

Board, etc. v. Allman, (1895), 142 Ind. 573, 39 L. R. A. 58. * * *” (Emphasis ours)

In view of the statutes and authorities quoted, I am of the opinion a contract by a county to purchase a policy of insurance as described by you in your letter, extending the coverage beyond the requirements of the law, is illegal and invalid.

OFFICIAL OPINION NO. 15

April 24, 1947.

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

Dear Mr. Yoder:

I have before me your request for an official opinion in the matter of the petition sent by certain light and power users of the Boonville Municipal Light and Power Company, Boonville, Indiana, wherein they request the Public Service Commission to investigate an act by the common council of the City of Boonville on November 19, 1946 and made effective by them on November 25, 1946, and wherein it is further requested by said petitioners that the Public Service Commission of Indiana hold a formal hearing on said rates as provided for in the Acts of the General Assembly of 1913, Chapter 76, Section 1, page 167, Burns' 1926, Section 12672, and acts amendatory thereto.

You state that this particular municipal utility came into being some time in 1940 or 1941 which was, you state, after the 1933 amendment to the Acts of 1913, which, seemingly, took away from the Commission jurisdiction over most of municipal plant activities. You further state that the statutes, as a whole, are not too clear as to just what jurisdiction the Commission has over municipal utilities and that there is a great deal of difference of opinion as to the interpretation of the acts. In view of the foregoing representa-

tions and the presentation of the petition itself, you submit the following question:

“Under the present statutes regarding municipal utilities should a hearing on said petition be granted and heard by the Public Service Commission of Indiana?”

I understand your request herein to be for an official opinion as to whether or not a municipality now owning or operating a utility is subject to the jurisdiction of your Commission for the purpose of fixing rates to be charged the patrons of such utility for service.

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. (2) 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.”

Our court in said case concluded at page 537 that:

“The Spencer-Shively Act, (Acts of 1913, Chapter 76; Burns’ 1933, Section 54-101) creating the Public Service Commission, expressly applies to municipally owned utilities and such commission has authority

thereunder to fix the rates to be charged the public
by the city of Logansport for electric current.
* * *

Prior to the enactment of the Spencer-Shively Act in 1913, cities and towns possessed the power and authority to grant franchises to public utilities. The effect of this act was to take away from them all control over public utilities and the same, since the passage of said act, are operated through the Public Service Commission as the agent of the state.

City of Huntington v. Northern Indiana Power
Company, *supra*.

Section 1 of Chapter 76 of the Public Utilities Law of 1913 (Acts of 1913, page 167; 54-105 *et seq.* Burns' 1933) defines the term "public utility" as used in the act, as including every city or town, "that now or hereafter may own, operate, manage or control any street railway, or inter-urban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public."

Chapter 190 of the Acts of 1933 (Acts of 1933, page 928; 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, however, 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.

Section 1 of said act defines the term "rate" as used in the act "shall mean and include every individual or joint rate, fare, toll, charge, rental or other compensation of any utility or any two (2) 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." (Our emphasis).

By said section the term "utility" as used in this act "shall mean every street railway or interurban railway, and every plant or equipment within the state used for the conveyance of telegraph and telephone messages, or for the production, transmission, delivery, or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service, either directly or indirectly to the public."

Said section defines the term "municipally-owned utility" as used in this act "shall include every utility owned or operated by a municipality."

Section 109 of the Acts of 1913, chapter 76, page 167; 1933, chapter 190, section 19, page 928; Section 54-613 Burns' 1933 provides as follows:

"In the operation of any utility now owned by any municipality in this state, or any utility that may hereafter be 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).

In view of the above provisions of statutes of our state and the holding of our court as they appertain to same as herein set out, I think it is 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 municipalities, except and until the voters of said municipality have indicated by their vote that their municipally owned utility shall no longer be under the rate-making jurisdiction of said commission.

1944 Ind. OAG page 437.

I find that the petition is in conformance with Section 54-408 of Burns', Acts of 1913, Chapter 76, Section 57, page 167, same dealing with complaints, investigation and hearings by the Public Service Commission against any public utility. Section 54-613 of Burns', *supra*, gives jurisdiction to the Public Service Commission to proceed in the same man-

ner and with like power in the fixing of rates for municipally owned utilities as is provided in the case of public utilities.

In conclusion, it is my opinion 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 on said petition even though this particular municipal utility came into being in the year 1940. I am assuming herein that no election by the voters thereof, as prescribed by statute, has taken place.

OFFICIAL OPINION NO. 16

April 25, 1947.

Mr. C. E. Ruston, State Examiner,
State Board of Accounts,
304 State House,
Indianapolis, Indiana.

Dear Mr. Ruston:

I have your letter requesting an opinion on the following questions:

"1. Is a city of the fifth class entitled to participate in the provisions of the acts concerning police pension funds.

"2. Is the chief of police who has been serving in that capacity for eighteen years but who has never served in any other capacity with the police department entitled to the privileges of the police pension fund act.

"3. Is a present member of the police department who was thirty-eight years of age at the time of becoming a member of such department entitled to the privileges of the police pension fund acts."

In answer to your first question I call your attention to Section 1 of Chapter 51 of the Acts of 1925, page 167, as