The Indiana State Police Department Pension Trust Agreement, paragraph 20, *supra*, also specifically authorizes investment of its trust funds in life insurance policies, annuities and loans, unspecified in the Acts of 1963, Ch. 398, which, in essence, substitutes the so-called Prudent Man Rule for detailed specifications of authorized investments set out in prior law. Though, the statute lists some investments therein, it is unlimited in generality of application. Therefore, in making investments named in the Agreement, as well as others, the Trustee of the Indiana State Police Pension Trust must, under Burns' 31-507, *supra*:

> "* * * exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion and intelligence exercise in the management of their own affairs * * *."

In summary and conclusion, it is my opinion that the duties of the Trustee of the Indiana State Police Pension Fund are affected by the Acts of 1963, Ch. 398, which concerns the degree of care a trustee must exercise in acquiring, retaining, selling and managing property for any trust, but such enactment does not change the limitations otherwise applicable.

OFFICIAL OPINION NO. 50

November 6, 1963

Mr. Merton Stanley, Chairman
Public Service Commission of Indiana
901 State Office Building
Indianapolis, Indiana

Dear Mr. Stanley:

Your recent letter requesting an Official Opinion reads as follows:

> "The Acts of 1913, Chapter 76, Section 92, as found in Burns' Indiana Statutes, Section 54-505, provide:
>
> " '* * * Any public utility may issue notes for proper purposes and not in violation of any pro-

> visions of this act or of any other act, not to exceed 10% of the capital stock of said public utility, payable at periods of not more than twelve months, without such consent; * * *'.
>
> "In order to properly assess statutory fees to the Treasurer of the State of Indiana, the Commission requests an official opinion in answer to the following questions:
>
> "1. Does the term 'capital stock', as used in this Act, mean common stock at par value and no par value?
>
> "2. If the term 'capital stock' includes no par common stock, is the 10% to be determined by the stated value or the book value?
>
> "3. Does the term 'capital stock' include preferred stock both cumulative and non-cumulative?
>
> "4. Does the term 'capital stock' include earned surplus and/or capital surplus?
>
> "5. Does the term 'capital stock' include reserves and surpluses accumulated as the result of accelerated amortization and liberalized depreciation, as provided by Sections 167 and 168 of the Internal Revenue Code of 1954?"

Section 92 of the Acts of 1913, Ch. 76, as found in Burns' (1951 Repl.), Section 54-505 (hereinafter referred to as Section 92), in addition to that part quoted in your letter, sets out the authority of the commission to approve or disapprove a proposed issue, provides for a hearing on such issue, and declares the purposes for which the proceeds of such issue may be used. Were it not for Section 92, it would be unnecessary for a public utility to obtain approval from the commission on issues of notes payable in less than one year from their execution.

Thus, the portion of Section 92 quoted in your letter is a grant of authority to the commission requiring it to approve a short term note issue; however, said portion of Section 92 is likewise a limitation of the commission's jurisdiction, in that those issues of notes in amounts below ten per cent (10%)

of the utility's capital stock are not subject to commission approval.

The fees referred to in your letter are set forth in the Acts of 1913, Ch. 76, Sec. 96, as amended and found in Burns' (1951 Repl.), Section 54-511, which section reads, in pertinent part, as follows:

> "The commission shall charge every public utility and every municipality receiving permission from it to issue any * * * notes * * * an amount equal to twenty-five cents [25¢] for each one hundred dollars [$100] of such * * * notes * * *."

While this statute is applicable in those instances when commission approval must be obtained before notes are issued, it is not relevant unless the commission has first determined that it has jurisdiction over the particular issue of notes proposed. The real question, then, is how such jurisdiction is to be determined with respect to Section 92, or, in other words, what does the limitation "10% of the capital stock of said public utility" mean.

In construing statutes the paramount objective is to find and preserve the intent of the Legislature as it is manifested by the language used in the statute.

The 10% limitation in Section 92 was obviously designed to accommodate a utility's need for funds on a short term basis, without placing the burden on such utility to obtain commission approval. But the Legislature, mindful of its responsibility to provide supervision over a public utility's fiscal arrangements (a function closely tied to rate-making), extended such benefit only to the issuance of notes maturing in twelve months or less, and only insofar as the aggregate amount of such notes did not exceed 10% of the utility's capital stock.

It is equally clear that the phrase "10% of the capital stock of said public utility" is a standard provided by the Legislature to aid the commission in determining its jurisdiction over short term note issues. Being the basic factor within the standard, the term "capital stock" must be considered as a constant rather than a variable. To say otherwise would be to presume the Legislature meant to allow discrimination in

the application of the 10% limitation by permitting a utility to alter the term "capital stock" according to its method of accounting. Such a presumption would be tantamount to attributing an unconstitutional act to the Legislature, which is contrary to well-established rules of statutory construction.

Since Section 92 has remained in its present form from the time of its enactment and would constitute a fundamental responsibility of the commission, I would be constrained to consider the construction placed upon this section by the commission if such formed a consistent pattern of interpretation.

In the case of Gross Income Tax Div. v. Colpaert Realty Corporation (1952), 231 Ind. 463, 478, 109 N. E. (2d) 445, the court stated as follows:

> "While not controlling, the contemporaneous construction of a statute by those charged with the administration of it is entitled to great weight, and should not be interfered with unless there are very cogent and persuasive reasons for departing from it * * *."

Having in mind that an administrative interpretation of Section 92 by the commission could have a bearing on the answer to the question, a request was made of your accounting department for copies of prior proceedings of this nature. That department furnished my office with all short term financing orders from January 1950 to July 1963, with certain petitions upon which such orders were founded.

An analysis of these records clearly shows that no uniformity existed in the past and that no consistent administrative construction has been arrived at and followed, either by this commission or prior commissions.

Instances were found wherein the value of the capital stock consisted of the value of common and preferred stock, but surplus was excluded, while in other instances the surplus was included. Other conflicting situations were noted, and it becomes apparent that no uniform administrative construction of the meaning of "capital stock" has been arrived at or followed by the commission.

Because of this failure on the part of the various commissions, the law, as set forth in Gross Income Tax Div. v. Col-

paert Realty Corporation, *supra*, would not be applicable. Rather, the effect of such varied constructions would be determined by the principle stated in In re Newberry's Estate (1953), 138 W. Va. 292, 75 S. E. (2d) 851, 854, wherein the court stated as follows:

> "* * * Moreover, the stipulation shows that the interpretation given the statutes, by those charged with their administration, has been varied, sometimes being in accord with the contention of the taxpayer—sometimes not. In such circumstances, the administrative interpretation can be of little, if any, help in finding the intended meaning of the statute. See State ex rel. Rickey v. Sims, 122 W. Va. 29 at page 35, 7 S. E. (2d) 54."

See also Sutto v. Board of Medical Registration and Examination (1962), 242 Ind. 556, 565, 180 N. E. (2d) 533, and 2 Am. Jur. 2d Administrative Law § 250.

It thus becomes necessary to determine the intention of the Legislature in using the words "capital stock," since previous action by the commission in the application of Section 92 will be of little value.

The Legislature and the Supreme Court have provided us with a guide to be used in arriving at the proper meaning of words and phrases used in statutes, which has been declared as follows:

> "Words and phrases shall be taken in their plain, or ordinary and usual, sense. But technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."
>
> 2 R. S. 1852, Ch. 17, Sec. 1, as found in Burns' (1946 Repl.), Section 1-201;
>
> Gross Income Tax Division v. Colpaert Realty Corporation (1952), 231 Ind. 463, 470, 109 N. E. (2d) 415.

In its proper and ordinary sense, the term "capital stock" is said to be defined as follows:

"The *capital stock* of a corporation *is the amount of money, property, or other means authorized by its charter* and contributed, or agreed to be contributed, by the shareholders as the financial basis for the prosecution of the business of the corporation * * *. *It is a fixed amount* and does not vary even though the actual value of the capital stock, as determined by the assets of the corporation, is diminished or increased." (Our emphasis)

13 Am. Jur., Corporations, § 172.

Similar definitions of this term may be found in the following treatises:

18 C. J. S. Corporations, § 193;

Stevens, Corporations, Sections 96 and 100;

Fletcher Cyclopedia, Corporations, Vol. II, Ch. 58, p. 12.

See also: Lake Superior Dist. Power Co. v. Public Service Commission (1947), 250 Wis. 39, 26 N. W. (2d) 278, 282.

Our Supreme Court has expressed the meaning of the term "capital stock" in the following language:

"The *capital stock* of a corporation * * * *is the sum of money fixed by the corporate charter* as the amount paid in, or to be paid in, by the stockholders, for the prosecution of the business of the corporation and for the benefit of corporate creditors * * *. The capital stock belongs to the corporation, considered as a legal person, and the shares are the property of the individual shareholders * * *. The capital stock is to be distinguished from the amount of property owned by the corporation. Generally the *capital stock does not vary,* although the actual property of the corporation may fluctuate widely in value. Sometimes the word 'stock' has been used to indicate the same thing as capital stock, but stock generally means shares of stock." (Our emphasis)

Markle v. Burgess (1911), 176 Ind. 25, 27, 95 N. E. 308.

The above language was cited with approval in Department of Treasury v. Crowder (1938), 214 Ind. 252, 255, 15 N. E. (2d) 89.

Thus, the proper and ordinary meaning of "capital stock" has been accepted as a legal definition by our Supreme Court, and since both meanings are substantially the same, it is immaterial whether the term be taken in its ordinary sense or as having a legal meaning. However, it seems of great significance that the definition contained in the Markle case, *supra*, was handed down just two years before the Legislature enacted Section 92. In the case of Indiana Trust Co. v. Griffith (1911), 176 Ind. 643, 95 N. E. 573, the Supreme Court was asked to interpret ambiguous language of a statute. The court noted that the legislative enactment conformed with the expression used by the courts in earlier decisions, which, in turn, was in harmony with the great weight of authority, and then held (176 Ind. 643, 650):

> "* * * it must be presumed that the legislature in enacting the statute, and that part of it before quoted, meant to adopt such limitation, for *if the legislature uses words that have received a judicial construction, they are presumed to be used in that sense*, unless the contrary intent can be gathered from the statute." (Our emphasis)

The term "capital stock" has received a judicial construction which is consistent with accepted definitions of the term; the mandate of the Legislature and the court states that it shall be accepted as such unless legislative intent is contrary. Presumably the 1911 Markle decision, *supra*, was clear in the minds of the legislative members in 1913 when Section 92 was enacted into law; furthermore, the above definition provides a readily determinable standard, which is definite, certain and equally applicable to all utilities. Thus, the legislative intent encourages the use of the term as hereinabove defined and as accepted by our courts. Upon this rationale I adopt the Markle case definition, *supra*, as the controlling meaning of "capital stock" as that term is used in Section 92.

In answer to your first and third questions, therefore, it is my opinion that, although the term "capital stock" does not mean common and preferred stock in the sense of shares of stock, it does mean the amount of money, etc., derived from the sale of all classes of shares of stock, with or without par value, including shares of preferred stock.

> Warren v. King (1883), 108 U. S. 389, — L. Ed. —, 2 S. Ct. 789.

To this same effect, may I invite your attention to Stevens on Corporations, § 96, wherein it is said:

> "'Capital stock' on the other hand, is better used to refer to the bookkeeping item carried on the liability side for the purpose of determining whether there is a surplus or a deficit. The value of 'capital' may fluctuate and may be written up because of appreciation or written off because of depreciation, depletion or loss. But the capital stock item *which equals the aggregate par value of all par value shares plus the consideration received and to be received or transferred from surplus in payment of shares without par value* must remain constant, except as changed in accordance with required formalities." (Our emphasis)

Relative to your fourth and fifth questions, if the term "capital stock" is to be taken as previously defined, surplus in any form must, of necessity, be excluded. In 18 C. J. S. Corporations, § 193, at page 618, the rule is stated as follows:

> "* * * the general rule is that undivided profits or surplus forms no part of the capital stock in the proper sense * * *."

In Kansas Electric Power Co. v. Ryan (1942), 154 Kan. 747, 121 P. (2d) 217, the Supreme Court of Kansas had the problem of determining whether or not the basis for the assessment of an annual corporate license fee should have included surplus within the term "capital stock." Upon this question the court said:

> "* * * defendant pleaded in his answer and argues here that the surplus shown by plaintiff's reports should

> be regarded as added to the value of the paid-up capital stock of plaintiff without nominal or par value and treated as additional paid-up capital stock of the corporation. We think this position untenable. Neither a surplus nor a deficit in corporate assets constitutes capital stock."

The term "surplus" has been held to consist of the following:

> "* * * The surplus account represents the net assets of a corporation in excess of all liabilities including its capital stock. This surplus may be 'paid-in surplus,' as where the stock is issued at a price above par; it may be 'earned surplus,' as where it was derived wholly from undistributed profits; or it may, among other things, represent the increase in valuation of land or other assets made upon a revaluation of the company's fixed property * * *."
>
> Winkelman v. General Motors Corp. (S. D. N. Y. 1942), 44 F. Supp. 960, 966.

In specific regard to question No. 5, see Houston Lighting and Power Co. v. Calvert (1962), C. C. H., Texas Tax Reporter, 2 Tex. Tax Cases, par. 200-177, wherein the account established pursuant to Sections 167 and 168 of the Internal Revenue Code, as found in 26 U. S. C. A., §§ 167, 168, was excluded from stated capital and surplus.

Therefore, surplus, which includes capital or paid-in surplus, earned surplus, and surplus derived from revaluation of assets, does not possess characteristics of capital stock and is properly excluded from the value of capital stock as that term is used in Section 92. The same exclusion would apply to the accelerated amortization and liberalized depreciation account provided by the Internal Revenue Code, §§ 167 and 168, *supra*, notwithstanding such account was carried as a surplus account or a reserve account, the latter exclusion being based upon the fact that a reserve account would only be considered a liability, not even within the capital account.

The question remains as to the manner of determining the "*amount*" of such money, property, etc., of which "capital

stock" is composed. The Acts of 1913, Ch. 76, Sec. 89, as amended, as found in Burns' (1951 Repl.), Section 54-502, reads, in part, as follows:

> "No public utility shall issue any stock or certificate of stock, except in consideration of money or of labor or property at its current fair cash value as found and determined by the commission actually received by it. No stock or certificate of stock shall be sold at a discount or premium without the approval of the commission and if sold at a discount, the commission shall make a record thereof and give such publicity of the facts as it may deem necessary at the expense of the utility * * *."

My understanding of this statute and of the practice of the commission is that a utility must disclose, or must have disclosed, at the time an issue of stock was made, the par value of par stock and the stated value of no par stock as a condition of approval by the commission. Otherwise, the commission would be unable to perform the duties imposed upon it by Sections 90 and 91, *supra*, of that Act and by Acts of 1923, Ch. 65, Sec. 1, as found in Burns' (1951 Repl.), Section 54-506. In addition, it will be noted that approval must be obtained for stock sales at premium or discount, thereby providing the commission with complete knowledge of the amounts of money, property, etc., received by the utility for such sales.

Therefore, in answer to this question generally, and in particular response to your question No. 2, I believe it is entirely in accord with the term "capital stock" as defined herein, to determine the amount thereof from the par value of par stock and the stated value of no par stock, as such latter value may be increased by appropriate transfers from surplus (See: Acts of 1929, Ch. 215, Sec. 122, as added by Acts of 1949, Ch. 194, Sec. 17, as amended, and as found in Burns' [1960 Repl.], Section 25-2112) provided that stock sold at discount should be valued at the amount actually received therefor. A valuation in this manner would take into account all money, property, etc., actually received from the sale of stock that may be properly considered as capital stock, while excluding therefrom all money, property, etc., obtained as a result of sales at premium, which amounts can only be considered as capital sur-

plus until they have been appropriately transferred to reflect an increase in the stated value of the capital stock account. Accordingly, such a valuation, being a fixed amount, is absolutely compatible with the concept that the 10% limitation is a legislative yardstick that is constant, by which the commission can readily measure its jurisdiction.

Conversely, book value, as opposed to stated value, fluctuates with the acquisition, sale and depreciation of assets, as well as the everchanging fair market value thereof. Thus, capital stock based upon book value of shares would be contrary in every respect to the concept of capital stock developed herein, as related to the jurisdictional standard set out in Section 92.

In summary then, it is my opinion, that the consideration paid, or to be paid, for all shares of stock, regardless of class, authorized to be issued, including those amounts subsequently transferred from surplus to the capital stock account pursuant to applicable provisions of the law under which the utility is organized, constitutes the capital stock of a utility within the meaning of that portion of Section 92 quoted from your letter; it is my further opinion that surplus, in any form, unless transferred as hereinabove provided, should be excluded therefrom.

Finally, it is my opinion that in arriving at a capital stock figure, par stock should be taken at par value, and no par stock at stated value, as such stated value may be increased through appropriate transfers from surplus; except where stock is sold at a discount it should be valued at the amount actually received therefor.

OFFICIAL OPINION NO. 51

November 8, 1963

Mr. B. B. McDonald
State Examiner
State Board of Accounts
912 State Office Building
Indianapolis, Indiana

Dear Mr. McDonald:

This is in response to your letter concerning Sections 3 and