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STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN RE THE COMPLAINT OF KOKOMO) OPALESCENT GLASS, INC. V.) KOKOMO GAS AND FUEL COMPANY A) SUBSIDIARY OF NIPSCO INDUSTRIES,) INC.)	CAUSE NO. 43661 <u>FINAL ORDER</u> APPROVED: FEB 10 2010
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BY THE COMMISSION:

Larry S. Landis, Commissioner
Lorraine Hitz-Bradley, Administrative Law Judge

On March 23, 2009, Kokomo Opalescent Glass, Inc. (“KOG”) filed its complaint against Kokomo Gas and Fuel Company (“KGF”) with the Indiana Utility Regulatory Commission (“Commission”) in this matter, as a result of the Howard Circuit Court’s referral of the dispute between the parties to the Commission.

Pursuant to notice and as provided for in 170 I.A.C. § 1-1.1-15, a Prehearing Conference in this Cause was held in Room 222 of the National City Center, 101 West Washington Street, Indianapolis, Indiana at 9:30 a.m. on May 14, 2009. Proofs of publication of the notice of the Prehearing Conference have been incorporated into the record and placed in the official files of the Commission. KOG, KGF and the Office of Utility Consumer Counselor (“Public” or “OUCC”) appeared and participated at the Prehearing Conference. No members of the general public appeared. The Presiding Officers heard oral argument from the parties, with the OUCC taking no position on behalf of either party. KOG advised that it had appealed the trial court’s ruling which lead to the filing of this Cause.¹ The Presiding Officers requested that KOG and KGF file briefs setting forth their respective positions.

1. Jurisdiction and Notice. KGF is a public utility as that term is defined under Ind. Code § 8-1-2-1, providing gas service within Howard County, Indiana. The Commission has jurisdiction over the parties and this matter as set forth in I.C. § 8-1-2, *et seq.*, specifically under I.C. § 8-1-2-34.5 for the resolution of customer complaints.

2. Background. KOG filed this complaint with the Commission after the Howard County trial court sent this matter to the Commission for resolution. KOG’s original complaint requested a jury trial upon a claim that from 1994 – 2000 “KOG relied upon and reasonably trusted KGF to correctly identify the rate options for which KOG was or might be eligible, and to accurately advise KOG of the eligibility requirements, and to bill KOG at the most favorable available rate for which KOG was eligible.” *Complaint*, ¶11.² KOG argued that KGF did not

¹ That appeal was dismissed without prejudice to refile by the Court of Appeals on June 11, 2009. *Kokomo Opalescent Gas, Inc. v. Kokomo Gas & Fuel, et al.*, 34A02-0905-CV-00388.

² We note that although both KOG and KGF caption their pleadings in the Howard County action as the Howard County Superior Court, the action was commenced in the Howard County Circuit Court. In addition, the complaint filed in Howard County under Cause No. 34C01-0810-CT-1006 was attached to the Complaint filed with the

advise it of the several rates which would have been beneficial for KOG. *Id.* at ¶ 15. KOG asserted it asked KGF whether KOG would pay less under a certain rate, and that KGF responded that it had examined the alternative and determined that KOG would pay more, not less. *Id.* at ¶ 16. KOG asserted that KGF had “through these contacts, expressly agreed to recalculate” KOG’s rates semi-annually and advise KOG if and when a better rate could be achieved. *Id.* at ¶ 17. KOG states that whenever KGF was asked, it responded to KOG that KGF had studied the issue and determined that KOG was only eligible for, “or would benefit economically most from” the rate charged; KOG states that KGF consequently overcharged KOG by approximately \$310,000. *Id.* at ¶¶ 21, 24-25.

KOG now seeks a refund of these alleged overcharges with prejudgment interest.³ *Id.* at ¶¶ 26-28. The Howard County Circuit Court sent the dispute to the Commission upon KGF’s argument that KOG had failed to exhaust its administrative remedies and that the Commission had sole jurisdiction to settle the dispute. KOG then filed the instant Cause, entitled “Complaint, Jury Trial Demand, and Petition for Immediate Ruling on IURC Jurisdiction and Availability of Administrative Remedy” (“Commission Complaint.”) Specifically, KOG requested that the Commission resolve whether or not it has “jurisdiction and an available administrative remedy to resolve a breach of contract claim between a commercial customer and a gas utility, alleging that the gas utility breached its contract by failing to bill [KOG] at the lowest approved rate for which it was eligible, and for misrepresenting the availability and eligibility requirements of alternative IURC approved tariffs.” Complaint, at 1.

KGF asserted that only the Commission can determine the existence of a duty, “which is requisite for recovery[.]” KGF stated that KOG was alleging that KGF had a duty to provide a service and to identify and charge the most favorable rate, and that no such duty existed for utilities generally or KGF in particular.

3. Discussion and Analysis. The Commission, having reviewed the filings of the parties and being duly advised, hereby makes the following findings.

At the outset, we note that the Commission has no power to either convene a jury trial or award damages. See, *Ind. Bell Tele. v. Ind. Office of Util. Consumer Counselor*, 725 N.E.2d 432, 435 (Ind. App. 2000)(citing *State ex rel. Indianapolis Water Co. v. Niblack*, 240 Ind. 32, 34, 161 N.E.2d 377, 378 (1959)). The Court of Appeals has likewise held that the Commission has no power to determine liability between a private litigant and a utility “in a dispute that does not involve a neglect or violation of the regulatory scheme.” *S. Eastern Ind. Nat. Gas Co., Inc. v. Ingram*, 617 N.E.2d 943, 947 (Ind. App. 1993).

Under I.C. § 8-1-2-34.5, the Commission’s Appeals Division may address complaints involving a dispute between a utility and a customer. While KOG’s initial filing with the Commission was captioned as a ‘complaint,’ one of the matters enumerated in I.C. § 8-1-2-34.5 for the Commission to resolve, I.C. § 8-1-2-34.5 does not govern a dispute as to the correctness

Commission under this Cause and forms the basis of KOG’s prayer for relief.

³ The parties entered into a tolling agreement regarding the applicable statute of limitations which has carried over to proceedings before the Commission.

of a particular rate.⁴ The contention here is not that the rate itself was objectionable, but that KGF applied a less-beneficial tariff rate to KOG in contravention of a promise to do otherwise.

A utility has an obligation to only charge rates that have been approved by the Commission, as set forth in I.C. § 8-1-2-44.⁵ Of the various rates on a tariff, a customer may have several rate options from which to choose. KOG was charged one of the rates from KGF's Commission-approved tariff. Therefore, all the rates in question were allowable for KGF to charge.

Apart from a utility's obligation to charge Commission-approved tariff rates in a manner that is not unjustly discriminatory, unreasonable, insufficient or unsafe,⁶ a utility does *not* have a statutory obligation to choose the most favorable price for a customer. In addition, the charging of different rates for different service rendered under different conditions and circumstances is not unlawful. I.C. § 8-1-2-68, our statute governing unjust rates, does not:

prohibit differing rates for differing classes or types of service, but rather proscribes unreasonable differences or unjust discrimination. It is only *unreasonable* differences in rates between customers or classes of customers that violate this statute. The charging of different rates for service rendered under different conditions and under different circumstances is not unlawful or unduly preferential...Absolute equality between classes of service is a practical impossibility. Rates for different classes of service need not be uniform or equal or equally profitable to the utility; the prohibition is against unreasonable or undue discrimination in the application of the rates.

Capital Improvement Bd. of Managers v. Pub. Serv. Comm'n, 176 Ind. App. 240, 264 375 N.E.2d 616, 633 (Ind. App. 1978) (emphasis in original; quotations and citations omitted).

As KOG raises issues regarding the rate it selected from various Commission-approved tariff provisions, its claim that it failed to select the most advantageous rate does not form the basis of a Complaint that may appropriately be considered by the Commission. While a utility and its customer may do individualized, non-tariffed rates by a special contract between them, such a contract must be approved by the Commission before it can be implemented. See, I.C. §§ 8-1-2-24, 8-1-2-25; *Verified Petition of Speedway Mgt., LLC*, Cause No. 43390, 2008 Ind. PUC LEXIS 315 (Ind. Util. Regulatory Comm'n Aug. 7, 2008). No such contract between KGF and KOG was ever filed with or approved by the Commission. KGF complied with its duty to charge only tariffed rates, and did not have a statutory obligation to find a rate that KOG deemed most advantageous. Therefore, based on our consideration of the facts presented, this Complaint is hereby dismissed.

⁴ See, *Sexton v. Johnson Sub. Util., Inc*, 422 N.E.2d 1293, 1296 (Ind. App. 1981).

⁵ "It shall be unlawful for any public utility to charge, demand, collect, or receive a greater or less compensation for any service performed by it within the state, or for any service in connection therewith, than is specified in such printed schedules, including schedules of joint rates, as may at the time be in force, or to demand, collect, or receive any rates, tolls, or charges not specified in such schedule. The rates, tolls, and charges named therein shall be the lawful rates, tolls, and charges unless the same are changed as provided in this chapter." I.C. § 8-1-2-44.

⁶ I.C. § 8-1-2-68.

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

1. This Cause is hereby dismissed by the Commission.
2. This Order shall be effective on and after the date of its approval.

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

APPROVED: FEB 10 2010

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

A handwritten signature in cursive script that reads "Brenda A. Howe". The signature is written in black ink and is positioned above a horizontal line.

Brenda A. Howe
Secretary to the Commission