

WEST VIRGINIA DIVISION OF HIGHWAYS
“DIG ONCE” INTERIM FINAL GUIDANCE
November 2020

INTRODUCTION

The Commissioner of Highways in West Virginia is authorized by law to establish rules, policies and guidelines pertaining to the use of State rights-of-way and adjacent areas. The West Virginia Division of Highways (Division) [Accommodation of Utilities on Highway Right of Way and Adjustment and Relocation of Utility Facilities on Highway Projects](#) (the “Utility Manual”) presents the Division policy concerning the process, review, approval, location, installation, adjustment and maintenance of utilities on State highway right-of-way. The Division policy applies to all utilities, including but not limited to electric, wired and wireless communication, data transmission, gas, oil, petroleum products, chemical, water, steam, sewage and similar facilities that are to be accommodated, adjusted or relocated within State highway right-of-way. Further, the Division policy prohibits longitudinal occupancy inside the controlled access right-of-way by any utility on any type of highway that is fully or partially controlled, except that telecommunications companies may be permitted to locate underground fiber optic facilities therein in accordance with the federal Telecommunications Act of 1996 (P.L. 104-104), as amended, upon such terms as are acceptable to the Division and the US Department of Transportation, Federal Highway Administration (FHWA).

APPLICABILITY

This document provides guidance concerning the considerations within the Utility Manual and the provisions of W.Va. Code §17-2E-1 *et seq.* that allow Telecommunications Carriers to install within Division right-of-way underground telecommunications facilities upon such terms as are acceptable to the Division and the FHWA. This guidance does not supersede existing federal or State guidelines, policy or procedures, or violate any provisions identified in the West Virginia Code of State Regulations pertaining to utility installation within Division rights-of-way. The provisions of this document are applicable to all Telecommunications Carriers that perform work within the State of West Virginia. Further, this guidance is applicable to any fully or partially controlled access right-of-way, non-controlled access right-of-way, or other property or real estate owned by the Division.

The FHWA has determined that the use of highway rights-of-way to accommodate public utility facilities is in the public interest (23 CFR Part 645.205 (a)). To the extent that any such facilities serve “the public,” they may be accommodated under the Utility Manual. If the use of such facilities is to serve a private or proprietary interest, that use might still be accommodated but such use would have to be approved under the airspace leasing

requirements of 23 CFR 710 Subpart D. The distinction between a public or private use will determine which regulations apply.

Telecommunications Carriers seeking to locate underground facilities within Division right-of-way may provide some form of compensation to the Division for costs incurred as a result of use and occupancy of the right-of-way, and those Telecommunications Carriers will be required to comply with all other applicable requirements of the federal Telecommunications Act of 1996, as amended. Except where they are expressly exempted from the requirements and rules of the Utility Manual, Telecommunications Carriers will comply with and observe all other restriction and requirements contained within the Utility Manual. Telecommunications Carriers do not have to provide proof that they have the power of eminent domain.

Underground “Dig Once” permit applications (DOH Form MM-109) will be given priority by the DOH over all other permit applications except Small Wireless Facilities applications, which have specific deadlines set by law.

DIG ONCE APPLICATIONS

I. Definitions

- (A) “Broadband conduit” or “conduit” means a conduit, innerduct, or microduct for fiber optic cables that support facilities for broadband service.
- (B) “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.
- (C) “Commissioner” means the Commissioner of the Division of Highways or his or her designee.
- (D) “Council” means the Broadband Enhancement Council.
- (E) “Direct bury” means the burying of telecommunications wire or cable directly into the ground by means of plowing or direct insertion without the opening of a trench and without the installation of conduit or innerduct.
- (F) “Division” means the Division of Highways.

- (G) “Longitudinal access” means access to or the use of any part of a right-of-way that extends generally parallel to the traveled right-of-way.
- (H) “Permit” means an encroachment permit (Form MM-109) issued by the Commissioner pursuant to the Utility Manual, or equivalent policy, as may be currently enforced by the Division, that specifies the requirements and conditions for performing work in a right-of-way and where such work involves the creation or opening of a trench for the installation of telecommunications facilities in a right-of-way.
- (I) “Right-of-way” or “R/W” means land, property, or any interest therein acquired or controlled by the Division for transportation facilities or other transportation purposes or specifically acquired for utility accommodation.
- (J) “Telecommunications carrier” or “carrier” means a telecommunications carrier:
 - (1) As determined by the Public Service Commission of West Virginia; or
 - (2) That meets the definition of telecommunications carrier with respect to the Federal Communications Commission, as contained in 47 U.S.C. §153.
- (K) “Telecommunications facility” means any cable, line, fiber, wire, conduit, innerduct, access manhole, handhole, tower, hut, pedestal, pole, box, transmitting equipment, receiving equipment, power equipment, or other equipment, system, or device that is used to transmit, receive, produce or distribute a signal for telecommunications purposes via wireline, electronic, or optical means.
- (L) "Utility" means any privately, publicly, or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, data, information, video services, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, stormwater not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public. The term "utility" also includes those similar facilities which are owned or leased by a government agency for its own use, or otherwise dedicated solely to governmental use, or those facilities which are owned or leased by a local exchange carrier, as defined by 150 CSR 6.
- (M) “Wireless access” means access to, and use of, a right-of-way for the purpose of constructing, installing, maintaining, using, or operating telecommunications facilities for wireless telecommunications.

II. Agreements for construction, installation, or maintenance

- (A) Prior to obtaining a permit for construction, installation, or maintenance of telecommunication facilities or to share Division-owned conduit or other telecommunication facilities in a Division R/W, the Carrier and the Division shall enter into an agreement, to be developed by the Division’s Utility Coordinator

with assistance and coordination of the affected District(s), which provides, but is not limited to, the following:

- (1) The Carrier shall afford the Division an adequate amount of time to review its plans and for revision of the plans as may be necessary.
 - (2) The Division shall not unnecessarily delay plan review nor unreasonably withhold, condition or delay plan approval so long as the terms of the agreement, laws, rules, policies, standards and guidelines are met.
 - (3) The Carrier shall not unreasonably interfere with the operation and maintenance of the state road system or violate the Division's safety and traffic management standards.
 - (4) The Carrier's construction plans must be approved by the Division.
 - (5) The Division may, in its sole discretion, deny any longitudinal access or wireless access if such access would compromise the safe, efficient, and convenient use of any road, route, highway, or interstate in the state for the traveling public.
- (B) For construction, installation, and maintenance of telecommunication facilities the agreement shall:
- (1) Be competitively neutral and nondiscriminatory to other carriers;
 - (2) Specify the terms and conditions for renegotiation of the agreement;
 - (3) Specify the maintenance requirements for each telecommunications facility;
 - (4) Be non-exclusive;
 - (5) Not exceed a term of 30 years; and
 - (6) If required, received approval or concurrence from the Federal Highway Administration.
- (C) Terms of the agreement for construction or installation of telecommunications facilities may include provisions for the Carrier to compensate the Division for the use of Division R/W or spare conduit or other telecommunication facilities at fair market value. The Legislature has set the monetary fair market value at zero dollars (\$0) but provided for in-kind compensation. In-kind compensation paid to the Division under an agreement may include, without limitation:
- (1) Conduit or excess conduit;
 - (2) Innerduct;
 - (3) Dark fiber;
 - (4) Access points;
 - (5) Telecommunications equipment or services;
 - (6) Bandwidth; and
 - (7) Other telecommunications facilities as a component of the present value of the trenching.

III. Agreements for use of spare or excess conduit or related facilities

- (A) An agreement for use of spare conduit or excess conduit or related facilities and R/W access of the Division shall provide:
 - (1) For in-kind compensation as provided in II. (C) of this guidance.
 - (2) For the Division, in its sole discretion, to adjust the fair market value of in-kind compensation once every five years. The Division will determine any such adjustment by conducting an analysis in accordance with the rules, policies, or guidelines of the Division, to determine the fair market value of a right-of-way to which access has been granted. The fair market value of the in-kind compensation may be determined based on the incremental costs for the installation of conduit and related facilities.
 - (3) For adjustment, in conjunction with the West Virginia Broadband Enhancement Council, for areas determined to be underserved or unserved and may consider the value to such areas for economic development enhancing the transportation system, expanding opportunities for digital learning and telemedicine.

IV. All agreements

- (A) All agreements shall provide:
 - (1) For the Division to, in its sole discretion, deny any longitudinal access or wireless access if such access would compromise the safe, efficient, and convenient use of any road, route, highway, or interstate in the state for the traveling public.
 - (2) That, with written approval of the Governor, any conduit, fiber or other equipment may be transferred or assigned to any other state agency.
 - (3) For the signature of the Commissioner to be affixed to the agreement prior to sending the agreement to the applicant carrier.
 - (4) For the Carrier to sign and have the agreement notarized and returned to the Commissioner
 - (5) For the agreement to contain such other terms and conditions required by law, rule, policy or guidelines of the Division.
- (B) The Commissioner will forward the agreement to the appropriate District Utility Supervisor. A copy of the Agreement will be retained at the District; the original Agreement will be sent to the Division's Right-of-Way Division.

V. Permit Application

- (A) After an agreement has been fully executed with the Commissioner, a permit from the appropriate District or Districts must be obtained by the Carrier prior to accessing a Division R/W. The agreement covers the entire project regardless of the number of Counties the project affects. A Carrier shall submit

to the relevant district or districts a permit application for the longitudinal installation, extension, expansion or upgrade of underground telecommunications network, or wireless access, or use of Division-owned conduit or other telecommunications facilities within the Division's R/W.

- (B) At a minimum, the following information is required to be submitted as a permit application package:
- (1) A complete permit application, Form MM-109. The District shall promptly review the MM-109 for completeness and return an incomplete application to the Carrier with an explanation of the additional information that is required.
 - (2) Plan View (*.pdf, *.kmz, or *.dgn format), Profile View, Cross Sections (if applicable) which indicate the proposed underground telecommunications installation, extension, expansion or upgrade. It is anticipated that the District or Districts will have participated in the development of plans in conjunction with the agreement which will be incorporated into the permit application.
 - (3) Details, including but not limited to, description of work including the type, installation technique and length of work within the Division's R/W, a location map, temporary traffic control plan, trench repair details (as applicable), conduit size and type, number of innerducts.
 - (4) Coordinates of the beginning and ending points, for each segment, for the installation of the underground telecommunications facility.
 - (5) The project, in its entirety, must be set forth in the application.
 - (6) Inspection fees and bond, as applicable.
 - (7) Written affirmation by the applicant Carrier of compliance with W. Va. Code §17-2E-5 (the "Dig Once" statute) and either:
 - (a) written affirmation that no other carriers provided within the required timeframe notice of interest to share the applicant's trench; or
 - (b) a shared-use agreement as provided in Section VI below.
 - (8) Completed Submission Checklist. A copy of the checklist is attached as Appendix A.

VI. Joint Use of Trench

- (A) If one or more carriers, or the Division, are interested in sharing the applicant's trench, an agreement between all interested parties shall be executed, within 30 days of the notice of interest, by or among those entities, outlining the responsibilities and financial obligations of each, with respect to the installation within the right-of-way in accordance with the requirements of West Virginia code §17-2E-5.

- (B) The financial obligations of each carrier shall be based on the proportionate sharing of costs between each carrier for joint trenching or trench sharing based on the amount of conduit innerduct space or excess conduit that is authorized in the agreements. If the Division desires to use the trench, it shall also pay its proportional share unless it is utilizing the trench as in-kind payment for use of the right-of-way. A copy of the executed agreement shall be provided to the Division prior to the issuance of a permit to begin the installation.
- (C) The applicant Carrier shall provide the Division, in writing, affirmation that all of the requirements of W. Va. Code §17-2E-5 have been met as part of the permit application process. If no copy of an executed shared-use agreement is provided to the Division, the applicant Carrier must affirm to the Division, in writing, that no other Carrier notified applicant Carrier, within the required timeframe, of a desire to share the applicant's trench. The Division may, if desired, request of Council certification of compliance with the requirements of W. Va. Code §17-2E-5 or certification that no other carriers requested to share the applicant Carrier's trench.
- (D) The requirements of joint use do not apply to the following projects:
 - (1) where the trench is less than 1,000 feet in length for the entire project;
 - (2) where the direct bury method is used;
 - (3) where the trench or related facilities are solely for the service of entities involved in national security matters or where disclosure or sharing of a trench location would be against federal policy; or
 - (4) where the Carrier installs an amount of spare conduit or innerduct equal to what is being installed for its own use and which is made available for lease to competing telecommunications carriers on a nondiscriminatory basis at rates established by the rules of the Federal Communications Commission.

VII. Miscellaneous

- (A) The responsible District, or Districts shall review the application for completeness and accuracy and shall issue a permit granting access under the law and this guidance; provided, that the Division has complied with all applicable federal regulations with respect to approval.
- (B) The District or Districts will scan and add the Permit to the Division's recordkeeping database software.
- (C) The District or Districts will send a scanned copy of the Permit and attachments to appropriate Division personnel and to the Council.
- (D) The Carrier will coordinate its work with the District or Districts, which includes but is not limited to the following:

- (1) The Carrier is required to contact the District Utility Supervisor a minimum of 48 hours prior to construction or as designated in the permit application; and
 - (2) The Carrier will cooperate in allowing the District or Districts to inspect, as needed, the work performed by the Carrier within the Division's R/W.
- (E) Relocations or modifications of existing telecommunication facilities in the Division's R/W are not subject to the provisions of the Dig Once law, nor shall the provisions apply to aerial telecommunications facilities or associated apparatus or equipment in a R/W. The relocation of telecommunications facilities within the Division's R/W shall be in accordance with the provisions of W.Va. Code §17-4-17b.
- (F) Any longitudinal access or wireless access to a R/W granted by the Division does not abrogate, limit, supersede, or otherwise affect access granted or authorized pursuant to the Division's rules, policies, and guidelines related to the Utility Manual.
- (G) The District will release the bond, if one was required, upon satisfactory completion of the terms and conditions of the agreement and permit.