

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

PETITION OF NORTHERN INDIANA)
 PUBLIC SERVICE COMPANY FOR) CAUSE NO. 38706 FAC 80 S2
 APPROVAL OF A FUEL COST CHARGE)
 AND CUSTOMER CREDIT ADJUSTMENT) ORDER ON RECONSIDERATION
 TO BE APPLICABLE IN THE MONTHS)
 OF NOVEMBER AND DECEMBER 2008) APPROVED: DEC 07 2010
 AND JANUARY 2009 PURSUANT TO I.C.)
 8-1-2-42 AND CAUSE NO. 41746)

BY THE COMMISSION

David E. Ziegner, Commissioner
Aaron A. Schmoll, Senior Administrative Law Judge

On June 23, 2010, the Commission issued its Interim Order in this Cause (“Interim Order”). In the Interim Order, the Commission determined that \$984,000 was a reasonable award, but required the consumer parties to file “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.” Further, the Commission outlined an informal process to review the FAC process with stakeholders, and ordered the remainder of the refund set aside pursuant to the Settlement to be credited to FAC customers in NIPSCO’s next FAC proceeding. On June 30, 2010, the consumer parties filed their *Joint Verified Statement Pursuant to June 23, 2010 Interim Order* (“Joint Verified Statement”).

On September 22, 2010, the Commission issued its final order (“September 22 Order”) awarding each consumer party requesting a portion of the award an equal share. On October 12, 2010, Intervenor LaPorte County and the City of Hammond (“LaPorte/Hammond”) filed its *Petition for Reconsideration* (“Petition”). On October 18, 2010, Intervenor NIPSCO Industrial Group (“Industrial Group”) filed its *Response*. On October 25, 2010, LaPorte/Hammond filed its *Reply*.

In our September 22 Order, we discussed the award as follows:

Accordingly, the Commission ordered the consumer parties to file verified statements “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.” Interim Order at 9. With respect to quantifying responsibility, the consumer parties stated:

All the consumer parties collaborated and coordinated their positions in order to present a united front to NIPSCO during settlement discussions.... The creation of the common fund, accordingly, was the result of the combined efforts of all the

Consumer Parties working together in a collaborative fashion. The distinct efforts of the Consumer Parties were not segregated into defined areas of specific responsibility or otherwise separately divided in a manner that can be readily quantified in terms of individual contribution to the outcome. Rather, each of the Consumer Parties contributed materially and substantially to the results achieved in this Cause.

Joint Verified Statement at 2.

In terms of quantifying the allocation of the award, the consumer parties noted that the OUCC did not request an award of attorney fees, but worked with the Intervenors to reduce the fee request. Between the two Intervenors, the consumer parties verified that the \$984,000 award determined in the Interim Order should be divided with \$802,827 (\$792,031 in attorney fees and \$10,796 in expenses) going to LaPorte/Hammond and \$181,173 (120,657 in attorney fees and \$60,516 in expenses) going to the Industrial Group.

The Commission finds that the consumer parties' quantification of the award on a roughly 4 to 1 split (and over 7 to 1 if only attorney fees are considered) does not yield a reasonable award based upon the (unquantified) description of the division of each parties' responsibility. While we respect the difficulty the consumer parties may have faced in attempting to quantify their respective responsibilities, we explicitly ordered the consumer parties to do so, and in the absence of an agreed quantification, each consumer party could have filed its own verified statement. Instead, a reasonable interpretation of the description of the division of responsibility in the Joint Verified Statement ("each of the Consumer Parties contributed materially and substantially to the results achieved in this Cause") leads us to conclude that each consumer party had equal responsibility for the result.

Order at 2-3. Based upon our discussion, we modified the proposed division of the award and found that each consumer party should be awarded \$492,000 plus accrued interest.

LaPorte/Hammond sought reconsideration of the Commission award, arguing that the equal award was not reasonable in light of the evidence presented in this case, and LaPorte/Hammond's "lead role" in pursuing the refund.

In this Cause, the Commission ordered the consumer parties to file a verified statement concerning the quantification of each party's role in obtaining the credit for NIPSCO ratepayers. The Commission was forced to do so in its Interim Order because none of the parties' witnesses were willing or able to quantify their respective efforts during the evidentiary hearing. Although LaPorte/Hammond, in its Petition, argued that "even attempting to quantify each party's individual contribution to the settlement" would result in the disclosure of confidential settlement communications, we fail to see how quantifying the contribution of effort results in any improper disclosure. Further, while we recognized that the parties agreed counsel for LaPorte/Hammond had a "lead role" in pursuing the claims, such a characterization does not quantify the contribution of any party, which is precisely why the Commission sought a verified statement

from the parties. Based on the Joint Verified Statement, and in the absence of any statement from the parties directly quantifying their respective efforts, the Commission reasonably concluded that each consumer party contributed equally to the result.

Thus, the question the Commission was left to consider in this Cause was as follows: if two groups of attorneys contribute equally to a result, and one group of attorneys invests approximately 1,200 hours of time and \$10,000 of expert expenses, and the second group of attorneys invests approximately 230 hours of time and \$60,000 of expert expenses, is a reasonable award of attorney fees be based solely on the result or the time spent on achieving the result? Time may be an appropriate element in conducting the double-check using the lodestar approach, and in fact, the Commission did consider the lodestar analysis when it determined the appropriateness of a 12 percent award from the common fund. However, from our perspective, using time as a basis for dividing the award does not yield a reasonable division when premised on equal contribution.

However, in this Cause, the risk each attorney group faced was markedly different. Counsel for the Industrial Group was fully compensated by their clients, while counsel for LaPorte/Hammond undertook representation, for the most part, on a contingent basis. In considering a division of the award between LaPorte/Hammond and Industrial Group, risk of nonpayment is a significant factor that distinguishes the two groups. Thus, the more appropriate question that the Commission must answer is as follows: if two groups of attorneys contribute equally to a result, and one group is working on contingency and the other group was compensated when service was rendered, what constitutes a reasonable division of the award? While we considered risk when we determined an appropriate overall award, we did not address the differential in risk each attorney group faced in dividing the award. Thus, our equal division of the award, as ordered in our September 22 Order, gave little weight to this significant factor differentiating these two consumer parties.

As we noted in our September 22 Order, the proposed division by the parties yielded a LaPorte/Hammond to Industrial Group split that exceeded a 4 to 1 ratio (when expenses were considered). Although we concluded in that Order that such a ratio was unreasonable given the equal contribution to the award, after reconsideration, we believe that we should reweigh the allocation of the award given the divergent levels of risk each attorney group faced. When risk of nonpayment to the LaPorte/Hammond attorneys is considered, we believe that the division of the award as noted by the consumer parties in the Joint Verified Statement is appropriate. Accordingly, LaPorte/Hammond should be awarded \$802,827 (consisting of \$792,031 in fees and \$10,796 in expenses) and Industrial Group should be awarded \$181,173 (consisting of \$120,657 in fees and \$60,516 in expenses). Given our prior award ordered in the September 22 Order, which awarded each party \$492,000, on reconsideration we order Lewis & Kappes to transfer \$310,827 to the trust account of Dean-Webster, Wright & Kite, LLC.

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

1. Intervenors' request for an award of attorney fees and expenses is approved as set forth above and consistent with the consumer parties' Joint Verified Statement. Within ten (10) days from the date of this Order, Lewis & Kappes, P.C. shall transfer the amount of \$310,827

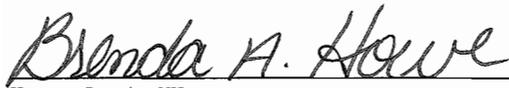
plus any accrued interest on that amount to the trust account of Dean-Webster, Wright & Kite, LLC.

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

ATTERHOLT, MAYS AND ZIEGNER CONCUR; LANDIS NOT PARTICIPATING:

APPROVED: DEC 07 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