

**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' MOTION TO DISMISS OR FOR SUMMARY  
JUDGMENT, OR IN THE ALTERNATIVE FOR CONTINUANCE**

Intervenor Petitioner not-for-profit corporation Save the Ozarks (STO) hereby moves to dismiss or for summary judgment on the basis of legal defects that appear on the face of SWEPCO's application for a Certificate of Environmental Compatibility and Need (Certificate), and because there is no genuine dispute of fact that STO is entitled to judgment as a matter of law. In the alternative, STO moves for a continuance.

**I. SWEPCO'S APPLICATION FOR A CERTIFICATE SHOULD BE DISMISSED  
AND STO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE  
SWEPCO HAS FAILED TO MEET THE STATUTORY PREREQUISITE OF  
OBTAINING AND PROVIDING TO THE COMMISSION WITH ITS APPLICATION  
THE REQUIRED FEDERAL AND/OR STATE ENVIRONMENTAL PERMITS**

It is undisputed that SWEPCO has not obtained or submitted to the Commission either a Clean Water Act (CWA) Section 10 or a CWA Section 404 permit. The July 2013 letter to the Commission from the Army Corps of Engineers (Corps) makes clear the position of the federal

agency charged with issuing such permits that such federal environmental permits are required to be obtained by SWEPCO for the project. *See* Exhibit 1.

Arkansas Code 23-18-519(b)(4) provides:

(b) **The commission shall not grant a certificate** for the location, financing, construction, operation, and maintenance of a major utility facility, either as proposed or as modified by the commission, **unless it finds and determines:**  
**(4) That the major utility facility represents an acceptable adverse environmental impact, considering** the state of available technology, the requirements of the customers of the applicant for utility service, the nature and economics of the proposal, **any state or federal permit for the environmental impact**, and the various alternatives, if any, and other pertinent considerations;

Arkansas Code 23-18-519(b)(4) (emphasis added).

Because this statutory provision requires that the Commission consider any federal permit for the environmental impacts of the facility before granting the Certificate, the statute by clear implication requires the Commission to deny any Certificate applied for prior to the Applicant having acquired the required federal permits, in the instant case the Corps issued CWA Section 10 and Section 404 permits, or at minimum to postpone any hearing and decision to grant or deny the Certificate until the required permits are obtained and can be considered by the Commission. Because SWEPCO has not yet obtained the required CWA permits and has not submitted such permits for review by the Commission, SWEPCO has not complied with Arkansas Code 23-18-519(b)(4) and SWEPCO's non-compliance precludes the Commission from complying with its obligations under Arkansas Code 23-18-519(b)(4). Consequently, the Commission should either dismiss SWEPCO's Application or grant summary judgment to STO on the basis of this non-compliance with statutory prerequisites, or in the alternative, at minimum, the hearing in the above captioned matter should be continued until SWEPCO has obtained the required permits and submitted same to the Commission for review in this proceeding.

SWEPCO may argue that the Commission can issue the Certificate now and merely add a condition that no construction commence until all required permits are obtained. However, while such an approach would satisfy a statute that simply required that applicable permits be obtained prior to construction of the project, this approach will not satisfy the statute at hand which requires more - i.e. which requires not only that the permits be obtained but also that the permits be considered by the Commission before deciding whether to issue the Certificate.

Further, the Commission Rules of Practice and Procedure, Rules 4.01 and 4.02, require that certificates of environmental compatibility and need be applied for using formal applications, that all formal applications must be in writing, and that in the event the statute under which the application is made requires any additional information, such as a permit, a copy thereof must be attached to the application. Here, SWEPCO could not have complied with this additional requirement of the Commission's Rules of attaching the relevant environmental permits because SWEPCO has yet to obtain those permits from the Army Corps. For all these reasons, SWEPCO's Application should be dismissed or STO should be granted summary judgment, or in the alternative the hearing should be continued pending SWEPCO's compliance with these legal requirements.

**II. SWEPCO'S APPLICATION FOR A CERTIFICATE SHOULD BE DISMISSED AND STO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE SWEPCO HAS FAILED TO PROVIDE NOTICE REQUIRED BY STATUTE TO LANDOWNERS ON THE PROPOSED ROUTES AND TO THE PUBLIC**

SWEPCO is required by statute to provide notice to landowners on the proposed routes via certified mail and to the public via publication in a newspaper having substantial circulation in the affected counties. *See* Arkansas Code 23-18-513.

§ 23-18-513. Application for certificate--Service or notice of application

\* \* \*

(c)(1) Each application shall also be accompanied by proof that written notice specifying the date on or about which the application is to be filed and the date that interventions or limited appearances must be filed with the commission, unless good cause is shown pursuant to [§ 23-18-517](#), has been sent by certified mail to each owner of real property on the proposed route selected by the utility on which a major utility facility is to be located or constructed.

(2) The written notice required by this subsection shall be directed to the address of the owner of the real property as it appears on the records in the office of the county sheriff or county tax assessor for the mailing of statements for taxes as provided in [§ 26-35-705](#).

(d)(1) Each application shall also be accompanied by proof that public notice of the application was given to persons residing in municipalities and counties entitled to receive notice under subsection (a) of this section by the publication in a newspaper having substantial circulation in the municipalities or counties of:

(A) A summary of the application;

(B) A statement of the date on or about which it is to be filed; and

(C) A statement that intervention or limited appearances shall be filed with the commission within thirty (30) days after the date stated in the notice, unless good cause is shown under [§ 23-18-517](#).

(e) Inadvertent failure of service on or notice to any of the municipalities, counties, governmental agencies, or persons identified in subsections (a) and (c) of this section may be cured pursuant to orders of the commission designed to afford such persons adequate notice to enable their effective participation in the proceedings.

Arkansas Code 23-18-513.

However, it is not genuinely disputed that numerous landowners along the proposed routes have yet to receive notice via certified mail and it is too late in the proceedings before the Commission for SWEPCO or the Commission to cure this failure by belatedly issuing Notice. SWEPCO cannot demonstrate that it has notified C.R. (Pete) Birchfield, 293 Virchfiled Lane, Eureka Springs, Arkansas 72632 landowners along the proposed routes in Arkansas, of

SWEPCO's Application. It is undisputed that Karl Reiter, 1298 County Road 212, Eureka Springs, Arkansas, 72631 is an Arkansas owner of record of land that is traversed by one of the proposed routes. It is undisputed that Karl Reiter, 1298 County Road 212, Eureka Springs, Arkansas, 72631 did not receive any notification by certified mail about the filing of SWEPCO's application. It is undisputed that Jim and Karen Brittain, 129 County Road 2120, Eureka Springs 72631, are Arkansas owners of record of land that is traversed by one of the proposed routes. It is undisputed that Jim and Karen Brittain, 129 County Road 2120, Eureka Springs 72631 did not receive any notification by certified mail about the filing of SWEPCO's application.

SWEPCO also cannot demonstrate that the landowners in Missouri along the proposed route that extends into Missouri received notice, including Jamie Harvey, Kent Smith, Jim Hock, or Rebecca Thomson, Terrie Sue Smith at 2097 Bear Hollow Rd., Pineville, Missouri, 64856, Gary Lee Miller at 2240 Bear Hollow Rd., Pineville, Arkansas 64856, Greg Pool, 190 Pea Ridge Rd., Pineville, Missouri, or the Hock Revocable Trust at 2240 Bear Hollow Rd., Pineville, Missouri 64856, among others.

For these reasons, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be dismissed or summary judgment should be issued to STO, or in the alternative the hearing in this matter should be continued until SWEPCO can arrange for all the proper parties to be noticed.

Further, the notice published by SWEPCO in a newspaper was not in a newspaper having substantial circulation in the affected counties. As the Danos Petitioners have pointed out in their motion to dismiss and testimony, SWEPCO posted a public notice of this APSC filing in the Arkansas Democrat-Gazette on Monday, April 1, 2013 and Tuesday, April 2, 2013.

According to the U.S. Bureau of the Census, Population Estimates Program (PEP), Carroll County had a total of 13,691 housing units in 2011. SWEPCO's public newspaper notice in the Arkansas Democrat-Gazette had the potential to reach only 10% of the homes in Carroll County. According to the U.S. Bureau of the Census, Population Estimates Program (PEP), Madison County had a total of 7,554 housing units in 2011. SWEPCO's public newspaper notice in the Arkansas Democrat-Gazette had the potential to reach less than 8% of the homes in Madison County. There are other newspapers that serve these counties with more substantial circulation (i.e. Ozark Trader, Carroll County News). For this reason, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be dismissed or summary judgment should be issued to STO, or in the alternative the hearing in this matter should be continued until SWEPCO can arrange for the proper notice to be published in a newspaper that has sufficient circulation to comply with the statute.

**III. SWEPCO'S APPLICATION FOR A CERTIFICATE SHOULD BE DISMISSED AND STO IS ENTITLED TO JUDGMENT AS A MATTER OF LAW BECAUSE THE EIS FILED BY SWEPCO WITH ITS APPLICATION IS LEGALLY DEFICIENT**

SWEPCO's is required by statute to provide an application for the certificate along with an EIS which adequately addresses the need for and environmental and economic impacts of the project.

An applicant for a certificate shall file with the Arkansas Public Service Commission a verified application in the form required by the commission and containing the following information:

\* \* \*

- (2) A general description of any reasonable alternate location or locations considered for the proposed facility;
- (3) A statement of the need and reasons for construction of the facility, including, if applicable, a reference to any prior commission action in an energy resource declaration-of-need proceeding determining the need for additional energy supply or transmission resources by the public utility;

\* \* \*

(6) An analysis of the projected economic or financial impact on the applicant and the local community in which the major utility facility is to be located as a result of the construction and the operation of the proposed major utility facility;

\* \* \*

(8)(A) An exhibit containing an environmental impact statement that fully develops the four (4) factors listed in subdivision (8)(B) of this section, treating in reasonable detail such considerations, if applicable, as:

(i) The proposed major utility facility's direct and indirect effect on the following in the area in which the major utility facility is to be located:

(a) The ecology of the land, air, and water environment;

(b) Established park and recreational areas; and

(c) Any sites of natural, historic, and scenic values and resources of the area in which the major utility facility is to be located; and

(ii) Any other relevant environmental effects.

(B) The environmental impact statement shall state:

(i) The environmental impact of the proposed action;

(ii) Any adverse environmental effects that cannot be avoided;

(iii) A description of the comparative merits and detriments of each alternate location considered for the major utility facility;

(iv) For generating plants, the energy production process considered;

(v) A statement of the reasons why the proposed location and production process were selected for the major utility facility; and

(vi) Any irreversible and irretrievable commitments of resources that would be involved in the proposed action should it be implemented;

Arkansas Code 23-18-511.

However, here the EIS and application have obvious defects and omissions in failing to address impacts on Army Corps properties including impacts on lakes and rivers. *See* Exhibit 1.

It is undisputed that on July 10, 2013, Randy Hathaway, Deputy Engineer with the Corps of Engineers (Department of the Army, Little Rock District) stated in a letter to the Arkansas Public Service Commission, that "(a)ny impacts to Corps s of Engineers property associated with crossing Beaver Lake, Table Rock Lake, or the White River will require a review for National Environmental Policy Act (NEPA) compliance..." It is undisputed that on July 10, 2013, Randy Hathaway, Deputy Engineer with the Corps of Engineers (Department of the Army, Little Rock District) stated in a letter to the Arkansas Public Service Commission, that "(a)ny impacts to Corps s of Engineers property associated with crossing Beaver Lake, Table Rock Lake, or the White River will require ... a Regulatory Section 10 Permit..." It is undisputed that on July 10, 2013, Randy Hathaway, Deputy Engineer with the Corps of Engineers (Department of the Army, Little Rock District) stated in a letter to the Arkansas Public Service Commission, that "(t)he SWEPCO Environmental Impact Statement dated March 2013 associated with this project does not fully address all potential impacts to Corps of Engineers property." It is undisputed that the SWEPCO EIS fails to address erosion and sedimentation issues relating to Corps properties stemming from potential loss of vegetation, loss of Bald Eagle roosting habitat, impacts to cultural resources, and the aesthetic impacts from a 150 ft right-of-way.

Further, the EIS is defective on its face in failing to address adverse economic impacts including impacts on tourism and property values. The EIS also on its face fails to address the clearly available and feasible alternatives to the project identified in the pre-filed direct testimony of Dr. Hyde Merrill that solve the problem identified as creating the need with dramatically less environmental impacts and at dramatically lower cost. The six alternatives mentioned by Merrill are: (a) Do nothing, and dispatch generation to avoid overloads; (b) Open the Avoca-Beaver 161-kV line; (c) Open the Avoca-Beaver 161-kV line and build a second E



Roger-Avoca 161-kV line; (d) Install a special protection scheme ("SPS") that opens the Avoca-Beaver 161-kV line if the Flint Creek-Brookline 345-kV line trips; (e) Install a phase-angle regulator ("PAR"), probably to limit the flows on the Avoca-Beaver 161-kV line; and (f) Install a flexible alternating current transmission system ("FACTS") device, probably to limit the flows on the Avoca-Beaver 161-kV line.

All of these omissions in the EIS submitted by SWEPCO are apparent from the face of the EIS and SWEPCO cannot genuinely dispute that it has addressed such matters in the EIS. For these reasons, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be dismissed or summary judgment should be issued to STO, or in the alternative the hearing in this matter should be continued until SWEPCO can submit a proper EIS for the project.

## **CONCLUSION AND RELIEF RQUESTED**

For this reason, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be dismissed or summary judgment should be issued to STO, or in the alternative the hearing in this matter should be continued until SWEPCO can demonstrate compliance with the above referenced statutory requirements.

Respectfully submitted,

/s/ Mick G. Harrison  
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Bloomington, IN 47404  
Telephone: 812-361-6220  
Email: [mickharrisonsq@gmail.com](mailto:mickharrisonsq@gmail.com)

**CERTIFICATE OF SERVICE**

The undersigned certifies that on August 16, 2013, a true and correct copy of the above and foregoing Motion to Dismiss or for Summary Judgment and in the Alternative for Continuance was served on all parties of record by electronic mail.

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



**DEPARTMENT OF THE ARMY**  
**LITTLE ROCK DISTRICT, CORPS OF ENGINEERS**  
POST OFFICE BOX 867  
LITTLE ROCK, ARKANSAS 72203-0867  
www.swl.usace.army.mil/

**JUL 10 2013**

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Arkansas Public Service Commission  
Secretary of Commission  
P.O. Box 400  
Little Rock, Arkansas 72203-0400

Dear Secretary of Commission:

Please reference a letter dated March 26, 2013, regarding Southwestern Electric Power Company's (SWEPCO) proposed transmission line routes, specifically referred to as Docket No. 13-041-U.

After reviewing the proposal and proposed routes, the Corps of Engineers is providing our comments and concerns regarding SWEPCO's proposed actions. All of the proposed routes cross Corps of Engineers property. Our preference is that impacts to Corps property be completely avoided, but understand these impacts may in fact be unavoidable. The Corps of Engineers prefers Routes 33, 108, or 109 as opposed to the other alternate routes. Routes 33 and 109 have the least significant environmental impacts to Corps property, avoiding it entirely with the exception of one perpendicular, spanned crossing of the White River, at the headwaters of Table Rock Lake. Proposed Route 108 crosses a portion of Beaver Lake, parallel to Highway 412. The crossing for Route 108 is located primarily in a previously disturbed corridor and would have less impact to Government property.

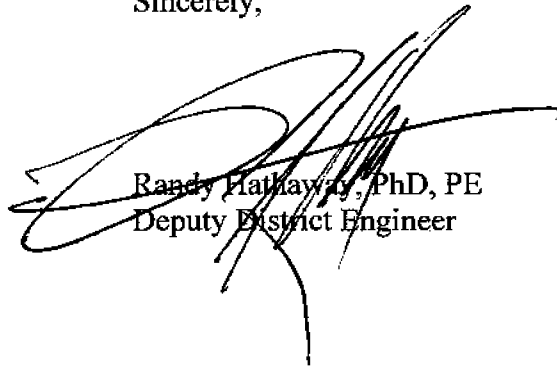
Proposed Routes 62, 86, and 91 cross Corps of Engineers property in the Indian Creek area of Beaver Lake. The proposed crossing is in an undisturbed area of the lake and does not follow any existing corridors across Government property. The potential impacts from Routes 62 and 86, specifically Path #12, are of greater concern because of the close proximity of the right-of-way to the White River. The path is proposed to run parallel for approximately a mile. The Corps will not, nor is able to make the land available for the crossings at these locations because other practical alternatives are available. Please be advised eminent domain is not applicable to federal property.

Our concerns for all of the routes include erosion and sedimentation issues stemming from potential loss of vegetation; loss of Bald Eagle roosting habitat; impacts to cultural resources; and the aesthetic impacts from a 150 ft right-of-way through generally undisturbed areas.

Any impacts to Corps of Engineers property associated with crossing Beaver Lake, Table Rock Lake, or the White River will require a review for National Environmental Policy Act (NEPA) compliance, a Real Estate instrument, a Regulatory Section 10 Permit, and non-statutory mitigation. The SWEPCO Environmental Impact Statement dated March 2013 associated with this project does not fully address all potential impacts to Corps of Engineers property.

We appreciate the opportunity to comment and I look forward to working with you to reach a satisfactory agreement. I am forwarding a copy of this letter to SWEPCO for their records. If you need additional information, please contact Jason Gramlich in the Little Rock District Office at (501) 324-5119 or [Jason.V.Gramlich@usace.army.mil](mailto:Jason.V.Gramlich@usace.army.mil).

Sincerely,

A handwritten signature in black ink, appearing to read 'Randy Hathaway', is written over the typed name and title. The signature is stylized and somewhat illegible due to overlapping strokes.

Randy Hathaway, PhD, PE  
Deputy District Engineer