I have re-examined the above opinion and adhere to that opinion as applied to the particular facts then under consideration. I think too that the same reasoning applies to the case which you have submitted, except as to projects where the equipment is operated wholly on private property. As to those cases, I think the refund should be allowed. As to cases where the trucks are operated partially on the highway and partially on private property, as a practical matter I do not see how a refund could be granted. It seems to me that there is no possible way in which the two services could be separated, and I am quite clear upon the point that no exemption or refund can be allowed on the ground that the sale is to a Federal agency.

INSURANCE DEPARTMENT: Surplus of qualifying life insurance company need not be paid-in in money but may consist of securities acceptable to the department.

January 16, 1939.

Hon. George A. Newbauer,
Insurance Commissioner,
State of Indiana,
State House, Room 240,
Indianapolis, Indiana.

Honorable Sir:

I have before me your letter of January 12, 1939, in which you request my official opinion upon the interpretation of Section 74, Clause E, of the Indiana Insurance Law of 1935, approved and enforced March 8, 1935.

Your question reads as follows: “In the organization of a new life insurance company, the original capital of $100,000 is paid-in in actual cash, can this department accept securities acceptable to this department for $50,000 surplus as required in Section 74, Clause E, Insurance Law of 1935?”

Section 74, Clause E, reads as follows: “Sec. 74, Cl. E. Each domestic capital stock company organized under this law, in addition to the capital in and by this section required, shall have a surplus paid-in equal to at least fifty per centum of the capital required of such company.”

Your question in its ultimate analysis is, may this surplus so required consist of assets acceptable to your department?
Conversely stated, does Section 74, Clause E, supra, require that this surplus be paid-in in cash or in money the same as the capital stock of such a company?

It is significant that Section 74 provides: "A domestic capital stock company organized under this law shall have a capital stock paid up in money," (our italics) while Section 74, Clause E, omits the words "in money." Had it been the intention of our assembly to exact the same requirement for surplus as for capital stock for such a company, it is logical to assume it would have inserted the words "in money" or some phrase or word of like meaning following the adjective "paid-in" in Clause E of said Section.

The word surplus taken by itself has been variously defined. A comprehensive definition is found in the case of the Insurance Company of North America v. McCoach (Internal Revenue Collector), 218 Fed. Rep. 905, at page 908 of the opinion. The surplus of a corporation is, of course, the difference between the aggregate value of all of its assets and the sum of all its liabilities including capital stock. The difference may be called surplus, undivided profits, contingent fund or any other name. In a real and substantial sense it is a reserve. Broadly speaking it is not required to be maintained but may be paid out in dividends or otherwise distributed among the stockholders. Ordinarily no part of it is embraced in the sum total of liabilities. When, however, something is added to the sum total of liabilities which is now owing by the company, this addition then becomes a reserve. It is in this sense that moneys set aside to meet possible liabilities are "reserves" and, if required by law to be thus carried, they are additions required by law to be made to reserve funds.

The foregoing definition is particularly applicable in the instant case in that it is a definition applied to an insurance company. It clearly distinguishes reserve from surplus, or more correctly when a surplus under insurance laws and regulations becomes a reserve. That there can be no question of a reserve in the instant case is apparent when it is considered that such company is only applying for a certificate of authority to begin business and, consequently, has no insurance policies in force, the contingent liability on which would, under the law, require a reserve.

We are therefore concerned with the word "surplus" which in the absence of words restricting or limiting its meaning
must be taken in its ordinary meaning; it could then consist of various kinds of assets, standing by itself.

But does the hyphenated word "paid-in" heretofore held by me in an official opinion on the same section of the statute dated September 27, 1938, to be an adjective modifying the word "surplus," mean that the surplus referred to in Section 74, Clause E, must be paid in cash or in money?

It would seem that such was not the intention of our assembly for the reasons above stated. It is moreover, so universally considered that payment may consist of anything offered by the payor and accepted as such by the payee as to require no citations of authorities. Section 6 of the Indiana General For Profit Corporation Act of 1929, enforced July 1, 1929, provides that consideration for shares of stock may be paid in whole or in part, in money, in other property, tangible or intangible. (See Burns Revised Statutes 1933, Section 25-205 Clause E.)

In Heaston v. King, 167 Indiana 101, an action to contest the validity of a will, at page 112 of the opinion the court in construing the word "paid" said: "The word 'paid' is one which is often loosely used and is always liberally construed."

In the light of the foregoing it is my opinion that our assembly did not intend that the surplus referred to in Section 74, Clause E, Indiana Insurance Law of 1935, should be paid-in in cash and that the language employed "surplus paid-in" does not mean surplus paid-in in cash.

Upon general principles there seems no good reason why insurance companies should be required to maintain a cash surplus. This would be a denial of the right to invest in profit-making securities and it must be accepted as public policy that a fund of this kind, a surplus, should not be idle but should be used to increase earnings wherever possible. This is not to say, however, that a surplus may be invested in any securities that the corporation might see fit but considering the quasi public character of an insurance company and the duty of the State to supervise and regulate it in the interest of the public, the securities in which it is invested should have that degree of liquidity as to permit of ready conversion into cash if and when the emergency arises requiring ready cash.

My attention is called to the second to the last paragraph of an official opinion heretofore delivered by me to you under date of September 27, 1938, in connection with an interpre-
tation of the same section of the Indiana Insurance Law of 1935. The question in that case was the necessity of a full $50,000 surplus on hand as a condition precedent to the issuance of a certificate of authority to an insurance company to begin business. In the paragraph alluded to the following language was used, "It is my opinion that the $50,000 in the instant case must be cash on hand at the time of the issuance of the charter." It was my intention at that time merely to show the necessity of a surplus equal to fifty per centum of the capital as paid-in as of the time when a certificate of authority shall have been applied for and that no deductions therefrom were allowable. The words "in cash" as used in that opinion and according to my then intention were used therein simply to emphasize the necessity of a paid-in surplus as of the time in question. The expression used, moreover, was not in answer to any question submitted or answered in that opinion. This explanation is made to avoid confusion.

The answer to your question then is in the affirmative.

FINANCIAL INSTITUTIONS, DEPARTMENT OF: Credit union may not charge interest greater than 1 per cent to provide insurance to protect loans.

January 25, 1939.

Hon. Ross H. Wallace,
Director, Department of Financial Institutions,
State House,
Indianapolis, Indiana.

Dear Mr. Wallace:

This will acknowledge receipt of your letter of January 20, 1939, in which you submit the following question:

"We should like to be advised as to whether a State-chartered credit union has the power to charge its borrowers, in addition to interest at the rate of 1 per cent per month on unpaid balances, a sum sufficient for the credit union to take out insurance against loss on the loans to its borrowers."

I am of the opinion that a credit union does not have the power to charge its borrowers interest at a greater rate than