

- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and

- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, these proposed PM<sub>2.5</sub> NAAQS attainment determinations do not have Tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the State, and EPA notes that it will not impose substantial direct costs on Tribal governments or preempt Tribal law.

#### List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Particulate matter, Reporting and recordkeeping requirements.

Dated: May 3, 2011.

**Susan Hedman,**

*Regional Administrator, Region 5.*

Dated: May 5, 2011.

**W.C. Early,**

*Acting Regional Administrator, Region 3.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Chapter I

[WC Docket No. 11-59; FCC 11-51]

#### Acceleration of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice of inquiry.

**SUMMARY:** In this document, the Federal Communications Commission seeks to work with stakeholders including state and local governments, other Federal agencies, Tribal governments, consumer advocates, and the private sector to identify means of improving rights of way policies and wireless facilities siting requirements. Policies for managing rights of way and siting

wireless facilities, including the procedures and costs for acquiring permission to build, affect how long it takes and how much it costs to deploy broadband. By working together with other interested parties on these issues, the Commission can reduce the costs and time required for broadband deployment, both fixed and mobile, which will help unleash private investment in infrastructure, increase efficient use of scarce public resources (including spectrum) and increase broadband adoption.

**DATES:** Comments are due July 18, 2011 and reply comments are due August 30, 2011.

**ADDRESSES:** You may submit comments, identified by WC Docket No. 11-59, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Federal Communications Commission's Web Site:* <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.

- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or phone: 202-418-0530 or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the supplementary information section of this document.

**FOR FURTHER INFORMATION CONTACT:** Claudia Pabo, Wireline Competition Bureau, Competition Policy Division, 202-418-1595.

#### SUPPLEMENTARY INFORMATION:

Pursuant to §§ 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415 and 1.419, interested parties may file comments on or before July 18, 2011 and reply comments on or before August 30, 2011. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/> or the Federal eRulemaking Portal: <http://www.regulations.gov>.

- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this

proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington, DC 20554.

*People with Disabilities:* To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY-A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone: (202) 488-5300, fax: (202) 488-5563, or via e-mail <http://www.bcpweb.com>.

#### Initial Paperwork Reduction Act of 1995 Analysis

This document does not contain proposed information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

Below is a synopsis of the Commission's Notice of Inquiry in WC Docket No. 11-59, adopted and released April 7, 2011.

## Synopsis of Notice of Inquiry

### I. Introduction

1. This Notice of Inquiry (Notice) concerns key challenges and best practices in expanding the reach and reducing the cost of broadband deployment by improving government policies for access to rights of way and wireless facilities siting. In this proceeding we seek to work with stakeholders including state and local governments, other Federal agencies, Tribal governments, consumer advocates, and the private sector to identify means of improving rights of way policies and wireless facilities siting requirements. By working together on these issues, we can reduce the costs and time required for broadband deployment, both fixed and mobile, which will help unleash private investment in infrastructure, increase efficient use of scarce public resources (including spectrum), and increase broadband adoption.

2. Providing broadband service requires the deployment and use of varied and physically dispersed communications infrastructure that is placed in public and private rights of way and on towers and building roof tops. Access to public rights of way, tower sites, and buildings is governed by Federal, state, local, or Tribal requirements depending on the location. Obtaining access to rights of way on fair and reasonable terms, and through a predictable process, is critical for all infrastructure providers.

3. This Notice is intended to update our understanding of current rights of way and wireless facilities siting policies, assess the extent and impact of challenges related to these matters, and develop a record on potential solutions to these challenges. This inquiry is a necessary step towards determining whether there is a need for coordinated national action to improve rights of way and wireless facilities siting policies, and, if so, what role the Commission should play in conjunction with other stakeholders. We seek a detailed record of the nature and scope of broadband deployment issues, including both best practices that have promoted deployment and matters that have resulted in delays.

4. The Commission is most interested in systemic practices rather than individual or anecdotal situations, which are less suited for Federal policies. So that we might have a factual basis upon which to determine the nature and extent of any problems, we ask commenters to provide us with information on their experiences, both positive and negative, related to

broadband deployment. In the case of comments that name any state or local government or Tribal or Federal entity as an example of barriers to broadband deployment, we strongly encourage the party submitting the comments to name the specific government entity it is referring to, and describe the actions that are specifically cited as an example of a barrier to broadband deployment, as this is the best way to ensure that all affected parties—the relevant governmental entity, citizens and consumer groups, and other private parties that have sought access in the area—are able to respond to specific examples or criticisms. Identifying with specificity particular examples or concerns will ensure that the Commission has a complete understanding of the practices and can obtain additional background if appropriate. In turn, we ask government entities to explain the policy goals underlying their current practices and charges regarding rights of way and wireless facilities siting. We seek to identify best practices, systemic challenges and fully consider possible steps the Commission can take, in partnership with Federal, state, local, and Tribal governments—with input from consumer groups and industry—to foster improvements in these areas.

5. The Commission may move forward in other contexts to act on individual issues raised here, as appropriate, without awaiting completion of this proceeding.

### II. Rights of Way and Wireless Facilities Siting Issues

6. In this section, we describe the various types of possible issues regarding rights of way governance and wireless facilities siting requirements, and we seek input in order to obtain a more complete understanding of these areas. We seek to develop a complete record of how rights of way and wireless facilities siting decisions influence build out and adoption of broadband and other communications services. We believe that rights of way and wireless facilities siting issues can generally be broken into several broad categories: (1) Timeliness and ease of the permitting process; (2) the reasonableness of charges; (3) the extent to which ordinances or statutes have been updated to reflect current communications technologies or innovative deployment practices; (4) consistent or discriminatory/differential treatment; (5) presence or absence of uniformity due to inconsistent or varying practices and rates in different jurisdictions or areas; (6) other rights of way concerns including “third tier”

regulation or requirements that cover matters not directly related to rights of way use or wireless facilities siting. We ask commenters to describe the specific kinds of public rights of way and wireless facilities siting issues that exist in each of these areas. Do some of these issues particularly affect various categories of rights of way owners, wireless facilities siting authorities, network users, or network functions? We also ask interested parties to describe best practices in each of these areas.

#### A. Timeliness and Ease of the Permitting Process

7. The Commission recently addressed the timeliness of state and local permitting processes for tower siting in the *Shot Clock Ruling*, 74 FR 67871 Dec. 21, 2009, which set a timeline for action on collocation and other tower siting applications. We seek comment on the application of the *Shot Clock Ruling*, and its efficacy in reducing delays in the local zoning process. In particular, has the *Shot Clock Ruling* reduced the number of collocations pending before state and local government authorities for periods of longer than 90 days, and the number of applications other than collocations pending for longer than 150 days? Has this approached proved satisfactory from the perspective of the communities in resolving actions for collocation? Have individual cases been taken to district courts for zoning authorities' failure to act, and if so, how did the courts apply the *Shot Clock Ruling*? Do parties believe that adoption of the *Shot Clock Ruling* has resulted in faster rulings from state and local government authorities? In answering these questions, parties should provide as much specificity as possible.

8. We also seek updated information on the timeliness and ease of permit processing for rights of way and siting of wireless facilities. Are application processes defined with sufficient clarity? Is information on all necessary application procedures, forms, substantive requirements, and charges readily accessible? How do rights of way holders and wireless facilities siting authorities handle new or novel requests for access to rights of way or tower and antenna sites? Are there processes in place for addressing situations in which it is difficult to identify the rights of way holder? How could the application process be streamlined in certain situations, such as where an infrastructure provider seeks to collocate new facilities on an existing tower? Is the process for obtaining permits for accessing rights of

way or siting wireless facilities timely? To the extent applications are not processed in a timely fashion, what factors are responsible for delays? Are there types of errors, omissions, or substantive requirements in applications that frequently lead to rejection, dismissal, or return of the applications? What application processing timeframes are reasonable? Are there particular practices that can improve processing time frames?

9. We also ask commenters to provide data about their experiences and situations. We ask commenters to submit data related to processing intervals for permit approval, both targeted and actual, for all relevant providers (data submitted by rights holders) and communities (data submitted by infrastructure providers). We ask that any submitted data be broken out in as disaggregated a fashion as possible. For example, we encourage commenters to include for each application the name of the provider; name of the location or community; type of project, including whether a project is wholly new or an augmentation of an existing facility (e.g., wireless collocation on existing structure); whether the community is subject to comprehensive state franchising or rights of way laws; and total time to process applications. To the extent that certain activities during a particular approval took an unusual length of time, we encourage participants to provide any relevant details, such as pre-processing time devoted to obtaining a complete-as-filed application, time spent negotiating, or time spent waiting for events external to the application process. Commenters also should include any other relevant categories of data or explanations that will make their submissions more informative.

#### *B. Reasonableness of Charges*

10. To what extent and in what circumstances are rights of way or wireless facilities siting charges reasonable? Is it possible to identify rights of way or wireless facilities siting charges that all stakeholders agree are reasonable? If not, are there rate levels that most infrastructure providers agree are reasonable, and different rate levels that most government entities agree are reasonable? Are there instances and circumstances in which rights of way or facilities siting charges are unreasonable? What are appropriate criteria for determining the reasonableness of such charges? For example, are permitting or application fees unreasonable to the extent they exceed amounts that would recover

administrative and other specifically identifiable costs? Are "market based" rates for use of public rights of way or publicly-owned wireless facilities sites reasonable? In particular, how are market-based rates or other non-cost based rates for public rights of way determined when, in many situations, there does not appear to be a competitive market for public rights of way? Are market-based rates substantially higher than cost-based rates?

11. We ask commenters to provide factual data to help the Commission understand existing charges and practices. We seek data on current permitting charges, including all recurring and non-recurring charges, as well as any application, administrative, or processing fees. In presenting these data, we ask commenters to identify such information as the type of facilities for which such charges are assessed; how such charges are structured (e.g., per foot or percent of revenue in the case of rights of way fees); whether the community is subject to comprehensive state franchising or rights of way laws; whether the charges are published in advance or individually negotiated, designed to approximate market rates or merely recover costs (direct and/or indirect), and accompanied by comprehensive terms, and conditions; and the value of any in-kind contributions required for access or permit approval. We also request commenters to include information that enables us to determine the extent to which such charges are related to impacts on the local community, such as pavement restoration costs for projects that involve trenching in roadways. We recognize that certain information may disclose competitively sensitive information and we understand the need to aggregate such data across multiple communities or providers, or otherwise present it in a way that does not disclose any competitively sensitive data.

12. We also seek information on how a market-based charge is calculated in the context of various types of fees. For example, do per-foot fees and other usage fees vary depending on the number of providers that need access to the rights of way and the amount of fiber or other facilities each such provider places in the rights of way (a measure of demand)? To what extent do entities vary such fees based on other market factors, for example, the available supply, such as the remaining usable space within a conduit system in the rights of way, or the amount of land available to accommodate a new system? We also are interested in

understanding how the levels of percent-of-revenue fees are set in order to achieve a market-based rate.

13. We also invite comment on whether there are specific circumstances in which rights of way or wireless facilities siting charges are more likely to be unreasonable. For example, once an infrastructure provider has placed facilities in a public right of way, incurring sunk costs, is the public rights of way holder frequently in a position to exercise market power in establishing subsequent charges, such as on renewals of long-term contracts or requests to make changes to a vitally important network facility? Are there specific situations where such market power has been exercised? How can instances of the exercise of market power be identified? What situations are most likely to cause wireless facilities siting charges to be unreasonable? Do rights of way or wireless facilities site administrative and/or usage fees vary by the demographics of the customer base? For example, do holders of public rights of way, government owners of tower or antenna sites, and/or government entities regulating wireless facilities sites located in dense, urban, and/or suburban high-income areas tend to impose higher fees than government entities in other areas, and are such differences reasonable?

14. We also request comment on the ways in which rights of way or wireless facilities site processing or usage charges affect broadband subscribers. Are such charges imposed on a broadband provider ultimately passed on to that provider's customers? What fraction of a broadband provider's costs do public rights of way and governmental wireless facilities site or administrative fees typically represent? Insofar as broadband providers charge geographically averaged rates, high rights of way and wireless facilities siting charges will be recovered by providers in part from consumers in other jurisdictions rather than recovered directly from consumers within the jurisdiction imposing the high charges. To what extent should this affect the analysis of rights of way and wireless facilities siting charges? For example, should we be concerned about excessive charges if they are transparent and recovered solely from residents of the jurisdiction imposing the charge?

#### *C. Qualitative Information*

15. We also seek qualitative information that describes how the prices for rights of way and wireless facilities siting and the target timeframe for approval of infrastructure providers' applications are set, and that describe

the process of receiving approval to access rights of way or site wireless facilities, particularly for broadband. How are we to distinguish and evaluate different policies and practices? To help create a record of existing and best practices, we ask infrastructure providers, localities, and other interested parties to submit examples of model, typical, and problematic franchising or access agreements.

16. Certain qualitative information we seek is best provided by states and localities. For instance, we request information on the policy goals and other objectives underlying practices and charges related to access to rights of way and approval of wireless facilities. To what extent are local requirements designed to achieve public interest goals, such as ensuring public safety, avoiding disruption of traffic, or maintaining roadways? What role do other civic goals play in guiding local rights of way and wireless governance decisions? For example, how do localities weigh such issues as preventing the public disruption and damage to roads that accompanies street cuts, or satisfying aesthetic, environmental, or historic preservation concerns, with goals of greater fixed and mobile broadband deployment and adoption through timely processing of permits, nondiscrimination, transparency, and reasonable charges?

17. Certain other information we seek may be best provided by infrastructure providers. For example, we seek information about how rights of way issues influence the deployment decisions of infrastructure providers. In this regard, we request information on both specific instances in which a provider chose not to build out broadband facilities due to rights of way concerns and comprehensive data or analysis that might demonstrate the extent to which rights of way concerns are impeding broadband infrastructure investment and broadband adoption. As providers prioritize capital investments, to what extent do rights of way and wireless siting governance issues have an effect? How do providers take into account any uncertainty with regard to cost or timing? In areas where processes have been standardized, we ask providers to provide evidence of how this has affected their deployment decisions and quantify any benefits. Are there situations in which localities believe that infrastructure providers have unreasonably refused to build out broadband facilities despite best efforts on the part of the locality to encourage deployment through rights of way or wireless facility siting policies?

*D. Extent to Which Ordinances or Statutes Have Been Updated To Reflect Current Communications Technologies or Innovative Deployment Practices*

18. We ask interested parties whether state statutes or local ordinances have been updated to reflect current developments in the communications industry or recent changes in communications technologies that require access to public rights of way. Where such updates have not occurred, do providers experience problems or issues with application processing or delays? For example, do existing ordinances or other requirements successfully address the placement of small antennas on existing facilities in rights of way? In particular, we seek comment on any challenges that may apply to the deployment of microcells, picocells, femtocells, and Distributed Antenna Systems (DAS). What, if anything, do states and localities require in order to permit the attachment of microcells, picocells, femtocells, and DAS antennas to existing infrastructure that is different from attaching any other antenna to a given structure? Do any states or localities allow all of the proposed DAS antennas within a DAS network to be combined in a single permit application, and is this or would this be helpful for DAS deployment? Are there any other ways in which microcells, picocells, femtocells, and DAS antennas are treated uniquely, and are there any ways in which states, localities, or wireless service providers think they should be treated differently? To what extent are these facilities treated as public utilities? To what extent are they subject to local zoning processes? To what extent should existing ordinances or statutes be revised to reflect changes in the communications industry and technology?

19. We also seek comment on how different jurisdictions treat the use of existing infrastructure for wireless services, both in and out of rights of way. Is there disparate treatment between a pole attachment, *i.e.*, the attachment of a wireless antenna to an existing public utility pole, and a collocation, where a wireless antenna is attached to some other existing structure? Are different or additional considerations required for some types of rights of way, such as those used for transportation, as compared to other types? Are there instances in which conflicting laws may apply to the attachment of a wireless antenna to an existing structure? What is the overall effect of these considerations on the ability and the likelihood that existing

infrastructure can be effectively used to deploy wireless services? Do some regulations and policies encourage resource sharing, while others discourage it? Do states and localities show any preference for collocated antennas or for the placement of wireless facilities on public property? Are there particular approaches that facilitate wireless deployment, including DAS? Why do they work well?

*E. Consistent or Discriminatory/Differential Treatment*

20. How have ordinances addressed differences in rights of way users and wireless facilities siting applicants, the different uses they make of rights of way and sites, and the different equipment they seek to deploy? Are differing rights of way or wireless facilities siting practices or charges reasonable? Do they involve unreasonable or discriminatory differential treatment of various types of rights of way users or facilities siting applicants? What are appropriate methods to determine whether a practice or charge is unreasonable or discriminatory? For example, do publicly available fee schedules for various categories of rights of way use tend to be nondiscriminatory? Are zoning requirements for wireless facilities siting nondiscriminatory? Are there other criteria that can and should be used to determine whether charges or practices are discriminatory without fact-intensive and burdensome administrative or court proceedings?

*F. Presence or Absence of Uniformity Due to Inconsistent or Varying Practices and Rates in Different Jurisdictions or Areas*

21. In a given metropolitan area, the main city and various surrounding towns, villages, and counties may have differing practices and charges for rights of way usage and wireless facilities siting. To what extent do these practices and charges differ within a particular state? Does inconsistent treatment of infrastructure providers among states and localities make the deployment of broadband more difficult or time-consuming, or is inconsistency among states and/or localities not problematic as long as infrastructure providers have a clear path to follow within each jurisdiction? To what extent does the need to file multiple applications cause problems for infrastructure providers, regardless of the similarity or differences in the practices and charges involved?

22. To what extent do rights of way governance and wireless facilities siting requirements vary between different

Federal government agencies? Do different agencies require varying types of information or do different agencies require similar information to be presented in different formats? To what extent do any differences among agencies make it more difficult to obtain permits and build out broadband networks on Federally controlled properties? Have there been efforts to increase uniformity? How successful have they been?

#### G. Other Issues

23. *Other Rights of Way or Wireless Facilities Siting Issues:* We ask interested persons to identify and describe any other rights of way or wireless facilities siting issues that have an impact on broadband deployment and adoption. We also ask interested parties to identify any other practices or approaches that have been particularly beneficial to facilitating broadband deployment. Do government rights of way owners or wireless facilities siting authorities impose requirements that are not directly relevant to intended use? For example, in some cases in the past, localities owning rights of way have required that infrastructure providers supply information of the type usually required for a certificate of operating authority from the state. Is this an ongoing requirement for applicants seeking rights of way or siting permits? Are there other examples of such requirements? What are the policy reasons for such requirements? Are there adjustments that could be made to ensure that localities obtain necessary information and address legitimate concerns?

24. *Private Rights of Way and Tower Sites:* We ask interested persons to provide information on issues that arise in the context of private rights of way or tower sites to the extent such information might be helpful to the Commission in achieving a complete understanding of potential public rights of way issues or issues concerning tower siting on public lands.

25. *General Scope of Concerns:* We seek comment on whether specific rights of way and wireless facilities siting concerns are widespread or generally limited to particular Federal agencies, states, Tribes, and localities. Are rights of way and wireless facilities siting concerns generally less widespread in states that have adopted comprehensive rights of way laws than in other states? Are rights of way and wireless facilities siting concerns more common in certain types of areas, such as cities and surrounding suburbs, and less common in rural areas? We also ask interested persons to comment on the

extent to which rights of way and wireless facilities siting concerns are likely to increase or decrease in the near future. For example in other contexts, it appears that many long-term rights of way contracts will expire in the next few years. Is this likely to cause a spike in rights of way disputes? Will the need for new facilities to provide next generation wireless services increase concerns regarding facilities siting?

26. *Additional Data Gathering:* We seek input on whether the Commission should take any additional steps to gather information on issues relevant to this proceeding, including workshops, surveys, and/or mandatory data collections. Are there any existing sources of relevant data the Commission could rely on for purposes of this proceeding?

27. We seek input on the costs and benefits of each of these approaches and whether any of these approaches should be pursued in this proceeding. Are there any other approaches that would yield better results with similar or smaller investments of time and effort?

### III. Solutions

#### A. Prior Efforts To Resolve Concerns

28. We seek information on what interested parties have already done to address rights of way and wireless facilities siting concerns. Have the Federal government, states, localities, Tribes, and/or the organizations representing them developed best practices for rights of way and wireless facilities siting governance? We also seek comment on best practices proposed by private sector entities. Are there existing compendia of rights of way and wireless facilities siting best practices? Aside from state statutes, have there been efforts to develop consolidated rights of way application processes that cover multiple jurisdictions and reduce or eliminate the need to file multiple applications? Have other approaches to improving rights of way and wireless facilities siting governance been attempted? We request comment on the effects of previous efforts to address rights of way and wireless facilities siting governance. Have state statutes governing rights of way helped increase uniformity and reduce costs? We encourage states that have adopted such legislation to describe the approach adopted as well as the benefits and drawbacks. In addition, we ask interested persons to submit information on instances in which government entities and industry have worked together in a positive manner to foster broadband deployment, and describe the factors or

circumstances that led to such constructive collaboration.

#### B. Options—Possible Actions To Address Current Areas of Concern

29. In this section, we ask interested persons to comment on a number of actions the Commission might take to foster broadband deployment by addressing rights of way and wireless facilities siting concerns. For analytical purposes we have broken the options into two groups: One focused primarily on possible voluntary programs and educational activities coordinated or facilitated by the Commission, and the other involving the exercise of Commission rulemaking or adjudicatory authority. These sets of options are not mutually exclusive. We ask interested parties to comment on the benefits and costs of each of these potential actions, and to quantify those benefits and costs to the extent possible. We also ask interested parties to comment on the extent of the Commission's authority to take the various actions discussed below, particularly the Commission's authority to engage in rulemaking and/or adjudication. We also ask whether there are other effective options to foster broadband deployment through improvements in rights of way or wireless facilities siting governance.

##### 1. Voluntary Programs and Educational Activities

30. *Commission Educational Efforts and Voluntary Activities:* Should the Commission address rights of way and wireless facilities siting concerns through educational efforts and voluntary activities? We ask interested parties to focus on the substantive scope of such educational voluntary activities described below.

31. *Best/Worst Practices:* Should the Commission compile a set of best practices for public rights of way and wireless facilities siting policies that are consistent with facilitating broadband deployment? If so, how should this be done? Should this effort focus on a limited set of problematic issues, or should we instead try to develop a comprehensive set of best practices?

32. *Increased Uniformity:* Closely related to the issue of best practices, although emphasized somewhat differently, is the issue of increased uniformity. Should the Commission work to increase uniformity in rights of way and wireless facilities siting governance among localities and/or within the Federal government? Could the Commission, in partnership with affected stakeholders, develop a model application processes or other procedures or practices, to lower costs

and streamline processes across multiple jurisdictions?

33. With respect to uniformity in practices and procedures within the Federal government, what if any steps should the Commission take to help streamline the process of siting facilities on Federal lands? Should the Commission, for example, recommend convening or participating in an inter-agency task force to inventory current procedures and identify benchmarks for best practices?

34. *Competitions and Awards:* We also ask interested parties to comment on whether the Commission should encourage best practices and increased uniformity by initiating a "race to the top" type of competition. The Commission could promote streamlined processes that provide timely access to rights of way and wireless facilities siting by recognizing individual localities for their outstanding efforts on these issues. By doing so, the Commission would be encouraging more localities and states to implement rights of way or wireless facilities siting best practices and/or increase uniformity in these areas. What kinds of incentives would encourage participation by localities and states?

35. *Commission Sponsored Mediation:* Should the Commission establish a process for voluntary mediation of rights of way and wireless facilities siting disputes by selected state or local representatives working in conjunction with industry? How should such a process be structured, and how could participation be encouraged?

36. *Improved Facilities Deployment Practices in Rights of Way:* Should the Commission work to raise awareness about facilities deployment techniques that could reduce costs and speed deployment? For example, should the Commission promote micro trenching and deployment of Distributed Antenna System facilities on street light and traffic light poles where appropriate? We invite comment on other innovative rights of way or wireless facilities deployment practices that should be considered in this regard.

37. *Recommendations to Congress or the Administration:* The National Broadband Plan recommended that Congress consider allowing agencies to set fees for access to rights of way for broadband services based on direct cost recovery, especially in markets currently underserved or unserved by broadband. The Plan also recommended that the Executive Branch develop master contracts for all Federal property and buildings covering the placement of wireless towers. Are there additional specific actions that the Commission

should recommend to the Administration or to Congress that would remove roadblocks and encourage further broadband build out on Federal properties? For example, should the Commission recommend that the Executive Branch formally permit wireless facility sites on Federal property, including postal service property? Should the Commission make recommendations to Congress or the Administration concerning rights of way or wireless facilities siting concerns? For example, is legislation needed to address certain concerns? Would Congressional action promote uniformity? Should the Commission make recommendations to the Administration? We invite suggestions for specific legislative language recommended for Congress.

## 2. Rulemaking and Adjudication

38. In this section we discuss possible rulemaking and adjudication options. We note that these options may work well as backstops to voluntary action and Commission educational efforts or in combination with such options.

39. *Adopt Policy Guidelines:* Should the Commission adopt policy guidelines addressing rights of way or wireless facilities siting issues? Such guidelines could set out the Commission's views on various issues, such as application processing time frames, but would not be enforceable as rules. We invite comment on the policy benefits and drawbacks of this option.

40. *Adopt Rules:* Should the Commission adopt rules designed to foster broadband deployment by addressing rights of way or wireless facilities siting problems?

41. *Substantive Scope of Policy Guidelines or Rules:* What subjects should be addressed by any policy guidelines or rules adopted by the Commission? For example, should the Commission address the issues described below? Are there other substantive issues in this proceeding that the Commission should address through policy guidelines or rules?

42. *Safe Harbors/Triggers:* Should the Commission adopt policy guidelines or rules establishing safe harbors for rights of way and wireless facilities siting procedures, practices, and charges; or triggers that would subject such procedures, practices, and charges to heightened scrutiny by the Commission or a court in particular circumstances? If so, what procedures, practices, and rates should be included in this approach?

43. *Billing Practices:* Should the Commission adopt guidelines or rules allowing or requiring infrastructure

providers to impose separate line item fees to recover rights of way or wireless facilities siting charges directly from subscribers in the jurisdiction imposing such charges in order to increase transparency and accountability and minimize cross-subsidies?

44. *Interpretation of Sections 253 and 332:* Should the Commission adopt guidelines or rules interpreting the terms of these statutory provisions with respect to rights of way and wireless facilities siting requirements? If so, what provisions of each section should the Commission address and how should those provisions be interpreted?

45. *Adjudication:* Should the Commission address certain rights of way problems through adjudication under section 253? Would this approach be well suited to addressing problems that are not widespread, but may represent significant obstacles to broadband deployment in a particular locality or a small number of localities?

## 3. Other Proposals

46. We also invite interested parties to suggest other specific actions the Commission could take to improve policies regarding public rights of way and wireless facilities siting. In each case, we ask them to describe the problem or subject matter addressed and its effect on broadband deployment. We then ask them to explain their proposal. We also ask interested persons to describe the benefits of such proposals and to address potential drawbacks. In addition, we ask interested persons to identify proposals that can be implemented relatively quickly and those that would take longer to implement, along with suggested timelines.

## IV. Legal Authority

47. We believe the Commission has authority to engage in educational activities to foster broadband deployment through improved policies regarding public rights of way and wireless facilities siting and to coordinate and participate in voluntary activities designed to achieve this goal. We also believe the Commission has authority to adopt policy guidelines and rules concerning these issues. We ask for comment on these views and on whether the Commission has authority to adjudicate rights of way cases under section 253. An analysis of these legal issues is set forth below. In this regard, we emphasize that the views described here do not represent final determinations on these issues and that our ultimate legal conclusions will reflect a careful consideration of the comments addressing these issues.

### A. Background

48. We begin by reviewing the terms of the statutory provisions most relevant to this proceeding—section 706 of the 1996 Telecommunications Act and sections 253 and 332(c)(7) of the Communications Act. We also address a number of additional statutory provisions in this section.

49. Section 706(a) provides that the Commission is to encourage the deployment of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) on a reasonable and timely basis. In granting the Commission authority to fulfill this mandate, Congress specifically directed the Commission to use various regulatory methods, including those that remove barriers to infrastructure investment. In the *2010 Sixth Broadband Deployment Report*, the Commission concluded that broadband was not being deployed to all Americans in a reasonable and timely manner. When the Commission makes such a negative determination, section 706(b) requires that the agency take immediate action to accelerate broadband deployment of by removing barriers to infrastructure investment and promoting competition.

50. Section 253(a) bars state or local statutes, regulations, or other legal requirements that prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service. Section 253(b) contains a safe harbor preserving competitively neutral state requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers. Section 253(c) also preserves the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis. Section 253(d) expressly requires the Commission to preempt state or local government action in certain situations.

51. Section 332(c)(7) of the Act applies to rights of way issues concerning wireless services. It preserves state and local authority over decisions regarding the placement, construction, and modification of personal wireless service facilities subject to certain limitations. However, under section 332(c)(7), the regulation of the placement, construction, and modification of personal wireless

service facilities by any State or local government must not prohibit or have the effect of prohibiting the provision of personal wireless services. The statute also requires the State or local government to act on any request to place, construct, or modify personal wireless service facilities within a reasonable period of time.

### B. Authority for Educational Activities and Voluntary Programs

52. We believe the Commission has ample authority to engage in educational efforts to foster broadband deployment by encouraging improvements in policies regarding public rights of way and wireless facilities siting. We also think the Commission has ample authority to participate in or facilitate voluntary endeavors to achieve this goal. Section 706(a) specifically charges the Commission with encouraging the deployment of broadband through the use of methods that remove barriers to infrastructure investment. Section 1 of the Act also states that the Commission was created to ensure rapid, efficient communication services. In addition, section 4(i) gives the Commission broad authority to take whatever actions are necessary to the execution of its functions as long as they are not otherwise inconsistent with the Act. Education and involvement in voluntary programs would advance the goals of section 706 and section 1 and come within the broad flexibility accorded the Commission under section 4(i). We believe that such activities also further the goals of sections 253 and 332 by reducing the likelihood of state or local actions that have the effect of prohibiting the provision of a telecommunications service or personal wireless service in violation of those sections. We seek comment on these issues.

### C. Authority for Rulemaking

53. We also believe that the Commission has authority to engage in rulemaking to improve rights of way and wireless facilities siting governance. Section 201(b) states that the Commission may prescribe rules and regulations necessary to carry out the provisions of the Act. Section 303(r) contains a similar grant of rulemaking authority, and section 4(i) authorizes the Commission to make rules and regulations, and issue orders necessary in the execution of its functions. Thus, we believe the Commission has broad general rulemaking authority that would allow it to issue rules interpreting sections 253 and 332. We seek comment on this view. Could the Commission, for

example, adopt rules further defining when a state or local legal requirement constitutes an effective barrier to the provision of a telecommunications service under section 253(a) or defining what constitutes fair and reasonable compensation under section 253(c)? We also seek comment on our authority to adopt rules concerning matters in this proceeding pursuant to section 706.

### D. Adjudication of Rights of Way Cases Under Section 253

54. We also invite comment on whether the Commission has authority to adjudicate rights of way disputes under section 253. The Commission has not taken action to resolve this issue and courts have taken differing approaches. Moreover, to the extent that the statutory language is ambiguous, the Commission is not bound by those courts' statutory interpretations.

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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## DEPARTMENT OF TRANSPORTATION

### Federal Motor Carrier Safety Administration

#### 49 CFR Parts 390 and 391

[Docket No. FMCSA-2008-0363]

RIN 2126-AA97

### National Registry of Certified Medical Examiners

**ACTION:** Notice of availability of draft guidance; request for comments.

**SUMMARY:** FMCSA announces the availability for public review and comment draft guidance for the core curriculum specifications that could be used by training providers in implementing the National Registry of Certified Medical Examiners (National Registry) proposed rule. The National Registry is required by section 4116 of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU). On December 1, 2008, the Agency published a Notice of Proposed Rulemaking to implement the National Registry and the proposal included minimum training requirements for medical examiners. The draft guidance announced by this notice would provide core curriculum specifications as additional information for training organizations that may need such assistance in developing training