

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of the Application of NextEra Energy)
Transmission SW, LLC for a Certificate of Public) Docket No. 22-NETE-419-COC
Convenience and Necessity to Transact the Business of)
a Public Utility in the State of Kansas.)

RESPONSE TO PETITIONS FOR RECONSIDERATION

NextEra Energy Transmission Southwest, LLC (“NEET Southwest”) hereby files this Response to the Petitions for Reconsideration filed by Kansas Industrial Consumers Group, Inc. (“KIC”) and Darren McGhee and Rochelle Smart McGhee (together, the “McGhees”) on September 12, 2022, relating to the Commission’s Order on Application for Certificate of Convenience and Necessity issued on August 29, 2022 (“Order”). Both KIC and the McGhees fail to establish a basis for the Commission granting reconsideration.

CONTENTS

I.	Background Facts.....	3
II.	Applicable Legal Standards for Reconsideration	4
III.	Responses to Arguments by KIC and the McGhees	5
A.	KIC Petition.....	5
1.	Response to KIC Argument 1: The Commission Properly Interpreted the Merger Standards and Decided all Issues Requiring Resolution.....	5
2.	Response to KIC Argument 2: The Commission Relied on Substantial Competent Evidence Regarding Benefits to Kansas Customers	7
B.	McGhee Petition.....	9
1.	Response to McGhee Argument 1: Environmental Issues Relating to Theoretical Future Wind Farm Construction Are Not within the Scope of the Proceeding.	10
2.	Response to McGhee Argument 2: The Commission Engaged in Lawful Procedure. .	11
3.	McGhee Argument 3: The Commission Reasonably Determined that NEET Southwest Did Not “Transact Business” within the Meaning of the Statute.	13

I. BACKGROUND FACTS

1. The Commission issued its Order on August 29, 2022, granting NEET Southwest a Certificate of Convenience and Necessity (“CCN”) to transact business as a transmission-only public utility in the State of Kansas and to construct, own, operate, and maintain an approximately 94-mile single-circuit 345 kV transmission line from the existing Wolf Creek Substation in Kansas to the existing Blackberry Substation in Missouri (the “Project”). The Order approved the terms listed in NEET Southwest’s Application,¹ as modified by the Nonunanimous Settlement,² conditioned upon compliance with additional conditions included in the Order.

2. The Commission’s Order came after several months of discovery, working conferences, settlement conferences, a two-day evidentiary hearing on June 8-9, 2022, and two rounds of briefing. The Nonunanimous Settlement was supported by the Staff of the State Corporation Commission of the State of Kansas (“Staff”), Evergy Kansas Central, Inc. and Evergy Kansas South, Inc. (together as “Evergy Kansas Central”) and Evergy Metro, Inc. (“Evergy Kansas Metro”) (Evergy Kansas Central and Evergy Kansas Metro are collectively referred to herein as “Evergy”), Sunflower Electric Power Corporation (“Sunflower”), Kansas Electric Power Cooperative, Inc. (“KEPCo”), Southwest Power Pool (“SPP”), and NEET Southwest. ITC Great Plains, LLC (“ITC Great Plains”) and Southwestern Public Service Company (“SPS”) did not oppose the Nonunanimous Settlement, did not offer testimony at hearing, and did not file post-hearing briefs. Only KIC and the McGhees opposed the Nonunanimous Settlement and presented arguments and briefing against the Nonunanimous Settlement and the Application altogether.

¹ See Application for a Certificate of Convenience and Necessity to Construct Transmission Facilities in the State of Kansas, 22-NETE-419-COC (February 28, 2022) (“Application”).

² See “Nonunanimous Settlement Agreement”, as attached to Joint Motion for Approval of Nonunanimous Settlement Agreement, 22-NETE-419-COC (June 6, 2022) (“Non-Unanimous Settlement”).

II. APPLICABLE LEGAL STANDARDS FOR RECONSIDERATION

3. Under K.S.A. 66-118b, a party must “file a petition for reconsideration “stating the specific grounds upon which relief is requested.”³ “The purpose of requiring that all issues be included in the petition for reconsideration is to inform the KCC and other parties where mistakes of law and fact were made in the order.”⁴ The purpose for requiring the petition for reconsideration is to inform the Commission of mistakes of law or fact made in the order.⁵ In considering another petition for reconsideration, the Commission ruled that arguments based on policy are not sufficient grounds that would justify an appellate court granting relief, and therefore, do not establish sufficient reason for the Commission to alter its order.⁶

4. A party may not raise a new argument in a motion for reconsideration unless such argument could not be presented earlier.⁷

5. Parties seeking reconsideration must provide sufficient support for assertions. The courts have found that “[f]ailure to support a point with pertinent authority or show why it is sound despite a lack of supporting authority or in the face of contrary authority is like failing to brief an issue.”⁸ Further, “[s]imply pressing a point without pertinent authority” should be treated as a waived or abandoned issue.⁹

³ *Kansas Indus. Consumers v. State Corp. Comm'n*, 30 Kan. App. 2d 332, 338, 42 P.3d 110, 115 (2002); and see K.S.A. 77-529.

⁴ *Id.*

⁵ See *Kansas Indus. Consumers v. Kansas Corp. Comm'n*, 30 Kan. App. 2d 332, 338 (2002).

⁶ Order Denying Petition for Reconsideration, 13-HHIW-460-GIV (May 21, 2016) at ¶ 5.

⁷ *Lario Oil & Gas Co. v. Kansas Corp. Comm'n*, 57 Kan. App. 2d 184, 199, 450 P.3d 353, 363 (2019) citing *Sierra Club v. Mosier*, 305 Kan. 1090, 1122, 391 P.3d 667 (2017).

⁸ *Id.* at 199-200, citing *University of Kan. Hosp. Auth. v. Board of Comm'rs of Unified Gov't*, 301 Kan. 993, 1001, 348 P.3d 602 (2015).

⁹ *McCain Foods USA, Inc. v. Central Processors, Inc.*, 275 Kan. 1, 15, 61 P.3d 68 (2002).

III. RESPONSES TO ARGUMENTS BY KIC AND THE MCGHEES

A. KIC Petition

6. KIC's Petition advances two arguments against the Commission's Order. First, KIC claims that the Order violates Kansas law because the Commission does not decide "an issue requiring resolution." This argument fails because the Commission *did* decide the issue raised by KIC, and to the extent KIC finds that decision dissatisfactory, it is not an issue that requires any further resolution. KIC's second argument centers on its belief that the Commission did not consider evidence in the manner that KIC would like and in its view, this means that the Commission did not consider material, substantial, and "uncontroverted" evidence. KIC's second argument fails because KIC has selectively focused on evidence the Commission did not find persuasive in its decision while failing to acknowledge the evidence that the Commission did find persuasive.

1. Response to KIC Argument 1: The Commission Properly Interpreted the Merger Standards and Decided all Issues Requiring Resolution

7. KIC first claims that the Commission "failed to decide an issue requiring resolution"—the issue, according to KIC, being "whether [the Project] will cause electric power costs in Kansas to increase up to 21%, and if so, should a [CCN] be ordered for NextEra to construct and operate the [Project]."¹⁰ KIC asserts that the Commission "refused to decide the issue,"¹¹ and that the Commission's failure to do so violates K.S.A. 77-621.

8. There is no merit to the claim that the Commission refused to decide whether the project would benefit customers. This issue fits squarely within the Commission's consideration of how the Project will affect customers, which is one of the Merger Standards. The Commission's consideration of this standard spans five pages of the Order (pp. 9-13). KIC's exact argument is

¹⁰ KIC Petition at ¶ 31.

¹¹ *Id.*

discussed in paragraphs 18-19 of the Order. There, the Commission considers KIC's argument that levelizing costs by 21% could cause cost increases in Western Kansas, and the Commission concludes "there is no evidentiary support in the record for KIC's theory that the Transmission Project would lead to a 21% increase in energy prices."¹² The Commission then cites to testimony in the record from Evergy witness Darren Ives, SPP witness Kelsey Allen, and Staff witness Justin Grady that challenges and disputes KIC's theory.¹³ The Commission also explains why theoretical regional cost increases are not dispositive in determining the net effect on Kansas customers, explaining that levelization may benefit regional energy pricing, reduce energy costs in other parts of the state, and remove congestion in the Kansas transmission system.¹⁴

9. To the extent that KIC is dissatisfied with how the Commission decided the issue of "whether [the Project] will cause electric power costs in Kansas to increase up to 21%," that does not make this an issue that requires further resolution. The Order considers, and resolves, KIC's exact argument on this point. In doing so, the Commission appropriately considers the Merger Standards and the standards of review for nonunanimous settlements,¹⁵ and the Commission is under no obligation to agree with KIC's unfounded claims. Further, whether the Project costs will cause "electric power costs in Kansas to increase up to 21%" is not a required enumerated step within the tests used by the Commission to issue a CCN.¹⁶ KIC admits that its "issue" is not related to an actual standard—conceding that the Commission should evaluate the issue "on a purely

¹² Order at ¶ 18.

¹³ *Id.*; see also, fns. 32-38.

¹⁴ Order at ¶ 19.

¹⁵ See Order ¶¶ 11-14 (defining applicable standards); ¶¶ 15-66 (applying merger standards) ¶¶ 65-89 (applying standards evaluating settlements).

¹⁶ This is readily distinguishable from *Pittsburg State Univ./Kansas Nat. Educ. Ass'n v. Kansas Bd. of Regents/Pittsburg State Univ.*, 280 Kan. 408, 429, 122 P.3d 336, 349 (2005), wherein the Kansas Supreme Court remanded an agency decision because the agency failed to include required steps within a balancing test before issuing its decision.

equitable basis.”¹⁷ KIC also fails to set forth any meaningful argument in its briefing as to why the Commission should recognize in its evaluation of the Merger Standards, whether a project may present regional cost increases to any areas of Kansas.¹⁸

2. *Response to KIC Argument 2: The Commission Relied on Substantial Competent Evidence Regarding Benefits to Kansas Customers*

10. KIC’s second critique is that the Commission’s Order “makes not a single reference to the testimony of SPP witness Allen in the Order.”¹⁹ On its face, this claim is not correct. Kelsey Allen’s live testimony was cited in at least two instances.²⁰ Notwithstanding that inaccuracy, KIC argues that the Commission disregarded specific testimony from Mr. Allen regarding the accuracy of quantifying Kansas specific benefits from the 2019 ITP report. KIC posits that Mr. Allen’s testimony is “best evidence”²¹ and that, because of that testimony, there can be no evidence in the record as to Kansas specific benefits.²²

11. This issue has been well-briefed by NEET Southwest,²³ Staff,²⁴ and Evergy,²⁵ and there is substantial evidence in the record to support the beneficial aspects of the Project for Kansas customers. In evaluating the sum of this evidence, the Commission found the testimony of Staff witness Justin Grady and Evergy witness Darren Ives “most compelling and convincing” on the matter of benefits to Kansas customers and found that the Project “will have a beneficial effect on customers by lowering overall energy costs, removing inefficiency, relieving transmission congestion, and improving the reliability of the transmission system.”²⁶

¹⁷ KIC Petition for Reconsideration, ¶ 33.

¹⁸ See Post-Hearing Brief of KIC filed on June 30, 2022 at ¶¶20-31 (stating applicable law).

¹⁹ KIC Petition at ¶ 34.

²⁰ Order at ¶ 18, fn. 33; ¶ 19, fn. 38.

²¹ KIC Petition at ¶ 38.

²² KIC Petition at ¶ 45.

²³ See NEET Southwest Initial Post-Hearing Brief at pp. 11-16 and NEET Southwest Reply Brief at pp. 8-9.

²⁴ Staff Post-Hearing Brief at ¶ 23-27.

²⁵ See Evergy Reply Brief at pp. 3-4.

²⁶ Order at ¶ 22.

12. In light of this substantial evidence, one must infer that KIC believes that the only person who can credibly speak about the benefits of transmission is SPP witness Allen. KIC fails to address why evidence and testimony from Evergy (Kansas’ largest utility), NEET Southwest (the applicant), and Staff, among others, should carry zero evidentiary weight. Instead, KIC trains its focus on conclusions drawn by the 2019 ITP Report, the limits of reliance on the report as described by Mr. Allen, and alleged collateral effects of witness testimony that interprets the report.²⁷

13. No party disputes that the 2019 ITP Report was based on a portfolio of projects and that the Report does not include a Project-specific analysis just for the State of Kansas. That is the nature of regional planning.²⁸ Accordingly, calculating *quantitative* benefit/cost ratios and *quantitative* rate impacts of a *single* project for a *single* state introduces concerns about the practicality and accuracy of such exercise.²⁹ But KIC goes further to assert that the 2019 ITP Report is therefore of *no* benefit to the Commission’s review of the issues, and that *no other witness* can rely on the Report in analyzing the qualitative benefits and approximate cost impacts associated with the line’s impact on Kansas.

14. To clarify, Mr. Allen’s testimony and data request response do *not* state that the 2019 ITP Report cannot be used to deduce *qualitative* benefits or approximate impacts. In line with that understanding, the Commission relied on testimony from experts representing Staff, Evergy, and NEET Southwest, who addressed their interpretations of the 2019 ITP Report (as well as their more general knowledge of the Project and the state of Kansas transmission system in general) and concluded that the Project will have a “beneficial effect on customers by lowering overall energy costs, removing inefficiency, relieving transmission congestion, and improving the reliability of the

²⁷ KIC Petition at ¶¶34-43.

²⁸ See Direct Testimony of Kelsey Allen, p. 8.

²⁹ Cross-Answering Testimony of Josh Frantz, pp. 5-6.

transmission system.”³⁰

15. As the Kansas courts have acknowledged,

“[t]he commission's decisions involve the difficult problems of policy, accounting, economics and other special knowledge that go into fixing utility rates. It is aided by a staff of assistants with experience as statisticians, accountants and engineers, while courts have no comparable facilities for making the necessary determinations. [citation omitted] Hence a court may not set aside an order of the commission merely on the ground that it would have arrived at a different conclusion had it been the trier of fact. It is only when the commission's determination is so wide of the mark as to be outside the realm of fair debate that the court may nullify it. [citation omitted]”³¹

16. There is no indication in the Order that the Commission based its decisions on the 2019 ITP Report with ignorance as to its limitations—which were covered in great detail by KIC throughout the hearing and in briefing. But KIC’s complete focus on that one document’s limitations ignores the additional substantial evidence that supports the Commission’s decision and ignores the experience and capability of the many witnesses who were able to opine on and interpret the 2019 ITP Report and give thoughtful and credible testimony about Kansas-specific benefits and costs that could be construed from the Report.

B. McGhee Petition

17. The McGhee Petition makes three arguments. The first is that the Commission failed to consider evidence on the environmental impact of wind and solar projects that could be developed because of increased transmission capacity from the Project.³² The second argument is that Commissioner French violated the Canons and Rules of the Kansas Code of Judicial Conduct.³³ As an initial note, neither of these two issues appear in the McGhee’s brief, nor were either of these

³⁰ Order at ¶¶ 15-22.

³¹ *Midwest Gas Users Ass’n v. State Corp. Comm’n*, 3 Kan.App.2d 376, 380-81 (1979) citing *Southwestern Bell Tel. Co. v. State Corporation Commission*, 192 Kan. 39, 48-9, 386 P.2d 515 (1963); *Kansas-Nebraska Natural Gas Co. v. State Corporation Commission*, 217 Kan. 604, 617, 538 P.2d 702 (1975); *Graves Truck Line, Inc. v. State Corporation Commission*, 215 Kan. 565, Syl. P 5, 527 P.2d 1065 (1974).

³² McGhee Petition at ¶¶ 4-12.

³³ McGhee Petition at ¶¶ 13-19.

issues addressed at hearing. Third, the McGhees argue that the Commission acted unlawfully in granting the certificate because of the McGhees' allegations regarding NEET Southwest's activities in Kansas.³⁴ These arguments are addressed in turn.³⁵

1. Response to McGhee Argument 1: Environmental Issues Relating to Theoretical Future Wind Farm Construction Are Not within the Scope of the Proceeding.

18. NEET Southwest requested a CCN from the Commission to build a transmission line stretching from Missouri to Kansas. NEET Southwest's Application does not request Commission authority to build a wind or solar farm. As the McGhees correctly point out, the Commission's environmental review was limited to assessing the transmission line's potential impact on wetlands, sensitive species habitat, and cultural and archaeological resources.³⁶

19. There is no precedent for including analysis into the environmental impacts of potential generation construction in transmission planning—for good reason. First, wind and solar facilities are regulated by local governments, state and federal aviation regulators, and state and federal environmental regulators.³⁷ Commission encroachment into development of wind and solar projects through transmission line proceedings could be seen as an overreach into those other areas of regulation. Second, adding a requirement that transmission line operators identify and account for theoretical generating unit construction and operation is untenable. There is no way for NEET Southwest or the Commission to predict what generation units could be built in the future, not to mention what generation type the units will be (coal, wind, solar, nuclear), who will build them,

³⁴ McGhee Petition at ¶¶ 21-25.

³⁵ The McGhees make a fourth, summary argument in paragraph 26, stating that no Kansas-specific benefits were provided in the Application or supporting evidence. For the reasons expressed in the KIC Responses, as well as NEET Southwest's previous briefing, this argument is meritless.

³⁶ McGhee Petition at ¶ 5.

³⁷ The McGhees acknowledge this point: "[t]he Commission has no authority to regulate wind farms and solar projects. Therefore, once the Commission issues a CCN for the proposed transmission line, it loses all authority to prevent or reduce the environmental impact of those wind farm and solar projects." McGhee Petition at ¶ 10.

where they will be placed, and what environmental issues will be of concern for each of those projects. Therefore, this is the wrong forum for such a discussion.

20. Further, as provided in *Lario Oil & Gas Co. v. Kansas Corp. Comm'n*, 57 Kan. App. 2d 184 (2019), parties may not raise new arguments in a motion for reconsideration unless the argument could not be presented earlier.³⁸ The McGhees did not present this issue at hearing or in briefing, nor have they provided evidence that they were unable to do so. On this ground, the argument fails as well.

21. Finally, the McGhees have not supported this assertion with any pertinent authority or shown why the assertion is sound despite the lack of supporting authority.³⁹ Therefore, the McGhees have not provided a salient reason for the Commission to change its decision.

2. *Response to McGhee Argument 2: The Commission Engaged in Lawful Procedure.*

22. Accusing a Commissioner of judicial misconduct is a serious charge, and no evidence in the record supports such a claim. At no point in the hearing did counsel for the McGhees object to the Commissioner's line of questions and at no point in the briefing did the McGhees raise this issue. As discussed in the last subargument, parties may not raise new arguments in a motion for reconsideration unless the argument could not be presented earlier.⁴⁰ The McGhees provide no explanation for this last-minute argument, and, on this point alone, the argument must fail.

23. Moving to the specific allegations, the first two examples that the McGhees reference (McGhee Petition at ¶¶ 13-14) relate to situations where Commissioner French asked a witness a

³⁸ *Id.* at 199.

³⁹ *Id.* at 200; *University of Kan. Hosp. Auth. v. Board of Comm'rs of Unified Gov't*, 301 Kan. 993, 1001, 348 P.3d 602 (2015).

⁴⁰ *Lario Oil & Gas Co.*, 57 Kan. App. 2d at 199-200.

question and later, an attorney complimented Commissioner French on the questions and implied they were planning to ask similar questions. In both instances, Commissioner French's questions were clearly not asked from positions of advocacy, but instead sought to clarify the record, and affirm Commissioner French's understanding of some specific area. The Commissioners and parties' attorneys on redirect have a shared interest in clarifying the record, so the fact that a Commissioner and an attorney on redirect may have shared questions is not a surprise to anyone with experience before the Commission.

24. The McGhees' third example relates to a misunderstanding of Commissioner French's question to Staff witness Justin Grady.⁴¹ Commissioner French's actual question was:

“I guess I just want you to unequivocally state, have you seen any evidence in this proceeding, has any analysis crossed your desk that would suggest that the reason this project was planned and the notice to construct was issued was to serve or benefit customers outside of SPP?”⁴²

The McGhees characterize this as a “flat-out demand[]” that Mr. Grady give a certain answer to the question. But a simple review of the question shows the question affords Mr. Grady the option to reply in either the affirmative or the negative, akin to a request for a “yes-or-no” answer.

25. The last example complained of by the McGhees relates to alleged *ex parte* communications between Commissioner French and Justin Grady that was apparently alluded to in the following remark by Commissioner French to Mr. Grady: “Would it be fair to say that you and I have had a lot of conversations over the last several years, when I was both inside and outside of KCC, about my and your concerns about the escalating transmission cost?” For a few reasons, this does not rise to the level of an impermissible *ex parte* communication.

26. Per K.A.R. 82-1-207, Kansas regulations prohibit “parties to the proceeding, or their

⁴¹ McGhee's Petition at ¶ 15.

⁴² Trans. Vol. II at 507:12-17.

attorneys,” from discussing the “merits of the proceeding” with a Commissioner after the Commission has announced a hearing shall be conducted. Further, subparagraph (b) provides that “no member of the technical staff shall be considered a party to any proceeding before the commission, regardless of participation in staff investigations in the proceeding or of participation in the proceeding as a witness.”

27. Justin Grady is employed by the Commission as a member of the technical staff, so he is automatically excluded from the *ex parte* prohibition. Further, it appears clear from the question that the conversation was of a general nature and pre-existed this proceeding. Therefore, the conversations referenced by Commissioner French were outside of the *ex parte* window.

28. Finally, none of the referenced conversations rise to a level that would appear to influence the decision in the matter, but rather appear to merely reflect the fact that two people working at the same institution occasionally talk about common issues of interest at their place of employment.

3. *McGhee Argument 3: The Commission Reasonably Determined that NEET Southwest Did Not “Transact Business” within the Meaning of the Statute.*

29. The McGhees argue that the Commission incorrectly determined the issue of whether NEET Southwest impermissibly transacted business in Kansas prior to having a certificate of convenience and necessity.⁴³ The Commission addressed the McGhees’ arguments thoroughly in its Order (at ¶¶51-58), finding that the acquisition of easements and engaging in site preparation did not constitute unauthorized “business of a public utility,” citing to *Matter of Acquisition of Land by Eminent Domain, Kansas Gas & Electric Co. v. Will Investments, Inc.*, 261 Kan. 125 (1996).⁴⁴ As a backstop, the Commission also noted that even if NEET Southwest was found to have violated the

⁴³ McGhee Petition at ¶¶ 21-25.

⁴⁴ Order at ¶ 56.

statutes, that such a violation does not warrant denial of the CCN.⁴⁵

30. The McGhee Petition argues simply that the Commission is wrong but provides no precedent for its conclusion other than citing the statute. This summary conclusion is not persuasive, does not satisfy the standards for reconsideration, and should not cause the Commission to overturn its well-reasoned Order.

WHEREFORE, NEET Southwest respectfully requests the Commission deny the Petitions for Reconsideration filed by KIC and the McGhees.

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⁴⁵ *Id.* at ¶ 58.

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AFFIRMATION OF ANDREW O. SCHULTE

I, Andrew O. Schulte, hereby swear and affirm that I am an attorney for NextEra Energy Transmission SW, LLC, and that I have read the foregoing and that the facts set forth therein are true and correct to the best of my knowledge and belief.

Date: September 21, 2022

/s/ Andrew O. Schulte
Andrew O. Schulte

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served upon the parties listed below by email or U.S. mail, postage prepaid, this 21st day of September, 2022.

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