

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE COMPLAINT OF)
ARCELORMITTAL BURNS HARBOR LLC,)
ARCELORMITTAL INDIANA HARBOR LLC,)
ARCELORMITTAL USA INC., I/N TEK LP,)
AND I/N KOTE LP AGAINST NORTHERN)
INDIANA PUBLIC SERVICE COMPANY FOR)
MISAPPLICATION OF TARIFF PROVISIONS)
AND VIOLATION OF FILED RATE)
DOCTRINE IN CONNECTION WITH)
SERVICE UNDER RATE 328FT)

CAUSE NO. 43657

APPROVED: OCT 27 2010

RESPONDENT: NORTHERN INDIANA)
PUBLIC SERVICE COMPANY)

BY THE COMMISSION

David E. Ziegner, Commissioner
Angela Rapp Weber, Administrative Law Judge

On March 17, 2009, Complainants ArcelorMittal Burns Harbor LLC, ArcelorMittal Indiana Harbor LLC, ArcelorMittal USA Inc., I/N Tek LP and I/N Kote LP (collectively, "ArcelorMittal") filed a Complaint with the Indiana Utility Regulatory Commission ("Commission"). The Complaint alleged that the Respondent, Northern Indiana Public Service Company ("NIPSCO"), has acted contrary to Indiana law by misapplying tariff provisions and otherwise imposing conditions, rules and regulations not on file with the Commission. In addition, ArcelorMittal alleged that NIPSCO has acted unreasonably by denying customers natural gas service under its Rider 328FT who were otherwise eligible to receive such service as of the effective date of the Rider. At issue are four facilities owned by ArcelorMittal: Indiana Harbor West, Indiana Harbor East, Burns Harbor and I/N Tek-I/N-Kote at New Carlisle, Indiana ("New Carlisle").

Specifically, ArcelorMittal alleged that the Commission's May 12, 1999 Order in Cause No. 39854 approving the Settlement Agreement, which established Rider 328FT, required NIPSCO to file the tariff sheets. NIPSCO did not file the tariff sheets until April 2, 2008, which, ArcelorMittal asserted, is the effective date of the tariff. On that date, the four facilities owned by ArcelorMittal and at issue in this Cause were, pursuant to the terms of the Rider, eligible to receive service under Rider 328FT, but NIPSCO has refused to provide such service to Burns Harbor and Indiana Harbor West.

In addition, the Complaint stated that the four facilities were also eligible to receive service under Rider 328FT as of the date the underlying Settlement Agreement was approved by the Commission in 1999. Therefore, the Complaint alleged that NIPSCO has improperly refused to provide service to Burns Harbor and Indiana Harbor West under Rider 328FT. New Carlisle and Indiana Harbor East are eligible for service under Rider 328FT. Finally, ArcelorMittal alleged that NIPSCO acted unreasonably in unilaterally assigning maximum daily quantities ("MDQs") to customers seeking to obtain service under Rider 328FT and by threatening to, or actually, reducing MDQs to zero if a customer objected to the assigned MDQ.

On April 3, 2009, NIPSCO filed its Answer generally admitting that it has refused to provide service under Rider 328FT to Burns Harbor and Indiana Harbor West. However, NIPSCO contended that it has not acted contrary to the terms of its tariffs and was otherwise justified in refusing service. NIPSCO also asserted that Rider 328FT became effective on June 1, 1999 by the terms of the Settlement Agreement approved by the Commission's May 12, 1999 Order issued in Cause No. 39854. According to NIPSCO, since that time, previous owners of the Indiana Harbor West and Burns Harbor facilities have gone through bankruptcy proceedings, which resulted in those facilities becoming ineligible for service under Rider 328FT. With respect to the Indiana Harbor East and New Carlisle, NIPSCO stated that ArcelorMittal has refused to execute an addendum setting forth an MDQ as required by Rider 328FT.

On April 22, 2009, ArcelorMittal filed a Response with respect to NIPSCO's request for affirmative relief contained within its Answer. ArcelorMittal denied any implication that the facilities at issue were ineligible to receive service under Rider 328FT. ArcelorMittal further asserted that it has acted reasonably in resisting NIPSCO's efforts to impose MDQs on a unilateral basis. Also on April 22, 2009, ArcelorMittal filed a Motion to Consolidate this Cause with Cause No. 43656. NIPSCO opposed consolidation, and by Docket Entry dated June 10, 2009, the Presiding Officers denied ArcelorMittal's Motion to Consolidate.

On June 26, 2009, ArcelorMittal filed the direct testimony of its witness Paul J. Ciesielski, with attached exhibits, and a Request for Administrative Notice of the Commission's May 12, 1999 Order in Cause No. 39854, the Settlement Agreement approved by the May 12, 1999 Order, a copy of Rider 328FT attached to the Settlement Agreement, a letter dated April 1, 2008 and a copy of Rider 328FT file marked on April 2, 2008. NIPSCO then filed the direct testimony of its witness W. Robert Jessen and accompanying exhibits on August 28, 2009. On that same date the Office of Utility Consumer Counselor ("OUCC") filed a notice of its intent not to file testimony in this Cause. ArcelorMittal filed the rebuttal testimony of Mr. Ciesielski together with supporting exhibits on October 2, 2009.

Pursuant to notice given and published as required by law, the Commission held an Evidentiary Hearing in this Cause on January 13, 2010 at 9:30 a.m. in Room 222, 101 W. Washington Street, Indianapolis, Indiana. At the Hearing, the pre-filed testimony and exhibits of ArcelorMittal and NIPSCO were offered and admitted into evidence, and the witnesses for both parties were made available for cross-examination and questioning by the Commission. The Presiding Officers also granted ArcelorMittal's Request for Administrative Notice. The OUCC appeared at the Hearing, but no member of the public attended the Hearing or attempted to participate.

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 facilities throughout Northern Indiana, including those facilities at issue in this Cause. NIPSCO is a public utility incorporated under the laws of the State of Indiana, which provides natural gas service to customers in Indiana, including gas transportation service to the ArcelorMittal facilities involved in this proceeding. Pursuant to Indiana Code §§ 8-1-2-34.5, 38, 39, 44, 58, 68, 69, 103, 107 and 115, the Commission has jurisdiction over the parties and the subject matter of this Cause.

2. **Relief Requested.** ArcelorMittal requested that the Commission direct NIPSCO to provide service under Rider 328FT as of April 2, 2008 to all four ArcelorMittal facilities at issue and to recalculate bills as needed and issue refunds for any overcharges. ArcelorMittal also asked that the Commission direct NIPSCO to cease assigning MDQs on a unilateral basis and otherwise cease its unreasonable application of Rider 328FT. NIPSCO requested the Commission to determine that certain ArcelorMittal's facilities are ineligible to receive service under Rider 328FT and further determine that the remaining ArcelorMittal facilities remain ineligible until they execute a contract with NIPSCO for an assigned MDQ. NIPSCO also requested this Commission determine that its assignment of MDQ values is reasonable.

3. **Background.** The dispute between the parties in the Cause arises from a proceeding previously before the Commission in Cause No. 39854, which was concluded with an Order issued on May 12, 1999. The May 12, 1999 Order approved a Settlement Agreement between NIPSCO and a number of industrial intervenors that resolved lengthy litigation between the parties over, among other issues, the question of whether service under NIPSCO's Rate 328 was firm or interruptible. The Settlement Agreement contemplated revisions to several of NIPSCO's rates, including Rate 328, and the introduction of Rider 328FT. Under the terms of the Settlement Agreement, customers who were eligible for service under Rate 328 as of the effective date of Rider 328FT were eligible for service under that Rider, and were eligible to receive firm transportation service at the same price they had been receiving service under Rate 328. Rate 328 then became an interruptible service, and customers not eligible for service under Rider 328FT would thereafter be eligible for interruptible transportation under Rate 328.

The ArcelorMittal facilities involved in this proceeding were previously owned by various other steel producers. Burns Harbor was first owned by Bethlehem Steel, which was purchased by the International Steel Group ("ISG") in bankruptcy. LTV owned Indiana Harbor West before being purchased by ISG in bankruptcy. Ispat Inland owned Indiana Harbor East and I/N Tek I/N Kote owned New Carlisle. Each facility was ultimately acquired by ArcelorMittal in various transactions. At the time of the Commission's Order in Cause No. 39854, each of the facilities was eligible to receive service under Rate 328. In October 2007, NIPSCO requested that ArcelorMittal execute addenda to the Rate 328 contracts for the Indiana Harbor East and New Carlisle facilities with MDQs assigned by NIPSCO. NIPSCO further took the position that Indiana Harbor West and Burns Harbor were ineligible to receive service under 328FT.

During the course of subsequent negotiations, ArcelorMittal discovered that NIPSCO had failed to file the tariff sheets as directed in the May 12, 1999 Order in Cause No. 39854. After ArcelorMittal raised that issue, NIPSCO made the filing with the Commission on April 2, 2008. NIPSCO notified ArcelorMittal that the assignment of MDQ levels was not negotiable and explained that MDQs would be set at zero for ArcelorMittal's facilities if the MDQs established by NIPSCO were not accepted. The impasse led to the initiation of this Cause.

4. **ArcelorMittal's Evidence.** ArcelorMittal submitted the testimony of Mr. Paul J. Ciesielski, Sourcing Manager – Natural Gas & Liquid Fuels for ArcelorMittal USA. Mr. Ciesielski testified concerning the eligibility of the ArcelorMittal facilities to receive service under Rider 328FT. He also testified regarding NIPSCO's assignment of MDQs to ArcelorMittal facilities.

Mr. Ciesielski explained that there are four facilities at issue in the proceeding, all of which receive large volume gas transportation service from NIPSCO. These facilities are Burns Harbor, owned and operated by ArcelorMittal Burns Harbor, LLC; Indiana Harbor West, owned and operated by ArcelorMittal Indiana Harbor, LLC; Indiana Harbor East, owned and operated by ArcelorMittal USA, Inc.; and the I/N Tek LP and I/N Kote LP facilities in New Carlisle, Indiana. According to Mr. Ciesielski, ArcelorMittal acquired the Burns Harbor and Indiana Harbor West facilities from affiliates of ISG, which had, in turn, acquired the facilities from Bethlehem Steel and LTV Steel in bankruptcy proceedings. ArcelorMittal acquired the Indiana Harbor East facility from Ispat Inland, as well as Ispat's interest in the I/N Tek and I/N Kote operation. Mr. Ciesielski explained that except for investments made by ArcelorMittal to improve and upgrade these facilities, they are the same operations being utilized by ArcelorMittal in essentially the same manner as they were utilized by their previous owners.

Mr. Ciesielski also discussed the Settlement Agreement reached in Cause No. 39854. He opined that since all four facilities at issue in this Cause were eligible for Rate 328 as of the effective date of the Settlement Agreement in 1999, they are entitled to received service under Rider 328FT. He assumed, though, that NIPSCO filed Rider 328FT with the Commission in 1999.

Mr. Ciesielski stated Rider 328FT requires that a contractual addendum be executed between NIPSCO and the customer establishing an MDQ. He explained that the MDQ sets the volume of gas up to which NIPSCO is required to provide firm service under Rider 328FT. Gas volumes provided above the MDQ are done so on an interruptible basis. Mr. Ciesielski testified that in early October 2007 he received communications from Mr. Thomas Payne from NIPSCO asking that he sign addenda for the New Carlisle and Indiana Harbor East facilities with an MDQ determined by NIPSCO without negotiation. Mr. Ciesielski also testified that around the same time he received another letter from Mr. Payne requesting that he execute a contract for Rate 328, or interruptible transportation service, for the Indiana Harbor West facility.

Mr. Ciesielski testified that over the next several months he continued discussing the matter with NIPSCO in an attempt to negotiate different MDQs and to establish that the Burns Harbor and Indiana Harbor West facilities were eligible for service under Rider 328FT. Despite these efforts, NIPSCO insisted it would set the MDQ level for each facility without negotiation, and if those levels were not agreed to by ArcelorMittal, the MDQ would be set at zero. Moreover, Mr. Ciesielski testified that in November 2007, he received additional letters from Mr. Payne, including one which provided for an MDQ at the Indiana Harbor West facility, but which enclosed a contract for interruptible service under Rate 328 rather than firm service under Rider 328FT. Mr. Ciesielski testified that in February 2008 he received a letter from NIPSCO stating the MDQ levels are not negotiable.

Mr. Ciesielski further testified ArcelorMittal sought to negotiate a higher MDQ than that set by NIPSCO for the New Carlisle facilities because ArcelorMittal was planning to expand its operations to add another finishing line. Therefore, New Carlisle needed a higher MDQ to secure firm service for the expanded operations. Mr. Ciesielski stated despite the economic benefits the expanded operations would bring to Northern Indiana, ArcelorMittal put the project on indefinite hold, in part because of NIPSCO's refusal to negotiate a higher MDQ.

Mr. Ciesielski also explained ArcelorMittal's concerns with NIPSCO's position regarding the setting of MDQs and the provision of firm transportation. Specifically, Mr. Ciesielski testified reliable, firm service was needed because interruptions in gas service could cause serious losses and

damage ArcelorMittal's operations. Mr. Ciesielski further testified that the Indiana Harbor East and West facilities were on a portion of NIPSCO's distribution system known as the 483 system, which serves several other large industrial operations. He explained as an upstream user on that system, ArcelorMittal has concerns regarding diminishing pressure and the greater risk of interruption in the absence of firm service rights. He expressed these concerns to NIPSCO and requested that NIPSCO provide ArcelorMittal with a system load analysis in February 2008 in order to evaluate NIPSCO's assurance of its capability to provide reliable service, but NIPSCO never provided that analysis.

Mr. Ciesielski also testified that during the course of discussions with NIPSCO regarding the provision of service to ArcelorMittal's facilities, he was unable to find a fully endorsed copy of Rider 328FT and discovered the Rider was not included in the published gas tariffs maintained by the Commission. Mr. Ciesielski stated he notified NIPSCO of the non-filing of Rider 328FT on March 12, 2008 and requested a file stamped copy, which he never received. Mr. Ciesielski testified that ArcelorMittal did not receive notice that NIPSCO filed the tariff on April 2, 2008 until after the fact. Mr. Ciesielski testified when NIPSCO finally filed Rider 328FT in April 2008, all of the ArcelorMittal facilities at issue in this proceeding were receiving service from NIPSCO under Rate 328 or Rider 328FT with zero MDQs assigned.

Mr. Ciesielski also explained the facilities at issue are grandfathered under the 1999 Settlement Agreement reached in Cause No. 39854. In Mr. Ciesielski's opinion, NIPSCO acted unreasonably during its discussions with ArcelorMittal because NIPSCO had, effectively, sought to place ArcelorMittal in a position in which it had to choose between interruptible service or firm service under more expensive rate schedule. From his perspective, this constituted a refusal to apply the terms of a longstanding settlement reasonably to the very facilities that were the subject of the Settlement Agreement.

5. NIPSCO's Case-in-Chief. NIPSCO presented the pre-filed testimony of W. Robert Jessen and several exhibits as its case-in-chief. Mr. Jessen testified that until October 26, 2009 when he retired from NIPSCO, he served as Senior Accounts Manager. Mr. Jessen stated the purpose of his testimony is to provide background information regarding the establishment of Rider 328FT, the historical information about the facilities at issue in this proceeding and the services provided to the facilities, as well as to address certain points raised by Mr. Ciesielski.

Mr. Jessen stated Rate 328 dates to a period prior to the issuance of FERC Order 636, which mandated unbundling of natural gas pipeline sales service from transportation service. Following the issuance of FERC Order 636, controversy arose between NIPSCO and some of its customers relating to the treatment of Rate 328, which led to the initiation of Cause No. 39854 and ultimately to the Settlement Agreement that created Rider 328FT. Mr. Jessen stated under that Settlement Agreement, customers who were eligible to receive service under Rate 328 as of June 1, 1999 could have their natural gas volumes treated as firm under Rider 328FT. Customers who became eligible for service under Rate 328 after June 1, 1999 could only receive interruptible transportation service.

Mr. Jessen went on to state ArcelorMittal was not a customer on June 1, 1999 because it did not acquire ownership of the facilities at issue here until after that date. Mr. Jessen explained each of the facilities at issue were owned by a different entity as the issuance of the May 12, 1999 Order. On cross-examination, however, Mr. Jessen stated each of the facilities were eligible for service under Rider 328FT on June 1, 1999, and the facilities were eligible for service under Rate 328 as of April 2, 2008 when NIPSCO filed the tariff sheets with the Commission. (Tr. at A80; A83-84).

Mr. Jessen then described the character of the four facilities at issue, as well as the history of their ownership. He stated Burns Harbor is provided interruptible service under Rate 328 because when ISG purchased the facility from Bethlehem Steel in 2002 in bankruptcy proceedings, ISG did not affirm the existing Rate 328 contract. Rather, ISG executed a contract for Rate 328 on October 14, 2003. Mr. Jessen opined that because ISG did not affirm the contract, this extinguished Burns Harbor's eligibility to be served under Rider 328FT.

With respect to the New Carlisle facility, Mr. Jessen explained although the facility was being served under a Rate 328 contract that predated June 1, 1999, ArcelorMittal refused to sign an addendum containing a preset MDQ based on the highest daily usage in the previous ten-year period. He stated ArcelorMittal refused to sign the contract because it desired a higher MDQ in order to accommodate additional capacity needed for a planned expansion. Mr. Jessen said this request was problematic. In order for NIPSCO to apply Rider 328FT in a non-discriminatory manner, it would have to agree to higher MDQs for all of its customers. Mr. Jessen testified that doing so would cause operational problems from a system and capacity planning perspective.

Mr. Jessen testified the Indiana Harbor East facility is served under a Rate 328 contract, which predates the Settlement Agreement reached in Cause No. 39854. According to Mr. Jessen, ArcelorMittal previously agreed to an MDQ but did not sign an addendum. He said ArcelorMittal later agreed to sign the addendum but only under other conditions that were unrelated to service to Indiana Harbor East and unacceptable to NIPSCO. The conditions were: (1) the provision of firm service under Rider 328FT to all of ArcelorMittal's facilities, (2) the assignment of a higher MDQ for New Carlisle and (3) the placement of all accounts in ArcelorMittal's name without a credit check and deposit.

With respect to the Indiana Harbor West facility, Mr. Jessen stated the previous Rate 328 contract had been terminated when it was rejected by LTV during bankruptcy proceedings in 2003. Mr. Jessen acknowledged the existence of a letter agreement dated October 9, 2000 between LTV and NIPSCO, established an MDQ that was subsequently incorporated into an Instrument of Assignment and Assumption affirmed by the Bankruptcy Court in 2005. Mr. Jessen testified he did not know why the letter agreement was incorporated into that document two years after the Rate 328 contract had been terminated. Mr. Jessen opined a Rider 328FT requires service under Rate 328 contract. Because the underlying Rate 328 contract had been terminated, no Rate 328 contract exists. A letter agreement establishing an MDQ is not the same as an executed Rate 328 contract and Rider 328FT addendum.

In summarizing NIPSCO's position concerning the facilities' eligibility for service under Rider 328FT, Mr. Jessen stated Burns Harbor and Indiana Harbor West are ineligible for service under Rider 328FT because the underlying Rate 328 contracts were terminated in bankruptcy. Further, New Carlisle and Indiana Harbor East remained eligible for service under Rider 328FT upon execution of addenda with MDQs set by NIPSCO. Mr. Jessen also testified the facilities remain eligible for firm service under Rate 344, which would result in a cost that is higher than service under Rider 328FT.

Mr. Jessen stated he did not know when the Rider 328FT tariff sheets were filed with the Commission. He noted, however, the predecessor companies all had notice of the content of the tariffs because the sheets were attached to the Settlement Agreement, and the Settlement Agreement was incorporated into the Commission's Order in Cause No. 39854. With respect to Mr. Ciesielski's position that the MDQ incorporated into a Rider 328FT addendum should be arrived at by mutual

consent, Mr. Jessen opined such a view was inconsistent with the language of the tariff. Mr. Jessen also repeated that allowing for negotiated MDQ levels might place operational constraints on NIPSCO's system, making mutually agreeable MDQs problematic.

6. ArcelorMittal's Rebuttal Evidence. Mr. Ciesielski testified concerning the circumstances under which Rider 328FT was filed in April 2008, the eligibility of ArcelorMittal's facilities to receive service under Rider 328FT on April 2, 2008 and NIPSCO's position that eligibility Rider 328FT depends upon a continuous and ongoing Rate 328 contract.

Mr. Ciesielski first noted NIPSCO did not dispute that Rider 328FT was not filed until April 2, 2008 and that the express terms of Rider 328FT defines eligibility for service under the Rider as contingent upon eligibility for service under Rate 328 "as of the effective date of this Rider." Mr. Ciesielski testified Rider 328FT was not effective until April 2, 2008, and because it was undisputed that all of the facilities were eligible for service under Rate 328 on that date, the facilities are therefore eligible for firm transportation service under Rider 328FT. Mr. Ciesielski also took issue with Mr. Jessen's interpretation of the eligibility requirements. He noted Mr. Jessen did not address the provision in Rider 328FT itself making eligibility contingent upon its effective date and the Ordering Paragraph in the Commission's May 12, 1999 Order requiring that Rider 328FT be filed with the Commission's Engineering Division.

Mr. Ciesielski also restated it was undisputed that the facilities were all eligible for service on June 1, 1999. He noted NIPSCO conceded Indiana Harbor East and New Carlisle remain eligible despite transfer of ownership to ArcelorMittal. Based on the language of the tariff, Mr. Ciesielski did not agree that a lapse in a Rate 328 contract extinguished eligibility for firm transportation under Rider 328FT. Rather, he said eligibility is contingent upon status as of a specific point in time, the effective date of Rider 328FT. Mr. Ciesielski explained even if the effective date were June 1, 1999, the facilities would remain eligible because they were all receiving service under Rate 328 on that date.

Mr. Ciesielski disagreed with Mr. Jessen's contention that the interruptible service contract for Burns Harbor, signed by ISG in 2003, extinguished eligibility for service under Rider 328FT. Mr. Ciesielski testified NIPSCO did not offer a firm service contract to ISG in 2003 because, according to NIPSCO, bankruptcy extinguished the underlying Rate 328 contract. Mr. Ciesielski testified NIPSCO should have offered ISG service under Rider 328FT. Therefore, Burns Harbor should not be barred from receiving service under Rider 328FT.

Mr. Ciesielski testified NIPSCO's position with regard to the extinguishment of eligibility based on any lapse in a continuously effective Rate 328 contract suggested an effort to phase out service under Rider 328FT by reducing the number of eligible customers. He testified this was an unreasonable means to implement Rider 328FT because the purpose of the Settlement Agreement in Cause No. 39854 was to provide reliable, firm service to NIPSCO's core industrial consumers. According to Mr. Ciesielski, NIPSCO's interpretation of Rider 328FT's eligibility requirements runs contrary to the spirit and terms Settlement Agreement.

Mr. Ciesielski also disagreed with Mr. Jessen's assertion that the MDQ levels could be set unilaterally. He stated the language in Rider 328FT anticipates an addendum to a contract that implies a negotiated agreement between the parties, rather than the unilateral imposition of terms. Moreover, under NIPSCO's interpretation, the MDQ could be set a zero, which would effectively nullify the purpose behind establishing a firm transportation rider.

Mr. Ciesielski also stated service under Rate 344 is substantially higher than service under Rider 328FT. The provision of firm service was important to protect the facilities as well as the economic viability of the operations. Mr. Ciesielski testified that the planned expansion at New Carlisle would have meant increased jobs, energy use and investment in Northern Indiana. Because service under Rider 328FT could not be secured, ArcelorMittal has not proceeded with expansion of New Carlisle.

Finally, Mr. Ciesielski testified that the provision of firm service requires NIPSCO to maintain and upgrade its system and plan to meet firm service needs. According to Mr. Ciesielski, ArcelorMittal is concerned that NIPSCO is attempting to avoid taking necessary steps to ensure its ability to provide reliable service to its large transportation customers. For ArcelorMittal, this raises serious concerns that NIPSCO is looking for ways to restrict the scope of service obligations.

7. **Commission Findings.** There are three issues in this Cause be determined by the Commission: (1) the effective date of Rider 328FT, (2) the establishment of MDQs and (3) the eligibility of Indiana Harbor West and Burns Harbor for service under Rider 328FT. The Commission will address each issue separately.

It is undisputed that Indiana Harbor East and the New Carlisle are eligible under Rider 328FT. The only issue to be decided with respect to those facilities concerns the determination of an MDQ in accordance with Rider 328FT. NIPSCO contends it is entitled to set an MDQ without negotiation, and ArcelorMittal contends the MDQ should be negotiated between NIPSCO and the customer.

NIPSCO disputes, however, the eligibility of the other two facilities, Indiana Harbor West and Burns Harbor, on the ground that the Rate 328 contracts for those facilities which were in effect when the settlement creating Rider 328FT was approved by the Commission were not subsequently affirmed in bankruptcy proceedings. ArcelorMittal contends those two facilities are eligible for two reasons: (1) the effective date of Rider 328FT is April 2, 2008 when it was filed by NIPSCO with the Commission, and on that date all the facilities satisfied the eligibility criteria; and (2) even if the effective date of the Rider were June 1, 1999, the facilities were all eligible on that date, and the terms of the Rider do not predicate eligibility on the continuing existence of a Rate 328 contract over any subsequent period of time.

A. **Effective date of Rider 328FT.** In Cause No. 39854, the Commission approved a Settlement Agreement pursuant to its Final Order dated May 12, 1999, which provided for the creation of Rider 328FT, as well as the implementation of a variety of other tariff sheets. Language in the Settlement Agreement and the May 12, 1999 Order approving the Settlement Agreement provides the Commission with guidance as to the effective date of Rider 328FT.

The Settlement Agreement on page two states, “The Parties agree that the tariff sheets contained in Exhibit I hereto shall be filed with the Commission and made effective on the same date as the effectiveness of this Agreement.” Term III on page five of the Settlement Agreement provides that the Settlement Agreement “shall become effective on the first day of the month following Commission approval of this Agreement” Page two of the May 12, 1999 Order notes that according to the Settlement Agreement the tariff sheets included as Exhibit I were to be filed with the Commission and become effective “on the first day of the month following Commission approval of the Agreement.” Exhibit I includes tariff sheets for Rate 328 and Rider 328FT. Finally, Ordering

Paragraph 2 of the May 12, 1999 Order states, “Northern Indiana shall file the tariff sheets contained in Exhibits I and III of the Agreement with the Commission’s Engineering Division and Northern Indiana shall be, and hereby is, authorized to make effective such tariff sheets on the first day of the month following the issuance of this Order.”

It is undisputed that NIPSCO failed to file Rider 328FT with the Commission’s Engineering Division as required by the Final Order in Cause No. 39854 until April 2, 2008. NIPSCO should have filed the tariff sheets with the Commission much sooner. However, based on the clear language contained in the Settlement Agreement and the Commission’s Order issued in Cause No. 39854 approving the Settlement Agreement, Rider 328FT and the Settlement Agreement became effective on the first day of the month following the Commission’s approval of the Settlement Agreement, as the parties intended. The Commission’s Order approving the Settlement Agreement is dated May 12, 1999. It appears that based on the language in the Settlement Agreement, the parties intended for the filing of the tariffs in Cause No. 39854 to be a formality or an administrative function. Therefore, the Commission finds that the effective date of Rider 328FT is June 1, 1999. The Commission notes that according to NIPSCO, it charged rates to eligible customers according to the terms of the Rider 328FT tariff approved in the May 12, 1999 Order since the issuance of that Order, which is the same rate for Rate 328. No allegation to the contrary was made in this Cause.

B. Determination of MDQs. According to NIPSCO, the assignment of MDQs is a matter committed to NIPSCO’s determination, and NIPSCO has decided to set MDQs based on a ten-year historical peak for the given facility. Conversely, ArcelorMittal asserts MDQs are to be determined by mutual agreement through negotiation. The relevant language in Rider 328FT states:

Any Customer requesting service hereunder shall execute an addendum to the Customer’s Contract for Gas Service under Rate 328 for such period as shall be mutually agreeable to the parties. The addendum shall set forth the maximum daily contract quantity (MDQ) to be provided by [NIPSCO]. The MDQ shall be included in the Rider 328 FT addendum to the Customer’s Rate 328 contract.

NIPSCO’s position is that, by the terms of Rider 328FT, only the time period of the contract has to be “mutually agreeable to the parties.” By contrast, the determination of MDQs is not qualified in the same terms. (Tr. at A109–10). Mr. Jessen explained that NIPSCO establishes MDQs by using a customer’s highest daily usage in the previous ten-year period. NIPSCO uses this formula for all of its customers so that the assignment of MDQs is non-discriminatory. Mr. Jessen stated NIPSCO also uses this formula to ensure that it can serve its customers’ loads and to avoid operational problems from a system and capacity planning perspective. According to Mr. Ciesielski’s rebuttal testimony, however, the contractual addendum contemplated by Rider 328FT is designed to be a negotiated document, and nothing in the language of Rider 328FT suggests that NIPSCO will have unilateral discretion to assign MDQs.

The relevant language contained in the Rider 328FT tariff and quoted above is clear. In order to receive service under Rider 328FT, an addendum to Rate 328 shall be executed by the customer “for such a period as shall be mutually agreeable by the parties.” The negotiated portion of the addendum is for the term of service provided under Rider 328FT. However, the tariff language does not provide for negotiation of the MDQ and explains that the addendum shall establish an MDQ “to be provided by [NIPSCO].”

Further, the evidence of record establishes that NIPSCO uses a set formula to determine MDQs, which NIPSCO applies in a fair and non-discriminatory manner to customers who are eligible for service under Rider 328FT. The formula reviews a reasonable span of time to take into account, for example, economic cycles and weather trends to determine a customer's consumption and resultant MDQ. This formula is also applied so that NIPSCO can provide adequate and reliable service and facilities to its customers. Accordingly, the Commission finds that NIPSCO's method of determining MDQs is appropriate based on the language contained in the Rider 328FT tariff.

C. Application of the eligibility criteria under Rider 328FT. The final issue to be determined by the Commission is whether Burns Harbor and Indiana Harbor West are eligible for service under Rider 328FT. It is undisputed that Indiana Harbor East and New Carlisle are eligible for service under Rider 328FT. The eligibility provision for Rider 328FT states, "This rider shall be available to those Customers who elect to take service under this Rider and who are eligible to take service under Rate 328 as of the effective date of this Rider as approved by the [Commission]." Rider 328FT also states, "Any Customer requesting service hereunder shall execute an addendum to the Customer's Contract for Gas Service under Rate 328 for such period as shall be mutually agreeable to the parties."

It is undisputed that all four of the facilities at issue were eligible for service under Rate 328 as of June 1, 1999. (Ex. PJC at 5; Ex. WRJ-1 at 6; and Tr. at A-80). ArcelorMittal contends that a lapse in a Rate 328 contract does not extinguish eligibility for firm transportation under Rider 328FT. Rather, eligibility is contingent upon status as of a specific point in time, which is the effective date of Rider 328FT. NIPSCO contends that a customer must maintain a continuously effective Rate 328 contract, which preexisted Rider 328FT, to be eligible for Rider 328FT. To illustrate, Exhibit PJC-1 is a letter concerning the eligibility for service under Rider 328FT and the establishment of MDQs for Indiana Harbor East and New Carlisle sent by NIPSCO to ArcelorMittal. Exhibit PJC-1, attached to Petitioner's Ex. PJC, states, "Eligible customers are those customers who were being served under the provision of Rate 328 at the time of the approval of Rider 328 FT."

The Commission agrees with ArcelorMittal that based on the language contained in the tariff for Rider 328FT, eligibility is contingent upon a fixed point in time, the effective date of Rider 328FT. No language in the Rider 328FT tariff suggests eligibility under Rider 328FT would be lost if a Rate 328 contract preexisting the Rider were to lapse. Mr. Jessen admitted under cross-examination that the tariff language does not support NIPSCO's assertion that a continuous Rate 328 contract must be maintained. (Tr. at A-100). Also, the evidence does not support NIPSCO's assertion that a customer must have been receiving service under Rate 328 at the time of Rider 328FT's effective date to be eligible for service under the Rider. According to Petitioner's Ex. CX-3, which depicts the succession of intervenors in Cause No. 39854, Praxair – Chesterton received service under Rate 330 prior to June 1999 until July 1, 2004. Praxair – Chesterton began receiving service under Rider 328FT on July 1, 2004, well after the date of approval of the Rider.

Based on the tariff language and the evidence presented, eligibility for Rider 328FT is predicated on the eligibility to receive service under Rate 328 as the effective date of Rider 328FT, which, as determined previously in Paragraph 7A, is June 1, 1999. Those customers who are eligible for service under Rate 328 as of June 1, 1999 must execute a contract for service under Rate 328. Then, the customer must execute the addendum to its Rate 328 contract for Rider 328FT. Thus, the Commission must now examine NIPSCO's definition of customer for the purposes of Rider 328FT to determine exactly who is eligible for service under Rider 328FT.

Mr. Jessen testifies that a customer who rejects a Rate 328 contract during bankruptcy and chooses to negotiate new contracts becomes a new customer. Therefore, that new customer is no longer grandfathered under the Settlement Agreement to receive service under Rider 328FT. (Tr. at A-98–A-99). According to Mr. Jessen, Indiana Harbor West and Burns Harbor lost their eligibility after June 1, 1999 when the previous owners of those operations went into bankruptcy, and the NIPSCO gas contracts were not affirmed during the bankruptcy process by ISG; ISG chose to become a new customer. (Tr. at A-97–A-98).

He adds that a simple name change without changing operations at a location does not create a new customer. A customer can retain the same name but change entirely its operations at the same location and remain the same customer, in NIPSCO’s opinion. Further, the purchase of a business in the normal course business (not during a bankruptcy proceeding) does not make an entity a new customer. (Tr. at A-144). Likewise, Mr. Jessen testifies that a bankruptcy proceeding does not make an entity a new customer, even if a new entity purchases the previous entity, as long as the Rate 328 contract is affirmed. (Tr. at A-98–A-99).

The evidence also indicates an entity can change entirely, including its operations, without becoming a new customer for the purpose of receiving service under Rider 328FT. For example, on Petitioner’s Ex. CX-3, Bayer Corp. became Feed the Children in 2004.¹ The account number changed when the entity changed, which typically indicates that a new customer is located at that facility. However, NIPSCO permitted Feed the Children to receive service under Rider 328FT and alternate between Rate 328 and Rider 328FT in subsequent years.

Based on Mr. Jessen’s testimony, the identity of an entity is irrelevant to its eligibility for service under Rider 328FT. Rather, continuous service under the original Rate 328 contract is required to receive service under the Rider. However, ArcelorMittal’s attorney asked Mr. Jessen during cross-examination if the intent of the 1999 Settlement Agreement was to gradually phase out firm service. ArcelorMittal’s attorney asked, “Isn’t that the effect of requiring a continuity of the same entity with the same contract in order to retain eligibility?” Mr. Jessen responded, “It doesn’t have to be the same contract. It has to be the same entity that was taking service on that date.” (Tr. at A-101). This response contradicts Mr. Jessen’s position outlined in his prefiled testimony and answers given during questioning at the Evidentiary Hearing because, according to Mr. Jessen, the only way an entity becomes a new customer is by terminating the original contract.

Based on the evidence presented, the Commission finds NIPSCO’s definition of customer for the purposes of determining who is eligible for service under Rider 328FT to be inconsistent and confusing. The single consistent factor in the evidence presented concerning NIPSCO’s definition of customer is the location of the facility receiving service from NIPSCO. When asked from the bench for NIPSCO’s definition of customer, Mr. Jessen stated, “[I]t’s basically the meter . . . where we have a meter set for a particular business, residence, whatever. That’s a customer.” He further explained, “The customer – I mean, it’s the meter at the location under a specific name; an example, LTV.” (Tr. at A-139–A-140). A meter has a physical location. Accordingly, the Commission finds that the location of a facility subject to the Settlement Agreement approved by the Commission’s May 12, 1999 Order is eligible for Rider 328FT, including Burns Harbor and Indiana Harbor West.

¹ Generally, Bayer Corp. is a publicly traded company with a business focused on the areas of health care, nutrition and high-tech materials. See www.bayer.com. Feed the Children is an international, not-for-profit, Christian organization that delivers food and other necessities to children and families in need. See www.feedthechildren.org.

D. Conclusion. The effective date of Rider 328FT is June 1, 1999. All of the ArcelorMittal facilities at issue in this Cause are eligible for firm service under the terms of Rider 328FT because each location was eligible for service under Rate 328 on June 1, 1999, the effective date of the Rider. NIPSCO's contention that two of the facilities lost their eligibility as a result of bankruptcy proceedings does not comport with the terms of the Rider or the evidence presented in this Cause. By the terms of Rider 328FT, an MDQ is to be determined by NIPSCO, using a customer's peak day usage for the previous ten-year period.

In its Complaint, ArcelorMittal asked the Commission to recalculate bills for customers affected by NIPSCO's actions and refund any overages discovered as a result of the recalculation. However, ArcelorMittal presented no evidence in this Cause concerning the recalculation of bills for the purposes of a refund. The Commission also notes that the rate for service under Rider 328FT is the same as that for service under Rate 328.

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

1. The effective date of Rider 328FT is June 1, 1999.
2. The four ArcelorMittal facilities at issue in this proceeding are eligible to receive service under Rider 328FT.
3. Pursuant to the terms of Rider 328FT, NIPSCO may establish an MDQ using a customer's peak day usage for the previous ten-year period for customers receiving service under Rider 328FT.
4. This Order shall be effective on and after the date of its approval.

LANDIS, MAYS AND ZIEGNER CONCUR; ATTERHOLT ABSENT:

APPROVED: OCT 27 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**