CONCLUSION

It is, therefore, my opinion that:

1. It is your duty, as Governor, under Section 18 of Article 5 of the Constitution to appoint a Lieutenant Governor to fill the vacancy in that office caused by the resignation of the incumbent.

2. That Chapter 183 of the Acts of 1941 is unconstitutional and that the Auditor of State has no power or authority to perform any of the duties of the Lieutenant Governor or to succeed him as a member of any board or commission.

3. That the person appointed by you will hold office until the election and qualification of a Lieutenant Governor for the four-year term beginning on the second Monday of January of 1949.

OFFICIAL OPINION NO. 31

April 5, 1948.

Mr. LeRoy E. Yoder, Chairman,
Public Service Commission,
401 State House,
Indianapolis, Indiana.

Dear Sir:

Receipt is acknowledged of your letter of March 12, 1948 in which you request an opinion as to the jurisdiction of the Public Service Commission over municipal water utilities in the State of Indiana and especially pertaining to the water company in Michigan City, Indiana. Receipt is likewise acknowledged of the enclosed letter from the legal representative of the Department of Water Works of the city of Michigan City, Indiana.

The writer of the enclosed letter states the Department of Water Works of Michigan City, Indiana is constituted and operating under and by virtue of Chapter 235 of the Acts of 1933, being Sections 48-5301 to 48-5327 of Burns. He states that this chapter is an amendment to Chapter 18 of the Acts of 1931 and that it was under the 1931 Act that Michigan City first established its water department; also that the 1933

Amendment broadened the act so that other cities and towns might come under such act. He further contends that by Section 5, Item 5 of Chapter 235 of the Acts of 1933 the trustees of the water department were given the power to fix rates and collect water rental; that by Item 6 of said section the trustees were given power to make and adopt by-laws, rules and regulations subject to the approval of the Public Service Commission; and that Section 20 of said act provides that any services rendered the city or municipal corporation shall be charged against such city or other municipal corporation, and that the rates charged said city shall be subject to the appoval of the Public Service Commission of Indiana.

In summing up he contends that the Public Service Commission's approval is required only in the adoption of rules and regulations and the rate to be charged for service rendered to the municipality; that the Department of Water Works has the full and exclusive power, without the approval of the Public Service Commission, to make rates for water service to any users other than the city or other municipal corporations.

The writer further points out, in support of his position and contention that the Public Service Commission has no jurisdiction over water rate hearings, that Chapter 190 of the Acts of 1933, same being an amendment of Chapter 76 of the Acts of 1913, same being the original Public Service Commission Act, specifically eliminated municipally owned utilities from the definition of public utilities and that the most that can be said is that Chapter 190 of the Acts of 1933 constituted but an independent and alternative authority in so far as it provided a method for acquiring water works and paying therefor.

First, I desire to point out Chapter 18 of the Acts of 1931, page 26, the title of which reads:

> "AN ACT concerning municipally owned water works, in cities having a population of more than twenty thousand (20,000) and less than thirty-five thousand (35,000), according to the last preceding United States census, where the chief source of water supply therefor is derived from a lake not wholly within the boundaries of the State of Indiana, and declaring an emergency."

and which specifically applied to the city of Michigan City was specifically repealed by Section 27 of Chapter 235 of the Acts of 1933. It will be noted that Chapter 235 of the Acts of 1933 was an act to authorize cities and towns owning and operating water works to create a department of water works, establish a water district, provide for extensions and additions to the system, and for the management thereof.

Section 1 of this act provides:

> "Any city or town owning and operating a water works may, by ordinance adopted by the common council of any such city or the board of trustees of any such town, create a department of water works in such city or town, subject to the provisions of this act as hereinafter set out. * * *." (Section 48-5301 Burns', 1933.)

In the case of Kirkpatrick v. City of Greensburg (1943), 113 Ind. App. 402, it was held that this act is permissive in form rather than mandatory, and that a city in order to avail itself of this act would have to adopt an ordinance creating a department of water works and be subject to the provisions of the act as set out.

It is further held in this case that none of the provisions of Chapter 96, Acts of 1921, the title of which act reads:

> "AN ACT to authorize cities, towns and other municipal corporations to purchase and acquire waterworks and to issue bonds therefor, payable from the revenues and receipts of such works."

(which act, together with the amendments thereto is now set forth at Section 48-5343, Burns' 1933 and subsequent sections) were repealed by the provisions of Chapter 235 of the Acts of 1933.

In the case of Hamilton v. Public Service Commission (1938), 215 Ind. 138, it was held that Chapter 190 of the Acts of 1933 constituted an independent, alternative authority in so far as it provides a method for providing water works and paying therefor, and that this act in no way repealed, modified, affected or superseded, in whole or in part, Chapter 96 of the Acts of 1921 or any amendment or supplement thereto. It may be as the writer states that the city of Michigan City

is operating its water works as per Chapter 235 of the Acts of 1933, as it is provided by Section 1 of said act, same being Section 48-5301, Burns:

> "* * * That if such water works now be under the control and management of a board of trustees heretofore appointed under the authority of any ordinance enacted pursuant to the provisions of chapter 18, Acts of the General Assembly of the state of Indiana, 1931, approved February 20, 1931, and any acts amendatory thereof, a readoption of such ordinance and reappointment of such trustees shall not be deemed necessary, but such ordinance and all ordinances amendatory thereof or supplemental thereto, and all resolutions, orders and acts of the common council and of the board of public works incidental to the transfer of such waterworks to the control and management of such trustees, and all acts of said board of trustees heretofore performed under said chapter 18 of the Acts of 1931, are hereby confirmed and shall be valid for all purposes as though adopted, passed and performed under the provisions of this act."

The Acts of 1921, Chapter 96, Section 16, page 205; 1927, Chapter 90, Section 3, page 557, same being Section 48-5365, Burns', gave to the governing body of the municipality, subject to the jurisdiction of the Public Service Commission of Indiana, power to make rules and regulations governing the furnishing of service to patrons and for the payment of same.

As no provisions of the Acts of 1921, Chapter 96, have been repealed or modified or affected by Chapter 235 of the Acts of 1933, and as Chapter 190 of the Acts of 1933 constituted an independent alternative authority in so far as it provides a method for providing water and paying therefor, and that said act in no way repealed, modified, affected or superseded in whole or in part Chapter 96 of the Acts of 1921 or any amendment or supplement thereto, it follows that the Public Service Commission still retains jurisdiction in water rate hearings of municipally owned water works operating under said act (Acts of 1921, Chapter 96).

The question then presents itself, what jurisdiction has the Public Service Commission in water rate hearings of munici-

pally owned water works operating under Chapter 235 of the Acts of 1933 and what effect, if any, Chapter 190 of the Acts of 1933 had on the matter of jurisdiction of the Public Service Commission in water rate hearings of municipally owned utilities.

It is well settled that a municipal corporation is a subordinate branch of the domestic government of the state and possesses only those powers expressly granted by the legislature, those necessarily or fairly implied in or incident to powers expressly granted, and those indispensable to the declared purposes and objects of the municipalities.

> City of Huntington v. Northern Indiana Power Co. (1936), 211 Ind. 502 at 519, 5 N. E. (2d) 889.

In the case of City of Logansport v. Public Service Commission (1931), 202 Ind. 523, our court held at page 535 that:

> "* * * Rate regulation is a matter of the police power of the state * * * The rate-making power is a legislative function, and necessarily involves legislative discretion * * * The right to regulate public utility rates is a power vested in the state. It may be delegated to the municipality but such an intent must clearly appear. Every doubt must be resolved in favor of the continuance of the power in the state."

The Spencer-Shively Act creating the Public Service Commission, same being Chapter 76 of the Acts of 1913, vested in the Public Service Commission power to fix the rates of all public utilities that are within the definition of the term "public utility" in Section 1 of the act.

> City of Logansport v. Public Service Commission, *supra;* Greensburg Water Co. v. Lewis (1921), 189 Ind. 439, 128 N. E. 103.

Chapter 190 of the Acts of 1933, page 928, Section 54-105 Burns', 1933, amends Section 1 of the Acts of 1913 by changing the definition of the term "public utility" so as to exclude municipally owned plants. There are other sections, how-

ever, in the Act of 1933 providing for the regulation and operation of municipally owned utilities.

> Wilkins v. Leeds (1939), 216 Ind. 508 at 510, 25 N. E. (2) 442.

I believe it well to mention here that Section 23 of said act (Chapter 190, Acts of 1933) amended the title of the Spencer-Shively Act, Acts of 1913, Chapter 76, and that same now reads:

> "AN ACT concerning public and municipally owned utilities, authorizing municipalities to hold, own, acquire, construct and operate utilities and to issue bonds to pay therefor, providing the manner in which such municipalities may acquire and pay for such utilities, abolishing the railroad commission of Indiana and conferring the powers of the railroad commission on the public service commission."

Section 1 of said act defines other terms as used in said act in addition to the term "public utility." The term "rate" as used in said act is defined:

> "The term 'rate' as used in this act shall mean and include every individual or joint rate, fare, toll, charge, rental or other compensation of any utility or any two or more such individual or joint rates, fares, tolls, charges, rentals or other compensations of any utility or any schedule or tariff thereof, but nothing in this paragraph shall give the commission any control, jurisdiction or authority over the rate charged by a municipally owned utility except as in this act expressly provided."

Said section defines the term "municipally owned utility" as:

> "The term 'municipally owned utility' shall include every utility owned or operated by a municipality."

Section 109 of the Spencer-Shively Act was amended by Section 19 of the Acts of 1933, Chapter 190, same being Section 54-613, Burns' 1933. It now provides as follows:

"In the operation of any utility now owned by any municipality in this state, or any utility that may hereafter he constructed or acquired by any municipality in this state, the municipal council of any such municipality may operate such utility, or it may provide for the operation thereof by a committee of its own members, or it may by ordinance establish for that purpose a utility service board; Provided, That if such municipality has a board of public works such board may operate and manage such utility with the same powers and authority as provided herein by a utility service board. If such municipality determines to establish a utility service board, it shall be the duty of its municipal council to provide, by ordinance, for the establishment of a utility service board to be composed of not less than three (3) nor more than seven (7) members, not more than a majority of whom shall be members of the same political party. In the ordinance establishing such board provision shall be made for the appointment of the majority members thereof by the mayor or executive head of such municipality, a minority of the members to be appointed by the municipal council, the term of office to be for four (4) years but to be so arranged in the first appointments to permit alternating terms in future appointments. Said ordinance shall also stipulate the salaries, if any, to be paid the members of such board, and the board shall be authorized to select its chairman. Such board, when organized, shall select a manager who shall have executive charge of any such utility owned by the municipality. Such manager may be removed by such board for cause, at any time, after notice and a hearing. If more than one (1) utility is owned by the municipality then a manager may be selected for each such separate utility as the board may determine. In the appointment of a manager the board shall make the selection on the basis of fitness to manage the particular utility to which he is to be assigned, taking into account his executive ability and his knowledge of the utility industry. The board shall fix the number and the compensation of all employees, including the manager, such compensation to be submitted to

the municipal council for approval, the council shall have authority to lower such compensation but not to raise it. Each year, at a time to be fixed by the municipal council, the board shall submit a budget of its financial needs for the ensuing year to be set out in such detail as the municipal council may direct, the council having the power to lower any item or items in such budget but not to raise any such item or items. *The utility service board shall have general supervision over the utility or utilities owned by a municipality, fixing the policy of control, including the establishment of rates and other regulations, with the approval of the municipal council,* but in no way to interfere with the detailed supervision of the utility by the manager, who is to be held responsible to such board for the business and technical operation of the utility. The utility service board shall adopt rules and regulations governing the appointment of all employees, making proper classifications, such rules to determine the eligibility of applicants; to determine by competitive examination the relative fitness of applicants for positions; to establish eligible lists arranged according to the ratings secured, and to provide for the appointment of those having the highest ratings, in compliance with such rules as such board may establish for that purpose, appointments to be made from such eligible lists by the manager, such manager having the right to discharge at will but shall be required to state the cause; Provided, That unskilled labor may be employed by the manager in such manner as he may direct without competitive examination. Such rules shall also provide methods of promotion of employees; *Provided, however, That (in) any municipality in this state that now operates such a utility by a committee of its municipal council, such committee may operate and manage such utility in the same manner, and with the same power, and subject to the same limitations, as provided in the case of a municipally-owned utility governed by a utility service board; Provided further, That any municipality now owning or operating a utility shall be subject to the jurisdiction of the commission for the purpose of fixing rates to be charged*

the patrons of such utility for service, and for such purpose said commission is given jurisdiction to proceed in the same manner and with like power as is provided by this act in the case of public utilities: Provided further, That whenever a petition is presented to the municipal council of any such municipality signed by five (5) per cent of the voters of such municipality, as determined by the total votes cast for all candidates for municipal clerk at the last preceding municipal election therein, praying that said municipally-owned utility be taken out of the jurisdiction of said commission for rate-making purposes, said municipal council shall at the next municipal election in such municipality submit such question to the voters thereof on a separate ballot provided therefor, and if a majority of the voters voting thereon shall vote in favor of taking such municipally-owned utility out of the jurisdiction of said commission, then such municipally-owned utility shall no longer be under the jurisdiction of said commission for rate-making purposes as above provided." (Our emphasis.)

It is further provided by statute that in addition to the existing executive departments of cities of the first class there is created a department of public utilities, known as the "Board of Directors for Utilities." (Acts of 1929, chapter 77, section 1, page 252; 1931, chapter 67, section 1, page 152; Section 48-7101, Burns' 1933.)

Section 2 of said act (48-7103 Burns' 1933) provides that the Board of Directors for the said utilities shall have the exclusive government, management, regulation and control of all public utilities. Said act further empowers the board to prescribe rules for service and rates for service in connection with the furnishing of any public utility service by said city to consumers, users or patrons: Provided, *that any such rules and rates for service shall be in full force and effect only after the same have been filed with and approved by the Public Service Commission of Indiana,* to the extent that such filing and approval are required under the laws of the State of Indiana. (Paragraph 9, Acts of 1929, chapter 77, section 3, page 252; 1931, chapter 67, section 2, page 152; Section 48-7103, Burns' 1933.)

I refer you to Official Opinion No. 15, dated April 24, 1947. Said opinion deals with the subject of the jurisdiction of your commission for the purposes of fixing rates to be charged patrons of municipally owned utilities for services, as well as Chapter 190 of the Acts of 1933. Therein I stated that I thought it was clear that the legislature never intended to take from the Public Service Commission the duty and responsibility of rate making of utilities owned and operated by municipal utilities, except and until the voters of said municipalities had indicated by their votes that their municipally owned utility should no longer be under the rate making jurisdiction of said commission.

Section 5 of Chapter 235 of the Acts of 1933 provides in part as follows:

> "In connection with the duties devolving upon such board as aforesaid, it shall have full power as follows:
>
> "* * *
>
> "5. To furnish an adequate supply of water to consumers thereof within such water districts; to fix rates and collect water rentals therefor, pay all necessary expenses of operation, construction, alteration and building of such water works system, * * *."

Standing alone it would be well argued that by this section the legislature had delegated to the municipality the exclusive right to fix water rates of municipally owned water works systems operating under this act. However, Section 20 of said act 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." (Our emphasis.)

And it is further provided in part by Section 27 of said act:

> "* * * That this act shall not be deemed or construed to alter, amend or repeal any other statute, or any act passed at the 78th session of the general assembly of the State of Indiana."

Section 41 of the Acts of 1913, Chapter 76, page 167, same being Section 54-313 of Burns', provides:

> "Every public utility shall file with the commission, within a time fixed by the commission, schedules, which shall be open to public inspection, showing all rates, tolls and charges which it has established and which are enforced at the time for any service performed by it within the state, or for any service in connection therewith, or performed by any public utility controlled or operated by it. The rates, tolls and charges shown on such schedules shall not exceed, without the consent of the commission, the rates, tolls and charges in force January 1, 1913."

The initial rate is fixed by filing a schedule of rates with the commission, as was held in the case of Rice v. City of Indianapolis (1914), 183 Ind. 203, 108 N. E. 584.

It is to be noted that Chapter 190 and Chapter 235 of the Acts here in question were passed at the same session of the legislature and that both acts contained an emergency clause. Chapter 190 was approved March 8, 1933 and Chapter 235 was approved March 9, 1933.

It is a rule of statutory construction that all consistent statutes that can stand together, as related to the same subject, shall be construed together and with reference to the whole system of which they form a part, and harmony and effect given to all, if this can consistently be done, so as to make the law consistent in all its parts and uniform in its application and results; and the intent, as collected from an examination of the whole, will prevail over the literal import

of particular terms and control the strict letter of such terms when the latter would lead to injustice and contradiction. Princeton Coal, etc., Co. v. Lawrence (1911), 176 Ind. 469, 95 N. E. 423, 96 N. E. 387.

Again in City of New Albany v. Lemon, *et al.* (1926), 198 Ind. 127, 149 N. E. 350, 152 N. E. 723, it was held that statutes relative to the same subject matter, passed at the same session of the legislature and taking effect at the same time, must be construed together as parts of one body of law, and as together expressing the legislative will, if it be possible to reconcile them on any basis whereby both may be given effect. In applying this rule there can be no doubt but that the Public Service Commission has jurisdiction to approve rates fixed by the board of trustees of municipally owned water works operating under Chapter 235 of the Acts of 1933, and that all general provisions of the statutes with reference to fixing rates and rate hearings under the Spencer-Shively Act, and amendments thereto, are applicable to the fixing of rates and rate hearings of municipally owned water works systems operating under the Acts of 1933, Chapter 235.

There appears to be nothing ambiguous about the provisions of Section 20 or Section 27 of Chapter 235. Section 20 provides in part:

> "* * * The rates for such service to said city of any other municipality shall be included in the *schedule of rates* and be subject to the approval of the public service commission of Indiana, * * *." (Our emphasis.)

It is to be presumed that the legislature knew that rates were initiated by the filing of a schedule and that they had in mind when passing Section 5 of Chapter 235, which purports to give to the board of trustees the power "to fix rates and collect water rentals," that they had amended Section 109 of the Acts of 1913, Chapter 76 by Section 19 of Chapter 190 herein by providing:

> "* * * That any municipality now owning or operating a utility shall be subject to the jurisdiction of the commission for the purpose of fixing rates to be charged the patrons of such utility for service, and for such purpose said commission is given jurisdiction to proceed in the same manner and with like

power as is provided by this act in the case of public utilities; * * *."

Section 20 and Section 27 of Chapter 235 are clear that it was the legislative intention that rates set under that act were subject to the approval of the Public Service Commission and that by said act they did not intend to take away from the Public Service Commission its jurisdiction of fixing rates to be charged the patrons for service and when we apply the rule as set down by our Supreme Court in the case of City of Logansport v. Public Service Commission, *supra,* at page 535, to-wit:

> "* * * The right to regulate public utility rates is a power vested in the state. It may be delegated to the municipality but such an intent must clearly appear. Every doubt must be resolved in favor of the continuance of the power in the state."

There appears to be no question but that the Public Service Commission still retains jurisdiction of rate hearings as same pertain to municipally owned water works systems operating under Chapter 235.

My opinion herein is the same as that rendered in Official Opinion No. 15, dated April 24, 1947, that a municipality now owning or operating a utility is subject to the jurisdiction of your commission for the purposes of fixing rates to be charged the patrons of such utility for services and that your commission has the authority and power to act in all municipally owned water systems unless the voters of said municipality have indicated by their votes that their municipally owned utility shall no longer be under the rate making jurisdiction of said commission, as provided by Section 19 of Chapter 190 of the Acts of 1933, Section 54-613, Burns' 1933.