Testimony of Eric D. Myers

Executive Director

Before the

House Resources Subcommittee on

Parks, Recreation, and Public Lands

H.R. 3258

The Reasonable Right-of-Way Fees Act

Good Afternoon. My name is Eric Myers, and I am testifying today in my capacity as the Executive

Director of the Telecommunications Right-of-Way Coalition, or TelROW. On Behalf of TelROW, I would like to thank Chairman Radanovich, Ranking Member Christensen, Representative Cubin, and members of the Subcommittee for convening today's hearing to address the important issues covered by H.R. 3258, the Reasonable Right-of-Way Fees Act.

TelROW's members, including companies and trade associations in the communications and energy sectors, operate a network of more than 100,000 miles of fiber optic cable, and more than 700,000 miles of electric transmission lines, across the United States. Some of this critical infrastructure, especially in the west, crosses federal public lands. The companies who formed this coalition were motivated by several interim and proposed policies developed by the Bureau of Land Management and U.S. Forest Service (See Attachments). We support H.R. 3258 as a necessary amendment to the Federal Land Policy and Management Act (FLPMA), to ensure a reasonable approach to collecting right-of-way rents. H.R. 3258 ensures that right-of-way rents are consistent with the fair value of the right to cross federal lands, thus promoting sound management of these public resources, and advancing the public's interest in these lands.

Introduction and Background

Communications providers and other operators and owners of linear infrastructure pay the federal government for the use of rights-of-way (ROW) over lands administered by the U.S. Forest Service (USFS), the Bureau of Land Management (BLM), and other federal agencies. Currently, the fees for rights-of-way on federal lands have been based on a proxy for the market value of the land, the size of the right-of-way, and the number of cables, pipes, or other distinct facilities. These calculations are reasonably equivalent to the land value and the physical impact of the utility project.

Recently, however the BLM and USFS proposed to increase ROW fees, by changing the basis of the calculation for "fiberoptic projects," based on data they believed demonstrated a special, separate "value of fiberoptic use and occupancy." These interim and proposed policies, however, capture neither the fair market value of the land over which fiberoptic cable is conveyed, nor the consequent impact on federal lands and resources. Instead, the proposed policies attempt to capture a portion of telecommunications revenues, by charging for uses not based on the value of land to the federal government or impacts thereto, but by rates specific to the technology

or economic value of the facilities themselves. We believe these policies are based on arbitrary assumptions and anecdotal evidence regarding the "market" value of telecommunications easements across private, state, and municipal lands, sometimes in distant, urban settings. The first instances in which these proposed and interim policies were implemented resulted in fees 150 times those in the published, established, and legitimate federal fee schedules. The USFS and BLM have failed to justify such large increases based either on actual land value or on land impact. Currently, after much Congressional inquiry and stern oversight, the agencies have indefinitely delayed implementation of new fees.

The Proposed Methodologies are Unjust

The methodologies proposed by the BLM and USFS are inconsistent with current regulations and policies applied to other infrastructure providers. Forcing critical infrastructure providers to pay dramatically increased fees for the use of federal lands, particularly where the new use is similar or compatible to other existing uses, involving impacts identical to or less than uses for which a lower fee is charged, is inconsistent. Such policies protect neither the public land nor the public interest. Such policies do not accomplish the goals of protecting the value of federal lands or natural resources. They amount to a tax on the services conveyed by these facilities. Furthermore, under such policies, federal lands and other reservations become roadblocks or toll booths to interstate and international commerce.

Agency Officials Have Recognized the Inequity of These Policies

The Interagency Land Acquisition Conference, an ad hoc group of appraisers and real estate professionals in the federal government, recognized the inappropriate nature of these technology-based valuations in their most recent revision to the Uniform Appraisal Standards for Federal Land Acquisition (see Attachment). The Conference indicated that the federal government *should not pay* inflated technology-based prices when *acquiring* rights-of-way over lands owned by private citizens or other entities. However, in addressing what a federal agency may *charge* for the use of an easement on federal land, the participating agencies indicated, quite inconsistently, that they saw no reason why federal agencies could not charge private easement holders these technology-specific rates. Thus, the agencies made clear that, technology-based prices for leasing rights of way are inappropriate when a federal agency has to pay such inflated rates, but may be perfectly appropriate when the federal agencies are the recipient of such fees. In both cases, we are talking about definitions of "fair market value." It is important to note that many of the same appraisers who crafted this inconsistent internal agency policy are the

same individuals advising the new fiberoptic fee schedules.

The Proposed Methodology is Contrary to Real Estate Appraisal Principles

Generally speaking, easement values are determined to be somewhat less than the fee value of the land upon which the easement is established, since these rights-of-way consist of a limited contract to use lands for a specific purpose. These valuations are guided by two basic principles, 1) "before and after" value, which ascribes a value to easements equal or similar to the reduction of value or utility resulting from an easement use, and 2) "willing buyer-willing seller," a principle which suggests that the parties to an easement transaction enter as willing and equal participants, with an array of possible options. The approach taken by federal agencies focuses on situations where cities or other entities have incorporated franchise-like fees into required easement payments, or where individual landowners have leveraged their ability to "hold out" or obstruct established rights across adjacent lands to obtain higher payments for easements on their land. These cases are exceptional, and should not alter the established principles, which base easement payments on the underlying property value.

Land Value Is the Proper Measure of Fair Market Value for Rights-of-Way

Since there is no true market in federal land, overall valuation, as well as the cost of the land impact, must be estimated. While it is appropriate for the government to come up with some methodology to estimate values, in this case, we believe they have chosen to apply inappropriate principles. An estimation of ROW value must be based on the estimated value of the land, and on the estimated impact of the project on the value of the remaining land, not on the value of technology installed or associated commerce. A cost or impact-based principle is the universal methodology used by right-of-way project developers to determine constitutional levels of payment for rights-of-way obtained from private parties in condemnation proceedings. This is how the Federal Government determines how much to pay private land owners when they acquire rights-of-way for roads or other public projects.

The Market Value of Most Federal Land is Low

Government-held land is subject to far more restrictions than is similar private property. This is

because federal statutes restrict activities on federal lands to accomplish other public objectives. For instance, federal easement holders cannot obtain permanent rights-of-way, and must obtain federal regulatory approval to engage in routine maintenance. Such restrictions increase operating costs, and thus dramatically decrease the value of the federal land easements. Furthermore, development of federal lands is limited, as they are not made available for many of the competing uses possible on private lands, and therefore federal lands are generally of lower real estate value than similar privately-held lands. As a result, any policy that attempts to draw direct associations between right-of-way fees on private lands and fair equivalents on federal lands must take into account factors which reduce the utility and value of federal land easements, and which limit the value of federal lands.

The Agency Proposals are Inefficient and Environmentally Unsound

These new fee schedules, proposed to increase fees incrementally based on the number of users, or are based on the type of technology rather than the land value and use, discourage the construction of dark-fiber or additional unused capacity, which can be utilized at a later date. Discouraging the installation of fiber that may be currently unused simply means that additional capacity needed in the future may require additional complete installations, with the related economic costs and environmental impacts of re-accessing federal lands and resource areas. Such additional installations would be unnecessary if large numbers of fibers, cables, or ducts, even though underutilized, were installed all at one time, at one fee.

The USFS and BLM, which currently administer ROW through a single, consistent linear fee schedule, have indicated their intention to increase fees for fiber optic rights-of-way first, and then proceed to reissue fees for other facilities, such as pipelines, power lines, water lines, et cetera. As I noted earlier, and as you will hear from my colleague from the Interstate Natural Gas Association of the Americas, the impacts of such fees on our nations energy infrastructure could be devastating for companies that supply or deliver these services and commodities.

USFS and BLM have initiated a trend among other federal agencies that manage public lands. Through authorizing statutes other than FLPMA, the National Park Service and National Oceanic and Atmospheric Administration have drafted or are considering similar policies charging fees for the right to

cross parks and marine sanctuaries with fiber optic cables. It is important to note that none of these rights-of-way are established until extensive NEPA analyses have been conducted, and deliberate and due care has been taken to prevent and monitor impacts to the environment. Despite the conclusions of government studies, indicating little or no ecological harm, these agencies have followed the lead of the BLM and USFS in pursuing exorbitant increases in right-of-way rents and other compensation for the right to cross federal lands.

Conclusion

Rights-of-way for fiber-optic telecommunications and other linear facilities are an important use of federal lands, whose impact on the underlying value, and other uses of those lands is minimal. To paraphrase FLPMA, rent for rights-of-way should be no greater than the value of the rights and privileges authorized by the right-of-way grant or permit, and should reflect a public interest in the construction of such facilities . Furthermore, we believe that valid, established real estate principles should underlie any regulatory decisions made as to the value of rights-of-way. TelROW supports passage of H.R. 3258, as well as other regulatory and legislative processes through which a reasonable, practical, and consistent linear right-of-way fee schedule can be developed.

We recognize that these agencies may have, in good faith, misinterpreted the intent of Congress in charging ROW fees, and believe that through the additional guidance provided by H.R. 3258, and a public rule making process with adequate opportunity for notice and comment from all stakeholders (the process through which the existing fee schedule was established), the existing fee schedule can be revised, if necessary, to more accurately reflect the value of these rights-of-way. Prompt resolution of this issue will provide certainty to the purveyors of our Nation's critical infrastructure, who are committed to delivering reliable, secure, and vital products, utilities, and services to America's consumers and growing economy. We look forward to working with Ms. Cubin, this Committee, Federal Land Management Agencies, and other interested stakeholders pursuant to what we believe is a common goal, in the public interest. Thank you again for inviting met to testify today. I would be happy to answer now, or provide written answers, to

any questions you may have.

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Index of Attachments

Attachment 1: BLM "FiberRent" Policy

Attachment 2: U.S. Forest Service "Case Specific Interim Rents."

Attachment 3: Letter form the U.S. Forest Service and Bureau of Land Management to industry advising them of the intention to adjust fiber optic right-of-way rents first, prior to adjusting fees for power lines, pipelines, telephone lines, and water lines.

Attachment 4: Excerpt from the "*Uniform Appraisal Standards for Federal Land Acquisition.*" Highlighted portion presents inconsistent policy when Federal agencies acquire and convey rights-of-way.