It is, therefore, my opinion that the charges on the books of the commission that were incurred in 1939, that is, the $16,727.20 item and the $4,315.38 item, cannot be charged to the LaPorte Gas and Electric Company in the present rate case, under your docket No. 16172, which evidently did not result from the investigation in which the costs were incurred.

STATE BOARD OF ACCOUNTS: Cities and towns. Statutes relating to requisition of water works. Control of funds. Who fixes rates.

December 8, 1944.

Opinion No. 100

Hon. Otto K. Jensen, State Examiner,
Department of Inspection and Supervision
of Public Offices,
State House,
Indianapolis, Indiana.

Dear Sir:

This will acknowledge receipt of your letter of October 23rd in which you state that a difference of opinion has arisen regarding the operation and handling of funds of the water utility at Greencastle, Indiana. You enclose a copy of the original Ordinance No. 2A-1935 providing for the issuance of bonds, Ordinance No. 5A-1935 providing for a Utility Service Board, and Ordinance No. 9A-1935 repealing No. 5A-1935 and providing for a Board of Trustees. You also state that since and prior to June 1, 1935, the date upon which the city purchased and took over the water utility, there has been an order on file with the Public Service Commission of Indiana establishing a rate for hydrant rental in the city at $75.00 per plug; that various amounts have been paid by the city of less than $75.00 and for several years nothing was paid for hydrant rental. You further state that because of increased price for material and increased wages necessary to keep experienced men working for the department, the 45% allocated to operations account is now insufficient and that it might be necessary for the department to borrow money unless it can collect delinquent hydrant rental
from the city. On these facts you ask the following questions:

"1. Does the Department of water works function under Chapter 96 of the Acts of 1921, or under Chapter 235 of the Acts of 1933? Specifically, can the Trustees of the Department transfer funds under Section 18 of Chapter 235 of the Acts of 1933?

"2. Under whose control is the Depreciation Fund Account and the Bond and Interest Redemption Fund Account, the Trustees of the Department or the City Council and Clerk Treasurer?

"3. Is it the duty of the Department of Water Works to collect delinquent accounts from the City for hydrant rental where the rate has been fixed by the Public Service Commission? Can the Department enforce the collection by law?

"4. Upon what body rests the legal responsibility or duty of fixing rates both for hydrant rental as well as for private use, the City Council or the Trustees of the Department of Water Works?"

Ordinance No. 2A-1935 approved May 9, 1935 states that the purchase of the utility is under Chapter 96 of the Acts of 1921. It provides for an amount to be known as the "The Bond and Interest Redemption Account" into which shall be set aside from income such portion as will be sufficient to pay interest and principal of bonds and it is determined that the amounts to be so set aside shall be 50% in monthly installments. The ordinance then provides: "Said fund as next hereinbefore provided shall be used solely and only and is hereby pledged for the purpose of paying the principal and interest of the bonds herein authorized to be issued."

It is provided that 45% shall be set aside for operation and maintenance and 5% to the depreciation fund. It also provides, "Compensation for services rendered to said City shall in like manner be charged against the City and payment for same from the corporate funds shall be made monthly into the special fund created by this ordinance other income and revenues of said plant and shall be apportioned to operation and maintenance, depreciation and bond and interest redemption accounts as such other income and revenues."
Section 10 of Ordinance No. 2A-1935 provides:

"The provisions of this ordinance shall constitute a contract between the City of Greencastle and the holders of the bonds herein authorized to be issued, and after the issuance of any of said bonds no change, variation, or alteration of any kind of the provisions of this ordinance shall be made in any manner except as herein provided until such time as all of said bonds issued hereunder and the interest thereon have been paid in full."

Section 12 of Ordinance No. 2A-1935 provides:

"The funds accumulated in 'The Bond and Interest Redemption Account' shall be remitted to the bank designated as the place of payment of said bonds so that sufficient sums to meet the principal and interest requirements will be thereon deposit at the respective due dates. All moneys in such account in excess of $2,500 pending such remittance shall be placed in banks as a special or preferred deposit or trust fund, or shall be secured to the full amount by or invested in bonds, notes or other forms of indebtedness in the custody of the City issued, or guaranteed as to payment, by the United States Government, maturing as nearly as may be on or before the date or dates when such moneys will be required for payment of principal and, or interest of the bonds authorized by this ordinance."

Ordinance No. 5A-1935, passed May 28, 1935, provides for a "Utility Service Board" of three members to have general supervision over the utility. This ordinance was repealed by Ordinance No. 9A-1935 approved June 25, 1935, which latter ordinance created and placed the operation of said water works under a Department of water works. Section 2 of said Ordinance No. 9A-1935 provides:

"That such Department of Water Works shall be under the exclusive management of a Board, consisting of three trustees, not more than two of whom shall be members of the same political party."
Sections 8 and 9 of said ordinance provide as follows:

"Section 8. That said Board of Trustees of said Water Department shall have the exclusive government, management, regulation and control of the Greencastle Water Works, and shall have all power as given in the acts of Indiana for the year 1933 in Chapter 235 thereof on page 1063 under which statute this Department of Water Works is now created.

"Section 9. That such Board shall operate the Greencastle Water Works so as to conform in all things with Ordinance No. 2A-1935 of the City of Greencastle, Indiana."

Chapter 96 of the Acts of 1921 (Section 48-5345, et seq., Burns' R. S. 1933) as amended provides a method by which a city can acquire a water works and pay therefor. None of the provisions of this act were repealed by the provisions of Chapter 235 of the Acts of 1933.

Kirkpatrick v. City of Greensburg (1943), 113 Ind. App. 402, 47 N.E. (2) 153.

In the above case the court said at page 408:

"* * * We find nothing in the act" (1933) "so expressly in conflict with the provisions of chapter 96, Acts of Indiana General Assembly 1921, and its subsequent amendments, as to warrant this court in holding that any of its provisions have been repealed by implication. In fact, chapter 235, Acts of Indiana General Assembly 1933, contains the express provision: 'That this act shall not be deemed or construed to alter, amend or repeal any other statute, * * *' except those expressly set forth therein."

The court also said at page 407:

"* * * It will be noted that chapter 235, Acts of Indiana General Assembly 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; * * *" (§ 48-5301 Burns' 1933.)

"* * * It will be noted that the act is permissive in form rather than mandatory, and there is no evidence in this record that the City of Greensburg ever adopted an ordinance creating a department of water works in such city under the provision of this act, nor is there any evidence that the city ever tried to avail itself of any of the provisions of this act."

Carrying out the expression of the court in the last quotation, and the permission in Section 1 of the 1933 Act, I see no reason why a city which had acquired a water works under the provisions of the Act of 1921 could not thereafter adopt an ordinance availing itself of the provisions of the Act of 1933 so long as no contractual or vested rights were impaired.

Section 7 of the Acts of 1921 (Section 48-5352, Burns' R. S. 1933) provides for "The Bond and Interest Redemption Act" and Section 9 (Section 48-5354, Burns' R. S. 1933) provides:

"If and when a surplus shall be created in the said bond and interest redemption account which shall be in excess of the interest and principal of any bonds becoming payable during the calendar, operating or fiscal year then current, together with the amount of interest or principal of any bonds which shall become due and payable during the calendar, operating or fiscal year then next ensuing, the said common council or other governing authority may transfer any excess over such surplus to either the operation and maintenance account, or to the depreciation account, which said common council or other governing authorities may designate."

Section 16 of the 1933 Act (Section 48-5316, Burns' R. S. 1933) provides for "the bond and interest redemption act"
and Section 18 (Section 48-5318 Burns' R. S. 1933) provides as follows:

“If and when a surplus shall be created in the said bond and interest redemption account, which shall be in excess of the interest and principal of any bonds becoming payable during the calendar, operating or fiscal year then current, together with the amount of interest or principal of any bonds which shall become due and payable during the calendar, operating and fiscal year then next ensuing, the said board of water-works trustees may transfer any excess over such surplus to either the operation and maintenance account, or to the depreciation account, which said board of trustees may designate.”

It is thus to be seen that the only difference between Section 9 of the Acts of 1921 and Section 18 of the Acts of 1933 is that the transfer is made by the “common council or other governing body” under the 1921 Act and by the “board of trustees” under the 1933 Act. In this connection I also point out that under the 1921 Act the council may put the management and control of said water works in the hands of a board of five trustees and “said board of trustees shall have complete control of said water works plant and shall be charged with the duty of managing the same.” (Acts 1921, Section 16, as amended in 1927; Section 48-5365 Burns' R. S. 1933.)

Specifically answering your first question:

1. In my opinion Ordinance No. 9A-1935 was a clear attempt to adopt the provisions of the 1933 Act. It created a department of water works, and provided for a board of three trustees. I therefore am of the opinion that the department of water works functions under Chapter 235 of the Acts of 1933 and can transfer funds under Section 18 of that Act unless that right was previously contracted away by Ordinance No. 2A-1935.

The provision in Ordinance No. 2A-1935 that: “Said fund as next hereinbefore provided shall be used solely and only and is hereby pledged for the purpose of paying the principal and interest of the bonds herein authorized to be issued,” in my opinion is valid and precludes said fund being used for any purpose other than paying the principal and interest of the bonds, as provided by said ordinance. That the operation
is to conform to Ordinance No. 2A-1935 is also recognized by Section 9 of Ordinance No. 9A-1935 above quoted.

2. In connection with your second question, both Section 3 and Section 5 of said Act of 1933 provide that the exclusive management, regulation and control of the water works is in the board of trustees. In my opinion the Depreciation Fund Account and the Bond and Interest Redemption Account are under the control of the trustees of the Department of Water Works.

Your third and fourth questions involve consideration of additional matters. Section 5 of said Act 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 district; to fix rates and collect water rentals therefor, * * *""

(Section 48-5305 Burns' R. S. 1933.)

The board of trustees is given power to bring actions in the name of the city by Section 6 of said Act (Section 48-5306 Burns' R. S. 1933). Section 9 of the Acts of 1935 (Section 48-5309 Burns' R. S. 1933) provides in part as follows:

"Upon the creation of said water department, as herein set out, it shall be the duty of said board of trustees to receive and collect all revenues due or becoming due said water department, and to disburse said revenues into the respective funds, as herein provided. * * *"

Section 109 of the Public Service Commission Act of 1913 as amended in 1933 (Section 54-613 Burns' R. S. 1933) provides in part as follows:

"** * * 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; * * *.”

Under these two provisions the Board of Trustees may fix the rates subject to the jurisdiction of the Public Service Commission.

See also:
City of Washington v. Public Service Commission (1921), 190 Ind. 105;
City of Logansport v. Public Service Commission (1931), 202 Ind. 523.

3. It is the duty of the board of trustees of the water department to collect any delinquent rental for hydrants from the city.

4. Under the statutes quoted the trustees of the Department of Water Works fix the rates subject to the jurisdiction of the Public Service Commission. An investigation of the records of the Public Service Commission shows that on August 4, 1944 petition was filed showing rates for hydrant rental had been omitted by mistake from the rate schedule filed in 1935 and setting a rate of $62.50 per hydrant. Prior to the purchase of the utility by the city the established rate for fire hydrant rental was $75.00 per annum per hydrant as fixed in 1929. That rate would continue until a new rate was established as provided for by law.

SCHOOLS: Pupil under 16 years of age may be required to attend city high school in the township where no township high school is located, the township trustee paying the expense and transportation therefor.

December 9, 1944.

Opinion No. 101

Hon. Clement T. Malan,
State Superintendent of Public Instruction,
State House,
Indianapolis, Indiana.

Dear Dr. Malan:

I have your letter of November 16th, 1944, requesting an official opinion on the following question: