by your Department, either the investment or non-investment type, may establish and operate branch offices.

2. The branches of an industrial loan and investment company may be established only within the city in which the principal office of such company is located.

3. An industrial loan and investment company proposing to establish a branch is required to apply for a certificate of authority to engage in business at the location of the proposed branch.

4. Your Department is required to hold public hearings on these applications to determine whether public necessity exists for such a branch subject to the exceptions noted in subheading 4, *supra.*

5. The Department of Financial Institutions is governed by the population limits as set forth in Acts of 1951, Ch. 79, Burns' (1955 Supp.), Section 18-3104, *supra,* in issuing such certificates.

OFFICIAL OPINION NO. 11

May 1, 1957

Honorable Frank A. Lenning
Secretary of State
201 State House
Indianapolis 4, Indiana

Dear Mr. Lenning:

This is in reply to your request for an Official Opinion in which you state that your office has rejected articles of incorporation of a proposed corporation submitted for filing and approval under and pursuant to "The Indiana General Not For Profit Corporation Act," being the Acts of 1935, Ch. 157, as amended, Burns' (1948 Repl.), Section 25-507 *et seq.* The purpose of the proposed corporation, as stated in numerical paragraph 2 of its proposed Articles of Incorporation, is as follows:

> "2. The purpose or purposes for which it is formed are as follows:

"To enable its members to associate themselves together for the purpose of consolidating or distributing freight for themselves, on a non-profit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates.

"To carry out its purposes solely to avail its members of the provisions of Section 402c, U. S. Code, Title 49, Section 1002, and for no other purposes.

"To perform only such acts as are necessary, convenient or expedient to accomplish the purposes for which it is formed and such as are not repugnant to law, and to have and possess all the general rights, privileges and powers under the provisions of the Indiana General Not for Profit Corporation Act, being Chapter 157 of the Acts of 1935 of the Indiana General Assembly, and all Acts amendatory thereof or supplemental thereto."

The precise question in your letter requesting this Official Opinion is as follows:

"Are we correct in saying this proposed purpose is contra to Burns' Indiana Statute 1933 Edition 25-508 (d) which says, 'The term "not for profit" as applied to any corporation organized or reorganized under this act shall mean and include any corporation which does not engage in any activities for the *profit* of its *members* and which is organized and conducts its affairs for purposes other than the *pecuniary gain* of its *members.*' "

By way of explanation of the purpose of this proposed corporation, 49 U. S. C. A. § 1002 (c) referred to in the purpose clause of the proposed articles of incorporation, *supra,* reads as follows:

"(c) The provisions of this chapter shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in *consolidating* or *distributing* freight for *themselves* or for the *members* thereof, *on a non profit basis,* for the purpose of securing the benefits of carload, truckload or other volume rates * * *." (Our emphasis)

The effect of the above Federal legislation is to remove the operations of shippers falling within the classification there stated from the jurisdiction of the Interstate Commerce Commission to the extent that they might otherwise be subject to the provisions of Part IV of the Interstate Commerce Act. See United States v. Pacific Coast Wholesalers' Assn. (1950), 338 U. S. 689, 94 L. Ed. 474, 70 S. Ct. 411, in which wholesale automobile parts dealers formed a non-profit corporation as a means of assembling, forwarding and distributing freight to secure the benefit of volume rates, which was held exempt from Interstate Commerce Commission regulations as a freight forwarder under Section 1002 (c), *supra*. In addition thereto, another advantage to be gained will be in the *improvement of service* since carload and truckload shipments will come *directly* through to the member merchants (situated in the same locality), while less-than-carload and less-than-truckload shipments are inevitably delayed in transit due to the fact that they are invariably placed on cars or trucks which are stopped many times between the point of origin and the point of delivery in order to deliver other less-than-carload or less-than-truckload shipments which are on the same car or truck. It should further be emphasized that the saving in rates is uncertain since, by reason of shipping in carload or truckload lots, additional costs may be incurred for handling charges, both at the point of origin and the point of delivery.

Your office has assumed its duty of examining the proposed articles of incorporation prior to filing and approval, pursuant to the Acts of 1935, Ch. 157, Sec. 31, as found in Burns' (1948 Repl.), Section 25-537, which requires that you ascertain whether the proposed corporation is, in fact, a bona fide not-for-profit corporation. It should be stated at this time that, although you have the duty of so determining, the question as to whether articles of incorporation submitted under this Act comply with the terms thereof is not absolutely within the discretion of your office. Said section of the statute further authorizes the persons offering such papers for filing to have a trial *de novo* either in the Marion County Superior Court or in the Circuit Court of Marion County, from which an appeal may be taken, as in civil actions, in cases in which your office has rejected such papers as tendered.

In refusing to accept the tendered articles of incorporation for filing and approval, your office has apparently relied upon the following provisions in the Not for Profit Corporation Act, to-wit: Acts of 1935, Ch. 157, Sec. 2 (d), as amended, Sec. 4 (c) and Sec. 13, as found in Burns' (1948 Repl.), Sections 25-508 (d), 25-510 (c) and 25-519, which read as follows:

> "(d) The term 'not for profit' as applied to any corporation organized or reorganized under this act shall mean and include any corporation which does not engage in any activities for the *profit* of its members and which is organized and conducts its affairs for purposes other than the *pecuniary gain* of its members.
>
> "The term 'not for profit' as used in this act also shall include *but not be limited* to any religious, civil, social, educational, fraternal, charitable or cemetery association organized or reorganized under this act which does not engage in any activities for the *profit* of its trustees, directors, incorporators, or members." (Our emphasis) Burns' (1948 Repl.), Section 25-508 (d).
>
> "(c) No corporation shall, by any implication or construction, be deemed to possess the power of engaging in any activities for the purpose of or resulting in the *pecuniary remuneration* to its members *as such*, but this provision shall not be deemed to prohibit reasonable compensation to members for services actually rendered; *nor shall such corporation be prohibited from engaging in any undertaking for profit* so long as such undertaking does not inure to the *profit* of its members." (Our emphasis) Burns' (1948 Repl.), Section 25-510 (c).
>
> "No member of any corporation organized or reorganized under this act shall have or receive any *earnings from* such corporation, except that a member may be an officer, director, or employee of such corporation, in which event such member may receive fair and reasonable compensation for his services as such officer, director, or employee and except also that a member may receive principal and interest on moneys loaned or advanced to the corporation as hereinbefore pro-

vided." (Our emphasis) Burns' (1948 Repl.), Section 25-519.

It is to be noted that corporations organized under the Not for Profit Corporation Act have the broad powers designated in the Acts of 1935, Ch. 157, Sec. 4, as found in Burns' (1948 Repl.), Section 25-510 and the only types of operations expressly forbidden under that Act are those "of a banking, railroad, insurance, surety, trust, safe deposit, mortgage guarantee, building and loan or credit union business." Certain other characteristics of the Not for Profit Corporation Act may be gleaned from the above quoted sections as follows:

1. The Act does *not* apply *solely* to religious, civil, social, educational, fraternal, charitable or cemetery associations, commonly termed as eleemosynary organizations, but may apply to other types of organizations so long as compliance is made with the terms of the Act. Burns' 25-508 (d), *supra.*

2. The Act does *not* forbid such a corporation from engaging in any undertaking for profit. Burns' 25-510 (c), *supra.*

3. It appears that the principal test in each and all of the above quoted sections of the statute in determining whether such corporation is not a *bona fide* not for profit corporation is whether its activities are for the sole purpose of "profit," "pecuniary gain," "pecuniary remuneration" or "earnings" to its members (solely by reason of membership) other than for reasonable compensation to members for services actually rendered and other than principal and interest not to exceed 6% per annum of moneys loaned or advanced to the corporation.

The Acts of 1935, Ch. 157, Sec. 7, as found in Burns' (1948 Repl.), Section 25-513 attempts to control this and to prevent members from being able to receive "profit," "pecuniary gain," "pecuniary remuneration" or "earnings" by denying such a corporation the right to have any capital stock or the right to pay any dividends. However, the same section recognizes that the members of the corporation may have "relative *rights, privileges,* duties, liabilities, limitations and restrictions as may be provided for in its articles of incorporation not inconsistent with the provisions of this act."

Although Section 2 of the Act, being Acts of 1935, Ch. 157, Sec. 2, as amended, as found in Burns' (1948 Repl.), Section 25-508, is one containing definitions of terms used in the Act, it is to be noted that said section does not contain definitions of the terms "profit," "pecuniary gain," "pecuniary remuneration" or "earnings" nor are definitions of such terms found elsewhere in the Act. Therefore, pursuant to 2 R. S. 1852, Ch. 17, Sec. 1, as found in Burns' (1946 Repl.), Section 1-201, such terms shall be accorded and taken in their plain, or ordinary and usual sense. Used in their ordinary sense, the terms "profit," "gain" and "earnings" contemplate an *increase* in value over and above expenditures. The terms "pecuniary gain" and "pecuniary remuneration" contemplate a gain or payment in *money*. The term "earnings" as used in the Acts of 1935, Ch. 157, Sec. 13, as found in Burns' (1948 Repl.), Section 25-519 specifically refers to earnings received *"from"* the corporation. However, the Acts of 1935, Ch. 157, Sec. 7, Burns' (1948 Repl.), Section 25-513 expressly recognizes that the members of the corporation may have rights and privileges as well as duties and liabilities. Realities would be ignored if we were to assume that a member of a not for profit corporation never received rights, privileges and benefits of a monetary value.

The precise question in issue here is whether the uncertain, yet probable, savings in freight rates is to be considered as a "profit," "pecuniary gain," "pecuniary remuneration" or "earnings" from the corporation in the sense in which those terms are used in the Act. There appears to be little, if any, direct case authority in Indiana precisely applicable to this question. It must be admitted that in other jurisdictions there are cases holding that a saving of expenses may be considered as a profit. See State of Ohio *ex rel.* J. F. Russell v. Sweeney, Secretary of State (1950), 153 Ohio St. 66, 91 N. E. (2d) 13, 16 A. L. R. (2d) 1337, and State *ex rel.* Troy v. Lumbermen's Clinic (1936), 186 Wash. 384, 58 P. (2d) 812. Neither of these is substantially similar to the situation presented by your letter, the first concerning a real estate development project and the second concerning an employer's medical aid plan. However, of the cases generally on the subject here involved, those which, in my opinion, are nearest the fact pattern presented by your letter of request, are Read v. Tide-

water Coal Exchange (1922), 13 Del. Ch. 195, 116 Atl. 898, and Mutual Orange Distributors v. Black (1926), 221 Mo. App. 493, 287 S. W. 846.

Read v. Tidewater Coal Exchange, *supra,* concerned a corporation conceived as the agency of shippers, transshippers and consignees of bituminous coal who constituted its membership. Among its purposes was the promotion of economy and ease of transshipping coal in order to lessen the cost of producing, distributing and consuming coal. The Court stated (p. 905):

> "I have no doubt that its members were benefited by its activities, and in an indirect way this benefit doubtless reflected itself in their financial betterment."

The Court noted that the Exchange handled no moneys except such amounts as were calculated to cover the *actual net cost* of its operations, which costs were allocated to and paid by the members. In upholding the incorporation of this agency as a not for profit corporation, the Court stated (p. 904):

> "When may a corporation be said to be organized not for profit? Or, putting the converse of the question, when may a corporation be said to be organized for profit?
>
> "In the ordinary acceptation of the term 'profit' means, as was said by the court in Curry v. Warner Co., 2 Marvel, 98, 42 Atl. 425, 'acquisition beyond expenditure, or the excess of sale or value received over costs.' Our General Corporation Law in those provisions which deal with the declaration of dividends provide, expressly, or by inference, that such may be paid not only from surplus but also from 'net profits' (sections 1927. 1949 [sections 13, 35, c. 65] Revised Code of 1915), or 'accumulated profits' (section 1948 [section 34] Id.). From this it is argued that a corporation organized for profit is one which expects to pay dividends, and 1 Clark & Marshall on Private Corporations, p. 83, is cited in support of this contention. There the following is found:

" 'A corporation for pecuniary profit is a corporation organized for the pecuniary profit of its stockholders or members. Banking corporations, manufacturing and trading corporations, railroad companies, water and gas companies, and the like, which pay or are expected to pay dividends, clearly come within this class.'

"In the same connection, this citation is taken from 1 Fletcher's Cyclopedia of Corporations, p. 92:

" 'Under the statutes of some states, separate provisions are made for the incorporation of corporations for pecuniary profit, as distinguished from corporations not for pecuniary profit. Within the meaning of such a provision, a corporation for pecuniary profit has been defined to be a corporation organized for the pecuniary profit of its stockholders or members. Included in this class are banking, manufacturing and trading corporations, water and gas companies, and the like, which are expected to pay dividends.'

"Whether dividends are expected to be paid may, generally speaking, be taken as the test by which we are to determine whether, or not, a given corporation is organized for profit. Perhaps a better way to put it would be to say that a corporation is for profit when its purpose is, whether dividends are intended to be declared or not, to make a profit on the business it does which in reason belongs to it and which if its affairs are administered in good faith would be available for dividends. Subterfuges by which a corporation allowed *its* profits to be diverted to those owning it, though not in the form of dividends, would manifestly not remove from the corporation its feature of profit making. Nor would a mere declaration in its certificate of incorporation that it was organized not for profit, be sufficient to stamp upon it a nonprofit character. In each case, when the corporation is examined, the true facts must be ascertained and the corporation judged accordingly, no matter what its scheme of operation, or its pretensions may be. Such being true, the state is always protected against schemes to evade franchise taxes, first by the inspection which the corporation must undergo before the Secretary of State, and secondly by the writ

of quo warranto which the state may always employ to oust a corporation for abuse of its franchise.

"Profit furthermore must be something of a tangible or pecuniary nature. Intangible benefits not capable of measurement in definite terms, though of value to the recipients, cannot be called profits. When we speak of a corporation for profit, I take it also that we mean profit coming to, or belonging to, the corporation qua such, as distinct from its members or stockholders. Barring cases where profits are improperly diverted directly to the corporate members and not conveyed to them through the channel of the corporate treasury, which cases would rest on a distinct footing, the term 'profit' as employed in the section under discussion means *gain or earnings that are expected to come into the possession of the corporation.*" (Our emphasis)

Section 13 of the Indiana Not for Profit Act, Burns' 25-519, *supra,* is comparable to this reasoning in that said section prohibits a member of a not for profit corporation from receiving "any earnings *from* such corporation."

Mutual Orange Distributors v. Black, *supra,* concerned a corporation conceived as a selling agency, whose members were growers of fruit. Its purpose was "to market the crop for the growers at the actual cost." The system of operation contemplated payments by the members based upon estimates of cost for the ensuing year; at the end of the year, after actual costs had been determined, deficiencies or overpayments were handled either by additional assessments or rebates to the members. The Court upheld the organization as a nonprofit corporation, relying upon a statutory definition of the term "nonprofit" which was enacted subsequent to the agency's incorporation which read (p. 847) :

"(e) Associations organized hereunder shall be deemed 'nonprofit,' inasmuch as they are not organized to make profit for themselves, as such, or for their members, *as such,* but only for their members *as producers.*" (Our emphasis)

Section 4 (c) of the Indiana Not for Profit Act, Burns' 25-510 (c), *supra,* contains comparable language prohibiting

a nonprofit corporation from engaging in activities resulting in pecuniary remuneration "to its members *as such.*" The words "as such" are clearly restrictive—confining the above prohibition to the receipt of pecuniary remuneration by a member *solely by reason of his membership.* The speculative savings to members of the proposed corporation herein will not arise solely by reason of membership *but rather by reason of the member's use of facilities and services of the corporation.*

I do not find that our Legislature has expressed a public policy against the type of operation contemplated by the use of the proposed corporation herein. To the contrary, it has expressly encouraged the formation of organizations to promote savings in the rendition of services to their members and considered such organizations to be nonprofit corporations.

Reference is made to the "Rural Electric Membership Corporation Act," Acts of 1935, Ch. 175, as amended, as found in Burns' (1951 Repl.), Section 55-4401 *et seq.*

Section 2 of the R. E. M. C. Act, Burns' (1951 Repl.), Section 55-4402, provides as follows:

> "Any number of natural persons not less than eleven (11) may, by executing, filing and recording articles of incorporation as hereinafter provided, for [form] a corporation *not organized for pecuniary profit* for the purpose of promoting and encouraging the fullest possible use of electric energy in the state by making electric energy available to inhabitants of rural areas of the state *at the lowest cost consistent with sound economy and prudent management of the business of such corporations and/or by rendering other services to its members.*" (Our emphasis)

This law was enacted by the same session of the General Assembly which enacted "The Indiana General Not for Profit Corporation Act." Special legislation was necessary for the R. E. M. C. business because of the peculiarities of the electricity distribution operation including the necessity of providing regulatory jurisdiction by the Public Service Commission of Indiana.

Corporations formed pursuant to the R. E. M. C. Act, *supra,* do not operate upon capital derived from the issuance

and sale of stock, but instead upon borrowed money and revenues derived from members for electrical energy furnished. Members must be situated within the area served by the corporation and must use energy supplied by such corporation. Such members receive only a membership certificate. Rates for service are determined upon a cost basis as provided by Section 17 of the Act, Acts of 1935, Ch. 175, Sec. 17, as found in Burns' (1951 Repl.), Section 55-4417, which reads as follows:

> "A corporation formed hereunder shall be required to furnish reasonably adequate services and facilities. The charge made by any such corporation for any service rendered or to be rendered, either directly or in connection therewith, shall be nondiscriminatory, reasonable and just, and every discriminatory, unjust or unreasonable charge for such service is prohibited and declared unlawful. A reasonable and just charge for service within the meaning of this section shall be such charges as shall produce sufficient revenue to pay all legal and other necessary expense incident to the operation of its system, to include maintenance cost, operating charges, upkeep, repairs, interest charges on bonds or other obligations, to provide a sinking fund for the liquidation of bonds or other evidences of indebtedness, to provide adequate funds to be used as working capital, as well as funds for making extensions and replacements, and also for the payment of any taxes that may be assessed against such corporation or its property, it being the intent and purpose hereof that such charges shall produce an income sufficient to maintain such corporation property in a sound physical and financial condition to render adequate and efficient service. Any rate too low to meet the foregoing requirements shall be unlawful. Revenues and receipts not needed for the above and foregoing purposes shall be returned to the members *on a pro rata basis according to the amount of energy consumed,* either in cash or in abatement of current charges for energy, as the board may decide." (Our emphasis)

This section clearly demonstrates that the members of such corporation derive a financial betterment. However, whatever

rebates to which members may be entitled are not in the nature of dividends based upon ownership of a proportionate part of the assets of the corporation as in a for-profit corporation; instead such rebates are upon a "pro rata basis according to the amount of energy consumed." The speculative savings or financial advantage which may inure to the members of the proposed corporation about which you inquire appear to be comparable to the financial advantage of members of Rural Electric Membership Corporations, which are specifically classified by the Legislature as nonprofit corporations.

In view of the above and foregoing, it is my opinion that the declared purpose of the desired corporation is not contrary to the provisions of the Not for Profit Act and that such proposed articles should be accepted for filing and approved. It should be noted that the jurisdiction of your office is continuous over such corporations. Acts of 1935, Ch. 157, Sec. 33, as found in Burns' (1948 Repl.), Section 25-539 provides the procedure by which corporations violating the Act shall be made to comply therewith or be dissolved. Therefore, should this corporation or any other one posing as a not for profit organization under said Act use its said corporate being as a subterfuge by which to conceal a profit-making purpose for its members, the Act provides an adequate remedy.

OFFICIAL OPINION NO. 12

May 2, 1957

Mr. Albert Kelly
Administrator, Department of Public Welfare
141 South Meridian Street
Indianapolis 4, Indiana

Dear Mr. Kelly:

This is in response to your recent letter requesting an Official Opinion on the following question:

> "May a person who has been appointed and is now serving as a member of a county board of public welfare continue to perform the duties of a Notary Public pursuant to a commission in effect at the time of his appointment as a member of the county welfare board?"