

May 22, 2019

## **FERC RESOLVES KEY ASPECTS OF GENERATOR OPTION TO BUILD INTERCONNECTION UPGRADES; IGNORES 60-DAY CLOCK UNDER SECTION 205 WHERE NO SPECIFIC EFFECTIVE DATE REQUESTED**

To Our Clients and Friends:

The Federal Energy Regulatory Commission (“FERC”) recently issued two back-to-back orders that resolve key questions regarding the Interconnection Customer’s “Option to Build” the Transmission Owner’s transmission facilities under a FERC-jurisdictional interconnection agreement. In addition, FERC demonstrated that it will ignore the “60-day clock” for action on a Section 205 filing unless a specific Effective Date has been requested that is 60 days or less from the filing. All practitioners should note this important procedural point.

Both orders address the Option to Build under PJM’s Open Access Transmission Tariff. The two orders issued May 10, 2019 address (1) a complaint filed by American Electric Power Service Company (“AEP”) against PJM (“*AEP Complaint Order*”)[1] and (2) a related unexecuted Interconnection Construction Service Agreement (“ICSA”) involving AEP and a new generator interconnection using the Option to Build (“*Guernsey ISA/ICSA Order*”).[2]

### **FERC Clarifies the Option to Build**

Under the PJM Tariff the Option to Build generally means that the generator has the right to construct certain of the transmission owner interconnection facilities and network upgrades, including the switching station where the generator interconnects to the transmission system. After the Option to Build facilities are constructed by the generator, they are transferred to the transmission owner to own and operate.

FERC addressed key aspects of liability and indemnification for facilities constructed by generators under the Option to Build.

FERC confirmed that the generator’s “indemnification obligation” applies to the Option to Build. FERC found that the indemnification obligation is limited to the generator’s “construction” under the Option to Build, although the transmission owner has the right to review and approve the “engineering design” for the Option to Build facilities. FERC confirmed that the “indemnification obligation” applies *only* to claims by third parties, and not to claims between the generator and transmission owner. The indemnification is bilateral, and applies to construction by both the transmission owner and the generator.

Unlike the “indemnification obligation,” such claims *between* the interconnection parties are subject to a limitation on consequential damages. FERC rejected AEP’s request to remove the long-standing consequential damages limitation only for claims by the transmission owner against the generator under the Option to Build, and reiterated that this provision is bilateral and applies equally to both parties.

FERC also confirmed that Order No. 845 *did not expand* the terms or scope of the Option to Build indemnification provision, and made no changes to the provisions. In particular, FERC rejected AEP’s claim that the indemnification provision now includes a host of specific indemnification requests made by three transmission owner entities in the Order No. 845 proceeding.

FERC directed PJM to make compliance filings for the *pro forma* ICSA and the generator-specific ICSA within 30 days in the two proceedings. PJM made its compliance filing in response to the *AEP Complaint Order* yesterday in Docket No. ER19-1922-000.

These new orders provide important clarity for any generator seeking to use the Option to Build. The orders are fully consistent with FERC’s expansion of the Option to Build in Order No. 845. The orders establish that indemnification *does apply* to a generator’s work on the Option to Build – but *only* with respect to construction. Moreover, the indemnification is *only* for third-party claims, and not claims by the transmission owner, which remain subject to the consequential damages limitation. Finally, the orders confirm that the indemnification is limited to what it says on its face, and FERC expressly rejected claims that the indemnification obligation had somehow been expanded by implication in Order No. 845.

## **FERC Ignores 60-Day Clock Under Section 205 of the FPA**

In the second order, FERC ignored the “60-day FPA clock” for acting on a new Section 205 rate filing, and indicated that it is not bound to act in 60 days unless a specific effective date has been requested. In fact, FERC took more than four (4) months to act on the Section 205 filing.<sup>[3]</sup> In the initial filing, PJM requested “an effective date ... as [FERC] deems reasonable.”<sup>[4]</sup> Sixty days came and went with no FERC action or order of any sort on the Section 205 filing. FERC indicated that if no specific effective date is requested, FERC *is not bound* by the “60-day clock” for Section 205 filings, and after 60 days the rate *does not* go into effect by operation of law. After *84 days* with no FERC action, PJM filed an amendment on March 13, 2019 for the sole purpose of establishing a *specific* Effective Date 60 days after the amendment. FERC then finally issued an order on the Section 205 rate filing – *142 days* after the filing - with the specific effective date requested by PJM. FERC disregarded arguments the Section 205 filing should have become effective by operation of law after 60 days because no specific effective date had been requested.

We leave for another day whether FERC’s approach and statutory interpretation is lawful. But practitioners are now on notice that FERC believes it is *not bound* by the “60-day clock” under Section 205 unless a *specific* effective date is requested, *and* that date is 60 days or less from the date of the filing.

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- [1] *American Electric Power Service Company v. PJM Interconnection, L.L.C.*, Order Granting in Part and Denying in Part Complaint, 167 FERC ¶ 61,121 (2019) (“*AEP Compliant Order*”).
- [2] *PJM Interconnection, L.L.C.*, Order Accepting Agreements Subject to Condition, 167 FERC ¶ 61,120 (2019) (“*Guernsey ISA/ICSA Order*”).
- [3] PJM filed on December 19, 2018, and FERC did not act until May 10, 2019, almost four (4) months later. *Guernsey ISA/ICSA Order* at 1.
- [4] *Guernsey ISA/ICSA Order* at 11.



*Gibson Dunn's Energy, Regulation and Litigation lawyers are available to assist in addressing any questions you may have regarding the developments discussed above. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or the authors:*

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