

confidentiality problems and is a bad business practice.

462. FP&L proposes, without elaboration, that the Commission modify proposed LGIA Article 5.14.5 to permit the Transmission Provider to require a jointly filed request for a private letter ruling.

463. FirstEnergy asks the Commission to clarify that the last sentence of this article refers to the need to maintain a parental guarantee or letter of credit as required by proposed LGIA Article 5.14.3, and not the Interconnection Customer's indemnification obligations under proposed LGIA Article 5.14 generally.

464. NYTO argues, without elaboration, that a provision is needed to ensure that a Transmission Owner can ask the Interconnection Customer to provide financial security to backstop its potential tax liability where the Transmission Owner has not asked for a gross-up payment from the Interconnection Customer pending any ruling from the IRS.

Commission Conclusion

465. The Commission rejects comments that seek to deny the Interconnection Customer the right to ask the Transmission Provider, at the Interconnection Customer's expense, to seek a private letter ruling from the IRS. The Interconnection Customer would otherwise be without recourse if it disagrees with the Transmission Provider's conclusion regarding either tax liability (and gross-up) or the need for security, and it is the Interconnection Customer that pays the taxes.

466. In response to Dynegey, we will not grant the Interconnection Customer greater latitude with respect to the Transmission Provider's request for a private letter ruling because the proposed provision already offers a fair balance between the interests of the Parties. While the Interconnection Customer funds the request for a private letter ruling, permitting it to submit an "initial draft" of the private letter ruling request, and to insist on a single appeal, allows the Interconnection Customer to have adequate participation in the effort to secure an IRS determination.

467. The Commission disagrees with Salt River Project's argument that allowing the Interconnection Customer to prepare the initial draft of the request for a private letter ruling from the IRS gives rise to disclosure and confidentiality problems. The Commission leaves it to the Parties to work within the confidentiality and other provisions of the LGIA to determine the most appropriate means

for allowing the Interconnection Customer to draft the request.

468. FP&L offers no explanation for why the Transmission Provider should be permitted to require a jointly filed request for a private letter ruling. As a result, we reject FP&L's request.

469. The Commission agrees with FirstEnergy that the last sentence of Proposed LGIA Article 5.14.5 should be revised. This sentence refers to the Interconnection Customer's obligations if a private letter ruling concludes that the transfers or sums paid to the Transmission Provider are not subject to federal income taxation. In this event, the Interconnection Customer's obligations with respect to the guaranty or gross-up allowed under Final Rule LGIA Article 5.17.3 will be reduced or eliminated. The private letter ruling would not eliminate the Interconnection Customer's obligation to indemnify the Transmission Provider in the event that the IRS changes its ruling or policy or a subsequent taxable event occurs.

470. As for NYTO's argument that the Transmission Provider should be able to ask the Interconnection Customer to provide financial security when the Transmission Provider has foregone the gross-up, such authority is already in Final Rule LGIA Article 5.17.3. Under this article, the Transmission Provider may secure a guaranty from the Interconnection Customer in an amount equal to the Interconnection Customer's estimated tax liability. Since the article does not specify the timing of such a request, the request may be made at any time the Transmission Provider believes that it is appropriate.

471. This article is designated Article 5.17.5 in the Final Rule LGIA.

472. *Article 5.14.6—Contests*—Proposed LGIA Article 5.14.6 described the obligations that would apply if any Governmental Authority determines that the Transmission Provider's receipt of payments or property is income subject to taxation. At the Interconnection Customer's sole expense, the Transmission Provider would appeal or oppose such a determination. Proposed LGIA Article 5.14.6 also described the procedures for settling the contested ruling.

Comments

473. Southern proposes clarifying that the Interconnection Customer's obligation for the settlement amount is calculated on a basis that is fully grossed-up for taxes.

474. NYTO argues that the Transmission Owner's obligation to contest a determination by a Governmental Authority should be subject to the Interconnection Customer

providing an opinion of tax counsel that there is high likelihood of success.

Commission Conclusion

475. The Commission rejects the commenters' requests. The Transmission Provider may determine if the settlement amount is appropriate under Article 5.14.6, which is designated Article 5.17.7 in the Final Rule, and, therefore, has the opportunity to ensure that the amount is calculated in an acceptable manner. The Commission will not require that the Interconnection Customer tender a tax counsel opinion. Under Article 5.17.7, the Interconnection Customer must pay all of the costs of an appeal of the ruling. The Commission believes that the prospect of paying for an appeal with a low likelihood of success should be a sufficient incentive not to pursue a weak case.

476. *Article 5.14.7—Refund* (In the Final Rule LGIA: Article 5.17.8)—Proposed LGIA Article 5.14.7 described the conditions under which a refund would be payable to the Interconnection Customer for any payments made related to income tax liability and the formula for calculating the refund.

Comments

477. The Florida PSC recommends that the indemnification treatment in the LGIA be subject to review by state commissions on a case-by-case basis since there are local consequences. In some instances, indemnification alone is insufficient and letters of credit, parental involvement or other forms of guarantees may be required to protect retail customers adequately from becoming the default responsible Party. The Transmission Provider should be able to petition the state commission for a more stringent indemnification standard.

Commission Conclusion

478. The Commission does not grant Florida PSC's request. When the Commission, under the authority of sections 201, 205 and 206 of the Federal Power Act⁸⁰ sets a rate, term or condition for such transmission, a state may not exercise its jurisdiction over a retail rate to review the reasonableness of the rate, term or condition set by the Commission.⁸¹

479. This article is designated Article 5.17.8 in the Final Rule LGIA.

⁸⁰ 16 U.S.C. 824, 824d and 824e (2000).

⁸¹ See, e.g., *Mississippi Power & Light v. Mississippi ex rel. Moore*, 487 U.S. 354, 371–72 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970 (1986) (both applying the same principle to the Commission's jurisdiction over wholesale sales of electric energy).