Jurisdiction to Regulate Utilities On Highway Right-of-Way

JAMES E. THOMSON, State Counsel, Iowa State Highway Commission

The development of controlled- or limited-access highways has moved highway authorities to institute new standards for utility location on these facilities. This has involved either increased regulation of existing and new utility lines or their prohibition or removal from within such highways. The foremost example is the AASHO Policy on the Accommodation of Utilities on the National System of Interstate and Defense Highways.[1]

This development has been marked in Iowa by a serious challenge to the authority of its Highway Commission to comply with this AASHO utility policy.

In 1958, the Iowa Power and Light Company (IPALCO) applied to the Iowa Commerce Commission for a franchise, which it subsequently received, to locate a 161,000-kv electric transmission line along 21 miles of Interstate 80 and 35 north and west of the City of Des Moines. This line was to be hung from 32-ft crossarms each supported by double poles 15½ ft apart. After unsuccessfully opposing IPALCO before the Commerce Commission and later in district court, the Highway Commission was recently successful in obtaining an Iowa Supreme Court decision[2] holding that the Highway Commission had the exclusive authority under its controlled-access law to regulate or prohibit the location of such utilities on the Interstate System.

This paper reviews the factual background and legal basis of this Iowa decision to place it in perspective in relation both to existing utility regulation on controlled- or limited-access highways, and to any reasonable extension of such control by various highway departments.

In 1930, the Iowa Supreme Court established that the Iowa Commerce Commission and not the highway authorities had the sole jurisdiction to determine whether power lines would be located on the rural public highways of Iowa.[3] That court somewhat prophetically stated:

> The fact, if it be a fact, that in the onward march of commerce conditions may arise in the future under which a larger use of the highway demands the further removal of these poles, or their entire removal from the highways, under existing statutory powers or under future legislation under the reserve powers of the state, is a question with which we are not now concerned...

Not until 1955 when the Iowa legislature enacted the model controlled-access law was there any basis for increased Highway Commission jurisdiction.[4]

During this 25-year period, limited-access facilities came into existence in other States. Parkways and toll roads were probably the first of such to appear.[5] Utility lines located above ground were obviously incompatible with parkways. Many toll road authorities had the right to charge utilities for the use of their right-of-way and

---

Paper sponsored by Special Committee on Highway Laws.

[1] AASHO, 1959.
[2] Iowa Power & Light Co. v. Iowa State Highway Comm., 117 N.W.2d 425 (Oct. 16, 1962).
[3] Iowa Railway & Light Co. v. Lindsey, 211 Iowa 544, 231 N.W.461 (1930).
[4] Iowa Acts, 56th G.A., ch. 148 (1955); now Iowa Code, ch. 306A (1962).
[5] See D.R. Levin, "Public Control of Highway Access and Roadside Development." Public Roads Admin., pp. 6-9 (1947).

most had the power to regulate strictly any utility facilities that might desire to locate there.[6] Apparently utilities did not have any extensive installations on toll roads, for as one toll road attorney explained, their regulations were so strict that utilities preferred to locate elsewhere.

As early as 1944, proposed standards for a system of National interregional superhighways provided that "the erection of electric light, power, and telephone lines within the right-of-way... except those necessary for the service of the highway or its pertinent facilities shall be discouraged." Those recommendations were the same for underground facilities, but these were to be preferred to those above ground.[7]

Some States, such as Kentucky in 1957 and 1958,[8] imposed new, strict limitations on the maintenance of utility facilities on all of their limited-access highways.

By 1958 some substantial sections of the National System of Interstate Highways had been constructed in many States, including Iowa. Although the interim policy was generally a prohibition of new utility facilities, no final standards for the system had been formulated. The AASHO Committee on Planning and Design Policies developed a proposed policy during the year. It was finally adopted as a standard by letter ballot of the States on July 30, 1959, and by the Bureau of Public Roads shortly thereafter. This "policy" required the exclusion of utility lines along the right-of-way of the system within the control of access lines except in very exceptional circumstances.

IPALCO received its franchise to locate on the Interstate prior to the official adoption of the AASHO policy by either the States or the Bureau. It was determined to locate on the Interstate, not only because of the initial right-of-way savings and ease of access for maintenance, but also because the location was strategic to its plan for providing electrical power for the future projected growth of the metropolitan area of the City of Des Moines. The Interstate would serve as a power line right-of-way for the completion of the north and west sides of a transmission power grid or belt around the city. The metropolitan area of Des Moines had historically been growing both west and northwest and this was being accelerated by the establishment of the Interstate. The alternative to the use of this highway as right-of-way involved many difficult location problems for the company, including legal restrictions on residential proximity.

IPALCO contended that prohibition of its utility lines would be unreasonable because the supporting poles would be located so far from the traveled lanes on the 300-ft right-of-way as to make the danger of collision very remote; that their line crews never had had any accidents working on highways; that serious power outages were uncommon; and that little difficulty was expected with maintenance.

In support of the reasonableness of its position, the Highway Commission submitted that the location of the transmission line on the Interstate System and its use as a utility service road would be detrimental to the complete access and interior traffic control features embodied in its design; that the great traffic volume expected on the section in question (up to 29,000 vehicles per day by 1975) together with the high legal speed limits (65 mph at night and 75 mph during the day) made any non-highway use a potential hazard; that the establishment of such restrictions and policy on a system designed to carry up to one-fifth of the Nation's traffic volume was a prudent application;[9] that the foreseeable future use of the highway for additional traffic lanes, if utility lines were established, would increasingly aggravate other safety problems

---

[6] "Reimbursement of Utilities for Relocation of Facilities Along Highways." National Highway Users Conf. Research Dept. Bull., p. 6 (Oct. 1956).

[7] "Interregional Highways. A Report of the National Interregional Highway Committee, Outlining and Recommending a National System of Interregional Highways." 78th Cong., 2d Sess., H.R.Doc.No. 379, p. 165, 173 (1944).

[8] Patterson, M., "Kentucky Extends Its Utility Policy to Cover All Limited-Access Highways." American Highways, 37:12-13 (July 1958).

[9] U.S.Cong. & Admin. News. 85th Cong., 2d Sess. S.Rep.No. 1407, pp. 2368-2369. Interstate System to comprise about 1.5 percent of the Nation's mileage and carry about 20 percent of its highway traffic.

such as pole collisions; and that the line would interfere with the extensive landscaping program already undertaken on the right-of-way for erosion control, safety, and aesthetic design.[10]

Many of the trees that the Highway Commission had already planted were of a variety that eventually would have had to be cut back in keeping with the power company's policy of trimming all foliage within 16 ft of such highly charged lines. The power company countered that there were kinds of trees and shrubs that could be planted that would not interfere.

Basically, there were three legal issues in IPALCO's declaratory judgment action brought by it against the Highway Commission to determine its rights under the Commerce Commission franchise: (a) whether the controlled-access statute established jurisdiction in the Highway Commission to regulate the accommodation of utilities on the Interstate System; (b) whether in the event that the Highway Commission had jurisdiction, a prohibition of such line was a reasonable exercise of its discretion; and (c) whether the Iowa Federal co-operation statutes together with the Federal statutes and regulations empowered the Highway Commission to enforce prohibition of such utility line location. The Supreme Court decided the case in favor of the Highway Commission on the basis of the first two issues; while commenting on the Federal co-operation question, it did not find that issue necessary to determine.

The court held that the controlled-access law did establish authority in the Highway Commission to "regulate" utility location on the Interstate System because such statute was both a special and a later enacted one. Because it could not be reconciled, it superseded the statutory general authority of the Commerce Commission over utility location on highways generally. The court found that the use of the word "regulate" in two different locations in section three of the controlled-access act gave the Highway Commission "the right to 'regulate' first the building and maintenance of the highway; and second, traffic after it is in operation."[11] It noted that the legislature had not stated that the highway authority might regulate the facility "except for the right of the Commerce Commission to grant franchises to public utilities for the building and maintenance of transmission lines."

In 1959, a utility reimbursement law was enacted in Iowa under which the Highway Commission could cause and pay for the relocation or removal of utilities from within public highways determined by it to be necessary for construction of the Interstate System.[12] A consideration of this law strengthened the court's belief that it had correctly interpreted the intent of the legislature. It thought it absurd that the Highway Commission would have the right to remove existing facilities from within the right-of-way of the Interstate while not being able to prevent new ones from locating there.

---

[10] "A Policy on Landscape Development for the National System of Interstate and Defense Highways." AASHO pp. 11-15 (1961); Walker, R.T., "Preliminary Report on Landscape Design Factors and Their Influence on Highway Safety." HRB Roadside Development 1961, pp. 49-53 (1961).

[11] Iowa Code §306A.3 (1962).

"Authority to Establish Controlled Access Facilities

"Cities, towns, and highway authorities having jurisdiction and control over the highways of the state, as provided by Chapter 306, Code 1954, acting alone or in cooperation with each other or with any Federal, State, or local agency or any other state having authority to participate in the construction and maintenance of highways, are hereby authorized to plan, designate, establish, regulate, vacate, alter, improve, maintain, and provide controlled-access facilities for public use wherever such authority or authorities are of the opinion that traffic conditions, present or future, will justify such special facilities... Said cities, towns and highway authorities may regulate, restrict, or prohibit the use of such controlled-access facilities by the various classes of vehicles or traffic in a manner consistent with Section 2 of this act." (Emphasis Supplied)

[12] Iowa Acts, 58th G.A. ch. 205 (1959).

Because the Highway Commission had the power to control the accommodation of utility facilities on the Interstate, the court found that it was proper for it to either issue regulations controlling such installations as had been done,[13] or to refuse to locate such facilities without formal regulations.

The court stated that the refusal of the Highway Commission to permit utility facilities along and on the rights-of-way of the Interstate System was a proper exercise of its discretion. To the contention of the utility that its lines would be along the outer edge of the highway and would be of no inconvenience to anyone, the court said:

> Interstate Highways, in fact all highways, are subject to increasing traffic burdens; it seems certain that in the foreseeable future it will be desirable to widen many of them and so use a greater part of the right-of-way for carrying traffic; and, again, the presence of utility poles along the right-of-way adds considerably to the hazards when the driver on the highway loses control of his vehicle, or for any reason is diverted to the shoulder or generally untraveled portion of the right-of-way. Collision with a heavy pole is always a dangerous possibility under such circumstances.

The court's decision is in accord with the administrative law principle that decisions committed to the discretion of an agency of the State will not be disturbed by the courts unless they are manifestly arbitrary or unreasonable.[14]

IPALCO had argued very strenuously that the intent of the controlled-access law could not have been to give the Highway Commission the power to regulate or prohibit its line because any highway authority in Iowa was authorized to establish controlled-access facilities; and the Highway Commission had already declared most of the highways under its jurisdiction as such facilities. To this the court pointed out that they were dealing only with Interstate Federal highways, and its decision applied only to it; however, the court admitted that "logically it appears the same reasoning would apply to any controlled access road."

Although the court did not find it necessary to pass on the Federal co-operation questions, it did indicate that the Federal co-operation section of the Iowa controlled-access law[15] seemed broad enough to permit the Highway Commission to enter into agreements with the United States, that the latter's regulations would govern such matters as the construction of utility facilities along and on the Interstate System. The court did not determine whether there were such regulations in effect at the time of the project agreement or whether they had been adopted later and now governed. The court found a basis for a logical argument that the regulation in effect in 1959 was broad enough to bar utilities.[16] It further stated:

> Inevitably the Federal government, which furnishes the greater part of the funds for the construction of Interstate highways, will assert the right to control in essential details of construction and operation. In its amicus curiae brief it asserts the right, in fact the duty, to withhold payment of road funds to the state and to deny approval of future projects if its regulations, specifically those which it contends prohibit construction of utility facilities along rights-of-way are violated. No one needs be surprised at this attitude.

---

[13] See Appendix for text of regulations.

[14] Porter v. Iowa State Highway Commission, 241 Iowa 1208, 44 N.W.2d 682 (1950); Reter v. Davenport, Rock Island & Northwestern Railroad Company, 243 Iowa 1112, 54 N.W.2d 863, 35 A.L.R.2d 1306 (1952); See also 2 Am.Jur.2d, Ad.Law, §§651,652.

[15] Iowa Code §306A.7 (1962).

[16] 23 C.F.R. §1.11(c) (in effect from 2-21-57 to 5-11-60).

Because the AASHO utility policy is now officially an Interstate System standard[17] and because the Bureau now has a new and more appropriate regulation[18], the interpretation of Federal Interstate project agreements by the courts to require utility compliance in the various States should be assured.

The increasing construction of highways built to standards and for purposes similar to the Interstate System will require additional consideration in the future by various State highway departments of an extension of control and regulation of utility highway accommodations. The departments, unilaterally, now have varying degrees of jurisdiction ranging from full control to a very limited or uncertain authority, and often depending on either the type of utility or the particular highway location.[19]

In those States now having apparent authority in their highway departments to regulate utilities, the IPALCO case should serve as a precedent of a reasonable exercise of the discretion of an administrative agency.

Among the many States having specific controlled-access legislation some have statutory language enough similar to the Iowa and model controlled-access laws that the IPALCO case should be of assistance in supporting an interpretation that the highway department has the power reasonably to regulate or restrict utilities and their maintenance on such facilities.[20]

A logical possible extension of utility highway regulation could be achieved by joint AASHO and Bureau of Public Roads action adopting utility accommodation standards for other federally-aided fully controlled access highways other than the Interstate.

Any consideration of widening the scope of highway utility regulation will have to balance the safety and general welfare of the traveling public against the benefits to the utility and general public of utility location on the highway. The conclusion of an author of a study on the benefits to utilities from highway location in this regard was the following:

> ...we find the balance of net monetary benefit to utilities a significant combined utility and non-utility benefit from utility use of the highways. The advantages outweigh the disadvantages generally with exceptions where the existence of utility lines on the highways seriously affect (1) the safety of highway users, (2) the costs of highway construction or maintenance, (3) the flow of traffic, and (4) the aesthetics of the landscape.[21]

In conclusion, it would appear reasonable to expect a further increased regulation or restriction of utility accommodation on at least those controlled-access highway facilities designed completely for the motorist and bearing high volumes of traffic at rapid speeds.

---

[17] P.P.M.No. 40-2(6) (issued Sept. 30, 1959, B.P.R.).

[18] 23 C.F.R. §1.23(b), §1.23(c) (effective May 11, 1960).

[19] "Relocation of Public Utilities Due to Highway Improvement." HRB Special Report 21 (1955). See table of State statutory and constitutional provisions concerning occupancy of State highways by public utilities, pp. 85-136.

[20] But see R.P. Garbarino, "Limited Access Highways and Public Utility User." 3 Vill.L. Rev. 489 (June 1958). This article was cited by IPALCO in support of its argument that controlled-access laws were not intended to give highway authorities control over utility regulation or restriction on such highways. It submits various reasons in support of its thesis. However, it is based to a great extent on the language of the Pennsylvania statute and situation.

[21] Blensly, R.C., "Benefits to Utilities from Rural Highway Locations in Oregon." HRB Special Report 75, pp. 52-59 (1962); see also C.E. Nelson, "Economic Implications of Utility Use of Highway Location in Utah." HRB Special Report 75, pp. 33-51 (1962).

Appendix

RULES AND REGULATIONS PERTAINING TO FULLY CONTROLLED ACCESS HIGHWAYS

Non-Traffic and Special Uses

Section 1. For the purposes of these rules and regulations a fully controlled access highway is defined as a highway or street especially designed for through traffic, and over, from or to which owners or occupants of abutting land or other persons have no right or easement of access, light, air, or view by reason of the fact that their property abuts upon such fully controlled access highway or for any other reason, including, but not limited to, those highways or streets which are part of the Interstate Highway System.

Section 2. Ingress and egress to fully controlled access highways shall be by use of public road entrances and exits. No other ingress or egress shall be allowed to any person or vehicle to, from, or across said highway right-of-way to or from abutting lands, except that with written approval of the Iowa State Highway Commission (and the Federal Bureau of Public Roads when necessary) access from abutting lands to the right-of-way of a fully controlled access highway may be made at those points needed to construct, service, and maintain necessary crossings for public utilities, drainage facilities, and other public services, or for any uses of the right-of-way as may hereafter be specially authorized by the Iowa State Highway Commission.

Section 3. No motor vehicles not used for necessary highway maintenance shall be driven or stopped upon the non-surfaced portions of a fully controlled access highway except as provided for by the regulations of the Iowa State Highway Commission.

Section 4. No motor vehicle not used for necessary highway maintenance shall be driven or stopped upon the surfaced shoulders of a fully controlled access highway except for emergency reasons.

Section 5. The use of any portion of the right-of-way of fully controlled access highways for the purpose of constructing or servicing utility facilities thereon is prohibited unless specially authorized by the Iowa State Highway Commission pursuant to Section 7 hereof, except that necessary public service and utility crossings may be constructed or maintained as follows:

(a) Motor vehicles may use frontage roads and the unsurfaced portions of the right-of-way of fully controlled access highways to construct and service necessary public service and utility crossings provided they obtain ingress and egress thereto from other than the surfaced portions of the fully controlled access highway at such points and by such routes as may be specified by the Iowa State Highway Commission.

(b) In the event that it is impossible to reasonably construct and service necessary public service and utility crossings with the motor vehicle movements herein allowed, additional use of the right-of-way of fully controlled access highways may be allowed by permit issued by the Iowa State Highway Commission provided all reasonable provisions for the safety of the general traveling public are incorporated therein.

(c) In disaster emergencies where such ingress or egress as outlined in Section 5(a) above is temporarily impossible, the surfaced area of the right-of-way of fully controlled access highways may be used to approach the distressed lines or facilities, and the surfaced shoulders may be used for temporary parking, provided all reasonable provisions for the safety of the general traveling public are made, including prior notification of the Iowa Highway Patrol and the Maintenance Department of the Iowa State Highway Commission.

(d) Where utility lines or public service facilities are so damaged as to constitute a danger to the life or property of the general traveling public, access to the same may be by the most expeditious route and where necessary in such event, temporary

parking on the surfaced shoulders of the fully controlled access highway will be permitted, provided due care is exercised for the safety of the traveling public. Notice of such situation shall be given to the Iowa Highway Patrol and the Maintenance Department of the Iowa State Highway Commission as soon as reasonably prudent under the circumstances.

Section 6. In regard to necessary crossings for public utilities, drainage facilities, and other public services, designation of points of access thereto and routes therefrom and permits required therefor shall be obtained by application to the Maintenance Department of the Iowa State Highway Commission at Ames, Iowa. Said application shall set forth the name of the applicant, the type of public service or utility crossings involved, the exact location thereof, and such other information and specifications as may be required by said Maintenance Department in connection with such application.

Section 7. No structure of any type or public utility facility which is not authorized by the Iowa State Highway Commission as a part of the highway design for the safety and convenience of the general traveling public using a fully controlled access highway shall be constructed or placed thereon, except necessary public service and utility crossings, or except as hereinafter provided. Other uses of the highway right-of-way that are not a part of such highway design and that are not otherwise provided for herein may be authorized under circumstances where: (1) an application is made to the Iowa State Highway Commission, Ames, Iowa, which sets forth the type of such other use of the right-of-way desired, the specifications of any structures or facilities necessary thereto, and the desired location therefor, together with any other relevant information that may be thereafter requested by the Highway Commission; (2) the Iowa State Highway Commission finds and determines that such occupancy, use, or reservation is in the public interest and will not impair the highway or interfere with the free and safe flow of traffic thereon; and (3) permission for such use where granted will be on such terms and conditions as the Iowa State Highway Commission may prescribe for the safe use of the highway.