

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

ENROLLED

Committee Substitute

for

House Bill 2002

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MILLER, RILEY, BARNHART, SYPOLT, STATLER, ROWAN
AND REED

[Passed April 10, 2021; in effect May 27, 2021.]

1 AN ACT to repeal §17-2E-6 of the Code of West Virginia, 1931, as amended; to repeal §31G-1-
2 6, §31G-1-9, and §31G-1-12 of said code; to amend and reenact §17-2E-3, §17-2E-5,
3 §17-2E-7, §17-2E-8, and §17-2E-9 of said code; to amend and reenact §31G-1-4 of said
4 code; to amend said code by adding thereto a new article, designated §31G-1A-1, §31G-
5 1A-2, §31G-1A-3, §31G-1A-4, §31G-1A-5, and §31G-1A-6; to amend said code by adding
6 thereto two new sections, designated §31G-3-3 and §31G-3-4; to amend and reenact
7 §31G-4-1, §31G-4-2, and §31G-4-4 of said code; and to amend said code by adding
8 thereto a new article, designated §31G-6-1 and §31G-6-2, all relating to broadband
9 expansion policies; establishing requirements for agreements between the Division of
10 Highways and an entity seeking to install telecommunications facilities; providing that if
11 such installation can be accommodated as a utility pursuant to federal and state law, the
12 division shall issue a permit for access to rights-of-way; providing for permit procedures
13 and requirements; requiring notice to the Office of Broadband of a telecommunication
14 entity's intent to seek construction in division rights-of-way; providing the Office of
15 Broadband is responsible for ensuring compliance with certain terms of permit
16 requirements; granting the division authority to determine whether its use of a
17 telecommunication carrier's trench warrants apportionment of costs to it; modifying
18 exceptions to dig once requirements; providing the division authority to allow carriers to
19 use excess telecommunications facilities; allowing the division to transfer or assign
20 ownership of excess telecommunications facilities to another state agency upon approval
21 by Governor; providing rulemaking authority to the division; modifying the powers and
22 duties of Broadband Enhancement Council; establishing the Office of Broadband within
23 the Department of Economic Development; creating the position of the Director of the
24 Office of Broadband; requiring the Office of Broadband report annually to the Joint
25 Committee on Government and Finance; establishing the powers and duties of the Office
26 of Broadband; requiring the Office of Broadband to coordinate with the Consumer

27 Protection Division of the Attorney General’s Office on specified consumer protection
28 claims; requiring the Office of Broadband to map broadband in the state and establish an
29 interactive public map; defining “unserved area”; requiring certain executive agencies to
30 cooperate and provide information to the Office of Broadband regarding AREA maps;
31 allowing Office of Broadband to establish a voluntary data collection program; providing
32 that information collected in program not subject to the Freedom of Information Act;
33 providing procedures and requirements for a data collection program; protecting
34 proprietary business information provided to the Office of Broadband and exempting such
35 information from Freedom of Information Act requirements; providing rulemaking authority
36 to the Office of Broadband; establishing requirements for counties, municipalities, and
37 political subdivisions regarding installation of conduit; authorizing a broadband operator to
38 construct or operate a system over public rights-of-way and through easements which are
39 within the area to be served and which have been dedicated for compatible uses;
40 establishing requirements for broadband operators related to installation and construction;
41 requiring broadband operators to indemnify the state for any claims for injury and damage
42 to persons or property; establishing requirements for broadband operator related to the
43 use of public highways and other public places; providing installations in railroad rights of
44 way and trackways do not have any greater or lesser requirement to comply with stated
45 railroad safety requirements; establishing requirements for broadband operator related
46 easements; defining terms; requiring that an ILEC who accepts payment for make-ready
47 work, and fails to perform that work within 45 days, to immediately return and refund the
48 moneys paid for that work which was not completed, and providing remedies and
49 exceptions in such instances; requiring the Public Service Commission to promulgate
50 rules to address abandoned cable, conductor, and related facilities attached to utility poles
51 and providing requirements for said rules; requiring the Public Service Commission to
52 promulgate rules to govern the timely transfer of facilities from an old pole to a new pole

53 and the removal of utility poles that have had electric facilities moved to new poles but
54 continue to have other facilities attached in the telecommunications space on the old
55 existing poles and providing requirements for said rules; providing for preemption of West
56 Virginia Code, the Code of State Rules, and ordinances relating to installation of certain
57 broadband equipment; providing private agreements, promulgated or effective after the
58 effective date of this legislation, may not regulate or prevent the exterior installation of
59 antennas and equipment necessary to or typically utilized for broadband deployment;
60 providing for scheme of construction of such language in favor of encouraging and
61 assisting broadband installation and deployment; providing for preemption of West Virginia
62 Code, the Code of State Rules, and ordinances relating to pole attachment of certain
63 broadband equipment; and providing for scheme of construction of language of private
64 agreements relating to pole attachment.

Be it enacted by the Legislature of West Virginia:

CHAPTER 17. ROADS AND HIGHWAYS.

ARTICLE 2E. DIG ONCE POLICY.

§17-2E-3. Use of rights-of-way; broadband conduit installation in rights-of-way; permits; agreements; compensation; valuation of compensation; telecommunications facilities construction and installation in rights-of-way.

1 (a) If in-ground construction or installation of a telecommunications facility in rights-of-way
2 owned or controlled by the division serves a public purpose and shall be accommodated as a
3 utility pursuant to federal and state law, the division will receive applications and issue a permit
4 consistent with this section with respect to requirements and conditions for performing work in
5 division rights-of-way.

6 (b) Upon receipt of a complete application as specified in the Accommodation of Utilities
7 on Highway Right-of-Way and Adjustment and Relocation of Utility Facilities on Highway Projects

8 Policy, or equivalent policy, as may be currently enforced by the division, that specifies the
9 requirements and conditions for performing work in a right-of-way, the division shall, within 60
10 business days, advise applicant in writing of any deficiencies with the planned project that:

11 (1) Adversely affect the safety, design, construction, operation, maintenance, or stability
12 of the state road system;

13 (2) Interfere with or impair the present use or planned future expansion of any affected
14 highway or bridge;

15 (3) Conflict with applicable division policy with respect to requirements and conditions for
16 performing work in division rights-of-way; or

17 (4) Violates applicable federal or state law.

18 (c) An applicant may correct any deficiencies and resubmit the application, which shall be
19 reviewed by the division and either approved or denied within 30 days of the resubmittal. Any
20 denial of a resubmittal shall be in writing and explain any deficiencies as provided in subsection
21 (b) of this section. After the division approves a permit application, notwithstanding any other
22 provision of this code to the contrary, the division shall issue a specific district level construction
23 authorization for the approved project within 10 business days unless specific logistical issues
24 reasonably prevent commencement.

25 (d) Compliance with applicable environmental laws shall at all times be the responsibility
26 of the applicant. If any environmental clearance must be performed by the division before an
27 application is approved, the division will notify the applicant in writing of all necessary
28 requirements for such clearance within 15 business days of receiving a complete application. The
29 division will also provide a list of all known federal and state entities with whom an applicant may
30 also need to consult and coordinate for environmental clearance purposes.

31 (e) The division will create and make available for potential applicants an informational
32 notice specific to in-ground telecommunications facility construction and installation that explains

33 routine issues for such projects, including a consolidated checklist or flow chart of all state or
34 federal regulatory requirements, including but not limited to applicable permits, required reviews,
35 required approvals, and required forms. The division shall annually update such informational
36 notice for accuracy and completeness by coordination with each state or federal agency having
37 required regulatory action in the permitting process legal, regulatory, and division requirements
38 and may request the assistance of the Office of Broadband in preparing this informational notice.

39 (f) The provisions of this article shall not apply to the relocation or modification of existing
40 telecommunications facilities in a right-of-way, nor shall these provisions apply to aerial
41 telecommunications facilities or associated apparatus or equipment in a right-of-way. Relocation
42 of telecommunications facilities within rights-of-way for state highways shall be in accordance with
43 the provisions of §17-4-17b of this code.

§17-2E-5. Telecommunications carrier initiated construction and joint use.

1 (a) Upon application for a permit, the applicant shall notify, by email, the Office of
2 Broadband and all other telecommunications carriers on record with the office of the application.
3 Other telecommunications carriers have 15 calendar days to notify the applicant of their interest
4 to share the applicant's trench. This requirement extends to all underground construction
5 technologies.

6 (b) If no competing telecommunications carrier provides notice of interest to share the
7 applicant's trench within 15 calendar days of notice of the project, the applicant shall provide
8 written certification in accordance with subsection (g) of this section.

9 (c) If a competing telecommunications carrier provides notice of interest to share the
10 applicant's trench, an agreement between the two (or more) telecommunications carriers shall be
11 executed by those entities within 30 days of the notice of interest, outlining the responsibilities
12 and financial obligations of each, with respect to the installation within the right-of-way. The
13 financial obligations of each carrier shall be based on the proportionate sharing of costs between

14 each carrier for joint trenching or trench sharing based on the amount of conduit or innerduct
15 space or excess conduit that is authorized in the agreements entered into pursuant to this article.
16 If the division uses a trench, it shall also pay its proportional share unless it is utilizing the trench
17 as in-kind payment for use of the right-of-way, or the division has otherwise determined, in its sole
18 discretion, that including the division in the apportionment of costs is not warranted. A copy of the
19 executed agreement shall be provided to the division.

20 (d) Should a dispute arise between the initial applying telecommunications carrier and a
21 competing telecommunications carrier, including a failure to execute an agreement required by
22 subsection (c) of this section, the dispute shall be adjudicated by the Public Service Commission.
23 All disputes brought to the Public Service Commission under this article shall be adjudicated
24 within 45 days.

25 (e) If two or more telecommunications carriers are required or authorized to share a single
26 trench, each carrier in the trench must share the cost and benefits of the trench in a fair,
27 reasonable, competitively neutral, and nondiscriminatory manner. This requirement extends to all
28 underground construction technologies.

29 (f) The provisions of this section do not apply to the following projects:

30 (1) Projects where the total continuous length of the trench is less than 1,000 feet;

31 (2) Projects that use the direct bury of cable or wire facilities;

32 (3) Projects that are solely for the service of entities involved in national security matters
33 or where the disclosure or sharing of a trench location would be against federal policy; or

34 (4) Projects made available for lease to competing telecommunications carriers on a
35 nondiscriminatory basis at rates established by the rules of the Federal Communications
36 Commission Projects where the telecommunications carrier installs an amount of spare conduit
37 or innerduct equal to what is being installed for its own use and which is given to the Office of
38 Broadband. Such spare conduit or innerduct shall be made available for sale or lease to
39 competing telecommunications carriers on a nondiscriminatory basis at rates apportioned on the

40 basis of the cost of the installation thereof, to other telecommunications providers, and the
41 revenues derived from such sale, less any costs associated therewith, shall be remitted to the
42 telecommunications carrier that installed such spare conduit or innerduct in a manner consistent
43 with all applicable state and federal law and regulations. All carriers installing spare conduit or
44 innerduct shall notify the council and the Office of Broadband of the location and capacity of such
45 spare conduit and innerduct upon completion of the project, and the council shall make such
46 information publicly available for competing telecommunications carriers.

47 (g) The Office of Broadband is responsible for ensuring compliance with this section and
48 will provide the division and the applicant with certification of compliance at such time as the
49 applicant has met all of the requirements of this section.

§17-2E-6. In-kind compensation.

1 [Repealed].

**§17-2E-7. Use of telecommunications facilities owned or controlled by Division of
Highways.**

1 The division may enter into an agreement and issue a permit consistent with the
2 requirements of §17-2E-3 of this code to allow any carrier to use excess telecommunications
3 facilities owned or controlled by the division: *Provided*, That this section shall be subject to the
4 provisions of the Vertical Real Estate Management and Availability Act, as provided for in §31G-
5 5-1 *et seq.* of this code, and no excess telecommunications facilities owned or controlled by the
6 division subject to §31G-5-1 *et seq.* of this code shall be governed by the provisions of this section.

§17-2E-8. Disposal of in-kind compensation; excess telecommunications facilities.

1 Upon written approval of the Governor, the division may transfer or assign the ownership,
2 control, or any rights related to any excess telecommunications facilities owned or controlled by
3 the division to any other state agency.

§17-2E-9. Rule-making authority.

1 The commissioner of the division may promulgate rules pursuant to the provisions of
2 §29A-3-1 *et seq.* of this code as may be necessary to carry out the purpose of this article.

CHAPTER 31G. BROADBAND ENHANCEMENT AND EXPANSION
POLICIES.

ARTICLE 1. BROADBAND ENHANCEMENT COUNCIL.

§31G-1-4. Powers and duties of the council generally.

1 (a) The council shall:

2 (1) Explore any and all ways to expand access to broadband services, including, but not
3 limited to, middle mile, last mile and wireless applications;

4 (2) Gather data regarding the various speeds provided to consumers in comparison to
5 what is advertised. The council may request the assistance of the Legislative Auditor in gathering
6 this data;

7 (3) Explore the potential for increased use of broadband service for the purposes of
8 education, career readiness, workforce preparation and alternative career training;

9 (4) Explore ways for encouraging state and municipal agencies to expand the
10 development and use of broadband services for the purpose of better serving the public, including
11 audio and video streaming, voice-over Internet protocol, teleconferencing and wireless
12 networking;

13 (5) Cooperate and assist in the expansion of electronic instruction and distance education
14 services; and

15 (6) Explore ways to achieve digital equality of opportunity throughout the state, which is a
16 condition where all individuals and communities have the information technology capacity needed
17 for full participation in our society, democracy and economy.

18 (b) In addition to the powers set forth elsewhere in this article, the council is hereby granted
19 the authority to:

20 (1) Promote awareness of public facilities that have community broadband access that
21 can be used for distance education and workforce development;

22 (2) Advise on deployment of e-government portals such that all public bodies and political
23 subdivisions have homepages, encourage one-stop government access and that all public entities
24 stream audio and video of all public meetings;

25 (3) Make and execute contracts, commitments and other agreements necessary or
26 convenient for the exercise of its powers including, but not limited to, the hiring of consultants to
27 perform the duties of the council;

28 (4) Acquire by gift or purchase, hold, or dispose of real property and personal property in
29 the exercise of its powers and performance of its duties as set forth in this article; and

30 (5) Receive and dispense funds appropriated for its use by the Legislature to carry out its
31 statutory duties.

32 (c) The council shall advise and make recommendations to the Office of Broadband, and
33 shall coordinate with the office on bringing broadband service to unserved and underserved
34 areas, as well as to propose statutory changes that may enhance and expand broadband in the
35 state.

36 (d) The council shall report to the Secretary of Economic Development on or before
37 December 1 of each year. The report shall include the action that was taken by the council during
38 the previous year in carrying out the provisions of this article. The council shall also make any
39 other reports as may be required by the Legislature or the Governor.

§31G-1-6. Mapping of areas within state.

1 [Repealed]

§31G-1-9. Collection of data.

1 [Repealed]

§31G-1-12. Grants.

1 [Repealed]

ARTICLE 1A. OFFICE OF BROADBAND.

§31G-1A-1. Office of Broadband; Director of Office.

1 There is hereby established an Office of Broadband, which shall be organized within the
2 Department of Economic Development under the authority of the Secretary of Economic
3 Development. The Office of Broadband shall be managed by a director, who shall report to the
4 Secretary of Economic Development.

§31G-1A-2. Powers and duties of the Office of Broadband generally.

1 (a) The Office of Broadband shall have the following duties:

2 (1) Explore any and all ways to expand access to broadband services, including, but not
3 limited to, middle mile, last mile, and wireless applications;

4 (2) Gather data regarding the various speeds provided to consumers in comparison to
5 what is advertised. The office may request the assistance of the Legislative Auditor in gathering
6 this data;

7 (3) Cooperate and assist in the expansion of electronic instruction and distance education
8 services;

9 (4) Gather and report data regarding the adoption by broadband services, by speed, and
10 by community, separately for residential and non-residential consumers;

11 (5) Gather and report data regarding prices charged for broadband services to residential
12 and non-residential consumers, including, but not limited to one-time fees, monthly fees,
13 termination fees, equipment fees, and other fees;

14 (6) Incorporate the goal of digital equality in its fulfillment of responsibilities, which is a
15 condition where all individuals and communities have the information technology capacity needed
16 for full participation in our society, democracy, and economy;

17 (7) Provide for the increased public awareness of issues concerning broadband services;
18 and

19 (8) Report to the Joint Committee on Government and Finance of the West Virginia
20 Legislature on or before December 30 of each year.

21 (b) In addition to the powers set forth elsewhere in this article, the Office of Broadband is
22 hereby granted the authority necessary and appropriate to carry out and effectuate the purpose
23 and intent of this article, including, but not limited to, the authority to:

24 (1) Make and execute contracts, commitments, and other agreements necessary or
25 convenient for the exercise of its powers, including, but not limited to, the hiring of consultants to
26 assist in the mapping of the state and categorization of areas within the state;

27 (2) Acquire by gift or purchase, hold, or dispose of real or personal property in the exercise
28 of its powers and performance of its duties as set forth in this article;

29 (3) Receive and dispense funds appropriated for its use by the Legislature or other funding
30 sources or solicit, apply for, and receive any funds, property, or services from any person,
31 governmental agency, or organization to carry out its statutory duties;

32 (4) To oversee the use of conduit installed pursuant to §31G-3-2 of this code;

33 (5) Make recommendations to the Legislature on bringing broadband service to areas of
34 the state;

35 (6) Contract with and retain outside expert consultants to assist in the purposes of this
36 article;

37 (7) Create guidelines for, and recommend to the Legislature, a means of implementing a
38 voluntary donation program to allow for pipeline, railroad, and other similar structures and rights-
39 of-way in the state to be donated to the state for use by public or private entities to facilitate
40 broadband service and availability through placement of fiber;

41 (8) Create guidelines for, and recommend to the Legislature, a means of implementing a
42 program to allow for an easement program to be established to allow public or private entities to
43 facilitate broadband service and availability through placement of fiber;

44 (9) Coordinate with the Consumer Protection Division of the Office of the Attorney General
45 to provide for the following consumer protections:

46 (A) If a broadband service to a subscriber is interrupted for more than 24 continuous
47 hours, such subscriber shall, upon request, receive a credit or refund from the broadband operator
48 in an amount that represents the proportionate share of such service not received in a billing
49 period, provided such interruption is not caused by the subscriber;

50 (B) A broadband operator may not deny service, deny access, or otherwise discriminate
51 against subscribers, channel users, or any other citizens on the basis of age, race, religion, sex,
52 physical handicap, political affiliation, political views, or exercise of other speech protected by the
53 1st Amendment to the United States Constitution, or country of natural origin;

54 (C) A broadband operator shall provide subscribers 30 days advance written notice of any
55 changes to rates or charges, including the expiration of any promotion or special pricing that would
56 result in an increase in the subscribers billing or cost of service; and

57 (D) A broadband operator shall inform subscribers and provide written notice to
58 subscribers that disputes regarding interrupted or substandard service or billing issues, which are
59 unresolved to satisfaction of the subscriber; and

60 (10) Perform any and all other activities in furtherance of the purposes of this article.

61 (c) In furtherance of the purposes of this article, the Office of Broadband is permitted to
62 seek non-state funding and grants. The Office of Broadband may utilize funding and grants to
63 support the responsibilities, initiatives, and projects set forth in this article. The Office of
64 Broadband may additionally disburse such moneys to fund projects and initiatives in furtherance
65 of the enhancement and expansion of broadband services in this state, and the other purposes
66 of this article.

§31G-1A-3. Mapping of areas within state.

1 (a) Based on its analysis of data, broadband demand, and other relevant information, the
2 Office of Broadband shall establish a mapping of broadband services in the state. The council
3 shall publish an annual assessment and map of the status of broadband, including specific
4 designations of unserved areas of the state. With respect to unserved areas of the state, the
5 Office of Broadband shall, to the extent it is able, map project areas with funding provided by
6 public entities. For the purposes of this section, the term “unserved area” means an area lacking
7 broadband internet service from at least one terrestrial broadband internet service provider
8 offering all of the following in at least one service plan to residential consumers: (1) an actual
9 downstream data rate of at least 25 megabits per second; and (2) an actual upstream data rate
10 of at least three megabits per second; and (3) unlimited data usage without overage charges; and
11 (4) unlimited data usage without “throttling” or reduction of downstream or upstream data rate
12 due, in whole or in part, to the amount of data transferred in any period.

13 (b) To the extent possible, and subject to limitations contained in subsection (g) of this
14 section, the Office of Broadband shall additionally establish an interactive public map reflecting
15 estimated or actual downstream data rate and upstream data rate in a particular region, area,
16 community, street or location. Any such mapping may only specify data rates at a particular street
17 address or physical location, and shall not make public the IP address or the name of the specific
18 individual at such location. This map shall be known as the West Virginia Broadband Availability
19 Map.

20 (c) To the extent possible, and subject to limitations contained in subsection (g) of this
21 section, the Office of Broadband shall additionally establish an interactive public map reflecting
22 the adoption of broadband services, separately by estimated or actual downstream data rate and
23 upstream data rates, in a particular region, area, community, street or location. Any such mapping
24 shall provide data separately for residential connections and non-residential connections. This
25 map shall be known as the West Virginia Broadband Adoption Map.

26 (d) The mapping provided for in this section may be based on information collected or
27 received by the Broadband Council and Office of Broadband, including, but not limited to, data
28 collected from:

29 (1) State and federal agencies or entities that collect data on broadband services;

30 (2) Industry provided information;

31 (3) Consumer data provided to the Broadband Council or Office of Broadband pursuant to
32 §31G-1A-6 and §31G-1A-9 of this code; and

33 (4) Other data sources procured by or provided to the Office of Broadband or the
34 Broadband Council.

35 (e) Any entity that has received or hereinafter receives state or federal moneys, and which
36 has used those moneys to install infrastructure used for broadband services, shall furnish detailed
37 information concerning the location, type, and extent of such infrastructure to the Office of
38 Broadband for use in mapping and shall furnish the location, type, and prices of any broadband
39 services subscribed to by residential (and separately non-residential) consumers as a result of
40 the installed infrastructure.

41 (f) The mapping and designations provided for under this section may be revised on a
42 continuing basis by the office as warranted by the data and information provided.

43 (g) In addition to the provisions of §31G-1A-13 of this code, the mapping of broadband
44 services may exclude from public accessibility and availability:

45 (1) The location or identity of any critical infrastructure used by public or private entities in
46 furtherance of their internet services;

47 (2) Personal name and personal IP addresses connected with particular data rates; and

48 (3) Information designated as confidential for public security reasons by either state or
49 federal homeland security agencies: *Provided*, That it shall be duty of the public and private
50 entities to make the Office of Broadband aware of such confidential designation: *Provided*,
51 *however*, That unless the Office of Broadband determines good cause exists, the actual or

52 estimated upstream and downstream data rates of an area or region of the state shall not be
53 excluded from public or private availability.

54 (h) All executive agencies which have permitting and/or regulatory approval authority over
55 any project permitted or reviewed and approved pursuant to §17-2E-3 of this code shall cooperate
56 with and provide all necessary information to the Office of Broadband to determine the feasibility
57 and federal allowability of creating Advanced Regulatory Environment Analysis (AREA) maps.
58 AREA maps will pre-survey likely routes for middle-mile infrastructure so all relevant information
59 can be included in a centralized GIS mapping system to be maintained by the Office of Broadband
60 for utilization by the private sector when extending new fiber infrastructure pursuant to §17-2E-1
61 *et seq.* of this code. AREA mapping shall also include, but is not limited to, any areas already
62 granted Finding of No Significant Impact (“FONSI”), categorical exclusions (“CATEX”), areas prior
63 approved by the West Virginia State Historic Preservation Office (“SHPO”), and all West Virginia
64 Division of Highways mapping for permits that include installation of infrastructure.

65 (i) If in analyzing the consumer-supplied speed data for an area of two square miles or
66 more, the Office of Broadband finds that speeds supplied by a provider are less than 80% of the
67 lowest speed tier advertised by the provider in more than 40% of the tests in that area in a calendar
68 year, then the Office of Broadband shall notify the Consumer Protection Division of the Attorney
69 General’s Office, and shall transmit such records of any relevant speed tests in their custody to
70 the Consumer Protection Division of the Attorney General’s Office.

§31G-1A-4. Collection of data.

1 (a) In order to ascertain, categorize, analyze, map, and update the status of broadband in
2 the state, as well as to enable the Office of Broadband to make informed policy and legislative
3 recommendations, the Office of Broadband may establish a voluntary data collection program.
4 The program may include voluntarily submitted data from internet service providers, including any
5 home or region data rate meters utilized by the provider. The program may also utilize and collect

6 voluntarily submitted data rate information submitted by any person reflecting the person's
7 personal data rate at a particular IP address. This personal data rate may be based upon a web-
8 based test or analysis program.

9 (b) Any and all data collected by the Office of Broadband shall not be deemed public
10 information and is not subject to public release or availability pursuant to §29B-1-1 *et seq.* of this
11 code.

12 (c) Any data collection program established by the Office of Broadband shall:

13 (1) Make clear to those providers or persons submitting information that the data rate
14 speed may become public, including specific reference to the person's physical address;

15 (2) Make clear this is a voluntary data collection program and that submission of
16 information shall be deemed consent to use and make public such data rate information; and

17 (3) Not include any person's personal web history or search information, or otherwise
18 publicly identify the person's name in connection with an IP address or physical address.

19 (d) The Office of Broadband may establish guidelines and additional rules governing a
20 data collection program through the legislative rulemaking pursuant to the provisions of §29A-3-
21 1 *et seq.* of this code.

§31G-1A-5. Protection of proprietary business information.

1 (a) Broadband deployment information provided to the Office of Broadband or its
2 consultants and other agents, including, but not limited to, physical plant locations, subscriber
3 levels, and market penetration data, constitutes proprietary business information and, along with
4 any other information that constitutes trade secrets, shall be exempt from disclosure under the
5 provisions of §29B-1-1 *et seq.* of this code: *Provided*, That the information is identified as or would
6 reasonably be contemplated to be confidential information when submitted to the Office of
7 Broadband.

8 (b) Trade secrets or proprietary business information obtained by the council or the Office
9 of Broadband from broadband providers and other persons or entities shall be secured and

10 safeguarded by the state. Such information or data shall not be disclosed to the public or to any
11 firm, individual, or agency other than officials or authorized persons of the state.

12 (c) The official charged with securing and safeguarding trade secrets and proprietary data
13 for the Office of Broadband is the Secretary of Economic Development, who is authorized to
14 establish and administer appropriate security measures.

§31G-1A-6. Legislative rule-making authority.

1 In order to implement and carry out the intent of this article, the Secretary of the
2 Department of Economic Development may propose rules for legislative approval pursuant to the
3 provisions of §29A-3-1 *et seq.* of this code.

ARTICLE 3. CONDUIT INSTALLATION; MICROTRENCHING.

**§31G-3-3. Conduit installation or fiber installation by counties, municipalities, and other
political subdivisions.**

1 (a) Notwithstanding any other provision of this code to the contrary, any county,
2 municipality, or other political subdivision of the State of West Virginia may:

3 (1) Install or contract with any entity for the installation of conduit, fiber, or broadband
4 facilities throughout that political subdivision;

5 (2) Partner with any of the following entities, or any combination thereof, to install such
6 conduit or communications facilities throughout that political subdivision:

7 (A) Nonprofit organization;

8 (B) Cooperative association;

9 (C) Another county, municipality, or political subdivision;

10 (D) Private corporations, company, or person; or

11 (E) Public-private partnership; and

12 (4) Partner with any of the following entities, or any combination thereof, which operate a
13 network operations center, to operate a fiber network: *Provided*, That a political subdivision may
14 operate a network for their own use:

- 15 (A) Nonprofit organization;
- 16 (B) Cooperative association;
- 17 (C) Another county, municipality, or political subdivision;
- 18 (D) Private corporations, company, or person; or
- 19 (E) Public-private partnership.

§31G-3-4. Compatible use.

1 (a) A broadband operator shall be authorized to construct or operate a broadband system:
2 (1) Over public rights-of-way; and
3 (2) Through easements, which are within the area to be served by the broadband system
4 and which have been dedicated for compatible uses.

5 (b) In installing, operating, and maintaining facilities, the broadband operator shall avoid
6 all unnecessary damage and injury to any trees, structures, and improvements in and along the
7 routes utilized for the system.

8 (c) The broadband operator shall indemnify and hold the state, county and municipality
9 harmless at all times from any and all claims for injury and damage to persons or property, both
10 real and personal, caused by the installation, operation, or maintenance of its broadband system,
11 notwithstanding any negligence on the part of the state, county, and/or municipality, their
12 employees, or agents. Upon receipt of notice in writing from the state, county, and/or municipality,
13 the broadband operator shall, at its own expense, defend any action or proceeding against the
14 state, county and/or municipality in which it is claimed that personal injury or property damage
15 was caused by activities of the broadband operator in the installation, operation or maintenance
16 of its broadband system.

17 (d) The use of public highways and other public places shall be subject to:

18 (1) All applicable state statutes, municipal ordinances and all applicable rules governing
19 the construction, maintenance, and removal of overhead and underground facilities of public
20 utilities;

21 (2) For county highways, all applicable rules adopted by the governing body of the county
22 in which the county highways are situated;

23 (3) For state or federal-aid highways, all public welfare rules adopted by the Commissioner
24 of the Division of Highways; and

25 (4) With respect to the use of any public highway that crosses the trackway of any railroad,
26 nothing in this article shall be construed to provide for any greater or any lesser compliance with
27 any safety policy or procedure established by the railroad with respect to the construction of utility
28 crossings across the railroad's trackway that is applicable to any other similarly situated utility,
29 whether utilizing aerial or buried lines.

30 (e) In the use of easements dedicated for compatible uses, the broadband operator shall
31 ensure:

32 (1) That the safety, functioning, and appearance of the property and the convenience and
33 safety of other persons is not adversely affected by the installation or construction of facilities
34 necessary for a broadband system; and

35 (2) That the owner of the property is justly compensated by the broadband operator for
36 any damages caused by the installation, construction, operation, or removal of facilities by the
37 broadband operator.

38 (f) An "easement dedicated for compatible uses" is a public or private easement for
39 electric, gas, telephone, or other utility transmission

ARTICLE 4. MAKE-READY POLE ACCESS.

§31G-4-1. Definitions.

1 As used in this article, the following terms are defined as follows:

2 (1) "Applicable codes" means uniform building, fire, electrical, plumbing, or mechanical
3 codes adopted by a recognized national code organization, including, but not limited to, the
4 National Electrical Safety Code, or any local amendments to those codes: *Provided*, That
5 notwithstanding any other provisions of said applicable codes, the Code of West Virginia, or the
6 West Virginia Code of State Rules, variances for the installation and maintenance of broadband
7 service infrastructure on utility poles shall be permitted if these are agreed upon between
8 infrastructure owners.

9 (2) "Attacher" means any person, corporation, or other entity, or the agents or contractors
10 of such seeking to permanently or temporarily fasten or affix any type of equipment, antenna, line,
11 or facility of any kind to a utility pole in the right of way or its adjacent ground space.

12 (3) "Attachment Application" means the application made by an Attacher to a Pole Owner
13 for attachment of equipment, antenna, line or facility of any kind to a utility pole. It shall include:

14 (A) Proof of insurance; or

15 (B) An indemnification agreement prepared by the Pole Owner.

16 (4) "Make Ready Costs" means the costs incurred by an Attacher associated with the
17 transfer of the facilities, antenna, lines, or equipment of a Pre-Existing Third Party User,
18 undertaken by an Attacher to enable attachment to the utility pole or similar structure. Make-
19 Ready Costs that are to be paid by an Attacher include, without limitation, all costs and expenses
20 to relocate or alter the attachments or facilities of any Pre-Existing Third Party User as may be
21 necessary to accommodate an Attacher's attachment.

22 (5) "Pole Owner" means a person, corporation or entity having ownership of a pole or
23 similar structure in the right of way to which utilities, including without limitation, electric and
24 communications facilities, are located or may be located whether such ownership is in fee simple
25 or by franchise.

26 (6) "Pre-Existing Third Party User" means the owner of any currently operating facilities,
27 antenna, lines or equipment on a pole or its adjacent ground space in the right of way.

§31G-4-2. Attachment to third party facilities.

1 (a) Upon approval of an Attachment Application, an Attacher may relocate or alter the
2 attachments or facilities of any Pre-Existing Third Party User as may be necessary to
3 accommodate an Attacher's attachment using Pole Owner approved contractors; provided,
4 however, that an Attacher will not effectuate a relocation or alteration of a Pre-Existing Third Party
5 User's facilities that causes or would reasonably be expected to cause a customer outage without
6 first providing 45 days prior written notice to the Pre-Existing Third Party User, in order to permit
7 the Pre-Existing Third Party User to relocate its facilities on its own.

8 (b) In the event the Pre-Existing Third Party Users of such other facilities fail to transfer or
9 rearrange their facilities within 45 days from receipt of notice of relocation or alteration of a Pre-
10 Existing Third Party User's facilities that causes or would reasonably be expected to cause a
11 customer outage, an Attacher may undertake such work.

12 (c) Within 30 days of the completion of any relocation or alteration, an Attacher shall send
13 notice of the move and as-built reports to the Pre-Existing Third Party User and the owner of all
14 poles or other structures on which such relocations or alterations were made. The as-built reports
15 shall include a unique field label identifier, and an address or coordinates.

16 (d) Upon receipt of the as-built reports, the Pre-Existing Third Party User and pole or
17 structure owner(s) may conduct an inspection within 14 days at an Attacher's expense. An
18 Attacher shall pay the actual, reasonable, and documented expenses incurred by the Pre-Existing
19 Third Party User and pole or structure owner for the inspection. If any such relocation or alteration
20 results in the facilities of the Pre-Existing Third Party User on the pole or other structure failing to
21 conform with the applicable safety Pole Owner's standards, the Pre-Existing Third Party User
22 shall, within seven days of the inspection, notify an Attacher of such failure to conform.

23 (e) In a notice, the Pre-Existing Third Party User may elect to either:

24 (1) Perform the correction itself and bill the Attacher for the actual, reasonable and
25 documented costs of the correction, or

26 (2) Instruct the Attacher to correct such conditions at Attacher's expense. Any post-
27 inspection corrections performed by the Attacher must be completed within 30 days of such
28 notification.

29 (f) As a condition of exercising the ability to relocate, rearrange, or alter a Pre-Existing
30 Third Party User's facilities pursuant to this section, an Attacher shall indemnify, defend and hold
31 harmless the owner or owners of all poles or other structures on which such relocation,
32 rearrangement or alteration takes place, the affiliates of such owner or owners, and the officers,
33 directors and employees of such owner or owners and their affiliates, each being deemed an
34 Indemnitee, from and against all third party damage, loss, claim, demand, suit, liability, penalty or
35 forfeiture of every kind and nature, including, but not limited to, costs and expenses of defending
36 against the same, payment of any settlement or judgment therefor and reasonable attorney's
37 fees, that are actually and reasonably incurred by an Indemnitee, by reason of any claim by an
38 affected Pre-Existing Third Party User or any person or entity claiming through such Pre-Existing
39 Third Party User arising from such relocation, rearrangement or alteration.

40 (g) All work performed must be in accordance with applicable codes, as defined in section
41 one of this article, including, but not limited to, the National Electrical Safety Code: *Provided*, That
42 the variances to applicable codes and to private agreements as set forth in §31G-6-1 of this code
43 shall apply to this section.

44 (h) In the event an ILEC accepts payment for make-ready work, and fails to perform that
45 work within 45 days, the ILEC which has been paid and which has failed to perform the work,
46 shall immediately return and refund the moneys paid for that work which was not completed.
47 Failure to return those funds within 14 calendar days shall be cause for a fine, payable to the
48 Public Service Commission, equal to the amount of the payment and a cause of action in circuit
49 court for return of the payment and is subject to treble damages, reasonable attorney's fees, and
50 any applicable court costs. Good-cause and good-faith efforts to have performed the work shall

51 be a defense against the imposition of any fine: *Provided*, That the provisions of this subsection
52 shall not apply to any make-ready work where a pole replacement is necessary.

§31G-4-4. Public Service Commission jurisdiction; rulemaking; enforcement.

1 (a) The Public Service Commission shall possess and exercise regulatory jurisdiction over
2 the provisions of this article. The commission shall administer and adjudicate disputes relating to
3 the issues and procedures provided for under this article.

4 (b) The commission shall adopt the rates, terms, and conditions of access to and use of
5 poles, ducts, conduits, and rights-of-way as provided in 47 U.S.C. § 224 and 47 C.F.R. § 1.1401
6 – 1.1415, inclusive, of the dispute resolution process incorporated by reference in those
7 regulations and any subsequent modifications or additions to the provisions of the United States
8 Code or Code of Federal Regulations provisions referenced herein.

9 (c) The commission shall certify to the Federal Communications Commission that this
10 state, as evidenced by the enactment of this article, hereby exercises jurisdiction over the
11 regulation of pole attachments. The certification shall include notice that the State of West Virginia
12 hereby:

13 (1) Regulates the rates, terms, and conditions related to pole attachments; and

14 (2) In so regulating such rates, terms, and conditions, the state has the authority to
15 consider and does consider the interests of the subscribers of the services offered via such
16 attachments, as well as the interests of the consumers of the services.

17 (d) (1) Notwithstanding subsection (b), the commission shall promulgate rules to address
18 abandoned cable, conductor, and related facilities attached to utility poles. The rules shall include
19 provisions that:

20 (A) Provide for the pole owner to fully recover from the owner of the attachment the costs
21 incurred by the pole owner for the removal and disposal of abandoned cable, conductors, and
22 related facilities;

23 (B) Address situations where the pole owner is unable to receive full recovery of its
24 removal and disposal costs from the owner of the attachment by instead receiving recovery of its
25 net unrecovered costs from its jurisdictional customers, including other Attachers, in such manner
26 as the commission determines is just and reasonable; and

27 (C) Allow the pole owner to book or defer these net costs on its accounting books and
28 request recovery to the commission outside of a base rate case proceeding through a surcharge
29 or other rate recovery mechanism.

30 (2) Any pole owner, after making reasonable efforts to require the attachment owner to
31 remove abandoned facilities, that proceeds to remove what the pole owner reasonably believes
32 is abandoned cable, conductor, and related facilities, shall be released and held harmless from
33 liability from claims or any related losses claimed by the Attacher or others for the pole owner's
34 removal work, including any loss of property value, potential business value, salvage value, or
35 any other value of such cable, conductor, and related facilities.

36 (e) Notwithstanding subsection (b), the commission shall promulgate rules to govern the
37 timely transfer of facilities from an old pole to a new pole and the removal of utility poles that have
38 had electric facilities moved to new poles but continue to have other facilities attached in the
39 telecommunications space on the old existing poles. Should the attached facilities not be
40 transferred in a timely manner from the old pole to the new pole by the owner of the attachments,
41 as determined by the commission, the rules shall address this matter and include the right and
42 mechanism of the pole owner itself to transfer the facilities to the new pole, to remove the old
43 pole, and to recover its costs fully and timely from the owner of the facilities transferred. Any pole
44 owner who transfers facilities from an old pole to a new pole, after reasonable due diligence, shall
45 be released and held harmless from liability for its transfer work, except for acts of negligence or
46 willful misconduct.

ARTICLE 6. PRE-EMPTION OF CONFLICTING LOCAL ORDINANCES AND PRIVATE RESTRICTIONS

§31G-6-1. Pre-emption in favor of broadband services; construction of language in agreements.

1 (a) Notwithstanding any other provision of the West Virginia Code or the West Virginia
2 Code of State Rules to the contrary, any ordinance of any political subdivision relating to
3 broadband service is hereby pre-empted to the extent necessary in favor of such broadband
4 installation.

5 (b) No corporate policy, organizational policy, institutional policy, agreement, contract, or
6 other like document, including the rules and regulations of any Home Owners Association, or any
7 similar entity or organization, promulgated or made effective after the effective date of this section,
8 may regulate or prevent the exterior installation of antennas and equipment necessary to or
9 typically utilized for broadband deployment and the terms of any such document shall be strictly
10 construed in favor of encouraging and assisting broadband installation and deployment.

§31G-6-2. Pre-emption in favor of broadband service in pole attachments; construction of language in pole attachment agreements.

1 (a) Notwithstanding any other provision of the West Virginia Code or the West Virginia
2 Code of State Rules to the contrary, any ordinance of any political subdivision regarding pole
3 attachment spacing, positioning, or order by or between any Investor Owned Utility (“IOU”) and
4 any Incumbent Local Exchange Carrier (“ILEC”) and/or Competitive Local Exchange Carrier
5 (“CLEC”) which would seek to provide broadband service, is hereby pre-empted to the extent
6 necessary in favor of such broadband installation or deployment.

7 (b) Any corporate policy, individual agreement, organizational policy, contract, or like
8 document relating to pole attachment spacing, positioning, or order by or between any Investor
9 Owned Utility (“IOU”) and any Incumbent Local Exchange Carrier (“ILEC”) and/or Competitive

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- 10 Local Exchange Carrier (“CLEC”) shall be strictly construed in favor of encouraging and assisting
- 11 broadband installation and deployment.

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

.....
Chairman, House Committee

.....
Chairman, Senate Committee

Originating in the House.

In effect May 27, 2021.

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Clerk of the House of Delegates

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Clerk of the Senate

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Speaker of the House of Delegates

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President of the Senate

The within this the.....
day of, 2021.

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Governor