

MEMORANDUM

TO: Public Commenters and all stakeholders

FROM: Jonas Durham, Fiber Development Manager

DATE: May 23, 2023

SUBJECT: Proposed Fee Structure for CDOT right of way access and use for broadband

Purpose

The purpose of this memorandum is to provide further background and explanation related to CDOT’s proposed fee structure for right of way access for deployment of broadband infrastructure (fiber) and public input received to date. This memo also outlines the updates CDOT has made to the proposed fee structure as a result of this public input. Currently, the Transportation Commission plans to complete its review and likely adopt a fee structure at its June, 2023 Transportation Commission meetings, with a plan to periodically review and update it in future years as necessary to adapt to increased data collection about the impact of the fee structure on development of broadband in Colorado.

Background

In February 2022, the Governor issued Executive Order D 2022 009 (restated in June in EO D 2022 023) and Senate Bill 22-083, Accelerating Broadband Deployment in Colorado. This Executive Order and Senate Bill directed CDOT develop a simplified fee structure to facilitate access to CDOT rights of way for the deployment of broadband.

CDOT has reviewed the background and comments submitted to date and has received legal guidance from the Attorney General’s Office related to its legal authority and expectations so that it can balance all interests related to the use of CDOT rights of way for broadband purposes. This legal guidance is summarized here as part of the information relied upon by CDOT and the Transportation Commission when developing this fee program.

CDOT is allowed and encouraged to receive valuable consideration for the use of state highway right-of-way. Colorado statutory law addresses telecommunications providers’ access to public rights-of-way in C.R.S. §§ 38-5.5-102 through 109. CDOT has been advised that limitations contained in these statutes as to what telecommunications providers can be charged apply to local government entities and political subdivisions as distinguished from CDOT. CDOT is a principal department of the State of Colorado and is neither a “political subdivision” or “local government entity” as defined in C.R.S. § 38-5.5-102(5).

Furthermore, several other provisions in state law refer to and authorize CDOT to receive valuable consideration for use of state highway right-of-way. Per C.R.S. § 43-1-1201, *et seq.*, CDOT can enter into a non-exclusive public-private initiative partnership agreement with a telecommunications company but must either receive a commensurate contribution for the use of CDOT’s right-of-way or be able to offset the benefit that the private telecommunications company will be receiving with a public benefit. In addition, federal and state law also requires CDOT to obtain fair market value for the use and disposal of state highway right-of-way. See *e.g.*, C.R.S. §43-1-210(5).



Lastly, the Federal Telecommunications Act specifically allows an entity like CDOT to require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis for the use of public rights-of-way. See 47 U.S.C.A. § 253(c).

Proposal Development

CDOT presented a simplified structure for initial consideration at the March 2023 commission workshop and has since received public comments on the proposed structure. The comments received have similar themes and concerns summarized here. The major themes of feedback received include:

- concerns with the proposed structure being cost prohibitive in rural areas, and believing it would impede broadband deployment,
- perceived lack of clarity how the funds will be allocated and why CDOT is proposing a simplified fee structure,
- fees being allegedly arbitrary and inconsistent with entities like cities and counties,
- delay on delivering on the simplified fee structure per Executive Order D-2022-0009, and Senate Bill 22-083,
- suggestion for a one-time fee, and
- concern about CDOT's alignment with federal and state legislation.

CDOT formed a small, working subcommittee with members of the Transportation Commission, members of the Transportation Unit within the Colorado Attorney General's office, and CDOT leadership. The objective of this subcommittee was to examine every public comment received and develop a revised fee structure based on the consideration of those public comments and input from the Transportation Commissioners to date. The subcommittee reviewed the proposed fee structure and costs to be recovered, compared other DOT's approaches, reviewed comments received and has discussed potential revisions to the originally proposed structure.

Response and Revised Proposal

While the fiber program staff members believe that the proposed fee structure stays within the guardrails of our state and federal laws and regulations, they propose revisions to be considered which respond to the public input received to date, which continue to acknowledge that CDOT is authorized to receive fair market value for the use of public rights of way and in addition must receive fair and reasonable compensation from telecommunication providers for the management of its rights of way.

The subcommittee identified three major changes that may be applied to the originally proposed simplified fee structure.

First, the subcommittee identified and agreed that a component of the proposed fee structure could be turned into a one-time fee, as opposed to an annually recurring fee. Specifically, the working group proposed revising the fee structure to move the administrative costs of the program to an up-front, one-time payment.

Second, the subcommittee examined how the fee structure could be adjusted in an attempt to reduce the costs overall. CDOT proposed reducing the maintenance fee component by 66% through several proposed changes. Originally, CDOT proposed setting the maintenance fee component at \$0.39 per linear foot, representing a 3-foot width of ROW disturbance. CDOT proposes reducing this fee to \$0.13 per linear foot, representing a 1-foot width of ROW. This component of the fee structure represents all impacts to the state of the ROW and the ongoing required maintenance activities that enable access to other entities' infrastructure installed in the ROW.



Third, the subcommittee also examined reducing the Abandonment Liability Fee from \$0.13 per linear foot and proposed reducing this component by 50%. The newly proposed component would result in \$0.06 per linear foot to cover the risks and cost ordinarily covered by typical bonding requirements, since the new proposal includes elimination of bonding to CDOT for fee-based permittees.

By providing a hybrid fee structure that includes paying administrative costs one time and up front as well as paying costs associated with managing and maintaining the ROW annually, CDOT addressed the request for a one-time payment. In addition, by reducing the maintenance and abandonment costs, CDOT is increasing internal risk, but trying to reduce challenges in deploying broadband infrastructure across the state.

The revised proposed fee structure results in the follow per foot costs for an initial, up front payment and an annual, recurring payment:

Initial, One-Time Fee	Annual, Recurring Fee
Interstate = \$0.11 per foot US Routes = \$0.09 per foot State Highway = \$0.07 per foot	Interstate = \$0.43 per foot per year US Routes = \$0.33 per foot per year State Highway = \$0.27 per foot per year

Next Steps

The team is workshopping a revised fee structure in May and will be on the agenda in June to continue moving the simplified fee structure required by EO 2022 009 to approval. The subcommittee will continue to meet through the adoption of a fee structure to continue reviewing and addressing received comments.

Comments received to date:

1. Jeff Weist, President of Colorado Cable Telecommunications Association (CCTA) and Colorado Telecommunications Association (CTA) on 4/18/23
2. Kevin Brandon CEO of SECOM, Jack Johnston CEO of ELEVATE, and Steve Johnson CEO of Luminare
3. Ron Christensen, President of Viaero Fiber Networks, LLC
4. Eric Bergman, Policy Director of Colorado Counties, Inc. (CCI) on 4/19/23
5. Josh Wehe, Operations Director at Jade communications and Blanca Networks on 5/4/23
6. Corey Bryndal, Regional Broadband Director, Region 10 on 5/4/23
7. Lola Spradley, Chair, Huerfano Economic Development Commission on 5/5/23
8. Jon Saunders, CBDO, SECOM on 5/8/23
9. Brian Shepherd, VP of Grant Engagement, Visionary Broadband on 5/12/23

