

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Improvements to Generator)	Docket No. RM22-14-000
Interconnection Procedures and)	
Agreements		

INITIAL COMMENTS OF THE ISO/RTO COUNCIL

The ISO/RTO Council (“IRC”)¹ respectfully submits these initial comments regarding the Notice of Proposed Rulemaking (“NOPR”) issued in the above-captioned proceeding on June 16, 2022.

Although individual IRC members will submit individual comments on the questions and proposals in the NOPR, the IRC, as a group, will focus on the Commission’s proposal to impose automatic penalties should tariffed interconnection deadlines be missed. Although the IRC understands the Commission’s intent, as detailed herein, the proposal overlooks the reality that the RTOs/ISOs and their Transmission Owners have no control over the size of their respective interconnection queues and limited control over the quality of the submittals. The Commission’s proposal will deprive parties of the requisite due process that should accompany any proposal to implement penalties and may lead to the unintended consequence of less thorough studies and the introduction of a more litigious relationship among the parties.

The IRC sets forth below its objections to the proposal. Individual RTOs/ISOs may propose alternatives for the Commission’s consideration that would accomplish the Commission’s

¹ The IRC comprises the following independent system operators (“ISOs”) and regional transmission organization (“RTOs”): Alberta Electric System Operator (“AESO”); California Independent System Operator (“CAISO”); Electric Reliability Council of Texas, Inc. (“ERCOT”); the Independent Electricity System Operator of Ontario, Inc. (“IESO”); ISO New England Inc. (“ISO-NE”); Midcontinent Independent System Operator, Inc. (“MISO”); New York Independent System Operator, Inc. (“NYISO”); PJM Interconnection, L.L.C. (“PJM”); and Southwest Power Pool, Inc. (“SPP”). AESO, ERCOT, and IESO are not subject to the Commission’s jurisdiction and therefore do not join this filing.

goals in a more constructive manner. The IRC members, individually and collectively, urge the Commission to engage in further consultation with the RTOs/ISOs, Transmission Owners, and Interconnection Customers to develop a more reasonable alternative, taking into account the individual RTO/ISO-proposed alternatives, the IRC's and individual RTO/ISO comments, and the comments of other stakeholders.

I. INITIAL COMMENTS

The IRC appreciates the Commission's desire to address study delays and shares the Commission's goal to address the sources of delay. However, the IRC respectfully submits that the proposal, in the NOPR to eliminate the reasonable efforts standard and instead impose penalties against transmission providers for missed deadlines on a strict liability basis, is unjust and unreasonable. Such penalties are unlikely to address the actual source of delay, and will prove to be disruptive to the efficient processing of interconnection requests due to the varied and circumstance-specific nature of study delays. Moreover, the IRC believes that the Commission's NOPR efforts are better focused on ensuring successful implementation of other reforms proposed in the NOPR, and additional course correction, as significant RTO/ISO queue processing improvement efforts are being implemented or are pending before the Commission.

A. *Automatic Imposition of Penalties Fails to Recognize the Realities Associated with the Processing of Interconnection Requests.*

The IRC is concerned with the automatic penalty structure in the NOPR proposal, which provides no possibility for the RTO/ISO or the Transmission Owner to explain the circumstances that may have caused the deadline to be missed. Study deadlines may be missed for a number of reasons outside of the RTO/ISO's control. For example, the proposal fails to recognize that RTOs/ISOs are managing an ever-growing and complex queue and have no control over the number of queue submittals. All RTOs/ISOs have seen significant increases in the number of

interconnection requests with varying degrees of quality. Even with the reforms that are proposed in the NOPR (or the reforms that individual RTOs/ISOs have implemented or are in the process of implementing), there is no basis to assume that the number of interconnection requests will moderate—rather, as a result of new actions taken by Congress through the Inflation Reduction Act,² as well as state renewable portfolio requirements, the IRC expects the number of interconnection requests to continue to rise.

Further, the penalty proposal is premised on an erroneous first principle - that RTOs/ISOs perform all interconnection studies, and therefore are responsible for any delays. However, in most RTO/ISO regions, the overwhelming majority of the necessary studies are performed by the Transmission Owner to whose facilities a generator or group of generators will connect. This is logical, as it is these Transmission Owners that have the ‘on the ground’ visibility into the topology on individual portions of their systems. Likewise, delays can be caused by Interconnection Customers who delay cluster studies when they submit incomplete or inaccurate data that must be corrected and/or completed. As noted in previous Order No. 845³ quarterly compliance filings, both Transmission Owners and Interconnection Customers have often been the cause of delays. This is incongruous with the NOPR’s proposed strict liability penalty structure, which lays all responsibility on the transmission provider.

As revenue-neutral parties, RTOs/ISOs will necessarily need to pass through the costs of any penalties imposed to customers. As a result, customers may be penalized for the actions of others that caused the delay. Although the Commission has indicated that the RTO/ISO can submit

² Inflation Reduction Act of 2022, H.R. 5376, 117th Cong., Pub. L. No. 117-19 (2022).

³ *Reform of Generator Interconnection Proc. & Agreements*, Order No. 845, 163 FERC ¶ 61,043 (2018), *errata notice*, 167 FERC ¶ 61,123, *order on reh’g*, Order No. 845-A, 166 FERC ¶ 61,137 (2019), *errata notice*, 167 FERC ¶ 61,124, *order on reh’g*, Order No. 845-B, 168 FERC ¶ 61,092 (2019).

a Federal Power Act (“FPA”) section 205⁴ filing to recover penalty costs, the causes of delays are not always singularly assignable to one party or easily allocated among a number of parties, including the Interconnection Customer itself. FPA section 205 penalty cost proceedings will engender more litigation at the very time that RTOs/ISOs and Transmission Owners need to work effectively to manage an ever-growing interconnection queue. Moreover, those penalties will ultimately be borne by end-users, as the RTO/ISO does not have a fund of equity dollars with which to pay such penalties. The Commission should not propose a process which will ultimately put customers at risk for increased costs.

RTOs/ISOs have filed or are in the process of implementing significant interconnection reforms, focused on extensive process changes, training stakeholders and staff, and identifying ways to optimize the new processes. RTOs/ISOs should be allowed to focus on implementing those new process reforms and evaluating ways to refine them.

B. The Commission’s Proposal to Allow for Section 205 Filings to Allocate Penalties is Unworkable and Counterproductive.

The IRC acknowledges that the NOPR proposes to allow transmission providers to make a filing under FPA section 205 to pass penalties on to “the appropriate transmission owner that is responsible for, or contributed to, the delay.”⁵ Such provisions, if accepted, would begin to avoid some of the inequity of a strict liability approach. However, this too is likely to be unworkable. The proposed rule incorrectly assumes that the RTO/ISO will be able to identify a Transmission Owner that is responsible for the delay. Interconnection Customers may also cause or contribute to delays, such as by providing incomplete or untimely data, or making changes to projects that

⁴ 16 U.S.C. § 824d.

⁵ NOPR at P 172.

necessitate restudies. Any structure for allocating penalties should not discriminate against one group of participants in the study process by assuming that only they can drive delays.

Perhaps most significantly, any just and reasonable penalty apportionment must be based on fault. Determining fault requires both a fact finder and a detailed process for obtaining evidence and hearing the positions of parties subject to fines. North American Electric Reliability Corporation (“NERC”) penalty procedures provide a useful example of how such procedures should work in practice. These provide for evidentiary submissions, a hearing, opportunities to present positions, and findings of fact issued by a Hearing Body⁶ supporting any penalty that ultimately is issued.⁷ RTOs/ISOs are not regulatory bodies, and as a result do not have procedures beyond Alternative Dispute Resolution processes for adjudicating disputes, and even these procedures typically call for multi-month processes.

Under the FPA section 205 structure, the RTO/ISO will need to act as a fact-finding tribunal to fairly assign penalties before making a filing. The RTO/ISO would need to hear from each entity potentially subject to penalty cost allocation, allow them to present their views on why they were not at fault under a standard to be developed, allow parties with opposing positions to present their views as to who was at fault, and allow for rebuttal. Such a process would be extremely time and resource consuming, a result inconsistent with the Commission’s goal of addressing study processing delays. Additionally, when the RTO/ISO files at the Commission to allocate the costs to a particular Transmission Owner, this too will likely trigger litigation as to which party is ‘at fault’ and consume both Commission and RTO/ISO staff resources. Instead,

⁶ Section 403 of the NERC Rules of Procedure, available at: https://www.nerc.com/AboutNERC/RulesOfProcedure/NERC%20ROP%20effective%2020220825_with%20appendices.pdf.

⁷ Appendix 4C of the NERC Rules of Procedure, available at: https://www.nerc.com/AboutNERC/RulesOfProcedure/NERC%20ROP%20effective%2020220825_with%20appendices.pdf.

these resources should be used to work collaboratively with Transmission Owners, states, Interconnection Customers, and this Commission on process improvements.

The NOPR penalty proposal is fundamentally different from other penalty structures, such as those used by NERC. NERC does not depend on the registered entities to act as a fact-finding tribunal, instead using Hearing Bodies of Regional Entities for this purpose. This avoids the potential for conflicts of interest and process disruptions that would inevitably stem from requiring the transmission provider to judge such disputes.

Ultimately, the causes of delays often are not straightforward and assessing them accurately risks consuming engineer time that is better focused on continuing to manage and expedite interconnection requests. Assume, for example, that a Transmission Owner performs a System Impact Study and completes it 20 days beyond the deadline. At first glance, this may appear straightforward. However, the Transmission Owner may have evidence that one or more Interconnection Customers failed to provide data needed to complete the study for several days. The Interconnection Customers would then have an interest in disputing their role in causing the delay, arguing that the data was not needed to begin the study or not actually deficient. Concomitant with these delays, an affected system may be delayed in providing its analysis, giving rise to the argument that there would have been a delay of equal length even if the Transmission Owner and Interconnection Customer had timely completed their tasks. In such a situation, the transmission provider would have to make findings of fact to determine who must pay the fine, and whether the Transmission Owner should bear full financial responsibility if it contributed to the delay but was not the primary cause.⁸

⁸ Note that there is not necessarily a 1 to 1 relationship between delays in receiving inputs and performing a study. If consultants needed to have the data by a certain date in order to perform the study and, not having received it, needed to move on to another study, a five-day delay in providing the input could lead to a longer delay in the study being completed.

The RTO/ISO personnel with the knowledge of study delay causes are also the RTO/ISO's planning engineers who oversee studies. Taking these engineers away from performing studies to provide evidence in, or judge, continuing disputes over study delays would impair their ability to conduct ongoing studies, producing more delays. In addition, while these disputes are being sorted out, RTOs/ISOs must still depend on the parties to the penalty disputes to continue efficiently processing new studies with the same personnel. The acrimony that such proceedings entail does not engender continued cooperation.

Additionally, by way of further comparison, penalties for NERC reliability violations are not automatic. Unlike the NOPR proposal, which mandates fixed penalties for each day of delay, NERC reliability violations involve *discretion* by the Regional Entity to determine both liability for the penalty and penalty amount based on numerous factors, as outlined in Appendix 4B of the NERC Rules of Procedure.⁹ These guidelines allow for consideration of factors such as extenuating circumstances, the role of other parties, and mitigation efforts, thereby promoting nuanced fact findings, encouraging proactivity and mitigation, and not excluding the possibility that a penalty may not be appropriate. This allows for fact-based apportionment of responsibility.¹⁰ In contrast, the NOPR proposal is a blunt instrument, mandating a fixed penalty and allowing transmission providers, at most, to propose a mechanism for passing the penalty along. A process with nuance akin to NERC's is needed for fairness in addressing the root causes of delays. Requiring the RTO/ISO to implement and adjudicate according to such a process would create problems far in excess of any that it solves.

⁹ Appendix 4B of the NERC Rules of Procedure, available at: <https://www.nerc.com/AboutNERC/RulesOfProcedure/NERC%20ROP%20effective%2020220825%20with%20appendices.pdf>.

¹⁰ The NERC Rules of Procedure have a special procedure for RTOs/ISOs to have the Hearing Body make findings of fact as to responsibility so that the RTO/ISO can allocate the penalty to other parties. See Section 5.11 of Appendix 4C.

C. The Penalty Proposal Will Change the Focus Away from Accurate Studies and toward Penalty Avoidance, All at the Expense of Interconnection Customers.

Requiring fixed penalties to be paid or assessed by transmission providers is not an effective or cost efficient tool for addressing queue delays, and is likely to create a significant administrative and litigation burden that will disrupt queue processes and ultimately overwhelm Commission staff as penalty challenges are filed.¹¹ In addition, this approach would incentivize rushed or incomplete studies that would prolong—rather than resolve—uncertainty for Interconnection Customers. If an entity must meet a fixed deadline or pay a fine regardless of the reason for a delay, they *may* meet that deadline. It is possible that an entity may engage in less thorough analysis than appropriate, because the more robust study would drive the need for more time. However, system impact studies are intended to give the Interconnection Customer accurate information about the costs of their projects that they can rely on to make commercial decisions. If a study is missing inputs or is hastily performed, the likely result would be less certainty to the Interconnection Customer. Errors or omissions can result in a restudy, causing unscheduled surprises for Interconnection Customers who have already made decisions based on the results of a less robust study.¹² The IRC strongly believes that the Commission should focus on addressing the root causes of delays and requiring process changes to enable timeliness, rather than establishing automatic penalties that apply irrespective of the size or complexity of a given queue

¹¹ Penalties from the Commission will have reputational, political, or state regulatory consequences for a utility or other entity that are independent from the dollar value of the fine. An entity assessed such a penalty therefore will have a far stronger incentive to litigate than the amount of the penalty may suggest.

¹² Ultimately, a project's impacts to the transmission system and the costs to mitigate those impacts would not go away simply because they were not included in a study report. Impacts must be addressed and the Commission's cost causation rules specify that the Interconnection Customer causing the impact must pay to mitigate it. Avoiding restudies therefore should be an important goal. Rules that give no room for justifiable or unavoidable delays will not serve this goal.

and issues that might arise as a result of actions or inactions of Interconnection Customers, Transmission Owners, or others.

D. Conclusion.

The IRC's opposition to the proposed penalties does not mean that the IRC opposes a rule that holds the entities causing delay accountable. To the contrary, the IRC supports such accountability. As noted above, overly simplistic strict liability approaches carry with them considerable problems both legally and practically. Moreover, trying to devise an incentive system through the submission of written comments is bound to lead to a less-informed and sub-optimal resolution. It is for this reason that the IRC requests additional Commission workshops on this issue, should it decide to proceed. Various individual RTO/ISO commenters may submit alternatives for the Commission's consideration. Each of those should be further vetted, should the Commission wish to pursue this path further.

Accordingly, the IRC requests that the Commission defer adopting specific interconnection study penalty provisions until more work has been done to develop alternatives to the NOPR's proposals. The IRC stands ready to work with the Commission and all states and stakeholders on addressing the Commission's goals in a manner which is (a) workable; (b) actually improves the interconnection queue process; and (c) is consistent with due process guarantees.

Respectfully submitted,

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