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,	§	Adversary No.: 25-03025 (MI)
v.	§	
OMAHA PUBLIC POWER DISTRICT,	§	
Defendant.	§	

DEFENDANT OMAHA PUBLIC POWER DISTRICT'S
WITNESS AND EXHIBIT LIST FOR HEARING SCHEDULED FOR
JULY 9, 2025, AT 4:00 PM (PREVAILING CENTRAL TIME)

Omaha Public Power District ("**OPPD**") hereby files its *Witness and Exhibit List* for the hearings scheduled for **July 9, 2025, at 4:00 p.m. (CT)**.

1. OPPD may offer any one or more of the following exhibits at the hearings:

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

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EXHIBIT NO.	DESCRIPTION	MARK	OFFERED	OBJECTION	ADMITTED	W/D	DESPOSITION AFTER HEARING
1	The Reorganized Debtors' First Amended Adversary Complaint [Docket No. 22]						
2	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 [Docket No. 2731 (Case No. 24-90377)]						
3	Excerpts for Debtors Plan Confirmation Order [Docket No. 2431 (Case No. 24-90377)]						
4	Declaration of Matthew R. Eibes in Support of Defendant Omaha Public Power District's Opposition to Zachry's Motion for Partial Summary Judgment re Liquidated Damages [Docket No. 48]						
5	Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations dated September 21, 2021 (the "Contract") [Docket No. 48-1, Ex. A-1] (UNDER SEAL)						
6	Amendment No. 1 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations (Contract No. 263406) [Docket No. 48-2, Ex. A-2] (UNDER SEAL)						
7	Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating						

EXHIBIT NO.	DESCRIPTION	MARK	OFFERED	OBJECTION	ADMITTED	W/D	DESPOSITION AFTER HEARING
	Stations (Contract No. 263406) [Docket No. 48-3, Ex. A-3]						
8	OPPD Adequate Assurance Letter to Zachry dated 05.30.2024 [Docket No. 48-4, Ex. A-4]						
9	Zachry Industrial, Inc.'s Response to OPPD's Letter dated 05.30.2024 [Docket No. 48-5, Ex. A-5]						
10	Zachry Industrial, Inc.'s Letter with proposed OPPD Amendment No. 2 to Contract #263406 EPC Construction of TCS and SBL Stations [Docket No. 48-6, Ex. A-6]						
11	Declaration of Kimberly Reome [Docket No. 48-7]						
12	Declaration of Joseph Lang in Support of Defendant Omaha Public Power District's Opposition to Zachry's Motion for Partial Summary Judgment re Liquidated Damages [Docket No. 48-8]						
13	Zachry Holdings, Inc., v. Omaha Public Power District Transcript from Hearing on 04.14.25 [Docket No. 47-1]						
	Any document or pleading filed in the above-captioned case(s).						
	Any exhibit necessary for impeachment and/or rebuttal purposes.						
	Any exhibit identified or offered by any other party.						

2. OPPD may call any of the following as a witness at the hearings:

A. Matthew R. Eibes (fact witness live or via declaration filed at Docket No. 48);

B. Kimberly Reome (expert witness via declaration filed at Docket No. 48-7);

C. Any witness necessary to authenticate a document;

D. Any witness called or designated by any other party in interest; and

E. Any witness necessary to impeach or rebut the testimony of witnesses called or designated by any other party.

Dated: July 7, 2025

Respectfully submitted by:

/s/ Thomas C. Scannell

Thomas C. Scannell (TX 24070559)
Robert T. Slovak (TX 24013523)
J. Michael Thomas (TX 24066812)
Zachary C. Zahn (TX 24137675)
FOLEY & LARDNER LLP
2021 McKinney Avenue, Ste. 1600
Dallas, Texas 75201
Telephone: (214) 999.3000
Facsimile: (214) 999.4667
tscannell@foley.com
rslovak@foley.com
jmthomas@foley.com
zzahn@foley.com

ATTORNEYS FOR OMAHA PUBLIC POWER DISTRICT

CERTIFICATE OF SERVICE

I certify that I caused the foregoing document to be filed on July 7, 2025, using the Court's CM/ECF System which caused it to be served upon those parties registered in the system to receive such service.

/s/ Zachary C. Zahn
Zachary C. Zahn

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

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)
Debtors.	)	(Jointly Administered)

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

PLEASE TAKE NOTICE OF THE FOLLOWING:

On February 27, 2025, the United States Bankruptcy Court for the Southern District of Texas (the "**Bankruptcy Court**") entered 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* [Docket No. 2431] (the "**Confirmation Order**"), confirming the *Further Modified First Amended Joint Chapter 11 Plan of Reorganization of Zachry Holdings, Inc. and Its Debtor Affiliates* [Docket No. 2362] (as modified, amended, or supplemented from time to time in accordance with its terms, the "**Plan**") and approving, on a final basis, the Disclosure Statement [Docket No. 1986] of the above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**" or the "**Reorganized Debtors**").[2]

Pursuant to the Confirmation Order, the Reorganized Debtors are required to file this *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* no later than seven (7) Business Days after the Effective Date.

The Effective Date of the Plan occurred on April 10, 2025. All conditions in **Article IX.A** of the Plan have been satisfied or waived pursuant to **Article IX.B** of the Plan. As set forth in

[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 the 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 www.veritaglobal.net/ZHI. The location of the Reorganized Debtors' service address in the Chapter 11 Cases is: P.O. Box 240130, San Antonio, Texas 78224.

[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Plan.

Article IX.C of the Plan, substantial consummation of the Plan, as defined in 11 U.S.C. § 1101(2), shall be deemed to occur on the Effective Date.

Pursuant to the Confirmation Order, the Bankruptcy Court has approved the settlement, discharge, release, injunction, and exculpation provisions in the Plan, including in **Article VIII** of the Plan, which are now in full force and effect.

Pursuant to **Article V.B** of the Plan, unless otherwise provided by a Final Order of the Court, all Proofs of Claim with respect to Claims arising from the rejection of Executory Contracts or Unexpired Leases pursuant to the Plan or the Rejection List, if any, must be filed with the Claims and Noticing Agent at the address set forth below and served on the Reorganized Debtors on or before **May 12, 2025** (*i.e.*, 30 days after the Effective Date). **Any Proofs of Claim arising from the rejection of an Executory Contract or Unexpired Lease not timely Filed with the Claims and Noticing Agent shall be automatically Disallowed without further order of the Court, forever barred from assertion, and shall not be enforceable against the Debtors, the Reorganized Debtors, the Estates, or their property, without the need for any objection by the Debtors or Reorganized Debtors, or further notice to, action, order, or approval of the Court or any other Entity, and any Claim arising out of the rejection of the Executory Contract or Unexpired Lease shall be deemed fully satisfied, released, and discharged, and be subject to the permanent injunction set forth in Article VIII.F of the Plan, notwithstanding anything in a Proof of Claim to the contrary**. All Allowed Claims arising from the rejection of the Debtors' Executory Contracts or Unexpired Leases shall be classified and treated in accordance with **Article III** of the Plan. Further, pursuant to **Article V** of the Plan, the Reorganized Debtors reserve the right to alter, amend, modify, or supplement the Rejection List upon notice to the affected counterparty, including the right to add any Executory Contract or Unexpired Lease to the Rejection List if any cure dispute is not resolved in a manner acceptable to the Debtors or Reorganized Debtors in their sole discretion.

The Debtors or the Reorganized Debtors, as applicable, shall pay Cure Claims in the amounts set forth on the Assumption List on the Effective Date or as soon as reasonably practicable thereafter. Pursuant to **Article V.C** of the Plan, all requests for payments of Cure Claims that differ from the amounts paid or proposed to be paid by the Reorganized Debtors to a counterparty must be filed with the Court and served on the Reorganized Debtors on or before **May 12, 2025** (*i.e.*, 30 days after the Effective Date). **Any such request that is not timely filed shall be disallowed and forever barred, estopped, and enjoined from assertion, and shall not be enforceable against any Reorganized Debtor, without the need for any objection by the Reorganized Debtors or any other party in interest or any further notice to or action, order, or approval of the Court**.

All requests for payment of Professional Fee Claims for services rendered and reimbursement of expenses incurred prior to the Confirmation Date must be filed no later than **May 27, 2025** (*i.e.*, 45 days after the Effective Date). The Court shall determine the Allowed amounts of such Professional Fee Claims after notice and a hearing in accordance with the procedures established by the Court. The Reorganized Debtors shall pay Professional Fee Claims in Cash in the amount the Court allows.

The Plan, the Confirmation Order, the Plan Supplement, and their provisions are binding upon and inure to the benefit of the Debtors, the Reorganized Debtors, all current and former Holders of Claims, all current and former Holders of Interests, and all other parties-in-interest and their respective heirs, successors, and assigns, executors, administrators, Affiliates, officers, directors, managers, agents, representatives, attorneys, beneficiaries, or guardians, whether or not the Claim or Interest of such Holder is Impaired under the Plan, and whether or not such Holder voted to accept the Plan.

Copies of the Confirmation Order, the Plan, the Plan Supplement, and all documents filed in the Reorganized Debtors' Chapter 11 Cases, are available, free of charge by: (a) accessing the Reorganized Debtors' restructuring website at https://www.veritaglobal.net/zhi; (b) contacting Kurtzman Carson Consultants, LLC dba Verita Global (the claims, noticing, and solicitation agent retained in these Chapter 11 Cases by Court order) at (866) 479-8211 (U.S. or Canada) or +1 (781) 575-2037 (International); or (c) submitting an inquiry via https://www.veritaglobal.net/ZHI/inquiry. You may also obtain copies of any pleadings filed in these Chapter 11 Cases for a fee via PACER at https://www.txsb.uscourts.gov.

The Plan and Confirmation Order contain other provisions that may affect your rights. You are encouraged to review the Plan and Confirmation Order in their entirety.

IF YOU HAVE ANY QUESTIONS ABOUT THIS NOTICE, PLEASE CONTACT VERITA GLOBAL BY CALLING (866) 479-8211 (U.S. OR CANADA) OR +1 (781) 575-2037 (INTERNATIONAL), OR SUBMITTING AN INQUIRY VIA WWW.VERITAGLOBAL.NET/ZHI/INQUIRY.

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Dated: April 10, 2025
Houston, Texas

/s/ Charles 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

Bojan Guzina (admitted *pro hac vice*)
Andrew F. O'Neill (admitted *pro hac vice*)
Fan B. He (admitted *pro hac vice*)
Adam T. Swingle (admitted *pro hac vice*)
111 South Wacker Drive, Suite 5100
Chicago, Illinois 60606
Telephone: (312) 881-5400
Email: bojan.guzina@whitecase.com
aoneill@whitecase.com
fhe@whitecase.com
adam.swingle@whitecase.com

Counsel to the Reorganized Debtors

Certificate of Service

I certify that on April 10, 2025, I caused a copy of the foregoing document to be served by the Electronic Case Filing System for the United States Bankruptcy Court for the Southern District of Texas.

/s/ Charles R. Koster
Charles R. Koster

any non-Debtor under the VGPL Guaranties, VGPL Payment Bonds, VGPL Performance Bonds, PLNG EPC Contracts, or otherwise with regard to the VGPL Guaranty Obligations, VGPL Surety Bond Obligations, and PLNG EPC Contracts Obligations. Subject to **Article VIII** of the Plan, nothing in this paragraph shall affect in any way any non-Debtor's rights against VGPL under the VGPL Guaranties, VGPL Payment Bonds, VGPL Performance Bonds, PLNG EPC Contracts, or otherwise with regard to the VGPL Guaranty Obligations, VGPL Surety Bond Obligations, and PLNG EPC Contracts Obligations.

161. **OPPD Reservation of Rights.** Notwithstanding anything to the contrary in the Plan Documents: (i) nothing contained in the Plan Documents shall operate to release, discharge, impair, or enjoin any rights, obligations, Claims, Causes of Action, defenses, or remedies of Omaha Public Power District ("**OPPD**"), the Debtors, or the Reorganized Debtors, as applicable, against the Debtors, Reorganized Debtors, OPPD, or any Person, as applicable, accruing before, on, or after the Effective Date as it relates to that certain *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated September 21, 2021, as amended by those certain *Amendment No. 1 and Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated August 13, 2024 (together with all amendments, exhibits, schedules, and ancillary agreements and documents thereto, the "**OPPD Contract**"), or the adversary proceeding, pending before the Court at Adversary Number 25-03025; (ii) all parties' rights, remedies, and obligations under the OPPD Contract are explicitly preserved, and all terms of the OPPD Contract remain fully enforceable after the Effective Date notwithstanding the Plan Injunction; and (iii) OPPD is hereby deemed, as of the Effective Date, to have affirmatively opted out of the Third-Party Release

OPPD Exhibit 3
Page 1 of 2

provisions of the Plan and is not bound by the Third-Party Release or any other provision contained in the Plan Documents purporting to release, discharge, impair, or enjoin OPPD's rights, Claims, Causes of Action, or remedies against any non-Debtor, including Travelers Casualty and Surety Company and Pacific Indemnity Company, who issued performance and payment bond no. 107261753/82455022 (the "**OPPD Surety Bonds**"). All of OPPD's rights (whatever such rights may or may not be) are hereby explicitly preserved against the OPPD Surety Bonds.

162. **Provisions Regarding Element Fleet**. Notwithstanding anything to the contrary set forth in the Plan or this Order, (i) on the Effective Date, the Reorganized Debtors shall be deemed to have assumed (a) the Master Lease Agreement dated July 1, 2008, executed by Zachry Industrial, Inc. (together with any and all amendments); (b) the Master Services Agreement dated July 1, 2008, executed by Zachry Industrial, Inc. (together with any and all amendments, and addenda); (c) the Vehicle Fleet Open-End Lease Agreement dated April 18, 2022, executed by Zachry Maintenance Services, LLC (together with any and all amendments, and addenda); (d) the Master Services Agreement dated April 18, 2022, executed by Zachry Maintenance Services, LLC (together with any and all amendments, and addenda); (e) the Continuing Guaranty of Payment dated June 23, 2008, executed by ZHI; and (f) the Continuing Guaranty of Payment dated March 28, 2022, executed by ZHI (collectively, (a)-(f), the "**Element Contracts**" and items (e) and (f), collectively, the "**Guaranty Agreements**"); (ii) no Cure Claim in Cash shall be paid to Element Fleet Corporation ("**Element**") by the Reorganized Debtors on the Effective Date; (iii) to the extent either or both of the Guaranty Agreements are not executory contracts capable of being assumed under section 365 of the Bankruptcy Code they shall not be subject to the discharge (**Article VIII**), re-vesting of assets (**Article IV.E**) or cancellation of instruments (**Article IV.I**) provisions of the Plan and shall remain enforceable in accordance with their terms and applicable non-bankruptcy

Exhibit A

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

In re:	§	Chapter 11
ZACHRY HOLDINGS, INC., *et al*	§	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 MATTHEW R. EIBES IN SUPPORT OF DEFENDANT OMAHA PUBLIC POWER DISTRICT'S OPPOSITION TO ZACHRY'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE LIQUIDATED DAMAGES

I, Matthew R. Eibes, make the following declaration in lieu of an affidavit pursuant to 28 U.S.C. § 1746:

1. I am over 21 years old. The facts and matters stated in this declaration are based on my own personal knowledge and information, or on my review of records created by Defendant Omaha Public Power District ("OPPD") in the ordinary course of business. I submit this declaration in connection with OPPD's Opposition to Zachry's Motion for Partial Summary Judgment re: Liquidated Damages.

2. OPPD is a public corporation and political subdivision of the State of Nebraska that provides electricity to approximately 1 million people in the Omaha, Nebraska metropolitan area and an additional 13 counties in southeastern Nebraska.

3. I am currently employed by OPPD as Director of the Project Management Office within Utility Operations in Omaha, Nebraska. In this capacity, I am responsible for overseeing project management operations, ensuring alignment with strategic goals, and driving successful project delivery. In this capacity, I have direct knowledge of the Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek

EXHIBIT
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Generating Stations (Contract No. 263406) dated September 21, 2021 (together with all exhibits, schedules, and ancillary agreements and documents thereto, the "EPC" or "Contract").

4. I am the Director – Project Management Office (Utility Operations) and, in this role, I have knowledge of every exhibit attached to this declaration. Attached hereto as Exhibits 1–10 are true and correct copies of the following:

   a. **Exhibit 1**: Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations (Contract No. 263406) dated September 21, 2021 (the "EPC" or "Contract"), including Exhibit E attached thereto.[1]

   b. **Exhibit 2**: *Amendment No. 1 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) ("First Amendment");

   c. **Exhibit 3**: *Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) ("Second Amendment");

   d. **Exhibit 4**: Letter from OPPD to Zachry dated May 30, 2024, re: Adequate Assurance of Performance;

   e. **Exhibit 5**: Letter from Zachry to OPPD dated June 6, 2024, re: OPPD's Adequate Assurance Letter; and

   f. **Exhibit 6**: Letter from Zachry to OPPD dated June 20, 2024, re: Proposed Draft Second Amendment.

5. Exhibits 1–6 are true and correct copies and were made and/or kept by OPPD in the regular course of business; it was the regular course of business for OPPD for an employee or representative of OPPD with knowledge of the act, event, condition, or opinion recorded to make the record or to transmit the information thereof to be included in such record; and the record was made at or near the time of the date appearing on such record or reasonably soon thereafter.

6. Under the terms of the Contract, which is attached hereto as Exhibit 1, Zachry is to provide or subcontract for services for all activities associated with designing, procuring, installing, starting up, and testing two (2) power plant sites: (i) the Standing Bear Lake Station ("SBLS"); and (ii) the Turtle Creek Station ("TCS") (collectively the "Projects"). The construction of the Projects is intended to meet increasing energy demand in Omaha and the surrounding areas and serve as significant upgrades to OPPD's existing infrastructure. Once construction is

[1] The Contract is almost 4,000 pages with all exhibits (Exhibit A – Exhibit BB). Given the voluminous size of the document, I have attached the Contract with Exhibit E only. I included Exhibit E because it is the originally agreed upon "Guaranteed Completion Date(s) and Project Schedule."

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complete and the Projects come online, OPPD will submit to retire other units currently operating within its system.

7. The Contract was amended in October of 2023, and August of 2024. I participated in the negotiations surrounding both amendments. I have served in the role as Director – Project Management Office (Utility Operations) since February 2022 overseeing a portfolio of projects including the SBLS and TCS. The project team that supported these Projects since their commencement in 2021 was brought under my direction upon my placement in the aforementioned Director position in February 2022.

8. Under the original Contract, the Guaranteed Substantial Completion Date was May 1, 2023 for SBLS, and August 18, 2023 for TCS. The original Contract specified liquidated damages for failure to meet the Guaranteed Substantial Completion Dates as laid out in Article XI.

9. Zachry failed to meet the Guaranteed Substantial Completion Dates in 2023. Rather than immediately imposing liquidated damages, OPPD – in the spirit of ensuring completion of these critical infrastructure assets as soon as possible while accounting for safety, quality, rising project costs, and long-term operations and maintenance costs – chose to negotiate an amendment to the Contract. The Contract was first amended in October 2023.[2]

    a. In the First Amendment to the Contract, which is attached hereto as Exhibit 2, the Guaranteed Substantial Completion date was extended to August 8, 2024 for SBLS and August 30, 2024 for TCS. OPPD also agreed in the First Amendment to provide substantial additional funds for the Projects, in Change Order No. 1, in the sum of $64,185,282, raising the total Contract price to $428,741,118.00.

    b. Given the increased length of time to substantial completion and increased costs that OPPD continued to incur while the Projects were being completed, the parties also agreed to changes to the liquidated damages amounts in Article XI. The new amounts of liquidated damages that Zachry agreed to as a result of delay in completion of work are laid out in the First Amendment in paragraph 5.

    c. Recognizing the importance in having these plants operational within the winter months and to fulfill load growth requirements of customers and economic development needs, OPPD also agreed to incentive payments for early completion in the First Amendment. These incentive payments were offered per day. This means that even if Zachry completed SBLS and/or TCS just one day before the Guaranteed Substantial Completion Dates, it would still get an incentive payment for competing the work early. The incentive payments offered by OPPD are laid out in the First Amendment in paragraph 6.

[2] The parties came to an agreement in October 2023 and a Memorandum of Understanding was executed in October 2023, but the First Amendment was actually executed in November 2023. For purposes of this declaration, I will use the October date because that is when the parties came to an agreement.

EXHIBIT A

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10. I first learned that Zachry filed for bankruptcy on or around May 22, 2024. OPPD had immediate questions and concerns about the impact Zachry's bankruptcy would have on the Projects, neither of which were finished.

11. On May 29, 2024, I participated in a meeting at OPPD's Omaha offices with other employees of OPPD and Zachry executives Ralph Biediger and Brad Reece. Mr. Biediger specifically stated that it was Zachry's intention to complete the Projects recognizing that the Projects were close to completion, but not as close as Zachry would like. Furthermore, Mr. Biediger stated that Zachry was pulling resources from its Golden Pass LNG project in Texas to OPPD's Projects, demonstrating Zachry's commitment to finish SBLS and TCS. There was significant conversation about what could be done to get the Projects finished given Zachry's financial challenges. Mr. Biediger commented that the liquidated damages as set forth in the First Amendment would negatively impact Zachry's reputation and Zachry's position in the pending bankruptcy proceeding. Zachry wanted to know what could be adjusted under the Contract (and First Amendment thereto) in terms of Milestone Payments and payment terms (*e.g.*, moving from a Net 30 days payment approach as stated in the Contract to a Net 7 days approach) that would provide Zachry cashflow. Zachry also inquired about OPPD releasing retainage amounts withheld per the Contract to pay Zachry's subcontractors associated with OPPD's Projects (*i.e.* the 5% of each milestone payment withheld pending substantial completion of the Projects). Zachry said it would provide OPPD a means to assure payment to subcontractors if OPPD would be willing to release its retainage, thereby providing the funds for such payment. OPPD relied on the statements made by Zachry in this meeting and kept working with Zachry to complete the projects.

12. On May 30, 2024, pursuant to the terms of the Contract, OPPD sent Zachry a letter formally requesting that Zachry furnish OPPD with adequate assurance that it could and would make due performance of its obligations under the Contract. The letter is attached hereto as Exhibit 4.

13. On June 6, 2024, Zachry responded, stating it was open to assuming the Contract in bankruptcy (which would require the "cure" of alleged defaults thereunder) subject to modifications. The letter is attached hereto as Exhibit 5.

14. On June 12, 2024, I participated in a meeting with Zachry and other representatives of OPPD. Representatives from Zachry included Ralph Biediger, Brad Reece, and Jay Old, Zachry's General Counsel. The goal of that meeting was to discuss how Zachry would proceed with the Projects given its bankruptcy and still achieve completion of the Projects to get both SBLS and TCS online as well as explore possible resolution with Zachry to assure assumption of the Contract. Zachry provided an update regarding its bankruptcy proceedings and asked OPPD to provide direct payment to Zachry's subcontractors in the range of $10 million to $15 million. Mr. Biediger asked that the Guaranteed Substantial Completion Dates, which were fast approaching, be extended. OPPD's interest remained in getting these Projects completed as soon as possible while recognizing safety, quality, expanding project costs, and long-term operations and maintenance costs. Based on the information presented by OPPD about costs, as well as discussions regarding extending the Guaranteed Substantial Completion Dates and changing the payment terms, Zachry changed its position on liquidated damages from what it

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represented in its June 6th letter and agreed to include a liquidated damages clause in a new amendment to the Contract.

15. Zachry sent a letter to OPPD on June 20, 2024, that included a proposed amendment to the Contract that it claimed was based on the June 12th meeting between Zachry and OPPD. The letter is attached hereto as Exhibit 6. The fact that Zachry did not remove the liquidated damages altogether in its June 20th initial proposed amendment indicated to me that it understood the financial impact that not having these Projects completed was having, and would continue to have, on OPPD.

    a. As proposed in paragraph 5 in Zachry's June 20th proposal, Zachry wanted to extend the date for reaching the maximum liquidated damages cap regarding substantial completion from December 2024 to April 2025. The proposed date of April 2025 was surprising and unacceptable, recognizing the status of the Projects and Zachry's expressed confidence in its ability to complete the work. During meetings, Zachry representatives repeatedly stated that Zachry had completed multiple similar and more complex projects than SBLS and TCS. Mr. Biediger had already addressed project leadership challenges by replacing Mr. Rick Blanchette with Mr. Brad Reece.[3] These plants were originally supposed to be completed in 2023 and now the August 2024 dates were going to be missed. The April 2025 date in Zachry's proposal was overwhelming and caused me to question Zachry's intention to finish OPPD's Projects including the level of effort from Zachry.

    b. With each delay, OPPD continued to experience increased costs, missed economic opportunities (like unit marketplace availability from a revenue perspective), and system reliability and resiliency issues. Omaha is a thriving community with expansion of existing customer load and potential for economic development with new customers. OPPD's inability to have SBLS and TCS completed was negatively impacting OPPD's ability to serve the Omaha area and surrounding communities as a public power provider – not to mention the financial impact.

16. Brad Reece called me directly prior to sending the proposed amendment on June 20, 2024, stating Ralph Biediger directed him to get the proposal out and noted that Mr. Biediger had not been in the office all week. When Mr. Reece emailed the proposed amendment, he did not include Troy Via, OPPD's Chief Operating Officer and Vice President Utility Operations, who had been participating in our prior discussions. I did not believe the proposal accurately reflected the negotiations that occurred on June 12th.

17. As written, the June 20th proposed amendment from Zachry was a non-starter for OPPD. Even though Zachry had included a liquidated damages clause in its proposal, the lower amount no longer reflected a reasonable estimate of damages. If Zachry did not complete the Projects in

[3] At the time of this writing, Zachry is on its second Executive over the Projects (the current one being Brad Reece), its third project manager (the current one being Lyle Fouts). After Mr. Reece became the new Executive, he replaced the site superintendents at SBLS and TCS.

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2024 (having started them in 2021), the damages to OPPD would be far greater than what Zachry had proposed.

a. Furthermore, a mere seven months earlier when the parties agreed upon the First Amendment to the Contract, OPPD had agreed to extend the Guaranteed Substantial Completion Dates such that they were more than a year after the original agreed-upon dates, agreed to increase the Contract price by more than $64 million, and added incentive payments for early completion of the Projects. Given the First Amendment, OPPD felt that Zachry's proposal that OPPD directly pay all pre-petition amounts owed to Zachry's subcontractors on OPPD's Projects was essentially asking OPPD to pay twice for the same work without Zachry's overhead.

18. Despite OPPD's reservations about Zachry's requests, in order to advance the Projects, OPPD had begun making best efforts to help Zachry's financial situation by voluntarily making payments 15 days from invoice date, rather than the Net 30 days allowed by the Contract. OPPD did this even without a new amendment to the Contract in place to demonstrate to Zachry that OPPD was willing to work with it.

19. OPPD felt strongly that Zachry was responsible for payment of its pre- and post-petition amounts owed to subcontractors, and that OPPD was not responsible for those payments, as many of those obligations were milestones OPPD had already paid.

20. OPPD rejected Zachry's June 20th proposed amendment and negotiations were scheduled in Omaha for July 18, 2024. I participated in those negotiations. During the meeting on July 18th, the parties came to a tentative agreement on a number of important points:

a. OPPD agreed to change the payment terms of the Contract, including moving to a Net 15 day payment plan. This was done to support Zachry's access to capital in a timely fashion in recognition of its bankruptcy, restructuring efforts, and vendor-owed payments both pre-petition and post-petition.

b. The parties reached a tentative agreement on new Guaranteed Substantial Completion Dates. OPPD asked Zachry to provide new dates that it could meet. For SBLS, Zachry proposed a Guaranteed Substantial Completion Date of December 30, 2024, which provided Zachry 25 days of schedule "float" to account for any/all delays (weather, quality, rework, resources, holidays, etc.). For TCS, Zachry proposed to move the Guaranteed Substantial Completion Date to December 16, 2024, which provided Zachry 30 days of float to account for any/all delays (weather, quality, rework, resources, holidays, etc.). Having the Projects complete by the end of December was important to OPPD because it was dealing with mounting costs including but not limited to extension of the owner-furnished-equipment agreements which commonly exceed $1 million per month, OPPD's payroll costs and inability to be working on other planned projects, SBLS damage claims due to a sabotage incident, and the purchase of market capacity (necessary to maintain accredited capacity requirements). As the Projects continued without reaching substantial completion, the costs continued to grow higher given the delays were reaching in excess of 14 months. Additionally, the Southwest Power Pool (or "SPP") had recently defined winter reserve margins which

EXHIBIT A

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was a point of concern to OPPD because this was the first time winter margins were defined separately from summer requirements. This was going to be another cost that OPPD would have to cover through purchasing capacity. OPPD was also dealing with lost revenue due to the failure to have the Projects completed such as missed energy market revenue and lost and missed economic opportunities with large customer projects or expansions due to lack of generation.

c. The parties also reached a tentative agreement on revised amounts for liquidated damages. OPPD explained during the July 18th meeting that OPPD had sustained costs in the tens of millions of dollars due to the delay in completion of the Projects and would incur tens of millions more in costs if the plants were not completed by the new dates. Zachry acknowledged the wide variety of costs and lost economic opportunities (as explained above) that OPPD was sustaining. The tentative agreement regarding liquidated damages reached on July 18th was ultimately what was memorialized in paragraph 7 of the Second Amendment, which is attached hereto as Exhibit 3. Even though Zachry's position was that SBLS was approximately 96% complete and TCS was 93% complete, there was still a significant amount of work to be done to reach substantial completion. As such, Zachry agreed to higher liquidated damages, and OPPD agreed to extend the period of damages accruing at the lower dollar amount from a 15-day to a 30-day duration. At no time during this meeting or after did anyone from Zachry state that the numbers agreed to for liquidated damages were unreasonable or a penalty. On July 18, 2024, SBLS was already more than 14 months delayed from when it was supposed to be completed (May 1, 2023), and TCS was 11 months delayed from when it was supposed to be completed (August 18, 2023), and there still were many months of work to be done. The amount of time that passed was not just limited to calendar impact – each day impacted the total costs spent by OPPD as well as lost revenue. The parties also agreed that, with a new amendment in place, Zachry would not start to accrue liquidated damages under the First Amendment to the Contract, which would have begun to accrue for SBLS on August 8, 2024, and for TCS on August 30, 2024.

d. There was discussion regarding OPPD's release of retainage and payment of subcontractors for Zachry. OPPD offered to pay half of the retainage amount to Zachry solely for payment of subcontractors upon court approval of a written amendment to the Contract and then pay the remaining half of the retainage once the natural gas units successfully achieved "first fire." Agreement was not reached on this point during the July 18th meeting.

21. Following the negotiations on July 18, 2024, I learned that Mr. Biediger was overall pleased with the progress made during the negotiations and that he was agreeable to the proposed Guaranteed Substantial Completion Dates, net payments, and liquidated damages terms. By the end of July 2024, Zachry began talking about moving the bankruptcy court to assume the Contract as amended by the parties' negotiations. I hoped this meant that the parties would be able to reach an agreement to get SBLS and TCS online.

22. I participated in another in-person negotiation with representatives from Zachry and OPPD on August 1, 2024. During this meeting, OPPD discussed its concerns with Zachry being able to

EXHIBIT
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finish the Projects and whether OPPD needed to get a new EPC vendor. Zachry representatives continued to tell me that it was Zachry's goal to finish the Contract and expressed that bringing in another contractor would delay the Projects further and cost more money than what it would cost for OPPD to put in additional funds and have Zachry finish the Projects. Zachry agreed to include language in the new amendment warranting and agreeing that it had the necessary workforce and resources to complete the Projects, including achieving the Guaranteed Substantial Completion Dates. There were more negotiations regarding the release of the retainage. As laid out in paragraph 4 of the Second Amendment, OPPD agreed to release the entirety of its retainage into an escrow account so that Zachry's subcontractors associated with OPPD's Projects could be paid. This was a large concession for OPPD considering it had essentially spent the retainage with the cumulative owner furnished equipment pass-through charges alone (for which it had not been reimbursed) and repeated delays in reaching substantial completion. Liquidated damages were also discussed again. OPPD agreed to do a structured incentive payment similar to what was in the First Amendment to motivate Zachry to finish the Projects early. The new incentive payments that were agreed to were memorialized in paragraph 5 of the Second Amendment, which is attached hereto as Exhibit 3. The daily incentive payments offered by OPPD increased from the First Amendment, demonstrating the daily impact OPPD was suffering from by not having the Projects completed.

23. Around this same time at the beginning of August 2024, Brad Reece of Zachry flew to Omaha to direct the Projects through the remainder of the work with the intent to reach substantial completion and turnover to OPPD. He told me that he had come to complete the Projects, and, shortly after his arrival, I walked both sites with Mr. Reece. His presence and comments to me about finishing the Projects led me to believe that Zachry intended to assume the Contract in its bankruptcy and complete the Projects. OPPD relied on both Mr. Reece's comments and actions when it agreed to the Second Amendment.

24. As the Guaranteed Substantial Completion Dates established in the First Amendment as being in August 2024 approached and OPPD and Zachry had not yet executed a signed, written amendment to the Contract, OPPD looked to provide relief to Zachry from the pending Guaranteed Substantial Completion Dates and beginning of liquidated damages accrual as provided for in the First Amendment. Troy Via and I agreed that this would allow Brad Reece and me to work through other issues, including Potential Change Notices and Owner Furnished Equipment pass-through details. Accordingly, OPPD notified Zachry that OPPD would defer Article XI, Section (c)(1) of the Contract, as amended by the First Amendment, regarding the accrual of liquidated damages for failure to meet the Guaranteed Substantial Completion Dates. Zachry and OPPD had already agreed upon what the liquidated damages would be in the new amendment to the Contract that was still being finalized. Despite all of this attention being given to liquidated damages, nobody from Zachry ever told me that the damages were unreasonable or that Zachry perceived the liquidated damages as a penalty. I am not aware of Zachry communicating that the damages were unreasonable or were perceived as a penalty to anyone at OPPD or to OPPD's representatives.

25. On August 14, 2024, the Second Amendment to the Contract was executed by Zachry; OPPD signed it on August 20, 2024. With the execution of the Second Amendment, Zachry agreed to have the Contract assumed in its bankruptcy, which occurred by Court Order on September 17, 2024.

EXHIBIT
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26. As of the date of this Declaration, the Projects still have not reached substantial completion.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of May, 2025.

DocuSigned by:
Matthew R. Eibes
EBCBFB691C474F3...

Matthew R. Eibes

EXHIBIT
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Exhibit No. 5

Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations dated September 21, 2021 [Docket No. 48-1, Ex. A-1]

(FILED SEPARATELY UNDER SEAL)

Exhibit No. 6

Amendment No. 1 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations (Contract No. 263406) [Docket No. 48-2, Ex. A-2]

(FILED SEPARATELY UNDER SEAL)

Exhibit A-3

EXHIBIT
A-3

United States Bankruptcy Court
Southern District of Texas
ENTERED
September 17, 2024
Nathan Ochsner, Clerk

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)
Debtors.	)	(Jointly Administered)

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

Upon the motion (the "**Motion**")[2] of the above-captioned debtors and debtors in possession (collectively, the "**Debtors**") for entry of an order (this "**Order**"): (i) approving the settlement by and among Debtor Zachry Industrial ("**ZII**") and Omaha Public Power District ("**OPPD**"), (ii) authorizing ZII to amend and assume (as amended) that certain *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated September 21, 2021 (as amended, the "**OPPD Contract**"), and (iii) granting related relief, all as more fully set forth in the Motion; and this Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334; this Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and that this Court may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409;

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

[2] Capitalized terms used but not otherwise defined herein have the meanings ascribed to them in the Motion.

EXHIBIT
A-3

and this Court having found that the relief requested in the Motion is in the best interests of the Debtors' estates, their creditors, and other parties in interest; and this Court having found that the Debtors' notice of the Motion and opportunity for a hearing on the Motion were appropriate under the circumstances and no other notice need be provided; and this Court having reviewed the Motion and having noted that the motion is unopposed; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon all of the proceedings had before this Court; and after due deliberation and sufficient cause appearing therefor, IT IS HEREBY ORDERED THAT:

1. The OPPD Settlement memorialized in that certain *Amendment No. 2* to the OPPD Contract attached as **Exhibit A** to this Order (the "**Amendment**") is hereby approved in all respects and shall be binding and enforceable in accordance with its terms on the Debtors, their estates, and OPPD, and each of their respective successors and assigns, in each case in accordance with the terms of the Amendment and this Order.

2. The Debtors shall provide an accounting of direct payments made to OPPD Vendors from the Retainage funds by the OPPD Escrow Account to OPPD, the Committee, and the Debtors' bank lenders on every Monday (starting with the first Monday after the payment of the first OPPD Vendor by the OPPD Escrow Account).

3. ZII is authorized to assume, and the OPPD Contract is hereby assumed, as amended pursuant to the Amendment, in its entirety pursuant to sections 105(a) and 365 of the Bankruptcy Code effective immediately upon entry of this Order.

4. ZII is authorized to cure all defaults under the OPPD Contract, which cure amount for the OPPD Contract is $0. Upon the curing of such defaults, ZII's obligations to cure any

EXHIBIT
A-3

defaults under the OPPD Contract under section 365(b)(1)(A) of the Bankruptcy Code shall be deemed satisfied.

5. Adequate assurance of future performance under the OPPD Contract to the extent required pursuant to section 365(b) of the Bankruptcy Code has been provided.

6. Upon assumption of the OPPD Contract, such contract shall be a postpetition contract of ZII, and all obligations thereunder shall be postpetition obligations of ZII.

7. Nothing contained in the Motion or this Order, nor any action taken pursuant thereto, nor any payment made pursuant to the authority granted thereby, is intended to be or shall be construed as: (a) an admission as to the amount of, basis for, or validity of any claim against a Debtor entity under the Bankruptcy Code or other applicable non-bankruptcy law; (b) a waiver of the Debtors' rights to dispute any claim on any grounds; (c) a promise or requirement to pay any claim; (d) an implication or admission that any claim is of a type specified or defined in this Motion or any order granting the relief requested by this Motion; (e) a waiver of any claims or causes of action that may exist against any creditor or interest holder; (f) a request or authorization to assume, adopt, or reject any agreement, contract, or lease pursuant to section 365 of the Bankruptcy Code, other than the OPPD Contract; (g) a waiver or limitation of the Debtors' rights under the Bankruptcy Code or any other applicable law; or (h) a concession by the Debtors that any liens (contractual, common law, statutory, or otherwise) that may be satisfied pursuant to the Motion are valid and the Debtors expressly reserve their rights to contest the extent, validity, or perfection or seek avoidance of all such liens.

8. Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Order are immediately effective and enforceable upon its entry.

EXHIBIT
A-3

9. The Debtors are authorized to take all actions necessary to effectuate the relief granted in this Order in accordance with the Motion.

10. The Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

Signed: September 17, 2024

Marvin Isgur
United States Bankruptcy Judge

EXHIBIT
A-3

EXHIBIT A

Amendment

EXHIBIT A-3

CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBJECT TO FRE 408 & ALL SIMILAR PROTECTIONS

AMENDMENT NO. 2 TO ENGINEER, PROCURE, AND CONSTRUCT CONTRACT FOR OMAHA PUBLIC POWER DISTRICT STANDING BEAR LAKE AND TURTLE CREEK GENERATING STATIONS (CONTRACT NO. 263406)

This AMENDMENT NO. 2 to Contract No. 263406 ("**Amendment No. 2**") is entered into as of this 13 day of August ("**Effective Date**"), by and between Omaha Public Power District, a public corporation and political subdivision of the State of Nebraska ("**OPPD**"), and Zachry Industrial, Inc., a Texas corporation ("**Contractor**") (together with OPPD, the "**Parties**" or individually, a "**Party**").

WHEREAS, OPPD and Contractor are parties to that certain *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated 21 of September, 2021 (the "EPC Contract");

WHEREAS, pursuant to Article IV, Subsection (b) of the EPC Contract, OPPD withholds five percent (5%) of each Milestone Payment owed to Contractor as retainage and as of the Effective Date, OPPD is holding approximately [$20,220,446] in retainage (the "**Retainage**");

WHEREAS, Contractor and certain of its affiliates (collectively, the "**Debtors**") filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the Southern District of Texas ("**Bankruptcy Court**") on May 21, 2024 (the "**Petition Date**"), which initiated the chapter 11 cases (the "**Chapter 11 Cases**") now jointly administered under lead case number 24-90377 (MI); and

WHEREAS, OPPD and Contractor desire to amend the EPC Contract as described herein.

NOW, THEREFORE, in consideration of the mutual covenants set forth below, the Parties agree as follows:

1. Defined Terms. Unless otherwise defined herein, all capitalized terms used herein shall have the meanings ascribed thereto in the EPC Contract.

2. Amendment of Article IV – Contract Price, Payment. Article IV, Subsection (b) of the EPC Contract is hereby deleted in its entirety and replaced in its entirety with the following:

(b) Milestone Payments. Contractor shall submit an invoice, on the tenth (10th) day of each month, showing milestones completed and payments due for those milestones in accordance with the Milestone Payment Schedule set forth in Exhibit G. After review and approval of the invoice by OPPD, milestone payments shall be made to the Contractor in the amount of 100% of approved invoice, without withholding of retainage. Such payment shall be made approximately fifteen (15) days from receipt of the invoice. Payment of such

EXHIBIT A-3

monthly milestone payments by the District shall not be construed or deemed to be an acceptance of the Work covered thereby.

3. Amendment of Article IV – Contract Price, Payment. Article IV of the EPC Contract is hereby amended to add the following Section (i):

(i) Contractor warrants and agrees that it has the necessary work force and resources to complete the Work, including achieving the Guaranteed Substantial Completion Dates. In an effort to expedite completion of the Work, and provided that Contractor shall assume the EPC Contract (as amended) as specified in Section 10 hereof and recommend approval of this Amendment by the Bankruptcy Court of the Southern District of Texas, the District shall remit certain "Milestone Final Completion" payments to the Contractor. These Milestone Final Completion payments are contingent on the Contractor meeting the lesser of ninety days (90) from Substantial Completion or the dates for the respective Sites listed in subsections (a) and (b) below. Failure of Contractor to meet the scheduled dates below for each individual site will result in Contractor forfeiting the additional Two Million Dollar ($2,000,000.00) payment for the respective Site set forth in this Amendment No. 2. Subject to the terms of the EPC Contract, including this Amendment No. 2, the Milestone Final Completion payments shall be adjusted as follows:

On Final Completion, the Milestone Final Completion payment shall increase by Two Million Dollars ($2,000,000.00) per site from the allotted amount set forth in the EPC Contract:

(a) SBLS will be a payment of Three Million Dollars ($3,000,000.00) if the current schedule date of March 30, 2025 is met.

(b) TCS will be a payment of Three Million Dollars ($3,000,000.00) if the current schedule date of March 16, 2025 is met.

4. Amendment of Article IV – Contract Price, Payment. Article IV of the EPC Contract is hereby amended to add Section (j), as set forth below:

(j) Release of Retainage. The following procedures shall apply to the release of the Retainage:

(i) SurTec Information Systems, Inc. shall serve as Contractor's designated third-party administrator (the "**Agent**");
(ii) Contractor shall direct Agent to establish an escrow account (the "**OPPD Escrow Account**");
(iii) Upon execution of this Amendment No. 2, OPPD shall promptly deposit the entirety of the Retainage into the OPPD Escrow Account; and
(iv) The Agent shall directly pay Subcontractors, associated with the funds held in the OPPD Escrow Account; *provided that*, OPPD shall receive

EXHIBIT
A-3

contemporaneous notice of all payments made from the OPPD Escrow Account.

5. Amendment of Article XI – Liquidated Damages. Article XI Section (f) of Amendment No. 1 to the EPC Contract is hereby deleted in its entirety, such that Article XI, Section (f) now provides in its entirety, the following:

(f) 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.

6. Amendment of Article XI – Liquidated Damages. Article XI, Section (b) of Amendment No. 1 to the EPC Contract, is hereby deleted in its entirety, such that Article XI, Section (b) of the Agreement now provides, in its entirety, the following:

(b) On or before August 31, 2024, EPC Contractor, OFE Suppliers and OPPD shall meet and confer regarding the status of Acceptance Tests and progress toward meeting the Guaranteed Substantial Completion Date(s), and EPC Contractor and Suppliers shall commit in writing that the Work will be completed by the Guaranteed Substantial Completion Date(s). Failure to meet the Guaranteed Substantial Completion Date(s) shall be subject to the provisions of subsection (c)(1) below. Such provisions shall be the sole and exclusive remedy for any such failure.

7. Amendment of Article XI – Liquidated Damages. Article XI, Section (c), Subsection (1) (i) and (ii) of the EPC Contract is hereby deleted in its entirety, such that Article XI, Section (c), Subsection (1) (i) and (ii) of the EPC Contract now provides, in its entirety, the following:

(1) Delay in Completion of Work

(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 delay, the Contractor shall be subject to liquidated damages as follows: For each calendar day beyond the Guaranteed

EXHIBIT
A-3

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.

8. Revised Schedule. The Guaranteed Substantial Completion Date for SBLS shall be December 30, 2024, and the Guaranteed Substantial Completion Date for the TCS will now be December 16, 2024.

9. Waiver. Upon execution of this Amendment No. 2 and approval of the Bankruptcy Court, all OPPD's current and future Owner Furnished Equipment (OFE) backcharges will be waived and dismissed and all of Contractor's current and future Potential Change Notices (PCN's) will be waived and dismissed.

10. Assumption. Contractor shall seek Court approval to assume the Agreement (as amended by this Amendment) pursuant to Section 365 of the Bankruptcy Code. The Parties agree that all requirements for assumption of this Agreement (as amended by this Amendment) under section 365(b)(1) of the Bankruptcy Code shall be satisfied upon the Parties' entry into this Amendment No. 2. Contractor acknowledges and agrees that it shall continue to perform all obligations under the EPC Contract (as amended by Amendment No. 1 and Amendment No. 2), including achieving Substantial Completion of the SBLS and the TCS as specified in Section 8 of this Amendment No. 2.

11. Bankruptcy Court Approval and Effectiveness. This Amendment No. 2 shall be effective only upon entry of an order by the Bankruptcy Court of the Southern District of Texas approving Contractor's assumption of the EPC Contract (as amended) pursuant to section 365 of the Bankruptcy Code. Upon entry of such order by the Bankruptcy Court of the Southern District of Texas, Sections 6 and 7 of this Amendment shall take effect retroactively to the date of execution of this Amendment.

EXHIBIT
A-3

12. Effect of Amendment. Except as provided in Amendment No. 1 and this Amendment No. 2, all other terms and conditions of the EPC Contract shall remain the same and in full force and effect.

13. Counterparts. This Amendment may be executed and delivered by facsimile or other electronic means and upon such delivery the facsimile or electronic signature will be deemed to have the same effect as if the original signature had been delivered to the other Party. This Amendment may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

[*Signature Page to Follow*]

EXHIBIT
A-3

IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed by their duly authorized representatives as of the date set forth above.

OMAHA PUBLIC POWER DISTRICT

By: _____

Title: COO

Date: 8/20/2024

ZACHRY INDUSTRIAL, INC.

By: _____

Title: President, EPC

Date: 8/14/2024

EXHIBIT
A-3

Exhibit A-4

EXHIBIT
A-4

Your Energy Partner®
OPPD
Omaha Public Power District

May 30, 2024

Sent Via Email (FoutsL@zachrygroup.com and bunced@zachrygroup.com)

Mr. Lyle Fouts and Mr. Duane Bunce
Zachry Industrial, Inc.
527 Logwood Ave
San Antonio, TX 78221

RE: Engineer, Procure, and Construct Contract Dated September 21, 2021 ("EPC Contract"); Adequate Assurance of Performance

Dear Mr. Fouts and Mr. Bunce:

On May 21, 2024, Zachry Industrial, Inc. ("Zachry Industrial") and other entities filed a petition in bankruptcy under Chapter 11 of the United States Bankruptcy Code in the Southern District of Texas. Zachry Industrial is the Contractor under the EPC Contract for the construction of OPPD's Standing Bear Lake and Turtle Creek Stations. Pursuant to the EPC Contract, OPPD formally requests that, within ten (10) calendar days and prior to further negotiations, Zachary Industrial furnish OPPD with adequate assurance that it can and will make due performance of its obligations under the EPC Contract.

OPPD requires adequate assurance that Zachry Industrial will ensure adherence to the schedule for completion of the work under the EPC Contract; demonstrate its ability to perform and complete construction and commissioning efforts for the power stations; and establish that it will timely meet its obligations to pay subcontractors and suppliers for the projects. In light of the bankruptcy filing, we request that Zachry Industrial furnish OPPD with documentation that Zachary Industrial has obtained debtor-in-possession financing; that Zachry Industrial has the ability and authority to use cash collateral; and that it will provide information demonstrating its financial position to pay subcontractors and suppliers.

Recognizing recent discussions between company leadership, and considering the two power stations are near completion, OPPD appreciates Zachry Industrial's intention to assume the EPC Contract and complete the projects.

If you have any questions, please do not hesitate to call. We will await your timely response.

Your Energy Partner®
OPPD
Omaha Public Power District

Sincerely,

Heather Lauterbach
Contract Specialist
Supply Chain Management Division
Omaha Public Power District

Cc: via email
Matt Eibes, OPPD
Megan Walker, OPPD
Sharyl McGuire, OPPD
Tim Schulte, OPPD
John Wichman, OPPD
Dean Fleege, OPPD
Troy Via, OPPD
Steve Bruckner, Fraser Stryker
Matt Ferguson, HDR
Brad Reece, Zachry
Ralph Biediger, Zachry

Exhibit A-5

EXHIBIT
A-5

100 YEARS OF ZACHRY

June 6, 2024

Sent Via Email

Heather Lauterbach
Contract Specialist
Supply Chain Management Division
Omaha Public Power District ("**OPPD**")

Dear Ms. Lauterbach,

Zachry Industrial, Inc. ("**Zachry**") is in receipt of your letter dated May 30, 2024 (the "**Letter**"), requesting adequate assurance of future performance by Zachry under that certain Engineer, Procure, and Construct Contract dated September 21, 2021 (the "**EPC Contract**"). As you are aware, Zachry (and certain of our affiliates, collectively, the "**Debtors**") filed chapter 11 cases in the United States Bankruptcy Court for the Southern District of Texas (the "**Bankruptcy Court**") on May 21, 2024 (the "**Petition Date**"). An "automatic stay," came into effect by operation of law on the Petition Date and prevents contract counterparties from taking actions to recover amounts that accrued prior to the Petition Date or commencing actions to recover on claims that arose before the Petition Date. 11 U.S.C. § 362(a).

Despite the automatic stay, Zachry continues work on your projects. Zachry is working collaboratively with OPPD and appreciates OPPD's cooperation with Zachry through this process. Zachry has not sought permission to assume the EPC Contract and is under no obligation to make its decision to assume or reject the EPC Contract until confirmation of a reorganization plan.

Zachry is open to assuming the EPC Contract (which would require the "cure" of alleged defaults thereunder), subject to the modifications that Mr. Ralph Biediger recently discussed with OPPD leadership. Those requests include a request that OPPD direct-pay prepetition vendor expenses using the balance of the retention, which we understand is approximately $20.3M, and that OPPD waive its right to recover Liquidated Damages under the EPC Contract. We also appreciate your willingness to shorten the cycle for making progress payments.

As a debtor-in-possession, Zachry is authorized to operate in the ordinary course of business and to honor its post-petition obligations to customers. *See* 11 U.S.C. §§ 363(c)(1), 1107 & 1108. To enable its continued performance under the EPC Contract (and otherwise during the chapter 11 cases), Zachry has obtained authority to use cash collateral with the consent of its lenders. We have also obtained the authority to pay certain prepetition amounts necessary to maintain our operations in the ordinary course, such as employee wages, taxes, utilities, and insurance, and have the ability to pay certain "critical" vendors, subject to requirements established by the Bankruptcy Court. *See In re Zachry Holdings Inc.*, Case No. 24-90377 (Bankr. S.D. Tex.), Docket Nos. 48, 56, 57, 58 & 80.[1] For more detail regarding Zachry's consensual use of cash collateral, please see the Cash Collateral Order entered by the Bankruptcy Court on May 22, 2024.[2]

As detailed in Exhibit 1 to the Cash Collateral Order (the Debtors' cashflow forecast), the Debtors have ample capitalization and liquidity to continue operating and performing all post-petition obligations to customers in the ordinary course of business. As demonstrated in the Cash Forecast and attested to in the

[1] All docket number references herein are to the Debtors' above-cited chapter 11 cases.

[2] The "**Cash Collateral Order**" is the *Interim Order (I) Authorizing Postpetition Use Of Cash Collateral, (II) Granting Adequate Protection To the Prepetition Secured Parties, (III) Modifying the Automatic Stay, (IV) Scheduling a Final Hearing, and (V) Granting Related Relief* [Docket No. 59].

EXHIBIT A-5

Debtors' First Day Declaration[3] filed with the Bankruptcy Court on the Petition Date, the Debtors had approximately $163.3 million in cash on hand on the Petition Date, which, along with cash generated from operations, is expected to provide sufficient liquidity to meet ongoing business obligations during the chapter 11 cases.

We look forward to continuing to work on the project and working with you in good faith on the EPC Contract and would be pleased to discuss these matters with you in additional detail at your convenience.

Sincerely,

James R. Old, Jr.
General Counsel

Cc: via email
Matt Eibes, OPPD
Megan Walker, OPPD
Sharyl McGuire, OPPD
Tim Schulte, OPPD
John Wichman, OPPD
Dean Fleege, OPPD
Troy Via, OPPD
Steve Bruckner, Fraser Stryker
Matt Ferguson, HDR
Brad Reece, Zachry
Ralph Biediger, Zachry

[3] The **"First Day Declaration"** is the *Declaration of Mohsin Y. Meghji In Support of Debtors' Petitions and Requests for First Day Relief* [Docket No. 7].

EXHIBIT
A-5

Exhibit A-6

EXHIBIT
A-6

100 YEARS OF ZACHRY

June 20, 2024

Matthew R. Eibes
Director – Project Management Office, Utility Operations
Omaha Public Power District
1101 North 180th Street / ELK-5
Elkhorn, NE 68022

Subject: Amendment #2 to Contract #263406 EPC Construction of TCS and SBL Stations

Dear Mr. Eibes,

Please see the attached proposed Amendment #2. This proposed amendment reflects the changes as discussed in the meeting between OPPD and CONTRACTOR on June 12th, 2024.

The proposed amendment address:

- Suggested changes to withholding retention and timing of payments for future Milestone Payment Schedule;
- Change in the Guarantee Substantial Completion date for both Standing Bear and Turtle Creek Project along with LD dates; and
- Payment of pre-petition claims and release of retainage.

Please review the attached proposed amendment and let me know your thoughts and comments or if acceptable please execute and return to me.

Regards,

Brad Reece
Sr. Vice President of Projects
Operations
Zachry Group

Cc: via email
Ralph Biediger
Jay Old
Lyle Fouts
Duane Bunce
Steve Bruckner
Matt Eibes
Jonathan Parker
John Wichman
Matt Ferguson

527 Logwood Ave
San Antonio, TX 78221
O: 210-588-5000
www.zachrygroup.com

EXHIBIT
A-6

CONFIDENTIAL SETTLEMENT COMMUNICATION
SUBJECT TO FRE 408 & ALL SIMILAR PROTECTIONS

AMENDMENT NO. 2 TO ENGINEER, PROCURE, AND CONSTRUCT CONTRACT FOR OMAHA PUBLIC POWER DISTRICT STANDING BEAR LAKE AND TURTLE CREEK GENERATING STATIONS (CONTRACT NO. 263406)

This AMENDMENT NO. 2 to Contract No. 263406 (this "**Amendment**") is entered into as of this ___ day of June, by and between Omaha Public Power District, a public corporation and political subdivision of the State of Nebraska ("**OPPD**"), and Zachry Industrial, Inc., a Texas corporation ("**Contractor**") (together with OPPD, the "**Parties**" or individually, a "**Party**").

WHEREAS, OPPD and Contractor are parties to that certain *Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations* (Contract No. 263406) dated 21 of September, 2021 (the "**Agreement**");

WHEREAS, Contractor and certain of its affiliates (collectively, the "**Debtors**") filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code (the "**Bankruptcy Code**") in the United States Bankruptcy Court for the Southern District of Texas ("**Bankruptcy Court**") on May 21, 2024 (the "**Petition Date**"), which initiated the chapter 11 cases (the "**Chapter 11 Cases**") now jointly administered under lead case number 24-90377 (MI);

WHEREAS, as of the Petition Date the Debtors owe approximately $[•] million in prepetition amounts to Subcontractors (as defined below);

WHEREAS, pursuant to Article IV, Subsection (b) of the Agreement, OPPD withholds five percent (5%) of each Milestone Payments owed to Contractor as retainage and as of the Petition Date, Contractor is owed $[•] million in retainage (the "**Retainage**"), all of which is prepetition; and

WHEREAS, OPPD and Contractor desire to amend the Agreement as described herein.

NOW, THEREFORE, in consideration of the mutual covenants set forth below, the Parties agree as follows:

1. Defined Terms. Unless otherwise defined herein, all capitalized terms used herein shall have the meanings ascribed thereto in the Agreement.

2. Amendment of Article IV – Contract Price, Payment. Article IV, Subsection (b) of the Agreement is hereby deleted in its entirety and replaced in its entirety with the following:

> (b) Milestone Payments. Contractor shall submit an invoice, on the tenth (10th) day of the month, showing milestones completed and payments due for those milestones in accordance with the Milestone Payment Schedule set forth in Exhibit G. Approval by the District of the invoice shall be made within fifteen (15) days of receipt and milestone payments shall be promptly made to the Contractor in the amount of one hundred percent (100%) of

EXHIBIT
A-6

the approved invoice. Upon the District's approval that Contractor has achieved Substantial Completion of the Work for TCS or SBLS, the District shall, upon Contractor invoicing, within thirty (30) calendar days, pay Contractor all monies held by the District less the value of the Punch List items at Substantial Completion for the Site. Contractor may submit one additional invoice for punch list items completed within thirty (30) calendar days of Substantial Completion. All remaining completed punch list items will be paid upon Final Completion. Milestone payments will be made by electronic transfer of immediately available funds within ten (10) days of submission of the invoice. Payment of such monthly milestone payments by the District shall not be construed or deemed to be an acceptance of the Work covered thereby.

3. Amendment of Article IV – Contract Price, Payment. Article IV of the Agreement, is hereby amended to include Section (i):

(i) OPPD shall directly pay all amounts that arose prior to the Petition Date ("**Prepetition Amounts**") owed to Contractor's subcontracts, suppliers, and vendors (the "**Subcontractors**") in connection with work related to the Agreement, as follows:

(i) Contractor may instruct, by written notice to OPPD, and OPPD shall directly pay, from the Retainage, those certain priority Subcontractors ("**Priority Subcontractors**") identified by Contractor to OPPD via written notice (email being sufficient), which written notice shall state the amount to be paid along with all relevant payment information, and OPPD shall pay such Subcontractors by no later than [five (5)] business days from receipt of such notice or on such other timeline as agreed between the Parties in writing (email being sufficient). With respect to all payments made pursuant to this Subsection (i), other than paying such claims from the Retainage or reducing the Retainage on a dollar-for-dollar basis in the amount paid to the applicable Priority Subcontractors, OPPD hereby (x) agrees that it shall not seek to collect such amounts from Contractor or any of the other Debtors, whether by recoupment, setoff, indemnity, asserting a proof of claim in the Chapter 11 Cases, or by any means, and (y) waives and releases all claims against Contractor and the Debtors for any amounts paid pursuant to this Subsection (i); in each case effective immediately upon payment of the applicable Priority Subcontractor.

EXHIBIT A-6

(ii) OPPD shall directly pay the all other Prepetition Amounts owed to the Subcontractors ("**Other Subcontractors**") by no later than [**DATE/TIMELINE**]. Contractor shall provide OPPD with information sufficient for OPPD to make such payments to Other Subcontractors at least [five (5)] business days prior to the date scheduled for each such payment. With respect to all payments made pursuant to this Subsection (ii), OPPD hereby (x) agrees that it shall not seek to collect such amounts from Contractor or any of the other Debtors, whether by recoupment, setoff, indemnity, asserting a proof of claim in the Chapter 11 Cases, or by any means, and (y) waives and releases all claims against Contractor and the Debtors for any amounts paid pursuant to this Subsection (i); in each case effective immediately upon payment of the applicable Other Subcontractor; *provided* that, to the extent there exists any remaining Retainage after all Priority Subcontractors have been paid, OPPD may reduce the Retainage on a dollar-for-dollar basis in the amount paid to the applicable Other Subcontractors.

(iv) Where a payment is made pursuant to (i) or (ii), above, OPPD shall (x) at the time of such payment provide to Contractor with confirmation of the payment and (y) as soon as reasonably practicable after making payment, a copy of such payment.

4. Amendment of Article XI – Liquidated Damages. Article XI, Section (b) of the Agreement, is hereby deleted in its entirety, such that Article XI, Section (b) of the Agreement now provides, in its entirety, the following:

(b) On or before August 31, 2024, EPC Contractor, OFE Suppliers and OPPD shall meet and confer regarding the status of Acceptance Tests and progress toward meeting the Guaranteed Substantial Completion Date(s), and EPC Contractor and Suppliers shall commit in writing that the Work will be completed by the Guaranteed Substantial Completion Date(s). Failure to meet the Guaranteed Substantial Completion Date(s) shall be subject to the provisions of subsection (c)(1) below. Such provisions shall be the sole and exclusive remedy for any such failure.

5. Amendment of Article XI – Liquidated Damages. Article XI, Section (c), Subsection (1) (i) and (ii) of the Agreement is hereby deleted in its entirety, such that Article XI, Section (c), Subsection (1) (i) and (ii) of the Agreement now provides, in its entirety, the following:

(1) Delay in Completion of Work

EXHIBIT A-6

(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 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, $125,000 per calendar day through December 31, 2024, and $250,000 per calendar day, from January 1, 2025, 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 April 20, 2025, then on April 21, 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, $50,000 per calendar day, through November 20, 2024, and $100,000 per calendar day, from November 21, 2024, 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 April 20, 2025, then on April 21, 2025, Contractor shall pay the remainder of such maximum liquidated damages applicable to TCS.

6. Schedule. Guaranteed Substantial Completion Date for Standing Bear Project will now be December 16, 2024 and Guaranteed Substantial Completion Date for the Turtle Creek Project will now be November 20, 2024.

7. Reservation of Rights. The Parties intend, agree, and acknowledge that their entry into this Amendment shall not constitute an assumption, assumption and assignment, or rejection of the Agreement pursuant to section 365 of the Bankruptcy Code. The Agreement remains subject to assumption, assumption and assignment, or rejection under section 365 of the Bankruptcy Code, provided that any cure payment in connection with the Agreement will be made, if at all, only in connection with assumption of the Agreement after approval by the Bankruptcy Court or as otherwise agreed to by OPPD and Contractor with the approval of the Bankruptcy Court, and not upon execution of this Amendment. The Parties further intend, agree, and acknowledge that nothing herein nor the fact of their entry into this Amendment shall have the effect of converting any claims under the Agreement that arose prior to the Petition Date from "prepetition" general unsecured claims against the Debtors to "postpetition" administrative expense claims against the Debtors entitled to priority under section 503(b)(1) or another section of the Bankruptcy Code to the extent such claims would not have been entitled to priority absent this Amendment.

8. Effect of Amendment. Except as provided in this Amendment, all other terms and conditions of the Agreement shall remain the same and in full force and effect.

9. Counterparts. This Amendment may be executed and delivered by facsimile or other electronic means and upon such delivery the facsimile or electronic signature will be deemed to have the same effect as if the original signature had been delivered to the other Party. This

EXHIBIT
A-6

Amendment may be executed in one or more counterparts, all of which taken together shall constitute one and the same instrument.

[*Signature Page to Follow*]

EXHIBIT
A-6

IN WITNESS WHEREOF, the Parties have caused this Amendment to be executed by their duly authorized representatives as of the date set forth above.

OMAHA PUBLIC POWER DISTRICT

By: _____

Title: _____

Date: _____

ZACHRY INDUSTRIAL, INC.

By: _____

Title: _____

Date: _____

EXHIBIT
A-6

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

In re:	§	Chapter 11
ZACHRY HOLDINGS, INC., *et al*	§	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 KIMBERLY REOME

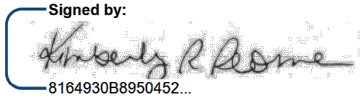
I, Kimberly Reome, pursuant to 28 U.S.C. § 1746, declare under penalty of perjury that the following is true and correct:

1. I am over 21 years old. I am of sound mind and capable of submitting the testimony herein (including all exhibits and attachments incorporated herein). I submit this declaration in support of Omaha Public Power District's opposition to Zachry Holdings, Inc.'s Motion for Partial Summary Judgment on Liquidated Damages, filed in the above-referenced adversary proceeding.

2. I have prepared the *Expert Report of Kimberly Reome*, which is attached hereto and entirely incorporated herein as if set forth verbatim. I make the statements of fact herein (including all exhibits and attachments incorporated herein) from my own personal knowledge, research, and analyses. If called as a witness in this proceeding, I would testify competently to the contents set forth herein (including all exhibits and attachments incorporated herein).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of May, 2025.

Signed by:

8164930B8950452...

Kimberly Reome

EXHIBIT
B

CASE NO. 24-90377 AND 25-03025

IN THE MATTER OF A LITIGATION BETWEEN

ZACHRY HOLDINGS, INC — PLAINTIFF

AND

OMAHA PUBLIC POWER DISTRICT — DEFENDANT

EXPERT REPORT OF KIMBERLY REOME

May 19, 2025

ON BEHALF OF: Omaha Public Power District

PREPARED FOR: Foley & Lardner LLP

SUBJECT MATTER: Damages

Signed by:
8164930B8950452...

KIMBERLY REOME

May 19, 2025

HKA Global, LLC
300 South Wacker Drive
Suite [illegible]
Chicago, Illinois 60606

EXHIBIT B

CONTENTS

1. EXECUTIVE SUMMARY 3
1.1 OVERVIEW 3
1.2 SUMMARY OF OPINIONS 3

2. INTRODUCTION 4
2.1 EXPERT QUALIFICATIONS 4
2.2 ASSISTANCE 5
2.3 RETENTION 5
2.4 INFORMATION AND MATERIALS PROVIDED AND RELIED UPON 5
2.5 THE PROJECTS 6
2.6 BACKGROUND TO THE DISPUTE AND THE ISSUES 6

3. METHODOLOGY 8

4. RESPONSE TO BODELL DECLARATION 9

5. OPPD'S LIQUIDATED DAMAGES ARE A REASONABLE APPROXIMATION OF ACTUAL DAMAGES 12

6. OPPD'S ACTUAL DAMAGES 15
6.1 SUMMARY OF ACTUAL DAMAGES 15
6.2 CAPACITY PURCHASES 16
6.3 MISSED MARKET ENERGY NET REVENUE 18
6.4 NATURAL GAS DAMAGES 19
Turtle Creek Station – Firm Natural Gas Transport 19
Standing Bear Lake Station – Natural Gas and Propane Service Costs 20
6.5 LOST RETAIL CAPACITY REVENUE 21
6.6 EXTENDED PROJECT COSTS 23

APPENDICES

Appendix A Kimberly Reome Curriculum Vitae
Appendix B Kimberly Reome Testimony List
Appendix C List of Documents Considered

INDEX OF EXHIBITS

Exhibit 1 Liquidated Damages 15% Cap
Exhibit 2 Summary Of Damages
Exhibit 3 Capacity Purchases Summary
Exhibit 4 Missed Energy Market Net Revenue – Turtle Creek Station
Exhibit 4.1 Missed Energy Market Net Revenue – Standing Bear Lake Station
Exhibit 5 Turtle Creek Firm Natural Gas Station Transport Summary
Exhibit 5.1 Standing Bear Lake Station National Gas and Propane Services Costs
Exhibit 6 Lost Retail Capacity Revenue
Exhibit 7 Project Costs OPPD Incurred From Missed Guaranteed Substantial Completion Dates

INDEX OF FIGURES

Figure 1: MISO Capacity Pricing 12

INDEX OF TABLES

Table 1: Liquidated Damages Provisions In EPC Contract and Amendments 14
Table 2: Summary of OPPD Actual Damages 16
Table 3: Capacity Purchases 17
Table 4: Missed Energy Market Net Revenue 19
Table 5: Turtle Creek Firm Natural Gas Transport Cost 20
Table 6: Standing Bear Natural Gas and Propane Service Costs 21
Table 7: Lost Retail Capacity Revenue 22

1. EXECUTIVE SUMMARY

1.1 OVERVIEW

1.1.1 I have been requested to opine on the calculation of Omaha Public Power District's ("OPPD") damages resulting from Zachry's[1] failure to reach Guaranteed Substantial Completion on construction of two power plants. The issues which I have been requested to provide my opinion on are as follows:

a) Calculate OPPD's contractual Liquidated Damages.

b) As an alternate measure of damages, review OPPD's calculation of actual damages.

c) Determine if OPPD's Liquidated Damages are a reasonable approximation of OPPD's actual damages.

d) Review and respond to the opinions on damages expressed in the Declaration of Tanya Bodell, filed on behalf of Zachry.

1.2 SUMMARY OF OPINIONS

1.2.1 Based on my analysis of the information available to date, it is my opinion that:

a) OPPD's Liquidated Damages due to Zachry's delay of the Guaranteed Substantial Completion Date are approximately $64.3 million.

b) OPPD's Liquidated Damages are a reasonable approximation of actual damages.

c) Liquidated Damages are commonly used when actual losses are difficult to ascertain with precision, as is the case here.

d) OPPD's actual damages to date are substantial and ongoing, and based on available data, those damages are expected to ultimately exceed $64.3 million, and may be much higher. OPPD's damages are expected to continue through at least December 2025.[2]

[1] "Zachry" is defined in ¶ 2.6.1 below.

[2] I understand that Zachry promised multiple Substantial Completion dates at different times, and that OPPD is currently estimating damages through December 2025. If Substantial Completion is reached earlier or later, my opinion on damages may be updated based on the final date achieved.

e) Ms. Bodell has significantly understated OPPD's actual damages. Ms. Bodell only estimated certain categories of actual damages, and for those categories she did consider, OPPD's actual damages are greater than what she estimated. Ms. Bodell did not provide workpapers allowing a detailed review of her analysis. Ms. Bodell's analysis only considered a limited time period, used capacity pricing from a different location, failed to consider the volatility in capacity prices, and the pricing she used is already outdated. As a result, her opinion does not represent a reliable or comprehensive assessment of OPPD's economic loss.

f) I understand discovery has been limited to date. As a result, I reserve the right to amend my opinion as information becomes available.

2. INTRODUCTION

2.1 EXPERT QUALIFICATIONS

2.1.1 I, Kimberly R. Reome, am a Partner of HKA Global, LLC ("HKA"), based in the company's Chicago office. HKA is a consulting firm of accounting, financial, economic, and engineering professionals with expertise in the evaluation of economic damages and the determination of delays in the construction and electric power industries. HKA's professionals have substantial experience regarding financial, accounting, economic, business operations, and damages issues on complex commercial litigation.

2.1.2 I have a Bachelor of Arts in Finance from Michigan State University Honors College and a Master of Business Administration from Northwestern University Kellogg School of Management. I am a Certified Construction Industry Financial Professional and a Certified Fraud Examiner.

2.1.3 I have over 30 years of experience analyzing, quantifying, and developing damages analyses, with experience analyzing accounting, financial, and economic issues in various types of disputes, with a primary focus in the electric power and construction industries. I have provided expert testimony, authored expert reports, and assisted in the production of expert reports on numerous electric power and construction disputes. My experience includes calculating damages for matters relating to power plants, including calculation of replacement power and capacity costs during power plant shutdowns and derates.

2.1.4 My Curriculum Vitae and list of testimony experience are appended to this Report at Appendices A and B, respectively.

2.2 ASSISTANCE

2.2.1 I have been assisted by others in the preparation of this Report. I confirm that these individuals worked under my supervision and direction.[3]

2.2.2 The opinions expressed in this Report are mine and mine alone.

2.3 RETENTION

2.3.1 HKA has been retained by Foley & Lardner LLP ("Foley"), acting on behalf of OPPD, to provide expert opinion on OPPD's damages incurred for delay in substantial completion on two electric generating stations.

2.3.2 HKA billed for my services on this matter at a rate of $695 per hour. Rates of consultants working under my direction range from $175 to $595 per hour. No compensation to be paid to HKA is contingent on the outcome of this matter or the content of these opinions.

2.4 INFORMATION AND MATERIALS PROVIDED AND RELIED UPON

2.4.1 In connection with my analysis, I relied on information and documents provided by the parties to this litigation, various pleadings, discussions with client personnel and Counsel, publicly available information, and my own education, training and experience analyzing similar issues as those raised in this case. This report, which sets forth my qualified opinions and the basis for those qualified opinions, relies on the information available, reviewed, and analyzed as of May 19, 2025. See Appendix C for a list of documents and information considered.

2.4.2 Since discovery—including document production—has not yet commenced,[4] and I understand that no depositions have occurred, it is likely that additional information will be available for my review and consideration at a later date. I reserve the right to amend this Report if further information or documents are provided to me or otherwise become available to me. I reserve the right to respond to any additional information obtained through discovery or issues raised by experts retained by Zachry, if any.

2.4.3 In connection with my anticipated trial testimony in this action, I reserve the right to prepare additional exhibits, charts, graphs, tables, demonstratives, and diagrams to summarize or support

[3] As used herein, other than references to my education and experience, "I" and "We" shall mean either I personally or those HKA personnel under my supervision. Also, "My", "Our", and "Us" shall also refer to actions taken by me personally or by those HKA personnel under my supervision.
[4] *Joint Discovery/Case Management Plan Under Federal Rule of Civil Procedure 26(f)* dated April 7, 2025, ¶ 11.

the opinions and analyses set forth in this Report. If called as a witness at trial, I may testify to some or all of the opinions in this Report. I will notify Foley, in writing, if, for any reason, my existing report requires any correction or qualification that impacts my opinion(s). I have not yet created such exhibits as of this report's date.

2.4.4 My opinion is based on the assumptions that: My understanding of the EPC Contract is not intended to represent a legal opinion about the interpretation of the contract. I have been asked to assume liability. I am not opining on the causes of schedule delay, as I understand that issue is addressed by others.

2.5 THE PROJECTS

2.5.1 On September 21, 2021, OPPD entered into an Engineer, Procure, and Construct contract with Zachry to construct two power plants ("EPC Contract"): Standing Bear Lake Station ("Standing Bear") and Turtle Creek Station ("Turtle Creek") (collectively, the "Projects").[5]

2.5.2 Standing Bear is a 150-megawatt ("MW") station, and Turtle Creek is a 450-MW station. Both stations are powered by natural gas and fuel oil. Standing Bear is located in Omaha, Nebraska, and Turtle Creek in Springfield, Nebraska.[6]

2.6 BACKGROUND TO THE DISPUTE AND THE ISSUES

2.6.1 The Parties to this dispute are as follows:

a) Plaintiff Zachry Holdings, Inc. is a prominent company in North America, specializing in turnkey engineering, construction, maintenance, turnaround, and fabrication services for the energy, chemicals, power, manufacturing, and industrial sectors.[7]

b) Plaintiff Zachry Industrial, Inc. ("Zachry" or "Contractor") is a subsidiary of Zachary Group, headquartered in San Antonio, Texas.[8] The company specialized in heavy and civil

[5] Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations, Contract No. 263406 ("EPC Contract") dated September 21, 2021, p.1.
[6] "Standing Bear Lake Station," OPPD, last updated April 8, 2025, https://www.oppdcommunityconnect.com/standing-bear-lake-station; "Turtle Creek Station," OPPD, last updated May 16, 2025, https://www.oppdcommunityconnect.com/turtle-creek-station.
[7] Zachry Group website, https://zachrygroup.com/; and "Zachry Holdings, Inc. Receives Court Approval For Restructuring Plan," Zachry, February 26, 2025, https://zachrygroup.com/newsandstories#press-releases.
[8] "Zachry Industrial, Inc.," Dun & Bradstreet Business Directory, https://www.dnb.com/business-directory/company-profiles.zachry_industrial_inc.81b945ea3ce2b060d13669d1a358e401.html.

engineering construction, providing services such as engineering, procurement, construction ("EPC"), and maintenance for energy and industrial sectors.[9,10]

c) Plaintiffs Zachry Holdings, Inc. and Zachry and their affiliated debtors (collectively referred to as the "Reorganized Debtors")[11] filed a lawsuit against Omaha Public Power District, a Nebraska public electric utility.[12]

d) Defendant Omaha Public Power District ("OPPD") is a publicly owned electric utility serving the Omaha metropolitan area and surrounding regions in Nebraska.[13]

2.6.2 Relevant non-party Siemens Energy, Inc. ("Siemens") is a leading global energy technology company. The company focuses on providing innovative solutions across the energy landscape, including gas turbines, power plants, digital grids, and renewable energy technologies.[14]

2.6.3 Relevant non-party Wartsila North America, Inc. ("Wartsila") is a subsidiary of Wartsila Corporation, headquartered in Houston, Texas.[15] The company is a leader in innovative technologies and lifecycle solutions for the marine and energy markets. Wartsila provides flexible power plants, marine propulsion systems, and supports customers throughout the lifecycle of their installations.[16]

2.6.4 Wartsila and Siemens are the Owner Furnished Equipment contractors responsible for providing the engines and generators that will power Standing Bear and Turtle Creek, respectively.[17]

2.6.5 On May 21, 2024, Zachry filed for Chapter 11 bankruptcy.[18]

2.6.6 I understand that OPPD's position is that Zachry has yet to complete the Projects and has not met the Guaranteed Substantial Completion Date. The parties dispute whether Substantial

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[9] Zachry Group website, https://zachrygroup.com/.
[10] For the purpose of this report, Zachry Holdings, Inc. and Zachry Industrial, Inc. are referred to interchangeably as Zachry.
[11] 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. (See Zachry Holdings, Inc., et al., Verita, https://www.veritaglobal.net/ZHI).
[12] The Reorganized Debtors' First Amended Adversary Complaint ("First Amended Complaint") dated April 11, 2025.
[13] OPPD website, https://www.oppd.com/, and "Quick Facts," OPPD, December 31, 2024, https://www.oppd.com/media/204897/quick-facts.pdf.
[14] Siemens Energy website, https://www.siemens-energy.com/us/en/home.html.
[15] "Wartsila North America, Inc." Dun & Bradstreet Business Directory, https://www.dnb.com/business-directory/company-profiles.wartsila_north_america_inc.cebf621ddbcbf6905b19e949b4f8b67f.html.
[16] Wartsila website, https://www.wartsila.com/usa.
[17] *Order Granting Complex Chapter 11 Bankruptcy Cases Treatment* dated May 21, 2024.
[18] First Amended Complaint, ¶ 15.

Completion has been reached.[19] I understand Certificates of Substantial Completion have not been issued. OPPD assessed Liquidated Damages of not less than $38 million against Zachry as of February 14, 2025.[20] Zachry filed suit against OPPD in the U.S. Bankruptcy Court for the Southern District of Texas, Case No. 24-90377 and Adversary Proceeding No. 25-03025. Zachry disputes owing Liquidated Damages.[21]

3. METHODOLOGY

3.1.1 Damages are generally calculated as the difference between the actual costs incurred and the costs that would have been incurred.[22] Damages are recoverable if they represent financial loss suffered and if they would place the injured party in the same position as it would have been had there been no breach of contract.[23] In this case, I calculated OPPD's damages caused by Zachry's delays.

3.1.2 Parties generally use liquidated damages clauses in contracts to stipulate an amount for damages in the event of a particular breach.[24]

3.1.3 Liquidated damages are generally explained as follows:

> "[A] liquidated damage provision . . . is a contractual instrument fixing compensatory damages in the event of late completion of a defined scope of work. Regardless of the milestone or event to which the damage rate applies (that is, substantial completion, a defined portion of the work, the submission of shop drawings, or the delivery of equipment), ***it must represent a reasonable estimate, at the time of contracting, of the damages*** a party will incur in the event of failure to achieve the defined milestone on schedule. In other words, ***liquidated damages must compensate rather than punish*** for a delay or breach." [emphasis added][25]

3.1.4 Liquidated damages may also be an appropriate measure of damages when losses would be difficult, or even impossible, to estimate with any accuracy when the parties enter into a contract.[26]

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[19] First Amended Complaint, ¶ 104.

[20] *Omaha Public Power District's Application for Allowance of Administrative Expense Claim* dated February 14, 2025, ¶ 17-18; *Order Granting Omaha Public Power District's Application for Allowance of Administrative Expense Claim* dated February 14, 2025, ¶ 2. Because Zachry had not yet achieved Substantial Completion as of February 14, 2025, liquidated damages continue to accrue.

[21] First Amended Complaint, ¶ 109.

[22] "Damages for breach of contract should seek to place the party alleging breach in the same position it would have been in, had the contract been fully performed." William Schwartzkopf, *Calculating Construction Damages* § 1.03 General Methods of Damage Calculation (Fourth Edition, 2025-2 Supp. 2021).

[23] William Schwartzkopf, *Calculating Construction Damages* § 1.01 Introduction to General Principles of Damage Calculation (Fourth Edition, 2025-2 Supp. 2021).

[24] Neal J. Sweeney, Chad V. Theriot, Christopher D. Cazenave, Tiffany C. Raush & Lauren Lesueur, *Construction Law Update* § 2.01 Introduction (2024 Edition 2021).

[25] William Schwartzkopf, *Calculating Construction Damages* § 18.02 Purpose of Liquidated Damages (Fourth Edition, 2025-2 Supp. 2021) Fourth Edition, 2025-2 Supp. See also Barry B. Bramble & Michael T. Callahan, *Construction Delay Claims* § 2.15 Liquidated Damages (Seventh Edition, 2025-1 Supp. 2020).

[26] Barry B. Bramble & Michael T. Callahan, *Construction Delay Claims* § 2.15 Liquidated Damages (Seventh Edition, 2025-1 Supp. 2020).

3.1.5 In addition to the methodology described in this section, my more specific methodology for each opinion is discussed in Sections 4 through 6 below.

4. RESPONSE TO BODELL DECLARATION

4.1.1 Tanya Bodell of StoneTurn issued a declaration on April 28, 2025 ("Bodell Declaration"). The Bodell Declaration was intended to support Zachry's Motion for Partial Summary Judgment on Liquidated Damages and was included as Exhibit I.[27]

4.1.2 In my opinion, Ms. Bodell's analysis is understated. Ms. Bodell only estimated certain categories of actual damages, and for those categories she did consider, OPPD's actual damages are greater than what she estimated. Ms. Bodell did not provide any workpapers for HKA to perform a detailed review of Ms. Bodell's analysis. Ms. Bodell's analysis only considered a limited time period, used capacity pricing from a different location, and failed to consider the volatility in capacity prices. Each of these points is further discussed in the following paragraphs. As a result, Ms. Bodell's opinion does not represent a reliable or comprehensive assessment of OPPD's economic loss.

4.1.3 In summary, the Bodell Declaration opined on an estimate of OPPD's economic damages and compared to the contracted-for liquidated damages.[28]

4.1.4 The Bodell Declaration calculated that the Liquidated Damages cap of 15% was reached on February 20, 2025.[29]

4.1.5 Ms. Bodell performed her own calculations of what she believes are appropriate actual OPPD damages, to support her opinion that "Liquidated Damages significantly exceed estimated economic damages that OPPD incurred."[30] Ms. Bodell performed her calculation of OPPD's damages by using market prices for electricity.[31]

4.1.6 The Bodell Declaration notes that discovery in this matter has not yet occurred:

> "I understand that Zachry has requested, but not received, information from OPPD concerning its electricity purchases and other actions taken to address peak demand during the delay in Substantial Completion of the Facilities. If and as additional information becomes available, I reserve the right to modify or supplement my opinion and this declaration accordingly."[32]

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[27] *Reorganized Debtors' Motion For Partial Summary Judgment Re: Liquidated Damages* dated April 28, 2025, Exhibit I - Bodell Declaration, ¶ 1.
[28] Bodell Declaration, ¶ 9.
[29] Bodell Declaration, ¶ 20.
[30] Bodell Declaration, ¶ 21.1.
[31] Bodell Declaration, ¶ 21.5.
[32] Bodell Declaration, ¶ 11.

4.1.7 Similarly, OPPD and HKA have received no information from Zachry to quantify damages because there has been no discovery.

4.1.8 In my opinion, Ms. Bodell's analysis results in an estimate of OPPD's actual damages that is understated. Ms. Bodell only estimated certain categories of actual damages, and for those categories she did consider, OPPD's actual damages are greater than what she estimated. Ms. Bodell only estimates certain categories of damages (energy and capacity). OPPD estimated its actual damages, which I have reviewed. OPPD's actual damages include categories of damages that Ms. Bodell did not consider (Firm Natural Gas Transport, Lost Retail Capacity Revenue, and Extended Project Costs). For the categories she did consider, OPPD's actual damages are greater than what Ms. Bodell estimated (these categories are Capacity Purchases and Missed Market Energy Net Revenue).

4.1.9 Ms. Bodell's analysis only considered a limited time period. Ms. Bodell estimated her damages calculation for the period December 17, 2024 to April 15, 2025.[33] Because Zachry has not yet met Substantial Completion, OPPD's damages continue to accrue. OPPD estimated its damages through December 2025.[34] The amounts presented for OPPD's actual damages in Section 6 below are subject to change because the Projects themselves are not complete. Because Ms. Bodell cut off her damages analysis on April 15, 2025, she has greatly underestimated OPPD's actual damages.

4.1.10 HKA has not received any workpapers supporting Ms. Bodell's analysis. The Bodell Declaration provides summary-level tables and charts, that must be supported by detailed calculations, which have not been provided to HKA to review. Without Ms. Bodell's supporting calculations and analyses, HKA is not able to review her calculations in detail to respond accordingly. For example, Ms. Bodell describes, "Key inputs used to calculate damages using the ex-post approach and actual pries that occurred include the following" and then lists "Damages Period, Plant Heat Rate, Variable O&M, Quantity, Energy Price, Ancillary Services Price, and Capacity Price" as inputs.[35] For HKA to respond fully to Ms. Bodell's calculations, we would need to be provided the details behind her assumptions and calculations for review.

4.1.11 Ms. Bodell's analysis used capacity pricing from a different location and failed to consider the volatility in capacity prices.

[33] Bodell Declaration, ¶ 21.6.
[34] See Section 6 and Table 2 below.
[35] Bodell Declaration, Exhibit E – Assumptions, Section E.1 – Ex-Post Historical Analysis.

4.1.12 Ms. Bodell stated that Southwest Power Pool ("SPP") does not operate a centralized market for capacity, and therefore she used capacity pricing for a neighboring market, Midcontinent Independent System Operator ("MISO") capacity market in Iowa (MISO Zone 3).[36] In my opinion, Ms. Bodell used the wrong market: OPPD operates in the SPP market, not the MISO market that Ms. Bodell used.

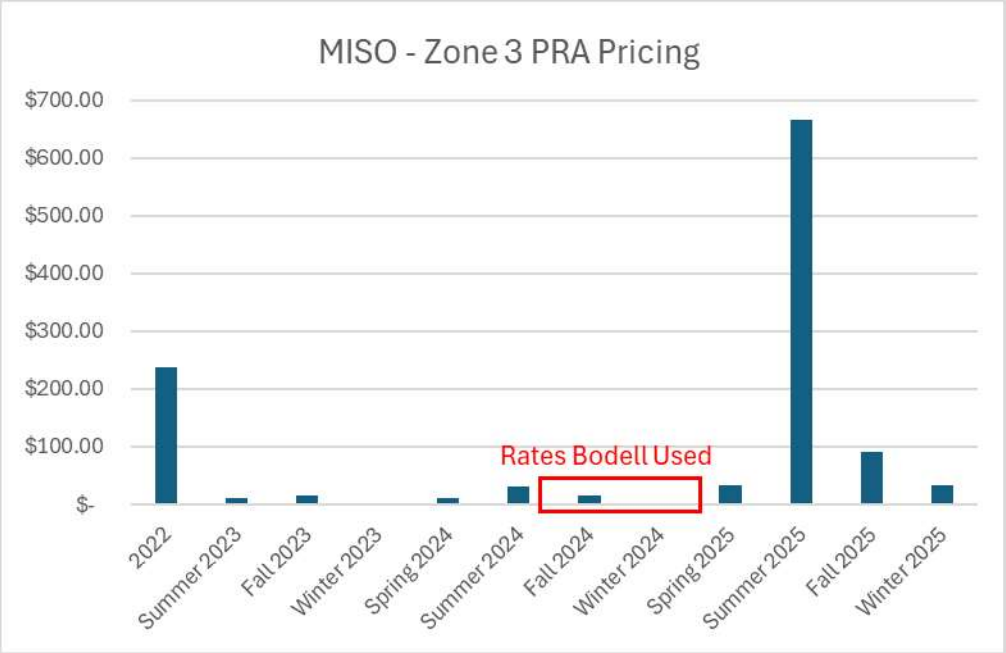
4.1.13 Ms. Bodell's capacity pricing analysis only considered a five-month period, from December 2024 to April 2025.[37] Ms. Bodell used an April 2024 MISO document for her capacity pricing.[38] The same day Ms. Bodell issued her declaration, MISO's annual auction results came out for the next year and the new capacity pricing went up dramatically.[39] MISO explained this capacity price increase was caused in part by "[n]ew capacity additions did not keep pace with decreased accreditation, suspensions/retirements and external resources," as well as "[d]elays of new resource additions" and "[m]ore frequent extreme weather," among other reasons.[40] Ms. Bodell's analysis used $0.75 per MW-day for winter 2024-2025 and $34 per MW-day in spring 2025.[41] MISO's newly published rates are $667 per MW-day for summer 2025, $92 per MW-day for fall 2025, $33 per MW-day for winter 2025-2026, and $70 per MW-day for spring 2026.[42]

4.1.14 The new MISO auction results show the extreme volatility in the market pricing for the "proxy market" that Ms. Bodell chose. OPPD necessarily had to consider capacity market volatility in its Liquidated Damages amounts, and the volatility of the capacity market makes it difficult to measure damages in advance of the Substantial Completion date, as Ms. Bodell has done. Figure 1 below shows the MISO capacity pricing for the last four years—of note, because Ms. Bodell limited her analysis to a five-month period, she only looked at a period of very low pricing. If Ms. Bodell had used the new MISO pricing in her damages model, her damages numbers would be dramatically higher. Similarly, if Ms. Bodell had used an average of historical prices, her damages estimate would be higher. The EPC Contract was originally entered into in 2021; I have included data back to 2022 which is currently available on MISO's website.

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[36] Bodell Declaration, ¶ 71-74 and Exhibit E – Assumptions, Section E.1.8 – Capacity Price.
[37] Bodell Declaration, Figure 10 – Economic Damages from Delayed Capacity.
[38] Bodell Declaration, Exhibit E – Assumptions, Section E.1.8 – Capacity Price, footnote 105; "Planning Resource Auction Results for Planning Year 2024-25," MISO, April 25, 2024, slide 2, https://cdn.misoenergy.org/2024%20PRA%20Results%20Posting%2020240425632665.pdf.
[39] "Planning Resource Auction Results for Planning Year 2025-26," MISO, April 28, 2025, slide 2, https://cdn.misoenergy.org/2025%20PRA%20Results%20Posting%2020250428694160.pdf.
[40] "Planning Resource Auction Results for Planning Year 2025-26," MISO, April 28, 2025, slides 6-7, https://cdn.misoenergy.org/2025%20PRA%20Results%20Posting%2020250428694160.pdf.
[41] Bodell Declaration, Exhibit E – Assumptions, Section E.1.8 – Capacity Price.
[42] "Planning Resource Auction Results for Planning Year 2025-26," MISO, April 28, 2025, slide 2, https://cdn.misoenergy.org/2025%20PRA%20Results%20Posting%2020250428694160.pdf.

Figure 1: MISO Capacity Pricing[43]



5. OPPD'S LIQUIDATED DAMAGES ARE A REASONABLE APPROXIMATION OF ACTUAL DAMAGES

5.1.1 The EPC Contract specified the Guaranteed Substantial Completion Date for Standing Bear and Turtle Creek as May 1, 2023, and August 18, 2023, respectively.[44]

5.1.2 EPC Contract Article XI – Liquidated Damages states that should Zachry fail to comply with the agreed-upon Guaranteed Substantial Completion Date, Zachry is liable for a daily rate of Liquidated Damages until the work is complete.[45]

5.1.3 The Liquidated Damages clause states that actual damages would be difficult to determine, and that both parties agreed the Liquidated Damages amounts were reasonable and appropriate

[43] "2022/2023 Planning Resource Auction (PRA) Results," MISO, April 14, 2022, slide 4, https://cdn.misoenergy.org/2022%20PRA%20Results624053.pdf.; "Planning Resource Auction Results for Planning Year 2023-24," MISO, May 19, 2023, slide 4, https://cdn.misoenergy.org/2023%20Planning%20Resource%20Auction%20(PRA)%20Results628925.pdf; "Planning Resource Auction Results for Planning Year 2024-25," MISO, April 25, 2024, slide 2, https://cdn.misoenergy.org/2024%20PRA%20Results%20Posting%2020240425632665.pdf; "Planning Resource Auction Results for Planning Year 2025-26," MISO, April 28, 2025, slide 2, https://cdn.misoenergy.org/2025%20PRA%20Results%20Posting%2020250428694160.pdf.

[44] First Amended Complaint ¶ 20; EPC Contract, Exhibit E – Guaranteed Completion Dates And Project Schedules.

[45] EPC Contract, Article XI(c)(1) – Delay in Completion of Work.

measures of damages and not a penalty. The total Liquidated Damages were not to exceed 15% of the Contract Price:

> "(a) The Contractor and the District acknowledge that **actual damages** incurred by the District 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, and are not a penalty. **Total liquidated damages in the aggregate for both sites shall not exceed Fifteen percent (15%) of the Contract Price**." [emphasis added][46]

5.1.4 On November 9, 2023, the EPC Contract was amended ("First Amended EPC") to adjust the Guaranteed Substantial Completion Date for the Projects. The parties agreed to extend the Guaranteed Substantial Completion Date for Standing Bear from May 1, 2023, to August 8, 2024, and for Turtle Creek from August 18, 2023, to August 30, 2024.[47] The First Amended EPC also increased the Liquidated Damages daily amount due to the increased costs caused by the delay.[48] Finally, the First Amended EPC also adjusted the total contract price to $428,741,118.[49]

5.1.5 On August 13, 2024, the parties again amended the EPC Contract due to further delays ("Second Amended EPC").[50] Among other changes, the Second Amended EPC extended the Guaranteed Substantial Completion Dates and revised portions of the Liquidated Damages provision under EPC Contract Article XI. The revised Guaranteed Substantial Completion Dates for Standing Bear and Turtle Creek were set for December 30, 2024, and December 16, 2024, respectively.[51]

5.1.6 See Table 1 below for a summary of the Guaranteed Substantial Completion Dates and Liquidated Damages daily rates from the Liquidated Damages clauses from the original EPC Contract and the two amendments.

[46] EPC Contract, Article XI(a) – Liquidated Damages.
[47] Amendment No. 1 to Contract No. 263406 ("First Amended EPC") dated November 9, 2023, Exhibit E – Guaranteed Completion Dates and Project Schedules.
[48] First Amended EPC, Amendment of Article XI(c)(1) – Liquidated Damages.
[49] First Amended EPC, Exhibit G – Revised Milestone Payment Schedule and Payment Table, Change Order 1.
[50] Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations (Contract No. 263406) dated August 13, 2024 ("Second Amended EPC").
[51] Second Amended EPC, Amendment of Article XI – Liquidated Damages and Revised Schedule.

Table 1: Liquidated Damages Provisions In EPC Contract and Amendments[52]

	Standing Bear		Turtle Creek	
	Guaranteed Substantial Completion Date	Liquidated Damages	Guaranteed Substantial Completion Date	Liquidated Damages
Original EPC (September 21, 2021)	May 1, 2023	- $125,000 per calendar day through May 15, 2023 - $250,000 per calendar day, from May 16, 2023, until the Work is accepted as complete	August 18, 2023	- $50,000 per calendar day, through September 1, 2023 - $100,000 per calendar day, from September 2, 2023, until the Work is accepted as complete
First Amended EPC (November 9, 2023)	August 8, 2024	- $225,000 per calendar day through August 23, 2024 - $350,000 per calendar day, from August 24, 2024, until the earlier of (a) Substantial Completion, or (b) December 19, 2024	August 30, 2024	- $150,000 per calendar day through September 14, 2024 - $200,000 per calendar day, from September 15, 2024, until the earlier of (a) Substantial Completion, or (b) December 19, 2024
Second Amended EPC (August 13, 2024)	December 30, 2024	- $350,000 per calendar day through January 29, 2025 - $500,000 per calendar day, from January 30, 2025, until the Work is accepted as complete	December 16, 2024	- $250,000 per calendar day, through January 15, 2025 - $400,000 per calendar day, from January 16, 2025, until the Work is accepted as complete

5.1.7 As previously stated, the amended EPC Contract value is $428,741,118.[53] EPC Contract Article XI states total Liquidated Damages "in the aggregate for both sites shall not exceed Fifteen percent (15%) of the Contract Price."[54] Therefore, the maximum Liquidated Damages value is 15% of $428,741,118, or $64,311,168.[55] The daily Liquidated Damages rates applied by the days of delay exceeds the maximum; therefore, the maximum applies.

5.1.8 Liquidated damages should generally be a reasonable estimate of actual damages and not a penalty. The reasonableness of the damages estimate is often determined by what is known at the time of contracting. When constructing the liquidated damages provisions in a contract, the drafter should determine the types of damages it wants to cover with the clause and then make a reasonable estimate of the costs of those damages.[56]

[52] EPC Contract, Article XI – Liquidated Damages and Exhibit E – Guaranteed Completion Dates and Project Schedules; First Amended EPC, Amendment of Article XI(c)(1) – Liquidated Damages and Exhibit E – Guaranteed Completion Dates and Project Schedules; Second Amended EPC, Amendment of Article XI – Liquidated Damages and Revised Schedule.
[53] First Amended EPC, Exhibit G – Revised Milestone Payment Schedule and Payment Table, Change Order 1.
[54] EPC Contract, Article XI – Liquidated Damages.
[55] HKA Exhibit 1 – Liquidated Damages 15% Cap.
[56] William Schwartzkopf, *Calculating Construction Damages* § 18.03 – Developing an Enforceable Clause (Fourth Edition, 2025-2 Supp. 2021) Fourth Edition, 2025-2 Supp.

5.1.9 Industry guidance suggests the following on determining liquidated damages:

> "When setting the amount of the daily liquidated damages the owner should evaluate the potential losses that would result from late completion. The factors include loss of revenue, interest costs, financing fees, replacement rental, moving costs, holdover penalties, impact on wages, and labor productivity of the owner's forces."[57]

5.1.10 The damages inputs that the parties considered at the time of contract negotiations necessarily included various assumptions (e.g., capacity prices, energy prices, and natural gas prices). Some of these inputs may have later turned out to be higher or lower depending on actual market conditions.

5.1.11 I compared the Liquidated Damages I calculated in paragraph 5.1.7 above ($64.3 million), to the actual damages presented in Section 5.1.8 below. I concluded the actual damages are expected to ultimately exceed $64.3 million, and may be much higher.

5.1.12 In my opinion, based on my analysis, the Liquidated Damages are a reasonable approximation of OPPD's actual damages.

6. OPPD'S ACTUAL DAMAGES

6.1 SUMMARY OF ACTUAL DAMAGES

6.1.1 OPPD's actual damages to date are substantial and ongoing. Based on available data, those damages are expected to ultimately exceed $64.3 million, and may be much higher. OPPD's damages are expected to continue through at least December 2025.

6.1.2 OPPD has incurred and will continue to incur actual damages caused by Zachry's delay in Substantial Completion of the Projects. OPPD incurred costs and will continue to incur costs for capacity purchases, missed market energy revenue, firm natural gas transport, lost retail revenue and extended construction costs. Each of these categories of damages is described in the following Sections 6.2 through 6.6.

6.1.3 I was asked to review OPPD's actual damages for the time period January 2025[58] (after the Guaranteed Substantial Completion Dates detailed in the Second Amended EPC Contract Amendment 2) through December 2025. OPPD also provided information on its actual damages

[57] Barry B. Bramble & Michael T. Callahan, *Construction Delay Claims* § 2.15 – Liquidated Damages (Seventh Edition, 2025-1 Supp. 2020).
[58] For a more precise damages calculation, damages incurred in December 2024 would be apportioned to before and after the Guaranteed Substantial Completion Date for each facility. I have not yet performed that analysis, as it does not affect my conclusion that actual damages exceed the $64.3 million Liquidated Damages.

incurred for delays from May 2023 through December 2024; however, the parties agreed to extend the Guaranteed Substantial Completion Dates to December 2024 in the Second Amended EPC. In my opinion, the information on the actual damages incurred in the earlier time period is relevant to the issue at hand of establishing reasonable Liquidated Damages rates (as the Liquidated Damages rates were originally established in the original EPC Contract and then revised twice).

6.1.4 In total, OPPD's actual damages for January 2025 through December 2025 exceed the $64.3 million of Liquidated Damages, as summarized in Table 2 below. The damages presented in this table do not currently include all damages considered: for example, as described in Section 6.5 below, potential damages for additional lost retail revenue customers is not currently quantified.

Table 2: Summary of OPPD Actual Damages[59]

Damages Period	Capacity Purchases	Missed Market Energy Net Revenue	Natural Gas Damages	Lost Retail Capacity Revenue	Extended Project Costs	Total
May 2023 - Aug. 2024	$ 13,058,000	$ 5,140,000	$ 1,685,000	$ 76,686,000	*N/A*	**$ 96,569,000**
Sep. 2024 - Dec. 2024	6,226,000	115,000	3,217,000	16,036,000	*N/A*	**25,594,000**
Jan. 2025 - Dec. 2025	20,481,000	5,870,000	11,771,000	14,479,000	18,096,000	**70,697,000**
	$ 39,765,000	**$ 11,125,000**	**$ 16,673,000**	**$ 107,201,000**	**$ 18,096,000**	**$ 192,860,000**

6.2 CAPACITY PURCHASES

6.2.1 OPPD is a transmission-owning member of SPP. OPPD must meet Resource Adequacy Requirements established by SPP through several key steps:

a) Capacity Planning: OPPD ensures it has enough capacity to meet the highest peak demand plus a margin during both summer and winter months.[60]

b) Accredited Capacity: SPP must accredit the capacity, meaning the capacity meets specific standards and criteria set by SPP.[61]

c) Compliance with SPP Policies: OPPD follows policies and processes developed by SPP and the Supply Adequacy Working Group to ensure reliable supply and compliance with

[59] HKA Exhibit 2 - Summary Of Damages.
[60] "2024 SPP Resource Adequacy Report," Southwest Power Pool, June 14, 2024, 2. Executive Summary, https://www.spp.org/documents/71804/2024%20spp%20june%20resource%20adequacy%20report.pdf. See also "Peak load trend likely to continue," *The Wire*, OPPD, March 21, 2023, https://oppdthewire.com/peak-load-trend-likely-to-continue/.
[61] "Resource Adequacy," Southwest Power Pool, https://www.spp.org/engineering/resource-adequacy/.

North American Electric Reliability Corporation ("NERC") Reliability Standards.[62] For example, NERC recently published its 2025 Summer Reliability Assessment, which stated that SPP remains at risk for energy shortfall and faces transmission system congestion and scarcity conditions.[63]

d) Resource Adequacy Requirements: OPPD, as a Load Responsible Entity, maintains adequate capacity to meet its Resource Adequacy Requirements for the upcoming seasons.[64]

6.2.2 When OPPD determined the Turtle Creek and Standing Bear facilities would not reach commercial operation on time, OPPD was required to cover Resource Adequacy by purchasing capacity on the open market.

6.2.3 OPPD provided a summary of the capacity purchased, and contracted to be purchased, from May 2023 through December 2025.[65] OPPD's capacity purchases damages are supported by transaction confirmations and agreements documenting these purchases. These documents are identified in HKA Exhibit 3.

6.2.4 Table 3 below summarizes the preliminary calculation of OPPD's incurred costs for capacity purchases due to the Projects' delays.

Table 3: Capacity Purchases[66]

Time Period	Capacity Purchases
May 2023 through August 2024	$13,058,000
September 2024 through December 2024	6,226,000
January 2025 through December 2025	20,481,000
Total	$39,765,000

[62] "Resource Adequacy," Southwest Power Pool, https://www.spp.org/engineering/resource-adequacy/.
[63] "2025 Summer Reliability Assessment," North American Electric Reliability Corporation, May 2025, p. 6, https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_SRA_2025.pdf.
[64] "2024 SPP Resource Adequacy Report," Southwest Power Pool, June 14, 2024, 5 – Load Responsible Entities, https://www.spp.org/documents/71804/2024%20spp%20june%20resource%20adequacy%20report.pdf.
[65] "Capacity Purchase Contracts – TCS and SBL Delay May 2023-Dec 2025(OPPD-EXPERT-01118).xlsx." The capacity OPPD purchased currently runs through December 2025 because OPPD was required to enter contracts for that duration to obtain the capacity needed. I understand that OPPD trades capacity on a full calendar year or seasonal basis, which does not allow for market pricing on a daily or monthly basis.
[66] HKA Exhibit 3 - Capacity Purchases Summary.

6.2.5 If OPPD had not established its Resource Adequacy requirements by making the capacity purchases identified in Table 3, OPPD would have been subject to Cost of New Entry ("CONE") penalties. The CONE penalties are designed to incentivize participants to ensure adequate capacity in the market. The Open Access Transmission Tariff explains the calculation of CONE penalties.[67] I understand that OPPD has estimated the amount of CONE penalties that it would have occurred had it not purchased capacity on the market. OPPD estimated CONE penalties of approximately $13 million for 2023 and approximately $34 million for 2024.

6.3 MISSED MARKET ENERGY NET REVENUE

6.3.1 As previously mentioned, OPPD participates in the SPP energy markets. Selling power in the SPP provides OPPD with revenue to hedge the market price of energy to serve load. Because the Projects have not reached Substantial Completion and have not provided power, OPPD has missed market energy net revenue.

6.3.2 OPPD's energy market team performed an analysis of the missed market energy net revenue by using the Aurora Production Cost model, which OPPD uses in the normal course of business.[68] I understand from discussions with OPPD personnel that the model considers the production capability of the entire SPP and the OPPD portfolio. 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.

6.3.3 In my experience, it is typical to use models such as these for estimating power generation, costs and revenues in the power industry. I have used models such as these to calculate replacement power costs on other projects. When a power plant is not generating electricity as expected, the electricity normally produced by that plant generally needs to be replaced by other sources to meet customer demand. Replacement power can be obtained in several ways, including increasing production at another plant in the utility's generating system, operating a standby generation plant in the utility's system, purchasing power from another producer, or forgoing sales to customers. Models such as the one OPPD used analyze actual and estimated operation and other data to perform economic analyses. Replacement power costs are quantified by comparing the economic

[67] "Cost of New Entry" and "Resource Adequacy Assurance," Southwest Power Pool, *Open Access Transmission Tariff*, Sixth Revised Volume No. 1 – Attachment AA Resource Adequacy, Sections 13 and 14, available at https://sppviewer.etariff.biz/tariff.
[68] "Aurora Energy Forecasting Software," Energy Exemplar, https://www.energyexemplar.com/aurora.

results of meeting system demand with and without generation from Turtle Creek and Standing Bear during the period of study.

6.3.4 OPPD provided summary-level output from the model analysis.[69] The missed energy market net revenue is summarized in Table 4 below:

Table 4: Missed Energy Market Net Revenue[70]

Time Period	Turtle Creek Station	Standing Bear Lake Station	Total
May 2023 through August 2024	$5,949,000	$(809,000)	$5,140,000
September 2024 through December 2024	115,000	0	115,000
January 2025 through December 2025	5,691,000	179,000	5,870,000
Total	$11,755,000	$(630,000)	$11,125,000

6.3.5 I understand from discussions with OPPD personnel that, due to Zachry's delay, OPPD has missed out on other ancillary revenues opportunities, like spinning reserves and supplemental reserves.[71] At this time, OPPD has not calculated these missed ancillary revenues.

6.4 NATURAL GAS DAMAGES

Turtle Creek Station – Firm Natural Gas Transport

6.4.1 As previously stated, Turtle Creek is a natural gas-powered plant. Turtle Creek is located in an area where natural gas is supplied by Northern Natural Gas Company ("NNG").[72]

6.4.2 I understand Turtle Creek is located on one of NNG's branch lines and not the main line. This is important as branch lines are prone to constraint due to only having a limited amount of capacity. Main lines have several parallelled pipes and move multiple billion cubic feet of natural gas in a

[69] "Summary Table – TCS and SBL Energy Revenue Impact Amendment 2 CONFIDENTIAL (OPPD-EXPERT-000482).xlsx."
[70] HKA Exhibit 4 - Missed Energy Market Net Revenue – Turtle Creek Station; HKA Exhibit 4.1 – Missed Energy Market Net Revenue – Standing Bear Lake Station.
[71] "Spinning, Non-Spinning, and Supplemental Reserves," https://mypdh.engineer/lessons/spinning-non-spinning-and-supplemental-reserves/.
[72] "About Us / Overview," Northern Natural Gas, May 19, 2025, https://www.northernnaturalgas.com/aboutus/Pages/Overview.aspx.

day. The main lines provide a lot of flexibility and virtually no transport concerns. Firm transport allows a shipper to reserve space on the pipeline.[73]

6.4.3 OPPD reasonably assumed that Turtle Creek would be available to operate beginning in December 2024 (the Guaranteed Substantial Completion Date per the Second Amended EPC). 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.[74] OPPD has incurred the cost of having firm natural gas transport for Turtle Creek even though it is not operating.[75] The costs in Table 5 below reflect the firm natural gas transport costs and do not include any costs for purchasing natural gas.

Table 5: Turtle Creek Firm Natural Gas Transport Cost[76]

Time Period	Firm Natural Gas Transport Costs
May 2023 through August 2024	$0
September 2024 through December 2024	$2,125,000
January 2025 through December 2025	$10,126,000
Total	$12,251,000

Standing Bear Lake Station – Natural Gas and Propane Service Costs

6.4.4 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.[77] For each month,

[73] "About Us / Our Services," Northern Natural Gas, May 19, 2025, https://www.northernnaturalgas.com/aboutus/ourservices/Pages/OurServices.aspx.
[74] If OPPD did not enter the natural gas contract at the time, NNG had declared "open season" and OPPD could have missed chance for firm transport ("West Leg 2024," Northern Natural Gas, May 16, 2025, https://www.northernnaturalgas.com/expansionprojects/Pages/West_Leg_2024.aspx).
[75] I understand OPPD also incurred a small amount of costs for System Management Services (or balancing services for NNG) that are not included here. Additionally, OPPD participates in a profit-sharing program selling excess natural gas. The dollar amounts are minimal and also not included in this analysis.
[76] HKA Exhibit 5 - Turtle Creek Firm Natural Gas Station Transport Summary.
[77] Firm Deferred Delivery Supply Agreement dated October 18, 2021 with MUD and OPPD ("MUD Agreement") (OPPD-EXPERT-001243 – OPPD-EXPERT-001259). I understand that MUD supplies natural gas to Standing Bear. The propane is used to "peak shave" MUD's system and decrease their take from NNG. This NNG natural gas capacity is then redirected to Standing Bear. (See for example explanation of peak shaving, "Propane-Air Peak Shaving Plants Custom & Turnkey Packages," TransTech Energy LLC, https://www.transtechenergy.com/peak-shaving-systems.)

whether gas is supplied or not, OPPD is charged a demand charge from October through April of each year.[78] OPPD also pays MUD a monthly service fee.[79]

6.4.5 Per the agreement with MUD, OPPD also pays an annual storage charge in November of each year.[80]

6.4.6 OPPD provided the agreement with MUD and invoices supporting the costs incurred.

Table 6: Standing Bear Natural Gas and Propane Service Costs[81]

Time Period	Standing Bear Lake Natural Gas and Propane Service Costs
May 2023 through August 2024	$1,685,000
September 2024 through December 2024	1,092,000
January 2025 through December 2025	1,645,000
Total	$4,422,000

6.5 LOST RETAIL CAPACITY REVENUE

6.5.1 In addition to missing energy market revenue, OPPD has also lost retail revenue from Zachry's missed Substantial Completion dates for Turtle Creek and Standing Bear. OPPD has a "customer queue" which has entities that either wanted to expand their services with OPPD or become a new customer. Large customers in OPPD's "customer queue" were either delayed or lost.

6.5.2 For example, OPPD contracted with a large company in the area for OPPD to supply capacity for the customer's data centers.[82] Due to the delay in Substantial Completion for the Projects, OPPD had to delay the capacity supply due to Resource Adequacy concerns. The energy supply

[78] MUD Agreement (OPPD-EXPERT-001243 – OPPD-EXPERT-001259, at OPPD-EXPERT-001252).
[79] I understand OPPD has also incurred approximately $2.5 million for propane purchases. Those costs are not included in this report.
[80] MUD Agreement (OPPD-EXPERT-001243 – OPPD-EXPERT-001259, at OPPD-EXPERT-001252).
[81] HKA Exhibit 5.1 – Standing Bear Lake Station National Gas and Propane Services Costs.
[82] Accredited Generation Capacity & Energy Supply Agreement, March 27, 2019 (OPPD-EXPERT-000483- OPPD-EXPERT-000513).

agreement with the large company is capped until Standing Bear and Turtle Creek accredited capacity comes online.[83]

6.5.3 OPPD's customer service group compared the monthly anticipated MW load capacity schedule from the energy supply contract with the large company against the monthly actual historical MWs the company used from OPPD.[84] The difference (anticipated MWs less the actual load MW) was then multiplied by the demand charge rates ($ per kilowatt) from the contract to determine the demand revenue difference.[85] The calculation is supported by supply agreements and rate manuals. These source documents are listed on HKA Exhibit 6.

6.5.4 The lost retail capacity revenue damages are summarized in Table 7 below:[86]

Table 7: Lost Retail Capacity Revenue

Time Period	Lost Retail Capacity Revenue
May 2023 through August 2024	$76,686,000
September 2024 through December 2024	16,036,000
January 2025 through December 2025	14,479,000
Total	$107,201,000

6.5.5 I understand that in January 2023, OPPD contacted customers seeking to expand greater than five MW of new load, notifying them OPPD would have to limit load growth until the Standing Bear and Turtle Creek generation facilities came online.

6.5.6 I understand from discussions with OPPD personnel that OPPD was working on obtaining four potential additional customer projects. When the potential customers learned about the Turtle Creek and Standing Bear delays, they decided to move to other locations outside OPPD's service territory. Because the capacity was not available, OPPD missed out on additional lost retail revenue. These lost retail amounts have not yet been quantified and are not included in the

[83] Amended & Restated Accredited Generation Capacity & Energy Supply Agreement, June 1, 2023 (OPPD-EXPERT-000376-OPPD-EXPERT-000423).
[84] "Standing Bear and Turtle Creek Lost Revenue – Confidential (OPPD-EXPERT-000424).xlsx."
[85] "Standing Bear and Turtle Creek Lost Revenue – Confidential (OPPD-EXPERT-000424).xlsx."
[86] HKA Exhibit 6 – Lost Retail Capacity Revenue.

lost retail capacity revenue damages outlined above. I understand that OPPD considered these potential lost revenue scenarios when developing and negotiating the Liquidated Damages.

6.6 EXTENDED PROJECT COSTS

6.6.1 OPPD has incurred, or anticipates to incur, extended project costs due to Zachry's missed December 2024 Substantial Completion dates from January 2025 through December 2025. OPPD quantified and estimated these extended project costs of approximately $18 million.[87] The extended project costs 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.[88]

[87] HKA Exhibit 7 - Project Costs OPPD Incurred From Missed Guaranteed Substantial Completion Dates.
[88] Id.

Appendix A

CURRICULUM VITAE

KIMBERLY R. REOME

PARTNER



QUALIFICATIONS

MBA, Kellogg Graduate School of Management, Northwestern University, USA
BA (High Honors), Finance, Michigan State University Honors College, USA
Certified Construction Industry Financial Professional (CCIFP)
Certified Fraud Examiner (CFE)

MEMBERSHIPS

Member, Association of Certified Fraud Examiners (ACFE)
Member, Construction Financial Management Association (CFMA)
Member, AACE International
Member, Women Construction Owners & Executives (WCOE)
Associate Member, American Bar Association (ABA)

- Litigation Section
- Forum on Construction Law
- Infrastructure and Regulated Industries Section
- Section of Environment, Energy, and Resources

Member, U.S. Women in Nuclear (U.S. WIN)

PERSONAL DEVELOPMENT

Lexology Index (formerly Who's Who Legal (WWL)) Client Choice Award – Global Elite Thought Leader – Energy – Consulting Experts, 2025
Lexology Index Consulting Experts – Construction – Quantum, Delay & Technical, 2023 & 2024
Lexology Index Consulting Experts – Financial Advisory and Valuation – Quantum of Damages, 2024
Lexology Index Commercial Litigation – Expert Witnesses, 2024
Lexology Index Client Choice Award – Energy – Experts, 2024
Lexology Index Construction Expert Witness, 2024

PROFILE

Kimberly R. Reome has more than 30 years of experience in damages analysis, primarily focused on the construction, electric utility, and government contracts industries. Kim has analyzed accounting, financial, and economic issues in various types of disputes, including increased costs, critical path schedule analysis, productivity analysis, lost profits, and valuation of lost royalties. She has also calculated damages for intellectual property, environmental and financial institutions, and other commercial litigation.

Kim has provided trial testimony, arbitration testimony, expert reports, and deposition testimony in civil courts, arbitrations, and regulatory commissions in the U.S. Court of Federal Claims, U.S. District Court, California State Court, Colorado State Court, Georgia Public Service Commission, Illinois State Court, Kansas State Court, Missouri State Court, Montana State Court, Nebraska State Court, Nevada State Court, Texas State Court, Washington State Court, and Wisconsin State Court, as well as in domestic and international arbitrations and dispute resolution board hearings.

Kim's project experience includes nuclear and other electric power plants, steel facilities, highways, aircraft modifications, hotels, casinos, residential housing, airports, oil refineries, mines and processing facilities, wastewater treatment plants, sports arenas, and hospitals. Her clients include electric power and telecommunication companies, construction and government contractors, project owners, real estate developers, insurance companies, manufacturers, computer software companies, service companies, steel companies, oil and chemical companies, financial institutions, universities, labor unions, and state and county agencies, among others.

CONSTRUCTION CLAIMS EXPERIENCE

AEROSPACE, SECURITY & SPACE

Government Contractor, Aircraft Modification Project, Canada

Assisted a government contractor involved in a dispute with a subcontractor on an aircraft modification project. The subcontractor claimed delay and disruption. Analyzed the subcontractor's claim, developed a counterclaim for delay costs and lost productivity, and prepared a schedule analysis for this complex long-term project.

BUILDINGS

COMMERCIAL

Contractor, Cold Storage Warehouse – Automated Conveyance Handling System

Assisted a contractor in a dispute with the owner of a cold storage warehouse. The contractor designed, procured, and installed the automated storage and retrieval conveyance handling system. Analyzed the owner's alleged damages, including liquidated damages, costs to repair, and past and future lost profits, and prepared and presented a preliminary expert report at mediation, where the case was settled.

Developer, Office Building Conversion

Assisted the developer involved in converting a historic mid-rise building into office space. The developer was in a dispute with the general contractor and architect. Analyzed change orders to determine the adjusted value of the guaranteed maximum price contract and analyzed schedule delays.

EDUCATION

General Contractor, University Building Renovation

Assisted a general contractor engaged in the renovation of a historic university building. The general contractor was in a dispute with the electrical subcontractor. Calculated the general contractor's damages for costs to complete, repair costs for defective work, and other back charges; analyzed the subcontractor's damages

claims, including claims for alleged extra work and productivity claims; and performed schedule analysis of the subcontractor's work and the overall project work. Issued an expert report and testified at deposition and trial.

PUBLIC SECTOR

City Government and Real Estate Developer, Various Buildings and Facilities, USA
Hired by both parties to assist in a dispute between a city government and a private real estate developer over cost sharing in a joint development agreement. The project involved the city's construction of a museum and convention center and the private developer's construction of an office building, all on the same site. The two parties shared the costs of the site's parking garage and various building infrastructure. Role included analyzing the construction costs incurred and determining appropriate cost allocations.

Community Park District, Municipal Renovation Project, USA
Assisted a community park district in a dispute with the architect of a municipal project consisting of the renovation and construction of new facilities at a farm owned by the park district. Analyzed cost support for change orders assessed against the architect, investigated delays caused by late design work, and quantified credit owed to the park district for overpayments to the architect. Quantified the associated schedule delays and economic damages.

County Government, Multipurpose Complex, USA
Assisted the owner (a county government) of a multipurpose sports, entertainment, convention, and expo complex after the steel contractor went bankrupt during the project. As a result, the county was faced with delay and disruption claims from multiple contractors. Evaluated claims for three of the contractors (masonry, cement, walls), ultimately providing settlement recommendations to the county. Claims were settled based on the recommendations and claims analysis.

HEALTHCARE

Framing and Drywall Subcontractor, Hospital Expansion
Assisted a framing and drywall subcontractor in preparing a claim for wrongful termination on a hospital expansion project. Analyzed the subcontractor's damages, including productivity analysis and cost of changed work.

REAL ESTATE

Owner, Mixed-Use Development (Casino, Hotels, Residential, Shopping, Theater)
Assisted the owner of a multibillion-dollar, mixed-use development (including high-rise hotels and condominium towers, a casino, a shopping center, a convention center, a theater, parking garages, and associated infrastructure) in a dispute with the general contractor and numerous subcontractors. Analyzed damages incurred by the owner, including cost overruns, costs to repair, back charges, and liquidated damages, as well as the subcontractors' claims (including electrical and plumbing) for delay and disruption. Also supported the contract closeout of hundreds of subcontracts.

Development Group, Various Multi-Use Projects
Assisted a development group that had constructed several multi-use condominium and restaurant projects and that suspected one of its partners and the general contractor owned by that partner of potential fraudulent use of funds. Analyzed the use of funds to determine whether any fraudulent activity had occurred.

General Contractor, Mixed-Use Condominium and Shopping Complex
Assisted a general contractor who constructed a condominium and shopping complex in a ski resort town. Analyzed cost overruns and schedule delays to determine what was caused by the owner either through additional scope or delays in providing information or payment.

General Contractor, Mixed-Use Condominium and Retail Building
Assisted the general contractor of a mixed-use condominium and retail building in a dispute against the developer. Performed a project cost audit to validate that the labor, material, equipment, and subcontractor

costs incurred on the project were accurately reported in the contractor's cost accumulation and reporting system.

Developer, Historic-to-Mixed-Use Building Conversion Project
Assisted a developer who renovated a historic mid-rise building into a mixed-use retail and office building. Developed a framework to analyze the change order requests, allowances, and contingency for numerous subcontractors to determine an adjusted guaranteed maximum price to be used in closeout negotiations with the contractor. Also analyzed schedule delays caused by the architect.

Developer, Mixed-Use Office and Retail Development
Assisted a developer in a dispute with a construction manager of a mixed-use office and retail development over the construction manager's failure to complete the project. Prepared a damages claim, including the cost to complete and the value of the construction costs completed before termination.

Developer, Government Building-to-Mixed-Use Development Conversion Project
Assisted a developer in converting a former government building into a mixed-use development with restaurant, retail, office, and residential space. Audited one of the subcontractor's project costs to determine if the subcontractor had fraudulently billed the developer. Audit included project records such as contracts, invoices, payment applications, and canceled checks.

RESIDENTIAL

Developer, Various Apartment Complexes
Assisted a developer in calculating damages incurred on the construction of numerous apartment complexes throughout the United States. The developer alleged a bribery and fraud scheme among one of its employees and several contractors. Calculated damages associated with this alleged bribery scheme, which included liquidated damages, extended project costs, and defective work costs, among others, and analyzed claims from an adverse party, which included lost profits. Submitted several expert reports and testified at multiple depositions.

Drywall Subcontractor, Apartment Projects
Assisted a drywall subcontractor in a dispute with a contractor on several apartment construction projects by calculating the subcontractor's damages, including pricing of disputed change orders and analysis of contract balance. Submitted an expert disclosure and testified at trial.

General Contractor and Subcontractors, Office-to-Condominium Building Conversion Project
Assisted counsel for a general contractor and several subcontractors in preparing damages claims related to the conversion of a historic high-rise office building to a residential condominium tower. Prepared damages claims, including damages for delays and disruption, and analyzed the owner's counterclaim, including increased financing costs and lost sales of condominium units.

Labor Union, Residential Subdivisions
Assisted a labor union in reviewing claims by residential housing developers and contractors. The labor union had picketed model homes and construction sites in several new subdivisions because the construction contractors were using non-union labor. The developers and contractors claimed damages for lost home sales during the picketing, as well as other damages such as extra security costs and vandalism. Reviewed publicly available home sales data in the two subdivisions and by the specific builders in question before, during, and after the picketing. Analyzed home sales in the surrounding area to identify any trends in the real estate market. Also reviewed the work papers of the opposing damages expert.

RETAIL & COMMERCIAL

Shopping Center
Reviewed construction liens, claims, payments, and job progress reports of the general contractor and subcontractors involved in the construction of a shopping center.

TOURISM, HOTELS & RESORTS

Interior Designer, Hotel Renovation
Assisted an interior designer in a dispute with a hotel owner on a hotel renovation project. The hotel owner claimed that the interior designer caused delays resulting in damages. Analyzed the owner's damages claims for increased construction costs, increased procurement costs, and lost profits. Prepared a schedule analysis to assess what deadlines were met and the cause of delays. Issued an expert report, presented at mediation, and testified at arbitration.

Contractor, Various Hotel Projects
Assisted a contractor in a dispute with a former employee and several related entities. The contractor alleged the employee had engaged in potential fraud on several hotel construction projects, including hiring related-entity subcontractors that performed allegedly overpriced and defective work. Calculated damages related to alleged overpayments, costs to correct deficient work, and excess payments to the benefit of the employee, and issued an expert report.

Concrete Subcontractor, Hotel and Resort Complex
Assisted a concrete subcontractor who alleged that late, incomplete, and inadequate design drawings delayed and disrupted the performance of concrete operations during the construction of a mid-rise hotel and resort complex. Analyzed the construction schedule to determine the duration and cause of delays to the concrete work, including the development of precast concrete shop drawings. Reviewed the concrete subcontractor's calculation of increased costs, including extended general conditions costs.

DEFENSE

Contractor and Surety, U.S. Air Force Base – Hydrant Fuel System Replacement, USA
Assisted a contractor and its surety in packaging their claim against the federal government for the replacement of a hydrant fuel system at a U.S. Air Force base. Analyzed the cost and schedule impacts of differing site conditions.

INDUSTRIAL & MANUFACTURING

AUTOMOTIVE

Owner, Bus Manufacturing Facility
Assisted the owner of a bus manufacturing facility in performing a project cost audit of the construction contractor of a new bus manufacturing facility and corporate headquarters. Audited costs invoiced by the cost-plus contractor, including subcontractor, payroll, material, equipment, and non-reimbursable costs, as well as general conditions and profit.

MANUFACTURING

Owner, Biodiesel Production Facility
Assisted the owner of a biodiesel production facility in analyzing a construction contractor's claim. Evaluated the contractor's invoices for potential discrepancies, inconsistencies, and double counting.

Construction Company, Coke Battery Facility
Prepared a damages claim for a construction company in a dispute with the owner of a coke battery facility. Quantified labor inefficiency and delay claims.

Owner, Automation Equipment Manufacturing Facility
Analyzed claims for schedule delay and disruption for a manufacturer of automation equipment.

Design/Builder, Cement Plant Capital Improvement Project
Assisted the design/builder on a capital improvement project for a cement plant by calculating home office overhead claims for arbitration.

Owner, Pea Processing Plant
Assisted an owner of a pea processing plant in a dispute with the engineering, procurement, and construction (EPC) contractor over the construction of the plant. Analyzed the contractor's claim for increased costs and calculated the owner's damages, including costs to complete, costs to repair defective work, and lost profits for delayed operations. Issued multiple expert reports and testified at deposition.

Construction Manager, Corn Processing Plant Expansion
Assisted a construction management firm in analyzing claims related to a corn processing plant expansion project. Analyzed delay and disruption claims from the owner, the subcontractor, and the subcontractor's vendors.

MINING & METALS

Contractor, Aluminum Smelter Modernization
Assisted the contractor on an aluminum smelter modernization project by evaluating the cost growth of project estimates and performing a cost analysis to determine the cause and associated cost type for the growth throughout each period. Also assisted the contractor in preparing a root cause analysis presentation that was presented to the owner.

Contractor, Direct Reduced Iron (DRI) Processing Facility
Assisted the contractor on an overseas DRI processing facility construction project. Prepared cost and schedule delay claims arising from delayed and deficient owner-supplied structural steel, ductwork, and process equipment. Also reviewed project schedules and cost data to prepare claims for delay, acceleration, lost productivity, extended site overhead, and material quantity growth.

Owner, Potash Mine and Processing Facility
Assisted the owner of a potash mine and processing facility in performing a project cost audit of the EPC contractors for the facility's expansion. Audited the costs the contractors billed the owner, including subcontractor and vendor, field construction equipment, payroll, and non-reimbursable costs.

Owner, Coal Handling Facility
Assisted an owner involved in a dispute with an engineering firm that provided engineering services to design a coal handling facility. The owner claimed that the engineering firm's drawings were late and incorrect, resulting in increased costs. Analyzed whether late and incorrect drawings resulted in increased costs and worked with the technical design expert witness to prepare for arbitration.

Owner and Construction Manager, Steel Mill
Assisted the owner and construction manager of a large steel mill construction project with the contract termination of the foundation contractor. The contractor was terminated due to poor performance on schedule, safety, and quality issues. Helped prepare a preliminary claim against the contractor for use in settlement discussions and analyzed reasons for schedule delays. Also gathered documentation regarding the contractor's schedule, safety, and quality performance and prepared a database of relevant documents.

RESEARCH & DEVELOPMENT

Developer, Various Biotechnology Research Facilities
Assisted a real estate development company that constructed numerous biotechnology research facilities overseas to investigate whether fraud had occurred by some of its employees. Analyzed construction costs, including contracts, bids, invoices, and cost reporting systems, and developed recommendations for project controls.

Owner, Nuclear Laboratory Decontamination and Decommissioning
Assisted the owner of a nuclear laboratory in a dispute with a contractor on the decontamination and decommissioning of a building at the nuclear laboratory. Analyzed the contractor's and owner's damages and performed a detailed analysis of the contractor's project costs and schedule to determine what areas of the project experienced cost overruns and responsibility for delays. Prepared a mediation report and presented findings at mediation.

TRANSPORTATION INFRASTRUCTURE

AIRPORTS

Contractor, Airport Terminal
Assisted a contractor in a dispute with the steel subcontractor on an airport terminal construction project. Calculated the contractor's damages for increased costs, including schedule delay costs for the contractor and its subcontractors and costs to complete and correct defective work. Analyzed the subcontractor's claims for increased costs due to alleged disruption, delay, and repair costs and submitted several expert reports. Also analyzed the contractor's potential claims against the owner for delay and disruption.

Design and Construction Contractor, Airport Terminal
Assisted a design and construction joint venture contractor with claims against the design joint venture on an airport terminal construction project. Analyzed existing claims assembled by the client and consolidated damages and supporting documents for these claims. Also presented (in a mediation-like forum) the value of these claims to the design joint venture and its insurers to assist in negotiations.

General Contractor, Airport Terminal
Assisted the general contractor on an airport terminal construction project to analyze subcontractor claims involving cost overruns, delay, and disruption. Negotiated change orders and analyzed the claim of the plumbing subcontractor who was terminated for convenience.

Excavation Contractor, Airport Runway
Assisted the excavation contractor on an airport runway construction project in submitting claims for increased costs due to differing site conditions to the owner. Analyzed the contractor's claim pricing and presentation and assisted the contractor in properly pricing its claims for the purpose of change order negotiations.

RAIL & TRANSIT

Government Contractor, Train Control System Dispute
Assisted a government contractor in developing a cost and schedule claim on a dispute with a railway authority involving the development of a train control system that used global positioning satellite technology to allow high-speed passenger and freight trains to share the same tracks.

ROADS & HIGHWAYS

Contractor, Highway and Bridge Construction Project
Assisted a contractor in preparing a claim related to a highway and bridge construction project. Calculated damages due to a delay by a steel subcontractor and performed a detailed schedule analysis, review of cost and accounting records, development of claim methodology, and pricing of claim elements.

PETROLEUM REFINING

Owner, Oil Refinery – Sulfur Reduction Units
Prepared a labor inefficiency claim for an oil refinery owner who experienced delays during the construction of new sulfur reduction units. Quantified inefficiency man-hours and associated costs and assisted in determining which equipment arrived late and the effects of the delays on the site.

Mechanical Contractor, Oil Refinery
Assisted an oil company in analyzing a claim from a mechanical contractor on an oil refinery construction project. Analyzed the contractor's claim for cost overruns and schedule delays and provided recommendations on the claim pricing and entitlement for the oil company to use in settlement negotiations.

Owner, Oil Refineries – Capital Improvement Projects
Assisted an oil company in developing certain claims against the contractor performing capital improvement projects on two refineries. The projects involved installing equipment to reduce the refineries' sulfur emissions. Worked in conjunction with a technical industry expert to determine the contractor's performance on the cost-plus design, engineering, and construction project.

POWER & UTILITIES

COMBINED-CYCLE GAS TURBINE (CCGT)

Electric Utility, Combined-Cycle Natural Gas Power Plant
Assisted an electric utility in a dispute with the contractor for the construction of a combined-cycle natural gas power plant. The utility terminated the contractor for default and took over management of the remaining construction and start-up efforts. To support the utility's decision to terminate the contractor for default, developed schedule and percent-complete analyses. Also assisted with the analysis of costs and damages.

Subcontractor, Combined-Cycle Natural Gas Generating Facility
Assisted a subcontractor on a claim involving the construction of a combined-cycle natural gas generating facility. Analyzed labor hours and costs to calculate labor productivity and discrete claims.

FOSSIL (COAL-, GAS- & OIL-FIRED)

Owner, Coal-Fired Power Plant
Assisted the owner of a coal-fired power plant in a dispute with a co-owner. Analyzed replacement power costs for periods when the plant was not operating, issued an expert report, and testified at trial.

Equipment Manufacturer, Various Coal-Fired Power Plants, China
Assisted a power equipment manufacturer in analyzing the project's financial status to construct four coal-fired power plant projects in China. Also assessed the financial condition of one of three consortium members who entered into an agreement to design and procure equipment and material for the projects.

Electric Utility, Coal-Fired Power Plant – Temporary Shutdown
Assisted an electric utility in a dispute with the manufacturer of a piece of equipment that failed, causing the temporary shutdown of a coal-fired power plant. Analyzed lost profits and replacement power costs caused by the plant shutdown, increased financing costs, and costs to repair. Presented damages calculation in deposition and trial testimony.

General Contractor, Coal-Fired Power Plant – Precipitator Rebuild
Assisted a general contractor in a dispute with a subcontractor on a precipitator rebuild project for a coal-fired power plant. The subcontractor had claimed that lack of payment on the project had put the company in severe financial condition. Analyzed the subcontractor's financial situation before, after, and during the project. Also evaluated the entity's financial condition based on a review of project records, estimates to completion, internal management reports, bank records, and other various financial records.

General Contractor, Natural Gas-Fired Power Plant
Prepared a claim for a general contractor in a dispute with a manufacturer and two insurance companies (builders' risk and ocean cargo insurance) related to the construction of a natural gas-fired power plant. Major equipment for the plant was damaged in shipment, causing delays to the construction of the plant. The contractor accelerated its work to mitigate the delays. Worked with the contractor to contemporaneously

document increased direct and disruption costs associated with the impacts resulting from the incident, and calculated damages related to productivity impacts and delays.

Design & Construction Contractor, Coal-Fired Power Plant – Selective Catalytic Reducer
Assisted the joint venture responsible for the design, engineering, and construction of a selective catalytic reducer for a coal-fired power plant in preparing a request for equitable adjustment (REA). The joint venture had experienced cost overruns, disruption, and schedule delays caused by late and defective equipment deliveries and changed conditions. Analyzed cost overruns attributed to discrete changes, productivity impacts, and delays and assisted the joint venture in presenting the REA to the owner.

EPC Subcontractor, Coal-Fired Power Plant – New Units, Asia
Assisted a contractor in preparing claims related to the construction of new units at a coal-fired power plant in Asia. The client was the EPC subcontractor to the overall project contractor. Calculated increased costs for EPC work and prolongation costs, calculated schedule delays, and analyzed claims from the contractor's procurement joint venture partner.

Electric Utility, Coal and Natural Gas Power Plant Retrofit
Assisted an electric utility in assessing a claim submitted by its contractor on the retrofit of a coal and natural gas power plant. The contractor, who was responsible for installing pollution controls and emissions monitoring equipment to make the plant compliant with new regulatory requirements, claimed extended overhead costs caused by delays and productivity impacts.

Electrical Subcontractor, Gas-Fired Power Plant
Assisted an electrical subcontractor in a dispute with the contractor on a natural gas-fired power plant. Analyzed increased costs and prepared a productivity claim for labor inefficiencies caused by the owner and contractor.

EPC Contractor, Gas-Fired Power Plant
Assisted an EPC contractor in a dispute with the owner of a natural gas-fired power plant construction project. The owner had terminated the contractor for default, and the contractor argued that termination for default was not reasonable. Evaluated and responded to the expert report filed on behalf of the owner and analyzed project documentation and schedule analysis, including reconciliation of the initial cost estimate and pre-termination target price estimate.

Owner, Historic Coal-Fired Municipal Power Plant
Assisted the owner of a historic coal-fired municipal power plant in evaluating a claim submitted by an asbestos removal subcontractor during a demolition project. Reviewed relevant documents to determine the validity of the claim and prepared a counterclaim.

Power Plant Manufacturer, Gas-Fired Power Generation Facility, Latin America
Assisted a power plant manufacturer involved in litigation regarding the cancellation of the construction of a natural gas-fired power generation facility in Latin America. Analyzed the opposing experts' report claiming lost profits. Analysis included appropriate discount rate, capacity factors, and fuel prices, including currency and government risk.

HYDROELECTRIC

Electric Utility, Hydroelectric Power Facility – Breached Reservoir
Assisted an electric utility with analyzing replacement options for a breached reservoir in a hydroelectric power facility. The utility was in negotiations with its insurance company over various repair or replacement options. Analyzed the cost estimates for various options provided by the utility and the insurance company's engineers to provide comparable cost estimates on which to base decisions. Also evaluated contractors' bids and contract estimates, adjusting project estimates for risks not covered in the estimates.

NUCLEAR

Electric Utility, New Nuclear Power Plant Construction
Assisted an electric utility in the prudence review regarding the construction of two new nuclear power plant units. Analyzed the causes of more than $6B in cost growth, including costs of delay, productivity loss, technical and design changes, and other costs; issued an expert report; and testified at a public utility commission hearing.

Owners, New Nuclear Power Plant Construction
Assisted an electric utility and its co-owners in litigation with the EPC contractor over the design and construction of two new nuclear power plant units. Analyzed cost and schedule issues, performed document review, assisted with fact witness deposition discovery, and organized millions of project records. Also evaluated and critiqued the contractor's damages claims, including more than $1B in increased costs associated with design changes and years of project delays. After the contractor declared bankruptcy, prepared cost estimates for the owner to complete the project.

Owners, New Nuclear Power Plant Construction
Assisted an electric utility and its co-owners in a dispute with the completion contractor for the construction of two new nuclear power plant units. Analyzed the contractor's time-related delay costs and provided rebuttal testimony to the opposing expert's time-related cost calculations. Submitted an expert report and testified at deposition and at a dispute review board hearing.

Electrical Substation Contractor, Nuclear Power Plant – Forced Outage
Assisted an electrical substation contractor in litigation with the owner of a nuclear power plant regarding a forced outage at the plant. Reviewed the damages and delay analyses prepared by the owner's expert and analyzed alleged lost sales, replacement power costs, and direct outage-related expenses. Also evaluated the outage schedule to determine the cause of the forced outage's length. Submitted two expert reports and testified at two depositions.

Various Electric Utilities, Spent Nuclear Fuel Storage
Assisted more than a dozen electric utilities with damage claims against the U.S. Department of Energy for increased costs related to spent nuclear fuel storage. Analyzed least-cost strategies for storage of spent nuclear fuel, as well as past and future capital, operations and maintenance, storage, and decommissioning costs; and assessed increased financing costs. Issued expert reports, and testified at deposition in multiple cases. Assisted numerous utilities with annual settlement filings for ongoing costs.

Various Electric Utilities, Nuclear Power Plants – Steam Generator Disputes
Prepared damage claims for numerous nuclear facilities' steam generator degradation issues, including the analysis of past and future costs related to the degradation issues and quantification of delay costs. Developed a computer model to identify the least-cost steam generator remediation strategy, using degradation projections and the costs and technical feasibility of different remediation strategies. Also analyzed similar models developed by utilities and replacement power costs for plant shutdowns and derates caused by the degradation.

Various Electric Utilities, Nuclear Power Plant Disputes
Analyzed electric power utilities' corporate decision-making models to facilitate the determination of future claimed costs for nuclear power plant disputes and to understand the utilities' cost structures and numerous inputs considered in their decision-making processes, including fuel costs, escalation rates, operation costs, capital expenditures, system power outputs, and cost of capital.

Electric Utility, Nuclear Power Plant – Steam Generator Replacement Prudence
Assisted an electric utility in preparing for a potential prudence audit of its steam generator replacement project at a nuclear power plant. Reviewed the document trail for certain key decisions regarding the project and helped the utility complete its prudence package.

Electric Utility, Nuclear Power Plant – Steam Generator Replacement Termination
Assisted an electric utility with the termination of a contract for the fabrication of replacement steam generators at a nuclear power plant. The contract was terminated because the utility decided not to replace the steam generators at this nuclear facility. The contractor had already begun purchasing materials and performing preliminary engineering for the steam generators. Assisted the utility in determining a reasonable termination value to be paid to the contractor. Analyzed the contractor's direct and indirect costs and overhead and profit rates. Resulting recommendation was used by the utility to effectively settle the contract termination.

Electric Utility, Nuclear Power Plant – Steam Generator Replacement Risk Assessment
Assisted an overseas electric utility that was undergoing a steam generator replacement project at its nuclear power plant. Prepared a risk assessment report analyzing the cost and procurement risks of the steam generator replacement contractor and other risks related to the steam generator replacement outages.

Electric Utility, Nuclear Power Plant Modifications
Assisted an electric utility with a prudence review of the capital costs of modifications at a nuclear power plant. Analyzed costs budgeted and incurred, purchase orders, work orders, and reasons for cost growth.

Electric Utility, Nuclear Power Plant – Lifecycle Management and Power Uprate
Assisted an electric utility under investigation by a state utility commission for the prudence, reasonableness, and rate recoverability of the utility's lifecycle management and power uprate at a nuclear power plant. Analyzed the basis for cost estimates during the project's design and construction phases. Identified the underlying causes for cost overruns. Reviewed and analyzed accounting information, supporting cost information, project status reports, budgets, and numerous other company and publicly available documents. Analyzed and reconciled cost overruns on the project and the prudence of management's decisions.

Electric Utility, Various Nuclear Power Plants – Prudence
Assisted an electric utility involved in a prudence audit regarding the operations of several nuclear power plants. Prepared testimony for the expert witness, critiquing a management audit ordered by the state public utility commission, and designed and developed a database of case documents, assigning relevant issues to each document.

RENEWABLES (BIO, GEOTHERMAL, SOLAR, TIDAL, WIND)

Electric Utility, Waste-to-Energy Plant
Assisted an electric utility in a dispute with an independent power producer. The independent power producer had constructed a waste-to-energy plant and, under a state law, was allowed a retail rate for power produced. When the state revoked this facility's qualification, the utility instead paid a wholesale rate to the power producer. The power producer filed for bankruptcy and claimed breach of contract against the utility. Analysis included lost profits and review of relevant power rates.

EPC Contractor, Thermosolar Power Plant
Assisted an EPC contractor on a thermosolar power plant to recalculate the owner's assessment of damages related to the plant's ability to meet performance criteria. The contract called for a performance model to determine the amount of energy that should be produced. Determined the proper methods for the performance model inputs, which are actual meteorological conditions. Analyzed meteorological inputs in the format required to run the performance model. Using the model inputs, determined the amount of energy that should be produced by the plant given the conditions at the plant site. Using the amount of energy output by the model, calculated the number of damages that should have been assessed. Submitted three expert reports.

Owner and Contractor, Solar Power Plant
Assisted the owner and contractor of a solar power plant in a dispute with a supplier of major equipment. Analyzed the owner and contractor's damages for repairs and replacement of defective equipment. Issued expert report.

Owner, Various Solar Power Plants – Defective Equipment
Assisted the owner of numerous solar power plants in a dispute with the solar equipment supplier regarding alleged defective equipment. Analyzed the owner's damages, including repair and replacement costs and lost profits. The analysis included actual costs incurred and preparing a model projecting future replacement, repair, and lost profits costs for equipment on thousands of solar panels. Lost profits calculation used models analyzing expected energy production based on meteorological inputs and site conditions to compare expected energy output to actual energy output.

Owner, Various Wind Power Generation Facilities
Assisted the owner of three separate wind power generation facilities who was involved in three disputes with the construction contractor (one of the disputes also involved the wind turbine supplier). Prepared a schedule delay analysis, calculated damages, and responded to the delay and damages opinions presented by the opposing experts. Submitted expert reports. Provided expert testimony in deposition and at an arbitration hearing on damages issues.

TRANSMISSION & DISTRIBUTION

Design-Build Contractor, Two Electric Power Substations
Assisted a design-build contractor in a dispute with a construction subcontractor on the construction of two electric power substations. The contractor terminated the subcontractor for cause. Calculated delay and acceleration damages. Assessed back charges. Presented findings at a mediation.

WASTE

Contractor, Decommissioned Plutonium Production Facility – Waste Treatment Plant, USA
Assisted a contractor on a waste treatment plant for environmental cleanup of a decommissioned U.S. Department of Energy plutonium production facility. Assisted contractor with analysis of project delays and lost productivity. Provided technical writing for the contractor's REA.

WATER & WASTEWATER

Contractor, Brewery Wastewater Treatment System
Assisted a contractor who provided a wastewater treatment system to a beer company to treat the brewery's wastewater. The beer company claimed damages related to the alleged non-performance of the wastewater treatment system. Evaluated the owner's damages claims for lost savings, lost revenue, and capital and operating expenditures.

TECHNOLOGY

TELECOMMUNICATIONS

Construction Company, Cellular Telecommunications Construction Project
Analyzed cost overruns and schedule delays incurred during a cellular telecommunications construction project for a large international construction company. Investigated the cost overrun and evaluated owner changes that impacted the cost of installation. Investigated delay, acceleration, and productivity impacts. Prepared a damages claim for the construction company to use in settlement discussions with the owner and prime contractor.

General Contractor, Fiber-Optic Cable Installation Project
Assisted a general contractor in evaluating a subcontractor's claims associated with the installation of underground fiber-optic cables for broadband service. Reviewed and analyzed opposing experts' reports submitted on behalf of the subcontractor. Analyzed alleged extended costs resulting from project impacts and delays and the methodology used to calculate alleged project delays.

Appendix A

Telecommunications Company, Telecommunications Construction Project
Prepared a damages claim for changed work for a telecommunications company that installed a telecom system throughout a university, including preparation of trial exhibits, and managed a large document library and database.

FORENSIC ACCOUNTING & COMMERCIAL DAMAGES EXPERIENCE

INTELLECTUAL PROPERTY

- Assisted an international engineering and manufacturing company in an international arbitration dispute with a U.S.-based competitor. The two parties had recently ended a long-term relationship of sharing technology in the areas of nuclear fuel and nuclear power plant design, fabrication, construction, and servicing. Quantified economic damages, including lost profits and reasonable royalty, due to alleged contract breaches and unauthorized use of nuclear design technologies.
- Assisted a chemical company that was a defendant in a patent infringement dispute with a competitor. The plaintiff's claim included damages for lost profits and price erosion. Analyzed the case issues and Panduit criteria and determined that lost profits and price erosion were not applicable. Analyzed the company's incremental profit to determine a reasonable royalty.
- Assisted a university that was a defendant in a patent infringement dispute with a biomedical device company. The plaintiff company had a consulting arrangement for research with a doctor at the university. The plaintiff alleged breach of contract and trade secret violations and claimed lost profits damages. Analyzed the plaintiff's claim for lost profits using the Panduit criteria and determined that lost profits were not applicable. Determined a reasonable royalty for an alternate damages amount.
- Analyzed a lost profits claim for patent infringement in the computer software industry.

DAMAGES ANALYSIS

- Assisted a contractor in analyzing lost profits incurred at a petrochemical plant that lost electric power. The owner of the petrochemical plant was in dispute with a contractor who performed services and supplied equipment at an electrical substation at the plant. Analyzed the plaintiff's lost profits damages calculations. Submitted an expert report and provided deposition testimony.
- Assisted a contractor in analyzing potential lost profits and other damages allegedly incurred at an oil refinery that lost electric power. The owner of the refinery was in a dispute with the utility that supplied power and a contractor that manufactured components at the electrical substation. The refinery's alleged damages included lost profits during the power outage and increased costs. Analyzed the plaintiff's damages. Submitted an expert report and provided deposition testimony.
- Assisted an automotive crankshaft manufacturer in a commercial damages dispute with a steel supplier. Prepared lost profits claim on lost sales caused by the manufacturer's damaged reputation based on the defective steel supplied by its supplier.
- Assisted an insurance company in defense of a steel company's lost profits claim for a shutdown blast furnace. Analyzed opposing expert's lost profits claim based on lost production.
- Calculated the cost impact of a change in accounting practices for a government contractor performing environmental science services.
- Assisted potentially responsible parties of an environmental cleanup site by reviewing the costs incurred to date by the U.S. Environmental Protection Agency (EPA) and other government entities. Identified the level of supporting documentation provided by the government to assist the companies in settlement negotiations.

- Prepared damages claims for potentially responsible parties of an environmental cleanup site. Determined the costs incurred and anticipated to be incurred to remediate the site. Calculated weighted average cost of capital rates for the companies involved.
- Reviewed draft EPA settlement for de minimis parties for potentially responsible parties of an environmental cleanup site. Analyzed how the proposed settlement would affect payments by various parties. Prepared questions for the EPA regarding the proposed settlement.
- Identified potentially responsible parties for an environmental cleanup site.

BREACH OF CONTRACT

- Assisted a manufacturer on a breach of contract matter involving a failed joint venture between two companies that manufactured prefabricated shelters used for telecommunication projects or power conversion stations. Calculated lost profits and increased cost damages and analyzed the alleged lost profits and increased costs claimed by the opposing party. Submitted two expert reports and provided trial testimony.

WRONGFUL DEATH

- Assisted both plaintiffs and defendants in several wrongful death matters in the railroad industry. Prepared and reviewed damages claims for future lost earnings, which considered various inputs such as salary, benefits, salary growth rate based on industry data, and personal consumption. Provided videotaped testimony that was used in mediation.

FRAUD INVESTIGATION

- Assisted the operator of several cemeteries after the operator was accused in a criminal investigation of misappropriation of funds from the cemetery operating accounts. Analyzed checking and investment account records for various operating and capital funds for numerous cemeteries. Performed a detailed forensic accounting analysis of the sources and uses of funds to determine whether cemetery operating accounts were used to pay for any personal expenses.

MISCELLANEOUS

- Analyzed the accounting and business records of a rental property manager claiming lender liability. Performed analysis to support the lender's claim that the loan default was caused by the rental property manager's poor management practices. Performed market analysis of rental rates charged for other apartment complexes in the area.
- Assisted states in the identification and quantification of healthcare expenditures associated with Medicaid, state employees, and charitable hospitals that were attributable to the use of tobacco by individuals.
- Performed a business valuation of a surgical clinic.

PUBLICATIONS & PAPERS

"**Nuclear Renaissance – Avoiding New Generation Reactor Construction Issues**," Commercial Dispute Resolution, *March 2025*

"**The Coming Wave of Construction Disputes – Supply Chain Disruptions and Material Price Increases**," Co-Author, Who's Who Legal, *October 2022*

"**Don't Let the Poppies Slow You Down – Flow-down, Delay and Liquidated Damages Provisions**," Co-Author, Paper presented at American Bar Association (ABA) Forum on Construction Law 2018 Midwinter Program, *January 2018*

"**CFMA's Study Guide for the CCIFP [Certified Construction Industry Financial Professional] Exam, 2017–18**," Co-Author, Construction Financial Management Association (CFMA), *January 2017*

"**Spent Nuclear Fuel and the U.S. Response to Fukushima**," Co-Author, Energy Litigation, a publication of the American Bar Association (ABA) Section of Litigation Energy Litigation Committee, *Fall 2011*

"**Nuclear Energy Powers Up, But Challenges Remain...**," Co-Author, Trends, a publication of the ABA Section of Environment, Energy and Resources, *November/December 2010*

"**Nuclear Waste Issue Persists as New Plants Forge Ahead**," Co-Author, Ecopolitology, *April 2010*

"**DOE's Non-Performance on Permanent Storage of Spent Nuclear Fuel Costs Billions**," Co-Author, Ecopolitology, *November 2009*

"**A Lack of Performance on Nuclear Waste Storage**," Co-Author, Nuclear Street, *July 2009*

"**Nonperformance on Nuclear Waste Storage**," Co-Author, Law360, *April 2009*

"**Serving Clients by Managing Your Experts and Consultants: Up-Front Planning and Regular Communications Are Essential**," Co-Author, *Of Counsel*, Aspen Publishers, *July 2008*

"**Expert Use in Claims of Construction Defects and Code Violations**," Co-Author, Construct!, a publication of the ABA Construction Litigation Committee, *Spring 2007*

PRESENTATIONS & SPEAKING ENGAGEMENTS

Lectured at seminars on accounting, nuclear power, construction damages, delay, fraud, and contractual issues for various organizations, including Northwestern University School of Engineering; American Bar Association Forum on Construction Law; American Bar Association Litigation Section, Construction Litigation and Expert Witness Committees; Construction SuperConference; Construction Financial Management Association; National Association of Women in Construction; Construction Owners Association of America; National Contract Management Association; National Subcontractors Alliance; Chicago Bar Association; Lorman Education; and law firms.

LANGUAGES

English (native)

Appendix B

Kimberly R. Reome
Testimony List

Case Name	Venue	Approximate Date
ERES Yellowstone Hospitality, LLC v. Connor & Gaskins Unlimited, LLC and Andrew Twetan Cause No. DV-16-2023-869-OC	Gallatin County District Court, State of Montana	2025
Alpine Customs, Inc. v. Connor & Gaskins Unlimited, LLC, and Yellowstone Crossing HC, LLC, ERES Yellowstone Hospitality, LLC Cause No. DV-16-2023-1002-BD	Gallatin County District Court, State of Montana	2025
Bechtel Power Corporation v. Georgia Power Company; Oglethorpe Power Corporation; Municipal Electric Authority of Georgia; Dalton Utilities; and Southern Nuclear Operating Company, Inc.	Dispute Resolution Board Proceeding for the Vogtle 3 and 4 Construction Completion Agreement	2024
Austin Building and Design, Inc. d/b/a The Austin Company v. Ingredion Incorporated v. Austin Building and Design, Inc. d/b/a The Austin Company; Kajima U.S.A., Inc. and Kajima International, Inc. Case No. CI 20-91	District Court, Dakota County, Nebraska	2024
Garcia's Drywall, LLC v. Inwall Services, LLC; McPherson Contractors, LLC; Fidelity and Deposit Company of Maryland; and Kris Smithson d/b/a Inwall Services, d/b/a Inwall Services, LLC Case No. 19-CV-4316	District Court of Johnson County, Kansas; Civil Court Department	2024
In Re: Georgia Power Company's Application to Adjust Rates to Include Reasonable and Prudent Vogtle Units 3 and 4 Costs Docket No. 29849	State of Georgia, Before the Georgia Public Service Commission	2023

OPPD Exhibit 11
Page 41 of 56

EXHIBIT
B

Appendix B

Kimberly R. Reome
Testimony List

Case Name	Venue	Approximate Date
CORE Electric Cooperative f/k/a Intermountain Rural Electric Association v. Public Service Company of Colorado Case No. 2021CV32787	District Court, Denver County, Colorado	2023
Alabama Power Company, Georgia Power Company and Southern Nuclear Operating Company, Inc. v. United States Case Nos. 17-1480C, 17-1481C, 17-1492C	U.S. Court of Federal Claims Washington, D.C.	2023
Continental Properties Company, Inc.; Continental 335 Fund LLC; Continental 355 Fund LLC; Continental 235 Fund LLC; Continental 342 Fund LLC; Continental 326 Fund LLC; Continental 298 Fund LLC; Continental 332 Fund LLC; and Continental 347 Fund LLC v. Hiscox Insurance Company, Inc. Case No. 2020CV000248	State of Wisconsin Circuit Court, Waukesha County	2023
Code Engineering Services, Inc. v. Berglund Construction Company and The University of Chicago Case No. 2016-CH-04296	Circuit Court of Cook County, Illinois, County Department – Chancery Division, Mechanics Lien Division	2022
Parkland Acquisition Two, LLC v. Avenir Creative, LLC Case No. 0l-19-0004-1177	American Arbitration Association	2022
Skookumchuck Wind Energy Project, LLC v. RES America Construction, Inc. Case No. 01-21-0002-1061	American Arbitration Association	2021

EXHIBIT B

Kimberly R. Reome
Testimony List

Case Name	Venue	Approximate Date
Indorama Ventures Oxides LLC (successor in interest to Huntsman International LLC) v. ABB Inc. v. Huntsman Petrochemical LLC; Indorama Ventures Oxides LLC (f/k/a Huntsman International Fuels, LLC), and Indorama Ventures Propylene Oxides LLC (f/k/a Huntsman Propylene Oxides LLC) v. Pritech LLC and Samir M. Patel Cause No. E-201064	District Court of Jefferson County, Texas; 172nd Judicial District	2021

EXHIBIT
B

Zachry Holdings, Inc. v. Omaha Public Power District
List Of Documents Considered
May 19, 2025

Appendix C

Category	Document Description	Bates Number
	All documents referenced in the Report and Report Exhibits	
Legal Filings	Order Granting Complex Chapter 11 Bankruptcy Cases Treatment dated May 21, 2024. The Reorganized Debtors' First Amended Adversary Complaint, dated April 11, 2025. Omaha Public Power District's Application for Allowance of Administrative Expense Claim dated February 14, 2025. Order Granting Omaha Public Power District's Application for Allowance of Administrative Expense Claim dated February 14, 2025. Reorganized Debtors' Motion For Partial Summary Judgment Re: Liquidated Damages dated April 28, 2025.	
Contracts	Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations Contract, dated September 21, 2021. Exhibit E to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations Contract, dated September 21, 2021.	OPPD-EXPERT-001079-OPPD-EXPERT-001095
	First Amendment to Agreement between Omaha Public Power District and Zachry Industrial, Inc., dated October 11, 2023. Amendment No. 2 to Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations (Contract No. 263406), dated August 13, 2024. Standing Bear Lake Station and Turtle Creek Station Capacity Purchase Agreements for the period May 2023 through December 2025.	OPPD-EXPERT-01118
Miscellaneous	Declaration of Tanya Bodell, dated April 28, 2025. Project Costs OPPD Incurred in missing Amendment 2 Guaranteed Substantial Completion Date.	OPPD-EXPERT-OPPD-EXPERT-000484
	Standing Bear and Turtle Creek Demand Revenue for Google for period May 2020 through April 2025.	OPPD-EXPERT-000424
	Internal Omaha Public Power District Email Chain, Subject: Prep for Tuesday Meeting, dated May 5, 2025 through May 7, 2025.	OPPD-EXPERT-000425-OPPD-EXPERT-000431
	Standing Bear and Turtle Creek Energy Revenue Impact Amendment 2 for period May 2023 through December 2025.	OPPD-EXPERT-000482
	"Capacity Purchase Contracts – TCS and SBL Delay May 2023-Dec 2025(OPPD-EXPERT-01118).xlsx. Summary Table – TCS and SBL Energy Revenue Impact Amendment 2 CONFIDENTIAL (OPPD-EXPERT-000482).xlsx." Standing Bear and Turtle Creek Lost Revenue – Confidential (OPPD-EXPERT-000424).xlsx	
Publicly Available Information	"2022/2023 Planning Resource Auction (PRA) Results," MISO, April 14, 2022, https://cdn.misoenergy.org/2022%20PRA%20Results624053.pdf. "Planning Resource Auction Results for Planning Year 2023-24," MISO, May 19, 2023, https://cdn.misoenergy.org/2023%20Planning%20Resource%20Auction%20(PRA)%20Results628925.pdf. "Planning Resource Auction Results for Planning Year 2024-25," MISO, April 25, 2024, https://cdn.misoenergy.org/2024%20PRA%20Results%20Posting%2020240425632665.pdf.	

EXHIBIT
B

Zachry Holdings, Inc. v. Omaha Public Power District **Appendix C**
List Of Documents Considered
May 19, 2025

Category	Document Description	Bates Number
	"Planning Resource Auction Results for Planning Year 2025-26," MISO, April 28, 2025, https://cdn.misoenergy.org/2025%20PRA%20Results%20Posting%2020250428694160.pdf.	
	"Spinning, Non-Spinning, and Supplemental Reserves", https://mypdh.engineer/lessons/spinning-non-spinning-and-supplemental-reserves/.	
	"West Leg 2024," Northern Natural Gas, May 163, 2025, https://www.northernnaturalgas.com/expansionprojects/Pages/West_Leg_2024.aspx.	
	"2024 SPP Resource Adequacy Report," Southwest Power Pool, June 14, 2024, https://www.spp.org/documents/71804/2024%20spp%20june%20resource%20adequacy%20report.pdf.dn.	
	"Aurora Energy Forecasting Software," Energy Exemplar, https://www.energyexemplar.com/aurora.	
	"Planning Resource Auction Results for Planning Year 2024-25," MISO, April 25, 2024, https://cdn.misoenergy.org/2024%20PRA%20Results%20Posting%2020240425632665.pdf.	
	"Planning Resource Auction Results for Planning Year 2025-26," MISO, April 28, 2025, https://cdn.misoenergy.org/2025%20PRA%20Results%20Posting%2020250428694160.pdf.	
	"Peak load trend likely to continue," *The Wire*, OPPD, March 21, 2023, https://oppdthewire.com/peak-load-trend-likely-to-continue/.	
	https://mypdh.engineer/lessons/spinning-non-spinning-and-supplemental-reserves/	
	"Quick Facts," OPPD, December 31, 2024, https://www.oppd.com/media/204897/quick-facts.pdf.	
	"Resource Adequacy," Southwest Power Pool, https://www.spp.org/engineering/resource-adequacy/.	
	"2025 Summer Reliability Assessment," North American Electric Reliability Corporation, May 2025, https://www.nerc.com/pa/RAPA/ra/Reliability%20Assessments%20DL/NERC_SRA_2025.pdf.	
	"Cost of New Entry" and "Resource Adequacy Assurance," Southwest Power Pool, *Open Access Transmission Tariff*, Sixth Revised Volume No. 1 – Attachment AA Resource Adequacy, Sections 13 and 14, available at https://sppviewer.etariff.biz/tariff	
	"Turtle Creek Station," OPPD, https://www.oppdcommunityconnect.com/turtle-creek-station.	
	"Wartsila North America, Inc." Dun & Bradstreet Business Directory, https://www.dnb.com/business-directory/company-profiles.wartsila_north_america_inc.cebf621ddbcbf6905b19e949b4f8b67f.html.	
	"Zachry Industrial, Inc.," Dun & Bradstreet Business Directory, https://www.dnb.com/business-directory/company-profiles.zachry_industrial_inc.81b945ea3ce2b060d13669d1a358e401.html.	
	"Aurora Energy Forecasting Software," Energy Exemplar, https://www.energyexemplar.com/aurora	
	"Cost of New Entry" and "Resource Adequacy Assurance," Southwest Power Pool, *Open Access Transmission Tariff*, Sixth Revised Volume No. 1 – Attachment AA Resource Adequacy, Sections 13 and 14, available at https://sppviewer.etariff.biz/tariff	
	OPPD website, https://www.oppd.com/.	
	Siemens Energy website, https://www.siemens-energy.com/us/en/home.html.	
	Wartsila website, https://www.wartsila.com/usa.	
	Zachry Group website, https://zachrygroup.com/.	
	"About Us / Overview," Northern Natural Gas, May 19, 2025, https://www.northernnaturalgas.com/aboutus/Pages/Overview.aspx	
	"Propane-Air Peak Shaving Plants Custom & Turnkey Packages," TransTech Energy LLC, https://www.transtechenergy.com/peak-shaving-systems	

EXHIBIT
B

Zachry Holdings, Inc. v. Omaha Public Power District **Appendix C**
List Of Documents Considered
May 19, 2025

Category	Document Description	Bates Number
Publications	Barry B. Bramble & Michael T. *Callahan, Construction Delay Claims* (Seventh Edition, 2025-1 Supp. 2020). Michael T. Callahan, Robert F. Cushman, John D. Carter, Paul J. Gorman & Douglas F. Coppi, *Proving and Pricing Construction Claims* (4th Edition, 2025-2 Supp. 2020). Neal J. Sweeney, Chad V. Theriot, Christopher D. Cazenave, Tiffany C. Raush & Lauren Lesueur, *Construction Law Update* (2024 Edition 2021). William Schwartzkopf, *Calculating Construction Damages* (Fourth Edition, 2025-2 Supp. 2021).	
Rate Manuals	Omaha Public Power District Resolution No. 6544: Omaha Public Power District 2023 Corporate Operating Plan, dated December 13, 2022.	
	Omaha Public Power District Resolution No. 6621: Omaha Public Power District 2024 Corporate Operating Plan, dated December 19, 2023.	OPPD-EXPERT-000740-OPPD-EXPERT-000899
	Omaha Public Power District Service Regulations & Schedules, dated January 1, 2025.	OPPD-EXPERT-000900-OPPD-EXPERT-001056
	FERC Gas Tariff Seventh Revised Volume No. 1 of Northern Natural Gas Company, dated August 30, 2024.	OPPD-EXPERT-001260-OPPD-EXPERT-001346
		OPPD-EXPERT-000001-OPPD-EXPERT-000364
Agreements	Accredited Generation Capacity & Energy Supply Agreement between Omaha Public Power District and Goldenrod LLC, dated March 27, 2019.	
	Metropolitan Utilities District of Omaha, Nebraska Firm Deferred Delivery Supply Agreement, dated October 18, 2021	OPPD-EXPERT-000483-OPPD-EXPERT-000513
	Amended & Restated Accredited Generation Capacity & Energy Supply Agreement by and between Omaha Public Power District and Goldenrod LLC and Fermion Energy LLC, dated June 1, 2023.	OPPD-EXPERT-001243-OPPD-EXPERT-001259
		OPPD-EXPERT-000376-OPPD-EXPERT-000423
Invoices	Metropolitan Utilities District Invoice November 2022.	
	Metropolitan Utilities District Invoice December 2022.	OPPD-EXPERT-001444
	Metropolitan Utilities District Invoice January 2023.	OPPD-EXPERT-001456
	Metropolitan Utilities District Invoice February 2023.	OPPD-EXPERT-001365
	Metropolitan Utilities District Invoice March 2023.	OPPD-EXPERT-001371
	Metropolitan Utilities District Invoice April 2023.	OPPD-EXPERT-001382
	Metropolitan Utilities District Invoice May 2023.	OPPD-EXPERT-001388
	Metropolitan Utilities District Invoice June 2023.	OPPD-EXPERT-001346
	Metropolitan Utilities District Invoice July 2023.	OPPD-EXPERT-001352
	Metropolitan Utilities District Invoice August 2023.	OPPD-EXPERT-001394
	Metropolitan Utilities District Invoice September 2023.	OPPD-EXPERT-001358
	Metropolitan Utilities District Invoice October 2023.	OPPD-EXPERT-001425
	Metropolitan Utilities District Invoice November 2023.	OPPD-EXPERT-001432
	Metropolitan Utilities District Invoice December 2023.	OPPD-EXPERT-001438
	Metropolitan Utilities District Invoice January 2024.	OPPD-EXPERT-001450
	Metropolitan Utilities District Invoice February 2024.	OPPD-EXPERT-001462
	Metropolitan Utilities District Invoice March 2024.	OPPD-EXPERT-001400
	Metropolitan Utilities District Invoice April 2024.	OPPD-EXPERT-001406
	Metropolitan Utilities District Invoice May 2024.	OPPD-EXPERT-001412
	Metropolitan Utilities District Invoice Reversal of 2% Statutory Payment to Cities June 2024.	OPPD-EXPERT-001413
	Metropolitan Utilities District Invoice June 2024.	OPPD-EXPERT-001468
	Metropolitan Utilities District Invoice July 2024.	OPPD-EXPERT-001414
	Metropolitan Utilities District Invoice August 2024.	OPPD-EXPERT-001415
	Metropolitan Utilities District Invoice September 2024.	OPPD-EXPERT-001416

EXHIBIT
B

Zachry Holdings, Inc. v. Omaha Public Power District **Appendix C**
List Of Documents Considered
May 19, 2025

Category	Document Description	Bates Number
	Metropolitan Utilities District Invoice October 2024.	OPPD-EXPERT-001417
	Metropolitan Utilities District Invoice November 2024.	OPPD-EXPERT-001418
	Metropolitan Utilities District Invoice December 2024.	OPPD-EXPERT-001419
	Metropolitan Utilities District Invoice January 2025.	OPPD-EXPERT-001420
	Metropolitan Utilities District Invoice February 2025.	OPPD-EXPERT-001421
	Metropolitan Utilities District Invoice March 2025.	OPPD-EXPERT-001422
	Metropolitan Utilities District Invoice April 2025.	OPPD-EXPERT-001423
	Northern Natural Gas Invoice November 2024.	OPPD-EXPERT-001424
	Northern Natural Gas Invoice December 2024.	OPPD-EXPERT-000370
	Northern Natural Gas Invoice January 2025.	OPPD-EXPERT-000371
	Northern Natural Gas Invoice February 2025.	OPPD-EXPERT-000372
	Northern Natural Gas Invoice March 2025.	OPPD-EXPERT-000373
	Northern Natural Gas Invoice April 2025.	OPPD-EXPERT-000374
		OPPD-EXPERT-000375
Discussions with OPPD Personnel	Matthew Eibes, Director of Utility Project Operations	
	Shannon Coleman, Manager, Energy Resource Planning	
	Eric Bassingthwaighte, Manager, Energy Commodities	
	Joseph Lang, Director, Generation Strategy & Origination	
	Jene' Reese, Manager, Large C&I (Commercial and Industrial) Sales & Service	
	James Krist, Director of Customer Sales and Service	
	Deborah Burns, Fuel Supply Manager of Natural Gas	
	Jacob Glair, Manager of Thermal Energy Resources	
	Devin Meisinger, Manager Economic Development	

EXHIBIT
B

Exhibit 1

Zachry Holdings, Inc. v. Omaha Public Power District
Liquidated Damages 15% Cap

Contract Price [1]	15% Liquidated Damages Cap [2]	Total Liquidated Damages
$ 428,741,118	*15.00%*	$ 64,311,168

Source(s):

(1) Change Order No. 1, pg. 3 (*See* First Amendment to EPC - signed.pdf).

(2) "Total liquidated damages in the aggregate for both sites shall not exceed [f]ifteen percent (15%) of the Contract Price." (*See* signed EPC Contract (No Exhibits) 2021.pdf).

EXHIBIT
B

Exhibit 2

Zachry Holdings, Inc. v. Omaha Public Power District
Summary of Damages

Damages Period	Capacity Purchases	Missed Market Energy Net Revenue	Natural Gas Damages	Lost Retail Capacity Revenue	Extended Project Costs	Total
May 2023 - Aug. 2024	$ 13,058,000	$ 5,140,000	$ 1,685,000	$ 76,686,000	*N/A*	**$ 96,569,000**
Sep. 2024 - Dec. 2024	6,226,000	115,000	3,217,000	16,036,000	*N/A*	**25,594,000**
Jan. 2025 - Dec. 2025	20,481,000	5,870,000	11,771,000	14,479,000	18,096,000	**70,697,000**
	$ 39,765,000	**$ 11,125,000**	**$ 16,673,000**	**$ 107,201,000**	**$ 18,096,000**	**$ 192,860,000**

Source(s):
HKA Exhibits 3 through 7.

EXHIBIT B

Exhibit 3

Zachry Holdings, Inc. v. Omaha Public Power District
Capacity Purchases Summary

Date	Capacity (MW)	Price ($/kW-mo)	Cost
May-23	150	$ 2.00	$ 300,000
Jun-23	334	1.06	355,400
Jul-23	334	1.06	355,400
Aug-23	334	1.06	355,400
Sep-23	334	2.74	916,750
Oct-23	230	2.20	506,000
Nov-23	230	2.20	506,000
Dec-23	230	2.20	506,000
Jan-24	230	2.20	506,000
Feb-24	230	2.20	506,000
Mar-24	230	2.20	506,000
Apr-24	230	2.20	506,000
May-24	230	2.20	506,000
Jun-24	497	4.51	2,242,230
Jul-24	497	4.51	2,242,230
Aug-24	497	4.51	2,242,230
Sep-24	497	4.51	2,242,230
Oct-24	242	4.18	1,010,980
Nov-24	242	4.18	1,010,980
Dec-24	427	4.60	1,962,230
Jan-25	427	4.60	1,962,230
Feb-25	427	4.60	1,962,230
Mar-25	427	4.60	1,962,230
Apr-25	242	4.18	1,010,980
May-25	242	4.18	1,010,980
Jun-25	325	7.16	2,325,930
Jul-25	325	7.16	2,325,930
Aug-25	325	7.16	2,325,930
Sep-25	325	7.16	2,325,930
Oct-25	200	4.20	839,680
Nov-25	200	4.20	839,680
Dec-25	200	7.95	1,589,680
May 2023 - Aug. 2024	**4,817**	**$ 2.44**	**$ 13,057,640**
Sep. 2024 - Dec. 2024	**1,408**	**$ 4.37**	**$ 6,226,420**
Jan. 2025 - Dec. 2025	**3,665**	**$ 5.59**	**$ 20,481,410**
		Total	**$ 39,765,470**

Source(s):
Capacity Purchase Contracts - TCS and SBL Delay May 2023-Dec 2025(OPPD-EXPERT-01118).xlsx.

EXHIBIT
B

Exhibit 4

Zachry Holdings, Inc. v. Omaha Public Power District
Missed Energy Market Net Revenue - Turtle Creek Station

Date	Generation (MWh)	Total Production Cost [1]	Total Energy Revenue [1]	Net Revenue/(Cost) [1]
May-23	-	$ -	$ -	$ -
Jun-23	-	-	-	-
Jul-23	-	-	-	-
Aug-23	60,788	1,541	2,721	1,180
Sep-23	-	-	-	-
Oct-23	-	-	-	-
Nov-23	-	-	-	-
Dec-23	-	-	-	-
Jan-24	83,134	8,941	8,020	(922)
Feb-24	-	-	-	-
Mar-24	-	-	-	-
Apr-24	-	-	-	-
May-24	-	-	-	-
Jun-24	20,464	519	911	392
Jul-24	225,061	4,434	7,718	3,284
Aug-24	177,999	3,513	5,528	2,015
Sep-24	14,129	332	447	115
Oct-24	-	-	-	-
Nov-24	-	-	-	-
Dec-24	-	-	-	-
Jan-25	-	-	-	-
Feb-25	-	-	-	-
Mar-25	-	-	-	-
Apr-25	-	-	-	-
May-25	-	-	-	-
Jun-25	4,728	201	355	154
Jul-25	112,482	4,084	7,406	3,322
Aug-25	56,764	2,252	4,280	2,028
Sep-25	12,488	446	632	187
Oct-25	-	-	-	-
Nov-25	-	-	-	-
Dec-25	-	-	-	-
	768,038	**$ 26,263**	**$ 38,018**	**$ 11,755**
May 2023 - Aug. 2024	**567,446**	**$ 18,948**	**$ 24,897**	**$ 5,949**
Sep. 2024 - Dec. 2024	**14,129**	**$ 332**	**$ 447**	**$ 115**
Jan. 2025 - Dec. 2025	**186,463**	**$ 6,983**	**$ 12,674**	**$ 5,691**

Note(s):
(1) Represented in thousands.

Source(s):
Summary Table - TCS and SBL Energy Revenue Impact Amendment 2 CONFIDENTIAL (OPPD-EXPERT-000482) .xlsx.

EXHIBIT B

Zachry Holdings, Inc. v. Omaha Public Power District
Missed Energy Market Net Revenue - Standing Bear Lake Station

Exhibit 4.1

Date	Generation (MWh)	Total Production Cost [1]	Total Energy Revenue [1]	Net Revenue/(Cost) [1]
May-23	-	$ -	$ -	$ -
Jun-23	-	-	-	-
Jul-23	1,413	90	78	(12)
Aug-23	815	52	52	1
Sep-23	-	-	-	-
Oct-23	-	-	-	-
Nov-23	-	-	-	-
Dec-23	-	-	-	-
Jan-24	10,171	2,555	1,737	(817)
Feb-24	-	-	-	-
Mar-24	-	-	-	-
Apr-24	-	-	-	-
May-24	-	-	-	-
Jun-24	-	-	-	-
Jul-24	278	17	19	2
Aug-24	994	58	74	16
Sep-24	-	-	-	-
Oct-24	-	-	-	-
Nov-24	-	-	-	-
Dec-24	86	6	6	(0)
Jan-25	-	-	-	-
Feb-25	-	-	-	-
Mar-25	-	-	-	-
Apr-25	-	-	-	-
May-25	-	-	-	-
Jun-25	-	-	-	-
Jul-25	1,469	118	221	103
Aug-25	987	79	155	76
Sep-25	-	-	-	-
Oct-25	-	-	-	-
Nov-25	-	-	-	-
Dec-25	-	-	-	-
	16,213	**$ 2,975**	**$ 2,344**	**$ (630)**
May 2023 - Aug. 2024	**13,670**	**$ 2,771**	**$ 1,962**	**$ (809)**
Sep. 2024 - Dec. 2024	**86**	**$ 6**	**$ 6**	**$ (0)**
Jan. 2025 - Dec. 2025	**2,456**	**$ 197**	**$ 376**	**$ 179**

Note(s):
(1) Represented in thousands.

Source(s):
Summary Table - TCS and SBL Energy Revenue Impact Amendment 2 CONFIDENTIAL (OPPD-EXPERT-000482) .xlsx.

EXHIBIT
B

Zachry Holdings, Inc. v. Omaha Public Power District
Turtle Creek Firm Natural Gas Station Transport Summary

Exhibit 5

Vendor	Invoice Identifier	Invoice Date	Transaction Dates	Rate Schedule[1]	Rate	Quantity (dth)	Amount ($/Dth)	Source
Northern Natural Gas - Tenaska Marketing Ventures	RC00112411249957	12/2/2024	11/1/24 - 11/30/24	TFX	$ 15.4794	51,474	$ 796,787 [2]	OPPD-EXPERT-000370
Northern Natural Gas - Tenaska Marketing Ventures	RC00122412241920	1/2/2025	12/1/24 - 12/31/24	TFX	25.7990	51,474	1,327,978	OPPD-EXPERT-000371
Northern Natural Gas - Tenaska Marketing Ventures	RC00012501254008	2/3/2025	1/1/25 - 1/31/25	TFX	25.7990	51,474	1,327,978	OPPD-EXPERT-000372
Northern Natural Gas - Tenaska Marketing Ventures	RC00022502256230	3/3/2025	2/1/25 - 2/28/25	TFX	25.7990	51,474	1,327,978	OPPD-EXPERT-000373
Northern Natural Gas - Tenaska Marketing Ventures	RC00032503258398	4/1/2025	3/1/25 - 3/31/25	TFX	25.7990	51,474	1,327,978	OPPD-EXPERT-000374
Northern Natural Gas - Tenaska Marketing Ventures	RC00042504250108	5/1/2025	4/1/25 - 4/30/25	TFX	9.6760	51,474	498,062	OPPD-EXPERT-000375
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	5/1/25 - 5/31/25	TFX	9.6760	51,474	498,062 [3]	
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	6/1/25 - 6/30/25	TFX	9.6760	51,474	498,062	
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	7/1/25 - 7/31/25	TFX	9.6760	51,474	498,062	
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	8/1/25 - 8/31/25	TFX	9.6760	51,474	498,062	
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	9/1/25 - 9/30/25	TFX	9.6760	51,474	498,062	
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	10/1/25 - 10/31/25	TFX	9.6760	51,474	498,062	
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	11/1/25 - 11/30/25	TFX	25.7990	51,474	1,327,978	
Northern Natural Gas - Tenaska Marketing Ventures	*N/A*	*N/A*	12/1/25 - 12/31/25	TFX	25.7990	51,474	1,327,978	
						Total	**$ 12,251,090**	

May 2023 - Aug. 2024	**$ -**
Sep. 2024 - Dec. 2024	**$ 2,124,764**
Jan. 2025 - Dec. 2025	**$ 10,126,326**

Note(s):
(1) Per the Rate Schedule TFX from the FERC Gas Tariff, Winter rates are from November through March and Summer rates are from April through October. OPPD-EXPERT-000001 - 364 @ OPPD-EXPERT-000008.
(2) November 2024 was a partial month due to the start of the NNG - Tenaska Marketing Ventures firm transportation contract.OPPD-EXPERT-000425-431 @ OPPD-EXPERT-000427.
(3) For May 2025 through December 2025, I used the FERC Gas Tariff TFX rates to anticipate the period May through December 2025. OPPD-EXPERT-000001 - 364 @ OPPD-EXPERT-000008.

Source(s):
FERC Gas Tariff: OPPD-EXPERT-000001 - 364 @ OPPD-EXPERT-000008.

EXHIBIT
B

Exhibit 5.1

Zachry Holdings, Inc. v. Omaha Public Power District

Standing Bear Lake Station Natural Gas and Propane Service Costs

Date	Monthly MUD Fees [1]	Propane Demand Charge	Storage Fee	Refund 2% Tax [2]	Total	Bates For Invoice(s)
Nov-22	$ 10,623	$ -	$ -	$ -	$ 10,623	OPPD-EXPERT-001444
Dec-22	10,623	-	-	-	10,623	OPPD-EXPERT-001456
Jan-23	10,672	-	-	-	10,672	OPPD-EXPERT-001365
Feb-23	10,673	-	-	-	10,673	OPPD-EXPERT-001371
Mar-23	10,673	-	-	-	10,673	OPPD-EXPERT-001382
Apr-23	10,673	-	-	-	10,673	OPPD-EXPERT-001388
May-23	10,673	-	-	-	10,673	OPPD-EXPERT-001346
Jun-23	10,673	-	-	-	10,673	OPPD-EXPERT-001352
Jul-23	10,673	-	-	-	10,673	OPPD-EXPERT-001394
Aug-23	10,673	-	-	-	10,673	OPPD-EXPERT-001358
Sep-23	10,673	-	-	-	10,673	OPPD-EXPERT-001425
Oct-23	10,673	30,500	727,763	-	768,936	OPPD-EXPERT-001432
Nov-23	10,673	146,000	-	-	156,673	OPPD-EXPERT-001438
Dec-23	10,673	146,000	-	-	156,673	OPPD-EXPERT-001450
Jan-24	10,698	146,000	-	-	156,698	OPPD-EXPERT-001462
Feb-24	10,698	158,541	-	-	169,239	OPPD-EXPERT-001400
Mar-24	10,698	148,980	-	-	159,678	OPPD-EXPERT-001406
Apr-24	10,698	31,122	-	-	41,821	OPPD-EXPERT-001412
May-24	10,492	-	-	(19,859)	(9,367)	OPPD-EXPERT-001413; OPPD-EXPERT-001468
Jun-24	10,492	-	-	-	10,492	OPPD-EXPERT-001414
Jul-24	10,492	-	-	-	10,492	OPPD-EXPERT-001415
Aug-24	10,492	-	-	-	10,492	OPPD-EXPERT-001416
Sep-24	10,492	-	-	-	10,492	OPPD-EXPERT-001417
Oct-24	10,492	30,500	727,763	-	768,754	OPPD-EXPERT-001418
Nov-24	10,492	146,000	-	-	156,492	OPPD-EXPERT-001419
Dec-24	10,492	146,000	-	-	156,492	OPPD-EXPERT-001420
Jan-25	10,517	146,000	-	-	156,517	OPPD-EXPERT-001421
Feb-25	10,517	146,000	-	-	156,517	OPPD-EXPERT-001422
Mar-25	10,517	146,000	-	-	156,517	OPPD-EXPERT-001423
Apr-25	10,517	30,500	-	-	41,017	OPPD-EXPERT-001424
May-25	10,517	-	-	-	10,517 (3)	*N/A*
Jun-25	10,517	-	-	-	10,517	*N/A*
Jul-25	10,517	-	-	-	10,517	*N/A*
Aug-25	10,517	-	-	-	10,517	*N/A*
Sep-25	10,517	-	-	-	10,517	*N/A*
Oct-25	10,517	30,500	727,763	-	768,779	*N/A*
Nov-25	10,517	146,000	-	-	156,517	*N/A*
Dec-25	10,517	146,000	-	-	156,517	*N/A*
Total	**$ 402,248**	**$ 1,920,643**	**$ 2,183,288**	**$ (19,859)**	**$ 4,486,319**	
May 2023 - Aug. 2024	**$ 170,144**	**$ 807,143**	**$ 727,763**	**$ (19,859)**	**$ 1,685,190**	
Sep. 2024 - Dec. 2024	**$ 41,967**	**$ 322,500**	**$ 727,763**	**$ -**	**$ 1,092,229**	
Jan. 2025 - Dec. 2025	**$ 126,200**	**$ 791,000**	**$ 727,763**	**$ -**	**$ 1,644,963**	

Note(s):

(1) Monthly MUD Fees = Service Fee + Gas Infrastructure Replacement.

(2) Refund of 2% Tax in May 2024 due to Standing Bear Lake Station being outside city limits.

(3) For May 2025 through December 2025, I used the historical pricing from fall 2024 for Propane Demand Charges and the Storage Fee; and the annual Monthly MUD Fees from 2025.

EXHIBIT B

Exhibit 6

Zachry Holdings, Inc. v. Omaha Public Power District
Lost Retail Capacity Revenue

Date	[A] 3/2019 Energy Supply Agreement (ESA) Exhibit B Load Schedule (MW)	[B] Google Total History (MW)	[C = A - B] Difference (MW) (ESA - Actual Load)[1]	[D] Demand Charge Rate ($/kW)[2]	[E = C * D * 1000] Demand Revenue Difference
May-23	300	48	252	$19.52	$ 4,928,566
Jun-23	300	55	245	19.52	4,776,154
Jul-23	330	60	270	19.52	5,265,793
Aug-23	330	67	263	19.52	5,138,913
Sep-23	330	76	254	19.52	4,952,536
Oct-23	360	87	273	19.52	5,328,023
Nov-23	360	95	265	19.52	5,173,503
Dec-23	360	109	251	19.52	4,906,547
Jan-24	390	119	271	18.36	4,977,102
Feb-24	390	135	255	18.36	4,685,031
Mar-24	390	149	241	18.36	4,427,771
Apr-24	420	164	256	18.36	4,708,018
May-24	420	178	242	18.36	4,438,732
Jun-24	420	194	226	18.36	4,142,530
Jul-24	450	206	244	18.36	4,487,221
Aug-24	450	213	237	18.36	4,349,557
Sep-24	450	218	232	18.36	4,265,322
Oct-24	450	229	221	18.36	4,061,856
Nov-24	450	238	212	18.36	3,899,050
Dec-24	450	242	208	18.36	3,810,167
Jan-25	450	247	203	19.51	3,951,514
Feb-25	450	259	191	19.51	3,726,941
Mar-25	450	265	185	19.51	3,612,959
Apr-25	450	287	163	19.51	3,187,700
May-25	450	*N/A*	*N/A*	19.51	*N/A*
Jun-25	450	*N/A*	*N/A*	19.51	*N/A*
Jul-25	450	*N/A*	*N/A*	19.51	*N/A*
Aug-25	450	*N/A*	*N/A*	19.51	*N/A*
Sep-25	450	*N/A*	*N/A*	19.51	*N/A*
Oct-25	450	*N/A*	*N/A*	19.51	*N/A*
Nov-25	450	*N/A*	*N/A*	19.51	*N/A*
Dec-25	450	*N/A*	*N/A*	19.51	*N/A*
Total / Average	**13,200**	**3,939**	**5,661**	**$19.08**	**$ 107,201,507**
May 2023 - Aug. 2024	**6,000**	**1,954**	**4,046**	**$18.94**	**$ 76,685,998**
Sep. 2024 - Dec. 2024	**1,800**	**927**	**873**	**$18.36**	**$ 16,036,395**
Jan. 2025 - Dec. 2025	**5,400**	**1,058**	**742**	**$19.51**	**$ 14,479,114** [3]

Note(s):
(1) This analysis calculates lost retail revenue for one large customer.
(2) Demand Charges of $19.52/kW, $18.36/kW, and $19.51/kW for 2023, 2024, and 2025 respectively.
(3) This subtotal only includes January through April 2025 as no historical MWs have been provided for the remainder of 2025.

Source(s):
Standing Bear and Turtle Creek Lost Revenue - Confidential (OPPD-EXPERT-000424).xlsx.
Energy Supply Agreement w Goldenrod LLC - Executed (OPPD-EXPERT-000483-000513).pdf.
Rate Manuals:
2022-12-dec-resolution-6544-2023 final corporate operating plan(OPPD-EXPERT-000740-000899).pdf.
2023-12-dec-resolution-6621-2024 final corporate operating plan(OPPD-EXPERT-000900-001056).pdf.
2025 oppd-rate-manual (OPPD-EXPERT-001260).pdf.

EXHIBIT B

Exhibit 7

Zachry Holdings, Inc. v. Omaha Public Power District

Project Costs OPPD Incurred From Missed Guaranteed Substantial Completion Dates

Costs Incurred in Zachry Missing Amendment 2 Guaranteed Substantial Completion Dates [1]		
OPPD		
HDR	$	710,983
Qualus, Benesch, Farris, etc.		378,608
Fuel Oil Analysis		24,557
Payroll		3,866,891
EMI Expert MegaLabs		23,100
EMI Materials & Installation		380,720
Wilson & Co. TCS Wastewater		37,495
	$	**5,422,354**
Legal Fees		
Legal Fees	$	705,903
	$	**705,903**
OFE (Technical Field Assistant "TFA")		
Wartsila	$	3,297,384
Siemens		6,002,719
	$	**9,300,103**
Damage Claims		
Siemens		
Fuel Oil Related	$	1,155,265 [2]
Unit 2 Zachry Fuel Oil Human Performance Error		390,000
Damaged / Missing Parts		1,000,000
Wartsila		
Dec. 16, 2024 EMI Incident Damaged Cards		225,000
Raccoon		38,275
Damaged / Missing Parts		190,146
Engine 8 Sabotage		55,075
TCS Fuel Oil Spill Remediation		320,020
	$	**3,373,781**
Total (Not Including Legal Fees)	**$**	**18,096,238**

Note(s):

(1) For purposes of this analysis, the costs are assumed to have been incurred after December 2024.

(2) Costs for the Service Team would be in addition to the $1.2 million.

Source(s):

Project Costs - OPPD Incurred(OPPD-EXPERT-000484).png.

EXHIBIT B

Docusign Envelope ID: 9BB37A0A-689E-419C-868C-CA6796230745

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

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

DECLARATION OF JOSEPH LANG IN SUPPORT OF DEFENDANT OMAHA PUBLIC POWER DISTRICT'S OPPOSITION TO ZACHRY'S MOTION FOR PARTIAL SUMMARY JUDGMENT RE LIQUIDATED DAMAGES

I, Joseph Lang, make the following declaration in lieu of an affidavit pursuant to 28 U.S.C. § 1746:

1. I am over 21 years old. The facts and matters stated in this declaration are based on my own personal knowledge and information, or on my review of records created by Defendant Omaha Public Power District ("OPPD") in the ordinary course of business. I submit this declaration in connection with OPPD's Opposition to Zachry's Motion for Partial Summary Judgment re: Liquidated Damages.

1. I am currently employed by OPPD as the Director of Generation Strategy & Origination, in Omaha, Nebraska. In this capacity, I am responsible for overseeing efforts to site, spec, negotiate and contract for the purchase of generation equipment and construction for new and existing OPPD generation facilities. I am a licensed Professional Engineer in the State of Nebraska.

EXHIBIT C

Docusign Envelope ID: 9BB37A0A-689E-419C-868C-CA6796230745

2. I have knowledge of the Engineer, Procure, and Construct Contract for Omaha Public Power District Standing Bear Lake and Turtle Creek Generating Stations (Contract No. 263406) dated September 21, 2021 (together with all exhibits, schedules, and ancillary agreements and documents thereto, the "EPC" or "Contract"). Under the terms of the Contract, Zachry is to provide services for all activities associated with designing, procuring, installing, starting up, and testing two (2) power plant sites: (i) the Standing Bear Lake Station ("SBLS"); and (ii) the Turtle Creek Station ("TCS") (collectively the "Projects"). The Contract was amended in October of 2023, and August of 2024.

3. Through my past and current employment with OPPD, I have knowledge of the tariff, protocols, and other rules of the Southwest Power Pool ("SPP"). I am a member of the following relevant SPP committees: Chairman of the SPP Markets and Operations Policy Committee, and member of the Members Committee that advises the SPP Board of Directors on voting positions. OPPD is a Transmission Owner member of SPP. OPPD also is a "Load Responsible Entity" within the rules of SPP. A Load Responsible Entity within SPP is an entity that has a service obligation to provide electric service to end-use customers. OPPD is a Load Responsible Entity for a service area that includes the Omaha, Nebraska metropolitan area, east of the Missouri River, and thirteen counties in eastern Nebraska.

4. As a Load Responsible Entity within SPP, OPPD has an obligation to have sufficient electric capacity to serve the peak load of its customers plus a margin above that peak load, referred to in SPP as a Planning Reserve Margin ("PRM"). Presently, the PRM under SPP rules is fifteen percent (15%) year-round. Beginning in the summer of 2026 and winter of 2026-27, SPP has increased the PRM to be 16% during the summer months and 36% in the winter months.

5. For an electric utility like OPPD, there are two critical aspects to the production of electricity from generation units such as TCS and SBLS: capacity and energy. "Capacity" is the maximum amount of power that a generator can produce. "Energy" refers to the amount of electricity generated or consumed over a period of time. Capacity typically is expressed in megawatts ("MW"), representing the maximum output of a generator at any given time. Energy is measured in kilowatt hours ("kWh"). It describes a generator operating for a specific duration and is the basis for billing customers for their use of energy.

6. The Declaration of Tanya Bodell, offered by Zachary in support of its Motion for

EXHIBIT C

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Partial Summary Judgment, states that OPPD projects using SBLS and TCS approximately 15% of the time on an annual basis. Although that statement may be accurate as to energy usage over the course of a year, it neglects to consider the capacity provided by these two stations, which is a total of 600 MW. That capacity is needed by OPPD to meet Resource Adequacy ("RA") requirements of SPP. When Zachary delayed the completion of the two power stations, OPPD still had to meet its RA requirements with SPP. To do so, OPPD was required to enter into capacity contracts in the market to meet the RA requirements. Those capacity purchases were substantial. They total in excess of $25 million for the period beginning August of 2024 and extending through 2025. The alternative faced by OPPD if it did not purchase capacity to meet its RA requirements, when the plants were delayed, was a deficiency payment assessed by OPPD known as a Cost of New Entry ("CONE") payment. Those payments would have been $13.6 million for 2023 and $34.1 million for 2024.

7. The Liquidated Damages clause in the Contract states that actual damages would be difficult to determine, and that both parties agreed the Liquidated Damages amounts were reasonable and appropriate measures of damages and not a penalty. The total Liquidated Damages were not to exceed 15% of the Contract Price.

> "(a) The Contractor and the District acknowledge that **actual damages** incurred by the District 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, and are not a penalty. **Total liquidated damages in the aggregate for both sites shall not exceed Fifteen percent (15%) of the Contract Price**." (emphasis added)

8. The Cybersecurity and Infrastructure Security Agency of the Department of Homeland Security identifies the energy sector and electric power industry as critical infrastructure. Not having the Turtle Creek Station ("TCS") and Standing Bear Lake Station ("SBLS") facilities commissioned prevents them from supporting OPPD's system and grid resiliency and adversely impacts OPPD's ability to serve load under certain adverse grid conditions and localized grid events. These events could lead to a weakened system or load shedding that TCS and SBLS could otherwise have addressed or prevented. These generation assets are located close to OPPD's load pocket and SBLS and TCS completion delays create risks and impacts to OPPD's mission critical facilities.

9. TCS and SBLS provide voltage support on the local and regional electrical grid.

EXHIBIT C

Docusign Envelope ID: 9BB37A0A-689E-419C-868C-CA6796230745

Delay of having these generation facilities online creates power quality and low voltage risks that could adversely impact customers in addition to causing premature degradation to grid components and equipment leading to decreased equipment life and increased failure risks.

10. OPPD is a customer owned public power utility and such adverse grid events without the support of SBLS and TCS could impact OPPD's reputation and goodwill with the public, community and economic development of OPPD's service territory.

11. The foregoing damages are difficult to determine due to the physical nature of grid and equipment impacts, as well as anticipating the scenarios and unforeseen circumstances that could materialize. There are also intangible losses that can further impact future losses, the quantification of which would be highly speculative and difficult to determine.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of May, 2025.

DocuSigned by:
Joseph E. Lang
E215E097FE0444A...

Joseph E. Lang, P.E.

EXHIBIT C

THE UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

* * * * *

IN RE:	*	
	*	
ZACHRY HOLDINGS, INC.,	*	NO. 24-BK-90377
	*	
DEBTOR	*	

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ZACHRY HOLDINGS, INC.,	*	NO. 25-AP-03025
	*	Houston, Texas
vs.	*	
	*	10:04 a.m. - 10:24 a.m.
OMAHA PUBLIC POWER DISTRICT	*	April 14, 2025

* * * * *

MOTION HEARING

BEFORE THE HONORABLE MARVIN ISGUR
UNITED STATES BANKRUPTCY JUDGE

* * * * *

Proceedings recorded by electronic sound recording
Transcript produced by transcription service

APPEARANCES:

For Zachry Holdings, Inc.:

MR. CHARLES R. KOSTER (Houston Office)
MR. JASON ZAKIA (Chicago Office)
MS. LAURA GARR (New York Office)
White & Case, LLP
609 Main Street
Suite 2900
Houston, TX 77002

MR. JOHN B. THOMAS
Hicks Thomas, LLP
700 Louisiana
Suite 2300
Houston, TX 77002

For Omaha Public Power District:

MR. THOMAS C. SCANNELL, JR.
Foley & Lardner, LLP
2021 McKinney Avenue
Suite 1600
Dallas, TX 75201

Courtroom Deputy:

AARON JACKSON

P R O C E E D I N G S

10:04 A.M. - APRIL 14, 2025

THE COURT: Next case we have is Zachry Holdings. It is 24-90377.

MR. KOSTER: Good morning. Charles Koster, White & Case, for the Reorganized Debtors. Very short agenda today, just one item going forward, a Status Conference in the Adversary Proceeding filed against OPPD with respect to the liquidated damages dispute.

The other matters on the agenda have come off given the current status of the case. We filed a notice of effective date last week mooting the cash collateral motion and a further extension of that relief, and with respect to Encino's request to file a late proof of claim. That has been adjourned to the May 12th hearing.

I have no heavy lifting to do, fortunately. I'm joined by my colleagues, Mr. Zakia and Ms. Garr and Mr. Thomas from the Hicks Thomas Firm. They will be addressing the status of this matter.

THE COURT: All right. Let's move then directly into that matter.

Mr. Zakia.

MR. ZAKIA: Good morning, Your Honor. Jason Zakia for the Debtors.

Your Honor, as you will have seen from the pre-conference report, the principal area of -- there are several areas of disagreement, but the principle one for today, I would submit, is a schedule. The parties have proposed starkly different ways for Your Honor to approach this case. And I'm happy to talk about whatever you'd like, but I was going to propose starting with that.

THE COURT: I was wondering, though, in that report it doesn't really say what to do about the semi-dispositive motions that are here, either to dismiss or to withdraw the reference or to transfer it somewhere else. What are y'all proposing we do? What are both parties proposing we do about those in conjunction with opening discovery and things of that nature?

MR. ZAKIA: So I think, Your Honor, our view would be those can proceed in parallel. There is no reason to stop progression of the case while those motions are pending. As Your Honor may have seen, we did file an Amended Complaint, so that would moot --

THE COURT: I saw an Amended Complaint. I also saw that on Friday you filed the answers to those, and y'all identified that they haven't had the chance to deal with --

MR. ZAKIA: Right. So I think that if they choose, after they see the Amended Complaint, they can move to dismiss that. That's their choice.

And with regards, we did file a response on the Motion to Transfer and the Motion to Withdraw Reference. We do not believe there's any reason that if Your Honor were to adopt our phase approach, Phase I, which would tee up the issue of the enforceability and availability of liquidating damages, which we think could substantially narrow this dispute and set us up for favorable conditions for potential mediation, we don't think there's any reason for that not to go forward now while Your Honor considers the pending motion.

THE COURT: So what discovery do you need, if any, to tee that question up?

MR. ZAKIA: So I think there would be far more limited discovery and more focused discovery, but some discovery with regard to the liquidated damage issue, specifically concerning -- I think we'd have some expert discovery on why the actual damages to be incurred were foreseeable and far, far, far different than the liquidated damage amounts set forth in the contract; and I think some targeted fact discovery potentially, for example, as to what arrangements OPPD

had made to mitigate their damages early on in the process, possibly before they even signed the contract.

THE COURT: So let's say you get all that discovery that you want.

MR. ZAKIA: Yes, Your Honor.

THE COURT: And they don't agree with you and I end up with a disputed factual question at that hearing, which I think I will. I'd be pretty shocked if there isn't a factual disagreement about that.

MR. ZAKIA: Yeah.

THE COURT: What good does it do to take it up first if I can't rule on it without bifurcating into a separate trial?

MR. ZAKIA: So, I think, Your Honor, you could rule on it notwithstanding -- we think that any factual disputes with regard to Phase I would be far, far more limited and easier to manage than what we propose for Phase III.

THE COURT: Okay. But are you proposing an actual bifurcation or trifurcation of the trial?

MR. ZAKIA: Bifurcation.

THE COURT: Because I thought this was only sort of a discovery issue, not a trial issue.

MR. ZAKIA: No, Your Honor, I think -- well, obviously, Your Honor is the judge and will decide how

we do it, but what we were proposing is that the end of Phase I we could have, to the extent there are factual issues, which I agree there might be -- they would be very narrow, but we could have an evidentiary hearing on Phase I and Your Honor could dispose of Phase I even if there were some limited factual issues at that point. That's what we were proposing --

THE COURT: So why do you need to take any discovery to bring your motion?

MR. ZAKIA: So, Your Honor, because I do think it is -- the reason we didn't just, for example -- well, I think that while there are certainly important legal issues with regard to Phase I, the enforceability of liquidated damages, it is necessarily going to turn on two factors:

One, the ability of the parties to foresee and determine what damages were likely to be --

THE COURT: Right. So you have your person saying you win; right? You've already got them lined up. You don't need to take your own versions discovery to say you win.

MR. ZAKIA: Sure. Although I do think, Your Honor -- and I'm not going to pre-argue the case and they will tell me I'm wrong. I think if we do discovery, you are going to see that what actually

happened on their side matches much more to what our expert is going to say that they could have done. They may have actually done it -- and I do think the factual discovery issues, while real, will be pretty targeted and pretty limited, which is why we think it could be done in a fairly streamlined manner.

THE COURT: So I guess what I'm wondering -- and I'm fixing to stop talking to you and talk to them for a minute about this same issue -- is why you can't file a dispositive motion on that question next week, let them oppose it under, among other things, probably 54(g), and we let things progress without deciding today whether we're going to have that bifurcated trial. I mean, we're all going to be speculating about what these factual disputes are until it's joined. So I don't see why you aren't in a position immediately to file your Motion for Summary Judgment on that.

MR. ZAKIA: Certainly, Your Honor. What we were trying to set up was how we saw it playing out. If Your Honor is not inclined to do that today, I certainly agree we could. If Your Honor were to set a schedule for the whole case, we could focus on that issue first and tee that up with a partial summary judgment motion, if that's what Your Honor is suggesting.

THE COURT: I guess I'm thinking I should be doing that as well as taking up the Motion to Dismiss and Transfer Venue, and then see where we are before I decide whether to bifurcate things, and probably not open discovery until we figure out the dismissal and the transfer matter.

In the meantime, you can be filing -- I wouldn't prevent you from filing your Summary Judgment Motion, make them answer it. We're then going to know what discovery we need and we come back for discovery in the context of the other pending motions. I know that's a different approach than what y'all have talked about, but I think it puts you where you need to be and I think it puts them where they need to be, which is they don't want me hearing this for -- I don't mean that pejoratively. They just want somebody --

MR. ZAKIA: They don't even want to start until next year.

THE COURT: They think it ought to be heard somewhere else.

MR. ZAKIA: I actually thought that was a typo when I first saw it.

So, Your Honor, certainly, what you are suggesting would work far better than the schedule they proposed. I certainly agree with that. And the only

issue I was trying to moot with our proposal is I do think it is very possible there will be a couple of discovery issues that might be needed for Phase I, and if we could get started on that, it would expedite the ability to resolve that issue. But we'll obviously proceed how Your Honor wants.

THE COURT: Yeah, how long will it take you to file your Motion for Summary Judgment, thought? Are we literally talking next week?

MR. ZAKIA: I'm getting the sign of two weeks, Your Honor.

THE COURT: Two weeks.

MR. ZAKIA: There's probably some cushion baked into it. But we could move, we could do that quickly.

THE COURT: But if you did that by the 28th and then they would have, if my calendar is right, until the 19th of May to file their response -- which would indicate, I'm assuming, a 54(g) in part response -- and then if we were to set their Motions to Dismiss and to Transfer and to Withdraw the Reference on the same day as we had the first hearing on the Motion for Summary Judgment, I'd say around June 2nd or so -- and I'm not opening my calendar to see what I really have free -- I think that puts you where you

want to be and where they want to be. And I'm not suggesting we delay things at all, but why don't you talk to your team and let me hear from them a little bit about this kind of an issue, too.

MR. ZAKIA: Thank you, Your Honor.

THE COURT: Thank you.

MR. SCANNELL: Thank you, Judge. Good morning. Tom Scannell for OPPD.

THE COURT: Good morning.

MR. SCANNELL: What Your Honor is proposing is what OPPD would support. What we're seeking is a traditional scheduling order that may be entered after the motions have been decided because we'll know where we are, we'll know where we're going to be, which direction the case is going. We do think it would be premature to trifurcate or bifurcate the schedule. It's too early in the case to even know what we don't know yet.

THE COURT: But, if I do that, I might very well set -- once I can read their motion and read your answer, if that will get rid of the dominant issue in the case, I'm not -- I would normally be inclined to bifurcate and I want you to be aware of that. So I'm not trying to terminate that as a concept. I just want to get it a little riper before we go there.

MR. SCANNELL: And I believe ripeness is the issue. We don't even know yet, but there may be other issues in the case that are going to come to light that could impact the liquidate damages issue. It's too soon for us to put that in a vacuum.

Essentially, I think it would be inequitable for them to sue us and then dictate to us how we get to defend our case. We need to be able to look at everything and decide whether or not it's appropriate to limit the issue to liquidate damages up front. We would not support that at this point in case.

To Your Honor's point, they are free to move for summary judgment as early as they want to, subject to any response we have that gets them where they want to be without any prejudice to us, and that's why we're opposing that.

THE COURT: So they filed their responses to your motions Friday. So, if I set you for a trial -- not for a trial, for a hearing on your motions the first week of June, does that work for you timing-wise?

MR. SCANNELL: It does, Your Honor. I believe it does.

THE COURT: And I make discovery open on a voluntary -- but full disclosures have to be made, of

course, under Rule 26, but then discovery would be open by both parties, but only on a voluntary basis so y'all can voluntarily decide to do some discovery. But at that hearing that we held in that first week of June, I will take up and then sort of the competing idea of whether we ought to bifurcate or not depending about what's in dispute. And I don't know what's going to be in dispute.

Are you okay with that whole concept?

MR. SCANNELL: That's fair, Your Honor.

THE COURT: So let me -- why don't you confer with your team and I'll let them confer with their team and we'll come back out.

MR. SCANNELL: Thank you, Judge.

THE COURT: In the meantime, I'll find a date for all this.

MR. ZAKIA: We just ask it not be June 5th, Your Honor.

THE COURT: Not be when?

MR. ZAKIA: June 5th.

THE COURT: It will not be June 5th, then.

MR. ZAKIA: Thank you.

THE COURT: Mr. Jackson, am I free the 2nd? It looks like I'm totally open the 2nd. Is that right? If I'm not misreading the calendar.

Yeah, I happen to be free on June 2nd. I have no idea why. It's the first I've looked at my calendar. That's the day we're targeting anyway. So that would avoid the 5th.

MR. ZAKIA: Thank you, Your Honor. And from our perspective, what Your Honor proposes works. It may be we're talking about limited discovery issues at that point, but then Your Honor will be more -- had the ability to read more about this and can adjudicate those issues at that time.

THE COURT: Yeah.

MR. ZAKIA: I assume when you say voluntary discovery. You mean both sides need to volunteer?

THE COURT: Yeah. Look, they want to move faster than you want to move, probably. And so them agreeing to do a little bit of discovery so that we're more prepared for the arguments on June 2nd may make a lot of sense to them. I don't know. It may not make sense to them. I'm not going to mandate that. I'm just saying I don't want to really open discovery, but that allows people to agree. These are some targeted areas where counsel knows it will be helpful for that hearing. Y'all can agree to do that. If you don't, you don't. I'm not going to make people agree to it, but I want to hear the Motion to Dismiss, I want to

hear whether I ought to be hearing it, I want to hear whether I ought to transfer it to Nebraska, all that stuff.

MR. SCANNELL: Understood. And we would file our motion with the expert report attached and can go from there.

THE COURT: So you're okay with June 2nd, 9:00?

MR. ZAKIA: I am.

THE COURT: Counsel?

MR. KOSTER: Thank you, Your Honor. That early date in June works for us. I would be remiss if I didn't at least mention to the Court that it's a bit of a moving target here because both of these projects are still ongoing. So whatever discovery we're doing, it's likely going to change, it's going to be hard to pin down because this whole dispute really centers on the cause for delays on projects that are still ongoing. So material facts that are relevant to really the heart of this dispute are still developing each day. So we'll have to see what the motion looks like when it gets filed. It's hard to tell what things are going to look like on June 2nd, but there's a very good chance that there's going to be a fact issue because things have come to light between now and the

beginning of June that we didn't know then or we don't know now.

THE COURT: Well, you're telling me there may be fact issues, he's telling me there may be fact issues. If I can get rid of any dominant issue in the case, then maybe we can resolve those at a mini trial.

On the other hand, I may leave that up to the judge in Nebraska; right?

MR. KOSTER: Correct.

THE COURT: So these will all be up on the table for that day.

MR. KOSTER: That's right.

THE COURT: But I don't want to take it off the table and I don't want your client thinking that we're not going to do that. I want your client knowing that that is a normal event for me to do, to bifurcate or trifurcate a case to try and get rid of dominant issues.

That does not mean that it's appropriate to you. That just means you may have told your client. Most of you have gone through a whole lot of bifurcations. It's something I do a lot as part of my case management. It has to make sense. I don't do it every time it's asked for, but I do it some. And that's why I want to hear that argument.

MR. KOSTER: I've been in front of you for 16 years. I've seen you do it.

THE COURT: I know. Thank you.

MR. KOSTER: Thank you, Judge.

MR. ZAKIA: One last point, Your Honor. I don't think it changes anything as to how we're going to proceed. But the good news with regard to what counsel just mentioned is the projects are already largely complete and both should be completed well before June 2nd. It should be in the next couple of weeks.

THE COURT: You know, full completion of a project also has to have people sit down and talk about their problems, so that's a good thing.

MR. ZAKIA: Thank you, Your Honor.

THE COURT: Can I do all this by documentary or do y'all want to have a formal order? I don't care.

MR. KOSTER: Documentary will be fine, Your Honor.

THE COURT: All right. So what we're talking about is Adversary Proceeding 25-3025. On June 2nd, at 9:00, we will hear ECF No. 11, the Motion to Dismiss this proceeding. We will hear ECF No. 12, the Motion to Withdraw the Reference or Transfer Venue of this issue. We will hear a Motion for Summary Judgment to

be filed by Zachry not later than April 28th at 5:00 p.m.. The response to the Motion for Summary Judgment will be due on May 19th, not later than 5:00 p.m.. Any response to that will be due not later than May 28th at 5:00 p.m.. The hearing, again, will start at 9:00 on June 2nd.

We will also hear at 9:00 on June 2nd whether to issue a Scheduling Order that bifurcates the proceeding or to issue a more traditional Scheduling Order. That will be part of what we take up on the 2nd.

Finally, discovery is not yet open. Disclosures must me made in accordance with the rules. The parties may engage in discovery by consent if they wish to target narrow areas that they think would be helpful. I'm not requiring the parties to do that, but allowing that to occur.

I think that's what all we ordered. If y'all continue that as well, you let me know. But I wanted Mr. Jackson to have good notes of what we're doing.

So, if we could, I'm going to get Mr. Koster back up to be sure we have a good record of what we've done on the balance of the agenda.

So the Encino matter, which is ECF 2120,

is continued by agreement to May 12th at 10:00 in the morning?

MR. KOSTER: Correct.

THE COURT: The Status Conference has been held. The Cash Collateral Motion is moot.

I think that's it.

MR. KOSTER: That's correct, Your Honor.

THE COURT: Is there anything else anyone here or on the phone believes we ought to be covering at this morning's hearing?

[No response]

Okay, thank you.

[10:24 a.m. - Proceedings adjourned.]

C E R T I F I C A T I O N

I certify that the foregoing is a correct transcript of the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Gwen Reed

4-16-25