

Interconnection Customer that suspends or terminates construction of such Network Upgrades. However, the Commission is not obligating in this Final Rule a subsequent (*i.e.*, lower queued) Interconnection Customer to pay for these costs regardless of whether that Interconnection Customer benefits from the facilities, since this would subject that Interconnection Customer to significant financial risk. Prices quoted for interconnection in the LGIA are estimates based on the results of studies conducted during the LGIP phase of the interconnection process. If it is apparent to the Parties at the time they execute the LGIA that contingencies (such as other Interconnection Customers terminating their LGIAs) might affect the financial arrangements, the Parties should include such contingencies in their LGIA and address the effect of such contingencies on their financial obligations. If no such contingencies are accounted for in the executed LGIA, since the costs of Network Upgrades may influence an Interconnection Customer's decision whether it can enter into an Interconnection Agreement, we leave it to the subsequent Interconnection Customer and the Transmission Provider to revisit the negotiated terms of their executed Interconnection Agreement. We deny the requests to revise or delete Proposed LGIA Article 5.13 on these grounds.⁷⁴

410. We also retain the three year period. The Commission agrees with Peabody that allowing the Interconnection Customer to have the Transmission Provider suspend work for up to three years allows generation projects the flexibility necessary to accommodate permitting and other delays that are particularly likely to affect large projects.

411. The Final Rule requires the Interconnection Customer to pay all reasonable costs that the Transmission Provider incurs in suspending work on its Interconnection Facilities, as well as costs that are reasonable and necessary to ensure the safety and integrity of the Transmission Provider's Transmission System during the suspension.

412. We reject Cinergy's proposal that an Interconnection Customer be limited to one suspension period per Generating Facility. The LGIA is designed to be a standard agreement that will operate in any number of situations, and to limit arbitrarily each Generating Facility to only one suspension period, regardless of circumstances, is unreasonable.

413. We adopt NERC's proposal that Article 5.13 require a suspending Interconnection Customer to leave the system in a safe and reliable condition in accordance with Good Utility Practice and the Transmission Provider's safety and reliability criteria.

414. In response to Cinergy's request for clarification of the term "suspension of work," the Commission clarifies that a Transmission Provider, upon receiving written notice of suspension from the Interconnection Customer, is authorized to cancel or suspend material, equipment and labor contracts associated with that work. If reliability could be compromised by stopping construction, the Transmission Provider must continue construction until it reaches a stage where it can safely discontinue work. Any costs associated with suspension (or of completing a discrete Network Upgrade) shall be deducted from the Interconnection Customer's security deposit.

415. With respect to the Midwest ISO's request to require an Interconnection Customer to notify both the Transmission Owner and the Transmission Provider, we clarify that if both Parties are signatories to the LGIA, the Interconnection Customer is required to notify both the Transmission Owner and the Transmission Provider.

416. This article is designated Article 5.16 in the Final Rule LGIA.

417. *Article 5.14—Taxes*—Proposed LGIA Article 5.14 addressed the allocation of responsibilities that would apply with respect to the tax treatment of an Interconnection Customer's payments or property transfers to the Transmission Provider for the installation of the Transmission Provider's Interconnection Facilities and Network Upgrades.

418. Internal Revenue Service policy, as expressed in IRS Notice 2001–82 and IRS Notice 88–129, delineates the standards under which an Interconnection Customer's payments to build interconnections facilities will not create a current tax liability for a Transmission Provider. The "safe harbor" provisions described in these notices generally prevent the transaction from being considered a taxable transfer. If the IRS changes its policy, or if the transaction no longer qualifies for safe harbor protection and tax liability results, under the provisions in Article 5.14 the Interconnection Customer would indemnify the Transmission Provider for any tax liability that may arise from the payments to build the Transmission Provider's Interconnection Facilities and Network Upgrades.

Comments

419. Several entities argue that the IRS safe harbor does not eliminate all risk of these payments being treated as taxable income to the Transmission Provider because the IRS may revisit its policies in a manner that establishes tax liability for interconnections, including the credits provided against transmission service in exchange for the reimbursement of Network Upgrades.⁷⁵ These commenters argue that Article 5.14 should account for these risks.

420. Some commenters, including Duke, EPSA, NYTO, and PG&E, argue that the Commission should adopt Article 5.16.5 of the Consensus LGIA, which ensures that a Transmission Owner is made whole when a contribution from an Interconnection Customer is non-taxable when made, but the IRS later imposes tax liability. NYTO further suggests that the two revisions to Consensus LGIA Article 5.16.5 that were proposed by the Transmission Owners should be retained. These provisions would ensure that the Transmission Owner would be reimbursed for taxes imposed more than ten years after the date the Interconnections Facilities are placed in service and allow for security for such potential tax liability.

Commission Conclusion

421. The Commission finds that Article 5.14 as proposed appropriately addresses the risk that the contracting Parties face because of the uncertainties regarding IRS policy, because it requires the Interconnection Customer to indemnify the Transmission Provider in the event that the IRS changes or clarifies its policy.

422. The Commission concludes that a discussion of subsequent taxable events is appropriate for the Final Rule LGIA.⁷⁶ The two additions NYTO requests are unnecessary because Final Rule LGIA Article 5.17.3 addresses limitation of indemnification and the ability of the Transmission Provider to require security from the Interconnection Customer.

423. *Article 5.14.1—Interconnection Customer Payments Not Taxable* (In the Final Rule LGIA: Article 5.17.1)—Proposed LGIA Article 5.14.1 would have provided that, consistent with IRS Notice 2001–82 and IRS Notice 88–129 (discussing the IRS safe harbor provisions), all payments made by the Interconnection Customer to the

⁷⁵ *E.g.*, EEI, FP&L, MidAmerican, and TXU.

⁷⁶ Subsequent taxable events are discussed in Final Rule LGIA Article 5.17.6. This discussion retains the article numbers that appeared in the NOPR LGIA.

⁷⁴ An RTO or ISO with participant funding may propose an alternative policy for Commission approval.