



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: Highways TITLE-SERIES: 157-13
RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No
RULE NAME: Small Wireless Facilities on Division of Highways
Rights-of-Way
CITE STATUTORY AUTHORITY: W.Va.Code §31H-2-3

The above rule has been authorized by the West Virginia Legislature.

Authorization is cited in (house or senate bill number) SB364

Section 1 Passed On 2/12/2020 12:00:00 AM

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

March 18, 2020

This rule shall terminate and have no further force or effect from the following date:

March 18, 2025

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Rita A Pauley -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

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TITLE 157
LEGISLATIVE RULE
DIVISION OF HIGHWAYS

SERIES 13
SMALL WIRELESS FACILITIES ON DIVISION OF HIGHWAYS RIGHTS-OF-WAY

§157-13-1. General.

1.1. Scope. – This legislative rule implements the Small Wireless Facilities Deployment Act, enacted March 5, 2019. It provides for a permit process and specifies the information that must be provided in connection with a permit application.

1.2. Authority. – West Virginia Code §31H-2-3.

1.3. Filling Date. – March 18, 2020.

1.4. Effective Date. – March 18, 2020.

1.5. Sunset Provision – This rule shall terminate and have no further force and effect on March 18, 2025.

§157-13-2. Definitions. (See W. Va. Code §31H-1-2)

2.1. “Antenna” means communications equipment that transmits or receives electromagnetic radio frequency signals used in the provision of wireless services.

2.2. “Affidavit” means a properly executed sworn statement averring that the applicant has contacted the utility pole owner for permission to locate a small wireless facility on the pole.

2.3. “Applicable codes” means uniform building, fire, electrical, plumbing, or mechanical codes adopted by a recognized national code organization or local amendments to those codes, including the National Electrical Safety Code.

2.4. “Applicant” means any person who submits an application and is a wireless provider.

2.5. “Application” means a request submitted by an applicant to the Division for a permit to collocate small wireless facilities or to approve the installation, modification, or replacement of a utility pole or wireless support structure.

2.6. “Authority” means the State of West Virginia or a political subdivision that has jurisdiction and control for use of public rights-of-way as provided by this code for placements within public rights-of-way or has zoning or land use control for placements not within public rights-of-way.

2.7. “Authority utility pole” means a utility pole owned or operated by an authority in a public right-of-way.

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2.8. "Collocate" or "collocation" means to install, mount, maintain, modify, operate, or replace wireless facilities on or adjacent to a wireless support structure or utility pole.

2.9. "Commissioner" means the Commissioner of the West Virginia Division of Highways.

2.10. "Communications facilities" means the set of equipment and network components, including wires, cables, antennas, and associated facilities, used by a communications service provider to provide communications service.

2.11. "Communications service" means cable service, as defined in 47 U.S.C. 522(6), as amended; information service, as defined in 47 U.S.C. 153(24), as amended; telecommunications service, as defined in 47 U.S.C. 153(53), as amended; mobile service, as defined in 47 U.S.C. 153(33), as amended; or wireless service other than mobile service.

2.12. "Communications service provider" means any entity that provides communications service.

2.13. "Decorative pole" means an Division utility pole that is specially designed and placed for aesthetic purposes and on which no appurtenances or attachments, other than a small wireless facility, or specially designed informational, or directional signage, or temporary holiday or special event attachments have been placed, or are permitted to be placed, according to nondiscriminatory municipal rules or codes.

2.14. "District" means one of the management areas of the state, which include one or more counties, established by the Division of Highways, with each district headed by a separate district engineer or manager. A list of the Division of Highways' Districts and contact information for each is available on the Division's website at <https://transportation.wv.gov/highways/districts/Pages/default.aspx>.

2.15. "Division" means the West Virginia Division of Highways.

2.16. "Existing Utility Status Report" means a written document that identifies and locates all private and public utility companies, owning facilities located within the area of influence of the proposed activity. The report must certify that those utility companies were consulted, and that each utility's location, bearing, grade, depth, and diameter is accurately represented on the plans and profiles.

2.17. "FCC" means the Federal Communications Commission of the United States.

2.18. "Fee" means a one-time, nonrecurring charge.

2.19. "Law" means a federal or state statute, common law, code, rule, regulation, order, or a local ordinance or resolution.

2.20. "Micro wireless facility" means a small wireless facility that is not larger in dimension than 24 inches in length, 15 inches in width, and 12 inches in height and any exterior antenna 11 inches or less.

2.21. "Permit" means an encroachment permit, MM-109, that provides the written authorization required by the Division to perform an action or initiate, continue, or complete a project on the Division's right-of-way.

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2.22. "Right-of-way" means the area on, below, or above a Division public roadway, highway, street, sidewalk, alley, utility easement, or similar property, but not including interstate highway.

2.23. "Small wireless facility" means a wireless facility that meets both of the following qualifications:

2.23.1. Each antenna could fit within an imaginary enclosure of no more than 6 cubic feet; and

2.23.2. All other wireless equipment associated with the facility is cumulatively no more than 28 cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume: Electric meter, concealment elements, telecommunications demarcation box, ground-based enclosures, grounding equipment, power transfer switch, cut-off switch, and vertical cable runs for the connection of power and communications services.

2.24. "Utility pole" means a pole or similar structure that is or may be used, in whole or in part, by a communication services provider or for electric distribution, lighting, traffic control, signage (if the pole is 15 feet or taller), or a similar function, or for the collocation of small wireless facilities. However, "utility pole" does not include wireless support structures or electric transmission structures.

2.25. "Wi-Fi" means the standard wireless local area network (WLAN) technology for connecting computers and myriad electronic devices to each other and to the internet. It is the wireless version of a wired Ethernet network, and is commonly deployed alongside it.

2.26. "Wireless facility" means equipment at a fixed location that enables wireless communications between user equipment and a communications network, including:

2.26.1. Equipment associated with wireless communications; and

2.26.2. Radio transceivers, antennas, coaxial or fiber-optic cable, regular and backup power supplies, and comparable equipment, regardless of technological configuration. "Wireless facility" includes small wireless facilities. "Wireless facility" does not include:

2.26.2.a. The structure or improvements on, under, or within which the equipment is collocated; or

2.26.2.b. Wireline backhaul facilities, coaxial or fiber-optic cable that is between wireless support structures or utility poles, or coaxial or fiber-optic cable that is otherwise not immediately adjacent to, or directly associated with, an antenna.

2.27. "Wireless infrastructure provider" means any person or entity, including a person authorized to provide telecommunications service in the state, that builds or installs wireless communication transmission equipment, wireless facilities, wireless support structures, or utility poles, but that is not a wireless provider.

2.28. "Wireless provider" means a wireless infrastructure provider or a wireless service provider.

2.29. "Wireless services" means any services, using licensed or unlicensed spectrum, including the use of Wi-Fi, whether at a fixed location or mobile location, provided to the public using wireless facilities.

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2.30. "Wireless service provider" means a person who provides wireless services.

2.31. "Wireless support structure" means a structure, such as a monopole; tower, either guyed or self-supporting; billboard; or other existing or proposed structure designed to support or capable of supporting wireless facilities. "Wireless support structure" does not include a utility pole.

2.32. "Wireline backhaul facility" is a facility used for the transport of communications service or any other electronic communications by coaxial, fiber-optic cable, or any other wire.

§157-13-3. Application for permit. (See W. Va. Code §31H-2-1(f) through §31H-2-1(j) and W. Va. Code §31H-2-2)

3.1. A wireless infrastructure provider, or wireless provider, herein after "Provider", that plans to install, extend, expand, or upgrade wireless facilities within a Division right-of-way shall submit a permit application to the Division.

3.2. At a minimum, the following information is required as part of a permit application:

3.2.1. A complete application form, MM-109. The MM-109 may be electronically through the Division's website <https://transportation.wv.gov/highways/engineering/files/MM-109.pdf>; or by mailing the application to the Division at 1900 Kanawha Blvd. E., Building 5, Room 109, Charleston W.Va. 25305.

3.2.2. A plan view submitted in *.pdf, *.kmz, or *.dgn formats, with coordinates which indicate the proposed location of the small wireless facilities. Providers seeking to collocate small wireless facilities on Division utility poles must enter into an Agreement with the Division.

3.2.3. Details, including but not limited to:

3.2.3.a. Size of any transmitter or receiver.

3.2.3.b. Height of installation which must comply with W. Va. Code §31H-2-1.

3.2.3.c. Attachment details.

3.2.3.d. Point of electrical service and meter number.

3.2.3.e. Fiber optic connections.

3.2.3.f. Location on map and coordinates.

3.2.3.g. Temporary traffic control plan to be utilized during installation and during maintenance.

3.2.4. Proof of insurance and any applicable bond as provided in section five of this rule.

3.2.5. Completed Submission Checklist. (See Appendix A)

3.2.6. Notarized affidavit. (See Appendix B)

§157-13-4. Permit requirements, approvals, denials and fees. (See §31H-2-2 and §31H-2-3)

4.1. A small wireless provider has the right to collocate a small wireless facility and install, maintain, modify, operate and replace its own utility pole, or with the permission of the owner, a third party's utility pole that exceeds these height limits along, across, upon, and under the right-of-way. Such facilities shall be installed and maintained in a manner that will not obstruct or hinder usual travel, public safety, or the function or operation of the Division's utility poles, equipment or communications devices on the right-of-way or to obstruct the legal use of the right-of-way by other utilities or the Division.

4.2. The Division may require the placement of small wireless facilities on any specific utility pole or category of poles or require multiple antenna systems on a single utility pole or the underground placement of small wireless facilities.

4.3. The Division may limit placement of small wireless facilities by minimum separation distances.

4.4. The Division will assign a tracking number to each application and promptly send the application to the appropriate District or Districts with the deadlines for acting on the application. When determining the time in which an application must be acted upon, if the final day to act falls on a federal or state holiday, the date to act upon the application shall be the next weekday that is not a federal or state holiday.

4.5. The District shall review the application for completeness and accuracy within 10 days of receipt of the application by the Division. If the application is incomplete the District shall send the applicant a letter detailing the deficiencies of the application.

4.5.1. The District must approve or deny a completed application for collocation of a small or micro wireless facility within 60 days.

4.5.2. The District must approve or deny a completed application for installation, modification or replacement of a utility pole in the right-of-way within 90 days.

4.5.3. Applications not acted upon within the processing deadlines are deemed approved. The processing deadlines may be extended by written agreement of the Provider and the District.

4.6. The Provider may correct the deficiencies and return the application to the District. The deadlines are stopped pending receipt of the requested information. Once the supplemental information is received, the District has 10 days to review the supplemental information for completeness and notify the Provider of any deficiency in the supplemental information.

4.7. If the application meets all statutory and regulatory requirements, the District shall issue a permit granting access to the right of way as specified in the permit.

4.8. Denial of an application at any stage of the process must be in writing and provide the basis for the denial including the specific federal or state law, code, regulation, or rule, policy, guideline or standard provisions on which the denial was based.

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4.9. An application for collocation of a small wireless facility or installation, modification, or replacement of a utility pole that meets the requirements of this rule and the Small Wireless Facilities Act may be denied only if the proposed application:

4.9.1. Materially interferes with the safe operation of traffic control equipment;

4.9.2. Materially interferes with sight lines or clear zones for transportation or pedestrians;

4.9.3. Materially interferes with compliance with the Americans with Disabilities Act, Public Rights-Of-Way Accessibility or similar federal or state standards regarding pedestrian access or movement;

4.9.4. Fails to comply with reasonable and nondiscriminatory spacing requirements of general application adopted by legislative rule or standards that concern the location of ground-mounted equipment and new utility poles. Such The spacing requirements may not prevent a wireless provider from serving any location;

4.9.5. Fails to comply with applicable codes, legislative rule, policy, guidance, and generally applicable standards that are consistent with the Small Wireless Facilities Act adopted by the Division for construction and public safety in the rights-of-way, including reasonable and nondiscriminatory wiring and cabling requirements, grounding requirements, and abandonment and removal provisions;

4.9.6. Fails to attest that a small wireless facility will comply with relevant Federal Communications Commission (FCC) regulations concerning:

4.9.6.a. Radio frequency emissions from radio transmitters; and

4.9.6.b. Unacceptable interference with the public safety spectrum and CII spectrum, including compliance with the abatement and resolution procedures for interference with the public safety spectrum and CII spectrum established by the FCC set forth in 47 C.F.R. 22.970 through 47 C.F.R. 22.973 and 47 C.F.R. 90.672 through 47 C.F.R. 90.675;

4.10. The denial is effective the day the Division mails the denial to the applicant.

4.11. The applicant may cure the deficiencies listed in the denial and resubmit the application within 30 business days without paying an additional application fee.

4.11.1. Review of the resubmitted application is limited to the specific deficiencies listed in the denial.

4.11.2. If the resubmittal is deficient, the Division must submit a second denial in writing to the applicant and provide the basis for the denial including the specific federal or state code, regulation, or rule provisions on which the denial was based.

4.11.3. The applicant may cure the deficiencies listed in the second denial and resubmit the application within 30 business days without paying an additional application fee.

4.12. A provider seeking to collocate small wireless facilities at multiple locations within the Division's rights-of-way may file a consolidated application in the District specifying the Districts in which the

provider seeks to collocate with the Division. If approved, the applicant will receive one permit covering all approved locations. Denial of one or more collocations in a consolidated application may not delay processing the remaining location requests in the same permit request. Upon approval of the consolidated application, the Provider shall notify the Division and the affected Districts of the order in which it will undertake the collocations and a proposed timeline for the work.

4.13. All permits for small wireless facilities are valid for a period of 10 years and may be renewed for additional 10-year periods if the provider and the utility pole continue to meet all applicable federal and state laws, codes, regulations, and rules, policies, guidelines and standards.

4.14. If the provider fails to comply with the terms and conditions of its permit, the Division may revoke the permit until such time as the deficiencies are corrected. Prior to revoking a permit, the Division will notify the provider of the deficiencies in writing and allow the provider 30 business days to correct the deficiencies.

4.15. An application fee of \$250 shall accompany each application for a MM-109 permit for the installation, modification, or replacement of a utility pole and the collocation of an associated small wireless facility on a Division right-of-way. The fee shall be reviewed and may be adjusted 10 percent every five years, rounded to the nearest \$5.00.

4.16. Applications for collocation of small wireless facilities to be located on existing utility poles may contain multiple locations in a district. An application fee of \$200 shall accompany the application for a MM-109 permit for each of the first five small wireless facilities contained in an application and \$100 for each additional small wireless facility in that same application. These fees shall be reviewed and may be adjusted 10 percent every five years, rounded to the nearest \$5.00.

4.17. A provider seeking a permit for collocation of multiple small wireless facilities in more than one district shall submit the applications the Commissioner for processing.

4.18. An application fee of \$1,000 shall accompany each application for the installation, modification, or replacement of a utility pole and the collocation of an associated small wireless facility that is not a permitted use in accordance with the specifications of the Small Wireless Facilities Act. The fee shall be reviewed and may be adjusted 10 percent every five years, rounded to the nearest \$5.00.

4.19. The Division shall assess an annual recurring fee of \$65 per year per utility pole for access to a Division owned utility pole. (See W. Va. Code §31H-2-3 for fee authorization)

4.20. The Division will not charge an additional fee or require an additional permit for a provider to:

4.20.1. Conduct routine maintenance;

4.20.2. Replace wireless facilities with wireless facilities that are substantially similar, the same size or smaller; or

4.20.3. To install, place, maintain, operate, or replace micro wireless facilities that are suspended on existing cables that are strung between existing utility poles in compliance with applicable safety codes and the pole owner's construction standards and engineering practices.

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4.21. All providers must notify and coordinate with the District where the work will be conducted a minimum of 48 hours prior to commencing work in a Division right-of-way to assure that the Provider's access will not conflict with work conducted by the Division or another utility. Failure to notify and coordinate with the District may result in delay or stoppage of the Provider's work to allow previously scheduled road or utility work to proceed. In the event of an emergency the Provider shall notify the district where the work will be conducted as soon as practicable prior to commencing work in a Division right-of-way.

4.22. The Division may revoke a permit at any time if the conditions of the permit are no longer being met. Any denial or revocation of a permit may be appealed pursuant to the provisions of 157CSR1, Rules Relating Generally to Various Functions of the Commissioner of Highways which is available on the West Virginia Secretary of State's website.

§157-13-5. Make ready work. (See W. Va. Code §31H-2-3)

5.1. The Division shall provide a good faith estimate for any make-ready work necessary to enable a Division owned utility pole to support the requested collocation of small wireless facilities within 60 days after the receipt of a complete application for a permit.

5.2. Upon acceptance by the provider of the Division's good faith estimate for make-ready work, the provider has 60 days to complete the work.

5.3. Replacement of a utility pole may only be required if the Division demonstrates that the collocation would make the utility pole structurally unsound. The Division may not require more make-ready work than required to meet applicable codes or industry standards.

5.4. Make-ready work may not include work related to preexisting conditions.

5.5. Costs for make-ready work including any utility pole replacement may not exceed the actual costs or the amount charged to other communications service providers for similar work and may not include any consultant fees or expenses.

§157-13-6. Requirements for insurance, bonding and other protections. (See W. Va. Code §31H-2-4)

6.1. A wireless provider who owns or operates small wireless facilities or utility poles in a Division right-of-way shall indemnify, protect, defend, and hold the Division and its officers, employees, agents, and volunteers harmless against any and all claims, lawsuits, judgments, costs, liens, losses, expenses, fees to include reasonable attorney fees and costs of defense, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including personal or bodily injury or death, property damage or other harm for which recovery of damages is sought, to the extent that it is caused by the negligence of the wireless provider who owns or operates small wireless facilities or utility poles in the right-of-way, any agent, officer, director, representative, employee, affiliate, or subcontractor of the wireless provider, or their respective officers, agents, employees, directors, or representatives while installing, repairing, or maintaining facilities in rights-of-way.

6.2. Except for a wireless provider with an existing franchise to occupy and operate in the rights-of-way, during the period in which the wireless provider's facilities are located on the Division's rights-of-

way, the Division may require the wireless provider to carry, at the wireless provider's own cost and expense, the following insurance:

6.2.1. Property insurance for its property's replacement cost against all risks;

6.2.2. Workers' compensation insurance, as required by law; or

6.2.3. Commercial general liability insurance with respect to its activities on the Division's rights-of-way to afford minimum protection limits consistent with its requirements of other users of Division's rights-of-way, including coverage for bodily injury and property damage. The Division may require a wireless provider to include the Division as an additional insured on the commercial general liability policy and provide certification and documentation of inclusion of the Division in a commercial general liability policy as reasonably required by the Division.

6.3. A wireless provider may self-insure all or a portion of the insurance coverage and limit requirements required by the Division. A wireless provider that self-insures is not required, to the extent of the self-insurance, to comply with the requirement for the naming of additional insureds under this section. A wireless provider that elects to self-insure shall provide to the Division evidence sufficient to demonstrate its financial ability to self-insure the insurance coverage and limits required by the Division.

6.4. The Division may impose reasonable and nondiscriminatory requirements for bonds, escrow deposits, letters of credit, or any other type of financial surety to ensure removal of abandoned or unused wireless facilities or damage to the right-of-way or Division property caused by the wireless provider or its agent.