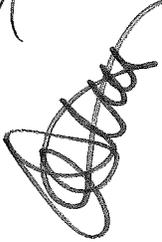


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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE COMPLAINT OF THE )  
NORTHERN INDIANA PUBLIC SERVICE COMPANY )  
AGAINST UNITED STATES STEEL CORPORATION )  
BECAUSE OF BREACH OF CONTRACT, VIOLATION )  
OF ELECTRICITY SUPPLIERS' SERVICE AREA )  
ASSIGNMENTS ACT; VIOLATION OF NATURAL GAS )  
SERVICE TERRITORY; UNLAWFUL PROVISION OF )  
RETAIL ELECTRIC SERVICE TO AN END USE )  
CONSUMER; AND RELATED MATTERS )  
)  
  
RESPONDENT: UNITED STATES STEEL )  
CORPORATION )

CAUSE NO. 43363

ORDER ON SUMMARY  
JUDGMENT

APPROVED: MAY 11 2010

IN THE MATTER OF THE COMPLAINT OF UNITED )  
STATES STEEL CORPORATION AND )  
ARCELORMITTAL INDIANA HARBOR INC. )  
AGAINST NORTHERN INDIANA PUBLIC SERVICE )  
COMPANY FOR DETERMINATION THAT PASS- )  
THROUGH ARRANGEMENT IS NOT IN VIOLATION )  
OF TARIFF OR UTILITY LAW REQUIREMENTS )  
)  
  
RESPONDENT: NORTHERN INDIANA PUBLIC )  
SERVICE COMPANY )

CAUSE NO. 43369

ORDER ON MOTION TO  
DISMISS

APPROVED: MAY 11 2010

BY THE COMMISSION:

David Lott Hardy, Chairman  
Angela Rapp Weber, Administrative Law Judge

On September 27, 2007, United States Steel Corporation (“USS”) and ArcelorMittal USA, Inc, (“AM”<sup>1</sup>) brought a complaint to the Indiana Utility Regulatory Commission’s (“Commission”) Consumer Affairs Division (“CAD”) pursuant to I.C. § 8-1-2-34.5. USS and AM asked the Commission to initiate an investigation of Northern Indiana Public Service Company (“NIPSCO”) in connection with negotiations between the parties for NIPSCO to begin supplying electric and gas service to AM in September 2007. In their complaint, USS and AM alleged that NIPSCO unreasonably refused to agree to sub-metering for AM through USS, as it previously allowed under similar circumstances; refused to give USS assurances that NIPSCO would not seek to find that USS acted as a utility in its provision of electric and gas service to AM; accused USS of violating the law by USS’s provision of gas and electricity to AM; and unreasonably demanded that USS resolve a pending dispute before the Court of Appeals before NIPSCO would agree to terms requested by USS.

<sup>1</sup> At the beginning of the time period relevant to this dispute, the name of the entity with which USS engaged in the disputed transactions was ISG Indiana Harbor, Inc. Thereafter, as a result of subsequent, unrelated corporate transactions, ISG Indiana Harbor, Inc. became ArcelorMittal Steel USA, Inc., and now, Mittal USA, Inc. Since the continuity of interest and operations for these various entities is undisputed, we will refer to them collectively herein as AM.

On October 1, 2007, NIPSCO filed a Complaint in Cause No. 43363 (“43363 Complaint”) against USS seeking a determination that USS violated Indiana law and NIPSCO’s tariffs by selling electric and gas service to AM. On October 4, 2007, USS and AM filed a docketed Complaint<sup>2</sup> in Cause No. 43369 (“43369 Complaint”) against NIPSCO seeking a determination that neither USS nor AM violated any laws or tariffs.<sup>3</sup> The respondents in both actions—USS and AM in 43363, and NIPSCO in 43369—timely filed answers to the complaints. In addition, USS and AM filed their 43369 Complaint as a counterclaim in 43363, and NIPSCO timely replied by adopting its answer to the 43369 Complaint. At the Prehearing Conference on November 14, 2007, the Presiding Officers granted a motion to consolidate the two actions.

On January 15, 2008, USS and AM filed their *Motion for Summary Judgment*, seeking a summary determination “that the provision of gas and electricity to the Plate Mill as operated by AM within the Gary Works property of USS has not violated any tariff, utility contract or other requirement of utility law.” *Motion for Summary Judgment*, p. 2. The *Motion for Summary Judgment* was accompanied by a *Brief in Support* and a *Designation in Support of Summary Judgment* (“Designation in Support”). On March 17, 2008, NIPSCO timely filed its response in opposition and its *Designation of Materials in Opposition* (“Designation of Materials”). On April 14, 2008, USS and AM timely filed their *Reply Brief in Support of Summary Judgment*. On January 15, 2008, NIPSCO filed a *Motion to Dismiss the Counterclaim of USS and AM*, which, in the alternative, sought judgment on the pleadings with reference to the Counterclaim. On February 5, 2008, USS and AM timely filed their response in opposition to NIPSCO’s *Motion to Dismiss*, and on February 19, 2008, NIPSCO timely filed its Reply in Support.

On April 22, 2008, a public hearing was held at which the parties presented oral argument on their motions. The Indiana Office of Utility Consumer Counselor (“OUCC”) also attended the hearing, but did not participate in the argument. Other than the parties, no member of the rate paying public appeared or participated in the hearing.

Based upon the pleadings, the undisputed material facts, and the applicable law, the Commission now finds as follows:

**1. Commission Jurisdiction and Notice.** Proper notice of the hearing in these Causes was given as required by law. USS owns and operates a steel production facility located in Gary, Indiana (“Gary Works”) and purchases electric and gas service from NIPSCO. AM owns and operates a Plate Mill facility located on land within The Gary Works and purchases electric service from NIPSCO and has previously purchased gas and electric service from USS. NIPSCO is a public utility corporation pursuant to I.C. § 8-1-2-1, incorporated under the laws of the State of Indiana, providing electric and gas service to customers in Indiana. The provision of

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<sup>2</sup> The docketed complaint consisted of a formal filing of the original CAD complaint brought by USS and AM. The CAD did not pursue resolution of the original filing once USS and AM filed the complaint under Cause No. 43369.

<sup>3</sup> While USS and AM refer to the provision of electricity and gas by USS to AM as a “pass-through”, we decline to use that term, as it has connotations relating to the pass-through of charges, such as in the gas cost adjustment context. Instead, we use the term “distribution” to refer to the services USS provided to AM.

electric service by NIPSCO to USS is pursuant to a contract approved by this Commission in Cause No. 41333.<sup>4</sup>

USS and AM brought a complaint and requested an investigation of NIPSCO pursuant to I.C. § 8-1-2-34.5 and I.C. § 8-1-2-58. Therefore, the Commission has jurisdiction over the parties and the subject matter of these Causes.

**2. Background.** USS owns and operates a large, integrated steel-making operation on the southern shore of Lake Michigan, in Northwest Indiana, known as The Gary Works. The Gary Works is a large consumer of electricity and natural gas, and some of the electricity for the Gary Works is supplied from cogeneration facilities owned and operated by USS within the Gary Works. The rest is supplied by NIPSCO under a special contract approved by this Commission in 1999.

All of the natural gas consumed at the Gary Works is delivered by NIPSCO. USS buys its own supplies of natural gas in the market and arranges and pays for interstate and intrastate transportation to deliver the gas to NIPSCO, which then transports the gas across its local distribution system and delivers it to the Gary Works. The electric and gas interconnections and meters where NIPSCO delivers electricity and gas to USS are located at or near the Gary Works property line. USS owns, operates and maintains all of its own electrical and gas distribution facilities and equipment within the Gary Works.

AM also owns and operates a large, integrated steel-making operation on the southern shore of Lake Michigan, in Northwest Indiana, known as the East Chicago Works. The East Chicago Works was formerly owned and operated by LTV Steel, and was acquired by AM in the bankruptcy of LTV before 2003. The East Chicago Works is also a large industrial electric and natural gas customer of NIPSCO.

In approximately August of 2003, USS and AM agreed to enter into a transaction to swap facilities, and effective November 1, 2003, USS became the owner of the Pickle Line at the East Chicago Works, and AM became the owner of the Plate Mill at the Gary Works. *See, USS Designation in Support*, Ex. D, E. Full right, title and interest of all the property above the ground, representing the Plate Mill and its operations, was conveyed by USS to AM and USS retained no title or ownership of that property. *Id.* USS retained ownership of the ground under the Plate Mill, and leased that ground to AM for a nominal annual rent under a long-term Ground Lease agreement. *See, USS Designation in Support*, Ex. F. It is the provision of gas and electric service to AM at the Plate Mill beginning November 1, 2003, which gives rise to the controversy presented in these Causes.

The Plate Mill is located inside the Gary Works, several miles from the Gary Works property lines. *Complaint*, Cause No. 43369, ¶ 6. The Plate Mill itself housed three facilities: (i) a pre-heat facility to heat slabs of steel, (ii) a rolling mill in which the heated slabs of steel are flattened into plate steel, and (iii) a heat treat facility in which the plate steel can be tempered to give it specific, customer ordered properties. *Complaint*, Cause No. 43369, ¶ 9. Upon acquiring

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<sup>4</sup> *In the Matter of the Complaint of U.S. Steel Group, a Unit of USX Corp., v. Northern Indiana Public Service Co.*, Cause No. 41333, 1999 Ind. PUC LEXIS 130 (Ind. Util. Regulatory Comm'n July 8, 1999).

ownership of the Plate Mill as of November 1, 2003, AM began to operate the heat treat facility, trucking plate steel from another nearby rolling mill, but did not operate either the pre-heat facility or the rolling mill. *USS Designation in Support*, Ex. G; Ex. M, ¶¶ 4, 6. AM did not arrange with NIPSCO for electric or gas service to the Plate Mill; instead, AM purchased electric and gas service for the Plate Mill from USS. *Complaint*, Cause No. 43369, ¶ 7.<sup>5</sup> This arrangement was a continuation of USS's previous distribution to itself of gas and electricity when USS operated the Plate Mill. *Id.*

NIPSCO asserts that it was not aware that USS was providing gas and electric service to support the operation of the heat treat facility from 2003 forward. *Complaint*, Cause No. 43363, ¶ 27. NIPSCO states that it operated on the belief that the only energy needs for the Plate Mill would be the minimal amount necessary for plant protection, and that USS would provide that energy. *Answer of NIPSCO*, Cause No. 43369, p. 2. In May of 2007, AM publicly announced it intended to reopen the Plate Mill. *Complaint*, Cause No. 43369, ¶ 10. Since AM had been operating the heat treat facility within the Plate Mill, the announced reopening represented AM's intention to expand operations at the Plate Mill by operating the rolling mill and attendant preheat facility, with an anticipated reopening date in September of 2007. *Id.* Upon that announcement, NIPSCO contacted AM about providing electric and gas service to the reopened Plate Mill. *Complaint*, Cause No. 43369, ¶ 12.

Over the summer of 2007, the parties met numerous times regarding service to be provided to the Plate Mill. *Complaint*, Cause No. 43369, ¶ 13. The parties reached an agreement under which NIPSCO installed an electric sub-meter inside the Gary Works on the USS owned and operated electric distribution lines, to meter the flow of electricity to the Plate Mill. *Id.* NIPSCO's power to the Plate Mill would thus flow through the interconnection between NIPSCO and USS, and then flow across USS's internal electric distribution to NIPSCO's sub-meter. *Id.* NIPSCO would bill AM based on the readings of the sub-meter and would subtract the sub-meter readings from the readings of its meter with USS for purposes of billing USS. That agreed arrangement was implemented in the fall of 2007. *Id.* The Plate Mill actually began its expanded operations before NIPSCO could get its sub-meter installed, and on a temporary basis, NIPSCO agreed to rely, for the purposes of billing AM, on the readings from a pre-existing USS owned meter at the interconnection between USS's distribution system and the Plate Mill. However, within a few weeks after the Plate Mill began its expanded operations, NIPSCO's sub-meter was installed. *Id.*

Regarding the provision of gas, NIPSCO stated that its gas meter could not be installed on USS's internal gas lines. *Complaint*, Cause No. 43369, ¶ 14. Rather, NIPSCO's meter for the Plate Mill needed to be located near the existing NIPSCO meter for the Gary Works at or near the Gary Works property line. *Id.* The customer line from that location to the Plate Mill would be over 3 miles long. *USS Designation in Support*, Ex. T. No further progress toward an agreement occurred because the proposed natural gas provisioning was "dependent on [a] letter from

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<sup>5</sup> As the Plate Mill was essentially an island miles inside Gary Works, USS and AM entered into a comprehensive Plate Services Agreement that made provision not only for USS to supply electric and gas service, but also water, industrial waste water treatment, sanitary sewer discharge, oxygen, and communications services, use of scales, rail lines and barge docks, access to the Gary Works property, as well as security, fire protection and response, emergency medical and hazardous response services.

NIPSCO regarding USS compliance with tariff/contract[.]”, and AM remains a customer of USS rather than NIPSCO for gas service to the Plate Mill. *USS Designation in Support*, Ex. Z.

As the date for reopening the Plate Mill drew closer, USS sought assurances from NIPSCO that NIPSCO would not take action against USS for acting as a utility by virtue of its provision of electric and gas service to AM. *USS Designation in Support*, Ex. W. The matter was discussed by NIPSCO and USS employees in numerous meetings, and the parties engaged in a process to get the requested assurance from NIPSCO. *Id.*, see also Ex. AA. Several days before the assurance was to be provided, NIPSCO corporate counsel in Pennsylvania advised USS that NIPSCO would not provide the requested assurance unless USS resolved a pending contract dispute appeal before the Court of Appeals related to a Commission order in Cause No. 43204.<sup>6</sup> *USS Designation in Support*, Ex. BB. USS objected. USS and AM attempted to file a complaint with the Commission’s CAD. NIPSCO filed its complaint with the Commission, and USS’s cross-complaint followed thereafter.

**3. Relief Requested.** All parties request a determination whether the past and existing arrangements for electric and gas service to AM at the Plate Mill violate the law, NIPSCO’s tariffs, or have the effect of making USS a public utility. NIPSCO seeks a determination in the affirmative, while USS and AM seek a determination in the negative. In addition, USS and AM requested that the Commission undertake an investigation of NIPSCO on this issue.

**4. Request for Investigation.** USS and AM originally filed a complaint with the CAD against NIPSCO under I.C. § 8-1-2-34.5 and I.C. § 8-1-2-58. Under I.C. § 8-1-2-34.5, the section governing complaints by individual consumers, “[n]otwithstanding IC 8-1-2-54, the commission may investigate and enter orders on complaints arising under this section.”<sup>7</sup> Under I.C. § 8-1-2-58, this Commission may undertake an investigation of a public utility on the Commission’s own motion. The following are the arguments posited by USS and AM in favor of a Commission investigation.

- (1) NIPSCO would not agree to provide natural gas service to the Plate Mill for AM under a sub-meter arrangement similar to the arrangement through which NIPSCO agreed to provide electricity to the Plate Mill, and instead proposed to locate a new meter near the existing gas meter for USS.
- (2) NIPSCO accused USS of violating the law by selling electricity and gas to AM.
- (3) NIPSCO refused to provide a letter requested by USS and AM to the effect that USS would not violate any law, tariff or contract provision by using its facilities to transmit gas and electric service to AM.

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<sup>6</sup> The Indiana Supreme Court upheld the Commission’s order in that Cause, which found in favor of U.S. Steel. See, *N. Ind. Pub. Svc. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012 (Ind. 2009).

<sup>7</sup> Under the terms of I.C. § 8-1-2-54, USS and AM would have to have an additional eight (8) complainants against NIPSCO to invoke the Commission’s jurisdiction to entertain a complaint.

- (4) After the dispute broke out between the parties over providing the letter demanded by USS and AM and whether or not USS's sale of gas and electric service to AM violated the law, NIPSCO injected into the negotiations a pre-existing billing dispute between NIPSCO and USS and demanded that USS concede the dispute in favor of NIPSCO.

I.C. § 8-1-2-34.5 and I.C. § 8-1-2-58 do not give the parties the right to an investigation, but rather state that the Commission *may* undertake an investigation, which is permissive, not mandatory, language. Based on our findings herein, we do not find the need to undertake an investigation in these consolidated Causes. We now turn to an examination of the remaining issues.

**5. Undisputed Material Facts.** Based on the pleadings, the evidentiary materials submitted by the parties, and administrative notice of NIPSCO's service territory, the following facts are undisputed and material to the issues presented by the motion for summary judgment.

- (a) The Gary Works and the Plate Mill are within NIPSCO's exclusive electric service territory; gas providers do not have exclusive service areas.
- (b) NIPSCO has in the past allowed by agreement the distribution of NIPSCO-provided electricity from a NIPSCO customer to a third party. *See, USS Designation in Support of Evidence*, Ex. H.<sup>8</sup>
- (c) Since October 1, 2003, the Plate Mill has been owned and operated by AM. *See, USS Designation in Support*, Ex. D.
- (d) Since October 1, 2003, USS has owned the ground under the Plate Mill and has leased it to AM. *See, USS Designation in Support*, Ex. F.
- (e) Since November 1, 2003, NIPSCO was aware that USS distributed electricity to the Plate Mill, although NIPSCO stated its understanding that such distribution was for the purposes of plant protection only. *See, NIPSCO Designation of Materials*, Ex. 7, pp. 3-4.
- (f) At all relevant times NIPSCO delivered electricity to USS for its use at the Gary Works.

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<sup>8</sup> NIPSCO states that it never "agreed to a pass-through arrangement for natural gas service at the Pickle Line." *See, NIPSCO Designation of Materials*, Ex. 7, p. 7, ¶ 21. During the period of time in question, NIPSCO had an electric contract with AM that specifically permitted a distribution arrangement for electricity service to the Tin Mill. *See, NIPSCO Designation of Materials*, Ex. 7, ¶¶ 5, 7. Because NIPSCO employees believed the Tin Mill and Pickle Mill to be "associated ... and co-located", they erroneously believed that "the electric service to U.S. Steel for the Pickle Line would be automatically covered by the existing pass-through to which NIPSCO had consented, and that for gas service, the Pickle Line would be serviced by NIPSCO through the existing dedicated line to the Tin Mill." *See, NIPSCO Designation of Materials*, Ex. 7, p. 7, ¶ 20; Ex. 8, p. 2; Ex. 9, p. 3; Ex. 10, p. 1.

- (g) At all relevant times NIPSCO transported gas owned by USS and delivered it to USS at the Gary Works.
- (h) At all relevant times USS owned and operated plant and equipment at the Gary Works to produce electricity for its own use.
- (i) At all relevant times USS owned and operated its own internal facilities and equipment within the Gary Works to distribute within the Gary Works both cogenerated electricity and electricity purchased from NIPSCO.
- (j) At all relevant times USS owned and operated its own internal facilities and equipment within the Gary Works to distribute within the Gary Works gas delivered by NIPSCO.
- (k) In 2003, USS planned a shared services agreement with AM for the Plate Mill, modeled on the Tin Mill facilities, which distributed electricity to AM. *See, USS Designation in Support, Ex. G.*
- (l) From November 1, 2003, through the fall of 2007, USS sold to AM all of the electricity that AM used and consumed at the Plate Mill. *See, USS Designation in Support, Ex. M.*
- (m) The price USS charged AM for the electricity was the weighted average of (i) the price USS paid NIPSCO for purchased electricity and (ii) USS's computed internal cost of its cogenerated electricity.
- (n) From November 1, 2003 through the fall of 2007, USS supplied to AM all of the natural gas consumed by AM at the Plate Mill.
- (o) The natural gas USS supplied to AM was purchased by USS from gas suppliers other than NIPSCO.
- (p) USS arranged and paid for the interstate and intrastate transportation to NIPSCO of the natural gas supplied to AM. *See, USS Designation in Support, Ex. I.*
- (q) In May 2007, USS, AM and NIPSCO began reviewing the gas and electric service to the Plate Mill to prepare for the new line to be initiated at the Plate Mill in September 2007. *See, USS Designation in Support, Ex. O, P, Q.*
- (r) As of September 5, 2007, USS, AM and NIPSCO meeting participants working on the new electric service to the Plate Mill agreed that "no electricity tariff or contract prevents USS distribution over its lines to AM Plate Mill." *See, USS Designation in Support, Ex. X.*

- (s) On September 5, 2007, USS, AM and NIPSCO meeting participants working on the new gas service to the Plate Mill were seeking to confirm “that no natural gas transportation tariffs or contracts prevent USS transportation of natural gas to AM Plate Mill.” *See, USS Designation in Support*, Ex. W. The meeting minutes stated that the “final connection between USS and AM will not occur until the NIPSCO letter” confirmed that “that no natural gas transportation tariffs or contracts prevent USS transportation of natural gas to AM Plate Mill.” *Id. See also, USS Designation in Support*, Ex. Z, USS Bates no. 0188.
- (t) Since the fall of 2007, AM has purchased all of the electricity used and consumed at the Plate Mill from NIPSCO under an arrangement where the electricity is delivered by NIPSCO to the interconnection between NIPSCO and USS, the electricity flows over USS’s electric transmission and distribution system at the Gary Works to a sub-meter owned and operated by NIPSCO, and then flows from the sub-meter to the Plate Mill.
- (u) Since the fall of 2007, AM has arranged for and purchased its own natural gas from suppliers other than NIPSCO. AM has arranged and paid USS for the interstate and intrastate transportation and delivery of its gas included in USS’s daily nomination. USS has arranged and paid for the transportation of AM’s gas within Indiana by NIPSCO for the benefit of AM.

**6. Issues on Summary Judgment.**

*A. Standard of Review.* While summary judgment is not commonly employed before the Commission, it may be guided generally by the relevant provisions of the Indiana Rules of Trial Procedure, to the extent those rules are consistent with the Commission’s Rules of Practice and Procedure. 170 I.A.C. § 1-1.1-26(a). Trial Rule 56 governs summary judgment, and provides in relevant part that “[t]he judgment sought shall be rendered forthwith if the designated evidentiary matter shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56 further provides that “[w]hen any party has moved for summary judgment, the court 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.”

Summary judgment is a procedure for applying the law to the facts when no factual controversy exists. *See, Lee v. Weston*, 402 N.E.2d 23 (Ind. App. 1980). The Commission must accept the facts as provided by the parties’ proffered evidentiary materials. The Commission’s task is to determine which facts that arise from the evidentiary materials are both undisputed and material. Facts that arise by inference may be considered only when the inference from which they arise is either (i) the only reasonable inference, or (ii) an inference in favor of the non-moving party. If the application of the law to the material facts requires judgment for either the moving party, or any other party on the issues raised in the motion for summary judgment, the

Commission must enter that judgment. Otherwise, the Commission must deny the motion for summary judgment.

The motion for summary judgment asks us to determine whether USS is a public utility because of (1) its sale of electricity and natural gas to AM from November 1, 2003 through the fall of 2007; and (2) its arranging and paying for transportation of AM's natural gas within Indiana since the fall of 2007. NIPSCO asserts that it was harmed and asks us to find that USS violated NIPSCO's tariff prohibitions against the resale of its electric and gas service because of those same transactions. NIPSCO argues that the only fact subject to dispute, although immaterial to the issues on summary judgment, is the extent of that harm. NIPSCO seeks Commission findings against USS so that NIPSCO may pursue damages in circuit or superior court.

**B. U.S. Steel's Provision of Electricity to AM.**

*i. Whether USS's actions made it a public utility.* NIPSCO argues that USS acted as a public utility by its distribution of electricity to AM, and that USS violated NIPSCO's designated electric service area thereby. NIPSCO states that all of the electricity that NIPSCO sold USS was at the discounted special rate under USS's special contract and that if NIPSCO had furnished the electricity to AM for the Plate Mill operations, it would have been at NIPSCO's tariff rate, which is higher than the special rate in the USS contract. USS argues that because all the transactions occurred on private property, the question is one of whether a landlord may distribute services to a tenant. USS argues it made no public sales and that it is therefore not a utility.

If a "question of whether a business is a public utility is material to the determination of an agency action, the agency must make specific findings as to that issue." *Ind. Util. Regulatory Comm'n v. Gary Joint Venture*, 609 N.E.2d 7, 10 (Ind. App. 1993); *accord, Hidden Valley Lake Prop. Owners Ass'n v. HVL Utils., Inc.*, 408 N.E.2d 622, 629 (Ind. App. 1980). We must begin by applying the definition of public utility as set forth in Ind. Code § 8-1-2-1:

'Public utility', as used in this chapter means every [person or entity] that may own, operate, manage or control any plant or equipment within the state for the:... (2) production, transmission, delivery, or furnishing of heat, light, water, or power, [either directly or indirectly to the public].<sup>9</sup>

In addition, I.C. § 8-1-6-3 defines "public utility" as:

[E]very corporation, company, cooperative organization of any kind, individual, association of individuals, their lessees, trustees...that...may own, operate, manage or control any plant or equipment within the state...for the production, transmission, delivery or furnishing of heat, light, water or power...for service directly or indirectly to the public.

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<sup>9</sup> While the final bracketed phrase "either directly or indirectly to the public," is not present in the text of I.C. § 8-1-2-1(a), it must be considered part of the statute. *U.S. Steel Corp. v. NIPSCO*, 486 N.E.2d 1082 (Ind. App. 1985).

The question of USS's identity as a public utility with respect to the provision of electric service has been litigated before by USS with NIPSCO as its adversary. In that proceeding, USS used its own transformer and private transmission system to send energy purchased from two different utilities between two USS sites for its own use. *U.S. Steel v. NIPSCO*, 482 N.E.2d 501 (Ind. App. 1985). The Court focused on the fact that USS would not be making the electricity available to the public, but rather would be transmitting it only for its own private use. Absent holding out to the public either directly or indirectly, the Court found that USS's distribution of electricity on its own property for its own use did not make it a public utility, and as a consequence the Commission did not have jurisdiction over USS. *Id.* at 504-05. Similarly, in *Knox County Rural Elec. Membership Corp. v. PSI Energy, Inc.*, 663 N.E.2d 182 (Ind. Ct. App. 1996), Black Beauty purchased electricity from PSI Energy and transmitted the electricity throughout its coal mining operation, a portion of which was located within Knox County REMC's service territory. Relying on *USS*, the Court found that Black Beauty was not a public utility by transmitting electricity across assigned service territories to itself. The Court found that a key element was the fact that the company was the sole entity involved in the utility service transaction, and that it was "transmitting the electricity to itself and not to the 'public'." *Id.* at 195.

**ii. Commission Findings.** We have recently addressed the issue of utility status at length in *The Petition of BP Products North America, Inc.*, Cause No 43525, 2009 Ind. PUC LEXIS 188 (Ind. Util. Regulatory Comm'n, May 13, 2009), *appeal remanded*, (Ind. App. Oct. 5, 2009)("BP"). There we found that BP acted as a utility in its provision of services to other entities within an industrial facility in Whiting, Indiana.

As we found in *BP*, in the present case USS "is not the only consumer of the... electricity it purchases from [NIPSCO]...[USS's] actions are not private. On the contrary, [USS] sells these services, pursuant to executed contracts." *BP*, Order at 14, 2009 Ind. PUC LEXIS 188 at \*38. There is no dispute that USS charged AM for the electricity it distributed, pursuant to a contract. *See, USS Designation in Support*, Ex. D, Plate Services Agreement Between AM and USS, September 30, 2003. USS argues that because it did not profit from the distribution, it cannot be held to be a public utility. However, public utilities are not defined based on whether or not the provision of service results in a profit. Once USS began transmitting and selling electricity to an entity other than itself, it became a public utility. We conclude that USS acted as a public utility under Indiana law by virtue of its distribution of electricity to a separate entity. We now move to NIPSCO's allegations regarding its service territory.

**iii. Whether USS violated NIPSCO's service territory.** Each electricity supplier in Indiana has an exclusive service territory throughout which it is obligated by law to furnish reasonable and adequate electric service to all customers. In return for accepting that obligation to serve, each electric supplier has "the sole right to furnish retail electric service to each present and future consumer within the boundaries of its assigned service area." I.C. § 8-1-2.3-4(a).

**iv. Commission Findings.** NIPSCO admitted "that NIPSCO may, with the consent and agreement of USS, utilize the facilities of USS to provide service to [AM], and that in doing so neither NIPSCO, USS nor [AM] will violate any tariff, contract or laws." *NIPSCO Answer in*

*Cause No. 43369*, p. 10 ¶ 31. NIPSCO has agreed to “non-standard” agreements “under which [NIPSCO’s] electric service is delivered to a customer through interconnection with the private facilities of another customer, when the end-use customer is located entirely within the ‘campus’ of the other customer.” *Id.* at p. 3, n. 3. NIPSCO had previously agreed to such a ‘non-standard’ ‘shared services arrangement’ for service to the Plate Mill, modeled on the agreement in place for the East Chicago Tin facilities. *See, USS Designation in Support on Summary Judgment*, Ex. G.

USS does not have an assigned service territory under I.C. § 8-1-2.3-2(e), and it provided electricity to another entity within NIPSCO’s exclusive service territory. NIPSCO knew that USS was violating NIPSCO’s service area. Under the statute, NIPSCO did not have the power to acquiesce to that distribution absent Commission approval. Because this occurred in NIPSCO’s assigned service territory and the parties failed to seek Commission approval, there is a violation of I.C. § 8-1-2.3 by USS.

While we can note that the provision of electric service by an entity without a service territory violates I.C. § 8-1-2.3, *et seq.*, we have no statutory power to remedy that fact. *BP, Order* at 17, 2009 Ind. PUC LEXIS 188 at \*46. At this juncture the dispute has been resolved by virtue of the subsequent electricity arrangements between NIPSCO and AM, in which electricity flows across USS’s facilities to AM.

### **C. U.S. Steel’s Gas Transportation.**

*i. Whether USS’s actions made it a public utility.* NIPSCO states that it was unaware that USS was providing fully bundled commodity gas to AM; that USS only paid NIPSCO for local transportation under NIPSCO’s transportation tariff; and that if NIPSCO furnished fully bundled commodity service to AM it would have charged the applicable higher rate. NIPSCO also argues that USS’s transportation of gas to AM violated NIPSCO’s ban on resale. NIPSCO argues that I.C. § 8-1-2-87.5 resolves the issue against USS and in favor of NIPSCO because USS purchased gas and engaged in transporting it for direct sale to AM, an end use consumer, in Indiana in the absence of “a necessity certificate from the Commission.” *Complaint*, Cause No. 43363, ¶ 61.<sup>10</sup>

USS asserts that NIPSCO acquiesced in the distribution of services, including gas, and further states that its distribution of gas service “lawfully utilized private distribution facilities that [USS] owns...recover[ing] from its tenant a reasonably allocated portion of the utility charges resulting from consumption on the leased premises.” *USS Answer and Counterclaim*, Cause 43363, ¶ 30.

Governing the transportation of natural gas, I.C. § 8-1-2-87.5(b) applies:

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<sup>10</sup> NIPSCO alleged that it was the sole authorized gas provider within the Gary Works. While this may be true, gas providers do not have monopoly service areas in the same way that electricity providers do, and there is no provision in the gas transportation statute for damages parallel to the electric service area’s damage provision of I.C. § 8-1-2.3-4(b). Therefore, we will not address this allegation.

Any person, corporation, or other entity that: (1) Is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state; (2) Is engaged in the transportation of gas solely within this state on behalf of any end use consumer or consumers; or (3) Is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed; is a public utility as defined in [I.C. § 8-1-2-1] of this chapter and must obtain a necessity certificate from the commission before it may engage in any activities described in this subsection.

*ii. Commission Findings.* USS's distribution of gas service to AM was a continuation of USS's prior transportation of gas to itself on the same facilities. *USS Answer and Counterclaim*, Cause 43363, ¶¶ 5, 7, 30. During that time, USS would have been exempted from utility status by virtue of the fact that it was transporting gas for its own use within the premises where the gas was to be consumed. However, once USS began transporting gas to AM, USS engaged in "transportation of gas...within this state on behalf of [an] end use consumer" as set forth in I.C. § 8-1-2-87.5(b)(2), and therefore USS qualifies as a utility. Although we recognize that this finding is inconsistent with our finding in *BP*, we believe our decision here to be correct because when read in its totality, I.C. § 8-1-2-87.5(b) is phrased in the disjunctive; an entity can be a utility if it engages in transportation under (a), (b), or (c).<sup>11</sup>

We are aware that this creates a level of obligation on the part of USS that it is unlikely the legislature either desired or envisioned. The phrase in I.C. § 8-1-2-87.5(b)(3) "other than transportation on the premises where the gas is consumed" would include industrial facilities where gas is moved from one place to another in the course of business. There is no evidence, however, that the legislature anticipated the current complex arrangements in which multiple owners and lessees exist within the confines of an otherwise-self-contained industrial island.<sup>12</sup> We would also note that the legislature has generally sought to avoid duplication of facilities and afforded the Commission with jurisdiction to address such situations. *See*, I.C. § 8-1-2-86 and I.C. § 8-1-2.3-1.<sup>13</sup> However, there is no exception for end-use customers transporting gas for others also located on the premises. Consequently, we must leave this to be addressed at some future date by the Legislature.

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<sup>11</sup> *See, Ind. Bell Tele. Co., Inc. v. Ind. Util. Regulatory Comm'n*, 810 N.E.2d 1179, 1186 (Ind. App. 2004) *t'fer denied*, 831 N.E.2d 734 (Ind. 2005) (an agency is not bound by prior precedent, and may change course as long as it explains the reasons for doing so).

<sup>12</sup> The electric service area statute, premised on monopoly providers, deals with disputes by competing electric service providers on a single tract of land by a customer "housed in a single structure or which constitute[s] a single...industrial...operation." I.C. § 8-1-2.3-6(3). In those circumstances the Commission is specifically empowered to make a determination regarding which provider or providers should serve the contested area.

<sup>13</sup> "It is the policy of this State, as evidenced by I.C. § 8-1-2-86, I.C. § 8-1-2-87, I.C. § 8-1-2-88 [repealed 7/1/09], and I.C. § 8-1-2.3-1 to avoid unnecessary duplication of utility facilities." *In re An Investigation into the Proposed Direct Natural Gas Pipeline Connection between ANR Pipeline Company and Bethlehem Steel Corp.*, Cause No. 37531, 1984 Ind. PUC LEXIS 473 (Ind. Util. Regulatory Comm'n June 27, 1984).

Notwithstanding our decision, we note I.C. § 8-1-2.5, *et seq.*, provides a mechanism for jurisdictional utilities to seek alternative regulatory treatment. In certain instances when we have found an entity to be a public utility under I.C. § 8-1-2-87.5(b), we simultaneously noted “that the Commission may decline exercising its full jurisdiction over these entities upon review under the Alternative Utility Regulation Act[.]”<sup>14</sup> However, such declination is not automatic; a utility must petition the Commission to be eligible for such alternative regulatory treatment.

We also find that from 2003 to 2007 USS violated NIPSCO’s tariff ban on resale, which states, “Gas transported by [NIPSCO] for a Customer contracting for service hereunder shall be for the sole and exclusive benefit of such Customer and shall not be available for resale except under the provisions of the Nomination Exchange and Imbalance Exchange Services of [NIPSCO’s] Gas Transportation Rate Schedules.” Rate 328, Rate for Gas Service, Transportation and Transportation Balancing Service. There is no evidence that USS sought to use those provisions and no evidence that the resale of gas by USS was otherwise authorized by NIPSCO. *See, Complaint*, Cause No. 43363, Ex. B, p. 2.

Based on the evidence of record, USS stopped any resale of gas to AM in the fall of 2007, and now only transports gas on its premises to AM. We therefore find that USS is not currently in violation of NIPSCO’s tariff ban on resale. However, USS is still transporting gas “within this state on behalf of [an] end use consumer” by its transportation of gas to AM. Therefore, USS “is a public utility as defined in [I.C. § 8-1-2-1] of this chapter and must obtain a necessity certificate from the commission” as set forth in I.C. § 8-1-2-87.5(b).

**D. NIPSCO’s Claims for Damages.** NIPSCO argues that it is entitled to damages under I.C. § 8-1-2-107 as a result of USS’s violation of its electric service territory and NIPSCO’s ban on gas resale. I.C. § 8-1-2-107 provides:

If any public utility shall do, or cause to be done or permit to be done, any matter, act, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing required to be done by this chapter, such public utility shall be liable to the person, firm, limited liability company, or corporation injured thereby in the amount of damages sustained in consequence of such violation.

While NIPSCO may be entitled to damages, the Commission, as an administrative agency, cannot award a money judgment or damages. *E.g., Indianapolis Water Co. v. Niblack*, 161 N.E.2d 377, 378 (Ind. 1959); *Pub. Serv. Indiana, Inc. v. Nichols*, 494 N.E.2d 349, 353 (Ind. Ct. App. 1986)(citations omitted).

7. **Conclusion.** Based on the analysis herein, USS acted as a public utility in the provision of electricity to AM and violated NIPSCO’s electric service area under I.C. § 8-1-2.3, *et seq.* However, USS is no longer selling electricity to AM, and this matter has since been resolved by agreement between NIPSCO and AM.

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<sup>14</sup> *The Application of Granger Energy of Indy, LLC*, Cause No. 43540, 2008 Ind. PUC LEXIS 452, at \*13 (Ind. Util. Regulatory Comm’n Nov. 12, 2008).

While there was a violation by USS of NIPSCO's tariff ban on the resale of gas from 2003 to 2007, that matter was subsequently resolved and AM now purchases gas on its own behalf. The transportation of such gas by USS to AM as an end-use consumer, which based on the evidence is on-going, was and is in violation of I.C. § 8-1-2-87.5(b)(2) and USS was and is acting as a utility in doing so. Therefore, USS must obtain a necessity certificate from the Commission under I.C. § 8-1-2-87.5(b).

The resolution of NIPSCO's claims for damages must be addressed by another tribunal. This Order disposes of all issues.

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

1. By its sale of electricity to ArcelorMittal, U.S. Steel was acting as a public utility.
2. By providing electric service to ArcelorMittal within Northern Indiana Public Service Company's service territory, U.S. Steel violated I.C. § 8-1-2.3, *et seq.*
3. By transporting gas to ArcelorMittal, an end use consumer as set forth in I.C. § 8-1-2-87.5(b)(2), U.S. Steel was and is acting as a public utility.
4. U.S. Steel violated Indiana Public Service Company's tariff by reselling gas to ArcelorMittal between 2003 and 2007.
5. Because U.S. Steel is a utility by virtue of transporting gas "within this state on behalf of [an] end use consumer", U.S. Steel must obtain a necessity certificate from the commission as set forth in I.C. § 8-1-2-87.5(b).
6. The Complaint in Cause No. 43369 and the Counterclaim in Cause No. 43363 are dismissed.
7. This Order shall be effective on and after the date of its approval.

**HARDY, ATTERHOLT AND MAYS CONCUR; LANDIS AND ZIEGNER ABSENT:**  
**APPROVED: MAY 11 2010**

**I certify that the above is a true  
and correct copy of the Order as approved:**



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