

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.<sup>1</sup> On July 19, 2018, the Commission filed an unopposed motion for voluntary remand of the Waiver Orders<sup>2</sup> so that it may consider the implications of the D.C. Circuit's decision in *Old Dominion Electric Cooperative v. FERC*.<sup>3</sup> 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)."<sup>4</sup> On July 31, 2018, the D.C. Circuit granted the Voluntary Remand Motion.<sup>5</sup> On August 6, 2018, the Commission afforded parties the opportunity

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<sup>1</sup> *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".

<sup>2</sup> *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).

<sup>3</sup> 892 F.3d 1223 (D.C. Cir. 2018) (*Old Dominion*).

<sup>4</sup> Voluntary Remand Motion at 2.

<sup>5</sup> *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.<sup>6</sup>

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)<sup>7</sup> and lists any such identified Service Upgrades in an Aggregate Facilities Study report. SPP directly assigns the costs of Service Upgrades to the transmission customer whose transmission service request gave rise to the network upgrade, which later may be base plan funded (i.e., included in and recovered through rolled-in transmission rates charged to transmission customers) if the upgrades meet the base plan funding criteria in the Tariff. Under Attachment V (Generator Interconnection Procedures) of the Tariff, SPP studies generator interconnection requests to determine whether network upgrades are required to accommodate the requests and directly assigns network upgrade costs to interconnection customers. Under Attachment O (Transmission Planning Process) of the Tariff, SPP studies a Sponsored Upgrade<sup>8</sup> 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

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<sup>6</sup> *Federal Register*, 83 Fed. Reg. 40,033 (2018) (August 2018 Notice).

<sup>7</sup> 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).

<sup>8</sup> 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).<sup>9</sup> 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.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup> In 2013, SPP again revised its Tariff to refine the

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<sup>9</sup> 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.

<sup>10</sup> 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.

<sup>11</sup> *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).

<sup>12</sup> *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.<sup>13</sup> However, SPP's implementation of revenue crediting under Attachment Z2 was delayed until 2016 due to a variety of circumstances.

**A. July 2016 Waiver Order**

6. On April 1, 2016, SPP filed a petition requesting waiver of section I.7.1 of the Tariff<sup>14</sup> 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.<sup>15</sup> SPP explained that, because of delays in implementing computer software, it was unable to list certain Creditable Upgrades in Aggregate Facilities Study<sup>16</sup> 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.<sup>17</sup> In support of its decision, the Commission

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<sup>13</sup> *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).

<sup>14</sup> 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.

<sup>15</sup> 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.

<sup>16</sup> SPP's Aggregate Facilities Study report provides the results of SPP's Aggregate Transmission Service Study. SPP Tariff, section I.1 (Definitions).

<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

## **B. Rehearing Order**

8. Several parties filed requests for rehearing of the July 2016 Waiver Order, which the Commission denied.<sup>20</sup> 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.<sup>21</sup> The parties argued that this provision was part of the filed rate, and therefore, could not be waived consistent with the filed rate doctrine.<sup>22</sup> 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.<sup>23</sup> The

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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.

<sup>18</sup> *Id.* P 56.

<sup>19</sup> *Id.*

<sup>20</sup> Rehearing Order, 161 FERC ¶ 61,144.

<sup>21</sup> *Id.* P 29.

<sup>22</sup> *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)).

<sup>23</sup> 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.”<sup>24</sup>

**C. Old Dominion**

10. On June 15, 2018, the D.C. Circuit issued a decision in *Old Dominion*.<sup>25</sup> 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.<sup>26</sup>

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.”<sup>27</sup> 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.<sup>28</sup>

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

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<sup>24</sup> *Id.* P 30.

<sup>25</sup> *Old Dominion*, 892 F.3d 1223.

<sup>26</sup> *Old Dominion Elec. Coop.*, 151 FERC ¶ 61,207.

<sup>27</sup> *Old Dominion*, 892 F.3d at 1231.

<sup>28</sup> *Id.* at 1232.

soon as practical” a “retroactive waiver”<sup>29</sup> of the rate cap to compensate those generation capacity resources whose costs for electricity generation had exceeded the tariff’s rate cap.<sup>30</sup> 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.<sup>31</sup> 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.”<sup>32</sup> 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.<sup>33</sup>

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<sup>29</sup> 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.

<sup>30</sup> *Id.*

<sup>31</sup> *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”).

<sup>32</sup> *Old Dominion*, 892 F.3d at 1231-32.

<sup>33</sup> *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)." <sup>34</sup> In the August 2018 Notice, the Commission provided the parties until August 31, 2018 to file briefs on the matter. <sup>35</sup>

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. <sup>36</sup> On August 31, 2019, Midwest Energy, Inc. (Midwest Energy) filed a motion to intervene out of time <sup>37</sup> and brief, and Old Dominion filed a motion to intervene out of time and statement

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<sup>34</sup> 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.*

<sup>35</sup> 83 Fed. Reg. 40,033 (2018).

<sup>36</sup> 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.

<sup>37</sup> 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.<sup>38</sup> 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.<sup>39</sup> 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.<sup>40</sup> 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."<sup>41</sup> 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

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<sup>38</sup> 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.

<sup>39</sup> NextEra Brief at 16-17; SPP Brief at 20; EDF Brief at 5.

<sup>40</sup> SPP Brief at 17.

<sup>41</sup> OG&E Brief at 4.

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

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.<sup>44</sup> NextEra explains that Xcel was (and continues to be) a member of the Regional Tariff Working Group in SPP.<sup>45</sup> 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.<sup>46</sup> SPP asserts that Xcel admits that it had actual notice.<sup>47</sup>

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.<sup>48</sup> EDF asserts that the PJM tariff contained an offer price cap that explicitly precluded the type of surcharge requested in *Old Dominion*.<sup>49</sup> EDF and NextEra argue that *Old Dominion* is distinguishable from the Waiver Orders because the Tariff has

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<sup>42</sup> SPP Brief at 17, 19.

<sup>43</sup> NextEra Brief at 15.

<sup>44</sup> SPP Brief at 20-21; NextEra Brief at 16-17; OG&E Brief at 4-5.

<sup>45</sup> NextEra Brief at 16.

<sup>46</sup> *Id.* at 15.

<sup>47</sup> 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.”)).

<sup>48</sup> NextEra Brief at 14-15; EDF Brief at 5.

<sup>49</sup> EDF Brief at 4-5.

explicitly provided for revenue crediting in Attachment Z2 since at least 2008.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> Similarly, EDF contends that the Commission's grant of the waiver did not make an exception to the filed rate doctrine

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<sup>50</sup> NextEra Brief at 14-15; EDF Brief at 5.

<sup>51</sup> NextEra Brief at 15, 17.

<sup>52</sup> SPP Brief at 14.

<sup>53</sup> *Id.* at 14-15.

<sup>54</sup> EDF Brief at 6.

<sup>55</sup> *Id.* at 6-7.

<sup>56</sup> 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.<sup>57</sup>

**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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> 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.”<sup>62</sup>

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).<sup>63</sup> SPP agrees with

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<sup>57</sup> EDF Brief at 7.

<sup>58</sup> SPP Brief at 22; NextEra Brief at 17.

<sup>59</sup> SPP Brief at 23; NextEra Brief at 18.

<sup>60</sup> NextEra Brief at 18.

<sup>61</sup> *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)).

<sup>62</sup> 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”)).

<sup>63</sup> *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."<sup>64</sup> 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.<sup>65</sup> 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*.<sup>66</sup> 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.<sup>67</sup>

#### 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.<sup>68</sup> Similarly, OG&E contends that Attachment Z2, as effectuated by the Waiver Orders, is consistent with Order No. 1000<sup>69</sup> 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

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<sup>64</sup> *Id.* at 23-24.

<sup>65</sup> *Id.* at 24.

<sup>66</sup> 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*).

<sup>67</sup> SPP Brief at 24-25.

<sup>68</sup> EDF Brief at 8.

<sup>69</sup> *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.<sup>70</sup> 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*<sup>71</sup> 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.<sup>72</sup>

**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.<sup>73</sup> Both entities

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<sup>70</sup> EDF Brief at 8.

<sup>71</sup> *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).

<sup>72</sup> OG&E Brief at 6.

<sup>73</sup> 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.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup> 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.<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> 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

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<sup>74</sup> SPP Brief at 29-30; NextEra Brief at 22.

<sup>75</sup> NextEra Brief at 20.

<sup>76</sup> SPP Brief at 27-28.

<sup>77</sup> *Id.* at 27.

<sup>78</sup> *Id.* at 27, 29.

<sup>79</sup> *Id.* at 27-29.

<sup>80</sup> *Id.* at 29.

assessments, subject to ‘a reasonable payment plan [being] accepted by the Commission and greater information about the impacts to customers.’”<sup>81</sup>

**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.<sup>82</sup> 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.<sup>83</sup>

**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.<sup>84</sup>

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.<sup>85</sup>

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<sup>81</sup> *Id.* at 30 (citing AEP/Xcel Aug. 8, 2016 Rehearing Request at 6).

<sup>82</sup> *Id.* at 34-35.

<sup>83</sup> *Id.* at 35.

<sup>84</sup> NextEra Brief at 22.

<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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.<sup>88</sup>

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.<sup>89</sup> 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.”<sup>90</sup> EDF agrees that SPP can implement

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<sup>86</sup> NextEra Brief at 18-20.

<sup>87</sup> SPP Brief at 26-27.

<sup>88</sup> OG&E Brief at 4-5.

<sup>89</sup> SPP Brief at 32-33.

<sup>90</sup> *Id.* at 33.

Attachment Z2 without seeking a waiver for section I.7.1.<sup>91</sup> 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.<sup>92</sup>

**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.<sup>93</sup> 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.<sup>94</sup> 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.<sup>95</sup> 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.<sup>96</sup> 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

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<sup>91</sup> EDF Brief at 9.

<sup>92</sup> *Id.* at 11.

<sup>93</sup> KEPCo Brief at 7, 13 (citing *Seminole v. Fla. Light & Power*, 139 FERC ¶ 61,254).

<sup>94</sup> Golden Spread Brief at 8.

<sup>95</sup> Xcel Brief at 19.

<sup>96</sup> Golden Spread Brief at 9.

alleges that in these cases, CAISO sought a waiver before the filed rate was violated.<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup>

**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.<sup>100</sup> 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.”<sup>101</sup> 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.<sup>102</sup>

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

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

<sup>98</sup> 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)).

<sup>99</sup> *Id.* at 14.

<sup>100</sup> AEP Brief at 3-4; KEPCo Brief at 7; Xcel Brief at 18-19.

<sup>101</sup> AEP Brief at 4 (citing *Old Dominion*, 892 F.3d at 1231); Golden Spread Brief at 14.

<sup>102</sup> KEPCo Brief at 18.

factors change over time.<sup>103</sup> Additionally, Xcel asserts that no contractual agreement exists whereby it consented to retroactive Attachment Z2 charges.<sup>104</sup> 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.<sup>105</sup> 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.<sup>106</sup> 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.<sup>107</sup>

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.<sup>108</sup> 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.<sup>109</sup> Similarly, Golden Spread states that the court, in *Old Dominion*, found that extraneous materials cannot supplant the filing and notice provisions of the FPA,<sup>110</sup> 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.<sup>111</sup> 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

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<sup>103</sup> *Id.* at 16-17; Xcel Brief at 21; Golden Spread Brief at 10.

<sup>104</sup> Xcel Brief at 22.

<sup>105</sup> *Id.*; AEP Brief at 4; KEPCo Brief at 19.

<sup>106</sup> Xcel Brief at 22.

<sup>107</sup> *Id.* at 23.

<sup>108</sup> *Id.* at 22, 24; AEP Brief at 4; KEPCo Brief at 19.

<sup>109</sup> KEPCo Brief at 19 (citing *Old Dominion*, 892 F.3d at 1232).

<sup>110</sup> Golden Spread Brief at 12 (citing *Old Dominion*, 892 F.3d at 1232).

<sup>111</sup> *Id.* at 11.

incorrect, and that the notation in the reports does not provide adequate notice.<sup>112</sup> 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.<sup>113</sup>

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.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup>

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.<sup>117</sup> 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.<sup>118</sup> 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.

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<sup>112</sup> Xcel Brief at 24; KEPCo Brief at 19.

<sup>113</sup> Xcel Brief at 24-25 (citing *West Deptford*, 766 F.3d 10).

<sup>114</sup> Golden Spread Brief at 7, 13.

<sup>115</sup> AEP Brief at 5; Golden Spread Brief at 7-8, 10.

<sup>116</sup> AEP Brief at 5-6.

<sup>117</sup> Golden Spread Brief at 13.

<sup>118</sup> 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.<sup>119</sup>

### 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.<sup>120</sup> 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.<sup>121</sup>

### 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.<sup>122</sup> 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.<sup>123</sup> 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.<sup>124</sup> Xcel states that, nevertheless, in the Waiver Orders the Commission "found no undesirable consequences despite the fact that greater

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<sup>119</sup> AEP Brief at 4.

<sup>120</sup> KEPCo Brief at 10-11.

<sup>121</sup> *Id.* at 28.

<sup>122</sup> Xcel Brief at 30-31.

<sup>123</sup> *Id.* at 30.

<sup>124</sup> *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.<sup>125</sup> 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.<sup>126</sup>

**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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup> 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.<sup>130</sup> 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.<sup>131</sup> AEP, Golden Spread, KEPCo,

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<sup>125</sup> *Id.* at 33.

<sup>126</sup> *Id.* at 13-14.

<sup>127</sup> AEP Brief at 5-6.

<sup>128</sup> Xcel Brief at 14.

<sup>129</sup> Golden Spread Brief at 7.

<sup>130</sup> AEP Brief at 5-6.

<sup>131</sup> 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.<sup>132</sup>

### **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.<sup>133</sup> 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

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<sup>132</sup> AEP Brief at 4; Golden Spread Brief at 7-8; KEPCo Brief at 23-24; Xcel Brief at 20.

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

period of 2008-2016).<sup>134</sup> 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.”<sup>135</sup> 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.”<sup>136</sup> 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.<sup>137</sup> 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.”<sup>138</sup> 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.<sup>139</sup>

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<sup>134</sup> See *supra* n.14.

<sup>135</sup> 16 U.S.C. § 824d(c) (2012).

<sup>136</sup> *Id.* § 824d(d).

<sup>137</sup> *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)).

<sup>138</sup> *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).

<sup>139</sup> 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.<sup>140</sup> 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.”<sup>141</sup> 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.<sup>142</sup> 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.<sup>143</sup> 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,<sup>144</sup> without evidence that SPP estimated the size of any such payment

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<sup>140</sup> SPP Tariff, section I.7.1.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> SPP Brief at 26.

<sup>144</sup> 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,<sup>145</sup> 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.<sup>146</sup> 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,"<sup>147</sup> courts have found that, where a rate change has a retroactive effect, the filed rate doctrine and rule against retroactive ratemaking can be

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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.

<sup>145</sup> SPP Brief at 33.

<sup>146</sup> 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.

<sup>147</sup> See *Old Dominion*, 892 F.3d at 1230.

satisfied if customers had adequate notice of the proposed change.<sup>148</sup> 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;<sup>149</sup> rather, in *Old Dominion*, the court found adequate notice lacking because the new rate was not on file with the Commission.<sup>150</sup>

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.<sup>151</sup>

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

<sup>149</sup> SPP Brief at 19.

<sup>150</sup> See *Old Dominion*, 892 F.3d at 1232.

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

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

54. We find SPP's reliance on cases such as *Consolidated Edison* and *Cal. Pub. Util. Comm'n* to be misplaced, as these cases do not support SPP's assertion that it provided adequate notice to transmission service customers on the potential for retroactive credit payment obligations beyond the one-year billing limitation imposed by section I.7.1 of the Tariff. SPP cites to these cases for the proposition that customers are on adequate notice when parties are on actual notice.<sup>152</sup> However, the cases to which SPP cites pertain to findings of actual notice where there was prior agreement between parties.<sup>153</sup> or the potential for a rate to be overturned on appeal and thus changed retroactively.<sup>154</sup> 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.<sup>155</sup> 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

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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).

<sup>152</sup> 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).

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

<sup>154</sup> *Pub. Utils. Comm'n of Cal.*, 988 F.2d at 165 n.10.

<sup>155</sup> See *Old Dominion*, 892 F.3d at 1230.

grounds and whether the Commission properly applied the four-part waiver criteria).<sup>156</sup> 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.<sup>157</sup> Even assuming that Xcel failed to meet the intervention requirements under Rule 214 of the Commission's Rules of Practice and Procedure,<sup>158</sup> 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.<sup>159</sup>

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.<sup>160</sup> 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.<sup>161</sup>

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

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<sup>156</sup> 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.

<sup>157</sup> See SPP Brief at 34-35.

<sup>158</sup> 18 C.F.R. § 385.214 (2018).

<sup>159</sup> See *id.* 18 C.F.R. § 385.211(a)(3) (2018).

<sup>160</sup> See, e.g., *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354 (2017).

<sup>161</sup> 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.<sup>162</sup> 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.

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

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

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

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket No. ER16-1341-003

(Issued February 28, 2019)

LaFLEUR, Commissioner, *concurring*:

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

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

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

For these reasons, I respectfully concur.

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Cheryl A. LaFleur  
Commissioner

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Southwest Power Pool, Inc.

Docket No. ER16-1341-003

(Issued February 28, 2019)

GLICK, Commissioner, *concurring*:

1. Although I join today's order, I recognize that the result is wholly inequitable. As the Commission explains, SPP's tariff created a mechanism whereby an entity that pays for certain types of transmission upgrades may receive revenue credits from transmission customers that would not have been able to take transmission service but for those facilities.<sup>1</sup> 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).<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

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<sup>1</sup> *Southwest Power Pool, Inc.*, 166 FERC ¶ 61,160, at P 4 (2019) (Order).

<sup>2</sup> *Id.* at P 6.

<sup>3</sup> *Id.* at PP 47-49.

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

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

3. I appreciate that the complexity of the crediting and billing practices in many organized markets can prove more difficult in practice than in theory. But, as today's order illustrates, the failure to timely implement those practices, or take other remedial action,<sup>5</sup> 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.<sup>6</sup> A safety valve of that type could go a long way toward avoiding a repeat of the unfortunate outcome here.

For these reasons, I respectfully concur.

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Richard Glick  
Commissioner

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

<sup>5</sup> 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).

<sup>6</sup> See NYISO Market Administration and Control Area Services Tariff § 7.4; Order, 166 FERC ¶ 61,160 at P 53 n.151.