PUBLIC SERVICE COMMISSION: Natural gas service, authority to grant franchise in county where other utility is now operating; use of public highways.

August 18, 1939.

Mr. William A. Stuckey, Commissioner,
Public Service Commission,
Indianapolis, Indiana.

Dear Sir:

This is in answer to your request of August 5, 1939, for an interpretation of paragraph numbered 5 of section 1 of chapter 7 of the Indiana Acts of 1935. It appears that a petition has been filed with the Public Service Commission asking that it determine that public convenience and necessity require the petitioner to engage in the distribution, furnishing, sale and delivery of natural gas to the inhabitants of Vigo County, and also, that the commission give its consent that the Board of County Commissioners of Vigo County grant a license, permit, or franchise to petitioner to use certain public highways for natural gas pipe lines. It also appears that an artificial gas company is already serving a gas of a different heat unit in Vigo County. It is asserted that there is a need and demand for the petitioner's service. The petitioner is a corporation proposing to operate a public utility.

You say that a question involved is whether the words "property of the county" as used in the statute under consideration refers to public highways, or whether the language refers only to such property of the county as a court house, county infirmary, etc.: that is, real property owned and controlled exclusively by a county. The statute is as follows:

"To grant licenses, permits or franchises with respect to the use of property of the county only upon such terms as that the licenses, permits or franchises are not exclusive and are not indeterminate in duration and are assignable only with the consent of such board: Provided, however, That in the event either a public utility or a municipally owned or operated utility is already engaged under a franchise, license, or indeterminate permit in the production, transmission, delivery, distribution, supplying, furnishing, or sale to any inhabitants of the county outside of the corporate limits of incorporated towns or cities of a
commodity or service the same as or substantially similar to that with respect to which the use of the property of the county is asked by the applicant for a license, permit, or franchise from such board, such board shall have no power to grant to such applicant any such license without the consent of the public service commission first had and obtained after a public hearing of all parties interested and the determination by such public service commission that public necessity and convenience require that such applicant engage in the production, transmission, delivery, distribution, supplying, furnishing, or sale of such same or substantially similar commodity or service: Provided, further, That the provisions of this section as to securing the consent of the public service commission shall not apply to a municipally owned or operated utility, as to which existing law shall control."


The above paragraph is an amendment added in 1935 to the Act of 1852, which already prescribed the duties and powers of boards of county commissioners. The provision brings a new element into the 1852 law. That is the matter of control and regulation of utilities. Paragraph numbered 1 of said section 1 is as follows:

"To make orders respecting the property of the county in conformity to law, to sell the public grounds of the county upon which the public buildings are situated, and to purchase in lieu thereof, in the name of the county, other grounds in the county seat on which such buildings shall be erected; to purchase other lands for the enlargement of the public square, and to take care of and preserve such property; but only in conformity with existing law."

Reading this paragraph 1, and especially the part of paragraph 5 above the proviso, it might be concluded that the words "property of the county" does not refer to public highways. However, I do not believe the legislature intended to take away from county commissioners certain control over county roads.

Section 1 of chapter 108 of the Acts of 1913 (Burns Ind. Stat. Anno. 1933, 48-7303) gives boards of county commis-
tioners authority to grant to persons and corporations a franchise to use public highways, "for the erection grant (laying) or constructing of any pole, poles, wire, track, pipe, cable or conduit." Within a municipality a city council or board of trustees of a town has the same power that the board of county commissioners has outside of a municipality. The statute provides for a notice and hearing of protests before the franchise may be granted. The Attorney General has heretofore held that the above provision of the 1913 Acts does not apply to highways under control of the State Highway Commission.


The public highways of the State belong to the State and the control of the county commissioners or other local authorities over highways is simply that control which the State has conferred upon them and is largely for the purpose of maintenance. See Kincaid v. The Indianapolis Natural Gas Company, 124 Ind. 577.

The Indiana statutes also provide that in the case of a public utility operating within a municipality that no license, permit, or franchise shall be granted by a municipality where there is already in operation a public utility engaged in furnishing similar service unless the Public Service Commission, after a hearing, declares that public convenience and necessity require the service of the second utility.

Acts of 1933, Chap. 190, Sec. 9;
Burns Ind. Stat. Anno. 1933, 54-601;
See Farmers, etc., Tel. Co. v. Boswell Tel. Co., 187 Ind. 371.

No doubt the 1935 statute was intended to extend the policy of the 1933 statute to territory outside of a municipality. In construing the particular provision of the 1935 statute which is the subject of our inquiry all of the existing statutes that might throw any light on the subject must be taken into account. The proviso in paragraph 5 which excludes municipally owned and operated utilities from the provision of said paragraph would have little meaning if the use of public highways in a county outside of a city or town were not intended to be covered by the statute.

In my opinion, the statute was simply intended to limit the authority of county commissioners in granting private utilities the use of public highways to those cases where there
is no service in the community substantially similar to that
to be furnished by a petitioner who seeks the use of public
highways for utility lines or pipes.
I believe that the Board of Commissioners of Vigo County
has no authority to permit the use of any public highway under
its control for the laying of a natural gas pipe line if there is
another private utility already furnishing substantially similar
service unless the Public Service Commission has determined
that public convenience and necessity require the service of
a second utility. In my opinion, the Public Service Commis-
sion should entertain jurisdiction of the petition of the Frank
N. Pierson Natural Gas Corporation at least to the extent
of ascertaining whether there is another privately operated
public service company furnishing the same or substantially
similar service that the petitioner proposes to furnish. If this
is found to be a fact, then the commission is required to de-
termine whether public convenience and necessity require the
service of the petitioner. If you find the service is needed,
then the matter of use of the public highways will be for the
board of county commissioners to determine.

FINANCIAL INSTITUTIONS, DEPARTMENT OF: Pawn-
broker's lien, right to, where title to chattel pledged is
retained by vendor under conditional sales contract.

August 18, 1939.

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

Dear Sir:

I have before me your letter calling attention to section 32
of the Pawnbroking Law, the same being section 32 of chapter
195 of the Acts of 1935, which provides as follows:

"Sec. 32. Pawnbroker's Lien on Pledge. A pawn-
broker shall have a first lien on all pledges for the
amount of his loan, interest and charges in all cases ex-
cept where the pledging or possession thereof by the
pledger constituted larceny at the common law, or ex-
cept where a prior lien exists by virtue of any other
statute."