



STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232
www.dot.ny.gov

JOAN McDONALD
COMMISSIONER

ANDREW M. CUOMO
GOVERNOR

January 9, 2013

Honorable Jaclyn A. Brillig
Secretary
NYS Public Service Commission
Three Empire State Plaza
Albany, New York 12223-1350

Re: Case 12-G-0297 Proceeding on Motion of the Commission to Examine Policies
Regarding the Expansion of Natural Gas Service

Dear Secretary Brillig:

The New York State Department of Transportation (NYSDOT) submits this letter in response to the above referenced case to detail what policies the Department follows when siting utilities on its controlled access facilities.

NYSDOT has an agreement with, and an obligation to, the Federal Highway Administration (FHWA) on how utility facilities are accommodated on controlled access highways throughout New York State; this agreement is the "Accommodation Plan For Longitudinal Use of Freeway Right-of-Way By Utilities." NYSDOT's Accommodation Plan is based upon Title 23 Part 645 of the Code of Federal Regulations. This policy applies to any designated freeway. Currently, the only utilities which are permitted to longitudinally occupy New York State freeway rights-of-way (within the control of access) are communication utility facilities.

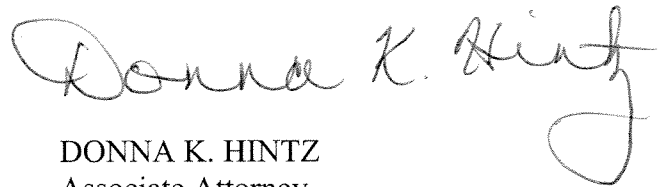
Any requests for a non-highway use of controlled access highways are considered exceptions to the NYSDOT's Accommodation Plan and, therefore, require FHWA approval. NYSDOT has an established procedure for exception requests under which NYSDOT reviews any requests prior to submission to FHWA for consideration and approval or rejection. FHWA and NYSDOT require a SEQRA and FHWA regulations based NEPA review for each and every

feasible alternative. All alternatives must be exhausted before FHWA approval of an exception can be granted. Enclosed please find the requirements and the procedure for requesting an exception in order to utilize any controlled access highways for a project regardless of the highway's owner. The toll portions of Interstates 87 and 90 under the jurisdiction of the New York State Thruway Authority (NYSTA) are included in this Plan.

As stewards of Federal Highway funds, NYSDOT and the NYSTA must ensure compliance with federal laws, regulations and requirements. Failure to comply will result in a sanction issued by FHWA and could result in the affected highway facilities becoming ineligible for any federal-aid funding.

Please contact me at 518-457-2411 if you have any questions on the material provided.

Sincerely,

A handwritten signature in cursive script that reads "Donna K. Hintz". The signature is written in black ink and is positioned above the typed name and title.

DONNA K. HINTZ
Associate Attorney
Division of Legal Affairs

DKH1042

Enc.

cc: M. Mariotti, MO DQAB
D. Nelson, MO Operations

Accommodation of Non-Communication Utilities on New York State Freeway or Controlled Access Rights-of-Way

I. INTRODUCTION

The New York State Department of Transportation (NYSDOT) has an agreement with the Federal Highway Administration (FHWA) on how utility facilities are accommodated on freeways in New York State. This agreement is the "Accommodation Plan For Longitudinal Use of Freeway Right-of-Way By Utilities" which is available at www.dot.state.ny.us/cmb/consult/hdmfiles/hdm13/hdm13app_b.pdf

Currently, the only utilities which are allowed to longitudinally occupy New York State freeway rights-of-way or controlled access rights-of-way are communication utility facilities. A highway with full control of access is a highway on which entrances and exits are controlled or limited at designated interchanges; all other intersections or connections are prohibited. NYSDOT's Accommodation Plan is based upon Title 23 Part 645 of the Code of Federal Regulations (CFR) which permits states to establish their own policies, subject to FHWA approval, with regard to longitudinal accommodation of utilities on controlled access rights-of-ways. This policy applies to any designated freeway, regardless of ownership, i.e. freeways owned by NYS Office of Parks, Recreation and Historic Preservation are also included in this policy.

Any interest in a longitudinal occupancy of a controlled access right-of-way by a non-communications utility must be submitted as a request for an exception to the current approved Accommodation Plan. Pursuant to 23 CFR 1.23, when a State Highway Agency acquires property for a highway project, it must dedicate use of said property exclusively to highway purposes except under strictly controlled conditions. Any request to use said property for non-highway purposes is considered a request for an exception. Both NYSDOT and FHWA must approve these requests. Since FHWA is involved and therefore, federal action is required, the National Environmental Policy Act (NEPA) applies and requires an extensive and detailed evaluation of all possible alternatives pursuant to 23 CFR 771. NYSDOT procedures to fulfill NEPA requirements are available at www.dot.state.ny.us/cmb/consult/dpm1/pdm_01_30_04.html. All exception requests must show that alternate locations are not feasible or cannot be implemented from a standpoint of providing efficient utility services in a manner conducive to safety, durability and economy of maintenance and operations. Additionally, the request must demonstrate that the accommodation will not adversely impact the design, construction, operation, maintenance, or stability of the highway and that it will not interfere with or impair future expansion of the highway. Any installation shall comply with 23 USC 111 and 23 CFR 645.209 as noted below.

Specifically, under 23 CFR 645.209 (c)(2), any accommodation plan shall assure that installations satisfy the following criteria:

(i) The effects utility installations will have on highway and traffic safety will be ascertained, since in no case shall any use be permitted which would adversely affect safety.

(ii) The direct and indirect environmental and economic effects of any loss of productive agricultural land or any productivity of any agricultural land which would result from the disapproval of the use of such right-of-way for accommodation of such utility facility will be evaluated.

(iii) These environmental and economic effects together with any interference with or impairment of the use of the highway in such right-of-way which would result from the use of such right-of-way for the accommodation of such utility facility will be considered.

(v) A utility strip will be established along the outer edge of the right-of-way by locating a utility access control line between the proposed utility installation and the through roadway and ramps. Existing fences should be retained and, except along sections of controlled access rights-of-way having frontage roads, planned fences should be located at the controlled access right-of-way line. The State or political subdivision is to retain control of the utility strip right-of-way including its use by utility facilities. Service connections to adjacent properties shall not be permitted from within the utility strip.

In addition to the federal law and regulations, any accommodation would have to satisfy NYS Finance Law and Highway Law Requirements for use of State property. There will be a fee charged for use and occupancy of the controlled access right-of-way. Each accommodation will be reviewed on a case by case basis.

It is imperative that NYSDOT be contacted and included early in the planning process due to the complicated legal and operational issues that need to be considered when seeking longitudinal accommodation on a controlled access right-of-way.

Freeways or controlled access rights-of-ways are the State's most important and highest volume roadways. The NYSDOT plans and maintains right-of-way along these roadways to accommodate future changes to the highway and service demands. The flexibility to improve our freeways is critical. A sound transportation system is crucial to the State's economic viability.

II. 2006 LOBBYING LAW REQUIREMENTS AND COMPLIANCE

Pursuant to NYS Finance Law §§139-j and 139-k, a request to use NYSDOT freeways, controlled access highways or rights-of-ways imposes certain restrictions on communications between NYSDOT and the requesting party during the procurement process. The requesting party is restricted from making contacts during the procurement process through final award and approval of the procurement by NYSDOT and, if applicable, Office of the State Comptroller ("restricted period") to other than designated staff unless it is a contact that is included among certain statutory exceptions set forth in NYS Finance Law §139-j(3)(a). The restricted period is defined

as the period of time commencing with the earliest written notice or solicitation of a request for proposal or other method of soliciting a response from offerors intending to result in a procurement contract with a governmental agency. The term "contact" is defined by statute and refers to those oral, written or electronic communications that a reasonable person would infer are attempts to influence the governmental procurement. Designated staff shall be identified for each project. NYSDOT employees are also required to obtain certain information when contacted during the restricted period and make a determination of the responsibility of the requesting party pursuant to these two statutes. NYS Finance Law §139-k(4) obligates every governmental entity, such as NYSDOT, during the restricted period of a procurement contract to make a written record of any Contacts made. Procurement contract is defined as any contract or agreement for an article of procurement involving an expenditure in excess of fifteen thousand dollars. In addition to obtaining the required identifying information, the governmental entity must inquire and record whether the person or organization that made the contact was the offerer or was retained, employed or designated on behalf of the offerer to appear before or contact the governmental entity. An offerer would be a utility company seeking to use NYSDOT freeways or controlled access highways for the siting of its facility. Certain findings of non-responsibility can result in rejection for contract award and in the event of two findings within a 4 year period, the requesting party is debarred from obtaining governmental procurement contracts. Further information about these requirements and the required forms may be found at www.nysdot.gov/portal/page/portal/main/business-center/consultants.

The requesting party must file an Affirmation of Understanding and Agreement pursuant to NYS Finance Law §139-j(3) and §139-j(6)(b), Disclosure of Prior Non-Responsibility Determinations and Certification of Compliance with NYS Finance Law §139-k(5). A termination clause requiring compliance will be added to any contract, use and occupancy agreement, or highway work permits. The forms and the termination clause may be found at www.ogs.state.ny.us/aboutOgs/regulations/defaultAdvisoryCouncil.html.

III. TRANSPORTATION CORPORATION RIGHTS

A transportation corporation is a company organized under NYS Transportation Corporations Law. Transportation corporations are typically gas, electric, telephone, water and sewage companies. Such companies have certain legislated rights to occupy the State's highway rights-of-way (ROW) without payment of a use and occupancy fee, but this does not apply to controlled access rights-of-way.

IV. APPLICATION OR PROPOSAL CONTENT

Any request submitted to NYSDOT for longitudinal accommodation shall include, at a minimum, the following:

(a) Organizational Overview

Identify the overall project organization for the proposed project or action, include the firm(s) which will be involved and their respective relationships, roles and responsibilities and whether they are considered Transportation Corporations or incorporated under other laws. Provide proof of Transportation Corporation status.

Provide a description of the relevant corporate experience of all involved firms including examples of current/prior involvement in efforts of this type.

Identify the management team, including key personnel and their respective relationships, roles and responsibilities and specifically the individual(s) who will be responsible for communicating with NYSDOT on project matters.

(b) Project Development and Public Need

Provide a description of the overall public need. Identify any research and/or analysis performed which supports the planned facility, including any projected trends in how the market(s) may develop over time. Describe any involved statewide planning process and include any resulting plans or reports. Provide a copy of any certificates issued by New York State Public Service Commission (NYSPSC) or Federal Energy Regulatory Commission (FERC).

Provide an overall schedule for the proposed installation which indicates the best estimate of the time frame(s) associated with all major project activities.

Identify potential problems to successfully implement the proposed facility and a discussion, as applicable, of your approach to resolving such potential problems.

(c) Alternatives

Provide detailed description and evaluation that is in full compliance with NEPA and SEQRA requirements for all alternatives, including impacts to the transportation system. The alternatives analysis should include environmental, social, physical impacts and a cost analysis. Provide specific engineering deficiencies for each alternate route.

(d) Capacity and Availability

Provide description of the proposed facility's general capacity. Demonstrate how projected demand will be served by the project.

Provide description of the extent, if any, of the proposed facilities that will be made available for the use of others, including how such access will be provided. Outline the terms and conditions under which such facilities would be made available to others.

There is a presumption that it is in the public interest for the competing utilities to provide service within the available corridors. In order to protect and encourage such competition and ensure minimum future intrusion into the controlled access right-of-way and to avoid disturbance to traffic by installation of multiple facilities, the applicant is required to provide a description of the facilities, which will be available to others and how others will be provided access to the facilities proposed to be installed, if any. An outline of the terms and conditions under which the applicant would make such facilities available to other services shall be provided.

(e) Installation

Provide design and initial installation plans of the facility. Include a traffic control plan in conformance with the NYSDOT Manual of Uniform Traffic Control Devices (MUTCD). Indicate the extent to which the installation will affect traffic flow and safety, landscaping and protected resources, as well as the freeway's/corridor's appearance, its structural and controlled access integrity and its ability to be maintained, widened or otherwise modified. These plans should clearly delineate the proposed construction limits.

Include discussion of any planned or likely improvements and/or upgrades to the utility facilities and time frames.

(f) Constructability

Provide a feasibility study of access routes required to mobilize and transport specialized equipment and materials. Identify potential for work to be scheduled during time of reduced traffic volumes. Describe impacts on existing utilities in the project area.

(g) Access for Operations and Maintenance

Provide plan for access to the utility facilities for operation and maintenance, including traffic control plans in conformance with NYSDOT MUTCD, a description and frequency of routine maintenance work and emergency call procedures.

(h) Financial

Provide a pro-forma revenue and expense statement for the proposed project which identifies all assumptions underlying the statement.

Provide an explanation to assess the financial capacity of the entity, seeking this accommodation, to fulfill its commitments and responsibilities.

(i) Fair Consideration Proposal

Provide a description of the consideration (monetary and/or service) being offered to the State, if any. Identify the total dollar amount(s) and terms of payment and a description

of the type(s), level(s) and extent of any service(s) being offered. Include all assumptions.

V. CRITERIA FOR EVALUATION OF PROPOSAL

In addition to compliance with NEPA and SEQRA requirements, the proposal shall meet the following evaluation criteria:

(1) Project supports a strategic need within the project area and is in accordance with local and state planning efforts.

(2) Review the relative degree of disruption of the controlled access right-of-way during installation as shown in plans and schedules and the extent to which such disruption will affect traffic flow and safety, landscaping, and protected resources, as well as the freeway's appearance, structural and controlled access integrity and ability to be maintained, widened or otherwise modified in the future. To minimize the disruption of the controlled access right-of-way during installation, all proposals must be in accordance with the following guidelines:

(a) All elements of the facility are to be installed in a designated utility strip to be established by the NYSDOT. The utility strip shall be approximately 10 feet wide and be located along the edge of the right-of-way; the final location will be determined during the planning process pending FHWA approval. The NYSDOT and FHWA may authorize installation within the roadway in exceptional situations (e.g., to provide access to a bridge which is needed to carry the facilities over natural barriers). The location of the facilities shall be such as to minimize impact on highway use, safety, maintenance, aesthetics, and future highway improvements.

Being permitted to use controlled access rights-of-way does not automatically include permission to use bridges or other structures. Any proposed use of bridges must be evaluated and approved by the NYSDOT and FHWA as per Section 131.20 of Title 17 NYCRR (New York Codes, Rules and Regulations). Any request to install facilities on bridges or other structures must be stated in the initial application for any permit including all installation details the NYSDOT and FHWA indicate are necessary to evaluate the proposal.

(b) Except as provided elsewhere in this document, facilities shall generally be installed underground with no part of the facility visible from the roadway.

(c) The initial installation shall include all appurtenances necessary or incidental to the operation of the facility, and shall include manholes or other access points at appropriate intervals to permit operation and maintenance without further excavation. Any electrical service necessary to operate stations or similar appurtenances shall be placed in underground ducts or conduits running from crossroads or frontage roads adjacent to the required point of access or from

easements the utility owns. The utility shall furnish and pay for all materials, equipment, and labor required for the proposed installation and maintenance.

(d) Installations of any part of a facility within the controlled access right-of-way including an interchange ramp roadway shall be by a trenchless technology and shall be installed in a manner to preclude or minimize disturbing the roadways and their clear zones for installation, operation or maintenance. To the extent feasible and practicable, such crossings should be on a line generally perpendicular to the centerline of the roadway alignment.

(e) At bridge crossings or where unusual terrain, environmental, or other conditions warrant, the NYSDOT and FHWA may authorize installation of a portion of the facility above ground, if it is found that there is no practical alternative inside or outside the right-of-way and that the installation will not impair controlled access right-of-way safety or the aesthetic quality of the land traversed. However, no above ground facility that constitutes a fixed object will be allowed within the clear zone.

(f) Where a facility installation must cross a major valley or river, such installation may be carried on an existing controlled access right-of-way structure only where the NYSDOT and FHWA finds that such use of the structure will not interfere with the use or maintenance of the controlled access right-of-way and that denial of such use would result in significant harm to the environment. Similarly, such installation shall not be allowed to occupy vehicular tunnels without such a finding by the NYSDOT and FHWA.

(g) In designated scenic or park preservation areas, the NYSDOT may authorize installations only when they do not require extensive alterations of trees or terrain features visible to the highway user or impair the aesthetic quality of the land traversed.

(h) All methods of installation, as well as methods of erosion control and other details of installation of the facility, shall be subject to the review and approval of the NYSDOT.

(i) Upon completion of installation, all disturbed areas shall be returned to their original topography and all steps necessary to prevent future erosion shall be taken. Backfill shall be tamped and vegetation replaced. The NYSDOT may specify the type and location of replacement vegetation. The NYSDOT may require the completion of an approved mitigation plan for replacement of tree loss created by the construction of the facility. The survival of all replacement trees and vegetation shall be guaranteed by the utility for a period of two (2) years following planting.

(j) Longitudinal occupancy of controlled access rights-of-way shall be for transmission type facilities only. Service connections to adjacent properties shall not be permitted from the controlled access rights-of-way.

(k) The proposal shall take into account planned or likely improvements or alterations in the nature or configuration of the highway and the impact of planned or likely improvements in the nature or configuration of the utilities.

(l) Any occupancy or access that adversely affects safety will not be permitted as the safety of the traveling public and protection of the State rights-of-way for future use are of primary importance in allowing longitudinal occupancy by any utility or facility.

(3) Review measures taken to provide access to facilities from outside the controlled access right-of-way.

(a) Access to the facility for installation, operation or maintenance along or across a controlled access right-of-way should be limited to access via nearby frontage roads (where available), adjacent public roads and streets, or trails along or near but outside of the controlled access right-of-way line, connecting only to an intersecting road, from any one or all of which entry may be made to the outer portion of the controlled access right-of-way to the greatest extent possible.

(b) A locked gate along the controlled access right of way line (control-of-access) fence may be utilized to meet periodic access needs. Where a gate is allowed, the use and occupancy agreement shall include adequate safeguards against unauthorized use. FHWA approves all breaks in access. A break in access means any activity which enters onto highway right-of-way which has been designated as controlled, includes but not limited to vehicular, pedestrian, or utility occupancies at, above or below ground. This also includes any airspace occupancy of controlled access highway rights-of-way.

(c) The NYSDOT shall impose conditions for policing and other controls as are necessary to assure the safety of highway travelers and to avoid interference with controlled access use. During installation, operation and maintenance, barriers and/or signs and/or other warning devices conforming to the NYSDOT MUTCD shall be installed as required and approved by the NYSDOT to alert and protect highway travelers to utility activities within the controlled access right-of-way. Where signs conforming to the NYSDOT MUTCD are placed in the vicinity of the through roadway or clear recovery area, they shall be collapsible upon impact from a vehicle. Additional maintenance and protection provisions shall be as stated in the "general conditions" clauses of the required Highway Work Permit as discussed in Section VIII. The NYSDOT reserves the right to require more stringent measures when it deems it necessary, as provided by Sections 126, 128, and 129, of NYCRR Title 17.

(d) Lane closures on the mainline, service roads or ramps of the controlled access right-of-way will not generally be permitted during the installation, operation, or maintenance of facilities unless the utility will be within 12 feet of the edge of the shoulder or travel way. In accordance with NYSDOT Engineering Instruction (EI) 96-027 and any applicable Regional policies, NYSDOT may require the installation to be completed at night. All lane closures must be proposed to NYSDOT in writing

at least one month before the beginning of the work and must be approved in writing by the Region before the work can begin.

(e) Access to facilities for installation, operation and maintenance within a controlled access right-of-way will only be allowed in accordance with the provisions of a traffic control plan specified in the highway work permit and use and occupancy agreement as discussed in Sections VIII and X.

(4) The initial installation of a facility shall be of a character and capacity to preclude the programmed need for any additional disruption. Absent compelling circumstances, the NYSDOT and FHWA will not permit additional installations after initial construction. If future expansion will be needed, this should be noted in the initial request.

VI. TIME FRAME

Actions classified as Class I projects under NEPA require an Environmental Impact Statement and typically take 2-4 years to reach an environmental determination for NYSDOT Projects. Actions classified as Class III projects under NEPA require an Environmental Assessment and typically take 1-3 years to reach an environmental determination for NYSDOT Projects. Actions classified as Class II projects under NEPA, which may be a Categorical Exclusion (Automatic, Programmatic, or Programmatic with documentation), typically take 6-18 months to reach an environmental determination for NYSDOT Projects.

VII. NYSDOT ACTIONS AND SUBMISSION TO FHWA

The NYSDOT reviews, comments and determines if the exception request is adequate and appropriate for submission to FHWA. If NYSDOT determines that the application meets the minimum criteria and does not conflict with NYSDOT operations, NYSDOT makes the formal request for an exception and forwards the project documentation to FHWA. ***Please be advised that compliance with all submittal requirements does not guarantee final approval from NYSDOT or FHWA.***

The FHWA reviews and issues their recommendation. If the request is approved, all related Use and Occupancy agreements and breaks in access must also be approved by FHWA.

If FHWA denies the request, the utility must reevaluate its project on the basis of the response.

VIII. ACTIONS TO PROGRESS A UTILITY PROJECT AFTER AN EXCEPTION HAS BEEN GRANTED BY FHWA

Any utility permitted to occupy NYSDOT controlled access right-of-way (ROW) must comply with 17 NYCRR Part 131, which is available at

Award of any agreements and use of NYSDOT property is subject to negotiations of acceptable terms and approval by NYSDOT Counsel, after consultation with the NYS Attorney General, and the Office of the NY State Comptroller. Permits or agreements may vary, but will generally include the following provisions:

- (1) The NYSDOT reserves the right to restrict the use of controlled access right-of-way. Such restrictions may include but not be limited to: number and types of facilities allowed; physical space occupied by the facilities or by equipment used for installation, operation and maintenance; time restrictions on installation, operation or maintenance; provisions of a traffic control plan for the maintenance and protection of traffic; system expansion, etc. The applicant may be required to make installations concurrent with others so as to limit such work to one installation operation. Applicants shall provide the NYSDOT with copies of all inspection reports.
- (2) Except where payment is required by Section 10, Subsection 24-b of the NYS Highway Law, any relocation of any facility allowed to be on the controlled access right-of-way, made necessary as a result of highway construction or maintenance operations, or changes in NYSDOT policy or design standards, shall be made promptly and at the sole expense of the utility applicant.
- (3) The use of the controlled access right-of-way shall be by a Use and Occupancy Agreement or other similar agreement obtained from the NYSDOT including a fee for the use of the property. Generally, this agreement must be executed prior to the issuance of a Highway Work Permit and will require that a Highway Work Permit be obtained prior to installation or construction. In addition, an Annual Maintenance Permit must be secured prior to the undertaking of any maintenance activity on the controlled access right-of-way. A NYSDOT approved traffic control plan for installation, operation and for future access for maintenance activities is a prerequisite to issuance of both permits. Application and general conditions for Highway Work Permits and Annual Maintenance Permits are explained in Title 17 Parts 125-129 NYCRR.
- (4) Violation of the Use and Occupancy Agreement, Highway Work Permit, Annual Maintenance Permit, or of any other law or rule at any time by the permit holder or its agent(s) in the installation, operation or maintenance of facilities within controlled access rights-of-way shall be the basis for denial of use, imposition of fines, or physical removal of the offending party and/or the permit holder's facilities as designated in such permit, or as otherwise provided by law.
- (5) The permit holder shall be responsible for obtaining all necessary permits, approvals, etc. required by any Federal, State or local agencies and shall furnish copies to the NYSDOT of such permits and approvals.
- (6) The applicant shall be required under the Highway Work Permit to provide the NYSDOT with a log of each entrance onto the controlled access rights-of-way with

personnel and/or equipment to include date, time, duration, location of entrance and exit from the controlled access rights-of-way, and the reasons for such entrance and exit, the equipment and personnel involved, etc.

(7) The applicant shall install along with any buried facilities a system of continuous plastic ribbon or marking tape. Such marker shall be installed at a level no less than 12 inches below the surface of the ground. The marker shall include a metal thread or other system capable of reliably emitting a signal readable by equipment operating on the surface. The applicant also shall install adequate permanent buried cable markers showing the approximate horizontal and vertical location of its underground facility. Such post markers shall not interfere with highway operations or maintenance and shall be offset from the actual location of the facility where necessary to avoid such interference. The applicant shall also maintain records that describe the facility, its location, depth, size, and other relevant data, which shall be available upon request to the NYSDOT and to other interested agencies. Within 120 days following the completion of the work authorized under a location permit, the applicant shall file with the NYSDOT one complete set of "as built" plans showing the locations of all parts of the facility stamped by a Professional Engineer. The applicant also shall file with the NYSDOT at that time one complete set of plans on microfiche or other form of information storage system as determined by the NYSDOT.

(8) Except where a use and occupancy permit calls for different procedures, the applicants shall comply with the construction standards, location standards, and special marking techniques established by the most recent publication of 23 CFR 645.

(9) The NYSDOT shall have authority to place inspectors on site to monitor and observe the applicant's activities, and/or to request the presence of state or local police to assure the safety of controlled access right-of-way travelers, at such times and for such periods as the NYSDOT deems appropriate. All inspector costs thereof shall be borne by the applicant.

(10) Upon issuance of a permit and from time to time during any installation, operation, or maintenance periods, the applicant shall pay to the NYSDOT those amounts representing all of the costs of processing the application and administering the permit, including without limitation any costs relating to the need to relocate the facility in connection with any other work performed by the NYSDOT including design review.

(11) Acceptance of a permit by the applicant shall constitute an agreement by the applicant, notwithstanding any other provision of law, to assume all liability for any loss, cost, damage, or harm arising out of or relating to the installation, operation or maintenance, of its facility and to the presence of its facility in the controlled access right-of-way. Further, acceptance of a use and occupancy agreement shall constitute an agreement by the applicant to indemnify and hold harmless the State of New York, its officers, agents, and employees from all loss, cost, damage, and harm, including attorney's fees, arising out of or relating to the foregoing. This permit shall not be effective unless accepted and approved in writing by the State.

IX. APPLICABLE FEDERAL AND STATE LAWS, REQUIREMENTS AND POLICIES

NYSDOT Engineering Instruction (EI) 96-027
www.dot.state.ny.us/cmb/consult/eib/files/ei96027.pdf

This EI is based on Chapter 361 of the Laws of 1995 amending the NYS Transportation Law by adding a new §20, "Nighttime work on major capital construction projects on highways, expressways and parkways".

23 CFR 645

23 CFR 771

Title 23, USC Chapter 1, Section 111

NYS Finance Law, Section 112

NYS Highway Law, Sections 10(24) and 10(24-b)

NYS Highway Law, Section 52

NYS Transportation Corporations Law

NYS Transportation Law, Sections 13 and 16

NYS General Obligations Law, Section 11-102

Title 17 Part 131 NYCRR

Title 17 Part 15 NYCRR

NYSDOT Manual of Uniform Traffic Control Devices (MUTCD)

X. NYSDOT RIGHTS-OF-WAY REQUIREMENTS

Pursuant NYS Transportation Law, Sections 13 and 16, NYSDOT has established rules and criteria to approve the use of rights-of-way under their jurisdiction. The instrument typically used to allow the use of NYSDOT rights-of-way is a Use and Occupancy Agreement. If the value of this property is in excess of \$15,000, the use must be approved by NYSDOT Executive Management, the Office of the NYS Comptroller and the NYS Attorney General.

The fee to be charged for use and occupancy of the controlled access right-of-way will be based on a market valuation and require two independent appraisals. The cost of the fee determination will be paid for by the utility requesting occupancy of NYSDOT property. The fee determination will be obtained by NYSDOT.

XI. HIGHWAY WORK PERMIT REQUIREMENTS

Any work, including installation, maintenance and upgrades of utility facilities, within a state highway right-of-way requires the issuance of a highway work permit pursuant to Highway Law Section 52. The forms and requirements are described as follows.

There are various options available to a municipality or public service corporation /public authority to provide insurance through an Undertaking Agreement.

Undertakings are described in Title 17 part 127.2:

"Any municipality may pay the insurance fee or may furnish one policy of protective liability insurance annually, and one policy or endorsement of completed operations liability insurance annually as may be required; and public service corporations may comply in like manner or they may furnish the usual form of undertaking that provides full indemnification for the State without specifying amount of coverage."

Self-insured entities may provide PERM 1, PERM 2 or PERM 6 in lieu of PERM 17.

The following forms are typically required for the types of requests discussed in previous sections of this document. Pertinent information about each form is included.

PERM 17 (11/05) – CERTIFICATE OF INSURANCE FOR SPECIAL HAULING, DIVISIBLE LOAD OVERWEIGHT, AND HIGHWAY WORK PERMIT INSURANCE REQUIREMENTS

- This is to be prepared by an insurance agency or insurance company.
- This PERM needs to be filed and kept current with the Permittee's information and submitted to:
NYS Department of Transportation
Central Permit Office
50 Wolf Road, 1st floor
Albany, NY 12232

PERM 32m (2/00) – HIGHWAY WORK PERMIT APPLICATION FOR UTILITY WORK AND ANNUAL MAINTENANCE PERMIT

- This form is to be prepared by the permittee for work to be performed. Applications should be submitted to the Permit Engineer in the appropriate Region.
- Authorized subcontractors, acting as agents of prime contractors, under the permit to the Prime Contractor, are bound by the agreements of the prime contractor. If, however, both parties are named as co-permittees, they have equal responsibility and NYSDOT requires a PERM 17 from BOTH parties.
- After construction is complete, the PERM 32m should be completed under the Maintenance/Annual type of operation to perform any maintenance of existing towers/utility poles. New construction/installations can not be performed under the annual permit; they require an individual permit for original installation.

PERM 36 (2/06) – ATTACHMENT TO HIGHWAY WORK PERMIT FOR MAJOR PROJECTS

- The NYSDOT requires the Permittee to provide a consultant to inspect the Permit work when the duration, of the work, is three or more days. The inspector

is intended to act as the NYSDOT's agent on the work site. When a consultant inspector is provided PERM 36 should be completed.

- PERM 36 is to be completed and signed by the Permittee and the consultant providing the inspector/s.

PERM 41-1d (4/88) – METHOD OF PERFORMING WORK WITH THE STATE RIGHT OF WAY

- Provides general conditions as well as design and construction method requirements for installation.

PERM 44e (8/01) - SURETY BOND (PERFORMANCE)

- The NYSDOT requires the Permittee to provide a bond or letter of credit to insure and guarantee the timely and workmanlike completion of work undertaken with a Highway Work Permit

PERM 51 (11/90) - PAYMENT AGREEMENT FOR HIGHWAY WORK PERMITS DESIGN REVIEW

- The permittee will be billed on a periodic basis for the costs incurred by the NYSDOT to process a highway work permit.

PERM 50e (9/93) –INSPECTION AND/OR SUPERVISION PAYMENT AGREEMENT FOR HIGHWAY WORK PERMITS

- The permittee will reimburse the NYSDOT for inspection and/or supervision of any permit work by NYSDOT employees which exceeds one hour of work on a highway work permit.

PERM 52b (9/93) - INSPECTION AND/OR SUPERVISION PAYMENT AGREEMENT FOR HIGHWAY WORK PERMITS FOR PUBLIC UTILITY COMPANIES

- The permittee will reimburse the NYSDOT for inspection and/or supervision of any permit work by NYSDOT employees which exceeds one hour of work on a highway work permit.

XII. SPECIAL HAULING PERMIT REQUIREMENTS

Many utility projects require equipment or materials to be delivered to project locations which require special hauling permits. For additional information, see the following website: www.nypermits.org/. A Complete Plan Submission for a Special Hauling Permit must include in detail the following:

- **PERM 17 (11/05) – CERTIFICATE OF INSURANCE FOR SPECIAL HAULING, DIVISIBLE LOAD OVERWEIGHT, AND HIGHWAY WORK PERMIT INSURANCE REQUIREMENTS**
- Delivery Plan
- Cable Pulling Plan
- Pick Plan
- Maintenance and Protection of Traffic Plans (M&PT)
 - detours schemes for night delivery
 - shoulder closure and temporary concrete barrier schemes that will remain in place until reels are emptied and pulling and cradles are removed.
- Site details for temporary staging area for each pit location(i.e.: limits of vegetation removal, details for cut and fill areas for level working pads, placement of Recycled Concrete Aggregate (RCA) bedding, erosion controls, etc.) necessary to safely support dispensing operation equipments in soft shoulder.

XIII. ATTACHMENTS

- 2006 Lobbying Laws
 - Offerer Disclosure of Prior Non-Responsibility Determinations
 - Offerer's Affirmation of Understanding of and Agreement pursuant to NYS Finance Law §139-j (3) and §139-j (6) (b)
- Use and Occupancy Agreement ROW 75n (10/06)
- Highway Work Permit Forms
 - PERM 17 (11/05)
 - PERM 32M (2/06)
 - PERM 36 (2/06)
 - PERM 41-1d (4/86)
 - PERM 44e (8/01)
 - PERM 50e (9/93)
 - PERM 51 (11/90)
 - PERM 52b (9/93)

6/20/07

**APPENDIX 13B
ACCOMMODATION PLAN**

ACCOMMODATION PLAN FOR LONGITUDINAL USE
OF FREEWAY RIGHT-OF-WAY BY UTILITIES
October, 1995

- A. This Accommodation Plan is submitted pursuant to 23 CFR §645.209 and is subject to 23 CFR §645.211 and 645.215. It is applicable only to the occupation of freeways by lines, facilities or systems used for communications to the extent provided by 23 CFR §645.207(m) (hereinafter referred to as communications facilities or facilities). The longitudinal use of freeways by utilities shall not be allowed except in accordance with 17 NYCRR Part 131 and in particular §131.6, which requires a case-by-case evaluation of individual requests, and with the above federal requirements as implemented below. In no case shall any installation be allowed within the median of the freeway. In all cases, occupation of the right-of-way is subject to a use and occupancy agreement issued by the Department of Transportation under 17 NYCRR 131.16(d), containing the conditions of occupancy.
- B. In recognition of the fact that certain public authorities, public benefit corporations and municipalities have exclusive jurisdiction and control of certain designated freeways covered by the above-mentioned FHWA Regulations, this Accommodation Plan shall apply to those designated freeways only to the extent that such public authority or public benefit corporation has not received FHWA approval of its own Accommodation Plan. When consummated, an informational copy of any formal agreement between the Commissioner and any responsible local officials, public authorities and/or public benefit corporations concerning the applicability of this (or other) utility accommodation plan to federally-aided freeways not under the Department's jurisdiction and control shall be provided to the Federal Highway Administration. Such agreement shall insure that the utility accommodation policies of the public authorities, public benefit corporations or municipalities shall provide at least the same measure of protection as provided by Part 131 NY CRR Title 17.

1. General Policy

The Department will make available the rights-of-way of freeways for the installation of communications facilities where they can be safely installed, operated, and maintained. For purposes of this plan install, operate and maintain shall include but not be limited to: construction, service, repair, replacement, inspection, etc.

Parties interested in using portions of the right-of-way of a freeway for longitudinal installations of communications facilities are encouraged to make their general interest known. Expressions of interest should be directed to the Director, Real Estate Division, Building 5, State Office Campus, New York State Department of Transportation, Albany, New York 12232.

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2. Application Process

Where there is a reasonable expectation of interest **in the installation of communications facilities** within a portion of the right-of-way of a freeway, as evidenced by expressions of interest received by the Department and excess fiber optics capacity installed in the freeway right-of-way is not already available from another source, the Department will offer the right to install, operate, and maintain communications facilities within the right-of-way of specific portions of freeways through an open competitive process which involves advertisement, evaluation of proposals negotiation of an agreement with a selected proposer, and award of a contract.

a. Request for Proposals

The Department will advertise in the New York State Contract Reporter and in periodicals normally used for such purposes, a request for proposals for the installation, operation, and maintenance of communications facilities within the right-of-way of specified portions of freeways. Although requirements may vary between locations in some respects, each proposal will be required to include:

- (1) a plan and schedule for initial installation, including a traffic control plan in conformance with the Manual of Uniform Traffic Control Devices (MUTCD);
- (2) a plan for access to the communications facilities for operation and maintenance including traffic control plans in conformance with the MUTCD;
- (3) information regarding the general capacity of the facilities proposed to be provided and an analysis that shows how projected demand will be served by the proposed installed capacity; (Note: The Department is fully aware of the desire for confidentiality and will make every effort to proceed in that regard.)
- (4) a statement of the degree to which facilities, will be available, if at all, for the use of others and the terms and conditions of such use; and
- (5) the proposed payment to be made for occupancy of the freeway rights-of-way.

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- b. Review and evaluation of proposals will be by committee in accordance with criteria specified in the Request for Proposals. The committee will be composed of members designated by the Department. The committee may consult with the Public Service Commission and the Department of Economic Development in evaluating proposals. The criteria for evaluation will include:

- (1) The **relative degree of disruption of the right-of-way** during installation as shown in plans and schedules and the extent to which such disruption will affect traffic flow and safety, landscaping, and protected resources, as well as the freeway's appearance, its structural and controlled access integrity and its ability to be maintained, widened or otherwise modified. To minimize the disruption of the right-of-way during installation, all proposals must be in accordance with the following guidelines:

- (a) All elements of a facility are to be installed in a designated "utility strip" to be established by the Department. The utility strip shall be approximately 10 feet wide and shall generally be established along the edge of the right-of-way. The utility strip shall fall within the edge of the right-of-way and the "roadway". Roadway is defined in the Department's design manual as "that portion of the highway included between the outside edges of the graded width of shoulder." The Department may authorize installation within the roadway in exceptional situations (e.g., to provide access to a bridge which is needed to carry the facilities over natural barriers). The location of the facilities shall be such as to minimize impact on highway use, safety, maintenance, aesthetics, and future highway improvements.
- (b) Except as provided elsewhere in this document, facilities shall generally be installed in underground ducts or conduits and no part of the facility shall be visible from the roadway.
- (c) The initial installation shall include all appurtenances necessary or incidental to the operation of the facility, and shall include manholes or other duct/conduit access points at appropriate spacings to permit the pulling of additional cables into the duct system without further excavation. Any electrical service necessary to operate repeater/booster stations or similar appurtenances shall be placed in underground ducts or conduits running from crossroads or frontage roads adjacent to the required point of access or from easements the utility owns. No longitudinal electrical line installation on the freeway right-of-way will be allowed. The utility shall furnish and pay for all materials, equipment, and labor required for the proposed installation.

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- (d) Installations of any part of a facility crossing the freeway, an interchange ramp roadway or any roadway shall be by a trenchless technology and shall be installed in a manner so as virtually to preclude any necessity for disturbing the roadways and their clear zones for installation, operation or maintenance. To the extent feasible and practicable, such crossings should be on a line generally normal to the roadway alignment.
- (e) At bridge crossings or where unusual terrain, environmental, or other conditions warrant, the Department may authorize installation of a portion of the facility above ground, or under conditions which differ from those specified in this Plan, if it is found that there is no practicable alternative inside or outside the right-of-way and that the installation will not impair freeway safety or the aesthetic quality of the land traversed. However, no above ground facility that constitutes a fixed object will be allowed within the clear zone, nor will installation be allowed within the median.
- (f) Where a facility installation must cross a major valley or river, such installation may be carried on an existing freeway structure only where the Department finds that such use of the structure will not interfere with the use or maintenance of the freeway and that denial of such use would result in significant harm to the environment. Similarly, such installation shall not be allowed to occupy vehicular tunnels without such a finding by the Department.
- (g) In scenic areas, the Department may authorize installations only when they do not require extensive alterations of trees or terrain features visible to the highway user or impair the aesthetic quality of the land traversed. When installation of a facility is authorized, trees within nine feet of the center line of the designated facility area within the freeway right-of-way may be removed. This area may be kept clear of trees during the period of its use and occupancy by the facility.
- (h) All methods of installation, as well as methods of erosion control and other details of installation of the facility, shall be subject to the review and approval of the Department.
- (i) Upon completion of installation, all disturbed areas shall be returned to their original topography and all steps necessary to prevent future erosion shall be taken. Backfill shall be tamped and vegetation, other than trees, replaced. The Department may specify the type and location of replacement vegetation. The Department may require the completion by the selected proposer of an approved mitigation plan for replacement of tree loss created by the construction of the facility. The survival of all replacement trees and vegetation for a period of two (2) years following planting shall be guaranteed.

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- (j) Longitudinal occupancy of freeway rights-of-way shall be for transmission type facilities only. Service connections to adjacent properties will not be allowed from the freeway rights-of-way, including service connections at repeater/booster stations located on the freeway right-of-way.
 - (k) The proposal shall take into account planned or likely improvements or alterations in the nature or configuration of the highway and planned or likely improvements in the nature or configuration of facilities.
 - (l) The proposal shall also identify the direct and indirect environmental and economic effects of the loss of productive agricultural land or the productivity of any agricultural land which would result if the facility is not located within the freeway right-of-way. It shall also identify the potential impact upon freeway landscaping.
 - (m) Safety of the driving public and protection of the State rights-of-way for future use are of primary importance in allowing longitudinal occupancy by any facility. In no case will occupancy or access be permitted that will adversely affect safety.
- (2) Measures to be taken to provide access to facilities from outside the right-of-way.
- (a) To the greatest extent possible in light of the locations designated for the facility, access for installing, operating or maintaining a facility along or across a freeway should be limited to access via nearby frontage roads (where available), adjacent public roads and streets, or trails along or near but outside of the freeway right-of-way line, connecting only to an intersecting road, from any one or all of which entry may be made to the outer portion of the right-of-way.
 - (b) A locked gate along the freeway control-of-access fence may be utilized to meet periodic access needs. Where a gate is allowed, the use and occupancy permit shall include adequate provision against unauthorized use.
 - (c) The Department shall impose conditions for policing and other controls as are necessary to assure the safety of highway travelers and to avoid interference with freeway use. During installation, operation and maintenance, barriers and/or signs and/or other warning devices conforming to the MUTCD shall be installed as required and approved by the Department to alert and protect highway travelers to utility activities within the right-of-way. Where signs conforming to the MUTCD are placed in the vicinity of the through roadway or clear recovery area, they shall be collapsible upon impact from a vehicle. Additional maintenance and protection provisions shall be as stated in the "general conditions" clauses of the Highway Work Permit. The Department reserves the right to require more stringent measures when it deems it necessary, as provided by Sections 126, 128, and 129, of NYC RR Title 17.

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- (d) Lane closures on the mainline or ramps of the freeway will not generally be permitted during the installation, operation, or maintenance of facilities.
 - (e) Access to facilities for installation, operation and maintenance within a freeway right-of-way will only be allowed in accordance with the provisions of a traffic control plan which is specified in the negotiated contract.
- (3) The total capacity being installed. Installation of facilities shall be of a character and capacity to preclude the programmed need for any additional disruption. Absent compelling circumstances, the Department will not permit installation of additional ducts or conduits for a minimum of 10 years from initial construction. The Department will, however, allow installation of additional cable and/or replacement of existing cable within a previously installed duct or conduit to the extent it can be accomplished without direct or indirect interference with freeway traffic.
- (4) The degree to which facilities, will be available, if at all, for use by others and the proposed terms and conditions of such use.

There is a presumption that it is in the public interest for the competing utilities to provide service within the available corridors. In order to protect and encourage such competition and ensure minimum future intrusion into the right-of-way and to avoid disturbance to traffic by installation of multiple facilities, the proposer is required to provide a description of the facilities, which will be available to others and how others will be provided access to the facilities proposed to be installed, if any. An outline of the terms and conditions under which the proposer would make such facilities available to other services shall be provided.

- (5) Proposed payment or payments to be made for use and occupancy of the freeway right-of-way.

The Department may charge an assessment for the privilege of permitting installation of facilities and using the freeway right-of-way.

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3. Contract Award

Award of a contract to a selected proposer in accordance with the general terms outlined in the proposal will usually be made within 90 days of the deadline for receipt of a complete proposal by the Department. Contract awards are subject to the negotiation of an acceptable contract and approval by Department Counsel, after consultation with the Division of the Budget, the Attorney General, and the Comptroller.

a. Contract Provisions - Contracts may vary but will generally include the following provisions:

- (1) The Department reserves the right to restrict the use of freeway right-of-way. Such restrictions may include but not be limited to: number and types of facilities allowed; physical space occupied by the facilities or by equipment used for installation, operation and maintenance; time restrictions on installation, operation or maintenance; provisions of a traffic control plan for the maintenance and protection of traffic; system expansion, etc. The selected proposer may be required to make installations concurrent with others, so as to limit such work to one installation operation.
- (2) Except where payment is required by Section 10, Subsection 24-b of the New York State Highway Law, any relocation of any fiber optics facility allowed to be on the freeway right-of-way, made necessary as a result of highway construction or maintenance operations, or changes in Department policy or design standards, shall be made promptly and at the expense of the selected proposer.
- (3) The use of the freeway right-of-ways shall be by a "Use and Occupancy Agreement" or other similar agreement obtained from the Department. Such Permit will require that a "Highway Work Permit" be obtained prior to actual installation. In addition an "Annual Maintenance Permit" must first be secured prior to the undertaking of any maintenance activity on the right-of-way. A Department approved traffic control plan for installation, operation and for future access is a prerequisite to issuance. Application and general conditions for such "Highway Work Permit" and "Annual Maintenance Permit" are explained in Title 17 Part 131 NYCRR.
- (4) No permit to allow installation of a facility on freeway right-of-way will be issued nor will work commence until a contract is awarded to a selected proposer.
- (5) Violation of the "Use and Occupancy Agreement", "Highway Work Permit", "Annual Maintenance Permit", or of any other law or rule at any time by the permit holder or its agent(s) in the installation, operation or maintenance of facilities within freeway rights-of-way shall be the basis for denial of use, imposition of fines, or physical removal of the offending party and/or the permit holder's facilities as designated in such permit, or as provided by law.

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- (6) The permit holder shall be responsible for obtaining all necessary permits, approvals, etc. required by any Federal agency or other State agency and shall furnish to the Department copies of such permits and approvals.
- (7) Being permitted to use freeway rights-of-way does not automatically mean permission to use bridges. Any proposed use of bridges must be evaluated and approved by the Department as per Section 131.20 of 17 NYCRR. Any desire to install facilities on bridges or other structures must be stated in the initial application for any permit, together with whatever installation details the Department indicates are necessary to evaluate the proposal.
- (8) The selected proposer shall be required under the Highway Work Permit to provide the Department with a log of each entrance onto the freeway rights-of-way with personnel and/or equipment to include date, time, duration, location of entrance onto and exit from the rights-of-way, and the reasons for such entrance and exit, the equipment and personnel involved, etc.
- (9) The selected proposer shall install along with any buried facilities a system of continuous plastic ribbon or marking tape. Such marker shall be installed at a level no less than 12 inches below the surface of the ground. The marker shall include a metal thread or other system capable of reliably emitting a signal readable by located equipment operated on the surface. The selected proposer also shall install adequate permanent buried cable markers showing the approximate horizontal and vertical location of its underground facility. Such post markers shall not interfere with highway operations or maintenance and shall be offset from the actual location of the facility where necessary to avoid such interference. The selected proposer shall also maintain records that describe the facility, its location, depth, size, and other relevant data, which shall be available upon request to the Department and to other interested agencies. Within 120 days following the completion of the work authorized under a location permit, the selected proposer shall file with the Department one complete set of "as built" plans showing the locations of all parts of the facility. The selected proposer also shall file with the Department at that time one complete set of said plans on microfiche or other form of information storage system as determined by the Department.
- (10) Except where this Plan or the use and occupancy permit calls for different procedures, the selected proposers shall comply with the construction standards, location standards, and special marking techniques established by the most recent publication of 23 CFR 645.
- (11) The Department shall have authority to place inspectors on site to monitor and observe the selected proposer's activities, and/or to request the presence of state or local police to assure the safety of freeway travelers, at such times and for such periods as the Department deems appropriate. All costs thereof shall be borne by the selected proposer.

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- (12) Upon issuance of a permit and from time to time during any installation, operation, or maintenance periods, the selected proposer shall pay to the Department those amounts representing all of the costs of processing the application and administering the permit, including without limitation any costs relating to the need to relocate the facility in connection with any other work performed by the D epartment.

- (13) Acceptance of a permit by the selected proposer shall constitute an agreement by the selected proposer, notwithstanding any other provision of law, to assume all liability for any loss, cost, damage, or harm arising out of or relating to the installation, operation or maintenance, of its facility and to the presence of its facility in the freeway right-of-way. Further, acceptance of a use and occupancy agreement shall constitute an agreement by the selected proposer to indemnify and hold harmless the State of New York, its officers, agents, and employees from all loss, cost, damage, and harm, including attorney's fees, arising out of or relating to the foregoing.

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