

Dear Senators DEN HARTOG, Woodward, Nelson, and  
Representatives PALMER, DeMordaunt, Gannon:

The Legislative Services Office, Research and Legislation, has received the enclosed rules of  
the Idaho Transportation Department:

IDAPA 39.03.43 - Rules Governing Utilities on State Highway Right-of-Way (New Chapter, Fee  
Rule) - Proposed Rule (Docket No. 39-0343-2102).

Pursuant to Section 67-454, Idaho Code, a meeting on the enclosed rules may be called by the  
cochairmen or by two (2) or more members of the subcommittee giving oral or written notice to Research  
and Legislation no later than fourteen (14) days after receipt of the rules' analysis from Legislative  
Services. The final date to call a meeting on the enclosed rules is no later than 12/06/2021. If a meeting is  
called, the subcommittee must hold the meeting within forty-two (42) days of receipt of the rules' analysis  
from Legislative Services. The final date to hold a meeting on the enclosed rules is 01/03/2022.

The germane joint subcommittee may request a statement of economic impact with respect to a  
proposed rule by notifying Research and Legislation. There is no time limit on requesting this statement,  
and it may be requested whether or not a meeting on the proposed rule is called or after a meeting has  
been held.

To notify Research and Legislation, call 334-4854, or send a written request to the address on the  
memorandum attached below.



**Terri Kondeff**  
Director

# Legislative Services Office Idaho State Legislature

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*Serving Idaho's Citizen Legislature*

## MEMORANDUM

**TO:** Rules Review Subcommittee of the Senate Transportation Committee and the House Transportation & Defense Committee  
**FROM:** Senior Legislative Drafting Attorney - Matt Drake  
**DATE:** November 18, 2021  
**SUBJECT:** Idaho Transportation Department

IDAPA 39.03.43 - Rules Governing Utilities on State Highway Right-of-Way (New Chapter, Fee Rule) - Proposed Rule (Docket No. 39-0343-2102)

### Summary and Stated Reasons for the Rule

The proposed fee rule addresses the permitting process for small wireless facilities in the state's rights-of-way. The Department states that a permitting process regarding utilities in the State's rights-of-way currently exists, but that the proposed rule would specifically address requests pertaining to small wireless facilities. The proposed rule contains fees related to applications for access and new installations. The Department states that such fees are in accordance with applicable law.

### Negotiated Rulemaking / Fiscal Impact

Negotiated rulemaking was conducted. There is no fiscal impact.

### Statutory Authority

The rulemaking appears to be authorized pursuant to Sections 40-312(3), Idaho Code.

cc: Idaho Transportation Department  
Ramon Hobdey-Sanchez

### \*\*\* PLEASE NOTE \*\*\*

Per the Idaho Constitution, all administrative rules may be reviewed by the Legislature during the next legislative session. The Legislature has 3 options with this rulemaking docket: **1)** Approve the docket in its entirety; **2)** Reject the docket in its entirety; or **3)** Reject the docket in part.

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Paul Headlee, Deputy Director Legislative Services Office	Kristin Ford, Manager Research & Legislation	Keith Bybee, Manager Budget & Policy Analysis	April Renfro, Manager Legislative Audits	Glenn Harris, Manager Information Technology
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Boise, Idaho 83720-0054

Tel: 208-334-2475  
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**IDAPA 39 – IDAHO TRANSPORTATION DEPARTMENT**  
**39.03.43 – RULES GOVERNING UTILITIES ON STATE HIGHWAY RIGHT-OF-WAY**  
**DOCKET NO. 39-0343-2102 (NEW CHAPTER, FEE RULE)**  
**NOTICE OF RULEMAKING – PROPOSED RULE**

**AUTHORITY:** In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has initiated proposed rulemaking procedures. The action is authorized pursuant to Sections 40-312 and 67-5229, Idaho Code.

**PUBLIC HEARING SCHEDULE:** Public hearings concerning this rulemaking will be held as follows:

<b>Tuesday, November 16, 2021</b> <b>3:00 p.m. to 5:00 p.m. (MT)</b>
<i>Participation in-person is available at the following location:</i>  <b>ITD Headquarters: East Annex</b> <i>(Southeast area of the ITD Headquarters campus)</i> <b>3293 West Jordan St.</b> <b>Boise, ID 83703</b>  <i>Participation via phone or Webex is also available:</i>  <b>Join Online Webex Meeting</b> <b>Meeting Number (Access Code): 2459 562 6772</b> <b>Meeting Password: 1234</b>  <i>Join by phone at: 1-844-740-1264 (USA Toll Free)</i>

The hearing site(s) will be accessible to persons with disabilities. Requests for accommodation must be made not later than five (5) days prior to the hearing, to the agency address below.

**DESCRIPTIVE SUMMARY:** The following is a nontechnical explanation of the substance and purpose of the proposed rulemaking:

As the Idaho Transportation Department (ITD) continues its efforts to address utility accommodation for those seeking access to the state's right-of-way (ROW), ITD is proposing rule changes to address the permitting process for small wireless facilities. The proposed changes bring clarity to the Department's accommodation of these utilities in the state's ROW.

ITD *incorporates by reference* the July 2003 Edition of the Utility Accommodation Policy (UAP) in IDAPA [39.03.43 Rules Governing Utilities on State Highway Right-of-Way](#). Some proposed changes in this rule occur within the incorporated document.

Although the UAP referenced in IDAPA 39.03.43 addresses all utilities, the focus of this rulemaking is to update portions that directly relate to small wireless facility permitting and accommodation; criteria, standards and policy.

**FEE SUMMARY:** The following is a specific description of the fee or charge imposed or increased:

The new fees being added to this chapter relate to the installation and location of small wireless facilities in the state's ROW. The assessed fees are in accordance with the Federal Communications Commission's Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133, (Sept. 26, 2018). The fees address applications for access and new installations.

**FISCAL IMPACT:** The following is a specific description, if applicable, of any negative fiscal impact on the state general fund greater than ten thousand dollars (\$10,000) during the fiscal year as a result of this rulemaking: N/A

**NEGOTIATED RULEMAKING:** Pursuant to Section 67-5220(1), Idaho Code, negotiated rulemaking was conducted. The Notice of Intent to Promulgate Rules - Negotiated Rulemaking was published in the June 2, 2021, Idaho Administrative Bulletin, Vol. 21-6 pages 65-66 and in the July 7, 2021, Idaho Administrative Bulletin, Vol. 21-7 pages 33-34.

**INCORPORATION BY REFERENCE:** Pursuant to Section 67-5229(2)(a), Idaho Code, the following is a brief synopsis of why the materials cited are being incorporated by reference into this rule:

The Department's Utility Accommodation Policy (UAP) was incorporated by reference in 1990 with only several updates since then, the most recent in July 2003. This is the official policy for governing occupancy of state highway rights-of-way by utility facilities. This policy applies to maintenance of existing utilities, new utility installations and existing utility installations to be retained or adjusted as a result of highway construction or reconstruction, as well as the relocation of utility facilities that are found to constitute a hazard to the traveling public on all rights-of-way under the jurisdiction of the ITD.

**ASSISTANCE ON TECHNICAL QUESTIONS, SUBMISSION OF WRITTEN COMMENTS:** For assistance on technical questions concerning the proposed rule, please contact Robert Beachler, Planning Broadband Program Manager, at (208) 772-1216. Materials pertaining to this rulemaking, including any available preliminary rule drafts, can be found on the Idaho Transportation Department's website at the following web address: <https://itd.idaho.gov/rulemaking/>.

Anyone may submit written comments regarding this proposed rulemaking. All written comments must be directed to the undersigned and must be delivered on or before November 24, 2021.

DATED this 22nd Day of October 2021.

Ramón S. Hobdey-Sánchez, J.D.  
Office of Governmental Affairs  
Idaho Transportation Department  
3311 W. State St.  
Boise, ID 83707-1129  
Phone: 208-334-8810  
[ramon.hobdey-sanchez@itd.idaho.gov](mailto:ramon.hobdey-sanchez@itd.idaho.gov)

**THE FOLLOWING IS THE PROPOSED TEXT OF FEE DOCKET NO. 39-0343-2102**  
**(New Chapter)**

**39.03.43 – RULES GOVERNING UTILITIES ON STATE HIGHWAY RIGHT-OF-WAY**

**000. LEGAL AUTHORITY.**

Under authority of Sections 40-312(3) and 67-5229, Idaho Code, the Idaho Transportation Board adopts this rule.

( )

**001. SCOPE.**

The purpose of the policy is to regulate the location, design and methods for installing, relocating, adjusting and maintaining utilities on State highway right-of-way (ROW) when such use and occupancy is legal, in the public interest and will not adversely affect the highway or its users. The policy applies to new utility installations, to existing utility installations to be retained, relocated, maintained or adjusted because of highway construction or reconstruction, and to the relocation of utility facilities which are found to constitute a definite hazard to the traveling public. ( )

**002. ADMINISTRATIVE APPEALS.**

Administrative appeals under this chapter shall be governed by Section 2.4 “Administrative Appeal” of the “Utility Accommodation Policy” incorporated by reference. ( )

**003. INCORPORATION BY REFERENCE.**

The Idaho Transportation Department incorporates by reference the 2022 Edition of the “Utility Accommodation Policy.” This publication is available for public review on the Department’s website at <http://itd.idaho.gov>. ( )

**004. SMALL WIRELESS FACILITIES.**

**01. Definitions.** ( )

**a. Small Wireless Facilities (SWF).** ( )

**i. The facilities:** ( )

(1) Are mounted on structures fifty (50) feet or less in height including their antennas; or ( )

(2) Are mounted on structures no more than ten percent (10%) taller than other adjacent structures; or ( )

(3) Do not extend existing structures on which they are located to a height of more than fifty (50) feet or by more than ten percent (10%), whichever is greater. ( )

ii. Each antenna associated with the deployment, excluding associated antenna equipment is no more than three (3) cubic feet in volume; ( )

iii. All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than twenty-eight (28) cubic feet in volume; ( )

iv. The facilities do not require antenna structure registration under FCC Ruling 18-133 Part 17; Guide for Utility Management General Information 100.00 6/2021 100-4; ( )

v. The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and ( )

vi. The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards. ( )

**b. Fifth-Generation (5G). 5G wireless technology which require new infrastructure in the form of small cell facilities.** ( )

**02. Small Wireless Facility Fees.** ( )

**a. Federal Communications Commission (FCC).** Per the Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, FCC 18-133, (Sept. 26, 2018), the fee schedule is as follows: ( )

- i. Five hundred dollars (\$500) for non-recurring fees, including a single up-front application that includes up to five (5) SWFs, with an additional one hundred dollars (\$100) for each SWF beyond five (5) (colocation/attachment); ( )
- ii. One thousand dollars (\$1,000) for non-recurring fees for a new pole (not a collocation) intended to support one (1) or more SWF; and ( )
- iii. Two hundred seventy dollars (\$270) per SWF per year for all recurring fees, including any possible ROW access fee or fee for attachment to structures in the ROW. ( )

**005. – 999. (RESERVED)**

## PROPOSED RULE COST/BENEFIT ANALYSIS

Section 67-5223(3), Idaho Code, requires the preparation of an economic impact statement for all proposed rules imposing or increasing fees or charges. This cost/benefit analysis, which must be filed with the proposed rule, must include the reasonably estimated costs to the agency to implement the rule and the reasonably estimated costs to be borne by citizens, or the private sector, or both.

**Department or Agency:** Idaho Transportation Department

**Agency Contact:** Ramón Hobdey-Sánchez      **Phone:** 208.334.8810

**Date:** November 4, 2021

**IDAPA, Chapter and Title Number and Chapter Name:**

[39.03.43 – Rules Governing Utilities on State Highway Right-of-Way](#)

**Fee Rule Status:**  **Proposed**       **Temporary**

**Rulemaking Docket Number:** 39-0343-2102

### STATEMENT OF ECONOMIC IMPACT:

The proposed fee rule for the permitting of Small Wireless Facilities within the State Highway Right-of-Way (ROW) requires additional evaluation by Idaho Transportation Department engineering staff of proposed Small Wireless Facilities to be installed within the ROW or attached to existing structures. These additional costs associated with a more detailed structural analysis and review by staff will be offset by the proposed fee structure.

There are no anticipated costs to be borne by citizens.

The proposed fee rule is in accordance with Federal Communications Commission DECLARATORY RULING AND THIRD REPORT AND ORDER 18-133.

- a) \$500 for non-recurring fees, including a single up-front application that includes up to five Small Wireless Facilities, with an additional \$100 for each Small Wireless Facility beyond five, or
- b) \$1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more Small Wireless Facilities; and
- c) \$270 per Small Wireless Facility per year for all recurring fees including any possible Right-of-Way access fee or fee for attachment to municipally owned structures in the Right-of-Way.

47 U.S.C. §253(c) allows state or local governments to charge fees that recover a reasonable approximation of the state or local governments' actual and reasonable costs. In addition to requiring that compensation be "fair and reasonable," Section 253(c) requires that it be competitively "neutral and nondiscriminatory" and not discriminate as to the fees charged to different providers. The proposed fee rule structure noted above was presented to wireless providers and trade association representatives during public stakeholder meetings and the comments received by Idaho Transportation Department were in support of the proposed fees structure.