contingent right to hold over after 31 December 1957 had been defeated. Thus, at the time of his death there was created a prospective vacancy in the term to which he had been elected beginning on 1 January 1958 to 31 December 1960. The creation of this vacancy empowered the then commissioners to elect a qualified person to fill the office for the entire term, pursuant to Burns' 26-601, *supra.*

It is true that had Mr. Gibbs failed to qualify as his own successor, the person appointed to fill out the remainder of his first term would have held over until the general election in November of this year, inasmuch as the commissioners could not have made an appointment for the full term in the absence of a vacancy in the office. However, as has been pointed out, a vacancy did occur which prevented the appointee from holding over until his successor was elected and qualified.

Therefore, in answer to your question it is my opinion that, pursuant to Burns' 26-601, *supra,* the second appointment of Mr. Ferguson to the office of County Commissioner was for the full term from 1 January 1958 to 31 December 1960.

OFFICIAL OPINION NO. 13

February 14, 1958

Hon. John W. VanNess, Chairman
Public Service Commission
401 State House
Indianapolis, Indiana

Dear Mr. VanNess:

I am in receipt of your letter of January 14, 1958, in which you request an Official Opinion upon the question of application of certain portions of Burns' (1951 Repl.), Section 55-101, and which request further reads as follows:

> "This Section states that 'The power and the authority is hereby vested in the railroad commission (public service commission) and it is hereby made its duty to supervise all railroad—train service and accommodation.'

"In the case of Vandalia Railroad Company v. Railroad Commission, 192 Ind. 382, 101 N. E. 85 it was held that in the absence of congressional legislation the state may authorize the railroad commission to regulate the equipment of cars used in interstate commerce.

"In the Attorney General's Opinion, 1929-1930, page 526, the Attorney General held that the Public Service Commission of Indiana had jurisdiction over operation of a passenger train between Frankfort, Indiana and Peoria, Illinois, with authority to allow or disallow the abandonment of such train.

"We now have for consideration the question of whether the Public Service Commission of Indiana now has authority to allow or disallow the discontinuance of a train that discharges passengers at a city in Indiana, which passengers boarded the train at a station outside the state, and takes on passengers at the same Indiana city for a destination outside the state.

"In other words does this Commission have jurisdiction over a passenger train operating between Chicago, Illinois and Lima, Ohio and making only one stop in Indiana for the purpose of loading and unloading passengers."

The applicable statutory material for the discussion of your question is as follows:

(1) Acts of 1905, Ch. 53, Sec. 3, as amended, as found in Burns' (1951 Repl.), Section 55-101, the pertinent language of said section being as set out in your letter; and

(2) 49 U. S. C. A. § 1 (18-20), wherein provision is made for carriers subject to the Interstate Commerce Act to apply to the Interstate Commerce Commission for abandonment of all or a portion of a line for a certificate that the present or future public convenience and necessity permit of such abandonment.

Under the Interstate Commerce Act, and particularly the section noted above, it has been generally held that where an interstate railroad is discontinuing a portion of its passenger

service, there is not an "abandonment" as contemplated by the act and that therefore, the Interstate Commerce Commission does not have exclusive jurisdiction.

> Alabama Public Service Comm. *et al.* v. Southern R. Co. (1951), 341 U. S. 341, 71 S. Ct. 762, 95 L. Ed. 1002;
>
> M. & O. R. Co. v. Louisiana Public Service Comm. (D. C. La. 1954), 120 F. Supp. 250.

Your question does not raise the problem of abandonment of *inter*state service within the meaning of that act, nor does it concern a partial discontinuation of *intra*state service over which the Interstate Commerce Commission has held it does not have any authority under the act.

> New York Central Railroad Company Abandonment, 254 I. C. C. 745, 765.

We are here concerned with a discontinuation of wholly interstate passenger service in Indiana.

The United States Supreme Court early had before it a fact situation in which the Court reached conclusions concerning state regulation of *inter*state passenger service that help clarify the states' limitations in that area. The case was that of Lake Shore & Michigan Southern Railway v. Ohio (1898), 173 U. S. 285, 19 S. Ct. 465, 43 L. Ed. 702, and involved an Ohio statute which required that a railroad whose road was operated within the state must cause three of its regular trains, carrying passengers each way, if so many were run daily, to stop at any station of over 3,000 inhabitants for a time sufficient to receive and discharge passengers. The plaintiff in error there contended that the power to regulate interstate commerce was vested in Congress and that the statute of Ohio in its application to trains engaged in such commerce was directly repugnant to the Constitution of the United States. The language that follows in the decision of the court is so applicable to the question you have raised, I feel it warrants being set out in some detail.

The Court said at page 289:

> "In support of this contention it insists that an interstate railroad carrier has the right to start its train at

any point in one State and pass into and through another State without taking up or setting down passengers within the limits of the latter State. As applied to the present case, that contention means that the defendant company, although an Ohio corporation deriving all its franchises and privileges from that State, may, if it so wills, deprive the people along its line in Ohio of the benefits of interstate communication by its railroad; in short, that the company if it saw fit to do so could, beyond the power of Ohio to prevent it, refuse to stop within that State trains that started from points beyond its limits, or even trains starting in Ohio destined to places in other States."

The Court then discussed the plaintiff in error's cases cited to support the contention and then said at page 292:

"* * * While cases to which counsel refer involved the validity of state laws having reference directly to the public health, the public morals or the public safety, in no one of them was there any occasion to determine whether the police powers of the States extended to regulations incidentally affecting interstate commerce but which were designed only to promote the public convenience or the general welfare. There are however numerous decisions by this court to the effect that the States may legislate with reference simply to the public convenience, subject of course to the condition that such legislation be not inconsistent with the National Constitution, nor with any act of Congress passed in pursuance of that instrument, nor in derogation of any right granted or secured by it. * * *"

The Court discussed decisions involving "public convenience" concluding the discussion with this quote (page 297):

"* * * Mr. Cooley well said: 'It cannot be doubted that there is ample power in the legislative department of the State to adopt all necessary legislation for the purpose of enforcing the obligations of railway companies as carriers of persons and goods to accommodate the public impartially, and to make every rea-

sonable provision for carrying with safety and expedition.' Cooley's Const. Lim. (6th ed.), p. 715. It may be that such legislation is not within the 'police power' of a State, as those words have been sometimes, although inaccurately, used. But in our opinion the power, whether called police, governmental or legislative, exists in each State, by appropriate enactments not forbidden by its own constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and therefore to provide for the public convenience and the public good. This power in the States is entirely distinct from any power granted to the General Government, although when exercised it may sometimes reach subjects over which national legislation can be constitutionally extended. * * *"

Returning to your question particularly, the Court's language following the above quote is very *apropos* (page 298):

"It is not contended that the statute in question is repugnant to the Constitution of the United States when applied to railroad trains carrying passengers between points within the State of Ohio. But the contention is that to require railroad companies, even those organized under the laws of Ohio, to stop their trains or any of them carrying interstate passengers at a particular place or places in the State for a reasonable time, so directly affects commerce among the States as to bring the statute, whether Congress has acted or not on the same subject, into conflict with the grant in the Constitution of power to regulate such commerce. That such a regulation may be in itself reasonable and may promote the public convenience or subserve the general welfare is, according to the argument made before us, of no consequence whatever; for, it is said, a state regulation which *to any extent* or for a limited time only interrupts the absolute, continuous freedom of interstate commerce is forbidden by the Constitution, although Congress has not legislated upon the particular subject covered by the state enactment. If these broad propositions are approved, it will be difficult to sustain the numerous judgments of this court uphold-

ing *local regulations which in some degree or only incidentally affected commerce among the States, but which were adjudged not to be in themselves regulations of interstate commerce, but within the police powers of the States and to be respected so long as Congress did not itself cover the subject by legislation.*" (Our emphasis)

The Court then concluded its discussion in this area by saying at page 302:

> "* * * In the absence of legislation by Congress, it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the State to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled of course to provide for the convenience of persons desiring to travel from one point to another in the State on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the State to places beyond its limits, or the convenience of those outside of the State who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the State without stopping. * * *"

The rationale of this case is unchanged today and is still cited by the court as authority for a state, in certain circumstances, to validly "in some degree or only incidentally" affect interstate commerce.

As pointed out heretofore, there is still an absence of legislation by the Congress in this area of discontinuation of train passenger service.

> "* * * where there has been no direct legislation upon the precise subject-matter, that it is to be regarded as equivalent to a declaration by Congress that, until it sees proper to legislate thereon, the matter may be regulated by the state."

Vandalia R. Co. v. Railroad Comm. (1914), 182 Ind. 382, 388, 101 N. E. 85.

"Congress has dealt with the burden on interstate commerce resulting from state requirements of service by authorizing the abandonment of all service on any line or part of a line, where the Interstate Commerce Commission after giving consideration to the public interest so determines. On the principle *expressio unius est exclusio alterius*, this is clear indication of intention not to interfere with the power of the states to require service in cases where there is no abandonment pursuant to the statute. It is hardly thinkable that the railroads should be permitted to abandon passenger service in defiance of state requirements upon a showing that the service is operated at a loss and constitutes a burden upon interstate commerce, whereas to abandon both freight and passenger service on the same grounds they must apply for leave to the Interstate Commerce Commission. * * *"

Southern Railway Co. v. South Carolina Public Service Comm. *et al.* (D. C. S. C. 1940), 31 F. Supp. 707, 715.

The Federal Congress has left to the states the regulation of service other than absolute abandonment. States may, therefore, regulate discontinuances of interstate trains provided such regulation does not "unduly burden," "substantially interfere," "impair the efficiency," or "control beyond the boundaries of the state" interstate trains.

In the recent decisions, distinctions between regulation of *inter*state trains rendering *intra*state services and wholly *inter*state trains have not been drawn, nor is this deemed necessary since the courts earlier reached the conclusion that states can regulate *inter*state as well as *intra*state commerce in areas where the Congress has not acted and when such regulation does not seriously impair, burden or interfere with the interstate commerce.

The absence of federal legislation on the subject of discontinuance of trains in interstate commerce shows that the incentive to deal with this problem nationally is slight, and that

even though the problem concerns interstate trains, nonetheless, their regulation is for the state, as regards the discontinuation of their service rendered by such trains in the particular state.

Obviously, the Public Service Commission is not to be given a *carte blanche* in this area of regulation, but as pointed out above, its jurisdiction is confined to those areas where its regulations will not unduly interfere with or burden interstate commerce. "Whether a state in a particular matter goes too far must be left to be determined when the precise question arises." Southern Pacific Co. v. Arizona *ex rel.* Sullivan (1945), 325 U. S. 761, 781, 65 S. Ct. 1515, 89 L. Ed. 1915.

It is my opinion therefore, that the Public Service Commission of Indiana does have jurisdiction over wholly interstate trains and is vested with the authority to allow or disallow the discontinuance of service of such trains at a point or place in Indiana.

OFFICIAL OPINION NO. 14

February 19, 1958

Mr. T. M. Hindman
State Examiner
State Board of Accounts
304 State House
Indianapolis, Indiana

Dear Mr. Hindman:

This will acknowledge receipt of your letter of December 20, 1957, in which you request an Official Opinion upon the following question:

> "Would the subscription to service proposed by the Indiana County and Township Officials Association be a proper expenditure by counties of public funds?"

With the letter requesting this Opinion, you have enclosed a letter and Brief prepared by an Indianapolis attorney setting forth the general plan of services proposed by the association together with a rough estimate of its 1958 budget.