

VIRGINIA ACTS OF ASSEMBLY -- 2021 SPECIAL SESSION I

CHAPTER 370

An Act to amend and reenact § 56-585.1:9 of the Code of Virginia, relating to provision of broadband services by investor-owned electric utilities.

[S 1413]

Approved March 25, 2021

Be it enacted by the General Assembly of Virginia:

1. That § 56-585.1:9 of the Code of Virginia is amended and reenacted as follows:

§ 56-585.1:9. Provision of broadband capacity to unserved areas of the Commonwealth.

A. ~~The Commission shall establish pilot programs under which each~~ *Each* Phase I Utility and each Phase II Utility, as such terms are defined in subdivision A 1 of § 56-585.1, may submit one or more petitions to provide or make available broadband capacity to ~~nongovernmental~~ Internet service providers in areas of the Commonwealth unserved by broadband. ~~Any such petitions that a Phase I Utility submits shall not exceed \$60 million in costs annually. Any such petitions that a Phase II Utility submits shall not exceed \$60 million in costs annually.~~ The provision of such broadband capacity to ~~nongovernmental~~ Internet service providers in areas of the Commonwealth unserved by broadband pursuant to this section is in the public interest.

B. ~~The incremental costs of providing broadband capacity pursuant to any such pilot program petition, net of revenue generated therefrom, shall be eligible for recovery from customers as an electric grid transformation project pursuant to clause (vi) of subdivision A 6 of § 56-585.1 filed on or after July 1, 2020~~ *2021, as a non-bypassable charge. Notwithstanding any provision of subdivision A 6 or 7 of § 56-585.1, the utility may file one or more petitions for approval of such a rate adjustment clause, on a stand-alone basis, seeking recovery of the costs of providing broadband capacity at any time on or after July 1, 2021, and the Commission shall issue its final order regarding such petition within six months following the date of filing.*

C. Notwithstanding the provisions of § 13.1-620 or the articles of incorporation of an investor-owned utility, an investor-owned utility may, either directly or through an affiliate or subsidiary, pursuant to a ~~pilot program~~ *petition* that the Commissioner approves pursuant to this section, (i) own, manage, or control any broadband capacity equipment and electronics, including any plant, works, system, lines, facilities, or properties, or any part or parts thereof, together with all appurtenances thereto, used or useful in connection with the provision and extension of such broadband services; (ii) lease indefeasible rights of use in such broadband capacity equipment and electronics to ~~nongovernmental~~ Internet service providers in areas of the Commonwealth unserved by broadband pursuant to this section; and (iii) provide access points that are outside the utility's energized zone to allow connection between the utility's broadband capacity system and the ~~nongovernmental~~ Internet service provider's system.

D. Each petition to provide broadband capacity pursuant to this section that an investor-owned utility submits to the Commission shall identify the ~~nongovernmental~~ Internet service provider to which the utility shall lease such capacity, together with the area to be served using such capacity. The Commission shall, after notice and opportunity for hearing, initiate proceedings to review each petition submitted. ~~In determining whether an area is unserved by broadband, the Commission shall take into account the impact of any grants or loans made to provide broadband access to the designated area. The Commission's final order regarding any such petition shall be entered by the Commission not more than six months after the date of the filing of such petition. The Commission shall condition any approval of such petition on the requirement that construction shall commence within three years of such approval. If the utility fails to commence construction within such period, the utility may resubmit the petition for Commission approval. The Commission shall condition any approval of such petition on the requirement that construction shall commence within 18 months of such approval. If the utility fails to commence construction within such time period, the utility may resubmit the petition for conditional approval. The Commission shall also condition any approval of such petition on the requirement that the utility and its Internet service provider submit annual public reports on construction progress by the utility and delivery of broadband services by the Internet service provider until construction is completed. The Commission's final order regarding any such petition shall be entered by the Commission no more than six months after the date of filing of such petition. An area shall be determined to be unserved by broadband if (i) the Department of Housing and Community Development has certified within the last 18 months that the designated area is unserved; (ii) the Virginia Telecommunication Initiative of the Department of Housing and Community Development has issued a grant or loan to construct a broadband service project within the last 18 months, and the grant or loan recipient is the Internet service provider to which the utility proposes to lease capacity; (iii) the federal government has issued a grant or loan or has provided support to construct a broadband service project in the designated area~~

within the last 18 months, and the grant or loan recipient is the Internet service provider to which the utility proposes to lease capacity; or (iv) the Commission determines the area is unserved on the basis of other competent evidence. The determination of the Department of Housing and Community Development that an area is unserved shall be made following public notice of the proposed finding and an opportunity for third parties to challenge such finding, and such determination shall be presumed sufficient for the Commission to find the area to be unserved. The Commission may determine that an area is unserved on the basis of other competent evidence.

E. An investor-owned utility shall be responsible ~~to obtain~~ *for obtaining* all necessary rights-of-way or other easements or real property rights to permit leasing of broadband capacity to ~~nongovernmental~~ Internet service providers. ~~A nongovernmental~~ An Internet service provider shall be responsible ~~to obtain~~ *for obtaining* all necessary rights-of-way or other easements or real property rights from utility access point to permit the provision of broadband services to end-user customers.

F. As used in this section:

"Broadband" means Internet access at speeds ~~equal to or greater than 10 Mbps download speed and one Mbps upload speed, provided that the adequate speed as determined by the broadband guidelines set out by the Department of Housing and Community Development for its Virginia Telecommunication Initiative may by guideline modify such speeds from time to time.~~

"Unserved by broadband" means a designated area in which less than 10 percent of residential and commercial units are capable of receiving broadband service, provided that the Department of Housing and Community Development for its Virginia Telecommunication Initiative may by guideline increase such percentage from time to time.

G. No investor-owned utility nor any affiliate thereof may offer broadband or Internet service provider services to residential or commercial end-user customers in the Commonwealth pursuant to this section. Nothing in this section shall be construed to prevent an investor-owned utility or an affiliate thereof from providing transport of or capacity for broadband or Internet service *in the Commonwealth* as a wholesaler or intermediate vendor, provided that an unaffiliated ~~nongovernmental~~ third party is the provider of broadband or Internet services to the end-user customer.

H. The provision and extension of broadband capacity by an incumbent electric utility to an area of the Commonwealth unserved by broadband pursuant to a ~~pilot program~~ *petition* that the Commission approves pursuant to this section, including any business activity related to the construction or leasing of broadband capacity facilities, shall be exempt from any rules and regulations that the Commission has promulgated or may promulgate governing functional separation of generation, retail transmission, and distribution of incumbent electric utilities. Investor-owned electric utilities may for the purposes of this section engage in such coordination between and among their various corporate divisions as necessary for the purposes of providing broadband capacity to an area of the Commonwealth unserved by broadband.

I. The pilot program established pursuant to this section shall continue for the three-year period ending three years following the date the Commission approves the first petition to provide broadband capacity pursuant to this section, unless the Commission extends the pilot program or makes the pilot program permanent. At the termination of the pilot program, a utility shall continue to provide broadband capacity pursuant to leases existing as of the date of such termination.

J. Notwithstanding the provisions of § 13.1-620 or the articles of incorporation of an investor-owned utility, an investor-owned utility may, either directly or through an affiliate or subsidiary, lease *broadband-related assets or capacity* to any third party that is a wholesaler and that is not a government-owned broadband authority, for the purposes of providing broadband connectivity. The leases may, if the parties choose, extend in length beyond the end of the pilot program, notwithstanding any Commission order issued pursuant to subsection I terminating the pilot program. The revenues generated from such leases shall offset (i) the incremental costs of the ~~pilot program~~ *petition* recovered through the rate adjustment clause described in subsection B or (ii) the utility's electric cost of service.

2. That any pilot program established by Phase I or Phase II Utility prior to July 1, 2021, under § 56-585.1:9 of the Code of Virginia prior to the enactment of this act may continue, and the utility may maintain such pilot program at its discretion, under the terms originally established. Upon the expiration of such pilot program, the utility may seek to renew or extend such program pursuant to the terms of this act.