

recommends that the Commission modify proposed LGIA Article 5.1.B(ii) to specify a maximum of 20 percent of the project costs for all Interconnection Customers relying on the upgrade.

875. National Grid argues that the ERCOT LGIA provision, which has a compensatory approach, was better than the NOPR LGIA provision, which takes a punitive approach. The asymmetry between risk and reward may cause a Transmission Provider to avoid any obligation to perform Interconnection Services, says National Grid. Since a Transmission Provider can opt out of the liquidated damages provision in the interconnection agreement, an Interconnection Customer will likely be forced to find another builder.

876. PG&E requests that the Commission adopt a 15 month period for completing the work, which was in the ERCOT liquidated damages provision.

877. Cal ISO argues that damages must track the entity performing the work. In cases where there is an RTO or ISO, the Transmission Owner should be liable, and the RTO or ISO should not be a guarantor for the Transmission Owner.

878. Western argues that it is inequitable to allow the Interconnection Customer to extend the In-Service Date without penalty (Article 5.5) without also giving the Transmission Provider this option. Also, the Transmission Provider should be allowed to provide justification for not meeting unreasonable deadlines.

879. The Construction Issues Coalition argues that proposed LGIA Article 5.1.B.1.a should be modified to allow a Transmission Provider or a Transmission Owner not to enter into an interconnection agreement that includes liquidated damages for any reason, not just because of unacceptable dates. Because the limits on liquidated damages recovery may not be appropriate for every Interconnection Customer, Mirant argues, the proposed LGIA liquidated damages provision should be optional and left to the election of the Interconnection Customer.

880. American Forest expresses concern that the liquidated damages cap could be used by the Transmission Provider to delay or deny completion of Interconnection Studies or construction of facilities or upgrades simply by paying liquidated damages. The Commission should clarify that the cap should not be used by the Transmission Provider to impede the development of new generation. It proposes either deleting the cap or adding language to specify that the cap does not apply if the

Transmission Provider intentionally delays or denies service. Also, Cal ISO notes that the penalty of 0.5 percent of the upgrade cost in proposed LGIA Article 5.1.A(ii) for each day the Transmission Provider fails to meet an agreed upon deadline for completing any portion of the Transmission Provider Interconnection Facilities or Network Upgrades does not really work as an incentive because there may be no incentive to meet a deadline if the cost of the upgrade is small because the penalty would be so low.

881. Several commenters, including Duke Energy, EPSA, and NE Utilities, support the liquidated damages provision in the NOPR LGIA but none provide detailed arguments explaining their support.

#### Commission Conclusion

882. As noted above, the proposed LGIA liquidated damages provision allows a Transmission Provider to refuse the Interconnection Customer's proffered construction schedule and perhaps even negotiate to revise the liquidated damages provision if the Parties end up negotiating over construction terms.<sup>161</sup> We are concerned that Transmission Providers will always negotiate to eliminate liquidated damages liability unless the provision is revised to further protect the Transmission Provider. For this reason, we are adopting the recommendations of several commenters to revise this provision.

883. In the Final Rule LGIA, liquidated damages would be recoverable if an Interconnection Customer chooses the Alternate Option in Final Rule LGIA Article 5.1.2. Under this option, if a Transmission Provider fails to complete the Interconnection Facility or the Network Upgrades by the dates designated by the Interconnection Customer and accepted by the Transmission Provider, 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, and not to exceed 20 percent of the Transmission Provider's actual costs. They would not be recoverable under certain circumstances, such as when the Interconnection Customer is not ready to commence use of the Transmission Provider's Interconnection Facilities or Network Upgrades by the date specified

(unless the Interconnection Customer was not ready due to delay on the part of the Transmission Provider) or if the delay is due to a cause beyond the reasonable control of the Transmission Provider.

884. Liquidated damages should not be payable if the delay is due to circumstances beyond the control of the Transmission Provider. As a result, liquidated damages will be available only due to the action or inaction of a Transmission Provider, and not when the delays are due to third parties or other circumstances beyond the Transmission Provider's control. For the purposes of this provision, the Transmission Provider's subcontractors will not be considered third parties, but delays due to the action or inaction of Interconnection Customers earlier in the queue will be considered delays due to third parties. This provision also will sufficiently protect a Transmission Provider that seeks to interconnect multiple Generating Facilities to the same interconnection, since liability to each of the Interconnection Customers for liquidated damages may be avoidable as long as the delay is not attributable to the Transmission Provider or its subcontractors. This will also counterbalance the Interconnection Customer's ability to adjust the schedule under Final Rule Article 5.7, since the Transmission Provider can avoid liability for the acts of third parties. Finally, because liquidated damages liability will not have to be paid unless the Transmission Provider is at fault, we conclude that these damages will not be considered just and reasonable costs of service and will not be recoverable in transmission rates.

885. Finally, if the Parties agree to liquidated damages and liquidated damages are payable, this will be the exclusive remedy for failure to complete construction on time. We are not making the liquidated damages provision bilateral, however, because the Final Rule LGIA provides a Transmission Provider the necessary protection from liquidated damages liability, as well as the ability to negotiate provisions of the interconnection agreement to better match its chosen level of risk.

#### (4) General Comments on the LGIP Liquidated Damages Provision

886. Many commenters, most of them Transmission Providers, ask the Commission to either eliminate<sup>162</sup> or

<sup>161</sup> In Final Rule LGIA Article 5.1.4, the Parties may negotiate terms under the Negotiated Option.

<sup>162</sup> E.g., APS, Bridger Valley, El Paso, Entergy, FP&L, LADWP, LPPC, NYISO, PacifiCorp, PG&E, PGE, PJMTO, PSNM, Southern, WestConnect RTO, and Western.