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Attachments: [UDOT Comments to Docket no. 1540414365-5365-01 \(1\) S2.pdf](#)

Please see the attached UDOT Comments to Docket no. 1540414365-5365-01 (1).

Thank you,
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State of Utah

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DEPARTMENT OF TRANSPORTATION

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June 10, 2015

National Telecommunications and Information Administration (NTIA)
U.S. Department of Commerce
Broadband Opportunity Council
1401 Constitution Avenue NW, Room 4626
Washington, DC 20230
(sent via email to: BOCrfc2015@ntia.doc.gov)

Comments to the Broadband Opportunity Council in response to the Council's Notice and Request for comment published in the Federal Register April 29, 2015 (Docket No. 1540414365-5365-01)

Dear Broadband Opportunity Council,

The Utah Department of Transportation (UDOT) appreciates the opportunity to provide comments to the Broadband Opportunity Council in response to the Council's Notice and Request for comments on expanding broadband deployment and adoption by addressing regulatory barriers and encouraging investment and training.

UDOT supports the Council's goals of providing broadband service to unserved and underserved populations and believes this is best accomplished through public-private partnerships and streamlining federal regulations which in some cases are a significant barrier. Any proposed changes to federal regulations should recognize these successes, promote their continuation, and remove unnecessary barriers where appropriate.

General Principles

The following general principles should be understood from a highway operating agency's perspective and protected when considering changes in federal regulations.

A. **Public Private Partnerships.** UDOT has successfully used public-private partnerships to enable expansion of service provider networks to unserved and underserved areas of the state for many years. These partnerships began in the late 1990s when a change in federal law allowed the states to accommodate longitudinal access of telecommunications facilities within interstate rights-of-way under certain conditions. Utah subsequently changed its state law to allow companies to lease or barter in-kind for this access. These successful public private partnerships have enabled UDOT to significantly expand its highway operations over large remote expanses of the state as well as enabling private providers to expand their service. An example of a successful public private partnership is the Scipio to Holden interstate project that included fiber and conduit. Scipio is a very rural town close to the center of Utah. The current incumbent local exchange carrier (ILEC) was a copper only plant that was out of space and did not have the ability to provide good broadband services. Even though system upgrades were needed the ILEC was not in any hurry to provide them because there was no competition. The Scipio school was not connected to high speed internet because there was no service available. Cell phones in the area had very poor connectivity because they were not connected to fiber backbones. A rural competitive local exchange carrier (CLEC) decided that by partnering with UDOT it could afford to provide service to Scipio and the surrounding area. The big difference between the ILEC and CLEC service is that the CLEC built a new high speed fiber network to deliver services. The town of Scipio now has two choices for phone service and business, schools and residents now can get high speed internet. As a result of the new CLEC service the ILEC decided it needed to upgrade and provide better service. An area that was underserved now has great service and cell phones now have strong signals. Broadband prices are reasonable because of two competing providers. By partnering UDOT facilitated a rural community getting high speed connectivity.

B. **Value of Interstate and Federal-aid Rights-of-Way Enables Public Private Partnerships.** A key principle to the success of public private partnerships is the property value of interstate right-of-way. When the interstate system was built, billions of dollars were spent to purchase expansive linear corridors, remove all longitudinal utility lines and consolidate utility crossings. This initial investment is fiercely protected by the states to keep the interstates operating efficiently without constant interruptions for utility work, to minimize risks imposed by utility lines in the roadway, and to keep future reconstruction and repair costs low. Experience has shown that road project schedules and costs are significantly impacted by utility relocations. With these principles in mind, states are sensitive to allowing any longitudinal utilities in interstate right-of-way. Where the return on investment can be justified to the state, and a private partner recognizes the value of using expansive linear corridors relatively free of obstructions and other utilities, public private partnerships make sense for all parties. The property value of linear highway corridors is a major incentive enabling public private partnerships. Proposed policy changes need to retain this principle.

C. **States and Local Agencies Control Highway Rights-of-Way.** The primary purpose of a highway is to move people and goods by vehicles. A secondary benefit of highway rights-of-way is accommodation of public utilities. Construction, maintenance and operation of highways are primarily paid with user fees. Use of a highway right-of-way by utilities is subordinate to vehicular usage. States and local government agencies have enacted legal frameworks to manage highways and balance secondary uses. Permission is required prior to any third party encroaching on the highway right-of-way. Strict requirements may also be imposed depending on the nature of the encroachment and proposed work. State and local control of activities within highway rights-of-way is paramount to protecting their primary usage, and accomplishing community goals. These goals include protecting the public, minimizing delays, enhancing the environment, aesthetics, and promoting economic development. Control of highway rights-of-way needs to remain with the owners.

D. **Interaction with Federal Land Agencies.** In Utah federal agencies own two thirds of all lands. When interstates and other federal-aid highways were constructed, many easements were granted by federal agencies rather than fee title. A specific highway may traverse UDOT-owned fee title and easements from multiple federal agencies along its route. The practice of issuing highway easements rather than fee title of federal property has led to conflicts operating, maintaining and improving the state highway system.

UDOT practice is to obtain fee title property when building a new road or widening an existing road. This standard practice facilitates operational decisions, permitting decisions, and negotiations with third parties. UDOT is unable to obtain fee title from federal land owners. When there are two owners of the land, confusion arises as to what rights are included/excluded within the easement and who the deciding parties are, mistakes are inadvertently made, and decisions by federal agencies are not always made promptly and transparently. These challenges are compounded an order of magnitude when UDOT is required to interact with multiple federal agencies when installing fiber optics along the highway and partnering with telecommunication companies.

A recent fiber optic and conduit build with a partner telecommunication company highlights exactly these issues. The telecom worked with UDOT and installed more than 100 miles of conduit and fiber on UDOT right of way. In exchange for use of UDOT right-of-way, the telecom provided fiber and conduit - allowing UDOT to communicate with its variable message signs, CCTV cameras, weather sensors, traffic sensors, traffic signals, maintenance sheds and any other device or location that needed to be connected to the traffic network. The telecom company benefitted from the partnership by gaining additional capacity to provide broadband service to underserved communities. UDOT cleared all the environmental requirements because it owns the conduit and part of the fiber optics. The telecom purchased the materials and did the installation.

While this completed public private partnership is now very successful, it almost didn't happen due to federal bureaucratic delays. UDOT works closely with FHWA when completing work on federal-aid highways. The installation of fiber optics and traffic systems on federal-aid highways known as Intelligent Transportation Systems (ITS) in public private partnerships is encouraged by FHWA in accordance with [Title 23 of the U.S. Code section 514 b. \(4\)](#) "to promote the innovative use of private resources in support of intelligent transportation system development". When the project was about 60% complete, Bureau of Land Management (BLM) notified the telecom and UDOT that both were in violation of BLM land rights. The BLM then required UDOT's telecom partner to obtain land use permits for any portion of the route that traversed easements on BLM land granted to FHWA/UDOT as part of the interstate system. Furthermore, the BLM would not issue any permits to the telecom company for work in areas that were not part of the partnership with UDOT until permits were obtained for work within the UDOT highway easements across BLM land. Project construction came to a complete halt while the BLM and the Federal Highway Administration (FHWA) disagreed about federal policies, definitions and which agency was allowed to make the decision. As a last resort, the telecom went ahead and obtained permits from BLM for the partnered work. The process caused significant and costly delays which threatened the telecom with loss of a major contract. In desperation the telecom reached out to a state senator's office for help. Completion of the project was delayed by over 8 months. These bureaucratic delays are costly and unnecessary. One agency not multiple agencies should control the permitting and usage of a parcel of land. One federal agency issuing partial oversight of an easement to another federal agency is a confusing and costly practice that needs to be changed.

Response to RFC Questions

In addition to the general principles stated above, UDOT offers the following responses to questions specified in the RFC document numbered to correspond with those questions:

5. How can the federal government best collaborate with stakeholders (state, local, and tribal governments, philanthropic entities, industry, trade associations, consumer organizations, etc.) to promote broadband adoption and deployment?

Response: Identify and authorize a single federal agency to collaborate with the state when it is partnering with a private provider to barter or share facilities which cross federal lands.

10. Are there federal policies or regulations within the Executive Branch that create barriers for communities or entities to share federally-funded broadband assets or networks with other non-federally funded networks?

Response: UDOT has led the way in partnering with telecommunication companies to facilitate broadband builds in urban and rural areas. Public private partnering encourages competition, enhances service in underserved areas, and provides service to unserved areas. UDOT uses highway right-of-way to install conduit and fiber systems in public private partnerships which

support Intelligent Transportation Systems (ITS) used to manage traffic throughout the state. This is in accordance with [Title 23 of the U.S. Code section 514 b. \(4\)](#) *“to promote the innovative use of private resources in support of intelligent transportation system development”*

During federal highway project F-I15-5(54)179, the Bureau of Land Management (BLM) informed UDOT that there was a violation of the use of BLM land on the interstate project. BLM had heard that UDOT was partnering with telecommunication companies along the interstate right of way and allowing commercial traffic within UDOT conduit and fiber lines. BLM informed UDOT that the highway easement allowed use of the fiber and conduit systems for road purposes only and did not provide for private partner usage of UDOT conduits and fiber that crossed BLM managed land. UDOT assumed that since the Interstate was granted highway easements that UDOT, working closely with FHWA, would handle permitting for telecommunication access. BLM referenced an agreement between BLM and the FHWA known as the “Interagency Agreement between the Bureau of Land Management and the Federal Highway Administration Dated July 27, 1982” Section 3 of the agreement states:

“BLM retains the authority to grant additional right-of-way uses within and across the appropriated highway or material site right-of-way. Such additional uses include, but are not limited to, transportation and utility systems for water, power, communications, oil and gas, or any other facilities which are in the public interest, are not directly associated with highway use, operation and related highway purposes, and are not inconsistent with Title 23 of the U.S. Code. The FHWA shall be consulted prior to the issuance of such authorizations”.

UDOT completed the project in partnership with the telecom company. UDOT built 10 miles of conduit and fiber and the telecom company built an additional 15 miles. This public private partnership effectively doubled the fiber miles available through this rural area for both entities. Of the 25 total miles of the newly installed communication system about 3.5 miles crossed the interstate highway easement that was granted by BLM for the Interstate. The telecom company was required to obtain an additional permit from BLM for the 3.5 miles prior to transmitting any commercial broadband traffic. These permit fees are in addition to what UDOT charged the company for ROW fees for use of the 25 miles of interstate right-of-way. The company is being charged twice for the same use authorized separately by FHWA and BLM. This is one example of a recurring problem throughout the state.

The 1982 agreement between BLM and FHWA needs to be updated to enable states to use public private partnerships and reflect numerous changes such as:

- The 1998 FHWA policy change allowing states to accommodate longitudinal access of utilities within interstate rights-of-way;
- The 1996 Telecommunications Act authorizing states to enter into agreements with telecom companies;

- USC 23.514b(4) promoting innovative use of public private partnerships to promote development of ITS for highway operations; and
- Subsequent changes in state laws allowing longitudinal access to interstate highway right-of-way such as Utah Code Subsection 72-7-108(2)(a), *“except as provided in Subsection (4), the department may allow a telecommunication facility provider longitudinal access to the right-of-way of a highway on the interstate system for the installation, operation, and maintenance of a telecommunication facility”*

Highway right-of-way should be controlled by the states with FHWA as the lead federal agency when the right-of-way is granted by easement across federal lands. The double standard of state-owned interstate highway rights-of-way (with states having full control of fee title property purchased with federal monies during initial construction of interstate highways) versus easements across federal lands needs to be eliminated. This is primarily an issue in rural areas with a higher percentage of federal lands – in many cases directly impacting the same populations who are unserved and underserved with Broadband.

This one regulation creates the biggest barrier to getting broadband deployment to rural areas. UDOT has transportation corridors that can also be used as broadband corridors. UDOT needs the ability to continue promoting the build out of communication systems without highway projects being held hostage as federal agencies sort out old agreements from the 80’s. UDOT encourages the correction or replacement of this agreement, or new policy that would grant the authority to permit public private partnerships for communication facilities on federal-aid highway rights-of-way that cross BLM lands to state Departments of Transportation through FHWA.

11. Should the federal government promote the implementation of federally-funded broadband projects to coincide with other federally-funded infrastructure projects? For example, coordinating a broadband construction project funded by USDA with a road excavation funded by DOT?

Response: As a practice, UDOT accommodates coincidental utility projects where they do not interfere with or add additional cost/schedule to the highway projects. In some cases, this is as simple as coordinating the work. Where a high risk of impact to the highway project exists, the utility work may need to be performed in advance of the highway project or included in UDOT’s project contract and paid for by the utility owner. In some cases, having the utility work included in a highway project contract may cost the utility owner more. Coincidental work typically minimizes overall costs and impacts to the public. Promotion of coincidental work is a good practice, but should not interfere with highway project work. If there are additional costs to the highway project, these should be the responsibility of the utility owner.

18. What barriers exist at the state, local, and/or tribal level to broadband deployment and adoption? How can the federal government work with and incentivize state, local, and tribal governments to remove these barriers?

Response: Define a highway easement across federal lands to include private broadband service providers when the facilities are part of a public private partnership and the public partner is the highway owner. This would allow the highway owner to permit and manage the facilities like it does on all other highway rights-of-way. This would also resolve an internal disagreement between BLM and FHWA regarding language in [Title 23 of the U.S. Code section 514 b. \(4\)](#) “to promote the innovative use of private resources in support of intelligent transportation system development”. UDOT, in close coordination with the local FHWA office, has successfully used this law to enable numerous public private partnerships with broadband service providers. Where UDOT has tried to barter conduits and fiber within highway easements, and the easements cross BLM land, BLM is regulating these uses as they would for a utility company with no public partnership. In this situation BLM permitting has thwarted the public private partnerships for two reasons: 1) the BLM wants a fee from the utility company to locate on “BLM property” even though the facilities are in UDOT’s highway easement and in UDOT’s conduits; 2) the BLM requires a permit for this use and the approval process in some cases has taken over a year.

Summary

Providing broadband access to unserved and underserved populations is best accomplished by public private partnerships where the public partner is the highway owner. The value of highway right-of-way is the keystone that enables partnerships. Control of highway right-of-way needs to remain with the owners – state and local agencies. Where highways cross federal lands by easement, clarify the highway easement rights include broadband service providers who have entered into public private partnerships with the highway owner.

Thank you for the opportunity to share UDOT’s perspective on this important topic. UDOT remains committed to promoting expanded access to broadband services where this can be accomplished through successful public private partnerships.

Sincerely,

Randy Park, P.E.
Director of Project Development