



Groups move this Court to dismiss IKEC's 2010 Petition and Complaint pursuant to Indiana Trial Rules 12(B)(1) (lack of subject matter jurisdiction) and 12(B)(6) (failure to state a claim upon which relief can be granted), for the following reasons:

1. IKEC has petitioned the Court to review a final order with intermediate non-final orders of the OEA in Cause No. 02-S-J-2989, a proceeding in which IKEC has prevailed on the merits. This Court does not have subject matter jurisdiction over IKEC's Petition and Complaint because there is no live controversy in this case and IKEC has no demonstrable injury for this Court to remedy. Indiana courts are restrained to resolving real controversies in which the complaining party has a demonstrable injury.

2. The issue of Citizens Groups' ability to rely on associational standing to initiate the OEA proceeding and all other issues in the OEA Orders and this Court's 2005 entry of remand are moot now that the OEA proceeding has concluded with IKEC having prevailed on the merits. There is no injury for this Court to redress on judicial review. Moreover, IKEC does not meet the AOPA requirement that a party seeking relief on judicial review must show it has been "prejudiced" by the challenged agency action. IKEC can show no prejudice from the non-final OEA Orders after having prevailed on the merits. In addition, the Court has no relief to provide to IKEC because any alleged procedural errors committed by the OEA in the challenged orders are harmless error under Trial Rule 61. The OEA Orders do not affect IKEC's substantial rights and made no difference to the final outcome of the case, and are thus harmless. Harmless errors are not an adequate ground for granting relief and should not be revisited.

3. IKEC's challenge to the non-final OEA Orders is in reality a collateral attack on the Indiana Court of Appeals' ruling on associational standing in *Save the Valley, Inc. v. Indiana-Kentucky Elec. Co.*, 820 N.E.2d 677 (Ind. Ct. App. 2005), *aff'd on rehearing, trans. denied without opinion* (hereinafter "*Save the Valley*"), litigation which IKEC initiated with its 2003 interlocutory appeal to this Court. This Court must decline IKEC's invitation to overturn two Court of Appeals' rulings in *Save the Valley*: (1) that associational standing can satisfy the AOPA standard for obtaining administrative review and that OEA had power and authority to grant an adequate remedy in the administrative proceeding; and (2) that the Court of Appeals' ruling on these issues was necessary and essential to, and intertwined with, the decision that the Marion Superior Court (*i.e.*, this Court) was without subject matter jurisdiction over IKEC's 2003 interlocutory appeal because IKEC had failed to exhaust its administrative remedies. The Court of Appeals expressly tied these issues together in its initial decision and on rehearing. IKEC had vigorously presented these issues as inextricably linked in its briefs to the OEA, to the Marion Superior Court on judicial review, and to the Court of Appeals in *Save the Valley*. The Marion Superior Court also had linked these issues together in its 2003 Findings of Fact, Conclusions of Law, and Orders. These rulings in *Save the Valley* are law of the case and have binding effect on this Court, and were properly viewed as such by this Court in its 2005 entry of remand. No facts or law before or since *Save the Valley* changes this binding effect. A request to the Marion Superior Court to overturn the Court of Appeals' binding rulings does not state a valid claim for which relief can be granted.

4. IKEC's argument on pages 33 through 46 of its 2010 Petition would have been appropriately addressed to the Indiana Supreme Court in *Save the Valley*, but the Supreme Court denied

transfer in the case. IKEC is now arguing that frustrated appeal to this Court in the hopes that the Court will nullify the Court of Appeals' ruling that associational standing applies to administrative petitions for review in Indiana. Because the Court of Appeals' ruling in *Save the Valley* on the issue of associational standing is binding law of the case, this Court must not allow IKEC to re-litigate the issue here.

5. IKEC's Trial Rule 60(B)(6) and (8) motion for relief from judgment or order (*i.e.*, 2010 Complaint) is unjustified and untimely. IKEC invites this Court, after the passage of five years, to reconsider and substantively modify its 2005 entry of remand, in order to keep alive IKEC's claim that Citizens Groups did not meet the AOPA standards for administrative review in a proceeding that has ended with IKEC prevailing on the merits. IKEC's Complaint/motion was not filed within a reasonable time and has not alleged a meritorious claim or defense, both of which are required by Rule 60(B). The proper function of Rule 60(B)(8) is to afford "extraordinary" relief from circumstances that could not have been discovered in time for a Rule 59 motion to correct errors, but no new facts, case law, or circumstances have appeared since the entry of remand. The entry of remand is not void under Rule 60(B)(6) because this Court properly remanded to OEA for further proceedings consistent with *Save the Valley*. IKEC's claim that the Court of Appeals' ruling in *Save the Valley* on the issue of associational standing is void is meritless. The Court of Appeals' decision is the binding law of the case. IKEC's Complaint fails to state a claim for which relief can be granted.

6. IKEC's claim in its Complaint that it failed to receive a timely copy of this Court's 2005 entry of remand is hollow and must be dismissed. Even assuming that IKEC did not receive a copy at

the time, IKEC was on notice of the resulting OEA proceeding and participated actively in it. Thus, even assuming it was error that IKEC did not receive notice of the entry, its lawyers have a duty to inquire and the error was patently harmless.

For each of these reasons and those included in Citizens Groups' Brief in Support, Citizens Groups respectfully request that this Court dismiss IKEC's 2010 Petition and 2010 Complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, and award Citizens Groups (1) attorney's fees and the costs of responding to IKEC's 2010 Petition and 2010 Complaint, and (2) all other relief that this Court deems proper and just under the circumstances. IKEC's 2010 Petition and Complaint are but the latest volley in a recurring series of motions to dismiss and to reconsider designed to avoid the binding effect of the Court of Appeals' rulings in *Save the Valley*. This Court should not re-decide these issues and should take this opportunity to accord the rulings in *Save the Valley* the finality warranted by law.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of the foregoing was served by hand delivery or U.S. Mail, postage prepaid, this 10th day of May, 2010, on the following counsel of record:

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