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SUPREME COURT OF THE STATE OF WASHINGTON

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SPOKANE COUNTY, a political subdivision of the State of Washington,

Respondent,

v.

KATHY MIOTKE, an individual, and NEIGHBORHOOD ALLIANCE OF SPOKANE,

Appellants.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. IDENTITY OF RESPONDENTS

Pursuant to RAP 13.4, Appellants, Kathy Miotke and Neighborhood Alliance, provide this response respectfully requesting that this Court deny Spokane County's request for review of this matter.

II. COURT OF APPEALS DECISION

Spokane County ("County") seeks review of the May 20, 2014, decision of Division II of the Court of Appeals. *See Miotke v. Spokane County,* 325 P.3d 434 (2014) ("Decision"). A copy of that decision is included as Appendix A to the County's Petition for Review. That decision involved the review under the Growth Management Act ("GMA"), Chapter 36.70A RCW and reversed a decision of the Growth Management Hearings Board (the "Board") finding that a Spokane County resolution reversing the County's previous expansion of its Urban Growth Area ("UGA") boundary complied with the requirements of the GMA, despite the fact that the change in the UGA boundary resulted in urban levels of development in now rural areas. That decision was subsequently affirmed by the Thurston County Superior Court.

The Court of Appeals reversed the decision of the Superior Court and the findings of the Board, finding that: (1) the County failed to sustain its burden under the GMA because merely rescinding its previous UGA action does not establish that the County no longer substantially interferes

with GMA goals where urban development rights vested and urban growth occurred; (2) neither the vested rights doctrine nor the availability of project-level development regulations preclude a finding that the County substantially interfered with the GMA; and (3) that the County failed to produce sufficient evidence that its action met the requirements of the GMA in any meaningful way.

III. ISSUES FOR REVIEW

Appellants do not seek review of any matters decided by the Court of Appeals, but believe that the County's issues for review are better characterized as follows:

A. Whether the Growth Management Act, specifically RCW 36.70A.320(4), requires a jurisdiction to provide evidence to demonstrate whether a compliance action complies with the goals of the Act.

B. Whether the Growth Management Act, specifically RCW 36.70A.320(4), requires the Growth Management Hearings Board to consider whether urban development has occurred when considering whether a compliance action complies with the goals of the Act.

IV. STATEMENT OF THE CASE

The facts are well summarized in the Court of Appeals' decision at pages 2-5 of the published opinion. *See* Appendix IV, Petition for Review.

However, provided is a detailed statement of the facts relevant to the petition for review.

On August 25, 2005, Appellants petitioned the Board to review a resolution of Spokane County that amended its Comprehensive Plan by expanding the UGA by 229 acres in Spokane County. AR 1-29. After a full hearing on this appeal, the Board on February 14, 2006 issued a Final Decision and Order ("FDO") finding that the County violated several provisions of the GMA and found the UGA expansions invalid. AR 30-79.

The Board found the amendments, which expanded the UGA, invalid and that the County's actions were "clearly erroneous" with respect to the County's failure to engage in joint planning, failing to perform a population and land quality analysis, and failing to consider the critical nature and environmental character of the area. AR 76-77.

Prior to the Board's decision and finding of invalidity, development permits were submitted and accepted by the County, thereby vesting residential urban development on the subject property. AR 549, 731. Much of this area was then built to urban levels of density.

After issuing its FDO, the Board, on two separate occasions, issued orders finding the County was in continued noncompliance with the GMA for failing to take sufficient efforts to bring itself into compliance. Rather

than addressing the shortcomings raised by the Board in its FDO, the County, instead, passed Resolution 07-0077 that simply reversed the expansion of the UGA. AR 619-21. On January 23, 2007, the County Commissioners adopted Resolution 7-0077, which reversed the UGA expansions by re-designating the areas as outside of the UGA, stating, in part:

> **NOW, THEREFORE, BE IT RESOLVED** by the Board that only to the extent of the adoption of the Comprehensive Plan amendments 03-CPA-31 through 36 and 04-CPA-01, the Board Resolutions number 5-0365 and 5-0646 are reversed and rescinded to have the effect that the Comprehensive Plan amendments 03-CPA-31 through 36 and 04-CPA-01 are not adopted and are of no force or effect.

AR 621.

On January 24, 2007, the County filed a Supplement to Statement of Action to Comply with the Board, discussing Resolution 07-0077 and the re-designation of the UGAs. AR 612-621. Appellants objected to this action arguing that Resolution 07-0077 and the repeal of the UGAs failed to comply with the GMA. AR 534-563, 604-611, 622-34. Appellants argued, in part, that "the paper exercise of re-designation [of the UGAs], itself, substantially interferes with other GMA requirements and fails to address any of the issues in the [Hearings Board's] Final Order." AR 633.

On March 5, 2007, the Board found Spokane County in compliance with the Growth Management Act. AR 693-700. The Board found, in part:

> With the repeal of the portions of the resolution which enlarged the UGA, the objected to action was removed and the County brought itself into compliance. We cannot find otherwise. The Petitioners contend that the Board should review the case substantially as well as procedurally. In doing so, the Board could look only at the County's action and whether it addresses the findings and conclusions in the FDO. To go beyond that and determine whether the vested development has proper facilities or the population analysis supports the enlargement of the UGA allowing this development would be beyond the Board's jurisdiction.

AR 698.

On March 14, 2007, Appellants filed a Motion for Reconsideration, arguing that the Board failed to apply the proper burden of proof in issuing its Compliance Order. AR 703-707. On April 12, 2007, the Board issued an Order on Reconsideration. AR 726-31. In this Order, the Board affirmed its previous Order Finding Compliance. *Id.*

Appellants filed an appeal in Thurston County Superior Court of the Hearings Board's August 30, 2011 order, which affirmed its previous decisions finding that the County's action did not interfere with the purposes and goals of the GMA. CP 4-11. On October 12, 2012, the Superior Court found that the Hearings Board did not erroneously interpret

or apply the law. CP 100-02. Appellants filed a timely appeal of this decision to Division II of the Court of Appeals

On May 20, 2014, Division II issued its decision reversing the ruling of the Thurston County Superior Court and the decision of the Board. The Decision found that the County failed to provide evidence that its compliance action met the goals of the GMA, stating:

> [That] the County failed to sustain its burden because merely rescinding resolution 5-0649, without more, does not establish that the County's initial UGA expansion no longer substantially interferes with GMA goals where urban development rights vested and urban growth occurred.

Decision at 7. The County seeks review of the Decision.

V. ARGUMENT OPPOSING PETITON FOR REVIEW

A. THE COUNTY FAILED TO ARTICULATE WHY THE PETITION MET THE CRITERIA SET FORTH IN RAP 13.4(B).

RAP 13.4(b) provides that a petition for review will be accepted only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals;
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Here, the County failed to demonstrate to this Court any of the four criteria warranting review by this Court. To the contrary, as demonstrated below, the Court of Appeal's decision is consistent with the clear intent of the Legislature in enacting the GMA, other decisions of Washington courts, with other Hearings Board decisions, and does not raise any constitutional or public interest issues. Moreover, the County's bases for review, as discussed below, are simply without merit. Accordingly, this Court should deny the Petition for Review.

B. THE COURT OF APPEALS' DECISION DID NOT LIBERALLY CONSTRUE THE GMA, BUT APPLIED THE PLAIN LANGUAGE OF THE ACT AND CONCLUDED THAT THE COUNTY FAILED TO DEMONSTRATE THAT ITS COMPLIANCE ACTION NO LONGER INTERFERES WITH THE GOALS OF THE GMA.

The County asserts in its petition that the Court of Appeals liberally construed the GMA and established an erroneous precedent by requiring that the County demonstrate that its action complies with the goals of the GMA. This argument ignores the plain language of the Act and prior precedent.

The GMA is clear that in the event of a finding of invalidity, the County has the burden to demonstrate that the compliance action

substantively complies with the requirements of the act. Specifically, the GMA explains, "[A] county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard in RCW 36.70A.302(1)." RCW 36.70A.320(4) (emphasis added).

The Court of Appeals, in *Wells v. Western Washington Growth Management Hearings Bd.*, explained:

> [W]hen a local government is subject to a determination of invalidity, it bears the burden under RCW 36.70A.320(4) of "demonstrating [before the growth management hearings board] that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter....

100 Wash.App. 657, 667, 997 P.2d 405 (2000). This is also consistent with previous practice of the Board, itself. In *Alexanderson v. Clark County,* 2009 WL 3844483 (GMHB Case No. 04-2-0008, Order Finding Compliance, October 8, 2009), the Board explained:

> Only if a finding of invalidity has been entered is the burden on the local jurisdiction to demonstrate that the ordinance or resolution adopted in response to the finding of invalidity no longer substantially interferes with the goals of the GMA. RCW 36.70A.320(4).

In this case, the Board's FDO found the County's actions invalid stating:

> On the record before us, we find that the continued validity of the violations of the GMA described in the above non-compliant Legal Issues does substantially interfere with the fulfillment of goals 1, 2, 3 and 12 of the Growth Management Act, such that the enactments at issue should be held invalid pursuant to RCW 36.70A.302.

AR 73.

As stated above, RCW 36.70A.320(4) places the burden on the County, not Appellants, to demonstrate, after a finding of invalidity, that its action taken to comply with a previous Board order no longer substantially interferes with the goals of the GMA.

The Legislature granted the Hearings Board sufficient authority to address compliance with GMA. Specifically, the GMA explains: "(1) A growth management hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county or city planning under this chapter is not in compliance with the requirements of this chapter...." RCW 36.70A.280.

Furthermore, the Legislature expressly provided for compliance hearings and enumerated them as being of central importance. RCW 36.70A.330. Specifically, that section provides, "The board shall conduct a hearing and issue a finding of compliance or noncompliance with the

requirements of this chapter and with any compliance schedule established by the board in its final order." RCW 36.70A.330(2). Not only must the actions of counties be line with the GMA, but it also is the Board's duty to evaluate whether or not compliance has occurred. It would simply undermine the intent of the Legislature if the Hearings Board failed to evaluate whether an action taken in pursuant of a Board order, such as the re-designation of the UGA at issue in this case, is consistent with the goals of the GMA.

The Board has the duty to ensure compliance with the GMA and that Spokane County had the burden to demonstrate to the Hearings Board that its compliance action no longer substantially interfered with the GMA Goals. That simply did not occur in this case.

C. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH CLEAR LANGUAGE AND PURPOSE OF THE GMA AND WITH OTHER COURT PRECEDENT REGARDING INCLUSION OF URBAN DEVELOPMENT IN URBAN GROWTH AREAS.

The County asserts that the Court of Appeals set an erroneous precedent by creating a "new rule, not found in the GMA, that all urban development, including potential urban development by bested development permit application, must be brought within the UGA." County's Petition for Review at 11. This argument is without merit.

First of all, the Court of Appeals decision did not establish such a rule, but merely narrowly found that the County must demonstrate that its compliance action that reduces an urban growth area boundary is consistent with GMA goals.

Second, the GMA, courts, and the Hearings Board itself have held that it is unlawful to allow urban growth outside of the UGA:

> The GMA forbids growth that is "urban in nature" outside of the areas designated as UGAs. RCW 36.70A.110(2). Accordingly, "growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands ..." is not allowed in areas designated as rural. RCW 36.70A.030(17). ... Urban growth is not allowed outside areas designated as UGAs.

Diehl v. Mason County, 94 Wash.App. 645, 655-56, 972 P.2d 543 (1999).

A key element of the GMA's strategy is RCW 36.70A.110(1), which specifically states that the comprehensive plans adopted by the counties must "designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature." This requirement has been described by this Court as "[o]ne of the central requirements of the GMA." *Quadrant Corp. v. State Growth Management Hearings Bd.,* 154 Wn.2d 224, 232, 110 P.3d 1132 (2005).

The intent of RCW 36.70A.110(1) was to confine urban growth to these areas and not allow it to overrun surrounding undeveloped areas. This, in turn, helps to achieve the specified GMA goals contained in RCW 36.70A.020, including the first two stated goals which encourage development in urban areas and reduce sprawl, by which the Act seeks to prohibit "the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020(1),(2). This intent was recognized by the Court of Appeals:

> The GMA forbids growth that is "urban in nature" outside of the areas designated as UGAs. "[G]rowth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands" is not allowed in areas designated as rural.

Quadrant Corp. v. State Growth Management Hearings Bd., 119 Wn. App. 562, 567-68, 81 P.3d 918 (2003).

In fact, allowing urban development outside the UGA has been specifically held to be inconsistent with GMA goals:

> [T]he GMA specifically prohibits urban development outside of the UGA regardless of the County's desire to provide more affordable homes or protect property rights. ... In permitting urban-like densities in violation of RCW 36.70A.110, the County has violated, at the minimum Goals 1 and 2. Since such urban densities may create a

> demand for urban levels of services, including public transportation, the County has also violated Goals 3 and 12.

City of Wenatchee v. Chelan County, 2009 WL 1044321 (GMHB. Case No. 08-1-0015, Final Decision and Order, March 6, 2009). The Board in *Greenfield Estates Homeowners Association v. Grant County,* which involved an UGA amendment challenge, recognized the importance of considering the GMA goals stating, "The proper sizing and location of an UGA involves more than a simple mathematical analysis. ... The County must use GMA's planning goals to guide the development and adoption of the UGA. One of the primary purposes of the Act is to avoid sprawl and direct new growth into UGAs." 2004 WL 3335333 (GMHB Case No. 04-1-0005, Final Decision and Order, October 8, 2004).

The GMA prohibits the County from allowing low and medium density residential urban development to occur in areas outside of the urban growth boundary. RCW 36.70A.110. The act of first creating an UGA, then allowing urban development to vest at low or medium density residential, then reversing the UGA without regard for or analysis of that development violates this prohibition. The action of carving areas of urban development from its UGA is precisely the type of action that the GMA seeks to prevent.

While the County had latitude in its land use decision, it cannot simply redraw its UGA to allow urban growth outside of the UGA. *Timberlake Christian Fellowship v. King County,* 114 Wash.App. 174, 184-85, 61 P.3d 332 (2002) ("Although the GMA does not prohibit specific land uses, it does require that local planning authorities draw a line between urban and rural areas."). While the County certainly found itself in a dilemma in trying to achieve compliance with the Board's FDO, it "cannot adopt regulations that fail to place appropriate conditions on growth outside UGAs to limit it to achieve conformance with requirements of .110." *Peninsula Neighborhood Association v. Pierce County,* 1996 WL 650338 (GMHB Case No. 95-3-0071, Final Decision and Order , March 20, 1996).

This Court recognized that a jurisdiction should consider urban development when determining whether an area is properly within a UGA boundary. In *Quadrant,* 154 Wash.2d at 240-41, this Court reversed a Court of Appeals decision that allowed a jurisdiction to ignore vested development and only consider development actually constructed when determining proper UGA boundaries, stating:

> The vested rights doctrine establishes that land use applications vest on the date of submission and entitle the developer to divide and develop the land in accordance with the statutes and ordinances in effect on that date. *See Noble Manor Co. v. Pierce County*, 133 Wash.2d 269, 278–

80, 943 P.2d 1378 (1997); *see also* RCW 58.17.033 (extending vested rights doctrine to preliminary plat applications). Here the Board determined that counties may only consider the "built environment." CP at 42. The Court of Appeals agreed. *Quadrant Corp.*, 119 Wash.App. at 572, 81 P.3d 918. In dissent, Judge Coleman framed the relevance of the vested rights doctrine in the planning process:

> Under the definition [of "urban growth"] approved by the legislature, territory already committed to the process of growing in a manner incompatible with rural uses can be considered for an urban designation, and indeed it would be inconsistent with the goals of the GMA not to.... While there is always a possibility that construction may never occur, an area of land already committed to urban development from the County's perspective bears characteristics of urban use that should not be ignored in the planning process.

Id. at 580, 81 P.3d 918. (Coleman, J., concurring/dissenting). The Board's decision unreasonably precludes local jurisdictions from considering vested rights to divide and develop the land and essentially forces counties, in adopting comprehensive plans, to ignore the likelihood of future development. The Board's failure to reconcile the statutory planning process with Washington's vested rights doctrine resulted in a strained interpretation that does not further the legislature's intent in establishing the GMA.

Thus, we reverse the Court of Appeals and hold the Board erred in ruling King County failed to comply with the GMA when King County considered vested subdivision applications in determining whether an area "already [was] characterized by urban growth."

Quadrant makes it clear that urban development is a consideration of the UGA planning process of the GMA and is not to be ignored – as the County urges.

D. THE COURT OF APPEALS' OPINION IS CONSISTENT WITH WASHINGTON'S VESTED RIGHTS DOCTRINE.

The County asserts that the Court of Appeals' decision is inconsistent with RCW 58.17.033 and the law surrounding Washington's Vesting Rights Doctrine. While vesting may have limited the actions that the County could take to comply with the Board's order, it does not allow it to ignore the fundamental prohibition against urban development in rural areas.

While the vesting of urban development limited the available remedies for the County to comply with the Hearings Board's order, but it did not provide license for the County to disregard and violate the requirements of RCW 36.70A.110(1) by taking an entirely new legislative action – the passage of Resolution 2007-0077. However, the record indicates that the County had other options to come into compliance, which it first pursued and then abandoned in favor of this unlawful action. AR 90-91; 267-272. While the County has latitude in its land use decisions, including action to bring itself into compliance with the GMA, it cannot simply redraw its UGA to allow urban growth outside of the

UGA. *Timberlake Christian Fellowship v. King County*, 114 Wash.App. 174, 183-85, 61 P.3d 332 (2002) ("Although the GMA does not prohibit specific land uses, it does require that local planning authorities draw a line between urban and rural areas.").

In another proceeding, the Board recognized that the establishment of urban development may restrict a jurisdiction's ability to retract its boundaries as a means of compliance, stating:

> If capital facilities planning for the 2005 updates shows that Sedro-Woolley cannot provide infrastructure needed for urban development within its UGA, the choice to retract the urban growth boundary to the City **limits would be impaired by the creation of new, smaller lots within the UGA prior to revision of the UGA boundaries**.

City of Sedro-Woolley v. Skagit County, 2004 WL 1864631 (GMHB Case No. 03-02-0013c, Compliance Hearing Order, June 18, 2004)(emphasis added). In other words, subsequent actions may limit the remedies available to a jurisdiction, as in the case.

As recognized by the Court of Appeals, the vesting of urban development on the properties at issue eliminated the option of retracting the UGA boundary because doing so would be inconsistent with GMA goals. Accordingly, the County's argument to the contrary should be rejected.

E. THE COURT OF APPEALS' OPINION IS CONSISTENT WITH THE CLEAR LANGUAGE OF THE GMA FINDING THAT THE COUNTY BORE THE BURDEN TO DEMONSTRATE THAT THE COMPLIANCE ACTION WAS CONSISTENT WITH GMA GOALS.

The County asserts that the Court of Appeals erred in finding that the County violated the GMA by asserting that the Hearings Board was entitled to broad discretion and that the Court of Appeals has a limited scope of review. What the Court doesn't do, is actually argue the error of the ruling and how the County's action was consistent with the GMA.

Indeed, courts have declined to afford deference to county actions that violate GMA requirements. *Thurston County v. Cooper Point Ass'n*, 148 Wash.2d 1, 14, 57 P.3d 1156 (2002). In *Thurston County*, the county's proposed action violated a specific statutory mandate; extending urban services into a rural area in contravention of RCW 36.70A.110(4). *Id.* Thus, this court refused to defer to county's decision where the "County's proposal [did] just what the GMA prohibits." *Id.*

As discussed above, the GMA, RCW 36.70A.320(4), places the burden on the County to demonstrate compliance with the GMA goals, which the Court of Appeals found did not occur. The record lacks any attempt by the County to demonstrate that Resolution 2007-0077 will comply with the goals of the GMA. Indeed, the County's argument has merit only if the Court is convinced that it can turn a blind eye to the

development of urban development on the ground that occurred prior to the adoption of Resolution 2007-0077. No provision of the GMA allows local jurisdictions to ignore the effects of its actions and the County's argument simply fails.

F. THE COURT OF APPEALS' OPINION ADDRESSED ISSUES GOVERNED BY THE GMA AND NOT BY THE LAND USE PETITIONS ACT ("LUPA").

The County argues that requiring it to demonstrate compliance with goals 3 and 12 is a matter for consideration under the Land Use Petition Act ("LUPA"). Contrary to this assertion, Appellants do not seek any order or appeal any aspect of the vested urban development – this is not a LUPA Act case. The Court of Appeals clearly recognized this. *See* Decision at 7, fn.6 ("The County advances arguments tangential to this dispute that we need not fully address because the mischaracterize Miotke's position.").

Appellants have no claims as to the merit of the specific development projects. Rather, as recognized and narrowly addressed by the Court of Appeals, Appellants seek a decision as to whether the GMA allows the County to diminish the UGA where vested urban growth has and will occur by the enactment of Resolution 2007-0077.

Changes to an urban growth area boundary are the type of actions subject to review by the Growth Management Hearings Board.

Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wash.2d 169, 178, 4 P.3d 123 (2000); RCW 36.70A.290(2). RCW 36.70A.280 grants the Hearings Board jurisdiction to hear claims that a county "planning under this chapter is not in compliance with the requirements" of the GMA. Appellants argue that Resolution 2007-0077 violates the Planning Goals of the GMA set forth in RWC 36.70A.020 and that the action violates RCW 36.70A.110. These are all GMA issues that fall squarely within the jurisdiction of the Hearings Board and are not subject to a LUPA appeal.

VI. CONCLUSION

Spokane County failed to demonstrate that this matter meets the requirements set forth in RAP 13.4(b). The decision of the Court of Appeals is consistent with Washington law, as well as decisions of the Supreme Court and the Court of Appeals. Moreover, no constitutional issues or substantial matters of public interest are raised.

For these reasons and the reasons set forth above, Appellants request that this Court deny the County's Petition for Review.

Respectfully submitted this 16th day of July, 2014.

Rick Eichstaedt, WSBA #36487
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Attorney for Appellants

PROOF OF SERVICE

I, Danette Lanet, hereby certify that I caused a true and correct copy of the ***Response to Petition for Review*** to be served, via USPS, postage prepaid, on the following:

David Hubert
Deputy Spokane County Prosecuting Attorney
1115 W. Broadway
Spokane, WA 99260

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 16 day of July, 2014.

Danette Lanet
DANETTE LANET

OFFICE RECEPTIONIST, CLERK

To: Danette Lanet
Subject: RE: 90415-4

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From: Danette Lanet [mailto:dlanet@cforjustice.org]
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Please file the attached Response to Petition for Review in the above-referenced matter on behalf of:

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