Mr. Otto K. Jensen,
State Examiner,
State Board of Accounts,
State House, Room 304,
Indianapolis, Indiana.

Dear Sir:

I have your letter in which you ask the following questions:


"2. Does this Act apply to towns of 2,000 to 10,000 which are not at the present time civil cities pursuant to election or otherwise under previous laws?"

In order to understand and interpret this Act it is necessary to have the state of facts that existed at the time of its passage before us. Section 1, Chapter 233, Acts of 1933, Burns' 48-1201 provided that cities of the fifth class must have a population of at least 3,000. Section 2 of said Act provided that all then present civil cities with a population of less than 3,000 should on or after twelve o'clock noon of the first Monday of January, 1934, become civil towns and should operate thereafter under the provisions of the laws pertaining to the government of civil towns. This section further provided for the election of town officers for those cities affected by the Act. Several of the then cities affected by the Act, by court judgments, had the Act so far as their particular cities were concerned declared unconstitutional and restraining orders were issued by the courts to prevent those cities from holding town elections. These court judgments were unappealed from and therefore the municipalities in question remained cities by a court order.


The Act of 1933, supra, was later amended by the Act of 1935, Chapter 97, 48-1201 Burns' 1948 Supplement. The 1935 amendment reduced the minimum population of cities
of the fifth class from 3,000 to 2,000. Section 2 of the 1935
Act, 48-1202, 1948 Supplement, provides:

"All present civil towns with a population of more
than two thousand (2,000) and less than ten thousand
(10,000), as shown by the last preceding United States
census, which, prior to the taking effect of chapter
233 of the Acts of the General Assembly at the session
of 1933, approved March 9, 1933, were civil cities and
reverted to civil towns, shall, upon the taking effect of
this act, become civil cities and shall operate thereafter
under the provisions of the laws pertaining to the gov-
ernment of civil cities: Provided, That the present
board of trustees of any such town shall become mem-
ers of the common council and shall elect a mayor and
all other officers of said city in conformity to the re-
quirements of chapter 233 of the Acts of the General
Assembly at the session 1933, approved March 9, 1933,
and the mayor and council shall have the power there-
after to fill all vacancies occurring in any such offices
and such elected and appointed officers shall serve as
such until the first Monday in January, 1939, and until
their successors are duly elected and qualified: * * *"
(Our emphasis.)

As indicated above, there were several municipalities which,
because of court judgments, did not revert to civil towns and
the question has oftentimes arisen as to whether or not this
section had any application to them as the section of the Act
refers to "all present civil towns." See: 1937 O. A. G., 401.
This is true especially here of late when several of these
cities have applied to the Federal Government for loans on
flood control projects. In passing, it might be noted that by
the Acts of 1935, Chapter 240, Section 2, page 1245, Section
48-1248, 1948 Burns' Supplement, procedure is set up whereby
civil towns may become cities of the fifth class.

The Act in question, including the title is as follows:

"AN ACT concerning the classification and govern-
ment of certain civil cities, and declaring an emergency.

"BE IT ENACTED BY THE GENERAL ASSEMBLY
OF THE STATE OF INDIANA:
"SECTION 1. All municipal corporations whatsoever having a population of two thousand (2,000) or over and less than ten thousand (10,000), according to the last preceding United States census, are hereby declared to be cities of the fifth class."

It is to be noted that though the title of the Act declares an emergency the Act itself did not contain an emergency clause. Therefore, the Act will become effective at the time the Acts are published.

Section 28, Article 4 of the Indiana Constitution; State v. Williams (1910), 173 Ind. 414, 90 N. E. 754.

It is likewise to be noted that this Act makes no provision for a method by which a municipal corporation not a city shall become a city, that is, it provides for no election or other method by which the municipality may be governed. By statute the next city election is to be held in 1951—the primary to be held on the first Tuesday after the first Monday in May and the election on the first Tuesday after the first Monday in November, Section 29-4312-13 Burns’ 1947 Pocket Supplement.

There are radically different laws governing cities and towns. The offices and procedure vary greatly. Cities of the fifth class are governed by a city council and have a clerk, treasurer and mayor. Burns’ 48-1219. Towns are managed by a board of trustees of not less than three and not more than seven which employs a superintendent.

In the case of Keane v. Remy (1929), 201 Ind. 286 it was said, at page 293:

"* * * and further if the act provides no sufficient means whereby it may be enforced, the act or the section of the act which fails in that particular should be declared judicially invalid and void. A legislative act is stillborn, without life, though it be attended at its inception with all the official function necessary to give it life, unless it contains within it a delegation and grant of power by which it may be carried into effect. * * *” (Our emphasis.)
In the case of Harrell v. Sullivan (1941), 220 Ind. 108 our Supreme Court in discussing the problem of impossibility of performance at page 116 said:

"It is contended that the act under consideration is unworkable and, therefore, void because it creates boards of registration in certain counties composed of two members of opposite political affiliations with no provisions for settling disputes between them in the event of a disagreement and because the obligations imposed upon health officers with respect to reporting deaths are impossible of performance in point of time. In support of these contentions the appellants rely on Keane v. Remy (1929), 201 Ind. 286, 168 N. E. 10, which is authority for the statement that a legislative act may be declared invalid if it does not, in some manner, provide sufficient means whereby it may be executed. This is undoubtedly true, but chapter 100 is not open to that objection. The means of execution are provided, and this court must presume that the public officers referred to in the act can and will discharge the duties imposed upon them according to law. So. Ind. Gas & Elec. Co. v. City of Boonville (1939), 215 Ind. 552, 20 N. E. (2d) 648. There may be differences of opinion as to the wisdom or efficiency of the act, but these pertain to matters of policy for which the Legislature alone is responsible."

See also 1944 O. A. G., 81, 84, in which the Attorney General ruled on a similar problem in connection with the State Personnel Act as follows:

"If certain provisions of an act make it unworkable and impossible of performance, such provisions are void and of no effect. Keane v. Remy (1929), 201 Ind. 286. If such provisions later become possible of performance, they come into effect at such later time, but during the time of impossibility they are suspended or held in abeyance. Board of Education v. Morgan (1925), 147 N. E. 34 (Ill.)"

As the Act in question provides no machinery for the change-over it is invalid as to those municipalities not now
having civil city officials or not now organized as a city. I do believe, however; that there is a possibility that because of this Act the present election laws with reference to civil cities may be applicable and therefore the Act may become possible of performance in 1951.

The fact that the title of the Act mentions only civil cities might serve both as an indication of legislative intent and a limitation in the subject matter of the Act. (See: City of Indianapolis v. Evans (1940), 216 Ind. 555, 24 N. E. (2) 776). That title as we have seen is as follows:

"AN ACT concerning the classification and government of certain civil cities, and declaring an emergency."

For the reasons given, the answer to your second question is that said Act does not apply to towns which were not civil cities pursuant to an election, court decree or otherwise prior to the effective date of the Act in question. And an examination of the legislative history of this Act shows that when the original bill (the Act in question) was introduced there was attached thereto the following digest or synopsis:

"An act to clarify the status of certain municipalities between a population range of 2,000 and 10,000, whose status became uncertain as to whether they were towns or cities by virtue of the enactment of Chapter 233, Acts of 1933 and Chapter 97 of the Acts of 1935. This is particularly adaptable to the City of Delphi.

"It will enable the City of Delphi to so reorganize its city boards so as to qualify for federal assistance on flood control projects and clarify its status for all other purposes."

While this digest is not a part of the law it may be considered as showing legislative intent and that the Act was apparently considered as applying only to Delphi and cities in like situation. My information is that Delphi was a city operating with a city council, mayor and city officials both prior and subsequent to the Act of 1933, supra, and was subsequent to the Act of 1933, supra, held by a court decree to be a city. However, there was doubt as to whether it was an
unclassified city or a city of the fifth class and some doubt as to whether it was a city at all and this bill was intended to settle that question. If this information be correct the Act would apply to Delphi only and classify it as a city of the fifth class and would be valid for that purpose.

In addition to answering your specific questions I believe it well to say that in my opinion this Act in no way affects the fiscal affairs of civil cites or towns in the State of Indiana.

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OFFICIAL OPINION NO. 51
June 9, 1949.

Hon. Henry F. Schricker,
Governor of Indiana,
State House,
Indianapolis, Indiana.

My Dear Governor:

I have before me your letter of May 28, which is as follows:

"I hereby request an official opinion of your office upon the following question:

"Does a municipally owned utility, owned and operated by a municipality, fall within the purview and meaning of the term 'public utility' as used and defined in Section 2 of Chapter 341 of the Acts of 1947?

"While I am submitting the above question in general form, I attach hereto a petition presented by Local Union L-723 International Brotherhood of Electrical Workers of Fort Wayne which raises the question of my official duty under Section 5 of the above mentioned act."

With the idea of possibly having a more thorough understanding of your question, we have immediately scrutinized the petition attached and the allegations contained therein, and as a result our investigation discloses that the business and financial structure of the City Light & Power Company