

October 25, 2021

This is the Transportation Interim Committee's administrative rule review for proposals by the Department of Transportation and the Motor Vehicle Division.

A. Department of Transportation

MAR Notice No.	Public Hearing Date	Where	Comment Due Date	Purpose
18-185	n/a	n/a	November 19, 2021	To update utility rule definitions to reflect changes in statute and in updated electronic permit issuance processes, and to clarify language for relocation of utilities and for certain payments.

B. Motor Vehicle Division

Proposed Rules: None

BEFORE THE DEPARTMENT OF TRANSPORTATION
OF THE STATE OF MONTANA

In the matter of the amendment of) NOTICE OF PROPOSED
ARM 18.7.202 and 18.7.206) AMENDMENT
pertaining to Utility Relocation costs)
) NO PUBLIC HEARING
) CONTEMPLATED

TO: All Concerned Persons

1. On November 22, 2021, the Department of Transportation proposes to amend the above-stated rules.

2. The Department of Transportation will make reasonable accommodations for persons with disabilities who wish to participate in this rulemaking process or need an alternative accessible format of this notice. If you require an accommodation, contact the Department of Transportation no later than 5:00 p.m. on November 12, 2021, to advise us of the nature of the accommodation that you need. Please contact Steve Giard, Utility Section Manager, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620-1001; telephone (406) 444-6080; fax (406) 444-7254; TTY Service (800) 335-7592 or through the Montana Relay Service at 711; or e-mail sgiard@mt.gov.

3. The rules as proposed to be amended provide as follows, new matter underlined, deleted matter interlined:

18.7.202 DEFINITIONS (1) through (4) remain the same.

(5) "Engineering costs" means costs for designing, locating, staking, inspecting, or any other incidental costs of engineering.

(5) and (6) remain the same but are renumbered (6) and (7).

~~(7)~~ (8) "Highway" means any highway under the jurisdiction of the Department of Transportation a commission-designated highway system or state highway.

(8) and (9) remain the same but are renumbered (9) and (10).

~~(10)~~ (11) "Occupancy agreement," "common use agreement," or "utility encroachment permit, "or utility occupancy agreement permits" means mean the documents the owner must secure from the department, prior to occupancy, showing the conditions of occupancy of highway right-of-way, whether such occupancy is overhead, underground, or on the surface.

(12) "Public utility" means:

(a) all public utilities as defined by 69-3-101, MCA, but including publicly owned water and sanitary sewer facilities;

(b) all common carrier pipelines as defined by 69-13-101, MCA; and

(c) all rural cooperative, non-profit membership corporations organized under the Rural Electric and Telephone Cooperative Act, as set forth in 35-18-101 through 35-18-503, MCA.

(13) "Relocation" means the adjustment or replacement of an existing publicly owned utility facility with a facility of lesser or equal value to accommodate a department highway construction project.

(11) through (13) remain the same but are renumbered (14) through (16).

~~(14) "Utility" means:~~

~~(a) all public utilities as defined by 69-3-101, MCA, but including publicly owned water and sewer facilities;~~

~~(b) all common carrier pipelines as defined by 69-13-101, MCA; and~~

~~(c) all rural cooperative, non-profit membership corporations organized under the Rural Electric and Telephone Cooperative Act, as set forth in 35-18-101 through 35-18-503, MCA.~~

AUTH: 60-3-101, 60-4-402, MCA

IMP: 60-3-101, 60-4-402, 60-4-403, MCA

REASON: The proposed amendments are necessary to update utility rule definitions in accordance with legislative statutory changes and updated MDT electronic permit issuance processes. The proposed addition of (5) will define "engineering costs" as non-covered costs as addressed in ARM 18.7.206. The proposed amendment to (8) will make the definition consistent with statutory changes by use of the phrase "a commission-designated highway system or state highway" to describe the affected roadways. The proposed amendments to (11) will make the definition consistent with MDT's recent electronic Utility Permit Application Process (UPAS) terminology in existing ARM 18.7.207. The proposed addition of (12) will make the definition consistent with proposed changes to ARM 18.7.206, clarifying existing practices for statutory relocation payments for eligible publicly owned utilities. The proposed addition of (13) will add a definition for the term "relocation" to clarify existing statutory authority for utility relocation payments.

18.7.206 AUTHORITY OF PRIVATE AND PUBLIC UTILITY LINES UTILITIES – RELOCATION COSTS ~~(1) All utilities defined in (3) of ARM 18.7.202, have authority under Montana law to occupy highway rights-of-way, and in event of relocation, are eligible for reimbursement pursuant to the laws of the state of Montana.~~

~~(2) All other facilities are private and have no authority to occupy highway rights-of-way other than by revocable permits issued at the sole discretion of the department. Such facilities are regulated by these provisions, but in the event of relocation, they are not eligible for reimbursement under the provisions of 23 CFR part 645, subpart A, or otherwise.~~

(1) All public utilities defined in ARM 18.7.202 may occupy commission-designated highway systems or state highway rights-of-way by utility occupancy agreement permits issued at the sole discretion of the department.

(2) All utility facilities not meeting the definition in ARM 18.7.202 are private utilities and may only occupy commission-designated highway systems or state highway rights-of-way by revocable utility encroachment permits issued at the sole discretion of the department.

(3) Public utilities granted utility occupancy agreement permits for public utilities occupying commission-designated highway systems are eligible for payment by the department for highway construction project costs of relocation in the percentages allowed pursuant to 60-4-403, MCA, and the following terms:

(a) for publicly owned water or sanitary sewer facilities, when the actual cost of the work performed by a state contractor, excluding engineering costs, is under \$25,000, the department will pay costs including materials, labor, traffic control, and mobilization;

(b) for publicly owned water or sanitary sewer facilities, when the actual cost of the work performed by a state contractor, excluding engineering costs, is over \$25,000, the public utility owner must pay the owner's proportionate share as defined in 60-4-403, MCA, of the actual costs charged by the contractor and the following costs:

(i) eight percent of the owner's proportionate share for traffic control;

(ii) eight percent of the owner's proportionate share for mobilization; and

(iii) the department's current indirect cost rate.

(4) Private utility facilities granted revocable utility encroachment permits are not eligible for highway construction project relocation payment under federal or state statutes, regulations, or rules.

AUTH: 60-3-101, 60-4-402, MCA

IMP: 60-3-101, 60-4-402, 60-4-403, MCA

REASON: The proposed amendments to ARM 18.7.206 are necessary to further clarify existing statutory relocation of utilities requirements in Title 60, chapter 4, part 4, MCA. The amendments will clarify public utility eligibilities for MDT payment of highway construction project costs of relocation in the percentages allowed pursuant to 60-4-403, MCA. The amendment will also clarify MDT's long-standing practice of waiving publicly owned water or sanitary sewer facilities' payment when the actual cost of the work performed by a state contractor is under \$25,000 (excluding engineering costs). In that case, MDT will pay all non-engineering costs including materials, labor, traffic control, and mobilization. The proposed amendment will also clarify MDT's practice of charging owners their proportionate share of traffic control, mobilization, and indirect costs.

4. Concerned persons may submit their data, views, or arguments concerning the proposed action in writing to: Steve Giard, Utility Section Manager, Department of Transportation, P.O. Box 201001, Helena, Montana, 59620-1001; fax (406) 444-7254 or e-mail sgiard@mt.gov, and must be received no later than 5:00 p.m., November 19, 2021.

5. If persons who are directly affected by the proposed actions wish to express their data, views, or arguments orally or in writing at a public hearing, they must make written request for a hearing and submit this request along with any written comments to Steve Giard at the above address no later than 5:00 p.m., November 19, 2021.

6. If the agency receives requests for a public hearing on the proposed action from either 10 percent or 25, whichever is less, of the persons directly affected by the proposed action; from the appropriate administrative rule review committee of the Legislature; from a governmental subdivision or agency; or from an association having not less than 25 members who will be directly affected, a hearing will be held at a later date. Notice of the hearing will be published in the Montana Administrative Register. Ten percent of those directly affected has been determined to be 60 persons based on the approximately 600 utility occupancy agreements issued annually.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, e-mail, and mailing address of the person to receive notices and specifies for which program the person wishes to receive notices. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be mailed or delivered to the contact person in paragraph 4 above or may be made by completing a request form at any rules hearing held by the department.

8. An electronic copy of this proposal notice is available on the Department of Transportation website at www.mdt.mt.gov.

9. The bill sponsor contact requirements of 2-4-302, MCA, do not apply.

10. With regard to the requirements of 2-4-111, MCA, the department has determined that the amendment of the above-referenced rules will not significantly and directly impact small businesses.

11. With regard to the requirements of 2-15-142, MCA, the department has determined that the amendment of the above-referenced rules will not have direct tribal implications.

/s/ Carol Grell Morris
Carol Grell Morris
Rule Reviewer

/s/ Julie Brown
Julie Brown
Deputy Director
Department of Transportation

Certified to the Secretary of State October 12, 2021.