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SENATE BILL NO. 794

AMENDMENT IN THE NATURE OF A SUBSTITUTE
(Proposed by the House Committee on Labor and Commerce
on February 18, 2020)

(Patrons Prior to Substitute—Senators Lewis, Stanley [SB 302], and Peake [SB 539])

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's 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 to exist, without any requirement of adverse possession, claim of right, or exclusivity, when physical evidence, records of the incumbent utility, public records, or other evidence indicates that it has existed on the servient estate for a continuous period of 20 years or more, without intervening litigation during such period by any party with a title interest seeking the removal of utility facilities or reformation of the easement. The size of such easement shall be deemed to be the greater of the actual occupancy of the easement in the incumbent utility's usual course of business or 7.5 feet on each side of the installed facilities' center-line.

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

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

62 B. It is the policy of the Commonwealth that:

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

65 2. The use of easements, appurtenant or gross, to provide or expand broadband or other
66 communications services is in the public interest;

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

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

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

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

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

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

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

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

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

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

112 I. Notwithstanding any other provision of law, in any action for trespass, or any claim sounding in
113 trespass or reasonably related thereto, whatever the theory of recovery, relating to real property that is
114 brought after July 1, 2020, against an incumbent utility or a communications provider, in relation to the
115 existence, installation, construction, maintenance, modification, operation, repair, replacement, or
116 removal of any poles, wires, conduit, or other communications infrastructure, including fiber optic or
117 coaxial cabling or the existence of any easement, appurtenant or gross, including a prescriptive
118 easement, if proven, damages recoverable by any claimant bringing such claim shall be limited to actual
119 damages only, and no consequential, special, or punitive damages shall be awarded. Damages shall be
120 based on any reduction in the value of the land as a result of the existence, installation, construction,
121 maintenance, modification, operation, repair, replacement, or removal of communications facilities, as

such tract existed at the time that any alleged trespass began giving rise to such claim under this section. The court shall also consider any positive value that access to broadband or other communications services may add to the property's value when calculating damages. Injunctive relief to require the removal or to enjoin the operation of other communications facilities or infrastructure shall not be available when such line or facilities are placed within an existing electric utility or communications easement, appurtenant or gross, but damages as set forth in this subsection shall be the exclusive remedy.

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

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

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

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

4. 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

5. 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.

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

185 *R. Notwithstanding any other provision of law, every action against an incumbent utility, public*
186 *utility, or communications provider, or a subsidiary or affiliate of any such entity, in relation to the*
187 *existence, installation, construction, maintenance, modification, operation, repair, replacement, or*
188 *removal of any poles, wires, or other communications infrastructure, including fiber optic or coaxial*
189 *cabling, whatever the theory of recovery, shall be brought within 12 months after the cause of action*
190 *accrues. The cause of action shall be deemed to accrue when overhead broadband or other*
191 *communications infrastructure is installed or when such underground infrastructure is discovered.*

192 *S. Notwithstanding any other provision of law, every action against an incumbent utility, public*
193 *utility, or a communications provider, or a subsidiary or affiliate of any such entity, after actual notice*
194 *has been given to the landowner or occupant in relation to the existence, installation, construction,*
195 *maintenance, modification, operation, repair, replacement, or removal of any poles, wires, or other*
196 *communications infrastructure, including fiber optic or coaxial cabling, overhead or underground,*
197 *whatever the theory of recovery, shall be brought within six months after the cause of action accrues.*
198 *The cause of action shall be deemed to accrue when actual notice, including notification of such*
199 *six-month limitation period, is given to the landowner or occupant by first class mail to the last known*
200 *mailing address of the landowner or occupant in the incumbent utility's records, or other actual notice.*

201 *T. Notwithstanding any other provision of law, every claim cognizable against any incumbent utility,*
202 *public utility, or communications provider for trespass, or any claim sounding in trespass or reasonably*
203 *related thereto, whatever the theory of recovery, in relation to the overhead or underground existence,*
204 *installation, construction, maintenance, modification, operation, repair, replacement, or removal of any*
205 *poles, wires, or other communications infrastructure, including fiber optic or coaxial cabling, shall be*
206 *forever barred unless the claimant or his agent, attorney, or representative has filed a written statement*
207 *addressed to the incumbent utility, and, if known, to the communications provider, of the nature of the*
208 *claim, which includes the time and place at which the claim is alleged to have transpired, within 12*
209 *months after such cause of action accrued. The cause of action shall be deemed to accrue when*
210 *physical overhead broadband or other communications infrastructure is installed, or when the existence*
211 *of such underground infrastructure is discovered. However, if the claimant was under a disability at the*
212 *time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply.*