FEDERAL HIGHWAY ADMINISTRATION
OFFICE OF REAL ESTATE SERVICES
PRESENTS:

FEDERAL REGULATORY REQUIREMENTS - ALTERNATIVE USE OF THE HIGHWAY ROW

Presented by FHWA
Key Topics

- Federal Interest in the Right-of-Way (ROW)?
- Federal Statutory and Regulatory Requirements Affecting the Use of the ROW.
- Utility Accommodation Provisions or ROW Provisions?
1) Why is the Federal Government Interested in the Use of the ROW?

- President Eisenhower promoted program to build the Interstate System.
  - Nation’s Governors did not want to increase taxes.
  - Program took shape in the Federal-Aid Highway Act of 1956.
  - Congress retained Federal/State Matching share of 90%-10%

- The Interstate System is important to the Nation's economy, defense, and mobility, Federal statutes and regulations in place to protect the Federal interest.
23 CFR 1.23(b)

- Real property acquired for highway purposes within the boundaries of a federally-assisted highway project...shall be devoted exclusively to public highway purposes.

- Other use or occupancy. Subject to 23 U.S.C. 111
  - Non-highway use may be approved by the Administrator if the use is
    - in the public interest,
    - will not impair the highway, or
    - interfere with the free and safe flow of traffic thereon.
(a) Prohibited commercial activity within the Interstate ROW
- prohibits commercial establishments for serving motor vehicle users;
- Grandfathers commercial establishments prior to 01/01/1960; and
- Allows the use of airspace but no access from the interstate right-of-way.

(b) Rest areas
- limited commercial activities for serving motor vehicle users.
- Vending machines – Federal Register Notice closed 12/27/16 - Docket number 2016-23269
Regulations Governing the Use of Right-of-Way

- **Utility Accommodation Policy/Plan**
  (23 CFR 645 Subpart B)

- **ROW Use Agreement** (AKA Air Space Agreements)
  (23 CFR 710 Subpart D)

- **Basic requirements for both options**
  - Must be in the **public interest**;
  - Must not affect **safety** or **operation** of the facility;
  - Must consider **Environmental effects**;
Utility Test Determination (2 parts)

1) Does the facility qualify as a utility?

- Federal definition for Utility is very broad.
  “privately, publicly or cooperatively owned line, facility, or system for producing, transmitting, or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water steam, waste, storm water not connected with highway drainage, or any other similar commodity, including any fire or police signal system or street lighting system, which directly or indirectly serves the public.” 23 CFR 645.207
Utility Test Determination (2 parts)

1) Does the facility qualify as a utility?

- State definition for utility may be more restrictive.
  - Is it regulated by the government?
  - Is it a new or untried technology which is not a regulated utility service? The state may not consider the service a utility.
Utility Test Determination

2) Does the service directly or indirectly serve the public?—23 CFR 645.207

- Public vs. Private
  - Public line – electricity goes into the grid
  - Private line – serves a limited proprietary use (dedicated services to a corporation)

- May require a legal opinion from the State to establish the status of the facility. (must be documented)
Facility Qualifies as a Utility

Utility Accommodation Manual/Plan (23 CFR 645 Subpart B)

- **FHWA approved** (programmatic)

- **Agreement** - Special Use Permit or Joint Use Agreement or similar document
  - adequately protect the highway;
  - clearly defines the each parties’ responsibilities and authorities;
  - meet safety requirements; and
  - meet NEPA requirements as appropriate.

- **Fees** charged for utility use are at a states discretion and may be used as the State sees fit. The FHWA encourages States to use generated revenues for transportation purposes.
If the service does NOT qualify as a “Utility”…

ROW Use Agreement—23 CFR 710.405 NEW

- **Final Rule** - Air Space replaced w/ROW USE Agreement,
- Federal approval - **Site specific** (Not programmatic),
- **Fair Market Rent** required for land with exception: Public interest- social, environment, and economic,
- **Planning** is there a conflict with future expansion or use of the ROW,
- **Safety, Traffic, Maintenance, Security,**
- **Access** to facility – not from the ROW,
- **Public Interest** (directly or indirectly serves the public assists in operational costs for DOT) no commercialization, and
- **Environmental** clearance.
ROW Use Agreement

Application Requirements

- 23 CFR 710.405(e) Application requirements: NEW
  - Identifies party;
  - Describes proposed use and why it would be in the public interest;
  - Documents that the proposed use would not impair highway flow of traffic;
  - Lists the provisions for maintenance access;
  - Provides general provisions: term of use, insurance requirements, design limitations, safety, and accessibility maintenance; and
  - Provides design for the use of the space including facilities to be constructed;
    - Maps, plans, sketches;
  - 3D presentation unless it is to be used for leisure activity, then a metes and bound description, plans, cross sections may be provided in lieu of.
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## Federal Funds Participated in the Highway Project

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Alternative Uses of the Right of Way/Fiber Optics on the Interstate
Utah DOT Experience

Chattanooga, Tennessee
May 1, 2019
UDOT’s Fiber Optic Network
Coordinating with Telecomms

- Yearly planning meetings
  - Single point of contact
  - Telecomm wish-list
- Know what facilities are in the ROW in order to direct questions to the right people
  - Permits Office
  - ROW Office
- Communication is the key!
Reducing Broadband Deployment Time

- DOT involvement makes access to the ROW easier
  - Cooperation between other state and federal agencies
    - Forest Service
    - BLM
    - School Trust Lands
    - State and National Parks
  - Telecomm wish-list
- Do not allow exclusive access!
Underserved Area Incentives

• Help communities understand how to attract fiber providers
  ▪ Allow them to use DOT standards for construction
  ▪ Attend City/County planning meetings to help with coordination

• Build it and they will come
  ▪ Big & Little Cottonwood Canyons
  ▪ Fiber in the canyons boosts economic development
Big & Little Cottonwood Canyons
Big & Little Cottonwood Canyons

4 major ski resorts
500 inches of annual snowfall
Year-round recreation
Peak Traffic Days are Snow Days
Avalanches
Project Summary

- Project Estimate: $5 Million
  - 35 poles
  - 24.5 miles of fiber optics
  - 7200 volt electrical system
  - 12 new cameras
  - 8 Road Weather Information Systems (RWIS)
  - 15 chain-up signs
  - Improved communications for all users
  - Avalanche Operations Center
References

- State Code/Rules for Longitudinal Telecommunications Access
  - http://le.utah.gov/code/TITLE72/htm/72_07_010800.htm
Solar Power at Maryland DOT
About MDOT

7 BUSINESS UNITS

The Secretary's Office (Headquarters)
Aviation Administration
Highway Administration
Motor Vehicle Administration
Port Administration
Transit Administration
Transportation Authority
Annual Energy Consumption

UTILITY
- 395,000 MWH
- $40M
- 275K MT CO2E

SOLAR
- 2,300 MWH
- $265K
- 1.6K MT CO2E
Why Solar?

**SOCIAL**
- Reliable and resilient energy source
- Improved public health

**ENVIRONMENTAL**
- Greenhouse gas emission reduction
- Water pollution reduction

**ECONOMIC**
- Local, well-paying jobs
- Affordable, stable energy prices
State & Federal Incentives

- **RENEWABLE PORTFOLIO STANDARD**
  - 25% by 2020
  - 2.5% solar carve out

- **GREENHOUSE GAS REDUCTION ACT**
  - 40% by 2030

- **COMMUNITY SOLAR**

- **NET METERING**

- **ENERGY ADMINISTRATION GRANTS**

  - **INVESTMENT TAX CREDIT**
    - 30% until 2019
    - 26% until 2020
    - 22% until 2021
    - 10% thereafter

  - **5-YR MODIFIED ACCELERATED COST RECOVERY SYSTEM (MACRS)**
Master Services Agreement

- Designed to promote innovation and competition
- 5-year contract, 2-year renewal
- Qualify master contractors
- Secondary competition for tasks
- Power purchase & license agreements (25-year term)
- Energy performance, storage, microgrids, electric vehicle charging
- Buyout option
- Cooperative agreement
Task Order Process

- MDOT SELECTS SITE(S) AND RELEASES TASK ORDER RFP TO MASTER CONTRACTORS
- MASTER CONTRACTORS ANALYZE SITES AND SUBMIT PROPOSAL
- MDOT AWARDS TO MASTER CONTRACTOR WITH MOST ADVANTAGEOUS PROPOSAL
- MASTER CONTRACTOR FINANCES, DEVELOPS, DESIGNS, CONSTRUCTS, COMMISSIONS, OPERATES, MAINTAINS AND DECOMMISSIONS
- MDOT PROVIDES THE LAND AND PURCHASES SOLAR POWER, OR COMMUNITY BUYS POWER
Benefits

**DEVELOPER**

- Receives all tax incentives (ITC & MACRS)
- Long-term agreement with MDOT to buy energy produced

**MDOT**

- Zero upfront capital cost
- Full utilization of Federal tax incentives (ITC & MACRS)
- Favorable fixed electricity rate
- License revenue (Community Solar, EV chargers)
- Solar Renewable Energy Credits (SRECs)
Phase I Sites

- 35 sites
- 34 MW
- 46,000 MWH/YR
- $966K SRECS ($7)
- 32,300 MT CO2E/YR
- 326 jobs
Phase II Sites

- Airport
- Port
- Transit-oriented development
- Noise barriers
- Unimproved land
Timeline

April 2016
- Secretary authorized evaluation

July 2016
- Request for Information released

October 2016
- Secretary approved project
  - *No upfront capital
  - *No impact to operations

December 2016
- Governor's Office approved project

June 2017
- Request for Proposal released

August 2017
- Proposals received

February 2018
- Master Contract awarded
CHALLENGES

COMPETING USE OF PROPERTY
STRUCTURAL INTEGRITY OF EXISTING INFRASTRUCTURE
SAFETY & SECURITY
UTILITIES
SIGNAGE
OPERATION & MAINTENANCE
CHESAPEAKE BAY WATER QUALITY TREATMENT
INTERCONNECTION
Lessons Learned (so far)

- Existing Leases & Bonds
- Support from Other State Agencies
- Outreach to Other State Dots
- State-wide Bulk Energy Procurement
- Legal Support – Procurement, Energy, Real Estate
- Multi-discipline Team
- Technical Expertise
- Existing Internal Approval Processes
Contact

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