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## HOUSE BILL NO. 831

## FLOOR AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by Senator Petersen  
on February 25, 2020)

(Patron Prior to Substitute—Delegate Carroll Foy)

A BILL to amend and reenact § 55.1-306 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 55.1-306.1, relating to utility easements; broadband and other communications services.

Be it enacted by the General Assembly of Virginia:

1. That § 55.1-306 of the Code of Virginia is amended and reenacted and that the Code of Virginia is amended by adding a section numbered 55.1-306.1 as follows:

§ 55.1-306. Utility easements.

A. For the purposes of this section, "utility services" means any products, services, and equipment related to energy, ~~telecommunications~~ broadband and other communications services, water, and sewerage.

B. Where an easement, whether appurtenant or gross, is expressly granted by an instrument recorded on or after July 1, 2006, that imposes on a servient tract of land a covenant (i) to provide an easement in the future for the benefit of utility services; (ii) to relocate, construct, or maintain facilities owned by an entity that provides utility services; or (iii) to pay the cost of such relocation, construction, or maintenance, such covenant shall be deemed for all purposes to touch and concern the servient tract, to run with the servient tract, its successors, and assigns for the benefit of the entity providing utility services, its successors, and assigns.

§ 55.1-306.1. Utility easements; expansion of broadband.

A. As used in this section, unless the context otherwise requires:

"Claim" means, in reference to litigation brought against an indemnified party, any demand, claim, cause or right of action, judgment, settlement, payment, provision of a consent decree or a consent decree, damages, attorney fees, costs, expenses, and any other losses of any kind whatsoever associated with litigation.

"Communications provider" means a broadband or other communications service provider, including a public utility as defined in § 56-265.1, a cable operator as defined in § 15.2-2108.1:1, a local exchange carrier, competitive or incumbent, or a subsidiary or affiliate of any such entity.

"Easement" means an existing or future occupied electric distribution or communications easement with right of apportionment, including a prescriptive easement, except that "easement" does not include (i) easements that contain electric substations or other installations or facilities of a nonlinear character and (ii) electric transmission easements.

"Enterprise data center operations" has the same meaning as provided in § 58.1-422.2.

"Evidence of creditworthiness" means commercially reasonable assurance, in a form satisfactory to the incumbent utility, that the communications provider will be able to meet its obligations to indemnify as required by this section. Demonstrating that the communications provider has met the eligibility requirements for the Virginia Telecommunications Initiative (VATI), without regard to receipt of a VATI grant, pursuant to regulations or guidelines adopted by the Department of Housing and Community Development, shall be presumptive evidence of creditworthiness.

"Incumbent utility" means the entity that is the owner of the easement.

"Indemnified parties" means an incumbent utility, or any subsidiary or affiliate of any such entity, and the employees, attorneys, officers, agents, directors, representatives, or contractors of any such entity.

"Occupancy license agreement" means an uncompensated agreement between an incumbent utility and a communications provider, for use when the communications provider wishes to occupy an easement underground, that includes evidence of creditworthiness, nondiscriminatory provisions based on safety, reliability, and generally applicable engineering principles.

"Prescriptive easement" means an easement in favor of an incumbent utility or communications provider that is deemed by a court to exist.

"Public utility" has the same meaning as provided in § 56-265.1.

"Sensitive site" means an underlying servient estate that is occupied by a railroad or an owner or tenant having operations related to national defense, national security, or law-enforcement purposes.

B. It is the policy of the Commonwealth that:

1. Easements for the location and use of electric and communications facilities may be used to provide or expand broadband or other communications services;

2. The use of easements, appurtenant or gross, to provide or expand broadband or other

60 *communications services is in the public interest;*

61 3. *The installation, replacement, or use of public utility conduit, including the costs of installation,*  
62 *replacement, or use of conduit of a sufficient size to accommodate the installation of infrastructure to*  
63 *provide or expand broadband or other communications services, is in the public interest.*

64 4. *The use of easements, appurtenant or gross, to provide or expand broadband or other*  
65 *communications services (i) does not constitute a change in the physical use of the easement; (ii) does*  
66 *not interfere with, impair, or take any vested or other rights of the owner or occupant of the servient*  
67 *estate; (iii) does not place any additional burden on the servient estate other than a de minimis burden,*  
68 *if any; and (iv) has value to the owner or occupant of the servient estate greater than any de minimis*  
69 *impact;*

70 5. *The installation and operation of broadband or other communications services within easements,*  
71 *appurtenant or gross, are merely changes in the manner, purpose, or degree of the granted use as*  
72 *appropriate to accommodate a new technology; and*

73 6. *The statements in this subsection are intended to provide guidance to courts, agencies, and*  
74 *political subdivisions of the Commonwealth. Nothing in this section shall be deemed to make the use of*  
75 *an easement for broadband or other communications services, whether appurtenant, in gross, common,*  
76 *exclusive, or nonexclusive, a public use for the purposes of § 1-219.1 or other applicable law.*

77 C. *The installation and operation of broadband or other communications services by an incumbent*  
78 *utility for that utility's own internal use, adjunctive to the operation of the electric system, or for the*  
79 *purposes of electric safety, reliability, energy management, and electric grid modernization, are*  
80 *permitted uses within the scope of every easement.*

81 D. *Absent any express prohibition on the installation and operation of broadband or other*  
82 *communications services in an easement that is contained in a deed or other instrument by which the*  
83 *easement was granted, the installation and operation of broadband or other communications services*  
84 *within any easement shall be deemed, as a matter of law, to be a permitted use within the scope of*  
85 *every easement for the location and use of electric and communications facilities.*

86 E. *Subject to compliance with any express prohibitions in a written easement, any incumbent utility*  
87 *or communications provider may use an easement to install, construct, provide, maintain, modify, lease,*  
88 *operate, repair, replace, or remove its communications equipment, system, or facilities, and provide*  
89 *communications services through the same, without such incumbent utility or communications provider*  
90 *paying additional compensation to the owner or occupant of the servient estate or to the incumbent*  
91 *utility, provided that no additional utility poles are installed.*

92 F. *Nothing in this section shall diminish a landowner's right to contest, in a court of competent*  
93 *jurisdiction, the nature or existence of a prescriptive easement that has been continuously occupied for*  
94 *less than 20 years.*

95 G. *Any incumbent utility or communications provider may use a prescriptive easement to install,*  
96 *construct, provide, maintain, modify, lease, operate, repair, replace, or remove its communications*  
97 *equipment, system, or facilities, and provide communications services through the same, without such*  
98 *incumbent utility or communications provider paying additional compensation to the owner or occupant*  
99 *of the servient estate or to the incumbent utility, provided that no additional utility poles are installed.*

100 H. *Any incumbent utility may grant or apportion to any communications provider rights to install,*  
101 *construct, provide, maintain, modify, lease, operate, repair, replace, or remove its communications*  
102 *equipment, system, or facilities, and to provide communications services through the incumbent utility's*  
103 *prescriptive easement, including the right to enter upon such easement without approval of the owner or*  
104 *occupant of the servient estate, such grant and use being in the public interest and within the scope of*  
105 *the property interests acquired by the incumbent utility when the prescriptive easement was established.*

106 I. *Nothing in this section shall be deemed to limit damages or compensation recoverable in any*  
107 *action for trespass, any claim sounding in trespass or reasonably related thereto, or any other theory of*  
108 *recovery, brought against an incumbent utility or a communications provider.*

109 *In addition to any damages awarded, if the court finds that an incumbent utility or a*  
110 *communications provider is liable for trespass, or any claim sounding in trespass or reasonably related*  
111 *thereto, the claimant shall be entitled to recover reasonable costs, including costs and reasonable fees*  
112 *for expert witnesses, and attorney fees from such incumbent utility or communications provider.*

113 J. *Nothing in this section shall be deemed to limit any liability for personal injury or damage to*  
114 *tangible personal property of the landowner or occupant caused directly by the activities of the*  
115 *incumbent utility or communications provider while on or adjacent to the landowner's or occupant's real*  
116 *property.*

117 K. *Any communications provider making use of an easement pursuant to this section shall:*

118 1. *Give written notice, via certified mail, return receipt requested, to the landowner and any*  
119 *additional easement holders at least 15 days before the communications provider will occupy the*  
120 *easement. The written notice shall include the first date that the communications provider will occupy*  
121 *the easement and a description of the equipment or facilities that the communications provider will*

install in the easement.

2. Enter into an agreement with the incumbent utility authorizing it to use an easement;

3. Adhere to such restrictions as the incumbent utility may place on the communications provider, provided that such restrictions are reasonably related to safety, reliability, or generally applicable engineering principles and are applied on a nondiscriminatory basis;

4. For underground facilities, enter into an occupancy license agreement with the incumbent utility;

5. Agree in writing to indemnify, defend, and hold harmless the indemnified parties as against any third party for any claim, including claims of trespass, arising out of its entry onto, use of, or occupancy of such easement and provide evidence of creditworthiness, as the incumbent utility may prescribe, provided that the communications provider is given timely written notice and full cooperation of the indemnified parties in defending or settling any claim, including access to records and personnel to establish the existence of an easement and its history of use by the incumbent utility, and further provided that every communications provider occupying an easement that is the subject of a claim shall be jointly and severally liable to the indemnified parties, with an obligation of equal contribution, for any claim arising out of entry onto, use of, or occupancy of an easement for communications purposes; and

6. For underground facilities, abide by the provisions of the Underground Utility Damage Prevention Act (§ 56-265.14 et seq.).

L. A communications provider, making use of an easement pursuant to this section, shall not:

1. Locate a telecommunications tower in such easement; or

2. Install any new underground facilities except pursuant to an occupancy license agreement (i) in an incumbent utility's conduit pursuant to a joint use agreement; (ii) where incumbent utility facilities are permitted underground, using a clean-cutting direct burial technique beneath the surface soil no more than 24 inches in depth and six inches in width; or (iii) riser or drop lines or equipment connection lines, followed in all cases by reasonable restoration of the surface to substantially its prior condition. Provided that the landowner shall not, absent an agreement to the contrary, be responsible for relocating or reimbursing the incumbent utility or a communications provider for the cost of relocating any new underground communications facilities installed pursuant clause (ii) of this subdivision, which relocation and associated costs shall be addressed in the occupancy license agreement. This limitation on reimbursement or payment of relocation costs incurred as a result of development or redevelopment by the landowner shall not apply to any communications facilities in the public rights of way adjacent to or overlying the real property in question.

M. As against a communications provider, no incumbent utility shall:

1. Solely by virtue of the provisions of this section, require any additional compensation for use of an easement, unless such compensation is required expressly in a written easement or other agreement;

2. Unreasonably refuse to grant an occupancy license agreement to any communications provider;

3. Include in an occupancy license agreement requirements for title reports, surveys, or engineering drawings; or

4. Use an occupancy license agreement for dilatory purposes or to create a barrier to the deployment of broadband or other communications services.

N. Nothing in this section shall apply to those easements located on sensitive sites or housing enterprise data center operations.

O. Notwithstanding any provision of this section, a public utility or an incumbent utility may assess fees and charges and impose reasonable conditions on the use of its poles, conduits, facilities, and infrastructure, which, as regarding attachments to utility poles, shall be subject to the provisions of 47 U.S.C. § 224 for investor-owned utilities and to § 56-466.1 for electric cooperatives. The statutes of repose, limitation, and notice-of-claim requirements contained in subsections R, S, and T shall not apply as being between a communications provider and an incumbent utility.

P. Nothing in this section shall be construed to inhibit, diminish, or modify the application of the provisions of Chapter 4 (§ 56-76 et seq.) of Title 56 or § 56-231.34:1 or 56-231.50:1, as applicable.

Q. The provisions of this section shall be liberally construed. An agreement to indemnify pursuant to this section shall not be void as against public policy.

R. Nothing in this section shall be deemed to limit the applicable limitations period in which any action may be brought against an incumbent utility, public utility, or communications provider, or a subsidiary or affiliate of any such entity, which shall continue to be governed by the applicable limitations periods under existing law.

S. Notwithstanding any other provision of law, in any action or claim that a person's property has been taken or damaged within the meaning of Article I, Section 11 of the Constitution of Virginia and compensation has not been paid, or any other claim reasonably related thereto, that is brought after July 1, 2020, against an incumbent utility or a communications provider, in relation to the existence, installation, construction, maintenance, modification, operation, repair, replacement, or removal of any

183 poles, wires, conduit, or other communications infrastructure, including fiber optic or coaxial cabling or  
184 the existence of any easement, appurtenant or gross, including a prescriptive easement, if proven, the  
185 claimant, in addition to being entitled to just compensation, shall be entitled to reasonable attorney fees  
186 and costs. If the court finds that claimant's property has been taken or damaged within the meaning of  
187 Article I, Section 11 of the Constitution of Virginia and compensation has not been paid, or any other  
188 claim reasonably related thereto, the claimant shall be entitled to recover reasonable costs, including  
189 costs and reasonable fees for expert witnesses, and attorney fees from such incumbent utility or  
190 communications provider.