

<b>PENNSYLVANIA</b>	ALL COUNTIES	\$29.69	\$25.96
<b>PUERTO RICO</b>	ALL	\$44.50	\$38.96
<b>RHODE ISLAND</b>	ALL COUNTIES	\$ 7.40	\$ 6.47
<b>SOUTH CAROLINA</b>	ALL COUNTIES	\$44.50	\$38.96
<b>SOUTH DAKOTA</b>	BUTTE	\$22.23	\$19.48
	CUSTER		
	FALL RIVER		
	LAWRENCE		
	MEADE		
	PENNINGTON		
	ALL OTHER COUNTIES	\$ 7.40	\$ 6.47
<b>TENNESSEE</b>	ALL COUNTIES	\$29.69	\$25.96
<b>TEXAS</b>	CULBERSON	\$ 7.40	\$ 6.47
	EL PASO		
	HUDSPETH		
	ALL OTHER COUNTIES	\$44.50	\$38.96
<b>UTAH</b>	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		

<b>UTAH (Conl'd)</b>	SALT LAKE		
	SANPETE		
	SEVIER		
	SUMMIT		
	UTAH		
	WASATCH		
	WEBER	\$22.23	\$19.48
<b>VERMONT</b>	ALL COUNTIES	\$29.69	\$25.96
	ALL COUNTIES	\$29.69	\$25.96
<b>VIRGINIA</b>	ADAMS	\$14.85	\$12.98
<b>WASHINGTON</b>	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			

<b>WASHINGTON</b> (Conl'd)	SKAGIT SKAMANIA SNOHOMISH THURSTON WAHKIAKUM WHATCOM		
<b>WEST VIRGINIA</b>	ALL COUNTIES	\$29.69	\$25.96
<b>WISCONSIN</b>	ALL COUNTIES	\$22.23	\$19.48
<b>WYOMING</b>	ALBANY CAMPBELL CARBON CONVERSE FREMONT GOSHEN HOT SPRINGS JOHNSON LARAMIE LINCOLN NATRONA NIOBRARA PLATTE SHERIDAN SUBLETTE SWEETWATER UINTA WASHAKIE	\$ 7.40	\$ 6.47
	BJG 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](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](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/RcaProperty\\_Mgmt.htm](http://165.83.216.66/RcaProperty_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://uermits.fws.gov/>

### Kefuge 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 (WW) 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](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/lnd/Ind05-01.htm#to>

### Land Directives and Standards

Link to the web page: [http://www.usbr.gov/recman/d\\_and\\_s.htm#lnd](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/lnd/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/uscmmain.html>

## **United States General Accounting Office (GAO)**

Link to the web page: <http://www.eao.eov/>

## **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 US. Government Publications

Other Databases

Link to the web page: [http://www.access.gpo.gov/su\\_docs/index.html](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.

(9) 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 are 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