IN THE

INDIANA SUPREME COURT

Cause No. _____

INDIANA GAS COMPANY, INC. and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY, *et al.*,	)	Appeal from the Indiana Utility Regulatory Commission
Appellants-Respondents,	)	Cause No. 43976
vs.	)	The Honorable James D. Atterholt, Chairman
INDIANA FINANCE AUTHORITY and INDIANA GASIFICATION, LLC,	)	Court of Appeals Cause No. 93A02-1112-EX-01141
Appellees-Petitioners.	)	

APPELLANTS VECTREN ENERGY DELIVERY OF INDIANA, INC., OHIO VALLEY GAS CORPORATION, OHIO VALLEY GAS, INC., AND SYCAMORE GAS COMPANY'S JOINT RESPONSE TO APPELLEES' PETITION TO TRANSFER

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Having failed to challenge the Court of Appeals' adverse decision on rehearing, Appellees' request for transfer is untimely. Moreover, Appellees are judicially estopped from making assertions on transfer that are inconsistent with their position in the Court of Appeals. Accordingly, Appellees' Petition should be dismissed.

Appellees' substantive arguments also do not justify consideration of the issues they belatedly seek to present on transfer. Appellees cannot ask for relief from this Court that conflicts with a provision in their Contract, which operated to void the entire agreement once the Contract's definition of "retail end use customer" was invalidated. In entering into the Contract, Appellees agreed that every term was material and non-severable. This Court cannot rewrite Appellees' agreement or by delegation order the Indiana Utility Regulatory Commission to do that which Appellees contracted could not be done. An instruction compelling the Commission to approve Appellees' allegedly amended Contract is beyond this Court's jurisdiction to give and would be an improper exercise of agency authority.

This Court is bound by constitutional limitations and the intent of the parties as expressed within the four corners of the Contract. Appellees' arguments for transfer would necessitate overturning long-standing principles of administrative and contract law. Therefore, Appellees' Petition should be denied.

ARGUMENT

I. Appellees' Petition Should Be Dismissed.

Appellees' Petition should be dismissed because it is untimely. Appellate Rule 57(B) states that "[t]ransfer may be sought from adverse decisions issued by the Court of Appeals" in the form of a published opinion, an unpublished memorandum decision, any amendment or modification to a published opinion or unpublished memorandum decision, or an order

dismissing an appeal. "Any other order by the Court of Appeals . . . shall not be considered an adverse decision for the purpose of petitioning to transfer[.]" Ind. App. R. 57(B). Appellate Rule 57(C) governs the time for filing a petition to transfer from an adverse decision by the Court of Appeals and provides that such a petition "shall be filed . . . no later than thirty (30) days after the adverse decision if rehearing was not sought; or . . . if rehearing was sought, no later than thirty (30) days after the Court of Appeals' disposition of the Petition for Rehearing." Under Appellate Rule 54(B), "[a] Petition for Rehearing shall be filed no later than thirty (30) days after the [Court of Appeals'] decision."

Here, the Court of Appeals handed down its Opinion on October 30, 2012. The court reversed the Commission's approval of the Contract because the Contract's definition of "retail end use customer" deviated from the statutory definition in IC § 4-4-11.6-10. *Indiana Gas Co. v. Indiana Finance Auth.*, 977 N.E.2d 981, 1002-03 (Ind. Ct. App. 2012). Chief Judge Robb dissented in part, believing that the Contract's invalid definition could be excised and that the Commission's approval of the Contract need not otherwise be reversed. *Id.* at 1004 (Robb, C.J., dissenting). The Court of Appeals thus issued an adverse decision against Appellees from which they had thirty days – to and including November 29, 2012 – to seek rehearing by the Court of Appeals or transfer to this Court. *See* Ind. App. R. 54(B) and 57(C). Appellees did neither.

Instead, they opposed rehearing and remained silent on the arguments they now raise on transfer. Appellees did not file a Petition to Transfer until March 18, 2013, nearly five months after the Court of Appeals' adverse decision reversing approval of the Contract. Appellees

having failed to challenge the Court of Appeals' adverse decision on rehearing, their belated request for transfer should be dismissed.[1]

To the extent Appellees claim that the transfer deadline for them was tolled pending disposition of the Utilities'[2] and Citizens Groups' Petitions for Rehearing, that contention is defeated by a plain reading of the appellate rules. The ability to request transfer turns on the existence of an adverse decision issued by the Court of Appeals. Ind. App. R. 56(B) and 57(A); *State Farm Fire & Cas. Co. v. Radcliff*, 973 N.E.2d 566, 566-67 (Ind. 2012) (reiterating that transfer may only be sought from Court of Appeals' adverse decisions). In this case, the adverse rulings that were the subject of the Petitions for Rehearing were separate and distinct from the only decision adverse to Appellees – the Court of Appeals' reversal of the Commission's approval of the Contract. Only Appellees could preserve any error predicated on the Court of Appeals' reversal by pursuing their own petition for rehearing or petition to transfer. *See Stoner v. Custer*, 252 Ind. 661, 253 N.E.2d 231, 232 (1969) (making distinction between appellees who filed petition for rehearing on ruling adverse to them and appellant who did not file a petition for rehearing on ruling adverse to her).

Appellees' independent obligation to seek rehearing or transfer from an adverse decision against them is bolstered by Appellate Rule 55, which addresses the scenario in which different holdings may be adverse to different parties such that "rehearing is sought by one party, and transfer is sought by another[.]" Had Appellees filed a petition to transfer on November 29,

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[1] The Court of Appeals entered an Order denying rehearing on February 14, 2013. The Order did not amend or modify its October 30, 2012 Opinion. Therefore, the Order was not an adverse decision from which transfer could be sought under Appellate Rule 57(B).

[2] Appellees refer to the Utilities collectively as "Vectren." (Petition, p. 4). Three of the five Utilities in this appeal have no affiliation with Vectren, but are equally opposed to Appellees' Petition. The Utilities are joined by four Citizens Groups, who similarly oppose Appellees' Petition.

2012, it would not have mattered that the Utilities and Citizens Groups filed Petitions for Rehearing that same day.[3] The appeal merely would have proceeded as described in Appellate Rule 55.

In sum, Appellate Rule 57(C)(1) required Appellees to file their own petition to transfer no later than thirty days after the Court of Appeals' adverse decision against them if they did not seek rehearing of that adverse decision. If Appellees did seek rehearing of that adverse decision, Appellate Rule 57(C)(2) allowed them thirty days after the Court of Appeals' disposition of their petition for rehearing to seek transfer. *See Weinberg v. Bess*, 717 N.E.2d 584, 589 n.9 (Ind. 1999) ("A party whose petition for rehearing was denied is entitled to seek transfer of her claim to this Court."). Appellees cannot ride on the coattails of the Utilities' and the Citizens Groups' Petitions for Rehearing in order to extend the time for requesting transfer on a wholly unrelated ruling adverse to them and no one else.

Not only is Appellees' Petition untimely, but their arguments are barred by judicial estoppel, which "prevents a party from asserting a position in a legal proceeding inconsistent with one previously asserted." *See Plaza Group Properties, LLC v. Spencer County Plan Comm'n*, 911 N.E.2d 1264, 1269 (Ind. Ct. App. 2009), *trans. denied.* Appellees request transfer on the theory that the Court of Appeals erred when it reversed approval of the Contract because the language in the definition of "retail end use customer" was nothing more than a "contractual embellishment" that did not contravene the statute. (Petition, p. 10). But every action Appellees have taken reflects their unrestricted *acceptance* of the outcome reached by the Court of Appeals based on an *admitted* statutory defect in the Contract.

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[3] And conversely, if no other party had requested rehearing, the appeal would have concluded and the Opinion would have been certified as final in 2012. *See* Ind. App. R. 65(E).

On December 13, 2012, Appellees entered into a Reformation Agreement purporting to amend the Contract and its definition of "retail end use customer" so as "to bring the . . . Contract into compliance with [the Court of Appeals'] opinion[.]" (York Aff., ¶¶ 4-5). Appellees amended their Contract "in conformity with [the Court of Appeals'] decision" to "address [the court's] concern regarding the definition of 'Retail End Use Customer[.]'" (Appellees' Opp. to Pet. for Reh'g, pp. 2, 14). The Reformation Agreement itself acknowledges that the proviso in the Contract's definition "may be regarded as inconsistent with the applicable statute[.]" (Reformation Agreement, p. 1).

Appellees also "join[ed] in and adopt[ed] by reference the . . . Indiana Industrial Group's Opposition to [the Utilities'] Petition for Rehearing[,]" explaining that:

> [i]n making this joinder, [Appellees] do not contest [the Court of Appeals'] finding on the issue of Retail End Use Customer. Additionally, . . . [Appellees] have entered into a Reformation Agreement that conforms the definition of Retail End Use Customer in the Contract to the statutory definition[.]

(Appellees' Opp. to Pet. for Reh'g, pp. 11-12). Appellees stated matter-of-factly and without objection that the Court of Appeals' Opinion "simply revers[ed] the [Commission's] order approving [the Contract]." (Appellees' Response to Motion to Strike, pp. 1, 5). According to Appellees, the Utilities did not "show[] any error in [the Court of Appeals'] Opinion[.]" (*Id.*, p. 2). These contentions are directly contrary to Appellees' current position.

Even the relief Appellees seek on transfer is inconsistent with their representations in the Court of Appeals. On rehearing, Appellees' witness averred that "[u]pon termination of this appellate proceeding, [they] intend to present their Reformation Agreement to the . . . Commission . . . for review and approval." (York Aff., ¶ 7). Appellees declared that "[o]nce the appellate litigation ceases, [they] will proceed to the [Commission] for final approval of the

Contract reformed consistent with [the Court of Appeals'] directives." (Appellees' Opp. to Pet. for Reh'g, p. 12). Now in contrast, Appellees want this Court to either "reverse the Court of Appeals and affirm the [Commission's] approval of the Contract regardless of the addition of the 37 words," or "remand to the [Commission] with a specific instruction to approve the amended Contract without further process." (Petition, p. 14).

Given Appellees' repeated endorsement of the Court of Appeals' Opinion and their conduct in conformity therewith, Appellees are judicially estopped from advocating that the court's adverse decision against them was in any way erroneous. In opposing the Petitions for Rehearing and never disputing reversal of the Commission's approval of the Contract, Appellees "accept[ed] the opinion of the Appellate Court in toto[.]" *See Stoner*, 253 N.E.2d at 671. For this additional reason, Appellees' Petition should be dismissed.

II. Appellees' Attempt To Ignore The Statutory Defect In Their Contract Is Contrary To The Terms They Negotiated.

Appellees next "dispute the extreme remedy of reversing . . . approval of the Contract" despite the statutory defect in the Contract's definition of "retail end use customer." (Petition, p. 10). Appellees posit that the Court of Appeals "should . . . have construed the 37 words at issue in harmony with the SNG Statute, as the parties themselves intended, rather than to be in conflict." (*Id.*, p. 12). Appellees ask this Court to grant transfer and affirm the Commission's "approval of the Contract regardless of . . . the 37 words" that deviated from the statutory definition. (*Id.*, p. 14). Appellees' Petition fails on multiple fronts.

Foremost, Appellees' reliance on *Harbour v. Arelco, Inc.*, 678 N.E.2d 381 (Ind. 1997), and similar decisions, for the proposition that a court will enforce the remainder of a contract if it "contains an illegal provision which can be eliminated without frustrating the [contract's] basic purpose" is misplaced. *See id.* at 385. *See also Continental Basketball Ass'n, Inc. v. Ellenstein*

Enters., Inc., 669 N.E.2d 134, 140-41 (Ind. 1996); *Imperial Ins. Restoration & Remodeling, Inc. v. Costello*, 965 N.E.2d 723, 729 (Ind. Ct. App. 2012). Those cases involved an inquiry not relevant here: whether the particular contract was void *as against public policy* due to a provision that violated a statute. In making that assessment, the appellate courts balanced a number of competing factors that have never been at issue in this appeal.

More importantly, none of the contracts in *Harbour*, *Continental Basketball*, or *Imperial* contained a materiality/non-severability clause like the one in Appellees' Contract. "[W]hether a contract is entire or divisible is controlled by the intention of the parties as it is disclosed by the terms of the contract." *Samper v. Ind. Dept. of State Rev.*, 231 Ind. 26, 106 N.E.2d 797, 802 (1952). *See also Heritage Dev. of Ind., Inc. v. Opportunity Options, Inc.*, 773 N.E.2d 881, 891 (Ind. Ct. App. 2002). Section 15.2 of the Contract, which Appellees have chosen not to mention for apparent reasons, reads:

> Non-Severability. All of the provisions of this Agreement constitute a material integral part of the Parties' agreements and this Agreement shall be construed in whole and not in part so that if individual provisions, agreements or covenants are determined to be invalid, void or unenforceable by any court having jurisdiction, then such determination shall invalidate, void, and make unenforceable this Agreement in its entirety.

(Utilities' App. 301). Section 15.2 evinces Appellees' intent that the invalidity of any provision voids the entire Contract. Accordingly, in light of the statutory defect in the Contract's definition of "retail end use customer," and by operation of Appellees' own agreement, the Contract is invalid, void, and unenforceable in its entirety.

Appellees invoke the "fundamental tenet of construction" that a contract should not be interpreted so as to render any terms ineffective or meaningless. (Petition, p. 12). Yet that is exactly what they are requesting this Court to do on transfer – write out Section 15.2 of the

Contract as if it never existed. Appellees cannot pick and choose which provisions to give effect to and which provisions to overlook when it suits their purpose, nor can they expect this Court to do so.

Appellees cannot avoid the statutory defect in their Contract or the application of Section 15.2 with "hindsight" either. (*Id.*, p. 11). Appellees are bound by the intent expressed within the four corners of the document. *See Oxford Fin. Group, Ltd. v. Evans*, 795 N.E.2d 1135, 1142 (Ind. Ct. App. 2003); *Eskew v. Cornett*, 744 N.E.2d 954, 957 (Ind. Ct. App. 2001) (noting that terms of contract "prevail over an averment differing therefrom" and that "[w]hen the language of a contract is clear and unambiguous, the intent of the parties is determined from the four corners of the instrument"). This Court is equally bound.

In short, the language of Section 15.2 controls and forecloses the relief Appellees seek on transfer. To grant transfer and affirm the Commission's approval of the Contract regardless of its statutory defect would require this Court to ignore the terms of Appellees' agreement and eviscerate one of the most basic rules of contract law: that a court "cannot re-write and then enforce contracts, which, to the knowledge of the court, the parties themselves did not enter into." *See Wenning v. Calhoun*, 827 N.E.2d 627, 630 (Ind. Ct. App. 2005). *See also Von Hor v. Doe*, 867 N.E.2d 276, 278 (Ind. Ct. App. 2007) (stating that court may not rewrite clear and unambiguous language of a contract), *trans. denied.*

Perhaps recognizing that their Petition conflicts with well-established contract principles, Appellees abandon these principles altogether in favor of an alternative *de minimis* theory. But *D&M Healthcare, Inc. v. Kernan*, 800 N.E.2d 898 (Ind. 2003), the only authority Appellees cite for this argument, is inapposite because it did not involve a materiality/non-severability clause in which the parties declared that "[a]ll of the provisions of this Agreement constitute a material

integral part of the Parties' agreements[.]" (Utilities App. 301). Section 15.2 of Appellees' Contract is the very antithesis of *de minimis* – which, "in contemporary American vernacular, . . . is the courts' way of saying 'So what?'" *See D&M Healthcare*, 800 N.E.2d at 900. Having closed the door on a *de minimis* defense by inserting a materiality/non-severability clause into their Contract, Appellees cannot re-open that door just because they perceive the *de minimis* notion to be better for them on transfer than the Contract terms they negotiated.[4]

Appellees' repeated reference to "the 37 words" that deviated from the statutory definition of retail end use customer – a transparent effort to marginalize the defect in their Contract – is likewise unpersuasive. Any analysis that requires a court to draw a line in the sand regarding how many words in a contract constitute a *de minimis* legal defect is dangerous. Under Appellees' "So what?" theory, the Contract Savings Guaranty Amount, which they allege guarantees retail end use customers the savings required under the statute, is even more *de minimis* because it only contains 18 words.[5] (Utilities' App. 260). Appellees' dismissive approach to the alteration of material terms in their agreement tarnishes the "public interest gloss" their Contract is supposed to carry for retail end use customers. *See Citizens Action Coalition of Ind., Inc. v. PSI Energy, Inc.*, 664 N.E.2d 401, 406 (Ind. Ct. App. 1996).

Any assertion that the Reformation Agreement moots the issue of the Contract's defective definition of "retail end use customer" and negates the need for further proceedings before the Commission is not well taken. Pursuant to Section 15.2 of the Contract, the Contract

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[4] Contrary to Appellees' suggestions elsewhere, they cannot avoid the terms of their agreement by espousing less stringent standards, such as whether the Contract meets "the primary public policy objectives of the SNG Statute" or whether the Contract is "harmful." (Petition, pp. 11, 13). These are not a substitute for the laws of contract interpretation.

[5] The Utilities and Citizens Groups have filed Petitions to Transfer challenging the Contract's lack of finality and guaranteed savings for retail end use customers. The relief Appellees request on transfer assumes their Contract, even as amended, meets these statutory requirements, which it does not.

became void and unenforceable in its entirety. As such, there was no Contract to be amended, through a Reformation Agreement or otherwise. *See City School Corp. of Evansville v. Hickman*, 47 Ind. App. 500, 94 N.E. 828, 829 (1911) (noting that contract that is illegal or void cannot be reformed).

Appellees offer no explanation – nor can they – for how they could amend a contract that was invalidated by the very Opinion upon which they relied in reforming the agreement and in the face of a materiality/non-severability clause which they chose to include in their agreement. As Appellees concede, "[n]o other changes were made" to the Contract and "[e]ach and every term of the Contract – other than the 37 deleted words in the [Retail End Use Customer] definition – remains the same." (Petition, pp. 14-15). The Reformation Agreement itself confirms "that except for the reformation of the definition of 'Retail End Use Customers' . . . , all other provisions of the [Contract] shall remain unchanged and in full force and effect in accordance with its terms." (Reformation Agreement, p. 1). The Reformation Agreement does not moot the invalidity of the Contract and does not justify the relief Appellees request on transfer.

III. This Court Cannot Usurp The Commission's Authority By Compelling The Agency To Approve Appellees' Amended Contract Or Order The Commission To Do That Which Appellees Agreed Could Not Be Done.

Alternatively, Appellees ask this Court to direct the Commission "to approve the amended Contract without further process." (Petition, p. 14). In Appellees' view, "[r]emanding to the [Commission] for further proceedings would serve no purpose" and this Court should simply compel the agency to approve the Contract as allegedly modified by the Reformation Agreement. (*Id.*, p. 15). Appellees' attempt to circumvent any due process on remand should be rejected for three reasons.

First, the alternative relief Appellees seek is contrary to the agreement they negotiated. By its own terms, the Contract was rendered void as a result of the defective definition of "retail end use customer." A contract that is void cannot be amended. *Hickman*, 94 N.E. at 829. This Court cannot order the Commission to approve the so-called amended Contract when the Contract itself is void and the Reformation Agreement is ineffective. The Commission cannot accomplish through delegation what Appellees agreed could not be done.

Second, a court cannot "mandate the . . . Commission to enter any particular order" because that would "usurp the legislative prerogative of the . . . Commission[.]" *Public Serv. Comm'n v. Chicago, Indpls. and Louisville Ry. Co.*, 235 Ind. 394, 132 N.E.2d 698, 700 (1956) (discussing Commission's predecessor agency). *See also Public Serv. Comm'n v. Indiana Tel. Corp.*, 237 Ind. 352, 146 N.E.2d 248, 253 (1957) ("A court may not substitute its opinion on a subject matter properly within the judgment or discretion of the Commission and then enter an affirmative order mandating the Commission to carry it out."). That is because under Article 3, § 1 and Article 4, § 1 of the Indiana Constitution, a court "is not a legislative or administrative agency of the State, and it has no authority to usurp or exercise the functions of the Commission." *State ex rel. Public Serv. Comm'n v. Johnson Circuit Court*, 232 Ind. 501, 112 N.E.2d 429, 431 (1953) (discussing Commission's predecessor agency). *See also State ex rel. Indiana State Bd. of Finance v. Marion County Superior Court*, 272 Ind. 47, 396 N.E.2d 340, 344 (1979); *Bolerjack v. Forsythe*, 461 N.E.2d 1126, 1129-30 (Ind. Ct. App. 1984). Thus, in *Johnson Circuit Court*, this Court held that a trial court's judgment "which mandated the Commission . . . to enter an order approving the sale and transfer of the Certificate [of Public Convenience] . . . was in excess of the jurisdiction of the Johnson Circuit Court, and for that reason was void." 112 N.E.2d at 431. *See also Indiana Tel. Corp.*, 146 N.E.2d at 253 (striking

paragraphs from trial court's judgment because court did not have right "to refer the proceeding back to the Commission with affirmative orders to be carried out"); *State ex rel. Indiana Alcoholic Beverage Comm'n v. Lake Superior Court*, 259 Ind. 123, 284 N.E.2d 746, 749 (1972) (holding that court "may not grant or renew licenses on its own through the guise of a restraining order").

"The sole relief a court may grant when an administrative decision is found to be unlawful is to vacate the decision and remand the matter to the agency for a further determination." *State ex rel. State Bd. of Tax Comm'rs v. Marion Superior Court*, 271 Ind. 374, 392 N.E.2d 1161, 1166 (1979) (concluding that it was error for trial court to go beyond vacating State Tax Board's decision and calculate what it deemed to be proper tax rate and "mandate[] the Board to approve and certify this increased rate"). *See also Shettle v. Shearer*, 425 N.E.2d 739, 741 (Ind. Ct. App. 1981) (although agency's denial of license application "was clearly contrary to law, the trial court erred in ordering [agency] to issue the license."). This Court cannot usurp the Commission's power by compelling the agency to approve the purportedly amended Contract without further process. Such an instruction is beyond this Court's jurisdiction to give and would be an improper exercise of agency authority.[6]

Third, such an encroachment would be contrary to law. There is a "need for the Commission's decisions, rulings, and orders to be based upon current information." *Shoup Buses,* 380 N.E.2d at 107 and n.4 (holding that Commission could only issue certificate of public convenience based on "current conditions" and "needed to consider the current status of those

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[6] *Miller v. Mayberry*, 546 N.E.2d 834 (Ind. 1989), which Appellees cite, is inapposite because it did not involve judicial review of an agency determination. "[T]here are significant differences between the relations of an appellate court to a lower court and those of a court to a law-enforcing agency[.]" *Shoup Buses, Inc. v. Public Serv. Comm'n*, 177 Ind. App. 482, 380 N.E.2d 104, 106 (1978).

matters set forth in [the statute]"). If the Court short-circuits the administrative proceedings on remand, it would be mandating approval of a contract with a different risk profile than the contract previously found by the Commission to be in the public interest. Moreover, the Court would be taking away the Commission's ability to base its public interest determination on "current information." *See id.* Indeed, the landscape has been materially altered by the Court of Appeals' exclusion of transportation customers from the statutory definition of retail end use customer. This represents a significant change in circumstances since the Commission initially reviewed the Contract, in that transportation customers over a certain usage level will no longer be forced to bear the risk of loss or share in the agreement's financial implications.[7]

Whether retail end use customers suffer losses under the Contract in the form of higher charges on their gas bills depends in large part on the market price for natural gas. The weight of the impact on retail end use customers increases when a smaller pool of customers (now excluding transportation customers) are allocated responsibility for the potential Contract losses. Therefore, it is critical that updated market conditions and the reallocation of risk be evaluated against the most current information available. That inquiry is within the province of the Commission, not this Court, to resolve if the case is remanded.

CONCLUSION

The Utilities respectfully request that Appellees' Petition be denied.

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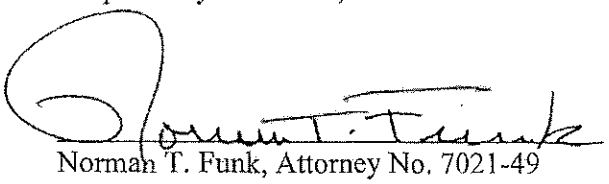
[7] This is not a *de minimis* change (using Appellees' expression) and will result in the reallocation of potentially billions of dollars in costs under the Contract, as evidenced by the transportation customers' vigorous opposition to being subject to the agreement.

Respectfully submitted,



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WORD COUNT CERTIFICATE

The undersigned counsel verifies that the foregoing Joint Response to Appellees' Petition to Transfer (excluding cover page, table of contents, table of authorities, word count certificate, certificate of service, and signature block) contains 4,194 words as determined by the word count of the word processing system used to prepare this Petition, specifically Microsoft Word, which is no more than the 4,200 words permitted by Ind. Appellate Rule 44(E).

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing document was served upon the following by way of First Class United States mail, postage prepaid, this 10th day of April, 2013.

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