From:	Doug Heiken
To:	DSL Rules * DSL
Subject:	OAR rules for Comm Site Leases on State land - comments
Date:	Monday, July 18, 2022 1:42:43 PM

FROM; Doug Heiken, Oregon Wild | PO Box 11648, Eugene, OR 97440 | 541-344-0675 | dh@oregonwild.org
TO: Oregon DLS
VIA: dsl.rules@dsl.oregon.gov
DATE: 18 July 2022
RE: OAR rules for Comm Site Leases on State land - comments

Please accept the following comments from Oregon Wild regarding OAR rules for Comm Site Leases on State land, https://www.oregon.gov/dsl/Laws/Pages/Rulemaking.aspx. Oregon Wild represents approximately 20,000 supporters who share our mission to protect and restore Oregon's wildlands, wildlife, and waters as an enduring legacy.

The email notice directed people to an online form at https://www.oregon.gov/dsl/Laws/Pages/RuleComment.aspx that did not work because (according to the drop-down menu) "no rulemaking is open for comment" even though this rule is supposed to be open all through the month of July.

Oregon Wild recognizes that communication using electromagnetic waves is a critically important technology now and for the foreseeable future.

Our suggestions for this rule-making are:

1. Provide an opportunity for informed public comment on the siting of comm sites that are new or are being considered for expansion of the existing physical footprint.
2. Adopt a policy to consider and document environmental trade-offs and a policy to avoid and minimize environmental effects to the extent practicable. Relevant environmental impacts include loss/degradation/fragmentation of habitat (forest meadow, rock garden, wetlands, etc), wildlife collisions and mortality, scenic impacts, light pollution, noise pollution, soil erosion, water pollution, weeds, fire hazards, etc.
3. Adopt a policy to avoid siting new comm sites in locations that will require increased fire suppression effort or add to the complexity of fire control, especially in places where fire is a natural part of the natural disturbance regime.
4. Consider alternatives such as alternative locations for comm sites and access roads so that trade-offs of different sites can be weighed.
5. Require site decommissioning and site restoration when comm sites are no longer needed. Require performance bonds or collect fees to cover the cost of decommissioning and site restoration.

Sincerely,
/s/

Doug Heiken (he/him) Oregon Wild
PO Box 11648, Eugene OR 97440
dh@oregonwild.org, 541.344.0675

July 31, 2022

VIA E-MAIL

Ms. Allison Daniel
Rules Coordinator
Department of State Lands
775 Summer St. NE, Suite 100
Salem, OR 07301
Rules@dsl.oregon.gov

Re: Administrative Rules for Authorizing Communications Site Leases on State-Owned Land

Dear Ms. Daniel:

CTIA[1] appreciates the opportunity to comment on the Department of State Lands' ("Department's") Notice of Proposed Rulemaking in this proceeding.[2]

CTIA supports the Department's development of rules for siting on state-owned land that will advance Oregon's longstanding commitment to expanding the availability of broadband communications services to all residents. Wireless services play a central role in achieving broadband availability nationwide, and our industry is making substantial capital investments in the wireless facilities needed for broadband – over $30 billion in 2020 alone, and over $600 billion throughout the life of the industry.[3] Enabling wireless facilities to be

[1] CTIA – The Wireless Association ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as app and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] Administrative Rules for Authorizing Communication Site Leases on State-Owned Land (June 17, 2022) ("Notice").

[3] CTIA, "2021 Annual Survey Highlights" (July 2021), *available at* https://www.ctia.org/news/2021-annual-survey-highlights (last accessed July 31, 2022).

installed efficiently on state-owned lands will promote broadband expansion consistent with state policy.

CTIA is, however, concerned that a number of the proposed rules would impede, rather than promote, broadband expansion in Oregon. They would impose excessive, burdensome and complex fees and requirements that would not advance Oregon's longstanding goal to expand broadband, or the Department's stated objective to streamline siting on state-owned lands.

CTIA urges the Department to revise the proposed rules, as detailed in this letter, to better advance State objectives. The Department's rules should:

- Acknowledge the fundamental differences between small wireless facilities and other types of deployment;
- Promote the deployment of small wireless facilities by adopting an annual fee of $270;
- Promote the deployment of larger facilities by setting annual fees of $4,000-$8,000;
- Reduce annual fees on collocations to promote efficient use of rights-of-way;
- Adopt an application fee for new facilities based on the Department's costs of reviewing and processing those applications; and
- Streamline the application process for all new wireless facilities, eliminate duplicative reviews, revise collocation approvals from an application to a consent process, and set deadlines for the Department to complete action on applications for new facilities.

I. THE PROPOSED RULES WOULD UNDERMINE THE LONGSTANDING OREGON POLICY GOAL TO EXPAND BROADBAND AVAILABILITY.

Achieving universal broadband availability has long been a priority for Oregon. For nearly two decades, state policymakers have recognized the critical importance of rapidly deploying advanced communications networks to serve all Oregon residents, and have removed barriers to that deployment. For example:

- In 2003, the Legislature enacted a law declaring that "it is the goal of this state to promote access to broadband services for all Oregonians in order to improve the economy in Oregon, improve the quality of life in Oregon communities and reduce the economic gap between Oregon communities that have access to broadband digital applications and services and those that do not, for both present and future generations." The law finds that expanding broadband requires actions such as

"[r]emoving barriers to the full deployment of broadband digital applications."[4]

- In 2018, Governor Brown issued an Executive Order establishing the Oregon Broadband Office and declaring that "broadband constitutes critical infrastructure for the property of all Oregonians, especially Oregon's rural and underserved communities," and is "increasingly vital for the conduct of commerce, the economic viability of communities, and Oregon's global competitiveness." The Governor directed the new agency to "remove barriers to and support broadband infrastructure deployment to close the continuing digital divide."[5]

- The Oregon Broadband Office currently identifies as two of its missions to "develop broadband investment and deployment strategies" and "advocate for public policies that remove barriers, promote and coordinate solutions, support and promote broadband planning."[6]

- The 2020 Oregon Statewide Broadband Assessment and Best Practices Study concluded, "As broadband becomes an ever-increasing critical asset, too many smaller, rural and less affluent localities confront a confluence of geographic, economic and cultural barriers to adequate broadband. Cost is chief among these impediments – planning, designing, and constructing a broadband network requires significant resources up front as well as an ongoing infusion of capital to operate, maintain and upgrade."[7]

Efficient deployment of wireless networks advances Oregon's policy goals by making broadband available to residents, businesses and government agencies. Wireless is a cost-effective communications technology that can be rapidly deployed. It is particularly cost-effective compared to fiber in rural areas, where residents often lack reliable service. State-owned lands are often optimal locations for wireless facilities.

In particular, fifth-generation ("5G") wireless technology enables providers to deploy small wireless facilities ("SWFs") to complement their network of larger facilities. A SWF uses an

[4] 2003 c.775 §1, codified at Oregon Revised Statutes 759.016(1).

[5] Office of the Governor, Executive Order No. 18-31, "Establishing the Oregon Broadband Office" (Dec. 14, 2018).

[6] *Business Oregon,* "Oregon Broadband Office," *available at* https://www.oregon.gov/biz/programs/oregon_broadband_office/pages/default.aspx (last accessed July 31, 2022).

[7] Strategic Network Group, Oregon Statewide Broadband Assessment and Best Practices Study Prepared for the Oregon Business Development Department (Jan. 31, 2020).

antenna that is only a few cubic feet in size and is attached to rooftops, building exteriors, water towers, signs and poles (including streetlight poles), thus minimizing visual impact. SWFs can extend coverage and also enhance the network's capacity, which is critical in the provision of broadband service. SWFs are installed more closely together than macro facilities.

The major evolution in technology that 5G and SWFs represent is enabling faster deployment of broadband services across the nation. It makes a "one size fits all" regulatory approach not only unwarranted but also a threat to broadband investment, because it will discourage the deployment of SWFs in Oregon.

The Department proposes to adopt rules "to establish and streamline administrative procedures for authorizing communication site facilities on state-owned land."[8] CTIA agrees that siting communications facilities on Department-managed lands will benefit the public, and supports the objective to "streamline" those procedures. However, a number of the proposed rules erect substantial obstacles that will delay and impede – if not outright block – the Department's goal to authorize those facilities. Rather than "streamline" procedures, the proposed rules add multiple layers of complicated requirements, new costs, and long timelines. Moreover, the proposed rules do not seem to account for the proliferation of SWFs as fifth-generation networks are deployed across Oregon, and appear to be predicated on the assumption that all wireless communications sites will be larger and more complicated than other types of communications sites on state land.

These expensive and burdensome requirements will not only deter the investment in infrastructure the Department says it seeks to promote, but will also create the very "barriers" that the Oregon Broadband Office is tasked to remove. Despite the findings of the 2020 Statewide Broadband Assessment that high costs deter capital investment in networks, the rules would drive up costs and thus discourage that investment. Put simply, the Department proposes a path that is inconsistent with that of the Oregon agency charged with promoting broadband deployment. And to the extent that the proposed rules seek to use state lands to drive revenue, such revenue will be severely curtailed by the fact that the proposed rules will discourage wireless providers from siting on state lands at all.

The Department can correct these problems by revising its proposed rules to reduce their costs, delays, and burdensome compliance mandates. These changes will better align the

[8] Notice at 1.

Department with Oregon's broadband policies, accelerate expanded wireless network coverage, and achieve the clear public interest benefits that expanded coverage will deliver to the state's economy and to its residents.

II. THE DEPARTMENT SHOULD ADOPT LOWER RECURRING AND APPLICATION FEES FOR ALL WIRELESS FACILITIES TO PROMOTE INFRASTRUCTURE INVESTMENT.

A. The Department Should Acknowledge the Difference Between Large and Small Wireless Facilities in the Proposed Rules, and Significantly Reduce the Recurring Fees for Installations of New Small Wireless Facilities.

The proposed rules would apply the same minimum base annual fee of $20,000 to all types of "cellular communications" facilities. The rules appear to assume that all facilities involve antenna towers or large structures, but, as previously discussed, this is not the case for modern wireless deployments.

The marked difference in the economics of SWF technology has led the federal government to apply lower fees and less burdensome regulations to SWFs in order to remove barriers to deployment. In 2018, the FCC heralded the development of SWF technology as enabling greatly expanded wireless broadband service without requiring the construction of large towers. But it found that high fees would effectively prohibit SWF deployment, frustrating the national priority to accelerate broadband.

The FCC thus defined small wireless facilities as:

- *Size:* Facilities that are either:
  - (i) mounted on structures 50 feet or less in height including their antennas, or
  - (ii) mounted on structures no more than 10 percent taller than adjacent structures, or
  - (iii) that do not extend an existing structure to a height of more than 50 feet or by more than 10 percent, whichever is greater; and
- *Volume:* Facilities where the antenna is no larger than three cubic feet in volume, and all other associated equipment is no more than 28 cubic feet in volume.

The FCC also required that fees for deploying SWFs in rights-of-way be based on the state or locality's reasonable costs to manage deployment. The FCC concluded that annual recurring

access fees of $270 are presumptively reasonable, and held that a state or locality may set a higher fee if its costs would not be recouped by the presumptively reasonable amount.[9]

The fees the proposed rules would impose are steep for all communications facilities, as will be discussed below. But in particular, these recurring fees are exorbitant for SWFs. The $20,000 annual fee for cellular facilities in Proposed Rule 141-126-0150 is simply not viable for a SWF. Further, the $20,000 figure cannot be justified as being necessary for the state or locality to recoup its administrative costs, as required by the FCC. And the fact that these fees would pile up quickly for deployments of multiple small facilities would dissuade providers from siting *any* small facilities in an area.[10]

CTIA urges the Department to instead adopt rules and annual fees for new installations of SWFs that align with the FCC's rules and account for the differences in types of wireless facilities.[11] The Department should:

- Add a definition of "small wireless facility" to the definitions in Rule 0140-126-0120 that tracks the FCC's definition; and
- Set the annual recurring fee at $270 for each SWF, as the FCC has.

B. The Department Should Reduce the Recurring Fees for Larger Wireless Facilities, Aligning them with the BLM's Approach Rather Than an Ill-Defined "Market Rate".

The Department states that the proposed rules "establish a lease rate and fee structure consistent with market rates, based on a market study of lease rates and fees for the Bureau of Land Management ["BLM"] and other western states that manage similar communication facility leases." However, Proposed Rule 141-126-0150's flat annual rental fee for "cellular"

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[9] *See In re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling, Report and Order, 33 FCC Rcd 9088 (Sep. 27, 2018) ("2018 FCC Order").

[10] The Department should also note that federal law prohibits state regulations that "may prohibit, or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §253(a).

[11] To the extent that the proposed fees discriminate against providers who rely more heavily on small cells to support their networks, the Department's rules could run afoul of federal law on those grounds as well. *See* 47 U.S.C. §253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, *on a competitively neutral and nondiscriminatory basis*, for use of public rights-of-way *on a nondiscriminatory basis*") (emphasis added).

facilities[12] bears no resemblance to the lower fees for other commercial wireless facilities, or to the BLM's fees, and more importantly, its market-based approach would erect significant barriers to deployment.

The Department proposes a flat annual fee of $20,000 for all cellular facilities, but does not make available the "market study" that it purports to rely on to establish a "market rate", or supply any factual basis to set the fees at such a level. Moreover, Rule 141-126-0150 states that the $20,000 annual fees are only "minimum base amounts" amounts that can be set higher: "The Department reserves the right to establish the base annual compensation in amounts that may be greater than the minimum base annual compensation." This uncertainty will deter wireless providers from seeking to site facilities on Department-managed land and undermine the Department's and state's objective to encourage expanded wireless service on its lands.

Although the Department notes that the fees are set to "generate revenue for the state's Common School Fund," courts have invalidated fees that similarly seek to raise revenues without being based on the costs governments incur to oversee granting siting applications and overseeing deployment. These courts have found that where fees are revenue-based and bear no relationship to governmental costs, they can effectively prohibit communications service in violation of 47 U.S.C. 253(a).[13] CTIA fully supports the goal of funding schools, and during the Covid-19 pandemic wireless carriers have gone to great lengths to enable remote learning, but school funding need not, and should not, prevent or detract from broadband deployment. (Moreover, to the extent that the Department's proposed reliance on market-based rates dissuades carriers from siting on state-owned

[12] As an aside, the use of the term "cellular" in the proposed rules is both dated and too narrow. While the FCC used that term for the first commercial mobile wireless systems in the 1980s, it has subsequently used many additional terms for systems that offer the public similar services, such as "personal communications service" and "advanced wireless service." To avoid confusion, CTIA suggests that the Department use the single term "commercial wireless" facilities to apply to all facilities that the proposed rules classify as "cellular" or "commercial" facilities (with a separate definition for "small wireless facilities," as discussed *supra*).

[13] *See, e.g., City of Portland v. United States,* 969 F.3d 1020, 1039 (9th Cir. 2020) ("The statute requires that compensation be 'fair and reasonable"; this does not mean that state and local governments should be permitted to make a profit by charging fees above costs."); *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003) ("Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way. . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry.").

lands, the proposed rules would limit broadband deployment *and* fail to generate revenue, making them completely counterproductive.)

The Department also provides only a cursory explanation for why it proposes to charge the annual fee of $20,000 for a "cellular" facility but much less – $4,000-$8,000 – for a "commercial" facility. "Cellular" is defined to mean "transmission and receiving of signals for mobile telecommunications over a cellular network," while "commercial" appears to cover all other commercial wireless communications (which would appear to include fixed wireless services). But this distinction (which is not in the Department's current rules) is arbitrary, because both types of facilities use antennas mounted on towers or other structures; they both receive and transmit communications. Nor are cellular antennas necessarily any larger or more complex other types of antennas. To the contrary, as CTIA explained above, they are often smaller, because cellular providers are increasingly relying on SWFs to build out their mobile networks.[14]

In contrast to the Department's proposed approach, the BLM sets progressively lower fees for wireless facilities as a market's population declines. The Department does not explain the basis for departing from the BLM's approach or for charging such a large flat fee. The flat fee also is inconsistent with the Department's own statement that it based fees on "market rates," as the market for land is certainly different in different parts of Oregon.

In short, the proposed annual fees are likely to inhibit broadband deployment, undercutting state policy to accelerate that deployment. CTIA urges that the Department to instead use the same tiered approach for larger facilities that it has established for "commercial" wireless facilities:

- $4,000 for facilities in counties with a population of less than 50,000
- $6,000 for facilities in counties with a population of 50,000-150,000
- $8,000 for facilities in counties with a population of more than 150,000.[15]

[14] Again, to the extent that the proposed rules are discriminatory, they would not pass muster under federal law. *See* note 11, *supra*.

[15] If the Department declines to follow this approach, it should use the tiered fees in the BLM's fee schedule.

C. The Department Should Significantly Reduce Annual Fees for Collocations.

The fees Rule 141-126-0170 would impose for collocation are excessive. Collocators would have to pay a minimum annual rent of $10,000, but that amount could be set higher based on an appraisal of the market value of the location – and there is no upper limit on that amount.

The Department supplies no basis for a $10,000 fee. As CTIA discussed earlier in these Comments, the FCC and courts have found that such large government-imposed fees deter investment in new infrastructure.

Moreover, the Department would already be collecting the annual fee from the pre-existing site user. If three additional users located on the same structure, the Department would collect a minimum of $50,000 each year (at least $20,000 for the initial user and at least $10,000 for each other user). Double- or triple-charging for the same facility ignores the Department's mission to promote deployment of new infrastructure, and dissuades efficient use of state-owned rights-of-way.

Rule 141-126-0170 should thus be modified to delete the additional rental fees that co-locators must pay and replace that fee structure with one that is reasonable, non-discriminatory and promotes Oregon's broadband deployment goals.

D. The Department Should Align Its Application Fees with the FCC's.

Rule 141-126-0130(2), governing application fees, suffers from the same issues as the proposed recurring fees. It would charge up-front application fees of $1,000 for "commercial" uses but double that -- $2,000 – for "cellular communications." As CTIA explained above, there is no plausible basis to discriminate between these types of facilities, creating issues with 47 U.S.C. §253(c). Both types of facilities provide commercial wireless services. The fact that a cellular facility can transmit signals to mobile devices (per the proposed definition) has no bearing on the appropriate amount of an application fee. In addition, the rule does not distinguish between SWFs and larger facilities, meaning exponentially higher fees for installations with multiple smaller facilities.

In its 2018 Order, the FCC reinforced the important of cost-based state and local application fees for wireless facilities in rights-of-way. It pointed to record evidence that given the economics of deployment, up-front fees of thousands of dollars were impairing deployment, undercutting the national priority to accelerate expanded service. It thus required state and

local governments to limit SWF application fees to recover governmental costs to process the application, and determined that the presumptively reasonable cost-based fee was $500 for a single application that includes up to five SWFs, with an additional $100 for each additional facility, or $1,000 for a new pole or other structure. Governments that can demonstrate these amounts would not recover their application review costs can increase those fees to the level needed to recoup them.[16]

The Department should incorporate these application fees into its rules. Adopting these fees will address the arbitrary distinction the proposed rules create and ensure that SWFs pay commensurately lower application fees. Application fees for new larger facilities should be based on the Department's costs. As discussed in Section III below, the Department should not require collocations to undertake a full application process because collocations would be implemented under the lease entered into by the structure owner. The Department should instead have a consent process for such collocations.

III. THE DEPARTMENT SHOULD STREAMLINE APPLICATION PROCEDURES, AND ELIMINATE UNNECESSARY AND/OR DUPLICATIVE PROCESSES.

CTIA is also concerned that the extensive application procedures the rules propose will deter investment in new infrastructure, undermining state broadband objectives. Because some procedures duplicate reviews that applicants must already undergo, they will unnecessarily increase costs and delays and conflict with the Department's stated objective to streamline the review process. The Department should delete or modify these requirements.

Public Notice and Review. Rule 141-16-0140(5) would require the application to "be circulated to applicable local, state, federal agencies, Tribal governments*, and other interested persons, including but not limited to* adjacent property Holders, affected lessees and permittees, and easement Holders for review and comment" (emphasis added).

This vague, unbounded list fails to give applicants fair notice of their obligation because it does not define who would qualify as an "applicable," "interested," or "affected" person. There is also no reason for the Department to require any such notice. Local governments typically require that notice of a wireless installation be given to them, published in a local newspaper, and/or considered in a public hearing. And federal and state environmental and historic preservation review processes require the applicant to provide to, or coordinate with,

[16] *See* 2018 FCC Order.

Federal, State and local agencies and Tribes. The Department should delete this duplicative notice requirement entirely and defer to those other existing procedures.

Rule 141-16-0140(5) would also direct the Department to seek comment from all notified persons on the environmental impact of the facility on "threatened or endangered species" and "archaeological and historic resources," which it will then review. This process appears to be duplicative of the reviews already conducted pursuant to State and Federal environmental and historic preservation laws. For example, at the federal level, FCC rules already require wireless providers to conduct this review pursuant to the National Environmental Policy Act and National Historic Preservation Act for facilities that could potentially have an impact on the environment or historic properties. There is thus no basis for the Department to conduct a redundant environmental and historic resource review. This entire process should be deleted.

Rule 141-16-0140(5) also provides the application will be circulated to agencies and Tribes so that a review for compliance with various laws can be completed. If the applicant needs to secure building permits, conduct studies or obtain other governmental approvals, it is unreasonable to burden it with the costs of doing so without first securing grant of the lease. Rule 141-16-0140(5) should be revised to authorize the Department to execute a lease with the condition that the applicant subsequently secure necessary approvals.

Timelines for Granting Applications. The proposed rules set exceedingly long potential timelines for the review and grant of applications, without any deadline for the Department to act. Rule 141-16-0130 requires an application to be filed at least 180 days prior to the date of intended use, indicating that the applicant should expect up to six months for the Department to complete its review. But the rule's six month "expectation" does not set a deadline for the Department to act on the application. To help make certain that applications are acted upon in a timely manner, an actual deadline should be provided.

The FCC has determined in several orders that promptly completing application reviews is important to achieving the public interest benefits from expanded wireless service. It thus adopted specified timelines applicable to state and local review to speed deployment. It found that setting such time periods will provide more certainty to wireless companies, which will incent investment. The FCC also determined that the installation of SWFs should involve less review and be significantly shortened given their much reduced visual impact, and thus set shorter deadlines for action on applications for those facilities.

The Department should set specific deadlines for acting on applications. Consistent with the time periods the FCC has set for installations of new facilities, the rules should direct that the Department must act within 150 days for macro sites, and within 90 days for SWFs. Those deadlines should begin to run immediately upon the filing of an application, and should encompass all Department review procedures, with an application deemed granted if not acted upon under this reasonable schedule.

When no new structure will be constructed and the antenna and supporting equipment will instead be collocated on an existing structure, there is no need for an application process or extended Department review beyond basic safety and engineering approval. Rather, the Department should merely be taking the ministerial act of consenting to the collocation. The rules should thus specify that collocations do not require a full approval process, and that the Department shall issue its consent for collocations within 30 days.

IV. THE DEPARTMENT SHOULD DELETE OR MODIFY CERTAIN OTHER RULES THAT WOULD UNDERMINE OREGON'S BROADBAND POLICIES OR CONFLICT WITH FEDERAL LAW.

Lease Term. Rule 141-16-0160(1) would provide that "the initial term of the lease may be up to, but not exceed ten (10) years, unless otherwise approved by the Director." This short term is likely to deter expansion of wireless services, contrary to state policy objectives. A 10-year term is insufficient given the capital investment needed to construct or install new wireless facilities. The rule should be modified to set a minimum initial term and automatic renewal terms of not less than 25-30 years. The Department is fully protected by Proposed Rule 141-16-0220, which empowers the Department to terminate a lease when it establishes that the lessee has defaulted on the lease terms.

In addition, Rule 141-16-0160(1) should include a two-year notice requirement should the Department determine not to renew the lease. Providers need that amount of time to find alternative locations, finalize any leasing and zoning processes, and install equipment there. Forcing the shutdown of communications services before new facilities are ready would unjustifiably disrupt service to the public.

Site Access. Rules 141-16-0160(4), (5) and (6) would address site access but would not address the lessee's access to utilities that are on-site. These rules should specifically grant the lessee utility access. These provisions also adopt conflicting requirements for third-party access. They recognize the need to restrict access to lease areas to protect the public, but

then also state that the public should have that access, and leave access issues to the Department's discretion. The language on third-party access should be removed because leaseholders should be entitled to quiet enjoyment of the premises they are leasing to operate facilities without interference from the public or Department involvement in determining access, absent a default on the lease. Further, it would be highly irregular for the public to have access to wireless facilities, and carriers should be able to secure such facilities on Department lands as they do elsewhere.

Frequency Changes. Rule 141-16-0160(12) would require the lease holder to notify the Department of "any equipment modifications resulting in a change of frequency." The Department will then notify other users, and the leaseholder "must resolve the frequency issue." However, Section 332(c)(7)(B) of the Communications Act preempts states and localities from regulating the use of radio frequencies, granting that authority exclusively to the FCC.[17] The FCC has set specific power and other limits on the frequencies that wireless service providers can use and addresses interference issues that may arise. This federal regime ensures that all wireless services can coexist and that problems can be quickly resolved. States have no permissible role in regulating frequency use or modifications to that use. Proposed Rule 141-16-0160(12) is preempted by federal law, serves no purpose not already addressed by the FCC's rules and procedures, and should be deleted or revised to clarify that FCC rules govern interference issues.

Indemnification. Rule 141-126-0160(19) would state that the holder of a lease "will indemnify the State of Oregon and the Department of State Lands against any claim or costs arising from or related to Holder's use or occupation of the lease area." This section should be revised to exclude claims or costs that are caused by, or arise from or relate, to the State's or the Department's willful misconduct, gross negligence, or fraud. These are typical exclusions to indemnification provisions.

Competitive Bidding. Rule 141-126-0210 would establish a "Competitive Bidding Process" under which the Department may choose to offer access to the lands it controls through competitive bids. This process should not be adopted.

- First, it would increase the cost of investing in new facilities. The bidding process would thus deter wireless firms from investing in new infrastructure because of the uncertainty as to how much they will have to pay – undermining the proceeding's

[17] *See also In re: 960 Radio, Inc.*, Memorandum Opinion and Declaratory Ruling, FCC 85-578, 1985 WL 193883 (Nov. 4, 1985) at para 4-6.

objective to facilitate wireless use of state-owned lands. And, the already substantial up-front application fees wireless providers would have to pay would be in addition to the amount of the winning bid, making investment even less attractive.

- Second, a competitive bidding process adds still more delay into securing access to a site – contrary to the Department's stated objective to "streamline administrative procedures."

- Third, the Department supplies no basis for how it would determine the winning bidder. The proposed rule states that the Department "will determine at its discretion the highest qualified applicant," but fails to explain what qualifications it would consider and how it would weigh them to compare and evaluate applicants. The rule would thus leave wireless firms with no basis to expect that whatever bid they submit would be successful.

- Fourth, bidding would be particularly difficult for smaller firms, which may lack the financial resources to compete with larger firms, driving them away from seeking to use state-owned lands. The Department asserts that the rules overall "will not have any significant fiscal impact on small businesses." But it failed to address the fiscal impact or the deterrent effect of requiring small businesses to engage in bidding.

Competitive bidding could for these reasons drive providers, particularly small firms, away from seeking to deploy at least at some locations – undermining the Department's stated objective of promoting deployment of broadband. Rule 141-126-0210 should be deleted.

Insurance. Rule 141-126-0200 would require lessees to obtain insurance coverage, but some wireless firms are self-insured, and cannot provide policies that would meet the rule's requirements. The rule should allow for alternative insurance coverage that would provide equivalent protection to the Department.

Enforcement. Rule 141-126-0230 would impose a process for the Department to determine when violations of the lease occur, but it fails to give the lessee the opportunity to correct the violation before the Department may take enforcement action (including a civil penalty). The rule should be modified to give the lessee 60 days to correct the violation before any enforcement action is taken. The rule should also provide that the Department will give the lessee advance notice of any inspection of the lessee's facilities.

* * *

The revisions to the rules that CTIA proposes will advance the State's broadband objectives and the Department's goal to streamline deployment on State-owned lands.

Sincerely,

/s/ Matthew DeTura
Matthew DeTura
Counsel, External and State Affairs
CTIA
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