Negotiated Rulemaking Comments

39.03.43 – Rules Governing Utilities on State Highway Right-of-Way

Below is a listing of the submitted comments:

Date	Name/Organization	Pages
7/27/21	The Wireless Association (CTIA)	1-15
7/28/21	Idaho Cable Broadband Association (ICBA)	16-27
7/28/21	Idaho Telecom Alliance (ITA)	28-32
7/28/21	Syringa Networks, LLC	33-34
7/29/21	Verizon Wireless	35
7/30/21	Port of Lewiston	36-38

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

Rules Governing Utilities on State Highway Right-of-Way	))	Docket No. 39-0343-2102

COMMENTS OF CTIA

I. INTRODUCTION AND SUMMARY

CTIA – The Wireless Association[1] appreciates the opportunity to submit these comments on the Idaho Transportation Department's ("Department's") Notice of Intent to Promulgate Rules to update its Guide for Utility Management ("GUM"), which governs utility facilities on highway rights-of-way ("ROW").[2] CTIA commends the Department for its collaborative negotiated rulemaking process, including holding several constructive workshops, and provides these comments in that same constructive spirit.

When it began this proceeding, the Department stated that it sought to promote the use of rights-of-way to support broadband networks: "As the Idaho Transportation Department continues its efforts to address utility accommodation of broadband facilities seeking access to the state's ROW, ITD is initiating this negotiated rulemaking process to further analyze and

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers and suppliers, as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington.

[2] Idaho Transportation Department, Rules Governing Utilities on State Highway Right-of-Way, Docket No. 39-0343-2012, Notice of Intent to Promulgate Rules, Idaho Administrative Bulletin (June 2, 2021) ("Notice").

update the necessary policies and procedures, while also meeting federal requirements and supporting Governor Little's initiative to improve broadband access in Idaho."[3]

The Department's rulemaking comes at a critical time for broadband deployment. Idaho in particular has made rapid broadband deployment a statewide policy objective, and both federal and state policymakers have acknowledged the enormous economic and social benefits that broadband can deliver, and are committing funding to pay for broadband deployment to close the digital divide.

The Department has the opportunity in this rulemaking to promote the public's access to wireless broadband services, including fifth-generation ("5G") services, by streamlining its procedures for approving wireless facilities along state roads and highways. Those locations are often optimal for wireless networks because of their proximity to large volumes of wireless traffic. Installing antennas and supporting facilities along rights-of-way will deliver advanced wireless services, including broadband service, to the public in rural as well as urban areas, benefiting consumers, public safety agencies, and other users across the state. Adopting reasonable cost-based siting fees, simple permit application procedures, and timelines for acting on applications will incent wireless providers to invest in new infrastructure in Idaho, directly benefiting the public and the state's economy. Moreover, those fees, procedures, and deadlines can be adopted consistent with the Department's mission to oversee a comprehensive and safe state highway system.

The wireless industry looks forward to collaborating with the Department to develop and implement rules that will incent deployment of state-of-the-art communications networks along

[3] Notice at 65.

state roads and highways. In particular, CTIA supports the Department's proposal to adopt a fee schedule for wireless broadband facilities that is consistent with the Federal Communications Commission's ("FCC's") landmark 2018 Declaratory Ruling interpreting the Communications Act. The FCC determined that this federal law requires states and localities to adopt cost-based fees for small wireless facilities and to ensure that fees for larger facilities are reasonable and do not have the effect of inhibiting deployment. Recent written guidance from the Federal Highway Administration ("FHWA") allows state transportation departments to adopt cost-based fees that align with the FCC's 2018 Declaratory Ruling by determining either that providers are "utilities" under state law, or that deployment of new or upgraded facilities serves the public interest. The Department can with confidence make both of these determinations as to wireless facilities. Establishing cost-based fees for wireless facilities will directly promote Idaho's policy to expand broadband access, because they will encourage investment in new and upgraded facilities across the state.

CTIA also recommends that the Department make a small number of targeted revisions to its proposed update of the GUM in order to streamline permitting procedures and thus accelerate broadband deployment along Idaho's highways. The Department should, among other revisions, make clear that its procedures apply to larger as well as smaller wireless facilities and to modifications to existing facilities, adopt a forward-looking definition for next-generation technologies, implement specific time periods for acting on permit applications, include the completion of negotiated Master Lease Agreements within those periods, and limit the aesthetic control provisions to environmentally or historically sensitive locations. These revisions, further discussed below, will help to achieve Idaho's policy objective to make broadband service available statewide.

II. ACCELERATING BROADBAND DEPLOYMENT ALONG HIGHWAY ROW WILL HELP FULFILL A CARDINAL IDAHO AND FEDERAL POLICY OBJECTIVE.

In October 2019, the Idaho Broadband Task Force issued its report recommending actions to improve broadband speed, connectivity and infrastructure across Idaho. The Task Force concluded: "Like water, electricity and highways, Idaho citizens, communities and businesses, in both urban and rural areas, must have access to secure, reliable, affordable broadband internet speeds in order to grow, thrive and connect to the world. . . . Access to broadband and high-speed internet services is an urgent priority for Idahoans in all corners of the state."[4]

Expanding access to broadband is a critical state and national priority. Congress, the Biden Administration, and the FCC have all recognized that broadband will deliver enormous benefits to consumers, businesses, and the economy. For example, a CTIA study completed in February 2021 calculated that 5G (which delivers broadband as well as voice and other wireless services) will contribute roughly $1.5 trillion to U.S. GDP, and create approximately 4.5 million additional jobs over the next decade.[5]

The FHWA also supports highway ROW use policies that expand the availability of broadband services. On April 22, 2021, it issued a national Guidance Document (discussed further below) in which it "supports the consistent utilization of the ROW" for projects that serve the public interest.[6] FHWA specifically identifies broadband as one such type of project, and

---

[4] Idaho Broadband Task Force, "Broadband Access is Imperative for Idaho: Recommendations to Improve Idaho's Broadband Plan" (Oct. 31, 2019) at 3.

[5] *See* CTIA, "Building the 5G Economy: The Wireless Industry's Plan to Invest and Innovate in the U.S." (February 2021), *available at* https://api.ctia.org/wp-content/uploads/2021/01/2021-Wireless-Briefing-2_9.pdf (last accessed July 28, 2021).

[6] Memorandum from Stacey Pollack, Acting Administrator, FHWA, to Directors of Field Services, Division Administrators and Division Directors, "State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance" (April 22, 2021) ("Guidance Document").

directs its offices across the nation to "encourage State DOTs to consider practices that can further broadband deployment initiatives."[7]

The Department's rulemaking is vital to achieving the national and State priority to deploy broadband and the Task Force's vision for a robust, statewide broadband network. Idaho's roads and highways are ideal locations for wireless broadband infrastructure. Idahoans continually travel on them, and they cross through every town, city and county, across the most rural areas as well as more populated parts of the state. The COVID-19 epidemic has demonstrated the tremendous value of wireless technologies in keeping consumers, businesses, schools, and government support services interconnected.[8] Similarly, antennas along highways provide improved wireless services for public safety agencies that perform their missions there, and will facilitate advanced services offered over wireless networks, such as autonomous vehicles.

Given these consistent state and national policies to accelerate and expand the public's access to broadband and other advanced wireless services, the Department should adopt revisions to the GUM that drive rapid expansion of these services to rural as well as urban areas. Accommodating wireless broadband facilities along highway ROW and adopting streamlined permitting procedures, including timelines for granting siting applications, can achieve that objective by facilitating ubiquitous deployment across Idaho.

[7] *Id.* at 2.

[8] For specific examples and up-to-date news on the wireless industry's COVID-19 relief efforts, *see* CTIA, "The Wireless Industry Responds to COVID-19", *available at* https://www.ctia.org/covid-19 (last accessed July 28, 2021).

III. THE DEPARTMENT SHOULD ADOPT REASONABLE, COST-BASED FEES FOR WIRELESS BROADBAND FACILITIES.

A. The Department Should Adopt Its Proposal to Set Fees in Accordance With the FCC's Declaratory Ruling.

The Department has appropriately recognized that setting reasonable, cost-based fees that enable the Department to recover the costs it incurs to oversee that deployment is the correct framework for overseeing the installation of broadband facilities along state roads and highways. The deployment of antennas and support structures is extremely expensive, typically requiring the expenditure of tens of thousands of dollars for a single site. Additional governmental fees, especially if those fees are assessed annually, will often undermine the financial case for deployment, particularly in rural areas where expanded service is particularly needed.

The Department proposes to adopt new Rule 620.02 governing the use of highway ROW for "broadband wireless telecommunications."[9] The rule states that "ITD will receive fair and reasonable compensation for access to Right-of-Way and attachment to ITD facilities in accordance with Federal Communications Commission (FCC Declaratory Ruling 18-133)."[10] CTIA supports this rule because it is consistent with federal law and fulfills the policy objective of accelerating the public's access to broadband services by reasonably constraining siting fees to a level that simultaneously allows the Department to recover its costs and encourages

[9] GUM at 600-4. (Page references are to the proposed revision to the GUM, which the Department issued in connection with announcing its Notice of Intent to Promulgate Rules.)

[10] GUM at 600-5. *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 33 FCC Rcd 9088 (2018). In August 2020 the United States Court of Appeals for the Ninth Circuit upheld the FCC's interpretation of these statutory provisions and its requirement that fees for small wireless facilities be cost-based: "As the FCC explained here, its cost-based standard would prevent excessive fees and effective prohibition of 5G services in many areas across the country." *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020). The Supreme Court denied a petition for certiorari of the Ninth Circuit's decision on June 28, 2021.

broadband deployment. Rule 620.02 appropriately references and applies the FCC's decision, and will encourage broadband deployment in Idaho.

B. The Department's Proposal to Adopt Fees Pursuant to the FCC's Declaratory Ruling Is Consistent with FHWA Regulations.

Rule 620.02's approach to broadband siting fees is also consistent with FHWA regulations governing the installation of broadband infrastructure along federally-funded highways and the FHWA's April 2021 Guidance Document. The FHWA's regulations are codified in 23 CFR Parts 645 and 710. Although 23 CFR § 710.403(e) generally directs state DOTs to recover the fair market value of the portion of the ROW that accommodates such uses, two exceptions apply to broadband facilities: ROW uses by utilities and uses that are in the public interest. The FHWA clarified in its Guidance Document that because wireless broadband facilities meet each of 23 CFR § 710.403(e)'s exceptions, the fair market value requirement for ROW use does not apply.

Utility Exception. 23 CFR § 701.403(e)(2) exempts "use by public utilities in accordance with 23 CFR Part 645" from the fair market value requirement. FHWA's regulations state that "in determining whether a proposed installation is a utility or not, the most important consideration is how the [State Transportation Department] views it under its own State laws and/or regulations."[11] Under Title 40 of the Idaho Code, which governs highway regulation, wireless carriers meet the definition of "utility" applicable for the purposes of access to ROWs. Idaho Code § 40-210(4) defines a "utility" using much of the same broad language as FHWA's rules: ""Utility" means an entity comprised of any person, private company, public agency or cooperative owning and/or operating utility facilities"; ""Utility facility" means all privately,

[11] *See* 23 C.F.R. § 645.209(m); *see also* Guidance Document at 3.

publicly or cooperatively owned lines, facilities and systems for producing, transmitting or distributing communications, cable television, electricity, light, heat, gas, oil, crude products, ore, water, steam, waste or storm water not connected with highway drainage and other similar commodities."[12] The Legislature codified this definition of "utility" specifically for use of the ROW by utilities, such as wireless providers, so it seems most appropriate for the Department to use this definition rather than the one arising under Title 61 of the Idaho Code that presently is incorporated in the proposed revisions to the GUM. While CTIA suggests the Department use the Title 40 definition, wireless carriers meet the definition of utility under Title 61 as well.[13] Thus, under either approach, wireless carriers satisfy the exemption for utilities from FHWA's fair market value requirement for ROW use.

CTIA also notes that the Title 40 definition eliminates any need for the Department to distinguish in Section 615.00 between utilities that have obtained a certificate from the Public Utilities Commission and those that have not, designating any that have not as "a non-public utility."[14] CTIA is not aware that the term "non-public utility" arises anywhere under Idaho law. As the term does not appear to carry any significance regarding access to the ROW, there would be no useful purpose served by separately defining utilities that have a Certificate of Convenience and Necessity ("public utility") and those that do not ("non-public utility").

---

[12] Idaho Code § 40-210(4). *Compare* "Utility means a privately, publicly, or cooperatively owned line, facility or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public." 23 CFR § 645.105.

[13] Title 61 defines public utilities to include telephone corporations, *see* Idaho Code § 61-129, and telephone corporations include mobile providers like CTIA's wireless members because they provide telecommunications services as such services are defined at Idaho Code § 61-129. Although wireless providers are considered public utilities under Title 61, they are exempted "from any requirement of title 61, or chapter 6, title 62, Idaho Code." Idaho Code § 61-121(1).

[14] GUM at 600-1.

Maintaining such separate definitions, however, does burden the Department to have to ensure that its references to utilities include each type, unnecessarily complicating matters for the Department.

Public Interest Exception. In addition to the FHWA's utility exception to the fair market value requirement for highway ROW uses, a separate regulation provides that this requirement also does not apply when "an exception is in the overall public interest based on social, environmental, or economic benefits."[15] The FHWA's April 22, 2021 Guidance Document cited above explicitly concludes that installing broadband facilities along highway ROW meets this public interest exemption: "The FHWA has also determined that broadband installation can assist with equitable communications access. These non-highway alternative uses of highway ROW are in the public interest."[16] FHWA thus properly concludes that the deployment of new or upgraded wireless infrastructure along highway ROW serves the "overall public interest" by expanding or enhancing the public's access to broadband. The FHWA's determination is consistent with 23 CFR § 645.205, which states that it is in the public interest to accommodate utility facilities on the highway ROW of a Federal-aid or direct Federal highway project.

Idaho's legislature has found that important benefits to the public result from granting utilities access to state highway ROW. It has declared to be its "legislative intent" that ROW are "lawfully used in connection with uses associated with utility purposes necessary to provide utility services to the public. Without making use of public highways and their associated rights-of-way, the utility facilities and services could not reach or economically serve the

[15] 23 CFR § 710.403(e)(1).

[16] Guidance Document at 4.

residents of the state of Idaho."[17] The Department can and should add language to the GUM expressly making the same determination.

In sum, the Idaho Code and the FHWA's Guidance Document provide the Department with the clear legal bases to incorporate the national policies the FCC adopted for cost-based wireless siting fees into the Department's rules governing broadband facilities along highway ROW. It can conclude that broadband providers, like wireless carriers, satisfy the Idaho definition of "public utility"[18] and shall be treated as such for the purpose of receiving an exception to the FHWA's fair market value requirement. Or, it can find that the use of highway ROW to support broadband infrastructure serves the public interest. By applying either of the exclusions the FHWA provides, the Department can set reasonable, cost-based fees that are both consistent with FCC and FHWA regulations and that will advance Idaho's policy to promote broadband deployment.

IV. THE DEPARTMENT SHOULD MAKE TARGETED REVISIONS TO CERTAIN PROPOSED RULES TO STREAMLINE THE EXPANSION OF WIRELESS BROADBAND SERVICES.

CTIA broadly supports the Department's proposed rules because they properly recognize the benefits that locating broadband facilities along highway ROW will deliver across Idaho. The Department can magnify those benefits by modifying a handful of its proposed rules to provide more clarity and certainty to broadband providers and by streamlining its permitting processes.

[17] Idaho Code § 40-210(1).

[18] *See* Idaho Code § 40-210(4).

Section 110.00 – Definition of Small Wireless Facility.[19] The definition of this term is largely consistent with the definition in the FCC's rules.[20] However, item (6) in the definition should refer explicitly to the FCC's rule governing radiofrequency radiation, 47 C.F.R. § 1.1307(b) (as the FCC's definition does) to more accurately identify the applicable standard.

Section 110.00 – Definition of 5G.[21] Wireless technologies are continually evolving. Only a few years ago fourth-generation services ("4G") were state of the art. The Department should make its definition forward-looking and refer to all future generations of technologies (5G included) by using the term "next generation" instead of 5G.

In addition, the Department should clarify its rules to provide that the definition of next generation wireless facilities includes both small facilities (as defined in Section 110.00, which generally incorporates the FCC's definition of that term) and wireless facilities that do not meet the small cell definition. Wireless networks rely on both small and larger facilities depending on the broadband coverage that is needed in a particular geographic area, the radio frequencies that providers have access to, and the characteristics of the terrain. Particularly along highways that traverse rural areas or areas with rough terrain, larger facilities may be required to provide high service quality and adequate coverage. The Department should not inadvertently discourage service in these areas by imposing additional permitting burdens on those larger facilities.

Section 620.01 – Broadband Fiber Optic Telecommunications.[22] This proposed rule appears to apply to wireline facilities only. However, its provisions addressing "Shared Resource Agreements" and "Mutually Agreed Upon Exchanges of Facilities and Services" are

[19] GUM at 100-3.

[20] *See* 47 C.F.R. § 1.6002(l).

[21] *Id.* at 100-4.

[22] *Id.* at 600-3.

not expressly limited to such facilities. The Department should clarify that these provisions do not apply to wireless antennas and support structures and that any resource sharing or facility and service exchanges are voluntary on the part of the applicant. In addition, the first paragraph of the rule contemplates "using space saving measures such as corridors for broadband infrastructure, colocation of facilities, and use of conduits containing micro-ducts that can be used by multiple providers." Those types of planning measures can be effective tools to accommodate additional wireline deployment. However, to the extent those requirements apply to wireless deployments, the Department should apply those measures in a flexible way to afford service providers the ability to design their networks to meet coverage and capacity requirements based on their specific network requirements.

Section 620.02 – Broadband Wireless Telecommunications.[23] This proposed rule addresses permitting procedures for wireless facilities. CTIA recommends four amendments to this rule to streamline the permitting process and ensure it applies to all wireless facilities.

1. Apply the rule to all wireless facilities, irrespective of size. Section 620.02 expressly applies only to facilities that meet the definition of "small wireless facilities," but as noted above, larger facilities that do not meet the small wireless facilities definition may be needed to provide high quality service and adequate coverage. Such facilities may, in some instances, exceed the definition of small wireless facilities only slightly. There is no policy reason why a 50-foot structure should qualify for these permitting procedures as a "small wireless facility" but a 51-foot structure should not. Deleting the term "small" in each place where it appears in this rule will resolve this disparity and ensure that the Department's permitting procedures apply to all wireless facilities.

[23] *Id.* at 600-4.

2. Include time periods for acting on permit applications. Section 620.02 should include the FCC's time periods for states and localities to act on permit applications. The FCC adopted those time periods, colloquially known as "shot clocks," to help speed broadband deployment while ensuring that states and localities have a sufficient opportunity to review applications.[24] Incorporating them into the Department's rules will provide more certainty to both the Department and providers as to the process approving new facilities. These deadlines for states and localities to act on applications are as follows:

- Applications to install a new small wireless facility: 90 days
- Applications to modify an existing small wireless facility: 60 days
- Applications for a new larger facility: 150 days
- Applications to modify an existing larger facility: 90 days

3. Clarify that these time periods include time for negotiating a Master Lease Agreement. The time needed for the Department and a wireless broadband provider to negotiate the Master License Agreement ("MLA") that Section 620.02 calls for could cause delay that extends beyond the time periods the FCC's rules allow for the Department to act on permit applications. The Department should clarify that all processes, including execution of an MLA, must be completed within the applicable time periods specified above.

4. Adopt a model form of Master Lease Agreement. Section 620.02 also does not provide a model MLA that providers will be required to sign. The Department should share a model MLA during this rulemaking so that providers can offer constructive recommendations on any revisions that will clarify their obligations and expedite the permit process. As a practical matter, having a standard form that has been developed with stakeholder input will speed and simplify the deployment of wireless facilities to the public's benefit.

[24] See 47 C.F.R. § 6003.

Section 620.04 – Installations in interstate ROWs.[25] These installations require separate approval from FHWA, which could delay permit approval well beyond the shot-clock periods mandated by FCC rules. The Department should clarify this rule to state that when FHWA approval is needed for a facility, the Department will notify FHWA as early as possible within the applicable shot clock period that FHWA's approval is being sought, and will work with FHWA to secure its approval as quickly as possible.

Section 620.06 – Failure to provide "as-built" drawings within 30 days of installation.[26] Under this rule, failure to provide "as-built" drawings within 30 days of installation constitutes a default under the permit, rendering it invalid and requiring removal of the installation. That remedy is excessively harsh given that not timely supplying drawings does not indicate that the facilities were improperly constructed or pose a threat to public safety. The Department should modify this rule to provide that if as-built drawings are not provided within 30 days, the Department will notify the provider, who will then have an additional 30 days to supply drawings to avoid default.

Utility Accommodation Policy Section 5.9 – Aesthetic Controls.[27] While this section appropriately recognizes that certain environmentally or historically sensitive areas such as scenic strips, overlooks, parks and historic sites may require different treatment in the context of deployment, it unnecessarily applies the same treatment to other locations such as rest areas and weigh stations. However, those areas are not entitled to, and should not receive, such heightened

[25] *Id.* at 600-5.

[26] *Id.* at 600-6.

[27] *Id.*, Appendix A at 20.

scrutiny. The Department should limit the aesthetic controls in this section only to locations with environmental or historical sensitivity.

In addition, the proposed rule would preclude deployment of aerial facilities in these areas unless there is no feasible and prudent alternative and several additional factors are met. This obligation does not include any limits or guardrails regarding the scope of the requirement and could significantly hinder deployment. Accordingly, the Department should adopt more specific criteria that will apply to wireless facilities in environmentally or historically sensitive locations and permit them if those criteria are met.

V. CONCLUSION

Through a well-designed, streamlined regulatory framework, the Department can drive the expansion of broadband and 5G services to all areas of Idaho. Its proposed revisions to the GUM are a major step toward achieving that framework. CTIA is committed to working with the Department to hone those revisions in order to bring robust, ubiquitous broadband to all areas of Idaho using highway ROWs, which will directly benefit the state's citizens and economy.

Respectfully submitted,

_____/s/_____
Benjamin J. Aron
Assistant Vice President, State Regulatory Affairs

Dated: July 28, 2021

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

UTILITY ACCOMMODATION (BROADBAND) NEGOTIATED RULEMAKING	**)** **)** **)** **)**	**Docket No. 39-0343-2102** **COMMENTS OF THE IDAHO CABLE BROADBAND ASSOCIATION**

1. Introduction

The Idaho Cable Broadband Association ("**ICBA**") thanks the Idaho Transportation Department ("**ITD"**) for the opportunity to provide these written comments, which will focus on the same topics ICBA presented to ITD at the public hearing on July 20, 2021.

ICBA acknowledges that for ITD purposes cable television facilities are included within the statutory definition of "utility facility" under Idaho Code § 40-210(4)(b).[1] The Idaho legislature understood that "[w]ithout making use of public highways and their associated rights-of-way, the utility facilities and services could not reach or economically serve the residents of the state of Idaho."[2] The legislature therefore intended Section 40-210 "to effectively minimize costs, limit the disruption of utility services, and limit or reduce the need for present or future relocation of such utility facilities" along public highways and their associated rights of way.[3] Cable television operators, however, are not common carriers or utilities under federal law[4] and also are not "public utilities" under Idaho Code § 61-129.

In addition to providing cable television service, Idaho cable television operators provide broadband and other information services over their cable facilities located in the public right-of-

---

[1] For purposes of Idaho Code § 40-210, "'Utility facility" means all privately, publicly or cooperatively owned lines, facilities and systems for producing, transmitting or distributing communications, cable television, electricity, light, heat, gas, oil, crude products, ore, water, steam, waste or storm water not connected with highway drainage and other similar commodities" and "'Utility' means an entity comprised of any person, private company, public agency or cooperative owning and/or operating utility facilities."

[2] Idaho Code § 40-210(1).

[3] *Id.*

[4] 47 U.S.C. §541(c)

way ("**ROW**"). As applied to those cable operators and as discussed below, ICBA believes that several of the ITD proposals, if adopted, would unintentionally impede rather than promote greater broadband availability and would conflict with governing federal and state law. Among other things, ITD's proposal under the Guide for Utility Management Manual ("**GUMM**") Section 620.01 to rely on the mandatory exchange of facilities and services through "Shared Resources Agreements" will impede broadband deployment by cable operators and is inconsistent with relevant provisions of the Idaho Video Service Act,[5] the federal Communications Act,[6] and Federal Communications Commission ("FCC") rules. As currently formulated, therefore, these provisions are preempted by federal law and unenforceable against cable operators.[7]

ICBA nevertheless believes these few ITD proposals may be rectified with minor revisions that will advance ITD's policy goals while remaining consistent with federal and state law. For example, the mandatory exchange of facilities and services incorporated in the Shared Resources Agreements required under proposed GUMM § 620.01 arguably could be made consistent with federal law and FCC rules either by (i) providing an option for franchised cable operators to choose generally applicable, cost-based permitting fees in lieu of providing mandatory "in-kind" broadband facilities and services, or (ii) eliminating mandatory in-kind facilities and services for franchised cable operators.

---

5 Idaho Code Ann. §§ 50-3001 through 50-3011.

6 Communications Act of 1934, ch 652, 48 Stat. 1064 (1934), as amended.

7 *See* 47 U.S.C. § 556(c) ("any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded").

2. Cable Operators Provide Broadband and Other Information Services in Addition to Cable Service Pursuant to Idaho Certificates of Franchise Authority That Are Governed by The Federal Communications Act.

Both cable operators and the state of Idaho are subject to the rights and requirements of the federal Communications Act because the state has granted Certificates of Franchise Authority and because Idaho law expressly incorporates relevant federal requirements. The Idaho Certificates of Franchise Authority held by ICBA members authorize them to provide cable service or video service in specific areas and "to install, construct and maintain facilities within the public rights-of-way . . . subject to the applicable federal and state laws and regulations, including highway district, municipal and county ordinances and regulations."[8] Under the Idaho Video Service Act, such certificates "constitute a franchise" under the federal Communications Act,[9] and "the state of Idaho shall constitute the franchising authority for system operators in the state of Idaho."[10] The Idaho Video Service Act also states explicitly that it is "intended to be construed to be consistent with the federal Cable Communications Policy Act of 1984, 47 U.S.C. sections 521 through 573."[11] The proposed revisions to the GUMM therefore are constrained by federal law.

Nothing in federal or Idaho law prohibits cable operators from providing Broadband Internet Access Service ("**BIAS**") or other Information Services,[12] such as Voice Over Internet

---

[8] *See*, *e.g.*, CoxCom, LLC Amended Certificate of Franchise Authority, File Number VF103 (Aug. 24, 2012).

[9] Idaho Code Ann. § 50-3002(6) (citing 47 U.S.C. § 522).

[10] *Id.* § 50-3003(9).

[11] *Id.* § 50-3011(1).

[12] The FCC has determined that BIAS is an interstate information service, and the courts have affirmed that determination. *See Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, 321 (2017), *aff'd in pertinent part, Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019); Order on Remand, 35 FCC Rcd 12328 (2020). *See also* 47 U.S.C. § 153(20) ("The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.").

Protocol ("**VoIP**"), over their cable system facilities. In fact, through their franchises, cable operators are explicitly authorized to provide non-cable services over their cable system without incurring additional ROW fees or authorizations from the state. This has enabled cable operators in Idaho to provide both BIAS and VoIP service under their franchises in addition to cable television service, and cable operators are primarily responsible for the already widespread deployment of BIAS and VoIP service in the state. Moreover, federal law prohibits local franchising authorities ("**LFAs**"), such as the state of Idaho, from regulating or imposing additional obligations regarding non-cable services cable operators provide on their systems.[13] Both cable operators and the state of Idaho therefore are indisputably subject to the federal Communications Act.

3. The Communications Act and Idaho Franchises Authorize Cable Operator Occupancy in The Public ROW. Cable Operators Already Pay More Than Fair Market Value for that Occupancy.

In revising the GUMM, ITD should consider the facts that franchised cable operators (i) already have the right to occupy public ROW under both federal and state law, and (ii) already pay as much as five percent (5%) of their gross revenues for the privilege of accessing public ROW, including ITD ROW.

Section 541(a)(2) of the federal Communications Act and Sections 50-3006(1) and 50-3011 of the Idaho Video Service Act both give franchised cable operators the right to occupy public ROW. For example, Section 541(a)(2) of the Communications Act provides that:

> Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated for compatible uses, except that in using such easements the cable operator shall ensure--

[13] *See, e.g.*, 47 U.S.C. § 544(a) ("Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."); *see also* 47 U.S.C. § 544(b)(1) ("in its request for proposals for a franchise . . . [LFAs] may establish requirements for facilities and equipment, but may not . . . establish requirements for video programming or other information services.").

> (A) that the safety, functioning, and appearance of the property and the convenience and the safety of other persons not be adversely affected by the installation or construction of facilities necessary for a cable system;
>
> (B) that the cost of the installation, construction, operation, or removal of such facilities be borne by the cable operator or subscriber, or a combination of both; and
>
> (C) that the owner of the property be justly compensated by the cable operator for any damages caused by the installation, construction, operation, or removal of such facilities by the cable operator.[14]

These rights and conditions also are reflected in Section 50-3006 of the Idaho Video Service Act[15] and are expressly incorporated in Section 50-3011(1).[16]

Moreover, cable operators already pay more than fair market value for their use of Idaho public ROW. Section 542(b) of the Communications Act[17] and Section 50-3007 of the Idaho Video Service Act[18] permit LFAs to require payments of as much as five percent (5%) of a cable operator's annual gross revenues derived from the operation of the cable system to provide cable services. And, in all but a few isolated locations, cable operators in Idaho remit the maximum franchise fee payments allowed under federal and state law.

Given these circumstances, ITD is constrained by federal and state law from applying to cable operators the additional authorizations and fees incorporated in its proposed revisions of the GUMM. Although generally applicable cost-based permitting fees are allowable, ITD's

---

[14] 47 U.S.C. § 541(a)(2).

[15] Idaho Code Ann. § 50-3006.

[16] Idaho Code Ann. § 50-3011(1). Section 50-3011(4) also provides that "No provision of this chapter shall diminish or otherwise limit the authority of this state, highway district or other local unit of government having jurisdiction over the public rights-of-way. Nothing in this chapter shall be construed to limit, abrogate or supersede the provisions of any applicable local ordinance or other regulation governing the use of the public rights-of-way." Nevertheless, no state or local law may take precedence over federal law, U.S. CONST., ART. VI, CL.2, and the Communications Act explicitly preempts inconsistent state and local laws and regulations. "[A]ny provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded." 47 U.S.C. § 556(c).

[17] 47 U.S.C. § 542(b).

[18] Idaho Code Ann. § 50-3007(3).

proposals for mandatory Shared Services Agreements — or any fees required to access IDT ROW beyond what is already required in a franchise — exceed the limits of federal law as applied to cable operators.

4. The Communications Act and FCC Rules Prohibit Requiring Cable Operators to Provide Additional In-Kind Services and Facilities As A Condition Of Occupying Public ROW.

ICBA believes ITD should reconsider its proposed revisions to GUMM § 620.01 regarding mandatory Shared Resource Agreements as applied to cable operators because those proposed revisions are inconsistent with governing federal law and because they will impede rather than promote broadband deployment in Idaho.

In its proposed revision of Section 620.01 of the GUMM, ITD states its intent to use mandatory "Shared Resources Agreements in lieu of fees or other financial transactions with broadband providers," and to require "District Engineers and Division Administrators [to] enter into Shared Resources Agreements with broadband providers who are requesting access to ITD Right-of-Way."[19] In exchange for using the public ROW cable operators already have the right to use under federal and state law, and for which they already pay the statutory maximum of five percent (5%) of their gross revenues, the proposed GUMM revisions would subject cable operators to the payment of the following "in-kind" services and facilities:

1. "dark or lit fiber on a dedicated ITD fiber optic cable, or strands of fiber on a larger cable to be installed by the broadband provider."
2. "Installation of additional conduits to include a conduit for the State of Idaho or ITD use, and additional conduit(s) made available for purchase by other users on a non-discriminatory basis at a price per linear foot specified in a Shared Resources Agreement.
3. "ITD may also negotiate broadband services to ITD facilities from the provider."[20]

---

[19] Proposed GUMM §620.01 at 600-3.

[20] *Id.* at 600-4.

These proposed requirements and "in-kind" payments, however, are inconsistent with federal law and FCC rules, which prohibit LFAs from using their cable franchising authority to regulate any services other than cable services provided over cable systems (the "mixed use" rule)[21] and categorize such "in-kind" contributions as franchise fees (the "in-kind contribution" rule).[22] Moreover, inasmuch as Idaho cable operators typically already pay the statutory maximum of five percent (5%) of their gross revenues as franchise fees, any such payments, if required, likely constitute violations of the franchise fee limitations in both the Communications Act and the Idaho Video Service Act.[23] Therefore, if such payments were imposed, most cable operators in Idaho would be entitled under federal and state law to deduct the costs of those "in-kind" payments from their franchise fee remittances. Inasmuch as franchise fees are remitted directly to the political subdivisions in which cable operators provide services under Section 50-3007(1) of the Idaho Video Service Act,[24] these additional payments would result in reduced franchise fee revenues to local Idaho governments.

a. The Mixed Use Rule.

As noted above, the Communications Act prohibits LFAs from regulating any "services, facilities, and equipment" except as consistent with the Act,[25] and specifically prohibits LFAs

---

[21] *See* 47 C.F.R. § 76.43. As an exception to the "mixed use" rule, LFAs may continue to regulate channel capacity on institutional networks. "A franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on institutional networks." *Id*.

[22] *See* 47 U.S.C. §§ 542(b), 542(g); 47 C.F.R. §76.42 (categorizing "in-kind" contributions as franchise fees "subject to the five percent cap set forth in 47 U.S.C. 542(b)").

[23] *See* 47 U.S.C. § 542(b) and Idaho Code Ann. § 50-3007(3) (limiting franchise fees to no more than five percent of gross revenues).

[24] Idaho Code § 50-3007(1).

[25] *See* 47 U.S.C. § 544(a): "Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."

from establishing requirements for non-cable services, including "information services."[26] Section 76.43 of the FCC's rules implements these statutory provisions in the "mixed use" rule.[27]

The FCC established its "mixed use" rule in the 2007 *First 621(a) Order*.[28] The FCC's initial "mixed use" rule applied only to cable operators that also were common carriers, however. Later in 2007, the FCC extended its "mixed use" rule to non-common carrier cable operators.[29] In the *Third 621(a) Order*, the FCC re-issued the "mixed use" rule[30] and extended its determinations to state (as opposed to local) LFAs.[31]

In *City of Eugene, Oregon v. FCC*, the United States Court of Appeals for the Sixth Circuit recently affirmed the FCC's "mixed use" rule and the *Third 621(a) Order* in pertinent part.[32] The Court specifically found that an LFA's imposition of fees on a cable operator's broadband service impermissibly circumvented the Section 544(b)(1) statutory prohibition against establishing information services requirements as a condition for granting a franchise.

> The power of a franchisor qua franchisor, as explained above, is the power to grant (or deny) access to public rights-of-way to construct and operate a cable system. 47 U.S.C. § 541(a)(2), (b)(1). The City (or its franchisor) exercised that power when it granted a cable operator there a franchise under § 541(b)(1). In doing so, the City granted the cable operator the right to use its cable system,

---

[26] *See* 47 U.S.C. § 544(b)(1) ("[LFAs] may establish requirements for facilities and equipment, but may not . . . establish requirements for video programming or other information services").

[27] 47 C.F.R. § 76.43.

[28] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101 at para. 121 (2007) ("***First 621(a) Order***") ("We clarify that LFAs' jurisdiction applies only to the provision of cable services over cable systems"), *aff'd Alliance for Community Media v. FCC*, 529 F.3d 763 (6th Cir. 2008).

[29] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd 19633 (2007) ("***Second 621(a) Order***"), Order on Reconsideration, 30 FCC Rcd 810, 814-17, (2015), *vacated and remanded Montgomery County v. FCC*, 863 F.3d 485, 492-93 (6th Cir. 2017).

[30] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, 34 FCC Rcd 6844 at paras. 64-79 (2019) ("***Third 621(a) Order***").

[31] *Id.* at paras. 113-119.

[32] *City of Eugene, Oregon v. FCC* (6th Cir. No. 19-4161, May 26, 2021), petitions for rehearing and rehearing en banc filed July 12, 2021).

> including—as Congress plainly anticipated—the right to use that system to provide information services. The City also surrendered its right to exclude the cable operator from the City's rights-of-way. Yet the City imposes a seven-percent "license fee" upon the same cable operator to use the same cable system on the same "rights-of-way."

The proposed revision of Section 620.01 of the GUMM suffers from the same defect the Sixth Circuit Court identified in *Eugene*, which the FCC's "mixed use" rule is specifically designed to prevent. Section 544(b)(1) of the federal Communications Act indisputably prohibits the state from requiring the provision of broadband services, facilities, and equipment as a condition of granting a Certificate of Franchise Authority.[33] Therefore, as applied to cable operators at least, the imposition of requirements for broadband services, facilities, and equipment as proposed in ITD's revision of Section 620.01 represents additional fees and regulations for franchised cable operators to use their existing cable systems on the same public ROW granted to them in their Idaho Certificates of Franchise Authority.

As the *Eugene* Court held, this "is merely the exercise of [Idaho's] franchise power by another name," which Section 544(b) of the Communications Act expressly prohibits.[34] The FCC similarly found that the Section 556(c) statutory preemption provision[35] applies broadly to any inconsistent provision of law of "any State, political subdivision, or agency thereof" and that Congress intended to prevent LFAs from circumventing "the Act's limitations by using other governmental entities or other sources of authority to accomplish indirectly what franchising authorities are prohibited from doing directly."[36]

---

[33] *See supra* n.26.

[34] *See Liberty Cablevision of P.R., Inc. v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005) (holding that "the municipalities' attempts to assess fees for use of these same rights-of-way are inconsistent with the [Act] and are necessarily preempted").

[35] *See* 47 U.S.C. § 556(c): "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."

[36] *Third 621(a) Order*, 34 FCC Rcd 6844 at para. 81 (footnotes omitted).

In summary, the proposed revisions to Section 620.01 of the GUMM are inconsistent with the federal Communications Act as applied to franchised cable operators and would be preempted under 47 U.S.C. § 556(c) if adopted.

b. The In-Kind Contribution Rule.

Under the FCC's "in-kind contribution" rule, the cost of non-monetary obligations unrelated to the provision of cable television service — such as the proposed obligations to provide ITD with broadband services, dedicated conduits, and dark and lit fiber optic cable — constitute franchise fees subject to the five percent limitation in Section 542 of the federal Communications Act and Section 50-3007(3) of the Idaho Video Service Act.[37]

The FCC established its "in-kind contribution" rule in the 2007 *First 621(a) Order*. The FCC's initial "in-kind contribution" rule applied only to new competitive entrants.[38] The FCC extended its "in-kind contribution" rule to incumbent cable operators in the *Second 621(a) Order* and held that "any municipal projects requested by LFAs unrelated to the provision of cable services that do not fall within the exempted categories in Section 622(g)(2) are subject to the statutory 5 percent franchise fee cap."[39] In the *Third 621(a) Order*, the FCC re-issued the "in-kind contribution" rule[40] and extended its determinations to state (as opposed to local) LFAs.[41]

As the Sixth Circuit recently held in affirming the FCC's "in-kind contribution" rule in pertinent part:

---

[37] 47 U.S.C. §§ 542(b); Idaho Code Ann. § 50-3007(3).

[38] *First 621(a) Order*, 22 FCC Rcd at 5150, para. 108 ("We clarify that any requests made by LFAs unrelated to the provision of cable services by a new competitive entrant are subject to the statutory 5 percent franchise fee cap . . . . Municipal projects unrelated to the provision of cable service do not fall within any of the exempted categories in Section 622(g)(2) of the Act and thus should be considered a "franchise fee" under Section 622(g)(1).").

[39] *Second 621(a) Order*, 22 FCC Rcd 19633 at para. 11.

[40] *Third 621(a) Order*, 34 FCC Rcd 6844 at para. 62 ("cable operators may count . . . ongoing and future in-kind contributions toward the five percent franchise fee cap").

[41] *Id.* at para. 119 ("ensuring that the Cable Act is applied uniformly between state and local franchising authorities is necessary to further the goals of the Act, and more importantly, is consistent with the language of the Act").

> the Act makes a distinction between obligations that the Act itself imposes and obligations that a franchising authority may choose to [impose] . . . . Only the latter count as franchise fees. We therefore agree with the FCC that, under the statutory text and structure . . . . noncash cable-related exactions (including I-Net exactions) that the Act merely permits a franchising authority to impose are franchise fees under § 542(g) and thus count toward the five-percent cap.[42]

As demonstrated above, the in-kind services requirements in the proposed revision of Section 620.01 of the GUMM indisputably constitute franchise fees subject to statutory limitations under federal and Idaho law. Inasmuch as Idaho cable operators often already pay the statutory maximum five percent franchise fee, such requirements, if adopted, would constitute a violation of both federal and state law, and, as mentioned above, would result in reduced franchise fee revenues to local Idaho governments.[43]

5. Conclusion.

The proposed revisions to Section 620.01 of the GUMM as currently formulated are inconsistent with the requirements of federal and state law as applied to franchised cable operators. To address the constraints of federal and state law discussed above, if ITD proceeds in seeking the mandatory exchange of facilities and services incorporated in the Shared Resources Agreements required under proposed GUMM § 620.01, it should either (i) provide an option for franchised cable operators to choose reasonable, cost -based permitting fees in lieu of providing mandatory "in-kind" broadband facilities and services, or (ii) eliminate mandatory in-kind facilities and services for franchised cable operators.

---

[42] *Eugene v. FCC*, slip op. at 6.

[43] *See supra* n.24 and accompanying text. Franchise fees are remitted directly to the political subdivisions in which cable operators provide services under Section 50-3007(1) of the Idaho Video Service Act, and fees imposed in excess of statutory limitations therefore would be deducted from payments to local governments.

Moreover, given the substantial franchise fees cable operators already pay to use the public ROW, proposed rules to levy additional fees and to require additional in-kind services for further extending their broadband services would significantly impede broadband deployment throughout the state, and therefore would not promote the public interest.

RESPECTFULLY SUBMITTED this 28th day of July 2021.

/s/ Ronald L. Williams

Ronald L. Williams
Attorney and Executive Director
Idaho Cable Broadband Association
Williams Bradbury, P.C.

GIVENS PURSLEY LLP
Attorneys and Counselors at Law

601 W. Bannock Street
PO Box 2720
Boise, ID 83701
Telephone: 208-388-1200
Facsimile: 208-388-1300

www.givenspursley.com

July 28, 2021

VIA EMAIL

Robert Beachler
Broadband Program Manager
Idaho Transportation Department
Division of Highways, Planning Services Section
600 W. Prairie Ave.
Coeur d'Alene, ID 83815
robert.beachler@itd.idaho.gov

Ramón S. Hobdey-Sánchez
Office of Governmental Affairs
Idaho Transportation Department
3311 W. State St.
Boise, ID 83707
ramon.hobdey-sanchez@itd.idaho.gov

Mr. Beachler and Mr. Hobdey-Sánchez:

This letter contains comments submitted on behalf of the Idaho Telecom Alliance ("ITA") in response to the request for comments on negotiated rulemaking relating to broadband infrastructure in the Idaho Transportation Department's ("ITDs") Right-Of-Way ("ROW"). These comments are provided on the proposed rulemaking in Docket No. 39-0343-2102. ITA is an association of Idaho rural telephone and broadband companies whose members include both commercial companies and cooperatives (attached at Exhibit A). ITA member companies provide basic local exchange and broadband services in rural Idaho. All members are Incumbent Local Exchange Carriers ("ILECs"), are designated Eligible Telecommunications Carriers ("ETCs") in Idaho, as determined by the Public Utilities Commission ("PUC") and the Federal Communications Commission ("FCC"), and serve high cost areas of the state. A map of their service territories is attached (attached at Exhibit B).

ITA has read the comments submitted by Syringa Networks, LLC, and the Idaho Cable Broadband Association, and endorses their views. Of particular note, ITA feels strongly that ITD must consider access to broadband to be a public good. For this reason, it is important that ITD provide the greatest access to its ROW at either low or no cost to *all* broadband providers.

ITD outlines its goal in Section 605.00 (Purpose) of the Guide For Utility Management ("GUMM") of expanding access to its ROW for broadband providers and states that this must be achieved on a competitively neutral basis where possible. As it stands, the Department's proposal unnecessarily falls short of achieving its goals. The Department's proposed fee structure treats entities differently based on their status as either a public utility or other broadband provider. To truly encourage the breadth of broadband expansion both Governor Little and the Department envisage, the Department should allow broadband providers access to the ROW for appropriate uses at the lowest possible cost and on the same basis irrespective of entity status when the proposed use of the ROW is for the same use and purpose. Only when charges for the same use are as low as possible and non-discriminatory will broadband be allowed and encouraged to expand on a competitively neutral basis.

The Department's proposed language in the GUMM affects ITA members in a significant way and creates a distinction without a meaningful difference. As stated above, all ITA members are ILEC's and ETC's, as defined by the PUC and FCC. Some members also own Competitive Local Exchange Companies ("CLEC's"). These affiliates are defined as non-public utilities under the Department's suggested definition because the PUC does not regulate CLEC's. To illustrate, the company receives preferential treatment when it is operating within its historical ILEC area, but must adhere to an alternative set of rules when operating as a CLEC for purposes of ROW access. ITD treats the entities differently based solely on where the ROW is located.

Further, four of ITA's members are member-owned cooperatives, whose members set their rates, and who are not regulated by the PUC. ITD's current language categorizes these cooperatives as non-public utilities and thus subjects them to lesser and/or more costly access to the ROW. This is so even though the cooperatives provide identical services to those regulated providers and have ILEC and ETC status conferred upon them by the PUC and the FCC. There is no substantive reason for ITD to draw this distinction. In contrast, at the federal level, for the purposes of access to the ROW, all types of utilities are captured within the definition at 23 CFR § 645.105. The language should include all ILEC's, CLEC's, and ETC's within the definition, regardless of whether they regulated by the PUC. For ITD to perpetuate this distinction between public and non-public utilities is inconsistent with the state and national recognition of broadband as for the public good, particularly at a time when distance learning, telemedicine, and public safety rely heavily on broadband access.

ITA believes that all broadband providers should be provided equal access to the ROW because they provide a public good. If ITD does not believe that broadband should be considered a public good, at a minimum, it should adopt the definition of "utility" in 23 CFR § 645.105, which defines a "utility" to be inclusive of "a privately, publicly, or cooperatively owned line, facility or system . . . . The term utility shall also mean the utility company inclusive of wholly owned or

controlled subsidiary."[1] This definition sufficiently includes cooperatives and CLEC's, which will result in treating ROW use the same, regardless of the provider's entity status.

We thank the Department for considering our comments.

Sincerely,

KRM / cvc

Kenneth R. McClure

KRM/CVC
Attachments
CC: John Stuart, President, ITA (*via email: john.stuart@mtecom.com*)

[1] 23 CFR § 645.105.

EXHIBIT A

Idaho Telecom Alliance Members

ATC Communications (Albion, Idaho)

Blackfoot Communications (Fremont)

Cambridge Telephone Company

Custer Telephone Cooperative (Challis, Idaho)

Direct Communications (Rockland, Idaho)

Farmers Mutual Telephone Company (Fruitland, Idaho)

Inland Networks

MTE Communications (Midvale, Idaho)

Oregon-Idaho Utilities

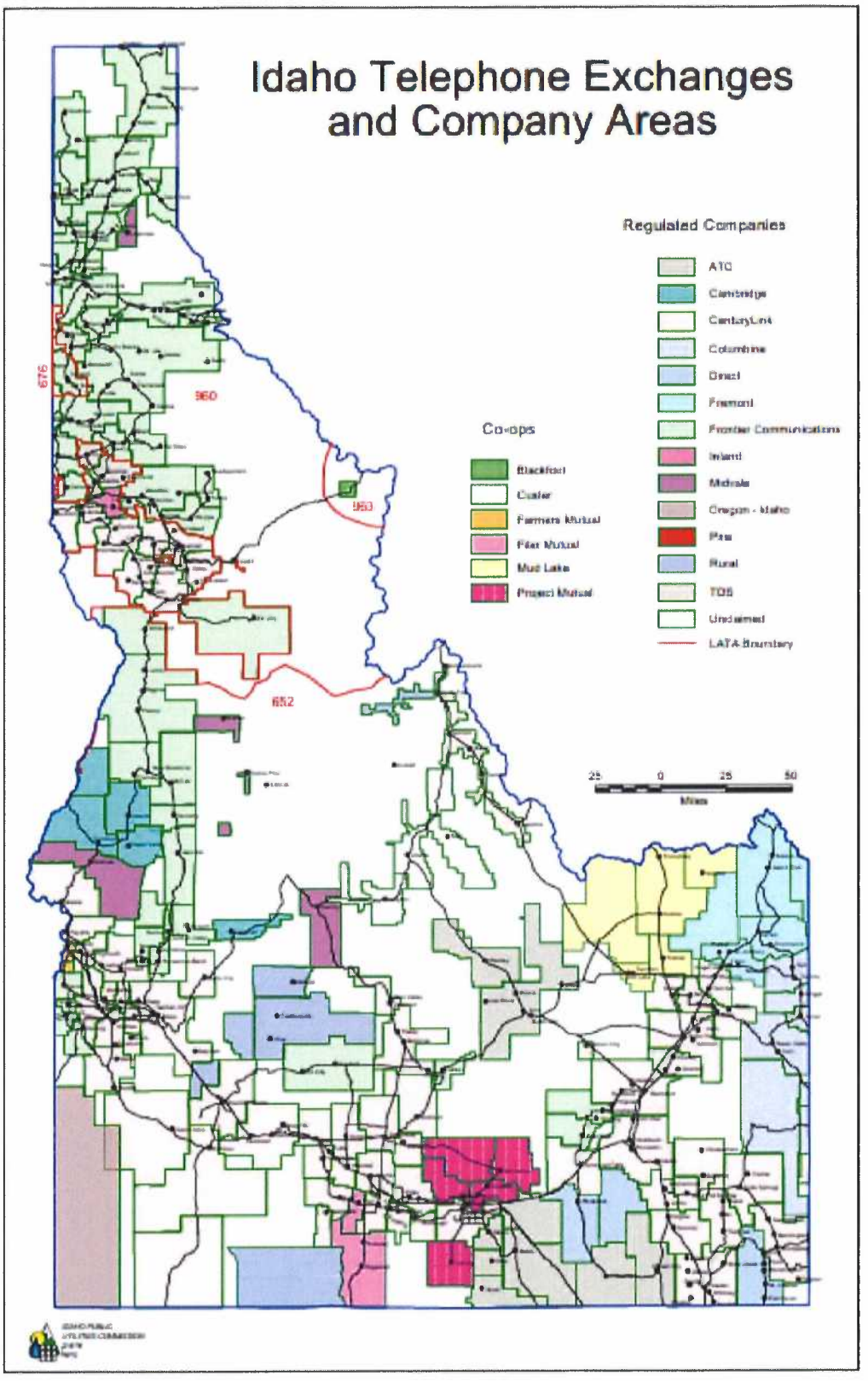
Project Mutual Telephone (Rupert, Idaho)

Rural Telephone Company (Glenns Ferry, Idaho)

Silver Star Communications (Columbine)

Truleap Technologies (formerly Filer Mutual, Filer, Idaho)

EXHIBIT B


Idaho Telephone Exchanges
and Company Areas
Regulated Companies
ATC
Cambridge
CenturyLink
Columbine
Direct
Fremont
Frontier Communications
Inland
Midvale
Oregon - Idaho
Pine
Rural
TDS
Unclaimed
LATA Boundary
Co-ops
Blackfoot
Custer
Farmers Mutual
Filer Mutual
Mud Lake
Project Mutual
676
960
950
652
25 0 25 50
Miles

GIVENS PURSLEY LLP
Attorneys and Counselors at Law

601 W. Bannock Street
PO Box 2720
Boise, ID 83701
Telephone: 208-388-1200
Facsimile: 208-388-1300

www.givenspursley.com

Jeremy C. Chou
208 388 1211
jcc@givenspursley.com

July 28, 2021

VIA EMAIL

Robert Beachler
Broadband Program Manager
Idaho Transportation Department
Division of Highways, Planning Services Section
600 W. Prairie Ave.
Coeur d'Alene, ID 83815
robert.beachler@itd.idaho.gov

Ramón S. Hobdey-Sánchez
Office of Governmental Affairs
Idaho Transportation Department
3311 W. State St.
Boise, ID 83707
ramon.hobdey-sanchez@itd.idaho.gov

RE: Public Comment relating to Negotiated Rulemaking for Rules Governing Utilities on State Highway Right-of-Way

Dear Mr. Beachler and Mr. Hobdey-Sánchez,

On behalf of Syringa Networks, LLC, thank you for the opportunity to provide a public comment regarding broadband access to Idaho's highway right-of-way during the Idaho Transportation Department's (ITD) negotiated rulemaking process.

We understand that the State is required to charge the fair market value for the use of Idaho's highway right-of-way unless the use of the right-of-way falls within the public interest exception.[1] It is our position that broadband access to the right-of-way falls within this exception because improving Idaho's broadband has been declared to be in the public interest by Governor Brad Little as a vital economic development tool.

Broadband is in the overall public interest because it promotes economic benefits. Since May of 2019, Governor Little has made it clear that investing in broadband is a matter of public interest to Idahoans. As a first step, an Idaho Broadband Task Force was set up by Executive

[1] 23 CFR § 710.403(e).

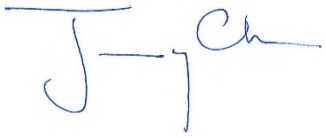
Order.[2] The Order declared that connectivity "attract[s] business [to the State] and create[s] maximum success for our communities."[3] Since May of 2019, Governor Little has continued to promote broadband improvements and has entrenched broadband as a major public policy priority for his administration.[4] Not only is developing broadband infrastructure key to encouraging business opportunities, it is also a recognized need for Idaho's COVID-19 response.[5]

Currently, the fair market value for broadband is exorbitant. It is our understanding that in some areas of Idaho, ITD's proposed fees for laying broadband fiber could cost up to $11,000 per mile annually. This great cost is not sustainable for Idaho broadband businesses, and costs would have to be recouped by broadband customers. This would have the unfortunate effect of further limiting access to broadband in Idaho to those who cannot pay premium prices for broadband. In the alternative, such costs would prohibit the building of broadband entirely. Not only do broadband stakeholders not wish to be put in such a position, the access fee seems to directly conflict with Idaho's priority to expand broadband services across all communities.

Furthermore, the Idaho government does not need additional funds to provide right-of-way access for the broadband industry. Idaho Senate Bill 1199 directed $45 million toward new broadband investments in internet connectivity for underserved areas. Idaho awarded nearly $50 million in CARES Act funds for broadband through local governments. Critically, during the 2021 legislative session, Senate Bill 1094 appropriated significant additional money to ITD for the right-of-way acquisition program. In addition, Idaho has a slew of ARPA funds, and Idaho just closed its fiscal year with a record surplus of nearly $900 million.[6] Thus, requiring the broadband stakeholders to pay exorbitant amounts to place conduit per mile is asking for unnecessary and superfluous funds absent justification.

Ultimately, we believe that allowing broadband stakeholders access to the right-of-way exempted from the fair market value condition is in the public interest and in line with Governor Little's broadband investment mandate. Also, due to Idaho's current financial standing, access can be achieved in a fiscally conservative manner. It is our hope that we see such an exemption reflected in the forthcoming rules. Thank you for your consideration of our comment.

Sincerely,



Jeremy C. Chou

JCC/CC

---

[2] Idaho Exec. Order No. 2019-07 (May 23, 2019), https://gov.idaho.gov/wp-content/uploads/sites/74/2019/05/eo-2019-07.pdf.
[3] *Id.*
[4] *See, e.g.*, Gov. Little's push for more broadband investment now law, IDAHO OFFICE OF THE GOVERNOR (May 4, 2021), https://gov.idaho.gov/pressrelease/gov-littles-push-for-more-broadband-investment-now-law/.
[5] *Id.*
[6] Idaho closes fiscal year with record surplus, From the Desk of the Governor (July 20, 2021), https://gov.idaho.gov/pressrelease/idaho-closes-fiscal-year-with-record-surplus/.

BEFORE THE IDAHO TRANSPORTATION DEPARTMENT

Rules Governing Utilities on State Highway Right-of-Way	Docket No. 39-0343-2102

COMMENTS OF VERIZON WIRELESS

Verizon Wireless ("Verizon") submits these comments to express its appreciation and support for the Idaho Transportation Department ("ITD")'s rulemaking establishing state highway rights of way ("ROW") rules for broadband and wireless facilities.

As the first wireless provider to deploy a 5G network in Idaho, Verizon has been at the forefront in bringing high-speed wireless services to Idaho residents. Boise was also one of the first cities in which Verizon deployed its 5G network. Verizon commends the ITD and the state for recognizing the importance of broadband and wireless technologies for its residents, and supports the proposed modifications to the ITD's Guide for Utility Management ("GUM"). These proposed modifications will further ensure an efficient process for the deployment of wireless technologies on the state highway ROW, which as CTIA notes in its comments, are "often optimal for wireless networks because of their proximity to large volumes of wireless traffic."

Verizon also supports the comments of CTIA, which recommend some targeted and specific revisions to the GUM, to eliminate confusion and uncertainty and to ensure an efficient process for deployment of wireless services in Idaho. Verizon looks forward to working with the ITD and stakeholders in this proceeding.

Respectfully submitted this 28th day of July 2021,

/s/ Jane Whang
Jane Whang
Verizon
201 Spear St., 7th Floor
San Francisco, CA 94105
E-mail: jane.whang@verizon.com
Attorneys for Verizon

Port of Lewiston

1626 6th Avenue N. • Lewiston, ID 83501
(208) 743-5531 • Fax (208) 743-4243
E-mail: portinfo@portoflewiston.com
Container Yard
(208) 743-3209

July 29, 2021

Idaho Transportation Department
Office of Governmental Affairs
Ramon S. Hobdey-Sanchez – Email: ramon.hobdey-sanchez@itd.idaho.gov
3311 W. State Street
PO Box 7129
Boise, ID 83707-1129

RE: 2021 ITD RULEMAKING – Comments

Thank you for this opportunity to comment on the ITD rulemaking guidelines under development for telecommunications infrastructure within the State of Idaho Right-of-Way. We respectfully request ITD to consider our below comments in the establishment of rules. It is our opinion that prioritizing dark fiber access to ITD owned conduits within State Right-of-Way is a critical step needed to achieve competitive and economic success of our State's economy. Our comments are as follows:

ALLOW NON-UTILITY ROW ACCESS:

The Port of Lewiston supports allowing access to non-utility providers. The Port of Lewiston is not regulated by the FCC as a utility. Our model is to build open access, dark fiber *infrastructure*. This allows multiple providers to offer lit services to their customers on our one cable. Our model creates a level playing field where service providers optimize the number of strands they need to serve their end-use customers for an equal price per strand. As of the June 24, 2021, ITD meeting, it is our understanding that Utility and Non-Utility access will be incorporated into the rules.

COMMIT COMMUNICATIONS TROUGHS WITHIN ROW DESIGN:

The Port of Lewiston supports development of a standard communications trough included into all ITD designs as physically able within the project ROW. The Idaho Broadband Task Force asked that ITD develop access for telecommunications when undertaking large, ground disturbing projects. We appreciate the new ITD website indicating upcoming ITIP projects.

A communications trough will allow for maximum flexibility for access by utilities/non-utilities now and into the future while supporting the dig once concept. Therefore, we support the concept of a communications trough standard to be included into each ITD project design as part of their regular design guidelines to accommodate access by utility/non-utility providers. The June presentations repeatedly stated that physical limitations may need to be considered if a project area is constrained. We support a standardized design of a ***minimum*** of three (3) ITD funded and managed conduits with micro-ducts in each conduit, per project.

Given the dig once concept, not every telecom will want into the trough at every ITD project statewide. However, they may eventually build to that location and eventually need into the trough or the ITD tier one conduits/micro-ducts as networks expand. It is *not* acceptable that communication troughs are removed from a project plan because access is determined as 'not needed by telecom providers today', or 'not needed today by ITD'. Please build for the future and not limit growth based on who is currently utilizing the asset today.

ITD OWNED CONDUIT FOR USE IN PUBLIC ROW:

The Port of Lewiston strenuously supports ITD owning and managing public conduit within the State Public Right-Of-Way. We believe all entities should be able to work directly with ITD to gain access into the public ROW through a network of publicly owned conduits for lease.

1. This allows service providers to apply for use of the conduits while ITD keeps inventory of what is in use and by whom, to ultimately help facilitate competition so that no one provider can utilize all conduits nor all ROW space.

We support the investment of installing these conduits by ITD (preferred method) or by ITD acquiring them. If a provider applies for a permit to build into the ROW, ITD could require that they install three extra conduits for ITD to buy back and manage as part of the permit requirements issued for accessing the ROW. Costs will be clear either way for passing through on leases issued to others.

Based on June discussions, we heard ITD say they 'are not in the telecommunications business'. here was mention that maybe a service provider could build into the ROW for themselves and others so ITD didn't have to keep inventory and permit telecom access. We do not support this approach. Utility and non-utilities should not have to work through a private telecommunications company to gain access into what is considered the public ROW. Our concern is that any private telecommunication company who was allowed to build the only infrastructure into a limited ROW space now become a 'gate keeper' for others to access public ROW and can become a barrier to entry for free market competition. Additionally, telecom representatives were clear in the June discussions that they did not want to do things that created opportunity for competition.

We understand negotiating a lease for a micro-portion of conduit with service providers in exchange of service to connect ITD facilities is reasonable.

1. Agreements between the Non/Utility and ITD allow for inventory and assignment of the conduits by ITD and are necessary for ITD to control the ROW and maintain neutrality. First, this will allow every non/utility interested in accessing the ROW to enter into an agreement with ITD for assignment of their respective conduit. This keeps conduit/micro-duct assignment under the ITD umbrella. This would allow ITD to treat access equally for reimbursement costs associated with placement of the conduit. If ITD does not know who is in their ROW, then how do you communicate with appropriate entities for extensions to ROW improvements, damages, relocation, etc. if a gate keeper regarding inventory and use is a private company.

2. ITD was clear that they need to create a neutral process for access as well as have clear understanding who is in the public ROW. Public conduits and control of them is necessary for

ITD to carry out their objective of providing neutral access by others, especially by providers not currently within the ROW but willing to lease access to serve their local/regional areas.

3. ITD should not be picking winners and losers by allowing one or two companies to absorb all public space. It may be easier for ITD, but it does not serve the public's ability to have freedom of choice for service providers or support the free market process. ITD could lease micro-ducts within the public conduits so that no one entity absorbs all capacity within the physical ROW space (or absorb all of the available micro-ducts). ITD should control the conduits within the public Right-of-Way while recovering their investment costs, and maximizing space based on terms determined by agreements, etc.

4. Consider at least one micro-duct to be utilized solely by public entities. Example: ITD, Corrections, E-911, and local governments

Thank you for consideration of our comments. We are happy to discuss these topics further should ITD wish to have additional conversation. We have enjoyed a good working relationship with the District 2 office and look forward to working with ITD in the future.

Sincerely,
PORT OF LEWISTON

David R. Doeringsfeld
General Manager