

**APPROVED REGULATION OF THE
DEPARTMENT OF TRANSPORTATION**

LCB File No. R155-18

Filed December 30, 2019

EXPLANATION – Matter in *italics* is new; matter in brackets ~~(omitted material)~~ is material to be omitted.

AUTHORITY: §§1-3, 7-9, NRS 408.55029; §§4-6 and 10-15, NRS 408.423 and 408.55029.

A REGULATION relating to statewide telecommunications; setting forth requirements for certain agreements between a telecommunications provider and the Department of Transportation regarding access to certain rights-of-way; setting forth requirements for compensation between a telecommunications provider and the Department for such access; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law authorizes the Department of Transportation to grant a telecommunications provider with longitudinal access or wireless access to a right-of-way for the installation, operation and maintenance of a telecommunications facility. (NRS 408.5502) Before such access is granted, the Department and the telecommunications provider must enter into an agreement, and the telecommunications provider must obtain a permit from the Department. (NRS 408.5502) Existing law also requires a telecommunications provider to compensate the Department for the use of spare conduit or related facilities as part of any such access, either with monetary compensation or in-kind compensation. (NRS 408.5502)

Section 4 of this regulation sets forth the requirements for such an agreement between the Department and a telecommunications provider, and **section 5** of this regulation sets forth certain requirements for a telecommunications provider to obtain an occupancy permit in connection with such an agreement. **Section 6** of this regulation sets forth requirements for a telecommunications provider or a contractor working for a telecommunications provider addressing an emergency situation that requires work in a right-of-way before a permit is issued to either the telecommunications provider or a contractor working for the telecommunications provider. **Section 7** of this regulation sets forth the requirements and criteria for the Department to calculate and publish a base rate of compensation for spare conduit and related facilities in each of several geographic regions of the State. **Section 7** also authorizes the Department to offer discounts on compensation required from a telecommunications provider so long as such discounts are provided in a competitively neutral and nondiscriminatory manner as to all similarly situated telecommunications providers. **Section 8** of this regulation sets forth requirements for valuing in-kind compensation. **Section 3** of this regulation provides that the new provisions of **sections 3-9** of this regulation only apply to access by a telecommunications

provider to rights-of-way that are on or adjacent to interstate highways. **Sections 10-15** of this regulation make conforming changes.

Section 1. Chapter 408 of NAC is hereby amended by adding thereto the provisions set forth as sections 2 to 9, inclusive, of this regulation.

Sec. 2. *As used in this chapter, unless the context otherwise requires, “provider of telecommunications” means any entity which provides telecommunications service for public use, and includes a telecommunications provider as that term is defined in NRS 408.55017.*

Sec. 3. *1. The provisions of sections 3 to 9, inclusive, of this regulation apply only to a telecommunications facility of a telecommunications provider that is located in or on right-of-way that is located on or adjacent to an interstate highway.*

2. As used in this section, “interstate highway” has the meaning ascribed to it in NRS 410.060.

Sec. 4. *An agreement entered into by the Department and a telecommunications provider pursuant to NRS 408.5502:*

1. Must set forth the procedures, conditions and other requirements or restrictions imposed by the Department for the issuance of an occupancy permit to the telecommunications provider, including, without limitation, those provisions of NAC 408.438 to 408.4424, inclusive, which will apply to the parties to the agreement.

2. Does not guarantee the Department’s approval of any permit sought by the telecommunications provider.

3. May be renegotiated by the Department upon a determination by the Department that such renegotiation is required due to a substantive or relevant change in the circumstances which existed when the agreement was entered into.

4. May be terminated by either party to the agreement not less than 30 days after written notice of such termination is provided by the party seeking termination to the other party. Such termination does not affect any permit issued to the telecommunications provider during the time that the agreement was valid.

5. Must set forth any compensation charged by the Department pursuant to NRS 408.5501 to 408.55029, inclusive, including, without limitation, a description of in-kind compensation and the proportions of shared obligations for compensation pursuant to NRS 408.55026, if applicable. The agreement must provide:

(a) Whether the telecommunications provider will pay monetary compensation, if any, annually or in one or more lump sums; and

(b) That annual compensation rates, if any, and values for in-kind compensation, if any, may vary through the term of the agreement as revised by the Department pursuant to sections 7 and 8 of this regulation.

Sec. 5. 1. Except as otherwise provided in section 6 of this regulation, before a telecommunications provider who has entered into an agreement with the Department pursuant to NRS 408.5502 or a contractor working for the telecommunications provider may engage in any work in the right-of-way that is the subject of the agreement, the telecommunications provider or contractor must obtain an occupancy permit as required pursuant to NRS 408.423 and in accordance with the applicable provisions of NAC 408.438 to 408.4424, inclusive.

2. A telecommunications provider who has entered into an agreement with the Department pursuant to NRS 408.5502 or a contractor working for the telecommunications provider will not be allowed to install a facility underground in a right-of-way until the

telecommunications provider provides proof satisfactory to the Department that the telecommunications provider or contractor has an agreement with or subscription to a person or system that ensures compliance with the applicable provisions of chapter 455 of NRS.

3. If a telecommunications provider who has entered into an agreement with the Department pursuant to NRS 408.5502 or a contractor working for the telecommunications provider cuts into or excavates a newly constructed, paved or overlaid highway without the express permission of the Department, the telecommunications provider or contractor must comply with any special restoration conditions imposed by the Department.

Sec. 6. 1. In the event of an emergency situation that requires a telecommunications provider who has entered into an agreement with the Department pursuant to NRS 408.5502 or a contractor working for the telecommunications provider to engage in work in a right-of-way that is not within the scope of the occupancy permit of the telecommunications provider or contractor, or before the telecommunications provider or contractor has obtained a permit, the telecommunications provider or contractor:

(a) Must contact the Department immediately;

(b) Must request and obtain from the Department an emergency permit; and

(c) May engage in the work or have the work done by a bonded contractor, a public agency or another telecommunications provider, but all work done must comply with NAC 408.4412 and the provisions of sections 3 to 9, inclusive, of this regulation.

2. If work in a right-of-way pursuant to this section cuts or opens an excavation in a newly constructed, paved or overlaid highway, the telecommunications provider or contractor must comply with any special restoration conditions imposed by the Department.

Sec. 7. 1. For the purposes of determining rates of monetary compensation for the use of and access to spare conduit and related facilities pursuant to NRS 408.5502 or 408.55024, the Department will establish geographic regions of the State, which may be amended as deemed necessary by the Department.

2. The Department will calculate the value of spare conduit and related facilities for each geographic region of the State based on an analysis of the:

(a) Current fair market value of such conduit and related facilities in each geographic region of the State; and

(b) Costs to the Department for its construction, installation and maintenance of the conduit and related facilities.

3. Not less than every 5 years, the Department will calculate base annual compensation rates for spare conduit and related facilities based on:

(a) The requirements of NRS 408.5502 and 408.55024; and

(b) The value of spare conduit and related facilities calculated pursuant to subsection 2.

4. Except as provided in subsections 5 and 8, any agreement must use the base compensation rates calculated pursuant to this section.

5. Annual compensation calculated pursuant to this section and included in an agreement entered into pursuant to NRS 408.5502 is not owed until the work by the telecommunications provider included in the agreement begins. Any annual compensation due in the first year of an agreement will be prorated for the portion of the year after such work begins.

6. The Department will publish the geographic regions established pursuant to subsection 1, the values calculated pursuant to subsection 2 and the compensation rates calculated

pursuant to subsection 3, as well as any revisions made to those regions, values or rates, on the Internet website of the Department.

7. Except as otherwise provided in subsection 8, compensation owed to the Department pursuant to this section or section 8 of this regulation may be paid in annual installments or in a lump sum, as set forth in the agreement.

8. The Department may allow:

(a) A discount on the base compensation rate owed to the Department by a telecommunications provider; or

(b) A compensation schedule in an agreement that is structured to separate certain projects of a telecommunications provider so that compensation is not due for certain projects until those projects are commenced by the telecommunications provider,

↳ except that any such discounts or structured agreements by the Department must be offered and provided in a competitively neutral and nondiscriminatory manner as to all similarly situated telecommunications providers.

Sec. 8. 1. For the purposes of valuing in-kind compensation paid to the Department pursuant to NRS 408.55025 by a telecommunications provider who has entered into an agreement with the Department pursuant to NRS 408.5502, the telecommunications provider must provide to the Department an estimate of the value of the in-kind compensation.

2. If the value, as determined by the Department pursuant to NRS 408.55025, of in-kind compensation paid by a telecommunications provider is:

(a) Less than the value of annual or lump-sum monetary compensation the Department would require from the telecommunications provider, the Department may require additional

compensation in the form of lump-sum or annual monetary compensation from the telecommunications provider.

(b) More than the value of annual or lump-sum monetary compensation the Department would require from the telecommunications provider, the telecommunications provider must provide the Department, on a form prescribed by the Director, consent to the excess value of the payment and a waiver of any and all claims for reimbursement from the Department.

Sec. 9. *The requirements of NAC 408.303 to 408.379, inclusive, apply to any relocation or removal of a telecommunications facility that is required pursuant to NRS 408.55029 by a telecommunications provider who has entered into an agreement with the Department pursuant to NRS 408.5502.*

Sec. 10. NAC 408.4402 is hereby amended to read as follows:

408.4402 1. Except as otherwise provided in subsection 2, the Department will approve or deny an application for an occupancy permit in writing within 90 days after it receives a substantially completed application. If the Department denies the application for an occupancy permit, the Department will send a written notice to the provider of telecommunications or community antenna television company that sets forth the reasons for the denial.

2. The Department will provide to the provider of telecommunications or community antenna television company a written report concerning the status of its application within 45 days after it receives the application. If the telecommunications facility is a significant project, the Department will, in lieu of approving or denying the application within 90 days, provide to the provider or company a written report concerning the status of its application within 90 days after the Department receives the application, and include a statement that the Department will

require additional time to complete the review of the application. The Department will extend the periods for review prescribed by this section if additional information is required.

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

(a) NAC 408.403 to 408.419, inclusive;

(b) NAC 408.447 to 408.459, inclusive;

(c) NAC 408.467 and 408.469;

(d) NAC 408.438 to 408.4424, inclusive;

(e) *NRS 408.5501 to 408.55029, inclusive, and sections 3 to 9, inclusive, of this regulation;*

(f) Any applicable federal or state laws, including obtaining any required approvals from federal agencies or state agencies, other than the Department;

~~(f)~~ (g) Any required approvals by local governments, which may include a public hearing process for a telecommunications facility that is more than 8 feet in height; and

~~(g)~~ (h) Applicable Department standards relating to underground and overhead utilities.

Sec. 11. NAC 408.4406 is hereby amended to read as follows:

408.4406 1. The Department may, upon request, issue an annual occupancy permit to a provider of telecommunications or a community antenna television company that wishes to install more than one telecommunications facility or change more than one telecommunications facility, or any combination thereof, within 1 year if the portion of the telecommunications facility located on a state highway or right-of-way is less than one-half mile in length. ~~The~~ *Except as otherwise provided in NRS 408.5501 to 408.55029, inclusive, and sections 3 to 9, inclusive, of this regulation, the* Department will not issue an annual occupancy permit for an

interstate highway or highway where access is controlled, or where the installation or change is one-half mile or more in length.

2. If a provider of telecommunications or a community antenna television company applies for an annual occupancy permit, the provider or company must obtain an annual occupancy permit for each highway district in which the telecommunications facility will be installed or changed. The provider or company must submit a completed application to the district office of the Department in each district for which an annual occupancy permit is requested not later than January 15 of each year. The Department will issue or renew or refuse to issue or renew an annual occupancy permit not later than March 15 of each year. ~~And~~ *Except as otherwise provided in an agreement entered into with the Department pursuant to NRS 408.5502, an annual occupancy permit is valid until March 15 of the following year.*

3. The district office of the Department may limit the application of the annual occupancy permit to certain state highways or rights-of-way or sections of those state highways or rights-of-way.

4. The Department may require the provider of telecommunications or community antenna television company to obtain a surety bond in the amount of \$200,000 for each annual occupancy permit that is issued to the provider or company by the Department.

Sec. 12. NAC 408.4408 is hereby amended to read as follows:

408.4408 1. If an annual occupancy permit is issued by the Department pursuant to NAC 408.4406, the provider of telecommunications or community antenna television company shall:

(a) Notify the district office of the Department not less than 5 working days before work on the telecommunications facility begins; and

(b) Submit to the district office of the Department:

(1) Plans indicating the location of the telecommunications facility, including the elevation and alignment of the facility;

(2) A schedule for the completion of the installation of or change to the telecommunications facility; and

(3) A plan for controlling traffic pursuant to NAC 408.413.

2. The district office may:

(a) Prohibit or restrict access to a right-of-way for which an annual occupancy permit has been issued if access to the right-of-way will prevent, delay or otherwise interfere with a highway project or based on other relevant factors; and

(b) Limit the hours during which work relating to the telecommunications facility may be performed where necessary in residential or commercial areas.

3. A telecommunications facility must be installed or changed in accordance with the requirements set forth in the annual occupancy permit and the provisions of NAC 408.438 to 408.4424, inclusive.

4. The Department may revoke an annual occupancy permit if the provider of telecommunications or community antenna television company fails to comply with the requirements set forth in the permit, ~~or~~ any provision of NAC 408.438 to 408.4424, inclusive ~~+~~, *or any provision of an agreement entered into with the Department pursuant to NRS 408.5502, if applicable.*

Sec. 13. NAC 408.4412 is hereby amended to read as follows:

408.4412 ~~The~~ *Except as otherwise provided in sections 3 to 9, inclusive, of this regulation, or an agreement entered into with the Department pursuant to NRS 408.5502, the inspection and repair of a telecommunications facility must be performed in accordance with the*

provisions of NAC 408.461 and applicable Department standards, terms and conditions relating to emergencies, control of access highways, routine inspection and maintenance of underground utilities, emergency repairs, and routine inspection and maintenance of pole lines.

Sec. 14. NAC 408.4414 is hereby amended to read as follows:

408.4414 The Department may, in issuing an occupancy permit, require the provider of telecommunications or community antenna television company to meet additional conditions including, but not limited to:

1. Providing for the inspection of the construction of the facility, by an engineering consultant approved by the Department or by any other method approved by the Department.

2. Restoring the state highway or right-of-way a condition which is at least comparable to the condition which existed before the placement of the telecommunications facility.

3. Installing additional conduits that must be made available to other providers of telecommunications and community antenna television companies on a competitively neutral and nondiscriminatory basis, if physical conditions prevent future installations of conduits. The conduits remain the property of the provider or company that installed the conduits.

4. Any applicable provisions of an agreement entered into with the Department pursuant to NRS 408.5502.

Sec. 15. NAC 408.4424 is hereby amended to read as follows:

408.4424 If the Department approves an application for an occupancy permit, the utility provider of telecommunications or community antenna television company must comply with applicable Department standards, terms and conditions relating to general provisions for occupancy permits, as well as any specific conditions required by the Department ~~+~~, *including,*

without limitation, any applicable provisions of an agreement entered into with the Department pursuant to NRS 408.5502.