

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

House Bill 4619

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ATKINSON, WESTFALL, QUEEN, NELSON, SUMMERS, J. KELLY,
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[Introduced January 30, 2020; Referred
to the Committee on Technology and Infrastructure
then the Judiciary.]

1 A BILL to amend and reenact §24-2-1 of the Code of West Virginia, 1931, as amended; to amend
2 said code by adding thereto a new section, designated §24-2-1o, all to authorize the Public
3 Service Commission to approve plans proposed by electric utilities to install middle-mile
4 broadband fiber and provide expedited cost recovery.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. POWER AND DUTIES OF PUBLIC SERVICE COMMISSION.

§24-2-1. Jurisdiction of Commission; waiver of jurisdiction.

1 (a) The jurisdiction of the Public Service Commission shall extend to all public utilities in
2 this state and shall include any utility engaged in any of the following public services:
3 Common carriage of passengers or goods, whether by air, railroad, street railroad, motor
4 or otherwise, by express or otherwise, by land, water or air, whether wholly or partly by land, water
5 or air; transportation of oil, gas or water by pipeline; transportation of coal and its derivatives and
6 all mixtures and combinations thereof with other substances by pipeline; sleeping car or parlor
7 car services; transmission of messages by telephone, telegraph or radio, except an electric utility
8 that has installed middle-mile fiber broadband infrastructure under the provisions of §24-2-1o of
9 this article shall not be considered a public utility engaged in the transmission of messages by
10 telephone, telegraph or radio; generation and transmission of electrical energy by hydroelectric
11 or other utilities for service to the public, whether directly or through a distributing utility; supplying
12 water, gas or electricity by municipalities or others; sewer systems servicing 25 or more persons
13 or firms other than the owner of the sewer systems: *Provided*, That if a public utility other than a
14 political subdivision intends to provide sewer service by an innovative, alternative method, as
15 defined by the federal Environmental Protection Agency, the innovative, alternative method is a
16 public utility function and subject to the jurisdiction of the Public Service Commission regardless
17 of the number of customers served by the innovative, alternative method; any public service
18 district created under the provisions of §16-13A-1, *et seq.* of this code, except that the Public
19 Service Commission will have no jurisdiction over the provision of stormwater services by a public

20 service district; toll bridges, wharves, ferries; solid waste facilities; and any other public service:
21 *Provided, however,* That natural gas producers who provide natural gas service to not more than
22 25 residential customers are exempt from the jurisdiction of the commission with regard to the
23 provisions of such residential service: *Provided further,* That upon request of any of the customers
24 of such natural gas producers, the commission may, upon good cause being shown, exercise
25 such authority as the commission may deem appropriate over the operation, rates and charges
26 of such producer and for such length of time as the commission may consider to be proper.

27 (b) The jurisdiction of the commission over political subdivisions of this state providing
28 separate or combined water and/or sewer services and having at least 4,500 customers and
29 annual combined gross revenues of \$3 million or more that are political subdivisions of the state
30 is limited to:

31 (1) General supervision of public utilities, as granted and described in §24-2-5 of this code;

32 (2) Regulation of measurements, practices, acts or services, as granted and described in
33 §24-2-7 of this code;

34 (3) Regulation of a system of accounts to be kept by a public utility that is a political
35 subdivision of the state, as granted and described in §24-2-8 of this code;

36 (4) Submission of information to the commission regarding rates, tolls, charges or
37 practices, as granted and described in §24-2-9 of this code;

38 (5) Authority to subpoena witnesses, take testimony and administer oaths to any witness
39 in any proceeding before or conducted by the commission, as granted and described in §24-2-10
40 of this code; and

41 (6) Investigation and resolution of disputes between a political subdivision of the state
42 providing wholesale water and/or wastewater treatment or other services, whether by contract or
43 through a tariff, and its customer or customers, including, but not limited to, rates, fees and
44 charges, service areas and contested utility combinations: *Provided,* That any request for an
45 investigation related to such a dispute that is based on the act or omission of the political

46 subdivision shall be filed within 30 days of the act or omission of the political subdivision and the
47 commission shall resolve said dispute within 120 days of filing. The 120-day period for resolution
48 of the dispute may be tolled by the commission until the necessary information showing the basis
49 of the rates, fees, and charges or other information as the commission considers necessary is
50 filed: *Provided, however,* That the disputed rates, fees and charges so fixed by the political
51 subdivision providing separate or combined water and/or sewer services shall remain in full force
52 and effect until set aside, altered, or amended by the commission in an order to be followed in the
53 future.

54 (7) Customers of water and sewer utilities operated by a political subdivision of the state
55 may bring formal or informal complaints regarding the commission's exercise of the powers
56 enumerated in this section and the commission shall resolve these complaints.

57 (8) In the event that a political subdivision has a deficiency in either its bond revenue or
58 bond reserve accounts, or is otherwise in breach of a bond covenant, any bond holder may
59 petition the Public Service Commission for such redress as will bring the accounts to current
60 status or otherwise resolve the breached covenant, and the commission shall have jurisdiction to
61 fully resolve the alleged deficiency or breach.

62 (c) The commission may, upon application, waive its jurisdiction and allow a utility
63 operating in an adjoining state to provide service in West Virginia when:

64 (1) An area of West Virginia cannot be practicably and economically served by a utility
65 licensed to operate within the State of West Virginia;

66 (2) Said area can be provided with utility service by a utility which operates in a state
67 adjoining West Virginia;

68 (3) The utility operating in the adjoining state is regulated by a regulatory agency or
69 commission of the adjoining state; and

70 (4) The number of customers to be served is not substantial. The rates the out-of-state
71 utility charges West Virginia customers shall be the same as the rate the utility is duly authorized

72 to charge in the adjoining jurisdiction. The commission, in the case of any such utility, may revoke
73 its waiver of jurisdiction for good cause.

74 (d) Any other provisions of this chapter to the contrary notwithstanding:

75 (1) An owner or operator of an electric generating facility located or to be located in this
76 state that has been designated as an exempt wholesale generator under applicable federal law,
77 or will be so designated prior to commercial operation of the facility, and for which such facility
78 the owner or operator holds a certificate of public convenience and necessity issued by the
79 commission on or before July 1, 2003, shall be subject to §24-2-11c(e) through §24-2-11c(j) of
80 this code as if the certificate of public convenience and necessity for such facility were a siting
81 certificate issued under §24-2-11c of this code and shall not otherwise be subject to the jurisdiction
82 of the commission or to the provisions of this chapter with respect to such facility except for the
83 making or constructing of a material modification thereof as provided in §24-2-1(d)(5) of this code.

84 (2) Any person, corporation or other entity that intends to construct or construct and
85 operate an electric generating facility to be located in this state that has been designated as an
86 exempt wholesale generator under applicable federal law, or will be so designated prior to
87 commercial operation of the facility, and for which facility the owner or operator does not hold a
88 certificate of public convenience and necessity issued by the commission on or before July 1,
89 2003, shall, prior to commencement of construction of the facility, obtain a siting certificate from
90 the commission pursuant to the provisions of §24-2-11c of this code in lieu of a certificate of public
91 convenience and necessity pursuant to the provisions of §24-2-11 of this code. An owner or
92 operator of an electric generating facility as is described in this subdivision for which a siting
93 certificate has been issued by the commission shall be subject to §24-2-11c(e) through §24-2-
94 11c(j) of this code and shall not otherwise be subject to the jurisdiction of the commission or to
95 the provisions of this chapter with respect to such facility except for the making or constructing of
96 a material modification thereof as provided in §24-2-1(d)(5) of this code.

97 (3) An owner or operator of an electric generating facility located in this state that had not
98 been designated as an exempt wholesale generator under applicable federal law prior to
99 commercial operation of the facility that generates electric energy solely for sale at retail outside
100 this state, or solely for sale at wholesale in accordance with any applicable federal law that
101 preempts state law, or solely for both such sales at retail and such sales at wholesale, and that
102 had been constructed and had engaged in commercial operation on or before July 1, 2003, shall
103 not be subject to the jurisdiction of the commission or to the provisions of this chapter with respect
104 to such facility, regardless of whether such facility subsequent to its construction has been or will
105 be designated as an exempt wholesale generator under applicable federal law: *Provided*, That
106 such owner or operator shall be subject to §24-2-1(d)(5) of this code if a material modification of
107 such facility is made or constructed.

108 (4) Any person, corporation or other entity that intends to construct or construct and
109 operate an electric generating facility to be located in this state that has not been or will not be
110 designated as an exempt wholesale generator under applicable federal law prior to commercial
111 operation of the facility that will generate electric energy solely for sale at retail outside this state,
112 or solely for sale at wholesale in accordance with any applicable federal law that preempts state
113 law, or solely for both such sales at retail and such sales at wholesale and that had not been
114 constructed and had not been engaged in commercial operation on or before July 1, 2003, shall,
115 prior to commencement of construction of the facility, obtain a siting certificate from the
116 commission pursuant to the provisions of §24-2-11c of this code in lieu of a certificate of public
117 convenience and necessity pursuant to the provisions of §24-2-11 of this code. An owner or
118 operator of an electric generating facility as is described in this subdivision for which a siting
119 certificate has been issued by the commission shall be subject to §24-2-11c(e) through §24-2-
120 11c(j) of this code and shall not otherwise be subject to the jurisdiction of the commission or to
121 the provisions of this chapter with respect to such facility except for the making or constructing of
122 a material modification thereof as provided in §24-2-1(d)(5) of this code.

123 (5) An owner or operator of an electric generating facility described in this subsection shall,
124 before making or constructing a material modification of the facility that is not within the terms of
125 any certificate of public convenience and necessity or siting certificate previously issued for the
126 facility or an earlier material modification thereof, obtain a siting certificate for the modification
127 from the commission pursuant to the provisions of §24-2-11c of this code in lieu of a certificate of
128 public convenience and necessity for the modification pursuant to the provisions of §24-2-11 of
129 this code and, except for the provisions of §24-2-11c of this code, shall not otherwise be subject
130 to the jurisdiction of the commission or to the provisions of this chapter with respect to such
131 modification.

132 (6) The commission shall consider an application for a certificate of public convenience
133 and necessity filed pursuant to §24-2-11 of this code to construct an electric generating facility
134 described in this subsection or to make or construct a material modification of such electric
135 generating facility as an application for a siting certificate pursuant to §24-2-11c of this code if the
136 application for the certificate of public convenience and necessity was filed with the commission
137 prior to July 1, 2003, and if the commission has not issued a final order thereon as of that date.

138 (7) The limitations on the jurisdiction of the commission over, and on the applicability of
139 the provisions of this chapter to, the owner or operator of an electric generating facility as imposed
140 by and described in this subsection shall not be deemed to affect or limit the commission's
141 jurisdiction over contracts or arrangements between the owner or operator of such facility and any
142 affiliated public utility subject to the provisions of this chapter.

143 (e) The commission shall not have jurisdiction of Internet protocol-enabled service or
144 voice-over Internet protocol-enabled service. As used in this subsection:

145 (1) "Internet protocol-enabled service" means any service, capability, functionality or
146 application provided using Internet protocol, or any successor protocol, that enables an end user
147 to send or receive a communication in Internet protocol format, or any successor format,
148 regardless of whether the communication is voice, data or video.

149 (2) "Voice-over Internet protocol service" means any service that:

150 (i) Enables real-time two-way voice communications that originate or terminate from the
151 user's location using Internet protocol or a successor protocol; and

152 (ii) Uses a broadband connection from the user's location.

153 (3) The term "voice-over Internet protocol service" includes any service that permits users
154 to receive calls that originate on the public-switched telephone network and to terminate calls on
155 the public-switched telephone network.

156 (f) Notwithstanding any other provisions of this article, the commission shall not have
157 jurisdiction to review or approve any transaction involving a telephone company otherwise subject
158 to §24-2-12 and §24-2-12a of this code if all entities involved in the transaction are under common
159 ownership.

160 (g) The Legislature finds that the rates, fees, charges and ratemaking of municipal power
161 systems are most fairly and effectively regulated by the local governing body. Therefore,
162 notwithstanding any other provisions of this article, the commission shall not have jurisdiction over
163 the setting or adjustment of rates, fees and charges of municipal power systems. Further, the
164 jurisdiction of the Public Service Commission over municipal power systems is limited to that
165 granted specifically in this code.

§24-2-10. 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 and underserved rural areas of the state
6 continues to be an issue of importance to the Legislature, and progress is hindered by lack of full
7 development of 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 and underserved 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.

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

31 “Project” means one or more middle-mile fiber infrastructure expansion projects, including
32 any portion of such projects to be used for the electric utility’s communication needs, proposed

33 by an electric utility and approved by the commission pursuant to subsection (e) of this section as
34 part of the program.

35 (c) *Establishment of program.* Commencing July 1, 2020, the Middle-mile fiber Broadband
36 Infrastructure Expansion Program is hereby authorized and established.

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

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

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

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

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

52 (f) *Written plan.* Following the council's determination that construction, installation,
53 operation, and repair of middle-mile broadband infrastructure by an electric utility is feasible
54 pursuant to §31G-4-5 of this code, the electric utility shall file a written plan and application
55 seeking the commission's approval of one or more projects and their associated cost recovery. A
56 written plan and application is in lieu of a proceeding pursuant to §24-2-11 of this code and shall
57 contain the following:

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

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

71 (3) Proposed schedule of construction of the proposed project; and

72 (4) Method of attachment and connection of the middle-mile broadband fiber assets to the
73 electric utility's distribution infrastructure.

74 (5) Testimony, exhibits or other evidence that demonstrates the project is reasonable,
75 prudent, useful and not contrary to the public interest.

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

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

79 (g) The electric utility shall publish, in the form the commission directs, which form shall
80 include, but not be limited to, the anticipated monthly and yearly electric rate increase, if any, and
81 actual rates under the proposal, by average percentage and dollar amount for customers within
82 a class of service, as a Class I legal advertisement in compliance with the provisions of §59-3-1
83 et seq. of this code, the publication area to be each county in which service is provided by the

84 electric utility, a notice of the filing of the application and that the commission shall hold a hearing
85 on the application within 90 days of the notice; unless no opposition to the plan or the rate change
86 is received by the commission within the time limits established by the commission, in which case
87 the hearing can be waived, and the commission shall issue a final order within 150 days of the
88 application filing date.

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

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

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

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

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

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

112 (5) Following commission approval of the project and related cost recovery mechanism,
113 an electric utility shall place into effect a commission approved reconcilable rate surcharge that
114 recovers the revenue requirement of the allowance for return, related income taxes, operation
115 and maintenance expenses, depreciation, property tax expenses associated with the electric
116 utility's estimated project investments for the upcoming year, net of middle-mile revenue or
117 contributions in aid of construction recovery of those costs provided by last mile broadband
118 Internet providers upon completion of the project, if any ("middle-mile cost recovery rates"). In
119 each year subsequent to the order approving the project and middle-mile cost recovery rates, the
120 electric utility shall file a petition with the commission setting forth new proposed middle-mile cost
121 recovery rates that recover the revenue requirement of the project investments previously
122 installed and projected costs of the project based on investments to be made in the subsequent
123 year, plus any under-recovery or minus any over-recovery of actual costs attributable to the
124 project, for the preceding year.

125 (j) The electric utility may make any accounting accruals necessary to establish a
126 regulatory asset or liability through which actual costs incurred and costs recovered through the
127 rate mechanism are tracked.

128 (k) Construction, installation, operation, maintenance and repair of middle-mile fiber
129 expansion projects. Subject to continuing authority of the commission to determine the
130 reasonableness of acts and practices, for all projects contained in a written plan approved by the
131 commission pursuant to subsection (e) of this section, and constructed, installed, operated,
132 maintained and repaired by an electric utility pursuant to this section, the electric utility shall have
133 control of the scope, scheduling and execution of the project to construct, install, operate, maintain
134 and repair middle-mile fiber assets, including fiber build route selection and build and splice
135 schedules. The electric utility shall be entitled to reestablish electric service and assure safety of

136 its workers prior to restoration of middle-mile fiber broadband service in order to ensure
137 operational safety matters of the shared infrastructure. Additionally, the electric utility shall be
138 entitled to use contractors chosen and approved by the electric utility to construct, install, operate,
139 maintain and repair middle-mile fiber assets pursuant to this section because of its or electric
140 utility's knowledge of hazards in the power supply zone and the associated controls to reduce the
141 risks involved. Nothing in this section confers any rights to work in the power supply space except
142 by the electric utility and its designated contractors.

143 (l) Attachment and connection of middle-mile fiber assets. An electric utility participating
144 in the program shall have sole control of the location and method of attachment and connection
145 of middle-mile fiber assets to the electric utility's distribution infrastructure, unless otherwise
146 ordered by the commission.

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

150 (n) Miscellaneous. Notwithstanding anything in this code or in the articles of incorporation
151 of an electric utility to the contrary, an electric utility may, either directly or indirectly or through an
152 affiliate or subsidiary, pursuant to a written plan approved by the commission:

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

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

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

NOTE: The purpose of this bill is to authorize the Public Service Commission to approve plans proposed by electric utilities to install middle-mile broadband fiber and provide expedited cost recovery.

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