

170 FERC ¶ 61,126
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

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| Southwest Power Pool, Inc. | Docket Nos. ER16-1341-003 ER16-1341-004 |
| Kansas Electric Power Cooperative, Inc. v. Southwest Power Pool, Inc. | EL17-21-001 |
| Xcel Energy Services Inc. v. Southwest Power Pool, Inc. | EL18-9-001 |
| Xcel Energy Services Inc. v. Southwest Power Pool, Inc. | EL19-75-000 |
| EDF Renewables, Inc. Enel Green Power North America, Inc. NextEra Energy Resources, LLC Southern Power Company v. Southwest Power Pool, Inc. | EL19-77-000 |
| Oklahoma Gas & Electric Company v. Southwest Power Pool, Inc. | ER18-1702-002 (not consolidated) |

ORDER DENYING MOTION

(Issued February 20, 2020)

1. On June 28, 2019, pursuant to Rule 212 of the Commission's Rules of Practice and Procedure,¹ Southwest Power Pool, Inc. (SPP) filed a motion for stay of the refund directive in the Commission's February 28, 2019 order in Docket No. ER16-1341-003.² In addition, pursuant to Rules 203, 212, and 603(c) of the Commission's Rules of Practice and Procedure,³ SPP requests that the Commission establish settlement judge procedures and hold the above-referenced proceedings in abeyance.⁴ As discussed below, we deny SPP's Motion.

I. Background

2. The Commission set forth the factual background for this order in detail in the Remand Order,⁵ and we will not repeat it in full here. In brief, on July 7, 2016, the Commission granted SPP's petition for waiver to allow SPP to implement the Attachment Z2 revenue crediting process⁶ 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 Section I.7.1 of SPP's Open Access Transmission Tariff (Tariff).⁷ On February 28,

¹ 18 C.F.R. § 385.212 (2019).

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

³ 18 C.F.R. §§ 385.203, 385.212, 385.603(c).

⁴ We refer to SPP's requests for stay, to hold proceedings in abeyance, and to establish settlement judge procedures collectively as the "Motion."

⁵ *See* Remand Order, 166 FERC ¶ 61,160 at PP 3-14.

⁶ Attachment Z2 (Revenue Crediting for Upgrades) provides that transmission customers, generator interconnection customers, and entities that request a sponsored upgrade may receive revenue credits for network upgrades whose costs have been directly assigned to them (Creditable Upgrades). SPP Tariff, Attachment Z2. The revenue credits provided to a customer that has been directly assigned network upgrade costs are funded by and recoverable from transmission customers taking new transmission service that could not have been provided "but for" the Creditable Upgrade, in the form of credit payment obligations. SPP collects credit payment obligations and disburses revenue credits until the amount owed to the transmission customer, generator interconnection customer, or upgrade sponsor that was directly assigned the costs of the Creditable Upgrade is zero.

⁷ *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,020 (2016) (July 2016 Waiver Order), *reh'g denied*, 161 FERC ¶ 61,144 (2017) (Waiver Rehearing Order) (together, Waiver

2019, the Commission issued the Remand Order, which reversed the Commission's decision in the Waiver Orders to grant SPP's waiver request. In the Remand Order, the Commission directed SPP to provide refunds of amounts collected from transmission service customers for Attachment Z2 credit payment obligations from the historical period, with interest calculated pursuant to 18 C.F.R. § 35.19a (2019). In addition, the Commission required SPP to file a plan within 120 days detailing how it proposes to make the refunds required by the Remand Order. The Commission stated that it would provide an opportunity for comment on the plan. Finally, the Commission directed SPP not to provide any refunds prior to the issuance of a further Commission order directing refunds.⁸ On June 28, 2019, SPP filed the refund plan required by the Remand Order.⁹ In an order being issued concurrently with this order, we deny rehearing of the Remand Order.¹⁰

II. Motion

3. SPP requests a partial stay of the Remand Order, which reversed the Commission's previous determinations in the Waiver Orders and denied SPP's request for waiver of certain provisions of its Tariff to facilitate SPP's delayed implementation of Attachment Z2.¹¹ Specifically, SPP seeks stay of the refund directive in the Remand Order for the historical period.¹² SPP additionally requests that the Commission establish settlement judge procedures to consider the numerous overlapping and interdependent issues pending in the captioned proceedings, and to hold all of the referenced proceedings in abeyance until such time as a settlement is reached or an impasse is declared.¹³

4. SPP argues that granting the motion for partial stay is appropriate because: (1) it will facilitate the possibility of a comprehensive settlement addressing issues arising in all Attachment Z2 proceedings; (2) Attachment Z2 crediting is sequential (i.e., current

Orders), *appeal docketed, Xcel Energy Servs. Inc. v. FERC*, No. 18-1005 (filed D.C. Cir. Jan. 5, 2018).

⁸ Remand Order, 166 FERC ¶ 61,160 at P 43.

⁹ This order does not address the merits of the refund plan.

¹⁰ *Sw. Power Pool, Inc.*, 170 FERC ¶ 61,125 (2020).

¹¹ SPP Motion at 2.

¹² *Id.* at 3-4.

¹³ *Id.* at 2-3.

and future creditable balances and credit payment obligations are based on what has already been paid out), so refunds implemented by SPP will involve unwinding and recalculating Attachment Z2 settlements for the period of time after refunds occur; therefore, a grant of partial stay would allow SPP to only resettle once, after all the litigation uncertainties are resolved; (3) modification of the software to address recalculation of payments and credits may take considerable time and effort; (4) the precise import of the Commission's refund directive, and whether SPP can comply with it, remains unclear, which SPP states virtually ensures that any refund plan will be subject to challenges and further litigation; (5) unwinding any portion of the historical period charges and credits impacts the aggregate transmission system study processes that have occurred since the time of the Commission's July 2016 Waiver Order, and reversing credit payments means that such studies will need to be rerun to reassess impacts and shift credit payment obligation responsibilities; (6) SPP is faced with numerous logistical, administrative, and legal impediments;¹⁴ and (7) there are uncertainties associated with the ability of entities who received Attachment Z2 revenues to provide those payments in lump sums, with interest.¹⁵

5. SPP argues that its request satisfies the factors that the Commission considers in determining whether to grant a stay. First, SPP asserts that SPP, its members, customers, and Attachment Z2 credit payers and recipients will suffer irreparable injury unless the Remand Order's refund directive is stayed.¹⁶ SPP states that Attachment Z2 crediting is sequential, so refunds implemented by SPP will involve unwinding and recalculating Attachment Z2 settlements for the period of time after refunds occur.¹⁷ SPP contends that compliance with the Remand Order will yield an approach for refunds and resettlements that could be altered and undermined by future action by the Commission and courts, and unless stayed, the Remand Order sets in motion the potential for a

¹⁴ For example, SPP states that some upgrade sponsors have failed to respond to SPP letters requesting confirmation that they will return the credit revenues received or have disavowed obligations to return credit payments. SPP also observes that some credit payment recipients are generation developers who may have sold their projects or are non-SPP members who sponsored Creditable Upgrades but do not have contractual relationships with SPP or are non-jurisdictional entities. SPP states that in these cases, it will likely need to initiate litigation proceedings to seek recovery. *Id.* at 17-18 (citing Locke Aff. ¶ 10).

¹⁵ *Id.* at 14-20. For example, SPP states that generation developers may have already deployed the revenues they received on other investments. *Id.* at 19.

¹⁶ *Id.* at 21.

¹⁷ *Id.* at 15-16, 21-22.

succession of refunds and resettlements. Therefore, SPP avers that a grant of partial stay would allow SPP to only resettle once, after all the litigation uncertainties are resolved, and will mitigate the irreparable harm that would follow from having to conduct multiple rounds of recalculations, collections, and payments.¹⁸

6. Second, SPP states that granting the stay will not harm third parties.¹⁹ SPP also states that, should the Commission ultimately deny 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 had SPP provided refunds today. SPP argues that a delay in receiving refunds is not a countervailing irreparable harm warranting rejection of an otherwise meritorious stay request, particularly in light of the requirement that refunds be subject to interest.

7. Third, SPP contends that the requested stay is in the public interest because the requirement to unwind and resettle the credit payment obligation assessments may ultimately be found to be unnecessary or may be significantly affected by other ongoing legal proceedings surrounding Attachment Z2 implementation.²⁰ SPP states that the public interest is not served by a process that may entail multiple resettlements and, until all Attachment Z2-related litigation is resolved, calculations for the refunds are necessarily inconclusive and subject to modification.²¹ SPP notes that these issues affect all transmission customers, not just those using Creditable Upgrades. In addition, SPP asserts that multiple resettlements pose implications on SPP's aggregate transmission service study process.²² SPP states that the Commission has granted stays in the past to facilitate the completion of rehearing, appeal, and/or settlement proceedings before executing Commission directives, and it should do so here.²³

¹⁸ *Id.* at 23.

¹⁹ *Id.*

²⁰ *Id.* at 24.

²¹ *Id.* at 25.

²² *Id.* at 26.

²³ *Id.* at 27 (citing *Ne. Utils. Serv. Co.*, 51 FERC ¶ 61,006, at 61,019 (1990); *Utils. Comm'n*, 41 FERC ¶ 61,027, at 61,073 (1987); *The Mont. Power Co.*, 85 FERC ¶ 61,400, at 62,535 (1998)).

8. SPP also requests that the Commission hold in abeyance all pending proceedings where some element of Attachment Z2 implementation is being disputed.²⁴ SPP states that 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.²⁵ SPP argues that no party will be adversely affected, and if settlement judge procedures are unsuccessful, the abeyance order can be lifted. In addition, SPP claims that, if the Attachment Z2 disputes are eventually resolved through litigation, parties are protected by the Commission's requirements governing interest on any refunds owed.²⁶

9. Finally, SPP requests that the Commission initiate settlement judge procedures, pursuant to Rule 603(c) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603(c) (2019).²⁷ SPP states that the matter of Attachment Z2 implementation is particularly suitable for settlement judge procedures because it involves highly complex, technical processes, as well as subjective judgments that should be vetted with all affected parties. In addition, the issues concerning Attachment Z2 implementation are currently being contested in multiple open proceedings, and allowing these issues to be litigated on separate tracks and schedules only serves to further complicate the process and preclude any near-term comprehensive solution. Moreover, according to SPP, several litigants in the Attachment Z2 proceedings have indicated support for settlement and/or a technical conference. Finally, SPP argues that an objective, neutral facilitator is critically important and offers the best chance of coming to a negotiated resolution.²⁸

III. Comments and Answers

10. On July 12, 2019, Western Farmers Electric Cooperative (Western Farmers) filed comments. On July 15, 2019, Oklahoma Gas & Electric Company (OG&E), Generation Developers,²⁹ Kansas Electric Power Cooperative (KEPCo), and Xcel Energy Services Inc. (Xcel) filed answers. On July 16, 2019, City of Prescott, Arkansas (City of Prescott) filed comments. On August 15, 2019, Generation Developers filed an answer to Xcel's

²⁴ *Id.* at 28.

²⁵ *Id.* at 29.

²⁶ *Id.* at 29-30.

²⁷ *Id.* at 30.

²⁸ *Id.* at 30-31.

²⁹ Generation Developers are EDF Renewables, Inc., Enel Green Power North America, Inc., NextEra Energy Resources, LLC, and Southern Power Company.

answer. On August 30, 2019, SPP filed an answer to KEPCo's and Xcel's answers. On September 10, 2019, Xcel filed an answer to SPP's answer. On September 12, 2019, Generation Developers filed an answer to SPP's answer. On November 13, 2019, SPP filed an answer to KEPCo's, Xcel's, and the Generation Developers' answers.

A. Supporting Comments and Answers

11. Western Farmers, Generation Developers, OG&E, and City of Prescott support SPP's Motion. Western Farmers supports SPP's request for a stay and to hold the pending Attachment Z2 proceedings in abeyance to allow settlement discussions to occur. Western Farmers contends that the stay would avoid imposing a potentially significant administrative burden on SPP and the entities on all sides of the Attachment Z2 crediting issues, and would prevent SPP from potentially having to unwind revenue credit payments to upgrade sponsors while awaiting a final determination in the various proceedings. Western Farmers notes that, while it continues to dispute the Commission's determination in the Remand Order, if resettlement is necessary, there is a benefit to only having to resettle the allocation of revenue credits once. Western Farmers also agrees with SPP that any potential future resettlement would be complicated by further changes resulting from the numerous pending Attachment Z2 matters and likely appeals. In addition, Western Farmers agrees with SPP that, because Attachment Z2 revenue crediting is sequential, subsequent aggregate transmission service studies assume that revenue crediting balances have declined and that, if revenue crediting is reversed, these studies may need to be rerun to assess the impact on later transmission service requests.³⁰ As a result, Western Farmers agrees with SPP that allowing for a stay of the Remand Order as well as the other pending proceedings may facilitate reaching a comprehensive settlement, which could alleviate some of the uncertainty in implementing Attachment Z2, to the benefit of all parties.³¹

12. OG&E supports SPP's motion for stay. OG&E explains that it filed a complaint against SPP in Docket No. EL19-77-000, in which it states that it has performed all the obligations necessary to receive Attachment Z2 revenue credits, as SPP itself recognized in paying OG&E such credits for the historical period and in continuing to pay such credits currently.³² OG&E argues that, while its complaint and the many other related proceedings SPP references in its motion are in litigation, it would be premature to force SPP to proceed with the complex task of implementing any refund and repayment obligations. OG&E also notes that it has requested rehearing of the Remand Order, and

³⁰ Western Farmers Comments at 5.

³¹ *Id.* at 5-6.

³² OG&E Answer at 3.

OG&E contends that a stay is appropriate while the rehearing and any further review of the Remand Order is pending.

13. Western Farmers and City of Prescott argue that settlement is appropriate for the pending Attachment Z2 proceedings because they involve highly complex and technical processes that the affected parties should have the opportunity to resolve in settlement negotiations.³³ Moreover, Western Farmers contends that allowing the proceedings to continue on separate tracks could result in additional complications and uncertainties. Western Farmers adds that the request to set proceedings for settlement is supported by and has been requested by some of the affected parties and agrees with SPP that it is beneficial to attempt to find a comprehensive solution.³⁴ Similarly, OG&E points out that other parties have also sought rehearing or filed complaints, expressly asking for the Commission to set all of the outstanding Attachment Z2 issues for settlement procedures.³⁵

14. Generation Developers support SPP's request that all Attachment Z2 issues be set for settlement absent a Commission order granting their complaint in Docket No. EL19-75-000. Generation Developers agree with SPP that settlement procedures would allow all parties to reach a negotiated resolution and avoid continued litigation. However, Generation Developers request that the Commission set clearly defined parameters for the issues to be resolved through settlement along the lines of the roadmap set forth in their complaint in Docket No. EL19-75-000. Generation Developers further request that the Commission refrain from consolidating the various Attachment Z2 proceedings because, if the settlement process is unsuccessful, these dockets raise different legal bases for relief and different facts in support that would not lend to any administrative resolution through litigation.³⁶

15. Although Generation Developers generally support SPP's Motion, they dispute SPP's position that, based on its status as a not-for-profit entity, SPP cannot independently issue refunds unless it first receives the funds to pay refunds, regardless of settlement discussions.³⁷ Generation Developers note that the Commission has long held

³³ Western Farmers Comments at 4; City of Prescott Comments at 2-3.

³⁴ Western Farmers Comments at 4-5.

³⁵ OG&E Answer at 3-4.

³⁶ Generation Developers Answer at 5.

³⁷ *Id.* at 3 (citing Answer of Southwest Power Pool, Inc. to Complaint, Docket No. EL19-77-000, at n.72 (filed July 3, 2019)).

that, when a regional transmission organization violates the Federal Power Act, it is not immune from being held financially liable for the consequences of its violation.³⁸

B. Opposing Answers

16. KEPCo and Xcel protest SPP's motion for stay of the Commission's refund directive. KEPCo and Xcel argue that SPP has not met the Commission's high standard for granting stay. First, KEPCo states that SPP has not demonstrated that it will suffer irreparable injury without a stay of the refund obligation.³⁹ KEPCo asserts that SPP's claims of irreparable injury boil down to administrative difficulty and the possibility of needing to recalculate refunds in the event that the Remand Order is overturned; however, KEPCo states that the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) has explained that "[m]ere injuries, however substantial, in terms of money, time, and energy necessarily expended in the absence of a stay are not enough."⁴⁰ Xcel expresses skepticism regarding SPP's claims of complexity of unwinding settlements because it states that SPP is fully aware of which entities were billed and received Attachment Z2 credits, as evidenced in the refund plan.⁴¹ Likewise, KEPCo argues that, while SPP may find the possibility of having to recalculate any resettlements daunting, it can implement transparent mechanisms to track the refunds.⁴² Moreover, KEPCo and Xcel aver that SPP's claims of irreparable harm are not based on evidence, but based on speculation that the Commission will reverse course, which is not a basis for holding a refund obligation in abeyance.⁴³ KEPCo notes that SPP has not

³⁸ *Id.* at 3-4.

³⁹ KEPCo Answer at 11.

⁴⁰ *Id.* at 11-12 (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Va. Petroleum Jobbers Ass'n v FPC*, 259 F.2d 921 (D.C. Cir. 1985)).

⁴¹ *Id.* at 12-13. KEPCo also notes that SPP previously raised these arguments in the proceeding, and the Commission held that those concerns were not material to its decision to hold SPP to its obligation to implement the filed rate. *Id.* at 14 (citing Remand Order, 166 FERC ¶ 61,160 at PP 54, 58).

⁴² *Id.* at 12.

⁴³ *Id.* at 14; Xcel Answer at 12.

alleged that having to comply with the Commission's directives in the Remand Order threatens the existence of its business.⁴⁴

17. Second, KEPCo and Xcel argue that granting the stay would result in harm to third parties. Xcel argues that, by being allowed to delay its obligation to refund Attachment Z2 payments, SPP will be subjecting SPP members to further harm by delaying refunds to which they are entitled and will increase the amount and complexity of the refund resettlement calculation. Xcel notes that Attachment Z2 credits continue to accrue and new service requests potentially could be assessed additional credits that will need to be resettled as part of the refund.⁴⁵ Xcel states that its agreement to a voluntary remand of the proceeding from the D.C. Circuit was predicated, in part, upon the Commission's voluntary commitment to issue an order within six months of remand, and the Commission should continue to comply with its commitment by rejecting SPP's motion to hold the remand proceeding in abeyance.⁴⁶ KEPCo states that, by SPP's own admission, the more time that lapses, the less likely it will be that SPP is able to recoup the revenues, which KEPCo asserts would result in harm to third parties.⁴⁷

18. Third, KEPCo contends that SPP has not demonstrated that a stay is warranted for public interest considerations. KEPCo asserts that the Commission does not grant stays simply because its orders may be overturned by the courts.⁴⁸ KEPCo alleges that, given that SPP has requested a stay of an indeterminate length of time, SPP's request really amounts to an impermissible second request for rehearing of the obligation to provide refunds. KEPCo asserts that the public interest is best served by ensuring that the rate on file is the rate that customers are charged.⁴⁹ Also, KEPCo asserts that SPP's statements that it is not sure whether it can claw back funds already paid out to upgrade sponsors

⁴⁴ KEPCo Answer at 13 (citing *Westar Energy, Inc.*, 123 FERC ¶ 61,240, at P 10 (2008) (“[A] showing of irreparable injury must be more than unfavorable economic circumstances or loss of profits”)).

⁴⁵ Xcel Answer at 11.

⁴⁶ *Id.* at 12.

⁴⁷ KEPCo Answer at 16.

⁴⁸ *Id.* at 17 (citing *El Paso Natural Gas Co.*, 2 FERC ¶ 61,124, at 61,295 (1978)).

⁴⁹ *Id.* at 18.

demonstrate that any further delay in the resolution of these cases exacerbates the risk that SPP will not recover the funds, which is not in the public interest.⁵⁰

19. KEPCo also argues that the Commission should reject SPP's request for abeyance of the Attachment Z2 proceedings because it would be prejudicial to KEPCo and put refunds owed to KEPCo at great risk of never being paid.⁵¹ KEPCo notes that it is not a party to the agreements that are subject to the other complaint proceedings, and the complainants in the other dockets are not parties to KEPCo's transmission service agreement; therefore, holding KEPCo's proceeding in abeyance pending resolution of all Attachment Z2 proceedings would unfairly burden KEPCo.

20. KEPCo objects to initiation of settlement judge procedures for consolidated Attachment Z2 proceedings generally, but states that, if the Commission orders settlement judge procedures, it should also direct SPP to develop and file a tariff mechanism that will provide the refunds required by the Commission in the Remand Order.⁵² Xcel also objects to settlement judge procedures, stating that there are no issues of material fact, nor is it likely there will be a "meeting of the minds" at this point.⁵³ Xcel argues against consolidating the Remand Order rehearing proceeding with any of the complaint dockets because they involve different factual and legal issues, but states that it would support a consolidation of the Xcel proceedings in Docket No. EL18-9 and KEPCo proceedings in Docket No. EL17-21 because they involve the similar issue of whether SPP implemented the "but for" test correctly.⁵⁴ Xcel also argues that the Commission should dismiss the complaints in Docket Nos. EL19-75-000 and EL19-77-000 as collateral attacks on the Remand Order.⁵⁵

⁵⁰ *Id.* at 19.

⁵¹ *Id.* at 20.

⁵² *Id.* at 22.

⁵³ Xcel Answer at 3, 12.

⁵⁴ *Id.* at 15-19.

⁵⁵ *Id.* at 16-18.

IV. Discussion

A. Procedural Matters

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to an answer unless otherwise ordered by the decisional authority. We are not persuaded to accept Generation Developers', SPP's, and Xcel's answers to answers and, therefore, we reject them.

B. Substantive Matters

22. We deny SPP's Motion, as discussed below. The Commission reviews requests for stay under the standard established by the Administrative Procedure Act and grants a stay when "justice so requires."⁵⁶ In assessing a request for stay, the Commission considers several factors, including whether: (1) the party requesting the stay will suffer irreparable harm without a stay; (2) issuing the stay may substantially harm other parties; and (3) a stay is in the public interest.⁵⁷

23. In order to support a stay, the movant must substantiate that irreparable injury is "likely" to occur.⁵⁸ The injury must be both certain and great and it must be actual and not theoretical. Bare allegations of what is likely to occur do not suffice. The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future. Further, the movant must show that the alleged harm will directly result from the action which the movant seeks to enjoin.⁵⁹ If the party requesting a stay is unable to demonstrate that it will suffer irreparable harm absent a stay (i.e., the first factor), the Commission need not examine the other factors.⁶⁰

⁵⁶ 5 U.S.C. § 705 (2018); *Midwest Indep. Transmission Sys. Operator, Inc.*, 140 FERC ¶ 61,100, at P 13 (2012).

⁵⁷ *Am. Wind Energy Ass'n v. Sw. Power Pool, Inc.*, 168 FERC ¶ 61,006, at P 20 (2019).

⁵⁸ *Transcontinental Gas Pipe Line Co., LLC*, 150 FERC ¶ 61,183, at P 10 (2015) (citing *Wis. Gas Co. v. FERC*, 758 F.2d 669 at 674).

⁵⁹ *Id.*

⁶⁰ *Nat'l Fuel Gas Supply Corp.*, 139 FERC ¶ 61,037, at PP 25-26 (2012).

24. We find that SPP has not satisfied the first factor. SPP fails to demonstrate how it will be irreparably harmed if the Commission does not grant the stay other than to argue in various ways that it will be challenging and burdensome for SPP to implement the refund directive or to have to unwind any refunds it issues if a court overturns the Commission's decision in the Remand Order. In explaining what constitutes irreparable harm, the D.C. Circuit stated that "mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough."⁶¹ SPP has not alleged any harms other than injuries relating to the expense and effort that would result from having to implement the Remand Order's refund directive or to reprocess refunds if the Commission's decision is modified or otherwise overturned. Therefore, we find that SPP has not met the standard of irreparable harm required to justify a stay.⁶²

25. We also deny SPP's requests that we hold in abeyance all pending proceedings where some element of Attachment Z2 implementation is being disputed⁶³ and initiate settlement judge procedures. We question whether settlement discussions would be productive at this point. Notably, given the length of time that has elapsed since SPP's initial waiver request, parties have had considerable time to engage in settlement discussions or consider negotiation through the stakeholder process. However, at no point in the lengthy history of this proceeding have parties on opposite sides of the issue supported settlement at the same time. Based on the unique history of this proceeding,

⁶¹ *Wis. Gas Co. v. FERC*, 758 F.2d 669 at 674 (quoting *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921); see also KEPCo Protest at 12.

⁶² See, e.g., *Midcontinent Indep. Sys. Operator, Inc.*, 163 FERC ¶ 61,182, at P 28 (2018) (finding that "economic and administrative difficulties associated with implementing the refunds and surcharges described in [a refund report] . . . [do] not meet the standard of irreparable harm required to justify a stay"); *Am. Wind Energy Ass'n*, 168 FERC ¶ 61,006 at P 23 (determining that economic losses alone, even if substantial, do not rise to the level of irreparable harm); *Black Oak Energy, L.L.C.*, 140 FERC ¶ 61,003, at P 29 (2012) (stating that the Commission does not typically grant stays because denying requests for stays "assure[s] definiteness and finality in Commission proceedings"). We decline to address Generation Developers' arguments regarding SPP's statements in Docket Nos. EL19-75-000 and EL19-77-000 discussing SPP's financial liability for the Commission's refund directive in the Remand Order because that issue is more appropriately addressed in the complaint proceedings and on rehearing of the Remand Order.

⁶³ While we are denying SPP's request to formally hold these proceedings in abeyance, we nevertheless acknowledge the practical benefit, as we move forward, of avoiding "piecemeal decision-making" on Attachment Z2-related issues, as SPP argues in its Motion at 28.

unless we receive a request for settlement evincing broader support from parties on both sides of this issue, we believe that settlement judge procedures would not be productive.

The Commission orders:

SPP's Motion is hereby denied, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.