 basis, that will be recovered by the electric utility through a rate adjustment at the commission;
48 and

49 (8) Such other information that is pertinent to the project.

50 (e) Upon receipt of a feasibility study, the council shall post the same on the council
51 website for written public comment for a period of seven days and then shall render a
52 determination, by a majority vote of the council, as to the feasibility of the proposed project.

53 (f) In its consideration of the feasibility of a project, the council shall identify one or more
54 last-mile broadband Internet providers that may lease the middle-mile broadband Internet
55 capacity created by the proposed project pursuant to lease terms and conditions set by the
56 council.

57 (g) The council shall render such feasibility determination within 60 days from the date the
58 feasibility study is submitted to the council.

59 (h) Commencing January 1, 2020, and each year thereafter, the council shall give a report
60 of its consideration of feasibility studies submitted pursuant to this section to the Governor, the
61 President of the Senate, the Speaker of the House of Delegates, and the Joint Committee on
62 Government and Finance.

§31G-4-5a. Electric Cooperative Providing Broadband Services.

1 An electric cooperative organized pursuant to state and federal law, including the Rural
2 Electrification Act of 1936, may utilize its distribution system, poles, or rights of way to provide for
3 critical infrastructure, which may include the construction or operation, or both, of a broadband
4 infrastructure project consisting of middle mile or last mile services, or both.

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

.....
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

The within this the.....
day of, 2020.

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Governor