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ten (10) years and shall bear interest at the rate provided for in section 11 of this act. * * *” (Our emphasis)

And it is further provided in part:

“* * * The department may issue to the clerk a satisfaction of lien in any case where it is shown that the full amount of judgment plus interest accrued thereon has been paid or where it is found that the assessment was in error but in no other case shall the department release any portion or parcel of taxpayer’s property affected by said judgment. * * *” (Our emphasis)

I believe that it is clear from the reading of the Act and specifically the above quoted portions of Section 13 (a), that after the delinquent tax has been determined and a warrant has been issued and filed that all the interest, penalties and damages become a part of the warrant and are made a part of the judgment constituting a lien upon the property of the taxpayer, and that the judgment shall bear interest as provided for in Section 11 of the Gross Income Tax Act, supra, which is at the rate of 1% per month.

OFFICIAL OPINION NO. 74
December 20, 1954

Hon. John W. Van Ness, Senator
Indiana General Assembly
603 Franklin Street
Valparaiso, Indiana

Dear Senator Van Ness:

This is in reply to your request for an Official Opinion, inquiring as to the following:

“Do municipal water departments in the State of Indiana come under the control of the Public Service Commission on matters pertaining to water main extensions?
If said municipalities do come under the control of said Commission, and the Commission orders a water main extension to be made, can the municipality pass on all or a part of the cost of said extension to prospective customers?"

For purposes of clarity this Official Opinion in regard to water main extensions will pursue the following outline:

1. What municipal waterworks may do voluntarily, either with or without Public Service Commission approval.
   (a) Municipal utilities under Acts of 1913, Ch. 76, as amended, excluding fifth class cities under Acts of 1933, Ch. 259—Without approval of Public Service Commission;
   (b) Municipal water districts under permissive Acts of 1933, Ch. 235; including fifth class cities who have qualified under said permissive act—Without approval of Public Service Commission.

2. What duties municipal utilities have and by whom and how they may be enforced.
   (a) Duties;
   (b) Enforcement upon Public Service Commission’s own motion;
   (c) Enforcement by petition to Public Service Commission from complainers.

3. What portion of the cost of extending a water main a municipality may pass on to third parties. [Public Service Commission, Rules and Regulations, Section 105-3, Rule 29, as approved November 8, 1945, in Public Service Commission Docket No. 17689.]

1(a): The Acts of 1913, Ch. 76, as amended, as found in Burns’ Indiana Statutes (1951 Repl.), Section 54-601 et seq., is a general municipal utility act, commonly known as the Shively-Spencer Utility Commission Act. It conferred the powers of the former Railroad Commission on a newly created Public Service Commission. The Act deals with all types of utilities in general and does not specifically treat municipal
waterworks separately. The Act required all those operating a public utility to surrender whatever form of franchise they were operating under and to secure an “indeterminate permit” from the Public Service Commission by July 1, 1915. Section 98, Ch. 76, as amended, supra, makes the following exception:

“Any municipality in the state of Indiana is hereby empowered, subject to the provisions of this act applicable thereto, to own, lease, erect, establish, purchase, condemn, construct, acquire, hold and operate any utility within the boundaries of such municipality, and within a radius of six miles from the corporate limits of such municipality, without the consent or control of any department, bureau or commission other than the municipal council of the municipality in which such utility may be operated. * * *” (Our emphasis)

Section 105 of said Ch. 76, as amended, supra, places a duty upon a municipality operating such a utility, as follows:

“Every municipality owning or operating a utility under this act is required to furnish reasonably adequate services and facilities. * * * A reasonable and just charge * * * shall be such charges as shall provide * * * funds for making extensions and replacements * * *.” (Our emphasis)

Since a municipality is given the power to “condemn, construct and operate” any utility without the consent of the Public Service Commission, and has a duty to “furnish reasonably adequate services and facilities,” and since it may charge to provide sufficient funds “for making extensions and replacements,” a municipal water department did not have to obtain the consent of the Public Service Commission to make a water extension under this Act. But the Legislature subsequently passed the Acts of 1929, Ch. 155, as found in Burns’ Indiana Statutes (1950 Repl.), Section 48-5328 et seq., which had the following title:

“An Act to authorize cities of the fourth class owning and operating unencumbered waterworks to provide for extensions and additions of such waterworks. * * *”
Sections 1 and 2 of said Ch. 155, supra, provide:

"Sec. 1: Be it enacted by the general assembly of the State of Indiana, That any city of the fourth class owning and operating unincumbered waterworks * * *.

"Sec. 2: Subject to the approval of the public service commission of the State of Indiana, heretofore acquired or hereafter to be acquired, any city, town or other municipal corporation in this state may contract with any person or corporation for the making of extensions and additions of waterworks * * *.” (Our emphasis)

While the title and Section 1 contain restrictions to fourth class cities, none of the remaining sections do. Therefore, construed to uphold its constitutionality, all provisions of Chapter 155, supra, must be interpreted as applying only to fourth class cities, i.e., every time a provision in the body says “any city” the phrase “of the fourth class” must be read in, due to the restriction in the title.

In 1933, Ch. 254 amended the Acts of 1929, Ch. 155, as follows:

"Sec. 1: Be it enacted by the general assembly of the State of Indiana, That the title of the above entitled act be amended to read as follows: An act to authorize cities and towns owning and operating unincumbered waterworks and/or other utilities to provide for extensions and additions of such waterworks and/or other utilities and the issuance of bonds payable only from the revenue and receipts of such waterworks and/or other utilities for said extensions and additions and declaring an emergency.

"Sec. 2: That section 1 of the above entitled act be amended to read as follows: Section 1. Any city or town owning and operating unincumbered waterworks, supplying such city or town * * *.”

Section 3 of said amending act re-enacts Section 10 of the 1929 Act verbatim, and Section 4 adds a new section on municipal bonds.

It is settled constitutional law in Indiana that while Art. 4,
Sec. 19 of the Indiana Constitution requires all acts to be limited to one subject which is expressed in the title, still, a subsequent legislature may broaden that subject-matter by amending the title of the prior act to allow inclusion of correspondingly broader subject-matter. Crabbs v. State (1923), 193 Ind. 248, 255, 139 N. E. 180. See also 1944 O. A. G., page 96, No. 27.

However, Section 2 of said Ch. 254, supra, amends Section 1 of said 1929 Act, leaving out the enacting clause of said 1929 Act which was contained in said Section 1. Provisions of an amended section which are not set out in the amending section are repealed. Sutton v. State (1951), 230 Ind. 62, 101 N. E. (2d) 636; Sutherland Statutory Construction (Horack's 3rd Ed.), Section 1932. Art. 4, Sec. 1 of the Indiana Constitution provides:

"** * * The style of every law shall be: 'Be it enacted by the General Assembly of the State of Indiana' * * *

Therefore, the repeal of the enacting clause invalidates the amended act, except for re-enacted Sections 1 and 10. May v. Rice (1883), 91 Ind. 546; Sutherland Statutory Construction (Horack's 3rd Ed.), Section 1903. Since the remaining sections of the Acts of 1929, Ch. 155, supra, are invalid, fourth class cities are still covered under Acts of 1913, Ch. 76, supra, and do not require Commission approval to make water main extensions.

During the same 1933 term, the Legislature passed an act identical to that of Ch. 254, but applying only to fifth class cities and requiring Commission approval for water main extensions. [Acts 1933, Ch. 259, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-5441.] This act being more specific than Acts of 1913, Ch. 76, supra, repeals by implication that portion of said prior general act which would allow fifth class cities to make water main extensions without Commission approval. 50 Am. Jur., Statutes, § 563. See also 1942 O. A. G., page 140.

1(b): In 1933, the Legislature passed the Acts of 1933, Ch. 235, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-5305, the title and pertinent section of which are as follows:

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"AN ACT authorizing cities and towns owning and operating waterworks to create a department of waterworks, establishing a water district and the boundaries thereof, providing for building extensions and additions to such waterworks and for the operation, maintenance and management thereof, * * *.

* * *

"Sec. 5: The said board of trustees of said water department shall have exclusive government, management, regulation and control of any waterworks system, or part or parts of waterworks system within such district, and shall have all necessary power to purchase, construct, maintain, operate and repair such system or parts thereof.

"In connection with the duties devolving upon such board as aforesaid, it shall have full power as follows:

* * *

"3. To design, order, contract for and construct a waterworks system, or any part thereof, now or hereafter necessary, and to make, construct, alter and build additions, extensions and betterments thereto, within such water district." (Our emphasis)

The Acts of 1933, Ch. 235, supra, has been held by the Supreme Court of Indiana to be a permissive and not a mandatory act. Long v. Stemm (1937), 212 Ind. 214, 7 N. E. (2d) 188.

Therefore, it is my conclusion, based upon the above set out statutes, that municipal waterworks utilities do not have to secure the approval of the Public Service Commission of Indiana before extending a water main, unless the municipality is a fifth class city, in which case it must secure such approval, provided said fifth class city has not voluntarily availed itself of and qualified itself within the provisions of the Acts of 1933, Ch. 235, supra, by setting up a water district and a board of trustees, in which case said fifth class city does not have to obtain approval of the Commission before extending a water main.

It should be noted in passing that municipal waterworks of
fifth class cities under 1(a), not only have to secure approval of the Public Service Commission of Indiana for any contracts entered into for extensions and additions [Acts 1933, Ch. 259, Sec. 2, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-5442], but also said fifth class city municipal waterworks must secure Public Service Commission approval of the status of their income and revenue before being entitled to issue any bonds to pay for the extensions. [Acts 1933, Ch. 259, Sec. 11, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-5451.]

2(a): As heretofore set out under 1(a), the Acts of 1913, Ch. 76, Sec. 105, as amended, places the duty upon any municipal utility "to furnish reasonably adequate services and facilities." Since the permissive act, Acts of 1933, Ch. 235, supra, does not specify any different or lesser duty, the same duty would apply to both municipal utilities under 1(a), and municipal water districts under 1(b). See Logansport v. Public Service Commission of Indiana (1931), 202 Ind. 523, 177 N. E. 249, 76 A. L. R. 838. See Anno: 97 A. L. R. 838.

2(b): The Public Service Commission has both the power and duty to enforce the laws of the state as to municipal utilities [Acts of 1913, Ch. 76, Sec. 124, as found in Burns' Indiana Statutes (1951 Repl.), Section 54-714]. Should the Public Service Commission feel that any municipal waterworks utility is not furnishing "reasonably adequate services and facilities" (which might mean a needed water main extension), it could proceed to make such orders as are necessary to require the extension after the usual notice, hearing, et cetera. [Acts of 1951, Ch. 101, as found in Burns' Indiana Statutes (1951 Repl.), Section 54-112.] See Anno: 45 A. L. R. 829; 43 Am. Jur., Public Utilities and Services, § 199. As to findings necessary for Public Service Commission to require extensions, see L. R. A. 1916F, 756; as to discretion of Public Service Commission, see Anno: 45 A. L. R. 829.

2(c): Persons or entities dissatisfied with the acts or services of a municipal water utility may proceed in the following fashion:

"Upon a complaint made against any public utility by any mercantile, agricultural or manufacturing society or by any body politic or municipal organization
or by ten persons, firms, corporations or associations, or ten complainants of all or any of the aforementioned classes, or by any public utility * * * that any regulation, measurement, practice or act whatsoever affecting or relating to the service of any public utility, or any service in connection therewith, is in any respect unreasonable, unsafe, insufficient or unjustly discriminatory, or that any service is inadequate or can not be obtained, the commission shall proceed, with or without notice, to make such investigation as it may deem necessary or convenient. * * *” (Our emphasis)

Acts of 1913, Ch. 76, Sec. 57, as found in Burns' Indiana Statutes (1951 Repl.), Section 54-408.

It would be possible under this statute for dissatisfied persons to complain in order to prevent a contemplated water main extension, as well as to request one. As to the reasonableness of a demand for extension, see Anno: 97 A. L. R. 839, 47 L. R. A. (NS) 656, and 43 Am. Jur., Public Utilities and Services, § 48.

The Acts of 1913, Ch. 76, Sec. 98, as found in Burns' Indiana Statutes (1951 Repl.), Section 54-602, set the geographic limits of a municipal utility's powers:

"* * * within boundaries of such municipality and within a radius of six miles from the corporate limits of such municipality * * *.” (Our emphasis)

The permissive Acts of 1933, Ch. 235, Sec. 4, as found in Burns' Indiana Statutes (1950 Repl.), Section 48-5304, defines the geographic limits of a municipal water district as:

"* * * all the territory included within the corporate limits of such city, and all territory within a radius of five miles of such limits * * *.” (Our emphasis)

Apparently, municipalities taking advantage of the later permissive act lose a mile from the radius of their circle of jurisdiction in the process.

It would seem axiomatic that municipal utilities have no authority nor can they be compelled by the Public Service Commission to make water main extensions outside of the
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territorial limits established by the Legislature. [As to related
gas line extensions, see Anno: 31 A. L. R. 333.] However, it
is equally clear that most municipalities have the power to
indirectly increase the radius of their jurisdiction by expand-
ing the corporate limits of the municipality through the
process of annexation.

Pursuant to the Acts of 1945, Ch. 120, as found in Burns' Indiana Statutes (1951 Repl.), Section 60-1501 et seq., the Public Service Commission of Indiana adopted the following Rule:

"Sec. 105-3. Rules and Standards of Service for Water Utilities in Indiana.

"Statutory Provisions:

"Rule 1. Original jurisdiction lies with the municipal governments in Indiana in the matter of fixing stand-
ards of service, and also in the matter of water main extensions. The commission exercises only appellate jurisdiction in these matters, and in case of appeal to the commission it will to a very great extent be gov-
erned by the following standards and requirements * * *." (Our emphasis)

Public Service Commission Rules and Regulations, Sec. 105-3, as approved November 8, 1945, in Public Service Commission Docket No. 17689.

To the extent that this Rule conflicts with the statutes here-
tofore discussed in this opinion, it would be void. Just as an administrative body cannot enlarge its powers beyond those conferred by the Legislature, so it cannot restrict its jurisdic-
tion to a narrower scope than that prescribed by the Legis-
lature. It has heretofore been pointed out that a fifth class city under Acts of 1933, Ch. 259, supra, does not have "origi-
nal" jurisdiction, to make a water main extension—it must first secure approval of the Commission, unless it has brought itself within the terms of Acts of 1933, Ch. 235, supra, by setting up a water district, in which case it does have "origi-
nal" jurisdiction to make a water main extension. The lan-
guage of the rule might be rationalized if the Commission was using the term "appellate" in the sense of "citizens appealing

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from the failure of a municipality to act, or acting in an inadequate or unreasonable manner.” At any rate, it remains a gratuitous pronouncement by a legislative agency which cannot change the law enacted by the Legislature.

3: What portion of the cost of extending a water main, a municipality may pass on to third parties.

The relative competing interests involved and the reasoning behind any sharing of the cost of extension has been well summed up in the following administrative agency pronouncement in regard to electrical service:

"Since rural * * * service is not, as a general thing, capable of supporting the full cost of the service, including the return on the capital, unless the rural customer is to pay a part or all of the construction cost, the service either will not be furnished, or customers residing in cities and villages must make up the loss, or the loss must be carried by the utility, and since it is not fair to require the utility to extend its service at a loss or to require local customers to make up the loss, rules requiring reasonable connecting charges in rural districts will be upheld."


Similarly, to a prospective water customer, the cost of a given main extension has three-fold significance: (A) If prohibitive in relation to anticipated revenue to the municipality, the Commission may not order the extension at all; (B) If the Commission does order the extension it may order the particular prospective customer to bear a given portion of the initial cost of extension, to avoid any undue burden being placed upon either the other customers or the utility itself; (C) After the prospective customer has borne a portion of the initial cost, he would expect to be reimbursed gradually as the extension begins to pay for itself or others hook on and use it. Point A is an administrative matter involving discretion of the Commission and is discussed in L. R. A. 1916F, 756, 45 A. L. R. 829.

Points B and C are also administrative matters involving commission discretion. The Public Service Commission of
Indiana has set up certain standards and requirements by which it will ordinarily determine the proportionate share that a prospective customer must pay of the cost of a given water main extension. [Public Service Commission Rules & Regulations, Sec. 105-3, Rule 29, as approved November 8, 1945, in Public Service Commission of Indiana Docket No. 17689.] This Rule sets up an arbitrary dividing line of six years as the time in which the estimated total revenue from prospective customers should equal the cost of the extension. If it does, the extension is free; if it doesn’t, a formula is provided for a deposit and refund.

Subsection (e) under Rule 29 supra provides:

“This rule shall not be construed as prohibiting any utility from making free extensions of lengths greater than above specified, from providing an alternate plan approved by the Commission, or from providing a method of return of deposits for extensions more favorable to customers, so long as no discrimination is practiced between customers whose service requirements are similar.”

Subsection (f) under Rule 29, supra, provides that no extensions should be required unless the prospective customers will contract to use the service for four years.

Fifth class municipalities under Acts of 1933, Ch. 259, supra, as amended by Acts of 1933, Ch. 254, supra, will be faced with these standards and requirements when they seek approval before making a water main extension; all other municipalities, and fifth class cities within the terms of the Acts of 1933, Ch. 235 will be faced with them after making a water main extension of which customers disapprove, or after refusal to make a water main extension which the prospective customers feel is an unreasonable refusal. [For annotation involving electrical extension as affected by cost, see 58 A. L. R. 537.]

These are administrative matters to be decided upon the facts in each individual case by the Public Service Commission when properly presented with a case within its jurisdiction.
Since these exercises of discretion are entrusted to a legislative agency by the Legislature itself, they are not proper subjects of judicial review in advance of their actual application to a given set of facts and a resultant Commission order.