

STATE OF INDIANA	)	MARION COUNTY SUPERIOR COURT
	) SS:	ENVIRONMENTAL DIVISION, ROOM NO. 12
COUNTY OF MARION	)	CAUSE NO. 49F12-1004-MI-016855

INDIANA-KENTUCKY ELECTRIC CORPORATION,	)
	)
	)
Petitioner (Intervenor-Respondent Below),	)
Plaintiff as to Count II,	)
	)
INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT,	)
	)
	)
Party Pursuant to Ind. Code 4-21.5-5-6(d),	)
Respondent Below,	)
Party as to Count II,	)
	)
v.	)
	)
SAVE THE VALLEY, INC.; HOOSIER ENVIRONMENTAL COUNCIL, INC.; and CITIZENS ACTION COALITION OF INDIANA, INC.,	)
	)
	)
Respondents (Petitioners Below),	)
Defendants as to Count II.	)
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**CITIZENS GROUPS’ MOTION TO DISMISS  
IKEC’S PETITION FOR JUDICIAL REVIEW AND  
AMENDED COMPLAINT TO SET ASIDE ORDER  
AND FOR DECLARATORY JUDGMENT**

Respondents-Defendants Save The Valley, Inc., Hoosier Environmental Council, Inc., and Citizens Action Coalition of Indiana, Inc. (collectively “Citizens Groups”), by counsel, respectfully submit their timely filed Motion to Dismiss Petitioner Indiana-Kentucky Electric Corporation’s (“IKEC’s”) “Verified Petition for Judicial Review and Amended Complaint to Set Aside as Void This Court’s Judgment or Order of September 6, 2005 and for Declaratory Judgment” (hereinafter “Amended Petition/Complaint”). IKEC’s Amended Petition/Complaint,

filed on May 17, 2010, adds a declaratory judgment action to IKEC's initial Petition and Complaint.

Citizens Groups now move this Court to dismiss IKEC's Amended Petition/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's declaratory judgment action, like its petition for review and Rule 60(B) motion, is nothing more than a collateral attack on the law of the case established 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*") that Indiana law recognizes the doctrine of associational standing and that the doctrine was available to Citizens Groups for the purpose of their challenge to IDEM's permit. This declaratory action is yet another procedural tool used by IKEC to ask this Court for the same remedy that IKEC has already requested in its initial Petition/Complaint: namely, to ignore the binding law-of-the-case and collateral estoppel effect of the rulings in *Save the Valley* and to do what IKEC could not get the Indiana Court of Appeals or Supreme Court to do – rule in IKEC's favor on the issue of associational standing.

2. IKEC is improperly attempting to use its declaratory judgment action to simultaneously obtain review of final agency action in OEA Cause No. 02-S-J-2989, obtain review of non-final agency action in OEA Cause No. 08-S-J-4106, and obtain a declaration that Indiana does not recognize associational standing for administrative review. To the extent that IKEC's declaratory judgment action is an express or implied challenge to agency action in OEA Cause No. 02-S-J-2989, the declaratory judgment action does not trigger this Court's subject matter jurisdiction because there is no live controversy in this case. Moreover, IKEC has failed to show

that it is “prejudiced” by challenged agency actions in the OEA proceeding under review, as required by AOPA. In addition, to the extent that IKEC’s declaratory judgment action is an express or implied challenge to agency action in the separate OEA Cause No. 08-S-J-4106 (as evidenced by IKEC’s arguments and its Exhibits N, O, and P) the action does not trigger this Court’s subject matter jurisdiction because IKEC is attempting to obtain interlocutory review of non-final agency action using the wrong cause of action in the wrong forum and without following AOPA procedures. AOPA Chapter 5 establishes the exclusive means for judicial review of an agency action.

3. IKEC’s declaratory judgment action must be dismissed pursuant to Trial Rule 12(b)(6) because the declaration on associational standing requested by IKEC is directly contrary to Indiana law as articulated in *Save the Valley*. *Save the Valley* is the law on associational standing in administrative proceedings in Indiana, and thus IKEC cannot prove any set of facts or circumstances under which it would be entitled to relief in this matter. 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 (2) that the Court of Appeals’ ruling on this issue 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 petition. 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 interlocutory review, and to the Court of Appeals in *Save the Valley*. The Marion Superior Court also linked these issues together in its 2003 order. The 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. The rulings also are binding on OEA under the law-of-the-case and collateral estoppel doctrines. No facts or law before or since *Save the Valley* changes this binding effect.

4. IKEC's declaratory judgment action must be dismissed because it will not serve a useful purpose and another remedy is more effective and efficient: namely, IKEC has had a full and fair review of the issue of associational standing in this Court and in the Court of Appeals in the *Save the Valley* litigation. Both Courts ruled squarely on the issue, and the Supreme Court denied transfer. IKEC got its fully adequate remedy because, as the case was presented to this Court and the Court of Appeals, the issue on which IKEC sought interlocutory review was inextricably linked to the issue of this Court's subject matter jurisdiction. Therefore, any claim by IKEC at this time that it has not or cannot get a fair hearing on the issue of associational standing is hollow.

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 Amended Petition/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 costs of responding to IKEC's Amended Petition/Complaint, and (2) all other relief that this Court deems proper and just under the circumstances. IKEC's 2010 Amended Petition/Complaint is yet another groundless and unreasonable filing attempting to avoid the binding effect of the Court of Appeals' rulings in *Save the Valley*. This Court should not re-decide those issues that were squarely decided by the Court of Appeals.

Respectfully submitted,

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By Attorneys for Citizens Groups

Jeffrey B. Hyman (Attorney No. 24625-89)  
Staff Attorney  
Conservation Law Center  
116 S. Indiana Ave., Suite 4  
Bloomington, Indiana 47408  
812.856.5737 [Voice]  
812.855.1828 [Fax]  
jbhyman@indiana.edu

Jerome E. Polk (Attorney No. 23712-4)  
Senior Counsel  
Polk & Associates, LLC  
101 W. Ohio Street, Suite 2000  
Indianapolis, Indiana 46204  
317.636.5165 [Voice]  
317.636.5435 [Fax]  
jpolk@polk-law.com

Attorneys for Petitioners Save The Valley, Inc.,  
Hoosier Environmental Council, Inc., and Citizens  
Action Coalition of Indiana, Inc.

**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 2nd day of June, 2010, on the following counsel of record:

Anthony C. Sullivan  
Bryan G. Tabler  
Barnes & Thornburg LLP  
11 South Meridian Street  
Indianapolis, IN 46204

Denise A. Walker  
Deputy Attorney General  
Indiana Office of the Attorney General  
302 West Washington Street  
IGCS, 5th Floor  
Indianapolis, Indiana 46204

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Jeffrey B. Hyman