

NOVEMBER - DECEMBER 2019

VOL. 19-10

PRATT'S

ENERGY LAW

REPORT



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ISBN: 978-1-6328-0836-3 (print)
ISBN: 978-1-6328-0837-0 (ebook)
ISSN: 2374-3395 (print)
ISSN: 2374-3409 (online)

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT’S ENERGY LAW REPORT [page number]
(LexisNexis A.S. Pratt);

Ian Coles, *Rare Earth Elements: Deep Sea Mining and the Law of the Sea*, 14 PRATT’S ENERGY
LAW REPORT 4 (LexisNexis A.S. Pratt)

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POSTMASTER: Send address changes to Pratt's Energy Law Report, LexisNexis Matthew Bender, 121 Chanlon Road, North Building, New Providence, NJ 07974.

FERC Further Clarifies Its Orders Reforming Generator Interconnection Procedures and Agreements

*By Mark R. Haskell, George D. Billinson, and Lamiya N. Rahman**

The Federal Energy Regulatory Commission recently issued an order granting in part and denying in part requests for further clarification of its reform of Large Generator Interconnection Agreements and Procedures. Order No. 845-B affirms the Commission's findings that the expansion of an interconnection customer's option to build does not impede transmission owners' ability to recover a return of and on network upgrades. This article discusses the order.

Recently, the Federal Energy Regulatory Commission (“FERC” or “the Commission”) issued an order granting in part and denying in part requests for further clarification of its reform of Large Generator Interconnection Agreements (“LGIA”) and Procedures (“LGIP”).¹ Order No. 845-B affirms FERC’s prior findings that the expansion of an interconnection customer’s option to build does not impede transmission owners’ ability to recover a return of and on network upgrades. The order also reiterates FERC’s determination not to revise the pro forma LGIA’s indemnity provisions.

BACKGROUND

Order No. 845—FERC’s Final Rule revising the *pro forma* LGIP and LGIA—made various reforms to “improve certainty for interconnection customers, promote more informed interconnection decisions, and enhance the interconnection process.”² Among these changes, the Commission expanded interconnection customers’ ability to exercise the option to build transmission providers’ interconnection facilities and standalone network upgrades beyond

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¹ *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845-B, 168 FERC ¶ 61,092 (2019).

² *Id.* at P 1.

instances where the transmission provider is unable to meet the interconnection customer's preferred construction timeline.

A subsequent decision, Order No. 845-A, among other things, rejected arguments that the option build revisions contradicted the U.S. Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") decision in *Ameren Services Co. v. FERC*. According to the Commission, "*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."³ In that case, the D.C. Circuit vacated FERC's orders requiring the Midcontinent Independent System Operator, Inc. ("MISO") to remove an option under its tariff allowing transmission owners to unilaterally elect to initially fund network upgrades and to thereafter recover the interconnection customer's portion of the cost burden through periodic network upgrade charges that included a return on the capital investment (*i.e.*, the "transmission owner initial funding option"). Although the Commission initially found the transmission owner initial funding option unjust and unreasonable, the D. C. Circuit remanded the orders directing the Commission to "explain how investors could be expected to underwrite the prospect of potentially large non-profit appendages with no compensatory incremental return."⁴ The Commission reinstated the transmission-owner initial funding option on remand.

In Order No. 845-A, the Commission found that the expansion of the option to build did not implicate the same return recovery concerns underlying *Ameren*. The Commission preliminarily noted that the *Ameren* decision related to specific variations to FERC's crediting policy that were unique to MISO. Moreover, the Commission determined that the option to build revisions did not hinder a transmission owners' ability to earn a return of or on standalone network upgrades, finding that "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. Additionally, when the transmission provider includes in its rate base the cost of a network upgrade, the transmission provider earns a return *on* the costs of this facility."⁵

Order No. 845-A also rejected requests, in response to the broadened option to build, to expand the applicability of the *pro forma* LGIA's indemnity

³ *Id.* at P 35.

⁴ See *Ameren Services Co. v. FERC*, 880 F.3d 571, 581 (D.C. Cir. 2018).

⁵ *Reform of Generator Interconnection Procedures and Agreements*, Order No. 845-A, 166 FERC ¶ 61,137 at P 19 (2019).

provisions and to make interconnection customers liable for consequential damages.

In the instant decision, Order No. 845-B, the Commission addressed a request for clarification, or in the alternative, rehearing of Order No. 845-A by American Electric Power Service Corporation ("AEP") regarding these issues.

OPTION TO BUILD

Citing language in Order No. 845-A that the *Ameren* decision related to the "unique features of MISO's tariff and precedent that applies in MISO," AEP requested clarification that FERC will address the concerns raised in *Ameren* in each regional transmission organization ("RTO") or independent system operator ("ISO") compliance filing for those RTOs/ISOs that, like MISO, have adopted participant funding. AEP argued that together with participant funding, the exercise of the option to build has resulted in investor-owned transmission owners not earning returns on network upgrades that are constructed by interconnection customers. In the alternative, AEP requested rehearing on this issue.

In response, the Commission first affirmed its determination in Order No. 845-A that the expanded option to build does not implicate the concerns underlying *Ameren*. The Commission explained that its grounds for rejecting *Ameren*-related arguments in Order No. 845-A did not hinge on the uniqueness of MISO's tariff. Rather, as the Commission explained, the D.C. Circuit's key concern in *Ameren* was that the Commission did not adequately justify its removal of MISO's transmission owner initial funding option or respond to transmission owners' concerns regarding the inability to earn a return of and on the cost of network upgrades. Finding that the option to build revisions do not preclude transmission owners from earning a return, Order No. 845-A determined that the concerns in *Ameren* were not at issue here.

While noting that participant funding in and of itself does not preclude recovery of a return on facilities costs or lead to issues similar to those in *Ameren*, the Commission nonetheless clarified that RTOs/ISOs were free to request independent entity variations and to address whether their tariff provisions implicate *Ameren* in their Order No. 845 compliance filings. The Commission reiterated that neither Order No. 845 nor Order No. 845-A changed FERC's procedures regarding the ability to protest an RTO/ISO compliance filing or to seek rehearing or appeal of a Commission decision.

INDEMNIFICATION

AEP also made several requests for clarification with respect to the LGIA's indemnification provisions as they relate to the option to build. First, AEP sought clarification as to whether the Commission had granted various parties'

requests to expand the indemnification protections for transmission owners and to hold interconnecting customers liable for consequential damages, in light of allegedly conflicting language in Order Nos. 845 and 845-A. The Commission denied this request, finding that it had sufficiently responded to and ultimately denied requests to expand the indemnification provisions in cases where the option to build is exercised.

Second, AEP requested clarification on whether limits on consequential damages can be litigated in individual RTO/ISO compliance filings based on the independent entity variation, and whether transmission owners have the right to seek both indemnification and direct damages for the life of facilities constructed by an interconnection customer. While acknowledging that transmission owners are free to argue that they qualify for variations from the *pro forma* LGIA and LGIP, the Commission declined to revise the limitation on consequential damages in the *pro forma* LGIA. The Commission also found no modifications were necessary to clarify survival of indemnification and direct damages rights because the *pro forma* LGIA already provides that these rights survive termination of the agreement.

Finally, AEP asked whether the indemnity provision under the option to build relating to “construction” also extends to other construction/installation-activities such as engineering and procurement, and whether RTOs/ISOs can clarify the term “construction” in their own tariffs so that it is less vague. The Commission disagreed that the term “construction” is unreasonably vague, and confirmed that it intentionally omitted engineering and procurement activities from the indemnity provision.