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' PETITION FOR REHEARING OF COMMISSION ORDER 37 ISSUED MARCH 25, 2015

Pursuant to Arkansas Code § 23-2-422 and Commission Rules of Practice and Procedure Rule 4.14, Intervenor Petitioner not-for-profit corporation Save the Ozarks (STO) hereby, by counsel, respectfully submits its Petition for Rehearing in the above captioned matter of Docket No. 13-041-U Order No. 37 issued by the Commission on March 25, 2015. STO seeks rehearing on Order 37 in its entirety including the Commission's denial of STO' s request that the Commission issue an order denying SWEPCO' s Application for a CECPN (Commission Order 37 at 12), the Commission's denial of STO's request that the Commission find the Intervenors to be the prevailing parties in this Docket and issue a procedural order to consider awarding Intervenors attorneys' fees (Commission Order 37 at 13), and the Commission's decision to allow SWEPCO to withdraw its Application for a CECPN and close this Docket.

Rehearing should be granted here because: 1) Contrary to the Commission's findings and conclusions in Order 37, STO was the prevailing party in this Docket, 2) It is arbitrary and not in

the interests of justice for the Commission to allow SWEPCO, under the circumstances present where a full trial was held, to simply withdraw its Application for a Certificate of Environmental Compatibility and Public Need (CECPN) by filing a Notice, and 3) The Commission does have the authority pursuant to the Legislature's broad grant of authority to the Commission in Ark. Code § 23-2-301, to award Intervenor STO attorneys fees.

I. REHEARING SHOULD BE GRANTED BECAUSE THE COMMISSION'S DECISION IS CONTRARY TO LAW

A. The Commission's Decision that It Lacks Authority to Award Attorney Fees Pursuant to its Broad Grant of Authority from the Legislature in Arkansas Code § 23-2-301 is Contrary to Law

The Commission acted contrary to law in deciding that its broad grant of authority in Ark. Code § 23-2-301 does not give it the authority to award attorneys' fees in a CECPN case (Commission Order 37 at 12). Although Arkansas follows the American rule which is that attorneys' fees are not chargeable as costs in litigation unless specifically permitted by statute, s*ee*, *Brandon v. Arkansas Public Service Com'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999) citing *City of Hot Springs v. Creviston*, 288 Ark. 286, 705 S.W.2d 415 (1986), here, the Legislature has provided the Commission by statute authority to issue attorney fees, albeit in a non-typical manner. *See*, Ark. Code § 23-2-301.

The Arkansas Legislature, somewhat unusually, granted to the Commission broad authority to do all things necessary and reasonable to accomplish its assigned mission including powers not explicitly enumerated in the governing statutes. The Arkansas courts have recognized this broad authority and have held, for example, that the Commission has authority to hear and decide class actions even though this power is not explicitly enumerated in the governing statutes.

> We recognize that the Commission is a creature of the legislature and must act within the power conferred upon it by legislative act. See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n, 267 Ark. 550, 593 S.W.2d 434 (1980). We note, however, that the legislature has chosen not to limit the Commission's jurisdiction to the powers expressly set out in the public utility statutes. Arkansas Code Annotated section 23–2–301 (1987) also defines the Commission's authority, and it provides:
>
> > The commission is vested with the power and jurisdiction, and it is made its duty, to supervise and regulate every public utility defined in section 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**.

Brandon v. Arkansas Public Service Com'n, 67 Ark. App. 140, 992 S.W.2d 834 (1999) (quoting Ark. Code § 32-2-301) (emphasis added).

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. In *Brandon*, the Court of Appeals considered this argument and decided that in the circumstances there (a case involving a consumer complaint, not a contest over issuance of a CECPN) that the legislative history of the statutory provision in question precluded the court from recognizing the Commission's power to grant an award of attorney fees. *Id*. The legislative history in question, though, which involved deletion by the Legislature of language providing for attorney fees awards by the Commission from the final version of the bill enacting an amendment, was related only to the statutory provisions regarding consumer complaints, not the statutory provisions regarding CECPN contested cases. *Brandon* is therefore distinguishable from the case here where there has been no deletion of language providing for attorney fees from any proposed legislation relating to CECPN contested cases.

Judge Griffen, concurring in *Brandon*, expressed the clear rationale for why it would be in the public interest and further the Commission's mission for the Commission to be able to make awards of attorney fees.

> I would have been happy to reverse the Public Service Commission's decision on appellant's second point. However, I am forced to conclude, as Judge Rogers has written in the majority opinion, that the Arkansas General Assembly apparently decided not to confer the power to award attorneys' fees to the Commission when it enacted Act 758 of 1985. I cannot ignore the plain fact that the General Assembly deleted language in House Bill 393 that would have authorized the Commission to award attorneys' fees when it enacted Act 758. Nevertheless, I am convinced that the Commission's power to regulate public utilities will only be enhanced if the legislature authorizes it to award attorneys' fees in appropriate cases. The ordinary ratepayer will almost always have too small a pecuniary interest at stake to justify the significant cost of challenging an allegedly excessive utility rate. Yet, such challenges, when successful, produce benefits to a range of ratepayers and serve the public interest in fair utility rates. Unless the legislature confers the power to award attorneys' fees, it is obvious that potential challenges to allegedly excessive utility rates will go unasserted.

Brandon, *supra*, Judge Griffen concurring. Because the Legislature's deletion of language providing for attorney fees in proposed legislation was applicable only to consumer complaints, and not to CECPN contested cases which fall under a different portion of the statutes governing the Commission, that legislative history and the *Brandon* decision do not control the question of the Commission's power to award attorney fees here.

What does control here, however, is the broad grant of authority by the Legislature to the Commission as noted in *Brandon* which includes not only all powers necessary but also all powers expedient to performance of the Commission's charge, whether enumerated in the statutes or not. Judge Griffen's cogent analysis in his Concurring Opinion makes clear why the Commission should recognize that it has the power to award attorney fees to a prevailing party in CECPN contested cases. Consequently, the Commission's decision in Order 37 that it lacked authority to award attorney fees in a CECPN case is contrary to law. The Commission relies on

Docket 92-218-U, Order 13, as precedent that the Commission lacks authority to award attorney fees in any proceeding (Commission Order 37 at 12). However, that Commission Order, made in response to a request by the Attorney General's Office (AG), simply notes that the AG did not cite to any legal authority for the power of the Commission to award fees and noted that the Commission was aware of none. Docket 92-218-U, Order 13, is not a case or an order where the question here, of whether the broad grant of authority to the Commission by the Legislature via Ark. Code § 32-2-301 provides the Commission the power to award attorney fees in a CECPN case, was explicitly and squarely presented to the Commission to decide. The instant STO case does appear to be the first occasion where this question has been squarely presented to the Commission and the Commission acted contrary to law here in denying its authority to award fees to STO in the instant CECPN case.

Further, in *Brandon*, the majority found that there were logical and compelling reasons why an award of attorney fees should be made by the Commission under the Common Fund Doctrine. The *Brandon* court held, however, as noted *supra*, that because of the unique legislative history involving deletion of language providing for awards of attorney fees from a proposed amendment to the statutory provision regarding consumer complaints, that the court was constrained from holding that such fees were available in that case. *Brandon v. Arkansas Public Service Com'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999).

> Although logical and equitable reasons are advanced here for payment of attorneys' fees under the common-fund doctrine, our statutory scheme and the holdings of the Supreme Court that fees are only allowed in specific situations constrain us from making new law in these circumstances. We recognize that, by this holding, ratepayers will have a difficult, if not impossible, task of funding legal counsel to represent them in actions against utilities. We are unable to broaden the law to extend attorneys' fees to these circumstances, as this is a legislative function.

Id.

Here, as noted *supra*, in a case involving a challenge to an application for a CECPN, the legislative history involving deletion of language providing for fee awards (as opposed to the consumer complaints) is not present. But the logic that supports a Common Fund Doctrine or analogous award under the Commission's broad authority is present.

> The Supreme Court discussed the common-fund doctrine in *Bradshaw v. Bank of Little Rock*, 76 Ark. 501, 504, 89 S.W. 316, 317 (1905): "[W]hen many persons have a common interest in a fund, and one of them for the benefit of all brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay." (quoting *Davis v. Bay State League*, 158 Mass. 434, 33 N.E. 591 (1893)). *See also Marlin v. Marsh & Marsh*, 189 Ark. 1157, 76 S.W.2d 965 (1934); *Valley Oil Co. v. Ready*, 131 Ark. 531, 199 S.W. 915 (1917). A court of equity is not incompetent to grant an award of costs and attorney's fees to a taxpayer out of a common fund established because of his efforts in a taxpayer suit on behalf of himself and other taxpayers to recover misappropriated county funds.

Brandon v. Arkansas Public Service Com'n, 67 Ark. App. 140, 992 S.W.2d 834 (1999), citing *Crittenden County v. Williford*, 283 Ark. 289, 675 S.W.2d 631 (1984). S*ee also, Powell v. Henry*, 267 Ark. 484, 592 S.W.2d 107 (1980).

Although there is no already collected fund of ratepayer moneys here due to the timing and nature of this CECPN action, here STO litigated and prevailed in a challenge to a new major electric power transmission line that would have cost ratepayers approximately $125 million and would have caused significant environmental damage, negative economic impacts, and aesthetic harm. All ratepayers benefited substantially from this effort but incurred no cost to gain that benefit thanks to STO's initiative. But STO's herculean effort here at its own expense is the exception not the rule and it is generally not practical without substantial personal sacrifice, if at all, for citizens and consumers to be able to bring such expensive and arduous challenges. 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,

and consequently, the Commission should have recognized its power to do so in this case either under the Common Fund Doctrine or under the Commission's broad grant of authority from the Legislature. The Commission's failure to do so was contrary to law.

B. The Commission's Decision that It Lacks Authority to Award Attorney Fees as a Sanction for Discovery Abuse and Misconduct is Contrary to Law

The Commission acted contrary to law in deciding that the Commission may not award attorneys' fees as a sanction for discovery failures and abuses and other misconduct as alleged by STO to have occurred here (and as reflected in the record). The Commission too narrowly read its authority as limited by Commission Rule 5.12's language referencing "failure of any Party to comply with any Commission order of discovery". Although it is true here that there was no specific discovery order issued that SWEPCO explicitly violated, this does not mean that SWEPCO's conduct in failing to disclose material facts regarding its (concealed) 161kV proposed solution, which material facts had they been disclosed would have led STO to conduct additional critical discovery, is not sanctionable by the Commission.

As noted *supra*, the Legislature granted broad authority to the Commission as reflected in A.C.A. § 23-2-301. The Commission clearly views this authority as broad enough to allow it to issue sanctions, including attorney fees, for discovery failures and abuses. *See*, Commission Rules of Practice and Procedure (RPP), Rule 5.12(d)(4) (2013). There is no reason to believe this broad authority does not extend to the issuance of sanctions for other misconduct in proceedings before the Commission, including a party making knowingly false material representations directly or by material omission, and violations of the duty of candor. Here SWEPCO and SPP made knowing material misrepresentations, directly and by omission and failures to disclose material facts, and

violated their duty of candor to the tribunal as detailed in STO's Response to SWEPCO Notice of Withdrawal.

SWEPCO submitted an application to the Commission for a CECPN for construction of a new 345 kV transmission line and represented to the Commission via that application that there was a need for the proposed new 345 kV transmission line. However, as became evident only at hearing in this matter on cross examination of SPP witness Lanny Nickell by STO's counsel, SWEPCO had actually determined there was not a need for such a new 345 kV line but that a less ambitious 161 kV rebuild alternative would suffice. Nickell referred to an undefined 161-kV solution proposed by SWEPCO to solve the problem identified in 2006-2007, the same problem SWEPCO later represented to the Commission via its Application required for its solution a new 345 kV line. Nickell testified that SPP overruled SWEPCO's 161 kV solution in favor of the new 345-kV facilities reflected in SWEPCO's ultimate Application. *See*, TR August 29, 2013, Nickell, p. 1843.

SWEPCO submitted its application for the 345 kV line and its representations of need for same to the Commission apparently only because SPP required it to do so. Thus, SWEPCO knew when it submitted its application to the Commission that its own analysis had determined that the 345 kV line it was applying for was not needed, but SWEPCO failed to disclose this fact or its 161 kV rebuild (no-new-terrain) alternative to the Commission when it submitted its Application and accompanying EIS. Neither the EIS nor any document submitted by SPP or SWEPCO to the Commission contained an analysis of the costs, impacts, feasibility, or relative effectiveness of the 161 kV rebuild alternative. TR Nickell, pp. 1834, 1844.

SWEPCO clarified, in its Post-Hearing Brief at 8, importantly, that this 161 kV rebuild alternative would have been upgrading existing 161 kV systems. Thus this rebuild alternative

would essentially be a no-new-terrain no-new-station alternative which would have dramatically less adverse environmental impacts and costs than the new terrain alternatives SWEPCO and SPP were advocating before the Commission. Given that SWEPCO asserted that the Route 33 alternative was identified as the preferred alternative because it had the least adverse impacts and cost, the SWEPCO 161 kV alternative should have been prominently addressed in the EIS.

Had this 161 kV rebuild alternative been addressed in the EIS, the Intervenors (and the public) would have been on timely notice of that alternative and SWEPCO's (the Applicant's support for it) and could have pursued more focused and effective pre-hearing discovery. Had SWEPCO timely disclosed these facts, STO and other intervenors would have been able to develop this information in pre-hearing discovery rather than having been limited to eliciting only the tip of this evidentiary iceberg during adverse cross examination at hearing. SWEPCO's conduct in this regard violates SWEPCO's duty of candor to the tribunal and is a basis for an award of attorney fees by the Commission to the prevailing Intervenors, including STO, as a sanction.

Of course, SPP is no innocent in this matter either. SPP knew that SWEPCO had proposed the 161 kV rebuild alternative solution to SPP's preferred 345 kV line and that, in applying to the Commission for the CECPN, SWEPCO was putting forth SPP's proposal, not its own. SPP also remained silent on these matters, in violation of its own duty of candor to the Commission. And, SPP of course is responsible for putting forth to the Commission the new June 2013 need analysis purportedly as work done by Nickell, or at least thoroughly reviewed and approved by Nickell, and as having a good faith basis in fact, contrary to what the hearing record disclosed (and contrary to what the post-reconsideration disclosures by SWEPCO and SPP in the SWEPCO Notice of Withdrawal reveal).

Authority to sanction such misconduct by SWEPCO and SPP is clearly within the broad grant of authority by the Legislature to the Commission via Ark. Code § 23-2-301, whether or not the Commission has issued a regulation or rule specifically saying so. Such authority is within the inherent power of any court or quasi-judicial body and there can be no doubt, given the broad language of Ark. Code § 23-2-301, that the Commission has such power even if the courts did not recognize such power as "inherent". Consequently, the Commission acted contrary to law in concluding that it lacked such authority.

II. REHEARING SHOULD BE GRANTED BECAUSE THE COMMISSION'S DECISION IS ARBITRARY AND AN ABUSE OF DISCRETION

The Commission's decisions to not declare Intervenors to be the prevailing parties, to not deny SWEPCO's Application, and to allow SWEPCO to withdraw its Application for a CECPN notwithstanding that a full trial had been held in this matter (Commission Order 37 at 11) were arbitrary and an abuse of discretion. It is undisputed that in its Order 36 of June 9, 2014, on rehearing, the Commission, in vacating the issuance of the CECPN by the Presiding Officer, concluded that "the record is presently insufficient to determine: the need for the particular 345 kV project that has been proposed, whether that project is consistent with the public convenience and necessity, and whether the project represents an "acceptable adverse environmenta1 impact," and that this conclusion by the Commission was made after considering SPP's and SWEPCO's proffered evidence of need for the proposed new 345 kV power line, including 2007 Ozark Transmission Study, the 2007 SPP Transmission Expansion Plan, and the supplemental evaluation conducted by SPP during this litigation (June 2013) (in addition to the other pre-trial and trial record evidence. *See*, Order 36 at 6, 11, 13, and 15. Because SWEPCO had the burden to demonstrate need for the proposed 345 kV line project and conceded following issuance of the

Commission's Order 36 in its Notice of Withdrawal and the attached letter from SPP that there was not evidence that this 345kV line project was needed, the Commission should simply have denied SWEPCO's Application for failure to demonstrate need.

SWEPCO's Notice and the attached SPP letter preclude the possibility that SWEPCO and SPP could submit to the Commission any additional evidence supporting need for the proposed new 345 kV line in response to the Commission's Order 36. Therefore, the Commission had more than a sufficient basis to conclude, and should have concluded, that SWEPCO failed to make an adequate demonstration of need to justify issuance of a CECPN pursuant to Ark. Code § 23-18-519(b) and Commission RPP Rule 6.06, and has failed to meet its burden on its application. For this reason, SWEPCO's application should have been denied, not withdrawn, and STO and other Intervenors who challenged SWEPCO's assertion of need should have been declared to be prevailing parties in the above captioned matter.

After the expenditure of many tens of thousands of dollars, months of attorney time, months of efforts by Intervenor STO's members and the other Intervenors, public hearings, a lengthy trial, substantial briefing on multiple issues, and significant efforts and time commitments by the Commission, its presiding officer, and agency staff, all directed towards a just determination of the controversy in the above captioned docket, initiated by SWEPCO, SWEPCO should not be allowed to simply file a "never mind" Notice to close the matter. Although the Commission has broad authority provided by statute, which no doubt provides the Commission the power to close a docket under appropriate circumstances, to simply close the docket here without further ado was arbitrary and an abuse of discretion given the post-trial and post-reconsideration posture of the case.

What the Commission did via Order 37 would not be allowed in the Arkansas courts pursuant to Rule 41. Such action is analogous to a civil court agreeing to allow a party to withdraw its case via voluntarily dismissal, over the objection of the opposing parties, after a full trial on the merits was conducted, post-trial briefing was completed, and reconsideration motions have been briefed and decided (substantially adversely to the party seeking to voluntarily dismiss the matter). The Arkansas courts do not allow such unilateral voluntary dismissals at such a late stage in a litigation.

> (a) Voluntary Dismissal; Effect Thereof.
> (1) Subject to the provisions of Rule 23(e) and Rule 66, **an action may be dismissed** without prejudice to a future action by the plaintiff **before the final submission of the case to the jury, or to the court** where the trial is by the court.

Ark. R. Civ. P. 41 (emphasis added). *Also see*, *White v. Perry*, 348 Ark. 675, 681, 74 S.W.3d 628, 631-32 (2002). The Commission relies on Docket 92-218-U, Order 12, as precedent for its authority to allow withdrawal by SWEPCO of its Application for a CECPN here (Commission Order 37 at 11). However, that Docket was not a CECPN case and the proceedings there were still in pre-hearing discovery, not nearly as far as long as in the instant case. Therefore, Docket 92-218-U, Order 12 is not relevant authority (assuming it was decided correctly). Although the Commission may not have to follow Rule 41 *per se*, it was nonetheless arbitrary and an abuse of discretion for the Commission to allow voluntary dismissal by SWEPCO under the circumstances here.

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, pursuant to Arkansas Code § 23-2-422 and Commission Rules of Practice and Procedure Rule 4.14, the Commission should grant Intervenor Petitioner

not-for-profit corporation Save the Ozarks' (STO) Petition for Rehearing, vacate Commission Order 37, not allow SWEPCO to withdraw its Application for a CECPN by simple Notice but rather deny SWEPCO's Application, declare STO the prevailing party in this Docket, and award STO its reasonable attorney fees and expenses in this matter. Such rehearing should be granted here because the Commission's Order 37 is arbitrary, an abuse of discretion, contrary to law, and unjust for all the reasons presented herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on April 24, 2015, a true and correct copy of the foregoing STO Petition for Rehearing of Commission Order 37 was served on all parties of record by electronic mail.

/s/ Mick G. Harrison
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