

LCB File No. R082-01

**PROPOSED REGULATION
OF THE NEVADA DEPARTMENT OF TRANSPORTATION**

(This proposed regulation was adopted as LCB file No. T057-01)

Bolded italics are proposed additions and ~~strikeouts~~ are proposed deletions.

AUTHORITY: NRS 408.423

Section 1. Chapter 408 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 16, inclusive, of this regulation:

Sec. 2. *"Telecommunication facility" means any telecommunication or community antenna television company cable line, fiber, wire, conduit, interduct, access manhole, handhole, tower, pedestal, pole, box, transmitting equipment, receiving equipment, power equipment, system and device, used to transmit, receive, produce, or distribute a wireless, wireline, electronic, or optical signal for communication purposes.*

Sec. 3. *For the purposes of sections 4 to 16, inclusive, of this regulation and NAC 408.403, "highway right of way" means the longitudinal right of way along, under and above a state or federal highway, which is not likely to be disposed of in accordance with NRS 408.523, 408.527 or 408.533.*

Sec. 4. *It is the policy of the department in managing its rights of way to accommodate telecommunications facilities along highway rights of way in accordance with the Telecommunications Act of 1996, Public Law 104-104, 110 Stat. 56-161, when such use and occupancy of the state highway or highway right of way do not adversely impact highway or traffic safety, or otherwise impair unreasonably the state highway, or its aesthetic quality, and do not conflict with federal, state and local laws and regulations, including any rights of underlying property owners that granted easements to the department. Except for existing aerial facilities with capacity, it is presumed that telecommunications facilities will be installed underground. The department may permit aerial installations if it determines there to be unusual circumstances. In determining whether or not to permit an aerial installation, the department will consider safety, in addition to the factors contained in NAC 408.467.*

Sec. 5. *1. Except as provided in subsection 2 of this section, to minimize adverse impacts to the state highway or highway right of way, and related highway facilities and pavement structures, and to avoid a significant compromise of the safe, efficient and convenient use of the state highway system for the traveling public, the department may limit the number of trenches, plowings or borings in a particular section of any state highway or highway right of way to once every 5 years.*

2. The department:

(a) May at any time; and

(b) Shall once every 18 months,

grant an exception to the limitation set forth in subsection 1 of this section in special cases as needed by telecommunications or community antenna television companies to carry out the obligations to serve under federal, state or local laws, or local government franchise

agreements in instances where trenching, plowing or boring in a particular section of any state highway or highway right of way for the installation of telecommunications facilities is the only practicable method of constructing or installing the required telecommunications facility. Nothing in this section is intended to impair any rights which may be afforded to telecommunications carriers under the Telecommunications Act.

3. In determining whether or not to grant an exception pursuant to subsection 2 of this section, the department will, in management of the rights of way, consider the feasibility of alternatives, the type of highway facility, and impact to the traveling public and the highway system.

4. In instances where an exception is granted pursuant to subsection 2 of this section, the applicant must obtain a permit, and the department may require the permittee to mitigate any impact caused to the state highway or highway right of way.

5. Subsection 1 of this section shall not restrict the frequency of applications by a permittee for a telecommunication facility to obtain a permit for occupancy or encroachment of the same or substantially similar physical area within a state highway or highway right of way where occupancy or encroachment is necessary for emergency situations to protect public health and safety in accordance with paragraph 27 of the department's Terms and Conditions Relating to Right-of-Way Occupancy Permits (1986 edition and any subsequent editions issued by the department which may be obtained from the department at 1263 South Stewart Street, Carson City, Nevada 89712, at no cost).

Sec. 6. The minimum depth for the installation of new direct buried telecommunication lines and conduits will be 36 inches, except that the minimum depth may be 42 inches when necessitated by department design requirements. The department may require deeper installations in areas where it is needed, such as the toe of a slope.

Sec. 7. 1. Except as provided in NAC 408.403, a permittee constructing or installing a telecommunication facility upon a state highway or highway right of way must provide to the department the information required in NAC 408.411, Section 6; NAC 408.413; NAC 408.427; NAC 408.523, Section 3, and the information required in the department's Terms and Conditions Relating to Right-of-Way Occupancy Permits (1986 edition and any subsequent editions issued by the department which may be obtained from the department at 1263 South Stewart Street, Carson City, Nevada 89712 at no cost), Section II, General Requirements Regarding Preparation and Submission, (2) Plans, (3) Traffic Control, (5) Drainage Plan, when it is necessary for installing the facility, (6) Cultural Resources Survey, if necessary, and (7) Approval from Local Agencies, if required. A permittee constructing or installing a telecommunication facility upon the part of a freeway where access is controlled must also provide to the department the information required in NAC 408.411, Sections 3, 4, and 5.

2. If approval from a local governmental agency is required and is not submitted to the department, any permit issued under this section will be contingent upon approval from the local government agency.

3. If approval from a federal agency or other state agency is required and is not submitted to the department, and the application can otherwise be issued by the department, the department will issue a notice of intent to approve the applicant's permit which is contingent upon the approval by the federal agency or other state agency.

4. The applicant must provide the fee required by section 16 of this regulation.

Sec. 8. 1. Following receipt of an application for a permit to install or construct a telecommunication facility, the department will determine if public notice of the application is

required to provide other interested parties the opportunity to install telecommunications facilities in the same segment of the state highway or highway right of way. If public notice is required, the department will notify the applicant in writing within 15 working days of receipt of the application.

2. The department may require the applicant for a permit to install or construct a telecommunication facility to provide public notice if such facility will be:

- (a) On any part of a state highway or highway right of way where access is controlled; or*
- (b) One mile or more in length; and,*

the department determines that the future construction or installation of additional telecommunication facilities will be precluded or limited because of insufficient state highway or highway right of way, the physical constraints of a particular location, safety concerns or other relevant factors.

3. If the department determines that public notice is required pursuant to subsection 2 of this section, the applicant must:

(a) Publish the notice twice in two regional newspapers of general circulation in this state. The notice must provide a comment period of no less than 30 days from the date of publication.

(b) Provide notice to all telecommunications companies included on the service list for interconnection agreements maintained by the Public Utilities Commission of Nevada, or any other such list established by the department, and provide these telecommunications companies a comment period of no less than 30 days from the date they are notified.

4. The applicant shall submit to the department a copy of the notices required by subsection 3 of this section, along with any comments received by the applicant, prior to any permit being approved.

Sec. 9. *1. The department will approve or deny an application for a permit in writing within 90 days after a substantially completed application is received. Where the department denies the application, the written notice will include the reasons for denial.*

2. The department will provide to the applicant a written status report within 45 days. For significant projects, the department may provide to the applicant a written status report within 90 days, in lieu of the approval or denial, and indicate that additional time will be needed to complete the review. The time periods prescribed by this section will be extended if the application is deficient and requires additional information.

3. In determining whether or not to grant a permit, the department will review the application to assure compliance with all applicable provisions of:

- (a) NAC 408.403 through NAC 408.419, inclusive;*
- (b) NAC 408.447 through NAC 408.459, inclusive;*
- (c) NAC 408.467 through NAC 408.469, inclusive;*

(d) The department's Terms and Conditions Relating to Right-of-Way Occupancy Permits (1986 edition and any subsequent editions issued by the department which may be obtained from the department at 1263 South Stewart Street, Carson City, Nevada 89712 at no cost), Section IV, Underground Utilities and Section V, Overhead Utilities;

(e) Other relevant federal and state laws including, but not limited to, environmental, wetlands, endangered species, historic preservation, and cultural resources; and

(f) For above ground facilities over 8 feet in height, any required approval from local government agencies, which may include a public hearing process.

4. If the department approves an application, it may require a surety bond in the amount

of \$100,000. The department will, in determining whether or not a bond is necessary, consider the experience the department has with the utility, the potential disruption of the maintenance and operation of the highway resulting from the installation of the telecommunication facility, the potential for increased hazards to the users of the highway if the telecommunications facility is not installed in a timely manner, or is installed in a manner inconsistent with the provisions of the permit, and potential damage to the highway system itself. The department may require a surety bond up to \$2 million for the installation of telecommunications facility of significant length.

Sec. 10. *1. In lieu of permits to install new telecommunications facilities and change existing permitted telecommunications facilities during a given year beginning March 15th, and at the request of the applicant, the department may grant to an applicant an annual permit for the installation of new and changing existing permitted telecommunications facilities that are less than one-half mile in length on specific state highway or highway rights of way, except for Interstate and other controlled access highways.*

2. If the applicant seeks to operate under an annual permit, an annual permit must be obtained for each highway district in which new telecommunications facilities will be installed or existing permitted telecommunications facilities will be changed during a given year beginning March 15th. An applicant must submit a completed application to the department's district office in each district for which an annual permit is requested by January 15th of each year. The department will grant, deny or renew an annual permit application by March 15th of each year. If an annual permit is granted, it will be valid until March 15th of the following year.

3. The department's district office may exclude certain state highways or highway rights of way, or segments of such highways or rights of way, from the annual permit.

4. The department may require a surety bond in the amount of \$200,000 for each annual permit.

Sec. 11. *1. If an annual permit is approved pursuant to Section 10, the department's district office must be notified no less than 5 working days in advance of installation of a new telecommunication facility, or change to an existing permitted telecommunications facility.*

2. The department's district office will require plans showing the location, including elevation and alignment of the telecommunication facility installation, a construction schedule and traffic control plan pursuant to NAC 408.413.

3. The department's district office may deny or limit access under an annual permit issued pursuant to Section 10, based on conflict with highway projects or other relevant factors, and limit the hours of work where necessary such as in residential and commercial areas. All telecommunication facility installations must be made in accordance with the conditions of the annual permit. Failure to comply with the conditions of the annual permit may result in revocation of the annual permit.

Sec. 12. *1. If a permittee wishes to change telecommunications facilities in an existing permitted telecommunication facility, the permittee must provide the department's district office no less than 5 working days in advance of the work with a written description of the change and an explanation of how the works fits within the scope of the original permit which was issued by the department, a basic plan showing the location of the existing facility and facilities to be added, a construction schedule, and traffic control plan pursuant to NAC 408.413. If there is no department permit for the existing facility, the permittee may provide a*

copy of the permit for the existing facility issued by the county or city.

2. The applicant must provide the fee required by sections 10 or 16 of this regulation.

Sec 13. *The inspection and repair of telecommunications facilities must be performed in accordance with NAC 408.461, and the department's Terms and Conditions Relating to Right-of-Way Occupancy Permits (1986 edition and any subsequent editions issued by the department which may be obtained from the department at 1263 South Stewart Street, Carson City, Nevada 89712 at no cost), Section III, (27) Emergencies and (28) Control of Access Highways, Section IV Underground Utilities (10) Emergency Repairs, and Section V Overhead Utilities (8) Routine Inspection and Maintenance of Pole Lines.*

Sec. 14. *1. If the department approves an application, the utility must comply with the department's Terms and Conditions Relating to Right-of-Way Occupancy Permits (1986 edition and any subsequent editions issued by the department which may be obtained from the department at 1263 South Stewart Street, Carson City, Nevada 89712 at no cost), Section III, General Conditions, as well as any specific conditions required by the department.*

2. Nothing in this section should be construed to prohibit the department from requiring additional conditions in a permit to install telecommunications facilities upon a state highway or highway right of way, including but not limited to:

(a) Installing additional conduits to be available on a competitively-neutral and non-discriminatory basis to other permittees, which shall remain the property of the permittee, where physical constraints preclude future installations;

(b) Providing construction inspection through the use of an engineering consultant approved by the department, or through other means acceptable to the department; and,

(c) Restoring the state highway or highway right of way and pavement to its original condition.

Sec. 15. *1. The permittee shall indemnify, defend and save harmless the state, the department and its officers, agents and employees from any and all claims, causes of action, suits at law or in equity, for losses, damages, claims or demands, and from any and all liability and expense of whatsoever nature (including reasonable attorney's fees) arising out of the permittee's use or occupancy of the state highway or highway right of way, except where such permittee establishes a claim that the cause of the damage or injury is the willful misconduct or gross negligence of the state, the department or its officers, agents or employees.*

2. The state, the department or its employees will not be liable for expense incurred by the utility in its use and occupancy of the state highway or highway right of way.

3. Subject to the requirement of NAC 408.303 to 408.379, inclusive, permits for telecommunications facilities are revocable and the department assumes no responsibility for relocating telecommunications facilities.

Sec. 16. *1. Fees for reviewing applications and inspecting installations are contained in the department's Terms and Conditions Relating to Right-of-Way Occupancy Permits (1986 edition and any subsequent editions issued by the department which may be obtained from the department at 1263 South Stewart Street, Carson City, Nevada 89712 at no cost), Section II, General Requirements Regarding Preparation and Submission, (1) Fees.*

2. All fees are non-refundable, except that the department may only retain the non-refundable portion of the fee for an application which is not granted.

Sec. 17. NAC 408.403 is hereby amended to read as follows:

408.403 1. Each facility or encroachment upon a state highway or **highway** right of way

for a state highway must be authorized pursuant to an agreement *a permit* to occupy or use the highway right of way unless the occupancy *facility or encroachment* was established before the highway became a state highway.

2. If the department does not have a fee interest in the property upon which the state highway *or highway right of way* is located, the owner of the facility or other encroachment upon the state highway *or highway right of way* must obtain an occupancy permit and, *except as provided in subsections 7 and 8 of this section*, the consent of the owner of the property upon which the state highway *or highway right of way* is located.

3. The department will allow the joint use of state highways or *highway* rights of way for state highways if essential service to the general public is provided and joint use can be accommodated within the state highway *or highway right of way* without substantially affecting the operation, safety, maintenance or aesthetics of the state highway.

4. The department will perpetuate the existing rights of a utility *or owner of a telecommunication facility*, which is required to relocate a facility because or in accommodation of a project of the department if the utility had a prior compensable interest in the property.

5. *Except where required by Part 645 of Title 23 of the Code of Federal Regulations, in acting upon an application for a permit to install, construct, maintain or repair a telecommunications facility, the director may not impose a condition on approval of the application requiring, in instances where the department does not have a fee ownership interest, that the permittee for a telecommunication facility acquire at its sole cost and expense all easements, consents or other rights or interests from owners of fee interests or other interests along any portion of a state highway or highway right of way for such permittee to construct, install, operate, maintain, repair, replace or remove a telecommunication facility, provided such permittee furnishes indemnification to the state and the department pursuant to the provisions of subsection 7 of this section, and the information required in subsection 8 of this section.*

6. *Any permit issued by the director pursuant to this section authorizes the permittee only to occupy the state highway or highway right of way to the extent of the interest therein of the state and the department and does not confer on the permittee any rights to or interest in the underlying fee or other property interests therein of another person, if any.*

7. *In instances where the department does not have a fee ownership interest in a state highway or highway right of way each permittee must indemnify, defend and save harmless the state, the department and its officers, agents, and employees from any and all claims, causes of action, liability, loss, damage, cost, expense, and fee of whatever nature which it or they may incur, suffer or be required to pay to any person claiming the fee interest or other property interest therein in such state highway or highway right of way, except where such permittee establishes that the cause of the damage or injury is the willful misconduct or gross negligence of the state, the department or its officers, agents or employees. The indemnity required by this subsection must include:*

(a) *The obligation of the permittee to commence and diligently prosecute an appropriate cause of action or defend any other cause of action to protect the department from the immediate or automatic reversion of any easement or other interest in the state highway or highway right of way and remove any permitted telecommunication facility from the state highway or highway right of way if ordered by a court with jurisdiction;*

(b) *At the discretion of the department, for permittees or their successors in interest with net assets of a value of less than \$20 million located in the State of Nevada, the obligation to*

provide and maintain a satisfactory surety or indemnity bond, in an amount determined by the department based on reasonable costs associated with removal of telecommunications facilities and restoration of the rights of way, naming the state, the department and its employees in the event the permittee's indemnity is insufficient; and

(c) The written obligation of the permittee to include in any instrument transferring ownership of the telecommunication facility, a copy of which instrument must be submitted to the department subject to such confidential and non-discriminatory requirements agreed to by the party to such instruments, the assumption and acceptance by the transferee of the indemnity and, where applicable, the surety or indemnity bond to the state and the department as required by this section.

8. In instances where the department does not have a fee ownership interest in a state highway or highway right of way and the application does not relate to an existing telecommunication facility, the applicant must provide a verification that the applicant has conducted due diligence and an explanation of the factual or legal basis supporting the applicant's right to occupy the state highway or highway right of way.