



**DEPARTMENT OF TRANSPORTATION**

**[4910-22-P]**

**Federal Highway Administration**

**23 CFR Part 645**

**[Docket No. FHWA-2019-0037]**

**RIN 2125-AF92**

**Broadband Infrastructure Deployment**

**AGENCY:** Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM); request for comments.

**SUMMARY:** FHWA proposes to amend its regulations governing the accommodation of utilities on the right-of-way (ROW) of Federal-aid or direct Federal highway projects to implement requirements of the Consolidated Appropriations Act, 2018, for broadband infrastructure deployment. The requirements, which will apply to each State that receives Federal funds under Chapter 1 of Title 23, United States Code (U.S.C.), aim to facilitate the installation of broadband infrastructure.

**DATES:** Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**ADDRESSES:** To ensure that you do not duplicate your docket submissions, please submit them by only one of the following means:

- **Federal eRulemaking Portal:** Go to <http://www.regulations.gov> and follow the online instructions for submitting comments.
- **Mail:** Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue, SE., Washington, D.C. 20590-0001.

- Hand Delivery: U.S. Department of Transportation, Docket Operations, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue, SE., Washington, D.C. 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329.

All submissions should include the agency name and the docket number that appears in the heading of this document or the Regulatory Identification Number (RIN) for the rulemaking. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Julie Johnston, Office of Preconstruction, Construction and Pavements (HICP-10), (202) 591-5858, or via e-mail at [Julie.Johnston@dot.gov](mailto:Julie.Johnston@dot.gov), or Mr. Lev Gabrilovich, Office of the Chief Counsel (HCC-30), (202) 366-3813, or via e-mail at [Lev.Gabrilovich@dot.gov](mailto:Lev.Gabrilovich@dot.gov). Office hours are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

**SUPPLEMENTARY INFORMATION:**

**Electronic Access and Filing**

This document and all comments received may be viewed online through the Federal eRulemaking portal at <http://www.regulations.gov>. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at: <http://www.archives.gov/federal-register> and the Government Publishing Office's Web page at: <http://www.govinfo.gov/app/frtoc/today>.

All comments received before the close of business on the comment closing date

indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA will also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period and after DOT has had the opportunity to review the comments submitted.

### **Background**

FHWA recognizes that it is in the public interest for utility facilities to use jointly the ROW of public roads and streets when such use and occupancy do not adversely affect highway or traffic safety, or otherwise impair the highway or its aesthetic quality, and does not conflict with Federal, State, or local laws and regulations. The opportunity for such joint use avoids the additional cost of acquiring separate ROW for the exclusive accommodation of utilities. As a result, the ROW of highways is often used to provide public services to abutting residents as well as to serve conventional highway needs.

Utility facilities, unlike most other fixed objects that may be present within the highway environment, are not owned nor are their operations directly controlled by State or local public agencies. Federal laws and FHWA regulations contained in 23 U.S.C. 109, 111, 116, and 123 and 23 CFR parts 1, 635, 645, and 710 regulate the accommodation, relocation, and reimbursement of utilities located within the highway ROW. State departments of transportation (State DOT) are required to develop Utility Accommodation policies that meet these regulations. 23 CFR 645.211.

## **Legal Authority and Statement of the Problem**

The Consolidated Appropriations Act, 2018 (Pub. L. 115-141), Division P, Title VII (“MOBILE NOW Act”), Section 607, Broadband Infrastructure Deployment (47 U.S.C. 1504), directs the Secretary of Transportation to promulgate regulations to ensure that States meet specific registration, notification, and coordination requirements to facilitate broadband infrastructure deployment in the ROW of applicable Federal-aid highway projects. Accordingly, FHWA proposes to revise its regulations governing the accommodation of utilities to implement the Section 607 requirements. This rulemaking is required by statute. It addresses the need to update FHWA regulations to implement the Section 607 requirements.

### **MOBILE NOW Act Direction for Broadband Deployment**

Once the regulations take effect, the Section 607 requirements will apply to each State that receives funds under Chapter 1 of Title 23, U.S.C., including the District of Columbia and the Commonwealth of Puerto Rico. The MOBILE NOW Act defines the term “State” to mean a State, the District of Columbia, and the Commonwealth of Puerto Rico. 49 USC 1504(a)(4). The MOBILE NOW Act defines “appropriate State agency,” as “a State governmental agency that is recognized by the executive branch of the State as having the experience necessary to evaluate and carry out projects relating to the proper and effective installation and operation of broadband infrastructure.” 47 USC 1504(a)(1). In addition, the MOBILE NOW Act defines “broadband infrastructure” as “any buried, underground, or aerial facility, and any wireless or wireline connection, that enables users to send and receive voice, video, data, graphics, or any combination thereof,” 47 USCC 1504(a)(2), and “broadband infrastructure entity” as “any entity that

installs, owns, or operates broadband infrastructure and provides broadband services in a manner consistent with the public interest, convenience, and necessity, as determined by the State.” 47 USC 1504(a)(3).

### **Discussion of General Requirements and Limitations**

In proposed § 645.307(a), FHWA sets out four new requirements of the MOBILE NOW Act. Proposed § 645.307(a)(1) requires that the State DOT, in consultation with appropriate State agencies, identify a broadband utility coordinator who is responsible for facilitating the infrastructure ROW efforts within the State. Under the proposal, the coordinator may reside in the State DOT or in another State agency and may have additional responsibilities.<sup>1</sup> The primary burden of this provision is imposed on States, though States will likely vary considerably in their implementation of it. Some States, for example, may add this responsibility onto the role of an existing employee, while other States may hire a new person to assume this role. The FHWA assumes that another cost to States would be the cost to update their Web sites to provide information about the coordinator and their work. The FHWA expects that the duties of a broadband utility coordinator would be less than a full-time commitment, assuming roughly 30 percent of an employee’s time. This provision would also result in time burdens for FHWA employees, including time to disseminate information and to prepare and present one external and one internal Webinar to explain the proposed requirements to State DOTs, and to conduct any follow-up activities related to the Webinars.

Consistent with Section 607 of the MOBILE NOW Act, FHWA is proposing in §

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<sup>1</sup> The proposed requirements are to be implemented by State DOTs in consultation with appropriate State agencies. While FHWA expects employees of other State agencies to be involved, FHWA assumes that the majority of the time burdens imposed by this rule would accrue to State DOTs.

645.307(a)(2) to require the State DOT, in consultation with appropriate State agencies, to establish a registration process for broadband infrastructure entities that seek to be included. The FHWA believes that States may vary considerably in their approach for implementing this provision, and that States will likely choose an approach that fits with their existing processes. The FHWA assumes that States will spend time implementing this provision to establish the process, update their utility accommodation policy, notify broadband companies, and put the relevant information up on the States' Web sites. The FHWA assumes that these duties would require the most State employee time in the first year, and substantially less time in subsequent years. While FHWA does not have a formal role in the registration process, FHWA would likely incur costs associated with monitoring States' compliance with the requirements.

Consistent with Section 607 of the MOBILE NOW Act, FHWA is proposing in § 645.307(a)(3) to require the State DOT, in consultation with appropriate State agencies, to establish a process for electronically notifying broadband infrastructure entities identified under proposed § 645.307(a)(2), on an annual basis, of the State transportation improvement program and providing other notifications as necessary. To comply with this provision, FHWA assumes that States will create an electronic notification process, update their utility accommodation policies to include this new process, and also notify broadband companies of these changes. The costs to States would primarily be upfront, and there would be smaller annual costs to send the notifications in subsequent years.

Finally, FHWA proposes in § 645.307(a)(4) to require that the State DOT, in consultation with appropriate State agencies, coordinate initiatives under Section 607 of the MOBILE NOW Act with other statewide telecommunication and broadband plans

and State and local transportation and land use plans, including strategies to minimize repeated excavations that involve broadband infrastructure installation in a ROW. The FHWA assumes this proposed provision will be handled by a statewide coordinator. The cost that States would incur to implement this proposed provision may vary considerably due to differing processes across States. The FHWA assumed that the duties associated with this provision would require 25 percent of the time of a management-level employee on an annual basis. The FHWA does not anticipate any costs to accrue to the Agency as a result of this proposed provision, as FHWA would not be directly involved in these coordination efforts.

Proposed § 645.307(b) contains the MOBILE NOW Act provision that, if a State chooses to provide for the installation of broadband infrastructure in the ROW of an applicable Federal-aid highway project, the State DOT must ensure that any existing broadband infrastructure entities are not disadvantaged, as compared to other broadband infrastructure entities, with respect to the Section 607 program. The FHWA assumes that this provision will not result in any time burdens or costs to FHWA, State DOTs, or broadband infrastructure entities.

Consistent with the MOBILE NOW Act, proposed § 645.309 provides that nothing in Part 645, Subpart C, requires that a State install or allow the installation of broadband infrastructure in a highway ROW, and that nothing in part 645, subpart C, authorizes the Secretary to withhold or reserve funds or approval of a Title 23 project. The FHWA again assumes that this provision will not result in any time burdens or costs to FHWA, State DOTs, or broadband infrastructure entities.

The FHWA requests comments on the proposed rule. The FHWA also requests comments and information regarding the assumptions used and other aspects of the economic analysis of the proposed rule to inform the economic analysis at the final rule stage. The FHWA presents the economic analysis in a supporting statement and a spreadsheet found in the rulemaking docket (FHWA-2019-0037) and summarizes the analysis under the “Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs), and DOT Regulatory Policies and Procedures” heading of this preamble.

#### **Rulemaking Analyses and Notices**

#### **Executive Order 12866 (Regulatory Planning and Review), Executive Order 13563 (Improving Regulation and Regulatory Review), and DOT Regulatory Policies and Procedures**

The FHWA has determined that the proposed rule will not be a significant regulatory action within the meaning of Executive Order (E.O.) 12866 or DOT regulatory policies and procedures.<sup>2</sup> This action complies with E.O. 12866, 13563, and 13771 to improve regulation. The FHWA anticipates that the proposed rule would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. The proposed rule also does not raise any novel legal or policy issues.

The following paragraphs summarize the economic analysis for this proposed

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<sup>2</sup> See 49 CFR part 5.

rule. A supporting statement and a spreadsheet in the rulemaking docket (FHWA-2019-0037) contain additional details. The FHWA requests data and information that could inform the economic analysis for this rule, including any estimates of resulting benefits, at the final rule stage.

The FHWA estimated the costs of the proposed rule at \$24.5 million for the 10-year period from 2020 through 2029, or \$3.5 million on an annual basis, measured in 2018 dollars and using a 7 percent discount rate. If a 3 percent discount rate is used, these costs are estimated at \$29.6 million for the same 10-year period, or \$3.5 million on an annual basis, again measured in 2018 dollars.

Table 1 summarizes the economic impacts of the proposed rule that were able to be quantified at this stage of the regulatory process. The quantifiable impacts are the costs that the proposed rule would impose on States and also on FHWA. The costs of the proposed rule are primarily borne by States, with less than 1 percent of the total costs accruing to FHWA and the remaining more than 99 percent of costs accruing to States. Based on the estimated economic impacts and the other criteria for a significant regulatory action under Section 3(f) of E.O. 12866 and as supplemented by E.O. 13563, this proposed rule is not a significant regulatory action.

**Table 1. Estimated Costs of the Broadband Infrastructure Deployment  
Proposed Rule (2018\$)**

<b>Calendar Year</b>	<b>Analysis Period Year</b>	<b>Costs</b>
2020	1	\$4,185,039
2021	2	\$3,380,660
2022	3	\$3,380,660
2023	4	\$3,380,660
2024	5	\$3,380,660
2025	6	\$3,380,660
2026	7	\$3,380,660
2027	8	\$3,380,660
2028	9	\$3,380,660
2029	10	\$3,380,660
<b>Total Undiscounted Costs to FHWA</b>		<b>\$75,502</b>
<b>Total Undiscounted Costs to State DOTs</b>		<b>\$34,535,477</b>
<b>Undiscounted Total Costs</b>		<b>\$34,610,980</b>
<b>Total Costs with 3% Discounting</b>		<b>\$29,618,666</b>
<b>Total Costs with 7% Discounting</b>		<b>\$24,496,098</b>
<b>Average Annual Costs (Undiscounted)</b>		<b>\$3,461,098</b>
<b>Annualized Costs, 3% Discount Rate, 10 Years</b>		<b>\$3,472,211</b>
<b>Annualized Costs, 7% Discount Rate, 10 Years</b>		<b>\$3,487,693</b>

The FHWA anticipates that the proposed rule would result in benefits that would accrue primarily to broadband companies and to residents in areas adjacent to project sites. Several of the proposed provisions will result in increased coordination and cooperation between broadband companies and State DOTs. This increased coordination would have the effect of increasing the ability of broadband companies to conduct project work at times when roads are already closed or under construction for other purposes. Coordination of construction activities between State DOTs and broadband companies is likely to increase the efficiency of projects, and also result in fewer disruptions for area residents if road closures are coordinated rather than occurring at separate times for the purposes of State DOTs and broadband infrastructure. The FHWA, however, lacks the data and information necessary to quantify these potential benefits at this stage in the regulatory process. The FHWA requests data and information from commenters that could inform the economic analysis for this rule, including any estimates of resulting benefits or cost savings, or that could facilitate a quantification of costs, benefits, or cost savings at the final rule stage.

#### **Executive Order 13771 (Reducing Regulation and Controlling Regulatory Costs)**

This proposed rule is not an E.O. 13771 regulatory action because it is not significant under E.O. 12866.

#### **Regulatory Flexibility Act**

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this proposed rule on small entities and has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. The proposed rule affects States, and States are not

included in the definition of small entity set forth in 5 U.S.C. 601. The proposed rule would also affect broadband entities, but the impact on these entities is expected to be beneficial and also to involve potential cost savings. The proposed rule is thus not expected to result in increased costs for broadband entities. Therefore, FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

### **Unfunded Mandates Reform Act of 1995**

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, 109 Stat. 48). This proposed rule would not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any one year (2 U.S.C. 1532). Further, in compliance with the Unfunded Mandates Reform Act of 1995, FHWA will evaluate any regulatory action that might be proposed in subsequent stages of the proceeding to assess the effects on State, local, and Tribal governments and the private sector. In addition, the definition of “Federal Mandate” in the Unfunded Mandates Reform Act excludes financial assistance of the type in which State, local, or Tribal governments have authority to adjust their participation in the program in accordance with changes made in the program by the Federal Government. Finally, this proposed rule only implements requirements specifically set forth in statute.

### **Executive Order 13132 (Federalism Assessment)**

This proposed action has been analyzed in accordance with the principles and criteria contained in E.O. 13132, and FHWA has determined that this proposed action would not have sufficient federalism implications to warrant the preparation of a

federalism assessment. The FHWA has also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

### **Executive Order 13175 (Tribal Consultation)**

The FHWA has analyzed this proposed rule in accordance with the principles and criteria contained in E.O. 13175, "Consultation and Coordination with Indian Tribal Governments." The proposed rule implements statutory requirements that apply to States that receive Title 23 Federal-aid highway funds, and it would not have substantial direct effects on one or more Indian Tribes, would not impose substantial direct compliance costs on Indian Tribal governments, and would not preempt Tribal laws. Accordingly, the funding and consultation requirements of E.O. 13175 do not apply and a Tribal summary impact statement is not required.

### **Paperwork Reduction Act**

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 et seq.), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this proposed rule does not contain collection of information requirements for the purposes of the PRA.

### **National Environmental Policy Act**

The Agency has analyzed this proposed rulemaking action pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) and has determined that it is categorically excluded under 23 CFR 771.117(c)(1), which applies to activities that do not involve or lead directly to construction. Categorically excluded actions meet

the criteria for categorical exclusions under the Council on Environmental Quality regulations (40 CFR 1508.4) and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA. This rulemaking proposes to include in FHWA regulations the coordination, registration, and notification requirements of 47 U.S.C. 1504 that are applicable to States that receive Title 23 Federal-aid highway funds. This rulemaking does not involve and will not lead directly to construction. The FHWA does not anticipate any environmental impacts, and there are no unusual circumstances present under 23 CFR 771.117(b).

#### **Regulation Identification Number**

A RIN is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

#### **List of Subjects in 23 CFR Part 645**

Grant Programs-transportation, Highways and roads, Reporting and recordkeeping requirements, Utilities.

Issued under authority delegated in 49 CFR 1.81 and 1.85.

Nicole R. Nason  
Administrator  
Federal Highway Administration

In consideration of the foregoing, FHWA proposes to amend Part 645 of Title 23 of the CFR as set forth below:

1. Revise the authority citation for part 645 to read as follows:

**Authority:** 23 U.S.C. 101, 109, 111, 116, 123, and 315; 47 U.S.C. 1504; 23 CFR 1.23 and 1.27; 49 CFR 1.48(b); and E.O. 11990, 42 FR 26961 (May 24, 1977).

2. Add subpart C to read as follows:

**Subpart C—BROADBAND INFRASTRUCTURE DEPLOYMENT**

Sec.

645.301 Purpose.

645.303 Applicability.

645.305 Definitions.

645.307 General requirements.

645.309 Limitations.

**§ 645.301 Purpose.**

To prescribe additional requirements to facilitate the installation of broadband infrastructure pursuant to 47 U.S.C. 1504.

**§ 645.303 Applicability.**

This subpart applies to each State that receives funds under Chapter 1 of Title 23 of the U.S.C. and only to activities for which Federal obligations or expenditures are initially approved on or after the effective date of this subpart.

**§ 645.305 Definitions.**

For purposes of this subpart, the terms defined in 47 U.S.C. 1504(a) shall have the same meaning where used in these regulations, notwithstanding other provisions of this part or Title 23 of the U.S.C.

**§ 645.307 General requirements.**

(a) A State department of transportation, in consultation with appropriate State agencies, shall:

(1) Identify a broadband utility coordinator, whether in the State department of transportation or in another State agency, that is responsible for facilitating the broadband infrastructure right-of-way efforts within the State. The broadband utility coordinator may have additional responsibilities.

(2) Establish a process for the registration of broadband infrastructure entities that seek to be included in those broadband infrastructure right-of-way facilitation efforts within the State.

(3) Establish a process to notify electronically broadband infrastructure entities identified under subsection (2) of the State transportation improvement program on an annual basis and provide additional notifications as necessary to achieve the goals of this subpart; and

(4) Coordinate initiatives carried out under this subpart with other statewide telecommunication and broadband plans and State and local transportation and land use plans, including strategies to minimize repeated excavations that involve the installation of broadband infrastructure in a right-of-way.

(b) If a State chooses to provide for the installation of broadband infrastructure in the right-of-way of an applicable Federal-aid highway project under this section, the State department of transportation shall carry out any appropriate measures to ensure that any existing broadband infrastructure entities are not disadvantaged, as compared to other broadband infrastructure entities, with respect to the program under this section.

**§ 645.309 Limitations.**

Nothing in this subpart establishes a mandate or requirement that a State install or allow the installation of broadband infrastructure in a highway right-of-way. Nothing in this subpart authorizes the Secretary to withhold or reserve funds or approval of a project under Title 23 of the U.S.C.

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