

Comprehensive Automobile Liability Insurance, and Excess Public Liability Insurance.

b. Liquidated Damages

851. Two liquidated damages provisions appeared in the NOPR, one in Article 5.1 of the LGIA and the other in Section 13.5 of the LGIP.

852. The liquidated damages provision in the NOPR LGIA would be applicable if an Interconnection Customer chooses the option described in Article 5.1.B. Under this option, if a Transmission Provider fails to complete construction of the Interconnection Facilities by the In-Service Date or the Network Upgrades by the Commercial Operation Date, the Transmission Provider would pay the Interconnection Customer liquidated damages. Liquidated damages would be limited to 0.5 percent per Calendar Day of the actual aggregate costs of the Interconnection Facilities or Network Upgrades for which the Transmission Provider remains responsible, not to exceed 20 percent of such costs.

853. The liquidated damages provision in Section 13.5 in the NOPR LGIP would have the Transmission Provider pay liquidated damages if it fails to meet its obligations in the LGIP and does not remedy the failure within 15 Business Days. Liquidated damages would be one percent of the actual costs of the applicable study cost per Calendar Day, with a cap at 50 percent. Also, upon expiration of the remedy period, the Transmission Provider would refund any deposit amount for the applicable study that the Interconnection Customer had paid beyond the actual reasonably incurred study costs.

Comments

854. Many commenters make similar arguments about these provisions, and since the provisions serve different functions, there may be different responses to the same argument. Nevertheless, there are a few issues that the Commission will address collectively; namely, legal authority to allow liquidated damages, and the applicability of liquidated damages to public power organizations and RTOs.

(1) Legal Authority To Require Liquidated Damages

855. Some commenters argue that liquidated damages are beyond the Commission's statutory authority inasmuch as they are penalties that are not fact-specific because they are not designed to remedy the actual damages

experienced,¹⁵⁰ or are damages beyond the statutory authority of the Commission.¹⁵¹ Others, including El Paso and WestConnect RTO, argue that liquidated damages are inconsistent with just and reasonable rates under the Federal Power Act. Southern questions whether the Commission has authority to require liquidated damage in private contracts. Idaho Power argues that the liquidated damages provisions violate the Federal Power Act by preventing a Transmission Provider from recovering costs prudently incurred in providing service to an Interconnection Customer. Maine PSC notes that the imposition of liquidated damages is at odds with the Commission's precedent on liability, which states that there should be no liability without fault and that liability should be unavoidable if caused by one's own gross negligence or intentional actions.¹⁵² Other commenters, including Idaho Power and WestConnect RTO, argue that an Interconnection Customer should file a complaint if it believes that the rates, terms, and conditions of Interconnection Service are unjust or unreasonable.

Commission Conclusion

856. We are deleting the liquidated damages provisions from the Final Rule LGIP and retaining them, with modifications, in the Final Rule LGIA.

857. Liquidated damages provisions are within our statutory authority because, although we do not assess or award damages, we have jurisdiction under Section 205 over agreements from which damages may arise. Liquidated damages can help manage risk within a jurisdictional agreement.

858. In response to the comments questioning the imposition of liquidated damages by regulatory fiat, we clarify that the Final Rule, like the NOPR, does not require liquidated damages. A Transmission Provider has the option to agree to a liquidated damages provision after agreeing to the dates for designing, procuring and constructing the Interconnection Facilities and Network Upgrades designated by the Interconnection Customer.¹⁵³ If the Parties are unable to agree on an acceptable schedule, they may negotiate terms and conditions—including revisions to the liquidated damages provision—under the Negotiated Option in Article 5.1.4 of the Final Rule LGIA. So, rather than impose liquidated

damages, the Final Rule LGIA provides liquidated damages as an option that may become a provision in the interconnection agreement signed by the Parties.

859. Because we are not including a liquidated damages provision in the Final Rule LGIP, we are not discussing that proposed provision here.

(2) Applicability of Liquidated Damages to Public Power, Cooperatives, and RTOs

860. Georgia Transmission argues that liquidated damages are particularly burdensome for cooperatives because of their inability to recover these costs except directly from the cooperative customers. For similar reasons, liquidated damages may make it financially prohibitive for some public power providers to handle Interconnection Requests from third party Interconnection Customers.¹⁵⁴ Western warns that it cannot agree to a contractual provision that would result in open-ended financial exposure when funds have not been appropriated for this purpose.

861. Midwest ISO TO argues that the liquidated damages provisions will not work in the RTO context, especially when the RTO is non-profit, for several reasons: (1) A Transmission Owner in an RTO should not be subject to liquidated damages because it will not be in charge of the interconnection process—the RTO will be, (2) an RTO should not pay liquidated damages since the costs will end up being spread over all customers who will pay the Interconnection Customer for the RTO's failure to meet the schedule, and (3) in an RTO context, with a neutral, non-profit RTO, there should be much less of a need for liquidated damages.

862. Cal ISO argues that since a Transmission Owner, rather than an RTO or ISO, will undertake many of these functions, the RTO or ISO should not be a guarantor for the Transmission Owner. For the RTO's responsibilities, Cal ISO continues, an Interconnection Customer is afforded recourse via Section 210 of the Federal Power Act.

863. PSEG and PJMTO similarly argue that the Final Rule should treat liquidated damages as a last resort remedy that would not apply where either the Interconnection Customer has an effective alternative backstop to protect itself against discriminatory conduct by the Transmission Provider or Transmission Owner, or the interconnection process is under the control of an independent third party

¹⁵⁰ *E.g.*, El Paso, Idaho Power, PacifiCorp, and WestConnect RTO.

¹⁵¹ *E.g.*, Entergy and SoCal PPA.

¹⁵² *See, e.g.*, ANR Pipeline Co., 98 FERC ¶ 61,128 at 61,862 (2002).

¹⁵³ LGIA Articles 5.1.2 and 5.1.3.

¹⁵⁴ *E.g.*, Imperial Irrigation, Lakeland, and LPPC.