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.	

REORGANIZED DEBTORS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT RE LIQUIDATED DAMAGES

[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.

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INTRODUCTION

The Reorganized Debtors moved for partial summary judgment declaring that the Liquidated Damages Provision in the Second Amended EPC between Zachry and OPPD is an unenforceable penalty. *See* Doc 37 ("Motion"). OPPD has responded to the motion. *See* Doc. 45 ("Response"). The Reorganized Debtors respectfully submit this reply.

FURTHER STATEMENT OF THE CASE

A consistent theme of OPPD's response is that "as of this filing" on May 19, Zachry "has not completed the Projects." Response at 1. In fact, no later than June 4, 2025, Zachry reasonably expects to send "Guaranteed Substantial Completion Certificates" to OPPD for both Projects. *See* Exhibit J, at 2, ¶ 3 (declaration of Zachry's Project Manager at Turtle Creek Station and Standing Bear Lake Station).

ARGUMENT

We address first OPPD's various arguments why Zachry has supposedly forfeited its challenge to the enforceability of the Liquidated Damages Provision. We then address the merits, namely, the two-part test under Nebraska law for evaluating that challenge.

I. OPPD's "forfeiture" arguments lack merit.

OPPD advances three forfeiture-related arguments, which we address in turn.

A. OPPD's contention that the EPC "Contract must be enforced as written" has no basis in logic or authority.

OPPD's first argument is that Zachry may not challenge the enforceability of the Liquidated Damages Provision because the "Contract must be enforced as written." Response at 14. By this, OPPD means that the provision is enforceable — regardless of

whether it is reasonable — **simply and solely** because "Zachry 'willingly and knowingly' agreed to the Liquidated Damages Clause and 'understood [its] whole purpose.'" *Id.* at 15 (citing the Original EPC's statement 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, and are not a penalty").

As Zachry already demonstrated, that "is not the law." Motion at 20. Consider first *Lund-Ross Constructors, Inc. v. Vecino Natural Bridge, LLC*, 2021 WL 6202667 (D. Neb. Nov. 3, 2021), the decision that OPPD trumpets as "instructive." Response at 15. As OPPD correctly observes, *Lund-Ross* opined that not "only did the challenging party **willingly and knowingly agree to the provision** when it signed the contract, **it understood that the whole** purpose of including a liquidated-damages provision was to obviate the need for the non–breaching party to prove actual damages." *Id.* (emphasis by OPPD and quoting 2021 WL 6202667, at *5). Under OPPD's theory, the court could have and should have stopped right there and held that the plaintiff had "forfeited" the right to challenge the liquidated damages provision as an unenforceable penalty.

But *Lund-Ross* did nothing of the kind. Rather, the court held that the plaintiff's willing and knowing agreement to the provision, along with its understanding of the purpose of provision, meant that "the Nebraska Supreme Court would likely place the burden on the party seeking to invalidate the liquidated-damages provision." 2021 WL 6202667, at *5. What "burden"? The "burden of proving whether a stipulated amount is liquidated damages or a penalty." *Id.* That proof did not concern what the parties "agreed" or how the contract was otherwise "written." Rather, that proof concerned the two-part test that *Lund-Ross* itself

identified and that both parties have quoted and applied, namely (1) whether actual damages are difficult to ascertain or measure and (2) whether the stipulated amount is either a reasonable estimate of, or reasonably proportional to, actual damages. *See id.* at *4 (citing *Kozlik v. Emelco, Inc.*, 483 N.W.2d 114, 121 (Neb. 1992)), *cited in* Motion at 11 and Response at 25. With no hint of forfeiture of the kind that OPPD suggests, *Lund-Ross* went on to apply that test on the merits. *See* 2021 WL 6202667, at *5.

Moreover, none of the other cases cited by OPPD (or Zachry) resolves the liquidated-damages issue on the basis of such forfeiture, i.e., holding that the challenger loses simply and solely because the contract itself states that the stipulated sum constitutes enforceable liquidated damages rather than an unenforceable penalty. Indeed, from out of the decades of litigation about liquidated damages across the common-law world, OPPD could pluck not a single decision so holding. That is unsurprising: the logic of OPPD's argument would allow parties — simply by including language like that in Article XI(a) of the Original EPC — to insulate any contractually stipulated sum from judicial review. That, in turn, would compel courts always to enforce an "agreement for a penalty in case of breach," although enforcement of such an agreement "is confessedly opposed to public policy." *Wortman v. Jessen*, 183 Neb. 274, 276 (1968).

OPPD's argument based on the notion that the "Contract must be enforced as written" should be rejected.

B. Similarly, Zachry did not "waive" its right to challenge the Liquidated Damages Provision.

OPPD renews its forfeiture notion under the rubric of "waiver," this time based on the fact that Zachry failed to "rais[e] objections to the Liquidated Damages Clause" when it negotiated the First and Second Amendments to the Original EPC and when it "assumed" the EPC in bankruptcy. Response at 17–18. Putting aside bankruptcy-related assumption for Section C below (pp. 7–11), the two renegotiations of the EPC do not bolster OPPD's forfeiture notion.

Again, the logic of OPPD's argument is that a party "waives" the age-old common-law right to challenge a liquidated damages clause as an unenforceable penalty simply and solely by renegotiating a contract and thereby "reaffirm[ing] its acceptance" of the clause. Again, that would eviscerate a court's ability to ensure that it does not enforce contractual penalties in violation of universal public policy. Not surprisingly, therefore, OPPD cites not a single decision in support of its waiver argument.[2] The whole point of doctrines that render certain contractual clauses unenforceable on the basis of public policy is that parties categorically may not "negotiate" certain things. *Cf. In re Tama Beef Packing, Inc.*, 290 B.R. 90, 98 (B.A.P. 8th Cir. 2003) (A "fairly negotiated" contract must be enforced according to the parties' intentions "**unless** illegal or **against public policy**." (emphasis added)).

OPPD's waiver argument should be rejected.

[2] *U.S. Pipeline, Inc. v. Northern Natural Gas Co.*, 303 Neb. 444, 473 (2019), *cited in* Response at 18, is certainly not such a decision. *U.S. Pipeline* does indeed discuss waiver, but only to hold that a "contractual provision for liquidated damages for delay in performance may be waived." *Id.* at 474.

C. Zachry is not "estopped" to challenge the Liquidated Damages Provision via its assumption and compromise in these bankruptcy proceedings.

OPPD next contends that Zachry is "estopped" to challenge the Liquidated Damages Provision on the merits because, pursuant to Section 365, "Zachry voluntarily assumed the parties' [EPC] Contract as modified by the Second Amendment — an amendment that openly and expressly increased the liquidated damages as a 'predetermined reasonable' measure of damages." *Id.* at 19, 20. OPPD's contention fails as a matter of law.

First, OPPD invokes the precept that in assuming an executory contract pursuant to Section 365, "it's all or nothing: An executory contract must be assumed or rejected in its entirety." *Id.* (cleaned up; quoting *Matter of Thornhill Brothers Fitness, L.L.C.*, 85 F.4th 321, 325 (5th Cir. 2023)). That precept does not help OPPD here. The pending question is not whether the Liquidated Damages Provision of the Second Amended EPC has been "assumed" or not. Rather, the pending question is whether that provision, having indeed been assumed as part of the "entirety" of the contract, is enforceable or not. Had Zachry attempted to use **Section 365** to "reject" the Liquidated Damages Provision, then *Thornhill Brothers Fitness* might well have blocked that attempt. But Zachry is distinctly relying on well-settled **Nebraska law** — which OPPD agrees governs the EPC Contract, *see id.* at 14 n.62 — to declare the provision unenforceable.

Second, OPPD charges that Zachry is attempting to "evade the requirement that it take any retained executory contracts *cum onere*, with all their benefits and burdens." *Id.* at 20–21 (cleaned up; quoting *Thornhill Brothers Fitness*, 85 F.4th at 326). But like the defendants in *In re Astria Health*, 640 B.R. 758, 769 (Bankr. E.D. Wash. 2022), OPPD

"place[s] undue weight and overbroad impact on the *cum onere* principle," which "prevents a party from using the power available under Bankruptcy Code section 365 to 'cherry pick' contractual terms by assuming those it finds favorable and freeing itself from others it finds unfavorable." Yet nothing in "courts' articulation of the *cum onere* principle, let alone the statutory text, suggests that the principle has a broader effect that ossifies an agreement against a latent defect or an attack otherwise available under applicable nonbankruptcy law." *Id.* Consequently, whatever "limitations applicable nonbankruptcy law may place on the enforceability or validity of particular aspects of an agreement are themselves **part of the agreement**," and assumption under Section 365 "does not resolve issues about the validity, **enforceability**, scope, or extent of the contract, and hence the *cum onere* principle cannot bind the estate representative to an outcome regarding those issues." *Id.* at 769–70 (second emphasis added).

In *Astria Health* itself, the debtor assumed a prepetition contract that contained a limitation-of-liability clause. *See id.* at 763. The confirmation order, which approved the assumption, contained agreed-upon language and a broad reservation of rights with respect to various issues in connection with the contract. *See id.* at 764. The debtor subsequently filed an adversary proceeding against the contract counterparty asserting claims for, among others, fraud in inducement, negligent misrepresentation, and avoidance of all transfers and obligations related to the assumed contract. *See id.* at 764–65. The counterparty sought a partial summary judgment based on theories of ratification and waiver, arguing that the debtor's assumption of the contract prevented the debtor from attempting to void it. *See id.* at 765. On the basis of the foregoing, the court rejected the counterparty's argument

and held that assumption did not bar the debtor's claims: "Fundamental questions related to the parties' contractual and other state-law rights — such as the validity or legality of an agreement, **the enforceability of particular provisions**, or whether one side has breached or terminated the agreement — are not considered" during the contract assumption process under Section 365. *Id.* at 768 (emphasis added). Rather, that process "leaves all existing rights intact for full plenary litigation on the merits." *Id.* Just so here.

Although *Thornhill Brothers Fitness* had no occasion to cite *Astria Health* or otherwise confront the issues raised therein, nothing in the Fifth Circuit's decision contradicts *Astria Health*. To the contrary, *Thornhill Brothers Fitness* explained that "the debtor's contractual counterparty should retain the same rights" — no more, no less — under § 365 in bankruptcy as it would have outside of bankruptcy." 85 F.4th at 326 (citing *Mission Product Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 381–82 (2019)). Here, Zachry retained its rights to challenge the Liquidated Damages Provision under Nebraska law. Moreover, the Fifth Circuit has often cited and applied the long-standing precept that parties (like OPPD here) should not "receiv[e] a windfall merely by reason of the happenstance of bankruptcy." *Sosebee v. Steadfast Insurance Co.*, 701 F.3d 1012, 1024 (5th Cir. 2012) (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979)). Enforcing the Liquidated Damages Provision even if it is contrary to Nebraska law on the merits would give OPPD just such a windfall.

Third, OPPD argues that determining the enforceability of the Liquidated Damages Provision on the merits would "strip OPPD of its adequate assurance and only consideration under the [Rule] 9019 compromise." Response at 21. That is false: the fact that

assumption of the EPC Contract was coupled with a request to approve a settlement under Rule 9019 does not negate the foregoing analysis. Courts have held that a party is not estopped from challenging as unenforceable provisions in even a court-approved settlement. *See, e.g.*, *Scavenger Sale Investors L.P. v. Bryant*, 2001 WL 709441, at *6 (N.D. Ill. June 21, 2001) (holding that even "[p]ortions of court-approved agreements can constitute unenforceable penalties" if they are not enforceable under state law); *In re VEC Farms, LLC*, 395 B.R. 674, 683 (Bankr. N.D. Cal. 2008) (ruling that "approval of the Settlement Agreement under [Rule] 9019 does not prevent the Court from considering the [defendants'] argument that the Judgment is an invalid penalty"). Moreover, declining to enforce an unenforceable Liquidated Damages provision does not "strip" OPPD of its rights to recovery if OPPD can demonstrate breach and actual damages.

Fourth, OPPD advances "judicial estoppel" as yet another reason to avoid the merits under Nebraska law. Response at 22–23. The premise of that argument is that "this Court, via the Assumption Order, 'approved in all respects' the Second Amendment and ruled that the [EPC] Contract — which includes the Liquidated Damages Clause — is 'binding and enforceable in accordance with its terms on the Debtors.'" *Id.* at 23. That premise is false: the Assumption Order actually provides that the Second Amended EPC "is hereby approved in all respects and shall be binding and enforceable in accordance with its terms on the Debtors . . . **in accordance with the terms of** the [Second Amended EPC] and **this Order**." Doc. 961, at 2, ¶ 1 (emphasis added). Paragraph 7 of the Order expressly preserves Zachry's rights (among others) to assert a claim against OPPD challenging the Liquidated Damages Provision under Nebraska law: "Nothing contained in . . . this Order . . . is intended to be

or shall be construed as . . . (e) a waiver of any claims or causes of action that may exist against any creditor or interest holder"; or (g) a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law." *Id.* at 3, ¶ 7 (emphasis added). The Confirmation Order is to the same effect, expressly preserving the parties "defenses" (among other rights) and providing that "all parties' rights, remedies, and obligations under the OPPD Contract are explicitly preserved." Doc. 2431, at 75, ¶ 161.

These express preservations are sufficient to negate "judicial estoppel." *See, e.g.*, *Asarco, LLC v. Noranda Mining, Inc.*, 844 F.3d 1201, 1210 (10th Cir. 2017) (holding that the debtor was not judicially estopped from bringing an adversary proceeding because the court-approved Rule 9019 settlement contained the debtor's reservation of rights regarding its asserted claims). Moreover, the express preservations distinguish the present situation from those in *In re Coastal Plains, Inc.*, 179 F.3d 197, 205–06 (5th Cir. 1999) (estopping debtor from pursuing adversary claim that was not disclosed in bankruptcy schedules and lift-stay stipulation); and *In re Air Safety International, L.C.*, 336 B.R. 843, 863–64 (S.D. Fla. 2005) (estopping party from challenging as unenforceable an unconditional stipulation in the nature of a settlement that the party had earlier moved to approve).[3]

[3] OPPD's arguments fare no better when recast in terms of "equitable" estoppel. *See, e.g., Branhaven, LLC v. BeefTek, Inc.*, 965 F. Supp. 2d 650, 665 (D. Md. 2013) (applying Delaware law and holding that equitable estoppel did not apply to a dispute over enforceability of an assumed Licensing Agreement because that agreement "was only 'in full force and effect' to the extent it ever could be," and "even if the defendants relied upon a statement by Branhaven that the Licensing Agreement was enforceable, such a statement was a legal conclusion not supportive of equitable estoppel," which "depends on misrepresentation of facts that misled the party asserting estoppel"). Nebraska law is the same. *See, e.g., Kohlbeck v. City of Omaha*, 318 N.W.2d 742, 745 (Neb. 1982) (A "misrepresentation as to the law will not give rise to an action for fraud and deceit . . . and, therefore, cannot be said to constitute conduct which amounts to a false representation or concealment of material facts . . . which the party subsequently attempts to assert [i.e., the first element of equitable estoppel under Nebraska law]."). OPPD argues that it relied on Zachry's representation that the Liquidated Damages Provision is "fair, reasonable, and appropriate." Response at 11. If anything, those are legal conclusions on which OPPD could not have relied under Nebraska law.

* * *

In sum, OPPD's "forfeiture" arguments lack merit and should be rejected.

II. No genuine dispute of material fact precludes the Court from ruling summarily that the Liquidated Damages Provision is an unenforceable penalty.

Under governing Nebraska law, in order to qualify as true liquidated damages that are enforceable against Zachry, the Second Amended EPC's Liquidated Damages Provision must satisfy **both** the "difficult to ascertain" requirement **and** the "reasonable estimate" or "reasonably proportional" requirement. *See* Motion at 11. As explained in the following two parts, Zachry has satisfied its burden to show that the Liquidated Damages Provision satisfies **neither** requirement. Although OPPD declined voluntary discovery that would have provided Zachry with conclusive evidence in support of its Motion, the facts necessary to determine the enforceability of the Liquidated Damages provision are not in dispute.

A. Whether OPPD's actual damages are "difficult to ascertain or measure" can be answered as a matter of law, and the answer is "no."

The parties concur that the "first factor in evaluating reasonableness is whether the damages arising from the breach are difficult to ascertain or measure." Response at 25.[4] For much of its argument on this factor, OPPD speaks in glittering generalities:

[4] In a paragraph citing *Berens & Tate, P.C. v. Iron Mountain Info. Mgmt., Inc.*, 275 Neb. 425, 430 (2008), and *Kozlik v. Emelco, Inc.*, 483 N.W.2d 114, 121 (Neb. 1992), OPPD argues: "Zachary offers no evidence of the parties' **intent** at the time of contracting. Without it, this Court cannot grant Zachary's requested summary judgment." Response at 25; *accord id.* at 31 (arguing that Zachry's "post-hoc analysis bears no relationship to the parties' contracting **intent** at the time of the Contract's execution"). This focus on "intent," is bizarre, as "intent" is not an aspect of either part of the test for determining the enforceability of a liquidated damages provision, as set forth by *Berens & Tate* or by *Kozlik* (or by *Lund-Ross*).

- OPPD contends that "daily accrual damages are **inherently** difficult to ascertain" because a court once opined that "'each day's delay, while unquestionably injurious, is injurious **frequently** in ways that are difficult to estimate.'" *Id.* at 25–26 (emphasis added; quoting *Lund-Ross*, 2021 WL 6202667, at *5). But "inherently" and "frequently" are not synonyms.

- OPPD observes that courts have explained that "[d]amages for lost profits, missed opportunities, and reputational harm are hard to quantify." *Id.* at 26 (quoting *Lund-Ross*, 2021 WL 6202667, at *6. So they are. But lost profits and reputational harm are classic instances of the "consequential damages" that are expressly excluded by Section 33(a) of the EPC Contract. *See* Response Exhibit A-1, at 37, § 33(a). As for missed opportunities — apart from "missed market energy net revenue" that OPPD's expert easily calculates (discussed below) — OPPD's expert states merely: "I understand from discussions with OPPD personnel that, due to Zachry's delay, OPPD has missed out on other ancillary revenues opportunities." Response Exhibit B, at 19, ¶ 6.3.5. This conclusory statement is hardly competent evidence that damages are "hard to quantify."

- OPPD observes that the EPC Contract "is not one for a small commercial project or residential home"; rather, it is (to simplify) really, really big. Response at 27. But the mere fact that a project is big does not mean that actual delay damages therefor are inherently difficult to ascertain; it means instead that the damages will be bigger than they would be for a small project.[5]

- OPPD also asserts that the "complexity of these Projects alone made it especially difficult to measure at time of contracting the scope of the anticipated damages that would result from Zachry's breaches." *Id.* OPPD's only authority for this assertion is a five-word snippet from two cases — from which OPPD misleadingly omits the word "frequently." *See id.* n.97.

When OPPD finally comes around to specifics, it over-promises and under-delivers. OPPD's first reference to a reasonably specific item of damages comes from its expert's opinion that the "volatility of the capacity market makes it difficult to measure damages in advance of the Substantial Completion date." *Id.* at 28 n.7 (quoting Response Exhibit B, at

[5] OPPD notes, for example, that "Zachry has utilized more than 1,000 subcontractors, vendors, and suppliers throughout the construction of the Projects and that these Projects are one of [Zachry's] largest ongoing projects." Response at 27 n.95 (internal quotation marks omitted). OPPD never explains how relationships of these persons with **Zachry** or the importance of the project to **Zachry** bears on the difficult of ascertaining damages suffered by OPPD.

11, ¶ 4.1.14); *accord id.* at 29–30 (expert opinion that the "new MISO auction results show the extreme volatility in the [capacity] market pricing" (quoting same)). But regardless of how volatile the capacity market might be, it will not be difficult to use readily accessible historical market prices when the time comes to measure damages; there is no warrant to try to "measure" damages "in advance." It is the **conceptual difficulty** of measurement — one of the factors of the "reasonableness" of a liquidated damages clause — that is to be "judged as of the time the contract was formed," *Kozlik v. Emelco, Inc.*, 483 N.W.2d 114, 121 (Neb. 1992), not the **measurement itself**. After all, the standard asks whether damages are "difficult to **ascertain or measure**," not whether they are "difficult to **estimate**."

That same logical flaw animates OPPD's argument that measuring delays damages for EPC Contract is inherently difficult merely "there are various input assumptions that must be made at the time of forecasting, which may later 'turn[] out to be higher or lower depending on actual market conditions.'" Response at 30 (quoting Response Exhibit B, at 15, ¶ 5.1.10, which refers to "capacity prices, energy prices, and natural gas prices"). Again, however, there is no warrant in this context for "forecasting," so long as the "actual market conditions" (i.e., historical prices) are readily available at the time that damages actually need to be measured.

OPPD argues that even "Zachry's own Expert Report reflects the potential complexity involved with any damages resulting from a breach of the Contract," citing the report's estimate that "'the project economic damages for energy during the period from December 17 through April 15, 2025 would have been $6.7 million to $17.0 million, depending on the assumed price shapes.'" *Id.* at 31 (quoting Motion Exhibit I, at 33, ¶ 90). In OPPD's

view, "a $10.3 million spread in Bodell's opinion — calculated with the benefit of hindsight — is clearly indicative of a difficulty in estimating what the actual damages are." *Id.* This view is fatally flawed. That estimate was certainly **not** Bodell's calculation with the benefit of hindsight.

To the contrary, her hindsight-benefiting calculation — i.e., her calculation using the best available data like any party would use to ascertain or measure damages in a breach-of-contract case — was a flat, no-spread figure of $8.7 million. *See* Motion at 13 (citing Motion Exhibit I, at 28, ¶ 77). Bodell's calculation yielding "the $10.3 million spread," by contrast represented her successful effort to show that "it was feasible **in August 2024** to make **reasonable estimates** of both Actual Purchase Costs and Estimated Generation Costs rather than merely fabricate large round numbers." *Id.* at 18 (second emphasis added). A "reasonable estimate" is not part of the "difficulty" factor under discussion here; rather, it is part of the second factor to be discussed in Subsection II.B.1 below (pp. 16–19).

Finally, OPPD's own expert asserted no "difficulty" in calculating damages after-the-fact and using historical data. To the contrary, she readily "calculated OPPD's damages caused by Zachry's delays." Response Exhibit B, at 9, ¶ 3.1.1; *see also* Exhibit K, at 2, ¶ 3 (supplemental declaration of Zachry's expert Tanya Bodell elaborating on this point).

In sum, once we set aside generalities regarding "construction" contracts or "big" contracts or "complex" contracts, we are left with the undisputed fact that calculating delay damages for the EPC Contract is not so difficult. To be sure, it depends on numerous inputs that, at the time of calculation, are "available" from OPPD itself or from public or proprietary sources. *See* Motion at 6–8. Therefore, it is not surprising that Zachry's expert

did in fact measure or ascertain OPPD's actual damages without too much trouble. *See id.* at 12–13. Indeed, OPPD and its expert did the same, *see* Response at 40, though (as we shall see below) with certain methodological flaws that vastly inflated the numbers. In these circumstances, no disputed issue of material fact precludes the Court from ruling that OPPD's delay damages are "not difficult to ascertain or measure," and thus (for that reason alone) the Liquidated Damages Provision is an unenforceable penalty.

B. Alternatively, whether the stipulated amount is a "reasonable estimate" of, or "reasonably proportional" to, actual damages is a question that can be answered without additional discovery, and the answer is "no."

This part of the test considers the reasonableness of the stipulated sum from an ex-ante perspective (was it a reasonable estimate?) and an ex-post perspective (did it turn out to be reasonably proportionate?). Here, both questions must be answered in the negative.

1. The stipulated amount was *not* a reasonable estimate of OPPD's likely damages.

In its Motion, Zachry readily acknowledged that whether "a stipulated amount is a reasonable estimate of likely damages is to be determined **as of the time the contract was entered**," namely, August 2024. Motion at 16 (cleaned up; emphasis added). Accordingly, Zachry's expert was careful to address the feasibility of making an estimate **at that very time**: "using publicly available historical data and prices from robust futures markets, it was feasible in **August 2024** to make reasonable estimates of both Actual Purchase Costs and Estimated Generation Costs rather than merely fabricate large round numbers." *Id.* at 18 (emphasis in original); *see also id.* (so estimating "total Damages of between $6.7 and $17.0 million"). Given this clarity, it is troubling that OPPD repeats the obviously incorrect

statement that Zachry and the Bodell Report "**rely solely on a post-hoc damages model** to argue that the liquidated damages were not a reasonable forecast." Response at 33 (emphasis added); *see also id.* at 31 (charging that the foregoing estimate was "calculated with the **benefit of hindsight**" (emphasis added)). This misstatement should make the Court even more skeptical of OPPD's hyperbolic arguments.

Zachry advanced four reasons why the amount stipulated in the Liquidated Damages Provision was not a reasonable estimate of OPPD's likely damages. *See* Motion at 16–18. OPPD has no good responses to any of these reasons. Indeed, a great deal of this portion of OPPD's brief, *see* Response at 32–38, is devoted to rehashing the point that the parties "agreed" to the Liquidated Damages Provision — a point thoroughly debunked in Part I above and not requiring repetition here.

First, given that "the 'reasonable estimation' precept requires that the parties make a good faith attempt to predict damages," there is "no indication that Liquidated Damages Provision is an estimate at all, let alone a reasonable one." Motion at 16 (cleaned up). OPPD responds that nothing in Nebraska law "requires parties to explicitly 'show their math' in the contract." Response at 34. Perhaps, but it is telling that for all of the detail that OPPD provides about "the facts and circumstances leading up to the Second Amendment," *id.* at 32, OPPD does not even begin to show a reasoned basis for the actual numbers set forth in the provision. Indeed, the oft-cited Eibes Declaration — consisting of 26 paragraphs over more than eight single-spaced pages, *see* Response Exhibit A — contains but a single dollar figure related to OPPD's alleged damages: "extension of the owner-furnished-equipment agreements which commonly exceed $1 million per month." *Id.* at 6, ¶ 20(b). That figure

does not even come close to justifying $63.4 million in stipulated damages over a five-month period.

Ironically, OPPD's briefing confirms that the stipulated daily amounts in the Second Amended EPC bear no relation to estimated actual damages, reasonable or otherwise. OPPD all but admits that it boosted the amounts to compensate itself for having "agreed to advance nearly $20 million in payments not yet due, extend the Guaranteed Completion Deadline, and increase incentive payments." Response at 33. The size of that compensation might be reasonable if the issue were the substantive fairness of the exchange (e.g., to determine "reasonably equivalent value" under Section 548(a)(1)(B)(i)), but OPPD's unilateral desire for additional compensation cannot constitute a reasonable **estimate of damages**.

Second, the Motion observed that from the Original EPC to the Second Amended EPC, the maximum daily charge for failing to timely complete Standing Bear Lake Station doubled from $250,000 to $500,000, and the maximum daily charge for failing to timely complete Turtle Creek Station quadrupled from $100,000 to $400,000. *See* Motion at 17. OPPD acknowledges "the overall increase in the liquidated damages from the First Amendment to the Second Amendment," but OPPD attempts to justify the (massive) increase in terms that have nothing to do with making a reasonable **estimate of damages**. Response at 35 (again pointing to "the substantial benefits [that Zachry] received under the Second Amendment"). Moreover, the fact that "OPPD incurred additional delay costs between the First and Second Amendments" by definition cannot bear on the estimate of the delay costs that OPPD would incur **after** the Second Amendment. Finally, OPPD does not challenge Zachry's point that "the increases cannot be justified by seasonal variation." Motion at 17.

Third, Zachry observed that "just 30 days after the Substantial Completion Date for each Station, the daily charge for that Station ratchets up by $100,000," arguing that "such a round-numbered increase completely disconnects the Liquidated Damages provisions from economic harm actually incurred by OPPD." *Id.* at 18 (cleaned up). OPPD responds to this point much as before, i.e., "this increase is supported by the substantial consideration OPPD provided to Zachry during its insolvency." Response at 36. That is simply another admission by OPPD that the Liquidated Damages Provision is a mechanism to compensate it for **past** financial contributions, not a reasonable estimate of **future** damages.

Fourth, as already stated, Zachry's experts estimated (again, **without** the benefit of hindsight) "total Damages of between $6.7 and $17.0 million," which makes the Liquidated Damages Provision's "estimate" of $64.3 million between four and nine times too high — and unreasonable on its face. Motion at 18. OPPD attacks this estimate on the ground that it is "a **range** of estimated damages," asserting this fact "demonstrates that damages were difficult to determine, not that they are unreasonable." Response at 37. "Difficulty" is not relevant in this context, and OPPD never explains why a range is an inherently unreasonable estimate. No doubt a stipulated amount within a reasonable range would be enforceable as liquidated damages, and so OPPD attacks a strawman in asserting that "a precise or fixed damages calculation was not feasible." *Id.*

For these many reasons, no disputed issue of material fact precludes the Court from ruling that the amount stipulated in the Second Amended EPC was not a reasonable estimate of OPPD's likely damages.

2. The stipulated amount is *not* reasonably proportionate to OPPD's actual damages.

The parties agree that the final factor is "whether the actual damages incurred as a result of the breach are reasonably proportionate to the stipulated damages." Response at 38. Zachry observed that its "experts have calculated that OPPD theoretically sustained actual damages though April 15, 2025 of just under $8.7 million," but "the amount yielded by the Liquidated Damages Provision tops $64.3 million, a multiple of **roughly 7.4** and a windfall to OPPD of **more than $55 million**." Motion at 19. OPPD does not dispute that under the governing caselaw identified by Zachry, that multiple is not reasonably proportionate, and that windfall is not reasonable. Rather, OPPD argues that summary judgment should nevertheless be denied for various reasons, none of which has merit.

First, OPPD observes that "the Projects are still not complete and OPPD's actual damages are continuing to accrue." Response at 38. In fact, Zachry completed all work within in its control in late March, and the Projects will be formally complete — meaning that Zachry will have sent "Guaranteed Substantial Completion Certificates" to OPPD for both Projects — no later than June 4, 2025. *See* Exhibit J, at 2, ¶ 3 (declaration of Zachry's Project Manager).

Second, OPPD observes that the "Bodell Report measures proportionality based on a damages calculation that extends only through April 15, 2025," rendering it "outdated." Response at 38. That would be a telling point if Zachry were seeking summary judgment on the **precise amount of actual damages**. But the exercise here is to determine merely whether actual damages are **reasonably proportionate** to the stipulated amount of $63.4

million. That the Bodell Report is slightly "outdated" does not fundamentally change the conclusion under the cited caselaw (which OPPD does not dispute applies here).

Third, OPPD asserts that the "Bodell Report greatly underestimates OPPD's actual damages," in part because it "ignore[ed] other categories of damages that should be included in the damages calculation," namely, "firm natural gas transport, lost retail capacity, and extended project costs." Response at 39 (cleaned up). But none of these three categories is valid:

- *Firm natural gas transport* refers to the cost incurred by "a shipper [here, OPPD] to reserve space on the pipeline" serving a particular plant. Response Exhibit B, at 20, ¶ 6.4.2. OPPD alleges that "in November 2024, OPPD contracted with [Northern Natural Gas Company] to reserve firm natural gas transport for Turtle Creek," and OPPD observes that it "has incurred the cost of having firm natural gas transport for Turtle Creek even though [the plant] is not operating." *Id.* **As a matter of law**, this cost is not a recoverable item of contractual damages because it is a cost that OPPD would have incurred **regardless** of whether Zachry failed to complete Turtle Creek by the Substantial Completion Date.[6]

- *Lost retail capacity* refers to "lost retail revenue." OPPD "has a 'customer queue' which has entities that either wanted to expand their services with OPPD or become a new customer"; however, as a result of Zachry's alleged delays, "[l]arge customers in OPPD's 'customer queue' were either delayed or lost." Response Exhibit B, at 21, ¶ 6.5.1. But these alleged lost profits are classic instances of the "consequential damages" that are expressly excluded by Section 33(a) of the EPC Contract. *See* Response Exhibit A-1, at 37, § 33(a).

[6] *See, e.g., Energy Northwest. v. United States*, 641 F.3d 1300, 1306 (Fed. Cir. 2011) (A "plaintiff must prove the extent to which his incurred costs differ from the costs he would have incurred in the non-breach world."); *TeeVee Toons, Inc. v. Gerhard Schubert GmbH*, 2006 WL 2463537, at *10 (S.D.N.Y. Aug. 23, 2006) (A "large part of this category of damages represents a fixed cost, which is not recoverable because it would have been incurred regardless of whether the breach occurred.").

- *Extended project costs* refers to a hodgepodge of costs that OPPD estimated that it will incur "from January 2025 through **December 2025**," which "include items such as costs to pay Technical Field Assistants for an extended time on the Projects, repair costs for **damaged items**, extended **payroll** costs, etc." Response Exhibit B, at 23, ¶ 6.6.1 (emphasis added). These are presented on the final page of the cited exhibit. So many of these costs are obviously non-recoverable that the estimate is essentially worthless. OPPD would have incurred costs to repair "damaged items" ($1.0M + $190K) and "payroll" ($3.7M) **regardless of the delay** in completing the Projects. Many other listed items appear to fall into this category, namely, warranty-related disputes that have nothing to do with delay. Nor are "Legal Fees" ($706K) recoverable. Worst of all, OPPD's estimate continues through "December 2025," i.e., for twelve months rather than for five months in the real world. *See also* Exhibit K, at 6–7, ¶ 10(c) (amplifying these criticisms).

Fourth, OPPD lobs other criticisms at the Bodell Report. *See* Response at 39–40. Some, like the "ongoing nature of damages," we have addressed above. Others reflect mere differences in terminology, given that (with the exception of wholly improper categories discussed in the previous paragraph) "the Reome Report includes the same basic categories of damages that [Bodell] assessed in [her original] Declaration: lost energy net revenues and capacity purchases." Exhibit K, at 4, ¶ 8.

Fifth, OPPD's most "serious" attack on Zachry's expert is based on OPPD's own calculation of its actual damages, in which OPPD conjured up the fantastical sum of **$192.9 million**. *See* Response at 40. This sum is ridiculous on several levels:

- The first two rows of OPPD's Table 2 refer to the periods "May 2023 – Aug. 2024" and "Sep. 2024 – Dec. 2024," respectively. *Id.* But there is no conceivable basis for obtaining "delay" damages for calendar years 2023 and 2024 with respect to plants having Substantial Completion Dates renegotiated to December of 2024.

- The third row of that table refers to the period "Jan. 2025 – Dec. 2025" without distinguishing between actual costs incurred and anticipated future harm. *Id.* Yet there is no conceivable basis for obtaining "delay" damages for the latter half of calendar year 2025 for plants that will be substantially completed in June of 2025.

- Setting aside the legal infirmities discussed in the *Third* paragraph above, OPPD's categories of Firm Natural Gas Transport Cost and Lost Retail Capacity Revenues, *see* Response Exhibit B, at 19–22, suffer from "serious economic errors." Exhibit K, at 4, ¶ 9.

- The bottom line is that, properly adjusted, a calculation using the Reome Report's methodology and data (for purchased capacity, assumed quantities, and assumed prices) yields actual damages of less than $9.9 million. *See id.* at 8, ¶ 12 (Figure 1). That makes the stipulated damages of $64.3 million "only" **6.5 times**, or at least **$54.4 million**, too high. **Not reasonably proportional**.

- Interestingly, even if one excludes only the invalid "extended project costs" and adjusts only for the correct time period — December 2024 through May 2025 (rather than May 2023 through December 2025) — a calculation using the Reome Report's methodology and data yields actual damages of $35.1 million. *See id.* Under even that inflated number, stipulated damages are nearly double actual damages and would give OPPD a nearly $30 million windfall.

Sixth, OPPD contends that "Bodell makes numerous unsupported assumptions and consistently identifies areas where additional information is needed." Response at 40. To be sure, Ms. Bodell did identify areas where additional information — **in the possession of OPPD** — would make her analysis more robust. *See id.* at 40–41 (e.g., OPPD's "capacity contracts with third parties," "actual trade information from OPPD," "projections that OPPD performed," and "OPPD's tradebook"). But despite the Court's suggestion and Zachry's request, OPPD categorically refused to provide any of this information in its possession. *See* Motion Exhibit H. OPPD cannot complain that Zachry "could have done a better job" by using information that OPPD refused to provide.

For these many reasons — especially including the disproportionately small figure yielded by OPPD's own the properly adjusted estimate — no disputed issue of material fact precludes the Court from ruling that the amount stipulated in the Second Amended EPC was not reasonably proportional to OPPD's likely damages.

C. Federal Rule 56(d) justifies, at most, a modest deferral to complete any necessary discovery focused on damages.

Having refused to engage in discovery, OPPD now wants to engage in discovery. *See* Response at 42–43. Zachry respectfully submits that if the Court believes that genuine issues of material fact preclude resolution of the Motion, the sensible course is to "(1) defer considering the motion" or to "(2) allow time to obtain affidavits or declarations or to take discovery." Fed. R. Civ. P. 56(d). That discovery should be focused on liquidated damages, particularly including (as discussed on the previous page) the transactional information in OPPD's possession that will enable Zachry's expert to produce a more accurate calculation of OPPD's actual damages.

D. Any denial of the Motion should be *without* prejudice.

The parties agree that bankruptcy courts "may reconsider prior summary judgment denials," because they possess "considerable discretion in controlling their dockets, which includes determining whether to allow successive or multiple motions for summary judgment." Response at 43 (cleaned up and quoting *In re Crescent Trading LLC*, 654 B.R. 246, 253 (Bankr. S.D. Tex. 2023)). On the dramatic ground that "Zachry has chosen its fate," OPPD suggests that the Court "deny the Motion, **with prejudice**, and preclude Zachry from refiling its Motion at a later date on the same issue." *Id.* at 44 (emphasis added). That suggestion is wholly without merit.

In the first place, an order categorically "preclud[ing]" a later motion for summary judgment cannot be reconciled with the above-noted "considerable discretion" of courts to reconsider denials of such motions. Moreover, if the Court denies the Motion under Federal

Rule 56(d) — as discussed in the previous Section II.C — by definition, the denial should be **without** prejudice. Under Rule 56(d)(1), "deny[ing]" a motion for summary judgment when essential facts are unavailable to the nonmoving party is expressly the alternative to "defer[ring] considering the motion," i.e., to put off resolution of the motion until those facts become available. A denial **with** prejudice — putting off resolution **forever** — does not fulfill the purpose of the rule.

If the Court ultimately determines that a deferral is necessary for discovery, then the deferral should be for a reasonable time, after which the parties and the Court will be equipped to resolve this crucial, multimillion dollar issue expeditiously. In that instance, the Reorganized Debtors respectfully renew their request for bifurcation of this issue.

CONCLUSION

For these reasons, the Liquidated Damages Provision of the Second Amended EPC is an unenforceable penalty under governing Nebraska law, and the Court should grant the Reorganized Debtors partial summary judgment so declaring.

Dated: May 28, 2025

Respectfully submitted,

/s/ *John B. Thomas*

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CERTIFICATE OF SERVICE

I certify that on this day, a copy of the foregoing pleading was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

Dated: May 28, 2025

/s/ *John B. Thomas*
John B. Thomas

EXHIBITS

J. Declaration of Lyle Fouts (May 28, 2025).

K. First Supplemental Declaration of Tanya Bodell (May 28, 2025).

EXHIBIT J

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

In Re:	§	Chapter 11
ZACHRY HOLDINGS, INC., et al.,[1]	§	Case No. 24-90377 (MI)
Debtor	§	(Jointly Administered)
ZACHRY HOLDINGS, INC.	§	
Plaintiff,	§	
v.	§	Adversary No. 25-03025 (MI)
OMAHA PUBLIC POWER DISTRICT	§	
Defendant	§	

DECLARATION OF LYLE FOUTS

I, Lyle Fouts, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. I make this declaration in support of the Reply in Support of Motion for Partial Summary Judgment on Liquidated Damages filed by Zachry Holdings, Inc. ("Zachry") in the above-named matter. I make the statements of fact in this declaration of my own personal knowledge, research, and analyses. If called as a witness in this proceeding, I could testify competently to the facts set forth herein.

2. My name is Lyle Fouts. I am the Project Manager for Zachry Industrial, Inc. at both the Turtle Creek Station and Standing Bear Lake Station sites. It has been my responsibility to plan for and oversee the construction and commissioning activities at each site, the project schedule and when Zachry will achieve Substantial Completion at each site. I have been Zachry's point person for communicating with OPPD on these topics, and the counterpart to Matt Eibes of OPPD.

[1] Zachry, https://zachrygroup.com/

3. Based on current projections and our estimate of remaining commissioning work that Zachry is responsible for completing, Zachry reasonably expects to send Guaranteed Substantial Completion Certificates for Turtle Creek Station to OPPD no later than May 30, 2025 and for Standing Bear Lake Station no later than June 4, 2025.

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts and data stated herein are true and correct. Executed on May 28, 2025.



Lyle Fouts

EXHIBIT K

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

In Re:	§	Chapter 11
ZACHRY HOLDINGS, INC., et al.,[1]	§	Case No. 24-90377 (MI)
Debtor	§	(Jointly Administered)
ZACHRY HOLDINGS, INC.	§	
Plaintiff,	§	
v.	§	Adversary No. 25-03025 (MI)
OMAHA PUBLIC POWER DISTRICT	§	
Defendant	§	

FIRST SUPPLEMENTAL DECLARATION OF TANYA BODELL

I, Tanya Bodell, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. I make this declaration in support of the Reply in Support of Motion for Partial Summary Judgment on Liquidated Damages filed by Zachry Holdings, Inc., ("Zachry") in the above-named matter. I make the expert opinions in this declaration of my own personal knowledge, research, and analyses. If called as a witness in this proceeding, I could testify competently to the opinions set forth herein.

2. I have reviewed the declaration of Kimberly Reome and the Expert Report of Kimberly Reome and Exhibits attached thereto (collectively the "Reome Report") and have the following observations related to her analyses and opinions.

    a. Damages can be calculated: The Reome Report provides no support for the argument that that "actual losses are difficult to ascertain with precision"[2] in

[1] Zachry, https://zachrygroup.com/

[2] Reome Report, para 1.2.1(c), p. 3.

this case, or that OPPD's Liquidated Damages as defined in the Second Amended EPC Contract are a reasonable approximation of the actual damages resulting from delay in achieving substantial completion. She readily calculated OPPD's damages caused by Zachry's delays. In fact, her stated experience in calculating damages, her own calculations, and reliance on OPPD's model results and documents, all indicate the damages in this case can be ascertained, even if she makes a number of errors and erroneous assumptions.

b. The Reome Report, when adjusted for the time frame in the Second Amended EPC Contract, with and without an adjustment to correct for errors, indicates that damages are well below the Liquidated Damages value of $64.3 million.

3. Interestingly, the Reome Report does not claim that actual damages are difficult or impossible to estimate, only to "ascertain with precision." Indeed, she claims to have "over 30 years of experience analyzing, quantifying, and developing damages analyses . . . calculating damages for matters relating to power plants, including calculation of replacement power and capacity costs during power plant shutdowns and derates." Damages associated with the failure to achieve substantial completion under the Second Amended EPC Contract effectively are a calculation of replacement power and capacity costs that OPPD incurred during the operational delay and can be reasonably estimated using standard industry approaches, including the methodologies that both she and I used.

4. The work reflected in the Reome Report confirms that OPPD has a market model to perform a calculation of lost net energy revenues:[3]

a. Backcasts: OPPD's market model apparently can be used to do a backcast in order to estimate actual damages associated with lost net energy revenues incurred with and without the two Facilities, as the Reome Report purports to do dating back to May 2023 based on historical values.

b. Forecasts: OPPD's market model also can do forecasts and projections of lost net energy revenues, as indicated by the Reome Report projection of damages from May through December 2025.[4]

[3] The Reome Report relies on OPPD's analysis and outputs from the Aurora Production Cost model produced by OPPD's energy market team with respect to the missed market energy net revenue. According to the Reome Report, "OPPD ran the model under the scenarios of Turtle Creek and Standing Bear operating, compared to not operating, the model outputs the difference in revenue and costs. The missed market energy revenue is netted against variable generation costs (e.g., fuel and variable operations and maintenance costs). The model inputs include, but are not limited to, 2023 and 2024 historical values for locational marginal price, SPP load, natural gas prices, and SPP wind generation" (Reome Report, para. 6.3.2., p. 18).

[4] Reome Report, Exhibits 4 and 4.1.

c. No Missed Market Energy Net Revenues: OPPD's own market model indicates that OPPD incurred zero damages associated with lost energy revenues for the period from December 2024 through May 2025.[5]

5. The Reome Report also confirms that OPPD maintains records and has the accounting ability to tally costs tied to firming, natural gas, electricity product purchases and sales, and other costs associated with power projects.[6] Unfortunately, she applies these records to perform an inaccurate calculation of damages based on an inappropriate application of damages theory, as detailed below. However, the Reome Report indicates that information was and is available to provide a reasonable estimate of damages actually incurred and that would be incurred going forward as of the date the Second Amended EPC Contract.[7]

6. This supports the conclusions in my Declaration that actual damages can be calculated retrospectively, as well as looking forward, using standard industry methodologies.[8] I addressed the fact that OPPD and the industry regularly do such calculations in my original expert report,[9] and this is confirmed by the calculations and reliance on OPPD's model results and documentation cited in the Reome Report, as well as by Ms. Reome's own stated qualifications related to 30 years of performing such damages calculations.

7. The Reoeme Report calculates damages according to five categories:

(1) Capacity Purchases [Section 6.2; Exhibit 3];

(2) Missed Market Energy Net Revenue [Section 6.3; Exhibits 4 and 4.1];

(3) Natural Gas Damages (Firm Transport Station and Services Costs) [Section 6.4; Exhibits 5 and 5.1];

(4) Lost Retail Capacity Revenue [Section 6.5; Exhibit 6] and

(5) Extended Project Costs [Section 6.6; Exhibit 7]

[5] See Reome Report, Exhibits 4 and 4.1.

[6] See Reome Report, Appendix C and Exhibits 3, 5, 5.1, 6, and 7, which rely on a compilation of values apparently based on OPPD's documents, contracts, trades, and other records.

[7] Specifically, OPPD provided Ms. Reome with Capacity Purchase Contracts - TCS and SBL Delay May 2023-Dec 2025(OPPD-EXPERT-01118).xlsx.

[8] Bodell Report, para. 21, pp. 6-7; para. 76, p. 28.

[9] Bodell Report, para. 14, footnote 7, p. 4.

8. The Reome Report claims that my calculation of actual damages is incomplete, yet the Reome Report includes the same basic categories of damages that I assessed in the Declaration: lost energy net revenues and capacity purchases.[10]

    a. Lost energy net revenues: The Reome Report refers to these as "missed energy market net revenues" which is similar to my category for "energy;" and

    b. Capacity Purchases: The Reome Report labels a category "capacity purchases" which is described in a manner similar to my category labeled "capacity".

9. I disagree with the Reome Report calculation of damages for these categories and, for the reasons described in the following paragraph, the other categories are invalid measures of damages and have serious economic errors for reasons described below.

    a. Missed Market Energy Net Revenues is a calculation by OPPD using its production cost model to measure its production costs with and without the Facilities.[11] Such models, although used regularly in the industry for various purposes, including calculating potential replacement power costs, are notorious for underestimating market price volatility and therefore the lost energy value of peaker plants such as Turtle Creek Station and Standing Bear Lake Station. This would explain why OPPD calculates zero damages for missed market energy net revenues for December 2024 through May 2025 in contrast to my spreadsheet model that works off of the actual volatility in prices that occurred.

    b. Capacity Purchases appears to be calculated using actual trades and transactions that OPPD entered into to purchase capacity. Without access to the underlying documents and data, I cannot opine on the methodology, calculations or relevance to the delay in the substantial completion date. However, the capacity prices appear to be based on a collection of contracts that may have been entered well before the Seconded Amended EPC Contract was entered into, extend for a term well before and after the damages period for the Second Amended EPC Contract, and therefore would not reflect the cost of short-term capacity purchases that OPPD would enter into to meet its reliability requirements due to the delay in substantial completion. The neighboring market interconnected to OPPD had very low capacity market prices of $0.75/kW-month for the winter of 2024/25 and the market participants can buy and sell capacity across regions

[10] See Reome Report, Section 6.3, Exhibits 4 and 4.1 for missed market energy net revenues; and Section 6.2 and Exhibit 3 for capacity purchases. She does not calculate damages associated with ancillary services (Reome Report, Section 6.3.5, p. 19).

[11] Reome Report, Section 6.3.

making the pricing used in the Reome Report suspect.[12] I therefore reserve my opinion on the validity of the quantities and prices that compose the capacity purchases category.

10. The Reome Report erroneously includes other categories:

a. Natural Gas Damages (i.e., Firm Fuel Transportation and Services):[13] The Reome Report fails to consider the fact that the Actual World expenditures and sales to procure fuel transportation and services without the Facilities also would have occurred in the Actual World had the Facilities been operational, resulting in no net damages to OPPD.[14]

b. Lost Retail Capacity Revenue: The Reome Report claims that there were large customers in OPPD's queue for interconnection that would have paid very high prices for capacity from OPPD.[15] Exhibit 6 of the Reome Report calculates the lost retail capacity revenue that allegedly could have been sold to one specific customer under its contract had the Facilities been operation. There are multiple issues with this claim.

i. First, it is unclear that the assumed price truly reflects wholesale market capacity that the Facilities would deliver versus another product tied to a retail demand charge rate.

ii. Second, the assumed prices for the demand charges are more than four times the price that the Reome Report assumes for its Capacity Purchases category, implying that such a lucrative spread would support OPPD purchasing additional capacity from the market to replace the lost capacity from the Facilities to meet that incremental demand and mitigate damages.

[12] Bodell Report, Figure E-4, p. 85.

[13] The Reome Report refers to this category of damages as "Natural Gas Damages" in Section 6.4, further defined as "Firm Natural Gas Station Transport" for Turtle Creek Station (Exhibit 5) and "Natural Gas and Propane Service Costs" (Exhibit 5.1) for Standing Bear Lake Station.

[14] As such costs are fixed costs unrelated to the production cost of energy included in Exhibits 4 and 4.1., I would not expect the Aurora model to net off such costs. Indeed, the Reome Report calculates total production costs for both Turtle Creek Station and Standing Bear Lake Station in 2025 as only $7.2 million (Exhibits 4 and 4.1) versus $11.7 million in firm delivery costs and services (Exhibits 5 and 5.1) for the same period, indicating that the fixed fuel transport and services costs are separate and apart from actual dispatch of the Facilities.

[15] Reome Report, Section 6.5, "Lost Retail Capacity Revenue."

iii. Third, the prices for the demand charges are almost three times the cost to build a new power plant for capacity,[16] implying that any large customer would minimize that capacity charge and either build their data center elsewhere or build their own plant to meet their needs.[17] It is ludicrous to think that a large customer would pay that price instead of simply moving to a lower cost area or building their own power plant. This may be the real reason the large customer did not connect to OPPD's system or maximize their capacity service.

iv. Lastly, there is no support for the claim that the large customer would ever consume the maximum contractual capacity at the site if the substantial completion of the Facilities had not been delayed.

All of these reasons render this entire category to be speculative and inconsistent with the other damages calculations in the Reome Report.[18]

c. Extended Project Costs: I have not received the documents to perform a forensics accounting exercise of the "Project Costs OPPD Incurred From Missed Guaranteed Substantial Completion Dates" reported in Exhibit 7 of the Reome Report. However, I note that the largest line items representing vast majority of the costs are OFE (Technical Field Assistant "TFA") for Wartsila and Siemens ($9.3 million) and Payroll ($3.9 million), for which there is no evidence that they are due to the delay in substantial completion. Some of the other costs also seem like they could have occurred even if the Facilities had achieved substantial completion.[19] The other items described as "repair costs for damaged items" do not appear to be due to delay or prolongation costs, but rather seem to be contractual cost allocation disputes by OPPD for alleged Zachry work deficiencies or physical damage to the facility before and after the Guaranteed Substantial Completion Date,[20] and therefore would not be included

[16] Bodell Report, para. 73, p. 17; para 79, p. 29.

[17] As posted by SPP in its Cost of New Entry calculation to be $85.61/kW-year (SPP Open Access Transmission Tariff, Section 13.0 and 14.2, https://sppviewer.etariff.biz/tariff), which equates to $7.13/kW-month.

[18] There is potentially a double-counting occurring as well. If OPPD has to procure 427 MW per month in the winter of 2024/25 in the absence of the Facilities to meet its reliability obligations, it is unclear how adding 600 MW of capacity at the Facilities in lieu of the purchases could release 450 per month of capacity to a retail purchaser. I also understand that there is a legal argument that this damages category would be considered consequential damages and precluded by the Second Amended EPC Contract.

[19] For example, fuel oil issues seem unrelated to substantial completion date, and damaged/missing parts reflect a potential fail to mitigate damages.

[20] Eibes Declaration at 20(b) ("SBLS damage claims due to a sabotage incident"); Reome Report Ex. 7 ("Fuel Oil Related Unit 2 Zachry Fuel Oil Human Performance Error Damaged / Missing Parts" and "Dec. 16, 2024 EMI Incident Damaged Cards, Raccoon Damaged / Missing Parts Engine 8 Sabotage"; *see also* First Amended Complaint, at para.

> in a comparison to the Liquidated Damages provision for delay. In addition, OPPD's estimate is "assumed to be incurred after December 2024" and continues through "December 2025," i.e., for twelve months rather than five months in the real world.[21]

I therefore conclude that the Reome Report grossly overstates damages.

11. Each category of damages in the Reome Report also is calculated for periods that start before the Guaranteed Substantial Completion guaranteed commercial operation date defined in the Liquidated Damages provisions in the Second Amended EPC Contract and extend into the future through December 2025. For example, Section 6 of the Reome Report purports to calculate damages for the time period of May 2023 through 2025, with monthly detail provided in the attached exhibits to the Reome Report. However, there is no explicit allocation of those damages to the Liquidated Damages period defined in the Second Amended EPC Contract, being the time period between the Guaranteed Substantial Completion Dates set forth in paragraph 8 of the amendment [December 16 and 31, 2024; the date the maximum amount of Liquidated Damages accrue [February 15, 2025] and Substantial Completion (hereinafter "Liquidated Damages Period").

12. To compare damages in the Reome Report to my own calculations, I have performed a rough comparison of the damages under the Reome Report categories for December 2025 through May 2025 using the monthly details contained in exhibits to the Reome Report. The following table calculates damages using Reome's values for the December 2024 through May 2025 time period (which extends beyond my damages calculation period of December 17, 2024 to April 15, 2025). The first column reflects Reome's calculated damages for the time period. The second column reflects Reome's calculated damages adjusted for Double Counting, as more fully explained below.[22] The final column shows the calculated damages in my Declaration.

72-102 (describing facts underlying these claims).

[21] Reome Report, Exhibit 7.

[22] Eliminating the categories that cannot be substantiated as economic damages or damages caused by the delayed substantial completion date, and assuming the Reome Report calculation of missed energy market net revenue estimates and purchased capacity costs are valid, which I do not concede to be the case, collapses damages down to nothing more than the calculation of purchased capacity in the Liquidated Damages period defined in the Second Amended EPC Contract.

Figure 1: Comparison of Damages in Bodell Report to Reome Report (Corrected)

Month Year	Exhibits 3 - 6 Reome Report	Exhibits 3 - 6 Reome Report Corrected	Energy, AS, Capacity Bodell Report (December 17, 2024 - April 15, 2025)
December 2024	$ 7,256,867	$ 1,962,230	$ 651,213
January 2025	$ 7,398,239	$ 1,962,230	$ 1,709,470
February 2025	$ 7,173,666	$ 1,962,230	$ 1,447,137
March 2025	$ 7,059,684	$ 1,962,230	$ 3,143,046
April 2025	$ 4,737,759	$ 1,010,980	$ 1,715,034
May 2025	$ 1,519,559	$ 1,010,980	
TOTAL	**$ 35,145,774**	**$ 9,870,880**	**$ 8,665,901**

The stipulated damages of $64.3 million is 6.5 times, or at least $54.4 million, higher than the Reome Report Corrected damages value. Even accepting all of the damages categories and calculations as valid (with the exception of the undated Extended Project Costs), Liquidated Damages are nearly double the total damages in the Reome Report for the damages period starting at the Second Amended EPC Contract dates.

13. The results of this comparison demonstrate that the actual damages for the Liquidated Damages Period estimated in my Declaration are not materially different than what Reome would have calculated for the same time period if OPPD's actual damages had been properly allocated to the Liquidated Damages Period and do not include erroneous double counting or failure to mitigate.

For example, the missed energy market net revenue estimates cover May 2023 through the end of 2025. However, supporting Reome Report Exhibits 4 and 4.1 show that there are no damages associated with lost energy during the Liquidated Damages Period, which supports my conclusion that electrical demand within OPPD's service area is seasonal and peak demand occurs primarily during summer months. With zero energy damages using OPPD's production cost model, Reome must calculate damages associated with capacity (which she fails to offset with capacity sales to retail customers) and natural gas delivery contracts (which would be the same in both worlds, and therefore equal to zero). Correcting for these errors brings the Reome Report damages to a value close to my calculation for the period of December 16, 2024 through April 15, 2025.

Similarly, the extended project costs of $18 million are for the entirety of January 2025 through December 2025, and not the Liquidated Damages Period, and appear to include separate amounts for damages that have nothing to do with delay or prolongation of the project or would have been incurred in the But-for World (see Reome Report Exhibit 7).

14. The corrections to the Reome Report calculations for December 2024 through May 2025 adjust to remove double counting, failure to mitigate, and the extended project costs. The basis for each of these adjustments is described below.

a. **Natural Gas Damages:** In section 6.4, the Reome Report describes the basis for natural gas damages:

- **Turtle Creek Station:** "I understand that in November 2024, OPPD contracted with NNG to reserve firm natural gas transport for Turtle Creek. It was therefore reasonable for OPPD to lock in natural gas supply shortly before the Guaranteed Substantial Completion Date.[FN74] OPPD has incurred the cost of having firm natural gas transport for Turtle Creek even though it is not operating.[FN 75]"

- **Standing Bear Lake Station:** "In October 2021, OPPD entered into an agreement with Metropolitan Utilities District of Omaha, Nebraska ("MUD") to supply natural gas and/or propane to Standing Bear.[FN 77] For each month, whether gas is supplied or not, OPPD is charged a demand charge from October through April of each year.[FN 78] OPPD also pays MUD a monthly service fee.[FN 79] Per the agreement with MUD, OPPD also pays an annual storage charge in November of each year.[FN 80]"

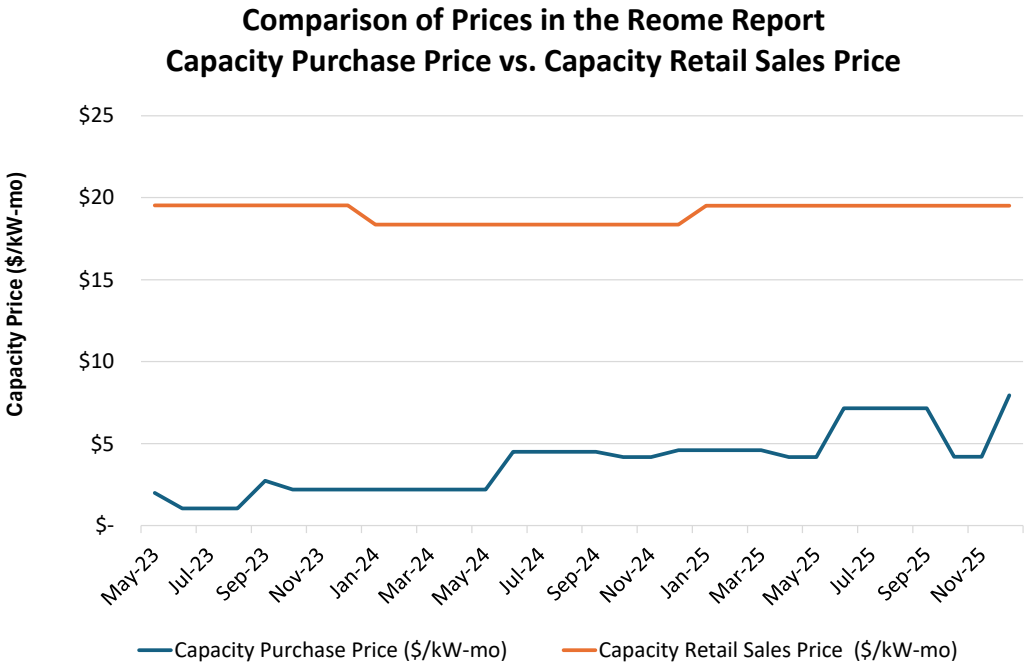
According to the Reome Report, these Natural Gas Firm purchase and transportation costs were incurred despite the delay in substantial completion. These contracts, therefore, also would have been incurred if the plants were operating by the guaranteed date of substantial completion. Therefore, there are no damages associated with these contracts as they would have occurred in the But-for World and actually did occur in the Actual World. Additionally, the Reome Report does not include or reference mitigation tied to reselling the gas storage and firm transportation, which are readily sellable assets traded on a daily basis in the marketplace.

b. **Lost Retail Capacity Revenue:** In Section 6.5, the Reome Report references $107.2 million in costs for the lost sales of capacity to retail customers for the entirety of May 2023 to December 2025, of which $14.5 million is for 2025. This claim is unsupportable on its face. According to the OPPD 2024 Annual Report, as of December 31, 2024, OPPD "Power sales commitments that extend through 2027 were $4.6 million as of December 31, 2024,"[23] well below the estimated incremental damages value for lost retail capacity revenue for 2025 alone. It is difficult to believe that the Facilities would have tripled the power sales commitments for OPPD. Furthermore, there is clearly a failure to mitigate. If retail

[23] OPPD, 2024 Annual Report, p. 77, https://www.oppd.com/media/320606/entire-2024-annual-report.pdf

customers are willing to pay for demand charges (presumably tied to the capacity of the connection, but unclear based on the Reome Report), OPPD could have resold the excess capacity that it had purchased at the lower rates in Exhibit 3 at a significant profit at the rates listed in Exhibit 6 (Figure 2)..

Figure 2: Comparison of Reome Report Capacity Purchase Price to Capacity Sales Price



15. One explanation of this discrepancy is that the Reome Report includes capacity prices that are not or were not available to OPPD. Alternatively, the demand charge for retail customers is not an equivalent product to the purchased capacity. OPPD cannot both have to buy capacity to cover the facilities, but then claim that it is unable to sell the capacity from the facilities to retail customers.

16. **Figure 3** compares the actual damages calculations in the Reome Report, as presented and corrected, to the actual and forecasted damages in the Bodell report for the period December 2024 through May 2025 by damages category. The corrected Reome Report damages are adjusted to remove failure to consider natural gas costs if the Facilities were operational, failure to mitigate, and removes the Extended Project Costs as being unrelated to the delay. In effect, the Reome Report's damages claims collapse down to the calculation of purchased capacity costs.

Figure 3: Comparison of Alternative Damages Calculations by Category

	December 2024 - May 2025			December 17, 2024 - April 15, 2025	
	Exhibits 3 - 6	Exhibits 3 - 6		Bodell Report	
Month Year	Reome Report as Reported	Reome Report Adjusted	Notes	Actual as of April 15, 2025	Forecasted as of August 1, 2024
Energy Net Revenues	$ -	$ -	[1]	$ 7,577,085	$ 14,079,680
Ancillary Services	$ -	$ -	[2]	$ 115,931	$ 124,232
Capacity Purchases	$ 9,870,880	$ 9,870,880	[3]	$ 972,885	$ 972,885
Lost Retail Capacity Revenue	$ 18,289,281	$ -	[4]	$ -	$ -
Natural Gas Firm Transport and Services	$ 6,985,613	$ -	[5]	$ -	$ -
Extended Project Costs	$ 18,096,238	$ -	[6]	N/A	N/A
TOTAL	**$ 53,242,012**	**$ 9,870,880**		**$ 8,665,901**	**$ 15,176,797**

[1] Reome Report indicates minimal dispatch and zero net revenues for winter period.
[2] Reome Report does not calculate Ancillary Services.
[3] For this purpose, assumes Reome Report capacity purchases and prices are correct, even though the prices are suspect for winter demand.
[4] Unsupported by economics, market conditions, and speculative regarding what the large customer would have done if the Facilities were operatio
[5] Set to zero to reflect same charges in But-for World if the Facilities had achieved substantial completion.
[6] Set to zero as extended project costs are not shown to be related to the delay in substantial completion.

I declare under penalty of perjury under the laws of the United States of America that the foregoing facts and data stated herein are true and correct. Executed on May 28, 2025.



Tanya Bodell