

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

THE PETITION OF BP PRODUCTS)
NORTH AMERICA INC. FOR SUCH)
CERTIFICATES, PERMITS, AND)
AUTHORITY AS MAY BE REQUIRED)
BY LAW FOR PETITIONER TO)
PROVIDE SERVICES TO ENTITIES)
ADJACENT TO AND WITHIN THE)
FOOTPRINT OF ITS WHITING,)
INDIANA REFINERY, FOR THE)
COMMISSION TO DECLINE TO)
EXERCISE ITS JURISDICTION OVER)
PETITIONER AND ITS SERVICES,)
THROUGH AN ALTERNATIVE)
REGULATORY PLAN UNDER I.C. § 8-)
1-2.5 IF NECESSARY, EXCEPT FOR)
SUCH ISSUANCE OF CERTIFICATES,)
PERMITS, OR AUTHORITY AS)
DEEMED NECESSARY; AND FOR)
PROTECTION FROM DISCLOSURE)
OF CONFIDENTIAL AND)
PROPRIETARY INFORMATION)

CAUSE NO. 43525

ORDER ON VOLUNTARY REMAND

APPROVED: JUN 23 2010

BY THE COMMISSION:

David Lott Hardy, Chairman

Angela Rapp Weber, Administrative Law Judge

This matter is before the Indiana Utility Regulatory Commission (“Commission”) on remand from the Indiana Court of Appeals in Cause No. 93A02-0905-EX-490. On May 13, 2009, the Commission issued an Order in this Cause finding, among other things, that BP Products North America, Inc. (“BP”) was acting as a public utility in connection with its delivery of electricity to a tenant on its property, Marsulex, Inc. (“Marsulex”). The Commission also found that in addition to acting as a public utility, BP’s provision of service to Marsulex was in violation of the Northern Indiana Public Service Company’s (“NIPSCO”) service rights under Ind. Code § 8-1-2.3-1 *et seq.* Accordingly, we ordered BP to enter into discussions with NIPSCO regarding its provision of electric service within NIPSCO’s assigned service territory with the intent to reach an amicable resolution. The Commission also directed BP to file a compliance report with the Commission no later than August 11, 2009 regarding the status of those discussions. BP filed a Notice of Appeal of the Order on May 29, 2009. Intervenor, United States Steel Corporation (“U.S. Steel”) filed a Notice of Appeal on June 2, 2009.

On August 11, 2009, BP filed with the Commission a Notice of NIPSCO’s 1999 Contractual Consent to BP’s Allocation of Electricity to Geographically Contiguous Affiliates

and Third Parties (“Notice of Consent”). Attached to the Notice of Consent were: (i) a redacted copy of a Contract for Electric Service and Energy between BP’s predecessor, BP Amoco Company (“Amoco”), and NIPSCO, which was entered into on July 22, 1999 (the “Contract”) and is still effective; and (ii) a Commission Order dated March 22, 2000 in Cause No. 41608 approving the Contract. The Notice of Consent indicated that the attorneys and witnesses were unaware of the existence of the Contract and the March 22, 2000 Order. The Notice of Consent further asserted that as a result of the Contract and the Commission’s March 22, 2000 Order, BP has received NIPSCO’s consent to provide electric service to Marsulex and is not in violation of Ind. Code § 8-1-2.3-4.¹

On September 1, 2009, BP and U.S. Steel filed with the Indiana Court of Appeals a Verified Motion for Temporary Stay and Remand to Commission for Additional Findings (“Verified Motion”). The Verified Motion requested that the Court of Appeals issue a temporary stay of the appeal and remand the proceeding to the Commission so that the Commission could consider the Contract and the March 22, 2000 Order. On October 5, 2009, the Court of Appeals entered an Order temporarily staying the appeal and remanding the proceeding to the Commission.

On October 28, 2009, BP and U.S. Steel filed with the Commission a Verified Joint Petition of BP Products and U.S. Steel to Reopen Record for Consideration of Additional Evidence (“Motion to Reopen”) pursuant to 170 IAC 1-1.1-22 and Ind. Code § 8-1-2-72. Also, on October 28, 2009, BP and U.S. Steel filed with the Commission a Joint Request for Administrative Notice (“Request for Administrative Notice”) pursuant to 170 IAC 1-1.1-21, which requested that the Commission take administrative notice of the Contract submitted in Cause No. 41608 and the Commission’s Order issued on March 22, 2000 approving the Contract. Attached to the Request for Administrative Notice was a copy of the Contract and a copy of the Commission’s March 22, 2000 Order in Cause No. 41608.

On October 13, 2009, NIPSCO filed with the Commission a Petition to Intervene in this matter. The Presiding Officers granted NIPSCO’s Petition to Intervene pursuant to a Docket Entry dated November 12, 2009. On November 30, 2009, the Presiding Officers issued a Docket Entry granting the Motion to Reopen and the Request for Administrative Notice. The November 30, 2009 Docket Entry also established a procedural schedule for this Cause. Accordingly, NIPSCO filed the direct testimony of Timothy R. Caister on December 14, 2009. On December 28, 2009, BP submitted its exhibits, which consisted of: (i) the Contract and (ii) the Commission’s March 22, 2000 Order issued in Cause No. 41608.

Pursuant to notice duly published as required by law, the Commission conducted an Evidentiary Hearing at 1:30 p.m. on January 12, 2010 in Room 222 of the National City Center, 101 West Washington Street, Indianapolis, Indiana. NIPSCO, BP, the Office of Utility Consumer Counselor (“OUCC”), and U.S. Steel appeared by counsel and participated at the

¹ Indiana Code § 8-1-2.3-4(a) provides in pertinent part that “no other electricity supplier shall render or extend retail electric service within its assigned service area unless the electricity supplier with the sole right consents thereto in writing and the commission approves.” By definition, “electricity supplier” means “a public utility . . . which furnishes retail electric service to the public.” Ind. Code § 8-1-2.3-2(b).

Evidentiary Hearing. During the Evidentiary Hearing, NIPSCO and BP offered their respective evidence without objection. No members of the general public appeared.

Based upon the applicable law, the evidence presented herein and being duly advised, the Commission now finds:

1. Notice and Jurisdiction. Due, legal, and timely notice of the January 12, 2010 public Evidentiary Hearing conducted by the Commission in this Cause was given and published by the Commission as required by law. BP and U.S. Steel timely commenced appellate proceedings seeking judicial review of the findings made in the Commission's May 13, 2009 Order in this Cause.² Pursuant to Appellate Rule 8, jurisdiction over this Cause passed to the Court of Appeals on June 26, 2009. However, BP and U.S. Steel jointly moved for the Court of Appeals to remand the Cause to the Commission pursuant to Appellate Rule 37 to allow the Commission to consider the new evidence before the appeal proceeds to a decision on the merits. In an Order dated October 5, 2009, the Court of Appeals remanded the appeal of this proceeding to the Commission to give BP and U.S. Steel the opportunity to seek Commission permission to reopen the record to introduce evidence that was not previously before the Commission. In accordance with the October 5, 2009 Order of the Court of Appeals, the Commission has jurisdiction over the subject matter of this proceeding.

2. Relief Requested. BP and U.S. Steel requested that the Commission grant the Motion to Reopen so that the Commission could consider the Contract and the March 22, 2000 Order. Further, BP and U.S. Steel requested that, as a result of the Contract and the March 22, 2000 Order, the Commission modify its May 13, 2009 Order and find that BP is not acting as a public utility and is not in violation of Ind. Code § 8-1-2.3-1 *et seq.* with respect to its provision of electric service to Marsulex.

3. Additional Evidence Presented on Remand. No witness testified on behalf of BP or U.S. Steel. During the January 12, 2010 hearing on remand, BP offered into evidence the Contract and the Commission's March 22, 2000 Order in Cause No. 41608.

Mr. Timothy R. Caister, Director of Regulatory Policy for NIPSCO, testified on behalf of NIPSCO at the Evidentiary Hearing. Mr. Caister testified that during an August 2009 meeting, NIPSCO brought to BP's attention the existence of the Contract, and in particular Section 12(2). After this proceeding was voluntarily remanded to the Commission, BP and NIPSCO engaged in several discussions concerning whether BP had profited from the resale of electricity to Marsulex. According to Mr. Caister, NIPSCO concluded that BP did not resell electricity to Marsulex at a profit, which would have violated the terms of the Contract.

Mr. Caister testified that NIPSCO agrees that the provision of electricity by an entity to an entity other than itself constitutes the provision of public utility service. He added that the existence of the Contract should not change the Commission's determination that by providing electricity to Marsulex, BP is a public utility subject to Commission regulatory requirement. First, Mr. Caister explained, the Contract can be terminated after June 30, 2006 by either party giving written notice of termination. Therefore, with respect to violations of Ind. Code § 8-1-

² NIPSCO also petitioned to intervene in and is a party appellee in the appeal.

2.3-1 *et seq.*, the Contract provides only temporary protection to entities rendering electric utility service.

Second, Mr. Caister stated that nothing in the Contract affects the determination of the May 13, 2009 Order that the provision of electricity by an entity to anyone other than itself constitutes the provision of public utility service. In Mr. Caister's opinion, this central determination is consistent with the Indiana statutory construct and sound policy from the perspective of a customer like BP that consumes electricity as well as resells at cost some of the electricity and from the perspective of the incumbent electricity supplier whose assigned service area is involved. Mr. Caister testified that altering this finding in the May 13, 2009 Order based on the Contract would undermine those policies.

4. Discussion and Findings. The issue to be addressed by the Commission on remand concerns BP's provision of electricity to Marsulex. The evidence to be considered is the Contract and our March 22, 2000 Order issued in Cause No. 41608 approving the Contract. The specific provision of the Contract relevant to this proceeding is Section 12(2), which states:

No energy sold by the Company to the Customer hereunder shall be resold for profit by it to any other person or corporation without written consent of the Company. Customer has the right to allocate energy supplied by the Company to its geographically contiguous affiliates, and geographically contiguous third parties who provide the Customer goods and services, who receive power through Customer's master meter and are not currently receiving their power requirements from the Company.

The March 12, 2000 Order approving the Contract in Cause No. 41608 does not make any findings with respect Section 12(2). Ordering Paragraph No. 1 in the March 12, 2000 Order simply states, "The provisions of the [Contract] by and between [NIPSCO] and Amoco are just and reasonable, are practical and advantageous to the parties thereto, and such provisions are consistent with the provisions of Ind. Code § 8-1-2-1 *et seq.*"

Section 12(2) of the Contract does not alter the Commission's determination that BP is acting as a public utility by providing electric utility service to Marsulex. BP is providing electric service to an entity other than itself and is therefore a public utility pursuant to Ind. Code § 8-1-2-1 and Ind. Code § 8-1-6-3. Therefore, the Commission's previous finding is affirmed.

Further, in our May 13, 2009 Order in this Cause we found BP's provision of electric service within NIPSCO's assigned service territory to be in contravention of Ind. Code § 8-1-2.3-1 *et seq.* and directed BP to enter into discussions with NIPSCO to resolve this issue. The evidence presented on remand shows that in accordance with Ind. Code § 8-1-2.3-4, the language contained in Section 12(2) of the Contract was intended to reflect NIPSCO's written consent to BP's provision of electric service "to its geographically contiguous affiliates and geographically contiguous third parties who provide [BP] goods and services" during the term of the Contract. Based on Section 12(2) of the Contract, we find that any issue relating to BP's provision of service without NIPSCO's consent has been addressed as required by the Order issued in this Cause on May 13, 2009.

However, as the Commission stated on page sixteen of the May 13, 2009 Order, “A utility providing retail electric service within the State of Indiana must possess an assigned service territory in accordance with Ind. Code § 8-1-2.3 *et seq.* Since BP does not possess an assigned service territory, it lacks the necessary legal authority to furnish retail electric service within the State of Indiana. Accordingly, the Commission finds that BP’s sale of electricity to Marsulex is contrary to Ind. Code § 8-1-2.3 *et seq.*” Section 12(2) of the Contract does not change the fact that BP does not possess an assigned service territory and cannot legally furnish electric service within Indiana. Under Indiana law, NIPSCO cannot consent to the provision of electric service within its service territory by an entity that does not possess an assigned service territory.

Accordingly, based on the evidence presented on remand and in the underlying proceeding, the Commission affirms its previous finding that BP is a public utility with respect to its provision of electric service to Marsulex. However, based on the law and applicable statutes, the Commission finds that BP does not possess the necessary legal authority to provide electric service to an entity other than itself. Therefore, BP must cease its service activity consistent with our prior findings. NIPSCO’s consent under Section 12(2) of the Contract does not provide BP with such legal authority or modify our prior determination on this issue.

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

1. Petitioner is a “public utility” within the meaning of Ind. Code § 8-1-2-1 and Ind. Code § 8-1-6-3 with respect to its provision of electric service to Marsulex.
2. BP’s provision of electric service to an entity other than itself is in contravention of Ind. Code § 8-1-2.3 *et seq.*, and BP must cease the provision of electric service to Marsulex consistent with the Commission’s findings in our May 13, 2009 Order and our findings herein.
3. This Order shall be effective on and after the date of its approval.

ATTERHOLT, LANDIS, MAYS AND ZIEGNER CONCUR; HARDY ABSENT:

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**