

The Federal Government and Building Transmission Along Existing Rights of Way

Key Takeaways:

- The Federal Government, via the Federal Highway Administration (FHWA), **clearly provides a pathway** for states to permit co-location of transmission lines along existing rights-of-way (ROW).
- State Departments of Transportation (DOT) retain authority to decide whether or not to permit transmission lines in state and interstate highway ROWs, either through a **utility accommodation** policy or through recognition of an **alternative use**.

The FHWA 2021 memo [State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance](#) clarifies the ability to utilize the ROW for “Clean Energy and Connectivity” (CEC) projects. Notably, the guidance encourages state DOTs to leverage the highway ROW for “pressing public needs relating to climate change, equitable communications, renewable energy generation, electrical transmission and distribution projects, broadband projects, vegetation management, inductive charging in travel lanes, alternative fueling facilities, and other appropriate uses[.]”

Per the memorandum, there are two existing regulatory pathways that may be used for siting energy and communications projects in [Federal-aid highway](#) ROW. Approximately [one quarter](#) of all highways fall under this definition. Projects can obtain approval as a:

1. A **“Utility Accommodation”** allows utility facilities to be placed within highway ROW. To obtain a utility accommodation under [23 CFR 645](#), State law must consider the project type to be a utility. The 2021 memorandum clarifies that if State law considers renewable energy, electric transmission, or broadband to be utilities, then the utility accommodation can be used; or
2. An **“Alternative Use”** allows use of highway ROW for certain non-transportation purposes. To obtain approval as an alternative use of the highway ROW under [23 CFR 710](#), the FHWA must determine that “such occupancy, use, or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic.” The 2021 memorandum clarifies that CEC projects are in the public interest and may be acceptable alternative uses providing that they comply with relevant regulations and statutes.

Note: The FHWA, in its 2021 memorandum, “encourages State DOTs to consider addressing these facilities through accommodation as a utility to the extent practicable and consistent with State law.” However, a project that does not qualify for the utility accommodation may still use the highway ROW if the project qualifies under the alternative use provision. The FHWA had prohibited utilities in federal-aid highways since the advent of the interstate highway system, but started relaxing prohibitions in 1980s in response to requests from telecommunications providers. Over the past 40 years, more allowances have been made for utility co-location.

Additional Guidance and Limitations:

- Per the 2021 memorandum, State DOTs are not required to charge fair market rent or other fees for use of the ROW if the utility accommodation pathway is utilized.
- Fees may be set at the discretion of the State. It is encouraged, but not required that fees are allocated for transportation uses and services.
- Each State DOT must submit a UAP in accordance with 23 CFR 645.211 and 645.215, addressing how the State DOT will consider applications for utility accommodation within the access control lines of a freeway.
- A CEC project that is being accommodated as a utility facility is not a prohibited commercial activity under 23 U.S.C. 111, unless the project also qualifies as an automotive service station or other commercial establishment. For example, electric vehicle charging stations that are considered a utility also qualify as an automotive service station, so fees cannot be charged for their use.

Additional Sources:

- [“Policy on Using Bipartisan Infrastructure Law Resources to Build a Better America,” U.S. Department of Transportation Federal Highway Administration, February 2023](#)
 - Clarifies FHWA’s support for “accommodating new and emerging technologies like electric vehicle charging stations, renewable energy generation, and broadband deployment in transportation rights-of-way.”
- [“Memorandum: State DOTs Leveraging Alternative Uses of the Highway Right-of-Way Guidance,” U.S. Department of Transportation Federal Highway Administration, April 2021](#)
 - Advises State DOTs on the above two regulatory pathways that may be used for siting energy and communications projects in Federal-aid highway ROWs.
- [“Successes in Stewardship: Alternative Uses of the Right-of-Way,” U.S. Department of Transportation Federal Highway Administration, June 2023](#)
 - Provides additional information to State DOTs on successfully utilizing pathways for siting energy and communications projects in Federal-aid highway ROWs.
 - Highlights the successful use of the “alternative use” pathway by Georgia’s Department of Transportation and Minnesota’s Department of Transportation to advance wildflower and roadside solar projects, respectively.

Relevant Federal Laws and regulations on the accommodation, relocation, and reimbursement of utilities located within the highway ROW:

- [23 CFR § 645.211](#) - State transportation department accommodation policy requirements
- [23 CFR § 645.215\(a\)](#) - Approvals
- [23 CFR §710.403](#) - Management - Subpart D-Real Property Management (alternative uses)
- [23 CFR §710.405](#) - ROW Use Agreements

About NextGen Highways

The NextGen Highways is a collaborative initiative promoting the use of highways and other existing rights-of-way as infrastructure corridors where electric and communications infrastructure are strategically and safely co-located in existing highway right-of-way. Learn more at NextGenHighways.org