BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

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

PETITION FOR RECONSIDERATION OF EVERGY

COME NOW Evergy Kansas Metro, Inc., Evergy Kansas South, Inc. and Evergy Kansas Central, Inc. ("Evergy") and pursuant to K.S.A. 66-118b, K.S.A. 77-529, and K.A.R. 82-1-235, petitions for reconsideration or clarification of the *Order On Application For Certificate of Convenience and Necessity* ("Order") issued in this docket by the State Corporation Commission of the State of Kansas ("Commission or KCC") on August 29, 2022. Evergy is requesting the Commission reconsider and/or clarify the portion of its Order concerning the double circuit issue as addressed on pp. 37-39, ¶¶ 96-99 of the Order. In support, Evergy states as follows:

I. INTRODUCTION AND BACKGROUND

1. NextEra Energy Transmission Southwest, LLC ("NEET Southwest") filed its application in this docket on February 28, 2022. Evergy was granted intervention status by Commission Order issued April 22, 2022.

2. On June 6, 2022, NEET Southwest, Staff, Evergy, CURB, SPP, KEPCo and Sunflower filed a Joint Motion for Approval of Nonunanimous Settlement Agreement ("Settlement Agreement").

3. In the Settlement Agreement, NEET Southwest made certain commitments, including the following concerning the double circuit option:

> NEET Southwest will consider and address as part of its line siting proceeding an option to double circuit a 25-mile portion of the Wolf Creek-Blackberry Project that parallels an existing Evergy 161 kV transmission line, subject to receiving necessary approvals for a change in project scope from SPP and necessary agreements from Evergy.[1]

4. In the Order, the Commission approved the Settlement Agreement with additional conditions. Specific to the double circuit issue, the Commission conditioned approval of the Settlement Agreement,

> [u]pon compliance by NEET Southwest ***and Evergy*** to coordinate, cooperate, and jointly evaluate the technical and financial feasibility of the option of double circuiting this 25 mile portion of the Wolf Creek to Blackberry line, and to file the results of said evaluation with the Commission as part of the line siting docket to be filed pursuant to K.S.A. 66-1 ,177, et. seq. Given the Commission's jurisdiction over both public utilities, the Commission directs NEET Southwest ***and Evergy*** to work expeditiously and keep Staff informed as this process unfolds so that Staff is prepared to critically and independently evaluate the results of this comprehensive evaluation when filed.[2]
>
> …
>
> Accordingly, NEET Southwest ***and Evergy*** shall consider at least (but not limited to) the following factors in this evaluation: 1) Detailed cost estimates of the cost to double circuit this portion of the line; 2) Cost sharing arrangements/agreements between NEET Southwest and Evergy pertaining to the upgrade costs and all aspects of operation and maintenance of this double-circuited portion of the line; 3) Easement sharing agreements and O&M responsibility sharing agreements for the double circuit portion of the line; 4) Any revisions to construction timelines (of either standalone project) necessary to accommodate Evergy or NEET Southwest's construction schedule for this portion of the line; and 5) Any engineering analysis necessary to determine construction standards for this portion of the line. To be clear, the timelines for approval of a line siting docket as provided by K.S.A. 66-1,178(b) shall not begin to toll until the NEET Southwest has filed a comprehensive evaluation of the option to double-circuit this portion of the line containing a satisfactory analysis of (at least) each of the enumerated evaluation factors described above.[3]

[1] Settlement Agreement, ¶ 10.d.
[2] Order, pp. 37-38, ¶97 (emphasis added).
[3] Order, p. 38, ¶ 98 (emphasis added).

> Accordingly, the Commission directs ***Evergy*** and NEET Southwest to collaboratively work together in good faith, including but not limited to sharing internal information and resources, to fully consider, study, and evaluate the double circuit option in a timely manner. The results of such review must be presented for consideration as part of an evaluation of the proper route for the NEET Southwest's line siting filing. The Commission finds this condition necessary to protect the rights of all interested parties and those of the general public pursuant to K.S.A. 66-1,180.[4]

II. REQUEST FOR CLARIFICATION

5. As a signatory to the Settlement Agreement, Evergy accepted the obligation to collaborate with NEET Southwest to allow NEET Southwest to consider and address as part of its line siting proceeding the double circuit option.[5] The responsibility for the Project, as well as the evidentiary basis upon which a future siting application would be filed, remained solely with NEET Southwest.

6. Evergy's understanding of its commitment to participate in a good faith assessment of the double circuit option would include Evergy providing NEET Southwest with Evergy's engineering standards and jointly assessing impacts to cost, landowners, operations and maintenance, construction schedules, reliability, and availability of the lines for this option. This is what Evergy anticipated as a signatory to the Settlement Agreement, and Evergy requests the Commission clarify that this accurately describes the scope of Evergy's obligation under the Order.

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[4] Order, pp. 38-39, ¶ 99 (emphasis added).

[5] At hearing, Evergy's witness, Mr. Darrin Ives, explained, "I don't believe the Settlement Agreement requires for that double circuit to be done. It requires for it to be considered and evaluated. (Ives, Tr. Vol. 2, p. 276.) When asked if this term of the Settlement Agreement, if accepted by the Commission, would allow for an increase in the notice to construct in order to accommodate the colocation, Mr. Ives, answered, "At this point, I don't think it's, in my company's opinion, I guess, or my opinion, not necessary because the commitment in the Settlement Agreement is to make a good faith assessment of the viability of doing that. (Ives, Tr. Vol. 2, p. 277.)

III. REQUEST FOR RECONSIDERATION

7. To the extent the Commission intends in the Order to impose more extensive requirements upon Evergy, Evergy requests the Commission grant reconsideration. Evergy is not the applicant in this case and does not carry the burden of proof to establish the bases upon which a certificate would be awarded to NEET Southwest. The same would be true in any subsequent line siting proceeding. This is not Evergy's project; Evergy is only an intervenor in this proceeding and would only be an intervenor in a subsequent line siting proceeding. If the Order is intended to cast Evergy into the role of *de facto* partner to NEET Southwest or impose upon Evergy an obligation to create and/or present evidentiary proof to support NEET Southwest's certificate or siting permit, Evergy objects to that aspect of the Order and submits that reconsideration should be granted to clarify and/or correct this inappropriate mandate.

8. There are many problems resulting from the Commission requiring Evergy to engage in a joint venture with another utility on a project for which Evergy does not, voluntarily, seek to participate. The Commission would be acting outside its certification authority and impermissibly imposing itself into the area of management prerogative. Further, if this is the intent of the Order, there is inadequate evidence in the record to support the findings of the Commission upon which the double circuit mandate is based, and the Order fails to state specific facts supporting such findings. Importantly, there would also be legal and jurisdictional flaws inherent in the Commission imposing a forced joint venture between NEET Southwest and Evergy to construct a line that is different than what was approved as part of the federal tariff process. Put simply, if the Commission's intent is to go beyond the commitment Evergy made in the Settlement Agreement, as set out above in Section II, the Commission's directive would be legally fraught.

A. The Order Fails to Identify the Statutory Authority Under Which the Commission Acts When Modifying the Double Circuit Term of the Settlement Agreement

9. The Commission's modifications to paragraph 10.d of the Settlement Agreement are ultra vires of the agency's delegated authority under K.S.A. 66-131. Indeed, the only statute the Commission cites as authority for the modifications is K.S.A. 66-1,180.[6] Yet, as the Commission correctly notes, K.S.A. 66-1,180 relates to line siting—which is not the subject matter of this docket.[7] Thus, consistent with the Commission's finding in the Order as regards KIC's reference to the siting act, "[f]or purposes of this docket, arguments raised under K.S.A. 66-1,180 are premature."[8] The Commission's invocation of the same statute as authority for modifying the Settlement Agreement is likewise premature and without basis.

B. The Order Violates the Separation Between Management's Role to Operate the Utility and the Commission's Authority to Regulate

10. Although the Commission has broad authority under Chapter 66 of the Kansas Statutes Annotated, its authority is not unlimited. Kansas Courts have consistently recognized that there is a distinction between the function of management and that of the regulatory authority.[9] The general power of management is to make the business decisions for the utility, deciding how to run the utility and its facilities; the Commission's role is to regulate. The power of the Commission is limited by the consideration that it is not the owner of the utility's property

[6] Order ¶ 99.
[7] Order at ¶ 77.
[8] *Id.*
[9] *Sekan Electric Coop. Ass'n v. Kansas Corporation Comm'n*, 4 Kan.App.2d 477, 480 (1980) – "It must be kept in mind, of course, that the regulatory commission does not have the actual authority to revise a utility's capital structure, per se, or to order the utility to change it into a different setup. That is a prerogative of management which cannot be superseded by the substitution of regulatory opinion that is to say, how much debt should be incurred or common stock issued."

or clothed with the general power of management incident to ownership.[10]

11. The Commission's regulatory power over the operations of a public utility is not absolute, even if the Commission believes such intervention is necessary to carry out its public policy objectives.[11] The Commission is the regulator, not the co-manager, of the utility. Generally, the Commission may govern rates and services of a utility within the limits imposed by statutory and constitutional guaranties and inhibitions but may not extend itself into the areas of decision-making reserved to the company's management.[12] "The commission is not the company's business manager. The company has a business manager of its own who must be allowed good-faith exercise of judgment, discretion, and initiative."[13]

12. The Commission impermissibly crosses this line if it is ordering Evergy to perform work (beyond what Evergy voluntarily agreed to in the Settlement Agreement) on a project belonging to and providing financial benefit to the shareholders of another competing utility company.[14] The testimony in the record establishes that the Project as modified by the Settlement Agreement - without the double circuit - meets the Commission's standards for approval and serves the public interest. Intervention by the Commission to explore other business alternatives is not justified or appropriate in this case, even if the Commission's purpose is to carry out its public policy objectives.

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[10] *See* generally, *Community of Woodston v. State Corporation Commission*, 196 Kan. 747 (1960), wherein the Court held that it was the prerogative of management to arrange the hours of service of any agent at a station and to designate the base station, subject to the condition that the service provided met public convenience and necessity.
[11] *See, Williams Natural Gas Co. v. Kansas Corporation Comm'n,* 22 Kan. App. 2d 326, 338, 916 P.2d 52, *rev. denied,* 260 Kan. 1002 (1996).
[12] *Union Pac. Rld. Co. v. State Corp. Commission,* 165 Kan. 368, 371, 194 P.2d 939 (1948).
[13] *Wichita Gas Company v. Public Service* Commission, 126 Kan. 220, 268 P. 111 (1928).
[14] *Wichita Gas Co. v. Public Service Commission of Kansas*, 2 F.Supp. 792, 799 (1933) – "The commission was not empowered to substitute its judgment for that of the officers and directors of the Cities Service Gas Company as to the amount of leases necessary to afford an adequate gas reserve, in the absence of a showing of abuse of discretion by such officers in that regard."

C. The Findings in the Order on the Double Circuit Option Lack Evidentiary Support

13. The Commission is required to find specific facts in the record and to determine whether there is adequate record support.[15] Additionally, the Commission must state expressly its findings of fact and conclusions of law. This requirement prevents arbitrary agency action and facilitates judicial review, thus ensuring a lawful exercise of legislative authority.[16] The Commission did not make independent findings to support its modifications to paragraph 10.d of the Settlement Agreement or, for that matter, afford the parties a meaningful opportunity to be heard on the matter before ordering the modifications. Certain findings in the Commission's orders are not founded on substantial competent evidence, that is, evidence "which possesses both relevance and substance, and which furnishes a substantial basis of fact from which the issues can be reasonably resolved."[17]

14. The factual basis cited by the Commission for modifying paragraph 10.d of the Settlement Agreement is the generalized commentary contained in Staff's Post-Hearing Brief regarding avoiding economic waste and minimizing land encumbrances, which concludes as follows:

> While Staff acknowledged any new transmission construction will encumber the landscape to some degree and a double circuit requirement will minimize encumbrance of the land, the Project does not *unnecessarily* encumber the land. This Settlement Agreement addresses Staff's request for NEET Southwest to consider a double circuit on a portion of the Project in paragraph 10.d. However, paragraph 10.d does not affect Staff's analysis; therefore, Staff concludes the Project will promote the public interest when evaluated under Merger Standard (f)." (emphasis original)[18]

[15] K.S.A. 77-526(c).
[16] *See Farmland Industries, Inc. v. State Corp. Comm'n,* 25 Kan. App. 2d 849, 852, 971 P.2d 1213 (1999).
[17] *Southwestern Bell Tel. Co. v. State Corp. Comm'n, 4 Kan. App. 2d 44, 46 (1979).*
[18] Order ¶¶ 27-32; 39-40; 96-99.

15. There is no evidence in the record that the line, as approved by SPP and proposed by NEET Southwest in its Application, will unnecessarily encumber the landscape. The Commission finds "it will be important to evaluate the double circuit option" because the Commission "agrees with Staff that economic waste can occur when the landscape is unnecessarily encumbered".[19] But Staff's testimony was that the Project "does **not** unnecessarily encumber the land", which is the standard under which the Commission evaluates transmission rights only ("TRO") applications.[20]

16. The Commission's Order does not cite to specific facts in the record to support its decision that a "robust analysis of the double circuit option" might establish that the double circuit option is in the public interest[21], or that "any potential encumbrances would be tempered and limited if the line is double circuited"[22], or that the "public interest of Kansas, especially including the landowners that would be affected along this portion of the preliminary route of the line, will not be served if this issue is not comprehensively reviewed before NEET Southwest files its line siting request with the Commission.[23] There is no evidence to support the Commission's finding that the concept of double circuiting this portion of the Wolf Creek to Blackberry line is important "because of the potential to reduce the total cost of this portion of the line when properly compared to the cost of building both a new Wolf Creek to Blackberry line and rebuilding Evergy's existing 161 kV line", or that "this option has the potential to reduce landowner encumbrances and environmental impacts on approximately 25% of the preliminary route of the line", or that the double circuit option "appears to have the potential to reduce total costs, landowner encumbrances,

[19] Order, p. 16, ¶31.
[20] Order, p. 8 ¶14.
[21] Order, p. 16, ¶32.
[22] Order, p. 18, ¶39.
[23] Order, p. 37, ¶96.

and environmental impacts along the preliminary route of this line."[24] In fact, the testimony of the parties in the record regarding the double circuit option explained why it is not a viable option and would not promote the public interest.[25]

17. Finally, the parties did not have a meaningful opportunity to be heard on whether this Project should be modified from what was approved and put out by SPP for bid or whether Evergy and NEET Southwest should be ordered to partner on studying, analyzing and reporting on the double circuit option. These were not the issues presented in the docket by NEET Southwest's Application.

18. The absence of sufficient evidence and analysis concerning these important findings renders the Commission's modifications to paragraph 10.d of the Settlement Agreement arbitrary, capricious, and invalid.[26]

D. An Order Directing Evergy to Participate in the Double Circuit Proposal Would Be Legally Fraught

19. The Commission should grant Evergy's clarification request because any order directing Evergy to participate in the double circuit proposal (referred to in this section as a "Future Order") would be legally fraught, and unlikely to survive subsequent legal challenge. First and foremost, any Future Order would likely be inconsistent with preemption principles, as the Commission would be acting contrary to FERC-approved tariffs and processes, and otherwise be intruding upon areas of exclusive federal jurisdiction. The Future Order may also constitute an impermissible taking, as the Commission would be forcing Evergy to accept NEET Southwest as a partner and user of Evergy's own property. Finally, such a Future Order may be

[24] Order, p. 38, ¶98.
[25] Walding, Tr. Vol. 1, p. 92; Mayers, Tr. Vol. 1, pp. 208-11; Ives, Tr. Vol. 2, pp. 276-77, 291-92; Allen, Tr. Vol. 2, pp. 381-83; 388-90; Mayers Prefiled Rebuttal, pp. 4-7.
[26] *Citizens' Util. Ratepayer Bd.,* 28 Kan. App. 2d at 324.

inconsistent with the Dormant Commerce Clause, which prevents states from substantially burdening interstate commerce without sufficient justification. A Future Order would also inevitably lead to challenges before FERC, including from other SPP bidders who did not win the original bid. To be clear, Evergy does not believe the Commission's order—if clarified in the manner discussed in this Petition—necessarily raises these concerns. A Future Order might, though.

(1) The Future Order Would Likely Be Preempted and Inconsistent with the Filed Rate Doctrine

20. Requiring Evergy to participate in the double circuit proposal would raise significant concerns under the related legal principles of preemption and the filed rate doctrine. First, a Future Order would likely be field preempted, as FERC retains exclusive authority over regional transmission planning and transmission cost allocation. Any Future Order would also likely be conflict preempted and contravene the filed rate doctrine, given that the FERC-approved SPP methodology did not endorse or approve the double circuit proposal, and implementing it is contrary to FERC-approved tariffs and tariff processes.

(a) Given FERC's Exclusive Oversight of Regional Transmission Planning and Transmission Cost Allocation, the Future Order Would Likely be Field Preempted

21. State action may be field preempted where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law[.]"[27] "States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority[.]"[28] FERC regulates "transmission of electric energy in interstate commerce," 16 U.S.C. § 824(a), a grant of authority from Congress

[27] *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016) (quotation omitted) (finding state program field preempted because it "contravene[ed] the FPA's division of authority between state and federal regulators.")

that has been "construed broadly" by the U.S. Supreme Court.[29] FERC also has exclusive authority over wholesale transmission rates, and any practices affecting such rates.[30] Given these grants, interstate transmission planning falls "squarely within [FERC's] jurisdiction[.]"[31]And states are likewise prohibited from intruding on FERC's exclusive authority over cost allocation.[32]

22. Because a Future Order requiring adoption of the double circuit proposal would effectively regulate within these areas, it would be field preempted. First and foremost, the Future Order would constitute transmission planning from a non-FERC-approved process: the independent evaluation of one regulator (the Commission) to evaluate what transmission plan is appropriate for a given transmission line. But that is just the start. For example, the Order requires the parties to study "[c]ost sharing arrangements/agreements between NEET Southwest and Evergy pertaining to the upgrade costs and all aspects of operation and maintenance of this double-circuited portion of the line."[33] Any Future Order implementing the double circuit option would almost necessarily determine how costs, revenues, and other items are divided among the parties and their respective transmission customers, who would be forced into an arrangement they neither contemplated nor support; that is not within the Commission's purview, given FERC's exclusive authority over practices affecting transmission rates.

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[28] *Id.* at 164.
[29] *New York v. FERC*, 535 U.S. 1, 15 (2002); *see also FPC v. Fla. Power & Light Co*., 404 U.S. 453 (1972).
[30] 16 U.S.C. § 824d(c).
[31] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Order No. 1000, 76 Fed. Reg. 49,842 at 49,862 (Aug. 11, 2011) (subsequent history omitted); *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63 (D.C. Cir. 2014) ("*SCPSA*") (upholding FERC's "assertion of authority over transmission planning matters").
[32] *See, e.g., Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988).
[33] Order, p. 38, ¶ 98.

(b) Even if Not Field Preempted, the Future Order Would Likely be Conflict Preempted Given that the FERC-Approved Process Reached a Different Outcome and Did Not Endorse the Double Circuit Proposal

23. State action may also be conflict preempted where "compliance with both state and federal law is impossible," or where "the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[34] Here, a Future Order may cause both to occur. Compliance with both the federal directive, and the contrary KCC directive, would likely not be possible. SPP used a FERC-approved methodology (embodied in the SPP tariff) to identify the line as the appropriate solution to address a need identified as part of the FERC-approved SPP transmission planning process. SPP did so through a competitive process where it evaluated different proposed solutions to address its system needs and selected the NEET Southwest proposal. The SPP's process, embodied in its FERC-approved tariff, is equivalent to federal law.[35]

24. If the KCC rejects the outcome that flows from the FERC-approved process and requires a different solution based on a different methodology, the two findings would likely conflict, which is impermissible. A Commission Future Order cannot undertake "identical, independent inquiries regarding [the transmission line's] merits" but "from the perspective of different public interests" and thereby "reach conflicting conclusions."[36]

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[34] *California v. ARC America Corp*., 490 U.S. 93, 100, 101 (1989) (quotation omitted).
[35] *See, e.g*., *California ex rel. Lockyer v. Dynegy, Inc*., 375 F.3d 831, 839 (9th Cir.) ("Once filed with a federal agency, [FERC] tariffs are the 'equivalent of a federal regulation.'"), *opinion amended on denial of reh'g*, 387 F.3d 966 (9th Cir. 2004) (quoting *Cahnmann v. Sprint Corp*., 133 F.3d 484, 488 (7th Cir.1998)); *ARCO Alaska, Inc. v. FERC*, 89 F.3d 878, 886 (D.C. Cir. 1996) (finding that a tariff binds "with the force of law"); *MCI Telecommunications Corp. v. Garden State Inv. Corp*., 981 F.2d 385, 387 (8th Cir. 1992) ("federal tariffs are the law, not mere contracts.").
[36] *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va*., 812 F.2d 898, 905 (4th Cir. 1987).

25. Relatedly, adoption of the Future Order would likely stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. The FPA vests FERC with the power to establish procedures for balancing benefits and costs in evaluating the appropriate interstate transmission solution as part of transmission planning.[37] SPP does that through a specific FERC-approved methodology, which was followed here.[38] A Future Order essentially re-designing the transmission line, based on different factors and a separate evaluation than that used by SPP (and accepted by FERC), would be an obstacle to FERC's goals and objectives, which are embodied in the process FERC has chosen to utilize.

(c) The Future Order Would Also Likely Violate the Filed Rate Doctrine Given its Inconsistency with FERC-Approved Tariffs

26. A related principle, the filed rate doctrine, would also likely be implicated by any Future Order.[39] SPP's tariff has a specific process by which projects are evaluated and selected and includes very specific rules governing which projects are subject to competitive bidding and which are not.[40] For example, any project that utilizes an incumbent utility's existing right-of-way is not subject to competitive bidding.[41] So too are projects that require a rebuild of an existing facility.[42]

27. If the KCC issued a Future Order adopting the double circuit proposal, such order would likely contravene SPP's tariff and process, raising filed rate doctrine concerns. For instance, the SPP tariff prohibits a Designated Transmission Owner (here, NEET Southwest)

[37] *See generally SCPSA*, 762 F.3d at 61-63.
[38] *See generally* SPP OATT Att. Y.
[39] *See, e.g., Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) ("When the filed rate doctrine applies to state regulators, it does so as a matter of federal pre-emption through the Supremacy Clause.").
[40] *See generally* SPP OATT Att. Y.
[41] *Id*. § I.1.d.
[42] *Id*. § I.1.c.

from "assign[ing] the Competitive Upgrade to another entity,"[43] which the Commission would essentially be doing, at least in part, *sua sponte*. What's more, adopting a Future Order could lead to an outcome not permitted by the SPP tariff—*i.e.*, a project built (at least in part) by a competitive developer over the right-of-way for an existing Evergy transmission facility.[44] This is just a sampling of the issues that may arise, but under governing law all of it is impermissible.[45]

(2) The Future Order May Constitute an Impermissible Taking

28. "The Takings Clause of the Fifth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, provides that private property shall not be taken for public use, without just compensation."[46] There are two types of takings, physical and regulatory.

29. The former concerns "where government requires an owner to suffer a permanent physical invasion of her property—however minor[.]"[47] Actions that "compel the property owner to suffer a physical invasion of his property" require compensation if the invasion is permanent, "no matter how minute the intrusion, and no matter how weighty the public purpose behind it[.]"[48] Here, a Future Order could require a physical intrusion into Evergy's right-of-way over the 161-kV transmission line, even though (1) that was not requested by NEET Southwest, (2) was not sanctioned through the FERC-approved process, and (3) Evergy was not the

[43] *Id*. § III.2.e.xi.
[44] E.g., *Id*. § I.2.b (requiring that if less than 80% of the project cost constitutes a rebuild of existing facilities, the project shall be divided and SPP "shall designate the Transmission Owner(s) in accordance with Section IV," which would require that the project segment over existing facilities be built by Evergy alone).
[45] *E.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 969 (1986) ("for a state ratemaking agency to disregard a FERC-filed rate would clearly be inconsistent with the exclusive federal regulatory scheme"); *Entergy*, 539 U.S. at 47 ("[I]nterstate power rates filed with FERC … must be given binding effect by state utility commissions … as a matter of federal preemption.").
[46] *Kansas One-Call Sys., Inc. v. State*, 294 Kan. 220, 237 (2012) (internal citations and quotations omitted).
[47] *Id*. at 238 (internal citations and quotations omitted).
[48] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992).

applicant to the CCN. Said differently, it would be an intrusion without Evergy's consent—that is a physical taking under the law.

30. It might also be a regulatory taking. "[R]egulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)."[49] While it is impossible to say what conditions a Future Order might contain, it would almost certainly substantially interfere with Evergy's distinct investment-backed expectations in its 161-kV transmission facility, given that Evergy never planned (nor intended) to operate the line in this way, work as a joint venturor with NEET Southwest, or otherwise engage in the form of partnership the KCC seems to envision. And, of course, as the Order notes, Evergy's plan had been to rebuild the line.[50] A Future Order could very well be a regulatory taking.

(3) The Future Order May Run Afoul of the Dormant Commerce Clause

31. A Future Order may violate the Dormant Commerce Clause, which applies whenever state action imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits. . . ."[51] Here, substantially modifying the SPP-approved transmission plan places a substantial burden on interstate commerce, as the federally chosen solution (over which a federal agency controls) would be disregarded solely for local considerations. To the extent the Commission issued such a Future Order, it would invite other state regulators to modify, at their discretion, federal interstate transmission planning decisions—no matter how great the regional and national benefits, and no matter how the projects had been

[49] *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528, 538 (2005). Such standards evaluate, *inter alia*, "the extent to which the regulation has interfered with distinct investment-backed expectations," and the "character of the governmental action." *Penn Central*, 438 U.S. at 124.
[5050] Order ¶ 27.
[51] *Pike v. Bruce Church, Inc.,* 397 U.S. 137, 142 (1970).

evaluated—whenever a particular project does not satisfy the local regulator's own idea of an appropriate project. The Dormant Commerce Clause does not allow such an outcome.

(4) If the Commission Were to Attempt to Implement the Double Circuit Proposal, Substantial Litigation Would Likely Ensue at FERC and In the Courts

32. Finally, Evergy notes that if the Commission were to impose a different project configuration, it would necessarily disrupt the SPP competitive process, almost assuredly resulting in further litigation before FERC which could result in neither project (either NEET Southwest's original proposal or a Commission-ordered joint project) being built. Unsuccessful bidders would likely raise a host of issues in a complaint to FERC and may also seek redress in federal court. FERC may require that the bidding process begin anew, or even evaluate alternative solutions. Put simply, a future order in which Evergy is required to participate in the double circuit solution would be legally fraught and likely to result in substantial litigation, with a potential ultimate result that the project never gets built in any form.

IV. CLOSING

33. Evergy requests the Commission issue an order on reconsideration clarifying that Evergy's obligation under the Order regarding the double circuit option is consistent with Evergy's understanding of the obligation it undertook as a signatory to the Settlement Agreement, as set out in Section II, above.

34. If the Commission's intent was to expand Evergy's obligations under the Order, then reconsideration of the double circuit provisions is requested to address Evergy's assertions that:

- The Commission would be acting outside its certification authority and would be

impermissibly imposing itself into the area of management prerogative.

- There is inadequate evidence in the record to support some of the findings of the Commission upon which the double circuit mandate is based.
- The Order fails to state the specific facts in the record upon which it is based.
- There are legal and jurisdictional flaws inherent in the Commission modifying a SPP approved Project or imposing a forced joint venture between NEET Southwest and Evergy.

Respectfully submitted,

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VERIFICATION

I, Glenda Cafer, verify under penalty of perjury that I have caused the foregoing pleading to be prepared; that I have read and reviewed the same; and that the contents thereof are true and correct to the best of my information, knowledge, and belief.

/s/Glenda Cafer

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Reply Brief was electronically served this 13th day of September, 2022 to:

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