

DOCKET NO. ____

APPLICATION OF SOUTHWESTERN § PUBLIC UTILITY COMMISSION
PUBLIC SERVICE COMPANY FOR §
AUTHORITY TO CHANGE RATES § OF TEXAS

DIRECT TESTIMONY

of

BRYAN R. DAVIS

on behalf of

SOUTHWESTERN PUBLIC SERVICE COMPANY

(Filename: DavisRRDirect.doc)

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GLOSSARY OF ACRONYMS AND DEFINED TERMS

<u>Acronym/Defined Term</u>	<u>Meaning</u>
ASC	Accounting Standards Codification
Commission	Public Utility Commission of Texas
FERC	Federal Energy Regulatory Commission
GAAP	Generally Accepted Accounting Principles
Historical Period	Net charges assessed under Attachment Z2 of the SPP OATT for the period from March 1, 2008 through August 31, 2016
July 2016 Waiver Order	Order Granting Waiver Request, 156 FERC ¶ 61,020
MWh	Megawatt-hour
OATT	Open Access Transmission Tariff
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
<i>Old Dominion</i>	<i>Old Dominion Electric Cooperative v. FERC</i> , 892 F.3d 1223 (D.C. Cir. 2018)
Remand Order	Order on Remand, 166 FERC ¶ 61,160
SPP	Southwest Power Pool, Inc.
SPS	Southwestern Public Service Company, a New Mexico corporation
Test Year	April 1, 2018 through March 31, 2019
total company	Total SPS (before jurisdictional allocations)
Update Period	April 1, 2019 through June 30, 2019
USoA	FERC Uniform System of Accounts

<u>Acronym/Defined Term</u>	<u>Meaning</u>
Xcel Energy	Xcel Energy Inc.
XES	Xcel Energy Services Inc.

LIST OF ATTACHMENTS

<u>Attachment</u>	<u>Description</u>
BRD-RR-1	Remand Order (<i>Non-native format</i>)
BRD-RR-2(V)	Requests for Rehearing and Related Complaints (<i>Non-native format</i>)
BRD-RR-3	SPP Compliance Report Describing Proposed Refund Plan and Motion for Stay, to Hold Proceedings in Abeyance, and to Initiate Settlement Procedures (<i>Non-native format</i>)

**DIRECT TESTIMONY
OF
BRYAN R. DAVIS**

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, 12th Floor, 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"), a 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. ("XES"), 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 Companies¹. 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 Master's in Accountancy in 2006. I began my career as an auditor at PricewaterhouseCoopers. After that I held a position as Senior Manager,

¹ The Operating Companies are: Northern States Power Company, a Minnesota corporation; Northern States Power Company, a Wisconsin corporation; Public Service Company of Colorado, a Colorado corporation; and SPS.

1 Accounting at The Western Union Company. I began working at Xcel Energy in
2 2012 as a Principal Financial Consultant in the Technical Accounting department,
3 where I was primarily responsible for accounting and reporting of long-term
4 power purchase agreements and other commodities contracts. In 2014, I was
5 promoted to Manager, Transmission Accounting where I was responsible for
6 accounting and financial forecasting of wholesale transmission revenues and
7 expenses under rates regulated by the Federal Energy Regulatory Commission
8 (“FERC”) for all Xcel Energy Operating Companies, including Xcel Energy’s
9 activities in the Midcontinent Independent System Operator and Southwest Power
10 Pool, Inc. (“SPP”) regional transmission organizations. In 2016, I was promoted
11 to my current position.

12 **Q. Do you hold any professional licenses or certifications?**

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

14 **Q. Have you submitted pre-filed testimony in any previous cases?**

15 A. Yes. I submitted pre-filed testimony in Docket No. 47527 and Docket No. 48973
16 before the Public Utility Commission of Texas (“Commission”).² I have also
17 submitted pre-filed supplemental direct testimony to the New Mexico Public
18 Regulation Commission in SPS’s 2017 New Mexico base rate case, Case No.
19 17-00255-UT³ and pre-filed direct testimony is SPS’s 2019 New Mexico base rate
20 case, Case No. 19-00170-UT.

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

³ *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).

1 **II. ASSIGNMENT AND SUMMARY OF TESTIMONY AND**
2 **RECOMMENDATIONS**

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

4 A. The purpose of my direct testimony is to support SPS's application for a base rate
5 change filed with the Commission. Specifically, my testimony describes the
6 accounting methods used to record revenues, expenses, assets, and liabilities on
7 SPS's books for the period from April 1, 2018 through March 31, 2019 ("Test
8 Year") and the period from April 1, 2019 through June 30, 2019 ("Update
9 Period"). Additionally, I sponsor or co-sponsor as the accounting witness the
10 following schedules in SPS's Rate Filing Package ("RFP"):

Schedule E	1.3
Schedule G	4, 4.1, 4.1a, 4.1b, 4.1c, 4.1d, 4.2, 4.2a, 4.2b, 4.2c, 4.3, 4.3a, 4.3b, 4.3c, 4.3d, 4.3e, 5, 5.1, 5.1a, 5.1b, 5.2, 5.3, 8, 10, 11, 12, and 15
Schedule H	12.1, 12.4a, 12.4c, 12.5b, 12.5c, 12.5d, and 12.5e
Schedule I	1.1, 1.2, and 1.3
Schedule J	2

11 I also describe the accounting used to record amounts charged to SPS under
12 Attachment Z2 of the SPP Open Access Transmission Tariff ("OATT"). Finally,
13 I support SPS's request to defer, as a regulatory asset or liability, any differences
14 between the amount recovered from customers and the Texas retail share of the
15 final amount billed by SPP, excluding interest.

1 **Q. Were the Attachments to your direct testimony and the RFP schedules that**
2 **you sponsor or co-sponsor prepared by you or under your direct supervision**
3 **and control?**

4 A. Yes. Also, I incorporate those portions of the RFP schedules that I sponsor or
5 co-sponsor as part of my direct testimony.

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

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

13 **Q. Will your testimony be updated for actual costs incurred in the Update**
14 **Period, April through June 2019?**

15 A. No, my testimony will not be updated, but some of the RFP schedules I sponsor
16 will be updated. As discussed by SPS witness William A. Grant, SPS will file an
17 update 45 days after filing this application, and that update will include actual
18 amounts for the Update Period. In that case update filing, SPS will also provide
19 updates to certain schedules, as required in the RFP instructions. For example,
20 Schedule G-15, which I sponsor in part, will be updated with information
21 available after March 31, 2019, the end of the Test Year in this case. The update
22 will provide all information available for the period after the Test Year end but
23 not previously provided in the RFP.

1 **Q. Please summarize your testimony and conclusions.**

2 A. SPS has properly accounted for its revenues and operating expenses using
3 Generally Accepted Accounting Principles (“GAAP”), and it has recorded such
4 revenues and expenses in accounts as prescribed by the FERC Uniform System of
5 Accounts (“USoA”). Regulatory liabilities and assets have been accounted for
6 and amortized in accordance with Financial Accounting Standards Board
7 Accounting Standards Codification (“ASC”) 980, Regulated Operations,
8 (formerly Statement of Financial Accounting Standards No. 71).

9 As of May 2019, the most recent quarterly payment, SPS has paid a total
10 of \$7.8 million (total company, comprised of \$6.8 million of principal and \$1.0
11 million of interest) to SPP for the net charges assessed under Attachment Z2 of
12 the SPP OATT for the period from March 1, 2008 through August 31, 2016 (the
13 “Historical Period”). Under an optional payment plan approved by the FERC,
14 SPS elected to pay the back-billed Attachment Z2 charges over a five-year period,
15 and SPS proposes to recover one-fifth of the \$6,501,016 amount assigned to the
16 Texas retail jurisdiction as part of this rate application. SPS further proposes to
17 defer, as a regulatory asset or liability, any differences between the amount
18 assigned to Texas and the Texas retail share of the final amount billed by SPP,
19 excluding interest.

1 **III. SPONSORED OR CO-SPONSORED SCHEDULES**

2 **Q. What topic do you discuss in this section of your testimony?**

3 A. In this section of my testimony, I describe the RFP schedules that I sponsor or
4 co-sponsor.

5 **Q. Please describe the RFP schedules that you sponsor and co-sponsor in this**
6 **proceeding.**

7 A. The following chart provides the RFP schedules that I sponsor and co-sponsor,
8 along with an explanation of the information contained in the schedules.

Schedule	Content
E-1.3: Short Term Assets Policies	Provides a schedule detailing all changes in policy of accounting for the book balances for all items included in Schedule E-1. I co-sponsor this schedule with SPS witness Arthur P. Freitas. I sponsor information related to accounting policies.
G-4 Series	The G-4 series of schedules presents advertising, contributions, and dues expenses subject to the 0.3% limitation required by 16 Tex. Admin. Code § 25.231(b)(1)(E). Detailed information related to Advertising, Contributions & Donations, and Membership Dues Expenses is provided on the G-4 schedules. I co-sponsor these schedules with Mr. Grant. I sponsor the accounting of the expenses reflected on these schedules.
G-5: Summary of Exclusions from Test Year Expense	Provides a summary of all Test Year expenditures in specific categories to be excluded both above and below the line. I co-sponsor this schedule with Mr. Freitas. I sponsor the accounting of the exclusions reflected on the schedule.
G-5.1: Analysis of Legislative Advocacy	Provides a line item detail of advocacy expense. I co-sponsor this schedule with Mr. Grant. I sponsor the accounting of the expenses reflected on this schedule.

Schedule	Content
G-5.1a: Payments to Registered Lobbyists	Provides a summary of payments to individuals registered to lobby for SPS during the Test Year. These costs are not requested in SPS's cost of service. I co-sponsor this schedule with Mr. Grant. I sponsor the accounting of the expenses reflected on this schedule.
G-5.1b: Payments for Monitoring Legislation	Provides a summary of all payments to individuals or firms who monitored legislation for SPS during the Test Year. I co-sponsor this schedule with Mr. Grant. I sponsor the accounting of the expenses reflected on this schedule.
G-5.2: Summary of Penalties and Fines	Provides a summary of all penalties and fines included in Test Year expense. I co-sponsor this schedule with Mr. Freitas. I sponsor the accounting for the penalties and fines.
G-5.3 Other Exclusions	Provides a summary of other exclusions related to political organizations.
G-8: Outside Services Employed - FERC 900 Series Expenses	Provides information on all outside services SPS used during the Test Year that appear in FERC 900 series accounts. I co-sponsor this schedule with Mr. Grant. I sponsor the accounting of the expenses reflected on this schedule.
G-11: Deferred Expense from Prior Dockets	Provides information concerning all amortization expense either included in the Test Year or requested in SPS's application. I co-sponsor this schedule with Mr. Freitas and SPS witness Ruth M. Sakya. I sponsor the accounting of the expenses reflected on this schedule.
G-12: Below the Line Expenses	Provides a complete detailed analysis of all expenses charged below the line during the Test Year. I co-sponsor this schedule with Mr. Freitas. I sponsor the accounting of the expenses reflected on this schedule.
G-15: Monthly O&M Expense	Provides SPS's operations and maintenance expense according to each account within the USoA. I co-sponsor this schedule with Mr. Freitas. I sponsor the accounting of the expenses reflected on this schedule.

Schedule	Content
H-12.1: Supply and Load Data	Provides SPS's supply and load data on the prescribed form. I sponsor the accounting for the supply and system own use on this schedule.
H-12.4a and H-12.4c: Firm and Non-firm Purchased Power and related costs	These schedules provide SPS's information regarding SPS's firm and non-firm purchased power along with energy costs, fixed costs, and costs per megawatt-hour ("MWh"). I co-sponsor these schedules with SPS witness Jeffrey C. Klein. I sponsor the accounting of the expenses reflected on these schedules.
H-12.5b – H-12.5e: Off-System Sales	These schedules provide data related to SPS's off-system sales and revenues, including the energy charge component, fixed charge component, and energy charge per MWh.
I-1.1: Fuel by Account Number	Provides fuel expense by subaccount numbers for each month included in the Test Year. I co-sponsor this schedule with Mr. Grant and SPS witness H. Craig Romer. I sponsor the accounting of the expenses reflected on this schedule.
I-1.2: Fuel Burned	Provides fuel expense by each generating station for each month in the Test Year. I co-sponsor this schedule with Mr. Grant and Mr. Romer. I sponsor the accounting of the expenses reflected on this schedule.
I-1.3: Fossil Fuel Purchased	Provides fossil fuel purchased by each generating station for each month in the Test Year. The information is provided for each fuel type and supplier. I co-sponsor this schedule with Mr. Grant and Mr. Romer. I sponsor the accounting of the expenses reflected on this schedule.
J-2(CD): Consolidated Financial Statements	Provides the consolidated financial statements of Xcel Energy and its subsidiaries, including SPS.

1 **IV. ACCOUNTING METHOD SUPPORTING THE**
2 **COST OF SERVICE**

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

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

9 **Q. Is the information provided in the Rate Filing Package taken from SPS's**
10 **books and records?**

11 A. Yes. The information submitted in this filing is taken from SPS's books and
12 records that are maintained according to the USoA. The USoA is prescribed by
13 FERC for public utilities and licensees subject to the provisions of the Federal
14 Power Act. FERC prescribes accounting classifications and guidance by which
15 public utilities achieve uniform accounting records for use in financial reporting,
16 ratemaking, and other regulatory filings. These regulations are found and defined
17 in the Code of Federal Regulations 18 – Conservation of Power and Water
18 Resources, Subchapter C – Accounts, Federal Power Act, Part 101 – USoA. The
19 Commission, in 16 Tex. Admin. Code § 25.72, explicitly requires that SPS keep
20 its books in accordance with the USoA.

21 **Q. How did SPS determine the expense used in the cost of service and RFP**
22 **schedules?**

23 A. SPS started with the amounts recorded to its General Ledger for the Test Year.
24 As required by GAAP, SPS employs the accrual method of accounting, under
25 which SPS records an estimated amount for expenses incurred during the month.

1 This may include amounts for which an invoice has not yet been received. After
2 SPS receives the invoice or obtains more (or better) information related to an
3 estimate, or there is a change in a regulatory or accounting principle, the expense
4 is trued-up. In the case of an expense related to an invoice, the books are trued-up
5 to the actual invoiced amount. This true-up typically occurs the following month.
6 Thus, in a given month, expenses may include the accrual for the current month,
7 the true-up of the prior month's accrual to actual invoiced amounts, and
8 adjustments as they become known.

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

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

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

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

1 **V. ACCOUNTING FOR ATTACHMENT Z2 CHARGES**

2 **Q. Please describe SPP's OATT Attachment Z2.**

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

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

16 A. Yes. SPP's implementation of Attachment Z2 was delayed until 2016 due to a
17 variety of circumstances. To address this issue, SPP filed with FERC a petition
18 requesting a waiver to allow SPP to implement the Attachment Z2 revenue
19 crediting process for the Historical Period and to enable SPP to invoice
20 transmission service customers for credit payment obligations outside of the one-
21 year billing adjustment limitation in the SPP OATT.⁴ Despite protests from
22 several parties, including SPS, FERC granted the requested waiver in July 2016

⁴ Petition of Southwest Power Pool, Inc. for Tariff Waiver under FERC Docket No. ER16-1341.

1 (“July 2016 Waiver Order”).⁵ In November 2016, SPP invoiced SPS total net
2 charges of \$12.8 million (total company) for the Historical Period. In Docket No.
3 47527 which was resolved by an unopposed stipulation approved by the
4 Commission, SPS’s cost of service filed in the Rebuttal Testimony of Arthur P.
5 Freitas assigned \$6,501,016 million of this amount to the Texas retail
6 jurisdiction.⁶ No party in Docket No. 47527 opposed SPS’s recovery of
7 Historical Period Attachment Z2 charges.

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

10 A. Under a payment plan approved by FERC in September 2016,⁷ amounts due to
11 SPP for Historical Period Attachment Z2 charges are to be remitted in quarterly
12 installments over a five-year period that began in November 2016. As of May
13 2019, which is SPS’s most recent payment to SPP, SPS has paid a total of \$7.8
14 million (total company, comprised of \$6.8 million of principal and \$1.0 million of
15 interest).

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

18 A. No. Several parties, including SPS, filed requests for rehearing of the July 2016
19 Waiver Order. The FERC denied the requests for rehearing, and SPS filed an
20 appeal of the July 2016 Waiver Order with the D.C. Circuit. During the pendency

⁵ 156 FERC ¶ 61,020 (2016).

⁶ 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 historical Attachment Z2 charges attributable to the Historical Period.

⁷ 156 FERC ¶ 61,245 (2016).

1 of the appeal, the D.C. Circuit issued a decision in *Old Dominion* holding that
2 retroactive charges would violate the filed rate doctrine.⁸ In response, FERC
3 sought voluntary remand of the July 2016 Waiver Order in order to re-evaluate its
4 decision in that case. In February 2019, following consideration of additional
5 briefs filed by all parties regarding the impact of *Old Dominion*, FERC issued a
6 new order (“Remand Order”) reversing its approval of SPP’s waiver request and
7 directing SPP to provide refunds, with interest, of amounts billed for the
8 Historical Period (except Sept. 2015 – Aug. 2016, which were permissible
9 without the waiver);⁹ however, prior to issuing refunds, FERC further ordered
10 SPP to file a report within 120 days detailing how it proposes to make the
11 required refunds.¹⁰ On April 1, 2019, SPP and two other parties filed requests for
12 rehearing of the Remand Order; on May 9, 2019, a group of four Upgrade
13 Sponsors filed a complaint alleging SPP’s delayed implementation of Attachment
14 Z2 violated its tariff and seeking to retain all credits and interest paid to date and
15 to continue to receive amounts they claim to be owed under the SPP OATT; and
16 on May 23, 2019, a similar complaint was filed by Oklahoma Gas and Electric
17 Company.¹¹ Finally, on June 28, 2019, SPP filed its compliance report setting
18 forth a proposed preliminary framework by which SPP would unwind and resettle
19 Attachment Z2 amounts as required by the Remand Order; however, SPP’s filing
20 enumerated numerous assumptions required and challenges presented by that

⁸ *Old Dominion Electric Cooperative v. FERC*, 892 F.3d 1223 (D.C. Cir. 2018)(“*Old Dominion*”).

⁹ See Attachment BRD-RR-1 at 166 FERC ¶ 61,160 (2019).

¹⁰ *Id.*

¹¹ See Attachment BRD-RR-2(V).

1 plan, including its belief that resettlement would likely take until mid-2022 to
2 complete. Consequently, rather than proceeding with issuing refunds, SPP
3 concurrently filed a motion requesting that FERC stay the refund requirement of
4 the Remand Order, hold all other related proceedings in abeyance, and initiate
5 settlement proceedings in an attempt to resolve all pending Attachment Z2
6 litigation.¹²

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

9 A. Yes. In addition to challenging SPP's authority to retroactively assess charges for
10 the Historical Period at all under the Remand Order, Kansas Electric Power
11 Cooperative, Inc. and SPS each filed separate complaints with the FERC
12 challenging various components of the methodology utilized by SPP to calculate
13 charges under Attachment Z2. Both complaints were initially denied;¹³ however,
14 requests for rehearing remain pending before FERC.

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

17 A. ASC 450-20-25-2 requires that a contingent liability be recognized when it is
18 probable and estimable. Although SPS continues to dispute certain aspects of
19 SPP's implementation of crediting under Attachment Z2, based on FERC's July
20 2016 Waiver Order and SPP's calculated charges for the Historical Period, SPS
21 accrued a liability of \$12.8 million (Total Company) for amounts invoiced by

¹² See Attachment BRD-RR-3.

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

1 SPP. This liability has subsequently been offset by the principal amount of
2 payments under the five-year Z2 payment plan. Due to the uncertainty inherent in
3 the ongoing billing disputes for the Historical Period, SPS has not recorded any
4 reductions to that liability for potential refunds under FERC's Remand Order.

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

7 A. Yes. ASC 980-340-25-1 sets forth guidance that an entity should defer all or part
8 of an incurred cost that would otherwise be charged to expense if it is probable
9 that the specific cost is subject to recovery in future revenues.¹⁴ Based on an
10 assessment of the likelihood of recovery through future rates SPS initially
11 deferred the Historical Period Attachment Z2 charges assigned to the Texas retail
12 jurisdiction in Account 186, Miscellaneous Deferred Debits. Upon issuance of
13 the Commission's order in Docket No. 47527, SPS reclassified such deferred
14 debits to Account 182.3, Other Regulatory Assets. Similar accounting was also
15 recorded for amounts assigned to SPS's New Mexico retail and wholesale
16 jurisdictions.

17 **Q. Did SPS include the amount paid to SPP for the Attachment Z2 Historical**
18 **Period as part of its rate filing in Docket No. 47527?**

19 A. Yes. In Docket No. 47527, SPS requested recovery of the Historical Period
20 Attachment Z2 charges over a 5-year period, which was roughly commensurate
21 with the 5-year payment plan over which SPS is scheduled to remit payment to

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.

1 SPP. As discussed in the rebuttal testimony of Mr. Freitas in that case, total
2 Historical Period Attachment Z2 charges of \$6,501,016 were assigned to the
3 Texas retail jurisdiction or \$1,300,203 annually over five years. Although the
4 case was ultimately resolved through a black box settlement, no party opposed
5 SPS's recovery of Historical Period Attachment Z2 charges and SPS is, for
6 accounting purposes, amortizing the \$6,501,016 over a five-year period beginning
7 January 23, 2018, the relate-back date from Docket No. 47527.

8 **Q. What impact is the February 2019 Remand Order expected to have on SPS's**
9 **liability for Attachment Z2 charges assessed by SPP for the Historical**
10 **Period?**

11 A. The impact of the Remand Order is unknown at this time. Although the order
12 reverses FERC's previous decision granting SPP's waiver request, it did not order
13 SPP to actually issue refunds. Instead, the FERC ordered SPP to file a report
14 proposing how SPP *would propose* to calculate and process the refunds. In
15 addition to requesting rehearing of that order, SPP's compliance filing stated that
16 "the refund amounts are not available at this time"¹⁵ and that the process "will
17 take several years to implement."¹⁶ SPP instead requested that FERC stay the
18 refund condition, hold all other related proceedings in abeyance, and initiate
19 settlement proceedings in an attempt to resolve all pending Attachment Z2
20 litigation. Finally, should FERC ultimately uphold its Remand Order and

¹⁵ Compliance Report of Southwest Power Pool, Inc. Describing Proposed Plan for Implementing Refunds of Historical Amounts Billed Under Attachment Z2 and Request for Privileged Treatment, FERC Docket No. ER16-1341-003, at 6.

¹⁶ *Ibid.*, at 3.

1 subsequently order SPP to actually issue refunds, that order is highly likely to be
2 further challenged and appealed to the DC Circuit.

3 Although the ultimate result of charges for the Historical Period may not
4 be known for some time, assuming the Remand Order is upheld, SPS's obligation
5 for the Historical Period would be expected to shrink, as charges for periods prior
6 to September 2015 would be eliminated. This could be expected to reduce SPS's
7 total amount due from \$12.8 million to approximately \$3.5 million - \$4.0 million
8 (total company), or a reduction of approximately \$9 million (total company).
9 However, these amounts are quite uncertain, as charges for any given creditable
10 upgrade are based, in part, on whether amounts related to that upgrade have been
11 previously recovered. Therefore, while charges prior to September 2015 could be
12 eliminated, charges subsequent to that date could increase.

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

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

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

23 A. Yes. SPS proposes to continue to recover amounts billed for the Attachment Z2
24 Historical Period as originally included in Docket No. 47527. However, as

1 significant uncertainty remains regarding the final amounts SPS may ultimately
2 be required to pay, SPS proposes to defer, as a regulatory asset or liability, any
3 differences between the amount assigned to the Texas retail jurisdiction and the
4 Texas retail share of the final amount billed by SPP, excluding interest.

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


6 A. Yes.

AFFIDAVIT

STATE OF COLORADO)
)
COUNTY OF DENVER)

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

I am the witness identified in the preceding testimony. I have read the testimony and the accompanying attachment(s) and am familiar with the 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.



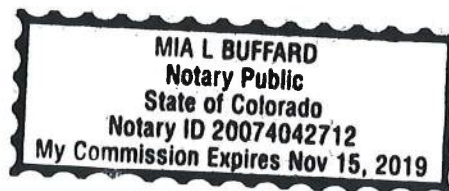
BRYAN R. DAVIS

Subscribed and sworn to before me this 2nd day of August, 2019 by BRYAN R. DAVIS.



Notary Public, State of Colorado

My Commission Expires: November 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 Orders² 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 Upgrade⁸ 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 Tariff¹⁴ 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 Study¹⁶ 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. 1000⁶⁹ 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.

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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 parties¹⁵³ 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.

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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).

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(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.

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

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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.

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)

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Southwestern Public Service Company

Request for Hearing and Related Complaints

2019 TX Rate Case

**APPLICATION OF
SOUTHWESTERN PUBLIC SERVICE COMPANY
FOR AUTHORITY TO CHANGE RATES**

BRD-RR-2(V)

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

Southwest Power Pool, Inc.)	Docket No. ER16-1341-003
)	
)	
)	
Kansas Electric Power Cooperative, Inc.,)	Docket No. EL17-21-001
Complainant,)	
v.)	
Southwest Power Pool, Inc.,)	
Respondent.)	
)	
)	
)	
Xcel Energy Services Inc.,)	Docket No. EL18-9-001
Complainant,)	
v.)	
Southwest Power Pool, Inc.)	
Respondent.)	
)	
)	
)	
EDF Renewables, Inc., et al.,)	Docket No. EL19-75-000
Complainants,)	
v.)	
Southwest Power Pool, Inc.,)	
Respondent.)	
)	
)	
)	
Oklahoma Gas & Electric, Co.,)	Docket No. EL19-77-000
Complainant,)	
v.)	
Southwest Power Pool, Inc.,)	
Respondent.)	
)	
)	
)	
Southwest Power Pool, Inc.)	Docket No. ER18-1702-002
)	
)	
)	(not consolidated)

**MOTION OF SOUTHWEST POWER POOL, INC.
FOR STAY OF REFUND CONDITION, TO HOLD PROCEEDINGS IN
ABEYANCE, AND FOR INITIATION OF SETTLEMENT PROCEDURES**

Pursuant to Rule 212 of the Federal Energy Regulatory Commission’s (“Commission”) procedural rules,¹ Southwest Power Pool, Inc. (“SPP”) hereby moves for partial stay of the Commission’s February 28, 2019 order in Docket No. ER16-1341-003² reversing previous Commission determinations³ and retroactively denying SPP’s request for waiver of certain provisions of its Open Access Transmission Tariff (“Tariff”) to facilitate SPP’s delayed implementation of Tariff Attachment Z2.⁴ In conjunction with the motion for stay, and in accordance with Rules 203,⁵ 212, and 603(c),⁶ SPP additionally requests that the Commission establish settlement judge procedures to consider the numerous overlapping and interdependent issues pending in the captioned proceedings,

¹ 18 C.F.R. § 385.212.

² *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019) (“Remand Order”). The Remand Order directed SPP to submit a “refund report” detailing SPP’s proposed plan for implementing refunds of amounts that the Commission determined in the Remand Order to be improperly collected and paid. Concurrently with this motion, SPP is filing the Compliance Report of Southwest Power Pool, Inc. Describing Proposed Plan for Implementing Refunds of Historical Amounts Billed under Attachment Z2 and Request for Privileged Treatment, Docket No. ER16-1341-003 (June 28, 2019) (“Refund Report”), which also includes the Affidavit of Charles J. Locke, Director, Transmission Policy and Rates, on Behalf of Southwest Power Pool, Inc. (“Locke Affidavit”).

³ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016) (“Initial Waiver Order”), *reh’g denied*, 161 FERC ¶ 61,144 (2017) (“Waiver Rehearing Order”) (collectively “Waiver Orders”).

⁴ Petition of Southwest Power Pool, Inc. for Tariff Waiver, Docket No. ER16-1341-000 (Apr. 1, 2016) (“Waiver Request”).

⁵ 18 C.F.R. § 385.203.

⁶ *Id.* § 385.603(c).

and to hold all of the referenced proceedings in abeyance until such time as a settlement is reached or an impasse is declared. Given the significant uncertainty surrounding Attachment Z2 implementation, numerous ongoing litigated proceedings, and the Commission's retroactive reversal of a three-year-old waiver and the resulting triggering of substantial refunds and resettlement of prospective periods, the relief requested herein is fully justified, as discussed in more detail below.

I. OVERVIEW AND SUMMARY OF RELIEF REQUESTED

At this juncture, it is fair to say that there is no end in sight to the long and tortured history of Attachment Z2. Every filing that touches on any aspect of Attachment Z2 is protested on some level, and new complaints, advancing new theories of Attachment Z2 rights and obligations, continue to be filed with the Commission even as old complaints remain pending on rehearing. Looming largest, at least in terms of contributing to the highly unsettled landscape, are the unresolved requests for rehearing and/or clarification that have been filed in response to the Remand Order. In short, the last decade, during which issues concerning the interpretation and implementation of Attachment Z2 have been vetted in SPP stakeholder negotiations and litigated in multiple proceedings, has not brought Attachment Z2 implementation any closer to final resolution, but instead has introduced new issues, provided opportunities for more disputes, and created more polarization of positions.

This pleading seeks a path forward from this regulatory morass. As the first step, SPP seeks a stay of the Remand Order's refund directive for the relevant Refund Period⁷

⁷ Consistent with the definitions set forth in the Refund Report, SPP adopts the following terms for this motion: (1) "Historical Period" refers to the operating months used for transmission service settlements extending from March 2008

in order to avoid the prospect of multiple rounds of unwinding, recalculating, and resettling credit payment obligation (“CPO”) assessments. No point is served by moving forward with refunds while so many elements of the Attachment Z2 implementation process are still subject to litigation and possible revision. Indeed, even apart from litigation uncertainty, there is considerable question regarding the administrative feasibility of tracking and calculating Refund Period refunds in the manner contemplated by the Commission, owing in part to the reliance of the process on interdependent long-term transmission study results and the fact that current and future creditable balances and CPOs are based on what has already been paid out, meaning that any Refund Period refunds implemented by SPP will require SPP to unwind and recalculate post-Refund Period Attachment Z2 settlements (including the Final Historical Year and subsequent periods).⁸

SPP therefore seeks to pause the refund process on all fronts. The hope is that by allowing all affected parties, with the aid of the Commission’s settlement judge procedures, to explore a comprehensive resolution, years of continuing litigation can be avoided and closure reached on all aspects of Attachment Z2. Facilitation of this plan requires that, in addition to staying the Remand Order’s refund directive and initiating settlement judge

through August 2016, inclusive (i.e., the prior period for which invoices for settlements under Attachment Z2 were initially issued in November 2016, with resettlement invoices issued for the same period in November 2017); (2) “Final Historical Year” refers to the operating months used for transmission service settlements extending from September 2015 through August 2016, inclusive, for which the Remand Order would not require refunds to be paid; and (3) “Refund Period” refers to the operating months extending from March 2008 through August 2015, inclusive, for which the Remand Order directs SPP to unwind Attachment Z2 charges and payments and provide refunds. *See* Refund Report at Section II.

⁸ Locke Affidavit ¶¶ 7, 9.

procedures, the Commission hold in abeyance the various dockets in which Attachment Z2 issues are being considered. The stay of the refund obligation, if granted, would remain in effect until such time as the Attachment Z2 issues are resolved, either through settlement or litigation. Settlement procedures, and the suspension/abeyance of further Commission action in related Attachment Z2 proceedings, would continue until such time as a comprehensive settlement is reached or the parties conclude that negotiations are no longer productive. Meanwhile, as with any settlement negotiations, all parties preserve any and all rights or claims in the event that negotiations are not successful and litigation is restarted.

II. BACKGROUND

The Commission is well aware of the history associated with SPP's attempts to initiate revenue crediting under Attachment Z2 of its Tariff.⁹ Attachment Z2 and its predecessor Attachment Z—included in the Tariff since 2005¹⁰—establish the requirement

⁹ See, e.g., *Xcel Energy Servs. Inc. v. Sw. Power Pool, Inc.*, 162 FERC ¶ 61,203, at PP 2-6 (2018) (“Xcel Complaint Order”) (describing the history of Attachment Z2 adoption, implementation, and delays), *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”) (same), *reh’g pending*; Initial Waiver Order at PP 53, 56 (detailing the history of Attachment Z2 and 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).

¹⁰ 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 ¶ 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

that customers funding Network Upgrades to SPP's Transmission System through directly assigned upgrade costs are provided credits when, and to the extent that, those Network Upgrades are used to accommodate another customer's request for transmission service. Due to well-documented delays with the development of necessary procedures, systems, and software, SPP's implementation of Attachment Z2 billing and crediting did not occur until 2016. Throughout the process, SPP worked with stakeholders to develop the procedures whereby SPP would eventually calculate revenue credits for Creditable Upgrades and assess these costs to transmission service customers.¹¹

In 2016, as these collaborative efforts were ongoing, SPP filed the Waiver Request that is the subject of the proceeding in Docket No. ER16-1341-000, which sought, among other things, a waiver of the twelve-month billing adjustment period specified in Section I.7.1 of the Tariff. SPP explained that because Attachment Z2 assessments are calculated separately from transmission service settlement processes and would therefore constitute *initial* settlement charges,¹² the applicability of Section I.7.1, covering

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). SPP proposed further Tariff revisions in 2013 in an effort to streamline and clarify Attachment Z2 implementation further, which the Commission accepted on December 6, 2013, subject to additional compliance. *Sw. Power Pool, Inc.*, 145 FERC ¶ 61,198 (2013).

¹¹ 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.

¹² Waiver Request at 11.

adjustments and corrections of *previously rendered* billings, was unclear.¹³ Nevertheless, “out of an abundance of caution,”¹⁴ SPP filed its Waiver Request.

The Initial Waiver Order granted SPP’s Waiver Request, finding that affected parties had ample notice of the Tariff’s crediting requirements by virtue of SPP’s long-standing, Commission-approved Attachment Z2 and noting the parties’ actual awareness of the difficulties and delays experienced by SPP in developing the systems to implement these crediting requirements.¹⁵ Emphasizing the importance of ensuring SPP’s ability to implement the Tariff provisions, and the parties’ concession of “notice through Attachment Z2 [regarding] responsibility for credits for Sponsored Upgrades,”¹⁶ the Commission granted SPP’s Waiver Request without reaching a conclusion on whether Section I.7.1 applies to the Attachment Z2 settlements at issue or otherwise addressing the merits of SPP’s arguments that Section I.7.1 does not apply.¹⁷ The Commission concluded that SPP had satisfied the grounds for waiver by demonstrating good faith, limiting the scope of its

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Initial Waiver Order at PP 1, 53, 56.

¹⁶ Waiver Rehearing Order at P 29.

¹⁷ SPP does not now concede, and has never conceded, that the waiver was *necessary* to enable SPP to implement Attachment Z2 crediting in 2016. As previously explained, SPP filed its Waiver Request out of an abundance of caution to ensure that there would be no potential impediment to implementing Attachment Z2 charging and crediting. *See* Request for Rehearing and Motion for Clarification of Southwest Power Pool, Inc., Docket No. ER16-1341-003, at Section IV.C (Apr. 1, 2019) (discussing the possibility that a waiver of Section I.7.1 was not required to implement Attachment Z2 invoicing in the first place); Post-Remand Brief of Southwest Power Pool, Inc., Docket Nos. ER16-1341-000, -001, at Section III.B (Aug. 31, 2018) (same).

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.¹⁸ 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.

On rehearing of the Initial Waiver Order, the Commission reaffirmed its original findings, holding that the waiver facilitated SPP's implementation of the filed rate—i.e., the revenue crediting process of SPP's currently effective Tariff (i.e., Attachment Z2)—and did not constitute retroactive rate-making.¹⁹ 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 Z2.²⁰

Xcel Energy Services Inc. ("Xcel") filed a petition for review of the Waiver Orders with the United States Court of Appeals for District of Columbia Court ("D.C. Circuit").²¹ 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 Electric Cooperative v. FERC*,²² which the court observed addressed only "legal

¹⁸ Initial Waiver Order at PP 52-56.

¹⁹ Waiver Rehearing Order at P 28.

²⁰ *Id.*

²¹ Petition for Review of Xcel Energy Services Inc., *Xcel Energy Servs. Inc. v. FERC*, No. 18-1005 (D.C. Cir. Jan. 5, 2018).

²² 892 F.3d 1223 (D.C. Cir. 2018) ("*Old Dominion*").

principles [that were] decidedly routine.”²³ On July 19, 2018, the Commission filed a motion for voluntary remand of Xcel’s pending appeal, citing the possible implications of *Old Dominion* and asking the court to return the case to the Commission so that the agency could “take[] into account the Court’s *Old Dominion* decision.”²⁴ On July 31, 2018, the court granted the Commission’s Remand Motion²⁵ and, on August 6, 2018, the Commission issued a notice inviting parties to submit post-remand briefs.²⁶ Eight parties filed timely post-remand briefs.²⁷

On February 28, 2019, the Commission issued the Remand Order, reversing the Commission’s findings in the Waiver Orders and, nearly three years later, retroactively denying SPP’s Waiver Request. The Commission directed SPP to provide refunds, with interest, for the Refund Period,²⁸ and ordered SPP to file a report within 120 days of the date of the Remand Order detailing how it proposes to make the refunds.²⁹

²³ *Id.* at 1226.

²⁴ Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand, No. 18-1005, at 2 (D.C. Cir. July 19, 2018) (“Remand Motion”).

²⁵ *Xcel Energy Serv. Inc. v. FERC*, Order, No. 18-1005 (D.C. Cir. July 31, 2018) (order granting the Commission’s voluntary Remand Motion).

²⁶ *Sw. Power Pool, Inc.*, Notice Affording the Parties an Opportunity to File Briefs, Docket No. ER16-1341-000, -001 (Aug. 6, 2018).

²⁷ These parties include: SPP, Xcel, Kansas Electric Power Cooperative, Inc. (“KEPCo,”), Golden Spread Electric Cooperative, Inc., American Electric Power Service Corporation (“AEP”), Oklahoma Gas and Electric Company (“OG&E”), EDF Renewables, Inc. (“EDF”), and NextEra Energy Resources, LLC (“NextEra”).

²⁸ Remand Order at P 58.

²⁹ *Id.* at P 59.

SPP, OG&E,³⁰ and Flat Ridge 2 Wind Energy LLC³¹ filed requests for rehearing, pointing out numerous legal and logical flaws of the Remand Order, and Western Farmers Electric Cooperative filed comments supporting SPP's and OG&E's rehearing requests.³² While rehearing and clarification of the Remand Order is pending before the Commission, SPP's Refund Report is being filed today concurrently with this motion, with refunds presumably to follow after the Commission acts on SPP's refund plan.³³ Given the magnitude of the dollars involved, it is highly likely that the Commission's action on rehearing and clarification of the Remand Order, as well as any Commission action on SPP's Refund Report, will be appealed, regardless of how the Commission acts.

The Remand Order proceeding is but one of many open dockets examining various aspects of Attachment Z2. First, in 2016 and 2017, KEPCo and Xcel, respectively, filed complaints challenging SPP's interpretation and implementation of Attachment Z2³⁴ and these proceedings remain open, with the Commission's orders denying the complaints

³⁰ Request of Oklahoma Gas and Electric Company for Rehearing of the Order on Remand, Docket No. ER16-1341-004 (Apr. 1, 2019).

³¹ Request for Rehearing of Flat Ridge 2 Wind Energy LLC, Docket No. ER16-1341-004 (Apr. 1, 2019) ("Flat Ridge Rehearing Request").

³² Motion for Leave to Intervene Out-of-Time and Comments of Western Farmers Electric Cooperative, Docket No. ER16-1341-004 (Apr. 1, 2019).

³³ Remand Order at P 43 ("SPP shall not provide any refunds prior to the issuance of a further Commission order directing refunds.").

³⁴ Complaint Requesting Fast-Track Processing of Kansas Electric Power Cooperative, Inc., Docket No. EL17-21-000 (Nov. 21, 2016) ("KEPCo Complaint"); Complaint of Xcel Energy Services Inc. on Behalf of Southwestern Public Service Company and Request for Fast Track Processing, Docket No. EL18-9-000 (Oct. 10, 2017).

pending on rehearing.³⁵ AEP has also challenged two rounds of SPP amendments to its Network Integration Transmission Service (“NITS”) agreement to list Creditable Upgrades needed to accommodate AEP’s service and associated CPO costs.³⁶ In the first instance, the Commission accepted the amended AEP NITS agreement over AEP’s objections,³⁷ but has yet to act on AEP’s request for rehearing of the Commission’s order. In the second instance, the Commission has not issued any order regarding the merits of the proposed amendment.

Meanwhile, on May 8, 2019, EDF, ENEL Green Power North America, Inc., NextEra, and Southern Power Company (“EL19-75 Complainants”) filed another complaint challenging SPP’s authority to recoup CPO payments previously disbursed by SPP.³⁸ According to the EL19-75 Complainants, SPP was obligated to credit Upgrade Sponsors under the terms of the Tariff irrespective of the Commission’s initial grant, and later repudiation of, SPP’s Waiver Request. More recently, on May 23, 2019, yet another complaint was filed, this one by OG&E in Docket No. EL19-77-000, alleging OG&E’s unconditional right under the Tariff and its Sponsored Upgrade agreement to be reimbursed

³⁵ Request for Rehearing of Kansas Electric Power Cooperative, Inc., Docket No. EL17-21-001 (Dec. 6, 2017); Request for Rehearing of Xcel Energy Services, Inc. Docket No. EL18-9-001 (Apr. 5, 2018).

³⁶ Submission of Network Integration Transmission Service Agreement and Network Operating Agreement of Southwest Power Pool, Inc., Docket No. ER19-1672-000 (Apr. 25, 2019); Protest of American Electric Power Service Corporation, Docket No. ER19-1672-000 (May 16, 2019).

³⁷ *Sw. Power Pool, Inc.*, 165 FERC ¶ 61,048 (2018), *reh’g pending*.

³⁸ Complaint to Enforce Attachment Z2 of the SPP Tariff of EDF Renewables, Inc., et al., Docket No. EL19-75-000 (May 9, 2019) (“EDF Complaint”).

for Creditable Upgrades and to retain all CPO payments made by SPP.³⁹ SPP filed its response to the EDF Complaint on June 13, 2019, and plans to submit its response to the OG&E Complaint by the July 3, 2019 due date.

Additionally, the Commission has granted SPP two further waivers of various provisions of its Tariff (including the billing limitation provision set forth in Section I.7.1): (1) a waiver in Docket No. ER16-2330 to allow SPP to implement its five-year levelized “payment plan” for customers who owed Attachment Z2 credits for the Historical Period to pay those CPOs, along with post-Historical Period CPOs, over time rather than in a lump sum;⁴⁰ and (2) a further waiver of Section I.7.1 to enable SPP to correct invoices issued during the initial implementation of Attachment Z2 to correct billing errors.⁴¹ While neither of these proceedings is pending on rehearing or judicial review, both have implications for the ultimate resolution of both the Remand Order and Attachment Z2 implementation generally. As discussed in more detail below,⁴² Attachment Z2 crediting must be settled in a sequential manner and the payment plan authorized by the Commission entails levelized payments and interest that involve both amounts that are refundable and that are non-refundable under the Remand Order, as well as applicable interest.

³⁹ Complaint of Oklahoma Gas and Electric Company, Docket No. EL19-77-000 (May 24, 2019) (“OG&E Complaint”).

⁴⁰ *See Sw. Power Pool, Inc.*, 156 FERC ¶ 61,245 (2016) (“Payment Plan Waiver Order”).

⁴¹ *See Sw. Power Pool, Inc.*, 162 FERC ¶ 61,155 (2018).

⁴² *See infra* Section III.A; *see also* Locke Affidavit ¶¶ 7, 9.

III. MOTION FOR PARTIAL STAY OF REMAND ORDER

SPP seeks to avoid having to implement the refund/resettlement directives of the Remand Order while such order is pending on rehearing and may be reversed by further Commission or judicial action, and while numerous other Attachment Z2-related proceedings are unresolved. The requested partial stay would be effective until such time as all related ongoing legal proceedings have been concluded, either through litigation or settlement. For as long as the stay is in effect, SPP would be allowed to defer any required unwinding, resettlement, and refunds of Attachment Z2 payments for the Refund Period and recalculation of Attachment Z2 charges and credits for subsequent periods that would be necessitated by the mandated refunds.

SPP is not requesting stay of Tariff obligations to process *ongoing* and *future* Attachment Z2 credits and payments. However, calculation and finality of these post-Refund Period CPOs, as explained below and in SPP's concurrently-submitted Refund Report, will be affected by the ultimate settlement of Refund Period amounts. Grant of the partial stay will minimize the burden and irreparable harm otherwise associated with the Remand Order by sparing SPP and its stakeholders (including parties on all sides of Attachment Z2 crediting) from the multiple and overlapping winding and unwinding of Attachment Z2 charges and credits that may otherwise be required based on the outcome of the various ongoing legal proceedings.

A. Specific Factors Justifying Stay

The Remand Order poses considerable legal, practical, and administrative implications that are likely far beyond those contemplated by the Commission. Not reflected in the Remand Order is any consideration of the impact that various complaints and other pending Attachment Z2-related proceedings may have on Attachment Z2 re-

settlements and refunds, the interrelationship between historical and current/future Attachment Z2 calculations, the potential difficulties in fully recovering amounts paid to recipients of credits during the Refund Period, the need to revisit long-term transmission service study results based on revised CPOs that would result from the refunds, or the possibility of Commission or judicial reversal of the Remand Order's findings and the resulting impacts of unwinding and subsequently re-implementing Attachment Z2 charges and credits. The bottom line is that a stay of the refund directive will allow SPP (and Attachment Z2 CPO payers and payees) to avoid multiple resettlements of post-Refund Period credits and payments and instead facilitate a single, comprehensive resettlement covering both the Refund Period and post-Refund Period Attachment Z2 charges and credits, if necessary, once all of the various uncertainties are resolved.⁴³

There are numerous, specific factors that weigh in favor of granting the requested stay. *First*, granting the requested stay will facilitate the possibility of a comprehensive settlement addressing issues arising both under the Remand Order and in the numerous overlapping Attachment Z2 proceedings. As discussed above, four complaints pending in Docket Nos. EL17-21-000, EL18-9-000, EL19-75-000, and EL19-77-000, respectively, challenge SPP's interpretation and implementation of Attachment Z2 and SPP's ability to recoup past Attachment Z2 revenue credit payments made to Upgrade Sponsors.⁴⁴ While

⁴³ As explained, *infra*, implementing the Remand Order's directives before those directives are final and no longer subject to judicial review, coupled with the possibility that aspects of SPP's Attachment Z2 implementation design, procedures, and software may be changed by further Commission or court action, demonstrates the significant harm that will occur by not granting the requested stay.

⁴⁴ A fifth complaint was filed by Nebraska Public Power District in 2018. Complaint of the Nebraska Public Power District, Docket No. EL17-86-000 (Aug. 31, 2017) ("NPPD Complaint"). The Commission denied that complaint, and no party filed

the Commission denied two of these complaints in substantive part,⁴⁵ both denials are pending before the Commission on rehearing. The more recent complaints in Docket Nos. EL19-75-000 and EL19-77-000 have yet to be addressed by the Commission. AEP has also challenged two rounds of revisions to its NITS agreements related to Attachment Z2 CPO responsibilities, both of which are pending before the Commission in different regulatory stages.⁴⁶ If the Commission does not grant SPP's stay request and subsequently decides any of these complaints or NITS agreement proceedings in a manner that alters any aspect of SPP's Attachment Z2 implementation procedures, such changes could have considerable impact on the determination of Attachment Z2 charges and credits, which could force one or more additional rounds of claw-backs, refunds, and surcharges.

Second, Attachment Z2 crediting is sequential—current and future creditable balances and CPOs are based on what has already been paid out. As a consequence, any refunds implemented by SPP will require SPP to unwind and recalculate Attachment Z2 settlements for the post-Refund Period (including both the Final Historical Year and

for rehearing, making the Commission's disposition of that complaint final as a matter of law. *Neb. Pub. Power Dist. v. Sw. Power Pool, Inc.*, 162 FERC ¶ 61,204, at PP 1, 42-49 (2018) (denying the NPPD Complaint and finding that SPP appropriately interpreted its Tariff and properly implemented Attachment Z2).

⁴⁵ Xcel Complaint Order at PP 1, 72-84; KEPCo Complaint Order at PP 1, 59-70. In large part, the Commission denied the KEPCo Complaint, siding with KEPCo only on a Tariff interpretation issue that did not affect the outcome and setting for hearing a single issue that KEPCo subsequently withdrew. KEPCo Complaint Order at PP 64, 71-75; Notice of Partial Withdrawal of Kansas Electric Power Cooperative, Inc., Docket No. EL17-21-000 (Dec. 29, 2017).

⁴⁶ *Sw. Power Pool, Inc.*, 165 FERC ¶ 61,048, *reh'g pending*; Protest of American Electric Power Service Corporation, Docket No. ER19-1672-000 (May 16, 2019). The Commission's final resolution of these proceedings, like the complaint proceedings, may impact past, present, and future Attachment Z2 settlements.

subsequent time periods). If the Commission grants this partial stay request, SPP will only have to resettle once, after all litigation uncertainties are resolved, and such resettlement will address both the Refund Period and post-Refund Period settlements. Likewise, the Attachment Z2 “payment plan,” which the Commission authorized by granting a separate waiver request⁴⁷ that was not addressed by the Remand Order, calculates Attachment Z2 obligations for the Historical Period and spreads them out over a five-year term on a levelized basis, meaning that the quarterly payments under the payment plan include costs both for the Refund Period and the first year of the post-Refund Period. Unwinding and recalculating these payments under the payment plan, including the interest component,⁴⁸ will be complicated and further impacted if any changes to Attachment Z2 implementation are ordered in any of the pending proceedings.

Third, it took SPP (with the active assistance of its stakeholders) nearly a decade to design the procedures and to develop and deploy the software necessary to implement Attachment Z2. Modifying the software to address recalculation of payments and credits to address the consequences of the Commission’s Remand Order directives on post-Refund Period Attachment Z2 settlement may also take considerable time and effort,⁴⁹ which will all be for naught if the Commission or a court reverses any aspect of the Remand Order.

Fourth, irrespective of litigation uncertainties, the precise import of the Commission’s refund directive, and whether SPP can comply with it, remains unclear. The

⁴⁷ Payment Plan Waiver Order at PP 1, 33-35, 38.

⁴⁸ *Id.* at P 37 (requiring interest to be calculated and compounded quarterly pursuant to Commission Rule 35.19a(a)(2), 18 C.F.R. § 35.19a(a)(2)(iii)(A)).

⁴⁹ Refund Report at IV.C.3; Locke Affidavit ¶¶ 6, 8-10.

numerous subjective judgments and assumptions necessary to formulate a refund plan, coupled with the practical challenges of unwinding and resettling CPO assessments (including identifying payment recipients, and recovering and redistributing credited amounts),⁵⁰ virtually ensures that any refund plan submitted by SPP will be subject to challenges and further litigation.

Fifth, unwinding any portion of Historical Period Attachment Z2 charges and credits necessarily impacts the ATSS processes that have occurred from the time of the Commission's grant of the Waiver Request. Because Attachment Z2 crediting is sequential, as discussed above, subsequent aggregate transmission service studies assume that upgrades that were earlier deemed eligible for Attachment Z2 revenue credits indeed received those credit payments and the creditable balances have declined as a result. They also assume that transmission service during the Refund Period actually contributed CPO payments in a manner that is proportionate to the costs borne by the Transmission Customer that originally funded the Creditable Upgrade, which is then reflected in impact factors of subsequent service. Reversing credit payments means that such studies will need to be rerun to reassess the impacts of transmission service requests on Creditable Upgrades whose credit payments are now being reversed, which will result in shifts of CPO responsibilities from some Transmission Customers to others.

Sixth, the prospect of having to recover Attachment Z2 revenue credits related to the Refund Period presents numerous additional logistical, administrative, and legal impediments to SPP. As Mr. Locke notes in his affidavit accompanying SPP's Refund

⁵⁰ These challenges and uncertainties are described in more detail in the contemporaneously filed Refund Report and Locke Affidavit. Refund Report at Sections IV.A, IV.C, IV.D; Locke Affidavit ¶¶ 5-12.

Report, SPP recently sent letters to Upgrade Sponsors requesting confirmation that they will return the credit revenues they received when requested by SPP. A significant percentage of those recipients either failed to respond, declined to confirm their assent to repayment, or disavowed any obligation to return credit payments received from SPP.⁵¹ Some of these recipients are generation developers who may have sold their existing SPP projects and moved on to other projects, other non-SPP Members who, aside from their sponsorship of Creditable Upgrades, have no other contractual or business relationship with SPP, or non-jurisdictional entities. In addition to the various ongoing Attachment Z2 implementation-related litigated proceedings current pending before the Commission (detailed elsewhere in this motion), there is a substantial likelihood that SPP will need to initiate numerous additional legal actions in multiple states to seek recovery of Attachment Z2 payments made to recipients who are beyond SPP's or the Commission's reach. This raises the prospect of multiple conflicting state and federal court decisions applying different state and federal laws, and presents significant legal uncertainty regarding such potential issues as damages, state/federal jurisdiction, statutes of limitations, standing, attorney and legal fees, and the recoupment of Attachment Z2 payments and interest, among other potential issues. These uncertainties create substantial risk of short-payments and additional process and calculation complications, including the risk of repeated resettlement of all Attachment Z2 amounts from 2015 forward, as described herein and in the Refund Report and Locke Affidavit.⁵² Such legal efforts to recoup Attachment Z2

⁵¹ Locke Affidavit ¶ 10.

⁵² See *supra* note 50; see also, e.g., OG&E Complaint at 18 (claiming that "SPP should thus be directed not to seek any repayment from OG&E, as that would violate SPP's Tariff and the filed rate doctrine"); EDF Complaint at 3 (claiming

credit revenues previously paid will also come at considerable financial expense to SPP and, by extension, SPP's Members and customers who fund SPP's administrative costs.

Finally, there are uncertainties associated with the ability of entities who received Attachment Z2 revenues that now owe Refund Period repayments back to SPP to provide those payments in lump sum, with interest. Many of the entities at issue are generation developers. In SPP's experience, it is often the case that such entities move from project to project, meaning that they may have already deployed the Attachment Z2 revenues they received on other investments (or may have otherwise used the funds to pay vendors or investors in the generating resource, creating additional shortfall risk). Moreover, requiring these entities to repay Attachment Z2 credits now before all of the legal uncertainty surrounding Attachment Z2 interpretation, implementation, and enforcement is resolved places these entities in a difficult position of having to come up with significant sums of money (including interest) that ultimately may not need to be repaid. The same reasons that led the Commission to grant SPP's Waiver Request to implement the payment plan—avoiding the “financial harm” associated with “a large one-time payment”⁵³—particularly given all of the legal uncertainty surrounding Attachment Z2, militates in favor

that “SPP alone bears that responsibility” to provide refunds); Motion for Leave to File Limited Answer Out-of-Time and Limited Answer of EDF Renewables, Inc., Enel Green Power North America, Inc., and NextEra Energy Resources, LLC, Docket No. ER16-1341-004, at 2-5 (June 12, 2019) (claiming that SPP should be responsible for interest associated with Attachment Z2 refunds); Flat Ridge Rehearing Request at 10, 31, 33-34 (suggesting that SPP should bear the cost of the refunds and that Refund Period credit recipients should be entitled to retain their credit payments).

⁵³ Payment Plan Waiver Order at P 35.

of staying such refund and repayment obligations until such time as all related legal proceedings are resolved to finality.

As the foregoing should make clear, there are too many moving pieces at this point to move forward practicably on processing refunds as directed by the Remand Order and resettling post-Refund Period credits and payments as a result of the refunds. It is both illogical and highly inefficient to force SPP to implement the complex and burdensome process of unwinding prior settlements (including, necessarily, both Refund Period and post-Refund Period settlements), and recouping and redistributing CPO costs assessed for the Refund Period, only to discover, following the conclusion of the numerous ongoing proceedings involving Attachment Z2 implementation, that SPP must do it again (and possibly again and again as various proceedings are resolved by the Commission and the courts).

B. The Requested Partial Stay Will Avoid Irreparable Harm, Will Not Adversely Impact any Party, and Is in the Public Interest

Pursuant to the Administrative Procedure Act, the Commission may stay its action when “justice so requires.”⁵⁴ The Commission has identified the following factors it considers in determining whether to grant a stay: “(1) whether the party requesting the stay will suffer irreparable injury without a stay; (2) whether issuing the stay may substantially harm other parties; and (3) whether a stay is in the public interest.”⁵⁵ The Commission also

⁵⁴ 5 U.S.C. § 705; *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9 (2015).

⁵⁵ *Transcon. Gas Pipe Line Co.*, 150 FERC ¶ 61,183, at P 9. Unlike a judicial stay request, an applicant’s likelihood of success on the merits is not a consideration for the Commission in whether to grant a stay. *See, e.g., id.* at P 18 (“The factors we examine when considering whether to grant a stay, enumerated above, do not include the likelihood of success on the merits. We have not yet considered the merits of the petitions on rehearing, and we will not prejudge them in any manner.”)

“may examine [] other factors” even in the absence of irreparable harm “where appropriate.”⁵⁶ SPP’s stay request satisfies all of these factors.

1. Irreparable Harm

SPP and its Members, customers, and Attachment Z2 credit payers and recipients will suffer irreparable injury unless the Remand Order’s refund directive is stayed. On an ongoing basis, and for purposes of future assessments, the amounts paid to Upgrade Sponsors are based on the amounts that they have previously been paid, including amounts related to the Refund Period.⁵⁷ The unwinding of historical crediting and billing in order to calculate and distribute refunds inextricably impacts all subsequent billing and crediting.⁵⁸ In short, while the sequential Attachment Z2 process is extraordinarily

(citation omitted)); *Ruby Pipeline, L.L.C.*, 134 FERC ¶ 61,020, at P 16 (2011) (“[T]he Commission [] has not considered a movant’s likelihood of success on the merits in a pending judicial appeal as a relevant factor in determining whether to grant a stay. Rather, the Commission’s standard for reviewing a request for stay is whether ‘justice so requires.’”).

⁵⁶ *Cal. Indep. Sys. Operator Corp.*, 114 FERC ¶ 61,339, at P 20 (2006) (citing *The Mont. Power Co.*, 85 FERC ¶ 61,400, at 62,535 (1998) (granting a stay even without a finding of irreparable harm)).

⁵⁷ Credits are also “given first to the [original] Project Sponsor . . . until the revenue credit due to the Project Sponsor for that Creditable Upgrade is zero” and are then subsequently paid to other “Upgrade Sponsor(s) of the Creditable Upgrade.” Tariff, Attachment Z2 § II.D.2; *see also id.* § II.D.3 (stating that credits for Creditable Upgrades associated with a Generator Interconnection Agreement will first be paid to the Generation Interconnection Customer(s) “until the revenue credit due is zero” and then “to all other Upgrade Sponsors of the Creditable Upgrade”). This means that some recipients’ receipt of Attachment Z2 revenue credits depends on the original Upgrade Sponsor first being paid back for its original funding of the Creditable Upgrade.

⁵⁸ As one example, if historical amounts are not paid (or payments are reversed), the credit obligation owed to an Upgrade Sponsor will not have been reduced by the amounts being paid, leading to a higher gross receivable over time when accrued interest is included. The larger gross CPO receivable would have downstream impacts to subsequent users of the upgrade, increasing the amount due from

complicated to administer,⁵⁹ repeating the process is even *more* difficult to administer, as Mr. Locke attests.⁶⁰

Indeed, compliance with the literal terms of the Remand Order—insofar as the order may presume SPP’s ability to unwind Refund Period CPO assessments, revise post-Refund Period transmission service cost allocations, and resettle the post-Refund Period CPO assessments as if SPP had not previously implemented Attachment Z2—presents potentially insurmountable challenges, and, at best, will yield an approach for refunds and resettlements that is inherently subjective and implicates numerous assumptions and contingencies, any number of which could be altered or undermined by future action by the Commission and courts.⁶¹ In this sense, the injuries threatened by immediate implementation of the Remand Order’s refund directive are not limited to economic loss or administrative burden. Unless stayed, the Remand Order sets in motion the potential for a succession of refunds, resettlements, and demands for repayment that, with each iteration,

subsequent users and the amount owed to other Upgrade Sponsors of the Creditable Upgrade.

⁵⁹ The determination of CPO assessments involves sequential calculations to determine when credit recipients have been fully compensated, a determination that is based upon the subsequent incremental and proportionate use of each affected Creditable Upgrade.

⁶⁰ Locke Affidavit ¶¶ 6-7; *see also* Refund Report at 3-4, 18-19.

⁶¹ In similar contexts, the Commission has recognized the inherent impracticability of unwinding settled results. *See, e.g., Mirant Energy Trading, LLC. v. PJM Interconnection, L.L.C.*, 122 FERC ¶ 61,007, at P 38 (2008) (noting the practical problems of achieving accurate and reliable outcomes when attempting to upset a settled result based on parameters determined after-the-fact).

are more subject to circumstantial changes and more difficult to implement (and potentially unwind).⁶²

A temporary reprieve from having to recoup the revenue credits paid and refund the charges associated with the Refund Period will facilitate the eventual resettlement of *all* Attachment Z2 obligations—i.e., covering both the Refund Period and post-Refund Period—and will mitigate the irreparable harm that would follow from having to conduct multiple rounds of recalculations, collections, and payments, each of which would interject greater difficulty in SPP’s ability to track and recoup CPO costs from, and refund such amounts to, the proper entities, as contemplated in the Remand Order.⁶³

2. *No Harm to Third Parties*

Granting the stay requested by SPP will not harm third parties. If the Commission ultimately denies rehearing of the Remand Order, and the Commission’s findings survive judicial review, third parties will be in no worse position after the stay is lifted than they would be in had SPP provided refunds today.⁶⁴ Delay in the receipt of funds is not a

⁶² See *Cal. Indep. Sys. Operator*, 114 FERC ¶ 61,339, at P 21 (granting a stay “[t]o avoid the potential significant expenditures and other consequences . . . pending rehearing” and because “many other market participants could pay large amounts that are not subject to refund” where “there would be no way to return these entities to their status quo ante” if rehearing is granted).

⁶³ In addition to the irreparable harms detailed here, “other factors” support granting the requested stay. See *supra* note 56 and accompanying text. For example, SPP began billing and paying Attachment Z2 credits in direct response to the Commission’s Initial Waiver Order, and SPP and other parties engaged in conduct and made decisions in reliance on the Waiver Orders, which now, nearly three years later, have been overturned by the Remand Order. Granting the requested stay will avoid further legal and regulatory uncertainty for all involved.

⁶⁴ The same is true if, as requested, the Commission initiates settlement procedures that, for whatever reason, fail to produce a resolution.

countervailing irreparable harm warranting rejection of an otherwise meritorious stay request, particularly in light of the Commission's requirement that all refunds and delayed payments be subject to interest.⁶⁵

3. *Public Interest Considerations*

The requested stay is in the public interest because the documented irreparable harm of unwinding and resettling CPO assessments may ultimately be found to be entirely unnecessary, or may be significantly impacted by other ongoing legal proceedings surrounding Attachment Z2 implementation. Indeed, the manner by which such unwinding and resettlement is to occur remains unclear, both in terms of the complexities involved in retrospective calculations and due to unresolved legal challenges concerning the interpretation and implementation of Attachment Z2 (including rehearing requests in this proceeding). The public interest is not served by a process that may ultimately entail multiple resettlements of hundreds of millions of dollars of CPO costs.⁶⁶

⁶⁵ See, e.g., *Empire Dist. Elec. Co.*, 123 FERC ¶ 61,205, at P 10 (2008) (“[A] showing of irreparable injury must be more than unfavorable economic circumstances or loss of profits.”).

⁶⁶ As the Commission is aware, SPP commenced billing under Attachment Z2 in November 2016, based on the authority granted in the Waiver Order. The Remand Order's refund directive implicates approximately \$140 million of historical Attachment Z2 settlements for the Refund Period. In addition, more than \$200 million additional Attachment Z2 CPO costs have been settled for the post-Refund Period. As explained, the refund requirement bears directly on the calculation and assessment of CPO costs for the periods that were not purportedly touched by the Remand Order—i.e., the Final Historical Year and post-Historical Period that fall outside of the one-year limitation provision of Tariff Section I.7.1. In analogous situations, the Commission has declined to require market resettlements, citing the obvious practical impediments of, effectively, going back in time and recreating market environments. Cf. *Midwest Indep. Transmission Sys. Operator, Inc.*, 162 FERC ¶ 61,173, at PP 17, 19 (2018) (in the context of challenges to settled outcomes in the Midcontinent Independent System Operator, Inc.'s energy markets, the Commission declined to order unwinding and resettlement, finding that any

Until such time as all Attachment Z2-related litigation is resolved, either through settlement or final adjudication, CPO calculations for both the Refund Period and post-Refund Period are, necessarily, inconclusive and subject to modification. If SPP is required to refund and resettle Attachment Z2 charges and credits under the Remand Order now, before this and other proceedings are resolved, the mandatory unwinding of Refund Period CPO assessments and the determination of post-Refund Period CPO billings (which cannot be known until the Refund Period reversals are applied) will be subject to further uncertainty and possible multiple iterations of resettlements if the Commission or a court ultimately determines that SPP's interpretation and implementation of Attachment Z2 was erroneous in any way. These issues impact all Transmission Customers, not just those using Creditable Upgrades.⁶⁷

Additionally, as challenging and time-consuming as it will be to resettle the post-Refund Period once, having to resettle multiple times (due, for example to future Commission and/or court action or to address short-payments) will entail enormous administrative burden and prolong the process indefinitely. Indeed, the extent to which SPP must deal with short-payments will affect the degree of pay-off at each point in time

such remedy “would be extremely complex, subject to controversy and further litigation, and cause significant disruptions and burdens”); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,252, at P 55 (2017) (recognizing the complications associated with unwinding settled positions and the impact to and uncertainty imposed on market participants).

⁶⁷ For example, there is an impact and vulnerability to Transmission Customers through Schedule 11 rates due to the inclusion of a portion of CPO costs in the zonal and region-wide revenue requirements set forth in Attachment H of the Tariff.

and could also affect the impact factors and the identification of relevant Creditable Upgrades applied in CPO calculations.⁶⁸

The prospect of multiple resettlements poses implications on the ATSS processes as well, all as addressed above and more fully described in the Refund Report and Locke Affidavit.⁶⁹ Further, and as noted, any changes to current and future settlements are contingent on implementation of refunds for the Refund Period. Granting a stay of the refund obligation eliminates the need to make changes to current and future settlements during the period of the stay. This is because, during the period of the stay, creditable balances of the Upgrade Sponsors would not have been increased by the refund and costs would not have been shifted to the original Upgrade Sponsors as would occur if the refund were implemented.

The upshot is that scheduled Attachment Z2 charges and payments are currently being settled, including quarterly payments under the payment plan, despite the fact that all such payments and settlements are certain to be affected (i.e., subject to change) by the yet-to-be determined refund of historical CPO assessments. And, even if the Commission were promptly to act on SPP's refund plan, and assuming, however improbable, that SPP could collect the data and calculate prospective CPO charges that take into account the elimination of historical payments without any need for further process or software

⁶⁸ This could occur, for example, if SPP initially receives less than 100 percent of the total amount owed, and proceeds with revising ATSS results and resettlement on that basis. But if incremental amounts are received at later dates, the ATSS revision and resettlement processes may need to start over again. A single such re-start would be highly disruptive and time-consuming, yet the short-payment situation described above could result in multiple re-starts.

⁶⁹ Refund Report at Section IV.D.; Locke Affidavit ¶¶ 10, 12.

modifications, there remains, as noted, the very real possibility that these calculations and payments will be the subject of further litigation and possible revision.⁷⁰

In sum, any forced unwinding of Refund Period assessments and resettlement of post-Refund Period Attachment Z2 invoices, as may ultimately be required by the Remand Order or as the result of other pending Attachment Z2-related proceedings, should only be undertaken once and only on terms that are final and not subject to further review and possible modification. Such finality may take the form of a negotiated, comprehensive resolution (i.e., if the Commission initiates settlement procedures, as requested, and those procedures are successful) or litigated outcomes. Given all of the practical and economic implications of implementing refunds now, with the possibility of eventually being required to revamp the procedures and potential software modifications should SPP's Attachment Z2 implementation obligations change (e.g., by virtue of a negotiated comprehensive settlement or Commission or court action in any of the numerous pending dockets), the public interest is best served by staying the refund obligation.

The Commission has granted stays in the past to facilitate the completion of rehearing, appeal, and/or settlement proceedings before executing Commission directives, and should do so here.⁷¹ SPP has thoroughly demonstrated that the requested stay satisfies

⁷⁰ As noted, the levelized nature of the payment plan further complicates matters, because Refund Period CPOs and a portion of post-Refund Period CPOs are both included in the payments and credits that have been processed to date.

⁷¹ *See Ne. Utils. Serv. Co.*, 51 FERC ¶ 61,006, at 61,019 (1990) (“Under these circumstances, the Commission concludes the [Northeast Utilities Service Company] has shown good cause for a stay of the directive to file a revised Seabrook Power Contract while its request for rehearing is pending.”); *Utils. Comm’n*, 41 FERC ¶ 61,027, at 61,073 (1987) (“Such a stay will . . . maintain the *status quo* pending our decision on Vanceburg’s request for rehearing.”); *The Mont. Power Co.*, 85 FERC ¶ 61,400, at 62,535 (“For example, in Bangor Hydro-Electric

the Commission's test for granting a stay, and refusing the requested stay will cause irreparable injury not only to SPP but also to its Members, customers, and Attachment Z2 credit recipients and payers.

IV. MOTION TO HOLD RELATED ATTACHMENT Z2 PROCEEDINGS IN ABEYANCE

The foregoing request for partial stay is one component of a multi-prong approach designed to provide a process for examining and potentially resolving all related Attachment Z2 issues. A necessary second component requires that the Commission hold in abeyance all pending proceedings, listed in Table 1 below, where some element of Attachment Z2 implementation is being disputed.

Table 1.

Docket No.	Case Name	Description	Status
ER16-1341-003 & -004	Southwest Power Pool, Inc.	003- Order on Voluntary Remand of SPP Waiver Orders. 004- Requests for rehearing and clarification of Order on Remand	003- Compliance due 06/28/19. 004- Requests for rehearing and clarification pending.
EL17-21-001	Kansas Electric Power Coop., Inc. v. Southwest Power Pool, Inc.	Requests for rehearing of Commission order on complaint regarding the assignment of costs to KEPCo in connection with the Z2 revenue crediting process.	Pending
EL18-9-001	Xcel Energy Services, Inc. v. Southwest Power Pool, Inc.	Request for rehearing of March 6, 2018 order denying complaint re: Attachment Z2 revenue crediting.	Pending

Co., we granted a stay pending appeal of mandatory fish passage facilities.” (citation omitted)).

Docket No.	Case Name	Description	Status
EL19-75-000	EDF Renewables, Inc., et al. v. Southwest Power Pool, Inc.	Complaint re: enforcement of Attachment Z2 and challenging obligation to refund Attachment Z2 credit payments received	Pending
EL19-77-000	Oklahoma Gas and Electric Company v. Southwest Power Pool, Inc.	Complaint re: enforcement of Attachment Z2 and challenging obligation to refund Attachment Z2 credit payments received	Pending
ER18-1702-002	Southwest Power Pool, Inc.	Request for rehearing of Commission order accepting SPP filing of unexecuted NITS agreement and executed Network Operating Agreement between SPP and AEP.	Pending

Holding these cases in abeyance will provide an opportunity for parties to engage in meaningful settlement discussions without the possibility of a Commission order upsetting that process. Moreover, by suspending any further action in these related proceedings, the Commission will avoid piecemeal decision-making and allow all Attachment Z2-related issues to be considered together, in a setting that offers the best hope for a comprehensive and final resolution that will avoid years of complex litigation.

No party will be adversely affected by an order holding these cases in abeyance. If settlement judge procedures are unsuccessful, the abeyance order can be lifted and the Commission will be free, at that point, to determine the most efficient process for moving forward in the various dockets. In the event that Attachment Z2 disputes are ultimately resolved through litigation, parties are protected by the Commission's requirements

governing interest on any refunds owed. Furthermore, no party shall be deemed to have waived any claim or argument during the period in which the matters are held in abeyance.

V. MOTION FOR INITIATION OF SETTLEMENT PROCEDURES

Under Rule 603(c), any party may, by motion, request that the Commission initiate settlement judge procedures. In addition, the Commission will, on its own, often defer formal hearings and direct parties to explore a negotiated resolution under the auspices of a settlement judge.

The matter of Attachment Z2 implementation is particularly suitable for settlement judge procedures for numerous reasons. First, implementation of Attachment Z2 (including implementation of any refunds required for the Refund Period and the calculation of ongoing CPO assessments), involves highly complex, technical processes and subjective judgments that should be vetted with all affected parties. Second, issues concerning Attachment Z2 implementation, and ultimately affecting the proper determination of revenue credits and CPO assessments, are currently being contested and/or are under review in multiple open proceedings. Allowing these issues to be litigated on separate tracks and on separate schedules will serve only to further complicate the process, engender additional proceedings, and likely preclude any near-term comprehensive solution. Third, SPP's request for comprehensive settlement proceedings is not novel. Several litigants in the various pending Attachment Z2-related proceedings have indicated support for settlement and/or technical conference procedures with the hope of addressing these complicated issues in a non-adjudicatory setting.⁷² Finally, in the

⁷² See, e.g., Brief of Xcel Energy Services Inc. on Behalf of Southwestern Public Service Company, Docket Nos. ER16-1341-000, -001, at 36 (Aug. 31, 2018); EDF Complaint at 35-36.

circumstances presented here, involving widely divergent views and hundreds of millions of dollars at stake, an objective, neutral facilitator is critically important and offers the best chance of bringing parties to a negotiated resolution.

VI. CONCLUSION

For the foregoing reasons, the Commission should: (i) partially stay its Remand Order with respect to the implementation of refunds and the resulting post-Refund Period resettlements relating to Attachment Z2 assessments; (ii) hold in abeyance all identified pending proceedings concerning Attachment Z2 implementation; and (iii) initiate settlement judge procedures to provide an opportunity for parties to seek a comprehensive resolution of all Attachment Z2 issues.

Respectfully submitted,

/s/ Matthew J. Binette

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June 28, 2019

CERTIFICATE OF SERVICE

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

Dated at Washington, DC, this 28th day of June 2019.

/s/ Kathleen E. Schnorf
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FEDERAL ENERGY REGULATORY COMMISSION

AND REQUEST FOR PRIVILEGED TREATMENT

discussed in more detail below.

¹ *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019) (“Remand Order”).

2 SPP is submitting this Refund Report to comply with the Commission’s directives in the Remand Order. SPP sought rehearing and clarification of the Remand Order on April 1, 2019. *See* Request for Rehearing and Motion for Clarification of Southwest Power Pool, Inc., Docket No. ER16-1341-004 (Apr. 1, 2019) (“SPP Rehearing/Clarification Request”). By submitting this proposed refund plan, SPP is not waiving any argument raised on rehearing and clarification of the Remand Order. SPP continues to believe that the Commission erred in the Remand Order and that it should, on rehearing, reverse its directive to SPP to process refunds for past Attachment Z2 charges and credits.

I. INTRODUCTION AND OVERVIEW

The Remand Order directs SPP to submit various data concerning the amounts of CPO assessments previously paid and received, as well as the amounts of refunds due to individual entities as a consequence of the Remand Order’s reversal of waivers previously granted to SPP, and other historical and forward-looking data.³ The Remand Order further directs SPP “to file a report within 120 days of the date of this order detailing how it proposes to make the [Attachment Z2] refunds required herein.”⁴ SPP submits this Refund Report to comply with the Remand Order. In addition to providing information required by the Remand Order (to the extent presently available and calculable), SPP has developed a proposed preliminary plan to address refunds associated with the so-called “Refund Period,” defined below.⁵

As explained in the affidavit of Mr. Charles J. Locke, SPP’s Director of Transmission Policy and Rates, included as Attachment 1 hereto (“Locke Affidavit”), the refund plan outlined herein necessarily reflects numerous assumptions and subjective judgments by SPP, including assumptions regarding the outcomes of various ongoing proceedings challenging elements of Attachment Z2 implementation. Additionally, the Remand Order affects more than \$340 million of CPO assessments to date that have been determined using SPP’s Credit Stacking System (“CSS”) and that are subject either to refund under the Remand Order or to resettlement as a result of the refunds required by the

³ Remand Order at P 59. The waiver orders reversed by virtue of the Remand Order are: *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016) (“Initial Waiver Order”), *reh’g denied*, 161 FERC ¶ 61,144 (2017).

⁴ Remand Order at P 59.

⁵ *See infra* Section II.

Remand Order. Any attempt to unwind and resettle these assessments presents numerous technical challenges, including the potential need for software and system modifications. Further complicating the process is the required reevaluation of transmission service requests that were studied and confirmed by SPP, but must now be restudied in order to reverse CPO assessments deemed unlawful by the Remand Order and revise CPO assessments due to the effects of the Remand Order. A more comprehensive discussion of the assumptions and contingencies that must be resolved prior to implementation of SPP's preliminary refund plan is presented below and in Mr. Locke's affidavit.

As noted herein and in the Locke Affidavit, there are numerous moving pieces to Attachment Z2, which make the process of unwinding seven years of Attachment Z2 credits and charges an extraordinarily complex, time-consuming, and potentially expensive proposition. Moreover, given the sequential nature of Attachment Z2 crediting, with future credits and charges premised on past amounts paid and received, unwinding any portion of historical Attachment Z2 charges and credits affects both current and future charge and credit calculations. The Commission's directive, therefore, will take several years to implement as refunds are calculated, credit payments made to Upgrade Sponsors are clawed back, and current/future Attachment Z2 credit payment responsibilities and credits are recalculated and reprocessed. For these reasons, while SPP provides this Refund Report to comply with the Remand Order, SPP requests that the Commission grant SPP's concurrently-filed motion requesting stay of the refund requirement, abeyance of ongoing

Attachment Z2-related proceedings, and appointment of a settlement judge to facilitate a comprehensive settlement of ongoing Attachment Z2 disputes.⁶

II. GLOSSARY OF TERMS USED IN REFUND REPORT

To aid the Commission’s understanding of the proposed refund methodology, SPP provides a summary of defined terms used herein. Other capitalized terms are defined in the applicable section of this Refund Report or in the SPP Tariff.

Credit Payment Obligation (“CPO”): The amount charged to one or more Transmission Customer(s) and/or one or more Transmission Owner(s) in order to fund the payment of a revenue credit to an Upgrade Sponsor for a Creditable Upgrade under Attachment Z2 of the Tariff.

Credit Stacking System (“CSS”): The term commonly used to refer to the Attachment Z2 crediting settlement system developed by SPP, which calculates the CPOs to be paid by Transmission Customers and Transmission Owners and the distribution of resulting revenue credits to Upgrade Sponsors.

Current Payment Plan: The payment plan associated with historical Attachment Z2 CPO charges that the Commission authorized in Docket No. ER16-2330-000.⁷ The operating months subject to the Current Payment Plan are March 2008 through August 2016.

Final Historical Year: The operating months used for transmission service settlements extending from September 2015 through August 2016, inclusive.

Historical Period: The operating months used for transmission service settlements extending from March 2008 through August 2016, inclusive. This is the prior period for which invoices for settlements under Attachment Z2 were initially issued in November 2016, with resettlement invoices issued for the same period in November 2017.

Refund Period: The operating months used for transmission service settlements extending from March 2008 through August 2015, inclusive, which is the period for which the Remand Order directed SPP to unwind Attachment Z2 charges and credits and process refunds.

⁶ Motion of Southwest Power Pool, Inc. for Stay of Refund Condition, to Hold Proceedings in Abeyance, and for Initiation of Settlement Procedures, Docket Nos. ER16-1341-003, et al. (June 28, 2019).

⁷ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,245 (2016).

III. INFORMATION REQUESTED IN THE REMAND ORDER

Paragraph 59 of the Remand Order requested that specific information be provided as part of this report. The information sought, together with SPP's response, is provided below.

- 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.*

SPP Response:

Attachment 2⁸ of this Refund Report shows the charges applicable to each entity to fund CPOs and the corresponding revenue credits applicable to each entity under Attachment Z2 for the Refund Period.

The Refund Period is determined by the issuance dates for invoices and the provisions of Section I.7.1 of the Tariff. Transmission service invoices for the operating month of September 2015 were issued on November 4, 2015. The initial settlement invoices for Attachment Z2 Historical Period charges and credits were issued on November 3, 2016. Thus, the September 2015 operating month could have been resettled at that time without any request for a waiver of the provisions of Section I.7.1.⁹ For this reason, the appropriate cut-off is September 1, 2015, for operating month billing amounts

⁸ Attachment 2 contains commercially sensitive information and, for that reason, is submitted under seal pursuant to 18 C.F.R. § 388.112. See *infra* Section V.

⁹ SPP has not conceded and does not concede that a waiver of Section I.7.1 was necessary in order to invoice Transmission Customers for Attachment Z2 CPOs arising during the Historical Period. SPP Rehearing/Clarification Request at 26-31 (explaining the deficiencies in the Remand Order's analysis regarding the applicability of Section I.7.1 to initial Attachment Z2 settlements).

eligible for resettlement under the Remand Order and the end of the Refund Period is August 31, 2015. All short-term and long-term transmission service reservations with a term of service ending on or after September 1, 2015, are subject to resettlement under Attachment Z2 and such reservations are required to pay CPOs from September 2015 forward to the extent the transmission service is dependent on one or more Creditable Upgrades.

As further discussed below, the amounts in Attachment 2 do not represent the exact set of CPOs paid and credits received that would be revised as a consequence of the Remand Order. Some credits and payments attributable to the Refund Period have not yet been collected and paid by virtue of the Current Payment Plan, which combines and levelizes the Historical Period Attachment Z2 CPO net payments over an ongoing five-year term. Additionally, the amounts in Attachment 2 do not include the effects of the resettlement of all operating months subsequent to the Refund Period, which is necessary due to the refund requirement of the Remand Order.

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.

SPP Response:

Determination of these refund amounts is dependent on implementation of the refund plan, which in turn is dependent on Commission review of and response to the proposed refund plan outlined in this Refund Report, including all of the numerous assumptions discussed herein, and favorable disposition of the various ongoing Attachment Z2 litigated proceedings. Therefore, the refund amounts are not available at this time.

- 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.*

SPP Response:

Determination of these prospective CPO charges and revenue credit amounts is dependent on implementation of the refund plan, which in turn is dependent on Commission review of and response to the plan outlined in this Refund Report, including all of the numerous assumptions discussed herein, and favorable disposition of the various ongoing Attachment Z2 litigated proceedings. Therefore, these amounts are not available at this time.

IV. FRAMEWORK PROPOSAL FOR REFUNDS AND RESETTLEMENT

A. Key Assumptions

Before describing the mechanics of the refund and resettlement calculations that SPP proposes, it is first necessary to identify the key assumptions underlying such calculations. Reflecting the necessarily preliminary nature of SPP's proposal, the Commission should recognize that if any of these assumptions proves incorrect, the planned refund methodology would need to be reassessed and modified.¹⁰

First, the proposed Refund Report assumes that the pending litigation in other dockets related to the interpretation and administration of Attachment Z2 will be resolved consistent with SPP's position on all substantive points. This includes all issues raised

¹⁰ In addition to the Key Assumptions outlined in this section, other assumptions are described in other sections of this Refund Report. Changes to any of these other assumptions also may require modifications to the entire refund plan.

(and pending) in the following dockets: Docket Nos. EL19-77, EL19-75, ER19-1672, ER18-1702, EL18-9, and EL17-21.

Second, SPP assumes that termination of the Current Payment Plan will be authorized by the Commission prior to execution of the refund and that the effective date of termination of the Current Payment Plan will synchronize with the implementation date of the refunds such that amounts actually invoiced through the Current Payment Plan can be fully refunded, with interest accrued up to the refund implementation date.

Third, SPP assumes that, to the extent requested by SPP stakeholders, SPP will submit, and the Commission will approve, an optional payment plan for parties who will owe Attachment Z2 revenue credits received for the Historical Period for which the Remand Order directs SPP to process refunds.

Fourth, SPP assumes that any ordered implementation of SPP's refund plan will not occur until such time as SPP has confirmed the feasibility of such plan, including confirmation of the lead time associated with any software/system modifications and restudy and filing requirements necessary to comply with the Commission's unwinding and refund directive.

B. Key Elements of the Proposed Refund and Resettlement Processes

The proposed refund and resettlement processes included in this Refund Report consist of five key elements. SPP developed these elements based on SPP's interpretation and understanding of the Commission's refund directive. The five elements, which are discussed in detail in Section IV.C, below, are as follows:

- SPP will refund all amounts invoiced for the Historical Period. This includes both the Refund Period and the Final Historical Year, because both lump sum payments and Current Payment Plan payments include combined amounts attributable to both the Refund Period and the Final Historical Year.

- SPP will calculate and apply interest payable and receivable for the Refund Period.
- SPP will resettle the Final Historical Year. Discharging the refund obligation affects all operating months after the Refund Period including the Final Historical Year and the post-Historical Period.
- SPP will prescribe procedures to address short-paid amounts, as necessary, and will implement a payment plan, if requested by stakeholders and approved by the Commission.
- SPP will resettle operating months after the Historical Period. This resettlement extends from September 2016 up to the most recent month that will have been settled with charges and credits under Attachment Z2.

C. Explication of Elements of Refund/Resettlement Processes

1. Refund of Amounts Invoiced for the Historical Period

In order to disburse refunds as directed, SPP must first determine all charges and credits issued to each Upgrade Sponsor, Transmission Owner, and Transmission Customer for Historical Period settlements under Attachment Z2 as of the refund implementation date. This includes invoiced amounts under: (a) the initial lump-sum settlement in November 2016; (b) the lump-sum resettlement in November 2017; and (c) the Current Payment Plan, including interest, as initially determined in 2016 and adjusted due to the resettlement in 2017.

Once these determinations are made, SPP would next issue invoices reversing all of the charges and credits identified above effective on the refund implementation date. This will exclude any Current Payment Plan amounts that have not yet been invoiced as of that date. Transmission Customers and Transmission Owners will be invoiced separately even if they are separate functions within the same company. Because the invoices are issued on a net basis for each invoiced entity, this separation may facilitate accounting

processes within each company for ratemaking purposes, including transmission formula rate updates.¹¹

Finally, SPP will revise the Revenue Requirements and Rates (“RRR”) Files’ monthly data throughout the Refund Period to zero out Schedule 11 funded components of CPOs. This step is necessary because a portion of CPO cost is funded through Schedule 11 revenue requirements. Attachment H of SPP’s Tariff provides for the CPO-related portion of revenue requirements to be included in column 7 of Table 1 (labeled “Base Plan Zonal ATRR to pay Upgrade Sponsors”) and in row 5 of Tables 2-A and 2-B (labeled “Base Plan Region-wide ATRR to pay Upgrade Sponsors”). The RRR File is a data file posted on the SPP website¹² that provides information regarding revenue requirements, rates, and other cost data applicable to settlements for transmission service under the SPP Tariff for each operating month. It allows such information to be updated with administrative efficiency since it does not require a filing with the Commission every time it is revised.¹³ It also facilitates access to the information by transmission owners and customers. Because there

¹¹ In conjunction with the invoicing of charge and credit reversals, SPP will provide Upgrade Sponsors, Transmission Customers, and Transmission Owners with the accounting details showing the reversal of all charges and credits under Attachment Z2 settlements for operating months in the Historical Period. This will be provided as background information and is separate from the reversal invoices described above. Differences between the net of total amounts in this data set and the net of total invoice reversals are expected for many entities because the Current Payment Plan includes interest and likely will not have run its full five-year term as of the refund implementation date.

¹² See *SPP Documents & Filings*, Southwest Power Pool, Inc., <https://www.spp.org/spp-documents-filings/?id=18251> (last visited June 28, 2019). The RRR File is located in the folder labeled “Governing (Tariff, Bylaws, Articles, Criteria, Membership/Seams Agreements, Market Protocols, Business Practices).”

¹³ The Commission approved SPP’s use of the RRR File in December 2011. *Sw. Power Pool, Inc.*, Letter Order, Docket No. ER12-74-000 (Dec. 5, 2011).

will be no CPOs applicable in the Refund Period upon implementation of the refund, the Attachment H entries in the RRR Files where these revenue requirement values are recorded will be replaced with zeroes.

2. *Calculation and Application of Interest Payable and Receivable for the Refund Period*

The determination of interest payable and receivable entails several sequential steps. First, SPP proposes to calculate the net amount payable or receivable for each Upgrade Sponsor, Transmission Owner, and Transmission Customer. This is based on the detailed operating month amounts that resulted from CPOs in network and point-to-point rates, directly assigned charges, and claw-back of point-to-point revenues, from revenue credits, and from incremental point-to-point charges and revenues applicable to months in the Refund Period. SPP would then calculate the net amount in the same manner for each entity based on months in the Final Historical Year. The detailed operating month amounts processed in the November 2017 resettlement must be included in the net amounts with those processed in the November 2016 initial settlement.

For each entity, with Transmission Customers and Transmission Owners treated as separate entities, SPP will calculate the ratio of the net amount for the Refund Period to the net amount for the entire Historical Period (i.e., the sum of the Refund Period and the Final Historical Year). For each entity, SPP then would multiply this “refund ratio” by amounts invoiced for the Historical Period under: (a) the initial lump-sum settlement in November 2016; (b) the lump-sum resettlement in November 2017; and (c) the Current Payment Plan as initially determined in 2016 and adjusted due to the resettlement in 2017.

After application of the refund ratio to invoiced amounts resulting from Historical Period settlements under Attachment Z2, SPP then would determine those adjusted

amounts that are to be paid back by the affected entity in order to implement the refund (i.e., reversal of a prior credit). Such amounts would be subject to interest calculated from the transaction date to the refund implementation date. This interest would be charged to all entities with adjusted amounts that are to be paid back.

Amounts determined by SPP to be refundable (i.e., reversal of a prior charge) would have interest calculated as a pro rata distribution of the total interest to be paid for each transaction date, with the distribution based on refundable adjusted amounts invoiced on the same transaction date. This interest is to be credited to entities with refundable adjusted amounts. The interest rates applied in these calculations are to be the quarterly rates applicable to refunds as posted on the Commission's website and as required by the Remand Order and Commission regulations.¹⁴

3. *Resettlement of the Final Historical Year and Accounting for Effects on All Operating Months After the Refund Period*

As Mr. Locke explains, settlement of crediting under Attachment Z2 has cumulative effects through time such that prior activity affects current and subsequent activity.¹⁵ Therefore, the refund required under the Remand Order will alter Attachment Z2 settlements for all months subsequent to the Refund Period. As a consequence, crediting must be resettled from the first month after the Refund Period up through the most recent settled month.

To accomplish this, SPP will process the Final Historical Year consistently with the process by which settlements for the full Historical Period were processed for invoices

¹⁴ Remand Order at PP 2, 43 (directing SPP to provide refunds with interest calculated pursuant to the Commission's regulations); *see also* 18 C.F.R. § 35.19a.

¹⁵ Locke Affidavit ¶ 7.

initially issued under Attachment Z2 in November 2016 and resettled in November 2017. This includes application of the billing module and procedures that SPP implemented specifically for settlement of Schedule 11 incremental charges and revenues resulting from the Historical Period settlements under Attachment Z2, which were developed in order to facilitate the calculations. As noted above, a portion of CPO cost is funded through Schedule 11 revenue requirements, which results in an increase in Schedule 11 rates and revenue. Because SPP's Historical Period settlements did not include these incremental Schedule 11 amounts prior to deployment of the CSS in 2016, SPP developed a special billing module and procedures to address Schedule 11 when CPOs and revenue credits were initially settled for the Historical Period. This allowed SPP to settle the Historical Period in an efficient and timely manner rather than utilize the normal transmission settlement system, which is limited to processing only one or two additional prior operating months per invoice month.

This approach of using the Schedule 11 billing module and procedures is predicated on continued recognition of the waiver of Section IV.A of Attachment J of the Tariff as previously granted by the Commission.¹⁶ These Schedule 11 calculations will permit settlement of the Final Historical Year to be conducted at the time the Historical Period refund is calculated rather than extending the settlement process over an additional period of six to twelve months (the number of invoice months required to process twelve prior operating months on the normal transmission settlement system at a rate of one or two per invoice month), with resulting effects on interest obligations. The Final Historical Year resettlement amounts will not be netted against the prior settlement results that were

¹⁶ See Initial Waiver Order at PP 57-58.

initially calculated in November 2016 and resettled in November 2017 because the prior settlement results will have been reversed through the Historical Period refund.

The Remand Order's refund directive will require SPP to reevaluate the treatment of Creditable Upgrades constructed in response to requests for long-term transmission service. Subsequent transmission service reservations impacting upgrades that were originally constructed for transmission service require utilization-impact stacking in order to address the reverse flow analysis of the "but for" test. Under SPP's existing processes, this utilization-impact stack for reverse flow is created by SPP's CSS. However, the impacts for those long-term reservations terminating prior to the end of the Refund Period should not be included in the impact stack utilized for calculating CPOs for such upgrades. This is because stacking the Refund Period impacts on such upgrades for CPO calculation purposes would cause the original sponsoring Transmission Customer to bear a disproportionate share of cost relative to subsequent sponsoring Transmission Customers after implementation of the refund. Therefore, CSS modifications are required in order to retain the "but for" stacking logic while removing the CPO calculation stacking in the Refund Period. Because the impact stacking logic is one of the most complex sections of the CSS, the Commission must recognize that SPP will require a minimum of six months to implement and test the necessary CSS software changes.

SPP plans to determine CPOs and their billing components in the same manner as they were prior to the Remand Order with the exception of the CPO stacking modification noted above. Although these CPO calculation algorithms will remain the same, it is likely that many CPOs will change significantly due to the effects of the CPO stacking modification and the fact that, because of the required refunding, sponsors of several Creditable Upgrades will not be fully compensated (if at all) until a later operating month.

It is also anticipated that virtually all CPOs for Point-To-Point Transmission Service will change slightly due to the two CPO effects noted above. This is because increases in CPOs resulting from the dual effects of stacking modifications and delay or reduction in sponsor compensation will cause a change in the amount of CPO revenue requirement recovered through Schedule 11. Consequently, point-to-point rates under Schedule 11 will be altered, causing CPOs for Point-To-Point Transmission Service to change by a small percentage.

In addition, these CPO changes for network and Point-To-Point Transmission Service will result in altered billing components such as the portion of the CPO that is directly assigned to the customer and the portion that is funded under Schedule 11 as previously described. These various factors can affect CPOs and their billing components regardless of whether the term of service starts before or after the end of the Refund Period. For reservations that start before the end of the Refund Period, the CPOs and their billing components will be charged to Transmission Customers only in operating months subsequent to the Refund Period. The portion of each reservation term that occurs before the end of the Refund Period will not be charged a CPO and Upgrade Sponsors will not receive credits for those operating months.

In order to process the Final Historical Year and all subsequent months, SPP will be required to reset the CSS and to calculate and enter certain input data manually, in order to operate without inputs and results from the Refund Period. SPP has determined that, at a minimum, the CSS reset will involve several input revisions, including the following:

- The CPOs and associated amounts applied by the CSS in the Refund Period must be overwritten with zeroes to eliminate transactions in the Refund Period;

- The creditable balance of each Upgrade Sponsor must be manually adjusted to reflect the amount that would have existed absent transactions in the Refund Period;
- The CSS will need to be thoroughly tested to ensure that any presently unforeseen problems are identified, which may require software modifications in addition to those already noted, potentially at additional software development cost.

Lastly, the RRR Files' monthly data for all operating months subsequent to the Refund Period will have to be revised to adjust the Schedule 11-funded components of CPOs.

4. Short-Paid Amounts and Payment Plan Implementation

SPP's refund plan includes contingency procedures to account for any short-paid amounts. Short-pays will arise in any situation in which SPP is unable to fully fund refunds owed.¹⁷ Where the administration of the refund results in short-paid amounts, SPP proposes to allocate the necessary revenue reduction in proportion to the outstanding net amounts owed by each entity on an aggregate basis after netting together the individual amounts payable and receivable for that invoice date. The Transmission Owner and Transmission Customer functions will be treated as separate entities for this purpose even if under the same corporate ownership. This approach is also consistent with the initial settlement in November 2016, the resettlement in November 2017, and the Current Payment Plan.

If requested by SPP stakeholders, SPP may need to seek Commission approval of an optional payment plan for either or both the Historical Period refund (including interest

¹⁷ For example, a short-pay could arise due to insolvency of an Upgrade Sponsor that is now unable to return the Attachment Z2 credits previously received for service during the Refund Period.

calculated as described above) and the Final Historical Year resettlement. The purpose of such plan(s) would be to mitigate the financial burden on entities owing amounts pursuant to the required unwinding and resettlement of CPO assessments. Under such a plan, each entity owing amounts under these mechanisms would have an opportunity to pay the amounts over time, including interest. While this stakeholder process will take time to complete (along with additional time for SPP to prepare and file and the Commission to approve any such payment plan), it is anticipated that the existing SPP stakeholder process would be used to develop the proposed characteristics of the new payment plan, including payment term and frequency. It is also assumed that the time required for this stakeholder process and any resulting filing with the Commission will partially overlap the CSS software development timeline in order to minimize the schedule impact associated with this element of the refund plan.

5. Resettlement of Operating Months After the Historical Period

The final implementation element of SPP's refund plan requires that the months following the Historical Period be resettled. Because current and future Attachment Z2 charge and credit calculations are built upon past amounts charged and credited, any refunds of past Attachment Z2 charges necessitate resettling of current charge and credit amounts and future credit entitlements. Such post-Historical Period resettlements are proposed to be administered jointly through the CSS, the RRR File, and the transmission settlement system working together as is done currently for settlement of Attachment Z2 charges and credits. SPP estimates that the existing transmission settlement system may be able to handle resettlement of one and a half prior operating months during each current settlement month initially, with the possibility of ramping up to three prior operating months per month after other resettlement activity has been migrated to SPP's new

settlement system.¹⁸ From the end of the Historical Period (beginning September 2016) through January 2020, after which the current transmission settlement system is to be replaced, there are forty-one operating months. Therefore, approximately twenty months may be required to implement the refund and the resulting resettlements up to the end of the current transmission settlement system's functionality.

If, in fact, the new transmission settlement system is able to handle up to three prior operating months for Attachment Z2 processing during each current settlement month, such improved pace of resettlement would apply from the February 2020 operating month forward. Assuming, for sake of example, that Attachment Z2 refund implementation commences March 2020, with the resettlement of post-Historical Period months starting at that time, these estimates of resettlement speed indicate that the resettlement of Attachment Z2 amounts may reach the window of time for resettlement that is normally permissible under Section I.7.1 by mid-year 2022. At that point, the resettlement of Attachment Z2 amounts can be included with other resettlement activity that may be ongoing, which eventually will bring Attachment Z2 billing fully up-to-date.

In addition to the time required to process the resettlement, SPP notes that additional administrative costs will be incurred by SPP to resettle post-Historical Period operating months. For example, retaining the current transmission settlement system beyond its current expected retirement date would result in additional licensing costs. There likely would be incremental staffing costs also. The total incremental costs associated with licenses and staffing are estimated to exceed \$500,000. If additional

¹⁸ See *infra* Section IV.D (discussing SPP's new settlement system); Locke Affidavit ¶ 11 (same).

resettlement of the post-Historical Period becomes necessary due to factors such as reversal of issues in currently pending dockets or substantially delayed recovery of refund amounts from Historical Period Attachment Z2 revenue credit recipients, these incremental costs could more than double. The implementation of post-Historical Period resettlements could begin only after all necessary process changes, manual calculations, and CSS software modifications have been completed. Further, this estimated schedule does not include time for administration of long-term transmission study changes as described below.¹⁹

D. Additional Scheduling and Implementation Considerations

Currently, a key initiative of SPP is the development of a new software system for transmission and Integrated Marketplace settlements. The design, coding, and development of the new system is now final, subject to ongoing system testing by SPP and its stakeholders, with the goal of a February 1, 2020 launch date. The delayed effective date of a number of previously-filed Tariff changes are contingent on meeting that February 1, 2020 implementation deadline.²⁰ Moreover, as Mr. Locke explains,²¹ given the substantial personnel and operational requirements of implementing the new settlements system on the current schedule, SPP would face severe manpower and administrative challenges if forced to implement Attachment Z2 refunds and Final Historical Year resettlements prior to February 1, 2020.

¹⁹ See *infra* Section IV.D.

²⁰ See *Sw. Power Pool, Inc.*, 167 FERC ¶ 61,035 (2019) (granting SPP's requests for extensions of the effective dates of numerous Tariff provisions to allow SPP to implement its new settlement system).

²¹ Locke Affidavit ¶ 11.

Additionally, as the reversal of point-to-point revenue reallocations occurs through the refund, and as additional revisions of point-to-point revenue distributions occur through post-Refund Period resettlements, the Transmission Owners' future formula rates will necessarily reflect the revenue changes. For Transmission Owners without formula rates, SPP will implement these effects through its administration of Attachment H. These revenue shifts will alter network and point-to-point rates under the Tariff with a variable lag, depending on the Transmission Owner, of one to three years after each resettlement is applied. The effects of the revenue changes also will be reflected in retail customer rates across the SPP Region through the retail rate-setting mechanisms applicable to each load serving entity. Thus, any planned refund procedures pose implications for both Commission-regulated and state-regulated activities within the SPP Region apart from the direct refund and resettlement activity.

Finally, the Commission should appreciate that the refund and resettlement schedule must allow sufficient time for reprocessing long-term transmission service requests under Attachment Z1 to incorporate the revised CPO amounts and for administering any resulting modifications of transmission service agreements to reflect modified cost allocation. Changes to the terms of SPP's transmission service agreements may require submission of filings with the Commission. SPP estimates that as many as twenty-one Creditable Upgrades may be directly affected by these issues, with indirect effects on the CPOs for an additional twenty-five Creditable Upgrades. SPP also estimates that these effects will result in changes in CPOs for well over two-hundred long-term transmission service reservations, including both point-to-point and network service. It is difficult to estimate with precision the additional time necessary to study and administer these changes, but a minimum of twelve months may be required.

V. REQUEST FOR CONFIDENTIAL TREATMENT

SPP respectfully requests confidential privileged treatment of Attachment 2 to this filing in accordance with section 388.112 of the Commission's regulations²² governing the confidential treatment of commercially-sensitive information. Good cause exists to grant such confidential privileged treatment, as the data provided in Attachment 2 includes customer-specific charge and credit data that SPP customarily treats as confidential from public disclosure. The information contained therein includes materials that SPP deems as commercially sensitive; as such, the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. § 552.

In accordance with the requirements of section 388.112(b)(2) of the Commission's regulations, 18 C.F.R. § 388.112(b)(2), SPP includes a proposed form of protective agreement as Attachment 3 to this filing. The proposed form of protective agreement is based on the Commission's "Model Protective Order," with certain specific changes to account for the fact that it is an agreement (e.g., changing the term "Participant" to "Party" in several places where relevant), removing provisions relevant only in oil pipeline proceedings and proceedings before an administrative law judge (as no such judge has been appointed in this proceeding), and adding language addressing potential legal and equitable remedies in the event of a breach of the agreement.²³ Given the contractual nature of the Protective Agreement and the sensitivity of the information involved, these departures from the Commission's Model Protective Order are appropriate.

²² 18 C.F.R. part 388.

²³ *See, e.g.*, Attachment 3 at para. 21.

Confidential, non-public, and privileged treatment of the information identified in Attachment 2 is fully justified, appropriate, and necessary to protect customer-specific data. Accordingly, the Commission should grant SPP's request to treat this material as confidential privileged information exempt from public disclosure and should place the non-redacted version of Attachment 2 in a non-public file.

VI. DOCUMENTS SUBMITTED WITH THIS FILING

Enclosed with this Refund Report are the following materials:

- | | |
|--------------|--|
| Attachment 1 | Affidavit of Charles J. Locke on Behalf of Southwest Power Pool, Inc. |
| Attachment 2 | Credit Payment Obligations and Revenue Credits During the Refund Period March 2008 - August 2015 (contains CUI//PRIV information) |
| Attachment 3 | Protective Agreement |

VII. CONCLUSION

This Refund Report represents SPP's earnest attempt to comply, as much as possible, with the Commission's directives. However, the shroud of uncertainty associated with the various pending challenges to Attachment Z2, the issues associated with restudy and cost reallocation for already-granted long-term transmission service reservations, the possibility of short-payments when SPP attempts to recover previously distributed revenue credits for the Refund Period, and the lack of finality as to the scope of software and system changes that may be required to reverse and resettle CPO assessments in a manner deemed reasonable by the Commission, does not permit SPP to present a final or ready-to-implement refund proposal at this time. SPP's path forward will be better informed following the Commission's review and response to this Refund Report.

Respectfully submitted,

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Attorneys for Southwest Power Pool, Inc.

June 28, 2019

Attachment 1

Affidavit of Charles J. Locke on Behalf of Southwest Power Pool, Inc.

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

Southwest Power Pool, Inc.

)

Docket No. ER16-1341-003

**AFFIDAVIT OF CHARLES J. LOCKE
ON BEHALF OF
SOUTHWEST POWER POOL, INC.**

1. My name is Charles J. Locke. I am employed by Southwest Power Pool, Inc. ("SPP") as Director, Transmission Policy and Rates. My business address is 201 Worthen Drive, Little Rock, AR 72223. In my current position, I am responsible for assisting SPP's senior management team in addressing ongoing and strategic transmission policy issues and providing support regarding federal and state transmission policy and rate questions. In connection with this role, I conduct rate and other analyses to inform SPP decision-making and administration, support compliance with the SPP Open Access Transmission Tariff ("Tariff") and other governing documents, address stakeholder questions regarding Tariff application, coordinate among SPP departments to address transmission matters, support SPP stakeholder working groups in considering and developing solutions to transmission issues, and represent SPP in various regulatory matters.

2. I earned a Bachelor's Degree in Economics from Southwest Missouri State University and a Master of Arts Degree in Economics from the University of Missouri-Kansas City. Prior to being named Director of Transmission Policy and Rates in August 2017, I served as a Lead Regulatory Analyst at SPP from 2014 until 2017. Before working at SPP, I was employed by Kansas City Power & Light Company for approximately thirty-three years in a number of managerial and analytical positions, primarily in the areas of state and federal regulatory affairs.

3. I am submitting this affidavit to explain the accompanying Refund Report¹ of SPP. The Refund Report was developed under my supervision and is intended to comply with the Federal Energy Regulatory Commission's ("Commission") February 28, 2019 Remand Order² in Docket No. ER16-1341-003. In accordance with the Remand Order, the Refund Report reflects SPP's proposed procedures for resettling both Historical Period³ and subsequent credit payment obligations ("CPO"), as administered by SPP pursuant to Attachment Z2 of the SPP Tariff. As noted below, however, there are several legal and practical difficulties associated with performing such settlements, and SPP's proposed Refund Report relies on several assumptions and interpretations of the Commission's orders, a change to any one of which could cause the need for significant changes to aspects of the refund proposal and the actual refunds and resettlements issued.

4. In order to provide context for the testimony that follows, it is appropriate to begin with the specific compliance directive from the Remand Order. Paragraphs 58 and 59 of the Remand Order require SPP to process refunds of CPO amounts for the Historical Period except for the Final Historical Year,⁴ and to submit a report detailing

¹ Compliance Report of Southwest Power Pool, Inc. Describing Proposed Plan for Implementing Refunds of Historical Amounts Billed Under Attachment Z2 and Request for Privileged Treatment, Docket No. ER16-1341-003 (June 28, 2019) ("Refund Report").

² *Sw. Power Pool, Inc.*, 166 FERC ¶ 61,160 (2019) ("Remand Order").

³ As defined in the accompanying Refund Report, the "Historical Period" is "[t]he operating months used for transmission service settlements extending from March 2008 through August 2016, inclusive. This is the prior period for which invoices for settlements under Attachment Z2 were initially issued in November 2016, with resettlement invoices issued for the same period in November 2017." Refund Report at Section II.

⁴ As defined in the accompanying Refund Report, the "Final Historical Year" is "[t]he operating months used for transmission service settlements extending from September 2015 through August 2016, inclusive." *Id.*

SPP's plan for calculating and resettling such refunds.⁵ Paragraph 59 of the Remand Order further directs SPP to provide information identifying the entities that received and paid CPOs, the amounts so received and paid, and the refunds that each of the entities will receive for the Refund Period. The Remand Order also requires SPP to specify the amounts of CPOs to be owed and to be received prospectively by each entity, under each service agreement in effect during the Historical Period and remaining in effect on the date SPP initially rendered CPO assessments.

5. Although the compliance directive may appear to be straightforward and readily administered, the reality is just the opposite. SPP has provided in its Refund Report all of the requested data and information that currently can be provided based on information that is calculable without actually processing any refunds. However, the data is necessarily incomplete in certain respects, particularly as it concerns prospective disbursements that may ultimately be owed. In other words, even though SPP has provided its proposed Refund Report per Commission mandate, SPP is not at this time able to commence implementing refunds as envisioned by the Refund Report, even if the Commission were to act on the Refund Report.

6. Many factors limit SPP's ability to provide definitive refund calculations at this juncture. In the first place, and as explained in SPP's contemporaneously-filed motion

⁵ The Refund Report refers to the relevant period for which refunds are required as the "Refund Period," which includes "[t]he operating months used for transmission service settlements extending from March 2008 through August 2015, inclusive." *Id.* As noted in the Refund Report, this definition includes certain assumptions, any changes to which could require changes to the entire Refund Report's proposed procedures. *Id.* at Section III, response to Commission data request (a).

for stay,⁶ there are several ongoing proceedings in which elements of SPP's interpretation and implementation of Attachment Z2 are under review. I am also aware that requests for rehearing and/or clarification have been filed concerning the Remand Order itself. The Refund Report is based on the premise that the Commission and courts will not upset any prior Commission rulings relating to Attachment Z2 and that the recently-filed complaints by EDF Renewables, Inc., et al.⁷ and Oklahoma Gas and Electric Company⁸ will be denied. Should this premise be incorrect, the validity of numerous assumptions underlying the Refund Report could be affected, as would, in turn, the calculation of refunds as contemplated in the proposed plan. For example, if by virtue of future Commission or court action, SPP's historical interpretation and/or application of the "but for" test under Attachment Z2 is upset, SPP would be forced, again, to unwind and resettle CPO amounts, both for past periods and current periods. Software and program changes would also be required because SPP's current Attachment Z2 settlements software is premised on SPP's stakeholder-developed impact stacking methodology, which implements the "but for" requirement under Attachment Z2, modifications to which would delay indefinitely SPP's ability to settle CPO assessments fully and finally.

7. Beyond the uncertainty created by the aforementioned pending litigation, the process of calculating Refund Period refunds is far more complicated than the Commission seemingly presumes. At several steps of the refund process, there are

⁶ Motion of Southwest Power Pool, Inc. for Stay of Refund Condition, to Hold Proceedings in Abeyance, and for Initiation of Settlement Procedures, Docket Nos. ER16-1341-003, et al. (June 28, 2019).

⁷ Complaint to Enforce Attachment Z2 of the SPP Tariff of EDF Renewables, Inc., et al., Docket No. EL19-75-000 (May 9, 2019).

⁸ Complaint of Oklahoma Gas and Electric Company, Docket No. EL19-77-000 (May 24, 2019).

implementation challenges involving subjective judgments and assumptions, each of which necessarily builds and is dependent upon earlier judgments and assumptions. These judgments and assumptions are documented in more detail in the Refund Report. Additionally, because the determination of Refund Period refunds directly affects the proper calculation of post-Refund Period and future CPO assessments, the implications of implementing refunds that may later be invalidated or altered could lead to years and years of complicated and contentious attempts to resettle Attachment Z2 charges and credits, even for periods and for service that occurred entirely outside of the Historical Period.

8. Indeed, as discussed below, before SPP can implement the procedures set forth in the accompanying Refund Report, it requires not only the Commission's review and response to the plan, but additional time to evaluate the plan's feasibility given SPP's current systems and software configurations and constraints, the anticipated roll-out of SPP's new settlement system in early 2020, the possibility of shortfalls in recovery of revenue credit payments from recipients of credits associated with the Refund Period, and the need to reevaluate transmission service requests for those long-term reservations that terminate after the end of the Refund Period and the effect such reevaluations have on base plan funding, directly assigned costs, and transmission service agreements.

9. In that regard, in order to determine the degree to which prior period CPO assessments and disbursements must be unwound to meet the Remand Order's refund directive, SPP must modify its Credit Stacking System ("CSS") software. SPP's evaluation of transmission service reservations impacting Creditable Upgrades entails utilization impact stacking—i.e., prioritizing, by degree of impact on Creditable Upgrades, the extent to which new transmission service reservations make use of such upgrades—in order to address the reverse flow analysis for the "but for" test. However, the impacts for long-

term reservations terminating prior to the end of the Refund Period—and perhaps for *any* portion of a long-term reservation term prior to the end of the Refund Period—should not be included in the stack utilized for calculating CPOs on Creditable Upgrades originally constructed for transmission service, because including such impacts would reduce future credit revenues paid to Upgrade Sponsors as if they had received credits from such reservations during the Refund Period, even though they would, in fact, not have received the credits once the refunds are implemented. In other words, stacking the Refund Period impacts on such upgrades for CPO calculation purposes would cause the original sponsoring Transmission Customer to bear a disproportionate share of cost relative to subsequent sponsoring Transmission Customers after implementation of the refund. SPP’s existing CSS software is not designed to recognize and properly account for these long-term reservations in the manner required to render the correct calculations under the Remand Order. SPP must therefore modify the existing CSS software to retain the reverse flow “but for” stacking logic, while removing the Refund Period stacking for CPO calculation for such Creditable Upgrades. Further, to the extent that SPP encounters situations where it, for whatever reason, cannot recover Attachment Z2 revenue credits paid to one or more recipients, further modifications to the stacking process, and further program alterations in the CSS, may need to be designed and developed.

10. The inability to recover from recipients the revenue credits they received that are attributable to the Refund Period is real. SPP recently sent letters to such recipients informing them of the Remand Order’s directives and requesting confirmation that the recipients will return credits received when requested by SPP. A significant percentage of those recipients responded either declining to provide the requested confirmation or disavowing any obligation to return credit payments received from SPP. If even one of

these recipients ultimately refuses to return payments received and SPP is unable to recover such payments on a timely basis, SPP will need to have a process in place to address any shortfalls because of effects on the distribution of net refund amounts. Due to the sequential nature of Attachment Z2 in which prior activity affects later results, any such shortfall in recovery of credits for the Refund Period would affect Upgrade Sponsors' creditable balances, which would require adjustment to account for the amounts actually recovered rather than amounts invoiced. This would create a need to resettle post-Refund Period operating months with the adjusted creditable balances. It also may create a need for further modifications to SPP's CSS software to ensure that Transmission Customers with service approved in different Aggregate Transmission Service Studies ("ATSS") have CPOs determined in a comparable manner. The administrative complications associated with potential shortfall in recovery of credits for the Refund Period would be substantially magnified if such amounts are eventually recovered on a piecemeal basis over an extended period, which could result in iterative resettlement of all operating months subsequent to the Refund Period.

11. Additionally, and as the Commission is well aware,⁹ SPP has devoted considerable time over the past three years on a plan to replace SPP's current transmission and markets settlement systems. These ongoing efforts are being staffed by several of the same subject-matter experts and personnel that will necessarily be part of implementing

⁹ The Commission has, in fact, authorized SPP to defer several compliance obligations and filed Tariff revisions relating, e.g., to the enhancement of SPP's Out-of-Merit Energy process, automation of components of SPP's Revenue Neutrality Uplift process, and other approved Tariff revisions in order to accommodate the implementation of SPP's new transmission and markets settlement systems. *See Sw. Power Pool, Inc.*, 167 FERC ¶ 61,035 (2019) (granting SPP's requests for extensions of the effective dates of numerous Tariff provisions to allow SPP to implement its new settlement system).

SPP's refund plan as set forth in the Refund Report. The design and coding of the new settlements system have been finalized and SPP and its stakeholders are presently in the testing phase, with formal launch expected in the first quarter of 2020. The heavy administrative and system requirements identified by SPP in the Refund Report could divert personnel and resources away from the new settlements system, possibly causing either delay in implementation of numerous pending Tariff refinements that SPP filed and then subsequently sought to postpone (with Commission approval) pending the launch of SPP's new settlements systems¹⁰ or inadequate attention to issues that may arise after implementation of the new settlements system. Therefore, implementation of the refund plan should not occur before the new settlements system has been successfully launched and operated for a period to ensure a successful transition for SPP's Members and customers.

12. Finally, and perhaps most problematic, is the fact that sufficient time must be allowed for reprocessing of ATSS results consistently with effects of refunds and for administration of any resulting changes in transmission service agreements. As SPP initiates the process of unwinding Refund Period CPOs, it must reevaluate the impact factors of transmission service requests that may change due to the elimination of CPOs and revenue credits in the Refund Period, as discussed above. Additionally, the elimination and postponement of pay-offs of Creditable Upgrades by virtue of the Remand Order could result in new CPOs for service requests that were studied after relevant Creditable Upgrades were presumptively paid off, but are now determined not to be paid off by virtue of the refund requirements of the Remand Order. Thus, some transmission service

¹⁰ See *supra* note 9.

reservations that were granted using capacity provided by certain Creditable Upgrades that were considered to be previously paid off may now be subject to CPO assessments for those Creditable Upgrades because, by virtue of the refunds, the sponsors of those upgrades will not be fully compensated at the time previously determined because of having to return credit revenues paid that were attributable to the Refund Period. The new or revised CPOs resulting from these factors would necessitate revisiting prior ATSS cost allocation determinations, with resulting adjustments in base plan funding or direct assignment of costs and revision of the applicable transmission service agreements.

13. This concludes my affidavit.

VERIFICATION

STATE OF ARKANSAS)

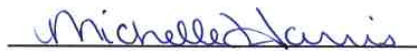
COUNTY OF PULASKI)

I, Charles J. Locke, being duly sworn according to law, state under oath that the matters set forth in the foregoing **AFFIDAVIT OF CHARLES J. LOCKE ON BEHALF OF SOUTHWEST POWER POOL, INC.,** are true and correct to the best of my knowledge, information, and belief.



Charles J. Locke

Subscribed and sworn to before me, a Notary Public, on this 28th day of June 2019.



Notary Public

My Commission expires: 04-01-2028

SEAL



Attachment 2

Credit Payment Obligations and Revenue Credits During the Refund Period March 2008 - August 2015

[REDACTED]

Attachment 3

Protective Agreement

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

Southwest Power Pool, Inc.) Docket No. ER16-1341-000, et al.

FORM OF PROTECTIVE AGREEMENT

This Protective Agreement is entered into this _____ day of _____, _____, by and between Southwest Power Pool, Inc. (“Applicant”) and _____ (“Intervenor”), and shall govern the use of all Privileged Material submitted by Applicant to the Federal Energy Regulatory Commission (“Commission”) in this proceeding. Applicant and Intervenor are sometimes referred to herein individually as a “Party” and jointly as “Parties.”

1. Applicant filed in the above referenced proceeding Privileged Material, as such term is defined herein. Intervenor is a Participant in such proceeding, as the term Participant is defined in 18 C.F.R. 385.102(B), or has filed a motion to intervene or a notice of intervention in such proceeding. The Parties enter into this Protective Agreement to govern the use of Privileged Material produced by Applicant in the above referenced proceeding. Notwithstanding any order terminating such proceeding, this Protective Agreement shall remain in effect unless and until specifically modified or terminated jointly by the Parties or by the Commission or a court of competent jurisdiction.

2. The Commission’s regulations¹ and its policy governing the labelling of controlled unclassified information (CUI),² additionally provide for the designation of Privileged Material. As to this designation, this Protective Agreement provides that a Party may designate as Privileged Material any material which customarily is treated by that Party as commercially sensitive or proprietary or material subject to a legal privilege, which is not otherwise available to the public, and which, if disclosed, would subject that Party or its customers to risk of competitive disadvantage or other business injury.

3. For the purposes of this Protective Agreement, the listed terms are defined as follows:

A. Party(ies): As defined above.

B. Privileged Material:³

¹ Compare 18 C.F.R. § 388.112 with 18 C.F.R. § 388.113.

² Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff, 82 Fed. Reg. 18632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

³ The Commission’s regulations state that “[f]or the purposes of the Commission’s filing requirements, non-CEII subject to an outstanding claim of exemption from disclosure under FOIA will be referred to as privileged material.” 18 C.F.R. § 388.112(a). The regulations

- i. Material (including depositions) provided by a Party in response to discovery requests or filed with the Commission, and that is designated as Privileged Material by such Party;⁴
- ii. Material that is privileged under federal, state, or foreign law, such as work-product privilege, attorney-client privilege, or governmental privilege, and that is designated as Privileged Material by such Party;⁵
- iii. Any information contained in or obtained from such designated material;
- iv. Any other material which is made subject to this Protective Agreement by the Commission, any court, or other body having appropriate authority, or by agreement of the Parties (subject to approval by the relevant authority);
- v. Notes of Privileged Material (memoranda, handwritten notes, or any other form of information (including electronic form) which copies or discloses Privileged Material);⁶ or
- vi. Copies of Privileged Material.
- vii. Privileged Material does not include:
 - a. Any information or document that has been filed with and accepted into the public files of the Commission, or contained in the public files of any other federal or state agency, or any federal or state court, unless the information or document has been determined to be privileged by such agency or court;

further state that “[f]or material filed in proceedings set for trial-type hearing or settlement judge proceedings, a participant’s access to material for which privileged treatment is claimed is governed by the presiding official’s protective order.” 18 C.F.R. § 388.112(b)(2)(v).

⁴ See *infra* P 11 for the procedures governing the labeling of this designation.

⁵ The Commission’s regulations state that “[a] presiding officer may, by order . . . restrict public disclosure of discoverable matter in order to . . . [p]reserve a privilege of a participant. . . .” 18 C.F.R. § 385.410(c)(3). To adjudicate such privileges, the regulations further state that “[i]n the absence of controlling Commission precedent, privileges will be determined in accordance with decisions of the Federal courts with due consideration to the Commission’s need to obtain information necessary to discharge its regulatory responsibilities.” 18 C.F.R. § 385.410(d)(1)(i).

⁶ Notes of Privileged Material are subject to the same restrictions for Privileged Material except as specifically provided in this Protective Order.

- b. Information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Agreement; or
 - c. Any information or document labeled as “Non-Internet Public” by a Party, in accordance with Paragraph 30 of FERC Order No. 630.⁷
- C. Critical Energy/Electric Infrastructure Information (CEII): As defined at 18 C.F.R. §§ 388.113(a), (c).
- D. Non-Disclosure Certificate: The certificate attached to this Protective Agreement, by which Parties granted access to Privileged Material must certify their understanding that such access to such material is provided pursuant to the terms and restrictions of this Protective Agreement, and that such Parties have read the Protective Agreement and agree to be bound by it. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for this proceeding.
- E. Reviewing Representative: A person who has signed a Non-Disclosure Certificate and who is:
 - i. Commission Trial Staff designated as such in this proceeding;
 - ii. An attorney who has made an appearance in this proceeding for a Party;
 - iii. Attorneys, paralegals, and other employees associated for purposes of this case with an attorney who has made an appearance in this proceeding on behalf of a Party;
 - iv. An expert or an employee of an expert retained by a Party for the purpose of advising, preparing for, submitting evidence or testifying in this proceeding;
 - v. A person designated as a Reviewing Representative by order of the Commission; or
 - vi. Employees or other representatives of Parties appearing in this proceeding with significant responsibility for this docket.
- 4. Privileged Material shall be made available under the terms of this Protective Agreement only to Parties and only to their Reviewing Representatives as provided in this Protective Agreement. The contents of Privileged Material or any other form of information that copies or

⁷ FERC Stat. & Reg. ¶ 31,140.

discloses such material shall not be disclosed to anyone other than in accordance with this Protective Agreement and shall be used only in connection with this specific proceeding.

5. All Privileged Material must be maintained in a secure place. Access to those materials must be limited to Reviewing Representatives specifically authorized pursuant to this Protective Agreement.

6. Privileged Material must be handled by each Party and by each Reviewing Representative in accordance with the Non-Disclosure Certificate executed pursuant to Paragraph 9 of this Protective Agreement. Privileged Material shall not be used except as necessary for the conduct of this proceeding, nor shall such material (or its substance) be disclosed in any manner to any person except a Reviewing Representative who is engaged in this proceeding and who needs to know the information in order to carry out that person's responsibilities in this proceeding. Reviewing Representatives may make copies of Privileged Material, but such copies automatically become Privileged Material. Reviewing Representatives may make notes of Privileged Material, which shall be treated as Notes of Privileged Material if they reflect the contents of Privileged Material.

7. If a Reviewing Representative's scope of employment includes any of the activities listed under this Paragraph 7, such Reviewing Representative may not use information contained in any Privileged Material obtained in this proceeding for a commercial purpose (e.g. to give a Participant or competitor of any Participant in this proceeding a commercial advantage):

- A. Energy marketing;
- B. Direct supervision of any employee or employees whose duties include energy marketing; or
- C. The provision of consulting services to any person whose duties include energy marketing.

8. In the event that a Party wishes to designate a person not described in Paragraph 3.E above as a Reviewing Representative, the Party must seek agreement from the Party providing the Privileged Material. If an agreement is reached, the designee shall be a Reviewing Representative pursuant to Paragraph 3.E of this Protective Agreement with respect to those materials. If no agreement is reached, the matter must be submitted to the Commission for resolution.

9. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to Privileged Material pursuant to this Protective Agreement until three business days after that Reviewing Representative first has executed and served a Non-Disclosure Certificate.⁸ However, if an attorney qualified as a Reviewing

⁸ During this three-day period, a Party may file an objection with the Commission contesting that an individual qualifies as a Reviewing Representative, and the individual shall not receive access to the Privileged Material until resolution of the dispute.

Representative has executed a Non-Disclosure Certificate, any participating paralegal, secretarial and clerical personnel under the attorney's instruction, supervision or control need not do so. Attorneys designated as Reviewing Representatives are responsible for ensuring that persons under their supervision or control comply with this Protective Agreement, and must take all reasonable precautions to ensure that Privileged Material is not disclosed to unauthorized persons. All executed Non-Disclosure Certificates must be served on all Participants on the official service list maintained by the Secretary of the Commission for the proceeding.

10. Any Reviewing Representative may disclose Privileged Material to any other Reviewing Representative as long as both Reviewing Representatives have executed a Non-Disclosure Certificate. In the event any Reviewing Representative to whom Privileged Material is disclosed ceases to participate in this proceeding, or becomes employed or retained for a position that renders him or her ineligible to be a Reviewing Representative under Paragraph 3.E of this Protective Agreement, access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every person who has executed a Non-Disclosure Certificate shall continue to be bound by the provisions of this Protective Agreement and the Non-Disclosure Certificate for as long as the Protective Agreement is in effect.⁹

11. All Privileged Material in this proceeding filed with the Commission or submitted to any Commission personnel must comply with the Commission's *Notice of Document Labelling Guidance for Documents Submitted to or Filed with the Commission or Commission Staff*.¹⁰ Consistent with those requirements:

- A. Documents that contain Privileged Material must include a top center header on each page of the document with the following text: CUI//PRIV. Any corresponding electronic files must also include this text in the file name.
- B. The specific content on each page of the document that constitutes Privileged Material must also be clearly identified. For example, lines or individual words or numbers that include Privileged Material shall be prefaced and end with "BEGIN CUI//PRIV" and "END CUI//PRIV".

12. The Secretary shall place any Privileged Material filed with the Commission in a non-public file. By placing such documents in a non-public file, the Commission is not making a determination concerning any claim of privilege. The Commission retains the right to make determinations with regard to any privilege claim, as well as the discretion to release information necessary to carry out its jurisdictional responsibilities. For documents submitted to Commission Trial Staff, the notification procedures specified at 18 C.F.R. § 388.112 must be followed before making public any Privileged Material.

13. If any Party desires to include, utilize, or refer to Privileged Material or information derived from Privileged Material in testimony or other exhibits during any hearing in this

⁹ See *infra* P 21.

¹⁰ 82 Fed. Reg. 18632 (Apr. 20, 2017) (issued by Commission Apr. 14, 2017).

proceeding in a manner that might require disclosure of such materials to persons other than Reviewing Representatives, that Party first must notify both counsel for the disclosing Party and the Commission, and identify all such Privileged Material. Thereafter, use of such Privileged Material will be governed by procedures determined by the Commission.

14. Nothing in this Protective Agreement shall be construed as precluding any Party from objecting to the production or use of Privileged Material on any appropriate ground.

15. Nothing in this Protective Agreement shall preclude any Party from requesting the Commission or any other body having appropriate authority to find this Protective Agreement should not apply to all or any materials previously designated Privileged Material pursuant to this Protective Agreement. The Commission or any other body having appropriate authority may alter or amend this Protective Agreement as circumstances warrant at any time during the course of this proceeding.

16. Each Party governed by this Protective Agreement has the right to seek changes in it as appropriate from the Commission or any other body having appropriate authority.

17. Subject to Paragraph 18, the Commission shall resolve any disputes arising under this Protective Agreement pertaining to Privileged Material according to the following procedures. Prior to presenting any such dispute to the Commission, the Parties to the dispute shall employ good faith best efforts to resolve it.

- A. Any Party that contests the designation of material as Privileged Material shall notify the Party that provided the Privileged Material by specifying in writing the material for which the designation is contested.
- B. In any challenge to the designation of material as Privileged Material, the burden of proof shall be on the Party seeking protection. If the Commission finds that the material at issue is not entitled to the designation, the procedures of Paragraph 18 shall apply.

18. The designator will have five (5) days in which to respond to any pleading requesting disclosure of Privileged Material. Should the Commission determine that the information should be made public, the Commission will provide notice to the designator no less than five (5) days prior to the date on which the material will become public. This Protective Agreement shall automatically cease to apply to such material on the sixth (6th) calendar day after the notification is made unless the designator files a motion with the Commission with supporting affidavits, demonstrating why the material should continue to be privileged. Should such a motion be filed, the material will remain confidential until such time as the interlocutory appeal or certified question has been addressed by the Motions Commissioner or Commission, as provided in the Commission's regulations, 18 C.F.R. §§ 385.714, .715. No Party waives its rights to seek additional administrative or judicial remedies after a decision regarding Privileged Material or the Commission's denial of any appeal thereof or determination in response to any certified question. The provisions of 18 C.F.R. §§ 388.112 and 388.113 shall apply to any requests under the Freedom of Information Act (5 U.S.C. § 552) for Privileged Material in the files of the Commission.

19. Privileged Material shall remain available to Parties until the later of 1) the date an order terminating this proceeding no longer is subject to judicial review, or 2) the date any other Commission proceeding relating to the Privileged Material is concluded and no longer subject to judicial review. After this time, the Party that produced the Privileged Material may request (in writing) that all other Parties return or destroy the Privileged Material. This request must be satisfied within fifteen (15) days of the date the request is made. However, copies of filings, official transcripts and exhibits in this proceeding containing Privileged Material, or Notes of Privileged Material, may be retained if they are maintained in accordance with Paragraph 5 of this Protective Agreement. If requested, each Party also must submit to the Party making the request an affidavit stating that to the best of its knowledge it has satisfied the request to return or destroy the Privileged Material. To the extent Privileged Material is not returned or destroyed, it shall remain subject to this Protective Agreement.

20. Regardless of any order terminating this proceeding, this Protective Agreement shall remain in effect until specifically modified or terminated by the Commission.

21. Neither Party waives the right to pursue any other legal or equitable remedies that may be available in the event of actual or anticipated disclosure of Privileged Material, including but not limited to indemnification for unwarranted release of Privileged Material and injunctive relief.

22. Any violation of this Protective Agreement and of any Non-Disclosure Certificate executed hereunder shall constitute a violation of an order of the Commission.

23. IN WITNESS WHEREOF, the Parties each have caused this Protective Agreement to be signed by their respective duly authorized representatives as of the date first set forth above.

By: _____

By: _____

Name: _____

Name: _____

Title: _____

Title: _____

Representing Applicant

Representing Intervenor

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

Southwest Power Pool, Inc.) Docket No. ER16-1341-000, et al.

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Privileged Material is provided to me pursuant to the terms and restrictions of the Protective Agreement dated _____, _____, by and between Southwest Power Pool, Inc. and _____ (“Intervenor”) in this proceeding, that I have been given a copy of and have read the Protective Agreement, and that I agree to be bound by it. I understand that the contents of Privileged Material, any notes or other memoranda, or any other form of information that copies or discloses such materials, shall not be disclosed to anyone other than in accordance with the Protective Agreement. I acknowledge that a violation of this certificate constitutes a violation of an order of the Federal Energy Regulatory Commission and may subject me and/or Intervenor to the imposition of legal or equitable remedies.

By: _____

Printed Name: _____

Title: _____

Representing: _____

Date: _____

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 28th day of June 2019.

/s/ Jeffrey G. DiSciullo
Jeffrey G. DiSciullo
WRIGHT & TALISMAN, P.C.
1200 G Street, N.W., Suite 600
Washington, DC 20005-3898

Attorney for
Southwest Power Pool, Inc.