UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Nora Mead Brownell, and Suedeen G. Kelly.

Central Iowa Power Cooperative Docket No. EL04-129-001

v.

Midwest Independent Transmission
System Operator, Inc.

ORDER DENYING REHEARING AND GRANTING IN
PART AND DENYING IN PART CLARIFICATION

(Issued November 1, 2005)

Introduction

1. In this order, we deny requests for rehearing and grant in part and deny in part requests for clarification of the order issued on February 7, 2005 (February 7 Order).[1]

Background

2. Central Iowa Power Cooperative (Central Iowa), which is a Rural Utility Service-financed electric cooperative, and Interstate Power and Light Company (IPL), which is a jurisdictional public utility, each owns a discrete portion of a transmission system (Integrated Facilities) that they operate jointly pursuant to an Operating and Transmission Agreement (O&T Agreement), which was filed with the Commission by IPL. Central Iowa's complaint alleged that Midwest Independent Transmission System Operator, Inc. (Midwest ISO) was using Central Iowa's portion of the Integrated Facilities to provide transmission service on behalf of its member Ameren Energy Marketing Company (Ameren) to Ameren's wholesale power customer the Resale Power Group of Iowa (RPGI) without authorization from, or compensation to, Central Iowa.[2] Central Iowa

[1] *Central Iowa Power Cooperative v. Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,093 (2005).

[2] *See* February 7 Order, 110 FERC ¶ 61,093 at P 4-25.

requested that the Commission direct Midwest ISO to collect Central Iowa's tariff rate from Midwest ISO's transmission customers and then, in turn, pay Central Iowa. Alternatively, if the Commission declined to direct Midwest ISO to compensate it, Central Iowa requested that the Commission explain that such determination would not constitute Commission authorization for Midwest ISO to use Central Iowa's transmission facilities without compensation.

3. The February 7 Order denied Central Iowa's request to order Midwest ISO to compensate Central Iowa, finding that it lacked jurisdiction to regulate Central Iowa's rates. It further rejected Central Iowa's argument that certain provisions of the Midwest ISO Tariff required Midwest ISO to compensate Central Iowa. The February 7 Order granted the alternative relief, stating that nothing therein authorized Midwest ISO to use Central Iowa's transmission facilities without compensation.

Requests for Rehearing and Other Pleadings

4. Central Iowa filed a request for rehearing and clarification of the February 7 Order. The National Rural Electric Cooperative Association (NRECA) and Dairyland Power Cooperative (Dairyland) filed requests for rehearing of the February 7 Order. We will discuss these pleadings in more detail below.

Discussion

A. Lack of Commission Jurisdiction over Central Iowa

5. Central Iowa argues that it is irrelevant whether the Commission has jurisdiction over Central Iowa, its facilities, or its rate. Instead, Central Iowa contends that the issue is whether the Commission has jurisdiction over Midwest ISO to prevent Midwest ISO's alleged unauthorized use of a non-public utility's (*i.e.*, Central Iowa's) transmission facilities without compensation.[3] It contends that the Commission's lack of jurisdiction over Central Iowa does not prevent the Commission from addressing Central Iowa's complaint and directing Midwest ISO to pay Central Iowa under Central Iowa's rate.

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[3] Central Iowa reiterates its assertions that: (1) Midwest ISO's use of the Integrated Facilities constitutes third-party transmission service under section 5.15 of the O&T Agreement, which requires the approval of both IPL and Central Iowa; (2) IPL's zonal rate under the Midwest ISO Tariff does not recover the cost of Central Iowa's transmission facilities; and (3) Central Iowa and IPL have agreed that the "total rate" for third-party transmission service is IPL's zonal rate under the Midwest ISO Tariff plus Central Iowa's tariff rate.

According to Central Iowa, the O&T Agreement is a jurisdictional contract on file with the Commission, Central Iowa's rate was developed pursuant to the O&T Agreement, and the Commission has jurisdiction over Midwest ISO, therefore, "the Commission clearly has jurisdiction over the Midwest ISO's rate for this jurisdictional service."[4]

6. Central Iowa also reiterates one of its alternative arguments, *i.e.*, that under the Midwest ISO open access transmission tariff (OATT), Midwest ISO could enter into an Agency Agreement with IPL for access to Central Iowa's facilities, pursuant to which Midwest ISO would pay IPL for the use of IPL's facilities. In turn, IPL, which has contractual privity with Central Iowa through the O&T Agreement, would then pay Central Iowa. Thus, Central Iowa concludes, the Commission has "jurisdiction over the service in question and relevant contracts."[5]

7. Central Iowa proffers other alternative bases for the Commission to assert jurisdiction to review its rates. Central Iowa claims: (1) the Commission could review Central Iowa's transmission rate similar to its review of the reciprocity tariffs of non-public utilities; (2) the Commission asserted jurisdiction over a similar situation involving use of a non-jurisdictional transmission owner's system;[6] (3) the Commission could require Midwest ISO to include the requested charge in its rates, which would be analogous to requiring a Regional Transmission Organization (RTO) or other transmission provider to provide a credit based on the valuation of a non-jurisdictional customer's transmission facilities; and (4) the Commission has approved RTO rates that included charges of non-jurisdictional transmission owners.

8. Central Iowa also argues for the first time on rehearing that Article 9 of the Midwest ISO Transmission Owners Agreement (TOA), which concerns third-party joint agreements, provides that a transmission owner may bring to the Commission a dispute between the transmission owner and Midwest ISO where an interpretation of the TOA may cause the transmission owner to be in breach of a third-party joint use agreement. It contends that IPL's intervention in this proceeding requires Central Iowa's complaint to be resolved.

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[4] Central Iowa Rehearing at 17.

[5] *Id.* at 16.

[6] Alliant Services Co., 86 FERC ¶ 61,272 (1999) (*Corn Belt*) (this case involved IPL and Corn Belt Power Cooperative).

Commission Response

9. Central Iowa argues that Midwest ISO is a third-party transmission customer of Central Iowa, and it argues that the service in question should fall under Midwest ISO's OATT. In essence, Central Iowa appears to argue that Midwest ISO should be treated as if it were providing third-party transmission service to itself over Central Iowa's facilities under Midwest ISO's OATT, but required to charge itself Central Iowa's rate – all without Central Iowa being a member of Midwest ISO or having any contractual relationship with Midwest ISO.

10. We reject Central Iowa's argument that Midwest ISO is the jurisdictional provider of the alleged transmission service at issue.[7] Central Iowa's focus on Midwest ISO is misplaced. The complaint concerns alleged transmission service over the facilities of a non-public utility. Further, Central Iowa itself argues that it has not authorized Midwest ISO to use its facilities. Thus, the service at issue is transmission service over Central Iowa's facilities, and Midwest ISO cannot be considered the jurisdictional provider of third-party transmission service to itself over Central Iowa's facilities. And, as discussed below, that service is not under our jurisdiction.

11. Because Central Iowa is an RUS-financed electric cooperative, and thus is not a regulated public utility within the Commission's jurisdiction, the Commission has no authority under sections 205 and 206 of the Federal Power Act (FPA) to regulate Central Iowa's rates.[8] Further, Central Iowa attaches unwarranted reliance on the fact that the O&T Agreement is on file with the Commission. Central Iowa was not the entity to file the O&T Agreement with the Commission.[9] The O&T Agreement is jurisdictional with respect to the service provided thereunder by IPL, the jurisdictional public utility that filed it. As Central Iowa is clearly not under the Commission's jurisdiction under

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[7] We use the term "alleged" in the sense that our orders in this proceeding make no findings with regard to the parties' factual allegations.

[8] February 7 Order, 110 FERC ¶ 61,093 at P 28. *See also, e.g., New West Energy Corp.*, 83 FERC ¶ 61,004 at 61,015-16 & n. 3-4 (1998) (*New West Energy*) (*citing City of Paris, Kentucky v. FPC*, 399 F.2d 983 (D.C. Cir. 1968); *Salt River Agricultural Improvement & Power District v. FPC*, 391 F.2d 470 (D.C. Cir. 1968), *cert. denied*, 393 U.S. 85 (1968); *Dairyland Power Cooperative*, 37 FPC 12 (1967)).

[9] It is not Commission practice to assert jurisdiction over entities that are simply mentioned in documents on file with the Commission.

sections 205 and 206 of the FPA, and Central Iowa does not dispute this, and is the provider of transmission service over its lines, we find that the transmission service in question cannot be considered to be under our jurisdiction.

12. Accordingly, we find that the alleged service in question is non-jurisdictional under sections 205 and 206 and is not jurisdictional service by Midwest ISO. Thus, Central Iowa's alternative arguments concerning the applicability of various provisions of the Midwest ISO OATT are rejected.

13. Moreover, because Central Iowa raises the argument concerning Article 9 of the TOA for the first time on rehearing, it is therefore improper.[10] Nevertheless, Central Iowa's argument is inapplicable, because (1) the TOA applies to transmission-owing members of Midwest ISO, and Central Iowa is not a member; (2) although IPL is a transmission-owning member of Midwest ISO, IPL did not file the instant complaint; and (3) in any event, no evidence has been presented that IPL has satisfied the requirement of Article 9 that it discuss its position with the Midwest ISO Board and the other transmission owners before submitting a conflict to the Commission.

B. Other Issues

14. Central Iowa also argues that the Commission must hold an evidentiary hearing because it has raised issues of material fact. Since we lack jurisdiction over Central Iowa as a public utility, we declined to set the complaint for hearing. Merely raising factual allegations concerning a non-jurisdictional issue does not warrant an evidentiary hearing where we lack jurisdiction to grant the remedy requested.

15. Central Iowa also argues that the Commission has previously invited it to file a complaint if Midwest ISO did not file a service agreement for its transmission service on behalf of Ameren to RPGI. Central Iowa alleges that Midwest ISO has not filed a Network Operating Agreement for its transmission service to RPGI on behalf of Ameren. It contends that such omission has denied it and other interested parties the opportunity to file comments and protests in a section 205 proceeding.

16. In Docket No. ER04-738-000, in the context of discussing Central Iowa's concern with regard to the alleged lack of a filing by Midwest ISO of a service agreement for transmission service to RPGI on behalf of Ameren, we stated to Central Iowa that it could seek compensation for the use of its facilities when an applicable service agreement was

[10] *See, e.g.*, *Nevada Power Co.*, 111 FERC ¶ 61,111 at P 10 (2005).

filed or, in the absence of a filing, it could file a complaint.[11] It was not our intent to suggest that Central Iowa could seek a remedy beyond our statutory authority to provide, as Central Iowa has sought in this case. Rather, as the February 7 Order noted, the Commission has previously held that, if Central Iowa believes that its arrangements with IPL do not properly account for the use of the Integrated Facilities and for sharing of revenues from third-party uses, it may file a complaint to modify the O&T Agreement.[12]

17. Further, Central Iowa's reliance on *Corn Belt* is unpersuasive. In that case, Alliant proposed to provide transmission service for MidAmerican Energy Company (MidAmerican) to transmit electricity to MidAmerican's wholesale power customer. Corn Belt's protest alleged that Alliant could not provide the proposed service without using Corn Belt's facilities and that Alliant had not made arrangements for the use of Corn Belt's facilities. Corn Belt sought compensation for the use of its facilities. MidAmerican, which also intervened in that proceeding, disputed whether Corn Belt was entitled to separate compensation. Alliant and MidAmerican disagreed concerning which of them should be responsible for making arrangements with Corn Belt, if that were required. The Commission set Alliant's proposed transmission service for hearing, because it presented issues of fact and law. However, that case was settled at the hearing stage. The hearing order did not resolve whether Corn Belt was entitled to compensation, what the appropriate arrangements should have been, and upon whom the responsibility should have fallen to make such arrangements. Even if the Commission had done so, which it did not, that would still have fallen short of providing a forum to determine the appropriate level of compensation to Corn Belt, a non-public utility. Although the Commission accepted the parties' settlement, at no point in that proceeding did the Commission determine what arrangements were required for the proposed service (including the appropriate level of compensation, if any, due to Corn Belt) or what entity was required to make such arrangements. Thus, the *Corn Belt* case does not stand for the proposition that the Commission has asserted jurisdiction to determine the appropriate compensation for the use of non-public utility facilities under sections 205 and 206 of the FPA.

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[11] *Midwest Independent Transmission System Operator, Inc.*, 108 FERC ¶ 61,008 at P 9 (2004).

[12] February 7 Order, 110 FERC ¶ 61,093 at P 28 & n. 24.

18. Finally, Central Iowa argues that it is entitled to compensation under *TRANSLink Transmission Company, L.L.C.* (*TRANSLink*),[13] in which the Commission held that TRANSLink, a proposed independent transmission company, cannot use other parties' facilities without appropriate compensation. In the *TRANSLink* proceeding, Midwest ISO and three of its transmission-owing members proposed to form TRANSLink. Central Iowa had argued that it had not consented to the transfer of control of its facilities to TRANSLink and further expressed concern about the potential use of its facilities without compensation. In response, the Commission held:

> We clarify that TRANSLink cannot use other parties' facilities without appropriate compensation. Similarly, we clarify that TRANSLink participants can only transfer rights and ownership interests in the facilities to the extent that they actually have such rights and interests. For facilities that are jointly owned, TRANSLink may only operate those facilities consistent with the ownership interest transferred and cannot impair any contractual rights of other joint owners.[[14]]

19. Central Iowa's reliance on *TRANSLink* is not persuasive. The holding in *TRANSLink* at most means only that Midwest ISO cannot use Central Iowa's facilities without appropriate compensation. The February 7 Order held the same, *i.e.*, the February 7 Order held that nothing in that order was intended to authorize Midwest ISO to use Central Iowa's facilities without compensation. Further, *TRANSLink* did not hold, as Central Iowa would have us hold in this case, that the Commission may determine what constitutes appropriate compensation to a non-public utility such as Central Iowa or order Midwest ISO to pay (or to arrange for one of Midwest ISO's members to pay) a non-public utility's rate. Nor could the February 7 Order have so held, because the Commission lacks section 205 jurisdiction over Central Iowa.

20. We note that, while we are denying Central Iowa's request for relief in this case, other possible solutions remain available to Central Iowa. As Central Iowa stated in its answer to Midwest ISO's answer, there are measures that it can take to prevent the alleged unauthorized use of its facilities.[15]

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[13] 101 FERC ¶ 61,140 (2002).

[14] *Id.* at P 23.

[15] *See* Central Iowa's Information to Supplement Complaint at 17 (Sept. 30, 2004) (expressing Central Iowa's willingness "to take steps to curtail service to the RPGI cities unless compensation was agreed upon").

C. The Parties' Policy Arguments

21. NRECA argues that ensuring that non-jurisdictional transmission owners will be compensated for use of their transmission facilities by RTOs would encourage more voluntary cooperation between such owners and RTOs and thereby enhance access to transmission facilities. NRECA urges the Commission to hold that a transmission owner should be compensated regardless of whether the owner is a member of Midwest ISO, and both NRECA and Dairyland urge the Commission to provide the forum for resolving such disputes. Central Iowa also argues that (1) in Order No. 888, the Commission recognized the need for transmission owners to be compensated for the use of their facilities and (2) it is discriminatory if the Midwest ISO OATT only permits payments for its use of members' facilities, but denies payments for its use of a non-member's facilities located within Midwest ISO's geographic region.

Commission Response

22. It is unnecessary for us to address the merits of the parties' policy arguments. Where, as in this case, the Commission does not have authority under sections 205 and 206 to grant the relief requested, policy considerations cannot prevail over the statutory limitations on the Commission's authority.[16]

D. Requests for Clarification

23. Central Iowa requests two "clarifications." First, after acknowledging that the February 7 Order granted in part its alternative request for relief by stating that the order should not be interpreted as a determination that Midwest ISO may use Central Iowa's facilities without compensation, Central Iowa requests that the Commission further clarify that, besides Midwest ISO, the February 7 Order should not be interpreted as permitting either Ameren, RPGI or any other party to use Central Iowa's facilities without permission or compensation. Second, Central Iowa reiterates its request that the Commission find that Midwest ISO is providing transmission services for the service in question to the interconnection points alleged by Central Iowa in its complaint.

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[16] *See*, *e.g.*, *Chippewa and Flambeau Improvement Co.*, 112 FERC ¶ 61,115 at P 7 (2005) (public interest and policy considerations do not bear on the statutory provisions that must govern the Commission's jurisdictional determinations); *KN Watterberg Transmission, LLC*, 90 FERC ¶ 61,321 at 62,075, *reh'g denied*, 93 FERC ¶ 61,041 (2000), *reh'g denied*, 94 FERC ¶ 61,189 (2001) (Commission policy cannot be used to circumvent a statutory mandate).

Commission Response

24. The first request for clarification does not cite any lack of clarity of the February 7 Order with respect to the order's statement that, if the February 7 Order did not grant the relief sought by Central Iowa, the order should not be interpreted as a determination that Midwest ISO may use Central Iowa's facilities without compensation. That was the interpretation that Central Iowa sought in its complaint, and we granted it. However, we will add here that nothing in the February 7 Order or this order is intended to authorize any party to use Central Iowa's facilities without compensation or permission. In so doing, we further note, as discussed above, that nothing in the February 7 Order or this order is intended to make a factual finding regarding Central Iowa's, or any other party's, factual allegations. Central Iowa's second requested clarification merely reiterates its original request, and we deny it for the same reason that we denied it in the February 7 Order.[17]

25. We also wish to clarify the February 7 Order's statement that:

> [I]f the parties were to agree on (or a court with jurisdiction were to determine) a charge to be paid by Midwest ISO or IPL and then reflected in a jurisdictional rate, then the jurisdictional entity, whether it be IPL or Midwest ISO, could file the proposed *charge* with the Commission.[[18]]

We clarify that if the parties were to agree on (or a court with jurisdiction were to determine) a charge to be paid by a public utility -- be it Midwest ISO or IPL or another appropriate entity -- and then reflected in a jurisdictional rate, then the public utility could make a section 205 filing with the Commission to reflect the charge as a cost component of its jurisdictional rate.

E. Request to Take Judicial Notice

26. On June 24, 2005, Central Iowa filed a request that the Commission take judicial notice of the Commission's order in *City of Vernon, California* (*City of Vernon*).[19] Central Iowa argues that, following *City of Vernon*, it would voluntarily make its facilities available to Midwest ISO, and because Central Iowa's rates would be included in Midwest ISO's rate for service, the Commission could review Central Iowa's rates to

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[17] 110 FERC ¶ 61,093 at P 32.

[18] *Id.* at P 28 (footnote omitted) (emphasis added).

[19] 111 FERC ¶ 61,092 (2005).

ensure that they are just and reasonable. It contends that, similar to *City of Vernon*, the Commission would be permitted to review Central Iowa's rates as a component of the Midwest ISO rate. Central Iowa contends that its lack of membership in Midwest ISO is irrelevant to this determination.

27. RPGI and Midwest ISO filed answers on July 8, 2005 and July 10, 2005, respectively. RPGI and Midwest ISO distinguish *City of Vernon* from this case, arguing that the City of Vernon, California is a member of the California Independent System Operator Corporation (CAISO) and had granted the CAISO the contractual authority to collect revenues on its behalf. Further, they argue that the Commission was reviewing the City of Vernon's transmission revenue requirement as a component of the CAISO's jurisdictional rate. Midwest ISO further asserts that Central Iowa is improperly raising a new issue on rehearing by arguing that it is willing to submit to a section 205-style review of its rate after arguing in its complaint that the Commission should simply accept its unfiled tariff and providing no cost support. To the extent that the Commission takes official notice of *City of Vernon*, Midwest ISO requests that the Commission also take official notice of its July 7, 2005 Order in *Interstate Power Company*,[20] in which the Commission reaffirmed that it has no authority to regulate Central Iowa's rates or to require any entity to pay Central Iowa's non-jurisdictional rate.[21]

Commission Response

28. In *City of Vernon*, the Commission held that the transmission revenue requirement of a participating transmission owner is a cost of the CAISO, and it determined that it could review the transmission revenue requirement of a non-public utility participating transmission owner (the City of Vernon, California) as a cost of the CAISO in the context of determining whether the rates of the CAISO, the jurisdictional entity, were just and reasonable under section 205 of the FPA.[22] However, unlike the City of Vernon in the CAISO, Central Iowa is not a participating transmission owner in Midwest ISO, and, in turn, Central Iowa's transmission revenue requirement is not a cost of Midwest ISO. Central Iowa's willingness to allow review of its rate under the justness and reasonableness standard of the FPA is also unpersuasive. A non-public utility such as

[20] 112 FERC ¶ 61,048 (2005).

[21] *Id.* at P 10.

[22] *City of Vernon, California*, 111 FERC ¶ 61,092 at P 13-14 (2005), *citing Pacific Gas and Electric Co. v. FERC*, 306 F.3d 1112, 1116-17 (D.C. Cir. 2002).

Central Iowa cannot waive the statutory restriction on the Commission's jurisdiction and volunteer to make itself subject to the Commission's jurisdiction under sections 205 and 206 of the FPA.[23] Thus, Central Iowa's reliance on *City of Vernon* is unpersuasive.

The Commission orders:

The requests for rehearing of the February 7 Order are hereby denied, as discussed in the body of this order. The requests for clarification of the February 7 Order are hereby granted in part and denied in part, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.

[23] *See, e.g.*, *Southwestern Electric Cooperative, Inc. v. Soyland Power Cooperative, Inc.*, 86 FERC ¶ 61,217 at 61,779, n.22 (1999), *order on reh'g*, 95 FERC ¶ 61,254, *order on reh'g*, 97 FERC ¶ 61,008 (2001), *order on reh'g*, 99 FERC ¶ 61,001 (2002), *aff'd sub nom. Southwestern Electric Cooperative, Inc. v. FERC*, 347 F.3d 975 (D.C. Cir. 2003); *New West Energy*, 83 FERC at 61,015; *see also South Carolina Public Service Authority*, 75 FERC ¶ 61,209 at 61,696 (1996) (the Commission is prohibited by statute from regulating directly the activities of nonpublic utilities under sections 205 and 206 of the FPA).