

133 FERC ¶ 61,006
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Resale Power Group of Iowa and
WPPI Energy

v.

Docket No. EL10-68-000

ITC Midwest LLC and
Interstate Power and Light Company

PRELIMINARY ORDER ON COMPLAINT

(Issued October 1, 2010)

1. On May 18, 2010, the Resale Power Group of Iowa (RPGI) and WPPI Energy (WPPI) (collectively, Complainants) filed a complaint (Complaint) pursuant to section 306 of the Federal Power Act (FPA)¹ against Interstate Power and Light Company (IPL) and ITC Midwest LLC (ITC Midwest) (collectively, Respondents). Complainants allege that Respondents modified their January 1991 Operating and Transmission Agreement (O&T Agreement) with Central Iowa Power Cooperative (CIPCO) and did not make the requisite filings under sections 205(c) and 205(d) of the FPA.² Complainants seek an order: (i) directing Respondents to file a revised O&T Agreement that reflects all modifications made by the parties to the O&T Agreement; (ii) revoking the O&T Agreement's grandfathered status; and (iii) directing Midwest Independent Transmission System Operator, Inc. (Midwest ISO) to become a party to the O&T Agreement. In this order, we grant the Complaint in part and direct Respondents to file with the Commission all appropriate changes to the O&T Agreement to reflect current practices resulting from

¹ 16 U.S.C. § 825e (2006).

² 16 U.S.C. § 824d (2006).

any changes in the parties' course of dealing, as discussed below. We will address issues raised in the proceeding not addressed herein in a subsequent order, as appropriate.

I. Background

2. Complainants state that they arrange for transmission of power to their members.³ They state that Midwest ISO provides Complainants network integrated transmission service pursuant to its Open Access Transmission and Energy Markets Tariff (Tariff)⁴ over facilities encompassing the Integrated Transmission System (ITS) in Iowa.⁵ Complainants state that the O&T Agreement provides for transmission services on the ITS, which is composed of facilities that were owned separately by IPL and CIPCO until 2007 and, since 2007, by ITC Midwest and CIPCO.⁶ In 2007, IPL sold its transmission facilities, including IPL-owned ITS facilities, to ITC Midwest (2007 Transaction).⁷ The 2007 Transaction added ITC Midwest as a party to the O&T Agreement, and assigned to ITC Midwest all of IPL's transmission-related obligations, with IPL retaining its generation and distribution rights and responsibilities under the O&T Agreement.⁸ The O&T Agreement provides for the rates, terms and conditions of transmission service on the ITS, and is on file with the Commission as a rate schedule and designated as grandfathered agreement (GFA) No. 16 under Attachment P to the Midwest ISO Tariff.⁹

³ Complaint at 11. RPGI is an association of municipal utilities, one cooperative, and one small privately-owned utility in Iowa. *Id.* at 10. WPPI is a municipal joint action agency formed pursuant to Wis. Stat. § 66.0825 (2009). *Id.* at 11.

⁴ 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).

⁵ Complaint at 11.

⁶ *Id.* at 3.

⁷ *Id.* at 4 (citing *ITC Holdings Corp.* 121 FERC ¶ 61,229 (2007) (*ITC Holdings*)).

⁸ *Id.* (citing *ITC Holdings*, 121 FERC ¶ 61,229 at P 139).

⁹ *Id.* at 15 (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 128 FERC ¶ 61,046, at P 64 n.49 (2009); *Midwest Indep. Transmission Sys. Operator, Inc.*, 108 FERC ¶ 61,236, at P 90 (2004)).

II. The Complaint

3. Complainants claim that the parties to the O&T Agreement have modified it through: (i) changes in the parties' course of dealing; (ii) the partial assignment of obligations under the agreement to ITC Midwest; and (iii) the addition of two appendices. Complainants argue that none of these changes are reflected in the version of the O&T Agreement on file with the Commission.

4. First, Complainants argue that IPL and CIPCO materially changed how they calculate rates for third-party service on the ITS, and did not reflect that change in section 5.15¹⁰ of the O&T Agreement on file with the Commission. Complainants state that IPL's and CIPCO's course of dealings through December 31, 2003, confirms that third-party customers on the ITS were charged a "one-part" rate under section 5.15 of the O&T Agreement, which was shared pro rata between IPL and CIPCO.¹¹ However, Complainants argue that, effective January 1, 2004, when RPGI switched suppliers from MidAmerican Energy Company (MEC) to Ameren Energy Marketing Services Company, CIPCO began invoicing RPGI monthly for "network integration service" in an amount exceeding \$400,000 per month.¹² Complainants argue that the new charge resulted from an agreement between IPL and CIPCO to change the terms of section 5.15 of the O&T Agreement from a shared "one-part" rate to a "two-part" rate for third-party service (consisting of the IPL zonal rate under the Midwest ISO Tariff plus a rate for network transmission service under CIPCO's Open Access Transmission Tariff (OATT)) without making the requisite section 205 filing.¹³

5. Second, Complainants argue that, since the 2007 Transaction, and the addition of ITC Midwest as a party to the O&T Agreement, the rights and obligations of the parties

¹⁰ Section 5.15 of the O&T Agreement on file with the Commission provides that, "in the event that either CIPCO or [IPL] enter into an agreement with a non-party . . . , or to serve customers of said non-party, thereby utilizing the [ITS], the agreement with respect to such transaction shall be approved by both CIPCO and [IPL]." Ex. 1, O&T Agreement at 39. Further, section 5.15 provides that "[a]ny monies paid to CIPCO or to [IPL] for such services shall be shared by both in the same proportion as the basis for investment in transmission facilities described in section 5.17 [of the O&T Agreement]." *Id.*

¹¹ Complaint at 21.

¹² *Id.* at 23.

¹³ *Id.* at 24.

to the O&T Agreement have changed and are not reflected in the O&T Agreement on file with the Commission.¹⁴ Specifically, Complainants cite to a December 20, 2007 agreement between IPL, ITC Midwest and CIPCO (the Allocation Agreement) which Complainants state revises the compensation terms of the O&T Agreement, and reallocates in whole or in part, each of IPL's rights and obligations under the O&T Agreement among IPL and ITC Midwest.¹⁵ Complainants argue that the Allocation Agreement modified the terms and conditions of jurisdictional transmission service provided to CIPCO and IPL on the ITS by eliminating the mutuality of rights and obligations under sections 5.14 and 5.17 of the O&T Agreement between IPL and CIPCO and between ITC Midwest and CIPCO, and that those changes were required to be filed with the Commission pursuant to section 205.¹⁶

6. Third, Complainants assert that two appendices were never filed with the Commission.¹⁷ Appendix 15 is titled "Payment for Transmission Operation" and is a 2002 agreement amending section 5.11 of the O&T Agreement to change the calculation of IPL's charges to CIPCO for operating CIPCO's ITS facilities.¹⁸ Complainants further state that Appendix 16 is a 2003 agreement titled "CIPCO/IPL O&T Succession Plan," which was intended "to set forth the mutual understanding and agreement between CIPCO and [IPL] . . . for succession issues pertinent to the Parties transitioning from integrated ownership and operation of certain facilities . . . to regional transmission

¹⁴ *Id.* at 17-20.

¹⁵ Complainants Supplemental Information to Complaint at 3 (citing Supp. Ex. 1, Allocation Agreement at 4, 18-23).

¹⁶ Complaint at 4. Complainants state that section 5.14 of the O&T Agreement currently on file with the Commission provides that IPL and CIPCO shall have reciprocal rights to transmission service on each other's ITS facilities without payment of wheeling charges. Complainants also state that the right to reciprocal service is predicated on the parties' respective facilities investment obligations under section 5.17 of the O&T Agreement. *Id.* (citing Ex. 2, Direct Testimony of J. B. Solomon on behalf of CIPCO at 7-8, IES Util., Inc., *et al.*, Docket No. EC96-13-000, *et al.* (filed Mar. 27, 1997)).

¹⁷ *Id.* at 24-27.

¹⁸ *Id.* at 25.

organizations. . . .”¹⁹ According to Complainants, Appendix 16 also specifically provides for IPL to compensate CIPCO for transmission provided to RPGI on the ITS.²⁰

7. In addition, Complainants argue that Midwest ISO must become a party to the O&T Agreement consistent with *Interstate Power Company*.²¹ Complainants also argue that, because the O&T Agreement requires that the jurisdictional and non-jurisdictional ITS facilities be operated as a single, integrated transmission system, Midwest ISO is the sole transmission provider for all of the facilities composing the ITS consistent with *Michigan Electric Transmission Company*.²²

8. Complainants also argue that material modifications were made to the O&T Agreement such that the O&T Agreement should lose its GFA status. Finally, Complainants argue that the 2007 Transaction creates undue discrimination on the ITS by allowing IPL to continue to obtain free transmission service over CIPCO’s portion of the ITS, even though IPL is no longer a transmission owner. To remedy the alleged undue discrimination, Complainants request that the Commission: (i) direct IPL and ITC Midwest to file a revised O&T Agreement that clearly reflects the current rates, terms and conditions of jurisdictional transmission service on the ITS; (ii) rescind the GFA status of the O&T Agreement and require the parties to provide for non-discriminatory, open access transmission service on the ITS; and (iii) require the Midwest ISO to become a party to the O&T Agreement. Complainants argue that, if those changes are not made, CIPCO and IPL will continue to receive discounted grandfathered services at a lower rate

¹⁹ *Id.* (quoting Ex. 28, App. 16 to O&T Agreement at 2).

²⁰ *Id.* at 26 (citing Ex. 28 at 2).

²¹ *Id.* at 47-48 (citing *Interstate Power Co.*, Docket No. ER05-386-000 (Feb. 15, 2005) (Letter Order), *reh’g denied*, 112 FERC ¶ 61,048 (2005) (*Interstate Power Company*) (directing IPL to modify an integrated transmission system agreement with CIPCO to include Midwest ISO as a signatory and to “reflect that Midwest ISO has operational authority over the IPL transmission system, including interconnections with CIPCO, and provide that all future amendments to the agreement will be subject to negotiation and approval by all three parties.” *Interstate Power Company*, Letter Order at 2)).

²² *Id.* at 27-37 (citing *Michigan Electric Transmission Company*, 119 FERC ¶ 61,101 (2007) (*Michigan Electric*) (holding that even transmission service under grandfathered contracts must be provided by Midwest ISO in order that Midwest ISO satisfy Order No. 2000’s requirements that it be the sole transmission provider for facilities over which its has operational control)).

than their competitors, including Complainants. Complainants argue that IPL pays only the Midwest ISO Tariff rate for transmission on the ITS, not the Midwest ISO Tariff rate plus the CIPCO OATT rate, and therefore can provide bundled power supply products to customers interconnected with the ITS at a lower cost. Complainants also argue that CIPCO is receiving reciprocal transmission service over the ITS facilities owned by ITC Midwest at no charge, when it is not clear what benefit ITC Midwest receives in exchange.

III. Notice of Filing and Responsive Pleadings

9. Notice of the Complaint was published in the *Federal Register*, 75 Fed. Reg. 29,531 (2010), with interventions and protests due no later than June 7, 2010.²³ On June 15, 2010, Complainants filed a Supplemental Information to Complaint. Notice of the supplement was published in the *Federal Register*, 75 Fed. Reg. 35,786 (2010), with interventions and protests due no later than July 6, 2010. Respondents each filed timely answers to the Complaint. CIPCO and Midwest ISO filed timely motions to intervene and comments. IPL and CIPCO filed answers to Midwest ISO's comments. Complainants and Midwest ISO filed answers to Respondents' answers and CIPCO's comments. ITC Midwest filed an answer to Midwest ISO's and Complainants' answers.

A. IPL's Answer

10. IPL argues that Complainants failed to establish that Respondents materially modified the O&T Agreement and had an obligation to file amendments to the O&T Agreement with the Commission. IPL also argues that there have been no changes to section 5.15 of the O&T Agreement. IPL argues that "the parties' course of dealings since 2003 show that IPL and CIPCO never considered O&T Agreement § 5.15 to provide for a 'one-part rate' for third party [IPL] customers taking service on the ITS...."²⁴ IPL states that IPL and CIPCO consistently have interpreted section 5.15 of the O&T Agreement as establishing a mechanism to allow the parties to recover their costs for third party uses of their respective ITS facilities. Further, IPL argues that the Allocation Agreement does not make any changes to section 5.15, but rather allocated responsibility for the provision to ITC Midwest without change.

²³ On June 2, 2010, IPL filed an unopposed motion for an extension of time until June 18, 2010 to file answers to the Complaint. On June 3, 2010, an extension of time for filing answers to the Complaint was granted, up to and including June 18, 2010.

²⁴ IPL Answer at 23.

11. With respect to the 2007 Transaction and the Allocation Agreement, IPL argues that the parties undertook a responsible division of obligations under the O&T Agreement to maintain the pre-transaction status quo. IPL states that, in the section 203 proceeding, Respondents committed to maintain the O&T Agreement and the parties' rights and obligations under it, without material change. IPL argues that the Allocation Agreement expressly provides "that by entering into and implementing this Agreement, they are not amending any Transmission Contract."²⁵ IPL argues that IPL and CIPCO agreed that each would retain and continue to perform their rights and obligations under the O&T Agreement except for the transmission-related rights and obligations specifically identified and allocated to ITC Midwest. IPL states that the Allocation Agreement allocates to ITC Midwest specific responsibilities for planning, operating, and maintaining the ITS, while reserving to IPL other rights and responsibilities under the O&T Agreement. Accordingly, IPL argues that the Allocation Agreement was a practical and responsible accommodation to the changed circumstances to undertake the Commission's direction to leave the O&T Agreement materially unchanged. IPL argues that the effect of the Allocation Agreement was not to materially amend the O&T Agreement, but to ensure that Respondents could continue to perform the O&T Agreement without impact to CIPCO.

12. IPL argues that Appendices 15 and 16 to the O&T Agreement did not need to be filed with the Commission. IPL argues that Appendix 15 is merely the 1998 and 2002 minutes of the Administrative Committee, styled as Appendix 15 to the O&T Agreement, reflecting the Administrative Committee's decisions to update IPL and CIPCO's respective ITS ownership percentages. IPL argues that Appendix 15 does not reflect an action to amend the O&T Agreement, but is instead an action to administer the O&T Agreement, specifically sections 5.11 and 5.17. IPL argues that since IPL and CIPCO's action to carry out the O&T Agreement did not cause them to amend the agreement, those actions do not give rise to a need to file an O&T Agreement amendment. With respect to Appendix 16, IPL argues that Appendix 16 would have governed actions by IPL and CIPCO were they to join TRANSLink, but since TRANSLink was never developed, the Appendix 16 succession plan became obsolete and was never implemented.

13. IPL rejects Complainants' request to add Midwest ISO as a party to the O&T Agreement or to direct that the ITS be operated as a single system under Midwest ISO's functional control. IPL argues that the O&T Agreement does not compel, or even permit, the Commission to treat the ITS as a single system that should be placed under Midwest ISO's functional control and that that Commission has consistently treated CIPCO's

²⁵ *Id.* at 18 (citing Allocation Agreement at § 1).

portion of the ITS separately from IPL's portion. Further, IPL argues that Midwest ISO is not a party to the O&T Agreement and the O&T Agreement nowhere provides that Midwest ISO is granted authority to operate CIPCO's ITS facilities. Additionally, IPL states that CIPCO has not joined Midwest ISO and has not otherwise transferred control of its system to Midwest ISO. Finally, IPL argues that the Commission lacks jurisdiction to grant Midwest ISO functional control over CIPCO's ITS facilities, and therefore cannot compel CIPCO to transfer operational control of its transmission system to Midwest ISO.

14. IPL also rejects Complainants' request that the Commission revoke the O&T Agreement's GFA status due to material modifications or undue discrimination. IPL argues that Respondents have not materially modified the O&T Agreement and therefore, have not created a basis for revocation of the O&T Agreement's GFA status. Further, IPL argues that there is no undue discrimination under the O&T Agreement because IPL and CIPCO do not get the rights to reciprocal transmission service on each other's system "for free." Rather, IPL argues that each provides consideration to the other in the form of its grant of reciprocal rights and its obligation to plan, develop, and make investments in the ITS. IPL argues that, while ITC Midwest performs the O&T Agreement's transmission planning, development, and investment responsibilities formerly undertaken by IPL, IPL takes and pays for service on ITC Midwest's portion of the ITS under the Midwest ISO Tariff, with the result being that IPL now pays the Midwest ISO Tariff rate and thereby pays for those ITC Midwest activities in support of the ITS under the O&T Agreement. Additionally, IPL argues that because the parties have not materially modified the O&T Agreement, they could not have done anything that could give rise to discriminatory treatment. In either event, IPL states that Complainants fail to satisfy the high burden imposed by *Mobile-Sierra*²⁶ to revoke the GFA status, because Complainants do not establish that the O&T Agreement is contrary to the public interest. IPL argues that Complainants bear a high burden of proof when they seek to have the Commission abrogate or modify an agreement, particularly that they must demonstrate that the O&T Agreement "seriously harms the public interest." IPL argues that because Complainants fail to demonstrate that the O&T Agreement represents serious harm to the public interest, they fail to establish a need for the Commission to abrogate the O&T Agreement by revoking its GFA status.

²⁶ *Id.* at 28 (citing *United Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *clarified, Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish*, 554 U.S. ___, 128 S. Ct. 2733 (2008); *NRG Power Marketing, LLC, et al. v. Maine Public Utilities Commission*, 558 U.S. ___, 130 S. Ct. 693 (2010) (*Mobile-Sierra*)).

15. Finally, IPL argues that Complainants' claims are barred by principals of *res judicata* and collateral estoppel. IPL argues that the existence of extensive prior litigation related to their claims demonstrates that the underlying nature of Complainants' complaint relates to CIPCO's attempts to enforce the CIPCO OATT. IPL argues that Complainants' plain objective is to seek relief from the obligation to pay for transmission service on the CIPCO transmission system. IPL argues that by arguing that the ITS should be considered a single system subject to Midwest ISO's control, Complainants collaterally attack the Commission's prior order and seek to re-litigate the same issues settled in CIPCO's 2004 complaint proceeding.²⁷

B. ITC Midwest's Answer

16. ITC Midwest argues that the only charge against ITC Midwest is that it violated section 205 by failing to file modifications to the O&T Agreement resulting from the 2007 Transaction and by failing to file the Allocation Agreement. ITC Midwest argues that the Commission, in approving the 2007 Transaction and directing that transmission-related agreements remain in place without material change, clearly understood that the O&T Agreement would be partially assumed by ITC Midwest and would become a three party agreement.

17. With respect to Complainants' arguments about the 2007 Transaction changing the mutuality of obligation between the parties, ITC Midwest argues that IPL's right to receive reciprocal service for its native load under section 5.14 of the O&T Agreement is a non-transmission-related right that was retained by IPL and not assumed by ITC Midwest. Therefore, ITC Midwest argues that both IPL and CIPCO retained their historical rights under section 5.14, and no contract modification that would trigger a section 205 filing ever took place. ITC Midwest argues that CIPCO pays for the reciprocal service it receives on the ITS by providing reciprocal service to IPL and by continuing appropriate investment in the ITS facilities. Likewise, ITC Midwest argues that IPL pays for the reciprocal service it receives by providing for CIPCO to receive reciprocal service and by continuing appropriate investment in the ITS facilities. ITC Midwest argues that IPL pays ITC Midwest to perform those obligations by paying ITC Midwest's revenue requirement under the Midwest ISO Tariff applicable to ITC Midwest-owned facilities.²⁸ Therefore, ITC Midwest argues, ITC Midwest is fully compensated by IPL for the reciprocal service provided to CIPCO on its facilities.

²⁷ *Id.* at 29-30 (citing *Central Iowa Power Coop. v. Midwest Independent Transmission System Operator, Inc.*, 110 FERC ¶ 61,093, at P 29 (2005) (CIPCO I)).

²⁸ ITC Midwest Answer at 15. ITC Midwest submitted an affidavit of Douglas C. Collins, Executive Director of ITC Midwest, to demonstrate that the rate that IPL pays

18. ITC Midwest rejects the notion that the Allocation Agreement created or enhanced discriminatory or competitive advantages. ITC Midwest argues that because the rights of IPL and CIPCO remained the same as they were prior to the 2007 Transaction, and neither IPL nor CIPCO gets anything for “free,” there was no change in the competitive landscape with respect to the O&T Agreement. ITC Midwest argues that, to the extent there were any anti-competitive impacts from the O&T Agreement, they existed prior to the 2007 Transaction and should have been raised back in 2000 when IPL joined Midwest ISO. ITC Midwest further argues that Complainants and Midwest ISO are barred by collateral estoppel because they should have raised any undue discrimination arguments in the context of the section 203 proceeding for the 2007 Transaction. ITC Midwest argues that Complainants and Midwest ISO cannot now attack the Commission’s direction to preserve the O&T Agreement without material change and to maintain its GFA status.

19. ITC Midwest argues that Complainants’ argument about the integrated nature of the ITS is irrelevant to the complaint, and further, that the Commission has already ruled that the integrated nature of the facilities does not empower the Commission to assert rate jurisdiction over CIPCO’s non-jurisdictional ITS facilities. ITC Midwest rejects Complainants’ reliance on *Michigan Electric*.²⁹ ITC Midwest distinguishes *Michigan Electric* as a case concerning whether the non-jurisdictional entities should pay Midwest ISO’s transmission charges for their own loads on the integrated system – not use of the integrated system by third parties. Further, ITC Midwest argues that, unlike here, the facilities in *Michigan Electric* were jointly owned by jurisdictional and non-jurisdictional entities, not individually owned.

20. In sum, ITC Midwest argues that the 2007 Transaction and the execution of the Allocation Agreement did not modify the O&T Agreement nor result in any undue discrimination, and therefore, the Commission cannot rescind the O&T Agreement’s GFA status. ITC Midwest distinguishes *Interstate Power Company*³⁰ on the basis that, in that case, the parties modified the agreement by extending its term, which is not applicable in this case.

pursuant to the Midwest ISO Tariff recovers the costs of the service provided to CIPCO’s native load on the ITC Midwest-owned ITS facilities and also includes the costs associated with ITC Midwest’s investments in the ITS facilities.

²⁹ 119 FERC ¶ 61,101.

³⁰ *Interstate Power Company*, 112 FERC ¶ 61,048.

C. Midwest ISO's Comments

21. Midwest ISO agrees with Complainants that the Allocation Agreement contains provisions that directly affect jurisdictional services³¹ and was required to be filed pursuant to section 205. Also, Midwest ISO argues that Appendix 16 needed to be filed pursuant to section 205, regardless of whether TRANSLink suspended its activities in November 2003, unless another amendment voiding IPL's performance is filed with and accepted by the Commission. Further, Midwest ISO argues that the parties to the O&T Agreement effectively revised section 5.15 in or about 2003 by converting it from a "one-part" rate provision into a "two-part" rate provision. In support, Midwest ISO submits statements from meeting minutes of the Engineering Planning Subcommittee of the Administrative Committee formed under the O&T Agreement that, according to Midwest ISO, reveal that at least as of March 1999, Alliant Energy Corporation (Alliant), the corporate parent of IPL, willingly shared the RPGI revenues under the Alliant-MEC Service Agreement with CIPCO pursuant to the "one-part" rate, and CIPCO did not object to such sharing.³² In contrast, Midwest ISO submits statements from September and October 1999 meeting minutes, which Midwest ISO argues, demonstrate Alliant's change of position about sharing revenues from RPGI.³³ Midwest ISO also submits as evidence exchanges in 2000 at the senior executive level relating to Alliant's proposal to change its investment ratio to reflect the loss of RPGI customers and CIPCO's alternative proposal of a joint tariff option.³⁴ Midwest ISO argues that these exchanges reveal that Alliant desired to recover its stranded costs associated with RPGI's departure, and rather than follow the Commission's stranded cost procedures, Alliant and CIPCO decided to

³¹ Midwest ISO Comments at 7 (citing Allocation Agreement, Section 2 (Allocation of Responsibilities and Obligations), and Section 3 (Compensation)). Midwest ISO also notes that the assignment of operating and maintenance obligations to ITC Midwest created a new jurisdictional operations and maintenance agreement that should have been filed in its own right. *Id.* at 7, n.7 (citing *PSI Energy, Inc.*, 63 FERC ¶ 61,107 (1993)).

³² *Id.* at 9 (citing Midwest ISO Ex. 3, Engineering Planning Subcommittee Meeting Minutes, January 28, 1999; Midwest ISO Ex. 4, Engineering Planning Subcommittee Meeting Minutes, March 26, 1999).

³³ *Id.* at 10 (citing Midwest ISO Ex. 5, Engineering Planning Subcommittee Meeting Minutes, September 24, 1999; Midwest ISO Ex. 6, Engineering Planning Subcommittee Meeting Minutes, October 22, 1999).

³⁴ *Id.* at 10-11 (citing Midwest ISO Ex. 8, Letter from Mr. Richard L. Anderson to Mr. Dale Sharp, dated February 9, 2000).

change the rate under section 5.15 to a “two-part” rate. Midwest ISO notes that, in response to CIPCO’s 2004 complaint, IPL took the position that when third parties seek transmission service, the applicable rate is the sum of IPL’s zonal rate under the Midwest ISO Tariff plus CIPCO’s applicable OATT rate.³⁵ Midwest ISO states that IPL, as a jurisdictional utility, was required to present the parties’ new rate arrangements to the Commission pursuant to section 205 of the FPA.

22. In addition, Midwest ISO argues that Respondents failed to comply with Order No. 888³⁶ by failing to revise the O&T Agreement to permit third parties to use the public utility’s share of the joint facilities and provide for any needed cost allocation procedures between the public utility and the non-jurisdictional owner. Similarly, Midwest ISO argues that IPL may have breached its duty under Article Nine of the Midwest ISO Transmission Owners Agreement (TOA) which requires transmission owners to either negotiate the non-discriminatory use of their own facilities or come to the Commission.

23. Midwest ISO requests that the Commission explicitly recognize Midwest ISO’s right to receive and deliver energy throughout the ITS, to the same extent as IPL (now ITC Midwest) was permitted to do, with CIPCO’s compensation issues left to be settled between the Respondents and CIPCO. Midwest ISO argues that the Agency Agreement it executed with Alliant in November 1999 grants Midwest ISO authority to provide transmission service over Non-Transferred Transmission Facilities, including CIPCO-owned ITS transmission facilities that IPL operated or controlled.³⁷ Midwest ISO makes several other legal arguments as to why it should have functional control over CIPCO’s ITS transmission facilities, including interpretations of prior transmission service agreements, Appendix 16 to the O&T Agreement, and CIPCO’s failure to take affirmative action to prevent Midwest ISO’s unauthorized use of its facilities.

³⁵ *Id.* at 11 (citing Ex. 16, Motion and Answer of IPL at 6-7).

³⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff’d sub nom. New York v. FERC*, 535 U.S. 1 (2002).

³⁷ Midwest ISO Comments at 23.

24. Midwest ISO also requests that the Commission clarify that Midwest ISO does not “use” the CIPCO portion of the ITS because physical control (as opposed to functional control) of CIPCO’s facilities rests with ITC Midwest. Finally, Midwest ISO requests that the Commission resolve the issues surrounding Midwest ISO’s provision of service on ITC Midwest’s portion of the ITS including guidance with respect to reformation of the RPGI Service Agreement and the Network Integration Transmission Service Agreements of similarly-situated Alliant and CIPCO Network Loads, and the treatment of loads interconnected with ITC Midwest, but islanded by CIPCO transmission elements. If the Commission determines that Midwest ISO has no authority to “use” the CIPCO elements, Midwest ISO states, it would not be able to exercise functional control over such “islands” and would request ITC Midwest to remove them from Midwest ISO’s functional control pursuant to Appendix B of the Midwest ISO TOA. If the Commission dismisses the Complaint, or rejects Midwest ISO’s arguments that it is entitled to effectuate deliveries to Complainants, Midwest ISO seeks clarification as to whether it can perform Balancing Authority service involving CIPCO facilities without having a pseudo-tie with firm point-to-point service over those sections of intervening CIPCO facilities that make up the ITS to bring them back into the definition of the Midwest ISO Balancing Authority Area.

D. CIPCO’s Comments

25. CIPCO rejects Complainants’ arguments that the parties modified section 5.15 of the O&T Agreement. CIPCO states that, rather than modifying the provision, the parties took into account changes in the law resulting from Order No. 888 and voluntarily agreed upon how to implement the broad authority granted under section 5.15.³⁸ CIPCO also argues that the 2007 Transaction did not materially modify the O&T Agreement, but rather reflects the permissible exercise and assignment of rights and obligations under the existing terms of the O&T Agreement, and therefore, the Commission should not rescind the O&T Agreement’s GFA status nor direct Midwest ISO to become a party to the O&T Agreement. CIPCO argues that a section 205 filing was not required for the 2007 Transaction because it is a permissible exercise of assignment rights under the O&T Agreement, and nevertheless, IPL and ITC Midwest’s section 203 application and the Commission’s order approving the 2007 Transaction provided sufficient public notice of any changes. CIPCO argues that neither the addition of Appendix 15 nor Appendix 16 serve as a basis for modifying the O&T Agreement, nor abrogating the O&T Agreement’s GFA status. Further, CIPCO argues that the Complaint fails to satisfy the *Mobile-Sierra* “public interest” legal standard necessary for abrogating the O&T Agreement’s GFA status.

³⁸ CIPCO Comments at 38-39.

26. CIPCO also argues that the Complaint is a collateral attack on prior Commission orders and the recent decision of the United States Court of Appeals for the Eighth Circuit³⁹ remanding CIPCO's claims to Iowa state court. CIPCO argues that the Commission's orders on CIPCO's 2004 complaint⁴⁰ are final and non-reviewable as a matter of law on the Commission's determination that CIPCO never transferred operational control over its transmission facilities to Midwest ISO, that Midwest ISO is not the transmission provider over CIPCO's facilities, and that CIPCO could raise its claims in an appropriate court. CIPCO also argues that the Complaint collaterally attacks the Commission's order limiting Alliant's transfer to Midwest ISO of only the facilities Alliant actually owned and establishing that the transfer would not result in any material modification to the O&T Agreement.⁴¹ CIPCO also argues that the Complaint collaterally attacks the Commission's order approving Alliant's sale to ITC Midwest⁴² by suggesting that the transaction materially modified the O&T Agreement such that it should lose its GFA status. Finally, CIPCO alleges that the Complaint collaterally attacks the Commission's order denying Complainant's Petition for Declaratory Order⁴³ because it involves the same dispute and the Commission determined that the Iowa state court would be fully able to construe the O&T Agreement and any other jurisdictional tariff or contract relevant to the case. CIPCO also argues that the Complaint misconstrues the integrated nature of the ITS by suggesting that Midwest ISO must be the sole transmission provider on the system because it must be operated as a "single integrated system."⁴⁴

³⁹ *Central Iowa Power Cooperative v. Midwest ISO*, 561 F.3d 904, 919 (8th Cir. 2009) (Eighth Circuit Decision). CIPCO argues that the Eighth Circuit upheld CIPCO's right to pursue its claims under state law regarding use of its facilities without compensation.

⁴⁰ CIPCO I, 110 FERC ¶ 61,093, *order on reh'g*, 113 FERC ¶ 61,116 (2005) (CIPCO II).

⁴¹ *Alliant Energy Corporate Services, Inc.*, 90 FERC ¶ 61,344 (2000).

⁴² *ITC Holdings*, 121 FERC ¶ 61,229.

⁴³ *Resale Power Group of Iowa*, 130 FERC ¶ 61,217 (2010).

⁴⁴ CIPCO Comments at 17-18.

E. Additional Responsive Pleadings

27. CIPCO and IPL each submitted answers protesting Midwest ISO's comments. IPL argues that the Allocation Agreement did not represent a material change to the O&T Agreement, but merely gave effect to the Commission's direction that IPL and ITC Midwest leave existing customers unaffected by their transaction, and that action does not constitute a violation of section 205. With respect to section 5.15, IPL explains statements in the Administrative Committee meeting minutes as simply revealing IPL and CIPCO's struggle to figure out how to satisfy their obligations during the "tumult caused by the epic changes triggered by open access and [Midwest ISO] integration."⁴⁵ IPL states that, while there was some tension during this period with the details of sharing of revenues from third-party customers taking service on the ITS, the parties did in fact continue to share those revenues as provided under section 5.15. CIPCO argues that, contrary to Midwest ISO's assertions, section 5.15 allows broad authority regarding third-party service and describes a process by which the parties to the O&T Agreement agree to a rate.⁴⁶ CIPCO distinguishes Midwest ISO's reliance on *Interstate Power Company* because in that case, the contract expired by its terms, yet here, the O&T Agreement runs through 2035. CIPCO and IPL also include numerous arguments opposing Midwest ISO's request for the Commission to grant Midwest ISO the right to receive and deliver energy throughout the ITS, to the same extent as IPL (now ITC Midwest) was permitted to do.

28. Complainants and Midwest ISO each submitted an answer to Respondents' answers and CIPCO's comments. Complainants and Midwest ISO reject Respondents' and CIPCO's contentions that the Allocation Agreement and restructuring of rights and obligations under the O&T Agreement did not require a filing under section 205. Complainants and Midwest ISO argue that the Commission could not have passed judgment on the Allocation Agreement in its *ITC Holdings* order because Respondents did not include the Allocation Agreement in their application, IPL only partially assigned IPL's transmission rights and obligations under the O&T Agreement, and the Commission's order in *ITC Holdings* specifically provided "that approval of a transaction under section 203 does not free the parties from any legal obligation they have."⁴⁷ Additionally, Complainants note that the Commission's *ITC Holdings* order could not have waived Respondents' section 205 filing requirement because, absent express

⁴⁵ IPL Answer at 8.

⁴⁶ CIPCO Answer at 12-13.

⁴⁷ Complainants' Answer at 16 (citing *ITC Holdings*, 121 FERC ¶ 61,229 at P 141).

authorization from Congress, the Commission does not have the authority to waive the statutory requirement that public utilities file rate schedules under section 205.⁴⁸

Complainants and Midwest ISO note that the 2007 Transaction could not have been preauthorized by the O&T Agreement because amendments to the O&T Agreement and the Allocation Agreement each are conditioned on FERC approval.⁴⁹

29. Complainants and Midwest ISO also reject Respondents' arguments that they did not materially modify section 5.15 of the O&T Agreement as inconsistent with evidence submitted by Midwest ISO in this proceeding. Midwest ISO also notes that IPL implicitly admits that the parties' practice under section 5.15 was different prior to 2003.⁵⁰ Midwest ISO argues that regardless of whether section 5.15 includes a rate or is a process for determining a rate, as advocated by CIPCO, the agreement to switch to a "two-part" rate had to be filed under section 205 because it directly and substantially affected the rates paid by RPGI.

30. Complainants and Midwest ISO also reject Respondents' arguments that Appendix 16 did not need to be filed with the Commission because TRANSLink never came to be. Midwest ISO argues that IPL should have filed Appendix 16 at least sixty (60) days before it was executed on April 21, 2003 – a time when there was no reason to believe that TRANSLink proponents would withdraw their application in November of that year. Additionally, Midwest ISO notes that Appendix 16 was assigned to ITC Midwest in the 2007 Transaction, suggesting that it continues to be a valid legal obligation. Further, Complainants and Midwest ISO note that it appears that IPL and, after the 2007 Transaction, ITC Midwest, made payments to CIPCO in satisfaction of a monetary settlement regarding the sharing of RPGI transmission revenues pursuant to Paragraph B of Appendix 16, suggesting that at least part of Appendix 16 remains operative.⁵¹

⁴⁸ *Id.* at 28 (citing *Removing Obstacles to Increased Elec. Generation and Natural Gas Supply in the W. U.S.*, 95 FERC ¶ 61,225, at 61,769 (2001)).

⁴⁹ Section 3.11 of the O&T Agreement provides that any amendments shall be binding upon the Parties when approved or accepted for filing by any regulatory authority or other agency having jurisdiction over the parties. The Allocation Agreement includes the condition that "[t]his Agreement shall terminate in its entirety if FERC rejects it for filing in a final order." Complainant Answer at 17 (citing Allocation Agreement at 7).

⁵⁰ Midwest ISO Answer at 5-6 (citing IPL Answer at 23).

⁵¹ Complainants' Answer at 23-24 (citing Supplemental Ex. 2).

31. Finally, Complainants and Midwest ISO reject Respondents' and CIPCO's arguments that the Complaint is barred by collateral estoppel or *res judicata*. Complainants distinguish each prior case and note that the claims established in the Complaint could not have been "properly raised and litigated" in any of those proceedings for the simple reason that, at the time the proceedings were litigated, Complainants did not know, nor could they have known, about the Allocation Agreement, Appendix 16, or the IPL/CIPCO committee meeting minutes demonstrating Respondents' motives underlying their modification of the revenue sharing provisions of the O&T Agreement."⁵² Further, Complainants and Midwest ISO argue that collateral estoppel does not bar the Complaint because none of the prior proceedings litigated or decided the issue of Respondents' failure to file modifications to the O&T Agreement in violation of section 205. Complainants and Midwest ISO also reject Respondents' and CIPCO's arguments that *Mobile-Sierra* applies in this case on the basis that the standard only applies to involuntary modification or abrogation of jurisdictional contracts. Here, Complainants and Midwest ISO argue, it is Respondents and CIPCO that have made the changes to the O&T Agreement without making requisite section 205 filings, and the *Mobile-Sierra* standard simply does not apply to the Commission's enforcement of section 205(c) of the FPA.

32. ITC Midwest submitted an answer to Complainants' and Midwest ISO's answers. ITC Midwest argues that Midwest ISO and Complainants have misconstrued the facts in this case, and that the changes imposed by the Allocation Agreement do not result in undue discrimination. Additionally, to the extent Complainants' and Midwest ISO's undue discrimination arguments go to the terms and conditions of transmission service provided by CIPCO, a non-jurisdictional entity, to IPL, ITC Midwest argues that the claims appear to be beyond the proper scope of the Commission's authority.

IV. Discussion

A. Procedural Matters

33. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2010), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

34. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2010), prohibits an answer to a protest and/or answer unless otherwise

⁵² *Id.* at 27 (citing *Transcontinental Gas Pipe Line Corp.*, 85 FERC ¶ 61,357, at 62,386 (1998)).

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

35. We grant the Complaint, in part, and direct Respondents to file with the Commission all appropriate changes to the O&T Agreement to reflect current practices resulting from any changes in course of dealing,⁵³ including changes resulting from the 2007 Transaction, and the addition of any appendices or other changes to the O&T Agreement not currently on file with the Commission affecting the rates, terms and/or conditions of services provided on the ITS.

36. Section 205 requires that “all rates and charges made, demanded or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable”⁵⁴ Moreover, section 205(c) requires public utilities to file “schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.”⁵⁵

37. While section 205(c) is broad and can encompass many things, the Commission has recognized, and the United States Court of Appeals for the District of Columbia has affirmed, that ““there is an infinitude of practices affecting rates and service . . . [and] section 205(c) must reasonably be read to require the recitation of only those practices that affect rates and services significantly, that are realistically susceptible of

⁵³ See, e.g. *Public Service Co. of Colorado*, 67 FERC ¶ 61,371, at 62,268 (1994) (stating “[t]he FPA and our regulations require that for each jurisdictional service, public utilities set out applicable rates in a manner that allows readers of the schedule readily to determine the applicable charge”); see also *Duke Energy Carolinas, LLC*, 131 FERC ¶ 61,241 (2010) (rejecting parties’ arguments for a different calculation of depreciation expense based upon longstanding course of performance and upholding the filed terms of the Catawba Agreement).

⁵⁴ 16 U.S.C. § 824d (2006).

⁵⁵ *Id.*

specification, and that are not so generally understood as to render recitation superfluous.”⁵⁶

38. Pursuant to Commission precedent, the “rule of reason” applies when the Commission has jurisdiction over the particular contract or practice, but nevertheless exercises its discretion to allow utilities to forego filing contracts or practices.⁵⁷ Here, the amendments directly relate to a jurisdictional agreement on file with the Commission and neither Respondents nor CIPCO argue that the amendments are not jurisdictional to the Commission. Rather, Respondents and CIPCO seem to argue that the changes are not “material” and therefore, did not need to be filed.⁵⁸ We interpret these arguments as a request for the rule of reason to apply to the changes, such that they do not need to be filed. As the Commission explained in *Town of Easton*,⁵⁹ in applying the rule of reason, the Commission balances the “desire not to deprive utilities or groups of utilities of the flexibility they need to manage their own affairs by introducing substantial delay and layered decision-making into their operations, with the need for full disclosure that furthers the purpose of having filing and posting requirements which provide real benefits to existing and potential customers or users of the services in question.” Here, Respondents and CIPCO have not argued, and we do not perceive, that filing the changes parties have made to the O&T Agreement would result in any particular burden to management of day-to-day operations on the ITS. Further, filing the amendments at issue would provide benefits in terms of clarity of the terms and conditions of

⁵⁶ *Public Service Co. of Colorado*, 67 FERC at 62,267 (citing *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,988, n.2 (1993) (quoting *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985)). This exception to the section 205(c) filing requirement is colloquially known as the “rule of reason.”

⁵⁷ *Id.*

⁵⁸ We reject IPL’s argument that Appendix 15 was not an amendment, but rather an action to administer the O&T Agreement. Appendix 15 changes CIPCO’s portion of the transmission operation expense from the 14 percent provided in section 5.11 of the O&T Agreement to 8.9839 percent. While this change is allowable under the O&T Agreement, the change is a change of practice that affects jurisdictional rates and service. Since there does not appear to be a significant administrative burden to filing Appendix 15, we direct Respondents to file it. Likewise, Respondents are directed to file Appendix 16. Complainants provide evidence that portions of Appendix 16 remain operative, and it does not appear to be a significant administrative burden to file it.

⁵⁹ *Town of Easton, MD v. Delmarva Power and Light Co.*, 24 FERC ¶ 61,251 and 61,531 (1983) (*Town of Easton*) (citations omitted).

transmission service to the existing and potential customers of the transmission service available on the ITS.

39. Additionally, we reject Respondents' and CIPCO's arguments that the Commission's order in *ITC Holdings* approving the 2007 Transaction somehow absolved Respondents from making requisite section 205 filings. As an initial matter, as noted by Complainants and Midwest ISO, respectively, section 205(c) cannot be waived by the Commission⁶⁰ and the Commission's order specifically noted that "approval of a transaction under section 203 does not free the parties from any legal obligations they have."⁶¹ Further, the Allocation Agreement was not filed as part of the application. Therefore, nothing in *ITC Holdings* absolved Respondents of making the requisite 205 filings to implement the transaction. Similarly, the Commission's prior orders and the Eighth Circuit Decision are not a bar to Complainants' arguments in this proceeding that Respondents have violated section 205(c) by not filing changes to the O&T Agreement.

40. We will address in a future order, as appropriate, the parties' additional arguments raised in this proceeding once there is a complete record reflecting the changes parties have made to the O&T Agreement.

The Commission orders:

- (A) Petitioners' Complaint is hereby granted in part, as discussed herein.

⁶⁰ Complainants' Answer at 28 (citing *Removing Obstacles to Increased Elec. Generation and Natural Gas Supply in the W. U.S.*, 95 FERC ¶ 61,225, at 61,769 (2001)).

⁶¹ Midwest ISO Answer at 11 (citing *ITC Holdings*, 121 FERC ¶ 61,229 at P 141).

(B) Respondents are directed to file with the Commission all appropriate changes to the O&T Agreement within thirty (30) days of the date of this order, as discussed herein.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.