NAHBA
Minutes of Quarterly Teleconference
April 29, 2003

2:00 – 3:30 p.m. (EST)

The NAHBA Quarterly Conference was held on Tuesday, April 29, 2003, commencing at 2:00 p.m., (EST) with the following participants:

Barbara Wessinger, South Carolina DOT
Bryan O'Neill - FHWA, Washington, D.C.
Bob Black - FHWA, Washington, D.C.
Juanice Hagan - Florida DOT
Sue Perkins - Kentucky DOT
Cathy O'Hara - Kansas DOT
Jimmy Odom - Oregon DOT
John Wichman – Oregon FHWA
Andy Lyles – Ohio DOT.

AGENDA

(1) On-premise electronic variable sign messages - question presented by Jim Odom – Oregon DOT;
(2) Readily-recognizable: *an objective or subjective standard*, and
(3) Status of the 6-1-91 FAP Survey.

DISCUSSION

(1) On-premise electronic variable sign messages – questions by Jim Odom, Oregon DOT:

Question: Oregon law allows on-premise electronic variable message (EVM) signs while not allowing off-premise EVMs. Arguments against allowing off-premise EVM signs because of safety are not very strong, because there are a lot of on-premise EVM signs visible to state highways throughout the state. Have other states had this problem? And if so, how have they addressed it? The second part of the question evolves around the definition of "intermittent". Oregon does not have a statutory definition of intermittent. Here is what EVM sign owners propose to us. "If we changed the copy electronically once in a 24-hour period and during the early morning, off-peak traffic hours, would that constitute intermittent?" Have other states dealt with the intermittent issue? If an EVM sign is changed once in a 24-hour period, would that be considered intermittent or flashing? In addressing these issues, did any states have to amend their agreement with FHWA?

Discussion: Bryan O'Neill and Bob Black of FHWA directed attention to a 1997 FHWA memo in which the FHWA indicated that the states would be the ones to define the term

"intermittent" and "flashing" consistent with their state/federal agreements. If a state could interpret the state/federal agreement to allow off-premise EVM signs, then such signs could be allowed with federal approval. Regarding on-premise EVM signs, Bryan O'Neill confirmed that federal law, regulations and federal memos, allowed changeable messages on on-premise structures.

Andy Lyles and Barbara Wessinger indicated that they did not have definitions for "intermittent" in their state. Bryan O'Neal suggested that the states contact Ernie Huckabee – FHWA and the FHWA Right of Way Operations Section to discuss the definition, as well as the potential overlapping of the federal MUTCD guidelines as they relate to off-premise LED signs on highway right of way. Bob Black indicated that the FHWA task force charged with studying the changes to the MUTCD would be issuing a final recommendation May 13, 2003, and possibly at that point some guidelines may be forthcoming.

Bob Black also indicated that a previous study sponsored by NAHBA studied the effects of changeable message signs safety of the traveling public. The study was inconclusive regarding intermittent lighting and whether EVM signs affected the safety of the traveling public. Mr. Black indicated that the results of that study concluded that more research was needed in this issue.

Andy Lyles, Ohio DOT indicated that in Ohio there are two classes of EVM signs that have been allowed by recent legislative changes. The two classes are: (1) lottery boards and (2) price pack signs. The messages on these EVM signs are digitally changed two to three times a week, either manually or by remote satellite operation. Price pack signs are gas station signs, which have the price per gallon indicated underneath their emblem. The digits are changed on infrequent intervals. The Ohio legislation indicates that digital changes of this nature are not considered intermittent changes violating their federal/state agreement or federal law.

Bryan O'Neil indicated that the 1997 memo dealing with EVM signs was really directed at tri-vision signs and that as new technology grows, the position of the FHWA on these issues may need to be explored. The FHWA indicated that if a state implements a reasonable interpretation of flashing, intermittent and moving lights, then the FHWA would not necessarily object to that interpretation unless it was blatantly offensive to the FHWA. A question was posed whether the FHWA would entertain changes to the state/federal agreement to allow states to interpret a liberal definition of flashing, intermittent and moving lights so that off-premise lighting requirements are the same or similar to on-premise lighting requirements. Bob Black indicated that the law is migrating to allow this type of change; however, no official comments were made regarding this issue by the FHWA.

(2) <u>Readily recognizable: "An Objective vs Subjective Standard?</u>

Question: The issue was whether a readily recognizable government facility could be considered a commercial activity because of minimal commercial activity being conducted on the premises. Barbara Wessinger questioned whether any states had "objective" criteria to establish the readily recognizable standard in their regulations.

Discussion: Bryan O'Neill and Bob Black stated there might be a case in Kansas on this issue and would report back to Barbara. Sue Perkins indicated that Kentucky DOT would consider such activity as commercial. Juanice Hagan indicated that in Florida, a commercial area is determined by:

1) the size of the parcel;
2) the contiguity of the parcel with commercial activity;
3) public access to the parcel; and
4) whether the local media recognizes it as a commercial area.

Subsequent to the teleconference, Bob Black advised that the controversy in Kansas was not really on point. In that matter, the City of Kansas had broached the idea of erecting signs on property owned by a power company. It appears that the substation was located in a zoned residential area; however, the power company property was not subject to zoning by the local zoning authority. The proponent argued that since the property was not subject to zoning, it was unzoned under the HBA. The FHWA, however, indicated "that an area can be zoned or it can be unzoned, but it can't be both…..The electrical substation to serve an area is, in effect, a nonconforming use not an unzoned area."

Bob Black provided citations to two cases regarding readily recognizable and commercial activity requirements. They are: (1) Creative Signs vs. MoHTD, 898 SW 133 (Ct. App. 1995) and In Re Denial of Eller Media Company's Application, 642 NW2d 492 (Ct. App. 2002).

(3) Status of 6-1-91 FAP Survey.

Barbara Wessinger provided a status report on the 6-1-91 FAP Survey indicating that most states have been reluctant to provide their administrative cost for regulating the 6-1-91 non-NHS FAP routes. This has become difficult for the survey to be analyzed and to proceed with any formal action on elimination of the 6-1-91 non-NHS FAP system. A determination was made that the survey should be resubmitted to the members and possibly be reworded to elicit additional information on this matter.

(4) Miscellaneous

FHWA indicated that they will be providing to NAHBA in the near future key memorandums and policy statements [that reflect current thinking] out of their files on ODA control. No Index will be provided. Barbara will have the documents posted on the NAHBA web site and will seek assistance from the NAHBA Internet provider to create an Index. Hopefully, this can be established prior to the September Conference in Asheville.

NAHBA is finalizing the first issue of its Newsletter. Ideas for articles should be forwarded to Barbara.

Barbara will notify the NAHBA membership of the next quarterly conference date and will poll the membership in advance of the teleconference for issues to discuss.

With there being no additional items for discussion, the teleconference was adjourned.

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Barbara M. Wessinger
Chairman, NAHBA