

## **ITD Negotiated Rulemaking Comments**

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

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June 29, 2022

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Ramón S. Hobdey-Sánchez  
Idaho Transportation Department  
Office of Governmental Affairs  
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Boise ID 83707-1129

Re: HB640 aaS 2022 – “Idaho Broadband Dig Once and Right-of-Way Act”

Dear Mr. Hobdey-Sánchez,

Please accept our thanks, to both the Idaho Department of Transportation and to you for leading the implementation of this important legislation. The Idaho Regional Optical Network (IRON) is Idaho’s non-profit broadband network that supports the colleges and universities of Idaho, 911 services, local governments, research, education, and healthcare. Established in 2007, IRON is owned and operated by its Associates for the public benefit. As such we feel we are uniquely positioned to comment on broadband access.

The Dig Once policy will provide significant benefits to Idahoans in the most underserved areas of our state if we use our combined resources to bridge the digital divide. The implementation of the Dig Once policy has the opportunity to provide all of our citizens access to jobs, healthcare, education and more.

To that end, please accept these comments below.

40-517(3) Definition of Broadband Provider.

Comment: While the definition mentions “...private-public partnership established for the purpose of expanding broadband in the state”, this doesn’t clearly state that “non-profits” are broadband providers. The Department needs to ensure that rules do not exclude entities that can provide broadband services or infrastructure even if they are not traditional utilities, regulated or unregulated.

40-518(5) For each project for which the department provides notice under this section, the department shall engage with each broadband provider that submits a statement of interest to determine whether accommodation of installation of broadband infrastructure is appropriate.

Comment: The rules or criteria which the Department uses to determine whether accommodation of broadband infrastructure is appropriate

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should ensure that the project provides open access and addresses the long-term growth in Idaho that is fundamental intent of the Dig Once policy. As broadband demands continue to grow, it is critical to consider future broadband and infrastructure needs to ensure Idaho is competitive.

40-518(8)(a), Processing and reviewing of statement of interest.

Comment: When reviewing statements of interest, the procedures should assure open and equal access to infrastructure in the public right of way (ROW).

The Department should ensure that all potential participants are aware of the Broadband Provider Registry and are eligible to participate in projects.

40-518 (8)(d) Criteria for the installation of the department's own conduit. Rules may allow use of such conduit by broadband providers.

Comments: In order to ensure broadband access statewide, providers need access to ROW and conduit infrastructure. The Department should equitably prioritize requests from all participants, thereby ensuring that Idaho's fundamental open access needs are served.

In closing, we thank you for the opportunity to comment on these important rules. We believe the implementation of this statute should encourage the widespread development of an open, competitive statewide fiber infrastructure that ensures all Idahoans have access.

Respectfully,



Brent J. Stacey

President/CEO

Idaho Regional Optical Network, Inc.



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June 29, 2022

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**RE: DIG ONCE UTILITY ACCOMMODATION -- RULEMAKING COMMENTS JUNE 2022**

Thank you for this opportunity to provide comment regarding development of competitively neutral processes regarding telecom access into the State's Right-of-Way (ROW). The Port of Lewiston fully supports the Legislative Intent stating broadband is a vital component needed to achieve the overall health and public interest for Idaho. As ITD is aware, today's funding environment to help enhance the presence of broadband within Idaho is at an unprecedented level. Thoughtful use of the public ROW is an essential step to help Idaho citizens receive the benefit of partnerships utilizing their investment in public assets in a cooperative, fair nature.

**COMMENT #1 – BUILD FOR THE FUTURE**

ITD should facilitate access for utilities capacities over a 20-year horizon. In this context, ITD should accommodate existing providers facilities within a project, ITD's current and future needs, as well as plan well into the future for access by multiple providers. ITD can facilitate access, and limit separate and exclusive joint use applications in the future, should they build for long term growth. While ITD accommodates most utilities that exist within ROW during ITD construction projects, placement of additional capacity will support growth and promote competition. The roll out of today's funding environment will allow all providers to grow their networks over years of phased construction of their networks to reach rural and urban areas. Constructing additional capacity will allow room for networks to eventually reach ITD completed projects without creating pinch points or limits to access due to poor long-term planning.

**COMMENT #2 – LIMIT SPECULATIVE PRACTICES AND BALANCE INVESTMENT**

There is concern by public and non-profit broadband entities statewide that ITD may unknowingly succumb to speculative practices by private/closed network providers that limits the legislative intent to promote competition among broadband providers. We are offering several solutions that can mitigate concerns into the rulemaking process to assist with the objective of creating a free market environment:

- a.) Create a joint use program for the newly added capacity. (for both public, and private) Costs and criteria for use of added capacity can be passed forward through agreements with ITD for their cost recovery.
- b.) Dedicate, at a minimum, one half of the added capacity to public use by governments, non-profits, education and healthcare so the public asset results in public benefit.
- c.) Dedicate the other half of the added capacity to any entity, public or privately held networks utilizing the ROW to help bolster their network models and investments wishing to expand and reach new market areas.
- d.) Limit awarding total additional capacity to any one provider. This eliminates speculative practices designed to block competition needing the same access into the ROW which results in limiting service options to end users. ROW should be accessible to more providers, not less.
- e.) Consider open access providers for priority access to projects with limited available capacity. Open access models are available to all providers on an equal basis at attractive at-cost rates; this model is usually not offered by privately held for-profit providers. Closed/private network models do not offer competition to utilize their assets at attractive rates, and again, serves to block competition.

The Port of Lewiston would like to thank the Idaho Transportation Department for their efforts to promulgate rules that are nondiscriminatory, neutral, fair, and objective and that promote competition among broadband providers, as intended. We greatly appreciate your consideration in reviewing our comments that may help alleviate overall concerns while implementing a fair and balanced approach. We stand ready to make ourselves available as a trusted resource to your team. Please reach out should you have any questions regarding our comments.

Sincerely,

PORT OF LEWISTON



Scott Corbitt  
General Manager



June 29, 2022

**VIA E-MAIL**

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**Re: Broadband Utility Accommodation Rulemaking, Docket No. 39-0343-2201**

Dear Mr. Hobdey-Sánchez:

CTIA<sup>1</sup> appreciates the opportunity to submit these comments on the Idaho Transportation Department's ("Department's") new negotiated rulemaking to implement the Idaho Broadband Dig Once and Right-of-Way Act.<sup>2</sup>

The Act declares that "broadband service throughout the entire state is in the overall public interest," and that "the use of highway rights-of-way to support broadband infrastructure and a 'Dig Once Policy' furthers the overall public interest."<sup>3</sup> It thus directs the Department "to facilitate the expansion of broadband with the cost-efficient, orderly, and coordinated installation of broadband infrastructure on highway rights-of-way and during roadway construction."<sup>4</sup>

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<sup>1</sup> CTIA – The Wireless Association ("CTIA") ([www.ctia.org](http://www.ctia.org)) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21<sup>st</sup> century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as app 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, D.C.

<sup>2</sup> House Bill 640, Idaho Broadband Dig Once and Right-of-Way Act (enacted March 24, 2022) ("Act"). The Act amends Chapter 5, Title 40, Idaho Code, to add new Sections 40.515-40.520.

<sup>3</sup> Idaho Code § 40-516(2).

<sup>4</sup> *Id.* § 40-516(3).



CTIA fully supports the Act's cardinal purpose: to speed the deployment of broadband facilities in rights-of-way because those facilities will expand the availability of broadband service to Idaho residents. Streamlining the Department's process for granting permits for wireless facilities directly advances that purpose. Wireless services are an efficient, cost-effective way to provide broadband across Idaho, particularly in rural areas, and rights-of-way are often optimal locations for wireless facilities because of their proximity to large volumes of wireless traffic.

CTIA thus urges the Department to reaffirm that wireless providers have access to all rights-of-way, and take actions in this docket to ensure that its procedures advance that access, as detailed below. The "Dig-Once" provisions of the Act, however, apply to excavations into rights-of-way to bury underground conduit that will hold fiber optic lines. These provisions do not seem intended to, and should not apply to wireless structures and antennas, which must be installed above ground. CTIA thus recommends that the Department make explicit that any rules it develops to regulate the installation of conduit and fiber using that conduit do not apply to wireless structures and antennas.<sup>5</sup>

In the Department's previous negotiated rulemaking to update its Guide to Utility Management ("GUM") and Utility Accommodation Policy ("UAP"),<sup>6</sup> CTIA asked the Department to (1) adopt reasonable cost-based wireless siting fees, (2) set "shot clocks" for acting on applications, and (3) make other revisions to those documents to streamline the siting of wireless facilities.<sup>7</sup> The Department concluded that rulemaking by adopting a rule that includes the presumptively reasonable fees that the Federal Communications Commission ("FCC") identified for small wireless facilities. That rule promotes the deployment of wireless service, including wireless broadband, in Idaho rights-of-way. The Department should continue its efforts on that front by addressing CTIA's other comments on the UAP and GUM as summarized below.

**Permit Fees.** The Department addressed CTIA's proposal on wireless permit fees by adopting a new rule, Section 39.03.43, which specifies the up-front and recurring fees that will be charged for small wireless facilities. CTIA appreciates the Department's action, which aligns with the FCC's action and will help to promote wireless broadband service. The Department also revised Section 2.7 of the UAP to reference the new rule. However, Section 2.7 continues to state that fees will be based as well on

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<sup>5</sup> Specifically, the Department should exclude wireless providers from any rules it develops to implement Section 40-520 (governing "longitudinal use and access to the rights-of-way" and deployment of conduit).

<sup>6</sup> *Rules Governing Utilities on State Highway Right-of-Way*, Docket No. 39-0343-2102.

<sup>7</sup> *Id.*, Comments of CTIA (filed July 28, 2021); Further Comments of CTIA (filed Nov. 24, 2021). For the Department's convenience, a copy of these comments is attached.





“Master License Agreement terms.”<sup>8</sup> Neither the UAP nor the GUM specify the terms for those agreements, leaving the possibility for Master License Agreements inappropriately to diverge from the rule. The Department should remove this potential for inappropriate divergence by deleting the reference in Section 2.7 to Master License Agreements.

**Shot Clocks.** The Department’s revisions to the UAP did not address CTIA’s request that it adopt specific time limits for acting on wireless permit applications consistent with federal law. CTIA explained that the FCC adopted such limits, known as “shot clocks,” to govern state and local permit reviews, finding that they would help speed broadband deployment while providing sufficient time for states and localities to complete their review.<sup>9</sup> These time limits clearly apply to state transportation departments’ review of wireless siting applications, so incorporating the “shot clocks” into the UAP would be appropriate and consistent with the Department’s approach to fees in Section 39-03.43.

CTIA thus renews its request that the Department adopt all of the FCC shot clocks. It should also state that procedures that it and applicants must follow, including negotiation of a Master License Agreement, must be completed within the applicable shot clock period. The shot clocks can be included in UAP Section 2.3, which lays out the permit process. Alternatively, if the Department plans to take up the revisions to the GUM that it proposed in its earlier rulemaking, the shot clocks can be included in new Section 620.02, which addresses “broadband wireless telecommunications.” Adopting them will comply with federal law and speed broadband deployment, promoting the Act’s objective “to facilitate the expansion of broadband.”

**Streamlining Approvals.** Finally, CTIA proposed a number of modifications to the UAP and GUM to simplify the process for approving wireless facilities along rights-of-way, which the Department has not yet addressed.<sup>10</sup> CTIA recommended, for example, that the Department:

- Adopt the same policies for both small and larger wireless facilities. Particularly along rights-of-way in rural areas, larger structures are often needed to provide sufficient broadband coverage to Idaho residents. Moreover, rapid deployment of all types of wireless structures advances the Act’s purpose.

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<sup>8</sup> “Small Wireless Facility (SWF) permit fees are based on IDPA 39.03.43 – Rules Governing Utilities on State Right-of-Way and Master License Agreement terms including rates per facility, and annual attachment and right-of-way access fees.” UAP Section 2.7.

<sup>9</sup> The rules are codified at 47 CFR § 1.6003. The shot clocks are 90 days for a new small wireless facility and 150 days for a larger facility. Applications to modify existing facilities have shorter review periods: 60 days for small facility modifications and 90 days for larger facility modifications.

<sup>10</sup> CTIA’s July 28, 2021 Comments included each of the proposals. See Comments at 11-14.





- Adopt a model form of Master License Agreement. Having a standard form that has been developed with stakeholder input will, as CTIA noted, speed and simplify the deployment of wireless facilities and thus also advance the Act's objectives.

CTIA renews these proposals and asks that the Department adopt them in this new rulemaking. The Department can and should do so because they will simplify and expedite the review process and thereby promote broadband expansion – consistent with the Idaho Legislature's objectives as set forth in the Act.

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CTIA looks forward to working with the Department to ensure that its rules and policies advance the deployment of wireless facilities as an essential part of providing broadband to all Idaho residents.

Sincerely,

/s/ Benjamin Aron

Benjamin Aron

Assistant Vice President, State Regulatory Affairs

CTIA

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**BEFORE THE IDAHO TRANSPORTATION DEPARTMENT**

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

## COMMENTS OF CTIA

## I. INTRODUCTION AND SUMMARY

CTIA – The Wireless Association<sup>1</sup> 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”).<sup>2</sup> 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

<sup>1</sup> CTIA – The Wireless Association® (“CTIA”) ([www.ctia.org](http://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.

<sup>2</sup> 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.”<sup>3</sup>

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

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<sup>3</sup> 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.”<sup>4</sup>

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.<sup>5</sup>

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.<sup>6</sup> FHWA specifically identifies broadband as one such type of project, and

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<sup>4</sup> Idaho Broadband Task Force, “Broadband Access is Imperative for Idaho: Recommendations to Improve Idaho’s Broadband Plan” (Oct. 31, 2019) at 3.

<sup>5</sup> 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](https://api.ctia.org/wp-content/uploads/2021/01/2021-Wireless-Briefing-2_9.pdf) (last accessed July 28, 2021).

<sup>6</sup> 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.”<sup>7</sup>

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.<sup>8</sup> 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.

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> 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.”<sup>9</sup> 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).”<sup>10</sup> 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

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<sup>9</sup> 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.)

<sup>10</sup> 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 (9<sup>th</sup> 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.”<sup>11</sup> 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,

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<sup>11</sup> 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.”<sup>12</sup> 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.<sup>13</sup> 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.”<sup>14</sup> 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”).

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<sup>12</sup> 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.

<sup>13</sup> 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).

<sup>14</sup> 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.”<sup>15</sup> 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.”<sup>16</sup> 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

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<sup>15</sup> 23 CFR § 710.403(e)(1).

<sup>16</sup> Guidance Document at 4.

residents of the state of Idaho.”<sup>17</sup> 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”<sup>18</sup> 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.

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<sup>17</sup> Idaho Code § 40-210(1).

<sup>18</sup> See Idaho Code § 40-210(4).

**Section 110.00 – Definition of Small Wireless Facility.**<sup>19</sup> The definition of this term is largely consistent with the definition in the FCC’s rules.<sup>20</sup> 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.**<sup>21</sup> 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.**<sup>22</sup> 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

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<sup>19</sup> GUM at 100-3.

<sup>20</sup> See 47 C.F.R. § 1.6002(l).

<sup>21</sup> *Id.* at 100-4.

<sup>22</sup> *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.***<sup>23</sup> 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.

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<sup>23</sup> *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.<sup>24</sup> 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.

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<sup>24</sup> See 47 C.F.R. § 6003.



***Section 620.04 – Installations in interstate ROWs.***<sup>25</sup> 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.***<sup>26</sup> 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.***<sup>27</sup> 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

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<sup>25</sup> *Id.* at 600-5.

<sup>26</sup> *Id.* at 600-6.

<sup>27</sup> *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,

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

Dated: July 28, 2021

**BEFORE THE IDAHO TRANSPORTATION DEPARTMENT**

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

## FURTHER COMMENTS OF CTIA

CTIA submits these further comments on the Idaho Transportation Department’s (“Department’s”) proposed amendments to IDAPA 39.03.43, which governs the installation of infrastructure on State highway rights-of-way (“ROWs”), to address small wireless facilities siting and fees.

At its November 16, 2021 Technical Meeting, the Department invited interested parties to submit additional comments that specifically address its latest proposed amendments to IDAPA 39.03.43 and changes to its Utility Accommodation Policy (“UAP”). CTIA strongly endorses the proposed changes to the Department’s policies and procedures for approving small wireless facilities in the ROWs. These actions will greatly help to bring new investment and upgraded wireless facilities to Idaho communities and residents and strengthen Idaho’s economy.

## I. INTRODUCTION.

In October 2019, the Idaho Broadband Task Force issued its final report recommending actions to improve broadband speed, connectivity, and infrastructure in Idaho, concluding that “[a]ccess to broadband and high-speed internet services is an urgent priority for Idahoans in all corners of the state.”<sup>1</sup> Streamlining the deployment of small wireless facilities will help to achieve that goal because it will promote the public’s access to wireless broadband services, including the latest, fifth-generation (“5G”), wireless technology, across Idaho.

<sup>1</sup> Idaho Broadband Task Force, “Broadband Access is Imperative for Idaho: Recommendations to Improve Idaho’s Broadband Plan” (Oct. 31, 2019) at 3.

The proposed changes to IDAPA 39.03.43 and the UAP are well aligned with federal requirements that were adopted to speed access to expanded wireless broadband. In 2018 the Federal Communications Commission (“FCC”) interpreted Sections 253 and 332 of the Communications Act<sup>2</sup> to adopt presumptively reasonable fees that states and localities may charge for the installation of small wireless facilities, and to set maximum time periods for them to act on applications for these facilities.<sup>3</sup> CTIA is pleased that the Department has included those same fee amounts in its proposed rule amendments.

Accordingly, CTIA urges the Department to adopt the proposed changes to IDAPA 39.03.43 and the UAP with the minor modifications discussed in Section II of these Comments. These small changes will enhance the effectiveness of the rule and the UAP in promoting the rapid deployment of advanced wireless services.

The Department stated during the November 16, 2021 Technical Meeting that it also intends to amend the Guide to Utility Management Manual (“GUM”) to address siting of additional types of facilities along State highway ROWs. CTIA will remain engaged with the Department to ensure that amendments to the GUM will further streamline the deployment of all types of wireless facilities. In particular, CTIA is interested in modifications to the GUM that will promote additional broadband service by addressing structures that do not qualify as small wireless facilities. Such structures are often necessary to serve rural areas or areas where the terrain makes small wireless facilities infeasible, because the increased height of larger facilities

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<sup>2</sup> 47 U.S.C. §§ 253, 332.

<sup>3</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, 22 FCC Rcd 9088 (2018). The United States Court of Appeals for the Ninth Circuit upheld both the FCC’s interpretation of Sections 253 and 332 to require cost-based fees for small wireless facilities and the time periods it adopted for states and localities to act on applications for such facilities. *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied*, S.Ct. No. 20-1354 (2021).

expands the area that wireless signals can reliably cover. These facilities should also be eligible for a streamlined review process, because they too will expand advanced wireless service to the public – and in some circumstances more effectively than an antenna on a smaller structure would. Adopting appropriate fee limits and deadlines for acting on applications for these larger structures will thus also help to drive the availability of state-of-the-art wireless services across Idaho.

## **II. THE DEPARTMENT SHOULD MAKE MINOR MODIFICATIONS TO THE AMENDED RULE AND UAP TO ENHANCE THEIR EFFECTIVENESS IN PROMOTING ADVANCED WIRELESS SERVICES ACROSS IDAHO.**

*1. Adopt two modifications to IDAPA 39.03.43.* The Department’s proposed amendments to IDAPA 39.03.43 include a definition of “small wireless facilities”<sup>4</sup> and a schedule of fees to be charged for the installation of those facilities that aligns with federal law. CTIA supports the Department’s proposal with two minor revisions.

CTIA first suggests a small change to the Department’s proposed section addressing radiofrequency radiation exposure from wireless facilities. Subsection 04(a)(i)(6) states that the facilities “do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards.” Because the FCC has plenary authority under the Communications Act to adopt rules governing radiofrequency radiation, and has done so, the only “applicable safety standards” are the FCC’s. Accordingly, the Department’s rule should reference the FCC’s rules. CTIA suggests the Department revise Subsection 04(a)(i)(6) to state that the facilities “do not result in human exposure to radiofrequency radiation in excess of the applicable federal safety standards as codified at 47 C.F.R. § 1.1310.”<sup>5</sup>

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<sup>4</sup> Section 1.3 of the UAP includes the same definition.

<sup>5</sup> The proposed new language is underscored. A parallel change should be made to UAP Section 1.3’s definition of small wireless facilities.

CTIA's next suggestion pertains to subsection 04(a)(ii), which includes the term "Fifth-Generation (5G)" and defines it as "5G wireless technology which requires new infrastructure in the form of small cell facilities." This provision should be stricken from the rule for several reasons. Wireless networks have considerable longevity, so providers are still relying on and deploying fourth-generation ("4G") equipment. Such deployment is taking place even as providers are aggressively deploying 5G networks, and in the future will deploy still additional network generations (*i.e.* 6G and beyond). Focusing on 5G in the rule may negatively impact the application of the rule to other generations of wireless networks. Indeed, small wireless facilities are integral to the delivery of 4G and 5G service today, and likely will be integral to future generations of wireless systems. The Department therefore should avoid singling out a particular technology. In addition, neither IDAPA 39.03.43 nor the UAP reference 5G, so there is no need to retain the provision defining it. Accordingly, CTIA recommends deleting the definition of 5G in Subsection 04(a)(ii).

**2. *Include the fee schedule in the UAP.*** CTIA suggests that the fee schedule for small wireless facilities that is properly set out in amended IDAPA 39.03.43 also should be set out in the UAP, and a discrepancy between the two should be removed. The proposed UAP does not currently reflect the proposed new fee schedule in IDAPA 39.03.43. Instead, Section 2.7 of the UAP states that small wireless facility fees are "based on Master License Agreement terms," and Section 2.7 does not include any limits on those fees.

UAP Section 2.7 should be revised to track IDAPA 39.03.43 by including or at least cross-referencing the fee schedule that is in the rule. Also, language indicating that fees are based on the Master License Agreement should be deleted from Section 2.7. This will remove

any doubt or ambiguity as to the fees the Department will charge providers for installing small wireless facilities.

**3. *Include application action deadlines (“shot clocks”) in the UAP.*** Based on the discussion at the November 16 Technical Meeting, CTIA understands that the Department is amenable to incorporating into its rule and/or policy the FCC’s rules that set maximum time periods (known as “shot clocks”) for state and local agencies to act on small wireless facility deployment applications. These deadlines are 90 days for a new facility and 60 days for modifying an existing facility.<sup>6</sup>

The currently proposed amendments to the rule and UAP do not include these shot clock provisions. Adding them will help ensure the Department’s procedures are aligned with federal law that is binding on state and local agencies. CTIA thus urges that they be expressly added to the UAP. (An appropriate place would be Section 2.3, which sets out the permitting process.) The Department should also clarify that all required procedures that it and applicants must follow to place small wireless facilities in the ROWs, including negotiation of a Master License Agreement, must be completed within the applicable shot clock period. These changes will help expedite installation of new facilities to serve the public.

**4. *Modify UAP Section 5.9.*** The Department should also modify amended Section 5.9 of the UAP, entitled “Aesthetic Controls,” which imposes heightened aesthetic review to certain types of locations along State highway ROWs. First, it should narrow the scope of Section 5.9 to apply it only to those areas where such review is warranted. Section 5.9 reasonably recognizes that certain environmentally or historically sensitive areas such as scenic strips, overlooks, parks, and historic sites may require review of aesthetic issues. Unfortunately, it applies the same

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<sup>6</sup> See 47 C.F.R. § 1.6003.



review to other locations that are not environmentally or historically sensitive, including rest areas and weigh stations. Given that there is no basis to apply heightened aesthetic review to facilities proposed in these locations, they should be removed from Section 5.9.

Second, as to other locations that may be environmentally or historically sensitive, the proposed rule would prohibit deployment unless there is no feasible and prudent alternative and several additional requirements are met. This requirement would raise concerns under Section 332 of the Communications Act, which prohibits states and localities from adopting regulations that have the effect of prohibiting service.<sup>7</sup> Even more problematic, Section 5.9 includes no guidelines for applying these requirements, which leaves entirely unclear whether small wireless facilities may be installed at these locations at all, potentially hindering the public's access to service. CTIA thus urges the Department to remove the "no feasible and prudent alternative" standard from Section 5.9, and adopt more specific criteria for reviewing applications to build small wireless facilities in these environmentally or historically sensitive places.

***5. Amend the GUM to accelerate approval of other wireless structures to enhance service.*** Finally, CTIA also recommends that when the Department focuses on amending the GUM, it consider changes that will streamline the deployment of wireless structures that do not qualify as small wireless facilities. As noted above, such structures are often necessary to serve rural areas or areas where the terrain or other factors make small wireless facilities infeasible. In such instances, they are an effective – and in some situations the only – way to bringing reliable broadband service to these areas. Adopting fee limits and deadlines for acting on applications

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<sup>7</sup> See 47 U.S.C. § 332(c)(7)(B) ("The regulating of the placement, construction and modification of personal wireless services facilities by and State or local government or instrumentality thereof ... shall not prohibit or have the effect of prohibiting the provision of personal wireless services.")

for these larger structures will also help to accelerate the availability of state-of-the-art communications services.

### **III. CONCLUSION**

The Department's proposed amendments to IDAPA 39.03.43 and the UAP are a major step toward a streamlined regulatory framework that will help to accelerate the availability of broadband services across Idaho. CTIA looks forward to working with the Department to refine these amendments to further promote rapid deployment of advanced wireless services to benefit all Idahoans.

Respectfully submitted,

By:                     /s/                      
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Dated: November 24, 2021



June 29, 2022

Ramon Hobdey-Sanchez  
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On behalf of Imagine Idaho, we want to thank you and the entire staff at Idaho Transportation Department (ITD) working on broadband for hosting the first of several meetings for the purposes of negotiating rulemaking for Broadband infrastructure and the newly passed "DIG ONCE" legislation per HB 640aaS (2022). Imagine Idaho is optimistic about the progress and the work that ITD has and continues to do to help Idaho get connected. We look forward to seeing the additions made to the broadband rules and the incorporation of our suggestions as well as several of our coalition members recommendations, some of which are copied with this letter.

As broadband rules are drafted, Imagine Idaho asks that all "providers" be thought of regardless of how they exist. ITD has made great progress in recognizing the need to be inclusive of the many different entities that could be considered a provider and to treat them all the same. Paramount to the entire broadband infrastructure conversation, is the continued need for shared or "Open Access" to broadband infrastructure. Protecting this for all users will be vital, and we acknowledge the Department made it a point to be inclusive and neutral while writing the initial draft of these new broadband rules.

We continue to work with a broad coalition in support of ITD's efforts and the future of the broadband rules. Collaborating with rural partners, nonprofits, traditional providers, and local governments will be crucial for current and future broadband needs across Idaho. These partners will need to be incorporated, updated, and informed and the rollout of the new website and subsequent applications as well as your commitment to this rulemaking are a tremendous start.

Imagine Idaho is also encouraged by the use of the Utility Accommodation Policy (UAP) and Guide for Utility Management as you treat all providers as a utility regardless of how they are regulated federally or otherwise. The use of the UAP will provide a level playing field that will spur competition and allow for cooperation simultaneously and prevent many of the challenges that have existed in past efforts over the years. The consistency with these documents will provide clarification to all interested parties and while occasional modifications or amendments may need to be made, the use of the UAP will allow continuity for all parties from the start from.

Imagine Idaho is grateful for the Department's hard work on this issue. We are happy to help and offer additional support to ITD as the negotiated rules process continues. As a draft of the rules becomes available, Imagine Idaho will be sharing it with our coalition members for more input. We will continue to work with the Department to offer suggestions on future drafts for language, clarifications, support for our members and to continue to support the expansion of broadband infrastructure for all entities to have access to.

We are committed to seeing the future of broadband in Idaho grow across all parts of the state. Please do not hesitate to reach out to us moving forward for additional input. We look forward to continuing to support ITD as they work persistently to create guidelines for open access for broadband installation.

Respectfully,

Christina Culver  
Imagine Idaho

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June 29, 2022

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Re: **H640; Fees Charged to Cable Providers**

Dear Mr. Hobdey-Sanchez and Mr. Beachler,

At the June 13, 2022 webinar to initiate negotiated rulemaking to update Idaho Transportation Department (ITD) Rules related to the State's new Dig Once Policy<sup>1</sup>, you requested clarification of the language found at I.C. § 45-520(4) stating that "[F]ees charged to a cable provider shall be in accordance with applicable federal law." Below is a brief analysis and explanation of the meaning of this sentence.

Regulation of cable systems is a matter of both federal and state law, providing cable operators with both multiple obligations and benefits. One of the benefits given cable providers under this coordinated federal/state regulatory scheme is the right to occupy the state's (and instrumentalities of the state) rights-of-way. One of the obligations is that a cable provider must pay for the right to occupy the state's rights-of-way (ROW). In Idaho, cable operators pay local franchising authorities (LFAs) franchise fees for the right to occupy all public ROWs located in the state.

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<sup>1</sup> <https://legislature.idaho.gov/sessioninfo/2022/legislation/H0640/>

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--

(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.<sup>2</sup>

These rights and conditions also are reflected in Section 50-3006 of the Idaho Video Service Act<sup>3</sup> and are expressly incorporated in Section 50-3011(1).<sup>4</sup>

In essence, cable operators already pay much more than fair market value for their use of Idaho's public Rights-of-Way. Section 542(b) of the Communications Act<sup>5</sup> and Section 50-3007

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<sup>2</sup> 47 U.S.C. § 541(a)(2).

<sup>3</sup> Idaho Code Ann. § 50-3006.

<sup>4</sup> Idaho Code § 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).

<sup>5</sup> 47 U.S.C. § 542(b).

June 29, 2022

Page 3

of the Idaho Video Service Act<sup>6</sup> permit LFA's 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, it is clear that the first sentence of I.C. § 40-520(4)<sup>7</sup> allows ITD to charge fees to broadband providers – other than cable providers – for use of the ROW in an amount equivalent to what ITD charges regulated utilities.

It is equally clear that the second sentence of I.C. § 40-520(4) provides that ITD may not charge cable providers an additional fee for use of ITD's ROW, for the reason that under both federal and state law, cable providers are already paying franchise fees for the right to use ITD's public ROW.

On a final note, the same federal cable provider restrictions explained above regarding fees [not "costs"] for use of the ROW would apply equally to shared resources or services agreements. Although generally applicable cost-based permitting fees are allowable, any proposals for mandatory shared services agreements — or any fees required to access ITD ROW beyond what is already required in a franchise — exceed the limits of federal law as applied to cable operators.

If you wish to review more in-depth legal analysis of these points discussed above, please review the Idaho Cable Broadband Association's comments filed in ITD Docket No. 39-0343-2102 (*Utility Accommodation (Broadband) Negotiated Rulemaking*) on July 28, 2021, and on file at ITD.

Sincerely,



Executive Director, Idaho Cable Broadband  
Association

HAWLEY TROXELL ENNIS AND HAWLEY

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<sup>6</sup> Idaho Code § 50-3007(3).

<sup>7</sup> "The department shall require the same fees from a broadband provider under this section for longitudinal access to the right-of-way as a public utility as defined under Section 61-129, Idaho Code."