168 FERC ¶ 61,092
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Cheryl A. LaFleur and Richard Glick.

Reform of Generator Interconnection Procedures and Agreements — Docket No. RM17-8-003

ORDER NO. 845-B

ORDER ON REHEARING AND CLARIFICATION

(Issued August 16, 2019)

1. On April 19, 2018, the Commission issued Order No. 845, which revised the Commission's *pro forma* Large Generator Interconnection Procedures (LGIP) and *pro forma* Large Generator Interconnection Agreement (LGIA) to improve certainty for interconnection customers, promote more informed interconnection decisions, and enhance the interconnection process.[1] On February 21, 2019, the Commission issued Order No. 845-A, which granted in part and denied in part requests for rehearing and clarification of its determinations in Order No. 845. On March 25, 2019, American Electric Power Service Corporation (AEP), on behalf of various public utility subsidiaries[2] of American Electric Power, Inc., submitted a request for clarification or,

[1] *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845, 163 FERC ¶ 61,043, at P 2 (2018) (Order No. 845), *order on reh'g and clarification*, Order No. 845-A, 166 FERC ¶ 61,137 (2019) (Order No. 845-A).

[2] AEP filed on behalf of Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Kingsport Power Company, Ohio Power Company, Public Service Company of Oklahoma, Southwestern Electric Power Company, Wheeling Power Company, AEP Appalachian Transmission Company, Inc., AEP Indiana Michigan Transmission Company, Inc., AEP Kentucky Transmission Company, Inc., AEP Ohio Transmission Company, Inc., AEP West Virginia Transmission Company, Inc., AEP Oklahoma Transmission Company, Inc., and AEP Southwestern Transmission Company, Inc.

in the alternative, rehearing of Order No. 845-A.[3] In this order, we deny in part and grant in part AEP's request for clarification, and deny AEP's alternative request for rehearing, as discussed below.

I. Background

2. AEP's rehearing request pertains to one of the reforms adopted in Order No. 845, the interconnection customer's option to build, as well as related indemnity provisions. Discussion of AEP's request for rehearing requires a familiarity with the interconnection pricing and crediting policies established in Order No. 2003;[4] network upgrade cost responsibility in the Midcontinent Independent System Operator, Inc. (MISO) region; and the decision by the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) in *Ameren Services Co. v. Federal Energy Regulatory Commission*[5] and how that decision affects the interconnection customer's option to build, as modified by Order Nos. 845 and 845-A. Additionally, we provide background regarding the option to build indemnity provision in the *pro forma* LGIA.

A. Order No. 2003

3. In Order No. 2003, the Commission required public utilities that own, control, or operate transmission facilities to file standard generator interconnection procedures and a standard agreement to provide interconnection service to generating facilities with a capacity greater than 20 MW. To this end, the Commission adopted the *pro forma* LGIP and *pro forma* LGIA and required public utilities to modify their Open Access Transmission Tariffs to incorporate the *pro forma* LGIP and *pro forma* LGIA.[6] In Order No. 2003, the Commission drew a distinction between interconnection facilities, which

[3] On May 21, 2019, the American Wind Energy Association (AWEA) filed an answer to AEP's rehearing request. Because Rule 713(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d) (2018), prohibits answers to requests for rehearing, we reject AWEA's answer.

[4] *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC ¶ 61,103 (2003), *order on reh'g*, Order No. 2003-A, 106 FERC ¶ 61,220, *order on reh'g*, Order No. 2003-B, 109 FERC ¶ 61,287 (2004), *order on reh'g*, Order No. 2003-C, 111 FERC ¶ 61,401 (2005), *aff'd sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1230 (2008).

[5] 880 F.3d 571 (D.C. Cir. 2018) (*Ameren*).

[6] Order No. 2003, 104 FERC ¶ 61,103 at P 924.

are "found between the Interconnection Customer's Generating Facility and the Transmission Provider's Transmission System,"[7] and network upgrades, which "include only facilities at or beyond the point where the Interconnection Customer's Generating Facility interconnects to the Transmission Provider's Transmission System."[8] Under Order No. 2003, this classification determines which party has ultimate cost responsibility for a particular facility. Interconnection facilities are paid for solely by the interconnection customer, and network upgrades are funded *initially* by the interconnection customer, unless the transmission provider elects to fund them.[9]

4. While Order No. 2003 generally requires interconnection customers to initially fund network upgrades, the Commission also established a crediting policy to reimburse interconnection customers for these costs.[10] Under this policy, the transmission provider[11] must repay the total amount of the network upgrades as credits against the interconnection customer's payments for transmission services, so long as this repayment period does not exceed twenty years.[12] Order No. 2003 also established a mechanism that explicitly allows transmission providers to include the costs of interconnection-customer-funded network upgrades in their transmission rates to the extent that the

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[7] *Id.* P 21.

[8] *Id.*

[9] *Id.* P 22 (emphasis added).

[10] In Order No. 2003, the Commission refers to this policy of reimbursing interconnection customers for the cost of network upgrades as its "crediting policy." *See* Order No. 2003, 104 FERC ¶ 61,103 at P 683. In this order, we refer to this mechanism as the Order No. 2003 crediting policy.

[11] The *pro forma* LGIP and *pro forma* LGIA both state that the "term Transmission Provider should be read to include the Transmission Owner when the Transmission Owner is separate from the Transmission Provider." *Pro forma* LGIP Section 1 (Definitions); *pro forma* LGIA Art. 1 (Definitions). While the transmission provider and transmission owner may be the same entity, in a Regional Transmission Organization (RTO) or Independent System Operator (ISO), the RTO/ISO—an independent, non-profit entity— typically assumes the role of the transmission provider, and the transmission owner(s) is a separate entity.

[12] Order No. 2003, 104 FERC ¶ 61,103 at P 683; Order No. 2003-B, 109 FERC ¶ 61,287 at PP 3 & 36.

transmission provider has provided credits to the interconnection customer.[13] When the transmission provider includes the cost of the network upgrade in its transmission rate base, the transmission provider earns a return on the costs of this facility.[14]

5. The Commission also contemplated proposals for participant funding in Order No. 2003. Participant funding refers to the direct assignment to a particular interconnection customer of the costs of network upgrades required for its interconnection request. The Commission stated that "under the right circumstances, a well-designed and independently administered participant funding policy for Network Upgrades offers the potential to provide more efficient price signals and a more equitable allocation of costs than the crediting approach."[15] In Order No. 2003-A, the Commission reiterated that, "when implemented by an independent Transmission Provider which does not have an incentive to discourage new generation by competitors, new cost recovery methods including participant funding [could] yield efficient competitive results."[16]

6. In Order No. 2003, the Commission also adopted a provision in the *pro forma* LGIA that affords the interconnection customer the option to build certain facilities. Pursuant to this option, an interconnection customer may exercise the option to build the Transmission Provider's Interconnection Facilities[17] and Stand Alone Network

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[13] Order No. 2003-A, 106 FERC ¶ 61,220 at P 657.

[14] *See* Order No. 845-A, 166 FERC ¶ 61,137 at P 19.

[15] Order No. 2003, 104 FERC ¶ 61,103 at P 695.

[16] Order No. 2003-A, 106 FERC ¶ 61,220 at P 691.

[17] The *pro forma* LGIA defines Transmission Provider's Interconnection Facilities as follows:

> Transmission Provider's Interconnection Facilities shall mean all facilities and equipment owned, controlled or operated by the Transmission Provider from the Point of Change of Ownership to the Point of Interconnection as identified in Appendix A to the Standard Large Generator Interconnection Agreement, including any modifications, additions or upgrades to such facilities and equipment. Transmission Provider's Interconnection Facilities are sole use facilities and shall not include Distribution Upgrades, Stand Alone Network Upgrades or Network Upgrades.

See pro forma LGIA Art. 1 (Definitions).

Upgrades[18] but only if the transmission provider cannot meet the in-service date, initial synchronization date, and/or commercial operation date selected by the interconnection customer. Article 5.2 in the *pro forma* LGIA lays out the requirements that the interconnection customer must satisfy when exercising the option to build.

B. ***Ameren*** **Decision**

7. In 2009, MISO sought, and the Commission granted, an independent entity variation[19] for MISO to depart from the Order No. 2003 crediting policy.[20] Under this variant crediting policy, MISO directly assigns to interconnection customers 90 percent of the costs for network upgrades rated 345 kV and above (with the remaining 10 percent

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[18] The *pro forma* LGIA defines Stand Alone Network Upgrades as follows:

> Stand Alone Network Upgrades shall mean Network Upgrades that are not part of an Affected System that an Interconnection Customer may construct without affecting day-to-day operations of the Transmission System during their construction. Both the Transmission Provider and the Interconnection Customer must agree as to what constitutes Stand Alone Network Upgrades and identify them in Appendix A to the Standard Large Generator Interconnection Agreement. If the Transmission Provider and Interconnection Customer disagree about whether a particular Network Upgrade is a Stand Alone Network Upgrade, the Transmission Provider must provide the Interconnection Customer a written technical explanation outlining why the Transmission Provider does not consider the Network Upgrade to be a Stand Alone Network Upgrade within 15 days of its determination.

See id.

[19] In Order No. 2003, the Commission stated that RTOs/ISOs may seek an independent entity variation from particular requirements imposed by Order No. 2003. Order No. 2003, 104 FERC ¶ 61,103 at P 827. The Commission also stated that the independent entity variation is "more flexible" than the "consistent with or superior to" standard and regional differences standard that the Commission applies when evaluating whether a variation is appropriate for a non-RTO/non-ISO. *Id.* P 26; Order No. 2003-A, 106 FERC ¶ 61,220 at P 759.

[20] MISO's tariff initially provided three alternatives for funding the costs of network upgrades for generator interconnections. The Commission removed the first option from MISO's tariff in 2011. *E.ON Climate & Renewables North America, LLC v. Midwest Indep. Transmission Sys. Operator, Inc.,* 137 FERC ¶ 61,076 (2011) (*E.ON*).

recovered on a system-wide basis) and 100 percent of the costs for network upgrades rated below 345 kV.[21]

8. MISO's tariff provides two options for funding the costs of network upgrades for generator interconnections.[22] Under the first option, which we refer to in this order as MISO's interconnection customer initial funding option, the interconnection customer provides up-front funding for the capital costs of the network upgrades. The transmission owner then refunds the reimbursable portion[23] of the payment, as applicable, to the interconnection customer in the form of a credit to reduce the transmission service charges incurred by the transmission customer with no further financial obligations on the interconnection customer for the cost of network upgrades.

9. Under a second option, the transmission owner could unilaterally elect to provide the up-front funding for the capital cost of the network upgrades. A MISO transmission owner electing this option would assign the non-reimbursable portion of the costs of the network upgrades directly to the interconnection customer through a network upgrade charge that recovers a return of, and on, the transmission owner's cost of capital.[24] In this order, we refer to this option as MISO's transmission owner initial funding option.

10. On June 18, 2015, in response to a complaint relating to these network upgrade initial funding options, the Commission instituted a proceeding pursuant to section 206 of the Federal Power Act (FPA)[25] to examine MISO's *pro forma* Generator Interconnection Agreement (GIA), *pro forma* Facilities Construction Agreement, and *pro forma* Multi-

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[21] *Midwest Indep. Transmission Sys. Operator*, *Inc.*, 129 FERC ¶ 61,060, at P 8 (2009).

[22] See *Ameren*, 880 F.3d at 575 (citing *E.ON,* 137 FERC ¶ 61,076).

[23] The reimbursable portion would be the 10 percent of the cost of network upgrades 345 kV and above that MISO recovers on a system-wide basis, and zero percent of the cost of network upgrades less than 345 kV. The non-reimbursable portion, then, would be the remainder.

[24] As noted by the D.C. Circuit, this network upgrade charge "paid from the incoming generator . . . includes *both* a return *of* capital . . . and a return *on* capital" and is, according to the D.C. Circuit, "thus economically equivalent to inclusion in the rate base, with the exception that they are charged specifically to the incoming generator rather than to all of the transmission owner's customers." *Ameren*, 880 F.3d at 576 (emphasis in original).

[25] 16 U.S.C. 824e (2012).

Party Facilities Construction Agreement.[26] To support this decision, the Commission explained that allowing MISO transmission owners to unilaterally select transmission owner initial funding "may be unjust, unreasonable, unduly discriminatory or preferential"[27] and "may increase costs of interconnection service . . . with no corresponding increase in service."[28]

11. On December 29, 2015, the Commission issued an order denying rehearing of Otter Tail I. In particular, the Commission stated that "because there is the possibility for an increase in costs presented by a transmission owner's unilateral election [of transmission owner initial funding] as compared with [interconnection customer initial funding], and yet there is no increase in interconnection service provided, such unilateral election is unjust and unreasonable."[29] For this reason, the Commission directed MISO to revise its tariff "to remove the ability of a transmission owner to unilaterally elect to initially fund network upgrades."[30] In response to a request for rehearing of Otter Tail II, the Commission again denied rehearing, finding that Otter Tail II did not deprive MISO transmission owners of the opportunity to earn a return "to which they are entitled" because, pursuant to the interconnection customer initial funding option, "the [MISO] transmission owner makes no investment of which, or on which, it is entitled to a return."[31]

12. The petitioners in *Ameren* challenged these decisions regarding MISO's options for transmission owners to recover network upgrade capital costs from interconnection

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[26] *Midcontinent Indep. Sys. Operator*, *Inc*., 151 FERC ¶ 61,220, at P 2 (2015) (Otter Tail I).

[27] *Id.* P 53.

[28] *Id.* P 49.

[29] *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 153 FERC ¶ 61,352, at P 32 (2015) (Otter Tail II).

[30] *Id.* P 65.

[31] *Otter Tail Power Co. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,099, at P 12 (2016). The Commission also stated that its "task is to allow a public utility the opportunity to offer its investors a return commensurate with the risk associated with their investment, as represented by the utility's business and financial risks" and that, under the interconnection owner initial funding option, "the transmission owner does not bear that risk." *Id.* P 13.

customers.[32] On January 26, 2018, the D.C. Circuit vacated and remanded the orders, finding that the Commission had not adequately responded to MISO transmission owner concerns that MISO's interconnection customer initial funding option "compels [transmission owners] to construct, own, and operate facilities without compensatory network upgrade charges—thus forcing them to accept additional risk without corresponding return as essentially non-profit managers of [network] upgrade facilities."[33] Regarding these risks, the D.C. Circuit stated that MISO transmission owners would have to "assume certain costs that are never compensated" such as "liability for insurance deductibles and all sorts of litigation, including environmental and reliability claims."[34] Moreover, the D.C. Circuit stated that the MISO orders at issue suggested that the Commission did not believe that MISO transmission owners were entitled "to earn a return on capital" for network upgrades funded through MISO's interconnection customer initial funding despite transmission owners' assumption of such costs.[35] For these reasons, the D.C. Circuit stated that the Commission "must explain how investors could be expected to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return."[36] On remand, the Commission reversed its decision to require mutual agreement prior to a transmission owner selecting transmission owner initial funding and reinstated the tariff provision that allowed a transmission owner to unilaterally elect transmission owner initial funding.[37]

C. The Option to Build under Order No. 845

13. In Order No. 845, the Commission revised articles 5.1, 5.1.3, and 5.1.4 of the *pro forma* LGIA to allow interconnection customers to unilaterally select the option to build for Stand Alone Network Upgrades and Transmission Provider's Interconnection Facilities regardless of whether the transmission provider agreed to the interconnection

[32] *Ameren*, 880 F.3d at 573.

[33] *Id.*

[34] *Id.* at 580.

[35] *Id.* at 581.

[36] *Id.*

[37] *Midcontinent Indep. Sys. Operator, Inc.*, 164 FERC ¶ 61,158, at P 1 (2018). The Commission also solicited further briefing limited to the treatment of agreements that were entered into during the time period between June 24, 2015 and August 31, 2018.

customer's proposed construction timeline.[38] The Commission stated that the revisions adopted in Order No. 845 would "benefit the interconnection process by providing interconnection customers more control and certainty during the design and construction phases of the interconnection process."[39]

1. *Ameren* Rehearing Arguments

14. On rehearing, several entities argued that the option to build revisions adopted in Order No. 845 were contrary to *Ameren* because the Commission failed to consider that transmission owners should receive compensation for the risk of owning and operating facilities, including those constructed pursuant to the option to build. They argued, among other things, that the revised option to build interfered with a transmission owner's ability to place the costs for stand alone network upgrades and transmission owner's interconnection facilities in its rate base or otherwise earn a return on such facilities.[40]

15. The Commission rejected these arguments in Order No. 845-A, explaining that it first adopted the option to build in Order No. 2003 as part of the *pro forma* LGIA in conjunction with the establishment of the Order No. 2003 crediting policy, which "explicitly allows transmission providers to earn a return of, and on, the costs of network upgrades."[41] The Commission also noted that it effectuated changes to the option to build through revisions to the *pro forma* LGIA in Order No. 845, which did not alter the Order No. 2003 crediting policy.[42] For this reason, the Commission concluded that the concerns identified in *Ameren* were not present with regard to the Order No. 845 revisions to the option to build, as Order No. 845 did not deprive transmission owners of the ability to earn a return of, and on, network upgrade costs. The Commission noted, however, that the concerns in *Ameren* arose as a consequence of, among other things, MISO's decision to seek a variation from the Commission's Order No. 2003 crediting policy and not the Commission's creation of a generic rulemaking.[43]

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[38] Order No. 845, 163 FERC ¶ 61,043 at P 85.

[39] *Id.*

[40] *See* Order No. 845-A, 166 FERC ¶ 61,137 at P 16.

[41] *Id.* P 19.

[42] *Id.* P 20.

[43] *Id.*

2. Indemnity Rehearing Arguments

16. *Pro forma* LGIA article 5.2 provides the general conditions that the interconnection customer must meet when exercising the option to build. *Pro forma* LGIA article 5.2(7) requires that the interconnection customer "indemnify Transmission Provider for claims arising from Interconnection Customer's construction . . . under the procedures applicable to Article 18.1 Indemnity."

17. Among the numerous comments the Commission received on the Notice of Proposed Rulemaking (NOPR) that led to Order No. 845, Edison Electric Institute (EEI), Xcel Services, Inc. (Xcel), and National Grid argued that *pro forma* LGIA article 5.2(7) was insufficient and suggested multiple specific ways to expand the protection provided in *pro forma* LGIA article 5.2. In Order No. 845, the Commission declined to expand the indemnity protections in this article. Instead, the Commission stated that it "consider[s] [*pro forma* LGIA article 5.2(7)] sufficiently broad to address EEI's, Xcel's, and National Grid's concerns."[44]

18. On rehearing, Arizona Public Service Company (APS) argued that *pro forma* LGIA article 5.2(7) was insufficient to protect transmission providers that may violate their regulatory requirements as a result of the expanded option to build and requested clarification on how this provision and article 18.2 (Consequential Damages)[45] should be applied in light of the Commission's Order No. 845 revisions.

19. In response, in Order No. 845-A, the Commission disagreed with APS and explained that "article 5.2(7) in combination with the *pro forma* LGIA indemnification provisions [in article 18.1] provide sufficient protection from third party claims against transmission providers for claims arising from the interconnection customer's construction under the option to build."[46] Further, the Commission stated that Order No. 845-A "made no changes to *pro forma* [LGIA] article 5.2, including the indemnity provision related to the option to build in article 5.2(7)" and also that the Commission does "not interpret *pro forma* LGIA article 5.2(7) to expand the terms of the indemnity

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[44] Order No. 845, 163 FERC ¶ 61,043 at P 94.

[45] Article 18.2 protects "either Party from liability for any special, indirect, incidental, consequential, or punitive damages, including profit or revenue." However, the interconnection customer and transmission provider "remain liable for . . . any damages for which a Party may be liable to the other Party under another agreement." *See* Order No. 2003, 104 FERC ¶ 61,103 at P 906.

[46] Order No. 845-A, 166 FERC ¶ 61,137 at P 53.

provisions to include indemnification by the interconnection customer for activities other than the interconnection customer's option to build construction."[47]

20. The Commission explained that it did not expand the applicability of *pro forma* LGIA article 5.2(7) for three reasons. First, the phrase "claims arising from Interconnection Customer's construction" already provides indemnification for the transmission provider for a significant number of third party claims arising from the interconnection customer's option to build construction.[48] Second, even if the indemnity provision did not apply, the transmission provider could pursue a claim for breach of the LGIA if the interconnection customer's conduct breached the interconnection agreement.[49] And third, the Commission stated that *pro forma* LGIA article 5.2 "gives the transmission provider 'significant oversight authority' over the option to build, which, if exercised properly, gives the transmission provider a significant role in ensuring that the interconnection customer's exercise of the option to build does not expose the transmission provider to liability."[50]

21. Regarding the relationship between the indemnity and consequential damages provisions of the *pro forma* LGIA, the Commission explained that, while article 18.2 does not exclude consequential damages that arise as a part of an indemnification claim, Order No. 2003's limitation on consequential damages protects one party to an LGIA, either the interconnection customer or the transmission provider, from having to pay consequential damages to the other.[51]

II. Discussion

22. As discussed below, regarding AEP's request for clarification and rehearing in the alternative on the Commission's finding that *Ameren* does not apply to the revision to the *pro forma* LGIA's option to build provision, we grant AEP's request for clarification in part and deny its request for rehearing in the alternative. Additionally, we deny AEP's request for clarification regarding the indemnity discussion in Order No. 845.

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[47] *Id.* P 54.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* PP 51-52 (citing Order No. 2003-A, 106 FERC ¶ 61,220 at P 455).

A. *Ameren*

1. Clarification and Rehearing Request

23. On rehearing of Order No. 845-A, AEP asks the Commission to clarify that it will address the ramifications of *Ameren* in each RTO/ISO compliance filing if the RTO/ISO has adopted a participant funding interconnection pricing policy.[52] AEP argues that the Commission was erroneous when it stated that the concerns identified in *Ameren* pertain only to the "unique features of MISO's tariff and precedent that applies in MISO" and do "not implicate the Commission's revisions to the *pro forma* LGIP and *pro forma* LGIA."[53]

24. Instead, AEP argues that Order No. 845's obligations apply to all transmission providers, including those that have adopted participant funding.[54] AEP notes that the Commission, in Order No. 2003, specifically expressed its willingness to consider participant funding as a financing mechanism for network upgrades in RTOs/ISOs,[55] and that, as a consequence of both participant funding and interconnection customers exercising the option to build, many investor-owned transmission owners are not earning any return on network upgrades constructed by interconnection customers.[56] AEP argues, therefore, that the Commission erred in stating that the lack of return issue identified in *Ameren* exists only under the unique features of the MISO tariff because the concern exists in other RTOs/ISOs as well, including in PJM Interconnection, L.L.C. (PJM) and Southwest Power Pool, Inc., which also have participant funding.[57] For these reasons, AEP argues that the Commission should have stated that it will evaluate

[52] AEP Mar. 25, 2019 Request for Rehearing at 4 (AEP Request).

[53] *Id.* at 6 (quoting Order No. 845, 163 FERC ¶ 61,043 at P 18).

[54] *Id.* at 7.

[55] *Id.* at 7 & 8 (citing Order No. 2003, 104 FERC ¶ 61,103 at P 695; Order No. 2003-A, 106 FERC ¶ 61,220 at P 691).

[56] *Id.* at 7.

[57] *Id.* at 9 (citing *PJM Interconnection, L.L.C.*, 108 FERC ¶ 61,025, at PP 19-20 (2004) and *Interstate Power and Light Co. v. ITC Midwest, LLC*, 146 FERC ¶ 61,113, at P 17 & n.31 (2014)).

the impacts of *Ameren* in the compliance filings submitted by RTOs/ISOs that have adopted participant funding.[58]

25. AEP also asks the Commission to clarify that any RTO/ISO that has adopted participant funding "should be able to propose to re-balance the allocation of ownership and operational risks between the [interconnection customer] and the [transmission owner] consistent with *Ameren*."[59] Additionally, AEP asks the Commission to clarify that if an RTO/ISO compliance filing does not account for *Ameren*, transmission owners have the right to protest and seek rehearing and appeal of any such Commission decision.[60] If, however, the Commission does not grant these clarifications, AEP seeks rehearing of the Commission's determination in Order No. 845-A that the tariff features in MISO are unique, and that other RTOs/ISOs are precluded from raising *Ameren* issues on compliance.[61]

2. Commission Determination

26. We find that the Commission did not distinguish *Ameren* erroneously. AEP misapprehends the relevant discussion in Order No. 845-A, which it reduces to a recitation of the Commission's isolated statement that the concerns in *Ameren* arose as a result of "unique features of MISO's tariff and precedent that applies in MISO."[62] The D.C. Circuit's salient findings in *Ameren* were that the Commission did not adequately justify its removal of the option for transmission owners in MISO to fund network upgrades and did not adequately respond to transmission owners' concern with the lack of opportunity to earn a return of, and on, the cost of network upgrades to the relevant transmission system. The Commission in Order No. 845-A correctly concluded that the option to build revisions in Order No. 845 did not give rise to the same concern.[63] In particular, the Commission stated that:

> Order No. 845 does not deprive transmission providers of the ability to earn a return of, and on, network upgrades, including stand alone network

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[58] *Id.* at 8.

[59] *Id.* at 10.

[60] *Id.* at 11.

[61] *Id.* at 11-13.

[62] *Id*. at 6 (quoting Order No. 845-A, 166 FERC ¶ 61,137 at P 18).

[63] Order No. 845-A, 166 FERC ¶ 61,137 at PP 18-20.

> upgrades constructed pursuant to the option to build as outlined in the *pro forma* LGIA. On the contrary, Order No. 2003 established the Order No. 2003 crediting policy, a mechanism that explicitly allows transmission providers to earn a return of, and on, the costs of network upgrades. To this end, under the Commission's policy as outlined in Order No. 2003, a transmission provider has the ability to earn a return *of* capital expenditure for network upgrades to the extent that it has reimbursed an interconnection customer with transmission credits.[64]

27. We therefore affirm the finding that *Ameren* does not implicate the Commission's revisions to the *pro forma* LGIA adopted in Order No. 845, which did not modify the Order No. 2003 crediting policy. For this reason, Order No. 845 did not change the fact that the Commission explicitly provided an option pursuant to which transmission providers can earn a return of, and on, the costs of network upgrades through the Order No. 2003 crediting policy.

28. AEP also argues that the RTOs/ISOs that have adopted participant funding should be allowed to reflect the impacts of *Ameren* in their compliance filings. We note, however, that the adoption of participant funding, in and of itself, does not preclude the recovery of a return of, and on, the costs of facilities. Additionally, we note that adoption of participant funding, in and of itself, did not create the circumstances leading to *Ameren*. Nevertheless, we provide clarification in part to reiterate that the Commission did not prohibit transmission providers, including RTOs/ISOs, from arguing that they qualify for a variation from the *pro forma* LGIP and the *pro forma* LGIA.[65] RTOs/ISOs, in particular, were free to argue that they qualify for an independent entity variation.[66] Thus, nothing prevented RTOs/ISOs from addressing whether the relevant provisions in their tariffs implicate *Ameren* and ensuring that they address such concerns when they submitted their filings to comply with Order Nos. 845 and 845-A. Additionally, we clarify that nothing in Order Nos. 845 or 845-A changed the Commission's procedures

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[64] *Id.* P 19 (citing Order No. 2003-A, 106 FERC ¶ 61,220 at P 657).

[65] The majority of transmission providers, including all of the RTOs/ISOs, submitted their filings to comply with Order Nos. 845 and 845-A before or on May 22, 2019.

[66] Order No. 845, 163 FERC ¶ 61,043 at P 43.

regarding the ability to protest an RTO's/ISO's compliance filing and seek rehearing[67] and appeals[68] of any Commission decision.

B. Indemnity Provisions

1. Clarification Request

29. AEP also asks the Commission to clarify the meaning of language in Order No. 845 addressing indemnity provisions.[69] AEP argues that, in response to the NOPR that led to Order No. 845, National Grid, EEI, and Xcel sought to hold interconnection customers liable for consequential damages suffered by a transmission owner directly as a result of the exercise of the option to build. AEP notes that National Grid, in particular, urged the Commission to revise article 5.2 of the *pro forma* LGIA to increase the indemnity protections for the transmission owner.[70] According to AEP, EEI similarly argued that interconnection customers should be "liable for any direct or indirect costs incurred by the [transmission owner] to address equipment failure due to material defect or workmanship for a set period after a facility is commissioned."[71] Additionally, AEP notes that National Grid asked for the article 5.2(7) protection to apply to "engineering, procurement, or construction," and EEI mentioned that equipment failure due to material defect or workmanship should be covered and be the responsibility of the interconnection customer.[72] Finally, AEP argues that Xcel raised concerns about the duration of the protection afforded to transmission owners.[73] AEP states that, in response to these comments, the Commission recited the text of article 5.2(7) and stated that "[w]e consider this provision sufficiently broad to address EEI's, Xcel's, and National Grid's concerns."[74] AEP argues that one "reasonable interpretation" of this paragraph of

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[67] 18 C.F.R. § 385.713.

[68] *See* 16 U.S.C. § 825l(b) (2012).

[69] AEP Request at 16-17 (citing Order No. 845, 163 FERC ¶ 61,043 at P 94).

[70] National Grid Apr. 13, 2017 Comments at 11 (National Grid Comments).

[71] EEI Apr. 13, 2017 Comments at 23 (EEI Comments).

[72] National Grid Comments at 11; EEI Comments at 23.

[73] AEP Request at 15 (citing Xcel Apr. 13, 2017 Comments at 10).

[74] Order No. 845, 163 FERC ¶ 61,043 at P 94.

Order No. 845 is that the Commission granted the relief requested by these commenters, which was "well beyond indemnification as defined by [the Commission]."[75]

30. AEP argues, however, that Order No. 845-A created confusion as to the meaning of this paragraph. More specifically, AEP argues that the Commission stated that it rejected the request that transmission owners be protected against consequential damages, which makes the fate of the other concerns unclear.[76] AEP argues that, by not issuing a clear denial of some of the commenters' requests for relief or by not providing any explanation for any denials of relief in Order No. 845, the Commission failed to meet the obligation to respond meaningfully to rulemaking comments.[77]

31. AEP also argues that, while Order No. 845-A explains why the Commission retained the limit on consequential damages in article 18.2, this limitation is only reasonable in combination with oversight and a return. AEP asserts that the Commission has never considered whether this risk allocation scheme is reasonable in those RTOs/ISOs where transmission owners are not entitled to a return.[78] AEP argues that where the transmission owner does not earn a return, there should be no justification to force the transmission owner to shoulder the liability risks for facilities that it did not engineer and build.[79] AEP thus seeks clarification as to whether its contention that the limits on consequential damages are unjust is an issue that can be litigated on compliance given the independent entity variation.[80] Additionally, AEP asks the Commission to clarify that transmission owners have the right to seek both indemnification and direct damages from the interconnection customer for the life of the facilities constructed by the interconnection customer.[81] AEP argues that this issue is especially important to AEP because the PJM tariff removes various transmission owner protections for the option to

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[75] AEP Request at 16.

[76] *Id.*

[77] *Id.* at 16-17 (citing *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35-36 & n.58 (D.C. Cir. 1977); *Ala. Power Co. v. Costle*, 636 F.2d 323, 384-85 (D.C. Cir. 1979); *Pennzoil Co. v. FERC*, 645 F.2d 360, 372 (5th Cir. 1981)).

[78] *Id.* at 18.

[79] *Id.* at 19.

[80] *Id.*

[81] *Id.* at 20.

build, which not only eliminates the transmission owner's return, but increases its risk related to the option to build.[82]

32. Finally, AEP notes that article 5.2(7) of the *pro forma* LGIA, which relates to indemnification under the option to build, only pertains to "construction." In light of National Grid's NOPR comments, AEP asks the Commission to clarify that this term also covers other work activities related to the construction and installation of the upgrades, including engineering and procurement of the necessary materials and equipment.[83] It argues that this clarification would be logical and consistent when read in conjunction with articles 5.2(1) and 5.2(2) of the *pro forma* LGIA. AEP also seeks clarification that, under the independent entity standard, an RTO/ISO can revise its tariff to clarify article 5.2(7) to eliminate the vagueness of the term "construction."[84]

2. Commission Determination

33. We deny AEP's request for clarification regarding the indemnity discussion in Order No. 845. In Order No. 845-A, the Commission denied the relief requested by NOPR commenters. Specifically, the Commission stated that Order No. 845 made "no changes to *pro forma* article 5.2."[85]

34. We also disagree with AEP's assertion that the Commission did not meaningfully respond to rulemaking comments. In Order No. 845-A, the Commission explained its rationale for not expanding *pro forma* LGIA article 5.2(7) as suggested by EEI, National Grid, and Xcel. The Commission declined to expand the applicability of the provision because: (1) the existing language "already provides indemnification for the transmission provider for a significant number of third party claims arising from the interconnection customer's option to build construction;" (2) even "if the indemnity provisions do not apply, the transmission provider may pursue a claim for breach if the interconnection customer's conduct . . . breaches the interconnection agreement;" and (3) article 5.2 "gives the transmission provider 'significant oversight authority' over the option to build, which, if exercised properly, gives the transmission provider a significant role in ensuring that the interconnection customer's exercise of the option to build does not expose the transmission provider to liability."[86] Therefore, to address AEP's contention, we affirm

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[82] *Id.*

[83] *Id.* at 21-22.

[84] *Id.* at 22.

[85] Order No. 845-A, 166 FERC ¶ 61,137 at P 54.

[86] *Id.* (citing Order No. 845, 163 FERC ¶ 61,043 at P 110).

these statements, which provide a clear denial of the requests to expand the applicability of *pro forma* LGIA article 5.2(7).

35. Regarding AEP's arguments that the Commission should rethink the limitation on consequential damages embodied in *pro forma* LGIA article 18.2 in light of the possibility that some RTOs/ISOs may not be earning a return on facilities constructed pursuant to the option to build, we reiterate that *Ameren* stands for the principle that the Commission cannot prohibit a transmission owner from earning a return of, and on, the cost of its network upgrades, and that the Commission did not restrict transmission providers from arguing that they qualify for a variation from the *pro forma* LGIP or the *pro forma* LGIA.[87] AEP has not, however, demonstrated a connection between its concerns regarding a return and the limitation on consequential damages; therefore, we find that no changes are necessary to the limitation on consequential damages established in the *pro forma* LGIA.

36. We deny AEP's requests that the Commission clarify that transmission providers have "the right to seek both indemnification *and* direct damages from the [interconnection customer] for the life of the facilities that the [interconnection customer] constructed" pursuant to the option to build.[88] The *pro forma* LGIA already makes clear that indemnity provisions and a party's right to seek direct damages for defaults under the *pro forma* LGIA survive the termination of the agreement. Specifically, *pro forma* LGIA article 2.6 (Survival) states that the LGIA "shall continue in effect after termination to the extent necessary to . . . permit the determination and enforcement of liability and *indemnification obligations* arising from acts or events that occurred while this LGIA was in effect."[89] Furthermore, *pro forma* LGIA article 17.1.2 (Right to Terminate) states that if a breach "is not cured as provided in this article, or if a Breach is not capable of being cured within the period provided for herein, the non-breaching Party shall have the right to declare a default and terminate this LGIA . . . and . . . to recover from the breaching Party all amounts due hereunder, plus all other damages and remedies to which it is entitled at law or in equity." This provision also states that the terms of this provision survive termination of the LGIA. Thus, there is no need to grant clarification to modify the *pro forma* LGIA to allow a transmission provider to invoke these provisions after the termination of an interconnection agreement.

37. Finally, we find that the term "construction" used in *pro forma* LGIA article 5.2(7) is not unreasonably vague, especially in light of the Commission's intentional omission

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[87] *Id.* at P 20 (citing *S. Cal. Edison Co.,* 141 FERC ¶ 61,100, at P 23 (2012)).

[88] AEP Request at 20.

[89] *Pro forma* LGIA Art. 2.6 (Survival) (emphasis supplied).

of the terms "engineering" and "procurement," which the Commission used in *pro forma* LGIA articles 5.2(1) and 5.2(2). This point was already sufficiently clear from the Commission's statement in Order No. 845-A that the Commission "did not interpret LGIA Article 5.2(7) to expand the terms of the indemnity provisions to include indemnification by the interconnection customer for activities other than the interconnection customer's option to build *construction*."[90] Also, as noted above, we see no need to expand this article to provide indemnity protection for the transmission provider, since the transmission provider already has significant oversight authority over the interconnection customer's option to build.[91]

The Commission orders:

(A) AEP's request for clarification is hereby denied in part and granted in part, as discussed in the body of this order.

(B) AEP's alternative request for rehearing is hereby denied, as discussed in the body of this order.

By the Commission. Commissioner McNamee is not participating.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

[90] Order No. 845-A, 166 FERC ¶ 61,137 at P 54 (emphasis supplied).

[91] Order No. 845, 163 FERC ¶ 61,043 at P 110; Order No. 845-A, 166 FERC ¶ 61,137 at P 54.