

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

House Bill 3541

By Delegates Rowe, Griffith, Pushkin, and Walker

[Introduced February 14, 2023; Referred to the
Committee on Technology and Infrastructure]

1 A BILL to amend and reenact §24-2-1p of the Code of West Virginia, 1931, as amended, relating to
 2 removing surcharges from the Middle-Mile Fiber Broadband Infrastructure Expansion
 3 Program.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. POWERS AND DUTIES OF PUBLIC SERVICE COMMISSION.

§24-2-1p. 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 code.

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

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

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

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

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

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

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

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

51 (2) Review, approve, or reject amendments to written plans submitted by an electric utility
52 pursuant to subsection (f) of this section. Amendments to a written plan shall be approved if the
53 commission determines that the proposed amendments to a written plan are reasonable, prudent,
54 useful and not contrary to the public interest considering the interests of the potential broadband
55 users, ~~and the electric utility customers.~~

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

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

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

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

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

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

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

81 (6) A cost recovery mechanism that allocates all net costs to be recovered under this
82 section from the users of the broadband facilities; on a distribution-level basis and

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

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

99 broadband rate requirements are just, reasonable, not contrary to the public interest, and will allow
100 for the provision and maintenance of adequate, efficient, safe, reliable and reasonably priced
101 middle-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 constructed
104 as part of a project proposed pursuant to this section. No board, commission, agency, or other
105 governmental body may regulate the costs extended to a broadband customer from any last-mile
106 broadband Internet service provider. Nothing in this subsection shall prevent the commission from
107 reviewing, modifying, and approving or denying the cost or means of providing a middle-mile fiber
108 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 from users of the broadband facilities: net of any middle-mile
111 ~~broadband revenues or contributions 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 on
116 equity authorized by the commission in the electric utility's most recent broadband rate case
117 proceeding or in the case of a settled broadband rate case, a rate of return on equity as
118 determined by the commission, and the projected cost of the electric utility's debt during the period
119 of the project to determine the weighted cost of capital based upon the electric utility's capital
120 structure.

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

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

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

127 (5) Following commission approval of the broadband project and related cost recovery
128 mechanism, an electric utility shall place into effect a commission approved reconcilable rate
129 ~~surcharge~~ that recovers the revenue requirement of the allowance for return, related income
130 taxes, operation and maintenance expenses, withdrawing legal fees and expert witness fees or
131 other costs in the rate proceeding, depreciation, property tax expenses associated with the electric
132 utility's estimated project investments for the upcoming year, net of middle-mile revenue or
133 contributions in aid of construction recovery of those costs provided by last mile broadband
134 Internet providers upon completion of the project, if any ("middle-mile cost recovery rates"). In
135 each year subsequent to the order approving the project and middle-mile cost recovery rates, the
136 electric utility shall file a petition with the commission setting forth new proposed middle-mile cost
137 recovery rates that recover the revenue requirement of the project investments previously
138 installed and projected costs of the project based on investments to be made in the subsequent
139 year, plus any under-recovery or minus any over-recovery of actual costs attributable to the
140 project, for the preceding year. This approved reconcilable rate will be recovered from users of the
141 broadband facilities.

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

145 (l) Construction, installation, operation, maintenance, and repair of middle-mile fiber
146 expansion projects. Subject to continuing authority of the commission to determine the
147 reasonableness of acts and practices, for all projects contained in a written plan approved by the
148 commission pursuant to subsection (e) of this section, and constructed, installed, operated,
149 maintained, and repaired by an electric utility pursuant to this section, the electric utility shall have
150 control of the scope, scheduling and execution of the project to construct, install, operate, maintain

151 and repair middle-mile fiber assets, including fiber build route selection and build and splice
152 schedules. The electric utility shall be entitled to reestablish electric service and assure safety of
153 its workers prior to restoration of middle-mile fiber broadband service in order to ensure
154 operational safety matters of the shared infrastructure. Additionally, the electric utility shall be
155 entitled to use contractors chosen and approved by the electric utility to construct, install, operate,
156 maintain, and repair middle-mile fiber assets pursuant to this section because of its or electric
157 utility's knowledge of hazards in the power supply zone and the associated controls to reduce the
158 risks involved. Nothing in this section confers any rights to work in the power supply space except
159 by the electric utility and its designated contractors.

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

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

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

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

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

176 (3) Provide access points that are outside the electric utility's power supply zone to allow

177 connection between the electric utility's broadband capacity system or fiber strands, and any non-
178 governmental Internet service provider's or other third party's system.

NOTE: The purpose of this bill is to move the recovery of certain expenses from the reconcilable rate to be charged to the users of the broadband facilities.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.