TEACHERS' RETIREMENT FUND BOARD: Whether municipality may buy existing public utility without the consent of Public Service Commission.

January 14, 1936.

Hon. Robert B. Hougham,
Executive Secretary,
Indiana State Teachers'
Retirement Fund Board,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter inquiring whether the approval of the Public Service Commission is required to authorize the purchase by a municipality of an existing privately owned waterworks system pursuant to the authority conferred by sections 48-5345 to 48-5368 inclusive of Burns Indiana Statutes Annotated (1933) and the issuance of water revenue bonds with which to raise money for the payment of a part of the purchase price, in view of the provisions of section 54-509 of said statutes.

The sections under Title 48 of Burns Indiana Statutes Annotated (1933) supra of particular importance in the consideration of the above question are Sections 48-5346, 48-5348 and 48-5366, the same being Sections 2, 4 and 17 of Chapter 96 of the Acts of 1921, Section 4 being as amended in 1929.

The Act of 1921 supra was an act entitled "An act to authorize cities, towns and other municipal corporations to purchase and acquire waterworks and to issue bonds therefor, payable from the revenues and receipts of such works." Acts of 1921 page 205. Section 2 of this act expressly required the approval of such a contract of purchase by the public service commission and Section 17 required a like approval for the issuance of bonds under the act. However in 1929 section 4 of the Act was amended so as to make Sections 2 and 17 inapplicable under the conditions therein set out which are as follows:

"In the event a city, town or other municipal corporation shall propose to purchase an existing waterworks, serving said city, town or municipal corporation and its inhabitants with water, said ordinance may, in the discretion of the common council or gov-
erning body of such city, town of other municipal corporation, provide that a fixed proportion of the income and revenues of such water-works, or a fixed amount thereof, shall be paid annually into the general fund of said city in lieu of municipal taxes levied upon said property. The said fixed proportion or fixed amount of said revenues shall be used to offset the loss of tax revenues to said city, occasioned by the transfer of said water-works from private to public ownership, and said payments to the general fund of said city, town or other municipal corporation shall, accordingly, constitute a continuing charge upon the revenues of said water-works, and in the event the gross receipts of the water-works proposed to be purchased, based upon the receipts and expenditures thereof during the calendar year next preceding the date of the adoption of said ordinance as shown by the annual report of the owners to the public service commission of Indiana, and after proper adjustments, thereby eliminating nonrecurring charges under public ownership, are sufficient to pay all operating and maintenance expenses, to pay into the depreciation fund, a reasonable amount as a depreciation reserve, to pay the amount required by said ordinance to be paid into the general fund in lieu of taxes, and also to provide for the payment of the interest upon the bonds proposed to be issued to acquire said water-works, and to create a sinking fund sufficient to pay said bonds at maturity, then the provisions of sections two and seventeen (secs. 48-5346, 48-5366) of this act shall be inapplicable. Said facts shall be determined by the ordinance authorizing the issuance of said bonds, and said determinations shall be conclusive, and all bonds issued under such ordinance, shall be incontestable except for fraud, forgery, or violation of constitutional limitations.”

Burns Indiana Statutes Annotated (1933), Section 48-5348.

It follows that under the conditions above set out no approval by the Public Service Commission of such a bond issue as is referred to in the opening paragraph of this opinion is
required unless by virtue of Section 54-509 of Burns Indiana Statutes Annotated (1933) supra to which I now desire to direct your attention. This section is section 95 of Chapter 76 of the Acts of 1913 as amended by Chapter 54 of the Acts of 1925, Chapter 76 supra being the 1913 act creating the Public Service Commission.

The part of said section 95 as amended which is particularly pertinent to the question under consideration provides that

“No public utility, as defined in section one of this act, shall sell, assign, transfer, lease, or encumber its franchise, works or system to any other person, partnership or corporation, or contract for the operation of any part of its works or system by any other person, partnership or corporation, without the approval of the commission after hearing.”

Burns Indiana Statutes Annotated (1933), Section 54-509.

Section 1 of the 1913 Act supra had defined “public utility” as embracing, among others, “every city or town, that now or hereafter may own, operate, manage or control * * * any plant or equipment within the state * * * for the production, transmission, delivery or furnishing of heat, light, water or power * * *.”


Clearly, in view of that definition of “public utility” the language above quoted would have to be construed as requiring the approval of the Public Service Commission of the purchase by a city of a waterworks system. The 1921 Act supra authorizing the purchase by cities of waterworks systems was in entire harmony with this provision until the amendment of section 4 thereof in 1929 as heretofore set out, which amendment, I think would obviously modify the provision of the Public Service Commission Act above quoted so as to permit the purchase of a waterworks system by a city under the conditions enumerated in the 1929 amendment of the 1921 act without the approval of the Commission.

However that may be, I think all possible doubt upon the subject is removed by the 1933 amendments of the Public
Service Commission Act of 1913 which evince, in my opinion, a clear intent to remove from the Public Service Commission all control over the purchase by municipalities of public utilities. In the first place the amendment of section 1 of the 1913 act defining the term "public utility" expressly removes from the term a municipality that may now or hereafter acquire, own, or operate what otherwise would be a public utility. Moreover, it has been held by a long line of decisions that the terms "person," "partnership" and "corporation" as used in Burns Indiana Statutes Annotated (1933), Section 54-509, the pertinent portion of which already having been quoted herein, does not include a municipal corporation.

Wallace v. Lawyer, 54 Ind. 501;
Township of East Oakland v. Skinner, 94 U. S. 255;
Campbell v. Paris & D. R. Co., 71 Ill. 611;
Cedar County v. Johnson, 50 Mo. 225;
Emes v. Fowler, 89 N. Y. Supp. 685;
Town of Kearney v. Jersey City, 73 Atl. 110, 78 N. J. Law 77;
Bramblett v. City Council of Greenville, 70 S. E. 450, 88 S. C. 110;
In re City of New York, 91 N. Y. Supp. 987;
Franklin Savings Bank v. Inhabitants of Framingham, 98 N. E. 925, 212 Mass. 92;
Donahue v. City of Newburyport, 98 N. E. 1081, 212 Mass. 561.

It follows from the foregoing that the provision of Section 54-509 supra that "no public utility, as defined in Section One of this Act, (the Public Service Commission Act of 1913) shall sell, assign, transfer, lease, or encumber its franchise, works or system to any other person, partnership or corporation *** without the approval of the commission after hearing," (our italics) by its express terms applies only to sales, assignments, transfers, leases and encumbrances of such franchises, works or system to persons, partnerships or corporations which do not include municipal corporations. In other words section 54-509 supra does not prohibit such a transfer to a municipality without the approval of the Commission. This conclusion is re-enforced by the following further pro-
vision of Section 54-610 (b) of Burns Indiana Statutes Annotated (1933) which reads in part as follows:

"Any municipality within this state shall have the power to construct, acquire, purchase, condemn, operate and/or manage any utility, or make extensions or replacements to such municipally-owned utility without the approval or consent of the public service commission, or the intervention of such commission in any way whatsoever;".

In my opinion under the conditions set out in the first literary paragraph of this opinion the approval of the Public Service Commission is not required to authorize the purchase by a municipality of an existing waterworks system pursuant to the authority conferred by sections 48-5345 to 48-5368 inclusive of Burns Indiana Statutes Annotated (1933), and is not required to authorize the issuance of water revenue bonds with which to raise money for the payment of a part of the purchase price of such system so acquired.

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ATTORNEY GENERAL, ASSISTANT TO: Whether absence of savings clause in Act repealing a former Act prevents recovery under previous Act of accrued liabilities.

January 14, 1936.

Mr. John W. Kenny,
Assistant to the Attorney General,
309 State House,

Dear Sir:

Your letter of December 31, 1935, to the Attorney General requesting an advisory opinion concerning the absence of a so-called savings clause in Chapter 132 of the Acts of 1935 has been referred to me for reply. You submit the following question:

"Does the lack of a savings clause in the Act of 1935 render the Act of 1917 as ineffective as if it had never existed, so as to preclude the collection of maintenance charges accruing under the latter act, notwithstanding Section 1-307 of Burns Annotated Statutes of 1933?"