

February 18, 1998

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# ENGROSSED HOUSE BILL No. 1376

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DIGEST OF HB 1376 (Updated February 17, 1998 10:19 am - DI 75)

**Citations Affected:** IC 8-1.

**Synopsis:** Public utility access to public right-of-way. Requires a municipality or county executive to adopt an ordinance to specify the provisions of a public utility's occupation of a public right-of-way. (Currently a municipality may use a contract as well as an ordinance.) Gives county executives the same powers as a municipality with respect to determining the basis upon which a public utility may occupy a public right-of-way. Prohibits a municipality or county executive from unreasonably denying or delaying a public utility's access to public property within the municipality or county. Allows a municipality to recover the direct, actual, and reasonably incurred costs of managing a right-of-way. Specifies that the franchise agreements in force between a cable company and a municipality or county are not affected.

**Effective:** July 1, 1998.

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**Bottorff, Yount**  
(SENATE SPONSORS — MILLS, LEWIS)

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January 13, 1998, read first time and referred to Committee on Commerce and Economic Development.

January 27, 1998, amended, reported — Do Pass.

February 2, 1998, read second time, amended, ordered engrossed.

February 3, 1998, engrossed. Read third time, passed. Yeas 83, nays 13.

SENATE ACTION

February 9, 1998, read first time and referred to Committee on Commerce and Consumer Affairs.

February 17, 1998, amended, reported favorably — Do Pass.

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February 18, 1998

Second Regular Session 110th General Assembly (1998)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 1997 General Assembly.

# ENGROSSED HOUSE BILL No. 1376

A BILL FOR AN ACT to amend the Indiana Code concerning utilities and transportation.

*Be it enacted by the General Assembly of the State of Indiana:*

1 SECTION 1. IC 8-1-2-101 IS AMENDED TO READ AS  
 2 FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 101. (a) Every  
 3 municipal council **or county executive** shall have power:  
 4 (a) (1) To determine by ~~contract~~, ordinance ~~or otherwise~~, the  
 5 ~~quality and character of each kind of product or service to be~~  
 6 ~~furnished or rendered by any public utility furnishing any product~~  
 7 ~~or service within said municipality and all other terms and~~  
 8 ~~conditions provisions~~, not inconsistent with this chapter **or**  
 9 **IC 8-1-11.1**, upon which ~~such a public utility may be permitted~~  
 10 ~~to occupy or department of public utilities created under~~  
 11 **IC 8-1-11.1 occupies the areas along, under, upon, and across**  
 12 the streets, highways, or other public property within such  
 13 municipality **or county**, and such ~~contract~~, ordinance or other  
 14 determination of such municipality **or county executive** shall be  
 15 in force and prima facie reasonable. Upon complaint made by  
 16 such public utility, **department of public utilities**, or by any

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1 qualified complainant, as provided in section 54 of this chapter,  
 2 the commission shall set a hearing, as provided in sections 54 to  
 3 67 of this chapter, and if it shall find such ~~contract~~, ordinance or  
 4 other determination to be unreasonable, such ~~contract~~, ordinance  
 5 or other determination shall be void.

6 ~~(b)~~ (2) To require of any public utility, by ordinance, ~~or otherwise~~,  
 7 such additions and extensions to its physical plant within said  
 8 municipality **or county** as shall be reasonable and necessary in  
 9 the interest of the public, and to designate the location and nature  
 10 of all such additions and extensions, the time within which they  
 11 must be completed, and all conditions under which they must be  
 12 constructed, subject to review by the commission as provided in  
 13 subdivision ~~(a)~~: (1).

14 ~~(c)~~ (3) To provide for a penalty for noncompliance with the  
 15 provisions of any ordinance or resolution adopted pursuant to the  
 16 provisions of this section.

17 ~~(d)~~ (4) The power and authority granted in this section shall exist  
 18 and be vested in said municipalities **or county executives**,  
 19 anything in this chapter to the contrary notwithstanding.

20 Provided, however, whenever, after a request by petition in writing of  
 21 any public utility, **department of public utilities**, the city, or other  
 22 political subdivision or other body, having jurisdiction of the matter,  
 23 shall refuse or fail, for a period of thirty (30) days, to give or grant to  
 24 such public utility **or department of public utilities** permission and  
 25 authority to construct, maintain, and operate any additional  
 26 construction, equipment, or facility, reasonably necessary for the  
 27 transaction of the business of such public utility **or department of**  
 28 **public utilities** and for the public convenience or interest, then such  
 29 public utility **or department of public utilities** may file a petition with  
 30 said commission for such right and permission, which petition shall  
 31 state, with particularity, the construction, equipment, or other facility  
 32 desired to be constructed and operated, and show a reasonable public  
 33 necessity therefor, and also the failure or refusal of such city, political  
 34 subdivision, or other body to give or grant such right or permission;  
 35 and the commission shall thereupon give notice of the pendency of  
 36 such petition, together with a copy thereof, to such city or other  
 37 political subdivision or body, and of the time and place of hearing of  
 38 the matter set forth in such petition; and such commission shall have  
 39 power to hear and determine such matters and to give or grant such  
 40 right and permission and to impose such conditions in relation thereto  
 41 as the necessity of such public utility **or department of public utilities**  
 42 and the public convenience and interest may reasonably require.

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1 Provided, further, that when the relocation by a public utility **or**  
 2 **department of public utilities** of any of its construction, equipment,  
 3 or facility located within the corporate limits of two (2) or more  
 4 adjoining cities is reasonably necessary for the public convenience or  
 5 interest, and any or either of said cities fail or refuse to give or grant to  
 6 such public utility **or department of public utilities** permission and  
 7 authority to relocate such construction, equipment, or facility, any  
 8 municipality which has given or granted to such public utility **or**  
 9 **department of public utilities** permission and authority to relocate  
 10 such construction, equipment, and facility, **or said the** public utility **or**  
 11 **department of public utilities** may file a petition with said  
 12 commission for such right and permission to which petition the city or  
 13 cities failing or refusing to give or grant the same shall be made a  
 14 respondent, and such public utility **or department of public utilities**  
 15 if not the petitioner shall also be made a respondent, and said  
 16 commission shall have power to hear and determine such matter and to  
 17 give or grant such right and permission and to impose such conditions  
 18 in relation thereto as the public convenience and interest may  
 19 reasonably require; and if said commission shall give or grant such  
 20 right and permission, no further public authority to make such  
 21 relocation as authorized or to go on any street, alley, road, or highway  
 22 in said city or cities necessary to be used therefor shall be required of  
 23 said public utility **or department of public utilities**. All orders entered  
 24 before June 30, 1931, by the commission in cases within the provisions  
 25 of this section are hereby declared legal and valid.

26 **(b) Subject to the commission's authority under subsection**  
 27 **(a)(1) with respect to an unreasonable ordinance or other**  
 28 **determination, the municipality or county executive may operate**  
 29 **and maintain the streets, highways, and other public property in**  
 30 **the municipality or county for the safety of the traveling public,**  
 31 **and a municipality or county executive may manage the public**  
 32 **right-of-way or require by ordinance fair and reasonable**  
 33 **compensation on a competitively neutral and nondiscriminatory**  
 34 **basis for occupation of the public right-of-way on a**  
 35 **nondiscriminatory basis, including occupation by the municipality**  
 36 **or county executive, if the compensation required is publicly**  
 37 **disclosed by the municipality or county executive. Fair and**  
 38 **reasonable compensation may not exceed the municipality's or**  
 39 **county executive's direct, actual, and reasonably incurred costs of**  
 40 **managing the public right-of-way caused by the public utility's or**  
 41 **department of public utilities' occupancy. The management costs,**  
 42 **which the municipality or county executive shall assign**



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1 individually to the public utility or department of public utilities  
 2 creating the management costs, must be limited to the direct,  
 3 actual, and reasonably incurred costs a municipality or county  
 4 incurs in managing the public right-of-way. As used in this section,  
 5 the term "management costs" includes but is not limited to the  
 6 costs to the municipality or county of the following:

- 7 (1) Registering occupants.
- 8 (2) Verifying public right-of-way occupation.
- 9 (3) Inspecting job sites and restoration projects.
- 10 (4) Restoring work inadequately performed after providing  
 11 notice and the opportunity to correct the work.
- 12 (5) Administering a reasonable restoration ordinance that  
 13 ensures that a public utility or department of public utilities  
 14 adequately restores the right-of-way as near as is reasonably  
 15 possible to the right-of-way's original condition.
- 16 (6) Management costs associated with the implementation of  
 17 an ordinance adopted under this section.

18 However, as used in this section, direct, actual, and reasonably  
 19 incurred management costs do not include rents, franchise fees, or  
 20 any other payment by a public utility for occupation of the public  
 21 right-of-way. As used in this section, the term "public  
 22 right-of-way" does not include the airwaves above the streets,  
 23 highways, or other public property within the municipality or  
 24 county as those airwaves are used for cellular or other nonwire  
 25 telecommunications or broadcast service.

26 (c) A municipality or county executive may not unreasonably  
 27 delay a public utility's or department of public utilities' access to  
 28 or use of a street, highway, or other public property within the  
 29 municipality or county. However, subsection (a)(1) and this  
 30 subsection do not limit a municipality or county executive's right  
 31 to advance notification of and review of a public utility's or  
 32 department of public utilities' occupation of a street, highway, or  
 33 other public property within the municipality or county to ensure  
 34 and protect the safety of the public.

35 (d) Nothing in this section may be construed to affect franchise  
 36 agreements between a cable company and a municipality or  
 37 county.

38 SECTION 2. An emergency is declared for this act.



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## COMMITTEE REPORT

Mr. Speaker: Your Committee on Commerce and Economic Development, to which was referred House Bill 1376, has had the same under consideration and begs leave to report the same back to the House with the recommendation that said bill be amended as follows:

Page 1, delete lines 1 through 17.

Delete page 2.

Page 3, delete lines 1 through 20.

Page 3, line 23, after "council" insert "**or county executive**".

Page 3, line 24, strike "or otherwise,".

Page 3, line 27, strike "terms and".

Page 3, line 28, strike "conditions" and insert "**provisions**".

Page 3, line 29, strike "may be permitted to occupy" and insert "**occupies**".

Page 3, line 31, after "municipality" insert "**or county**".

Page 3, line 32, after "municipality" insert "**or county executive**".

Page 3, line 39, strike "or otherwise".

Page 3, line 41, after "municipality" insert "**or county**".

Page 4, line 9, after "municipalities" insert "**or county executives**".

Page 5, delete lines 11 through 38, begin a new paragraph and insert:

**"(b) Subject to the commission's authority under subsection (a)(1) with respect to an unreasonable ordinance or other determination, the municipality or county executive may operate and maintain the streets, highways, and other public property in the municipality or county for the safety of the traveling public. A municipality or county executive may manage the public right-of-way or require by ordinance fair and reasonable compensation on a competitively neutral and nondiscriminatory basis for occupation of the public right-of-way on a nondiscriminatory basis, including occupation by the municipality or county executive, if the compensation required is publicly disclosed by the municipality or county executive. Fair and reasonable compensation may not exceed the municipality or county executive's direct, actual, and reasonably incurred costs of managing the public right-of-way caused by the public utility's occupancy. The management costs, which the municipality or county executive shall assign individually to the public utility creating the management costs, must be limited to the direct, actual, and reasonably incurred costs a municipality or county incurs in managing the public right-of-way. As used in this section, "direct, actual, and reasonably incurred costs" refers to the costs**



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to the municipality or county of the following:

- (1) Registering occupants.
- (2) Verifying public right-of-way occupation.
- (3) Inspecting job sites and restoration projects.
- (4) Restoring work inadequately performed after providing notice and the opportunity to correct the work.
- (5) Administering a reasonable restoration ordinance that ensures that a public utility adequately restores the right-of-way as near as is reasonably possible to the right-of-way's original condition.

Management costs do not include payment by a public utility for the occupation of the public right-of-way or the fees and costs of litigation relating to the interpretation of this section or an ordinance adopted under this section. As used in this section, the term "public right-of-way" does not include the airwaves above the streets, highways, or other public property within the municipality or county as those airwaves are used for cellular or other nonwire telecommunications or broadcast service."

Page 5, line 39, after "municipality" insert "**or county executive**".

Page 5, line 39, delete "deny or".

Page 5, line 41, after "municipality" insert "**or county**".

Page 5, line 42, delete "municipality's" and insert "**municipality or county executive's**".

Page 5, line 42, delete "review and".

Page 6, line 1, delete "approve" and insert "**advance notification of and review of**".

Page 6, line 1, delete "access to and ongoing use" and insert "**occupation**".

Page 6, line 2, after "municipality" insert "**or county**".

Page 6, line 3, delete "health,".

Page 6, line 3, delete ", and welfare".

Page 6, after line 3, begin a new paragraph and insert:

"SECTION 3. IC 8-23-6-6 IS AMENDED TO READ AS FOLLOWS [EFFECTIVE UPON PASSAGE]: Sec. 6. (a) An opening may not be made in:

- (1) a highway in the state highway system;
- (2) the right-of-way of a state highway; or
- (3) the roadway of a street of a city or town over which a state highway is routed and which the department is required to maintain;

and a structure or obstruction may not be placed in a highway or roadway of a state highway without the consent of the department. A

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highway or roadway may not be dug up for laying or placing a pipe, sewer, pole, wire, conduit, track, or railway or for any other purpose, and trees may not be removed from the right-of-way of a state highway without the written permit of the department, and then only in accordance with the rules of the department. The work shall be done under the supervision and to the satisfaction of the department, and the entire expense of restoring the highway or street in as good condition as before shall be paid by the person to whom the permit is given.

(b) The department may require, before the granting of a permit, that a sufficient bond be given, or cash deposit made, to insure the restoration of the highway or street. **Except as provided in subsection (c)**, in granting a permit, the department may designate the place in the street, highway, or right-of-way thereof where the pipe, sewer, pole, wire, conduit, track, railway, or other device or thing may be constructed.

(c) **In the case of construction of facilities to provide water to property that borders a United States highway within a two mile radius of a city having a population of more than eight thousand (8,000) and over which the city has zoning and planning authority in a county having a population of more than twenty-seven thousand five hundred (27,500) but less than twenty-seven thousand six hundred (27,600), the department may not designate the place in a street, highway, or a street or highway right-of-way where a pipe, sewer, pole, wire, conduit, track, railway, or another device or thing may be constructed if an applicant for a permit proposes an alternative place that:**

- (1) would reduce the cost of the project; and
- (2) does not endanger the public health or safety.

(d) **Whenever an alternative place in a street, highway, or a street or highway right-of-way where a pipe, sewer, pole, wire, conduit, track, railway, or another device or thing may be constructed is selected under subsection (c), the work must be done under the supervision and to the satisfaction of the department. The entire expense of restoring the highway or street to a condition that is as good as the condition of the street or highway before construction begins must be paid by the person to whom the permit is given.**

(e) A person who violates this section commits a Class C infraction.

**SECTION 4. [EFFECTIVE UPON PASSAGE] The Indiana department of transportation shall adopt rules under IC 4-22-2 to implement IC 8-23-6-6, as amended by this act.**

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**SECTION 5. An emergency is declared for this act."**

Renumber all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to House Bill 1376 as introduced.)

BOTTORFF, Chair

Committee Vote: yeas 14, nays 0.

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## HOUSE MOTION

Mr. Speaker: I move that House Bill 1376 be amended to read as follows:

Page 3, line 38, after "section," insert "**the phrase**".

Page 3, line 39, delete "refers" and insert "**includes but is not limited**".

Page 4, line 8, before "Management" insert "**However, as used in this section, direct, actual, and reasonably incurred costs do not include rents or franchise fees for occupation of the public right-of-way.**".

Page 4, between lines 23 and 24, begin a new paragraph and insert:

"**(d) Nothing in this section may be construed to affect franchise agreements in force between a cable company and a municipality or county before July 1, 1998.**".

(Reference is to House Bill 1376 as printed January 28, 1998.)

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## COMMITTEE REPORT

Mr. President: The Senate Committee on Commerce and Consumer Affairs, to which was referred House Bill 1376, has had the same under consideration and begs leave to report the same back to the Senate with the recommendation that said bill be AMENDED as follows:

Page 1, line 2, delete "[EFFECTIVE JULY 1, 1998]" and insert "[EFFECTIVE UPON PASSAGE]".

Page 1, line 8, after "chapter" delete "," and insert "**or IC 8-1-11.1,**".

Page 1, line 9, strike "such" and insert "**a**".

Page 1, line 9, after "occupy" insert "**or department of public utilities created under IC 8-1-11.1**".

Page 1, line 14, after "utility" insert "**, department of public utilities,**".

Page 2, line 5, after "ordinance" insert "**,**".

Page 2, line 20, after "utility," insert "**department of public utilities,**".

Page 2, line 22, after "utility" insert "**or department of public utilities**".

Page 2, line 25, after "utility" insert "**or department of public utilities**".

Page 2, line 26, after "utility" insert "**or department of public utilities**".

Page 2, line 38, after "utility" insert "**or department of public utilities**".

Page 2, line 40, after "utility" insert "**or department of public utilities**".

Page 3, line 2, after "utility" insert "**or department of public utilities**".

Page 3, line 4, after "utility" insert "**or department of public utilities**".

Page 3, line 5, strike "or said" and insert "**the**".

Page 3, line 5, after "utility" delete "," and insert "**or department of public utilities**".

Page 3, line 8, after "utility" insert "**or department of public utilities**".

Page 3, line 16, delete "." and insert "**or department of public utilities.**".

Page 3, line 23, delete ". A" and insert "**, and a**".

Page 3, line 31, delete "municipality" and insert "**municipality's**".

Page 3, line 33, after "utility's" insert "**or department of public utilities**".

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Page 3, line 35, after "utility" insert "**or department of public utilities**".

Page 3, line 39, delete "phrase" and insert "**term**".

Page 3, line 39, delete "direct, actual, and reasonably incurred" and insert "**management**".

Page 4, line 6, after "utility" insert "**or department of public utilities**".

Page 4, between lines 8 and 9, begin a new line block indented and insert:

**"(6) Management costs associated with the implementation of an ordinance adopted under this section."**

Page 4, line 10, after "incurred" insert "**management**".

Page 4, line 10, delete "or" and insert ",".

Page 4, line 10, after "fees" insert "**, or any other payment by a public utility**".

Page 4, line 11, delete "Management costs do not include".

Page 4, delete lines 12 through 14.

Page 4, line 15, delete "section."

Page 4, line 21, after "utility's" insert "**or department of public utilities**".

Page 4, line 25, after "utility's" insert "**or department of public utilities**".

Page 4, line 29, delete "in force".

Page 4, line 30, after "county" insert ".".

Page 4, line 30, delete "before July 1, 1998."

Page 4, delete lines 31 through 42.

Page 5, delete lines 1 through 40.

Re-number all SECTIONS consecutively.

and when so amended that said bill do pass.

(Reference is to House Bill 1376 as reprinted February 3, 1998.)

MILLS, Chairperson

Committee Vote: Yeas 10, Nays 0.

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