LIVE AND LET DIE . . .
OR,
LIVE AND LET LIVE?
CURRENT AND EMERGING “HOT” ISSUES
ARISING FROM A PUBLIC UTILITY’S NEED TO USE COUNTY ROADS TO SERVE THE PUBLIC

Presented to:

PURDUE ROAD SCHOOL - 2003

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Background

With reference to the *drawing* that is included with your materials, 140\textsuperscript{th} Street is an east – west highway in Hamilton County, and a future part of the County’s arterial highway system. The County’s comprehensive plan for 140\textsuperscript{th} Street denotes 65’ half right-of-ways. Presently, except for one section, most of 140\textsuperscript{th} Street is a two lane road with pavement approximately 18’ in width.

Cinergy/PSI is an electric public utility which serves Hamilton County among other counties in the state, and has seen an explosion of customer demand for electricity on the west side of the County in the area of 140\textsuperscript{th} Street.

Going from west to east across the County on 140\textsuperscript{th} Street, the County and Cinergy/PSI have the following projects planned:
Segment #1: From the west County line to County Road 1000 West

Cinergy/PSI needs to construct an overhead 69KV transmission line with an overhead 12KV distribution line underbuild along the south side of 140th Street to provide capacity to a new substation planned at the southwest corner of 140th Street and CR1000W. A developer on the west end dedicated a 65' road right of way to the County as a condition of getting Hamilton County Plan Commission approval of his residential subdivision. An ordinance in Hamilton County mandates that all electric lines for new residential subdivisions shall be underground. The developer has platted a 20' wide drainage and landscaping area adjoining and south of the 65' road right of way area.

The next parcel east of the subdivision has been acquired by a residential developer but plans for the subdivision have neither been finalized nor submitted to the Plan Commission. There is an old farm fence located approximately 16½' south of the center of the pavement of 140th Street.

The next landowner east is a farmer who farms up to a small drainage ditch which runs adjacent to and south of the pavement of 140th Street. Cinergy/PSI has acquired the remaining tract of land at the southwest corner of 140th Street and CR1000W.
Segment #2: From County Road 1000 West to County Road 900 West

Between CR1000W and CR900W, there is not presently a section of 140th Street, due in large part to a north-south waterway which was converted into a legal drain approximately 5 years ago which is 160 feet in width. The County plans to acquire a 130' road right of way and to construct in the center, a four-lane highway with pavement of 48' in width.

Approximately 2 years ago, Cinergy/PSI acquired an 80' wide electric line easement corridor between CR1000W and CR900W which is centered upon the center of the proposed 140th Street road right-of-way. Cinergy/PSI is expected to begin construction next year in conjunction with the substation at the southwest corner of 140th Street and CR1000W.
Segment #3: From County Road 900 West to County Road 800 West

The County plans to widen 140th Street between CR900W and CR800W from a two lane, 18' paved road, to a four lane, 48' paved road. Between CR900W and State Road 19 (which has a 100' right of way), a 1921 Commissioners’ Order was found in the Commissioners’ Order Book in the Auditor’s Office which established a 40' road right of way.

Between CR900W and CR800W, there are underground gas and telephone utilities and an overhead Cinergy/PSI 34.5KV electric line in a 7½' area located adjacent to and south of the pavement.

The County has requested Cinergy/PSI pursuant to a County ordinance, to re-construct the overhead 34.5KV electric line as an underground electric line.

The County has also requested Cinergy/PSI to re-construct the overhead 34.5KV electric line off of the 140th Street road right of way since the County is planning to construct upon the 140th Street road right of way, a new underground storm water drainage system for that part of the County which will not leave any room on the road right of way for the Cinergy/PSI electric lines.

Between State Road 19 and CR800W, Cinergy/PSI has an overhead 230KV transmission line extending generally in a north-south direction across 140th Street with a steel, self-supporting, single pole structure located just south of the 7½’ utility area on the Cinergy/PSI 100' easement area.
Segment #4: From County Road 800 West to County Road 700 West

At the intersection of CR800W and 140th Street, a developer owning land at the northeast corner of that intersection is required at the developer’s expense, to reconfigure that intersection including adding stoplights and turn lanes, all as a condition of getting his subdivision plan for the northeast corner of that intersection approved by the Plan Commission. The Plan Commission also included as a condition for the subdivision plan approval that the developer dedicate a 65' road right of way area on the north side of 140th Street to the County in fee simple.

Between CR800W and CR700W, there are underground gas and telephone utilities and an overhead Cinergy/PSI 34.5KV electric line in a 7½' area located adjacent to and south of the pavement.

On the south side of 140th Street, the County is planning to construct a “accel/decel” lane across the 7½' utility area for the new County Jail.

The County also plans to install an underground fiber optic video communication system within the 7½’ utility area between the County Jail and the County Courts located east of CR700W so that prisoners will not need to be transported to the court for arraignments and certain other legal proceedings.

Respectfully submitted,

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APPENDIX

**Legal Authorities**

1. *The State v. Berdetta* (1880), 73 Ind. 185: Roads belong to the traveling public; not to the government.

2. *Fox v. Ohio Valley Gas Corporation* (1968), 250 Ind. 111, 235 N.E.2d 168: Public utilities are considered members of the traveling public when they use public road right-of-ways with their utility facilities.

3. **IC 8-1-2-4**: Every public utility is required to furnish reasonably adequate service and facilities to its customers.

4. **IC 8-20-1-28**: Public utility may use county (and state) highways to construct, operate and maintain utility facilities; provided it reviews its plans with the County Executive.

5. **IC 8-23-8-1**: County Executive (or INDOT or a municipality) may create limited access highways, and regulate, restrict, or prohibit their use by various classes of vehicles and traffic.

6. *Southern Ind. Gas v. Dept. of Highways* (1989), Ind. App., 533 N.E.2d 1289: Public utility shall relocate its utility facilities at its expense which are in the way of a road improvement project *UNLESS*:
   a. There is not a reasonable relocation area on a public road.
   b. The road improvement project is necessitated by a utility or other non-road improvement project, e.g., a municipal sewer or storm water drainage project.
   c. A private developer is paying for the project (versus tax dollars); provided, if tax dollars are being spent on a road improvement project which benefits a parcel of land adjoining the right-of-way, the public utility should be reimbursed, e.g., a turn on/turn off lane for a school or governmental maintenance facility.
   d. The relocation was unnecessary, i.e., County has not let contract for highway project within two years after public utility completes the relocation, or County changes project after public utility completes the relocation resulting in further need for public utility to relocate its facilities. **IC 8-23-26-7**.
   f. Unreasonable “order” per **IC 8-1-2-101**.

7. **IC 8-20-1-15**: County Executive may not establish a road right-of-way that is less than twenty (20) feet on each side of the centerline, exclusive of additional width required for cuts, fills, drainage, *utilities*, and public safety. (Emphasis added.)

8. **IC 8-20-1-15.5**: County Executive may establish the width of an apparent road right-of-way which shall not exceed twenty (20) feet on each side of the centerline, exclusive of additional width required for cuts, fills, drainage, *utilities*, and public safety. (Emphasis added.)

9. **IC 8-1-23-3**: County Executive may require a public utility to enter into a contract to address restoration and to reimburse the County Executive for the use of the right-of-way, before installing underground facilities on the right-of-way.

10. **IC 8-17-1-2**: County Executive shall provide easements necessary for drainage and *utilities* if it constructs, reconstructs or improves a county highway. (Emphasis added.)
11. **IC 8-1-2-101**: County Executive can reasonably regulate a public utility’s use of county road right-of-way with utility facilities, *subject to IURC review*. (Emphasis added.)

12. **IC 36-7-3-16**: County Executive may vacate a county road subject to the right of a public utility to continue to operate and maintain any utility facilities that are located upon the road right-of-way at the time of the vacation.

13. In absence of deed or dedication to County Executive, or condemnation or order by County Executive, edge of pavement may be edge of road right of way.

   a. *Bd. of Com’rs. of Monroe Cty. v. Hatton* (1981), Ind.App., 427 N.E.2d 696. (The width of a road established by public use may only be limited to that actually used by or for the public in establishing the road - occasional mowing by gov’t. may not be enough to establish public use of area outside pavement.)

   b. *Elder v. Board of County Comm’rs of Clark County* (1986), Ind.App., 490 N.E.2d 362. (County surveyor’s recollection and unrecorded survey maps may not be enough to establish public use of area outside pavement.)

   c. *Contel of Indiana, Inc. v. Coulson* (1995), Ind.App., 659 N.E.2d 224. (Mowing and maintaining ditches and culverts may not be enough to establish public use of area outside pavement.)

   d. *Worldcom Network Services v. Thompson* (1998), Ind. App., 698 N.E.2d 1233. (County Executive’s order book on file with the auditor establishing width of road, is a public record binding upon adjoining landowners, and shall be sufficient to establish width of road.)

   e. *Ostler v. Level 3 Communications, Inc.* , Case No. IP00-0718 C-H/B (U.S. District Court, Southern District of Indiana, Indianapolis, Indiana).