

ORIGINAL

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

IN THE MATTER OF THE CONSUMER AFFAIRS) CAUSE NO. 44515
DIVISION'S COMPLAINTS OF WINONA)
POWDER COATING INC. AND WINONA PVD) APPROVED:
COATINGS, LLC AGAINST SPARK ENERGY, LP)

FEB 11 2015

Handwritten signatures and initials:
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ORDER OF THE COMMISSION

Presiding Officers:

Angela Rapp Weber, Commissioner

Jeffery A. Earl, Administrative Law Judge

On June 26, 2014, Winona Powder Coating Inc. ("Winona Powder") and Winona PVD Coatings, LLC ("Winona PVD") (collectively "Winona") filed separate complaints with the Commission's Consumer Affairs Division against Spark Energy Gas, LP ("Spark") (collectively "Complaint"). On July 15, 2014, the Director of the Consumer Affairs Division and the Commission's General Counsel requested the complaints be docketed for consideration by the Commission in a formal proceeding under 170 IAC 16-1-5(e).

On July 31, 2014, Northern Indiana Public Service Company, Inc. ("NIPSCO") filed a petition to intervene in this Cause, which the presiding officers granted on August 13, 2014.

On September 26, 2014, Spark filed a Motion to Dismiss ("Motion"). On October 14, 2014, Winona filed its response to the Motion ("Response"). On October 17, 2014, Winona filed a Request for Hearing on Respondent's Motion to Dismiss. On October 22, 2014, Spark filed a Response to request for hearing, and on October 31, 2014, Spark filed its Reply in Support of its Motion to Dismiss.

1. Background and Relief Requested. Winona Powder is an Indiana company engaged in the powder coating business. Its office is located in Etna Green, Indiana. Winona PVD is an Indiana company engaged in the business of coating automobile wheels. Its office is located in Warsaw, Indiana. Spark is a retail marketer of natural gas doing business in Indiana through NIPSCO's Choice Program, which allows NIPSCO gas utility customers to choose their own natural gas supplier.

Winona Powder and Winona PVD agreed to receive natural gas service from Spark in separate Natural Gas Sales Agreements dated December 23, 2013. Winona claims that it was promised significant savings in its natural gas bills, but that such savings did not occur. Rather, Winona claims it experienced natural gas bills as much as three times the rates charged by NIPSCO during the same time period. Winona disputed the validity of the sales agreements with Spark and

later filed complaints with the Commission's Consumer Affairs Division. The Complaint requests the following relief:

- a determination that the Commission has jurisdiction over this matter;
- a declaration that the contracts between Spark and Winona are void and unenforceable due to the actions of Spark;
- a determination that Winona's financial responsibility to Spark is limited to natural gas priced at rates in effect for NIPSCO for the time periods in question;
- a determination that Spark shall adopt a written code of conduct and supply that code to customers prior to the execution of any energy contract; and
- a determination that Spark, through its website and its sales staff, misrepresented its pricing structure and capabilities to Winona.

2. Request for Hearing on Motion to Dismiss. Winona requested a hearing on the Motion, asserting that the issues in this matter are complex and could have a far-reaching impact on the NIPSCO Choice Program. Spark objected to the request.

Having reviewed the Motion and related filings, we find that the Motion presents a purely legal question of whether the Commission has jurisdiction over the issues raised in the complaints. The parties do not dispute the relevant factual issues, which are primarily memorialized in the various agreements and other documents filed with the Complaint and briefs on the Motion. Therefore, we find that a hearing on the Motion would not assist the Commission in reaching its decision, and we deny the Request for Hearing on the Motion to Dismiss.

3. Motion to Dismiss. Spark filed a motion to dismiss this case asserting that the Commission does not have jurisdiction over the relief requested, and that the proper forum for Winona's claims is a trial court. Both in its Motion and its reply in support of the motion, Spark relies primarily on an Indiana Court of Appeals opinion in *Austin Lakes Joint Venture v. Avon Utilities, Inc.*, 648 N.E.2d 641 (Ind. 1995).

In response, Winona argues that language in the Supplier Aggregation Service Agreement ("SASA") between Spark and NIPSCO, the Supplier Code of Conduct ("Code of Conduct"), and the Natural Gas Sales Agreement between Spark and Winona ("Sales Agreement") create Commission jurisdiction.

4. Commission Discussion and Findings. The Commission was created primarily as a "fact-finding body with the technical expertise to administer the regulatory scheme devised by the legislature." *U.S. Gypsum, Inc. v. Ind. Gas Co.*, 735 N.E.2d 790, 795 (Ind. 2000) (quoting *United Rural Elec. Membership Corp. v. Ind. & Mich. Elec. Co.*, 549 N.E.2d 1019, 1021 (Ind. 1990)). Our authority "includes implicit powers necessary to effectuate the statutory regulatory scheme." *Id.* (quoting *OUCS v. Pub. Serv. Co.*, 608 N.E.2d 1362, 1363-64 (Ind. 1993)). But, we may exercise only that power conferred by statute. *Id.*

A. **Ind. Code §§ 8-1-2-1 and 8-1-2-87.5.** Winona did not cite any statutory authority providing the Commission jurisdiction over its claims for relief. Winona did assert that Spark should be considered a public utility, citing Ind. Code § 8-1-2-87.5. That statute states in relevant part:

Any person, corporation, or other entity that:

- (1) Is engaged in the transportation of gas from outside Indiana for direct sale or delivery to any end use consumer or consumers within this state;
- (2) Is engaged in the transportation of gas solely within the state on behalf of any end use consumer or consumers; or
- (3) Is an end use consumer engaged in the transportation within this state of gas owned or acquired by such end use consumer for use in this state, other than transportation on the premises where the gas is consumed;

is a public utility as defined in [Ind. Code § 8-1-2-1]

A printout from Spark’s website, explains that Spark “buy[s] natural gas from the people who process it, then sell[s] that gas to [customers].” Response, Exh. G. It says that NIPSCO manages the pipes, lines, and other infrastructure to get the gas safely and reliably to homes and businesses. *Id.* Similarly, another printout from Spark’s website, says: “For the physical distribution and delivery of the . . . gas to your home, we all depend on the local utilities to maintain the lines and pipes to keep the system safe and operating.” Complaint, Exh. J. It goes on to refer to the local utility, NIPSCO in this case, as “a Transmission and Distribution Service Provider.” *Id.* A printout from NIPSCO’s website, says that “[r]egardless of who you choose to supply your natural gas, NIPSCO will still deliver it to your home or business.” Complaint, Exh. I. In addition, ¶ 9 of the Terms of Service attached to the contracts between Spark and Winona says: “Your [local distribution company] will continue to deliver your gas” Complaint, Exh. B. The contract defines NIPSCO as the local distribution company. *Id.*

In order to be a public utility under any of the options in Ind. Code § 8-1-2-87.5, an entity must be engaged in the transportation of gas. The evidence is clear that Spark purchases natural gas from suppliers and resells it to Winona, but NIPSCO, not Spark, transports and delivers the gas to Winona. Therefore, we find that Spark is not a public utility under Ind. Code § 8-1-2-87.5, and the statute does not provide the Commission jurisdiction over the subject matter of this case.

Ind. Code § 8-1-2-1(a) defines a public utility as an entity that “may own, operate, manage, or control any plant or equipment within the state” for the “production, transmission, delivery, or furnishing of heat, light, water, or power.” Winona did not designate any evidence that Spark owns, operates, manages, or controls any plant or equipment within the state for natural gas utility service. As discussed above, Spark purchases natural gas from suppliers and sells it to Winona, but NIPSCO transmits, delivers, and furnishes the natural gas to the customers using its own plant and equipment. Therefore, we find that Spark is not a public utility under Ind. Code § 8-1-2-1(a), and the statute does not provide the Commission jurisdiction over Spark.

B. SASA. Winona points to several sections in the SASA, which it claims create Commission jurisdiction over this case. The SASA is a contract between NIPSCO and Spark. Winona is not a party to the contract. The SASA mentions the Commission in several places. Section 4 requires Spark to certify that it will provide adequate firm supply under contract to meet customer demand and to provide a copy of the affidavit to the Commission. Response, Exh. A at 2. Section 9.c.ii. requires Spark to retain enrollment and complaint records and to make the records available for review by the Commission or the Indiana Office of Utility Consumer Counselor (“OUCC”). *Id.* at 4. Section 10 says that supply agreements with customers must have a provision stating the agreement is subject to termination in the event of Commission action requiring termination or terminating the Choice Program. *Id.* at 5. Section 12 says that the interest rate for cash deposits is the rate established by the Commission for customer deposits. *Id.* at 7. None of these provisions create Commission jurisdiction over Spark’s rates for gas service or the contract between Winona and Spark.

Section 13.e. provides the process for resolving customer complaints that Spark is engaging in fraudulent, deceptive, or abusive acts; administrative violations; or has violated the terms of the SASA. *Id.* at 10-11. Complaints are initially forwarded to Spark for resolution. If the resolution is insufficient, NIPSCO conducts an investigation of the complaint, and if it finds a violation, it can impose sanctions on Spark. Spark can then appeal NIPSCO’s determination to the Commission. Section 13.c. says that complaints made to the Commission or the OUCC can be relevant evidence of fraudulent, deceptive, or abusive practices. *Id.* at 10.

Similarly, Section 17 allows Spark or NIPSCO to file a formal complaint with the Commission seeking resolution of a dispute over the SASA. *Id.* at 12. Section 17 also indicates that Spark and NIPSCO consent to Commission jurisdiction over them and the subject matter of the dispute for the purpose of such resolution. *Id.*

Sections 13 and 17 purport to create Commission jurisdiction. We do not necessarily agree that parties can create Commission jurisdiction by agreement where no statutory jurisdiction exists, but we need not decide that issue here. Assuming without deciding that the SASA creates Commission jurisdiction over Spark, that jurisdiction would be limited to the terms of the SASA, namely the appeal of a finding of violation by NIPSCO or resolution of a dispute between Spark and NIPSCO related to the terms of the SASA. Section 19 specifically says that the SASA “is not intended and should not be deemed to vest any rights, privileges or interests of any kind or nature to any third party, including, but not limited to the Customers or Customer groups that [Spark] establishes under [the SASA].” *Id.* at 13. Thus, the SASA does not purport to create Commission jurisdiction over a dispute between Winona and Spark. Rather, Section 10 requires the contract between Spark and a customer to include a statement advising the customer of its right to “contact the OUCC with any questions, concerns or conflicts regarding [Spark] or the program” *Id.* at 5. Therefore, we find that the SASA does not create Commission jurisdiction over the subject matter of this case.

C. Code of Conduct. Winona next claims that several sections of the Code of Conduct create Commission jurisdiction over this case. Section 9.c.iv. of the SASA requires Spark to

comply with the Code of Conduct. *Id.* at 4. At issue in this case are the sections of the Code of Conduct that apply to fraudulent, deceptive, or abusive practices and customer complaints. Response, Exh. B. Section 6 addresses complaints made by customers to NIPSCO and creates processes and remedies for customer complaints against Spark. *Id.* Section 7 addresses customer complaints received by the Commission and the OUCC and says that such complaints should be referred to NIPSCO. *Id.*

Section 7 also says that customer complaints received by the Commission and referred to NIPSCO shall be handled in accordance with the Commission's rules. *Id.* 170 IAC 16-1 governs customer complaints. 170 IAC 16-1-1(b)(1) says that the rules apply to any gas utility subject to the Commission's jurisdiction. As discussed above, Spark is not a public utility under Ind. Code §§ 8-1-2-1(a) or 8-1-2-87.5. Therefore, the Commission's customer complaints rules do not apply to a dispute between Winona and Spark. Rather, as the Code of Conduct instructs, the proper entity to address such a dispute is NIPSCO. In addition, even if the Commission did have jurisdiction over Winona's dispute with Spark, 170 IAC 16-1-3(a) and 16-1-5(a) indicate that Winona must first seek resolution of the dispute through NIPSCO.

Based on the evidence and our discussion above, we find that the Code of Conduct does not create Commission jurisdiction over Spark or the subject matter of this case.

D. Sales Agreement. Finally, Winona argues that the Sales Agreement creates Commission jurisdiction over this case. Paragraph 18 of the Sales Agreement addresses billing disputes and complaint resolution and states:

Customers are to contact [Spark's] Customer Service Department with questions or concerns about Customer's monthly bill. . . . If the billing dispute is not resolved to Customer's satisfaction, Customer may contact the [OUCC] If a dispute cannot be resolved by discussions between both parties, the issue may be submitted by either party to mediation, non-binding arbitration, or court.

Complaint, Exh. B. The Sales Agreement does not refer to filing a complaint with the Commission as an acceptable method of resolving a dispute between Winona and Spark. The Sales Agreement does refer to contacting or filing a complaint with the OUCC, but the OUCC and the Commission are separate state agencies with different statutory charges, and reference to one may not be understood to implicitly refer to the other. Therefore, the Sales Agreement does not create Commission jurisdiction over Spark or the subject matter of this case.

E. Austin Lakes. Spark relies on *Austin Lakes* to support its motion to dismiss and Winona relies on *Austin Lakes* to support its opposition to the motion. *Austin Lakes* is inapposite to the issue in this case.

The primary legal issue in *Austin Lakes* is the doctrine of primary jurisdiction. 648 N.E.2d at 645. "The doctrine of primary jurisdiction is an invention of the United States Supreme Court to deal with the problem that arises when the courts and an agency both have claims to jurisdiction of an

issue in a case that has come before a court.” *Id.* (citing *Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907)). Primary jurisdiction comes into play when a claim is cognizable in a court but adjudication of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative agency. *Id.* The court instructed trial courts to analyze issues of primary jurisdiction by examining each issue presented in the case, and if at least one of the issues is within the trial court’s jurisdiction, the entire case falls within its jurisdiction. *Id.* at 646. This is true even if one or more of the issues are clearly matters for exclusive regulatory agency determination. *Id.* In those cases where one or more issues fall within a regulatory agency’s jurisdiction, the trial court has the discretion to submit the issues to the regulatory agency for determination or to determine the issue itself, unless the issues require exhaustion of administrative remedies before judicial review can occur. *Id.* at 646-47. This issue is not before a trial court, and *Austin Lakes* provides no guidance to adjudication of primary jurisdiction issues by a regulatory agency nor does it define or limit the Commission’s jurisdiction. Therefore, *Austin Lakes* is inapposite.

5. **Conclusion.** Spark moved to dismiss this case because the claims in Winona’s Complaint do not invoke the Commission’s jurisdiction. Based on our review above of the purported sources of Commission jurisdiction designated by Winona in its response, we conclude that the Commission does not have jurisdiction over the dispute between Winona and Spark. The SASA, Code of Conduct, and Sales Agreement provide the proper methods for Winona to resolve its dispute, which include filing a complaint with NIPSCO or the OUCC or submitting the dispute to mediation, non-binding arbitration, or court.

Therefore, we dismiss this case without prejudice.

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

1. This case is dismissed without prejudice.
2. This Order shall be effective on and after the date of its approval.

STEPHAN, HUSTON, MAYS-MEDLEY, WEBER, AND ZIEGNER CONCUR:

APPROVED: FEB 11 2015

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



Brenda A. Howe
Secretary to the Commission