

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
ORDER NO. 37

ORDER

Procedural History

On January 17 and January 21, 2014, the Presiding Officer, sitting pursuant to delegation¹ issued Order Nos. 32 and 33 in this Docket granting Southwestern Electric Power Company (SWEPCO) a Certificate of Environmental Compatibility and Public Need (CECPN) to construct and operate (1) a new 345 kV transmission line from the Shipe Road station to the proposed Kings River Station; and (2) a new 345 kV station on SWEPCO owned property located northwest of Berryville, Carroll County, Arkansas (together referred to as “ the proposed Facilities”). Subsequently SWEPCO and Save The Ozarks (STO), an Intervenor herein, each filed a separate Petition for Rehearing.²

On June 9, 2014, pursuant to petitions for rehearing filed by SWEPCO and STO, the Arkansas Public Service Commission (Commission) entered Order No. 36 in this Docket granting rehearing “for consideration of additional evidence on the need for, and the potential environmental impact of, the proposed 345 kV project.” See Order No. 36

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¹ See Order No. 1 entered on April 19, 2013.

² See SWEPCO’s *Petition For Limited Rehearing Of Order Nos. 32 and 33 And Motion For Clarification Of Order No. 3* filed on March 14, 2014; See STO’s *Petition For Rehearing* filed on March 18, 2014.

at 14. The Commission directed the parties to provide additional testimony and more recent evidence on the need for the proposed 345 kV project, whether alternative options might meet needed transmission requirements, the comparative costs associated with such options, and the environmental impact and long term sufficiency of the options. The Commission also granted rehearing for consideration of additional evidence on the routing of the proposed transmission line, including whether existing 161 kV lines could be upgraded or existing rights-of-way used or expanded so as to limit adverse environmental impacts. *Id* at 14, 15.

Subsequent to the entry of Order No. 36, SWEPCO submitted on December 30, 2014, its *Notice of Withdrawal of Application for Certificate of Environmental Compatibility and Public Need* (Notice), in which SWEPCO stated that it had received correspondence from Southwest Power Pool (SPP) indicating that SPP had determined that the proposed Facilities are no longer needed and therefore, SWEPCO “no longer seeks the relief requested and hereby withdraws its Application . . .” Notice at ¶ 3. SWEPCO stated that according to the correspondence from SPP, the proposed Facilities are no longer needed because updated load forecasts show a decrease in load and several large, long-term transmission service reservations have been cancelled. The cancellation of these reservations removed 665 MW of transmission service that previously contributed to the need for the Project. Notice at ¶¶ 2, 3; Notice Exhibit A.

STO filed a Response³ to SWEPCO’s Notice whereby STO objects to the voluntary withdrawal and requests that the Commission issue an Order denying the CECPN Application and declaring the Intervenors to be the prevailing parties. STO Response at

³ Petitioner Save the Ozarks’ Response to SWEPCO’s Notice of Withdrawal of SWEPCO’s Application for a Certificate of Environmental Compatibility and Public Need (STO Response) filed on January 12, 2015.

1, 5. STO also asked the Commission to set a briefing schedule on STO's anticipated motion for attorney fees and litigation costs. *Id.* On January 20, 2015, SWEPCO, SPP, and Arkansas Electric Cooperative Corporation⁴ (hereinafter referred to as the Joint Parties) responded asking the Commission to deny STO's requested relief, including its request for further scheduling and briefing, and asking the Commission to close this Docket (Joint Reply).⁵

On March 17, 2015, STO filed a Surreply Motion⁶ by which STO asked for leave to file a Surreply, arguing that it would be helpful to the Commission "in determining the proper course" because the Joint Parties failed to cite to any Commission or Court decisions, made material misrepresentations, and the issue of attorney fees represents an issue of first impression. Surreply Motion at ¶¶1-3. On the same day, STO also filed its Surreply. The Joint Parties filed a joint reply to STO's Surreply Motion the following day asking the Commission to deny the Surreply Motion and strike the Surreply as both were filed weeks beyond the deadline set out in the Commission's *Rules of Practice and Procedure* (RPPs) Rule 3.10 and without a showing of good cause as required by Rule 3.11. Joint Reply to Surreply Motion at ¶¶ 6, 8.

⁴ SPP and AECC were granted intervention in this docket pursuant to Order No. 2.

⁵ *Joint Reply To Response of Save The Ozarks Response To SWEPCO's Notice Of Withdrawal Of Application For Certificate Of Environmental Compatibility And Public Need* (Joint Reply) filed on January 20, 2015.

⁶ *Petitioner Save The Ozarks' Motion For Leave To File Surreply On SWEPCO's Notice Of Withdrawal Of SEPCO's Application For A Certificate Of Environmental Compatibility And Public Need* (Surreply Motion) filed on March 17, 2015.

Positions of the Parties

Save The Ozarks (STO)

STO argues that the Commission should deny SWEPCO's Application for a CECPN and declare the Intervenors, including STO, the prevailing parties.⁷ STO Response at 3. STO goes on to argue that there is a sufficient basis for the Commission to conclude that SWEPCO and SPP failed to make an adequate demonstration of need pursuant to Ark. Code Ann. § 23-18-519 (b) and Rule 6.06 of the Commission's RPPs. *Id.* STO states that SWEPCO cites to no statutory provision or regulation that provides for withdrawal simply by filing a unilateral notice and argues that closing the Docket would be "arbitrary given the post-trial and post-reconsideration posture of the case." *Id.* at 4. STO states that to do as SWEPCO asks is analogous to a civil court proceeding where a party seeks to voluntarily dismiss its action and states that Arkansas courts do not allow such actions, citing *Arkansas Rules of Civil Procedure* (Ark. R. Civ. P.) Rule 41. According to STO, the Arkansas courts do not allow unilateral voluntary dismissals over the objections of parties after a full trial on the merits, post-trial briefing and reconsideration motions have been briefed and decided. *Id.* at 4, 5.

STO next argues that it has a substantial basis to claim attorneys' fees and litigation costs and argues the Commission should deny SWEPCO's Application and set a schedule for filing and briefing Intervenors' motions for fees and costs. *Id.* STO acknowledges that Arkansas follows the American rule that attorneys' fees are not chargeable as costs in litigation unless specifically permitted by statute, citing *Brandon v. Ark. Pub. Serv. Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999). STO argues,

⁷ The Commission notes that SWEPCO has filed a "Notice of Withdrawal" and does not make a request for action from the Commission. See Notice at ¶ 5.

however, that the Commission has authority to award attorneys' fees in a case involving an application for a Certificate of Environmental Compatibility and Public Need (CECPN) pursuant to Ark. Code Ann. § 23-2-301.⁸ STO states that this gives the Commission an unusual grant of power to award attorneys' fees and points out that Arkansas courts have recognized the Commission's authority to hear and decide class actions under this Code section. *Id.* at 5, 6. "If this broad grant of authority is sufficient to provide the Commission power to decide class actions notwithstanding that this power was not enumerated in the governing statutes, then the Commission's power should also be deemed broad enough to provide the Commission the power to award attorney fees to prevailing parties in contested cases regarding the issuance of a CECPN." *Id.* at 7.

STO also argues that the "Common Fund" doctrine provides the Commission with authority to award fees to the prevailing party in a CECPN action. STO states that although there is no fund of ratepayer moneys in this case, STO mounted a challenge to SWEPCO's CECPN Application, saving ratepayers approximately \$125 million and all ratepayers have benefitted substantially from this effort. STO argues that it would promote the public interest and "facilitate the Commission's performance of its duties if the Commission made awards of attorney fees to prevailing parties under the circumstances herein." *Id.* at 10.

Citing Rule 5.12(d)(4) of the Commission's RPPs, STO next argues that the Commission's broad authority allows it to award attorneys' fees as a sanction for

⁸ Section 23-2-301 vests the Commission with "the power and jurisdiction . . . to . . . regulate every public utility. . . and to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction"

SWEPCO's alleged misconduct in making representations of need for a 345 kV line when its own analysis had determined that such a line was not needed and for SWEPCO's alleged failure to disclose that its own analysis had found the 345 kV line was not needed and there was a 161 kV rebuild alternative. *Id.* at 11. STO states, that had this been disclosed, the Intervenors could have pursued more effective pre-hearing discovery instead of eliciting the information during cross-examination. *Id.* at 12.

According to its Surreply Motion filed on March 17, 2015, STO asks the Commission for leave to file a Surreply, stating that a Surreply would be helpful to the Commission because the SWEPCO, SPP, and the Arkansas Electric Cooperatives (AEEC)(hereafter jointly referred to as the Joint Parties)⁹ failed to cite any substantive Commission or Court decisions, that the Joint Parties made material misrepresentations, and that a Surreply would assist the Commission in deciding a case of first impression regarding its power to award attorney fees in CECPN cases. Surreply Motion at 1, 2.

Along with the Surreply Motion, STO also filed its Surreply, in which STO argues that the Joint Parties have failed to cite any authority for the assertion that attorneys' fees cannot be awarded by the Commission in a CECPN action or authority for the assertion that the Commission, in performing legislative functions, may not award attorneys' fees. *Id.* at 3, 4. STO argues that the Joint Parties misrepresent that the Commission has allowed applicants for a CECPN to withdraw their application by notice; misrepresent that the Arkansas courts have cited the *Brandon* decision as

⁹ STO refers here to the *Joint Reply To Response Of Save The Ozarks Response To SWEPCO's Notice Of Withdrawal Of Application For Certificate Of Environmental Compatibility And Public Need* (Joint Reply) filed by the Joint Parties on January 20, 2015.

precedent that the Commission cannot award attorneys' fees in a CECPN docket; misrepresent that the Joint Parties have complied with National Energy Regulatory Commission (NERC) standards; and misrepresent that STO has taken issue with NERC standards. *Id.* at 5-7.

Joint Parties

The Joint Parties state that the Commission granted rehearing in this case and stated its intention to establish a subsequent procedural schedule to consider additional evidence on the question of need. The Joint Parties state that in this case the argument is not closed and under the Ark.R.Civ.P. 41 and Rule 3.10 of the Commissions' RPPs, a plaintiff would be entitled to a voluntary nonsuit as a matter of right. Joint Parties' Reply at 2, 3. The Joint Parties also cite to Docket No. 09-059-U and Docket No. 92-218-U as Commission precedent allowing a party to withdraw a pending application over objections of other parties. *Id.* at 4.

The Joint Parties argue that the principles set out in *Brandon* apply to all actions at the Commission, not just consumer complaint actions and that the Court in *Brandon* reaffirmed that Arkansas follows the "American Rule" that each litigant must pay their own attorneys' fees unless specifically permitted by statute to be chargeable as litigation costs. *Id.* at 6. According to the Joint Parties, STO cannot avoid the fact that without express and specific statutory authority, the Commission is barred from granting attorneys' fees. *Id.* at 8.

Addressing STO's argument that the Commission can award attorneys' fees pursuant to the "common fund" doctrine, the Joint Parties state that STO admits that there is no common fund in this case (*See* STO Response at 10) and the Joint Parties

further state that there are no parties enjoying the supposed benefit created by STO. *Id.* Additionally, the Joint Parties state STO is incorrect in arguing that there has been misconduct in this case. *Id.* at 10.

The Joint Parties point out that SPP and SWEPCO are required to plan transmission facilities according to the SPP Open Access Tariff and NERC reliability standards. *Id.* at 12. The prior SPP study presented in this Docket showed that by 2016, the Beaver to Eureka 161 kV and the East Rogers-Avooca 161 kV lines would overload if there was an outage of the Flint Creek to Brookline 345 kV line. The Joint Parties argue that none of the study processes used for the 2007 Load Study supporting the Application was misrepresented and SPP did not fail to disclose how it conducted its study. *Id.* at 12, 13.

The Joint Parties state that all of the issues were thoroughly litigated in this Docket and point out that STO's own witness was able to offer corrections to a results table in SPP witness Nickell's testimony, which Mr. Nickell then corrected through an errata filing. The Joint Parties state that STO may not agree with how SPP applied NERC standards or the FERC approved planning process defined in SPP's Open Access Transmission Tariff, but there was certainly no misrepresentation or omission of material facts. *Id.*

In responding to STO's Surreply Motion filed on March 17, 2015, the Joint Parties ask the Commission to deny the Surreply Motion as untimely and to strike the Surreply filed the same day. The Joint Parties state that Rule 3.10 of the Commission's RPPs provides that "any Party desiring to file a reply to a response to a written motion shall file such within seven (7) days after the filing of the response." Joint Reply to Surreply

Motion at 2. Further, they argue that under Rule 3.10, STO's response was due no later than January 27, 2015, but was not filed until March 17, 2015. Additionally, the Joint Parties argue that STO's request for leave to file a Surreply was not supported by good cause as required by Rule 3.11 of the Commission's RPPs. Although Rule 3.11 allows for an extension of the deadline, the Joint Parties argue that a request for such an extension "shall be made on or before such deadline." They point out that STO's Surreply Motion was fifty-six (56) days beyond the deadline. *Id.* at 2, 3.

Likewise, in support of their motion to strike STO's Surreply, the Joint Parties argue that a "reply to a response" must be filed within seven days of the response, unless an extension of time has been granted. They further argue that pursuant to Rule 3.01 (a), STO's Surreply should be stricken in its entirety because it is untimely and contains nothing that could not have been included in a timely filing. Finally, the Joint Parties note that the filing of a document by the Secretary of the Commission is not a determination or waiver of compliance with the Commission's RPPs. *Id.* at 4.

Commission Findings and Ruling

The Commission is not persuaded by STO's arguments that SWEPCO should not be allowed to withdraw its CECPN Application in this Docket. In this Docket, both SWEPCO and STO made motions for rehearing. The Commission granted rehearing for the consideration of additional evidence on the need for, and the potential environmental impact of the proposed 345 kV project. The Commission required the parties to submit additional testimony and more recent comprehensive evidence on the need for the proposed 345 kV project, whether transmission requirements might be met

by alternative options, the environmental impact of the options, and the long term sufficiency of the options. Order No. 36 at 14.

The Commission also granted rehearing for consideration of additional evidence on the routing of the proposed transmission line. The Commission vacated the prior grant of the CECPN, and in vacating the prior grant of the CECPN stated that, "Whether a CECPN for transmission facilities should be granted and, if so, along what route will be determined after consideration of all the evidence." *Id.* at 15.

Rule 3.10 of the Commission's RPPs provides as follows:

A Party may seek relief by motion, including motions available under the Ark. R. Civ. P. All motions shall be in writing and filed, except such oral motions as may be entertained by the Commission during any hearing. Unless a different time is ordered by the Commission, any Party desiring to file a response shall file the response within ten (10) Days after the filing of the motion, and any Party desiring to file a reply to a response to a written motion shall file such reply within seven (7) Days after the filing of the response. No additional responses or replies shall be permitted unless specifically authorized by the Commission.

STO asks the Commission to reject SWEPCO's Notice of Withdrawal and enter an order specifically finding there was no need for the facilities. STO states that because of the advanced state of the proceedings, this would be the result pursuant to Ark. R. Civ. P. Rule 41. SWEPCO argues that the situation at hand is more akin to an appeal, reversal and remand for further proceedings, where the moving party would be entitled to a voluntary nonsuit as a matter of right. The Commission notes it is not bound by the Arkansas Rules of Civil Procedure. Although it may take guidance from the Arkansas Rules of Civil Procedure and from decisions of the Arkansas courts regarding those rules, the Commission has wide latitude in conducting proceedings before it. *Entergy Arkansas, Inc. v. Ark. Pub. Serv. Comm'n*, 104 Ark. App. 147, at 155, 289 S.W. 3d 513 at

521 (2008); See footnote 7, *Commercial Energy Users Group v. Ark. Pub. Serv. Comm'n*, 369 Ark. 13 at 20, 250 S.W.3d 225 at 231 (2007).

In any event, in this case the Commission vacated the Presiding Officer's ruling and directed the parties to present further evidence. The Commission had not yet established a procedural schedule for the taking and consideration of such evidence. Therefore, there was no final disposition and the Commission is within its discretion to allow SWEPCO to withdraw its Application. See e.g., Docket 92-218-U, Order 12.

STO asks the Commission to not only order that the proposed Facilities are not needed, but to also order that the Intervenors are the prevailing parties, in the belief that the Commission can then order SWEPCO to pay Intervenors' attorneys' fees. STO argues that the broad grant of authority to the Commission by Ark. Code Ann. § 23-2-301 empowers it to award attorneys' fees in CECPN actions. However, SWEPCO correctly states, and STO acknowledges that Arkansas follows the "American Rule" regarding attorneys' fees - that each litigant must pay his or her own attorneys' fees unless such fees are specifically permitted by statute to be chargeable as litigation costs. STO argues that the Commission's authority under 23-2-301 rises to the level of a statutory grant of such authority.

Ark. Code Ann. § 23-2-301 provides as follows:

The commission is vested with the power and jurisdiction, and it is made its duty, to supervise and regulate every public utility defined in 23-1-101 and to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

The Court of Appeals in *Brandon* specifically held that absent a statutory grant of authority, the Commission was without authority to grant attorneys' fees in a consumer

complaint case. The Commission does not agree that its broad grant of authority in § 23-2-301 gives it the authority to award attorneys' fees in a CECPN case. *See also*, Docket 92-218-U, Order 13.

STO argues that the Commission may award attorneys' fees as a sanction pursuant to Rule 5.12(d)(4) for discovery failures and abuses, and therefore the Commission's authority is broad enough to award attorneys' fees for other misconduct. The Commission disagrees. Rule 5.12 addresses sanctions for discovery violations "In the event of any failure of any Party to comply with any Commission order of discovery." Here STO does not identify a specific discovery order with which any of the Joint Parties has failed to comply.

Additionally, SWEPCO argues that STO's March 17, 2015 Surreply Motion and Surreply are untimely. The Commission agrees. As STO has failed to show good cause as to why it's Motion and Surreply were filed 56 days after SWEPCO filed their Reply, or to present compelling facts for its failure to make a timely filing, STO's Motion to file Surreply should be denied. Rule 3.01 (a)(1) of the RPPs provides that documents not conforming to the RPPs may be stricken by the Commission upon motion and the Joint Parties ask the Commission to strike STO's Surreply. Because the Commission is denying STO's Surreply Motion, the Commission finds no need to strike the Surreply but will not consider it. Accordingly, the Commission orders as follows:

1. STO's request that the Commission issue an order denying SWEPCO's Application for a CECPN is hereby denied.

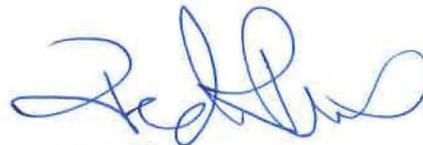
2. STO's request that the Commission find the Intervenor to be the prevailing parties in this Docket and issue a procedural order to consider awarding Intervenor attorneys' fees is denied.

3. STO's Surreply Motion is hereby denied and the Joint Parties' request to strike STO's Surreply is hereby denied.

4. SWEPCO is hereby allowed to withdraw its Application for a CECPN and there being no further action needed, this Docket is hereby closed.

BY ORDER OF THE COMMISSION,

This 25th day of March, 2015.



Ted J. Thomas, Chairman

I hereby certify that this order, issued by the Arkansas Public Service Commission, has been served on all parties of record on this date by the following method:

U.S. mail with postage prepaid using the mailing address of each party as indicated in the official docket file, or
 Electronic mail using the email address of each party as indicated in the official docket file.



Elana C. Wills, Commissioner



Lamar B. Davis, Commissioner



Michael Sappington, Secretary of the Commission