

Party is taking to remedy the Force Majeure condition. Dominion Resources and Progress Energy request that the Commission clarify the obligations and responsibilities of each Party during a Force Majeure occurrence. Specifically, they ask the Commission to clarify how a Party invokes the Force Majeure provision.

621. A number of commenters ask the Commission to clarify that the Party claiming Force Majeure must return to complying with the LGIA as soon as the Force Majeure event ends and that the other Party's obligation to pay for services rendered is not suspended during the Force Majeure event.⁹⁹

622. PacifiCorp argues that the Force Majeure clause should cover acts of negligence or intentional wrongdoing by someone other than the claimant, while MidAmerican requests the opposite. Cinergy comments that the NOPR does not define curtailment, and is concerned that this term might unnecessarily broaden the definition of Force Majeure.

Commission Conclusion

623. We agree that the contracting Parties would benefit from greater specificity in the Force Majeure provision, so the Final Rule LGIA sets forth the procedural obligations and responsibilities of the Parties during a Force Majeure event. We adopt a requirement that the Party experiencing a Force Majeure event formally notify the other Party and that it keep the other Party informed about its attempt to remedy the situation. A Party shall exercise due diligence to remove the disability with reasonable dispatch, and it will resume its duties under the LGIA as soon as reasonably possible. For instance, a fire that triggers a Force Majeure claim may be put out within hours, but it may take the Party days or weeks to resume normal operation. The Party would not be in Default of its obligations during that time. The Final rule article also clarifies that the obligation to pay money when due is not suspended by reason of Force Majeure.

624. We agree that it would be useful to identify economic hardship as a non-Force Majeure event. Economic hardship is not considered an event outside the control of the Party. However, it is unnecessary to specify that a "removable or remediable" cause does not qualify as Force Majeure event. Final Rule Article 16 defines a Force Majeure event as one that is "beyond a Party's control."

625. NOPR Article 16.1 proposed to except from the list of Force Majeure events acts of "negligence or intentional wrongdoing." We clarify in the Final Rule LGIA that acts of negligence or intentional wrongdoing committed by an entity other than the Party claiming Force Majeure would qualify for Force Majeure protection. This is an event beyond a Party's reasonable control.

626. With respect to Cinergy's comments regarding use of the term "curtailment," we conclude that while the curtailments imposed by governmental military or lawfully established civilian authorities are considered Force Majeure events under Section 10.1 of the OATT, it is an inappropriate Force Majeure event in the Final Rule LGIA. Curtailments to transmission service should not serve as the cause for excusing performance under an interconnection contract. As a result, the Commission omits curtailment from the definition of Force Majeure in the Final Rule LGIA.

627. *Article 17—Default*—Proposed LGIA Article 17 defined Default as the failure of either Party to perform any obligation in the time or manner provided in this LGIA. No Default would exist as a result of Force Majeure or an act or omission of the other Party. Article 17 also described notice and cure procedures: the defaulting Party would have 30 Calendar Days from receipt of a Default notice to cure the Default; or, if the Default cannot be cured within 30 Calendar Days, the defaulting Party must begin the cure within 30 Calendar Days and must complete the cure within 90 Calendar Days. NOPR Article 17.1.2 provided the non-defaulting Party with the right to terminate the LGIA and recover damages if a Default is not cured, or is not capable of being cured, within the time provided in Article 17.1.1.

Comments

628. Calpine is concerned that not all Defaults are capable of being cured within 90 Calendar Days, especially if they involve the purchase, modification or installation of equipment. It therefore argues that it is sufficient to require that the cure begin in 30 Calendar Days, and that the defaulting Party "continuously and diligently complete such cure," as required under Article 17.1.1.

Commission Conclusion

629. The Commission declines to adopt Calpine's proposed change. The non-defaulting Party needs to be protected from lengthy Defaults by having the right to terminate, even if the Default cannot be cured within 90 Calendar Days through diligent action

by the defaulting Party. The LGIA does not prevent the Parties from agreeing to an extension of the time permitted to cure a Default. Calpine's proposal would provide the non-defaulting Party with too little protection.

630. *Article 18—Indemnity*—Indemnification is defined as compensating another for a loss suffered due to a third party's act or Default.¹⁰⁰ In the NOPR, we proposed that the LGIA incorporate the indemnity provision currently found in the OATT. Thus, the indemnification provision in NOPR LGIA Section 18.1 would indemnify the Transmission Provider and Interconnection Customer for legal costs due to claims by third persons arising from performance of the Transmission Provider's or Interconnection Customer's obligations under the LGIA on behalf of the other contracting Party, and would not explicitly allow indemnification for disputes arising over enforcement of this provision. The Commission sought comments on this approach and the relative merits of the alternative provisions in the Consensus LGIA and ERCOT interconnection agreement. The Consensus LGIA does not extend indemnity protection to cases of ordinary negligence or willful misconduct, and the ERCOT provision does not extend indemnity protection to cases of gross negligence or intentional wrongdoing. Additionally, the Consensus LGIA, unlike the ERCOT interconnection agreement, sets forth detailed procedures for pursuing an indemnity claim and makes the recovery of legal costs available as part of an indemnity claim.

Comments

631. Commenters generally support the inclusion of an indemnification provision, but ask that the Final Rule cover other charges, such as attorneys' fees, and explain the process for invoking this protection.¹⁰¹ Several commenters, including Duke Energy, Monongahela Power, PacifiCorp, and Sempra, point out a typographical error that would have excepted negligence or intentional wrongdoing by the indemnifying Party rather than the indemnified Party. Some commenters recommend extending the protection to ordinary negligence by the Transmission Provider, but denying

⁹⁹ E.g., The Coalition for Contract Terms, Exelon, PSEG, and PJMTO.

¹⁰⁰ Black's Law Dictionary 772 (7th ed. 1999).
¹⁰¹ E.g., Central Maine, Dominion Resources, Exelon, Monongahela Power, NYTO, and Progress Energy.