

**STATE OF INDIANA  
INDIANA UTILITY REGULATORY COMMISSION**

JOINT PETITION BY THE INDIANA FINANCE )  
AUTHORITY (“AUTHORITY”) AND INDIANA )  
GASIFICATION, LLC (“INDIANA )  
GASIFICATION”) FOR THE INDIANA UTILITY )  
REGULATORY COMMISSION TO (1) APPROVE )  
A SUBSTITUTE NATURAL GAS PURCHASE )  
AND SALE AGREEMENT ENTERED INTO BY )  
THE AUTHORITY AND INDIANA )  
GASIFICATION FOR THE SALE BY INDIANA )  
GASIFICATION AND PURCHASE BY THE )  
AUTHORITY OF SUBSTITUTE NATURAL GAS )  
 (“SNG”) OVER A 30 YEAR TERM PURSUANT )  
 TO I.C. 4-4-11.6; (2) IF NECESSARY, ORDER )  
 INDIANA REGULATED ENERGY UTILITIES TO )  
 ENTER INTO A MANAGEMENT CONTRACT )  
 WITH THE AUTHORITY; (3) DECLINE TO )  
 EXERCISE JURISDICTION PURSUANT TO I.C. )  
 8-1-2.5-5 OVER INDIANA GASIFICATION )  
 WITH RESPECT TO ITS FINANCING, )  
 CONSTRUCTING, OWNING AND OPERATING )  
 SNG PRODUCTION AND TRANSPORTATION )  
 FACILITIES, AND AN ANCILLARY )  
 INTEGRATED COAL GASIFICATION )  
 POWERPLANT (“ICGP FACILITIES”) AND )  
 ELECTRIC GENERATION FACILITIES WHICH )  
 USE CLEAN COAL TECHNOLOGY IN )  
 CONNECTION THEREWITH, AND WHICH )  
 PRODUCES SNG TO BE SOLD TO THE )  
 AUTHORITY AND OTHER PERSONS, AND )  
 PRODUCES ELECTRICITY WHICH WILL BE )  
 SOLD TO ENERGY UTILITIES; AND (4) GRANT )  
 ALL OTHER APPROPRIATE AND ASSOCIATED )  
 APPROVALS AND RELIEF )

**FILED**  
March 08, 2012  
INDIANA UTILITY  
REGULATORY COMMISSION

**CAUSE NO. 43976**

**OPPOSITION OF INDIANA INDUSTRIAL GROUP TO MOTION  
SEEKING EXPEDITED DENIAL OF RECONSIDERATION PETITION**

Evidently frustrated by the rejection of their efforts to demand special expedited treatment at both the Indiana Supreme Court and the Court of Appeals, Indiana Finance

Authority (“IFA”) and Indiana Gasification, LLC (“IG”) now urge the Commission to suspend the ordinary process of reasoned decision-making and proceed in a rush to a decision on the Petition for Reconsideration filed by the Indiana Industrial Group. IFA and IG appear to have forgotten that the Petition for Reconsideration seeks a Commission determination on a highly material issue that was actively litigated in the underlying proceeding but left undecided in the Commission’s final order. The Industrial Group properly seeks to establish the application of the statutory term “retail end use customer” as defined by the legislature. The judiciary clearly wishes to give the Commission another opportunity to address that issue. The Commission should make its determination with the same deliberation it gives to any important question placed before it. The IFA/IG motion for expedited denial is misguided and should be denied.

**A. The Commission Was Divested of Jurisdiction to Decide the Petition for Reconsideration Until the Court of Appeals Issued Its Remand Order**

Notwithstanding the pending Petition for Reconsideration, the parties seeking review of the Commission’s November 22, 2011 Order were required to file their Notices of Appeal by December 22, 2011, in order to avoid waiver under the reasoning in Citizens Industrial Group v. Heartland Gas Pipeline, LLC, 856 N.E.2d 734 (Ind. App. 2006), transfer denied, 869 N.E.2d 453 (Ind. 2007) (dismissing appeal where notice of appeal was not filed until after Commission ruled on reconsideration petition). As recommended in the Heartland decision, the Industrial Group moved the Court of Appeals for an order temporarily staying the appeal and remanding the case so that the Commission could rule on the Petition for Reconsideration. See 856 N.E.2d at 738.

The rules of appellate procedure, however, called for the Commission Reporter to notify the Court of Appeals within thirty days that the Clerk’s Record had been assembled. See Ind. Appellate Rule 10(B)-(C). The required notice was timely filed on January 20, 2012. By virtue

of Ind. Appellate Rule 8, the Court of Appeals at that point acquired general jurisdiction over the case. The Commission, consequently, was divested of jurisdiction and could not issue a ruling on the pending Petition for Reconsideration, unless and until the Court of Appeals remanded.

The Court of Appeals order granting the temporary stay and remand, however, was delayed as a result of a flurry of threshold motions practice by IFA and IG in the appeal. First, IFA and IG filed an emergency motion to seeking immediate transfer of the appeal to the Indiana Supreme Court. That motion was denied by the Supreme Court on February 15, 2012. A copy of the Supreme Court order is attached hereto as Exhibit A. Notably, the Supreme Court expressly stated the Industrial Group's motion for a temporary stay and remand "remains pending for the Court of Appeals to consider and rule upon." Id. at 2 ¶3. As contemplated in the Supreme Court order, the Court of Appeals then issued its order granting the temporary stay and remanding the case to the Commission on March 5, 2012. A copy of that Court of Appeals order is attached hereto as Exhibit B.

In addition, after the Supreme Court denied the motion for immediate transfer, IFA and IG filed a motion in the Court of Appeals seeking "expedited consideration" of the appeal. Another party then requested an extension of time to file its appeal brief. On March 5, 2012, the Court of Appeals issued another order finding the request for an extension moot in light of the grant of a temporary stay and remand. A copy of that order is attached as Exhibit C.

When the Supreme Court and Court of Appeals issued their orders, they were fully informed as to the procedural status of the Industrial Group's Petition for Reconsideration. On February 13, 2012, IFA and IG filed a "Notice" with both appellate courts asserting that the Industrial Group's petition had been "deemed denied" by virtue of 170 Ind. Admin. Code §1-1.1-22(e)(5). Two days later, the Supreme Court nevertheless expressly preserved the Court of

Appeals' authority to consider and rule upon the motion for temporary stay and remand. See Ex. A at 2 ¶3. The Court of Appeals, too, had been notified by IFA and IG, but nevertheless proceeded to grant the motion for temporary stay and remand. See Ex. B.

The appellate courts, accordingly, have now twice rejected the position of IFA and IG that expedited action is necessary and appropriate. Despite explicit notice of IFA and IG's position that the Industrial Group's petition had been "deemed denied," the appellate courts remanded the case to the Commission for a ruling. The Commission, of course, was divested of jurisdiction for the latter portion of the 60-day time period allowed under 170 Ind. Admin. Code §1-1.1-22(e)(5), and as a result did not have the full opportunity to address that petition before the period elapsed. The appellate courts, quite clearly, considered it appropriate to provide the Commission with that opportunity.

After their demands for expedited treatment were rejected by the Supreme Court and the Court of Appeals, IFA and IG now make the same demand on the Commission. They offer the novel contention that the Commission Reporter's filing of a timely Notice of Completion of Clerk's Record should be construed as an implied ruling by the Commission denying the Industrial Group's Petition for Reconsideration. See 3/7/12 IFA/IG Request at ¶8. The Commission Reporter, of course, is not authorized to decide Petitions for Reconsideration. The Reporter's obligation under Ind. Appellate Rule 10(B)-(C), rather, is to assemble the Clerk's Record in a timely fashion and provide Notice when that has been completed. The Reporter's compliance with the appellate rules does not substitute for a Commission determination on a timely Petition for Reconsideration.

**B. The Petition for Reconsideration Seeks a Ruling on a Material Issue that Was Litigated But Left Undecided**

The IFA and IG misstate that the Petition for Reconsideration raises issues that were already “addressed by the Commission” in the November 22, 2012 Order. See 3/7/12 IFA/IG Request at ¶3. To the contrary, the Petition seeks a ruling on a highly material dispute that was raised and litigated in the underlying proceeding but was not decided in the Commission’s order. Specifically, the Industrial Group seeks a determination that large volume transporters who purchase gas supplies in the competitive interstate market and not from Commission-regulated public utilities fall outside the scope of the statutory definition of “retail end use customers” for purposes of Ind. Code §4-4-11.6-10.

The Industrial Group submits that the correct application of the statutory provision does not subject large volume transporters to the surcharge and crediting mechanism applicable to “retail end use customers.” Despite the statutory language, some parties nevertheless contended such transporters should be required to provide rate support for the IFA/IG project. The IFA and IG, in their contract as approved by the Commission, crafted alternative language without any antecedent in the statute that would set a threshold level of consumption, by which those transporting less than 50,000 dth annually would be subject to the rate adjustment mechanism but those transporting more would not. Despite the vigorously litigated dispute on this important issue, the Commission did not make a determination one way or the other in the November 22, 2011 Order.

The absence of a Commission finding on a matter duly raised and presented in a matter before it is, in itself, a potential basis for reversal on appeal. See, e.g., Public Service Commission v. Indiana Bell Telephone Co., 235 Ind. 1, 27, 130 N.E.2d 467, 479 (1955); Hidden Valley Lake Property Owners Association v. HVL Utilities, Inc., 408 N.E.2d 622, 626 (Ind.

App.), reh. denied, 411 N.E.2d 1262 (1980); L.S. Ayres & Co. v. Indianapolis Power & Light Co., 169 Ind. App. 652, 662, 351 N.E.2d 814, 822 (1976). The Court of Appeals, accordingly, properly remanded for a Commission determination. The suggestion by the IFA and IG that the Commission should simply deny the Petition for Reconsideration without deciding the dispute over the application of Ind. Code §4-4-11.6-10 to large volume transporters would leave the Commission's order vulnerable to reversal for want of a material finding.

**C. All Members of the Industrial Group Have a Strong Interest in the Issue Raised in the Petition for Reconsideration**

In an evident reference to their previously asserted objections to the addition of members to the Industrial Group, the IFA and IG attempt to belittle the interests at stake by characterizing the Industrial Group as having “revolving-door membership.” See 3/7/12 IFA/IG Request at ¶3. One member of the Industrial Group, ArcelorMittal, has been an active participant in the proceeding ever since the intervention was granted on February 10, 2011, and unquestionably has full right to protect its interests as a party before the Commission and on appeal. Given the language of Ind. Code §4-4-11.6-10 defining “retail end use customer,” it is hardly surprising that additional large volume transporters became concerned when the Commission's Order did not include a determination on the scope of that statutory definition.

All of the members of the Industrial Group share the same strong interest as ArcelorMittal in establishing without ambiguity that “retail end use customer” does not include large volume transporters who do not purchase gas from Commission-regulated public utilities. The rate adjustment mechanism contemplated by the statute reflects the market price of gas produced by the proposed IFA/IG facility, and hence under the statutory scheme is properly passed through to “retail end use customers” who buy their gas from public utilities. The interest

of the Industrial Group in the correct application of the statutory definition, therefore, is the same strong interest shared by all large volume transporters.

The dismissive approach urged by the IFA and IG does not fairly address the significant interests at stake. The Commission, rather, should overrule the IFA and IG's objections to the Industrial Group membership and grant the Petition for Reconsideration.

WHEREFORE, the Industrial Group respectfully requests that the Commission deny the request for expedited denial of the Petition for Reconsideration, overrule the objections to the Industrial Group membership, and grant the Petition for Reconsideration.

Respectfully submitted,

LEWIS & KAPPES

By: /s/ Joseph P. Rompala  
Joseph P. Rompala (25078-49)

Counsel for Indiana Industrial Group

LEWIS & KAPPES  
One American Square, Suite 2500  
Indianapolis, Indiana 46282  
Telephone: (317) 639-1210  
Fax: (317) 639-4882  
E-mail: [JRompala@Lewis-Kappes.com](mailto:JRompala@Lewis-Kappes.com)

**CERTIFICATE OF SERVICE**

I, the undersigned hereby certifies that copies of the foregoing document has been served upon the following as a .PDF attachment to electronic mail, this 8<sup>th</sup> day of March 2012:

<p><b>OUCC</b> David Stippler Randy Helmen <b>Office of Utility Consumer Counselor</b> Indiana Government Center North 115 W. Washington St., Ste. 1500 South Indianapolis, IN 46204 <a href="mailto:dstippler@oucc.in.gov">dstippler@oucc.in.gov</a> <a href="mailto:rhelmen@oucc.in.gov">rhelmen@oucc.in.gov</a> <a href="mailto:infomgt@oucc.in.gov">infomgt@oucc.in.gov</a></p> <p><b>INDIANA FINANCE AUTHORITY AND INDIANA GASIFICATION, LLC:</b> Karl Mulvaney David McGimpsey Michael Limrick <b>Bingham Greenebaum Doll LLP</b> 2700 Market Tower, 10 W. Market St. Indianapolis, IN 46204 <a href="mailto:kmulvaney@bgdlegal.com">kmulvaney@bgdlegal.com</a> <a href="mailto:dmcgimpsey@bgdlegal.com">dmcgimpsey@bgdlegal.com</a> <a href="mailto:mlimrick@bgdlegal.com">mlimrick@bgdlegal.com</a></p> <p><b>INDIANA GASIFICATION</b> Larry Wallace James A. L. Buddenbaum Travis Montgomery <b>Parr Richey Obremskey &amp; Morton</b> 201 N. Illinois Street, Suite 300 Indianapolis, IN 46204 <a href="mailto:llwallace@parrlaw.com">llwallace@parrlaw.com</a> <a href="mailto:jbuddenbaum@parrlaw.com">jbuddenbaum@parrlaw.com</a> <a href="mailto:tmontgomery@parrlaw.com">tmontgomery@parrlaw.com</a></p> <p><b>INDIANA FINANCE AUTHORITY</b> Mark Cooper <b>Attorney at Law</b> 1449 N. College Ave. Indianapolis, IN 46202 <a href="mailto:attymcooper@indy.rr.com">attymcooper@indy.rr.com</a></p>	<p><b>LINCOLNLAND ECONOMIC DEVELOPMENT CORP.</b> Jefferson Lindsey <b>Lindsey Law Office</b> 217 Main St. Rockport, IN 47635-1415 <a href="mailto:Lindsey217main@sbcglobal.net">Lindsey217main@sbcglobal.net</a></p> <p><b>INDIANA GAS COMPANY, INC.</b> Norman T. Funk Rori L. Goldman Elizabeth A. Trachtman <b>Hill Fulwider McDowell Funk &amp; Matthews</b> One Indiana Square, Ste. 2004 Indianapolis, IN 46204 <a href="mailto:tom@hfmfm.com">tom@hfmfm.com</a> <a href="mailto:rori@hfmfm.com">rori@hfmfm.com</a> <a href="mailto:Elizabeth@hfmfm.com">Elizabeth@hfmfm.com</a></p> <p>Robert E. Heidorn Joshua Claybourn <b>Vectren Corporation</b> One Vectren Square 211 N.W. Riverside Drive Evansville, Indiana 47708 <a href="mailto:rheidorn@vectren.com">rheidorn@vectren.com</a> <a href="mailto:jclaybourn@vectren.com">jclaybourn@vectren.com</a></p> <p><b>VECTREN</b> Daniel McGill <b>Barnes &amp; Thornburg, LLP</b> 11 S. Meridian St. Indianapolis, IN 46204 <a href="mailto:dmcgill@btlaw.com">dmcgill@btlaw.com</a></p>
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**CITIZENS GROUPS**

Jerome Polk  
Russell Ellis  
**Polk & Associates, LLC**  
101 W. Ohio St., Ste. 2000  
Indianapolis, IN 46204  
[jpolk@polk-law.com](mailto:jpolk@polk-law.com)  
[Russell.ellis@polk-law.com](mailto:Russell.ellis@polk-law.com)

**NIPSCO**

Claudia Earls  
**NiSource Corporate Services – Legal**  
101 W. Ohio Street, Ste. 1707  
Indianapolis, IN 46204  
[cjearls@nisource.com](mailto:cjearls@nisource.com)

J. Thomas Vetne  
Brian M. Kubicki  
**Jones Obenchain, LLP**  
600 KeyBank Building  
200 South Michigan Street  
South Bend, IN 46634-4577  
[jtv@jonesobenchain.com](mailto:jtv@jonesobenchain.com)  
[bkubicki@jonesobenchain.com](mailto:bkubicki@jonesobenchain.com)

**AURORA GAS**

Randolph Turner  
**Aurora Municipal Gas Utility**  
110 Main Street  
Aurora, IN 47001  
[utilities@aurora.in.us](mailto:utilities@aurora.in.us)

**BOONVILLE NATURAL GAS**

John Lewellyn  
**Boonville Natural Gas Corporation**  
1425 N. Rockport Rd.  
Boonville, IN 47601  
[lynette@bngas.com](mailto:lynette@bngas.com)

**CITIZENS GAS**

**CITIZENS GAS WESTFIELD**

Michael Cracraft  
**Hackman Hulett & Cracraft, LLP**  
111 Monument Cir. Dr., Ste. 3500  
Indianapolis, IN 46204  
[mcracraft@hhclaw.com](mailto:mcracraft@hhclaw.com)

**COMMUNITY NATURAL GAS  
SYCAMORE GAS CO.**

**MIDWEST NATURAL GAS  
INDIANA NATURAL GAS  
OHIO VALLEY GAS CORP.  
OHIO VALLEY GAS, INC.**  
Clayton Miller  
**Bamberger, Foreman, Oswald & Hahn,  
LLP**  
201 N. Illinois St., Ste. 1225  
Indianapolis, IN 46204  
[cmiller@bamberger.com](mailto:cmiller@bamberger.com)

**FOUNTAIN TOWN GAS COMPANY,  
INC.**

**SOUTH EASTERN**  
Jason Wortman  
**Fountaintown Gas Company, Inc.**  
P.O. Box 1007  
Morristown, IN 46161-0252  
[Jason@fountaintowngas.net](mailto:Jason@fountaintowngas.net)

**INDIANA UTILITIES**

Frank Czeschin  
**Indiana Utilities Corporation**  
123 West Chestnut St.  
Corydon, IN 47112  
[iucfczeschin@portative.net](mailto:iucfczeschin@portative.net)

**SNOW & OGDEN GAS CO., INC.**

Kent House  
**Snow & Ogden Gas Company, Inc.**  
14064 Olive Branch Road  
Hagerstown, IN 47346

**SWITZERLAND COUNTY**

Marsha Chase  
**Switzerland Country Natural Gas Co.**  
P.O. Box 47  
Vevay, IN 47043  
[switzco@gmail.com](mailto:switzco@gmail.com)

<p>Andrew Kienle <b>Indiana Finance Authority</b> One North Capital Avenue, Ste. 900 Indianapolis, IN 46204 <a href="mailto:akienle@ifa.in.gov">akienle@ifa.in.gov</a></p>	<p><b>VALLEY RURAL UTILITY COMPANY</b> 19435 Alpine Drive Lawrenceburg, IN 47025</p>
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*/s/ Joseph P. Rompala*  
\_\_\_\_\_  
Joseph P. Rompala

LEWIS & KAPPES, P.C.  
One American Square, Suite 2500  
Indianapolis, IN 46282-0003  
Telephone: (317) 639-1210  
Fax: (317) 639-4882

# **EXHIBIT A**

In the  
Indiana Supreme Court



INDIANA GAS COMPANY, et al.,                    )  
Appellants,    )  
  )  
v.    )  
  )  
INDIANA FINANCE AUTHORITY, et al.        )  
Appellees.   )

Indiana Court of Appeals  
Cause No. 93A02-1112-EX-1141  
  
Indiana Utility Regulatory Comm'n  
Cause No. 43976

ORDER

On December 21 and 22, 2011, Appellants filed Notices of Appeal in this matter. On January 12, 2012, Appellees' Indiana Finance Authority and Indiana Gasification, LLC jointly filed a "Verified Motion for Emergency Transfer of Appeal from the Indiana Utility Regulatory Commission" under Indiana Appellate Rule 56(A), in which the Indiana Office of Utility Consumer Counselor and Lincolnland Economic Development Corporation later joined. Over the next several days, various Appellants either filed responses in opposition to Appellees' Rule 56(A) motion or joined existing responses in opposition. On January 27, 2012, Appellants Indiana Finance Authority and Indiana Gasification, LLC sought leave under Appellate Rule 34(D) to file a reply in support of their Rule 56(A) motion. Finally, on February 13, 2012, Appellees filed a "Notice and Renewed Request for Emergency Transfer."

In addition, on January 17, 2012, Appellant Indiana Industrial Group filed a "Verified Motion for Temporary Stay and Remand to Commission," asking that this appeal be stayed and the matter remanded so that the Indiana Utility Regulatory Commission could consider and rule upon a Petition for Reconsideration that Indiana Industrial Group had filed on December 12, 2011. Citizens Action Coalition of Indiana, Inc., Save the Valley, and Spencer County Citizens for Quality of Life later joined this Motion for Temporary Stay and Remand. On January 19, 2012, Indiana Finance Authority filed response in opposition to the Motion for Temporary Stay and Remand.

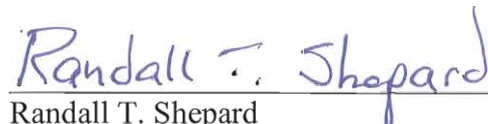
The Court, having considered the matter and being duly advised, hereby rules as follows:

- (1) Appellees' "Verified Motion for Emergency Transfer of Appeal from the Indiana Utility Regulatory Commission" and Appellees' "Notice and Renewed Request for Emergency Transfer" are DENIED. Jurisdiction, to the extent it exists in this appeal, remains with the Court of Appeals.
- (2) Appellees' "Motion for Leave to File Reply in Support of Emergency Transfer" is GRANTED. The Clerk is directed to file Appellees' Reply in Support of Emergency Transfer as of the date it was "received" in the Clerk's Office for filing.

- (3) Having decided not to assume jurisdiction of this appeal, Appellant's "Verified Motion for Temporary Stay and Remand to Commission" remains pending for the Court of Appeals to consider and rule upon.

The Clerk is directed to send a copy of this order the Hon. Margaret Robb, Chief Judge of the Indiana Court of Appeals; Steve Lancaster, Indiana Court of Appeals Administrator; and to all counsel of record.

Done at Indianapolis, Indiana, this 15<sup>th</sup> day of February, 2012.

  
\_\_\_\_\_  
Randall T. Shepard  
Chief Justice of Indiana

All Justices concur.

# **EXHIBIT B**

IN THE  
COURT OF APPEALS OF INDIANA



INDIANA GAS COMPANY, et al.,            )  
  )  
                  Appellants,                    )  
  )  
                  vs.                                ) CAUSE NO. 93A02-1112-EX-1141  
  )  
INDIANA FINANCE AUTHORITY, et al., )  
  )  
                  Appellees.                    )

ORDER

Appellant Indiana Industrial Group, by counsel, has filed a Verified Motion for Temporary Stay and Remand to Commission. Appellants Indiana Gas Company and Southern Indiana Gas and Electric Company, d/b/a Vectren Energy Delivery of Indiana, Inc., by counsel, have filed a Joinder in Indiana Industrial Group’s Verified Motion for Temporary Stay and Remand to Commission. Appellants Citizens Action Coalition of Indiana, Inc., Save the Valley, and Spencer County Citizens for Quality of Life, by counsel, have also filed a Joinder in Indiana Industrial Group’s Verified Motion for Temporary Stay and Remand to Commission. Appellees Indiana Finance Authority and Indiana Gasification, LLC, by counsel, have filed an Opposition to Motion for Temporary Stay and Remand to Commission.

Having reviewed the matter, the Court FINDS AND ORDERS AS FOLLOWS:

1. Appellant Indiana Industrial Group’s Verified Motion for Temporary Stay and Remand to Commission is GRANTED.

2. Pursuant to Appellate Rule 37, this matter is REMANDED to the Indiana Utility Regulatory Commission for consideration of the pending petition for reconsideration. The Commission is directed to rule on the pending petition for reconsideration within thirty (30) days of the date of this order.
3. Within five (5) days of the Commission's ruling on the petition for reconsideration, Appellant Indiana Industrial Group is ORDERED to file a Notice with the Clerk of this Court and to attach a copy of any issued order.
4. The briefing schedule in this appeal is HELD IN ABEYANCE pending further order of this Court.
5. The Clerk of this Court is directed to send copies of this order to the parties and to the Indiana Utility Regulatory Commission.
6. The Indiana Utility Regulatory Commission is directed to file a copy of this order under Lower Cause Number 43976 and cause the same to be spread of record.

ORDERED this 5<sup>th</sup> day of March, 2012.

Darden, Mathias, JJ., Sharpnack, Sr.J., concur.

FOR THE COURT,



Chief Judge



# **EXHIBIT C**

