

Commission sought comments on this approach and the relative merits of the alternative provisions in the consensus and ERCOT interconnection agreements.

#### Comments

901. Many commenters, mostly Transmission Providers, recommend that the Final Rule LGIA limit exposure to consequential damages, such as incidental, exemplary or indirect damages, lost profits, and other business interruption damages.<sup>168</sup> Without a provision limiting exposure, the Mississippi PSC explains, a Transmission Provider will be unable to contractually protect itself from these claims. The risk of exposure will impose significant additional costs, which will then be charged to all transmission customers. In this way, clauses that exclude liability for consequential damages reduce rates.

902. APS explains that, because statutes for liability vary from state to state, the LGIA must recognize these differences, and dictating specific terms should be avoided. FP&L notes that, contrary to the Commission's reliance on state statutes, not all states provide consequential damages protection. As an example, FP&L points to Florida, which allows exclusion of consequential damages, but the provision must be included in a contract. Progress Energy warns that a reliance on statutes or other laws dealing with consequential damages, as the Commission proposed in the NOPR, will only invite future disagreements and litigation.

903. Some commenters, including Duke Energy and Dynegy, request that, if language limiting liability for consequential damages is not inserted, the Commission should, at a minimum, provide Parties the option of mutually agreeing to include a limitation on liability, consistent with existing Commission policy.

904. Westconnect RTO notes that if liquidated damages are not available under the option in proposed LGIA Article 5.1B(i)(b), an Interconnection Customer may still sue the Transmission Provider for failing to meet the In-Service Date if there is no limitation of liability clause. It notes that without a clause limiting liability for consequential damages, an Interconnection Customer may still be able to secure damages akin to liquidated damages, even if the Parties

do not expressly agree to liquidated damages in their executed interconnection agreement.

905. Central Maine takes issue with the NOPR position that a Transmission Provider is protected from consequential and indirect damage liability to third parties through indemnification. A Transmission Provider's obligation to indemnify the Interconnection Customer for third party claims against the Interconnection Customer may be viewed as a payment of consequential damages by the Transmission Provider.

#### Commission Conclusion

906. There are several factors that convince us that a provision limiting consequential damages should be added to the Final Rule LGIA. First, by standardizing the liability protection, rather than leaving the issue to state law, it should offer greater certainty to Transmission Providers and Interconnection Customers alike. Contrary to APS's argument, it is precisely because state liability statutes vary that we are prescribing a specific liability provision. Second, liability limitation provisions protect against excessive utility rates by capping damage awards.<sup>169</sup> Finally, a goal of this rulemaking is to reduce litigation arising from interconnection, and an express provision in the LGIA limiting liability will have this effect. For these reasons, we are including a provision limiting consequential damages. Final Rule LGIA Article 18.2 protects either Party from liability for any special, indirect, incidental, consequential, or punitive damages, including profit or revenue. The Parties remain liable for any liquidated damages payable, and any damages for which a Party may be liable to the other Party under another agreement.

#### d. Two vs. Three Party Agreements

907. In the NOPR, the Commission proposed that, along with the Interconnection Customer, the Transmission Provider, and, to the extent necessary, the Transmission Owner, must become signatories to the interconnection agreement. The intent was to require the Transmission Provider to sign the agreement, and if the Transmission Owner is a separate entity, to require it to sign as well. We reasoned that the Transmission Provider should sign the agreement because the Interconnection Service would be provided under the Transmission

Provider's OATT. However, we noted that no one disputes that the Transmission Owner must also enter into an agreement with the Interconnection Customer, and it would be inefficient to require the Interconnection Customer to enter into separate agreements with the Transmission Owner and the Transmission Provider.

#### Comments

908. Interconnection Customers, such as Calpine, Dairyland Power, and PSEG, generally prefer a three party agreement because it facilitates "one-stop shopping." RTOs, ISOs, and some Transmission Owners, including Cal ISO, PJM, and PG&E believe that, when the Transmission Provider is not the Transmission Owner, the former's responsibilities can be fully addressed in the Tariff and it need not be a Party to the interconnection agreement. They argue that the main purpose of the agreement is to establish a property-based relationship between the Interconnection Customer and the Transmission Owner. Also, PJM states that the NOPR LGIA is not structured to accommodate its use as a three party agreement, and should be changed to clearly define the roles of Transmission Owners and Transmission Providers.

#### Commission Conclusion

909. We are replacing the proposed words "to the extent necessary" with the words "if the Transmission Owner is not the Transmission Provider" in the Final Rule provision. Thus, both must sign the interconnection agreement when the Transmission Owner is not also the Transmission Provider. We believe that this better defines the relationship among the Parties in one document, protects the Interconnection Customer and, therefore, facilitates the development of new generation resources. In an RTO or ISO where the Transmission Provider is not the Transmission Owner, the RTO or ISO's compliance filing may propose a modified interconnection agreement that provides different respective rights and obligations in the region. In other cases, we do not believe that the three party agreement should create an undue burden for either entity.

#### D. Compliance Issues

##### 1. Amendments to Transmission Providers' OATTs

910. The Commission is requiring all public utilities that own, control, or operate interstate transmission facilities to adopt the Final Rule LGIP and Final Rule LGIA as an amendment to their

<sup>168</sup> E.g., Ameren, American Transmission, APS, Avista, Central Maine, the Coalition for Contract Terms, Dominion Resources, Duke Energy, FP&L, Mississippi PSC, NYTO, PacifiCorp, Progress Energy, PSNM, RTO West Utilities, Tucson Electric, and WestConnect RTO.

<sup>169</sup> See Richard J. Pierce, Regional Transmission Organizations: Federal Limitations Needed for Tort Liability, 23 Energy L.J. 63, 67-72 (2002).