

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

JLG

IN THE MATTER OF THE COMPLAINT OF)
THE INTERNATIONAL BROTHERHOOD)
OF ELECTRICAL WORKERS, LOCAL)
UNION NO. 1395, AND SIXTEEN)
INDIVIDUAL RETIREES AGAINST)
INDIANAPOLIS POWER & LIGHT)
COMPANY FOR ENFORCEMENT OF)
FINAL ORDER AND SETTLEMENT)
AGREEMENT IN CAUSE NO. 39938 WITH)
RESPECT TO FUNDING OF NON-PENSION)
POST-RETIREMENT BENEFITS)
)
)
RESPONDENT: INDIANAPOLIS POWER &)
LIGHT COMPANY)

CAUSE NO. 43385

APPROVED: MAY 13 2009

BY THE COMMISSION:

Jeffrey L. Golc, Commissioner
Aaron A. Schmoll, Administrative Law Judge

On November 13, 2007, International Brotherhood of Electrical Workers, Local Union No. 1395 ("Union") and certain retirees of IPL ("Retirees") (collectively "Complainants") filed their Complaint with the Indiana Utility Regulatory Commission ("IURC" or "Commission") against Indianapolis Power & Light Company ("IPL," "the Company," or "Respondent"). The Complainants seek enforcement of their interpretation of a 1995 final order ("Rate Case Order") and associated settlement agreement ("Settlement Agreement") resolving IPL's most recent basic rate case, Cause No. 39938 ("Rate Case").¹

On November 28, 2007, IPL filed its Response and Answer ("Respondent's Answer") and Motion to Dismiss ("Respondent's Motion"). On December 20, 2007, Complainants filed: Complainants' Opposition to IPL's Motion to Dismiss ("Complainants' Opposition"); Complainants' Motion for Partial Summary Judgment on the Interpretation of the Commission-Approved Settlement ("Complainants' Motion"); Brief in Support of Complainants' Motion for Partial Summary Judgment ("Complainants' Brief"); Complainants' Summary Judgment Record Designation ("Complainants' Record Designation"); and Complainants' Motion for Administrative Notice ("Complainants' Administrative Notice"). On January 23, 2008, IPL filed: Respondent's Verified Reply to Complainants' Opposition to IPL's Motion to Dismiss ("Respondent's Reply"); Respondent's Brief in Opposition to Summary Judgment in Favor of Complainants and in Support of Summary Judgment in Favor of IPL ("Respondent's Summary Judgment Brief"); Respondent's Summary Judgment Evidentiary Designation ("Respondent's Evidentiary Designation"); Respondent's Response to Complainants' Motion for Administrative

¹ *In re Petition of Indianapolis Power & Light Co., Cause No. 39938 (Aug. 24, 1995).*

Notice ("Respondent's Response"); and Respondent's Request for Administrative Notice ("Respondent's Administrative Notice"). On February 6, 2008, Complainants filed Complainants' Reply on Dispositive Motions ("Complainants' Reply"). In accordance with a docket entry dated February 29, 2008, the parties filed proposed orders on March 17, 2008. The Office of Utility Consumer Counselor ("OUCC") is a party to this proceeding, but has not made any filing in connection with the pending motions.

Based on the submissions of the parties and applicable law, the Commission now finds as follows:

1. **Commission Jurisdiction and Notice.** IPL owns, operates, manages and controls facilities for the provision of electrical energy and renders electric service to approximately 470,000 retail customers in and around Indianapolis, Indiana. IPL is a "public utility" within the meaning of Ind. Code §8-1-2-1, and is subject to the jurisdiction of the Commission to the extent and in the manner provided by Indiana law. The Complaint in this case was filed pursuant to Ind. Code § 8-1-2-54, which provides a procedure for complaint proceedings against a public utility brought by "any mercantile, agricultural or manufacturing society or by any body politic or municipal organization or by ten (10) persons, firms, limited liability companies, corporations, or associations, or ten (10) complainants of all or any of the aforementioned classes." Complainants fall within the categories of potential complainants identified in the statute. The Complaint alleges that IPL has violated a settlement agreement previously approved by the Commission. Accordingly, the Commission has jurisdiction over the parties and subject matter of the Complaint.

2. **The Complaint.** The Complaint in this matter arises from a provision that was included in the Stipulation and Settlement Agreement ("Settlement") that concluded Cause No. 39938. That cause was IPL's most recent general rate proceeding, and established the base rates and charges for IPL that have remained in effect through the present time. Among other issues, the Settlement addressed the accounting of non-pension post-retirement benefit expenses, sometimes referred to as "SFAS 106 costs," and included this provision: "SFAS 106 costs shall be treated as proposed by IPL." The Settlement itself did not further define the phrase "as proposed by IPL."

The Commission approved the Settlement and incorporated its provisions in a rate order dated August 24, 1995, concluding the last IPL rate case. In the ordering paragraphs of that rate order, the Commission ordered the parties to comply with the provisions of the Settlement.

The Retirees are sixteen individuals who served as long-time employees of IPL but are now retired. Local 1395 represents two bargaining units that comprise nearly one thousand current IPL employees, about half of IPL's workforce. Complainants contend that the IPL proposal referred to in the Settlement related to a requested test year adjustment that IPL supported with a long-term plan to fund a Voluntary Employees' Beneficiary Association ("VEBA") trust. The Complaint alleges that, after the Settlement was approved, IPL initially followed through on its proposal by making annual contributions to a VEBA Trust for a six-year period, but that all funding was curtailed in 2001 as a result of a holding company transaction in which IPL was acquired by AES Corporation ("AES"). Complainants contend that IPL has

continued to collect the rates set pursuant to the Settlement, but has violated its obligations by curtailing contributions to the VEBA Trust as a result of the AES acquisition. Despite the curtailment of funding, retirees continue to receive benefits from the VEBA trust, albeit at increased cost. *See Complaint*, Tab D.

3. **The Pending Motions.** IPL filed its Motion to Dismiss concurrent with its Response and Answer. The Response and Answer included a narrative addressing the Complaint, responses to individually numbered paragraphs, affirmative defenses, and also attached exhibits. The Motion to Dismiss was presented by IPL under two headings, "The IURC Lacks Jurisdiction to Grant the Relief Sought" and "The Doctrine of Laches Bars the Relief Sought." See Motion to Dismiss at 2, 18. The "Jurisdiction" section raised arguments both relating to subject matter jurisdiction as well as alleging a failure to state a claim. The Motion to Dismiss referred to statements in, and exhibits attached to, the Response and Answer, but neither the Motion to Dismiss nor the Response and Answer were verified or supported by affidavit.

In its Opposition to IPL's Motion to Dismiss, Complainants argued that evidence outside the challenged pleading is not appropriately considered on a motion to dismiss for failure to state a claim, and in any event the fact assertions and exhibits offered by IPL did not qualify as evidence. See Opposition at 5-9. Concurrent with that Opposition, Complainants filed a Motion for Partial Summary Judgment. In that Motion, they sought a determination by the Commission on a central issue in the case, specifically that the Settlement provision requiring non-pension retiree benefit costs to be treated "as proposed by IPL" included the IPL proposal to fund the VEBA Trust. That Motion was supported by a Summary Judgment Record Designation with copies of pleadings and exhibits supported by affidavits, and also by a Motion for Administrative Notice with copies of additional materials previously filed with the Commission. The Motion for Administrative Notice was later supplemented with a full copy of a document that inadvertently had missing pages in the original submission.

In response, IPL filed a Verified Reply in support of its Motion to Dismiss, and also a Brief in Opposition to the motion for partial summary judgment that included a request for the entry of summary judgment in favor of IPL. The Verified Reply included a Verification regarding the representations in not only the Verified Reply, but also IPL's earlier Response and Answer and Motion to Dismiss. Id. at 24. IPL supported its filing with a Summary Judgment Evidentiary Designation, containing affidavits and attached exhibits, and a Request for Administrative Notice of attached documents that were previously filed with the Commission.

IPL also filed a Response to the Retirees/Local 1395's Motion for Administrative Notice. In that Response, IPL did not object to, but questioned the need for, submission of prior Commission orders (id. at 2-3) and further objected to consideration of portions of the record from Cause No. 39938 as submitted by Complainants without also taking administrative notice of additional portions submitted by IPL (id. at 3-5). Complainants did not object to IPL's Request for Administrative Notice. Both parties are seeking administrative notice of orders and evidentiary submissions previously filed with the Commission, and the respective submissions comply with the provisions of 170 IAC §1-1.1-21. The Commission, therefore, grants the requests of both parties and will take administrative notice of the materials included in the

Retirees/Local 1395's Motion for Administrative Notice, as supplemented, and IPL's Request for Administrative Notice.

With its formal evidentiary submission, IPL also provided notice pursuant to Ind. Trial Rule 12(B) that it was converting its Motion to Dismiss into a motion for summary judgment. IPL also clarified its position with respect to its arguments concerning Commission jurisdiction, stating that "IPL does not claim the Commission cannot enforce a settlement agreement that it has approved" and instead agreeing that "the Commission may enforce its standing orders and approved settlement agreements." See Verified Reply at 2, 5.

The parties' submissions, then, are before the Commission as cross-motions for summary judgment. Complainants seek a determination that the IPL proposal referenced in the Settlement included the proposal to fund the VEBA Trust. IPL seeks a determination that the Settlement does not include any obligation to fund the VEBA Trust. IPL also argues laches, contending that Complainants delayed too long before seeking Commission relief.

4. Commission Discussion and Findings.

A. Summary Judgment Standard. Summary judgment is a procedure for applying the law to the facts when no factual controversy exists. *Lee v. Weston*, 402 N.E.2d 23 (Ind. Ct. App. 1980). "When any party has moved for summary judgment, the [Commission] may grant summary judgment for any other party upon the issues raised by the motion although no motion for summary judgment is filed by such party." Ind. Tr. Rule 56(B). Pursuant to Ind. Tr. Rule 12(B), the Commission may treat Respondent's Motion pursuant to Rule 12(B)(6) as one for summary judgment.

The dispute in this Cause concerns a Settlement Agreement approved by the Commission in the Rate Case. The Commission has continuing jurisdiction over settlement agreements it approves. Issues of contract or settlement agreement interpretation are particularly appropriate for resolution through summary judgment. *Complaint of Ultimate Medium Communications*, Cause No. 43076, at 3 (July 26, 2006), *citing Indiana Bell Telephone Co., Inc. v. Time Warner Communications of Indiana, L.P.*, 786 N.E.2d 301, 309 (Ind. Ct. App. 2003). Under Indiana law, "[w]here the terms of a contract are clear, the meaning of the contract is determined as a matter of law." *Anderson v. Horizon Homes, Inc.*, 644 N.E.2d 1281, 1290 (Ind. Ct. App. 1995), *trans. denied*. The words used in the Settlement Agreement must be given their usual and common meaning and they must be read in light of the contract as a whole, its purpose at the time of execution and all applicable laws in force at the time the agreement is made. *Complaint of Ultimate Medium Communications*, Cause No. 43076 at 4; *Petition of Ratepayers of Indiana Gas Co. et. al*, Cause No. 40437, at 33 (Sept. 12, 1997). If a contract is unambiguous, the Commission "is not to construe the contract or look at parol or extrinsic evidence to expand, vary, or explain the contract but rather will simply apply the contract provisions to determine the intent of the parties." *United Consulting Engineers v. Bd. of Comm'rs of Hancock County*, 810 N.E.2d 351,354 (Ind. Ct. App. 2004); *Turnpaugh v. Wolf*, 482 N.E.2d 506, 508 (Ind. Ct. App. 1985). "[I]t is not the proper function of the [Commission] by any rules of interpretation or construction to make another . . . entirely different contract for the parties from the one they made for themselves." *Smith v. Mercer*, 118 Ind. App. 575, 584, 79 N.E.2d 772, 776 (Ind. Ct. App. 1948).

“[I]t is not necessary for [the Settlement Agreement] to be so worded as to exclude every other possible meaning which might be suggested as a matter of speculation or conjecture.” *Wallace v. Cutsinger*, 66 Ind. App. at 197, 115 N.E. 789, 793 (Ind. Ct. App. 1917), *trans. denied*. Rather, the meaning of the Settlement Agreement “may be said to be clear when it fairly expresses an intention on a reasonable interpretation of the language used, regardless of other possible intentions not apparent but which must be reached through a forced construction, or circuitous reasoning.” *Bressler v. Bressler*, 601 N.E.2d 392, 395 (Ind. Ct. App. 1992), *quoting Wallace*, 66 Ind. App. at 197, 115 N.E. at 793.

B. Settlement Agreement. Complainants’ claim rests solely on its interpretation of the Settlement Agreement approved by the Commission in IPL’s Rate Case. The Settlement Agreement was entered into by and between IPL and the other parties “for the purposes of establishing new rates, rules and regulations for IPL’s electric service.” Settlement Agreement at 1. Complainants are not a party to that Settlement Agreement and were not a party in the Rate Case. The terms and conditions of the Settlement Agreement set forth the relief that the Commission granted in its Rate Case Order. The specific provision upon which Complainants rely is found in Paragraph F of the Settlement Agreement, which provides as follows:

F. Other Accounting Matters. *SFAS 106 costs shall be treated as proposed by IPL.* The recovery of the entire Petersburg Unit 4 deferrals shall be approved as proposed by IPL; provided, however, that IPL shall amortize the post-1986 rate order equity portion of the Petersburg Unit 4 deferred carrying charges over a period of two years. The amount of the pro forma investment tax credit amortization shall be (\$2,841,000).

(emphasis added).

C. Analysis. At issue in this Cause is the review of certain language discussing SFAS 106 costs. In order to provide some background, we first must discuss our Order in Cause No. 39348, which, in simple terms, addressed whether utilities subject to FASB standards “should be allowed to fund through current rates the non-pension post-retirement benefit liability now required to be accrued by SFAS 106.” *Joint Petition of Indiana Bell Telephone Company, et al. for Certain Accounting and Ratemaking Authority Associated with the Implementation of Statement of Financial Accounting Standards No. 106*, Cause No. 39348, at 32 (Dec. 30, 1992).

In Cause 39348, the Commission noted that due to changes in Generally Accepted Accounting Principles (“GAAP”), as issued by the Financial Accounting Standards Board (“FASB”), companies subject to SEC regulation, and hence subject to financial reporting in accordance with GAAP, were required to implement SFAS 106 for fiscal years beginning after December 15, 1992. SFAS 106 changed the accounting treatment for non-pension post-retirement benefits, often referred to as Other Post Retirement Benefits (“OPRBs”) or Other Post Employment Benefit (“OPEB”) Plans, i.e., non-pension benefits. Prior to the adoption of SFAS 106, costs of OPRBs were treated using cash method accounting, i.e., no OPRB costs were booked for the present year for employees currently earning these benefits but not receiving them until future years. Under SFAS 106, however, costs of OPRBs were treated using accrual method accounting, which would allow a utility to book future OPRB costs for current

employees in the present year. Cause 39348 was initiated by utilities seeking guidance on whether the Commission would accept SFAS 106 for ratemaking purposes, since the Commission is not bound to follow GAAP.

Ultimately, the Commission issued its Order approving SFAS 106 accounting treatment for ratemaking purposes as follows:

1. Joint Petitioners, Respondents and all Indiana utilities which are or may be required to comply with FASB standards which are under the jurisdiction of this Commission shall become and hereby are authorized (a) to book SFAS 106 related accruals, including the amortization of the transition obligation and ongoing period accruals of the reasonable and necessary cost of non pension retirement benefits; (b) to charge to an appropriate deferred account for the difference in cost between OPRBs determined on a cash basis and OPRBs determined on an accrual basis in accordance with SFAS 106 commencing on the date of adoption of SFAS 106 until the effective date of the Commission's Final Order in each utilit[y's] next or pending general rate proceeding or, in the alternative, expense the costs associated with the implementation of SFAS 106 on January 1, 1993 without establishing a regulatory asset; (c) to recognize as a regulatory asset the deferred charges authorized under subparagraph (b) of this Ordering Paragraph; (d) to amortize over a reasonable period of years to be determined in the utility's next general rate proceeding, the regulatory asset established under Subparagraph (c) of this Ordering Paragraph; (e) to recognize as an ongoing regulatory asset the difference between the current cash amount of the OPRBs and that portion of any SFAS 106 accruals allowed to be recovered through current rates in any utility's next or pending general rate proceeding; and (f) to treat any funds allowed to be collected through current rates to offset the difference between cash basis s [sic] and the SFAS 106 accrual in a fashion consistent with the Commission determination in the utility's pending or next general rate proceeding; all of the foregoing to be implemented in a fashion consistent with the findings set forth in Finding No. 10 above.

Id. at 42.

Thus, while the Commission's Order in Cause No. 39348 authorized utilities to establish a regulatory asset for post-retirement benefit costs, that Order specified that the regulatory asset would only continue until a utility's next rate case. *See id.* at 41 ("the actual calculation of the SFAS 106 accruals will not be considered and approved by the Commission prior to each utility's next upcoming general rate proceeding"). Accordingly, the Commission would determine, in a utility's subsequent rate order, whether a utility would be permitted to continue treating non-pension benefit costs on an accrual basis for ratemaking purposes. In other words, the authorization, in Cause 39348, to book SFAS 106 costs in a deferred account did not authorize the ongoing treatment of SFAS 106 costs on an accrual basis for purposes of ratemaking.

The Rate Case Order described the subject matter of the Settlement Agreement relating to

SFAS 106, stating that the Settlement Agreement approved “the treatment of non-pension post-retirement benefit costs in accordance with Statement of Financial Accounting Standard No. 106.” Rate Case Order at 4. The Rate Case Order also stated that “IPL requested the cost of non-pension post-retirement benefits be computed based on the accrual methodology provided by [SFAS 106].” Rate Case Order at 6. Again, these excerpts relate to the accounting treatment of those costs, and the Commission made no specific finding related to the actual dollar numbers associated with that accounting treatment. These two statements in the Rate Case Order constituted the totality of the Commission’s contemporaneous findings with respect to the Settlement Agreement.

The Commission’s statements with respect to SFAS 106 are distinct from the rate implications coincident with that accounting treatment. The Rate Case Order approved a two step rate increase totaling \$60 million in additional revenues. Rate Case Order at 4. IPL had initially sought approximately \$88 million in increased revenues. *Id.* Neither the Settlement Agreement nor the Rate Case Order specified what specific adjustments were associated with the approved revenue increase, and, as noted above, made no specific reference to an adjustment for SFAS 106 costs. Indeed, the Settlement Agreement made no specific reference to any adjustment for the SFAS 106 accounting treatment, while identifying a specific adjustment of (\$2,841,000) for the Petersburg Unit 4 tax credit amortization. See Settlement Agreement, *supra*, Para. F.

Given the foregoing, we cannot say that the Settlement Agreement, or the Rate Case Order approving the Settlement Agreement, required some set amount of funding for post retirement benefits. If the parties to the Settlement Agreement intended to require a specific adjustment for SFAS 106 costs, the parties could have specified that adjustment. That no specific dollar amount was so specified supports the conclusion that the language in the Settlement Agreement only referred to the accounting treatment for SFAS 106 costs.

Moreover, given the nature of a rate case proceeding before this Commission, in that we determine required revenue based on test year costs, we do not agree with Complainants’ contention that an authorization of an overall revenue increase implies continued revenue expenditures of the test year costs in perpetuity, particularly as a revenue increase relates to one specific expense adjustment. As noted above, neither the Settlement Agreement nor the Commission made such a specific determination concerning ongoing VEBA expenses. Generally, a rate case presents a snapshot of a utility’s test year expenses and revenues. Absent a specific mandate from the Commission or specific term of a settlement agreement, a utility is not required to maintain expenditures at test year levels. In the Rate Case, no such mandate was included in the Settlement Agreement; to the contrary, the Rate Case Order approved the Settlement Agreement’s general revenue increase without making any determination regarding specific adjustments other than the amortization of the investment tax credit for Petersburg Unit 4.

Because we find that the Settlement Agreement referred only to the accounting treatment of the SFAS 106 costs, we cannot agree with Complainants that the Settlement Agreement required ongoing funding of the VEBA Trust, because that concept, both in regard to its ongoing nature and funding level, as argued by Complainants, were not terms addressed in the Settlement Agreement. Such terms would have been fundamental to give rise to the relief requested by

Complainants. Accordingly, the Commission grants summary judgment in favor of IPL, and denies Complainant's Motion for Partial Summary Judgment.

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

1. Complainants' Motion for Partial Summary Judgment shall be and hereby is denied. Summary Judgment shall be and hereby is granted in favor of Indianapolis Power & Light Company
2. Consistent with our finding above, administrative notice shall be and hereby is granted.
3. This Order shall be effective on and after the date of its approval.

HARDY, GOLC, LANDIS, SERVER, AND ZIEGNER CONCUR:

APPROVED: MAY 13 2009

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



**Brenda A. Howe
Secretary to the Commission**