

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Committee Substitute

for

House Bill 4447

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HARSHBARGER, FAST, LANE, HOLLEN, CAPITO AND

SUMMERS

[Reported February 23, 2018.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
2 designated §31G-5-1, §31G-5-2, §31G-5-3, §31G-5-4, §31G-5-5, §31G-5-6, §31G-5-7,
3 §31G-5-8, §31G-5-9, §31G-5-10 and §31G-5-11, all relating to providing a uniform and
4 efficient system of broadband conduit installation coinciding with the construction,
5 maintenance or improvement of highways, and rights-of-way under the oversight of the
6 Division of Highways; defining terms; providing procedures for broadband conduit
7 installation in rights-of-way; providing for requirements for permits to install broadband
8 conduit there; providing for agreements to install broadband conduit there and terms to be
9 included; compensation due the Division of Highways for use of spare conduit or related
10 facilities of the Division of Highways as part of any longitudinal access granted to a right-
11 of-way pursuant to this section; defining the valuation of such compensation, including in-
12 kind compensation; establishing limitations on longitudinal access consistent with highway
13 safety and certain existing highway policies; delineating requirements for provider initiated
14 construction; providing guidelines for joint use of trenches or trench sharing where multiple
15 providers share a single trench and agreements governing the same; delineating
16 provisions governing the Division of Highways offering a provider use of, and access to,
17 its spare conduit; providing guidelines for the relocation and upgrade of existing
18 telecommunications facilities within rights-of-way for state highways; providing guidelines
19 for the installation of broadband conduit in covered highway construction projects;
20 providing that the Division of Highways install broadband conduit on certain highway
21 construction projects as recommended by the Broadband Enhancement Council; requiring
22 coordination between the Broadband Enhancement Council and various state and local
23 government entities for the installation, maintenance and improvement of the conduit;
24 requiring development of a strategy and adoption of policies for deployment of broadband
25 conduit to serve buildings and property of state, county, municipal and local units of

26 government owned lands and buildings; and providing joint rule-making authority to the
27 Broadband Enhancement Council and the Commissioner of the Division of Highways to
28 further the ends of this statute.

Be it enacted by the Legislature of West Virginia:

ARTICLE 5. "DIG ONCE" POLICY.

§31G-5-1. Definitions.

1 In this article, unless the context otherwise requires:

2 (1) "Broadband conduit" or "conduit" means a conduit, innerduct or microduct for fiber optic
3 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) "Cost-based rate" means a lease rate that is only comprised of direct and actual
6 associated indirect costs of obtaining and maintaining the associated right-of-way and broadband
7 conduit and must be equitably allocated among users of the associated right-of-way, broadband
8 conduit and innerduct or microduct.

9 (4) "Council" means the Broadband Enhancement Council.

10 (5) "Covered highway construction project" or "project" means:

11 (A) A project to construct a new highway or bridge or to construct or relocate an additional
12 lane or shoulder for an existing highway that is commenced after the effective date of this section
13 and that receives funding from state or federal monies; or

14 (B) Any other project undertaken by the Division of Highways that opens, bores, or
15 trenches alongside any state-owned infrastructure or right-of-way, including, but not limited to,
16 surface mounting on bridges, overpasses, and other facilities where below ground placement is
17 impossible or impractical.

18 (6) "Division" means the Division of Highways.

19 (7) “Longitudinal access” means access to or the use of any part of a right-of-way that
20 extends generally parallel to the right-of-way.

21 (8) “Permit” means an encroachment permit issued by the Commissioner of the Division
22 of Highways under the authority of §17-4-8 or §17-16-6 of this Code, and pursuant to the
23 “Accommodation of Utilities On Highway Right Of Way and Adjustment and Relocation Of Utility
24 Facilities On Highway Projects Policy”, or the equivalent policy, as currently enforced by the
25 Division of Highways, that specifies the requirements and conditions for performing work in a
26 right-of-way.

27 (9) “Provider” means an entity that provides for the sale or resale of wholesale or retail
28 broadband services in this state.

29 (10) “Right-of-way” means land, property or any interest therein acquired or controlled by
30 the Division of Highways for transportation facilities or other transportation purposes.

31 (11) “Spare conduit” means unused vacant conduit.

32 (12) “Statewide telecommunications purposes” means the development of the statewide
33 network that meets the telecommunications needs of state agencies or serves another public
34 purpose.

35 (13) “Telecommunications facility” means any cable, line, fiber, wire, conduit, innerduct,
36 access manhole, handhole, tower, hut, pedestal, pole, box, transmitting equipment, receiving
37 equipment, power equipment or other equipment, system or device that is used to transmit,
38 receive, produce or distribute a signal for telecommunications purposes via wireline, electronic
39 or optical means.

40 (14) “Telecommunications provider” means a telecommunications provider:

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

42 (B) That meets Federal Communications Commission and industry carrier class service
43 guidelines.

44 (15) "Utility facility" has the meaning ascribed to it in 23 C.F.R. § 645.207.

45 (16) "Vacant conduit" means conduit which has not had fiber optic cable installed.

§31G-5-2. Broadband conduit installation in rights-of-way; permits; agreements.

1 (a) Before obtaining a permit for the construction or installation of a telecommunications
2 facility in a right-of-way, a telecommunications provider must enter into an agreement with the
3 Division consistent with the requirements of this article.

4 (b) Before granting permitted longitudinal access to a right-of-way, the Division must:

5 (1) Enter into an agreement with a telecommunications provider that is competitively
6 neutral and nondiscriminatory as to other telecommunications providers, and

7 (2) Issue a permit granting such access, consistent with the requirements of this article.

8 Such an agreement must be approved by the Commissioner of the Division of Highways and,
9 without limitation:

10 (A) Specify the terms and conditions for renegotiation of the agreement;

11 (B) Set forth the maintenance requirements for each telecommunications facility;

12 (C) Be nonexclusive; and

13 (D) Be for a term of not more than 30 years.

14 (c) Unless specifically provided for by some other provision of this article, in any
15 agreement entered into consistent with the requirements of this article, the Division may not
16 grant a property interest in a right-of-way.

§31G-5-3. Compensation; valuation of compensation.

1 (a) If required as part of the agreement, a telecommunications provider must
2 compensate the Division for use of spare conduit or related facilities of the Division as part of
3 any longitudinal access granted to a right-of-way pursuant to this section. Such compensation
4 must be, without limitation:

5 (1) Fair and reasonable;

6 (2) Competitively neutral;

7 (3) Nondiscriminatory;

8 (4) Open to public inspection;

9 (5) Calculated in such manner as:

10 (A) To promote access by multiple telecommunications providers; and

11 (B) Based on the geographic region of this State, taking into account the population and
12 the impact on private right-of-way users in the region; and

13 (C) Once, calculated, set at an amount that encourages the deployment of digital
14 infrastructure within this State;

15 (6) Such compensation is to be paid as follows:

16 (A) In monetary compensation, or with in-kind compensation, or a combination of
17 monetary compensation and in-kind compensation; and all monetary compensation is to be paid
18 according to the terms of the agreement.

19 (B) All monetary compensation collected by the Division pursuant to the provisions of
20 this article must be deposited in the State Road Fund.

21 (C) In-kind compensation paid to the Division under an agreement entered into pursuant
22 to this article may include, without limitation:

23 (i) Conduit or excess conduit;

24 (ii) Innerduct;

25 (iii) Dark fiber;

26 (iv) Access points;

27 (v) Telecommunications equipment or services;

28 (vi) Bandwidth; and

29 (vii) Other telecommunications facilities as a component of the present value of
30 the trenching

31 (b). For the purpose of determining the amount of compensation a telecommunications
32 provider must pay the Division for the use of spare conduit or excess conduit or related facilities

33 of the Division as part of any longitudinal access granted to a right-of-way pursuant to this
34 section, the Division shall:

35 (1) Conduct an analysis once every 5 years, in accordance with the regulations of the
36 Division of Highways, to determine the fair and reasonable value of a right-of-way to which
37 access has been granted pursuant to this section; and

38 (2) If compensation is paid in-kind, in consultation with the Council, determine the value
39 of any such in-kind compensation based on the incremental costs to the Division for the
40 installation of conduit and related facilities, or the costs to the telecommunications provider for
41 the installation of conduit and related facilities, as applicable; and

42 (3) The value of in-kind compensation or a combination of monetary compensation and
43 in-kind compensation must be equal to or greater than the amount of monetary compensation
44 that the Division would charge if the compensation were paid solely with monetary
45 compensation.

46 (4) The Division shall value any in-kind compensation as follows:

47 (A) Electronic equipment, conduit, fiber and other telecommunications hardware and
48 software must be valued on a present value basis at the estimated, reasonable cost to the
49 telecommunications provider for procuring and installing such hardware and software.

50 (B) Excess conduit, fiber and other related facilities must be valued on a present value
51 basis of the estimated, reasonable cost to the Division for procuring and installing such facilities.

52 (C) The present value of the estimated, reasonable cost to the telecommunications
53 provider of joint trenching for placing conduit, excess conduit, fiber and other related facilities for
54 the provider and the Division must be proportionately allocated to the Division pursuant to this
55 paragraph and must equal some proportion of the total estimated, reasonable cost of the
56 trenching work. The Council and the Commissioner of the Division of Highways shall jointly
57 promulgate rules to calculate and determine the valuation of this allocation, as hereinafter
58 provided for in this article.

59 (D) The present value of the estimated, reasonable cost to a telecommunications
60 provider for providing any other telecommunications facility which is shared jointly by the
61 provider and the Division must be proportionately allocated to the Division as a component of
62 the present value of the in-kind compensation. The Division shall determine the proportion to be
63 allocated to the Division pursuant to this paragraph based on the percentage of use or benefit to
64 which each party is entitled under the agreement entered into pursuant to this act.

65 (E) The Division shall determine the present value of warranties of equipment, conduit,
66 fiber or other components and software, maintenance covenants and operating covenants,
67 based on the reasonable, estimated cost of purchasing such warranties and covenants from
68 manufacturers or other third parties.

69 (F) The total present value of the in-kind compensation is the sum of the present values
70 determined in paragraphs (A) to (E) of this subdivision, inclusive.

71 (G) Any in-kind compensation received by the Division pursuant to this act must be used
72 exclusively for statewide telecommunications purposes and may not be sold or leased in
73 competition with telecommunications providers or Internet service providers. Fair and
74 reasonable valuation of facilities owned by either the Division or a telecommunications provider
75 offered as part of in-kind compensation must be determined by the Division.

76 (H) In determining the value of any in-kind compensation, the Division shall also
77 consider any valuation or cost information provided by the telecommunications provider.

§31G-5-4. Highway Safety and Existing Highway Policies.

1 (a) The Division shall not grant any longitudinal access to a right-of-way if such access
2 would compromise the safe, efficient and convenient use of any road, route, highway or
3 interstate in this State for the traveling public.

4 (b) Notwithstanding any other provision of law, the requirements set forth in this article,
5 including any longitudinal access to a right-of-way granted by the Division, do not abrogate,
6 limit, supersede or otherwise affect.

7 (1) Existing policies and procedures relating to other utility facilities within a right-of-way
8 or for accommodating utility facilities or other facilities under the control of the Division; or

9 (2) Access granted or authorized pursuant to the Division's "Accommodation of Utilities
10 On Highway Right-Of-Way and Adjustment and Relocation Of Utility Facilities On Highway
11 Projects Policy: June 2007" or equivalent policy.

12 (c) The Division may consider the financial and technical qualifications of a provider
13 when determining specific insurance requirements for contractors authorized to enter a right-of-
14 way to construct, install, inspect, test, maintain or repair telecommunications facilities with
15 longitudinal access to the right-of-way.

16 (d) If the Division authorizes longitudinal access, or the use of and access to conduit or
17 related facilities of the Division for construction and installation of a telecommunications facility,
18 the Division may require an approved provider to install the telecommunications facility in the
19 same general location as similar facilities already in place, coordinate their planning and work
20 with other contractors performing work in the same geographic area, install in a joint trench
21 when two or more providers are performing installations at the same time and equitably share
22 costs between such providers.

23 (e) The placement, installation, maintenance, repair, use, operation, replacement and
24 removal of telecommunications facilities with longitudinal access to a right-of-way or that use or
25 access conduit or related facilities of the Division must be accommodated only when in
26 compliance with all requirements of §17-4-8 or §17-16-6 of this Code, the Division's
27 "Accommodation of Utilities On Highway Right-Of-Way and Adjustment and Relocation Of Utility
28 Facilities On Highway Projects Policy: June 2007" or the equivalent policy, and any rules
29 promulgated pursuant to this article; and

30 (f) Access to a right-of-way must be administered in compliance with the
31 Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56-161, as amended.

§31G-5-5. Provider initiated construction.

1 (a) (1) Before obtaining a permit for the construction or installation of a
2 telecommunications facility in a right-of-way, the provider must notify all other active providers of
3 the permit application by submitting a notice of application to the Council.

4 (2) As provided in §31G-5-6 of this Code, other providers shall have sixty days to notify
5 the applicant provider of their desire to share the proposed facility.

6 (b) If other providers wish to join the construction, the provider applying for the permit
7 shall act as the lead company and shall not be required to alter their preferred construction type
8 or method to accommodate another carrier.

9 (c) The Council and the Commissioner of the Division of Highways shall jointly
10 promulgate rules governing the relationship between the providers, as hereinafter provided in
11 this article.

12 (d) In exchange for the right-of-way and permitting costs, the Division shall receive
13 compensation consistent with the provisions as set forth in §31G-5-3 of this Code.

§31G-5-6. Joint Use; Multiple Providers in a Single Trench.

1 (a) (1) The Division shall provide for the proportionate sharing of costs between the
2 Division and a telecommunications provider for joint trenching or trench sharing based on the
3 amount of conduit innerduct space or excess conduit that is authorized by agreement entered
4 into pursuant to section two of this article.

5 (2) Upon application for a permit, the provider will notify, by email, the Council and, by
6 email, all other providers on record with the Council. Other providers have sixty days to notify
7 the applicant if they wish to share the applicant's trench. This requirement extends to all
8 underground construction technologies, including, but not limited to, directional boring.

9 (3) If two or more telecommunications providers are required to share a single trench,
10 each provider in the trench must share the cost and benefits of the trench in a fair, reasonable,

11 competitively neutral and nondiscriminatory manner. This requirement extends to all
12 underground construction technologies, including, but not limited to, directional boring.

13 (b) (1) If the Division enters into an agreement with two or more telecommunications
14 providers, a consortium of such providers, or other entity, whose members, partners, or other
15 participants are two or more telecommunications providers, or, if the Division requires two or
16 more telecommunications providers to share a single trench, the agreements entered into
17 pursuant to this act must require that the telecommunications providers share the obligation of
18 compensating the Division on a fair, reasonable and equitable basis, taking into consideration
19 the proportionate uses and benefits to be derived by each telecommunications provider from the
20 trench, conduits and other telecommunications facilities installed under the agreements.

21 (2) The provisions of subdivision (1) of this subsection do not prevent the Division from
22 requiring every participating telecommunications provider from bearing joint and several liability
23 for the obligations owed to the Division under the agreements.

24 (3) Any agreement requiring two or more telecommunications providers to share the
25 obligation of compensating the Division must provide the Division the right to review and audit
26 the records and contracts of and among the participating providers to ensure compliance with
27 subdivision (1) of this subsection.

§31G-5-7. Use of Spare Conduit.

1 (a) (1) The Division may offer a telecommunications provider use of and access to any of
2 its spare conduit and related facilities if the Division:

3 (A) Determines the spare conduit and related facilities are not and will not be needed for
4 highway purposes;

5 (B) Receives fair compensation for the use of and access to the spare conduit and
6 related facilities; and

7 (C) Offers such use and access in a competitively neutral and nondiscriminatory manner
8 as to all similarly situated telecommunications providers.

9 (2) The Division shall establish rates of compensation for the use of and access to its
10 spare conduit to ensure that the Division receives fair compensation for the value of its
11 underground installations of conduit and related facilities. The compensation must be fair and
12 reasonable to both the Division and the telecommunications provider, and charged in a
13 competitively neutral and nondiscriminatory manner to all similarly situated telecommunications
14 providers.

15 (3) Any compensation charged pursuant to this section must be set forth in an
16 agreement entered into between the Division and the telecommunications provider.

17 (b) The Division shall:

18 (1) Determine the annual compensation to be paid by each telecommunications provider
19 for use of its conduit and related facilities based on the present value of the estimated,
20 reasonable cost to the Division of trenching to place conduit, fiber and other related facilities;
21 and

22 (2) Conduct an analysis every 5 years to determine if there are any changes in the value
23 of its spare conduit and related facilities. If the Division determines that the value of its spare
24 conduit or related facilities has changed, the Division must apply the new values to each
25 agreement executed thereafter.

26 (3) The Division may accept in-kind compensation for the use of and access to its spare
27 conduit and related facilities in accordance with the valuation procedures as set forth in §31G-5-
28 3 of this Code.

§31G-5-8. Relocation.

1 (a) Relocation and upgrade of telecommunications facilities within rights-of-way for state
2 highways shall be conducted as follows:

3 (1) For rights-of-way not on an interstate, the Division may place additional conduit and
4 related facilities within such rights-of-way for use by telecommunications providers based on the
5 potential use by such providers, as determined by the Division. The Division may grant use of

6 such conduit and related facilities by telecommunications providers in exchange for a trade
7 value, as determined by the Division, for such use from such providers. A telecommunications
8 provider is not entitled to compensation for its expenses to relocate from the conduit
9 infrastructure of the Division unless such provider has a right of occupancy in its current location
10 because it holds a compensable real property interest.

11 (2) For rights-of-way on an interstate, the Division may grant longitudinal access to such
12 rights-of-way in accordance with the provisions of this article, and in accordance with Federal
13 law.

14 (b) The Commissioner of the Division of Highways may construct, reconstruct, operate
15 and maintain materials testing and research laboratory facilities as may be necessary to
16 establish and maintain such standards and specifications.

17 (c) The Commissioner of the Division of Highways may be consulted by county officials,
18 including members of regional transportation commissions, having authority over streets and
19 highways within their respective counties relative to any question involving such streets and
20 highways; and the Commissioner, in like manner, obtain from such county officials all such
21 information or assistance as they may render in the performance of the Commissioner's duties
22 with their county, and such county officials shall supply such information when requested by the
23 Commissioner.

§31G-5-9. Broadband conduit installation in covered highway construction projects.

1 (a) (1) Notwithstanding any other provision of this section, the Division shall inform the
2 Council 90 days prior to issuing a request for proposal or a request for qualifications for a covered
3 highway construction project, and provide to the Council a description of the project adequate to
4 make a determination by the Council of the necessity to include broadband conduit in the project
5 and to determine the specifications of the broadband conduit to be included in the project. Upon
6 review of the proposed project, the Council shall issue a determination as to whether or not the
7 covered highway construction project represents an effective and efficient opportunity for the

8 expansion of broadband service. The recommendation may include installation of the broadband
9 conduit throughout the entire project, or, only in portions of the project.

10 (2) (A) If the Council determines the covered highway construction project represents an
11 effective and efficient opportunity for the expansion of broadband service; and

12 (B) If no provider has applied under the provisions of this article to install conduit in the
13 right of way of that covered highway construction project; then

14 (C) The Division shall install vacant broadband conduit in accordance with this article as
15 part of that covered highway construction project. All work performed must be in accordance with
16 the National Electrical Safety Code and other generally accepted safety codes. All details of such
17 installation, including the depth of installation of conduit, the size of said conduit, the placement
18 of hand holes and manholes for fiber access, the location and access to pull tape, the interval
19 between access points, and other such considerations are to be in accordance with industry best
20 practices, and as determined by applicable rules jointly promulgated by the Council and the
21 Commissioner of the Division of Highways.

22 (b) Providers desiring use of this conduit may make use of this vacant conduit upon
23 application to the Division. If the Division approves, it shall then lease the broadband conduit to
24 providers at a cost-based rate and coordinate with providers regarding planning and relocating of
25 broadband conduit and any related provider facilities within the right-of-way at the provider's
26 expense if future highway improvements make the relocations necessary. The Division shall take
27 reasonable steps to ensure market-based, nondiscriminatory pricing, and, may limit provider
28 access to any broadband facilities within the right-of-way for initial installation and infrequent
29 access for maintenance purposes and may take other actions necessary to maintain highway
30 safety

31 (c) The Division may install broadband conduit without regard to the timing of a related
32 existing construction project, based on a request for and receipt of funding from the Council.

33 (d) The Division shall not be required to comply with the provisions of this section if a
34 provider has already installed conduit:

35 (1) As part of the same covered highway construction project; or

36 (2) On the same right-of-way prior to the commencement of the covered highway
37 construction project.

§31G-5-10. Infrastructure development.

1 (a) The Council shall, in collaboration with the Department of Transportation, Division of
2 Highways, and private entities, encourage and coordinate “dig once” efforts for the planning,
3 relocation, installation, or improvement of broadband conduit within a right-of-way in conjunction
4 with any current or planned construction, including, but not limited to, highways and bridges. To
5 the extent necessary, the Council shall, in collaboration with the Department of Transportation
6 and Division of Highways, evaluate engineering and design standards, procedures and criteria
7 for contracts or lease agreements with private entities, and pricing requirements, and provide for
8 allocation of risk, costs, and any revenue generated.

9 (b) The Council shall, in collaboration with other state departments and agencies the
10 Council considers necessary, develop a strategy to facilitate the timely and efficient deployment
11 of broadband conduit or other broadband facilities on state-owned lands and buildings.

12 (c) To the extent practicable, the Council shall encourage and assist local units of
13 government to adopt and implement policies similar to those under subsections (a) and (b) of this
14 section for construction or other improvements to county and municipal building projects, and any
15 other right-of-way under the local unit of government’s jurisdiction, and to other lands or buildings
16 owned by the local unit of government.

§31G-5-11. Rulemaking authority.

1 The Broadband Enhancement Council and the Commissioner of the Division of Highways
2 shall jointly promulgate rules pursuant to the provisions of §29A-3-15 of this code and shall
3 propose rules for legislative approval in accordance with the provisions of §29A-3-1 et seq. of this

- 4 code as may be necessary to carry out the purposes of this article, and as may have been
5 specifically delineated within this article.

NOTE: The purpose of this bill is to provide for a uniform and efficient system of broadband conduit installation coinciding with the construction, maintenance or improvement of highways and right-of-way under the oversight of the Division of Highways.

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