Scenic America v FHWA
Talking Points

BRIEF HISTORY: The lawsuit involves the letter, spirit and intent of the federal Highway Beautification Act (HBA) enacted on October 22, 1965. Many people know the HBA as the Lady Bird Act in honor of President Lyndon Johnson's wife, Lady Bird Johnson.

HBA LIGHTING STANDARDS—CUSTOMARY USE: The HBA established lighting standards for billboards along federal highways. The standards were based upon the "customary use" for the display of messages through lighting. In making that determination, hearings were held across the country to determine what was in "customary use" circa October 1965. Public hearings were held in every state to gather information on what was customary use as to size, spacing and lighting. In almost every state, "intermittent" lighting was prohibited for commercial messaging. The only intermittent lighting that was in customary use was for public service information such as time, day and temperature and the like. Federal-state agreements (FSAs) detailing customary use limitations as to size, spacing, and lighting were then negotiated and executed between 1967 and 1973.

Billboard industry representatives participated in these hearings and made recommendations that the only exception to the intermittent prohibition be for public service information such as time, date, and temperature. Public service information would include messages such as amber alerts, silver alerts, law enforcement messages, traffic warning and other hazard messages, but would not include commercial messages. Thus, in almost all of the FSAs, intermittent lighting was prohibited except for noncommercial public service information. In 1978 Congressional action by the House to weaken the customary lighting prohibitions and open the door to commercial messages was defeated in a House-Senate Conference Committee.

FACTS LEADING UP TO THE LAWSUIT; 2007 GUIDANCE MEMO: By 2007, the billboard industry changed its position when it became clear that digital billboards displaying commercial messages would generate huge amounts of income. They began lobbying at the state and federal level for a reversal. Simultaneously, some state transportation officials, charged with controlling outdoor advertising and following the FHWA's longstanding prohibition on intermittent lighting, turned to FHWA Headquarters for additional guidance. FHWA had previously followed the letter and spirit of the law.

Under immense pressure from a powerful billboard lobby to approve the signs, FHWA suddenly reversed its position by way of the "guidance memorandum" or *de facto* rule. The memorandum stated that a changing message through the use of lighting was not considered to be "intermittent" if the message changed in the range of every 4 to 10 seconds, i.e., changes that result in between twenty-one thousand (every 4 seconds) to eight thousand times a day (every ten seconds). This memorandum gave a green light to every state DOT in the country to allow TV-like

commercial messages to be displayed along our federal highways so long as the message did not change more frequently than every 4 seconds.

RESULT OF 2007 FHWA ACTION: Since FHWA reversed its position, the number of digital commercial displays has risen to nearly 4,000 displays (nearly a 400% increase) around the country. Most of these displays operate along the federal highways regulated under the HBA. Drivers are being distracted by these eye-catching signs, adjacent properties are being devalued, homes are being invaded by lights shining through windows, and many people and scenic groups have spent thousands of dollars and spent thousands more hours trying to stop these invasive signs.

SCENIC AMERICA'S LAWSUIT: On January 23, 2013, after petitioning to the FHWA for 3 years with no official response, Scenic America filed a lawsuit in federal court in Washington D.C. seeking to overturn the FHWA 2007 memorandum. The lawsuit, filed by the Institute for Public Representation at Georgetown University Law Center on behalf of Scenic America and its members, asserts, among other things, that the FHWA 2007 guidance memorandum was improperly issued as a *de facto* rule and violates well-established lighting standards established as customary use decades ago under the Highway Beautification Act.

WHAT THIS LAWSUIT WILL NOT DO: This lawsuit will not impact digital billboards that are along **non-federal** highways that are not regulated under the HBA, and, even for those operating along a federally regulated highway, this lawsuit will not impact digital billboards that display time, date, temperature messages or other non-commercial public service message displays such as amber alerts, silver alerts, law enforcement messages, traffic warnings, driver hazard alerts and the such since they operate under HBA exceptions to the intermittent lighting prohibitions.

Representing Scenic America are: Thomas Gremillion, Staff Attorney, and Hope Babcock, Director, of the Institute for Public Representation at Georgetown University Law Center. In addition William D. Brinton of Rogers Towers, P.A. in Jacksonville, Fla. is advising Scenic America.

For media questions: Margaret Lloyd, Scenic America Vice Chair, at 713-898-2819 or Lloyd@scenic.org; or Bill Brinton, Scenic America counsel, at 904-346-5537 or wbrinton@rtlaw.com