BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF SOUTHWESTERN PUBLIC SERVICE COMPANY'S APPLICATION FOR: (1) REVISION OF ITS RETAIL RATES UNDER ADVICE NOTICE NO. 282; (2) AUTHORIZATION AND APPROVAL TO SHORTEN THE SERVICE LIFE OF AND ABANDON ITS TOLK GENERATING STATION UNITS; AND (3) OTHER RELATED RELIFE,	)	**CASE NO. 19-00170-UT**
SOUTHWESTERN PUBLIC SERVICE COMPANY,	)	
APPLICANT.	)	

DIRECT TESTIMONY

of

BRYAN R. DAVIS

on behalf of

SOUTHWESTERN PUBLIC SERVICE COMPANY

TABLE OF CONTENTS

GLOSSARY OF ACRONYMS AND DEFINED TERMS

Acronym/Defined Term	**Meaning**
July 2016 Waiver Order	Order Granting Waiver Request, 156 FERC ¶ 61,020
ASC	Accounting Standards Codification
Base Period	April 1, 2018 through March 31, 2019
CFR	Code of Federal Regulations
Commission	New Mexico Public Regulation Commission
FERC	Federal Energy Regulatory Commission
GAAP	Generally Accepted Accounting Principles
OATT	Open Access Transmission Tariff
Old Dominion	*Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018)
Operating Companies	Northern States Power Company – Minnesota, a Minnesota corporation; Northern States Power Company – Wisconsin, a Wisconsin corporation; Public Service Company of Colorado, a Colorado corporation; and SPS
Revised Waiver Order	Order on Remand, 166 FERC ¶ 61,160
RFP	Rate Filing Package
SPP	Southwest Power Pool, Inc.
SPS	Southwestern Public Service Company, a New Mexico corporation
USoA	FERC Uniform System of Accounts

Acronym/Defined Term	Meaning
Xcel Energy	Xcel Energy Inc.

LIST OF ATTACHMENTS

Attachment	**Description**
BRD-1	Order on Remand (*Non-native format*)
BRD-2	Requests for Rehearing (*Non-native format*)

I. WITNESS IDENTIFICATION AND QUALIFICATIONS

Q. Please state your name and business address.

A. My name is Bryan R. Davis. My business address is 1800 Larimer Street, Denver, Colorado 80202.

Q. On whose behalf are you testifying in this proceeding?

A. I am filing testimony on behalf of Southwestern Public Service Company, a New Mexico corporation ("SPS") and wholly-owned electric utility subsidiary of Xcel Energy Inc. ("Xcel Energy").

Q. By whom are you employed and in what position?

A. I am employed by Xcel Energy Services Inc., the service company subsidiary of Xcel Energy. My position is Director, Utility Accounting.

Q. Please briefly outline your responsibilities as Director, Utility Accounting.

A. I am responsible for managing the personnel performing accounting and financial services related to SPS and the other Xcel Energy Operating Companies. My teams support the regulatory, commercial, transmission, and market operations accounting functions.

Q. Please describe your educational background, professional experience, and previous work experience.

A. I graduated from Brigham Young University with a Bachelor of Science and Masters in Accountancy in 2006. I began my career as an auditor at PricewaterhouseCoopers. After that I held a position as Senior Manager, Accounting at The Western Union Company. I began working at Xcel Energy in 2012 as a Principal Financial Consultant in the Technical Accounting department, where I was primarily responsible for accounting and reporting of long-term power purchase agreements and other commodities contracts. In 2014, I was promoted to Manager, Transmission Accounting where I was responsible for accounting and financial forecasting of wholesale transmission revenues and expenses under rates regulated by the Federal Energy Regulatory Commission ("FERC") for all Xcel Energy Operating Companies, including Xcel Energy's activities in the Midcontinent Independent System Operator and Southwest Power Pool, Inc. ("SPP") regional transmission organizations. In 2016, I was promoted to my current position.

Q. Do you hold any professional licenses or certifications?

A. Yes, I am a licensed Certified Public Accountant in Colorado and Arizona.

Q. Have you submitted pre-filed testimony in any prior cases?

A. Yes. I submitted pre-filed testimony in Case No. 17-00255-UT[1], before the New Mexico Public Regulation Commission ("Commission"). I also submitted pre-filed testimony in Docket No. 47527[2] and Docket No. 48973[3] before the Public Utility Commission of Texas.

[1] *In the Matter of Southwestern Public Service Company's Application for Revision of its Retail Electric Rates Pursuant to Advice Notice No. 272*, Case No. 17-00255-UT, New Final Order on Partial Mandate from the New Mexico Supreme Court (Mar. 6, 2019).

[2] *Application of Southwestern Public Service Company for Authority to Change Rates*; Docket No. 47527, Final Order (Dec. 10, 2018).

[3] *Application of Southwestern Public Service Company for Authority to Reconcile Fuel and Purchased Power Costs for the Period January 1, 2016 through June 30, 2018*, pending.

II. ASSIGNMENT AND SUMMARY OF TESTIMONY AND RECOMMENDATIONS

Q. What is the purpose of your direct testimony in this proceeding?

A. The purpose of my direct testimony is to support SPS's application for a base rate change filed with the Commission. Specifically, my testimony describes the accounting methods used to record revenues, expenses, assets, and liabilities on SPS's books for the Base Period, (April 1, 2018 through March 31, 2019). Additionally, I sponsor or co-sponsor as the accounting witness the following Schedules in SPS's Rate Filing Package ("RFP"):

Schedule E	2, 3
Schedule H	1, 4, 5, 6, 8, 15
Schedule P	4
Schedule Q	2, 3, 4, 5, 6

I also describe the accounting used to record amounts charged to SPS under Attachment Z2 of the SPP Open Access Transmission Tariff ("OATT"). Finally, I support SPS's request to defer, as a regulatory asset or liability, any differences between the amount assigned to New Mexico in Case No. 17-00255-UT and the New Mexico retail share of the final amount billed by SPP, excluding interest.

Q. Were the RFP Schedules that you sponsor or co-sponsor prepared by you or under your direct supervision and control?

A. Yes. I incorporate those portions of the RFP Schedules that I sponsor or co-sponsor as part of my direct testimony.

Q. How does your direct testimony relate to the testimony of other SPS witnesses?

A. I support the manner in which SPS maintains its books and records, which, in turn, supports the accounting schedules and work papers underlying the calculations for SPS's total cost of service. Other witnesses provide additional testimony supporting the reasonableness of various expenses and rate base items in the cost of service schedules.

Q. Please summarize your testimony and conclusions.

A. SPS has properly accounted for its revenues and operating expenses using Generally Accepted Accounting Principles ("GAAP") and recorded such revenues and expenses in accounts as prescribed by the FERC Uniform System of Accounts ("USoA"). Regulatory liabilities and assets have been accounted for and amortized in accordance with Financial Accounting Standards Board

Accounting Standards Codification ("ASC") 980, Regulated Operations, (formerly Statement of Financial Accounting Standards No. 71).

As of May 2019, the most recent quarterly payment, SPS has paid a total of $7.8 million (total company, comprised of $6.8 million of principal and $1.0 million of interest) to SPP for the net charges assessed under Attachment Z2 of the SPP OATT for the period from March 1, 2008 through August 31, 2016 (the "Historical Period"). Under an optional payment plan approved by the FERC, SPS elected to pay the back-billed Attachment Z2 charges over a five-year period, and SPS proposes to continue to recover one-fifth of the $2,602,450 amount assigned to the New Mexico retail jurisdiction and approved in Case No. 17-00255-UT[4]. SPS further proposes to defer, as a regulatory asset or liability, any differences between $2,602,450 and the New Mexico retail share of the final amount billed by SPP, excluding interest.

[4] *See* Case No. 17-00255-UT, Recommended Decision at Section I, pages 174-180; *aff'd* Final Order Adopting Recommended Decision with Modifications (Sept. 5, 2018).

III. ACCOUNTING METHOD SUPPORTING THE COST OF SERVICE

Q. What method of accounting does SPS use to record revenues and expenses associated with activities incurred as a result of business operations?

A. SPS uses the accrual method of accounting as required by GAAP to record revenues and expenses. These revenues and expenses are recorded in accounts prescribed by the USoA and are recorded in accordance with the Commission's rules.

Q. Is the information provided in the RFP taken from SPS's books and records?

A. Yes. The information submitted in this filing is taken from SPS's books and records that are maintained according to the USoA. The USoA is prescribed by FERC for public utilities and licensees subject to the provisions of the Federal Power Act. FERC prescribes accounting classifications and guidance by which public utilities achieve uniform accounting records for use in financial reporting, ratemaking, and other regulatory filings. These regulations are found and defined in the Code of Federal Regulations ("CFR") 18 – Conservation of Power and Water Resources, Subchapter C – Accounts, Federal Power Act, Part 101 – USoA. The Commission, in Rule 17.3.510.10, explicitly requires that SPS keep its books in accordance with the USoA.

Q. How did SPS determine the expenses used in the cost of service and RFP Schedules?

A. SPS started with the amounts recorded to its General Ledger for the Base Period. As required by GAAP, SPS employs the accrual method of accounting, under which SPS records an estimated amount for expenses incurred during the month. This may include amounts for which an invoice has not yet been received. After SPS receives the invoice or obtains more (or better) information related to an estimate, or there is a change in a regulatory or accounting principle, the expense is trued-up. In the case of an expense related to an invoice, the books are trued-up to the actual invoiced amount. This true-up typically occurs the following month. Thus, in a given month, expenses may include the accrual for the current month, the true-up of the prior month's accrual to actual invoiced amounts, and adjustments as they become known.

Q. Are there any other reasons the expense amounts shown on those schedules may be trued-up?

A. Yes. In general, true-up adjustments are also made necessary by such things as resolved billing disputes, corrections of errors, changes in the method used to develop estimates, the acquisition of more or better information about the cost estimate, changes in regulatory principles, and changes in accounting principles.

Q. How does SPS account for regulatory assets and liabilities?

A. SPS accounts for certain income and expense items in accordance with ASC 980, Regulated Operations. Under ASC 980, certain costs that would otherwise be charged to expense are deferred as regulatory assets based upon the ability of the utility to recover those costs in future rates. In addition, certain credits that would otherwise be reflected as income are deferred as regulatory liabilities based upon the expectation that they will be refunded to customers in future rates. Consequently, estimates for recovering deferred costs and refunding deferred credits are based upon specific ratemaking decisions or precedents for each particular item. These regulatory assets and liabilities are amortized consistent with the period approved by the Commission.

IV. ACCOUNTING FOR ATTACHMENT Z2 CHARGES

Q. Please describe SPP's OATT Attachment Z2.

A. Attachment Z2 of the SPP OATT provides that transmission customers, generator interconnection customers, and entities that pay for a Sponsored Upgrade may receive revenue credits for network upgrades whose costs have been directly assigned to them (Creditable Upgrades). The revenue credits provided to a customer that has been directly assigned network upgrade costs are funded by and recoverable from transmission customers taking new transmission service that could not have been provided "but for" the Creditable Upgrade, in the form of credit payment obligations. SPP collects credit payment obligations and disburses revenue credits until the amount owed to the transmission customer or generator interconnection customer that was directly assigned the costs of the Creditable Upgrade is zero.

Q. Are you aware of any outstanding billing issues regarding SPP's administration of Attachment Z2?

A. Yes. SPP's implementation of Attachment Z2 was delayed until 2016 due to a variety of circumstances. To address this issue, SPP filed with FERC a petition requesting a waiver to allow SPP to implement the Attachment Z2 revenue

crediting process for the period spanning from March 2008 to August 2016 (the "Historical Period") and to enable SPP to invoice transmission service customers for credit payment obligations outside of the one-year billing adjustment limitation in the SPP OATT.[5] Despite protests from several parties, including SPS, FERC granted the requested waiver in July 2016 ("July 2016 Waiver Order").[6] In November 2016, SPP invoiced SPS total net charges of $12.8 million (total company) for the Historical Period. In Case No. 17-00255-UT, the Commission assigned approximately $2.6 million of this amount to the New Mexico retail jurisdiction.[7]

Q. Has SPS paid the Attachment Z2 charges assessed by SPP for the Historical Period?

A. Under a payment plan approved by FERC in September 2016,[8] amounts due to SPP for Historical Period Attachment Z2 charges are to be remitted in quarterly installments over a five-year period that began in November 2016. As of May

[5] Petition of Southwest Power Pool, Inc. for Tariff Waiver under FERC Docket No. ER16-1341.

[6] 156 FERC ¶ 61,020 (2016).

[7] SPS will also incur Attachment Z2 charges going forward, but those amounts are included within the normal wheeling expenses. The amounts I am discussing in this section of my testimony are only the Attachment Z2 charges attributable to the Historical Period.

[8] 156 FERC ¶ 61,245 (2016).

2019, which is SPS's most recent payment to SPP, SPS has paid a total of $7.8 million (total company, comprised of $6.8 million of principal and $1.0 million of interest).

Q. Did the July 2016 Waiver Order resolve the billing issues associated with the Attachment Z2 process for the Historical Period?

A. No. Several parties, including SPS, filed requests for rehearing of the July 2016 Waiver Order. The FERC denied the requests for rehearing, and SPS filed an appeal of the July 2016 Waiver Order with the D.C. Circuit. During the pendency of the appeal, the D.C. Circuit issued a decision in *Old Dominion* holding that retroactive charges would violate the filed rate doctrine.[9] In response, FERC sought voluntary remand of the July 2016 Waiver Order in order to re-evaluate its decision in that case.

In February 2019, following consideration of additional briefs filed by all parties regarding the impact of *Old Dominion,* FERC issued a new order ("Revised Waiver Order") reversing its approval of SPP's waiver request and directing SPP to provide refunds, with interest, of amounts billed for the

[9] *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018) ("*Old Dominion*").

Historical Period (except Sept. 2015 – Aug. 2016, which were permissible without the waiver);[10] however, prior to issuing refunds, FERC further ordered SPP to file a report within 120 days detailing how it proposes to make the required refunds.[11] On April 1, 2019, SPP and two other parties filed requests for rehearing of the revised FERC order, and on May 9, 2019, a group of four Upgrade Sponsors filed a complaint alleging SPP's delayed implementation of Attachment Z2 violated its tariff and seeking to retain all credits and interest paid to date and to continue to receive amounts they claim to be owed under the SPP OATT.[12]

Q. Besides the July 2016 Waiver Order and the Upgrade Sponsors' complaint, are there other uncertainties related to charges for the Historical Period?

A. Yes. In addition to challenging SPP's authority to retroactively assess charges for the Historical Period at all under the Revised Waiver Order, Kansas Electric Power Cooperative, Inc. and SPS each filed separate complaints with the FERC challenging various components of the methodology utilized by SPP to

[10] *See* Attachment BRD-1 at 166 FERC ¶ 61,160 (2019).

[11] *Id.*

[12] *See* Attachment BRD-2.

calculating charges under Attachment Z2. Both complaints were initially denied;[13] however, requests for rehearing remain pending before FERC.

Q. How has SPS accounted for the Attachment Z2 charges assessed by SPP for the Historical Period?

A. ASC 450-20-25-2 requires that a contingent liability be recognized when it is probable and estimable. Although SPS continues to dispute certain aspects of SPP's implementation of crediting under Attachment Z2, based on FERC's July 2016 Waiver Order and SPP's calculated charges for the Historical Period, SPS accrued a liability of $12.8 million for amounts invoiced by SPP. This liability has subsequently been offset by the principal amount of payments under the five-year Z2 payment plan. Due to the uncertainty inherent in the ongoing billing disputes for the Historical Period, SPS has not recorded any reductions to that liability for potential refunds under FERC's Revised Waiver Order.

Q. Did SPS record a regulatory asset related to Attachment Z2 charges for the Historical Period?

A. Yes. ASC 980-340-25-1 sets forth guidance that an entity should defer all or part of an incurred cost[14] that would otherwise be charged to expense if it is probable

[13] 161 FERC ¶ 61,145 (2017), 162 FERC ¶ 61,203 (2018).

that the specific cost is subject to recovery in future revenues. Originally based on an assessment of the likelihood of recovery through future rates SPS deferred the Historical Period Attachment Z2 charges assigned to the New Mexico retail jurisdiction in Account 186, Miscellaneous Deferred Debits. Upon issuance of the Commission's order in Case No. 17-00255-UT, SPS reclassified such deferred debits to Account 182.3, Other Regulatory Assets. Similar accounting was also recorded for amounts assigned to SPS's Texas retail and wholesale jurisdictions.

Q. Has the Commission previously reviewed how SPS should recover the amount paid to SPP for the Attachment Z2 Historical Period?

A. Yes. SPS first requested recovery of the Attachment Z2 Historical Period charges in Case No. 17-00255-UT. In that case, SPS sought to recover $520,490 in its cost of service for the Historical Period charges, which is one-fifth of the $2,602,450 assigned to the New Mexico retail jurisdiction, commensurate with the five-year time period of the FERC approved payment plan. The Hearings Examiner's Recommended Decision, which was adopted by the Commission

[14] ASC 980-10-20 defines an Incurred Cost as "A cost arising from cash paid out or [an] obligation to pay for an acquired asset or service, a loss from any cause that has been sustained and must be paid for". Therefore, amounts for SPS's Historical Period Attachment Z2 charges meet the definition of an incurred cost, even if not yet paid in cash.

without modification as to the Attachment Z2 Historical Charges, included recovery of this amount.

Q. What impact is the February 2019 Revised Waiver Order expected to have on SPS's liability for Attachment Z2 charges assessed by SPP for the Historical Period?

A. The impact of the Revised Waiver Order is unknown at this time. Although the order reverses FERC's previous decision granting SPP's waiver request, it does not order SPP to actually issue refunds. Instead, the FERC ordered SPP to file a report proposing how SPP *would propose* to calculate and process the refunds. SPP has since requested rehearing of that order and raised a number of questions about how such a methodology would work, or even whether it's possible. Finally, should FERC ultimately uphold its Revised Waiver Order and subsequently order SPP to actually issue refunds, that order is highly likely to be further challenged and appealed to the DC Circuit.

Although the ultimate result of charges for the Historical Period may not be known for some time, assuming the Revised Waiver Order is upheld, SPS's obligation for the Historical Period would be expected to shrink, as charges for periods prior to September 2015 would be eliminated. This could be expected to

reduce SPS's total amount due from $12.8 million to approximately $3.5 million - $4.0 million (total company), or a reduction of approximately $9 million (total company). However, these amounts are quite uncertain, as charges for any given creditable upgrade are based, in part, on whether amounts related to that upgrade have been previously recovered. Therefore, while charges prior to September 2015 could be eliminated, charges subsequent to that date could increase.

Q. Would it be appropriate to take this potential impact into account in this case?

A. No. The only thing certain at this time is that SPP continues to require SPS to remit payments under the FERC-approved payment plan based on the full $12.8 million of initially invoiced charges. SPP billed the most recent installment under the payment plan in May 2019, well after FERC's February 2019 Revised Waiver Order. Therefore, it is too early to determine the impact of FERC's recent order and impossible to take its impact into account in this case.

Q. Does SPS propose to continue to recover amounts paid to SPP for the Attachment Z2 Historical Period?

A. Yes. SPS proposes to continue to recover amounts billed for the Attachment Z2 Historical Period as originally approved in Case No. 17-00255-UT. However, as

significant uncertainty remains regarding the final amounts SPS may ultimately be required to pay, SPS proposes to defer, as a regulatory asset or liability, any differences between $2,602,450 (the amount assigned to New Mexico and approved in Case No. 17-00255-UT) and the New Mexico retail share of the final amount billed by SPP, excluding interest.

Q. Does this conclude your pre-filed direct testimony?

A. Yes.

VERIFICATION

STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

BRYAN R. DAVIS, first being sworn on his oath, states:

I am the witness identified in the preceding direct testimony. I have read the direct testimony and the accompanying attachment(s) and am familiar with their contents. Based upon my personal knowledge, the facts stated in the testimony are true. In addition, in my judgment and based upon my professional experience, the opinions and conclusions stated in the testimony are true, valid, and accurate.

BRYAN R. DAVIS

SUBSCRIBED AND SWORN TO before me this 24th day of June, 2019 by BRYAN R. DAVIS.

Notary Public of the State of Colorado
My Commission Expires: November 15, 2019

MIA L BUFFARD
Notary Public
State of Colorado
Notary ID 20074042712
My Commission Expires Nov 15, 2019

166 FERC ¶ 61,160
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc. Docket No. ER16-1341-003

ORDER ON REMAND

(Issued February 28, 2019)

1. On January 5, 2018, Xcel Energy Services Inc. (Xcel) filed with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) a petition for review of the Commission's orders in the instant proceeding.[1] On July 19, 2018, the Commission filed an unopposed motion for voluntary remand of the Waiver Orders[2] so that it may consider the implications of the D.C. Circuit's decision in *Old Dominion Electric Cooperative v. FERC*.[3] In the Voluntary Remand Motion, the Commission stated that it "will permit the parties to file, within 30 days of the court's order on this motion, supplemental pleadings on the significance of the *Old Dominion* decision (or on any matter of relevance)."[4] On July 31, 2018, the D.C. Circuit granted the Voluntary Remand Motion.[5] On August 6, 2018, the Commission afforded parties the opportunity

[1] *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016) (July 2016 Waiver Order), *reh'g denied*, 161 FERC ¶ 61,144 (2017) (Rehearing Order), *appeal docketed*, *Xcel v. FERC*, No. 18-1005 (D.C. Cir. Jan. 5, 2018). We refer to the July 2016 Waiver Order and the Rehearing Order, collectively, as the "Waiver Orders".

[2] *Xcel Energy Serv. Inc. v. FERC*, Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand, No. 18-1005 (filed July 19, 2018) (Voluntary Remand Motion).

[3] 892 F.3d 1223 (D.C. Cir. 2018) (*Old Dominion*).

[4] Voluntary Remand Motion at 2.

[5] *Xcel Energy Serv. Inc. v. FERC*, No. 18-1005 (D.C. Cir. July 31, 2018) (order granting the Commission's Voluntary Remand Motion).

to file briefs with the Commission by August 31, 2018, addressing the significance of the *Old Dominion* decision or any other matter of relevance to the present proceeding.[6]

2. In this order, we reverse the determinations in the Waiver Orders and deny Southwest Power Pool, Inc.'s (SPP) request for waiver. We direct SPP to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2018). We also direct SPP to file a report within 120 days of the date of this order detailing how it proposes to make the refunds required herein.

I. Background

3. Under Attachment Z1 (Aggregate Transmission Service Studies) of the SPP Open Access Transmission Tariff (Tariff), SPP studies long-term transmission service requests to determine whether any new network upgrades are needed to accommodate those requests (Service Upgrades)[7] and lists any such identified Service Upgrades in an Aggregate Facilities Study report. SPP directly assigns the costs of Service Upgrades to the transmission customer whose transmission service request gave rise to the network upgrade, which later may be base plan funded (i.e., included in and recovered through rolled-in transmission rates charged to transmission customers) if the upgrades meet the base plan funding criteria in the Tariff. Under Attachment V (Generator Interconnection Procedures) of the Tariff, SPP studies generator interconnection requests to determine whether network upgrades are required to accommodate the requests and directly assigns network upgrade costs to interconnection customers. Under Attachment O (Transmission Planning Process) of the Tariff, SPP studies a Sponsored Upgrade[8] to evaluate its impact on the reliability of the transmission system and to identify any necessary mitigation of these impacts.

4. Attachment Z2 (Revenue Crediting for Upgrades) of the Tariff provides that transmission customers, generator interconnection customers, and entities that request a

[6] *Federal Register*, 83 Fed. Reg. 40,033 (2018) (August 2018 Notice).

[7] Service Upgrades are "Network Upgrades required to provide transmission service requested by an Eligible Customer in accordance with Attachment Z1 to this Tariff." SPP Tariff, section I.1 (Definitions).

[8] Sponsored Upgrades are "Network Upgrades, requested by a Transmission Customer or other entity, which do not meet the definition of any other category of Network Upgrades." SPP Tariff, section I.1 (Definitions). The entity that requests the Sponsored Upgrade "must be willing to assume the cost of such Sponsored Upgrade, study costs, and any cost associated with such necessary mitigation." SPP Tariff, Attachment O, section IV.1.

Sponsored Upgrade may receive revenue credits for network upgrades whose costs have been directly assigned to them (Creditable Upgrades).[9] The revenue credits provided to a customer that has been directly assigned network upgrade costs are funded by and recoverable from transmission customers taking new transmission service that could not have been provided "but for" the Creditable Upgrade, in the form of credit payment obligations.[10] SPP collects credit payment obligations and disburses revenue credits until the amount owed to the transmission customer or generator interconnection customer that was directly assigned the costs of the Creditable Upgrade is zero.

5. In 2005, SPP added the Aggregate Transmission Service Study process to the Tariff in a new Attachment Z, including provisions for revenue credits.[11] In 2008, SPP filed revisions to separate Attachment Z into two attachments, Attachment Z1 (Aggregate Transmission Service Study Procedures and Cost Allocation and Recovery for Service Upgrades) and Attachment Z2 (Revenue Crediting for Upgrades), which together provided for the direct assignment of the costs of Service Upgrades, generator interconnection-related network upgrades, and Sponsored Upgrades, as well as provision for associated revenue crediting.[12] In 2013, SPP again revised its Tariff to refine the

[9] A Creditable Upgrade is "[a] Network Upgrade which was paid for, in whole or part, through revenues collected from a Transmission Customer, Network Customer, or Generation Interconnection Customer through Directly Assigned Upgrade Costs . . . ." SPP Tariff, Attachment Z2, section I.A.

[10] Attachment Z2, section II provides in part:

> An Upgrade Sponsor shall be eligible to receive revenue credits in accordance with this Attachment Z2. The Directly Assigned Upgrade Costs are recoverable, with interest calculated in accordance with 18 CFR §35.19a(a)(2), from new transmission service using the facility as defined below until the amount owed the Upgrade Sponsor is zero.

[11] *Sw. Power Pool, Inc.*, 111 FERC ¶ 61,118, *order on reh'g*, 112 FERC ¶ 61,319 (2005); *Sw. Power Pool, Inc.*, 110 FERC ¶ 61,028 (2005). SPP's Aggregate Transmission Service Study aggregates transmission service requests received over an open season that are then evaluated simultaneously to provide for optimization of transmission expansion. SPP Tariff, section I.1 (Definitions).

[12] *Sw. Power Pool, Inc.*, Submission of Proposed Tariff Revisions of Southwest Power Pool, Inc., Docket No. ER08-746-000 (filed Mar. 28, 2008).

revenue crediting process.[13] However, SPP's implementation of revenue crediting under Attachment Z2 was delayed until 2016 due to a variety of circumstances.

A. July 2016 Waiver Order

6. On April 1, 2016, SPP filed a petition requesting waiver of section I.7.1 of the Tariff[14] to allow SPP to implement the Attachment Z2 revenue crediting process for the period spanning 2008 to 2016 (termed the historical period) and to enable SPP to invoice transmission service customers for credit payment obligations outside of the one-year billing adjustment limitation set forth in the Tariff.[15] SPP explained that, because of delays in implementing computer software, it was unable to list certain Creditable Upgrades in Aggregate Facilities Study[16] reports, calculate and assess costs, and distribute credits to transmission customers pursuant to Attachment Z2 before August 2016.

7. On July 7, 2016, the Commission granted SPP's petition for waiver after applying the Commission's four-part waiver criteria.[17] In support of its decision, the Commission

[13] *Sw. Power Pool, Inc.*, Revisions to Clarify the Determination of Credits and Distribution of Credit Revenue for Creditable Upgrades of Southwest Power Pool, Inc., Docket No. ER13-1914-000 (filed July 9, 2013).

[14] Section I.7.1 of the Tariff states in relevant part that:

> Billing adjustments for reasons other than (a) the replacement of estimated data with actual data for service provided, or (b) provable meter error, shall be limited to those corrections and adjustments found to be appropriate for such service within one year after rendition of the bill reflecting the actual data for such service.

[15] In addition to seeking waiver of section I.7.1, SPP requested waiver of section IV.A of Attachment J concerning reallocations of Balanced Portfolio transfers and section III.C of Attachment Z1 that dictates the posting deadline requirement associated with waiver of the Safe Harbor Cost Limit.

[16] SPP's Aggregate Facilities Study report provides the results of SPP's Aggregate Transmission Service Study. SPP Tariff, section I.1 (Definitions).

[17] The Commission has granted waiver of tariff provisions where: (1) the applicant acted in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties. *See* July 2016 Waiver Order, 156 FERC ¶ 61,020 at P 52. The

focused on the notice SPP provided to stakeholders by holding informational sessions covering the implementation of Attachment Z2. The Commission also relied on the existing Attachment Z2 Tariff provisions to determine that stakeholders had notice of their obligations to provide compensation to upgrade sponsors since the Commission accepted those Tariff provisions in 2008.[18] Finally, the Commission found that transmission customers benefited from upgrades paid for by upgrade sponsors without providing compensation to upgrade sponsors for those benefits during the historical period.[19]

B. Rehearing Order

8. Several parties filed requests for rehearing of the July 2016 Waiver Order, which the Commission denied.[20] As relevant to this order on remand, several parties challenged the Commission's granting of SPP's request to waive section I.7.1 of its Tariff, which sets forth a one-year billing adjustment limitation for past invoices.

9. In denying requests for rehearing on this issue, the Commission rejected Xcel's and American Electric Power Service Corporation's (AEP) argument that section I.7.1 of the Tariff required the Commission to deny SPP's petition for waiver.[21] The parties argued that this provision was part of the filed rate, and therefore, could not be waived consistent with the filed rate doctrine.[22] The Commission rejected this argument, noting that Xcel and AEP conceded that they received notice of their obligation to compensate upgrade sponsors from the provisions contained within Attachment Z2.[23] The

Commission also granted waiver of section IV.A of Attachment J concerning reallocations of Balanced Portfolio transfers and section III.C of Attachment Z1 that dictates the posting deadline requirement associated with waiver of the Safe Harbor Cost Limit.

[18] *Id.* P 56.

[19] *Id.*

[20] Rehearing Order, 161 FERC ¶ 61,144.

[21] *Id.* P 29.

[22] *See id.*; AEP/Xcel Aug. 8, 2016 Rehearing Request at 10 (citing *Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207 (2015), *reh'g denied*, 154 FERC ¶ 61,155, at PP 17-25 (2016)).

[23] Rehearing Order, 161 FERC ¶ 61,144 at P 29.

Commission also determined that a notation in Aggregate Transmission Service Study reports provided by SPP to transmission service customers provided adequate notice of possible cost impacts, even though that notation "did not list specific costs for these upgrades."[24]

C. ***Old Dominion***

10. On June 15, 2018, the D.C. Circuit issued a decision in *Old Dominion*.[25] In the proceeding, which stemmed from events during the 2014 Polar Vortex, Old Dominion Electric Cooperative (Old Dominion), a PJM Interconnection L.L.C. (PJM) market participant, had requested waiver of the $1,000/MWh rate cap in PJM's tariff so that it could retroactively recover operational costs that exceeded the then-current tariff. The Commission denied the waiver request, stating that the retroactive charges would violate the filed rate doctrine and rule against retroactive ratemaking.[26]

11. In *Old Dominion*, the court upheld the Commission's decision. On appeal, Old Dominion argued that allowing it to recoup its losses would be consistent with the filed rate doctrine because ratepayers were on notice that the tariff set a market rate for electricity, and the Polar Vortex altered that market rate. The court rejected Old Dominion's argument, noting that "[w]hen the very terms of the filed rate warn customers, at the time they contract for service, that the price charged will fluctuate based on an identified formula with specified cost drivers, then the rate is allowed to change when fluctuations in those cost drivers occur."[27] The court found that Old Dominion failed to identify any tariff provision that openly specified the type of market-variable cost components required for formula rates.[28]

12. The court also rejected Old Dominion's argument that a statement posted on PJM's website provided adequate notice that rates may exceed the tariff-imposed rate cap. Specifically, PJM posted a statement on its website that reiterated the generators' contractual obligation to offer full capacity into the day-ahead market at a price not to exceed $1,000/MWh and also expressed PJM's intent to file with the Commission "as

[24] *Id.* P 30.

[25] *Old Dominion*, 892 F.3d 1223.

[26] *Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207.

[27] *Old Dominion*, 892 F.3d at 1231.

[28] *Id.* at 1232.

soon as practical" a "retroactive waiver"[29] of the rate cap to compensate those generation capacity resources whose costs for electricity generation had exceeded the tariff's rate cap.[30] The court found Old Dominion's argument failed because the website statement was not filed with the Commission, as is required with all rate changes; the website statement was limited to retroactive "make whole" payments and to prospective relief; and the website statement reiterated that, unless and until the Commission granted the prospective waiver of the tariff's rate cap provision (including the $1,000/MWh rate cap), the market rules remained in effect. The court pointed out that "all rate changes" must be filed with the Commission, and because the website statement did not meet that requirement, it "did not provide the legally required notice" to wholesale purchasers or retail customers.[31] Instead, the court found that "[c]ustomers . . . were on explicit notice that, although market forces might cause some variation within a range, the rates charged would never exceed the agreed-upon rate cap."[32] In addition, the court highlighted that the Commission cannot disregard for good cause or any other equitable grounds either the filed rate doctrine or the rule against retroactive ratemaking.[33]

[29] Prior to Old Dominion seeking retroactive waiver, PJM filed, and the Commission granted, two waivers related to the Polar Vortex—one for immediate "make whole" relief (effective the day after filing) and one for prospective waiver of the $1,000/MWh rate cap. *Id.* at 1229.

[30] *Id.*

[31] *Id.* at 1232; *see West Deptford Energy LLC v. FERC*, 766 F.3d 10, 24 (D.C. Cir. 2014) (*West Deptford*) (rejecting the Commission's argument that interconnection studies provided notice for financial responsibility for upgrades because the Commission provided "no reasoned explanation for expanding the notice exception to encompass such one-way assertions, especially since generators have no apparent way to challenge any costs such studies purport to assign").

[32] *Old Dominion*, 892 F.3d at 1231-32.

[33] *Id.* at 1230 ("The filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations."); *see id*. (noting the Commission's finding that "this court's precedent stripped it of any power to disregard on equitable grounds either the filed rate doctrine or the rule against retroactive ratemaking, no matter how compelling the equities might be").

D. Voluntary Remand

13. As a result of the D.C. Circuit's decision in *Old Dominion* and its discussion of notice in the context of waiver proceedings, the Commission sought voluntary remand of the Waiver Orders, and the D.C. Circuit remanded the proceeding on July 31, 2018. In its unopposed motion for voluntary remand, the Commission stated that it would "permit the parties to file, within 30 days of the court's order on this motion, supplemental pleadings on the significance of the *Old Dominion* decision (or on any matter of relevance)."[34] In the August 2018 Notice, the Commission provided the parties until August 31, 2018 to file briefs on the matter.[35]

14. The following entities filed timely briefs: Kansas Electric Power Cooperative, Inc. (KEPCo); Golden Spread Electric Cooperative, Inc. (Golden Spread); AEP; Oklahoma Gas and Electric Company (OG&E); EDF Renewables, Inc. (EDF); SPP; Xcel; and NextEra Energy Resources, LLC (NextEra). On August 29, 2018, Enel Green Power North America, Inc. (Enel) filed a motion to intervene out of time.[36] On August 31, 2019, Midwest Energy, Inc. (Midwest Energy) filed a motion to intervene out of time[37] and brief, and Old Dominion filed a motion to intervene out of time and statement

[34] Voluntary Remand Motion at 2. The Commission also stated that "[t]he Commission intends to issue an order on voluntary remand within 6 months of filing of supplemental pleadings." *Id.*

[35] 83 Fed. Reg. 40,033 (2018).

[36] In its doc-less intervention, Enel does not provide an explanation for its untimely motion. Enel asserts that intervention at this stage will not disrupt the proceeding and will not result in prejudice to, or additional burden on, existing parties. Enel Out of Time Motion to Intervene, Docket No. ER16-1341-000 (filed Aug. 29, 2019). Although Enel filed a brief with EDF, we refer only to EDF when describing the arguments set forth in that brief because we deny Enel's late intervention below.

[37] Midwest Energy asserts that it did not intervene in this proceeding because it initially did not find that the matters at issue in this docket warranted intervention to protect Midwest Energy's business interests; however, following *Old Dominion* and the Commission's voluntary remand of the issues in this proceeding, Midwest Energy now believes that the Waiver Orders were not adequately justified and could negatively impact Midwest Energy's business interests in the future. Motion to Intervene Out of Time and Brief of Midwest Energy, Inc., Docket No. ER16-1341-000, at 2 (filed Aug. 31, 2018).

in lieu of brief.[38] On September 17, 2018, KEPCo filed a motion for leave to answer and answer to Xcel's brief, and SPP filed an answer to Old Dominion's statement. On October 22, 2018, Old Dominion filed an answer to SPP's answer.

II. Supplemental Briefs

A. Arguments Supporting Affirming the Waiver Orders

1. *Old Dominion* is not controlling and is distinguishable from the Waiver Orders because SPP provided sufficient notice

15. SPP, NextEra, and EDF all argue in support of the Commission's findings in the Waiver Orders that notice of the Attachment Z2 credit payment obligations was sufficient to satisfy the filed rate doctrine for SPP's customers.[39] SPP claims that *Old Dominion* merely reaffirmed existing precedent that the filed rate doctrine is satisfied where customers have adequate notice because, as the D.C. Circuit has reasoned, advance notice fulfills the predictability purpose of the filed rate doctrine.[40] OG&E adds that the D.C. Circuit did not suggest in *Old Dominion* that it was overturning prior precedent or breaking new ground in its decision that the court characterized as "decidedly routine."[41] SPP further claims that the D.C. Circuit and the Commission have repeatedly determined that advance notice to customers that rates are provisional and subject to change turns what would otherwise be considered retroactive ratemaking into a functionally

[38] Old Dominion explains that it did not timely intervene because it has no load in SPP, does not participate in any SPP markets or transmission planning, and did not stand to be impacted by the outcome of this proceeding and, therefore, had no cause to timely intervene. Old Dominion Motion to Intervene Out-of-Time and Statement in Lieu of Brief, Docket No. ER16-1341-000, at 7 (filed Aug. 31, 2018). Old Dominion states that it was only upon the voluntary remand of this proceeding, on the basis of the *Old Dominion* opinion and the August 2018 Notice, that Old Dominion stood to be potentially impacted by the outcome of this proceeding. Old Dominion states that it does not take any position on the merits of the Waiver Orders but contends that this proceeding highlights the inequitable and anomalous denial of its request for waiver in the Commission proceeding that led to the decision in *Old Dominion*. *Id.* at 5-7.

[39] NextEra Brief at 16-17; SPP Brief at 20; EDF Brief at 5.

[40] SPP Brief at 17.

[41] OG&E Brief at 4.

prospective process; and nothing in *Old Dominion* alters this approach.[42] NextEra notes that courts have not required a single type of event to provide adequate notice.[43]

16. SPP, NextEra, and OG&E also argue that notations in study reports, quarterly public meetings, and extensive stakeholder involvement in decisions regarding the development and implementation of Attachment Z2 also provided adequate notice to customers.[44] NextEra explains that Xcel was (and continues to be) a member of the Regional Tariff Working Group in SPP.[45] NextEra claims that, as a member of this working group, Xcel would have known that SPP intended all along to require compensation for upgrade sponsors dating back to the effective date of the Tariff (i.e., 2008) but that delays were hindering the implementation of Attachment Z2. Unlike the notice provided through the stakeholder process in this matter, NextEra argues that the record in *Old Dominion* fails to demonstrate that those customers had notice that they could be charged for the costs above the market offer cap.[46] SPP asserts that Xcel admits that it had actual notice.[47]

17. EDF and NextEra contend that the waiver in *Old Dominion* would have allowed the generator to collect a rate surcharge that was not provided for or allowed by the PJM tariff.[48] EDF asserts that the PJM tariff contained an offer price cap that explicitly precluded the type of surcharge requested in *Old Dominion*.[49] EDF and NextEra argue that *Old Dominion* is distinguishable from the Waiver Orders because the Tariff has

[42] SPP Brief at 17, 19.

[43] NextEra Brief at 15.

[44] SPP Brief at 20-21; NextEra Brief at 16-17; OG&E Brief at 4-5.

[45] NextEra Brief at 16.

[46] *Id.* at 15.

[47] SPP Brief at 21 (citing *Sw. Power Pool, Inc.*, 161 FERC ¶ 61,144 at P 29 ("We find that AEP/Xcel thus concede the existence of notice, even though they believe such notice was inadequate, based on their interpretation of section III.C.8 of Attachment Z1.")).

[48] NextEra Brief at 14-15; EDF Brief at 5.

[49] EDF Brief at 4-5.

explicitly provided for revenue crediting in Attachment Z2 since at least 2008.[50] Given these existing Tariff provisions in Attachment Z2, NextEra contends that customers in SPP should have known that at some point they would be required to compensate upgrade sponsors, whereas customers in *Old Dominion* would have had no way to know that Old Dominion could seek a rate increase that exceeded the offer price cap that existed in PJM.[51]

2. ***Old Dominion*** **is not controlling and is distinguishable from the Waiver Orders because the Commission did not grant waiver on equitable grounds**

18. SPP argues that *Old Dominion's* holding that equitable circumstances cannot justify waiver of the filed rate doctrine is not applicable to the Waiver Orders because the Commission did not rely on equitable grounds to grant the waiver.[52] Instead, SPP contends that it did not advance equitable considerations as the justification for the waiver request, and the Waiver Orders are based on a finding that SPP's customers and stakeholders had adequate notice such that the filed rate doctrine was satisfied.[53] Similarly, NextEra and EDF agree that the Commission did not grant waiver of the Tariff on equitable grounds and argue that the decision to grant the waiver was based on the Commission's long-established, four-part waiver criteria.[54] EDF claims that *Old Dominion* did not determine that the Commission is broadly precluded from issuing tariff waivers, noting that, had it done so, *Old Dominion* would have upset decades of precedent relating to the Commission's use of waivers.[55] SPP argues that whereas the generator in *Old Dominion* requested that the Commission waive the filed rate due to the extraordinary circumstances presented by the Polar Vortex (i.e., it requested to "circumvent" the Tariff on equitable grounds), here SPP requested the waiver in order to implement the Tariff provisions that were already on file.[56] Similarly, EDF contends that the Commission's grant of the waiver did not make an exception to the filed rate doctrine

[50] NextEra Brief at 14-15; EDF Brief at 5.

[51] NextEra Brief at 15, 17.

[52] SPP Brief at 14.

[53] *Id.* at 14-15.

[54] EDF Brief at 6.

[55] *Id.* at 6-7.

[56] SPP Brief at 13-14.

because it was implementing already existing Tariff provisions, and therefore, there was no reason for the Commission to reach equitable grounds as a basis for its decision.[57]

3. Waiver is appropriate because section I.7.1 of the Tariff is a non-rate term that can be waived without violating the filed rate doctrine

19. SPP and NextEra claim that section I.7.1 is a non-rate term that can be waived without violating the filed rate doctrine and rule against retroactive ratemaking because it does not subject ratepayers to an additional surcharge.[58] Both entities argue that a waiver of section I.7.1 does not subject ratepayers to an additional surcharge because the rate resulting from the waiver is the rate on file that the Tariff obligated customers to pay for service under the Tariff.[59] NextEra argues that section I.7.1 is a non-rate term because, although it ultimately affects the rate that a customer pays, the rate charged will be consistent with the existing Tariff language in Attachment Z2, as well as the overall intent of the Tariff.[60] NextEra contends that the Commission is more lenient in granting waivers of non-rate terms when the waiver will give greater effect to the intent of the filed rate, as would be the case with waiving the requirements of section I.7.1.[61] SPP also notes that the Commission has previously granted waivers of section I.7.1 "in order to allow SPP to make corrections to invoices that would otherwise be barred by [s]ection I.7.1's time limitation."[62]

20. SPP contends that, even if the Commission were to determine that section I.7.1 is part of the filed rate, waiver of the provision is still warranted to permit the implementation of the Attachment Z2 provisions (i.e., the filed rate).[63] SPP agrees with

[57] EDF Brief at 7.

[58] SPP Brief at 22; NextEra Brief at 17.

[59] SPP Brief at 23; NextEra Brief at 18.

[60] NextEra Brief at 18.

[61] *Id.* at 17 (citing *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,217 (2014); *N.Y. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,108 (2012)).

[62] SPP Brief at 22-23 (citing *Sw. Power Pool, Inc.*, 153 FERC ¶ 61,180, at PP 15-19 (2015) (explaining that "SPP customers will be charged the proper amounts based on the rate on file and no third party will be harmed")).

[63] *Id.* at 23.

the Commission's determination in the Waiver Orders that SPP customers had adequate notice and that such notice was "not inconsistent with the policy underlying section I.7.1."[64] SPP further argues that the Commission's previous waiver of section I.7.1, along with its waiver of similar provisions for other utilities, also provided stakeholders with notice that the provision was waivable and notes that Xcel intervened and supported SPP's request to waive section I.7.1 in a different proceeding.[65] SPP also argues that the waiver of section I.7.1 is distinguishable from the Commission's decision to give full effect to a similar provision at issue in *Seminole Elec. Coop. Inc. v. Fla. Power & Light*[66] because stakeholders were on notice from the time they took service of the Attachment Z2 provisions and the associated charges; this contrasts with the utility in *Seminole* who only became aware of its misapplication of its tariff four years after the misapplication began.[67]

4. Waiver is appropriate under cost causation principles

21. EDF argues that any action by the Commission that would impede SPP's implementation of Attachment Z2, including reversing the Waiver Orders, violates the cost causation principle because generators would effectively be providing a free service to other customers if upgrade sponsors are not compensated for the transmission upgrades they sponsored.[68] Similarly, OG&E contends that Attachment Z2, as effectuated by the Waiver Orders, is consistent with Order No. 1000[69] and its cost causation principle. EDF contends that generators relied on this principle when they made the business decision to invest large sums of money in transmission upgrades. EDF argues that this informed business decision made in reliance on existing tariff provisions is "akin" to the filed rate

[64] *Id.* at 23-24.

[65] *Id.* at 24.

[66] 139 FERC ¶ 61,254 (2012) (*Seminole v. Fla. Light & Power*), *reh'g denied*, 153 FERC ¶ 61,037 (2015), *pet. for review denied, Seminole Elec. Coop. Inc. v. FERC*, 861 F.3d 230 (D.C. Cir. 2017) (*Seminole*).

[67] SPP Brief at 24-25.

[68] EDF Brief at 8.

[69] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014).

doctrine, and therefore, generators are entitled to receive the benefits promised by Attachment Z2.[70] OG&E claims that none of the parties opposing the Waiver Orders dispute the Commission's determination that SPP is acting in good faith to allocate revenues to project sponsors as contemplated by Attachment Z2.

5. Waiver is appropriate because a failure to do so would violate OG&E's contractual rights and the filed rate doctrine

22. OG&E argues that a failure to affirm the Waiver Orders would lead to a violation of OG&E's contractual rights, as well as the filed rate doctrine. OG&E contends that the *Mobile-Sierra*[71] presumption applies to its Sponsored Upgrade Agreement with SPP. According to OG&E, it is entitled to receive revenue credits for bearing the initial costs of a transmission upgrade project specified in the Sponsored Upgrade Agreement unless the Commission makes a finding that honoring the contract is contrary to the public interest. OG&E also argues that a failure to affirm the waiver would itself constitute a violation of the filed rate because Tariff provisions that have been effective since 2008 obligate customers to compensate upgrade sponsors for their subsequent use of transmission upgrades. OG&E notes that it received regulatory approval from the Oklahoma Corporation Commission for the transmission upgrade project associated with the Sponsored Upgrade Agreement based on assurances that this Tariff language provided that, while OG&E would initially be responsible for the full revenue requirement of the transmission upgrade, OG&E would receive credits for subsequent usage of the transmission line. OG&E argues that Attachment Z2 represents the filed rate and that it must be enforced.[72]

6. The Commission should use its remedial authority under section 309 of the Federal Power Act to uphold SPP's invoicing of credit payment obligations for the historical period

23. SPP and NextEra both note the breadth of the Commission's remedial authority under section 309 of the Federal Power Act (FPA), citing several cases laying out the Commission's authority under section 309, and argue that the Commission should use this authority to allow the continued implementation of Attachment Z2.[73] Both entities

[70] EDF Brief at 8.

[71] *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

[72] OG&E Brief at 6.

[73] SPP Brief at 27-28; NextEra Brief at 21.

argue that a reversal of the Waiver Orders would deprive companies that invested in upgrades of the value that their investments created and would create a "free rider" problem.[74] NextEra further argues that the only violation of the Tariff that occurred relating to Attachment Z2 was SPP's failure to implement the Attachment Z2 provisions between 2008 and 2016.[75] NextEra also argues that it was the Waiver Orders that remedied the violation by allowing SPP to begin invoicing customers for the historical period.

24. SPP claims that the policy underlying the billing adjustment limitation in section I.7.1 is to protect customers from surprise rate increases that occur years after the issuance of an original invoice.[76] SPP argues that no such concern exists with Attachment Z2 because it "has served as a stand-alone, self-contained, fully-noticed 'filed rate' obligation" since 2008.[77] SPP argues that, if section I.7.1 is considered part of the filed rate, then it will be in direct conflict with the other filed rate provisions of Attachment Z2, leaving no room to give both provisions independent effect; this, SPP avers, is in contrast to the underlying purpose of section I.7.1.[78] SPP contends that Attachment Z2 is the "primary filed rate provision," and the Commission should use its broad remedial powers found under section 309 of the FPA to subordinate section I.7.1's requirements in favor of the Attachment Z2 requirements for revenue crediting.[79]

25. As support for this subordination of section I.7.1, SPP notes the significant investment undertaken by project sponsors based on the belief that they would be compensated for the beneficial use of these investments by third parties pursuant to Attachment Z2.[80] Finally, SPP claims that Xcel should not be able to claim protection under section I.7.1 because of Xcel's prior support for a waiver of section I.7.1 in another matter and its statements that it was willing to "make good on historical Attachment Z2

[74] SPP Brief at 29-30; NextEra Brief at 22.

[75] NextEra Brief at 20.

[76] SPP Brief at 27-28.

[77] *Id.* at 27.

[78] *Id.* at 27, 29.

[79] *Id.* at 27-29.

[80] *Id.* at 29.

assessments, subject to 'a reasonable payment plan [being] accepted by the Commission and greater information about the impacts to customers.'"[81]

7. Xcel lacks standing to challenge the Waiver Orders

26. SPP argues that the Waiver Orders do not create an injury that is concrete, particularized, and actual or imminent and that Xcel is not aggrieved by the Waiver Orders. SPP asserts that no economic obligation or financial liability is incurred by Xcel as a result of the Waiver Orders and that the Waiver Orders do not determine whether SPP has properly invoiced Xcel.[82] SPP also asserts that all of Xcel's challenges to Attachment Z2 are properly before the Commission in Xcel's complaint proceeding in Docket No. EL18-9-000. SPP argues that Xcel therefore lacks standing to challenge the Waiver Orders.[83]

8. Reversal of the Waiver Orders will lead to substantially more litigation

27. NextEra warns that, should the Commission reverse its previous decision in the Waiver Orders, Attachment Z2 disputes and litigation will extend for many more years. NextEra further warns that aggrieved upgrade sponsors who are unable to receive revenue credits for upgrades that they have placed into service prior to 2015 will file new complaints alleging tariff and generator interconnection agreement violations. NextEra states that upgrade sponsors such as itself could pursue enforcement of generator interconnection agreements in individual contract proceedings.[84]

28. In addition, SPP states that it is uncertain whether it will be able to recover all of the credits that it has paid out to upgrade sponsors to date, if the Commission were to reverse its decisions. SPP notes that some upgrade sponsors may have subsequently sold their generation facilities. SPP asserts that, in other cases, upgrade sponsors may be non-jurisdictional entities who may question the Commission's authority to order them to pay refunds of the upgrade credits they have received.[85]

[81] *Id.* at 30 (citing AEP/Xcel Aug. 8, 2016 Rehearing Request at 6).

[82] *Id.* at 34-35.

[83] *Id.* at 35.

[84] NextEra Brief at 22.

[85] SPP Brief at 29.

9. Alternatively, waiver of section I.7.1 is not necessary because it does not apply to credit payment obligations under Attachment Z2

29. NextEra contends that the plain language of section I.7.1 allows SPP to invoice customers back to 2008 without a waiver because a final invoice cannot be issued until actual data (as opposed to estimated data) is available to SPP. NextEra asserts that no actual data for the historical period was available until SPP completed its calculations of credit payment obligations in 2016, at which point SPP sent out final invoices. Because SPP sent the invoices as soon as actual data became available, NextEra argues that SPP properly invoiced customers pursuant to section I.7.1 and that no waiver is required.[86] SPP makes similar arguments regarding replacing estimated data from the historical period with actual data once it finished its calculations of credit payment obligations in 2016.[87]

30. OG&E adds that the resolution of transmission cost allocation proceedings and subsequent judicial review generally take several years to reach resolution. OG&E argues that the one-year limitation on billing should not be applied to a complex cost allocation issue such as the implementation of Attachment Z2.[88]

31. Similarly, SPP argues that the Commission could determine that section I.7.1 does not apply to Attachment Z2 credit payment obligations. SPP argues that invoices issued in 2016 for Attachment Z2 credit payment obligations represent initial settlements of those charges during the historical period and are not corrections or revisions to invoices issued during that time period. SPP contends that the Attachment Z2 provisions are stand-alone components of the filed rate whose initial implementation should not be prevented by invoking the 12-month billing correction limitation in section I.7.1.[89] SPP also notes that it created an entirely separate system "for the sole purpose of generating historical [and future] Attachment Z2-related settlement amounts, leaving the previous transmission settlement results unchanged."[90] EDF agrees that SPP can implement

[86] NextEra Brief at 18-20.

[87] SPP Brief at 26-27.

[88] OG&E Brief at 4-5.

[89] SPP Brief at 32-33.

[90] *Id.* at 33.

Attachment Z2 without seeking a waiver for section I.7.1.[91] EDF notes that SPP did not seek to change the revenue crediting mechanism in the Tariff and only sought to implement Attachment Z2 pursuant to a different timeline due to a series of software implementation issues.[92]

B. Arguments Supporting Reversal of the Waiver Orders

1. Waiver of section I.7.1 of the Tariff violates the filed rate doctrine

32. Several parties argue that section I.7.1 of the Tariff, which sets forth a one-year billing adjustment limitation, is part of the filed rate. KEPCo asserts that section I.7.1 of the Tariff is an integral part of the filed rate, and Commission precedent has firmly established that provisions establishing time limitations on billing adjustments constitute the filed rate.[93] Golden Spread states that many Commission-approved tariffs have limitations on revisions to invoices, with the goal of creating certainty as to adjustments, and that affected providers or customers may bring timely claims to rectify any necessary adjustments.[94] Xcel similarly argues that the Tariff in force at the time of the transactions that gave rise to the Attachment Z2 credit payment obligations did not allow SPP to retroactively assess costs eight years into the past.[95] Golden Spread argues that SPP should have filed a waiver request earlier, noting that SPP has demonstrated in other proceedings that it knows how to file timely requests for waiver in advance to avoid a violation of the filed rate.[96] Golden Spread argues that complex software implementation issues are not unique to SPP, noting that, as a result of software implementation issues, the California Independent System Operator Corporation (CAISO) filed two waiver requests over the past two years when it could not implement new market features or products to align with the effective date approved by the Commission. Golden Spread

[91] EDF Brief at 9.

[92] *Id.* at 11.

[93] KEPCo Brief at 7, 13 (citing *Seminole v. Fla. Light & Power*, 139 FERC ¶ 61,254).

[94] Golden Spread Brief at 8.

[95] Xcel Brief at 19.

[96] Golden Spread Brief at 9.

alleges that in these cases, CAISO sought a waiver before the filed rate was violated.[97] KEPCo argues that Commission precedent establishes that after expiration of the one-year billing adjustment limitation in section I.7.1, the billed amounts of these invoices become the filed rate and may not be altered.[98] KEPCo contends that it relied on the clear language in section I.7.1 and that the Commission has no discretion to retroactively modify the final charges by waiving section I.7.1 in this case.[99]

2. SPP provided insufficient notice, and the notice exceptions do not apply

33. Several parties state that, in order for a utility to alter the rates it charges, it must provide adequate notice; otherwise, the Commission may not allow a retroactive change in the rates charged to consumers.[100] Some parties also note *Old Dominion*'s explanation that the filed rate doctrine and rule against retroactive ratemaking provide a "nearly impenetrable shield for consumers, ensuring rate predictability and preventing discriminatory or extortionate pricing."[101] After reviewing court precedent on what qualifies as adequate notice, KEPCo concludes that courts have treated adequate notice as a limited and narrow exception and argues that the Commission should not seek to expand the notice exception under the facts at issue in the Waiver Orders.[102]

34. Several parties contend that the prohibition against retroactively charging rates that differ from the filed rate typically yields only in two limited circumstances and that neither are applicable in this matter: (1) when a court invalidates the set rate as unlawful; and (2) when the filed rate takes the form of a formula that varies as the incorporated

[97] *Id.* (citing *Cal. Indep. Sys. Operator Corp.*, 159 FERC ¶ 62,167 (2017); *Cal. Indep. Sys. Operator. Corp.*, 157 FERC ¶ 61,048 (2016)).

[98] KEPCo Brief at 13 (citing *Seminole v. Fla. Light & Power*, 139 FERC ¶ 61,254; *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086 (2009); *N.Y. State Elec. & Gas Corp.*, 133 FERC ¶ 61,094 (2010), *reh'g denied*, 142 FERC ¶ 61,151 (2013)).

[99] *Id.* at 14.

[100] AEP Brief at 3-4; KEPCo Brief at 7; Xcel Brief at 18-19.

[101] AEP Brief at 4 (citing *Old Dominion*, 892 F.3d at 1231); Golden Spread Brief at 14.

[102] KEPCo Brief at 18.

factors change over time.[103] Additionally, Xcel asserts that no contractual agreement exists whereby it consented to retroactive Attachment Z2 charges.[104] Aside from these two exceptions, several parties contest the Commission's determination in the Waiver Orders that customers received the requisite notice of the retroactive Attachment Z2 charges through the Tariff itself.[105] Xcel contends that the Attachment Z2 provisions must be read in conjunction with the entirety of the Tariff, including section I.7.1, which it contends prohibits charges that are more than one year old.[106] Xcel argues that the Waiver Orders render the prior notice requirements of section 205 of the FPA and the filed rate doctrine meaningless because the orders stand for the proposition that a utility can inform its customers of its intent to change past transmission charges or otherwise unilaterally indicate that a tariff provision is provisional.[107]

35. Several parties also argue that customers should be able to rely on the provisions contained in the Tariff that is filed with the Commission, rather than assertions made by utilities about the Tariff in the stakeholder process.[108] KEPCo argues that, like the website posting in *Old Dominion*, which the court found did not provide adequate notice, SPP's stakeholder communications were not filed with the Commission and therefore do not provide adequate notice.[109] Similarly, Golden Spread states that the court, in *Old Dominion*, found that extraneous materials cannot supplant the filing and notice provisions of the FPA,[110] and Golden Spread argues that the Commission's reliance on these extraneous materials as notice to satisfy the filed rate doctrine is in stark contrast to this precedent.[111] Xcel and KEPCo both contend that the Commission's conclusion that parties received adequate notice through a notation in the Aggregate Transmission Service Study report indicating that "Attachment Z2 upgrades may be required" is

[103] *Id.* at 16-17; Xcel Brief at 21; Golden Spread Brief at 10.

[104] Xcel Brief at 22.

[105] *Id.*; AEP Brief at 4; KEPCo Brief at 19.

[106] Xcel Brief at 22.

[107] *Id.* at 23.

[108] *Id.* at 22, 24; AEP Brief at 4; KEPCo Brief at 19.

[109] KEPCo Brief at 19 (citing *Old Dominion*, 892 F.3d at 1232).

[110] Golden Spread Brief at 12 (citing *Old Dominion*, 892 F.3d at 1232*).*

[111] *Id.* at 11.

incorrect, and that the notation in the reports does not provide adequate notice.[112] Xcel states that the D.C. Circuit has rejected the notion that "some" or "any" notice, particularly through an informal report or attachment, is sufficient to overcome the requirements of the filed rate doctrine; instead, Xcel contends that the Commission should consider the totality of the circumstances to determine whether SPP provided adequate notice, including contradicting Tariff provisions such as section I.7.1.[113]

36. Golden Spread contends that the Attachment Z2 process contemplated that transmission customers would know how and which Creditable Upgrades were impacted by a service request before the customer contractually committed to the service; SPP, however, failed to advise customers seeking service of such costs at that time.[114] Several parties argue that not all network upgrades were identified in the Aggregate Transmission Service Study reports and that the cost assignment of certain network upgrades were identified for the first time in 2016.[115] AEP contends that it indicated to SPP that it wished to keep its transmission service request under study and subsequently take transmission service only if there were no directly assigned upgrade costs associated with the service.[116]

37. Golden Spread argues that, when the Commission granted SPP's waiver request, the Commission had no concept of the total impact of re-billing transmission customers, as SPP provided no quantitative information on this task.[117] Golden Spread claims that, in contrast, the Commission would reject a cost-based filing made under section 205 of the FPA if the applicant failed to provide sufficient cost support or information on rate increase impacts. AEP argues that SPP's filing in Docket No. ER18-1702 indicates the severity of the retroactive charges from SPP.[118] According to AEP, these charges appeared for the first time in an AEP network integration transmission service agreement, despite the fact that construction of the network upgrades commenced years ago.

[112] Xcel Brief at 24; KEPCo Brief at 19.

[113] Xcel Brief at 24-25 (citing *West Deptford*, 766 F.3d 10).

[114] Golden Spread Brief at 7, 13.

[115] AEP Brief at 5; Golden Spread Brief at 7-8, 10.

[116] AEP Brief at 5-6.

[117] Golden Spread Brief at 13.

[118] AEP Brief at 4; *see Sw. Power Pool, Inc.*, 165 FERC ¶ 61,048 (2018).

Additionally, AEP states that some of the network upgrades were not mentioned at the time AEP's transmission service request was studied.[119]

3. The Commission cannot grant waiver for equitable reasons

38. KEPCo argues that the Waiver Orders, in contrast to *Old Dominion*, were decided solely on good cause and equitable considerations.[120] KEPCo states that the Commission, in the Waiver Orders, focused on how the delay in Attachment Z2 implementation negatively affected upgrade sponsors; however, KEPCo asserts that these upgrade sponsors could have filed complaints if they believed that SPP was violating the Tariff, and did not.[121]

4. The Commission's finding that there would be no undesirable consequences was insufficient

39. Xcel contests the Commission's finding in the Waiver Orders that granting waiver would not result in undesirable consequences.[122] Xcel argues that, without more information of the amount of the retroactive rebilling and how it was being calculated, it was not reasonable for the Commission to determine whether the waiver would create undesirable consequences.[123] In addition, Xcel argues that the Commission's findings in the Waiver Orders are inconsistent with the Commission's denial of Xcel's waiver request in Docket No. ER14-2363-000.[124] Xcel states that, nevertheless, in the Waiver Orders the Commission "found no undesirable consequences despite the fact that greater

[119] AEP Brief at 4.

[120] KEPCo Brief at 10-11.

[121] *Id.* at 28.

[122] Xcel Brief at 30-31.

[123] *Id.* at 30.

[124] *Id.* at 32 (citing *Sw. Pub. Serv. Co.*, 150 FERC ¶ 61,128 (2015), *reh'g denied*, 153 FERC ¶ 61,020 (2015) (finding that the "undesirable consequence" test had not been met because granting waiver would result in costs flowing to other SPP customers, which would constitute "adverse consequences.")). Xcel claims that the Waiver Orders are also inconsistent with other Commission precedent. *Id.* at 31-34 (citing *TGP Granada, LLC v. Pub. Serv. Co. of N.M.*, 140 FERC ¶ 61,005 (2012); *Cal. Indep. Sys. Operator Corp.*, 137 FERC ¶ 61,180 (2011); *Ne. Util. Serv. Co.*, 135 FERC ¶ 61,123 (2011); *N.Y. Indep. Sys. Operator, Inc.*, 126 FERC ¶ 61,100 (2009)).

increased costs on SPP customers was the understood outcome" of granting the waiver.[125] Xcel argues that the waiver imposed an undue hardship on SPS's retail and wholesale customers, who never received adequate notice of possible Attachment Z2 crediting liabilities and did not foresee such a result under the Tariff.[126]

5. SPP failed to provide adequate information regarding credit payment obligations as required by the Attachment Z1 Transmission Service Study Process

40. AEP states that not all affected network upgrades were identified in the Aggregate Transmission Service Study reports associated with AEP's transmission service requests. AEP claims that communications from SPP in April 2016 were the first identification of the cost assignment of certain network upgrades related to one of AEP's transmission service requests. AEP notes that at other times, SPP mentioned network upgrades without describing the amounts or basis for the cost allocation.[127] Xcel alleges that SPP disregarded section III.C.8 of Attachment Z1 of the Tariff that requires SPP to provide a cost estimate for transmission service requests.[128] Golden Spread states that the process accepted by the Commission in 2008 contemplated that transmission customers would know how and which Creditable Upgrades were impacted by a service request before the customer contractually committed to the service.[129] AEP states that as part of the 2013-AG3 SPP Aggregate Study, it executed an Aggregate Study Completion Agreement in which it indicated that it would be willing to pay $0 of directly assigned upgrade costs related to its transmission service request. AEP notes that after the Commission granted the July 2016 Waiver Order, SPP attempted to assign projects and costs in excess of the parameters that AEP agreed to in the Aggregate Study Completion Agreement.[130] KEPCo alleges that the information provided in Aggregate Facilities Study reports was not comprehensive, and facilities associated with its transmission service request were not listed in the table in the back of the study report.[131] AEP, Golden Spread, KEPCo,

[125] *Id.* at 33.

[126] *Id.* at 13-14.

[127] AEP Brief at 5-6.

[128] Xcel Brief at 14.

[129] Golden Spread Brief at 7.

[130] AEP Brief at 5-6.

[131] KEPCo Brief at 20-24.

and Xcel state that network integration transmission service agreements previously tendered to them associated with their transmission service requests never indicated that any additional directly assigned upgrade costs would be assessed at a later date.[132]

III. Discussion

A. Procedural Matters

41. When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late intervention may be substantial. Thus, movants bear a higher burden to demonstrate good cause for granting such late intervention. Enel, Old Dominion, and Midwest Energy have not met this higher burden of justifying their late interventions.[133] Accordingly, we deny their motions to intervene out of time.

42. In the August 2018 Notice, the Commission directed the parties to file briefs with the Commission by August 31, 2018; the Commission did not provide the parties with the opportunity to file answers to the briefs. Accordingly, we deny the motions to answer submitted by KEPCo, SPP, and Old Dominion and reject their answers.

B. Substantive Matters

43. As discussed below, based on a review of the record in this proceeding, including the briefs filed by parties in response to the August 2018 Notice, we reverse the Waiver Orders and deny SPP's request for waiver. We direct SPP to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2018). SPP shall file a report within 120 days of the date of this order detailing how it proposes to make the refunds required herein. The Commission will provide an opportunity for comment on the report. SPP shall not provide any refunds prior to the issuance of a further Commission order directing refunds.

44. SPP sought a retroactive waiver of section I.7.1 of the Tariff so that it may invoice transmission service customers for Attachment Z2 credit payment obligations for an eight-year period prior to the date on which it made its waiver filing (i.e., the historical

[132] AEP Brief at 4; Golden Spread Brief at 7-8; KEPCo Brief at 23-24; Xcel Brief at 20.

[133] *See, e.g.*, *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

period of 2008-2016).[134] As discussed below, we find that the relief sought by SPP, under the circumstances here, is prohibited by the filed rate doctrine and the rule against retroactive ratemaking.

45. The FPA requires public utilities to "file with the Commission" and "keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission."[135] When a public utility seeks to change its filed rate, it must "fil[e] with the Commission and keep[] open for public inspection new schedules stating plainly the change or changes in the schedule or schedules then in force and the time when the change or changes go into effect."[136] As a consequence, regulated utilities are forbidden to charge rates for services other than those on file with the Commission, a prohibition that has become known as the filed rate doctrine.[137] The related rule against retroactive ratemaking also "prohibits the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."[138] When evaluating whether granting the requested relief would violate either the filed rate doctrine or the rule against retroactive ratemaking, the Commission considers whether the ratepayers had sufficient notice that the approved rate was subject to change.[139]

[134] *See supra* n.14.

[135] 16 U.S.C. § 824d(c) (2012).

[136] *Id.* § 824d(d).

[137] *West Deptford*, 766 F.3d at 11 (citing *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 800 (D.C. Cir. 2007); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981)).

[138] *Towns of Concord v. FERC*, 955 F. 2d 67, 71 & n. 2 (D.C. Cir. 1992). *See Associated Gas Distrib. v. FERC*, 898 F.2d 809, 810 (D.C. Cir 1990) (per curiam) (Williams, J., concurring) (describing the relationship between the filed rate doctrine and the rule against retroactive ratemaking).

[139] *See Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154, 164 (D.C. Cir. 1993); *see also PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,078, at P 46 (2014) ("The waiver is effective prospectively, as of the date of this order, and therefore does not retroactively change the rules . . . . Further, the instant filing put market participants on notice regarding a possible rule change."); *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 794-97 (D.C. Cir. 1990) (applying same concepts in waiver context); *Consolidated Edison Co. of N.Y. v. FERC*, 347 F.3d 964, 968-70 (D.C. Cir. 2003) (applying same concepts in waiver context).

46. SPP does not dispute that section I.7.1 sets a general one-year deadline for which it may correct invoices. However, SPP argues that it did not need to seek waiver and only submitted its request out of an abundance of caution, contending that section I.7.1 is not applicable to Attachment Z2. SPP suggests that the charges for credit payment obligations for transmission service during the historical period are not an initial settlement for such transmission service and, thus, fall outside the scope of the billing limitation in section I.7.1.

47. We disagree. Section I.7.1 requires the transmission provider—i.e., SPP—to invoice its customers each month for "all services furnished under the Tariff" during the previous month.[140] Section I.7.1 further provides that "billing adjustments" to those invoices "shall be limited to those corrections and adjustments found to be appropriate for such service within one year after rendition of the bill reflecting the actual data for such service."[141] The only exceptions to that general rule are (1) in the case of "provable meter error" and (2) when the transmission provider updates estimated data regarding the services provided with actual data.[142] In this case, the relevant service provided is transmission service taken pursuant to the Tariff. Attachment Z2 credit payment obligations can arise only in connection with such transmission service. Accordingly, we find that section I.7.1 applies to the transmission services charges in the historical period invoices, notwithstanding the fact that SPP did not reflect the Attachment Z2 credit payment obligations in those invoices.

48. In addition, we find that no exception to section I.7.1's 12-month limitation on billing adjustment applies here. SPP contends that a retroactive assessment of Attachment Z2 credit payment obligations can be analogized to the updating of estimated data regarding transmission service with actual data.[143] SPP, however, has not pointed to any record evidence indicating that it provided estimates of the cost of Attachment Z2 projects in any Aggregate Facilities Study report—or any other relevant report—during the historical period. Although listing a potential credit payment obligation in an Aggregate Facilities Study report could potentially provide notice of a future payment obligation,[144] without evidence that SPP estimated the size of any such payment

[140] SPP Tariff, section I.7.1.

[141] *Id.*

[142] *Id.*

[143] SPP Brief at 26.

[144] Such notice of a future payment obligation would not resolve the filed rate doctrine concern discussed below, which involves the intersection of a future payment

obligations, we cannot conclude that SPP provided estimated data contemplated by section I.7.1.

49. To the extent that SPP contends that section I.7.1 is inapplicable because Attachment Z2 credits are determined by a separate settlement process than other components of the transmission service invoice,[145] we again disagree. Attachment Z2 credits are charges directly related to requests for transmission service and should have been reflected in the monthly invoices for transmission service, as required by section I.7.1. As a result, section I.7.1's limitation on retroactive adjustments applies to Attachment Z2 credit payment obligations, regardless of how those obligations are settled.

50. We also disagree with SPP that section I.7.1 can be waived, under the circumstances here, without violating the filed rate doctrine. As the Commission has previously recognized, enforcing a tariff provision that places a time limitation on the correction of invoices (e.g., a time bar provision) is consistent with the filed rate doctrine, even where such provision results in a lack of refunds for a violation of the filed rate.[146] Consistent with this precedent, we find that section I.7.1, and its one-year limitation on retroactive billing, is part of SPP's filed rate.

51. As the court in *Old Dominion* reaffirmed, the filed rate (i.e., section I.7.1 here) can be waived only if an exception to the filed rate doctrine exists or the filed rate doctrine is otherwise satisfied. Although the D.C. Circuit has described the filed rate doctrine as an "impenetrable shield for consumers,"[147] courts have found that, where a rate change has a retroactive effect, the filed rate doctrine and rule against retroactive ratemaking can be

obligation intended to correct past invoices and SPP's application of a separate Tariff provision that places a time limitation on the correction of invoices.

[145] SPP Brief at 33.

[146] *See, e.g., Seminole v. Fla. Light & Power,* 139 FERC ¶ 61,254 at P 43, *reh'g denied*, 153 FERC ¶ 61,037, *pet. for review denied*, *Seminole*, 861 F.3d 230; *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086; *N.Y. State Elec. & Gas Corp.*, 133 FERC ¶ 61,094 at P 63; *N.Y. State Elec. & Gas Corp.*, 142 FERC ¶ 61,151 at P 26.

[147] *See Old Dominion*, 892 F.3d at 1230.

satisfied if customers had adequate notice of the proposed change.[148] Based on the record here, we find that SPP did not provide that adequate notice.

52. As an initial matter, the information that SPP points to as providing notice, other than the Attachment Z2 provisions, was not filed with the Commission. Although the Attachment Z2 provisions were on file with the Commission, these provisions did not provide adequate notice of SPP's intent to invoice transmission customers retroactively beyond the one-year limitation provided by section I.7.1. Moreover, SPP is incorrect in arguing that *Old Dominion* supports affirming the Waiver Orders because SPP provided adequate notice through study report notations and stakeholder involvement;[149] rather, in *Old Dominion*, the court found adequate notice lacking because the new rate was not on file with the Commission.[150]

53. As SPP continued to have problems implementing the Attachment Z2 crediting process, SPP could have sought a delay of the effective date of applicable Tariff provisions until it was able to invoice transmission service customers for Attachment Z2 credit payment obligations. Such action by SPP would have allowed transmission customers to make fully informed decisions about the cost of their transmission service to avoid later incurring potentially significant credit payment obligations.[151]

[148] *See NSTAR*, 481 F.3d at 801 (citing *Columbia Gas III*, 895 F.2d at 797); *Consolidated Edison*, 347 F.3d at 969.

[149] SPP Brief at 19.

[150] *See Old Dominion*, 892 F.3d at 1232.

[151] The SPP Tariff does not contain language that allows the Commission to order the reopening of an invoice after it is considered finalized, pursuant to a time bar provision. In contrast, section 7.4 of New York Independent System Operator, Inc.'s (NYISO) Market Administration and Control Area Services Tariff (Services Tariff) states that:

> For purposes of this Section 7.4, "finalized" data and invoices shall not be subject to further correction, including by the ISO, except as ordered by the Commission or a court of competent jurisdiction: provided, however, that nothing herein shall be construed to restrict any stakeholder's right to seek redress from the Commission in accordance with the Federal Power Act.

54. We find SPP's reliance on cases such as *Consolidated Edison* and *Cal. Pub. Util. Comm'n* to be misplaced, as these cases do not support SPP's assertion that it provided adequate notice to transmission service customers on the potential for retroactive credit payment obligations beyond the one-year billing limitation imposed by section I.7.1 of the Tariff. SPP cites to these cases for the proposition that customers are on adequate notice when parties are on actual notice.[152] However, the cases to which SPP cites pertain to findings of actual notice where there was prior agreement between parties[153] or the potential for a rate to be overturned on appeal and thus changed retroactively.[154] Neither those nor analogous circumstances are present here: there was no prior agreement between SPP and the parties memorializing an understanding that SPP could invoice further back than one year, nor was there a pending judicial appeal that might have alerted parties to potential retroactive changes in the filed rate.

55. We need not reach arguments that denial of SPP's waiver request will result in extra litigation, including SPP's statement that it may have difficulties recovering the money already paid out. Because we find that section I.7.1 is part of the filed rate and that waiver of that provision under the circumstances here would violate the filed rate doctrine, such equitable considerations do not bear on our determination.[155] For the same reason, we need not reach any of the parties' cost causation, contractual, tariff violation, or equitable arguments (e.g., whether the Commission granted the waiver on equitable

The Commission has found that this language was sufficient to permit reopening of an invoice when it determined that there were "extraordinary circumstances" and that "significant injustice would result in the absence of Commission action." *See, e.g.*, *Niagara Mohawk Power Corp.*, 123 FERC ¶ 61,314, at P 25 (2008); *GDF Suez Energy Resources, NA*, 149 FERC ¶ 61,257, at PP 15-18 (2014) (applying this interpretation in the context of Superstorm Sandy), *clarification denied*, 152 FERC ¶ 61,114, at PP 9-10 (2015); *N.Y. State Elec. & Gas Corp.*, 142 FERC ¶ 61,151, at PP 32-37 (2013) (declining to re-open invoices).

[152] SPP Brief at 18 & n.68 (citing *Consolidated Edison*, 958 F.2d 429, 434 (1992); *Cal. Pub. Util. Comm'n*, 988 F.2d at 165 n.10).

[153] *Consolidated Edison*, 958 F.2d at 434 (describing *City of Piqua* and *Hall* findings of adequate notice based on parties' prior agreement or consent).

[154] *Pub. Utils. Comm'n of Cal.*, 988 F.2d at 165 n.10.

[155] *See Old Dominion*, 892 F.3d at 1230.

grounds and whether the Commission properly applied the four-part waiver criteria).[156] Additionally, we need not address any of the parties' arguments on SPP's administration of its transmission service request process in this order because these issues are beyond the scope of this proceeding.

56. We are also unpersuaded by SPP's contention that Xcel lacks standing.[157] Even assuming that Xcel failed to meet the intervention requirements under Rule 214 of the Commission's Rules of Practice and Procedure,[158] Xcel could still protest SPP's waiver request. Thus, regardless of whether Xcel has been aggrieved by the Waiver Orders, the Commission may consider the arguments made by Xcel in determining further appropriate action in this proceeding.[159]

57. We decline to exercise our authority under FPA section 309 to allow SPP to retroactively invoice transmission service customers for Attachment Z2 credit payment obligations, as set forth in its waiver request. The D.C. Circuit has recognized our "broad remedial" authority to remedy unjust outcomes.[160] Nonetheless, we find that, having determined that the filed rate doctrine and rule against retroactive ratemaking (which are intended to implement FPA section 205) preclude SPP's waiver request, exercising our authority under FPA section 309 in this instance would be inappropriate.[161]

58. Accordingly, we reverse the Waiver Orders and deny SPP's request to waive its Tariff to enable SPP to invoice transmission service customers for credit payment obligations outside of the one-year billing adjustment limitation for the historical period. We direct SPP to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2018). Specifically, SPP must refund credit payment obligation amounts for the historical period, except for those becoming payable one year prior to the date SPP

[156] *See, e.g.*, *Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207 at P 48; *Old Dominion Elec. Coop.*, 154 FERC ¶ 61,155 at P 26.

[157] *See* SPP Brief at 34-35.

[158] 18 C.F.R. § 385.214 (2018).

[159] *See id.* 18 C.F.R. § 385.211(a)(3) (2018).

[160] *See, e.g.*, *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354 (2017).

[161] *See, e.g.*, *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018) ("Section 309 accordingly permits [the Commission] to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act").

initially rendered bills to customers for credit payment obligations.[162] This result gives effect to both the provisions of Attachment Z2 and section I.7.1, which are each part of SPP's filed rate with the Commission.

59. We direct SPP to file a report within 120 days of the date of this order detailing how it proposes to make the refunds required herein. This report should, at a minimum, contain the following information pertaining to credit payment obligations:

a. Prior to the calculation of the refunds, a listing of the existing credit payment obligation amounts paid, the existing credit payment obligation amounts received, and the existing net credit payment obligation amounts for each entity that has received or paid credit payment obligations for the historical period up to one year prior to the date SPP initially rendered bills to customers for credit payment obligations;

b. the amount of refunds of credit payment obligations paid and refunds of credit payment obligations received that each of the entities will receive for the historical period up to one year prior to the date SPP initially rendered bills to customers for credit payment obligations; and

c. the amounts of credit payment obligations owed and to be received prospectively by each entity, beginning one year prior to the date SPP initially rendered bills to customers for credit payment obligations, under all transmission service agreements that were in effect during the historical period and that were still in effect on the date that SPP initially rendered bills to customers for credit payment obligations.

The Commission orders:

(A) The determinations in the Waiver Orders are hereby reversed, and SPP's request for waiver is hereby denied, as discussed in the body of this order.

(B) SPP is hereby directed to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2018), as discussed in the body of this order.

[162] SPP has indicated that it began invoicing transmission revenue credits under Attachment Z2 for the historical period in November 2016. *See Sw. Power Pool, Inc.*, SPP Transmittal at 4, Docket No. ER18-381-000 (filed Dec. 4, 2017).

(C) SPP is hereby directed to file a report within 120 days of the date of this order, as discussed in the body of this order.

By the Commission. Commissioners LaFleur and Glick are concurring with separate statements attached.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc. Docket No. ER16-1341-003

(Issued February 28, 2019)

LaFLEUR, Commissioner, *concurring*:

1. In today's order, the Commission reverses its prior determinations that, as relevant here, granted waiver of the one-year billing adjustment limitation contained in section I.7.1 of the Southwest Power Pool, Inc. (SPP) Open Access Transmission Tariff. I supported those earlier orders, which belatedly gave effect to the crediting authorized by Attachment Z2, and only begrudgingly support today's order, which concludes that the filed rate doctrine and rule against retroactive ratemaking bar the Commission from providing the relief previously authorized.

2. I continue to believe that compensating upgrade sponsors pursuant to Attachment Z2 for the so-called "historic period" would be the equitable outcome, if the Commission has legal authority to require it. I recognize that SPP's long-challenged implementation of Attachment Z2 has created significant problems for realizing its intended purpose. However, whatever steps SPP, the Commission, or even upgrade sponsors could have taken during that time to ensure the Commission's authority to fully implement Attachment Z2 are not at our disposal today. After further consideration of the full record, including the briefs filed after the voluntary remand, I am reluctantly persuaded that granting the requested retroactive waiver is not within our authority.

3. The financial impacts of today's order will rightly be frustrating to those parties that would otherwise receive credits for the historic period, and the order provides an unfair windfall to those who benefitted from those upgrades during the historic period but are not required to pay for them. This is a result that could have been avoided, and we should, where possible, take steps to prevent similar issues in the future. As today's order notes, the New York Independent System Operator, Inc. tariff authorizes the Commission to order changes to otherwise "finalized" data and invoices. I join Commissioner Glick in encouraging SPP and other RTOs/ISOs to consider comparable revisions to their tariffs to avoid similarly inequitable outcomes in the future.

For these reasons, I respectfully concur.

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Cheryl A. LaFleur
Commissioner

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc. Docket No. ER16-1341-003

(Issued February 28, 2019)

GLICK, Commissioner, *concurring*:

1. Although I join today's order, I recognize that the result is wholly inequitable. As the Commission explains, SPP's tariff created a mechanism whereby an entity that pays for certain types of transmission upgrades may receive revenue credits from transmission customers that would not have been able to take transmission service but for those facilities.[1] Those upgrade sponsors have undertaken significant financial expense to build transmission facilities, with the possibility of reimbursement presumably playing at least some role in their decision to incur that expense. However, as a result of SPP's multi-year failure to follow its tariff, SPP did not collect from transmission customers the funds needed to reimburse upgrade sponsors for a period of time between 2008 and 2016 (the historical period).[2] Now, as a result of today's order, those upgrade sponsors will not receive the funds to which they should be entitled under SPP's tariff.

2. I support today's order, however, because I agree with the Commission's conclusion that the billing limitation in section I.7.1 of SPP's tariff prevents SPP from correcting its failure by retroactively changing the bills that certain transmission customers received during seven of the eight years in the historical period.[3] I also agree that, notwithstanding the equities before us, the filed rate doctrine and the rule against retroactive ratemaking prevent us from granting SPP's request to waive section I.7.1.[4]

[1] *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160, at P 4 (2019) (Order).

[2] *Id.* at P 6.

[3] *Id.* at PP 47-49.

[4] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1230 (D.C. Cir. 2018) ("The filed rate doctrine and the rule against retroactive ratemaking leave the Commission no discretion to waive the operation of a filed rate or to retroactively change or adjust a rate for good cause or for any other equitable considerations."); *Seminole Elec. Coop., Inc. v. Fla. Light & Power*, 139 FERC ¶ 61,254, at P 43 (2012) (finding that a billing limitation provision can also be part of the filed rate, limiting recovery for

Unfortunately, that leaves us without the authority to approve a remedy that would ensure that upgrade sponsors receive the revenue credits to which they should be entitled under SPP's tariff.

3. I appreciate that the complexity of the crediting and billing practices in many organized markets can prove more difficult in practice than in theory. But, as today's order illustrates, the failure to timely implement those practices, or take other remedial action,[5] can leave market participants holding the bag for the market operator's mistakes. I urge all RTOs and ISOs to consider whether to revise any billing limitations in their tariffs in order to ensure that they provide the flexibility needed to prevent the inequitable result in today's order. In particular, I urge them to consider an approach similar to that in the New York Independent System Operator, Inc.'s (NYISO) Tariff, which permits the Commission to order the reopening of invoices that would otherwise be subject to a time bar.[6] A safety valve of that type could go a long way toward avoiding a repeat of the unfortunate outcome here.

For these reasons, I respectfully concur.

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Richard Glick
Commissioner

violations of the tariff), *aff'd*, *Seminole Elec. Coop., Inc. v. FERC*, 861 F.3d 230 (D.C. Cir. 2017).

[5] *See* Order**,** 166 FERC ¶ 61,160 at P 53 (explaining that SPP could have addressed its inability to timely implement its tariff by seeking a delay of the relevant effective date).

[6] *See* NYISO Market Administration and Control Area Services Tariff § 7.4**;** Order, 166 FERC ¶ 61,160 at P 53 n.151.

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Document Content(s)

Table of Contents

REQUEST FOR REHEARING AND MOTION FOR CLARIFICATION OF SOUTHWEST POWER POOL, INC.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.) Docket No. ER16-1341-003

REQUEST FOR REHEARING AND MOTION FOR CLARIFICATION OF SOUTHWEST POWER POOL, INC.

In accordance with Rules 713 and 212 of the Federal Energy Regulatory Commission's ("Commission") Rules of Practice and Procedure[1] and section 313 of the Federal Power Act ("FPA"),[2] the Southwest Power Pool, Inc. ("SPP") requests rehearing and clarification of the Commission's order on remand issued February 28, 2019 in the captioned proceeding.[3]

I. EXECUTIVE SUMMARY

The Remand Order reverses previous determinations made by the Commission[4] and produces an outcome that, in the words of Commissioners Glick and LaFleur, is "wholly inequitable"[5] and "unfair."[6] It sets in motion revenue collection and refund procedures that may be difficult, if not impossible, to implement fully, and directs the

1 18 C.F.R. §§ 385.713 & 385.212.

2 16 U.S.C. § 825*l*(a).

3 *Sw. Power Pool, Inc*., 166 FERC ¶ 61,160 (2019) ("Remand Order"). The Remand Order is the result of the Commission's request for voluntary remand from the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"), sought by the Commission in *Xcel Energy Servs. Inc. v. FERC*, D.C. Circuit No. 18-1005 (D.C. Cir. Jan. 5, 2018). Remand Order at P 1 nn.1-2.

4 *Sw. Power Pool, Inc*., 156 FERC ¶ 61,020 (2016) ("Initial Waiver Order"), *reh'g denied*, 161 FERC ¶ 61,144 (2017) ("Rehearing Order") (collectively "Waiver Orders").

5 Remand Order, Glick concurrence at P 1.

6 *Id.*, LaFleur concurrence at P 3.

forced unwinding of settled transactions that will deny rightful compensation to upgrade sponsors, while conferring a windfall, in the form of free service, to parties who used and benefitted from these sponsored upgrades.[7]

The Commission should grant rehearing of the Remand Order. The legal rationale presented in the Remand Order reflects a flawed and overly rigid application of the filed rate doctrine that is neither compelled by, nor consistent with, the *Old Dominion*[8] decision purportedly relied upon by the Commission. Indeed, as SPP explained in its Remand Brief, the orders under review and upheld in *Old Dominion* involved the Commission's rejection of the petitioner's request for a waiver based on the Commission's findings of a clear and conceded conflict with the utility's filed rate; in contrast, the instant case involves the Commission's grant of a waiver in order to ensure

[7] On or before the deadline established in the Remand Order (i.e., June 29, 2019), SPP intends to file a refund plan, as directed by Paragraph 59 of the order. Given the complexities involved in attempting to unwind prior credit payment obligation ("CPO") assessments and payments, the refund plan will reflect implementation procedures that, in SPP's judgment, are both reasonably practicable and consistent with the Commission's compliance directive. SPP will provide the Commission, as part of such refund plan, the historical data described in subpart (a) of Paragraph 59 of the Remand Order. However, because future settlement of Attachment Z2 charges and credits depends on prior settlements that the Remand Order, if left standing, would require to be undone, the data requested in subparts (b) and (c) of the order cannot be calculated with finality until such time as the Commission confirms SPP's proposed refund implementation procedures as compliant with the Commission's intentions, and the Commission resolves the issues pending on rehearing both in this proceeding by virtue of this rehearing request and in the various complaint proceedings in Docket Nos. EL17-21-000 and EL18-9-000, as well as in separate cases involving the disputed inclusion of CPO costs in network service agreements (e.g., Docket No. ER18-1702-000), all of which, in some form or fashion, challenge aspects of SPP's interpretation and administration of Attachment Z2.

[8] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018) ("*Old Dominion*").

that the filed rate provisions of the SPP Open Access Transmission Tariff ("Tariff") are enforced.[9]

Furthermore, the notice issues presented in *Old Dominion*, including whether customers had any awareness of the prospect of being charged rates in excess of PJM's tariff-prescribed market cap, are entirely absent here. Since 2005, the requirements associated with revenue crediting currently governed by Attachment Z2 have been in the SPP Tariff. Since that time, Attachment Z2 (along with its predecessor Attachment Z) has served as a stand-alone, fully-noticed, filed rate obligation of CPO assessments. More to the point, the record here demonstrates actual, *conceded* notice of such assessments by the petitioner, Xcel Energy Services, Inc. ("Xcel"), and other SPP customers. The notion that, in the face of such actual, conceded notice, an administrative, non-rate term (i.e., the Tariff's one-year billing limitation set forth in Tariff Section I.7.1) should operate to bar implementation of Attachment Z2's filed rate is even more implausible when considered in light of prior instances where the Commission (sometimes with Xcel's support) has granted waivers of the very same or analogous non-rate billing limitation provisions and similar non-rate provisions in order to give full effect to the Tariff's substantive rate provisions, including waivers with retroactive application.

Leaving aside the Remand Order's legal infirmities, the Commission fails to provide any justification for imposing a remedy that produces irrational and unjust

[9] Post-Remand Brief of Southwest Power Pool, Inc., Docket Nos. ER16-1341-000, et al., at 12-31 (Aug. 31, 2018) ("SPP Post Remand Brief").

results. While acknowledging its broad authority under FPA section 309,[10] the Commission declines to exercise such authority, stating only (and without any legal support) that filed rate and retroactive ratemaking considerations make this an "inappropriate" case for exercise of the Commission's remedial discretion.[11] The Commission's determination deprives upgrade sponsors (i.e., customers) of the very rate protections that FPA section 205[12] is designed to afford. Contrary to the Commission's assertion, exercising its remedial discretion in this case would *advance*, rather than *conflict with*, the FPA requirements that customers pay, and investors receive, just and reasonable rates.

SPP urges the Commission to reconsider. It was the Commission's initial grant of the requested waivers that led to SPP's invoicing and crediting of CPO costs for the historical period (i.e., 2008-2016), with almost $140 million of historical credits already settled up to 2015 based on SPP's reliance on the Waiver Orders. In addition, more than $200 million in credits has been paid out for the period from 2015 to the present, which would need to be recalculated and resettled because of the Commission's reversal of the Waiver Orders and the resulting refunds for most of the historical period.[13] Significant time has passed since SPP initiated billing under Attachment Z2, during which certain customers who were taking service at the time and/or taking service during the historical

10 16 U.S.C. § 825h.

11 Remand Order at P 57.

12 16 U.S.C. § 824d.

13 Moreover, because present and future Attachment Z2 credits and charges take into consideration and reflect past charges and credits, refunds for the historical period also have a significant effect on current and future Attachment Z2 settlements.

period are no longer taking service, and ownership of some of the generation projects that triggered the initial need for and funding of Attachment Z2 upgrades has changed hands. Credits have also been paid to non-jurisdictional entities, and recouping these payments presents additional legal and practical challenges.

If rehearing is not granted, the legal consequence of the Remand Order is effectively an outcome that SPP acted contrary to its Tariff in invoicing Attachment Z2 assessments for the historical period outside the one-year billing limitation period. The Commission has broad remedial discretion in addressing Tariff violations, and should exercise it here by declining to require SPP to reverse prior period CPO collections and payments. In analogous cases, the Commission has excused utilities from unwinding transactions to avoid illogical or unjust results.[14] If ever a case called for a similar exercise of discretion, it is this one.

Finally, SPP seeks clarification of Ordering Paragraph (B) of the Remand Order, which provides that refunds owed shall be subject to interest, as calculated pursuant to section 35.19 of the Commission's regulations.[15] To the extent that the Commission does not grant rehearing as requested herein, SPP asks that the Commission expressly confirm that any interest owed as a result of this refund condition shall be collected from the entities who received payments from SPP as a result of settlements under Attachment Z2

[14] *Town of Concord v. FERC*, 955 F.2d 67, 76 (D.C. Cir. 1992) (scope of agency discretion is "at [] zenith" when fashioning remedies to address violations); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) (same); *see also Mirant Energy Trading, LLC v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,007, at P 38 (2008) (noting practical problems and concerns about achieving reliable outcomes when attempting to upset settled results).

[15] 18 C.F.R. § 35.19a; *see* Remand Order at PP 43, 58.

authorized by the Waiver Orders, and not from SPP. This clarification is required by Commission policy and precedent, which recognizes that the interest obligation is designed to account for the time-value of money and the need to make the recipients of refunds "whole." In these circumstances, any time-value benefits would have been realized by the payment recipients, not SPP.

II. BACKGROUND

The Commission is well aware of the history associated with SPP's attempts to implement revenue crediting under Attachment Z2 of SPP's Tariff.[16] Attachment Z2 establishes the requirement that customers funding Network Upgrades to SPP's Transmission System are reimbursed when, and to the extent that, those Network Upgrades are used to accommodate a customer's request for transmission service.

Due to well-documented delays with necessary system and software upgrades,[17] SPP's implementation of the Attachment Z2 billing system and procedures did not occur until 2016.[18] Throughout the process, SPP worked with stakeholders in an open and

16 *See, e.g.*, *Xcel Energy Servs. Inc. v. Sw. Power Pool, Inc.*, 162 FERC ¶ 61,203, at PP 2-6 (2018) ("Xcel Complaint Order"), *reh'g pending*; *Kan. Elec. Power Coop., Inc. v. Sw. Power Pool, Inc.*, 161 FERC ¶ 61,145, at PP 2-4 (2017) ("KEPCo Complaint Order"), *reh'g pending*.

17 *See, e.g.*, Xcel Complaint Order at PP 2-6 (describing the history of Attachment Z2 adoption, implementation, and delays); KEPCo Complaint Order at PP 2-4 (same); Initial Waiver Order at PP 53, 56 (citing delays but commending SPP's "concerted efforts to implement the revenue crediting process" and referencing SPP's outreach initiatives designed to keep stakeholders informed and to respond to questions regarding Attachment Z2 implementation).

18 Attempts to develop procedures and software for calculating and assessing CPOs to customers have been ongoing since the initial introduction of Attachment Z in 2005. *Sw. Power Pool, Inc.*, 111 FERC ¶ 61,118, at PP 1, 71-72 (accepting, subject to further compliance, SPP's revenue crediting proposal), *order on reh'g & compliance*, 112 FERC ¶ 61,319 (2005); *Sw. Power Pool, Inc.*, 110 FERC

transparent process to develop the procedures whereby SPP would eventually calculate revenue credits for Creditable Upgrades and assess these costs to transmission service customers using and benefitting from such upgrades.[19]

In 2016, as these collaborative efforts were ongoing, SPP filed a petition for waivers of certain Tariff provisions to facilitate SPP's ability to implement Attachment Z2.[20] One such provision was the twelve-month billing adjustment period specified in Section I.7.1 of the Tariff.[21] SPP explained that because Attachment Z2

¶ 61,028, at P 16 (2005) (accepting SPP's Aggregate Transmission Service Study ("ATSS") process). In 2008, SPP decided to split Attachment Z into two new Tariff Attachments—Z1 and Z2—to clarify the separate processes associated with the ATSS and revenue crediting, respectively, and to reflect the fact that revenue crediting under Attachment Z2 is not limited to the ATSS process but also encompasses revenue crediting for other Network Upgrades. Submission of Proposed Tariff Revisions of Southwest Power Pool, Inc., Docket No. ER08-746-000 (Mar. 28, 2008). The Commission partially accepted these revisions and directed additional compliance on May 27, 2008. *Sw. Power Pool, Inc.*, 123 FERC ¶ 61,208 (2008).

19 *See* Crediting Process Task Force, *Determination of Credits and Distribution of Credit Revenue: Tariff Attachment Z2 Implementation*, Southwest Power Pool, Inc. (June 20, 2011), https://www.spp.org/Documents/17736/Crediting%20Process%20Task%20Force%20Whitepaper_6-20-2011.doc.

20 Petition of Southwest Power Pool, Inc. for Tariff Waiver, Docket No. ER16-1341-000 (Apr. 1, 2016) ("Waiver Request").

21 This rehearing request focuses primarily on Section I.7.1 because the Remand Order focuses *entirely* on Section I.7.1, seemingly forgetting that the Commission's Waiver Orders also waived other provisions of the Tariff retroactively. Notwithstanding the Remand Order's failure to consider the implications of its reversal on other provisions of the Tariff that were waived (i.e., Tariff Attachment J Section IV.A and Attachment Z1 Section III.C), arguments herein regarding the filed rate doctrine, notice, and the Commission's ability to grant waivers also apply to those other sections as well. The Remand Order's failure to address fully the implications of its reversal on all of the waived provisions of the Tariff underscores the deficiencies of the Commission's review and consideration, rendering the Remand Order arbitrary and capricious. *Motor*

assessments are calculated separately from transmission service settlement processes and would therefore constitute *initial settlement* charges,[22] the applicability of Section I.7.1, covering adjustments and corrections of *previously rendered* billings, was unclear.[23] Nevertheless, "out of an abundance of caution,"[24] SPP filed its Waiver Request.

Xcel (among others) protested the Waiver Request, arguing that the estimated amount of potential CPO costs posed an undue hardship on transmission service customers who received "inadequate notice" and did not foresee such liabilities under the current Tariff. Xcel urged the Commission to require SPP to submit an FPA section 205 filing to establish the specific terms by which Attachment Z2 crediting would be implemented. Xcel conceded that it was aware of and participated in the lengthy SPP stakeholder process to resolve Attachment Z2 crediting,[25] but argued that the details of that process, and the ultimate impact to Xcel, "have always been, at best, vague."[26]

> *Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious when lacking meaningful examination of all relevant facts and an explanation that rationally connects facts found and determination made).

22 Waiver Request at 11.

23 *Id.*

24 *Id.*

25 Motion to Intervene and Protest of Xcel Energy Services Inc., Docket No. ER16-1341-000, at 12 (Apr. 22, 2016) ("Xcel Protest") ("As suggested by the committee materials cited throughout the Petition, SPS, as a stakeholder in SPP, has been aware that SPP has been seeking a method to resolve Attachment Z2 crediting.").

26 *Id.* at 12.

With respect to the applicability of Section I.7.1 of the Tariff, Xcel disagreed with SPP's characterization of CPO costs as "initial settlement" charges.[27] Without directly addressing the issue or explaining how independent and separately-tariffed charges are properly considered "adjustments" to previously-rendered invoices, Xcel asserted that Section I.7.1 operates as an "affirmative limitation" on SPP's ability to invoice Attachment Z2 charges prior to 2015.[28] Consequently, Xcel insisted that a waiver of this provision was required in order for SPP to charge transmission customers for CPO costs associated with prior periods.[29]

The Initial Waiver Order granted SPP's Waiver Request. The Initial Waiver Order found that affected parties had ample notice of the Tariff's crediting requirements by virtue of SPP's long-standing, Commission-approved Attachment Z2.[30] The Commission noted the parties' awareness of the difficulties and delays experienced by SPP in developing the systems to implement these crediting requirements.[31] Emphasizing the importance of ensuring SPP's ability to implement the Tariff provisions,

27 *Id.* at 16.

28 *Id.*

29 *Id.* at 17. In its brief to the D.C. Circuit, Xcel advanced an altogether different and inconsistent argument—*to wit*, that waiver of Section I.7.1 is precluded as a matter of law. Initial Brief of Petitioner at 13-19, *Xcel Energy Services Inc. v. FERC*, No. 18-1005 (D.C. Cir. May 29, 2018) ("Xcel Brief"). However, even assuming that Section I.7.1 applies to Attachment Z2 assessments, the record facts demonstrate that Xcel (and all SPP stakeholders) fully recognized (i.e., had ample notice) that in order to implement Attachment Z2 in accordance with the plain terms of the Tariff, SPP was obligated to invoice CPO costs covering prior periods back to the effective date of the Tariff's crediting mechanism.

30 Initial Waiver Order at PP 53, 56.

31 *Id.*

and the parties' concession of "notice through Attachment Z2 [regarding] responsibility for credits for Sponsored Upgrades,"[32] the Commission rejected claims that Section I.7.1 operated as a bar to SPP's assessment of Attachment Z2 credits for prior period services.[33] The Commission concluded that SPP had satisfied the grounds for waiver by demonstrating good faith, limiting the scope of its Waiver Request, and establishing that the waiver would remedy a concrete problem and ensure that customers making beneficial use of the SPP system compensated upgrade sponsors, as required under the terms of the Tariff.[34] Shortly thereafter, SPP commenced invoicing, collecting, and distributing CPO assessments for the period from 2008 forward, in accordance with the authorization provided in the Initial Waiver Order.

Xcel and American Electric Power Service Corporation ("AEP") jointly sought rehearing of the Initial Waiver Order, explaining that a subsequent waiver request by SPP offered an approach to mitigate the burden of historical Attachment Z2 credits, and that, with a reasonable optional payment plan (which was subsequently approved by the Commission[35]), they "could support the Attachment Z2 repayment credit process."[36]

32 Rehearing Order at P 29.

33 *See* Initial Waiver Order at P 55.

34 *Id.* at PP 52-56.

35 *See Sw. Power Pool, Inc.*, 156 FERC ¶ 61,245 (2016).

36 *See* Request for Rehearing of American Electric Power Service Corporation and Xcel Energy Services Inc., Docket No. ER16-1341-000, at 11 (Aug. 8, 2016) ("Xcel/AEP Rehearing Request").

While preserving their merits-based objections to the Initial Waiver Order, Xcel and AEP asked the Commission to defer ruling on rehearing.[37]

In the Waiver Rehearing Order, the Commission denied rehearing of the Initial Waiver Order. The Commission held that the waiver facilitated SPP's implementation of the filed rate—i.e., the Attachment Z2 revenue crediting process of SPP's currently effective Tariff.[38] The Commission further found that arguments regarding the applicability of Section I.7.1 of the Tariff were addressed by virtue of the Commission's finding of adequate notice of CPO assessments, as mandated by the Commission-approved provisions of Attachment Z2.[39]

Xcel filed a petition for review of the Waiver Orders with the D.C. Circuit.[40] On June 15, 2018, following Xcel's submission of its petitioner brief but before the Commission submitted its respondent brief, the D.C. Circuit rendered its decision in *Old Dominion*. On July 19, 2018, the Commission filed a motion for voluntary remand of Xcel's pending appeal, citing the possible implications of *Old Dominion.*[41] Noting that the *Old Dominion* court's discussion of "equitable factors" in the context of filed rate challenges and Xcel's argument that SPP's Waiver Request was based on "purely [] a weighing of equitable factors," the Commission asked the court to return the case to the

37 *Id.* at 6.

38 Rehearing Order at P 28.

39 *Id.*

40 Petition for Review of Xcel Energy Services Inc., *Xcel Energy Servs. Inc. v. FERC*, No. 18-1005 (D.C. Cir. Jan. 5, 2018).

41 Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand, D.C. Cir. No. 18-1005 (D.C. Cir. July 19, 2018) ("Remand Motion").

Commission so that the agency could "take[] into account the Court's *Old Dominion* decision."[42] On July 31, 2018, the court granted the Commission's Remand Motion[43] and, on August 6, 2018, the Commission issued a notice inviting parties to submit post-remand briefs.[44] Eight parties filed timely post-remand briefs.[45]

On February 28, 2019, the Commission issued the Remand Order. The Remand Order reverses the Commission's findings in the Waiver Orders and retroactively denies SPP's Waiver Request. The Remand Order holds that the billing limitation under Section I.7.1 of the Tariff is part of SPP's "filed rate" and, under *Old Dominion*, the filed rate can be waived "only if an exception to the filed rate doctrine exists or the filed rate doctrine is otherwise satisfied."[46] The Commission determined that none of the recognized exceptions were applicable,[47] and that the notice that it previously found to satisfy filed rate doctrine requirements—i.e., primarily in the form of SPP's long-standing, Commission-approved Attachment Z2 and the conceded actual notice provided to affected parties—was not sufficient.[48] The Commission rejected, or disregarded as

42 *Id.* at 2.

43 *Xcel Energy Serv. Inc. v. FERC*, No. 18-1005 (D.C. Cir. July 31, 2018) (order granting the Commission's Voluntary Remand Motion).

44 *Sw. Power Pool, Inc.*, Notice Affording the Parties an Opportunity to File Briefs, ER16-1341-000, -001 (Aug. 6, 2018).

45 These parties include: SPP, Xcel, Kansas Electric Power Cooperative, Inc. ("KEPCo"), Golden Spread Electric Cooperative, Inc., AEP, Oklahoma Gas and Electric Company, EDF Renewables, Inc., and NextEra Energy Resources, LLC.

46 Remand Order at P 51.

47 Including, for example, prior agreement between the parties and/or the potential for reversal based on a pending appeal. *See id.* at P 54.

48 *Id.* at PP 51-52.

outside the scope of the proceeding, all other arguments advanced in support of the Waiver Orders.

III. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

In support of its request for rehearing, SPP provides the following statement of issues and specifies the following errors in accordance with Commission Rule 713(c)(2), 18 C.F.R. § 385.713(c)(2):

- The Remand Order's retroactive denial of waiver based on a perceived violation of the filed rate doctrine is contrary to record evidence and unlawful. As the Commission properly observed, the filed rate doctrine provides that "regulated utilities are forbidden to charge rates for services other than those on file with the Commission." Remand Order at P 45. The Remand Order permits an administrative, non-rate term to supplant the filed rate for which parties had sufficient notice, thereby *preventing* SPP from charging rates on file and approved by the Commission. The Remand Order is therefore arbitrary, capricious, and not the product of reasoned decision-making. *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006); *Horsehead Resource Dev. Co. v. Browner*, 16 F.3d 1246 (D.C. Cir. 1994); *Nat'l Gypsum Co. v. EPA*, 968 F.2d 40 (D.C. Cir. 1992); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992); *Cent. Ill. Pub. Serv. Co. v. FERC*, 941 F.2d 622 (7th Cir. 1991); *Gen. Chem. Corp. v. United States*, 817 F.2d 844 (D.C. Cir. 1987); *Office of Consumers Counsel v. FERC*, 783 F.2d 206 (D.C. Cir. 1986).

- In finding inadequate notice to satisfy the filed rate doctrine, the Remand Order relies on an exceedingly narrow and overly rigid interpretation of *Old Dominion* that disregards critical factual distinctions between SPP's Waiver Request and the waiver at issue in *Old Dominion*. Unlike *Old Dominion*, SPP's Waiver Request was intended to facilitate implementation of SPP's filed rate and to ensure collection and distribution of CPO assessments mandated by Attachment Z2—not a penny more or less. Unlike *Old Dominion*, the Waiver Orders properly found adequate notice in the form of the filed Tariff and the conceded awareness of affected parties that CPO assessments, while delayed, were forthcoming. Under prevailing legal standards, the Commission acts unlawfully when it issues orders that are arbitrary, capricious, and contrary to precedent. Likewise, the Commission erred in apparently abandoning without explanation its reasoning for seeking voluntary remand in the first place. 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018); *Williams Gas Processing-Gulf*

Coast Co. v. FERC, 475 F.3d 319 (D.C. Cir. 2006); *Pub. Utils. Comm'n of Cal. v. FERC*, 988 F.2d 154 (D.C. Cir. 1993); *Consol. Edison Co. v. FERC*, 958 F.2d 429 (D.C. Cir. 1992); *Gen. Chem. Corp. v. United States*, 817 F.2d 844 (D.C. Cir. 1987).

- In rejecting arguments that waiver of Section I.7.1 was not necessary to implement Attachment Z2, the Commission disregarded critical facts and relied on assumptions that are unsupported and contrary to record evidence. *La. Pub. Serv. Comm'n v. FERC*, 522 F.3d 378 (D.C. Cir. 2008); *Ky. Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005); *Exxon Mobil Corp. v. FERC*, 315 F.3d 306 (D.C. Cir. 2003); *Dominion Res., Inc. v. FERC*, 286 F.3d 586 (D.C. Cir. 2002); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001); *City of Oswego v. FERC*, 97 F.3d 1490 (D.C. Cir 1996); *ANR Pipeline Co. v. FERC*, 71 F.3d 897 (D.C. Cir. 1995); *Gen. Chem. Corp. v. United States*, 817 F.2d 844 (D.C. Cir. 1987); *N.Y. State Elec. & Gas Corp.*, 133 FERC ¶ 61,094 (2010).

- The Commission's refusal to exercise its remedial authority to avoid objectively irrational and inappropriate outcomes is arbitrary and not the product of reasoned decision-making. 16 U.S.C. § 825h; *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29 (1983); *Verso Corp. v. FERC*, 898 F.3d 1 (D.C. Cir. 2018); *Ky. Pub. Serv. Comm'n v. FERC*, 397 F.3d 1004 (D.C. Cir. 2005); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289 (D.C. Cir. 2001); *Town of Concord v. FERC*, 955 F.2d 67 (D.C. Cir. 1992); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,197 (2017); *La. Pub. Serv. Comm'n v. Entergy Corp.*, 155 FERC ¶ 61,120 (2016); *Md. Pub. Serv. Comm. v. PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,169 (2008).

In support of SPP's motion for clarification, SPP respectfully submits:

- In the event that the Commission declines to grant rehearing to correct the errors specified above, the Commission should clarify that any interest owed with respect to the refund obligation described in Ordering Paragraph (B) of the Remand Order shall be paid by the entities who received payments from SPP as a result of settlements under Attachment Z2 authorized by the Waiver Orders, and not from SPP. Such clarification is required to comport with the Commission's refund policy, which recognizes that the interest obligation associated with refunds is designed to account for the time value of money and the need to make the recipients of refunds "whole." Any time-value benefits associated with monies paid by SPP would have been realized by the payment recipients, not SPP. To the extent that the Commission does not grant the requested clarification, SPP requests rehearing because failing to clarify the interest obligations in the manner discussed herein would constitute an arbitrary and capricious

departure from long-standing Commission precedent. *Alcoa Inc. v. FERC*, 564 F.3d 1342 (D.C. Cir. 2009); *Williams Gas Processing-Gulf Coast Co. v. FERC*, 475 F.3d 319 (D.C. Cir. 2006); *PG&E Gas Transmission v. FERC*, 315 F.3d 383 (D.C. Cir. 2003); *Pub. Serv. Comm'n of Wis. v. Midcontinent Indep. Sys. Operator, Inc.*, 156 FERC ¶ 61,205 (2016); *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057 (2016); *New Charleston Power, L.P.*, 83 FERC ¶ 61,281 (1998).

IV. REQUEST FOR REHEARING

A. The Commission Erred by Issuing a Remand Order That Does Not Enforce, But Instead Undermines, the Terms of SPP's "Filed Rate"

It bears emphasizing, up front, that no party disputes that Attachment Z2 of the Tariff (as well as its predecessor Attachment Z) has, for more than a decade, been part of SPP's Commission-approved "filed rate." Nor is there any dispute that, by its terms, Attachment Z2 obligates SPP to collect and credit CPO costs so that upgrade sponsors are reimbursed when upgrades are used to provide transmission service to third-parties. There is likewise no disagreement concerning the foundational principle of the filed rate doctrine, pursuant to which, as the Remand Order properly summarizes, "regulated utilities are forbidden to charge rates for services other than those on file with the Commission."[49]

Where opinions diverge is in the application of this principle to SPP's delayed implementation of Attachment Z2. In the Waiver Orders, the Commission reached what was, by all accounts, an eminently logical, if not self-evident, conclusion: *viz.*, that a party cannot both have actual notice of impending charges specifically authorized under the filed Tariff and, at the same time, avoid payment of those charges based on filed rate

[49] Remand Order at P 45 (citations omitted).

doctrine objections. The filed rate doctrine is a "notice" doctrine[50] and, in this case, the charges sought to be assessed have been fully noticed since 2005. The billing limitation provision in Section I.7.1 could not operate to prevent CPO assessments in the manner found by the Remand Order for the simple reason that affected parties (including Xcel and other participants in this proceeding and other SPP customers) were not only on notice of forthcoming Attachment Z2 charges by virtue of Attachment Z2 itself, but were also participants in the lengthy stakeholder discussions that, owing to the myriad of complex software and process issues involved, forced the delay of Attachment Z2 implementation. At no point in those stakeholder discussions, or in any of the ensuing litigation involving Attachment Z2 implementation, did any CPO invoice recipient claim that it believed that the beneficial use made of Creditable Upgrades would be free of charge so long as such use was outside of the one-year billing correction period of Section I.7.1.[51]

50 *See, e.g.*, *Natural Gas Clearinghouse*, 965 F.2d at 1075.

51 Indeed, notwithstanding the Commission's observation that, for example, KEPCo "contends that it relied on the clear language in section I.7.1," Remand Order at P 32, none of KEPCo's prior pleadings including, most notably, its complaint in Docket No. EL17-21-000, ever suggested that KEPCo, in fact, relied on, previously invoked, or intended to invoke Section I.7.1 to limit its exposure to Attachment Z2 obligations. Any statement to that effect in KEPCo's post-remand brief is, at best, a *post hoc* rationalization and, at worst, disingenuous. In any event, there is no record evidence in any of the interrelated Attachment Z2 proceedings to suggest that customers lacked notice of the need for assessments of Attachment Z2 charges back to 2008 once the proper processes and systems were in place, or that any customer actually relied on the operation of Section I.7.1 when making decisions regarding transmission service. To the extent that the Commission relied on KEPCo's or other parties' similar unsubstantiated claims on brief, such reliance is erroneous. *E.g.*, *Horsehead Resource Dev. Co.*, 16 F.3d at 1269 (vacating orders where an agency "rel[ied] on pure speculation"); *Nat'l Gypsum Co.*, 968 F.2d at 43-44 (stating that an agency cannot "infer" facts not in

Thus, even accepting the premise that Section I.7.1 constitutes part of SPP's "filed rate," there is no legal or policy justification for allowing this administrative rule to negate the effect of Attachment Z2. As part of SPP's filed rate, Attachment Z2 commands that SPP assess, that upgrade sponsors receive, and that upgrade users pay for, CPO costs. Existence of these obligations has been published in one form or another in the filed Tariff and known since 2005.

Yet the Remand Order subordinates these filed rate obligations to the billing limitation of Section I.7.1. According to the Commission, this result is compelled based on case law requiring enforcement of time-bar provisions as "consistent with the filed rate doctrine."[52] But the precedent relied upon in the Remand Order is clearly distinguishable. None of the cited Commission decisions involved application of a time-bar to charges explicitly authorized under a separate section of the Tariff, but delayed due to implementation issues of which all affected parties were on notice. The *Seminole* case chiefly relied upon by the Commission, and the only one that was subject to judicial review, did not present an issue of conflicting tariff terms, or how the filed rate doctrine should apply to reconcile seemingly inconsistent rate and non-rate tariff provisions. The *Seminole* case was decided instead on a straight-forward interpretation of contractual language obligating the recipient of a bill for service to bring any challenge concerning

the record), *Cent. Ill. Pub. Serv. Co.*, 941 F.2d at 629 ("Neither this court nor the Commission may base its decisions on speculation.").

[52] Remand Order at P 50 (citing *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*, 139 FERC ¶ 61,254 (2012) ("*Seminole*"), *reh'g denied*, 153 FERC ¶ 61,037 (2005), *pet. for review denied, Seminole Elec. Coop., Inc. v. FERC*, 861 F.3d 230 (D.C. Cir. 2017)).

"the correctness" of the bill within twenty-four months of receipt.[53] The proposition embraced in the Remand Order—i.e., that a tariff's administrative, "time-bar" provision can prevent delayed implementation of a separately-stated rate term—finds no support in *Seminole*, or any of the other cases cited by the Commission.

In fact, when previously confronted with requests for waivers of non-rate terms that impaired implementation of the filed rate, the Commission has demonstrated a readiness to grant such requests.[54] On numerous occasions, the Commission has waived billing limitation and similar provisions of a utility's tariff in order to give full and often retroactive effect to the tariff's rate terms, including prior retroactive waivers of SPP's Section I.7.1 and similar provisions.[55] In none of these prior cases did any party argue

53 *Seminole* at PP 40-43.

54 *See, e.g.*, *PJM Interconnection, L.L.C.*, 148 FERC ¶ 61,217 (2014) (granting a waiver to allow *retroactive* re-calculation of shoulder-hour lost opportunity cost formula to conform to the "intent" of the subject tariff's filed rate terms); *N.Y. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,108 (2012) (granting a retroactive waiver of New York Independent System Operator, Inc.'s ("NYISO") tariff provisions to permit suppliers to retain payments made by NYISO that did not comport with the letter of its tariff).

55 *Sw. Power Pool, Inc.*, 162 FERC ¶ 61,155 (2018) (order granting waiver of one-year billing adjustment limitation in Section I.7.1 of SPP's Tariff); *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,245 (2016) (order granting request for waiver of Section I.7.1 and Section II.B of Attachment Z2 of SPP's Tariff); *Sw. Power Pool, Inc.*, 153 FERC ¶ 61,180 (2015) (order granting waiver of one-year billing adjustment limitation in Section I.7.1 of SPP's Tariff); *Sw. Power Pool, Inc.*, 154 FERC ¶ 61,194 (2016) (order granting a waiver of the 365-day limitation period for modification to settlement statements in Section 10.1(3) of Attachment AE of SPP's Tariff); *see also Ok. Gas & Elec. Co.*, 163 FERC ¶ 61,239 (2018) (granting a tariff waiver to allow retroactive adjustments to previously-charged rates to reflect the impact of tax law changes); *Westar Energy, Inc.*, 163 FERC ¶ 61,352 (2018) (same); *Sw. Pub. Serv. Co.*, 162 FERC ¶ 61,089 (2018) (order granting Southwestern Public Service Company and SPP a limited one-time waiver of certain provisions in Attachment O-SPS of the Xcel Energy Operating Companies Open Access Transmission Tariff, also incorporated in Attachment H of SPP's

that time-bar or similar non-rate provisions were non-waivable as a matter of law, and the Commission expressed no such concerns in granting the requested waivers. In fact, Xcel, the primary opponent to SPP's Waiver Request, previously supported waiver of Section I.7.1,[56] and, when it separately filed a complaint in 2017 challenging the implementation of the "but for" requirement for determining creditable upgrades under Attachment Z2, Xcel explicitly acknowledged the Waiver Orders, described those orders as "allow[ing] SPP to apply the requirements of Attachment Z2 and its Tariff to a historical period in order to assess CPOs retroactively,"[57] and stated that it "does not challenge the Tariff waivers previously granted by the Commission to SPP allowing recovery of Attachment Z2 credits retroactive to 2008."[58] The fact that the Commission has on prior occasions willingly waived Section I.7.1 and similar provisions—including on a retroactive basis—coupled with statements from customers acknowledging, without

Tariff, to allow retroactive adjustment to charges that was not presumably allowed under the filed rate) ("SPS Waiver Order"); *Sw. Power Pool, Inc.*, 153 FERC ¶ 61,339 (2015) (order granting a limited, one-time waiver of certain sections in Attachment AE of SPP's Tariff); *Sw. Power Pool, Inc.*, 151 FERC ¶ 61,122 (2015) (order granting a limited waiver of certain provisions in Attachment AE of SPP's Tariff); *N.Y Indep. Sys. Operator, Inc.*, 115 FERC ¶ 61,026, at P 45 (2006) (granting a tariff waiver to permit NYISO "to ensure that final bills, as far as possible, conform to its filed rate schedules").

56 (doc-less) Out-of-Time Motion to Invervene [sic] of Xcel Energy Services Inc., Docket No. ER15-2295-000 (Nov. 5, 2015) ("[Xcel] strongly support[s] the Commission granting the SPP waiver [of Section I.7.1]."); *cf.* SPS Waiver Order at P 1 (noting that Xcel was one of the parties supporting a request for a waiver of a non-rate tariff provision with retroactive applicability).

57 Complaint of Xcel Energy Services, Inc. on Behalf of Southwestern Public Service Company and Request for Fast Track Processing, Docket No. EL18-9-000, at 5 (Oct. 10, 2017).

58 *Id.*

objection, the retroactive implications of the Waiver Orders, is clear proof that industry participants in general and SPP customers specifically have been on notice that the such non-rate provisions are waivable. Indeed, it is difficult to fathom more concrete notice than the Commission's repeated waiver of such provisions.

According to the Remand Order, "actual notice" constitutes "adequate notice" only where there exists a prior agreement memorializing the parties' shared understanding or where a pending judicial appeal alerts parties to potential retroactive changes in the filed rate.[59] However, nothing in the cases cited by the Commission undercuts SPP's principal argument, which is that the Tariff itself provided legally sufficient notice of impending CPO assessments under Attachment Z2. At a minimum, the Commission was required to explain why these other means of notice are more adequate and/or of higher quality, than the notice demonstrated on the record here, for example: actual, conceded notice of Attachment Z2 and its existence in the Tariff dating back more than a decade (and of the explicit credit and payment obligations mandated thereunder, as well as study report notations and stakeholder discussions alerting customers of potential CPO assessments); actual, conceded notice of Attachment Z2 delays; and, actual, conceded notice of, and prior support for, waivers of Section I.7.1. The Commission's conclusion that filed rate "notice" principles bar SPP from assessing CPO costs is not supported by case law and is contrary to record facts.[60]

[59] Remand Order at P 54.

[60] The Commission's description of Xcel/AEP's rehearing arguments is not entirely accurate. According to the Commission, "[Xcel/AEP] argued that [Section I.7.1] was part of the filed rate, and therefore, could not be waived consistent with the filed rate doctrine." Remand Order at P 9. In fact, on rehearing, Xcel/AEP faulted the Commission for failing to address Xcel's protest regarding

Because the Remand Order's retroactive denial of SPP's Waiver Request based on a perceived violation of the filed rate doctrine is, in fact, contrary to the record evidence and prevailing precedent, it is unlawful as a matter of law and should be reversed on rehearing.[61]

B. The Commission's Reliance on and Flawed Interpretation of *Old Dominion* Constitute Legal Error

In finding that customers had inadequate notice of subsequent invoicing of Attachment Z2 charges to satisfy the filed rate doctrine, the Remand Order erroneously relies on an exceedingly narrow and overly rigid interpretation of *Old Dominion* that disregards critical factual and legal distinctions between *Old Dominion* and the instant proceeding. Under prevailing legal standards, the Commission acts unlawfully when it issues orders that are arbitrary, capricious, and contrary to precedent.[62] Moreover, by changing course without sufficient explanation, the Commission's action was arbitrary

Section I.7.1 and made only passing reference to the implications of the filed rate doctrine vis á vis Section I.7.1. In Xcel's protest, far from arguing that Section I.7.1 was non-waivable, Xcel stated, "[b]ecause SPP asserts it may not need the Commission to grant the requested waiver to charge transmission customers for historical transmission services, [Xcel] requests the Commission clarify that SPP may not do so without Commission approval." Xcel Protest at P 17.

61 *Office of Consumers' Counsel*, 783 F.2d at 227 (ruling that the Commission's factual conclusions must be supported by substantial evidence demonstrating that reasoned consideration was given to each of the pertinent factors underlying the agency's decision); *see also Williams Gas Processing*, 475 F.3d at 322 (an agency may change course only when it provides a reasoned explanation for doing so); *Gen. Chem.*, 817 F.2d at 846 (finding an agency action arbitrary and capricious where the agency analysis was "inadequately explained").

62 *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

and capricious.[63] The Commission should correct these deficiencies on rehearing by reinstating its grant of the requested waivers.

1. Unlike Old Dominion*, the Rate SPP Sought to Charge Was on File and Fully Noticed*

The Remand Order relies on *Old Dominion* to support its finding that the Waiver Orders were issued in error. Rejecting SPP's arguments distinguishing *Old Dominion* from the instant case, the Commission—presumably in an attempt to find parallels between the two cases—states "in *Old Dominion*, the court found adequate notice lacking because the new rate was not on file with the Commission."[64]

The Commission's rationale is not responsive to SPP's arguments. As an initial matter, it ignores the fundamental distinction SPP emphasized between its waiver request and the request presented (and properly rejected) in *Old Dominion*—i.e., that the rate sought to be charged by SPP *was, in fact, on file.*[65] The study report notations and stakeholder involvement that the Commission now deems inadequate were not the exclusive or even primary evidence or indicia of notice, as urged by SPP and/or relied upon by the Commission in the Waiver Orders.

To the contrary, the Commission, in the Initial Waiver Order found that:

> The revenue crediting provisions in Attachment Z2 were accepted by the Commission and are included in the currently effective Tariff. Stakeholders have been on notice of these provisions and that SPP has

63 *See, e.g.*, *Williams Gas Processing*, 475 F.3d at 322 (an agency may change course only when it provides a reasoned explanation for doing so).

64 Remand Order at P 52.

65 SPP Post-Remand Brief at 14-15, 19-20.

been working to implement the crediting process for the historical period.[66]

These findings were explicitly reaffirmed on rehearing. There, the Commission reiterated that it was the Commission's acceptance of Attachment Z2, and its long-standing incorporation as part of the Tariff, that placed stakeholders on notice of the crediting obligations.[67] Stakeholder meetings and study report notions clearly buttressed the Commission's notice findings, but were not, as the Commission now suggests, the only means of notice supporting SPP's assessment of CPO costs.

Thus, nothing from *Old Dominion* warrants a change to the Commission's findings in the Waiver Orders. This is because the Commission's deliberations leading to the Waiver Orders considered the filed rate doctrine and the rule against retroactive ratemaking as part of the Commission's traditional four prong analysis. The Commission's recent insistence that *Old Dominion* sets forth new law that undermines the Waiver Orders constitutes legal error.[68]

2. The Commission Has Inexplicably Abandoned, Without Explanation, Its "Equitable Considerations" Rationale as the Basis for Requesting Remand

To the extent that *Old Dominion* provided any illumination of the filed rate doctrine, it did so with respect to the "equitable considerations" presented by the petitioner in that case in support of its request for a waiver of the filed rate. In *Old Dominion*, the court explained that such considerations did not permit the Commission to

66 Initial Waiver Order at P 56.

67 Rehearing Order at PP 26, 28.

68 When, as here, the Commission abruptly reverses course and reaches a conclusion that directly contradicts its previous findings, it must provide a reasoned and meaningful explanation. *Williams Gas Processing*, 475 F.3d at 322.

authorize a rate that was not on file as part of the utility's tariff.[69] The Remand Motion seized on this aspect of the *Old Dominion* decision in requesting that the case be returned to the agency for further consideration.[70]

SPP did not advance equitable considerations as justification for its waiver, nor did the Commission cite equitable grounds in granting the waiver. Rather, SPP argued, and the Commission found, that waiver was justified because SPP's customers and stakeholders had sufficient notice to satisfy the filed rate doctrine.[71] Therefore, any arguably "new" dimension of the filed rate doctrine, as provided in *Old Dominion*, had no bearing on the Waiver Orders and could not justify revisiting the Commission's previous determinations.

In the Remand Order, the Commission declines to confront these arguments, insisting that they are not relevant to the Commission's reversal of the Waiver Orders. But the Commission cannot have it both ways. It cannot reconcile its defense to the court, as grounds for remand, of *Old Dominion's* "equitable considerations" rationale, and, at the same time, refuse to address SPP's arguments demonstrating that this rationale did not support reexamination of the Waiver Orders.[72]

69 *Old Dominion* at 1230.

70 Remand Motion at 2.

71 Rehearing Order at PP 26-27; Initial Waiver Order at PP 53, 56; Waiver Request at 18.

72 *Cf. Williams Gas Processing*, 475 F.3d at 322 (agency may change course only when it provides a reasoned explanation for doing so); *Gen. Chem. Corp.*, 817 F.2d at 846 (finding an agency action arbitrary and capricious where the agency analysis was "inadequately explained").

3. *In All Other Respects,* Old Dominion *Validates the Commission's Waiver Orders*

The case presented in *Old Dominion* was not novel. To the contrary, the court described the legal principles at issue as "decidedly routine."[73] One such "decidedly routine" principle is, as the court explained, that the filed rate doctrine is satisfied when parties are on actual notice of the rate to be charged.[74] *Old Dominion* discussed a number of ways that legally sufficient notice could have been provided, but found that the petitioner failed to demonstrate that any applied in the facts presented.

The differences between *Old Dominion* and the instant case are clear. Indeed, when viewed in proper context, *Old Dominion* in fact *reinforces* the Commission's grant of waiver to SPP for the same reasons that it reinforced the Commission's denial of waiver requested in that prior case. *Old Dominion* instructs that, consistent with long-standing precedent, adequate advanced notice can take different forms. One such form is when parties are on actual notice of future charges.[75] Thus, there is nothing in *Old Dominion* to suggest that notice is "inadequate" when customers are invoiced in accordance with revenue crediting provisions that have been part of a Commission-

73 *Old Dominion* at 1226.

74 *Consol. Edison Co.*, 958 F.2d at 434 ("[W]here the purchaser has actual notice that the rate would be increased [. . .] the predictability-promoting function of [. . .] the filed rate doctrine is adequately served."); *see also Pub. Utils. Comm'n of Cal.*, 988 F.2d at 165 n.10 (quoting *Consol. Edison*, 958 F.2d at 434, to distinguish between the Natural Gas Act's statutorily mandated thirty days' notice between the filing for and the effective date of such an increase and "actual notice," which is the "essential requirement of the filed rate doctrine")).

75 *Consol. Edison*, 958 F.2d at 434 ("[W]here the purchaser has actual notice that the rate would be increased [. . .] the predictability-promoting function of [. . .] the filed rate doctrine is adequately served."); *see also Pub. Utils. Comm'n of Cal.*, 988 F.2d at 165 n.10 (quoting *Consol. Edison*, 958 F.2d at 434).

approved tariff for years. Such notice is not diminished or negated simply because the implementation of a tariff's filed rate is, by virtue of negotiations and system development work that were noticed and known to all affected parties, delayed. In stark contrast, when a party seeks a retroactive change to an express tariff provision to obtain more compensation than the filed tariff allowed—such as that requested in *Old Dominion*—denial of such a change on filed rate doctrine grounds is wholly appropriate.

Moreover, notwithstanding the Commission's implicit findings to the contrary, *Old Dominion* did not change anything regarding how the Commission should analyze requests for waivers. Nor does *Old Dominion* implicate any changes in facts or circumstances bearing on the specific findings upon which the Waiver Orders rested. The Commission's Remand Order therefore reverses a prior decision without proper explanation and without any demonstrable link to the lone development—i.e., issuance of the *Old Dominion* decision—that, according to the agency, necessitated reconsideration of its earlier determinations.[76]

C. The Commission Did Not Give Reasoned Consideration to SPP's Argument That Section I.7.1 Did Not Apply to Attachment Z2 Charges, Rendering Any Tariff Waiver Unnecessary

In order to withstand judicial scrutiny, a Commission order must be based on substantial evidence, must articulate a rational connection between the facts found and

[76] *E.g.*, *Gen. Chem. Corp.*, 817 F.2d at 846 (finding an agency action arbitrary and capricious where the agency analysis was "inadequately explained"); *cf. Exxon Mobil*, 315 F.3d at 310 ("There is, however, a serious glitch: The Commission failed to reconcile its decision at issue here with its previous opinions . . . ."); *Dominion Res.*, 286 F.3d at 592 (explaining that the Commission decision "represents a sharp and unexplained break with FERC precedent and is otherwise arbitrary and capricious"); *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1995) ("[W]here an agency departs from established precedent without a reasoned explanation, its decision will be vacated as arbitrary and capricious.").

the choice made, and must give reasoned consideration to the record evidence and arguments made before the agency.[77] The Remand Order failed to adhere to these standards, and thus is legally infirm.

In its post-remand brief, SPP raised for the Commission's consideration (for the second time) the issue of whether the billing limitation provisions of Section I.7.1 are applicable to initial implementation of Attachment Z2 charges. The Waiver Orders themselves never directly addressed the applicability of Section I.7.1; rather, the Commission seemed to presume (or else sidestepped altogether) the need for the waiver to ensure SPP's ability to enforce the filed rate provisions of Attachment Z2. SPP noted that its Waiver Request was filed "out of an abundance of caution" and without conceding that a Tariff waiver was required in order to implement Attachment Z2.[78] SPP also explained that historical CPO assessments under Attachment Z2 would be settled separately and were not part of initial settlements for transmission service.[79] Finally, SPP argued that Section I.7.1, by its terms, does not apply to billing adjustments associated with updates of estimated data, and that the provisional nature of initial transmission invoices, as indicated by study report notifications of potential future CPO assessments, arguably cast Attachment Z2 invoices outside the scope of Section I.7.1.[80]

In the Remand Order, the Commission summarily rejected all of these arguments, finding that SPP is obligated to invoice its customers monthly for all services provided

77 *E.g.*, *Ky. Pub. Serv. Comm'n*, 397 F.3d at 1008.

78 Waiver Request at 11.

79 *Id.*

80 SPP Post-Remand Brief at 26.

under the Tariff,[81] and that the separate settlement process developed to administer Attachment Z2 billing did not remove CPO assessments from coverage under Section I.7.1.[82] The Commission concluded that the billing adjustment constraints under Section I.7.1 "appl[y] to the transmission services charges in the historical period invoices," including charges, such as CPO assessments, that were not reflected in original transmission invoices sent to customers.[83]

The Commission should grant rehearing and find that Section I.7.1 does not apply to Attachment Z2 assessments. The Commission offers no response to the argument presented by SPP that Section I.7.1 is properly understood, and has historically been administered, to prevent untimely, "surprise" adjustments to previously issued invoices that, by all accounts, are presumed to be final.[84] Indeed, in other cases, the Commission has confirmed SPP's understanding as correct, finding that provisions like Section I.7.1 serve to provide rate certainty that would otherwise be absent if a utility could indefinitely and unilaterally alter prior billings and assess new charges to unwary customers.[85]

Attachment Z2 assessments represent separately-stated components of SPP's "filed rate," embedded in a stand-alone section of the Tariff, and fully noticed

81 Remand Order at P 47.

82 *Id.* at P 49.

83 *Id.* at P 47.

84 SPP Post-Remand Brief at 31-32.

85 *See, e.g.*, *N.Y. State Elec. & Gas*, 133 FERC ¶ 61,094, at PP 44-45.

since 2005.[86] Refusing to give effect to the rights and obligations memorialized in Attachment Z2 does not promote "rate certainty," but rather *undermines* it.

The Commission ignores these features of Attachment Z2 and fails to explain why CPO assessments should be treated, for purposes of Section I.7.1, in the same manner as untimely attempts to remedy a newly-discovered calculation error on previously issued invoices. In explaining that Attachment Z2 CPO costs for the historical period are reflected as initial settlements, SPP was not asserting that CPO costs do not arise in connection with transmission services, as the Commission appears to believe.[87] SPP's point was that historical CPO assessments are, necessarily, settled independently from other transmission charges and, as such, do not constitute a "correction or adjustment" to a previously-issued "bill" that should be time-barred under Section I.7.1.

A plain reading of Section I.7.1 makes clear the Commission's interpretive error in the Remand Order:

> Billing adjustments for reasons other than (a) the replacement of estimated data with actual data for service provided, or (b) provable meter error, shall be limited to those corrections and adjustments found to be

[86] *See* SPP Post-Remand Brief at 4 n.14 (explaining that, in some cases, Attachment Z2 assessments reflected claw backs of prior revenue payments).

[87] *See* Remand Order at PP 46-47. The Commission erroneously asserts that "SPP suggest[ed] that the charges for credit payment obligations for transmission service during the historical period are *not* an initial settlement for such transmission service . . . ." *Id.* at P 46 (emphasis added). In fact, SPP has argued that the invoices sent out in 2016 *are* initial Attachment Z2 settlements. *See id.* at P 31. The Commission's mischaracterization of SPP's argument demonstrates a lack of reasoned decision-making. *See Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299 (agency's failure to respond meaningfully to party's objections renders agency action arbitrary and capricious).

> appropriate for such service within one year *after rendition of the bill reflecting the actual data for such service*.[88]

This Tariff language is clear on its face—the one-year time limit begins to accrue from the date that a bill is rendered with *actual data* included. Prior to 2016, SPP was unable to calculate "actual data" reflecting Attachment Z2 CPOs because the process and software were still under development. Accordingly, any prior invoices that were issued did not include the *actual data* for Attachment Z2 obligations. Under the clear language of the Tariff, the one-year clock could not have begun to tick on Attachment Z2 obligations until SPP began issuing invoices reflecting Attachment Z2 calculations in 2016. The Commission's misinterpretation of the plain language of the Tariff is reversible error that the Commission should correct on rehearing.[89]

The Commission also summarily rejects SPP's argument that Attachment Z2 assessments can be reasonably analogized to updates of estimated billing data, which would take them outside the scope of Section I.7.1. The Commission acknowledges that study report notations of future CPO charges may serve as indications that as-billed transmission charges could be subject to future adjustment,[90] but finds that because SPP

88 Tariff § I.7.1 (emphasis added).

89 *City of Oswego v. FERC*, 97 F.3d 1490, 1498-99 (D.C. Cir 1996) (the Commission is not afforded deference when its interpretation is "plainly erroneous or inconsistent with [its] regulation"). Accordingly, the Commission in the Remand Order failed to undertake an "analysis of the critical phrases in [S]ection" I.7.1, which further contrasts this case from the *Seminole* case. *Seminole* at P 43.

90 Remand Order at P 48.

failed to estimate the size of any such payment obligations, "we cannot conclude that SPP provided estimated data contemplated by section I.7.1."[91]

Once again, the Commission is back-tracking on its previous factual findings without explanation. As the Commission and all involved parties concede, SPP was unable to estimate CPO assessments for transmission service requests evaluated during the historical period due to ongoing software and process development efforts and stakeholder negotiations to finalize implementation details. Yet despite these constraints, the Commission found that "transmission customers were on notice from both the study report and the provisions of Attachment Z2 that they could have directly assigned cost responsibility,"[92] and did not demand that SPP provide more comprehensive cost estimates. The Commission does not explain why it now holds SPP to an estimation requirement that it previously found to be both unrealistic and unnecessary. The Commission should grant rehearing to rectify these errors.[93]

91 *Id.* Indeed, the Commission again misreads the Tariff and, as such, imposes upon SPP an obligation that the Tariff does not require. Specifically, the Commission suggested that, while listing potential credit payment obligations in an Aggregate Facilities Study report could potentially provide notice, "without evidence that SPP estimated the size of any such *payment obligations*" the cited provision of Section I.7.1 does not apply. *Id.* (emphasis added). However, nowhere does Section I.7.1 require that SPP estimate *charges* (i.e., payment obligations) as a prerequisite to later adjustments—in this regard, the Commission confuses *data* with *charges.*

92 Rehearing Order at P 30. The Commission further explained that the "payment obligation arises under the Tariff" and because all transmission customers are bound to the terms of the Tariff, the absence of specific upgrade cost data in transmission service agreements did not preclude SPP from assessing Attachment Z2 costs. *Id*. at P 31.

93 *Williams Gas Processing*, 475 F.3d at 322; *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299.

D. Given the Irrational Outcomes and Recognized Inequities of Denying Effect to Attachment Z2, the Commission's Refusal to Exercise Its Remedial Discretion Was Plain Error

The consequences of the Remand Order are demonstrably unfair and illogical. Upgrade sponsors who funded system expansions on the basis of Attachment Z2's crediting provisions are denied duly-owed reimbursement of their investment. Users of these upgrades, who took service fully aware of Attachment Z2, and who benefited from the additional transmission capability provided by these upgrades, are off the hook for millions of dollars, notwithstanding that none of these users ever argued, much less showed, that they took service on the assumption that they would ultimately be excused from Attachment Z2 responsibilities by virtue of Section I.7.1.[94] The Commission's failure to come to grips with these significant problems renders its Remand Order arbitrary and capricious, and, therefore, unlawful.[95]

The Commissioners' characterizations of the Remand Order's outcome as "wholly inequitable"[96] and "unfair"[97] do not tell the full story. SPP commenced Attachment Z2 billing in November 2016, based on the authority granted in the Waiver Order. It now faces the daunting task of having to unwind almost $140 million of

94 *See supra* note 51.

95 *Ky. Pub. Serv. Comm'n*, 397 F.3d at 1008 (agency must confront and provide reasoned response to parties' objections); *see also Motor Vehicle Mfrs.*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); *Canadian Ass'n of Petroleum Producers*, 254 F.3d at 299.

96 Remand Order, Glick concurrence at P 1.

97 *Id.*, LaFleur concurrence at P 3.

Attachment Z2 settlements for the period from 2008 to 2015 as well as recalculate settlement amounts under Attachment Z2 from 2015 up to the present time (totaling more than $200 million), with no assurance that it will be able to claw back all credit amounts paid to upgrade sponsors. This is because, as SPP has already determined, certain generator owners who received credits have sold their assets. Credits have also been disbursed to non-jurisdictional entities, and recouping amounts paid to these entities may give rise to a separate set of legal and practical questions and challenges. Other intergenerational-type issues are implicated to the extent that any customers that paid CPO costs or received Attachment Z2 revenue credits are no longer taking service from SPP. Additionally, present and future Attachment Z2 settlements are premised on past Attachment Z2 payments, meaning that unwinding past Attachment Z2 settlements will have a profoundly complicating impact on SPP's current and future implementation of Attachment Z2 crediting and billing.[98] Many of the upgrade sponsors who will have to refund the credits they received for the 2008-2015 period may not be able to fully recover those amounts through future crediting.[99]

[98] Additionally, as noted above, *supra* note 21, the Remand Order wholly ignored that other provisions of the Tariff in addition to Section I.7.1 were waived as well. The Remand Order therefore improperly fails to consider or address the implications for these other waived Tariff provisions resulting from the Commission's retroactive mandate to unwind SPP's implementation of Attachment Z2 for most of the historical period. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (stating that an agency decision is arbitrary and capricious when the agency "entirely failed to consider an important aspect of the problem").

[99] This is because future transmission service customers will not be obligated to pay individual CPOs associated with those upgrades in sufficient magnitude for the upgrade sponsors to recover their investment. The revenue requirements of the Creditable Upgrades (which are a key factor in calculating CPOs for Network Integration Transmission Service) for those historical years will not be available

Moreover, the process for implementing refunds in accordance with the Remand Order is extraordinarily complex, potentially requiring significant system and software changes and the dedication of enormous manpower resources. SPP's ongoing efforts to develop a refund implementation plan has identified a host of practical and process issues that will take considerable time to resolve.

The Remand Order recognizes the Commission's broad remedial discretion under FPA section 309, but concludes, without any consideration of relative equities, that this is not a proper case for the exercise of such discretion. This approach represents an inexplicable departure from the Commission's prior policy of "balancing [relative] equities" when contemplating action that would upset the settled expectations of market participants.[100] Additionally, this conclusion starkly contradicts the very purpose of the Commission's FPA section 309 authority—i.e., to "perform any and all acts . . . as it may find necessary *to carry out the provisions of this chapter*."[101] By failing to exercise its discretionary authority, the Commission fails to carry out the important purpose of FPA section 205 to ensure that customers are charged, and investors are compensated at, just and reasonable rates for the services and upgrades that they use and fund, respectively.

in calculating future CPOs, so there will not be an adequate means to make up the lost historical credits in many cases.

100 *See PJM Interconnection*, 161 FERC ¶ 61,197, at P 175.

101 16 U.S.C. § 825h (emphasis added); *see, e.g., Verso*, 898 F.3d at 10 ("Section 309 accordingly permits FERC to advance remedies not expressly provided by the FPA, *as long as they are consistent with the Act*." (emphasis added) (citations omitted)). Requiring customers to pay for the upgrades that were used to accommodate their service, and allowing upgrade sponsors to recover their investment of such upgrades, is plainly "*consistent with the Act*."

Indeed, the only arguable countervailing justification offered by the Commission for giving effect to an admittedly "unfair" outcome is the hindsight suggestion that SPP "could have sought a delay of the effective date of applicable Tariff provisions until it was able to invoice [. . .] Attachment Z2" assessments.[102] Respectfully, this is a non-solution. Deferring the effective date of Attachment Z2 until such time as SPP and its stakeholders had worked out all process and software issues associated with Attachment Z2 revenue crediting implementation would also have necessarily entailed halting the processing of generator interconnection and transmission service requests, because the generator interconnection and aggregate transmission service study processes are iterative and rely on the results of earlier studies, and Attachment Z2 eligibility and crediting are necessary components to both processes.[103] Halting implementation of these critical processes pending resolution of Attachment Z2 issues would have resulted in unmanageable backlogs in SPP's already-overloaded study queues and, no doubt, would have engendered strong opposition and numerous legal complaints from SPP

102 Remand Order at P 53.

103 Delaying implementation of Attachment Z2 in the manner requested by the Commission would have either required putting interconnection and transmission service requests on hold pending resolution of Attachment Z2 implementation, or else "postponing" the effectiveness of Attachment Z2, which would have resulted in excusing customers who initiated generator interconnection or transmission service requests during the period from paying CPOs for which they were obligated under Tariff language that was previously adopted. To suggest that SPP could have simply avoided this entire problem by seeking a delay in Attachment Z2's effectiveness is, therefore, illogical. *Motor Vehicle Mfrs.*, 463 U.S. at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

stakeholders and customers. At the same time, resource additions, as well as important transmission system enhancements, would have been delayed for years.[104]

It is hard to conceive of a case more deserving of the Commission's remedial discretion. Even if the Commission is inclined to adhere to its exceedingly rigid interpretation of the filed rate doctrine, the equities weigh heavily in favor of excusing SPP from unwinding the Attachment Z2 settlements that have occurred. The necessary consequence of such rigid interpretation is a finding that SPP acted contrary to its Tariff in paying out and invoicing Attachment Z2 credits and charges in response to the Waiver Orders. In cases involving tariff violations, the courts have recognized the Commission's considerable latitude in assessing remedies.[105] In the circumstances presented here, the

[104] Moreover, because Attachment Z2 is SPP's means of complying with the Commission's Order No. 2003 requirement to provide crediting or "valuable transmission rights" to interconnection customers, delaying the effectiveness of Attachment Z2 until SPP could fully implement it would have left SPP without a means to comply with Order No. 2003's mandate. *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, 104 FERC 61,103, at PP 693-703 (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).

[105] A formidable line of cases confirms the Commission's broad discretion in matters involving remedies and refunds generally, as well as in situations involving the unwinding of prior settlements. *Town of Concord*, 955 F.2d at 76 (describing the agency discretion at its "zenith" when the challenged action relates to the fashioning of remedies); *Midwest Indep. Sys. Operator, Inc.*, 117 FERC ¶ 61,113, at PP 93-95 (2006) (stating that the Commission was exercising its remedial discretion in declining to order prior period transactions unwound, noting the substantial uncertainty created by post-hoc disruption of market results, even in the face of a Tariff violation); *see also Md. Pub. Serv. Comm.*, 123 FERC ¶ 61,169, at P 49 ("In a case involving changes to market design, we generally exercise our discretion over remedies and do not order refunds that require re-running [the] market."). Furthermore, because Attachment Z2 is effectively a cost allocation mechanism (i.e., it governs the allocation of costs to initial causers and future beneficiaries of transmission upgrades), the Commission should adhere to

Commission should exercise its broad remedial discretion in response to any Tariff violation deemed to be committed by SPP and find that "balancing of equities"[106] does not justify the toll imposed by forced unwinding of settled positions.

V. MOTION FOR CLARIFICATION

Ordering Paragraph (B) of the Remand Order directs SPP to provide refunds, "with interest calculated pursuant to 18 C.F.R. § 35.19a." To the extent that the Commission does not (as it should) grant rehearing as requested above, SPP seeks clarification that the interest obligation described in Ordering Paragraph (B) will apply to the actual recipients of payments resulting from settlements under Attachment Z2, and not to SPP. While SPP will serve as the conduit for the recovery and distribution of such payments, SPP is not properly the subject of any interest obligation. As the Commission has explained, its policy of requiring interest on refunds is intended to reflect the time-value of money held by the refunding entity.[107] In the circumstances here, any time-value benefits associated with monies paid by SPP would have been realized by the payment recipients, not SPP. Furthermore, the Commission has routinely determined, in the context of refunds, that regional transmission organizations must be able to recover not only the amount of the refund but any required interest, given their revenue neutral

its general policy of not ordering refunds in cost allocation cases. *See, e.g.*, *La. Pub. Serv. Comm'n*, 155 FERC ¶ 61,120, at PP 24-27 (explaining Commission policies with respect to refunds and noting that where a cost allocation is determined to be unlawful, but no over-recovery has occurred, the Commission traditionally declines to order refunds).

106 See *supra* note 100.

107 *New Charleston Power*, 83 FERC ¶ 61,281, at 62,168.

status.[108] Therefore, if the Commission does not grant rehearing, as requested, the Commission should expressly clarify that interest owed on any refunds arising out of this proceeding shall be the responsibility of the payment recipients.[109]

[108] *Pub. Serv. Comm'n of Wis.*, 156 FERC ¶ 61,205, at P 79 ("Moreover, in order to provide interest on refunds, as required by the Commission's regulations, MISO must logically charge mathematically corresponding interest on surcharges; MISO, as a non-profit entity, must fund the refunds entirely through surcharges. Additionally, to the extent that some LSEs initially paid fewer SSR costs than were just and reasonable, they had access to that capital during the interim period, which offsets the interest on surcharges that they are now assessed."); *see also Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057, at P 17 ("For the reasons explained below, we remedy the legal error . . . by directing SPP to bill . . . for the amounts . . . that SPP collected from ratepayers between April 1, 2012 and February 21, 2013, with interest . . . . Given SPP's not-for-profit status, we will not require it to issue refunds until it has received payment . . . ."); *id.* at P 21 n.39 ("Requiring SPP to pay refunds without authorizing the recovery of such funds from Tri-County would be inconsistent with Commission refund policy because SPP is a not-for-profit entity that is independent with no shareholders, and therefore ordering such refunds would lead to an undercollection of revenue by SPP." (citations omitted)).

[109] To the extent that the Commission declines to provide the requested clarification, SPP seeks rehearing, and specifies as error, any Commission ruling that would hold SPP responsible for any interest obligation associated with refunds ordered to be paid. Any such ruling would, as noted, be contrary to Commission precedent, arbitrary and capricious, and produce an outcome that is unjust and unreasonable. *New Charleston Power*, 83 FERC ¶ 61,281, at 62,167; *see also Alcoa*, 564 F.3d at 1347; *see also* cases cited *supra* note 108. Failure to ensure that SPP can recover the refund revenues and interest would be an unlawful departure from Commission precedent. *Williams Gas Processing*, 475 F.3d at 326-27, 330 ("Reasoned decisionmaking necessarily requires consideration of relevant precedent"); *PG&E Gas Transmission*, 315 F.3d at 388-90 (vacating and remanding orders in which the Commission "utterly failed to confront" and distinguish applicable precedent).

VI. CONCLUSION

For the reasons set forth herein, the Commission should grant rehearing of the Remand Order and reinstate the Waiver Orders.

Respectfully submitted,

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April 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, DC, this 1st day of April 2019.

/s/ Jeffrey G. DiSciullo

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REQUEST OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR REHEARING OF THE ORDER ON REMAND

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.	)	Docket Nos. ER16-1341-000
	)	ER16-1341-001

REQUEST OF OKLAHOMA GAS AND ELECTRIC COMPANY FOR REHEARING OF THE ORDER ON REMAND

Pursuant to Rule 713 of the Commission's rules, 18 CFR § 385.713, Oklahoma Gas and Electric Company ("OG&E") hereby requests rehearing of the Commission's February 28, 2019 Order captioned *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019)("*Order on Remand*"). The *Order on Remand* denied the request of the Southwest Power Pool, Inc. ("SPP") to implement Attachments J and Z2 of SPP's Open Access Transmission Tariff ("SPP Tariff") to enforce OG&E's rights to revenue credits for use of OG&E's transmission facilities during the "historical period" under the SPP Tariff and under OG&E's contract with SPP to sponsor specified transmission upgrades.

The Commission ignored OG&E's rights under a filed and effective tariff and under a contract protected by the *Mobile-Sierra* doctrine solely on the basis that Section I.7.1 of the SPP Tariff superseded other provisions of the tariff and OG&E's contractual rights. That provision does not do so and was never intended to do so, as shown by its language, history, and purpose, and by the Commission's own precedent. Unless first stayed and then reversed, the *Order on Remand* would lead to an unfair and inequitable result contrary to the expectations of the market participants, denying OG&E timely recovery for the costs of an important and necessary project that it funded in reliance on the express promise it would be repaid by the actual users of that

project, and allowing those users to free ride on the project by obtaining free transmission services for nearly a decade.

Neither the filed rate doctrine nor any other aspect of the FPA countenances, much less requires, this absurd result, which is also directly contrary to the expressly stated purposes of Order 1000.[1] The Commission should reinstate its prior rulings permitting OG&E to timely recover its costs of building a transmission upgrade from the actual users of that upgrade.

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SPECIFICATIONS OF ERROR

1. The Commission erred in refusing to enforce the provisions of the SPP Tariff entitling OG&E to recover its costs of building a transmission upgrade from the actual past users of that upgrade.

2. The Commission erred in denying OG&E its contractual right to recover its costs of building a transmission upgrade from the actual past users of that upgrade.

[1] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, Order No. 1000,* FERC Stats. & Regs. ¶ 31,323 (2011) ("Order 1000"), *order on reh'g,* Order No. 1000-A, 139 FERC ¶ 61,132, *order on reh'g and clarification,* Order No. 1000-B, 141 FERC ¶ 61,044 (2012) , *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC,* 762 F.3d 41 (D.C. Cir. 2014).

3. The Commission erred in ruling that a single provision of the SPP Tariff, Section I.7.1, which was designed for another purpose, applied to overrule OG&E's tariff and contractual rights.

STATEMENT OF ISSUES

1. The decision in *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018), does not support the *Order on Remand*.

2. The *Order on Remand i*mproperly refused to recognize and enforce the provisions of the SPP Tariff entitling OG&E to recover its costs of building a transmission upgrade from the past users of that upgrade. The ruling that Section I.7.1 of the SPP Tariff superseded other provisions of the tariff is inconsistent with the language, history, and purpose of that provision and with the Commission's own precedent. *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016), *reh'g denied,* 161 FERC ¶ 61,144 (2017); *Seminole Electric Cooperative, Inc. v. Fla. Light & Power*. 139 FERC ¶ 61,254, *reh'g denied,* 153 FERC ¶ 61,037, *pet. for review denied*, 861 F.3d 230 (D.C. Cir. 2017); *N.Y. State Elec. & Gas Corp*, 133 FERC ¶ 61,094 (2010), *reh'g denied*, 142 FERC ¶ 61,151 (2013). *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698 (D.C. Cir. 2010) (citing Restatement (Second) of Contracts § 203(a) (2009)); *High Island Offshore System, L.L.C.*, 138 FERC ¶ 61,114 (2012); *PJM*, 139 FERC ¶ 61,030); *Vaalidus Reinsurance, Ltd. v. United States*, 786 F.3d 1039 (D.C. Cir. 2015); *Boston Edison Co. v. FERC*, 856 F.2d 361 (1st Cir. 1988); *California ex rel. Brown v. Powerex Corp*., 135 FERC ¶ 61,178 (2011); *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103, at 61,643-44 (1993). *Towns of Concord. v. FERC*, 955 F.2d 67 (D.C. Cir. 1992).

3. The *Order on Remand* also improperly refused, on apparently the same basis, to recognize and enforce OG&E's contractual rights to recovery of its costs of building a

transmission upgrade from the past users of that upgrade. *Morgan Stanley v. Pub. Util. Dist. No. 1 of Snohomish City., Wash.*, 554 U.S. 527 (2008); *Papago Tribal Util. Auth. v. FERC,* 723 F.2d 950 (D.C. Cir. 1983); *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016), *reh'g denied,* 161 FERC ¶ 61,144 (2017); *Seminole[Electric Cooperative, Inc. v. Fla. Light & Power*. 139 FERC ¶ 61,254, *reh'g denied,* 153 FERC ¶ 61,037, *pet. for review denied,* 861 F.3d 230 (D.C. Cir. 2017); *N.Y. State Elec. & Gas Corp,* 133 FERC ¶ 61,094 (2010), *reh'g denied,* 142 FERC ¶ 61,151 (2013). *Colo. Interstate Gas Co. v. FER*C, 599 F.3d 698 (D.C. Cir. 2010) (citing Restatement (Second) of Contracts § 203(a) (2009)); *High Island Offshore System, L.L.C.*, 138 FERC ¶ 61,114 (2012); *PJM*, 139 FERC ¶ 61,030); *Vaalidus Reinsurance, Ltd. v. United States,* 786 F.3d 1039 (D.C. Cir. 2015); *Boston Edison Co. v. FERC,* 856 F.2d 361 (1st Cir. 1988); *California ex rel. Brown v. Powerex Corp*., 135 FERC ¶ 61,178 (2011); *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103 (1993). *Towns of Concord v. FERC,* 955 F.2d 67, 72-73 (D.C. Cir. 1992).

4. The Commission erred in ruling that a single provision of the SPP Tariff, Section I.7.1, which was designed for another purpose, applied to overrule OG&E's tariff and contractual rights. *Seminole Electric Cooperative, Inc. v. Fla. Light & Power*. 139 FERC ¶ 61,254, *reh'g denied,* 153 FERC ¶ 61,037, *pet. for review denied,* 861 F.3d 230 (D.C. Cir. 2017); *N.Y. State Elec. & Gas Corp,* 133 FERC ¶ 61,094 (2010), *reh'g denied,* 142 FERC ¶ 61,151 (2013). *Colo. Interstate Gas Co. v. FER*C, 599 F.3d 698 (D.C. Cir. 2010) (citing Restatement (Second) of Contracts § 203(a) (2009)); *High Island Offshore System, L.L.C.*, 138 FERC ¶ 61,114 (2012); *PJM*, 139 FERC ¶ 61,030); *Vaalidus Reinsurance, Ltd. v. United States,* 786 F.3d 1039 (D.C. Cir. 2015); *Boston Edison Co. v. FERC,* 856 F.2d 361 (1st Cir. 1988); *California ex rel. Brown v. Powerex Corp*., 135 FERC ¶ 61,178 (2011); *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103 (1993). *Towns of Concord v. FERC,* 955 F.2d 67, 72-73 (D.C. Cir. 1992).

FACTUAL BACKGROUND

A. OG&E's Sponsored Upgrade Agreement

In December 2008, OG&E executed a Sponsored Upgrade Agreement with SPP for the 345 kV "Northwest-to-Woodward" transmission upgrade project, better known as the "Windspeed Transmission Line." The line was built so that generators could unlock the value of wind in the very sparsely populated areas of western Oklahoma by allowing that wind power to be transmitted to population centers elsewhere. Unlocking and integrating renewable resources like wind generation that are likely to be remote from demand centers was a key public interest need underlying the Commission's adoption, and the court of appeals' affirmance, of Order 1000.[2]

The Commission also recognized in Order 1000 that "constructing new transmission facilities requires a significant amount of capital and, therefore, a threshold consideration for any company considering investing in transmission is whether it will have a reasonable opportunity to recover its costs," and that difficulties in ascertaining the beneficiaries of new and improved transmission facilities "creates significant risk for transmission developers that they will have no

[2] See *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 51 (D.C. Cir. 2014)(citing 2008 and 2009 NERC projections that a 9.5% to 15% increase in circuit miles of transmission would be needed to maintain reliability and to "unlock" wind and other renewable generation, and a U.S. Department of Energy determination that "under any future electric industry scenario" a "significant expansion of the transmission grid will be required" to "increase reliability, reduce costly congestion and line losses, and supply access to low-cost remote resources, including renewables."); *id.* at 65-66, 89 (noting and deferring to the Commission's finding that the public interest required changes to existing transmission planning and cost allocation practices due to "'significant changes in the nation's electric power industry, including the proliferation of renewable energy resources," and that these changes included a longer-term period of investment in new transmission facilities driven in large part by increasing reliance on natural gas and large-scale renewable generation).

identified group of customers from which to recover the cost of their investment."[3] The Commission found that the "risk of the free rider problems associated with new transmission investment is particularly high for projects that affect multiple utilities' transmission systems and therefore may have multiple beneficiaries," and that "a cost allocation method that relies exclusively on a participant funding approach, without respect to other beneficiaries of a transmission facility, increases this incentive and, in turn, the likelihood that needed transmission facilities will not be constructed in a timely manner."[4] Finally, the Commission "anticipated that such misalignment of incentives would become more acute" due to the "growing need for new transmission facilities that cross . . . regions" created by "the expansion of regional power markets," a situation made even more prevalent by, among other things, "increasing adoption of state resource policies, such as renewable portfolio standards."[5] "In short, the Commission recognized that, unless costs were allocated to those who benefit, needed expansion and improvement of the power grid would not likely occur." [6]

The Sponsored Upgrade Agreement was a direct response to circumstances of the very type described by Order 1000. Because the project was designed to induce the development of wind generation, there was, in the words of Order 1000, "no identified group of customers from which [OG&E could] recover the cost of their investment." Thus, even though Western Oklahoma is rich in wind resources, in the years before OG&E committed to fund the Windspeed Transmission Line the pace of wind development there had been slow due to the lack

[3] *Id*. at 82 (citing Order 1000 at ¶ 485).

[4] *Id*. (quoting Order 1000 at ¶ 486).

[5] *Id*. (quoting Order 1000 at ¶ 484).

[6] *Id*. at 82-83.

of sufficient transmission capacity to move wind-generated energy from Western Oklahoma to customer load centers.

In order to resolve this conundrum, OG&E agreed under the Sponsored Upgrade Agreement to pay the Directly Assigned Upgrade Costs of the Northwest-to-Woodward Sponsored Upgrade "pursuant to Attachment J of the Tariff," and SPP in turn agreed to "provide Project Sponsor [OG&E] with revenue credits pursuant to Attachment Z2 of the Tariff." The contract was amended February 19, 2009.[7] SPP filed the Agreement and amendment with the Commission on March 31, 2009 in Docket No. ER09-928. The Commission accepted the Agreement, and it became SPP Service Agreement 1764. SPP and its stakeholders had also developed tariff revisions to provide the specificity necessary to calculate the revenue credits, and the Commission also accepted those, with an effective date of May 27, 2008.[8]

Attachment J to the Sponsored Upgrade Agreement provided that the credits were the "exclusive compensation of the Project Sponsor under this Agreement."[9] The Agreement was to terminate once SPP "has fulfilled its obligation to pay" OG&E "all revenue credits" pursuant to its terms, thus contractually committing SPP to pay Attachment Z2 credits to OG&E until it fully recovers its costs of building the Windspeed Transmission Line.

B. OG&E's Reliance on the Agreement and the Tariff in Constructing the Windspeed Transmission Project

OG&E advanced the costs of the Windspeed Transmission Line upgrade project on the express understanding that its costs would be reimbursed through the credits. This understanding was reflected not only in the Agreement, but also in Attachment Z2 of the SPP Tariff, which

[7] Sponsored Upgrade Agreement, Section 3.0. A copy of the Sponsored Upgrade Agreement is attached hereto as Attachment 1.

[8] *Sw. Power Pool, Inc.*, Letter Order, Docket Nos.ER08-746-001, *et al.* (August 28, 2008).

[9] *Id.*

requires a transmission customer to pay credits for new transmission service "that could not be provided but for one or more Creditable Upgrades[.]" Thus, SPP is contractually committed to pay Attachment Z2 credits to OG&E, funded by the actual users of the project, until OG&E has fully recovered the costs it incurred to build the Windspeed Transmission Line.

The Windspeed line would not have been built were it not for the Z2 funding option, and the renewable wind energy of the very type that Order 1000 was designed to foster also could not have been built. The project was a success, and Xcel Energy Services Inc. ("Xcel"), American Electric Power Service Corporation's (AEP), Kansas Electric Power Cooperative, Inc. (KEPCo), and other parties in the area used it so heavily that the line became overloaded and a second line had to be built. Yet Xcel and these other parties, having so heavily and directly benefited from the line, now seek to avoid paying OG&E anything for its use for a multi-year period.

As is the case with many transmission upgrade projects,[10] calculation of the incremental use each transmission customer makes of a particular Creditable Upgrade under Attachment Z2 was the subject of lengthy discussion among the stakeholders and consideration by SPP. The tariff clarifications adopted in 2008 did not eliminate the substantial complexity inherent in the process of determining the beneficiaries of a project intended to serve a broad and undeveloped market, rather than an existing identifiable group of beneficiaries, again precisely the type of challenge the Commission had recognized in Order 1000. This calculation was not practicable for SPP to accomplish within a year, as SPP notified its stakeholders throughout the process.

[10] For example, litigation over allocation of the cost of high voltage transmission lines in PJM lasted more than 13 years before the Commission approved a contested settlement. *PJM Interconnection, L.L.C.*, 163 FERC ¶ 61,168 (2018). That approval is currently subject to requests for rehearing and clarification. *See, e.g.*, Request for Clarification or, in the Alternative, Rehearing of Linden VT, LLC, Docket No. EL05-121-013 (filed Jul. 2, 2018). The Commission has approved transmission cost allocation methodologies specifically because they allocate costs to beneficiaries "over time." *PJM Interconnection, L.L.C.*, 142 FERC ¶ 61,214 at PP 412-413, 417.

SPP and its stakeholders thus agreed to develop a more detailed process and calculation methodology so that SPP could effectively implement the revenue crediting process.

The first step in this process was the creation of a task force to develop and recommend specific processes and methods for the calculation of Attachment Z2 revenue credits, a process that culminated in a June 2011 white paper. That process was approved by the SPP's Market Operations and Policy Committee (MOPC), which then directed that software development proceed. The MOPC included representatives of the relevant stakeholders, including Xcel, AEP, and KEPco.[11] The complexity of the calculations and the voluminous nature of the data led to delays in development of the software, and eventually to the replacement of the original vendor, but the software process became operational in the second quarter of 2016. SPP then began to process the historical data to calculate the credit payment obligations due to upgrade sponsors, collected those credit payments from the appropriate entities, and processed payments in accordance with Attachment Z2.[12]

The credit charges and payments were invoiced in the fourth quarter of 2016. Up to that point, OG&E and other project sponsors had not received any recovery of the funds they had fronted to build these projects, even though Xcel, AEP, KEPco, and others had been using them for years, overloading them to such a degree that an additional line had to be built. Again, the difficulty of implementing these charges was contemplated not only by all market participants at the time, but by Order 1000 itself, which noted the "difficulties in ascertaining the beneficiaries of new and improved transmission facilities." As a result, OG&E was forced to wait many years before it could begin to receive its revenue credits as provided by the Agreement.

[11] *See, e.g.,,* MOPC minutes of July 2011 meeting at pp. 9-14 (showing the participation of these parties and many others, available at

http://www.spp.org/documents/15073/mopc%20meeting%20minutes%20july%202011.pdf

[12] The history of this process is laid out in more detail in SPP's Waiver Request, at 4-8.

All stakeholders were fully aware that this calculation was being undertaken, that a software solution to this determination would take a long time to complete, and that an allocation to each user of the upgrade of its share of the upgrade costs would be made once it was completed.[13] Nowhere in this process was there any indication that such a process was to be cut short or limited by a tariff provision designed to limit the time period for correcting final invoices and that would be applicable only after the software solution had been implemented and final and completed invoices issued.

C. The Prior Proceedings

After user liability for the upgrade for the historical period was determined, SPP sought to bill users of the upgrade as required by its tariff and by its contract with OG&E. Out of an abundance of caution, SPP sought certain waivers to implement the revenue crediting plan.[14] One of the waivers at issue involved Section I.7.1 of the SPP Tariff, which reads as follows:

> Billing adjustments for reasons other than (a) the replacement of estimated data with actual data for service provided, or (b) provable meter error, shall be limited to those corrections and adjustments found to be appropriate for such service within one year after rendition of the bill reflecting the actual data for such service

SPP believed that a waiver of this provision was not necessary because the one-year limitation was intended to apply to adjustments to amounts credited and billed, and not to the initial

[13] *See* SPP Waiver Request at 17, noting that SPP's stakeholders had worked closely with SPP throughout the development of the processes and calculations necessary for implementation, that SPP had been fully transparent about the process and had provided regular updates on the status, and that "the intention of SPP and its stakeholders was always to account for the delay by calculating the credit payment obligations back to the date the first credit payment obligations was due," citing to years worth of meeting minutes setting all of this out.

[14] *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016), *reh'g denied*, 161 FERC ¶ 61,144 (2017) ("*July 2016 Order*").

assessment and settlement of costs such as the creditable upgrade cost allocation, but sought the waiver for avoidance of doubt.[15]

The Commission granted the waiver, and thus did not need to reach SPP's contention that it was unnecessary in the first instance. The Commission found that SPP had "acted in good faith," had made "concerted efforts to implement the revenue crediting process," had "worked closely with stakeholders, providing regular updates on the status of the project and providing numerous informational sessions and trainings on the Attachment Z2 implementation," thus providing sufficient "notice of possible cost impacts."[16] The Commission further found a concrete need for SPP "to implement the revenue crediting process in its currently effective Tariff" and to "ensure that upgrade sponsors are properly compensated in accordance with the revenue crediting process under the Tariff."[17]

Rejecting the claim that granting the waiver would lead to "undesirable consequences," the Commission found that "the revenue crediting provisions in Attachment Z2 were accepted by the Commission and are included in the currently effective Tariff," that "[s]takeholders have been on notice of these provisions and that SPP has been working to implement the crediting process for the historical period," and that "the waiver will permit SPP to provide credits to all upgrade sponsors on a consistent basis, and denial of its waiver request would cause harm to upgrade sponsors, who funded projects with the expectation of receiving credit payments if the upgrades were subsequently used for transmission service."[18] Finally, the Commission found that granting the waiver request would not harm third parties because the "compensation that

[15] *See* Waiver Request at 11, noting that Section I.7.1, by its terms, applies only to adjustments and corrections of previously rendered billings.

[16] *July 2016 Order*, at P 53.

[17] *Id*. at P 55.

[18] *Id*. at P 56.

these upgrade sponsors are entitled to would come from transmission customers who have benefited from upgrades paid for by upgrade sponsors," and because "the largest shift in revenue requirements for any single zone is expected to be small (i.e., four hundredths of one percent of that zone's revenue requirement or an average bill impact of less than $40 per year)." [19]

On rehearing the Commission fully affirmed these findings.[20] It found that "granting the waiver would allow SPP to implement the revenue crediting process in its currently effective Tariff and would ensure that upgrade sponsors are properly compensated in accordance with the revenue crediting process under the Tariff." [21] It noted that "SPP had been providing all the notice it was able to provide," and thus acted good faith, that "the revenue crediting provisions in Attachment Z2 had been accepted by the Commission and are included in the currently effective Tariff," and that "[a]s a result stakeholders had been "on notice of these provisions and that SPP has been working to implement the crediting process for the historical period."[22] It further found that "even though the agreements did not list specific costs for these upgrades, the transmission customers were on notice from both the study report and the provisions of Attachment Z2 that they could have directly assigned cost responsibility,"[23] and that two parties who contested the waiver, Xcel and AEP, "conceded that they received notice of their obligation to compensate upgrade sponsors from the provisions contained within Attachment Z2."[24]

The Commission further explained that the "compensation that upgrade sponsors are entitled to would come from transmission customers who have benefited from the upgrades and

[19] *Id*. at PP 56-57.

[20] *Southwest Power Pool, Inc.*, 161 FERC ¶ 61,144 (2017)("*Rehearing Order*").

[21] *Rehearing Order* at P 26.

[22] *Id.* at P 18.

[23] *Id*. at P 30.

[24] *Order on Remand,* P 9 (citing *Rehearing Order* at P 29).

from the funds that should have been paid as credits during the historical period" when SPP was incapable of implementing revenue crediting.[25] The Commission also noted that claims of burden based on a one-time payment of charges that accrued over an extended period of time, or on claims that SPP was assessing charges alleged to be incorrect and excessive, did not undermine the need to impose a crediting mechanism, and could be dealt with through a stakeholder payment plan, if the stakeholders so desired, or in separate proceedings to address contentions that any charges were excessive or unexpected.[26]

After the Commission's affirmance of its position on rehearing, Xcel, which had been allocated costs for its past use of OG&E's upgrade, petitioned for review of the Commission's decision. The Commission sought and received a voluntary remand of that petition to consider the effect of the intervening decision in *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018). A "decidedly routine" case that applied "emphatic rules" that are "not in question, *Old Dominion* held that the Commission cannot simply ignore tariff provisions on equitable grounds to allow an after-the-fact exception to an explicit price cap in a tariff due to unforeseen weather conditions (in that case the 2014 "Polar Vortex").

On remand, OG&E and other parties explained that this case bears little resemblance to *Old Dominion*. SPP has sought here to enforce its tariff and OG&E's contractual right to reimbursement for its sponsored upgrade, consistent with the expectations of the market participants. At the time the upgrade was constructed and placed into service, market participants were made fully aware, and continued to be made aware throughout the process of implementation, that they would be liable for these costs once they were determined and fixed. OG&E also explained that the Oklahoma Corporation Commission ("OCC") pre-approved the

[25] *Rehearing Order*. at P 20.

[26] *Rehearing Order* at PP 21-22.

costs of the upgrade based on the Sponsored Upgrade Agreement between OG&E and SPP under which OG&E and its customers would initially be responsible for the full revenue requirement of the line, but would receive credits as others used the line.[27] The circumstances in this case are thus directly contrary to those in *Old Dominion*, where the applicant sought to amend a tariff rate cap after the fact due to unforeseen circumstances, and where there was no tariff or contractual agreement in place granting the right to compensation, but merely a promise to seek "as soon as practical" a "retroactive waiver" of the rate cap.[28]

D. The Commission's Order on Remand

On remand the Commission abruptly changed course, with two separate opinions decrying the inequity of the result, and suggested for the first time in the years that this proceeding has been pending that OG&E might not be entitled to full recovery of its upgrade costs from historical users of that upgrade. The Commission did not overturn any of the findings that it had made previously, including that

(a) SPP sought to implement the revenue crediting process in Attachment Z2, which had been accepted by the Commission and included in the currently effective SPP Tariff;

(b) the process was intended to ensure that upgrade sponsors are properly compensated in accordance with the revenue crediting process under the SPP Tariff by the transmission customers who have benefited from the upgrades;

(c) SPP was providing all the actual notice it was able to provide, and had acted good faith; and

[27] *Oklahoma Gas and Electric Co*., Application at Ex. PLC-1, Cause No. PUD 200800148 (Okla. Corp. Comm'n May 19, 2008), Direct Testimony of Philip L. Crissup, at 8-9.

[28] 892 F.3d at 1229.

(d) stakeholders had been on notice throughout the historical period of the revenue crediting provisions in the SPP Tariff, and that SPP was working to implement the crediting process for the period, even though the specific costs for these upgrades were not yet known.

Instead, the Commission based its decision solely on Section I.7.1 of the SPP Tariff. The Commission did not, however, analyze the language, history, or purpose of this provision, or try to harmonize it with other provisions of the tariff or with OG&E's contractual rights. It simply pronounced that "Attachment Z2 credits are charges directly related to requests for transmission service and should have been reflected in the monthly invoices for transmission service, as required by section I.7.1."[29] Apparently based on this pronouncement of the supposedly preclusive effects of Section I.7.1, the Commission expressly declined to consider "any of the parties' cost causation, contractual, tariff violation, or equitable arguments (e.g., whether the Commission granted the waiver on equitable grounds and whether the Commission properly applied the four-part waiver criteria)."[30]

The Commission did not explain why it was refusing to consider OG&E's contractual, tariff violation, and cost causation arguments. It merely cited in a footnote, without any discussion, two decisions from the *Old Dominion* proceeding. The cited portions of those decisions merely state that in the *Old Dominion* proceeding the Commission did not need to reach "equitable arguments" that might support "impermissible retroactive relief." [31] These decisions do not address in any way OG&E's arguments that its contract and tariff rights have been violated by the Commission's enforcement of its erroneous reading of one provision of the

[29] *Order on Remand* at P 49.

[30] *Id. at* P 55.

[31] *See Old Dominion Elec. Coop*., 151 FERC ¶ 61,207 at P 48 (declining to consider equitable argument to vary tariff provisions); *Old Dominion Elec. Coop*., 154 FERC ¶ 61,155 at P 26. (same where no notice given, and also refusing to provide a detailed analysis of whether the request met the Commission's waiver standards.)

tariff, Section I.7.1 to the exclusion of these other rights. OG&E is seeking to enforce its contact and tariff rights, not to override a tariff violation based on equitable considerations.

As noted above, *Old Dominion* is distinguishable from this case on numerous other grounds as well. Indeed, in *Old Dominion* the generators had a "contractual obligation to offer full capacity into the day-ahead market at a price not to exceed $1,000/megawatt-hour,"[32] and thus the waiver sought in that case would have violated, not helped to fulfill, both a contractual obligation and a tariff cap. *Old Dominion* cannot support the Commission's decision to ignore OG&E's tariff and contractual rights here.

The Commission likewise failed to explain why it should be permitted to elevate and enforce its understanding of one provision of the tariff, Section I.7.1, over other provisions of the tariff that gave OG&E the right to payments from the actual users of its creditable upgrades. Again, a mere citation to *Old Dominion*, which concerned an attempt to override tariff and contractual and provisions on equitable grounds alone, cannot serve to address OG&E's arguments that in this case its tariff and contractual rights would be violated were it not permitted to recover these payments.

ARGUMENT

As the Commission recognized in the *Order on Remand*, citing Attachment Z2, Section II of the SPP tariff, the "revenue credits provided to a customer that has been directly assigned network upgrade costs are funded by and recoverable from transmission customers taking new transmission service that could not have been provided 'but for' the Creditable Upgrade, in the form of credit payment obligations."[33] It is undisputed in this case that OG&E provided a creditable upgrade for which it is entitled to recover costs from users of that upgrade. The

[32] 892 F.3d at 1229.

[33] *Order on Remand*, at P 4.

Commission's prior orders, which were reversed by the *Order on Remand*, preserved OG&E's rights under the SPP Tariff to recover network upgrade costs from historical transmission customers taking new transmission service that could not have been provided "but for" the upgrade. The *Order on Remand* abrogates those rights.

A. The *Order on Remand* Violates OG&E's Rights under the SPP Tariff

1. *Old Dominion* does not address, much less resolve, the issue

The ostensible ground for the Commission's refusal to defend its prior orders on appeal, leading to its reversal of position and abrogation of OG&E's contractual and tariff rights, was the intervening court of appeals decision in *Old Dominion.* *Old Dominion* held that a rate cap in a tariff could not be amended retroactively simply because unforeseen circumstances made its enforcement arguably inequitable. The decision does not question, much less abrogate, basic rules of tariff and contract interpretation, including that where practicable a tariff must be interpreted as a whole, giving meaning to all provisions, if possible,[34] and that interpretations that bring about an anomalous result are to be avoided when other interpretations are available.[35] The question of how to address one provision of a tariff that is argued to conflict with other tariff provisions or contractual rights was not raised in *Old Dominion*, where the claim was that an admitted tariff violation should be excused on equitable grounds. And as the separate opinions accompanying the *Order on Remand* make clear, the result reached by that order is highly anomalous and inequitable.

[34] *See Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703 (D.C. Cir. 2010) (citing Restatement (Second) of Contracts § 203(a) (2009)); *High Island Offshore System, L.L.C.*, 138 FERC ¶ 61,114, at P 21 (2012); *PJM*, 139 FERC ¶ 61,030 at P 33.

[35] *See Vaalidus Reinsurance, Ltd. v. United States*, 786 F.3d 1039, 1045-46 (D.C. Cir. 2015).

The court of appeals also stated in *Old Dominion* that no violation of the filed rate doctrine occurs when "buyers are on adequate [advance] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service."[36] Here as noted above the Commission found – a finding that was not overturned in the *Order On Remand* – that buyers had ample and consistent actual notice that the amounts they were invoiced for transmission services were not final, and that a process was underway to fix the amounts they would be charged for their use of OG&E's creditable upgrade. *Old Dominion* thus simply does not address the circumstances present in this case, where OG&E's claims are not based on after-the-fact equitable arguments, but on pre-existing tariff and contractual rights.

2. Section I.7.1 does not override OG&E's tariff rights

Because the *Order on Remand* incorrectly frames the issue as one of whether equitable concerns can override the clear terms of a tariff, it does not address the real issue in the case -- whether Section I.7.1 can and should be read to override OG&E's right under the SPP Tariff to reimbursement. As noted above, the Commission expressly stated that it need not reach OG&E's "tariff violation" arguments, and cited in support of that conclusion two cases that dealt only with claims that equitable considerations should override a tariff provision, and not with a claim such as OG&E's that the Commission's decision itself violates a filed and effective provision of the applicable tariff.

The closest the Commission comes to addressing this issue is its statement that "enforcing a tariff provision that places a time limitation on the correction of invoices (e.g., a time bar provision) is consistent with the filed rate doctrine, even where such provision results in

[36] 892 F.3d at 1231 (quoting *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).

a lack of refunds for a violation of the filed rate."[37] This at least suggests, although the Commission never squarely grapples with the issue, that the Commission may intend to conclude that Section I.7.1 is the type of time bar provision that has been held to override tariff rights.

If it were the Commission's intention to so conclude, however, it would be in error. First, as both OG&E and SPP have set forth, while Section I.7.1 does set a time limitation on "corrections and adjustments" of invoices, that is not what is at issue in this case. Here SPP did not send invoices that purported to be full and final bills under the tariff, and then seek years later to correct or adjust for alleged errors in those invoices. Rather, the invoices were sent with express notice to, and the understanding of, all parties that the amounts due and owing for use of OG&E's creditable upgrades remained to be calculated. This process could not, as noted at p. 8 & n.9 above, practicably be accomplished within a one-year timeframe, and there is no evidence anyone ever intended that the process would be limited by an artificial one-year timeframe. The Commission's suggestion that a time limitation on the "correction" of invoices could serve to cut off the contractual and tariff rights of OG&E and others to recover from past users the costs of creditable upgrades is thus erroneous.

The error is also readily apparent from looking at the cases the Commission cites for its stated proposition. The Commission does not discuss any of these cases or attempt to explain how they support its conclusion. A review of them makes clear that tariff rights can be overcome by a "time bar provision" only if the provision represents a "knowing waiver" of rights under a tariff, and if the provision expressly requires not only that "corrections" to invoices be made within the time period, but also any challenges to the "propriety" or "correctness" of the invoices. In other words, the language must be so broad as to make clear that a party such as

[37] *Order on Remand*, P 50.

OG&E has actually waived its right to insist on enforcement of the tariff or contract, if a resulting payment is charged to a buyer outside the established time. The Commission has not found, and could not properly find, that Section I.7.1 is such a provision.

The Commission's first supportive citation is to *Seminole Electric Cooperative, Inc. v. Fla. Light & Power*.[38] The provision at issue in *Seminole* allowed a customer to "challenge the correctness of any bill rendered under the Tariff no later than twenty-four (24) months after the date the bill was rendered," and further provided the bill "will be binding on the Customer twenty-four months after the bill is rendered or adjusted" unless such a challenge is made. The provision covered both challenges to the ""the arithmetical accuracy of the bill" and to the "use of the correct rate and billing determinants for the service provided."[39] The Commission emphasized that the barred challenges were to "both 'the arithmetical accuracy of the bill' *and* 'the use of the correct rate and billing determinants for the service provided"[40] in concluding "based on an analysis of the critical phrases" in the provision that it represented "the parties' knowing waiver of their statutory right for refunds for violations of the filed rate that fall outside the time limitation." [41]

Section I.7.1 does not contain language constituting a knowing waiver of OG&E's rights to payments under the tariff, or the rights of other providers of creditable upgrades, simply because the process of ascertaining the amounts of such payments goes beyond one year. Nor is there any evidence that was ever the intent of SPP, OG&E, or any other market participant. To

[38] 139 FERC ¶ 61,254, *reh'g denied*, 153 FERC ¶ 61,037, *pet. for review denied*, 861 F.3d 230 (D.C. Cir. 2017)].

[39] *Id.*. at P 35.

[40] *Id.*. at P 42 (emphasis in original).

[41] *Id.*at P 43 (stating that the provision must reflect the parties' "knowing waiver of their right to refunds for violations of the filed rate.").

the contrary, the limitation is only as to matters of "correction and adjustment," and the Commission's precedent makes clear that such language is insufficient to preclude enforcement of OG&E's rights under a filed rate.[42] And as set out above, given the difficult and time-consuming nature of determining the proper cost allocations for transmission projects such as the Windspeed Transmission line, it would be nonsensical to conclude that OG&E somehow "knowingly waived" its right to payments from users of that line if the cost allocation determinations could not be completed within a one-year timeframe. Section I.7.1 addresses billing errors, not the issue presented here.

The Commission also cited two decisions in *N.Y. State Elec. & Gas Corp,*[43] but that citation is puzzling. The first cited decision states expressly that in the presence of extraordinary circumstances the Commission has ordered the correction of finalized invoices when it has determined that "significant injustice" would result in the absence of action, though it held in the circumstances of that case that no significant injustice would result.[44] Here the significant injustice of the result is manifest, and is eloquently described in the separate statements of Commissioner LaFleur and Commissioner Glick. In the cited rehearing decision, the Commission confirmed that it would not "automatically reopen billing solely because one market participant paid too much and others paid too little at some point in the past due to a billing

[42] *See also Boston Edison Co. v. FERC*, 856 F.2d 361, 371 (1st Cir. 1988) (affirming FERC finding that challenges to the "propriety" of a bill include claims of tariff violations); *California ex rel. Brown v. Powerex Corp*., 135 FERC ¶ 61,178, at P 93 (2011) ("The Complaint seeks a market wide remedy for alleged tariff violation under the FPA; it is not a dispute regarding the clerical accuracy of bills."); *Carnegie Natural Gas Co.*, 63 FERC ¶ 61,103, at 61,643-44 (1993) (ordering company to replace the word "propriety" with "amount" in its billing challenge limitation clause because the word propriety "could be interpreted as applying to more than billing errors")

[43] 133 FERC ¶ 61,094 (2010), *reh'g denied*, 142 FERC ¶ 61,151 (2013).

[44] *Id.* at P 63.

error," and found that the party seeking relief in that case "reasonably could have discovered the billing errors as they occurred over the nine-year period."[45]

Here the issue is not a "billing error," and OG&E is not being denied compensation under the tariff due to some alleged failure on its part to exercise diligence. Indeed, OG&E was diligent over the years in pursuing its right to compensation under Attachment Z2 and the Sponsored Upgrade Agreements. OG&E attended all of the stakeholder meetings discussing the creation of the Z2 calculation, and was constantly assured that payment was forthcoming upon completion of the software. Additionally, members of the Oklahoma Corporation Commission regularly attended the SPP's Regional States Committee and were also assured that payments for use of the line would be made as soon as practicable.[46] It was also reasonable for OG&E to rely on SPP's efforts to begin implementing Attachment Z2. Moreover, the Commission's precedent, including the *Seminole* case discussed above, distinguishes between clerical corrections that can be time-limited by using language of the type in Section I.7.1, and remedies for tariff violations that cannot be. The *N.Y. State Elec. & Gas Corp.* decisions thus also offer no support for the Commission's conclusion.

The *Order on Remand* also suggests, again citing *N.Y. State Elec. & Gas Corp.,* that the SPP tariff is deficient because it does not include a provision allowing the Commission to order the reopening of an invoice after it is considered finalized pursuant to a time bar provision.[47] Such a provision is not necessary in this case, however, as the invoices here were never finalized to include the charges required under the SPP Tariff. Because Section I.7.1 does not apply to bar the application of these charges as required by the tariff, no reopening by the Commission is

[45] 142 FERC ¶ 61,151 at PP 25-26.

[46] As noted at pp. 8-10 and nn.10-12 above, this process was entirely transparent to all stakeholders throughout.

[47] *Order on Remand*, at P 55 & n.151.

necessary. Again, the circumstances under which such a provision might be necessary are those, as in *Old Dominion* or the Superstorm Sandy situation cited in the footnote, where a party seeks to amend a tariff or contract after the fact due to an unforeseen circumstance. That is not the situation here, where SPP seeks to enforce tariff and contractual provisions already in place in order to recover charges that all market participants knew had been incurred, and knew that SPP was making good faith efforts to calculate.

The courts have upheld the Commission's decisions to order refunds for violations of the filed rate back to the start of the violation. *See Towns of Concord v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992) (explaining that the Commission has broad remedial discretion under section 309 of the Federal Power Act, 16 B.SC. § 825h, to order refunds for tariff violations). Section I.7.1 does not limit the Commission's ability to do so here.

B. The *Order on Remand* Violates OG&E's contract rights

OG&E's rights to recover upgrade costs from users of the transmission upgrade are not merely a matter of tariff, but also derive from OG&E's Sponsored Upgrade Agreement executed with SPP. Those contract rights can only be abrogated or impaired under the *Mobile-Sierra* doctrine if the Commission makes a proper finding that circumstances of "unequivocal public necessity" exist.[48] The *Mobile-Sierra* doctrine addresses the Commission's authority "to modify rates set bilaterally by contract rather than unilaterally by tariff."[49]

The Commission made no finding that precluding OG&E from recovering years worth of payments assessed under the Sponsored Upgrade Agreement was a matter of "unequivocal public necessity." The Commission likewise made no finding that Section I.7.1 of the SPP Tariff

[48] *Morgan Stanley v. Pub. Util. Dist. No. 1 of Snohomish City., Wash.* ("*Morgan Stanley*"), 554 U.S. 527, 551 (2008).

[49] *Id.* at 532.

could, or should, be applied to override OG&E's contractual rights. The Commission again cited on this point inapplicable precedent holding that it need not consider arguments that tariff provisions should be ignored based on purely "equitable considerations."[50] That statement, however, is a non-sequitur. While the equities are certainly on OG&E's side, OG&E did not advance hundreds of millions of dollars to upgrade SPP's transmission system for the benefit of transmission customers on the hope or even the assumption that it would be reimbursed. Rather, it made that investment in the SPP transmission system based on an express contractual commitment in the Sponsored Upgrade Agreement that it *would* be reimbursed. Given that the burden of overturning a contractual commitment under the FPA is "practically insurmountable,"[51] OG&E had every right to expect that commitment to be honored.

There is no basis here to find that honoring OG&E's Sponsored Upgrade Agreement would "seriously harm the public interest."[52] To the contrary, the public interest supports enforcing OG&E's contractual rights. Transmission projects take many years and a very substantial capital investment to build, and that investment is often not fully recovered for forty or more years. Parties such as OG&E that undertake transmission upgrade projects based on contractual assurances that they will be reimbursed the costs by users of the transmission facilities not undertake such projects in the future if they know that they are subject to denial of that reimbursement years later. Moreover, failure by the Commission to honor contractual commitments to compensate companies investing in such projects will undoubtedly lead investors to require higher returns to adequately compensate them for the increased risk to the

[50] *Order on Remand*, at P 55.

[51] *Papago Tribal Util. Auth. v. FERC*, 723 F.2d 950, 954 (D.C. Cir. 1983).

[52] *Morgan Stanley*. 552 U.S. at 551.

recovery of their investment. The higher capital costs would be borne not only by parties such as OG&E whose contracts were not honored, but by all transmission ratepayers.

The public interest in enforcing OG&E's contractual rights is even more pronounced here given that, as set forth in detail in pages 5-8 above, the Z2 crediting mechanism was necessary to allow the development of renewable energy resources of the very type contemplated as in the public interest by Order 1000. Indeed, as also outlined above, the Commission relied very heavily on the public interest in building transmission to allow the development of such resources in supporting Order 1000, and the court of appeals cited to it extensively in upholding the Commission. The expectation of reimbursement was restated in SPP proceedings over years, and affirmed twice by the Commission. One would expect in such circumstances a requirement of the clearest possible showing that an unrelated tariff provision actually and necessarily overrides these contractual rights and this Commission policy. To the contrary, however, the analysis in the *Order on Remand* attempting to justify the sudden change in position on this point was virtually nonexistent. Finally, as stated above at pp. 9-10, state regulatory authorities were expressly advised of this contractual provision as part of their approval process.

C. The Commission erred in ruling that a single provision of the tariff, Section I.7.1, that was designed for another purpose applied to overrule OG&E's tariff and contractual rights.

As noted above, although the Commission based its decision solely on Section I.7.1 of the SPP Tariff, and did not analyze the language, history, or purpose of the provision. It simply pronounced that "Attachment Z2 credits are charges directly related to requests for transmission service and should have been reflected in the monthly invoices for transmission service, as required by section I.7.1." [53] The Commission did not undertake an "analysis of the critical

[53] *Order on Remand,* at P 49.

phrases" in the provision, as it did in the *Seminole* case, before concluding erroneously that it overruled OG&E's tariff and contractual rights. Nor did it explain why the language in Section I.7.1 would be sufficient to override a filed rate under Commission precedent that distinguishes between time limitations that apply to arithmetical errors and corrections, such as Section I.7.1, and those sufficient to override a filed rate, which must be written more broadly than Section I.7.1 so that they apply to any challenge to the "propriety" or the "correctness" of the rate itself and expressly bind a party that does not make timely objection to an invoice .

The Commission's conclusions are also inconsistent with SPP's own description of what the tariff provision means, and the way in which market participants treated it. Section I.7.1 was never intended to artificially limit stakeholder consideration of complex transmission allocation issues to an unreasonably short period of one year, rather than to correct obligations fixed and invoiced. Moreover, SPP did not seek to override a tariff provision, but to assure compliance with the obligation to "upgrade sponsors of compensation to which they are entitled and anticipated receiving since 2008 under the Tariff, consistent with the filed rate."[54]

The Commission also provided no sound reason why the result it reached serves any legitimate interests the interests of the marketplace. The *Order on Remand* states that SPP could have sought a delay of the effective date of applicable Tariff provisions until it was able to invoice transmission service customers for Attachment Z2 credit payment obligations, and that such action by SPP would have allowed transmission customers to make fully informed decisions about the cost of their transmission service to avoid later incurring potentially significant credit payment obligations. But the Commission does not state why the supposed interests of transmission customers in making informed purchasing decisions should be given

[54] July 2016 Order, at P 55.

more weight than OG&E's interests in achieving the reimbursement it was promised by the tariff and under the contract by which it agreed to incur those costs.

Nor is there any evidence that purchasers would have would have altered their purchasing decisions had the effective date of the tariff been delayed. As set out above, purchasers were aware they were liable for costs under Attachment Z2 of the tariff, a finding affirmed by the Commission twice and not overturned in the recent reversal.[55] There is no reason to believe that they would have altered their behavior had SPP taken the administrative step of delaying the effective date of a tariff provision or announcing in some different manner what the market already knew -- that the revenue crediting provisions in the SPP tariff required users of the upgrade to pay a share of its costs and that SPP was working in good faith to implement the crediting process for the historical period. The filed rate doctrine is "satisfied . . . when parties have notice that a rate is tentative and may be later adjusted with retroactive effect."[56]

Contrary the supposition stated in the *Order on Remand,* for many years it was perfectly plain to all market participants through the filed tariff provisions and the ongoing implementation discussions that costs in some amount would be allocated, and users were thus able to make informed decisions on this basis. The reversal of position years after the fact gives purchasers a windfall that is contrary to the cost allocation principle that, "[t]he cost of transmission facilities must be allocated to those within the transmission planning region that

[55] *See Consolidated Edison v. FERC*, 958 F.2d 429, 434 (D.C. Cir. 1992)(allowing increased charges before they were filed where a prior agreement set them out).

[56] *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (quotation marks and citation omitted).

benefit from those facilities in a manner that is at least roughly commensurate with estimated benefits."[57]

Finally, by reading Section I.7.1 to preclude OG&E's right to recovery on the tariff and its contract, the *Order on Remand* ignores the rule that interpretations that bring about an anomalous result are to be avoided when other interpretations are available.[58] Here a reading fully consistent with the language, history and purpose of the provision, and with Commission precedent, was available to prevent a result plainly inequitable for the reasons stated by Commissioners LaFleur and Glick. The *Order on Remand* erred by adopting a contrary and unsupported reading.

[57] Order 1000 at P 622. *See also Ill. Commerce Comm'n v. FERC*, 756 F.3d 556, 565 (7th Cir. 2014)*(*beneficiaries from transmission facilities must bear a roughly proportionate share of the costs); *Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368–69 (D.C. Cir. 2004)(same).

[58] *See Vaalidus Reinsurance*, 786 F.3d at 1045-46.

CONCLUSION

The Commission should grant this request for rehearing, reverse the *Order on Remand*, and reinstate its prior rulings that OG&E is permitted to timely recover its costs of building a transmission upgrade from the actual users of that upgrade.

Respectfully Submitted,

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April 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served this 1st day of April 2019 upon each person designated on the official service list compiled by the Secretary in this proceeding.

/s/ Benjamin L. Tejblum
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REQUEST FOR REHEARING OF FLAT RIDGE 2 WIND ENERGY LLC

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc. — Docket Nos. ER16-1341-000, ER16-1341-001, ER16-1341-003

REQUEST FOR REHEARING OF FLAT RIDGE 2 WIND ENERGY LLC

Pursuant to Section 313 of the Federal Power Act[1] ("FPA") and Rule 713 of the Federal Energy Regulatory Commission's ("FERC" or "Commission") Rules of Practice and Procedure,[2] Flat Ridge 2 Wind Energy LLC ("Flat Ridge") requests rehearing of the Commission's February 28, 2019 Order on Remand[3] issued in the above-captioned proceeding in which the Commission determined that Southwest Power Pool, Inc. ("SPP") was not permitted to reallocate transmission revenues to Upgrade Sponsors that had funded Creditable Upgrades as required under Attachment Z2 of its Open Access Transmission Tariff ("Tariff") to the extent that the relevant transmission services were provided prior to November 2015.[4]

[1] 16 U.S.C. § 825l.

[2] 18 C.F.R. § 385.713.

[3] *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019) ("Remand Order"). Flat Ridge filed a timely Motion to Intervene in Docket No. ER16-1341-000 on April 22, 2016, and is a party to this proceeding by virtue of that intervention. *See Southern Company Services, Inc*., 101 FERC ¶ 61,373 at P 11 (2002), *citing Public Service Company of New Hampshire v. New Hampshire Electric Cooperative, Inc*., 88 FERC ¶ 61,110 at 61,259 n.1 (1999) (intervention in the root docket makes the intervenor a party in all subsequent subdockets).

[4] Unless otherwise noted, capitalized terms have the same meaning attributed to them under the SPP Tariff.

TABLE OF CONTENTS

I. EXECUTIVE SUMMARY

A. Upgrade Sponsors Are Contractually Entitled To Z2 Credits, Which Entitlement Is Entirely Separate From SPP's Ability To Invoice Transmission Customers.

The Remand Order contravenes both the Tariff and the SPP *pro forma* Generator Interconnection Agreements ("GIA"), pursuant to which Upgrade Sponsors are entitled to receive credits from SPP.[5] This right is not contingent on SPP timely computing the actual impact on transmission customer invoices, on SPP timely invoicing transmission customers, or on transmission customers paying their bills on time. SPP's payment obligation to the Upgrade Sponsor depends only upon whether the Creditable Upgrades came to be used to provide its transmission services. While, under Attachment Z2, SPP is separately authorized to charge network transmission customers amounts in connection with those Creditable Upgrades, these are two separate transactions with SPP as the single counterparty to each; it is not a transaction between the transmission customers and the Upgrade Sponsors. Put simply, the means by which SPP is authorized to pay an Upgrade Sponsor is wholly separate and apart from SPP's obligation to do so. Accordingly, the Commission erred insofar as it sought to cure what it perceived to be a violation of the Tariff with respect to SPP's transmission customers by at the same time violating the Tariff with respect to Upgrade Sponsors.

B. The Commission Erred In Directing SPP To Unwind The Z2 Implementation.

The Attachment Z2 provisions have a long and tortured history.[6] And owing to the Remand Order, the torture continues. Despite SPP's finally having come to resolve the Z2

[5] The three-party Flat Ridge GIA (with SPP and Westar) reflects the *pro forma* GIA that is set forth in the SPP Tariff.

[6] *See Southwest Power Pool, Inc.*, 123 FERC ¶ 61,208 (2008) (establishing Attachment Z2 crediting program); *Southwest Power Pool, Inc.*, 145 FERC ¶ 61,198 (2013) (revising Attachment Z2 crediting program because SPP
(Continued...)

implementation process, and the Commission having blessed SPP's final procedures,[7] the Commission has now unreasonably turned the Z2 process back on its head – unraveling the Commission-authorized implementation – by virtue of an irrelevant and incorrect application of the filed rate doctrine, and its claim of being compelled to initiate a rebilling process that wholly ignores equitable considerations and doubtless will spark litigation for years to come.

Much of the Remand Order turns on the fact that transmission customers, whose service was made possible because Upgrade Sponsors like Flat Ridge constructed new facilities (Creditable Upgrades), allegedly lacked adequate notice that once the delays in implementing Attachment Z2 were overcome there could be attendant financial ramifications; i.e., these customers were unaware that they would be billed in accordance with their use of those Upgrades in accordance with the final Z2 procedures. This, of course, is untrue, as the record clearly indicates – and it is unquestionably untrue as to the transmission customer who, but for the Creditable Upgrades constructed by Flat Ridge, could not have taken service as it did.

The Commission dismisses arguments that transmission customers had adequate notice on the ground that whatever notice they did have was not cognizable under any of the few well-known notice-based exceptions to the filed rate doctrine's application, e.g., where rate levels are pending appeal. Indeed, the Commission errs here insofar as it reads *CPUC*[8] as permitting a finding of adequate notice only where there is "the potential for a rate to be overturned on appeal

had been able in the prior five years to initiate a workable implementation program); "Petition of Southwest Power Pool, Inc. For Tariff Waiver," Docket No. ER16-1341-000 (Apr. 1, 2016) (requesting waiver of Section I.7.1's invoice revision deadline, to the extent required, to finally initiate the Z2 implementation program).

[7] *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016) ("Waiver Order"), *reh'g denied*, 161 FERC ¶ 61,144 (2017) ("Rehearing Order").

[8] *Public Utilities Comm'n of State of Cal. v. FERC*, 988 F.2d 154 (D.C. Cir. 1993) ("*CPUC*").

and thus changed retroactively."[9] *CPUC* stated no such thing. Instead, it instructs that the Commission is obliged to examine the facts and evaluate whether, "as a practical matter" customers "had sufficient notice that the approved rate was subject to change."[10] The filed rate doctrine "*simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service*."[11]

The fact that the Commission has never been called upon to examine whether facts similar to those here would represent adequate notice does not excuse the Commission from failing to consider them here, and from determining that, here, the facts do show that transmission customers were on adequate notice that Z2 would be implemented at some point in the future and consequently would, pursuant to the Tariff, financially impact those customers who could not have obtained service but for their use of one or more Creditable Upgrades. Plainly, then, the Commission failed to do here what *CPUC* instructs. It failed to develop a record on which to make such a highly fact-specific determination and it ignored entirely the request to do so.[12] Hence, its determination that customers lacked "adequate" notice was not the product of reasoned decision-making.

[9] Remand Order at P 54. As the Remand Order also notes, adequate notice can be found where there is a prior agreement between the parties, which is not relevant here. *Id.*

[10] *CPUC*, 988 F.2d at 164.

[11] *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 22 (D.C. Cir. 2014) ("*West Deptford*"), *quoting Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) (emphasis added).

[12] "Brief of Xcel Energy Services, Inc. On Behalf of Southwest Public Service Company," Docket Nos. ER16-1341-000 and -001, at 3, 36 (Aug. 31, 2018) (requesting the Commission "set the consolidated proceedings for hearing and settlement judge proceedings. XES also recommends the Commission consider holding a technical conference, so the parties may have an opportunity to discuss the facts and issues, rather than continuing to debate via pleadings. A consolidated proceeding would allow the parties to attempt to reach a comprehensive solution to Attachment Z2 issues, which would serve the public interest.").

What the Commission should have done was to allow the parties to present the facts about SPP's Z2 implementation processes, such as by holding an evidentiary hearing or, at a minimum, a technical conference, as Xcel initially suggested. Had it done so, it would have seen that although Z2 implementation was delayed, it was universally known in SPP that once implemented, transmission and upgrade cost allocations would be reconciled. Some Upgrade Sponsors would be paid (where their Creditable Upgrades were being used to provide transmission service) and some transmission customers would be assessed for those payments (where those customers in fact were the beneficiaries of those Upgrades).

Between 2008 and 2016, when FERC issued the Waiver Order, Z2 was continuously under discussion with members, including extensively with the very SPP Transmission Owners that now seek to de-legitimize Attachment Z2's implementation. And while the Commission correctly focuses on the potential impacts to "transmission customers," because SPP is comprised of vertically integrated utilities, most transmission services that implicate the Z2 process are, in fact, the SPP Transmission Owners who use network service and designate new resources under the SPP Tariff.[13]

Indeed, there should be no dispute as to the universal awareness in SPP of the Z2 delays and implementation plans and the fact that the final cost allocation procedures in fact subsequently would be applied to allocate cost responsibility (in those situations where transmission service would not have been possible but for use of a Creditable Upgrade). There were stakeholder meetings, white papers, PowerPoint presentations, Tariff drafting sessions,

[13] As is the case in most Regional Transmission Organizations and Independent System Operators, point-to-point service typically is not utilized except for export transactions. Accordingly, while some generators may acquire point-to-point transmission service under the SPP Tariff, Z2 Credits are funded by reallocating a portion of the transmission revenues already assessed and, therefore, Z2 implementation should not have any impact on point-to-point transmission customers.

information sessions, major committee meetings and board meetings during which the Z2 delay issues were examined and evaluated by the SPP community as a whole. It is inconceivable that any SPP Transmission Owner or other SPP member would swear an oath to the Commission that it was unaware of SPP's intent to implement Attachment Z2 for the historical period. The Commission need only have sought such sworn testimony, and if confirmed, any filed rate concern would have disappeared. In this regard, the Commission should recall that it provided no opportunity for reply briefs when it solicited views on "the significance to these proceedings of the *Old Dominion* decision or any other matter of relevance."[14]

At bottom, this case is about whether customers, while aware the rate they are being charged is preliminary, must know with precision the exact amount they ultimately will be charged in order for notice to be deemed "adequate." Some Z2 implementation opponents argue that even though they did expect the implementation to occur and to have financial impacts, in order for notice to be adequate for filed rate purposes, there must be advance notice of the precise financial impact. Wrong. The very issue debated over eight years concerned the challenge SPP faced in developing an implementation plan – meaning the very process for determining the precise financial impacts of Z2 implementation. And it is equally wrong, and maybe even disingenuous, for those same parties, after keeping silent as to their "notice" concerns about Z2 implementation for the last 8 years, during which Upgrade Sponsors had to wait for the monies indisputably due to them under the Tariff's express language -- and in whatever amount necessary to pay them back for having constructed the Creditable Upgrades -- to claim only now that they were not on notice of precisely how the Z2 implementation would

[14] "Notice Affording The Parties An Opportunity To File Briefs," *Southwest Power Pool, Inc.*, Docket Nos. ER16-1341-000 and ER16-1341-001 (Aug. 6, 2018).

proceed. Again, what the Commission simply ignores is the fact that the Tariff called and continues to call for all the Upgrade Sponsor's costs for the "but for" facility to be credited to the Sponsor. It simply took SPP eight years to figure out how this measurement should be processed.

C. The Remand Order Is Inconsistent With Commission Precedent.

The Commission also erred in rescinding its waiver of Section I.7.1 of the SPP Tariff (to the extent waiver was even required in order to implement Attachment Z2). The Commission effectively concludes that billing deadlines never can be waived. But this is belied by the Commission's prior practice where it has waived Section I.7.1 of the SPP Tariff -- on at least three occasions. Contrary to the Commission's holdings, *Old Dominion*[15] does not require that SPP expressly state in the Tariff or file with the Commission its intent to invoice retroactively. Unlike in *Old Dominion*, here SPP is implementing the filed rate. Attachment Z2 is on file and has been on file since 2008, and SPP is not seeking retroactively to assess a charge that is not part of the filed Tariff (as was the case in *Old Dominion*). Similarly, the notice PJM provided to customers in *Old Dominion* was limited to a single one-way communication through a website posting. Here, in order to implement the Tariff, SPP undertook a multi-year stakeholder process (dozens of meetings and documentation) vetted with all of its members, including the SPP Transmission Owners who now oppose the implementation of their and any other customer's Attachment Z2 obligations attributable to their use of facilities for which the Upgrade Sponsors initially were required to pay.

[15] *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223 (D.C. Cir. 2019) ("*Old Dominion*").

D. Permitting SPP To Claw Back From Upgrade Sponsors Their Z2 Credits Would Be Both Inequitable And Unreasonable.

In the Remand Order the Commission said it would not consider the equities here. But the Commission erred as a matter of law in failing to do so. At least as to remedies, its hands plainly are not tied; and even if the Commission were not to grant rehearing of its finding that SPP cannot implement the Z2 program as proposed, it at least should have considered the equities in fashioning the appropriate remedy.

The Commission's discretion is at its zenith when fashioning remedies, and particularly when seeking to correct unjust situations. To do so, FERC has done everything from waiving refund requirements to ordering disgorgement of profits.[16] Indeed, as to refunds, the Commission has found it to be "more difficult to justify refunds … when the parties that ultimately would pay them did not themselves violate the tariff."[17] As to the payments here, this could not possibly be more the case. First, the Upgrade Sponsors were required to wait years to be repaid for the amounts clearly due to them under the Tariff while the transmission customers using the Upgrade Sponsor's Creditable Upgrades began to take the very transmission service that they would not otherwise have obtained but for those upgrades. And now, the Remand Order requires SPP to refund these monies to transmission customers, and to file a report on how it intends to do so within 120 days, the implication of which is that Sponsors -- who never violated the Tariff and never had reason to think they would not be paid as required thereunder --

[16] *See e.g., Transwestern Pipeline Company*, 66 FERC ¶ 61,350 at n.19 (1994) ("Even in cases where a rate increase in violation of the filed rate doctrine was held to occur, the Commission still has been found to have the discretion to waive refunds under section 4 of the NGA, provided that, as we have done, the Commission shows that it considered relevant factors and ... struck a reasonable accommodation among them.") (internal quotations and citations omitted); *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 31 (2004) (ordering Enron's disgorgement of profits).

[17] *Midwest Independent Transmission System Operator, Inc.*, 155 FERC ¶ 61,127 at P 34 (2016) ("Tariff violations can be a reason for granting refunds, but it is more difficult to justify refunds on this basis when the parties that ultimately would pay them did not themselves violate the tariff.").

apparently will be required at least to some degree to forfeit those monies even where the use of their Creditable Upgrades occurred and continues.[18]

The Remand Order, however, describes no consideration of the equities in this case and would not provide Upgrade Sponsors any recourse. The Commission is required, at a minimum, to explain how its remedial decisions are a "reasonable accommodation of the relevant factors" and "equitable in the circumstances."[19] It did neither here. The Commission might also have considered how it would have responded to a FPA Section 206 complaint filed by Upgrade Sponsors to be paid immediately upon a transmission customer's beginning to make use of a Creditable Upgrade. And its decision to order refunds to transmission customers of amounts they rightfully owed in accordance with the Tariff's Z2 provisions, and subject Upgrade Sponsors to potential claw back of amounts they are rightfully due under those provisions is arbitrary, capricious and an abuse of discretion.[20]

The Commission pays short shrift to four uncontested facts. First, the contested payments were made to SPP by those transmission service customers who could not have received their service but for the Creditable Upgrades having been made available for their use.

Second, the amounts those transmission customers eventually were invoiced for their Z2 historical period obligations -- once the correct amounts were ascertained -- and paid to SPP plainly were made in accordance with the filed rate that was effective during that period. There

[18] *See* Remand Order at PP 55, 59.

[19] *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) ("*Koch*") (finding the Commission abused its discretion in ordering refunds where the it "failed to establish that its decision represents a reasonable accommodation of the relevant factors and that the refund is equitable in the circumstances.") (quotations and citations omitted); *Pub. Utilities Comm'n of State of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) ("FERC's decision not to consider a § 309 remedy for tariff violations was arbitrary and capricious, an abuse of discretion, and not in accordance with law.").

[20] *See id.*

is no dispute that the amounts were due and owing. The dispute here is whether SPP waited too long in ascertaining the amounts due and in issuing invoices in order for such uncontested, Tariff-required, amounts to be paid. Indeed, reduced to its essence, the issue here is whether an alleged violation of an administrative provision of the Tariff necessarily must result in a payment requirement in the Tariff effectively being eviscerated.

Third, the Commission claims to be wholly unable to redress this manifestly unjust outcome even when the transmission customers who knew they would be required to make payments in accordance with Tariff Attachment Z2 admit they were aware of SPP's intent eventually to invoice them for their accrued Z2 payment obligations,[21] and held off in raising the billing adjustment period deadline entirely in order to secure an acknowledged windfall!

Fourth, as is made very clear in the Remand Order,[22] SPP's actions resulted in significant delays in implementing its Tariff. The eight-year delay was bad enough, with SPP (and its members via their failure to object and despite their observed participation in the Z2 implementation process) all the while leading the Upgrade Sponsors reasonably to believe they would receive all accrued Z2 credits. But even after it was obvious that Z2 implementation had become, and would continue to be, substantially delayed, SPP, according to the Commission,[23] failed to take any steps to avoid the filed rate violations transmission customers allege to have occurred here and their arguments that, as a result of such violations, the Upgrade Sponsors should be forced to refund the entirety of any payments collected during the historical period.

The Remand Order itself sufficiently makes out the case for SPP's negligence here. And just as utilities typically are forced to bear the costs resulting from their own failings rather than

[21] *See* fn.53-55, *infra*.

[22] *See* Remand Order at PP 5-6, 53.

[23] *Id.* at P 53.

recovering those costs in rates, the same should be true here for SPP; and to the extent the Upgrade Sponsors are foreclosed from collecting pursuant to the Tariff, SPP itself should be required to make the Upgrade Sponsors whole (and whether or not it is independently required to do so under the Tariff and GIAs, as argued herein). At a minimum, the Commission at least must take SPP's conduct into account in balancing the equities and imposing a remedy here, even if that remedy would require SPP to draw on its insurance policies or otherwise be required to remit payments in instances where its actions were found to have been grossly negligent.

In short, the equities here incontestably fall squarely on the side of the Upgrade Sponsors; the Commission has the discretion to exercise its authority to order a remedy that reasonably recognizes these equities. Instead, the Remand Order "provides an unfair windfall to those who benefitted from [Creditable Upgrades] during the historic period but are not required to pay for them," while "leav[ing] market participants holding the bag for [SPP's] mistakes."[24] This is "wholly inequitable,"[25] and the Commission's decision not to order a remedy to right this uncontested wrong was arbitrary and unreasonable.

Finally, if the Commission does not grant rehearing, and if it allows SPP to claw back Z2 credit payments[26] and refund those amounts to transmission customers, it must, at a minimum, confirm, first, that SPP is still required to pay Upgrade Sponsors whatever Z2 credits they are due under the Tariff until fully compensated (as required under Attachment Z2) and, second, that SPP must disregard the prior "but for" analyses and all Creditable Upgrade amounts must be paid to Upgrade Sponsors as their facilities are used going forward.

[24] Remand Order, LaFleur Concurrence at P 3; *id.*, Glick Concurrence at P 3.

[25] Remand Order, Glick Concurrence at P 1.

[26] Remand Order at PP 55, 59.

II. FLAT RIDGE'S UPGRADE SPONSORSHIP

Flat Ridge owns and operates a 470 MW wind farm that is interconnected to transmission facilities owned by Westar Energy, Inc. ("Westar") and under the operational control of SPP. Flat Ridge is the Upgrade Sponsor for Creditable Upgrades in the amount of $7.9 million dollars that it was required to fund under its Generator Interconnection Agreement ("GIA") with SPP and Westar ("Flat Ridge GIA").[27]

Attachment Z2 provides that the interconnection upgrades required under the Flat Ridge GIA will remain Creditable Upgrades until (1) the facilities are removed from service; (2) Flat Ridge has been fully compensated; or (3) the costs of the facilities are fully included in rates pursuant to the roll-in provisions of Section III of Z2.[28] To determine the amount of Z2 credits payable to Flat Ridge, SPP is required to (and did) identify any new transmission service that could not be provided "but for" the Creditable Upgrades funded by Flat Ridge and, then, to allocate to Flat Ridge "a portion of the [transmission] revenues derived from sales of additional service that would not have been available."[29]

Transmission customers began to benefit from the Flat Ridge Creditable Upgrades immediately upon their taking service in 2013 because "but for" those upgrades they would not then have been able to secure service. Hence, pursuant to the Tariff, Flat Ridge was eligible to receive its Z2 Credits as early as 2013. But it was not until 2016 that SPP satisfied the Tariff's

[27] SPP Service Agreement No. 2257, Generator Interconnection Agreement entered into by the Southwest Power Pool, Inc., Wester Energy, Inc., and BP Wind Energy North America Inc. (Sep. 27, 2010, *as amended*, July 25, 2012, *as amended*, Mar. 16, 2018).

[28] Tariff, Attachment Z2 § I.C. Attachment Z2, Section III provides that when a facility subject to Z1 is rolled into the revenue requirement used for the development of generally applicable transmission service rates, the Transmission Owner that constructed the facility upgrade shall pay the remaining balance of any unrecovered payments.

[29] "Revisions to Clarify the Determination of Credits and Distribution of Credit Revenue for Creditable Upgrades," Southwest Power Pool, Inc., Docket No. ER13-1914-000, at 3 (July 9, 2013).

requirements under Attachment Z2 and reallocated a portion of the revenues SPP received for providing the new transmission service. While SPP did not believe its delay in implementing Attachment Z2 (and issuing an invoice in order to collect the requisite payments under the Tariff) would be viewed as a billing adjustment subject to a one year correction limit under Section I.7.1 of the Tariff, SPP requested, and the Commission approved, a waiver of Section I.7.1 to the extent that Section even was applicable. In November 2016, SPP issued Z2 credits to Flat Ridge in the amount of $6.1 million and additional Z2 credits and associated amounts in subsequent months.[30]

III. SPECIFICATION OF ERRORS AND STATEMENT OF ISSUES

In accordance with Rule 713(c), Flat Ridge provides the following specification of errors and statement of issues.

1. The Commission's failure to recognize that an Upgrade Sponsor's right to Z2 credits is entirely separate from SPP's ability to invoice transmission customers and the Tariff's requirements as to the timing of such invoices is arbitrary and capricious, and it is not in accordance with law insofar as it results in rates that are not just and reasonable. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mutual Auto Insur. Co.*, 463 U.S. 29, 43, 57 (1983); 16 U.S.C. § 824d; *FirstEnergy Serv. Co. v. FERC*, 758 F.3d 346, 348 (D.C. Cir. 2014) ("Section 205 confers upon FERC the duty to ensure that wholesale energy rates and services are just and reasonable.").

2. The Commission's conclusion that waiver of Section I.7.1 was prohibited under the filed rate doctrine and rule against retroactive ratemaking is arbitrary and capricious, not the product of reasoned decision making, and not in accordance with law. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mutual Auto Insur. Co.*, 463 U.S. 29, 43, 57 (1983); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970); *Public Utilities Comm'n of State of Cal. v. FERC*, 988 F.2d 154 (D.C. Cir. 1993); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992); *West Deptford Energy, LLC v. FERC*, 766 F.3d 10 (D.C. Cir. 2014).

[30] The fact that additional credits were paid after November 2016 does not necessarily indicate that such amounts were related to transmission services provided after that date. SPP's Z2 implementation provided options for transmission customers to participate in an installment plan. *See* "Petition of Southwest Power Pool, Inc. For Tariff Waiver," Docket No. ER16-2330-000 (July 29, 2016).

3. The Commission's failure to provide a reasoned explanation for departing from its precedent granting waivers of billing adjustments limitations, including SPP Tariff Section I.7.1, is arbitrary and capricious and does not reflect reasoned decision making. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mutual Auto Insur. Co*., 463 U.S. 29, 43, 57 (1983); *Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981) (an agency must provide a reasoned explanation for any failure to adhere to its own precedents).

4. The Commission's failure to respond to arguments to develop the facts and issues in this proceeding, such as though an evidentiary hearing or technical conference, is arbitrary and capricious and does not reflect reasoned decision making. *See* 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n. of U.S. v. State Farm Mutual Auto Insur. Co*., 463 U.S. 29, 43, 57 (1983); *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) ("by failing to respond to Moraine's arguments and to articulate its decision based on evidence in the record, the Commission breached its obligation to engage in reasoned decisionmaking").

5. The Commission's failure to consider and craft an appropriate and equitable remedy was arbitrary and capricious and an abuse of discretion. *See Xcel Energy Services Inc. v. FERC*, 815 F.3d 947 (D.C. Cir. 2016); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810 (D.C. Cir. 1998).

IV. ARGUMENT

A. The Commission Erred In Reversing Its Prior Waiver Orders And Denying SPP's Waiver Request.

1. An Upgrade Sponsor's right to Z2 credits is separate, and unrelated to, how SPP eventually decided to invoice transmission customers and to the Tariff's requirements as to the timing and possible correction of such invoices.

The Remand Order appears to assume that the Z2 credit program is based on some sort of Tariff-based contractual privity between transmission customers, on the one hand, and Upgrades Sponsors, on the other hand, and that Z2 credit payments flow directly from transmission customers to Upgrade Sponsors. This is not true. Upgrade Sponsors are entitled to receive credits from SPP under Attachment Z2 when new transmission service is taken using Creditable Upgrades.[31] This right is not contingent on SPP timely computing the actual amount of

[31] Tariff, Attachment Z2 § II. SPP is also authorized to invoice transmission customers in connection with Attachment Z2, but that is a separate transaction.

transmission customers' Z2 cost obligations, on SPP timely invoicing transmission customers for such amounts, or on transmission customers paying their bills on time. Rather, SPP's payment obligation to the Upgrade Sponsor depends only on whether the transmission service could not have occurred but for the use of the Creditable Upgrades. Simply put, while SPP is required to pay Z2 credit amounts to Upgrade Sponsors, and also is separately authorized in Attachment Z2 to charge network transmission customers amounts based on the Creditable Upgrades used to provide their transmission service, these are two separate transactions (each involving SPP); it is not a transaction between the transmission customers and the Upgrade Sponsors.[32]

In this respect, the one-year billing adjustment limit in Section I.7.1, to the extent applicable to any Z2 related invoices, applies only to SPP's invoices to transmission customers for services furnished by SPP, i.e., SPP's accounts receivable. It in no way relieves SPP from meeting its separate accounts payable obligations, i.e., paying generators the Z2 credits they are due.[33] Indeed, the Tariff provides a separate mechanism altogether and under which the generator is entitled to credits based on a transmission customer's impact on the Creditable Upgrade, and includes no provisions for SPP to delay these payments depending upon how and when SPP ultimately chooses to issue an invoice to the transmission customer(s) or whether the transmission customer timely pays its invoices.[34]

[32] When Creditable Upgrades allow SPP to grant a new Point-to-Point Transmission Service, SPP is required to reallocate a portion of the transmission revenues to the Upgrade Sponsor. There is no provision in the Tariff to assess the Point-to-Point Customer for additional amounts and, therefore, no argument that SPP needs to adjust prior invoices. Tariff, Attachment Z2 § II.A.

[33] The Remand Order found only that "section I.7.1 applies to the transmission services charges in the historical period invoices." Remand Order at P 47.

[34] Tariff, Attachment Z2 § II.B (stating that revenue for credits will be provided from new transmission service that could not be provided but for one or more Creditable Upgrades).

2. Granting the waiver did not violate either the filed rate doctrine or the rule against retroactive ratemaking.

The Remand Order concludes that waiver of Section I.7.1 to permit SPP to invoice transmission customers for Z2 credit payment obligations during the historical period is prohibited by the filed rate doctrine and the rule against retroactive ratemaking.[35] But as shown below, to the extent the filed rate doctrine and rule against retroactive ratemaking are even relevant here, transmission customers, for years, had been on notice of SPP's intent. Hence, the Commission should have concluded that, even if this case is cognizable under the filed rate doctrine, the notice exception to the filed rate doctrine did apply here in full satisfaction of the doctrine's notice and transparency goals.

The filed rate doctrine and rule against retroactive ratemaking are intended to provide rate predictability and equality,[36] by "forbid[ding] a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority"[37] and "prohibit[ing] the Commission from adjusting current rates to make up for a utility's over- or under-collection in prior periods."[38] These requirements, however, can be satisfied when, as here, customers, "as a practical matter," have adequate notice that a rate is subject to change.[39] The filed rate doctrine simply "does not extend to cases in which buyers are on adequate notice

[35] Remand Order at P 44.

[36] *Consolidated Edison Company of New York, Inc. v. FERC*, 347 F.3d 964, 969-70 (D.C. Cir. 2003).

[37] *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).

[38] *Towns of Concord v. FERC*, 955 F.2d 67, 71 n.2 (D.C. Cir. 1992).

[39] *CPUC*, 988 F.2d at 164; *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992) ("Notice … changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.").

that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service."[40]

While the Commission acknowledges that notice avoids any concerns about filed rate doctrine violations, the Remand Order suggests that the notice of potential adjustment must be on file with the Commission to provide "adequate" notice in this context, i.e., according to the Commission, "adequate notice [was] lacking because the new rate was not on file with the Commission."[41]

The Commission erred in its stingy limitations on what circumstances might give rise to a finding of adequate notice. The Commission reads *CPUC* as permitting a finding of adequate notice only where there was "the potential for a rate to be overturned on appeal and thus changed retroactively."[42] But neither *CPUC* nor any other case stands for so narrow a proposition. Courts have considered both explicit notice (such as statements in a Commission order), and less explicit notice (such as pending litigation and surrounding events) to be adequate.[43] Indeed, the Commission "must look for adequate notice from a variety of sources,"[44] and it is not confined solely to the traditional notice scenarios.[45] Rather, as stated in *CPUC*, the proper inquiry looks

[40] *West Deptford*, 766 F.3d at 22, *quoting Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992).

[41] Remand Order at PP 52, 54, *citing Old Dominion*, 892 F.3d at 1232. It is well-established that notice can also be adequate where notice of adjustment is explicitly provided in the Commission's orders, the rate is subject to appeal, or the rate is an explicit formula. *See NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007) (confirming "the acceptability of tariffs with a rate formula, under which rates may constantly change (as long as they do so consistently with the formula) without prior notice to the Commission or the public"); *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992) (notice provided by FERC's order saying the rate was provisional); *CPUC*, 988 F.2d 165 (pending litigation provided adequate notice).

[42] Remand Order at P 54.

[43] *See Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992); *CPUC*, 988 F.2d at 165 (noting that notice was "more atmospheric than explicit").

[44] *Texas E. Transmission Corp. v. FERC*, 102 F.3d 174, 186 (5th Cir. 1996).

[45] *See West Deptford*, 766 F.3d at 23-24.

to whether as a practical matter customers had sufficient notice, and it applied that inquiry to the facts at hand.[46] Hence, the Commission was obliged to examine the facts here, regardless of whether presented in an appellate or other context. In short, *CPUC* never stated, and it was plain error for FERC to have concluded, that adequate notice can be found to have occurred only in circumstances where there was knowledge that a rate might be changed on appeal.

Flat Ridge submits that it would be hard to find a more compelling fact pattern to demonstrate adequate notice. SPP's inability to implement Attachment Z2 had been well-known for eight years, starting with when it first included and described the purpose of the Z2 crediting provision in its Tariff. Since then, Z2 crediting has been documented again and again -- as has the fact that SPP had been trying unsuccessfully to implement Attachment Z2 for two years shy of a decade. The twists and turns in Attachment Z2's long odyssey always were made known in public filings and in stakeholder processes that included SPP's transmission owners and other potential transmission customers. In light of this well-known history, it simply cannot be gainsaid that SPP's purpose and intent was eventually to invoice for any accrued Z2 credits. Indeed its intent to do so, and its statements to this effect were <u>universally</u> known within SPP.

Xcel and other transmission customers have argued[47] they did not have adequate notice of the fact that eventually they would be invoiced for their Z2 cost obligations. But there should

[46] *CPUC*, 988 F.2d at 164 ("when determining whether a FERC order violates either the filed rate doctrine or the rule against retroactive ratemaking, this court inquires whether, as a practical matter, the purchasers of the gas – such as petitioners here – had sufficient notice that the approved rate was subject to change.").

[47] *See* Initial Brief of Petitioner at 21-27, *Xcel Energy Services, Inc. v. FERC*, Case No. 18-1005 (D.C. Cir. May 29, 2018) ("Xcel Brief"); *see also* "Motion to Intervene and Protest of Xcel Energy Services Inc.," Docket No. ER16-1341-000, at 12-14 (Apr. 22, 2016); "Motion to File Protest Out-of-Time and Protest of American Electric Power Service Corporation," Docket No. ER16-1341-000, at 3-6 (May 13, 2016); "Motion to File Protest Out-of-Time and Protest of Arkansas Electric Cooperative Corporation," Docket No. ER16-1341-000, at 4-8 (May 20, 2016); "Motion to File Protest Out of Time and Protest of Kansas Electric Power Cooperative, Inc.," Docket No. ER16-1341-000, at 4-5 (May 10, 2016); "Motion to Intervene and Protest of Tenaska Power Services Co.," Docket No. ER16-1341-000, at 11-12 (Apr. 22, 2016); "Request For Rehearing Of Southern Company Services, Inc.," Docket No. ER16-1341-001, at 4-6 (Aug. 8, 2016); "Request For Rehearing Of American Electric Power Service
(Continued...)

be no serious doubt that transmission customers were, as a practical matter, on notice that they would be assessed for Z2 payment obligations for the historical period when SPP was finally able to implement the precise manner by which such obligations would be assessed, and the Tariff's Z2 provision implemented so as fairly to achieve its purpose. Z2 implementation discussion was a constant in SPP.[48] As SPP described, it created an implementation task force in 2009 to develop processes and methods for Z2 implementation.[49] After working for over two years, this task force put out a white paper.[50] In January 2012, SPP's Markets and Operations Policy Committee endorsed moving forward with developing software based on the white paper's recommendations.[51] SPP's stakeholders continued reviewing the Z2 implementation process, and two years later, SPP filed Z2 revisions after identifying what it claimed were unsolvable implementation problems.[52]

Indeed, Xcel admits it "has been aware that SPP has been seeking a method to resolve Attachment Z2 crediting" and that its transmission study indicated "in a number of places" that Z2 "[c]redits may be required … in accordance with Attachment Z2 of the SPP OATT."[53] Other

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Corporation and Xcel Energy Services Inc.," Docket No. ER16-1341-001, at 8-10 (Aug. 8, 2016); "Request For Rehearing Of Kansas Electric Power Cooperative, Inc.," Docket No. ER16-1341-001, at 13-16 (Aug. 5, 2016); "Brief of Kansas Electric Power Cooperative Inc.," Docket Nos. ER16-1341-000 and -001, at 15-20 (Aug. 31, 2018); "Brief Upon Voluntary Remand of Golden Spread Electric Cooperative, Inc.," Docket Nos. ER16-1341-000 and -001, at 10-13 (Aug. 31, 2018); "Brief of American Electric Power Service Corporation," Docket Nos. ER16-1341-000 and -001, at 4-6 (Aug. 31, 2018); "Brief of Xcel Energy Services, Inc. On Behalf of Southwest Public Service Company," Docket Nos. ER16-1341-000 and -001, at 21-25 (Aug. 31, 2018); "Motion to Intervene Out of Time and Brief of Midwest Energy, Inc.," Docket Nos. ER16-1341-000 and -001, at 7-10 (Aug. 31, 2018).

[48] Waiver Order at P 53 ("SPP has made concerted efforts to implement the revenue crediting process and, despite delays, has demonstrated progress and kept its stakeholders informed of developments.").

[49] "Petition of Southwest Power Pool, Inc. for Tariff Waiver," Docket No. ER16-1341-000, at 5-6 (Apr. 1, 2018).

[50] *Id.*

[51] *Id.*

[52] *Southwest Power Pool, Inc.,* 145 FERC ¶ 61,198 (2013).

[53] "Motion to Intervene and Protest of Xcel Energy Services Inc.," Docket No. ER16-1341-000, at 12-13 (April 22, 2016).

transmission customers concede their having had similar notice.[54] And on appeal Xcel "conceded that it was aware of the provisions of Attachment Z2, as well as the fact that, prior to the Waiver Filing, SPP had indicated it intended to try to implement the revenue crediting of Attachment Z2 historically."[55] Transmission customers may argue that they did not know the exact cost amounts they would be assigned -- indeed, during the historic period, they could not precisely be ascertained, which everyone knew -- but that does not mean they had inadequate notice that the subsequent Z2-based adjustments would be implemented by SPP.

The Commission never grappled with the fact that the situation here demonstrably was not one where the transmission provider's *intention to implement* the Z2 allocation rules was unknown or even unclear. Nor was it unknown or unclear to transmission customers that if their service could not have been provided but for the presence of a Creditable Upgrade, that they would have been allocated part of the cost of that upgrade -- and potentially the entire cost. Nor is there any dispute here that, one way or the other, the *entirety* of a Sponsor's credits and a customer's Z2 obligations would be paid back to the Upgrade Sponsor once it was shown exactly what the size of the payment would be based on that customer's use of the Creditable Upgrades. And all customers knew that *if* it were to turn out that that customer was the only user, then that

[54] "Request For Rehearing Of American Electric Power Service Corporation And Xcel Energy Services Inc.," Docket No. ER16-1341-001, at 9 (Aug. 8, 2016) (admitting that "customers were on notice through Attachment Z2 that they can have responsibility for credits for Sponsored Upgrades."); "Motion to Intervene and Protest of Tenaska Power Services Co.," Docket No. ER16-1341-000, at 11-12 (Apr. 22, 2016) (not disputing that "stakeholders have been on notice for years that SPP has been working to develop the Attachment Z2 process and planned to implement the crediting process to account for the historical period back to when the first credit payment obligation was due"); "Motion For Leave To File Answer And Answer And Motion To Lodge Information In The Record Of Golden Spread Electric Cooperative, Inc.," Docket No. ER16-1341-000, at 5 (May 9, 2016) (Golden Spread "does not feign a total lack of knowledge about Attachment Z2. … Nor does Golden Spread fail to recognize that when the second software vendor retained by the SPP to review transmission service reservations and generate valid conclusions about cost responsibility has completed its work, it might owe a balance to the SPP."); "Motion To File Protest Out Of Time And Protest Of The Kansas Electric Power Cooperative, Inc.," Docket No. ER16-1341-000, at 4-5 (May 10, 2016) (admitting its "involvement with the stakeholder process" and that its transmission study document indicated potential Z2 liability).

[55] Xcel Brief at 24.

customer alone would be responsible for paying the full amount of whatever Creditable Upgrade it was utilizing in order to receive transmission service. In short, any such customer reasonably should have assumed that their obligation could range from *de minimis* to many millions of dollars (similar to the ranges that interconnection customers oftentimes are provided when subsequent studies are necessary, and where the final costs remain unknown until the conclusion of such studies). Yet the Commission considered none of these facts in holding that the transmission customers nonetheless had no notice of what their obligations would be. In this regard, the Remand Order does not constitute reasoned decisionmaking.[56]

It defies belief, then, that a transmission customer could possibly have reasonably believed that the day would never come when it would be "retroactively" invoiced for the entirety of its Z2 cost obligations, given both the Tariff's (at all pertinent times) express requirement that the entirety of such obligations in fact were to be paid to the Upgrade Sponsor, and the surrounding circumstances including SPP's ongoing implementation efforts to fairly and non-discriminatorily implement that requirement. The circumstantial evidence alone makes it difficult to understand how the Commission could have believed otherwise without at least considering the above contentions (and facts) or adducing its own facts in rebuttal. Its failure to do so is the very essence of unreasoned and arbitrary decision-making.

This case turns on whether transmission customers had "adequate" notice they would be responsible for their Z2 cost obligations. This is a highly fact-specific inquiry involving, among other things, SPP's Z2 implementation activities, what information it provided to stakeholders, and what actions transmission customers and Upgrade Sponsors may have taken during the

[56] *See Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (an agency must give "reasoned consideration to all the material facts and issues" and "articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination.").

relevant time period. Yet the Commission made its determination based solely on initial briefs, and while the Commission is typically conscious of the need to give parties an opportunity to respond to new arguments,[57] here it did not even provide for reply briefs. Xcel, in fact, requested that the matter be set for hearing and recommended holding a technical conference, but the Commission ignored this request entirely in the Remand Order.[58]

It is hornbook law that the Commission is required to both respond to arguments raised and to make "reasoned" decisions. But here it is difficult to see how the Commission's conclusions about notice based on such a limited record -- and its failure even to respond to Xcel's arguments[59] -- could possibly be the product of reasoned decision-making.[60] At a minimum, the Commission should have allowed the parties to present the facts establishing what notice may or may not have been provided about SPP's eventual Z2 implementation, which means the Commission should have held (or stated in the Remand Order that it would hold) an evidentiary hearing or, at a minimum, a technical conference to get to the bottom of this critical issue.

[57] *See, e.g., Calpine Oneta Power v. American Elec. Power Service Corp.*, 114 FERC ¶ 61,030, at P 7 (2006); *Midwest Independent Transmission System Operator, Inc.*, 112 FERC ¶ 61,211, at P 34 (2005), *citing Baltimore Gas & Elec. Co.*, 91 FERC ¶ 61,270, at 61,922 (2000) ("The Commission looks with disfavor on parties raising new issues on rehearing. This is because other parties are not permitted to respond to a request for rehearing").

[58] "Brief of Xcel Energy Services, Inc. On Behalf of Southwest Public Service Company," Docket Nos. ER16-1341-000 and -001, at 36 (Aug. 31, 2018) (requesting the Commission "set the consolidated proceedings for hearing and settlement judge proceedings. XES also recommends the Commission consider holding a technical conference, so the parties may have an opportunity to discuss the facts and issues, rather than continuing to debate via pleadings. A consolidated proceeding would allow the parties to attempt to reach a comprehensive solution to Attachment Z2 issues, which would serve the public interest."). Flat Ridge does not, however, support Xcel's request for consolidation.

[59] *Id.*

[60] *Moraine Pipeline Co. v. FERC*, 906 F.2d 5, 9 (D.C. Cir. 1990) ("by failing to respond to Moraine's arguments and to articulate its decision based on evidence in the record, the Commission breached its obligation to engage in reasoned decisionmaking").

For purposes of the filed rate doctrine, all that is required to show adequate notice is that customers "have notice that a rate is tentative and may be later adjusted with retroactive effect."[61] It is *not* required (and *not* limited only to those circumstances in which it can be shown) that the customers knew that their rates might ultimately change as a result of a pending rehearing or appeal. They had simply to be on notice that the rates could change. Thus, in *CPUC*, the court pointed to litigation related to pipelines' take-or-pay cost recovery, and the fact that "petitioners had to have been aware that FERC had previously and frequently approved passthrough mechanisms as a means to recover remaining take-or-pay charges" in finding that customers were on notice that "there might be a later adjustment, specifically a passthrough charge."[62] The court never contended customers knew precisely how, when, by what amount or for how long their rates would change -- but only that their rates were subject to being changed.[63]

That is exactly the case here. For years, SPP has been telling its members (which include all of the SPP Transmission Owners now challenging their having been invoiced) that it would retroactively invoice for Z2 cost obligations as soon as it figured out how best to do so. Among other ways, it informed transmission customers *in their study reports* that they could be subject

[61] *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007), quoting *Consolidated Edison Company of New York, Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003).

[62] *CPUC* at 164-65; *see also id.* at 164 ("the events surrounding the initiation of the GIC cannot have failed to alert SoCal and others to the fact that the conditions of the GIC might not survive appeal."); *Canadian Ass'n of Petroleum Producers v. FERC*, 254 F.3d 289, 299 (D.C. Cir. 2001) ("Although the pipeline in [*Natural Gas Clearinghouse v. FERC*] had specifically reserved the right to impose surcharges when it was ordered to file a new, lower tariff, we did not hold that such a reservation was necessary. So long as the parties had adequate notice that surcharges might be imposed in the future, imposition of surcharges does not violate the filed rate doctrine.").

[63] *See e.g., CPUC*, 988 F.2d at 165-66 ("Transwestern's petition for rehearing on the exclusivity condition and its judicial appeal of the sunset provision provided notice directed to its customers, … that its current take-or-pay recovery regime was subject to change."); *see also Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791, 797 (D.C. Cir. 1990) (notice places "the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision."). Adequate notice has also been premised, at least in part, on assumed customer knowledge of FERC policy and precedent. *Consolidated Edison Co. of New York v. FERC*, 958 F.2d 429 (D.C. Cir. 1992) (notice provided by pipeline's request for retroactive effective date and FERC's record of granting such requests).

to Z2-related charges.[64] Again, while the details of those customers' individual cost responsibilities might not have been known, the possibility of their being charged potentially the entire cost of a Creditable Upgrade was known to them; and exact amounts simply are not required to provide adequate notice.

Indeed, there is no reasoned basis for the Commission's assumption that transmission customers did not have a reasonable understanding of their potential Z2 cost obligations. While they may not have known with precision their ultimate cost obligations, they would have been informed during the transmission study process of the Creditable Upgrades that may be impacted by the requested service and that they could be responsible for the maximum amount associated with such Creditable Upgrades.[65] Accordingly, customers should have understood the potential maximum impact should they be allocated the full cost of the Creditable Upgrade.

The Commission states that *Old Dominion* requires that notice that SPP intended to invoice retroactively must be filed with the Commission (i.e., that filing puts the Commission and Tariff customers on notice there and then -- and only there and then -- that these customers might one day be invoiced for obligations incurred more than one year prior to the invoice's issuance).[66] This is incorrect.

First, and most fundamentally, while *Old Dominion* states that "all rate changes" must be filed with the Commission, it does not preclude, or even cast doubt on the possibility that

[64] Rehearing Order at P 30.

[65] Tarff, Attachment Z1 § V.c.2 ("Any Directly Assigned Upgrade Costs associated with a transmission service request shall be allocated to the Creditable Upgrade(s) identified in accordance with Section V.c.1 of this Attachment Z1 up to the maximum amount of upgrade costs allocated to the transmission service request for such Creditable Upgrade(s)."). SPP's *pro forma* Aggregate Facilities Study Agreement also clearly states that transmission service requests will be evaluated pursuant to the process in Attachment Z1. *See* SPP Aggregate Facilities Study Agreement, Fifth Whereas Clause.

[66] Remand Order at P 52 (rejecting SPP arguments that it "provided adequate notice through study report notations and stakeholder involvement" because "in *Old Dominion*, the court found adequate notice lacking because the new rate was not on file with the Commission.").

customers could be provided with adequate notice that a filed rate is subject to change by some other means.[67] Thus, in *West Deptford*, the court acknowledged that the notice exception to the filed-rate doctrine is not strictly limited to the two classic situations (i.e., judicial appeal or a formula rate).[68] Curiously, the Commission apparently believes *West Deptford* supports its position.[69] But while the *West Deptford* court ultimately found that PJM had not provided adequate notice, that case turned on an analysis of the facts, i.e., the adequacy of the notice contained in a PJM transmittal letter, itself deemed by the Commission to have been ambiguous as to when the rates in question would take effect and as to what parties. The facts here, though, are entirely distinguishable from *Old Dominion* and *West Deptford*.

Second, unlike in *Old Dominion*, SPP is implementing the filed rate -- Attachment Z2 is on file and has been on file since 2008 -- and is not seeking retroactively to assess a charge that is not part of the filed Tariff (as was the case in *Old Dominion*); and, third, unlike the notice PJM provided in *Old Dominion*, which was ruled to be a single one-way communication through a website posting, and the notice PJM provided in *West Deptford*, which was found to be a very confusing statement of PJM's intention, SPP undertook a years-long stakeholder implementation process (constant meetings and documentation) which was vetted through all of its members, including the SPP Transmission Owners now opposing SPP's implementation of Attachment

[67] *Old Dominion*, 892 F.3d at 1232.

[68] *West Deptford*, 766 F.3d at 23-24 ("The Commission also failed to explain how that material expansion of the notice exception remains consistent with the express commands of the Federal Power Act and the filed rate doctrine, or how an exception so broadly construed could avoid consuming the rule that rates are supposed to identify new changes 'plainly,' and do so in filed tariffs that are 'open in convenient form and place for public inspection.' 16 U.S.C. § 824d(c) & (d). Perhaps it can do that, but the decision on review provides no trace of a reasoned decision in that regard.").

[69] Remand Order at P 45, *citing West Deptford.*

Z2's indisputably clear language and the equally clear obligations that could arise as a result of that language's operation in a given circumstance.

Frankly, it would be exceedingly surprising if any SPP Transmission Owner or other SPP member were to attest to the Commission that that member was unaware of SPP's intent to implement Attachment Z2 for the historical period. Indeed, any such attestation would strain credulity, as does their justification (to the extent offered) as to why they remained ignorant of, and kept silent for eight years as to any concerns regarding the Tariff's Z2 provisions or SPP's implementation of those provisions. Moreover, to the extent the Commission implicitly accepted the argument that the Transmission Owners and other customers were not on notice that their rates might change (and that, consequently, SPP's issuing a notice for retroactive payment would violate the filed rate doctrine), this would also entail believing that the Upgrade Sponsors, already forced for eight years to wait for the monies due to them, must have been perfectly content to risk their never receiving a good chunk of their money.

In sum, Flat Ridge respectfully submits that the Commission should have concluded that customers affected by the Z2 implementation in fact did receive adequate notice that eventually any Z2 obligations would be determined and reconciled once SPP finally resolved its Z2 implementation issues; that until then, the amounts of such obligations would not be known precisely; and that their obligation to pay such amounts once determined necessarily could financially impact those customers. Accordingly, there can be no violation of the filed rate doctrine.

3. The Remand Order conflicts with Commission precedent.

The Remand Order states that "enforcing a tariff provision that places a time limitation on the correction of invoices (e.g., a time bar provision) is consistent with the filed rate

doctrine."[70] Indeed, it might well be. But the Commission erred insofar as it suggests that any waiver of a time limitation would be prohibited, as is borne out by the Commission's own precedent.

In fact, the Commission has repeatedly waived SPP's billing adjustment limit, both before and after granting the waiver in this proceeding.[71] In 2015, it waived Section I.7.1 insofar as necessary to allow SPP to resettle invoices as needed due to SPP's software development delays and errors.[72] There was no suggestion that the waiver was prohibited under the filed rate doctrine -- notably Xcel supported the waiver; and like here, there was no pending litigation or formula rate at issue. SPP simply notified its stakeholders of its intent and the possibility of a retroactive adjustment.[73] Then shortly after it granted a waiver in this proceeding, the Commission again waived Section I.7.1 thereby allowing SPP to give transmission customers with Z2 payment obligations a payment plan option, which Xcel again supported.[74] And in 2018, the Commission waived Section I.7.1 yet again, allowing SPP to correct its 2016 Z2 invoices.[75] It is true that in granting these waivers, the Commission was not required to address the filed rate doctrine or rule against retroactive ratemaking. However, it also is true that until issuing the Remand Order, there was never an ascertainable Commission policy generally prohibiting waivers of billing adjustment limitations.

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[70] *See* Remand Order at P 50.

[71] *Southwest Power Pool, Inc.*, 153 FERC ¶ 61,180 (2015) (granting waiver of Tariff Section I.7.1); *Southwest Power Pool, Inc.*, 162 FERC ¶ 61,155 (2018) (same); *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,245 (2016) (same).

[72] "Petition of Southwest Power Pool, Inc. For Tariff Waiver," Docket No. ER15-2295-000 (July 28, 2015); *Southwest Power Pool, Inc.*, 153 FERC ¶ 61,180 (2015).

[73] *Southwest Power Pool, Inc.*, 153 FERC ¶ 61,180 at P 8 (2015).

[74] "Petition of Southwest Power Pool, Inc. For Tariff Waiver," Docket No. ER16-2330-000 (July 29, 2016); *Southwest Power Pool, Inc.*, 156 FERC ¶ 61,245 (2016).

[75] *Southwest Power Pool, Inc.*, 162 FERC ¶ 61,155 (2018).

The Remand Order, however, neither acknowledges these precedents, nor explains why it denied a waiver here in spite of them, nor why it chose to change its position despite them.[76] It cites several cases, but none of them either stands for the proposition that a billing adjustment period never can be waived or supports departing here from the Commission's precedent. The NYISO cases cited in the Remand Order did not involve waivers of billing adjustment periods, but circumstances where a utility had asked the Commission to direct NYISO to retroactively resettle invoices. And, consistent with *CPUC*, the Commission, after examining the facts before it, determined that while NYISO's tariff might permit such resettlement under extraordinary circumstances, the tariff's billing adjustment limit and the requesting utility's own conduct weighed against doing so in those particular cases.[77]

Nor did *Seminole* address any waiver of a billing adjustment limit.[78] There, a transmission customer filed a complaint alleging it had been overcharged for years under its transmission service agreement. The Commission agreed and ordered refunds as to the most recent 24 months in accordance with the transmission service agreement's terms, which the Commission said reflected the parties' "knowing waiver of their right to refunds for violations of the filed rate."[79] Hence, not only is this case irrelevant as to whether SPP can request a waiver of its billing adjustment limit in Section I.7.1 but, here, the Upgrade Sponsors in no way waived their rights to Z2 credits where it was well-known that Z2 credits were accruing but not timely billed, and where those Sponsors withheld seeking relief from the Commission precisely in

[76] *See Hatch v. FERC*, 654 F.2d 825, 834 (D.C. Cir. 1981) ("an agency must provide a reasoned explanation for any failure to adhere to its own precedents.").

[77] *New York Independent System Operator, Inc.*, 128 FERC ¶ 61,086 at P 20 (2009); *New York State Electric & Gas Corp.*, 133 FERC ¶ 61,094 (2010), *reh'g denied*, 142 FERC ¶ 61,151 (2013).

[78] *Seminole v. Fla. Light & Power Co.*, 139 FERC ¶ 61,254 (2012), *reh'g denied*, 153 FERC ¶ 61,037 (2015), *pet. for review denied, Seminole Elec. Coop., Inc. v. FERC*, 861 F.3d 230 (D.C. Cir. 2017).

[79] *Seminole v. Florida Light & Power*, 139 FERC ¶ 61,254 at P 43 (2012).

reliance on SPP's oft-stated intent to retroactively pay their Z2 credits, as well as the Commission's other waiver decisions.[80]

Accordingly, to the extent a waiver was required to allow Z2 implementation, the Commission erred in ruling that it was legally foreclosed from granting it under the particular circumstances here.

B. The Commission Erred In Ordering Refunds.

1. The Commission erred in ruling that equitable considerations were irrelevant to its determination and in failing to consider applying its broad remedial authority.

Having ruled, in error, that it could not waive Section I.7.1 for the historic period, the Commission further erred in directing SPP to refund credit payment obligation amounts.[81] It gives no explanation for why it chose this particular remedy or as to why it thought its ruling just. To the contrary it all but said it was compelled to rule as it did notwithstanding any unjustness in the outcome because it had no discretion to order otherwise.[82] Then, seemingly to render this erroneous conclusion irrelevant, it curiously claims that its disposition "gives effect to both the provisions of Attachment Z2 and section I.7.1," which plainly is not true with respect to Z2.

The Commission's discretion is at its zenith when fashioning remedies,[83] and it is authorized under Section 309 to direct remedial measures not expressly provided for in the FPA

[80] *PPL EnergyPlus, LLC v. New York Independent System Operator Inc.*, 115 FERC ¶ 61,383 at P 29 (2006) ("It is unfair to market participants to assume that interpretations made by NYISO in its own publications … cannot be regarded as coming from a credible source.").

[81] Remand Order at PP 58-59.

[82] *Id*. at P 57; *see also id.*, LaFleur Concurrence at P 2, Glick Concurrence at P 2.

[83] 16 U.S.C. § 825h (Commission "shall have power to perform any and all acts … as it may find necessary or appropriate to carry out the provisions of" the FPA). *See, e.g., Niagara Mohawk Power Corporation v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967); *Louisiana Pub. Serv. Comm'n v. FERC*, 772 F.3d 1297, 1302 (D.C. Cir. 2014),
(Continued...)

provided that the action "conforms with the purposes and policies of Congress and does not contravene any terms of the Act."[84] It has exercised this equitable discretion to correct unjust situations, such as, by waiving refunds, recouping erroneous refunds, and ordering disgorgement of profits.[85] For instance, the Commission has declined to order refunds where doing so "would potentially result in under-recovery."[86] However, although discretionary, what it cannot do is fail even to consider how its remedial authority might reasonably be applied here. Put simply, its failure to do so, at least in the context of deciding upon an appropriate remedy, in and of itself rendered its decision unreasonable and not the result of reasoned decision-making.[87] Instead, it ignored all the other options, including developing the factual record in this proceeding, and blithely directs SPP to refund credit payment obligations amounts to transmission customers for the historical period.[88]

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citing La. Pub. Serv. Comm'n, 174 F.3d 218, 225 (D.C. Cir. 1999) ("the breadth of the Commission's discretion is "at its zenith" when fashioning remedies") (internal alterations and quotation marks omitted).

[84] *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967); *see also Southern California Edison Company*, 116 FERC ¶ 61,287 at P 26 (2006) ("Under Section 309 of the FPA, 16 U.S.C 825h (2000), the Commission is authorized to issue such orders as it may be necessary or appropriate to carry out provisions of the FPA, and authorizes the Commission to use regulatory means not spelled out in detail in the FPA.").

[85] *See e.g., Transwestern Pipeline Company*, 66 FERC ¶ 61,350 at n.19 (1994) ("Even in cases where a rate increase in violation of the filed rate doctrine was held to occur, the Commission still has been found to have the discretion to waive refunds under section 4 of the NGA, provided that, as we have done, the Commission shows that it considered relevant factors and ... struck a reasonable accommodation among them.") (internal quotations and citations omitted); *Verso Corporation v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018), citing *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 362 (D.C. Cir. 2017) ("This Court has endorsed FERC's authority under Section 309 to recoup erroneous refunds."); *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 31 (2004) (ordering Enron's disgorgement of profits).

[86] *Louisiana Public Service Commission and the Council of the City of New Orleans v. Entergy Corporation*, 142 FERC ¶ 61,211 at P 55 (2013), *order on remand*, 155 FERC ¶ 61,120 at PP 27-30 (2016).

[87] *Pub. Utilities Comm'n of State of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) ("FERC's decision not to consider a § 309 remedy for tariff violations was arbitrary and capricious, an abuse of discretion, and not in accordance with law."); *Koch*, 136 F.3d at 816 (finding the Commission abused its discretion in ordering refunds where the Commission "failed to establish that its decision represents a reasonable accommodation of the relevant factors and that the refund is equitable in the circumstances.") (quotations and citations omitted).

[88] Remand Order at P 58.

Refunds are required only where there is a statute affirmatively requiring them.[89] And in the absence of such statutory mandate, the Commission has discretion not to require them.[90] Thus, the Commission acknowledged that it "is more difficult to justify refunds … when the parties that ultimately would pay them did not themselves violate the tariff."[91] That is the case here, where Upgrade Sponsors, first, were forced to wait years for the amounts due to them even though the transmission customers with payment obligations immediately began to receive service -- service that uncontestably would not have been available to them but for Upgrade Sponsor's Creditable Upgrades; and now these Sponsors potentially might have to forfeit those monies altogether.

The Commission must, at a minimum, explain how its remedial decisions are a "reasonable accommodation of the relevant factors" and "equitable in the circumstances."[92] Yet it did neither here. The Remand Order describes no consideration of the equities in this case and notably would leave Upgrade Sponsors no recourse under Attachment Z2. It will, instead,

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[89] *Towns of Concord, Norwood & Wellesley, Mass. v. FERC*, 955 F.2d 67, 72-73 (D.C. Cir. 1992).

[90] *See e.g., Midwest Independent Transmission System Operator, Inc*., 118 FERC ¶ 61,212 at P 91 (2007) ("the Commission has broad authority to fashion remedies for tariff violations. In this instance, based on a balancing of the equities, we have elected not to impose refunds for this particular violation."); s*ee also, Louisiana Pub. Serv. Comm'n v. FERC*, 883 F.3d 929, 934 (D.C. Cir. 2018), *cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. FERC*, 139 S. Ct. 497 (2018) (noting FERC's "general tendency to deny refunds in cost allocation cases stems from the high correlation between such reliance and that type of case."); *Louisiana Pub. Serv. Comm'n & the Council of the City of New Orleans*, 135 FERC ¶ 61,218, at P 23 (2011) ("When a case involves a company over collecting revenues to which it was not entitled, the Commission generally holds that the excess revenues should be refunded to customers. By contrast, in a case where the company collected the proper level of revenues, but it is later determined that those revenues should have been allocated differently, the Commission traditionally has declined to order refunds.").

[91] *Midwest Independent Transmission System Operator, Inc.*, 155 FERC ¶ 61,127 at P 34 (2016) ("Tariff violations can be a reason for granting refunds, but it is more difficult to justify refunds on this basis when the parties that ultimately would pay them did not themselves violate the tariff."); *see also id*. at P 45 (noting "the Commission's long-established practice of denying refunds in cost allocation and rate design cases.").

[92] *Koch*, 136 F.3d at 816 (finding the Commission abused its discretion in ordering refunds where the Commission "failed to establish that its decision represents a reasonable accommodation of the relevant factors and that the refund is equitable in the circumstances.") (quotations and citations omitted); *Pub. Utilities Comm'n of State of Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006) ("FERC's decision not to consider a § 309 remedy for tariff violations was arbitrary and capricious, an abuse of discretion, and not in accordance with law.").

"provide[] an unfair windfall to those who benefitted from [Creditable Upgrades] during the historic period but are not required to pay for them," while "leav[ing] market participants holding the bag for [SPP's] mistakes."[93] This is "wholly inequitable."[94] The Commission's decision to allow transmission customers to get back amounts they rightfully owe, yet to subject Upgrade Sponsors to potential claw back of amounts they are rightfully due is arbitrary, capricious and an abuse of discretion.

First, as mentioned above in regards to the relevancy of the filed rate doctrine here, Flat Ridge's GIA contractually obligates SPP to award, and Flat Ridge to receive Z2 credits. It executed the Flat Ridge GIA in 2010, whereby it became "entitled to credits in accordance with Attachment Z2 of the Tariff" with respect to its Creditable Upgrades.[95] Pursuant to the Flat Ridge GIA, Flat Ridge funded upgrades that were first used by SPP in 2013 to provide transmission service, thus becoming Creditable Upgrades. Accordingly, for the entirety of the historical period, Flat Ridge was entitled under its GIA to receive credits associated with transmission service using the upgrade until fully compensated for what it paid to have the upgrades constructed.[96] And as further noted above, the Flat Ridge GIA has no billing adjustment limitation, and, therefore, no exposure to any clawbacks. In short, the fact that the Flat Ridge GIA expressly requires such payments, in their entirety, alone pushes all the equities to Flat Ridge's side of the ledger.

[93] Remand Order, LaFleur Concurrence at P 3; *id.*, Glick Concurrence at P 3.

[94] Remand Order, Glick Concurrence at P 1.

[95] Flat Ridge GIA § 11.4.1. The Flat Ridge GIA defines Tariff as SPP's "Tariff through which open access transmission service and Interconnection Service are offered, as filed with FERC, and as amended or supplemented from time to time, or any successor tariff."

[96] *Id.*; Tariff, Attachment Z2.

Second, if the Commission had appropriately "consider[ed] equitable principles, one of which is to do what should have been done,"[97] it is obvious that refunds are inappropriate. The transmission customers were granted services that would not have been granted but for the Creditable Upgrades. Furthermore, as noted above, the amounts transmission customers were invoiced and paid SPP for their Z2 historical period obligations were consistent with and in furtherance of the filed rate that was effective during that time period. But in any event, the Remand Order utterly, unreasonably and arbitrarily fails to show how ordering refunds to transmission customers, and potentially clawing back credit payments from Upgrade Sponsors, leaving those customers with a windfall, could possibly be a reasonable accommodation of the relevant factors and equitable in the circumstances.

Third, refunds are a particularly egregious remedy here in that transmission customers admit they were aware of SPP's intent to eventually invoice for accrued Z2 payment obligations.[98] As noted above as to the merits, this tends to show that these customers plainly knew of SPP's intent throughout the roughly eight years that it took to figure out how to implement the Tariff's express language. But worse still, as to the equities, they demonstrably are on the Sponsors' side given the fact that these customers admit to having been aware of SPP's intent, yet only long afterward came to raise the billing adjustment period deadline to shield them from honoring their obligations. Thus, whether or not this was a strategic decision, having failed to raise this issue during the eight years of SPP's struggles, or at a minimum when SPP revised the Z2 crediting method in 2013, it was fundamentally inequitable and unjust and

[97] *N. Nat. Gas Co., Div. of InterNorth v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986) ("Section 16 unquestionably gives FERC the authority, in fashioning remedies, to consider equitable principles, one of which is to regard as being done that which should have been done.").

[98] *See* fn.53-55, *supra*.

unreasonable for the Commission to require refunds to the transmission customers for amounts that, but for SPP's missteps in implementing its Tariff, were rightfully due under the Tariff.

2. Upgrade Sponsors should not be penalized for SPP's delays.

The Commission thought SPP's mismanagement in implementing its Tariff was obvious.[99] If so, SPP should bear the costs of its mismanagement. It is undisputed that SPP proposed the Z2 crediting system; it controlled the implementation process; it oversaw the work of its contractors; it led the Upgrade Sponsors to believe they would receive all accrued Z2 credits; and its ultimate implementation was eight years delayed. Even after Z2 implementation had become substantially delayed, SPP failed to take such steps as it thought potentially might have been necessary to insulate itself and the Z2 process from complaints such as those made by its transmission customers.[100] The fact that it chose to seek a waiver shows rather clearly that SPP did not protect the Upgrade Sponsors in the event its request was denied. And here we are as a result of that very conduct.

Upgrade Sponsors did not control SPP's Z2 implementation decisions. Instead, they waited years in reliance on SPP's representations that Z2 implementation for the full historical period was always imminent, finally to receive their accrued Z2 credits. They should not now be forced to return the long-awaited payments (monies that very possibly have already been spent) simply to reduce SPP's financial exposure in having to make refunds.

[99] *See* Waiver Order at P 59 ("we remind SPP that as a public utility it has an obligation to ensure that it implements provisions of its Tariff in a timely manner.").

[100] Remand Order at P 53 ("As SPP continued to have problems implementing the Attachment Z2 crediting process, SPP could have sought a delay of the effective date of applicable Tariff provisions until it was able to invoice transmission service customers for Attachment Z2 credit payment obligations. Such action by SPP would have allowed transmission customers to make fully informed decisions about the cost of their transmission service").

As true for other commercial parties, utilities typically are required to bear the costs resulting from their own misconduct rather than allowed to recover those costs in rates.[101] The same should be true for SPP here. It was SPP's mismanagement that created this situation. And it, not the Upgrade Sponsors, should bear the resulting costs, even if that means it ultimately either will otherwise have to collect those costs on some pro rata basis from its members, or be required to make a claim under its insurance policies.

3. The Commission acted arbitrarily and capriciously in failing to recognize that, because under the Tariff, Upgrade Sponsors must be made whole for the entirety of their Creditable ("but for") Upgrades (if used for transmission service), if the Commission were to allow SPP to claw back "historical" payments pursuant to the filed rate doctrine, then SPP will be required to assess those very amounts in its next invoices pursuant to the Tariff.

There can be no serious dispute that SPP's Z2 implementation was unreasonably delayed and that during this time Upgrade Sponsors relied in good faith on both the clear Z2 Tariff language and SPP's assurances that proper Z2 implementation was just around the corner.[102] Yet, if refunds are ordered, transmission customers will have been allowed to use and benefit from Creditable Upgrades free of charge. Accordingly, if the Commission allows SPP to claw back Z2 credit payments in connection with refunds it is required to make to transmission customers, Flat Ridge requests that, at a minimum, the Commission confirm that SPP is still required to pay Upgrade Sponsors the Z2 credits they are due under the Tariff and, therefore, if the Sponsors are not permitted to retain payments already made for use of their Creditable Upgrades, then new payments are required to be made on account of such use. In short, even if

[101] *See e.g., New England Conference of Pub. Utilities Commissioners, Inc. v. Bangor Hydro-Electric Co.*, 124 FERC ¶ 61291 at P 46 (2008) ("It is well established that the Commission has the authority to disallow the recoupment in rates of higher costs incurred as a result of negligence, mismanagement, or imprudence.").

[102] *See PPL EnergyPlus, LLC v. New York Independent System Operator Inc.*, 115 FERC ¶ 61,383 at P 29 (2006) ("It is unfair to market participants to assume that interpretations made by NYISO in its own publications … cannot be regarded as coming from a credible source.").

SPP did wait too long to correct an invoice, the Creditable Upgrades that SPP has identified as "but for" continue to be used in providing current transmission service, and the right of the Sponsors to receive Z2 payments for that use of their Creditable Upgrades up to the maximum amount of such Upgrades remains to be enforced.

There is nothing that forces the Commission to permit Upgrade Sponsors to be deprived of the credits to which they became entitled, and allow transmission customers to escape Z2 cost responsibility simply because SPP mismanaged the Z2 process and Tariff implementation. Indeed, if the result of the Remand Order is that the Z2 credit obligations will be disregarded for service provided prior to November 2015, Flat Ridge respectfully requests that the Commission must confirm that SPP must similarly disregard SPP's prior "but for" analyses. If transmission services did not trigger cost responsibility for actual Z2 credits, they also should not be considered a "but for" service until such time as they can be used to trigger the required Z2 credits. Hence, if the Commission does not grant rehearing, Flat Ridge asks that it confirm that all Creditable Upgrade amounts (including any clawed back) must be paid to Upgrade Sponsors as their facilities are used going forward.

V. CONCLUSION

For the foregoing reasons, Flat Ridge respectfully requests that the Commission grant rehearing and the relief requested herein. Not only was there no filed rate doctrine violation here, but even if there were, SPP still would be required to pay Flat Ridge for its Creditable Upgrades, and Flat Ridge would be entitled to retain all such payments. Moreover, the Commission also erred insofar as it unreasonably and without explanation chose not even to

acknowledge, much less weigh, any equitable considerations, but instead unjustly ordered refunds, potentially requiring Flat Ridge, and other Upgrade Sponsors, to return their Z2 credit payments to SPP.

Respectfully submitted,

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April 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2019, a copy of the foregoing document has been electronically served upon each person designated on the official service list in this proceeding.

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COMPLAINT TO ENFORCE

ATTACHMENT Z2 OF THE SPP TARIFF

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

EDF Renewables, Inc., et al.	**)**	
Complainants	**)**	
	)	
v.	**)**	**Docket No. EL19-___-000**
	)	
Southwest Power Pool, Inc.	**)**	
Respondent	**)**	

COMPLAINT TO ENFORCE ATTACHMENT Z2 OF THE SPP TARIFF

Pursuant to Sections 206, 306 and 309 of the Federal Power Act ("FPA")[1] and Rule 206 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission ("Commission"),[2] EDF Renewables, Inc. ("EDFR"), Enel Green Power North America, Inc. ("EGPNA"), NextEra Energy Resources, LLC ("NEER") and Southern Power Company ("SPC"), on behalf of and including their respective subsidiary project companies ("Complainants"), submit this Complaint against the Southwest Power Pool, Inc. ("SPP") to adhere to Attachment Z2 of SPP's Open Access Transmission Tariff ("Tariff").

I. EXECUTIVE SUMMARY

Complainants, via their Complainant Project Companies, have cumulatively funded nearly $95,000,000 in Network Upgrades that are owned by SPP Transmission Owners on the SPP transmission system through their respective generation interconnection agreements ("GIAs"). The first of these Network Upgrades became operational in 2010. Attachment Z2 to the SPP Tariff became effective under the FPA in 2008. Attachment Z2 requires SPP to annually (i) identify

[1] 16 U.S.C. §§ 824e, 825e, 825h.
[2] 18 C.F.R. § 385.206 (2019).

transmission service customers that rely on Network Upgrades funded by Complainants as Directly Assigned Network Upgrades to obtain service, that is, customers whose transmission reservations required the use of these Network Upgrades, (ii) collect a charge for that usage and (iii) pay credits associated with that usage to the funders (Upgrade Sponsors), such as Complainants. As the Commission is well aware, it took SPP eight years (until 2016) to put the software in place to implement Attachment Z2 (the "historical period"). In the meantime, SPP continued to provide and collect charges for transmission service that relied on Complainants' Network Upgrades. Yet, SPP did not provide a single dollar of Attachment Z2 credit to Complainants in support of that service until late 2016.

In late 2016, SPP finally started meeting its obligation under Attachment Z2 to pay credits to Complainants under Attachment Z2. These credits were funded pursuant to retroactive transmission charges authorized under the Waiver Order the Commission issued in Docket No. ER16-1341-000.[3] Some of the Complainants received the full credit owed for transmission service provided during the historical period. Others of the Complainants received a partial credit for transmission service provided during the historical period.[4] Cumulatively, Complainants have received over $18 million in Attachment Z2 payments for the historical period.[5] Complainants that received a lump sum expected these payments to be unconditional and final. Complainants that received partial payments had the same expectation and also relied on receiving the remaining

[3] *Southwest Power Pool, Inc*., 156 FERC ¶ 61,020 (2016) ("Waiver Order").
[4] *See Southwest Power Pool, Inc*., 156 FERC ¶ 61,245 (2016) ("Payment Plan Order").
[5] SPP records may show additional credits were provided. The numbers listed here are based on the best information available to Complainants. Further, it is unclear how much of this is credits (payment toward the principal amount funded) and how much is interest (because of the delay).

credits subject to the payment plan. That all changed with the Commission's revocation of its Waiver Order on February 28, 2019.[6]

Among other things, the Revocation Order requires SPP to "refund credit payment obligation amounts for the historical period," *i.e.*, 2008-October 2016.[7] So far as Complainants are aware, that is a huge undertaking for SPP and may impact its ability to determine and charge for transmission service going forward as part of its annual Aggregate Transmission Service Study process. Regardless, the Commission was very clear about who had the refund obligation: SPP must provide the refunds. This is appropriate because SPP is the entity that proposed the relevant Tariff provisions, pursued and then obtained Commission approval of those Tariff provisions, but then failed to comply with its Tariff over the course of many years. SPP is the entity that entered into binding commitments to credit the Complainants for Creditable Upgrades. SPP is the entity that granted and provided transmission service over the Creditable Upgrades during the historical period. SPP finally fulfilled is responsibilities under Attachment Z2 by providing credits to Complainants beginning in late 2016. Those amounts were lawfully paid under the SPP Tariff (albeit late) and rightfully belong to Complainants. No one has alleged that Complainants and other similarly situated interconnection customers did not comply with their obligations under their GIAs and the Tariff. As a result, to the extent there is a refund obligation, SPP alone bears that responsibility.

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[6] *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019) ("Revocation Order"), *reh'g pending*. The Complainants are not seeking to litigate herein the waiver issue presented for Commission resolution in the ER16-1341 proceeding, but instead address the consequences of the Commission's Revocation Order.

[7] *Id*. at P 58.

In its request for rehearing of the Revocation Order, however, SPP has characterized the Revocation Order as requiring it to engage in a "forced unwinding of settled transactions that will deny rightful compensation to upgrade sponsors…."[8] This signals that SPP might look to Upgrade Sponsors, such as Complainants, to cover SPP's refund obligation for the historical period. There are neither equitable nor legal grounds for SPP to obtain these refunds from Upgrade Sponsors. Upgrade Sponsors are in no way responsible for SPP's non-compliance with Attachment Z2, and Complainants are not aware of any mechanism in the SPP Tariff that would allow SPP to reclaim from Upgrade Sponsors funds they were entitled to under Attachment Z2. Complainants are the aggrieved Tariff customers because of SPP's multi-year non-compliance with Attachment Z2. Complainants endured for years waiting to receive credits from transmission service that SPP could not have provided to others but for using Complainant's Creditable Upgrades. Until such time as the Commission categorically specifies that SPP may not impose its refund obligation on Complainants, Complainants have been positioned with no choice but to file this Complaint under FPA Sections 206, 306 and 309. If the Commission directs SPP to obtain refunds from Upgrade Sponsors, it will exacerbate SPP's non-compliance with its obligations to Upgrade Sponsors under Attachment Z2 of its Tariff. Although Complainants appreciate the significant efforts SPP has undertaken to implement the software and administer Attachment Z2 since late 2016, SPP will veer further from Tariff compliance if the Commission requires it to reclaim from Complainants the Attachment Z2 credits to which they are entitled.[9]

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[8] *Southwest Power Pool, Inc.*, Request for Rehearing and Motion for Clarification, Docket No. ER16-1341-003, Apr. 1, 2019, at 1-2 & n.7 ("SPP Rehearing ER16-1341").

[9] As noted, Complainants are not aware of any SPP Tariff provision that would allow SPP to reclaim from Upgrade Sponsors funds they were entitled to under Attachment Z2.

Although various filings have been submitted to the Commission in the last few years about SPP's implementation of Attachment Z2 and assigning credit obligations,[10] none has asked the Commission to act pursuant to FPA Section 206, 306 and 309 and order specific relief to Upgrade Sponsors for the relevant historical period to address SPP's non-compliance, as Complainants do here.[11] In Docket No. ER16-1341, the Commission was asked to act based on its authority to grant Tariff waivers. Ultimately, the Commission found such authority to be limited, with Commissioner LaFleur concluding that "granting the requested retroactive *waiver* is not within our authority."[12] This Complaint is not a request that the Commission waive provisions of SPP's Tariff or reconsider its earlier denial of a waiver. This Complaint is the exact opposite: it seeks an order to uphold and enforce the terms of Attachment Z2 in SPP's Tariff, terms that have been part of the Commission-approved Tariff since 2008. The legal test for acting under this Complaint is far different from the waiver request, as the Commission has the responsibility to conclude whether SPP violated its Tariff – which in this case can hardly be denied – and authority and discretion to grant the relief requested in this Complaint pursuant to FPA, including Sections 206, 306 and 309.

Pursuant to FPA Sections 206, 306, and 309 and related Commission and Court precedent, Complainants request that the Commission find:

- SPP has violated the terms of its Tariff and the Complainant Project Companies' GIAs;
- SPP has engaged in unjust and unreasonable and unduly discriminatory and preferential practices in violation of the FPA;

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10 *See* Docket Nos. EL17-21, EL17-86, ER16-1341 and ER16-2330.

11 No similar complaint was submitted before this instant Complaint because such an earlier complaint would have been fruitless because SPP would have had no means to provide any relief that the Commission might order. In 2016, SPP finally had software in place to implement Attachment Z2, and in 2016 the Commission ordered relief per the Waiver Order. This instant Complaint is filed after the Commission issued the Revocation Order earlier this year.

12 Revocation Order, Commissioner LaFleur, Concurring at 2 (emphasis added); *see also* Revocation Order at P 53 (discussing SPP's waiver request).

- SPP has violated the filed rate doctrine;
- SPP has violated the cost causation and beneficiary pays principles; and
- Complainants are entitled to credits associated with transmission service that SPP provided since 2010, which transmission service SPP could not have provided but for using Complainants' Creditable Upgrades.

Pursuant to FPA Section 309 and the Commission's general authority under the FPA, Complainants request that the Commission fashion a remedy that:

- allows Complainants to retain all the credits and interest they have been paid to date; and
- finds any remaining credits and interest that are owed to Complainants for the relevant historical period are due immediately.

If the Commission is not inclined to grant this specific remedy, Complainants urge the Commission to exercise its authority under the FPA and send this matter to a Commission-overseen settlement process.

II. DESCRIPTION OF COMPLAINANTS AND COMPLAINANT PROJECT COMPANIES

A. EDFR

EDFR is a U.S. subsidiary of Électricité de France, S.A. ("EDF"), a French electric utility company.[13] EDFR develops, owns and operates large scale wind, solar, and biomass generation, and distributed energy and energy storage systems in North America. The following EDFR subsidiary project companies ("EDFR Project Companies") funded Network Upgrades in the SPP market for which they received credits for transmission service during the historical period:

[13] EDFR is a subsidiary of EDF Renouvelables S.A. (f/k/a EDF Energies Nouvelles, S.A.) ("EDFR S.A."). EDFR S.A. is an international company that develops, owns and operates renewable electric generation throughout the world. EDFR S.A., in turn, is a wholly-owned subsidiary of EDF that is owned by the French government (84.44%), with a small percentage of shares held by the current and former employees (approx. 1.85%) and the remaining shares owned by the public.

- **Roosevelt-Milo Interconnection, LLC** ("Roosevelt-Milo") owns and operates a 299.65 MW wind facility that interconnects with Southwestern Public Service Company ("SPS"). Mescalero Ridge Wind, LLC ("Mescalero"), SPS and SPP executed a GIA in January 2012, which was amended on October 4, 2013. The Mescalero GIA was assigned to Roosevelt Wind Project, LLC ("Roosevelt Project") on October 29, 2014. The Roosevelt Project GIA was assigned to Roosevelt-Milo in February 2015. The Roosevelt-MISO GIA is an effective rate schedule under the FPA.[14] Roosevelt-Milo (via Mescalero) funded $13,224,349 in Network Upgrades. The Roosevelt-Milo GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $13,224,349." *See* **Attachment A-1**. The Roosevelt generating facility (Phase 1 of GEN-2008-022) achieved commercial operation on November 6, 2015, and the Milo generating facility (Phase 2 of GEN-2008-022) achieved commercial operation on December 18, 2015. Based on information and belief, Roosevelt-Milo received $491,603 in Attachment Z2 payments for the historical period. However, this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

- **Slate Creek Wind Project, LLC** ("Slate Creek") owns and operates a 150.0 MW wind facility that interconnects with Westar Energy, Inc. ("Westar"). Slate Creek, Westar and SPP executed a GIA in March 2013, which was amended in November 2014 and June 2015. The Slate Creek GIA is an effective rate schedule under the FPA.[15] Slate Creek funded $1,640,698 in Network Upgrades. The Slate Creek GIA provides: "[T]he portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $1,640,698." *See* **Attachment A-2**. The Slate Creek generating facility achieved commercial operation on December 30, 2015. Based on information and belief, Slate Creek received $36,197 in Attachment Z2 payments for the historical period. However, this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

- **Spinning Spur Interconnect LLC** ("Spinning Spur"), SPS and SPP executed a GIA in May 2011, which was amended in August 2011. The Spinning Spur GIA is an effective rate schedule under the FPA.[16] Spinning Spur funded $4,743,785 in Network Upgrades. The Spinning Spur GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $4,743,785." *See* **Attachment A-3**. The Spinning Spur generating facility achieved commercial operation on December 12, 2012. Based on information and belief, Spinning Spur received $1,046,617 in Attachment Z2 payments for the historical period. However,

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14 SPP has been carrying the Roosevelt-Milo GIA in its Electric Quarterly Reports.

15 SPP has been carrying the Slate Creek GIA in its Electric Quarterly Reports.

16 SPP has been carrying the Spinning Spur GIA in its Electric Quarterly Reports. Affiliated generation of Spinning Spur obtained interconnection service via Spinning Spur funded Network Upgrades. *See Spinning Spur Interconnect LLC, et al.*, 139 FERC ¶ 61,017 (2012) (accepting common facilities agreement).

this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

B. EGPNA

EGPNA is part of the Renewable Energies division of the Enel Group, a subsidiary of ENEL S.p.A. EGPNA owns and operates wind, geothermal, hydropower and solar power plants in the United States and Canada. The following EGPNA subsidiary project Companies ("EGPNA Project Companies") funded Network Upgrades in the SPP market for which they received or are owed credits for transmission service during the historical period:

- **Buffalo Dunes Wind Project, LLC** ("Buffalo Dunes") owns and operates a 250 MW wind facility that interconnects with SPS. Buffalo Dunes, SPS and SPP executed a GIA in September 2011, which was amended in December 2013. The Buffalo Dunes GIA is an effective rate schedule under the FPA.[17] Buffalo Dunes funded $2,252,249 in Network Upgrades. The Buffalo Dunes GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $2,252,249." *See* **Attachment B-1**. The Buffalo Dunes generating facility achieved commercial operation on December 13, 2013. Based on information and belief, Buffalo Dunes received $1,033,310 in Attachment Z2 payments for the historical period. However, this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

- **Caney River Wind Project, LLC** ("Caney River") owns and operates a 199.8 MW wind facility that interconnects with Kansas Gas and Electric Company ("KG&E"). Caney River, KG&E and SPP executed a GIA in September 2006, which was amended in 2009 and 2010. The Caney River GIA is an effective rate schedule under the FPA.[18] Caney River funded over $8 million in facilities. The Caney River GIA provides: "The portion of Network Upgrades that is subject to the transmission service credits described in Section 11.4 of this Agreement is estimated at $8,393,000." *See* **Attachment B-2**. The Caney River generating facility achieved commercial operation on January 1, 2012. EGPNA acquired Caney River in 2011. Caney River takes transmission service to transmit the output from its generating facility. Caney River paid $18,994,778 in transmission service during the historical period, which had to use the Network Upgrades it funded per its GIA. At a minimum, this should have resulted in $18,994,778 in Attachment Z2 credits. However, Caney River received $0 in Attachment Z2 credits during the historical period.

[17] SPP has been carrying the Buffalo Dunes GIA in its Electric Quarterly Reports.

[18] The Commission accepted the Caney River GIA. *See Southwest Power Pool, Inc.*, Letter Order, Docket No. ER10-613-000 (Feb. 24, 2010).

- **Chisholm View Wind Project, LLC** ("Chisholm View") owns and operates a 299.04 MW wind facility that interconnects with OG&E. Chisholm View, OG&E and SPP executed a GIA in July 2008, which was amended in 2011, 2012 and 2013. The Chisholm View GIA is an effective rate schedule under the FPA.[19] Chisholm View funded over $8 million in Network Upgrades. The Chisholm View GIA provides: "The portion of Network Upgrades that is subject to the transmission service credits described in Section 11.4 of this Agreement is estimated at $8,226,915." *See* **Attachment B-3**. The Chisholm View generating facility achieved commercial operation on December 12, 2012. EGPNA acquired Chisholm View in 2012. Based on information and belief, Chisholm View received $5,974,124 in Attachment Z2 payments for the historical period. However, this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

C. NEER

NEER is a wholly-owned subsidiary of NextEra Energy Capital Holdings, Inc., which is a wholly-owned subsidiary of NextEra Energy, Inc. ("NextEra"), a publicly-traded Florida corporation. NEER is the merchant power subsidiary of NextEra. NEER's subsidiaries currently own or operate merchant generating facilities in 33 States and Canada with a combined gross generating capacity of approximately 21,000 MW, including interests held by NextEra Energy Partners, LP ("NEP"). In the SPP region, NEER subsidiaries own and operate approximately 5,500 MW of generation capacity, consisting mostly of wind energy generation. The following NEER subsidiary project companies ("NEER Project Companies") funded Network Upgrades in the SPP market for which they received credits for transmission service during the historical period:

- **Blackwell Wind Farm LLC** ("Blackwell Wind") owns and operates a 59.4 MW wind facility that interconnects with OG&E. Blackwell Wind, OG&E and SPP executed a GIA in April 2011, which was amended in 2012. The Blackwell Wind GIA is an effective rate schedule under the FPA.[20] Blackwell Wind funded $2,489,212 in Network Upgrades. The Blackwell Wind GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at

[19] SPP has been carrying the Chisholm View GIA in its Electric Quarterly Reports.
[20] SPP has been carrying the Blackwell Wind GIA in its Electric Quarterly Reports.

$2,079,212." *See* **Attachment C-1**. The Blackwell Wind generating facility achieved commercial operation on November 1, 2012. Based on information and belief, Blackwell Wind received $334,916 in Attachment Z2 payments for the historical period.

- **Cimarron Wind Energy, LLC** ("Cimarron Wind") owns and operates a 165.6 MW wind facility that interconnects with Sunflower Electric Power Corporation ("Sunflower"). CPV Cimarron Renewable Energy Company, LLC ("CPV Cimarron"), Sunflower and SPP executed a GIA on Dec. 2, 2011. The CPV Cimarron GIA is an effective rate schedule under the FPA.[21] CPV Cimarron funded $1,351,503 in Network Upgrades under the GIA, and additional amounts triggered by a transmission service reservation. The CPV Cimarron GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $2,434,710." CPV Cimarron was acquired by NEER entities in 2012 and changed its name to Cimarron Wind.[22] *See* **Attachment C-2**. The Cimarron Wind generating facility achieved commercial operation on October 1, 2012. Based on information and belief, Cimarron Wind received $963,210 in Attachment Z2 payments for the historical period, which includes payment for both types of Network Upgrades.

- **Ensign Wind, LLC** ("Ensign Wind") owns and operates a 98.9 MW wind facility that interconnects with Mid-Kansas Electric Company, LLC ("MKEC"). Ensign Wind, MKEC and SPP executed a GIA in April 2011, which was amended in 2012 and 2016. The Ensign Wind GIA is an effective rate schedule under the FPA.[23] Ensign Wind funded $34,424,820 in Network Upgrades. The Ensign Wind GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $34,032,144." *See* **Attachment C-3**. The Ensign Wind generating facility achieved commercial operation on October 10, 2012. Based on information and belief, Ensign Wind received $2,397,928 in Attachment Z2 payments for the historical period. However, this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

- **Minco Wind III, LLC** ("Minco Wind III") owns and operates a 106.5 MW wind facility that interconnects with OG&E. Minco Wind III, OG&E and SPP executed a GIA in February 2012, which was amended in April 2015. The Minco Wind III GIA is an effective rate schedule under the FPA.[24] Minco Wind III funded $2,489,212 in Network Upgrades.

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21 SPP has been carrying the Cimarron Wind GIA in its Electric Quarterly Reports.

22 *See CPV Cimarron Renewable Energy Company, LLC, et al.*, 141 FERC ¶ 62,077 (2012); *see also Cimarron Wind Energy, LLC*, Docket No. ER13-712-001, issued Mar. 14, 2013 (notice of succession).

23 The Commission accepted the Ensign Wind GIA. *See Southwest Power Pool, Inc.*, Letter Order, Docket No. ER11-3622-000 (July 18, 2011); *Southwest Power Pool, Inc.*, Letter Order, Docket No. ER12-2507-000 (Oct. 16, 2012); *Southwest Power Pool, Inc.*, Letter Order, Docket No. ER13-601-000 (February 12, 2013); *see also Southwest Power Pool, Inc.*, Letter Order, Docket No. ER16-2410-000 (October 6, 2016) (accepting notice of cancellation of GIA with SPP explaining that recent amendments make the GIA no longer non-conforming and thus SPP henceforth will carry the GIA in its Electric Quarterly Report).

24 SPP has been carrying the Minco Wind III GIA in its Electric Quarterly Reports.

The Minco Wind III GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.5 of this Agreement is estimated at $2,554,395." *See* **Attachment C-4**. The Minco Wind generating facility achieved commercial operation on November 1, 2012. Based on information and belief, Minco Wind III received $647,740 in Attachment Z2 payments for the historical period.

- **Minco Wind Interconnection Services, LLC** ("Minco Interconnection") is party to a GIA with OG&E and SPP that was executed in January 2012 , and which allows interconnection service of up to approximately 201.6 MW. Minco Interconnection is party to a shared facilities agreement with its affiliated companies Minco Wind, LLC and Minco Wind II, LLC, each of which owns and operates separate wind facilities with capacity of 100.8 MW.[25] The Minco Interconnection GIA is an effective rate schedule under the FPA.[26] Minco Interconnection funded $5,976,219 in Network Upgrades. The Minco Interconnection GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $7,632,042." *See* **Attachment C-5**. The Minco Wind and Minco Wind II generating facilities achieved commercial operation on December 11, 2010 and October 1, 2011, respectively. Based on information and belief, Minco Interconnection received $2,293,305 in Attachment Z2 payments for the historical period.

D. SPC

SPC, a subsidiary of Southern Company, is a leading U.S. wholesale energy provider meeting the electricity needs of municipalities, electric cooperatives, investor-owned utilities, and commercial and industrial customers. SPC and its subsidiaries own 49 facilities operating or under construction in 11 states with more than 11,300 MW of generating capacity in Alabama, California, Georgia, Kansas, Maine, Minnesota, Nevada, New Mexico, North Carolina, Oklahoma, and Texas. The following SPC subsidiary project companies ("SPC Project

[25] *See Minco Wind Interconnection Services, LLC*, 137 FERC ¶ 61,224 (2011) (accepting shared facilities agreement).

[26] SPP has been carrying the Minco Interconnection GIA in its Electric Quarterly Reports.

Companies")[27] funded Network Upgrades in the SPP market for which they received credits for transmission service during the historical period:

- **Grant County Interconnect, LLC** ("Grant County") owns and operates a 300 MW wind facility that interconnects with OG&E. Grant County, OG&E and SPP executed a GIA in December 2014, which was amended in 2015. The Grant County GIA is an effective rate schedule under the FPA.[28] Grant County funded $1,588,977 in Network Upgrades. The Grant County GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $1,588,977." *See* **Attachment D-1**. OG&E reimbursed Grant County for $885,827, leaving $703,150 subject to credits. The Grant County generating facility achieved commercial operation in April 2016. Based on information and belief, Grant County received nearly $200,000 in Attachment Z2 payments for the historical period. However, this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

- **Kay Wind, LLC** ("Kay Wind") owns and operates a 300 MW wind facility that interconnects with OG&E. Kay Wind, OG&E and SPP executed a GIA in February 2014, which was amended in 2015. The Kay Wind GIA is an effective rate schedule under the FPA.[29] The Kay Wind GIA identified $7,584,395 in Network Upgrades to be funded by Kay Wind. The Kay Wind GIA provides: "The portion of Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $7,584,395." The actual amount funded for the Network Upgrades was $9,070,231. Thus, $9,070,231 is eligible for Attachment Z2 credits. *See* **Attachment** D-2. The Kay Wind generating facility achieved commercial operation in November 2015. Based on information and belief, Kay Wind received nearly $3.1 million in Attachment Z2 payments for the historical period. However, this amount is subject to a payment plan and thus does not represent the full amount of credits and interest that is owed for the historical period.

[27] The SPC Project Companies, EDFR Project Companies, EGPNA Project Companies and NEER Project Companies are collectively referred to herein as "Complainant Project Companies" and individually as a "Complainant Project Company." To the extent that SPP has provided credits and interest for the historical period for Complainants' respective subsidiaries that are not listed in this Part II, such subsidiaries are included by reference.

[28] SPP has been carrying the Grant County GIA in its Electric Quarterly Reports.

[29] SPP has been carrying the Kay Wind GIA in its Electric Quarterly Reports.

III. ATTACHMENT Z2 OF SPP's TARIFF AND COMPLAINANTS' ELIGIBILITY FOR COMPENSATION

Attachment Z2 has been part of SPP's Tariff and on file with the Commission since 2008.[30]

Attachment Z2 provides, in pertinent part:[31]

> An Upgrade Sponsor ***will receive*** revenues from revenue crediting described in Sections I, II, and III of this Attachment Z2 . . . .
>
> I. Creditable Upgrades
>
> A. A Network Upgrade which was paid for, in whole or part, through revenues collected from a . . . Generation Interconnection Customer through Directly Assigned Upgrade Costs shall be considered a Creditable Upgrade where the Upgrade Sponsor is eligible to receive revenue credits in accordance with Section II of this Attachment Z2. . . . Such agreement requiring construction of the Network Upgrade shall include a Generator Interconnection Agreement . . . and shall include a list of those upgrades associated with the agreement that are eligible for credits in accordance with Section II of this Attachment Z2. . . .
>
> . . . .
>
> C. A Creditable Upgrade shall cease being a Creditable Upgrade when: (1) the facility is permanently removed from service, (2) all the Upgrade Sponsors have been fully compensated, or (3) the costs have been fully included in rates in accordance with Section III of this Attachment Z2. (emphasis added).

Pertinent definitions from SPP's Tariff are as follows:

- "Upgrade Sponsor" is "A . . . Generation Interconnection Customer . . . paying Directly Assigned Upgrade Costs for a Creditable Upgrade."

- "Directly Assigned Upgrade Costs" means "An Eligible Customer's share of the cost of a . . . Network Upgrade . . . , which includes any Network Upgrade costs that are . . . directly

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[30] *See Southwest Power Pool, Inc.*, Letter Order, Docket Nos. ER08-746-001, *et al.* (August 28, 2008) (accepting Attachment Z2 effective May 27, 2008) ("2008 Z2 Order"). In 2005, SPP filed and the Commission accepted Attachment Z to SPP's Tariff, which included the Aggregate Transmission Study Process and provisions for credits. *See Southwest Power Pool, Inc.*, 111 FERC ¶ 61,118, *order on reh'g*, 112 FERC ¶ 61,319 (2005); *see also Southwest Power Pool, Inc.*, 110 FERC ¶ 61,028 (2005). Attachment Z was split into Attachment Z1 (transmission study process) and Attachment Z2 (credits) in SPP's 2008 filing.

[31] Earlier versions of Attachment Z2 included the same credit concepts.

assigned to a Generation Interconnection Customer resulting from a request for generation interconnection."

- "Creditable Upgrade" is "Any Network Upgrade which meets the requirements of Section I of Attachment Z2."

Complainants satisfy the criteria in Section I of Attachment Z2. Each Complainant Project Company is an Upgrade Sponsor because each (i) is a Generation Interconnection Customer, (ii) was directly assigned the cost of Network Upgrades resulting from a generation interconnection request and (iii) paid for such Network Upgrades in full.[32] The funded Network Upgrades are Creditable Upgrades. In each Complainant Project Company's GIA, SPP identified the Network Upgrades and the amount of funds provided for those Network Upgrades that could be subject to Attachment Z2 transmission service credits.[33] All such Network Upgrades have been constructed (with funds supplied by Complainants as Upgrade Sponsors) and are in service as part of the integrated SPP's transmission grid. None of the Directly Assigned Upgrade Costs have been included in rates in Section III of Attachment Z2 (which addresses including Creditable Upgrade costs in applicable transmission rates). Accordingly, per Section I of Attachment Z2, Complainants are "eligible to receive revenue credits in accordance with Section II of this Attachment Z2."

Section II of Attachment Z2 provides, in pertinent part (emphasis added):

> II. Revenue Crediting
>
> An Upgrade Sponsor shall be eligible to receive revenue credits in accordance with this Attachment Z2. ***The Directly Assigned Upgrade Costs are recoverable, with interest calculated in accordance with 18 CFR §35.19a(a)(2), from new transmission service using the facility*** as defined below until the amount owed the

[32] *See* GIAs in **Attachments A-D**.
[33] *See id*.; *see also* information in Part II above.

Upgrade Sponsor is zero. The provisions of this Attachment Z2 are applicable to Transmission Owners subject to the provisions of Section 39.1 of this Tariff.

A. New Point-To-Point Transmission Service:

Revenues from new Long-Term Firm Point-To-Point Transmission Service that could not be provided but for the Creditable Upgrade(s) will be used, in whole or in part, for crediting purposes. For each new reservation for Long-Term Firm Point-To-Point Transmission Service that could not be provided but for one or more Creditable Upgrades, made after (i) the commitment for such Creditable Upgrade by an Upgrade Sponsor or (ii) the request causing the need for such Creditable Upgrade, with service commencing after or extending beyond the date the Creditable Upgrade is completed, ***the Upgrade Sponsor for each affected Creditable Upgrade shall receive a portion of the transmission service charge*** equal to the positive response factor of such new reservation on the Creditable Upgrade times the portion of the new reservation capacity that could not be provided but for the Creditable Upgrade times the rate applicable to such new reservation. For crediting purposes, the Transmission Provider shall perform a one-time calculation of the response factor of such new reservation on the Creditable Upgrade. This allocation from new service shall continue until the Upgrade Sponsor has been fully compensated. Revenue credits will be paid to Upgrade Sponsors in accordance with Section II.D of this Attachment Z2. . . .

B. New Network Integration Transmission Service and Service to Transmission Owners Taking Service Under Non-Rate Terms and Conditions:

Revenue for credits will be provided from (i) new Long-Term Network Integration Transmission Service, and (ii) new transmission service taken under the non-rate terms and conditions of this Tariff by Transmission Owners subject to Section 39.1 of this Tariff, ***that could not be provided but for one or more Creditable Upgrades to accommodate designation of new Network Loads or Transmission Owner's(s') loads***, new Designated Resources or increases in the designation of existing Designated Resources above previously designated levels. Revenue credits shall be determined based upon the subsequent incremental use of each affected Creditable Upgrade for such new or increased Network Load or Transmission Owner load or Network Resource.

The annual revenue credit amount to be paid monthly by a Network Customer, or included in rates, for each such new or increased use of a Creditable Upgrade shall be the product of the total annual revenue requirement associated with the Creditable Upgrade and the ratio of the incremental impact placed on the Creditable Upgrade by each such new or increased use to the total of the incremental impacts

> placed on the Creditable Upgrade by all currently and previously identified incremental Network Integration Transmission Service and Long-Term Firm Point-To-Point Transmission Service uses of the Creditable Upgrade.
>
> For the calculation of such revenue credits to be given to an Upgrade Sponsor for subsequent use of a Creditable Upgrade, the incremental use assigned to such Upgrade Sponsor shall be the capacity of the Creditable Upgrade minus all currently and previously identified incremental Network Integration Transmission Service and Long-Term Firm Point-To-Point Transmission Service uses. ***The cost of such revenue credit amount shall be paid by the Network Customer making such new or increased use of the Creditable Upgrade***, or included in rates pursuant to the Base Plan and Balanced Portfolio funding formulas in Attachment J, in addition to all other applicable charges under this Tariff. ***Revenue credits will be paid to Upgrade Sponsors in accordance with Section II.D of this Attachment Z2***. (emphasis added).
>
> Section II.D of Attachment Z2 provides in pertinent part:
>
> D. Distribution of Revenue Credits
>
> . . . .
>
> For use of Creditable Upgrades associated with a Generator Interconnection Agreement, revenue credits from new transmission service using the Creditable Upgrade shall be given first to the Generation Interconnection Customer(s) associated with the Creditable Upgrade until the revenue credit due is zero. Then such revenue credits shall be given to all other Upgrade Sponsors of the Creditable Upgrade. . . .

SPP has already determined that Complainants are eligible for credits associated with their funded Creditable Upgrades. As the Commission is well aware, although Attachment Z2 has been part of SPP's Tariff since 2008, it took SPP eight years to develop and deploy the software to implement Attachment Z2. In 2016, in Docket No. ER16-1341-000, SPP reported to the Commission that it was finally ready to begin implementing Attachment Z2. SPP sought a waiver of the one-year billing adjustment limitation in Section I.7.1 of its Tariff "[i]n order to account for the historical period in which SPP [was] unable to calculate, collect and distribute credit payment

obligations due to delays in SPP's implementation of the revenue crediting process."[34] The Commission granted that request in the Waiver Order, finding:

> ***[D]enial*** of its waiver request ***would cause harm to upgrade sponsors, who funded projects with the expectation of receiving credit payments if the upgrades were subsequently used for transmission service***. We find that granting the waiver request ***would not harm third parties because the compensation*** that these upgrade sponsors are entitled to ***would come from transmission customers who have benefited from upgrades paid for by upgrade sponsors***. Further, these transmission customers have received a benefit from the funds that should have been paid as credits, but instead have been retained by transmission customers during the historical period. Granting the Petition will enable SPP to take needed steps to implement its Tariff and ***restore customers and upgrade sponsors to the position they should have been in*** . . . .[35]

Thereafter, SPP performed the analysis and provided each of the Complainant Project Companies the long overdue revenue credits (plus interest) covering the historical period. Some of the Complainants received a lump sum of the credits that were owed. Others of Complainants received a portion because the transmission customers owing the credits opted to stagger payments per the Commission's Payment Plan Order. To date, Complainant Project Companies have cumulatively received over $18 million toward the cost of their respective Creditable Upgrades, which includes interest. Accordingly, SPP's Attachment Z2 implementation has confirmed that, since the Complainants' respective Creditable Upgrades went into service:

- SPP could not have provided transmission service over its system to specific customers during the historical period but for using such Creditable Upgrades;

- specific transmission service customers during the historical period utilizing Complainants' Creditable Upgrades were required to, but did not at that time, pay for that use per the formula in Attachment Z2, and only in late 2016 did SPP collect from them the full or partial payments for such use; and

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[34] *Southwest Power Pool, Inc*., Petition Of Southwest Power Pool, Inc. For Tariff Waiver, Docket No. ER16-1341-000, Apr. 1, 2016, at 9 ("SPP Waiver Petition").

[35] Waiver Order at P 56 (emphasis added).

- Complainants were owed credits for such transmission service customers' use of the Creditable Upgrades, which initial credits SPP provided to Complainants in late 2016.

To the extent SPP has finally started meeting its obligations to provide credits under Attachment Z2, Complainants and similarly situated Upgrade Sponsors are entitled under the Commission-approved Tariff to service under the Tariff, including Attachment Z2 credits, and to consider their credits received as closed. In the Revocation Order, the Commission stated that "SPP must refund credit payment obligation amounts for the historical period (*i.e.*, from 2008 to October 2016)."[36] The Commission obviously intended that SPP, not Upgrade Sponsors such as Complainants, provide the refunds. Regardless of how SPP views its obligation under the Revocation Order, Complainants are entitled, based on protections afforded by the filed rate doctrine and equitable principles, to retain the Attachment Z2 credits they have received to date (and are entitled to in the future) per the terms of Attachment Z2, the terms of their GIAs and per Commission and Court policy and precedent.[37]

IV. REQUESTED FINDINGS

A. The Commission Should Find That SPP Has Violated The Terms Of Its Tariff And The Complainant Project Companies' GIAs

There can be no doubt that SPP has violated its Tariff. Attachment Z2 was added to SPP's Tariff and became effective under the FPA in 2008. Since 2008, Attachment Z2 obligated SPP to determine at least annually whether transmission service could not be provided but for using Complainants' Creditable Upgrades and to collect amounts from Transmission Owners or

[36] Revocation Order at P 58.

[37] Nothing in this Complaint should be construed as a collateral attack on the Revocation Order. The Revocation Order rendered a narrow ruling applying the Commission's Tariff waiver policy as it pertains to the filed rate doctrine. Complainants are entitled to relief for all the reasons discussed in Parts IV-VI herein.

transmission service customers or both so credits could be provided to the Complainant Project Companies. Since 2010 to the present day, as applicable among Complainants:

- SPP failed to undertake the required annual assessment to identify the transmission service customers that could not have been provided transmission service under SPP's Tariff but for Complainants' Creditable Upgrades, as Attachment Z2 requires;

- SPP failed to collect amounts from Transmission Owners or transmission service customers or both that could not have been provided transmission service but for relying on Complainants' Creditable Upgrades, as Attachment Z2 requires; and

- SPP allowed Transmission Owners to collect and retain transmission service revenues for service that included use of Complainants' Creditable Upgrades, without providing the portion of collected revenue that is owed to Complainants, as Attachment Z2 requires.[38]

This is a prima facie violation of the terms of Attachment Z2.

There can be no doubt that SPP also has not complied with the terms of the Complainant Project Company GIAs. Section 11.4 (or Section 11.5, as applicable) in each Complainant Project Company GIA provides, in pertinent part:

> 11.4 Transmission Credits.
>
> 11.4.1 Credits for Amounts Advanced for Network Upgrades. Interconnection Customer ***shall be entitled to credits in accordance with Attachment Z2 of the Tariff for any Network Upgrades*** including any tax gross-up or other tax-related payments associated with Network Upgrades, and not refunded to Interconnection Customer pursuant to Article 5.17.8.
> . . . .

[38] So far as Complainants are aware, SPP collected Attachment Z2 credit amounts from applicable transmission service customers and provided the funds to Transmission Owners. SPP informed the Commission:

> Because the revenue crediting settlement system has not yet been implemented, these revenues have not been paid to compensate Upgrade Sponsors. Instead, they have been distributed to Transmission Owners under the revenue distribution provisions of Attachment L, Sections II.C and III. To the extent such revenues previously distributed to Transmission Owners are associated with credit payment obligations of Point-To-Point Transmission Service reservations, SPP will "claw back" the revenues to pay Upgrade Sponsors the amounts due.

SPP Waiver Petition at 10-11.

> 11.4.3 Notwithstanding any other provision of this GIA, ***nothing herein shall be construed as relinquishing or foreclosing any rights***, including but not limited to firm transmission rights, capacity rights, transmission congestion rights, ***or transmission credits, that Interconnection Customer, shall be entitled to, now or in the future*** under any other agreement or tariff as a result of, or otherwise ***associated with, the transmission capacity, if any, created by the Network Upgrades***, including the right to obtain transmission credits for transmission service that is not associated with the Generating Facility. (emphasis added).

Every one of these GIAs identified the Network Upgrades each Complainant Project Company was obligated to fund as Directly Assigned Upgrade Costs. Appendix B of each GIA specified the payment amounts and payment schedule for the interconnection customer. Each of the Complainants complied with its obligations and made such payments. Every one of those GIAs included a representation by SPP of the estimated funded amounts that could be eligible for credits under Attachment Z2. Yet, when the applicable Network Upgrades under each GIA went into commercial operation, SPP did not immediately thereafter, year after year, or in any year until late 2016, undertake the process to identify transmission service that could not be provided but for using the applicable Creditable Upgrades and to collect the portion of revenue owed to such Complainant Project Company for the use of its Creditable Upgrade. Every Complainant Project Company had a legal right, based on the terms in the applicable GIAs that were executed by SPP, that SPP would undertake the Attachment Z2 assessment and provide credits. SPP failed to do so.

B. The Commission Should Find That SPP Has Engaged In Unjust And Unreasonable And Unduly Discriminatory And Preferential Practices In Violation Of The FPA

The FPA requires SPP to provide jurisdictional services in a just and reasonable manner.[39] SPP's failure to implement Attachment Z2 has violated (and continues to violate) this statutory

[39] *See* 16 U.S.C. § 824d.

requirement. Complainants waited for years for credits to which they are legally and lawfully owed. Complainants were induced to execute the Complainant Project Company GIAs because of the potential for Attachment Z2 credits. Complainants relied on the terms in Attachment Z2 and the applicable Complainant Project Company GIAs as a reason to develop, finance, construct and bring online the new generation and fund the Network Upgrades. Complainants relied on Commission statements from numerous dockets addressing how Attachment Z2 works and that Upgrade Sponsors are entitled to credits to the extent Creditable Upgrades are used to provide transmission service.[40] It is unjust and unreasonable that Complainants have been deprived of the monetary benefit of those credits.

The FPA requires SPP to provide jurisdictional services in a not unduly discriminatory and preferential manner.[41] SPP's failure to implement Attachment Z2 has violated (and continues to violate) this statutory obligation. Since 2010, SPP provided transmission service to customers that could not have been provided but for using Complainants' Creditable Upgrades, but without providing Attachment Z2 credits to Complainant Project Companies, as applicable. By contrast, SPP precluded Complainant Project Companies from being provided interconnection service

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[40] For example, in 2018, SPP filed to limit what facilities might qualify as Creditable Upgrades. The Commission reiterated again regarding Attachment Z2:

> The directly-assigned network upgrade costs are recoverable, with interest, ***from customers taking new transmission service*** that could not have been provided 'but for' the Creditable Upgrade in the form of credit payment obligations, until the amount owed to the upgrade sponsor (i.e., the transmission customer or generator interconnection customer) that was directly assigned the costs of the Creditable Upgrade is zero.

Southwest Power Pool, Inc., 163 FERC ¶ 61,092 at P 3 (2018). Further, "[A]n interconnection customer qualifies for revenue credits when a network upgrade, for which it was directly assigned the costs, ***is subsequently used to provide transmission service***," and "the interconnection customer will continue to receive Attachment Z2 revenue credits when the upgrade ***is subsequently used to provide transmission service***." *Id*. at PP 71 and 73 (emphasis added).

[41] *See* 16 U.S.C. § 824d(b).

unless they paid in full, in advance, for such service, by funding the Network Upgrades. This is unduly discriminatory and preferential. Likewise, since 2010, SPP relinquished funds to Transmission Owners in connection with transmission service that included the use of Complainants' Creditable Upgrades to meet the Transmission Owner's annual revenue requirement under SPP's Tariff. Yet, during this same period, SPP failed to provide Complainants with Attachment Z2 credits in connection with that same transmission service and this notwithstanding that Section II of Attachment Z2 provides, for example, that an Upgrade Sponsor "shall receive a portion of the transmission service charge equal to the positive response factor of such new reservation on the Creditable Upgrade times the portion of the new reservation capacity that could not be provided but for the Creditable Upgrade times the rate applicable to such new reservation." This is unduly discriminatory and preferential. SPP cannot lawfully select which Tariff provisions it will implement and which it will disregard.

The Commission has a statutory obligation to require SPP to enforce the provisions of Attachment Z2 and the Complainant Project Company GIAs and address these FPA violations.

C. The Commission Should Find That SPP Has Violated The Filed Rate Doctrine

Attachment Z2 is a filed rate. Each Complainant Project Company GIA is a filed rate. The right to Attachment Z2 credits is a term in these filed rates. SPP is a public utility under the FPA. The Commission and the Courts have been very clear that a public utility must comply with the filed rate.

The filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority."[42] Under the filed rate doctrine, a party "can claim no rate as a legal right that is other than the filed rate."[43] The filed rate doctrine exists to provide "predictability," foster transaction finality and "to prevent customers from relying on certain rates, only to find later that their purchasing decisions have been upset and their costs increased."[44]

Complainants have had a "legal right" to credits under Attachment Z2. That "legal right" obligated SPP, by the terms of Attachment Z2, to collect a charge for Complainants' benefit in connection with transmission service that SPP provided to customers that relied on Complainants' Creditable Upgrades. SPP failed to do so. Complainants' "purchasing decisions [to execute the GIAs, develop generation facilities and fund the Network Upgrades] have been upset and their costs increased [from deprived monetary credits]" by SPP's failure to implement the filed rate. SPP's Tariff non-compliance has deprived the Complainants of what the filed rate doctrine is meant to provide: protection and predictability for customers by "relying on certain rates [and terms]" in Attachment Z2.

In the Revocation Order, the Commission explained that it considers whether "ratepayers had sufficient notice that the approved rate was subject to change."[45] Notice is not at issue here. First, there is no rate change. The right to credits in Attachment Z2 that applied when Complainants executed their GIAs and when Network Upgrades became commercially operable

42 *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).
43 *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Comm'n*, 341 U.S. 246, 251 (1995).
44 *Texas Eastern Transmission Corp. v. FERC*, 102 F.3d 174, 188-89 (D.C. Cir. 1996).
45 Revocation Order at P 45 (footnote omitted).

is unchanged. These terms provided the basis for SPP to determine that credits were owed to Complainants after the Waiver Order was issued. These terms still exist in Attachment Z2 today.

Second, notice for filed rate doctrine purposes applies when retroactivity is at issue. Retroactivity is not at issue here. This Complaint seeks to enforce the terms of Attachment Z2 as have existed since 2008. Further, the relief and remedy that is sought is based on FPA Section 309, which the Courts have made clear have no "temporal limitations" when a Tariff violation is at issue.[46]

Third, so far as Complainants are aware, the largest payer of the amounts owed as credits is the utility or Transmission Owner to which each Complainant Project Company interconnects and on whose system the funded Network Upgrades are located and integrated. All such Transmission Owners are parties and signatories to the applicable Complainant Project Company GIAs. Those GIAs specifically provided that the funded Network Upgrade amounts would be subject to Attachment Z2 credits.[47] These Transmission Owners executed the applicable GIAs. The Court has recognized that a party to an agreement has actual notice of rates as of the effective date of the agreement.[48]

D. The Commission Should Find That SPP Has Violated The Cost Causation And Beneficiary Pays Principles

It is a fundamental axiom of the just and reasonable and not unduly discriminatory and preferential clauses of the FPA that costs must be allocated in a way that satisfies the "cost

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46 *Pub. Util. Comm'n of Cal. v. FERC*, 462 F.3d 1027, 1045 (9th Cir. 2006)("*PUC Cal*").

47 *See* **Attachments A-D** and Part II above.

48 *See City of Piqua v. FERC*, 610 F.2d 950, 954-55 (D.C. Cir. 1979) (stating "In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract.")

causation" principle.[49] This principle requires costs to be allocated to entities that cause the cost or otherwise benefit from the cost that is incurred by others. The Seventh Circuit defined the cost causation principle: "To the extent that a utility benefits from the costs of new facilities, *it may be said to have 'caused' a part of those costs to be incurred*, as without the expectation of its contributions the facilities might not have been built, or might have been delayed."[50]

In this case, SPP assessed transmission service requests and determined that it could provide service to others so long as Complainants' Creditable Upgrades were utilized. Attachment Z2 provides:

> For each ***new*** reservation for Long-Term Firm Point-To-Point Transmission Service that could not be provided but for one or more Creditable Upgrades, made ***after*** (i) the commitment for such Creditable Upgrade by an Upgrade Sponsor or (ii) the request causing the need for such Creditable Upgrade, with service commencing ***after*** or extending beyond the date the Creditable Upgrade is completed, the Upgrade Sponsor for each affected Creditable Upgrade shall receive a portion of the transmission service charge equal to the positive response factor of such new reservation on the Creditable Upgrade times the portion of the new reservation capacity that could not be provided but for the Creditable Upgrade times the rate applicable to such new reservation. (emphasis added)

And:

> Revenue for credits will be provided from (i) new Long-Term Network Integration Transmission Service, and (ii) new transmission service taken under the non-rate terms and conditions of this Tariff by Transmission Owners subject to Section 39.1 of this Tariff, that could not be provided but for one or more Creditable Upgrades to accommodate designation of ***new*** Network Loads or Transmission Owner's(s') loads, ***new*** Designated Resources or ***increases*** in the designation of existing Designated Resources above previously designated levels. Revenue credits shall be determined based upon the subsequent incremental use of each affected Creditable Upgrade for such new or increased Network Load or Transmission Owner load or Network Resource. (emphasis added)

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[49] *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61,051 at P 504 (2011); *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300-01 (D.C. Cir. 1992) ("*KN Energy*"); *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470, 476 (7th Cir. 2009) ("*ICC*").

[50] *ICC*, 576 F.3d 470 at 476 (emphasis supplied).

Likewise, the Commission has explained, "The Commission accepted SPP's proposal for revenue crediting and found that 'it is appropriate to grant credits for ***subsequent*** network transmission service as well as point-to-point requests that ***use the capacity created*** by a requested economic upgrade.'"[51] SPP granted transmission service requests specifically relying on Complainants' Creditable Upgrades to do so and thereafter, since 2010, provided that transmission service based on those Creditable Upgrades. Without Complainants' Creditable Upgrades, transmission service customers would have had to fund upgrades of their own to receive the level of service they received or been delayed in receiving such service. Hence, following the Seventh Circuit's explanation, "To the extent [these transmission service customers] benefit[ted] from the costs of new facilities [*i.e.*, Creditable Upgrades], [these customers] may be said to have 'caused' a part of those costs to be incurred, as without the expectation of [their] contributions the facilities might not have been built, or might have been delayed." These transmission service customers benefitted from Complainants' Creditable Upgrades and thus caused part of the cost. The Commission recognized this benefit in its Waiver Order: "We find that granting the waiver request would not harm third parties because the compensation that these upgrade sponsors are entitled to would

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[51] *Kansas Electric Power Cooperative, Inc. v. Southwest Power Pool, Inc.*, 161 FERC ¶ 61,145 at P 67 (2017) (emphasis added). The Commission also stated:

> In its order accepting SPP's proposal to expand revenue credits to interconnection customers' network upgrades, the Commission reiterated its understanding that revenue credit payment obligations would be calculated based on subsequent use, finding that SPP's proposal to provide Interconnection Customers funding Network Upgrades with financial compensation from ***subsequent uses of those upgrades*** is consistent with the Commission's interconnection pricing policy.

Id. at P 68 (emphasis added) (internal quotation marks omitted).

come from transmission customers who have benefited from upgrades paid for by upgrade sponsors."[52] The cost causation principle requires such customers to pay for that benefit.

The text of Attachment Z2 is consistent with this cost causation principle. For Point to Point transmission customers, Attachment Z2 provides, "the Upgrade Sponsor for each affected Creditable Upgrade shall receive a portion of the transmission service charge equal to the positive response factor of such new reservation on the Creditable Upgrade times the portion of the new reservation capacity that could not be provided but for the Creditable Upgrade times the rate applicable to such new reservation." For Network Integration Transmission Service customers, Attachment Z2 provides, "Revenue credits shall be determined based upon the subsequent incremental use of each affected Creditable Upgrade for such new or increased Network Load or Transmission Owner load or Network Resource." SPP's failure to collect credits from transmission service customers since 2010, as applicable, has violated the cost causation principle under the FPA.

SPP has also violated the beneficiary pays principle and perpetuated the "free rider" principle that the Commission has found to be unjust and unreasonable.[53] SPP has provided transmission service to customers since 2010 using Complainant's Creditable Upgrades. SPP has tendered to Transmission Owners the full amount of revenues collected for such transmission service since 2010 but has failed to provide to Complainants their portion of the revenues associated with the contribution to service from their Creditable Upgrades.[54] SPP has given

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52 Waiver Order at P 56.

53 *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 118 FERC ¶ 61,119 at P 561 (2007) ("there are free rider problems associated with new transmission investment, such that customers who do not agree to support a particular project may nonetheless receive substantial benefits from it.").

54 *See* SPP Waiver Petition at 10-11.

transmission service customers (the majority of which are Transmission Owners) a "free ride" at the expense of Complainants. SPP has allowed Transmission Owners to retain transmission service revenues associated with Complainants' Creditable Upgrades to which they are not entitled and in doing so has allowed such Transmission Owners (who also are transmission service customers) to avoid paying for the benefit they reaped, *i.e.*, thus receiving a "free ride." This is unjust and unreasonable.[55]

E. The Commission Should Find That Complainants Are Entitled To Credits Associated With Transmission Service That SPP Provided Since 2010, Which Transmission Service SPP Could Not Have Provided But For Using Complainants' Creditable Upgrades

In late 2016, SPP undertook the Attachment Z2 analysis and affirmed that Transmission Owners and transmission service customers used Complainants' Creditable Upgrades during the historical period. This is an irrefutable fact. Complainants are legally owed credits for every year since their respective Network Upgrades were placed into service and used to provide transmission service.

Complainants are mindful that SPP did not deploy the software to enable it to implement Attachment Z2 until 2016. That failure does not excuse the Tariff non-compliance and should have no bearing on the Commission finding that Complainants are entitled to Attachment Z2 credits associated with transmission service that SPP provided using the applicable Network Upgrades, where such service could not have been provided but for Complainants' Creditable

[55] *See Midwest ISO Transmission Owners v. FERC*, 373 F.3d 1361, 1368 (D.C. Cir. 2004) ("Not surprisingly, we evaluate compliance with [the cost causation] principle by comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party." (*citing KN Energy*, 968 F.2d at 1300-01)).

Upgrades. SPP's Attachment Z2 obligations were never conditioned on SPP being able to deploy the right software. The obligations were unconditional.

V. THE COMMISSION SHOULD EXERCISE ITS AUTHORITY UNDER THE FPA, INCLUDING FPA SECTION 309, AND CONFIRM CREDITS ALREADY PAID ARE NOT SUBJECT TO REGULATORY CLAWBACK OR RECLAMATION

The Commission has authority pursuant to FPA Section 309 "to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."[56] The D.C. Circuit has explained that "necessary or appropriate" provisions, such as exist in FPA Section 309, "authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene any terms of the Act."[57]

As applied here, FPA Section 309 grants the Commission authority to order SPP to enforce the terms of Attachment Z2 and the Complainant Project Company GIAs and provide the credits to which Complainants are owed in connection with transmission service that SPP provided since 2010. There can be no doubt that such relief "conforms with the purposes and policies of Congress and does not contravene any terms of the Act." Attachment Z2 is part of SPP's Tariff *because* the Commission accepted what SPP filed in 2008 as just and reasonable under FPA Section 205.[58] The Complainant Project Company GIAs are based on the *pro forma* GIA in SPP's Tariff that the Commission found just and reasonable under FPA Section 205. The executed Complainant Project Company GIAs are effective under FPA Section 205 and are likewise just and reasonable. The

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56 16 U.S.C. § 825h.

57 *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967) ("*NIMO*").

58 *See* 2008 Z2 Order.

transmission service that SPP provided to customers since 2010 (that relied on Complainants' Creditable Upgrades) was provided pursuant to provisions of SPP's Tariff that also were found by the Commission to be just and reasonable under FPA Section 205. Hence, the relief Complainants request is squarely "within the purposes and policies of Congress and does not contravene any terms of the Act."

The Commission's Revocation Order does not bar the Commission from exercising its FPA Section 309 authority. As explained in Part I above, the Revocation Order pertained to a billing provision of SPP's Tariff that is not part of Attachment Z2 and a request for a waiver of that provision. That billing provision has no bearing on Complainants' legal right to relief to enforce Attachment Z2 and to relief when a public utility (SPP) fails to fulfill the terms of its Tariff. The Commission has authority under the FPA, including Section 309, to correct unjust situations.[59] It is patently unjust to deprive Complainants of the Attachment Z2 credits they are lawfully owed, which have significant monetary benefit. It is patently unjust to allow transmission customers (and Transmission Owners) to take transmission service since 2010 that could not have been provided but for using Complainants' Creditable Upgrades and to not pay for that service, *i.e.*, receive an "unfair windfall."[60] The Commission has exercised its FPA authority to avoid windfalls.[61]

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[59] *See e.g., Transwestern Pipeline Co.*, 66 FERC ¶ 61,350 at n.19 (1994) ("Even in cases where a rate increase in violation of the filed rate doctrine was held to occur, the Commission still has been found to have the discretion to waive refunds under section 4 of the NGA, provided that, as we have done, the Commission shows that it considered relevant factors and . . . struck a reasonable accommodation among them.") (internal quotations and citations omitted); *Verso Corporation v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018) ("*Verso*"), citing *TNA Merch. Projects, Inc. v. FERC*, 857 F.3d 354, 362 (D.C. Cir. 2017) ("This Court has endorsed FERC's authority under Section 309 to recoup erroneous refunds."); *El Paso Elec. Co.*, 108 FERC ¶ 61,071 at P 31 (2004) (ordering Enron's disgorgement of profits).

[60] Revocation Order, Commissioner LaFleur concurring at P 3.

[61] *See Gulf States Utilities Co.*, 46 FERC ¶ 61,163 (1989); *see also California v. FERC*, 383 F.3d 1006, 1015 (2004) (FERC has "broad remedial authority").

Likewise, the Court has explained that FPA Section 309 vests the Commission with authority to carry out its responsibilities "in the light of new and evolving problems."[62] At the very least, the impact of the Revocation Order (which merely revoked a prior waiver grant) is a "new and evolving problem" that the Commission can correct via its FPA Section 309 authority.

Attachment Z2 exists because the Commission accepted it as just and reasonable. If SPP had the software in place in 2008, all of the Attachment Z2 proceedings that have been before the Commission over the last three years, including this Complaint, would have been unnecessary.[63] Unfortunately, SPP encountered years of difficulty to establish the software to implement Attachment Z2. That software now exists. Complainants respectfully submit it is incumbent upon the Commission to order a remedy that ensures that its prior just and reasonable finding in 2008 is fulfilled. The Commission must order a remedy that bridges the gap of time when SPP was incapable to implementing Attachment Z2. If a public utility, such as SPP, fails to follow its Tariff, the Courts have long held that FPA Section 309 "imposes no temporal limitations," and the

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62 *NIMO*, 379 F.2d at 158.

63 For that matter, if SPP had followed the Commission's Order No. 2003 *pro forma* paradigm and provided funds or transmission credits to interconnection customers within years of commercial operation for the funded Network Upgrades, that too would have avoided all these proceedings. However, in 2008, the Commission granted SPP an independent entity variation from Order No. 2003, explaining: "SPP proposes to remove the provision in the LGIA that would require full reimbursement of all amounts advanced by the Interconnection Customer for Network Upgrades." *Southwest Power Pool, Inc.*, 122 FERC ¶ 61,060 at P 14 (2008). The Commission concluded:

> We find that SPP's proposal to provide Interconnection Customers funding Network Upgrades with financial compensation from subsequent uses of those upgrades is consistent with the Commission's interconnection pricing policy. Pursuant to SPP's proposal, Interconnection Customers will pay the 'but for' costs of the interconnection and in return receive a valuable right to future revenues when the Network Upgrades funded by the customer are used by other customers. We agree with SPP that the right to receive these revenues on an accelerated basis as compared with the timeframe for receiving credits under Order No. 2003 benefits Interconnection Customers that fund upgrades.

Id. at P 30. That "accelerated basis" has not happened.

Commission has authority under FPA Section 309 to impose a remedy as of the date the Tariff violation occurred.[64] For Complainants, that Tariff violation has occurred since 2010 when the first Network Upgrades became operational and transmission service was provided to third parties relying on Complainants' funded Network Upgrades. The Commission has ordered remedies when a public utility collected amounts it was not entitled to collect per the terms of its filed Tariff.[65] The corollary also applies: pursuant to its FPA authority, the Commission should order SPP to collect and provide to Complainants the credits to which they are entitled per the terms of Attachment Z2 of SPP's Tariff.

The Courts have found that the Commission's discretion is at its "zenith" when it fashions remedies.[66] In other words, when compared to the full scope of everything that the Commission regulates under the FPA, the Commission has the most flexibility when it fashions a remedy. Complainants respectfully submit it would be inequitable and negligent, given the facts here, for the Commission not to fashion a remedy for Complainants. The Courts have found that the Commission's failure to order a remedy in the face of a Tariff violation was an abuse of that

64 *PUC Cal*, 462 F.3d 1027 at 1045 ("Section 309 of the Federal Power Act…gives FERC authority to order refunds if it finds violations of the filed tariff and imposes no temporal limitations. *Consol. Edison v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003); 16 U.S.C. § 825h.").

65 *See San Diego Gas & Electric v. Sellers of Energy*, 158 FERC ¶ 61,076 at P 23 (2017) (affirming Section 309 refund authority and citing *Consol. Edison Co. of N.Y., Inc., v. FERC*, 347 F.3d 964, 967 (D.C. Cir. 2003) (stating that "FPA section 309 gives FERC authority to order refunds if it finds violations of the filed tariff")); *New York Power Authority v. Consolidated Edison Company of New York, Inc*., 115 FERC ¶ 61,088 at P 15 (2006) (granting a complaint and holding ConEdison failed to follow its tariff. "We find that NYPA's complaint has merit. Under the Federal Power Act and the filed rate doctrine, Con Edison can only charge the amount specified in its filed tariff. As explained by the U.S. Supreme Court in *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981), the filed rate doctrine 'forbids a regulated entity to charge rates for its service other than those properly filed with the appropriate federal regulatory authority.' Accordingly, we will grant NYPA's request for refund.").

66 *La. Pub. Serv. Comm'n*, 174 F.3d 218, 225 (D.C. Cir. 1999) ("the breadth of the Commission's discretion is at its zenith when fashioning remedies") (internal alterations and quotation marks omitted).

discretion.[67] Indeed, the Courts have even found that "[FPA] Section 309 . . . permits FERC to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act."[68] If the Commission has discretion to order a remedy that is "not expressly provided by the FPA," it surely has authority to order the remedy Complainants seek here, which is entirely consistent with (i) the FPA, (ii) the Commission's prior finding that Attachment Z2 is just and reasonable, (iii) the terms of Attachment Z2 and the Complainant Project Company GIAs, (iv) prior Commission statements about Upgrade Sponsor's rights to credits, and (v) SPP's analysis since late 2016 showing that Complainants are owed credits per Attachment Z2. Indeed, SPP recently told the Commission in regard to Attachment Z2: "Requiring customers to pay for the upgrades that were used to accommodate their service, and allowing upgrade sponsors to recover their investment of such upgrades, is plainly 'consistent *with the Act.*'"[69] If this is the public utility's (SPP's) position, it should be easy for the Commission to exercise its FPA Section 309 authority and fashion a remedy for Complainants. In doing so, the Commission will be following the D.C. Circuit's admonition to do "what should have been done."[70]

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[67] *See, e.g.*, *PUC Cal*, 462 F.3d at 1048 ("FERC's decision not to consider a § 309 remedy for tariff violations was arbitrary and capricious, an abuse of discretion, and not in accordance with law."); *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998) (finding the Commission abused its discretion in ordering refunds where the Commission "failed to establish that its decision represents a reasonable accommodation of the relevant factors and that the refund is equitable in the circumstances.") (quotations and citations omitted).

[68] *Verso*, 898 F.3d at 10.

[69] SPP Rehearing ER16-1341 at 34 (emphasis by SPP).

[70] *N. Nat. Gas Co., Div. of InterNorth v. FERC*, 785 F.2d 338, 341 (D.C. Cir. 1986) ("Section 16 unquestionably gives FERC the authority, in fashioning remedies, to consider equitable principles, one of which is to regard as being done that which should have been done."). Section 16 of the Natural Gas Act vests the Commission with the same authority to fashion remedies as FPA Section 309. *See also* Waiver Order at P 56 ("Granting the Petition will enable SPP to take needed steps to implement its Tariff and ***restore customers and upgrade sponsors to the position they should have been in*** . . . .") (emphasis added).

VI. REMEDY

A. Complainants Should Be Made Whole Immediately

The Commission should find that the appropriate remedy is for Complainants to receive, in a lump sum, the full credits and interest they are owed for transmission service that SPP provided during the historical period using Complainants' Creditable Upgrades since 2010. This means:

- For Complainants that received a lump sum in credits and interest, they will retain the amounts received.
- For Complainants that received partial credits and interest, (i) they will retain the amounts received and (ii) and immediately be provided with the remainder of the credits and interests that were subject to the payment plan.[71]
- For Complainants that received no credits, such as Caney River, they will receive the credits and interest owed.

Complainants are legally entitled to such credits and interest for the reasons explained in Parts I-V above. Then, year after year, SPP will continue to provide credits to Complainants to the extent such Creditable Upgrades are used by SPP to provide transmission service until Complainants' Directly Assigned Upgrade Costs are fully reimbursed.

If the Commission does not grant this specific remedy, it will render at least six unjust results:

1. All transmission customers from 2010 to October 2016 that could not have obtained transmission service but for using Complainants' Creditable Upgrades will receive a "free ride."
2. Transmission Owners will reap an "unfair windfall" by retaining a portion of transmission service revenue to which they were not entitled and earn a return on those funds.

[71] The Payment Plan Order allowed transmission customers to elect to pay the credits associated with the historical period over a period of time. The Revocation Order has rendered moot the Payment Plan Order and transmission customer's elections.

3. If SPP is only allowed to implement Attachment Z2 from November 2016 forward (*i.e.*, post-historical period), it will prolong even further the delay Complainants have endured to be compensated for the use of their Creditable Upgrades.

4. If SPP is only allowed to implement Attachment Z2 from November 2016 forward, it will shift costs to future transmission service customers because transmission service customers prior to October 2016 (who may or may not be the same as in the future) did not pay their fair share of the cost.

5. Section II of Attachment Z2 provides that credits will include "interest calculated in accordance with 18 CFR §35.19a(a)(2)." If SPP is only allowed to implement Attachment Z2 from November 2016 forward, the amount that will be recovered from future transmission customers will be larger than what SPP already provided to Complainants to date having to account for interest since 2010.

6. Some Complainant Project Companies are partially owned by passive unaffiliated tax equity. The terms of the arrangement allocated the benefits of potential credits among or to one party or the other. Or, the credits and interest already received from SPP have been dispersed to unaffiliated tax equity owners. Some Complainants acquired the Project Companies with the purchase price taking into account which party would receive Attachment Z2 credits. None of these contractual parties expected that transmission service provided using the Creditable Upgrades from 2010 to October 2016 would not receive credits. Regardless, depending on the contractual arrangement, Complainants would suffer double harm: (i) refund the full amount of credits and interest received but with none or only a portion under their control to do so, requiring them to find a source of funds elsewhere; and/or (ii) face repercussions from contractual parties.

These impacts support the Commission finding that the just and reasonable remedy is for Complainants to retain the credits and interest they have already received and are owed and immediately receive the remainder of credits (with interest) that are owed for the historical period.

B. Alternatives

If the Commission is not inclined to grant this specific remedy, or is not ready to make that determination, Complainants urge the Commission to set the remedy phase of this Complaint for settlement discussions to be held at the Commission. This matter would benefit from a

Commission Settlement Judge. There are several unresolved issues that could be addressed. For example:

- How should the credits already received and that are owed for the relevant historical period be handled?

- How should the interest already received and that is owed for the remainder of the relevant historical period be handled?

- To what degree, if any, should there be a payment plan? Market participants, transmission service customers and Transmission Owners, such as American Electric Power Service Corporation and Xcel Energy Services, Inc., have told the Commission they "could support the Attachment Z2 repayment credit process" so long as a reasonable payment plan is adopted.[72]

- To what degree should amounts owed to Complainants for part or all of the relevant historical period be uplifted to the market to address SPP's Tariff violation?

- To what degree should cost recovery of amounts that are owed to Complainants be rolled into transmission rates per Attachment Z2 and other SPP Tariff provisions? There is a legitimate basis to roll the cost into transmission rates and reimburse Complainants because Transmission Owners rely on the funded Network Upgrades to provide service to their load. If such amounts are rolled into transmission rates, the Transmission Owner would earn a rate of return on such amounts and follow the Order No. 2003 construct.

The Commission would be acting entirely within its FPA Section 309 discretion if it ordered settlement discussions for the remedy phase.[73] Such a settlement process might also provide means to globally address *all* Attachment Z2 issues, including those matters pending on rehearing in Docket Nos. ER16-1341 and EL18-9 (as discussed below) and Attachment Z2 measures the SPP membership is considering as part of its Holistic Integrated Tariff Team process.

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[72] *See Southwest Power Pool, Inc.*, Request For Rehearing Of American Electric Power Service Corporation And Xcel Energy Services Inc., Docket No. ER16-1341-000, Aug. 8, 2016, at 11.

[73] *See, e.g., AES Southland, Inc. and Williams Energy Marketing and Trading Co.*, 94 FERC ¶ 61,248 at 61,875 (2001) (Show cause order initiating investigation into possible violations of filed tariff and contracts and proposing Section 309 penalties). The matter eventually settled. *See Investigation of Anomalous Bidding Behavior and Practices in Western Markets*, 119 FERC ¶ 61,296 (2007).

VII. RULE 206(b)

A. ¶¶ (1)-(5). The information in Parts I-IV of this Complaint explain why SPP has violated its Tariff, Complainant Project Company GIAs and Commission and Court policy and precedent. Complainants have direct business and commercial interests that are impacted by SPP's failure to comply with its Tariff. Complainants have funded nearly $95 million in Network Upgrades. SPP has confirmed that such Network Upgrades are Creditable Upgrades and Complainants are eligible for Attachment Z2 credits, which credits and interest SPP began to provide in late 2016 resulting in over $18 million cumulatively received to date.[74] It is uncertain whether Complainants will retain these amounts given the Commission's Revocation Order, absent the Commission granting this Complaint and ordering the relief and remedy requested herein.

B. ¶ (6). In Docket No. ER16-1341, the Commission addressed a request by SPP to waive a discrete billing provision of SPP's Tariff and that is not part of Attachment Z2. This Complaint is distinct and asks the Commission to order SPP to enforce that terms of Attachment Z2. Although SPP is still assessing how it will comply with the Commission's directive that SPP provide refunds, SPP's obligation to do so has no bearing on Complainants' right to the relief requested in this Complaint. Further, the Revocation Order is a final order. Thus, the status of Docket No. ER16-1341 provides a clear path for the Commission to grant the relief requested in this Complaint.

[74] As noted above, there is a legitimate question as to why Caney River did not receive Attachment Z2 credits in connection with the transmission service it has been charged for the historical period. Thus, with potential credits to Caney River, the amount of Attachment Z2 credits during the historical period would double to $36 million.

In Docket No. EL18-9, the Commission denied a complaint that challenged how SPP was implementing Attachment Z2 to identify who must pay Attachment Z2 credits and the amounts owed.[75] The credits SPP has provided to date conform with the Commission's determination in that docket. Rehearing of that Commission order is also pending. In the meantime, the Commission's order in that docket is a final order and also provides a clear path for the Commission to grant the relief requested in this Complaint.

In terms of timing, the Commission is under no statutory time limit to address the rehearing requests pending in those dockets now that the Commission has issued tolling orders in both dockets. Complainants need relief now. Complainants have funded nearly $95 million in Network Upgrades and some have been waiting for years to utilize the monetary value of the credits they are owed. That relief should not be forestalled until some unknown date when the Commission acts on those rehearing requests.

C. **¶ (7).** The relief and remedy Complainants request is discussed in Part VI of this Complaint. The basis for that relief is discussed in Parts I-V of this Complaint.

D. **¶ (8).** All documents that support the facts in this Complaint that are in possession of, or otherwise attainable by, Complainants and are discussed herein or included as Attachments to this Complaint.

E. **¶ (9).** Complainants did not contact the FERC's Enforcement Hotline, Dispute Resolution Service and did not use any tariff-based dispute resolution mechanisms. The history of SPP's failure to timely implement Attachment Z2 and provide credits to Upgrade Sponsors has been well documented before the Commission in the last three years. In those proceedings, SPP

[75] *See Xcel Energy Services Inc. v. Southwest Power Pool, Inc.*, 162 FERC ¶ 61,203 (2018).

has sought to implement Attachment Z2, but has faced opposition from certain Transmission Owners and transmission service customers. Accordingly, none of those mechanisms would result in the relief requested. Nor would any dispute resolution be fruitful. Commission action is needed.

F. **¶ (10).** A form of notice of the Complaint suitable for publication in the Federal Register is provided in **Attachment E**.

VIII. CORRESPONDENCE AND COMMUNICATIONS

All communications, notices, pleadings, orders and other documents related to this proceeding should be addressed to the following individuals:

Gunnar Birgisson NextEra Energy Resources, LLC 801 Pennsylvania Avenue, N.W., Suite 220 Washington, D.C. 20004 202.349.3494 Gunnar.Birgisson@nee.com	Bruce A. Grabow Locke Lord LLP 701 8th Street, NW, Suite 700 Washington, DC 20001 202.220.6991 bgrabow@lockelord.com
Joshua Pearson EDF Renewables, Inc. 10 Second Street NE, Suite 400 Minneapolis, MN 55413 612.486.4508 Joshua.Pearson@edf-re.com	Tim Hall Southern Power Company 3535 Colonnade Parkway Birmingham, AL 35243 BIN S-950-EC 205.992.0040 TIMHALL@SOUTHERNCO.COM
Lisa Szot Enel Green Power North America, Inc. 100 Brickstone Square, Suite 300 Andover, MA 01810 978.513.3463 Lisa.Szot@enel.com	

IX. CONCLUSION

WHEREFORE, for the foregoing reasons, Complainants respectfully request that the Commission (i) grant this Complaint, (ii) find that SPP has violated its Tariff and that Complainants are owed credits under Attachment Z2 since 2010 and (iii) order the relief and remedy requested herein.

Respectfully submitted,

Bruce A. Grabow
Bruce A. Grabow
Locke Lord LLP
701 8th Street, NW
Suite 700
Washington, DC 20001
202.220.6991
bgrabow@lockelord.com

Counsel to Complainants

May 9, 2019

CERTIFICATE OF SERVICE

The undersigned certifies, on behalf of Complainants, that a copy of the Complaint has been served on contacts for the Southwest Power Pool, Inc. as listed on the Commission's list of Corporate Officials posted on its website.

Dated at Washington, DC this 9th of May 2019.

/s/ Bruce A. Grabow

_____

Bruce A. Grabow
Locke Lord LLP
701 8th Street, NW
Suite 700
Washington, DC 20001
202.220.6991
bgrabow@lockelord.com

Attachments A-D

Complainant Project Company GIA Excerpts

ATTACHMENT A-1

SA# Third Revised 2305

SPP Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

October 22, 2015

Conor Jarvis
Roosevelt-Milo Interconnection, LLC
15445 Innovation Drive
San Diego, CA 92128

Subject: Third Revised Appendices to GEN-2008-022 GIA
SPP Service Agreement No. 2305

Dear Mr. Jarvis:

Attached please find the final and redlined versions of the Third Revised Appendices to the GEN-2008-022 Generator Interconnection Agreement ("GIA") among Southwest Power Pool, Inc. ("SPP"), as Transmission Provider, Mescalero Ridge Wind, LLC ("Mescalero"), as Interconnection Customer, and Southwestern Public Service Company ("SPS"), as Transmission Owner, which GIA was dated January 4, 2012, and was amended by letter agreements effective October 4, 2013, and October 31, 2014 (SPP Service Agreement No. 2305). Mescalero assigned the GIA to Roosevelt Wind Project, LLC ("Roosevelt") effective October 29, 2013. Roosevelt assigned the GIA to Roosevelt-Milo Interconnection, LLC effective February 20, 2015.

Appendices A, C, and E were revised to accommodate the tenancy in common relationship between the Generating Facility owners. Appendix B was revised to update construction milestones. Contact information was updated in Appendix F. Appendices D and G were not revised but are included for completeness.

By signing this letter, the parties agree that the currently effective Appendices to the GIA are hereby superseded and replaced by the Third Revised Appendices attached hereto. Please have the appropriate officer execute the signature page below and then forward this letter agreement and Third Revised Appendices to SPS. After SPS has executed this letter agreement, this letter agreement and Third Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED
BY

Carl Monroe, Executive Vice President & Chief Operating Officer
(501) 614-3218 • cmonroe@spp.org

cc: Charles Hendrix

IN WITNESS WHEREOF, the Parties have executed these Third Revised Appendices to the GEN-2008-022 GIA.

Southwestern Public Service Company

By: _____

Printed Name: Teresa M. Mogensen

Title: Senior Vice President, Transmission

Date: 11-2-15

Roosevelt-Milo Interconnection, LLC

By: _____

Printed Name: Ryan Pfaff

Title: Executive Vice President Development

Date: 10/23/2015

Southwest Power Pool, Inc.

By: _____

Printed Name: Lanny Nickell

Title: Vice President, Engineering

Date: 11-5-15

APPROVED
TK
BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained by Interconnection Customer at its sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 345kV transformation substation with associated 34.5kV and 345kV switchgear;
- One (1) 345kV overhead transmission line or bus connection to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (providing) and 95% leading (absorbing) power factor at the point of interconnection;
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems; and
- 345 kV Roosevelt Milo Joint Use Switching Station ("RMJUSS") to accommodate tenancy in common ownership of the shared portion of the transmission line between the POI and the RMJUSS to Roosevelt Phase (250 MW) and Milo Phase (49.65 MW) of the Generation Facility.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

- New 345 kV Switching Station

o 345kV Disconnect Switch	$ 210,375
o Revenue Metering	$ 250,000
o 345kV Line Arrestors	$ 57,375

Total Transmission Owner Interconnection Facilities	$ 517,750

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- New 345kV 3-Breaker Ring Bus Switching Station

    - 3-Breaker Ring Bus Facility incl. Line reactors $9,518,013
    - Land $101,158
    - Substation SCADA equipment $219,570

Total Stand Alone Network Upgrades $9,838,741

(b) Network Upgrades to be designed, procured, constructed, owned and installed by Transmission Owner:

- New 345 kV Switching Station
    - Transmission Line Work $ 1,244,008
    - Relay upgrades to remote terminals $ 100,000
    - Transmission SCADA/microwave equipment $2,041,600

Total Network Upgrades $3,385,608

(c) Network Upgrades for which the Interconnection Customer shares cost responsibility ("Shared Network Upgrades"):

a. Shared Network Upgrades to be constructed, owned, and maintained by Transmission Owner:

    - None

b. Shared Network Upgrades to be constructed, owned, and maintained by Transmission Owner or other transmission owning entity in accordance with Attachment O. of the OATT:

    - None

(d) Joint Network Upgrades:

- None

(e) Previous Network Upgrades:

The following network upgrades, or their equivalents, are required to be in service prior to the COD of the Generating Facility:

- None

(f) The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $517,750.

(g) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $13,742,099. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $13,742,099 pursuant to the payment schedule as indicated in Appendix B, Milestones.

(h) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $13,224,349.

(i) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades.

4. Interconnection Service; Interconnection Customer has selected the following:

299.65 MW Energy Resource Interconnection Service
0 MW Network Resource Interconnection Service

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

6. Eligible Network Customers:

Not Used

7. Permits, Licenses and Authorizations:

Permit, License and Authorization	Responsible Party

8. Point of Change of Ownership:

The point of change of ownership shall be the point where the Interconnection Customer's 345kV transmission line from the RMJUSS meets the Transmission Owner's (SPS) dead end tower at the Transmission Owner's new 345kV ring bus switching station, that accommodates this interconnection request.

9. Point of Interconnection:

APPENDIX B TO GIA

Gen-2008-022

Milestones-Revision 3

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	9/15/2011-Complete
Provide payment in the amount of $520,924 for design of Network Upgrades listed in Appendix A.2.	Interconnection Customer	02/1/2012-Complete
Provide payment in the amount of $366,000 for design of Network Upgrades listed in Appendix A.2.	Interconnection Customer	6/22/2012-Complete
Issue final EMTP Study results	Transmission Provider	12/15/2012-Complete
Provide payment in the amount of $1,130,583 for procurement of long lead items and pre-construction of Network Upgrades listed in Appendix A.2.	Interconnection Customer	2/17/2014-Complete
Provide payment in the amount of $3,400,000 for procurement of Network Upgrades listed in A.2.	Interconnection Customer	4/1/2014-Complete
Provide payment in the amount of $3,000,000 for procurement and construction of Network Upgrades listed in Appendix A.2 and Transmission Owner Interconnection Facilities listed in Appendix A.1.b.	Interconnection Customer	11/10/2014-Complete
Complete Previous Network Upgrades in Appendix A.2.e	Transmission Provider	12/31/2014-Complete
Provide payment in the amount of $3,000,000 for procurement and construction of Network Upgrades	Interconnection Customer	1/12/2015-Complete
Provide payment in the amount of $2,324,592 for procurement and construction of Network Upgrades	Interconnection Customer	3/10/2015-Complete
Complete Transmission Owner's Interconnection Facilities	Transmission Owner	06/19/2015-Complete
Complete Network Upgrades constructed by Transmission Owner	Transmission Owner	06/19/2015-Complete
Complete registration of the Generating Facility as a market asset in the Transmission Provider's Integrated Marketplace in accordance with Attachment AE of the Tariff and the Transmission Provider's Market Protocols.	Interconnection Customer (if applicable)	Registration process must be completed prior to energization of the interconnection and applicable resources for either generation testing or commercial operation.
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	08/19/2015
Initial Synchronization Date (Phase I- 250 MW)	Interconnection Customer	10/1/2015
Initial Synchronization Date (Phase II- 49.65 MW)	Interconnection Customer	1/21/2016
Begin trial operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	10/2/2015
Commercial operation date (Phase I- 250 MW)	Interconnection Customer	10/16/2015
Commercial operation date (Phase II- 49.65 MW)	Interconnection Customer	1/31/2016
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs.	Transmission Owner	Within six month period after completion of the construction of Interconnection Facilities and the Network Upgrades

ATTACHMENT A-2

SA#Second Revised 2547

SPP Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

June 3, 2015

Jay Temple
Slate Creek Wind Project, LLC
c/o EDF Renewable Development, Inc.
15445 Innovation Drive
San Diego, CA 92128

Subject: Revised Appendices to GEN-2011-057 GIA
SPP Service Agreement No. 2547

Dear Mr. Temple:

Attached please find the final and redlined versions of the Second Revised Appendices to the GEN-2011-057 Generator Interconnection Agreement ("GIA") among Southwest Power Pool, Inc. ("SPP"), as Transmission Provider, Slate Creek Wind Project, LLC ("Slate Creek"), as Interconnection Customer, and Westar Energy, Inc. ("Westar"), as Transmission Owner, dated March 25, 2013, as amended by a letter agreement effective November 7, 2014.

Appendices A and C were revised to update requirements from the requested modification of generator technology by Slate Creek. Appendix B was revised to updated construction milestones. Contact information was updated in Appendix F. Appendices D, E and G were not revised but are included for completeness.

By signing this letter, the parties agree that the currently effective Appendices to the GIA are hereby superseded and replaced by the Second Revised Appendices attached hereto. Please have the appropriate officer execute the signature page below and then forward this letter agreement and Second Revised Appendices to Westar. After Westar has executed this letter agreement, this letter agreement and Second Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED
BY

Carl Monroe, Executive Vice President and Chief Operating Officer
(501) 614-3218 • cmonroe@spp.org

cc: Charles Hendrix

IN WITNESS WHEREOF, the Parties have executed these Second Revised Appendices to the GEN-2011-057 GIA.

Westar Energy, Inc.

By: Kelly B. Harrison

Printed Name: Kelly B. Harrison

Title: VP - Transmission

Date: July 6, 2015

Slate Creek Wind Project, LLC
By: EDF-RE US Development, LLC
Its: Managing Member
By: EDF Renewable Development, Inc.
Its: Managing Member

By:

Printed Name: Ryan Pfaff

Title: Executive Vice President Development

Date: 6-23-15

Southwest Power Pool, Inc.

By:

Printed Name: Carl Monroe

Title: EVP & COO

Date: 07/09/2015

APPROVED TK BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the GEN-2011-057 studies conducted by the Transmission Provider in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained by Interconnection Customer at its sole expense:

- 34.5 kV underground cable collection circuits;
- 34.5 kV to 138 kV transformation substation with associated 34.5 kV and 138 kV switchgear;
- One (1) 138 kV overhead transmission line to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (providing vars) to 95% leading (absorbing vars) power factor at the Point of Interconnection, which may include the need of reactors to compensate for injection of reactive power into the transmission system under light wind conditions. Any capacitor banks installed by the Interconnection Customer shall not cause voltage distortion and be in accordance with Article 9.7.6; and
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

- 138 kV Substation Work at Creswell Substation
  - One (1) 138 kV 3000 Amp Air Break Switch
  - One (1) 138 kV 3000 Amp Motor Operator for Switch
  - Three (3) CT's for Metering
  - Three (3) 138 kV VT's
  - One (1) Full tension dead-end structure
  - Revenue metering
  - One set of primary and redundant relaying $ 400,000

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by Transmission Owner:

- None

(b) Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- 138 kV Substation Work at Creswell Substation
  - Two (2) 138 kV 3000 Amp Breakers
  - Four (4) 138 kV 3000 Amp Air Break Switches
  - One (1) Breaker Control Relay Panel
  - One (1) Line Protection Relay Panel
  - All associated site, yard and conduit work $ 1,494,360

- 138 kV Transmission Line Work
  - Three (3) single wood poles to relocate existing distribution lines. Wire to terminate Slate Creek – Creswell 138 kV and relocate existing distribution conductor $ 146,338

Total Estimated Cost for Network Upgrades For Which Interconnection Customer has 100% Cost Responsibility	**$ 1,640,698**

(c) Network Upgrades for which the Interconnection Customer shares cost responsibility ("Shared Network Upgrades"):

a. Shared Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- None

b. Shared Network Upgrades to be designed, constructed, installed and owned by the Transmission Owner or other transmission owning entity:

- None

(d) Joint Network Upgrades:

There are no Joint Network Upgrades.

(e) Previous Network Upgrades:

- None

(f) The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $400,000.

(g) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $2,040,698. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $2,040,698 pursuant to the payment schedule as indicated in Appendix B, Milestones.

(h) Subject to the status of GEN-2011-057, the portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $1,640,968.

(i) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $738,837. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades.

4. Interconnection Service; Interconnection Customer has selected the following:

150.0 MW Energy Resource Interconnection Service
0 MW Network Resource Interconnection Service

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

6. Eligible Network Customers:

Not Used

7. Permits, Licenses and Authorizations:

Permit, License and Authorization	Responsible Party

APPENDIX B TO GIA

Milestones

Action	Responsible Party	Completion Date
Complete Facilities Study.	Transmission Provider	Completed
Execute GIA.	All Parties	March 25, 2013- Completed
Provide authorization to proceed with design & procurement of the Network Upgrades (NU) and Transmission Owner Interconnection Facilities (TOIF) to be constructed by Transmission Owner.	Interconnection Customer	April 30, 2013- Completed
Provide financial security to Transmission Owner of $100,000 for Transmission Owner's engineering and design time.	Interconnection Customer	April 30, 2013- Completed
Provide financial security to Transmission Owner of $1,900,000 for all remaining costs associated with the procurement, design, and construction of TOIF and NU.	Interconnection Customer	July 31, 2013- Completed
Provide preliminary design of Interconnection Customer's Interconnection Facilities (ICIF) to Transmission Owner.	Interconnection Customer	August 31, 2013- Completed
Provide final design of NU and TOIF to Interconnection Customer.	Transmission Owner	October 31, 2013- Completed
Provide each other with construction schedules and outage plans for construction of TOIF, NU, and ICIF.	Transmission Owner and Interconnection Customer	August 15, 2014- Completed
Provide initial specifications of the Interconnection Customer's System Protection Facilities.	Interconnection Customer	180 days prior to the Initial Synchronization Date- Completed
Per Article 5.10.4, provide Transmission Owner and Transmission Provider with the most current Generating Facility design and performance data for modeling.	Interconnection Customer	180 days prior to the Initial Synchronization Date- Completed
Provide final specifications of the Interconnection Customer's System Protection Facilities.	Interconnection Customer	90 days prior to the Initial Synchronization Date
Complete TOIF and NU.	Transmission Owner	June 1, 2015
In-Service Date for NU and TOIF.	Transmission Owner	June 1, 2015
In-Service Date for ICIF	Interconnection Customer	September 1, 2015
Complete registration of the Generating Facility as a market asset in the Transmission Provider's Integrated Marketplace in accordance with Attachment AE of the Tariff and the Transmission Provider's Market Protocols.	Interconnection Customer (if applicable)	Registration process must be completed prior to energization of the interconnection and applicable resources for either generation testing or commercial operation.
Initial Synchronization Date.	Interconnection Customer	September 2, 2015
Begin trial operation & testing.	Interconnection Customer & Transmission Owner	September 2, 2015
Commercial Operation Date.	Interconnection Customer	December 30, 2015
Complete the final accounting of costs incurred by Transmission Owner for TOIF and NU and send invoice to Interconnection Customer; Interconnection Customer is responsible for actual costs.	Transmission Owner	Within 90 days following completion of NU

ATTACHMENT A-3

SA # First Revised 2212

Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

July 15, 2011

Walter Hornaday, President
Spinning Spur Interconnect LLC
823 Congress Avenue, Suite 500
Austin, Texas 78701

Subject: First Revised Appendices to GEN-2008-051 GIA

Dear Mr. Hornaday:

Attached please find the final and redlined versions of the First Revised Appendices to the GEN-2008-051 Generator Interconnection Agreement ("GIA") executed by Southwest Power Pool, Inc. ("SPP") as Transmission Provider, Spinning Spur Interconnect LLC ("Spinning Spur") as Interconnection Customer, and Southwestern Public Service Company ("SPS") as Transmission Owner, dated May 3, 2011 (SPP Service Agreement No. 2212).

The GIA is being revised as a result of Spinning Spur's request for a Limited Operations Study and the subsequent phasing in of interconnection capacities. SPP revised Appendices A – C of the GIA to reflect these changes. Appendices D - G have not been revised but are included for completeness.

Please have the appropriate officer execute the signature page below and then forward this Letter Agreement and First Revised Appendices to SPS. After SPS has executed the Letter Agreement, the Letter Agreement and First Revised Appendices should be returned to SPP.

If you have any questions you may contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED BY

Carl Monroe
Executive Vice President & Chief Operating Officer
(501) 614-3218 • Fax: (501) 664-9553 • cmonroe@spp.org

cc: Annette Gallegos (SPS)
Katherine Prewitt (SPP)
Charles Hendrix (SPP)

IN WITNESS WHEREOF, the Parties have executed the revised Appendices to the GEN-2008-051 GIA.

Spinning Spur Interconnect LLC

Signature: _____

Printed Name: Walt Hornaday

Title: President

Date: 18 July 2011

Southwestern Public Service Company

Signature: _____

Printed Name: Teresa Mogensen

Title: Vice President, Transmission

Date: 8-1-11

Southwest Power Pool, Inc.

Signature: _____

Printed Name: Carl Monroe

Title: EVP & COO

Date: 08/05/2011

APPROVED TLS BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

Note: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained by the members of the Interconnection Customer, at the Interconnection Customer's sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 345kV transformation substations with associated 34.5kV and 345kV switchgear;
- One (1) 345kV overhead transmission line to the Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (providing) and 95% leading (absorbing) power factor at the Point of Interconnection;
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems; and
- 345kV Joint Use Switching Station ("JUSS" or "Joint Use Switching Station") to accommodate tenancy in common ownership of transmission line for Phase I (161MW) and Phase II (161MW) of the Generation Facility.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

- Transmission Owner's Potter County Interchange/Substation 345kV
  - Remote Terminal Unit $ 4,500
  - Revenue Metering $ 250,000
  - 345kV line Arresters $ 12,743

Total Transmission Owner Interconnection Facilities $ 267,243

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- None

(b) Network Upgrades to be designed, procured, constructed, owned and installed by Transmission Owner:

- Transmission Owner's Potter County Interchange/Substation 345kV
  - Disturbance Monitoring Device $ 51,346
  - 345kV Breaker Line Terminal $2,953,937

Total Interconnection Customer Estimated Cost Responsibility for Network Upgrades for which Interconnection Customer has 100% cost responsibility	$3,005,283

(c) Additional Network Upgrades: The following Network Upgrades will need to be placed in service before commercial operation pursuant to Article 5.9, Limited Operation. Transmission Provider Studies conducted for this Interconnection Request have demonstrated that the Interconnection Customer may interconnect at a level of up to 270 MW prior to the completion of the upgrades described in Section 2(f) of this Appendix A.

Harrington-Nichols 230kV (Ckt. K16) Upgrade*	$869,251
Harrington-Nichols 230kV (Ckt. K17) Upgrade*	$869,251

* This work includes both a reconductor of the transmission circuits and terminal upgrades at both Harrington and Nichols substations to raise the rating of both transmission lines to 735MVA (1845A).

Limited Operation interconnection service may be limited in the event that higher queued and/or equally queued customers, if any, identified in the table below ("Other Customers") commence commercial operation pursuant to their GIAs, with such interconnection service remaining limited until such time that the network upgrades described in Section 2(f) of this Appendix A can be placed in service or the Transmission Provider determines such network upgrades are no longer required; provided, however, that any such limitation is necessary on account of such required network upgrades in Section 2(f) not then being in service. In the event that any of the Other Customers commence commercial operations, service may be pre-empted or pro-rated to account for the operation of the aforementioned Other Customer(s) until such time that the network upgrades in Section 2(f) of this Appendix A can be placed in service or the Transmission Provider determines the network upgrades are no longer required. Transmission Owner and Transmission Provider will cooperate in good faith and use Reasonable Efforts to study technical solutions proposed by the Interconnection Customer to mitigate such preemption and/or proration and to permit operation that, upon implementation of such solutions, permits Interconnection Customer to operate and not be prorated or preempted as long as those efforts and solutions are consistent with the SPP Tariff, criteria, business practices and other governing

documents. Such technical solutions may include a) funding additional Network Upgrades, b) limiting Interconnection Customer's output at the POI through storage or project SCADA settings, c) operations under special protection scheme and d) utilizing the dynamic voltage control capabilities of the project that are in excess to FERC and SPP requirements of the LGIA.

Other Customers	MW
GEN-2006-045	240
GEN-2006-047	240
GEN-2007-002	160
GEN-2007-048	400

(d) Network Upgrades for which the Interconnection Customer shares cost responsibility ("Shared Network Upgrades"):

- None

(e) Joint Network Upgrades:

There are no Joint Network Upgrades

(f) Previous Network Upgrades:

(i) Subject to restudies for the termination of higher queued customers' GIAs, the following network upgrades (or their equivalents), which are not the responsibility of Interconnection Customer, are required to be in service before the Commercial Operation Date of the Generating Facility:

- Hitchland – Woodward double circuit 345kV transmission line – projected in service date 12/31/2014
- Woodward – Medicine Lodge double circuit 345kV transmission line – projected in service date – 12/31/2014
- Medicine Lodge – Wichita double circuit 345kV transmission line – projected in service date 12/31/2014

Additional Required Previous Network Upgrades Include -

- Finney – Holcomb 345kV ckt #2 – This network upgrade is currently the responsibility of GEN-2006-044 (Novus Wind). The GEN-2006-044 GIA is currently active and this network upgrade has no in-service date at this time. If higher queued projects terminate their GIA, a restudy will need to be performed to determine Interconnection Customer's cost responsibility for this upgrade.

(g) The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $267,243.

(h) The total cost for the Transmission Owner's Interconnection Facilities and Network Upgrades is estimated at $5,011,028. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities and Network Upgrades estimated at $5,011,028. pursuant to the payment schedule as indicated in Appendix B, Milestones.

(i) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this GIA is estimated at $4,743,785.

(j) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades

4. Interconnection Service; Interconnection Customer has selected the following:

322 MW Energy Resource Interconnection Service
__0 MW Network Resource Interconnection Service

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities and the Network Upgrades.

6. Eligible Network Customers:

Not Used

7. Upon request by Interconnection Customer, Transmission Owner shall promptly provide written confirmation that (i) Interconnection Customer is in compliance with this GIA, (ii) the interconnection of Phase I of the Generating Facility to the Transmission System has been completed in accordance with the Interconnection Agreement, and (iii) any output tests, safety protocols and other requirements of this GIA with respect to Phase I of the Generating Facility and/or Interconnection Customer's Interconnection Facilities have been completed or met satisfactorily.

APPENDIX B TO GIA

Milestones (Gen-2008-051)

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	7/2010
Provide authorization to proceed with design of Transmission Owner Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner per Article 5.5.2, and payment to Transmission Owner of $25,000.	Interconnection Customer	4/20/2011
Provide authorization to proceed for procurement of Transmission Owner's Interconnection Facilities and Network Upgrades to be constructed by Transmission Owner and payment of $1,200,000.	Interconnection Customer	6/15/2011
Provide authorization to proceed for procurement of Additional Network Upgrades (per Limited Operation Study) to be constructed by Transmission Owner and payment of $500,000.	Interconnection Customer	10/1/2011**
Provide authorization to proceed for procurement & construction of Transmission Owner's Interconnection Facilities and Network Upgrades and payment to Transmission Owner of $2,500,000.	Interconnection Customer	1/4/2012
Provide authorization to proceed for construction of remaining Additional Network Upgrades (per Limited Operation Study) and payment to Transmission Owner of $786,028.	Interconnection Customer	5/1/2012**
Complete Transmission Owner's Interconnection Facilities for backfeed.	Transmission Owner	5/1/2012
Complete Network Upgrades constructed by Transmission Owner for backfeed (Does not include Network Upgrades identified in Limited Operation Study).	Transmission Owner	5/1/2012
Complete Additional Network Upgrades (Appendix A, 2c facilities) (per Limited Operation Study;) constructed by Transmission Owner.	Transmission Owner	12/01/2012**
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	5/1/2012
Initial Synchronization Date	Interconnection Customer	5/1/2012
Begin Trial Operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	6/1/2012
Commercial Operation Date	Interconnection Customer	12/31/2014*
Complete Previous Network Upgrades listed in Appendix A.2.f	Transmission Provider	12/31/2014
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities and Network Upgrades constructed by Transmission Owner (other than those network upgrades specified in Section A.2.f). Interconnection Customer	Transmission Owner	Per Article 12.2

ATTACHMENT B-1

SA# First Revised 2258

SPP Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

December 19, 2013

Buffalo Dunes Wind Project, LLC
Attn: Lisa Szot
c/o Enel Green Power North America
3636 Nobel Drive, Suite 475
San Diego, CA 92122

Subject: Revised Appendices to GEN-2008-018 GIA
SPP Service Agreement No. 2258

Dear Ms. Szot:

Attached please find the final and redlined versions of the Revised Appendices to the GEN-2008-018 Generator Interconnection Agreement ("GIA") between Southwest Power Pool, Inc. ("SPP"), as Transmission Provider, Buffalo Dunes Wind Project, LLC ("Buffalo Dunes"), as Interconnection Customer, and Southwestern Public Service Company ("SPS"), as Transmission Owner, dated September 19, 2011 (SPP Service Agreement No. 2258).

Appendix A was revised to reflect the modification to reduce the amount of the Interconnection Service to 250MW. Appendix B was revised to reflect the Generator went into service with Limited Operation. Appendix C was revised to reflect the modification to reduce the amount of Interconnection Service to 250MW and the requested modification to change wind generator type. Contact information was updated in Appendices E and F. Appendix D was not revised but is included for completeness.

By signing this letter, the parties agree that the currently effective Appendices to the GIA are hereby superseded and replaced by the Revised Appendices attached hereto. Please have the appropriate officer execute the signature page below and then forward this letter agreement and Revised Appendices to SPS. After SPS has executed this letter agreement, this letter agreement and Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED TK
BY

Carl Monroe, Executive Vice President and Chief Operating Officer
(501) 614-3218 • cmonroe@spp.org

cc: Charles Hendrix

IN WITNESS WHEREOF, the Parties have executed these Revised Appendices to the GEN-2008-018 GIA.

Southwestern Public Service Company

By: _____

Printed Name: Teresa M. Mogensen

Title: Vice President, Transmission

Date: 12-19-13

Buffalo Dunes Wind Project, LLC

By: _____

Printed Name: _____

Title: _____

Date: _____

Southwest Power Pool, Inc.

By: _____

Printed Name: _____

Title: _____

Date: _____

IN WITNESS WHEREOF, the Parties have executed these Revised Appendices to the GEN-2008-018 GIA.

Southwestern Public Service Company

By: _____

Printed Name: _____

Title: _____

Date: _____

Buffalo ~~Dunes~~ Wind Project, LLC

By: _____

Printed Name: Francesco Venturini

Title: President & CEO

Date: 12-19-2013

Southwest Power Pool, Inc.

By: _____

Printed Name: _____

Title: _____

Date: _____

IN WITNESS WHEREOF, the Parties have executed these Revised Appendices to the GEN-2008-018 GIA.

Southwestern Public Service Company

By: _____

Printed Name: _____

Title: _____

Date: _____

Buffalo Dunes Wind Project, LLC

By: _____

Printed Name: _____

Title: _____

Date: _____

Southwest Power Pool, Inc.

By: _____

Printed Name: Carl Monroe

Title: EVP & COO

Date: 12/20/2013

APPROVED TK BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other higher queued interconnection customers suspend or terminate their GIAs, and any of the Network Upgrades listed in 2.e.i. below that they would have constructed will not be funded, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained by Interconnection Customer at its sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 345kV transformation substation with associated 34.5kV and 345kV switchgear;
- One (1) 345kV overhead transmission line to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (providing) to 95% leading (absorbing) power factor at the point of interconnection;
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems;
- 24 MVARs of 34.5kV capacitor bank(s); and
- 20 MVARs of 34.5kV reactor bank(s).

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

• Finney 345kV substation	
o 345kV Disconnect Switch	$ 44,675
o Remote Terminal Unit	$ 4,500
o Revenue Metering	$ 250,000
o 345kV line Arresters	$ 12,743
Total Transmission Owner Interconnection Facilities	$ 311,918

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by Transmission Owner:

- None

(b) Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- Finney 345kV substation
  - New 345kV Breaker Line Terminal $ 2,022,202
  - Disturbance Monitoring Device $ 51,346
  - 345kV Disconnect Switch $ 178,701

Total Interconnection Customer Estimated Cost Responsibility for Network Upgrades for which Interconnection Customer has 100% cost responsibility	$ 2,252,249

(c) Network Upgrades for which the Interconnection Customer shares cost responsibility ("Shared Network Upgrades"):

- None

(d) Joint Network Upgrades:

There are no Joint Network Upgrades.

(e) Previous Network Upgrades:

i. Subject to restudies for the termination of higher queued customers' GIAs, the following network upgrades (or their equivalents), which are not the responsibility of the Interconnection Customer are required to be in service before the COD of the Interconnection Customer Generating Facility:

- Hitchland – Woodward double circuit 345kV transmission line – projected in service date 12/31/2014
- Clark County – Thistle double circuit 345kV transmission line – projected in service date – 12/31/2014
- Woodward – Thistle double circuit 345kV transmission line – projected in service date – 12/31/2014

- Thistle – Wichita double circuit 345kV transmission line – projected in service date 12/31/2014

- Spearville - Clark County double circuit 345kV transmission line – projected in service date 12/31/2014

ii. Interconnection Customer has separately submitted a request for a Limited Operation Impact Study (LOIS) pursuant to Article 5.9. If the results of the study show that full or partial operation will be possible until such time as the above network upgrades in Section 2 (e)(i), or their equivalents, are placed in service or Transmission Provider determines that they are not necessary, and the Interconnection Customer provides the necessary authorization listed in the first note to the table of milestone dates in Appendix B, then the conditions precedent in Section 2(e)(i) shall not apply for the limited operation authorized by the LOIS, the milestones in Appendix B for "Commercial Operation Date" may be accelerated to 12/31/2012 or any other reasonable milestone date prior to 12/31/2014 as mutually agreed to by the Transmission Owner and the Interconnection Customer.

Transmission Owner shall permit Interconnection Customer to operate the Generating Facility and Interconnection Customer's Interconnection Facilities up to the maximum allowable output stated in the LOIS, but such operation may be limited at such time that higher queued and equally queued customers, if any, identified in "Table 9: Prior Queued Projects Not Included" the LOIS ("Other Customers") commence commercial operation pursuant to their GIAs without the network upgrades in Section 2(e)(i) being in service or the Transmission Provider determines the network upgrades are no longer required; provided, however, that the limitation is necessary on account of such required network upgrades in Section 2(e)(i) not then being in service. At the time that those Other Customers commence commercial operations, service may be pre-empted or pro-rated to account for the operation of the aforementioned Other Customers until such time that these network upgrades in section 2(e)(i) can be placed in service and the Transmission Provider determines through a restudy of the LOIS that Interconnection Customer’s Interconnection Service maximum allowable capacity must be reduced as a result.

Once Interconnection Customer has elected to proceed with the accelerated schedule allowed under the LOIS, if any of the Other Customers commence commercial operation or provide notice to proceed and payment for engineering, procurement or construction per their applicable milestone schedule(s) of their respective GIA(s), prior to the commercial operation date set for the limited operation in Appendix B of

this agreement, and it is determined via a restudy of the LOIS that there is not sufficient interconnection capacity to interconnect the generation capacity as determined in the LOIS previously in effect, then Interconnection Customer shall have the option of rescheduling the engineering, procurement, and/or construction activities of this GIA (at Interconnection Customer's sole expense), and adjusting the milestone schedule, as agreed to by the Transmission Owner, and commercial operation date later than the 12/31/2013 date set for limited operation in Appendix B, but prior to or coinciding with the in service date of all necessary Previous Network Upgrades listed in Section 2(e)(i) and 2(e)(ii) without entering this GIA into Suspension.

(f) The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $311,918.

(g) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $2,564,167. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $2,564,167 pursuant to the payment schedule as indicated in Appendix B, Milestones.

(h) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $2,252,249.

(i) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades.

4. Interconnection Service; Interconnection Customer has selected the following:

250 MW Energy Resource Interconnection Service
0 MW Network Resource Interconnection Service

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

APPENDIX B TO GIA

Gen-2008-018

Milestones - (Includes Dates Associated with Limited Operation ("LO"))

Action	Responsible Party	Completion Date with Limited Operation
Complete Facilities Study	Transmission Provider	3/2010
Issue Notice to Construct to affected transmission owners for network upgrades	Transmission Provider	NA
Provide authorization to proceed with design of Transmission Owner Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner per Article 5.5.2, and payment to Transmission Owner of $174,107.	Interconnection Customer	8/15/2011
Provide authorization to proceed for procurement of Transmission Owner's Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner and payment of $819,000.	Interconnection Customer	10/1/2011*
Provide authorization to proceed for procurement of Transmission Owner's Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner and payment of $273,335.	Interconnection Customer	12/1/2011*
Provide authorization to proceed for procurement of Transmission Owner's Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner and payment of $1,092,335.	Interconnection Customer	NA
Provide authorization to proceed for construction of Transmission Owner's Interconnection Facilities and all Network Upgrades and payment to Transmission Owner of $1,297,725.	Interconnection Customer	2/1/2012*
Complete Transmission Owner's Interconnection Facilities	Transmission Owner	11/2/2013 *
Complete Network Upgrades constructed by Transmission Owner	Transmission Owner	11/2/2013*
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	11/2/2013
Initial Synchronization Date and In-Service Date	Interconnection Customer and Transmission Owner	11/15/2013
Begin trial operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	11/15/2013
Commercial operation date	Interconnection Customer	12/13/2013
Complete Previous Network Upgrades listed in Appendix A.2.e	Transmission Provider	NA
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs.	Transmission Owner	Per Article 12.2

ATTACHMENT B-2

SA # Second Revised 1282

Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

July 16, 2010

Geoff Coventry
Caney River Wind Project, LLC
c/o TradeWind Energy, LLC
South Lake Technology Park
16105 W. 113th Street, Suite 105
Lenexa, KS 66219

Subject: Revised Appendices A and C to GEN-2005-013 LGIA

Dear Mr. Coventry:

Please find attached the final and redlined versions of the revised Appendices A and C to the GEN-2005-013 Large Generator Interconnection Agreement ("LGIA") executed by Southwest Power Pool, Inc. ("SPP") as Transmission Provider, Caney River Wind Project, LLC ("Caney River") as Interconnection Customer, and Kansas Gas and Electric Company ("KG&E") as Transmission Owner, dated September 13, 2006 (SPP Service Agreement No. 1282), as revised December 16, ~~2010~~ 2009.

Appendices A and C are being revised to reflect the change in technology to Vestes 1.8MW wind turbines as studied per the request of Caney River. Appendices B, and D – G have not been revised but are included for completeness.

Please have the appropriate officer sign the signature page below and then forward this letter agreement and revised Appendices to KG&E. After KG&E has executed the signature page, the letter agreement and revised Appendices should be returned to SPP.

If you have any questions you may contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED TK BY

Carl Monroe
Executive Vice President & Chief Operating Officer
(501) 614-3218 • Fax: (501) 664-9553 • cmonroe@spp.org

IN WITNESS WHEREOF, the Parties have executed these revised Appendices A and C to the GEN-2005-013 LGIA.

Kansas Gas and Electric Company

Signature: Kelly B. Harrison

Printed Name: Kelly B. Harrison

Title: Vice President

Date: July 26, 2010

Caney River Wind Project, LLC

Signature: Geoff A. Coventry

Printed Name: GEOFF A. COVENTRY

Title: VICE PRESIDENT

Date: 7-22-10

APPROVED TK BY

Southwest Power Pool, Inc.

Signature: Thomas P. Duran

Printed Name: Thomas P. Duran

Title: CFO

Date: July 28, 2010

Appendix A To Agreement

Interconnection Facilities, Network Upgrades and Distribution Upgrades

The facilities described in this Appendix are based on the GEN-2005-013 studies conducted by Transmission Provider in response to the Interconnection Request. The status of higher queued interconnection requests will affect the interconnection facilities for this request as described in this Appendix.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed and installed by Interconnection Customer:

a.1) One lot 34.5 kV underground power collection circuits

a.2) One (1) 34.5 kV to 345 kV collection/transformation substation with associated 34.5 kV and 345 kV equipment including (1) 34.5 kV to 345 kV transformer and associated circuit breaker, disconnect switches, control building with protective relaying and DC power supply.

a.3) Reactive power equipment necessary to maintain 95% lagging (supplying vars) and 95% leading (absorbing vars) at the point of interconnection. Additional capacitors may be required to meet this requirement in addition to the capabilities of the wind turbine generators.

- Until such time that GEN-2004-010 and GEN-2005-016 come into service, the Customer is required to meet the power factor requirements of 98% lagging (supplying vars) and 96% leading (absorbing vars).

a.4) One (1) 345 kV transmission line and related structures from the Customer's 34.5 kV to 345 kV collection/transformation station to the dead end structure at the Transmission Owner's Interconnection Facilities.

a.5) Associated foundations, steel, bus, yard cable and conduit

a.6) One lot real property and associated Right of Way and Easements for ICIF

The above equipment is to be finalized by Interconnection Customer pending further design and engineering, and investigation as to the appropriate location of the 34.5-345 kV collection/transformation substation and interconnection line route.

(b) Transmission Provider's Interconnection Facilities to be designed, procured, constructed and installed by Interconnection Customer:

b.1) Three (3) 345 kV VTs

b.2) Three (3) 345 kV CTs

b.3) One (1) 345 kV motor operated switch

b.4) One (1) metering panel and associated devices for revenue metering at the Point of Interconnection.

b.5) One Full tension Dead end structure

b.6) Associated foundations, steel, bus, yard cable and conduit.
b.7) Two (2) sets of primary and redundant line protection relays

Total Estimated Cost of the Transmission Provider's Interconnection Facilities is $951,000.

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed and installed by Interconnection Customer:

Description	Estimated Cost
a.1) 345kV Ring Bus Substation	
a.1.1) Three (3) 345 kV circuit breakers	
a.1.2) Six (6) 345kV disconnect switches	
a.1.3) Two (2) 345kV motor operated disconnect switches	
a.1.4) Six (6) 345kV CCVTs	
a.1.5) Two (2) 345kV wave traps	
a.1.6) Four (4) sets of primary and redundant line protection relays	
a.1.7) Two (2) 345kV full tension deadend structures	
a.1.8) All associated foundations, bus, structural, site, yard, and conduit work	
a.1.9) Related charges for relay settings and wave trap tuning.	
Subtotal for 345kV Ring Bus Substation	$6,817,000
Total Stand Alone Network Upgrades	**$6,817,000**

a.2) Real property rights to be provided by Interconnection Customer (e.g. lease or easement) necessary for the construction and operation of the Stand Alone Network Upgrades. Such real property rights shall be assignable to Transmission Owner and shall be for a term equal to or exceeding the term of this Agreement.

(b) Stand Alone Network Upgrades to be designed, procured, constructed and installed by Transmission Provider

Description	Estimated Cost
b.1 One future 345kV breaker position to be included in the Interconnection Substation	$50,000

(c) Other Network Upgrades to be designed, procured, constructed and installed by Transmission Owner:

Description	Estimated Cost
2 – 345kV full tension turning structures 1 – All associated foundation and site work	
Total for Other Network Upgrades	$625,000

(d) Joint Network Upgrades

Description	Estimated Total Cost	Share
No Joint Network Upgrades		

(e) Previous Network Upgrades

Description	Estimated Cost
No Previous Network Upgrades	

(f) The cost for the Transmission Provider's Interconnection Facilities to be constructed by Interconnection Customer is estimated at $951,000.

(g) The cost, including penalties, of redispatch or market-related costs arising from outages described in Section 9.7.1. of the Agreement will be determined at the time of construction based on the actual construction design, system generation, transaction scheduling and, configuration of the transmission system.

(h) The total cost for the Transmission Provider's Interconnection Facilities, Stand Alone Network Upgrades, and Other Network Upgrades is estimated at $ 8,443,000.

(i) Interconnection Customer's potential liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $2,625,000. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

(j) The portion of the Network Upgrades that is subject to the transmission service credits described in Section 11.4 of this Agreement is estimated at $ 8,393,000. Consistent with Attachment A to Appendix 4 of the Interconnection Facilities Study Agreement, this estimate is accurate to within +/- 20 percent.

3. Distribution Upgrades:

No Distribution Upgrades

4. Interconnection Service: Interconnection Customer has selected the following:

X MW Energy Resource Interconnection Service
____ MW Network Resource Interconnection Service within Transmission Owner's Control Area
____ MW Network Resource Interconnection Service to outside Transmission Owner's Control Area

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the **Option to Build** for construction of the Transmission Provider's Interconnection Facilities and the Stand Alone Network Upgrades.

6. Eligible Network Customers:

Not Used

7. Permits, Licenses and Authorizations:

Permit, License and Authorization	Responsible Party

Interconnection Customer shall obtain the necessary permits, licenses and authorizations for the Generating Facility and the Interconnection Customer's Interconnection Facilities. Transmission Owner shall obtain necessary permits, licenses and authorizations for Transmission Owners Interconnection Facilities and Network Upgrades including Stand Alone Network upgrades

8. Point of Change of Ownership:

The Point of Change of Ownership shall be the Transmission Owners 345kV full tension dead-end structure to which the Interconnection Customer's 345kV transmission line from the Interconnection Customer's Interconnection Facility is attached (refer to Figure A – 1).

9. Point of Interconnection:

The point of Interconnection shall be between the 345 kV revenue metering and the Transmission Provider's 345 kV ring bus substation (refer to Figure A – 1).

GEN 2005-013

Appendix B - Milestones

(Assumes IC Option to Build)

Action	Party	Duration	Milestone Date
Complete Facilities Study	Transmission Provider Interconnection		Complete
Revise Milestones for Suspension Removal	Customer	60 days	9/15/2009 - 11/16/2009
IC provide Notice of Intent to Proceed with detailed design to TO	**Interconnection Customer**	**1 day**	**12/1/2009**
TO provide substation design standards, specifications, vendor list, 1-line	Transmission Owner	10 days	2/15/2010
IC initiate detailed engineering design of SANU, ICIF, TPIF	Interconnection Customer	1 day	2/15/2010
IC provide financial security for TO Engineering review of IC submittals - Main Transformer = $2500 - Stand Alone Network Upgrades = $25000 - Transmission Owners Interconnection Facilities = $5000 - ICIF = $25000	Interconnection Customer	1 day	12/1/2009
TO review and approve IC main transformer procurement specification	Transmission Owner	30 days	2/15/2010 - 3/15/2010
TO review and approve SANU and ICIF detailed design/procure submittal package	Transmission Owner	90 days	3/15/2010 - 6/15/2010
TO review and approve TPIF detailed design/procure submittal package	Transmission Owner	30 days	5/15/2010 - 6/15/2010
IC place order for Main Transformer	Interconnection Customer	1 day	3/15/2010
IC place order for SANU	Interconnection Customer	30 days	4/14/2010 - 6/1/2010
IC place order for TPIF	Interconnection Customer	10 days	6/1/2010 - 6/10/2010

IC Secure obligation to complete Interconnection Facilities with Parent Guarantee	Interconnection Customer	1 day	**6/1/2010**
IC provide financial security for TO Engineering design of ONU - TO design Other Network Upgrades (line tap) = $25,000 - TO place order for equipment = $400,000 - TO execute construction contract = $200,000	**Interconnection Customer**	**1 day**	**6/1/2010**
IC obtain all construction permits w/copy to TO	Interconnection Customer	5 days	9/10/2010 - 9/15/2010
IC obtain all governmental authorizations w/copy to TO	Interconnection Customer	5 days	9/10/2010 - 9/15/2010
IC construction of SANU	Interconnection Customer	105 days	3/1/2011 - 6/15/2011
IC obtain back-up power supply for switchyard from LDC	Interconnection Customer	30 days	3/15/2011
TO start construction of ONU	Transmission Owner	75 days	4/1/2011 - 6/15/2011
TO review and approve relay/protection settings	Transmission Owner	45 days	4/15/2011 - 6/1/2011
IC start construction of TPIF	Interconnection Customer	15 days	6/1/2011 - 6/15/2011
IC to provide Doble test results on breakers and other equipment	Interconnection Customer	1 day	6/1/2011
Initiate and appoint Operating Committee	All Parties	1 day	6/1/2011
TO substation walk-thru approval, prior to energization	Transmission Owner	3 days	6/8/2011-6/10/2011
Begin testing and initial energization	All Parties	15 days	**6/15/2011**
In Service Date for SANU, TPIF, ONU	All Parties	1 day	**6/30/2011**
IC Assign all switchyard property rights to TO	Interconnection Customer	1 day	6/30/2011
Energize ICIF	Interconnection Customer	3 days	7/1/2011 - 7/5/2011
In Service Date for ICIF	**Interconnection Customer**	**1 day**	**7/5/2011**
Initial Sync Date	Interconnection Customer	1 day	7/5/2011
Test and commission all WTG, SCADA, and metering	Interconnection Customer	120 days	7/15/2011 - 11/15/2011

COD	Interconnection Customer	1 day	12/15/2011

*Based on Interconnection Customer providing and Transmission Owner receiving a hard copy of design packages 10 business days prior to milestone date and holding design review meetings on milestone date.

**Based on Real Property Rights (per Item A2 (a.2) and site control being delivered in acceptable format to T.O. 30 days prior to milestone date

ATTACHMENT B-3

SA# Third Revised 2032

SPP Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

August 6, 2013

Lisa Szot
Chisholm View Wind Project, LLC
c/o Enel Green Power North America
3636 Nobel Drive, Suite 475
San Diego, CA 92122

Subject: Third Revised Appendices to GEN-2008-013 GIA

Dear Ms. Szot:

Attached please find the final and redlined versions of the Third Revised Appendices to the GEN-2008-013 Generator Interconnection Agreement ("GIA") between Southwest Power Pool, Inc. ("SPP") as Transmission Provider, Chisholm View Wind Project, LLC ("Chisholm View") as Interconnection Customer, and Oklahoma Gas and Electric Company ("OG&E") as Transmission Owner, dated July 8, 2010, as amended by letter agreements dated August 11, 2011 and September 17, 2012 (SPP Service Agreement No. 2032).

Appendix B has been revised to reflect a change request in the synchronization, test trial and commercial operation dates of Phase II. Contact information was updated in Appendices E and F. Appendices A, C, D and G were not revised but are included for completeness.

Please have the appropriate officer execute the signature page below and then forward this Letter Agreement and Third Revised Appendices to OG&E. After OG&E has executed the Letter Agreement, the Letter Agreement and Third Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED TK BY

Lanny Nickell, Vice President, Engineering
(501) 614-3232 • lnickell@spp.org

IN WITNESS WHEREOF, the Parties have executed these Third Revised Appendices to the GEN-2008-013 GIA.

Oklahoma Gas and Electric Company

Signature: Phillip L. Crissup

Printed Name: Phillip L. Crissup

Title: Vice President Utility Tech Support

Date: 8/19/13

Chisholm View Wind Project, LLC

Signature:

Printed Name: Robert S. Lawsse

Title: Sr. Vice President

Date: 8. 6. 2013

Southwest Power Pool, Inc.

Signature:

Printed Name: Carl Monroe

Title: EVP & COO

Date: 08/23/2013

APPROVED
TC
BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained by Interconnection Customer at its sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 345kV transformation substation with associated 34.5kV and 345kV switchgear; the substation may contain multiple 345/34.5kV substation transformers delivering to a common distribution bus appropriately sized to support phased construction of generation resources;
- One (1) 345kV overhead transmission line from the Project transformation substation to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (supply VARS) to 95% leading (absorb VARS) power factor at the point of interconnection; and
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed by the Transmission Owner at Interconnection Customer's sole expense, owned and/or controlled by Transmission Owner:

- Interconnection customer to add a single 345kV line terminal to the new Grant County Substation. Dead end structure, line switches, line relaying, revenue metering including CTs and PTs

Transmission Owner Interconnection Facilities	$1,099,958

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by Transmission Owner at the Interconnection Customer sole expense:

- Construct the new Grant County substation – Station to consist of:
    - Three 345kV breakers, line relaying, disconnect switches, and associated equipment
    - Appropriate real estate and Right of Way for access to accommodate the EHV substation to be provided by the Interconnection Customer with the cooperation and approval of the Transmission Owner.

Total Stand Alone Network Upgrades $7,426,915

(b) Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- Replace relays at Woodring

Estimated Cost $ 50,000

- Transmission line engineering, procurement, construction, and project management to loop Woodring to Wichita 345kV transmission line into and out of new substation

Estimated Cost $750,000

- Total Network Upgrades (Non Stand Alone) $800,000

(c) Joint Network Upgrades:

There are no Joint Network Upgrades.

(d) Previous Network Upgrades:

There are no Previous Upgrades.

(e) The cost for the Transmission Owner's Interconnection Facilities is estimated at $1,099,958.

(f) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $9,326.873. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $9,326.873. Interconnection Customer will pay Transmission Owner for the costs it incurs for 2(f) pursuant to the payment schedule as indicated in Appendix B, Milestones.

(g) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $8,226,915.

(h) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades.

4. **Interconnection Service; Interconnection Customer has selected the following:**

299.04 MW Energy Resource Interconnection Service
Phase I – 235.2MW
Phase II – 63.84 MW
0 MW Network Resource Interconnection Service

5. **Construction Option Selected by Interconnection Customer:**

Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades and the Network Upgrades. Due to the critical nature of the schedule for the project and the need to maintain absolute commitment to milestone schedules included in Appendix B (especially the In Service date), the Transmission Owner, at its sole discretion, agrees to consider use of commercially Reasonable efforts to include schedule and performance related incentives if and when needed to expedite the project milestones.
The responsibility for such schedule and performance related incentives shall fall entirely on the Interconnection Customer and the Interconnection Customer shall reimburse Transmission Owner fully for any schedule and performance related incentives paid by Transmission Owner to contractors.

6. **Eligible Network Customers:**

Not Used

7. **Permits, Licenses and Authorizations:**

Permit, License and Authorization	Responsible Party
Project Substation and Radial T-line to POI	IC
EHV Switchyard and new terminal	TO
Line tap of existing T-line	TO

APPENDIX B TO GIA

Milestones

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	2/1/2010
Provide authorization to proceed with design & procurement of Transmission Owner Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner per Article 5.5.2	Interconnection Customer	7/1/2011
Provide security payment to the Transmission Owner of 10% of the amount in Appendix A.2(f) equal to $932,687.30	Interconnection Customer	11/1/2011
Provide security payment to Transmission Owner of 30% of amount in Appendix A 2(f) equal to $2,798,061.90	Interconnection Customer	1/01/2012
Provide security payment to Transmission Owner of 30% of amount in Appendix A 2(f) equal to $2,798,061.90	Interconnection Customer	3/01/2012
Provide security payment to Transmission Owner of 20% of amount in Appendix A 2(f) equal to $1,865,374.60	Interconnection Customer	6/01/2012
Complete the Stand Alone Network Upgrades and test for service readiness to the extent possible without energization	Transmission Owner	7/1/2012
Provide security payment to Transmission Owner of 10% of amount in Appendix A 2(f) equal to $932,687.30	Interconnection Customer	11/01/2012
Complete Transmission Owner's Interconnection Facilities	Transmission Owner	9/26/2012
Complete Network Upgrades	Transmission Owner	9/26/2012
Complete registration of the Generating Facility as a market asset in the Transmission Provider's Integrated Marketplace in accordance with Attachment AE of the Tariff and the Transmission Provider's Market Protocols.	Interconnection Customer (if applicable)	Registration process must be completed prior to energization of the interconnection and applicable resources for either generation testing or commercial operation.
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	9/28/2012
Initial Synchronization Date (In Service date) – Phase I 235.2MW	Interconnection Customer	10/1/2012

Action	Responsible Party	Completion Date
Begin trial operation & testing per Article 6.1 – Phase I 235.2MW	Interconnection Customer & Transmission Owner	10/1/2012
Commercial operation date – Phase I 235.2MW	Interconnection Customer	12/31/2012*
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs.	Transmission Owner	2/1/2013
Payment of any balance due, based on final accounting of costs	Interconnection Customer or Transmission Owner, as applicable	2/15/2013
Initial Synchronization Date (In Service date) – Phase II 63.84MW	Interconnection Customer	10/1/2014
Begin trial operation & testing per Article 6.1 – Phase II 63.84MW	Interconnection Customer & Transmission Owner	10/1/2014
Commercial operation date - Phase II 63.84MW	Interconnection Customer	12/31/2014

*SPP accepts the acceleration of Interconnection Customer's Commercial Operation Date on the basis that the Commercial Operation Date for Interconnection Customer's Generating Facility specified above shall not be automatically extended beyond December 31, 2014. Extensions beyond December 31, 2014 shall be evaluated for Material Modification per Generator Interconnection Procedures Section 4.4. Commercial operation shall mean generating electricity for sale, excluding electricity generated during trial operation and commissioning.

ATTACHMENT C-1

SA # First Revised 2209

Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

February 17, 2012

Scott Scovill
Director Wind Development
Blackwell Wind, LLC
c/o NextEra Energy Resources, LLC
700 Universe Boulevard
Juno Beach, FL 33408

Subject: Revised Appendices to GEN-2009-025 GIA

Dear Mr. Scovill:

Attached please find the final and redlined version of the Revised Appendices to the GEN-2009-025 Generator Interconnection Agreement ("GIA") between Southwest Power Pool, Inc. ("SPP"), Blackwell Wind Farm, LLC, and Oklahoma Gas and Electric Company ("OG&E"), dated April 22, 2011 (SPP Service Agreement No. 2209). Blackwell Wind Farm, LLC subsequently assigned the GIA to Blackwell Wind, LLC ("Blackwell Wind").

Appendices A and C were revised to reflect the results of the restudy for a change in generator technology being used for the Blackwell Generating Facility. Appendix C has also been revised to reflect changes to the Open Access Transmission Tariff regarding wind generating facilities. Appendix B was revised to reflect the new milestones that were negotiated by the Parties to bring the GIA out of suspension. Contact information was updated in Appendices E and F. Appendices D and G were not revised but are included for completeness.

Please have the appropriate officer execute the signature page below and then forward this Letter Agreement and Revised Appendices to OG&E. After OG&E has executed the Letter Agreement, the Letter Agreement and Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED
BY

Carl Monroe, Executive Vice President & Chief Operating Officer
(501) 614-3218 • Fax: (501) 664-9553 • cmonroe@spp.org

IN WITNESS WHEREOF, the Parties have executed these Revised Appendices to the GEN-2009-025 Interconnection Agreement.

Oklahoma Gas and Electric Company

By: Philip L. Crump VS

Title: VP Utility Technical Support

Date: 3/9/12

Blackwell Wind, LLC

By:

Title: ~~John DiDonato~~ Vice President

Date: 02/23/2012

Southwest Power Pool, Inc.

By:

Title: EVP & COO

Date: 03/13/2012

APPROVED
IK
BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. No contingent upgrades related to other projects in the interconnection queue have been identified for this project.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed, maintained, and owned by Interconnection Customer at its sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 69kV transformation substation with associated 34.5kV and 69kV switchgear;
- Reactive power compensation equipment to maintain 95% lagging (providing vars) and 95% (absorbing vars) leading power factor at the Point of Interconnection; and
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed, maintained, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

- Add a single 69kV line terminal to the new Blackwell Wind Farm. Dead end structure or bus support structures as appropriate, line relaying, revenue metering including CT's and PT's.

Total Estimated Cost of Transmission Owner Interconnection Facilities $410,000

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- 69kV Switching Station – Construct 69kV, three breaker ring bus substation, expandable to breaker-and-a-half. Work will include three 69kV circuit breakers, associated disconnect switches, structures, foundations, and all other associated equipment.

Total Estimated Cost of Stand Alone Network Upgrades	$2,079,212

(b) Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- Right-of-Way for 69kV Blackwell Wind Farm

Total Estimated Cost of Network Upgrades to be paid for by Interconnection Customer	$ 12,000

(c) Network Upgrades for which the Interconnection Customer shares cost responsibility ("Shared Network Upgrades"):

a. Shared Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner

- None

b. Shared Network Upgrades to be designed constructed, installed and owned by the Transmission Owner or other transmission owning entity

- None

(d) Joint Network Upgrades:

- There are no Joint Network Upgrades.

(e) Previous Network Upgrades:

- There are no Previous Upgrades.

(f) The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $410,000.

(g) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $2,489,212. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $2,489,212 pursuant to the payment schedule as indicated in Appendix B, Milestones.

(h) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $2,079,212, which

will be adjusted for actual costs and expenses incurred in accordance with Article 11.4.

(i) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

(j) All cost estimates will be trued up for actual costs and expenses for purposes of final billing under Article 12.2.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades.

4. Interconnection Service; Interconnection Customer has selected the following:

59.8 MW Energy Resource Interconnection Service
0 MW Network Resource Interconnection Service

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

6. Eligible Network Customers:

Not Used

7. Permits, Licenses and Authorizations:

Permit, License and Authorization	Responsible Party

APPENDIX B TO GIA

Milestones

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	Completed 7/2010
Provide authorization to proceed, per Article 5.5.2, with design & procurement of Transmission Owner Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner, including Stand Alone Network Upgrades, and payment to Transmission Owner of 10% of amount in Appendix A.2(g) as security in accordance with Article 11.5.	Interconnection Customer	3/01/2012
Provide authorization to proceed, per Article 5.6.3, for construction of Transmission Owner's Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner, including Stand Alone Network Upgrades, and payment to Transmission Owner of 30% of amount in Appendix A.2(g) as security in accordance with Article 11.5.	Interconnection Customer	3/15/2012
Provide payment to Transmission Owner of 30% of amount in Appendix A.2(g) as security in accordance with Article 11.5.	Interconnection Customer	6/15/2012
Submit initial specifications for the Interconnection Customer Interconnection Facilities to Transmission Owner, per Article 5.10.1.	Interconnection Customer	180 Calendar Days prior to the Initial Synchronization Date.
Submit final specifications for the Interconnection Customer Interconnection Facilities to Transmission Owner, per Article 5.10.2.	Interconnection Customer	180 Calendar Days prior to the Initial Synchronization Date.
Submit initial information, including any Transmission System information necessary to allow Interconnection Customer to select equipment and meet any system protection and stability requirements, per Article 24.2.	Transmission Provider	180 Calendar Days prior to Trial Operation.
Submit updated information, including manufacturer information, as required by Article 5.10.4.	Interconnection Customer	180 Calendar Days prior to the Initial Synchronization Date.
Complete Transmission Owner's	Transmission Owner	10/01/2012

Action	Responsible Party	Completion Date
Interconnection Facilities.		
Complete Network Upgrades and Stand Alone Network Upgrades constructed by Transmission Owner.	Transmission Owner	10/01/2012
Energization of Interconnection Customer's Interconnection Facilities.	Interconnection Customer	10/08/2012
Initial Synchronization Date.	Interconnection Customer	10/09/2012
Begin trial operation & testing per Article 6.1.	Interconnection Customer & Transmission Owner	10/10/2012
Commercial operation date.	Interconnection Customer	11/01/2012
Deliver "as-built" drawings, information, and documents for the Interconnection Customer Interconnection Facilities to Transmission Owner, per Article 5.10.3.	Interconnection Customer	120 Calendar Days after the Commercial Operation Date.
Deliver "as-built" drawings, information, and documents for the Transmission Owner Interconnection Facilities and Network Upgrades to Interconnection Customer, per Article 5.11.	Transmission Owner	Upon request, within 120 Calendar Days after the Commercial Operation Date.
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities, Network Upgrades, and Stand Alone Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs, as trued up for purposes of final billing under Article 12.2.	Transmission Owner	To be submitted within six months of Commercial Operation of Generating Facility
Payment of any balance due, based on final accounting of costs.	Interconnection Customer, Transmission Provider or Transmission Owner, as applicable	30 Calendar Days of receipt of invoice, per Article 12.3. Interconnection Customer shall receive a refund, if applicable, within 30 Calendar Days of the issuance of the final construction invoice, per Article 12.2.

ATTACHMENT C-2

SA#2293

GENERATOR

INTERCONNECTION AGREEMENT (GIA)

entered into by the

Southwest Power Pool, Inc.,

Sunflower Electric Power Corporation

And

CPV Cimarron Renewable Energy Company, LLC

entered into on the 2nd day of December, 2011

GEN-2010-009

IN WITNESS WHEREOF, the Parties have executed this GIA in triplicate originals, each of which shall constitute and be an original effective Agreement among the Parties.

SOUTHWEST POWER POOL, INC.

By: _____

Printed Name: Carl Monroe

Title: EVP & COO

Date: 12/02/2011

APPROVED MRBR BY

SUNFLOWER ELECTRIC POWER CORPORATION

By: _____

Printed Name: Noman Williams

Title: V.P. Transmission Policy

Date: 11/28/11

CPV CIMARRON RENEWABLE ENERGY COMPANY, LLC

By: _____

Printed Name: Sean J. Finnerty

Title: Senior Vice President

Date: Nov 1, 2011

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained by Interconnection Customer at its sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 345kV transformation substation with associated 34.5kV and 345kV switchgear;
- One (1) 345kV overhead transmission line to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (providing vars) and 95% leading (absorbing vars) power factor at the point of interconnection. Any capacitor banks installed by the Interconnection Customer shall not cause voltage distortion and be in accordance with Article 9.7.6; and
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

- New Sunflower 345kV Switching Station (Buckner) - Add 345kV dead-end tower, arresters, line equipment, metering, and associated equipment to terminate the 345kV line to the generating facility.

Total Transmission Owner Interconnection Facilities	$ 750,000

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by Transmission Owner:

- New Sunflower 345kV Switching Station (Buckner) – Add one (1) 345kV circuit breaker, disconnect switches, and all associated and miscellaneous equipment.

Total Network Upgrades	$ 1,500,000

(b) Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- None

(c) Network Upgrades for which the Interconnection Customer shares cost responsibility ("Shared Network Upgrades"):

a. Shared Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- None

b. Shared Network Upgrades to be designed constructed, installed and owned by the Transmission Owner or other transmission owning entity:

• ITC Post Rock 345kV Substation – Add 2nd 345/230kV autotransformer	
o Estimated Cost	$13,749,527
o Interconnection Customer Allocated Cost	$ 934,710
o Allocated ratio	6.7%
Total Shared Network Upgrades	$ 934,710

(d) Joint Network Upgrades:

There are no Joint Network Upgrades.

(e) Previous Network Upgrades:

The following network upgrades, or their equivalents, are not the responsibility of the Interconnection Customer:

- o Spearville – Comanche double circuit 345kV transmission line – projected in service date 12/31/2014
- o Spearville – Post Rock 345kV transmission line – projected in service date 6/01/2012

- Post Rock – Axtell 345kV transmission line – projected in service date 6/01/2013
- Comanche – Medicine Lodge double circuit 345kV transmission line – projected in service date – 12/31/2014
- Medicine Lodge – Woodward double circuit 345kV transmission line – projected in service date – 12/31/2014
- Medicine Lodge – Wichita double circuit 345kV transmission line – projected in service date – 12/31/2014

In accordance with Section 5.9 of this GIA, until such time as these network upgrades or their equivalents are placed in service or SPP determines that they are not necessary, service may be limited at such time that higher queued and equally queued customers, if any, reach their in-service date; provided, however, that the limitation is necessary on account of such required network upgrades not then being in service. At the time that those customers provide authorization to proceed toward meeting an in-service date and upon the completion of such additional operational studies under Section 5.9 that may need to be performed, service may be pre-empted or pro-rated to account for the operation of the aforementioned higher queued or equally queued customers until such time that these network upgrades can be placed in service or are no longer required.

(f) The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $750,000.

(g) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, Shared Network Upgrades and Network Upgrades is estimated at $3,184,710. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, Shared Network Upgrades and Network Upgrades estimated at $3,184,710 pursuant to the payment schedule as indicated in Appendix B, Milestones.

(h) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $2,434,710.

(i) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades.

4. **Interconnection Service; Interconnection Customer has selected the following:**

165.6 MW Energy Resource Interconnection Service
___0 MW Network Resource Interconnection Service

5. **Construction Option Selected by Interconnection Customer:**

Interconnection Customer has selected the Option to Build for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

6. **Eligible Network Customers:**

Not Used

7. **Permits, Licenses and Authorizations:**

Interconnection Customer shall obtain the necessary permits, licenses and authorizations for the generating facility to be constructed and operated as well as Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

APPENDIX B TO GIA

Milestones

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	3/2011
With a fully executed agreement and prior to commencement of activities on the Option to Build the Interconnection Customer shall provide to the Transmission Owner written notification of the date that the Interconnection Customer is initiating activities on the Option to Build for Interconnection Facilities and Network Upgrades pursuant to Appendix A - 2(a) & 2(b).	Interconnection Customer	Within 15 Days from execution of this GIA
With a fully executed agreement, Interconnection Customer shall allow 60 days from Interconnection Customers written notification to Transmission Owner for Transmission Owner to supply and/or convey to Interconnection Customer all necessary standards and specifications per section 5.2 (1). Interconnection Customer shall allow 14 calendars days for Transmission Owner to review and comment on each of the 30%, 60%, 90% and final reviews of the design package per Section 5.2 (1).	Transmission Owner	Effective at execution of this GIA.
Provide financial security for Shared Network Upgrades to Transmission Provider in the amount of $934,710.	Interconnection Customer	12/15/2012
Provide financial Security of $250,000 to Transmission Provider as security.	Interconnection Customer	Within 30 Days from execution of this GIA
Interconnection Customer provides construction contractor authorization to proceed with design & procurement of Transmission Owner Interconnection Facilities and Stand Alone Network Upgrades to be constructed by Interconnection Customer Under Section 5.12 - Option to Build.	Interconnection Customer	October 10, 2011
Transmission Owner approves design of Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades	Transmission Owner	December 1, 2011
Transmission Owner to commission Interconnection Facilities and Network	Transmission Owner	August 31, 2012

Upgrades into the Transmission Owners Critical Infrastructure Protection (CIP) secure network and the Energy Management System (EMS).		
Complete Transmission Owner's Interconnection Facilities and Network Upgrades	Interconnection Customer	September 15, 2012
Ownership of Transmission Owner Interconnection Facilities and Stand Alone Network Upgrades transferred to Transmission Owner prior to energization of facilities	Interconnection Customer and Transmission Owner	September 15, 2012
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	September 15, 2012
Initial Synchronization Date	Interconnection Customer	September 20, 2012
Begin trial operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	September 25, 2012
Commercial operation date	Interconnection Customer	December 31, 2012
Place Shared Network Upgrade in Service	Transmission Provider	No later than December 31, 2014
Final accounting of costs incurred by Transmission Owner for engineering oversight and coordination for Transmission Owner's Interconnection Facilities and Stand Alone Network Upgrades constructed by Interconnection Customer. Interconnection Customer responsible for actual costs.	Transmission Owner	To be submitted within six months of Commercial Operation of the Generating Facility
Payment of any balance due, based on final accounting of costs	Interconnection Customer, Transmission Provider or Transmission Owner, as applicable	Within 30 Days of submittal of final accounting costs.

ATTACHMENT C-3

SA# Third Revised 2208

SPP Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

March 14, 2016

Regional Director, Business Management, South Region
Ensign Wind, LLC
700 Universe Boulevard
Juno Beach, FL 33408

Subject: Third Revised Appendices to GEN-2008-079 GIA
SPP Service Agreement No. 2208

Dear Sir or Madam:

Attached please find the final and redlined versions of the Third Revised Appendices to the GEN-2008-079 Generator Interconnection Agreement ("GIA") among Southwest Power Pool, Inc. ("SPP"), as Transmission Provider, Ensign Wind, LLC ("Ensign"), as Interconnection Customer, and Mid-Kansas Electric Company, LLC ("Mid-Kansas"), as Transmission Owner, dated April 22, 2011, and amended by letter agreements effective July 24, 2012, and November 30, 2012 (SPP Service Agreement No. 2208).

Appendix A was revised to remove the description of the temporary Point of Interconnection, reflect the change in description and final costs to Network Upgrades, and to reflect the contribution to Network Upgrades by Mid-Kansas. Appendix B was revised to update to show that all construction milestones are complete. Appendix C was revised to remove provisions dealing with the temporary Point of Interconnection. Contact information was updated in Appendices E and F. Appendices D and G were not revised but are included for completeness.

By signing this letter, the parties agree that the currently effective Appendices to the GIA are hereby superseded and replaced by the Third Revised Appendices attached hereto. Please have the appropriate officer execute the signature page below and then forward this letter agreement and Third Revised Appendices to Mid-Kansas. After Mid-Kansas has executed this letter agreement, this letter agreement and Third Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

Carl Monroe, Executive Vice President & Chief Operating Officer
(501) 614-3218 • cmonroe@spp.org

cc: Charles Hendrix

IN WITNESS WHEREOF, the Parties have executed these Third Revised Appendices to the GEN-2008-079 GIA.

Mid-Kansas Electric Company, LLC

By: Al Tamimi

APPROVED DPK BY KKB

Printed Name: Al Tamimi

Title: VP, Transmission Planning and Policy

Date: 4/15/2016

Ensign Wind, LLC

By: M. J.

Printed Name: Mark Tourangeau

Title: Vice President

Date: 3/15/16

Southwest Power Pool, Inc.

By:

Printed Name: Carl Monroe

APPROVED TK BY

Title: EVP & COO

Date: 05/13/2016

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

As described below, Interconnection Customer's Point of Interconnection will be at the new (MKEC) 115kV Switching Station (also referred to as the Crooked Creek switchyard).

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained by Interconnection Customer at its sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 115kV transformation substation with associated 34.5kV and 115kV switchgear;
- One (1) 115kV overhead transmission line to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (providing vars) and 95% leading (absorbing vars) power factor at the point of interconnection (Interconnection Customer intends to install a 30 Mvar capacitor bank and filter); and
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed and installed by Interconnection Customer and owned by Transmission Owner, at the Interconnection Customer's sole expense:

- New (MKEC) 115kV Switching Station: Add 115kV dead-end tower, 115kV breaker, arresters, line equipment, metering, and associated equipment to terminate the 115kV line to the generating facility.

Transmission Owner Interconnection Facilities Constructed by Transmission Owner	$163,939.58
Transmission Owner Interconnection Facilities Constructed by Interconnection Customer	$835,318.08

Total Transmission Owner Interconnection Facilities	$999,257.66

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, and installed by Interconnection Customer and owned by Transmission Owner:

- New (MKEC) 115kV Switching Station: Build new T-Tap substation with two (2) 115kV circuit breakers and associated equipment at a point on the Judson Large - Cudahay 115kV transmission line.

Stand Alone Network Upgrades Constructed by Transmission Owner	$381,291.64
Stand Alone Network Upgrades Constructed by Interconnection Customer	$2,877,206.67
Total Stand Alone Network Upgrades Constructed by Transmission Owner or Interconnection Customer	$3,258,498.31

(b) Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner that are a joint cost responsibility of the Interconnection Customer and Transmission Owner. In accordance with Article 11.3, Transmission Owner has elected to fund a portion of the Network Upgrades:

- Spearville – North Ft. Dodge 115kV transmission line: Build approximately 17 miles of 115kV transmission line to serve as second circuit between North Ft. Dodge and Spearville.

Final Cost (Interconnection Customer Obligation)	$9,546,544.76

- North Fort Dodge – Ft. Dodge 115kV: Rebuild of North Fort Dodge and upgrades at Fort Dodge Substations including re-route of all necessary line terminals.

Final Cost (Interconnection Customer Obligation)	$5,397,550.57
Final Cost (Transmission Owner Obligation)	$10,000,000.00
Total Final Cost	$15,397,550.57

- Spearville Substation – Add 345/115kV autotransformer and 345kV and 115kV terminal positions for autotransformer.

Final Cost (Interconnection Customer Obligation)	$15,829,550.40

Total Network Upgrades	$40,773,645.73

(c) Network Upgrades for which the Interconnection Customer shares cost responsibility ("Shared Network Upgrades"):

a. Shared Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- None

b. Shared Network Upgrades to be designed, constructed, installed and owned by the Transmission Owner or other transmission owning entity:

- None

(d) Joint Network Upgrades:

There are no Joint Network Upgrades.

(e) Previous Network Upgrades: The following network upgrades are required to be in service before the Interconnection Customer's Generating Facility can reach Commercial Operation:

- None

(f) The cost for the Transmission Owner's Interconnection Facilities is estimated at $999,257.66.

(g) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $41,318,876.95 (not including the cost of the Transmission Owner Interconnection Facilities and Stand Alone Network Upgrades constructed pursuant to Option to Build). The Interconnection Customer has paid for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $31,318,876.95 (not including the cost of the Stand Alone Network Upgrades constructed pursuant to Option to Build).

(h) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement to the Interconnection Customer is estimated at $34,032,144.04.

(i) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement to the Transmission Owner is estimated at $10,000,000.00.

(j) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

3. **Distribution Upgrades:**

There are no Transmission Owner Distribution Upgrades.

4. **Interconnection Service; Interconnection Customer has selected the following:**

_98.9 MW Energy Resource Interconnection Service
__0.0 MW Network Resource Interconnection Service

5. **Construction Option Selected by Interconnection Customer:**

Interconnection Customer has selected the Option to Build for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

6. **Eligible Network Customers:**

Not Used

7. **Permits, Licenses and Authorizations:**

Interconnection Customer shall obtain the necessary permits, licenses and authorizations for the generating facility to be constructed and operated.

8. **Point of Change of Ownership.** The point of change of ownership shall be the point where the Interconnection Customer's 115kV transmission line meets the Transmission Owner's 115kV dead end tower at the Transmission Owner's 115kV Switching Station, Crooked Creek.

9. **Point of Interconnection:** Point of interconnection will be at the Transmission Owner's Crooked Creek Switching Station 115kV bus.

APPENDIX B TO GIA

Milestones

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	Complete
Provide authorization to proceed with design, procurement, and construction of all Network Upgrades and Transmission Owner Interconnection Facilities	Interconnection Customer	Complete
Provide financial security for design, procurement, and construction of all Network Upgrades and Transmission Owner Interconnection Facilities	Interconnection Customer	Complete
Complete Shared Network Upgrades constructed by Transmission Owner.	Transmission Owner	Complete
Complete Network Upgrades constructed by Transmission Owner	Transmission Owner	Complete
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	Complete
Initial Synchronization Date	Interconnection Customer	Complete
Begin trial operation & testing of Interconnection Upgrades, Shared Network Upgrades and Network Upgrades per Article 6.1	Transmission Owner	Complete
Begin trial operation & testing per Article 6.1	Interconnection Customer	Complete
Commercial operation date	Interconnection Customer	Complete
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities, Shared Network Upgrades, and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs.	Transmission Owner	Complete
Final accounting of costs incurred by Transmission Provider for shared Network Upgrades. Interconnection Customer responsible for actual costs.	Transmission Provider	Complete
Payment of any balance due, based on final accounting of costs	Interconnection Customer, Transmission Provider or Transmission Owner, as applicable	Complete

ATTACHMENT C-4

SA#3018

GENERATOR INTERCONNECTION AGREEMENT (GIA)

entered into by the

Southwest Power Pool, Inc.,

Oklahoma Gas and Electric Company

and

Minco Wind III, LLC

entered into on the 8th day of April, 2015

GEN-2011-010 and GEN-2014-005 (IFS-2014-001-05)

IN WITNESS WHEREOF, the Parties have executed this GIA in triplicate originals, each of which shall constitute and be an original effective Agreement among the Parties.

SOUTHWEST POWER POOL, INC.

By: _____

Printed Name: Carl Monroe

Title: EVP & COO

Date: 04/08/2015

APPROVED TK BY

OKLAHOMA GAS AND ELECTRIC COMPANY

By: _____

Printed Name: Philip L. Crissup

Title: Vice President Utility Tech Support

Date: 24 March 2015

MINCO WIND III, LLC

By: _____

Printed Name: Mark Tourangeau

Title: Vice President

Date: 3/20/2015

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Requests GEN-2011-010 and GEN-2014-005 (also known as IFS-2014-001-05). The GEN-2014-005 generation interconnection request increased the capacity of the GEN-2011-010 Generating Facility.

The Generator Interconnection Agreement for Interconnection Request GEN-2011-010 was executed between the Parties as SPP Service Agreement No. 2400. Interconnection Requests GEN-2011-010 and GEN-2014-005 have been combined into one GIA and, as a result, execution of this GIA will result in the termination of SPP Service Agreement No. 2400.

1. **Interconnection Facilities:**

   (a) **Interconnection Customer's Interconnection Facilities:** Interconnection facilities to be designed, procured, constructed, installed, maintained, and owned by Interconnection Customer at its sole expense:

   - 34.5 kV underground cable collection circuits;
   - 34.5 kV to 345 kV transformation substation with associated 34.5 kV and 345 kV switchgear;
   - One (1) 345 kV overhead transmission, approximately 10 miles, to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
   - Reactive power compensation equipment to maintain 95% lagging (providing vars) and 95% leading (absorbing vars) power factor at the Point of Interconnection, including approximately 13.0 Mvar of reactors (or an equivalent means) to compensate for injection of reactive power into the transmission system under light wind conditions. Any capacitor banks installed by the Interconnection Customer shall not cause voltage distortion and be in accordance with Article 9.7.6; and
   - All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

   (b) **Transmission Owner's Interconnection Facilities:** Interconnection facilities that are to be designed, procured, constructed, installed, maintained, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

   - Minco 345 kV: Add one (1) 345 kV line terminal including dead-end structure, substation steel, substation bus, interconnection metering, line relaying, line switches and associated equipment including CTs and PTs.

Estimated Cost (GEN-2011-010)	$ 1,099,958
Estimated Cost (GEN-2014-005)	$ 0
Total Transmission Owner Interconnection Facilities	**$ 1,099,958**

2. **Network Upgrades:**

(a) Stand Alone Network Upgrades: Network Upgrades that an Interconnection Customer may construct without affecting day-to-day operations of the Transmission System during their construction. The Transmission Provider, Transmission Owner and the Interconnection Customer must agree as to what constitutes Stand Alone Network Upgrades. Stand Alone Network Upgrades are to be designed, procured, constructed, installed and owned by Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- None

(b) Network Upgrades constructed by Transmission Owner: Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- Minco 345 kV: Add one (1) 345 kV breaker, line relaying, disconnect switches, and associated equipment.

Estimated Cost (GEN-2011-010)	$ 2,554,395
Estimated Cost (GEN-2014-005)	$ 0
Total Transmission Owner Network Upgrades	**$ 2,554,395**

(c) Network Upgrades constructed by other transmission owning entity: Network Upgrades to be designed, procured, constructed, installed and owned by another transmission owning entity that are 100% cost responsibility of the Interconnection Customer. These Network Upgrades will require a Notice to Construct:

- None

(d) Shared Network Upgrades: Network Upgrade that is needed for the interconnection of multiple Interconnection Customers' Generating Facilities and which is the shared funding responsibility of such Interconnection Customers that may also benefit other Interconnection Customer(s) that are later identified as beneficiaries. These Shared Network Upgrades may be constructed by the Transmission Owner or another transmission owning entity as identified:

(i) Transmission Owner Shared Network Upgrades:

- None

(ii) Other Transmission Owning Entity Shared Network Upgrades:

- None

(e) Previous Network Upgrades: Network Upgrades that are required for the interconnection of Interconnection Customers' Generating Facility, but are not the cost responsibility of the Interconnection Customer, subject to restudy:

(i) The following Network Upgrades, or their equivalents, are required to be in service prior to the COD of the Generating Facility:

- None

3. Summary of Generation Interconnection Costs:

(a) Transmission Owner Interconnection Facilities: The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $1,099,958 for GEN-2011-010 ($0 incremental for GEN-2014-005).

(b) Network Upgrades: The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.5 of this Agreement is estimated at $2,554,395 for GEN-2011-010 ($0 incremental for GEN-2014-005) which will be adjusted for actual costs and expenses incurred in accordance with Article 11.5.

(c) Total Interconnection Costs: The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $3,654,353 for GEN-2011-010 ($0 incremental for GEN-2014-005). The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $3,654,353 for GEN-2011-010 ($0 incremental for GEN-2014-005) pursuant to the payment schedule as indicated in Appendix B, Milestones.

(d) Initial Payment: Pursuant to Article 11.6 of this Agreement, the Interconnection Customer's Initial Payment, which is only applicable to GEN-2014-005, will be $22,800, equal to the greater of a) twenty (20) percent of the total cost of Network Upgrades, Shared Network Upgrades, Transmission Owner Interconnection Facilities and/or Distribution Upgrades or b) $4,000/MW of the size of the Generating Facility.

(e) Taxes, Interests and/or Penalties: Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Article 5.17.3 is estimated at $0. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

(f) Final Invoice: All cost estimates will be trued up for actual costs and expenses for purposes of final billing under Article 12.2.

4. **Distribution Upgrades:**

   - None

5. **Interconnection Service:**

   Interconnection Customer has requested the following (from Appendix 1 of the GIP):
   106.5 MW Energy Resource Interconnection Service – OR –
   0.0 MW Network Resource Interconnection Service

   This request has been analyzed only for Energy Resource Interconnection Service and shall be limited to a total of 106.5 MW of Energy Resource Interconnection Service.

6. **Construction Option Selected by Customer:**

   Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

7. **Permits, Licenses, and/or Authorizations:**

Permit, License, and/or Authorization	Responsible Party	Date Required
Obtain Governmental Authorization (as necessary).	As necessary	

8. **Description of the Point of Change of Ownership:**

   The point of change of ownership shall be the point where the Interconnection Customer's 345kV transmission line meets the Transmission Owner's 345kV dead end tower at the Point of Interconnection.

9. **Description of the Point of Interconnection:**

   Point of interconnection will be at the Transmission Owner's Minco 345kV substation, located in Grady County, Oklahoma.

10. **Higher-Queued Interconnection Customers:**

    - GEN-2007-050 (On line for 150MW)
    - GEN-2007-062
    - GEN-2011-007 (On Suspension)*
    - GEN-2011-019 (On Suspension)*
    - GEN-2011-020 (On Suspension)*
    - GEN-2011-051 (On Suspension)*
    - GEN-2011-054 (On Suspension)*
    - GEN-2013-035/IFS-2014-001-01*
    - GEN-2014-002/IFS-2014-001-02*
    - GEN-2014-003/IFS-2014-001-03*

    *Higher or equally queued for GEN-2014-005 only

APPENDIX B TO GIA

Milestones for GEN-2011-010 and GEN-2014-005

Action	Responsible Party	Completion Date
Complete Facilities Study for GEN-2011-010.	Transmission Provider	Complete – 12/1/2011
Provide authorization to proceed with design & procurement of Transmission Owner Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner per Article 5.5.2, and payment to Transmission Owner of $3,000,000 in Appendix A Item 3 (c) as security.	Interconnection Customer	Complete
Complete Transmission Owner's Interconnection Facilities	Transmission Owner	Complete – 8/30/2012
Complete Network Upgrades constructed by Transmission Owner	Transmission Owner	Complete – 8/30/2012
Complete registration of the Generating Facility as a market asset in the Transmission Provider's Integrated Marketplace in accordance with Attachment AE of the Tariff and the Transmission Provider's Market Protocols.	Interconnection Customer (if applicable)	Complete – Registration process must be completed prior to energization of the interconnection and applicable resources for either generation testing or commercial operation.
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	Complete – 8/31/2012
Initial Synchronization Date	Interconnection Customer	Complete – 8/31/2012
Begin trial operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	Complete – 9/1/2012
Commercial operation date for GEN-2011-010 (approximately 100.8 MW)	Interconnection Customer	Complete – 10/1/2012
Provide Initial Payment per Article 11.6 and Appendix A Item 3(d) in the amount of $22,800 (greater of 20% of cost of Transmission Owner Interconnection Facilities and Network Upgrades – OR – $4000/MW) to Transmission Provider. Only applicable to GEN-2014-005 (5.7 MW).	Interconnection Customer	Complete – 3/6/2014
Complete Facility Study for GEN-2014-005.	Transmission Provider	Complete – 1/12/2015
Begin trial operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	4/15/2015
Commercial operation date for GEN-2014-005 (approximately 5.7 MW uprate to GEN-2011-010)	Interconnection Customer	4/16/2015

Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs.	Transmission Owner	6 months after completion of Transmission Owner's Interconnection Facilities and Network Upgrades
Final accounting of costs incurred by Transmission Provider for shared Network Upgrades. Interconnection Customer responsible for actual costs.	Transmission Provider	Interconnection Facilities and Network Upgrades Interconnection Facilities and Network Upgrades
Payment of any balance due, based on final accounting of costs	Interconnection Customer, Transmission Provider or Transmission Owner, as applicable	30 days after final accounting and billing

ATTACHMENT C-5

SA# First Revised 2026

Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

January 6, 2012

Vice President Business Management, South Region
Minco Wind Interconnection Services, LLC
700 Universe Boulevard FEB/JB
Juno Beach, FL 33408-2683

Subject: First Revised Appendices to GEN-2007-043 GIA

Dear Sir or Madam:

Attached please find the final and redlined versions of the First Revised Appendices to the GEN-2007-043 Generator Interconnection Agreement ("GIA") dated June 10, 2010, between Southwest Power Pool, Inc. ("SPP"), Minco Wind, LLC ("Minco Wind") as Interconnection Customer, and Oklahoma Gas and Electric Company ("OG&E") (SPP Service Agreement No. 2026). Minco Wind subsequently assigned its interest in the GIA to Minco Wind Interconnection Services, LLC.

Appendix A has been revised to reduce the number of transformers. Appendices E and F have been revised to update the contact information for the parties. Appendices B-D and G have not been revised but are included for completeness.

By signing this letter, the parties agree that the currently effective Appendices to the GIA are hereby superseded and replaced by the First Revised Appendices attached hereto. Please have the appropriate officer execute the signature page below and then forward this letter agreement and First Revised Appendices to OG&E. After OG&E has executed this letter agreement, this letter agreement and First Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED BY

Carl Monroe, Executive Vice President & Chief Operating Officer
(501) 614-3218 • Fax: (501) 664-9553 • cmonroe@spp.org

Cc: Charles Hendrix

IN WITNESS WHEREOF, the Parties have executed these first revised Appendices to the GIA to be effective as of the date of the last signature.

Oklahoma Gas and Electric Company

By: Philip L. Crissup

Printed Name: Philip L. Crissup

Title: Vice President Utility Technical Support

Date: 1/18/2012

Minco Wind Interconnection Services, LLC

By: John DiDonato

Printed Name: JOHN DIDONATO

Title: VICE PRESIDENT

Date: 1/12/2012

Southwest Power Pool, Inc.

By:

Printed Name: Carl Monroe

Title: EVP & COO

Date: 01/25/2012

APPROVED TLC BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed and maintained and owned by Interconnection Customer at its sole expense:

- 34.5kV underground cable collection circuits;
- 34.5kV to 345kV transformation substation with associated 34.5kV and 345kV switchgear; The substation will contain one (1) 345/34.5kV substation transformer.
- One (1) 345kV overhead transmission line to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (supplying) and 95% leading (absorbing) power factor at the point of interconnection will be determined based on the most recent project information submitted by Interconnecting Customer.
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed by Interconnection Customer and owned by Transmission Owner.

- Add a single 345kV line terminal to the new Minco EHV Substation. Dead end structure, line switches, line relaying, revenue metering including CTs and PTs.

Transmission Owner Interconnection Facilities $1,099,958

2. Network Upgrades:

(a) Stand Alone Network Upgrades to be designed, procured, constructed, installed by Interconnection Customer and owned by Transmission Owner:

- Construct of a new Minco EHV substation – Station to consist of -
  - Three 345kV breakers, line relaying, disconnect switches, and associated equipment

Total Stand Alone Network Upgrades	$6,882,042

(b) Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner:

- Transmission - Route the existing Cimarron to PSO Lawton East Side (LES) line into and out of the new Minco substation

Network Upgrades -	$750,000

(c) Joint Network Upgrades:

There are no Joint Network Upgrades

(d) Previous Network Upgrades

There are no Previous Upgrades

(e) The cost for the Transmission Owner's Interconnection Facilities to be constructed by Interconnection Customer is estimated at $1,099,958.

(f) The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $8,732,000. The Interconnection Customer is responsible for the costs for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $8,732,000. Interconnection Customer will pay Transmission Owner for the costs it incurs pursuant to the payment schedule as indicated in Appendix B, Milestones.

(g) The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $7,632,042

(h) Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for acquisition of land.

3. Distribution Upgrades:

There are no Transmission Owner Distribution Upgrades

4. Interconnection Service; Interconnection Customer has selected the following:

201 MW Energy Resource Interconnection Service
0 MW Network Resource Interconnection Service

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the Option to Build for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

6. Eligible Network Customers

Not Used

7. Permits, Licenses and Authorizations:

Permit, License and Authorization	Responsible Party

Interconnection Customer shall obtain the necessary permits, licenses and authorizations for the generating facility to be constructed and operated.

8. Point of Change of Ownership:

The point of change of ownership shall be the point where the Interconnection Customer's 345kV transmission line meets the Transmission Owner's 345kV dead end tower at the Transmission Owner's new Minco 345kV Substation.

9. Point of Interconnection:

The Point of Interconnection shall be at the 345kV bus at the Transmission Owner's new Minco 345kV substation.

Appendix B to GIA

Milestones

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	January, 2010
Provide authorization to proceed with design & procurement of Transmission Owner Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner per Article 5.5.2, and payment to Transmission Owner of 10% of amount in Appendix A.2(b) as security.	Interconnection Customer	1 month after Effective Date
Provide authorization to proceed for procurement, and construction of Transmission Owner's Interconnection Facilities and all Network Upgrades to be constructed by Transmission Owner, and payment to Transmission Owner of 30% of amount in Appendix A.2(b) as security.	Interconnection Customer	1 month after Auth. To proceed
Provide payment to Transmission Owner of 30% of amount in Appendix A 2(b) as security.	Interconnection Customer	1 months after Auth. To proceed
Complete Transmission Owner's Interconnection Facilities	Interconnection Customer	5 months after Auth. To proceed
Complete Stand Alone Network Upgrades	Interconnection Customer	5 months after Auth. To proceed
Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	5 months after Auth. To proceed
Initial Synchronization Date	Interconnection Customer	5 months after Auth. To proceed
Begin trial operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	5 months after Auth. To proceed
Commercial operation date	Interconnection Customer	Ph 1 (100 MW) – 11/1/2010 Ph 2 (100 MW) - 12/1/2011
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs.	Transmission Owner	6 months after the completion of Transmission Owner's Interconnection Facilities and Network Upgrades
Payment of any balance due, based on final accounting of costs	Interconnection Customer or Transmission Owner, as applicable	30 days after final accounting

ATTACHMENT D-1

SA# First Revised 2975

SPP Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

March 20, 2015

Bill Pezalla
Grant County Interconnect, LLC
c/o Apex Clean Energy, Inc.
310 4th St. NE, Suite 200
Charlottesville, VA 22902

Subject: Revised Appendices to GEN-2013-029 GIA
SPP Service Agreement No. 2975

Dear Mr. Pezalla:

Attached please find the final and redlined versions of the Revised Appendices to the GEN-2013-029 Generator Interconnection Agreement ("GIA") among Southwest Power Pool, Inc. ("SPP"), as Transmission Provider, Grant County Interconnect, LLC ("Grant County"), as Interconnection Customer, and Oklahoma Gas and Electric Company ("OGE"), as Transmission Owner, dated December 11, 2014 (SPP Service Agreement No. 2975).

Appendix A was revised to reflect an adjustment to reactive power compensation requirements. Appendix B was revised to adjust milestones associated with the completion dates of facilities and Network Upgrades. Appendix C was revised to reflect the generator technology change requested by Grant County. Contact information was updated in Appendices E and F. Appendices D and G were not revised but are included for completeness.

By signing this letter, the parties agree that the currently effective Appendices to the GIA are hereby superseded and replaced by the Revised Appendices attached hereto. Please have the appropriate officer execute the signature page below and then forward this letter agreement and Revised Appendices to OGE. After OGE has executed this letter agreement, this letter agreement and Revised Appendices should be returned to SPP.

If you have any questions, please contact Charles Hendrix at 501-614-3546.

Sincerely,

APPROVED TK BY

Carl Monroe, Executive Vice President & Chief Operating Officer
(501) 614-3218 • cmonroe@spp.org

cc: Charles Hendrix

IN WITNESS WHEREOF, the Parties have executed these Revised Appendices to the GEN-2013-029 GIA.

Oklahoma Gas and Electric Company

By: Philip L Crissup KH

Printed Name: Philip L. Crissup

Title: Vice President Utility Tech Support

Date: 3/31/15

Grant County Interconnect, LLC

By: Grant Wind, LLC, its Sole Member
By: Apex GCL, LLC, its Sole Member
By: Apex Clean Energy Holdings, LLC, its Sole Member

By: W Goodwin

Printed Name: Mark Goodwin

Title: President

Date: 20 March 2015

Southwest Power Pool, Inc.

By:

Printed Name: Carl Monroe

Title: EVP & COO

Date: 04/02/2015

APPROVED TF BY

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request, GEN-2013-029 (IFS-2013-002-04).

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities: Interconnection facilities to be designed, procured, constructed, installed, maintained, and owned by Interconnection Customer at its sole expense:

- 34.5 kV underground cable collection circuits;
- 34.5 kV to 345 kV transformation substation with associated 34.5 kV and 345 kV switchgear;
- One (1) 345 kV overhead transmission, approximately four (4) miles, to the Point of Interconnection and Point of Change of Ownership with the Transmission Owner;
- Reactive power compensation equipment to maintain 95% lagging (providing vars) and 95% leading (absorbing vars) power factor at the Point of Interconnection, including approximately 10 Mvar of reactors to compensate for injection of reactive power into the transmission system under light wind conditions. Any capacitor banks installed by the Interconnection Customer shall not cause voltage distortion and be in accordance with Article 9.7.6; and
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities: Interconnection facilities that are to be designed, procured, constructed, installed, maintained, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

- Renfro 345 kV: Add one (1) 345 kV line terminal including dead-end structure, substation steel, substation bus, interconnection metering, line switch and associated equipment. No additional Right-of-Way is included in this cost.

  Estimated Cost $ 1,099,958

Total Transmission Owner Interconnection Facilities **$ 1,099,958**

2. Network Upgrades:

(a) Stand Alone Network Upgrades: Network Upgrades that an Interconnection Customer may construct without affecting day-to-day operations of the Transmission System during their construction. The Transmission Provider, Transmission Owner and the Interconnection Customer must agree as to what constitutes Stand Alone Network

Upgrades. Stand Alone Network Upgrades are to be designed, procured, constructed, installed and owned by Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- None

(b) Network Upgrades constructed by Transmission Owner: Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

- Renfro 345 kV: Install one (1) 345 kV, 3000 Amp breakers, line relaying, disconnect switches, and associated equipment.

  Estimated Cost $ 1,588,977

Total Transmission Owner Network Upgrades **$ 1,588,977**

(c) Network Upgrades constructed by other transmission owning entity: Network Upgrades to be designed, procured, constructed, installed and owned by another transmission owning entity that are 100% cost responsibility of the Interconnection Customer. These Network Upgrades will require a Notice to Construct:

- None

(d) Shared Network Upgrades: Network Upgrade that is needed for the interconnection of multiple Interconnection Customers' Generating Facilities and which is the shared funding responsibility of such Interconnection Customers that may also benefit other Interconnection Customer(s) that are later identified as beneficiaries. These Shared Network Upgrades may be constructed by the Transmission Owner or another transmission owning entity as identified:

(i) **Transmission Owner Shared Network Upgrades:**

- None

(ii) **Other Transmission Owning Entity Shared Network Upgrades:**

- None

(e) Previous Network Upgrades: Network Upgrade that is required for the interconnection of Interconnection Customers' Generating Facility, but is not the cost responsibility of the Interconnection Customer, subject to restudy:

(i) The following Network Upgrades, or their equivalents, are required to be in service prior to the COD of the Generating Facility:

- None

3. Summary of Generation Interconnection Costs:

(a) Transmission Owner Interconnection Facilities: The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $1,099,958.

(b) Network Upgrades: The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $1,588,977 which will be adjusted for actual costs and expenses incurred in accordance with Article 11.5.

(c) Total Interconnection Costs: The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $2,688,935. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $2,688,935 pursuant to the payment schedule as indicated in Appendix B, Milestones.

(d) Initial Payment: Pursuant to Article 11.6 of this Agreement, the Interconnection Customer's Initial Payment will be $1,200,000, equal to the greater of a) twenty (20) percent of the total cost of Network Upgrades, Shared Network Upgrades, Transmission Owner Interconnection Facilities and/or Distribution Upgrades or b) $4,000/MW of the size of the Generating Facility.

(e) Taxes, Interests and/or Penalties: Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Article 5.17.3 is estimated at $0. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

(f) Final Invoice: All cost estimates will be trued up for actual costs and expenses for purposes of final billing under Article 12.2.

4. Distribution Upgrades:

- **None**

5. Interconnection Service:

Interconnection Customer has requested the following (from Appendix 1 of the GIP):
300.0 MW Energy Resource Interconnection Service – OR –
0.0 MW Network Resource Interconnection Service

This request has been analyzed only for Energy Resource Interconnection Service and shall be limited to a total of 300.0 MW of Energy Resource Interconnection Service.

APPENDIX B TO GIA

Milestones

Action	Responsible Party	Completion Date
Complete Facilities Study	Transmission Provider	Completed 6/24/2014
Provide Initial Payment per Article 11.6 and Appendix A.3(d) in the amount of $1,200,000 ($4000/MW).	Interconnection Customer	Completed 8/13/2014
Obtain Governmental Authorization (as necessary).	Interconnection Customer	As necessary.
Provide written authorization to proceed with engineering of Transmission Owner Interconnection Facilities and all Network Upgrades listed in Appendix A, Item 1.(b) and 2.(b) to be constructed by Transmission Owner per Article 5.5.2, and payment to Transmission Owner of $250,000.	Interconnection Customer	Completed 9/4/2014
Provide written authorization to proceed with procurement of Transmission Owner Interconnection Facilities and all Network Upgrades listed in Appendix A, Item 1.(b) and 2.(b) to be constructed by Transmission Owner per Article 5.5.2.	Interconnection Customer	Completed 1/5/2015
Provide payment to Transmission Owner in the amount of $750,000 for engineering and procurement of the Interconnection Facilities and all Network Upgrades listed in Appendix A, Item 1.(b) and 2.(b).	Interconnection Customer	Completed 1/5/2015
Provide written authorization to proceed with construction of Transmission Owner Interconnection Facilities and all Network Upgrades listed in Appendix A, Item 1.(b) and 2.(b) to be constructed by Transmission Owner per Article 5.5.2.	Interconnection Customer	Completed 3/9/2015
Provide payment to Transmission Owner in the amount of $850,000 for procurement and construction of the Interconnection Facilities and all Network Upgrades listed in Appendix A, Item 1.(b) and 2.(b).	Interconnection Customer	Completed 3/9/2015
Provide financial security to Transmission Owner of $838,935 for procurement and construction of Interconnection Facilities and Network Upgrades listed in Appendix A, Item 1.(b) and 2.(b).	Interconnection Customer	June 3, 2015
Complete Transmission Owner Interconnection Facilities identified in Appendix A, Item 1.(b).	Transmission Owner	November 9, 2015

Complete Network Upgrades constructed by Transmission Owner listed in Appendix A, Item(s) 2.(b).	Transmission Owner	November 9, 2015
Complete registration of the Generating Facility as a market asset in the Transmission Provider's Integrated Marketplace in accordance with Attachment AE of the Tariff and the Transmission Provider's Market Protocols.	Interconnection Customer (if applicable)	Registration process must be completed prior to energization of the interconnection and applicable resources for either generation testing or commercial operation.
Energization of Interconnection Customer's Interconnection Facilities.	Interconnection Customer	November 10, 2015
Initial Synchronization Date.	Interconnection Customer	November 12, 2015
Begin trial operation & testing per Article 6.1.	Interconnection Customer & Transmission Owner	November 13, 2015
Provide written verification to the Interconnection Customer that all Interconnection Facilities identified in Appendix A, Item 1(b) and Network Upgrades listed in Appendix A, 2.(b) have been completed and are essentially ready to be placed in service.	Transmission Owner	November 20, 2015
Commercial operation date Phase I (150MW)	Interconnection Customer	March 3, 2016
Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs identified in Appendix A.	Transmission Owner	Five (5) months following completion of Transmission Owner's Interconnection Facilities and Network Upgrades.
Payment of any balance due, based on final accounting of costs.	Interconnection Customer, Transmission Provider or Transmission Owner, as applicable	Two (2) months following completion of final accounting of costs for Transmission Owner's Interconnection Facilities.
Commercial operations date Phase II (150MW)	Interconnection Customer	October 1, 2016

ATTACHMENT D-2

SA# First Revised 2799

SPP Southwest Power Pool

HELPING OUR MEMBERS WORK TOGETHER
TO KEEP THE LIGHTS ON... TODAY AND IN THE FUTURE

February 13, 2015

Bill Pezalla
Transmission Manager
Kay Wind, LLC
c/o Apex Clean Energy, Inc.
310 4th St. NE, Suite 200
Charlottesville, VA 22902

Subject: Revised Appendices to GEN-2012-032 GIA

Dear Mr. Pezalla:

Attached please find the final and redlined versions of the Revised Appendices to the GEN-2012-032 Generator Interconnection Agreement ("GIA") executed by Southwest Power Pool, Inc. ("SPP") as Transmission Provider, Kay Wind, LLC ("Kay Wind") as Interconnection Customer, and Oklahoma Gas and Electric Company ("OG&E") as Transmission Owner, dated February 19, 2014 (SPP Service Agreement No. 2799).

Appendix A is being revised to update the on-line drawing in Figure A.1. Appendix B is being revised to reflect updated milestones for the GIA. Appendix C is being revised to reflect a change in generator technology as requested by Kay Wind. Contact information is being revised in Appendix F. Appendices D, E and G have not been revised, but are included for completeness.

By signing this letter, the parties agree that the currently effective Appendices to the GIA are hereby superseded and replaced by the Revised Appendices attached hereto. Please have the appropriate officer execute the signature page below and then forward this Letter Agreement and Revised Appendices to OG&E. After OG&E has executed the Letter Agreement, the Letter Agreement and Revised Appendices should be returned to SPP.

If you have any questions, you may contact Charles Hendrix at 501-614-3546.

Sincerely,

Carl Monroe
Executive Vice President & Chief Operating Officer
(501) 614-3218 • cmonroe@spp.org

IN WITNESS WHEREOF, the Parties have executed the Revised Appendices to the GEN-2012-032 GIA.

Kay Wind, LLC

By: Kay Wind Holdings, LLC, its Sole Member
By: Apex GCL, LLC, its Sole Member
By: Apex Clean Energy Holdings, LLC, its Sole Member

Signature: _____

Printed Name: Mark Goodwin

Title: President

Date: 16 February 2015

Oklahoma Gas and Electric Company

Signature: _____

Printed Name: Philip L. Crissup

Title: Vice President Utility Tech Support

Date: 2/27/15

Southwest Power Pool, Inc.

Signature: _____

Printed Name: Carl Monroe

APPROVED
BY

Title: EVP & COO

Date: 03/03/2015

APPENDIX A TO GIA

Interconnection Facilities, Network Upgrades and Distribution Upgrades

NOTE: The facilities described in this Appendix are based on the studies conducted in response to the Interconnection Request. In the event that other interconnection customers suspend, terminate or request unexecuted filing of their GIAs, then additional studies may be required that could result in changes to the Interconnection Facilities and the Network Upgrades and in changes to Interconnection Customer's cost obligations for those facilities.

1. Interconnection Facilities:

(a) Interconnection Customer's Interconnection Facilities to be designed, procured, constructed, installed, maintained, and owned by Interconnection Customer at its sole expense:

- 34.5 kV underground cable collection circuits;
- 34.5 kV to 345 kV transformation substation with associated 34.5 kV and 345 kV switchgear;
- Reactive power compensation equipment to maintain 95% lagging (providing vars) and 95% (absorbing vars) leading power factor at the point of interconnection; and
- All necessary relay, protection, control and communication systems required to protect Interconnection Customer's Interconnection Facilities and Generating Facility and coordinate with Transmission Owner's relay, protection, control, and communication systems.

(b) Transmission Owner's Interconnection Facilities to be designed, procured, constructed, installed, maintained, owned and/or controlled by Transmission Owner at Interconnection Customer's sole expense:

- Add a single 345 kV line terminal to the new Open Sky Substation. Dead end structure, line switches, line relaying, revenue metering including CT's and PT's.

Total Estimated Cost of Transmission Owner Interconnection Facilities	$ 1,099,958

2. Network Upgrades:

- Stand Alone Network Upgrades to be designed, procured, constructed, installed and owned by Transmission Owner that are 100% cost responsibility of the Interconnection Customer:

    - New Transmission Owner Substation ("Open Sky Substation"): Construct a three breaker 345 kV ring bus substation. Work to include line relaying,

structural steel, disconnect switches, and associated equipment. No Additional ROW.

Total Estimated Cost of Stand Alone Network Upgrades	$ 7,554,395

- Network Upgrades to be designed, procured, constructed, installed and owned by the Transmission Owner that are 100% cost responsibility of the Interconnection Customer:
    - None
- Network Upgrades to be designed, procured, constructed, installed, and owned by a transmission owning entity (Westar Energy) for which the Interconnection Customer has 100% cost responsibility:
    - Rose Hill Substation (Westar Energy) – relay settings

Estimated Cost	$ 30,000

- Joint Network Upgrades:
    - There are no Joint Network Upgrades.
- Previous Network Upgrades: The following previous network upgrades are required for interconnection:
    - None
- The cost for the Transmission Owner's Interconnection Facilities to be constructed by Transmission Owner is estimated at $1,099,958.
- The total cost for the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades is estimated at $8,684,353. The Interconnection Customer is responsible for payment for the engineering, procurement, and construction of the Transmission Owner's Interconnection Facilities, Stand Alone Network Upgrades, and Network Upgrades estimated at $8,684,353 pursuant to the payment schedule as indicated in Appendix B, Milestones.
- The portion of the Network Upgrades that could be subject to the transmission service credits described in Article 11.4 of this Agreement is estimated at $7,584,395 which will be adjusted for actual costs and expenses incurred in accordance with Article 11.4.

- Interconnection Customer shall not be responsible for additional costs associated with any future upgrades to the Open Sky Substation not associated with Interconnection Service to the Generating Facility.

- Interconnection Customer's liability for reimbursement of Transmission Owner for taxes, interest and/or penalties under Section 5.17.3 is estimated at $0.00. This estimate assumes that there are no costs incurred by the Transmission Owner for land.

- All cost estimates will be trued up for actual costs and expenses for purposes of final billing under Article 12.2.

3. Distribution Upgrades:

- There are no Transmission Owner Distribution Upgrades.

4. Interconnection Service; Interconnection Customer has selected the following:

300 MW Energy Resource Interconnection Service, only.

5. Construction Option Selected by Interconnection Customer:

Interconnection Customer has selected the Standard Option for construction of the Transmission Owner's Interconnection Facilities and the Stand Alone Network Upgrades.

6. Eligible Network Customers:

Not Used

7. Permits, Licenses and Authorizations:

Permit, License and Authorization	Responsible Party
None	

8. Point of Change of Ownership:

The point of change of ownership shall be the point where the Interconnection Customer's 345kV transmission line meets the Transmission Owner's 345kV dead end tower at the Transmission Owner's Open Sky 345kV Substation.

9. Point of Interconnection:

Point of interconnection will be the OG&E Open Sky 345kV Substation to be constructed on the Rose Hill-Sooner 345kV line. Refer to Figure A-1.

APPENDIX B TO GIA

Milestones

	Action	Responsible Party	Completion Date
1	Complete Facilities Study	Transmission Provider	Complete November 20, 2013
2	Issue Notice to Construct to affected transmission owners for network upgrades	Transmission Provider	(N/A)
3	Provide authorization to proceed with design of Network Upgrades and Interconnection Facilities.	Interconnection Customer	Complete February 20, 2014
4	Provide Payment to Transmission Owner in the amount of $250,000 for design of the Interconnection Facilities and Network Upgrades listed in Appendix A.1(b) and A.2.	Interconnection Customer	Complete February 20, 2014
5	Provide authorization to proceed with procurement of materials and provide payment to Transmission Owner in the amount of $400,000 for design and the procurement of Interconnection Facilities and Network Upgrades listed in Appendix A.1(b) and A.2	Interconnection Customer	Complete May 1, 2014
6	Provide authorization to proceed with construction of Network Upgrades and Interconnection Facilities.	Interconnection Customer	Complete September 5, 2014
7	Provide payment to Transmission Owner in the amount of $900,000 for design, procurement and construction of Interconnection Facilities and Network Upgrades listed in Appendix A.1(b) and A.2	Interconnection Customer	Complete September 5, 2014
8	Provide payment to Transmission Owner in the amount of $3,660,611.80 for design, procurement and construction of Interconnection Facilities and Network Upgrades listed in Appendix A.1(b) and A.2	Interconnection Customer	Complete January 6, 2015
9	Provide financial security to Transmission Provider in the amount of $3,473,741.20 for procurement and construction of Interconnection Facilities and Network Upgrades listed in Appendix A.1(b) and A.2	Interconnection Customer	March 4 2015
10	Complete Transmission Owner's Interconnection Facilities	Transmission Owner	May 8, 2015
11	Complete Network Upgrades constructed by Transmission Owner	Transmission Owner	May 8, 2015
12	Complete registration of the Generating Facility as a market asset in the Transmission Provider's Integrated Marketplace in accordance with Attachment AE of the Tariff and the Transmission Provider's Market Protocols.	Interconnection Customer (if applicable)	Registration process must be completed prior to energization of the interconnection and applicable resources for either generation testing or commercial operation.
13	Energization of Interconnection Customer's Interconnection Facilities	Interconnection Customer	July 28, 2015
14	Initial Synchronization Date	Interconnection Customer	August 3, 2015

15	Begin trial operation & testing per Article 6.1	Interconnection Customer & Transmission Owner	August 6, 2015
16	Commercial operation date	Interconnection Customer	November 18, 2015
17	Final accounting of costs incurred by Transmission Owner for Transmission Owner's Interconnection Facilities and Network Upgrades constructed by Transmission Owner. Interconnection Customer responsible for actual costs.	Transmission Owner	To be submitted within five months of completion of Transmission Owner's Interconnection Facilities and Network Upgrades (Milestones 10 & 11)
18	Payment of any balance due, based on final accounting of costs	Interconnection Customer, Transmission Provider or Transmission Owner, as applicable	Within 30 days of submittal of final accounting costs (Milestone 17)

Attachment E

Form of Notice

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

EDF Renewables, Inc., et al.	)	
Complainants	)	
	)	
v.	)	**Docket No. EL19-___-000**
	)	
Southwest Power Pool, Inc.	)	
Respondent	)	

NOTICE OF COMPLAINT
May __, 2019

Take notice that on May 9, 2019, EDF Renewables, Inc., Enel Green Power North America, Inc., NextEra Energy Resources, LLC and Southern Power Company filed a formal joint complaint against the Southwest Power Pool, Inc. ("SPP") pursuant to Sections 206, 306 and 309 of the Federal Power Act, and Rule 206 of the Rules of Practice and Procedures of the Federal Energy Regulatory Commission, alleging that SPP has failed to implement Attachment Z2 of the SPP Tariff. The Complaint requests that the Commission order relief under Attachment Z2 of the SPP Tariff.

Complainants certify that a copy of the Complaint was served on the contacts for SPP as listed on the Commission's list of Corporate Officials.

Any person desiring to intervene or to protest this filing must file in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214). Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a notice of intervention or motion to intervene, as appropriate. The Respondent's answer and all interventions, or protests must be filed on or before the comment date. The Respondent's answer, motions to intervene, and protests must be served on the Complainants.

The Commission encourages electronic submission of protests and interventions in lieu of paper using the "eFiling" link at http://www.ferc.gov. Persons unable to file electronically should submit an original and 5 copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

This filing is accessible on-line at http://www.ferc.gov, using the "eLibrary" link and is available for review in the Commission's Public Reference Room in Washington, DC. There is an "eSubscription" link on the web site that enables subscribers to receive email notification when a document is added to a subscribed docket(s). For assistance with any FERC

Online service, please email FERCOnlineSupport@ferc.gov, or call (866) 208-3676 (toll free). For TTY, call (202) 502-8659.

Comment Date: 5:00 pm Eastern Time on May __, 2019.

Kimberly D. Bose,
Secretary.