

I. Background

2. A further history of these proceedings is included in the October 1, 2010 order² directing IPL and ITC Midwest to make the instant filing. Rather than repeat that detailed history here, we will briefly recount certain key points and the present case.

3. On May 18, 2010, in Docket No. EL10-68-000, the Resale Power Group of Iowa (RPGI) and WPPI Energy (WPPI) (collectively, RPGI/WPPI)³ filed a complaint (Complaint) pursuant to section 306 of the Federal Power Act (FPA)⁴ against IPL and ITC Midwest alleging that IPL and ITC Midwest modified their January 1991 O&T Agreement (1991 O&T Agreement) that is on file with the Commission but did not make the requisite filings under sections 205(c) and 205(d) of the FPA⁵ to modify the 1991 O&T Agreement. The Complaint alleges that the parties to the 1991 O&T Agreement modified it through: (i) changes in the parties' course of dealing; (ii) the partial assignment of obligations under the O&T Agreement to ITC Midwest as a result of the 2007 sale of IPL's transmission facilities to ITC Midwest (2007 Transaction); and (iii) the addition of two appendices.

4. The October 1 Order granted the Complaint, in part, and directed IPL and ITC Midwest to file with the Commission all appropriate changes to the 1991 O&T Agreement to reflect current practices resulting from any changes in the parties' course of dealing, including changes resulting from the 2007 Transaction, and the addition of any appendices or other changes to the O&T Agreement not on file with the Commission affecting the rates, terms and/or conditions of services provided on the ITS. The October 1 Order also stated that the Commission would address in a future order, as appropriate, the parties' additional arguments raised in the proceeding once there is a complete record reflecting the changes parties have made to the 1991 O&T Agreement.

² *Resale Power Group of Iowa and WPPI Energy v. ITC Midwest LLC and Interstate Power and Light Co.*, 133 FERC ¶ 61,006 (2010) (October 1 Order).

³ As described in their Complaint, RPGI/WPPI arrange for transmission of power to their members through network integration transmission service under the Midwest Independent Transmission System Operator, Inc. (MISO) Open Access Transmission and Energy Markets Tariff (Tariff) over facilities encompassing the Integrated Transmission System (ITS) in Iowa. The ITS is composed of facilities that were owned separately by IPL and CIPCO until 2007 and, since 2007, are owned separately by ITC Midwest and CIPCO. *See* October 1 Order, 133 FERC ¶ 61,006 at P 2.

⁴ 16 U.S.C. § 825e (2006).

⁵ 16 U.S.C. § 824d.

II. Docket Nos. ER11-2715-000 & -001

5. On January 20, 2011, in Docket No. ER11-2715-000, IPL and ITC Midwest filed the Restated O&T Agreement. IPL and ITC Midwest state that the Restated O&T Agreement includes the filing of Appendices 15 and 16 and also reflects the inclusion of ITC Midwest as a party to the agreement and the allocation of rights and responsibilities between IPL and ITC Midwest in the manner memorialized in the 2007 agreement among IPL, ITC Midwest and CIPCO (Allocation Agreement).⁶ IPL and ITC Midwest state that the 2007 Transaction did not cause or result in any substantive changes to the 1991 O&T Agreement, but rather, in accordance with the plan for preservation of contract rights presented to and approved by the Commission in the 2007 Transaction, ITC Midwest succeeded to IPL's transmission-related rights and obligations under the 1991 O&T Agreement, while IPL retained its non-transmission related rights and obligations. They state that all such assignments of right and obligations were pursuant to the existing assignment provision in section 3.09 of the 1991 O&T Agreement.⁷

6. IPL and ITC Midwest state that they have restated the 1991 O&T Agreement section 5.11 to reflect that CIPCO is responsible for 8.9839 percent of the expenses to operate the ITS, as memorialized in the newly submitted Appendix 15.⁸ They state that the change to this percentage by the Administrative Committee is pursuant to authority

⁶ IPL and ITC Midwest initially filed the Restated O&T Agreement in Docket No. ER11-1978-000 but withdrew that filing in order to make and submit revisions necessary to comply with Commission regulations. In the filing, IPL and ITC Midwest included the Allocation Agreement. Consistent with the requirement that public utilities eliminate the use of supplements and include in their filings only effective provisions, the Commission directed IPL and ITC Midwest to submit, in a new filing, a fully revised and restated O&T Agreement and include a marked version of the revised and restated O&T Agreement that compares it to the version of the O&T Agreement that was last filed with the Commission. *See Interstate Power and Light Co. and ITC Midwest LLC*, 133 FERC ¶ 61,244, at P 5 (2010).

⁷ Section 3.09 states that “[t]his [O&T] Agreement shall apply to and be binding upon the successors and assigns of the Parties hereto.”

⁸ IPL and ITC Midwest state that the Administrative Committee's update of IPL's and CIPCO's cost responsibility percentages for transmission system operations was reflected in the minutes of the Administrative Committee, and styled as Appendix 15 entitled “Payment for Transmission Operation.”

expressly conferred upon the Administrative Committee by the existing language in sections 5.11 and 5.17.⁹

7. IPL and ITC Midwest state that Appendix 16, entitled “CIPCO/IPL O&T Succession Plan” memorialized the agreement of IPL and CIPCO with respect to development and succession issues in connection with their consideration of the formation of, and possible membership in, TRANSLink Development Company, LLC, (TRANSLink) an independent transmission company. They state that TRANSLink was an initiative undertaken by a number of transmission providers in the Midwest during the early 2000s to consider developing an independent transmission company. They state that Appendix 16 sets forth actions that IPL and CIPCO committed to take in considering the development of TRANSLink, as well as future actions by IPL and CIPCO if they were to join TRANSLink. They state that TRANSLink did not come to fruition and, with the dissolution of TRANSLink, IPL and CIPCO did not develop a successor arrangement to the O&T Agreement and IPL did not file Appendix 16 with the Commission.

8. IPL and ITC Midwest state that Appendix 16 also memorialized a settlement of disagreements between IPL and CIPCO, including their disagreement regarding the sharing of revenues for the use of IPL’s facilities in the ITS. IPL and ITC Midwest state that IPL agreed to make a one-time lump sum payment and future monthly payments to CIPCO to resolve the disagreement. They state that the settlement was “black box,” meaning that the parties did not establish the exact amount that would represent CIPCO’s share of revenue earned by IPL for use of IPL’s facilities in the ITS, but instead established a settled amount to resolve the disagreement. IPL and ITC Midwest state that ITC Midwest continues to make the monthly settlement payments to CIPCO.

9. IPL and ITC Midwest also revised section 5.14 of the Restated O&T Agreement as follows:

5.14 Joint Use of Transmission Facilities

CIPCO and ~~IPL~~ each shall have the use of the Integrated Transmission System, including the right to tap the transmission facilities of ~~the other Party~~ CIPCO or ITC Midwest for the purpose of serving its customers or members in the Integrated System. No wheeling charge shall be made by ~~either Party~~ CIPCO to IPL or by ITC Midwest to CIPCO for the use of such

⁹ Section 5.11 states, in part, that the “percentage relating to CIPCO’s proportion, [sic] of the total operating expenses is subject to change by the Administrative Committee to reflect the respective transmission responsibilities of the Parties.” In this filing, IPL and ITC Midwest also propose to change the phrase “the Parties” at the end of that sentence to “CIPCO and ITC Midwest.”

facilities necessary to serve the respective customers of ~~the Parties.~~ ~~Either Party~~ CIPCO and IPL. CIPCO and IPL shall give ITC Midwest and CIPCO, as the other case may be, sufficient advance notice in writing prior to tapping such facilities to insure proper system coordination.

10. IPL and ITC Midwest note that the October 1 Order discusses other provisions of the 1991 O&T Agreement, including section 5.15. They state, however, that IPL and CIPCO did not revise the text of the 1991 O&T Agreement section 5.15, or their practices thereunder, prior to the 2007 Transaction, and ITC Midwest and CIPCO have not done so since then. IPL and ITC Midwest state that the Commission did not order any specific findings regarding section 5.15 or any other section of the 1991 O&T Agreement and, accordingly, IPL and ITC Midwest are not submitting revisions to section 5.15 as part of the Restated O&T Agreement.

11. Further, IPL and ITC Midwest state that because the 1991 O&T Agreement predates the establishment of MISO as the regional transmission system operator, the 1991 O&T Agreement is a grandfathered agreement (GFA) and is identified as such in Attachment P (List of Grandfathered Agreements) to the MISO Tariff. IPL and ITC Midwest state that, as a GFA, service under the Restated O&T Agreement is not subject to the rates, terms and conditions of the MISO Tariff. Additionally, IPL and ITC Midwest state that the Restated O&T Agreement does not provide rates, terms and conditions for the provisions of service to any third party customer. Rather, IPL and ITC Midwest state that third party customers take service on the ITS under the MISO Tariff (for service on the ITC Midwest-owned portions of the ITS) and CIPCO's tariff (for service on the CIPCO-owned portions of the ITS). IPL and ITC Midwest state that they do not wish to add to the arguments already made in Docket No. EL10-68-000 but state their view that the changes they are making to the Restated O&T Agreement do not include any material changes to the 1991 O&T Agreement that affect its GFA status.

12. In response to a March 15, 2011 deficiency letter, on March 31, 2011, IPL and ITC Midwest filed Exhibits 1, 2, and 5 to the Restated O&T Agreement. Exhibit 1 comprises a system map of the ITC Midwest and CIPCO transmission systems. Exhibits 2 and 5 are lists of facilities located on the ITC Midwest and CIPCO transmission systems.

III. Notice of Filing and Responsive Pleadings

13. Notices of the filings were published in the *Federal Register*, 76 Fed. Reg. 5573 (2011) and 76 Fed. Reg. 19,344 (2011), with interventions and protests due no later than February 10, 2011, and April 21, 2011, respectively. Timely, unopposed motions to intervene and protests were filed by RPGI/WPPI and MISO. RPGI/WPPI also moved to consolidate the filing with Docket No. EL10-68-000. CIPCO filed a motion to intervene

out-of-time and answer to RPGI/WPPI and MISO's comments and an opposition to consolidation.¹⁰ ITC Midwest filed an answer to protests filed by RPGI/WPPI and MISO and an opposition to consolidation.¹¹ IPL filed an answer to protests filed by RPGI/WPPI and MISO. RPGI/WPPI and MISO filed answers to answers filed by CIPCO, ITC Midwest and IPL. ITC Midwest filed an answer opposing RPGI/WPPI's and MISO's answers. CIPCO and IPL filed a joint objection to RPGI/WPPI's and MISO's answers.

A. RPGI/WPPI Protest

14. RPGI/WPPI argue that the Commission should rescind the GFA status of the Restated O&T Agreement, effective December 20, 2007, to eliminate undue discrimination under section 5.14 of the Restated O&T Agreement. RPGI/WPPI contend that the 1991 O&T Agreement was materially changed upon the 2007 sale of IPL's transmission facilities to ITC Midwest. They point out the reciprocal exchange of transmission services between CIPCO and IPL with no wheeling charges under the 1991 O&T Agreement has been changed since IPL now only receives partial assignment of transmission rights under the Restated O&T Agreement. Specifically, under section 5.14 of the Restated O&T Agreement, RPGI/WPPI argue that IPL receives the benefits of the free reciprocal transmission service on CIPCO's ITS facilities while ITC Midwest (and not IPL) now provides free reciprocal GFA transmission service to CIPCO. RPGI/WPPI argue that failure to eliminate the GFA status of the Restated O&T Agreement will perpetuate discrimination against MISO customers in the ITC Midwest pricing zone in favor of CIPCO and against suppliers who, unlike IPL, would be subject to both CIPCO and MISO Tariff rates to use the ITS.

15. Further, RPGI/WPPI argue that the filing is deficient because it fails to accurately reflect changes in practice with respect to third-party transmission service resulting from changes in the parties' course of dealing. RPGI/WPPI also allege that the Restated O&T Agreement contains blatant errors in sections 1.02, 1.03, 1.05, 2.14, 2.28, 3.03, 3.08, 5.01, 5.06, 5.07, 5.19, and Appendix 16. RPGI/WPPI also observe that the Restated O&T Agreement is unexecuted, which they state brings into question whether there is even a legally binding agreement among the parties. RPGI/WPPI request that the

¹⁰ CIPCO opposes consolidation on the basis that the filing solely addresses the discrete issue of whether IPL and ITC Midwest complied with the Commission's directive in the October 1 Order.

¹¹ ITC Midwest opposes consolidation on the basis that consolidation will not promote procedural efficiency because the applicable time frames for Commission action are different, the issues raised by the two cases are different, and consolidation will encourage further confusion of the issues.

Commission require IPL and ITC Midwest to file an executed, complete and revised O&T Agreement.¹² In addition, RPGI/WPPI contend that MISO has operational control over jurisdictional ITS facilities and, accordingly, the Commission should require MISO to be a signatory to the Restated O&T Agreement. Also, RPGI/WPPI request that the Allocation Agreement, filed by IPL and ITC Midwest on November 1, 2010 and then withdrawn, be refiled with the Commission as a stand-alone rate schedule.

16. Finally, RPGI/WPPI argue that this proceeding should be consolidated with the proceeding in Docket No. EL10-68-000. RPGI/WPPI assert that consolidation is appropriate since there is a “clear nexus of law and fact” between Docket Nos. EL10-68-000 and ER11-2715-000. Accordingly, they argue that consolidation of dockets would serve procedural efficiency goals and avoid inconsistent results.

B. MISO Protest

17. MISO agrees with RPGI/WPPI’s arguments for elimination the GFA status of the 1991 O&T Agreement and the concerns about undue discrimination related to the free transmission service IPL receives pursuant to section 5.14 of the Restated O&T Agreement.¹³ In particular, MISO asserts that changes IPL and ITC Midwest propose in the Restated O&T Agreement will allow IPL to pay only the ITC Midwest zonal rate under the MISO Tariff to use the ITS but other customers will have to pay *both* the ITC Midwest zonal rate *and* the CIPCO network rate. MISO also contends that IPL and ITC Midwest are currently violating the filed rate doctrine by attempting to charge RPGI/WPPI a two-part rate to use the ITS even though the 1991 O&T Agreement does not require separate rates for use of the ITC Midwest and the CIPCO portions of the ITS. Accordingly, MISO requests that the Commission clarify that the 1991 O&T Agreement does not permit a two-part rate.

IV. Discussion

A. Procedural Matters

18. Pursuant to Rule 214 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

¹² RPGI/WPPI also object to the March 31, 2011 Filing of Exhibit 1, to the extent that they argue that the version submitted was not legible when downloaded from the Commission’s e-Library site.

¹³ MISO also states that its concerns are explained at length in its pleading filed in Docket No. EL10-68-000.

19. Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R § 385.214(d) (2011), the Commission will grant CIPCO'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.

20. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest and/or answer unless otherwise ordered by the decisional authority. We are not persuaded to accept the answers filed and will, therefore, reject them.

B. Hearing and Settlement Judge Procedures

21. IPL and ITC Midwest's proposed Restated O&T Agreement raises issues of material fact that cannot be resolved based on the record before us and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

22. Our preliminary analysis indicates that the provisions in the Restated O&T Agreement have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. Issues of material fact to be determined in the hearing include, but are not limited to: (1) whether the provision of transmission service over the ITS has changed and whether any such changes are required to be reflected in the Restated O&T Agreement; (2) whether all current practices under the Restated O&T Agreement are properly and clearly reflected in the Restated O&T Agreement; (3) whether changes reflected in the Restated O&T Agreement were contemplated by previously existing provisions in the O&T Agreement; (4) whether changes reflected in the Restated O&T Agreement result in undue discrimination; and (5) whether the Allocation Agreement needs to be filed or if all relevant terms and condition of jurisdictional transmission service have been incorporated into the Restated O&T Agreement. Therefore, we will accept IPL and ITC Midwest's proposed Restated O&T Agreement for filing, suspend it for a nominal period, make it effective March 21, 2011, as requested,¹⁴ subject to refund, and set it for hearing and settlement judge procedures. We also direct IPL and ITC Midwest to file, in the compliance filing ordered below, a legible version of Exhibit 1 to the Restated O&T Agreement.

23. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing

¹⁴ Absent agreement from the filing utility, the Commission will not establish an effective date earlier than the filing utility requests. *See, e.g. New England Power Pool*, 97 FERC ¶ 61,338 (2001), *order on reh'g*, 98 FERC ¶ 61,299 (2002); *see also Portland General Electric Co.*, 98 FERC ¶ 61,050 (2002).

procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁵ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.¹⁶ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

C. Consolidation

24. Notwithstanding objections of CIPCO and ITC Midwest, we grant the motion to consolidate filed by RPGI/WPPI. We find that there are common issues of law and fact in this proceeding and the proceeding in Docket No. EL10-68-000. Therefore, in order to promote administrative efficiency, we will consolidate filings in Docket Nos. ER11-2715-000 & -001 with Docket No. EL10-68-000 for purposes of hearing, settlement and decision.

The Commission orders:

(A) Docket Nos. ER11-2715-000, ER11-2715-001 and EL10-68-000 are hereby consolidated.

(B) IPL and ITC Midwest's proposed Restated O&T Agreement is hereby accepted for filing and suspended for a nominal period, to become effective March 21, 2011, as requested, subject to refund, as discussed in the body of this order.

(C) IPL and ITC Midwest are hereby directed to submit in a compliance filing within ten (10) days of the date of this order, a legible version of Exhibit 1 to the Restated O&T Agreement.

¹⁵ 18 C.F.R. § 385.603 (2011).

¹⁶ If the parties decide to request a specific judge, they may make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

(D) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning IPL and ITC Midwest's proposed Restated O&T Agreement and issues raised in the Complaint proceeding in Docket No. EL10-68-000. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (E) and (F) below.

(E) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(F) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(G) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.