

Indiana's common fund doctrine, which constitutes approximately 13% of the common fund amount of \$8.2 million approved by the Commission in FAC 80 S1. LaPorte County/Hammond's fee calculation resulted in a lodestar amount of \$421,578.75, and a requested multiplier of 2.5. The requested amount included fees and expenses incurred from FAC 80 through FAC 84.

NIPSCO Industrial Group petitioned for an award of reasonable attorney fees of \$160,572 and expenses of \$60,516.30, which constitutes 2.7% of the \$8.2 million common fund. NIPSCO Industrial Group fee calculation resulted in a lodestar amount of \$80,286 and a requested multiplier of 2. Like LaPorte County/Hammond, NIPSCO Industrial Group's request included fees and expenses incurred from FAC 80 through FAC 84.

3. The Settlement Agreement. The Settlement, approved by the Commission in its November 4, 2009 Order in Cause No. 38706 FAC80 S1, resolved the resource allocation order and a process for Commission approval of a hedging policy associated with NIPSCO's FAC filings. The Agreement provided that all issues deferred for consideration in Cause Nos. 38706 FAC 80 through FAC 84 were resolved.

Pursuant to Paragraph 6(a) of the Settlement, the parties agreed that NIPSCO would set aside from the \$8.2 million credit, an amount not to exceed 18.5% of the credit, (i.e., \$1.517 million) from which Intervenors could make a request to the Commission for an award of attorney fees and expenses.

4. Evidence.

A. LaPorte County/Hammond. In support of its petition, LaPorte County/Hammond submitted the testimony and exhibits of Robert W. Wright and Jon R. Pactor.

1. Robert W. Wright. Mr. Wright, a partner at the law firm Dean-Webster and Wright and counsel for LaPorte County/Hammond, discussed Indiana's common fund doctrine and its applicability to the present Cause. He stated that the common fund doctrine provides for an award of attorney fees on the theory that those who benefit from the creation of the fund or from the creation of any other legal benefit should share in the expense of producing that benefit. He explained that attorney fee awards are considered under both a percentage-of-the-fund method and a lodestar method. Mr. Wright stated that courts and this Commission typically determine an appropriate percentage and use the lodestar method as a double-check to confirm the reasonableness of the percentage. Mr. Wright listed the factors that may be used in determining a reasonable fee, citing Rule 1.5 of the Rules of Professional Conduct.

He quantified LaPorte County/Hammond's award request of \$1,053,946.88 for attorney fees and \$10,795.75 in expenses, and stated that the total request constituted approximately 13% of the common fund. He also stated that in conjunction with the NIPSCO Industrial Group's request, the total requested award was less than 16% of the common fund. Mr. Wright opined that the 13% was a reasonable award under the percentage-of-the-fund method, based on other Commission and Court of Appeals cases.

Mr. Wright also discussed LaPorte County/Hammond's role in obtaining the settlement in FAC 80 S1. He stated that LaPorte County/Hammond played a lead role in pursuing the refund established in that Cause. He stated that LaPorte County/Hammond's attorneys and experts spent considerable time drafting discovery requests and examined voluminous discovery responses from NIPSCO, which ultimately led to several months of intensive discussions that resulted in the settlement. Mr. Wright testified that he personally reviewed more than 10,000 hours of NIPSCO power purchase and sales data, and sent and received more than 1,700 emails regarding this subdocket and related Causes.

He described the significant risk of non-payment faced by counsel for LaPorte County/Hammond in this proceeding, noting that except for a small portion of Shaw Friedman's time, any payment of counsels' time was to be made on a contingency basis. Mr. Wright also noted several cases before the Commission in which the Commission declined to establish a common fund. Accordingly, he reiterated his opinion that the requested fee percentage was reasonable.

Mr. Wright testified that the lodestar method verified that the percentage award requested by LaPorte County/Hammond was reasonable. Mr. Wright sponsored the confidential billing records of LaPorte County/Hammond counsel and its expert. Using those records, Mr. Wright calculated that LaPorte County/Hammond counsel had invested 1,187.5 hours of lead attorney time, 43.15 hours of local attorney time, 1.8 hours of paralegal time, and 45.9 hours of law clerk time. He further opined that the following constituted reasonable billing rates: \$340 per hour for lead attorney time; \$275 per hour for local counsel; and \$125 per hour for paralegal and law clerks. With that time and rate information, Mr. Wright calculated a lodestar of attorney fees in the amount of \$421,578.75 and expenses of \$10,795.75. Using the fee amount requested under the percentage-of-fee method, Mr. Wright stated that the multiplier requested in this Cause was 2.5, which he believed was consistent with the multiplier determined by the Commission in FAC 71 S1 and Cause 42359 S2. Finally, to the extent LaPorte County/Hammond have paid fees in connection with those requested in this Cause, Mr. Wright stated that LaPorte County/Hammond would be reimbursed prior to distributing any award to participating counsel.

2. Jon R. Pactor. Mr. Pactor is an Indiana attorney with a practice that focuses on attorney malpractice and ethics, including issues involving reasonable attorney's fees. In preparing his testimony for this Cause, Mr. Pactor stated that he reviewed the Petition filed in this Cause, along with the underlying Settlement filed in FAC 80 S1, as well as docket sheets from FAC 80 through FAC 84. Mr. Pactor testified that he also reviewed the attorney time sheets sponsored by Mr. Wright, various Commission orders relating to attorney fees, and Mr. Wright's prefiled testimony.

Mr. Pactor opined that the fee sought by LaPorte County/Hammond in this Cause was reasonable, as were the underlying hourly rates that were used in establishing the lodestar amount sponsored by Mr. Wright. Mr. Pactor stated that for complex legal work, a rate of \$340 per hour is reasonable. Mr. Pactor testified that he also believed that the hours and expenses incurred by LaPorte County/Hammond appeared to be reasonable given the complex issues presented and the monetary amount in dispute.

Mr. Pactor stated that he considered the factors listed in Rule 1.5 of the Rules of Professional Conduct in preparing his opinion in this Cause. Based upon the complexity and vigorous advocacy by the parties, and the significant risk faced by counsel for LaPorte County/Hammond by taking this representation on an almost exclusive contingency basis, Mr. Pactor concluded his testimony by reiterating his belief that the fees requested by LaPorte County/Hammond were reasonable.

B. NIPSCO Industrial Group. In support of its Petition, NIPSCO Industrial Group filed the testimony and exhibits of Bette A. Dodd.

1. Bette A. Dodd. Ms. Dodd, a partner at the law firm Lewis & Kappes, P.C. and counsel for the NIPSCO Industrial Group, testified that she was the lead attorney on behalf of the NIPSCO Industrial Group in FAC 80 S1. She explained that the NIPSCO Industrial Group has participated in NIPSCO's FAC filings for a number of years, and has participated in stakeholder meetings with NIPSCO, the OUCC, and LaPorte County/Hammond concerning NIPSCO's hedging policy. Ms. Dodd stated that NIPSCO Industrial Group determined it should challenge NIPSCO's hedging practices in FAC 80, and NIPSCO subsequently requested the establishment of the Subdocket.

Ms. Dodd discussed NIPSCO Industrial Group's role in challenging NIPSCO's recovery of purchased power costs through the FAC proceedings and its hedging strategy and procedures. She testified that NIPSCO Industrial Group conducted discovery, attended informal meetings with NIPSCO representatives and other parties concerning NIPSCO's economic dispatch system and its purchasing and hedging strategies for the months at issue. Ms. Dodd stated that NIPSCO Industrial Group also participated in the settlement discussions that led to the eventual settlement filed in FAC 80 S1.

She testified that her client's and firm's participation in FAC 80 S1 materially contributed to the creation of the \$8.2 million common fund, and opined that an award under the common fund was appropriate. Ms. Dodd described the fee arrangement between her firm and NIPSCO Industrial Group, noting that her client paid attorney fees and expenses, including expert fees, based on an hourly fee arrangement. She stated that the NIPSCO Industrial Group is aware of the common fund doctrine and authorized her firm to seek fees and expenses pursuant to that doctrine.

Ms. Dodd described her firm's time and expense records that were submitted as confidential exhibits. These time records include all legal work performed in relation to FAC 80 through 84, including FAC 80 S1. She stated that the firm's time records reflect 230.4 hours of attorney time and 15 hours of paralegal time spent on this matter, as well as \$60,516.30 in expenses and expert witness fees. Ms. Dodd also noted that based on her familiarity with the Indianapolis legal market, and in particular, the legal market representing clients in utility proceedings, the rates charged by her firm were competitive and consistent with the market rates for comparable services performed by counsel of similar skill and experience. She stated that the award of fees and expenses constitutes 2.69% of the common fund, and the lodestar multiplier was 2, which she believed reasonable given the complexity of the issues, the quality and vigor of NIPSCO's representation, and the ongoing benefits to all of NIPSCO's ratepayers.

Ms. Dodd opined that an award of attorney fees was in the public interest because without the representation by the consumer parties, the common fund would not exist. Accordingly, she stated that it is in the public interest that the beneficiaries pay a share of the cost incurred in achieving the benefit. Finally, she stated that NIPSCO Industrial Group would be fully reimbursed prior to distributing any award to her firm.

C. *OUCC*. In response to the Intervenor's Petitions, the OUCC filed its Response, sponsored by Mr. Randall C. Helmen, Chief Deputy Consumer Counselor.

1. Randall C. Helmen. Mr. Helmen, Chief Deputy Consumer Counselor for the OUCC, stated that after reviewing the time sheets and records submitted by Intervenor, the OUCC did not dispute the claimed hours worked. Mr. Helmen testified that he was familiar with the attorneys' preparation and performance involved in this Cause. He stated that the OUCC was involved in considerable discovery and settlement negotiations, but acknowledged that counsel for LaPorte County/Hammond took the lead role with respect to discovery, document review, and settlement negotiations.

Mr. Helmen compared the requested award to the award the Commission approved in FAC 71 S2. While the Commission limited the recovery in that Cause to 8.4% of the total credit, he stated that the proposed hourly rates and multipliers in this Cause were within the range described in the Commission's FAC 71 S2 Order. Further, he stated that the OUCC did not find LaPorte County/Hammond's 12.98% request to be unreasonable. In conclusion, Mr. Helmen stated that while the OUCC desired as much of the credit be returned to NIPSCO ratepayers as possible, the OUCC recognized the significant contributions made by Intervenor's counsel in this Cause.

D. *NIPSCO*. NIPSCO filed the responsive testimony of Timothy R. Caister.

1. Timothy R. Caister. Mr. Caister, Director of Electric Regulatory Policy, stated that he provided testimony pursuant to the request of the Presiding Officers. He stated that the Settlement provided that NIPSCO would not oppose recovery of attorney fees and expenses by Intervenor. Mr. Caister testified that Intervenor made material contributions that led to settlement, and that NIPSCO worked regularly with the parties, including extensive data analysis, to reach settlement rather than proceed with contentious litigation.

5. Commission Discussion and Findings. Paragraph 6(b) of the Settlement provides that NIPSCO will set aside an amount equal to 18.5% of the \$8.2 million credit be paid pursuant to Paragraph 6(a) from which counsel for Intervenor LaPorte County/Hammond and the NIPSCO Industrial Group may seek an award of reasonable attorneys' fees and expenses. Intervenor and their attorneys filed separate petitions seeking the award of reasonable attorney fees and expenses, in which they requested an award of \$1.29 million from the \$8.2 million credit, or approximately 16 percent. In support of their respective petitions, Intervenor Laporte County/Hammond filed the direct testimony and exhibits of Robert W. Wright and Jon Pactor, an expert witness regarding fee awards; Intervenor NIPSCO Industrial Group filed the testimony of Bette J. Dodd. Detailed, confidential time and expense records were submitted to the

Commission under seal pursuant to a docket entry granting a preliminary finding of confidentiality. No party to this proceeding or member of the public objected to the requested fee award.

In our January 30, 2008 Order in Cause No. 38706 FAC 71 S1, we observed that we are charged with the task of balancing the interests of the utilities and their consumers in our decisions, and therefore we must make an independent determination based upon the law and evidence offered by the parties of the reasonableness of the attorney fees requested. In our Order in Cause No. 38706 FAC 71 S2, the Commission outlined the legal basis for recovery of attorney fees under the common fund doctrine as follows:

The common fund doctrine was first recognized by the Indiana Supreme Court in *City of Hammond v. Darlington*, 162 N.E.2d 619 (1959). The Indiana Supreme Court has held that this Commission is authorized to award reasonable fees, costs and expenses out of a common fund in cases before it. *Northern Ind. Public Serv. Co. v. Citizens Action Coalition*, 548 N.E.2d 153 (Ind. 1989). This doctrine provides that an “award of attorneys’ fees is allowed to be paid from a common fund on the theory that those who benefit from the creation of the fund or from the creation of any other legal benefit should share in the expenses of producing the benefit. ... The rationale is an equitable one, designed to prevent ‘free riders’ from taking advantage of the fund without paying their fair share.” *Id.* at 161. However, when an attorney’s fee can be based upon tangible benefits or a “fund,” then any intangible benefits should not be considered in the award of attorney fees. *Comm. Care Ctrs., Inc. v. Ind. Fam. & Soc. Serv. Admin.*, 716 N.E.2d 519, 545 (Ind. Ct. App. 1999). A common fund exists “if there are ‘ascertainable benefits given to an ascertainable number of beneficiaries.’” *Citizens Action Coalition v. Northern Ind. Public Serv. Co.*, 812 N.E.2d 814, 817 (Ind. Ct. App. 2004) (quoting *Comm. Care Ctrs., Inc. v. Ind. Fam. & Soc. Serv. Admin.*, 716 N.E.2d at 547 (Ind. Ct. App. 1999)).

Petition of Northern Indiana Public Service Company, Cause No. 38706 FAC 71 S2, at 3 (March 26, 2008).

The Commission finds that a common fund has been created by the Agreement. Paragraph 6(a) of the Settlement creates a fund of \$8.2 million by providing for a credit to FAC customers paid in equal amount in FAC 84 through FAC 87. It is out of this fund of \$8.2 million that Intervenor request payment for attorney fees and expenses. See Paragraph 6(b) of the Settlement.

The Commission finds that the OUCC as well as Intervenor LaPorte County/Hammond and the NIPSCO Industrial Group materially contributed to the creation of the common fund provided for in the Agreement. LaPorte County/Hammond and the NIPSCO Industrial Group intervened and challenged NIPSCO’s hedging policy, purchased power benchmark tiers, and resource allocation. The evidence also demonstrates that LaPorte County/Hammond and the Industrial Group engaged in substantial discovery and participated in settlement negotiations over a six-month period that ultimately resulted in the Agreement. Thus, we find counsel for

Intervenors are entitled to an award of reasonable attorney fees and expenses from the common fund created by the Agreement.

A. Commission Determination on Fee Amount. In our Order in Cause No. 38706 FAC 71 S2, we discussed our standard of reviewing requests for reasonable attorney fees:

In reviewing any request for attorney fees, the Commission is required to use a reasonableness standard that balances the competing goals of fairly compensating the attorneys and of protecting the interests of the members in the fund. *Citizens Action Coalition of Ind. v. PSI Energy*, 664 N.E.2d 401, 406 (Ind. App. Ct. 1996). In calculating attorney fees in common fund cases, the most commonly used methods are the percentage method and the lodestar-multiplier method. *Id.* at 406-407. The Indiana Supreme Court has found that the Commission has discretion to use either the lodestar method or the percentage method, and its discretion is not limited by the evidence presented by the parties. *Id.* at 408. The Indiana Supreme Court has also noted that courts find it advantageous to use both methods to double check the fee and confirm that the lodestar-multiplier method does not award an exorbitant hourly rate and the percentage method does not dwarf the class recovery. *Id.* at 406, n.4. Regardless of what method is used, however, the award must not exceed what is “reasonable” under the circumstances of the case. *Id.* at 410; *Comm. Care Ctrs., Inc. v. Ind. Fam. & Soc. Serv. Admin.*, 716 N.E.2d at 551 (Ind. Ct. App. 1999).

We have previously identified a variety of factors the Commission should consider in determining what constitutes a reasonable percentage of the fund or an appropriate multiplier for use in a lodestar calculation. *In re City of South Bend*, Cause No. 43071 S1, p. 4-5 (Ind. Util. Reg. Comm’n, Dec. 19, 2007). Those factors include: benefits to ratepayers, magnitude and complexity of the case, risks involved in the litigation, experience and skill required by counsel, time and labor required of counsel, the size of the fund and its relationship to the requested attorney fees, awards in similar cases, undesirability of the case, any time limitations imposed by the case, customary fees, and public policy considerations. *Id.* However, we note that several factors, such as the experience and skill of counsel, and time and labor required, are often considered subsumed within a lodestar analysis as they are reflected within the hourly rate. *See e.g., Barker v. City of West Lafayette*, 878 N.E.2d 230, 233 (Ind. Ct. App. 2007).

Petition of Northern Indiana Public Service Company, Cause No. 38706 FAC 71 S2, at 4.

In this case, ratepayers will receive a substantial pecuniary benefit from the efforts of Intervenors and the OUCC in creating the \$8.2 million common fund. In addition to the common fund, the Settlement also provides for NIPSCO filing a new Cause to approve its hedging policy (docketed as Cause No. 43849).

With respect to the magnitude and complexity of the case, Intervenors’ testimony indicates that counsel engaged in extensive discovery, reviewed thousands of hourly purchased power costs and retained the services of experts. Testimony also indicates that although the

issues were fairly complex, the issues were not as complex as those faced in FAC 71. Upon becoming aware of the issue, NIPSCO altered its resource allocation practices which minimized the dollar amount constituting the common fund. We further recognize that counsel was required to, and does, have substantial experience and expertise in utility regulatory matters. Testimony from Intervenors indicates that to address the purchased power cost issues in this Cause, counsel was required to review and comprehend complex electric utility operations.

With respect to the risks presented by this case, the evidence indicates that the attorneys for the NIPSCO Industrial Group were fully compensated for their work on an hourly basis. However, the attorneys for LaPorte County/Hammond performed the majority of their work on a reduced hourly or contingent basis thereby presenting risk to those attorneys that they would not be fully compensated for their services. Regarding awards in similar cases, Mr. Pactor testified that, based upon his research, the hourly fee sought by LaPorte County/Hammond was reasonable given the Indianapolis market and the expertise necessary to identify and resolve the issues addressed in the Settlement. As we found in our FAC 71 S2 Order, we agree that the hourly fees presented are reasonable.

In addition to setting out the standard for our review, the discussion in the FAC 71 S2 Order is also helpful in our analysis in this Cause. In the FAC 71 S2 Order, the Commission considered prior awards of reasonable attorney fees and in that case rejected the proposed 12.9 percent fee award (resulting in a multiplier of almost 5) from the \$33.5 million common fund. Instead, the Commission found the case similar to the issues presented in our Order in *Petition of PSI Energy, Inc.*, Cause No. 42359 S2 (Sept. 6, 2006). In *PSI Energy*, the Commission found an award of 5.46% of a \$4.8 million common fund to be reasonable for a case that involved a single highly contested legal issue that was litigated over a fairly short period of time by highly qualified counsel facing a risk of non-payment. In comparing the PSI case to the FAC 71 S1 Settlement, the Commission found in the FAC 71 S2 Order that an 8.3% award of the \$33.5 million common fund was appropriate. Such an award resulted in a multiplier of three and total attorney's fees of almost \$2.7 million.

In the present case, the Intervenors' proposed requests for attorney fees closely follows our conclusion in the FAC 71 S2 Order, in that the requested award results in a multiplier of 2.5 and 2 for LaPorte County/Hammond and NIPSCO Industrial Group, respectively. Utilizing different multipliers appears to be appropriate given the differing levels of risk faced by the attorneys for LaPorte County/Hammond and the NIPSCO Industrial Group and the general agreement among the parties that LaPorte County/Hammond took the lead role in pursuing the issues that ultimately resulted in a settlement and creation of the common fund. However, while the Intervenors proposed different multipliers for their respective lodestars, it is unclear whether the difference in the resulting proposed awards represents the actual allocation of work performed to create the common fund. While the Intervenors requested separate awards based on the hours tracked to the underlying Subdocket, it does not necessarily follow that splitting the award based on time records results in an appropriate division of the award.

In the FAC 71 S2 Order, the parties had an internal agreement to divide the attorney fees award that was not presented to the Commission, and was applied to the award ordered by the Commission. We find it appropriate for this Commission to consider the allocation of work between the parties in determining a specific award for each party, rather than making a general

award that is subsequently divided among the petitioning parties without further review by this Commission.

Moreover, we find that the overall percentage of recovery, at nearly 16%, is higher than what the Commission considers to be reasonable given the facts and history of this Cause. As noted above, our award in the FAC 71 S2 Order was 8.3% of a settlement over four times the present amount, and our *PSI Energy* award was 5.46% of an award slightly less than half of the present amount. Our review of the Settlement leads us to conclude that the issues presented in FAC 80 were, in many ways, an outgrowth of the issues addressed in the earlier FAC for which this Commission has already awarded attorney fees in the amount of \$2,666,455.50. Indeed, during the hearing, Mr. Helmen testified that he did not believe the issues in FAC 80 were as complicated as those in FAC 71. We agree. Nevertheless, the work of the consumer parties led to an \$8.2 million credit, which constitutes a substantial benefit to the ratepayers.

Here, we find that a total award of 12%, or \$984,000, plus any accrued interest, constitutes reasonable attorney fees and expenses in this Cause. Taking the combined lodestars of the intervening parties, which total \$501,864.75, and subtracting expenses from the total award (\$984,000), results in a lodestar multiplier of 1.82. While this multiplier is lower than those approved in the FAC 71 S2 Order (multiplier of 3) and *PSI Energy* (multiplier of 2.2), we believe that the overall award of 12% of the common fund is appropriate and the lower multiplier is more a product of the fact that a portion of the lodestar represents hours that could have been allocated to the non-common fund aspects of the parties' work in FAC 80 through FAC 84. If the lodestar had been calculated using only those hours allocated solely to efforts related to the Settlement, the overall lodestar for each party would have been lower, resulting in a greater multiplier.¹ However, in no way does the lower multiplier represent a belief by this Commission that the quality of representation was substandard. Instead, the skill and experience of the attorneys involved resulted in the creation of the underlying common fund through settlement discussions rather than litigation.

As noted above, the parties did not quantify, in the evidence presented, their respective percentages of contribution to the creation of the common fund, as they apparently did by agreement with the award made in FAC 71 S2. Given the reduction in the award, the multipliers originally requested may no longer represent a fair allocation of the award, if they ever did, especially given the large amount of expenses incurred by the NIPSCO Industrial Group. Accordingly, within seven (7) days from the date of this Order, the consumer parties shall file, under this Cause, a compliance filing consisting of a verified statement quantifying the allocation of responsibility each consumer party, including the OUCC, bore in creating the common fund in this Cause and a quantification of how the consumer parties believe the award should be apportioned. If the consumer parties are unable to agree each party's respective responsibility

¹ Further, given the technical nature of much of the legal work, the Commission is concerned that the LaPorte County/Hammond lodestar represents a disproportionate amount of time billed at the lead attorney rate. It appears that a higher percentage of the work could have been performed at the lower paralegal or law clerk rate, with appropriate supervision by lead counsel, potentially resulting in a larger refund to ratepayers. However, we recognize the constraints of smaller legal offices and make no specific adjustment to the multiplier based on this concern. However, in the future, counsel must demonstrate that the work subject to lead attorney rate is work that is reasonable for lead counsel to perform.

in achieving the common fund, each consumer party should file a separate verified statement. Upon the filing of the verified statement(s), the Commission will issue further orders as appropriate.

B. Commission Discussion Related to Repeated Credit. As noted above, the \$8.2 million dollar common fund approved in FAC 80 S1 represents the second common fund award in the last three years related to NIPSCO's FAC proceeding. With two instances of common fund settlements totaling \$41.5 million on fuel clause issues, it is apparent that an examination of the general FAC review process is appropriate, especially as the fuel clause process has had elements added over time and the items included vastly expanded over time with only minimal change in the review time for the auditor. The FAC proceeding is an expedited process that allows utilities to recover anticipated fuel costs in a subsequent quarter, offset by any reconciliation of over or under recovery in past quarters. As an expedited proceeding, the statute authorizing the FAC did not anticipate extensive discovery and testimony. However, with the advancement of the energy markets, FAC proceedings have advanced well beyond the recovery of coal purchases and other self-generation related fuel costs. MISO costs and other elements such as off-system sales add levels of intricacy that are potentially complicated and difficult to dissect, especially in the context of a summary proceeding.

One instance may be regarded as isolated and unlikely to recur. To take the same view after two instances is a triumph of hope over logic. The refunds approved through these two FAC subdockets highlight the complexity of the FAC process, and necessitate a review to determine whether adjustment or alteration of the FAC process would be appropriate. Accordingly, the Commission plans to undertake a thorough review of the entire fuel clause review and oversight process in order to confirm the process is sound, or if not, to identify additional resources and procedures that are required in order for there to be confidence in the existing protocols. Initially, this will involve informal discussions with stakeholders and the future course will be determined based on those discussions.

There is no question the ratepayers have benefitted from the actions and results obtained by the consumer parties in whatever proportion their contributions were made. In this case, the ratepayers are \$8.2 million to the good, less the nearly one million dollar award to the consumer parties. The glaring problem is that the ratepayer cannot be made whole as the ratepayer must compensate the consumer parties for their efforts. Without ascribing an improper motive to NIPSCO, the fact remains that its sole detriment is to return the \$41.5 million NIPSCO has already received. It is unfortunate the FAC mechanism does not allow for the ratepayer to be made whole, nor does the statutory power granted the Commission.

C. Commission Discussion Concerning Remaining Portion of Common Fund. The Settlement approved by the Commission in Cause 38706 FAC 71 S1 included a provision that unawarded funds would be credited to ratepayers. There was no such agreement here, but the Commission finds that NIPSCO shall credit the unapplied amounts to FAC customers in a future FAC proceeding. Pursuant to the Settlement, NIPSCO set aside 18.5% of the common fund, or \$1.517 million, for payment of attorney fees determined by the Commission. NIPSCO also agreed that this amount would be placed in an interest-bearing account pending the determination of the award. Given this Commission's award of \$984,000, NIPSCO shall include as a credit \$533,000, plus interest, in the first FAC proceeding following issuance of this Order.

IT IS, THEREFORE, ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. Within seven (7) days from the date of this Interim Order, the consumer parties shall file a verified statement as set forth in Para. 5(A).

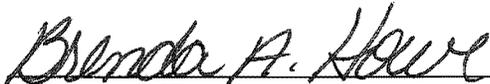
2. In the first FAC proceeding following issuance of this Interim Order NIPSCO shall credit to FAC customers the additional sum of \$533,000 plus any accrued interest on the interest-bearing account established in Paragraph 6(b) of the Settlement.

3. This Interim Order shall become effective on and after the date of its approval.

ATTERHOLT, MAYS AND ZIEGNER CONCUR; HARDY ABSENT; LANDIS NOT PARTICIPATING:

APPROVED: JUN 23 2010

I hereby certify that the above is a true and correct copy of the Order as approved.



Brenda A. Howe
Secretary to the Commission