OAR 141-126 Rulemaking Public Comments and Agency Response

Comments & Agency Response

A second public comment period was open from August 1, 2024, to September 3, 2024. The Department received 2 sets of comments in total, 0 of which were submitted via form letter.

Please note that comments are presented in the order they were received by the Department, with most recent comments listed first. Comments that were received via PDF are attached at the end of the document.

Table of Contents

Doug Heiken, Oregon Wild – September 3, 2024 (submitted via e-mail)

Comment: 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 proposed amendments to the communication site rules would establish and streamline administrative procedures for authorizing communication site facilities on state-owned land. Division 126 rules will accommodate industry standards, best practices, facilitate adaptive management, and update compensation rates and fees and allow for changes in market value ensuring the fiduciary responsibilities of the Department are being met.
>
> Some of the key issues that we urge the Land Board to consider relate to:
>
> **Wildfire**: Communication sites are often built in locations that are exposed to significant wildfire hazard. It is not reasonable to expect that wildfire will be controlled, so these communications facilities must be built to be resistant and resilient to wildfire. Luckily that can be done by building fire-safe structures, and modifying fuels within just 100 feet of structures. Broad-scale clearing of vegetation is not necessary for fire defense. See the work of Jack Cohen, such as: Finney and Cohen. 2003. Expectation and Evaluation of Fuel Management Objectives. USDA Forest Service Proceedings RMRS-P-29. http://www.fs.fed.us/rm/pubs/rmrs_p029/rmrs_p029_351_366.pdf; Jack Cohen and Dave Strohmaie 2020. Community destruction during extreme wildfires is a home ignition problem. Wildfire Today, September 21, 2020. https://wildfiretoday.com/2020/09/21/community-destruction-during-extreme-wildfires-is-a-home-ignition-problem/; Jack D. Cohen, Ph.D. 1999. Reducing the Wildland Fire Threat to Homes: Where and How Much? https://www.fs.fed.us/rm/pubs_other/rmrs_1999_cohen_j001.pdf presented this paper at the Fire Economics Symposium in San Diego, California on April 12, 1999.

Access Roads: Communication sites require access to remote sites, typically via road or helicopter. These roads are often used (both authorized and unauthorized) by the public which increases ecological impacts. DSL rules should focus on minimizing the impacts of roads. Building and maintaining roads on steep terrain has significant ecological costs including:

- Soil disturbance, erosion, compaction, loss of forest productivity
- Pollution: sedimentation, thermal loading
- Hydrologic modification: flow interception, accelerated run-off, peak flows
- Impaired floodplain function
- Barrier to movement of wood and spawning gravel
- Habitat removal
- Reduced recruitment of snags and down wood habitat
- Fragmentation: wildlife dispersal barrier
- Human disturbance, weed vector, hunting pressure, loss of snags, litter, marbled murrelet nest predation, human fire ignition, etc.
- Reduced carbon storage in adjacent and nearby forests

See also, NRDC 1999. "End of the Road: The Adverse Ecological Impacts of Roads and Logging: A Compilation of Independently Reviewed Research" (1999), https://web.archive.org/web/20081024112126/http://www.nrdc.org/land/forests/roads/eotrinx.asp; USDA Forest Service 2006. Draft Review and Comment on: Forest Service Roads: A Synthesis of Scientific Information, 2nd Draft, USDA FS: Ecological impacts - by Jack Wade (http://web.archive.org/web/20061008094731/http://www.wildlandscpr.org/resourcelibrary/reports/wade_report2.html.

Vegetation management: Comm sites often require vegetation maintenance to maintain line of site. DSL rules should protect mature and old-growth trees that provide important habitat, carbon storage, and other ecosystem services. Sites should be selected that will not require clearing of mature and old-growth trees.

Unique Habitats: Ridge tops often represent unique habitats (such as rock gardens, grasslands, and botanical areas) that are under-represented compared to historic conditions. Some ridgetops (such as Prairie Mountain and Mary's Peak) have experienced significant cumulative effects from extensive development of numerous communications facilities. The adverse effects include habitat loss, fragmentation, erosion, and all of the effects listed above related to roads. These effects are long-lasting and essentially irreversible. DSL rules should strive to minimize the ecological footprint of communications sites.

Subleases: Subleases may include activities that were not contemplated in the original lease. DSL rules should strive to minimize unintended and unanticipated effects that were not contemplated and increase the ecological footprint of the communications leases.

Public notice and public involvement: DSL should include the public in the process of planning and approving comm sites. This will help foster public trust and informed decision-making.

Agency Response:

Wildfire: Most of the Department's existing communication sites are located on butte tops in ecosystems with sparse fuels. The sites generally are surrounded by a cleared area of dirt

or gravel providing a break in surface fuels. The Department does not regulate building design or construction but can encourage lessees to incorporate fire safe considerations into their designs. The Department is currently planning fuels reduction at two sites to reduce fuels hazards to the communication sites. The Department is working with lessees in the planning phase of developing fire detection cameras and a remote weather station at several communication sites which will help in the early detection and prevention of serious wildfires in the vicinity. In addition, according to proposed OAR 141-126-0160(8)(c), Holders of communications site leases must cooperate and comply with "the Department and other agencies in the detection, prevention, and control of wildfires on a lease area."

Access Roads: Each of the six existing DSL communication sites are accessed by roads. Road access is restricted to lessees and agency personnel by gates while the sites remain open to public recreation on foot. Roads are regularly monitored for damage, including soil erosion, and maintained as necessary. There is currently a road improvement project in the planning phase at one site to improve the road surface and cross drains to maintain natural drainage.

Vegetation management: The Department infrequently has requests for new communication sites to be developed. The Department must follow all local, state and federal rules including the Oregon Forest Practices Act regarding maintaining old growth trees.

Unique Habitats: It is the policy of the Department to site uses that have impacts to land, wildlife and the environment in areas that are already disturbed or adjacent to areas that are already disturbed so as not to cause further fragmentation of lands and habitats that are intact. Further, per proposed OAR 141-126-0160(2), "leases will be offered by the Department for the minimum area determined by the Department to be required for the requested use," so as to minimize impact to land, habitat and environment. The Department's public process includes other agencies such as Oregon Department of Fish and Wildlife and the Oregon Department of Agriculture that have expertise and resource management guidelines pertaining to unique habitats. The most impactful uses such as cell towers are required by federal law to go through a full Environmental Impact Statement prior to siting any tower and is also required to co-locate on towers that already exist within the area of interest. Compliance with the Federal Communications Commission (FCC) rules implementing NEPA on new tower construction includes separate procedures the Endangered Species Act and the National Historic Preservation Act.

Subleases: All subleases must be approved by the Department and all uses are subject to proposed rules OAR 141-126-0110(8) which states that all uses subject to the rules must be authorized by a lease issued by the Department. In addition, uses and developments of communication sites must conform with local, state and federal laws according to OAR 141-126-0110(6). Subleases do not typically expand the physical footprint of the base lease but instead are co-located on the base lessee's existing equipment. It is often beneficial to have subleases rather than new base leases which would necessitate additional disturbed land.

Public notice and public involvement: All lease applications including those that involve building new facilities are circulated to applicable local, state, federal agencies, Tribal governments, and other interested persons, including but not limited to adjacent property Holders, affected owners, lessees and permittees, and easement Holders, or persons granted other authorizations from the department, for review and comment as described in OAR 141-126-0140(5). In addition, the department may post a notice of an

application and opportunity to comment at a local government building, public library, or other appropriate location(s) to ensure that minority and low-income communities are included and aware of a proposed use. The department shall make paper copies of an application available to any person upon request (OAR 141-126-0140(7)).

Matthew DeTura, CTIA – September 3, 2024 (letter submitted via e-mail, see attachment for full comments)

Comment:

1. The Department should reduce fees for larger cellular facilities and revise the proposed rules to establish maximum, not minimum, annual fees.
2. The Department should modify the proposed rules to clarify the status of fixed wireless access.
3. The Department should streamline application procedures, including revising its implementation of "shot clock" timelines to reflect the FCC's focus on reducing application delays.
4. The Department should eliminate regulation of radiofrequencies from the proposed rules to comply with the FCC's exclusive jurisdiction.
5. The Department should schedule one or more workshops to address concerns with the proposed rules.

Agency Response:

1. *The Department should reduce fees for larger cellular facilities and revise the proposed rules to establish maximum, not minimum, annual fees.*

   The Department reduced the annual fee from the 2022 proposal rate of $20,000 to $10,000 in the 2024 proposal. The $10,000 figure represents the low end of the market rate study prepared by the Department. This market rate study shows that the proposed rates are fair and reasonable compensation for the uses proposed. The Common School Fund obligation requires the Department to charge market rate for services.

   The Department does not anticipate requiring an appraisal as referenced in OAR 141-126-0150(3) unless the potential communication site is in a densely populated area and thus outside the minimum fees that have been established. All of the Department's current communication sites are in rural areas which allowed us to reduce the proposed fees to $10,000 but the rules provide the ability for the Department to charge higher rates if a site is developed in a more densely populated area. The Department does not manage suitable land in the major metro areas of Oregon including Portland, Salem, and Bend that are suitable candidates for future communication sites. For this reason, there is a low probability for an appraisal. The Applicant would be notified at the application phase if an appraisal was anticipated.

   While the fees set are minimums rather than maximums, the Department expects to update these rules periodically to evaluate the fees. It is not the Department's intent to have fees increase perpetually.

   For small wireless facilities the Department will honor the $270 as a maximum and appraisals will not apply. OAR 141-126-0150(3) has been updated to reflect this.

The categories of rent payments (commercial, non-commercial, and wireless cellular communications) were derived from the market study which compared rates and categories charged by other states and federal agencies.

The annual rent payment for co-locators (25% of fee charged to co-locator per year) was a recommendation from the Rules Advisory Committee as an industry standard. Charging a minimum fee for services is necessary because of the Department's Common School Fund obligation.

2. *The Department should modify the proposed rules to clarify the status of fixed wireless access.*

Justification for why fixed wireless access needs to be added to the OAR 141-126-0120 definitions was not adequately provided.

3. *The Department should streamline application procedures, including revising its implementation of "shot clock" timelines to reflect the FCC's focus on reducing application delays.*

In 141-126-0140(2) of the proposed rules, the Department reduced the amount of time to advise the Applicant of its determination of the completeness status of the application from 45 to 30 days. OAR 141-126-0140(5) sets the requirement for public review of each application. The public review period is a standard 30-day period. After the 30-day period closes, the onus to respond to any significant comments received is on the Applicant. The rules do not set a timeline for the Applicant to respond to public comment received. OAR 141-126-0140(8) requires the Department to notify the Applicant within 30 days if it is necessary for the Applicant to respond to comments received or if additional information is required. The Department will revise OAR 141-126-0140(10) to the following: "If the department approves the application, no changes are required as a result of the comment period(s), and no public auction is required, the department will notify the applicant in writing within 30 calendar days of the end of the most recent comment period...".

4. *The Department should eliminate regulation of radio frequencies from the proposed rules to comply with the FCC's exclusive jurisdiction.*

The Department is required to follow all local, state, and federal regulations. OAR 141-126-0110(6) states that "Uses of, and developments placed in, on, or over state-owned land pursuant to a communication site facility lease will conform with local (including comprehensive land use planning and zoning ordinance requirements), state, and federal laws." The Department requires verification of the FCC approval to ensure that the Department is authorizing uses allowed under federal law. The Department will revise OAR 141-126-0140(8)(b) to the following: "If the proposed use will cause interference with existing uses at the communication site. The applicant must remedy any frequency interference identified, as existing authorized frequencies are senior in right to new requests; the applicant may be required to provide documentation from the FCC verifying the proposed use has been approved by the FCC." The Department will revise OAR 141-126-0160(16) to the following: "The lessee must notify the department of any equipment modifications resulting in a change of frequency. The department will notify other lessees of the communication site of the equipment modifications for review

to identify any potential frequency conflicts. If a frequency conflict is identified, the lessee proposing the frequency change will work to resolve the frequency issue so as not to interfere with other authorized users. A lessee proposing a frequency change may be required to provide documentation from the FCC that the proposed frequency change has been approved by the FCC. The Federal Communications Act comprehensively regulates frequency interference". The Department is not regulating frequencies, but simply ensuring that FCC has approved frequencies being used at a communication site.

5. *The Department should schedule one or more workshops to address concerns with the proposed rules.*

The Department is confident that it has addressed the concerns raised to its fullest ability while still maintaining our core mission.

September 3, 2024

VIA E-MAIL

Ms. Danielle Boudreaux
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, 2024 Revisions

Dear Ms. Boudreaux:

CTIA[1] submits the following comments regarding the Department of State Lands' (the "Department's") July 30, 2024 Notice of Proposed Rulemaking and accompanying proposed regulations (the "Proposed Rules") regarding siting on state-owned lands.

CTIA appreciates the Department's willingness to work collaboratively with stakeholders to improve the Proposed Rules. CTIA previously commented on the Proposed Rules in 2022,[2] after which the Department issued revisions as well as a summary document describing its rationale.[3] In its 2022 Comments, CTIA emphasized the need for removing barriers to broadband deployment. That need has only intensified as a result of the steady increase in

[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 providers, device manufacturers, and suppliers as well as apps 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] CTIA Letter Re: Administrative Rules for Authorizing Communications Site Leases on State-Owned Land, July 31, 2022 ("2022 Comments").

[3] State of Oregon Department of State Lands, OAR 141-126 Rulemaking Public Comments and Agency Response, March 2023 ("Agency Response"). Because the Proposed Rules were not submitted for subsequent legislative consideration in 2023, CTIA has not had the opportunity to comment on the 2023 revisions until present, so it takes the 2023 and 2024 revisions together herein.

consumer demand for broadband. 2022 saw the greatest increase in mobile data traffic on record, nearly double the year-over-year increase from 2020 to 2021. The nation's wireless networks supported more than 73.7 trillion MB of data traffic that year.[4] To keep pace with this demand, wireless investment increased for the fifth year in a row, with a historic $39 billion invested in wireless networks —up nearly 12% from the previous year's record setting total.[5]

CTIA appreciates the Department's willingness to incorporate stakeholder feedback in the revisions of the Proposed Rules. In particular, the Proposed Rules now appropriately treat "macro cellular facilities" and qualifying "small wireless facilities" ("SWF") differently, putting them on a different schedule of fees for leasing and applications.

CTIA remains concerned, however, many provisions in the Proposed Rules would create significant barriers to deployment on Department-managed lands, and offers the following suggestions for the Department:

- The Department should reduce its fees for larger facilities and co-locations and make clear that its annual fees represent a cap on rents, not a minimum;
- The Department should clarify the Proposed Rules to include fixed wireless access within its definitions;
- The Department should implement "shot clock" timelines for applications – not applicants – in accordance with the FCC's rules; and
- The Department should eliminate its regulation of radiofrequency interference in the Proposed Rules, which infringes on the FCC's exclusive authority to address any such conflicts.

Given the scope of these changes, CTIA also asks the Department to schedule a workshop (or workshops) to better address these issues.

By taking these steps to refine the Proposed Rules, the Department will help remove barriers to deployment and promote certainty in investment, helping it better meet its stated goal of increasing broadband access to underserved communities in Oregon.

[4] CTIA, "2023 Annual Survey Highlights" (July 25, 2023), *available at* https://www.ctia.org/news/2023-annual-survey-highlights.

[5] *Id.*

I. THE DEPARTMENT SHOULD REDUCE FEES FOR LARGER CELLULAR FACILITIES AND REVISE THE PROPOSED RULES TO ESTABLISH MAXIMUM, NOT MINIMUM, ANNUAL FEES.

CTIA appreciates that the Department has nominally lowered its proposed leasing fees from previous revisions of the rules. Unfortunately, these changes may not have any impact because the Proposed Rules continue to treat these fees as a floor, rather than a ceiling, on siting rents.

Proposed Rule 141-126-0150 states that the annual fees are merely a "minimum base amount" that not only will automatically increase by three percent every year to reflect inflation, but can be set even higher: "The Department reserves the right to establish the base annual compensation in amounts that may be greater than the minimum base annual compensation." As a result, there is no practical impact of the changes to the fees because, as before, there is no upper bound on what they can be. Moreover, the Proposed Rules are unclear on how the Department will set the fees and when in the process applicants will be apprised of the cost of their potential deployment, creating massive uncertainty that could deter providers from investment.

The issue is more pronounced for small wireless facilities, for which the FCC has established $270 as the maximum at which annual fees are presumptively reasonable.[6] The Proposed Rules not only allow for higher fees but ensure that the annual fee for a small wireless facility will exceed the FCC's safe harbor no later than a year after siting. Under the FCC's rules, fees above $270 require the Department to "demonstrat[e] that the fee is a reasonable approximation of cost that itself is objectively reasonable."[7]

And despite the improvements in the revisions to the Proposed Rules, annual fees for both macro cellular sites as well as collocations are still high, even at the "base rent" level, and could be prohibitive to deployment – and prohibited by federal law, to the extent that they discriminate between telecommunications providers.

The Department proposes to charge an annual fee of $10,000 for a non-SWF "cellular" facility. While this is less than the Department's 2022 proposal for a $20,000 annual fee, it is still more than the tiered $4,000-$8,000 annual fees for a "commercial" facility which are to be based on the population of the county where the facility is constructed. This would mean that in

[6] *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 Small Cell Order").

[7] *Id. at* n. 214.

counties with small populations, a commercial facility would pay the Department $2,000 annually while a cellular facility would pay $10,000 – five times as much.

The fee distinction the Department intends to draw between these terms is unclear given that a "cellular" facility is a subset of a "commercial uses" under the Department's definitions. In any event, the distinction would be arbitrary because both cellular and non-cellular facilities use antennas mounted on towers or other structures, and they both receive and transmit communications. Nor are cellular antennas larger or more complex than all other types of antennas.

Without a valid reason, this policy of charging different rates for wireless facilities than other types of communications facilities would violate 47 U.S.C. §253 on its face, which only allows states to require fair and reasonable compensation from telecommunications providers for use of public rights-of-way "on a competitively neutral and nondiscriminatory basis."[8] The fees for larger cellular facilities should thus align with those for other commercial facilities.

With regard to co-locations, co-locators would have to pay a minimum annual rent of 25 percent of the annual rent that the lessor pays to the Department – *i.e.*, at least $2,500 (with no upper bound.) Again, the Department supplies no basis for this fee, and the FCC and courts have found that such large government-imposed fees deter investment in new infrastructure.[9] Moreover, the Department would already be collecting the annual fee from the pre-existing site user. Double- or triple-charging for the same facility is unwarranted given that the Department should incur no additional costs because there is no new facility to occupy space or require maintenance.

While the Department notes that the fees generate revenue for the Oregon'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 federal law.[10]

---

[8] 47 U.S.C. §253(c).

[9] *See* 2018 FCC Small Cell Order at para. 41 *et seq.*

[10] *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

Accordingly, CTIA asks that the Department make the following revisions to the proposed rules:

- Set cost-based, predictable, maximum annual fees for all categories of wireless facilities.
- Clarify that annual fees may not be increased over the term of a lease.
- Reduce the annual fee for macro cellular facilities to track the tiered base amounts for "commercial" 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.
- Reduce the additional rental fees that co-locators must pay to no more than $1,000.

II. THE DEPARTMENT SHOULD MODIFY THE PROPOSED RULES TO CLARIFY THE STATUS OF FIXED WIRELESS ACCESS.

CTIA appreciates the steps the Department took in its 2023 revisions to the Proposed Rules to separate larger wireless facilities from small cells. The Department should maintain these improvements, which better reflect the nature of modern wireless siting, in the Proposed Rules.

The Department should, however, clarify its definitions to ensure that sites supporting fixed wireless access, which is a significant part of the modern wireless ecosystem, are not treated as "commercial" under the Department's definition. In general, the term "cellular" communications is both dated and narrow with regard to wireless facilities, and the Department should consider replacing it with a broader term like "wireless communications services." At minimum, though, the Department should clarify the definition of "Cellular Communications" in the Proposed Rules to explicitly include fixed wireless access.

III. THE DEPARTMENT SHOULD STREAMLINE APPLICATION PROCEDURES, INCLUDING REVISING ITS IMPLEMENTATION OF "SHOT CLOCK" TIMELINES TO REFLECT THE FCC'S FOCUS ON REDUCING APPLICATION DELAYS.

In its 2022 Comments, CTIA noted the Proposed Rules had indeterminate timelines for application processing and urged the Department to amend the Proposed Rules to align them with the FCC's "shot clock" timelines for siting: to complete application review within

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.").

150 days for new macro sites (90 days for co-locations) and 90 days for small wireless facilities (60 days for co-locations).[11] In response, the Department revised the Proposed Rules to reduce the time that applicants are required to file an application in advance of a proposed deployment. In the Agency Response, the Department noted that "the timelines for the Department to process an application have been adjusted to conform with the FCC's 2009 and 2018 declaratory rulings on "shot clocks" for both macro cellular and small wireless facilities."[12] Unfortunately, the Department's revisions to the Proposed Rules did not accomplish this.

The FCC's "shot clock" timelines are imposed *on a reviewing agency*, not an applicant. While the Proposed Rules require an applicant to file an application 60/90/150 days in advance of a proposed deployment, nothing in the Proposed Rules guarantees that an applicant will know whether it is approved to deploy at the end of that period.

At present, the Proposed Rules do not set any deadline for the Department to seek public comment, respond to any such comments, and act on an application. This creates significant uncertainty for an applicant, as its application may be delayed for any length of time - potentially creating significant delays for broadband deployment, as the FCC has noted.

Accordingly, CTIA asks that the Department amend the Proposed Rules to make clear that the Department must approve or deny (with cause) an application within the timelines indicated.

IV. THE DEPARTMENT SHOULD ELIMINATE REGULATION OF RADIOFREQUENCIES FROM THE PROPOSED RULES TO COMPLY WITH THE FCC'S EXCLUSIVE JURISDICTION.

Proposed Rule 141-16-0160(16) requires 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." Further, Proposed Rule 141-16-0140 (8b) and Proposed Rule 141-16-0160(16) directly address frequency conflicts and require that the applicant provide documentation from the FCC that the proposed use or frequency change "will not interfere with existing uses at the communication site". These provisions are contrary to federal law and should be eliminated.

[11] *See* 2022 Comments at 11-12.

[12] Agency Response at 5.

The federal Communications Act preempts states and localities from regulating the use of radio frequencies, granting that authority exclusively to the FCC.[13] The FCC has "exclusive authority over technical matters" relating to use of radiofrequency spectrum,[14] and the FCC's exclusive occupation of the field of radiofrequency spectrum regulation and usage under Title III of the Communications Act is a bedrock principle in communications law.[15]

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 is designed to ensure that all wireless services can coexist and that problems can be quickly resolved.

By requiring leaseholders to resolve any complaints from other frequency users under the Proposed Rules and provide documentation of "frequency compliance," the Department is setting conditions for lease approval based on jurisdiction it does not have. Denying leases on these grounds is not an issue of notification, as the Department suggests in the Agency Response – it is squarely one of regulation. In the Agency Response, the Department notes that it "has had complaints in the past about interference from other user's new frequencies."[16] But it is unlawful for the Department to handle such complaints – only the FCC may do so.

The Proposed Rules put all the onus for avoiding interference on the leaseholder/applicant. But it may well be the complainant that is in violation of the FCC's rules by infringing on licensed use. Or it may be the case that – such as for certain bands of unlicensed spectrum – all parties are required to *accept* interference under the FCC's rules. But by requiring the applicant to show that its uses do not interfere with any others, the Department is not just impermissibly regulating interference disputes, it is adjudicating them without the facts.

---

[13] *See* 47 U.S.C. § 303.

[14] *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 105 (2d Cir. 2010) (citation and internal quotations omitted); *see also Head v. New Mexico Bd. of Examiners in Optometry*, 374 U.S. 424, 430 n.6 (1963). ("[T]he Commission's jurisdiction over technical matters such as a frequency allocation … is clearly exclusive").

[15] *See, e.g.*, *Cellco P'Ship v. FCC*, 700 F.3d 534, 542 (D.C. Cir. 2012) (quoting *NBC v. United States*, 319 U.S. 190 (1943)). *See also Southwestern Bell Wireless Inc. v. Johnson County Board of County Commissioners*, 199 F.3d 1185, 1190 (10th Cir. 1999); *Freeman v. Burlington Broadcasters Inc.*, 204 F.3d 311, 320 (2d Cir. 2000); *Broyde v. Gotham Tower, Inc.*, 13 F.3d 994, 997 (6th Cir. 1994).

[16] Agency Response at 6.

It is an applicant's responsibility to comply with the FCC's rules regarding frequency management, just as it is for all frequency users. The FCC has a public portal to handle interference complaints and an Enforcement Bureau that resolves such issues.

Additionally, as a practical matter, it is nearly inconceivable that a lease applicant would be able to produce FCC documentation demonstrating the proposed use or frequency change "will not interfere with existing uses at the communication site". The FCC does not offer such documentation. To the extent that the Department is interested in identifying licensed users of a spectrum band, that information is made publicly available by the FCC through its Universal Licensing System search function.

Accordingly, the Proposed Rules should be amended to eliminate regulation of RF interference, which authority is exclusively vested in, and is already comprehensively regulated by, the FCC. To the extent the Department is receiving any complaints regarding frequency interference issues, the Department should inform complainants that the proper forum for such issues is the FCC. CTIA suggests that, to the extent the Department is still concerned with such issues, it simply include a clause requiring lessees to comply with all applicable federal regulations for operation of their telecommunications equipment.

V. THE DEPARTMENT SHOULD SCHEDULE ONE OR MORE WORKSHOPS TO ADDRESS CONCERNS WITH THE PROPOSED RULES.

While CTIA appreciates that a public hearing was held on the Proposed Rules, that venue was extremely limited for productive discussion, with speakers limited to three minutes and no real discussion between the Department and stakeholders. Given the significant impact of the Proposed Rules on telecommunications siting and the concerns voiced herein, CTIA asks the Department to schedule at least one workshop following the comment round to allow stakeholders and the Department to meet collaboratively and discuss the issues raised over the course of this proceeding.

VII. CONCLUSION.

CTIA appreciates the opportunity to express its concerns with the Proposed Rules and urges the Department to make the revisions discussed herein in order to better meet the Department's goal of promoting broadband access in Oregon. While CTIA encourages the Department to schedule a workshop to gather all stakeholders to discuss these issues in a more formal setting, to the extent the Department has any questions regarding these

changes, or needs more information regarding issues related to wireless technology, CTIA remains available as a resource and would be happy to meet with the Department on an informal basis to answer questions and discuss any concerns prior to submission of the Proposed Rules to the Legislature.

Sincerely,

/s/ Matthew DeTura
Matthew DeTura
Counsel, External and State Affairs
CTIA
mdetura@ctia.org