WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 2008

ENROLLED

COMMITTEE SUBSTITUTE
FOR
House Bill No. 4637

(By Mr. Speaker, Mr. Thompson, and Delegate Armstead)
[By Request of the Executive]

Passed March 8, 2008

In Effect Ninety Days from Passage
AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §31-1SC-1, §31-1SC-2, §31-1SC-3, §31-1SC-4, §31-1SC-5, §31-1SC-6, §31-1SC-7, §31-1SC-8, §31-1SC-9, §31-1SC-10, §31-1SC-11, §31-1SC-12, §31-1SC-13 and §31-1SC-14, all relating to the deployment of broadband to the remaining unserved areas of the state; setting forth legislative findings and purpose; providing definitions; establishing the Broadband Deployment Council; establishing procedures for the council, and providing for administrative support; prescribing the powers, duties and responsibilities of the council generally; creating the Broadband Development Fund; categorizing areas of the state according to broadband access; authorizing the retention of an outside expert consultant or consultants to assist in categorization and other functions; providing for the stimulation of demand through public outreach and education; providing funding guidelines; granting emergency rulemaking
authority: establishing project requirements for funding assistance; describing the procedures for submitting applications and reviewing applications; requiring public notice; requiring the submission of written reports by certain state agencies or officers; placing limits on liability for membership or participation in the council; protecting confidentiality of trade secrets and proprietary business information; creating the misdemeanor offense of making any unauthorized disclosure of confidential information and establishing the penalties therefor; and providing for the expiration of the council.

Be it enacted by the Legislature of West Virginia:

That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new article, designated §31-15C-1, §31-15C-2, §31-15C-3, §31-15C-4, §31-15C-5, §31-15C-6, §31-15C-7, §31-15C-8, §31-15C-9, §31-15C-10, §31-15C-11, §31-15C-12, §31-15C-13 and §31-15C-14, all to read as follows:

ARTICLE 15C. Broadband Deployment.

§31-15C-1. Legislative findings and purpose.

The Legislature finds as follows:

1. That it is a primary goal of the Governor, the Legislature and the citizens of this state, by the year two thousand ten, to make every municipality, community, and rural area in this state, border to border, accessible to internet communications through the expansion, extension and general availability of broadband services and technology.

2. That although market-driven deployment has extended broadband access to most of West Virginia's cities, towns, and other concentrated population areas, some areas of the state, mostly rural, remain unserved.
(3) That based upon the same network principles that providers of telephony services have faced since the inception of the telecommunications industry, rising fixed costs and technological limitations prohibit broadband networks from being extended into rural areas where the level of demand in sparsely populated areas may not justify the required costs of construction.

(4) That the unique topography and demography of this state that hinders the provision of broadband access to rural areas of the state specifically disadvantages the elderly and low-income households that are the least likely to own computers or subscribe to internet service. In light of these topographical and demographic challenges, any attempt to fill the gaps in West Virginia's broadband availability must be organized according to the levels of demand in the various unserved areas to which service is sought to be extended.

(5) That, in particular, fair and equitable access to twenty-first century technology that will maximize the functionality of educational resources and educational facilities that are conducive to enabling our children to be exposed to and to receive the best of future teaching and learning is absolutely essential to this state. A quality educational system of the twenty-first century should have access to the best technology tools and processes. Administrators should have, among other things, the electronic resources to monitor student performance, to manage data, and to communicate effectively. In the classroom, every teacher in every school should be provided with online access to educational technology resources and the ability to deliver content standard and objectives to the students of West Virginia. Schools of the twenty-first century require facilities that accommodate changing technologies and twenty-first century instructional processes.
(6) Accordingly, it is the purpose of the Legislature to provide for the development of plans, processes and procedures to be employed and dedicated to extending broadband access to West Virginians, and to their families, by stimulating demand for those services and for encouraging and facilitating the construction of the necessary infrastructure to meet their needs and demands.

(7) In implementing this initiative, progress by market forces and industry is to be respected, and the Legislature intends that governmental assistance and funding is to be used only in those areas without broadband service and not to duplicate or displace broadband service in areas already served or where industry feasibly can be expected to offer services in the reasonably foreseeable future.

§31-15C-2. Definitions.

(a) For the purposes of this article,

(1) "Broadband" or "broadband service" means any service providing advanced telecommunications capability with either a downstream data rate or upstream data rate of at least 200 kilobits per second, that does not require the end-user to dial up a connection that has the capacity to always be on, and for which the transmission speeds are based on regular available bandwidth rates, not sporadic or burstable rates, with a minimum downstream-to-upstream data ratio of 10:1 for services with a downstream data rate of up to five megabits per second, and with a minimum upstream data rate of 500 kilobits per second for services with a downstream data rate of five megabits per second or greater.

(2) "Broadband deployment project" means either (A) a project to provide broadband services to a type 2 and/or type 3 unserved area, as defined in section six of this article; or
(B) a project to undertake activities to promote demand for broadband services and broadband applications.

(3) "Downstream data rate" means the transmission speed from the service provider source to the end-user.

(4) "Upstream data rate" means the transmission speed from the end-user to the service provider source.

(5) "Unserved area" means a community that has no access to broadband service.

(b) The definition of the term "broadband," the designation of areas that are "unserved," and the level of service required to qualify for funding of state programs and projects, are based on the Federal Communications Commission's current definition of broadband, which is stated in terms of the number of Kilobits (Kbps) per second, either upstream or downstream. It is the intention of the Legislature that the definition of broadband in this article and the level of service requirements for state funding be promptly updated by future Legislatures to conform with any revisions enacted by Congress or any rule or regulation promulgated by the Federal Communications Commission or other federal agencies involved with deploying and enhancing broadband services.

§31-15C-3. Broadband Deployment Council established; members of council; administrative support.

(a) The Broadband Deployment Council is hereby established. The council is a governmental instrumentality of the state. The exercise by the council of the powers conferred by this article and the carrying out of its purpose and duties shall be considered and held to be, and are hereby determined to be, essential governmental functions and for a public
purpose. The council is created under the Department of Commerce for administrative, personnel and technical support services only.

(b) The council shall consist of eleven voting members, designated as follows:

1. The Governor or his or her designee;
2. The Secretary of Commerce or his or her designee;
3. The Secretary of Administration or his or her designee;
4. The Director of Homeland Security and Emergency Management or his or her designee; and
5. Seven public members that serve at the will and pleasure of the Governor and are appointed by the Governor with the advice and consent of the Senate, as follows:

   i. One member representing employees of communications and cable providers, who shall be a member or representative of a union representing communications workers;

   ii. One member representing telecommunications providers who provide broadband services in this state;

   iii. One member representing cable operators who provide broadband services in this state;

   iv. One member representing broadband equipment or device manufacturers;

   v. One member representing higher education or secondary education; and
(vi) Two members representing the general public who are residents of the state: Provided, That one member represent rural communities: Provided, however, That both members may not reside in the same congressional district.

(6) In addition to the eleven voting members of the council, the President of the Senate shall name two senators from the West Virginia Senate and the Speaker of the House shall name two delegates from the West Virginia House of Delegates, each to serve in the capacity of an ex officio, non-voting advisory member of the council.

(c) The Governor or his or her designee shall chair the council and appoint one of the other council members to serve as vice chair. In the absence of the Governor or his or her designee, the vice chair shall serve as chair. The council shall appoint a secretary-treasurer who need not be a member of the council and who, among other tasks or functions designated by the council, shall keep records of its proceedings.

(d) The council may appoint committees or subcommittees to investigate and make recommendations to the full council. Members of these committees or subcommittees need not be members of the council.

(e) Six voting members of the council shall constitute a quorum and the affirmative vote of at least the majority of those members present shall be necessary for any action taken by vote of the council.

(f) The council is part-time. Public members appointed by the Governor may pursue and engage in another business or occupation or gainful employment. Any person employed by, owning an interest in, or otherwise associated with a broadband deployment project, project sponsor or project participant may serve as a council member and shall not be
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disqualified from serving as a council member because of a conflict of interest prohibited under section five, article two, chapter six-b of this code and shall not be subject to prosecution for violation of said section when the violation is created solely as a result of his or her relationship with the broadband deployment project, project sponsor or project participant: Provided, That the member recuses himself or herself from board participation regarding the conflicting issue in the manner set forth in legislative rules promulgated by the West Virginia Ethics Commission.

(g) No member of the council who serves by virtue of his or her office shall receive any compensation or reimbursement of expenses for serving as a member. The public members and members of any committees or subcommittees are entitled to be reimbursed for actual and necessary expenses incurred for each day or portion thereof engaged in the discharge of his or her official duties in a manner consistent with the guidelines of the Travel Management Office of the Department of Administration.


(a) In addition to the powers set forth elsewhere in this article, the council is hereby granted, has and may exercise all powers necessary or appropriate to carry out and effectuate the purpose and intent of this article. The council shall have the power and capacity to:

(1) Provide consultation services to project sponsors in connection with the planning, acquisition, improvement, construction or development of any broadband deployment project;

(2) To make and execute contracts, commitments and other agreements necessary or convenient for the exercise of its powers, including but not limited to the hiring of
consultants to assist in the mapping of the state, categorization of areas within the state, and evaluation of project applications: Provided, That the provisions of article three, chapter five-a of this code do not apply to the agreements and contracts executed under the provisions of this article;

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

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

(5) Perform any and all other activities in furtherance of its purpose.

(b) The council shall exercise its powers and authority to bring broadband service to unserved areas. The council may not duplicate or displace broadband service in areas already served or where private industry feasibly can be expected to offer services in the reasonably foreseeable future.

§31-15C-5. Creation of the Broadband Deployment Fund.

All moneys collected by the council, which may, in addition to appropriations, include gifts, bequests or donations, shall be deposited in a special revenue account in the State Treasury known as the Broadband Deployment Fund. The fund shall be administered by and under the control of the council. Expenditures from the fund shall be for the purposes set forth in this article and are not authorized from collections but are to be made only in accordance with appropriation by the Legislature and in accordance with the
provisions of article two, chapter eleven-b of this code:

Provided. That for the fiscal year ending the thirtieth day of June, two thousand nine, expenditures are authorized from collections rather than pursuant to appropriations by the Legislature.

§31-15C-6. Categorization of areas within state for broadband deployment purposes.

Based on its analysis of mapping, broadband demand, and other relevant data, the council shall designate unserved areas of the state as being one of three distinct types. These types are as follows:

(1) Type I unserved area: an area in which broadband may be deployed by service providers in an economically feasible manner;

(2) Type 2 unserved area: an unserved area in which broadband may be deployed by broadband service providers and other entities in an economically feasible manner, provided some form of public moneys is made available; and

(3) Type 3 unserved area: an unserved area in which, at present, cable or wireline broadband cannot be deployed in an economically feasible manner and an intermodal approach employing other technologies, such as satellite and wireless, is required to provide that area with high-speed internet access.

§31-15C-7. Retention of outside expert consultant.

In order to assist the council with the highly technical task of categorizing the areas of the state and evaluating and prioritizing projects, the council may retain an outside expert consultant or consultants qualified to map the state on the basis of broadband availability, to evaluate, categorize and
prioritize projects, to assist in public outreach and education in order to stimulate demand, to advise the council on the granting or denying of funding to projects, and to provide other support and assistance as necessary to accomplish the purposes of this article. The provisions of article three, chapter five-a of this code, shall not apply to the retention of an outside expert consultant pursuant to this section; Provided, that the council shall select the expert or experts by a competitive selection process.

§31-15C-8. Stimulation of demand through public outreach and education.

In order to implement and carry out the intent of this article, the council may take such actions as it deems necessary or advisable in order to stimulate demand through public outreach and education in unserved areas. The council shall consider the views, if offered, of affected members of the public, including private industry.

§31-15C-9. Development of guidelines and application for funding assistance; emergency rule-making authority.

(a) In order to implement and carry out the intent of this article in type 2 and type 3 unserved areas, the council shall promulgate emergency rules pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of this code to develop comprehensive, uniform guidelines for use by the council in evaluating any request by a project sponsor for funding assistance to plan, acquire, construct, improve or otherwise develop a broadband deployment project in a type 2 or type 3 unserved area. The guidelines shall include the following factors: (1) The cost-effectiveness of the project; (2) the economic development benefits of the project; (3) the availability of alternative sources of funding that could help finance the project, including, but not limited to, private
grants or federal funding and the efforts undertaken to obtain such funding; (4) if the project requires the construction of a network, the applicant's ability to operate and maintain such network; (5) the degree to which the project advances statewide broadband access and other state broadband planning goals; (6) the proposed technologies, bandwidths, upstream data rates and downstream data rates; (7) the estimated date the project would commence and be completed; (8) how the proposed project compares to alternative proposals for the same unserved area with regard to the number of people served, the amount of financial assistance sought, and the long-term viability of the proposed project; and (9) any other consideration the council deems pertinent.

b) Under no circumstances may the council's guidelines allow for the approval of any project for broadband service that does not include a minimum downstream transmission rate of 600 kilobits per second (Kbps) and a minimum downstream-to-upstream ratio of 8.5:1 for services with a downstream rate of up to five megabits per second (Mbps). In those cases where a project's broadband service's downstream rate is five Mbps or greater, the council's guidelines must require a minimum upstream data rate of 588 Kbps and allow information applications and market demands to dictate acceptable downstream-to-upstream data ratios.

c) The council shall create an application form that shall be used by all project sponsors requesting funding assistance from the council to plan, acquire, construct, improve or otherwise develop broadband deployment projects in type 2 or type 3 unserved areas. The application form shall contain all information required by all state agencies that will be required to issue permits and certificates regarding the project. The application shall require the project sponsor to set forth the proposed location of the project; the type(s) of
unserved area(s) the project proposes to address, the estimated total cost of the project; the amount of funding assistance required and the specific uses of the funding; other sources of funding available or potentially available for the project; information demonstrating the need for the project; that the proposed funding of the project is the most economically feasible and viable alternative to completing the project; and such other information as the council considers necessary.

§31-15C-10. Requirements for project funding assistance; review of project application by council; competitive applications.

(a) Once the council has categorized unserved areas pursuant to section six of this article, project sponsors may submit applications for funding assistance for projects in those unserved areas. Upon receiving its first completed application for a categorized unserved area, the council shall post notice of such application with the Secretary of State for sixty days so as to allow for competing applications to be submitted to the council. Within thirty days of the close of the aforementioned sixty-day notice period, the council shall review all applications timely received during the sixty-day period and either (i) approve funding for one or more projects after determining that the funding would constitute an appropriate investment of public funds, or (ii) if the council determines that the application does not contain all of the required information or otherwise is incomplete, or that a proposed project is not eligible for funding assistance, or that the proposed project is otherwise not an appropriate or prudent investment of state funds, the council shall deny the project funding request. Prior to approving or denying any funding request, the council may seek the advice of any expert consultant retained pursuant to section seven of this article, but the council is not bound by that advice. The
council shall also consider the views, if offered, of affected members of the public, including private industry.

(b) To apply for or receive any funding assistance for a broadband deployment project from the council pursuant to subsection (a) of this section, the project sponsor seeking the funding assistance shall submit a completed application to the council on the form prepared for such purpose by the council pursuant to section nine of this article.

(c) In reviewing each application, the council may use the engineering, financial and technical expertise of outside consultants in addition to the respective staffs of the government agencies and private-sector entities represented on the council or other government agencies.

(d) Notwithstanding any provision of article fifteen-a, chapter thirty-one or any other provision of this code, broadband deployment project proposals submitted to the council for its consideration pursuant to this article and the council's decisions with regard to such projects shall not be subject to review by the West Virginia Infrastructure and Jobs Development Council.

§31-15C-11. Required reporting by state entities.

(a) The secretary of administration shall submit a written report to the council by the thirty-first day of October of each year describing in detail the existing broadband infrastructure owned, leased, used or operated by the state; broadband infrastructure purchased by the state; the demand for the infrastructure in the state; and whether or not that infrastructure is available to the public. If significant changes to any of the information submitted to the council occur, the secretary of administration shall submit a written update to the council within sixty days of the change or in the next report, whichever date is sooner.
(b) The secretary of administration shall submit a written report to the council by the thirty-first day of October of each year describing in detail the state portal, any state services or programs that are available to the public on the state portal; the amount of usage of the portal; and efforts to create demand for the portal. If significant changes to any of the information submitted to the council occur, the secretary of administration shall submit a written update the council within sixty days of the change or in the next report, whichever date is sooner.

(c) The chancellor of the higher education policy commission shall submit a written report to the council by the thirty-first day of October of each year describing in detail the existing broadband infrastructure owned, leased, used, operated, or purchased by all public baccalaureate and graduate institutions in the state; all programs or initiatives designed to increase the usage of broadband and broadband based educational applications in the public baccalaureate and graduate institutions; and all training provided to instructors in the use of broadband and broadband based educational applications. If significant changes to any of the information submitted to the council occur, the chancellor of the higher education policy commission shall submit a written update to the council within sixty days of the change or in the next report, whichever date is sooner.

(d) The chancellor of the West Virginia Council for Community and Technical College Education shall submit a written report to the council by the thirty-first day of October of each year describing in detail the existing broadband infrastructure owned, leased, used, operated, or purchased by all public baccalaureate and graduate institutions in the state; all programs or initiatives designed to increase the usage of broadband and broadband based educational applications in the public baccalaureate and graduate institutions; and all training provided to instructors in the use of broadband and
broadband based educational applications. If significant changes to any of the information submitted to the council occur, the chancellor of the West Virginia council for community and technical college education shall submit a written update the council within sixty days of the change or in the next report, whichever date is sooner.

(e) The state superintendent of schools shall submit a written report to the council by the thirty-first day of October of each year describing in detail the existing broadband infrastructure owned, leased, used, operated, or purchased by all state schools; all programs or initiatives designed to increase the usage of broadband and broadband based educational applications in the schools and in Pre-K and early childhood education programs; all training provided to teachers in the use of broadband and broadband based educational applications; the availability of an access to broadband in homes and families with children aged four years to eight years; estimates of the number of families with children aged four years to eight years who are using broadband in the homes; estimates of the ownership of computers in families with children aged four years to eight years; and any unmet demand for broadband infrastructure in state schools. If significant changes to any of the information submitted to the council occur, the state superintendent of schools shall submit a written update to the council within sixty days of the change or in the next report, whichever date is sooner.

(f) The chair of the West Virginia healthcare authority shall submit a written report to the council by the thirty-first day of October of each year describing in detail the existing broadband infrastructure owned, leased, used operated, or purchased by all hospitals, medical facilities, clinics, or healthcare providers; all programs, initiatives, or applications utilizing broadband that are promoted by hospitals, medical facilities, clinics, or healthcare providers; and any unmet
demand for broadband by hospitals, medical facilities, clinics, or healthcare providers.

§31-15C-12. Limitation of liability.

No person is subject to antitrust or unfair competition liability based on membership or participation in the council, which provides an essential governmental function and enjoys state action immunity.


(a) Broadband deployment information provided to the council or its consultants and other agents, including but not limited to physical plant locations, subscriber levels, and market penetration data, constitutes proprietary business information and, along with any other information that constitutes trade secrets, shall be exempt from disclosure under the provisions of chapter twenty-nine-b of this code: Provided, That the information is identified as confidential information when submitted to the council.

(b) Trade secrets or proprietary business information obtained by the council from broadband providers and other persons or entities shall be secured and safeguarded by the state. Such information or data shall not be disclosed to the public or to any firm, individual or agency other than officials or authorized employees of the state. Any person who makes any unauthorized disclosure of such confidential information or data is guilty of a misdemeanor and, upon conviction thereof, may be fined not more than five thousand dollars or confined in a correctional facility for not more than one year, or both.

(c) The official charged with securing and safeguarding trade secrets and proprietary data for the council is the Secretary of Administration, who is authorized to establish
and administer appropriate security measures. The council chair shall designate two additional persons to share the responsibility of securing trade secrets or proprietary information. No person will be allowed access to trade secrets or proprietary information without written approval of a minimum of two of the three authorized persons specified above.

§31-15C-14. Expiration of council.

The council shall continue to exist until the thirty-first day of December, two thousand eleven, unless sooner terminated, continued or reestablished pursuant to an Act of the Legislature.
That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 5/8/, 2008.

day of _______ 2008.