

WEST VIRGINIA LEGISLATURE

2018 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 445

SENATORS BOSO, SWOPE, GAUNCH, JEFFRIES, RUCKER, MARONEY,

PLYMALE, MAYNARD, AND BEACH, *original sponsors*

[Passed March 10, 2018; in effect 90 days from passage]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §17-2A-17a; to amend and reenact §17-4-17b of said code; and to amend said
3 code by adding thereto a new section, designated §17-4-17e, all relating to utility
4 relocation; stating legislative findings; defining term; authorizing the Division of Highways
5 to acquire real or personal property for utility accommodation; authorizing the division to
6 lease real property to utilities; allowing the division to pay for utility relocation costs subject
7 to reimbursement agreement; specifying methods of preliminary engineering design work
8 completion and utility relocation construction work payment; providing legislative and
9 emergency rule-making authority; and providing for allocation of costs and the repayments
10 thereof for utility relocation on any state highway construction projects financed by
11 proceeds of bonds or notes which are issued before July 1, 2021.

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

10 (b) "Utility" means, for purposes of this chapter, privately, publicly, or cooperatively owned
11 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.

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

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

39 the property, from the commissioner: *Provided, however,* That for any utility which is not subject
40 to the jurisdiction of the Public Service Commission, the lease shall not contain any exclusivity
41 provisions.

ARTICLE 4. STATE ROAD SYSTEM.

§17-4-17b. Relocation of public utility lines on highway construction projects.

1 (a) Whenever the division reasonably determines that any public utility line or facility
2 located upon, across, or under any portion of a state highway needs to be removed, relocated, or
3 adjusted in order to accommodate a highway project, the division shall give to the utility
4 reasonable notice in writing as mutually agreed, but not to exceed 18 months, directing it to begin
5 the physical removal, relocation, or adjustment of such utility obstruction or interference at the
6 cost of the utility, including construction inspection costs and in compliance with the rules of the
7 division and the provisions of §29A-3-1 *et seq.* of this code.

8 (b) If the notice is in conjunction with a highway improvement project, it will be provided at
9 the date of advertisement or award. Prior to the notice directing the physical removal, relocation,
10 or adjustment of a utility line or facility, the utility shall adhere to the division's utility relocation
11 procedures for public road improvements which shall include, but not be limited to, the following:

12 (1) The division will submit to the utility a letter and a set of plans for the proposed highway
13 improvement project;

14 (2) The utility must within a reasonable time submit to the division a written confirmation
15 acknowledging receipt of the plans and a declaration of whether or not its facilities are within the
16 proposed project limits and the extent to which the facilities are in conflict with the project;

17 (3) If the utility is adjusting, locating, or relocating facilities or lines from or into the division's
18 right-of-way, the utility must submit to the division plans showing existing and proposed locations
19 of utility facilities.

20 (4) The utility's submission shall include with the plans a work plan demonstrating that the
21 utility adjustment, location, or relocation will be accomplished in a manner and time frame

22 established by the division's written procedures and instructions. The work plan shall specify the
23 order and calendar days for removal, relocation, or adjustment of the utility from or within the
24 project site and any staging property acquisition or other special requirements needed to complete
25 the removal, relocation, or adjustment. The division shall approve the work plan, including any
26 requests for compensation, submitted by a utility for a highway improvement project if it is
27 submitted within the established schedule and does not adversely affect the letting date. The
28 division will review the work plan to ensure compliance with the proposed improvement plans and
29 schedule.

30 (c) If additional utility removal, relocation, or adjustment work is found necessary after the
31 letting date of the highway improvement project, the utility shall provide a revised work plan within
32 30 calendar days after receipt of the division's written notification of the additional work. The
33 utility's revised work plan shall be reviewed by the division to ensure compliance with the highway
34 project or improvement. The division shall reimburse the utility for work performed by the utility
35 that must be performed again as the result of a plan change on the part of the division.

36 (d) Should the utility fail to comply with the notice to remove, relocate, or adjust, the utility
37 is liable to the division for direct contract damages, including costs, fees, penalties, or other
38 contract charges, for which the division is proven to be liable to a contractor caused by the utility's
39 failure to timely remove, relocate, or adjust, unless a written extension is granted by the division.
40 The utility shall not be liable for any delay or other failure to comply with a notice to remove,
41 relocate or adjust that is not solely the fault of the utility, including, but not limited to, the following:

42 (1) The division has not performed its obligations in accordance with the division's rules;

43 (2) The division has not obtained all necessary rights-of-way that affect the utility;

44 (3) The delay or other failure to comply by the utility is due to the division's failure to
45 manage schedules and communicate with the utility;

46 (4) The division seeks to impose liability on the utility based solely upon oral
47 communications or communications not directed to the utility's designated contact person;

48 (5) The division changes construction plans in any manner following the notice to remove
49 or relocate and the change affects the utility's facilities; or

50 (6) Other good cause, beyond the control of and not the fault of the utility, including, but
51 not limited to, labor disputes, unavailability of materials on a national level, act of God, or extreme
52 weather conditions.

53 (e) In order to avoid construction delays and to create an efficient and effective highway
54 program, the division may schedule program meetings with the public utility on a quarterly basis
55 to assure that schedules are maintained.

56 (f) If a utility that is required by law to bear all or a portion of its own relocation costs elects
57 to pursue a reimbursement agreement with the division pursuant to this subsection and provides
58 the division with sufficient evidence to demonstrate that the utility is not adequately staffed,
59 equipped, or capitalized to perform such relocation work with its own forces or contractors at a
60 time convenient to and in coordination with the associated highway project, the division may pay
61 for the associated relocation costs, including, but not limited to, design engineering, design
62 review, construction, and inspection costs, out of the State Road Fund: *Provided*, That the utility
63 shall reimburse the division in full for such portion of the relocation costs that it is required by law
64 to bear within two years of the completion of the highway project. The division shall deduct from
65 the utility's reimbursement amount any costs resulting from work performed as a result of plan
66 changes made by the division. Before the division may pay any relocation costs, the division and
67 the utility shall enter into a written reimbursement agreement containing terms that are mutually
68 acceptable to the division and the utility seeking the reimbursement agreement.

69 (1) Preliminary engineering design work associated with utility relocations to be paid for
70 by the division pursuant to a reimbursement agreement shall be completed by any of the following
71 methods:

72 (A) The division's or the utility's internal forces;

73 (B) A consultant selected by the division if the contract is administered by the division:

74 *Provided*, That the selected consultant shall be pre-approved by the utility; or

75 (C) Inclusion as part of the highway construction contract let by the division as agreed to

76 by the utility: *Provided*, That the subcontractor performing the preliminary engineering design work

77 associated with the relocation is pre-approved by the utility.

78 (2) Utility relocation construction work paid for by the division pursuant to a reimbursement

79 agreement shall be completed by either of the following methods:

80 (A) A contract awarded by the division to the lowest qualified bidder based on an

81 appropriate competitive solicitation: *Provided*, That the lowest qualified bidder for utility relocation

82 construction work is pre-approved by the utility; or

83 (B) Inclusion as part of the highway construction contract let by the division as agreed to

84 by the utility: *Provided*, That the subcontractor performing the utility relocation construction work

85 is pre-approved by the utility.

86 (3) All design and construction work paid for by the division pursuant to a reimbursement

87 agreement is subject to the reasonable inspection and acceptance of the utility, whose

88 acceptance shall not be unreasonably withheld, and shall be performed in accordance with the

89 specifications and standards required by the utility.

90 (4) All relocation work performed pursuant to a reimbursement agreement shall conform

91 to applicable state and federal laws or regulations.

92 (5) The provisions of this subsection are completely voluntary and shall not be interpreted

93 to require any utility to enter into a reimbursement agreement with the division or avail itself of the

94 options authorized by this subsection.

95 (6) The division may propose rules for legislative approval in accordance with the

96 provisions of §29A-3-1 *et seq.* of this code and the division may promulgate emergency rules

97 pursuant to the provisions of §29A-3-15 of this code in order to comply with this subsection.

§17-4-17e. Utility relocation on state highway construction projects financed by proceeds of bonds or notes issued before July 1, 2021.

1 Subject to the provisions of §17-4-17d of this code, and notwithstanding any other
2 provisions to the contrary, whenever the Commissioner of Highways determines that any utility
3 facility located upon, across, above, or under any portion of a state highway needs to be relocated
4 in order to accommodate a highway project funded, in whole or in part, with proceeds of bonds or
5 notes issued by the division, commissioner, West Virginia Parkways Authority, or the State of
6 West Virginia on or after January 1, 2018, and on or before July 1, 2021, the commissioner shall
7 notify the utility owning or operating the facility, which shall relocate the facility in accordance with
8 this article and in accordance with the cost-sharing provisions of this section. The utility shall bear
9 85 percent of any such relocation costs, and the Division of Highways shall bear 15 percent of
10 any such relocation costs. The division's share shall be paid out of the State Road Fund or paid
11 with other eligible funds, within two years of completion of the highway project, and shall be
12 considered a cost of the highway project: *Provided*, That nothing in this section shall alter or
13 amend the responsibility of the division to pay for the cost of utility facilities relocation when such
14 costs are incurred to accommodate a highway project and such utilities maintain pre-existing
15 property rights in their facilities' present location.

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 90 days 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

The within this the.....
Day of, 2018.

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Governor