

protection for gross negligence.¹⁰² NYTO and Cinergy request that the provision cover an Interconnection Customer's performance of construction activities. PSEG requests that the provision be revised to offer specific limitations on the damages provision and a provision limiting liability arising from an emergency. El Paso requests that the Final rule specifically indemnify the Transmission Provider from penalties incurred due to the actions or inactions of the Interconnection Customer.

632. PJMTO argues that the OATT provision does not contain enough specific provisions and inadequately constrains the potential financial risk to each Party. Specifically, it argues that the provision should limit damages and set forth the proper standard for assessing liability (*i.e.*, gross negligence and willful misconduct). It also expresses concern that lending institutions would shy away from investing in new generation without liability limits.

633. Southern proposes to require that each Party indemnify and hold the other Party harmless from any liability resulting from activities on the indemnifying Party's own side of the Point of Change of Ownership, except in cases of gross negligence or intentional misconduct. Each Party should also indemnify the other Party for failure to adhere to operating requirements and Breaches of the LGIA. SoCal PPA notes that it applies a more stringent "willful action" standard. It warns that if the Commission retains the proposed standard, a Transmission Owner will have to procure insurance to cover this exposure, for which the Interconnection Customer should pay.

634. NYTO takes issue with the provision's bilateral effect, arguing that a Transmission Owner should not have to indemnify an Interconnection Customer, since the Interconnection Customer requests interconnection for its own benefit. Similarly, NYISO argues that the provision should protect the active Parties to an agreement, here the Transmission Owner or ISO, but not the Interconnection Customer.

635. Salt River Project notes that it is unclear whether the Commission intends to preempt the appropriate tribunal's consideration of whether liability should attach for injuries to third parties.¹⁰³ It also argues that compliance with an Interconnection

Customer's request should not be required if it will result in violation of statutory restrictions, bond covenants, creditor agreements or private use restrictions.

Commission Conclusion

636. We are amending the proposed indemnity standard to match the customary legal standard of conduct and better address the potential for liability. Because risk exposure can increase interconnection costs, we are revising the indemnity standard to provide protection for acts of ordinary negligence, but not for acts of gross negligence or intentional wrongdoing. Similarly, commenters have convinced us that interconnection presents a greater risk of liability than exists for the provision of transmission service and that, therefore, the OATT indemnity provision is not suitable in the interconnection context. While several commenters request a dollar limit on liability, we conclude that the tightened standards serve as an acceptable limit on liability and that a monetary limitation on damages is not necessary to adequately protect the Parties.

637. Because construction of Interconnection Facilities may expose both a Transmission Provider and an Interconnection Customer to liability for acts taken on the other Party's behalf, we are retaining the bilateral nature of the provision. In response to the concern of some commenters, the indemnity provision of the Final Rule also describes the process for pursuing and securing indemnity from claims in more detail. Additionally, the Final Rule LGIA gives an indemnified Party the right to collect the legal costs of defending an indemnification claim if the indemnifying Party fails to adequately defend the claim on its own. We also adopt El Paso's proposal that indemnification be available because of action or inaction by the Interconnection Customer, and modify the provision accordingly.

638. In response to NYTO's request that the provision cover an Interconnection Customer's construction activities, the Final Rule provision covers construction activities as well as all other activities performed on behalf of the other Party. Where an Interconnection Customer constructs the Transmission Provider's Interconnection Facilities and Stand Alone Network Upgrades under the Option to Build in Final Rule LGIA Article 5.1, a Transmission Provider will be protected by the indemnification clause that appears in that article. Indemnification applies to all work, regardless of the side of the Point of

Interconnection on which the work occurs.

639. With regard to cost allocation, we clarify that each Party is responsible for paying its own insurance. This is equitable and helps keep the costs of interconnection low, which should encourage the construction of new generation resources. Additionally, we are eliminating indemnification for gross negligence or intentional wrongdoing, which will also reduce the Parties' risk exposure and cost of insurance.

640. It is not our intent to preempt the "appropriate tribunal's" assignment of liability for injuries to third parties, as proposed by Salt River Project. The indemnification provision is a common contractual risk-sharing provision and does not strip any court or other tribunal of jurisdiction. To the extent that this provision would cause a specific Transmission Provider to violate statutory or other restrictions, the issue should be raised on compliance in a filing explaining the special circumstances.

641. *Article 19—Assignment*—Proposed LGIA Article 19 provided the conditions for assigning the LGIA to another entity. It stated that any assignment under the LGIA shall not relieve a Party of its obligations, nor shall a Party's obligations be expanded.

642. *Article 19.1—Assignment*—Article 19.1 of the NOPR LGIA stated that written consent ordinarily would be required to assign the LGIA, but assignment may be secured without consent if the assignee is an Affiliate that meets certain qualifications. Article 19 also provided that no consent would be required if an Interconnection Customer assigns the LGIA for collateral security purposes to aid in financing.

Comments

643. The Bureau of Reclamation argues that there are limitations on its ability to comply with Article 19.1. It does not typically allow assignments without approval by both entities and assurance that assigns and successors are bound by the original terms of the interconnection agreement. It states that there are standard articles that it would be required to include that are not contained in the NOPR, such as "Officials Not to Benefit," "Use of Convict Labor," "Prompt Payment Provisions," and "Tort Claims."

Commission Conclusion

644. The Bureau of Reclamation's concerns are addressed in the reciprocity discussion at Article 14.1 (Regulatory Requirements) and Article

¹⁰² *E.g.*, Central Maine, the Coalition for Contract Terms, Midwest ISO TO, PSEG, Salt River Project, and Southern.

¹⁰³ *Citing* Avista Corp., 96 FERC ¶ 61,058 at 61,181 (2002).