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Due to varying factual situations attendant upon a consideration of various positions, in any given instance, it is my opinion that the responsibility for a determination as to whether such employment or appointment would be against public policy, whether the duties of the two positions would be incompatible with each other, and whether there is a conflict of interests in such employment, rests with the appointing authority.

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### OFFICIAL OPINION NO. 5

February 10, 1961

Mr. Clinton Green, Chairman  
State Highway Department  
11th Floor, State Office Building  
Indianapolis 4, Indiana

Dear Mr. Green:

This is in answer to a letter of December 16, 1960, wherein your predecessor requested an Official Opinion. The question is stated as follows:

“The State Highway Department of Indiana requests your opinion as to whether or not the State Highway Department has the legal authority to authorize the placing of pay telephone booths on State Highway Right-of-Way.”

The State Highway Department of Indiana has been vested with broad authority with respect to the establishment, construction, maintenance, repair and control of designated highways within the state system. All the rights, powers and duties, formerly vested in the State Highway Commission of Indiana have been continued in full force, transferred to and placed within the jurisdiction and powers of the State Highway Department of Indiana.

See: Acts of 1933, Ch. 18, Sec. 7, as amended, and found in Burns' (1949 Repl.), Section 36-107;

Acts of 1953, Ch. 225, Sec. 7, as found in Burns' (1959 Supp.), Section 36-173g.

The Indiana Law Encyclopedia contains the following statements which are relevant in a consideration of the above question:

- (a) "The State Highway Department of Indiana is an administrative body entrusted with the application and administration of the Act under which it is appointed. \* \* \*

"Although the State Highway Department of Indiana *has broad authority with respect to the establishment, location, construction, reconstruction, maintenance, repair and control of State highways*, it has only such authority with respect to the highways as is expressly delegated to it by the Legislature or necessarily implied from those powers which are delegated to it." (Our emphasis)

Indiana Law Encyclopedia, Vol. 15, § 4, p. 150.

- (b) "In the exercise of its police powers, the State, through the Legislature, *has the right to regulate and control the public highways and the use thereof for the purpose of protecting the highways and promoting the safety, peace, health, morals, and general welfare of the people.*" (Our emphasis)

Indiana Law Encyclopedia, Vol. 15, § 151, pp. 272, 273.

See also: 1931-32 O. A. G., pp. 501, 502.

In 1941 O. A. G., pp. 405, 409, the Attorney General in a consideration of authority for alterations and improvements for highways, made the following statement:

"The general law concerning this subject matter is well stated in 25 American Jurisprudence, pp. 554 to 558. We quote in part as follows:

"The use of highways and streets may be limited, controlled, and regulated by the public authority in the exercise of the police power whenever and to the extent necessary to provide for and promote the safety, peace, health, morals, and general welfare of the people, and is subject to such reasonable and impartial regulations

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adopted pursuant to this power as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement, and to provide for their safety while using it. \* \* \*”

In Vol. 25, American Jurisprudence, Highways, § 286, page 579, it is stated:

“Generally, structures which constitute a necessary incident to the use of the highway, or the purposes authorized by law, or which are intended for the protection *or convenience of the general traveling public* do not constitute a nuisance, and may be maintained or authorized by the controlling authorities.” (Our emphasis)

The Highway Department is given permissive and regulatory power by the Acts of 1941, Ch. 12, Sec. 3, as amended and found in Burns’ (1949 Repl.), Section 36-162 and by virtue of the Acts of 1957, Ch. 148, Sec. 9, as found in Burns’ (1959 Supp.), Section 36-2952.

Burns’ Section 36-162, *supra*, which remains in full force and effect [due to the provisions of Burns’ Section 36-173g, *supra*] reads, in part, as follows:

“\* \* \* The commission shall have power to make reasonable rules, amend, and repeal rules and regulations for the conduct of the work of the commission and of the divisions herein created. The commission may make, amend and repeal such other written rules and regulations as may be necessary or appropriate in their judgment to carry out the provisions of this act or to preserve the highways while under construction, *and also rules and regulations to regulate traffic in the interest of convenience in the use of, and in the interest of safety of travelers on, highways under the control of said commission*, not inconsistent with this act and the laws of the state. \* \* \*” (Our emphasis)

Burns’ Section 36-2952, *supra*, reads, in part, as follows:

“The department shall have the right and power to make reasonable regulations for the installation, con-

struction, maintenance, repair, renewal, relocation and removal of tracks, pipes, mains, conduits, cables, wires, towers, poles *and other equipment and appliances on state highways*, subject to the rights of public utilities now vested in them by law." (Our emphasis)

The words "equipment" and "appliances" are very broad in their meaning. These meanings have been defined to include whatever is needed for efficient action or service, whatever is applied or used as a means to an end and something used directly or adopted to the accomplishment of a purpose.

See: Ballentine's Law Dictionary, Second Edition, page 440; Words and Phrases, Perm. Ed., Vol. 3A, pp. 383, 384.

Pay station telephone booths designed for placement in outdoor locations have come into general use, in Indiana, largely within the past ten years. In making your administrative determination as to whether to grant permits for the placement of pay station telephone booths along highway rights of way, you may well take into consideration generally known information such as the importance of and the need for such booths, particularly in the rural areas. In this era of limited access and super highways, with rights of way closed off with high fences, and with service areas several miles apart, it would be proper for the Department to consider such elements as the possible benefits which may be derived because of the availability of convenient "round-the-clock" telephone service, not alone for the benefit of the individual traveler who may have an urgent and emergency need for such service, but also the substantial benefit which may flow to the Department itself in the performance of its function as authorized in Burns' 36-162, *supra*.

The State Highway Department can determine the merits of each application as a condition precedent to the granting of any permit under the provisions of the Acts of 1933, Ch. 18, Sec. 21, as amended, and found in Burns' (1949 Repl.), Section 36-121, which provides, in part, as follows:

*"No state highway shall be torn up or otherwise disturbed for any purpose by anybody without the written*

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*consent or permit of the chairman of the state highway commission, and then only in accordance with the regulations prescribed by said commission: \* \* \*.*" (Our emphasis)

This section remains in full force and effect and is applicable to the State Highway Department of Indiana through the provisions of Burns' Section 36-173g, *supra*. In addition, the Department has the regulatory power granted in Burns' 36-162, *supra*, and 36-2952, *supra*, to insure the proper placement of such booths and protection against their becoming a traffic hazard or a nuisance.

Therefore, in my opinion, the State Highway Department has sufficient authority to grant permits for the placement of pay station telephone booths on State Highway Department rights of way where such placement can be justified in the public welfare and where the location of such a booth will not interfere with the primary use of the highway as a public thoroughfare. The exercise of this right by the State Highway Department would be subject to any agreement or agreements that might exist between the U. S. Department of Commerce or the U. S. Bureau of Roads with the State Highway Department in regard to highways for which the construction and/or maintenance costs are partially paid with federal aid.

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### OFFICIAL OPINION NO. 6

February 13, 1961

Honorable William E. Wilson  
Superintendent of Public Instruction  
227 State House  
Indianapolis 4, Indiana

Dear Mr. Wilson:

Your request of February 8, 1961, for an Official Opinion has been received and, in part, reads as follows:

"Vincennes University, through its Board of Trustees, is making application to the Federal Communications Commission for a license and permit to construct