

Board of Adjustment Appeal

- Appellant: NextEra Energy Transmission Southwest, LLC (“NEET SW”)
- Decision appealed: Floodplain Permit Committee, July 17, 2023 Meeting
- Application Permit No. 675

Attachments

1. NEET SW Supplement
2. July 17, 2023 Agenda Packet, Floodplain Permit Committee Meeting
 - Application No. 675
 - Staff Report
3. Oklahoma Corporation Commission Final Order No. 733782
4. Southwest Power Pool 2020 Integrated Transmission Planning (ITP) Recommendations

I. Introduction

This is an appeal of the denial of NextEra Energy Transmission Southwest, LLC's ("NEET SW's") Application Permit No. 675, which was heard before the Floodplain Committee on July 17, 2023. As stated herein, the Application satisfied all requirements of the City of Norman floodplain regulations, was supported by City of Norman's Staff, and should have been approved. Moreover, if the Floodplain Committee desired additional information beyond that required by the original application and by Staff, then the Committee should have tabled its decision and given NEET SW an opportunity to provide supplemental information, instead of denying the permit out of hand on July 17. Finally, if for any reason the Board of Adjustment fails to approve the floodplain permit, it should advise the Floodplain Committee to reconsider the Application in light of the supplemental information submitted by NEET SW.

II. Project Background

NEET SW is constructing a new 345 kV transmission line ("the Project") in central Oklahoma between the Minco, Pleasant Valley, and Draper substations running through Grady, McClain, and Cleveland Counties. NEET SW is building the Project on behalf of the Southwest Power Pool ("SPP"), which is the regional transmission organization that oversees the operation of Oklahoma's electric grid. The SPP determined that the Project will increase electric reliability in central Oklahoma, reduce electric transmission congestion, defer electric reliability upgrades, lower costs for electric customers, and provide environmental benefits due to more efficient operation of transmission assets and greater utilization of renewable resources, in particular by unlocking wind energy in western Oklahoma and moving it to higher population areas in central Oklahoma. The SPP solicited bids to construct the transmission line. NEET SW submitted a bid and was the successful bidder.

III. Floodplain Application Permit No. 675

As summarized in the July 17, 2023 Staff Report, Application Permit No. 675 (“the Application”) is for an overhead electric transmission line beginning at the western boundary of the City of Norman near W. Robinson Street and extending to the northern boundary approximately 0.15 miles east of 48th Avenue N.E. Activities subject to the permit include: 35 overhead electric transmission line pole structures; tree clearing activities within the 150-foot easement right-of-way; and construction of temporary access roads. Of the 35 poles located within the floodplain, 33 will cause no rise in the base flood elevation; the remaining two poles will cause a rise of 0.01 feet. NEET SW will remove a minimum volume of material from each pole location in order to meet the compensatory storage requirements of the City of Norman’s floodplain regulations, and the Application details the extensive measures taken by NEET SW to mitigate any impacts within the regulatory floodplain, such as use of temporary crane mats for building temporary access roads, use of sediment controls, and use of overland travel to avoid grading and road construction altogether whenever possible. Temporary access roads will be removed and reclaimed following construction, and planting and revegetation will occur. Spoils from excavation and compensatory storage creation will be removed from the floodplain and spread in upland areas outside of the floodplain. Upon its careful review and analysis, Staff recommended approval of NEET SW’s permit application.

IV. Floodplain Committee Meeting (July 17, 2023)

At the July 17, 2023 meeting of the Floodplain Committee, public comment was offered, including questions concerning water flows, the ability of transmission infrastructure to withstand flooding, wildlife impacts, tree and vegetation concerns, and questions concerning ongoing litigation over right-of-way access.

In response to public comment and questions from the Committee, representatives of NEET SW explained that most impacts to the floodplain, such as access roads, will only be temporary; that permanent pole structures have undergone engineering studies to ensure safety and to mitigate or avoid flood impacts; that NEET SW will maintain transmission easements during the life of the Project; that there will be no permanent roads within the floodplain; that stormwater permits for project construction have already been submitted and accepted by the Oklahoma Department of Environmental Quality (“ODEQ”); and that NextEra has significant experience developing transmission infrastructure within floodplains, and is careful in doing so, including monitoring the weather during the construction phase.

Following discussions among Floodplain Committee members, a motion was made to approve the permit subject to NEET SW presenting evidence to the City of Norman that it had obtained easements to the relevant properties.¹ The Committee’s vote was four members voting in favor of approval, and two members voting against approval. Because five votes were needed to approve the permit, the motion failed.

V. Legal Standard

The City of Norman’s floodplain permitting requirements are contained in its Ordinance 36-533 (“Flood Hazard District”). The regulations set out standards for obtaining floodplain permits for the purpose of carrying out construction and improvement activities. To obtain a permit, applicants *must* submit certain information, such as plans showing structures and facilities, elevations, certain floodproofing measures, soil types, water flows, sloping information, and impacts of construction activities. 36-533(f)(3)(a). The Committee also *may* require certain

¹It was noted during the meeting that a recent floodplain permit approved for Cox Communications was similarly conditioned on submitting proof to the City of legal access to the property prior to construction.

additional information if the Committee believes that the information will improve the quality of the decision for the application. 36-533(f)(3)(b) (allowing the committee to request information such as specifications for building construction and materials, site elevation information, certifications from registered professional engineers, and “[s]uch other pertinent information as may be required to analyze the specific situation”).

In approving or denying a floodplain permit request, the Floodplain Committee must consider factors such as dangers to life and property from flood disasters, and special susceptibility of proposed structures to flood damage. 36-533(f)(5). In granting a floodplain permit, the Committee is authorized to attach such additional conditions as it deems necessary. 36-533(f)(6).

When the Board of Adjustment hears appeals it must make its decisions based upon the suitability of the proposed use in relation to the flood hazard. 36-533(f)(7). The Board of Adjustment has the power to reverse or affirm the decision below, wholly or in part, or to modify it, and otherwise can make such decision as “ought to be made” in conformity with the City of Norman’s zoning laws “and to that end shall have the powers of an administrative official from whom the appeal is taken.” 36-570(d).² In other words, the Board of Adjustment is not required to give deference to the decision of the Committee below.

VI. Argument

- A. The Application satisfied all requirements of the floodplain regulations, was supported by Staff, and should have been approved.

² Similarly, the Oklahoma Floodplain Management Act provides that an appellate body (such as The City of Norman’s Board of Adjustment) is authorized to reverse or affirm (wholly or partly) the Floodplain Committee’s decision, modify the decision, and otherwise exercise all powers of the Committee, applying the principles, standards and objectives set forth and contained in floodplain regulations. 82 O.S. § 1616(F), (G).

Floodplain permitting is designed to ensure affordable access to federal flood insurance programs, and to minimize losses from flood disasters within the Flood Hazard District. 36-533(a); 82 O.S. § 1602. The purpose of the floodplain regulations is not to block the construction of critical transmission infrastructure, which infrastructure otherwise satisfies all floodplain requirements. Indeed, the Oklahoma Floodplain Management Act, 82 O.S. §§ 1601–1620.2,³ directs local governments to give due consideration to industries “whose business requires that [they] be located within a floodplain,” 82 O.S. § 1614. Long transmission lines built at the direction of our region’s grid operator must necessarily cross floodplains, which is entitled to due consideration by the Committee and in turn by the Board of Adjustment.

NEET SW’s permit application was well-supported by extensive figures, plans, reports, and floodplain analyses, all establishing that floodplain impacts from the Project would be minimal, and in many cases only temporary. City Staff reviewed and approved the Application. No assertions were made at the July 17 Committee meeting that information in the application was incorrect or incomplete, and NEET SW was not notified of any such deficiencies before the meeting. The application should have been approved.

- B. If the Committee desired additional information beyond that requested by the application forms and by Staff, then it should have requested that the Application be supplemented, instead of denying the permit

As referenced in the section above, NEET SW’s application was complete and well-supported. *See* 36-533(f)(3)(a) (establishing information required from all applicants). Prior to the July 17 meeting, NEET SW lacked notice that the committee desired supplemental information, including, for example, regarding wildlife impacts and ongoing litigation over right-of-way access.

³ In its opening section titled “statutory authorization,” 36-533(a), The City of Norman’s Flood Hazard Ordinance cites to the Oklahoma Floodplain Management Act, 82 O.S §§1601–1620.2.

Pursuant to 36-533(f)(3)(b), the Committee is authorized to require additional information (in addition to that information initially required of all applicants pursuant to 36-533(f)(3)(a)) insofar as “the committee believes that the information will improve the quality of the decision for the application[,]” including other floodproofing measures, elevation information, engineering certifications, and “[s]uch other pertinent information as may be required to analyze the specific situation.” (emphasis added). In discussing the application, one Committee member at the meeting expressly referenced this apparent broad latitude of the Committee to justify voting against the permit. Yet, the Committee’s authority to request such additional information necessarily contemplated that the Committee would first *request* the information from the applicant, not deny the application for lack of information, which information had never before been requested. If information beyond that which is required by the application form (*see* 36-533(f)(3)(a)) was needed, then instead of denying the application, the Committee should have, at most, tabled consideration of the application until NEET SW was given an opportunity to supplement.

Because the Board of Adjustment may stand in the shoes of the Committee and makes its own determinations on permit applications (without deference to the Committee’s decision below, *see* 36-570(d)), NEET SW hereby submits the attached “NEET SW Supplement,” which responds to comments and questions of Committee members and members of the public who attended the meeting.

The NEET SW Supplement clarifies that the City of Norman Floodplain Permit will only be effective as to parcels to which the Project has obtained legal access, and the Project will provide evidence of legal access before conducting any activities approved under the City of Norman Floodplain Permit upon privately-owned parcels. The NEET SW Supplement provides information regarding the Project Stormwater Pollution Prevention Plan (SWPPP) and issued

ODEQ Construction Stormwater Permit and the measures approved to prevent impacts to surface water resources. Additionally, the NEET SW Supplement provides further information regarding the approved avoidance and minimization of impacts to threatened and endangered species. Finally, the NEET SW Supplement summarizes the voluntary coordination with interested tribal nations and their feedback. Documentation related to these topics is provided in attachments to the NEET SW Supplement.

- C. If the Board of Adjustment refuses to approve the floodplain permit, it should direct the Floodplain Committee to reconsider the Application in light of the supplemental information submitted by NEET SW.

As described in the section above, to deny a floodplain permit, based on missing information that had not been previously requested from NEET SW, would amount to an erroneous deprivation of Applicant's rights. Thus, should the Board of Adjustment refuse to approve the permit application for any reason, then instead of issuing a denial, NEET SW requests that the Board of Adjustment should advise the Floodplain Committee that it should reconsider the application in light of the Supplemental information submitted by NEET SW, given the lack of such information appeared to be the basis for the Committee's denial, and not any deficiency in the original application.

VII. Conclusion

The Application satisfied all requirements of the floodplain regulations, was supported by Staff, and should have been approved. If the Floodplain Committee desired additional information beyond that requested by the application forms and by Staff, then it should have tabled its decision and requested supplemental information, instead of issuing a denial. The supplemental information submitted by NEET SW in this filing amply responds to concerns raised at the July 17, 2023

meeting. NEET SW respectfully requests that the Board of Adjustment approve Floodplain Permit No. 675.