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 "teleconimunications, 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 pennit 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.

(I) **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 indcmnitication 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. Am. § 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 engincering drawings, as maintained in the ordionary 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. **Am.** § 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 rcquirements 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 Curriers, 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 PROVJDERS 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 rcquirements 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.I 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 ofthe main agencies along with comprehensive reference material for the reader. The appendix contains a comprehensive weblink reference sheet of federal agencies that could be cncountcred 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 bamer 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 a anecdotal example of the process gone bad as experienced by Midvale Tclcphone, 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/utilsr.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 ofadvanced 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 (bj. As mentioned above, this Section involves "interstate or intrastate telecommunications service."

In the recent NPRM on cable modem service,' 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 1, 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 1regulations. 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.[11] 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." 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

[11] 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 reliefunder 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 Stale commission to which a statement is submitted shall, not later than **60 days** after the date of such submission–(A) complete the review ofsuch 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 Resoonse 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.'' 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."

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

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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 *21,* 1997

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

Web Pare

Similar to the web pages that the FCC has created for the Federal-State Joint Conference on Advanced Telecommunications Services[20] 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"" 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 regulation[24] and discourage the placement of additional regulation on the Internet."

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[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 tu 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 nane is entitled: "FCC Focus on State and Local Government Issues." It can be reached through: http://www.fcc.rov/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 ofengineering site plans; contact information and descriptions of work area and construction schedule; identification of the carrier; maps ofthe proposed location of the carrier's system; submission of annual maps of facilities in the rights-of-way; minimization of traffic disruption; and remedies fur 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 ufregular financial reports; prohibition of the sale ofprovider'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; pruvision o f information on the use or purpose of telecommunications facilities, "most favored nation" ohligations 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 lo resolve wireless facilities siting problems by working together with slate 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 hoard." 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 Report" to rights-of-way issues. Similar to the inquiry done by the National Telecommunications and Information Administration (NTIA)," 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," 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, camers, 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 modem 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.""**

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[34] Secuon 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. Depanment 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://wv.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."" 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]

"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 5500 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.** §1 10-126, 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.