

NOTICE OF EXEMPT RULEMAKING
TITLE 17. TRANSPORTATION
CHAPTER 3. DEPARTMENT OF TRANSPORTATION
HIGHWAYS

PREAMBLE

- 1. Article, Part, or Section Affected (as applicable)** **Rulemaking Action**

Article 6	New Article
R17-3-601	New Section
R17-3-602	New Section
R17-3-603	New Section
- 2. Citations to the agency's statutory rulemaking authority to include the authorizing statute (general) and the implementing statute (specific), and the statute or session law authorizing the exemption:**

Authorizing statutes: A.R.S. §§ 28-366, 28-7384, and 28-7385
Implementing statutes: A.R.S. §§ 28-7381, 28-7384, and 28-7385
Statute or session law authorizing the exemption: Laws 2021, Chapter 351, § 6
- 3. The effective date of the rule and the agency's reason it selected the effective date:**

January 1, 2023. This effective date provides broadband providers reasonable time to prepare while also providing the Department the necessary time needed in order to begin accepting applications. It also allows for a reasonable start at the beginning of the incoming year.
- 4. A list of all notices published in the Register as specified in R1-1-409(A) that pertain to the record of the exempt rulemaking:**

None
- 5. The agency's contact person who can answer questions about the rulemaking:**

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- 6. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:**

The Department engages in this rulemaking to implement Laws 2021, Chapter 351, which allows for a telecommunication facility installation in a highway right-of-way by ADOT or a provider, as defined in A.R.S. § 28-7381. Pursuant to this legislation, the Department is establishing rules that:

- Specify the procedures for establishing an agreement for longitudinal access for a provider;
- Establish a schedule of rates of compensation for any longitudinal access granted;
- Govern the installation, operation and maintenance of a telecommunication facility granted longitudinal access; and
- Provide for the relocation or removal of a telecommunication facility for needed changes to a highway, expiration of an agreement and breach of an agreement.

7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

The Department did not review or rely on any study relevant to the rules.

8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

9. The summary of the economic, small business, and consumer impact, if applicable:

Pursuant to Laws 2021, Chapter 351, § 6, the Department is exempt from the rulemaking requirements of A.R.S. Title 41, Chapter 6, so an economic, small business, and consumer impact statement is not required.

10. A description of any changes between the proposed rulemaking, including any supplemental proposed rulemaking and the final rulemaking package (if applicable):

Not applicable

11. An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments, if applicable:

The Department had an exemption from the requirements of the Administrative Procedures Act, and was not required to receive any public comments regarding this rulemaking. In due course of drafting the rules, the Department conducted a couple of stakeholder meetings and requested, accepted, and incorporated stakeholder comments into the rules.

12. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules. When applicable, matters shall include, but not be limited to:

There are no other matters prescribed by statute applicable to the Department or to any specific rule or class of rules.

a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:

Pursuant to A.R.S. § 28-7384, these rules require providers to enter into a telecommunication use and occupancy agreement and obtain an encroachment permit in order to be granted longitudinal access to the right-of-way of a highway for new installation of a telecommunication facility.

An encroachment permit allows for construction of a fixed or temporary improvement within a state highway right-of-way, or for any activity requiring the temporary use of or intrusion upon a state

highway right-of-way. While for the purpose of these rules, the issuance of the encroachment permit would be for an activity similar in nature, an encroachment permit, in general, can be issued for various types of activities with some of the requirements general to all and others are specific to a particular encroachment activity. Therefore, encroachment permits fall outside the criteria provided under A.R.S. § 41-1037 and are an exception to the general permit requirement.

The Department's authorization of providers to have longitudinal access meet the requirements of a general permit since the activities and practices authorized by it are substantially similar in nature for all granted access for the purpose of installation of a telecommunication facility.

b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:

These rules are not more stringent than the following applicable federal laws:

- The Telecommunications Act of 1996, PL 104-104, 110 Stat. 56, which includes provisions on compensation and state authority; and
- 23 CFR 645, Subparts B and C, which includes provisions for accommodating utility facilities and private lines on federally-aided highway projects, use and occupancy agreements, and installation practices that minimize excavation when installing telecommunications infrastructure in highway rights-of-way.

c. Whether a person submitted an analysis to the agency that compares a rule's impact of the competitiveness of business in this state to the impact on business in other states:

No analysis was submitted to the Department.

13. A list of any incorporated by reference material and its location in the rule:

This rulemaking incorporates no materials by reference.

14. Whether the rule was previously made, amended, repealed or renumbered as an emergency rule. If so, the agency shall state where the text changed between the emergency and the exempt rulemaking packages:

Not applicable

15. The full text of the rules follows:

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TITLE 17. TRANSPORTATION
CHAPTER 3. DEPARTMENT OF TRANSPORTATION
HIGHWAYS

ARTICLE 6. ~~RESERVED~~ TELECOMMUNICATION FACILITIES

Section

- R17-3-601. Definitions
- R17-3-602. Telecommunication Use and Occupancy Agreement; Time-frames; Compensation for Longitudinal
Access to the Right-of-Way
- R17-3-603. Installation, Maintenance, Operation, and Relocation of Telecommunication Facilities

ARTICLE 6. ~~RESERVED~~ TELECOMMUNICATION FACILITIES

R17-3-601. Definitions

In addition to the definitions provided under A.R.S. §28-7381, the following terms apply to this Article unless otherwise specified:

“At-grade” means roadways, intersections, or facilities at the same elevation or level.

“Clear zone” means a specific distance from the edge of a travel lane free of above ground obstacles as determined by the Department and in accordance with the American Association of State Highway and Transportation Officials (AASHTO) Roadside Design Guide.

“Controlled access” has the same meaning as a controlled access highway as defined in A.R.S. § 28-601.

“Department” has the same meaning as defined in A.R.S. § 28-101.

“Dig Once” means reducing the number and scale of excavations when installing telecommunication facilities in highway rights-of-way.

“Encroachment permit” has the same meaning as defined in R17-3-501.

“Guideline for Accommodating Utilities on Highway Rights-of-Way” means the guidelines and procedures adopted by the Department for the accommodation of utilities on highway rights-of-way.

“Interstate System” has the same meaning as defined in A.R.S. § 28-7901.

“Lease agreement” means the written agreement between the Department and the provider, which authorizes the provider to utilize spare conduit and related facilities of the Department subject to the terms and conditions outlined in the agreement and this Article.

“New installation” means an initial installation on a highway right-of-way except in the event of a relocation required by the Department.

“Right-of-way” has the same meaning as defined in A.R.S. § 28-101.

“Right-of-way occupancy rate” means the compensation from a provider for longitudinal access to the right-of-way of a state highway for the purpose of installing telecommunication facilities as authorized under A.R.S. § 28-7385.

“State” means the state of Arizona.

“State highway” has the same meaning as defined in A.R.S. § 28-101.

“State Milepost System” means the markers placed on the highway at one-mile intervals that indicate the distance through the state.

“Uncontrolled access” means a highway to which owners or occupants of abutting lands and other persons have a legal right of access.

“Telecommunication use and occupancy agreement” means the written agreement between the Department and the provider allowing the provider longitudinal access of highway right-of-way for its telecommunication facilities or private line subject to the terms and conditions outlined in the agreement and this Article.

R17-3-602. Telecommunication Use and Occupancy Agreement; Time-frames; Compensation for Longitudinal Access to the Right-of-Way

- A.** A provider must enter into a telecommunication use and occupancy agreement with the Department and obtain an encroachment permit, as prescribed under Article 5 of this Chapter, before being granted longitudinal access for new installation of a telecommunication facility. This Section does not apply to a telecommunication facility with an encroachment permit approved before January 1, 2023.
- B.** A provider seeking to enter into a telecommunication use and occupancy agreement shall complete and provide the following information on a telecommunication use and occupancy agreement application provided by the Department at www.azdot.gov:
1. Name of provider;
 2. The point of contact's information, which includes name, telephone number, and email address;
 3. A description of the proposed work or activity in the right-of-way or facilities; and
 4. A map, drawing, or geographical description of the proposed telecommunication facility installation, including the starting and ending milepost to the nearest tenth of a mile, state highway number, the cardinal direction of the highway, the number and size of conduits, and accompanying telecommunication facility locations.
- C.** The Department shall, within five calendar days of receiving an application under subsection (B), provide written notice to the provider acknowledging receipt of the application:
1. If the application is complete, the notice shall acknowledge receipt of a complete application and indicate the date the Department received the complete application; or
 2. If the application is incomplete, the notice shall indicate the current date and include an itemized list of all additional information the provider must provide to the Department before the application can be considered complete and subsequently processed.
- D.** A provider with an incomplete application shall respond to the notice provided by the Department under subsection (C)(2) within 15 calendar days after the date indicated on the notice or the Department may deny the application.
- E.** The Department shall render a decision on the application within 15 calendar days after the date on the notice the Department gave to the provider under subsection (C)(1) acknowledging receipt of a complete application.
- F.** For the purpose of A.R.S. § 41-1073, the Department establishes the following time-frames:
1. Administrative completeness review time-frame: five calendar days.
 2. Substantive review time-frame: 10 calendar days.
 3. Overall time-frame: 15 calendar days.
- G.** A provider shall pay an annual right-of-way occupancy rate as compensation to the Department for longitudinal access to a highway right-of-way for new installations of telecommunication facilities, including overhead, surface, or underground, in accordance with A.R.S. § 28-7385.
1. The annual right-of-way occupancy rate schedule is as follows:
 - a. Interstate System: \$1.00 per linear foot of longitudinal access.

- b. Controlled Access Highways (non-interstate): \$0.50 per linear foot of longitudinal access.
 - c. Uncontrolled Access Highways: \$0.25 per linear foot of longitudinal access.
- 2. At the beginning of each calendar year, starting January 1, 2024, the cost per linear foot as prescribed in subsection (G)(1), increases at a rate of 2% per calendar year. The new annual right-of-way occupancy rate applies to any new or renewed telecommunication use and occupancy agreements established within that given year.
- 3. The annual right-of-way occupancy rate, established at the time of signing the telecommunication use and occupancy agreement, shall be the rate for each year of a 20-year or 30-year agreement.
- 4. The distance is measured using the State Milepost System, rounded to the nearest tenth of a mile and converted to a linear foot value.
- 5. The total amount of the annual right-of-way occupancy rate is determined by using the following calculation: cost per linear feet x distance = total annual right-of-way occupancy rate.
- 6. The Department shall receive monetary compensation in the form of an annual or lump sum payment, unless an in-kind compensation or combination of in-kind and monetary compensation is agreed upon by the Department and the provider.
 - a. Annual monetary compensation. The provider shall pay the total annual right-of-way occupancy rate established at the time of signing the telecommunication and occupancy use agreement and at the time of signing any renewals.
 - b. Lump-sum monetary compensation. The provider shall pay in accordance with the following:
 - i. The total annual right-of-way occupancy rate is multiplied by the number of years of the agreement.
 - ii. A discounted rate of 10% is applied utilizing net present value calculation.
 - c. In-kind compensation.
 - i. Telecommunication facilities shall be valued on a present value basis at the estimated, reasonable cost to the provider for procuring and installing such telecommunication facilities. The in-kind value shall be agreed upon, between the Department and provider, in the telecommunication use and occupancy agreement.
 - ii. The Department shall provide the provider with a list of the specific telecommunication facilities and services for consideration as in-kind compensation. The value of such in-kind compensation shall be subtracted from the total amount of monetary compensation due for occupancy of the right-of-way and the remaining balance, if any, shall be remitted as monetary compensation.
 - iii. Any telecommunication facilities acquired as in-kind compensation shall be used exclusively for the further development of telecommunications that serve state purposes and may not be sold or leased in competition with providers.
 - iv. The provider maintains ownership and is responsible for maintenance of the in-kind compensation provided, however, the associated costs will be agreed upon in the telecommunication use and occupancy agreement.

- d. Combination of monetary and in-kind compensation. The provider will pay the total annual right-of-way occupancy rate in accordance with subsections (G)(6)(a) through (c), as applicable, and as agreed upon by the Department and the provider.
 - 7. The payment of the annual right-of-way occupancy rate will be made as follows:
 - a. For monetary compensation, the provider shall pay the total annual right-of-way occupancy rate to the Department within 30 calendar days of signing the telecommunication use and occupancy agreement and any renewals.
 - b. For in-kind compensation, the agreement shall set forth the timeline for the Department to receive agreed upon telecommunication facilities.
- H. By signing a telecommunication use and occupancy agreement, a provider agrees to accept the following general obligations and responsibilities:
 - 1. Complying with the encroachment permit rules in Article 5 of this Chapter;
 - 2. Complying with the terms and conditions contained in the telecommunication use and occupancy agreement and encroachment permit documents for installation, operation, maintenance, and relocation of telecommunication facilities;
 - 3. Not having exclusive access or rights to the right-of-way;
 - 4. Having the term length of the telecommunication use and occupancy agreement to be for one year, 20 years, or 30 years with an option to renew the agreement at the current applicable starting rate for the first year of a new agreement or renewal; the rate will be increased annually if the renewal is for a one-year period, otherwise pursuant to the terms of a new 20-year or 30-year agreement; and
 - 5. Terminating the telecommunication use and occupancy agreement due to removal of facilities from the right of way.
 - a. For any monetary compensation, the provider shall receive a prorated refund based on the number of months remaining in the term agreement.
 - b. For any in-kind compensation, the access to facilities or services provided will terminate at the time of the removal of the facilities.

R17-3-603. Installation, Maintenance, Operation, and Relocation of Telecommunication Facilities

- A. Installations of telecommunication facilities may be permitted under the following conditions:
 - 1. The installation does not adversely affect the safety, design, construction, operation, maintenance or stability of the highway;
 - 2. The installation does not interfere with or impair the planned future expansion of the highway;
 - 3. The installation does not interfere with or impair planned future Department-owned telecommunication facilities projects;
 - 4. In accordance with Dig Once, the Department may require providers to adhere to Dig Once when installing telecommunication facilities into the same general location on the highway system and providers shall coordinate their planning and work, install in a joint trench, and equitably share costs;

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5. The Department does not incur any unreimbursed additional expense or maintenance costs associated with the telecommunication facility installation, relocation, or removal;
 6. The Department and state are not liable for any claims, demands, costs or expenses, including all legal expenses, for loss, damages or injury to any person or property, including third-party persons or property, due to the telecommunication facilities' use of the rights-of-way excluding claims made pursuant to A.R.S. § 28-7382;
 7. At-grade or underground telecommunication facility items requiring access, such as conduit, fiber, splice locations, vaults, manholes, and pull boxes may be allowed inside the control of access;
 8. Above ground telecommunication facility items such as cabinets, node buildings, amplifiers, pedestals, and regeneration huts will be located where they do not need to be accessed from the travel lane such as traffic interchanges, frontage roads, and intersections;
 9. Above ground telecommunication facilities will not be installed within the clear zone; and
 10. The location of longitudinal telecommunication facilities are as close to the right-of-way line as practical or as determined by one of the Department's Engineering and Maintenance district offices.
- B.** Telecommunication facilities may be installed longitudinally within a controlled access highway when it meets the requirements as outlined in the ADOT Guideline for Accommodating Utilities on Highway Rights-of-Way.
- C.** Pursuant to A.R.S. § 28-7384, the Department requires the removal or relocation of telecommunication facilities located on the highway right-of-way to accommodate operations and highway projects at the provider's expense. The Department may require removal or relocation of such telecommunication facilities upon expiration or earlier termination of the telecommunication use and occupancy agreement, encroachment permit, or other agreements at the provider's expense.