IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	Chapter 11
ZACHRY HOLDINGS, INC., *et al.*[1]	
Reorganized Debtors.	Case No. 24-90377
ZACHRY HOLDINGS, INC., *et al.*	
Plaintiffs,	
v.	Adv. Pro. No. 25-03025 (MI)
OMAHA PUBLIC POWER DISTRICT	
Defendant.	

THE REORGANIZED DEBTORS' FIRST AMENDED ADVERSARY COMPLAINT

Zachry Holdings, Inc. ("ZHI"), Zachry Industrial, Inc. ("Zachry" or "Contractor"), and their debtor affiliates (collectively with ZHI and Zachry, the "Reorganized Debtors"), the reorganized debtors in the above-captioned chapter 11 cases, bring this amended complaint[2] (the "Amended Complaint") against defendant Omaha Public Power District, a Nebraska public electric utility ("OPPD," or "Owner," and together with Zachry, the "Parties"), and allege as follows:

[1] The last four digits of Zachry Holdings, Inc.'s tax identification number are 6814. A complete list of each of the Reorganized Debtors in these chapter 11 cases and the last four digits of their federal tax identification numbers may be obtained on the website of the Reorganized Debtors' claims and noticing agent at https://www.veritaglobal.net/ZHI. The location of the Reorganized Debtors' service address in these chapter 11 cases is P.O. Box 240130, San Antonio, Texas 78224.

[2] On February 5, 2025, the Reorganized Debtors began this adversary proceeding arising in and relating to the Reorganized Debtors' cases pending before this Court under title 11 of the United States Code for declaratory judgment. *The Debtors' Adversary Complaint for Declaratory Relief* ("Complaint") [Docket No. 1].

NATURE OF THE ACTION

1. This action for declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing, stems from OPPD's actions delaying Zachry from completing two electric generating stations and associated substations: (a) the Standing Bear Lake Station ("SBLS") and (b) the Turtle Creek Station ("TCS" and, together with SBLS, the "Projects") under the *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* dated September 21, 2021 (the "EPC") (as further amended in October 2023 and August 2024 (the "Second Amended EPC")).

2. OPPD—both individually and through its control over its subcontractors, Siemens Energy Inc. ("Siemens") and Wartsila North America, Inc. ("Wartsila") (together, the "OPPD Contractors")—is unreasonably obstructing Zachry's good faith efforts to achieve Substantial and Final Completion of the Projects while seeking to impose a $900,000 a day penalty for delays outside of Zachry's control. OPPD has ignored (and at times seemingly permitted) the substantial delays caused by Wartsila and Siemens. OPPD has also prevented testing and other steps necessary for Substantial Completion of the Projects, refused to provide Zachry with Directives or allow Zachry to mitigate issues on site, withheld critical information necessary for efficient resolution of problems, and rejected change order requests and attempts at dispute resolution required under the Second Amended EPC.

3. Instead of working cooperatively with Zachry to complete the Projects, OPPD is using unfounded and unenforceable claims for liquidated damages to assert an outsized administrative claim in this proceeding. *See Omaha Public Power District's Application for Allowance of Administrative Expense Claim* [Bankr. Docket No. 2176] (the "Application"). The Reorganized Debtors seek damages for OPPD's breach of Sections 2, 10, 21, 22, 23, 24, and 29 of

the EPC General Conditions ("EPC GC") and Article IV of the EPC, breach of the implied covenant of good faith and fair dealing, and declaratory judgment that (a) the guaranteed substantial completion dates ("GSCDs") defined in the Second Amended EPC are no longer operative in light of OPPD and OPPD Contractor-caused delays; (b) the liquidated damages provision is unenforceable; and (c) OPPD's administrative expense is valued at $0 or, alternatively, if liquidated or other damages are deemed owed by Zachry, at no greater a value than the actual damages OPPD incurred from delays caused solely by Zachry, offset by amounts Zachry would be entitled to under EPC GC Sections 22 and 23 and damages for breach of the Second Amended EPC and the implied covenant of good faith and fair dealing.

THE PARTIES

4. ZHI is a corporation organized under the laws of the state of Delaware.

5. Zachry is a corporation organized under the laws of the state of Texas whose principal place of business is in San Antonio, Texas. ZHI and Zachry, together with their Reorganized Debtor affiliates,[3] provide engineering, construction, maintenance, turnaround, and fabrication services.

6. OPPD is a public corporation and political subdivision of the state of Nebraska.

RELEVANT NON-PARTIES

7. Siemens Energy, Inc. is a corporation organized under the laws of the state of Delaware with a principal place of business at 4400 North Alafaya Trail, Orlando, FL 32826.

[3] The Reorganized Debtors include Zachry Holdings, Inc., Zachry EPC Holdings, LLC, Zachry Engineering Corporation, ZEC New York, Inc, Zachry High Voltage Solutions, LLC, UE Properties, Inc, ZEC Michigan, Inc, Zachry Constructors, LLC, Zachry Industrial, Inc, Zachry Enterprise Solutions, LLC, Moss Point Properties, LLC, Zachry Nuclear Construction, Inc, Zachry Nuclear, Inc, Zachry Nuclear Engineering, Inc, Computer Simulation & Analysis, Inc, Zachry Plant Services Holdings, Inc, JVIC Fabrication, LLC, Zachry Industrial Americas, Inc, Zachry Maintenance Services, LLC, J.V. Industrial Companies, LLC, and Madison Industrial Services Team, LLC.

Siemens also maintains offices at 12505 Cypress North Houston Road, Houston, TX 77070 and 1111 North Loop West, Suite 600 and Houston, TX 77008.

8. Wartsila North America, Inc. is a corporation organized under the laws of the state of Delaware with a principal place of business at 1111 N. Loop W, Suite 500 Houston, TX 77008.

JURISDICTION AND VENUE

9. This adversary proceeding arises in and relates to the Reorganized Debtors' cases pending before this Court under title 11 of the United States Code (the "Bankruptcy Code").

10. This Court has jurisdiction over this adversary proceeding under 28 U.S.C. §§ 157 and 1334. This Court continues to have post-effective date jurisdiction over this adversary proceeding because it "arises in" the Reorganized Debtors' cases pending before this Court under chapter 11 of the Bankruptcy Code and, to the extent it "relates to" those cases, it concerns a dispute that arose from their pre-effective date relations, and the claims asserted herein were raised pre-effective date. *See Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 535 F.3d 325, 336 (5th Cir. 2008); *see also, e.g.*, *In re EP Energy E&P Co., L.P.*, No. 19-35647 (MI), 2021 Bankr. LEXIS 3430, at *23 (Bankr. S.D. Tex. Dec. 14, 2021). This Court also continues to have post-effective date jurisdiction over this adversary proceeding pursuant to the *Findings of Fact, Conclusions of Law, and Order (I) Approving the Debtors' Disclosure Statement on a Final Basis and (II) Confirming the Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and its Debtor Affiliates* (the "Confirmation Order") [Bankr. Docket No. 2431] ¶ 174 and Article XI of the *Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and its Debtor Affiliates* (the "Plan") [Bankr. Docket No. 2362], including, but not limited to, Article XI.1, 3, 5, 19, and 27. The Confirmation Order and the

Plan provide that this Court shall retain jurisdiction over various enumerated matters arising out of, or relating to, the chapter 11 cases, the Confirmation Order, and the Plan pursuant to sections 105(a) and 1142 of the Bankruptcy Code and "shall have exclusive jurisdiction to hear and determine disputes" concerning claims against Zachry that arose prior to the Plan's effective date. Confirmation Order ¶ 174; Plan, Art. XI.

11. This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A) because it stems from alleged post-petition breaches of the Second Amended EPC. The Reorganized Debtors assumed the Second Amended EPC in the chapter 11 cases under section 365 of the Bankruptcy Code upon entry of an order by the Court. *Order (I) Approving Settlement by and Among the Debtors and Omaha Public Power District, (II) Authorizing the Debtors to Amend and Assume (as Amended) the Omaha Public Power District Contract, and (III) Granting Related Relief.* (Bankr. S.D. Tex. Sept. 17, 2024) [Bankr. Docket No. 961]. This adversary proceeding is, therefore, a matter arising out of the administration of the Reorganized Debtors' estates. This matter is also a core proceeding under 28 U.S.C. § 157(b)(2)(B) and (C) because it concerns allowance or disallowance of an asserted administrative expense claim and counterclaims based on the same facts and involving the same legal issues that would necessarily be resolved in connection with the process of allowance or disallowance of the asserted administrative expense claim. To the extent any of the claims asserted may be construed as non-core, they are inextricably intertwined with the resolution of the core issues of allowance or disallowance of the asserted administrative expense claim.

12. This Court has jurisdiction to grant the relief sought under:

(a) Rule 7001(1) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for "a proceeding to recover money or property";

(b) Rule 7001(2) of the Bankruptcy Rules for damages and "to determine the validity, priority, or extent of" an "interest in property";

(c) Bankruptcy Rule 7001(9) for "a proceeding to obtain a declaratory judgment relating to any of the foregoing";

(d) section 105(a) of the Bankruptcy Code, which grants the Court broad authority to issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code; and

(e) The Federal Declaratory Judgment Act, 28 U.S.C § 2201, *et seq.*

13. Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409 because this adversary proceeding arises under and in connection with cases commenced under the Bankruptcy Code.

14. Venue is also proper under 28 U.S.C. § 1391 because a substantial part of the events or omissions giving rise to Zachry's claims occurred in this judicial district. Zachry is incorporated in Texas, its principal place of business is in Texas, it has reorganized under the Plan confirmed by this Court, and most of its principals and employees are located in Texas. Wartsila is incorporated in Texas and Siemens has two offices located in Houston, Texas. Neither have offices in Nebraska. Both Parties' counsel have offices in Texas. OPPD consented to the second amendment and assumption of the EPC during the chapter 11 cases and filed an administrative expense claim in this Court, therefore availing itself of this forum and submitting to this Court's jurisdiction.

FACTUAL BACKGROUND

A. Overview of Chapter 11 Cases

15. On May 21, 2024, the Reorganized Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code commencing the chapter 11 cases. The chapter 11 cases are being jointly administered under Bankruptcy Rule 1015(b). A detailed description of the Reorganized Debtors and their businesses, including the facts and circumstances giving rise to these chapter 11 cases, is in the *Declaration of Mohsin Y. Meghji in Support of Debtors' Petitions*

and Requests for First Day Relief (Bankr. S.D. Tex. May 21, 2024) [Case No. 24-90377; Bankr. Docket No. 7].

16. On February 27, 2025, the Court entered the Confirmation Order and the Plan.

17. On April 10, 2025, the Plan became effective. *See Notice of (I) Entry of Order Approving the Debtors' Disclosure Statement on a Final Basis and Confirming the Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and its Debtor Affiliates and (II) Occurrence of the Effective Date*. [Bankr. Docket No. 2731].

B. The Original EPC

18. On September 21, 2021, OPPD hired Zachry to construct two power plant sites: SBLS and TCS in Omaha, Nebraska. The power stations to be built under the EPC are not meant to serve as the main sources of electricity for OPPD's customers; rather, they are to serve as "regulating and peaking power Facility" or "peaker plants," essentially serving as back up when demand surges. The plants are also not designed to run daily. As announced publicly by OPPD, the stations at SBLS and TCS are to be used "only as needed (estimated at less than 15% of the time)."[4]

19. The EPC contains provisions setting forth, among other things, the schedules for the Projects, scope of work, deadlines for the Projects, including GSCDs and final completion, the circumstances in which the GSCDs are subject to change, payments owed to Zachry upon performance, and remedies for OPPD upon non-performance.

20. The original EPC provided that the GSCDs for SBLC and TCS were May 1, 2023

[4] *See Standing Bear Lake Station*, Omaha Public Power District, *available at* https://www.oppdcommunityconnect.com/standing-bear-lake-station (last visited March 10, 2025) ("Standing Bear Lake Station will be used to balance the energy load. The plant will run only as needed (estimated at less than 15% of the time) and will be available to support planned (maintenance) and unplanned (storms) outages . . . ."); *Turtle Creek Station*, Omaha Public Power District, *available at* https://www.oppdcommunityconnect.com/turtle-creek-station (last visited March 10, 2025) (same with respect to the Turtle Creek Station).

and August 18, 2023, respectively.

21. Article II(ii) of the EPC[5] defined "Substantial Completion" as:

> as to either or both SBLS and/or TCS, the time at which all of the following have occurred for such Site(s): (i) the Work or portions of the Work are sufficiently complete to allow unrestricted full-load commercial operation of the generating station, except for those items of Work which do not affect the operability, safety, or mechanical and electrical integrity of the generating station; (ii) SBLS and TCS, respectively, are mechanically and electrically sound, i.e., interruption of use for normal commissioning and testing activities is not expected; (iii) SBLS and TCS can be operated under full and part load test conditions without hazard or damage to the generating stations or any other property and without hazard or injury to any person; (iv) the Punch List has been prepared and accepted by both parties; (v) and [OPPD] has issued Contractor a Certificate of Substantial Completion.

22. Under Section 21 of the EPC GC, when Zachry considered the work substantially completed, it would provide written notification and request that OPPD issue a "Certificate of Substantial Completion." "Within a ***reasonable time thereafter***, [OPPD] and Contractor shall make an inspection of the specified Work to determine the status of completion. If [OPPD] does not consider the Work substantially complete, [OPPD] will ***notify Contractor in writing, giving the reasons therefor***." (emphasis added). But "[i]f [OPPD] considers the work substantially complete, [OPPD] will prepare and deliver to Contractor a Certificate of Substantial Completion."

(i) Modification of the GSCDs

23. The EPC contemplated several valid reasons why the Parties would need to modify the GSCDs.

[5] The same article defined "Substantial Completion" as "the time at which all of the following have occurred for such Site: (i) the substation(s) is sufficiently complete to allow unrestricted operation of the substation(s), except for those items of Work which do not affect the operability, safe-ty, or mechanical and electrical integrity of the substation(s); (ii) the substations(s) is mechanically and electrically sound, i.e., interruption of use for normal substation commissioning and testing activities is not expected; and (iii) [OPPD] has issued Contractor a Certificate of Substation Substantial Completion." Article II(ii).

24. *First*, the Parties agreed that the GSCDs could be modified due to the delay of OPPD or contractors under its control. Under Section 2 of the EPC GC, OPPD has the right to enter into contracts with third-party contractors in connection with work for the completion of the Projects. The EPC explicitly identified Siemens and Wartsila as the Owner Furnished Equipment ("OFE") contractors for the engines and generators that would power each site. Zachry has no contractual privity with these contractors and no control over their activities or schedules. As a result, the Parties expected that these OPPD Contractors could cause delay entitling Zachry to a "Change Order"[6] and requiring modification of the GSCDs. ("[I]f Contractor shall have their schedule impeded and if the schedule is delayed [by OPPD Contractors], they may be entitled to a Change Order for schedule and cost relief."). Under Section 10(b) of the EPC GC, if while coordinating with OPPD Contractors, "Contractor is impeded in their work[,] they may be entitled to a Change Order for cost and schedule relief." A Change Order memorializes the agreed upon modifications to the EPC, providing certainty as to the changed terms and that such changes were not Zachry's fault.

25. Under Section 2(b) of the EPC GC, if Zachry's work depends on the work and operations of OPPD or its contractors, then Zachry shall make a report to OPPD indicating how any third-party contractor's conduct will impact Zachry's ability to perform under the EPC. OPPD ***shall*** then take reasonable steps "to correct or cause the separate contractor or the [Owner] to remedy the stated conditions" that will cause the impact and the "Contractor may submit a claim for schedule relief . . . ." (emphasis added).

26. *Second*, four sections of the EPC provided that the GSCDs could be modified after

[6] A "Change Order" is "a written order from OPPD to the Contractor to change the scope of Work, the time for performance of Work, and/or other terms of the Contract Documents." Article II(f).

OPPD requested changes to the agreed upon Work.

27. Section 22 of the EPC GC, which applies to changes requested by OPPD, provides for equitable adjustment in contract price and time. For such changes, the Contractor must "promptly" provide a lump-sum estimate of the amount of the equitable adjustment, accompanied by a detailed estimate of the increased costs or time, and proposed payment terms. OPPD can then issue a written order to the Contractor to proceed with the change. If there is no agreement between the Parties regarding the equitable adjustment to price/time, the Parties must "work in good faith toward a timely, reasonable and mutually agreeable price and/or time adjustment for such change," which must be formalized in a signed writing. Section 22(b) provides a formula for calculating the Contractor's compensation for time and material work changes, which applies if the lump-sum estimate is deemed not acceptable.

28. Section 23 of the EPC GC, which addresses Contractor Change Requests,[7] permits equitable adjustments in price or time where (a) instructions from OPPD contain discrepancies, inconsistencies, omissions, or ambiguities or shall involve extra costs or time; or where (b) any other act or omission of OPPD or any of its agents, employees, suppliers, subcontractors, or suppliers, has caused or will cause the Contractor to incur extra costs or time not contemplated by the Contract Documents.[8] For OPPD instructions that contain discrepancies, inconsistencies, omissions, or ambiguities or involve extra costs or time, Zachry must provide notice and await a written directive from OPPD ("Directive") before proceeding with work. Once OPPD gives that Directive, Zachry must proceed in accordance with the Directive. If there is no agreement between

[7] "Contractor Change Requests" are defined as a "document initiated by OPPD or Contractor to describe a proposed change in the Work and/or Schedule." Article II(g).

[8] "Contract Documents" refers to "the EPC Contract, which shall include the Primary Contract Terms, General Conditions, Technical Specifications, Drawings, Performance and Payment Bond, all exhibits and attachments to the EPC Contract, and Change Orders issued pursuant to the EPC Contract." Article I(a).

the Parties regarding the equitable adjustment to price/time, the parties must "work in good faith toward a timely, reasonable and mutually agreeable price and/or time adjustment for such change," which must be formalized in a signed writing.

29. Section 24 of the EPC GC acknowledges that Zachry is entitled to additional compensation or an extension of time, "[i]n the event that the Contractor, through no fault of its own, encounters delays or extra costs as a result of the total or partial suspension of the Work or unreasonable interference therewith by the [Owner] or its other contractors . . ."

30. Section 29 of the EPC GC states that "[t]he Contractor may be entitled to a Change Order if the modifications [that OPPD requires] affect the schedule or price of the Contract."

(ii) Original Calculation of Unknown Damages for a Project

31. The original EPC, executed prior to the start of any construction, provided for a liquidated damages provision if the GSCDs were not met.

32. Under Article XI of the EPC GC, OPPD, and Zachry "acknowledge[d] that actual damages incurred by the [Owner] as a result of the Contractor's failure to meet the Guaranteed Substantial Completion Dates and Performance Guarantees ***would be difficult to determine*** and that both parties agree that the liquidated damages provisions in this Article XI are reasonable and ***appropriate measures of the damages*** for such completion and performance shortfalls." (emphasis added). As to "Delay[s] in Completion of Work," Article XI(1) set out specific daily amounts for liquidated damages "as a predetermined reasonable and sole and exclusive remedy for such delay": for SBLS, $125,000 per calendar day through May 15, 2023, and $250,000 per calendar day, from May 16, 2023, until the Work is accepted as complete (capped at 10% of the Contract Price);[9] and

[9] "Contract Price" is defined as the "amount set forth in Article IV of the Primary Contract Terms, as may be adjusted pursuant to the Contract Documents." Article II(k).

for TCS $50,000 per calendar day, through September 1, 2023, and $100,000 per calendar day, from September 2, 2023, until the Work is accepted as complete (capped at 10% of the Contract Price).

33. Although Article XI (originally and as amended) imposed liquidated damages if Contractor does not meet the GSCDs for the Projects, where "Work is delayed by the [Owner] or other contractors . . . Contractor may be entitled to a Change Order if price and schedule are impacted." EPC Article XI(c).

34. The EPC simultaneously provides for remedies apart from the liquidated damages detailed in Article XI. *See, e.g.*, EPC Article VIII(a) (discussing available remedies where OPPD terminates the EPC for cause); EPC Article XI(e) (discussing availability of specific performance).

35. Under Section 20 of the EPC GC, OPPD may withhold payment to Zachry "as may be necessary in [OPPD's] reasonable opinion to protect [OPPD] from loss on account of . . . [a] reasonable doubt that the Contract can be completed for the balance then unpaid [or] . . . [f]ailure of the Contractor to diligently prosecute the Work and maintain satisfactory progress required to meet Guaranteed Substantial Completion Date(s) and Final." If OPPD withholds payment from Zachry, it must provide Zachry with written notice.

(iii) Dispute Resolution

36. The parties drafted Article VI to govern disputes generally. It provides that "[a]ll questions of fact, and any and all disputes arising out of either party's performance under the Contract Documents, or changes therein, or extra Work in connection therewith, shall be submitted to OPPD's Project Manager for a ***written decision***." (emphasis added). If the Contractor is unsatisfied with the written decision, the Parties agree to attempt two rounds of good faith dispute resolution efforts.

C. The Amendments and Assumption of the EPC Contract

37. Beginning in September 2021, Zachry began delivering the agreed-upon services. The Projects were soon set back over six (6) months due to OPPD-caused delays. In October 2023 the EPC was amended the first time to, among other things, adjust the GSCD for each of the TCS and SBLS Projects—*i.e.*, the time by which Zachry was required to reach Substantial Completion—for each of the Projects to account for delays OPPD caused. The Parties agreed to amend the GSCDs for SBLS from May 1, 2023, to August 8, 2024, and TCS from August 18, 2023, to August 30, 2024. The change to the GSCDs under the first amendment was a negotiated extension to account for the OPPD-caused delays of over six (6) months.

38. On May 21, 2024 (the "Petition Date"), the Reorganized Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code commencing the chapter 11 cases.

39. On August 13, 2024, as a result of new delays, the Parties amended the EPC a second time, by, among other changes, extending the GSCDs, and amending portions of the liquidated damages provision under Article XI of the EPC. The new GSCDs for SBLS and TCS were set for December 30, 2024, and December 16, 2024, respectively. At the time of the second amendment to the EPC, Zachry had completed over 90% of all the work on both Projects—a fact publicly acknowledged by OPPD.[10]

40. The Second Amended EPC also provided for a new liquidated damages provision if the new GSCDs were not met. Under the Second Amended EPC Article XI(c)(1), the liquidated damages provisions for a delay in completion of the work were revised as follows:

> (i) If the Contractor fails to complete the Work on or before the Guaranteed Substantial Completion Date, for SBLS, as a predetermined reasonable and sole and exclusive remedy for such

[10] *See 2024 Series A and Electric System Revenue Bonds, 2024 Series B*, Omaha Public Power District, dated June 26, 2024, *available at* https://www.oppd.com/media/319956/official-statement-june-26-2024.pdf (last visited March 10, 2025) at 25.

> delay, the Contractor shall be subject to liquidated damages as follows: For each calendar day beyond the Guaranteed Substantial Completion Date for SBLS that the Work is not completed, $350,000 per calendar day through January 29, 2025, and $500,000 per calendar day until the Work is accepted as complete. There shall be an overall sub-cap on this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 28, 2025, then on March 1, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to SBLS.
>
> (ii) If the Contractor fails to complete the Work on or before the Guaranteed Substantial Completion Date, for TCS, as a predetermined reasonable and sole and exclusive remedy for such delay, the Contractor shall be subject to liquidated damages as follows: For each calendar day beyond the Guaranteed Substantial Completion Date for TCS that the Work is not completed, $250,000 per calendar day, through January 15, 2025, and $400,000 per calendar day until the Work is accepted as complete. There shall be an overall sub-cap on this liability equal to ten percent (10%) of the Contract Price. If Substantial Completion has not been achieved by February 14, 2025, then on February 15, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to TCS.

41. In addition, the as-amended liquidated damages clauses provided for payments for early completion:

> Payments for Early Completion. Provided that Zachry has successfully completed commissioning requirements per the EPC Contract, as determined by OPPD, Zachry shall be entitled to receive the following payments, to be paid within fifteen (15) days of receipt of an invoice:
>
> (1) For SBLS, $193,548.00 per day for each calendar day before the Guaranteed Substantial Completion Date that the Work is completed. There shall be an overall cap on this compensation of $5,999,988, reflecting up to 31 calendar days.
>
> (2) For TCS, $352,941.00 per day for each calendar day before the Guaranteed Substantial Completion Date that the Work is completed. There shall be an overall cap on this compensation of $5,999,997, reflecting up to 17 calendar days.

42. Further, the amendment made clear that "EPC Contractor, OFE Suppliers and

OPPD shall ***meet and confer*** regarding the status of Acceptance Tests and progress toward meeting the" GSCDs. (emphasis added).

43. Though the original EPC acknowledged that the liquidated damages provision reflected the Parties' agreement "that actual damages incurred by the [Owner] as a result of the Contractor's failure to meet the Guaranteed Substantial Completion Dates and Performance Guarantees ***would be difficult to determine***," and "that both parties agree that the liquidated damages provisions in this Article XI are reasonable and ***appropriate measures of the damages*** for such completion and performance shortfalls," the Second Amended EPC does not include this language.

44. Unlike on September 21, 2021, before construction began, by August 14, 2024, OPPD admits the Projects were 92% complete. Any potential damages caused by delay were therefore knowable to OPPD at the time of the second amendment. In fact, on information and belief, OPPD had contracted for supplemental power availability to cover the possibility that the completion deadlines would not be met well before the second amendment was executed. Moreover, by November 2024 for TCS and December 2024 for SBLS—before the GSCDs for the Projects—both sites were operational and capable of generating electricity.

45. Rather than revising the EPC at the time of the second amendment to reflect anticipated or actual harm from a delay in completion of the Projects, OPPD not only retained liquidated damages but imposed drastically higher daily liquidated damages amounts than under the EPC. OPPD tripled and, for the TCS quadrupled,[11] liquidated damages owed in the event the deadlines were not reached, while stripping certain protections from Zachry for delays caused by

[11] Such a substantial increase in liquidated damages for TCS from Zachry is all the more egregious because OPPD itself recognized that TCS is "more complex to go through commissioning"—the work for which Siemens was primarily responsible and over whom Zachry had no control.

no fault of Zachry. This did not reflect a reasonable estimation of actual damages that could be incurred but a penalty for late work. It also displayed the imbalance of the bargaining power that OPPD held over Zachry, a new debtor in the chapter 11 cases, at that time.

46. OPPD could have provided Zachry detailed insight in August 2024 of the actual expense it would incur should the Projects experience delay. OPPD could have determined to a reasonable degree of certainty the damages due to delay as of the date of the execution of the second amendment. Instead, it elected to pursue a liquidated damages provision that dramatically over-charged Zachry for any delays incurred on the Projects, creating an opportunity for OPPD to profit from delay, rather than merely recoup its costs, if any, associated with delay.

47. And though the Parties had agreed to the new GSCDs under the Second Amended EPC, Zachry did so without critical information, including the fact that OPPD would not require its contractors to maintain the same strict work schedule agreed-to by Zachry. Zachry also relied on the fact that, as before, that OPPD would abide by Section 2(b), 10, and 24 of the EPC GC, all of which remained in effect, and adjust the Project Schedule and GSCD for any delays caused by OPPD or OPPD Contractors. Of course, upon reflection, the second amendment incentivizes OPPD to delay completion and abandon the prior practice of extending the GSCDs even when the delays are caused by OPPD or OPPD contractors.

48. On September 17, 2024, Zachry assumed the Second Amended EPC pursuant to the *Order (I) Approving Settlement by and Among the Debtors and Omaha Public Power District, (II) Authorizing the Debtors to Amend and Assume (as Amended) the Omaha Public Power District Contract, and (III) Granting Related Relief.* (Bankr. S.D. Tex. Sept. 17, 2024) [Bankr. Docket No. 961]. The cure amount for the Second Amended EPC was $0, and Zachry had no duty to cure any purported default under the Second Amended EPC upon assumption.

D. Zachry's Post-Assumption Performance Under the EPC and Further OPPD and OPPD Contractor-Caused Delays

49. Following the second amendment and Zachry's assumption of the contract, Zachry continued performing under the EPC. The goal was to finish the Projects early and to obtain agreed bonus payments for completion before the GSCDs. Zachry increased the presence of its project leadership at both Projects and worked tirelessly to address any concerns OPPD had, which efforts OPPD's officials publicly recognized and commended.[12]

50. But beginning in late October 2024, Zachry was prevented from completing the work needed to achieve the GSCDs. These delays were significantly caused by OPPD Contractors conducting OFE equipment tuning, performance testing and other commissioning and startup work necessary to finish the Projects. Given that the Projects were nearing completion, this commissioning and startup work, which OPPD Contractors directed, was "taking center stage."[13]

51. Siemens and Wartsila supply the electrical generation equipment for the sites and provide technical advisory services that include (among other things) essential inspection, testing, and calibration work to start up and commission that equipment that must be completed before Zachry can achieve Substantial Completion of TCS and SBLS.[14] Siemens and Wartsila contracted directly with and answer only to OPPD. Zachry has no control over the work, scheduling, or activities of either Siemens or Wartsila. Zachry cannot even get Siemens and Wartsila to inform

[12] *See* Omaha Public Power District, *October 15, 2024 Committee Meeting*, YouTube (Oct. 16, 2024), https://youtu.be/uYkGVHs4qdY?si=nIIirm1egYSChHBJ, at 3:28:40–3:32:56 (Sharyl McGuire, OPPD's Senior Director of Operations Support, stating that it is "exciting to see" that the Zachry team "has been very responsive" and was "executing on items that have been brought to their attention" and noting that she was "pleased to see how Zachry is showing up at the two sites and bringing in more support," including project leadership).

[13] *Id.*

[14] Under the EPC, "Technical advisory services for the installation and commissioning of the OFE will be provided by the OFE Supplier. Services provided include technical advice for flushing, checkout, and commissioning of mechanical systems, electrical systems, and the control system provided with the OFE." Ex. B to the EPC § 10.3.4 OFE Technical Advisory Services.

Zachry directly, on a timely basis, about their work; Zachry can only do so through OPPD. This process has yielded very little fruitful information, usually received in an untimely manner, with virtually no coordination or cooperation because *none* of the parties involved in the commissioning process have *any* incentive to help Zachry promptly complete Zachry's scope of work.

52. Siemens and Wartsila had an increased role in dictating site activities as the Projects were nearing completion. They were primarily responsible for the tuning and testing required for commissioning, startup and turnover of the electrical generation equipment at the Sites. Their delays, non-performance, and errors, had an outsized effect on Zachry's ability to continue, let alone complete, its work—a fact well-known to OPPD. Zachry worked with OPPD Contractors to establish micro schedules to ensure Zachry and OPPD Contractors could perform their work efficiently. But OPPD Contractors substantially exceeded the projected timelines for conducting their work, had inadequate staff on hand to complete the work, made last minute changes to Zachry's schedule, and took extensive and unplanned time off from November 2024 through early January 2025.

53. As long as OPPD Contractors are engaged in the commissioning process and Substantial Completion is not achieved, their warranties do not take effect. Consequently, if Siemens or Wartsila encounter problems with their work or equipment that cause delay, the time used to investigate and correct those problems delays Zachry's completion of its work postponing Siemens' or Wartsila's warranty exposure. Concurrently, and improperly, OPPD tacks these extended schedule issues on to its delay claims against Zachry. Given that these peaker plants are less likely to be needed during the current weather window (as opposed to peak summer months), OPPD has even less incentive to pressure OPPD Contractors to expedite their work. In the meantime, the costs to Zachry for delayed completion (without liquidated damages) is substantial.

54. Following the second amendment, and particularly beginning in November 2024 as the GSCDs approached, there were significant delays to the completion of Zachry's work caused by OPPD and OPPD Contractors. Among many other issues, while Zachry tried to work throughout the holidays in accordance with the Second Amended EPC schedule, OPPD did not require key Siemens and Wartsila personnel to remain on site. OPPD approved or allowed Siemens personnel necessary to achieve Substantial Completion to take seven (7) consecutive days off and approved or allowed essential Wartsila personnel necessary to achieve Substantial Completion to take sixteen (16) consecutive days off, halting completion of the Projects right as the GSCDs approached. Siemens also took thirteen (13) days longer than scheduled to perform IGV/VGV calibrations to Unit 2 at TCS, did not communicate known items that would interfere with Zachry's work, and had inadequate staff to allow commissioning and startup activities to proceed on Units 1 and 2 at TCS simultaneously.

55. Between both Projects, by mid-January alone, OPPD and OPPD Contractor-caused delays resulted in no fewer than over eighty (80) days of delays since the Second Amended EPC was assumed. As of January 16, 2025, Siemens alone caused at least thirty-eight (38) days of delays to the agreed-to schedule, took thirteen (13) days longer to than scheduled to perform necessary calibrations at TCS, and had inadequate staff to complete work at TCS. As of January 16, 2025, and as reported to OPPD, Wartsila caused at least a twenty (20) day delay in the Projects schedule, as essential members of its staff took a two-week holiday break from December 22, 2024 to January 6, 2025, again upending the schedule agreed to between the Parties. These delays resulted in unanticipated costs, including prolonged use of rented equipment, site-related operations expenses, personnel costs, and even the cost of extending builder's risk insurance, among other expenses, not to mention the attendant challenges due to Zachry's inability to roll

personnel off the Projects and onto other Zachry's projects.

56. Throughout the Projects, and in accordance with its obligations under the Second Amended EPC, [15] Zachry provided OPPD with monthly progress reports on the Work, and weekly updates to the Project Schedule. Zachry was also in regular communication with OPPD, generally via text and calls, to keep OPPD regularly informed of all progress and concerns or issues. Starting in or around September 2024 for TCS, and October 2024 for SBLS, Zachry prepared micro-schedules twice a week for OPPD, Siemens, and Wartsila, reflecting activities to be completed at each site and estimates of progress to be made on a daily basis, as well as updates to the daily schedule based on Siemens' and Wartsila's actual progress. Zachry attempted to work with OPPD on how to address the delays outside of Zachry's control that impacted these schedules.

57. OPPD refused to acknowledge or address OPPD or OPPD Contractor-caused delays or Zachry's requests for Directives or Contract Change Requests to support a Change Orders for delays outside of Zachry's control as contemplated under Sections 22, 23, and 29 of the EPC GCs, and ignored Zachry's repeated efforts at dispute resolution as required under Article VI of the EPC.

58. Instead of addressing the existing OPPD and OPPD Contractor-caused delays, OPPD sent a notice of anticipatory breach. On December 10, 2024, OPPD sent a letter to Zachry stating that "[b]ased on Zachry's projected schedule, Zachry will fail to achieve the [GSCD] for [TCS], December 16, 2024, and [SBLS], December 30, 2024, as set forth in Amendment No. 2 of the EPC," and that Contractor's "failure to meet the [GSCD] will place Zachry in breach of the EPC." It also stated OPPD "must pursue all legal rights under the EPC Contract and otherwise under applicable law, including notification of the performance bond sureties for the EPC

[15] *See, e.g.*, Article V(b), Article XI, Section 24.

Contract." And OPPD wrote that "it must protect the interests of its customers in light of Zachry's anticipated breach."

59. Zachry expressed its disappointment with OPPD initiating a letter campaign, asserting anticipatory breach, and threatening remedies rather than pursuing a mutually agreeable resolution as required under Article VI of the Second Amended EPC. Zachry repeatedly asked for face-to-face meetings to discuss OPPD and OPPD Contractor-caused delays, mediation, or any other good faith alternatives to address the delays and complete the work. Zachry further noted that OPPD's approach was "neither legally warranted, nor consistent with the good faith, selfless work of Zachry to complete this job in a timely manner," including how Zachry had invested significant unreimbursed expenses since the chapter 11 cases began in a good-faith effort to finish these Projects.

60. Then on January 10, 2025, OPPD began issuing invoices for liquidated damages purportedly owed to OPPD because the Projects were not completed by the GSCDs.

61. Because OPPD refused any informal or formal attempts at resolution and demanded a response to its letter, Zachry responded on January 21, 2025, describing, in general, the delays attributable to Siemens and Wartsila, as of January 16, 2025, described above.

62. Zachry repeatedly attempted to engage with OPPD to reach a resolution by requesting an in-person meeting to discuss OPPD's contentions and try to find common grounds on potential solutions.

63. Instead of working on a resolution, on January 30, 2025, OPPD sent Zachry a letter rejecting Zachry's detailed request to amend the GSCDs based on OPPD and OPPD Contractor-caused delays. Ignoring the irrefutable evidence of OPPD or OPPD Contractor-caused delays, OPPD's January 30th letter stated that the GSCDs from the Second Amended EPC governed and

the delays resulted from two alleged incidents that OPPD claims Zachry caused: (a) repairs across nine generators in October 2024 caused by raccoon feces that OPPD claims is Zachry's fault for "failing to prevent"; and (b) one "Zachry human performance incident" on October 31, 2024. OPPD also issued another invoice to Zachry for liquidated damages of $25.4 Million.

64. Zachry made several proposals that would allow the parties to create a framework for expeditiously resolving the delay-related disputes that were rapidly developing, while also allowing the Projects to progress. OPPD rejected Zachry's proposals, without offering any alternatives. Likewise, OPPD continuously ignored requests that leadership of the Parties be allowed to meet and discuss the parties' concerns in an effort to resolve the open issues.

65. Because OPPD rejected each of Zachry's repeated attempts at resolution in accordance with the Second Amended EPC, Zachry commenced this adversary proceeding on February 5, 2025 seeking, among other things, a declaration that it had not breached the Second Amended EPC as the delays were OPPD and OPPD Contractor-caused, and a finding that the liquidated damages provision was unenforceable. [Docket No. 1].

66. On February 14, 2025, OPPD filed the Application seeking entry of an order allowing an administrative expense claim totaling at least $38 million as of the date of the Application pursuant to "section 503(b)(1)(A) of the Bankruptcy Code for any and all damages (whether liquidated, actual, or otherwise) due and owing to OPPD arising from any and all breaches by the Reorganized Debtors under the terms of the EPC General Conditions, as amended, occurring after the Petition Date and prior to the Plan's Effective Date." Application, at 11, ¶¶ 19-20. OPPD claims that Zachry will be obligated to pay 15% of the total EPC contract price as liquidated damages. *See id.* ¶ 20.

67. The Reorganized Debtors filed the *Debtors' Objection to Omaha Public Power*

District's Application for Allowance of Administrative Expense Claim [Bankr. Docket No. 2500] on March 10, 2025, requesting that the Court deny OPPD's Application. Among other grounds, Reorganized Debtors noted that administrative expense claim status is only awarded to liabilities that are for the "the actual, necessary costs and expenses of preserving the estate"; here, the purported liquidated damages do not meet that requirement. 11 U.S.C. § 503(b)(1)(A). Moreover, there has been no finding that any debtor breached the Second Amended EPC or that OPPD is entitled to such damages.

68. Subsequently, OPPD and the Reorganized Debtors agreed that the Application is abated until Zachry's liability, if any, to OPPD is determined on a final basis in this adversary proceeding. *Stipulation and Agreed Order Regarding Omaha Public Power District's Application for Allowance of Administrative Expense Claim the Debtor's Related Adversary Proceeding* [Bankr. Docket No. 2685].

69. With the adversary proceeding pending, and with the $900,000 a day penalty purportedly accruing, OPPD and OPPD Contractors erected new obstacles to prevent Zachry from achieving Substantial Completion.

E. OPPD and OPPD Contractor-Caused Delays Have Worsened Since the Filing of the Complaint

70. Since January 16, 2025 and the filing of the Complaint, OPPD and OPPD Contractor-caused delays have only worsened. Within hours after the Complaint's filing, communications at the worksite between Zachry and the OPPD Contractors began deteriorating. For example, the Wartsila personnel required to conduct final selective catalytic reduction tuning at SBLS—a critical step in the commissioning process—unexpectedly left site on January 23, 2025 and did not return until February 3, 2025, halting critical path progress for ten (10) days and increasing costs to Zachry. In addition, though the Parties had agreed at the time of the Second

Amended EPC that the required bucket and barrel testing on the TCS Project should have taken only five (5) days, it ended up delayed by twenty-one (21) days because of OPPD and Siemens-caused delays—a timeframe not accounted for in the GSCDs.

71. Moreover, OPPD has caused months of delay due its failure to direct OPPD Contractors to timely conduct the required testing or allow Zachry to redress issues on site. OPPD also halted completion of the SBLS Project for an entirely unfounded electromagnetic interference ("EMI") issue.

F. Fuel Additives Issue at TCS

72. Since the Complaint, OPPD spent months delaying Zachry from resolving a fuel oil contamination issue that halted commissioning activities at both sites.

73. The Projects have seven (7) fuel oil tanks (four (4) at TCS and three (3) at SBLS) that are used to store diesel fuel for use in the engines that generate power at each site. Each fuel tank has a manway hatch with rubber gasket seals to prevent fluid (like diesel) from leaking while under compression. There are also gaskets in various components of the tanks. On or around February 4, 2025, Zachry noticed a high pressure drop in the Siemens fuel oil strainers at TCS and investigated the cause. Zachry discovered that the gaskets in the fuel oil tanks were degrading, prompting Zachry to take immediate action. OPPD suggested – which turned out to be unfounded – that Zachry had over-heated fuel oil, causing the problem. Zachry sent fuel oil samples to third party Acuren Inspection Inc. for testing to identify the source of the problem. To expedite cleanup of the fuel and tanks, Zachry contracted with Babcock & Wilcox Enterprises, Inc. to supply fuel oil filtering equipment and Nebraska Iowa Supply Co. to supply tanker trucks to store fuel removed from the tanks. The fuel oil would need to be filtered before it could be reintroduced into the fuel tanks to ensure the fuel complied with requirements. Zachry also utilized sixteen fuel trucks to

store the fuel while the tanks and the fuel could be cleaned. Acuren's initial testing results revealed that a cold flow additive was added to the diesel fuel and that the additive could cause degradation of gasket materials at TCS. The additive contained xylene, ethylbenzene, and a solvent naptha (petroleum), which are not compatible with the particular gasket that was specified for use in the tank construction under the Second Amended EPC.[16] Cold flow additives were not referenced in the EPC fuel specifications or otherwise made known to Zachry during facility design and procurement or prior to being introduced into the tanks.[17] Meanwhile, Acuren's testing disproved the potential that overheating, if it ever occurred, which is denied, played any part in creating the problems.

74. On March 11, 2025, Lyle Fouts, EPC Project Manager at Zachry, emailed Teddy Hutchinson, Senior Project Manager at OPPD, to inform OPPD of the initial results of Zachry's investigation into the TCS fuel oil gaskets. Zachry immediately contacted its fuel tank subcontractor, Fisher Tank Company, to evaluate the type of gaskets that would be needed for use with the fuel additive. At significant cost to Zachry, Zachry took immediate action at TCS, removing the fuel, cleaning the affected tanks, and replacing the deteriorated gaskets with Teflon gaskets that could withstand the corrosive effects of the additive. Zachry was able to resolve the issue quickly. Because OPPD added the cold flow additive without notifying Zachry, Zachry was entitled to and has requested a Contract Change Request or other Directive to support a Change Order for the time and cost associated with correcting the damage to the gaskets at TCS.

75. As the cleaning process at TCS was drawing to a close, on February 19, 2025, Zachry, OPPD, and Siemens met to discuss the fuel contamination issue at TCS. They all agreed

[16] Fisher Tank Company recommended that this type of gaskets be used for TCS.

[17] OPPD continues to refuse to respond to Zachry's requests that the concentration values of the fuel additive in the tanks be provided.

on a path forward, which included inspecting and cleaning all four tanks and flushing a few combustion ring headers on the turbines. For Unit 2, in particular, the group agreed to Stage A and Stage B flushing.

76. Zachry proceeded to follow the agreed upon protocol at significant expense.

77. On March 20, 2025, without prior notice or explanation, OPPD directed Zachry to perform yet another flush on Unit 2 that was previously not contemplated:

> As Zachry's position is that the Unit 2 Pilot stage re-flush is not required and is contrary to Siemen's position that it is required prior to performing Unit 2 bucket and barrel testing, it falls into Article VI – Disputes of the EPC Contract (Contract # 236406). Per Article VI, "disputes" includes extra Work and shall be submitted to the OPPD Project Manager for written decision. As the OPPD Turtle Creek Project Manager, I have reviewed the email correspondence below in addition to other information/dates and am directing Zachry Commissioning to perform the re-flush of the Unit 2 Pilot stage after completion of the Unit 2 B stage flush. Please review Article VI of Contract # 236406 as it outlines next steps should Zachry be unsatisfied with this decision.

The insistence on a new flush paused the Project again.

G. Fuel Cleanup Delays at SBLS

78. Zachry conducted borescope testing at SBLS to determine whether similar degradation was being experienced at that project. The results showed black clumps of what was likely gasket material in the bottom of the SBLS fuel tanks. Consequently, Zachry's investigation revealed that further action would be needed to clean the fuel system and tanks at SBLS similar to what occurred at TCS. The most efficient way to conduct such operations would be to transition the resources in use at TCS to the SBLS site to perform similar services. This would require transferring some fuel from SBLS to TCS to store in one of the TCS tanks while cleaning could take place. The very next day, March 12, 2025, Mr. Fouts followed up with OPPD to provide the results of the investigation with respect to SBLS along with a video corroborating such results, to

request (again) a Directive in accordance with Section 23 of the EPC GC, and to inform OPPD that Babcock & Wilcox —a necessary element to the corrective process at TCS—was set to leave the TCS site on March 14, 2025.

79. Zachry needed a Directive from OPPD to keep fuel cleaning resources from TCS on site and available for use in cleaning fuel from SBLS. Considering the lead time associated with remobilizing these resources, Zachry requested that OPPD promptly issue a Directive to address the fuel issues at the SBLS site.

80. On March 14, 2025, Mr. Hutchinson wrote to Zachry, requesting that it accept in writing the risk to the TCS project schedule and the responsibility for replacing any fuel not considered reasonable operational loss. Zachry responded immediately that it did not accept the risk or replacement of fuel. Instead, Zachry asked whether, as required under the EPC, OPPD was issuing a Directive to proceed with correcting the fuel and gasket issues at SBLS. Because of the necessity to either utilize or release the diesel tank trucks and the Babcock & Wilcox crews who were wrapping up at TCS, Zachry set a March 14, 2025, at 6:00 p.m., deadline for OPPD to respond to allow Zachry to use these available resources to assist with the corrective action. However, OPPD did not answer the question timely, which it was obligated to do in accordance with Second Amended EPC GC Sections 22, 23, 24, and 29 and Article VI. OPPD also did not offer another solution. Even though Zachry knew how to successfully remedy the issue, as demonstrated at TCS, OPPD would not direct Zachry to act, thus causing delay and making any future cleaning process that much more expensive and difficult as the crews needed to do the work would have to be released.

81. On March 15, 2025, White & Case approached OPPD's outside counsel with the dilemma and sought to enlist the lawyers' assistance. White & Case requested to engage in

mediation with OPPD starting as soon as possible and expressed that Zachry remained willing to meet with senior leadership of OPPD to facilitate compromise so that the Projects could reach Substantial Completion without further unnecessary delays. OPPD did not agree to mediation. OPPD also rejected the request for a Directive to Zachry, stating that it was unclear whether the fuel oil at SBLS failed to meet Wartsila specifications. Consequently, Zachry was forced to release available resources which could have been used to promptly clean the tanks and fuel.

82. OPPD spent months neither acknowledging nor denying the presence of an additive in the fuel at either TCS or SBLS. It also failed to explain the fuel additive concentration levels, which is an important consideration given that over-treating fuel oil can contribute to gasket degradation. Of course, the use of an additive also impacts what type of gasket to use in any corrective action. Simply using the originally specified gasket material at SBLS might not be the best choice given the fact OPPD originally withheld information about its planned use of cold fuel additives at the Projects. By withholding such information, OPPD has further delayed the Projects and increased the risk of future problems, none of which is in the best interest of the Projects. Ultimately, OPPD confirmed the use of an additive and provided concentration levels.

83. On or around April 4, 2025, OPPD provided Zachry with a fuel test report that suggests that the deterioration of the gaskets is due to the incorporation of a different type of gasket than was specified for installation in the tanks. The report also indicates that the tested gasket material is incompatible with exposure to diesel fuel.

84. On April 7, 2025, Acuren issued its final report to Zachry, which likewise suggests that the specified gasket material—Buna-N—was not utilized at either location. What remains to be determined is whether Buna-N gaskets are compatible with the cold flow fuel additive used by OPPD and, if so, at what concentration level would it be appropriate. Initial reports from Acuren

suggest that Buna-N gasket material was incompatible with the cold fuel additive, giving rise to the concern that simply replacing the gaskets when the tanks were cleaned with Buna-N material would not avoid future problems. In any event, Zachry offered to replace the gaskets (as had been done at TCS) with Teflon gaskets. OPPD remained silent on Zachry's attempts to mitigate and no Directive has been issued on the subject.

85. Instead of allowing Zachry to resolve the fuel issue at SBLS, which would allow for Substantial Completion of the SBLS Project, OPPD and Wartsila began demanding that Zachry first address an alleged EMI issue—an issue which was known to OPPD and Wartsila since *mid-December 2024*, was not caused by Zachry, and which is entirely unrelated to and unnecessary for Substantial Completion.

86. On March 18, 2025, OPPD wrote to Zachry that "[w]hile the [fuel oil contamination issue] remains an important issue, it is secondary to the critical need to address and resolve the much longer lead time EMI condition addressed above." It also explained that the Parties still had not determined the "cause, extent, and consequences of this observed condition."

H. Electromagnetic Interference and Related Noise Interference Issue at SBLS

87. On December 16, 2024, Wartsila was conducting an electrical load failure test on SBLS' Engine 5. Wartsila's test protocol involved manipulating the electrical current until it induced a breaker to trip and shut down the engine being tested while the equipment was running at full capacity. Wartsila's testing protocol was not in accordance with industry practice; it involved intentionally altering electrical current into the system rather than simply manually tripping the breaker. Upon information and belief, Wartsila caused a transient spike in electrical current during the testing that damaged certain control cards.[18] On December 18, 2025—two days

[18] Interestingly, cards manufactured by other suppliers were not impacted.

after the transient spike incident, Wartsila asked Zachry personnel to install additional grounding to Wartsila's equipment that was not contained in Wartsila's original design—and was not in Zachry's scope of work. Zachry complied, and the transient electrical spike did not recur in subsequent testing.

88. Later testing at SBLS revealed the presence of low-level *static* EMI in the control cables, which did not violate any of OPPD's design specifications and, upon information and belief, should not have had any adverse impact on Wartsila's equipment.

89. At OPPD's request, Zachry began assessing the electrical system design and installation at SBLS to determine what, if any, impact, the static EMI had on the system and determine what, if any, action would be needed to mitigate its effects. Zachry tasked its Nebraska-licensed professional engineer of record to perform an engineering review of Zachry's work. Zachry's engineer determined that Zachry's design and installation were in accordance with all applicable codes and standards as well as the specifications found in the EPC's Exhibit B.[19] The report was relayed to OPPD the same day.

90. On or around February 13, 2025, Wartsila suspiciously stopped commissioning activities for all nine (9) engines it supplied at SBLS, claiming that static EMI needed to be eliminated before it could continue with commissioning. Zachry notified OPPD the next day that it opposed this decision on grounds that Wartsila had not provided any justification or proof showing that continuing commissioning activities posed a risk, particularly when four (4) Wartsila engines had been run at the same time on February 12, 2025 without any problems or interference. In fact, Zachry had done its own tests and collected data while Wartsila was running multiple

[19] Specifically, the power cables and control cables were, per the EPC specifications, put in the same cable duct bank due to logistical considerations that made separating those cables unfeasible.

engines at once that showed no effect on the levels of noise interference and shared the test results with both OPPD and Wartsila. Neither OPPD nor Wartsila have provided any contrary test results or data. Yet they refused to allow commissioning to continue.

91. Some electrical noise is to be expected in installations like SBLS. For this reason, it is important to know the engineering tolerances associated with Wartsila's equipment and susceptibility to electrical noise when assessing the possible cause of the December 2024 control card failure, as well as in determining the appropriate action, if any, to take to address EMI detected in the control cables. Rather than providing the tolerances information, both OPPD and Wartsila have withheld that information. Such information (*e.g.*, data sheets related to the electrical noise interference tolerances, specifications for acceptable noise levels, cables, and cable separations, etc.) is critical to Zachry being able to use its subject matter experts to review and analyze the EMI issue, provide an efficient solution, and avoid unnecessary further delays.

92. On February 14, 2025, OPPD informed Zachry that it wanted to use its own Engineering Council (a committee of OPPD-employed engineers) to do an "independent" investigation into the EMI issue. In the spirit of resolving this issue collaboratively, Zachry's engineering and commissioning representatives, Andrew Nelson and Ken Welch, met with OPPD's Engineering Council. However, prior to the meeting, upon information and belief, OPPD and Wartsila decided on their own that Zachry was at fault and needed to reroute certain control cables, which would cause months of delay to Substantial Completion of the project. This decision became evident when the meeting first began, as the only solution discussed was to reroute the control cables. By all appearances, the "independent" investigation was not an investigation at all, but simply a means to cast blame on Zachry without engaging in good faith, science-based problem solving. Rather than hold an Engineering Council meeting premised on determining a collective

path forward, the meeting proved to be an ambush of Zachry's representatives, undermining any spirit of the parties coming together to address the EMI issues collaboratively.

93. No one has identified any work by Zachry that violates a specification relative to the EMI issue. No one has identified any published manufacturer's specifications or tolerances that are being exceeded by identified EMI. Even though the presence of the static EMI is not a violation of any specification under the Second Amended EPC, there is no evidence that this proposal is the best course of action or will solve the issue, and this proposal would take months to complete, Zachry offered to address it in any way OPPD directs through a Directive. But, again, OPPD will not provide a Directive to proceed and will not entertain a Change Order for the time and cost associated with any directed corrective measure. OPPD insisted that Zachry reroute the power cables without any indication that this modification will actually solve the EMI concerns (which have yet to be articulated) or compensation and with the ongoing threat of liquidated damages hanging over Zachry's head.

94. On March 5, 2025, Zachry requested evidence or data that the transient spike and control card failure was not caused by Wartsila or OPPD specifications. OPPD answered that the question of specifications "can't be answered."

95. On March 7, 2025, Zachry followed up with OPPD asking it to confirm if it was issuing a Directive pursuant to Article 23 of the EPC contract to relocate the control cables or make some other change to the work and, if so, again notifying OPPD of a potential Change Order (the magnitude and duration of which to be determined at a later date).

96. OPPD responded the same day but without any Directive to reroute the cables or Contract Change Request to support a Change Order. Instead, OPPD attributed Wartsila's electronics malfunction to Zachry's design and installation. OPPD vaguely claimed that "[u]nder

the clear terms of the EPC Contract, Zachry remains responsible for resolving the EMI and electrical noise interference problem."

97. On March 12, 2025, Zachry reiterated that it was still missing a Directive from OPPD. Zachry also shared that it was working on a solution for which it would submit a Contract Change Request and Change Order for time and costs. Though the estimate cost required additional calculation, Zachry estimated a preliminary cost of $3 million and 14-week schedule delay.

98. On March 18, 2025, OPPD issued a letter to Zachry demanding that Zachry "resolve the EMI and related noise interference issues to achieve compliance with the EPC Contract." Again, OPPD failed to point to a single Second Amended EPC provision or specification that the noise issue violates and again failed to issue a Directive, share critical information, or make a written decision on a Change Order.

99. On March 22, 2025, Zachry responded to OPPD's letter explaining that the Second Amended EPC does not have a "requirement that electrical interference be completely eliminated, as that would not be possible." It reiterated that (a) it had followed the specifications that the EPC and Wartsila provided; (b) Zachry engineers had reported that the Project met all applicable OPPD and code requirements; (c) neither Wartsila nor OPPD identified an acceptable range or tolerance level; (d) the recommendation to reroute cables contradicted the actual conditions at the site; and (e) it was still waiting on a Directive or Contractor Change Request.

100. On March 26, 2025, OPPD responded that "OPPD will not direct work" while "[a]cknowledging Zachry's repeated request for OPPD to direct work." To avoid any further unnecessary and costly delay, Zachry offered that same day to perform the cable-reroute at SBLS that OPPD recommended in a good-faith effort to resolve the issue. Zachry made its offer with

reservation of rights to seek recovery delay, costs, and labor. OPPD has to date not accepted Zachry's offer.

101. Meanwhile, OPPD's and Wartsila's decision to stop commissioning and testing continues to prevent Substantial Completion at SBLS.

102. Subsequent testing on April 8 and 9, 2025 by an OPPD vendor demonstrated that OPPD's accusations attributing the cause of the December 16, 2024 event to Zachry's control cable and power cable installation were unfounded. The tests confirmed that the cessation of commissioning activities by Wartsila and OPPD – purportedly due to EMI – was improper, and unnecessarily delayed Substantial Completion.

I. Current Status

103. Zachry has worked in good faith to complete the Projects but has faced substantial headwinds that were outside of its control. Although the Second Amended EPC specifically contemplates additional payment and extensions of time where work is delayed or interfered with by OPPD and OPPD contractors, OPPD has refused to extend the GSCDs or issue Directives or Contract Change Requests to support Change Orders since the Second Amended EPC and Zachry's assumption of the contract. OPPD also continues to maintain that it is entitled to liquidated damages.

104. On March 24, 2025, Zachry submitted its conditional Notice of Substantial Completion to OPPD regarding TCS and SBLS.[20] To date, OPPD has not inspected the work to determine status of completion, notified Zachry in writing of its decision that the work is not substantially complete, or executed the certifications.

[20] Zachry had submitted a written notice of substantial completion for SBLS, but it offered on March 26, 2025 to withdraw the notice for SBLS as a good faith attempt to resolve the outstanding issues with proposals to do so, while reserving all rights. OPPD never accepted Zachry's offer.

105. On April 1, 2025, Zachry informed OPPD that it would submit a Change Order pursuant to Sections 22 and 23 for "additional time and cost to perform this work as it is not needed and is outside the scope of the contract" and "undertake Dispute Resolution as is their right."

106. On April 2, 2025, OPPD informed Zachry that it was reviewing Zachry's March 25, 2025 Notice of Substantial Completion for TCS and SBLS.

107. Zachry would have achieved Substantial Completion at SBLS long ago if OPPD and Wartsila had acted in good faith to address any concerns that may have existed pertaining to that location. Indeed, by OPPD's Chief Financial Officer's assessment, the Projects "are all but now generating."[21]

108. *First*, the Work performed at both sites is sufficiently complete to allow unrestricted full-load commercial operation of each station (except for items of Work that do not affect the operability, safety or mechanical and electrical integrity of the station). This was completed as part of turnover to commissioning. *Second*, both SBLS and TSC are mechanically and electrically sound. *Third*, there are Punch Lists[22] for both Project sites, circulated weekly, and Zachry has incorporated all comments by OPPD. *Fourth*, SBLS can operate under full and part load test conditions, but OPPD has simply failed to direct its contractor to conduct the testing required under Exhibit F of the EPC. Zachry's own testing for noise and thermal testing has been unreasonably stalled and compromised as a result. TCS could operate under full and part load test conditions if OPPD would permit Zachry to progress. For almost two months, OPPD has stalled all progress at SBLS based on the electrical noise issue —an issue that is not required for Substantial Completion

[21] Omaha Public Power District, *February 2025 OPPD Committee Meeting*, YouTube (Feb. 19, 2025), https://youtu.be/vNs5AQrfy38?si=Mikge_7ZfRsfYBPc&t=3892, at 1:04:38–1:04:55.

[22] "Punch Lists" are defined as "list of items of Work remaining to be completed by the Contractor, items which require corrective action, and other items required to be completed prior to Final Completion."

and has shown to be unfounded. *Fifth*, Zachry submitted a Notice of Substantial Completion for SBLS and TCS under Section 21(a) of the EPC GC along with a request for Certificate of Substantial Completion. But OPPD will not perform the pre-certification inspections, notify Zachy why it will not issue a Certificate of Substantial Completion, or issue the Certificate of Substantial Completion contemplated by the EPC.

109. The Reorganized Debtors dispute owing any liquidated damages (or corresponding administrative claim) because, among other reasons, the delays in achieving the GSCDs were caused—and continue to be caused—by OPPD and OPPD Contractors. The liquidated damages provision under the Second Amended EPC is also a penalty that does not and was never designed to reflect actual damages. The provision is not enforceable or reasonable even if Zachry were the sole cause for the delays to Substantial Completion (it was not).

110. OPPD by contrast, has, and continues to, violate numerous Second Amended EPC provisions and permit OPPD Contractors to hinder Zachry's good faith attempts to complete the Projects at substantial cost to Zachry.

111. OPPD has also rejected all attempts for "good faith resolutions" as required under Article VI of the EPC GC, with OPPD replying, in sum and substance for months, that it is "not able to commit to an immediate meeting of OPPD and [Reorganized Debtors'] principals at this time."

FIRST CLAIM FOR RELIEF
(Declaratory Judgment - Liquidated Damages Provision is Unenforceable)

112. The Reorganized Debtors repeat and re-allege all prior paragraphs of this Amended Complaint as if fully set forth herein.

113. By the second amendment, executed post-petition, OPPD increased the liquidated damages amount for each day beyond the GSCD to oppressive sums. Compared to the original

EPC, it increased liquidated damages for SBLS from $125,000/day initially and then $250,000/day until work is complete (capped at 10% of the Contract Price), to ***$350,000/day*** through January 29, 2025, and ***$500,000/day*** until the Work is accepted as complete (with a "sub-cap" of 10% of the contract price and total cap of 15%) under the Second Amended EPC. And for TCS, it increased from $50,000/day, and $100,000/day (capped at 10% of the Contract Price) under original EPC to ***$250,000/day*** through January 15, 2025 and ***$400,000/day*** until the Work is accepted as complete (with a "sub-cap" of 10% of the Contract Price and total cap of 15%), among other penalties.

114. The Second Amended EPC was executed at a time when OPPD admits the Projects were 92% complete. Any potential damages caused by delay were therefore knowable to OPPD and capable of being reasonably estimated. OPPD was able to ascertain and estimate its future economic damages at that time, as OPPD knew the average ongoing operational costs of the Projects and had access to market information and futures prices that would inform it of the approximate cost of supplemental replacement power, should it be needed. Because the power stations are anticipated to be operated as "regulating and peaking power" facilities meant only to serve as "back up" and operating only 15% of the time, as needed, and not as the primary baseload source of electricity for OPPD's customers, any damage caused by a delay in meeting the GSCDs was easily discernible from the amount OPPD actually spends as an alternative to using the plants in the event of a shortfall in supply versus demand. In fact, the Reorganized Debtors believe that OPPD had already contracted for supplemental power to cover the possibility that the completion deadlines would not be met well before the second amendment was executed. Before the GSCDs for the Projects (by November 2024 for the TCS and December 2024 for the SBLS)—both Stations were already operational and capable of generating electricity into the grid.

115. There was therefore no reason for a liquidated damages provision at all, and

certainly not one that is so wildly disproportionate to any actual damages incurred from such delay.

116. The liquidated damages provision under the Second Amended EPC does not purport to claim that the liquidated damages amount is a reasonable measure of damages or that the actual damages would be difficult to determine. It does not reflect and was not intended to reflect an estimate of damages. Instead, it serves solely as a harsh penalty for any delay. Just as the addition of a daily payment for early completion was meant to serve as an incentive.

117. The assessed liquidated damages are grossly disproportionate to any actual damages OPPD purportedly suffered. Currently, the Projects are around 99% complete. The construction was completed long ago. What remains is testing from OPPD Contractors and Punch List items that Zachry continues to complete. The substations are producing electricity. Yet OPPD is demanding nearly ***$1 million per day*** from the Reorganized Debtors (and the estates) for delays caused by OPPD and OPPD Contractors. Based on the Reorganized Debtors' preliminary assessment (without the benefit of discovery), the damages rate implied by the liquidated damage provisions is at least ***five to ten times higher*** than what the market would have valued the net revenues associated with the output of the two Projects during the same period. The "market values" relied upon by the Reorganized Debtors are likely higher than the costs incurred by OPPD given its membership in the Southwest Power Pool, which provides for shared power exchanges among its members.[23] The wholesale cost of electrical power is available to members like OPPD

[23] OPPD is a member of the Southwest Power Pool (SPP). *What is the SPP?*, Omaha Public Power District, *available at* https://www.oppd.com/media/268570/spp-101-infographic.pdf (last visited March 10, 2025). The SPP is "a regional transmission organization (RTO): a nonprofit corporation mandated by the Federal Energy Regulatory Commission to ensure reliable supplies of power, adequate transmission infrastructure and competitive wholesale electricity prices on behalf of its members." *About Us*, Southwest Power Pool, *available at* https://www.spp.org/about-us/ (last visited March 10, 2025). As a member, "OPPD can sell its wholesale power to other SPP members using the Integrated Marketplace." *What is the SPP?*, Omaha Public Power District, *available at* https://www.oppd.com/media/268570/spp-101-infographic.pdf (last visited March 10, 2025).

on a real-time basis.[24] Based on the historical prices of wholesale electricity when the Projects could have been operated, a calculated marginal cost of production using daily natural gas prices, and an assumed heat rate of the project generator technologies, the actual damages OPPD may have suffered, if any, are likely to be less than 10% of the asserted $38 million (through mid-February 2025) making the liquidated damages provision an unenforceable penalty.

118. Because, among other reasons, (a) actual damages were not difficult to ascertain or estimate at the time of the Second Amended EPC; (b) liquidated damages are disproportionate to the actual harm suffered; and (c) the liquidated damage provision was intended to penalize Zachry for delay, not compensate OPPD for the reasonable costs of anticipated harm, the Reorganized Debtors seek an order declaring that the liquidated damages provision of the Second Amended EPC is unenforceable.

SECOND CLAIM FOR RELIEF
(Declaratory Judgment–The GSCDs Have Not Yet Occurred)

119. The Reorganized Debtors repeat and re-allege all prior paragraphs of this Amended Complaint as if fully set forth herein.

120. Zachry agreed to the GSCDs for the Projects as amended under the Second Amended EPC based on the facts known to them at that time. Zachry relied, for example, on OPPD enforcing the strict work schedule agreed to between OPPD and Zachry with its OPPD Contractors. Had Zachry known at the time of the Second Amended EPC that OPPD Contractors—parties necessary to achieve the GSCDs—would be taking weeks off at that critical time, it would have adjusted the GSCDs accordingly.

[24] The SPP publishes publicly available integrated marketplace data on its website (https://portal.spp.org/groups/integrated-marketplace), providing historical and look-ahead data for the SPP integrated wholesale electrical marketplace. OPPD would also have access to other market information and prices at which futures are trading and settled through its trading and hedging functions.

121. Zachry further relied, as it had with the first and second amendments to the EPC, on OPPD continuing the parties' prior practice of further amending the contract's GSCDs to account for OPPD-caused delays. Zachry also relied on OPPD honoring Section 2(b), 10, and 24 of the EPC GC, which entitled Zachry to, among other things "adjustment of the Contract Price and/or additional time" to achieve the GSCDs "in the event Zachry, through no fault of its own, encounter[] delays or extra costs as a result of the total or partial suspension of the Work or unreasonable interference therewith by the [Owner] or its other contractors, an error or omission in [Owner]-provided information, or as a result of Force Majeure, or other event allowed by the Contract."

122. Zachry has maintained and provided to OPPD a detailed list of the OPPD-caused delays including all those attributable to OPPD Contractors. These include, but are not limited to:

(a) Extensive workdays taken off by Siemens and Wartsila personnel in late December 2024 and early January 2025;

(b) Delays on Unit 1 at TCS due to lack of support from Siemen on fuel oil tank flushing;

(c) Incorrect instructions and inadequate resources from Siemens for TCS Unit 2;

(d) OPPD or OPPD Contractors adding cold flow additive to the diesel fuel at TCS;

(e) OPPD's failure to timely provide Directives, Contract Change Requests or Change Orders regarding the decision to investigate and address cold flow additive to gaskets at SBLS;

(f) OPPD withholding information about the test results of fuel oil sample testing;

(g) Wartsila's refusal to provide specifications of acceptable levels of electrical noise interference, cables, and cable separation for its equipment at SBLS;

(h) Wartsila's decision to stop demonstration testing of all nine engines at SBLS until the EMI issue is resolved;

(i) OPPD's insistence on remedying the EMI issue before permitting the testing required for Substantial Completion;

(j) Siemens allowing debris into equipment at TCS and OPPD's refusal to correct or cause Siemens to take reasonable steps to correct its mistake;

(k) OPPD's decision to add additional work for TCS while refusing to provide Directives, Contract Change Requests or otherwise consider a Change Order;

(l) OPPD's ignoring its obligations to inspect and provide written answer after receiving Notices of Substantial Completion for TCS or SBLS; and

(m) OPPD's refusal to participate in mediation or dispute resolution as contemplated under the EPC to resolve the issues contributing to the delays.

123. In total, there have been at least four months of delays caused by OPPD and OPPD Contractors since the Second Amended EPC was executed (and the December 16, 2024 and December 30, 2024 GSCDs were agreed to). And these delays are ongoing.

124. OPPD has not and cannot dispute that these OPPD and OPPD Contractor-caused delays occurred and that Zachry is "impeded in their work" as a result. It also cannot deny that Zachry has repeatedly requested Directives and Contract Change Requests corresponding to the major Owner and OPPD Contractor-caused delays. OPPD breached the Second Amended EPC by arbitrarily refusing to acknowledge or issue Directives, Contract Change Requests or Change Orders. Had OPPD complied with the Second Amended EPC, including GC Sections 22, 23, 24, and 29, the GSCDs for both Projects would have been modified to dates that have not yet occurred.

125. With the TCS Substantially Complete and SBLS stalled at 99% complete for months at OPPD's election, the Reorganized Debtors seek an order that, as of the date hereof, the GSCDs for the Projects under the Second Amended EPC are inoperative and have not yet occurred because of OPPD and OPPD Contractor-caused delays and corresponding refusals to comply with the Change Order process in the EPC.

THIRD CLAIM FOR RELIEF
(Declaratory Judgment - Reduction of Any Administrative Claim)

126. The Reorganized Debtors repeat and re-allege all prior paragraphs of this Amended Complaint as if fully set forth herein.

127. Because Zachry has dutifully worked to fulfill its obligations under the Second Amended EPC and continues to do so, having achieved 99% completion of the Projects, and because any delay in achieving the GSCDs and final completion has been, and continues to be, caused by documented delays by OPPD and OPPD Contractors wholly controlled by OPPD, there has been no breach by Zachry. Nor is the liquidated damages provision of the Second Amended EPC unenforceable under Nebraska law and as a matter of public policy.

128. Should, however, the Court determine that the Reorganized Debtors breached the Second Amended EPC or that the liquidated damages provision is enforceable, OPPD's administrative expense claim for liquidated damages should not be given administrative priority in the full amount; instead, the administrative expense claim should be limited to only damages that "provide a benefit to the estate," or an "actual and necessary costs of preserving the estate," as contemplated under 11 U.S.C. § 503(b).

129. Liquidated damages based on an alleged breach of the assumed Second Amended EPC as an administrative expense would not benefit but would instead substantially harm, the Reorganized Debtors' estates. As set forth above, the liquidated damages are unreasonable, punitive, and do not reflect the actual harm suffered. The liquidated damages are not tied to actual damages at all but rather a daily penalty for a delay in reaching GSCDs—deadlines unachievable through no fault of the Reorganized Debtors.

130. Therefore, to the extent the Court finds that Zachry breached the Second Amended EPC, in whole or part, and that OPPD suffered damages as a result of such breach, the Reorganized

Debtors seek an order declaring that the administrative claim is valued at $0 or, alternatively, at such reduced amount that reflects the actual damages incurred by OPPD as a result of delays caused solely by Reorganized Debtors, offset by (a) changes to its Work imposed by OPPD and OPPD Contractors as well as extra costs and time resulting from their delay pursuant to EPC GC Sections 22 and 23; and (b) damages owed to Zachry as a result of OPPD's breach of the Second Amended EPC and implied covenant of good faith and fair dealing.

FOURTH CLAIM FOR RELIEF
(Breach of Contract against OPPD Under the Second Amended EPC)

131. The Reorganized Debtors repeat and re-allege all prior paragraphs of this Amended Complaint as if fully set forth herein.

132. The Second Amended EPC, with the exception of the aforementioned liquidated damages provisions, was and is a valid and enforceable contract with clear and unambiguous terms and obligations that govern the rights, obligations, and duties of the Parties.

133. The Reorganized Debtors have complied with all terms and fully performed all conditions, covenants, obligations and promises to be performed in accordance with the terms and conditions in the Second Amended EPC.

134. OPPD breached the Second Amended EPC under Article VI, and GC Sections 2, 10, 21, 22, 23, 24, and 29 by its unjustified and unexcused failure to perform all obligations thereunder.

135. *First*, OPPD breached GC Sections 2, 10, 23, and 24 by refusing to grant requested Change Orders or Directives after OPPD and OPPD Contractor-caused delays. Zachry made a good-faith effort to fulfill its performance obligations under the Second Amended EPC, intending to complete the Projects early. However, the actions of OPPD and OPPD Contractors made this impossible. When Zachry followed the proper procedure to request Directives and Change Orders

due to delays caused by OPPD Contractors and OPPD, OPPD refused to adjust the GSCDs, despite having exclusive authority over the conduct of both OPPD Contractors and OPPD personnel, who were responsible for significant delays. In line with past performance under the Second Amended EPC, and its terms, OPPD should have (a) taken "reasonable steps" to "correct or cause the separate contractor and or [OPPD] to remedy the stated conditions"; (b) agreed to adjust the GSCDs to reflect the delays caused by itself and OPPD Contractors; (c) agreed to additional compensation for Zachry; and (d) issued Directives. Instead, OPPD declined to do so, threatened litigation, and issued invoices claiming liquidated damages. OPPD did not engage in good-faith resolution by mutual decision.

136. *Second*, OPPD breached GC Sections 22, 23, 24, and 29 by demanding changes in Work specifications leading to additional time and costs without additional compensation, Change Orders, or Directives. OPPD has required Zachry to take certain actions outside of its obligations outlined in the Second Amended EPC on various occasions, including rerouting cables at SBLS and unnecessarily re-flushing oil tanks. When Zachry has agreed that it would perform the additional work with a Change Order for an estimated time and cost, OPPD has refused to comply with the Change Order process. Multiple times when Zachry requested Directives, OPPD has refused to provide them. When Zachry asked OPPD to engage in the Change Order process to allow for additional compensation for time and material work changes, OPPD refused to engage. Instead, OPPD has demanded that Zachry cover all expenses for new work. OPPD has not "work[ed] in good faith toward a timely, reasonable and mutually agreeable price and/or time adjustment for such change" in signed writing.

137. *Third*, OPPD has breached Article VI by withholding the repeatedly requested Directives and refusing to engage in good-faith resolution procedures. Several times Zachry

submitted questions of facts and disputes to OPPD's Project Manager, Mr. Hutchinson, for a written decision. In many instances, Mr. Hutchinson failed to provide a written decision in flagrant violation of Article VI. In other instances where Mr. Hutchinson did provide a written decision and Zachry was unsatisfied with the decision, OPPD did not engage in the mandatory good-faith resolution. In fact, OPPD has declined to engage in any recent in-person meetings to discuss the delays and potential consensual paths forward to complete the Projects. OPPD has also not accepted Zachry's request for mediation.

138. *Fourth*, OPPD violated GC Section 21, which required OPPD to inspect the Projects and notify Zachry in writing the reasons why a Certificate of Substantial Completion was withheld after Zachry submitted a Notice of Substantial Completion. Zachry submitted Substantial Completion Notices for TCS and SBLS. To date, OPPD has not performed the required inspections, executed certifications, or provided written explanation for its refusal to certify.

139. As a direct result of OPPD's material breaches of the Second Amended EPC, Reorganized Debtors have collectively sustained damages in an amount to be determined at trial.

140. Zachry therefore seeks a judgment in its favor and against OPPD in an amount to be determined at trial for OPPD's breach of the Second Amended EPC; pre-and post-judgment interest; attorneys' fees related to enforcing the Second Amended EPC along with costs; and any other relief as this Court may deem just and proper.

FIFTH CLAIM FOR RELIEF
(Breach of Duty of Good Faith and Fair Dealing against OPPD Under the Second Amended EPC)

141. The Reorganized Debtors repeat and re-allege all prior paragraphs of this Amended Complaint as if fully set forth herein.

142. OPPD owes Zachry the implied duty of good faith and fair dealing by virtue of their contractual relationship under the Second Amended EPC.

143. OPPD has breached the implied covenant of good faith and fair dealing by acting in a manner inconsistent and directly against the purposes and express or implied terms of the Second Amended EPC. OPPD has also failed to perform and failed to cause its OPPD Contractors to perform express obligations under the Second Amended EPC.

144. *First*, OPPD prevented Zachry from achieving the GSCDs by hiring and failing to provide the requisite oversight of and control over OPPD Contractors that caused substantial and material delays in the completion process. These OPPD Contractors served an important and necessary role in the Projects' completion in the months and weeks before the deadlines. But contrary to OPPD's obligations and responsibilities under the Second Amended EPC, OPPD did not set a strict work schedule that was necessary and appropriate to achieve Substantial Completion (despite such schedule being imposed on Zachry). OPPD allowed OPPD Contractors to substantially exceed the projected timelines for conducting their work and inadequately staff their work, take lengthy and unscheduled time off in critical months leading up to the GSCDs, and fail to communicate known items that would interfere with Zachry's work. OPPD did not require OPPD Contractors or hold them to the expectation that schedule changes needed to be made timely. As such, OPPD failed to perform its oversight and control duties over OPPD Contractors in good faith and in a manner consistent with the Second Amended EPC and the justifiable expectations of Zachry.

145. Zachry had no authority or control over these OPPD Contractors and, as a result, informed OPPD about the issues arising from OPPD Contractors' delays. Zachry attempted in good faith to meet its performance obligations under the Second Amended EPC, as it had intended to finish the Projects early. However, OPPD not only frustrated such efforts (*e.g.*, the unscheduled days off led to a complete halt in necessary work on the Projects) by engaging in arbitrary,

capricious, and an unreasonable manner, but also the purpose of the Second Amended EPC the justifiable expectations of Zachry, turning an achievable early completion milestone set forth in Article XI(f) (as amended) into an impossibility.

146. OPPD also prevented and allowed OPPD Contractors to prevent Zachry from performing under the Second Amended EPC. Because OPPD and its OPPD Contractors will not allow SBLS and TCS to run at full load so that testing can be conducted, they are needlessly stalling preconditions for Substantial Completion. OPPD's failure to perform, or cause its OPPD Contractors to perform, is also preventing Zachry from fulling its own testing obligations under the Second Amended EPC.

147. *Second*, OPPD declined to move the GSCDs despite OPPD having exclusive authority over the conduct of OPPD Contractors and the conduct of OPPD Contractors and OPPD having caused material and substantial delays. As of the date hereof, OPPD and OPPD Contractors have caused months of delays, and the delays are ongoing. Zachry requested a change in the GSCDs, but OPPD refused. Consistent with prior performance under and the terms of the Second Amended EPC, OPPD should have agreed to change the GSCDs to account for the delays it and its OPPD Contractor caused but declined to do so and instead threatened litigation and issued invoices asserting liquidated damages to reap a windfall. OPPD even declined to engage in any in-person meetings to discuss the delays and potential consensual paths forward to complete the Projects.

148. *Third*, OPPD withheld necessary Change Orders and Directives for work that Zachry either previously undertook or needs to undertake with respect to the fuel gasket issue concerning the Projects and EMI issue concerning SBLS. Resolution of the fuel gasket issue is necessary for Zachry to obtain Substantial Completion on SBLS; but OPPD spent months

unreasonably, arbitrarily, and capriciously mandating that Zachry fix the EMI issue prior to resolving the gasket issue even though (a) the EMI issue was not caused by Zachry and does not arise from a breach of Zachry's contractual obligations under the Second Amended EPC and (b) the gasket issue can be resolved in days whereas the EMI issue could take months. It is also uncertain if the EMI issue will be resolved if Zachry follows OPPD's Engineering Council's recommendation to reroute the cables. If the gasket issue is resolved at SBLS, then SBLS could be substantially complete. OPPD is further mandating resolution of the EMI issue without providing Directives or Change Orders. OPPD's failure to act in the best interests of the Projects and unwillingness to provide Change Orders and Directives so that important and necessary work could be completed epitomizes lack of good faith. Moreover, by arbitrarily electing to prioritize completion of the EMI issue over a remedy that would allow for Substantial Completion of SBLS, OPPD is unreasonably accruing the purported liquidated damage and risking completion in the summer months when surging is more likely. While OPPD finally agreed to a plan to address the fuel issue first, it did so after several months of unnecessary delay.

149. *Fourth*, OPPD has withheld critical information about Wartsila's equipment that is essential to determine the cause of the EMI issue and the most efficient and effective means for resolving it. Consequently, Zachry has been given a Hobson's choice: either comply with OPPD's mandates on these issues which are costly and time consuming or further delay Substantial Completion and accumulate the purported liquidation damages and other operational costs. OPPD—aware of this fact—has intentionally put Zachry in an impossible position and blocked effective mitigation, acting in a manner inconsistent with the EPC's purpose.

150. *Fifth*, OPPD has failed to cooperate in good faith with Zachry to the detriment of the Projects. OPPD refused to honor the resolution process under Article VI, unreasonably

rejecting repeated attempts at meetings and mediation and depriving Zachry of the right to receive the benefit of the terms of the Second Amended EPC and needlessly delaying completion of the Projects.

151. As a direct and proximate result of OPPD's breach, the Reorganized Debtors have incurred damages in an amount to be proven at trial.

PRAYER FOR RELIEF

152. WHEREFORE, the Reorganized Debtors respectfully request a judgment from this Court against OPPD as follows:

(a) An order under Bankruptcy Rule 7001(9), 28 U.S.C. § 2201, and 11 U.S.C. § 105(i) declaring that:

i. The GSCDs under the Second Amended Complaint are not operative and given the ongoing OPPD and OPPD Contractor-caused delays, have not yet occurred;

ii. The liquidated damages provision (Article XI) of the Second Amended EPC is unenforceable as a matter of law and public policy;

iii. The administrative claim asserted by OPPD is valued at $0 as of the effective date, or in the alternative, the administrative claim is valued at such reduced amount that reflects the actual damages incurred by OPPD from delays caused solely by the Reorganized Debtors and as further offset by (i) amounts Zachry would be entitled to under EPC GC Sections 22 and 23 and (ii) damages for breach of the Second Amended EPC and the implied covenant of good faith and fair dealing;

(b) Awarding damages in an amount to be determined at trial for OPPD's breach of the Second Amended EPC;

(c) Awarding damages in an amount to be determined at trial for OPPD's breach of the implied covenant of good faith and fair dealing;

(d) Awarding pre-and post-judgment interest;

(e) Awarding attorneys' fees related to enforcing the Second Amended EPC along with costs and disbursements; and

(f) All such other relief as the Court may find just and proper.

RESPECTFULLY SUBMITTED this 11th day of April, 2025 in Houston, Texas.

/s/ Charlie R. Koster
WHITE & CASE LLP
Charles R. Koster (Texas Bar No. 24128278)
609 Main Street, Suite 2900
Houston, Texas 77002
Telephone: (713) 496-9700
Facsimile: (713) 496-9701
Email: charles.koster@whitecase.com

Jason N. Zakia (admitted *pro hac vice*)
Bojan Guzina (admitted *pro hac vice*)
Andrew O'Neill (admitted *pro hac vice*)
Michael Andolina (admitted *pro hac vice*)
111 South Wacker Drive, Suite 5100
Chicago, Illinois 60606
Telephone: (312) 881-5400
Email: jason.zakia@whitecase.com
bojan.guzina@whitecase.com
aoneill@whitecase.com
mandolina@whitecase.com

Laura J. Garr (admitted *pro hac vice)*
1221 Avenue of the Americas
New York, New York 10020
Tel: (212) 819-8200
Email: lgarr@whitecase.com

HICKS THOMAS LLP
John B. Thomas (Texas Bar No. 19856150)
John Deis (Texas Bar No. 24028289)
700 Louisiana Street, Suite 2300
Houston, TX 77002
Tel: (713) 547-9100
Email: jthomas@hicks-thomas.com
jdeis@hicks-thomas.com

Counsel to the Reorganized Debtors