

174 FERC ¶ 61,116  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;  
Neil Chatterjee, James P. Danly,  
Allison Clements, and Mark C. Christie.

Southwest Power Pool, Inc.

Docket No. ER18-99-004

ORDER REJECTING CONTESTED SETTLEMENT

(Issued February 18, 2021)

1. On August 30, 2019, on behalf of the Settling Parties<sup>1</sup> and pursuant to Rule 602 of the Commission's Rules of Practice and Procedure,<sup>2</sup> Southwest Power Pool, Inc. (SPP) submitted an offer of settlement (Settlement) in the matter set for hearing and settlement judge procedures in this proceeding. Because the Settlement is contested and cannot be approved under *Trailblazer Pipeline Company*,<sup>3</sup> we reject the Settlement and remand the proceeding to the Chief Administrative Law Judge (Chief Judge) to resume hearing procedures.

**I. Background**

2. On October 18, 2017, SPP submitted proposed revisions to its Open Access Transmission Tariff (Tariff) to add an annual transmission revenue requirement (ATTR), implement a formula rate template, and add implementation protocols for certain

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<sup>1</sup> The Settling Parties are GridLiance High Plains LLC (GridLiance) (formerly known as South Central MCN LLC) and the ARKMO Cities. The ARKMO Cities are the following customers within SPP Zone 10: Paragould Light Water & Cable; Paragould Light Commission; Poplar Bluff Municipal Utilities; Kennett Board of Public Works; City of Piggott Municipal Light, Water & Sewer; and the City of Malden.

<sup>2</sup> 18 C.F.R. § 385.602(h) (2020).

<sup>3</sup> 85 FERC ¶ 61,345 (1998) (*Trailblazer*), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (*Trailblazer Rehearing Order*).

transmission facilities owned by GridLiance (Nixa Assets).<sup>4</sup> SPP explained that it had used its (then) new Transmission Owner Zonal Placement Process (Zonal Placement Process) to place the facilities into SPP Zone 10. SPP stated that it considered two potential zones for placement of the Nixa Assets — Zone 3 and Zone 10 — but that its criteria did not indicate clearly in which of the two zones the Nixa Assets should be placed. SPP stated that the SPP Tariff indicated that Zone 10 is the most appropriate zone for the Nixa Assets because the load served by the Nixa Assets is served by Zone 10.

3. Several parties protested the filing, including the ARKMO Cities, Nebraska Public Power District (NPPD), and a group of SPP transmission owners.<sup>5</sup> The protesters argued that SPP's rate impact analysis was inaccurate, the Zonal Placement Process does not mitigate or address cost shifts, and SPP did not quantify any alleged benefits, and thus provided no basis on which to weigh costs and benefits. On March 15, 2018, the Commission set the Tariff revisions for hearing and settlement judge procedures.<sup>6</sup>

4. That same day, the Commission denied a complaint filed by the ITOs and other SPP transmission owners alleging that the SPP Tariff was unjust and unreasonable because, when a new SPP transmission owner is integrated into an existing transmission pricing zone, the costs of the transmission owner's existing transmission facilities are allocated across the entire zone, resulting in cost shifts between new and existing transmission customers. The Commission found that granting the complaint would require finding that any potential cost shift that results from the reallocation of existing

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<sup>4</sup> The Nixa Assets consist of approximately 10 miles of transmission lines and related facilities interconnected to Southwestern Power Administration (Southwestern) in SPP Zone 10 and to City Utilities of Springfield, Missouri in SPP Zone 3, which GridLiance ultimately acquired from the City of Nixa, Missouri (City of Nixa) on April 1, 2018.

<sup>5</sup> These SPP transmission owners included: Westar Energy, Inc.; American Electric Power Service Corporation, on behalf of its affiliates Public Service Company of Oklahoma and Southwestern Electric Power Company; Kansas City Power & Light Company and KCP&L Greater Missouri Operations Company; Sunflower Electric Power Corporation (Sunflower); Mid-Kansas Electric Company, LLC (Mid-Kansas); and Xcel Energy Services, Inc. on behalf of its utility operating company affiliate Southwestern Public Service Company. These transmission owners (except for Sunflower and Mid-Kansas) plus Western Farmers Electric Cooperative (collectively, the ITOs) are the parties contesting the settlement.

<sup>6</sup> *Sw. Power Pool, Inc.*, 162 FERC ¶ 61,215 (Hearing Order), *order denying reh'g and clarification*, 164 FERC ¶ 61,120 (2018) (Rehearing Order).

transmission costs when a new transmission owner joins a Regional Transmission Organization or Independent System Operator (RTO/ISO) is *per se* unjust and unreasonable, noting that it had previously found, on a case-by-case basis, that some degree of cost shifting is just and reasonable and had permitted the costs of existing transmission facilities to be reallocated among existing transmission owners.<sup>7</sup> However, the Commission also found that parties retained the right to protest the proposed placement of a new transmission owner in an existing zone and argue that cost shifts render the proposed placement unjust, unreasonable, and unduly discriminatory or preferential when SPP makes such a filing.<sup>8</sup>

5. On April 16, 2018, SPP and GridLiance filed requests for clarification and rehearing of the Hearing Order. The Commission denied rehearing, stating “[w]e continue to find that the justness and reasonableness of SPP’s rate proposal, including its premise that the Nixa Assets should be placed in Zone 10, is best resolved through the hearing and settlement judge procedures that the Commission previously established.”<sup>9</sup>

6. After an initial round of settlement judge procedures failed and following the filing of post-hearing briefs in the subsequent evidentiary hearing, GridLiance and the ARKMO Cities stated that they had reached agreement in principle. The Chief Judge granted their motion to suspend the procedural schedule, and SPP filed the Settlement.

## II. Settlement

7. Article I of the Settlement contains background information and procedural history.

8. Article II of the Settlement contains the specific terms. Section 2.1 states that the Settlement represents a complete and final settlement of all issues set for hearing in this proceeding. Section 2.2 states that SPP will resettle the April 2018 through December 2018 billing period in Zone 10 by recalculating rates using one-fourth of GridLiance’s Zone 10 ATRR that was applicable during that period. Section 2.3 provides that the unrecovered three-fourths of GridLiance’s 2018 ATRR will accrue to a regulatory asset that will earn a return at GridLiance’s cost of debt as identified in GridLiance’s 2019 formula rate. Section 2.4 states that the regulatory asset will be recovered from Zone 10 transmission customers in the 2019 and 2020 rate years through

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<sup>7</sup> *Indicated SPP Transmission Owners v. Sw. Power Pool, Inc.*, 162 FERC ¶ 61,213, at PP 62-63 (Complaint Order), *order denying reh’g*, 165 FERC ¶ 61,005 (2018).

<sup>8</sup> Complaint Order, 162 FERC ¶ 61,213 at P 74.

<sup>9</sup> Rehearing Order, 164 FERC ¶ 61,120 at P 8.

SPP settlements and resettlements, as necessary, resulting in full recovery in rate years 2019 and 2020. Recovery of the regulatory asset will begin after resettlement of the April 2018 through December 2018 billing period has begun. Section 2.5 provides a payment to the ARKMO Cities in two separate allotments. The first will be made within five business days of the Commission's approval of the Settlement. The second payment will be made one year later. Section 2.6 states that no amount of the cash payments to the ARKMO Cities will be recovered through GridLiance's ATRR.

9. Articles III through VIII contain statements of non-severability, terms of modification, conditions of effectiveness, reservations of rights, standard of review, and other miscellaneous terms. Specifically, Article VII provides the standard of review for any change to the Settlement. For changes proposed by a Settling Party, the standard of review shall be the "public interest" application of the just and reasonable standard. For any modification requested by other entities, including the Commission, the standard of review shall be the most stringent standard permissible under applicable law, as determined by the Commission.<sup>10</sup>

10. Trial Staff filed initial comments in support of the Settlement and the ITOs filed initial comments contesting the Settlement. Associated Electric Cooperative, Inc. (Associated Electric), a current Zone 10 customer, filed comments in support of the ITOs' objections. Reply comments were filed by Trial Staff, SPP, the Settling Parties, and the ITOs. The ITOs also filed a limited answer to the reply comments.

11. On May 20, 2020, the Presiding Administrative Law Judge (Presiding Judge) certified the contested Settlement to the Commission.<sup>11</sup> The Presiding Judge found that the issues raised are arguably policy concerns that do not constitute genuine issues of material fact. The Trial Judge also found that the record contains substantial evidence upon which the Commission may make a reasoned decision in accordance with the first three approaches in *Trailblazer*.

### **III. Comments**

12. Trial Staff filed initial comments in support of the Settlement, stating that it is fair, reasonable, in the public interest, resolves the issue of rate mitigation and eliminates the need for additional expenditure of major financial and personnel resources by the parties and the Commission.<sup>12</sup> Trial Staff argues that "it will almost certainly provide Pricing

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<sup>10</sup> Settlement, art. VII (citing *Ill. Power Mktg. Co.*, 155 FERC ¶ 61,172, at PP 4-5 (2016)).

<sup>11</sup> *Sw. Power Pool, Inc.*, 171 FERC ¶ 63,032, at P 67 (2020) (Certification Order).

<sup>12</sup> Trial Staff Initial Comments at 1, 2, 6, and 7.

Zone 10 ratepayers rate mitigation at a much earlier date than would have otherwise occurred, if the Commission would have found such tools necessary under continued litigation of the case.”<sup>13</sup>

13. The ITOs filed initial comments opposing the Settlement as unjust, unreasonable, and unduly discriminatory. The ITOs reiterate their concerns that the Settlement preserves reallocation of sunk costs with a material impact that they argue was present in the originally proposed rate that caused the case to be set for hearing in the first place.<sup>14</sup> The ITOs argue that the deferral of 75% of charges for service provided in 2018 results in charging 2018 costs to new customers, i.e., Public Service Company of Oklahoma and Western Farmers, who did not take SPP service in 2018, but have already paid Southwestern for the service they received in 2018 under grandfathered agreements.<sup>15</sup> The ITOs argue that such an arrangement would violate the filed rate doctrine and the rule against retroactive ratemaking.<sup>16</sup> Additionally, the ITOs argue that potential new customers entering Zone 10 were not provided ample notice that upon joining Zone 10 they would be subject to charges from 2018 for the Nixa Assets.<sup>17</sup> The ITOs argue that the Commission, therefore, should provide those customers notice and an opportunity to comment on this new proposal to charge them for service they did not receive.<sup>18</sup>

14. The ITOs argue that the Settlement worsens what was already an unjust and unreasonable rate proposal “by exacerbating the cost shift, violating the filed rate doctrine and the rule against retroactive ratemaking, and singling out one customer,” namely the ARKMO Cities, for unduly preferential treatment.<sup>19</sup> The ITOs characterize the Settlement’s provision for payment to the ARKMO Cities as a “secret side payment,” “secret amount,” “secret payment” and “secret discount.”<sup>20</sup> The ITOs argue that by singling out the ARKMO Cities for special treatment, the Settlement creates three classes

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<sup>13</sup> *Id.* at 6.

<sup>14</sup> ITOs Initial Comments at 2-3, 11.

<sup>15</sup> *Id.* at 3, 4, 16, 17, 32-39.

<sup>16</sup> *Id.* at 32.

<sup>17</sup> *Id.* at 43-44 (citing *Duke Energy Ohio, Inc.*, 144 FERC ¶ 61,217, at PP 17, 19-20 (2013)).

<sup>18</sup> *Id.* at 44-45.

<sup>19</sup> *Id.* at 4-5, 27-28.

<sup>20</sup> *Id.* at 6, 13, 30, 46.

of customers, *i.e.*, City of Nixa, the ARKMO Cities, and the other Zone 10 transmission customers and thereby worsens what they describe as an already unjust situation.<sup>21</sup>

15. The ITOs assert that “responsibility to pay for facilities must be allocated in a way that satisfies cost causation by being at least ‘roughly commensurate’ with who the facilities were built to serve originally or who they benefit today.”<sup>22</sup> The ITOs argue that no evidence has been provided by the Settling Parties showing such benefit to customers in Zone 10 other than City of Nixa that would be roughly commensurate with the material rate impact they would incur as a result of the proposed Settlement.<sup>23</sup> Instead, according to the ITOs, the originally proposed rate, which is substantially unaffected by the proposed Settlement, will reallocate almost all of the sunk costs of the Nixa Assets and non-City of Nixa customers will pay for assets that were built only for City of Nixa and benefit only City of Nixa.<sup>24</sup> The ITOs assert that the only load flow evidence in the record suggests that City of Nixa receives 99% of the benefits associated with the Nixa Assets.<sup>25</sup> The ITOs assert that SPP could have placed the Nixa Assets in Zone 10 and yet still allocated the costs of the Nixa Assets only to City of Nixa.<sup>26</sup> The ITOs further assert that the record in this case refutes GridLiance’s arguments that the potential for future regional planning or local planning in Zone 10 could cure the cost causation problem inherent in the original proposal.<sup>27</sup>

16. The ITOs additionally state that the Settlement fails the threshold question of presenting an acceptable outcome that is consistent with the public interest, and fails all four approaches the Commission adopted in *Trailblazer* for approving a contested settlement.<sup>28</sup> The ITOs argue that for approaches 1-3 of the *Trailblazer* test, the Settlement fails on the merits because it produces unjust and unreasonable outcomes and

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<sup>21</sup> *Id.* at 2-4, 27.

<sup>22</sup> *Id.* at 18 (citing *Ill. Commerce Comm’n v. FERC*, 576 F.3d 470, 477 (7<sup>th</sup> Cir. 2009); Complaint Order, 162 FERC ¶ 61,213 at P 62).

<sup>23</sup> *Id.* at 19-24.

<sup>24</sup> *Id.* at 22, 27.

<sup>25</sup> *Id.* at 21.

<sup>26</sup> *Id.* at 26.

<sup>27</sup> *Id.* at 25 (citing ITOs Initial Post-Hearing Brief at 43-46).

<sup>28</sup> *Id.* at 4, 11-12 (citing *Trailblazer*, 85 FERC at 62,341).

unduly discriminatory outcomes.<sup>29</sup> The ITOs argue that the Commission must protect all customers in the zone from unduly discriminatory rate impact, not just those who settle.<sup>30</sup> In particular, as relates to *Trailblazer* approach 3, the ITOs argue that the ITOs' interests are not attenuated.<sup>31</sup> In arguing against the Commission accepting the Settlement under approach 4 of the *Trailblazer* test, the ITOs contend that cost allocation may be severed, but must be resolved, and parties cannot be severed because the issue of cost shift applies to all parties.<sup>32</sup> The ITOs additionally argue that even if every customer received the same discount, the fix would only be temporary, and the rate going forward would remain unjust and unreasonable.<sup>33</sup>

17. Associated Electric filed comments supporting the ITOs' comments opposing the Settlement.<sup>34</sup> Associated Electric states that as a result of the Settlement it will be exposed to substantial, additional costs in Zone 10 without any commensurate benefit, and without the advantage of a separate payment to help offset those costs.

#### **IV. Reply Comments**

18. The ITOs emphasize in their reply that the Settling Parties and SPP neither filed comments nor provided evidentiary support required by the Federal Power Act (FPA) and the Commission's regulations.<sup>35</sup> The ITOs argue that the ARKMO Cities are the sole customer to the proposed Settlement and, therefore, refer to the proposed Settlement as the "Single Customer Settlement." The ITOs argue that Trial Staff provides no evidentiary support for its claims and that Trial Staff's arguments are not supported by

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<sup>29</sup> *Id.* at 35, 37, 38-42.

<sup>30</sup> *Id.* at 39.

<sup>31</sup> *Id.* at 9, 37.

<sup>32</sup> *Id.* at 42-43.

<sup>33</sup> *Id.* at 31-32.

<sup>34</sup> The Presiding Judge notes that Associated Electric failed to submit an affidavit as to factual issues to support its position, in violation of rule 602(f)(4) of the Commission's regulations. The Presiding Judge, therefore, recommends that the Commission not consider Associated Electric's comments and find that Associated Electric has failed to establish any genuine issues of material fact. *See Certification Order*, 171 FERC ¶ 63,032 at P 59.

<sup>35</sup> ITOs Reply Comments at 1.

an affidavit.<sup>36</sup> The ITOs contend that zonal placement need not drive cost allocation within Zone 10 and that it is the cost allocation issue that is both contested and unresolved by the proposed Settlement.<sup>37</sup> The ITOs continue to maintain that the justness and reasonableness of the resulting cost allocation is the real issue in this case.<sup>38</sup> The ITOs argue additionally that the regulatory asset will not provide relief from rate shock, because the rate charged in 2019 will now be higher than originally proposed.<sup>39</sup>

19. The ITOs reiterate their contention in their initial comments that rather than offering meaningful rate mitigation to any customer other than the ARKMO Cities, the proposed Settlement instead exacerbates rate issues.<sup>40</sup> According to the ITOs, the Settlement adds expense, rather than avoiding it, because any approval of the Settlement “necessarily requires resolution of the cost allocation issue that was at the heart of the hearing process, while adding the procedural overlay of extra briefing in the settlement context.”<sup>41</sup> The ITOs contend that the proposed Settlement fails to resolve anything that has already been extensively litigated and briefed at hearing.

20. Finally, the ITOs argue that the burden of proof to justify that a rate is just and reasonable is on the filing parties.<sup>42</sup> The ITOs contend that none of the Settling Parties have provided evidence, such as is required by FPA section 205 and the Commission’s regulations, in support of the proposed settlement rate.<sup>43</sup> According to the ITOs, the Settling Parties had 65 days (i.e., the 45-day period that the Chief Judge allowed for the parties to file settlement documents after she granted GridLiance and the ARKMO Cities’ motion to suspend the procedural schedule plus the 20-day comment period after the Settlement was filed) to produce and file the necessary evidentiary support.<sup>44</sup> The ITOs opine that the case is ripe for Commission ruling, but urge the Commission to reject the

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<sup>36</sup> *Id.* at 2.

<sup>37</sup> *Id.* at 2-3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 2 (citing Affidavit of Michael M. Schnitzer at 9, n.6).

<sup>40</sup> *Id.* at 4.

<sup>41</sup> *Id.* (citing ITOs Initial Comments at 7).

<sup>42</sup> *Id.* at 5 (citing *ISO New England, Inc.*, 136 FERC ¶ 61,221 at P 20 (2011)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 8.

proposed Settlement because it fails to resolve the policy issues.<sup>45</sup> The ITOs urge that the Commission instead direct the Presiding Judge to issue an Initial Decision on the originally-proposed rate based on the extensive record already compiled in this case.<sup>46</sup>

21. The Settling Parties in their reply comments assert that the proposed Settlement represents a just and reasonable resolution of the issues set for hearing by resolving the rate impact concerns of all active customers in Zone 10.<sup>47</sup> The Settling Parties argue that the ITOs have not met their burden to show that any future customers in Zone 10 will be worse off than under any litigated outcome.<sup>48</sup> The Settling Parties argue that the amount of dollars attributable to the Settlement phase-in is a maximum of \$55,000-\$65,000, even if all potential expiring grandfathered agreements convert to SPP network service in 2020.

22. The Settling Parties assert that the ITOs make four mischaracterizations of the Settlement. First, the Settling Parties argue that the ARKMO Cities are not a single customer, but rather is “a coalition of five municipally owned utilities, representing five distinct municipalities in Arkansas and Missouri,” each having a separate contractual arrangement for its electrical service from SPP and Southwestern.<sup>49</sup> Second, the Settling Parties argue that the Settlement Payment to the ARKMO Cities is not secret, because it was shared with the participants that signed a non-disclosure agreement. Third, the Settling Parties argue that the payment to the ARKMO Cities is not a transmission rate discount, but is instead, “an exchange of risks and benefits among the parties aimed at resolving the underlying litigation and reaching finality.”<sup>50</sup> The Settling Parties explain that “[i]n accepting the Settlement Payment, the ARKMO Cities are giving up their right to further litigate this case and see an Initial Decision (which could provide them with more benefit or less benefit than the Settlement Payment exchange).”<sup>51</sup> The Settling Parties further state that the payment is intended to help offset the ARKMO Cities’

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<sup>45</sup> *Id.* at 5.

<sup>46</sup> *Id.* at 8.

<sup>47</sup> Settling Parties Reply Comments at 1.

<sup>48</sup> *Id.* at 2.

<sup>49</sup> *Id.* at 4.

<sup>50</sup> *Id.* at 6, 20-21 (citing *Sw. Pub. Serv. Co.*, 124 FERC ¶ 61,232, at P 29 (2008)).

<sup>51</sup> *Id.* at 21.

already-incurred litigation expenses and anticipated further litigation expenses.<sup>52</sup> Fourth, the Settling Parties argue that the Settlement does not create three classes of customers because the rate phase-in applies to all Zone 10 customers, and treats all customers alike and fairly.<sup>53</sup> The Settling Parties emphasize that the Settlement payment to the ARKMO Cities will not become part of the GridLiance ATRR and will not be paid by or otherwise borne by ratepayers, but instead will be paid by GridLiance equity investors as a below-the-line shareholder expense.<sup>54</sup>

23. The Settling Parties also assert that the Settlement addresses rate shock for 2018 and that the outcome of the Settlement leaves no Zone 10 customers worse off than they could have been under the litigated outcomes.<sup>55</sup> As relates to the ITOs' contention that it would be unjust and unreasonable for the two incoming members joining Zone 10 in 2019 and 2020 (i.e., Public Service Company of Oklahoma and Western Farmers) to be required to pay the deferred charges from 2018, as provided under the Settlement, the Settling Parties argue that such a phase-in is consistent with prior Commission approved contested settlements.<sup>56</sup> The Settling Parties additionally argue that the "Commission has reasoned that 'an intergenerational change in customer mix frequently occurs in ratemaking' and that change alone does not produce an unacceptable outcome."<sup>57</sup> The Settling Parties further assert that the rate impact on future customers entering Zone 10 would be minimal and therefore just and reasonable.<sup>58</sup> As concerns notice to such future customers, the Settling Parties argue that current and future Zone 10 customers had ample notice that the proceeding could result in a rate phase-in because the initial filing informed customers that the 2018 rates were subject to change.<sup>59</sup> The Settling Parties

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<sup>52</sup> *Id.* at 22.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.* at 23.

<sup>55</sup> *Id.* at 8-12.

<sup>56</sup> *Id.* at 16-17 (citing *New England Power Pool*, 41 FERC ¶ 61,232 (1987) (letter order approving contested settlement); *Devon Power LLC*, 115 FERC ¶ 61,340, at PP 30, 64 (2006)).

<sup>57</sup> *Id.* at 17 (citing *Williston Basin Interstate Pipeline Co.*, 63 FERC ¶ 61,184, at 62,236 (1993), *aff'd*, 115 F.3d 1042 (D.C. Cir. 1997); *US Dep't of Energy*, 65 FERC ¶ 61,186, at 61,913-14 (1993), *reh'g denied*, 66 FERC ¶ 61,091 (1994)).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 18.

assert that, therefore, the Settlement as applies to new entrants into Zone 10 does not violate the filed rate doctrine or the rule against retroactive ratemaking.<sup>60</sup> The Settling Parties additionally assert that the Settlement resolves the rate impacts on all of the active current customers from Zone 10 that participated in the hearing, and argue that the ITOs waived their opportunity to be considered an active current customer in the zone by failing to raise those issues at the hearing.<sup>61</sup> According to the Settling Parties, although the ITOs participated in the hearing and had the opportunity to present evidence that certain members of the ITOs would join Zone 10 in 2020, the ITOs did not.<sup>62</sup> The Settling Parties argue that the ITOs have not met their burden to demonstrate that any future customers in Zone 10 will be worse off than under any litigated outcome, nor supported their claims with actual financial harm that would accrue to such future customers.

24. The Settling Parties urge the Commission to accept the Settlement without modification. If, however, the Commission is not willing to accept it without modification, GridLiance commits to hold harmless new Zone 10 customers through the end of 2020, but such hold harmless commitment would not extend to any period prior to the expiration date in a currently effective grandfathered agreement, if such an agreement is terminated early. To determine the rate impact and mitigation that GridLiance must provide under a hold harmless commitment, the Settling Parties state that GridLiance would agree to participate in a limited fact-finding effort, in the form of a paper hearing, mediation or dispute resolution. However, the Settling Parties argue that such a fact-finding effort would be more costly than the total dollars at issue.<sup>63</sup>

25. The Settling Parties argue that the Commission can approve the Settlement, despite the contesting comments, under *Trailblazer* approaches 1, 2, and 3. The Settling Parties assert that an adequate record has been established through the hearing procedures upon which the Commission may resolve any contested issues under approach 1. The Settling Parties state that, under approach 2, the Settlement resolves the issues for the existing members of Zone 10, and that the ITOs waived their opportunity to be considered an active current customer in the zone by failing to raise issues regarding the rate phase-in proposals at the hearing. The Settling Parties argue that, under approach 3, the Commission may approve the Settlement because the Settlement benefits directly

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<sup>60</sup> *Id.* at 18-19.

<sup>61</sup> *Id.* at 29.

<sup>62</sup> *Id.* at 2.

<sup>63</sup> *Id.* at 37-38.

affected customers, the ITOs' interest is sufficiently attenuated, and allegations about future customers is not sufficient to outweigh the benefits to current customers.<sup>64</sup>

26. In its reply comments, Trial Staff states its belief that the Commission can approve the Settlement under the first approach in *Trailblazer*.<sup>65</sup> Trial Staff states that the only unresolved issue is “whether the City of Nixa should have to pay for the legacy Nixa Assets in perpetuity,” which Trial Staff asserts is a policy call that Commission has found apt for resolution under the first Trailblazer approach.<sup>66</sup> Trial Staff argues that the ITOs' objection to the Settlement due to customers who join Zone 10 in 2019 or later not properly being put on notice that they might be subject to Zone 10 charges for GridLiance's cost of the Nixa Assets in 2018 lacks merit, because notice was provided arguably as early as September 2017 when GridLiance first floated the idea of a regulatory phase-in during the negotiation process as part of SPP's Zonal Placement Process, and in GridLiance's rebuttal testimony.<sup>67</sup> Trial Staff also argues that the Commission should reject the ITOs' cost shift objection to the Settlement, arguing that in the Complaint Order the Commission rejected such cost shift arguments in denying the ITOs' prior complaint.<sup>68</sup>

27. Trial Staff argues that the Commission should reject the ITOs' argument that the Settlement unduly benefits the ARKMO Cities. Trial Staff asserts that the ITOs' claim has four deficiencies, including that: (1) the cash payment is not the economic equivalent of a rate offset because the ARKMO Cities have expended substantial monetary resources over two years in addressing the placement of the Nixa Assets; (2) the Commission has approved settlements in electric cases with cash payments;<sup>69</sup> (3) by the ITOs' own calculations, non-ARKMO Cities ratepayers in Zone 10 are better off as a group under the Settlement; and (4) the resulting modest reduction in rates is

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<sup>64</sup> *Id.* at 28-31.

<sup>65</sup> Trial Staff Reply Comments at 5-6.

<sup>66</sup> *Id.* at 6.

<sup>67</sup> *Id.* at 7 (quoting ITOs Reply Comments at 44).

<sup>68</sup> *Id.* at 6 (citing Complaint Order, 162 FERC ¶ 61,213).

<sup>69</sup> *Id.* at 11 (citing Settlement Agreement § 2.4, Docket Nos. ER16-1023-000, -001, filed Nov. 22, 2016 (providing \$157,000 payment to settling parties); *ISO New England Inc.*, 158 FERC ¶ 61,096 (2017) (approving settlement); Settlement Agreement § 3.4, Docket Nos. EL18-122-000 and ER18-1225-000, filed Dec. 19, 2018 (providing \$400,000 cash payment to settling party); *Sw. Elec. Power Co.*, 168 FERC ¶ 61,179 (2019) (order approving settlement)).

understandable for the ARKMO Cities, in light of litigation risks.<sup>70</sup> Finally, Trial Staff disputes that Zone 10 customers will be worse off under the Settlement because this is the first time the argument has been raised, and there has been no evidence presented to support this claim.<sup>71</sup> Trial Staff states that, if the Commission however agrees with the ITOs that other Zone 10 customers will be worse off, the Commission should condition its acceptance of the Settlement on GridLiance's hold harmless commitment.<sup>72</sup>

28. SPP asserts in its reply comments that the Settlement is in the best interest of SPP, its members and customers and all involved, particularly in light of the relatively small amount of dollars at stake as compared to the considerable additional costs of litigating the matter further.<sup>73</sup> SPP argues that the matters that the ITOs now proffer in their comments to the Settlement, such as (1) SPP's zonal placement of the Nixa Assets in Zone 10; (2) SPP's adherence to the requirements set forth in its zonal placement process document; and (3) SPP evidence of a "Notification to Construct" demonstrating placement of the Nixa Assets in Zone 10 as being consistent with cost causation, were litigated in full at the hearing.<sup>74</sup> Furthermore, SPP argues that Rule 510(c) of the Commission's Rules of Practice and Procedure prohibits parties from adding evidence to the record after it is closed by the Presiding Judge.<sup>75</sup> SPP additionally states that the ITOs erroneously conclude that City of Nixa receives 99% of the benefits, while non-City of Nixa customers receive only 1% of the benefits from the Nixa Assets. According to SPP, the load flow analysis that the ITOs reference is a facility impact assessment that only examined the impact of the ARKMO-adjacent facilities on City of Nixa and says nothing about how much any customers are impacted by the Nixa Assets.<sup>76</sup>

29. The ITOs filed a limited answer to Settling Parties' and SPP's reply comments stating that the parties to the proposed Settlement failed to abide by the Commission's settlement comment rules, which require initial comments to be submitted within 20 days of the filing, and instead presented their entire case as reply comments. The ITOs contend that this alone is grounds for rejection of the Settlement. However, the

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 15.

<sup>72</sup> *Id.* at 16.

<sup>73</sup> SPP Reply Comments at 4.

<sup>74</sup> *Id.* at 6-7.

<sup>75</sup> *Id.* at 9.

<sup>76</sup> *Id.* at 20.

ITOs contend that GridLiance's offered hold harmless commitment is the only new idea that the parties supporting the Settlement offer in their reply comments. The ITOs argue that the hold harmless commitment is in substance an admission that for some Zone 10 customers, the Settlement is worse than the "original unjust unreasonable rate proposal."<sup>77</sup> The ITOs argue that the Settlement is unjust, unreasonable, and unduly discriminatory even with the hold harmless commitment, which the ITOs argue does not hold non-ARKMO customers of Zone 10 harmless from (1) the unjust and unreasonable original rate proposal, or (2) the unduly discriminatory payment to the ARKMO Cities intended to lock in the original rate for all Zone 10 customers.<sup>78</sup> The ITOs assert that the hold harmless commitment would neutralize the effect of the proposed regulatory asset, not the effect of the originally proposed cost allocation.<sup>79</sup> The ITOs further assert that the remaining arguments made by the Settling Parties and by SPP are efforts to confuse the record and shift the burden of proof.<sup>80</sup> The ITOs reiterate their contention from their initial and reply comments that the rate proponents, not customers, have the burden of proof.<sup>81</sup> The ITOs argue that the regulations only require intervenors contesting a settlement to make enough of a showing to establish that facts are legitimately contested.<sup>82</sup>

30. The ITOs continue to maintain that the real issue is the unjust and unreasonable originally proposed cost allocation and that the Settlement will not improve the unjust and unreasonable originally filed rate.<sup>83</sup> The ITOs additionally argue that the Settling Parties fail to demonstrate that the ARKMO Cities are not similarly situated to other Zone 10 customers. The ITOs argue that, similar to the ARKMO Cities, the ITOs have also expended a considerable amount on litigation and that no evidence is offered showing that the "large side payment" the ARKMO Cities would receive corresponds to any meaningful degree with the ARKMO Cities' legal bills.<sup>84</sup> Finally, the ITOs argue that the cases cited by GridLiance and the ARKMO Cities do not support the

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<sup>77</sup> ITOs Limited Answer at 2.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 3.

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

<sup>81</sup> *Id.* at 4.

<sup>82</sup> *Id.*

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

<sup>84</sup> *Id.* at 5-6.

discriminatory side payment proposed by the Settlement because the facts are inapposite. According to the ITOs, unlike the cited cases, all customers in Zone 10 are similarly situated.<sup>85</sup>

## V. Discussion

31. In *Trailblazer*, the Commission outlined four alternative approaches for approving contested settlements.<sup>86</sup> As discussed below, we find that we cannot approve the Settlement under any of the four approaches and thus remand it for further proceedings.

32. Under the first *Trailblazer* approach, the Commission found that “if there is an adequate record, [it] can address the contentions of the contesting parties on the merits.”<sup>87</sup> The Commission has held that it “cannot approve a contested settlement under this approach if some of the contesting parties’ positions are found to have merit or the record lacks sufficient evidence to support a finding on the merits.”<sup>88</sup>

33. The Settling Parties and Trial Staff argue that the Commission can approve the Settlement under the first *Trailblazer* approach based on the record as presented. They argue that the issue of the potential cost shift caused by inclusion of the Nixa Assets into SPP Zone 10 is either not at issue in this proceeding or is a policy question on which the Commission has already made a determination. By contrast, the ITOs argue that the Settlement does not address the decision to place the assets in Zone 10, thereby resulting in an unjust and unreasonable cost shift that the Commission intended to be addressed in the hearing.

34. We agree with the ITOs that the alleged cost shift caused by the inclusion of the Nixa Assets into Zone 10 is at issue in this proceeding and is not addressed by the Settlement. The Settling Parties and Trial Staff are incorrect in asserting that the Commission has already reached a determination on cost shifts caused by the inclusion of existing facilities into an RTO/ISO.

35. In the Complaint Order, the Commission addressed the proper venue for the evaluation of cost shifts caused by the placement of a new transmission owners’ facilities into SPP. Although the Commission denied the complaint filed against SPP

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<sup>85</sup> *Id.* at 6.

<sup>86</sup> *Trailblazer*, 85 FERC at 62,341.

<sup>87</sup> *Id.* at 62,342.

<sup>88</sup> *Id.*

in that proceeding, the Commission noted that transmission owners and other parties retained their rights to object to particular placement and cost shift decisions. The Commission stated:

Specifically, parties have the right to protest the proposed placement of a new transmission owner in an existing zone when SPP makes the filing pursuant to section 205 of the FPA to add the ATRR of the new owner to the existing zone's ATRR. In such protests, parties have the opportunity to argue that cost shifts render the proposed placement and new AdTRR unjust, unreasonable, and unduly discriminatory or preferential. The language of the SPP Tariff does not preclude the Commission from then accepting or rejecting SPP's filing based on case-specific facts and circumstances.<sup>[89]</sup>

36. The Commission followed this case-by-case policy in its review of the SPP filing to include the transmission facilities of Tri-State Generation and Transmission Association, Inc. (Tri-State) into SPP.<sup>90</sup> On review of the initial decision in that proceeding, the Commission found, over NPPD's objections, that the cost shifts caused by inclusion of Tri-State's facilities into SPP Zone 17 were just and reasonable. Notably, the Commission determined that "shifting cost responsibility for some degree of legacy costs is not *per se* unjust and reasonable, but there may be cases in which a cost shift would be unjust and unreasonable."<sup>91</sup> Rather than finding the issue of cost shift to be outside the scope of the proceeding, the Commission made a full evaluation of the degree of the cost shift along with the benefits that other parties sustained from the facilities.<sup>92</sup> Ultimately, the Commission concluded that the cost shift at issue did not render the rates resulting from the placement of Tri-State's transmission facilities in Zone 17 unjust and unreasonable because the costs allocated to NPPD remained at least roughly commensurate with the benefits that it received from the transmission facilities in Zone 17.

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<sup>89</sup> Complaint Order, 162 FERC ¶ 61,213 at P 74.

<sup>90</sup> *Sw. Power Pool Inc.*, Opinion No. 562, 163 FERC ¶ 61,109 (2018) (*Tri-State*).

<sup>91</sup> *Id.* P 191.

<sup>92</sup> *See id.* PP 161-208. The Commission, among other things, also affirmed the Presiding Judge's finding that any adjustment to the alleged cost shift to customers that is known and measurable within a five-to-seven year period in the future should be considered in calculating the cost shift in that case. *Id.* P 157.

37. In setting SPP's filing in this proceeding for hearing, other than excluding from consideration in the hearing the merits of SPP's unpopulated formula rate template, which the Commission had previously approved in a different proceeding, the Commission did not rule on the merits of any other issue or specify any particular issue, including the issue of cost shifts, to be considered at the hearing. In addition, the Commission considered SPP and GridLiance's request for clarification and rehearing of the Hearing Order asking the Commission to remove the issue of the proper zonal placement of the Nixa Assets from the hearing. The Commission rejected the request, noting that as a general practice, when the Commission sets a rate for hearing, it permits the presiding judge to consider all components of a rate that bear on the justness and reasonableness of that rate.<sup>93</sup>

38. Trial Staff points to the Commission's decision in *PJM Interconnection, L.L.C.*,<sup>94</sup> which involved the inclusion of facilities owned by AMP Transmission into PJM. In that case, a protester argued that AMP Transmission's proposal to take existing facilities that were originally built to meet its needs and export the costs of those facilities to other transmission customers would be contrary to Opinion No. 494,<sup>95</sup> which the protester argued rejected the socialization of costs of already-constructed, existing facilities across the entire PJM footprint. The Commission disagreed, stating:

[w]hile the Initial Facilities may have been originally built primarily to meet the needs of the City of Napoleon, Ohio, as transmission facilities now under PJM's functional control, they are available for use in providing transmission service to any network service customer in the ATSI transmission zone and are appropriately recoverable from all network load in the ATSI transmission zone.[<sup>96</sup>]

39. Trial Staff argues that *PJM* represents a finding by the Commission that the issue of cost shifts need not be considered when evaluating the placement of a new RTO/ISO transmission owner's facilities into an existing zone. However, that argument reads too much into the Commission's findings in *PJM*, which should not be interpreted as creating a new policy with respect to the treatment of cost shifts in the placement of transmission assets into RTO/ISOs or overturning the more extensive discussion of this issue in the Complaint Order and other cases involving zonal placement in SPP. In *PJM*, the

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<sup>93</sup> Rehearing Order, 164 FERC ¶ 61,120 at P 9.

<sup>94</sup> 166 FERC ¶ 61,216 (2019) (*PJM*).

<sup>95</sup> *PJM Interconnection, L.L.C.*, Opinion No. 494, 119 FERC ¶ 61,063 (2007).

<sup>96</sup> *PJM*, 166 FERC ¶ 61,216 at P 25.

Commission was responding to an argument that Opinion No. 494 prohibits the costs of existing facilities that were originally built to meet AMP Transmission's needs from being exported to other transmission customers in the same zone. However, as the Commission stated in *PJM*, Opinion No. 494 addressed inter-zonal cost shifts and was inapposite to the situation in *PJM*, which involved intra-zonal cost shifts.<sup>97</sup> Similarly, the instant proceeding, as well as the *Tri-State* and Complaint Order proceedings, involve issues concerning intra-zonal cost shifts, which the Commission has found require case-by-case determinations.<sup>98</sup> The Commission's acceptance of AMP Transmission's zonal placement in *PJM* does not overturn the Commission's previous holdings as discussed above; it merely reaffirms that such decisions are made on a case-by-case basis reflecting the record at issue and that in some cases (e.g., *PJM*) cost shifts are not per se unjust and unreasonable.

40. In the Certification Order, the Presiding Judge states that if the Commission agrees with the ITOs that cost allocation is a genuine issue of material fact that is not resolved by the Settlement, then the Commission has a full record upon which to resolve cost allocation.<sup>99</sup> However, we find that there is insufficient evidence in the record for the Commission to make a determination on whether and the extent to which there are cost shifts involved in the placement of the Nixa Assets into Zone 10 or benefits that may accrue that would justify any such cost shifts. Our review of the record shows that there may be a significant rate increase for Zone 10 customers upon the inclusion of the Nixa Assets. In SPP's original filing, SPP estimated that inclusion of the Nixa Assets in Zone 10 would increase the rates in Zone 10 for network service under Schedule 9 of the Tariff by approximately 46% and would increase the rates for Point-to-Point transmission service under Schedule 7 of the Tariff by approximately 67%.<sup>100</sup> SPP noted that the impact would decrease if new load joined Zone 10. However, as the ARKMO Cities pointed out in their post-hearing briefs, the rate impact on Zone 10 due to the inclusion of the Nixa Assets in Zone 10 was over 40% as of early 2019, even with new load having entered the zone in late 2018.<sup>101</sup> The ARKMO Cities noted that this increase is higher

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<sup>97</sup> *Id.* (“As an initial matter, Opinion No. 494, in relevant part, pertained to the issue of allocating costs of existing transmission facilities across the PJM footprint, whereas the instant filing proposes a Formula Rate to recover the costs of new or newly acquired facilities from a single transmission zone.”).

<sup>98</sup> See Complaint Order, 162 FERC ¶ 61,213 at P 74; *Tri-State*, 163 FERC ¶ 61,109 at P 191.

<sup>99</sup> Certification Order, 171 FERC ¶ 63,032 at P 76.

<sup>100</sup> Complaint Order, 162 FERC ¶ 61,213 at P 12.

<sup>101</sup> ARKMO Cities Post-Hearing Reply Brief at 21.

than any other that has previously been approved in SPP, including the 8% increase approved for Tri-State.<sup>102</sup>

41. The existence of a rate impact does not necessarily mean that the cost allocation for the Nixa Assets is unjust and unreasonable. Nonetheless, we are not convinced that the record in this case shows that sufficient benefits will accrue to Zone 10 customers to justify the Settlement. As the ITOs pointed out, the evidence presented by SPP and GridLiance as to the benefits of the inclusion of the Nixa assets is general in nature and not specific to Zone 10 customers.<sup>103</sup> We note that this issue was not thoroughly briefed because many of the parties argued that the cost shift issue was outside the scope of the proceeding; we expect that on remand to the Chief Judge the parties will engage in this issue more closely. For example, we expect the parties to evaluate the cost shifts reflecting, among other things, known and measurable changes to the Gridliance system for the next 5 to 7 years, consistent with *Tri-State*.<sup>104</sup>

42. Based on the issues raised by the ITOs with respect to the cost shift caused by the inclusion of the Nixa Assets into SPP that we are unable to resolve based upon the record before us, we cannot approve the Settlement under the first *Trailblazer* approach. Because we reject the first *Trailblazer* approach based on the cost shift issue, we do not address here the other merits issues raised by the ITOs in their comments regarding the first *Trailblazer* approach.

43. Under the second *Trailblazer* approach, the Commission may “approve a contested settlement as a package on the grounds that the overall result of the settlement is just and reasonable.”<sup>105</sup> This approach requires a “detailed and independent cost benefit analysis of approving the settlement versus continued litigation.”<sup>106</sup> The Settling Parties argue that sufficient evidence exists in the record to permit the Commission to find that the overall result of the Settlement is just and reasonable. We disagree. Although the Settlement may provide benefits to the ARKMO Cities, we are unable to determine that customers as a whole within Zone 10 will benefit from the Settlement.

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<sup>102</sup> ARKMO Cities Post-Hearing Brief at 30 (citing Exhibit No. ARK-0001 at 10:4-17 (Busbee Direct Testimony); Tr. 329:1-7, 330:6-12, 375:2-7 (Hooton); Exhibit No. ARK-0005 (S-005) at 23 (providing the percentage increase of requested zonal ATRR to respective zones)).

<sup>103</sup> ITOs Post-Hearing Reply Brief at 19.

<sup>104</sup> *Tri-State*, 163 FERC ¶ 61,109 at P 157.

<sup>105</sup> *Trailblazer*, 85 FERC at 62,342.

<sup>106</sup> *Id.*

While it is true that the Settlement defers some costs from 2018 into 2019 and 2020, these costs are still charged to customers, and the Settlement will disadvantage those new customers who join Zone 10 in 2019 or 2020. Otherwise, as discussed above, the Settlement does not address the issue of the cost allocation of the Nixa assets to Zone 10 customers. As such, we are unable to approve the Settlement under the second *Trailblazer* approach.

44. Under the third *Trailblazer* approach, the Commission may approve a contested settlement “where (i) it determines that the contesting party’s interest is sufficiently attenuated that the settlement can be analyzed under the fair and reasonable standard applicable to uncontested settlements and (ii) the Commission [makes] an independent finding that the settlement benefits the directly affected settling parties.”<sup>107</sup> The Settling Parties argue that the Commission can approve the Settlement under the third *Trailblazer* approach because the Settlement benefits directly affected customers, the ITOs’ interest is sufficiently attenuated, and allegations about future customers is not sufficient to outweigh the benefits to current customers.<sup>108</sup> However, we find that the ITOs have a direct interest in this proceeding as Western Farmers’ grandfathered agreement expired and it took SPP network service on behalf of its customers after October 2017.<sup>109</sup> Additionally, Associated Electric filed comments as an existing customer opposing the Settlement. Although Associated Electric did not submit an affidavit supporting its position, the Commission has allowed objections to a settlement on policy grounds from a party that did not submit an affidavit.<sup>110</sup> Accordingly, because the ITOs and Associated Electric as contesting parties are affected by the Settlement, we are unable to approve the Settlement under the third *Trailblazer* approach.

45. Finally, under the fourth *Trailblazer* approach, the Commission may approve a settlement as to the non-contesting parties, while allowing the contesting parties to litigate their claims, or sever any contesting issue.<sup>111</sup> Under this approach, even absent a record sufficient to make merits determinations, the Commission may approve the Settlement for consenting parties and sever the contesting party or any contested issue. The Presiding Judge found that the fourth *Trailblazer* approach was not appropriate in this proceeding and noted that none of the participants believed that severance of the

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<sup>107</sup> *Id.* at 62,343.

<sup>108</sup> Settling Parties Reply Comments at 31.

<sup>109</sup> ITOs Initial Comments at 13.

<sup>110</sup> See *PJM Interconnection, LLC*, 144 FERC ¶ 61,207, at P 50 (2013).

<sup>111</sup> *Trailblazer*, 85 FERC at 62,344.

parties is appropriate.<sup>112</sup> Because the issues raised by the contesting parties apply broadly to all customers, we are unable to sever parties or any contesting issue and thus we are unable to approve the Settlement under the fourth *Trailblazer* approach.

46. Because the Settlement is contested and cannot be approved under *Trailblazer*, we reject the Settlement and remand the proceeding to the Chief Judge to resume hearing procedures.

The Commission orders:

(A) The Settlement is hereby rejected, as discussed in the body of this order.

(B) The proceeding is hereby remanded to the Chief Judge to resume hearing procedures, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.

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<sup>112</sup> Certification Order, 171 FERC ¶ 63,032 at PP 85-86.