

170 FERC ¶ 61,125
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Southwest Power Pool, Inc.

Docket No. ER16-1341-004

ORDER ON REHEARING AND CLARIFICATION

(Issued February 20, 2020)

1. On February 28, 2019, the Commission issued an order on voluntary remand in this proceeding.¹ In the Remand Order, the Commission determined that Southwest Power Pool, Inc.'s (SPP) request for waiver of its Open Access Transmission Tariff (Tariff) to allow SPP to retroactively invoice transmission service customers for credit payment obligations under Attachment Z2 of the Tariff from 2008 to 2016 (termed the historical period) was prohibited by the filed rate doctrine and the rule against retroactive ratemaking.² The Commission reversed its prior determinations granting the waiver request³ and directed SPP to provide refunds.
2. On April 1, 2019, SPP, Oklahoma Gas and Electric Company (OG&E), and Flat Ridge 2 Wind Energy LLC (Flat Ridge) requested rehearing of the Remand Order. In addition, SPP sought clarification of the Commission's refund directive in the Remand Order. For the reasons discussed below, we deny rehearing and grant clarification of the Remand Order.

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

² *Id.* PP 2, 43-44.

³ *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 Orders), *petition for review filed sub nom. Xcel Energy Servs. Inc. v. FERC*, No. 18-1005 (D.C. Cir. Jan. 5, 2018).

I. Background

3. The Remand Order provides a detailed background on this proceeding.⁴ As relevant to this order, in April 2016, SPP requested waiver of the one-year billing adjustment limitation (i.e., time bar) set forth in Section I.7.1 of the Tariff to allow SPP to implement the Attachment Z2⁵ revenue crediting process and to retroactively invoice transmission service customers for credit payment obligations for the historical period. Section I.7.1 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.⁶

4. In the Waiver Orders, the Commission granted SPP's waiver request, finding that customers had sufficient notice that they may be obligated to pay credit payment obligations for the historical period.⁷ On January 5, 2019, Xcel Energy Services Inc. (Xcel) filed a petition for review of the Waiver Orders with the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). Subsequently, but before ruling on Xcel's petition, the D.C. Circuit issued a decision in *Old Dominion Electric*

⁴ See Remand Order, 166 FERC ¶ 61,160 at PP 3-14.

⁵ 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.

⁶ SPP Tariff, Section I.7.1 (Billing Procedure).

⁷ See July 2016 Waiver Order, 156 FERC ¶ 61,020 at PP 52-59; Waiver Rehearing Order, 161 FERC ¶ 61,144 at PP 12-31; see also Remand Order, 166 FERC ¶ 61,160 at PP 6-9.

Cooperative v. FERC,⁸ a case that also involved the issue of notice in the context of waiver proceedings. In light of the D.C. Circuit's decision in *Old Dominion*, the Commission filed an unopposed motion for voluntary remand of the Waiver Orders so that it could consider the potential implications of *Old Dominion* on this case, which the court granted.⁹

5. After providing parties an opportunity to file supplemental briefs on remand,¹⁰ the Commission issued the Remand Order, which reversed the Waiver Orders. In the Remand Order, the Commission concluded that the billing adjustment limitation in Section I.7.1 was part of the filed rate and that, consistent with *Old Dominion*, this provision could not be waived, under the circumstances presented here, without violating the filed rate doctrine.¹¹ Specifically, the Commission determined that none of the recognized exceptions to the filed rate doctrine applied and that the alleged evidence of notice was not adequate for purposes of the filed rate doctrine because: (1) the provisions of Attachment Z2, although filed with the Commission, did not notify customers of SPP's intent to invoice retroactively beyond the one-year billing adjustment limitation in Section I.7.1; and (2) the study report notations and stakeholder engagement initiatives, although evidence of SPP's intent to implement Attachment Z2, were not filed with the Commission.¹² The Commission therefore reversed the Waiver Orders, finding that denying the waiver gave effect to both Attachment Z2 and Section I.7.1, which the Commission stated are each part of SPP's filed rate.¹³

6. Because the Commission found that Section I.7.1 could not be waived under the facts presented, the Commission declined to reach, or dismissed as outside the scope of

⁸ 892 F.3d 1223, 1232 (D.C. Cir. 2018) (*Old Dominion*) (stating that “the legally required notice” must be “filed with the Commission”).

⁹ *Xcel Energy Servs. Inc. v. FERC*, No. 18-1005 (D.C. Cir. July 31, 2018) (order granting the Unopposed Motion of Respondent Federal Energy Regulatory Commission for Voluntary Remand).

¹⁰ The following entities filed timely briefs: Kansas Electric Power Cooperative, Inc. (KEPCo); Golden Spread Electric Cooperative, Inc. (Golden Spread); American Electric Power Service Corporation; OG&E; EDF Renewables, Inc. (EDF Renewables); SPP; Xcel; and NextEra Energy Resources, LLC (NextEra).

¹¹ Remand Order, 166 FERC ¶ 61,160 at PP 50-51.

¹² *Id.* PP 52, 54.

¹³ *Id.* P 58.

the proceeding, all other arguments advanced in support of affirming the Waiver Orders.¹⁴ Specifically, although the Commission recognized its broad remedial authority to remedy unjust outcomes under section 309 of the Federal Power Act (FPA),¹⁵ the Commission determined that exercising this authority to affirm the Waiver Orders would be inappropriate, as FPA section 309 “permits [the Commission] to advance remedies not expressly provided by the FPA, as long as they are consistent with the Act.”¹⁶ Accordingly, the Commission found that the relief sought by SPP was prohibited by the filed rate doctrine and the rule against retroactive ratemaking.¹⁷ The Commission then directed SPP to provide refunds, with interest calculated pursuant to 18 C.F.R. § 35.19a (2019), and to file a report within 120 days of the date of the Remand Order detailing how SPP proposed to make the required refunds.¹⁸

II. Requests for Rehearing and Clarification and Subsequent Filings

7. As discussed below, SPP, OG&E, and Flat Ridge argue on rehearing that the Commission erred in reversing the Waiver Orders and denying SPP’s waiver request. SPP and Flat Ridge also argue that the Commission erred by ordering refunds as the appropriate remedy in this matter. If the Commission denies rehearing, SPP seeks clarification that any interest owed be collected from the entities who received payments from SPP as a result of settlements under Attachment Z2 for the historical period, and not from SPP.¹⁹

¹⁴ *Id.* P 55 (finding that cost causation, contractual, tariff violation, and equitable arguments did not bear on the Commission’s determination because Section I.7.1 is part of the filed rate and waiver of that provision, under the circumstances presented, is prohibited by the filed rate doctrine) (citing *Old Dominion*, 892 F.3d at 1230).

¹⁵ *Id.* P 57 (citing *TNA Merchant Projects, Inc. v. FERC*, 857 F.3d 354 (2017)); 16 U.S.C. § 825h (2018).

¹⁶ Remand Order, 166 FERC ¶ 61,160 at P 57 (quoting *Verso Corp. v. FERC*, 898 F.3d 1, 10 (D.C. Cir. 2018) (*Verso*)).

¹⁷ *Id.* PP 43-44.

¹⁸ *Id.* P 43. SPP filed a proposed plan on June 28, 2019, as required, in Docket No. ER16-1341-003 (the Refund Plan Proceeding). The Refund Plan Proceeding remains pending.

¹⁹ SPP Request for Rehearing and Clarification at 37-38.

8. On April 1, 2019, Western Farmers Electric Cooperative (Western Farmers) filed a motion for leave to intervene out-of-time and comments in support of OG&E's request for rehearing.

9. On May 6, 2019, Xcel, KEPCo, and Golden Spread (collectively, Movants) filed a motion for leave to answer and answer to the requests for rehearing filed by SPP, OG&E, and Flat Ridge. On June 12, 2019, EDF Renewables, Enel Green Power North America, Inc., and NextEra (collectively, SPP Generation Developers) filed a motion for leave to answer and answer to SPP's request for rehearing and clarification. On July 18, 2019, SPP filed a motion for leave to answer and answer to Flat Ridge's request for rehearing and SPP Generation Developers' answer. On August 15, 2019, SPP Generation Developers filed a motion for leave to answer and answer to SPP's answer.

III. Discussion

A. Procedural Matters

10. In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure,²⁰ and consider, *inter alia*, whether the movant had good cause for failing to file the motion within the time prescribed. When, as here, 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, Western Farmers bears a higher burden to demonstrate good cause for granting such late intervention.²¹ Western Farmers claims that good cause exists because it is facing an unforeseeable and significant potential refund liability following issuance of the Remand Order. We find that Western Farmers' justification for its delay has not met this higher burden of justifying its late intervention.²² Accordingly, we deny its motion to intervene out of time.

11. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713(d)(1) (2019), prohibits an answer to a request for rehearing. Accordingly, we deny the Movants', SPP Generation Developers', and SPP's motions to answer and reject their answers to the rehearing requests.

²⁰ 18 C.F.R. § 385.214(d) (2019).

²¹ See, e.g., *Big Rivers Elec. Corp. v. Midcontinent Indep. Sys. Operator, Corp.*, 161 FERC ¶ 61,225, at P 12 (2017).

²² See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc.*, 102 FERC ¶ 61,250, at P 7 (2003).

B. Substantive Matters

12. We deny rehearing. As discussed below, we affirm the finding in the Remand Order that Section I.7.1 is part of SPP's filed rate that applies to Attachment Z2 credit payment obligations and transmission service invoices for the historical period and, consistent with *Old Dominion*, the filed rate doctrine and the rule against retroactive ratemaking prohibit waiver of Section I.7.1 under the facts presented. Moreover, we disagree with arguments that certain contractual rights associated with Attachment Z2 are not affected by the time bar provision. In addition, although we consider the equitable arguments against ordering refunds, we nevertheless affirm the Commission's determination that refunds are the appropriate remedy here. Finally, we grant SPP's request for clarification that any interest owed on the refunds should be collected from the entities who received payments from SPP as a result of settlements under Attachment Z2 for the historical period, and not from SPP.²³

1. Applicability of Section I.7.1 to Attachment Z2 Credit Payment Obligations**a. Arguments on Rehearing**

13. SPP argues that the Commission did not give reasoned consideration to the argument that Section I.7.1 does not apply to Attachment Z2 credit payment obligations, thereby rendering any Tariff waiver unnecessary.²⁴ SPP reiterates that credit payment obligations for the historical period were settled independently from settlements for transmission service and therefore do not constitute corrections or adjustments to previously-issued invoices that may be time-barred.²⁵

14. SPP contends that the text of Section I.7.1 itself also supports SPP's argument that waiver of Section I.7.1 was unnecessary because the one-year billing adjustment limitation begins to accrue "after rendition of the bill reflecting actual data for such service."²⁶ According to SPP, because the historical period invoices did not include actual Attachment Z2 credit payment obligation amounts, the one-year billing adjustment limitation in Section I.7.1 could not have begun until 2016, when invoices began

²³ We will address specific issues related to SPP's proposed plan to comply with the refund directive in the Refund Plan Proceeding. *See infra* P 61.

²⁴ SPP Request for Rehearing and Clarification at 26-31.

²⁵ *Id.* at 29.

²⁶ *Id.* at 29-30 (citing SPP Tariff, Section I.7.1).

reflecting Attachment Z2 credit payment obligation amounts.²⁷ SPP thus contends that the Commission misinterpreted Section I.7.1. Similarly, OG&E asserts that the invoices were never finalized to include the charges required by Attachment Z2 and therefore, Section I.7.1 does not apply to bar the application of these charges.²⁸

15. SPP argues that Attachment Z2 credit payment obligations can be analogized to updates of estimated billing data, which would make them outside the scope of Section I.7.1. SPP claims that the Commission misread the Tariff when it concluded without explanation that, because there was no evidence that SPP estimated the size of the credit payment obligations, such as in the Aggregate Facilities Study reports,²⁹ SPP failed to provide estimated data contemplated by Section I.7.1.³⁰ SPP states that it was unable to estimate credit payment obligations for transmission service requests evaluated during the historical period due to ongoing software and process development efforts.

16. In the same vein, SPP, OG&E, and Flat Ridge argue that the Commission did not correctly interpret the purpose of Section I.7.1. According to SPP, the purpose of Section I.7.1 is to prevent “surprise” adjustments to final invoices.³¹ SPP argues that the Commission has interpreted similar time bar provisions narrowly to provide for rate certainty that would otherwise be absent if a utility could indefinitely and unilaterally alter prior billings and assess new charges to unwary customers. SPP also argues that the Commission’s refusal in the Remand Order to give effect to Attachment Z2 undermines this principle of rate certainty.³² Similarly, SPP argues that, even accepting the Commission’s premise that Section I.7.1 is also part of SPP’s filed rate, there is no legal

²⁷ *Id.* at 30.

²⁸ OG&E Request for Rehearing at 22-23.

²⁹ SPP studies long-term transmission service requests to determine whether any new network upgrades are needed to accommodate those requests and lists any such identified upgrades in an Aggregate Facilities Study report. *See* SPP Tariff, Section I.1 (Definitions).

³⁰ SPP Request for Rehearing and Clarification at 30-31 & n.91 (citing Remand Order, 166 FERC ¶ 61,160 at P 48).

³¹ *Id.* at 28.

³² *Id.* at 28-29.

or policy justification for allowing Section I.7.1 to subordinate and negate the effect of Attachment Z2.³³

17. OG&E disputes the Commission's reliance on *Seminole Elec. Coop., Inc. v. Fla. Power & Light Co.*³⁴ OG&E asserts that Section I.7.1 does not override its rights under the Tariff to be reimbursed under Attachment Z2. Specifically, OG&E argues that Section I.7.1 does not contain language constituting a "knowing waiver" of OG&E's rights to reimbursement simply because the process to calculate Attachment Z2 credit payment obligation amounts for the historical period took longer than one year.³⁵ OG&E also states that the language of Section I.7.1 does not preclude enforcement of OG&E's rights under a filed rate because Section I.7.1 addresses billing errors and matters of "correction and adjustment," and not the complex implementation issues presented here.³⁶ Similarly, according to Flat Ridge, upgrade sponsors in no way waived their rights to credit payment obligations, which makes the facts here distinguishable from *Seminole*. Flat Ridge asserts that it was well known that Attachment Z2 credit payment obligation amounts were accruing but were not being timely billed, and that upgrade sponsors specifically refrained from seeking relief from the Commission in reliance on SPP's statements that reimbursements would ultimately be forthcoming.³⁷ OG&E also asserts that it acted diligently over the years and reasonably relied on statements by SPP regarding its delayed implementation of Attachment Z2.³⁸

18. SPP and Flat Ridge argue that *Seminole* and other cases cited in the Remand Order for the proposition that Section I.7.1 is applicable are distinguishable. SPP contends that *Seminole* did not involve the issue of conflicting Tariff provisions or the question of how the filed rate doctrine should apply to reconcile seemingly inconsistent rate and non-rate provisions.³⁹ SPP contends that *Seminole* was instead decided on a straight-forward interpretation of contractual language in a service agreement related to challenges to bill

³³ *Id.* at 17.

³⁴ 139 FERC ¶ 61,254 (2012), *reh'g denied*, 153 FERC ¶ 61,037 (2015), *aff'd sub nom. Seminole Elec. Coop., Inc. v. FERC*, 861 F.3d 230 (D.C. Cir. 2017) (*Seminole*).

³⁵ OG&E Request for Rehearing at 20.

³⁶ *Id.* at 21.

³⁷ Flat Ridge Request for Rehearing at 27-28.

³⁸ OG&E Request for Rehearing at 22.

³⁹ SPP Request for Rehearing and Clarification at 17.

“correctness.”⁴⁰ Similarly, Flat Ridge argues that *Seminole* did not address a waiver of a time bar provision, but rather focused on the terms of the relevant transmission service agreement.⁴¹ SPP argues that neither *Seminole* nor any other case supports the proposition that an administrative time bar provision like Section I.7.1 can prevent delayed implementation of a separately-stated rate term.⁴²

19. OG&E and Flat Ridge claim that the New York Independent System Operator (NYISO) cases⁴³ cited in the Remand Order are distinguishable from this case because the NYISO cases involve a party seeking relief due to a billing error and do not involve waivers of billing adjustment periods.⁴⁴

b. Commission Determination

20. We affirm the Commission’s determination that the time limitation in Section I.7.1 applies to the transmission services charges in the historical period invoices, despite the fact that SPP did not reflect Attachment Z2 credit payment obligation amounts in those invoices.⁴⁵ We are unpersuaded by SPP’s renewed arguments that waiver of Section I.7.1 was unnecessary.⁴⁶ Contrary to SPP’s assertions, the Commission did not summarily reject any of SPP’s arguments. As discussed in the Remand Order, Section I.7.1 requires SPP to invoice customers each month for “all services furnished under the Tariff” during the previous month and make any adjustments to those invoices “within one year after rendition of the bill reflecting the actual data for such service.”⁴⁷ The Commission stated that, even though Attachment Z2 credit payment obligation amounts may have been determined through a separate settlement process from other components

⁴⁰ *Id.* at 17-18 (citing *Seminole*, 139 FERC ¶ 61,254 at PP 40-43).

⁴¹ Flat Ridge Request for Rehearing at 27.

⁴² SPP Request for Rehearing and Clarification at 18.

⁴³ See Remand Order, 166 FERC ¶ 61,160 at n.146 (citing *N.Y. State Elec. & Gas Corp.*, 142 FERC ¶ 61,151 (2013); *N.Y. State Elec. & Gas Corp.*, 133 FERC ¶ 61,094 (2010); *N.Y. Indep. Sys. Operator, Inc.*, 128 FERC ¶ 61,086 (2009)).

⁴⁴ Flat Ridge Request for Rehearing at 27; OG&E Request for Rehearing at 22-23.

⁴⁵ Remand Order, 166 FERC ¶ 61,160 at P 47.

⁴⁶ *Id.* PP 46-49.

⁴⁷ *Id.* P 47.

of the transmission service invoices, Attachment Z2 credit payment obligations are charges directly related to requests for transmission service and therefore should have been reflected in monthly invoices as required by Section I.7.1 regardless of how they were settled.⁴⁸

21. We do not find convincing SPP's interpretation that Section I.7.1 only became applicable after actual data became available in 2016. SPP's interpretation assumes that failing to implement one tariff provision in a timely manner allows a public utility to otherwise ignore other portions of its filed rate. We therefore are not persuaded by SPP's arguments that a request for waiver was unnecessary or that Section I.7.1 was otherwise inapplicable to Attachment Z2. Furthermore, the Commission explicitly considered and was not persuaded by SPP's arguments that the charges for credit payment obligations for transmission service during the historical period were not an initial settlement for such transmission service and, thus, fell outside the scope of the billing limitation in Section I.7.1.⁴⁹ The Commission thus found that the one-year billing adjustment limitation in Section I.7.1 applies to bar recalculations of settled historical period invoices.⁵⁰

22. The Commission also expressly determined that SPP's reliance on the estimated data exception to Section I.7.1's one-year billing adjustment limitation was misplaced.⁵¹ As the Commission explained in the Remand Order, SPP presented insufficient evidence that it provided actual estimates of Attachment Z2 credit payment obligation amounts on invoices or in study reports, even if such reports could constitute adequate notice to satisfy the filed rate doctrine. We affirm this determination and further note that, as SPP acknowledges here,⁵² it was unable to estimate this data during the historical period due to software and process development issues. Accordingly, because it was impossible for SPP to estimate this data, the estimated data exception in Section I.7.1 is not applicable to the facts of this proceeding.

23. We also are not persuaded by attempts to distinguish Section I.7.1 from the time bar provisions at issue in *Seminole* and other cases. SPP's, OG&E's, and Flat Ridge's interpretations of these cases are overly narrow and out of context. The Commission's

⁴⁸ *Id.* P 49.

⁴⁹ *Id.* PP 46-47.

⁵⁰ *Id.* P 46.

⁵¹ *Id.* P 48.

⁵² SPP Request for Rehearing and Clarification at 31.

Seminole decisions held that time bar provisions are part of the filed rate⁵³ and will even be applied in circumstances analogous to those present here—specifically, to bar the proper implementation of charges explicitly specified elsewhere in a filed tariff or contract.⁵⁴ The D.C. Circuit’s decision in *Seminole* upheld the application of that time bar provision, which was contained in a service agreement, to bar refunds beyond the time specified in that provision, even where the refunds were owed because of a violation of the filed rate.⁵⁵ These decisions support the Commission’s finding in the Remand Order that enforcement of a time bar provision is consistent with the filed rate doctrine. Because Section I.7.1 requires that SPP must both issue and correct any invoices in a timely manner, we are unpersuaded that it is sufficiently distinguishable from the similar provision in *Seminole* regardless of whether such a term is part of a service agreement or tariff. Accordingly, we affirm that Section I.7.1 forms part of SPP’s filed rate.

24. Similarly, we find unpersuasive arguments that *Seminole* is distinguishable because parties here did not knowingly waive their rights to credit payment obligations.⁵⁶ Section I.7.1 is part of SPP’s filed rate, and therefore, customers had notice of its existence and potential applicability to any service that required SPP to invoice customers, such as Attachment Z2. As discussed previously,⁵⁷ the language of Section I.7.1 is broad; the invoicing requirement contained within Section I.7.1 applies to “all services furnished under the Tariff” in a given month.⁵⁸ There is no exception for processes or services that may take longer than one year to implement. Additionally, as discussed in more detail below with regard to *Old Dominion*,⁵⁹ the fact that SPP made

⁵³ *Seminole*, 139 FERC ¶ 61,254 at P 44 (finding that the time bar provision “is itself the filed rate”), *reh’g denied*, 153 FERC ¶ 61,037 at P 27 (reiterating that “the Commission has found time limitations on the correction of bills involving violation of the filed rate doctrine to be consistent with the filed rate doctrine”).

⁵⁴ *Seminole*, 139 FERC ¶ 61,254 at P 44 (finding that refunds for a violation of the filed rate doctrine were not required for periods outside the 24-month period specified in the time bar provision).

⁵⁵ *Seminole*, 861 F.3d at 234-35.

⁵⁶ Flat Ridge Request for Rehearing at 27-28; OG&E Request for Rehearing at 20-21.

⁵⁷ See discussion *supra* P 20; Remand Order, 166 FERC ¶ 61,160 at PP 47.

⁵⁸ SPP Tariff, Section I.7.1 (emphasis added).

⁵⁹ See discussion *infra* section III.B.2.

statements that credit payment obligations were accruing but were not being timely billed was not sufficient to provide notice. These statements, and related stakeholder discussions, do not meet the strict requirements of the filed rate doctrine because they were not on file with the Commission.⁶⁰

25. Contrary to OG&E's and Flat Ridge's arguments on rehearing, the Commission's citation to various cases interpreting a NYISO tariff time bar provision only reiterated Commission precedent holding that a time bar provision is intended to promote rate certainty for customers and is part of the filed rate.⁶¹ Additionally, unlike the NYISO tariff, as the Commission noted in the Remand Order, Section I.7.1 does not provide for the Commission or a court to order that finalized invoices be reopened.⁶² Similarly, we find unconvincing SPP's arguments that the Remand Order's reversal of the waiver of Section I.7.1 undermines rate certainty, which SPP acknowledges is the primary rationale for time bar provisions like Section I.7.1.⁶³ In fact, giving full effect to Section I.7.1 by not subordinating it to the Attachment Z2 provisions advances the principle of rate certainty because it assures customers that a utility cannot assess them new charges after the one-year timeframe for doing so lapses in Section I.7.1. Additionally, any attempts to characterize Section I.7.1 as an "administrative" or "non-rate term" as a way to distinguish *Seminole* and other time bar provision cases is misplaced; as discussed above, Section I.7.1 is part of the filed rate.

26. In sum, we affirm the determination in the Remand Order that Section I.7.1 is part of the filed rate applicable to Attachment Z2 credit payment obligations. We also affirm that this determination leads to a "result [that] gives effect to both the provisions of

⁶⁰ See, e.g., *Old Dominion*, 892 F.3d at 1232; *West Deptford Energy, LLC v. FERC*, 766 F.3d 10, 23-24 (D.C. Cir. 2014) (*West Deptford*).

⁶¹ For example, in *N.Y. State Elec. & Gas Corp.*, the Commission stated that it agrees with arguments that the NYISO time bar provision "reflects Commission policy that, once invoices are finalized, they should generally remain unchanged, even if later found to contain errors, so that the market participants can rely on the charges contained in the invoices." 133 FERC ¶ 61,094 at P 63. On rehearing, the Commission determined that "since the deadline for correcting billing errors in NYISO's tariff passed well before [the company] discovered the errors, much less filed its petition, the 'filed rate' in the instant case became the actual billed amounts once that tariff deadline passed." *N.Y. State Elec. & Gas Corp.*, 142 FERC ¶ 61,151 at P 26.

⁶² Remand Order, 166 FERC ¶ 61,160 at n.151.

⁶³ SPP Request for Rehearing and Clarification at 28.

Attachment Z2 and Section I.7.1, which are each part of SPP's filed rate with the Commission."⁶⁴

2. Filed Rate Doctrine and *Old Dominion*

a. Arguments on Rehearing

27. SPP agrees with the Commission that the filed rate doctrine is a "notice doctrine."⁶⁵ Specifically, SPP argues that notice that Attachment Z2 credit payment obligations would be forthcoming was provided by the Tariff itself (i.e., Attachment Z2), through the stakeholder materials and discussions to implement Attachment Z2, and through notations in study reports.⁶⁶

28. Additionally SPP states that, according to the Remand Order, "actual notice" constitutes "adequate notice" only where a prior agreement exists between the parties or where a pending judicial appeal might alert parties to potential retroactive changes in the filed rate.⁶⁷ However, SPP argues that nothing in the cases cited by the Commission for this proposition undercuts SPP's principal argument, which is that the Tariff itself and parties' conceded awareness of the existence of Attachment Z2 in the Tariff and the credit and payment obligations mandated by Attachment Z2, study report notations and stakeholder discussions alerting customers of potential credit payment obligations, and prior waivers of Section I.7.1 provided legally sufficient notice of impending Attachment Z2 credit payment obligations. Therefore, according to SPP, the Commission must explain why these other means of notice (i.e., prior agreement or pending judicial appeal) are more adequate than the notice demonstrated on the record.

29. Flat Ridge asserts that the Commission erred in its narrow limitation on what circumstances might give rise to a finding of adequate notice.⁶⁸ According to Flat Ridge, SPP's inability to implement Attachment Z2 has been well-known for eight years, and transmission customers, including Xcel, have known and participated in stakeholder

⁶⁴ Remand Order, 166 FERC ¶ 61,160 at P 58.

⁶⁵ SPP Request for Rehearing and Clarification at 16 (citing *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).

⁶⁶ *Id.* at 16, 20.

⁶⁷ *Id.* at 20 (citing Remand Order, 166 FERC ¶ 61,160 at P 54).

⁶⁸ Flat Ridge Request for Rehearing at 16.

processes throughout that implementation process.⁶⁹ Flat Ridge contends that simply because transmission customers may argue they did not know the exact Attachment Z2 credit payment obligation amounts they would be assigned does not mean that they had inadequate notice that SPP would implement subsequent Attachment Z2-based adjustments.⁷⁰ Rather, Flat Ridge argues that transmission customers reasonably should have assumed that, in utilizing Creditable Upgrades⁷¹ for their transmission service, their obligations could range from *de minimis* to millions of dollars, which Flat Ridge argues is similar to the range of obligations that interconnection customers are provided when subsequent studies are necessary and when final costs remain unknown until the conclusion of such studies. Flat Ridge contends that the Commission erred by failing to consider these facts.⁷²

30. Flat Ridge also asserts that, to provide adequate notice, precedent indicates that customers do not need to know precisely how, when, and by what amount or for how long their rates would change, only that their rates were subject to being changed.⁷³ Flat Ridge suggests that occurred here, where SPP has for years informed its members that it would retroactively invoice Attachment Z2 cost obligations, including informing transmission customers in their study reports, even though transmission customers did not know the exact amounts they would owe.⁷⁴ Flat Ridge maintains that the Commission's conclusions about notice are ultimately based on a limited record (i.e., briefs in response to the Commission's motion requesting voluntary remand), and that the Commission should have required an evidentiary hearing or technical conference on the issue of notice. Without such a hearing, Flat Ridge argues that the Commission lacked an adequate record on which to make the "highly fact-specific" notice determination.⁷⁵

⁶⁹ *Id.* at 17-19.

⁷⁰ *Id.* at 19.

⁷¹ 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.

⁷² Flat Ridge Request for Rehearing at 19-20.

⁷³ *Id.* at 22.

⁷⁴ *Id.* at 22-23.

⁷⁵ *Id.* at 20-21.

31. OG&E likewise argues that SPP customers were aware that they were liable for costs under Attachment Z2.⁷⁶ OG&E asserts that there is no reason to believe that customers would have altered their behavior if SPP announced in some different manner what market participants already knew—i.e., that Attachment Z2 required users of Creditable Upgrades to pay a share of the costs for such upgrades and that SPP was working in good faith to implement Attachment Z2 for the historical period. Therefore, OG&E also argues that, because the filed rate doctrine is satisfied “when parties have notice that a rate is tentative and may be later adjusted with retroactive effect,” waiver was permissible here.⁷⁷

32. SPP argues that, in finding inadequate notice to satisfy the filed rate doctrine, the Commission relied on an “exceedingly narrow and overly rigid interpretation of *Old Dominion*” that disregards critical factual distinctions between that case and this one.⁷⁸ Specifically, SPP argues that, unlike in *Old Dominion*, here the rate SPP sought to charge was on file with the Commission (i.e., Attachment Z2) and was fully noticed. Additionally, SPP contends that, unlike in *Old Dominion*, here the Tariff provides actual notice to affected parties that Attachment Z2 credit payment obligation amounts, while delayed, were forthcoming. SPP argues that this notice was the Commission’s primary rationale for granting waiver in the Waiver Orders, and that the study report notations and stakeholder involvement merely buttressed the Commission’s finding of notice. SPP contends that the Commission has failed to adequately explain its departure from this position.⁷⁹

33. OG&E likewise argues that *Old Dominion* does not address or resolve the issues presented in this case. According to OG&E, *Old Dominion* held that a rate cap in a tariff could not be amended retroactively simply because unforeseen circumstances made its enforcement arguably inequitable.⁸⁰ But OG&E argues that *Old Dominion* neither questions nor abrogates basic rules of interpretation dictating that, where practicable, tariffs must be interpreted as a whole, giving meaning to all provisions, and that interpretations that bring about anomalous results should be avoided when other

⁷⁶ OG&E Request for Rehearing at 27.

⁷⁷ *Id.* (quoting *NSTAR Elec. & Gas Corp. v. FERC*, 481 F.3d 794, 801 (D.C. Cir. 2007)).

⁷⁸ SPP Request for Rehearing and Clarification at 21.

⁷⁹ *Id.* at 22-23.

⁸⁰ OG&E Request for Rehearing at 17.

interpretations are available.⁸¹ Additionally, OG&E asserts that the question of how to address one provision of a tariff that is argued to conflict with other tariff provisions or contractual rights was not raised in *Old Dominion*, where the claim was that an admitted tariff violation should be excused on equitable grounds. OG&E claims that *Old Dominion* simply reaffirmed the notion that no violation of the filed rate doctrine occurs when “buyers are on adequate [advance] notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service.”⁸²

34. Flat Ridge also argues that, contrary to the Commission’s determination, *Old Dominion* does not require that SPP expressly state in the Tariff or file with the Commission its intent to invoice retroactively. Rather, pointing to *West Deptford*,⁸³ Flat Ridge argues “the notice exception to the filed-rate doctrine is not strictly limited to the two classic situations (i.e., judicial appeal or a formula rate).”⁸⁴ Similarly, SPP contends that *Old Dominion* is consistent with court precedent stating that adequate notice for purposes of satisfying the filed rate doctrine can come in different forms.⁸⁵ According to Flat Ridge, notice turns on an analysis of the facts, and while notice was inadequate in *Old Dominion* and *West Deptford*, SPP’s years-long stakeholder implementation process supports a finding of adequate notice in this case.⁸⁶ Additionally, SPP and Flat Ridge contend that, unlike in *Old Dominion*, SPP is implementing the filed rate; it is not trying to retroactively assess a charge that is not part of the Tariff.⁸⁷

⁸¹ *Id.* (citing *Colo. Interstate Gas Co. v. FERC*, 599 F.3d 698, 703 (D.C. Cir. 2010); Restatement (Second) of Contracts § 203(a) (2009)); *High Island Offshore System, L.L.C.*, 138 FERC ¶ 61,114, at P 21 (2012); *PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,030, at P 33 (2012).

⁸² OG&E Request for Rehearing at 18 (citing *Old Dominion*, 892 F.3d at 1231; *Natural Gas Clearinghouse v. FERC*, 965 F.2d at 1075).

⁸³ 766 F.3d at 23-24.

⁸⁴ Flat Ridge Request for Rehearing at 24.

⁸⁵ SPP Request for Rehearing and Clarification at 25.

⁸⁶ Flat Ridge Request for Rehearing at 24.

⁸⁷ *Id.*; SPP Request for Rehearing and Clarification at 25-26.

b. Commission Determination

35. We find that the Commission properly interpreted *Old Dominion* and other precedent to conclude that Section I.7.1 could not be waived, under the circumstances presented, because the Tariff did not provide adequate notice of SPP's intent to invoice transmission customers retroactively beyond the time limit in this provision. Although it is undisputed that Attachment Z2 has been appropriately filed with the Commission in some form since 2008, the filed provisions of Attachment Z2 itself neither notified customers nor "plainly"⁸⁸ stated SPP's intent to waive or adjust the separately-filed and Commission-approved one-year billing adjustment limitation for retroactive invoicing in Section I.7.1. We find that Section I.7.1 provided explicit notice to SPP customers that charges billed more than one year ago *could not* be revisited save for two limited and inapplicable exceptions.⁸⁹ As we have explained, our interpretation of the Tariff gives full effect to two parts of SPP's filed rate—Attachment Z2 and Section I.7.1. In so concluding, we find that the Commission has neither elevated nor subordinated various provisions of the Tariff; rather, it has interpreted the Tariff as a whole.

36. We therefore affirm the Commission's determination in the Remand Order that the Tariff did not provide legally sufficient notice, adequate to satisfy the filed rate doctrine, that the Tariff allows waiver of a separate and distinct part of the filed rate—Section I.7.1.⁹⁰ The Commission's determination that the stakeholder discussions and study report notations did not provide adequate notice under these circumstances stemmed from the court's statement in *Old Dominion* that, for purposes of the filed rate doctrine, "all rate changes" must be filed with the Commission.⁹¹ Given this requirement, we find unpersuasive Flat Ridge's and SPP's argument that additional forms of notice not filed with the Commission may, under certain circumstances, be adequate.

⁸⁸ 16 U.S.C. § 824d(d) (2018). 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." *Id.*

⁸⁹ *See Old Dominion*, 892 F.3d at 1231-32 (stating that, because of the rate cap in the tariff at issue in that case, customers were on explicit notice that, although market forces might cause some variation within a range, the rates charged would never exceed the agreed-upon cap).

⁹⁰ *See* Remand Order, 166 FERC ¶ 61,160 at P 52.

⁹¹ *Old Dominion*, 892 F.3d at 1232 (finding that the website statement at issue did not meet this requirement, so it "did not provide the legally required notice" to wholesale purchasers or retail customers).

Although we acknowledge that parties may have been aware, through stakeholder proceedings or study report notations, of SPP's ultimate goal to implement Attachment Z2 for the historical period, there was nothing on file with the Commission relating to this rate change. The court in *Old Dominion* did not qualify the requirement, absent the existence of established exceptions to the filed rate doctrine, that to satisfy the filed rate doctrine's notice requirement, all changes to filed rates occur only after adequate advance notice is provided in the form of a filing with the Commission. The filed rate doctrine entitles customers to rely upon what is in a tariff, regardless of any "one-way" assertions made by the utility outside of Commission filings.⁹² Therefore, we affirm the Commission's interpretation of *Old Dominion* in the Remand Order.

37. We also note that, as was the case in *Old Dominion* with respect to the applicable rate cap provision,⁹³ Section I.7.1's one-year billing adjustment limitation for adjusting invoices provided explicit notice to customers that historical period invoices could not be adjusted or recalculated for any reason, other than for the two limited exceptions specified in Section I.7.1, after the requisite time period had passed. Accordingly, the court's analysis in *Old Dominion* regarding the notice provided by the tariff's rate cap supports the result reached in the Remand Order, which ensures that customers can continue to rely on filed tariff provisions.

38. We also are not persuaded by Flat Ridge's argument that additional fact-finding processes, such as an evidentiary hearing or technical conference, were necessary for the Commission to conclude that notice of SPP's intent to waive Section I.7.1's billing adjustment provision was not adequate.⁹⁴ The Commission has wide discretion regarding procedural matters, including whether to set a matter for hearing.⁹⁵ An evidentiary

⁹² *West Deptford*, 766 F.3d at 24 (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"); *see also Old Dominion*, 892 F.3d at 1232 (finding that the website statement at issue was not filed with the Commission, which "is required for all rate changes").

⁹³ The court in *Old Dominion* 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." *Old Dominion*, 892 F.3d at 1231-32.

⁹⁴ *See* Flat Ridge Request for Rehearing at 13, 21.

⁹⁵ *See Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 524-25 (1978) (stating that agencies have broad discretion over the formulation of their procedures); *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592

hearing is appropriate when there is a dispute of material fact that cannot be resolved on the basis of the written record.⁹⁶ In this proceeding, the Commission evaluated and considered a significant amount of evidence filed by the parties and was able to determine that SPP's requested waiver of the one-year billing adjustment limitation in Section I.7.1 would violate the filed rate doctrine and the rule against retroactive ratemaking. We therefore conclude that additional process was not warranted.

3. Commission Precedent on Waiver

a. Arguments on Rehearing

39. SPP and Flat Ridge contend that, when previously confronted with requests for waiver of "non-rate terms" that impaired implementation of the filed rate, the Commission has granted such requests,⁹⁷ and the Commission erred by departing from precedent.⁹⁸ SPP and Flat Ridge note that the Commission has waived billing limitations and similar provisions to give full and retroactive effect to a tariff's rate terms, including prior retroactive waivers of Section I.7.1.⁹⁹ Although Flat Ridge recognizes that the Commission was not required to address the filed rate doctrine or rule against retroactive ratemaking in these prior cases, it maintains that, until the Remand Order, the Commission had no ascertainable policy generally prohibiting waivers of time bar provisions.¹⁰⁰ SPP and Flat Ridge also contend that in none of these prior waiver cases did any party, including Xcel, argue or did the Commission express concern that time bar provisions were non-waivable as a matter of law.¹⁰¹ According to SPP, the Commission's prior waiver of Section I.7.1 on a retroactive basis, along with statements

(D.C. Cir. 1990) (stating that the decision as to whether to conduct an evidentiary hearing is in the Commission's discretion).

⁹⁶ *San Diego Gas & Elec. Co. v. Sellers of Energy Servs.*, 121 FERC ¶ 61,184, at P 143 & n.197 (2007).

⁹⁷ SPP Request for Rehearing and Clarification at 18.

⁹⁸ Flat Ridge Request for Rehearing at 25-26.

⁹⁹ SPP Request for Rehearing and Clarification at 18; Flat Ridge Request for Rehearing at 25-26.

¹⁰⁰ Flat Ridge Request for Rehearing at 26.

¹⁰¹ SPP Request for Rehearing and Clarification at 18-19; Flat Ridge Request for Rehearing at 27.

from customers acknowledging the retroactive implications of the Waiver Orders, is proof that customers had notice that such non-rate provisions are, in fact, waivable.¹⁰² SPP also argues that the Commission abandoned its rationale for seeking remand of the Waiver Orders—i.e., *Old Dominion*'s discussion of equitable considerations in support of waiver—without explanation.¹⁰³

b. Commission Determination

40. As explained above, in *Old Dominion*, the D.C. Circuit held that “[t]he 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.”¹⁰⁴ As the Commission found in the Remand Order and we affirm here, Section I.7.1 is part of the filed rate. Accordingly, in light of *Old Dominion* and based on the facts here, we also affirm that the Commission’s waiver of Section I.7.1 in the Waiver Orders was inappropriate. Further, as Flat Ridge acknowledges, the prior cases it cites in which the Commission previously granted waiver of section I.7.1 based on other facts did not address whether there was adequate notice to overcome the filed rate doctrine.¹⁰⁵ For that reason, those prior cases do not undermine the Commission’s conclusion in light of *Old Dominion* and based on the facts here.

41. In addition, we emphasize that the Remand Order does not stand for the proposition that time bar provisions, such as Section I.7.1, can never be waived; instead, the Commission found in the Remand Order that Section I.7.1 could not be waived under the circumstances presented because Attachment Z2, the stakeholder process, and study report notations did not provide adequate notice of SPP’s intent to invoice transmission customers retroactively beyond the one-year billing adjustment limitation provided by Section I.7.1.¹⁰⁶

¹⁰² SPP Request for Rehearing and Clarification at 19-20.

¹⁰³ *Id.* at 13, 23-24.

¹⁰⁴ *Old Dominion*, 892 F.3d at 1230.

¹⁰⁵ Flat Ridge Request for Rehearing at 26.

¹⁰⁶ Remand Order, 166 FERC ¶ 61,160 at P 52.

42. Additionally, we disagree with SPP that the Commission abandoned its rationale for requesting remand of the Waiver Orders.¹⁰⁷ Once the Commission reacquires jurisdiction of a case on remand, it has the discretion to reconsider the whole of its original decision, as it has done here.¹⁰⁸

4. Connection between Certain Contractual Rights and Invoicing under the Tariff

a. Arguments on Rehearing

43. Flat Ridge and OG&E argue that the Remand Order abrogates upgrade sponsors' rights to reimbursement under the Tariff and various contractual agreements, which they contend are separate rights not dependent upon the Tariff's requirements governing invoicing. Flat Ridge asserts that SPP's obligation to pay Attachment Z2 credits to upgrade sponsors is a separate transaction from SPP charging transmission customers for transmission service that uses those Creditable Upgrades.¹⁰⁹ Flat Ridge thus maintains that, to the extent that Section I.7.1 applies to any Attachment Z2-related invoices, it applies only to SPP's invoices to transmission customers for services furnished by SPP and in no way relieves SPP from its obligation to pay upgrade sponsors their Attachment Z2 credits.

44. In addition, Flat Ridge states that its Generator Interconnection Agreement¹¹⁰ contractually obligates SPP to award and Flat Ridge to receive Attachment Z2 credits. Flat Ridge argues that, when it executed this agreement in 2010, it became "entitled to credits in accordance with Attachment Z2 of the Tariff" with respect to its Creditable Upgrades, which were first used in 2013. Flat Ridge asserts that, for the entire historical period, it was entitled under the agreement to receive Attachment Z2 credits. Flat Ridge

¹⁰⁷ SPP Request for Rehearing and Clarification at 23-24.

¹⁰⁸ See, e.g., *Se. Mich. Gas Co. v. FERC*, 133 F.3d 34, 38 (D.C. Cir. 1998) (citing *Radio Television S.A. de C.V. v. FCC*, 130 F.3d 1078, 1083 (D.C. Cir. 1997)).

¹⁰⁹ Flat Ridge Request for Rehearing at 13-14.

¹¹⁰ A Generator Interconnection Agreement is "the form of interconnection agreement applicable to an Interconnection Request pertaining to a Generating Facility that is included in Appendix 6 to these Generator Interconnection Procedures." SPP Tariff, Attachment V, Section 1 (Definitions).

contends moreover that its Generator Interconnection Agreement has no time bar provision and therefore provides no exposure to any refund obligation.¹¹¹

45. Relatedly, OG&E argues that its right to recover Attachment Z2 credits derives not only from the Tariff but also OG&E's Sponsored Upgrade Agreement with SPP and that the rights under that agreement can only be abrogated under the *Mobile-Sierra* doctrine if the Commission finds that circumstances of "unequivocal public necessity" exist.¹¹² OG&E asserts that the Commission made no such finding but instead cited "inapplicable precedent holding that it need not consider arguments that tariff provisions should be ignored based on purely 'equitable considerations.'"¹¹³ OG&E contends that, while the equities are indeed on its side, it invested in the SPP transmission system based on an express contractual commitment in its Sponsored Upgrade Agreement that it would be reimbursed.¹¹⁴

46. OG&E maintains that there is no basis here to find that honoring its Sponsored Upgrade Agreement would "seriously harm the public interest."¹¹⁵ OG&E argues that, to the contrary, the public interest supports enforcing OG&E's contractual rights because transmission projects require both significant time and capital investments and may not be recovered for 40 or more years. OG&E explains that parties like itself that undertake such projects based on contractual assurances that they will be reimbursed may not undertake such projects in the future if they know that they may be subject to denial of reimbursement years later. OG&E also contends that the Commission's failure to honor contractual commitments to compensate companies investing in such products will undoubtedly lead to investors requiring higher returns for this increased risk, which will be borne not only by parties like OG&E whose contracts were not honored, but by all transmission ratepayers.¹¹⁶

¹¹¹ Flat Ridge Request for Rehearing at 31.

¹¹² OG&E Request for Rehearing at 23 (citing *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty., Wash.*, 554 U.S. 527, 551 (2008) (*Morgan Stanley*)).

¹¹³ *Id.* at 24.

¹¹⁴ *Id.* at 23-24.

¹¹⁵ *Id.* at 24 (quoting *Morgan Stanley*, 554 U.S. at 551).

¹¹⁶ *Id.* at 24-25.

47. OG&E also argues that, because the Remand Order incorrectly framed the issue as one of whether equitable concerns can override the clear terms of the Tariff, it does not address the issue of whether Section I.7.1 should, in fact, be read to override OG&E's Tariff rights to reimbursement.¹¹⁷ OG&E argues that SPP did not send invoices purporting to be final and then seek to correct those invoices later.¹¹⁸ OG&E contends, that, because customers were aware that credit payment obligation calculations remained outstanding when SPP sent invoices and could not practicably be completed within Section I.7.1's one-year timeframe, the Commission erred in determining that Section I.7.1 limits the calculation process and cuts off OG&E's contractual and Tariff rights to reimbursement.

48. Similarly, OG&E contends that, unless first stayed and then reversed, the Remand Order will lead to an unfair and inequitable result contrary to the expectations of the market participants, denying OG&E timely recovery for the costs of an important and necessary project that it funded in reliance on the express promise that it would be repaid by the actual users of that project.¹¹⁹ OG&E argues that the Commission's decision in the Remand Order allows those users to free ride on Creditable Upgrades by obtaining free transmission services for nearly a decade. OG&E also asserts that the Commission failed to articulate how the Remand Order serves the interests of the marketplace.¹²⁰

49. OG&E states that, in Order No. 1000,¹²¹ the Commission relied heavily on the public benefits of building transmission to allow the development of renewable resources, and the court of appeals cited to this rationale extensively in upholding Order No. 1000 on appeal.¹²² OG&E argues that Attachment Z2 was necessary to allow the development of renewable energy resources as contemplated by the Commission in Order No. 1000. OG&E therefore contends that one would expect the Commission to make the "clearest

¹¹⁷ *Id.* at 18.

¹¹⁸ *Id.* at 19.

¹¹⁹ *Id.* at 1-2, 7-8.

¹²⁰ *Id.* at 26.

¹²¹ *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, 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).

¹²² OG&E Request for Rehearing at 25.

possible showing” that Section I.7.1 “actually and necessarily” overrides OG&E’s contractual rights and Commission policy.¹²³

b. Commission Determination

50. We do not find Flat Ridge’s and OG&E’s arguments concerning contractual rights under their Generator Interconnection Agreement and Sponsored Upgrade Agreement, respectively, to be persuasive. Specifically, we find Flat Ridge’s and OG&E’s arguments that they are entitled to credits under their respective agreements, regardless of SPP’s Attachment Z2 and invoicing processes, do not overcome the Commission’s determination in the Remand Order that Section I.7.1 is part of the filed rate and that there was not adequate notice to support waiver of Section I.7.1 under the circumstances presented.¹²⁴ Flat Ridge’s Generator Interconnection Agreement states that “[t]he terms of this Article 12 apply to billing between the [p]arties for construction and operation and maintenance charges. All other billing will be handled according to the Tariff.”¹²⁵ In other words, Flat Ridge’s Generator Interconnection Agreement explicitly acknowledges that any billing not specifically for construction or operation and maintenance under the agreement is subject to the billing provisions contained in the Tariff. As determined by the Commission in the Remand Order, Attachment Z2 credit billing is administered under the Tariff and subject to the time bar provision in Section I.7.1. Accordingly, we find that Flat Ridge’s Generator Interconnection Agreement is subject to the time bar provision in Section I.7.1 of the Tariff. OG&E’s Sponsored Upgrade Agreement similarly does not supersede the Tariff, as OG&E suggests, because the Sponsored Upgrade Agreement expressly incorporates the Tariff, which includes the time bar in Section I.7.1, for all purposes. Accordingly, OG&E’s Sponsored Upgrade Agreement is subject to Section I.7.1 and the Commission’s determination in the Remand Order, as well.

51. We acknowledge that OG&E advanced substantial funds in reliance on the Sponsored Upgrade Agreement and that the agreement calls for SPP to “provide [the] Project Sponsor with revenue credits pursuant to Attachment Z2.”¹²⁶ However, the Sponsored Upgrade Agreement does not supersede the Tariff, as OG&E suggests.

¹²³ *Id.*

¹²⁴ Remand Order, 166 FERC ¶ 61,160 at P 55.

¹²⁵ See SPP Tariff, Attachment V, App. 6, Art. 12 (Invoice).

¹²⁶ See OG&E Brief at Attachment I, Agreement for Sponsored Upgrade, Art. 5.0, Docket Nos. ER16-1341-000 & ER16-1341-001 (filed Aug. 31, 2018) (OG&E’s Sponsored Upgrade Agreement).

Instead, as noted above, the Sponsored Upgrade Agreement expressly incorporates the Tariff, including the time bar provision in Section I.7.1 for all purposes.¹²⁷ Because the time bar provision in Section I.7.1 is incorporated into the Sponsored Upgrade Agreement, we need not reach OG&E's arguments that it has a right to recover Attachment Z2 credits unlimited by a time bar, and that such right is protected by a *Mobile-Sierra* presumption.

52. As discussed above, we find that the filed rate doctrine and the rule against retroactive ratemaking prohibit waiver of Section I.7.1 under the facts presented here. As a result, we also need not reach OG&E's arguments regarding the policies underlying Order No. 1000, transmission infrastructure development, and renewable energy policy.

5. Remedial Authority under Section 309 of the FPA

a. Arguments on Rehearing

53. According to SPP, the consequences of the Remand Order are unfair and illogical, as upgrade sponsors who funded Creditable Upgrades under Attachment Z2 will be denied duly-owed reimbursement of their investments, and users of Creditable Upgrades will not have to pay for services taken.¹²⁸ Additionally, SPP states that as a result of the Remand Order, it must now recalculate settlement amounts under Attachment Z2 after the historical period with no assurance that it will be able to recover all Attachment Z2 credit payment obligation amounts paid to upgrade sponsors, due to various factors.¹²⁹ SPP also argues that implementing the refunds required by the Remand Order will be complex and require significant resources and changes to existing systems.¹³⁰ SPP claims that implementing Attachment Z2 crediting and billing now and in the future will be substantially impacted by the Remand Order's requirement to refund credit payment obligations from the historical period because present and future Attachment Z2

¹²⁷ See OG&E's Sponsored Upgrade Agreement, Art. 8.0 ("The Tariff is incorporated herein and made a part hereof for all purposes.").

¹²⁸ SPP Request for Rehearing and Clarification at 32.

¹²⁹ *Id.* at 32-33 (alleging that certain generation owners have sold assets, credit payments have been disbursed to non-jurisdictional entities, and customers who paid Attachment Z2 costs may no longer be taking service from SPP).

¹³⁰ *Id.* at 34.

settlements are premised on past Attachment Z2 payments. SPP also states that upgrade sponsors may not fully recover refunded amounts through future crediting.¹³¹

54. SPP states that, in the Remand Order, the Commission recognized its broad remedial discretion under section 309 of the FPA,¹³² but incorrectly concluded, without any discussion of the equities, that this is not a proper case for the exercise of such discretion.¹³³ SPP notes that the Commission stated only that the filed rate and retroactive ratemaking considerations make this an inappropriate case for an exercise of the Commission's remedial discretion. SPP asserts that this approach represents a departure from the Commission's prior policy of "balancing the equities" when fashioning a remedy¹³⁴ and contradicts the very purpose of section 309 of the FPA, which in this instance would be to ensure that the Commission properly carries out its duties under section 205 of the FPA.¹³⁵ SPP also contends that an exercise of remedial discretion in this case would advance, rather than conflict with, the FPA's requirements that customers pay and investors receive just and reasonable rates.

55. SPP contends that delaying the effective date of Attachment Z2 until the issues causing the delay were resolved was not a feasible option. SPP explains that any such delay would have halted the processing of generator interconnection and transmission service requests resulting in backlogs and delays to important transmission upgrades.¹³⁶ Ultimately, SPP concludes that if the Commission is inclined to adhere to its rigid finding regarding the filed rate doctrine, then the Commission is effectively concluding that SPP violated the Tariff. Consistent with court precedent providing the Commission with

¹³¹ *Id.* at 33.

¹³² 16 U.S.C. § 825h.

¹³³ SPP Request for Rehearing and Clarification at 34.

¹³⁴ *Id.* (citing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,197, at P 175 (2017)).

¹³⁵ *Id.* (arguing that by ordering refunds, the Commission fails to effectuate the purpose underlying section 205 of the FPA because the Commission is not requiring customers to pay for the Creditable Upgrades that were used to accommodate their service and allowing upgrade sponsors to recover their investments at just and reasonable rates is plainly consistent with the FPA).

¹³⁶ SPP Request for Rehearing and Clarification at 35-36.

broad latitude to construct remedies for tariff violations, SPP argues that the Commission should balance the equities and determine that refunds are not appropriate.¹³⁷

56. Flat Ridge argues that the Commission ignored other available remedial options and failed to explain why it chose to require refunds as the appropriate remedy in this proceeding, which renders the Commission's decision unreasonable and not the result of reasoned decision-making.¹³⁸ Flat Ridge states that the Commission's discretion is at its zenith when fashioning remedies, particularly where it seeks to correct unjust situations and that refunds are only mandatory where a statute requires them. In support, Flat Ridge observes that the Commission has previously waived refund requirements, ordered the disgorgement of profits, and found it more difficult to order refunds when the parties that would pay them did not themselves violate the tariff, which is the case here.¹³⁹ Flat Ridge therefore argues that the Commission fails at a minimum to explain how its choice of remedy is a "reasonable accommodation of the relevant factors" and "equitable in the circumstances."¹⁴⁰

57. Flat Ridge argues that the equities favor not requiring refunds for several reasons under the circumstances here. First, Flat Ridge's Generator Interconnection Agreement contractually provides for Flat Ridge to receive credit payment obligations. Next, Flat Ridge claims that customers will receive a windfall by receiving service that would not have occurred but for the Creditable Upgrades. Finally, Flat Ridge contends that customers admit that they had notice of SPP's intent to retroactively invoice, but failed to raise the time bar provision until much later.¹⁴¹

58. Flat Ridge requests that, if the Commission denies rehearing, the Commission confirm that SPP is required to pay upgrade sponsors all Creditable Upgrade amounts that they are due under Attachment Z2. Flat Ridge continues that if the upgrade sponsors are not permitted to retain payments from the use of their Creditable Upgrades during the historical period, then upgrade sponsors are still entitled to receive credit payment obligations for the continued use of their Creditable Upgrades up to the maximum amount they are entitled to receive under Attachment Z2. Additionally, Flat Ridge

¹³⁷ *Id.* at 36-37.

¹³⁸ Flat Ridge Request for Rehearing at 28-29.

¹³⁹ *Id.* at 29-30.

¹⁴⁰ *Id.* at 7-8, 30 (citing *Koch Gateway Pipeline Co. v. FERC*, 136 F.3d 810, 816 (D.C. Cir. 1998); *Pub. Util. Comm'n Cal. v. FERC*, 462 F.3d 1027, 1048 (9th Cir. 2006)).

¹⁴¹ *Id.* at 31-32.

requests that if the Commission determines Attachment Z2 credit payment obligations will be disregarded for services provided prior to November 2015, then the Commission confirm that SPP must disregard its prior analyses used to determine Creditable Upgrades. Flat Ridge argues that, if a service did not trigger a cost responsibility for Attachment Z2 credit payment obligations, then that transmission service should not be considered a Creditable Upgrade until such time as it triggers the required creditable payment obligations.¹⁴²

b. Commission Determination

59. We disagree with SPP that the Commission erred by declining to exercise its remedial authority under FPA section 309 to uphold the Waiver Orders in the Remand Order. We also disagree with SPP and Flat Ridge that the Commission should reverse its decision to order refunds on rehearing by exercising its remedial authority under FPA section 309. The courts have described the Commission's remedial authority as expansive, explaining that "[s]ection 309 . . . permits FERC to advance remedies not expressly provided by the FPA as long as they are consistent with the [FPA]."¹⁴³ While we agree that the Commission has considerable discretion to remedy unjust outcomes, we affirm the Commission's determination in the Remand Order that "exercising our authority under FPA section 309 in this instance would be inappropriate."¹⁴⁴

60. On rehearing, parties argue that the Commission should weigh numerous equitable considerations, and conclude that on balance, refunds are not an appropriate remedy under the circumstances. The Commission has balanced the relevant equities here and reached a different result. The determination that refunds are appropriate represents the Commission's best effort under the less-than-ideal circumstances of this waiver proceeding to protect the core principles of adequate advance notice and rate certainty that serve as the foundational underpinnings of many provisions of the FPA and time bar provisions like Section I.7.1. Customers and interested parties must be able to rely on duly-filed and Commission-accepted tariff provisions, even under the most complex of circumstances. Accordingly, requiring refunds will ensure that the core principles of adequate advance notice and rate certainty for completed transactions and finalized invoices are given effect to the maximum extent possible. Therefore, under the circumstances presented here, we continue to agree with the Commission's determination

¹⁴² *Id.* at 34-35.

¹⁴³ *Verso*, 898 F.3d at 10; *see also Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 158 (D.C. Cir. 1967).

¹⁴⁴ Remand Order, 166 FERC ¶ 61,160 at P 57.

in the Remand Order that exercising our remedial discretion to uphold the Waiver Orders would be inappropriate.

61. While we recognize that there may be complexities associated with implementing the Remand Order's refund directive, we need not consider or address those issues here, where our determination is instead limited to whether refunds are appropriate in the first instance. Subsequently, consistent with the directive in the Remand Order that SPP take no action concerning refunds until the Commission has issued an order in the Refund Plan Proceeding, we will address these and other arguments concerning refund implementation as we consider SPP's proposed plan filed in the Refund Plan Proceeding.¹⁴⁵

6. Clarification of the Remand Order

a. SPP's Request

62. SPP states that, if the Commission denies rehearing of the Remand Order, SPP seeks clarification of the directive that SPP provide refunds, with interest.¹⁴⁶ According to SPP, the interest obligation applies to the actual recipients of payments and not to SPP.¹⁴⁷ Although SPP acknowledges its role as the conduit for recovery and distribution of payments, SPP requests that the Commission clarify that it is not the subject of any interest obligation, consistent with the Commission's policy of requiring interest on refunds to reflect the time value of money.¹⁴⁸ In addition, SPP asserts that the Commission has routinely held that regional transmission organizations like SPP must be able to recover not only the amount of the refund but any interest, given their revenue neutral status.¹⁴⁹ SPP states that if the Commission does not provide the requested clarification, SPP seeks rehearing of that determination.¹⁵⁰

¹⁴⁵ *Id.* P 43.

¹⁴⁶ SPP Request for Rehearing and Clarification at 37-38.

¹⁴⁷ *Id.* at 37.

¹⁴⁸ *Id.* (citing *New Charleston Power, L.P.*, 83 FERC ¶ 61,281, at 62,168 (1998)).

¹⁴⁹ *Id.* at 37-38 (citing *Pub. Serv. Comm'n of Wis.*, 156 FERC ¶ 61,205, at P 79 (2016); *Sw. Power Pool, Inc.*, 156 FERC ¶ 61,057, at PP 17, 21 & n.39 (2016)).

¹⁵⁰ *Id.* at 38 (alleging that failing to ensure that SPP can recover the refund revenues and interest would be an unlawful departure from Commission precedent).

b. Commission Determination

63. We grant SPP's request for clarification. SPP, as a not-for-profit regional transmission organization entity, has no independent funds and must recoup the refunds ordered by the Commission in this proceeding through charges to its members.¹⁵¹ Accordingly, we clarify that SPP may recover the amount of any refunds owed, as well as any interest accrued. We decline to address any other refund implementation or Attachment Z2 issues,¹⁵² however, as those issues are more appropriately addressed in the Refund Plan Proceeding or in other pending proceedings.

The Commission orders:

(A) The requests for rehearing are hereby denied, as discussed in the body of this order.

(B) SPP's request for clarification is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

¹⁵¹ See *Black Oak Energy, L.L.C. v. PJM Interconnection, L.L.C.*, 139 FERC ¶ 61,111, at P 42 (2012).

¹⁵² See *supra* P 62.