

unaffiliated with any market participant.

864. The Midwest ISO also argues that if an RTO or the Transmission Owner must pay liquidated damages, the Commission should limit their exposure by imposing liability only in cases of gross negligence and should require a Party to pay liquidated damages only if its action or inaction alone caused the damages.

Commission Conclusion

865. In response to commenters that question their ability to pay or recover liquidated damages, the Final Rule LGIA does not require that all executed interconnection agreements contain liquidated damages provision. As noted above in the discussion of proposed LGIA Article 5.1 (Options), a Transmission Provider may reject liquidated damages when the schedule proffered by the Interconnection Customer exposes it to too much risk.

866. Therefore, public power entities that have met a reciprocity obligation by filing a safe harbor Tariff will have the same opportunity to negotiate the liquidated damages provision as any other non-public power Transmission Provider. Entities with safe harbor tariffs that face unusual limitations, such as cooperatives financed by the Rural Utilities Service or federal power entities subject to contracting restrictions set by statute or regulation, may request waiver of the liquidated damages provision of the Final Rule LGIA when they comply with their reciprocity condition.

867. We agree with the Midwest ISO that liquidated damages may be unnecessary when an RTO or ISO administers the interconnection agreement and oversees the interconnection process. As noted above in part II.C.5 (Variations from the Final Rule), we will permit RTOs and ISOs to use an independent entity variation standard to justify variations from the Final Rule provisions. Accordingly, we will consider proposals to eliminate liquidated damages from the compliance filings of RTOs and ISOs.

(3) General Comments on the LGIA Liquidated Damages Provision

868. Many commenters, most of them Transmission Providers, ask the Commission to either eliminate¹⁵⁵ or modify¹⁵⁶ the liquidated damage

provision in the NOPR LGIA. They argue that liquidated damages are inappropriate because the Transmission Owner recognizes no profit from the interconnection and has no means of recouping such costs.¹⁵⁷

869. PG&E argues that the Commission should eliminate the liquidated damage clause and instead provide a rapid method for addressing Interconnection Customer complaints. PacifiCorp contends that this is not an appropriate context for liquidated damages because the Parties are not negotiating the terms. The Louisiana PSC argues that liquidated damages should be unavailable without a demonstration that harm was caused and that the Transmission Provider caused the harm. While FP&L argues that liquidated damages should not apply unless a Transmission Provider can recover these costs in rates, including retail rates, the Louisiana PSC argues that liquidated damages should not be recoverable in transmission charges.

870. Some commenters contend that, if the Parties agree to liquidated damages and liquidated damages are recoverable, it should be the exclusive remedy for failure to complete construction on time.¹⁵⁸ SoCal Edison argues that operating dates must be agreed upon between the Transmission Provider and the Interconnection Customer in order for liquidated damages to apply. Southern contends that liquidated damages should be available only for facilities that are not completed on time. If a Transmission Provider is subject to liquidated damages for failure to complete Interconnection Facilities being built by another Interconnection Customer, Dominion Resources argues, the Interconnection Customer constructing the Interconnection Facilities should indemnify the Transmission Owner for any liquidated damages resulting from the Interconnection Customer's failure to meet the designated date.

871. Others commenters, including Georgia Transmission and NRECA-APPA, argue that, in lieu of liquidated damages, the Commission should include a Good Utility Practice and best efforts standard that holds the Transmission Provider liable for actual damages. Several commenters ask the Commission to adopt a provision that would protect a Transmission Provider

from liquidated damages if it meets a certain standard, such as a best efforts or Reasonable Efforts standard.¹⁵⁹ Some commenters, including Cleco and FP&L, argue that liquidated damages should be available only in cases of intentional wrongdoing or negligence.

872. Several Transmission Providers also argue alternatively that, if the liquidated damages provision remains in the Final Rule LGIA, it should be modified. Recommended modifications include not holding the Transmission Provider liable for Force Majeure events and circumstances beyond its control, such as permitting and regulatory delays, delays due to third parties, and delays due to the requesting Interconnection Customer or other Interconnection Customers.¹⁶⁰ Ameren argues that proposed LGIA Article 5.1.B(ii) might result in confusion, appeals, and litigation.

873. FP&L comments that the liquidated damages provision penalizes the Transmission Provider without a symmetrical opportunity for it to make a profit or recoup its costs and requests that the Transmission Provider have the opportunity to receive a financial benefit above its costs if a study is completed on time. Other commenters, including American Transmission, Cleco, MidAmerican, PG&E, and SoCal Edison, ask that the Commission make liquidated damages bilateral, thereby subjecting an Interconnection Customer to liquidated damages for missing its milestones. American Transmission further argues that an Interconnection Customer should be responsible for liquidated damages payable to the Transmission Provider at two levels of liability—a higher level when Generating Facilities lower in the queue are dependent on the Interconnection Customer's timely performance and a lower level when no third parties are harmed by the delay but the Transmission Provider deserves compensation.

874. Ameren argues that the NOPR LGIA does not address a situation in which multiple Interconnection Customers rely on the same Transmission Provider Interconnection Facilities and Network Upgrades. American Transmission proposes that total liability for a particular project should be the same regardless of the number of Interconnection Customers requesting the component. The Construction Issues Coalition

¹⁵⁵ *E.g.*, APS, Bridger Valley, Cinergy, El Paso, FP&L, Entergy, Idaho Power, LADWP, Monongahela Power, PacifiCorp, PG&E, Tucson Electric, and Western.

¹⁵⁶ *E.g.*, Ameren, American Transmission, Cal ISO, the Construction Issues Coalition,

MidAmerican, Mirant, National Grid, NSTAR, NYTO, PSNM, Sempra, and SoCal Edison.

¹⁵⁷ *E.g.*, APS, Cinergy, Exelon, and Oklahoma G&E.

¹⁵⁸ *E.g.*, American Transmission, Construction Issues Coalition, NYTO, NSTAR, SoCal Edison, and WestConnect RTO.

¹⁵⁹ *E.g.*, Ameren, Cal ISO, Central Maine, El Paso, Exelon, and WestConnect RTO.

¹⁶⁰ *E.g.*, Ameren, the Construction Issues Coalition, Dominion Resources, FP&L, NE Utilities, NSTAR, PG&E, Sempra, SoCal PPA, and Southern.