

130 FERC ¶ 61,217
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Marc Spitzer, Philip D. Moeller,
and John R. Norris.

Resale Power Group of Iowa
WPPI Energy

Docket No. EL09-71-000

ORDER DENYING PETITION FOR DECLARATORY ORDER

(Issued March 18, 2010)

1. On September 3, 2009, the Resale Power Group of Iowa (RPGI) and WPPI Energy (WPPI) (collectively, Petitioners) filed a petition for declaratory order (Petition). In their Petition, Petitioners seek an order holding that the transmission rate that they pay to Midwest Independent Transmission System Operator, Inc. (Midwest ISO) under its Open Access Transmission and Energy Markets Tariff (Midwest ISO Tariff)¹ and applicable service agreements is the only charge that Petitioners can be required to pay for Midwest ISO's transmission of electricity to Petitioners' members. In this order, we deny the Petition.

I. Background

2. Petitioners supply wholesale electric power and energy to their member utilities.² Petitioners state that, beginning in 2000, RPGI, and later WPPI, purchased electricity that

¹ With Commission acceptance of Midwest ISO's proposals for an Ancillary Services Market, effective January 6, 2009, the Midwest ISO Open Access Transmission and Energy Markets Tariff became the Open Access Transmission, Energy, and Operating Reserve Markets Tariff. *See Midwest Indep. Transmission Sys. Operator, Inc.*, 125 FERC ¶ 61,321 (2008).

² Petition at 3. RPGI is a joint action agency comprised of 27 municipal electric utilities, one cooperative, and one small privately-owned utility in Iowa. WPPI is a municipal joint action agency acting on behalf of two of its members Preston, Iowa (Preston) and Maquoketa, Iowa (Maquoketa). *Id.* at 1.

Midwest ISO delivered to Petitioners' Iowa members pursuant to transmission service agreements executed with Alliant Energy Corporate Services, Inc. (Alliant)³ under the Alliant Open Access Transmission Tariff. In 2000, Alliant transferred functional control of its transmission facilities to Midwest ISO, which put the transmission service over Alliant's facilities under the Midwest ISO Tariff.⁴ Petitioners state that RPGI members have received transmission service from Midwest ISO since 2000 pursuant to Network Integration Transmission Service (NITS) agreements executed under the Midwest ISO Tariff successively by MidAmerican Energy Company (MidAmerican) as RPGI's agent, then by Ameren Energy Marketing Company as RPGI's agent, and later by RPGI.⁵ Petitioners state that, since January 1, 2009, RPGI members Maquoketa and Preston commenced power purchases from WPPI.⁶ Petitioners state that, for transmission to the two cities, Midwest ISO and WPPI executed a Transaction Specification Sheet for Network Integration Transmission Service dated as of September 26, 2008, adding delivery points for Preston and Maquoketa to WPPI's existing NITS agreement with Midwest ISO dated November 12, 2001.⁷

3. Petitioners state that Midwest ISO has provided this NITS service to Petitioners through its operational control of facilities forming part of an integrated transmission system (Integrated Facilities) in Iowa currently owned by ITC Midwest LLC (ITC Midwest)⁸ and CIPCO, a Rural Utility Service (RUS)-financed electric cooperative and

³ Alliant is a service company affiliate of Wisconsin Power & Light Company, Interstate Power and Light Company (IPL), and South Beloit Water Gas & Electric Company.

⁴ In the Commission order approving the transfer of functional control of Alliant's transmission facilities to Midwest ISO, and in response to concerns made by Central Iowa Power Cooperative (CIPCO) that its facilities were being transferred to Midwest ISO, the Commission noted that "in this order we are only approving the transfer to the Midwest ISO of the facilities that Alliant Energy actually owns." *Alliant Energy Corporate Svcs., Inc.*, 90 FERC ¶ 61,344, at P 7 (2000).

⁵ Petition at 8.

⁶ *Id.* at 14.

⁷ *Id.*

⁸ ITC Midwest acquired its portion of the Integrated Facilities from IPL in 2007. *See ITC Holding Corp.*, 121 FERC ¶ 61,229, at P 1 (2007). A detailed account of the historical ownership of IPL's portion of the Integrated Facilities is provided on page 7 of the Petition.

non-Midwest ISO member.⁹ The Integrated Facilities are operated pursuant to a 1991 Operating & Transmission (O&T) Agreement between IPL, ITC Midwest (as successor-in-interest to IPL) and CIPCO.

4. For several years and in various contexts, CIPCO has sought compensation for Midwest ISO's alleged use of CIPCO's portion of the Integrated Facilities to serve Petitioners' member cities. Petitioners state that CIPCO has alleged that Midwest ISO causes electricity to flow over CIPCO's transmission system to serve certain of Petitioners' member cities because Midwest ISO has functional control over ITC Midwest's transmission facilities, which are interconnected with CIPCO's facilities.¹⁰ CIPCO claimed that the Midwest ISO Tariff only includes revenue recovery for those facilities owned by ITC Midwest – not CIPCO's facilities integrated with ITC Midwest's facilities. Most recently, in 2004, the same parties involved in the present Petition were before the Commission in a complaint proceeding filed by CIPCO.¹¹ CIPCO's complaint requested that the Commission order Midwest ISO to collect a charge for the alleged use of CIPCO's transmission facilities to deliver power to Petitioners. In its ruling, the Commission denied CIPCO's request on the basis that it lacked jurisdiction, but stated that “nothing in this order should be construed as a determination that Midwest ISO may use [CIPCO's] facilities without compensation.”¹² While acknowledging that there were factual issues in dispute, the Commission declined to set factual issues for hearing because CIPCO's facilities are not within the Commission's jurisdiction.¹³ On rehearing, the Commission further clarified 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.”¹⁴

⁹ Petition at 3.

¹⁰ See Petition at 15-16, citing CIPCO Complaint, Docket No. EL04-129-000, at ¶ 42 (filed Aug. 24, 2004).

¹¹ CIPCO, Complaint, Docket No. EL04-129-000 (filed Aug. 24, 2004).

¹² *Central Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 110 FERC ¶ 61,093, at P 32 (2005) (CIPCO I).

¹³ *Id.*

¹⁴ CIPCO I, *order on reh'g*, 113 FERC ¶ 61,116, at P 25 (2005) (CIPCO II); *accord Interstate Power Company*, 112 FERC ¶ 61,048 at P 10.

5. In March 2006, CIPCO filed an action in Iowa state court against Petitioners and Midwest ISO for tort damages associated with Petitioners' and Midwest ISO's alleged unlawful use of CIPCO's portion of the Integrated Facilities. In its state court action, CIPCO claims that Midwest ISO must necessarily use CIPCO's Integrated Facilities in order to provide transmission service to certain Petitioners' member cities and that CIPCO has not been fully compensated for this use.¹⁵ CIPCO's state court action seeks damages against Petitioners and Midwest ISO for unauthorized use of CIPCO's Integrated Facilities, including breach of an implied-in-fact contract, unjust enrichment, trespass and conversion.¹⁶

6. Midwest ISO and Petitioners subsequently removed CIPCO's state law claims to federal court on the basis of federal question jurisdiction. Thereafter, the federal district court denied CIPCO's motion to remand the claims to the state court and dismissed the claims as barred by federal preemption and the filed rate doctrine.¹⁷ On appeal, the Eighth Circuit reversed the district court, holding that removal from state court was improper and finding that the adjudication of CIPCO's state law claims does not necessarily depend on the resolution of a substantial question of federal law:

[w]e conclude that the FERC's conclusions are sound and consistent with the FPA, which bases the 'FERC's authority . . . on the identities of the [service providers], rather than the nature of the transactions.' . . . 'FERC's rate jurisdiction under § 205 . . . expressly appl[ies] only to public utilities.' . . . That CIPCO may be awarded damages potentially in the form of a rate that is not included in the Midwest ISO OATT is, we think, the inevitable consequence of the stark jurisdictional boundary that the FPA draws between public utilities and non-public utilities.¹⁸

¹⁵ CIPCO Protest, Exhibit 2, March 6, 2006 Petition filed in the Iowa District Court for Linn County, at ¶¶ 54, 56.

¹⁶ *Id.*

¹⁷ *Central Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc.*, 2007 U.S. Dist. LEXIS 24038 (N.D. Iowa 2007).

¹⁸ *Central Iowa Power Coop. v. Midwest Indep. Transmission Sys. Operator, Inc., et al.*, 561 F.3d 904, 918-20 (8th Cir. 2009) (citations omitted) (*Central Iowa*). The Eighth Circuit explained that it did not have to address the merits of the district court's dismissal because it found that the district court lacked jurisdiction to make that determination. *Id.*

7. On that basis, the Eighth Circuit directed the district court to remand the case to Iowa state court for further proceedings. Iowa state court has since set the case for trial to begin Fall 2010.

II. Petition

8. Petitioners seek an order holding that the amounts paid to Midwest ISO pursuant to the Midwest ISO Tariff and applicable service agreements is the only charge that Petitioners can be required to pay for Midwest ISO's transmission of electricity across the Integrated Facilities, including CIPCO's facilities. Petitioners argue that the additional compensation sought by CIPCO in the Iowa state court proceeding is barred by the filed rate doctrine.

9. Petitioners argue that the filed rate doctrine has long protected customers of jurisdictional utilities by requiring courts and commissions to adhere to the published filed rates. Petitioners state that once a filed rate is established, customers can invoke the doctrine to preclude a utility from charging them or others a rate that deviates from the filed rate. Petitioners also argue that customers and utilities have been able to invoke the doctrine to preclude variations from the filed rate by courts in the form of damages awards.¹⁹ Here, Petitioners argue that if CIPCO obtains the relief it seeks from the Iowa state court, Petitioners would be required to pay amounts in excess of the filed rate for Midwest ISO's transmission service on the Integrated Facilities.

10. Petitioners argue that the issue of CIPCO's compensation is not relevant to the Commission's determination that the filed rate for Midwest ISO's transmission service to Petitioners is the only rate that Petitioners can be required to pay for that service. Nevertheless, Petitioners argue that the issue of CIPCO's compensation must be resolved among CIPCO and ITC Midwest under the terms of the O&T Agreement, as owners of the Integrated Facilities. Specifically, Petitioners state that section 5.15 of the O&T Agreement provides a mechanism for sharing revenues from third-party use of the Integrated Facilities. Petitioners argue that the Commission directed CIPCO to file a complaint pursuant to section 206 of the Federal Power Act if CIPCO believed that the O&T Agreement did not properly account for sharing of revenues from third-party uses.²⁰

11. Petitioners argue that the issues raised involve matters that fall within the Commission's expertise and should not be deferred to a court for resolution. Petitioners argue that CIPCO is seeking compensation from Midwest ISO and Petitioners for

¹⁹ Petition at 20 (citations omitted).

²⁰ Petition at 29-30, citing *IES Utils., Inc.*, Opinion No. 419, 81 FERC ¶ 61,187, at ¶ 61,839 (1997), *order on reh'g*, 82 FERC ¶ 61,089 (1998).

transmission service provided by Midwest ISO to Petitioners in excess of the filed rate under FERC-jurisdictional tariffs and service agreements. On that basis, Petitioners argue that the interpretation of the tariffs and service agreements on file with the Commission is a matter that falls squarely within the Commission's established standards for the issuance of declaratory orders.

III. Notice of Filing and Responsive Pleadings

12. Notice of the Petition was published in the *Federal Register*, 74 FR 49873 (2009), with interventions and protests due no later than October 5, 2009.

13. Ameren Services Company, Inc.²¹ and ITC Midwest filed timely motions to intervene. IPL filed a motion to intervene out-of-time.

14. CIPCO filed a motion to intervene and protest arguing that the Petition should be dismissed because: (1) the Commission lacks jurisdiction to act under the Federal Power Act; (2) principals of *res judicata* and collateral estoppel should apply because Petitioners did not seek rehearing of prior Commission orders related to the matter and the Eighth Circuit also made final determinations on the matter; (3) the filed rate doctrine only applies to services by jurisdictional utilities – not service over CIPCO's facilities; and (4) CIPCO's state law claims are not based on a violation of the O&T Agreement, so the Commission should not assert jurisdiction on the basis of interpreting the O&T Agreement.

15. Midwest ISO filed a motion to intervene and comments arguing that Petitioners' right to relief turns on whether the O&T Agreement created indivisible Integrated Facilities, fully subject to open and nondiscriminatory access by Midwest ISO and its customers, or whether the Integrated Facilities are in fact separate, divisible and non-integrated. Midwest ISO notes that CIPCO's status as a Network Customer entitles it to seek credits for third-party use of its portion of the Integrated Facilities through the Midwest ISO Tariff. Midwest ISO argues that important federal policy issues weigh in favor of the Commission acting decisively to interpret the O&T Agreement and determine the terms and conditions for the transmission services applicable to Petitioners. Midwest ISO also notes that, under the Midwest ISO Tariff, NITS cannot be provided to loads that are not physically connected to the facilities of Midwest ISO's transmission owners or that are located outside of a transmission owner control area.²² Coincident

²¹ Ameren Services Company, Inc. intervened as agent for Ameren Energy Marketing Company, Ameren Energy Generating Company, and AmerenEnergy Resources Generating Company.

²² Midwest ISO Comments at 14, citing Midwest ISO Tariff §§ 28.1 and 31.3.

with the filing of its comments, Midwest ISO posted on its Open Access Same-Time Information System (OASIS) a notice which states in pertinent part “Transmission Customers are further advised that if FERC does not issue guidance in Docket No. EL09-71-000 by December 31, 2009, the Midwest ISO may suspend [NITS] on the Integrated Facilities for deliveries that require the use of facilities owned by CIPCO and provide in lieu thereof Point-to-Point Transmission Service to internal points of interconnection pending judicial or administrative determination of the pending controversies, and/or take other necessary actions.”²³

16. CIPCO filed an answer to Midwest ISO’s comments. CIPCO argues that, contrary to Midwest ISO’s assertions, Midwest ISO can continue to provide NITS on a flexible basis to each of the relevant delivery points, through use of and proper compensation for CIPCO’s transmission facilities. CIPCO further argues that the Integrated Facilities are not jointly held, but that each entity owns discrete transmission facilities. CIPCO argues that, because it has not transferred legal control of its facilities to Midwest ISO, collecting a charge for use of such facilities is not rate pancaking. CIPCO rejects Midwest ISO’s suggestion that CIPCO could seek credits for its own use and for third-party use of the Integrated Facilities in accordance with section 30.9 of the Midwest ISO Tariff. CIPCO states that the credits would not adequately compensate CIPCO, since they can only be used up to a level of transmission service charges that CIPCO would pay, and in any event, the availability of credits is not relevant to the Petition. Finally, CIPCO states that the Petition does not raise policy issues, nor do CIPCO’s state law claims subject Midwest ISO to risk of (1) undue discrimination or (2) state interpretation of exclusively federal issues. CIPCO restates that the Commission has previously stated that it has no jurisdiction over CIPCO’s transmission service and rates.

17. Petitioners filed an answer to comments filed by Midwest ISO and CIPCO. Petitioners argue that Midwest ISO’s arguments about its ability to use the Integrated Facilities are outside the scope of the Petition. Petitioners also argue that Midwest ISO cannot unilaterally change Petitioners’ NITS agreement to a Point-to-Point Transmission Service agreement, as Midwest ISO suggested by posting on its OASIS. Petitioners argue that Midwest ISO must make a filing with the Commission pursuant to section 206 of the Federal Power Act to make this change and must make the requisite *Mobile Sierra*²⁴ showing of harm to the public interest.²⁵ Petitioners also reject CIPCO’s

²³ Midwest ISO Notice of Potential Change in Rates and Availability of MISO NITS on CIPCO ITS (Oct. 5, 2009), <http://www.oasis.midwestiso.org/OASIS/MISO>.

²⁴ *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

²⁵ Petition at 15, citing *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 128 S. Ct. 2733 (2008).

res judicata arguments on the basis that the Commission's rejection of CIPCO's complaint for lack of jurisdiction left Petitioners with no basis to address Petitioners' right to receive network service from Midwest ISO. Petitioners note that, as the prevailing parties, they could not claim to have been adversely affected by the Commission's dismissal of CIPCO's complaint and would have no basis to request rehearing on the ground that the Commission had erred within the meaning of Rule 713. Petitioners also reject CIPCO's argument that the Commission lacks jurisdiction. Petitioners argue that the Petition is limited to Petitioners' rights and obligations under jurisdictional contracts under the Midwest ISO Tariff and therefore falls squarely within the Commission's jurisdiction.

18. Midwest ISO filed an answer to CIPCO's protest. Midwest ISO argues that the Commission's prior orders encouraged CIPCO to challenge the O&T Agreement compensation formula and/or RPGI's service agreements, not pursue common law tort theories of damages for the past use of the Integrated Facilities. Midwest ISO also argues that the Commission is not bound by the Eighth Circuit decision, nor do principles of *res judicata* and collateral estoppel bar the Commission's interpretation of the O&T Agreement because the Commission has not previously been asked to construe the nature of service provided under that agreement. Additionally, Midwest ISO states that it did not seek rehearing of prior Commission orders because it did not believe there was anything objectionable about the prior orders. Midwest ISO argues that it was not using CIPCO's facilities to affect deliveries without compensation; it was using IPL's share of the Integrated Facilities to serve a preexisting customer. Additionally, Midwest ISO argues that CIPCO's compensation should be addressed pursuant to section 5.15 of the O&T Agreement. Finally, Midwest ISO argues that it is inconsistent with the filed rate doctrine for a state court to order Midwest ISO to alter its filed rates to collect sums for a private litigant.

19. ITC Midwest filed an answer to Midwest ISO's comments stating that the Commission has previously held that: (1) transfer to Midwest ISO of functional control over jurisdictional facilities by ITC Midwest and its predecessors applied only to the facilities owned by them, and did not cover the Integrated Facilities owned by CIPCO; and (2) nothing in the Commission's previous order should be construed as a determination that Midwest ISO may use CIPCO's facilities without compensation.²⁶

20. Midwest ISO also filed an answer to answers filed by Petitioners, CIPCO and ITC Midwest. In response to objections from Petitioners, Midwest ISO states that it has a right to modify any service agreement via filing under section 205 of the FPA, without making a *Mobile Sierra* "public interest" showing. Midwest ISO states that, to the extent an acceptable solution is not timely obtained through this proceeding, Midwest ISO will

²⁶ ITC Midwest Protest at 2, citing CIPCO I, 110 FERC ¶ 61,093 at P 29 and P 32.

make an appropriate filing with the Commission to effectuate unilateral modifications to Petitioners' service agreements in order to ensure their conformity with the Midwest ISO Tariff and to best protect itself against continuing exposure to CIPCO's lawsuit. Midwest ISO also rejects arguments by CIPCO and ITC Midwest that Midwest ISO can continue to provide NITS over the Integrated Facilities. Midwest ISO states that, so long as Midwest ISO remains subject to damages, it is compelled to protect its interests and those of its members and to treat the intersection of ITC Midwest and CIPCO facilities as a point of interconnection and allow CIPCO to enter into separate arrangements for transmission over its facilities. Midwest ISO also argues that modifications to the O&T Agreement should result in revocation of the agreement's grandfathered agreement status, lending the agreement to necessary revisions to reflect applicable open access transmission service requirements and arrangements.

21. Petitioners filed a motion for expedited and summary disposition of their Petition, to which Midwest ISO, CIPCO, and ITC Midwest responded.

IV. Discussion

A. Procedural Matters

22. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2009), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

23. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d) (2009), the Commission will grant IPL's late-filed motion to intervene given its interest in the proceeding, the early stage of the proceeding, and the absence of undue prejudice or delay.

24. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2009), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We will accept the answers filed in this proceeding because they have provided information that assisted us in our decision-making process.

B. Substantive Matters

25. For the reasons discussed below, we deny the Petition and motion for expedited and summary disposition and decline to assert primary jurisdiction over the issues presented based on the factors enumerated in *Arkansas Louisiana Gas Co. v. Hall*.²⁷

²⁷ 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031 (1979) (*Arkla*).

26. Petitioners argue that the additional compensation sought by CIPCO in the Iowa state court proceeding is barred by the filed rate doctrine. CIPCO's pending complaint in the Iowa state court concerns the alleged, unlawful use of CIPCO's transmission facilities by the Petitioners and/or Midwest ISO for which CIPCO seeks damages. A declaratory order granting the relief sought by Petitioners, that the filed rate doctrine bars CIPCO's request for damages could impact the rights of CIPCO, an entity that is neither a Commission-regulated public utility nor a transmission-owning member of Midwest ISO, and possibly pre-judge claims or defenses asserted by the parties in the Iowa state court proceeding.

27. Accordingly, while the Commission has jurisdiction over Petitioners' request insofar as it relates to the Midwest ISO tariff, we decline to assert primary jurisdiction over the issue of whether the filed rate doctrine bars CIPCO's possible recovery against Petitioners. As set forth in *Arkla*, the Commission considers the following three factors in deciding whether to assert primary jurisdiction over a matter that otherwise would be subject to state court jurisdiction: (1) whether the Commission possesses some special expertise which makes the case peculiarly appropriate for Commission decisions; (2) whether there is a need for uniformity of interpretation of the type of question raised in the dispute; and, (3) whether the case is important in relation to the regulatory responsibilities of the Commission.²⁸

28. With respect to the first factor in *Arkla*, while the Commission has special expertise in reviewing jurisdictional tariffs and service agreements, a filed rate doctrine analysis involves looking beyond the filed rate at the unique circumstances surrounding each charge sought to be imposed on the ratepayer. Here, the analysis would involve an application of the filed rate doctrine to a potential damages award to CIPCO. Since the filed rate doctrine is not an absolute bar to all claims involving a filed rate, but must be applied on a case-by-case basis by looking at all the facts and circumstances surrounding its application,²⁹ any determination would involve a complicated legal and factual inquiry

²⁸ *Arkla*, 7 FERC ¶ 61,175, *reh'g denied*, 8 FERC ¶ 61,031.

²⁹ *See, e.g., Brown v. MCI Worldcom Network Svcs.*, 277 F.3d 1166, 1171 (9th Cir. 2002) (holding that the filed rate doctrine is not a bar to claims enforcing the tariff itself); *United States v. Reliant Energy Svcs., Inc.*, 420 F. Supp. 2d 1043, 1066 (N.D. Ca. 2006) (holding filed rate doctrine not a bar to criminal enforcement proceedings by the federal government); *E. & J. Gallo Winery v. Encana Energy Svcs., Inc.*, 2005 U.S. Dist. LEXIS 24240 (2005) (holding claims associated with retail sales of natural gas not barred by the filed rate doctrine because outside scope of FERC jurisdiction).

which can be properly conducted in a state court setting.³⁰ Given the need for a well-developed factual record, and the extensive legal precedent on the filed rate doctrine, we believe the Iowa state court is equally capable of creating the necessary record and applying the legal precedent to the facts in this matter.

29. The second *Arkla* factor, the need for uniformity of interpretation of the type of question raised by the dispute, also does not weigh in favor of the Commission asserting primary jurisdiction over the issues presented in the Petition. While Petitioners argue that the Commission should assert jurisdiction because all jurisdictional customers need uniformity and predictability of filed rates embodied in service agreements under FERC-approved Open Access Transmission Tariffs, we find that the issue presented here involves a narrower, more fact-specific determination concerning the rights and/or obligations of the Petitioners with respect to alleged transmission service over non-jurisdictional transmission facilities.

30. Finally, with respect to the third factor, the Commission does not have an important regulatory responsibility in this case since CIPCO is not a public utility and is not a transmission-owning member of Midwest ISO. Further, the Commission has previously found that any transmission service to Petitioners over CIPCO's facilities is non-jurisdictional.³¹ As the Commission previously stated

Because [CIPCO] 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 [CIPCO's] rates. . . . As [CIPCO] is clearly not under the Commission's jurisdiction under sections 205 and 206 of the FPA, and [CIPCO] does not dispute this, and is

³⁰ The Commission previously declined to hold an evidentiary hearing regarding the underlying facts of the dispute among the parties based on the fact that it lacks jurisdiction over CIPCO as a public utility. CIPCO II, 113 FERC ¶61,116 at P 14.

³¹ As the Commission stated in CIPCO II: "We reject [CIPCO's] argument that Midwest ISO is the jurisdictional provider of the alleged transmission service at issue. [CIPCO's] focus on Midwest ISO is misplaced. The complaint concerns alleged transmission service over the facilities of a non-public utility. Further, [CIPCO] itself argues that it has not authorized Midwest ISO to use its facilities. Thus, the service at issue is transmission service over [CIPCO's] facilities, and Midwest ISO cannot be considered the jurisdictional provider of third-party transmission service to itself over [CIPCO's] facilities. And, as discussed below, that service is not under our jurisdiction." CIPCO II, 113 FERC ¶ 61,116 at P 10 (citations omitted).

the provider of transmission service over its lines, we find that the transmission service in question cannot be considered to be under our jurisdiction.³²

Therefore, based on our consideration of Petitioners' request under the *Arkla* factors, and consistent with the Eighth Circuit decision remanding CIPCO's claims back to Iowa state court for lack of federal question jurisdiction,³³ we deny the Petition. Our determination here is also consistent with prior Commission orders concerning the alleged use of CIPCO's transmission facilities.³⁴

31. Finally, while Midwest ISO and CIPCO make numerous arguments about the relative merits of CIPCO's state law claims, including legal contractual arguments and factual considerations of whether Midwest ISO has a right to use the Integrated Facilities, we defer to the Iowa state court for resolution of these issues along with the issues presented in the Petition.

³² CIPCO II, 113 FERC ¶ 61,116 at P 11 (citing CIPCO I, 110 FERC ¶ 61,093 at P 28).

³³ *Central Iowa*, 561 F.3d at 918-20.

³⁴ *See, e.g. Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,008 (2004) (denying CIPCO's request to direct Midwest ISO to file a service agreement involving service to RPGI as beyond the scope of the proceeding); *Interstate Power Company*, 112 FERC ¶ 61,048 (2005) (denying CIPCO's request for clarification that any new transmission service arrangements must recognize payment to CIPCO for use of its facilities by the Midwest ISO); *Alliant Energy Corporate Svcs., Inc.*, 90 FERC ¶61,344 (2000) (stating "if Central Iowa . . . believes[s] that [its] existing agreement[] with IES Utilities and Interstate Power do not properly account for the Alliant Operating Companies' use of the integrated transmission system and for sharing of revenues earned from third party uses, they are free to file a section 206 complaint to modify their agreements").

The Commission orders:

(A) Petitioners' petition for a declaratory order is hereby denied.

(B) Petitioners' motion for expedited and summary disposition of their Petition is hereby denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.