WEST VIRGINIA CODE CHAPTER 31H ARTICLE 2

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§31H-2-1. Use of rights-of-way for small wireless facilities and utility poles; other structures.

(a) The provisions of this section shall only apply to activities of a wireless provider within the right-of-way.

(b) Except as provided in this chapter, an authority may not prohibit, regulate, or charge for the collocation of small wireless facilities or the installation of utility poles and associated small wireless facilities.

(c) An authority may not enter into an exclusive arrangement with any person for use of the right-of-way for the collocation of small wireless facilities or the installation, operation, marketing, modification, maintenance, or replacement of utility poles.

(d) An authority may only charge a wireless provider a rate or fee for the use of the right- of-way with respect to the collocation of small wireless facilities or the installation, maintenance, modification, operation, or replacement of a utility pole in the right-of-way if the authority charges other entities for similar use of the right-of-way. Notwithstanding any provision of this article to the contrary, an authority is permitted, on a nondiscriminatory basis, to refrain from charging any rate to a wireless provider for the use of the right-of-way. The rate for occupancy and use of the right-of-way may not initially exceed $25 per year per small wireless facility. An authority may adjust this rate up to 10 percent every five years.

(e) Subject to the provisions of this section, a wireless provider has the right, as a permitted use not subject to zoning review or approval, to collocate small wireless facilities and install, maintain, modify, and replace its own utility poles or, with the permission of the owner, a third party's utility pole, along, across, upon, and under the right-of-way. Such structures and facilities shall be so installed and maintained as not to obstruct or hinder the usual travel or public safety on such right-of-way or to obstruct the legal use of such right-of-way by utilities or authorities.

(f) Each new or modified utility pole installed by a wireless provider in the right-of-way may not exceed the greater of:

(1) Ten feet in height above the tallest existing utility pole in place as of the effective date of this chapter located within 500 feet of the new pole in the same right-of-way; or

(2) Fifty feet above ground level. New small wireless facilities in the right-of-way may not extend:

(A) More than 10 feet above an existing utility pole in place as of the effective date of this chapter; or

(B) For small wireless facilities on a new utility pole, above the height permitted for a new utility pole pursuant to the provisions of this section. Subject to the provisions of this article,

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a wireless provider has the right to collocate a small wireless facility and install, maintain, modify, operate, and replace its own utility pole or, with the permission of the owner, a third party's utility pole that exceeds these height limits along, across, upon, and under the right-of-way, subject to applicable zoning regulations.

(g) An authority may adopt reasonable written design guidelines with objective, technically feasible criteria that reasonably match the aesthetics and character of an immediate area regarding all of the following:

(1) The location of any ground-mounted small wireless facilities;

(2) The location of a small wireless facility on a utility pole or wireless support structure;

(3) The appearance and concealment of small wireless facilities, including those relating to materials used for arranging, screening, or landscaping; and

(4) The design and appearance of a utility pole or wireless support structure.

Any such guidelines shall be applied in a nondiscriminatory manner. Materials utilized to comply with the appearance and concealment criteria established in the guidelines shall not be considered part of the small wireless facility for purposes of facility size restrictions in this chapter. Each new or modified small wireless facility or utility pole installed in the right-of-way shall comply with an authority's current design guidelines.

(h) A wireless provider is permitted to replace decorative poles when necessary to collocate a small wireless facility, but any replacement pole shall reasonably conform to the design aesthetics of the decorative poles being replaced.

(i) A wireless provider shall comply with written, objective, reasonable, and nondiscriminatory requirements that prohibit the installation of structures in the right-of-way in an area designated solely for underground communications and electric lines where:

(1) The authority has required all such lines to be placed underground by a date certain that is three months prior to the submission of the application;

(2) Those utility poles which the authority allows to remain shall be made available to wireless providers for the collocation of small wireless facilities and may be replaced by a wireless provider to accommodate the collocation of small wireless facilities, in compliance with this act; and

(3) A wireless provider may install a new utility pole in the designated area that otherwise complies with the other subsections of this section when it is not able to provide wireless service by collocating on a remaining structure. For small wireless facilities installed before an authority adopts requirements that communications and electric lines be placed underground, an authority adopting such requirements shall:

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(A) Permit a wireless provider to maintain the small wireless facilities in place subject to any applicable pole attachment agreement with the utility pole owner; or

(B) Permit the wireless provider to replace the associated utility pole within 50 feet of the prior location, subject to the permission of the utility pole owner.

(j) Subject to the provisions of this section, an authority may require reasonable, technically feasible, nondiscriminatory, and technologically neutral design or concealment measures in a historic district. Any such design or concealment measures may not have the effect of prohibiting any provider's technology; nor may any such measures be considered a part of the small wireless facility for purposes of the size restrictions in the definition of small wireless facility.

(k) Any requirements an authority adopts under subsections (g) through (j), inclusive, of this section must be:

(1) Reasonable, in that they are technically feasible and reasonably directed to avoiding or remedying the intangible public harm of unsightly or out-of-character deployments;

(2) No more burdensome than those applied to other types of infrastructure deployments; and

(3) Objective and published in advance. The authority, in the exercise of its administration and regulation related to the management of the right-of-way, must be competitively neutral with regard to other wireless service providers who are users of the right-of-way, including that terms may not be unreasonable or discriminatory and may not violate any applicable law or effectively prohibit the provision of wireless services.

(l) The authority may require a wireless provider to repair all damage to the right-of-way directly caused by the activities of the wireless provider in the right-of-way and to return the right-of-way to its functional equivalence before the damage, as determined by the authority, pursuant to the competitively neutral, reasonable requirements and specifications of the authority. If the wireless provider fails to make the repairs required by the authority within a reasonable time after written notice, the authority may complete those repairs and charge the applicable party the reasonable, documented cost of such repairs. Regardless of whether the authority or the wireless provider ultimately makes the repairs, the authority may assess an additional fine of $100 per day that the wireless provider failed to make the required repairs after the wireless provider received written notice until the repairs were completed.

(m) Nothing in this chapter shall be deemed to impose or otherwise affect any rights, controls, tariffs, or contractual obligations that may be established with regard to the utility poles, similar structures, or equipment of any type that are owned or controlled by an investor-owned electric utility whose rates are regulated by the Public Service Commission of West Virginia or any such utility's affiliates, or by an independent transmission company.

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§31H-2-2. Permitting process for small wireless facilities.

(a) The provisions of this section shall apply to the permitting of small wireless facilities by a wireless provider in or outside the right-of-way as specified in subsection (b) of this section and to the permitting of the installation, modification, and replacement of utility poles by a wireless provider inside the right-of-way.

(b) Small wireless facilities that meet the requirements of §31H-2-1(f) through §31H-2-1(j) of this code shall be classified as permitted uses and not subject to zoning review or approval if they are collocated:

(1) In the right-of-way in any zone; or

(2) Outside the right-of-way in property not zoned exclusively for single-family residential use.

(c) An authority may require an applicant to obtain one or more permits to collocate a small wireless facility that meets the requirements of §31H-2-1(f) through §31H-2-1(j) of this code or to install, modify, or replace a utility pole and associated small wireless facilities that meet the requirements of §31H-2-1(f) through §31H-2-1(j) of this code, provided that the permits are of general applicability. An authority shall receive applications for, process, and issue permits subject to the following requirements:

(1) An authority may not directly or indirectly require an applicant to perform services unrelated to the collocation for which approval is sought, such as in-kind contributions to the authority, including reserving fiber, conduit, or pole space for the authority on the wireless provider's utility pole;

(2) An applicant may not be required to provide more information to obtain a permit than communications service providers that are not wireless providers, provided that an applicant may be required to include construction and engineering drawings and information demonstrating compliance with the criteria set forth in this subsection;

(3) An authority, other than the Division of Highways, may not require the placement of small wireless facilities on any specific utility pole or category of poles or require multiple antenna systems on a single utility pole nor the underground placement of small wireless facilities;

(4) An authority, other than the Division of Highways, may not limit the placement of small wireless facilities by minimum separation distances;

(5) An authority may require an applicant to include an attestation that the small wireless facilities will be operational for use by a wireless provider within one year after the permit issuance date, unless the authority and the applicant agree to extend this period or delay is caused by lack of commercial power or communications transport facilities to the site;

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(6) Within 10 days of receiving an application, an authority must determine and notify the applicant in writing whether the application is complete. If an application is incomplete, an authority must specifically identify the missing information in writing. The processing deadlines in this subsection are tolled from the time the authority sends the notice of incompleteness to the time the applicant provides the missing information. That processing deadline also may be tolled by agreement of the applicant and the authority;

(7) An application shall be processed on a nondiscriminatory basis and deemed approved if the authority fails to approve or deny the application within 60 days of receipt of the application for a collocation of a small wireless facility and 90 days for an application for the installation, modification, or replacement of a utility pole in the right-of-way;

(8) An authority may deny a proposed collocation of a small wireless facility or installation, modification, or replacement of a utility pole that meets the requirements of this section only if the proposed application:

(A) Materially interferes with the safe operation of traffic control equipment;

(B) Materially interferes with sight lines or clear zones for transportation or pedestrians;

(C) Materially interferes with compliance with the Americans with Disabilities Act or similar federal or state standards regarding pedestrian access or movement;

(D) Fails to comply with reasonable and nondiscriminatory spacing requirements of general application adopted by legislative rule or ordinance that concern the location of ground-mounted equipment and new utility poles. Such spacing requirements may not prevent a wireless provider from serving any location;

(E) Fails to comply with applicable codes, legislative rule, and generally applicable standards that are consistent with this chapter and adopted by an authority for construction and public safety in the rights-of-way, including reasonable and nondiscriminatory wiring and cabling requirements, grounding requirements, and abandonment and removal provisions;

(F) Fails to comply with applicable design guidelines adopted under §31H-2-1(g) of this code; or

(G) Fails to attest that a small wireless facility will comply with relevant Federal Communications Commission (FCC) regulations concerning:

(1) Radiofrequency emissions from radio transmitters; and

(2) Unacceptable interference with the public safety spectrum and CII spectrum, including compliance with the abatement and resolution procedures for interference with the public safety spectrum and CII spectrum established by the FCC set forth in 47 C.F.R. 22.970 through 47 C.F.R. 22.973 and 47 C.F.R. 90.672 through 47 C.F.R. 90.675;

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(9) The authority must document the basis for a denial, including the specific code provisions on which the denial was based, and send the documentation to the applicant on or before the day the authority denies an application. The applicant may cure the deficiencies identified by the authority and resubmit the application within 30 days of the denial without paying an additional application fee. The authority shall approve or deny the revised application within 30 days. Any subsequent review shall be limited to the changes made in the resubmission;

(10) An applicant seeking to collocate small wireless facilities within the jurisdiction of a single authority shall be allowed at the applicant's discretion to file a consolidated application and receive a single permit for the collocation of multiple small wireless facilities; the denial of one or more small wireless facilities in a consolidated application may not delay processing of any other small wireless facilities in the same batch;

(11) Installation or collocation for which a permit is granted pursuant to this section shall be completed within one year after the permit issuance date unless the authority and the applicant agree to extend this period or a delay is caused by the lack of commercial power or communications facilities at the site. Approval of an application authorizes the applicant to:

(A) Undertake the installation or collocation; and

(B) Subject to applicable relocation requirements and the applicant's right to terminate at any time, operate and maintain the small wireless facilities and any associated utility pole installed by the wireless provider or authority utility that is covered by the permit for a period of not less than 10 years, which must be renewed for equivalent durations so long as the small wireless facilities and utility pole are in compliance with the criteria set forth in this subsection;

(12) An authority may not institute, either expressly or de facto, a moratorium on filing, receiving, or processing applications or issuing permits or other approvals, if any, for the collocation of small wireless facilities or the installation, modification, or replacement of utility poles to support small wireless facilities.

(d) An authority may require a permit to work within a right-of-way for any activities under this chapter, if applicable, and may prohibit access when a road is closed or its access is limited to the public: Provided, That except for this permit, and the other actions explicitly authorized by this chapter, an authority may not require an additional application, approval, or permit, or require any fees or other charges from a communications service provider authorized to occupy the right-of-way, for:

(1) Routine maintenance;

(2) The replacement of wireless facilities with wireless facilities that are substantially similar, the same size, or smaller; or

(3) The installation, placement, maintenance, operation, or replacement of micro wireless

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facilities that are suspended on existing cables that are strung between existing utility poles in compliance with applicable safety codes and the pole owner's construction standards and engineering practices.

(e) An authority may revoke a permit at any time if the conditions of the permit required pursuant to this article are no longer being satisfied.

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§31H-2-3. Access to authority utility poles; application and permit fees and rates for small wireless facilities.

(a) An authority shall allow the collocation of small wireless facilities on authority utility poles within the right-of-way subject to the provisions of this chapter and the following:

(1) An authority may not enter into an exclusive arrangement with any person for the right to attach small wireless facilities to authority utility poles;

(2) The rates and fees for collocations on authority utility poles shall be nondiscriminatory regardless of the services provided by the collocating person;

(3) An authority may charge an annual recurring rate to collocate small wireless facilities on an authority utility pole that equals $65 per year per pole. An authority may adjust this rate 10 percent every five years, rounded to the nearest five dollars. Nothing in this subdivision prohibits a wireless provider and an authority from mutually agreeing to an annual recurring rate of less than $65 to collocate a small wireless facility on an authority utility pole;

(4) The rates, fees, and terms for make-ready work must be nondiscriminatory, competitively neutral, and commercially reasonable and must comply with this section;

(5) An authority shall provide a good faith estimate for any make-ready work necessary to enable the pole to support the requested collocation by a wireless provider, including pole replacement if necessary, within 60 days after receipt of a complete application. Make-ready work including any pole replacement shall be completed within 60 days of written acceptance of the good faith estimate by the applicant. An authority may require replacement of the authority utility pole only if it demonstrates that the collocation would make the authority utility pole structurally unsound; and

(6) The person owning, managing, or controlling the authority utility pole may not require more make-ready work than is required to meet applicable codes or industry standards. Fees for make-ready work may not include costs related to preexisting or prior damage or noncompliance. Fees for make-ready work including any pole replacement may not exceed the actual costs or the amount charged to other communications service providers for similar work and may not include any consultant fee or expense.

(b) For the purposes of a state-owned right-of-way maintained by the Division of Highways, the commissioner shall propose rules for legislative approval, in accordance with the provisions of §29A-3-1 et seq. of this code, to implement the provisions of this article.

(c) Application fees are subject to the following requirements:

(1) An authority may not require a wireless provider to pay any rates, fees, or compensation to the authority or other person other than what is expressly authorized by this chapter;

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(2) An authority may charge an application fee for collocation of small wireless facilities on an existing utility pole not to exceed $200 each for the first five small wireless facilities in the same application and $100 for each additional small wireless facility in the same application. An authority may adjust this fee 10 percent every five years, rounded to the nearest five dollars;

(3) An authority may charge an application fee for the installation, modification, or replacement of a utility pole and the collocation of an associated small wireless facility that are permitted uses in accordance with the specifications in this chapter not to exceed $250. An authority may adjust this fee 10 percent every five years, rounded to the nearest five dollars; and

(4) An authority may charge an application fee for the installation, modification, or replacement of a utility pole and the collocation of an associated small wireless facility that is not a permitted use in accordance with the specifications in this chapter not to exceed $1,000. An authority may adjust this fee 10 percent every five years, rounded to the nearest five dollars.

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§31H-2-4. Local authority; miscellaneous provisions.

(a) Nothing in this chapter may be construed to relieve any person from any requirement:

(1) To obtain a franchise or a state-issued authorization to offer cable television service; or

(2) To obtain any required permission to install, place, maintain, or operate communications facilities, other than small wireless facilities subject to this chapter. The permitting procedures and authorizations set forth in this chapter apply only to the placement of small wireless facilities and associated utility poles, and do not authorize the installation or operation of a wireline backhaul facility.

(b) Except as provided in this chapter or otherwise specifically authorized by state or federal law, an authority shall not adopt or enforce any regulations or requirements on the placement or operation of communications facilities in a right-of-way by a communications service provider authorized by state or local law to operate in a right-of-way.

(c) Except as authorized by federal law, this chapter, and municipal taxation ordinances authorizing collection of business and occupation taxes since at least November 1, 1998, an authority shall not regulate any communications services or impose or collect any tax, fee, or charge for the provision of communications service over the communications service provider's communications facilities in a right-of-way, to the extent the communications service provider is already paying the authority a fee for access to the right-of-way.

(d) Subject to the provisions of this chapter and applicable federal law, an authority may continue to exercise zoning, land use, planning, and permitting authority within its territorial boundaries with respect to wireless support structures and utility poles; no authority shall have or exercise any jurisdiction or authority over the design, engineering, construction, installation, or operation of any small wireless facility located in an interior structure or upon the site of any campus, stadium, or athletic facility not owned or controlled by the authority, other than to comply with applicable codes; and an authority shall evaluate the structure classification for wireless support structures under the latest version of ANSI/TIA-222. Nothing in this chapter authorizes the state or any political subdivision, including an authority, to require wireless facility deployment or to regulate wireless services.

(e) An authority may adopt an ordinance that makes available to wireless providers rates, fees, and other terms that comply with the provisions of this chapter. Subject to the provisions of this section, in the absence of an ordinance that fully complies with this chapter and until such a compliant ordinance is adopted, if at all, wireless providers may install and operate small wireless facilities and utility poles under the requirements of this chapter. An authority and a wireless provider may enter into a voluntary and nondiscriminatory agreement implementing the provisions of this chapter, but an authority may not require a wireless provider to enter into such an agreement.

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(f) An agreement or ordinance that does not fully comply with this chapter may apply only to small wireless facilities and associated utility poles that became operational or were installed before the effective date of this chapter. Such an agreement or ordinance may not be renewed, or extended, unless it is modified to fully comply with this chapter. An agreement or ordinance that applies to small wireless facilities and associated utility poles that became operational or were constructed before the effective date of this chapter is invalid and unenforceable beginning on the 181st day after the effective date of this chapter unless it fully complies with this chapter. If an agreement or ordinance is invalid in accordance with this subsection, in the absence of an agreement or ordinance that fully complies with this chapter and until such a compliant agreement or ordinance is entered or adopted, small wireless facilities and associated utility poles that become operational or were constructed before the effective date of this chapter may remain installed and be operated under the requirements of this chapter.

(g) An agreement or ordinance that applies to small wireless facilities and utility poles that become operational on or after the effective date of this chapter is invalid and unenforceable beginning on the effective date of this chapter unless it fully complies with this chapter. If an agreement or ordinance is invalid in accordance with this subsection, in the absence of an agreement or ordinance that fully complies with this chapter and until such a compliant agreement or ordinance is entered or adopted, small wireless facilities and utility poles may be installed and operated in the right-of-way or become operational under the requirements of this chapter.

(h) Any wireless provider who owns or operates small wireless facilities or utility poles in the right-of-way shall indemnify, protect, defend, and hold the authority and its elected officials, officers, employees, agents, and volunteers harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees to include reasonable attorney fees and costs of defense, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury or death, property damage or other harm for which recovery of damages is sought, to the extent that it is caused by the negligence of the wireless provider who owns or operates small wireless facilities or utility poles in the right-of-way, any agent, officer, director, representative, employee, affiliate, or subcontractor of the wireless provider, or their respective officers, agents, employees, directors, or representatives while installing, repairing, or maintaining facilities in rights-of-way.

(i) Except for a wireless provider with an existing franchise to occupy and operate in the rights-of-way, during the period in which the wireless provider’s facilities are located on the authority improvements or rights-of-way, the authority may require the wireless provider to carry, at the wireless provider’s own cost and expense, the following insurance:

(1) Property insurance for its property’s replacement cost against all risks;

(2) Workers’ compensation insurance, as required by law; or

(3) Commercial general liability insurance with respect to its activities on the authority

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improvements or rights-of-way to afford minimum protection limits consistent with its requirements of other users of authority improvements or rights-of-way, including coverage for bodily injury and property damage. An authority may require a wireless provider to include the authority as an additional insured on the commercial general liability policy and provide certification and documentation of inclusion of the authority in a commercial general liability policy as reasonably required by the authority.

A wireless provider may self-insure all or a portion of the insurance coverage and limit requirements required by an authority. A wireless provider that self-insures is not required, to the extent of the self-insurance, to comply with the requirement for the naming of additional insureds under this section. A wireless provider that elects to self-insure shall provide to the authority evidence sufficient to demonstrate its financial ability to self-insure the insurance coverage and limits required by the authority.

(j) An authority may impose reasonable and nondiscriminatory requirements for bonds, escrow deposits, letters of credit, or any other type of financial surety to ensure removal of abandoned or unused wireless facilities or damage to the right-of-way or authority property caused by the wireless provider or its agent.

(k) On or before December 31, 2026, all Class I and Class II municipalities shall report to the Joint Committee on Government and Finance of the effects of the implementation of this article.

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