



ROW
RIGHTS-OF-WAY

Promoting Broadband Access Through Public Rights-of-Way and Public Lands

2002 NARUC Summer Meetings in
Portland, Oregon
July 31, 2002

**The options listed within this report are the product of the
Study Committee on Public Rights-of-Way and do not necessarily reflect the views of NARUC.**

RIGHTS-OF-WAY

The National Association of Regulatory Utility Commissioners (NARUC) has recognized that while governmental entities have a legitimate and important role in managing their rights-of-way and public lands, the rights-of-way practices of certain governmental entities have emerged as a barrier to the deployment of advanced telecommunications and broadband networks. NARUC believes that it has a key public policy role to support a pro-deployment, pro-consumer policy that ensures timely and cost-based access to rights-of-way. This policy role was recognized through the passage of a resolution at the NARUC Annual meetings held in Washington D.C. on February 13, 2002. As a consequence of this resolution, a rights-of-way study committee was created and charged with developing options for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks. The study committee consists of State Commission representatives from the NARUC Telecommunications and Finance & Technology Committees. Other participants from industry and groups representing state and local government were involved in the process. The five subgroups, and their chairs and staff, are as follows:

Commissioners

Public Lands - Commissioner Paul Kjellander of Idaho
State Legislation - Commissioner Bob Nelson of Michigan
State and Local Policy Initiatives - Commissioner Angel Cartagena of Washington D.C.
Federal Legislative and Policy - Commissioner Terry Deason of Florida
Condemnation - Commissioner John Burke of Vermont

Staffers

Public Lands - Joe Cusick of Idaho
State Legislation - Ken Roth of Michigan
State and Local Policy Initiatives - Pam Melton of Washington D.C.
Federal Legislative and Policy - Jason Fudge & John Mann of Florida
Condemnation - Peter Bluhm of Vermont
Art Work - Laura Gilleland-Beck of Florida

TABLE OF CONTENTS

<u>CHAPTER ONE</u>	1
STATE LEGISLATION	1
INTRODUCTION	1
A SUMMARY OF STATE LEGISLATION	2
MICHIGAN BROADBAND MODEL	14
MODEL RIGHT-OF-WAY ACCESS ACT	18
<u>CHAPTER TWO</u>	25
GOVERNMENT AND INDUSTRY INITIATIVES	25
BEST PRACTICES FOR PUBLIC RIGHTS-OF-WAY ACCESS FOR PROVIDERS OF TELECOMMUNICATIONS SERVICES	25
<u>CHAPTER THREE</u>	28
PUBLIC LANDS	28
INTRODUCTION	29
SUMMARY	30
RECOMMENDATION	31
<u>CHAPTER FOUR</u>	32
FEDERAL LEGISLATIVE AND POLICY	32
INTRODUCTION	32
SUGGESTED CHANGES IN FEDERAL LEGISLATION	33
SUGGESTED CHANGES IN THE ADMINISTRATION OF ROW LAWS	34
FCC Complaint Process	34
Time Limitation for Local Government Response to ROW Request	35
Other FCC Action	35
Web Page	36
Model Application	36
Suggested Model Fee Structure	37
Mediation	37
706 Report	38
NARUC Resolution	39
NTIA Report	39
National Broadband Principles	39
FCC Enforcement Mechanism	39
CONCLUSION	40
<u>CHAPTER FIVE</u>	42
CONDEMNATION	42

ATTACHMENTS

ATTACHMENT A - THE MIDVALE TELEPHONE PROJECT 44
ATTACHMENT B - RATES BY STATE 59
ATTACHMENT C - LINKS 72
ATTACHMENT D - ASSESSMENT OF THE EXISTING POLICIES ON BROADBAND ACCESS
AND FEES FOR FEDERAL RIGHTS-OF-WAY 77
ATTACHMENT E - STATE BY STATE STATUS REPORT 152
ATTACHMENT F- RESOLUTION ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND PUBLIC
LANDS, FEBRUARY 2002 WINTER MEETINGS IN WASHINGTON, D.C. 175
ATTACHMENT G - RESOLUTION ON RECOMMENDATIONS FOR PROMOTING BROADBAND
FACILITY ACCESS TO PUBLIC RIGHTS-OF-WAY AND PUBLIC LANDS FOR 2002
NARUC SUMMER MEETING AT PORTLAND, OREGON 177
ATTACHMENT H - §253 179
ATTACHMENT I - IROW’S SUPPLEMENTAL VIEWS ON THE NARUC STUDY GROUP’S
REPORT ON RIGHTS-OF-WAY 180
ATTACHMENT J - RIGHTS-OF-WAY: LOCAL GOVERNMENTS’ VIEW 183

CHAPTER ONE STATE LEGISLATION

I. INTRODUCTION

In a resolution adopted on February 13, 2002, NARUC created a Study Committee on Public Rights-of-Way to “develop recommendations for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks.” The Study Committee divided its work plan among five subgroups, one of which is the State Legislation subgroup (excluding condemnation issues) chaired by Commissioner Robert B. Nelson of the Michigan Public Service Commission. The remit of the State Legislation subgroup is to survey existing state legislation, identify some of the best ideas in recent enactments, and develop “best practices” that could serve as a recommended model for future legislation.

Section 253 of the federal Telecommunications Act of 1996, 47 U.S.C. § 253, has provided an impetus for reforming right-of-way access on the state level. Consequently, this survey has focused on states that have enacted right-of-way access legislation since the federal act. The survey includes legislation enacted by the following states:

- | | |
|---------------|--------------------|
| 1. Arizona | 11. Missouri |
| 2. California | 12. Nebraska |
| 3. Colorado | 13. North Dakota |
| 4. Florida | 14. Ohio |
| 5. Illinois | 15. Oregon |
| 6. Indiana | 16. South Carolina |
| 7. Iowa | 17. Texas |
| 8. Kansas | 18. Virginia |
| 9. Michigan | 19. Washington |
| 10. Minnesota | |

Section II of this paper summarizes right-of-way reforms in recent legislation.

On March 14, 2002, Michigan Governor John Engler signed into law a package of bills designed to promote the deployment of ubiquitous, economical broadband service. One of the bills, the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, Public Act 48 of 2002, is particularly relevant, in that it embodies standards and practices designed to overcome existing barriers to right-of-way access in Michigan. (Michigan has had prior experience implementing statutory right-of-way standards in Article 2A of the Michigan Telecommunications Act, Mich. Comp. Laws § 484.2251 et seq.¹ Public Act 48 builds upon that experience.) This statute positions Michigan as a leader in ongoing efforts to introduce state legislative reforms that make right-of-way access available

¹ Article 2A was enacted in 1995 and is repealed by Public Act 48, effective November 1, 2002. However, the new act restates the substance of the Article 2A standards in several respects. 2002 Mich. Pub. Acts 48, § 15. When appropriate, this paper will provide citations to both enactments.

on terms that are fair, administratively efficient, nondiscriminatory, and pro-competitive. The end result should provide a boost to the widespread deployment of broadband service. Although some of the new provisions address circumstances that may be unique to Michigan, the basic framework of the statute is a case study of practices that could potentially enhance the fairness and efficiency of right-of-way access in most states. The Committee believes that this framework merits extended discussion as a guide for future state legislation. The statute's provisions are discussed in Section III.

Finally, Section IV makes selective judgments regarding which of the previously enacted standards and provisions should serve as a basis for future model state legislation. Its recommendations are stated in the form of proposed model state legislation.

II. A SUMMARY OF STATE LEGISLATION

A. An Overview.

Nancy J. Victory, Assistant Secretary of Commerce for Communications and Information and Administrator of the National Telecommunications and Information Administration, has outlined four broad areas of contention that may arise when service providers interact with local or municipal governments over right-of-way access issues. Those four areas are: (1) the timeliness of the process for securing a permit, (2) fees, (3) "third tier" regulation that duplicates the jurisdictional oversight of federal and state agencies, and (4) regulatory treatment that favors some right-of-way users over others.² Because Ms. Victory's outline is a concise statement of a wide range of contemporary concerns, it can serve as a good framework for surveying and discussing state legislative practices in this paper.

Most state legislation enacted contemporaneously with the federal Telecommunications Act of 1996 contain standards that, in broad terms, require local permitting and fee assessment functions to be reasonable, competitively neutral, and nondiscriminatory. Most also impose generalized prohibitions against unreasonable fees, delay, and entry barriers. As a number of states can attest, it is often not enough to enact as standards worthy policy objectives that do not prescribe or proscribe more specific conduct. Attempts to enforce standards stated only in general terms often mean protracted litigation that, by itself, deters competitive entry and the introduction of advanced services.

As Ms. Victory also observed, "there are always two sides to each story."³ Local governments have an obvious stake in right-of-way management. As political subdivisions, they are directly responsible for the local interests most immediately affected by activities occurring within streets and rights-of-way. Thus, any effort to promote state legislative reform cannot ignore legitimate local concerns for public health, safety, and welfare. Moreover, the diversity of local conditions cautions against recommending "one size fits all" solutions. Most local governments are not predisposed against the introduction of new technologies and services and are not trying to wall off their communities from the economic and educational benefits of broadband deployment. However, the few that do persist in imposing undue burdens can have an effect that is disproportionate to their size. For example, a single suburban

² Nancy J. Victory, Address Before the Third Annual James H. Quello Communications Policy and Law Symposium (March 16, 2002).

³ *Id.*

government located within a metropolitan area can jeopardize a project based on constructing a fiber optic ring to serve numerous political subdivisions.

The majority view of the Committee is that the status quo has shortcomings. In many instances, right-of-way access is not as available as it should be. Parochial concerns sometimes slow, and occasionally halt, competition in communications services and the accelerated deployment of new technologies. Recent enactments suggest that state legislatures can alter right-of-way access issues for the better.

The task of the Study Committee is to identify and recommend solutions that will help all stakeholders. With respect to those issues in which providers and local governments are frequently in conflict, it may be necessary to strike balances that do not completely satisfy all interested persons. The objective of this survey is to identify and promote specific standards, requirements, or practices that potentially suggest more effective means of accomplishing the policy objectives set forth in 47 U.S.C. 253 without compromising the fair and efficient implementation of legitimate local concerns.

B. A Framework of Competitive Concerns.

1. Timeliness of Permitting Procedures.

In addressing the permitting process, some right-of-way statutes make a distinction between a general consent to conduct operations and install facilities within a municipality (or its rights-of-way) and specific permission to engage in construction, make an excavation, divert normal traffic, or otherwise create a physical disruption at a certain time and place. The general consent traditionally takes the form of a franchise (now termed, in **Washington**, a master permit), and the specific permission to construct facilities is sometimes referred to as a construction permit (in **Washington**, it is known as a use permit). See Wash. Rev. Code § 35.99.010(3), (8). The Washington State law provides explicit time frames by which a municipality must grant a master permit, 120 days, and a use permit, 30 days. Some states may accommodate separate grants of general and specific permission, even though their right-of-way statutes do not expressly acknowledge or distinguish between both forms of permission.

In **Michigan**, the state law displaces the historical franchise requirement with a statutory permit, but it does not discuss or prescribe locally imposed ordinances that regulate a grant of specific permission to excavate a street. However, some municipalities in Michigan do prescribe detailed regulations concerning the latter pursuant to their general powers provided in the state constitution and statutes, and those local regulations are permissible if they are consistent with the right-of-way statute and other provisions of state law.

a. *Time limits.* Some states require local governments to take action on an application for a permit within a fixed number of days. We believe this is an effective mechanism to ensure that telecommunications providers obtain timely access to the public rights-of-way.

1. Right-of-way legislation in **Kansas** and **Washington** provide separate deadlines for general permission and a specific construction permit:

a. **Kansas** –

- 90 days for a contract franchise. Kan. Stat. Ann. § 12-2001(h).

- 30 days for “any permit, license or consent to excavate, set poles, locate lines, construct facilities, make repairs, effect traffic flow, obtain zoning or subdivision regulation approvals, or for other similar approvals.” *Id.* § 17-1902(i).

a. **Washington** –

- 120 days for a master permit (“general permission . . . to enter, use, and occupy the right of way for the purpose of locating facilities”), subject to extension. Wash. Rev. Code § 35.99.030(1)(b).

- 30 days for a use permit (“permission . . . to enter and use the specified right of way for the purpose of installing, maintaining, repairing, or removing identified facilities”). *Id.* § 35.99.030(2).

2. **Missouri**’s 31-day deadline addresses right-of-way permit applications relating to a specific excavation. Mo. Rev. Stat. § 67.1836.3.
3. Other state statutes impose a single deadline for processing applications and either do not authorize two tiers of permits or do not set separate time provisions for each type of permission.
 - a. **Indiana** – 30 days, Ind. Code § 8-1-2-101(a).
 - b. **Michigan** – 90 days, Mich. Comp. Laws § 484.2251(3) (reduced to 45 days in 2002 Mich. Pub. Acts 48, § 15[3]).
 - c. **Ohio** – 30 days, Ohio Rev. Code § 4939.02(F).
 - d. **Virginia** – 45 days, Va. Code §§ 56-458.D, -462.D.

b. *Streamlined enforcement based on arbitration.* Some states have enacted a procedure for resolving disputes concerning permit decisions that can include binding arbitration, if both the applicant and municipality agree. The applicant seeks initial administrative review from the governing body of the municipality, which usually must be completed within a fixed time period and must result in a written ruling. Arbitration may then occur. The following incorporate the arbitration procedure (with nearly identical wording in each statute):

1. Iowa Code § 480A.5.
2. Mo. Rev. Stat. § 67.1838.
3. N.D. Cent. Code § 49-21-28.

2. Fees.

· *Reasonableness standard.* Most recent enactments set standards that limit fees to the “reasonable cost” of managing rights-of-way (or some variation of this terminology) without prescribing fixed amounts or formulas.

- 1) Ariz. Rev. Stat. § 9-582, subsec. B (“All application fees, permit fees and charges . . . shall be . . . directly related to the costs incurred by the political subdivision in providing services relating to the granting or administration of applications or permits [and] also shall be reasonably related in time to the occurrence of the costs.”).
- Cal. Gov’t Code § 50030 (“[A]ny permit fee . . . shall not exceed the reasonable costs of providing the service for which the fee is charged . . .”).
- Colo. Rev. Stat. § 38-5.5-107(1)(b) (“All fees and charges . . . shall be reasonably related to the costs directly incurred by the political subdivision in providing services relating to

the granting or administration of permits [and] also shall be reasonably related in time to the occurrence of such costs.”).

- Ind. Code § 8-1-2-101(b) (“[A] municipality or county executive may . . . require by ordinance fair and reasonable compensation [which] may not exceed the municipality’s or county executive’s direct, actual, and reasonably incurred costs of managing the public right-of-way caused by the public utility’s or department of public utilities’ occupancy.”).
- Iowa Code § 480A.3 (“A local government may recover from a public utility only those management costs caused by the public utility’s activity in the public right-of-way.”).
- Mich. Comp. Laws § 484.2253 (repealed in 2002 Mich. Pub. Acts 48) (“Any fees or assessments . . . shall not exceed the fixed and variable costs to the local unit of government in granting a permit and maintaining the right-of-ways, easements, or public places used by a provider.”).
- Minn. Stat. § 237.163, subd. 6(b) (“Fees . . . must be . . . based on the actual costs incurred by the local government unit in managing the public right-of-way . . .”).
- Mo. Rev. Stat. § 67.1840.2(1) (“Right-of-way permit fees . . . shall be [b]ased on the actual, substantiated costs reasonably incurred by the political subdivision in managing the public right-of-way.”).
- Neb. Rev. Stat. § 86-301(4)(b) (“All public highway construction permit fees or charges shall be directly related to the costs incurred by the municipality in providing services relating to the granting or administration of permits [and] shall also be reasonably related in time to the occurrence of such costs.”).
- N.D. Cent. Code § 49-21-26 (“A political subdivision may recover from a telecommunications company only those management costs caused by the telecommunications company activity in the public right of way.”).
- Ohio Rev. Code § 4939.03(B) (“The [construction permit] fee shall be limited to the recovery of the direct incremental costs incurred by the political subdivision in inspecting and reviewing any plans and specifications and in granting the associated permit.”).
- Wash. Rev. Code § 35.21.860(1)(b) (“A fee may be charged . . . that recovers actual administrative expenses incurred by a city or town that are directly related to receiving and approving a permit, license, and franchise, to inspecting plans and construction, or to the preparation of a detailed [statutory environmental] statement . . .”).
- Some statutes additionally list examples of specific types of costs that may be recovered:
 - A typical example is **Minnesota**, which provides that recoverable right-of-way management costs include “such costs, if incurred, as those associated with registering applicants; issuing, processing, and verifying right-of-way permit applications; inspecting job sites and restoration projects; maintaining, supporting, protecting, or moving user equipment during public right-of-way work; determining the adequacy of right-of-way restoration; restoring work inadequately performed after providing notice and the opportunity to correct the work; and revoking right-of-way permits.” Minn. Stat. § 237.162, subd. 9.
 - Ind. Code § 8-1-2-101(b).
 - Kan. Stat. Ann. § 17-1902(n) (related to construction or specific use permit).
 - Mo. Rev. Stat. § 67.1830(5).

- The statutes cited for **Indiana** and **Missouri** take the additional step of explicitly foreclosing the exaction of fees to recover rent for the economic or property value of the rights-of-way.
- b. *Fixed or formulaic fees.* A few states have adopted mechanisms that set a fixed schedule of fees or a formula which, in some cases, may be unrelated to providers' actual impact on the public rights-of-way for determining a fixed fee.
- **Illinois** imposes state and municipal telecommunications infrastructure maintenance fees as a combined percentage of gross retail revenues. The state fee is 0.5%. 35 Ill. Comp. Stat. § 635/15. The municipal fees cannot exceed 1% in municipalities with a population of 500,000 or less, or 2% in municipalities with a population of 500,000 or more. 35 Ill. Comp. Stat. § 635/20.
 - **Florida** enacted a harmonized state and local communications services tax system, which functions as a sales or use tax assessed on the retail price of telecommunications services. Fla. Stat. § 202.10 et seq. The local tax component varies by locality. Of the combined state and local tax rate (which can exceed 10%), 0.24% is earmarked to replace permit fees foregone by local governments that opt to participate in the tax collection system instead of collecting fees. Fla. Stat. §§ 202.19, 337.401(3)(c).
 - The **Kansas** statute authorizes cities to charge fees as follows:
 - Each city may impose either (1) an access line fee of up to \$2.00 per access line per month, or (2) a gross receipts fee of up to 5% on local services. Kan. Stat. Ann. § 12-2001(j).
 - It may also assess a one-time franchise application fee to cover “reasonable, actual and verifiable costs of reviewing and approving the contract franchise.” *Id.* § 12-2001(g).
 - It may assess use permit fees as reimbursement for “reasonable, actual and verifiable costs” relating to issuing, processing, and verifying a permit application; repairing and restoring excavations and damages; and conducting inspections. The city may also require a performance bond. *Id.* § 17-1902(n).
 - **Oregon** –
 - Cities and towns may charge a privilege tax of up to 7% of gross revenues. Or. Rev. Stat. § 221.515. *Quest Corp. v City of Portland*, 200 F. Supp. 2d 1250 (D. Or. 2002) (granting summary judgment rejecting claim that 47 U.S.C. § 253 preempts statutory privilege tax).
 - The state Department of Transportation may charge a permit fee for use of state highways in accordance with a fixed fee schedule (until January 2, 2006). 2001 Or. Laws ch. 2, § 2.
 - There is no provision for counties to charge a permit fee for public roads located outside of cities. Or. Rev. Stat. § 758.010.
 - **South Carolina** authorizes municipalities to implement a two-tiered tax system.
 - A. A business license tax of up to 0.75% of retail telecommunications gross income. S.C. Code Ann. § 58-9-2220.
 - A. A franchise or consent fee for the installation or construction of physical facilities in public rights-of-ways. The maximum permissible fee is based on municipal population and ranges from \$100 for a population of 1,000 or less to \$1,000 for a population of more than 25,000. S.C. Code Ann. § 58-9-2230.

- **Texas** municipalities assess right-of-way fees as an average rate per access line. The rate is based on a formula applied by the Public Utilities Commission and is pegged to average municipal fees collected in 1998. Tex. Loc. Gov't Code ch. 283.
- In **Virginia**, the state Department of Transportation annually calculates the Public Rights-of-Way Use Fee as an average rate per access line. The average weights public highway miles at \$425 per mile and new installations at \$1 per linear foot. Va. Code § 56-468.1.
- **Michigan**, as set forth in Public Act 48 (discussed *infra*).

c. *In-kind compensation.* Most recent statutes prohibit municipalities from obtaining free or discounted telecommunications services or the preferential use of telecommunications facilities in exchange for granting right-of-way access.

- Colo. Rev. Stat. §§ 38-5.5-107(3), -108(2).
- Fla. Stat. § 202.24(2).
- Iowa Code § 480A.4.
- Kan. Stat. Ann. §§ 12-2001(o)(5), 17-1902(h)(4).
- Minn. Stat. § 237.163, subd. 7(d).
- Mo. Rev. Stat. § 67.1842.3.
- Neb. Rev. Stat. § 86-301(6).
- N.D. Cent. Code § 49-21-27.
- Ohio Rev. Code § 4939.03(A).
- Or. Rev. Stat. § 221.515(3).
- Tex. Loc. Gov't Code § 283.055(n).
- Va. Code §§ 56-458.E, -462.E.
- Some states permit in-kind compensation, subject to statutory constraints.
 - **Arizona** permits a political subdivision and a telecommunications licensee or franchisee to agree to an in-kind arrangement, but the costs of the in-kind facilities offset the provider's obligation to pay local transaction privilege taxes or linear foot charges (applicable to interstate services) and must be equal to or less than the taxes or charges. Ariz. Rev. Stat. § 9-582, subsec. D.
 - “The in-kind facilities . . . shall remain in possession and ownership of the political subdivision after the term of the existing license or franchise expires.” *Id.*
 - “[A] political subdivision shall not require a telecommunications corporation to provide in-kind services, make in-kind payments or pay a fee in addition to the fees [authorized in the act] as a condition of consent to use a highway to provide telecommunications services.” *Id.*
 - **Washington** permits cities and towns to obtain access to ducts, conduits, or related structures of a service provider, subject to conditions that include the payment of compensation sufficient to recover the provider's incremental costs. If the municipality allows the in-kind facilities to be used to provide service to the public, it must compensate the provider on the basis of fully allocated costs. Wash. Rev. Code § 35.99.070.

3. “Third Tier” Regulation.

- a. *Centralization of authority in a state agency.* One approach is to create a state agency or authority to collect the fees, disburse a share of the fee revenues to local governments, and displace or preempt fee collection as a local governmental function. Conceivably, this model could apply to other regulatory functions historically associated with franchises. For example, several states have transferred responsibility for dispute resolution from local administrative procedures or courts to state public utility commissions. See Ind. Code § 8-1-2-101(a); 2002 Mich. Pub. Acts 48, §§ 6(2)-(3), 7, 18.

The following statutes consolidate fee collection and disbursement functions in a state agency:

- Illinois Telecommunications Municipal Infrastructure Maintenance Fee Act, 35 Ill. Comp. Stat. ch. 635.
 - Florida Communications Services Tax Simplification Act, Fla. Stat. § 202.10 et seq. See Fla. Stat. § 337.401.
 - **Michigan**, under new Public Act 48 (discussed *infra*).
- b. *Unrelated permit conditions.* Some statutes prohibit local regulations that set requirements unrelated to right-of-way management or intrude upon matters committed to state or federal jurisdiction.
- An example is **Florida**: “A municipality or county may not use its authority over the placement of facilities in its roads and rights-of-way as a basis for asserting or exercising regulatory control over a provider of communications services regarding matters within the exclusive jurisdiction of the Florida Public Service Commission or the Federal Communications Commission, including, but not limited to, the operations, systems, qualifications, services, service quality, service territory, and prices of a provider of communications services.” Fla. Stat. § 337.401(3)(g). See also *id.* § 337.401(3)(b).
 - **Texas** and **Kansas** list specific matters that are exempt from local regulation. By way of example, the **Texas** statute provides: “Police power-based regulation of certificated telecommunications providers may not include activities that are governed by this chapter or are within the sole business discretion of the certificated telecommunications provider. . . . A municipality specifically may not impose regulations on certificated telecommunications providers that are not authorized by this chapter, including:
 - “(1) requirements that particular business offices be located in the municipality;
 - “(2) requirements for filing reports and documents with the municipality that are not required by state law to be filed with the municipality and that are not related to the use of a public right-of-way;
 - “(3) inspection of a provider’s business records except to the extent necessary to conduct an authorized review of the provider to ensure compliance with the access line reporting requirements of this chapter . . . ; and
 - “(4) approval of transfers of ownership or control of a provider’s business, except that a municipality may require that a provider maintain current point of contact information and provide notice of a transfer within a reasonable time.” Tex. Loc.

Gov't Code § 283.056(c). See also Kan. Stat. Ann. §§ 12-2001(e)(5), (o), 17-1902(h).

- **Arizona** provides an exclusive list of matters that may be the basis for permit conditions: “As a condition of issuing a license or franchise to use the public highways to construct, install, operate and maintain telecommunications facilities, or a renewal thereof, a political subdivision may impose reasonable, competitively neutral and nondiscriminatory requirements on applicants which may include only:
 - “1. Proof that the applicant has received a certificate of convenience and necessity from the Arizona corporation commission.
 - “2. Public highway use requirements.
 - “3. Mapping requirements.
 - “4. Insurance, performance bonds, indemnification or similar requirements.
 - “5. Enforcement and administrative provisions, consistent with this section.” Ariz. Rev. Stat. § 9-583, subsec. B.
 - Mo. Rev. Stat. § 67.1836.1(4).
 - Neb. Rev. Stat. § 86-301(2).
 - S.C. Code Ann. § 58-9-2240.
 - Wash. Rev. Code § 35.99.040(1)(a).
 - **Michigan** prohibits permit conditions that are unrelated to right-of-way management. Mich. Comp. Laws § 484.252 (restated in 2002 Mich. Pub. Acts 48, § 15[4]).
- c. *Non-facilities-based providers.* Some statutes expressly state that non-facilities-based providers (e.g., telephone resellers) are not subject to permitting or fee requirements when they provide services to end-use customers located within a municipality.
- Fla. Stat. § 337.401(3)(c)1.a.(I).
 - Ohio Rev. Code § 4939.03(E).
 - See 2002 Mich. Pub. Acts § 8(5) (“The fee required under this section is based on linear feet occupied by the provider regardless of . . . whether the facilities are leased to another provider.”).
 - This is implicit in most statutory schemes. But cf. Tex. Loc. Gov't Code § 283.055(i), which shifts responsibility to pay fees from the wholesale provider of access lines to the resale provider that serves the end-use customer.

4. Discriminatory Treatment.

In keeping with 47 U.S.C. § 253, most recent state enactments contain a general prohibition against discrimination and mandate competitive neutrality. To the extent that disparities relate to the fees assessed to different providers (some of which have historically been subject to negotiation), modifying the statutory fee standard as discussed in II.B.2 may provide more uniformity in treatment. Beyond that, it is somewhat less clear what has been done to equalize the treatment of various right-of-way users, particularly in light of the differences in regulation accorded to different technology sectors under federal law. This discussion attempts to highlight certain issues addressed in state legislation that implicate competitive neutrality.

- a. *Wireless services.* Several state statutes exempt wireless service from permit or fee obligations or otherwise differentiate wireless carriers from wireline providers on the ground that they do not physically occupy or use public rights-of-way.
- Several statutes exclude the airwaves, as used for wireless or cellular services, from the definition of public right-of-way.
 - Ind. Code § 8-1-2-101(b).
 - Iowa Code § 480A.2, subsec. 3.
 - Kan. Stat. Ann. §§ 12-2001(c)(8), 17-1902(a)(1).
 - 2002 Mich. Pub. Acts 48, § 2(j), (k).
 - Minn. Stat. § 237.162, subd. 3.
 - Mo. Rev. Stat. § 67.1830(8)(a).
 - N.D. Cent. Code § 49-21-01, para. 16.
 - S.C. Code Ann. § 58-9-2230(D).
 - Tex. Loc. Gov't Code § 283.002(6).
 - Va. Code §§ 56-458(B), -462(B), exclude commercial mobile radio service providers from paying fees.
 - The tax collection schemes enacted by **Illinois** and **Florida**, which appear to have the rationalization of communications taxes as one of their objectives, explicitly apply to the gross revenues of wireless services. See also S.C. Code Ann. § 58-9-2220, which imposes a business license tax on retail telecommunications services, including mobile telecommunications services.
 - *Query:* Is it consistent with principles of nondiscrimination and competitive neutrality to exempt wireless providers from paying fees that are uniformly assessed to other facilities-based providers?
- b. *Cable services.* Some states exempt cable television franchises from regulatory statutes relating to right-of-way access.
- The following exempt cable services or operators by excluding them from the definitions of “telecommunications” or similar terms that trigger the statutes:
 - Ariz. Rev. Stat. § 9-581, para. 4.
 - Colo. Rev. Stat. § 38-5.5-102(3).
 - 35 Ill. Comp. Stat. § 635/10(b).
 - Iowa Code § 480A.2, subsec. 4.
 - Minn. Stat. § 237.162, subd. 4.
 - The following indicate that municipalities retain the ability to negotiate and implement cable franchise agreements and collect franchise fees as authorized by federal law, even though some of the parties’ rights and obligations with respect to right-of-way access may be statutorily modified:
 - Ind. Code § 8-1-2-101(d).
 - Mo. Rev. Code § 67.1830(5).
 - Ohio Rev. Code § 4939.03(D).
 - S.C. Code Ann. § 58-9-2210.
 - Wash. Rev. Code § 35.21.860(1)(d).

- **Florida** exempts cable franchising authority from the statutory right-of-way access provisions, but it applies the communications services tax to cable services instead of permitting municipalities to negotiate and collect cable franchise fees. Fla. Stat. § 337.401(3)(a)2.
 - A few statutes draw a distinction between the cable television and non-cable services provided by cable operators and subject only the non-cable services to new statutory right-of-way access and fee requirements.
 - **Michigan**'s new law preserves the ability of municipal governments to enter into cable franchises and collect franchise fees based on cable television revenues (but not broadband modem revenues), but it requires cable television operators that provide telecommunications and information services to pay cumulative statutory right-of-way fees. 2002 Mich. Pub. Acts 48, §§ 8(11)-(12), 13(6), 16.
 - Similarly, the **Arizona** statute provides:

“A political subdivision may not discriminate against a cable operator in its provision of telecommunications services if that cable operator complies with requirements applicable to telecommunications corporations. Nothing in this subsection limits the authority of any political subdivision to license cable systems and to establish conditions on those licenses consistent with federal law.”

Ariz. Rev. Stat. § 9-582, subsec. G.
- c. “*Grand fathered*” Franchises. Most states that have enacted new models of right-of-way regulation provide some type of exemption for already existing local ordinances or contractual arrangements between providers and local governments. These run the gamut from statutes that exempt all franchises for the remaining life of the agreement, see, e.g., Iowa Code § 480A.6, to those that provide incentives and disincentives to induce the parties to convert to the new system voluntarily. An example of the latter is **Florida**, which allows a local government either to participate in the state and local communications services tax system or to continue to collect its own permit fees. If it retains its own fee structure, it may collect no more than its management costs and may not charge any provider more than \$100. Fla. Stat. § 337.401(3)(c)1.a.(I).
1. *Query*: Is it discriminatory to enact legislation to “level the playing field” with respect to right-of-way access, but at the same time exempt existing franchises with remaining terms that may extend years into the future? Are there legal obstacles that would prevent state legislatures from reforming existing franchises?
 2. *Statewide franchises*. A variation of this issue is that some states historically granted telephone companies a general statutory right to use the public highways for their facilities. This can present difficult legal issues if a state later adopts legislation or implements policies that retract or modify the rights that the telephone company claims it secured when it originally constructed the facilities and began offering public service.⁴ A few states acknowledge these claims in recent legislation:

⁴ See Russell v Sebastian, 233 U.S. 195; 34 S. Ct. 517; 58 L. Ed. 912 (1914); TCG Detroit v City of Dearborn, 206 F.3d 618, 625-26 (6th Cir. 2000).

2. **Arizona** and **Washington** exempt a provider with an existing statewide franchise from certain requirements:
 2. Ariz. Rev. Stat. § 9-582, subsec. A, para. 2, exempts a statewide franchise holder from obtaining a license or franchise from the political subdivision. See also Ariz. Rev. Stat. §§ 9-582, subsec. E, -583, subsec. F. The statute further provides: “A political subdivision may distinguish between a telecommunications corporation [with a statewide franchise] and other telecommunications corporations to a justifiable extent based on differences in legal rights.” Id. § 9-583, subsec. E.
 2. Wash. Rev. Code § 35.99.030 provides a similar exemption from the master permit requirement.
 2. The new **Michigan** statute indicates that providers claiming statewide franchises are subject to the fee and permitting provisions. 2002 Mich. Pub. Acts 48, § 5(2).
- d. *Exclusive use provisions.* Some statutes prohibit a provider from securing exclusive rights or privileges.
- Kan. Stat. Ann. § 12-2001(e)(3).
 - Mo. Rev. Stat. § 67.1842.1(5).
 - Tex. Loc. Gov’t Code § 283.052(a)(1).

C. Other Statutory Provisions that Facilitate Right-of-Way Access and Administration.

This survey has noted a number of statutory provisions that do not directly redress competitive imbalances or remove entry barriers. However, they may facilitate right-of-way access on a fair and pro-competitive basis by improving the uniformity and clarity of standards and the efficiency of local administration. By balancing legitimate concerns of interested stakeholders, this type of provision may give assurance that perceived problems will be resolved and reduce the chances that disputes will end in litigation.

The following notes some practices that may promote a more efficient right-of-way process:

1. *Provider recovery of fees.* If there is some statutory assurance that providers will recover the fees they pay, they may be less disposed to dispute them. The ability to recover fees assessed on a uniform basis may mitigate any adverse effect on competition.
 - Some states indicate that the provider has a right to recover the fees through the rate structure it charges to its customers.
 - 220 Ill. Comp. Stat. § 5/13-511.
 - Iowa Code § 476.6, subsec. 24.
 - N.D. Cent. Code § 49-21-30.
 - Others provide for a direct pass-through of the fees to the provider’s customers in the form of a line item on customer bills.
 - Kan. Stat. Ann. § 12-2001(r).
 - Mo. Rev. Stat. § 67.1840.3.
 - S.C. Code Ann. § 58-9-2270.
 - Va. Code 56-468.1.G.

2. *Restoration of right-of-way after construction or excavation.* Several states have enacted provisions imposing an explicit obligation on a right-of-way user to restore rights-of-way to their former condition. Most statutes include enforcement provisions that allow the municipality to do the restoration work and charge the user for its costs. As noted below, a few make provisions for situations in which complete restoration to the right-of-way's preexisting condition is not feasible.

- Fla. Stat. § 337.402.
- Ind. Code § 8-1-2-101(b).
- Kan. Stat. Ann. § 17-1902(k).
- Mich. Comp. Laws § 484.2251(3) (restated and amplified in 2002 Mich. Pub. Acts 48, § 15[3], [5]).
- Minn. Stat. § 237.163, subd. 3. The statute also allows “a degradation fee in lieu of restoration to recover costs associated with a decrease in the useful life of the public right-of-way caused by the excavation.” *Id.* subd. 3(b).
- Mo. Rev. Stat. § 67.1834. The statute requires the permittee “to guarantee for a period of four years the restoration of the right-of-way in the area where such right-of-way user conducted excavation and performed the restoration,” *id.* § 67.1834.1, but it prohibits the political subdivision from recovering compensation for degradation in the permit fee, *id.* § 67.1830(5).
- Ohio Rev. Code § 4939.03(C).
- Va. Code § 56-467.

3. *Maps of Right-of-Way Facilities.* Maintaining maps showing the location of existing facilities can be important to local governments that administer right-of-way permits and to providers seeking to install new facilities.⁵ On the other hand, retrofitting map obligations on providers that have already maintained facilities in place for decades can be an expensive proposition. Due to trenching, repaving, grading, and other road work that changes the relative location of facilities, maps of existing facilities are not always reliable sources of information and should not preempt the need for “one call” centers to locate underground facilities before excavation. In addition, mapping requirements that vary in format, information, and medium from one jurisdiction to another can create unnecessary barriers.

- The **Minnesota** statute authorizes local government units to require the information necessary to develop a right-of-way mapping system. Minn. Stat. §237.162, subd. 8(6)-(7) (definition of authority to manage the public right-of-way). For an elaboration of the **Minnesota** mapping requirements, see applicable rules promulgated by the Public Utilities Commission to establish statewide construction standards. Minn. R. 7819.4000, .4100.
- See also Ariz. Rev. Stat. § 9-583, subsec. B.

⁵ Providers have concerns about disclosing competitively sensitive information to governmental entities that are unable to protect such information from mandatory public disclosure. This also raises network safety and homeland security issues. To counter the risks of a possible disclosure, some statutes provide for enhanced protection of confidential information. In its statute, **Florida** maintains the confidentiality of “proprietary confidential business information,” Fla. Stat. § 202.195, although this excludes “schematics indicating the location of facilities for a specific site that are provided in the normal course of the local governmental entity’s permitting process,” *id.* § 202.195(2). See also Kan. Stat. Ann. § 12-2001(p); 2002 Mich. Pub. Acts § 6(5); Neb. Rev. Stat. § 86-301(7).

4. *Indemnification.* A couple of statutes include a detailed provision setting forth the terms by which telecommunications providers must agree to indemnify the municipality.
 - Kan. Stat. Ann. §17-1902(q). This statute (as well as others) permits a city to require a performance bond as a means of insuring “appropriate and timely performance in the construction and maintenance of facilities located in the public right-of-way.” *Id.* §17-1902(n)(5).
 - Tex. Loc. Gov’t Code § 283.057.

III. MICHIGAN BROADBAND MODEL

A. An Overview.

Public Acts 48, 49, and 50 of 2002 are a tie-barred package of legislation that establishes a linkage between Michigan’s dual policy objectives of facilitating access to local rights-of-way for communications facilities and promoting a build-out of broadband facilities and services.

1. Public Act 48, the Metropolitan Extension Telecommunications Rights-of-Way Oversight (METRO) Act, establishes a uniform system for regulating access to, and fees paid for the use of, public right-of-ways. This piece of the legislative package is the most relevant to this discussion.
2. Public Act 49, the Michigan Broadband Development Authority Act, establishes a governmental bonding authority to raise capital and provide financing for the statewide development of a broadband infrastructure.
3. Public Act 50 provides tax credits. The first type of credit acts as an incentive for providers to make capital investments in broadband facilities. The second provides a measure of compensation to providers for the right-of-way maintenance fees that they will incur under the METRO Act. (The METRO Act prohibits any increase in rates to recover the fees.) Both credits reduce the intangibles property tax imposed on telecommunications companies under Mich. Comp. Laws 207.1 et seq.

B. Promoting Competition through Right-of-Way Reform.

The METRO Act addresses existing competitive issues (as outlined in Section II), both by introducing new innovations and by borrowing liberally from, and building upon, some of the “best practices” in prior state legislation:

1. “Third Tier” Regulation.

The METRO Act establishes a centralized system of fee collection that applies uniformly to facilities-based communications carriers using rights-of-way in Michigan. It continues to delegate actual permitting decisions to local units of government, subject, however, to uniform standards that

circumscribe permitting discretion and provide means of effective redress for erroneous or anti-competitive decisions.

- The METRO Act creates the METRO Authority as an autonomous state agency. Implementation of the METRO Act is a shared responsibility of the METRO Authority and the state Public Service Commission.
- Broadly speaking, the METRO Authority’s role is administrative—it assesses and collects right-of-way maintenance fees and disburses them to each eligible municipal government (in accordance with an allocation formula set forth in sections 10-12 of the METRO Act).
 - Municipalities may not impose additional or inconsistent fees. METRO Act § 4(1).
 - The fee proceeds disbursed by the METRO Authority “shall be used by the municipality solely for rights-of-way related purposes.” METRO Act § 10(4).
- The Commission’s role is primarily adjudicative (mediation, dispute resolution, enforcement).

2. Permitting Procedure.

a. *Time limits.* The period for local governments to resolve applications for local permits is 45 days. METRO Act § 15(3). The METRO Act further prohibits the unreasonable denial of a permit. *Id.*

b. *Streamlined enforcement.* The METRO Act provides a fast-track dispute resolution process to be administered by the Commission.

- Mediation is the initial step to resolve disputes relating to either (i) the local permit application or (ii) right-of-way construction activities (after a permit is issued). METRO Act §§ 6(2), 7.
 - If the dispute concerns a permit application, “[t]he [C]ommission may order that the permit be temporarily granted pending resolution of the dispute.” METRO Act § 6(2).
 - In either type of dispute, the Commission appoints a mediator within seven days of a request for mediation.
 - The mediator has 30 days to issue recommendations.
 - Parties have 30 days to appeal the mediation recommendations to the Commission for review.
 - The Commission has 60 days to decide the dispute, subject to a 30-day extension, if the interested parties agree.
 - If the dispute concerns post-permit construction activities, “[t]he [C]ommission shall issue its determination within 15 days from the date of the request [to review the mediation recommendations] if a municipality demonstrates that the public health, safety, and welfare require a determination before the expiration of the 60 days.” METRO Act § 7.
- Other complaints arising under the METRO Act are subject to Section 18, which incorporates procedures, deadlines, and remedies comparable to complaints filed under the Michigan Telecommunications Act. See Mich. Comp. Laws § 484.2203.

- The Commission issues a final order after a contested case hearing within 180 days (subject to a 30-day extension if the principal parties agree). Mich. Comp. Laws § 484.2203(11).
- The Michigan Telecommunications Act provides emergency relief procedures. Mich. Comp. Laws § 484.2203(2)-(6). See also METRO Act § 6(3).

3. Fees.

The METRO Act imposes a uniform fee system and prohibits local governments from imposing inconsistent fees. The fee provisions incorporate legislative findings regarding the reasonable, actual costs of providing right-of-way access, including administrative costs. The fee structure forecloses the collection of rent for the property value of the rights-of-way.

- Providers pay, directly to the municipal government, a nonrecurring \$500 fee with each permit application. METRO Act § 6(4). This obligation is subject to the following exceptions:
 - A provider holding a permit issued under the repealed provisions of the Michigan Telecommunications Act, Mich. Comp. Laws § 484.2251 et seq., need not apply for a new permit. METRO Act § 5(1).
 - A provider claiming a statewide franchise is not required to pay the fee if it applies for a permit in accordance with Section 5(3) of the METRO Act.
 - A cable television operator need not apply for a new permit to provide information or telecommunications services if it holds a cable franchise that is comparable to a METRO permit. METRO Act § 8(11).
- Providers using the rights-of-way pay to the METRO Authority an annual maintenance fee of 5¢ per linear foot in most cases. METRO Act § 8.
 - Fees paid by a provider are subject to a cap based on Ameritech’s average fees paid per access line.
 - As set forth in Section 8(21) of the METRO Act, a provider may seek a waiver of fees for up to ten years as an incentive to invest in telecommunications service in underserved areas.
 - A 40% fee discount is available to provide an incentive for several providers to enter into cooperative arrangements to share rights-of-way and coordinate construction activities. METRO Act § 9.
 - Different fee provisions apply to cable television operators that provide telecommunications or information services (including broadband Internet access). Their annual maintenance fee obligation is 1¢ per linear foot (cumulative to cable franchise fees owed to municipal governments). METRO Act § 8(11). The fee obligation can also be satisfied by making qualifying broadband investments. Id. § 8(12).
- Provider complaints concerning fee assessments issued by the METRO Authority are “subject to a de novo review by the [C]ommission.” METRO Act § 17.

4. Discriminatory Practices.

- a. *Expansive scope of permit and fee provisions.* The METRO Act addresses discriminatory practices by expanding its scope to encompass more right-of-way users and by prescribing uniform standards of conduct that apply to competing providers.
 - The METRO Act applies to traditional telephone companies that have historically claimed immunity from right-of-way permits or fees under statewide franchises.
 - Municipal governments or utilities, educational institutions, and energy utilities that market telecommunications services to the public are subject to the METRO Act. METRO Act § 8(18)-(20). A local government may not grant preferential treatment to a municipally owned telecommunications or broadband provider or discriminate against privately owned providers. *Id.* § 14.
- b. *Grand fathering.* Although Section 4 of the METRO Act preserves rights under permits issued prior to the effective date of the act, municipalities are ineligible to participate in the fee mechanism unless they conform their existing fee arrangements to the act. METRO Act § 8. Maintaining eligibility to receive funding should act as an incentive for each municipality to amend inconsistent local laws and manage its rights-of-way in compliance with the act.

C. Other Provisions.

1. *Provider recovery of fees.* Providers may not raise their telecommunications rates to recover the fees incurred under the METRO Act. The tax credit provision for right-of-way maintenance fees in Public Act 50 is “the sole method of recovery for the costs required under this act.” METRO Act § 8(17). A provider of basic local exchange service is eligible for the credit only if it is not already over collecting its total service long run incremental cost. *Id.* § 8(14), (16).
2. *Restoration of right-of-way after construction or excavation.* Section 15(5) of the METRO Act requires providers to restore right-of-way construction or excavation sites to their preexisting condition.
3. *Maps of right-of-way facilities.* The METRO Act contains provisions that will enable municipalities to develop and maintain maps of right-of-way facilities. METRO Act § 6(5), (7)-(8).
4. *Standardized application forms.* The METRO Act adopts standardized application and permit forms as previously developed by the Commission. METRO Act § 6(1). Section 6(1)-(2) further provides that the applicant and the municipality may agree on additional information requests and different permit provisions. The current version of the Commission’s standardized application package appears on its web site, at <http://cis.state.mi.us/mpsc/comm/rightofway/rightofway.htm>.

IV. MODEL RIGHT-OF-WAY ACCESS ACT

This discussion states its conclusions and recommendations in the form of model state legislation. The model does not attempt to prescribe solutions to all of the issues previously noted, but it recognizes that the historical development of law varies from state to state. Moreover, states have made different policy choices on some of the subsidiary issues (e.g., how to regulate wireless and cable television for right-of-way purposes). The model does not address these types of issues. In instances in which state legislation has suggested a divergence of approaches, the model may present alternatives.

Title.

Section 1. This act may be cited as the “Model Right-of-Way Access Act.”

Definitions.

Section 2. As used in this act:

(a) “Commission” means the [state public utility commission].

(b) “Municipal permit” means a grant of a right of access to the rights-of-way within the boundaries of a unit of government for the purpose of owning or exercising control over facilities that provide telecommunications, telecommunications services, or other wire communications.

(c) “Provider” means a person or its affiliate that provides telecommunications, telecommunications services, or other wire communications, or installs facilities utilized to provide such services, and includes a municipally or governmentally owned entity that provides telecommunications or other wire communications services to customers.

(d) “Right-of-way” or “public right-of-way” means the area on, below, or above a public highway, road, street, alley, public easement, or other corridor or space dedicated for public travel, which is subject to the jurisdiction or control of a unit of government.

(e) “Specific use permit” or “construction permit” means permission to undertake construction, make an excavation, install, repair, maintain, or remove facilities, or otherwise engage in activities that affect normal public use or traffic, at a specific time and location within a public right-of-way.

(f) “Telecommunications facilities” or “facilities” means facilities and equipment, including without limitation, cable, fiber, conduit, ducts, poles, cabinets, vaults, manholes, handholes, and other associated equipment and appurtenances, used directly or indirectly in providing telecommunications, telecommunications services, or other wire communications.

(g) “Unit of government” means the State, any county, city, town, or village within the State, or any subdivision, agency, department, or instrumentality of the State, or of any such county, city, town, or village.

Comment. The terminology “telecommunications, telecommunications services, or other wire communications” is not defined. For purposes of this discussion, the terms are used in the same sense as in the federal Communications Act of 1934. See 47 U.S.C. § 153. More specific definitions would vary according to state law. Specific exemptions for wireless service or services provided by cable television operators are beyond the scope of this discussion.

The distinction between a “municipal” and a “specific use” or “construction permit” is borrowed from the Washington statute and is intended to accommodate states that recognize a two-tiered process for obtaining right-of-way access. As outlined in Section 3, the purpose of a municipal permit is to confer a general license granting ongoing right-of-way access within the municipality, subject to appropriate time and place restrictions, and to ensure the applicant’s awareness and acceptance of the local framework for right-of-way administration. It enables a unit of government to maintain a registry identifying the entities that use its rights-of-way. A specific use permit authorizes a project or activity occurring at a given time and place, as set forth in Section 6.

For states that prefer a single-tier permit system, references to the specific use permit may be stricken, and the “municipal permit” may be referred to simply as a permit. As another variation of a single-tier structure, the statute could recognize the need for more extensive application procedures that apply on a one-time basis to the first application made by a provider to install or construct facilities and could institute more streamlined procedures for subsequent applications.

Municipal Permit.

Section 3. *Alternative #1: State Control.* (1) A provider seeking to own or exercise control over telecommunications facilities in the public rights-of-way of a municipality shall obtain a permit by applying to the Commission [or other designated state permitting agency]. A provider shall not install, maintain, or control facilities in a right-of-way without a permit.

Alternative #2: Local Control.

(1) A provider seeking to own or exercise control over telecommunications facilities in the public rights-of-way of a unit of government shall obtain a municipal permit by applying to the unit of government. A provider shall not install, maintain, or control facilities in a right-of-way without a municipal permit.

(2) The unit of government shall, upon application, grant a municipal permit, except as provided in this section. This section shall not limit the unit of government’s responsibility to protect the health, safety, and welfare of the public and ensure the reasonable management of the public rights-of-way on a competitively neutral and nondiscriminatory basis.

(3) The unit of government shall act reasonably and promptly on an application for a municipal permit and shall grant or deny the application within 45 days. A municipal permit shall not be unreasonably denied.

(4) As means of ensuring the reasonable management of the public rights-of-way, the unit of government may do any of the following:

(a) Require a provider to register with the unit of government and provide the following information, including changes in information on an ongoing basis:

(i) The name and address of the provider.

(ii) The name, address, and telephone number of a contact person.

(iii) Proof of insurance or self-insured status that is adequate to demonstrate financial responsibility for claims.

(b) Require maps of facilities as set forth in section 8.

(c) Impose reasonable requirements to secure the restoration of rights-of-way as set forth in section 9.

(d) Impose indemnification and insurance requirements as set forth in section 10.

(5) A unit of government shall not do any of the following:

(a) Impose requirements concerning the location of business offices.

(b) Impose requirements relating to the reporting of information, or inspections of business records, that are not reasonably related to the enforcement of the fee provisions in this act.

(c) Require approval of a transfer of ownership or control of the provider's business or assets, except that it may require the registration information set forth in subsection (4)(a) of this section to be updated.

(d) Exercise regulatory authority concerning matters within the jurisdiction of the Commission or the Federal Communications Commission, including, but not limited to, a provider's operation, systems, legal and financial qualifications, services, service territory, service quality, and rates or prices.

(e) Require a provider to waive its right to judicial or administrative review or any other remedies as a condition of obtaining a municipal or specific use permit or using the rights-of-way.

(6) Any conditions of a municipal permit shall be reasonable, competitively neutral, and nondiscriminatory and shall be limited to the unit of government's management of the rights-of-way within its jurisdiction.

(7) Obtaining a permit or paying the fees required under this Act does not give a provider a right to use conduit or utility poles.

(8) This section shall not limit a municipality's right to review and approve, as specifically authorized by Federal or state law, FCC or PUC authority, a providers access to and ongoing use of public rights-of-way or limit the municipalities authority to ensure and protect the health, safety and welfare of the public .

Comment. Subsection (5)(a)-(c) is based on Tex. Loc. Gov't Code § 283.056(c) and Kan. Stat. Ann. § 12-2001(o). Subsection (5)(d) is based on Fla. Stat. § 337.401(3)(g). Subsection (6) is based on 2002 Mich. Pub. Acts § 15(4).

Prohibition against Exclusive Use, Rights, or Privileges.

Section 4. Nothing in this act authorizes a provider to secure an exclusive franchise, right, or privilege. No provider may have an exclusive right of access or use concerning a right-of-way.

Fees.

Section 5. *Alternative #1: Reasonable Cost Standard.* (1) The unit of government may assess fees that do not exceed the reasonable, actual administrative costs incurred by the unit of government in managing the public rights-of-way with respect to governmental activities that are directly attributable to reviewing a provider's application, approving and administering a municipal or specific use permit granted to the provider, and inspecting plans, specifications, maps, and construction.

Alternative #2: Fixed Fee Structure.

(1) The unit of government shall [or may] assess the following fees as fair and reasonable means of providing reimbursement for the reasonable, actual administrative costs incurred by the unit of government arising from a provider's access to the public rights-of-way:

(a) A one-time application fee of \$XXX for each provider seeking right-of-way access within the unit of government.

(b) An annual maintenance fee of x¢ per linear foot of right-of-way occupied by the provider's facilities, regardless of the quantity or type of facilities using the right-of-way.

- (2) The fees assessed to each provider shall be competitively neutral and nondiscriminatory.
- (3) A unit of government may not assess fees relating to right-of-way access or use that are inconsistent with the provisions of this act. The fees assessed to a provider may not include any payment for rent or other compensation for the economic value of the property rights used within the rights-of-way.
- (4) The unit of government shall not demand or collect fees in the form of in-kind facilities or services or otherwise request in-kind facilities or services as a condition of granting right-of-way access.
- (5) *[Applicable only to state control model set forth as Alternative #1 in Sec. 3:]* The Commission [or other state permitting agency] shall approve and implement a procedure for distributing the fees collected under this section, or the portion allocable to the reimbursement of costs incurred in managing rights-of-way, to each unit of local government on a fair and equitable basis.

Comment. Alternative #2 is based upon the Michigan METRO Act.

Specific Use Permit.

Section 6. (1) To facilitate the orderly administration and management of construction and other activities that may cause temporary disruptions to the physical condition or normal use of rights-of-way, a unit of government may require a provider to obtain a specific use or construction permit. A specific use permit shall specify the routes of proposed facilities and the locations and times of the proposed construction or other uses of rights-of-way described in the provider's application and may not impose any condition that is unrelated to the proposed construction or use or is inconsistent with the terms and conditions of the provider's municipal permit.

(2) The unit of government shall act reasonably and promptly on an application for a specific use permit and shall grant or deny the application within 30 days.

(3) The unit of government shall administer specific use permits in a reasonable, competitively neutral, and nondiscriminatory manner. If the provider holds a municipal permit, a unit of government may deny or withhold a specific use permit only if all of the following occur:

(i) The routes, locations, or times specified in the application would create unreasonable interference with the public use as a means of travel or access to other places or an unreasonable effect on the public health, safety, or welfare or the management of public rights-of-way,

(ii) The unit of government proposes alternative routes, locations, or times that would not cause the provider to assume an unreasonable amount of additional expense or an unreasonable deterioration in its ability to provide the proposed services, and

(iii) The provider rejects all reasonable alternatives proposed by the unit of government.

Comment. Section 6 is loosely based on Kan. Stat. Ann. § 17-1902.

Shared Use Arrangement.

Section 7. (1) If two or more providers implement a shared use arrangement, each provider participating in the arrangement shall be entitled to a XX% discount of the [annual maintenance] fees imposed by this act for each linear foot of right-of-way in which the qualifying shared use occurs.

(2) A shared use arrangement requires each participating provider to do all of the following:

(a) Occupy and use the same poles, trenches, conduit, ducts, or other common spaces and physical facilities jointly with another provider.

(b) Coordinate the construction or installation of its own facilities with the construction schedules of another provider so that any pavement cuts, excavation, construction, or other activities taken to construct or install new facilities occur contemporaneously and do not impair the physical condition, or interrupt the normal uses, of the shared rights-of-way on more than one occasion.

(c) Enter the shared use arrangement and construct new facilities in the shared rights-of-way after the effective date of this act.

Comment. See 2002 Mich. Pub. Acts 48, § 9.

Maps.

Section 8. (1) As a condition of issuing a specific use or construction permit [or allowing access to a right-of-way for a construction project], the unit of government may require a provider to submit project data showing the proposed facilities.

(2) Within 90 days of the substantial completion of the construction, the unit of government may require the provider to submit data reflecting any changes from the data submitted under subsection (1) of this section.

(3) The unit of government may require each provider to submit data showing the provider's existing facilities within the rights-of-way of the municipality. The deadline for submitting the data shall be reasonable in light of the amount of data requested.

(4) For purposes of this section, "data" means maps, plans, schematics, diagrams, or other engineering drawings, as maintained in the ordinary course of business, showing the routes, horizontal locations and above-ground height. The data shall contain reasonably adequate detail to enable the unit of government to develop a right-of-way mapping system. The unit of government may require the data to be in a paper or electronic format. Data shall also include below-ground depth for facilities placed in the public rights-of-way after the date of the enactment of this Act.

Comment. This provision provides units of government with notice of the location of proposed facilities, and at the same time, recognizes the cost and expense of providing such information.

Right-of-Way Restoration.

Section 9. (1) A provider undertaking an excavation or construction, or installing, repairing, maintaining, or removing facilities, in a right-of-way shall promptly repair all damage caused by its activities to the pavement or surface and all installations within or near the right-of-way and shall promptly restore the right-of-way and surrounding areas to the condition existing immediately preceding the excavation or construction. If the provider fails to make adequate repairs, the unit of government in which the excavation has taken place, upon reasonable prior notice to the provider, may make the repairs necessary to restore the right-of-way to the condition existing immediately preceding the excavation or construction and charge the provider for the costs incurred in making the repairs.

(2) The unit of government may require that a bond be posted by the provider in an amount that does not exceed the reasonable cost of ensuring that the right-of-way and surrounding areas are restored to the condition existing immediately preceding the excavation or construction.

Indemnification.

Section 10. (1) The unit of government may require a provider using the rights-of-way pursuant to a municipal or specific use permit to defend, indemnify, and hold harmless the unit of government and its officers and employees against liability, damages, costs, expenses, and reasonable attorney fees arising from claims for bodily injury, death, property loss, or other compensable legal damages attributable to the alleged negligence or other wrongful acts or omissions of the provider or its employees, agents, officers, affiliates, representatives, contractors, or subcontractors relating to its use of the rights-of-way. The indemnity provided by this section does not apply to any liability resulting solely from the negligence of the unit of government, its officers, employees, contractors, or subcontractors. If the provider and the unit of government are found jointly liable by a court of competent jurisdiction, liability shall be apportioned comparatively in accordance with the laws of this state without waiving any governmental immunity available under state law and without waiving any defenses of the parties under state or federal law. This section is solely for the benefit of the unit of government and provider and does not create or grant any rights to any other person or entity.

(2) A provider or unit of government shall promptly notify the other in writing of any known claim or demand against the provider or unit of government related to or arising out of the provider's activities in a right-of-way.

Comment. Section 10 is based on a compilation of Kan. Stat. Ann. § 17-1902(q)-(r); Tex. Loc. Gov't Code § 283.057; and Minn. R. 7819.1250.

Arbitration.

Section 11. If a provider and the unit of government dispute matters arising under this act, including actions taken on an application for a municipal or specific use permit, terms and conditions imposed in a permit, arrangements for coordinating and minimizing the disruption of rights-of-way and ensuring the efficient construction of facilities, the restoration of the rights-of-way after construction, and measures necessary to protect the public health, safety, and welfare, the parties shall invoke the dispute resolution procedures set forth in this section. Either party may initiate the procedures in this section by notifying the Commission, which shall appoint a mediator to make recommendations within 30 days from the date of the appointment for a resolution of the dispute. The Commission may order that a municipal or specific use permit be temporarily granted pending resolution of the dispute. If any of the parties are unwilling to comply with the mediator's recommendations, any party to the dispute may request the Commission for a review and determination of a resolution of the dispute. The determination by the Commission under this section shall be issued within 60 days from the date of the request to the Commission. The Commission shall issue its determination on an accelerated basis if the unit of government demonstrates that the public health, safety, and welfare require a determination before the expiration of the 60 days. The interested parties to the dispute may agree to an extension of the 60-day requirement.

Comment. See 2002 Mich. Pub. Acts 48, §§ 6(2), 7. The Michigan procedure provides for a schedule that requires approximately four months to complete under normal circumstances (if the parties do not agree to a voluntary resolution or accept the mediation recommendation). Because the statutory deadlines may not be appropriate for all states, the model statute omits some of the time requirements in the Michigan statute.

Municipal providers.

Section 12. When performing duties required under this act, the unit of government shall not discriminate against, nor grant preferential treatment to, any provider that is owned or controlled by a governmentally owned entity.

Comment. This section recognizes the potential role of municipal government in deploying and providing broadband services and ensures that it receives even-handed treatment with respect to right-of-way access. In view of the embryonic nature of broadband regulation and the uncertainty as to the business model that will promote widespread availability to the public, competition in the broadband sector may pit private providers against municipal entities. To the extent that municipal providers benefit from being closely attuned to the needs of individual communities, they may be able to vigorously compete with private providers, and regulators should encourage them in this regard within the bounds of “fair play.” At this juncture, it would be premature to assume which sector or business model would be most effective in making broadband services available throughout the entire mass market, including rural or economically disadvantaged communities. For an anecdotal discussion of these considerations, see Peter Wayner, *Bypassing the Carriers, a Burg Goes Broadband*, N.Y. TIMES, April 25, 2002, at E8.

CHAPTER TWO

GOVERNMENT AND INDUSTRY INITIATIVES

DISCUSSION PAPER ON BEST PRACTICES FOR PUBLIC RIGHTS-OF-WAY ACCESS FOR PROVIDERS OF TELECOMMUNICATIONS SERVICES

The following "Best Practices" guidelines are intended to provide greater certainty to units of government and industry of the meaning of fair and reasonable access to and use of the public rights-of-way.

- Access to public rights-of-way (PROW) should be extended to all telecommunications providers, as long as they receive authorization from the appropriate unit of government, given that such authorization shall not be unreasonably denied.
- Government entities should act on a request for authorization to operate and place equipment in the PROW within a reasonable and fixed period of time from the date that the request for such access is submitted.
- Authorized providers shall apply for construction permits to place equipment in the PROW with the proper unit of government. Such permits shall be processed within a reasonable and fixed period of time from the date that the request for construction is submitted.
- Fees charged for PROW access shall be published in writing.
- All providers should be subject to equivalent terms and conditions of access to the PROW, subject to reasonable alternatives in particular cases, such as overcrowding and/or alternate route planning.
- For management purposes, the appropriate state or local authority should be able to identify the owner and the location of all facilities in the PROW.
- PROW construction permits shall not contain terms, qualifications, procedures, or other requirements unrelated to the actual management of the PROW. This does not preclude requirements for proof of authorization, indemnification of liability, insurance bonding, or construction route planning.
- Appropriate unit of government authority may take into account relevant public safety concerns, zoning and planning regulations as long as they do not unreasonably discriminate among service providers.
- Standard engineering practices should be used to manage construction in the PROW and to guide the development of any engineering standards involving placement of facilities and equipment in the PROW. Standard engineering practices should include coordination with adjacent landowners where future road improvements will impact construction in the PROW.

To contribute further to the ongoing debate concerning the use of public rights-of-way by members of the telecommunications industry, the State and Local Policy Initiatives subgroup developed a set of uniform rights-of-way management practices and procedures. While there was certain disagreement between local governments and industry, there was also certain agreed-upon principles. The first is that it is appropriate for local governments to manage the use of their rights of way. The legislative history of Section 253 of the Telecommunications Act of 1996 and subsequent case law define the following activities as falling within the "sphere of appropriate rights-of-way management:"

- Coordination of construction schedules.
- Insurance, bonding and indemnity requirements.
- Establishment and enforcement of building codes and other public safety codes, including police and fire codes.
- The tracking of multiple systems that use the rights-of-way, to prevent interference among them.
- General time, place and manner of construction regulations.
- Issuance of permits prior to excavations or construction work.
- Vehicular and pedestrian traffic regulations.
- Relocation procedures.
- Requirements to repair streets to return them to their pre-construction condition.
- Applicant contact information.
- A proposed construction schedule and construction map.

Industry members and units of government together should develop the appropriate scope of each of these activities, keeping in mind the key principle that these regulations should be applied to all users of the rights-of-way, not just telecommunications companies, and that any costs resulting from such management activities must be allocated appropriately among all such users. This management function should be administered, to the greatest extent possible, in a uniform and timely manner. The following practices should be adopted to accomplish these fundamental goals:

Timing

Units of government must act on a request for public rights-of-way access within a reasonable and fixed period of time from the date that the request for such access is submitted, or such request must be deemed approved.

Clarity

The specific steps and appropriate documentation (i.e., documentation must relate to ROW management, rather than the financial, technical, or legal qualifications of the provider) necessary to obtain a permit should be clear and in writing. Each unit of government involved in the process, and its specific requirements, should be identified. To the greatest extent possible, the unit of government that issues permits should be centralized, to avoid requiring multiple or duplicative approvals.

Cooperation

To the extent a unit of government needs to (1) alter the location of facilities placed in the public rights-of-way by telecommunications providers, utilities, or other persons; or (2) coordinate the placement of facilities in the public rights-of-way due to constraints on available space in the existing public rights-of-way, it must develop a process that will allow industry input to fully assess the issues and to develop solutions that accommodate both the government's concerns and each industry member's service goals and needs. To best facilitate a collaborative result, the unit of government responsible for public right of way management should provide ample written notice of its concerns and its intention to develop a plan to address them, and it should provide opportunities for industry members to provide written and in-person comments. Any plan that is adopted should be flexible to accommodate changes in an industry member's service goals. Cooperation and voluntary coordination between users of the public rights-of-way are appropriate; but mandatory requirements such as those imposed on telecommunications providers to construct or offer spare capacity to others, or to require a provider to use the facilities of another should be avoided.

Fees

The industry agrees that a local government is entitled to recover fees directly related to the costs it actually incurs to manage the right-of-way as a result of the telecommunications provider's activities in the right-of-way. However, local governments do not uniformly agree with the industry concerning the nature and amount of such fees. Consequently, issues relating to appropriate fees potentially create delays in the permit approval process. For this reason, permits should not be conditioned on the payment of fees; instead, the fee issue should be resolved in a separate process.

**CHAPTER THREE
PUBLIC LANDS**

**ASSESSMENT OF EXISTING POLICIES
ON BROADBAND ACCESS AND FEES**

INTRODUCTION

When Euclid theorized that the shortest distance between two points is a straight line, he didn't take into account that there might be public rights-of-way in between the two points. Examining issues involved in right-of way can only help a person appreciate the difficulties in navigating a minefield. There is no doubt that reasonable well-designed right-of-way regulations can facilitate the deployment of broadband. Conversely, poorly designed and disparate regulations can markedly slow down the deployment of broadband as well as increase its cost.

This report focuses primarily on the issues of right-of-way (ROW) on federal land. This is not to say that challenges do not exist at the state and local level. Certainly, much work needs to be done to address ways to facilitate broadband deployment in these rights-of-ways. The Study Committee on Public Rights-of-Way believes that government agencies and industries need to work together to produce a best practice approach to allow a more consistent application of ROW requirements in this area.

The focus on right-of-way on federal land may come from a western bias. A look at a map of BLM and Forest Service land would easily explain this. With a preponderance of land held in the western half of the country, no significant broadband route can be built without crossing federal lands. To put some numbers to this point, the total area of the United States is slightly over 3.5 million square miles. The area managed by various federal agencies is approximately 1.1 million square miles with almost two-thirds of that controlled by the BLM or the Forest Service. This does not include the federal highway system.

This report set out to answer three basic questions:

1. Which federal agencies are associated with obtaining right-of-way or access agreements for installation of fiber optics?
2. What are the permitting requirements? How long does the permitting process take? How many years does the lease or permit cover, and can it be renewed at the end of the lease period?
3. What are the range of fees and how are the fees determined? Are the fees different for various purposes (i.e. cable vs. fiber or any other plant or purpose)?

The rights-of-way requirements of the federal agencies are so varied that it makes it impractical to attempt to provide any concise summary of this information. What we have attempted to do is to provide a very broad summary of the main agencies along with comprehensive reference material for the reader. The appendix contains a comprehensive weblink reference sheet of federal agencies that could be encountered in the permitting process.

SUMMARY

Beyond the sheer size of federal lands is the complexity of acquiring ROW permits on these lands. What are the federal policies as regards to broadband deployment? In general, fiber optics is permissible on federal lands, with a permitting process and/or a lease for right-of-way usage required for each agency. All the federal agencies are required to receive fair market value of the land encumbered for access to the right-of-way. The up-front fees usually encompass the price for the permit and the lease for the right-of-way, as well as compensation to the individual agency for the time taken to issue the permit and inspection of the installation. The leases are in the 10 to 30 year range, depending on the agency. The timeline for the permit process varies from agency to agency, with the minimum being one to 2 months, and up to 18 to 24 months or longer if an environmental assessment is required.

There are areas where installations are prohibited, and while these usually are associated with either physical or geographical barriers that make installation problematic, there are locations with cultural barriers to installation, such as sacred burial grounds.

Each agency makes decisions on a case-by-case basis, and within each agency there can be differences among the divisions of that agency. For instance, there are many national forests, each with its own unique physical and cultural characteristics, and the permitting process in one forest may differ from the permitting process in the next forest. The process may also vary within each national forest, as the installation moves from one ranger district to the next. The individual ranger districts in each national forest handle the permitting process for the installation in their ranger district. Therefore, obtaining permits in just one national forest can be a challenge in terms of the range of possibilities for the permitting requirements, as well as the variation in the length of the permitting process between ranger districts.

It appears that the greatest barrier to installation of fiber optics is not the cost of the permits, although that can be significant, but the time it takes to obtain the needed permits and the frustration that accompanies the permitting process.

Attachment A is an anecdotal example of the process gone bad as experienced by Midvale Telephone, a small Idaho LEC. Midvale was attempting to bring service to some previously unserved communities in a remote area of central Idaho. The cost of these delays and the frustration involved would make it almost impossible to entice a small company with limited resources to provide broadband services to these areas.

BLM & Forest Service -For the two largest federal land holders, the BLM and Forest Service, the permitting process can take anywhere from 60 business days, the desired turnaround time for the BLM, to 18 months or more, depending on whether an environmental assessment is required. These permits are generally for thirty years. These agencies have a published price list and the prices vary depending on location. The published price list is included as Attachment B.

Federal Highway Administration - For the federal highway administration, each state has the opportunity to either allow or disallow use of right-of-way on the federal highway system in the state. Based on current information, twenty-eight states allow fiber optics along the interstate, seven states allow limited fiber optics along the interstate, usually for ITS (Intelligent Transportation Systems) or other state purposes, twelve states, Puerto Rico, and the District of Columbia do not allow, or have no experience with, fiber optics along the interstate and three states are not categorized. A matrix of this information is available on the United States Department of Transportation web site at: <http://www.fhwa.dot.gov/realestate/utlilsr.htm> and is included as Attachment E.

US Fish and Wildlife Service - The U.S. Fish and Wildlife Service is part of the Department of the Interior. Its mission is to work with others, to conserve, protect and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people.

The U.S. Fish and Wildlife Service is charged with protecting a healthy environment for people, fish and wildlife, and helping Americans conserve and enjoy the outdoors and our living treasures. The Service's major responsibilities are for migratory birds, endangered species, certain marine mammals, and freshwater and anadromous fish.

The US Fish and Wildlife Service allows rights-of-ways for the public good across USFW Lands where resources are not significantly impacted.

What is the process for getting an Incidental Take Permit? While FWS personnel provide you detailed guidance throughout the process, development of a habitat conservation plan (HCP) is driven by the applicant. The applicant is in charge of deciding whether to pursue a permit. Personnel from the FWS are there to give you technical and procedural guidance and to process applications. The necessary components of a completed permit application are: a standard application form, the HCP, and a National Environmental Policy Act (NEPA) document. The length of time to complete the permitting process depends on the complexity of issues involved, the completeness of the documents submitted by the applicant, and the willingness of the applicant to work with the FWS to resolve the details of the HCP process. Once a completed application is forwarded to the FWS's Regional Office, the typical processing time to issuance/denial of the application is about 100 days. Small, non-controversial applications have been processed in as little as 70 days. The agency's web site is located at: www.fws.gov.

Other agencies which may be encountered are: the National Parks Service, Bureau of Reclamation and the National Marine Sanctuary System. Web sites for these agencies are available on Attachment C.

RECOMMENDATION

While specific recommendations may get to the level of micro management, some things are apparent. There must be a more consistent and manageable process for obtaining right-of-way on federal lands. The Study Committee on Public Rights-of-Way believes that NARUC should work with stakeholders to develop a best practices approach to obtaining permits which encourage and facilitate broadband deployment to rural areas while maintaining a balance with the legitimate concerns of the federal agencies.

APPENDIX

Attachment	A	Midvale Telephone Project to install service in Rural Idaho
Attachment	B	BLM and Forest Service ROW Price List
Attachment	C	List of federal agency Web
Attachment	D	Existing Policies on Broadband Access
Attachment	E	State Highways Accommodation of Broadband Deployment – Status Report

CHAPTER FOUR

FEDERAL LEGISLATIVE AND POLICY

INTRODUCTION

In the 6 years since passage of the 1996 Act, rights-of-way (ROW) issues have emerged as a potential barrier to the deployment of next generation telecommunications networks. While Section 253 of the Communications Act,⁶ added by the 1996 Act, was intended to prevent state and local barriers to entry, ambiguities in the law and inconsistent court rulings have caused increased costs, delays, or in some cases, prevented the deployment of advanced telecommunication facilities. Increasingly, leading policy makers like Chairman Michael Powell of the Federal Communications Commission (FCC) have recognized the impact that rights-of-way issues can have on the speed and cost of deployment.

When it comes to rights-of-way regulation, local governments are concerned with the orderly deployments of the telecommunications infrastructure that will minimize congestion, inconvenience, visual impact and the costs to the citizens resulting from the placement of facilities within the public rights-of-way. To that end, a unit of government has established permitting procedures to preserve the physical integrity of streets and highways and assist in scheduling common trenching and street cuts. Local governments have imposed fees to recover the costs associated with acquiring, maintaining, and managing the public rights-of-way.

The telecommunications industry has raised concerns that local government regulation and compensation are barriers to entry. The industry cites to delays in the permitting process and excessive fees that makes it difficult to deploy its service in multiple jurisdictions. In addition, the industry has alleged that local governments have imposed additional tiers of regulation and have required terms and conditions that are unrelated to the management of rights-of-way. There is concern about certain municipalities and how they have imposed rent-based or profit-generating fees for the use of the right-of-way. Finally, the industry has alleged that local governments have discriminated in their treatment of providers over the terms and conditions of access to rights-of-way.

The National Association of Regulatory Utility Commissioners (NARUC) has recognized that while governmental entities have a legitimate and important role in managing their rights-of-way and public lands, the rights-of-way practices of certain governmental entities have emerged as a barrier to the deployment of advanced telecommunications and broadband networks. NARUC believes that it has a key public policy role to support a pro-deployment, pro-consumer policy that ensures timely and cost-based access to rights-of-way. This policy role was recognized through the passage of a resolution at the NARUC Annual meetings held in Washington D.C. on February 13, 2002.⁷ As a consequence of this resolution, a rights-of-way study committee was created and charged with developing recommendations for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks. The study committee consists of State Commission representatives from the NARUC Telecommunications and Finance & Technology Committees. Other

⁶ See Attachment H for full text of statute.

⁷ See Attachment F - NARUC Resolution regarding rights-of-way.

participants from industry and groups representing state and local government were invited to participate in the process. The five subgroups, and their chairs, are as follows:

Public Lands - Commissioner Paul Kjellander of Idaho
State Legislation - Commissioner Bob Nelson of Michigan
State and Local Policy Initiatives - Commissioner Angel Cartagena of Washington D.C.
Federal Legislative and Policy - Commissioner Terry Deason of Florida
Condemnation - Commissioner John Burke of Vermont

The focus of this document is to present recommendations for change as they relate to Federal Legislative and Policy of rights-of-way. For the past month, participants from cities, counties, and industry have discussed right-of-way issues. They were encouraged to share their views, participate in weekly conference calls and submit written comments. Based on this input and additional research, Florida Commissioner Deason and his staff have created the enclosed draft suggestions for changes to Federal Legislation and Policy on rights-of-way. These draft suggestions were presented to the entire rights-of-way study group in Washington D.C. on April 29, 2002. These suggestions, for both the U.S. Congress and the Federal Communications Commission (FCC), are intended to assist the federal government in fulfilling its statutory obligations with respect to public rights-of-way issues arising under the Telecommunications Act of 1996.⁸

The recommendations presented herein aim to alleviate the concerns raised by the industry. However, with the participation of local governments during the last month, we have realized that those concerns are not widespread. We also recognize the value of, and need for, reasonable management and regulation of the ROW by local governments. Consequently, these recommendations are designed to be transparent to those governments promoting the deployment of advanced services.

SUGGESTED CHANGES IN FEDERAL LEGISLATION

Section 253(a) seeks to ensure that state and local laws, regulations and requirements do not serve as barriers to entry into the telecommunications market, by providing that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Sections 253(b) and (c) retains for state and local governments the authority to manage their public rights-of-way, but requires that management of public rights-of-way be “competitively neutral and nondiscriminatory” and that any fees assessed be “fair and reasonable.” Section 253(d) allows the Federal Communications Commission to preempt violations of Sections 253(a) and (b). As mentioned above, this Section involves “interstate or intrastate telecommunications service.”

In the recent NPRM on cable modem service,⁹ the FCC has tentatively redefined this service as being an “information service” instead of a “telecommunications service.” In doing so, the FCC has decided to regulate this type of services under Title I, instead of Title II. Since Section 253 is in Title II,

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151, et seq. ('96 Act).

⁹ In a Declaratory Ruling adopted March 14, 2002, the FCC concluded that cable modem service is properly classified as an interstate “information service” and is therefore subject to FCC jurisdiction. The FCC determined that cable modem service is not a “cable service” as defined by the Communications Act. The FCC also said that cable modem service does not contain a separate “telecommunications service” offering and therefore is not subject to common carrier regulation. (FCC 02-77)

there is some confusion about whether or not these ROW rules will apply on a going forward basis to information services. In order to maintain the application of Section 253 rights-of-way rules on both cable modem and wireline broadband services, which is currently under consideration, we believe that §253 should be modified to include “information services” or that similar ROW language should be placed in the Title I regulations. By changing the definition of these advanced services, the FCC has introduced potential problems that could lead to renewed legal battles over the applicability of this section.

On the subject of applicability, a review of Section 253 seems to indicate that it does not apply to the federal government.¹⁰ In the trade press, some federal agencies have been criticized for seeking excessive rights-of-way fees from telecom providers for access to federal lands.¹¹ Therefore, should the Congress decide to modify Section 253 to include information services, then they may also want to consider extending the reach of this to federal agencies.

SUGGESTED CHANGES IN THE ADMINISTRATION OF ROW LAWS

The following are some recommended administrative changes that Study Committee on Public Rights-of-Way believes could ameliorate certain problems involving right-of-way disputes:

FCC Complaint Process

Notwithstanding units of government’s jurisdictional objections based upon Section 253 (d), the FCC has been asked to adjudicate numerous individual petitions by carriers that involve the rights-of-way practices of state and local governments. While the FCC has in place a complaint process to handle these ROW disputes, we believe that this process has proven to be inadequate and untimely. At the current time, the FCC has docketed items involving rights-of-way issues that are over a year old.¹² We believe that these delays in processing complaints is unacceptable.¹³ To the extent that the FCC may lawfully assert jurisdiction over these disputes, or Section 253 is amended to include Federal lands, we propose that the FCC set forth a time frame, for both itself and other federal governmental entities, within which these entities should act on a request for either access to the right-of-way or in the case of the FCC, a time certain that a dispute will be resolved. Based on other time frames outlined in the ‘96 Act, we believe that 90 days would afford the Commission ample time to adjudicate a complaint.¹⁴ The

¹⁰ Section 253(a) involves state and local laws. See Attachment H.

¹¹ Note that another ROW study committee is responsible for the topic of public lands.

¹² For example, City Signal Communications, Inc. filed petitions for declaratory relief under Sec. 253 on October 16, 2000. More than 17 months later, this petitions is still pending before the Commission (CS Docket No. 00-253). A November 29, 2000 City Signal Communications petition is still pending (CS Docket No. 00-255). Similarly, the Association of Communications Enterprises, Inc. filed a petition for declaratory ruling and preemption under Sec. 253 on January 18, 2001. Nearly 13 months later, that petition is also still pending.

¹³ "Justice delayed is justice denied." -William Gladstone

¹⁴ Sec. 252. [47 U.S.C. 252] Procedures For Negotiation, Arbitration, and Approval of Agreements. (3) Schedule for review.--The State commission to which a statement is submitted shall, not later than **60 days** after the date of such submission-- (A) complete the review of such statement.

Sec. 271. [47 U.S.C. 271] Bell Operating Company Entry Into InterLATA Services (3) Determination.--Not later than **90 days** after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State.

In the Classic Telephone Preemption Order, the FCC preempted the Cities' decisions denying Classic's franchise applications and stated that the Commission expected the Cities to reconsider Classic's franchise requests **within 60 days**. The Commission based its conclusion that the Cities' franchise denials violated section 253 of the Communications Act, as amended by the Telecommunications Act of 1996, on the Cities' cited concerns regarding

FCC should streamline the agency's decision process so that governmental entities and carriers alike can get timely decisions. The Commission should enact expedited enforcement procedures that will provide a prompt and effective process for resolving disputes. In an industry where time-to-market is crucial, delay can defer or deny a competitor the opportunity to enter a market. FCC Commissioner Martin recognized this problem in a recent address: "Regulatory uncertainty and delay function as entry barriers, limiting investment and impeding deployment of new services. We should work to be faster and more reliable in our decision making. Prolonged proceedings ultimately serve no one's interest, regardless of the substantive outcome."¹⁵

Time Limitation for Local Government Response to ROW Request

Several states have instituted time frames within which a local government must respond to a request to use its rights-of-way. States such as Michigan, Ohio, and Washington, have adopted strict timelines within which a local government must grant a carrier access to the public ROW.¹⁶ In conjunction with their own time frames, the FCC should consider promoting guidelines for state and local requirements to act on a carriers request for public rights-of-way access within a reasonable and fixed period of time. We recommend that the FCC promote a time period of 60 days.

Other FCC Action

The FCC expanded its outreach to local and state government when it created the Local and State Government Advisory Committee (LSGAC) in early 1997.¹⁷ The purpose of the Advisory Committee was to facilitate on-going intergovernmental communication between state and local governments and the FCC. It is comprised of members on both the local level (mayors, city council members) and the state level (legislators, PUC members and tribal organizations). The first policy recommendation that this group made in 1997 was on rights-of-way.¹⁸

Given the ongoing rights-of-way problems discussed above, we suggest that the Commission consider initiating a proceeding with the goal of developing recommended "national best practices" as guidelines for promoting timely access to the state and local public rights-of-way. The FCC could invite representatives from both industry and local governments, including associations, such as LSGAC, NATOA and NARUC, to participate in this proceeding. We believe that interaction among the parties, in such setting, would be beneficial to all concerned.

Greater coordination among state and local jurisdictions with the providers of advanced telecommunications service is critically important in facilitating the deployment to the 40% of rural

the ability of the service area to support two local service providers and the Cities' comparison of the relative merits of Classic and the other carrier. (Report No. CC 97-48)

¹⁵ "Framework for Broadband Deployment" Remarks of Kevin J. Martin, FCC Commissioner, At the National Summit on Broadband Deployment, October 26, 2001.
<http://www.fcc.gov/Speeches/Martin/2001/spkjm101.html>

¹⁶ For example, the Ohio statute provides a carrier access within 30 days of the request, the Michigan statute within 90 days, and the Washington statute within 120 days (although a "use permit" granting access to the public ROW must be issued within 30 days). See Ohio Rev. Code Ann. § 4909.02(F) (Callaghan 1999); Mich. Comp. Laws § 484.2251(3); Washington Rev. Code § 35.99.030 (2001).

¹⁷ <http://www.fcc.gov/statelocal/formalization.htm>

¹⁸ See Attachment D - Advisory Recommendation Number 1: Policy Statement On State and Local Rights-of-Way and Telecommunications Service Competition, June 27, 1997.

homes and business that do not have access to wireline or cable broadband.¹⁹ It will certainly fall to the FCC to engage all the ROW stakeholders in this new cooperative dialogue.

Web Page

Similar to the web pages that the FCC has created for the Federal-State Joint Conference on Advanced Telecommunications Services²⁰ and the FCC Focus on State and Local Government Issues,²¹ we suggest that the FCC consider creating a Rights-of-Way web page. The site could contain any number of items that could be useful to cities and industry alike, such as survey results on state ROW statutes, fees being charged throughout the country, examples of model ordinances and laws,²² information regarding pertinent FCC proceedings, text of relevant speeches by FCC officials and including a summary of decisions impacting the regulation of rights-of-way. We believe that this outreach could improve intergovernmental communication between state and local governments, industry and the FCC.

Model Application

The discretion inherent in the application process affects the manner in which local authorities decide whether or not to grant ROW access to a carrier. Therefore, the FCC should encourage state, county, and local jurisdictions to adopt clear, explicit written standards for timely access to the public ROW. These standards should be limited to specific ROW management issues, such as review of drawings, permitting issues, and inspection of a carriers work in the public ROW. We believe that the FCC could recommend a model application form which could be developed in cooperation with the municipalities and the carriers. Excessive reporting requirements, be they ongoing or at the inception of permitting, impede the process and introduce a “third tier”²³ of regulation that is already being accomplished at the state and federal level. For expediency, application requirements should be consistent from one jurisdiction to the next. We believe the FCC should have a pivotal role in promoting the use of model applications that encourage and further permissible rights-of-way regulation²⁴ and discourage the placement of additional regulation on the Internet.²⁵

¹⁹ As noted by Assistant Secretary of Commerce Nancy J. Victory, broadband service over cable and DSL (combined) platforms is currently available to 50%-60% of rural homes and businesses. Nancy J. Victory, Address to NARUC Broadband Summit, regarding information gathered during NTIA's Oct. 12, 2001 Broadband Forum (Oct. 25, 2001).

²⁰ <http://www.fcc.gov/jointconference/>

²¹ The Web page is entitled: “FCC Focus on State and Local Government Issues.” It can be reached through: <http://www.fcc.gov/statelocal>.

²² For example, in 1999 the 76th Texas Legislature passed legislation that adopted a uniform method to compensate cities for use of public rights-of-way. Tex. Local Gov't Code Ann. §§ 283.001 et seq. (Vernon Supp. 2002). Also see Florida Unified Communications Tax law, Chapter 202, Florida Statutes.

²³ We believe that it was Congress' intention to substantially reduce the role of local governments in the regulation of telecommunications, and thereby prevent them from imposing a “third tier” of regulation that might interfere with, and delay, the deployment of competitive telecommunications networks.

²⁴ For example, items that include such things as construction licenses and submission of engineering site plans; contact information and descriptions of work area and construction schedule; identification of the carrier; maps of the proposed location of the carrier's system; submission of annual maps of facilities in the rights-of-way; minimization of traffic disruption; and remedies for default.

²⁵ For example, items that include such things as a lengthy and complex application process and a exorbitant application fee; excessive requirements mandating description of provider's legal, technical, and financial qualifications; submission of regular financial reports; prohibition of the sale of provider's stock without local

Suggested Model Fee Structure

As with most issues, the most contentious debate over ROW involves the fees that are assessed for access to the ROW. Section 253 mandates that the amounts be fair reasonable, but the ambiguity of this requirement has created enough wiggle room to fill a court room. Industry members have stated that fees should be strictly related to the actual and direct costs incurred by a unit of government arising from providers' access to the public rights-of-way. Units of government have asserted that fees should be based on greater criteria, such as a percentage of the gross revenue of a provider or a fee equal to some "rental value" for use of the public rights-of-way.

We believe that creation of a model fee structure, such as that determined for pole attachments,²⁶ would be impractical for several reasons. First, determination of all the variables that could be incorporated in a ROW determination would be daunting. Secondly, we believe that the contracting parties, the carriers and the cities, should be able to explore options when agreeing to a ROW contract. For the large carriers, a reasonable up-front payment may be acceptable. For a small cash strapped carrier, the city may want to negotiate a deal that involves payment plan in lieu of an up-front payment. While flexibility should be allowed, we also believe that the standard of reasonable fees should be maintained. To this end, we suggest that the FCC survey the carriers in the country to determine what amounts are being paid for access to the rights-of-way. The FCC could then publish this information as a guide for cities to reference when determining the reasonableness of the charges they set for access to the rights-of-way. To prevent unreasonable and excessive demands for compensation, the FCC should adopt a policy of tracking and informing federal agencies, state, county and municipal governments of current assessments for ROW access. We believe that cities empowered with this information are more likely to set ROW rates that reflect the actual and direct costs incurred in managing the public ROW and less likely to assess their constituents an additional telecommunication or Internet tax.

Mediation

As mentioned above, justice delayed is justice denied. To the extent the state public utility commissions could use mediation to settle ROW disputes, disputes that may otherwise go to the FCC, we believe this course would be preferable to court action. No business plan can effectively factor in court delays and cost. Use of the judiciary to decide these matters becomes a barrier unto itself. As noted earlier, we believe the FCC should recommend guidelines within which governmental entities should act on requests for access to rights-of-way and for those cases that are in dispute, the FCC could propose expedited dispute resolution procedures.

The states could play a role in this process. The FCC has generally affirmed the authority of a state to franchise telecommunications providers and to reasonably condition telecommunications providers' activities. Access to the ROW is just like any other telecommunication activity and state commissions are well situated to provide mediation services, as they currently do for interconnection and arbitration disputes. The FCC is ill situated for being "a national zoning board"²⁷ and the courts are

government approval; provision of information on the use or purpose of telecommunications facilities; "most favored nation" obligations on rates and terms of service; and waiver of legal rights to challenge city ordinances.

²⁶ Section 224.

²⁷ Past FCC Chairman Kennard stated his intention to resolve wireless facilities siting problems by working together with state and local officials to find solutions to the problems that all parties can with. He commented that it is not his "intention of turning the FCC into a national zoning board." Remarks by William E. Kennard, Chairman,

not an effective way to speed deployment. Moreover, units of government have maintained that the FCC does not have jurisdiction under Section 253 (d) to preempt state or local dispute resolution mechanisms. To the extent ROW disputes are handled by individual states, such as state PUCs, which is envisioned in Section 253(c),²⁸ then we believe that the “regionalization” of this decision making process could greatly assist regional carriers to develop regional systems.

706 Report

Annually, the FCC creates a report detailing the status of broadband deployment in the US.²⁹ Based on the volume of court cases involving ROW disputes, industry complaints to the FCC, and general sentiment among industry participants that prompt access to ROW under fair and reasonable compensation terms has become a barrier to deployment of network facilities, we suggest that the FCC dedicate a portion of the 706 Report³⁰ to rights-of-way issues. Similar to the inquiry done by the National Telecommunications and Information Administration (NTIA),³¹ we believe the FCC should consider focusing greater attention on ROW issues and the affect they are having on the deployment of advanced services.

To its credit, the FCC in the most recent 706 Report did recognize four key measures with respect to rights-of-way access: (1) that permits should be issued within a fixed and reasonable time, (2) that excessive revenue-based fees and per-foot charges are a barrier to deployment; (3) that governmental entities should not use their control over rights-of-way to impose an additional tier of regulation on carriers; and (4) that governmental entities may not discriminate in their treatment of providers over the terms and conditions of access to public rights-of-way and public lands.³² We believe these general principles should be more fully developed. The Commission should include in its Section 706 report a discussion of the barriers to the deployment of broadband networks associated with the abusive rights-of-way practices of federal, state and local units of government, and steps that need to be taken to abate those practices.

Federal Communications Commission, to WIRELESS '98, Atlanta, Ga., February 23, 1998.

²⁸ Section 253(c) STATE AND LOCAL GOVERNMENT AUTHORITY. -- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

²⁹ Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Notice of Inquiry, CC Docket No. 98-146 (rel. August 9, 2001)

³⁰ Sec. 706. Advanced Telecommunications Incentives. (b) INQUIRY- The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

³¹ NTIA's Inquiry Regarding Deployment of Broadband Networks and Advanced Telecommunications [Docket No. 011109273-1273-01] See question L for specific information on ROW issues. <http://www.ntia.doc.gov/ntiahome/broadband/index.html>.

³² Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Notice of Inquiry, CC Docket No. 98-146 (rel. August 9, 2001)

NARUC Resolution

Based on the suggestions offered in this document, the Study Committee on Public Rights-of-Way should consider a formal resolution that recommends that regulators, academia, and all industry sectors carefully review and consider the recommendations provided in this white paper to reduce the detrimental effect ROW disputes are having on the deployment of advanced telecommunications.

NTIA Report

The National Telecommunications and Information Administration (NTIA), in its recent request for comments on barriers to broadband deployment,³³ specifically asked for comments on local issues affecting broadband deployment, including whether fees typically reflect or exceed actual and direct costs, and whether there are impediments to accessing federal lands that thwart broadband deployment. Numerous telecom providers, from every sector of the industry, provided comments chronicling the extent of ROW problems. We recommend that the NTIA issue a summary report on the ROW comments and suggest policy changes that could help to alleviate ROW impediments to the deployment of broadband facilities and services.

National Broadband Principles

In conjunction with the Federal Administration, specifically the President's Office, the NTIA, and the FCC, we recommend that a set of National Broadband Principles be developed. A component of these principles should be greater clarity of the local role in effecting policy that effects broadband deployment.

FCC Enforcement Mechanism

Currently, there is no penalty mechanism to address unreasonable ROW practices under §253. If, and to the extent that, the FCC asserts jurisdiction over ROW disputes, we believe that the FCC should, through rule making, allow prevailing parties in ROW disputes before the FCC to be granted their legal fees. Carriers that must fight for reasonable ROW access lose not only the critical time-to-market factor, but also must pay costly legal expenses to obtain compliance with the law. This seems patently unfair, and in and of itself, serves as another barrier to deployment. The ambiguities in Section 253 and a lack of an effective enforcement mechanism places the carriers in a jeopardy situation. The net effect is to delay deployment and to increase the cost of constructing an advanced telecommunications network.

Congress established a framework in which the FCC and state and local governments must work together to promote, not impede, competition. The FCC has received numerous petitions that seek preemption of state or local regulations that are alleged to impose undue burdens or excessive costs on telecommunications carriers. By putting consulting and legal fees at risk, should the FCC determine that an action by a municipality is unreasonable, we believe that municipalities may place greater emphasis on negotiating ROW fees in good faith.

³³ NTIA's Inquiry Regarding Deployment of Broadband Networks and Advanced Telecommunications [Docket No. 011109273-1273-01] See question L for specific information on ROW issues.
<http://www.ntia.doc.gov/ntiahome/broadband/index.html>.

CONCLUSION

The emergence of the Internet and the corresponding explosion in data traffic have created a tremendous demand for new telecommunications infrastructure. As a result, there has been, and continues to be, significant increases in the deployment of local, regional, national, and international high speed, fiber optic facilities. This increase in fiber optic deployment activity has led to a corresponding increase in the demand for access to the rights-of-way controlled by federal, state and local governments. The rapid deployment of new facilities for broadband advanced telecommunications services in the United States is contingent, in large part, on carriers gaining access to the public ROW in a timely manner and on reasonable compensation terms. As Congress clearly recognized in Section 253 the 1996 Act, without access to public ROW on a non-discriminatory and competitively neutral basis and paying only “fair and reasonable”³⁴ compensation, the promise of telecommunications competition and the deployment of next generation facilities will not be realized in a timely or cost-effective manner. Be it through education, as has been suggested in several of the recommendations contained in this document, or through some more authoritative mechanism, we believe that further refinement of the application of Section 253 is needed to help promote nationwide deployment of the infrastructure necessary to provide advanced telecommunications services. Therefore, we challenge the U.S. Congress, FCC, NTIA, state PUCs, and local governments to refine and oversee a ROW regime that will benefit consumers by ensuring cost-effective access and enhanced competition. These coordinated actions can lead to the development of a recommended “best practices” for gaining access to the ROW in a timely and cost efficient manner, while at the same time protecting the legitimate interests of local government. Ambiguous policies or untimely enforced rules that delay or prevent deployment or significantly increase deployment costs will undermine network development.

We believe that municipalities should treat their telecommunications infrastructure as a valuable economic asset rather than a revenue source. But because it becomes a money issue and a potential “budget buster”, state and local law governing property rights and eminent domain will continue to play a critical role in determining the rights and responsibilities of parties regarding easements and rights-of-way. But the battle over immediate gain versus sustainable economic growth will continue to be fought. As Bruce Mehlman, Assistant Secretary for Technology Policy, U.S. Department of Commerce, has so aptly stated: “when broadband deployment comes into conflict with state or municipal rules and demands . . . broadband often loses.”³⁵ This loss could effect cities, carriers, and most importantly, consumers who need and want affordable access to broadband.

The provisions of Section 253 serve to balance traditional state and local authority to protect what are essentially intrastate public welfare matters with the FCC’s broad responsibility for overseeing the modern competitive telecommunication age. A federal judge has recently noted that Section 253 was included in the Act as a result of “the as yet uncharted result of a tug of war which occurred between proponents of the Act who wanted to prevent local governments from deterring competition among telecom providers, and local governments, who wanted to maintain control over their rights of way.”³⁶

³⁴ Section 253(c) of the 1996 Act, 47 U.S.C. § 253(c). See Attachment H.

³⁵ Speech by Bruce P. Mehlman, Assistant Secretary for Technology Policy U.S. Department of Commerce, National Summit on Broadband Deployment, Washington, D.C. (October 26, 2001).

³⁶ The Telecommunications Act of 1996: Current Telecommunication Issues of Municipal Interest, Douglas M. Mcgarrah, Esq. and Pat A. Cerundolo, Esq. http://www.fhe.com/news_disp.asp?aid=172

From our understanding, a “one size fits all” approach will not work for ROW regulation. Through light handed regulation and an effort to solicit cooperation among the effected parties, we believe that cooperation will carry the day and that the consumers will benefit from expanded competition and expanded availability of enhanced services. We also believe that this supports FCC Chairman Powell’s call for broadband service existing in “a minimally regulated space.”³⁷ While minimally regulated, we should never lose sight of the importance of this initiative on the economic well being of this country.³⁸ Parochial interest must be set aside if we believe that broadband deployment and the Internet “are so vital that their incapacity or destruction would have a debilitating impact on the defense or economic security of the [entire] United States.”³⁹

³⁷ Michael K. Powell, Chairman, Federal Communications Commission, Press Conference, “Digital Broadband Migration” Part II (Oct. 23, 2001).

³⁸ R.W. Crandall and C.L. Jackson, “The \$500 Billion Opportunity: The Potential Economic Benefit of Widespread Diffusion of Broadband Internet Access,” July 2001.

³⁹ See Executive Order No. 13010 (July 15, 1996).

CHAPTER FIVE CONDEMNATION

A review of the condemnation statutes nationwide leads to the realization that there are three general approaches to the issue. Vermont's statutory approach, T.30 V.S.A. §110-126, is a scheme designed to give the landowner and other third parties ample opportunity to be heard on broad issues, including aesthetics. A decision granting the taking is appealable to the Vermont Supreme Court and the condemnation order is stayed unless the Court or an individual justice vacates such a stay. Many older statutes read in a similar way and while somewhat understandable in a rural state, this approach creates the potential for long delays and thus is undesirable, since it unduly prolongs the deployment process.

On the other extreme is the scheme Texas has adopted in Title 4 Chapter 21 of its Property Code and Chapter 181 of its Utilities Code. That scheme requires a good faith offer to be made by the utility to the owner prior to any litigation and a mutual disclosure of information (primarily appraisals) to be exchanged at that time. If agreement is not reached, a proceeding may be commenced to be heard before Special Commissioners.

The party who "wins" the commissioner hearing (does better than the negotiation offer) also is reimbursed for its costs, including attorneys fees and expert witness fees. If the award and the final offer are equal, the landowner pays the costs.

The order granting the taking goes into effect in an expedited manner and only the issue of damages would normally continue before the Courts in Texas. There is a provision that if the condemnation itself is overturned or if the utility abandons the project after the damage issue is decided then the landowner is entitled to damages for whatever disturbance or loss occurred as a result of the utility's activity on the land.

This scheme appears to be too industry friendly in that the landowner with few resources may be so afraid of being taxed with the utility's costs after hearing that he or she feels compelled to take the utility's offer at the preliminary negotiation stage.

Striking a mid-ground is the Michigan scheme found in Michigan Compiled Laws Annotated Ch. 213 which has the advantage of providing equitable title to the utility with dispatch while allowing the owner to carefully and with deference to his inconvenience assess and argue the real value of what was being taken from him. It does not contain the cost reimbursement provisions of the Texas scheme which as stated above, has the potential to chill the right landowners should have to contest the value of the taking.

There are three goals that any comprehensive condemnation scheme for utility deployment should address:

1. Allow for the utility to deploy without undue delay.
2. Allow for the landowner to have a fair opportunity to present his or her or its argument for the value of all that is being taken and;
3. Allow for a process that provides for a fair treatment of the competing concerns set forth in numbers 1 and 2 above.

Any best practice proposal should streamline the determination of necessity for the taking and bifurcate it from the determination of damages. The proposal should also provide for a fair and adequate opportunity for the landowner to make his case for the value of his loss which is often greater than just the per acre assessment of the land condemned. There should be care taken to assess the true value of the loss created by the taking such as the limitation of use imposed on the remainder of the parcel. Rather than attempt to set out exact provisions, one should use the Michigan scheme as an example of a process which addresses in a sensible way the 3 primary concerns set out above, and thus may act as a good outline for the creation of a fair and comprehensive condemnation statutory scheme.

ATTACHMENT A - THE MIDVALE TELEPHONE PROJECT
THE MIDVALE TELEPHONE PROJECT

**A REGULATORY CHRONICLE
OF THE EFFORT TO BRING TELEPHONE SERVICE
TO THE CENTRAL IDAHO COMMUNITIES OF
BURGDORF, SECESH MEADOWS, WARREN
AND SOUTH FORK SALMON RIVER**

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EXECUTIVE SUMMARY

Summary of Project

In June of 1992 Midvale Telephone Exchange, Inc. (“Midvale”) received authorization from the Idaho Public Utilities Commission (“PUC”) to bring reliable telephone service to the isolated, remote communities Burgdorf, Secesh Meadows, Warren and the South Fork Salmon River area, in central Idaho. The physical disturbance entailed by the project would be minimal. Midvale proposes to plow ½ inch fiber optic cable three feet deep, within existing roadbed, using a two inch shank, and to immediately pack the plow line. The project also will entail placement of several small splicing pedestals, repeaters and power boosters at a few points along the route. Stream crossings will be accomplished by attaching cable to existing bridges.

The roads on which the cable will be placed, by definition, already are disturbed areas. Moreover, they are subject to regular grading—which produces more sediment on an ongoing basis than the one-time plowing of cable. Because the cable will be buried, virtually no maintenance will be required. Most significantly, the project will not alter any stream or take a crop of Snake River Basin water.

From the outset, Midvale worked closely with regulatory agencies and committed up front to extensive mitigation of these modest environmental impacts. In short, this is anything but an environmentally controversial project.

Conclusion

The regulatory process documented here is a classic example of government gone wrong. That a project of this minor environmental dimension would be subjected to three years of regulatory review demonstrates that, under current law and practice, the agencies simply are not capable of rational priority setting.

As a result of these delays, these Idaho communities were denied the speedy installation of reliable telephone service ordered by the state PUC. These communities were without regular telephone service during the forest fires which ravaged much of the area last summer, and are still without such service today, three years after the PUC order.

The delays also have inflicted considerable economic damage on Midvale, a small company of eleven employees. As a result of the delays, financial deadlines have been missed and Midvale’s substantial investment in the project has earned no income over an extended period of time. Large corporations may be able to absorb such costs—and pass them on to their customers. Midvale cannot.

The bottom line is that the task of bringing quality communication service to rural areas is expensive—and marginally cost effective for the private sector under the current regulatory scheme. Now, however, the costs of physically bringing service to these areas is being out-paced by the cost of navigating the increasingly cumbersome, chaotic and unpredictable regulatory review process. The result is that the cost of serving remote customers can rise from thousands of dollars to tens of thousands of dollars per user—an unsustainable burden.

Protecting our nation’s streams and forests is a wise and laudable goal. It seems, however, that the federal agencies have lost the ability to distinguish between genuine environmental threats and environmentally benign projects, such as plowing cable in existing roadbeds. In short, substantial public and private resources were poured into a regulatory process which has produced no meaningful benefit to society. This occurred while other significant social problems go unattended.

If this experience is to be avoided in the future, it is essential that the regulatory process be streamlined, that meaningful and realistic deadlines be established, that agencies be required to keep regulated parties reasonably informed of changes in the status of their applications, and that sensible mechanisms be developed for focusing scarce regulatory dollars on real environmental problems.

Summary of Chronology

The chronology which follows tracks the course of regulatory developments over the last three years. The pattern is one of repeated assurances that everything was on track—upon which Midvale relied—followed by extensive and inexplicable delays.

NEPA

Midvale’s special use application was filed with the U.S. Forest Service (“USFS”) three years ago this August. In order to reduce the USFS’s regulatory burden and speed the review process, Midvale prepared and submitted in June of 1993 a draft Environmental Assessment (“EA”)⁴⁰ in accordance with the National Environmental Policy Act (“NEPA”). Unfortunately, the USFS waited a year before beginning to edit the document (see May 16, 1994 entry in chronology).

After four additional months of revisions, the EA was completed and a FONSI issued on September 7, 1994—two years after the permit application was filed. The accompanying Decision Notice, however, was conditioned upon successful completion of consultation with the National Marine Fisheries Service (“NMFS”) under the Endangered Species Act (“ESA”). ESA consultation was required because of the project’s location within a watershed occupied by endangered salmon—despite the fact that the project would never touch a stream or take a drop of water.

⁴⁰An EA is a preliminary review of anticipated environmental impacts from a proposed action, and is the first step required under NEPA. The EA results either in a Finding of No Significant Impact (“FONSI”), in which case environmental review under NEPA is complete, or in a determination that a full blown Environmental Impact Statement (“EIS”) is required. As discussed below, Midvale’s project eventually resulted in the issuance of a FONSI.

ESA

The convoluted ESA process had begun some time earlier with a draft Biological Assessment (“BS”) prepared by Midvale’s consultant and submitted to the USFS in March of 1993.⁴¹ The USFS might have chosen simply to process the application for this environmentally benign project, seeking informal concurrence from NMFS that the project was not likely to adversely affect endangered species. Instead the USFS chose to split the project into two parts and combine it with two watershed level BAs containing many other projects; one for the Main Stem Salmon and one for the South Fork.

This resulted in NMFS elevating the process to require full blown Biological Opinions (“BO”). Because this would be a lengthy process, NMFS responded to urging from Midvale by removing the component of the Midvale Project included in the South Fork BO, and inserting it into this Main Stem BO. This was done because the Main Stem BO was further advanced in the regulatory process.

Later, the USFS persuaded that the Midvale Project could be broken off entirely from both BOs, and undergo separate informal consultation leading to concurrence (without preparation of a BO on Midvale’s project).

Then, as a result of the fallout from the *PRC v. Thomas, II* litigation,⁴² NMFS undertook a “screening” process with the USFS. The purpose of this screening process was to re-evaluate those projects which could move forward on an expedited, informal level. Most of the projects included in the two watershed BOs (including the Midvale Project) passed muster and were preliminarily approved for concurrence as of March 10, 1995. Inexplicably, however, NMFS failed to act on this for over a month and a half (until April 26, 1995)—despite frequent assurances from NMFS staff that nothing remained to be done and that official action was imminent. During this time, Midvale was unable to make critical commitments necessary to allow the project to move forward.

As of this date, the USFS has received NMFS’s concurrence, and the USFS is expected to issue the special use permit shortly. If that occurs, Midvale will be able to begin construction this summer, but at a substantially higher cost due to the company’s inability to secure materials and labor with sufficient lead times.

Summary of Appendix

A separate appendix to this Regulatory Chronicle contains selected communications from Midvale’s lawyers and consultants to the USFS and NMFS. A few internal Midvale memoranda which document particular regulatory actions are included, as well. (Many other documents are not included here, because they contain collateral redundant or privileged information, or are simply too bulky.)

These communications document three things: First, Midvale has made every effort to comply with regulations, to cooperate with the agencies, and to accommodate each of their concerns. Second,

⁴¹Even this much procedure is not required under the ESA. Bas are required only when an Environmental Impact Statement is prepared, 50 C.F.R. §402.12(b), and none was for this project.

⁴²On January 12, 1995, the U.S. District Court in Idaho issued a remarkably broad injunction which prohibited all ongoing, announced and proposed logging, mining, grazing and road construction within six national forests in Idaho until the Forest Service completed endangered species consultation on its Land and Resource Management Plans (“LRMPs”). The injunction later was lifted, but issues in the case have not yet fully been resolved.

Midvale consistently made the agencies aware of Midvale's own deadlines and time constraints, and the importance of timely regulatory action. Third, in virtually every instance of delay, the federal agencies failed to notify the applicant of the delay, much less to explain the circumstances and offer revised assessments of what to expect next. Consequently, after nearly two years of delay and with the 1994 construction season fast approaching, Midvale was pushed to the additional expense of retaining counsel to monitor this unseemly regulatory process and to prod the agencies along through each remaining step of the process.

It is Midvale's view that the agencies' shortcomings cannot fairly be blamed on the staff-level members of these bureaucracies. Indeed, the correspondence in the Appendix documents many instances of agency staffers who, too, were frustrated by the sluggish pace of events, and who worked long and hard to assist Midvale in navigating this regulatory maze. The bottom line, however, is that despite the good efforts of these individuals, the process has not worked.

CHRONOLOGY OF USFS AND NMFS ACTIONS

<u>Date</u>	<u>Event or Document</u>
June 18, 1992.....	Idaho PUC issued Certificate of Public Convenience and Necessity to Midvale authorizing it to extend service to Burgdorf, Secesh, Warren & South Fork Salmon River Areas.
August 12, 1993.....	Midvale files special use application with USFS.
March 12, 1993.....	Midvale prepared draft BA. <i>Notes: Rather than following the draft prepared by Midvale, USFS incorporated discussion from Midvale's draft BA into two separate comprehensive Watershed Bas. (1) Main Salmon, (2) South Fork of the Salmon</i>
June 1993.....	Midvale prepared draft EA.
January 24, 1994.....	USFS letter to NMFS. <i>Notes: Transmits Main Salmon BA, including part of Midvale project.</i>
March 22, 1994.....	Draft Biological Opinion (terms and conditions). <i>Notes: Prepared by NMFS in response to Main Salmon BA.</i>
April 12, 1994.....	<i>PRC v. Thomas, II</i> filed. <i>Notes: Two environmental groups Pacific Rivers Council and the Wilderness Society brought suit against the USFS for failure to consult with the NMFS with respect to endangered salmon. This case was modeled on a similar successful case brought by the same environmental groups (and three others) in Oregon.</i>
April 15, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale). <i>Notes: Main Salmon BA on faster track; was approved by SFGS and sent to NMFS some time ago. South Fork BA still waiting approval on 4/15/94. Expected to be completed by the following Monday. Expect NMFS to decline to concur in the two Bas and prepare BOS instead. That should take 20 days following submission of South Fork BA (Short time frame, because NMFS is already working on it.)</i>
April 15, 1994.....	C. Meyer (Midvale) letter to L. Williams (Midvale). <i>Notes: Anticipate NMFS approval of BA or BO by June 1994, and USFS permit by July 1994.</i>
April 19, 1994.....	R. Joslin (USFS) letter to M. Tuttle (NMFS).

Date	Event or Document
April 19, 1994.....	R. Joslin (USFS) letter to M. Tuttle (NMFS).
May 16, 1994.....	C. Meyers (Midvale) memo to L. Williams (Midvale). <i>Notes: Learned that the USFS has decided to re-write the draft EA submitted by Midvale, despite the fact that this draft has been on the USFS's desk for a year. Begin discussion of whether the USFS will waive the 45 day appeal period if no adverse comments are received. NMFS has agreed to take Midvale component out of South Fork BA and put it in with Main salmon BA.</i>
June 8, 1994.....	C. Meyer (Midvale) conference with R. Strach (NMFS). <i>Notes: NMFS aiming at completion date of no later than The July 15, 1994.</i>
June 8, 1994.....	C. Meyer (Midvale) letter to L. Williams (Midvale). <i>Notes: USFS still working on revised EA. USFS determines that it can proceed to finalize EA while NMFS completes BO. NMFS still working on BO; expected on June 1, but didn't arrive. NMFS assures that BO can be finished and approved at all levels by July 15, 1994.</i>
June 13, 1994.....	D. Alexander (USFS) letter to Interested Party. <i>Notes: USFS releases June 1994 EA for public comment through July 15, 1994.</i>
June 16, 1994.....	C. Meyer (Midvale). <i>Notes: If no adverse comments, USFS should be able to approve by end of July 1994. NMFS says they are still on tract.</i>
June 20, 1994.....	C. Meyer (Midvale) letter to A. Nelson; C. Meyer letter to R. Strach (NMFS). <i>Notes: Begin discussion of possibility of issuing permit for portion of project, if SHPO approval cannot be approved for Town of Warren.</i>
June 27, 1994.....	D. Carter (NMFS) letter to L. Jacobson (USFS). <i>Notes: Requested information on six issues regarding possible project reconfiguration if only a partial permit is granted. This was identified as the information needed to complete the Biological Opinion.</i>
June 28, 1994.....	C. Meyer (Midvale) letter to L. Fitch (USFS). <i>Notes: Further clarification of Midvale's proposed partial project and attendant re-configuration.</i>
July 14, 1994.....	C. Meyer (Midvale) conference with R. Strach (NMFS). <i>Notes: Some slippage in BO, but assured that BO will be completed between July 30 and August 15, 1994.</i>

<u>Date</u>	<u>Event or Document</u>
July 15, 1994.....	End of comment period. <i>Notes: Several comments were received. The USFS deems a few of them to be “adverse” although none raise substantial issues. (E.g., “We don’t want any damn telephones in here.”)</i>
July 22, 1994.....	C. Meyer (Midvale) letter to D. Alexander (USFS). <i>Notes: Notes slippage with NMFS. Now USFS not expected to give final permit until early September 1994. Notify the USFS of Midvale’s plans to proceed with non-federal components.</i>
July 25, 1994.....	C. Meyer (Midvale) letter to D. Alexander (USFS). <i>Notes: Formal request for copy of draft BO prepared by NMFS.</i>
July 25, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale). <i>Notes: Thirty forest fires started over the weekend. This will delay USFS review of the draft BO.</i>
July 26, 1994.....	C. Meyer (Midvale) letter to D. Alexander (USFS). <i>Notes: Request that the USFS take one of two actions: (1) determine that no appealable issues were raised by the comments received, and proceed with final action at once, without appeal period. (2) Issue decision and begin appeal period now, without waiting for NMFS to complete BO, subject to receipt of final BO.</i>
August 2, 1994.....	C. Meyer (Midvale) letter to L. Fitch (USFS); K. Weyers (Midvale) memo to C. Meyer. <i>Notes: Responses prepared by K. Weyers to each of the comments received.</i>
August 2, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale). <i>Notes: Discussions with USFS indicate preliminary willingness to start the appeal clock running, without waiting for final BO. No word yet on how NMFS is doing on the BO.</i>
August 8, 1994.....	C. Meyer (Midvale) conference with R. Strach (NMFS). <i>Notes: Additional slippage on BO, but should be complete by early September 1994.</i>
August 10, 1994.....	C. Meyer (Midvale) letter to D. Alexander and L. Fitch (USFS). <i>Notes: It appears that nothing remains to be done except to issue the final decision. Again, urge USFS to move in order to begin appeal clock running. Request permit for Burgdorf and Secesh Meadows only. NMFS staff assures Midvale that BO will be issued within three weeks.</i>
August 12, 1994.....	C. Meyer (Midvale) letter to C. Spalding (USFS). <i>Notes: Notes that C. Spalding has been detailed to put out final decision document.</i>

Date	Event or Document
August 17, 1994.....	L. Fitch (USFS) letter to C. Meyer (Midvale). <i>Notes: Confirms that the USFS has no jurisdiction over private land, but that development on private land is still subject to consultation.</i>
August 22, 1994.....	DRAFT C. Meyer (Midvale) letter to D. Alexander and L. Fitch (USFS); phone conference w/ L. Fitch <i>Notes: Decision still not out. C. Spalding now on leave; not due back until August 29, 1994. L. Fitch says that issuance is imminent.</i>
August 29, 1994.....	USFS Decision Notice and FONSI. <i>Notes: Legal notice of the decision was set to run in the Idaho Statesman on the following day. For some reason it doesn't. Ms. Fitch (USFS) then reverses the action and retracts the decision. I am told that this retraction was taken in response to concerns raised by a staff level biologist who raised questions about the propriety of the conditional approval given to the project.</i>
September 2, 1994.....	C. Meyer (Midvale) letter to D. Alexander and L. Fitch (USFS). <i>Notes: Protest decision to retract decision. Notes that C. Meyer (Midvale) contacted General Counsel office in Ogden, which confirmed appropriateness of proceeding on conditional approval.</i>
September 1994.....	Final Environmental Assessment for Midvale project.
September 7, 1994.....	D. Alexander (USFS) memo to Interested Party: Decision Notice and FONSI on Midvale project. <i>Notes: The USFS finally issues conditional approval of the project, conditioned upon successful completion of consultation with NMFS. This action by the USFS came just over two years after the application for special use permit was filed by Midvale. This action, in turn, triggers a 45 day appeal period, due to the filing of "adverse" comments.</i>
September 16, 1994.....	C. Meyer (Midvale) memo to L. Williams (Midvale) <i>Notes: Appeal period to end October 25, 1994. Final permit could issue as early as October 31, 1994.</i>
October 14, 1994.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Inquire as to status of BO. Advise that time is of the essence.</i>
October 25, 1994.....	Appeal period ends.
October 26, 1994.....	C. Meyer (Midvale) letter to L. Fitch (USFS). <i>Notes: Note that NMFS has missed deadline for BO.</i>

Date

Event or Document

November 18, 1994.....

D. Burns (USFS) e-mail.

Notes: Notes that NMFS has agreed to break Midvale project out from the two BAs. NMFS requests that the USFS send NMFS a letter requesting this action.

December 7, 1994..... D. Alexander (USFS) letter to B. Brown(NMFS).

Notes: Requests that Midvale project be taken out of the Main Salmon and South Fork BAs, and handled separately in order to expedite. Notes that NMFS has prepared a draft letter concurring with the USFS's determination that project is "not likely to adversely affect." Requests informal concurrence..

January 12, 1995.....

Decision in *PRC v Thomas, II*.

Notes: Judge Ezra ruled in favor of the environmental groups and entered an order granting broad injunctive relief. The injunction did not include cable plowing activities. However, the injunction had the effect of causing both USFS and NMFS to allocate manpower to deal with the injunction's requirement that a programmatic Biological Opinion be prepared on all LRMPs in Idaho. Judge Ezra provided only one escape hatch: He said that the USFS may conduct evaluations of individual projects deemed "not likely to adversely affect" the species under section 7(d) of the ESA, in order to determine whether they will constitute "an irreversible or irretrievable commitment of resources" in violation of the Act. The judge said he would then entertain motions to except projects passing muster under the 7(d) standard. This triggered a "screening process" in an effort to identify those projects which could proceed. The agencies processed Midvale's application under this screen, even though it was not subject to the injunction.

February 14, 1995.....

C. Meyer (Midvale) letter to D. Carter (NMFS).

*Notes: Noted that the USFS has split off Midvale project from the two watershed BOs in order to facilitate process. The USFS has determined that the project is "not likely to adversely affect." Awaiting NMFS's concurrence. Concurrence effort being slowed by workload shifts in response to **PRC v. Thomas, II**. Midvale advised that it needs decision by mid March, 1995.*

February 27, 1995.....

C. Meyer (Midvale) letter to D. Carter (NMFS).

Notes: D. Carter expects to complete her review by the end of the week, and that further signoffs will follow.

March 1, 1995.....

Biological Opinion on the LRMPs.

*Notes: This grew out of the **PRC v. Thomas, II** litigation.*

March 3, 1995.....

L. Fitch (USFS) letter to K. Weyers (Midvale).

Notes: Requests information on five issues identified by NMFS.

Date	Event or Document
March 6, 1995.....	K. Weyers (Midvale) letter to L. Fitch (USFS). <i>Notes: Provides responses to five issues identified by NMFS.</i>
March 8, 1995.....	Injunction lifted in PRC v. Thomas, II
March 10, 1995.....	Adverse Effects Determination <i>Notes: D. Burns (USFS) signs “Adverse Effects Determination concluding that Midvale is “not likely to adversely affect” species. This is part of the “screenprocess” resulting from the decision in PRC v. Thomas, II.</i>
March 14, 1995.....	D. Alexander (USFS) letter to J. Wyland (NMFS). <i>Notes: Screen completed. Midvale passes.</i>
March 14, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Request for progress report.</i>
March 21, 1995.....	C. Meyer (Midvale) letter to L. Fitch (USFS). <i>Notes: Learned that Midvale passed muster under screening pursuant to PRC v. Thomas, II. Boise office of NMFS has prepared a draft concurrence letter. Ask if there is anything else the USFS needs from Midvale.</i>
March 21, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Time is of the essence.</i>
March 26, 1995.....	Deadline for completion of “screening.” <i>Notes: This deadline derives from the March 1, 1995 Biological Opinion on the LRMPs.</i>
April 6, 1995.....	C. Meyer (Midvale) letter to D. Carter (NMFS). <i>Notes: Still no news.</i>
April 24, 1995.....	U.S. Supreme Court denies certiorari in PRC v. Thomas, I . <i>Notes: This essentially locks in the decision in PRC v. Thomas, II.</i>
April 26, 1995.....	W. Stelle (NMFS) letter to D. Bosworth (USFS). <i>Notes: NMFS concurs in finding that the Midvale project is not likely to adversely affect endangered species.</i>

●APPENDIX●

THE MIDVALE TELEPHONE PROJECT

**A REGULATORY CHRONICLE
OF THE EFFORT TO BRING TELEPHONE SERVICE
TO THE CENTRAL IDAHO COMMUNITIES OF
BURGDORF, SECESH MEADOWS, WARREN
AND SOUTH FORK SALMON RIVER**

**Submitted by
MIDVALE TELEPHONE EXCHANGE, INC.
Lane R. Williams
President
2205 Keithley Creek Road
P. O. Box 7
Midvale, IO 83645
208-355-2211**

**Prepared by
Christopher H. Meyer, Esq.
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277 North 6th Street, Suite 300
Boise, Idaho 83702
208-342-6571**

May 3, 1995

INDEX TO APPENDIX

This appendix contains copies of correspondence from Midvale’s counsel and consultants to the SFS and NMFS. The correspondence is summarized in the table below.

Selected Correspondence From Midvale to USFS and NMFS		
DATE	TO	MATTER/SUBJECT
1. 4/15/94	Lane R. Williams	Endangered Species Act Compliance Procedures & Timetables.
2. 5/17/94	Allison Nelson	Explore 45 day delay issue.
3. 5/23/94 (replacing 5/18/94 Letter)	Curtis Spalding	Confirm understanding with respect to 45 day delay issue & definition of “adverse” comments.
4. 6/17/94	David F. Alexander	Environmental Assessment was made available for public comment on 6/13/94; comment period to run through 7/15/94; narrow window available for construction to begin this summer.
5. 6/20/94	Alison Nelson	Confirmation of telephone conversation re: comments not received to date except for SHPO; SHPO approval.
6. 6/20/94	Russ Strach	SHPO approval and contingency plan to shorten the project.
7. 6/27/94	Curtis Spalding	Discussion re: authority of the USFS to regulate non-federal lands. Enclosure: Informal research notes on this subject.
8. 6/28/94	Linda L. Fitch	Respond to USFS questions about configuration changes required in connection with partial permit approval. (Partial permit approval may be necessary if SHPO approval not timely secured.)
9. 7/22/94	David F. Alexander	Notice to the USFS of Midvale’s intent to proceed with project components on non-federal lands.
10. 7/25/94	David F. Alexander	Formal request for copy of Draft Biological Opinion, which the USFS and NMFS declined to make available to Midvale.
11. 7/26/94	David F. Alexander	Slippage in the timetable for final action; request for action.

12. 8/2/94	Linda L. Fitch	Midvale's response to public comments received on the project.
13. 8/2/94	Lane R. Williams	Report on telephone conference with Linda Fitch; Request for immediate issuance of decision.
14. 8/10/94	David F. Alexander Linda L. Fitch	Request for immediate issuance of decision.
15. 8/12/94	Curtis Spalding	Request for immediate issuance of decision.
16. 8/22/94	David F. Alexander Linda L. Fitch	Letter not sent, included here because it recites facts; Still no action taken; request for prompt action.
17. 8/30/94	Lane R. Williams	Documents further delays
18. 8/30/94	Lane R. Williams	Documents issuance of permit decision(which was later revoked.)
19. 9/2/94	David F. Alexander Linda L. Fitch	Protest revocation of permit decision; assert legal propriety of conditional approval; request for prompt action.
20. 10/14/94	Deb Carter	Reminder that USFS appeal period will end on 10/25/94; request status of Biological Opinion; urge prompt action.
21. 10/26/94	Linda L. Fitch	Note that appeal period ended yesterday; request confirmation that no appeals were filed; note that NMFS has failed to complete Biological Opinion.
22. 10/26/94	Russ Strach	Note that NMFS had 135 days under the regulations to complete the Biological Opinion, and that Biological Opinion was expected on 6/1/94; documents repeated slippage; request status of Biological Opinion.
23. 2/14/95	Deb Carter	Note that USFS has determined that the project is "not likely to adversely affect" and that NMFS has 30 days to respond. Emphasize importance of decision by 3/15/95.
24. 2/27/95	Deb Carter	Explain source of 30 day rule; request high priority attention to concurrence.
25. 3/6/95	Linda L. Fitch	Follow up on telephone conference which indicated that NMFS had some remaining concerns about the project.
26. 3/14/95	Deb Carter	Request for status of concurrence.

27. 3/21/95	Linda L. Fitch	Advise as to NMFS delays; inquire as to whether all the USFS's information needs have been satisfied.
28. 3/21/95	Deb Carter	Note that screening is completed; further NMFS deadlines have been missed and time is of the essence; ask if any additional information is required.
29. 4/6/95	Deb Carter	Still no action on concurrence; request for prompt attention.
30. 4/25/95	Deb Carter	Formal request for information on status of consultation.

ATTACHMENT B - RATES BY STATE

ALABAMA	ALL COUNTIES	\$29.69	\$25.96
ARKANSAS	ALL COUNTIES	\$22.23	\$19.48
ARIZONA	APACHE	\$ 7.40	\$ 6.47
	COCHISE		
	COCONINO, (North of the Colorado River)		
	GILA		
	GRAHAM		
	LAPAZ		
	MOHAVE		
	NAVAJO		
	PIMA		
	YAVAPAI		
	YUMA		
	COCONINO, (South of the Colorado River)	\$29.69	\$25.96
	GREENLEE		
	MARICOPA		
	PINAL		
	SANTA CRUZ		
CALIFORNIA	IMPERIAL	\$14.85	\$12.98
	INYO		
	LASSEN		
	MODOC		
	RIVERSIDE		
	SAN BERNARDINO		
	SISKIYOU	\$22.23	\$19.48
	ALAMEDA	\$37.08	\$32.45
	ALPINE		
	AMADOR		
	BUTTE		
	CALAVERAS		
	COLUSA		
	CONTRA COSTA		
	DEL NORTE		
	EL DORADO		
	FRESNO		
	GLENN		
	HUMBOLT		

CALIFORNIA (Cont'd)

KERN		
KINGS		
LAKE		
MADERA		
MARIPOSA		
MENDOCINO		
MERCED		
MONO		
NAPA		
NEVADA		
PLACER		
PLUMAS		
SACRAMENTO		
SAN BENITO		
SAN JOAQUIN		
SANTA CLARA		
SHASTA		
SIERRA		
SOLANO		
SONOMA		
STANISLAUS		
SUTTER	\$37.08	\$32.45
TEHAMA		
TRINITY		
TULARE		
TUOLUMNE		
YOLO		
YUBA		
LOS ANGELES	\$44.50	\$38.96
MARIN		
MONTEREY		
ORANGE		
SAN DIEGO		
SAN FRANCISCO		
SAN LUIS OBISPO		
SAN MATEO		
SANTA BARBARA		
SANTA CRUZ		
VENTURA		
ADAMS	\$7.40	\$6.47
ARAPAHOE		
CHEYENNE		
CROWLEY		

COLORADO

COLORADO (Cont'd)

EL PASO		
ELBERT		
HUERFANO		
KIOWA		
KIT CARSON		
LINCOLN		
LOGAN	\$7.40	\$6.47
MOFFAT		
MONTEZUMA		
MORGAN		
PHILLIPS		
PUEBLO		
SEDGEWICK		
WASHINGTON		
WELD		
YUMA		
BACA	\$14.85	\$12.98
DOLORES		
GARFIELD		
LAS ANIMAS		
MESA		
MONTROSE		
OTERO		
PROWERS		
RIO BLANCO		
ROUTT		
SAN MIGUEL		
ALAMOSA	\$29.69	\$25.96
ARCHULETA		
BOULDER		
CHAFFEE		
CLEAR CREEK		
CONEJOS		
COSTILLA		
CUSTER		
DELTA		
DENVER	\$29.69	\$25.96
DOUGLAS		
EAGLE		
FREMONT		
GILPIN		
GRAND		
GUNNISON		

COLORADO (Cont'd)

JACKSON
JEFFERSON
LaPLATA
LAKE
LARIMER
MINERAL
OURAY
PARK
PITKIN
RIO GRANDE
SAGUACHE
SAN JUAN
SUMMIT
TELLER

**CONNECTICUT
DELAWARE
FLORIDA**

ALL COUNTIES	\$ 7.40	\$ 6.47
ALL COUNTIES	\$ 7.40	\$ 6.47
BAKER	\$44.50	\$38.96
BAY		
BRADFORD		
CALHOUN		
CLAY		
COLUMBIA	\$44.50	\$38.96
DIXIE		
DUVAL		
ESCAMBIA		
FRANKLIN		
GADSDEN		
GILCHRIST		
GULF		
HAMILTON		
HOLMES		
JACKSON		
JEFFERSON		
LAFAYETTE		
LEON		
LIBERTY		
MADISON		
NASSAU		
OKALOOSA		
SANTA ROSA		
SUWANNEE		
TAYLOR		
UNION		

FLORIDA (Cont'd)	WAKULLA		
	WALTON		
	WASHINGTON		
	ALL OTHER COUNTIES	\$74.17	\$64.90
GEORGIA	ALL COUNTIES	\$44.50	\$38.96
IDAHO	CASSIA	\$ 7.40	\$ 6.47
	GOODING		
	JEROME		
	LINCOLN		
	MINIDOKA		
	ONEIDA		
	OWYHEE		
	POWER		
	TWIN FALLS		
	ADA	\$22.23	\$19.48
	ADAMS		
	BANNOCK		
	BEAR LAKE		
	BENEWAH		
	BINGHAM		
	BLAINE		
	BOISE		
	BONNER		
	BONNEVILLE		
	BOUNDARY		
	BUTTE		
	CAMAS		
	CANYON		
	CARIBOU		
	CLARK		
	CLEARWATER		
	CUSTER		
	ELMORE		
	FRANKLIN		
FREMONT			
GEM			

IDAHO (Cont'd)	IDAHO	\$22.23	\$19.48
	JEFFERSON		
	KOOTENAI		
	LATAH		
	LEMHI		
	LEWIS		
	MADISON		
	NEZ PERCE		
	PAYETTE		
	SHOSHONE		
	TETON		
	VALLEY		
	WASHINGTON		
ILLINOIS	ALL COUNTIES	\$22.23	\$19.48
INDIANA	ALL COUNTIES	\$37.08	\$32.45
IOWA	ALL COUNTIES	\$22.23	\$19.48
KANSAS	MORTON	\$14.85	\$12.98
	ALL OTHER COUNTIES	\$ 7.40	\$ 6.47
KENTUCKY	ALL COUNTIES	\$22.23	\$19.48
LOUISIANA	ALL COUNTIES	\$44.50	\$38.96
MAINE	ALL COUNTIES	\$22.23	\$19.48
MARYLAND	ALL COUNTIES	\$ 7.40	\$ 6.47
MASSACHUSETTS	ALL COUNTIES	\$ 7.40	\$ 6.47
MICHIGAN	ALGER	\$22.23	\$19.48
	BARAGA		
	CHIPPEWA		
	DELTA		
	DICKERSON		
	GOGEBIC		
	HOUGHTON		
	IRON		
	KEWEENAW		
	LUCE		
	MACKINAC		
	MARQUETTE		

MICHIGAN (Contd.)	MENOMINEE		
	ONTONAGON		
	SCHOOLCRAFT		
	ALL OTHER COUNTIES	\$29.69	\$25.96
MINNESOTA	ALL COUNTIES	\$22.23	\$19.48
MISSISSIPPI	ALL COUNTIES	\$29.69	\$25.96
MISSOURI	ALL COUNTIES	\$22.23	\$19.48
MONTANA	BIG HORN	\$ 7.40	\$ 6.47
	BLAINE		
	CARTER		
	CASCADE		
	CHOUTEAU		
	CUSTER		
	DANIELS	\$7.40	\$6.47
	DAWSON		
	FALLON		
	FERGUS		
	GARFIELD		
	GLACIER		
	GOLDEN VALLEY		
	HILL		
	JUDITH BASIN		
	LIBERTY		
	MCCONE		
	MEAGHER		
	MUSSELSHELL		
	PETROLEUM		
	PHILLIPS		
	PONDERA		
	POWDER RIVER		
	PRAIRIE		
	RICHLAND		
	ROOSEVELT		
	ROSEBUD		
	SHERIDAN		
	TETON		
	TOOLE		
	TREASURE		
	VALLEY		
	WHEATLAND		
	WIBAUX		

MONTANA (Cont'd)	YELLOWSTONE		
	BEAVERHEAD	\$22.23	\$19.48
	BROADWATER		
	CARBON	\$22.23	\$19.48
	DEER LODGE		
	FLATHEAD		
	GALLATIN		
	GRANITE		
	JEFFERSON		
	LAKE		
	LEWIS AND CLARK		
	LINCOLN		
	MADISON		
	MINERAL		
	MISSOULA		
	PARK		
	POWELL		
	RAVALLI		
	SANDERS		
	SILVER BOW		
STILLWATER			
SWEET GRASS			
NEBRASKA	ALL COUNTIES	\$ 7.40	\$ 6.47
NEVADA	CHURCHILL	\$ 3.71	\$ 3.24
	CLARK		
	ELKO		
	ESMERALDA		
	EUREKA		
	HUMBOLT		
	LANDER		
	LINCOLN		
	LYON		
	MINERAL		
	NYE	\$ 3.71	\$ 3.24
	PERSHING		
	WASHOE		
	WHITE PINE		
	CARSON CITY	\$37.08	\$32.45
DOUGLAS			
STORY			
NEW HAMPSHIRE	ALL COUNTIES	\$22.23	\$19.48

NEW JERSEY	ALL COUNTIES	\$ 7.40	\$ 6.47
NEW MEXICO	CHAVES	\$ 7.40	\$ 6.47
	CURRY		
	DE BACA		
	DONA ANA		
	EDDY		
	GRANT		
	GUADALUPE		
	HARDING		
	HIDALGO		
	LEA		
	LUNA		
	McKINLEY		
	OTERO		
	QUAY		
	ROOSEVELT		
	SAN JUAN		
	SOCORRO		
	TORRENCE		
	RIO ARRIBA	\$14.85	\$12.98
	SANDOVAL		
	UNION		
	BERNALILLO	\$29.69	\$25.96
	CATRON		
	CIBOLA		
	COLFAX		
	LINCOLN		
	LOS ALAMOS		
	MORA		
	SAN MIGUEL		
	SANTA FE		
	SIERRA		
	TAOS		
	VALENCIA		
NEW YORK	ALL COUNTIES	\$29.69	\$25.96
NORTH CAROLINA	ALL COUNTIES	\$44.50	\$38.96
NORTH DAKOTA	ALL COUNTIES	\$ 7.40	\$ 6.47
OHIO	ALL COUNTIES	\$29.69	\$25.96

OKLAHOMA	BEAVER	\$14.85	\$12.98
	CIMARRON		
	ROGER MILLS		
	TEXAS		
	LE FLORE	\$22.23	\$19.48
	MCCURTAIN		
	ALL OTHER COUNTIES	\$ 7.40	\$ 6.47
OREGON	HARNEY	\$ 7.40	\$ 6.47
	LAKE		
	MALHEUR		
	BAKER	\$14.85	\$12.98
	CROOK		
	DESCHUTES		
	GILLIAM		
	GRANT		
	JEFFERSON		
	KLAMATH		
	MORROW		
	SHERMAN		
	UMATILLA		
	UNION		
	WILLOWA		
	WASCO		
	WHEELER		
	COOS	\$22.23	\$19.48
	CURRY		
	DOUGLAS		
	JACKSON		
	JOSEPHINE		
	BENTON	\$29.69	\$25.96
	CLACKAMAS		
	CLATSOP		
	COLUMBIA		
	HOOD RIVER		
	LANE	\$29.69	\$25.96
	LINCOLN		
	LINN		
MARION			
MULTNOMAH			
POLK			
TILLAMOOK			
WASHINGTON			
YAMHILL			

PENNSYLVANIA	ALL COUNTIES	\$29.69	\$25.96
PUERTO RICO	ALL	\$44.50	\$38.96
RHODE ISLAND	ALL COUNTIES	\$ 7.40	\$ 6.47
SOUTH CAROLINA	ALL COUNTIES	\$44.50	\$38.96
SOUTH DAKOTA	BUTTE	\$22.23	\$19.48
	CUSTER		
	FALL RIVER		
	LAWRENCE		
	MEADE		
	PENNINGTON		
	ALL OTHER COUNTIES	\$ 7.40	\$ 6.47
TENNESSEE	ALL COUNTIES	\$29.69	\$25.96
TEXAS	CULBERSON	\$ 7.40	\$ 6.47
	EL PASO		
	HUDSPETH		
	ALL OTHER COUNTIES	\$44.50	\$38.96
UTAH	BEAVER	\$ 7.40	\$ 6.47
	BOX ELDER		
	CARBON		
	DUCHESNE		
	EMERY		
	GARFIELD		
	GRAND		
	IRON		
	JUAB		
	KANE		
	MILLARD		
	SAN JUAN		
	TOOELE		
	UINTAH		
	WAYNE		
	WASHINGTON	\$14.85	\$12.98
	CACHE	\$22.23	\$19.48
	DAGGETT		
	DAVIS		
	MORGAN		
	PIUTE		
	RICH		

UTAH (Cont'd)	SALT LAKE		
	SANPETE		
	SEVIER		
	SUMMIT		
	UTAH		
	WASATCH		
	WEBER	\$22.23	\$19.48
VERMONT	ALL COUNTIES	\$29.69	\$25.96
VIRGINIA	ALL COUNTIES	\$29.69	\$25.96
WASHINGTON	ADAMS	\$14.85	\$12.98
	ASOTIN		
	BENTON		
	CHELAN		
	COLUMBIA		
	DOUGLAS		
	FRANKLIN		
	GARFIELD		
	GRANT		
	KITTITAS		
	KLICKITAT		
	LINCOLN		
	OKANOGAN		
	SPOKANE		
	WALLA WALLA		
	WHITMAN		
	YAKIMA		
	FERRY	\$22.23	\$19.48
	PEND OREILLE		
	STEVENS		
	CLALLAM	\$29.69	\$25.96
	CLARK		
	COWLITZ		
	GRAYS HARBOR		
	ISLAND	\$29.69	\$25.96
	JEFFERSON		
	KING		
	KITSAP		
	LEWIS		
	MASON		
	PACIFIC		
	PIERCE		
	SAN JUAN		

WASHINGTON (Cont'd)	SKAGIT SKAMANIA SNOHOMISH THURSTON WAHKIAKUM WHATCOM		
WEST VIRGINIA	ALL COUNTIES	\$29.69	\$25.96
WISCONSIN	ALL COUNTIES	\$22.23	\$19.48
WYOMING	ALBANY CAMPBELL CARBON CONVERSE FREMONT GOSHEN HOT SPRINGS JOHNSON LARAMIE LINCOLN NATRONA NIOBRARA PLATTE SHERIDAN SUBLETTE SWEETWATER UINTA WASHAKIE	\$ 7.40	\$ 6.47
	BIG HORN CROOK PARK TETON WESTON	\$22.23	\$19.48

ATTACHMENT C - LINKS

United States Department of Agriculture

Agencies, Services and Programs

Link to the web page: <http://www.usda.gov/services.html>

Forest Service Websites

Forest Service Handbook

FSH 2709.11 - Special Uses Handbook

Chapter 30 - Fee Determination

Link to the web page: <http://www.fs.fed.us/im/directives/fsh/2709.11/2709.11,30.rtf>

Forest Service Handbook

FSH 2709.11 - Special Uses Handbook

Chapter 40 - Special Uses Administration

Link to the web page: http://www.fs.fed.us/im/directives/fsh/2709.11/id_2709.11-2001-1.doc

Special Uses Home Page

USDA Forest Service

Link to the web page: <http://www.fs.fed.us/recreation/permits/spuse.htm>

Joint Bureau of Land Management and Forest Service Websites

Communication Site Planning Forms

Link to the web page: http://www.fs.fed.us/recreation/permits/commsites/comm_forms.html

Communication Sites

USDI Bureau of Land Management and USDA Forest Service

Link to the web page: <http://www.fs.fed.us/recreation/permits/commsites/index.htm>

United States Department of Commerce

National Telecommunications and Information Administration

Reports, Filings, and Related Material

Link to web page: <http://www.ntia.doc.gov/reports.html>

National Telecommunications and Information Administration

Deployment of Broadband Networks and Advanced Telecommunications

[Docket No. 011109273-1273-01]

Comments Received in this Proceeding

Link to the web page: <http://www.ntia.doc.gov/ntiahome/broadband/index.html>

United States Department of Defense

DefenseLink

Link to the web page: <http://www.defenselink.mil>

Directives and Records Division

Link to the web page: <http://www.dtic.mil/whs/directives/>

Real Property Acquisition, Management And Disposal

Link to the web page for download: <http://www.dtic.mil/whs/directives/corres/html/41656.htm>

United States Department of the Interior

Quick Facts about the Department of Interior

Link to the web page: <http://www.doiu.nbc.gov/orientation/facts.cfm>

Interior Property Management Directives

410 Addition To IPMD

Link to the web page: <http://www.doi.gov/pam/114tab.html>

National Park Service Websites

National Park Service

Director's Order #53: Special Park Uses

Link to the web page: <http://www.nps.gov/refdesk/DOrders/DOrder53.html>

National Park Service

Reference Desk – Policies, Guidance, & Manuals

Link to the web page: <http://www.nps.gov/refdesk/policies.html>

National Park Service

Website for the Property Management Program

Link to the web site: <http://165.83.216.66/>

National Park Service

Real Property Management Policy and Forms

Link to the web page: http://165.83.216.66/Real_Property_Mgmt.htm

National Park Service

Office of Policy

Link to the web page: <http://165.83.219.72/npspolicy/index.cfm>

United States Fish and Wildlife Service

National Programs/Functions

Link to the web page: <http://info.fws.gov/function.html>

Permits

Link to the web page: <http://permits.fws.gov/>

Refuge Management

Klamath Basin National Wildlife Refuges

Draft Environmental Assessment-Draft Compatibility Determination

Yreka, California to Klamath Falls, Oregon - Fiber Optic Cable Project

Link to the web page: <http://klamathbasinrefuges.fws.gov/mgmt.html>

Bureau of Indian Affairs

The Bureau of Indian Affairs website is temporarily unavailable, however, the Department of Interior website is available, as is the following orientation page.

Bureau of Indian Affairs Orientation

Link to the web page: <http://www.doiu.nbc.gov/orientation/bia2.cfm>

Bureau of Land Management

Lands & Realty

Communication Site Management

Link to the web page: <http://www.blm.gov/nhp/what/lands/realty/management.htm>

Lands & Realty

Rights-Of-Way

Link to the web page: <http://www.blm.gov/nhp/what/lands/realty/row.htm>

Lands and Realty

Annual Adjustment of Linear Right-of-Way (R/W) Rental Rates

Link to the web page: <http://www.blm.gov/nhp/efoia/wo/fy01/ib2001-149.html>

Lands & Realty

Real Estate Appraisal

Link to the web page: <http://www.blm.gov/nhp/what/lands/realty/appraise.htm>

Joint Bureau of Land Management and Forest Service Websites

Communication Site Planning Forms

Link to the web page: http://www.fs.fed.us/recreation/permits/commsites/comm_forms.html

Communication Sites

USDI Bureau of Land Management and USDA Forest Service

Link to the web page: <http://www.fs.fed.us/recreation/permits/commsites/index.htm>

Bureau of Reclamation

Homepage

Link to the web page: <http://www.usbr.gov/main/index.html>

The Reclamation Manual Home Page

Link to the web page: <http://www.usbr.gov/recman/index.html>

Reclamation Manual / Directives and Standards LND 05-01

Real Estate Appraisal

Link to the web page: <http://www.usbr.gov/recman/Ind/Ind05-01.htm#to>

Land Directives and Standards

Link to the web page: http://www.usbr.gov/recman/d_and_s.htm#lnd

Land Use Authorizations (Also available as a pdf file)

Link to the web page: <http://www.usbr.gov/recman/Ind/Ind08-01.htm>

National Oceanic and Atmospheric Administration

National Ocean Service – National Marine Sanctuary System

Bulletin Board with links to the draft report "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries"

Link to the web page: <http://www.sanctuaries.nos.noaa.gov/news/newsbboard/newsbboard.html>

United States Department of Transportation

Federal Highway Administration (FHWA)

Federal Highway Administration

Link to home page: <http://www.fhwa.dot.gov/>

FHWA Web Sites

Link to web page: <http://www.fhwa.dot.gov/fhwaweb.htm>

FHWA

Subchapter G - Engineering And Traffic Operations

Part 645 - Utilities

Subpart A - Utility Relocations, Adjustments, and Reimbursement

Link to the web page: <http://www.fhwa.dot.gov/legsregs/directives/fapg/cfr0645a.htm>

Subchapter G - Engineering And Traffic Operations

Part 645 - Utilities

Subpart B - Accommodation of Utilities

Link to the web page: <http://www.fhwa.dot.gov/legsregs/directives/fapg/cfr0645b.htm>

Utilities Program

Link to the web page: <http://www.fhwa.dot.gov/programadmin/utility.html>

United States Code

Electronic Edition

Link to the web page: <http://www.access.gpo.gov/uscode/uscmain.html>

United States General Accounting Office (GAO)

Link to the web page: <http://www.gao.gov/>

United States Government Printing Office (GPO)

GPO Access – Quick links to the following federal sites:

Code of Federal Regulations

Federal Register

Congressional Record

U.S. Code

Congressional Bills

Catalog of U.S. Government Publications

Other Databases

Link to the web page: http://www.access.gpo.gov/su_docs/index.html

**ATTACHMENT D - ASSESSMENT OF THE EXISTING POLICIES ON BROADBAND
ACCESS AND FEES FOR FEDERAL RIGHTS-OF-WAY**

**Assessment of the Existing Policies on Broadband Access
and Fees for Federal Rights-of-Way**

Federal Lands and/or Jurisdiction

o United States Department of Transportation

§ Federal Highway Administration

o United States Department of Agriculture

§ Forest Service

§ Rural Utilities Service (RUS)

o United States Department of the Interior

§ Bureau of Land Management

§ Bureau of Reclamation

o National Park Service

o Military Facilities

o National Marine Sanctuaries

State Lands and/or Jurisdiction

Idaho Transportation Department

Railroads

Burlington Northern Santa Fe Railway

Union Pacific Railroad

Idaho Northern and Pacific

Montana Rail Link

Eastern Idaho Railroad

I. Federal Lands and/or Jurisdiction

A. United States Department of Transportation – Federal Highway Administration

The Federal Highway Administration (FHWA) has developed Freeway Accommodation Policies. The FHWA's Program Guide for Utility Relocations, Adjustment and Accommodations of Federal-Aid Highway Projects, Chapter 2, Utility Accommodation address this issue directly. The following excerpts are from Chapter 2.

It is recognized to be in the public interest for utility facilities to jointly use the right-of-way of public roads and streets when such use does not interfere with primary highway purposes. The opportunity for such joint use avoids the additional cost of acquiring separate right-of-way for the exclusive accommodation of utilities. As a result, the right-of-way of highways, particularly local roads and streets, is used to provide public services to abutting residents as well as to serve conventional highway needs.

Utility facilities, unlike most other fixed objects which may be present within the highway environment, are not owned nor are their operations directly controlled by State or local transportation departments. Because of this, highway authorities have developed policies and practices which govern when and how utilities may use public highway right-of-way. The FHWA utility accommodation regulations have been developed to reflect this situation. A discussion of the development of FHWA policies may be found in the following documents:

- Utility Relocation and Accommodation: A History of Federal Policy Under the Federal-Aid Highway Program, Part II: Utility Accommodation.
- Highway/Utility Guide, Chapter Two, Historical Perspective.

These documents were distributed in 1981 and 1993, respectively. They are important reference sources for those dealing with utility accommodation on Federal-aid projects. Copies are available from the FHWA's Office of Program Administration.

The last major rewrite of the FHWA's overall utility accommodation regulations occurred on May 15, 1985, when a final rule was published in the Federal Register. The only significant changes since then occurred on February 2, 1988, July 5, 1995, and November 22, 2000, when amendments to the regulations were published in the Federal Register.

The 1988 amendments dealt with utility use of freeway right-of-way. It stipulated that each State must decide, as part of its utility accommodation plan, whether or not to allow longitudinal utility installations within the access control limits of freeways and under what circumstances. The FHWA retained the authority to approve each State's freeway utility accommodation plan. The State then operates under its plan and decides whether to permit specific utility installations along freeways.

The 1995 amendments brought the definition of "clear zone" into conformance with the definition in the American Association of State Highway and Transportation Officials

(AASHTO) Roadside Design Guide, and incorporated an amendment conforming the utilities regulations to the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA).

The 2000 amendments emphasized that the most important consideration in determining whether a proposed facility is a utility or not, is how the STD views it under its own State laws and/or regulations, and eliminated a confusing provision to clarify the intent that the utility regulations are not applicable to longitudinal installations of private lines.

Chapter Two further states:

Freeway Accommodation Policies

Prior to FHWA's regulatory change in February 1988 each State, as part of its overall utility accommodation policy, was required to address transverse utility crossings of freeways and how they were to be controlled. Once a State's policy was approved by the FHWA, the State could then approve individual utility requests for transverse freeway crossings without any further referral to the FHWA provided the crossings satisfied the criteria in their approved policy. For longitudinal utility use of freeways, the States were required to adopt a position at least as restrictive as that in the then current AASHTO Policy. Hence, prior to 1988, the only longitudinal installations allowed on freeways were extreme case exceptions under provisions in the AASHTO Policy, and each individual request had to be approved by the FHWA.

Subsequent to the FHWA's 1988 regulatory change, each State was required to update its utility accommodation policy and include its own policy for permitting utility use of freeways, including longitudinal use if such use was to be allowed.

The States had to decide if they wanted longitudinal utility installations on freeways and if so to what extent and under what conditions. Whatever a State decided to do in this regard had to be documented in its utility accommodation policy and submitted to the FHWA Regional Administrator for approval. A State could permit certain utilities and exclude others. And, if a State so chose, it could prohibit any longitudinal utility installations.

All the States are now operating under freeway utility accommodation policies that have been approved by the FHWA. Many States opted to stick with the AASHTO Policy prohibiting longitudinal utility installations, except in special cases under strictly controlled conditions. The States that opted to allow longitudinal installations no longer have to submit individual proposals to the FHWA for approval. It has become their responsibility to assure that proposals are in accord with provisions in their approved utility accommodation policies. Exceptions to these policies, or changes, must be submitted to the FHWA Division Administrator for approval. In substance, this places all utility freeway installations under the same administrative process that other utility use proposals have been under since the late 1960s.

In summary, FHWA policy for longitudinal utility installations on freeways is as follows:

- The States may decide if they want to allow longitudinal utility installations on freeways (controlled access highways) and if so to what extent and under what conditions.

- Whatever a State decides to do in this regard must be documented in its utility accommodation policy and approved by the FHWA. Exceptions or changes must be approved by the FHWA Division Administrator.
- A State may permit certain utilities and exclude others. If a State so chooses, it can prohibit any longitudinal utility installations.
- Fees charged for utility use are at a State's discretion and may be used as the State sees fit. The FHWA does, however, encourage States to use generated revenues for transportation purposes.

In approving a State's freeway utility accommodation policy, the FHWA must give careful consideration to measures proposed to insure safety of the traveling public, and features to protect the operation and integrity of the highway. Effects on both the present and future use of the freeway must be considered.

The FHWA recognizes that conditions vary. Highway safety matters are not the same on a low volume rural freeway as on a high volume urban one. Considerable latitude may be appropriate on these rural facilities. The nature and type of utility facilities may also differ from area to area. All these variables must be taken into account. It is noted that there is no such thing as an absolutely safe utility installation. The construction, operation and maintenance of any utility on or near a major high speed highway cannot be done without some risk. Judgment must be exercised by highway authorities in determining if the risks are acceptable and whether all reasonable measures have been taken to maximize the safety of the traveling public.

The FHWA regulation presented in § 645.209(c)(2)(v) includes a few details governing specific criteria a State's utility freeway accommodation policy should contain if it plans to allow longitudinal utility use within the access control lines. These are:

- A utility strip should be established along the outer edge of the right-of-way. The FHWA has interpreted this to mean that longitudinal utility installations as a general rule should not be allowed within the median area of a freeway. There may, however, be some exceptional circumstances where utility facilities could be safely accommodated in the median. For example, for medians of extraordinary width where a utility could be installed well beyond the clear zone of the roadways and where access to the site is from crossroads, a case could well be made that there is minimal impact on the highway and its safe operation. A proposal by a State for a median installation under these circumstances, if considered to be justified, could be handled as an exception under the provisions of § 645.215(d).
- Existing fences should be retained and, except along section of freeways having frontage roads, planned fences should be located at the freeway right-of-way line.
- The State or political subdivision should retain control of the utility strip, including its use by utility facilities.
- Service connections to adjacent properties to provide services to utility consumers should not be permitted from within the utility strip.

Chapter 2 specifically address fiber optic/ wireless telecommunications on Freeway Right-of Way.

Fiber Optic/Wireless Telecommunications on Freeway Right-of-Way

Accommodation, Utility vs. Private Line

Many STDs are considering accommodating fiber optic lines and/or wireless telecommunications facilities (towers, monopoles, antennas) on freeway right-of-way in exchange for cash and/or use of the lines or facilities. In so doing, care needs to be exercised to determine whether the facility involved is a "utility facility" or "private line" as defined in 23 CFR 645.207. This distinction is important because it may impact how the transportation department treats the facility and also because the FHWA has different mechanisms for handling its review and approval actions.

When determining whether a facility is a "utility facility" or a "private line" there are two important tests: (1) how the STD views a particular facility under its own State laws and/or regulations, and (2) the definition of "utility facility" in 23 CFR 645.207.

The key item to consider in making this determination, using the above tests, is whether a State considers a particular facility to be a "utility facility" under its own State laws and/or regulations. If the State treats a facility as a utility, and if the facility is producing, transmitting, or distributing any of the commodities outlined in the FHWA definition for the use by or the direct benefit of the public, then the FHWA would also consider it to be a "utility facility" and handle it under its utility regulations.

Hence, if a STD considers a fiber optics line or a wireless telecommunications installation to be a "utility facility," then so too does the FHWA. Conversely, if the State considers them to be "private lines" so too does the FHWA.

An installation considered to be a "utility facility" is probably covered under the State's utility accommodation policy for permitting utility use of freeways and can be handled in accordance with approved procedures. If there is any doubt, the transportation department should be encouraged to amend its utility accommodation policy to clearly state its intent relative to accommodating fiber optics and wireless telecommunications.

Wireless telecommunications facilities installed at various intervals along a freeway, if physically located on the highway right-of-way and if relaying transmissions from one to the other, are considered to be longitudinal installations. A stand-alone wireless facility (tower, monopole, or antenna) is actually neither transverse nor longitudinal, but may nonetheless, if considered to be a "utility facility," be accommodated under provisions in a State's utility accommodation policy for either transverse or longitudinal installations, whichever is the most stringent. The intent is not to be a roadblock, but, as with any utility installation, to be sure careful consideration is given to effects on highway and traffic safety, and also on the operation and aesthetics of the highway.

Median Installations

Fiber optics lines have been installed in freeway medians and roadside clear zones in some States. This practice is not encouraged but may be allowed if there are no feasible alternatives. The official Headquarters policy is to install fiber optics lines in as safe a manner as possible, preferably as close to the control-of-access line as possible.

Location Criteria

When allowed on freeway right-of-way, wireless telecommunications facilities should be located as far from the roadway as possible and/or in inaccessible locations where they are unlikely to be hit by errant vehicles. In addition, the safety impacts of access to construct and service the facilities should be considered.

The Maryland State Highway Administration (MSHA), in coordination with the FHWA, has developed criteria for the placement of wireless facilities on controlled access highways. The goal is to ensure the wireless facilities are placed in locations that preclude them from being roadside hazards, yet still provide safe access for maintenance personnel. They specify that:

- Adequate sight distance must be provided for safe ingress to and egress from the sites.
- The wireless facilities must be located outside the clear zone (where unlikely to be struck) unless shielding already exists.
- An adequate pull off area beyond the shoulder must be provided for construction and maintenance purposes.

In addition, the MSHA has set up a descending order of preference for siting wireless telecommunications facilities, as follows:

- Priority 1: Vehicle access to the site can be obtained from outside the through-roadway and connecting ramps (e.g., access from frontage roads or cross roads).
- Priority 2: Within the interchange, vehicle access can be obtained from the right hand side of the diagonal ramps.
- Priority 3: Within the interchange, vehicle access can be obtained from the left hand side of the diagonal ramps.
- Priority 4: Vehicle access from the outside shoulder (right hand side) of the mainline.
- Priority 5: Vehicle access from the inside shoulder (left hand side of the mainline).

Justification must be provided for descending to any level below Priority 1. FHWA concurrence is required for any installation within a loop ramp, within any freeway weave area less than 3/4 mile in length, or requiring new shielding.

FCC Considerations

A number of States have permitted access to limited access highway right-of-way for fiber optic and wireless telecommunications installations. Several of these installations have been public-private partnerships with the telecommunications industry, which are generally referred to as shared resource agreements. In December 1999, the Federal Communications Commission (FCC) issued an opinion in a Minnesota Department of Transportation case involving such a partnership that defined the FCC's interpretation of the Telecommunications Act of 1996 (TCA) and its application to the Minnesota agreement.

As a result of the FCC's opinion, the FHWA engaged in a discussion with the FCC to clarify how these partnerships and other similar telecommunications installations should be conducted to avoid conflict with the TCA and be consistent with the FHWA's requirements for highway safety and right-of-way management. These discussions culminated in an approach that considers both the requirements of the transportation industry and its concern for highway safety, and the FCC's concern with implementation of the TCA. This approach was documented in two letters -- (1) a letter from the FHWA to the FCC defining elements pertaining to access to freeway ROW, and (2) a letter to the FHWA from the FCC defining competitive elements based upon the access restrictions defined by the FHWA.

The FHWA/FCC discussions are documented in the Executive Director's December 22, 2000, memorandum to Division Administrators setting forth guidance to assist STDs in the execution of shared resource agreements, particularly relative to access and competitive issues. Attached to this memorandum is a document entitled, "Background Discussion on Guidance: Telecommunications Installations, Limited Access Highway Right-of-Way," which presents a detailed discussion of the FCC's ruling on the Minnesota case, and the rationale for these guidelines which have been developed in cooperation with the FCC.

Guidance on Access Issues

If a State chooses to allow longitudinal access for fiber optic facilities installation on its freeway right-of-way, it is recommended the following guidelines apply to that installation:

1. In these guidelines, it is understood that the State retains the right and responsibility to manage its freeway ROW. Reasonable, nondiscriminatory time, place, and manner restrictions, including but not limited to traditional permitting conditions, may be placed on the design, installation, operation, and maintenance of fiber optic facilities.
2. All construction should be done in that portion of the ROW that is located furthest from the traveled roadway to the degree feasible, and should be accomplished in accordance with the Manual on Uniform Traffic Control Devices, per 23 CFR 655.603.
3. If all construction vehicles, equipment, and personnel can be located outside the clear zone on the freeway, as defined in the AASHTO Roadside Design Guide and adopted by FHWA in

Federal Aid Policy Guide, Par. 16(a)(3) NS 23 C.F.R. 625, except for ingress and egress, the State may use the freeway ROW for fiber optic facilities installation as frequently as reasonably necessary to satisfy the requirements of the State, and the needs of the telecommunications providers. A State may limit construction so that there is no more than one installation project underway at any given time on any major segment of the freeway.

4. If construction vehicles, equipment, and personnel cannot be located out of the freeway clear zone, then the State may restrict fiber optic facilities installation to only one time on that area of the freeway where construction would occur within the clear zone. No further installation needs to be allowed on that segment until such time as required by the end of the useful life of the fiber optic facilities, or if the existing capacity is exhausted or existing conduit is full. Existing fiber and conduit capacity will be deemed exhausted whenever the State and the contractor mutually determine that a bona-fide request for dark fiber, conduit space, or a bona-fide request for any other transmission facilities or service cannot be granted. Additional installation at this time will be subject to reasonable non-discriminatory State requirements, e.g., per #1 above.
5. A State may restrict the location of all the above ground equipment to the edge, or off of the ROW to allow access to that equipment for maintenance from service roads or other non-freeway access if feasible, as determined by the State. Such restrictions should be nondiscriminatory.

Guidance on Competitive Issues

To assist States in meeting the intent of the TCA with regard to maintaining a competitively neutral position in the process of developing and implementing a shared resource or other telecommunications installations project, the FCC suggests the following principles be followed in the development of these projects. These principles should be considered whenever a State decides to limit further installations of fiber optic facilities on its ROW, whether in or out of the clear zone.

1. The contractor should be selected through an open, fair, nondiscriminatory, competitive process.
2. Having selected a contractor, other interested third-party telecommunications companies should be allowed the opportunity to have their fiber optic facilities installed in conjunction with any installation of fiber optic facilities by the contractor. The State may make the contractor the sole party responsible for all installation work done at such times, and require that other third party telecommunications companies contract with that contractor for installation of their fiber optic facilities when their facilities are installed in conjunction with those of the contractor. In such cases, the contractor's charges, terms and conditions for installation should be fair, reasonable, and nondiscriminatory and may include a reasonable profit. The State should give potentially interested third parties reasonable notice of the anticipated or planned opening of the right-of-way. The notice period should reflect the time reasonably required by third parties to develop business plans and obtain financing. Notice can be accomplished through publication and dissemination of a construction schedule for the project. Such publication and dissemination should be reasonably calculated to provide potentially interested third parties with actual notice of the schedule.

3. The contractor should install spare fiber and empty conduit, adequate to accommodate reasonably anticipated future demand, whenever fiber optic facilities cannot be installed outside the clear zone. Each section of fiber/conduit within the clear zone should have connection points (manhole or cabinets) at each end outside the clear zone where third parties can access the conduit or interconnect with facilities in the conduit at their option. All rates, terms and conditions for interconnection and/or use of space in the conduit should be fair, reasonable, and nondiscriminatory and may include a reasonable profit.
4. The contractor should be required to sell fiber on an "Irrevocable Right of Use" (IRU) basis at rates and subject to terms and conditions that are just, reasonable, and nondiscriminatory. The contractor's charges for such facilities may include a reasonable profit.
5. The contractor should be required to offer facilities and services for resale at rates and subject to terms and conditions that are just, reasonable, and nondiscriminatory and may include a reasonable profit.
6. The agreement with the contractor should require that the contractor comply with the terms defined above, and give third parties the right to challenge the contractor's compliance with the appropriate elements of these terms dealing with third party access before an independent entity which does not benefit directly from the arrangement with the contractor. The independent entity should have the authority to order the contractor to comply with these terms. A State public utilities commission, or independent arbitrator, might serve in this capacity. In this regard, prompt resolution of such issues can be critically important to the development of competition.
7. It is substantially preferable that the contractor be a wholesaler of telecommunication in order to minimize competitive concerns, as opposed to being a retail telecommunications services and facilities provider either directly or through an affiliated entity. This reduces the potential for anti-competitive pricing that could violate section 253 of the TCA. However, if the contractor does provide retail telecommunications service directly or through an affiliated entity, all rates, terms and conditions for its retail service should be fair, reasonable, and nondiscriminatory.

Keep in mind that the above information is only guidance. The STDs don't have to follow it. The Division Offices don't have to abide by it. It is only guidance. However, if STDs opt to install fiber optics or wireless telecommunications towers on limited access highways in accordance with this guidance, they should have nothing to fear from the FCC. This doesn't mean the STDs can't do more. They can and the FHWA can approve what they do. And it may be all right. But there will be no assurances that the FCC will not take exception to what has been done and initiate actions to force STDs to make unwanted policy changes.

Longitudinal Telecommunication Lines On Freeways For A States Own Use

A State may install longitudinal telecommunication lines for its own use within the access control limits of freeways in the State, if appropriate provisions have been included in an approved utility accommodation plan. For these purposes the installation is considered to be a "utility facility" as opposed to a "private line" as defined in 23 CFR 645.207.

A State may lease longitudinal telecommunication lines, installed for its own use within the access control limits of freeways in the State, to other State agencies or to local governmental agencies. This is still considered to be "for the use of a State or local governmental unit."

Longitudinal utility facilities within the access control limits of freeways must directly or indirectly serve the public. Hence, a State could lease such telecommunication lines to a "utility" if such use was in accordance with their approved utility accommodation policy, but could not lease such telecommunication lines to "private" users without special FHWA Headquarters approval based upon a public interest finding in accordance with 23 CFR 1.23.

Fees Charged for Telecommunications Use of Highway Right-of-Way

The Telecommunications Act of 1996 (Public Law 104-104) and [guidance on page 44 of this publication](#) indicate STDs may, at their discretion, charge fees for longitudinal utility use of highway right-of-way. But, there is no mention in Federal law, regulation, or policy as to how these fees are to be used.

It has been the FHWA's policy for many years to allow States to charge fees for utility use of highway right-of-way if they desire, and to allow them to use the proceeds as they see fit. In the past, fees charged for utility use were generally just enough to cover the cost of processing permits. Now, with the advent of fiber optics and wireless telecommunications, opportunities exist for the States to make substantial profits. In such cases, the FHWA has informally encouraged the States to use such revenues for transportation purposes.

The above discussion has to do with utility use of highway right-of-way. It is important, however, to distinguish between a "utility facility" and a "private line," [as discussed previously beginning on page 38](#), because they are handled differently and have different requirements for the use of fees.

Private lines can be installed on highway right-of-way. However, it is important to understand that longitudinal private line installations are to be handled under the provisions of 23 CFR 1.23(c); whereas, longitudinal utility installations are to be handled under the provisions of 23 CFR 645, subpart B.

As part of a major update of the utility regulations in 1985, the FHWA wanted to establish procedures for handling both the accommodation of utilities and the use of highway right-of-way by private lines. It was decided that private line crossings could be handled under the utility regulations contained in 23 CFR 645 subpart B, but that private line longitudinal use could not.

Private line longitudinal use was considered to be clearly beyond the public interest finding in 23 CFR 645.205(a) that allowed utilities to occupy highway right-of-way. It was therefore decided that private line longitudinal use should be handled on a case-by-case basis under the provisions of 23 CFR 1.23(c), which is the agency's authority to allow non-highway use of highway right-of-way. This decision only addressed the approval mechanism for private line use of highway right-of-way. The matter of fees did not come into play.

Even so, 23 CFR 1.23(c) opens the door for the use of the airspace law and regulation in 23 U.S.C. 156 and 23 CFR 713 subpart B, respectively, and they in turn set forth income requirements for longitudinal private line use of highway right-of-way. It is important to note that utility use is clearly exempted from these requirements. The airspace law and regulation also requires that fair market value be charged for the use of airspace right-of-way and that any revenues obtained be used for projects eligible under title 23, U.S.C. As mentioned above, utility use of airspace right-of-way is exempted from these requirements, but private line use is not.

To summarize:

- STDs may charge fees at their discretion for longitudinal utility use of highway right-of-way, but there is no mention in Federal law, regulation, or policy as to how these fees are to be used. The FHWA encourages STDs to use generated revenues for transportation purposes.
- Private line longitudinal use of highway right-of-way is covered by 23 U.S.C. 156. STDs are required to charge fees for such use based on fair market value and to use such fees for title 23 purposes.
- Private line crossings of highways should be handled like utility crossings under the provisions of 23 CFR 645 subpart B. 23 U.S.C. 156 should not be applied in these situations.

Facilities Similar to Utilities

In 1997, the Office of Chief Counsel provided written legal advice to the Office of Engineering concerning environmental requirements that are triggered by the accommodation of telecommunications towers on Federal-aid highways. Chief Counsel noted that there are two different approaches to the siting of "utility facilities" and "private lines" on Federal-aid highway right-of-way, with different duties for environmental compliance, and suggested that FHWA consider revising its regulations to include facilities similar to utilities.

Facilities similar to utilities might include fiber optics, wireless telecommunications towers, or possibly other facilities that are considered by the FHWA to be included in the definition of "utility facility" in 23 CFR 645 and are considered to be utilities by many, but not all, of the States.

Presently, utilities may be accommodated on highway right-of-way under provisions in the utility regulations. Non-utilities may also be accommodated, but under provisions in another regulation, 23 CFR 1.23(c). The proposed change to the utility regulations would allow "similar facilities," whether considered by an individual State to be "utilities" or not, to be accommodated under provisions contained in the utility regulations. This would provide uniformity by avoiding wireless telecommunications towers and fiber optics from being accommodated under one FHWA procedure in one State and a different FHWA procedure in another State.

After much consideration it was decided not to make this change. While it would have provided uniformity and simplicity, it would have conflicted with the FHWA's long-standing policy that the most important consideration in determining whether a proposed installation is a utility or

not is how the STD views it under its own State laws and/or regulations. There was also the appearance that accommodating non-utilities under the utility regulations might interfere with other requirements currently in effect for accommodating non-utilities, particularly in regard to fair market value, use of revenues for title 23 purposes, and the environment.

Even so, there may be times when it would be expedient and prudent to consider a facility to be "similar" to a utility and to accommodate it under the utility regulations. This should only be done on a case-by-case basis and the reasons should be well documented. Particular attention should be given to environmental, right-of-way, and other sensitive issues to assure they are adequately addressed.

The FHWA's Program Guide, Utility Adjustments and Accommodation on Federal-Aid Highway Projects, CHAPTER 2, UTILITY ACCOMMODATION is available on the FHWA's internet site at the following address: <http://www.fhwa.dot.gov/reports/utilguid/utilchp2.htm>.

Engineering requirements are found in 23 CFR 645 Part B, Subchapter G – Engineering and Traffic Operations, Par 645 – Utilities, Subpart B – Accommodation of Utilities. Along with general requirements and state transportation department accommodation policies among other sections, there is section 645.213 - Use and occupancy agreements (permits). This section states:

Sec. 645.213 Use and occupancy agreements (permits).

The written arrangements, generally in the form of use and occupancy agreements setting forth the terms under which the utility is to cross or otherwise occupy the highway right-of-way, must include or incorporate by reference:

- (a) The transportation department standards for accommodating utilities. Since all of the standards will not be applicable to each individual utility installation, the use and occupancy agreement must, as a minimum, describe the requirements for location, construction, protection of traffic, maintenance, access restriction, and any special conditions applicable to each installation.
- (b) A general description of the size, type, nature, and extent of the utility facilities being located within the highway right-of-way.
- (c) Adequate drawings or sketches showing the existing and/or proposed location of the utility facilities within the highway right-of-way with respect to the existing and/or planned highway improvements, the traveled way, the right-of-way lines and, where applicable, the control of access lines and approved access points.
- (d) The extent of liability and responsibilities associated with future adjustment of the utilities to accommodate highway improvements.

(e) The action to be taken in case of noncompliance with the transportation department's requirements.

(f) Other provisions as deemed necessary to comply with laws and regulations.

(The information collection requirements in this section were approved under control number 2125-0522)

In summary, the Federal Highway Administration has jurisdiction over right-of-way issues for federal highways, and they have delegated that jurisdiction to the states. Each state would have their own particular rules and regulations for right-of-way leases. The Idaho Department of Transportation rules and regulations for highways in the state of Idaho are elsewhere in this report.

B. United States Department of Agriculture

1. Forest Service

The US Forest Service has numerous sources of regulation. Not only does the Forest Service have rules and regulations covering this topic at the national level, each of the Regions have their own rules and regulations that apply to the various National Forest's in their jurisdiction. Then, each particular National Forest can have their own set of rules and regulations that apply only to those Forest Service lands. Idaho is covered by 2 regions, Region 1, the Northern Region, with headquarters in Missoula, Montana; and at Region 4, the Intermountain Region, with headquarters in Ogden, Utah. In Idaho there are 2 separate National Forests.

Notwithstanding the various sources for regulation, in general, Right-of-Ways on Forest Service land us priced at fair market value. Forest Service Manual 2700 – Special Uses Management provides regulations and guidelines for telecommunication Right-of-Ways. Section 2728 of this manual covers Communications. Interim directive No. 2720-2001-1, which was effective on September 5, 2001 and expires on March 5, 2003 establishes a new code for fiber optic cable uses. Detailed direction on the processing of applications, issuance of authorizations, and establishment of rental fees for these uses on National Forest System lands is provided in section 48.23 of Forest Service Handbook 2709.11, the Special Uses Handbook. Section 48.23c states:

48.23c - Processing of Applications and Administration of Authorizations for Fiber Optic Cable Uses

Fiber optic cable project proponents often find it economically beneficial to design and construct a fiber optic cable project with excess capacity (fiber, cables, conduits, or other equipment) beyond their needs, which can be sold or leased to other telecommunications service providers. Thus, a single fiber optic cable project can have a variety of owners and separate telecommunications service providers. Each additional telecommunications service provider must have its own authorization from the Forest Service or be accommodated in a single authorization through that authorization's subleasing provisions.

The owner of the authorized fiber optic cable(s) or the telecommunications service providers that lease excess cable capacity from the owner may sublease to a customer for that customer's own internal communications needs. A customer does not sell or provide communications service to others and, therefore, would not need a separate authorization, nor would that customer's use be specifically provided for in the authorization.

1. New Authorizations Involving Capacity Excess to Applicant's Needs. Issue a single authorization on Form FS-2700-4. Do not issue separate authorizations to additional telecommunications service providers, except as provided in the following. Determine a single rental fee for all users, based on the current linear right-of-way schedule (sec. 36.4). Each authorization shall contain the following provisions:
 - a. A provision allowing subleasing and a requirement that the holder is liable and responsible for compliance with all the terms and conditions of the authorization, including compliance with the terms and conditions by any additional users (ex. 01).
 - b. A requirement that the holder notify the Forest Service of any change in the future ownership status of the fiber optic cable project and in the subleasing of excess capacity (ex. 02).
 - c. A right-of-way width that adequately accommodates the project, but not less than 10 feet in width.
 - d. A maximum term of 10 years.
 - e. A provision informing the authorization holder that the Forest Service would provide the holder appropriate advance notification if the agency adjusts the rental fees and/or changes regulations or administrative policies applicable to fiber optic cable uses (ex. 03).
 - f. A provision requiring annual data submission to the authorized officer (ex. 04).

When requested by a proponent or holder, the Forest Service may issue separate authorizations to each individual owner or telecommunications service provider involved in the project to accommodate the needs of that specific business arrangement. When one project has two or more authorizations associated with it, rent shall be assessed to each authorization holder based on the current linear right-of-way schedule (sec. 36.4 of this Handbook).

2. New Authorizations Not Involving Excess Capacity. Issue a single authorization on Form FS-2700-4 without subleasing provisions. The rental fee will be determined based on the current linear right-of-way schedule (sec. 36.4). Each authorization shall contain the following provisions:
 - a. A right-of-way width that adequately accommodates the project, but not less than 10 feet in width.
 - b. A maximum term of 10 years.
 - c. A provision informing the authorization holder that the Forest Service holder would provide the holder appropriate advance notification if the agency adjusts the rental fees

and/or changes regulations and administrative policies applicable to fiber optic cable uses (ex. 03).

3. Installation Within an Existing Transportation or Utility Right-of-Way. A new authorization is required when a fiber optic use is proposed for installation within an existing transportation or utility right-of-way, or within an existing authorized facility where the primary purpose is something other than fiber optic telecommunications. A new authorization is not needed if the existing authorization provides for fiber optic cable use or if all the fiber optic cables installed are used solely to support the operations of the current authorized use. New fiber optic authorizations issued within an existing transportation or utility right-of-way, or on existing authorized facilities, shall be issued in accordance with the provisions outlined in the preceding paragraphs 1 (new authorizations involving excess capacity) and 2 (new authorizations not involving excess capacity), including minimum width and maximum term of the authorization and only after a determination is made that the fiber optic facility will not be inconsistent with the rights and privileges granted to the holder of the authorization for the existing use and occupancy.

48.23c - Exhibit 01

Subleasing Provision for Fiber Optic Cable Special Use Authorizations

Include the following provision in all authorizations for fiber optic facilities that have capacity in excess of the holder's needs.

Subleasing.

The holder of this authorization may sublease, sell, or purchase back individual fibers, conduit space, and space within regeneration or optic amplification station sites authorized by the original authorization to telecommunications service providers and customers without further approval from the Forest Service.

The holder may utilize any empty conduit authorized by the original authorization for its own future expansion without additional approval from the Forest Service.

The holder may charge each customer or telecommunications service provider a reasonable rent without discrimination for the use and occupancy of the facilities and services provided. The holder must impose no unreasonable restrictions nor any restriction restraining competition or trade practices. The holder waives all defenses of laches, or estoppel against the United States and must at all times keep the title of the United States to the property free and clear of all liens and encumbrances.

Subleasing includes any change in ownership of any portion of the authorized use, or the subleasing of space to additional telecommunication service providers within the right-of-way during a portion of the authorization term. These additional telecommunication

service providers will not be required to obtain a separate permit for their use. Occupancy or renting of space does not constitute an assignment under this permit. The holder is liable and responsible for compliance with all terms and conditions of the authorization, including compliance with the terms and conditions by any telecommunication service providers or customers.

48.23c - Exhibit 02

Notification Requirement Provision for Fiber Optic Cable Special Use Authorizations

Include the following provision in all authorizations for fiber optic facilities that allow for subleasing of fiber, innerduct, or cable.

Notification Requirement.

The holder shall notify the authorized officer in writing of the date whenever:

1. A lease/purchase agreement has been signed for use of empty conduit space to separate telecommunications service providers, or
2. A change in the future ownership status of the project or segment of the project occurs.

Written notification by the holder to the authorized officer must occur within thirty (30) days of the actual dates specified in (1) or (2) above.

48.23c - Exhibit 03

Rent Determination Provision for Fiber Optic Cable Special Use Authorizations

Include the following provision in all authorizations for fiber optic use.

Rent Determination.

The holder must pay in advance an annual rent determined by the authorized officer in accordance with current linear right-of-way rent schedule, as adjusted annually (FSH 2709.11, sec. 36.41).

At this time, no additional rent will be assessed to the holder for any telecommunications service providers or customers located within the subject project or facility.

This authorization is subject to any new rent schedule or other suitable method for determining rent for linear right-of-way facilities, including fiber optic uses, in accordance with any new requirements applicable to such uses on National Forest System lands, such as policies or regulations that the Forest Service may adopt. The Forest

Service will provide the authorization holder appropriate advance notification of any such changes in rental fees and, where applicable, the opportunity to comment on such changes.

Forest Service Handbook 2709.11 – Special Uses Handbook, Chapter 36, Fee Determination states (of course, there are exceptions):

36.41 - Determination of Fee

Calculate the annual fee by using the fee schedule in exhibit 02 (which is issued separately as an interim directive) that provides rental rates by State, county, and type of linear right-of-way use. The annual fee is the rental rate times the number of acres. Round the acres to the nearest hundredth and round the total fee to the nearest dollar. For example, the 1991 fee for a municipal water canal located on 21.392 acres of National Forest System lands in Hood River County, Oregon, is calculated as follows:

$\$23.55 \text{ per acre per year} \times 21.39 \text{ acres} = \$558.84 \text{ (rounded to } \$559\text{)}.$

1. Annual Adjustments. The per-acre rental fees in the fee schedule are adjusted annually by multiplying the current year per-acre rental fee by the annual change (second quarter to second quarter) in the implicit price deflator-gross national product (IPD-GNP) index, exhibit 01 (which is issued separately as an interim directive), as published in the Survey of Current Business of the U.S. Department of Commerce, Bureau of Economic Analysis. The Washington Office Director of Lands is responsible for making annual updates to the IPD-GNP index and fee schedule.

2. Minimum Fee. Charge the Regional or Forest minimum fee when the calculated annual fee from the fee schedule is less than the minimum fee established by the Regional Forester or Forest Supervisor. For example, when the Regional Forester sets \$50 as the Regional minimum fee for a special-use permit, charge the minimum \$50 rather than the \$20 fee calculated from the linear right-of-way fee schedule.

3. Lump-sum Fee. Calculate the annual fee amount from the fee schedule and multiply the product by the number of years for which fees are collected (sec. 32.21). For example, the 1991 annual fee amount for a water line is \$60 and the special use permit provides for fee payments for 5-year periods. The fee amount would be \$300 ($\$60 \times 5 \text{ years} = \300). The fee would be collected again in 1996 and would be calculated by using the adjusted values in 1996 for the next 5-year period.

The Forest Service and the Bureau of Land Management have coordinated a website, “Communication Site Planning Forms.” It is located at the following internet address: http://www.fs.fed.us/recreation/permits/commsites/comm_forms.html

The Forest Service has a brochure for the special use permit, “Obtaining a Special-Use Authorization with the Forest Service.” This helpful brochure can be found at

<http://www.fs.fed.us/recreation/permits/broch.htm> and is reproduced here. A good starting place for the application process would be with the local National Forest Service office.

Obtaining a Special-Use Authorization with the Forest Service
The Application Process
U.S. Department of Agriculture Forest Service
Forest Service Special-Uses Program

The Forest Service manages 191.6 million acres of national forests and grasslands that comprise the National Forest System (NFS). Today, our growing population and mobile society have created a demand for a variety of uses of these federal lands. Often these diverse needs require specific approval. The Forest Service provides services that support our national policy and federal land laws. The Agency's special-uses program authorize uses on NFS land that provide a benefit to the general public and protect public and natural resources values. Currently there are over 72,000 authorizations on the national forests and grasslands for 200 types of uses.

Each year, the Forest Service receives thousands of individual and business applications for authorization for use of NFS land for such activities as water transmission, agriculture, outfitting and guiding, recreation, telecommunication, research, photography and video productions, and granting road and utility rights-of-ways. The Forest Service carefully reviews each application to determine how the request affects the public's use of NFS land. Normally, NFS land is not made available if the overall needs of the individual or business can be met on nonfederal lands.

·What are special-use authorizations?

A special-use authorization is a legal document such as a permit, lease, or easement, which allows occupancy, use, rights, or privileges of NFS land. The authorization is granted for a specific use of the land for a specific period of time.

·When do I need an authorization?

1. If you will need to occupy, use, or build on NFS land for personal or business purposes, whether the duration is temporary or long term.
2. If there is a fee being charged or if income is derived from the use.
3. If an activity on NFS land involves individuals or organization with 75 or more participants or spectators.

Application Process

·Is my proposal appropriate?

1. Your request must be consistent with federal, state, and local laws, regulations, and special orders that apply to the national forests.

2. Your request must be consistent with the Forest Plan that established standards and guidelines for management of the land where the activity will take place. A copy of the forest plan is available at your local Forest Service office and in many libraries.
3. Your request must not endanger public health or safety.
4. Your request must not require exclusive or perpetual use or occupancy.
5. Your request cannot conflict or interfere with administrative use by the Forest Service, other authorized existing uses, or uses of adjacent nonfederal lands.
6. The applicant must not owe any fees to the Forest Service from a prior or existing special-use authorization.
7. No gambling or providing of sexually oriented commercial services can be authorized on NFS land, even if permitted under state law.
8. No military or paramilitary training or exercises can be authorized on NFS land, unless it is federally funded.
9. No disposal of solid waste or storage or disposal of radioactive or other hazardous substances can be authorized on NFS land.

·How do I apply?

1. Contact a Forest Service office and request an application. You will receive an application, depending upon your requested use. Application information is also available on the special uses home page at <http://www.fs.fed.us/recreation/permits>
2. Prior to submitting the proposal, you are required to arrange a preapplication meeting at the local Forest Service office where the use is being requested. A staff member will discuss your proposal, potential land use conflicts, application procedures and qualifications, probable time frames, fees and bonding requirements, additional coordination with other agencies, environmental reports, and field reviews.
3. Most commercial uses require additional information with the application. You may need business plans, operating plans, liability insurance, licenses/registrations, or other documents. A commercial use is when an applicant intends to make use of NFS lands for business or financial gain.
4. Complete and submit the application form, including supporting documents, to the local Forest Service office. An incomplete proposal could delay the processing.

·How do I answer all the questions?

Name and Address - Include the full name(s) to be used. If the application includes real property, the name(s) on the legal document must match the application.

Applicant's Agent - This person must be at least 21 years old and may or may not be the same as the applicant. Documentation should be included to verify that this person may sign on behalf of the applicant.

Project Description - Include enough detail to enable the Forest Service to determine feasibility, environmental impacts, benefits to the public, the safety of the request, lands to be occupied or used, and compliance with applicable laws and regulations.

Environmental Protection Plan - Include proposed plans for environmental protection and rehabilitation during construction, maintenance, removal, and reclamation of the land.

Map - Provide a detailed map (U.S. Geological Survey quadrangle or equivalent) or plat (survey or equivalent) showing the requested use in relation to NFS land, identification of applicant's property (if applicable), scale, map legend, legal description, and a north arrow.

Technical and Financial Capability - Provide documentation to assure the Forest Service you are capable of constructing, operating, maintaining, removing the use off NFS land, and reclaiming the land after the authorization terminates.

Alternatives - You must first consider using nonfederal land. Lower costs or fewer restrictions are not adequate reasons for use of NFS lands. Provide alternative locations for the proposal in your application.

·What does an authorization cost?

Rental Fee - This is an annual rental fee based on the fair market value for the uses authorized and is payable in advance. Fees are established by appraisal or other sound business management principles.

Other Associated Costs - You may be responsible for providing information and reports necessary to determine the feasibility and environmental impacts of your proposal; compliance with applicable laws and regulations; and terms and conditions to be included in the authorization.

2. Rural Utilities Service (RUS)

The RUS does not, to my knowledge, manage any federal lands. They do, however, provide funding for telephone service. One of the RUS new initiatives for 2001 was the "Local Dial-Up Internet Program." I include reference to the RUS here as a possible source of funding for the installation of broadband services in rural areas that qualify under the Rural Utilities Service guidelines.

C. Department of the Interior

1. Bureau of Land Management

The Bureau of Land Management has the following information available on their website:

RIGHTS-OF-WAY

Each year hundreds of individuals and companies apply to the BLM for rights-of-way (ROW) on or across public lands. A ROW grant is an authorization to use a specific piece of public land for specific facilities for a specific period of time. Currently the vast majority of the ROWs granted are authorized by Title V of FLPMA (43 U.S.C. 1761-1771) and the Mineral Leasing Act (Section 28 of the Mineral Leasing Act of 1920, as amended, 43 U.S.C. 185). It is the policy of the BLM to authorize all ROW applications at the discretion of the authorized officer in the most efficient and economical manner possible.

FLPMA Rights-of-Way: As authorized by the Federal Land Policy and Management Act (FLPMA), BLM will issue ROW grants for electrical power generation, transmission and distribution systems, systems for the transmission and reception of electronic signals and other means of communications, highways, railroads, pipelines (other than oil and gas pipelines) and other facilities or systems which are in the public interest.

On February 24, 2001, the issued Instruction Memorandum No. 2001-080. The subject of this memorandum is "Rights-of-Way (ROW) for Fiber Optic Uses - Interim Policies and Procedures for Application Processing, Rental Determination and Administration." The Purpose of this Instruction Memorandum was to establish interim policies and procedures for processing and authorizing fiber optic ROW applications across public lands. The memorandum specifically states:

Policy/Action:

A. Interim Policy: The Bureau of Land Management (BLM) will assess a rental fee for fiber optic ROW projects based upon the current linear ROW rent schedule, as adjusted annually (43 CFR 2803.1-2), until new rental regulations for fiber optic projects can be implemented through a formal rulemaking process. Standard Stipulation No. 3 on the ROW grant form (Form 2800-14) will however continue to provide for adjustments of rent at the time that any new rental regulations are implemented and should be retained in all fiber optic ROW grants. In the interim, BLM will authorize and administer fiber optic projects, including rent determination, in accordance with this Instruction Memorandum.

Fiber optic projects, by their nature, can have a variety of owners and/or separate telecommunication service providers. Project proponents often find it economically beneficial to design and construct a fiber optic project with excess capacity (fibers, cables, conduits, and other equipment beyond the proponent's own needs which can be sold or leased to other parties). These additional users must each have their own authorization from BLM or the original ROW

grant must include a subleasing provision that authorizes additional use(s) as the need arises (43 CFR 2801.1-1(f)).

A subleasing provision included in the ROW grant would accommodate any change in the ownership of any portion of the project, and/or the subleasing of excess space or equipment to additional providers. These additional telecommunication service providers lease excess space (and/or equipment) from the primary project owner and holder of the ROW authorization. With a subleasing provision included in the original authorization, any additional telecommunication providers would not be required to obtain a separate grant for their use. However, the holder of the ROW remains liable for compliance with the terms/conditions of the grant by all parties using the fiber optic facility.

Owners and telecommunication service providers may also sublease to a customer for that customer's own internal communication needs. A customer is not selling or providing a communication service to others, and would therefore never need a separate authorization from the BLM.

An inventory of re-generation equipment can assist in distinguishing between "owners", "telecommunication service providers" and "customers". "Owners" and "telecommunication service providers" would typically have their own, separate, re-generation equipment, housed in their own building, to service their own equipment and business needs. In some cases, the holder will lease excess rack space in a re-generation facility to accommodate the re-generation equipment of an additional telecommunication service provider. "Customers" would not have separate re-generation equipment for their use. Field Offices (FO) should periodically inventory re-generation stations and equipment to help determine the number of separate owners and/or third-party telecommunication service providers for a particular fiber optic project, to assist in management of the right-of-way authorization.

B. New Authorizations

1. Preferred Authorization: Issue a single ROW grant with subleasing provision.

Because of the many benefits which subleasing provides to the BLM and the ROW holder, it is the preferred policy of BLM to issue a single ROW grant (Form 2800-14), with a subleasing provision, for all new fiber optic projects. Grants would include, but are not limited to, the following terms and conditions:

a. A provision to allow subleasing of space/equipment to additional telecommunication providers without further approval from the BLM. Subleasing includes any change in ownership of any portion of the project, or the subleasing of space to additional telecommunication service providers. These additional telecommunication providers will not be required to obtain a separate grant for their use. No additional rent will be assessed to the ROW holder for the additional sublease owner(s) or telecommunication provider(s) within the project or facility. The

holder is liable and responsible for compliance with all terms/conditions of the grant, including compliance with the terms/conditions by any additional user.

b. A provision which obligates the holder to notify BLM of any change in the future ownership status of the fiber optic project, or the subleasing to separate telecommunication service providers.

c. A ROW width that adequately accommodates the project, but not less than 10 feet.

d. A ten year maximum term.

e. A provision to allow the BLM to adjust the rent, consistent with regulations and rental schedules. Standard Stipulation No. 3 (RENTAL) on Form 2800-14 provides for such an adjustment and should be retained in all ROW grants.

f. Collection of an advance annual (or other term as specified in the grant or via regulatory provisions) rent that is determined by using the existing linear rent schedule. The ROW grant will be issued as an actual rent grant, and not as an "estimated rent" grant.

The holder will be assessed an annual rent that is determined by using the existing linear rent schedule found at 43 CFR 2803.1-2(c). The authorized ROW area shall include an appropriate width to accommodate the construction, operation/maintenance and termination of all components of the project, including all conduits, marker poles, maintenance stations, in-line amplifiers, and re-generation facilities. A short term ROW grant may be issued to accommodate temporary construction activities.

g. The holder must amend the ROW grant at any time additional land, equipment, and/or new uses are proposed which are beyond the scope of the existing authorization.

2. Importance of the pre-application meeting with the fiber optic project proponent(s).

FO's must explain to the proponent the financial obligations associated with processing a ROW application, and the potential monitoring costs and rental obligations if the application is approved.

3. ROW Application Requirements

The fiber optic project proponent must submit a completed application on Standard Form 299 in accordance with the provisions contained in 43 CFR 2802.3 and 2802.4. The project proposal must specifically describe in detail (preferably in a Plan of Development) the components of the fiber optic facility and/or system, including but not limited to, the size, number, and type of conduits, innerducts, cables, and fibers. The proposal must include a specific description (by project segment) of the number of fibers in each conduit or innerduct, and the use (commercial, public purpose, or internal) and ownership of fibers (via a fiber content map). If the ROW is

granted, it must contain a stipulation or provision which requires the holder to provide an updated fiber content map (including the number of active and installed but inactive fibers) on an annual basis. Finally, the project proposal must describe all ancillary components, including but not limited to, re-generation stations (number of individual sites and individual re-generation facilities at each site, distance between sites, access and power requirements, fencing needs, etc.), in-line amplifiers, fiber-splicing vaults (man-holes and/or hand-holes), and warning markers.

4. Alternative Authorization: Issuance of a new ROW grant without a subleasing provision.

For administrative efficiencies, issuance of one ROW grant per fiber optic project (with subleasing provisions) as described above, is BLM's preferred policy. However, BLM, at its discretion and at the request of the proponent/applicant, may issue a ROW grant for a fiber optic project without subleasing provisions. If only one entity is involved, BLM shall condition the grant and inform the applicant of the following:

- a. Future desires to sublease any portion of the fiber optic project must be approved in advance by BLM.
- b. The ROW grant will require an amendment to authorize any future subleasing.
- c. All amendments to the ROW grant will be subject to cost recovery fees.
- d. In lieu of an amendment that provides for subleasing, each additional owner and/or telecommunication service provider must obtain their own separate authorization which would be subject to rent based upon the current linear rent schedule. A proposed new owner would also need to submit a request and receive BLM approval for a full or partial assignment of the grant from the original ROW holder.

For multiple-owner projects that do not desire the subleasing provision, individual ROW grants without a subleasing provision can be issued to each separate owner or telecommunication service provider involved in the project in order to accommodate the needs of that specific business transaction. When one project has two or more ROW grants to accommodate different ownership entities or telecommunication service providers, rent is assessed to each holder based upon the existing linear rent schedule.

C. Existing Authorizations

1. Single Owner Projects Authorized Without Subleasing Provisions.

Many of the existing fiber optic projects that BLM has authorized to date have not included a subleasing provision which allows additional users without BLM approval. Rent has been assessed based on the existing linear rent schedule. Some of these existing authorizations were issued subject to an "estimated rent", again based upon the current linear rent schedule. Any

ROW grant with an "estimated rent" provision must be revised to eliminate the "estimated rent" provision. In addition, any future request by the holder to accommodate either additional owners or telecommunication service provider(s), must be approved by BLM and authorized by either:

- a. Issuance of a separate ROW grant to each new owner(s) or telecommunication service provider(s), or
- b. Amending the original grant to allow for "subleasing" of equipment and space within the authorized facilities. If the grant is amended to provide for subleasing, the holder must agree to notify BLM of any change in the ownership status of the fiber optic project, or whenever space has been subleased to additional telecommunication service providers.

2. Multiple Owner Projects Authorized Without Subleasing Provision.

a. Infrequently, ROW grants are held jointly by two or more entities, but the holders would be considered a single entity for rental determination purposes. For example, Companies A, B, & C may own equal shares of a ROW project and hold the ROW grant "jointly" or "in common". While each company is individually liable and responsible for compliance with all terms and conditions of the ROW authorization, for rental determination purposes, treat the grant as a single, one-entity authorization and establish rent by using the current linear rent schedule.

b. Instead of one ROW grant held in "joint ownership", companies may have been issued their own ROW grant for that portion of the project that they have an ownership interest. In these cases, use the current linear rent schedule to determine rent for each authorization holder.

D. Installation within an Existing Transportation or Utility ROW Authorization: BLM will issue a new ROW grant when a fiber optic use is proposed for installation within an existing transportation or utility ROW authorization (including Federal Aid Highway projects), unless the authorization provides for the subleasing of new uses (specifically fiber optic uses) without additional approval.

However, no approval or authorization is necessary from BLM for any new use (including fiber optic projects) proposed within a pre-Federal Land Policy Management Act (FLPMA) railroad ROW (Reference Solicitor's Opinion, M-36964, and memo to State Offices dated July 7, 1999, from the Assistant Director, Minerals, Realty and Resource Protection).

Whenever a pre-FLPMA railroad ROW becomes abandoned and the ROW reverts to public land status, non-railroad uses also terminate. Therefore, existing non-railroad uses previously authorized by the holder of the railroad grant must be re-authorized by BLM.

E. Installation of a Fiber Optic Project on Existing or within Existing and/or Proposed ROW Facilities (whose primary use is something other than fiber optic telecommunications): BLM will encourage holders of existing ROWs, to the greatest extent practical, to accommodate the placement of fiber optic projects within their ROW.

BLM will also encourage fiber optic project proponents/applicants to locate, to the greatest extent possible, their fiber optic project within existing ROWs.

Fiber optic projects to be installed on an existing (or proposed) utility structure whose primary use is something other than fiber optic telecommunications (i.e., electrical transmission power line or a pipeline for petroleum products, etc.) will require a separate ROW grant for the fiber optic use. The grant shall include a subleasing provision and be issued subject to rent as explained in Section B. above. The ROW width for the fiber optic project can vary from that of the primary use, but can not be less than ten feet. The term of the authorization for the fiber optic ROW grant will not exceed 10 years.

F. Authorization, Construction and Installation of Empty Fiber Optic Conduits: A fiber optic project that is authorized and/or constructed with empty conduits (no fiber optic cables) is considered a single line when determining rent under the existing linear rent schedule. Rent is determined in accordance with Section B. above.

G. Application of Policy to Holders Exempt From Rent: All holders who utilize fiber optic lines for commercial purposes are subject to rent in accordance with the existing linear rent schedule, unless they are specifically exempted from rent by statute or regulation, including facilities that are eligible for financing pursuant to the Rural Electrification Act of 1936, as amended (43 U.S.C. 1764 and 43 C.F.R. 2803.1-2(b)(1)(iii)).

Rent-exempt holders who lease/sell excess capacity for commercial purposes to other telecommunication service providers that are not exempt from rent by statute or regulation, lose their exemption for that portion of the fiber optic project being sold or leased for the commercial purposes. Given this exception, rent is determined in accordance with Section B. above.

H. Interagency Projects: Many of the major fiber optic projects being proposed to the BLM and the Forest Service (FS) include lands administered by both agencies. When such a fiber optic project is proposed, both agencies have typically collaborated and agreed upon a lead agency. The lead agency processes the application and oftentimes authorizes the project. This is a sound management practice that shall continue. FO's shall continue to make the lead agency determination based upon the nature of the project, its impact to the land and resources, issues or concerns about the proposal, availability of resources to process the application, and customer service to the applicant. (Refer to BLM Manual 2801.35B.1.f. (Coordination) for further guidance on determination of a lead agency).

Until a fiber optic rental regulation is adopted, the BLM and the FS have agreed that the land use rent for interagency projects will be determined in accordance with the existing linear ROW rent schedule found at 43 CFR 2803.1-2 (c).

I. Alternative Rent Determinations: The BLM will not apply the criteria found at 43 CFR 2803.1-2(c)(1)(v) to deviate from the current linear rent schedule in favor of an appraisal or other method to determine rent. However, many companies have indicated that they prefer to

make a one-time rent payment rather than annual payments. To accommodate these requests, the BLM will consider alternative methods to establish fair market value rent, but only when requested by the applicant and approved by the BLM.

The applicant may request an appraisal to establish fair market value rent for a fiber optic project, subject to the following terms and conditions:

1. BLM and the applicant must jointly agree to establish rent via an appraisal.
2. An appraisal provided by the applicant must be approved by the BLM.
3. An appraisal provided by the BLM must be accepted by the applicant.
4. All BLM appraisal and review work must be funded by the applicant via cost recovery.
5. Once an acceptable rent has been determined, the applicant can choose to pay the rent on a one time basis for the term of the grant; or as otherwise provided by regulations.
6. Rent established by an appraisal (or by negotiations based on relevant market data) will be considered actual rent for the full term of the grant.
7. Once a revised rental schedule is adopted by regulation for fiber optic uses, it can not be applied to ROW grants where actual rent has been paid for the full term of the grant.

J. Rent Reduction and Appeal Rights: With the concurrence of the State Director, the authorized officer may reduce rent when it is determined that payment of full rent will cause undue hardship on the holder/applicant and that it is in the public interest to reduce said rental. This "hardship" provision is found at 43 CFR 2803.1-2(b)(2)(iv). Appeal rights (under 43 CFR part 4) are available to all holders whose rent is determined by the existing linear rent schedule.

K. LR2000 Notations: A new commodity code (972) has been established to identify ROW uses for fiber optic facilities and to track these uses within LR2000. Please refer to WO Instruction Memorandum No. 2000-171, dated August 4, 2000, for guidance on the use of this new commodity code.

Timeframe: This IM is effective upon receipt.

Budget Impact: The application of this policy will have a minimal impact on budget and workload. The current linear ROW rental fee schedule will continue to be used, until new rental regulations are developed and implemented through a formal rulemaking process. However, there is a positive impact through the implementation of consistent procedures in the processing of fiber optic rights-of-way under existing regulations.

Background: The Bureau of Land Management (BLM) is receiving, processing and authorizing a growing number of proposals for the installation of fiber optic telecommunication lines across public lands. As a result of this ongoing activity, a number of questions have been raised by FO's regarding the authorization and administration of ROW applications and grants for fiber optic projects, and specifically, the determination and assessment of appropriate rent.

A growing volume of data indicates that the market value of fiber optic ROWs may exceed the annual land use rental rates in the existing linear ROW rent schedule found at 43 CFR 2803.1-2(c). In the last year or so, the BLM has routinely authorized projects and assessed an "estimated" rent, based upon the current linear rent schedule, while awaiting development of internal policy or regulations which would establish a rent schedule for fiber optic projects. Recently, BLM made an agreement with Congressional leaders that any new rent schedule for fiber optic uses would only be established via the regulatory process with full public participation.

It is to the benefit of both the BLM and the FS, as well as the customers we serve, that consistent policies and procedures be developed for the authorization and administration of fiber optic projects now located or proposed to be located on both the public lands and National Forest System lands. The BLM and FS have thus agreed to conduct a market study of fiber optic uses, with the objective of establishing a market based schedule of rates and/or methods that can be easily and consistently used by field managers in determining and assessing a fair market rent for fiber optic projects.

Manual/Handbook Sections Affected: BLM Manual 2801, ROW Management and Handbook H-2801-1, is affected by this IM and policy.

Coordination: The development of this policy was coordinated within the Department, and at the Director and Assistant Director level. BLM State Office and FO were contacted for input. Considerable Congressional interest has been expressed regarding the development of fiber optic ROW policies and numerous briefings of Congressional staff has been facilitated by the BLM Washington Office (WO), Legislative Affairs staff.

Contact: Any questions concerning the content of this IM should be directed to the WO, Lands and Realty Group (WO-350) and the attention of Ron Montagna, at (202) 452-7782 or Bill Weigand, at (208) 373-3862.

This memorandum is available on the BLM website at the following internet address: <http://www.blm.gov/nhp/efoia/wo/fy01/im2001-080.html>. This memorandum expires on September 20, 2002.

In summary, the BLM has a current rent schedule that applies specifically to fiber optics. It is Appendix A.

2. Bureau of Reclamation

The Bureau of Reclamation has similar requirements for the installation of fiber optics – yearly “fee” based upon the fair market value of the land in the easement or right-of-way; and the initial costs of the department paid for by the permittee. More information is available at the Bureau of Reclamation’s web site.

Bureau of Reclamation

In response to the question, “What is the Bureau of Reclamation?”, the Bureau of Reclamation responds with the following answer found at the Bureau of Reclamations web site located at <http://www.usbr.gov/main/what/index.html>:

Established in 1902, the Bureau of Reclamation is best known for the dams, power plants, and canals it constructed in the 17 western states. These water projects led to homesteading and promoted the economic development of the West. Reclamation has constructed more than 600 dams and reservoirs including Hoover Dam on the Colorado River and Grand Coulee on the Columbia River.

Today, we are the largest wholesaler of water in the country. We bring water to more than 31 million people, and provide one out of five Western farmers (140,000) with irrigation water for 10 million acres of farmland that produce 60% of the nation's vegetables and 25% of its fruits and nuts.

Reclamation is also the second largest producer of hydroelectric power in the western United States. Our 58 power plants annually provide more than 40 billion kilowatt hours generating nearly a billion dollars in power revenues and produce enough electricity to serve 6 million homes.

Today, Reclamation is a contemporary water management agency with a Strategic Plan outlining numerous programs, initiatives and activities that will help the Western States, Native American Tribes and others meet new water needs and balance the multitude of competing uses of water in the West. Our mission is to assist in meeting the increasing water demands of the West while protecting the environment and the public's investment in these structures. We place great emphasis on fulfilling our water delivery obligations, water conservation, water recycling and reuse, and developing partnerships with our customers, states, and Indian Tribes, and in finding ways to bring together the variety of interests to address the competing needs for our limited water resources.

As with the other federal agencies, permits for easements and right-of-ways are authorized in various titles and sections of the Code of Federal Regulations. The Bureau of Reclamation has manuals and directives that provide the governing rules and regulations.

One of the directives and standards deals with Land Use Authorizations. This documents stated purpose is to “provide standard procedures for issuing use authorization documents such as easements, leases, licenses, and permits which allow others to use Reclamation lands and interests in its lands, facilities, and water surfaces.”

Section 3 subsection G covers Commercial Telecommunications. This section covers the implementation of the Telecommunications Act of 1996. This section refers back to the General Services Administration (GSA) Bulletin, Federal Property Management Regulations (FPMR) D-242. As with other federal land easements or other land use permits, the fee is determined on the fair market value, unless there is a competitive bid process. In general, the term of the permit or easement is to be no longer than 25 years. Easements are only used when some lesser use for authorization, like a lease, license or permit does not suit the purpose of the applicant.

Easements should only be granted for uses which require an “interest in land” and will not interfere with other projects. Leases are used for such activities as grazing, agriculture, research, recreations, and concessions. The majority of applicants will be issues permits and licenses. Section 7 – Permit/License states, “Construction or placement of transmission or distribution lines, access roads, trails, pipelines, power lines, telephone lines, and other facilities involving installation or construction of longer-term capital improvements are the types of uses authorized through a longer term license.” Section 7 further states, “All licenses, including permits, should be limited to a period of 25 years or less.”

Section 9 – Use Authorization Fees and Financial Management states, “All use authorizations involving Reclamation acquired or withdrawn lands have a land use value (referred to as “value of rights-of-use” in 43 CFR Section 429) and an administrative cost..” The monies received by Reclamation for the land use values are also referred to as land use fees and are considered “incidental revenues...the administrative costs are those direct and indirect costs associated with approving and administering the use authorization.”

The Bureau of Reclamation Directives and Standards LND 05-01, which “sets forth appraisal procedures and standards to ensure compliance with Federal authorities, establishes directives and standards for written appraisals, and provides a system for resolution of appraisal problems and issues.”

In conclusion, once a permit has been granted, there is the ongoing fee for the use of the land, using the fair market value to determine that fee, and there is also the initial expenditure for the recovery of the administrative costs.

The following is from the Bureau of Reclamation’s web site at the following web address: <http://www.lc.usbr.gov/g2000/flands.html>

Land Operations and Realty

The Land Operations and Realty program supports the Reclamation mission by acquiring and administering land that is needed to allow construction and operation of Reclamation facilities including dams, canals, power plants, reservoirs, pumping plants, underground pipelines, electrical transmission lines, office buildings, and other supporting and related structures and facilities.

When projects are transferred to other entities, or retired and dismantled, Lands disposes of unneeded property.

Major Lands Function: Acquisition, Administration, Recreation, Land Disposal, Land Records, and More About Recreation.

Acquisition

All projects and facilities require land on which to construct and maintain works and facilities. Projects may require large blocks of land, or small linear rights of way, and usually a combination of many types of land and land interests. Lands may be acquired from private owners and states, or in the western states, from the Federal public domain lands. Acquisition of

land by Reclamation and other Federal agencies is highly regulated and tightly controlled, to ensure proper use of Federal funds and fair treatment of landowners.

A recent need has developed for Reclamation to acquire environmental mitigation lands. These lands, rather than being used directly for construction of facilities, and acquired and set aside and preserved for their natural values, often wildlife habitat. Preservation of these lands is needed to allow Reclamation to comply with laws like the Endangered Species Act, to offset possible environmental impacts of traditional water and power projects.

Administration

Good business practices - and Federal law - require that Reclamation-owned lands be properly managed. This requires continual inventory and inspection of lands. Reclamation must also protect and administer many resources on the lands, including wildlife, forest products and other vegetation, valuable minerals, cultural and historic properties, among others. This involves ongoing work to protect lands from erosion, wildfire, and other threats.

A major and growing problem on Reclamation lands, especially in areas near rapidly growing urban and suburban areas, is trespass. Trespasses from minor refuse dumping to encroachment of fences and buildings to serious illegal toxic waste dumping can be seen on lands throughout Reclamations systems. Protection of lands from damage and trespass, and clean-up and rehabilitation of damaged lands is an increasing demand on Reclamation's resources.

Non-Reclamation project uses are third party needs for use of Reclamation lands.

For example, authorization of a highway **right of way** crossing a Reclamation owned canal. Reclamation makes every attempt to accommodate the needs of the public and local communities for use of Reclamation lands, so long as the use would not damage project facilities. Reclamation routinely issues permits, rights of way, leases, and other rights of use for a multitude of uses. Proper management of these activities requires a broad mix of technical specialists, including realty specialists, appraisers, land surveyors, inspectors, engineers, and cartographers.

Recreation

Many Reclamation facilities, especially reservoirs, provide excellent opportunities to provide public recreation opportunities and development. Reclamation projects have resulted in the creation of hundreds facilities throughout the West such as campgrounds, picnic areas, boat ramps, hiking and biking trails, wildlife observation areas, and other amenities. Generally, Reclamation seeks out local government partners, such as state and county park departments, to operate these facilities on a concession basis, which significantly reduces administration costs for the Federal government. In other cases, Federal agencies such as the US Forest Service or National Park Service administer recreation use of Reclamation projects.

Land Disposal

Lands no longer needed for project purposes are identified for disposal. Reclamation sometimes sells land itself, but often works with the General Services Administration (GSA) to dispose of surplus lands through GSA processes. In some cases, Reclamation lands originally withdrawn from the public domain are returned to other Federal land managing agencies holding adjoining lands, or certain lands may be transferred to state or local agencies, if appropriate.

Reclamation in recent years has placed emphasis on transferring some entire projects to the local entities (usually irrigation or water districts) which operate them, a process referred to as "Title Transfer." In these cases, ensuring that the transfer documents adequately protect both the transferee entity and the Federal government requires the work of many experienced lands professionals and attorneys.

Land Records

Perhaps the single most significant functional responsibility of the Lands Operations and Realty program is the creation, maintenance, and protection of accurate, detailed land records. The failure to maintain good land records can result in inefficient administration and slow response to public demands, at best. At worst, it can jeopardize the integrity of vital water projects and result in untold unnecessary costs to the Federal government through imperfect title and tort liability costs. Reclamation maintains hundreds of thousands of land records spanning almost a century of water development in the West. These records were generally in traditional paper media. Many are deteriorating rapidly due to age, and some have been lost or damaged to the extent they must be recreated, a costly and time-consuming process. Reclamation has been working hard in past years to protect the information in these records, and to make it more accessible, through use of electronic information management technology. These new records media include computer database systems for storing text and tabular data, graphic systems for storing images of original documents, and geographic information systems (GIS) for storing map-based data.

D. National Park Service

Here are the regulations for special use permits in the national park system. Of special note is that no permits are given for areas designated wilderness. Once again, a permit is required and a yearly fee is assessed based upon fair market value. The cost for the implementation of the permit is also required – the permittee must pay the administrative costs involved with issuing the permit.

DIRECTOR'S ORDER #53: SPECIAL PARK USES

Approved: /s/ Robert G. Stanton (signed original on file)
Director, National Park Service

Effective Date: April 4, 2000

Sunset Date: April 4, 2004

Table of Contents

1. Introduction
2. Authorities
3. Policy Guidance
4. Permitting Instruments
5. Permitting and Renewal Considerations
6. Permit Provisions
7. Native American Rights
8. First Amendment Activities
9. Water Rights
10. Rights-of-Way
11. Agricultural Use
12. Domestic Livestock Management
13. Special Events
14. Filming and Photography
15. Expired Reservation of Use and Occupancy
16. Special Considerations for Alaska
17. Scientific Research and Related Collecting

1. INTRODUCTION

A special park use is a short-term activity that takes place in a park area and:

- Provides a benefit to an individual, group or organization, rather than the public at large;
- Requires written authorization and some degree of management control from the NPS in order to protect park resources and the public interest;
- Is not prohibited by law or regulation; and
- Is neither initiated, sponsored, nor conducted by the NPS.

The approval or denial of requests to engage in special park uses is an important and continuing responsibility of superintendents. Superintendents should be aware that local decisions related to permitting special park uses may have Service-wide implications, and set precedents that create difficulties for other superintendents. In such instances, the superintendent should consult with the regional or Service-wide specialist.

A special park use may involve either rights or privileges, and may or may not support the purposes for which a park was established. In either case, whether the request is approved or denied, the superintendent's decision must be able to withstand review, challenge and litigation. Whether the request is approved or denied, the superintendent's decision must be consistent with service-wide

policies and consistent with decisions made on both a park and on a service-wide basis. The judicial standard of review is whether the decision is "arbitrary and capricious."

A special park use does not include any activity managed under the Concessions Management Improvement Act of 1998 (16 USC 5901), any recreation use covered by section 4 of the Land and Water Conservation Fund Act (16 USC 4601-6a), any recreation use covered by the Recreational Fee Demonstration Program (16 USC 4601-6a Note), any leasing activity pursuant to the National Historic Preservation Act (16 USC 470h-3), or Section 802 of the National Parks Omnibus Management Act of 1998 (16 USC 1a-2(k)).

2. AUTHORITIES

2.1 The authority to issue this Director's Order is contained in 16 USC 1 through 4, and in delegations of authority contained in Part 245 of the Department of the Interior Manual.

2.2 The 1916 NPS Organic Act and a 1978 amendment to the NPS General Authorities Act place limits on the kinds of activities that may be allowed within the National Park System. The most important provisions read as follows:

[The National Park Service] shall promote and regulate the use of the [national parks] by such means and measures as conform to the fundamental purpose of the said parks..., which purpose is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations (16 USC 1).

The authorization of activities shall be construed and the protection, management, and administration of these areas shall be conducted in light of the high public value and integrity of the National Park System and shall not be exercised in derogation of the values and purposes for which these various areas have been established, except as may have been or shall be directly and specifically provided by Congress (16 USC 1a-1).

These provisions of law place obligations on the National Park Service to manage use of park areas in a manner that will protect against the impairment or derogation of park resources, values and purposes.

2.3 Superintendents must be able to cite a specific right or statutory authority to allow a special park use. Rights may include those granted under the Constitution, or through treaty or property entitlements. Statutory authorities include general statutes (e.g., 16 USC 1), or a park-specific statute. In addition to rights or statutory authorities, managers must also consider Executive orders, regulations, and case law to determine whether a proposed activity or special park use is allowed. Examples of authorities most frequently cited for special park uses are:

16 USC 1 - 4, for general uses

16 USC 5 and 79, for rights of way

Examples of authorities for charging fees and recovering costs related to special uses are:

16 USC 3a, for cost recovery
31 USC 9701, for fee collection
(See also section 10.1.)

3. POLICY GUIDANCE

Primary policy guidance on special park uses is contained in section 8.6 of NPS Management Policies. That guidance is summarized in, and supplemented by, this Director's Order.

3.1 General. The National Park Service may permit a special park use if the proposed activity will not:

- Cause injury or damage to park resources; or
- Be contrary to the purposes for which the park was established; or
- Unreasonably impair the atmosphere of peace and tranquility maintained in wilderness, natural, historic or commemorative locations within the park; or
- Unreasonably interfere with the interpretive, visitor service, or other program activities, or with the administrative activities of the NPS; or
- Substantially impair the operation of public facilities or services of NPS concessioners or contractors; or
- Present a clear and present danger to public health and safety; or
- Result in significant conflict with other existing uses.

A superintendent must deny initial or renewal requests upon finding that any of the above conditions will not be met. Existing activities that do not meet these conditions must be phased out.

3.2 Mandatory or Discretionary. Some special park uses are specifically authorized in a park area's enabling legislation, which may indicate that permitting is mandatory ("The Secretary shall permit ..."), or discretionary, ("The Secretary may permit ..."). In either instance, the proposed use is considered to be both authorized and appropriate, as long as adequate safeguards are established to protect park resources, values, and visitors.

3.3 Right or Privilege. A superintendent must determine whether a request for a special park use is prohibited or mandated, or involves a right or a privilege. A right is based on property ownership, legislative or treaty entitlement, or Constitutional guarantee. Where none of these factors is present, the use is a privilege over which the superintendent may exercise varying degrees of discretion and control. Generally speaking, citizens must be afforded the opportunity to exercise their rights; however, a superintendent may establish permit conditions to protect park visitors, park resources and values. When considering a privilege, the superintendent has the additional task of determining whether the activity will be allowed.

3.4 Compliance. The decision to issue or deny a permit for a special park use flows from the appropriate compliance under the National Environmental Policy Act (NEPA), Section 106 of the National Historic Preservation Act of 1966 (NHPA), and other applicable laws. For example in the case of NEPA, if the proposed special use is not covered by a categorical exclusion, the superintendent, in preparing an EA or

EIS, is responsible for identifying reasonable alternatives, both inside and outside the park, and completing appropriate compliance documentation. Although the superintendent may require the applicant to prepare this documentation, the NPS remains responsible for its content. Regardless of who prepares compliance documents, the applicant is responsible for paying all NPS costs incurred in meeting NEPA and 106 compliance requirements.

3.5 Permit Terms and Conditions. Superintendents will establish permit conditions that protect NPS and public interests, including park resources and values. Special park uses may be authorized for a period of not-to-exceed 5 years. Rights-of-way are addressed separately and may be issued for longer than 5 years. (See Section 10.)

3.6 Permit Fees and NPS Cost Recovery. Except as identified in Section 3.7 below, the NPS will charge fees and recover costs for special use permits unless prohibited by law or Executive order, or when the proposed use is protected by the First Amendment or involves another right and not a privilege. Charges should reflect the fair market value of the use requested. The fair market value of a special park use is the value of the lands or facilities used, plus the NPS costs incurred in managing or supporting the use. The NPS will retain funds recovered for the cost of managing a special park use. Charges arising from the use of NPS lands and facilities must be deposited in the U. S. Treasury, unless otherwise specifically authorized by law.

When special use permit fees are proposed to be increased, the superintendent will notify the permittee and/or the public of the increase at least sixty (60) days prior to the fee changes taking effect. (See 3.12 below. See also Reference Manual 53 Chapter 10.)

3.7 Permit Fee Waivers. A waiver from the requirements to charge permit fees and to recover costs may be appropriate when:

Charging and collecting are not cost-effective;

A waiver is considered an appropriate courtesy to a foreign government or international organization;

The permittee is a state, local, or Federal agency or Native American tribe or group; or

The superintendent determines that the proposed use will promote the mission of the NPS or promote public safety, health, or welfare.

3.8 Recreation Fees and Non-Recreation Uses. Special park use permittees who enter a park for recreational purposes are subject to the same entrance fees, recreation use fees, and recreation permit fees as the general public. However, persons engaging in special park uses that are not recreational in nature are exempt from entrance fees. Examples include but are not limited to: First Amendment; agricultural; grazing; filming activities; NPS authorized research; Federal, state and local government business; and outings conducted by schools and other bonafide educational institutions for educational purposes.

3.9 Fees Charged by Permittee. A permittee, while on park property, may not collect admission or any other money associated with a special event. All permittee monetary transactions must take place outside the park.

3.10 Donations. The NPS has authority to accept donations, but not to solicit donations. Therefore, NPS managers will not initiate discussion of a possible donation with any permit applicant. In addition, the applicant must not be approached by a representative of a cooperating association, friends group, or other park partner for a donation while the application is being considered, the permit is being negotiated, or the permitted activities are ongoing.

An applicant's offer of a donation to the park must not in any way influence the superintendent's decision to issue or deny a permit, nor may it influence the manner in which a permit is administered. If a permit applicant voluntarily indicates an interest in making a donation to the park, the superintendent must refrain from discussing the donation until after the permitted activity is completed. Superintendents may not accept donations in lieu of recovering costs.

3.11 Administrative Record. Superintendents must develop an appropriate administrative record to support their decisions. The information must be in writing and, depending on the sensitivity of the matter, contain the dates, discussions, and rationale involved in the decision process and the determination of all fees. In addition, the administrative record must contain all letters, compliance documentation, notes, and other documents related to the issuance of the permit, including a copy of the executed permit. Permits issued without fees or cost recovery will be retained in the park files for 1 year and 1 day following expiration of the permit. Permits issued with fees or cost recovery will be retained in park files for 6 years and 3 months following expiration of the permit.

3.12 Renewals. Superintendents must carefully review each permitting instrument for a special park use prior to renewal. A request for renewal should be considered as carefully as if it were an initial application. The review should take place before the existing permit expires, and must ascertain the continuing validity of the original findings as well as the Administrative Record of what has taken place since those findings. The review will determine whether the activity is still mandated or legally permissible, and whether it continues to be appropriate and compatible with the purposes of the park. The Renewal Flow Chart found in Reference Manual 53 Chapter 8 should be used for this purpose.

4. PERMITTING INSTRUMENTS

4.1 There are two instruments that may be used to authorize a special park use: (1) a Special Use Permit, or (2) a Right-of-way Permit.

(1) Special Use Permit. Instrument issued by a superintendent to an individual or organization to allow the use of NPS-administered resources and to authorize activities in 36 CFR Parts 1 - 7 that require a permit. (See Reference Manual 53.)

(2) Right-of-way permit. Instrument issued by a regional director to authorize any new utilities, including water conduits, on NPS lands. This includes those utilities not owned by the NPS, but serving the NPS and/or NPS concession facilities.

Superintendents may, as appropriate, renew, amend, or convert other documents to right-of-way permits for existing utilities. Right-of-way renewals and conversions may be signed by the superintendent.

NPS-owned utilities do not require a right-of-way permit, nor is one required when the specific use is authorized by a property right, such as a deeded easement, or by park-specific or other legislation when the statutory language is so written as to have the same effect as a deeded easement.

A right-of-way permit does not grant any interest in the land, and is a revocable permit issued at the discretion of the NPS.

When the right-of-way permit format prescribed by Reference Manual 53 is used without substantive changes, it does not require further review by the Solicitor.

4.2 Other Permits. NPS issues other permits and signed agreements, including but not limited to research, collection, and use of natural and cultural resources. Requirements for these permissions are found in other Director's Orders and related Reference Manuals (such as DO #24 NPS Museum Collections Management, DO #28 Cultural Resource Management, and DO #77 Natural Resources).

5. PERMITTING AND RENEWAL CONSIDERATIONS

5.1 Reasons for Issuing a Permit. There are three primary reasons for issuing a permit, regardless of type:

To impose conditions to manage the activity and prevent impairment or derogation of resources, values, and purposes for which the park was established;

To obtain the signature of the permittee agreeing to the conditions and other statements contained within the document; and

To establish a written account of the special use for inclusion in the administrative record.

5.2 Basic Requirements. To receive consideration, a proposal to engage in a special park use must be submitted in writing; be consistent with applicable legislation, Federal regulations and administrative policies; avoid visitor use conflicts; and should not create unacceptable impacts to park resources. (See 3.1.)

5.3 Administrative Record. Special park uses do not have to be allowed simply because a request has been made and discretionary authority for such use exists. The need to develop a rationale for the approval of each special park use request is as important as it is for the denial of such requests. The decision to approve or deny a special park use should be based on objective data and recorded in the administrative record.

5.4 Flow Chart. Superintendents must follow the "Flow Chart For Special Park Use Initial Requests" (see Reference Manual 53 Chapter 8) to ensure that all requirements of law, regulation, and NPS policy are addressed. Any special park use that is approved must be documented in writing, have a specific date for expiration, contain safeguards for the protection of the park's resources and values, and have an adequate administrative record.

5.5 Termination. Occasionally, activities or uses that passed an initial evaluation are no longer permissible. If a previously-permitted activity is found to be without legal authorization, or is judged to be no longer appropriate and compatible with current policy or the purposes of the park and additional stipulations would not mitigate enough to make it appropriate, it must be terminated.

6. PERMIT PROVISIONS

Superintendents will ensure that measures to protect the United States' interests are incorporated into permits for special park uses. To ensure this protection, superintendents will include in each permit issued some, or all, of the following items, depending on the activity. (The following items, however, may not be imposed on First Amendment activities.)

6.1 Performance Bonds. Performance bonds or deposits are the permittee's guarantee of compliance with permit conditions and reimbursement to the park for damage to resources and/or facilities as a result of the permittee's activities. An amount adequate to cover the cost of restoration, repair, rehabilitation and cleanup of the area may be required. Should resource damage beyond that envisioned by the original performance bond result from the permittee's use, the park may file suit against the permittee under the authority of 16 U.S.C. 19jj, Park System Resource Protection.

6.2 Liability Insurance. Liability insurance protects the government from negligent actions by permittees. Insurance in an amount sufficient to protect the interests of the United States may be required as a condition of the permit.

6.3 Property Insurance. Adequate property insurance coverage should be required whenever Federal buildings and/or facilities are being made available pursuant to a permit.

6.4 Hold Harmless/Indemnification. This is a legal statement intended for use as a condition of a permit. It states that the Federal government, its agents and employees, cannot be held liable for claims for damages or suits for any injuries or deaths from any cause occasioned by the permittees' occupancy and use of the land included within the permit.

6.5 Tort Claim Provision. This statement is used in lieu of an indemnification requirement when issuing permits to other Federal agencies. While it is directed mostly at the occupancy of NPS property by the other agency, it might be used for other purposes.

6.6 Anti-Deficiency Act. This statement protects the NPS against claims arising from an executed Agreement, which would be in excess of the fiscal year appropriation for that agreement.

6.7 Bankruptcy Termination. While this statement is primarily aimed at agricultural Special Use Permits, it might be appropriate under other circumstances and other instruments, depending on the use. Its purpose is to prevent the park or park lands from being claimed as an asset or becoming involved in any part of a settlement if the permittee becomes involved in bankruptcy proceedings.

7. NATIVE AMERICAN RIGHTS

The NPS, to the extent consistent with each park's legislated purposes, will develop and execute its programs in a manner that reflects knowledge of and respect for the cultures - including religious and subsistence traditions - of Native American tribes or groups with demonstrated ancestral ties to particular resources in parks.

The NPS will be as unrestrictive as possible in permitting Native American access to and use of traditional sacred resources for customary ceremonials, provided that such use does not cause derogation of the resources.

The NPS will permit members of Native American tribes or groups to have access to park areas to perform traditional religious, ceremonial, or other customary activities at places that have been used historically for such purposes. The Service will not direct visitor attention to the performance of religious observances unless the Native American group so wishes.

Members of Native American tribes or groups may enter parks for traditional non-recreational activities without paying an entrance fee.

8. FIRST AMENDMENT ACTIVITIES

The First Amendment to the United States Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

8.1 General. Freedom of speech, the press, religion, and assembly are rights, not privileges. However, the courts have recognized that activities associated with the exercise of these rights may be reasonably regulated to protect legitimate government interests. Therefore, in order to protect park resources, the NPS may regulate certain aspects of First Amendment activities, such as the time when, the place where, and the manner in which they are conducted. NOTE: It is the conduct associated with the exercise of these rights that is regulated, and never the content of the message. There are also First Amendment issues associated with photography and filming activities addressed later in this Director's Order. NPS regulations pertaining to First Amendment activities are found at 36 CFR 2.51 and 2.52, or at 36 CFR 7.96(g) for designated park units in the National Capital Region.

8.2 Religion. The First Amendment also prohibits the government from supporting or promoting a particular religion, religious view, or religious organization. However, it does not prohibit the National Park Service from permitting religious activities in park areas, in the same way as the Service would permit the exercise of any other First Amendment activity.

8.3 Equal Protection. The principle of equal protection, guaranteed by the due process clause of the Fifth Amendment, provides that, to the extent any particular activity is permitted, similar First Amendment activities may not be excluded. Therefore, any restraints imposed must be administered even-handedly to all groups and individuals for activities similarly situated. The NPS may not permit one group to engage in conduct while prohibiting others under similar circumstances. Superintendents must be

particularly careful to be neutral in their judgment, and not to favor organizations with which they are personally familiar, or whose "message" they privately support.

8.4 Political Events. Political events may be either First Amendment activities or special events. Typical examples of First Amendment events include public demonstrations, assemblies, or other forms of public expression of opinions and views. Examples of non-First Amendment events include political fund-raisers and other by-invitation-only political events not normally open to the general public. In addition to all the normal considerations involved in allowing special events in the parks, superintendents must take into consideration whether or not the activity would be permitted if requested by any other group.

9. WATER RIGHTS

Special park uses may involve the use and/or conveyance of water. Water law, both Federal and state, governs the manner, timing, and amount of use that any party, including the National Park Service, may make of any water body, including both surface and ground water. If a water use is not authorized under either Federal, state, or common law, then such use will not be permitted in an NPS unit.

Policy and additional laws specific to the National Park Service govern the sale, or other form of disposal, of water from Federal lands administered by the NPS. The general thrust of these laws and policy is that the NPS has no excess or surplus water and that water cannot be sold, given away, or otherwise provided for non-NPS use except under very limited circumstances.

Specific guidance on the sale or lease of services, resources, or water available within an area of the National Park System is available from the Water Resources Division, Water Rights Branch.

(See also Director's Order #35: Sale or Lease of Services, Resources, or Water.)

10. RIGHTS-OF-WAY

10.1 Authorities. The NPS may issue right-of-way permits only for those uses or activities specifically authorized by Congress and only if there is no practicable alternative to such use of NPS lands. Authority for a utility Right-of-Way (ROW) through parks is found in 16 USC 5 for radio, television and other forms of communication transmitting and receiving structures, facilities and antennas (including telecommunication antenna sites); and 16 USC 79 for electric power, telephone and telegraph lines, and a wide variety of water conduits (including sewer); or in a very few cases, park-specific legislation.

Guidance for authorizing roads and highways in NPS areas is found in Director's Order #87. Authority for highways that are part of the Federal Aid Highway System is found at 23 USC 317. Authority for permitting access to in-holdings in Alaska park units was granted by Public Law 96-487, title XI, §1110(b)(16 USC 3170(b)).

Examples of uses for which there are no general authorities are roads that are not a part of the Federal Aid Highway System (National Highway System), and oil, gas, or other petroleum product pipelines.

Oil and gas lines that serve NPS facilities only may be authorized under 16 USC 1 -3, but these lines may not be extended to serve any other purpose. If authority for a requested use is not found in general or specific legal authority, the park must deny the use. Should an unauthorized right-of-way already exist, the park should contact the regional program manager for resolution.

10.2 Regulations. NPS general regulations regarding ROW permits are located at 36 CFR Part 14. The regulations for NEPA Section 102 and NHPA compliance are located at 40 CFR Part 1500 and 36 CFR Part 60, 63 and 800. Alaska-specific regulations on ROW's and NEPA compliance are located at 43 CFR.

10.3 Telecommunication Antenna Sites. Director's Order 53A, 'Wireless Telecommunications,' is hereby rescinded and replaced by the applicable provisions of this Director's Order. The NPS will comply with the Telecommunications Act of 1996 and any other policies, requirements, or instructions that are applicable to the Service. In complying, superintendents will:

Encourage preliminary meetings with telecommunication industry companies who wish to discuss pending or proposed applications for sites in the park to explain park concerns and understand industry timeframes.

Encourage meetings with the applicants during the post application decision process as necessary, but especially if the manager is considering denying the application. Such meetings should take place prior to written notification of denial.

Consider the safety of the visiting public when reviewing telecommunication site applications, including the potential benefit of having telephone access to emergency law enforcement and public safety services.

Ensure that, when an application is submitted, the park replies in writing within 10 business days with an initial response on the application, and that response will be 'yes' (probably a known categorical exclusion requiring very minor additional information to be submitted), 'no' (with reasons in writing), or 'maybe' (with additional information to be submitted).

Ensure that, to the extent possible, the timeline and detailed steps enumerated in Reference Manual 53 are followed and the permit is issued or denied.

Ensure that compliance actions and reviews will be conducted expeditiously and consistent with all applicable statutes.

A telecommunication use is considered a utility and, like other utilities on NPS lands, will be authorized using the right-of-way permit process described in Reference Manual 53. 16 USC 5 will be used as the authority to permit telecommunication antenna sites.

10.4 Wilderness. Except as specifically provided by law, there will be no permanent road, structure or installation within any study, proposed, recommended, or designated wilderness area. This includes the

installation of utilities. (See the Wilderness Act 16 USC 23). The NPS will not issue any new right-of-way permits or widen or lengthen any existing rights-of-way in study, proposed, recommended, or designated wilderness areas. (See also Director's Order #41: Wilderness Preservation and Management)

11. AGRICULTURAL USE

Special Use Permits (SF 10-114) will be issued only for agricultural activities which meet defined objectives of restoring or perpetuating human-influenced landscapes identified in NPS planning documents. If a desired agricultural use is not specifically authorized in a park's enabling legislation, a superintendent may issue an agricultural permit under 16 USC 1 - 3.

In permitting agricultural use of NPS lands, the NPS will foster practices which conserve soil, protect natural waterways and groundwater, control proliferation of exotic species and avoid toxic contamination of the environment. Benefits and potential impacts of agricultural use should be carefully weighed. In no case will a permit be issued where the activity involved would impair or derogate any natural or cultural resource. Special consideration needs to be given to riparian areas, wetlands, and protection of threatened or endangered species and their habitats.

12. DOMESTIC LIVESTOCK MANAGEMENT

12.1 General. Each park that allows livestock use, including parks where livestock is managed by other agencies, will develop a livestock management plan. The NPS will allow livestock use only when the use is:

Specifically authorized by a park's enabling legislation or other legislation; or

A reserved right of use arising from the acquisition of a tract of land; or

Required in order to maintain a historic scene; or

Conducted as a necessary and integral part of a recreational activity appropriate to the park.

No livestock use or activity, regardless of how authorized, will be allowed that would impair or derogate the resources, values or purposes for which a park was established. In particular, livestock use that depletes or degrades non-renewable resources, or whose effects cannot be mitigated, will not be allowed.

The use of pack-in feed--preferably pellets--is encouraged for all pack and saddle stock while on the trail, and is required whenever grazing would have adverse impacts on a park's resources. When not actively engaged in recreational activities, pack and saddle stock will either be removed from the park or be confined within an appropriate corral or other structure, and fed pelletized feed or hay that is free of weed seeds.

12.2 Permitting Instruments. Grazing activities that are allowed will be conducted only pursuant to the terms and conditions of a special use permit, property lease, concessions contract or commercial use authorization.

In addition to any other penalty provisions, violation of the terms and conditions of the permit may result in revocation of the livestock use privilege.

(See Director's Order #38: Property Leasing; also Director's Order #77 and Reference Manual 77-3 for livestock management requirements. Also see sections 8.6.8--Domestic and Feral Livestock Management, and 4.4.10—Exotic Species, in NPS Management Policies.)

13. SPECIAL EVENTS

13.1 General. Special events are activities, such as sporting events, pageants, regattas, public spectator attractions, entertainment, ceremonies, large group camps, or rendezvous, which fall under the category of privileges. Special events differ from public assemblies and public meetings in that the latter activities are rights protected by the First Amendment.

A superintendent is required to apply the criteria spelled out at 36 CFR 2.50, or, for the designated park units in the National Capital Region, the special regulations at 36 CFR 7.96(g)(4)(vi). These regulations authorize special events, provided:

There is a meaningful association between the park area and the event;

The observance contributes to visitor understanding of the significance of the park; and

The superintendent has issued a permit.

Generally speaking, these criteria should be interpreted as being inclusive rather than exclusive, since most visits to national parks will entail some meaningful association and impart some understanding of the significance of the park. However, 36 CFR 2.50 requires that a permit be denied if, in the superintendent's opinion, the special event will:

Cause injury or damage to park resources; or

Be contrary to the purposes for which the park was established, or unreasonably impair¹ the atmosphere of peace and tranquility maintained in wilderness, natural, historic, or commemorative locations within the park; or

Unreasonably interfere with the interpretive, visitor service, or other program activities, or with the administrative activities of the NPS; or

Substantially impair¹ the operation of public facilities or services of NPS concessioners or contractors; or

Present a clear and present danger to public health and safety; or

Result in significant conflict with other existing uses.

It is the Service's intent to apply these criteria in a manner that will make the permitting process more uniform Service-wide, reduce the possibility of superintendents denying permits without good cause, and result in the timely processing of permit requests.

(See also Management Policies 8.6.1; and see 36 CFR 7.96(g) for special considerations applicable to the National Capital Region.)

13.2 Political Events. Political events may be First Amendment activities or special events. First Amendment activities of this nature are public demonstrations, assemblies, or other forms of public expression of opinions and views (see section 8.4). Examples of special events in the same vein are political fundraisers and other invitation-only political events not normally open to the general public.

13.3 Sale of Food or Merchandise. In general, the sale of food or merchandise in the parks without a permit is prohibited by 36 CFR. 5.3. Most sales operations within parks are managed under concession contracts or agreements with cooperating associations. Sales operations are restricted to indoor facilities specifically designated for use by concessioners and cooperating associations for that purpose.

The sale of printed material in connection with a special event or First Amendment activity is allowed, but only as provided in 36 CFR 2.52, or in 36 CFR 7.96(k).

The NPS places significant restrictions on the sale of items in connection with a special event. The sale of food is allowed only when the sale: (1) does not conflict with the activities of an NPS concession, (2) is managed under a permit, and (3) is conducted in compliance with Director's Order #83: Public Health. The sale of T-shirts, clothing, arts and crafts, and any other merchandise in connection with a special event or a First Amendment activity is prohibited.

13.4 Fireworks Display. Fireworks displays are not permitted in natural parks. In other parks, such displays must be approved by the superintendent, following consultation with the Regional Safety Officer.

14.FILMING AND PHOTOGRAPHY

As with any other request for a special park use, filming and photography activities may be permitted only when they meet the criteria listed in section 3.1. If those criteria are met, then the following policies and procedures apply.

14.1 Permits Requirements. The Special Use Permit (Form 10-114) is the instrument used to authorize filming or photography in NPS areas.

A permit is required for any filming or photography that:

involves the use of a model, set, or prop; or
requires entry into a closed area; or
requires access to the park before or after normal working hours.

A permit is not required for:

A visitor using a camera and/or a recording device for his/her own personal use and within normal visitation areas and hours; or

A commercial photographer not using a prop, model, or set, and staying within normal visitation areas and hours; or

Press coverage of breaking news. This never requires a permit, but is subject to the imposition of restrictions and conditions necessary to protect park resources and public health and safety, and to prevent impairment or derogation of park resources or values.

14.2 Other Considerations

A superintendent will not sign a location release supplied by an applicant.

A superintendent may request a credit line, provided that the content or subject matter of the filming project would not reflect adversely on the National Park Service.

The NPS may actively assist filming and photography activities that promote public understanding and appreciation of the National Park System, and the Director may authorize use of the arrowhead symbol for such filming projects.

The NPS will not censor the content of any filming project, nor require finished film products for review, files, or documentation purposes. However, a superintendent may review a story board or other material offered by the applicant to help determine whether:

A credit line would be appropriate; or

It would be appropriate for the NPS to actively assist a filming activity or authorize use of the arrowhead symbol.

(See Reference Manual 53 for more details.)

15. EXPIRED RESERVATIONS OF USE AND OCCUPANCY

Generally, the NPS, when it purchases properties, will remove any encumbering structures and restore the sites for park purposes. Superintendents may not extend use and occupancy reservations. However, they may either: (1) issue a lease (see Director's Order #38: Property Leasing), or (2) issue a SUP for temporary residency in an NPS structure at market rental rate, provided a determination has been made that:

It is in the best interest of the park and the United States; and

The use will not result in impairment or derogation of resources, values, and purposes for which the park was established; and

One or more of the following criteria are met:

Specific legislative authority exists to allow temporary residency;

The NPS is unable to remove the structure for a significant period of time;

The structure has or may have historic significance that would be endangered if it were vacated;

Extreme environmental conditions temporarily prevent the occupant from vacating the structure; or

Termination of residency would create an undue hardship on the occupant and the structure has served as the occupant's primary residence.

The permittee will reimburse the park for all costs associated with issuing and managing the permit, and will be charged a fee for the use of the facility, resource, or property based upon comparable prices in the local market (fair market value). The SUP does not grant any interest in the land. (See Reference Manual 53, Appendix 14.)

16. SPECIAL CONSIDERATIONS FOR NPS UNITS IN ALASKA

16.1 General. NPS Special Park Use policies are generally applicable to national park units in Alaska. However, in addition to the statutory authorities, regulations, cost recovery and policy directives discussed in this Director's Order and Reference Manual 53, superintendents must be familiar with the Alaska National Interest Lands Conservation Act of 1980 (ANILCA), and its implementing regulations. They must also be aware that, in addition to compliance with applicable laws such as NEPA and NHPA, any action to permit the use of public land will require an evaluation of the effect on subsistence uses that are authorized by section 810 of ANILCA.

16.2 Transportation or Utility Systems. Title XI of ANILCA requires a specific process for application, review, and approval of any transportation or utility system (TUS) in Alaska national park units. Approval of a TUS requires an existing statutory authority (just as it does elsewhere in the National Park System). If there is no existing authority, new legislation will be necessary if the requested use is to be authorized.

16.3 Access to In-holdings. Section 1110(b) of ANILCA requires the Secretary to give in-holders such rights as may be necessary to assure adequate and feasible access for economic and other purposes, subject to reasonable regulation to protect the natural and other values of Alaska national park units. Section 1110(b) is an authority for granting access to in-holdings in Alaska units. Under Department of the Interior regulations (43 CFR 36.10), in-holders must apply for a right-of-way permit using Standard Form-299 or a mining plan of operation in order to receive access rights.

16.4 Special Access. Section 1110(a) of ANILCA authorizes the use of snow machines (during periods of adequate snow cover or frozen river conditions), motorboats, airplanes, and non-motorized surface transportation methods for traditional activities (where such activities are permitted by law), and for travel to and from villages and home sites.

16.5 Temporary Access. Section 1111 of ANILCA authorizes temporary access across Alaska national park units if necessary for survey, geophysical, exploratory, or other temporary use of non-Federal land, and if such access would not result in permanent harm to unit resources.

16.6 Special Considerations. NPS managers in Alaska must be familiar with 43 CFR Part 36, 36 CFR Part 13, and all applicable titles of ANILCA. Alaska-specific law and regulations must be carefully considered before applying the Special Park Uses Handbook in Alaska.

17. SCIENTIFIC RESEARCH AND RELATED COLLECTING

17.1 Natural and Social Science Research and Related Collecting. Natural and social science research and related collecting activities in parks do not fall within the definition of "special park uses" and therefore are not governed by special use permits. Instead, these activities are governed by Scientific Research and Collecting Permits. For information about permitting natural and social science research and related collecting activities in parks, please refer to Director's Order 24: NPS Museum Collections Management; and Natural Resources Reference Manual 77; Director's Order 74: Scientific Research and

Collecting; and Director's Order 78: Social Science (note: some of these documents may not be completed as of this date). Additional guidance may be obtained from regional science advisors or from the Associate Director, Natural Resource Stewardship and Science.

17.2 Archeological Research in NPS Areas. Research must be conducted in accordance with the terms and conditions of a Federal Archeological Permit, Form DI-1991. Any archeological research conducted on park lands must be consistent with applicable statutes, regulations, policies, standards, and guidelines.

Permits issued to non-NPS researchers for archeological research on park lands must comply with regulations contained in 43 CFR Parts 3 and 7.

-----End of Director's Order-----

DIRECTOR'S ORDER #41: WILDERNESS PRESERVATION AND MANAGEMENT

Approved: /s/ Robert Stanton
Robert Stanton, Director

Effective Date: August 2, 1999

Sunset Date: August 2, 2003

Table of Contents

- | | |
|--|--|
| A. Introduction | 3. Interagency Coordination |
| B. Instructions and Requirements
Wilderness | 4. Cultural Resource Management in |
| 1. Reference Manual | 5. Fire Management in Wilderness |
| 2. National Wilderness Steering Committee | 6. Wilderness Interpretation and Education |
| 3. Management Responsibility and Accountability | 7. Mineral Development in |
| Wilderness | 8. Scientific Activities in Wilderness |
| a. Complete Wilderness Identification
and Designation Process | 9. Wilderness Use by Persons with |
| Disabilities | 10. Special Events in Wilderness |
| b. Complete Wilderness Management Planning | 11. Wilderness Training Requirements |
| c. Establish Wilderness Management Accountability | 12. Commercial Services in |
| d. Administer and Protect Wilderness Resource | |
| Wilderness | |
| C. Wilderness Management Issues | 13. Air Quality in Wilderness |
| 1. Wilderness Management Plan Requirements | 14. Annual Report to Congress |

2. Application of the Minimum Requirement Concept 15. Other Issues to be Addressed

A. INTRODUCTION

The purpose of **Director's Order #41** is to provide accountability, consistency, and continuity to the National Park Service's wilderness management program, and to otherwise guide service wide efforts in meeting the letter and spirit of the 1964 Wilderness Act. This Director's Order will clarify, where necessary, specific provisions of National Park Service Management Policies; and will establish specific instructions and requirements concerning the management of all National Park Service wilderness areas.

Director's Order #41 should be applied to management actions carried out within the framework of a park's general management plan, the Government Performance and Results Act, a park's natural and cultural resources plans, and the park's wilderness management plan.

It is important to note that policies may in some instances be superseded by statutory provisions that apply to individual wilderness areas, by rights reserved by former landowners and, in Alaska, by applicable provisions of the Alaska National Interest Lands Conservation Act (ANILCA).

B. INSTRUCTIONS AND REQUIREMENTS

In keeping with the principles of management accountability, the National Park Service will apply the following requirements to its wilderness preservation activities. For the purpose of applying these requirements, the term "wilderness" includes the categories of "suitable," "study areas," "proposed," "recommended," and "designated."

1. Reference Manual. The July 1999 edition of Reference Manual #41: Wilderness Preservation and Management is hereby approved for release as a supplement to this Director's Order. The Associate Director for Park Operations and Education is authorized and required to maintain and update the manual to provide comprehensive guidance on wilderness preservation and management. The reference manual will include applicable policies and Director's Orders; an assessment of the critical issues in wilderness preservation and management, with instructions on how these issues will be managed; minimum content requirements for wilderness management plans; and other information that will help field managers and staff meet their responsibilities.

2. National Wilderness Steering Committee. The Associate Director for Park Operations and Education may establish a National Wilderness Steering Committee to promote consistency and improvement in National Park Service wilderness stewardship, and to initiate interagency wilderness coordination. The Committee will provide the Directorate with recommendations and advice to establish accountability, consistency, and continuity within the Service's wilderness management program and will function until such time as the Directorate determines that it is no longer needed.

3. Management Responsibility and Accountability. Park managers will ensure that wilderness resources are afforded maximum protection through implementation of the following actions addressing the NPS wilderness accountability and responsibilities defined in Chapter 6 Wilderness Preservation and Management policies. (Reference Manual #41: Appendix C provides a checklist for these items)

a. Complete Wilderness Identification and Designation Process.

(i) Wilderness Suitability Assessments. A wilderness suitability assessment must be completed for all lands to determine suitability for inclusion within the National Wilderness Preservation System no later than one year after NPS acquisition.

(ii) Wilderness Studies. Formal studies of lands identified as suitable for wilderness must be completed within five years of the wilderness suitability assessment. (See also 36 CFR Subpart A Part 19)

(iii) Wilderness Proposal/Recommendation: Wilderness designation proposals will be forwarded to the Director immediately upon completion of the formal Wilderness Study for review and approval. The Director will, in a timely manner, forward the Wilderness Proposal and a recommendation to the Assistant Secretary and Secretary of the Interior for approval. Managers will track and know the status of their wilderness designation proposals.

(iv) Wilderness Designation Process: After the Secretary has forwarded the Recommendation to the President, and the President has transmitted the Recommendation to Congress, the National Park Service will track the status of the Recommendation as it progresses in the designation process.

b. Complete Wilderness Management Planning

(i) Wilderness Management Plan. Park superintendents with wilderness resources will prepare and implement a wilderness management plan or equivalent integrated into an appropriate planning document (see Reference Manual #41: Appendix D). An environmental compliance document, in keeping with NEPA requirements, which provides the public with the opportunity to review and comment on the park's wilderness management program, will accompany the plan.

(ii) Wilderness Management Plan Coordination. The goals and objectives of the wilderness management plan will be effectively coordinated with other park management documents (e.g. General Management Plan, Strategic Plan, Annual Performance Plan, and other operational plans such as the Fire Management Plan, and Natural and Cultural Resources Management Plan).

c. Establish Wilderness Management Accountability. Wilderness management accountability will be established through completion of the following:

(i) Critical Results for Wilderness Stewardship. Regional Directors will include a statement on wilderness management in the "Critical Results" element of the Employee Performance Plan and Results Report (Form DI-2002) for the superintendent of each area containing wilderness resources. Documentation of

these critical results will clearly identify and ensure appropriate focus on their wilderness management responsibilities.

(ii) Wilderness Responsibilities in Position Descriptions. All positions having significant wilderness responsibilities will be supported by position descriptions that describe these responsibilities.

(iii) Wilderness Integrated Into KSA's . Wilderness will be effectively integrated into the Knowledge, Skills, and Abilities requirements for all vacancy announcements for positions having significant wilderness responsibilities.

(iv) Wilderness Training for Key Staff. Each key person responsible for the management and protection of wilderness resources will receive the wilderness training necessary to ensure awareness, knowledge of, and accountability for, their specific wilderness responsibilities.

(v) Wilderness Referenced in GPRA Strategic Plan. Wilderness stewardship responsibilities will be referenced in the park's strategic plan developed pursuant to the Government Performance and Results Act.

(vi) Annual Report To Congress. Parks with wilderness resources will provide the Associate Director for Park Operations and Education with the information necessary to prepare the annual Report to Congress required by Section 7 of the Wilderness Act.

d. Administer and Protect the Wilderness Resource. Stewardship responsibilities for wilderness will be completed through the following:

(i) Responsible Persons and/or Organizations. Key park staff who have direct responsibility for the development, coordination, implementation, and accountability for the park's wilderness management program will be designated and identified. The responsible individual/organization may be the line officer, interdivisional committee, wilderness coordinator/manager, or other.

(ii) Minimum Requirement Process. A process to determine the "minimum requirement" for administrative actions, proposed special uses, scientific activities, and equipment use in wilderness will be identified and established. It must specify how the process is to be implemented in the park and that a record of the decisions generated through this process must be kept for public inspection.

(iii) Wilderness Management Plan Implementation: Progress will be made annually in implementing approved actions and activities in the wilderness management plan.

(iv) Suitable, Study Area, Proposed, and Recommended Wilderness Preservation. Lands identified as being suitable for wilderness designation, wilderness study areas, proposed

wilderness, and recommended wilderness (including potential wilderness) will be managed to preserve their wilderness character and values undiminished until Congress acts on the recommendations. Decisions will be made in the expectation of eventual wilderness designation.

(v) Legal Description and Boundary Map Completion. Every park with designated wilderness must possess a written legal description of the wilderness area and a map (or maps) that depict that legal description. Parks that have not yet done so, will complete a wilderness legal description and map(s) no later than eighteen months from the date of issuance of this Director's Order. All parks containing wilderness will ensure that the legal description and map are filed in the appropriate NPS offices and submitted to Congress, if required by law. (Reference Manual #41: Appendix G provides detailed instruction for completing legal descriptions and boundary maps).

(vi) Designated Potential Wilderness Management. Potential wilderness will be managed as wilderness to the extent that existing nonconforming uses will allow; temporary (non-conforming) uses will be eliminated as soon as practicable in keeping with National Park Service authorities and budgets. All parks containing potential wilderness designated by Congress will inventory that potential wilderness within two years of the issuance of this Director's Order, and every five years thereafter. When non-conforming uses have ceased within the potential wilderness, each park will take the steps necessary for the Secretary to publish in the Federal Register the notice that the potential wilderness is now designated wilderness. (Reference Manual #41: Appendix H addresses conversion of potential wilderness to designated wilderness).

(vii) Recreation Impact Evaluation. The appropriateness of recreation activities in wilderness, and recreation impacts, will be evaluated when changes in the nature and significance of the activities affect their compatibility with wilderness preservation and the statutory purposes of wilderness. The assessment of new or increased activities will be addressed through appropriate environmental compliance documentation as identified in DO#12.

(viii) Wilderness in Comprehensive Interpretive Plan. The Comprehensive Interpretive Plan for parks with wilderness resources will address the primary interpretive themes for wilderness education and reflect the wilderness significance statements as they appear in the park's GPRA Plan (See Reference Manual #41: Appendix I)

(ix) Geographic Naming in Wilderness. In order to maintain the untrammeled character of wilderness, the naming of additional geographic features is discouraged. The National Park Service will not propose to the U.S. Board of Geographic Names, nor support proposals by others, to apply new names to geographic features within any category of wilderness. An exception to this policy may be considered on a case-by-case basis when a proposed name: (a) serves a useful educational or interpretive purpose; or (b) is linked to an historical figure, activity, incident, or resources having a direct association with the

geographic feature; and (c) meets all other National Park Service and Board on Geographic Names policies applicable to geographic naming.

C. WILDERNESS MANAGEMENT ISSUES

The following guidance is provided for dealing with major wilderness management issues confronting the National Park Service:

1. Wilderness Management Plan Requirements

The superintendent of each park containing wilderness will develop and maintain a wilderness management plan (or plan for the management of suitable, proposed/ recommended wilderness area) to guide the preservation, management, and use of that area.

The plan will be developed with public involvement, and will contain specific, measurable management objectives that address the preservation and interpretation of wilderness-dependent cultural and natural resource values.

NPS Management Policies: 6.3.5 Wilderness Management Plan

For the purposes of applying NPS wilderness policies, the term 'wilderness' includes the categories of suitable, study, proposed, recommended and designated wilderness. NPS wilderness policies apply regardless of category. Potential wilderness may be a subset of any of these five categories...In addition to managing these classified areas for the preservation of their wilderness values, planning for these areas must ensure that the wilderness character is likewise preserved.

NPS Management Policies: 6.3.1 General Policy

The minimum content requirements for a wilderness management plan are as follows:

A wilderness management plan will be completed every ten years by all parks containing wilderness resources for the purpose of providing accountability, consistency, and continuity to the National Park Service's wilderness management program. The requirement to have a current wilderness management plan (or similar plan) applies to all areas containing suitable, study, proposed, recommended, and designated wilderness.

The wilderness management plan will: 1) clearly identify the boundaries of wilderness units of the park; 2) identify individuals and/or organizations within the park administration responsible for wilderness preservation; 3) establish an administrative process to determine "minimum requirement" for actions in wilderness; and 4) establish specific management actions to be applied to guide public use and preservation of wilderness resources, including the establishment of desired future conditions.

An environmental compliance document that provides the public with the opportunity to review and comment on the park's wilderness management program will accompany all wilderness management plans, consistent with the requirements of NEPA and appropriate National Park Service policy guidance.

Because of the unique nature of wilderness resources and possible public controversy over use allocations and their effects, in some instances a full environmental impact statement will be required. Wilderness management plans must be coordinated and integrated with other park planning documents (General Management Plan, the park's Strategic Plan/Annual Performance Plan, Facility Management Plans, Fire Management Plan, etc.) to ensure consistency across park management programs. All park disciplines should participate in the planning process.

While parks may exercise considerable flexibility as to the organizational and physical format of the wilderness management plan (i.e., plans may be developed as separate documents or integrated into General Management Plans, Backcountry Management Plans, or Resource Management Plans), the plan must contain at least the topics identified in the “Wilderness Management Plan-Recommended Content” included in Reference Manual #41: Appendix D.

2. Application of the Minimum Requirement Concept

...except as necessary to meet the minimum requirements for the administration of the area for the purpose of this Act (including measures required in emergencies involving the health and safety of persons within the area) there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area.

The Wilderness Act: Section 4 (c)

All management decisions affecting wilderness must be consistent with a minimum requirement concept.... When determining minimum requirement, the potential disruption of wilderness character and resources will be considered before, and given significantly more weight than, economic efficiency and convenience. If a compromise of wilderness resource or character is unavoidable, only those actions that preserve wilderness character and/or have localized, short-term adverse impacts will be acceptable.

NPS Management Policies: 6.3.5 Minimum Requirement

The National Park Service will apply the minimum requirement concept to all administrative activities that affect the wilderness resource and character. The application of the minimum requirement concept is intended to minimize impacts on wilderness character and resources and must guide all management actions in wilderness.

Wilderness managers may authorize (using a documented process) the generally prohibited activities or uses listed in Section 4(c) of the Wilderness Act if they are deemed necessary to meet the minimum requirements for the administration of the area as wilderness and where those methods are determined to be the ‘minimum tool’ for the project. The use of motorized equipment and the establishment of management facilities are specifically prohibited when other reasonable alternatives are available. The minimum requirement process cannot be used to permit roads or inappropriate commercial enterprises within wilderness unless these are authorized by specific legislation.

The minimum requirement concept is to be applied as a two-step process that documents:

- (1) A determination as to whether or not a proposed management action is appropriate or necessary for the administration of the areas as wilderness, and does not pose a significant impact to the wilderness resources and character; and,
- (2) If the project is appropriate or necessary in wilderness, the selection of the management method (tool) that causes the least amount of impact to the physical resources and experiential qualities (character) of wilderness.

It is important to understand the distinctions between the terms “Minimum Requirement,” and “Minimum Tool.”

Minimum Requirement is a documented process the NPS will use for the determination of the appropriateness of all actions affecting wilderness.

Minimum Tool means a use or activity, determined to be necessary to accomplish an essential task, which makes use of the least intrusive tool, equipment, device, force, regulation, or practice that will achieve the wilderness management objective. This is not necessarily the same as the term “primitive tool,” which refers to the actual equipment or methods that make use of the simplest available technology (i.e., hand tools).

Park managers will apply the minimum requirement concept when making all decisions concerning management of the wilderness area. This includes decisions concerning administrative practices, historic properties, proposed special uses, research, and equipment use in wilderness.

Planned administrative actions that may result in an exception to a prohibited use (i.e., chainsaws, aircraft use, radio repeater sites, rock drills, patrol structures, weather stations) or have the potential to impact wilderness resources and values must be consistent with an approved wilderness management plan and be documented in accordance with the park’s minimum requirements process. The minimum requirements process will be conducted through appropriate environmental analysis (e.g., categorical exclusions, environmental assessment/ FONSI, or an environmental impact statement/Record of Decision).

When determining the minimum requirement for a proposed action, the manager will strive to minimize the extent of adverse impact associated with accomplishing the necessary wilderness objective. The determination as to whether or not an action has an adverse impact on wilderness must consider both the physical resources within wilderness, and wilderness characteristics and values. These characteristics and values include: the wilderness’s primeval character and influence; the preservation of natural conditions (including the lack of man-made noises); cultural resource values, the assurance of outstanding opportunities for solitude; the assurance that the public will be provided with a primitive and unconfined type of recreational experience; and the assurance that wilderness will be preserved and used in an unimpaired condition.

Managers must give appropriate consideration to the aesthetic values of wilderness as well as the physical resource. These factors take precedence over cost or convenience in determining minimum requirement. National parks with wilderness must have a documented process for applying the minimum requirement concept. Reference Manual #41: Appendix F includes examples of "decision trees," which may be adopted or referred to as a procedure by which alternatives can be assessed and final management decisions developed. These decision tree examples do not alleviate a park's responsibility for providing adequate environmental compliance documentation for individual projects.

3. Interagency Coordination

For this purpose there is hereby established a National Wilderness Preservation System to be composed of federally owned areas....

The Wilderness Act: Sec. 2(a)

(a) Interagency cooperation and coordination and training responsibilities will also be carried out at the Washington, region, and park levels.

NPS Management Policies: 6.3.2 Responsibility

Interagency cooperation and coordination are required to minimize administrative differences and visitor confusion and to ensure that wilderness resources receive maximum protection. It will be the responsibility of the park manager to ensure that wilderness management within the park unit is coordinated with the management of the surrounding federal, state, and local land managers; federally recognized Native American tribes; and with other public and private organizations, as appropriate.

In areas where the National Park Service wilderness adjoins wilderness administered by another land management agency, the superintendent is responsible for coordinating with adjacent wilderness units to achieve as much consistency as possible in the application of wilderness regulations and management techniques. Coordination can include, but is not limited to, programs and policy concerning the issuance of permits, saddle and pack stock, group and party size, research projects, limits on campfires and pets, and other resource and visitor management issues. While the goal is to mitigate problems resulting from the differing missions of the agencies, the National Park Service will not adopt any practice that weakens or compromises the preservation of wilderness within the parks. Where appropriate, National Park Service wilderness education programs will explain the reasons for differences among neighboring agencies managing wilderness.

4. Cultural Resource Management in Wilderness

Each Federal agency shall establish, in consultation with the Secretary, a preservation program for the identification, evaluation, and nomination to the National Register of Historic places, and protection of historic properties.

National Historic Preservation Act

...the designation of any area of any park, monument, or other unit of the national park system as a wilderness area pursuant to this Act shall in no manner lower the standards evolved for the use and preservation of such park,...in accordance with the Act of August 25, 1916, the statutory authority under which the area was created, or any other Act of Congress which might pertain to or affect such area including...the Act of June 8, 1906 ["Antiquities Act"]... and the Act of August 21, 1935 ["Preservation of Historic Sites Act"]...

The Wilderness Act: Section 4(a)(3)

Except as otherwise provided in this Act, each agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character.

The Wilderness Act: Section 4(b)

Wilderness contains scientific, educational, and historical properties that are also cultural resources. There has been extensive prior human use in most areas now designated as wilderness, resulting in archeological sites, historic structures, cultural landscapes and associated features, objects, and traditional cultural properties that are contributing elements to wilderness. It is important to recognize that laws, such as the National Historic Preservation Act (NHPA), Archeological Resources Protection Act (ARPA), American Indian Religious Freedom Act (AIRFA) and the Native American Graves Protection and Repatriation Act (NAGPRA), as well as others, intended to preserve our cultural heritage, are applicable in wilderness.

National Park Service managers are responsible for maintaining an affirmative cultural resource management program in wilderness. The cultural resource management tasks within wilderness are the same as those elsewhere, but these sites must additionally be treated in a manner that preserves other wilderness resources and character. Measures to protect and inventory cultural resources in wilderness must comply with the Wilderness Act provisions on access and use of the minimum requirement concept.

Cultural resource specialists shall fully participate in the development of a park's wilderness management plan. In keeping with the full range of options identified in the Secretary's Standards, management actions affecting cultural resources in wilderness may include a variety of management options including preservation of a site or property, protection from vandalism, professional level documentation, and may include removal. However, actions involving all cultural resource types in wilderness must comply with cultural resource laws, such as compliance actions and inventory requirements mandated by the NHPA. Pertinent management actions must be made in consultation with the public interested in the historic preservation issue(s), including, but not limited to Native American tribes, State Historic Preservation Officers and, if necessary, the Advisory Council on Historic Preservation.

Wilderness, for some Native American groups, is a place of profound tribal history, traditional use, or a homeland. Ancestral human remains are protected in wilderness through NAGPRA, standing Executive orders, and the Presidential Memorandum concerning "Government to Government Relationships." These underscore strongly held tribal relationships to places in wilderness. Within wilderness, a number of Native American tribes continue religious ceremonies and other practices as provided for in the American Indian Religious Freedom Act.

Managers must develop long-term, constructive relationships with traditionally associated tribes to assist in culturally sensitive wilderness management. Wilderness areas may also be areas where treaty responsibilities and provisions apply.

5. Fire Management in Wilderness

(d) The following special provisions are hereby made...In addition, such measures may be taken as may be necessary in the control of fire...subject to such conditions as the Secretary deems desirable.

The Wilderness Act: Section 4(d)

Fire management activities conducted in wilderness areas will conform to the basic purposes of wilderness. The park's Fire Management and wilderness management plans together will identify the natural and historic roles of fire in the wilderness and will provide a prescription for response, if any, to natural and human-caused wildfires. If a prescribed fire program is implemented, these plans will also include the prescriptions and procedures under which the program will be conducted within wilderness.

Actions taken to suppress wildfire will use the minimum requirement concept and will be conducted in such a way as to protect natural and cultural features and to minimize the lasting impacts of the suppression actions and the fires themselves.

NPS Management Policies: 6.3.9 Fire Management

Under ideal conditions, natural fire should be considered as a fundamental component of the wilderness environment. Director's Order # 18: Wildland Fire Management, directs that all fires burning within wilderness will be classified as a "wildland fire" or a "prescribed fire." Wildland fires are those that result from unplanned ignitions. Prescribed fires are those resulting from planned ignitions. All wildland fires within wilderness will be managed to include the application of minimum requirement suppression techniques, the consideration of firefighter and public safety, a cost/benefit analysis, sensitive natural and cultural resources, and will use the strategic and tactical options described in an approved fire management plan.

Fire management plans must address the effects of fire management decisions on wilderness resources and character, air quality, smoke management, water quality, and other pertinent natural and cultural resource management objectives.

Until a fire management plan is approved, all wildland fires in wilderness must be suppressed, with strong emphasis on the concept of minimum requirement in determining suppression methodologies.

Parks containing wilderness will integrate wilderness considerations in the systematic decision-making process, determining the most appropriate management strategies for all planned ignitions (prescribed fires), and for any unplanned fires that no longer meet resource management objectives. While parks lacking an approved fire management plan may not use resource benefits as a primary consideration influencing selection of a wildfire suppression strategy, the resource impacts of suppression alternatives on wilderness values must be considered when decisions are made.

Wilderness values must be adequately represented during all fire planning processes, and wilderness managers will assist in the selection and implementation of appropriate responses to wilderness fires. Resource advisors must be knowledgeable about wilderness values, objectives, and policies.

Any delegation of authority to Incident Management Teams will include appropriate emphasis on the protection of wilderness resources. The methods used to suppress all wildland fires should be those that minimize the impacts of the suppression action and the fire itself, commensurate with effective control and the preservation of wilderness values. Fire suppression teams should be trained in the concepts of wilderness management, the preservation of wilderness values, and wilderness fire management. This requirement should be identified in appropriate delegation orders.

6. Wilderness Interpretation and Education

In the context of park interpretive and educational planning, national parks with wilderness resources will operate public education programs designed to promote and perpetuate public awareness of, and appreciation for, wilderness character, resources and ethics....

NPS Management Policies: 6.4.8 Wilderness Interpretation and Education

The Comprehensive Interpretive Plan for parks with wilderness will include and address the primary park interpretive themes that reflect the wilderness significance statements that appear in the park's GPRA Plan (See Reference Manual 41: Appendix I). Wilderness character and resources should be included in the park's interpretation and educational program, and be included as an integral component of the long range interpretive plan and annual implementation plan. Other key issues to be presented include wilderness safety and Leave No Trace ethics.

Public interpretation and education is essential for the support, understanding, and protection of wilderness. On-site programs may include talks, walks and other presentations, trailhead information, publications, and wilderness information centers or exhibits in existing visitor centers. Off-site and outreach programs may include a variety of presentations, curriculum-based education programs, web page sites, and publications.

Guided interpretive walks in wilderness will be conducted in accordance with day use limits prescribed in the park's Wilderness Management Plan. The walks will be conducted with sensitivity toward the experience of other wilderness users, and with minimal impact to the wilderness character and resource.

Staff education is an integral part of any wilderness education program. Wilderness awareness training will be incorporated into to all appropriate training programs. Examples include orientation training for seasonal park staff, cooperating associations, concessions, and volunteers. Park managers are encouraged to establish partnerships to better promote the benefits and values of wilderness.

7. Mineral Development in Wilderness

Except as specifically provided for in this chapter, and subject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area designated by this chapter.....

The Wilderness Act: Sec. 4(c)

The NPS will seek to remove or extinguish valid mining claims and non-federal mineral interests in wilderness through authorized processes including purchasing valid rights. In parks where Congress has authorized the leasing of federal minerals, the Park Service will take appropriate actions to preclude the leasing of lands or minerals within wilderness....

NPS Management Policies: 6.4.6 Mineral Development

Valid mineral interests and mining claims in wilderness will be managed pursuant to existing NPS regulations, policies, and procedures unless and until eliminated by acquisition, relinquishment, exchange or other methods. Regulations at 36 CFR Part 9A govern the development of mining claims located under the 1872 Mining Law. Regulations at 36 CFR Part 9B govern nonfederal oil and gas development. All other mineral development in parks, including wilderness, must be authorized under applicable regulations at 36 CFR Parts 1.6 and 2 through 5. Access in Alaska is additionally regulated by 43 CFR Part 36. More detailed information on managing minerals in wilderness can be found in other NPS guidance documents, including the "NPS Procedures Governing Mining Claims," the "NPS Procedures Governing Non-federal Oil and Gas Rights," and Natural Resources Reference Manual #77.

Validity exams: Under current NPS policy, validity exams must include the costs of complying with all applicable NPS regulations (NPS Procedures Governing Mining Claims, p. 35). In wilderness areas, validity exams should include the costs of environmental mitigation necessary to preserve the wilderness character, including possible restrictions on access or operations or additional costs of reclamation. Determination of the necessary mitigation measures may require that the environmental compliance process be conducted concurrently with the validity exam.

Motorized access: Stipulations on access may include non-motorized means, restrictions on the time and location of the access, restrictions on traffic volume and size, or other reasonable measures to minimize both short-term and long-term effects on wilderness resources and character.

Plan of operations: Stipulations on approved operations to ensure that short-term and long-term effects on the wilderness area are substantially unnoticeable may include, but are not limited to, sound barriers,

camouflage, camping platforms, reducing operations to certain times of the day or year, limiting night lighting, hauling out all grey water or other wastes, and restoration of natural conditions and processes.

Abandoned mine lands: Sites will be evaluated for closure or restoration using the minimum requirement analysis, which includes consideration of public safety and other pertinent laws and regulations and restoration of wilderness values.

8. Scientific Activities in Wilderness

A wilderness...may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

The Wilderness Act: Sec. 2(c)(4)

Except as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.

The Wilderness Act: Sec. 4(b)

The statutory purposes of wilderness include scientific activities, and these activities are permitted when consistent with the agency's responsibilities to preserve and manage wilderness. The National Park Service has a responsibility to support appropriate scientific activities in wilderness, and to use science to improve wilderness management. The National Park Service recognizes that wilderness can and should serve as an important resource for long-term research, study, and observation of ecological processes and the impact of humans on these ecosystems. The National Park Service further recognizes that appropriate scientific activities may be critical to the long-term preservation of wilderness. Accordingly, scientific activities are to be encouraged in wilderness, provided that the benefits of what can be learned outweigh any negative impacts on the wilderness resource or values.

NPS Management Policies: 6.3.6 Scientific Activities

The Wilderness Act intended, and NPS policy provides for, the conduct of legitimate natural and cultural scientific use of wilderness areas. The scientific value of wilderness derives from its undisturbed conditions. Because undisturbed natural areas are increasingly rare, wilderness areas often provide unique opportunities for scientific investigation. Scientific activities are to be encouraged in wilderness, provided that the benefits of what may be learned outweigh the negative impacts on other wilderness values.

The National Park Service recognizes and supports the value of wilderness areas as natural outdoor laboratories of both local and national significance. Research that aids or supports wilderness stewardship or administration and purposes of the wilderness area or park is to be encouraged--within the bounds of other applicable National Park Service policy and regulations, including the application of the minimum requirement concept.

The increase of scientific knowledge, even if it serves no immediate wilderness management purpose, may be an appropriate wilderness research objective when it does not compromise wilderness resources and character. However, research and other science projects in wilderness must meet accepted protocols and standards, including those related to safety.

It is important for scientists to understand that the conduct of their research should be in accord with wilderness preservation principles. Applications for research and other scientific work in National Park Service wilderness should demonstrate a positive benefit to wilderness or wilderness purposes and must include a minimum requirements analysis of the project's methodologies.

9. Wilderness Use By Persons With Disabilities

(1) In General -- Congress reaffirms that nothing in the Wilderness Act is to be construed as prohibiting the use of a wheelchair in a wilderness area by an individual whose disability requires use of a wheelchair, and consistent with the Wilderness Act, no agency is required to provide any form of special treatment or accommodation, or to construct any facilities or modify any conditions of lands within a wilderness area to facilitate such use.

(2) Definition -- For the purposes of paragraph (1), the term wheelchair means a device designed solely for the use by a mobility-impaired person for locomotion that is suitable for use in an indoor pedestrian area.

Americans with Disabilities Act of 1990 (ADA):

(b) *Section 507(c), 104 Stat. 327, 42 U.S.C. 12207*

In meeting the goal of accessibility, emphasis will be placed on ensuring that persons with disabilities will be afforded experiences and opportunities with other visitors to the greatest extent practicable.

NPS Management Policies: 9.1.2

Accessibility for Persons with Disabilities

The National Park Service has legal obligations to make available equal opportunities for people with disabilities in all of our programs and activities. This requirement includes the opportunity to participate in wilderness experiences. Management decisions responding to requests for special consideration to provide for wilderness use by persons with disabilities must be in accord with the Architectural Barriers Act of 1968, the Rehabilitation Act of 1973 (amended in 1978), and Section 507(c) of the Americans with Disabilities Act of 1990. Such decision should balance the intent of the access and wilderness laws and find a way to provide the highest level of access for the disabled with the lowest level of impact on the wilderness resource.

As a matter of law, the Rehabilitation Act (29 USC 701 et seq.) prohibits discrimination on the basis of disability in all programs and activities provided by the National Park Service. The Department of the Interior has adopted regulations (43 CFR 17) to implement the requirements of the Rehabilitation Act. Additionally, in the Americans with Disabilities Act, Congress added the above provision to the Act to address the access needs of persons with disabilities in wilderness areas.

The Secretary of the Interior’s regulations regarding “Enforcement of Nondiscrimination on the Basis of Disability in Department of the Interior Programs” (43 CFR 17) require that the NPS will operate all programs and activities so that they are accessible to and usable by persons with disabilities to the greatest extent practicable. However, Section 17.550 of those regulations states that agencies are not required to take any actions or provide access that would result in a fundamental alteration in the nature of a program or activity. This concept is also found in Section 507 of the American with Disabilities Act. The agency subsequently has the burden of proving that compliance would result in a fundamental alteration. While providing for the use of wheelchairs in wilderness areas, Congress states that “no agency is required to provide any form of special treatment or accommodation, or to construct any facility or modify any condition of lands within a wilderness area in order to facilitate the use of a person using a wheelchair.”

While the National Park Service is not required to provide any special treatment to provide access for persons with disabilities who use wheelchairs, managers should explore solutions for reasonable accommodations when not in conflict with the Wilderness Act (e.g., barrier-free trails, accessible campsites). Any facilities, built or altered, must meet current accessibility guidelines.

Wheelchairs are allowed in wilderness if they meet the definition in the ADA. The intent of this definition is that a wheelchair is a person's primary mode of locomotion, manual or electric, that is suitable for use in indoor pedestrian areas. This definition is also intended to ensure that persons using wheelchairs are reasonably accommodated in wilderness without the need to compromise the wilderness resource and its character.

The National Park Service will allow service animals within wilderness when it makes these areas accessible and usable by persons with disabilities. The ADA defines a service animal as any guide dog, signal dog, or other animal individually trained to provide assistance to a person with a disability. Service animals are required by persons with disabilities in day-to-day activities, and are permitted in wilderness. The training of service animals in wilderness is only allowed with specific permission from the park superintendent. Documentation must be provided that the animal is legitimately in training to be a service animal.

A publication entitled “Wilderness Access Decision Tool” (See Reference Manual #41: Appendix E) provides further guidance in assisting managers in making appropriate, objective, and consistent decisions regarding the use of wilderness areas by persons with disabilities. Managers should ensure that decisions concerning wilderness use does not inadvertently discriminate against persons with disabilities.

10. Special Events in Wilderness

The National Park Service will not sponsor or issue permits for special events to be conducted in wilderness if those events might be inconsistent with wilderness resources and character, or do not require a wilderness setting to occur.

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NPS Management Policies: 6.4.5 Special Events

Special events can cause wilderness resource degradation and intrude on the opportunities for solitude. Any request for the issuance of a permit for a special event in wilderness must be evaluated through the minimum requirement process and administered under 36 CFR 2.50.

Permits will not be issued for special events that are commercial enterprises, or for competitive events, activities involving animal, foot or water craft races, physical endurance of a person or animal, organized survival exercises, war games, or other similar exercises in NPS wilderness areas.

11. Wilderness Training Requirements

Superintendents, aided by the National Wilderness Program Manager and the Office of Employee Development, are responsible for providing appropriate types and levels of wilderness training needed by park and other agency personnel. Parks will be surveyed on a periodic basis to determine their highest priority wilderness training needs for incorporation into a long-term training strategy.

The Associate Director, Park Operations and Education, in cooperation with the Office of Employee Development, will develop and maintain a strategic plan for wilderness training that identifies training needs for personnel, locations of personnel, and a plan for delivery of training. The Office of Employee Development and the National Wilderness Program Manager will complete an annual training notice to provide information on all wilderness training opportunities available from all sources, recruitment and nomination procedures, criteria for selection of participants, and available funding sources. The National Wilderness Program Manager will also complete an annual report on wilderness training accomplishments.

12. Commercial Services in Wilderness.

Except as specifically provided for in this Act, and subject to existing private rights, there shall be no commercial enterprise...within any wilderness area....

The Wilderness Act: Section 4(c)

Commercial services may be performed within the wilderness areas designated by this Act to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the area.

The Wilderness Act: Section 6

Wilderness-oriented commercial services that contribute to achieving public enjoyment of wilderness values or provide opportunities for primitive and unconfined types of recreation may be authorized if they meet the "necessary and appropriate" tests of the Concessions Policy and Wilderness acts and if they are consistent with the wilderness management objectives contained in the park's Wilderness

Management Plan.

NPS Management Policies: 6.4.4 Commercial Services

Appropriate commercial enterprise may be permitted under special provisions found in: (1) Section 4(d)(5) of the Wilderness Act; (2) individual park wilderness enabling legislation; or (3) existing private rights. While a permitted commercial enterprise allowed under Section 4(d)(5), including a commercial recreational service such as a guide service, is not subject to the "prohibition of certain uses" conditions identified in section 4(c) of the Wilderness Act, it must adhere to the minimum requirement concept in all aspects of its operation.

The only structures or facilities used in support of such commercial recreational services that will be allowed in wilderness are temporary shelters, such as tents, which will be removed from the wilderness after each trip unless exceptions are clearly identified in the park's Wilderness Management Plan. There may also be specific exceptions to this policy identified within individual park wilderness enabling legislation or in ANILCA.

Commercial film and commercial photography permits, as identified and required by 36 CFR 5.5, Section 8.6.6 of National Park Service Management Policies, and Director's Order #53, will not be approved in wilderness areas unless determined to be necessary and proper for providing educational information about wilderness uses, resources or values, or necessary for other wilderness purposes.

The appropriate and fair ratio between commercial and private use allocation is to be addressed within the park wilderness management plan and associated environmental compliance document. The public must be afforded a full opportunity to provide input to these use allocations.

13. Air Quality in Wilderness

The purpose(s) of this part [Prevention of Significant Deterioration of Air Quality] are as follows...to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value...

The Clean Air Act: Section 160

Congress hereby declares as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory Class I federal areas, which impairment results from manmade air pollution.

The Clean Air Act: Section 169A

The Clean Air Act (CAA) as amended specifically gives Federal Land Managers (FLMs) the affirmative responsibility to protect the air quality related values (AQRVs), including visibility, of Class I areas and to consider, in consultation with the Administrator of EPA, whether a proposed major emitting facility will have an adverse impact on such values (CAA, Section 165 (d)(2)(B)).

AQRVs and levels of impact vary for different Class I areas. Managers must inventory wilderness ecosystems, collect baseline data, and identify sensitive indicators to air pollution. Long term monitoring programs should be established to track changes to these indicators.

Air pollution is a threat that knows no boundaries and is caused by many diverse sources. Most air pollution is generated outside Class I area boundaries and transported into wilderness areas and national parks. These sources of pollution include electric power generation, automobiles and other mobile sources, industrial manufacturing activities, dust from roadways, construction activities and other urban and rural sources, for example. To mitigate the impacts of these sources, managers will be involved in State and local air quality planning and permitting processes and in reviewing NEPA projects with the potential to impact Class I areas. Smoke from wildland fire is an exception, in that it commonly occurs within our Class I areas. Managers will be responsible for reducing the impacts of smoke from wildland fires on visibility in Class I wilderness, while understanding and promoting the need to re-introduce the natural role of fire into wilderness ecosystems.

As community leaders in environmental stewardship, NPS managers are committed to using sustainable practices in parks that will reduce air pollution, such as the use of alternative energy sources, i.e., solar power, wind energy, and alternative fuels. Interpretation of these and other sustainable practices in parks will also help educate visitors on ways they can reduce their contribution to air pollution.

Notwithstanding the FLM's affirmative responsibility to protect AQRVs in Class I areas, we have no direct permitting or enforcement authority over air pollution sources. Ours is a consultation role with the regulatory agencies. Our recommendations can be accepted or rejected by EPA, State, or local air permitting authorities. Therefore, it is very important that managers communicate routinely with regulatory agencies regarding sources that threaten resources in our Class I areas. Managers will participate in interagency partnerships for the purpose of protecting Class I air quality and related values.

Annual Report to Congress

At the opening of each session of Congress, the Secretaries of Agriculture and Interior shall jointly report to the President for transmission to Congress on the status of the wilderness system,....

The Wilderness Act: Section 7

Each wilderness park area will provide the information needed by the Washington Wilderness Program Coordinator to prepare the National Park Service's submission to the Secretary of the Interior for his/her Annual Report to Congress. The format for the park submission will be developed by the Wilderness Program Manager and the National Wilderness Steering Committee. Reference Manual #41: Appendix J contains a draft format as an example of the needed annual park submission.

15. Other Wilderness Management Issues To Be Addressed

There are many other policy and director's orders issues that need to be addressed and/or expanded upon, and this will be done quickly as time and staffing allow. These issues include, but are not limited

to, the following:

Climbing protocols, Annual Report to Congress Format (per Section 7 of the Wilderness Act), Evaluating Proposals for Scientific Activities in Wilderness, Solitude and Preservation of the Wilderness Soundscape, Risk Management and Safety/ Search and Rescue, New/Emerging Technologies, Zoning, Water Resource Management, Human Waste Management, Carrying Capacities, Group Size Limits, and Alien Species Management.

Other issues will be addressed as necessary. Superintendents and staff are encouraged to address these issues within the context of their individual wilderness management plans and/or request program guidance.

E. Military Facilities

A Department of Defense Directive, Number 4165.6, issued September 1, 1987 states in section 6.2.2 Use of Real Property. Installation commanders should use the following priorities when assigning unused space on their installations. They may make exceptions to these priorities when they determine if it is in the best interest of the installation to do so. The commanders shall consider: ...6.2.2.5. All others.” Prior to other uses, the installations commander must consider the DoD activities, then activities of other DoD tenants, then other federal agencies, before considering all others. Section 6.2.3.4. speaks to outleasing. and 6.26 Charges for Use of space. In section 6.2.3.4 “All proposed outleasing actions (irrespective of grantee or considerations must be considered and assessed within the policy guidance of DoD Directive 5100.50 and 42 USC 4321 (references (s) and (i)). It further states, in section 6.2.6, “Charges for Use of space. Unless specified differently in this or other DoD regulations, charges shall be assessed at fair market rates for use of DoD space by other Federal Agencies. Exceptions to this policy are: ...6.2.6.5. Permits in the nature of an easement granting a right of way for roads, pipelines, cables, or similar purposes.”

In summary, it is possible to receive a right-of-way on Department of Defense facilities, and while I found references to other federal agencies, or educational facilities, I did not specifically find a reference to utility installations or other installations such as fiber optics. I surmise that it is possible, and that once again, fair market value determines the ongoing annual fee, with the initial costs for installation being borne by the applicant.

F. National Marine Sanctuaries

The National Marine Sanctuary has issued a draft report titled “Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries” August 2001. In the conclusion of the report, the authors of the report recommend the analysis of comparable previous transactions at the appropriate approach to determining fair market value. Bulletin board for the National Marine Sanctuary, in the internet at the following address:
www.sanctuaries.nos.noaa.gov/news/newsbboard/newsbboard.html has the following posting.

A notice reopening the comment period on the draft report "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries" was published in the Federal Register on August 17, 2001. The comment period is open for 45 days, closing on October 1, 2001.

Summary of the Analysis and Original Comment Period

The National Oceanic and Atmospheric Administration's (NOAA's) National Marine Sanctuary Program (NMSP) has been addressing various issues related to the installation and maintenance of submarine cables in national marine sanctuaries. Section 310 of the National Marine Sanctuaries Act, 16 U.S.C. 1441, authorizes the issuance of special use permits to establish conditions of access to and use of any sanctuary resource or to promote public use and understanding of a sanctuary resource. Section 310 also authorizes the assessment of fees for issuance of special use permits, including a fee that represents the fair market value of the use of sanctuary resources. To date, two special use permits have been authorized for fiber optic cables in national marine sanctuaries: one in Olympic Coast NMS off the coast of Washington state (November 1999) and another in Stellwagen Bank NMS off the coast of Massachusetts (August 2000). With the assistance of several outside experts, NOAA resource economists have written the report "Fair Market Value Analysis for a Fiber Optic Cable Permit in National Marine Sanctuaries" analyzing how fair market should be calculated and assessed.

The report was first published in the Federal Register in January 2001 for a fifteen-day comment period. Most comments requested additional time to provide public input on the report. Therefore, NOAA is now reopening the comment period for 45 days.

Since the initial comment period, NOAA has updated the report by making a number of editorial and clarifying changes, and including some updated information. Further, NOAA has removed the recommended fee amount in the original analysis and is seeking comments on the methodology described in the report or suggestion of an appropriate alternative methodology. Once the current comment period closes, NOAA will evaluate the comments and make any necessary revisions to the methodology used in determining fair market value. NOAA will publish a final notice that summarizes all comments and presents a final fee methodology to be applied to any future cable projects within national marine sanctuaries that may be authorized pursuant to a special use permit.

The section titled **The Permitting Process and Fair Market Value** states:

The National Marine Sanctuaries Act (NMSA) authorizes the Secretary of Commerce to issue special-use permits authorizing the conduct of specific activities and establishing conditions of access and use for marine sanctuary resources. The presence of a fiber-optic cable on the floor of a sanctuary is a use for which a permit may be issued. According to the NMSA, the Secretary may assess and collect a fee that includes the cost of issuing the permit, as well as monitoring and other costs incurred as a result of the permitted activity.

In addition, the fee must include "an amount which represents the fair market value of the use of the sanctuary resource." In addition to issuing a special-use permit, Sanctuary authorities must review and authorize an Army Corps permit for any cable project that includes a sanctuary crossing. The permitting

process of the Army Corps of Engineers covers installation, maintenance and removal for an entire undersea cable project. Potential harm to the undersea environment from cable installation is examined in an appropriate environmental review under the National Environmental Policy Act. NMSP is developing a set of principles to guide the installation of cables in marine sanctuaries and is working to ensure that environmental impacts will be minimal and appropriately mitigated. Those principles were published for comment in an advance notice of proposed rulemaking (65 FR 51264, Aug. 23, 2000). NOAA is currently reviewing comments received on this notice.

Installation, maintenance, and removal of the cables are covered by sanctuary authorization of the Army Corps permit. Because some amount of injury may occur during cable installation, and because by law the special-use permit cannot be applied to any activity causing injury, the special use being authorized by NMSP is to allow the use of sanctuary resources by the long-term presence of the cables on the sanctuary seabed.

In 1993 the Office of Management and Budget (OMB) issued its most recent directive concerning fair market value and fees charged for the use of Federal agencies to assess a user charge against each identifiable recipient for a service or privilege that confers special benefits. As with the granting of a fiber-optic permit, such a privilege “enables the beneficiary to obtain more immediate or substantial gains or values (which may or may not be measurable in monetary terms) than those that accrue to the general public.” A government service is also designated as a special benefit if it is “performed at the request of or for the convenience of the recipient.” The directive further states, “user charges will be based on market prices.”

The issue of “fair market value” or “market price” for the use of a sanctuary resource is complicated by the presence of non-market amenities. The value of a marine sanctuary lies in the conservation of a marine environment deemed to have special significance. Many people receive pleasure in knowing that the sanctuaries exist and are protected. These individual values, added up over millions of people, may have tremendous value, but little economic information about the extent of this value is revealed in market transactions. Additionally, installing a cable in a marine sanctuary can provide economic benefits to the public. This fair market value analysis will take account of these potential economic benefits to the public.

This report relies on a comparison between the granting of a fiber optic permit and the sale of a fiber optic right of way. Numerous private-market precedents exist for the appraisal and sale of such right-of-way easements. This report also considers the amenity value of a sanctuary, but for a number of reasons this value is not specifically estimated and is not part of the calculation of fair market value. It is believed that the analysis of market transactions results in a reasonable special-use fee based on sound and thorough economic considerations.

II. State of Idaho Lands

A. Idaho Transportation Department

The Idaho Transportation Department (ITD)’s Roadway Design Manual, Chapter 4, addresses Utilities

and their usage of the right-of-way. Chapter 4 states, in part:

4.15 UTILITIES - GENERAL

Utility facilities shall mean all privately, publicly, or cooperatively owned lines, facilities, and systems for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, ore, water, steam, waste, storm water not connected with highway drainage, and other similar items including fire and police signal systems and street lighting systems that directly or indirectly serve the public or comprise part of the distribution systems that directly or indirectly serve the public.

The AASHTO Manual under Acquisition for right-of-way says in part, "...in all instances where utility facilities are encountered (in highway construction work), every effort should be made to accomplish the most economical and best engineered adjustments and relocations possible." Appendix B, ITD's "A POLICY FOR THE ACCOMMODATION OF UTILITIES WITHIN THE RIGHT-OF-WAY OF THE STATE HIGHWAY SYSTEM IN THE STATE OF IDAHO" also has established policies that shall be used when utilities must be relocated within the right-of-way of the State Highway System.

The Railroad/Utility Engineer has the responsibility for all agreements connected with the movement of utilities when highway projects involve relocation of utilities at state expense. The District is responsible for the agreements covering relocation of municipally owned utilities within municipal boundaries. The Railroad/Utility Engineer will maintain liaison with the District in such instances.

In cases where irrigation districts or canal companies move their facilities at state expense, the facility will be treated as utilities.

For projects that require installation of a new telephone service, should contact the ITD General Services section for assistance.

District Design shall notify all effected parties of any changes to the fiscal year construction schedule.

The Secretary of the Board will notify a utility company of the requirement to relocate its facilities after a utility hearing is held or the utility company executes a Waiver of Hearing. The notification normally takes place after the bids for a project are opened. The notice and opportunity for a hearing and the authority to order utility companies to relocate their facilities are contained in Idaho Code 40-312(3). Also, see Administrative and Board policies A and B-14-08, Movement of Utilities, for information about movement of utilities and utility hearings.

4.15.1 Cost of Relocation Responsibility

Where a utility company has a right of occupancy by reason of holding the fee, an easement, or other property interest and the facilities do not occupy public road right-of-way under existing conditions, the cost of relocation under the project will normally be at state expense.

Where a utility company's facilities occupy a public road right-of-way under existing conditions, the cost of relocation under the project will normally be at utility company expense. Where a utility company's facilities were previously located on the public right-of-way at state expense under a prior project, the relocation under a new project will also be at state expense.

Another source for information on right of way access and ITD are the following 2 policies - Highway Access Control Policy and the Right-of-Way Use Policy.

ITD does not have a written policy for permits for fiber optic or broadband easements that are not owned by utility companies. They have to date only processed one permit for a non-utility application.

III. Railroads

In general, the railroads have a great amount of information about the engineering specifications and licensing requirements for any type of railroad encroachment or crossing. The construction requirements appear to be uniform for almost all of the railroads in this investigation. Each company clearly defines the permitting process and the processing or application fee required; however, ongoing yearly lease or rental payments are not set forth on the various company's website, although doubtless there is a yearly cost for the encroachment or crossing.

A. Burlington Northern Santa Fe Railway

The Burlington Northern Santa Fe Railway has published on their website, a Utility Accommodation Policy. The policy relates the requirements for the “accommodation, location and method of installation, adjustments, removal, and relocation and maintenance of utility facilities” on Burlington Northern & Santa Fe Railway Company (BNMSF) property. The policy describes utilities as “lines, facilities and systems for producing, transmitting or distribution communications, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water and other similar commodities which are privately, publicly or cooperatively owned and which serve directly or indirectly the public or any part thereof.” The policy has requirements for utilities paralleling and crossing railroad property. The policy has design and construction requirements, as well as licensing and liability insurance requirements.

In Part 3, Utilities Paralleling Railroad Property, in underground installations, specifications for fiber optic lines are given. They are to be a minimum depth of 4.0 feet BNG (below ___ grade) for fiber optic cable wirelines, and whenever feasible, the cable should be laid within 5 feet from property lines. A warning tape is also to be installed, 1.0 foot BNG directly over the underground power line where located on Railroad right-of-way outside the track ballast sections.

In Part 3, Utilities Crossing Railroad Property, in underground installations, specifications for fiber optic lines are given. The policy states, “The same requirements for electric power line crossings will apply for fiber optic line crossings except for the following: A minimum depth of 4.0 BNG for fiber optic cable wirelines, and BNSF Engineering must approve any specialized equipment used to install cable. No rail plow will be allowed for installation purposes.”

There is a \$250 non-refundable processing fee to apply for a permit. BNSF uses the services of Staubach Global Services for professional Real Estate Services. The average cost of an electric line crossing is \$2500. The cost for communications crossings is determined by BNSF. The costs for installations parallel to the tracks are based on the value of the area and calculated on a case by case basis. The minimum cost for a longitudinal installation is \$2500. The average time for completion of the permitting process is 45 to 60 days from receipt of the application. There are additional costs that may be incurred for the appropriate licenses and insurance requirements.

B. Union Pacific Railroad

Union Pacific Railroad (UPRR) has extensive information on their web site about the use of their right-of-way on their property. On their website, in the section titled “real Estate & Utility Specs” they define installations in their right –of-way as “either pipeline or wireline, may be considered encroachments, crossings, or both. UPRR defines an encroachment as “a pipeline or wireline that enters the railroad company’s right-of-way and either does not leave the right-of-way or follows along the right-of-way for some distance. They have clear and extensive requirements for both crossings and encroachments. While the information on the website does not specifically mention telecommunications uses, or broadband applications such as fiber optics installations, the website does not necessarily exclude such uses, and the specifications for wireline, although these specifications are geared towards electric installations, would most likely apply or be very similar.

UPRR requires at a minimum, an application form, a map of the location for the crossing or encroachment, and the appropriate exhibit “A,” an engineering design for the crossing or encroachment,

for either the pipeline installation or the wireline installation. UPRR has specific procedures for wireline/pipeline encroachments, and for pipeline crossings. There is a section on the engineering specifications, with various requirements for different types of crossings. In the engineering specifications, pipelines for non-flammable substances are required to be below the frost line and not less than 4.5 feet below base of railroad rail. Crossings for telecommunications installations are not specifically mentioned in the section on pipeline crossings. The section on wireline crossings is geared towards electrical installations, both underground and overhead.

UPRR requires a non-refundable application fee of \$1055 with the application. The applicant must also reimburse UPRR for any and all expenses I incurred for the review of the encroachment applications. The processing time is approximately 3 to 6 months. The appropriate licensing and insurance certificates are required prior to the start of construction. The website makes no mention of further fees beyond the application fee. No mention is made time constraints on the use of the right-of-way, for instance, both the US Forest Service and the Bureau of Land Management have 10 year leases. There is also no mention of continuing compensation for the use of the right of way, such as yearly lease payments or some other form of yearly rent.

C. Idaho Northern & Pacific

The Idaho and Pacific Railroad Company operates in Idaho and northeast Oregon. The Rio Grande Pacific Corporation maintains a 100% equity interest in the Idaho and Pacific Railroad Company. Neither the Idaho and Pacific Railroad's website, nor its parent company's website provided any information on encroachments in the right-of-way.

D. Montana Rail Link

Montana Rail Link, Inc. operates in Montana, Idaho, and Washington. It is a unit of the Washington Group of Companies headquartered in Missoula, Montana, and is privately held. The Property Management Division of Washington Corporations manages Montana Rail Link's property. The website has information on pipeline and wireline crossings and longitudinal installations.

The application process for installations includes a completed application with a non-refundable \$600 review fee. There is a \$325 processing fee required after an agreement has been executed along with the payment for the first year's permit fee. There is no information as to how the yearly permit fee is calculated, or the length of time for the permits.

E. Eastern Idaho Railroad

Eastern Idaho Railroad is a subsidiary of Watco Companies. In the property management section of the Watco Companies website, information is available about pipeline and wireline installation, as well as property leases and permit to access property, among other applications and specifications.

Wireline installations require much the same information as required by UPRR. There is a non-refundable application fee of \$600. The agreement processing time is between 30 and 45 days. For underground wireline installations, there is a minimum of 5 feet below the base of rail for fiber optic cable wirelines, and a minimum of 5 feet below natural grade (BNG) for fiber optic cable wirelines. For

overhead installations, there is a minimum of 23.5 feet above top of rail clearance required. There is a minimum 4 feet clearance required above signal and communications lines.

The information provided on the website gives no indication of the ongoing requirements for lease or rental costs to be paid to the company, although there most likely are yearly rental or lease payments required, and would probably be calculated on a case by case basis.

ATTACHMENT E - STATE BY STATE STATUS REPORT

[FHWA Home](#) | [Feedback](#)

Real Estate

YPERLINK"http://www.fhwa.dot.gov/index.html"FHWA > HEP > Real Estate > Utility

RESOURCE SHARING

STATE- BY- STATE STATUS REPORT

December 2001 Update

Question: "Does your State accommodate fiber optics / wireless communications on Interstate or other freeways?"

Fiber Optics Wireless

FHWA Resource Center or State Interstate Other Freeways Interstate Other Freeways Comments

Eastern

Connecticut

Yes
(ITS.IMS and state use only)
No
Soon
No

Fiber Optics - For State purposes only - Incident Management System (IMS) and Intelligent Transportation System (ITS). No resource sharing involved.

Wireless - A project has been authorized for State purposes only -- Digital Highway Advisory Radio (HAR) at six locations. No resource sharing will be involved.

Maine

Yes
Yes
No
No

Fiber Optics - No resource sharing.

Massachusetts

No
Yes
Yes
Yes

Fiber Optics - State gets lines in return for accommodation.

Wireless - State gets some wireless facilities in return.

New Hampshire

No
Yes
No
No

Fiber Optics - A short line was placed from the FAA center in Nashua to a nearby location along Route 3. No resource sharing was involved. Comments - Currently working on RFP for consultant to assist in determining State's best interest, consultant in place by the Fall of 2001.

New Jersey

Yes
(ITS only)
Yes
Yes
Yes

Fiber Optics - ITS only.
Wireless - 5 installations as airspace agreements.

New York

Yes
Yes
Yes
Yes

Fiber Optics - Lines are installed on NY State Thruway. NYSDOT has continuing RFP for fiber projects on their R/W.

Puerto Rico

No
No
No
No

R/W sharing is under consideration.

Rhode Island

Yes
Yes
Yes
Yes

Fiber Optics - State obtained 2 conduits for state use in exchange for allowing private usage of R/W.

Vermont

No
No
No
No

Delaware

No
No
No
No

District of Columbia

No
No
No
No

Maryland

Yes
No
Yes
Yes

Fiber Optics - On most Interstates in central MD. Approximately 370 total miles.

Wireless - Ten towers have been installed along controlled access facilities. Towers accommodate multiple providers - as many as five providers per structure.

Pennsylvania

No
No
No
No

Resource sharing not permitted by state law on controlled access R/W. Turnpike is negotiating for joint use of fiber and wireless with private company.

Virginia

ITS only
ITS only
Yes
Yes

Wireless - There are a number of installations with more to follow.

West Virginia

No activity as yet. Recent RFP was canceled. Future status is unclear

Southern

Alabama

No
No
No
No

ALDOT has appointed a committee to evaluate all aspects of placing both fiber & wireless facilities on Alabama freeways.

Florida

ITS only
ITS only
Yes
Yes

Fiber Optics - (see details in the body of the survey)

Wireless - A total of 70 towers are expected.

Georgia

ITS only

No

No

No

Fiber Optics - For State purposes only. No resource sharing involved.

Kentucky

ITS only

ITS only

No

No

Fiber Optics - For State purposes only. No resource sharing involved.

Mississippi

Yes

Yes

No

No

Fiber Optics - One temporary Interstate installation and several installations on other freeways. No compensation. No resource sharing involved.

North Carolina

No

Yes

No

No

Fiber Optics - No compensation.

South Carolina

Yes

No

No

No

Fiber Optics - ITS use only, except one river crossing by Southern Bell.

Tennessee

Yes

No

No

No

Fiber Optics - There is one installation on the I-55 Bridge in Memphis. Committee is considering how to implement the law on future fiber-optic and wireless installations.

Texas

Yes

Yes

Yes

Yes

Fiber Optics - No compensation has been received. Utilities have a right to occupy the R/W. No resource sharing is involved as yet, but rulemaking underway.

Wireless - Two Interstate and two other freeway installations in the San Antonio area. No compensation

received. No resource sharing involved as yet.

Arkansas

Yes
No
No
No

Fiber Optics - Lines have been installed on some Interstates (I-40 across state; some sections of I-30, I-540, I-430). Received lines in exchange.

Wireless - Not allowed on any highway R/W at present.

Louisiana

Yes
Yes
Yes
Not yet

Fiber Optics - On interstates, the charge is \$5,000 per mile.

Wireless - One site.

New Mexico

Yes
Yes
Yes
Yes

Fiber Optics - State negotiating for Interstate and other State R/W accommodation partners.

Wireless - One site operational.

Oklahoma

Yes
Yes
No
No

Fiber Optics - Seven lines in place.

Wireless - None as yet.

Midwest

Illinois

Yes
No
No
No

Fiber Optics - Lines recently installed.

Indiana

Yes
No
No
No

Fiber Optics - Pilot project on the Indiana Toll Road, I-80/I-90, across the northern portion of the State. INDOT Toll Road Division compensated with cash and use of fiber capacity.

Wireless - INDOT is considering developing a RFP for wireless using certain facilities.

Michigan

Yes
Yes
No
No

No charge for use. Permit required with one-time permit fee of \$1000/mile. Accommodation normally within 15 ft of fence. All installations are longitudinal.

Minnesota

Yes
Yes
No
No

Fiber Optics - The state's fiber optic network currently spans 250 miles along I-94 from Wisconsin to Fargo, ND. In February 2001, MnDOT terminated its agreement with a private consortium that was granted exclusive access to lay a fiberoptic network within state trunk highway R/W. The consortium was unable to fully finance the remaining network of 2,000 miles as originally proposed. MnDOT is committed to complete the network and is currently exploring other options.

Ohio

No
No
Yes
Yes

Fiber Optics - No private fiber optics longitudinally installed along Interstate or other Freeways. ODOT is reviewing its position on this subject and awaiting experience of other states.

Wireless - 23 towers on Interstate R/W and 3 towers on Non-Interstate freeway. 3 towers at ODOT District offices.

Wisconsin

Yes
Yes
No
No

Fiber Optics - WisDOT has received cash from \$5,500 to \$10,000/mile over a 20-25 year period, but could receive fiber, cash, or both. Access to other highways is free. 5 companies utilize controlled-access highways. Approx 320 miles and \$1.8 million. State currently needs fiber for ITS /other applications.

Wireless - None to date, but some indicated interest. State allows towers at rest areas, weigh scales, or other safe R/W location. NOTE: For fiber/ wireless, a master agreement is prepared and permits issued per location.

Iowa

Yes
Yes
No
No

Fiber Optics - For State purposes only --the Iowa Communications Network (ICN). No resource sharing. Other commercial underground communications (fiber and copper) cables permitted for annual fee.

Kansas

Yes
Yes
No

No

Fiber Optics - On 25-mile section of Interstate maintained by the Kansas Turnpike Authority and on other freeways. Cash compensation in one case. KDOT has two shared resource projects. The statewide contract covers 550 miles of R/W from Kansas City to the Colorado border, through Lawrence, Topeka, and Salina, largely along I-70, and from Salina south on I-135 to Wichita.

Missouri

Yes
Yes
No
No

Fiber Optics - Some installations on interstate/other freeways. Only one installation (thru RFP process) in exchange for use of six strands of F.O. cable as backbone for MoDOT's ITS network. F.O. system value recognized under the FHWA Innovative Finance Program & \$30 million soft match credit approved for future ITS projects.

Wireless - MoDOT seeks partners for the future.

Nebraska

No
No
No
No

Western

Colorado

Yes
Yes
No
No

Fiber Optics - Installations have been permitted in exchange for fibers to be used by CDOT.

Montana

No
No
No
No

MDT continues to study the effects of utility occupancy of interstate R/W.

Wyoming

Yes (limited)
Yes
No
No

Fiber Optics - Installations permitted on freeway R/W. Interstate applications are reviewed separately on case-by-case basis. Compensation varies. Resource sharing under review. State Business Council and DOT involved in the review process.

North Dakota

Soon
Soon
No
No

Fiber Optics - NDDOT has considered the installation of fiber optics in the R/W. Negotiations with

a private vendor failed, and no additional requests have come forward.

South Dakota

Yes
Yes
No
No

Fiber Optics - The SDDOT has installed fiber optics cable in the Interstate R/W. Other requests will be considered as the need arises. All schools (elementary, Middle and High Schools, and Universities) in South Dakota have been wired with Fiber Optics to make the Internet available to all SD Students.

Utah

Soon
Soon
No
No

Fiber Optics - Governor's Task Force recommendations and regulations being developed to respond to recent change in State law allowing compensation beyond basic permit fee.

Arizona

No
No
Yes
Yes

Wireless - One antenna has been installed on one overhead sign structure support located adjacent to the ramp between I-10 and the Route 202 Freeway. Cash compensation was received.

California

State only
No
Yes
Yes

Fiber Optics - Installation for State purposes only. No resource sharing involved. Caltrans exploring options to develop fiber optics accommodation policy that would permit compensation in some form to Caltrans. Legislative changes would be necessary to revise State Code.

Wireless - Installations permitted on Interstate and other Freeways (access controlled) under State's "Licensing Process and Siting Guidelines". Cash compensation to Caltrans based on type of equipment and geographical location. (See website - <http://www.dot.ca.gov/wireless/>). Wireless telecommunication sites permitted on conventional highways as encroachments.

Idaho

No
No
No
No

Fiber Optics - Installations not permitted on Interstate R/W. Looking at hiring a consultant to prepare an RFP to offer fully limited access facilities (including the Interstate) for fiber installation in return for either barter or cash benefits. Use of other highways is anticipated.

**RESOURCE SHARING
STATE-BY-STATE STATUS REPORT
April 2001 Update**

Eastern Resource Center:

CONNECTICUT

FHWA Contact: Lester Finkle and John McAvoy, Connecticut Division (860) 659-6703, ext 3007

E-Mail Address: finkle@igate.fhwa.dot.gov and john.mcavoy@fhwa.dot.gov

State Contact: Robert Ritsick, ConnDOT (860) 594-3262

E-Mail Address: Robert.Ritsick@PO.state.ct.usa

Fiber Optics: Connecticut Department of Transportation (ConnDOT) policy does not permit fiber optics on Interstate routes nor limited-access highways. On all other State routes, if the utility is regulated by the DPUC, the established permitting process is followed.

Wireless: Facilities have not yet been installed on any Interstate highway R/W in Connecticut, but the Division Office authorized a project involving Digital Highway Advisory Radio (HAR) at 6 locations. No outside compensation was involved in the HAR installations. They had Federal/State transportation funding. The facility locations are outside the clear zone, in ramp median areas. The Division Office has been involved in the promotion of HAR, and in reviewing, providing comments, and approving Highway Advisory Radio (HAR) PS&E submittals. ConnDOT is also pursuing a pilot project allowing for a Request For Proposal to be promulgated relating to a specific site and allowing for a stipulated tower height. However, ConnDOT is not planning to change its stated policy.

MAINE

FHWA Contact: Ken Todd, (207) 622-8350 ext.12 E-mail: ken.f.todd@fhwa.dot.gov

State Contact: Brian Burne, Utility & R/W Services Manager, Maine DOT (207) 287-3681

E-mail address: Brian.Burne@state.me.usa

Fiber Optics: Lines have been installed on Interstate highway R/W in Maine and on other controlled access Federal-aid highway R/W in the State. No compensation has been received. The lines were installed outside the clear zone and are maintained from the mainline. The Division Office provides advice and approval.

Wireless: facilities have not been installed on Interstate highway R/W in Maine or on any other controlled access Federal-aid highway R/W.

MASSACHUSETTS

FHWA Contact: John McVann, (617) 494-2521 E-Mail: John.McVann@fhwa.dot.gov

State Contact: Michael Schwartz, Massachusetts Highway Department, (617) 973-7559

Fiber Optics: Mass. DPW has some installations on Route 128. State receives several lines in return

Wireless: State permits some wireless antennas, and receives some usage of these facilities.

NEW HAMPSHIRE

FHWA Contact: Martin Calawa, Area Engineer (603) 225-1609 E-Mail: Martin.Calawa@fhwa.dot.gov

Fiber Optics: The state is in the process of developing a RFP for a consultant to help them determine what would be in the best interest of the State regarding fiber installation. Basically, since the State does not have any experience with fiber they are seeking advice. In addition, they need to come to terms with what their own needs may be in the future. The plan is to have a consultant in place this fall, and to go to contract in 2003 for installation.

Wireless: New Hampshire presently does not have any wireless telecommunication facilities in Limited Access R/W. Pending legislation may dictate the use of "low towers" in the future in NH. This may mean more towers, but less obtrusive ones. They are also looking into these going into the NH R/W, but that is

still some time off.

NEW JERSEY

FHWA Contact: Keith Sinclair (609) 637-4204 E-Mail: keith.sinclair@fhwa.dot.gov

Fiber Optics: NJDOT Contact: James Paral (609) 530-2488. Fiber optics lines have been installed on Interstate R/W and other NHS highway R/W. These facilities are State owned and operated. They were installed for State Traffic Management Systems purposes (i.e. computerized signal systems, etc). They have been located at various locations, including the median. Access occurs from the traveled way. (i.e. need traffic control with lane closure, etc). The Division Office reviews, approves proposed locations, and advises NJDOT as part of their review of contract plans.

Wireless: NJDOT Contact: Henry Soloway, (609) 530-3875 Wireless facilities have been installed in 5 locations on Interstate and other NHS R/W with additional installations proposed. Since wireless communications are not a public utility under State law, the installations are being done under airspace agreement provisions rather than a utility accommodation policy. The Division Office reviews and comments on conceptual plans for proposed Interstate locations and approves final plans. The Division Office has assisted the NJDOT in establishing guidelines and procedures for installation, approval of location sites, and final approval of installations.

NEW YORK

FHWA Contact: Tom Herritt, (518) 431-4125 ext. 233 E-Mail ThomasG.Herritt@fhwa.dot.gov

NYSDOT Contact: Richard Lee (518) 457-4449 Utilities

Fiber Optics: Fiber-optic lines have been installed on the New York State Thruway, which is maintained by the New York State Thruway Authority (NYSTA), from New York City to Buffalo (+/- 500 miles). NYSTA is an Authority and not under the jurisdiction of NYSDOT. One of six fiber banks is dedicated to the NYSTA for their use with communications, ITS, and other things. In addition, phased in cash will be provided at years 5 thru 20, and complete ownership of all the fiber optic will be attained within the R/W after 20 years. Fiber-optic lines have been located mostly on the R/W line, but occasionally in the median because of environmental or other constraints. Maintenance will have to be performed from the mainline with a permit requiring proper work zone traffic control and other safety considerations. In addition, a 17-mile fiber-optic facility has been installed on I-84, which is under the jurisdiction of the NYSTA. NYSDOT has a fiber-optic project completed on Interstate 87 from Albany to Canada and one in the design stage on NY Rt. 22 & I-684. There are several routes on Long Island in the planning stage. The state receives eight governmental fibers, NYSDOT one empty duct. Revenue sharing does apply above a threshold. The Division Office has reviewed the fiber optic installation locations, approved those areas that required median installations, and advised of additional verbiage to enhance safety during installation and maintenance.

Wireless: Facilities (antennas) have been installed on Interstate 495 in New York State. The State receives a rental fee for accommodating the wireless installations (antennas). The antennas on the Interstate will be accessed for maintenance purposes from the mainline in some instances. Under a site manager services agreement, NYSDOT R/W is to be used for wireless. Gross revenues are distributed 30/70 or 50/50 depending on who builds (or built) the facility. A proposal to rent antenna space on New York State Thruway Authority communication towers was discussed with the DO to confirm that FHWA approval was not required. There are also about a dozen wireless sites in development.

PUERTO RICO

FHWA Contact: Jose Torres (787) 766-5600 x234 E-Mail: Jose.Torres@fhwa.dot.gov

Determination of R/W sharing not yet complete. Future DOT Intelligent Vehicle system and revenues are the only possible benefits now seen. PRDOT is installing conduits as part of widening projects in case accommodation decision is made.

RHODE ISLAND

FHWA Contact: Mike Butler (401) 528-4564 Email: MichaelJ.Butler@fhwa.dot.gov

State Contact: Robert Jackson (401) 222-2411 ext. 4525 E-Mail: Rjackson@dot.state.ri.us

Fiber Optics: Level 3 Communications, LLC has installed within the Interstate and other NHS Rights-of-Way, distance of approximately forty-six (46) miles, a minimum of nine (9) and a maximum of twenty-seven (27) one and one quarter inch conduits. Two conduits are State conduits, one conduit is vacant, and the other will have twenty-four (24) single-mode fibers for State use.

Wireless: Voicestream d/b/a as Omnipoint Holdings, Inc. has had an Agreement to erect twelve (12) monopoles within the Interstate and other NHS Rights-of-Way since December 1997. To date eleven (11) sites have been identified and five (5) monopoles have been erected with two (2) monopoles hosting co-locators. Two additional monopoles are scheduled to be erected in 2001 bringing the total to seven (7).

VERMONT

FHWA Contact: Mark D. Richter, (802) 828-4423 E-Mail: mark.richter@fhwa.dot.gov

Fiber Optics: Fiber optic lines have not been installed on Interstate R/W or on any other controlled access Federal-aid highway R/W in Vermont. The Division Office has provided advice to the State.

Wireless: Facilities have not been installed on Interstate highway R/W in Vermont or on any other controlled access Federal-aid highway R/W. Division Office provides advice to the State.

DELAWARE

FHWA Contact: Robert Kleinburd (302) 734-2966 E-Mail: robert.kleinburd@fhwa.dot.gov

DelDOT: Gene Donaldson (302) 739-7786

Fiber Optics: Lines have not been installed on Interstate highway R/W in Delaware or on any other controlled access Federal-aid highway R/W.

Wireless: Facilities have not been installed on Interstate R/W in Delaware or any other controlled access Federal-aid highway R/W. 3/2001 - Delaware still does not have shared resource activity. Although fiber-optic lines are being installed along I-95, it is being done in conjunction with the I-95 Corridor Coalition. The I-95 Corridor Coalition is an organization of Northeast States representatives gathered together to promote a coordinated ITS response. The most visible result of their activity is the EZ-Pass toll effort that involves the States from Maine to Delaware. Fiber-optic lines currently being installed will be used for coordinated ITS application, such as multi-state linked overhead signing messaging.

DISTRICT OF COLUMBIA

FHWA Contact: Ed Sheldahl, Bureau Operations Engineer & Tracy France, R/W, (202) 523-0163

Email: Tracey.France@fhwa.dot.gov

Fiber Optics: have not been installed on Interstate or other controlled-access R/W in the District. There are installations on other NHS routes in the District.

Wireless: Facilities have not been installed on Interstate or any other controlled access Federal-aid highway R/W in the District of Columbia.

MARYLAND

FHWA Contact: Ann Hersey, (410) 962-4342 ext. 135 E-Mail: Ann.Hersey@fhwa.dot.gov

Joseph Bissett, Statewide Utilities Engineer (410) 545-5546

Fiber Optics: Lines have been installed on Interstate R/W in Maryland on I-70, I-83, I-95, I-270, I-295, and I-695, but have not been installed on any other controlled access Federal-aid highway R/W in Maryland.

The State received conduit, fibers and monetary compensation. On approximately 685 total miles, cables were installed in the median, under the right hand shoulder, and beyond the right hand shoulder. All locations were within the R/W. Access is from the mainline. The Maryland Division and Region 3 offices worked with MSHA, providing guidance and approving the installations.

Wireless: Facilities have been installed on Interstate R/W in Maryland on I-95 at MD 32 in Howard County. A tower replaced a high mast light pole and now has a light fixture attached to it. Wireless telecommunications facilities have been installed at I-95 at MD32, I-270 at Montrose Rd, I-495 at MD185 and I-695 at Greenspring Avenue. Eight towers have been installed along controlled access facilities, many near or within interchanges. Towers accommodate multiple providers - as many as five providers per structure. Additional tower sites are under consideration. 9 additional towers are proposed within the R/W

of both Interstate and other controlled access Federal-aid highways. The State will receive monetary compensation for these installations, approximately \$24,000- \$37,500. per site annually. The dollar amount varies by site. The Maryland Division and Region 3 Office worked together with MSHA to develop guidelines for the placement of wireless facilities within the highway right-of-way. The priorities below correspond to Maryland's "Wireless Telecommunications - Priority Checklist for Site Selection."

1. I-270 at Montrose Road - located along diagonal ramp of the interchange. Access is available from the left hand side of the diagonal ramp. (Priority 3 location)
2. I-495 at MD 185 - located along the mainline, but well outside the clear zone. Access is available from Kensington Parkway, a county road. (Priority 1 location)
3. I-695 at Greenspring Ave. - located in the infield area of the interchange, with access from Greenspring Ave, a county road. (Priority 1 location)

PENNSYLVANIA

FHWA Contact: Leland J. Kissinger, Utilities Specialty in the PA Division Office, (717) 221-3727

E-Mail Address: Leland.Kissinger@fhwa.dot.gov

State Contact: John Proud, Utilities Engineer, PennDOT Central Office (717-787-4038).

E-Mail Address EJProud@dot.state.pa.us

Fiber Optics: Fiber-optic lines have not been installed on Interstate highway R/W in Pennsylvania or on any other Federal-Aid highway R/W in the State.

Wireless: Facilities have not been installed on Interstate highway R/W in Pennsylvania or on any other Federal-Aid highway R/W in the State.

Comments: The Division Office has provided PennDOT with resource sharing information developed by FHWA HQ, as well as current practices from other states. PennDOT has been encouraged to consider developing resource sharing and partnering agreements with private utilities as a means of providing the communications infrastructure necessary to enhance present and future ITS systems.

VIRGINIA

FHWA Contact: Tim Lewis, (804) 775-3348 E-Mail: Timothy.Lewis@fhwa.dot.gov

VDOT Contact: Stuart Waymack (804) 786-2923 Waymack_SA@vdot.state.va.us

Fiber Optics: Fiber-optic lines have not been installed on Interstate highway R/W in Virginia or on any other Federal-Aid highway R/W in the State as part of Resource Sharing. However, an agreement is in the works for 1,200 miles of fibers to be installed. Fiber-optic lines have been installed in Northern Virginia for VDOT's traffic management system but this is not a part of resource sharing. Virginia plans to receive fiber infrastructure as compensation. More specifically, they will receive 18 fibers on 1,300 miles of rural Interstate, and 48 fibers on 148 miles of urban Interstate. It is VDOT's intention to locate these facilities far enough off the edge of pavement where access would not be a problem. The fibers must be placed so as not to interfere with the safe operation of the highways. The preferred location is to the right of the travel lanes, possibly outside of the clear zone or near the R/W line; however, fibers will not be located in the median.

Wireless: There are 65 sites that have been approved for wireless telecommunications installations on Interstate highways in Virginia. Some of these towers are under construction. Most of these facilities are in Northern Virginia and Suffolk, mainly on Interstate highways at strategic interchanges. Virginia will receive a combination of money and ITS infrastructure. Normally VDOT owns the tower. After a 5 year period, VDOT will receive approx. \$1000/month from users of the tower. These tower facilities are going to be accessed from service roads, ramps, and secondary roads. Any access from mainlines has to be approved by the Division Office.

WEST VIRGINIA

FHWA Contact: Henry (Ed) Compton (304) 347-5268

E-Mail: henry.compton@fhwa.dot.gov

State Contact: Guy Mick, Utilities Supervisor (304) 558-3656 E-Mail: Gmick@dot.state.wv.us

Fiber Optics: Fiber optic lines have not been installed on Interstate highway R/W in West Virginia or on any other controlled access Federal-aid highway R/W.

Wireless: Towers have not been installed on Interstate highway R/W in West Virginia or on any other controlled access Federal-aid highway R/W. Comments: On November 15, 2000, the Governor's Office of Technology, the WV Department of Transportation, and the WV Parkways, Economic Development and Tourism Authority jointly issued a Request for Proposals from vendors to install and maintain a fiber optic communication network for as much as the area of the state as possible. On December 18, 2000, Verizon Communications filed for an injunction in Federal court seeking to halt the opening of the proposals. Verizon claimed the RFP was in violation of the Telecommunications Act of 1996 and other state laws related to regulation of utilities. On December 19, 2000, at the request of the Governor, the RFP was canceled. It is unclear at this time whether or not the RFP will be revised and reissued later.

Southern Resource Center:

ALABAMA

FHWA Contact: Linda Guin, (334) 223-7377 E-Mail: Linda.Guin@fhwa.dot.gov

Fiber Optics: Fiber-optic lines have not been installed on Interstate highway R/W in Alabama or on any other controlled access Federal-aid highway R/W. The Division Office has been monitoring ALDOT activities in this regard and providing education.

Wireless: Installations have not been installed on Interstate highway R/W in Alabama or on any other controlled access Federal-aid highway R/W. The Division Office has been monitoring DOT activities in this regard and providing education.

Comments: The Alabama DOT has appointed a committee to evaluate all aspects of placing both fiber and wireless facilities on Interstates and other access-controlled highways.

FLORIDA

FHWA Contact: Bill Wade, (805) 942-9650 x3021 E-Mail: Bill.Wade@fhwa.dot.gov

State Contact: Gene Glotzbach, FDOT (805) 414-7620

Fiber Optics: Fiber has been installed on Interstate highway R/W and other controlled access Federal-aid highway R/W in Florida on a limited basis by the Florida DOT to support ITS initiatives in urban areas. FDOT received and awarded a contract to Florida Fiber Inc. (FFN) to place fiber optic lines in all limited access highways in Florida. The Florida Division treated the installation as if it were a utility under our Utility Accommodation Agreement with FDOT. However, FHWA concurrence was required with the lease agreement because the UAM called for a permit and the lease was an exception to that policy. The current UAM prohibits longitudinal installation of utilities. Concerns about the environment were addressed throughout the process.. Subsequently, the FFN has not provided FDOT with the required financial plans and other resource commitments that they agreed to and FDOT has now written them a letter declaring FFN in default of the agreement and giving them 90 days to submit the required and promised materials. Also check out: <http://www11.myflorida.com/publicinformationoffice/fiber/finalppa.htm>.

Wireless: Commercial wireless facilities are being installed on Interstate highway R/W in Florida as well as the Florida Turnpike facilities. Florida DOT has signed an agreement with Lodestar Towers, Inc. to market limited access rights-of-way for the installation of commercial wireless telecommunications facilities. The Florida DOT has the option of receiving a percent of the gross revenue generated at these tower sites or receiving services. In addition to limited access rights-of-way, Lodestar can utilize Florida DOT Maintenance yards as well as existing communication facilities for commercial wireless telecommunications. The first commercial wireless telecommunications facilities were erected in March of 2000 and through the course of the year, Lodestar expects to erect some 70 towers on Florida DOT property. Florida DOT has its own network of towers to support the call box communication system and the Florida DOT's 47 MHz land mobile communication system. Lodestar Towers, Inc. was selected through the RFP process with an agreement signed March 25, 1999. The Division Office has provided technical assistance.

GEORGIA

FHWA Contact: Bob Chaapel, (404) 562-3657 E-Mail: Robert.Chaapel@fhwa.dot.gov

Fiber Optics: GDOT has installed fiber-optic lines on Interstate R/W but only for their own use on I-20, I-75, I-85 and I-285 in the Atlanta area and I-475 in the Macon area to support the deployment and operation of their ITS network (no resource sharing involved). GDOT has not installed fiber-optic on any other controlled access facilities. The FHWA Division Office provided technical assistance and approved the installation.

Wireless: GDOT has not installed any wireless telecommunications facilities on Interstate or other controlled access facilities. The FHWA Division Office advises GDOT on wireless issues.

KENTUCKY

FHWA Contact: Evan Wisniewski, (502) 223-6740 E-Mail: Evan.Wisniewski@fhwa.dot.gov

Fiber Optics: Lines have not been installed on Interstate highway R/W in Kentucky or on any other controlled access Federal-aid highway R/W in the State, except for some that have been installed solely for highway use -- no resource sharing involved. The State is currently considering the use of the R/W by others.

Wireless: Facilities have not been installed on Interstate highway R/W in Kentucky or on any other controlled access Federal-aid highway R/W in the State.

Comments: The Kentucky Division has played an advising role on resource sharing.

MISSISSIPPI

FHWA Contact: Bob Webster, (601) 965-4228 E-Mail: RWebster@ms.fhwa.dot.gov

Fiber Optics: Lines have not been installed on Interstate highway R/W in Mississippi, except for a very minor amount on the Gulf Coast. Fiber-optic lines have been installed on other controlled access Federal-aid highway R/W in Mississippi, as with other utilities, on many non-Interstate 4 lane and 2 lane highways. No resource sharing has been involved. MDOT people are of the opinion that the same people who pay the rates are the same people who pay for the highway, and the utility company would just pass the cost of any remuneration back to the public. Accommodation of the Interstate fiber- optic lines has been by a year-to-year permit for the last 6-7 years because the utility hasn't been able to buy R/W and move. Utilities locations are usually limited to the last five feet of R/W limits if possible. The Division Office advises MDOT whenever asked and only see the permits that deal with utilities crossing the Interstate.

Wireless: Facilities have not been installed on Interstate highway R/W in Mississippi or on any other controlled access Federal-aid highway R/W.

NORTH CAROLINA

FHWA Contact: Dan Hinton, (919) 856-4350 ext. 107 E-Mail: Dan.Hinton@fhwa.dot.gov

State Contact: Aydren Flowers, Utilities Coordinator (919) 733-7932

Fiber Optics: Lines have not been installed on Interstate or on any other fully controlled access highways in North Carolina. There have been some installations on partial controlled or limited access routes. No compensation was received for these installations. They were all installed near the R/W line and are to be accessed from existing access points or ramps/frontage roads, etc. - not from the mainline.

Wireless: Facilities have not been installed on Interstate or on any other fully controlled access routes in North Carolina. Comments The FHWA Division Office provides advice as needed on any issues relating to resource sharing. There has been no change in North Carolina since the review last year by the Office of Program Quality Coordination. North Carolina officials have not changed their position relating to these facilities. At the present time, they do not believe it is worth pursuing. There has been one persistent inquiry from VIVX relating to fiber-optic lines along I-40 and I-85, particularly between Greensboro and Durham, but the NCDOT has resisted the pressure and no facilities are planned.

SOUTH CAROLINA

FHWA Contact: Steve Ikerd, (803) 253-3885 E-Mail: Sikert@sc.fhwa.dot.gov

SCDOT Contact: Marion Leaphart, (803) 737-1293

Fiber Optics: With the exception of a Southern Bell fiber optic cable crossing of the Cooper River on the I-526 bridge in Charleston, the SCDOT has not allowed the installation of privately owned fiber optic lines within the R/W of any controlled access facility. In return for allowing the Cooper River crossing in the early 1990's, the SCDOT

received fibers from the bridge site to the District office for use in the operation of a Fog Detection and Warning System. The SCDOT has installed and owns approximately 50 miles of fiber optic cable along portions of I-85, I-77, and I-26 for operation of freeway management components in the Greenville/Spartanburg, Columbia, Rock Hill, and Charleston urban areas. The SCDOT put out an RFP for a Statewide Shared Resource Contract (fiber-optics) on Oct. 26, 2000. They are currently evaluating the responses.

Wireless: The SCDOT has not allowed the installation of telecommunication towers within the R/W of any controlled access facility.

TENNESSEE

FHWA Contact: Roger Port, (615) 781-5774 E-Mail: Roger.Port@fhwa.dot.gov

TNDOT - John Boynton (615) 741-2891

Fiber Optics: The first application of fiber-optic lines on Interstate highways in Tennessee was concurred in by the Division Office on 9-22-97 and involved the I-55 Bridge in Memphis. Actual installation has not commenced. No longitudinal fiber-optic lines have been permitted along any other controlled access facilities in the State. TDOT will receive the exclusive use of six(6) unlighted fiber lines on the I-55 Bridge installation. The lines are to be installed along the outside of the bridge structure, but no direct access will be allowed from the through roadway or ramps for initial placement or future servicing of the fiber optic lines. The Division Office has been instrumental in forwarding legal and operational guideline publications, as well as current informational material, to TDOT management and has conducted a one-day joint seminar with TDOT officials, and representatives of Apogee Research, Inc. and the Missouri DOT on 11-19-96.

Wireless: Facilities have not been installed on Interstate or any other Federal-aid controlled access highways in Tennessee.

TEXAS

FHWA Contact: Lee Gibbons, Utilities Coordinator, Texas Division (512) 916-5516

E-Mail Address: Lee.Gibbons@fhwa.dot.gov

Fiber Optics: Lines have been installed on Texas Interstate highway R/W and on other controlled access Federal-aid highway R/W in accordance with the TxDOT Utility Accommodation Manual. These lines have been installed by companies that are considered utilities, and no resource sharing has taken place as yet. No compensation was received since the companies had a right to occupy the right of way. These fiber optic lines are located outside the frontage roads, outside the clear zone near the R/W line. They will be maintained from the frontage roads and side streets. Texas has an extensive system of frontage roads along the Interstate and other controlled access highways throughout the state, and utilities are generally located between the frontage road and R/W line along these highways. The Division has not had any involvement in these lines since they are approved by TxDOT using permit procedures. Resource sharing efforts are well underway, with rulemaking procedures underway. A pilot implementation effort will then follow as a need is identified. Comments: TxDOT is currently considering installing a fiber-optic cable between Odessa and El Paso in the median.

Wireless: Facilities have been installed on Interstate R/W at two locations the TxDOT Central Office R/W (Utility) Section is aware of in the San Antonio area. There are also two wireless installations on other controlled access Federal-aid highway R/W in the San Antonio area. TxDOT did not receive any compensation for these installations since the companies erecting the facilities were considered utilities with a right to occupy the R/W. These facilities on the R/W are monopole tower assemblies. The support cabinets have generally been placed off the R/W. The towers located on the R/W are located near the R/W line outside the clear zone and will be accessed from the frontage road or side street. One pole is located in a benign location from the safety standpoint outside the frontage road in an interchange area. The Division Office does not have an active role but does communicate with the TxDOT Central Office R/W section on this subject occasionally.

ARKANSAS

FHWA Contact: David Blakeney (501) 324-6438 E-mail David.Blakeney@fhwa.dot.gov

State Contact: Perry Johnston, Utilities Coordinator, AH&D (501) 569-2321

E-Mail Address: Perry.Johnston@AHTD.state.ar.us

Fiber Optics: Lines have been installed on some Interstates (I-40 across state; I-30 from Little Rock to Hope; I-540 MO line to Ft. Smith through tunnel facility, I-430 from I-40 to I-30) and on I-55. All lines installed near fence line, with pull boxes outside access line at each interchange. AH&D has access to each pull box, and are assigned space/lines at each regeneration site in exchange.

Wireless: Not allowed on any highway R/W at present.

LOUISIANA

FHWA Contact: Pete Nyberg, (225) 757-7625 E-Mail: Peter.Nyberg@fhwa.dot.gov

LADOTD Contact: Tom Harrell, P.E. (225) 379-1509 E-mail: thomasharrell@dtd.state.la.us

Fiber Optics: Fiber-optic cables can be placed along non-controlled access freeways at no charge to the utility. Along controlled access freeways and Interstate highways fiber-optic lines can be placed for a charge of \$5,000 per mile (a one time charge). This charge may be waived in return for shared resources. The LDOTD published a Rule for Fiber Optic permits in the Louisiana Register on December 20, 1999 allowing fiber-optic lines and for resource sharing of the lines. LDOTD will ask for resources for their use in any agreement. Money obtained from this endeavor will be deposited in the Right of Way Permit Processing Fund. There are eight companies installing lines along Interstates as of April 1, 2001.

Wireless: Towers are allowed but only one tower has been installed in a rural Interstate Highway Interchange. The fees are low annual fees but higher than usually obtainable in other areas. Fees are based on area where tower will be located (higher fees in metropolitan areas, lower in rural areas).

NEW MEXICO

Contact: Joe Edwards, NM Division (505) 820-2024

E-Mail Address: JosephE.Edwards@fhwa.dot.gov

State Contact: John Rocha - NMSHTD Utility Section Chief (505) 827-5357

The State of New Mexico has a process in place & in use that enables the placing of wireless sites within State R/W. The State is currently developing a process to enable the placement of wire line (fiber-optic) facilities within Interstate and other state R/W. One cellular tower is operational.

OKLAHOMA

FHWA Contact: Jim Carver (405) 605-6040 E-mail: James.Carver@fhwa.dot.gov

State: Lynn Whitford, Utility Manager-ODOT (405) 521-2641;

Alan Stevenson, Traffic Engineering Division-ODOT (405) 521-2861;

Gary Brown, Oklahoma Turnpike Authority (405) 425-3646

Fiber Optics: Oklahoma currently has a fiber-optic facility in place that begins at the Texas/Oklahoma State Line and extends to Oklahoma City along Interstate Highway 35. The facility continues along Interstate Highway 44 to the Missouri/Oklahoma State Line. The Transportation Commission was the Authoritative body that granted an exception to current policy. The facility was placed under the supervision of the Department of Transportation. Resource sharing was a factor in the agreement to place this facility within Interstate Highway R/W. The facility was placed at no cost to the State. The State received exclusive use of 12 fibers (4 Lighted). The State would not be responsible for the maintenance of the facility. All future costs associated with Highway Construction requiring relocation would be born by the company. Traffic Engineering Division is currently working on the placement of a Fiber Optic facility along a route that involves various Interstate Highway Rights- of- Way that are associated with the future Intelligent Transportation System.

Wireless: Not allowed at this time.

Midwest Resource Center:

ILLINOIS

FHWA Contacts: Don Keith, R/W, (217) 492-4640 E-Mail: Don.Keith@fhwa.dot.gov
Peter Hartman, Eng. Team Leader (217) 492-4622 Peter.Hartman@fhwa.dot.gov

Fiber Optics: Lines have been installed this past year for the first time on the Interstate right of way. Williams Communications has installed fiber optics ducts (including a duct for state communications) along and near the access control fences along I-270 from St. Louis, I-55, I-155 and I-74 to Peoria and along I-55 between Bloomington and Bolingbrook. IDOT has resisted proposals from telecommunications providers to install fiber optics ducts along and within the Interstate medians, and all installations to date are along and within a few feet of the access control fences. The State will receive service in kind, i.e., their own separate fiber optics duct. Additionally, the State is receiving rental payments, based upon approved appraisals, for the permits given to Williams to longitudinally occupy the Interstate right of way.

INDIANA

FHWA Contact: Dennis Lee, Indiana Division, (317) 226-7487
E-Mail Address: Dennis.Lee@fhwa.dot.gov

Fiber Optics: The INDOT has not allowed any fiber optics installations along roads under their jurisdiction, except for the Indiana Toll Road which is I-80 / I-90 across the northern portion of the State and is 251 km in length. The Toll Road Division of INDOT had some fiber optic lines in place but they were outdated. They are now involved in a pilot project with new lines to be installed. There is no Federal money in this effort. Because of some concerns by INDOT about legal issues concerning use of the Right of Way, a Request for Information (RFI) has been sent to potential users to determine potential needs and usage of a fiber optic system. Even though no decision has been made, INDOT is currently leaning toward working on I-65 and I-64 as the initial effort. The information from the RFI will help them to decide where the first efforts will occur. An alternative that INDOT is considering is to possibly tie into the existing State Police wireless network.

Wireless: INDOT does not have wireless installations, but are considering a request for proposals (RFP) for wireless communications using certain facilities such as tower light supports. The City of Indianapolis currently has an RFP out trying to get private industry as partners in a wireless system. The State and we are anxiously awaiting the outcome.

MICHIGAN

FHWA Contact: John Wiesner, (517) 377-1880, Ext. 40 E-Mail : John.Wiesner@fhwa.dot.gov
MDOT Contact: Mark Dionise (517) 373-7682. E-Mail address: dionisem@state.mi.us.

Fiber Optics: Lines have been installed on Interstate highway R/W in Michigan and also on other controlled access Federal-aid highway R/W in the State. Compensation has consisted of a Permit Fee of \$1000 per mile. Lines have been located outside the clear and will be maintained from fence line, cross roads, or ramps, with exceptions.

Wireless: Facilities have not been installed on any Interstate highway R/W in Michigan or on any other controlled access Federal-aid highway R/W in the State. The Division Office has played a minimal role thus far.

MINNESOTA

FHWA Contacts: Jim McCarthy (651) 291-6112 or Pete Kiernan (651) 291-6106
MnDOT Contacts: Adeel Lari 651-282-6148 or Bob McPartlin (651) 296-4337

Web Site: <http://www.dot.state.mn.us/connect/> **Fiber Optics:** On December 23, 1997, the Minnesota Department of Transportation (MnDOT) entered into an agreement with a private consortium granting them exclusive access to lay a fiber optic network within state trunk highway right-of-way. The Minnesota trunk highway system consists of Interstate, NHS, and other principal arterials. Leading the consortium was International Communications Services (ICS)/Universal Communication Networks (UCN) from Denver, Colorado. Under this agreement, the consortium was to construct a 2,200 mile fiber optic network that included three loops, going to the northern and southern portions of the state as well as to the Twin Cities metropolitan area. In exchange for this accommodation within trunk highway right-of-way, the consortium would provide all state, city and county agencies, as well as public and private schools and universities, free access to the network, up to 20-30% of capacity. The consortium had the right to lease the remaining

capacity to other entities on a non-discriminatory basis. In February, 2001, MnDOT and the Minnesota Department of Administration terminated the agreement with ICS/UCN to build the fiber-optic network because the consortium could not garner sufficient financing to complete installation along the remaining 2,200 miles. After reviewing its options, the state decided that it was not practical to further amend the contract. To date, private sector investment in the project exceeds \$30 million in fiber-optic cable and conduit. The network currently spans 230 miles along I-94 from the Twin Cities to Moorhead. An additional 20-mile segment will soon be operational along I-94 from the Metro Area east to the Wisconsin border. Most of the network is comprised of two 2-inch PVC conduits. One PVC conduit is empty, the other contains 192 fibers in an .8-inch cable. In the Twin Cities metro area the number of conduits may vary.

Wireless: Towers have not been installed on any trunk highway right-of-way. Currently, MnDOT is planning and evaluating whether to go forward with an RFP for Wireless Communication. No decision has been made to date.

OHIO

FHWA Contact: Richard Henry (614) 280 -6842, E-Mail: Richard.Henry@fhwa.dot.gov

ODOT Contact: Steven D. Cheek (614) 466-3877.

Fiber Optics: No private fiber-optic lines have been installed longitudinally in Ohio. There have been transverse (crossings) installations. There are also a few municipal or MPO longitudinal installations for ITS purposes in some of the major metropolitan areas. ODOT is reassessing its past position on this issue and is currently waiting to the experience of other states programs.

Wireless: There have been tower installations on both Interstate and Limited Access Urban Freeways. 29 towers have been approved (23 on Interstate and 3 on Urban Freeways) There is also 3 installations on ODOT District property. Each provider must enter into a Statewide Master License Agreement and an individual Site Agreement for each site. The license fee is based on a schedule and ranges in price from \$9,200 to \$25,250 per year with periodic adjustments of 3.5% per year for each site depending on the site location (Urban, Suburban, Rural Suburban, or Rural) and the number of antennae on the tower. In addition, a \$10,000 security deposit is required for each installation until the aggregate of the deposits equals \$100,000 for an individual carrier. Each carrier must make space available for co-locator carriers and pay ODOT half the fee or half of the scheduled fee which ever is greater, and provide a space for the State Multi Agency Radio Communications System (MARCS) and other ITS applications at no charge.

WISCONSIN

FHWA Contact: Roger Szudera (608) 829-7508 E-Mail: Roger.Szudera@fhwa.dot.gov

WisDOT Contact: Robert Fasick (608) 266-3438 / (608) 267-7856(fax); robert.fasick@dot.state.wi.us

Fiber Optics: -WisDOT may receive compensation in fiber, cash, or both for long. installations on controlled-access freeways and expressways. Access to other state highways is free.

Wireless: No wireless accommodation to date, but companies have indicated interest. WisDOT would allow installations at rest areas, weigh scales, or another safe R/W location for a tower. NOTE: For fiber and wireless, a master agreement is prepared and permits issued for each location.

IOWA

FHWA Contact: Gerry Kennedy, (515) 233-7317 E-mail: Gerald.Kennedy@fhwa.dot.gov

Iowa DOT: Larry Heinz (515) 239-1373 lheintz@max.state.ia.us

Dave Widick (515/) 233-7903 dwidick@max.state.ia.us

Fiber Optics: Lines have been installed on Interstate highway R/W in Iowa and also on other controlled access Federal-aid highway R/W in the State. These fiber-optic lines comprise the Iowa Communications Network (ICS) system and other underground communications lines. The ICS system is State owned and operated for State of Iowa business only; therefore, the State has access to the R/W as needed at no cost. Other underground communications systems pay a yearly rental fee, and these facilities have been located as close to the R/W line as possible. Facilities on freeways will be accessed from adjacent lands outside the R/W. Facilities on non-freeways can be accessed from within the R/W. The Division Office has approved longitudinal occupancy.

Wireless: Facilities have not been installed on any Interstate highway R/W in Iowa or on any other

controlled access Federal-aid highway R/W in the State. The Division Office has been involved in talks with IDOT about the possibility of facilities in the future, but has neither encouraged nor discouraged at this time.

KANSAS

FHWA Contact: Jason Cowin (785) 267-7284 E-Mail Jason.Cowin@fhwa.dot.gov

KDOT Contact: Matt Volz, ITS Coordinator, (785) 296-6356, mattv@ksdot.org

Fiber Optics: Lines are currently being installed as part of two KDOT shared resources contracts with Digital Teleport, Inc. (DTI). The first contract, covering 147 miles, was awarded for the Kansas City metropolitan area in conjunction with an on-going ITS design project (Kansas City Scout) and a Missouri DOT fiber optic shared resources project with DTI on the Missouri side of the project area. The second contract, covering 550 miles, was awarded for a statewide system along I-35, I-70, I-435, I-635, US-69, US-169, K-10, and K-7. Both contracts were awarded in response to a KDOT RFP and are intended to provide the fiber-optic backbone for KDOT's ITS infrastructure. Each contract is approximately 90-95% complete. Prior to these shared resources contracts with DTI, fiber optics lines had only been installed on one section of Interstate R/W in Kansas, a 25-mile section maintained by the Kansas Turnpike Authority (KTA).

Wireless: Facilities have not yet been installed on Interstate R/W or any other controlled access Federal-aid highway R/W in Kansas. KDOT invited a wireless vendor in to explain the issues involved with wireless towers on State R/W, but has not yet taken action in this area.

MISSOURI

FHWA Contact: Bob Thomas, (573) 636-7104 E-Mail: Robert.Thomas@fhwa.dot.gov

MoDOT Contact: James R. Zeiger (573) 522-5994

Fiber Optics: lines have been installed on Interstate highway R/W in Missouri and on other controlled access Federal-aid highway R/W in the State. Under the terms of the public-private partnership with Digital Teleport Inc., MoDOT allowed placement of the fiber optic cable on highway R/W in exchange for use of 6 of the 24 strands of the fiber optic cable as the backbone of MoDOT's ITS network. No investment of public money was required. In addition, the value of the fiber optic system has been recognized under the FHWA Innovative Finance program and a \$30 million soft match credit for use on future ITS projects. Originally, the fiber optic line was intended to be buried 20 to 30 feet from the edge of pavement. However, after installation was initiated, topography dictated the best location for the fiber optic cable was in the median. Access for maintenance purposes is only allowed from frontage roads or crossroads in accordance with current MoDOT policy. No access from the mainline is permitted.

Wireless: MoDOT issued RFP's in September, 1997 and again in the fall of 1998 which were intended to lead to a shared resources public-private partnership with the telecommunications industry to support deployment and operation of the Intelligent Transportation System in Missouri. MoDOT had planned to allow placement of wireless facilities where mutually acceptable sites are identified on MoDOT property in exchange for goods and services that support ITS deployment and operation. A few firms responded to each RFP and a potential telecommunications partner was identified each time, however, in both cases, negotiations were not successfully concluded because mutually acceptable terms could not be reached. MoDOT has also recognized additional potential conflicts with wireless facilities on the right-of-way during anticipated widening of major Interstate facilities in the future. At this time, MoDOT is not actively pursuing a wireless shared resources partnership.

NEBRASKA

FHWA Contact: Ed Kosola, (402) 437-5973 E-Mail: Edward.Kosola@fhwa.dot.gov

Fiber Optics: Lines have not been installed on Interstate R/W or on any other fully controlled access highway R/W in Nebraska, except for crossings.

Wireless: Facilities have not been installed on Interstate R/W or on any other fully controlled access highway R/W in Nebraska.

Western Resource Center:

COLORADO

FHWA Contact: Scott Sands, (303) 969-6703, ext 362 E-Mail: Scott.Sands@fhwa.dot.gov

Fiber Optics: Lines have been installed on Interstate highway R/W in your Colorado and on other controlled access Federal-aid highway R/W. The Colorado DOT received fibers for their own use as compensation. Installations were made in the R/W but are not considered to be a maintenance problem. The DO provided advice and encouragement.

Wireline/Wireless: Facilities have not been installed on any Interstate highway R/W in Colorado or on any other controlled access Federal-aid highway R/W in the State. A revised utility accommodation plan has been submitted to DO for approval that addresses the wireline and wireless telecommunication facilities.

MONTANA

FHWA Contact: Carl James, (406) 449-5302 ext. 237 E-Mail: Carl.James@fhwa.dot.gov

Fiber Optics: Lines have not been installed on any interstate highway right-of-way in Montana.

Wireless: Facilities have not been installed on any interstate R/W to date or on any other controlled access federal-aid facility. Comments The MDT has appointed a Task Force to fully evaluate the merits of utility occupancy, including pipelines, of the interstate R/W.

WYOMING

FHWA Contact: Galen Hesterberg, Wyoming Division, (307) 772-2012, ext. 45

E-Mail Address: Galen.Hesterberg@dot.fhwa.gov

WYDOT Contact: Dave Braden (307-777-4133) e-mail: dbryde@state.wy.us

Fiber Optics: Lines have not been installed on any Interstate highway R/W in Wyoming, but have been installed on other controlled access Federal-aid highway R/W. Compensation under consideration by WYDOT and State Business Council for future installations. WYDOT dictates locations and pushes all facilities to the outside limits of the R/W. Access for maintenance is typically from the highway, as the R/W is fenced. Where available, access for maintenance is recommended from outside the R/W through a locked gate. The DO has provided information, discussed pros/cons, and encouraged development of State policy to consistently respond to requests.

Wireless: Facilities have not been installed on any Interstate highway or any other controlled access Federal-aid highway R/W in the State. Very few requests have been received by WYDOT. Current requests have been denied due to concerns about tower and guy line locations and safety. WYDOT and State Business Council will review future requests for placement and compensation. The DO has provided information, discussed pros/cons, and encouraged development of State policy to consistently respond to requests.

NORTH DAKOTA

FHWA Contact: Rob Griffith, (701) 250-4349 E-Mail: Robert.Griffith@fhwa.dot.gov

Fiber Optics: Lines have not been installed on any Interstate highway right-of-way or any other Federal-aid highway right-of-way in the state.

Wireless: Facilities have not been installed on any Interstate highway right-of-way or on any other Federal-aid highway right-of-way in the State. The DO has been providing advice, and assistance. Comments: The North Dakota DOT had negotiated with AT&T for the installation of fiber-optic cabling. However, negotiations have failed, no additional services being proposed.

SOUTH DAKOTA

FHWA Contacts: Ken Erlenbusch (605) 224-7326, x3027; E-Mail: Ken.Erlenbusch@fhwa.dot.gov

Utilities - Ginger Maisie, (605) 224-7326,x3037;

ITS - Craig Gunslinger, (605) 224-7326, x3047.

Fiber Optics: The SDDOT has installed fiber-optic cable in the Interstate R/W. Other requests will be approved as they are received. The Governor mandated that the World Wide Web be made available to all schools (public and private) in South Dakota. This project has now been completed. All schools (elementary, Middle and High Schools, and Universities) have been wired with fiber-optic cable to provide Internet service to all schools. This required installing fiber-optic cabling on many miles of non-Interstate rights-of-way. The DO is providing advice and assistance.

Wireless: Facilities have not been installed on any Interstate highway right-of-way or on any other Federal-

aid highway right-of-way in the State.

UTAH

FHWA Contact: Dan Pacheco, (801) 963-0078 x231 E-Mail: Dan.Pachecho@fhwa.dot.gov

UDOT - Orlando Jerez, Chief Utility/Railroad Engineer ojerez@dot.state.ut.us

4501 South 2700 West, Salt Lake City, Utah 84119-5996 Tel: (801) 965-4032 Fax: (801) 965-4338

Fiber Optics: Lines have not been installed on any Interstate highway or other highway in the State to date. A Governor's Task Force has presented a series of recommendations to the Legislature on what policy to follow to allow the State to benefit from the value of accommodating these lines. Regulations are being drafted to allow several options for charging, as the Legislature passed permissive legislation in April 1999.

Wireless: No activity to date. State utilities accommodation manual is on our web page located at <http://www.dot.state.ut.us/esd/Manuals/Utilities/utilities.htm>

ARIZONA

FHWA Contact: Philip Bleyl (602) 379-3913 Email: phillip.bleyl@fhwa.dot.gov

Craig Stender, (602) 712-8865, Arizona DOT contact for Fiber Optics E-mail: cstender@dot.state.az.us

Dennis Barker, (602) 712-7230, is the Arizona DOT wireless contact E-Mail: dbarker@dot.state.az.us

Fiber Optics: Arizona issued a statewide RFP in July 1998. The RFP requested a communications firm(s) to provide communications infrastructure with the Department as a joint user. Two proposals were received. Both were reviewed by the Attorney General's Office for legal sufficiency. They rejected one proposal as non-responsive. The other is now being evaluated. It is expected that the Department will decide how to proceed by the end of the calendar year. To be considered responsive, proposals, at a minimum, had to include private ownership, operation, construction, and maintenance of communications infrastructure while providing the state with capacity and other enhancements in exchange for entrance into highway right-of-way. A fiber-optic communications network was preferred, but other systems would be considered. Much of the selection criteria are based on the number of statewide needs that would be met and on the quality and capacity to be provided. The type of system, capacity, equipment, and other enhancements provided to the state should first focus on the Department's need to expand ITS capabilities (a copy of the plan was made part of the RFP). The most effective proposal would be a plan for a statewide network. However, proposals for only one region or corridor would be considered. Additionally, ADOT made it clear that while it believed that only one proposer would be selected for any specific route, the Department reserved the right to select more than one proposer when it was in the best interest of the state to do so. The proposal also required an explanation of how other entities could be accommodated within a single system. ADOT's purpose was to ensure competition was not inhibited, while providing the greatest benefit to the state.

Wireless: They currently have 8 providers under Master Lease Agreements. The Master Lease sets the basic terms, provisions and restrictions. Individual sites are leased under a separate site agreement which attaches to the Master Lease. New sites or collocations are requested by a provider and then advertised for competing bids. If no competing bids are received, which is usually the case, an Individual Site Agreement is executed. We currently have approximately 45 site agreements with some 15 pending.

CALIFORNIA

FHWA Contact: Bill Todd (916) 498-5011 E-Mail: William.Todd@fhwa.dot.gov

Caltrans Contact: Scott Atkins E-Mail Address Scott_Atkins@dot.ca.gov

(Fiber): Peter Schultze, (916) 654-2346 (Wireless) Bruce Wilson, (916) 654-4139

Fiber Optics: Lines have not been installed on Interstate highway R/W in California or on any other controlled access Federal-aid highway R/W, except by Caltrans for State purposes and in a few instances by others as an approved exception to the approved freeway utility accommodation policy. Approved exceptions for fiber-optics are now subject to Caltrans receiving compensation and excess capacity (conduits) - these conduits are then available to others (with compensation). The goal is to restrict

construction activities in the right of way. Legislative changes may be necessary to clarify authority to receive compensation.

Wireless: There are installations on Interstate R/W and on other controlled access Federal-aid highway R/W in accordance with Caltrans A Licensing Process and Siting Guidelines established for their Telecommunications (Wireless) Licensing Program. Compensation to Caltrans consists of cash based upon type of equipment and geographical location, ranging from \$10,980 to \$23,280 per site per year. Increases effective July 1, 2001 result in a new range from \$11,364-\$24,096. Guidelines have been established taking safety, functional, and aesthetic considerations into account. Access to wireless facilities is to be from outside the R/W. The DO has final review/approval authority over all wireless proposals on Federal-aid highways, including construction plans, environmental documents, collocation, and assignments. This and extensive related technical information is available through their website - <http://www.dot.ca.gov/wireless>

HAWAII

FHWA Contact: Laura Kong (808) 541-2700 ext. 328. E-Mail: Laura.Kong@fhwa.dot.gov
State Contact: Michael Amuro, HDOT, (808) 692-7332.

Fiber Optics: Lines have been installed at one Interstate location for the State's own use in traffic management purposes. The military has one installation on a state route that links the military bases through AT&T's HITS program. There is another private provider that traverses over 30 miles of State and city routes. This one installation sometimes runs longitudinal in the right-of-way and sometimes traverses the roadways.

Wireless: All installations are on Oahu and are at each of the tunnels located on H-3, SR-63, and SR-61. All active wireless providers are required to form a consortium that proposes a plan to coordinate installations. HDOT Right-of-Way Branch reviews and approves plans. They then issue 4 individual annual leases to each provider. Lease fee charged is based on a fair market value of the wireless site plus a \$2,000 security deposit per site. The consortium constructs sites and maintains them. Each provider also pays a pro-rata share of the cost of any utilities used because they are tapping into HDOT's power source.

NEVADA

FHWA Contact: Jeff Weinman, (775) 687-5334. E-Mail: Jeff.Weinman@fhwa.dot.gov
State Contact: Heidi Mireles, NDOT, (775) 888-7840. E-Mail Address HMireles@dot.state.nv.us

Fiber Optics: Three conduits have been installed, one of which contains a 100-fiber cable on Interstate (I-80) highway right-of-way in Nevada. It is within a 20-foot controlled access corridor between California and Utah known as the "Williams Project." A longitudinal, nonexclusive permit has been issued to multiple users for a minimal fee. Lateral lines are within secondary routes.

Wireless: NDOT is continuing to develop policy. Facilities have not been installed on any Interstate highway right-of-way. The FHWA Division Office will continue to provide advice to NDOT.

ALASKA

FHWA Contact Person: Aaron Weston, (907) 586-7427
E-Mail Address: Aaron.Weston@fhwa.dot.gov

Alaska has not yet had any experience with resource sharing activities.

IDAHO

FHWA Contact Person: Cathy Satterfield (208) 334-9180 x125
E-Mail Address: Cathy.Satterfield@fhwa.dot.gov

Idaho has not yet had any experience with resource sharing activities.

OREGON

FHWA Contact: John Gernhauser, (503) 587-4708. E-Mail: John.Gernhauser@fhwa.dot.gov

Fiber Optics: Oregon has accommodated fiber optics within Interstate right-of-way as an exception to its policy. ODOT is considering a policy on resource sharing. There was no compensation other than the normal administrative fee associated with the permit. Locations have been either traverse crossings under

the roadway or attached to structures.

Wireless: Facilities (towers, etc) have not been installed on Interstate or any other controlled access facilities in Oregon

WASHINGTON

FHWA Contact: Jim Leonard, (360) 753-9408. E-Mail: James.Leonard@fhwa.dot.gov

WSDOT Contacts: Al King, WSDOT, Operations Engineer and Light Lanes Project Director, (360) 705-7375.

E-Mail Address kinga@wsdot.wa.gov

Gerry Gallinger, Director of Real Estate Services, (360) 705-7305.

E-Mail Address galling@wsdot.wa.gov

Fiber Optics: The Seattle Project North Environmental document has been approved and an agreement executed. The project is moving forward. The I-5 South, I-90 and I-82 (East & West) environmental document is currently being worked on.

Wireless: WSDOT has a model airspace lease agreement that permits wireless on all highways if highway operations and safety are not compromised.

FOR CORRECTIONS OR ADDITIONS - CONTACT:

Janis Gramatins - Email: janis.gramatins@fhwa.dot.gov

FHWA Office of Real Estate Services

202-366-2030

or

Paul Scott - Email: paul.scott@fhwa.dot.gov

FHWA Office of Infrastructure

202-366-4104



This page updated March 14, 2002

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United States Department of Transportation - Federal Highway Administration

ATTACHMENT F- RESOLUTION ON ACCESS TO PUBLIC RIGHTS-OF-WAY AND PUBLIC LANDS, FEBRUARY 2002 WINTER MEETINGS IN WASHINGTON, D.C.

**Resolution on Access to Public Rights-of-Way and Public Lands,
February 2002 Winter Meetings in Washington, D.C.**

WHEREAS, Federal, State, and local governmental entities have a legitimate and important role in managing their rights-of-way and public lands; and

WHEREAS, Local government efforts to promote deployment of advanced services have been exceedingly valuable; and

WHEREAS, The rights-of-way practices of certain of these entities have emerged as a significant barrier to the deployment of advanced telecommunications and broadband networks since passage of the 1996 Act; and

WHEREAS, Prompt, nondiscriminatory access to public rights-of-way and public lands at reasonable rates, terms, and conditions is essential to the development of facilities-based competition, the deployment of state-of-the-art telecommunications services to the public and the implementation of facilities-based/broadband network redundancy to safeguard against network outages; and

WHEREAS, Most States do not have pro-access laws, and ambiguities in the laws of some of those states that do have such laws have undermined compliance; and

WHEREAS, Existing federal, State, and local laws have not prevented certain governmental entities from imposing unreasonable compensation and other concessions that have increased the cost, delayed, or prevented deployment of these critically needed facilities; and

WHEREAS, The failure of a governmental unit to provide prompt, non-discriminatory access to public rights-of-ways and public lands - free of unreasonable compensation or conditions, might pose an insurmountable barrier to entry to new carriers offering innovative facilities-based/broadband and other services; now therefore be it

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its February 2002 Winter Meetings in Washington, D.C., encourages all governmental entities to act on applications for access to public rights-of-way in a reasonable and fixed period of time, to treat all providers uniformly and in a competitively neutral manner consistent with applicable federal and State law, to ensure that their control over access to public rights-of-way and public lands is used to facilitate, and not to create an unnecessary burden to, the deployment of telecommunications facilities in the form of increased costs or delays, and to consider the impact of setting compensation above actual and direct costs on the deployment of advanced telecommunications and broadband networks; and be it further

RESOLVED, That NARUC encourages municipalities and managers of public lands to provide prompt, non-discriminatory access to requesting carriers at reasonable rates and terms, consistent with environmental stewardship and other management responsibilities; and be it further

RESOLVED, That NARUC supports the vigorous enforcement of existing access laws by local governments, State Commissions, the FCC and other federal agencies, as well as the adoption of right-of-way access laws where none exist, and the review or reform of existing local, State and federal measures to ensure that rights-of-way access is eliminated as an actual or potential barrier to deployment; and be it further

RESOLVED, That the NARUC create a Study Committee on Public Rights of Way, to consist of members of the NARUC Telecommunications Committee, and the Telecommunications Staff Subcommittee and the Staff Subcommittee on Accounting and Finance, and be it further

RESOLVED, That the study committee is charged to develop recommendations for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks; and be it further

RESOLVED, That the committee shall invite participation by the industry and by groups representing agencies and governments that own public lands or offer public rights of way and other organizations representing governmental interests; and be it further

RESOLVED, That the committee shall report recommendations at the NARUC Summer meeting in 2002 at Portland, Oregon, for adoption by NARUC.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors February 13, 2002

**ATTACHMENT G - RESOLUTION ON RECOMMENDATIONS FOR PROMOTING
BROADBAND FACILITY ACCESS TO PUBLIC RIGHTS-OF-WAY AND PUBLIC LANDS
FOR 2002 NARUC SUMMER MEETING AT PORTLAND, OREGON**

Resolution on Recommendations for Promoting Broadband Facility
Access to Public Rights-of-Way and Public Lands

WHEREAS, In February 2002, NARUC adopted a resolution encouraging all governmental entities to act on applications for access to public rights-of-way in a reasonable and fixed period of time, to treat all providers uniformly and in a competitively neutral manner consistent with applicable federal and State law, to ensure that their control over access to public rights-of-way and public lands is used to facilitate the deployment of telecommunications facilities; and

WHEREAS, That resolution also created a Study Committee on Public Rights-of-Way and charged it with developing recommendations for reducing the extent to which rights-of-way access serves as a barrier to the deployment of advanced telecommunications and broadband networks; and

WHEREAS, The Study Committee invited and received participation by the industry and by groups representing agencies and governments that own public lands or offer public rights-of-way and other organizations representing governmental interests; and

WHEREAS, The Study Committee has produced a report that outlines several possible methods to address the competing interests involved; and

WHEREAS, The report of the Study Committee contains several views regarding the issues; now therefore be it

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners, convened at its 2002 Summer meetings in Portland Oregon, offers its thanks to the Study Committee and all those that have submitted ideas and participated in the Rights-of-Way project and without endorsing the report recommends that regulators, academia, units of government and all industry sectors carefully review the report of the Study Committee on Public Rights-of-Way.

Sponsored by the Committee on Telecommunications
Adopted by the NARUC Board of Directors July 31, 2002

ATTACHMENT H - §253

§253

(a) IN GENERAL. -- No State or local statute or regulation, or other State or local requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY.-- Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY. -- Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and non-discriminatory basis, for the use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION. -- If, after notice and public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates section (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

ATTACHMENT I - I-ROW's Supplemental Views on the NARUC Study Group's Report on Rights-of-Way

I-ROW's Supplemental Views on the NARUC Study Group's Report on Rights-of-Way

The members of I-ROW appreciate the opportunity to participate in this process and wish to commend the members of the NARUC study group on rights-of-way for their efforts. Their report will serve as a useful information source for those seeking to identify and resolve issues that impact deployment of competitive and broadband services.

I-ROW members, including competitive local providers, long distance carriers and incumbent local providers, agree that:

- the actual and direct costs telecommunications providers impose upon the public rights-of-way constitute fair and reasonable amounts properly recoverable from telecommunications providers and
- the majority of units of government do not impose unreasonable delays or fee structures that inhibit or prohibit the deployment of telecommunications infrastructure.

A problem does exist, however. I-ROW members continue to experience unreasonable delays or non-cost based fee structures in some locations. Sound public policy does not support such results. It is important to remember that fees for accessing public rights-of-way are passed on (often as line-item charges) to end-user customers. Further, delays in the deployment of networks deny service choices to customers, not only in the immediate community, but also in other communities that the planned network is intended to serve. Finally, case law establishes that local governments hold public rights-of-way in trust for the public and that appropriate compensation for use of public rights-of-way should be cost-based.

Many discussions at NARUC meetings and elsewhere have stressed the need for more rapid deployment of broadband capabilities and for lower prices for broadband services. However, it cannot be denied that fees for access to public rights-of-way that are above the actual and direct costs of managing the rights-of-way serve to increase consumers' costs for broadband offerings or that excessive delays in granting permits slows or prevents the deployment of broadband offerings.

Excessive fee structures (e.g. those based upon percentage of gross revenues) are inappropriate and unlawful. In the instances where non-cost based fees have been imposed on a carrier, those fees have had an adverse impact on broadband deployment. If the practice were to become more widespread, it would further exacerbate the negative impact on the deployment of new and innovative services that

consumers and government desire.

Finally, seven United States District Courts, the United States Court of Appeals for the Ninth Circuit and the Supreme Court of Iowa have held that, under section 253 of the Telecommunications Act of 1996, local governments may only charge fees that are “directly related to the carrier’s actual use of the local rights-of-way.” It should be noted that while some courts have held that municipalities are permitted to charge franchise fees that are not cost-based, those cases cannot be reconciled with economic reality in that they assume industry members and local governments negotiate at arms-length over the use of public rights-of-way, nor are those cases consistent with the legislative purpose behind section 253.

I-ROW’s ten recommended measures follow. Adoption of these recommendations would serve to advance the objectives of rapid and affordable competitive and broadband services.

**TELECOMMUNICATIONS
INDUSTRY RIGHTS-OF-WAY
WORKING GROUP**

Adelphia Business Solutions
ALTS
AT&T
BellSouth Telecommunications, Inc.
CompTel
e.spire Communications, Inc.
Global Crossing Ltd.
Level 3 Communications, LLC
Metromedia Fiber Network
Qwest
SBC
Sprint
Time Warner Telecom
Velocita
Verizon
Williams Communications, LLC
WorldCom

**RECOMMENDED MEASURES
TO PROMOTE PUBLIC RIGHTS-OF-WAY ACCESS**

- Access to public rights-of-way should be extended to all entities providing intrastate, interstate or international telecommunications or telecommunications services or deploying facilities to be used directly or indirectly in the provision of such services (“Providers”).
- Government entities should act on a request for public rights-of-way access within a reasonable and fixed period of time from the date that the request for such access is submitted, or such request should be deemed approved.
- Fees charged for public rights-of-way access should reflect only the actual and direct costs incurred in managing the public rights-of-way and the amount of public rights-of-way actually used by the Provider. In-kind contributions for access to public rights-of-way should not be allowed.
- Consistent with the measures described herein and competitive neutrality, all Providers, including government owned networks, should be treated uniformly with respect to terms and conditions of access to public rights-of-way, including with respect to the application of cost-based fees.
- Entities that do not have physical facilities in, require access to, or actually use the public rights-of-way, such as resellers and lessees of network elements from facilities-based Providers, should not be subject to public rights-of-way management practices or fees.
- Rights-of-way authorizations containing terms, qualification procedures, or other requirements unrelated to the actual management of the public rights-of-way are inappropriate.
- Industry-based criteria should be used to guide the development of any engineering standards involving the placement of Provider facilities and equipment.
- Waivers of the right to challenge the lawfulness of particular governmental requirements as a condition of receiving public rights-of-way access should be invalid. Providers should have the right to bring existing agreements, franchises, and permits into compliance with the law.
- Providers should have a private right of action to challenge public rights-of-way management practices and fees, even to the extent such practices and fees do not rise to the level of prohibiting the Provider from providing service.
- The Federal Communication Commission should vigorously enforce existing law and use expedited procedures for resolving preemption petitions involving access to public rights-of-way.

Rights-of-Way: Local Governments' View

Introduction

Local Government¹ has been an active participant in the NARUC “Rights-of-Way” Study Group (“Study Group”) effort from its inception. An unbiased effort to address the concerns of government and industry regarding rights-of-way could only be of benefit to Local Government and its constituents. Further, Local Government supports the development of broadband technologies and new communications services and feels a regulatory environment that favors competition is the best way to foster new growth and innovation. What Local Government does not support is growth and innovation at any cost.

Competition among telecommunications providers has brought more construction to streets, businesses, and neighborhoods than ever before. Simply encouraging the growth of broadband deployment in our neighborhoods cannot be the only goal of rights-of-way policy. Local Government needs to balance the interests of local taxpayers with those of local telecommunications users and address issues such as traffic congestion, public safety, repeated disruptions of PROW, costs of inspection of the PROW, and the wear and tear on our local streets. These issues are not merely nebulous regulatory issues; they present very real financial and physical challenges to local budgets and streets. Local Governments must manage construction in the PROW and bring order to what often is a scene of considerable chaos.

The Study paper fails to acknowledge these real local concerns in its call for a uniform nationwide access and fee structure. Such a national model which deprives Local Government of its “police powers” to protect the public health, welfare and safety while providing for “rent free” occupation of the rights-of-way are unworkable solutions. For that reason Local Government laments a missed opportunity to advance broadband deployment by NARUC and offers these supplemental views.²

I. The Study Fails to Demonstrate Local Government’s actions are a barrier to entry

Telecommunications providers are pursuing entry strategies based on market factors, not local right-of-way policies and regulations. Furthermore, it is well past time for NARUC, the Federal Communications Commission and NTIA to state emphatically that state and local governments do not stand in the way of competition or of the deployment of broadband facilities. Our residential citizens hungry for broadband deployment and our commercial enterprises advance with the improvements resulting in price and speed that a competitive marketplace for bandwidth provides. Therefore local governments seek to promote facilities-based competition through the efficient, fair management and pricing of public rights-of-way essential to a predictable, vigorous broadband market. Public rights-of-way should be neither a source of subsidy nor a barrier to advanced networks. Local governments take seriously their duty to steward scarce public resources and to provide competitive access to local markets without damaging innocent third parties.

¹ These comments are offered on behalf of the National Association of Telecommunications Officers and Advisors (NATOA), the National League of Cities (NLC), the United States Conference of Mayors and the National Association of County Officials (NACO) hereinafter referred to as “Local Government.”

² **These supplemental views are in addition to the detailed edits Local Government offered during the Study Group process which may be found at www.natoa.org and the recently published “Right of Way Best Practices” manual crafted by the referenced four leading national associations of local officials at www.nlc.org**

Evidence of local governments' pro deployment stance may be found in the cable industry's broadband deployment. Predominately regulated by local government, cable has either won or is winning the race to bring broadband to the home. If local government had been the barrier to deployment claimed by many of the carriers, one would have to wonder how according to the National Cable & Television Association the cable industry has been able to deploy broadband to over seventy million homes by December 31, 2001?³

II. Local Government has a protected property rights interest in the PROW.

National and state rights-of-way policy, even under the banner of promoting broadband deployment, must recognize the rights of local governments under the U.S. Constitution and the Telecommunications Act of 1996 ("1996 Act"). The Study Group's report has either failed or refused to recognize local governments' property interest, held either in fee or in trust, in the right-of-way which has recently been valued at over \$4 trillion dollars⁴.

The U.S. Constitution protects local governments' property rights in public rights-of-way.⁵ The Constitution also protects the federal form of government, reserving to states and local governments all powers not delegated to the United States, including all authority to manage use and disruption of local public rights-of-way.

- 1) Section 253 of the Telecommunications Act of 1996 was crafted to balance the interests of federal, state, and local governments, and to preserve the local management of public rights-of-way. The 1996 Act recognized the rights of local

³ See http://www.ncta.com/industry_overview/indStat.htm

⁴ See TeleCommUnity Valuation filed at the FCC and available on TeleCommUnity's homepage.

⁵ Case law substantiates that a franchise providing access to the right-of-way is an interest in real property. See *Group W Cable v. City of Santa Cruz*, 669 F. Supp. 954, 973 (N.D. Cal. 1987), citing *Cox Cable San Diego v. County of San Diego*, 185 Cal. App. 3d 368 (Cal. App. 4th Dist. 1986) ("a cable franchise grants a taxable possessory interest in real property. A cable operator's license to use the public thoroughfares bears such an indicia of a possessory interest as exclusiveness, durability, independence and private benefit.")

Further support for the proposition that a franchise is a real property interest is found in federal case law saying that franchise fees, which companies must pay for use of the right-of-way, are "in the nature of rent." As far back as 1823, the Supreme Court recognized that public utilities use rights-of-way in a way that is an "absolute, permanent and exclusive appropriation." *St. Louis v. Western Union Tel.*, 148 U.S. 92, 98-99, 13 S. Ct. 485, 487-88 (1893). The Court in *St. Louis* went on to explain this unique relationship, "who would question the right of the city to charge for the use of the ground thus occupied, or call such charge a tax, or anything else except rental? So, in like manner, while permission to a telegraph company to occupy the streets is not technically a lease, and does not in terms create the relation of landlord and tenant, yet it is the giving of the exclusive use of real estate, for which the giver has a right to exact compensation, which is in the nature of rental." *Id.*

More recently, the Fifth Circuit has recognized the leasehold-like nature of a cable franchise, "[f]ranchise fees are not a tax, however, but essentially a form of rent: the price paid to rent use of the public right-of-ways." *City of Dallas, Texas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997). See also *Pacific Tel. & Tel. Co. v. City of Los Angeles*, 282 P.2d 36, 43 (Cal. 1955); *Erie Telecommunications v. Erie*, 659 F. Supp. 580, 595 (W.D. Pa 1987), *aff'd on other grounds*, 853 F.2d 1084 (3^d Cir. 1988). In *BellSouth Telecommunications, Inc., v. City of Orangeburg*, 337 S.C. 35, 522 S.E.2d 804 at § 1 (S.C. 1999), the court debunked the assumption that any payment that generates revenues for a local government must be a tax, even if it arises from a market transaction in which the payer receives valuable use of an asset in exchange for the payment. The *White Plains* decision, a New York federal district court decision in 2000, also spoke to the question of a telecommunications franchise fee based on gross revenues to reflect the market value of the local community's property. While *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81 (S.D.N.Y. 2000), held that burdensome application requirements plus a lengthy approval process could constitute a prohibition on entry triggering § 253(a), it also held that fair and reasonable compensation extends beyond mere costs. In fact the court upheld compensation requirements reflecting a gross revenues fee and a fixed annual fee.

governments to control and manage their rights-of-way and to obtain fair compensation for right-of-way use. The legislative history shows that Congress inserted § 253(c) specifically to preserve local authority over reasonable rights-of-way compensation and management, and drafted § 253(d) to ensure that the courts, and not federal agencies, have jurisdiction over § 253(c) issues.

- 2) Limiting local government right-of-way compensation to less than market value does not recognize the scarce and valuable nature of public-rights-of-way. Compensation should assure that the right-of-way is dedicated to its highest and best use and avoid wasteful consumption of this precious resource. The federal government does not give away either its spectrum or its federal lands at cost, but rather has crafted auction policies. For instance, spectrum, like right-of-way space, is a scarce resource that is most efficiently allocated through a market price mechanism. It is inconsistent for the federal government to auction spectrum at the highest possible price while at the same time asserting that local government property should be given away to telecommunications companies at below market compensation. If local governments are to protect their property interests, they must be free to seek appropriate efficient pricing mechanisms, including revenue-based measures, to establish such compensation.

III. Right-of-Way Management By Local Governments Is Necessary to Balance the Competing Demands Placed Upon Local Rights-of-Way.

Local communities work with telecommunications providers and other rights-of-way users to resolve problems and make rights-of-way work efficient. When telecommunications providers refuse to cooperate, or ignore legitimate requirements, people get hurt and physical assets are damaged.⁶ Too often, providers fail to abide by local government standards of right-of-way management.

Subject to the police powers of local government, public rights-of- ways can be partially occupied by utilities and other service entities for facilities used in the delivery, conveyance, and transmission of services rendered for profit as such deployments may enhance the health, welfare, and general economic well-being of the community and its citizens. Every states' rights-of-way statute, including the Study Groups' recommended Michigan statute, includes specific language to preserve the police powers of local government to protect the health, welfare and economic well-being of the community. Local Government therefore would respectfully recommend to any legislature considering rights-of-way legislation to employ the following Purpose Section and authorizing clauses:

Purposes

The purpose of this legislation is

- **manage a limited resource to the long-term benefit of the public;**
- **promote competition in the provision of telecommunications services and ensure that citizens have a wide variety of services available to them by establishing clear and consistent rules by which providers may occupy the public rights-of-way;**
- **recover the costs of managing the public rights-of-way;**
- **recover fair compensation for those parts of the public rights-of-way occupied by telecommunications and interactive computer service providers in their businesses;**
- **prevent premature exhaustion of capacity in the public rights-of-way to accommodate communications and other services; and**
- **minimize inconvenience to the public occasioned by the emplacement and maintenance of telecommunications and interactive computer service facilities in the public rights-of-way.**

⁶ See NATOA's filing with NTIA, for an illustrative list of such right-of-way disasters.

Additionally the statute should include language such as the following taken directly from the Michigan Rights-of-Way:

(*) This section shall not limit a municipality's right to review and approve a provider's access to and ongoing use of public right-of-way or limit the municipality's authority to ensure and protect the health, safety, and welfare of the public.⁷

(*) This section shall not limit the permitting agency's enforcement mechanisms included in a permit or authorizing ordinance, including the imposition of specific performance or impositions of fines and interests.

(*) This section shall not limit the right of the permitting agency to require the provider to move or relocate facilities when such movement is required for the public's health, safety or welfare.

IV. Bankruptcy

The proposed statute is silent as to the treatment of the equipment of bankrupt telecommunications utilities. While until recently such a predicament was hard to imagine, recent events has proved the state and local government must address the potential challenge. For that reason, Local Government suggests the following language for consideration in the development of rights-of-way legislation:

BANKRUPTCY AND ABANDONMENT

Section ** Nothing in this act shall be construed as to limit the ability of a municipality to establish terms and conditions in a permit to address issues of equipment distribution and ownership in the event of bankruptcy or abandonment.

V. Fair and Reasonable Compensation is not limited to Costs

The Report and its model statute are flawed as they are founded on the erroneous belief that 47 U.S.C. Section 253 limits local government to the recovery of costs. Congress rejected the industry's lobby effort to limit fees to the recovery of costs and instead clarified in the only amendment to the act adopted on the floor of the House, that local government was authorized to manage its rights of way and require "fair and reasonable" for access to those rights-of-way.

The rationale behind the Congressional decision to preserve the ability of local government to charge rent to telecommunications providers for residing in local rights-of-way is simple. Local government as either the owner in fee of the rights-of-way, or holder of the property in trust for tax payers should not be forced to provide rent free access to such property.

Local Government, therefore, offers the following legislative language which represents a means to recover fair and reasonable compensation as provided under the Act.:

⁷ This section is verbatim from the Michigan legislation.

Just and Reasonable Fee Structure⁸

(1) The governing body of a city may assess the following fees as just and reasonable compensation for the use of the public rights-of-way which includes the recovery for the taxpayers of the jurisdiction a payment for rent or other compensation for the economic value of the property rights used within the rights-of-way.

(a) An access line fee of up to a maximum of \$X.XX per month per access line, with an increase of \$.XX every six (6) years thereafter; or

(b) An access line fee of up to X% of gross receipts.

(2) The permitting agency and the provider may reach mutual agreement on the value of fees in the form of in-kind facilities or services so long as the provision of such in-kind fees does not result in the fees exceeding the maximum amounts established in the act.

Conclusion and Additional Resources

Because of agreed to page limitations for the supplemental views of local government, our analysis and suggestions must stop at this point. A detailed commentary on the Study Report, including a red-lined model statute are available electronically from the homepage of the National Association of Telecommunications Officers and Advisors at www.natoa.org. Additionally, information and copies of Local Government's manual on best practices for rights-of-way management may be obtained from the National League of Cities at www.nlc.org.

⁸ This language comes from the recently enacted rights-of-way statute in Kansas.

