

109 FERC ¶ 61,070
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Southern Company Services, Inc.

Docket No. ER04-1161-000

ORDER ACCEPTING IN PART AND REJECTING IN PART PROPOSED
MODIFICATIONS TO *PRO FORMA* LARGE GENERATOR
INTERCONNECTION PROCEDURES AND *PRO FORMA* LARGE GENERATOR
INTERCONNECTION AGREEMENT

(Issued October 22, 2004)

1. On August 24, 2004, pursuant to Order Nos. 2003 and 2003-A¹ and section 205 of the Federal Power Act (FPA),² Southern Company Services, Inc. (Southern), on behalf of Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric and Power Company (collectively Southern Companies), filed revisions to Southern's Open Access Transmission Tariff (OATT) to incorporate revisions to both the *pro forma* Large Generator Interconnection Procedures (LGIP) and the *pro forma* Large Generator Interconnection Agreement (LGIA) under both the regional reliability variation standard and the "consistent with or superior to" standard. In this order, the Commission accepts in part and rejects in part Southern's proposed tariff revisions to be effective August 24, 2004. This order benefits customers because it ensures that the terms, conditions, and rates for interconnection service are just and reasonable and thus encourages more competitive markets.

¹ Standardization of Generator Interconnection Agreements and Procedures, Order No. 2003, 104 FERC ¶ 61,103 (2003) (Order No. 2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220 (2004), *reh'g pending*; *see also* Notice Clarifying Compliance Procedures, 106 FERC ¶ 61,009 (2004).

² 16 U.S.C. § 824d (2000).

I. Background

2. In Order No. 2003, pursuant to its responsibility under sections 205 and 206 of the FPA to remedy undue discrimination, the Commission directed all public utilities that own, control, or operate jurisdictional transmission facilities to append to their OATTs a Final Rule LGIP and Final Rule LGIA. Order No. 2003 required these public utilities to file revised OATTs containing the *pro forma* LGIP and *pro forma* LGIA by January 20, 2004.³ The Commission left open the option for Transmission Providers⁴ to propose variations to the *pro forma* LGIP or *pro forma* LGIA as long as the proposed variations were based on established regional reliability requirements or were “consistent with or superior to” the *pro forma* LGIP or *pro forma* LGIA.⁵

3. Now Southern proposes several modifications to the *pro forma* LGIA and the *pro forma* LGIP, asserting that each satisfies either the “consistent with or superior to” standard or the regional reliability requirements standard. Southern’s specific proposed variations to the *pro forma* LGIA and *pro forma* LGIP are discussed below.

4. This is Southern’s second filing to comply with Order Nos. 2003 and 2003-A. The Commission has accepted several modifications to the *pro forma* LGIA and *pro forma* LGIP proposed by Southern in response to established regional reliability requirements.⁶ However, the Commission rejected other portions of Southern’s first compliance filing on the grounds that Southern had not met the “consistent with or superior to” standard for variations.

5. Notice of the August 24, 2004 filing was published in the *Federal Register*, 69 Fed. Reg. 54,665 (2004), with interventions and protests due on or before September 14, 2004. Progress Ventures, Inc. filed a motion to intervene out of time.

³ See Notice Clarifying Compliance Procedures, 106 FERC ¶ 61,009 (2004).

⁴ The “Transmission Provider” is the entity with which the Generating Facility is interconnecting. The term “Generating Facility” means the specific device (having a capacity of more than 20 megawatts) for which the Interconnection Customer has requested interconnection. The owner of the Generating Facility is referred to as the “Interconnection Customer.”

⁵ See Order No. 2003 at P 826.

⁶ See *Southern Co. Services, Inc.*, 106 FERC ¶ 61,311 (2004) (March 29 Order), *order on compliance*, 107 FERC ¶ 61,317 (2004), *order on reh'g*, 109 FERC ¶ 61,014 (2004).

II. Discussion

A. Procedural Matters

6. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2004), the motion to intervene out of time filed by Progress Ventures, Inc. is granted. Granting late intervention at this stage of the proceeding will not disrupt the proceeding or place additional burdens on existing parties.

B. Regional Reliability Variations

1. Modification of Interconnection System Impact Study Agreement

7. In the March 29 Order the Commission approved Southern's proposed modifications to section 7.3, Interconnection System Impact Study. These modifications allow it to conduct "a grounding review, reactive power analysis, regional transfer capability, and a nuclear plant off-site power analysis (where applicable)." The Commission accepted this modification as a regional reliability variation.⁷

8. *Pro forma* LGIP Appendix 3, section 5 (entitled "Interconnection System Impact Study Agreement") includes the same information as section 7.3, but was not proposed to be modified by Southern.

9. Southern now proposes to amend section 5.0 to require a grounding review, a reactive power analysis, a regional transfer capability analysis, and a nuclear plant off-site power analysis (where applicable).

10. We accept Southern's proposed modifications to LGIP Appendix 3, section 5.0 because they are supported by existing regional reliability standards and are consistent with the revisions made to section 7.3 approved in the March 29 Order.

2. Requiring Additional Technical Specifications from the Interconnection Customer

11. Appendix 1 (Interconnection Request for a Large Generating Facility) and Attachment A to Appendix 1 to the *pro forma* LGIP set forth the types of information to be provided by an Interconnection Customer in the Interconnection Request.

⁷ March 29 Order at P 14.

12. Southern proposes to require additional information from the Interconnection Customer. Among other things, Southern is asking for a United States Geological Survey map of the plant site, more specific summer and winter plant ratings, and Running Station Service Load, and is clarifying data requirements for certain plant data such as Generator Step-Up Transformer Data Ratings.

13. Southern also proposes requiring additional exhibits in Appendix C of the *pro forma* LGIA. The Interconnection Customer would be required to supplement the technical data provided in its Interconnection Request as the interconnection process proceeds.

14. Southern argues that the additional information will allow the Transmission Provider to more accurately perform critical system studies in accordance with North American Electric Reliability Council (NERC) Planning Standards, the Recommendations of the Final Report on the August 14, 2003 Blackout, and the NERC Control Area Readiness Audit Report for Southern Company.

15. We will accept Southern's proposed modifications as complying with regional reliability requirements. We find that these changes are consistent with recommendations in the Final Report on the August 14, 2003 Blackout, the NERC Control Area Readiness Audit Report for Southern Company, and NERC Planning Standards.

3. Reactive Power Modifications

16. Southern proposes to revise article 9.6.1 (Power Factor Design Criteria) to make it clear that the required power factor range of 0.95 leading to 0.95 lagging is a "minimum" range. Southern also proposes to modify article 9.6.2 (Voltage Schedules) to require the Interconnection Customer to follow its assigned voltage schedule and to state that the voltage schedule may be a wider range than the minimum requirement established in article 9.6.1.

17. We will accept Southern's proposed changes to article 9.6.1 (Power Factor Design Criteria) and article 9.6.2 (Voltage Schedules) of the LGIA as regional reliability variations. Southern's reactive power policy is consistent with NERC requirements and with recommendation 23 in the Final Report on the August 14, 2003 Blackout. We therefore accept the additional language in section 9.6.1 clarifying that the power factor requirements are "minimum" requirements and the additional language in section 9.6.2 specifying that the customer will follow the voltage schedule provided by Southern (so long as the voltage schedule falls within the design limitations of the generator.)

18. We will also accept Southern's proposal to provide its voltage schedule to the Interconnection Customer when the LGIA is executed and therefore accept new Exhibit 1 to Appendix C of the LGIA. This recommendation is included in the NERC Final Report and qualifies as a regional reliability requirement.

C. Proposed Modifications to the *Pro forma* LGIP and *Pro Forma* LGIA Under the “Consistent with or Superior to” Standard

1. Generator Balancing Service Arrangements

19. In Order No. 2003, the Commission required the Interconnection Customer to provide Generator Balancing Service Arrangements before scheduling its power for delivery. This service accounts for unintentional differences between the scheduled generation and the actual generation associated with each Large Generating Facility.

20. However in Order No. 2003-A, the Commission removed that requirement, stating that the provision of balancing services “is more closely related to delivery service than to Interconnection Service. Because delivery service requirements are addressed elsewhere in the OATT, the balancing service requirement . . . should not appear in the LGIA.”⁸

21. Southern proposes to reinsert the provision into its LGIA. Southern asserts that the balancing services provisions should be in the LGIA because the Interconnection Customer controls the amount of power its Large Generating Facility produces. Thus, the Interconnection Customer, and not the transmission delivery customer, should be responsible for correcting any mismatch between scheduled or delivered energy from the Large Generating Facility.

22. Southern asserts that generator balancing services are necessary to ensure that the Transmission Provider’s Transmission System can reliably accommodate such fluctuations. Southern asserts that the inclusion of this provision is “consistent with or superior to” the *pro forma* LGIP, since Order No. 888-A anticipated that generator balancing services would be included in individual interconnection agreements.⁹

⁸ Order No. 2003-A at P 667.

⁹ *Citing Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh’g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,230 (1997), *order on reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff’d in relevant*
(continued...)

Finally, Southern notes that it has historically included generator balancing services provisions in its interconnection agreements and that it does not have generator balancing service provisions anywhere else in its OATT.

23. Southern has not borne its burden of demonstrating that its provision is "consistent with or superior to" the *pro forma* LGIA. Southern does not present any arguments that the Commission did not consider in Order No. 2003-A when it decided to remove the generator balancing service requirement from the *pro forma* LGIA.¹⁰ Therefore, Southern's proposal is simply a collateral attack on Order Nos. 2003 and 2003-A.¹¹

2. Time Periods for Performing Evaluations and Studies

24. The *pro forma* LGIP allows Transmission Providers a set amount of time to complete various interconnection studies,¹² but allows additional time if the Transmission Provider explains to the Interconnection Customer why the additional time is necessary. However the provisions governing re-studies¹³ do not allow similar extensions.

part sub nom. Transmission Access Policy Study Group v. FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002) (*TAPS v. FERC*).

¹⁰ See Order No. 2003-A at P 667.

¹¹ Some Transmission Providers have requested modifications to their OATTs in order to include separate generator balancing service agreement requirements. See, e.g., *Aquila, Inc.*, 105 FERC ¶ 61,084 (2003). Southern has not yet chosen to make such an application. Southern may also enter into operating agreements with Interconnection Customers to provide generator balancing services that are separate from the LGIA.

¹² The studies covered by the LGIP are the Interconnection Feasibility Study (section 6), the Interconnection System Impact Study (section 7), the Interconnection Facilities Study (section 8), and the Optional Interconnection Study (if necessary) (section 10).

¹³ Re-studies are occasionally required because of changes to higher-queued Interconnection Requests. This can include higher-queued projects dropping out of the process entirely or simply changing the location of the Point of Interconnection. The Interconnection Customer being re-studied is responsible for the costs of the re-study.

25. Southern proposes to give itself the right to take additional time to complete the re-study, as long as it explains to the Interconnection Customer why the additional time is necessary. Southern asserts that just as a Transmission Provider can run out of time in conducting the initial studies, it can also run out of time to conduct a re-study.

26. We reject Southern's proposed modification to the re-study deadlines, since Southern has not borne its burden of demonstrating that its proposal is "consistent with or superior to" the *pro forma* LGIP. Moreover, Southern has not shown why the Transmission Provider should not be able to meet the deadlines for a re-study. Conducting a re-study does not entail restarting the study process. The Transmission Provider already has the benefit of the prior studies and is required to use those prior studies "to the extent practicable" in conducting all additional studies.¹⁴

3. **Open Access Same-Time Information System (OASIS) Posting of Affiliate Scoping Meeting**

27. Section 3.4 of the *pro forma* LGIP, "OASIS Posting," requires each Transmission Provider to post advance notice on OASIS of its intent to conduct a Scoping Meeting with an affiliate and to transcribe those meetings. These requirements do not apply to non-affiliated generators.¹⁵

28. Southern claims that this requirement conflicts with Order No. 2003's requirement that the list of interconnection requests posted on OASIS "not disclose the identity of Interconnection Customer until Interconnection Customer executes an LGIA or requests that Transmission Provider file an unexecuted LGIA with FERC."¹⁶ According to Southern, posting notice of meetings held only with affiliates will allow the industry to deduce which Interconnection Requests have been made by the Southern's affiliates, and will place the affiliate at a competitive disadvantage because other generators will have valuable information about an affiliated generator.

¹⁴ See also sections 6.3, 7.4 and 8.3 of the *pro forma* LGIP.

¹⁵ See Order No. 2003-A at P 107.

¹⁶ See LGIP, section 3.4. See *General Chemical Corp., et al. v. US.*, 817 F.2d 844, 857 (D.C. Cir. 1986).

29. Southern claims that the Commission's requirement to post advance notice of affiliates Scoping Meetings is arbitrary and capricious because it conflicts with the "nondisclosure" provision of section 3.4 of the LGIP.¹⁷ Southern proposes to revise this section to require notice of Scoping Meetings with all generators (but not specifying which Scoping Meetings involve affiliates) and the transcription of all such meetings. Southern asserts that industry participants would then be able to request a copy of these transcripts and the public would be able to monitor all Scoping Meetings for any preferential sharing of information while protecting the identity of affiliated generators and maintaining a competitive marketplace. Southern argues that this revision will result in treating all Interconnection Customers the same in accordance with judicial and regulatory precedent.

30. We reject Southern's proposed variation as a collateral attack on Order No. 2003. Southern has not shown that this variation is "consistent with or superior to" the *pro forma* LGIP. This requirement was included in Order No. 2003-A to ensure that Transmission Providers do not favor their affiliates and to comply with the requirements of the Commission's Standards of Conduct¹⁸ and the Code of Conduct¹⁹ that prohibit the preferential sharing of information between the Transmission Provider and its Affiliate.

31. Moreover, we also find that the posting of the Scoping Meetings does not conflict with the non-disclosure requirements in the *pro forma* LGIP. If a Scoping Meeting transcript contains Critical Energy Infrastructure Information or commercially sensitive information, the transmission provider may release a redacted copy of the transcript along with an explanation of the redactions.²⁰

4. Coordination with Affected Systems

32. Section 3.5 (Coordination with Affected Systems) of the *pro forma* LGIP requires that the Transmission Provider "include" all Affected System Operators in all meetings between the Transmission Provider and Interconnection Customers.

¹⁷ Section 3.4 of the LGIP requires that Southern maintain a list of pending Interconnection Requests on its OASIS website, along with the project's size, location, current status, etc. Southern is not permitted to reveal the identity of the Large Generating Facility until after an LGIA is signed.

¹⁸ Standards of Conduct for Transmission Providers, Order No. 2004, FERC Stats. & Regs. ¶ 31,155 (2003), *reh'g pending*.

¹⁹ *See Northeast Utilities Service Co.*, 87 FERC ¶ 61,276 (1999).

²⁰ Order No. 2003-A at P 107.

33. Southern proposes to modify section 3.5 to state that the Transmission Provider is only required to “invite” Affected System Operators. Southern argues that the Transmission Provider cannot force an Affected System Operator to participate in any of these meetings and that this revision allows the Transmission Provider and Interconnection Customer to proceed with any meeting to which the Affected System Operator has been invited.

34. The Commission will deny as unnecessary Southern’s proposed modification to section 3.5 of the LGIP. We view “invite” and “include” to mean essentially the same thing and do not see our provision as preventing meetings if the Affected System Operator was invited but chooses not to come. We also note that all Affected System Operators subject to this Commission’s jurisdiction are *required* to cooperate with a Transmission Provider in conducting any necessary studies – to do otherwise would be a violation of their OATT.²¹

35. We also note that Order No. 2003-A gives Transmission Providers guidance as what to do if an Affected System Operator does not cooperate with the Transmission Provider.²²

5. Invoicing Periods

36. Section 8.1.1 (Interconnection Facilities Study) of the *pro forma* LGIP outlines the invoicing requirements regarding interconnection facility studies. Article 12.1 (General) of the *pro forma* LGIA outlines the invoicing requirements regarding interconnection facilities and network upgrades. Both provisions state that invoices shall be sent on a monthly basis.

37. Southern proposes to revise both provisions to allow the parties to agree to an invoicing period other than monthly. Southern argues that some generators prefer to be invoiced for a different time period, such as quarterly, and that this revision provides an additional option to assist the Interconnection Customer in the interconnection process.

²¹ See section 3.5 (“A Transmission Provider which may be an Affected System shall cooperate with Transmission Provider with whom interconnection has been requested in all matters related to the conduct of studies and the determination of modifications to Affected Systems.”)

²² See Order No. 2003-A at PP 115-7.

38. We will accept Southern's proposed modification to the invoicing provisions in section 8.1.1 of the *pro forma* LGIP and article 12.1 of the *pro forma* LGIA. These changes are "consistent with or superior to" the *pro forma* LGIP and LGIA since they provide Interconnection Customers with additional options.²³

6. Operations and Maintenance Expenses

39. *Pro forma* article 10.5 (Operating and Maintenance Expenses), outlines the cost responsibility for operation and maintenance expenses associated with interconnection facilities and provides that the Interconnection Customer is responsible for reasonable expenses associated with: (1) owning, operating, maintaining, repairing and replacing Interconnection Customer Interconnection Facilities; and (2) operation, maintenance, repair and replacement of Transmission Provider Interconnection Facilities.

40. Southern proposes to revise article 10.5 to require the Interconnection Customer to pay also the operating and maintenance expenses associated with Network Upgrades (in addition to interconnection facilities), at least until the Transmission Provider can fully place the Network Upgrades into rates.

41. Southern argues that during the period between the completion of construction of Network Upgrades and the time the Transmission Provider is permitted to include the associated costs in transmission rates, the Transmission Provider will incur a variety of operations and maintenance expenses and that its proposed change will allocate cost responsibility for Network Upgrades in a manner consistent with the intent of Order No. 2003-A.

42. We will reject the change to article 10.5 of the *pro forma* LGIA. Southern has not demonstrated that this change is "consistent with or superior to" the *pro forma* LGIA. When the Interconnection Customer finances the cost of Network Upgrades, the Transmission Provider, which bears none of the cost up front, cannot immediately include such cost in its rates.²⁴ Only when the Transmission Provider begins providing credits to the Interconnection Customer may it propose to collect these cost through its transmission rates.²⁵ However, since the operation and maintenance expenses related to Network Upgrades are not initially financed by the

²³However, Southern must treat all requests to be billed on an other-than-monthly basis comparably.

²⁴ See Order 2003-A at P 657.

²⁵ *Id.*

Interconnection Customer, there is no prohibition against Southern seeking to recover these costs in transmission rates immediately, as with any other costs of the transmission network.

7. Security

43. *Pro forma* LGIA article 11.5, (Provision of Security), requires the Interconnection Customer to provide:

a guarantee, a surety bond, letter of credit or other form of security that is reasonably acceptable to Transmission Provider and is consistent with the Uniform Commercial Code Such security for payment shall be in an amount sufficient to cover the costs for constructing, procuring and installing the applicable portion of Transmission Provider's Interconnection Facilities, Network Upgrades, or Distribution Upgrades and shall be reduced on a dollar-for-dollar basis for payments made to Transmission Provider for these purposes.^[26]

44. Southern proposes two changes to article 11.5. First, it proposes to require the Interconnection Customer “to provide *and maintain*” the security required in article 11.5. Southern argues “that this change will make the terms of the LGIA consistent with both commercial practices and [Southern’s OATT].”²⁷

45. Second, Southern proposes to restrict the right of the Interconnection Customer to reduce the amount of security provided on a dollar-for-dollar basis as the Interconnection Customer pays down its bill. Southern argues that it could be required to return payments made to it by the Interconnection Customer if the Interconnection Customer files for bankruptcy. Therefore, Southern requests that it be allowed to keep the Interconnection Customer’s security in place for “approximately ninety days” after payment is made.²⁸ Southern contrasts this with the Commission’s comment in Order No. 2003-A that “requiring the Interconnection Customer to maintain the full security during the length of the interconnection process would seriously discourage new generation.”²⁹

²⁶ Article 11.5.

²⁷ Affidavit of Cheryl Brakefield at 5.

²⁸ *Id.* at 5.

²⁹ Order No. 2003-A at P 431.

46. This proposed modification to the security provision is rejected because Southern has not demonstrated that it is “consistent with or superior to” the Commission’s *pro forma* provisions. Southern’s first change is unnecessary. Article 11.5 already requires that the security provided by the Interconnection Customer specify “a reasonable expiration date.”³⁰ Therefore, Southern’s concern that an Interconnection Customer would not be required to maintain the security is misplaced; the article plainly requires that the security be maintained for a defined “reasonable” period of time.

47. We also reject Southern’s proposal to not reduce the security dollar-for-dollar as the Interconnection Customer pays its bill. The Commission addressed this argument in Order No. 2003-A, stating that requiring the Interconnection Customer to keep its security in place even after it pays its bill “was not appropriate because it would seriously discourage new generation.”³¹ Hence, this is a collateral attack on Order No. 2003 and Southern has not shown that its provision is “consistent with or superior to” the *pro forma*.

8. Assignment

48. Article 19 (Assignment) of the *pro forma* LGIA governs the rights of an Interconnection Customer or Transmission Provider to assign its rights under the LGIA to a third party.

49. Southern proposes a large number of changes to article 19 that it argues are “consistent with or superior to” the *pro forma* article 19. Southern’s proposed changes can be grouped into three broad categories: first, to make the LGIA’s assignment provisions consistent with the assignment provisions of its OATT; second, to prevent the assignment of the LGIA while the Interconnection Customer is in Default; and third, to modify the provision to state that the assigning Party is not relieved of its contractual obligations in event of an assignment.

50. Section 23 of Southern’s OATT provides that “a Transmission Customer may sell, assign, or transfer . . . its rights under its Service Agreement, but only to another Eligible Customer.”³² Southern proposes to incorporate this concept into article 19 by requiring that an assignment to someone other than an “Eligible Customer” would require the Transmission Provider’s prior written consent (which would not be unreasonably withheld). Southern also argues that the right of assignment should be

³⁰ See LGIA article 11.5.1, 11.5.2, and 11.5.3.

³¹ Order No. 2003-A at P 431.

³² Affidavit of Cheryl Brakefield at 9.

contingent on the Transmission Provider “not having received a contrary court order.”³³

51. We reject the changes to the assignment provisions, as Southern has not demonstrated that these changes are "consistent with or superior" to the *pro forma* LGIA.

52. Southern attempts to incorporate concepts from its transmission OATT into the interconnection portion of its OATT. This does not work. Assignment of a transmission service agreement raises very different issues than does the assignment of an interconnection agreement. That is why the Commission included an assignment provision in the LGIA tailored to the needs of the interconnecting parties. Incorporating defined terms (such as “Eligible Customer”) from the transmission portion of its OATT into the interconnection portion of its OATT is confusing and unhelpful. There is no reason why the assignee of an interconnection agreement should be a customer eligible to take transmission service under Southern’s OATT.

53. The Commission addressed several of Southern’s other proposed modifications -- the right of an Interconnection Customer to assign a interconnection agreement and the responsibility for debts incurred prior to the assignment -- in Order No. 2003-A:

Finally, we will not require an entity, exercising its right to assignment, to be responsible for debts of the assigning Party as Southern requests. The Transmission Provider already is protected against an Interconnection Customer's default by the security provisions of Article 11.5. Additionally, a Transmission Provider is not harmed by allowing the interconnection process to go forward with a new entity; either way, the new entity is responsible for any new debts, while the original Interconnection Customer is responsible for debts up until the right of assignment is exercised.^[34]

54. We also reject Southern’s proposal to include language conditioning the right of assignment on the absence of a conflicting claim. LGIA article 14.2.1 requires both Parties to comply with applicable laws. Additionally, as we stated in Order No. 2003-A, Southern can invoke Dispute Resolution should it encounter a situation with multiple competing assignees.³⁵

³³ *Id.* at 11.

³⁴ Order No. 2003-A at P 476.

³⁵ *See id.* at P 473.

9. Indemnification

55. Southern proposes to revise article 18 by first stating that the Transmission Provider may be indemnified for matters not caused by its gross negligence or intentional misconduct; and second, by providing that a Transmission Provider should not be subject to consequential damages, even in the indemnity context.

56. Southern also proposes to delete the provision that any indemnification “be net of any insurance or other recovery.” Southern argues such a provision as written is not appropriate outside of RTO, is a disincentive to maintain adequate insurance, and would penalize the wronged party just because it was prudent enough to have adequate insurance.

57. In addition, Southern renews its comments filed in response to the Large Generator NOPR that the indemnity provision is unclear.

58. We reject the changes to the indemnification provisions in article 18 of the *pro forma* LGIA. Southern has not demonstrated that these changes are “consistent with or superior to” the *pro forma* LGIA. Moreover, several of Southern’s arguments, such as its argument related to section 18.1, are simply collateral attacks on Order No. 2003.³⁶

59. Because the purpose of indemnification is to pay another for actual losses, the exclusion of “insurance or other recovery” from amounts owed to an indemnified Party does not undermine the intent of this provision, as Southern argues. Forcing an indemnifying Party to pay damages already covered under an insurance policy would allow the indemnified Party to profit at the expense of the indemnifying Party. Excluding insurance and other recoverable amounts avoids overcompensating an indemnified Party. Therefore we reject its proposal to eliminate this clause.

60. Southern proposes to exempt itself from having to pay consequential damages, even if it is indemnifying the other Party. It has not shown that this is “consistent with or superior to” the *pro forma*. There, we require that the indemnification of one

³⁶ See Order No. 2003-A at P 455 (“The indemnification of one Party by another must be comprehensive and must include any liability the indemnified Party faces as a result of the indemnifying Party’s misdeeds.”) See also Order No. 2003 at P 636 (“we are revising the indemnity standard to provide protection for acts of ordinary negligence, but not for acts of gross negligence or intentional wrongdoing.”)

Party by another be comprehensive, and that the indemnifying Party be responsible for all of the indemnified Party's costs – regardless of whether those costs are compensatory or punitive.

10. Interconnection Study Agreements

61. Included in the *pro forma* LGIP are interconnection study agreements for each of the interconnection studies.³⁷ These study agreements govern the cost of each study, the obligations of each Party to further the study process, etc. Both Parties are required to execute each agreement separately. Order No. 2003 gave Transmission Providers the flexibility to customize their interconnection study agreements so long as they use "standards that are generally accepted within the region and consistently applied to all generation projects, including those of the Transmission Provider."³⁸

62. Each agreement also contains a "miscellaneous provisions" section³⁹ that specifies that the Transmission Provider may include "standard miscellaneous terms including, but not limited to, indemnities, representations, disclaimers, warranties, governing law, amendment, execution, waiver, enforceability and assignment. . . . All of these provisions, to the extent practicable, shall be consistent with the provisions of the LGIP and the LGIA."⁴⁰

63. Southern now seeks to take advantage of the flexibility we built into the interconnection study agreements and proposes to include a common set of contractual provisions into the miscellaneous section of each study agreement. Southern's proposed modifications are discussed below.

a. Equipment Release Disclaimer

64. Southern includes an Equipment Release disclaimer in each of its interconnection study agreements. It reads:

Transmission Providers [relevant study] shall not be construed as confirming or endorsing the design, or as any warranty of safety,

³⁷ See *supra* n.12.

³⁸ Order No. 2003 at P 221.

³⁹ See Interconnection Feasibility Study Agreement, section 7; Interconnection System Impact Study Agreement, section 7; Interconnection Facilities Study Agreement, section 6 *and* Optional Interconnection Study Agreement, section 7.

⁴⁰ See *Entergy Services, Inc.*, 108 FERC ¶ 61,029 (2004) (*Entergy*).

durability, reliability, or suitability of Interconnection Customer's equipment or installation thereof for any use, including the use intended by Interconnection Customer, and Interconnection Customer agrees to hold Transmission Provider harmless for any claims or demands arising out of or relating to Interconnection Customer's use of the [study].

65. Southern's inclusion of an equipment release disclaimer is acceptable as a standard contractual term reasonably designed to limit Southern's liability. However the Commission will require Southern to make two modifications to this provision. First, it must remove the phrase: ". . . and Interconnection Customer agrees to hold Transmission Provider harmless for any claims or demands arising out of or relating to Interconnection Customer's use of the [study]." Southern also proposes to include an indemnity provision in the study agreement. Having both provisions is confusing and does not meet the "consistent with or superior to" standard.⁴¹ Second, we will require Southern to remove the term "Interconnection Customer's equipment" and either replace it with "Interconnection Customer's Large Generating Facility" (which is a defined term) or explain further what constitutes the "Interconnection Customer's equipment."

b. Indemnity and Consequential Damages

66. Southern proposes to include indemnity and consequential damages provisions in each of the interconnection study agreements. Southern states that the provisions included in the interconnection study agreements parallel the indemnity and consequential damages provisions it proposes to adopt into its LGIA.

67. Since the Commission rejected the modifications to the *pro forma* indemnity and consequential damages provisions on which the interconnection study agreement indemnity and consequential damages provisions are based, we will require Southern to modify these provisions in the interconnection study agreement to track the provisions found in the *pro forma*.⁴²

⁴¹ We also note that this clause does not appear to be consistent with the LGIA's indemnity provision that makes an exception for gross negligence or intentional wrongdoing. *See* Order No. 2003 at P 630.

⁴² We note that Southern's current indemnity provision included in the interconnection study agreements is unilateral in favor of the Transmission Provider. Southern should either make the provision bilateral, as required by the *pro forma* LGIA, or explain why its unilateral provision is "consistent with or superior to" a bilateral provision. *See, e.g.*, Order No. 2003 at P 637.

c. Governing Law

68. Southern proposes to include a “Governing Law” provision in its interconnection study agreements. This provision is different from, and appears to be inconsistent with, the governing law provision in article 14.2 of the *pro forma* LGIA, and Southern has not shown that it is “consistent with or superior to” that provision. We will require Southern to modify the governing law provision found in the interconnection study agreements to match that found in article 14.2.

d. Assignment

69. Southern proposes to include an assignment provision in the interconnection study agreements that is inconsistent with the *pro forma* LGIA. Southern has not shown that its proposal is "consistent with or superior to" the *pro forma* LGIA.

e. Waiver, Amendment, Execution, and Captions

70. Order No. 2003 gave Transmission Providers the flexibility to customize their interconnection study agreements so long as they use "standards that are generally accepted within the region and consistently applied to all generation projects, including those of the Transmission Provider."⁴³ Southern’s proposed clauses are standard contractual clauses that we find are consistent with the *pro forma* LGIA. As such, they are accepted into the interconnection study agreements.

11. Insurance

71. Article 18.3.1 of the *pro forma* LGIA requires the Parties to maintain "Employers' Liability and Workers' Compensation Insurance . . . in accordance with the laws and regulations of the state in which the Point of Interconnection is located."

72. Southern points out that the states in which it operates do not have statutorily mandated employer's liability or worker's compensation insurance. Therefore it proposes to revise article 18.3.1 to require \$1,000,000 of such insurance.⁴⁴ Southern also proposes conforming edits to article 18.3.10.

⁴³ Order No. 2003 at P 221.

⁴⁴ The Commission notes that Order No. 2003's article 18.3.1 required \$1,000,000 in insurance. This was changed in Order No. 2003-A to refer to state law instead.

73. We accept Southern's proposed modifications as "consistent with or superior to" the *pro forma*, since the states in which Southern operates do not require specific amounts of employer's liability or worker's compensation insurance.

12. Confidentiality

74. *Pro forma* LGIA article 22 governs the treatment of confidential information. It states that "Confidential Information shall include, without limitation, all information relating to a Party's technology, research and development, business affairs, and pricing, and any information supplied by either of the Parties to the other before the execution of this LGIA."

75. Southern proposes to modify article 22.1 to clarify that Confidential Information includes *all* information shared by the Parties, not just information shared before execution of the LGIA.

76. Southern also proposes to modify article 22.1.11 of the *pro forma* LGIA by deleting the term "Confidential Information" in favor of the term "Sensitive Information." Southern contends that the information categorized as "Confidential Information" is different under Article 22.1 and Article 22.1.11. Article 22.1.11 defines "Confidential Information" as "any information a Party claims is competitively sensitive, commercial or financial information," whereas article 22.1 defines the term as "all information relating to technology, research and development, business affairs, and pricing and any other information supplied by one party to the other."

77. Additionally, Southern argues that the class of persons (contractors, employees, etc.) who can have access to confidential information is different in article 22.1.11 than in article 22.1.3.

78. We reject Southern's proposed variations as a collateral attack on Order No. 2003. Here too, Southern has not shown that its proposals are "consistent with or superior to" the *pro forma* LGIA.

13. Operating Committee

79. Article 29 (Joint Operating Committee) of the *pro forma* LGIA sets forth detailed requirements for a Joint Operating Committee to coordinate operating and technical considerations of Interconnection Service. Southern proposes to modify article 29.1.1 to direct the committee to establish and maintain control and operating procedures arguing that this revision will facilitate the safe and reliable operation of the applicable control area.

80. We will reject the proposed change to article 29.1.1 of the *pro forma* LGIA, since Southern has not shown that its provision is “consistent with or superior to” the *pro forma* LGIA. Article 29.1 already requires the Joint Operating Committee to perform all its duties consistent with the LGIA. Collectively, the LGIA provides enough guidance and flexibility to ensure the reliable operation of the Interconnection Customer and provision of interconnection service.

14. Typographical Errors

81. Southern points out several typographical errors throughout the LGIA and LGIP, including: section 7.6 incorrectly references section 6.1 instead of 7.2; section 5.2 leaves out the word “Customer” after “Interconnection;” section 11.1 says that “within thirty (30) Calendar Days after the comments are submitted, *Interconnection Customer* [read: Transmission Provider] shall tender a draft LGIA, together with draft appendices completed to the extent practicable” (emphasis added); and article 18.3.5 incorrectly states that “30 days advance written notice to the Other Party Group prior to the *anniversary* [read: the] date of cancellation” (emphasis added).

82. Consistent with our order in *South Carolina Electric and Gas Co.*, 108 FERC ¶ 61,018 at P 17 (2004), we accept Southern’s proposed typographical corrections.

The Commission orders:

(A) Southern's proposed variations are hereby accepted in part and rejected in part, as discussed in the body of this order. The accepted provisions are effective August 24, 2004.

(B) Southern is hereby directed to make a compliance filing to be submitted within 30 days of the date of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Magalie R. Salas,
Secretary.