

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE COMPLAINT OF)
 ARCELORMITTAL INDIANA HARBOR) CAUSE NO. 43656
 LLC AGAINST NORTHERN INDIANA)
 PUBLIC SERVICE COMPANY FOR RELIEF) FINAL ORDER
 FROM UNREASONABLE BILLING)
 PRACTICES AND MISAPPLICATION OF) APPROVED: MAR 31 2010
 TARIFF PROVISIONS.)

BY THE COMMISSION:

David E. Ziegner, Commissioner
Lorraine Hitz-Bradley, Administrative Law Judge

On March 16, 2009, ArcelorMittal Indiana Harbor, LLC (“ArcelorMittal”) filed a *Complaint* with the Commission alleging that the Respondent, Northern Indiana Public Service Company (“NIPSCO”), had misapplied the economic development rider set forth in Rider 848.2 of NIPSCO’s electrical tariff, and had failed to fulfill its commitment to provide an economic development rate for the provision of electrical service to one of ArcelorMittal’s operations.

On April 3, 2009, NIPSCO filed its *Answer*, and requested certain affirmative relief from the Commission. On April 22, 2009, ArcelorMittal filed its *Response*. On April 22, 2009, ArcelorMittal filed a *Motion to Consolidate* this proceeding with that in Cause No. 43657. NIPSCO opposed consolidation of the causes, and by entry dated June 10, 2009, the Commission denied ArcelorMittal’s *Motion to Consolidate*.

On June 26, 2009 ArcelorMittal filed the direct testimony and exhibits of its witness Richard S. Kalmas and requested administrative notice of certain documents. On August 28, 2009, NIPSCO filed the direct testimony and exhibits of W. Robert Jessen, and the Indiana Office of Utility Consumer Counselor (“OUCC”) filed a notice of its intent not to file testimony in this Cause. Pursuant to an extension granted on September 23, 2009, ArcelorMittal filed the rebuttal testimony and exhibits of Mr. Kalmas on October 2, 2009.

Pursuant to notice duly given and published as required by law, and duly incorporated into the record and placed in the official files of the Commission, the Commission held an evidentiary hearing in this Cause on November 5, 2009 in Room 222 of the National City Center, 101 W. Washington Street, Indianapolis, Indiana, at 9:30 a.m. E.S.T.

At the hearing, the pre-filed testimony and exhibits of ArcelorMittal and NIPSCO were offered and admitted into evidence, and the witnesses for ArcelorMittal and NIPSCO were made available for cross-examination and questioning by the Commission. The OUCC also appeared at the evidentiary hearing. No members of the rate-paying public attended the hearing or otherwise sought to testify.

Based on the applicable law and evidence presented in this Cause, the Commission now finds as follows:

1. **Notice and Jurisdiction.** Due, legal, and timely notice of the public hearings held in this Cause was given and published by the Commission as required by law. ArcelorMittal owns and operates numerous steel production facilities throughout Northern Indiana, and brought the Complaint in this proceeding pursuant to the provisions of Ind. Code §§8-1-2-34.5, 58, 69 and 115. NIPSCO is a public utility as set forth in I.C. § 8-1-2-1 incorporated under the laws of the State of Indiana, and provides electric utility service to customers within its authorized service territory in Indiana. Accordingly, the Commission has jurisdiction over the parties and the subject matter of the Cause.

2. **Relief Requested.** ArcelorMittal requests that the Commission determine that NIPSCO has unfairly and improperly failed to provide ArcelorMittal with electrical service consistent with the terms of Rider 848.2 of NIPSCO's Commission-approved tariff at ArcelorMittal's Plate Mill facility located inside United States Steel Corporation's ("U.S. Steel") Gary Works complex (the "Plate Mill"), and seeks an order requiring that NIPSCO apply an economic development rate ("EDR") under the terms of that Rider to the Plate Mill. NIPSCO requests a finding by the Commission that ArcelorMittal is obligated to pay for electrical service from NIPSCO pursuant to the current Rate 824 contract between the parties. Both parties request that the Commission order that any appropriate refunds be issued, or underpayments be made, based on the resolution of the underlying tariff issue.

3. **Background.** The dispute between ArcelorMittal and NIPSCO is a disagreement over the appropriate rate for electrical service to be provided to the Plate Mill that is located within the Gary Works complex owned by U.S. Steel. ArcelorMittal acquired the Plate Mill in 2003 from U.S. Steel as part of a "facilities swap" in which U.S. Steel obtained a tin mill facility at ArcelorMittal's Indiana Harbor West location in exchange for the Plate Mill.¹ Because the facility was originally part of the Gary Works, it has historically received gas and electric service through U.S. Steel's internal distribution facilities.²

Beginning in 2003, ArcelorMittal used the Plate Mill for heat-treating steel produced at other facilities, but the rolling mill portion of the facilities had been dismantled previously and removed by U.S. Steel.³ In 2007, ArcelorMittal began the expansion of the Plate Mill by re-opening the rolling mill portion of the facility.⁴ Discussions began with NIPSCO in May 2007 for the provision of electrical service to ArcelorMittal at the Plate Mill, and ArcelorMittal restarted the rolling mill at the facility in October 2007.⁵

ArcelorMittal sought to obtain electrical service for the expanded operations at the Plate Mill under the terms of NIPSCO's EDR that is contained in Rider 848.2 of its tariff. Rider 848.2 implemented certain provisions of a settlement agreement approved by the Commission on September 23, 2002 in Cause No. 41746.⁶ Although ArcelorMittal and NIPSCO discussed the provision of electrical service pursuant to Rider 848.2 over the course of more than a year,

¹ Direct Testimony of Richard S. Kalmas ("RSK") at pp. 2-3.

² RSK at p. 5.

³ RSK at p. 3/8-11, Direct Testimony of W. Robert Jessen [hereinafter "WRJ"] at p. 4/3-4.

⁴ RSK at p. 3/12-13, WRJ at p. 7/15-18.

⁵ RSK p. 3/12-13; p.5/4-9; WRJ at p.7/13-18.

⁶ RSK at p.6/20-23 to p. 7/1-4; 41746 Order, at p. 4.

NIPSCO did not offer an EDR contract.⁷ In June of 2008, NIPSCO provided ArcelorMittal with a draft special contract,⁸ which ArcelorMittal did not accept, and NIPSCO ultimately withdrew the offer in February of 2009.⁹

Since October of 2007, NIPSCO has billed ArcelorMittal for electrical service provided to the Plate Mill under the terms of the Rate 824 contract signed by ArcelorMittal.¹⁰ ArcelorMittal paid the first month's bill in full but under protest, and has subsequently paid only the amount it believes appropriate by applying a rate similar to that received by ArcelorMittal for electrical service at its other Indiana operations.¹¹ During the evidentiary hearing, ArcelorMittal's witness testified that ArcelorMittal's other major facilities in NIPSCO's service territory receive electric service according to terms of Commission-approved special contracts, and that the pricing under those contracts is below the tariff rate.¹²

4. Evidence Presented. *a. ArcelorMittal's Case-in-Chief.* ArcelorMittal provided the testimony of Richard S. Kalmas, together with a number of exhibits and a Request for Administrative Notice as its case-in-chief. Mr. Kalmas, the Manager – Electric and Regular Affairs for ArcelorMittal USA, Inc., provided direct testimony regarding the course of dealings between ArcelorMittal and NIPSCO in attempting to arrange an EDR contract for electrical service to the Plate Mill.¹³

Mr. Kalmas testified that since 2003, when ArcelorMittal acquired the Plate Mill, it has operated the facility's heat annealing line to process steel from other ArcelorMittal facilities.¹⁴ In 2007, however, ArcelorMittal made a decision to expand its operations at the Plate Mill by re-opening the rolling mill line at the facility.¹⁵ In significant part, ArcelorMittal made the decision to re-open the rolling mill portion of the Gary Works Plate Mill rather than locating the facility elsewhere due to an understanding that ArcelorMittal would receive electrical rates from NIPSCO comparable with those at its other facilities located in Indiana.¹⁶ According to Mr. Kalmas, that understanding was later substantiated by representations made by Mr. Jessen that such rates would be made available to the Plate Mill operations.¹⁷

Mr. Kalmas testified that he believed an EDR pursuant to Rider 848.2 was a "natural fit with the expanded Plate Mill operations", and therefore pursued implementing an EDR for those operations.¹⁸ Mr. Kalmas testified that in his opinion the Plate Mill satisfied the eligibility requirements to receive service under Rider 848.2 because the expanded operations added more than two hundred new jobs and exceeded the minimum increase in electrical demand required by

⁷ RSK at p. 16/20-23 to p. 17/1-2.

⁸ *Id.*; Tr. at A-79/3-10; A-82/1-3; Complainant's Exit CX-3.

⁹ See RSK at p. 17/4-23 to p. 18/1-9; Exhibit RSK-21, WRJ at p. 23/11-14.

¹⁰ RSK at p. 10/6-18; p. 16/9-13; WRJ at p. 19/7-9.

¹¹ RSK at p. 16/15-18; Tr. at A-29/13-20.

¹² Tr. at A-27/9-21, A-28/10-15.

¹³ RSK at p.1/7-8; p. 2/ 8-16.

¹⁴ RSK at p. 3/8-11; Tr. at A-21/5-19.

¹⁵ RSK at p. 3/12-13; p.4/3-6.

¹⁶ RSK at p.4/8-15.

¹⁷ RSK at p.6/10-14, 16-18.

¹⁸ RSK at p.7/3-4.

the Rider.¹⁹ Mr. Kalmas also stated that based on documents obtained in discovery, it appeared that NIPSCO fully understood by July of 2007 that the criteria to receive an EDR had been met.²⁰ He stated that throughout the summer of 2007, NIPSCO did not suggest the Plate Mill failed to qualify for service under Rider 848.2.²¹ Finally, Mr. Kalmas testified that on August 15, 2007, at the request of Mr. Jessen, he provided written confirmation that the Plate Mill met the eligibility requirements set forth in Rider 848.2.²²

Mr. Kalmas testified he signed a contract with NIPSCO on behalf of ArcelorMittal for service at the Plate Mill pursuant to Rate 824 on August 24, 2007.²³ He testified, however, that it was not his understanding that by signing the Rate 824 contract, ArcelorMittal was foregoing the application of an EDR discount to service provided at the Plate Mill.²⁴ Rather, he understood the execution of the Rate 824 contract to be a necessary step in securing an EDR discount and in facilitating the installation of meters at the Plate Mill.²⁵ Mr. Kalmas explained that installation of new meters was required because the Plate Mill is located within U. S. Steel's Gary Works, and prior to October of 2007 electrical service to the facility was provided through U. S. Steel's privately owned distribution system without passing through a separate NIPSCO meter.²⁶

Mr. Kalmas testified that on October 31, 2007, prior to receiving the first bill for the expanded Plate Mill operations, Mr. Jessen of NIPSCO informed him for the first time that a decision had been made by NIPSCO not to apply an EDR.²⁷ According to Mr. Kalmas, Exhibit RSK-13, which is an email from Mr. Jessen to others at NIPSCO, accurately records the substance of that conversation.²⁸ That email indicates that the decision not to provide the EDR was made because it was "within [NIPSCO's] discretion and because of all of the issues, etc. that have arisen with Rate Case, FAC, IRP, etc."²⁹ However, Mr. Kalmas stated that a later email from Mr. Jessen suggested that NIPSCO had not yet made a final determination as to whether an EDR discount would be provided to the expanded Plate Mill operation.³⁰

When the expanded Plate Mill operations began in October 2007, NIPSCO billed ArcelorMittal at the full 824 Rate, without applying any EDR discount, which Mr. Kalmas believed to be a considerably higher rate than that promised by NIPSCO.³¹ Mr. Kalmas testified that ArcelorMittal paid the full amount of the October bill under protest, but that ArcelorMittal has paid only the undisputed amount of subsequent bills.³² Mr. Kalmas testified that the undisputed amount is determined by multiplying the average rate charged to ArcelorMittal's Burns Harbor operation by the meter usage at the Plate Mill.³³ Under cross-examination, Mr.

¹⁹ RSK at 7/6-15.

²⁰ RSK at p.7/17-21; RSK-2; RSK-3.

²¹ RSK at p.8/5-9.

²² RSK at p.10/1-4; RSK-8; RSK-9.

²³ RSK at p.10/6-18; RSK-10.

²⁴ RSK at p.10/20-21 to p.11/1.

²⁵ RSK at p.11/1-7.

²⁶ RSK at p. 5/11-17; Tr. at A-14/3-4.

²⁷ RSK at p.12/5-11.

²⁸ RSK at p.12/13-16.

²⁹ RSK-13.

³⁰ See RSK-17.

³¹ RSK at p.12/18-23.

³² RSK at p.13/1-17; RSK at p.16/15-18.

³³ RSK at p.13/20-23.

Kalmas stated that the Burns Harbor rate was “close” to and “in the same range” as the rate that would be applicable to the Plate Mill under the maximum discount allowable under Rider 848.2.³⁴

Mr. Kalmas testified that despite the billing dispute, ArcelorMittal made additional attempts to secure an EDR.³⁵ These attempts included communications between the attorneys for ArcelorMittal and Mr. Mark Kempic of NIPSCO.³⁶ Mr. Kalmas testified that Mr. Kempic’s January 11, 2008 letter constituted the first time that NIPSCO questioned whether the expanded operations met the EDR eligibility requirements.³⁷

Mr. Kalmas testified that in June of 2008, NIPSCO submitted a proposed special contract that included discounted rates.³⁸ Mr. Kalmas explained, however, that this was not an EDR contract, but rather a special contract subject to Commission approval. He further testified that this contract was unacceptable because it went beyond specifying the applicable rate discount, and instead contained provisions reallocating risk to ArcelorMittal, providing NIPSCO with additional remedies, and limiting the term of the contract at NIPSCO’s sole discretion, none of which were discussed previously with NIPSCO.³⁹ Mr. Kalmas stated that this offer was ultimately withdrawn by NIPSCO in February of 2009.⁴⁰

b. NIPSCO’s Evidence. NIPSCO presented direct testimony from its witness W. Robert Jessen, who worked with NIPSCO’s Major Accounts department handling Major Industrial Customers, including ArcelorMittal.⁴¹ Mr. Jessen provided testimony to explain the discussions surrounding the challenges presented by the location of the facilities, pricing of service to the Plate Mill and the availability of a discounted rate for the facility, as well as addressing some of the points raised in Mr. Kalmas’s direct testimony.⁴²

Mr. Jessen testified that NIPSCO was not informed by ArcelorMittal of its intention to expand operations at the Plate Mill until after a newspaper article appeared in *The Times of Northwest Indiana* on May 23, 2007, indicating that the rolling mill line would be re-opened.⁴³ Mr. Jessen testified that he believed the decision to reopen the rolling mill operations had been made prior to May 2007 because the newspaper article indicated that negotiations between ArcelorMittal and a local labor union had been ongoing, and because during a June 13, 2007 walk-thru of the facility he witnessed workers uncrating machinery necessary to operate the rolling mill.⁴⁴ Mr. Jessen agreed during cross-examination that he was supportive of an EDR for the facility after he received “load information” and “found out exactly what was going on.”⁴⁵ He also testified during cross-examination that as of June of 2007, an EDR discount of 50% – the

³⁴ Tr. at A-28/16-19; Tr. at A-35/2-14.

³⁵ RSK at p.14/17-20.

³⁶ *Id.*; RSK-18 and RSK-19.

³⁷ RSK at p.15/12-14.

³⁸ RSK at p.16/20-23 to p.17/1-2.

³⁹ *See* RSK at p.17/4-20.

⁴⁰ RSK at p.18/3-5; RSK-21.

⁴¹ WRJ at p. 1/10-15; p. 2 a/9-13.

⁴² WRJ at p. 2/1-8.

⁴³ WRJ at p. 5/12-20, Exhibit WRJ-3.

⁴⁴ WRJ at p. 8/1-16.

⁴⁵ Tr. at A-48/10-15.

maximum discount allowed under Rider 848.2 – was being discussed for the Plate Mill internally, but that he did not personally have the authority to make that offer.⁴⁶

Mr. Jessen acknowledged that he “committed to ArcelorMittal that NIPSCO would provide the best available rate” but denied making any representation to Mr. Kalmas that the Plate Mill would receive service at a rate comparable to other ArcelorMittal facilities.⁴⁷ Mr. Jessen acknowledged sending an internal email on June 19, 2007 indicating that he “need[ed] to get the rate competitive with the others we have given Mittal.”⁴⁸ He also acknowledged that his January 7, 2008 email indicating that he would “do [his] best to get Mittal a rate competitive with other mills serviced by NIPSCO” accurately reflected his prior discussions with Mr. Kalmas.⁴⁹ Mr. Jessen explained that decisions regarding the provision of discounted rates to customers involve a variety of personnel at NIPSCO, and that there was disagreement within NIPSCO about whether the Plate Mill was eligible for an EDR.⁵⁰ He indicated that while he had “input into the decision making process,” he was not empowered to make a final decision as to whether an EDR should be given to a particular facility.⁵¹

Mr. Jessen testified that he was not initially provided necessary information from ArcelorMittal regarding expanded load at the Plate Mill facility.⁵² Mr. Jessen also testified that ArcelorMittal failed to provide substantial documentation regarding the other criteria necessary to secure an EDR pursuant to Rider 848.2, and that this caused the delay in processing ArcelorMittal’s request for an EDR.⁵³ During cross-examination, Mr. Jessen acknowledged that he had no written documentation indicating that he informed ArcelorMittal that additional information was necessary to determine whether an EDR discount was appropriate between August 15, 2007 (when Mr. Kalmas provided letters to Mr. Jessen regarding the eligibility criteria) and the end of September of 2007 (when the expansion became operational.)⁵⁴ Although Mr. Jessen testified that he learned in a meeting with ArcelorMittal on May 25, 2007 that ArcelorMittal had been operating the annealing line at the Plate Mill since 2003, he agreed that he did not make a written request for information from ArcelorMittal regarding the load at the facility in order to conduct the EDR evaluation between that meeting and January of 2008, but indicated that such a request had been made more than once verbally.⁵⁵ Mr. Jessen confirmed that when the special contract was offered to ArcelorMittal in June of 2008, the understanding was that ArcelorMittal met the eligibility criteria under Rider 848.2.⁵⁶

Mr. Jessen testified that the initial offer of a Rate 824 contract in August of 2007 was based on the “need to have some type of contract in place for the installation of equipment, with the intention of continuing to work through issues involving both ArcelorMittal and U.S.

⁴⁶ Tr. at A52/7-23.

⁴⁷ WRJ at p. 10/13-14, p. 11/6-14, p. 17/7-14; Tr. at A-97/10-24.

⁴⁸ Tr. at A-53/1-11; *See also* Rebuttal Testimony of Richard S. Kalmas, Exhibit RSK-R2 (hereinafter RSK-R).

⁴⁹ Tr. at A-71/5-14.

⁵⁰ WRJ at p. 12/4-9; Tr. at A-56/2-12, A-88/14 through A-89/2.

⁵¹ WRJ at p. 12/10-12.

⁵² WRJ at p. 13/13-17; *see also* WRJ at p. 21/8-16.

⁵³ *See* WRJ at p. 14/4-17 and p. 21/8-16.

⁵⁴ Tr. A-62 to A-63.

⁵⁵ WRJ at p. 6/1-5; Tr. at A-72/4 through A-73/4.

⁵⁶ Tr. A-81/21-25.

Steel.”⁵⁷ He also testified that he never represented that the Rate 824 contract was a prerequisite to an EDR discount, but did acknowledge that after execution of that contract, he continued to “communicate to ArcelorMittal that I would work on getting the best possible rate for the Plate Mill, including the possibility of an EDR.”⁵⁸ Mr. Jessen explained during the evidentiary hearing that part of his role was to serve as an advocate for the customer within NIPSCO, and that in that role he continued to support availability of discounted rates for ArcelorMittal.⁵⁹

Mr. Jessen testified that in his October 31, 2007 conversation with Mr. Kalmas, during which he indicated that NIPSCO would not apply an EDR to the electrical service provided to the Plate Mill, he meant only that a “standard or traditional EDR” would not be offered, and left open the possibility of a discount provided through another means that could account for NIPSCO’s concerns regarding the use of U.S. Steel’s internal distribution system.⁶⁰ Mr. Jessen explained that the special contract offered to ArcelorMittal in June of 2008 was done in recognition of the pending rate case, as well as the operational challenges related to the quality of service, including NIPSCO’s lack of control over power quality and the inability to shut down power to the Plate Mill without turning off power to the U.S. Steel Gary Works as a whole.⁶¹ Mr. Jessen indicated that the terms of the special contract, particularly those regarding indemnification of NIPSCO and ArcelorMittal’s assumption of risk related to power quality, were necessary because those certain factors were out of NIPSCO’s control.⁶²

Mr. Jessen updated his prefiled testimony at the evidentiary hearing to clarify that as of that date, the difference between what NIPSCO had billed ArcelorMittal for service to the Plate Mill and what ArcelorMittal had actually paid amounted to roughly \$3.6 million.⁶³

c. ArcelorMittal’s Rebuttal Testimony. On rebuttal, ArcelorMittal presented the testimony of Mr. Kalmas together with additional evidence. Mr. Kalmas addressed what he described as “inaccurate statements and suggestive comments” made by Mr. Jessen in his direct testimony.⁶⁴

Mr. Kalmas first rejected Mr. Jessen’s contention that no representations had been made that NIPSCO would provide electrical service at a rate comparable to those at other ArcelorMittal facilities in Indiana.⁶⁵ In support of this position, Mr. Kalmas pointed to several of the exhibits introduced through his direct testimony, and also provided a May 25, 2007 email in which Mr. Jessen indicated that he and another individual at NIPSCO were supportive of offering an EDR from the very beginning of the discussions.⁶⁶ Mr. Kalmas also introduced Exhibit RSK-R2, an email which Mr. Jessen admitted sending indicating his “need to get the rate competitive with the others we have given Mittal.”⁶⁷

⁵⁷ WRJ at p. 16/18-21.

⁵⁸ WRJ at p. 17/7-14; *see also* Tr. at A-86/10-15.

⁵⁹ Tr. at A-50/8-9, A-53/4-6, A-86/19-21, A-98-16 through A-99/3, A-103/23 through A-104/1.

⁶⁰ *See* WRJ at p. 20/16-21 to p. 21/1-7.

⁶¹ WRJ at p. 7/1-12, and p. 21/17 to p.22/15.

⁶² *See* WRJ at p.22/5-15; *see also* Tr. at A-96/13-22.

⁶³ WRJ at p. 19/17, Tr. A-42/22-25.

⁶⁴ RSK-R at p.1 /19-21.

⁶⁵ *See* RSK-R at pp. 3-5.

⁶⁶ *See* RSK-R1; Tr. A-48/5-15.

⁶⁷ *See* RSK-R at p.4 /7-14; Tr. at A-53/1-11.

Mr. Kalmas also testified that throughout the spring and summer of 2007, leading to the expansion operations at the Plate Mill, he did not recall NIPSCO questioning whether the project would be eligible for an EDR.⁶⁸ Mr. Kalmas stated that during the entire course of dealings with NIPSCO from the time the EDR was first discussed until it was withdrawn in October 2007, there was never any real question as to whether the Plate Mill was eligible for an EDR discount. Mr. Kalmas referred to exhibits submitted with his direct testimony, including a March 19, 2008 email from Mr. Jessen stating that ArcelorMittal had “complied with the tariff and provided all the required information necessary.”⁶⁹

Mr. Kalmas also took issue with any suggestion that ArcelorMittal had delayed in producing necessary information to NIPSCO, and stated that he could not “recall a single instance during that time where NIPSCO requested information relative to the application of an EDR that we did not provide promptly.”⁷⁰

Mr. Kalmas’ rebuttal testimony also reiterated that in his view the terms of the special contract offered by NIPSCO in June of 2008 were not contemplated by Rate 824 or Rider 848.2. In particular, Mr. Kalmas suggested that the term of the contract, ending in NIPSCO’s discretion on 60-days’ notice, was “contrary to the provisions of the EDR rider.”⁷¹ In support of that view, Mr. Kalmas cited the language of Rider 848.2, which provides that in the event of a rate increase “existing customers and their associated existing electric rates will not be affected by the awarding of any contracts under this rider, as potential effects associated with the awarding of any Contract will be borne in that case by the Company.”⁷²

Mr. Kalmas also testified that it does not make sense for NIPSCO to insist upon installing new, dedicated lines to serve the Plate Mill directly. Mr. Kalmas stated that engineering documents produced in discovery by NIPSCO indicate that the cost of extending such facilities would total approximately \$2.1 million.⁷³ Those same documents indicate that NIPSCO can “continue to serve the Mittal Plate as presently configured without any additional expenditure.”⁷⁴

5. Commission Discussion and Findings. The issue presented to the Commission in this proceeding is whether NIPSCO acted in a manner inconsistent with its approved tariff by declining to offer ArcelorMittal service at the Plate Mill under its economic development rider, Rider 848.2. ArcelorMittal urges the Commission to conclude that both the annealing line and the rolling line at the Plate Mill should have been offered an EDR contract.⁷⁵ The threshold question for the Commission’s consideration in this proceeding is therefore whether any expansion of service at either production line at the Plate Mill meets the availability criteria contained in the tariff and is thereby consistent with the encouragement of economic development. We conclude it does not.

⁶⁸ RSK-R at p.6/7-9.

⁶⁹ RSK-R at p.6/18-21; RSK-20.

⁷⁰ RSK-R at p.7/19-20.

⁷¹ RSK-R at p.9/10-11.

⁷² RSK-R at p.10/2-9.

⁷³ RSK-R3.

⁷⁴ *Id.*

⁷⁵ *Complaint* ¶22, Tr. at A-24/20 through A-25/3.

Our analysis begins with the language of the tariff.

a. Qualification under the Requirements of Rider 848.2 for the Annealing Line. Rider 848.2 was approved by the Commission in Cause No. 42348 on March 26, 2003. Rider 848.2 is available to customers receiving electric service under rates 824, 826, 832, and 833, and is intended as a means to encourage economic development within NIPSCO's service territory:

This Economic Development Rider is available to Industrial and Commercial Customers for new or increased service requirements that result in increased employment opportunities, which are new to the Company's electric service territory and whose plants are located adjacent to existing electric facilities having capacity sufficient to meet the Customer's requirements. Applicants must demonstrate that, absent the availability of this Rider, this new service requirement and the resultant employment opportunities would be located outside of the Company's electric service territory. Increased service requirements that displace or duplicate existing load in the Company's service territory or are brought about by the shutdown of cogeneration facilities will not qualify under this Rider.

NIPSCO Electric Tariff, First Revised Sheet 18.3.

Thus, to be eligible for an EDR, the load in question must entail (1) "new or increased service requirements" that (2) result in "increased employment opportunities" that are (3) "new to the Company's electric service territory." Finally, the eligibility determination must be based on a demonstration that (4) "absent the availability of this Rider, this new service requirement and the resultant employment opportunities would be located outside of the Company's electric service territory." The tariff thus anticipates not only incremental load and additional jobs, but that the incremental load would be brought to NIPSCO's territory because of the availability of the EDR. This is consistent with the Commission's findings in NIPSCO's Rider 848 proceedings over the years. *See, Petition of NIPSCO for Approval of Rider 848 Economic Development Rider*, Cause No. 40296 (Ind. Util. Regulatory Comm'n Jan. 24, 1996).

In evaluating the eligibility of a specific project and the discount offered, the tariff specifies minimum criteria to be applied:

ELIGIBILITY THRESHOLDS

Unless otherwise noted, the criteria listed as follows will be used in determining the eligibility for the awarding of incentives under the terms and conditions of this Rider. Flexibility in the use of these criteria is at the sole discretion of the Company.

1. Full-time equivalent job creation per project: minimum 20.
2. New electrical demand: minimum 100 kW.
3. Customer documentation/certification to be provided noting "Customer is considering other specific locations as alternate locations for their planned new facility or expansion which affects (1) and (2) above."

In the event of any rate increase, existing customers and their associated existing

electric rates will not be affected by the awarding of any contract under this rider, as potential effects associated with the awarding of any Contract will be borne in that case by the Company.

NIPSCO Electric Tariff, First Revised Sheet 18.3B.

The customer certification requires an affirmative statement in the present tense that the availability of an EDR is pivotal in the customer's decision to locate the load in NIPSCO's territory, which is consistent with the encouragement of economic development that is the purpose of the Rider, acknowledged by ArcelorMittal.⁷⁶ Once a determination has been made that the load is eligible for service under these tariff provisions, a discounted rate *may* be offered at NIPSCO's discretion to the customer for the incremental load in question pursuant to the rates in the tariff.⁷⁷

We now examine whether the annealing line qualifies for the EDR under the relevant tariff provisions. In 2003, ArcelorMittal acquired the Steel Mill in a "swap" transaction with U.S. Steel.⁷⁸ At the time of the swap, all of the facilities at the Plate Mill had been shut down, the rolling line equipment removed to storage, and power consumption reduced to a minimal amount necessary to keep the facilities safe.⁷⁹ At some point after the swap, ArcelorMittal reactivated the annealing line at the Plate Mill and began treating steel brought in from other ArcelorMittal facilities.⁸⁰ Mr. Jessen testified that as the NIPSCO account representative responsible for the Plate Mill, the reactivation of the annealing line was not disclosed by ArcelorMittal until May of 2007.⁸¹ NIPSCO was concerned about the extent to which the annealing line facilities could be considered new load for purposes of EDR consideration,⁸² and even in his role as customer advocate, Mr. Jessen sought information about the annealing line load from which to determine a base usage from which any incremental load from the rolling line could be calculated.⁸³ Mr. Kalmas testified in rebuttal that "[t]he full satisfaction of the eligibility criteria was clearly understood by NIPSCO from the earliest discussions through the time the operation commenced."⁸⁴ We disagree.

The record indicates that those "earliest discussions" took place in late May, 2007. NIPSCO asserts that the meeting was four years after the reactivation of the annealing line.⁸⁵ While we find no evidence that the annealing line was reactivated in 2003, ArcelorMittal had already made a decision to "reopen a 160-inch plate mill", as announced in the *Times of*

⁷⁶ See Tr. at A-24/1-14.

⁷⁷ "The determination of monthly discounts to be applied will be at the sole discretion of [NIPSCO]..." Ex. WRJ-4, Rate 848.2 tariff, p.2. "The Company shall have the final determination of all incentives based on the determination of issues deemed most beneficial to all stakeholders." *Id.* at 3.

⁷⁸ RSK at p. 4/3-6, WRJ at 3/17-21.

⁷⁹ WRJ at p. 4/2-19, Tr. at A21/20-25.

⁸⁰ RSK at p. 3/8-12, Tr. at A-21/5-25.

⁸¹ WRJ at p. 6/6-9.

⁸² Tr. at A-56/2-12.

⁸³ WRJ at p. 21/12-15, Tr. at A-50/19-25, A-61/25 through A-62/6.

⁸⁴ RSK-R at p. 2/5-7 (emphasis added).

⁸⁵ See Tr. at A-25/18-19 ["I believe all of the details and the actual face-to-face meeting occurred on May 25, 2007"].

Northwest Indiana, on May 23, 2007.⁸⁶ The record reflects that the parties first met to discuss details of the reactivation on May 25, 2007.

Based on those facts, a threshold requirement for eligibility for new or expanded load under Rider 848.2 was not met, because the decision to reactivate the annealing line had been made before any consideration of the availability of the EDR. Because that deficiency is determinative of eligibility, we need not consider other eligibility criteria under the tariff, nor the other issues raised by the Parties in relation to the annealing line. Because ArcelorMittal announced its intention to restart the annealing line prior to any meeting with NIPSCO on the EDR and because we have no evidence beyond a bare assertion that ArcelorMittal intended this production to be located elsewhere, we conclude that ArcelorMittal failed to meet a threshold eligibility requirement under the tariff. Therefore, the decision by NIPSCO not to offer a contract under Rider 848.2 for the annealing line was appropriate and consistent with the tariff.

b. Qualification under the Requirements of Rider 848.2 for the Rolling Line. We now turn our attention to the rolling line at the Plate Mill. The operational components of the rolling line had been disassembled and removed prior to the acquisition of the Plate Mill by ArcelorMittal, and operation was not resumed until October of 2007. The reactivated load at the rolling mill is thus “new” within the meaning of the tariff, and is distinguishable from the annealing line because the load was not operational at the time an EDR dialogue between Mr. Jessen and Mr. Kalmas was initiated in May of 2007.⁸⁷ There is no dispute that “increased employment opportunities” in the form of about 200 new jobs were associated with the reinstallation and reactivation of the rolling line at the Plate Mill, and that the new jobs would be located in NIPSCO’s territory.⁸⁸ The focus of our inquiry with respect to the rolling mill is therefore whether there was a demonstration that “absent the availability of this Rider, this new service requirement and the resultant employment opportunities would be located outside of the Company’s electric service territory[]” as required by the tariff.

Evidence indicates that the decision to reinstall and reactivate the rolling mill had been made by ArcelorMittal before it discussed an EDR with NIPSCO. The May 23, 2007 front page article from *The Times of Northwest Indiana* stated that negotiations between ArcelorMittal and United Steelworker’s Union Local 6787 regarding staffing for the reopened plant had been underway for some time.⁸⁹ Two days later, when ArcelorMittal revealed to NIPSCO its decision to re-install the rolling equipment that had previously been removed by U.S. Steel, it had already begun engaging contractors to reinstall the rolling mill equipment.⁹⁰ By June 13, 2007, workers were actively engaged in uncrating rolling mill equipment for re-installation at the Plate Mill.⁹¹ There is no evidence in the record that as of that date there had been any communication from NIPSCO to ArcelorMittal about the availability of an EDR or what discount might be available at the Plate Mill.

⁸⁶ Exhibit WRJ-3.

⁸⁷ Tr. at A-47/19-25, A-50/5-9.

⁸⁸ RSK at p. 3/14-15, Tr. at A-48/22 through A-49/3.

⁸⁹ Exhibit WRJ-3, WRJ at p. 5/14-16.

⁹⁰ WRJ at p. 7/1518, p. 8/3-10; Tr. at A-25/13-19.

⁹¹ WRJ at p. 8/13-15, Tr. at A-90/7-18.

While NIPSCO was evaluating pricing options for the Plate Mill (including Rider 848.2), we find that the decision to reactivate the rolling mill was in no way premised on the availability of any specific pricing. The letter provided by ArcelorMittal two months later represented only that “[t]he start up of this operation in Northwest Indiana was based upon a review of a large number of economic factors. Our corporation reviewed alternative sites over a number of months and the final decision was the Gary, Indiana location.”⁹²

However, there is no indication in this letter (or the balance of the record) of any statement that the availability of the Rider was among the economic factors considered, or that the load would have been located outside NIPSCO’s service territory absent the availability of an EDR discount. In the absence of that affirmative assertion, ArcelorMittal did not satisfy the criteria for the EDR rate as set forth in the Commission-approved tariff. We accordingly find that NIPSCO’s determination not to offer an EDR contract to ArcelorMittal for the rolling line portion of the Plate Mill was reasonable and consistent with the Rider 848.2 tariff.

c. Whether ArcelorMittal is entitled to the EDR Based on the “Course of Dealings” Between Messrs. Kalmas and Jessen. We briefly address ArcelorMittal’s argument that the issue of EDR eligibility should be evaluated upon whether “based on the course of dealings” between Mr. Kalmas and Mr. Jessen such dealings were sufficient to create an obligation on the part of NIPSCO. Given the restrictions in NIPSCO’s tariff language, and the sophistication of the parties, we decline to accept an argument that substantial energy transactions of this type are closed based on informal discussions. Based on the fact that ArcelorMittal failed to meet the threshold criteria under the EDR, we decline to find in their favor here based on a “course of dealings.”⁹³

Based on the evidence presented, the Commission concludes that NIPSCO acted in a manner consistent with its tariff by not offering ArcelorMittal an EDR contract under Rider 848.2 for the Plate Mill operations. ArcelorMittal should remit the amount billed by NIPSCO for electric service at the Plate Mill under the executed Rate 824 contract beginning with October 2007 consumption within thirty (30) days of the effective date of this Order.

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

1. The Complaint by ArcelorMittal Indiana Harbor LLC alleging unreasonable billing practices and misapplication of NIPSCO’s tariff provisions is hereby denied consistent with the findings above.

2. The disputed billings relating to ArcelorMittal’s usage at the Plate Mill for consumption from October 2007 shall be paid by ArcelorMittal within thirty (30) days of the

⁹² Exhibit RSK-9.

⁹³ The Commission would note that NIPSCO’s decision to retract the EDR offering, well into the process of negotiations, is unsettling. If NIPSCO never meant to extend the EDR to ArcelorMittal, it would have been a far better practice to make that clear at the outset. While we cannot find that NIPSCO violated its own tariff, NIPSCO needs to make its intentions known in the interest of fair dealing.

effective date of this Order. ArcelorMittal is directed to make an informational filing in this Cause documenting such payment.

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

HARDY, ATTERHOLT, LANDIS, MAYS AND ZIEGNER CONCUR:

APPROVED: MAR 31 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**