MEMORANDUM DECISION

ATTORNEYS FOR APPELLANT

Todd A. Richardson
Joseph P. Rompala
Tabitha L. Balzer
Lewis & Kappes, PC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEES:
NORTHERN INDIANA PUBLIC SERVICE COMPANY, LLC

Brian J. Paul
Faegre Drinker Biddle & Reath, LLP
Indianapolis, Indiana

Robert E. Heidorn
NiSource Corporate Services – Legal
Indianapolis, Indiana

INDIANA UTILITY REGULATORY COMMISSION

Theodore E. Rokita
Attorney General of Indiana

Aaron T. Craft
Section Chief, Civil Appeals
Office of the Attorney General
Indianapolis, Indiana

Beth E. Heline
General Counsel
Indiana Utility Regulatory Commission

Steve Davies
Assistant General Counsel
Indiana Utility Regulatory Commission
Indianapolis, Indiana

INDIANA OFFICE OF UTILITY CONSUMER COUNSELOR

Randall C. Helmen
Chief Deputy Consumer Counselor

William I. Fine
Utility Consumer Counselor

Thomas J. Haas
Utility Consumer Counselor
Office of Utility Consumer Counselor
Indianapolis, Indiana

IN THE COURT OF APPEALS OF INDIANA

Realgy, LLC,
Appellant-Complainant,

v.

Northern Indiana Public Service Company, LLC, Indiana Utility Regulatory Commission, and Indiana Office of Utility Consumer Counselor,
Appellee-Respondents.

February 24, 2021

Court of Appeals Case No. 20A-EX-1417

Appeal from the Indiana Utility Regulatory Commission

The Honorable James F. Huston, Chairman

The Honorable Sarah E. Freeman, Commissioner

The Honorable Stefanie Krevda, Commissioner

The Honorable David L. Ober, Commissioner

The Honorable David E. Ziegner, Commissioner

The Honorable Carol Sparks Drake, Senior Administrative Law Judge

Cause No. 45321

Tavitas, Judge.

Case Summary

[1] Realgy, LLC ("Realgy") appeals the grant of summary judgment in favor of the Northern Indiana Public Service Company, LLC ("NIPSCO") by the Indiana Utility Regulatory Commission ("IURC"). Contending that NIPSCO improperly terminated its agreement with Realgy as a supplier of natural gas, Realgy argues that the IURC erred when interpreting the agreement between NIPSCO and Realgy. We conclude the agreement unambiguously allowed NIPSCO to terminate the agreement upon a sixty-day notice to Realgy; Realgy has failed to demonstrate that the termination was discriminatory; and the IURC properly granted summary judgment to NIPSCO. Accordingly, we affirm.

Issue

[2] Realgy raises three issues, which we consolidate and restate as whether the IURC properly granted NIPSCO's motion for summary judgment regarding NIPSCO's termination of its agreement with Realgy.

Facts

[3] NIPSCO is a public utility that provides electric and natural gas services in northern Indiana. The NIPSCO Choice Program was approved by the IURC in 1997. The Choice Program allows NIPSCO customers to obtain their natural gas from a Choice Supplier, rather than NIPSCO, but NIPSCO uses its distribution system to deliver the Choice Supplier's natural gas to the customer.

[4] In 2011, NIPSCO agreed to a Code of Conduct, which was part of an IURC approved stipulation and settlement in a separate cause. The Code of Conduct prohibits discrimination by NIPSCO against individual suppliers, among others, and requires NIPSCO to maintain "competitive neutrality." Appellant's App. Vol. III pp. 75-77.

[5] Realgy has been a Choice Supplier of natural gas since 2003. As such, NIPSCO and Realgy executed a Supplier Aggregation Service Agreement ("SAS Agreement" or "Agreement"), which was consistent with the standard SAS Agreement approved by the IURC as part of an order in Cause No. 44081. The current SAS Agreement between NIPSCO and Realgy was entered into on April 1, 2015, and contained four termination provisions—Sections 2, 13, 16, and 21.

[6] Section 2 provided:

> This Agreement shall be for an initial term of two (2) years beginning on April 1, 2015[,] and ending on March 31, 2017 (the "Initial Term"). This Agreement shall then continue in effect for the Initial Term and from month to month thereafter ("Renewal Term(s)"), unless terminated by either Party giving written notice of termination to the other party not less than sixty (60) days prior to the expiration of the Initial Term or sixty (60) days during any Renewal Term, or unless earlier terminated as provided herein or unless earlier terminated or modified by order of the IURC.

Id. at 178.

[7] Section 13 provided, in part:

Choice Supplier Non-Compliance - Remedies.

a. Termination of Agreement.

Company may terminate this Agreement in the manner specified below upon the occurrence of any of the following events:

(i) immediately, upon written notice to Choice Supplier, in the event that Choice Supplier either (a) fails to provide the collateral or additional collateral required to be delivered within 14 business days of Company's notice pursuant to Section 12 hereof or (b) fails to make any payment of money to Company when due under this Agreement and such failure is not cured within 3 business days after written notice of such failure is delivered to Choice Supplier;

(ii) immediately, upon written notice to Choice Supplier, in the event that Company determines, in its reasonable discretion, that Choice Supplier's noncompliance with the requirements of this Agreement is jeopardizing the operational integrity of the Company's distribution system in whole or in part or Choice Supplier fails to make appropriate gas supply deliveries;

(iii) upon five (5) days written notice to Choice Supplier, in the event that Company determines, in its reasonable discretion, that Choice Supplier has failed to comply with the Supplier Code of Conduct; or

(iv) upon ten (10) days prior written notice to Choice Supplier, in the event that Company determines, in its reasonable discretion, that Choice Supplier has failed to comply with or perform any other requirement or obligation under this Agreement not described in subparagraph (i), (ii) or (iii) above and such failure is not cured within such ten-day period.

* * * * *

c. Recurring Non-Compliance or Fraudulent, Deceptive, or Abusive Practices.

Without limiting Company's right to exercise its reasonable discretion under this Section 13, recurring fraudulent, deceptive, or abusive practices by Choice Supplier shall be considered cause for termination pursuant to Section 13(a)(ii) of this Agreement or for suspension of enrollment and/or nullification of customer contract pursuant to Section 13(b)(iii) of this Agreement. For purposes of this section "fraudulent, deceptive, or abusive practices" shall have the meaning defined in Paragraph 5 of the Supplier Code of Conduct.

* * * * *

f. Non-Exclusive Remedies.

Remedies identified in Sections 13 (a) and (b) are not Company's exclusive remedy for Choice Supplier's breach of this Agreement, and Company shall retain all rights and remedies available to it hereunder, at law or in equity, including, but not limited to, Company's right, without any additional notice to Choice Supplier, to liquidate in whole or in part Choice Supplier's collateral held by Company as security under this Agreement and to apply any proceeds thereof to costs incurred by Company as a result of Company's termination of this Agreement, and in the event Company's damages exceed such proceeds, to pursue recovery of such excess amounts from Choice Supplier.

Id. at 184-88 (emphasis in original).

[8] Section 16 provided that "[f]ailure to make timely payment . . . may result in termination of this Agreement" by NIPSCO. *Id.* at 189. Finally, Section 21 allowed NIPSCO to terminate the agreement in the event of the Choice Supplier's bankruptcy.

[9] On November 11, 2019, NIPSCO notified Realgy that it was "electing to not renew" the SAS Agreement pursuant to paragraph 2 of the Agreement effective March 31, 2020. Appellant's App. Vol. II p. 26. Realgy responded by filing a complaint against NIPSCO with the IURC on November 15, 2019.[1] Realgy argued that NIPSCO's termination of the SAS Agreement was unlawful.

[10] Realgy and NIPSCO filed cross-motions for summary judgment. Realgy argued that NIPSCO failed to comply with the terms of Section 13 of the SAS Agreement and that NIPSCO's termination of the SAS Agreement was discriminatory under the Code of Conduct and Indiana Code Sections 8-1-2-69 and 8-1-2-103. NIPSCO argued that the SAS Agreement was unambiguous; that NIPSCO properly terminated the Agreement under Section 2; and that extrinsic evidence should not be considered.

[11] On June 29, 2020, the IURC issued an order granting NIPSCO's motion for summary judgment. The IURC found that, under the plain, unambiguous language of the SAS Agreement, termination by either party was allowed under

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[1] Realgy also requested emergency relief because NIPSCO provided notice of its intent to suspend new customer enrollments. The parties reached an agreement, and NIPSCO agreed to continue processing customer enrollments during the pendency of these proceedings.

Section 2 upon the provision of appropriate notice. Because the SAS Agreement was not ambiguous, the IURC declined "to examine additional parol or extrinsic evidence outside the SAS Agreement to determine the intent of the parties." Appellant's App. Vol. II p. 12. The IURC also found that Realgy failed to show "that electing to not renew the SAS Agreement under Section 2 evidences the service discrimination or Code of Conduct noncompliance claimed or is akin to the unilateral action for cause under Section 13 necessitating compliance with the Code of Conduct." *Id.* at 13. Accordingly, the IURC granted NIPSCO's motion for summary judgment. Realgy now appeals.

Analysis

[12] Realgy argues that the IURC erred by granting NIPSCO's motion for summary judgment. Our Supreme Court discussed the standard of review applicable in appeals from summary judgment orders of the IURC in *N. Indiana Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, 1018 (Ind. 2009). The Court noted that appellate courts "apply a de novo standard when reviewing a trial court's summary judgment order because the reviewing court faces the same issues that were before the trial court and analyzes them the same way." *N. Indiana Pub. Serv. Co.*, 907 N.E.2d at 1018. Because agencies are "executive branch institutions which the General Assembly has empowered with delegated duties" rather than "judicial bodies," the Court concluded that "an adjudication by an agency deserves a higher level of deference than a summary judgment order by a trial court falling squarely within the judicial branch." *Id.* The Court,

therefore, applied "the established standard of review for judicial review of [IURC] orders." *Id.*

[13] This established standard includes a "multiple tiered review." *Id.* at 1016. First, we review "whether there is substantial evidence in light of the whole record to support the [IURC's] findings of basic fact." *Id.* "Such determinations of basic fact are reviewed under a substantial evidence standard, meaning the order will stand unless no substantial evidence supports it." *Id.* We neither reweigh the evidence nor assess the credibility of witnesses, and we consider only the evidence most favorable to the IURC's findings. *Id.*

> The [IURC's] order is conclusive and binding unless (1) the evidence on which the [IURC] based its findings was devoid of probative value; (2) the quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding does not rest upon a rational basis; (3) the result of the hearing before the [IURC] was substantially influenced by improper considerations; (4) there was not substantial evidence supporting the findings of the [IURC]; (5) the order of the [IURC] is fraudulent, unreasonable, or arbitrary.

Id. "This list of exceptions is not exclusive." *Id.*

[14] Secondly, "the order must contain specific findings on all the factual determinations material to its ultimate conclusions." *Id.* We review "conclusions of ultimate facts for reasonableness, the deference of which is based on the amount of expertise exercised by the agency." *Id.* Where "the order involves a subject within the [IURC's] special competence, courts should give it greater deference." *Id.* "If the subject is outside the [IURC's] expertise,

courts give it less deference." *Id.* In either case, we may "examine the logic of inferences drawn and any rule of law that may drive the result." *Id.* "[L]egal propositions are reviewed for their correctness." *Id.* at 1018. "Additionally, an agency action is always subject to review as contrary to law, but this constitutionally preserved review is limited to whether the [IURC] stayed within its jurisdiction and conformed to the statutory standards and legal principles involved in producing its decision, ruling, or order." *Id.* at 1016.

[15] In *N. Indiana Pub. Serv. Co.*, 907 N.E.2d at 1017-18, our Supreme Court noted that, where the IURC has approved a contract, effectively making it an order of the IURC, if the IURC is later called upon to interpret the contract, the IURC is "interpret[ing] its own order, not a contract entered by the parties and later disputed." "Approving such contracts and resolving disputes revolving around them is intrinsic to the [IURC's] regulation of utility rates." *Id.* at 1018. Interpreting such an order "is a question falling well within the [IURC's] expertise." *Id.* Our Supreme Court considered "this question as a mixed question of law and fact with a high level of deference, examining the logic of the inferences made and the correctness of legal propositions without replacing our own judgment for that of the [IURC]." *Id.*

[16] More recently, our Supreme Court has cited *N. Indiana Pub. Serv. Co. v. U.S. Steel Corp.*, 907 N.E.2d 1012, with approval in reviewing such mixed questions of law and fact. In *NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co.*, 125 N.E.3d 617, 623-24 (Ind. 2019), *reh'g denied*, our Supreme Court held:

> When presented with an appeal under this section, we apply three levels of review: "one for factual findings; another for mixed questions of law and fact; and a third for questions of law." [*NIPSCO Indus. Grp. v. N. Indiana Pub. Serv. Co.*, 100 N.E.3d 234, 241 (Ind. 2018), *modified on reh'g* (Sept. 25, 2018)]. *See also* [*N. Indiana Pub. Serv. Co. v. U.S. Steel Corp.,* 907 N.E.2d 1012, 1015-18 (Ind. 2009) (describing the levels of review). The Industrial Group's arguments addressed below involve only the second level of review.
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> Appeals involving claims of insufficient findings to sustain the ultimate conclusions contained in the order present questions of ultimate fact—or mixed questions of law and fact. *See Ind. Gas Co. v. Ind. Fin. Auth.*, 999 N.E.2d 63, 66 (Ind. 2013). In these cases, we review the [IURC's] conclusions for reasonableness, deferring to the [IURC] "based on the amount of expertise exercised by [it]." *U.S. Steel*, 907 N.E.2d at 1016 (citation omitted). Thus, we give more deference to orders on subjects within the [IURC's] expertise and less deference to orders dealing with matters outside its expertise. *Id.* "In either case, courts may examine the logic of inferences drawn and any rule of law that may drive the result." *Id.*

[17] Here, NIPSCO and Realgy executed an SAS Agreement, which was consistent with the standard SAS Agreement approved by the IURC as part of an order in Cause No. 44081. Accordingly, pursuant to *N. Indiana Pub. Serv. Co.*, 907 N.E.2d at 1018, we give the IURC's interpretation of the SAS Agreement a high level of deference. In interpreting a contract, we generally ascertain the intent of the parties at the time the contract was made, as disclosed by the language used to express the parties' rights and duties. *Ryan v. TCI Architects/Engineers/Contractors, Inc.*, 72 N.E.3d 908, 914 (Ind. 2017). "We look

at the contract as a whole to determine if a party is charged with a duty of care and we accept an interpretation of the contract that harmonizes all its provisions." *Id.* We give a contract's clear and unambiguous language its ordinary meaning. *Id.* We construe a contract "so as to not render any words, phrases, or terms ineffective or meaningless." *Id.* "A contract is ambiguous if a reasonable person would find the contract subject to more than one interpretation." *Citimortgage, Inc. v. Barabas*, 975 N.E.2d 805, 813 (Ind. 2012). "[T]he parties' disagreement over the plain meaning does not create ambiguity." *Care Grp. Heart Hosp., LLC v. Sawyer*, 93 N.E.3d 745, 753 (Ind. 2018). If we find ambiguous terms or provisions in the contract, "we will construe them to determine and give effect to the intent of the parties at the time they entered into the contract." *Citimortgage*, 975 N.E.2d at 813.

[18] Realgy argues that the SAS Agreement is ambiguous and that Section 2 of the Agreement conflicts with the process for termination of the Agreement outlined in Section 13. According to Realgy, "the SAS Agreement plainly does not permit NIPSCO to terminate without cause by notice of non-renewal, in derogation of the express termination requirements under Section 13." Appellant's Br. pp. 22-23. NIPSCO and the IURC respond that the SAS Agreement is unambiguous and clearly allowed NIPSCO to terminate the Agreement without cause under Section 2.

[19] Like the IURC, we find no ambiguity between Section 2 and Section 13. Under the plain language of Section 2, after the initial two-year term from April 1, 2015, to March 31, 2017, the SAS Agreement continued on a month-to-

month basis. During this month-to-month period, *either* NIPSCO or Realgy could terminate the SAS Agreement by providing written notice of not less than sixty days, "unless earlier terminated as provided herein or unless earlier terminated or modified by order of the IURC." Appellant's App. Vol. III p. 178. Section 2 of the Agreement does not require either party to show cause for termination.

[20] On the other hand, Section 13 allows NIPSCO to terminate the SAS Agreement for cause upon certain violations of the Agreement by Realgy. Unlike Section 2, Section 13 contains no limitation on when the termination could occur. Thus, if Realgy committed certain violations of the Agreement within the first two years, NIPSCO could have terminated the Agreement at that time.

[21] Realgy's argument that NIPSCO could only terminate the Agreement under Section 13 ignores and contradicts the plain language of the Agreement. Realgy's interpretation would effectively eliminate the termination provision of Section 2. We conclude that the Agreement contains several termination provisions. Most important to this action, Section 2 allowed either party to terminate the Agreement under certain circumstances without cause; Section 13 allowed NIPSCO to terminate the Agreement for cause upon Realgy's violation of certain provisions. Here, in compliance with the requirements of Section 2, NIPSCO terminated the Agreement pursuant to Section 2 after the initial two-year period and with more than a sixty-day notice to Realgy.

[22] Despite the plain language of the SAS Agreement, NIPSCO's compliance with Section 2 in terminating the Agreement, and the fact that the IURC previously approved the standard SAS Agreement, Realgy also argues that the termination was improper because: (1) NIPSCO is under an affirmative duty to provide service to eligible customers under Indiana Code Sections 8-1-2-4, 8-1-2-69, and 8-1-2-103;[2] (2) NIPSCO is "subject to the Code of Conduct that prohibits discrimination between and among Choice Suppliers and requires NIPSCO to maintain competitive neutrality," Appellant's Br. p. 32; and (3) NIPSCO's large industrial consumers enter into similar form contracts and could be denied service without cause.

[23] Our Supreme Court has noted that, "where the language of a written instrument is unambiguous, as it is here, the parties' intent is to be determined by reviewing the language contained within the 'four corners' of that written instrument." *Ryan*, 72 N.E.3d at 917. "[W]e do not go beyond the four corners of the contract to investigate meaning." *Care Grp. Heart Hosp.,* 93 N.E.3d at 756. "[E]xtrinsic evidence is not admissible to add to, vary or explain the terms of a written instrument if the terms of the instrument are susceptible of a clear and unambiguous construction." *Ryan*, 72 N.E.3d at 917. For example, we do

[2] In its motion for summary judgment, Realgy relied upon Indiana Code Sections 8-1-2-69 and 8-1-2-103. In its response to NIPSCO's motion for summary judgment, Realgy relied upon Indiana Code Sections 8-1-2-4, 8-1-2-44, 8-1-2-69, and 8-1-2-103. On appeal, Realgy limits its discussion to Indiana Code Sections 8-1-2-4, 8-1-2-69, and 8-1-2-103.

not consider extrinsic evidence, "even if that evidence is another agreement executed on the same day." *Care Grp. Heart Hosp.,* 93 N.E.3d at 756.

[24] Given the unambiguous language of the SAS Agreement, we are unconvinced that Realgy's arguments regarding evidence outside the four corners of the document are relevant here. Realgy, however, argues that "'[u]nless the contract provides otherwise, all applicable law in force at the time the agreement is made impliedly forms a part of the agreement,' because 'the parties are presumed to have had the law in mind.'" *Schwartz v. Heeter*, 994 N.E.2d 1102, 1106 (Ind. 2013) (quoting *Ethyl Corp. v. Forcum-Lannom Assocs., Inc.*, 433 N.E.2d 1214, 1220 (Ind. Ct. App. 1982)). Even if we consider Realgy's arguments regarding the statutes and Code of Conduct, we do not find that the IURC erred by granting summary judgment to NIPSCO.

[25] Realgy relies upon Indiana Code Section 8-1-2-4, which provides: "Every public utility is required to furnish reasonably adequate service and facilities." Realgy also relies upon Indiana Code Section 8-1-2-69, which provides:

> Whenever, upon the investigation made under the provisions of this chapter, the commission shall find any regulations, measurements, practices, acts, or service to be unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, or otherwise in violation of any of the provisions of this chapter, or shall find that any service is inadequate or that any service which can be reasonably demanded can not [sic] be obtained, the commission shall determine and declare and by order fix just and reasonable measurements, regulations, acts, practices, or service to be furnished, imposed, observed, and followed in the future in lieu

> of those found to be unjust, unreasonable, unwholesome, unsanitary, unsafe, insufficient, preferential, unjustly discriminatory, inadequate, or otherwise in violation of this chapter, as the case may be, and shall make such other order respecting such measurement, regulation, act, practice, or service as shall be just and reasonable.

Additionally, Indiana Code Section 8-1-2-103(a) provides: "No public utility . . . may charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered . . . than it charges, demands, collects, or receives from any other person for a like and contemporaneous service." Further, the Code of Conduct at issue here prohibits discrimination by NIPSCO against individual suppliers, among others, and requires NIPSCO to maintain "competitive neutrality." Appellant's App Vol. III pp. 75-77.

[26] Realgy has presented no evidence that NIPSCO's termination of the SAS Agreement, pursuant to Section 2, was in any way discriminatory, intended to interfere with competitive neutrality, or violated the statutes cited. Accordingly, we agree with the IURC's following conclusion:

> The [IURC] recognizes the nature of regulated utility services provides an important backdrop to any contract for regulated services, but we disagree that the presence of a regulated public utility as a party to the SAS Agreement opens the door to consider extrinsic evidence regardless of the contractual language and regardless of the context in which the contract was initially evaluated by the [IURC]. Importantly, we are not persuaded Realgy has shown that electing to not renew the SAS Agreement under Section 2 evidences the service discrimination or Code of

> Conduct noncompliance claimed or is akin to the unilateral action for cause under Section 13 necessitating compliance with the Code of Conduct.

Appellant's App. Vol. II p. 13.

[27] Section 2 of the SAS Agreement unambiguously allowed NIPSCO to terminate the Agreement after the initial two-year period with a sixty-day notice to Realgy. NIPSCO provided the proper, timely termination notice, and Realgy has failed to demonstrate that such termination was discriminatory or violated the cited statutes. Accordingly, we cannot say the IURC erred by granting summary judgment to NIPSCO.

Conclusion

[28] The SAS Agreement between NIPSCO and Realgy unambiguously allowed NIPSCO to terminate the Agreement with a sixty-day notice pursuant to Section 2. NIPSCO complied with Section 2 in terminating the Agreement, and Realgy has not demonstrated that the termination was discriminatory. Accordingly, the IURC properly granted summary judgment to NIPSCO on Realgy's complaint, and NIPSCO is entitled to judgment as a matter of law. We affirm.

[29] Affirmed.

Bailey, J., and Robb, J., concur.