

Economic Impact Statement

LSA Document #07-494

IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses

IC 4-22-2.1-5(a) If an agency intends to adopt a rule under IC 4-22-2 that will impose requirements or costs on small businesses, the agency shall prepare a statement that describes the annual economic impact of a rule on all small businesses after the rule is fully implemented as described in subsection (b).

Indiana Code 4-22-2.1-5 requires an agency to publish a statement concerning the economic impact of any proposed rule on small businesses in the Indiana Register and to submit the statement to the Indiana Economic Development Corporation (IEDC). The IEDC is required to review the rule and submit written comments to the agency not later than seven days before the public hearing.

The proposed rule implements the provisions of [IC 8-23-2-5\(a\)\(9\)](#) to establish a cost effective system to manage use of the public right-of-way of state highways. Specifically, the proposed rule establishes the type and quality of information that must be exchanged between the utilities, highway construction contractors, and the Indiana Department of Transportation (INDOT). The rule establishes time schedules and a relocation approval process that, per the cited statute, are enforceable through civil actions. The overall goal is to reduce uncertainty, risk, and costs for utilities, highway contractors, and INDOT.

Under the proposed rule, when a highway project is proposed, INDOT submits preliminary plans to all utilities known to have facilities in the general area. The utilities review these plans and determine if their facilities are in conflict with the proposed project. If there is a conflict, the utility proposes a relocation plan to INDOT. INDOT reviews the utility relocation plan to determine if the relocation plan is compatible with the proposed construction and the relocation plans submitted by other involved utilities. INDOT then approves a utility relocation plan.

The proposed rule formalizes processes currently being followed by both INDOT and the utility industry. The rule offers more certain scheduling of operations and fewer changes during the construction process than the informal process currently in place. The formalization of procedures imposes the annual requirement for utilities to notify INDOT of a designated liaison and to follow the communication process outlined in the rule. The communication process requires the utilities to review and submit certain documents within designated time periods.

The proposed rule will also have some impact on highway construction contractors who perform work for INDOT. This statement will consider those highway construction contractors affected by the rule. INDOT's past practice was to allocate much or most of the risk of problems with utility relocation delays on to the highway construction contractor. Thus, while additional duties may accrue to the highway construction contractor after promulgation of the rule, INDOT will include these duties as part of the contract, and INDOT will pay for the performance of these duties in the same manner as other duties required under the contract.

IC 4-22-2.1-5(a)(1): An estimate of the number of small businesses, classified by industry sector, that will be subject to the proposed rule.

[IC 4-22-2.1-4](#) defines small business as follows:

Sec. 4. As used in this chapter, "small business" means any person, firm, corporation, limited liability company, partnership, or association that:

- (1) is actively engaged in business in Indiana and maintains its principal place of business in Indiana;
- (2) is independently owned and operated;
- (3) employs one hundred (100) or fewer full-time employees; and
- (4) has gross annual receipts of five million dollars (\$5,000,000) or less.

Two industry sectors, as classified by the North American Industry Classification System (NAICS), may be impacted by the proposed rule: utilities and construction sectors.

In the 2004 Statistics for U.S. Businesses, the U. S. Census Bureau reported that NAICS classified 199 firms in the category of utilities. Of the 199 utility firms, 178 may be small businesses based on the number of employees as shown below.

Utility Firms with 0 Employees	12 Firms
Utility Firms with 1-4 Employees	62 Firms
Utility Firms with 5-9 Employees	41 Firms
Utility Firms with 10-19 Employees	22 Firms
<u>Utility Firms with 20-99 Employees</u>	<u>41 Firms</u>
Total	178 Firms

Revenue figures for utility companies are not available by industry group, so INDOT cannot determine exactly how many of these utility firms are small businesses based on gross annual receipts; however, INDOT estimates most if not all of the 178 firms with 100 or fewer employees meet all of the requirements for small businesses in

[IC 4-22-2.1-4](#). To assure that the impact on all utility firms that are or might be small businesses is evaluated, this statement assumes all 178 firms with 100 or fewer employees are small businesses.

In the 2004 Economic Census, the U.S. Census Bureau reported that NAICS classified 15,512 firms in the category of construction. Of these 15,512 firms, only 536 fall in to NAICS categories that the proposed rule might impact as shown below. The proposed rule might affect the following NAICS categories: #2371 Utility system construction and #2373 Highway, street, and bridge construction.

NAICS #2371, Utility System Construction	300 Establishments
<u>NAICS #2373, Highway, Street, and Bridge Construction</u>	<u>236 Establishments</u>
Total	536 Establishments

Revenue figures for construction companies are not available by industry group, so INDOT cannot determine exactly how many of these construction companies are small businesses based on gross annual receipts; however, Indiana law requires all contractors bidding on projects in excess of \$300,000 to be prequalified by INDOT. As a result, INDOT has some financial information on contractors. The data from INDOT's prequalification records indicates that about one-third of prequalified contractors may be classified as small businesses. Applying this proportion to the specified number of firms, INDOT estimates that 178 of the 536 construction establishments qualify as small businesses. INDOT estimates that most, if not all, of these establishments meet the other requirements of [IC 4-22-2.1-4](#) as well; therefore, INDOT estimates all 178 establishments are small businesses.

[IC 4-22-2.1-5\(a\)\(2\)](#): An estimate of the average annual reporting, record keeping, and other administrative costs that small businesses will incur to comply with the rule.

INDOT expects that the costs of annual reporting, record keeping, and other administrative requirements for small business in the proposed rule will be minimal in comparison to what utilities currently expend. As noted previously, the proposed rule does not substantively change the current utility coordination process.

Under the proposed rule, INDOT requires a utility company to notify INDOT annually of its authorized representative and to provide information on how to contact that person. The proposed rule also requires the utility company to update the required information if it changes during the year. This was an informal process prior to the proposed rule. The required information consists of the following for the authorized representative: name, title, telephone numbers, e-mail address, postal address, and street address. INDOT estimates that this requirement will add less than one hour of work per year to the utility. Although INDOT cannot anticipate who will perform this additional work for each company, INDOT estimates the cost of this hour at \$50 including salary and benefits. This would amount to \$8,900 for all 178 firms.

The rule also requires utilities to follow a communications process where they must review and submit certain documents within designated time periods. Specifically utilities must do the following: respond to the department with a description of facilities, verify that plan sheets are accurate, detail conflicts, submit work plans, attend a utility coordination meeting if conflicts are found, submit any necessary revisions to the work plans, acknowledge notifications, and review agreements. The rule provides time periods in which utility firms must comply with these requirements. Based on INDOT's communications and experience with utilities, INDOT estimates that these requirements will cost a utility approximately \$1,818.75 a year to comply with if the utility has one project within its service territory that year. INDOT bases this cost estimate on the following:

- INDOT estimates that all requirements of the proposed rule will cost a utility between \$675 and \$4,350 a year if the utility has one project within its service territory a year.
- INDOT estimates that for a minor project without a permit, a utility will spend nine hours at \$75 per hour for a total of \$675 for all needed steps in the process.
- INDOT estimates that for a minor project with a permit, a utility will spend 27 hours at \$75 per hour for a total of \$2,025 for all steps in the process.
- INDOT estimates that for a major project with a permit, a utility will spend 58 hours at \$75 per hour for a total of \$4,350 total for all steps in the process.
- INDOT reviewed 2005 and 2006 data and determined that approximately 25% of the time INDOT reimbursed the costs to the utility for projects when the utility received a permit. INDOT assumes that this will be the case for future projects as well. To reflect the fact that 25% of the time INDOT will pay back the utility for its cost, the totals can be reduced by 25% for projects where a permit will be issued. This would amount to a total of \$1,518.75 for minor projects and \$3,262.50 for major projects.
- To come up with an estimate for the cost per project, INDOT estimates that approximately one-third of the projects let each year will fall within each of the above categories. This would make the estimate per project at: (1/3 of \$675) plus (1/3 of \$1518.75) plus (1/3 of \$3,262.50); or \$225 plus \$506.25 plus \$1087.50 for a total of \$1,818.75.

This would amount to \$323,737.50 if all 178 utility firms happen to be affected within a single year. Typically, the smaller the utility service territory is, the greater the number of years between when it is affected by an INDOT project. Most utilities are already taking the steps outlined in the rule; therefore, they are already incurring these expenses.

In accordance with the proposed rule, highway construction contractors will not incur any additional costs for annual reporting, record keeping, or other administrative requirements. Implementation of the proposed rule will result in INDOT incorporating the work plans of the utilities into the construction contracts. This will provide the contractor with more complete information about the alteration and relocation of facilities including location, materials, and time schedule. Any additional duties that INDOT imposes on the highway construction contractor will be part of the contract, and INDOT will pay the cost the same as other duties under the contract. The proposed rule itself will not impose any additional costs on the contractor.

IC 4-22-2.1-5(a)(3): An estimate of the total annual economic impact that compliance with the proposed rule will have on all small businesses subject to the rule.

INDOT expects that the total annual economic impact on small business in complying with the proposed rule will be minimal when compared to what utilities are expending currently. As noted above, INDOT estimates that the total economic impact on all 178 utilities that are small businesses will be \$8,900 for notifying INDOT of its authorized representative and \$323,737.50 for complying with the communication process requirements. This amounts to a total estimated economic impact of \$332,637.50. The proposed rule does not substantively change the current utility coordination process; therefore, utilities already are incurring most of this cost.

The proposed rule is expected to improve the reliability of the exchange of information and time schedules associated with utility alteration and relocation. As such, the rule will likely reduce the annual economic impact associated with the traditional uncertainties of utility alteration and relocation. The cost of the proposed rule likely will be offset by the savings that a utility company will gain from the additional certainty for the utility relocation process that the rule provides. Small utilities likely will benefit more than larger utilities because smaller utilities lack flexibility due to smaller budgets, smaller staffs, and fewer work crews.

The total annual economic impact on small highway construction businesses for compliance with the proposed rule is estimated to be zero because the proposed rule places no additional requirements on small highway construction businesses. Small highway construction businesses likely will benefit more than larger highway construction businesses because smaller highway construction businesses lack flexibility due to smaller budgets, smaller staffs, and fewer work crews.

IC 4-22-2.1-5(a)(4): A statement justifying any requirement or cost that is: (A) imposed on small businesses by the rule; and (B) not expressly required by (i) the statute authorizing the agency to adopt the rule; or (ii) any other statute or federal law. The statement required by this subdivision must include a reference to any data, studies, or analyses relied upon by the agency in determining that the imposition of the requirement or cost is necessary.

The cost imposed on small businesses by the proposed rule is justified by the potential cost savings from a reduction of utility facility relocation delays. The proposed rule is expected to meet three specific goals: to comply with the requirements of the Indiana Code, to formalize the existing utility coordination process, and to reduce the cost to the state for delays in highway construction due to the alteration and relocation of utility facilities.

IC 8-23-2-5(a)(9) directs INDOT to adopt rules to cost effectively manage the right-of-way of the state highway system by establishing a formal procedure for highway improvement projects that involve the relocation of utility facilities. Additionally, at subsection (b), the rule "shall not unreasonably affect the cost, or impair the safety or reliability, of a utility service."

The proposed rule formalizes the existing process of coordinating the alteration and relocation of utility facilities with work proposed by highway improvement projects. The communication requirements found in the rule are justified because they allow INDOT to manage projects effectively. These requirements reduce uncertainty, risks, and costs that often result when INDOT, the utilities, and highway contractors do not get timely information from another party. The annual requirement on utility companies to notify INDOT of their designated authorized representative is justified because INDOT needs to know who to contact when coordination problems arise. Experience has shown that not knowing the authorized representative for a utility may lead to delays in the coordination of facility alterations and relocations and thereby may affect the timely execution of contracts.

The cost of utility facility relocation delays to the state of Indiana is difficult to determine for several reasons. First, the cost of utility delays has not, until recently, been tracked by the construction section of INDOT. Second, the cost of utility delays is often compensated for as additional time to the contractor, which may not be easily quantified. Third, the cost of utility delays may be hidden within the project by added design cost or added construction costs captured in the bid documents. Lastly, the information currently available only makes note of the open claims by contractors for utility delays. There is no comprehensive list available stating all delays resulting from untimely alteration or relocation of utility facilities.

INDOT's Construction Management Division reported the cost for utility related claims of \$4,681,544 over a nine year period. Based on this information and the extent of uncertainty in the tracking of utility related delays, INDOT may make a reasonable and conservative estimate for the cost of utility delays at \$520,000 per year. INDOT anticipates that the proposed rules will reduce that cost.

IC 4-22-2.1-5(a)(5): A regulatory flexibility analysis that considers any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule. The analysis under this subdivision must consider the following methods of minimizing the economic impact of proposed rule on small businesses:

(A) The establishment of less stringent compliance reporting requirements for small businesses.

(B) The establishment of less stringent schedules or deadlines for compliance of reporting requirements for small businesses.

(C) The consolidation or simplification of compliance reporting requirements for small businesses.

(D) The establishment of performance standards for small businesses instead of design or operational standards imposed on other regulated entities by the rule.

(E) The exemption of small businesses from part or all of the requirements or costs imposed by the rule.

(A) The proposed rule provides a balance between the needs of the utilities, highway construction contractors, and INDOT. The compliance and reporting requirements are necessary for the rule to be effective regardless of the size of the utilities. Construction contractors need to be able to rely on the information and assurances provided by utilities regardless of whether the utilities are small businesses. The additional certainty in the process will more than offset any additional costs.

(B) After consulting with utility representatives, highway construction contractors, and designers, INDOT established time frames and schedules that it believes are reasonable for all involved parties.

(C) The rule minimizes the compliance and reporting requirements for all parties affected by the rule. INDOT believes that these requirements cannot be reduced any further. Because the rule requires INDOT to provide utilities with more timely and complete information, compliance and reporting under the rule should be easier and less expensive than it currently is for utilities.

(D) The rule does not set or change design or operational standards. The rule requires utilities to provide timely information so INDOT can effectively manage the right-of-way of the state highway system.

(E) Exempting small businesses from requirements in the proposed rule would hinder the exchange of information that the rule seeks to promote.

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