

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

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