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SENATE BILL NO. 794

AMENDMENT IN THE NATURE OF A SUBSTITUTE

(Proposed by the Senate Committee on Commerce and Labor
on February 3, 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 in gross, 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; and

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.

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

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

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

94 F. In cases of a prescriptive easement, such easement shall be deemed to exist. Nothing in this
95 subdivision shall diminish a landowner's right to contest, in a court of competent jurisdiction, the nature
96 or existence of a prescriptive easement that has been continuously occupied for less than 20 years.

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

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

108 I. In any action for trespass, or any claim sounding in trespass or reasonably related thereto, to real
109 property that is brought after July 1, 2020, against an incumbent utility or a communications provider,
110 in relation to the existence, installation, construction, maintenance, modification, operation, repair,
111 replacement, or removal of any poles, wires, conduit, or other communications infrastructure, including
112 fiber optic or coaxial cabling or the existence of any easement, appurtenant or gross, including a
113 prescriptive easement, if proven, damages recoverable by any claimant bringing such claim shall be
114 limited to actual damages only, and no consequential, special, or punitive damages shall be awarded.
115 Damages shall be based on any reduction in the value of the land as a result of the existence,
116 installation, construction, maintenance, modification, operation, repair, replacement, or removal of
117 communications facilities, as such tract existed at the time that any alleged trespass began giving rise to
118 such claim under this section. The court shall also consider any positive value that access to broadband
119 or other communications services may add to the property's value when calculating damages. Injunctive
120 relief to require the removal or to enjoin the operation of other communications facilities or
121 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.

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

S. Notwithstanding any other provision of law, every action against an incumbent utility, public utility, or a communications provider, or a subsidiary or affiliate of any such entity, after actual notice

183 has been given to the landowner or occupant in relation to the existence, installation, construction,
184 maintenance, modification, operation, repair, replacement, or removal of any poles, wires, or other
185 communications infrastructure, including fiber optic or coaxial cabling, overhead or underground,
186 whatever the theory of recovery, shall be brought within six months after the cause of action accrues.
187 The cause of action shall be deemed to accrue when actual notice is given to the landowner or
188 occupant by first class mail to the last known mailing address of the landowner or occupant in the
189 incumbent utility's records, or other actual notice.

190 T. Notwithstanding any other provision of law, every claim cognizable against any incumbent utility,
191 public utility, or communications provider for trespass in relation to the overhead or underground
192 existence, installation, construction, maintenance, modification, operation, repair, replacement, or
193 removal of any poles, wires, or other communications infrastructure, including fiber optic or coaxial
194 cabling, shall be forever barred unless the claimant or his agent, attorney, or representative has filed a
195 written statement addressed to the incumbent utility, and, if known, to the communications provider, of
196 the nature of the claim, which includes the time and place at which the claim is alleged to have
197 transpired, within 12 months after such cause of action accrued. The cause of action shall be deemed to
198 accrue when physical overhead broadband or other communications infrastructure is installed, or when
199 the existence of such underground infrastructure is discovered. However, if the claimant was under a
200 disability at the time the cause of action accrued, the tolling provisions of § 8.01-229 shall apply.