ACCOUNTS, STATE BOARD OF: Whether funds carried in
depreciation account of municipally owned utility must be
deposited under the public depository Act. Municipally
owned utilities, right to invest fund in depreciation ac-
count.

December 6, 1938.

Hon. Ross Teckemeyer, Secretary,
State Board for Depositories,
State House,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion as
to the disposition of funds carried in the depreciation account
of municipally owned public utilities, your question having
reference simply to whether these funds may be invested or
whether they are required to be deposited under the Public
Depository Act of 1937, and when deposited, whether the same
can be withdrawn for the purpose of investment.

For the purpose of eliciting the information desired you
have stated your questions as follows:

"In your opinion (1) can a public officer withdraw
depreciation funds from the public depository for in-
vestment under the provisions of the Public Depository
Act, Chapter 3, Acts of 1937?

"(2) If said public officer can invest such funds, who
would be held responsible in case said investments were
later found to be invalid or could not be redeemed at
cost, and a loss sustained?

"(3) Providing the Acts governing the operation of
certain municipal water works do permit the invest-
ment of Depreciation Reserve Funds, would, in your
opinion, the general statutes for operation of public
utilities as amended in 1933 permit municipally owned
utilities, without expressed statutory provisions, to in-
vest the Depreciation Reserve Funds?"

The Public Service Commission Act of 1913 defined the term
"public utility" as follows:

"* * * the term 'public utility' as used in this act
shall mean and embrace every corporation, company,
individual, association of individuals, their lessees, trustees or receivers appointed by any court whatsoever, and every city or town, that now or hereafter may own, operate, manage or control any street railway or interurban railway or any plant or equipment within the state for the conveyance of telegraph or telephone messages, or for the production, transmission, delivery or furnishing of heat, light, water or power, or for the furnishing of elevator or warehouse service either directly or indirectly to or for the public.” (Our italics.)


The above provision remained unchanged until 1933. In the meantime, however, in 1925, sections 22 and 25 of the above Public Service Commission Act of 1913, were amended and now appear in Burns’ Indiana Statutes Annotated (1933) as sections 54-216 and 54-219. These sections, as amended, read as follows:

54-216: “Every public utility shall carry a separate, proper and adequate depreciation account whenever the commission, after investigation, shall determine that such depreciation account reasonably can be required. The commission, from time to time, shall ascertain and determine the proper and adequate rates of depreciation of the several classes of property of each public utility. The rates, tolls and charges shall be such as will provide the amounts required over and above the reasonable and necessary operating expenses, to maintain such property in an operating state of efficiency corresponding to the progress of the industry. Each public utility shall conform its depreciation accounts to such rates, so ascertained and determined by the commission. The commission shall make changes in such rates of depreciation, from time to time, as it may find necessary.”

54-219: “All money thus provided shall be set aside out of the earnings and carried in a separate depreciation fund. The money in this fund shall be applied first to depreciation expenses. Any balance in the fund, not applied to depreciation expenses, may be invested by the public utility or extended temporarily by it for new construction, extensions or additions to its utility
property. This fund shall be used for no other purpose. If invested, the income from the investment shall be carried into and become a part of the depreciation fund. Any balance, not applied to depreciation expenses, shall always remain a part of the depreciation fund. In no event shall moneys, temporarily expended from this fund for new construction, extensions or additions to the property, be carried into or considered a part of the capital account of such public utility. Upon the sale of any public utility property, to continue in operation as such, the balance in the depreciation fund, unexpended for depreciation expenses, shall be transferred to the purchaser and by the purchaser shall be held, administered and used as herein authorized and required."

Upon the basis of the above quoted sections and as the term “public utility” was defined at the time of the 1925 amendment, it would appear that depreciation funds of municipally owned utilities might be invested. However, in 1933, section 1 of the 1913 Act, supra, which is devoted to the definition of terms was amended. We call special attention to the definition of the term “public utility” as that term is defined in the 1933 amendment of section 1, supra. In that amendment the term “public utility” is defined in the same language identically as heretofore set out, except that after the word “whatsoever” and immediately preceding the words “that now or hereafter may own” the language “and every city or town” is stricken out and there is added after the words “warehouse service either directly or indirectly to or for the public,” the language “but said term shall not include a municipality that may now or hereafter acquire, own or operate any of the foregoing facilities.”

For the purpose of indicating the language stricken out in the definition of “public utility,” I have underlined the same in the quotation from the original Act defining “public utility.” The language added, of course, is very obvious in its placement.

In the amendment of section 1 of the 1913 Act, supra, the 1933 Act also defines a new term to cover the case of municipally owned utilities, it being provided therein that the term “‘municipally owned utility’ shall include every utility owned
or operated by a municipality.” The very obvious effect of the above described amendment is to take municipally owned utilities out of the definition of a “public utility,” so that after the effective date of the 1933 amendment, the language already quoted with respect to every public utility carrying a separate and adequate depreciation account whenever the commission shall determine that the same can be reasonably required and also providing that such funds in such account may be invested as the same is embodied in sections 54-216 and 54-219 of Burns’ Indiana Statutes Annotated (1933) would have no application to depreciation accounts, if any, required to be kept by municipally owned utilities.

An examination of the 1933 Act, supra, reveals further that no provision is made by that Act requiring municipally owned utilities to keep a depreciation account other than as provided in the following language quoted from page 952 of the Acts of 1933, viz.:

“Such governing body shall set aside sufficient of the remainder of the earnings of such utility into a separate and special fund to be identified as the special utility fund, to be used and applied in the maintenance, extension, replacement, in whole or in part, repair and operation of such utility.”

With this preliminary analysis of the Public Service Commission Act as applied to your question, I desire now to notice chapter 3 of the Acts of 1937. This Act, approved January 30, 1937, entitled “An Act concerning public funds” was enacted for the purpose of requiring the deposit of all public funds in accordance with its terms.

This department has already held in an official opinion under date of May 6, 1937, that the receipts from the operation of the gas system operated by the city of Indianapolis, Indiana, through its board of directors for utilities of its department of utilities, are public funds within the meaning of the above Act.

See opinions of the Attorney General for the year 1937.

I do not think it is necessary to restate the reasoning in that opinion, but upon the basis of the reasoning therein contained, it seems to me that any funds which are held by municipally
owned utilities under the 1933 Act and by the authority of the last above quoted provision are public funds and required to be deposited in conformity with the Depository Act of 1937.

Since there is no provision in the 1933 amendment of the Public Service Commission Act authorizing the investment of depreciation funds owned by municipally owned public utilities, unless the utility is organized under some other Act authorizing such investment, it is clear, in my opinion, that Chapter 3 of the Acts of 1937 would apply, and in such case there would be no authority to withdraw such depository funds, which are public funds, from a public depository for investment. Your first question is answered in the negative, that is, assuming that the municipally owned utilities involved are not organized under some Act other than the Public Service Commission Act of 1933, supra.

Your first question being answered in the negative, your second question requires no answer.

Your third question presents a somewhat different situation. It is recognized that there are certain acts for the organization and maintenance of municipally owned utilities of a special character, principally water works utilities. These acts usually contain provisions authorizing the investment of the depreciation funds.

An example of such a case is chapter 259 of the Acts of 1933 which was approved on March 9, 1933, one day later than the amendment of the Public Service Commission Act as amended by chapter 190 of the Acts of 1933. That Act, that is, the Act approved March 9, 1933, authorized cities of the fifth class owning and operating unincumbered water works to provide for extensions and additions. Section 6 of that Act expressly authorized any accumulation of the depreciation fund to be invested.


As I understand your third question, you desire to know whether in such a case as this the Public Depository Act of 1937 would prevent the investment of the depreciation funds notwithstanding the Act which is authority for the organization of the municipally owned utility expressly authorizes such investment to be made.

I think the answer to this question should be that the Public
Depository Act of 1937 does not prevent such investment to be made. It is noted that the Public Depository Act of 1937 does not expressly repeal these several acts authorizing the investing in certain cases of depreciation funds owned by municipally owned public utilities. The rule is well settled that implied repeals are not favored. Moreover, a general statute without negative words does not repeal the particular provision of a former statute on a special subject to which the general language of the later Act as it stood alone might be deemed to apply, unless the two statutes are irreconcilably inconsistent.


It seems to me that the Public Depository Act of 1937 is not in irreconcilable conflict with those provisions occurring in some of the laws authorizing municipalities to own public utilities whereby such municipally owned utilities are authorized to invest parts of the funds carried in the depreciation account, and your third question is answered accordingly.

ACCOUNTS, STATE BOARD OF: County hospitals, notice required for letting of contract for improvement.

December 6, 1938.

Hon. Wm. P. Cosgrove,
State Examiner,
Indianapolis, Indiana.

Dear Sir:

I have before me your letter requesting an official opinion in answer to the following question:

Whether, under Section 3, Chapter 144 of the Acts of 1917 (sec. 22-3218, Burns' 1933), the board of trustees of the county hospital organized thereunder has the power to contract for the construction of an addition to an improvement of such hospital, and if so, whether such board of trustees is required to give six weeks' notice to bidders as is required by Section 2, Chapter 271 of the Acts of 1907 (sec. 26-2002, Burns'