

modify¹⁶³ the liquidated damages provision in the LGIP.

887. Those opposed to the liquidated damages provision in the LGIP argue, among other things, that liquidated damages are inappropriate because the Transmission Owner recognizes no profit and has no means for recouping costs.¹⁶⁴ Entergy notes that liquidated damages are improper because the Commission traditionally rejected these payments in favor of the payments of identifiable and direct costs incurred. PacifiCorp contends that this is not an appropriate context for liquidated damages because the Parties are not bargaining on the terms. Southern complains that the liquidated damages are improper because the LGIP provides for an uncontrolled and lengthy process due to the many opportunities for the Interconnection Customer to change data and Generating Facility configuration.

888. The NYISO and PSNM argue that instead of liquidated damages, the Commission should use the OATT Section 19.4 study requirement, which requires due diligence to perform within a specified time period. Under this approach, if a Transmission Provider is unable to meet the deadline, it must notify the customer and provide an estimate of the additional time needed and explain why more time is necessary.

889. Among those commenters requesting modification, several Transmission Providers propose that liquidated damages be made bilateral, thereby subjecting Interconnection Customers to liquidated damages for failure to meet deadlines.¹⁶⁵ American Transmission argues that there should be separate levels of liability facing the Interconnection Customer depending on third party harm caused by the Interconnection Customer's delay. Some commenters, including National Grid and NE Utilities, recommend a reciprocal financial incentive to earn for superior performance to offset the risk of liquidated damages.

890. Several Transmission Providers, including AEP, Ameren, Idaho Power, LG&E Energy, and NE Utilities, recommend modifying the proposed LGIP to exempt the Transmission Provider from circumstances beyond its control, such as the action or inaction of third parties, the failure of the Interconnection Customer to provide all

relevant data, failure of a third party contracted by the Interconnection Customer to provide timely studies, or permitting or other state regulatory prerequisites.

891. The Salt River Project contends that a Transmission Provider should be able to avoid liquidated damages in the LGIP as it can in the LGIA. NSTAR recommends that the LGIP adopt NEPOOL language that allows the Parties to agree upon a schedule with deadlines if money damages are at stake for non-completion.

892. Several commenters, including Dominion Resources, FP&L, and Progress Energy, argue that the liquidated damages provision should be revised so that it does not apply unless the failure to meet a deadline results from negligence or intentional wrongdoing by the Transmission Provider.

893. Duke Energy asks the Commission to clarify that the Reasonable Efforts standard also applies to restudies, and that liquidated damages apply only to the study obligations under the LGIP, and not all of the LGIP obligations. NE Utilities recommends that, to avoid overlap and ambiguity, the first sentence of proposed LGIP Section 13.5 should be revised to apply to "study-related" obligations.

894. American Transmission argues that the 50 percent cap on liquidated damages in the LGIP is excessive and it should be reduced to 25 percent.

895. American Forest 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.

896. Mirant argues that the liquidated damages provision in the LGIP should provide for liquidated damages of one percent per day starting on the date the Transmission Provider misses a deadline for completing the study, but after 30 days, the Transmission Provider should pay the Interconnection Customer liquidated damages equal to the remaining difference between the study cost and the amount already paid in liquidated damages. Also, the Transmission Provider should refund with interest any deposit amount in excess of the actual reasonably incurred study costs immediately upon expiration of the 15 day remedy period. These modifications provide a better incentive for Transmission Provider compliance.

897. Some commenters, including Calpine, EPSA, and KeySpan, argue in favor of the incentive that this proposed liquidated damages provision provides.

Commission Conclusion

898. We are eliminating liquidated damages from the Final Rule LGIP. While we understand the value of providing an incentive to complete Interconnection Studies, we are concerned that the availability of such a provision may undermine the Transmission Provider's ability to economically administer its study process.

899. Moreover, we question whether liquidated damages are appropriate during the study phase, since at that time it will be unclear whether a prospective Interconnection Customer intends to pursue its Interconnection Request. Because at this stage the prospective Interconnection Customer does not face a substantial risk of damages, we are not standardizing liquidated damages for Transmission Providers during the study phase (*i.e.*, in the Final Rule LGIP). Rather, we are requiring that a Transmission Provider use due diligence to perform within a specified time period. This approach, which has been applied to facilities studies in OATT Section 19.4, gives the Transmission Provider a deadline, and requires that the Interconnection Customer be kept apprised in writing of any difficulties encountered in meeting the deadline. In order to ensure that a Transmission Provider complies with its obligations, we urge the Interconnection Customer to bring any disputes to the Commission's Dispute Resolution Service, or if necessary, pursue claims of unduly discriminatory treatment under Section 206 of the Federal Power Act.

c. Consequential Damages

900. Consequential damages are losses that flow indirectly—rather than directly and immediately—from an injurious act.¹⁶⁶ In the NOPR, the Commission chose to maintain consistency with the OATT, and the NOPR LGIA did not limit liability for losses or costs for consequential damages. Instead, it relied on the statement in Order No. 888–A that Transmission Providers and customers can rely on any statutes or other laws to protect Parties from consequential or indirect damages.¹⁶⁷ The NOPR also stated that the OATT protects a Transmission Provider from consequential damages and indirect damages claims by third parties through indemnification except in cases of negligence or intentional wrongdoing by the Transmission Provider. The

¹⁶³ *E.g.*, AEP, American Forest, American Transmission, Cal ISO, Central Maine, Cleco, Duke Energy, National Grid, NE Utilities, NYTO, and Salt River Project.

¹⁶⁴ *E.g.*, APS, PG&E, and PGE.

¹⁶⁵ *E.g.*, American Transmission, Joint Consumer Advocates, and the Midwest ISO.

¹⁶⁶ Black's Law Dictionary 394 (7th ed. 1999).

¹⁶⁷ Order No. 888–A, FERC Stats. & Regs. ¶ 31,048 at 30,302.