

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. 38

ORDER

Procedural History

On January 17, 2014, the Presiding Officer sitting pursuant to delegation¹ issued Order No. 32 in this Docket granting Southwestern Electric Power Company (SWEPCO) a Certificate of Environmental Compatibility and Public Need (CECPN) pursuant to SWEPCO's April, 2013 Application. Subsequently SWEPCO and Save The Ozarks (STO), an Intervenor herein, each filed a separate Petition for Rehearing asking the Arkansas Public Service Commission (Commission) to modify Order No. 32 for differing reasons.

On June 9, 2014, the 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 at 14. The Commission directed the parties to provide additional testimony and more recent evidence on the need for the proposed 354 kV project, whether alternative options might meet needed transmission requirements, the comparative costs associated with such

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



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.

On December 30, 2014, SWEPCO submitted its *Notice of Withdrawal of Application for Certificate of Environmental Compatibility and Public Need* (Notice), stating that Southwest Power Pool (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” In correspondence attached as Exhibit A to the Notice, SPP wrote that 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. Notice at ¶¶ 2, 3; Notice Exhibit A.

STO filed a Response² to SWEPCO’s Notice objecting to the voluntary withdrawal and requesting that the Commission issue an Order denying the CECPN Application and declaring the Intervenors to be the prevailing party. STO Response at 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 Corporation (AECC)³ (hereinafter referred to as the Joint Parties) responded asking the Commission to deny STO’s requested relief including its

² *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.

³ SPP and AECC were granted intervention in this docket pursuant to Order No. 2.

request for further scheduling and briefing and asking the Commission to close this Docket (Joint Reply).⁴

On March 17, 2015, at least fifty-six days after the Joint Reply was filed, STO filed a Motion⁵ by which STO asked for leave to file a Surreply,⁶ 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, without waiting for a Commission ruling on its Motion, STO also filed its Surreply. On March 18, 2015, the Joint Parties filed a *Joint Reply to Save The Ozarks’ Motion for Leave to File Surreply and Joint Motion to Strike Save the Ozarks’ Surreply* (Joint Motion to Strike) 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 Motion to Strike at ¶¶ 6, 8.

On March 25, 2015, the Commission entered Order No. 37 denying STO’s Surreply Motion and denying the Joint Parties’ Joint Motion to Strike.

Petitions for Rehearing, SPP Response and SWEPCO Response

On April 24, 2015, following the entry of Order No. 37, STO filed its *Petition for Rehearing of Commission Order 37* (STO Petition) and SWEPCO filed a *Motion for Limited Rehearing* (SWEPCO Motion). On May 4, 2015, SPP filed a Response to

⁴ *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.

⁵ *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.

⁶ Rule 3.10 of the Commission’s *Rules of Practice and Procedure* allows for the filing of a response to a motion within 10 days and a reply within 7 days. It further states that “No additional responses or replies shall be permitted unless specifically authorized by the Commission.”

SWEPCO's Motion (SPP Response) and on the same day, SWEPCO filed a Response to STO's Petition (SWEPCO Response).

STO argues that rehearing should be granted because STO was the prevailing party in this Docket; it is arbitrary and not in the interests of justice for the Commission to allow SWEPCO to withdraw its Application; and the Commission has the authority pursuant to its grant of authority in Ark. Code Ann. § 23-2-301 to award STO attorney fees. STO Petition at 2.

STO states that the Commission acted contrary to law in deciding that its broad grant of authority by the Arkansas Legislature does not give the Commission authority to award attorneys' fees in that the Arkansas Legislature granted 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." *Id.* STO argues that if this broad authority is sufficient to provide the Commission with authority to decide class actions, it is broad enough to give the Commission the authority to award attorneys' fees. *Id.* at 3. STO argues that there has been no deletion of language providing for attorneys' fees from any proposed legislation relating to CECPN contested cases as the Court found was the case in *Brandon v. Arkansas Public Service Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (1999). STO argues that the Commission should follow Judge Griffin's analysis in his Concurring Opinion in recognizing that it has the power to award attorney fees to a prevailing party in CECPN contested cases. *Id.* at 3, 4.

STO further argues that the majority in *Brandon* found that logical and compelling reasons existed to award attorney fees under the Common Fund Doctrine, but the Court in *Brandon* held that because of the unique legislative history involving

deletion of language authorizing attorneys' fees in Ark. Code Ann. § 23-3-119, the Court could not hold that such fees were available in that case. *Id.* at 5.

STO again argues that although there is no common fund, STO has prevailed in challenging a new major electric transmission line, saving the ratepayers approximately \$125 million. STO argues that all ratepayers have benefitted substantially from this effort and it would be in the public interest and facilitate the Commission's performance of its duties if the Commission made awards of attorneys' fees to prevailing parties in these circumstances. *Id.* at 6.

According to STO, although there was no specific discovery order which SWEPCO violated, the Commission too narrowly reads its authority to be limited by Commission Rule 5.12 of the Commission's RPPs to sanctions for the violation of discovery orders. *Id.* at 7. STO argues that SWEPCO's alleged conduct in failing to disclose material facts regarding a 161kV proposed solution should be sanctioned by the Commission under its broad authority pursuant to Ark. Code Ann. § 23-2-301. *Id.* STO also argues that SPP violated its duty of candor to the Commission and cites SPP witness Lanny Nickell's testimony regarding the new 2013 need analysis. *Id.* at 9.

STO argues that SWEPCO's Notice precludes the possibility that SWEPCO and SPP could submit any additional evidence supporting the need for the proposed new 345 kV line in response to the Commission's Order No. 36, and the Commission should have concluded that SWEPCO failed to meet its burden on its Application. STO argues that the Commission should have denied the Application and not allowed SWEPCO to withdraw it. *Id.* at 11. STO further argues that allowing SWEPCO to withdraw its Application would not be allowed by Rule 41 of the *Rules of Civil Procedure* (ARCP),

and the Arkansas Courts do not allow unilateral voluntary dismissals after a full trial on the merits, post-trial briefing, and reconsideration motions have been decided. *Id.* at 12.

Addressing the Commission's denial of the Joint Parties' Motion to Strike STO's Surreply, SWEPCO argues that by failing to strike STO's Surreply in Order No. 37, the Commission has essentially allowed the Surreply into the record and rendered the denial of permission to file it moot. SWEPCO further argues that it would be improper to allow STO to "shoe-horn into the record belatedly filed argument and testimony in the form of affidavit." SWEPCO points out that if the Surreply is not stricken from the record, the Commission's ruling has no actual effect. SWEPCO Motion at ¶ 7.

In its Response to STO's Petition, SWEPCO argues that the Commission correctly found that SWEPCO withdrew its Application on December 30, 2014, and that in Arkansas an award of attorney's fees is not allowed "except where expressly provided for by statute." *Harris v. City of Fort Smith*, 366 Ark. 277, 280, 234 S.W.3d 875, 878 (2006). SWEPCO Response at 2. SWEPCO further argues that there was no discovery abuse and/or misconduct in this Docket and the Commission's Order No. 37 was amply supported by the evidence, consistent with Arkansas law and should be affirmed. *Id.*

SWEPCO states that Arkansas recognizes the "absolute right to a nonsuit" even where the case has come to a hearing, as long as the argument was not yet closed, *citing Duty v. Watkins*, 298 Ark. 437, 438, 768 S.W.2d 526, 527 (1989). SWEPCO also argues that the proceedings in this Docket were on-going and that the Commission had ordered additional testimony, more recent evidence of need, evaluation of alternative transmission facilities and the costs and impacts of such options. *Id.* at 3. SWEPCO argues that the argument in this Docket was on-going when SWEPCO filed its Notice

and such a withdrawal is permissible under ARCP Rule 41 and incorporated by Rule 3.10 of the Commission's RPPs. *Id.* at 4.

Regarding the issue of attorneys' fees, SWEPCO goes on to argue that although the Commission does have broad authority, that authority has limitations and quotes *Arkansas Gas Consumers, Inc. v. Arkansas Pub. Serv. Comm'n*, 354 Ark. 37, 49, 118 S.W.3d 109, 116 (2003), "The PSC is a creature of the General Assembly with its power and authority limited to that which the legislature confers upon it." *Id.* at 5. SWEPCO argues that although Ark. Code Ann. § 23-2-301 grants the Commission authority to "do all things," such power is inherently restricted to those things otherwise permissible under Arkansas law. *Id.* at 6.

SWEPCO argues that in *Brandon*, only after determining that a class action was permitted under Ark. Code Ann. § 23-3-119, did the Court turn to the more general section of Ark. Code Ann. § 23-2-301. According to SWEPCO, this shows the proper interpretation of the Commission's legislative authority. The Court in *Brandon* makes it clear that attorneys' fees are not chargeable as costs in litigation unless specifically permitted by statute. *Id.* at 7. Additionally SWEPCO disputes STO's arguments regarding awards of attorneys' fees from a common fund, arguing that there can be no payment of legal fees under the Common Fund Doctrine where there is no common fund and no common fund where there was no common representation, *citing Fox v. AAA U-Rent It*, 341 Ark. 483, 17 S.W.3d 481 (2000). *Id.* at 8. SWEPCO also argues that there was no evidence of misconduct in this case, no discovery abuse and no basis for sanctions based on misconduct. *Id.* at 11.

In response to SWEPCO's Motion, SPP argues that Order No. 37 was proper with the exception that the Commission should have stricken STO's Surreply and thus,

SWEPCO's Motion should be granted. SPP Response at ¶ 3. According to SPP, STO should have filed its Surreply within seven days pursuant to Rule 3.11 of the Commission's *Rules of Practice and Procedure* (RPPs). STO filed its Surreply at least 56 days after the deadline and the Commission recognized this in Order No. 37. *Id.* at 3, 4.

SPP also argues that STO has not demonstrated that Order No. 37 was unreasonable, arbitrary, or without substantial evidence. *Id.* at 4. SPP argues that the Commission properly determined that SWEPCO could withdraw its Application and that the Intervenors were not the prevailing party. *Id.* at 5. SPP also points out that the proceedings were clearly on-going and not yet closed pursuant to Order No. 36 which granted rehearing of the Presiding Officer's Order. *Id.* at 6. SWEPCO withdrew its Application promptly and before the Commission has established a procedural schedule for presentation and consideration of additional evidence. *Id.*

SPP states that the Arkansas Supreme Court has held that a nonsuit does not sufficiently conclude the matter such that a determination of the prevailing party can be stated with certainty, citing *Burnette v. Perkins & Associates*, 343 Ark. 237, 242, 33 S.W.3d 145, 149-50 (2000). *Id.* at 7. SPP points out that contrary to STO's arguments regarding attorney fees, the holding in *Brandon* is that there is no statutory authority authorizing the Commission to award attorneys' fees. SPP also argues that the *Brandon* court was aware of the Commission's broad authority under § 23-2-301 and the case cites to that statute. However, according to SPP, the Court did not interpret this authority as authorization for the Commission to award attorneys' fees. *Id.* at 10.

SPP argues that there is clear Arkansas Supreme Court and Commission precedent on the issue of the Commission's power to award attorneys' fees. SPP points

out that the Arkansas Supreme Court has stated that the Commission may not award attorneys' fees and that such fees are not chargeable as cost of litigation unless expressly permitted by statute, citing *Centerpoint Energy, Inc. v. Miller County Circuit Court, Second Div.*, 370 Ark. 190, 258 S.W.3d 336 (2007). In Order No. 7 of Docket No. 07-147-C, and in Order No. 3 of Docket No. 08-148-C, the Commission held that it does not have authority to award attorneys' fees. *Id.* at 11.

SPP argues there was no discovery abuse or misconduct in this Docket on which to base an award of attorneys' fees and that STO's assertions in this regard are baseless. SPP states that the Commission correctly determined that Rule 5.12(d)(4) is not applicable in the present case and that STO is again attempting to create authority in the Commission that is not authorized by the legislature. *Id.* at 12. SPP states that it has not made misrepresentations or omitted material facts. SPP clearly stated that there have been material changes in the load projected by local load serving utilities and the cancellation of transmission service reservations greatly altered the reliability needs in the area. These changes occurred after SPP's 2013 reevaluation. *Id.* at 12,13.

SPP goes on to state that its witness, Mr. Lanny Nickell, never attempted to conceal any 161 kV alternative and stated in prefiled testimony that while a 161 kV facility might serve as a short-term solution for limited purposes, a 345 kV facility will serve as a solution for a future consisting of greater load growth over a longer period of time. SPP also points out that Mr. Nickell provided extensive testimony on this issue upon cross-examination during the proceedings in this Docket. *Id.* Additionally, SPP states that the underlying demand in the north Arkansas area changed between the 2013 reevaluation and the Commission-ordered reevaluation. *Id.* at 14.

Commission Findings of Fact and Ruling

Upon review of STO's Petition asking for rehearing of Order No. 37, it is clear that the majority, if not all, of STO's arguments on rehearing are repetitive and cumulative of its arguments made previously to the Commission and which were thoroughly discussed and rejected by the Commission in Order No. 37. STO has shown no reason why Order No. 37 should be reversed or modified regarding the Commission's authority to award attorneys' fees. STO argues that *Brandon* does not address the issue of deleted attorneys' fee language by the Arkansas Legislature in the CECPN⁷ statutes, and therefore, the Commission, because of the silence of the Courts regarding such authority relating to CECPN matters, should reverse its holding in this regard in Order No. 37 and find that it does indeed have such authority.

The Commission cannot agree. Without specific statutory authority, the Commission cannot make an award of attorneys' fees. The Commission notes that reliance on *dicta* from a concurring opinion in *Brandon* is not a sufficient basis to find statutory authority exists regarding attorneys' fees. Further, the Commission agrees with SWEPCO, that the Commission's power, although broad, has limitations and "its power and authority are limited to that which the legislature confers upon it." *Arkansas Gas Consumers, Inc. v. Arkansas Pub. Serv. Comm'n*, 354 Ark. 37, 49, 118 S.W.3d 109, 116 (2003).

The Commission cannot agree with STO that the public interest would be served by finding the authority to award attorneys' fees. Litigation costs incurred by utilities are a part of the rates paid by ratepayers, and absent compelling evidence of imprudence, utilities are entitled to recover these expenses. There are many cases in

⁷ Ark. Code Ann. §§ 23-18-501 *et seq.*

which parties oppose various proposals in utility applications. To the extent attorneys' fees were awarded when any party prevails on any issue in a case, the potential ratepayer impact could be substantial. Without a specific grant of statutory authority, the Commission cannot say that Arkansas Legislature's intended for the Commission to have this authority. Silence in the legislative history of the CECPN statute is simply not a sufficient basis on which the Commission can base such a decision.

The Commission additionally agrees with SPP's arguments in this regard and agrees that the Arkansas Supreme Court and the Commission itself have recognized that without statutory authority, the Commission cannot grant attorneys' fees. Further, as previously discussed in Order No. 37, Rule 5.12 of the Commission's RPPs is not applicable in this case and STO has not presented compelling reasons for the Commission to reverse or modify Order No. 37 for the reasons argued by STO; therefore STO's Petition for Rehearing should be denied.

Upon further review and consideration, the Commission agrees with SWEPCO that STO's Surreply should be stricken from the record in this Docket. As noted in Order No. 37, STO has failed to show good cause, under either Rule 3.11 or Rule 2.05(a) of the RPPs,⁸ to waive the Commission's rules and allow it to file the untimely Surreply. Rule 3.01 (a)(1) of the RPPs provides that documents not conforming to the RPPs may be stricken by the Commission upon motion. The Commission finds compelling SWEPCO's arguments that refusing to strike STO's Surreply essentially renders the denial of permission to file it moot. The Commission also agrees that since STO's Motion was denied, if the Surreply is not stricken from the record, the Commission's

⁸ Rule 3.11 of the RPPs states: "For good cause shown, the Commission may grant an extension of any deadline set by Rule or order. Such request shall be made on or before such deadline." Rule 2.05(a) of the RPPs states: "(a) The Commission may grant an exemption from any of its Rules if the exemption is found to be in the public interest and for good cause shown."

ruling is not effective. Furthermore, the Commission has already made clear in Order No. 37 that it would not consider the Surreply. SWEPCO's Motion should be granted and STO's Surreply filed on March 17, 2015 should be stricken from the record.

Accordingly, based on a review of the record in this case and consideration of all arguments of parties, the Commission orders as follows:

1. STO's Petition filed on April 24, 2015, is hereby denied;
2. SWEPCO's Motion filed on April 24, 2015, and SPP's requested relief in its Response filed on May 4, 2015, are hereby granted; and
3. The Surreply filed by STO on March 17, 2015, reflected as Document No. 449 in this Docket is hereby stricken and the Secretary of the Commission is hereby ordered to remove Document No. 449 from the record herein.

BY ORDER OF THE COMMISSION,

This 20th day of May, 2015.

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.


Ted J. Thomas, Chairman


Elana C. Wills, Commissioner


Lamar B. Davis, Commissioner


Michael Sappington, Secretary of the Commission