as it now exists in the several counties of the State, been affected by the State Security Act?"

The same question stated more in detail has been under consideration in an opinion of even date herewith addressed to Hon. Wayne Coy, copy of which I am enclosing herewith for your information. I think the letter to Mr. Coy fully answers your question, but if there are other specific questions which you have in mind which are not covered by the above opinion, and you will so indicate, I shall be glad to consider them.

GOVERNOR’S OFFICE: Rural Electric Corporations—Use of roads for distribution lines; whether such use is an additional servitude.

April 21, 1936.

Hon. Earl Crawford,
Secretary to the Governor of Indiana,
Indianapolis, Indiana.

Dear Sir:

I have before me your request for an official opinion in answer to the following question:

"Does a rural electric distribution line, when erected on a highway constitute an additional servitude with respect to abutting owners?"

To limit the question to the specific matter under consideration, I am advised that it relates particularly to electric distribution lines constructed or to be constructed by corporations organized pursuant to Chapter 175 of the Acts of 1935, and in the discussion of the matter herein the question will be so limited.

Chapter 175 supra expressly provides that corporations organized pursuant to its provisions shall have power, among other things,—

"To construct works across or along any street or public highway, or over any lands which are now or may be the property of this state or any political subdivision thereof without obtaining any franchise
or other permit therefor. The corporation shall, however, restore any such street or highway to its former condition or state as near as may be and shall not use the same in a manner to impair unnecessarily its usefulness, or to injure the property of others.”


The above authority, however, is given, in the case of streets and public highways, with reference to the public easement, and obviously has no bearing upon the question which you submit, which must be determined upon the basis of what is included in the easement for a public highway however acquired.

The identical question submitted by you has not been passed upon by any court in Indiana. Analogous questions, however, have been before the Supreme Court of Indiana whose opinions have enunciated principles which properly applied, I think, clearly indicate the answer to your inquiry.

In the first place, it is well settled in Indiana that the extent of the public easement in a public highway is not limited to the prevailing uses at the time of the dedication or condemnation, but is expansive so as to admit of new uses as civilization advances and progress in inventions create new methods of transportation and communication.

Magee vs. Overshiner, 150 Ind. 127.
Coburn vs. New Telephone Co., 156 Ind. 90.

In the first of the cases cited above the question involved was as to whether the placing of telephone poles in the curb line of the sidewalk on one of the principal business streets of the city of Logansport constituted an additional servitude. The whole question was very fully considered and some very interesting comments were made by the court. After stating some of the principles in a general way the court proceeded to say on page 129,—

"It must be, however, that the contemplated uses should be deemed to have been not only in the walking, riding upon horseback, and in wagons or other vehicles drawn by animals, in the going and return-
ing upon business, social, religious or political missions, but also by such methods of travel and communication, in addition or in substitution for those, as might come into vogue and be accepted and recognized as proper and important uses of the streets in the varying needs and demands of commerce, and the relations of man to man socially and otherwise. If this were not true, the way originally dedicated for a suburban highway, but by the growth of population becoming a city street, or the dedication of a village or town street afterwards becoming the principal thoroughfare of a great city, would be limited to the uses in vogue at the time and suited to the country road or the village or town street, and the growth of population, the advancement of commerce, and the increase in inventions for the aid of mankind would be required to adjust themselves to the conditions existing at the time of the dedication, and with reference to the uses then actually contemplated. That a dedication or condemnation is deemed to comprehend uses not actually in the minds of the parties at the time is seen from the almost unvarying rule that the electric street railway systems are not a new use, an additional servitude, but are a new method of enjoying an old and ever-existing use.”

Later on in the same opinion the court said,—

“Poles and wires for electric lighting have been admitted as a proper use on the ground that the streets are lighted and their general uses thereby made safer and more expeditious. Incidentally, the same use has been employed for supplying light to public, business, and private houses. Sewers have been admitted as not constituting an additional servitude because they afforded a means of drainage for the streets, although one use was in carrying the waste from buildings of the citizens. Gas mains and poles were admitted in like manner as electric lighting systems and for like uses.”

In the second case above cited the question involved was whether the granting of the use of a city street in the City
of Fort Wayne, Indiana, for the use of an interurban electric railroad constituted an additional servitude. The court held that no additional servitude was thereby created. In the course of the opinion the court used the following significant language on page 280,—

"The dedication of a street must be presumed to have been made, not for such purposes and usages only as were known to the landowner and platter at the time of such dedication, but for all public purposes, present and prospective, consistent with its character as a public highway, and not actually detrimental to the abutting real estate."

Later on on the same page the court said,—

"The convenience and advantage of all the inhabitants of the city, and of the public at large, must be regarded as the objects contemplated when the street was laid out or opened. A narrower construction would require a sacrifice of the greater interest of the community and the public to the inferior and subordinate claims of the local lot owner and abutter. Such a construction of the law governing the dedication of public streets and the reserved rights of the original landowner and his assigns in the street by unreasonably increasing the cost of rights of way or use would obstruct all progress, and deprive the local community of the benefit to be derived from the advancements of science, invention, and discovery. It would isolate the community to some degree at least from surrounding neighborhoods, towns, and cities, and subject it to many serious inconveniences and privations. This principle has been recognized by this court, and the question can no longer be considered an open one in this State."

In the third case cited above the question involved was as to whether a conduit under a sidewalk for telegraph cables and wires constitutes additional servitude. The court held that it does not. Note the language of the court in discussing the question on page 95,—

"In principle the question has been recently answered in the affirmative by this court in Magee v. Over-
shiner, 150 Ind. 127. The question in that case was whether the setting of telephone poles in the curb line of a street was a proper public use of the street, or a new and additional servitude upon the fee for which the owner was entitled to compensation; and the nature and extent of the public easement in municipal highways and the expansive and growing character of the easement in keeping pace with scientific discovery and the increase of population are there thoughtfully reviewed, and many of the later cases collated. The general doctrine of these cases is that in locating, marking, and dedicating streets, in plats of land for urban residences, the purpose of the dedication, in the absence of controlling language, is conclusively presumed to be for the accommodation of public travel, traffic, and communication. Anything which reasonably facilitates these ends is therefore consistent with the dedication."

It is true that these cases have reference to additional uses of public highways in cities. However, no real distinction can be found as applied to highways in rural sections in consideration of the remarkable advancements in methods of transportation and communication which have now become a part of rural life in Indiana. The telephone, the radio, the use of electrical energy in rural communities are now an established fact almost or entirely to the same extent as like conveniences were used in the towns and cities at the time of the decision of the cases above referred to.

This seems to have been the view of the court in the case of Crawford v. Alabama Power Co. (Ala.), reported in 128 Southern at page 454. This case incidentally was a case in which was directly involved the question as to whether the use of a public highway for the distribution of electrical energy for heat, light and power throughout the territory served constitutes an additional servitude upon the fee of the abutting owners. After discussing the case and the consideration of a number of other cases the court said,—

"It is further suggested, however, that the Christian Case" (Alabama Power Company v. Christian, 216 Ala. 160) "concerned urban property, and that a different rule applies to the rural district. The au-
authorities are likewise in conflict upon this question. But the argument was pressed upon the court in the Hobbs Case, and there given due consideration. The rural district was there involved, and the question was pointedly presented. The court cited Keasebey on Electric Wires, Section 103, where the author indicates such a distinction not well founded, and used the following language in reference thereto: ‘Some of the cases have drawn a distinction between urban and suburban roads, but in regard to wires and posts there would be no reason for declaring them burdensome in a city (where they accumulate in such numbers as to interfere with the operation of engines in extinguishing fires) than in the country where they are but few and far away from houses.’ The opinion in the Hobbs Case, supra, was delivered nearly a quarter of a century ago and present-day conditions demonstrate that the author looked into the future with a prophetic eye when he further wrote: ‘We may add that the uses of the telephone are as important in the country as in the city, and it does not take a prophet’s ken to see that in the near future they are to perform an important part in bringing the rural districts within the beneficial enjoyment of city improvements.’

‘The language is equally applicable to the supply of light, power, and heat by means of the electric current delivered through the transmission lines throughout the state. Indeed, it is common knowledge that in many rural sections within the borders of this state these modern improvements already exist and are in daily use by those bordering the territory so served, and who is bold enough to deny that within the not far distant future the public highways in rural districts may also be in a large measure electrically lighted?’

In the case of McCullough et ux. v. Interstate Power and Light Company (Wash.), reported in 300 Pacific 165, the question again was as to whether the use of a highway for the distribution of electrical energy for light, heat and power constitutes an additional burden upon the abutting property owners’ fee. The court in that case held that no additional
servitude was created. In the case of Kentucky and West Virginia Power Company v. Crawford (Ky.), reported in 16 S.W. 2nd at page 1041, a similar question was presented as to whether the erection of poles with wires strung along a public highway for the purpose of supplying the public with light, heat and power imposes an additional servitude for which the abutting landowner could recover compensation. The court held that no additional servitude was created. I desire to quote from page 1042 as follows:

"Without attempting to harmonize these cases, and the cases, supra, involving telephone lines, it is sufficient to say that cases involving electric transmission on lines cannot be distinguished from those involving telephone and telegraph lines. Lines for the transmission of light and power must be placed in the same category with telephone and telegraph lines. In 1 Nichols on Eminent Domain (2d Ed.) at page 585, the author says: 'An electric light line stands no worse than a telephone or telegraph line. In fact, to the unscientific mind, at least, the transmission of electricity to the various buildings of a city seems more directly analogous to the original functions of a highway than the use of a highway to facilitate conversations upon the telephone. It is safe to say that no court which holds a telegraph or telephone line to be within the highway easement would consider an electric light line to be an additional servitude, and in the few cases in which litigants have had the hardihood to argue to the contrary this assumption appears to be borne out.'"

It seems to me that the quotation from Nichols on Eminent Domain above referred to is apt. It seems to the writer that the holding, and that clearly is the holding in Indiana, that the erection of a telephone line upon a public highway does not create an additional servitude—it seems to the writer that such holding rests upon a much less secure basis than would be a similar holding that a line for the transmission of electrical energy does not create additional servitude. Clearly the use of a highway is primarily for transportation purposes. It may be the transportation of persons or the transportation of property which really the transportation of electrical
energy comes much more nearly being than the communication by means of telephone conversation. In other words, the transportation of electrical energy is after all completely in line with the original purpose of the highway. It is immaterial whether these heat units or light units are transported over the highway in the form of coal or coke or oil or electrical energy. It is in principle the same thing.

It is my opinion upon the authorities that your question should be answered in the negative and it is so answered.

HIGHWAY COMMISSION, STATE: Funds, State Highway—Expenditure of such funds not authorized on other than State highways unless Federal grant is made to State.

April 23, 1936.

Hon. Evan B. Stotsenburg, Commissioner,
Member State Highway Commission of Indiana,
State House Annex,
Indianapolis, Indiana.

Dear Sir:

I am in receipt of your letter of April 15th, 1936, a portion of which is as follows:

"The State Highway Commission has been asked by the Public Works Administration to approve and supervise the construction of certain grade elimination projects on other than State Highways, which work is petitioned for and sponsored by either cities or counties of the State. These projects are not on State Highways and the grant of the necessary funds thereof are not made to the State and expended by it. The supervising of the project will necessitate the employment of engineers, inspectors and experts who are expected to be paid out of the State Highway fund."

You desire to know whether or not the Highway Commission would have authority to expend its funds for the supervision of projects not sponsored by it on other than the highways in the state system.

I understand that while these projects must be programmed