TREASURER OF STATE: Refund from General Fund of State Provisions of Constitution on withdrawing money.

March 18, 1938.

Mr. Peter F. Hein,
Treasurer of State,
Indianapolis, Indiana.

Dear Sir:

This is in answer to your request for an opinion as to the authority of the Department of Treasury to refund certain fees paid the Public Service Commission in the matter of authorizing the issue of preferred stock.

The facts appear to be as follows:

The Southern Indiana Gas and Electric Company applied to the Public Service Commission for authority to issue and sell $1,200,000.00 principal amount of its first mortgage bonds and $250,000.00 par value of its preferred stock. On December 18, 1936, the commission considered said application and entered its order authorizing the company to issue and sell said bonds and preferred stock. In the order it was provided as follows:

"It is Further Ordered that the petitioner shall pay into the Treasury of the State of Indiana, through the secretary of this commission, the sum of $3,625.00, to which shall be added $5.41 publication expense, and $134.87 expense of checking by Accounting and Engineering Departments of the Commission, making a total of $3,765.28 to be so paid by the petitioner before any such bonds or preferred stock shall be issued."

Later, on December 21, 1937, the Southern Indiana Gas and Electric Company filed a supplemental petition with the commission stating that it had not issued or sold the preferred stock and asking that the authority granted in the order of December 18, 1936, to issue and sell said stock, be cancelled and held for naught, and that $625.00 statutory fee required to be charged by the commission and which had been paid by the company, be refunded. The commission, on December 23, 1937, considered the petition and entered the following order:

"It is Therefore Ordered by the Public Service Commission that the authority granted petitioner by order
in this cause approved December 18, 1936, to issue and sell $250,000.00 par value of its preferred stock be and the same is now hereby cancelled and held for naught."

On January 15, 1938, a petition was filed with the Department of Treasury by the Southern Indiana Gas and Electric Company asking for a refund of the $625.00 fee. The question submitted is whether you are authorized to make the refund.

The statutes of Indiana provide that all issues of securities by any public utility be submitted to the Public Service Commission. The commission is required to make an investigation as to the propriety and necessity for the issue. Although the state does not guarantee in any manner the bonds or stock which the commission authorizes, yet the authorization is not a perfunctory matter. The statute requires the commission to consider certain matters and to determine whether the issue and sale is in the public interest.

Burns’ Indiana Statutes 1933, Sec. 54-501 and following sections.

The section of the statute which provides for the charges which are to be made for the investigation and authorization is as follows:

"Sec. 54-511 (12709) Public Utilities—Fee for issuing securities.—The commission shall charge every public utility and every municipality receiving permission from it to issue any stock, bonds, notes or other securities an amount equal to twenty-five cents (25c) for each hundred dollars of such stock, bonds, notes or other securities, and the same shall be paid into the state treasury before any such stock, bonds, notes or other securities shall be issued. All money accruing from such charges, so made by the commission, is hereby appropriated to the commission for its use in defraying its expenses until and including the thirtieth of September, 1925, and thereafter shall be paid into the general fund of the state: Provided, That as to common stock of no par value, the fee shall be two and one-half cents (2½c) per share. (Acts 1913, ch. 76, sec. 96, p. 167; 1925, ch. 71, sec. 1, p. 220.)
It will be noted that the money collected from the Southern Indiana Gas and Electric Company, including of course, the $625.00, was paid by the commission into the general fund of the state.

The expenses of the Public Service Commission are provided for by the biennial Appropriation Act (Acts 1937, ch. 114, p. 560). After the appropriation of certain operating expenses, it is provided as follows:

"Provided, That all fees, receipts and moneys collected by the Public Service Commission under and pursuant to law shall be paid into the state treasury by said commission and the auditor of state shall issue quietus therefor. The auditor of state shall set aside such fees, receipts and moneys in the sum of fifty thousand dollars ($50,000), as a rotary fund for the use of the said commission in accordance with the provisions of section 1 of this Act. All such fees, receipts and moneys accumulated in the state treasury in excess of fifty thousand dollars ($50,000) shall be credited to the general fund of the state; and

Provided, further, That such rotary fund shall be used only for personal services and other operating expenses in case of special investigation by said commission, when it becomes necessary to employ additional expert services; no part of such rotary fund shall be used in payment of salaries, wages, or expenses of the regular officers or employees of the said commission; and,

Provided, further, That any expenditures to be made from such rotary fund shall be subject to the approval of the governor and the state budget committee."

The question is whether your department can refund money collected and paid into the general fund of the state.

The Constitution of Indiana provides as follows in Article 10, section 3:

"Appropriations—No money shall be drawn from the treasury, but in pursuance of appropriations made by law."

The money paid by the Southern Indiana Gas and Electric Company was not paid by mistake. It was paid, at least in
part, to reimburse the commission for its outlays, and to provide money for the state to carry on one of its governmental functions—that is to protect the utilities and the citizens against the improvident issue and purchase of securities. When the commission completed its investigation and made the order permitting the company to issue the stock, the money was payable.

In view of the constitutional provision against the withdrawal of money from the state treasury except by action of the Legislature, it is my opinion that your department does not have authority to grant the refund asked by the petitioner.

GROSS INCOME TAX, DIVISION OF: Power of municipalities to regulate sales in stores and by auction.

March 18, 1938.

Mr. Fred C. McClurg, General Counsel,
Store License Division,
141 South Meridian Street,
Indianapolis, Indiana.

Dear Sir:

I have before me your request that an official opinion issue in response to the following inquiry:

"The City of Terre Haute has an ordinance providing a license for any auctioneer in the City of Terre Haute, and the same ordinance provides that any one desiring to hold an auction sale within the city shall pay a certain license fee per day. The license for an auctioneer under this ordinance is fifteen dollars ($15) per day and the license for holding an auction is five dollars ($5.00) per day. This ordinance was passed in 1932 and was evidently passed under the power granted cities by the Legislature under section 10284, clause 35, Burns' Indiana Statute 1926 wherein the city council is given power "to regulate the sale of all kinds of property at auction, in the streets, stores, shops or elsewhere in the city and to license auctions."

"Did the Store License Tax Law supersede in any particular the statute above referred to, and did the