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of office of D, which will expire January 1, 1958. Section 7 of said statute, supra, provides if any such vacancy occurs in the office of school trustee in any such city by reason of death, resignation, disqualification or otherwise, except expiration of the elected term as provided in this Act, "the remaining trustees shall at their next regular meeting, or at a special meeting called for the purpose, elect a successor to fill such vacancy for the remainder of the unexpired term."

In my opinion such vacancy in D's office arises due to his being "disqualified" to continue serving the last two years of his original term of office for which he was elected, and that after January 1, 1956 the remaining members then on said board, A, B, D and E should elect a successor to fill such vacancy until January 1, 1958. In any event, such vacancy is not occasioned by any conditions or facts bringing it within the only exception to Sec. 7 of the statute, which is an "expiration of the elected term" of D, as his original term still has two more years to run. The foregoing assumes that D will accept the new office and enter in and upon the duties thereof.

OFFICIAL OPINION NO. 60

December 14, 1955

Hon. Warren Buchanan, Chairman
Public Service Commission of Indiana
401 State House
Indianapolis, Indiana

Dear Mr. Buchanan:

This is in reply to your request for an Official Opinion. Your letter, in part, reads as follows:

"When a municipal waterworks is admittedly under the jurisdiction of the Public Service Commission in regards to rates and finances within the municipality, if that same municipal waterworks contracts to sell water to other cities, both within and without the State, is such operation also under the jurisdiction of the Public Service Commission?

"The factual situation which has given rise to this question is as follows: The Hammond Waterworks
Board operates the municipal waterworks in the City of Hammond subject to Public Service Commission control. In addition the City has contracted for the sale of what it terms 'excess or surplus’ water to the cities of Lansing, Illinois, and Munster and Highland, Indiana, among others. The City claims that the sale of ‘excess and surplus’ water does not come under the jurisdiction of the Public Service Commission but is purely a contractual matter between the cities involved. Since the other Indiana cities involved either are in the process or propose to finance new waterworks and/or reservoir facilities in reliance upon the continuation of such contracts and their relative rates, the local city authorities desire a determination of their relationship with the City of Hammond and whether the waterworks board has exclusive discretion in determining rates under the contract or whether the entire transaction is under the jurisdiction of the Public Service Commission.”

The present Public Service Commission of Indiana was created in 1941, with all the powers and duties of the former Commission, and with additional powers and duties added from time to time.

Acts of 1941, Ch. 101, as amended, as found in Burns’ Indiana Statutes (1951 Repl.), Section 54-102 et seq.

Since there are a number of distinct and independent statutes concerning municipal waterworks, as well as certain amendments concerning the same made to the Shively-Spencer Act (Acts of 1913, Ch. 76, as found in Burns’ Indiana Statutes (1951 Repl.), Section 54-601 et seq.), the factual situations should be considered separately, and this opinion will therefore be concerned with your general question as related to the specific facts you have mentioned.

As a matter of geography, Munster and Highland are Indiana cities located almost entirely (if not entirely) within a five-mile radius of the City of Hammond. Although you refer only to “The Hammond Waterworks Board,” the waterworks of the City of Hammond has been made a part of a Department of Waterworks under the provisions of the Acts of 1933,
Ch. 235, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-5301 et seq., under the exclusive management and control of a board of trustees.

Ahlborn et al. v. City of Hammond (1952), 232 Ind. 12, 111 N. E. (2d) 70.

Thus, all the territory within the corporate limits of such city, and all territory within a radius of five [5] miles of such limits, constitutes a water district pursuant to that Act, and the board of trustees has a duty to furnish an adequate supply of water to consumers within such water district.

Acts of 1933, Ch. 235, Secs. 4 and 5, as found in Burns’ Indiana Statutes (1951 Repl.), Section 48-5304 and Section 48-5305.

Whether such supply of water to consumers in Munster and Highland is furnished directly, or through a municipal corporation, it is difficult to understand how such water in any event could be called “surplus” for any purpose.

As to the interest of the Public Service Commission in such case, the statute further provides as follows:

"The reasonable value of any service rendered to such city or other municipal corporation by such waterworks, by furnishing water for public purposes or by the maintenance of hydrants and other facilities for fire protection or otherwise, shall be charged against such city or other municipal corporation, and such sums so paid shall be kept and maintained in the same fund and apportioned in the same manner as other revenues derived from the furnishing of water for other purposes. The rates for such service to said city or any other municipality shall be included in the schedule of rates and be subject to the approval of the public service commission of Indiana, and shall be commensurate with the service rendered and the cost thereof." Acts of 1933, Ch. 235, Sec. 20, as found in Burns’ Indiana Statutes (1951 Repl.), Section 48-5320.

Insofar as sales of water to Lansing, Illinois is concerned, the sovereignty of the State of Indiana extends only to the
borders of the state (Indiana Constitution, Art. 14, Sec. 2) and of course the water district would terminate at that point, even though the state border is less than five [5] miles from the limits of the City of Hammond. Serious considerations concerning interstate commerce would necessarily confront your Commission in respect to regulation of rates and charges for water passing to the State of Illinois, whether delivery was made in Indiana or not, but there is no question that such service cannot be extended in the first instance without the consent of the Commission, under the provisions of the following Act:

"All municipal corporations of this state which now own or operate, or which may hereafter own or operate, electric light, power or water plants shall be and are hereby authorized, upon procuring the consent of the public service commission therefor, to furnish either electrical current or water, or both, to any person, firm or corporation, either municipal or private, living or situated without the corporate limits of the municipal corporation owning or operating such electric light, power or water plants." Acts of 1915, Ch. 123, Sec. 1, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-7207.

The Acts of 1933, Ch. 235, supra, has superseded this Act in respect to service within the water district, so that service furnished to consumers situate within that district but outside the city limits is not subject to the consent of the Commission.

The Supreme Court of Indiana has rejected a contention that a utility is not a public utility subject to Commission jurisdiction as to contract service to single large consumers,

Public Service Comm. v. Panhandle Eastern Pipeline Co. (1947), 224 Ind. 662, 71 N. E. (2d) 117.

and held that even though the commodity was moving in interstate commerce the Commission had jurisdiction to regulate as a local matter, since Congress had acted to place Federal control and regulation over the commodity only for sale in interstate commerce for resale.
Without Federal regulation in respect to interstate sale of water for resale, the same principle would apply, i.e., that where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the state appropriately deals in making reasonable provision for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power.

Minnesota Rate Cases (1913), 230 U. S. 352, 402, 33 S. Ct. 729, 57 L. Ed. 1511.

I do not mean to infer by the above discussion that a municipal corporation would have the power, even with the consent of the Public Service Commission of Indiana, to extend its mains outside the State of Indiana, or that the Public Service Commission of Indiana would have the unrestricted power to regulate the rates to be charged to an Illinois municipal corporation.

Since there are a number of problems which the Commission may encounter in respect to adequate service, rates and rate base if the board of trustees is permitted to sell water for delivery within the district to a municipal corporation situate outside the State of Indiana, which problems are essentially of an administrative character and not properly the concern of this office, my answer is limited to your question, on the facts stated, i.e., that it is my opinion that the sale of water to persons or municipalities within the district is subject to the regulation of the Public Service Commission of Indiana as to rates charged, and that the sale of water to municipalities situate outside the district cannot be made without the consent of said Commission.