Thus the answer to your second question is simple. Basic training center companies are permitted a credit equal to five percent (5%) of the salary paid to trainees and an additional five percent (5%) of the amount of the fees paid to a basic training center. The basic training center itself, if it employs trainees, is entitled to a credit of five percent (5%) of the wages paid such trainees and an additional five percent (5%) of the wages paid its supervisory personnel in training its own trainees. The time spent by supervisory personnel training the center's employees would be the fractional part of the time spent by the personnel in training all trainees that is equal to the fractional part of the number of trainees trained that represents the center's own employees. The fees received by the training center from the various participating employers would, of course, be considered income for the center.

OFFICIAL OPINION NO. 2
January 16, 1968

MUNICIPAL CORPORATIONS—Retirement Plans for Employees of Municipal Public Utilities—Authority of Municipality to Contribute to Fund.

Opinion Requested by Mr. Richard L. Worley, State Examiner.

This is in response to your request of December 28, 1967, for my Official Opinion concerning several questions about a municipal utility and its retirement system. The facts you presented are as follows:
1968 O. A. G.

“A municipal utility operating a pension plan since 1955 under Burns' 48-6631 et seq., wishes to termi-
nate its contract with the insurer and enter into an
entirely new and different plan which provides for re-
unding all contributions made by the employer and
employees.

“The principal difference, as relates to funding of
the two plans, is that under the original plan referred
to as a Money Purchase Plan the eventual benefit is
not fixed and is dependent, in part, upon employee
contributions. Under the new plan referred to as a
Deposit Administration Plan the eventual benefit is
fixed and is not dependent upon employee contribu-
tions.

“The proposal includes the plan to refund all em-
ployee contributions made to date. The employer is
likewise being refunded all contributions made to date;
however, the employer will be required to greatly ac-
celerate contributions in order to fund the newly re-
classified prior service while the employees will mere-
ly begin to make current contributions which cannot
exceed five per cent of the wage or salay.”

Your questions are as follows:

“1. Can the utility, its employees who are members
of an existing plan, and the insurer terminate
and liquidate the existing plan by refunding to
the employees all sums contributed by the em-
ployees and by refunding to the utility all sums
contributed by it, including the prior contributions
for past services, except those contributions now
required to pay benefits under the existing plan
to retired employees?

“2. Can the utility enter into a new plan to increase
benefits payable to the employees upon retire-
ment (except those already retired) and in so
doing contribute an amount to the plan in excess
of the 5% of salaries and wages which may be
contributed by the employees (exclusive of past
service contributions)?
OPINION 2

"3. Can the utility make a contribution for past services in respect to employees who elect to participate in the new plan in an amount sufficient to make the new plan actuarially sound?

"4. Can the utility make contributions to the program from time to time in order to keep the plan actuarially sound?"

The statute under which the retirement plan in question was created is Acts 1939, ch. 110, as amended by Acts 1943, ch. 313 and Acts 1945, ch. 142, Burns IND. STAT. ANN. §§ 48-6631—48-6634.

The first section authorizes the governing body of a municipal utility to "provide for a system of retirement pensions, annuities, insurance or any other suitable provision for a retirement fund for the employees of such municipal utilities." Section 3 of the 1939 Act, as last amended by section 3 of the 1945 Act, Burns § 48-6633, provides that the governing body "shall provide for contributions from employees desiring to become members of said fund." Under section 4, as amended by section 4 of the 1943 Act, Burns § 48-6634, the governing body is required to invest such funds or, in the alternative, is authorized to purchase with funds received pursuant to this Act "retirement income contracts or retirement annuity contracts, written or assumed by life insurance companies or companies licensed to do business in the state of Indiana."

Apparently the utility about which you are asking has purchased retirement annuity or retirement income contracts from a life insurance company licensed to do business in the State of Indiana. Undoubtedly it has entered into a contract with the insurance company for the purchase of retirement contracts. The manner in which that contract may be terminated concerning future purchases is a question of contract law, and will depend somewhat upon the terms of the individual contract between any particular municipality and its insurer. The statute authorizing these retirement plans does not set out required terms for any retirement income or annuity contracts which may be purchased by the municipal utility. Therefore, the terms of any such contracts
will vary greatly from utility to utility, and I am unable to make any statements concerning them except in the most general way. Any particular contract would have to be examined in order to determine how the contract might be terminated and who the parties are. The 1939 statute does not require the perpetual continuation of any one particular retirement plan, or purchase contract, established by a municipal utility, and it is my opinion that such a plan could be terminated, so long as no vested rights are thereby impaired.

Since contributions are mandatory only from employees who desire to become members of said fund, and since the General Assembly has specifically authorized the purchase of "annuities," I believe that employees who made contributions pursuant to the plan obtained a vested interest in the plan. In Jensen v. Pritchard, 120 Ind. App. 439, 90 N.E. 2d 518 (1950), on rehearing, 91 N.E. 2d 846, the Appellate Court decided that a retirement or pension plan established for public employees and into which both the employee and the public employer made payments, was an annuity, rather than a pension. The Court used two tests. When the employee has a choice between joining the plan and making payments, or refusing to join the plan while remaining an employee, an annuity plan rather than a pension plan is indicated. The second test is whether the administration and distribution of public funds is involved. In that case, the funds were turned over to the trustees created by the statute. In that case, funds are used to purchase retirement contracts, over the administration of which the utility has no control. The Appellate Court found that public funds were not involved in the Jensen case, and it is my opinion that the funds involved in the type of retirement plan in question are no longer public funds after they have been used to purchase retirement annuity contracts. Therefore, the plan amounts to an annuity rather than a pension plan consisting of public funds, and a contributing employee does obtain a vested interest in his contributions and future benefits. [This situation is in contrast with a public employee's lack of vested interest prior to retirement in a pension plan consisting of public funds and financed in part by required employee contributions and in
part by contributions of the public employer, see Kern v. State ex rel. Bess, 212 Ind. 611, 614-615, 10 N.E. 2d 915, 916 (1937).]

As the Appellate Court indicated in the Jensen case, no question of impairment of contract would be involved in a modification of the annuity contract by mutual consent of the parties (there to enter into a new contract with greater benefits to the employees). See 120 Ind. App. at 449-450, 90 N.E. 2d at 520. I can see no legal obstacle to a termination of the plan pursuant to agreement of the utility, the insurer and all covered employees.

Your last three questions all involve an interpretation of the second section of the 1939 statute, and therefore will be considered together.

The second section of the 1939 Act, as last amended by Acts 1945, ch. 124, § 2, Burns § 48-6632, reads as follows:

"Any such common council, board of trustees or board of directors or utility district or other municipal subdivision operating any municipal utility, desiring to set up such retirement fund for the benefit of the employees of such municipal plan, may provide that the contributions of employees be matched by like contributions of such utility out of its earnings, reserves or earned surplus, to create a fund for such purpose and to allocate to such fund contributions sufficient to establish the plan on a sound actuarial basis, including contributions for past services of employees, and where such contributions for Past Services are made they need not be matched by like contributions from employees." (Emphasis added.)

The emphasized portion was added by Acts 1943, ch. 313, § 2. (Acts 1945, ch. 124, § 2, added the words "board of trustees" after the words "common council" in the first line.)

Section 3 of the 1939 Act, as last amended by section 3 of the 1945 Act, Burns § 48-6633, requires that the plan provide for member-employee contributions, and limits the amount of such contributions to five percent (5%) of each member-employee's wage or salary:
1968 O. A. G.

"Any such . . . board of directors . . . may pro-
vide rules and regulations . . . and shall provide for
contributions from employees desiring to become
members of said fund: Provided, however, That the
amount of contributions required from any such em-
ployee shall not exceed five percent of the wage or
salary of any such employee." (First and last empha-
sis added.)

It is thus quite clear that the establishment of member-
employee contributions is mandatory, and the amount of such
contributions is limited to five percent (5%) of each mem-
ber-employee's salary or wage. It is also clear that an em-
ployer contribution is authorized. Your second question is
whether a municipal utility setting up such a plan may con-
tribute to such plan for current services an amount in excess
of five percent (5%) of salaries and wages.

The State Board of Accounts has consistently taken the
position that a utility may not contribute more for current
services, under this statute, than an amount "matching" or
equivalent to the amount contributed by its employees, up
to a maximum limitation of five percent (5%) of the employ-
ees' salaries and wages. In 1963, Robert W. McNevin, as As-
sistant Attorney General, issued an unofficial opinion to the
counsel for the Citizens' Gas and Coke Utility in Indianap-
olis in agreement with the position of the State Board of
Accounts. That interpretation is correct, in my opinion.

Section 2 originally provided that the utility "may provide
that the contributions of employees be matched by like
contributions of such utility . . . to create a fund for such
purpose." (Emphasis added.) It has been suggested that
since the word "may" is, in Indiana, permissive rather than
mandatory, this phrase is not a limitation on the power of
the municipal utility to contribute more to the fund than an
amount which matches employees' contributions.

It is true that in Indiana, the word "may" is permissive
rather than mandatory, unless the context requires other-
wise, State ex rel. Smitherman v. Davis 238 Ind. 563, 151
N.E. 2d 495 (1958). I agree that the word is clearly per-
missive in this statute. However, the conclusion that the
phrase does not limit the amount which the municipal utility may contribute to the fund does not follow. Municipalities are creatures of the Legislature, and may exercise only such powers as are expressly granted or as may be implied from those expressly granted, *City of Crawfordsville v. Braden*, 130 Ind. 149, 28 N.E. 849 (1891). A permissive grant of power to contribute "like" amounts does not carry with it, either expressly or impliedly, a grant of power to contribute a larger amount of money. Therefore, in my opinion, the answer to your second question is "No."

This answer also necessarily answers your fourth question in the negative, assuming that you are asking whether contributions for current services made "to keep the plan actuarially sound" could exceed the authorized contributions of an amount to match employee contributions, up to five percent (5%) of salaries and wages. Implicit in this question is the premise that the utility may be authorized to establish a plan which cannot be made actuarially sound by the amount of contributions permitted under the statute. In my opinion, this premise is fallacious. The utility is not authorized by the statute to set up a retirement plan which would be actuarially unsound based on the permitted contributions from employees and employers.

The words "and to allocate to such fund contributions sufficient to establish the plan on a sound actuarial basis" in section 2, as added by amendment in 1943, immediately follow the words "to create a fund for such purpose." In my opinion, those words state an additional purpose for which employers may contribute to the fund, but do not remove the previously stated limitation on the amount of contributions which may be made by the employer. This opinion is reinforced by the succeeding words and phrase: "where such contributions for past services are made they need not be matched by like contributions from employees." (Emphasis added.) The specific granting in this portion of section 2, as amended, of the power to contribute more than like amounts for past services only, precludes any intention of the Legislature to remove the limitation for contributions for current services.
1968 O. A. G.

Your third question is whether a utility may make a contribution for past services in an amount sufficient to make the new plan actuarially sound. My answer is "Yes," if the plan is properly established on a sound actuarial basis in the first place—that is, if the plan will be actuarially sound based upon permitted contributions. The contribution for past services cannot be utilized, however, to evade the limitation on contributions for current services imposed by the statute.

I am aware of the fact that any pension or retirement plan established under the contributions limitations imposed by the Legislature in this statute is likely to be inadequate under today's standards for the employees of the utility. A good pension or retirement plan is required if such utilities are to attract and retain employees.

Therefore, I call to your attention the fact that municipal utilities are authorized to participate in the Public Employees' Retirement Fund, created by Acts 1945, ch. 340, as amended, Burns §§ 60-1601—60-1626. Their employees not covered by the existing retirement plan thereupon become entitled to the benefits of that act, as supplemented by the provisions of Acts 1955, ch. 329, as amended, Burns §§ 60-1923—60-1940. Section 24 of Acts 1945, ch. 340, creating the Public Employees' Retirement Fund, as amended by Acts 1947, ch. 6, § 21, Burns § 60-1624, specifically provides for the manner in which the employees of a municipality who are covered by an existing retirement fund may become members of the Public Employees' Retirement Fund. Since the retirement plan of the utility in question was created in 1955, it was created subject to the right of the utility and its covered employees to bring that retirement system into the Public Employees' Retirement Fund pursuant to the 1945 Act and its 1947 amendment.