SECRETARY OF STATE: Foreign corporation fee, whether increased, proportionately where total number of shares of capital stock is increased.

September 26, 1939.

Hon. James M. Tucker,
Secretary of State,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter which in part is as follows:

"The 1939 report of Duncan Electric Manufacturing Company, an Illinois corporation qualified to do business in Indiana, shows 124,399 shares represented in Indiana. This amount is 100 per cent of the corporation's capital stock. The corporation has heretofore paid upon 62,968 shares, which also represents 100 per cent of its capital stock, the increase in capital stock being the result of issuing additional stock by the corporation.

"We have billed the corporation for an increase fee of $614.31 to cover the increase of 61,431 shares as shown upon the basis of the 1939 report. The corporation objects to this assessment, claiming there has been no increase in proportion since they have paid on 100 per cent heretofore."

You submit the following question:

"In view of the language of paragraph e, section 1, and paragraph d, section 2, of the General Corporation Act as amended, is the Secretary of State correct in assessing this corporation an increase fee of $614.31?"

(Note: You evidently refer in the above question to the Indiana Corporation Fee Act of 1929 as subsequently amended.)

Section 1, paragraph (e), above referred to, is as follows:

"As used in this Act: * * *

"(e) The term 'capital stock' shall mean the aggregate number of shares into which the capital of either a domestic corporation for profit or of a foreign corporation for profit is divided, whether such shares are declared to have a par value or are declared to have no par value."
Burns Ind. Statutes Annotated (1933), Cumulative Pocket Supplement June, 1939, section 25-601.

Section 2, paragraph (d), above referred to, is as follows:

"The Secretary of State shall charge and collect, for the benefit of the State, to be paid into the General Fund of the State of Indiana, the following fees, to wit: * * *

"(d) For increases in proportion of its issued and outstanding capital stock, represented in this State, of one thousand (1,000) shares or less, whether par value or no par value, of foreign corporations for profit, ten dollars ($10.00), to be computed on the basis of annual reports as required by law. For increases in proportion of its issued and outstanding capital stock, represented in this State, where the increase is one thousand (1,000) shares or over, of a foreign corporation for profit, one cent (1c) per share, to be computed on the basis of annual reports as required by law."

Burns Ind. Statutes Annotated (1933), Cumulative Pocket Supplement June 1939, section 25-602.

In the consideration of paragraph (d) of section 2, supra, paragraph (c) of section 2 should also be considered. It provides as follows:

"(c) For filing with the Secretary of State the application of a foreign corporation for profit with a proportion of its issued and outstanding capital stock, represented in this State, of one thousand (1,000) shares or less, whether par value or no par value, ten dollars ($10.00). If the proportion of its issued and outstanding capital stock, represented in this State, is over one thousand (1,000) shares, whether par value or no par value, one cent (1c) per share."

Burns Ind. Statutes Annotated (1933), Cumulative Pocket Supplement June 1939, section 25-602.

It is well settled that a State may exact a fee from a foreign corporation for the privilege of doing business within the
State based upon the proportion of its business to be transacted within the State; that such proportion may be represented in terms of number of shares used in the State; and that such fee may be based upon such number of shares as are thus determined to be or to have been used in the State.

State v. Siosi Oil Corporation, 209 Ind. 394, at page 399, with cases there cited.

In the above case, in construing a fee statute which is quite similar to the one under consideration, the court held that the fee was strictly an admission fee as distinguished from an annual recurring franchise tax for the right to continue to do business. The court said on page 399:

"The difficulty here arises out of the contention that the additional fee charged, and the additional fees contemplated upon an increase of $5,000 or more in the proportion of business transacted in this State, as shown by any annual report, is a tax upon the privilege of continuing the transaction of business, rather than an admission fee, and that, since domestic corporations are not taxed upon the same basis, it is unconstitutional. But the contention is not supported by the facts, nor upon any reasonable construction of the statute and its obvious purposes.

"It is clear that the fees contemplated by statute are not upon an annual or otherwise recurrent basis. A license fee for the privilege of coming into the State to do business is contemplated. The amount of this fee is measured by the amount of capital to be used and business to be transacted in the State, which in turn is measured by the number of shares of capital stock which is proportionate to the amount of capital to be used and business done within the State. The estimate made by the applicant in its application is taken as a tentative basis for determining the fee, but the statute clearly contemplates that the fee so determined is to be afterward adjusted upon the basis of the first and subsequent annual statements and reports of the corporation. It is as though the State had said: 'You may come into this State and do business by the payment of an admission fee proportionate to the amount of your business and capital engaged here. Permission
to enter the State is granted now. We will compute the fee when we have definite facts from which to determine the amount of capital engaged and business done within the State.' No reason is suggested, nor can we see a reason, why the State cannot make such an arrangement. See People, ex rel. Griffith v. Loughman et al. (1928), 249 N. Y. 369, 164 N. E. 253."

With these observations we desire to now notice more particularly the provisions of the statute which we are called upon to interpret. It will be noted in the first place, that the statute which we are called upon to interpret with respect to the fees to be paid by foreign corporations upon admission to do business in this State are likewise admission fees, and in a general way the language already quoted from the case of State v. Siosi Oil Corporation, supra, is applicable. The two cases, however, are differentiated by the fact that in the Siosi Case the percentage of the capital stock employed in the State upon original admission was only 50 per cent, the same being afterwards increased to 59.16 per cent.

Without going carefully into an analysis of the language used in the statute at this time, it is apparent that upon any theory of interpretation there was an increase in the proportion of business done in the State which for fee charging purposes must be reduced to number of shares, and it is interesting to see how the court in the Siosi case did this. The corporation had come into the State with the representation that its capital stock consisted of 100 shares. However, between the time of its entrance into the State of Indiana and the time of the filing of the annual report upon which the increased fee was charged the number of shares had been increased to 133,000. How did the court apply the 59.16 per cent in determining the fee to be paid? Did it apply it to the 100 shares with which the corporation entered the State or did it apply it to the shares as they existed at the time the additional fee was to be paid? Note the statement of facts made by the court as reported in the Siosi case on pages 395 and 396 of the report. It will be remembered that the corporation entered the State with only 100 shares of common stock having no par value and admission was granted upon the payment of a $25.00 fee. Note now the language of the court on page 395:

"Thereafter appellee filed an amended annual report for the year ending December 31, 1927, from which it
appears that at that time the total assets of the corporation and business done in the year 1927 was $318,858.89; that during that year it had property and assets of $153,091.44, and transacted business amounting to $35,545.57, within the State of Indiana; that as of December 31, 1927, it had outstanding 330 shares of preferred stock of the par value of $100 per share, and 133,000 shares of common stock of no par value. Upon the basis of these figures it appears that during 1927 the amount of its capital stock, represented by the proportion of its property and assets located in and business done in Indiana, was 59.16 per cent, or 195.22 shares of preferred stock and 78,682.8 shares of common stock."

These amounts are derived by multiplying 330 by 59.16 per cent and by multiplying 133,000 by 59.16 per cent. It appears very clearly, therefore, that the court applied the percentage of business done and shares represented to the number of shares in existence at the time the fee was charged. This is significant, showing clearly that the increased fee was not to be charged upon the basis of a percentage increase as applied to the original number of shares but upon the basis of the number of shares as they existed at the time the additional fee was charged. It shows, too, that in a statute fixing fees upon the basis of number of shares that an increase in number of shares used in a State may be brought about not only by an increase in the relative amount of business done but also by an increase in the total number of shares to which that relative amount of business is applicable.

The argument is made, doubtless, that the increase in number of shares issued and outstanding would have nothing to do with the fee (an admission fee) which is charged, unless perchance a percentage increase was also present. Such an argument, however, is lacking in persuasive weight when the true nature of the fee is considered. In the statute under which the Siosi case was decided it was evidently the purpose of the legislature to provide a method whereby foreign corporations could be admitted upon equal terms,—a result which could not follow if in the case of a percentage increase in business the number of shares outstanding when the increase occurs is to be taken into consideration, and where there is no percentage increase the original number of shares is to be
used as a measure notwithstanding that number may have been multiplied many times so that the corporation in the latter case is doing business in the State with a greatly increased number of shares without the payment of a corresponding increase in fee.

Returning to a consideration of the present statute, the term "capital stock" is said to mean "the aggregate number of shares into which the capital of either a domestic corporation for profit or of a foreign corporation for profit is divided." Wherever the words "capital stock" occur, therefore, in subdivisions (c) and (d) of paragraph 2, supra, we may properly insert the above language.

Substituting the definition of "capital stock," as above defined, for the words "capital stock" as the same appears in paragraph (c) of section 2, said section 2 would read as follows:

"For filing with the Secretary of State the application of a foreign corporation for profit with a proportion of its issued and outstanding aggregate number of shares into which the capital is divided, represented in this State, of one thousand (1,000) shares or less, whether par value or no par value, ten dollars ($10.00). If the proportion of its issued and outstanding aggregate number of shares into which the capital is divided, represented in this State, is over one thousand (1,000) shares, whether par value or no par value, one cent (1c) per share."

Paragraph (d) of section 2 likewise would read as follows:

"For increases in proportion of its issued and outstanding aggregate number of shares into which the capital is divided, represented in this State, of one thousand (1,000) shares or less, whether par value or no par value, of foreign corporations for profit, ten dollars ($10.00), to be computed on the basis of annual reports as required by law. For increases in proportion of its issued and outstanding aggregate number of shares into which the capital is divided, represented in this State, where the increase is one thousand (1,000) shares or over, of a foreign corporation for profit, one cent (1c) per share, to be computed on the basis of annual reports as required by law."
It is evident that the terms "proportion" and "increases in proportion" are the terms which give rise to the dispute, it being insisted by the corporation that since it came into the State upon the representation that its entire number of shares would be used in Indiana, that there could be no increase in proportion notwithstanding the number of shares so used be many times multiplied. It seems to me that such a view would necessarily result in discrimination in the State's treatment of foreign corporations admitted to do business therein, a result which should be avoided unless the intention to do otherwise is very clearly apparent. This leads me to an investigation as to the meaning of the word "proportion." I find that the first definition of the word given in Webster's New International Dictionary is as follows:

"The relation of one portion to another, or to the whole, or of one thing to another, as respects magnitude, quantity, or degree."

If this is the meaning of "proportion" as used in the statute under consideration, it very clearly is an inappropriate use of the term because it is not the relation of one portion to another or to the whole that is of importance. The thing that is of importance is the determination of the portion of aggregate number of shares which is used within the State, that portion being determined by the measure or ratio which the assets and business in the State of Indiana bears to the total assets and business done. In other words, referring to paragraph (c) of section 2, supra, the fee for admission is not determined by the proportion of the shares to be used in the State but by the number, amount or portion of the shares so used, the amount to be determined by applying the ratio of the assets and business in the State of Indiana to the total assets and business done. The court in the Siosi case clearly had this in mind when it said on page 399:

"A license fee for the privilege of coming into the State to do business is contemplated. The amount of this fee is measured by the amount of capital to be used and business to be transacted in the State, which in turn is measured by the number of shares of capital stock which is proportionate to the amount of capital to be used and business done within the State."
"Proportion," therefore, represents the manner in which the number of shares used in the State is to be determined. The increase referred to in paragraph (d) of section 2, refers to the increase in the number of shares used. This, after all, does not do violence to the language used since one of the meanings given of the word "proportion" is "portion." See Webster's New International Dictionary where the term is defined as:

"The portion one receives when a whole is distributed by a rule or principle."

In my opinion, when the language is properly construed, whatever results in an increased number of shares used in the State of Indiana requires an additional admission fee on the basis set out in the statute; and whether that result is obtained by an increase in the relative amount of assets and business done within the State or by an increase in the total number of shares makes no difference. Clearly, under the authority in the Siosi case the increase in assets and business done within the State for the purpose of fixing the increased fee is applied to the number of shares outstanding at that time. If that is true where there is an increase in relative amount of assets and amount of business done, it should likewise be true where the relative amount of assets and amount of business done has not changed. After all, it is the number of shares used in the State of Indiana which is the basis for the fee.

In my opinion, the question submitted should be answered in the affirmative.

CONSERVATION, DEPARTMENT OF: Submerged land, method of payment to State; whether such payment can be credited to rotary fund of Department.

October 4, 1939.

Hon. V. M. Simmons,
Administrative Officer,
Department of Conservation,
Indianapolis, Indiana.

Dear Sir:

I have your letter wherein you state that application has been made to the Governor of the State of Indiana to fill in