

# Attachment 1

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
CHARLESTON DIVISION**

FRONTIER WEST VIRGINIA INC. AND CITIZENS  
TELECOMMUNICATIONS COMPANY OF WEST  
VIRGINIA D/B/A FRONTIER COMMUNICATIONS OF  
WEST VIRGINIA,

PLAINTIFFS,

v.

GOVERNOR JAMES C. JUSTICE II, SOLELY IN HIS  
OFFICIAL CAPACITY AS GOVERNOR OF THE STATE  
OF WEST VIRGINIA; CHAIRMAN MICHAEL A.  
ALBERT, SOLELY IN HIS OFFICIAL CAPACITY AS  
CHAIRMAN AND COMMISSIONER OF THE PUBLIC  
SERVICE COMMISSION OF WEST VIRGINIA;  
COMMISSIONER BROOKS F. MCCABE, JR., SOLELY  
IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF  
THE PUBLIC SERVICE COMMISSION OF WEST  
VIRGINIA; AND COMMISSIONER RENEE A.  
LARRICK, SOLELY IN HER OFFICIAL CAPACITY AS  
COMMISSIONER OF THE PUBLIC SERVICE  
COMMISSION OF WEST VIRGINIA,

DEFENDANTS.

CIVIL ACTION NO. \_\_\_\_\_

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia (individually and collectively, “Frontier”), complain as follows against defendants Governor James C. Justice II, solely in his official capacity as Governor of the State of West Virginia; Chairman Michael A. Albert, solely in his official capacity as Chairman and Commissioner of the Public Service Commission of West Virginia (“PSC”); Commissioner Brooks F. McCabe, Jr., solely in his official capacity as

Commissioner of the PSC; and Commissioner Renee A. Larrick, solely in her official capacity as Commissioner of the PSC (“Defendants”):

#### **NATURE OF THE CASE**

1. Effective July 7, 2017, a new West Virginia law allows third parties to perform work on Frontier’s communications network, in some circumstances without so much as prior notice to Frontier. Under the new law, where a third party seeks to attach equipment to an electric utility pole and Frontier already has communications lines or other facilities on the pole, the third party may relocate or alter Frontier’s facilities as it deems necessary. If the third party believes its work on Frontier’s facilities would not cause or reasonably be expected to cause a customer outage, the third party need not notify Frontier in advance. The new law similarly would allow a third-party attacher to relocate or alter the facilities of an existing attacher on poles owned by Frontier.

2. Frontier seeks declaratory and permanent injunctive relief to restrain Defendants from enforcing this new West Virginia law. The law conflicts with and is preempted by the pole attachment regulations of the Federal Communications Commission (“FCC”). In addition, the new law violates the Contract Clause and the Fifth and Fourteenth Amendments of the United States Constitution.

#### **JURISDICTION AND VENUE**

3. This action arises under the laws and Constitution of the United States, specifically 47 U.S.C. § 224, a provision of the Communications Act of 1934 as amended by the Telecommunications Act of 1996, and under the Supremacy and Contract Clauses, as well as the Fifth and Fourteenth Amendments, of the United States Constitution. The Court has federal question jurisdiction over these claims pursuant to 28 U.S.C. § 1331 and equitable jurisdiction to enjoin unconstitutional action under *Ex Parte Young*, 209 U.S. 123 (1908).

4. The Court's authority to grant declaratory relief and related injunctive relief is based upon 28 U.S.C. §§ 2201-2202 because an actual controversy exists.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because Frontier's claims arose in this judicial district and a substantial portion of Frontier's property impacted by the challenged West Virginia law is situated in this district.

#### **PARTIES**

6. Frontier West Virginia Inc. and Citizens Telecommunications Company of West Virginia d/b/a Frontier Communications of West Virginia are West Virginia corporations with their principal place of business at 1500 MacCorkle Avenue, S.E., Charleston, West Virginia. At all relevant times, both corporations have been and are qualified to do business in West Virginia.

7. Defendant Governor James C. Justice II is the Governor of the State of West Virginia, and is sued solely in his official capacity. The chief executive power of the State is vested in the Governor, "who shall take care that the laws be faithfully executed." W. Va. Const., Art. VII, § 5.

8. Defendant Michael A. Albert is the Chairman and a Commissioner of the PSC and is sued solely in his official capacity. The PSC is "given power . . . to require [public utilities] to conform to the laws of [West Virginia]." W. Va. Code § 24-2-2(a).

9. Defendant Brooks F. McCabe, Jr. is a Commissioner of the PSC and is sued solely in his official capacity. The PSC is "given power . . . to require [public utilities] to conform to the laws of [West Virginia]." W. Va. Code § 24-2-2(a).

10. Defendant Renee A. Larrick is a Commissioner of the PSC and is sued solely in her official capacity. The PSC is "given power . . . to require [public utilities] to conform to the laws of [West Virginia]." W. Va. Code § 24-2-2(a).

## **OPERATIVE FACTS AND FEDERAL REGULATION**

### **Joint Use and Occupancy of Utility Poles**

11. Frontier is a wireline telecommunications carrier that provides telephone and other communications services in West Virginia. In order to provide these services, Frontier and its predecessors have invested hundreds of millions of dollars to construct, maintain, repair, replace, and operate an extensive communications network throughout the State.

12. A significant portion of Frontier's communications network in West Virginia consists of aerial communications facilities and attachments placed on telephone and electric utility poles. The majority of poles in West Virginia are owned by various electric utilities, with whom Frontier and other attachers have contracts for the joint use or occupancy of the poles. The remainder primarily are owned by Frontier.

13. In many instances, multiple providers (including electric utilities, communications providers, cable television providers and others) share space on a single pole. In the ordinary course of business, those providers work with each other and the pole owner to move or rearrange equipment, as necessary, to make room for a new provider seeking to attach to the pole. This process, commonly known as "make-ready" work, is the subject of contractual obligations and longstanding federal regulations. Those obligations and regulations include, among other things, provisions aimed at allowing all providers to share available pole space safely and effectively, without damaging or interfering with another provider's facilities or services.

### **Regulation of Utility Pole Use or Occupancy under Federal Law**

14. In 1978, Congress passed the Pole Attachment Act, codified at 47 U.S.C. § 224, as later amended by the Telecommunications Act of 1996. The Pole Attachment Act, as amended,

granted the FCC the power to regulate the rates, terms, and conditions for attachments on utility poles.

15. Under 47 U.S.C. § 224(c) a State may affirmatively displace or “reverse preempt” the FCC’s jurisdiction by satisfying *three* strict statutory requirements.

16. *First*, Section 224(c)(2) requires that the State make the following certification to the FCC:

Each State which regulates the rates, terms, and conditions for pole attachments *shall certify* to the Commission that –

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

47 U.S.C. § 224(c)(2) (emphasis added).

17. *Second*, Section 224(c)(3)(A) provides that “a State *shall not* be considered to regulate the rates, terms, and conditions for pole attachments *unless* the State has issued and made effective rules and regulations implementing the State’s regulatory authority over pole attachments.” *Id.* § 224(c)(3)(A) (emphasis added).

18. *Third*, Section 224(c)(3)(B) provides that:

a State *shall not* be considered to regulate the rates, terms, and conditions for pole attachments . . . with respect to any individual matter, *unless* the State takes final action on a complaint regarding such matter –

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

*Id.* § 224(c)(3)(B) (emphasis added).

19. West Virginia has satisfied *none* of these requirements to reverse preempt the FCC’s jurisdiction over pole attachments.

### **FCC Regulation of Pole Attachments in West Virginia**

20. 47 U.S.C. § 224(b) authorizes the FCC to “regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable” in all states that have not “reverse preempted” the FCC, including West Virginia.

21. In so regulating, the FCC has sought to “balance the needs of communications companies to deploy vital network facilities with the needs of utility pole owners, including the need to protect safety of life and the reliability of their own critically important networks.” *In the Matter of Implementation of Section 224 of the Act*, 26 F.C.C.R. 5240, ¶ 7 (April 7, 2011) (“*FCC Pole Attachment Order*”).

22. Among other things, the FCC’s regulations entitle an entity with existing attachments, including Frontier, to receive prior written notice in the event a third party proposes to perform any make-ready work that would affect the entity’s facilities. 47 C.F.R. § 1.1420(e). The FCC’s regulations allow any entity with existing attachments up to 60 days (and potentially more, depending upon the type of existing facilities and number of affected poles) to modify its attachments to accommodate a new attacher. *Id.* Under the FCC’s regulations, a new attacher may hire a contractor to complete the make-ready work itself only if the work has not been completed by the specified deadline. 47 C.F.R. § 1.1420(i).

23. In its recent Notice of Proposed Rulemaking, the FCC continues to examine its pole attachment regulations and to seek the proper balance of “the legitimate needs and interests of new attachers, existing attachers, utilities, and the public.” *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed

Rulemaking, Notice of Inquiry and Request for Comment, WC Docket 17-84 at ¶6 (Adopted: April 20, 2017; Released: April 21, 2017) (“2017 NPRM”). In considering changes to its existing regulations, the FCC specifically recognized “that speeding access to poles could raise meaningful concerns about safety and protection of existing infrastructure.” *Id.*

### **West Virginia House Bill 3093**

24. On April 8, 2017, the West Virginia Legislature passed House Bill 3093 (attached as Exhibit A). The Governor signed it on April 26, 2017, and it has an effective date of July 7, 2017.

25. House Bill 3093 creates a new Chapter of the West Virginia Code (Chapter 31G. Broadband Enhancement and Expansion Policies). House Bill 3093 includes provisions establishing a Broadband Enhancement Council and authorizing the formation of cooperative associations to provide Internet access service. Those provisions are not at issue here and are not being challenged by Frontier in this lawsuit.

26. House Bill 3093’s Article 4, however, would establish new terms and conditions of access to utility poles. Article 4 is limited in scope and is wholly severable from all remaining provisions of House Bill 3093.

27. Among other things, Article 4, § 31G-4-2(a) states that “[u]pon approval of an Attachment Application [by the pole owner], an Attacher may relocate or alter the attachments or facilities of any Pre-Existing Third Party User as may be necessary to accommodate an Attacher’s attachment using Pole Owner approved contractors...” without the consent of, or in some cases, even notice to, the Pre-Existing Third Party User.

28. Article 4 only requires the new Attacher to provide prior notice to the Pre-Existing Third Party User if the new Attacher concludes its work would cause, or would reasonably be



expected to cause, a customer outage: “an Attacher will not effectuate a relocation or alteration of a Pre-Existing Third Party User’s facilities that causes or would reasonably be expected to cause a customer outage without first providing forty-five days written notice to the Pre-Existing Third Party User.” Article 4, § 31G-4-2(a).

29. Even where a relocation or alteration would cause or is expected to cause a customer outage, the new Attacher may relocate or alter the Pre-Existing Third Party User’s facilities if the Pre-Existing Third Party User’s does not transfer or rearrange its facilities within forty-five days from receipt of the notice: “In the event the Pre-Existing Third Party Users of such other facilities fail to transfer or rearrange their facilities within forty-five days from receipt of notice of relocation or alteration of a Pre-Existing Third Party User’s facilities that causes or would reasonably be expected to cause a customer outage, an Attacher may undertake such work.” Article 4, § 31G-4-2(b).

30. Accordingly, Article 4 permits the new Attacher to seize Frontier’s property, and to alter or relocate Frontier’s property, without Frontier’s consent – and even without prior notice to Frontier in some cases – increasing the risk of loss of service to Frontier’s customers, including, among other things, 9-1-1 or other emergency services.

31. Even where Frontier is the Pole Owner, Article 4 may allow new Attachers to relocate or alter Pre-Existing Third Party User’s facilities on Frontier’s poles without prior notice of the specific work to be performed.

32. Under the procedures set forth in Article 4, Frontier will be deprived of the opportunity to assess the potential for network disruption caused by the alteration or relocation of its facilities or of Third Party User’s facilities, and to specify and oversee the work in order to

avoid or minimize any potential for harm to its network and other property – and ensure the continuity and quality of service to its customers.

33. In addition, as a result of those Article 4 procedures, in the event of network trouble during or after the new Attacher's work, Frontier may be hampered in locating and correcting that trouble. Either Frontier will not be notified at all of the location or nature of the new Attacher's work or, even where Frontier is entitled to notice, it may not know of the location and type of work until the new Attacher actually provides the notice of completion of the work, if ever.

34. The procedures specified by Article 4 provide substantially less protection for Frontier and its customers than the procedures specified by current contracts and by federal regulations.

35. Enforcement of Article 4 would inflict significant harm on Frontier and its customers, including, among other things, increasing the risk of interruptions and outages in Frontier's services because Article 4 authorizes third parties to perform work on Frontier's network without Frontier's authorization or oversight.

36. Many of the new Attachers are direct competitors of Frontier, and may have little or no incentive to avoid damaging Frontier's network facilities and other property.

37. Frontier's challenge to Article 4, as set forth in this Complaint, will not affect any remaining provisions of House Bill 3093.

**FIRST CLAIM FOR RELIEF:  
FEDERAL PREEMPTION (SUPREMACY CLAUSE)**

**A. Express Preemption by 47 U.S.C. § 224**

38. Frontier hereby incorporates by reference the allegations of paragraphs 1 through 37, inclusive, as though fully set forth herein.

39. West Virginia, and specifically in House Bill 3093, has not satisfied *any* of the statutory requirements for its assertion of jurisdiction over the rates, terms, and conditions for pole attachments – nor does House Bill 3093 even purport to do so.

40. *First*, West Virginia has *not* certified to the FCC that it “regulate[s] rates, terms, and conditions for pole attachments.” *See FCC Pole Attachment Order*, 26 FCC Rcd at 5371 (APPENDIX C “States That Have Certified That They Regulate Pole Attachments”). West Virginia’s House Bill 3093’s Article 4 seeks to regulate pole attachments to Frontier’s and electric utilities’ poles in the absence of any certification to the FCC.

41. *Second*, West Virginia has *not* certified that it “has issued and made effective rules and regulations implementing [its] regulatory authority over pole attachments, including a specific methodology for such regulation which has been made publicly available in the state.” *Id.* No such rules or regulations exist, nor does House Bill 3093 otherwise comply with federal law.

42. *Third*, House Bill 3093’s Article 4 has no provision for allowing complaints involving the rates, terms and conditions for pole attachments, including, among other things, complaints let alone requiring their resolution within 180 days.

43. Since House Bill 3093 satisfies *none* of the statutory conditions for reverse preemption of federal authority, 47 U.S.C. § 224 precludes West Virginia from regulating the rates, terms, and conditions of the pole attachments under the FCC’s jurisdiction.

44. Federal law expressly preempts Article 4 and renders it invalid and unenforceable.

## **B. Inconsistency with FCC Regulations**

45. Frontier hereby incorporates by reference the allegations of paragraphs 1 through 44, inclusive, as though fully set forth herein.

46. In adopting its pole attachment regulations, the FCC acted upon a developed record and made findings regarding the reasonableness and appropriateness of its mandated procedures and timelines. In doing so, the FCC weighed and balanced various competing interests, including, among other things, the public interest in avoiding service outages and giving utilities and telecommunications carriers sufficient time to perform make-ready work to ensure safety and reliability.

47. House Bill 3093's Article 4 conflicts with the FCC's regulations, including, among other things, upsetting the balances struck by the FCC in crafting those regulations.

48. Article 4 is preempted by and rendered invalid and unenforceable by the FCC's regulations.

## **C. Declaratory and Injunctive Relief**

49. Frontier hereby incorporates by reference the allegations of paragraphs 1 through 48, inclusive, as though fully set forth herein.

50. Frontier will suffer imminent, irreparable harm that cannot be redressed by recovery of damages, including, among other things, Frontier will be forced to comply with a preempted state law, and its business and property would be subject to improper seizure and interference by competitors.

51. Preliminary and permanent injunctions will advance the public interest as defined by Congress and the FCC.

52. Any and all other prerequisites to preliminary and permanent injunctive relief, and to declarative relief, have been met.

53. Frontier is entitled to a judgment declaring Article 4 invalid and unenforceable, and to preliminary and permanent injunctions restraining Defendants from enforcing, or authorizing any third parties to act pursuant to, Article 4.

**SECOND CLAIM FOR RELIEF:  
VIOLATION OF THE CONTRACT CLAUSE OF THE  
UNITED STATES CONSTITUTION**

54. Frontier hereby incorporates by reference the allegations of paragraphs 1 through 53, inclusive, as though fully set forth herein.

55. The Contracts Clause of the United States Constitution states in relevant part: “No State shall ... pass any ... law impairing the Obligation of Contracts.” U.S. Const. art. I, § 10.

56. Frontier has existing contractual relationships with electric utilities and other Pole Owners in West Virginia that govern, among other things, the use of poles and the maintenance of Frontier’s existing attachments and facilities on poles. Nothing in the contracts permits third parties to rearrange or transfer Frontier’s attachments and facilities unilaterally, and certainly not without prior notice. Further, if a new Attacher does so, the Pole Owner and Frontier cannot ensure compliance with obligations under the contracts.

57. Frontier has existing contractual relationships with cable television providers and other attachers in West Virginia that govern, among other things, the use of Frontier’s poles and the maintenance of existing attachments and facilities on Frontier’s poles. Nothing in the contracts permits third parties to rearrange or transfer existing attachments and facilities of cable television providers or others unilaterally, and certainly not without prior notice. Further, if a new Attacher does so, the existing attacher and Frontier cannot ensure compliance with obligations under the contracts.

56. All these contracts are protected against impairment by the United States Constitution.

57. House Bill 3093's Article 4 substantially and unconstitutionally impairs the obligations under existing contracts.

58. Article 4 effectively nullifies important provisions of existing contracts and imposes new and unexpected limitations and conditions.

59. Article 4 is neither reasonable nor necessary to accomplish any legitimate public purpose.

60. Article 4 violates the Contracts Clause of the United States Constitution.

61. Frontier will suffer imminent, irreparable harm that cannot be redressed by recovery of damages, including, among other things, Frontier will be forced to comply with an unconstitutional law, and its obligations under contracts with other parties will be unconstitutionally impaired.

62. Preliminary and permanent injunctions are in the public interest.

63. Any and all other prerequisites to preliminary and permanent injunctive relief, and to declarative relief, have been met.

64. Frontier is entitled to a judgment declaring Article 4 invalid and unenforceable and to preliminary and permanent injunctions restraining Defendants from enforcing, or authorizing any third parties to act pursuant to, Article 4.

**THIRD CLAIM FOR RELIEF:  
VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE  
UNITED STATES CONSTITUTION**

65. Frontier hereby incorporates by reference the allegations of paragraphs 1 through 64, inclusive, as though fully set forth herein.

66. The Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides in relevant part: “No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.”

67. Frontier has a vested property interest in its physical network and private property in West Virginia, including its facilities attached to utility poles, and including Frontier’s own poles.

68. House Bill 3093’s Article 4 allows third parties, including Frontier’s competitors, to trespass upon, handle, move, interfere with, and potentially damage Frontier’s facilities attached to utility poles in West Virginia – thereby, among other things, destroying in whole or in part Frontier’s investment and other property and its ability to use its facilities to provide service to its customers, without prior notice to Frontier and an opportunity to protect its property.

69. Article 4 constitutes an unlawful taking of Frontier’s property without just compensation in violation of the United States Constitution.

70. Frontier will suffer imminent, irreparable harm that cannot be redressed by recovery of damages, including, among other things, Frontier will be forced to comply with an unconstitutional law, and its business and property will be subject to an unlawful and unconstitutional taking.

71. Preliminary and permanent injunctions are in the public interest.

72. Any and all other prerequisites to preliminary and permanent injunctive relief, and to declarative relief, have been met.

73. Frontier is entitled to a judgment declaring Article 4 invalid and unenforceable and to preliminary and permanent injunctions restraining Defendants from enforcing, or authorizing any third parties to act pursuant to, Article 4.

#### **PRAYER FOR RELIEF**

WHEREFORE, Frontier prays for relief against Defendants as follows:

1. For a declaration and judgment that West Virginia House Bill 3093's Article 4 conflicts with and is preempted by federal law;
2. For a declaration and judgment that Article 4 violates the Contract Clause of the United States Constitution;
3. For a declaration and judgment that Article 4 violates the Fifth and Fourteenth Amendments to the United States Constitution;
4. For a permanent injunction restraining Defendants from enforcing, or authorizing any third parties to act pursuant to, Article 4; and
5. For such other and further relief as the Court may deem just and proper.

FRONTIER WEST VIRGINIA INC. AND  
CITIZENS TELECOMMUNICATIONS  
COMPANY OF WEST VIRGINIA D/B/A  
FRONTIER COMMUNICATIONS OF WEST  
VIRGINIA,

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# **WEST VIRGINIA LEGISLATURE**

**2017 REGULAR SESSION**

**ENROLLED**

**Committee Substitute**

**for**

**House Bill 3093**

BY DELEGATES HANSHAW, SHOTT, CAPITO, BYRD,  
ROBINSON, SUMMERS, FLUHARTY, LANE, ZATEZALO,  
N. FOSTER AND FRICH

[Passed April 8, 2017; in effect ninety days from passage.]



1 AN ACT to repeal §31-15C-1, §31-15C-2, §31-15C-3, §31-15C-4, §31-15C-5, §31-15C-6, §31-  
2 15C-7, §31-15C-8, §31-15C-9, §31-15C-12 and §31-15C-13 of the Code of West Virginia,  
3 1931, as amended; to amend and reenact §12-6C-11 of said code; to amend and reenact  
4 §31-15-8 of said code; and to amend said code by adding thereto a new chapter,  
5 designated §31G-1-1, §31G-1-2, §31G-1-3, §31G-1-4, §31G-1-5, §31G-1-6, §31G-1-7,  
6 §31G-1-8, §31G-1-9, §31G-1-10, §31G-1-11, §31G-1-12, §31G-1-13, §31G-1-14; §31G-  
7 2-1, §31G-2-2, §31G-2-3, §31G-2-4, §31G-2-5, §31G-2-6, §31G-2-7, §31G-2-8, §31G-2-  
8 9, §31G-2-10, §31G-2-11, §31G-2-12, §31G-2-13, §31G-2-14, §31G-2-15, §31G-2-16,  
9 §31G-2-17, §31G-2-18, §31G-2-19, §31G-2-20, §31G-2-21, §31G-2-22, §31G-2-23,  
10 §31G-2-24, §31G-2-25, §31G-2-26, §31G-2-27; §31G-3-1, §31G-3-2, §31G-4-1, §31G-4-  
11 2 and §31G-4-3, all relating to broadband services generally; requiring the Board of  
12 Treasury Investments make funds available to the West Virginia Economic Development  
13 Authority for the purpose of providing loan insurance for commercial loans used for the  
14 expansion of broadband service to unserved or underserved areas; establishing limits and  
15 conditions on the insuring of loans; establishing interest rates; establishing amortization  
16 periods; providing for security interests; providing for responsibilities of the West Virginia  
17 Economic Development Authority, the West Virginia Board of Treasury Investments and  
18 the Broadband Enhancement Council; providing that the members of the West Virginia  
19 Board of Treasury Investments do not have a fiduciary responsibility with regard to the  
20 loans; providing for notice for loan insurance; providing for hearings and appeal;  
21 establishing Broadband Enhancement and Expansion Policies; re-establishing and  
22 continuing the Broadband Enhancement Council; defining terms; revising council powers  
23 and duties; directing council to publish an annual assessment and map of broadband in  
24 the state; authorizing council to create an interactive map of broadband services; revising  
25 terms for retention of expert consultants; authorizing collection of data by council;  
26 authorizing creation of guidelines and recommendations to the Legislature for pilot project

for municipalities and counties to form non-profit cooperative associations for internet services; authorizing creation of guidelines and recommendations to the Legislature for voluntary pipeline donation program to facilitate broadband services; authorizing creation of guidelines and recommendations to the Legislature for easement program to facilitate broadband services; authorizing council to seek, utilize and dispense non-state funding and grants; providing for legislative rulemaking authority; authorizing formation of cooperative associations for internet services; providing for who may organize a cooperative association; defining terms; setting forth legislative findings and purpose; establishing the powers of such associations; setting forth all conditions, rights and responsibilities of such cooperative associations; declaring that cooperative association not deemed a restraint in trade; providing for the application of corporation laws; providing for microtrenching; defining terms; providing for make-ready pole access; defining terms; setting forth procedure for attaching items to third-party facilities and poles; and providing for exceptions to make-ready pole access.

*Be it enacted by the Legislature of West Virginia:*

That §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-12 and §31-15C-13 of the Code of West Virginia, 1931, as amended, be repealed; that §12-6C-11 of said code be amended and reenacted; that §31-15-8 of said code be amended and reenacted; and that said code be amended by adding thereto a new chapter, designated §31G-1-1, §31G-1-2, §31G-1-3, §31G-1-4, §31G-1-5, §31G-1-6, §31G-1-7, §31G-1-8, §31G-1-9, §31G-1-10, §31G-1-11, §31G-1-12, §31G-1-13, §31G-1-14; §31G-2-1, §31G-2-2, §31G-2-3, §31G-2-4, §31G-2-5, §31G-2-6, §31G-2-7, §31G-2-8, §31G-2-9, §31G-2-10, §31G-2-11, §31G-2-12, §31G-2-13, §31G-2-14, §31G-2-15, §31G-2-16, §31G-2-17, §31G-2-18, §31G-2-19, §31G-2-20, §31G-2-21, §31G-2-22, §31G-2-23, §31G-2-24, §31G-2-25, §31G-2-26, §31G-2-27; §31G-3-1, §31G-3-2; §31G-4-1, §31G-4-2 and §31G-4-3, all to read as follows:

## CHAPTER 12. PUBLIC MONEYS AND SECURITIES.

### ARTICLE 6C. WEST VIRGINIA BOARD OF TREASURY INVESTMENTS.

#### **§12-6C-11. Legislative findings; loans for industrial development; availability of funds and interest rates.**

1           (a) The Legislature finds and declares that the citizens of the state benefit from the creation  
2 of jobs and businesses within the state; that business and industrial development loan programs  
3 provide for economic growth and stimulation within the state; that loans from pools established in  
4 the Consolidated Fund will assist in providing the needed capital to assist business and industrial  
5 development; and that time constraints relating to business and industrial development projects  
6 prohibit duplicative review by both the Board and West Virginia Economic Development Authority  
7 Board. The Legislature further finds and declares that an investment in the West Virginia  
8 Enterprise Capital Fund, LLC, of moneys in the Consolidated Fund as hereinafter provided will  
9 assist in creating jobs and businesses within the state and provide the needed risk capital to assist  
10 business and industrial development. This section is enacted in view of these findings.

11           (b) The West Virginia Board of Treasury Investments shall make available, subject to a  
12 liquidity determination, in the form of a revolving loan, up to \$175 million from the Consolidated  
13 Fund to loan the West Virginia Economic Development Authority for business or industrial  
14 development projects authorized by section seven, article fifteen, chapter thirty-one of this code  
15 and to consolidate existing loans authorized to be made to the West Virginia Economic  
16 Development Authority pursuant to this section and pursuant to section twenty, article fifteen,  
17 chapter thirty-one of this code which authorizes a \$175 million revolving loan and article eighteen-  
18 b of said chapter which authorizes a \$50 million investment pool: *Provided*, That the West Virginia  
19 Economic Development Authority may not loan more than \$15 million for any one business or  
20 industrial development project. The revolving loan authorized by this subsection shall be secured  
21 by one note at a variable interest rate equal to the twelve-month average of the board's yield on

its cash liquidity pool. The rate shall be set on July 1 and adjusted annually on the same date. The maximum annual adjustment may not exceed one percent. Monthly payments made by the West Virginia Economic Development Authority to the board shall be calculated on a 120-month amortization. The revolving loan is secured by a security interest that pledges and assigns the cash proceeds of collateral from all loans under this revolving loan pool. The West Virginia Economic Development Authority may also pledge as collateral certain revenue streams from other revolving loan pools which source of funds does not originate from federal sources or from the board.

(c) The outstanding principal balance of the revolving loan from the board to the West Virginia Economic Development Authority may at no time exceed one hundred three percent of the aggregate outstanding principal balance of the business and industrial loans from the West Virginia Economic Development Authority to economic development projects funded from this revolving loan pool. The independent audit of the West Virginia Economic Development Authority financial records shall annually certify that one hundred three percent requirement.

(d) The interest rates and maturity dates on the loans made by the West Virginia Economic Development Authority for business and industrial development projects authorized by section seven, article fifteen, chapter thirty-one of this code shall be at competitive rates and maturities as determined by the West Virginia Economic Development Authority Board.

(e) Any and all outstanding loans made by the West Virginia Board of Treasury Investments, or any predecessor entity, to the West Virginia Economic Development Authority are refundable by proceeds of the revolving loan contained in this section and the board shall make no loans to the West Virginia Economic Development Authority pursuant to section twenty, article fifteen, chapter thirty-one of this code or article eighteen-b of said chapter.

(f) The directors of the board shall bear no fiduciary responsibility with regard to any of the loans contemplated in this section.

(g) Subject to cash availability, the board shall make available to the West Virginia Economic Development Authority, from the Consolidated Fund, a nonrecourse loan in an amount up to \$25 million, for the purpose of the West Virginia Economic Development Authority making a loan or loans from time to time to the West Virginia Enterprise Advancement Corporation, an affiliated nonprofit corporation of the West Virginia Economic Development Authority. The respective loans authorized by this subsection by the board to the West Virginia Economic Development Authority to the West Virginia Enterprise Advancement Corporation shall each be evidenced by one note and shall each bear interest at the rate of three percent per annum. The proceeds of any and all loans made by the West Virginia Economic Development Authority to the West Virginia Enterprise Advancement Corporation pursuant to this subsection shall be invested by the West Virginia Enterprise Corporation in the West Virginia Enterprise Capital Fund, LLC, the manager of which is the West Virginia Enterprise Advancement Corporation. The loan to West Virginia Economic Development Authority authorized by this subsection shall be nonrevolving, and advances under the loan shall be made at times and in amounts requested or directed by the West Virginia Economic Development Authority, upon reasonable notice to the board. The loan authorized by this subsection is not subject to or included in the limitations set forth in subsection (b) of this section with respect to the \$15 million limitation for any one business or industrial development project and limitation of one hundred three percent of outstanding loans, and may not be included in the revolving fund loan principal balance for purposes of calculating the loan amortization in subsection (b) of this section. The loan authorized by this subsection to the West Virginia Economic Development Authority shall be classified by the board as a long-term fixed income investment, shall bear interest on the outstanding principal balance of the loan at the rate of three percent per annum payable annually on or before June 30 of each year, and the principal of which shall be repaid no later than June 30, 2022, in annual installments due on or before June 30 of each year. The annual installments, which need not be equal shall commence no later than June 30, 2005, in annual principal amounts agreed upon between the board and the West Virginia



Economic Development Authority. The loan authorized by this subsection shall be nonrecourse and shall be payable by the West Virginia Economic Development Authority solely from amounts or returns received by the West Virginia Economic Development Authority in respect of the loan authorized by this subsection to the West Virginia Enterprise Advancement Corporation, whether in the form of interest, dividends, realized capital gains, return of capital or otherwise, in all of which the board shall have a security interest to secure repayment of the loan to the West Virginia Economic Development Authority authorized by this subsection. Any and all loans from the West Virginia Enterprise Advancement Corporation made pursuant to this subsection shall also bear interest on the outstanding principal balance of the loan at the rate of three percent per annum payable annually on or before June 30 of each year, shall be nonrecourse and shall be payable by the West Virginia Enterprise Advancement Corporation solely from amounts of returns received by the West Virginia Enterprise Advancement Corporation in respect to its investment in the West Virginia Enterprise Capital Fund, LLC, whether in the form of interest, dividends, realized capital gains, return of capital or otherwise, in all of which that board shall have a security interest to secure repayment of the loan to the West Virginia Economic Development Authority authorized by this subsection. In the event the amounts or returns received by the West Virginia Enterprise Corporation in respect to its investment in the West Virginia Enterprise Capital Fund, LLC, are not adequate to pay when due the principal or interest installments, or both, with respect to the loan authorized by this subsection by the board to the West Virginia Economic Development Authority, the principal or interest, or both, as the case may be, due on the loan made to the West Virginia Economic Development Authority pursuant to this subsection shall be deferred and any and all past due principal and interest payments shall promptly be paid to the fullest extent possible upon receipt by the West Virginia Enterprise Advancement Corporation of moneys in respect to its investments in the West Virginia Enterprise Capital Fund, LLC. The directors or the board shall bear no fiduciary responsibility as provided in section thirteen of this article with regard to the loan authorized by this subsection.

(h) Notwithstanding any provision in this code to the contrary, subject to a liquidity determination and cash availability, the board shall make available to the West Virginia Economic Development Authority, from the Consolidated Fund, in the form of a nonrecourse revolving loan, \$50 million, for the purpose of insuring the payment or repayment of all or any part of the principal, the redemption or prepayment premiums or penalties on, and interest on any form of debt instrument entered into by an enterprise, public body or authority of the state with a financial institution, including, but not limited to, banks, insurance companies and other institutions in the business of lending money, as authorized and as set forth in section eight, article fifteen, chapter thirty-one of this code, but only for the purpose of providing insurance on such debt instruments relating solely to the deployment of broadband under said section: *Provided*, That the West Virginia Economic Development Authority may not insure more than \$10 million for any one enterprise, public body or authority of the state in any single calendar year. The loan authorized by this subsection may not be included in the revolving fund loan principal balance for purposes of calculating the loan amortization in subsection (b) of this section. The loan authorized by this subsection shall be classified by the board as a long-term fixed income investment, and shall bear interest on the outstanding principal balance of the loan at a variable interest rate equal to the twelve-month average of the board's yield on its cash liquidity pool. The rate shall be set on July 1, 2017, and adjusted quarterly during each year thereafter. The maximum annual adjustment may not exceed one percent. Quarterly, the West Virginia Economic Development Authority shall make a payment sufficient to pay in full all accrued interests on the loan for the prior quarter. The loan authorized by this subsection is nonrecourse and is payable by the West Virginia Economic Development Authority solely from moneys received by the West Virginia Economic Development Authority in respect to insured debt instruments relating to providing broadband service under section eight, article fifteen, chapter thirty-one of this code. Upon payment in full of any said insured debt instruments, the West Virginia Economic Development Authority shall reduce the outstanding balance of the loan by a like amount. Additionally, quarterly, the West Virginia

125 Economic Development Authority shall determine the outstanding balance of all such insured debt  
126 instruments and shall accordingly adjust the outstanding balance of the loan to equal the  
127 outstanding obligations of the West Virginia Economic Development Authority for all said insured  
128 debt instruments. The loan is hereby secured by a security interest that pledges and assigns the  
129 cash proceeds of all collateral securing all insurance agreements entered into by the authority  
130 respecting debt instruments relating to the deployment of broadband under said section. In the  
131 event moneys received by the West Virginia Economic Development Authority respecting any  
132 individual insured debt instrument relating to providing broadband service under said section is  
133 insufficient to pay when due the principal or interest installments, or both, with respect to the loan  
134 authorized by this subsection by the board to the authority, the principal or interest, or both, as  
135 the case may be, due on the loan made to the authority pursuant to this subsection shall be  
136 deferred and any and all past-due principal and interest payments shall promptly be paid to the  
137 fullest extent possible upon receipt by the authority of all moneys respecting said debt  
138 instruments. The directors of the board bear no fiduciary responsibility as provided in section  
139 thirteen of this article with regard to the loan authorized by this subsection.

## **CHAPTER 31. CORPORATIONS.**

### **ARTICLE 15. WEST VIRGINIA ECONOMIC DEVELOPMENT AUTHORITY.**

#### **§31-15-8. Insurance fund.**

- 1 (a) There is hereby created an insurance fund which shall be a continuing, nonlapsing,  
2 revolving fund that consists of:
- 3 (1) Moneys appropriated by the state to the insurance fund;
- 4 (2) Premiums, fees and any other amounts received by the authority with respect to  
5 financial assistance provided by the authority from the insurance fund;
- 6 (3) Upon the satisfaction of any indebtedness or other obligation owed on any property  
7 held or acquired by the authority, such proceeds as designated by the authority from the sale,  
8 lease or other disposition of such property;

9 (4) Income from investments made from moneys in the insurance fund; and

10 (5) Any other moneys transferred to the insurance fund or made available to it for the  
11 purposes described under this section, under this article or pursuant to any other provisions of  
12 this code.

13 Subject to the provisions of any outstanding insurance agreements entered into by the  
14 authority under this section, the authority may enter into covenants or agreements with respect to  
15 the insurance fund, and establish accounts within the insurance fund which may be used to  
16 implement the purposes of this article. If the authority elects to establish separate accounts within  
17 the insurance fund, the authority may allocate its revenues and receipts among the respective  
18 accounts in any manner the authority considers appropriate.

19 If the authority at any time finds that more money is needed to keep the reserves of the  
20 insurance fund at an adequate level, the authority, with the consent of the chairman, shall send a  
21 written request to the Legislature for additional funds.

22 (b) The insurance fund shall be used for the following purposes by the authority to  
23 financially assist projects so long as such financial assistance will, as determined by the authority,  
24 fulfill the public purposes of this article:

25 (1) To insure the payment or repayment of all or any part of the principal of, redemption  
26 or prepayment premiums or penalties on, and interest on bonds or notes whether issued under  
27 this article or under the Industrial Development and Commercial Development Bond Act, the West  
28 Virginia Hospital Finance Authority Act or, with respect to health care facilities only, article thirty-  
29 three, chapter eight of this code;

30 (2) To insure the payment or repayment of all or any part of the principal of, redemption  
31 or prepayment premiums or penalties on, and interest on any instrument executed, obtained or  
32 delivered in connection with the issuance and sale of bonds or notes whether under this article or  
33 under the Industrial Development and Commercial Development Bond Act, the West Virginia

Hospital Finance Authority Act or, with respect to health care facilities only, article thirty-three, chapter eight of this code;

(3) To insure the payment or repayment of all or any part of the principal of, prepayment premiums or penalties on, and interest on any form of debt instrument entered into by an enterprise, public body or authority of the state with a financial institution, including, but not limited to, banks, insurance companies and other institutions in the business of lending money, which debt instruments shall include, but not be limited to, instruments relating to loans for working capital and to the refinancing of existing debt: *Provided*, That nothing contained in this subsection or any other provision of this article shall be construed as permitting the authority to insure the refinancing of existing debt except when such insurance will result in the expansion of the enterprise whose debt is to be refinanced or in the creation of new jobs;

(4) To pay or insure the payment of any fees or premiums necessary to obtain insurance, guarantees, letters of credit or other credit support from any person or financial institution in connection with financial assistance provided by the authority under this section;

(5) To pay any and all expenses of the authority, including, but not limited to:

(i) Any and all expenses for administrative, legal, actuarial, and other services related to the operation of the insurance fund; and

(ii) All costs, charges, fees and expenses of the authority related to the authorizing, preparing, printing, selling, issuing and insuring of bonds or notes (including, by way of example, bonds or notes, the proceeds of which are used to refund outstanding bonds or notes) and the funding of reserves; and

(6) To insure, for up to twenty years, the payment or repayment of all or any part of the principal of and interest on any form of debt instrument entered into by an enterprise, public body or authority of the state with a financial institution, including, but not limited to, banks, insurance companies and other institutions in the business of lending money, which debt instruments are to be solely for capital costs relating to:

(i) Providing broadband service, as defined in section one, article one, chapter thirty-one-g of this code, to a household or business located in an unserved area, as defined in section two of said article, or in an area with access to Internet service, by wireline or fixed wireless technology, but that fifteen percent or more of households and businesses in the area are served by Internet service with an actual downstream data rate less than ten megabits per second and an upstream data rate less than one megabit per second, and no part of the area has three or more wireline or fixed wireless broadband service providers; or

(ii) Building a segment of a telecommunications network that links a network operator's core network to a local network plant that serves either an unserved area, as defined in section two, article one, chapter thirty-one-g of this code, or an area in which no more than two wireline providers are operating.

The authority may not insure the payment or repayment of any part of the principal of and interest on any form of debt instrument under this subdivision, unless the participating financial institution provides written certification to the authority that, but for the authority's insuring the debt instrument, the financial institution would not otherwise make the loan based solely on the creditworthiness of the loan applicant: Provided, That nothing contained in this subsection or any other provision of this article may be construed as permitting the authority to insure the refinancing of existing debt.

Upon the filing of an application for loan insurance under this subsection, the broadband provider shall cause to be published as a Class II legal advertisement in compliance with article three, chapter fifty-nine of this code, notice of the filing of the application and that the authority may approve the same unless within ten business days after completion of publication a written objection is received by the authority from a person or persons challenging that the proposed broadband project does not satisfy the provisions of this subsection. The publication area for such notice is to be the county or counties in which any portion of the proposed broadband project is to be constructed. The notice shall be in such form as the authority shall direct, and shall include

86 a map of the area or areas to be served by the proposed broadband project. The applicant shall  
87 also cause to be mailed by first class, on or before the first day of publication of the notice, a copy  
88 of the notice to all known current providers of broadband service within the area proposed to be  
89 served. If a challenge under this paragraph is timely received by the authority, the authority shall  
90 advise the Broadband Enhancement Council, established in article one of chapter thirty-one-g of  
91 this code, in writing within five business days. The council shall set the matter for hearing on a  
92 date within thirty days of receipt of notice from the authority. The Broadband Enhancement  
93 Council shall issue a decision on whether the proposed project satisfies the requirements of this  
94 subsection or not within thirty days of completion of such hearing. Any party participating in said  
95 hearing may appeal the council's decision within thirty days of the issuance of said decision to  
96 the Circuit Court of Kanawha County. This provision shall apply to all applicants except to those  
97 broadband providers that plan on providing a downstream data rate of at least one gigabyte per  
98 second to the end user.

99 (c) Except as relating to insured portions of debt instruments under subdivision (6),  
100 subsection (b) of this section, the total aggregate amount of insurance from the insurance fund  
101 with respect to the insured portions of principal of bonds or notes or other instruments may not  
102 exceed at any time an amount equal to five times the balance in the insurance fund.

103 (d) The authority may, in its sole and absolute discretion, set the premiums and fees to be  
104 paid to it for providing financial assistance under this section. The premiums and fees set by the  
105 authority shall be payable in the amounts, at the time, and in the manner that the authority, in its  
106 sole and absolute discretion, requires. The premiums and fees need not be uniform among  
107 transactions, and may vary in amount: (1) Among transactions; and (2) at different stages during  
108 the terms of transactions.

109 (e) The authority may, in its sole and absolute discretion, require the security it believes  
110 sufficient in connection with its insuring of the payment or repayment of any bonds, notes, debt  
111 or other instruments described in subdivisions (1), (2), (3) and (4), subsection (b) of this section.

112 (f) The authority may itself approve the form of any insurance agreement entered into  
113 under this section or may authorize the chairman or his or her designee to approve the form of  
114 any such agreement. Any payment by the authority under an agreement entered into by the  
115 authority under this section shall be made at the time and in the manner that the authority, in its  
116 sole and absolute discretion, determines.

117 (g) The obligations of the authority under any insurance agreement entered into pursuant  
118 to this article shall not constitute a debt or a pledge of the faith and credit or taxing powers of this  
119 state or of any county, municipality or any political subdivision of this state for the payment of any  
120 amount due thereunder or pursuant thereto, but the obligations evidenced by such insurance  
121 agreement shall be payable solely from the funds pledged for their payment. All such insurance  
122 agreements shall contain on the face thereof a statement to the effect that such agreements and  
123 the obligations evidenced thereby are not debts of the state or any county, municipality or political  
124 subdivision thereof but are payable solely from funds pledged for their payment.

## **CHAPTER 31G. BROADBAND ENHANCEMENT AND EXPANSION**

### **POLICIES.**

#### **ARTICLE 1. BROADBAND ENHANCEMENT COUNCIL.**

##### **§31G-1-1. Legislative findings and purpose.**

1 The Legislature finds as follows:

2 (1) That it is a primary goal of the Governor, the Legislature and the citizens of this state,  
3 by the year 2020, to make every municipality, community, and rural area in this state, border to  
4 border, accessible to Internet communications through the expansion, extension and general  
5 availability of broadband services and technology.

6 (2) That although broadband access has been extended to many of West Virginia's cities,  
7 towns, and other concentrated population areas, some areas of the state, mostly rural, remain  
8 unserved.



(3) That the issues which have hindered the provision of broadband access to rural areas of the state especially disadvantage the elderly and low-income households.

(4) That fair and equitable access to twenty-first century technology is essential to maximize the functionality of educational resources and educational facilities that enable our children to receive the best of future teaching and learning is essential to the future development of this state. A quality educational system of the twenty-first century should have access to the best technology tools and processes. Administrators should have 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 and the ability to deliver the best available educational technology resources to the students of West Virginia. Schools of the twenty-first century require facilities that accommodate changing technologies.

(5) Accordingly, it is the purpose of the Legislature to provide for the development of policies, plans, processes and procedures to be employed and dedicated to extending broadband access to West Virginians, and to their families, by removing restraint on the development of those services and for encouraging and facilitating the construction of the necessary infrastructure to meet their needs and demands.

**§31G-1-2. Definitions.**

For the purposes of this article:

(1) "Broadband" or "broadband service" means any service providing advanced telecommunications capability with the same downstream data rate and upstream data rate as is specified by the Federal Communications Commission and 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 latency suitable for real-time applications and services such as voice-over Internet protocol and video conferencing, and with monthly usage capacity reasonably comparable to that of residential terrestrial fixed broadband offerings in urban areas: *Provided*, That as the Federal

Communications Commission updates the downstream data rate and the upstream data rate the council will publish the revised data rates in the State Register within sixty days of the federal update.

(2) "Council" means the Broadband Enhancement Council.

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

(4) "Internet protocol address" or "IP address" means a unique string of numbers separated by periods that identifies each computer using the internet protocol to communicate over a network.

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

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

**§31G-1-3. Broadband Enhancement Council; members of council; administrative support.**

(a) The Broadband Enhancement Council is hereby established and continued. The current members, funds, and personnel shall continue in effect and be wholly transferred; except as may be hereinafter provided. With regard to the terms of the public members appointed under subdivision five of subsection (d) of this section, at the next regular meeting of the council following July 1, 2017, the currently serving public members shall draw by lot for the length of their terms, three members to serve for one additional year, three members to serve for two additional years and the last three members to serve for three additional years, with all public members in future to serve for the duration of the term described below.

(b) 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 are 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.

(c) The council shall consist of thirteen voting members, designated as follows:

(1) The Secretary of Commerce or his or her designee;

(2) The Chief Technology Officer or his or her designee;

(3) The Vice Chancellor for Administration of the Higher Education Policy Commission or his or her designee;

(4) The State Superintendent of Schools or his or her designee; and

(5) Nine public members that shall serve three year terms from the date of their appointment and are appointed by the Governor with the advice and consent of the Senate, as follows:

(i) One member representing users of large amounts of broadband services in this state;

(ii) One member from each congressional district representing rural business users in this state;

(iii) One member from each congressional district representing rural residential users in this state;

(iv) One member representing urban business users in this state; and

(v) One member representing urban residential users in this state.

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

(d) The Secretary of Commerce shall chair the first meeting at which time a chair and vice chair shall be elected from the members of the council. In the absence of the chair, 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.

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

42           (f) Seven voting members of the council constitute a quorum and the affirmative vote of a  
43 simple majority of those members present is necessary for any action taken by vote of the council.

44           (g) The gubernatorial appointed members shall be deemed part-time public officials, and  
45 may pursue and engage in another business or occupation or gainful employment. Any person  
46 employed by, owning an interest in or otherwise associated with a broadband deployment project,  
47 project sponsor or project participant may serve as a council member and is not disqualified from  
48 serving as a council member because of a conflict of interest prohibited under section five, article  
49 two, chapter six-b of this code and is not subject to prosecution for violation of said section when  
50 the violation is created solely as a result of his or her relationship with the broadband deployment  
51 project, project sponsor or project participant so long as the member recuses himself or herself  
52 from board participation regarding the conflicting issue in the manner set forth in section five,  
53 article two, chapter six-b of this code and the legislative rules promulgated by the West Virginia  
54 Ethics Commission.

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

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

**§31G-1-4. Powers and duties of the council generally.**

1 (a) The council shall:

2 (1) Explore any and all ways to expand access to broadband services, including, but not  
3 limited to, middle mile, last mile and wireless applications;

4 (2) Gather data regarding the various speeds provided to consumers in comparison to  
5 what is advertised. The council may request the assistance of the Legislative Auditor in gathering  
6 this data;

7 (3) Explore the potential for increased use of broadband service for the purposes of  
8 education, career readiness, workforce preparation and alternative career training;

9 (4) Explore ways for encouraging state and municipal agencies to expand the  
10 development and use of broadband services for the purpose of better serving the public, including  
11 audio and video streaming, voice-over Internet protocol, teleconferencing and wireless  
12 networking; and

13 (5) Cooperate and assist in the expansion of electronic instruction and distance education  
14 services.

15 (b) In addition to the powers set forth elsewhere in this article, the council is hereby  
16 granted, has and may exercise the powers necessary or appropriate to carry out and effectuate  
17 the purpose and intent of this article, as enumerated herein. The council shall have the power and  
18 capacity to:

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

21 (2) Promote awareness of public facilities that have community broadband access that  
22 can be used for distance education and workforce development;

23 (3) Advise on deployment of e-government portals such that all public bodies and political  
24 subdivisions have homepages, encourage one-stop government access and that all public entities  
25 stream audio and video of all public meetings;

26 (4) Make and execute contracts, commitments and other agreements necessary or  
27 convenient for the exercise of its powers, including, but not limited to, the hiring of consultants to  
28 assist in the mapping of the state and categorization of areas within the state;

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

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

34 (7) to oversee the use of conduit installed pursuant to section two of article three of this  
35 chapter; and to

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

37 (c) The council shall exercise its powers and authority to advise and make  
38 recommendations to the Legislature on bringing broadband service to unserved and underserved  
39 areas, as well as to propose statutory changes that may enhance and expand broadband in the  
40 state.

41 (d) The council shall report to the Joint Committee on Government and Finance on or  
42 before January 1 of each year. The report shall include the action that was taken by the council  
43 during the previous year in carrying out the provisions of this article. The council shall also make  
44 any other reports as may be required by the Legislature or the Governor.

**§31G-1-5. Creation of the Broadband Enhancement Fund.**

1 All moneys collected by the council, which may, in addition to appropriations, include gifts,  
2 bequests or donations, shall be deposited in a special revenue account in the State Treasury  
3 known as the Broadband Enhancement Fund. The fund shall be administered by and under the  
4 control of the Secretary of the Department of Commerce. Expenditures from the fund shall be for  
5 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.

**§31G-1-6. Mapping of areas within state.**

(a) Based on its analysis of data, broadband demand, and other relevant information, the council shall establish a mapping of broadband services in the state. The council shall publish an annual assessment and map of the status of broadband, including specifically designations of unserved and underserved areas of the state.

(b) To the extent possible, and subject to limitations contained in subsection (f) of this section, the council may additionally establish an interactive public map reflecting estimated downstream data rate and upstream data rate in a particular region, area, community, street or location. Any such mapping may only specify data rates at a particular street address or physical location, and shall not make public the IP address or the name of the specific individual at such location. Such mapping may also contain data concerning capacity, based upon fiber count.

(c) The mapping provided for in this section may be based on information collected or received by the council, including but not limited to, data collected from (1) state and federal agencies or entities that collect data on broadband services; (2) industry provided information; and (3) consumer data provided to the council pursuant to section nine of this article.

(d) Any entity that has received or hereinafter receives state or federal moneys, and which has used those moneys to install infrastructure used for broadband services, shall furnish detailed information concerning the location, type, and extent of such infrastructure to the council for use in mapping.

(e) The mapping and designations provided for under this section may be revised on a continuing basis by the council as warranted by the data and information provided.

(f) In addition to the provisions of section thirteen of this article, the mapping of broadband services may exclude from public accessibility and availability: (1) The location or identity of any critical infrastructure used by public or private entities in furtherance of their internet services; (2)

24 personal name and personal IP addresses connected with particular data rates; and (3)  
25 information designated as confidential for public security reasons by either state or federal  
26 homeland security agencies: *Provided*, That it shall be duty of the public and private entities to  
27 make the council aware of such confidential designation: *Provided, however*, That unless the  
28 council determines good cause exists, the actual or estimated upstream and downstream data  
29 rates of an area or region of the state shall not be excluded from public or private availability.

**§31G-1-7. Retention of outside expert consultant.**

1 (a) In order to assist the council with the highly technical task of categorizing the areas of  
2 the state, the council may retain outside expert consultants to assist in the purposes of this article.  
3 The experts may assist the Council to map the state on the basis of broadband availability, to  
4 evaluate and categorize data, to assist in public outreach and education in order to stimulate  
5 demand and to provide other support and assistance as necessary to accomplish the purposes  
6 of this article.

7 (b) The retention and contracting of all expert consultants shall be transparent, including  
8 specifically, making publicly available any contracts, retention agreements, payments and  
9 invoicing for services.

**§31G-1-8. Public awareness and education.**

1 In order to implement and carry out the intent of this article, the council may take such  
2 actions as it deems necessary or advisable in order to increase awareness of issues concerning  
3 broadband services and to educate and inform the public.

**§31G-1-9. Collection of data.**

1 (a) In order to ascertain, categorize, analyze, map, and update the status of broadband in  
2 the state, as well as to enable the council to make informed policy and legislative  
3 recommendations, the council may establish a voluntary data collection program. The program  
4 may include voluntarily submitted data from internet service providers, including any home or  
5 region data rate meters utilized by the provider. The program may also utilize and collect



6 voluntarily submitted data rate information submitted by any person reflecting the person's  
7 personal data rate at a particular IP address. This personal data rate may be based upon a web-  
8 based test or analysis program.

9 (b) Any and all data collected by the Council shall not be deemed public information and  
10 is not subject to public release or availability pursuant to chapter twenty-nine-b of this code.

11 (c) Any data collection program established by the council shall:

12 (1) Make clear to those providers or persons submitting information that the data rate  
13 speed may become public, including specific reference to the person's physical address;

14 (2) Make clear this is a voluntary data collection program and that submission of  
15 information shall be deemed consent to use and make public such data rate information; and

16 (3) Not include any person's personal web history or search information, or otherwise  
17 publicly identify the person's name in connection with an IP address or physical address.

18 (d) The council may establish guidelines and additional rules governing a data collection  
19 program through the legislative rulemaking process, pursuant to the provisions of article three,  
20 chapter twenty-nine-a of this code.

**§31G-1-10. Pilot Project for cooperatives by political subdivisions.**

1 (a) Notwithstanding any provision in the code to the contrary, the council may create  
2 guidelines and recommend to the Legislature a pilot project for no more than three municipalities  
3 or counties, either individually or in conjunction with one another, to establish non-profit  
4 cooperative associations to provide high-speed internet and broadband services.

5 (b) Nothing herein shall preclude or prohibit the establishment of a cooperative association  
6 by non-political subdivisions outside the purview or authority of the council. It is not a requirement  
7 that a cooperative association established under article two of this chapter seek approval or  
8 guidance from the council, and such cooperative associations established under article two of this  
9 chapter shall not be under the authority of, nor subject to, the council.

**§31G-1-11. Voluntary donation and easement programs.**

1 (a) The council shall create guidelines for, and recommend to the Legislature a means of  
2 implementing a voluntary donation program to allow for pipeline, railroad, and other similar  
3 structures and rights-of-way in the state to be donated to the state for use by public or private  
4 entities to facilitate broadband service and availability through placement of fiber.

5 (b) The council shall create guidelines for, and recommend to the Legislature a means of  
6 implementing a program to allow for an easement program to be established to allow public or  
7 private entities to facilitate broadband service and availability through placement of fiber.

**§31G-1-12. Grants.**

1 In furtherance of the purposes of this article, the council is permitted to seek non-state  
2 funding and grants. The council may utilize funding and grants to support the responsibilities,  
3 initiatives and projects set forth in this article. The council may additionally disburse such monies  
4 to fund projects and initiatives in furtherance of the enhancement and expansion of broadband  
5 services in this state, and the other purposes of this article.

**§31G-1-13. Protection of proprietary business information.**

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

7 (b) Trade secrets or proprietary business information obtained by the council from  
8 broadband providers and other persons or entities shall be secured and safeguarded by the state.  
9 Such information or data shall not be disclosed to the public or to any firm, individual or agency  
10 other than officials or authorized employees of the state. Any person who makes any unauthorized  
11 disclosure of such confidential information or data is guilty of a misdemeanor and, upon conviction

thereof, may be fined not more than \$5,000 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.

**§31G-1-14. Legislative rule-making authority.**

In order to implement and carry out the intent of this article, the Secretary of the Department of Commerce, at the direction and recommendation of the council, may propose rules for legislative approval, pursuant to the provisions of article three, chapter twenty-nine-a of this code.

**ARTICLE 2. COOPERATIVE ASSOCIATIONS.**

**§31G-2-1. Definitions.**

As used in this article:

(1) "Cooperative association" or "association" means any corporation organized under this article. Each association shall also comply with the requisite business corporation provisions of chapter thirty-one-d or thirty-one-f of this code, or the nonprofit corporation provisions of chapter thirty-one-e of this code.

(2) "Internet services" means providing access to, and presence on, the internet and other services. Data may be transmitted using several technologies, including dial-up, DSL, cable modem, wireless, or dedicated high-speed interconnects.

(3) "Member" means a member of an association without capital stock and a holder of common stock in an association organized with capital stock.

11 (4) "Qualified person" means a person who is engaged in the use of internet services,  
12 either in an individual capacity or as a business.

13 (5) "Qualified activity" means using internet services.

**§31G-2-2. Who may organize.**

1 Notwithstanding any provision of this code to the contrary, twenty or more qualified  
2 persons engaged in the use of internet services may form a cooperative association, with or  
3 without capital stock, under this article.

**§31G-2-3. Legislative findings and purposes.**

1 (a) It is the finding of the Legislature that:

2 (1) West Virginia's cities, towns, and other concentrated population areas, areas of the  
3 state, mostly rural, remain unserved or underserved by broadband access; and

4 (2) The lack of affordable, accessible broadband service in the underserved and unserved  
5 areas in this state necessitates consideration of alternative means and methods of providing  
6 internet services.

7 (b) It is the purpose of this article that individuals and businesses be able to form  
8 cooperative associations for the purpose of obtaining internet services within their respective  
9 regions and communities.

**§31G-2-4. Powers.**

1 (a) A cooperative association shall have the following powers:

2 (1) To engage in any qualified activity in connection with any internet service; or any  
3 activity in connection with the purchase, providing or use by its members of internet services; or  
4 in the financing, directly, through the association of any qualified activities. All transactions with  
5 nonmembers shall be on terms fixed by the association and nonmembers shall not otherwise  
6 participate in any benefits derived from such transactions;

7 (2) To borrow money without limitation as to amount of corporate indebtedness or liability,  
8 and to make advance payments and advances to members; to execute, issue, draw, make,

9 accept, endorse and guarantee, without limitation, promissory notes, bills of exchange, drafts,  
10 warrants, certificates, mortgages, and any other form of obligation or negotiable or transferable  
11 bills of any kind; to become the surety, guarantor, maker, and/or endorser for accommodation or  
12 otherwise of bills, notes, securities and other evidences of debt of any association or person,  
13 anything in any other statutes or law of this state to the contrary notwithstanding;

14 (3) To act as the agent or representative of any member or members in any of the above-  
15 mentioned activities;

16 (4) To purchase or otherwise acquire, and to hold, own and exercise all rights of ownership  
17 in, and to sell, transfer or pledge, or guarantee the payment of dividends or interest on, or the  
18 retirement or redemption of, shares of the capital stock or bonds of any corporation or association  
19 engaged in any related activity or in the providing and marketing of any of the products handled  
20 by the association;

21 (5) To establish reserves and to invest the funds thereof in bonds or in such other property  
22 as may be provided in the bylaws;

23 (6) To buy, hold and exercise all privileges of ownership over real or personal property as  
24 may be necessary or convenient for the conduct and operation of any of the business of the  
25 association, or incidental thereto;

26 (7) To establish, secure, own and develop patents, trademarks and copyrights; and

27 (8) To do each and every thing necessary, suitable, or proper for the accomplishment of  
28 any one of the purposes or the attainment of any one or more of the subjects herein enumerated,  
29 or conducive to or not contrary to the interest or benefit of the association; and to contract  
30 accordingly; and, in addition, to exercise and possess all powers, rights and privileges necessary  
31 or incidental to the purposes for which the association is organized or to the activities in which it  
32 is engaged, and any other rights, powers, and privileges granted by the laws of this state to  
33 ordinary corporations, except such as are inconsistent with the purposes of this article.

**§31G-2-5. Members.**

1 (a) Under the terms and conditions prescribed in the bylaws adopted by it, a cooperative  
2 association may admit as members, or issue common stock to, only qualified persons.

3 (b) If a member of a nonstock association be other than a natural person, the member  
4 may be represented by an individual, associate, officer or manager or member thereof, duly  
5 authorized in writing.

6 (c) One association organized hereunder may become a member or stockholder of any  
7 other association or associations organized under this article or similar laws of any state.

**§31G-2-6. Articles of incorporation.**

1 Each association formed under this article shall prepare and file articles of incorporation,  
2 setting forth:

3 (1) The name of the association, which shall include the words "cooperative," "co-  
4 operative," or "co-op," and words or abbreviations designating a corporation;

5 (2) The purposes for which it is formed;

6 (3) The place where its principal business will be transacted;

7 (4) The period, if any prescribed, for the duration of the corporation;

8 (5) The number of incorporators which is not less than twenty, the number of directors  
9 which is not less than twenty and any number in excess of those minimums, or it may be set forth  
10 that the number of directors will be fixed by the bylaws;

11 (6) If organized without capital stock, whether the property rights and interest of each  
12 member are equal or unequal; and if unequal, the general rules applicable to the classes of  
13 members whose property rights and interest are determined and fixed; and provision for the  
14 admission of new members who may be entitled to share in the property of the association with  
15 the old members, in accordance with the general rules. This provision of the articles of  
16 incorporation may not be altered, amended or repealed except by the written consent or vote of  
17 three fourths of the members;

18 (7) If organized with capital stock and authorized to issue only one class of stock, the total  
19 number of shares of stock which the association has authority to issue, including: (A) The par  
20 value of each of the shares; or (B) a statement that all the shares are to be without par value;

21 (8) If the association is authorized to issue more than one class of stock, the total number  
22 of shares of all classes of stock which the association may issue, including: (A) The number of  
23 shares of each class that have a par value and the par value of each share by class; (B) the  
24 number of shares that are to be without par value; and (C) a statement of the powers, preferences,  
25 rights, qualifications, limitations or restrictions that are permitted by section thirteen of this article  
26 in respect to a class of stock fixed by the articles of incorporation or by resolution of the board of  
27 directors;

28 (9) The articles shall be signed and filed in accordance with the provisions of the business  
29 or nonprofit corporation laws of this state; and

30 (10) The articles may also contain any provisions managing, defining, limiting or regulating  
31 the powers and affairs of the association, the directors, the stockholders or members of the  
32 association.

**§31G-2-7. Amendments to articles of incorporation.**

1 The articles of incorporation may be altered or amended at any regular meeting or any  
2 special meeting called for that purpose. An amendment must first be approved by two thirds of  
3 the directors and then adopted by a vote representing a majority of all the members of the  
4 association. Amendments to the articles of incorporation, when so adopted, shall be filed in  
5 accordance with the provisions of the general corporation laws of this state.

**§31G-2-8. Bylaws.**

1 Each association incorporated under this article, must, within thirty days after its  
2 incorporation, adopt for its government and management a code of bylaws, not inconsistent with  
3 the powers granted by this article. A majority vote of the members or stockholders, or their written

4 assent, is necessary to adopt such bylaws. Each association, under its bylaws, may provide for  
5 any or all of the following matters:

6 (1) The time, place and manner of calling and conducting its meetings;

7 (2) The number of stockholders or members constituting a quorum;

8 (3) The right of members or stockholders to vote by proxy or by mail or both; and the  
9 conditions, manner, form, and effect of such votes;

10 (4) The number of directors constituting a quorum; and, if authority therefor is given in the  
11 articles of incorporation, the total number of directors;

12 (5) The qualifications, compensation, duties and term of office of directors and officers;  
13 time of their election and the mode and manner of giving notice thereof;

14 (6) Penalties for violation of the bylaws;

15 (7) The amount of entrance, organization and membership fees, if any; the manner and  
16 method of collecting the same; and the purposes for which they may be used;

17 (8) The amount which each member or stockholder shall be required to pay annually or  
18 from time to time, if at all, to carry on the business of the association; the charge, if any, to be  
19 paid by each member or stockholder for services rendered by the association to him or her and  
20 the time of payment and the manner of collection; and the marketing contract between the  
21 association and its members or stockholders which every member or stockholder may be required  
22 to sign; and

23 (9) The number and qualifications of members or stockholders of the association and the  
24 conditions precedent to membership or ownership of common stock; the method, time and  
25 manner of permitting members to withdraw or the holders of common stock to transfer their stock;  
26 the manner of assignment and transfer of the interest of members and of the shares of common  
27 stock; the conditions upon which and time when membership of any member shall cease; the  
28 automatic suspension of the rights of a member when he or she ceases to be eligible to  
29 membership in the association; the mode, manner and effect of the expulsion of a member; the



manner of determining the value of a member's interest, and provision for its purchase by the association, at its option, upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his or her membership, or, at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors, or at the election of the board, such property interests may be sold at public auction to the association itself, or to any person eligible to membership in such association and the proceeds of such sale paid over to the personal representative of such deceased member, or to the member withdrawing or expelled, as the case may be.

**§31G-2-9. General and special meetings.**

In its bylaws, each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time; and ten percent of the members or stockholders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting: *Provided*, That the bylaws may require instead that such notice may be given as provided by this section, namely, as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code, and the publication area for such publication shall be the county in which the principal place of business of the association is located.

**§31G-2-10. Directors.**

(a) The affairs of the association shall be managed by a board of not less than three directors, elected by the members or stockholders.

(b) The bylaws may provide that the territory in which the association has members shall be divided into districts and that the directors be elected either directly or by district delegates elected by the members in that district. The bylaws shall specify the number of directors to be elected by each district, the manner of reapportioning the directors and the method of redistricting

7 the territory covered by the association. The bylaws may provide that primary elections shall be  
8 held in each district to elect the directors apportioned to the districts and that the results of all the  
9 primary elections may be ratified during the next regular meeting of the association or may be  
10 considered final.

11 (c) The bylaws may provide that one or more directors may be appointed by a public  
12 official, commission or by the other directors. These public directors shall represent the interest  
13 of the general public in the associations. The public directors need not be members or  
14 stockholders of the association, but shall have the same powers and rights as other directors.  
15 The directors shall not number more than one fifth of the entire number of directors.

16 (d) An association may provide a fair remuneration for the time actually spent by its officers  
17 and directors in its service and for the service of the members of its executive committee. No  
18 director, during the term of his or her office, shall be a party to a contract for profit with the  
19 association differing from the contractual terms accorded regular members or holders of common  
20 stock of the association.

21 (e) The bylaws may provide that no director, except the president and secretary, shall  
22 occupy a position in the association on regular salary or substantially full-time pay.

23 (f) The bylaws may provide for an executive committee and may allot to the committee all  
24 the functions and powers of the board of directors, subject to the general direction and control of  
25 the board.

26 (g) When a vacancy on the board of directors occurs other than by expiration of term, the  
27 remaining members of the board, by a majority vote, shall fill the vacancy, unless the bylaws  
28 provide for an election of directors by district. In that case the board of directors shall immediately  
29 call a special meeting of the members or stockholders in that district to fill the vacancy.

**§31G-2-11. Officers.**

1 The directors shall elect from their number a president and one or more vice presidents.  
2 They shall also elect a secretary and a treasurer, who need not be directors or members of the

3 association; and they may combine the two latter offices and designate the combined office as  
4 secretary-treasurer; or unite both functions and titles in one person. The treasurer may be a bank  
5 or any depository, and, as such, shall not be considered an officer, but as a function of the board  
6 of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer,  
7 except that the funds shall be deposited only as and where authorized by the board of directors.

**§31G-2-12. Officers, employees and agents to be bonded.**

1 Every officer, employee and agent handling funds or negotiable instruments or property  
2 of or for any association created hereunder shall be required to execute and deliver adequate  
3 bonds for the faithful performance of his or her duties and obligations.

**§31G-2-13. Stock; membership certificate; voting; liability; limitations on transfer and ownership.**

1 (a) When a member of an association established without capital stock has paid his or her  
2 membership fee in full, he or she shall receive a certificate of membership. An association shall  
3 have power to issue one or more classes of stock, or one or more series of stock within any class  
4 thereof, any or all of which classes may be of stock with par value or stock without par value, with  
5 such voting powers, full or limited, or without voting powers and in such series, and with such  
6 designations, preferences and relative, participating, optional or other special rights, and  
7 qualifications, limitations or restrictions thereof, as shall be stated and expressed in the articles of  
8 incorporation, or in any amendment thereto, or in the resolution or resolutions providing for the  
9 issue of such stock adopted by the board of directors pursuant to authority expressly vested in it  
10 by the provisions of the articles of incorporation or of any amendment thereto.

11 (b) No association shall issue stock to a member until it has been fully paid for. The  
12 promissory notes of the members may be accepted by the association as full or partial payment.  
13 The association shall hold the stock as security for the payment of the note; but such retention as  
14 security shall not affect the member's right to vote.

15 (c) No member shall be liable for the debts of the association to an amount exceeding the  
16 sum remaining unpaid on his or her membership fee or his or her subscription to the capital stock,  
17 including any unpaid balance on any promissory notes given in payment thereof.

18 (d) An association in its bylaws may limit the amount of common stock which one member  
19 may own. No member or stockholder shall be entitled to more than one vote, regardless of the  
20 number of shares of common stock owned by him or her.

21 (e) Any association organized with stock under this article may issue preferred stock, with  
22 or without the right to vote. Such stock may be sold to any person, member or nonmember, and  
23 may be redeemable or retireable by the association on such terms and conditions as may be  
24 provided for by the articles of incorporation and printed on the face of the certificate. The bylaws  
25 shall prohibit the transfer of the common stock of the association to persons who are not qualified  
26 persons, or organizations that are not engaged in qualified activities handled by the association,  
27 or to persons or organizations that are not members of credit associations financing such  
28 products; and such restrictions shall be printed upon every certificate of stock subject thereto.

29 (f) Other kinds and classes of stock may be issued in compliance with the provisions of  
30 the articles of incorporation, the terms of the bylaws, or special resolutions of the board of  
31 directors.

32 (g) The association may, at any time, as specified in the bylaws, except when the debts  
33 of the association exceed fifty percent of the assets thereof, buy in or purchase its common stock  
34 at the book value thereof, as conclusively determined by the board of directors, and pay for it in  
35 cash within one year thereafter.

**§31G-2-14. Removal of officer or director.**

1 (a) Any member may bring charges against an officer or director by filing them in writing  
2 with the secretary of the association, together with a petition signed by five percent of the  
3 members, requesting the removal of the officer or director in question. The removal shall be voted  
4 upon at the next regular or special meeting of the association and, by a vote of a majority of the

5 members, the association may remove the officer or director and fill the vacancy. The director or  
6 officer against whom such charges have been brought shall be informed in writing of the charges  
7 previous to the meeting and shall have an opportunity at the meeting to be heard in person or by  
8 counsel and to present witnesses; and the person or persons bringing the charges against him or  
9 her shall have the same opportunity.

10 (b) In case the bylaws provide for election of directors by districts with primary elections in  
11 each district, then the petition for removal of a director must be signed by twenty percent of the  
12 members residing in the district from which he or she was elected. The board of directors must  
13 call a special meeting of the members residing in that district to consider the removal of the  
14 director; and by a vote of the majority of the members of that district the director in question shall  
15 be removed from office.

**§31G-2-15. Referendum.**

1 Upon demand of one third of the entire board of directors, made immediately and so  
2 recorded, at the same meeting at which the original motion was passed, any matter of policy that  
3 has been approved or passed by the board must be referred to the entire membership or the  
4 stockholders for decision at the next special or regular meeting; and a special meeting may be  
5 called for the purpose.

**§31G-2-16. Marketing contract.**

1 The association and its members may take and execute marketing contracts, requiring the  
2 members, for any period of time not over five years, to use, receive or provide all or any specified  
3 part of an internet service exclusively to or through the association, or any facilities to be created  
4 by the association. If they contract a sale to the association, it shall be conclusively held that title  
5 to the products, goods and services passes absolutely and unreservedly, except for recorded  
6 liens, to the association upon delivery, or at any other specified time if expressly and definitely  
7 agreed in such contract. The contract may provide, among other things, that the association may  
8 sell or resell the products, goods and services delivered by its members, with or without taking

9 title thereto, and pay over to its members the resale price, after deducting all necessary selling,  
10 overhead and other costs and expenses, including interest or dividends on stock, not exceeding  
11 eight percent per annum, and reserves for retiring the stock, if any; and any other proper reserves;  
12 or any other deductions.

**§31G-2-17. Remedies for breach of contract.**

1 The bylaws or the marketing contract may fix, as liquidated damages, specific sums to be  
2 paid by the member or stockholder to the association upon the breach by him or her of any  
3 provision of the marketing contract regarding the sale or delivery or withholding of internet  
4 services, and may further provide that the member will pay all costs, premiums for bonds,  
5 expenses and fees, in case the association shall prevail in any action brought by it upon the  
6 contract; and any such provisions shall be valid and enforceable in the courts of this state; and  
7 such clauses providing for liquidated damages shall be enforceable as such and shall not be  
8 regarded as penalties.

9 In the event of any such breach or threatened breach of such marketing contract by a  
10 member, the association shall be entitled to an injunction to prevent the further breach of the  
11 contract and to a decree of specific performance thereof. Pending the adjudication of such an  
12 action and upon filing a verified complaint showing the breach or threatened breach, and upon  
13 filing a sufficient bond, the association may be entitled to a temporary restraining order and  
14 preliminary injunction against the member.

15 In any action upon such marketing agreement, it shall be presumed as between the parties  
16 that the landowner, landlord or lessor claiming therein so to be is able to control the delivery of  
17 internet services produced on his or her land by tenants or others, whose tenancy or possession  
18 or work on such land or the terms of whose tenancy or possession or labor thereon were created  
19 or changed after execution by the landowner, landlord or lessor of such marketing agreement;  
20 and in such actions the foregoing remedies for nondelivery or breach shall lie and be enforceable  
21 against such landowner, landlord or lessor.

**§31G-2-18. Purchasing property of other associations, persons, firms or corporations.**

1           Whenever an association, organized under this article with preferred capital stock, shall  
2 purchase the stock of any property, or any interest in any property, or any person, firm or  
3 corporation or association, it may discharge the obligations so incurred, wholly or in part, by  
4 exchanging for the acquired interest shares of its preferred capital stock to an amount which at  
5 par value would equal the fair market value of the stock or interest so purchased, as determined  
6 by the board of directors. In that case the transfer to the association of the stock or interest  
7 purchased shall be equivalent to payment in cash for the shares of stock issued.

**§31G-2-19. Annual reports.**

1           Each association formed under this article shall prepare an annual report on forms  
2 provided by and filed with the Secretary of State pursuant to the requirements of section two-a,  
3 article one, chapter fifty-nine of this code.

**§31G-2-20. Conflicting laws not to apply.**

1           Any provisions of law which are in conflict with this article shall be construed as not  
2 applying to the association herein provided for.

**§31G-2-21. Interest in other corporations or associations.**

1           An association may organize, form, operate, own, control, have an interest in, own stock  
2 of, or be a member of any other corporation or corporations, with or without capital stock, and  
3 engaged in qualified activities regarding internet services.

**§31G-2-22. Contracts and agreements with other associations.**

1           Any association may, upon resolution adopted by its board of directors, enter into all  
2 necessary and proper contracts and agreements and make all necessary and proper stipulations,  
3 agreements and contracts and arrangements with any other cooperative corporation, association  
4 or associations, formed in this or in any other state, for the cooperative and more economical  
5 carrying on of its business or any part or parts thereof. Any two or more associations may, by  
6 agreement between them, unite in employing and using, or may separately employ and use, the

7 same personnel, methods, means and agencies for carrying on and conducting their respective  
8 business.

**§31G-2-23. Rights and remedies apply to similar associations of other states.**

1 Any corporation or association heretofore or hereafter organized under generally similar  
2 laws of another state shall be allowed to carry on any proper activities, operations and functions  
3 in this state upon compliance with the general regulations applicable to foreign corporations  
4 desiring to do business in this state, and all contracts made by or with such associations, which  
5 could be made by any association incorporated hereunder, shall be legal and valid and  
6 enforceable in this state with all of the remedies set forth in this article.

**§31G-2-24. Associations heretofore organized may adopt provisions of article.**

1 Any corporation or association organized in this state under previously existing statutes  
2 may, by a majority vote of its stockholders or members, be brought under the provisions of this  
3 article by limiting its membership and adopting the other restrictions as provided herein. It shall  
4 make out in duplicate a statement signed and sworn to by its directors to the effect that the  
5 corporation or association has, by a majority vote of the stockholders or members, decided to  
6 accept the benefits and be bound by the provisions of this article and has authorized all changes  
7 accordingly. Articles of incorporation shall be filed as required in section six of this article, except  
8 that they shall be signed by the members of the then board of directors. The filing fee shall be the  
9 same as for filing an amendment to articles of incorporation.

10 Where any association may be incorporated under this article, all contracts made prior to  
11 the date of incorporation, by or on behalf of such association by the promoters thereof in  
12 anticipation of its becoming incorporated under the laws of this state, whether or not such  
13 contracts be made by or in the name of some corporation organized elsewhere, and when they  
14 would have been valid if entered into subsequent to such date, shall be held valid as if made after  
15 such date.

**§31G-2-25. Liability as to delivery of products in violation of marketing agreements.**



1 Any person who solicits, persuades or permits any member of any association organized  
2 hereunder to breach his or her marketing contract with the association or one association with  
3 another, by accepting or receiving such member's products for sale or for auction or for display  
4 for sale, contrary to the terms of any marketing agreement of which such person has knowledge  
5 or notice, shall be liable to the association aggrieved in a civil suit for damages therefor. Courts  
6 of equity shall have jurisdiction to enjoin further breaches of such contract.

**§31G-2-26. Associations to be deemed not in restraint of trade.**

1 No association organized under this article and complying with the terms thereof shall be  
2 deemed to be a conspiracy or a combination in restraint of trade or an illegal monopoly or an  
3 attempt to lessen competition or to fix prices arbitrarily; nor shall the marketing contract and  
4 agreements between the association and its members or any agreements authorized in this article  
5 be considered illegal as such or in unlawful restraint of trade or as part of a conspiracy or  
6 combination to accomplish an improper or illegal purpose.

**§31G-2-27. Application of business corporation laws; nonprofit corporation laws.**

1 The provisions of the business corporation laws in chapter thirty-one-d or the nonprofit  
2 corporation laws in chapter thirty-one-e of this code and all powers and rights thereunder shall  
3 apply to the associations organized under this article and may be used by them, except when the  
4 provisions are in conflict with or inconsistent with the express provisions of this article.

**ARTICLE 3. CONDUIT INSTALLATION; MICROTRENCHING.**

**§31G-3-1. Definitions.**

1 "Microtrenching" means a technique of deploying cables, including specifically for  
2 broadband networks, using a cutting wheel to cut a trench with smaller dimensions than can be  
3 achieved with conventional trench digging equipment; with the trench dimensions being no  
4 greater than three inches in width, and a depth between one and two feet.

**§31G-3-2. Microtrenching permitted; notification.**

1 (a) A person may perform microtrenching, where such is feasible, to the extent allowed by  
2 a permit issued by the appropriate municipality, county or state agency. All microtrenching work  
3 performed must be in accordance with the National Electrical Safety Code and other generally  
4 accepted safety codes.

5 (b) A person must install conduit in a way that will readily permit another owner to add  
6 length to the microtrenching by connecting its own conduit to the first owner's conduit. Where an  
7 owner connects its own conduit to another owner's previously installed conduit, the owner must  
8 install conduit that has the same number of pathways or pipes as the previous owner's conduit.

9 (c) A person must install a vacant conduit of the same size as its own conduit when  
10 performing microtrenching operations. Other persons desiring use of conduit in the same area  
11 may make use of this vacant conduit upon application to the Broadband Enhancement Council.

12 (d) When applying for a permit a person must notify the appropriate permitting entity of the  
13 intended dates of the start and completion of microtrenching construction. Notification must be  
14 made on a form and in a format prescribed by the appropriate permitting entity. No fee shall be  
15 charged for such application, as the installation of additional vacant conduit under the provisions  
16 of this section shall function in lieu of a fee. The person shall submit the following documents to  
17 the appropriate permitting entity:

18 (1) Proof of insurance; or

19 (2) An indemnification agreement.

20 (e) Promptly after completion of microtrenching construction, but no longer than forty  
21 calendar days after issuance of the permit for microtrenching, the entity must file a document with  
22 the appropriate permitting entity containing the following information:

23 (1) An "as-built" drawing of the conduit installed. The "as-built" drawing will be treated as  
24 proprietary and confidential, to the extent permitted by law.

25 (2) A map showing the street location of the conduit including the side of the street the  
26 conduit is on, the beginning and ending points of the conduit, the number of ducts in the conduit,

27 and the number of ducts of excess capacity in the conduit. The map must accurately reflect the  
28 addresses of buildings that are passed by the conduit.

#### **ARTICLE 4. MAKE-READY POLE ACCESS.**

##### **§31G-4-1. Definitions.**

1 As used in this article, the following terms are defined as follows:

2 (1) "Attacher" means any person, corporation, or other entity, or the agents or contractors  
3 of such seeking to permanently or temporarily fasten or affix any type of equipment, antenna, line  
4 or facility of any kind to a utility pole in the right of way or its adjacent ground space.

5 (2) "Attachment Application" means the application made by an Attacher to a Pole Owner  
6 for attachment of equipment, antenna, line or facility of any kind to a utility pole. It shall include:

7 (A) Proof of insurance; or

8 (B) An indemnification agreement prepared by the Pole Owner.

9 (3) "Make Ready Costs" means the costs incurred by an Attacher associated with the  
10 transfer of the facilities, antenna, lines or equipment of a Pre-Existing Third Party User,  
11 undertaken by an Attacher to enable attachment to the utility pole or similar structure. Make-  
12 Ready Costs that are to be paid by an Attacher include, without limitation, all costs and expenses  
13 to relocate or alter the attachments or facilities of any Pre-Existing Third Party User as may be  
14 necessary to accommodate an Attacher's attachment.

15 (4) "Pole Owner" means a person, corporation or entity having ownership of a pole or  
16 similar structure in the right of way to which utilities, including without limitation, electric and  
17 communications facilities, are located or may be located whether such ownership is in fee simple  
18 or by franchise.

19 (5) "Pre-Existing Third Party User" means the owner of any currently operating facilities,  
20 antenna, lines or equipment on a pole or its adjacent ground space in the right of way.

**§31G-4-2. Attachment to third party facilities.**

1 (a) Upon approval of an Attachment Application, an Attacher may relocate or alter the  
2 attachments or facilities of any Pre-Existing Third Party User as may be necessary to  
3 accommodate an Attacher's attachment using Pole Owner approved contractors; provided,  
4 however, that an Attacher will not effectuate a relocation or alteration of a Pre-Existing Third Party  
5 User's facilities that causes or would reasonably be expected to cause a customer outage without  
6 first providing forty-five days prior written notice to the Pre-Existing Third Party User, in order to  
7 permit the Pre-Existing Third Party User to relocate its facilities on its own.

8 (b) In the event the Pre-Existing Third Party Users of such other facilities fail to transfer or  
9 rearrange their facilities within forty-five days from receipt of notice of relocation or alteration of a  
10 Pre-Existing Third Party User's facilities that causes or would reasonably be expected to cause a  
11 customer outage, an Attacher may undertake such work.

12 (c) Within thirty days of the completion of any relocation or alteration, an Attacher shall  
13 send notice of the move and as-built reports to the Pre-Existing Third Party User and the owner  
14 of all poles or other structures on which such relocations or alterations were made. The as-built  
15 reports shall include a unique field label identifier, and an address or coordinates.

16 (d) Upon receipt of the as-built reports, the Pre-Existing Third Party User and pole or  
17 structure owner(s) may conduct an inspection within fourteen days at an Attacher's expense. An  
18 Attacher shall pay the actual, reasonable, and documented expenses incurred by the Pre-Existing  
19 Third Party User and pole or structure owner for the inspection. If any such relocation or alteration  
20 results in the facilities of the Pre-Existing Third Party User on the pole or other structure failing to  
21 conform with the applicable safety Pole Owner's standards, the Pre-Existing Third Party User  
22 shall, within seven days of the inspection, notify an Attacher of such failure to conform.

23 (e) In a notice, the Pre-Existing Third Party User may elect to either:

24 (1) Perform the correction itself and bill the Attacher for the actual, reasonable and  
25 documented costs of the correction, or

(2) Instruct the Attacher to correct such conditions at Attacher's expense. Any post-inspection corrections performed by the Attacher must be completed within thirty days of such notification.

(f) As a condition of exercising the ability to relocate, rearrange, or alter a Pre-Existing Third Party User's facilities pursuant to this section, an Attacher shall indemnify, defend and hold harmless the owner or owners of all poles or other structures on which such relocation, rearrangement or alteration takes place, the affiliates of such owner or owners, and the officers, directors and employees of such owner or owners and their affiliates, each being deemed an Indemnitee, from and against all third party damage, loss, claim, demand, suit, liability, penalty or forfeiture of every kind and nature, including, but not limited to, costs and expenses of defending against the same, payment of any settlement or judgment therefor and reasonable attorney's fees, that are actually and reasonably incurred by an Indemnitee, by reason of any claim by an affected Pre-Existing Third Party User or any person or entity claiming through such Pre-Existing Third Party User arising from such relocation, rearrangement or alteration.

(g) All work performed must be in accordance with the National Electrical Safety Code and other generally accepted safety codes.

**§31G-4-3. Exceptions.**

(a) Notwithstanding any provision of this code to the contrary, the provisions of this article shall not apply to:

(1) Facilities located above the "Communication Worker Safety Zone" as such term is defined in the National Electrical Safety Code; or

(2) Any electric supply facilities wherever located.

(b) This article does not authorize any activity requiring an electric supply outage.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....  
*Chairman, House Committee*

.....  
*Chairman, Senate Committee*

Originating in the House.

In effect ninety days from passage.

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*Clerk of the House of Delegates*

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*Clerk of the Senate*

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*Speaker of the House of Delegates*

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*President of the Senate*

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The within ..... this the.....  
day of ....., 2017.

.....  
*Governor*