

BEFORE THE ARKANSAS PUBLIC SERVICE COMMISSION

**IN THE MATTER OF THE APPLICATION OF
SOUTHWESTERN ELECTRIC POWER
COMPANY FOR A CERTIFICATE OF
ENVIRONMENTAL COMPATIBILITY AND
PUBLIC NEED FOR THE CONSTRUCTION
OWNERSHIP, OPERATION AND
MAINTENANCE OF THE PROPOSED 345 KV
TRANSMISSION LINE BETWEEN THE SHIPE
ROAD STATION AND THE PROPOSED KINGS
RIVER STATION AND ASSOCIATED
FACILITIES TO BE LOCATED IN BENTON,
CARROLL AND/OR MADISON AND
WASHINGTON COUNTIES, ARKANSAS**

DOCKET NO: 13-041-U

**PETITIONER SAVE THE OZARKS' RESPONSE IN OPPOSITION TO SWEPCO'S
MOTION TO CONFORM THE PLEADINGS TO THE PROOF**

Intervenor Petitioner not-for-profit corporation Save the Ozarks (STO) hereby, by counsel, respectfully submits its Response in Opposition to SWEPCO'S Motion to Conform the Pleadings to the Proof in the above captioned matter. Arkansas Public Service Commission (Commission) Rule 2.09 specifies that a party seeking to amend to conform a pleading to relevant testimony must show that the proposed amendment would be in the furtherance of justice, and must obtain the permission of the Commission. For the reasons presented herein, SWEPCO'S motion should be denied because it would not be in the furtherance of justice to allow the amendments to conform SWEPCO's Application to the testimony (or documentary evidence) as requested by SWEPCO. It would also be arbitrary and capricious for the Commission to allow such amendments of SWEPCO's Application under the circumstances here.

I. IT WOULD NOT BE IN THE FURTHERANCE OF JUSTICE, AND WOULD BE ARBITRARY AND CAPRICIOUS, FOR THE COMMISSION TO ALLOW SWEPCO TO AMEND ITS APPLICATION REGARDING THE STATUTORILY REQUIRED STATEMENT OF NEED TO CONFORM TO TESTIMONY BECAUSE THE TESTIMONY MATERIALLY CHANGES THE ASSERTED BASIS OF NEED FROM THE NEED STATEMENT INCLUDED IN THE LEGALLY REQUIRED NOTICE TO THE PUBLIC

The amendment sought by SWEPCO here would materially change the statement of need required by Ark. Code § 23-18-511(3) included in its Application for a Certificate of Environmental Compatibility and Public Need (CECPN) for a new major utility facility as noticed to the public. This SWEPCO failure to mail to landowners and agencies and publish public notice of its actual rationale for the asserted need for the new proposed major utility facility violates the statutory requirement for such notices. *See* Ark. Code § 23-18-513.

SWEPCO's failure to properly and timely notice landowners and the public of the basis of need it is asserting as a justification for its Application prejudices affected agencies, landowners, and the public generally all of whom are entitled to notice of the actual asserted basis of need before deciding whether to intervene or comment. The testimony (and associated documentary evidence) in question actually reflects an abandonment of the original basis of need asserted in the Application and/or a concession that the original asserted basis of need was inadequate, and assertion of a new basis of need not noticed to the public. Certain parties may have chosen to intervene had they timely been made aware of the newly asserted basis of need. The public would have made materially different comments on SWEPCO's assertion of need for the project had the public been timely noticed of the new *post-hoc* SWEPCO and SPP rationale for need.

If this proposed SWEPCO amendment of its Application to conform to testimony is granted, the public will have been denied any meaningful opportunity to comment on whether

need has been demonstrated, one of the central issues to be decided by the Commission. This would be completely at odds with the public notice requirements of the controlling statute and the intention of the Arkansas Legislature that the public and affected landowners and agencies be given timely notice and a meaningful opportunity to comment to the Commission and participate in Commission proceedings on such applications for new major utility facilities.

The testimony of Nickell, Hassink, and Bittle taken together reflect admissions by SWEPCO and SPP that the original statement of need was either based on incorrect facts, and/or inadequate to demonstrate need, and/or outdated, and that the newly asserted basis for need for the proposed 345kV transmission line is *post hoc* (i.e., developed after the Application was submitted and after litigation before the Commission had commenced and the original statement of need challenged by the intervenors). SWEPCO asserts in its Motion that the testimony at hearing on the issue need in question provided “significant additional facts” that “supplement the written, pre-filed testimony.” However, this is not a situation where the testimony can be properly considered a “supplement” to the pre-filed direct testimony SWEPCO submitted in support of its Application. Here, the *post hoc* testimony of the three witnesses at issue asserts facts and circumstances materially different from those facts and circumstances originally stated in the Application and in SWEPCO’s pre-filed direct testimony in support of the Application as the basis for the need for the new project. These newly asserted facts and circumstances and basis for need were not properly or timely noticed to the public, contrary to the requirements of the controlling Arkansas statute.

If SWEPCO still wishes to pursue the proposed project on the basis of a different need rationale than stated in its originally noticed Application, then SWEPCO should withdraw its current application and reapply to the Commission, and properly and timely provide notice to

landowners, agencies, and the public of the new application containing the new asserted basis for need. Absent such a withdrawal of the Application by SWEPCO, the testimony of the three SWEPCO and SPP witnesses referenced in SWEPCO's motion, along with the remainder of the hearing record, provide a clear basis for denying SWEPCO's current Application on the basis of either an inadequate statement of need being included with the original Application, in violation of the controlling statute, or in the alternative, if the amendment requested were granted, failure to properly notice the public, agencies, and landowners of the actual asserted basis of need, a critical part of the statutorily required application for a CECPN.

Further, the amendment requested here would not be in the interests of justice for an additional reason. STO's counsel on cross examination elicited testimony from SPP's witness Nickell establishing a very material fact regarding the need (or lack thereof) for the proposed new 345kV transmission line. This fact is so material that it should have been disclosed in the SWEPCO Application, and in fact should have precluded any SWEPCO Application for a project of this type and size (i.e. a 345 kV line) because the applicant, SWEPCO, is on record as not believing there is a need for the 345 kV line that it is asking in its Application for the Commission to approve via issuance of a CECPN.

Nickell admitted on cross exam by STO's counsel that SWEPCO had actually proposed a smaller 161kV line to solve the perceived reliability issues asserted as the basis for need, TR August 29, 2013, Nickell, p. 1843, but SPP rejected SWEPCO's proposal because SPP wanted a larger 345 kV line, not because the larger line was needed to resolve the reliability problems but because SPP wanted "head space" and a more robust system to accommodate future development or projects or yet to be developed reliability problems, TR August 29, 2013, Nickell, p. 1843; August 26, 2013, Hassink, pp. 365-67; Johnson, August 29, 2013, pp. 1411-12.

essentially what the ALJ referenced as a form of super reliability, TR August 26, 2013, Hassink, 365-66, and what STO expert Merrill described as being beyond the concept of need and beyond what is required by the FERC rules. *See* Merrill pre-filed testimony.

Justice would not be served here by allowing SWEPCO's proposed amendment because the amendment would deem this fact that SWEPCO, prior to its Application, had concluded and proposed that only a 161kV line was required to resolve identified reliability problems was actually disclosed in its Application. But the reality is that SWEPCO concealed this key material fact, that applicant SWEPCO itself did not even believe there was a need for the requested 345kV line, from the Commission, other agencies, and the public and omitted mention of it in its Application.

It is now clear from the hearing transcript including Nickell's testimony that SWEPCO was applying for Commission approval of a 345kV line via a CECPN that SWEPCO itself did not even believe was needed, notwithstanding that the controlling Arkansas statute requires the applicant to state why the project is needed in its application. SWEPCO did include a statement of need for the proposed 345kV line in its original Application but the hearing transcript now makes clear that that statement by SWEPCO was disingenuous or in bad faith, because at the time SWEPCO only believed that a 161 kV line was needed and it was SPP, who is not the applicant, which wanted the larger 345kV line for "head space."

Consequently, SWEPCO at best violated its duty of candor to the Commission in seeking a CECPN for a 345 kV transmission line when it had concluded that only a 161kV line was needed. SWEPCO's Motion to Conform the Pleadings to the Proof should not be allowed to re-create history and avoid SWEPCO's liability for sanctions and summary denial of its Application by deeming the SWEPCO Application to have timely disclosed this material fact, when in fact

SWEPSCO intentionally omitted it from the Application. Such a re-creation of history to protect a wrongdoer that has misrepresented material facts to the Commission would not be in the furtherance of justice, and would be arbitrary and capricious and contrary to law.

II. STO'S DECISIONS TO NOT OBJECT TO THE ADMISSIBILITY OF SWEPSCO'S AND SPP'S TESTIMONY ON NEED IS NOT LEGALLY EQUIVALENT TO A DECISION BY STO TO NOT OBJECT TO AMENDMENT OF SWEPSCO'S APPLICATION, AND STO HAS NOT WAIVED ITS OBJECTION OR CONSENTED TO SWEPSCO'S REQUESTED AMENDMENT

STO did not explicitly consent pre-hearing or at hearing to amendment of the Application to assert a new basis for need or to litigation of SWEPSCO's Application on the basis of any new rationale for need not stated in the original Application. To the contrary, STO counsel explicitly objected to and opposed SWEPSCO's motion in this regard when it was made at hearing. *See* TR August 30, 2013, pp. 2470-81. Nor has STO impliedly consented to the proposed SWEPSCO amendment, as explained below. Because there was not express or implied consent from STO to try any issues not raised by the original pleadings, Arkansas Rule of Civil Procedure 15(b) does not support SWEPSCO's Motion here.

Although it is true as SWEPSCO points out that STO did not object to the admissibility of the testimony of the three witnesses in question, Hassink, Nickell, and Bittle, this does not mean that STO has implicitly consented to litigate SWEPSCO's Application as if it had been amended to include a new alleged basis of need. A party's failure to object to certain evidence offered at hearing (or pre-hearing) does not represent implied consent to litigation of a new claim or defense or consent to an amendment conforming the relevant pleading to that evidence if the party opposing the amendment who did not object to the admission of the evidence in question had reason to believe that the offered evidence in question was relevant to the existing claims,

defenses, and legal theories, and did object when it learned that an amendment to conform was being sought that would change the nature of the claims or defenses, as here. *See, e.g.,*

Although Rule 15 permits an amendment to the pleadings when the parties have implicitly agreed to the introduction of certain evidence, we find no such agreement here. Appellees made their position on this issue clear by filing their motion to strike appellant's defense of fraud on the morning of trial. Furthermore, midway through the trial, at the close of appellees' case, the court announced that it was granting appellees' motion to strike the fraud defense from appellant's answer. Thus, the parties' fundamental disagreement on this matter and absence of implied consent could not have been more apparent at trial. Under the circumstances, we cannot say that the trial court abused its discretion in denying appellant's motion to amend the pleadings

Ison Properties, LLC v. Wood, 85 Ark. App. 443, 449-50, 156 S.W.3d 742, 746 (2004).

The testimony offered by witnesses Hassink, Nickell, and Bittle were relevant to STO's claim that the statement of need in the original application was factually incorrect and outdated, and therefore was legally inadequate. The testimony of these witnesses reflected arguably an outright abandonment of the original statement of need, and in the alternative, at minimum reflected an admission of STO's party opponent that the statement of need in the original Application was materially outdated and that there is now a new SWEPCO and SPP asserted rationale of need based on post-hoc informal analyses by SPP staff for the SWEPCO (actually SPP) proposed 345kV transmission line that was not noticed to the public because it was not included with the Application (as required by statute).

SWEPCO asserts that the intervenors including STO will not be prejudiced because they were present when the evidence in question was offered at hearing and did not object. But the key question which SWEPCO in its Motion fails to address is prejudiced in regard to what (admissibility or amendment). STO did not object at hearing to the admissibility of this evidence because STO was not prejudiced by the admissibility of this evidence in regard to the issues which STO was on notice were being litigated, i.e. SWEPCO's assertions, including its

statement of need and reasons for the construction of the new facility, included in its Application. As noted, the evidence from the three witnesses referenced by SWEPCO in its Motion was relevant to the issues being litigated based on the original Application, and was actually helpful to Intervenor STO's case challenging the need for the new 345kV line. STO had no reason to object to its admissibility. But consent by a party to the admissibility of certain evidence in relation to the issues defined by the original pleadings does not imply consent to an amendment of the original pleadings to assert claims or defenses (in this case a statutorily required statement of need) beyond those the parties were on notice via the original pleadings were being litigated.

STO had legitimate reasons to allow the testimony in question into the record for purposes of its claims and arguments opposing the original SWEPCO Application with its original statutorily required statement of need. Under such circumstances, STO's decision to not object to the testimony of the three witnesses in question cannot be deemed an implicit consent to SWEPCO amending its Application to include a new asserted basis for need or to litigation of such an altered assertion of need as if it had been included in the Application. Although the concept of need was addressed in the Application, the controlling statute requires the Applicant to include in the Application that is required to be public noticed the specific basis alleged for the asserted need. The evidence offered at hearing to which SWEPCO now wishes to conform its pleading (Application) does not merely elaborate on or add details to the originally asserted basis for need, it materially changes the alleged basis for need. Under these circumstances, SWEPCO cannot assert that the referenced evidence offered at hearing is within the scope of the issues defined by its original pleading (Application).

SWEPCO makes a material misrepresentation when it asserts in its Motion that “Without exception, all of the requested amendments were presented in the hearing *without objection*.” SWEPCO Motion at p.5 para. #7 (emphasis added). SWEPCO and SPP offered witness testimony and exhibits without objection from STO as to their admissibility in relation to the issues being litigated before the Commission on SWEPCO’s original Application, which had not been amended or proposed to be amended at the time this evidence was offered. At no time until the end of the last hearing day, after all the evidence in question had been offered and admitted, did SWEPCO raise the idea of amending its Application.

Had SWEPCO asked for its Application to be amended in regard to the evidence offered by Hassink, Nickell, and Bittle during the hearing at the time each of these witnesses testified and their exhibits and pre-filed testimony were offered, STO would have objected then. Had the ALJ asked at the time each of these witnesses testified whether there were any objections not just to admissibility but to amendment of SWEPCO’s Application to encompass the witness’ evidence, STO again would have objected. The ALJ asked only whether there were objections to admissibility into the record of this evidence because the ALJ, like STO, had not yet been noticed by SWEPCO that it was seeking such amendment. When SWEPCO for the first time finally made its motion to amend on the last day of hearing, STO immediately objected and opposed that motion. So SWEPCO’s assertion in its Motion that each of its proposed “amendments” were offered at hearing without objection is simply false.

III. STO CONDITIONALLY DOES NOT OBJECT TO CERTAIN OF THE SWEPCO PROPOSED AMENDMENTS OF THE APPLICATION THAT REGARD PROPOSED CHANGES TO THE PROPOSED ROUTES REFLECTED IN AGREEMENTS MADE WITH THE AFFECTED PRIVATE LANDOWNERS

STO does not object to certain of the amendments of the SWEPCO Application proposed that regard proposed changes to the description of the project regarding proposed routes. STO does not object to these particular proposed amendments to the Application (although STO still objects to all the routes and opposes the Application) only to the extent these amendments reflect agreements made with all of the private landowners affected and to the extent that such route changes do not affect public lands or the land of other parties who have not consented on the record.

STO of course, while consenting to this limited extent to amendment of SWEPCO's allegations in its pleading (the Application) regarding route descriptions, does not waive its continuing objection and opposition to all the proposed routes and to SWEPCO's Application. STO does not waive, by way of this memorandum, any of its objections to SWEPCO's Application nor concede any of the arguments presented in STO's Motion for Summary Judgment, in STO's pre-filed testimony, at hearing, and in STO's post-hearing brief and proposed findings of fact and conclusions of law in opposition to SWEPCO's Application.

CONCLUSION AND RELIEF RQUESTED

For all of the foregoing reasons, because there was not express or implied consent from STO to try any issues not raised by the original pleadings, and SWEPCO has not met its burden to demonstrate that the requested amendments to conform the pleadings to the proof would be in the furtherance of justice, and because it would be arbitrary and capricious for the Commission to permit such amendments under the circumstances here, SWEPCO's motion should be denied.

Respectfully submitted,

/s/ Mick G. Harrison

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CERTIFICATE OF SERVICE

The undersigned certifies that on October 7, 2013, a true and correct copy of the foregoing STO Response in Opposition to SWEPCO's Motion to Conform the Pleadings to the Proof was served on all parties of record by electronic mail.

/s/ Mick G. Harrison
Mick G. Harrison, Esq.