

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

LCB FILE NO. R155-18I

**The following document is the initial draft regulation proposed
by the agency submitted on 06/20/2018**

**TELECOMMUNICATIONS PROVIDERS RIGHT-OF-WAY ACCESS
(SB 53 REGULATIONS)**

****NOTE:** That text highlighted in **yellow** is consistent with the text in SB 53 and NRS chapter 408. That text not highlighted is additional text and may be revised as deemed appropriate and consistent with both SB 53 and the Department standard practices.

Chapter 408 of NAC is hereby amended by adding thereto the provisions set forth as sections 1 to 8, inclusive, of this regulation.

Section 1. Application of this Rule. (NRS 408.215(4), SB 53, section 26)

1. Sections 1 through 8, inclusive, of this regulation apply to telecommunications providers (as defined in NRS 704.027) to be located, accommodated, adjusted or relocated within, on, along, across, over, through, or under the highway right-of-way. These sections apply to underground, surface, or overhead facilities, either singularly or in combination, including bridge attachments. These sections, however, do not apply to telecommunications facilities that are required for the Department highway purposes.

2. These sections also apply to Federal-aid highway projects, including local government projects. In compliance with 23 CFR §645.209(g), local governments are required to enter into formal agreements with the Department that provide for a degree of protection to the highway at least equal to the protection provided under sections 1 through 8, inclusive, of this regulation.

Sec. 2. Definitions. (NRS 408.215(4), SB 53, section 26)

(1) "Clear zone" means the total roadside border area, starting at the edge of the traveled way, available for safe use by errant vehicles. This area may consist of a shoulder, a recoverable slope, a non-recoverable slope, and/or a clear run-out area. The desired width is dependent upon the traffic volumes and speeds, and on the roadside geometry.

(2) "Council" means the Telecommunications Advisory Council created by SB 53, section 25.

(3) "Department" means the Nevada Department of Transportation.

(4) "Interstate system" means the Dwight D. Eisenhower National System of Interstate and Defense Highways as defined in the Federal-aid Highway Act of 1956 and any supplemental acts or amendments.

(5) "Longitudinal access" means access to or the use of any part of a right-of-way that extends generally parallel to the right-of-way.

(6) "Permit" means an encroachment permit issued by the Director pursuant to NRS 408.423 that specifies the requirements and conditions for performing work in a right-of-way.

(7) "Rate of return" means the annual rate of return on investment, using conduit value, as determined by the Department and established for compensation purposes under section 7, subsection 5 of this regulation.

(8) "Region" means a geographic region of right-of-way segments of the interstate system as determined by the Department and established for compensation purposes.

(9) "Right-of-way" means land, property or any interest therein acquired or controlled by the Department for transportation facilities or other transportation purposes.

(10) "Statewide telecommunications purposes" means the development of the statewide network that meets the telecommunications needs of state agencies or serves another public purpose.

(11) "Telecommunication Advisory Council" means the Telecommunication Advisory Council created by SB 53, Section 25.

(12) "Telecommunications facility" means any cable, line, fiber, wire, conduit, innerduct, access manhole, handhole, tower, hut, pedestal, pole, box, transmitting equipment, receiving equipment, power equipment or other equipment, system or device that is used to transmit, receive, produce or distribute a signal for telecommunications purposes via wireless, wireline, electronic or optical means.

(13) "Telecommunications provider" means a telecommunications provider:

(a) As defined in NRS 704.027;

(b) That meets Federal Communications Commission and industry carrier class service guidelines; or

(c) That is a political subdivision that has statutory authority to provide telecommunications services.

(14) "Utility facility" has the meaning ascribed to it in 23 CFR § 645.207.

(15) "Wireless access" means access to and use of a right-of-way for the purpose of constructing, installing, maintaining, using or operating telecommunications facilities for wireless telecommunications.

Sec. 3. Policy related to telecommunications providers' use of and access to the Department's spare conduit and related facilities. (NRS 408.215(4), SB 53, sections 17, 21, and 26)

1. The Department acknowledges that Federal and State Legislation, primarily the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 70 (Feb. 8, 1996) and NRS 223.610, encourage competition in the provision of telecommunication services, and the development and deployment of advanced telecommunication technologies, infrastructure, and networks. These legislative initiatives in turn have increased demand for rights-of-way, including highway rights-of-way, for the installation of telecommunications facilities necessary to support increased competition and deployment of an advanced telecommunication infrastructure.

2. The Department recognizes that longitudinal access and wireless access for telecommunications facilities may be provided without compromising interstate system integrity, safety, normal interstate system operation or maintenance activities, while contributing to the deployment and efficient operation of intelligent transportation systems.

3. The Department may allow longitudinal access and wireless access on highways of the interstate system for placement, construction, installation, maintenance, repair, use, operation, replacement, and removal of telecommunications facilities, as authorized by SB 53, sections 17, 21, and 26, and subject to compliance with sections 1 through 8, inclusive, of this regulation. These sections apply only to longitudinal access and wireless access for telecommunications facilities on rights-of-way within the interstate system and do not alter the existing policy concerning other utilities on system rights-of-way, or for accommodating utilities or other facilities within rights-of-way under the jurisdiction of the Department.

4. The requirements set forth in sections 1 through 8, inclusive of this regulation, do not alter existing policies and procedures relating to other utility facilities within a right-of-way or for accommodating utility facilities or other facilities under the control of the Department.

5. Limitations and Conditions.

(a) Longitudinal and wireless access of telecommunications facilities shall be permitted only as approved by the Department in accordance with the criteria and procedures set forth in sections 1 through 8, inclusive, of this regulation.

(b) In the interest of safety and preservation of the highway facility and pavement structure, the placement, installation, maintenance, repair, use, operation, replacement, and removal of telecommunications facilities with longitudinal access or wireless access to the right-of-way of the interstate system shall be accommodated only when in compliance with sections 1 through

8, inclusive, of this regulation and NAC 408.409.

(c) The Department may consider financial and technical qualifications of telecommunications providers, and specify insurance requirements for contractors authorized to enter interstate system rights-of-way to construct, install, inspect, test, maintain or repair telecommunications facilities with longitudinal access or wireless access.

(d) If the Department authorizes longitudinal access, wireless access or the use of and access to conduit or related facilities of the Department for construction and installation of a telecommunications facility, the Department may require an approved telecommunications provider to install the telecommunications facility in the same general location as similar facilities already in place, coordinate their planning and work with other contractors performing work in the same geographic area, install in a joint trench when two or more telecommunications providers are performing installations at the same time, and equitably share costs between such providers.

(e) Access to rights-of-way of the interstate system shall be administered in compliance with 47 U.S.C. 253 (2005).

Sec. 4. Installation, operation and maintenance of a telecommunications facility by a telecommunications provider which has been granted longitudinal access or wireless access to a right-of-way. (NRS 408.215(4), SB 53, sections 17 and 26)

1. The purpose of sections 1 through 8, inclusive, of this regulation is to implement a program for facilitating longitudinal access and wireless access to interstate system rights-of-way to provide for the installation, operation, and maintenance of cable and wireless telecommunications facilities in the rights-of-way pursuant to SB 53, section 17. This Rule recognizes the importance of quality infrastructure on the interstate system and that the safety and convenience of users of the interstate system must be preserved to the greatest extent possible. Compatible with this principle, this Rule also permits the use of the rights-of-way of the interstate system for telecommunications facilities that support Federal and State laws that encourage competition in telecommunication services and the deployment of advanced telecommunication technologies. The Department, through designated personnel, may facilitate such installations and maintenance of such facilities, which comply with the criteria established by sections 1 through 8, inclusive, of this regulation provided that such access would not compromise the safe, efficient, and convenient use of any road, route, highway, or interstate in this State for the traveling public.

Sec. 5. Procedures for entering into an agreement with a telecommunications provider to be granted longitudinal access or wireless access to a right-of-way. (NRS 408.215(4), SB 53, sections 17, 21, 25, and 26)

1. Telecommunications providers desiring to use rights-of-way under the jurisdiction of the Department for the installation or maintenance of any telecommunications facility must be licensed to do so by entering into a non-exclusive license agreement with the Department that is competitively neutral and non-discriminating to other telecommunications providers. The term of the agreement shall be that term as stated in the agreement, which term may not exceed thirty years. The Department may renegotiate of the terms and conditions of any such agreement in the event that the Department determines, in its sole discretion, that the circumstances upon which the agreement has been entered have changed.

2. This statewide agreement will set forth the procedures and conditions for the issuance of encroachment permits for all installations statewide. Encroachment permits are not issued without a the appropriate agreement(s) first being executed. the Department may impose additional restrictions or requirements in such agreements or encroachment permits.

3. A permitted facility shall, if necessary, be modified by the telecommunications provider to

improve safety or facilitate alteration or maintenance of the right-of-way as determined by the Department.

4. Agreements are executed by the Department and telecommunications providers to set forth the terms and conditions for the accommodation and maintenance of telecommunications facilities within the right-of-way. An agreement is required for, but does not guarantee the Department's approval of, encroachment permits.

5. As part of executing an agreement with the Department, owners of facilities located in the right-of-way are required to post a continuous bond in the amount of \$100,000.00 naming the Department as the insured, to guarantee satisfactory performance. The Department may approve a lesser amount. Failure by a telecommunications company to maintain a valid bond in the amount required is cause for denying issuance of future permits to that telecommunications provider and for the removal of that telecommunications provider's facilities from the right-of-way.

6. Upon discovery of telecommunications provider-caused damage to the highway or to the right-of-way, the Department may opt to exercise its bonding rights in recovering costs incurred to restore such highway or right-of-way. The telecommunications provider is liable for all restoration costs incurred as a result of damages caused by its facility, and its liability is not limited to the amount of such bond.

7. Agreements may be terminated at any time by either party upon 30 day's advance written notice to the other party. **Permits previously issued and approved under a terminated agreement are not affected and remain in effect** on the same terms and conditions set forth in the permit. The obligation to maintain the \$100,000.00 bond continues until the telecommunications provider's facilities are removed from the Department's right-of-way.

8. Any emergency work performed by a telecommunications provider shall comply with the following conditions:

(a) In all emergency work situations, the telecommunications provider or its representative shall contact the Department immediately, and on the first business day thereafter shall contact the Department to complete a formal permit. Failure to contact the Department for an emergency work situation and obtain an encroachment permit within the stated time period is considered to be a violation of the terms and conditions of the telecommunications provider's license agreement.

(b) At the discretion of the telecommunications provider, emergency work may be performed by a bonded contractor, public agency, or a telecommunications provider. None of the provisions of this Rule are waived for emergency work except for the requirement of a prior permit.

9. Underground facilities are not permitted within the right-of-way unless the telecommunications provider subscribes to an appropriate "call-before-you-dig" system.

10. Cuts or open excavations on newly constructed, paved, or overlaid highways are generally not allowed, except at the sole discretion of the Department. If an emergency cut or excavation occurs, the responsible telecommunications provider shall comply with any special conditions imposed by the Department regarding restoration of the roadway.

11. Encroachment permits for work in the right-of-way of state highways shall be obtained as follows:

(a) Telecommunications providers shall obtain an encroachment permit from the Department for the installation and maintenance of facilities within the right-of-way. Encroachment permits are approved or disapproved by the Department. Applications for encroachment permits are submitted to the District Permit Officers by the telecommunications provider or its contractor. No telecommunications provider or its contractor shall begin any utility work on the right-of-way until an approved encroachment permit is issued by the Department and the telecommunications provider is authorized to proceed in writing. Prior to the issuance of encroachment permits, fees are assessed to cover related costs incurred by the Department including costs for planning,

coordination, and utility plan review.

(b) If the telecommunications provider expects work to significantly impact travel lane capacity, the Department recommends that the telecommunications provider promptly contact the appropriate District Permit Office to discuss plan concepts in advance of submitting an encroachment permit application.

(c) Telecommunications providers shall submit four (4) sets of plans depicting the proposed installation. The plans shall be sized as required by the Department and include telecommunications provider identification, work location, facility type and size, type of construction, vertical and horizontal location of facilities relative to the centerline of road, location of all appurtenances, trench details, right-of-way limits, and traffic control plans. Traffic control plans shall conform to the MUTCD, are mandatory for each instance of facility construction or maintenance, and shall be attached to each permit application.

(d) Telecommunications providers may authorize their contractors to obtain permits on their behalf. All terms and conditions set forth in the ~~license~~ agreement apply. The telecommunications provider's construction forces or its contractor shall carry a copy of the approved permit at all times while working within the right-of-way.

12. The following bonding and liability insurance requirements apply to all work within the right-of-way.

(a) Encroachment permit applicants shall post a Performance and Warranty or Maintenance Bond, using the Department's approved bond form, for a period of three years from the date of beginning of work or two years from the end of work, whichever provides the longer period of coverage. A Performance and Warranty Bond may be required for each individual encroachment permit. The amount of the bond is determined by the Department District Permit Officer based on the scope of work being performed but, in any event, will not be less than \$10,000.00 unless a statewide bond is issued in accordance with subparagraph (b) of this subsection 12.

(b) Encroachment permit applicants who routinely acquire encroachment permits may elect to post a statewide performance and warranty or maintenance bond in lieu of posting multiple individual bonds. A statewide bond satisfies bonding requirements for work in all of the Department's Districts. The bond amount is to be determined by the Department but, in any event, will not be less than \$100,000.00. A valid statewide bond period shall be not less than three years and will meet bonding requirements for the Department permits for a period of one year from date of issue. Encroachment permit applicants may submit a replacement statewide bond on an annual basis provided the bond period is not less than three years at time of replacement.

(c) The Department may require an additional inspection bond to ensure payment for the Department field review and inspection costs before an encroachment permit is granted.

(d) The Department may proceed against the bond to recover all expenses incurred if payment is not received from the permit applicant within 45 calendar days of receiving an invoice. Upon discovery of facility-caused damage to the highway or to the right-of-way, the Department may opt to exercise its bonding rights in recovering costs incurred to restore the highway or right-of-way due to facility-caused damages. Failure by the telecommunications provider to maintain a valid bond in the amounts required shall be cause for denying issuance of future permits and for the removal of the facility from the right-of-way.

(e) Permit applicants are also required to provide a certificate of liability insurance in the minimum amounts of \$1,000,000.00 per occurrence and \$2,000,000.00 in aggregate. Failure to meet this requirement will result in application denial. Liability insurance coverage is required throughout the life of the permit and cancellation will result in permit revocation.

(f) Information about bond forms and liability insurance requirements are available on the Department's website or at the District Offices.

13. Any failure on the part of a telecommunications provider to comply with the terms and

conditions set forth in a license agreement or an encroachment permit may result in cancellation of the related permit. Failure to pay any sum of money for costs incurred by the Department in association with installation or construction review, inspection, reconstruction, repair, or maintenance of the facilities may also result in cancellation of the related permit. The Department also may remove the facilities and restore the highway and right-of-way at the sole expense of the telecommunications provider. Prior to any cancellation, the Department will notify the telecommunications provider in writing, setting forth the violations, and will provide the telecommunications provider with a reasonable time, based upon the attendant circumstances, to correct the violations to the satisfaction of the Department.

14. Permits shall not be assigned. All successors in interest to the original permittee shall be required to file a new permit application.

15. Indemnification. Permit holders performing utility work on the right-of-way shall, at all times, indemnify, defend, and hold harmless the Department, its employees, and the State of Nevada from responsibility for any damage or liability arising from their construction, maintenance, repair, or any other related operation during such work or as a result of such work. Permit holders shall also be responsible for the completion, restoration, and maintenance of any excavation for a period of three years unless the Department requires a longer period of indemnification due to specific or unique circumstances.

16. Public Involvement. The Department will advertise the Telecommunication Advisory Council public meeting and all fiber sharing initiatives, project plans and priorities on its website. This will allow other telecommunications providers an opportunity to share a joint placement of telecommunications facilities. Any interested parties may attend the public meeting to voice opinions to the Telecommunication Advisory Council as authorized by NRS Chapter 241. The Telecommunication Advisory Council will assist the Department in valuing in-kind compensation in accordance with SB 53, Section 25.

Sec. 6. Compensation. (NRS 408.215(4), SB 53, sections 17, 19, 20, 21, 22, and 26)

1. The Department will require compensation from a telecommunications provider under the provisions of SB 53, Sections 17 and 21, for longitudinal access or other use within the right-of-way of the interstate system and utilization of any spare conduit and related facilities of the Department consistent with sections 1 through 8, inclusive, of this regulation.

2. Additionally, a telecommunications provider shall be required to **complete and sign an agreement with the Department prior** to obtaining a permit for construction or installation of telecommunications facilities within the right-of-way.

3. The Department will provide for the proportionate sharing of costs between the Department and a telecommunications provider for joint trenching or trench sharing based on the amount of conduit innerduct space or excess conduit that is authorized in the agreement entered into pursuant to section 5 of this regulation.

4. If two or more telecommunications providers are required to share a single trench, each provider in the trench must share the cost and benefits of the trench in a fair, reasonable, competitively neutral, and nondiscriminatory manner.

5. All monetary compensation collected by the Department pursuant to this section 6 must be deposited in the State Highway Fund.

6. Any in-kind compensation received by the Department pursuant to this section 6 and section 7 of this regulation must be used exclusively for statewide telecommunications purposes and may not be sold or leased in competition with telecommunications providers or Internet service providers. Fair and reasonable valuation of facilities owned by either the Department or a telecommunications provider offered as part of in-kind compensation must be determined by the Department and approved by the Council.

Sec. 7. Methodology for valuing a right-of-way, excess conduit or related transportation facilities. (NRS 408.215(4), SB 53, sections 17, 21, and 26)

1. The purpose of this regulation is to implement compensation rates for longitudinal access to the rights-of-way of the interstate system for installation and operation of telecommunications facilities and for use of spare conduit or related facilities of the Department. This section 7 establishes the methodology and rates for charging compensation in accordance with sections 1 through 8, inclusive, of this regulation and requires that such compensation be: Fair and reasonable; Competitively neutral; Nondiscriminatory; Open to public inspection; Measured to promote access by multiple telecommunications providers; Calculated based on the geographic region of this State, taking into account the population and the impact on private right-of-way users in the region; Set at an amount to encourage the deployment of digital infrastructure within this State; Paid in cash or with in-kind compensation, or a combination of cash and in-kind compensation; and Paid in a lump-sum or in annual installments, as decided by the telecommunications provider.

2. The Department will establish rates based upon an analysis of conduit values for the interstate system using current market data based on, *but not limited to*:

(a) Construction, maintenance and conduit values differentiated by geographical region, population density (*urban, rural*) . ???

5. The Department will then determine annual fee valuation, as a rate of return on the *conduit values, using current market data*. The Department determined that a 10% annual rate of return on investment represents a fair and reasonable compensation rate in current market conditions.

6. Compensation for conduit values will be developed as follows:

(a) Geographic regions of the State will be established for purposes of determining *conduit values* and compensation rates for longitudinal access to the right-of-way of the interstate system based on current fair market value for conduit space; and

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(a) Geographic regions of the State will be established for purposes of determining *conduit values* and compensation rates for longitudinal access to the right-of-way of the interstate system based on current fair market value for conduit space.

(b) The Geographic Regions and rates shall be identified by the DEPARTMENT and available to the public on DEPARTMENT's website.

(c) The DEPARTMENT reserves the right to amend the Geographic Regions and rates as needed.

(d) (b) The construction, maintenance costs for the construction of DEPARTMENT's spare conduit.

(e) The existing right-of-way of the interstate system is to be placed into those regions.

(f) Whenever new right-of-way is added to the interstate system, the Department will classify the new right-of-way into the applicable region or regions and publish a Table of Regions setting forth the revised regions.

(g) At least once every five years the Department will conduct an analysis to determine changes, if any, in the conduit values determination. *boundaries of regions based on demographic and market data, including but not limited to data on similarity of surrounding land uses, population density, distances and number of telecommunications subscribers*. The Department will publish a modification to the regional boundaries and/or conduit value whenever they are changed.

10. *The Department is authorized to offer use of and access to its spare conduit to telecommunications providers, provided the Department determines the spare conduit is not*

and will not be needed for highway purposes, the Department receives additional compensation for the use of and access to the spare conduit, and offers such use and access in a competitively neutral, non-discriminatory manner to all similarly situated telecommunications providers.

(a) Such additional compensation shall be fair and reasonable to the Department and the telecommunications provider and shall be charged in a competitively neutral and nondiscriminatory manner to all similarly situated telecommunications providers. The Department will establish the amount of compensation for use of and access to the Department's spare conduit by geographic region.

(b) Such additional compensation shall be subject to adjustment in the same manner as provided in subsection 10.

(d) At least once every five years the Department will conduct an analysis to determine changes, if any, in the value of its spare conduit. Whenever the Department completes a market analysis and determines that value of its spare conduit has changed, the Department will apply its new values to each agreement thereafter executed by the Department.

11. The base compensation schedule for each calendar year after a year in which the Department determines conduit values under subsection 7 under this section 7 shall be adjusted effective January 1 of each such calendar year (each an "adjustment date"). The adjustment shall be calculated by multiplying the base compensation amount for the immediately preceding calendar year by a fraction. The numerator of the fraction shall be the "All Items, Consumer Price Index for All Urban Consumers (CPI-U) for the West (1982-84=100)," reported by the U.S. Department of Labor, Bureau of Labor and Statistics (BLS), published for the month of September immediately preceding the adjustment date in question. The denominator of the fraction shall be such index published for the next preceding month of September. The adjustment may result in an increase or decrease in the base compensation schedule.

(a) If the methodology for determining the index is changed by the issuer of the index, the Department will convert the index in accordance with the conversion factor published by the issuer of the index. If the index is discontinued or changed so that it is not practical to obtain a continuous measurement of price changes, the Department will replace the index with a comparable governmental index and apply the index chosen to all agreements which require annual adjustment to the base compensation.

(b) Except as provided in subsection 12 to this section 7, each agreement for longitudinal access to the right-of-way of the interstate system with telecommunications providers shall require that the rates of compensation during the first calendar year of the term of the agreement equal the base compensation schedule determined for that calendar year under this Rule (prorated if the term begins after January 1), taking into account any adjustments under this subsection 11.

(d) Except as provided in subsection 12 to this section 7, each agreement for longitudinal access to the right-of-way of the interstate system with telecommunications providers shall require an adjustment in the annual base compensation effective January 1 of each subsequent calendar year of the term (prorated for the last year of the term if it ends before December 31). The adjustment shall be calculated by multiplying the base compensation amount for the immediately preceding calendar year (annualized for partial calendar years during the term) by the fraction described in this subsection 11.

(e) It is the intent of this Rule that revisions to the base compensation schedule resulting from re-analysis of market conditions by the Department pursuant to this section 7 shall apply only to agreements executed after the Department completes and issues its revisions, and shall not apply to agreements executed prior to the revision. It also is the intent of this Rule that annual adjustments to the base compensation schedule due to inflation or deflation pursuant to

this subsection 11 shall apply to every agreement under which annual compensation payments are required.

12. The Department may charge compensation for the period of time between execution of the agreement and completion of construction at rates which are discounted from the full annual compensation rates determined under this section 7 including no compensation prior to commencement of construction. The Department also may agree to the phasing of projects into clearly identified phases, with the compensation schedule structured based on the construction commencement and/or completion dates for each phase.

(a) If the Department elects to discount compensation rates, it shall do so in a competitively neutral and nondiscriminatory manner for all similarly situated telecommunications providers.

13. The Department is authorized to charge a lump sum monetary compensation for entering into agreements for longitudinal access to the right-of-way of the interstate system with telecommunications providers which offer, in lieu of annual compensation, one or more lump sum payments of monetary compensation. The agreement shall set forth the lump sum payment or payments due.

(a) Lump sum payments shall be calculated to be equivalent, on a present value basis, to annual compensation payments which would be required under this Section 7 over the same time period as that covered by each lump sum payment.

(b) For purposes of determining lump sum monetary compensation for longitudinal access to the right-of-way of the interstate system, the Department will use a discount rate equal to the yield (in percent per annum) on Moody's seasoned Aaa Corporate Bonds, as reported by the Federal Reserve Board through the Federal Reserve Statistical Release. The yield on Moody's Aaa Corporate Bonds reported for the first full month immediately prior to the date an agreement for lump sum monetary compensation is executed by the Department will be the discount rate applied for purposes of determining the amount of such lump sum monetary compensation.

(c) Each telecommunications provider which is to pay monetary compensation shall have the right to choose whether to pay it in one lump sum as determined according to this subsection 13 or to pay it in annual installments. Unless the Department otherwise agrees in writing, this choice shall be made before the agreement is signed, and the agreement shall set forth the choice made.

14. The Department may enter into agreements for longitudinal access to the right-of-way of the interstate system with telecommunications providers which offer, in lieu of or in addition to monetary compensation, in-kind compensation. In-kind compensation may include, without limitation, delivery to the Department, for its own uses and purposes, conduit, innerduct, dark fiber, access points, telecommunications equipment, telecommunications services, bandwidth, and other telecommunications facilities. The agreement entered pursuant to Section 5 of this regulation shall set forth a description of the in-kind compensation.

(a) The Department will determine the present value of the in-kind compensation according to the methods set forth in this subsection

(b) The Department will prepare an analysis setting forth its valuation at or before the time it executes the agreement. The valuation analysis need not be included in the agreement.

(c) The Department will value the in-kind compensation as follows:

(1) For those facilities for Department use only, the electronic equipment, conduit, fiber and other telecommunications hardware and software contributed to the Department will be valued on a present value basis based on the incremental costs to the Department for installation of conduit and related facilities at the estimated, reasonable cost to the telecommunications provider of procuring and installing the same.

(2) When joint trenching is to be provided, the present value of the estimated, reasonable cost to the telecommunications provider of joint trenching for the placing of conduit, fiber, and other facilities of both the provider (and its customers) and the Department will be

proportionately allocated to the Department as a component of the present value of the trenching. The proportion allocated to the Department will equal the total estimated, reasonable cost of the trenching work multiplied by a fraction. The numerator of the fraction shall equal the amount of conduit and innerduct space to be contributed to the Department under the agreement. The denominator of the fraction shall equal the total amount of conduit space the telecommunications provider is authorized to install under the agreement. Single duct conduit space shall be measured using the planned diameter of the conduit. Multi-duct conduit space shall be measured by summing the planned diameters of each innerduct in the conduit.

(3) For other jointly used facilities, the present value of the estimated, reasonable cost to the telecommunications provider of providing any other telecommunications facility which is shared jointly by the provider and the Department will be proportionately allocated to the Department as a component of the present value of the in-kind compensation. The Department will determine the proportion to be allocated to the Department based on the percentage of use or benefit to which each party will be entitled under the agreement.

(4) The Department will determine the present value of equipment warranties, warranties of conduit, fiber or other components, software warranties, maintenance covenants and operating covenants based on the reasonable, estimated cost of purchasing such warranties, maintenance, and operating covenants from manufacturers or other third parties.

(5) The total present value of the in-kind compensation shall be the sum of the present values determined under subparagraphs (1) through (4) above.

(e) The Department will require annual or lump sum monetary compensation (determined according to the methods set forth in subsection 13, in addition to the in-kind compensation, if the present value of the in-kind compensation is less than the present value of the annual monetary compensation the Department would require over the term of the agreement. The amount of the annual or lump sum monetary compensation shall be the difference in such present values.

(f) The Department may accept in-kind compensation with a present value in excess of the present value of annual monetary compensation payments which would be required under this section 7 if the telecommunications provider consents in writing and gives a written waiver and release of all claims and protections arising under federal or Nevada law by reason of such excess value. The waiver and release shall be in form approved by the director.

(g) Before entering into an in-kind compensation agreement, the Department will obtain from the telecommunications provider its valuations of the in-kind compensation. The telecommunications provider may provide the Department information on its costs in order to assist the Department in determining in-kind compensation value. The Department will reasonably consider such valuation and cost information in making its determination, but is not bound by the valuation or cost information submitted.

15. In the event there are multiple telecommunications providers utilizing the same trench the following requirements shall apply:

(a) If the Department enters into an agreement with two or more telecommunications providers, or with a consortium or other entity whose members, partners, venturers or other participants are two or more telecommunications providers, or if the Department requires two or more telecommunications providers to share a single trench, then the agreement(s) shall require that the telecommunications providers share the burden of the compensation owing to the Department under the agreement(s) on a fair, reasonable, and equitable basis, taking into consideration the proportionate uses and benefits to be derived by each telecommunications provider from the trench, conduits, and other telecommunications facilities to be installed under the agreement(s).

(b) The foregoing does not limit the right of the Department to require all of the participating telecommunications providers to bear joint and several liability for the obligations owing to the Department under the agreement(s).

(c) Any agreement which requires sharing of the burden of compensation owing to the Department will provide the Department the right to review and audit the books, records, and contracts of or among the participating telecommunications providers to determine their compliance or lack of compliance with subsection 15(a).

Sec. 8. Relocation or removal of a telecommunications facility. (NRS 408.215(4), SB 53, section 26, NRS 408.210 and NRS 408.423)

1. The Department will require the removal or relocation of telecommunications facilities located on the interstate system to accommodate operations and highway projects at the telecommunications provider's expense. The Department may require removal or relocation of such telecommunications facilities upon expiration or earlier termination of the permit or other agreements or the telecommunications provider's breach of its permit or other agreements, at the telecommunications provider's expense, in accordance with applicable law.

2. This section 8 sets forth the Department's requirements and authority as to a telecommunications provider's coordination and cooperation when removal, relocation, or alteration of a facility is made necessary by a highway project or the permit or other agreements expires or is breached by the telecommunications provider, and sets forth the options the Department may pursue to proceed with a highway project in the event that a telecommunications provider fails to cooperate or coordinate with the Department as required by NRS 408.210 and 408.423.

3. When the Department notifies a telecommunications provider that relocation of a facility may be necessary due to a highway project, both the Department and the telecommunications provider shall use their best efforts to identify conflicts, minimize facility relocation costs and operational impacts, highway project costs and delays, and to coordinate and cooperate with one another. When the Department believes a conflict exists, it will offer an initial scoping meeting and provide authorization for the telecommunications provider to do preliminary design work. The telecommunications provider shall:

(a) Provide to the Department, the location of each facility likely to be affected.

(b) Identify to the Department conflicts between the Department's proposed highway work and the telecommunications provider's operation of its facilities.

(c) Submit to the Department all conveyances, vesting documents, or other evidence of title to real property related to the potential relocation of facilities as early as practicable.

(d) Submit to the Department the telecommunications provider's proposed design for relocation; detailed cost estimates; a reasonable relocation schedule to accommodate the highway project; reasonable limits on highway project work, including utility outage windows and construction loadings by the Department; and communication procedures between the parties. A reasonable relocation schedule for the project includes, but is not limited to, work sequencing, task durations, material ordering, notification requirements, mobilization, third-party coordination, communication between the parties, and any other activity necessary for the relocation of the facility to accommodate the highway project. If the relocation work is to be completed prior to the Department awarding the highway project to its contractor, the telecommunications provider shall include specific dates in the schedule.

(e) Execute a written relocation agreement with the Department. The agreement shall include terms and conditions, including but not limited to, the relocation scope of work, reimbursement provisions, federal requirements, description and location of the work to be undertaken, plans and drawings, and detailed cost estimates.

(f) After the Department has awarded the highway project to the contractor, coordinate with the contractor to develop a detailed work plan and schedule, and address all other matters of mutual concern during construction. Submit to the Department written acknowledgement of the approved schedule.

(g) Perform the work necessary for removal, relocation, or alteration of the facility in accordance with the detailed work plan and schedule developed in subparagraphs (d) and (f) above, and as described in the relocation agreement and supplemental agreements.

4. *Timeliness.* The work listed in subsection (3)(a) through (g), inclusive, must be timely completed by the telecommunications provider as not to delay the highway project or otherwise increase costs to the project. The Department will provide reasonable deadlines for the telecommunications provider so it can meet the deadlines and not unnecessarily delay the highway project. The Department will also provide the telecommunications provider with reasonable updates of highway project schedule changes.

5. *Relocation.* The basic concept when relocating telecommunications facilities is to functionally restore the operation of such facilities that existed prior to the Department constructing a highway project.

(a) The Department incorporates by reference 23 CFR Part 645, subpart A, for all telecommunications facility relocations required by the Department's highway projects. For deviations in determining whether the facility's real property needed for the highway project is to be handled as a facility relocation or right-of-way acquisition, NAC 408.309 and 408.307 shall apply.

(b) If the telecommunications provider's regulatory and construction requirements can be met, the Department may require telecommunications providers to jointly occupy trenches for the highway construction projects. To the extent utilities have valid agreements concerning the joint use of above ground facilities, the telecommunications providers shall cooperate with each other for the relocated joint use.

(c) If a telecommunications provider determines the existing facilities do not need to be replaced or are not needed to maintain its operational facilities, payment for the real property, which is needed to accommodate the construction of the highway project where the facilities are located, shall be handled as a right-of-way acquisition.

6. The Department must provide a telecommunications provider with replacement property rights when the telecommunications provider holds a fee interest, or easement to the subject property that is senior to the DEPARTMENT's right-of-way. The telecommunications provider shall transfer title to its prior fee or easement interest to the Department without charge.

(a) If the telecommunications provider has facilities within a fee or easement and the facilities are relocated within the Department's right-of-way, the telecommunications provider shall transfer title to the fee or easement interest to the Department without charge, and the Department will reimburse the telecommunications provider 100% of the future facility relocation costs in compliance with 23 CFR Part 645, subpart A.

(b) When the telecommunications provider's facilities are located in a public utility easement, the Department may purchase a replacement public utility easement and may require the telecommunications provider to relocate its facilities to the replacement public utility easement.

(c) The telecommunications provider shall pay the Department for any betterment between the existing real property interest and the replacement real property interest acquired for its relocation.

(d) If the Department obtains a court-ordered occupancy or right-of-entry from a property owner, the telecommunications provider shall relocate its facilities onto the replacement property rights while the Department obtains the final order or deeds from the property owner.

(e) Acquisition of non-operating real property from a telecommunications provider shall be in accordance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and applicable right-of-way procedures in 23 CFR Section 710.203.

7. The Department's reimbursement of relocation costs shall be determined in accordance with 23 CFR Part 645, subpart A, and the Program Guide, Utility Relocation and Accommodation on Federal-Aid Highway Projects, Sixth Edition, January 2003, as amended and any subsequent editions, Cost Development and Reimbursement, pages B-21 to B-23.

(a) If a telecommunications provider cannot provide a copy of a permit that shows the Department's acceptance of the deviation from the rule in effect at the time of installation of the facilities and the facilities do not meet the overhead clearance requirements, the telecommunications provider must relocate its facilities without any reimbursement from the Department. The telecommunications provider shall be responsible for 100% of its relocation costs for non-compliant facilities.

(b) When reimbursement is made on the basis of actual costs, the telecommunications provider's estimate and final billing shall be itemized to show the totals for labor, overhead construction costs, travel expenses, transportation, equipment, materials and supplies, handling costs, and other services in accordance with NAC 408.379.

(c) The telecommunications provider's final billing statement shall be provided in a format that facilitates making comparisons with the Department's approved estimates.

(d) A telecommunications provider must submit final billings to the Department within six months following the completion of the telecommunications facility relocation work. The Department may make a final payment when the final bill is received from a telecommunications provider more than six months after the completion of facility relocation work if the Department and the telecommunications provider have agreed in advance that a longer time period is needed.

(e) The costs incurred by the Department and a telecommunications provider for compliance with federal and state statutes, rules, and regulations will be included as part of the facility relocation costs.

(g) Temporary facility relocations required by a highway project will be included as part of the facility relocation costs.

(h) Telecommunications providers granted longitudinal interstate access are required to pay all relocation costs pursuant to NRS 408.200(2) and SB 53, Section 26, unless such providers have a right of occupancy in such location.

8. Betterments. No betterment credit is required for the replacement of telecommunications facility devices or materials that are:

(a) Required by the highway project;

(b) Of equivalent standards although not identical;

(c) Of the next highest grade or size when the existing devices or materials are no longer regularly manufactured;

(d) Required by law pursuant to governmental and appropriate regulatory commission code;

or

(e) Required by current design practices regularly followed by the telecommunications provider in its own work, and there is a resulting direct benefit to the highway project.