

BEFORE THE STATE CORPORATION COMMISSION  
OF THE STATE OF KANSAS

In the Matter of the Application of NextEra )  
Energy Transmission Southwest, LLC for its )  
Certificate of Convenience and Necessity to ) Docket No. 22-NETE-419-COC  
Construct Transmission Facilities in the State )  
of Kansas. )

**APPLICATION FOR INTERVENTION OF SPIRIT AEROSYSTEMS (SPIRIT),  
OCCIDENTAL CHEMICAL CORPORATION (OXY CHEM),  
THE GOODYEAR TIRE AND RUBBER COMPANY (GOODYEAR),  
ASSOCIATED PURCHASING SERVICES CORPORATION (APS), AND  
THE KANSAS INDUSTRIAL CONSUMERS GROUP, INC (KIC)**

COMES NOW Spirit, Oxy Chem, Goodyear, APS, and KIC and respectfully file this Application for Intervention in the above-referenced matter before the State Corporation Commission of the state of Kansas ("Commission" or "KCC").

1. On February 28, 2022, NextEra Energy Transmission Southwest, LLC (“NEET Southwest”) filed with the Kansas Corporation Commission an “APPLICATION FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY TO CONSTRUCT TRANSMISSION FACILITIES IN THE STATE OF KANSAS.”<sup>1</sup> NEET Southwest was selected by the Southwest Power Pool (SPP) as the “Designated Transmission Owner” for the Wolf Creek – Blackberry 345 kV Transmission Project (the “Project.”) (Application, at p. 1.)

2. SPP has no right or authority to issue a Certificate to NEET Southwest, and no Siting authority. “The authority to site new transmission infrastructure rests with the states, (i.e.

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<sup>1</sup> NEET Southeast plans to file for siting authority in Kansas approximately two to three months after filing this Application. (Application at p. 7)

the Commission) and every state has historically had the power to prevent transmission infrastructure it opposes.” (“Feds May Need Power to Take State Lands for New Grid;” Law 360, October 20, 2021.) (Exhibit A.)

3. Spirit, Oxy Chem, and Goodyear are retail electric customers in the State of Kansas. APS is the group purchasing organization on behalf of the Kansas Hospital Association (KHA), and the members hospitals of KHA are retail electric customers in the state of Kansas. (Spirit, Oxy Chem, Goodyear, APS, and KIC, collectively “Intervenors.”)

4. Spirit, Oxy Chem, Goodyear, and APS will participate in this Docket through KIC. On numerous occasions in the past, the Commission has granted intervenor status to Spirit, Oxy Chem, Goodyear, APS, and KIC.

5. NEET Southwest requests a Commission Order to construct, own, operate, and maintain approximately 85 miles of transmission facilities in Kansas (the “Project.”) (Application, at p. 1.) NEET Southwest also states that it intends to request siting authority for the described project pursuant to the Kansas Electric Transmission Line Siting Act, K.S.A. 66-1,177 et seq. (“Project Siting.”) (Application, at p. 4.) In accordance with applicable Kansas law, NEET Southwest must receive a Certificate of Convenience and Necessity from the Commission, prior to requesting siting authority from the Commission for the Project Siting. (K.S.A. 66-6,178.)

6. The described Project will extend 85 miles in Kansas<sup>2</sup> between the (a) Wolf Creek Station in Coffey County, Kansas (which is owned by Evergy Kansas Central and Evergy Metro (Evergy)) and (b) Blackberry Substation in western Jasper County, Missouri. (Application, at p.

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<sup>2</sup> This Project is 94 miles in total, with 9 miles located in Missouri.

3.) The Project will traverse five counties in Kansas (Coffey, Anderson, Allen, Bourbon, and Crawford counties. (Application, at p. 2.)

7. The Application of NEET Southwest for the Project and Project Siting requests an Order from the KCC that will physically impact a large part of Kansas, and will directly implicate the private property rights of a large number of Kansans and their farms, ranches, businesses, and residences along the 85 mile corridor of the Project and the Project Siting. “Under Kansas law (K.S.A. 66-1,177 et seq.), an electric utility must obtain a siting permit from the KCC before it can begin site preparation for a transmission line or exercise the right of eminent domain to acquire land for the line. Kansas Legislative Research Department, “Electric Transmission in Kansas,” dated September 29, 2017, at p. 2. (Attached as Exhibit B.)

8. The described NEET Southwest transmission Project will have a proposed cost of \$85.2 million. Application, at p. 5.

9. This \$85.2 million project cost, plus costs of operation (including a return on investment) (collectively, “Costs”) will be recovered “via SPP’s region-wide cost allocation methodology.” (Application, at p. 12.)<sup>3</sup>

10. As retail electric customers of Evergy Kansas Central, the Intervenors herein will directly pay in their retail electric rates of Evergy Kansas Central (“EKC”), the NEET Southwest Costs for the described Project and Project Siting. Intervenors have a direct financial interest in this KCC Docket.

11. NEET Southwest contends in its Application that the Project and Project Siting will “increase the transmission capacity and relieve transmission congestion from western

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<sup>3</sup> “Kansas has experienced tremendous growth in new transmission lines. There was no significant build-out of transmission from the mid-1980s until about 2007.” (Exhibit B.) Since that time, the extensive build-out of transmission has driven the rates of Evergy Kansas Central to higher and higher levels. (Exhibit C; Exhibit D; attached hereto.)

Kansas east to SPP load centers.” (Application, at p. 4.) The NEET Southeast Application lists purported “benefits” but does not state that this is “necessity” for the Project or Project Siting. The Wolf Creek Generation Plant has produced electric energy which has been delivered to EKC and Evergy Kansas Metro retail electric customers through existing transmission facilities since 1985.

12. The Project and Project Siting cannot be authorized by the Commission unless there is a “necessity for the proposed electric transmission line.” (K.S.A. 66-1,180.) Absent a finding that there is a “necessity” for the Project and the Project Siting, and compliance with the provisions of K.S.A. 66-1,177 et seq., Kansas law does not permit the siting of a transmission line. There is no evidence presented in the Application that there is a “necessity” for the Project and the Project Siting, and there is no evidence that the Costs of the Project and Project Siting will be less than alleged benefits to retail ratepayers of EKC.

13. The continued respect for rights of private property, guaranteed by both the U.S. and Kansas constitutions – which are implicated by eminent domain – require extraordinary care in granting or withholding siting authority under K.S.A. 66-1,177 et seq.

14. The KCC must make an independent decision, based on record evidence in this Docket that is material, with respect to the (a) necessity for and the reasonableness of the location of the proposed electric line Project and the Project Siting, (b) taking into consideration the benefit to both consumers in Kansas and consumers outside the state and economic development benefits in Kansas. (K.S.A. 66-1,180.)

15. The Commission is granted by the Legislature, the option to withhold granting a permit, and may condition such permit as the Commission “may deem just and reasonable and as may, in its judgment, best protect the rights of all interested parties and those of the general



public. K.S.A. 66-1,180. (See also, Exhibit B.) The KCC must hold a public hearing on a siting application within 90 days in one of the counties where the transmission line is proposed to be built. The purpose of the hearing is to determine the necessity for and the reasonableness of the location of the proposed lines. (“Kansas Legislative Research Department, Electric Transmission in Kansas, dated September 29, 2017,” at p. 3.)

16. At the current time, Evergy Kansas Central collects each year from its retail electric customers, an annual amount of \$310 million of transmission related costs. These costs are about 18% - 22% of the total annual retail electric costs of Spirit, Oxy Chem, Goodyear and APS member hospitals.

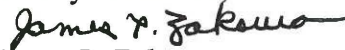
17. The retail electric rates of Evergy Kansas Central and Evergy Metro Kansas are not at regionally competitive price levels but exceed the retail electric rates of suppliers in neighboring states to Kansas. The Kansas Legislature directed that the KCC bring the retail electric rates in Kansas to regionally competitive levels. K.S.A. 66-1287. See also, KCC Order dated November 23, 2021, in KCC Docket No. 21-EKME-088-GIE to wit, at p. 12: “First, it is important for Evergy and other Kansas utilities to achieve and maintain regionally competitive retail rates.”

18. Intervenors contend that the KCC should not and cannot approve the proposed request for Certificate, or permit the project to be sited in Kansas, unless NEET Southwest demonstrates by substantial evidence that is clear and convincing in the record in this Docket, that (a) there is a “necessity” for the Project and Project Siting; (b) Intervenors will receive material savings / reductions in their retail electric rates, from the described NEET Southwest project and Costs related thereto; and (c) the described NEET Southwest project and Costs

related thereto will move the retail electric rates of Evergy Kansas Central closer to regionally competitive rate levels.

WHEREFORE, Intervenors respectfully request that the Commission issue an Order granting to them Intervention herein, and full party status, with all rights to conduct discovery consistent with Kansas law, and to participate fully in all aspects of this Docket.

Respectfully submitted,



/s/ James P. Zakoura

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and Participating Members  
Spirit, Oxy Chem, Goodyear, and APS*

**VERIFICATION**

STATE OF KANSAS            )  
  ) ss:  
COUNTY OF JOHNSON    )

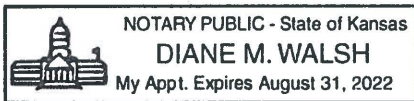
James P. Zakoura, being duly sworn upon his oath, deposes and states that he is the Attorney for the Kansas Industrial Consumers Group, Inc., that he has read and is familiar with the foregoing *Application for Intervention of Spirit AeroSystems, Occidental Chemical Corporation, The Goodyear Tire and Rubber Company, Associated Purchasing Services Corporation and Kansas Industrial Consumers Group, Inc.*, and that the statements therein are true to the best of his knowledge, information, and belief.

  
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James P. Zakoura

SUBSCRIBED AND SWORN to before me this 28th day of March, 2022.

  
\_\_\_\_\_  
Notary Public

My Appointment Expires:



## CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March 2022, the foregoing *Application for Intervention of Spirit AeroSystems, Occidental Chemical Corporation, The Goodyear Tire and Rubber Company, Associated Purchasing Services Corporation and Kansas Industrial Consumers Group, Inc.*, was electronically filed with the Kansas Corporation Commission and that one copy was delivered electronically to all parties on the service list as follows:

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## Feds May Need Power To Take State Lands For New Grid

By Michael Wigmore, Brandon Tuck and Kelly Rondinelli

(October 20, 2021, 4:12 PM EDT)

Ambitions to decarbonize the power sector by 2035 face a number of significant hurdles — the most intractable of which may be the extent of corresponding high-voltage transmission infrastructure necessary to accommodate the forecasted growth of renewable generation.

The authority to site new transmission infrastructure rests with the states, and every state has historically had the power to prevent construction of transmission infrastructure it opposes.

The Energy Policy Act gave the Federal Energy Regulatory Commission new backstop siting authority, in an attempt to overcome state opposition to construction of transmission infrastructure. But this authority was fatally flawed from the outset, and has never been used.

Although the Infrastructure Investment and Jobs Act, which passed the U.S. Senate on Aug. 10, seeks to bolster FERC's backstop authority in response to adverse court decisions, it fails to address another key flaw: the lack of eminent domain authority over state-owned lands.

Given the extent of state landholdings, it is practically impossible to build a major transmission line without crossing state lands, such as river bottoms. As a result, even if FERC grants a permit for a transmission project under its backstop authority, a state opposing the project can still prevent its construction, by simply denying the necessary real estate instruments.

Enacting a new legislative grant of federal eminent domain authority over state lands is no doubt politically daunting. But unless the current state-land eminent domain carveout is addressed, states will continue to have the power to stymie the energy transition and renewable generation goals, by blocking construction of transmission infrastructure.

### Background

The Biden administration has announced a goal to completely decarbonize the U.S. power grid by



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2035.[1] Likewise, a number of states have announced their own ambitious goals — New York seeks 100% zero-emission electricity by 2040;[2] California by 2045;[3] and Virginia and New Jersey by 2050.[4]

These decarbonization objectives can only succeed, however, if the nation's transmission network is tailored to move power from newly sited solar, wind and other renewable power sources to markets where the power is needed. This will require significant upgrades to existing transmission infrastructure, as well as extensive new construction.[5]

Siting transmission infrastructure has historically been governed by states, and some states continue to object to large transmission projects crossing their lands. This is especially true when a state may perceive, for example, that its residents do not derive adequate benefit from the project, or that its ratepayers are allocated an unfair share of the project's costs.[6]

### **The Energy Policy Act of 2005 and FERC Backstop Authority**

The Energy Policy Act[7] sought to address some of the impediments to the construction of additional transmission capacity, including measures to overcome state opposition by providing FERC with backstop authority.[8] This authority was designed to overcome one form of state objection — the failure of a state to grant timely authorization for construction or modification of new transmission lines.

Under Section 216 of the Federal Power Act, FERC has jurisdiction to issue permits, in certain circumstances, for the construction or modification of transmission facilities in areas designated as "national interest electric transmission corridors." [9]

This includes instances where a state entity with siting authority has withheld approval for more than one year after the filing of an application for a permit.[10] This attempt to provide FERC with backstop siting authority had at least two fatal flaws.

#### ***State Failure to Act***

First, as interpreted by the courts, FERC's Section 216 siting authority is triggered only when a state fails to act on an application, not when a state denies an application.

In *Piedmont v. FERC*, decided by the U.S. Court of Appeals for the Fourth Circuit in 2009,[11] two state utilities commissions and two community interest organizations challenged FERC's 2006 final regulations implementing its new Section 216 backstop authority.

The final regulations broadly interpreted the phrase "withheld approval for more than one year" to include situations where a state affirmatively denies an application. The Fourth Circuit rejected FERC's interpretation as contrary to law, and concluded that the phrase did not include "the outright denial of a permit application within the one-year deadline." [12]

In the context of the entire statutory provision in which the phrase appears, the Fourth Circuit noted:

A reading of the entire provision reveals that Congress intended to act in a measured way and conferred authority on FERC only when a state commission is unable to act on a permit application in a national

interest corridor, fails to act in a timely manner, or acts inappropriately by granting a permit with project-killing conditions.[13]

As a result, FERC currently does not have backstop siting authority when a state takes "the final administrative act of denying a permit." [14]

### ***Eminent Domain Carveout for State Lands***

In addition to the problems created when a state affirmatively denies an application for a needed authorization, the backstop authority also contains a separate fatal flaw. The eminent domain authority granted to holders of FERC backstop permits cannot be exercised over state lands.[15]

As a result, a state opposed to a project authorized under FERC's backstop authority can still prevent construction of the transmission project simply by refusing to grant real estate instruments. It is practically impossible to construct a high-voltage transmission line of any significant length without crossing state-owned lands.

Under the equal footing doctrine,[16] each state owns the bottoms of all navigable waters within its territory, such as riverbeds that form the boundaries of most states. All but four of the lower 48 states, including every state east of the Mississippi River, have at least part of their boundaries defined by rivers.[17]

Many states also have extensive terrestrial landholdings in the form of state parks and forests, as well as most of the land used for the interstate highway system. Finally, states can obtain interests in various lands through state conservation easements and preservation programs.[18]

As a result, a transmission project that completely avoids crossing any state lands is infeasible. A state that opposes a transmission project can easily kill it by denying the necessary real estate grants, notwithstanding the project's receipt of FERC backstop authorization.[19]

### **The Infrastructure Bill's Partial Remedy**

The Infrastructure Investment and Jobs Act,[20] which passed the Senate in August, includes several provisions that focus on decarbonization of the energy sector. The bill attempts to remedy the first fatal flaw in FERC's backstop authority noted above, addressing instances where a state commission has denied approval for a project.

Section 40105 of the bill provides that FERC could use its backstop siting authority not only when a state fails to act in a timely manner, but also when a state "has denied an application seeking approval pursuant to applicable law." That would solve the first issue explained above.

But the bill entirely ignores a state's ability to veto projects by denying real estate grants across state-owned lands. Congress could attempt to remedy this flaw, by eliminating the eminent domain carveout for state lands, if it could overcome certain political opposition. Congress has a model for doing so, as it enacted Section 7(h) of the Natural Gas Act[21] without any explicit carveout for state-owned lands.

Earlier this year, in *PennEast Pipeline Co. v. New Jersey*,[22] the U.S. Supreme Court upheld the use of the NGA's eminent domain authority for a natural gas pipeline crossing lands New Jersey claimed it owned. The pipeline in that case crossed 42 parcels of land in which New Jersey claimed an interest —

two parcels owned by the state, and 40 parcels in which the state claimed various nonpossessory interests, like conservation easements.[23]

New Jersey opposed the project, refused to grant the necessary real estate rights and challenged the exercise of eminent domain authority by the FERC certificate holder. During oral argument, Justice Stephen Breyer discussed the history of the NGA, and noted Section 7(h) was enacted specifically to overcome state objections to pipelines.

Justice Breyer cited examples of planned natural gas pipelines, from the Permian Basin to California, Pennsylvania, Illinois and Massachusetts, which were halted by states "objecting in a whole variety of complex ways." [24] So, Justice Breyer reasoned, Congress enacted the relevant provision in the NGA because the pipelines could not have been built without "the power to proceed against the state" in eminent domain.[25]

The same problem is evident here: Without any power to proceed against the state in eminent domain, transmission infrastructure projects necessary for the renewable energy transition will still be subject to a functional veto by nonconsenting states.

### **Conclusion**

There is growing recognition that FERC backstop authority may be necessary to achieve the aggressive goals set by the administration and some states to decarbonize electric power generation in the U.S.[26] But the backstop authority provided in Section 216 of the Energy Policy Act simply doesn't work, and has never been successfully used.

Although the Senate infrastructure bill attempts to address one flaw in FERC's backstop authority, so that FERC can act when a state affirmatively denies approval for a transmission project, it fails to address the lack of eminent domain authority over state lands. As a result, in situations where a state opposes a transmission line and denies approval, the state will still be able to prevent construction, notwithstanding issuance of a FERC backstop permit.

Without eminent domain authority over state lands, FERC's backstop authority remains as powerless against state opposition as it has been for the past two decades.[27] The states retain multiple authorities to stymie infrastructure projects they oppose, whether by denying real estate access, denying state water quality certifications or denying necessary permits under state-delegated programs that are not preempted.

The states and interest groups that oppose new transmission projects necessary for the renewable transition may be very different than those who have historically opposed gas pipelines. But notwithstanding the attempted fix in the Senate infrastructure bill, FERC's backstop siting authority for transmission infrastructure will likely never be successfully invoked over the opposition of a state, unless Congress grants eminent domain authority over state lands.

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*V&E associate Hannah Flesch contributed to this article.*



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[1] Press Release, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (April 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

[2] Climate Act, N.Y. State, <https://climate.ny.gov/> (last visited Oct. 7, 2021).

[3] Press Release, California Releases Report Charting Path to 100 Percent Clean Electricity (March 15, 2021), <https://www.energy.ca.gov/news/2021-03/california-releases-report-charting-path-100-percent-clean-electricity>.

[4] 2020 Session: HB 1526 Electricity Utility Regulation; Environmental Goals Summary as Passed, Va. Legis. Info. Sys., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB1526> (last visited Oct. 7, 2021); About the Energy Master Plan, State N.J. Energy Master Plan, <https://nj.gov/emp/energy/> (last visited Oct. 7, 2021).

[5] See Patrick R. Brown and Audun Botterud, The Value of Inter-Regional Coordination and Transmission in Decarbonizing the US Electricity System, 5 Joule 115-34 (2021); Hearing to Review Administration of Laws Within FERC's Jurisdiction Before the S. Comm. on Energy and Natural Resources, 117th Cong. (2021) (prepared statement of Richard Glick, Chairman, Federal Energy Regulatory Commission) ("The rapid shift in the resource mix and the growing threat to grid resilience due to the changing climate require significant investments in new and existing transmission"); Hearing to Review Administration of Laws Within FERC's Jurisdiction Before the S. Comm. on Energy and Natural Resources, 117th Cong. (2021) (prepared statement Allison Clements, Comm'r, Federal Energy Regulatory Commission) ("It is clear that a significant buildout of transmission is the optimal approach to capturing the benefits that low-cost clean energy resources present").

[6] How to allocate the costs for new transmission infrastructure needed to accommodate the transition to renewable generation is a very complex problem involving not only states, but FERC and regional transmission planning organizations as well, and much has been written about this topic. See Cong. Research Serv., R41193, Electricity Transmission Cost Allocation 1, 3-4 (2012), [https://www.everycrsreport.com/files/20121218\\_R41193\\_d98832ecc6dbab276ddd71eef21ffcc782421cb7.pdf](https://www.everycrsreport.com/files/20121218_R41193_d98832ecc6dbab276ddd71eef21ffcc782421cb7.pdf); Catherine Morehouse, Cost Allocation Remains Key Challenge for FERC Ahead of Transmission Reform, Glick Says (July 20, 2021), Utility Dive, <https://www.utilitydive.com/news/cost-allocation-remains-key-challenge-for-ferc-ahead-of-transmission-reform/603597/>.

[7] Energy Policy Act, Pub. L. No. 109-58 (Aug. 8, 2005).

[8] Section 1221 of the EPAct of 2005, codified as Section 216 of the Federal Power Act, 16 U.S.C. § 824p.

[9] 16 U.S.C. § 824p(b). To determine a "national interest electric transmission corridor," the secretary of energy considers whether:

(A) the economic vitality and development of the corridor, or the end markets served by the corridor, may be constrained by lack of adequate or reasonably priced electricity; (B)(i) economic growth in the corridor, or the end markets served by the corridor, may be jeopardized by reliance on limited sources of energy; and (ii) a diversification of supply is warranted; (C) the energy independence of the United States would be served by the designation; (D) the designation would be in the interest of national energy policy; and (E) the designation would enhance national defense and homeland security.

Id. (a)(4).

[10] 16 U.S.C. § 824p(b)(1)(C)(i).

[11] *Piedmont v. FERC*, 558 F.3d 304 (4th Cir. 2009).

[12] 558 F.3d at 315.

[13] Id.

[14] Id.

[15] 16 U.S.C. § 824p(e)(1).

[16] See *PPL Montana LLC v. Montana*, 565 U.S. 576 (2012); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 229 (1845).

[17] Although a permit from the U.S. Army Corps of Engineers under Section 10 of the Rivers and Harbors Act of 1899 is also required to cross navigable waters, that permit does not grant any real estate rights. 33 U.S.C. § 403; 33 C.F.R. § 320.4(g).

[18] See, e.g., *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244, 2253 (2021).

[19] Also, there is no indication the Energy Policy Act intended to remove other state authorities that are almost certainly required for construction of a major transmission project, such as a state's Clean Water Act Section 401 water quality certification authority (which all states possess) and Section 402 permitting authority (which most states possess through the implementation of federally delegated permitting programs). In the context of the recent gas pipeline wars, where FERC certificate holders are granted eminent domain authority over state-owned lands, numerous states have demonstrated the ability to block pipelines by refusing to grant necessary environmental authorizations.

[20] H.R. 3684, 117th Cong. (2021-2022).

[21] 15 U.S.C. § 717f.

[22] *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244 (2021).

[23] Id. at 2253.

[24] Oral Arg. Tr. at 65-66, *PennEast Pipeline Co. v. New Jersey*, 141 S.Ct. 2244 (2021) (No. 19-1039), [https://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/2020/19-1039\\_o7jq.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/19-1039_o7jq.pdf).

[25] PennEast Pipeline Co. may not be the last word on federal eminent domain authority over state lands. *Columbia Gas Transmission, LLC v. 12 Acres of Land*, No. 19-02040 (4th Cir. filed Sept. 25, 2019), currently pending before the Fourth Circuit, raises an 11th Amendment textual issue highlighted in Justice Neil Gorsuch's dissent in *PennEast*.

[26] See Hearing to Review Administration of Laws Within FERC's Jurisdiction Before the S. Comm. on Energy and Nat. Res., 117th Cong. (2021) (statements of Richard Glick, Chairman, Federal Energy Regulatory Commission and Allison Clements, Comm'r, Federal Energy Regulatory Commission).

[27] A separate provision of the Energy Policy Act, Section 1222 (codified at 42 U.S.C. § 16421), grants the U.S. Department of Energy federal siting authority for transmission lines, subject to certain conditions, within states in which the Western Area Power Administration and Southwestern Power Administration operate (essentially all of the lower 48 states west of the Mississippi River, excluding the Pacific Northwest). Although this section does not expressly grant eminent domain authority, the DOE has interpreted the statute as allowing it to condemn lands for Section 1222 projects pursuant to WAPA's and SWPA's eminent domain authority. But this authority has likewise never been successfully used. Opponents of the Plains & Eastern Clean Line Transmission Project, a 700-mile HVDC transmission line proposed in 2010 and designed to transport wind energy from the Oklahoma Panhandle to Western Tennessee, challenged the DOE's asserted authority to condemn private lands for the project. In examining the DOE's authority under Section 1222, the court in that case noted, "Whether the Energy Policy Act authorizes the United States to acquire needed easements by condemnation is a vexed question." *Downwind LLC v. Dep't of Energy*, No. 3:16-CV-00207 (D. Ark. Dec. 21, 2017) (slip op. at 8). Ultimately the court found the issue unripe, however, because the DOE had not yet acted to condemn any such lands. *Id.* at 9-10. The district court's decision was thereafter vacated by the U.S. Court of Appeals for the Eighth Circuit when the DOE terminated the Section 1222 agreement for the proposed project in 2018. *Downwind LLC v. Dep't of Energy*, No. 18-1399 (8th Cir. April 18, 2018). Even assuming the DOE has eminent domain authority for Section 1222 projects, and that authority extends to state lands, Section 1222 cannot be used to site proposed transmission projects east of the Mississippi River or in the Pacific Northwest. Moreover, states objecting to any such projects would still be able to withhold other necessary environmental authorizations.

# KANSAS LEGISLATIVE RESEARCH DEPARTMENT

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September 29, 2017

## ELECTRIC TRANSMISSION IN KANSAS

At its most basic level, the transmission system (or "grid") is an interconnected assembly of high-voltage transmission lines and associated equipment for moving electric energy at high voltages (typically 110 kilovolts [kV] or above) between points of supply and points of delivery. Transmission lines typically operate at higher voltages than distribution lines in order to minimize the amounts of energy lost during transmission.

Kansas has experienced tremendous growth in new transmission lines. There was no significant build-out of transmission from the mid-1980s until about 2007. Since that time, the following high-voltage projects have been initiated or completed:

- Westar Energy completed new 345 kV transmission lines from Salina to Wichita and from Rose Hill to the Kansas-Oklahoma border. From there, the line continues south to Sooner, Oklahoma;
- ITC Great Plains constructed a 345 kV line from Spearville to the Kansas-Nebraska border. From there, the line continues north to Axtell, Nebraska;
- ITC Great Plains and Prairie Wind Transmission (a joint venture between Westar Energy and Electric Transmission America, LLC) jointly constructed a dual 345 kV project often referred to as the "Y-Plan." The line runs from Spearville to Medicine Lodge to Wichita, with a connection south from Medicine Lodge to the Kansas-Oklahoma border. From the border, it continues south to Woodward, Oklahoma;
- ITC Great Plains and Westar Energy jointly constructed the Elm Creek-Summit Transmission Line, a 345 kV line from Salina to Concordia, which went into service in December 2016; and
- Clean Line Energy Partners is proceeding with planning for the Grain Belt Express, which would be the first high-voltage, direct current (HVDC) transmission line in Kansas, with a voltage of +/- 600 kV. The project proposes to gather wind-generated electricity from western Kansas at a point near Spearville and transport it to the energy markets of the central United States, with the line terminating in western Indiana. The Kansas Corporation Commission (KCC) issued a siting permit for the Kansas portion of the line on November 7, 2013, but required Clean Line to obtain siting approval in Missouri, Illinois, and Indiana before beginning construction in Kansas. In May 2013, Clean Line received approval from Indiana. In November 2015, Clean Line secured regulatory approval from Illinois. The company's application for a certificate of convenience

and necessity in Missouri was denied in July 2015, but in August 2016, the company filed an application for regulatory authority with the Missouri Public Service Commission (Commission). According to its website, the Commission denied the application on August 16, 2017, stating it lacks the statutory authority to grant a certificate of convenience and necessity (CCN) because Clean Line failed to obtain consent from all necessary counties to install power lines across roads as required by the Missouri Western District Court of Appeals. On August 25, 2017, Clean Line filed an application with the Commission for a rehearing and the application was denied by the Commission on September 19, 2017.

## **Funding for New Transmission**

Kansas belongs to the Southwest Power Pool (SPP) regional transmission organization. The SPP covers a geographic area of approximately 546,000 square miles, and manages transmission in all or parts of 14 states: Arkansas, Iowa, Kansas, Louisiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, and Wyoming.

One of SPP's responsibilities is regional transmission planning, which includes approving transmission projects that will benefit all or portions of the SPP region by strengthening reliability and reducing congestion on transmission lines. Projects approved by the SPP are most often paid for under the Highway/Byway methodology, which spreads the costs of projects with a voltage of 300 kV or greater (highway projects) across the entire SPP region. The costs of lower voltage projects are either split between the region and local zone (greater than 100 kV but less than 300 kV), or are borne entirely by the local zone (100 kV or less, called byway projects). Thus, the costs of the transmission projects described on the previous page (except the Grain Belt Express) are shared by all ratepayers in SPP, as Kansas ratepayers share in the costs of SPP-approved higher voltage projects in other states in the region.

The Grain Belt Express proposed project would not be funded under the Highway/Byway methodology. It is a "merchant" project. Under this model, Clean Line Energy, LLC incurs all costs of building the project and is solely responsible for recovering those costs. Clean Line expects to recover its costs by selling the electricity on the line in the energy markets of the central United States.

## **Siting Transmission in Kansas**

Under Kansas law (KSA 66-1,177 *et seq.*), an electric utility must obtain a siting permit from the KCC before it can begin site preparation for a transmission line or exercise the right of eminent domain to acquire land for the line. Initial SPP support for a transmission line addresses the general route, but states control the actual siting of the line. Kansas statutes define a transmission line as a line that is at least 5 miles long and which is used for bulk transfer of 230 kV or more of electricity.

The general process for siting a transmission line in Kansas is as follows:

- The utility hires a company to conduct a siting study. The purpose of the study is to gather data and analyze prospective routes;

- The utility then schedules open-house meetings in multiple cities along the proposed routes to provide information, answer questions, and get feedback from interested parties. The utility uses this information to help choose among various routes;

[Note: The actions in the first two bullets are typical, but are not required by Kansas statutes.]

- The utility must submit an application for a siting permit to the KCC, identifying the proposed route. Submission of an application triggers the start of the 120-day period for the KCC to rule on the route;
- The KCC must hold a public hearing on the siting application within 90 days in one of the counties where the line is proposed to be built. The purpose of the hearing is to determine the necessity for and the reasonableness of the location of the proposed line:
  - A notice of the hearing must be published in newspapers; and
  - Written notice, including a copy of the siting application, must be provided *via* certified mail at least 20 days before the hearing to landowners whose land is proposed to be acquired in connection with the construction of or is located within 660 feet of the center line of the easement where the line is proposed to be located;
- The KCC may conduct an evidentiary hearing on a siting application;
- The KCC must issue a final order on the application within 120 days after the application was filed. The decision of the KCC can be appealed to the Kansas Court of Appeals in accordance with the Kansas Judicial Review Act; and
- If the KCC approves the siting application, the utility begins land acquisition along the approved route. Utilities can exercise the power of eminent domain if agreement cannot be reached with a landowner on compensation.
  - To exercise eminent domain, the utility must file a petition in district court and the court will appoint three appraisers to determine the fair market value of the property. Private property cannot be taken without just compensation. KSA 26-513 details the factors to be considered in determining fair market value.
  - The appraisers must view the land and must take oral and written testimony from the plaintiff and interested parties in a public hearing prior to submitting a report to the court of their appraisal of the value of the land and their determination of damages and compensation to the interested parties resulting from the taking.
  - The plaintiff or any defendant dissatisfied with the appraisers' award may file an appeal in the district court.

### TDC History

**2007 through 2022- CPI Inflation Increase- 26.5%**  
**2007 THROUGH 2022- TDC Increase- 397.6%**

KIC Members- TDC is now 18% - 22% of total electric bill from EKC

#### **TDC Revenue Requirement by Year in EKC Retail Electric Rates**

2007 - \$62.3 million  
2008 - \$72.4  
2009 - \$104.2  
2010 - \$110.6  
2011 - \$127.9  
2012 - \$164.6  
2013 - \$176.7  
2014 - \$217.6  
2015 - \$224.9  
2016 - \$231.9  
2017 - \$244.6  
2018 - \$231.9  
2019 - \$248.2  
2020 - \$251.7  
2021 - \$289.6  
2022 - \$310.01





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## News Release

For more information contact: Linda Berry, KCC Director of Public Affairs (785) 271-3269

March 17, 2022

### **Evergy's Transmission Delivery Charge increase takes effect April 1**

**TOPEKA** - Beginning April 1, Evergy Kansas Central residential customers will pay an average of \$0.36 more per month to have electricity delivered to their homes. That amounts to \$4.32 per year, based on an average monthly usage of 900 kWh. Kansas law allows electric utilities regulated by the Kansas Corporation Commission (KCC) to recover costs associated with the transmission of electric power through a separate transmission delivery charge (TDC) on customer bills, without approval from the KCC.

The Commission acknowledged the effective date of the increase at its meeting this morning. Generally the KCC has jurisdiction over Evergy's retail rates and terms of service. However, a regulated electric utility is statutorily authorized to adjust its Transmission Delivery Charge due to changes in cost under K.S.A. 66-1237(c). As such, the Commission has no discretion and must accept Evergy's proposed change on a subject to refund basis within 30 business days of the application. In accordance with the statutory requirement, these transmission delivery charges are conclusively presumed prudent as filed. If irregularities are later found, the Commission can order changes, including refunds.

Evergy's application requested \$310 million in TDC revenues, an increase of \$20.4 million from the prior TDC. That increases the transmission-related portion of a residential customer's bill from \$0.018810 per kWh to \$0.019214 per kWh.

Today's order is available at: <https://estar.kcc.ks.gov/estar/ViewFile.aspx/20220317103416.pdf?id=77a74b46-e762-47e7-b938-7c0c7b8c2f19>

A recording of today's Business Meeting featuring comments by Commissioners on this order, is available on the [KCC YouTube channel](#).

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## Energy compared to the region

Regional Electric Rate Comparison				
2020/2021 – Sorted by Residential				
		Residential	Commercial	Industrial
Municipal Utilities	State	(¢/kWh)	(¢/kWh)	(¢/kWh)
McPherson BPU	KS	7.35	6.22	4.66
City of Russell	KS	10.17	9.42	7.25
Omaha Public Power District	NE	13.07	9.83	7.9
Kansas City BPU	KS	14.57	11.78	8.4
Independence Power & Light	MO	15.14	13.42	9.88
<b>Investor Owned Utilities (IOU)</b>				
OG&E Electric Services	OK	8.91	6.5	3.94
Public Service Company of OK	OK	9.33	5.94	3.83
Ameren Missouri	MO	10	7.71	5.76
Southwestern Electric Power	AR	10.35	7.82	5.61
MidAmerican Energy	IA	10.77	7.34	5.58
Public Service Company of CO	CO	11.41	10.11	6.22
Evergy Missouri West	MO	11.46	8.36	6.12
Evergy Kansas Central	KS	12.44	10.5	7.55
Evergy Kansas Metro	KS	12.86	10.74	8.19
Evergy Missouri Metro	MO	13.09	10.78	7.5

**Notes.**  
Municipal rates include charges for the PLOT and are calculated using current rates and the same billing determinants as IOU rates  
IOU rates are weighted averages of 4 months summer and 8 months of winter Edison Electric Institute rates and does not include any special contract rates

Comparison Prepared by BAI Associates  
Based on Data from the Edison Electric Institute

EXHIBIT D