

BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

PETITION FOR RECONSIDERATION

COMES NOW the Kansas Industrial Consumers Group, Inc. (“KIC”), Spirit AeroSystems, Occidental Chemical Corporation, The Goodyear Tire and Rubber Company, Associated Purchasing Services, Lawrence Paper Company, Renew Kansas Biofuels Association, Kansas Grain and Feed Association, Kansas Agribusiness Retailer Association, AGCO Corporation, and Big heart Brands (collectively, “KIC”) and state to the State Corporation Commission of the State of Kansas (“Commission” or “KCC”) for its Petition for Reconsideration (“PFR”) of the KCC “ORDER ON APPLICATION FOR CERTIFICATE OF CONVENIENCE AND NECESSITY,” (“KCC Order”) dated August 29, 2022, as follows:

1. This PFR is filed pursuant to K.S.A. 66-118a, 66-118b, 77-529, 77-621, and K.A.R. 82-1-235.
2. KIC states that the KCC Order is arbitrary and capricious, unreasonable, and in violation of Kansas law (K.S.A. 77.621) in that:
 - the KCC has not decided an issue requiring resolution;
 - the KCC has erroneously interpreted and applied the law; and

- the KCC action is based on a determination of fact, made or implied by the KCC, that is not supported by evidence that is substantial when viewed in light of the record as a whole.

3. The Commission, in making its determination, did not consider evidence which was material, substantial, and uncontroverted in this proceeding (K.A.R. 82-1-235 (b)), to-wit:

A. The only evidence regarding the issue of whether the Wolf Creek Blackberry line (“WC/BB”) had specific benefits identifiable for Kansas, was the Southwest Power Pool (“SPP”) 2019 ITP.

- (i) The Applicant, which has the burden of proof in this Docket, testified that it did not conduct any independent assessment of benefits. It instead relied exclusively on the SPP 2019 ITP. “Q. So my first question is, NextEra did not do any independent assessment. Is that correct? A. That is correct, yes.” Walding, Tr. 1, p. 122, ll 18-20.

B. The benefits of the SPP 2019 ITP are calculated system wide for the entire 14 state SPP region and benefits to Kansas have not been identified by SPP. The SPP witness, Mr. Allen, stated that it is not possible to identify Kansas specific benefits from the SPP 2019 ITP, and any attempt to do so would be questionable as to its accuracy.

- (i) The KCC Order does not consider that testimony of Mr. Allen. The Commission KCC Order does not contain a single reference to the testimony of SPP witness Allen, and does not consider his Direct

Prefiled Testimony or his 68 pages of testimony at the Hearing in this Docket.

- (ii) Mr. Zakoura, if you would continue your cross-examination.

Mr. Zakoura: Thank you. Oh, there is Mr. Allen. Thank you.

Q. I'm not sure exactly when I was off line but let me start over again, Mr. Allen. In the opening statement of Ms. Starnes, she indicated, generally, the extent and the manner in which SPP operates, in particularly with regard to the Blackberry line. And I would like to confirm with you, as a witness in this case, just what was done and how we approach this, how you approach it at SPP. And the way I'm going to do that is to read to you some of the testimony, a few lines of testimony of the CURB witness and see if you would confirm it. Or if you don't confirm it, if you could say where it's not correct. I'm reading from CURB testimony. It says: CURB subsequently met with SPP to discuss whether the benefit/costs analysis, or rate impacts, of the Wolf Creek-Blackberry project had been quantified specifically for Kansas customers. And, if not, whether they could be. **It is my understanding that SPP has not performed Kansas-specific benefit/costs and rate impact analyses for the Wolf Creek-Blackberry project. SPP expressed concern over the practicality and accuracy of the results if it were attempted to do so.**

Would you confirm those statements as being accurate? Or, if they need to be amended in any fashion, would you do that also, sir?

A. They are accurate.

Q. Thank you, sir. May I further read one passage that's in the CURB testimony? And, again, I would ask you, sir, to either confirm it to be accurate or to tell me where it's inaccurate in any manner. This is the testimony: **Because SPP's transmission planning process is regionally focused rather than locally focused, benefits and costs for the Wolf Creek-Blackberry project have been quantified by SPP at the regional level. Neither SPP nor NEET Southwest have quantified the Kansas**

specific benefits of the Wolf Creek-Blackberry project for analysis in this docket.

Would you confirm that as being correct?

A. **That is correct.**

Allen, Tr. 2, p. 334, ll 3-25; Tr. 2, p. 335, ll 1-20; Emphasis supplied.

- (iii) The SPP planning focus is regionally focused rather than locally focused. Tr. 2, p. 327, ll 18-25; Tr. 2, p. 328, ll 3-5.
- (iv) Q. And there are no individual benefits associated to any one of the 41. Are there? A. They look at the portfolio as a whole. That is correct. Loomis, Tr. 1, p. 181, ll 10-13.
- (v) Q. And did you hear the testimony yesterday that, as I understand - - let me rephrase that. And it's your understanding that SPP quantified benefits based on their portfolio on their portfolios of ITP 2019 program? A. It's my understanding that SPP's witness will be the best person to have that discussion in front of this Commission. Ives, Tr. 2, p. 282, ll 24-25 and Ives, Tr. 2, p. 283, ll 1-5.

Procedural History

4. On February 28, 2022, NextEra Energy Transmission Southwest, LLC ("NEET Southwest") filed an application for a certificate of convenience and necessity ("CCN"), requesting the Commission to permit it to operate as a public utility for the purpose of

constructing and operating the Wolf Creek to Blackberry Transmission Project pursuant to K.S.A. 66-131 and K.S.A. 66-1,180. (“WC / BB Project”).

5. On March 11, 2022, Evergy, Inc. filed a Petition for Intervention. On April 21, 2022, Evergy was granted intervention by the Commission. On March 28, 2022, CURB filed a Petition for Intervention. On April 21, 2022, CURB was granted intervention by the Presiding Officer.

6. On March 28, 2022, Spirit AeroSystems, Occidental Chemical Corporation, The Goodyear Tire and Rubber Company, Associated Purchasing Services Corporation, and the Kansas Industrial Consumers Group, Inc. filed a Petition to Intervene in this docket.

7. On April 1, 2022, the Lawrence Paper Company filed a Petition to Intervene.

8. On April 8, 2022, Sunflower Electric Power Corp. filed a Petition to Intervene. On April 27, 2022, Sunflower Electric Power Corp. was granted intervention by the Commission.

9. On April 13, 2022, Kansas Electric Power Cooperative, Inc. filed a Petition to Intervene. On April 25, 2022, Kansas Electric Power Cooperative, Inc. was granted intervention by the Presiding Officer.

10. On April 15, 2022, ITC Great Plains, LLC filed a Petition for Intervention. On April 28, 2022, ITC Great Plains, LLC was granted intervention by the Presiding Officer.

11. On April 25, 2022, Southwestern Public Service Company filed a Petition to Intervene.

12. On May 9, 2022, Southwestern Public Service Company was granted intervention by the Presiding Officer.

13. On April 28, 2022, the Commission filed an order granting intervention to Spirit AeroSystems, Occidental Chemical Corporation, The Goodyear Tire and Rubber Company, Associated Purchasing Services Corporation, Lawrence Paper Company, and the Kansas Industrial Consumers Group, Inc., with limitations.

14. On May 5 and 6, 2022, Renew Kansas Biofuels Association (“RKBA”), Kansas Grain and Feed Association (“KGFA”), Kansas Agribusiness Retailer Association (“KARA”), AGCO Corporation (“AGCO”), Big Heart Pet Brands (“BHPB”), Darren McGhee and Rochelle McGhee Smart also filed Petitions to Intervene.

15. On May 11, 2022, NEET Southwest filed a Response to the Petitions to Intervene of RKBA, KGFA, KARA, AGCO, and BHPB. In their Response, NEET Southwest requested that the Commission place the same limitations on AGCO and BHPB and to deny to intervention of RKBA, KGFA, and KARA until their membership is identified and customers of Evergy are specified.

16. On June 6, the Commission issued its Order on Petition for Reconsideration and Petitions for Intervention, granting the Intervention of RKBA, KGFA, KARA, AGCO, and BHPB. The Commission also, on Reconsideration, removed the limitation on participation in this Docket, of Spirit AeroSystems, Occidental Chemical Corporation, The Goodyear Tire and Rubber Company, Associated Purchasing Services Corporation, Lawrence Paper Company, and the KIC.

17. On June 8 and June 9, 2022, the Commission held a Hearing in this Docket.

18. On August 29, 2022, the KCC issued its “ORDER ON APPLICATION FOR CERTIFICATE OF CONVENIENCE AND NECESSITY.” (“KCC Order”).

19. The Commission Order stated that the WC / BB Project provided benefits to Kansas. This finding is erroneous – there is no record evidence that is material, substantial, and competent in support of this Commission finding and failed to determine a critical issue – whether the KCC Order would cause the price of electric power to increase in western Kansas. Failure to make this critical finding is not reasonable and is not lawful in that this finding is required to be considered by the KCC in determining the issue of benefits to Kansas. The KCC Order also failed to consider critical, substantial evidence that conclusively demonstrates that the record review is devoid of material, substantial, credible evidence of benefit of the WC / BB Project for Kansas. KIC seeks reconsideration of these points, as well as all other points and issues in this PFR.

Summary of the Material Facts

20. The Application of NEET Southwest in this Docket seeks an Order from the Commission permitting NEET Southwest to operate as a “transmission only, public utility” in the State of Kansas. Specifically, NEET Southwest seeks to construct and operate an 85-mile, 345 kV electric transmission line in Kansas (the “WC / BB Project”).

21. A KCC order permitting NEET Southwest to operate as a “transmission only, public utility” would permit NEET Southwest to use the power of eminent domain, to acquire land rights from those landowners that do not elect to voluntarily contract with NEET Southwest for rights-of-way and easements for the hereinafter described WC / BB Project. Landowners have entered appearances in this Docket, stating that they do not elect to encumber their land for rights-of-way and easements for the hereinabove described WC / BB Project.

22. The electric transmission line that is the subject of this Docket, will commence at the Wolf Creek facility of Evergy in Coffey County, Kansas, extend for about 85 miles in

Kansas, and will have about 9 miles of electric transmission line in Missouri. The electric transmission line terminates at the substation owned by Associated Electric Cooperative, Inc. (“AECI”) in Jasper County, Missouri (“the WC / BB Project”). The AECI substation in Jasper County, Missouri, will be materially upgraded as part of the WC / BB Project. AECI is not a member of the Southwest Power Pool (“SPP”).

23. The SPP has approved the WC / BB Project as 1 of 44 projects approved by SPP in its 2019 Integrated Transmission Plan (“2019 ITP”) Effective August 2020, SPP and AECI have entered into a Cost and Usage Agreement for the WC / BB Project. SPP and AECI also have entered into a Transmission Coordination Agreement, dated August 19, 2004, and a Joint Operating Agreement, dated August 12, 2008.

Applicable Law

24. The SPP has no authority to confer public utility status on any entity – public utility status is solely a Kansas state law issue. K.S.A. 66-131.

25. All costs of the WC / BB Project, and all costs of the operation of the WC / BB Project will be paid by transmission owner members of the SPP. These transmission owner members of SPP will, in turn, charge retail ratepayers in the 14 states of the SPP (including Kansas) for the capital costs and the costs of operation of the WC / BB Project.

26. Kansas state law requires that NEET Southwest meet the following statutory requirements to operate as a public utility in the state of Kansas, in order to construct and operate the Kansas located portion of the WC / BB Project.

27. K.S.A. 66-131 mandates that, before the Commission may grant a CCN, the Commission must first find that public convenience and necessity will be promoted by the transaction — in this case, the construction and operation of an 85-mile, 345 kV transmission

line in Kansas, by NEET Southwest (the WC / BB Project). The Commission must determine that the CCN and the WC / BB Project will provide benefits to Kansas.

28. The word “necessity” as used in K.S.A. 66-131, “means a public need without which the public is inconvenienced to the extent of being handicapped.” *Central Kansas Power Co. v. State Corp. Comm’n*, 206 Kan. 670, 675, 482 P.2d 1 (Kan. 1971).

29. In determining whether a CCN should be granted, the Commission should consider the interests of the parties in the following priority:

- (1) the public convenience ought to be the primary concern,
- (2) the interest of public utilities serving the territory next, and
- (3) the desires and solicitations of the applicant ought to be a relatively minor consideration.

30. The Commission has the authority to impose lawful and reasonable conditions on the granting of a CCN.

The Applicable Provisions of K.S.A. 77-621
The KCC has not decided an issue requiring resolution

31. The Commission has failed to decide an issue requiring resolution, to wit: the **Commission did not decide the issue of (a) whether the Wolf Creek to Blackberry Transmission Project (“WC / BB Project”) will cause electric power costs in Kansas to increase up to 21%, and if so, should a Certificate of Convenience and Necessity (“CCN”) be ordered for NextEra to construct and operate the WC / BB Project.** The Commission refused to decide the issue. There is substantial competent evidence, which is uncontroverted in this Docket, that the WC / BB project was specifically designed to equalize electric power, by increasing the historical lower power costs in western Kansas, in order to lower the prices in the eastern portion of SPP. At Paragraph 17 of the KCC Order, it is stated:

Justin Grady testified that the transmission Project would “levelized” Locational Marginal Prices (“LMP”) in the system causing prices that are lower to rise, and those that are higher will come down.” Attached to Justin Grady’s testimony in support of the Settlement Agreement is a document from the ITP which lists one of the benefits of the ITP is reducing market price disparity, “levelizing wholesale energy prices by 21% on average.”

32. The Commission goes on (at Paragraphs 18 and 19) to state that KIC did not show a correlation between equalizing / levelizing electric power costs, and increased costs for western Kansas consumers, the KCC has not decided an issue that is critical as to the legal standard that the granting of a CCN requires a resolution as to whether the WC / BB Project will increase electric power costs in western Kansas by up to 21%. (KIC Exhibits 35 and 42. Tr. 2, p. 324.)

33. The importance to decide this issue is highlighted by the Commission Order at Paragraph 19, to wit: “While Grady testified that LMPs in the western part of the State may go up he also testified that low LMPs are not necessarily a good thing for western Kansas.” Mr. Grady speculates that the benefit of low prices being materially increased, might actually be beneficial based on speculative gains in efficiency.

32. If the WC / BB project – as it is designed to do – will increase prices of electric power in western Kansas by up to 21% - that is an issue that requires resolution by the Commission. Absent that resolution, the Commission Order is in violation of K.S.A. 77-621.

33. On a purely equitable basis – why would the Commission decide this case without certainty of the impact on 350,000 Kansans living in western Kansas. It would be inequitable for the KCC to put the economic interests at risk of 350,000 Kansans living in western Kansas.

The KCC has erroneously interpreted and applied the law; and the KCC action is based on a determination of fact, made or implied by the KCC, that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole.

34. The Commission makes not a single reference to the Testimony of SPP witness Allen in the KCC Order.

35. SPP authored / prepared the 2019 ITP and Mr. Allen provided 217 pages of Testimony that described the preparation of the Study and the 2019 ITP, as providing extensive testimony during the Hearing.

36. SPP witness Allen, testifying on behalf of SPP, clearly and unequivocally testified that the benefits set forth in the 2019 ITP are calculated system wide for the entire 14 state SPP region, and the benefits to Kansas have not been identified by SPP.

37. In response to the Information Request of CURB, Mr. Allen stated that it was not possible to identify Kansas specific benefits, and any attempt to do so would be questionable as to its accuracy. Hearing Transcript, Vol. II at 334:11-25 – 335:1-20; KIC Exhibit 6, which includes Responses to CURB Information Requests 15 and 16.

38. The Commission has entirely disregarded and refused to consider the best evidence and most authoritative witness testimony (Mr. Allen) in the case.

39. “There . . . controlling, positive, uncontradicted and unimpeached evidence may not be disregarded even though adduced from interested witnesses, . . . the evidence – expert or non-expert – is all one way, there is no room for contrary finding[s]. *Stafos v. Missouri Pacific R.R. Co.*, 367 F.2d 314 (10th Cir. 1966).

40. The KCC Order is based on a determination of fact, made or implied by the KCC, “. . . that is not supported to the appropriate standard of proof by evidence that is substantial when viewed in light of the record as a whole.” (K.S.A. 77-621).

41. Any Order of the Commission must be based on substantial competent evidence. “Substantial competent evidence is evidence which possesses something of substance and relevant consequence, and which furnishes a substantial basis of fact from which the issues tendered can reasonably be resolved.” (K.S.A. 77-621).

42. Additionally, “controlling, positive, uncontradicted evidence may not be disregarded even though adduced from interested witnesses, and if all evidence, expert or nonexpert, is all one way, there is no room for contrary finding[s].” *Stafos, supra*.

43. In this case, there is uncontradicted evidence from SPP that the SPP model which is relied upon to “infer” Kansas benefits is not Kansas specific and does not quantify Kansas specific benefits.

44. As noted by witness Dr. Jeff Makholm, “[a]t a minimum, the KCC must have the facts regarding Kansas specific impacts. Instead, the KCC is being asked to approve Blackberry based on overall SPP metrics; not Kansas impacts in a situation where Kansas metrics may well differ. I note, in support of my point here, that in addition to Staff, [NEET Southwest’s] testimony only refers to overall SPP benefits and costs and not to Kansas benefits and costs.” (Makholm, Prefiled Direct Testimony, at p. 8). Dr. Makholm reiterated that there is no evidence of the project being cost beneficial to Kansas in response to a question from Commissioner French.

45. On this point, there is no dispute. There is no evidence in the record as to Kansas specific benefits. Kansas law requires the KCC to make such a finding as to benefits to Kansans in ordering a CCN.

46. As noted by SPP witness Kelsey Allen, neither SPP nor NEET Southwest quantified Kansas specific benefits of the WC / BB Project.

47. As noted by CURB Witness Frantz - “Because SPP’s transmission planning process is ‘regionally focused rather than locally focused,’ benefits and costs for the WC - BB Project have been quantified by SPP at the regional level. Neither SPP nor NEET-SW have quantified the *Kansas-specific* benefits of the WC - BB Project for analysis in this docket.” Franz, Cross-Answering Testimony, p. 5, ll 12-15.

48. Mr. Frantz went on to state: CURB subsequently met with SPP to discuss whether the B/C analysis or rate impacts of the WC / BB Project have been quantified specifically for Kansas customers and if not, whether they could be. It is my understanding that SPP has not performed Kansas-specific B/C and rate impact analyses for the WC / BB Project. SPP expressed concern over the practicality and accuracy of the results if it were to attempt to do so.

49. SPP witness Allen, testifying on behalf of SPP, clearly and unequivocally testified that the benefits set forth in the 2019 ITP are calculated system wide for the entire 14 state SPP region, and the benefits to Kansas have not been identified by SPP.

50. In response to the Information Request of CURB, Mr. Allen stated that it was not possible to identify Kansas specific benefits, and any attempt to do so would be questionable as to its accuracy.

51. In spite of this Testimony by SPP witness Allen – the witness whose employer (SPP) constructed the 44-project benefit analysis which forms the justification for such projects - Witnesses Walding, Loomis, and Grady (in response to Commissioner examination), attempted to construct evidence on the witness stand, in an apparent attempt to show Kansas specific benefits.

52. As what can best be described as “back of the envelope analysis,” these witnesses considered certain projects designated as economic projects and inferred that since the WC / BB Project was physically located in Kansas, economic benefits must be Kansas specific benefits.

53. The analysis or inferences of a witness must be based on a “fact” that is not in dispute. A witness cannot analyze and infer based on a foundation of misinformation. Here, the witnesses attempt to provide analysis and inferences from an SPP Study, based on an invented fact – “Kansas specific determination of benefits” – which SPP witness Allen has denied in the strongest terms.

- In response to the Information Request of CURB, Mr. Allen stated that it was not possible to identify Kansas specific benefits, and any attempt to do so would be questionable as to its accuracy.
- The inference of the witnesses as to Kansas specific benefits, is diametrically opposite to the sworn testimony of SPP in this Docket – that the 2019 ITP benefits cannot be made Kansas specific or specific to the WC / BB Project;
- SPP filed hundreds of pages of study documents, during a 29-month study period, that form the justification for the 2019 ITP, and nowhere in the study documents is there the purported “evidence” of Kansas benefits presented at the Hearing by witnesses Walding, Loomis, and Grady;
- There is no factual basis underlying this testimony of these witnesses. It is simply a type of math calculation based on no underlying facts of all the various “economic” projects as designated in the 2019 ITP;
- The fact that a project of the 2019 ITP is physically located in Kansas does not necessarily mean it has Kansas specific benefits, and if so for the sake of argument, there is no quantification of such benefits. Consistent with the testimony of SPP in this Docket, the 2019 ITP benefits – including the WC / BB Project – are system wide throughout the 14 states of the SPP. Indeed, the WC / BB Project is a system-wide funded Project.

Respectfully submitted,

/s/ James P. Zakoura

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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 *Petition for Reconsideration*, and that the statements therein are true to the best of his knowledge, information, and belief.



James P. Zakoura

SUBSCRIBED AND SWORN to before me this 12th day of September 2022.



Notary Public

My Appointment Expires:



CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September 2022, the foregoing *Petition for Reconsideration* 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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