Mr. Joe A. Harris, Chairman  
Indiana Alcoholic Beverage Commission  
911 State Office Building  
Indianapolis, Indiana

Dear Mr. Harris:

Your letter of March 16, 1962, has been received and reads as follows:

"The Indiana Alcoholic Beverage Commission has recently been made aware that there may be at work in this state some combination or effort in the nature of a restraint of trade or a discrimination, which seems to result in the general public's access to certain good beers at relatively high prices, but which also seems to result in the general public's not having access to other beers of good and equal quality at relatively low prices, even though the latter beers are readily available to be sold within the state of Indiana.

"At this time, the full nature and extent of the problem, if any exists at all, is not fully known and the Commission is now under certain pre-sentiment and concern with regard thereto. The Commission has requested your official opinion with regard to the following question:

"'If it should appear there are good, but lower priced, beers available for sale into the state of Indiana, is there any power, duty, responsibility upon, or authority in, the Indiana Alcoholic Beverage Commission to assure the general public's access to such lower priced beers through Indiana permittees?"

Generally speaking, administrative agencies, such as the Indiana Alcoholic Beverage Commission, have no common-law or inherent powers, but only such authority as is conferred upon them by valid statutory enactment, that is, the agencies possess and can exercise only such powers as are expressly granted to them by the statute creating them, together with
such other powers as may be necessarily incident to the powers expressly granted.


The Indiana Alcoholic Beverage Commission was created by the Acts of 1945, Ch. 357, Sec. 2, as found in Burns' (1956 Repl.), Section 12-432, and is the successor to all of the rights, powers, authorities, duties, jurisdiction or privileges held, exercised by, or required of the former Alcoholic Beverages Division or the former Alcoholic Beverage Commission of Indiana, by virtue of the Acts of 1945, Ch. 357, Sec. 3, as found in Burns' (1956 Repl.), Section 12-434. The latter section also transfers to and vests in the Chairman of the Indiana Alcoholic Beverage Commission all rights, powers, authorities, jurisdiction, and privileges held, exercised by, or required of the former Excise Administrator.

The general legislative grants of power, function and duty to and upon the commission in the particular realm of regulation and control of alcoholic beverage traffic as such, are set out in the Acts of 1935, Ch. 226, Sec. 6, as amended, as found in Burns' (1956 Repl.), Section 12-402. It should be here noted that by the very explicit terms of Burns' 12-402, supra, the powers enumerated therein take precedence over any other right, power, or duty of the commission which might elsewhere be set out in the Liquor Control Act, and such enumerated powers are, therefore, the inclusion of the strongest powers that the commission specifically possesses.

The broad supervisory, regulatory and controlling powers of the commission, in relation to your question and its background, as contained in Burns' 12-402, supra, are: (Though contained in one long paragraph, the powers here set out, in part, are separated for sake of clarity and consideration).

"The alcoholic beverage commission of Indiana shall have and exercise the following functions, duties and powers, to wit:

"(1) * * * to enforce and administer the provisions of this act, and the rules and regulations of the commission. * * *

* * *
"(3) * * * to prohibit or prescribe any practice for the business of any person holding a permit hereunder and for any such permit holder * * * in keeping, holding, * * * handling, selling, * * * furnishing, receiving or possessing alcohol beverages, * * *

"(4) * * * to prevent fraud, evasion, trickery or deceit in * * * receiving, handling, selling or furnishing alcoholic beverages and/or alcoholic or other evasion of the laws of the state relating thereto in any manner whatever. * * *

* * *

"(14) To regulate the mode and method of dealing in, * * * alcoholic beverages, and prescribe the manner and method in which all books, invoices, receipts, papers and documents, orders and bills, used or relating to such traffic * * * shall be kept and require the preservation thereof, and to inspect and examine, and require true copies and duplicates thereof to be made and furnished to the commission. * * *

* * *

"(17) To govern and control all traffic * * * of alcoholic beverages in accordance with the policies and purposes of this act in such manner as may be not in conflict with this act or other laws of the state of Indiana. * * *

* * *

"(19) * * * to regulate and control and to prohibit, in any instance, any practice or relationship to control or other dealings by and between permittees, which in the judgment of the commission is inimical to or a violation of any rule or regulation of the commission, or of any law of this state, or of the policy as declared in this act; * * *

Part of the policies and some of the purposes of the Liquor Control Act of 1935, mentioned in the foregoing quote, are expressed in the following statutory language:

"This act shall be deemed an exercise of the police powers of the state, for the protection of the economic
welfare, health, peace and morals of the people of the state, and to prohibit forever the open saloon; * * * and it is declared that alcohol and all beverages containing alcohol shall be subject to the provisions of this act; * * *"

Acts 1935, Ch. 226, Sec. 1, as found in Burns' (1956 Repl.), Section 12-301.

"No person shall * * * sell, * * * import, * * * furnish or possess, any * * * alcoholic beverages, * * * except as authorized in this act, * * *"

Acts 1935, Ch. 226, Sec. 2, as found in Burns' (1956 Repl.), Section 12-302.

"No provision of this act shall be deemed to prohibit the * * * sale of alcohol or alcoholic beverages, * * * but said * * * sale shall be controlled, regulated and confined to permittees as hereinafter specifically provided; * * *"

Acts 1935, Ch. 226, Sec. 4, as found in Burns' (1956 Repl.), Section 12-304.

The 1945 legislative overhaul of the basic 1935 Liquor Control Act, supra, included, in addition to those matters above-referred to, specific statutory provision dealing with coercive or intimidating activity by and between alcoholic beverage permittees in relation to other alcoholic beverage permittees. This section reads as follows:

"It shall be unlawful for any person to use threats, duress, coercion and/or intimidation, expressly or impliedly, to induce, persuade, impel, or influence the holder of an alcoholic beverage permit under the laws of the state of Indiana to buy, sell, distribute, or otherwise handle, or to refuse to buy, sell, distribute, or otherwise handle, alcoholic beverages of any specific brand or kind; and it shall be unlawful for any wholesaler to enter into any arrangement, combination, agreement, franchise or understanding whereby he shall receive discriminatory treatment in the purchase of alcoholic beverages from any brewer, distiller, rectifier, vintner or manufacturer of alcoholic beverages as
against other wholesalers who have attempted to purchase the same alcoholic beverages from such brewer, distiller, rectifier, vintner or manufacturer.

"Any person violating any of the provisions of this section shall be guilty of a misdemeanor and punished as provided in section 16½ [§ 12-449] of this act. In addition, upon complaint of any person that any wholesaler is receiving discriminatory treatment from a brewer, distiller, rectifier, vintner or manufacturer of alcoholic beverages as against any other wholesaler or wholesalers, who has or have attempted to purchase the same as aforesaid, the alcoholic beverage commission shall investigate and hear the facts (or may do so upon its own motion) and if it shall find that any wholesaler has entered into any such arrangement, combination, agreement, franchise or understanding, it shall revoke the permit of such wholesaler. For the purpose of such investigation and finding by the alcoholic beverage commission and any appeal therefrom, but not for the purpose of criminal prosecution, the existence of discriminatory treatment to any wholesaler, as above described, shall constitute prima facie evidence of such arrangement, combination, agreement, franchise or understanding."

Acts 1945, Ch. 357, Sec. 20, as added by Acts 1947, Ch. 148, Sec. 8, as found in Burns’ (1956 Repl.), Section 12-451.

In addition, the original 1935 Liquor Control Act provided, in part:

"No permittee engaged in the sale of alcoholic beverages shall be a party to or assist in any transaction of sale or contract to sell alcoholic beverages which discriminates between purchasers by granting any price, discount, allowance, or service charge which is not available to all purchasers at the same time: Provided, however, That the foregoing shall not be construed to authorize or require any permittee to sell to any person or to any other permittee to whom he is not expressly authorized to sell under other provisions of this act."
Acts 1935, Ch. 226, Sec. 6, as amended, as found in Burns' (1956 Repl.), Section 12-402, at p. 850.

The statutory language of some of the other laws of this state, included among those referred to in the quoted portions of Burns' 12-402, supra, which touch upon your question and its background, reads, in pertinent part, as follows:

"* * * all arrangements, contracts, agreements, trusts or combinations between persons or corporations who control the output of said [any] article of merchandise, made with a view to lessen, or which tend to lessen, full and free competition in the importation or sale of articles imported into this state, and all arrangements, contracts, agreements, trusts or combinations between persons or corporations who control the output of said article of merchandise, designed, or which tend, to advance, reduce or control the price or the cost to the * * * consumer of any such product or article, are hereby declared to be against public policy, unlawful and void."

Acts 1897, Ch. 104, Sec 1, as found in Burns' (1950 Repl.), Section 23-101.

"Every scheme, design, understanding, contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce or to create or carry out restrictions in trade or commerce, or to deny or refuse to any person or persons full participation, on equal terms with others, * * * or increase or reduce the price of merchandise or any commodity, natural or artificial, * * * within or without this state, is hereby declared to be illegal, * * *. Every person who shall make such contract or engage in any such combination or conspiracy, or enter into any such scheme, design or understanding, or do within this state any act in furtherance of any such contract, combination, conspiracy, scheme, design or understanding, entered into without this state, shall be deemed guilty of a misdemeanor, * * *"

Acts 1907, Ch. 243, Sec. 1, as found in Burns' (1950 Repl.), Section 23-116.
“Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce within this state, shall be deemed guilty of a misdemeanor, * * *”

Acts 1907, Ch. 243, Sec. 2, as found in Burns’ (1950 Repl.), Section 23-117.

Therefore, if it should appear to the commission, as a matter of fact derived from an inquiry or investigation, that there is a restraint of trade or price-control situation extant in the alcoholic beverage traffic within this state which is inimical to or violative of, in the judgment of the commission, the liquor control or combination-in-restraint-of-trade laws of the state, it is my opinion that the commission then has the authority, and the duty, to take such action as may be reasonably necessary to regulate, govern, control, or to prohibit, if necessary, such offensive practices, dealings, and/or relationships by and between permittees under its jurisdiction. In a very recent case the Indiana Appellate Court stated the proposition very concisely:

“We have found no provision of our Alcoholic Beverage Act which limits or denies, either affirmatively or negatively, the authority of the Commission, to which the regulatory powers were delegated by the legislature, [Sections 12-402 and 12-432 et seq., Burns’ 1956 Replacement] in the exercise of its discretion as to the reasonable requirements for the public health, morals, and safety, to control and regulate the conditions and prohibitory limitations governing the sale of alcoholic malt beverages * * *”


Two other considerations remain, namely, the inquiry and investigation, and the means by which the commission’s authority to act may be effectuated. A noted authority has commented on these considerations as follows:
"** The investigating power about which the many legal battles have been fought relates to compelling testimony, inspecting or ordering production of books and records, requiring the keeping of records in accordance with designated forms, and commanding that questionnaires be answered or that reports be made to administrative authorities. **

"** The administrative power of investigation is of course essential to law enforcement, but its most significant functions probably relate to the exercise of other administrative powers. The power of investigation is in one major aspect part and parcel of the prosecuting power and of the practically more important power of supervision which grows out of the prosecuting power. **

"Investigations are often the most important proceedings an agency conducts, because often an investigation is into a basic or broad problem of policy that underlies all of the agency's work, including both adjudication and rule making, in a whole segment of regulation. **

"Broad investigations ** may lead almost anywhere—to understanding for use in adjudication, to a set of rules, to further investigation along a different line, or to recommendations ** for legislation. **

Davis, Administrative Law Treatise, Vol. 1, Sec. 3.02, pp. 163 to 165.

Professor Davis' comments were made in 1958 after review of many cases and opinions in the field of administrative law. The 1935 Indiana General Assembly had the foresight to provide the commission with comprehensive, yet detailed, powers encompassing the entire field of regulation and control of alcoholic beverage traffic. Enumerated power numbered (19) of Burns' 12-402 supra and infra, appears to be specific authority in answer to your question. That enumerated power numbered (19) contains specific authority to investigate the facts of your present concern, and to require testimony and the production of records necessary thereto; furthermore, upon a
determination of fact, the said power authorizes action, either by adjudication in singular cases or by rule or regulation if the offenses are extensive. Immediately following the concluding language of said enumerated power numbered (19), the General Assembly has detailed the steps and findings requisite to the adoption of a rule or regulation. Enumerated power numbered (19) of Burns' 12-402, supra, reads:

“(19) To obtain and procure and to compel the production of all information, documents, evidence, records and books relating to, or concerning sales by or to any permittee hereunder, and to ascertain relations between, and dealings with or between any permittee or permittees hereunder, and to investigate, ascertain and compel the production of information with reference to all said relations or in reference to all said matters, and especially to credits extended by one permittee to another and the control and/or interest and/or participation and/or affiliation and/or association with, and/or ownership of or in the permit of one permittee or of his business by another permittee, including that part of the business of the permittee consisting of traffic in alcoholic beverages and all other parts of the business of such permittee and the cost price of alcoholic beverages, commission, freight charges, market price, margin of profit, and all other matters and information relating to the business of such permittee or dealings by and between permittees, and to regulate and control and to prohibit, in any instance, any practice or relationship to control or other dealings by and between permittees, which in the judgment of the commission is inimical to or a violation of any rule or regulation of the commission, or of any law of this state, or of the policy as declared in this act; and said action of the commission may be by rule or regulation, or by order in any particular instance upon hearing after five (5) days' notice to the permittee or permittees against whom such order, if made, shall be directed (the form of giving said notice and proof thereof, and the procedure for the hearing of all matters relating thereto, to be prescribed by the commission).” (Our emphasis)
The paragraphs immediately following in Burns' 12-402, supra, provide:

“In the exercise of the powers herein granted to this commission, to make rules and regulations, the commission shall investigate but may proceed upon inquiry although no hearing shall be required, except where specifically required by this act, or where the same is necessary under the Constitution of the state of Indiana or under the Constitution of the United States of America, which inquiry may be conducted or made by means of reports of officers, deputies or employees in said division or by or through any other officer or officers, of the state of Indiana, or from such sources and in such manner as the commission may deem best to use. It shall not be necessary for the commission to preserve or spread or record the evidence or information used in such inquiry.

“After such inquiry, if the commission find and record that it has found as a fact:

“1. That the protection of the economic welfare or the health or the peace and morals of the people of the state is in danger of being impaired, unless the rule or regulation being considered is adopted; or

“2. That the purpose and policy of the act will be better effected if such rule or regulation is adopted; or

“3. That this act will be evaded and disregarded unless such rule or regulation being considered is adopted; or

“4. That the privileges accorded under this act are being abused and will continue being abused or are being used or will be used for the purpose of evading the provisions of the act or the collection of taxes thereunder unless the rule or regulation being considered is adopted; or

“5. That a condition of negligence in the enforcement of this act exists, or practices are being carried on, which tend to promote disorder or which tend to promote fraud in the collection of taxes, or in the
enforcement of this act, or which tend to render the manufacture or traffic in, or transportation of alcoholic beverages dangerous to the political subdivision or subdivisions in which the same are being carried on, and that the rule or regulation being considered is advisable and designed to prevent or suppress such conditions or practices.

"Then, in case of any such findings so made and recorded the commission may adopt and record the rule or regulation under consideration by the commission, consistent with this act.

"The determinations, or findings of fact, by said commission shall be final. The commission shall keep a record of the meetings thereof, * * *"

It is interesting to note that this is not the first time the commission has become concerned, in the public's interest, with the availability of alcoholic beverages at reasonable prices. The commission's Minutes, Vol. II at p. 608, record the declaration of the commission to adopt a regulation setting maximum prices and prohibiting a price rise in alcoholic beverages as a threat to the economic welfare, health, peace and morals of the people of the state. Under Burns' 12-402, supra, enumerated power numbered (10), the commission deemed such price rises in violation of federal (Office of Price Administration) price regulations, and, by Special Bulletin dated July 30, 1943, did announce the adoption of said regulation. The commission's current Regulation No. 10, Rule 17 contains a provision to the same effect.

Regulation No. 26, promulgated and adopted February 19, 1946 and currently in effect, also contains provisions whereby the commission sought to assure the public's access to beer that is chilled. That situation is somewhat analogous to the present case. Your question is in search of authority to assure the public's access, wrongfully withheld, to available beer lower in price. The public interest and welfare is apparent in all three instances.

In summary then, it is my opinion that:

(1) The Indiana Alcoholic Beverage Commission is possessed with the authority, and probably the duty, to investi-
gate any situation seeming to exist in this state, which concerns alcoholic beverages and which appears to involve practices, dealings or relationships between permittees tending towards a monopoly, a restraint of trade, or a combination to control the price of alcoholic beverages.

(2) If, after inquiry and investigation, the commission, in its discretion and judgment, should find and determine as a matter of fact that such a monopolistic situation exists by and between permittees, the commission has the authority, and the duty, to take such affirmative action to regulate, control or prohibit, as it may deem necessary, any such offensive practices, dealings and/or relationships which tend to monopolize the public market in favor of certain alcoholic malt beverages to the exclusion of others.

(3) The commission is possessed with the discretionary authority under Burns’ 12-402, supra, enumerated power numbered (19), to take such affirmative action, as it may deem best, either by means of adjudication of particular violations, or, by promulgation of rules and regulations to control and regulate, or prohibit, widespread practices or dealings which result in such monopolistic practices or dealings.

OFFICIAL OPINION NO. 32

May 10, 1962

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

Dear Mr. McDonald:

Your letter requesting an Official Opinion has been received and reads as follows:

“We have received several questions regarding the compensation of members of boards of newly reorganized school corporations, which are reorganized under the provisions of Chapter 202 of the Acts of 1959, as amended.