OPINION 7

OFFICIAL OPINION NO. 7

March 29, 1967

EMINENT DOMAIN—INDIANA STATE HIGHWAY COMMISSION—Power of Public Utilities to Locate Facilities on Highway Right-of-Way.

Opinion Requested by Mr. M. L. Hayes, Executive Director, Indiana State Highway Commission.

This is in response to your request or an Official Opinion on whether Indiana public utility companies may locate or relocate their facilities on, over or under the right of way of Indiana highways as a matter of right or as a matter of privilege under Indiana law.

The power of eminent domain is a natural attribute of sovereignty which is superior to all other property rights, *State v. Flamme,* 217 Ind. 149, 26 N.E. 2d 917 (1940). The Legislature has conferred the power of eminent domain upon public utilities in this state under Acts 1929, ch. 218, § 1, Burns § 3-1713, which provides:

> "Any corporation organized under the law of the state of Indiana, authorized by its articles of incorporation to furnish, supply, transmit, transport or distribute electrical energy, gas, oil, petroleum, water, heat, steam, hydraulic power or communications by telegraph or telephone to the public or to any town or city, or to construct, maintain or operate turnpikes, toll bridges, canals, public landings, wharves, ferries, dams, aqueducts, street railways or interurban railways for the use of the public or for the use of any town or city, is hereby authorized and empowered to take, acquire, condemn and appropriate land, real

> estate or any interest therein, for carrying out such purposes and objects together with all accommodations, rights and privileges deemed necessary to accomplish the use for which the property is taken, including the right to construct railroad siding, switch or industrial tracks connecting its plant or plants or facilities with the tracks of any common carrier."

A utility may take private property by eminent domain as a matter of right without having to show public convenience or necessity. *Reuter v. Milan Water Co.,* 209 Ind. 240, 198 N.E. 442 (1935); 228 Ind. 120, 89 N.E. 2d 720 (1950), overruled on another point. *Joint County Park Bd. v. Stegemoller; Dahl v. Northern Ind. Public Serv. Co.,* 239 Ind. 405, 157 N.E. 2d 194 (1959). The obvious reason for giving such power to public welfare, as recognized in *Magee v. Overshiner,* 150 Ind. 127, 131, 49 N.E. 951 (1898). The Court said uses by public utilities "were always deemed to constitute a beneficial use of the streets as in some degree aiding in the means or opportunities for conducting the affairs of the inhabitants and in facilitating the communication indispensable to such affairs." The Legislature has also enacted the following public policy concerning telephone lines under Acts 1947, ch. 270, § 1, Burns § 55-4204, providing:

> ". . . the telephone system of this country is a nationwide interconnected and interrelated system, no part of which may be suspended without seriously and adversely affecting the whole, and . . . the continuous operation of such communications system is essential to the operation of the economic life of the country and is necessary to prevent extreme hardship. . . ."

However, the Indiana Supreme Court has stated that the power of eminent domain is subject to the prior exercise of the power by another. The Supreme Court refused to determine priorities of public uses, stating that the General Assembly is the proper body to do so, *The Cemetery Co. v. Warren School Township,* 236 Ind. 171, 139 N.E. 2d 538 (1957). Therefore, a public utility may not acquire use of property already dedicated to the use of the public for streets and

highways unless it is permitted to do so by statute, although both the legislative and judicial branches have recognized the public's interest in such use by a utility.

The Legislature has given utilities the power to erect poles and lines across or near highways and streets under Acts 1911, ch. 161, § 1, Burns § 36-1705, providing:

> "Corporations now formed or which may hereafter be organized for the purpose of constructing, operating and maintaining telephone lines and telephone exchanges, or for the purpose of generating and distributing electricity for light, heat or power, are authorized to set and maintain their poles, posts, piers, abutments, wires and other appliances or fixtures upon, along, under and across any of the public roads, highways and waters of this state outside of cities and incorporated towns; and individuals owning telephone lines or lines for the transmission of electricity are hereby given the same authority: Provided, That the same shall be erected and maintained in such manner as not to incommode the public in the use of such roads, highways and waters: Provided further, That no trees shall be cut along such roads or highways without the consent of the abutting property-owners: Provided, also, That no pole or appliance shall be so located as to interfere with the ingress or egress from any premises on said road, highway, or waters: Provided, further, That nothing herein contained shall be construed as depriving the county commissioners of any county of the power to require the relocation of any such pole, poles or appliances which may affect the proper uses of such highway for public travel, for drainage or for the concurrent use of other telephone lines or lines conducting electricity. The location and setting of said poles shall be under the supervision of the board of commissioners of the county."

A similar power, with certain limitations, has been given Rural Electric Membership Corporations under Acts 1937, ch. 258, § 7, Burns § 55-4411 (f), providing:

"To construct, operate and maintain works across or along any street or public highway, or over any lands which are now or may be the property of this state or any political subdivision thereof, after obtaining the necessary franchise or permit therefor: Provided, That before any such works are constructed across or along any highway permit of the state highway commission to do so, and the location and setting of such works shall be approved by and subject to the supervision of said commission: Provided, further, That before any such works are constructed on or across any lands belonging to the state such corporation shall first obtain the permit of the department of the state having charge of such lands, to do so, and the location and setting of such works shall be approved by and subject to the supervision of said department. Such works shall be erected and maintained in such manner as not to interfere with the use and maintenance of such streets, highways and lands, and no pole or appliance shall be located so as to interfere with the ingress or egress from any premises on said street or highway. Nothing in this section contained shall deprive the body having charge of such street or highway to require the relocation of any pole or appliance which may affect the proper use of said street or highway for public travel, for drainage or for the repair, construction or reconstruction of such street or highway. The corporation shall restore any such street, highway or lands to its former condition or state as near as may be, and shall not use the same in a manner to impair unnecessarily its usefulness or to injure the property of others."

The foregoing statutes pertaining to the power of the public utilities hold the key to determining whether utilities acquire a right or a privilege in the location of their facilities on, over or under state highway rights of way. It must be conceded at the outset that the use given utilities is one of a limited nature in the sense that they may not damage or interfere with the free use of public highways by the public. This limitation, however, is not dispositive of the question, for there are few absolute rights. Nearly all rights are in sub-

stance qualified rights, particularly insofar as they may collide with other rights. To describe a "right" as *per se* the power of free action is a misnomer. All rights must be viewed in relation to other rights. The question is, therefore, not whether the utilities acquire a right or a privilege, but whether they acquire a qualified right or a privilege that may be arbitrarily revoked or denied.

The importance of utilities having free access to highway rights of way has been specifically recognized. In *Tennessee v. United States,* 256 F. 2d 244, 258 (6th Cir. 1958), the permission granted the utility for the erection of its poles on highway rights of way was described as a "permissive right" because it is subordinate to public rights.

The question may be resolved by a careful analysis of *South East & St. L. Ry. v. Evansville & Mt. V. Elec. Ry.,* 169 Ind. 339, 82 N.E. 765 (1907). There a steam railway sought to enjoin an electric interurban railroad from constructing tracks and lines across its tracks. In holding that the interurban line had a right to cross the railroad tracks the court said:

> ". . . Assuming that the railroad was constructed across the highway, its owners thereby acquired merely *the privilege* of crossing in the transportation of freight and passengers, subject to all proper uses to which the highway might be devoted under the law. . . . When appellants obtained *the privilege* of crossing this highway, they did it with the knowledge and upon the condition that they must submit to such growing inconveniences as might result from the development of the country, among which would be the wants and demands of the public for better facilities in traveling." (Emphasis added.) 169 Ind. at 342.

The court went on to say at page 345:

> ". . . *The right* to operate an electric interurban railroad, designed to facilitate public travel, upon and along the highway, was one of the reserved uses of the public. *The right* to cross appellants' tract was necessarily incident to the franchise granted by the county

> board to construct and operate the electric road upon the public highway." (Emphasis added.)

The court's use of the word "privilege" is misleading until viewed in context. "Privilege" and "right" are used interchangeably, but in light of the holding both are used to indicate a qualified right, as a matter of law. The court recognized that a utility has a right of access for its conveyance line over, under, or on a highway right of way, but that right is limited where necessitated by reasonable regulation under the police power or the rights of public use, as also clearly evidenced by the limitation proviso in Burns § 36-1705. The key word is "reasonable." Denial of a utility's access to one side of a highway, for example, when, because of terrain or other conditions, the utility could not use the other side for its conveyance lines, would amount to a complete denial of the utility's product to some consumers, and would not constitute a reasonable regulation for the benefit of the public's use of the highway, unless it could be clearly demonstrated that the utility's proposed use would seriously interfere with the public's use of the highway. Because the General Assembly and the courts have recognized that the qualified right of public utilities to construct facilities on, over or under the right of way of Indiana highways is subject only to reasonable regulation, a utility's exercise of that qualified right may not be arbitrarily denied.

It is, therefore, my opinion that Indiana public utilities locate or relocate their facilities on, over or under the right of way of Indiana highways as a matter of qualified right and not as a matter of privilege.