

**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' PROPOSED FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

Intervenor Petitioner not-for-profit corporation Save the Ozarks (STO) hereby, by counsel, respectfully submits its Proposed Findings of Fact and Conclusions of Law in the above captioned matter.

**I. FINDINGS OF FACT**

**A. Findings of Fact Regarding Federal and State Environmental Permits**

1. SWEPCO has not obtained or submitted to the Commission a number of environmental permits required for a new major transmission line, and SWECO does not plan to do so until after the Commission decides whether to issue the Certificate. TR 8/27/2013, Thornhill, p. 755-56; TR 8/27/2013, Thornhill, p. 757; TR 8/27/2013, Thornhill, p. 839-41; TR 8/27/2013, Thornhill, p. 847-49; TR 8/27/2013, Thornhill, p. 873-74 (Section 401 Storm Water permit required but will not be obtained until after the Commission decision on the Certificate).

2. Such permits are planned to eventually be obtained by SWEPCO but no such permits have yet been obtained by SWEPCO. TR 8/30/2013, Cotten, p. 2426.

3. A storm water pollution prevention permit (called a program or plan) from the Arkansas Department of Environmental Quality (ADEQ) will be required, and none has been issued yet. TR 8/30/2013, Cotten, p. 2376.

4. No determination has been made by APSC staff regarding any state or federal permits that would be required for Route 109 in Missouri. TR 8/30/2013, Cotten, p. 2377.

5. APSC staff engineer Cotten did not review the permits required for the SWEPCO Project and those required permits have not yet been issued. TR 8/30/2013, Cotten, p. 2376-77.

6. The July 2013 letter to the Commission from the Army Corps of Engineers (Corps) states clearly the position of the federal agency charged with issuing two of these environmental permits, a Rivers and Harbors Act Section 10 permit and a Clean Water Act (CWA) Section 404 permit, that such federal environmental permits are required to be obtained by SWEPCO for the project. STO Costner Surrebuttal Testimony Exhibit 5 (Docket 309-5).

7. SWEPCO has intentionally not applied for, obtained, or submitted to the Commission several such permits including Army Corps issued River and Harbors Act Section 10 permits and Army Corps issued Section 404 CWA permits.

## **B. Findings of Fact Regarding Analysis of Economic and Financial Impacts**

8. No analysis of economic impacts on specific local communities such as Eureka Springs was conducted or presented to the Commission with the SWEPCO Application or EIS or at hearing.

9. The only mention of economic impacts in the EIS concerns the lack of any positive economic impacts such as significantly increased local employment due to the project. *See* EIS p.5-7 (Docket 2-2). There is no discussion in the EIS of adverse impacts on tourism, the arts, or other businesses in local communities such as Eureka Springs.

10. The proposed SWEPCO transmission lines are likely to cause significant adverse economic impacts on the local communities through which the lines will pass including Eureka Springs, including significant adverse impacts on tourism. Bishop direct testimony pp.3-10; Costner direct testimony p.12; DeVito direct testimony p.2, 9; Severe direct testimony p. 7; Hamby direct testimony p.11; Stowe direct testimony, pp.10 -13.

11. SWEPCO's EIS consultant Thornhill noted in commenting on the draft EIS that impacts on tourism should have been considered. TR 08/27/13, Thornhill, p.763-65.

12. SWEPCO admitted that no analysis of adverse impacts on tourism in the local communities from the proposed transmission lines was prepared. TR 08/29/13, Johnson, p.1479.

13. APSC engineer Cotten did not do any independent analysis of his own on tourism impacts. TR 8/30/2013, Cotten, p. 2440.

**C. Findings of Fact Regarding Analysis of the Costs of the Proposed Facility**

14. In order to prepare a good cost estimate of constructing in an area with karst features, a geotechnical survey would need to be completed. TR 08/27/13, Coffman p. 476-79.

15. Geotechnical surveys have not been done for the project. TR 08/29/13 Johnson p.1424; TR 08/30/13 Cotten p.2390-91.

16. No cost assessment for construction in karst has been prepared. TR 8/26/2013, Hassink, p. 334.

17. No comparative cost assessment was done regarding whether the proposed project is the most cost effective for rate payers. TR 8/26/2013, Bittle, p. 185-186.

18. No assessment was done comparing the costs of the proposed project to Dr. Merrill's identified alternatives. TR 8/26/2013, Bittle, p. 185-186.

19. Operation and maintenance costs were not included in the cost estimate that was done. TR 8/26/2013, Hassink, p. 282-83; TR 8/29/2013, Johnson, p.1433.

20. Total cost of the project was not a criteria that was used in evaluating alternatives, and the EIS was not intended to do an evaluation of alternatives in terms of cost. TR 8/27/2013, Thornhill, p. 771-72.

21. The cost estimates Jackson used were provided to her over the phone and were for Route 33 only, and she has never seen a cost estimate for other routes. TR 8/28/2013, Jackson, p. 1160-61.

22. Nickell testified that if Route 33 was rejected, and Route 108 or 109 was chosen, then SPP would probably still want to build it, but they would also consider the costs as one criteria, so if there was a significant cost increase, that might change SPP's decision to build Route 108 or 109. He also stated that it is fair to say that they do not know at this point what the costs for these other routes would be. TR 8/29/2013 Nickell, p. 1782-84.

23. Costs were not part of the criteria used to evaluate and rate alternative routes. TR 8/28/2013, Thornhill, p. 955.

24. Johnson testified that he did not task Burns & McDonnell to include a cost analysis in the EIS. TR 8/28/2013 Johnson, p. 1380.

#### **D. Findings of Fact Regarding Demonstration of Need for the Proposed Facility**

25. SWEPCO sat on the Notice to Construct for four years (from 2008 until 2012) before looking at how to implement it,<sup>1</sup> and for five years (from 2008 until 2013) before filing the Application, and then asserted its schedule was "Critical."<sup>2</sup>

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<sup>1</sup> Hassink Cross Examination, p. 284, lines 6-10.

<sup>2</sup> Application, p. 10, § 2.

26. Mr. Hassink said that SWEPCO delayed because “The need date was further out than required [getting started] in 2008.”<sup>3</sup>

27. Case studies were provided by Dr. Merrill that exemplified why NERC requires that plans not rely on long-term forecasts. In these cases, the needs were re-evaluated every year, and every year the need became less severe and receded a year. In 2010 and 2011 the projects were cancelled. Even five-year forecasts and analyses proved unreliable.<sup>4</sup>

28. “Load forecasts [are] the most important driver” of need for transmission reinforcement.<sup>5</sup>

29. Based on SPP data, for SPP as a whole, demand has been stagnant since 2006.<sup>6</sup>

30. The forecast for 2016 that was made by SPP in 2006 followed years of consistent high demand growth and preceded the stagnant demand since 2006.

31. The load growth that was projected by SPP to occur in the ten years between 2006 and 2016 has not materialized.<sup>7</sup>

32. Mr. Hassink’s rebuttal supplies historic and projected growth rates for the immediate Northern Arkansas region.<sup>8</sup> He observes that, “The load forecast growth rate of 2.2% reflects slower growth than observed historically.”<sup>9</sup> Mr. Hassink’s forecast is more than twice recent growth rates.<sup>10</sup>

33. NERC requires that, “Studies be conducted annually unless changes to system conditions do not warrant such analyses.”<sup>11</sup>

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<sup>3</sup> Hassink Cross Examination, p. 292, lines 21-24.

<sup>4</sup> Merrill Direct, pp. 11-14. See especially Exhibits HMM-3 and HMM-4 on pp. 11 and 13.

<sup>5</sup> *Id.*, p. 15, line 2.

<sup>6</sup> *Id.*, Exh. HMM-6, p. 16.

<sup>7</sup> *Id.*, p. 17, lines 4-7. See also p. 17, Exh. HMM-7.

<sup>8</sup> Hassink Rebuttal, p. 14, lines 1-8.

<sup>9</sup> *Id.*, p. 14, lines 7-8.

<sup>10</sup> Merrill Surrebuttal, p. 22, lines 10-14. See also p. 22, Exh. HMM-S-5.

<sup>11</sup> Merrill, Surrebuttal, Att. 1 (NERC Standards), p. 1, §R1.3.3.

34. PJM, the Mid-Atlantic equivalent to SPP, does “retool” studies every year to determine if major projects continue to be needed.<sup>12</sup>

35. The N-1 sceario based standard is less rigorous than the N-1-1 standard, which is less rigorous yet than the N-2 standard. When two separate contingencies are involved, the Category C standard allows manual intervention [by the system operator] after the first contingency in anticipation of the second. This is sometimes called N-1-1.

36. The N-2 conditions tested by Mr. Nickell are more severe than the standard’s N-1-1 because he assumes that the two contingencies occur simultaneously (without manual intervention after the first one).

37. Operational alternatives are to be considered once problems are identified. The standard does not require the system to withstand N-2 or simultaneous contingencies. To do so would be over-design . . .<sup>13</sup>

38. SPP’s recent non-formal re-assessment gave dramatically different results from the 2006-2007 Ozark Transmission Study.<sup>14</sup>

39. SPP’s subsequent reviews did not “build upon the results of the SPP Ozark” study and other “past plans” in a “regular and cumulative validation” but rather simply *assumed that the planned projects are built in future studies*. This in no way constitutes a validation of the previous need studies. The only way that is done is to study the system *without* the project.<sup>15</sup>

40. Dr. Merrill was not n error in not considering maintenance outages in his restudy of the 2006-2007 contingency.<sup>16</sup> NERC clearly states that operational adjustments will be made to protect the system: “studies [should] include any necessary adjustments that might be

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<sup>12</sup> Merrill Surrebuttal, p. 15, lines 10-16.

<sup>13</sup> *Id.*, p. 7, line 19 – p. 8, line 4.

<sup>14</sup> Nickell Direct, p. 11, lines 11-44 and pp. 21-22. The original p. 21 is in Merrill Surrebuttal, p. 16.

<sup>15</sup> Merrill Surrebuttal, p. 21, lines 2-6.

<sup>16</sup> Hassink Rebuttal, p. 6, lines 10-13.

required to accommodate planned outages, since a planned outage is not a ‘contingency.’”<sup>17</sup> In other words, the system is to be operated as reliably with planned outages as without planned outages.

41. The NERC standards balance two conflicting objectives of power system planning. Society needs a system that isn’t too reliable and costly, or too cheap and unreliable.

Two conflicting objectives of transmission planning are to maximize reliability and to minimize cost (investment in transmission facilities). The latter can be quantified in dollars once specific options or alternatives are considered. Reliability has an economic benefit, but it is exceedingly difficult to quantify precisely in dollars.

The purpose of the NERC transmission planning standards is to provide an objective resolution of this conflict that can be generally applied, so that transmission planners do not have to resolve the difficult tradeoff between cost and reliability project by project.<sup>18</sup>

42. Consistent with SPP’s stated standard, the Ozark Transmission Study performed N-1 analysis (NERC Category B) but reported no N-1-1 analyses (NERC Category C) or N-2 analyses (more severe than NERC Category C).<sup>19</sup> The 2008, 2010 and 2012 STEP plans considered only N-1 contingencies.<sup>20, 21, 22</sup>

43. Only in SPP’s June 2013 non-formal study is there a record of SPP applying criteria beyond N-1.<sup>23</sup>

44. SPP’s original report lists 18 “Overloaded Facilities.” Of these, 13 are labeled “N-2” or equivalently “G-1 and N-1.” Two of these were in error and were retracted later by SPP and Nickell. The other five are N-1, but only under statistically unusual Low Hydro conditions.

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<sup>17</sup> Merrill Surrebuttal, Att. 1 (NERC Standards), p. 8, last paragraph.

<sup>18</sup> Merrill Surrebuttal, p. 6, lines 3-10.

<sup>19</sup> Ozark Transmission Study, p. 3, §2, p. 4, §3, p. 6, §3, p. 7, §2.

<sup>20</sup> 2008 SPP Transmission Expansion Plan, p. 14, §1, p. 16, §2, 3, 4, and 5, p. 84, penultimate paragraph.

<sup>21</sup> 2010 SPP Transmission Expansion Plan, p. 13, §4, p. 15, §8, etc.

<sup>22</sup> 2012 SPP Transmission Expansion Plan, p. 39, §4.

<sup>23</sup> Nickell Direct, pp. 22-23.

45. Using the N-2 problems to attempt to justify the new facility is a violation of long-standing SPP standards and of NERC standards. Even under NERC Category C or “N-1-1” conditions<sup>24</sup>, Dr. Merrill points out, “manual intervention must be considered after the first contingency in every situation” and “one alternative [under industry-consensus and legally mandated NERC standards], applicable to all of the N-2 scenarios, is to shed load.”<sup>25</sup>

46. Five of sixteen – about one-third – of the overload cases found in SPP’s June 2013 non-formal study had to do with N-2 overloads on the Entergy 161-kV lines in the area between and around Osage Creek and Harrison. However, an Entergy witness testified that:

- Entergy did not request resolution of a reliability problem in this area,
- Entergy had not diagnosed a reliability problem here, and
- Entergy was not trying to resolve a reliability problem here.<sup>26</sup>

SPP’s alleged criteria violations in that area were of its own making, due to application of an N-2 standard, what one could appropriately call “super-reliability,” a standard that neither NERC nor SPP nor Entergy actually apply.

47. Dr. Merrill’s assertions about the NERC criteria were not challenged or contradicted by SPP or SWEPCO, except his interpreting the five contingencies with Low Hydro conditions as being N-2. However, for three of these five scenarios, Merrill identified simple and less expensive fixes – two transformers. Merrill also concluded that the last two of the five are so remote from Northern Arkansas as to be irrelevant – and should be fixed locally if needed.

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<sup>24</sup> Merrill Surrebuttal, Att. 1 (NERC Standards), p. 4, s.v. “Category C.”

<sup>25</sup> Merrill Surrebuttal, p. 15, lines 4-5 and p. 23, line 5.

<sup>26</sup> Montgomery Cross Examination, p. 406, lines 16-25.

<sup>27</sup> Merrill Surrebuttal, p. 23, lines 8-16.

48. In June 2013 Dr. Merrill and SPP independently re-evaluated the only contingency cited in the Application as violating NERC criteria, the sole basis for the need for the facilities. Dr. Merrill<sup>28</sup> and SPP concur that that contingency will not cause a violation in 2016. SPP says it will not cause a violation until after 2018.<sup>29</sup> However, no SPP studies done since 2006-2007 presented in this proceeding show that it will ever cause a violation.

49. Dr. Merrill showed that under NERC criteria doing nothing is acceptable for all of SPP's N-2 issues, and neither NERC nor SPP criteria require that the system be designed to N-2 criteria.

50. If N-2 reliability were required, Merrill showed that most of the N-2 problems identified have other much less costly and less intrusive fixes, compared to the proposed facilities.<sup>30</sup>

51. Of all of the supposed overloads identified in SPP's study of June 2013, only five are in N-1 conditions, and these are under unusual low hydro conditions that Mr. Hassink says are four times less likely than normal hydro conditions.<sup>31</sup>

52. Dr. Merrill concluded that one new transformer will resolve both of SPP's Brookline transformer problems. A second, smaller transformer will solve the Washburn transformer problem.<sup>32</sup>

53. Mr. Nickell's characterization of Dr. Merrill's solutions as "nearsighted" or "short term"<sup>33</sup> are not supported by the record given that the Ozark Transmission Study included three

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<sup>28</sup> Merrill Direct, p. 25.

<sup>29</sup> Nickell Direct, p. 22, 3<sup>rd</sup> and 4<sup>th</sup> lines.

<sup>30</sup> Merrill Surrebuttal, pp. 23-24.

<sup>31</sup> Hassink Sur-surrebuttal, p. 10, lines 9-11.

<sup>32</sup> Merrill Surrebuttal, pp. 23, lines 11-12.

<sup>33</sup> Nickell Cross Examination, p. 1855, lines 6-14.

new transformers in both options A and B – in addition to transformers that are not specifically named but are part of the proposed facilities and other projects.<sup>34</sup>

54. Dr. Merrill concluded that the last two N-1/low hydro issues are remote from Northern Arkansas and should be addressed locally.<sup>35</sup>

55. Mr. Hassink admits that doing nothing (apparently referring to Dr. Merrill's suggestion to take the Avoca-Beaver Dam 161-kV line out of service through switching) has been satisfactory in the past. He asserts without any justification that for some undefined reason it won't work in the future. Hassink Cross Examination, p. 367, line 15-p. 368, line 7.

56. The record shows no meaningful consideration by SPP or SWEPCO of less costly and less intrusive alternatives to the facilities, assuming that there was a need. The alternatives Mr. Nickell referred to were generally alternatives in addition to the proposed facilities. For example, see Nickell Cross Examination, p. 1759, lines 19-25.

57. Nickell did refer to an undefined 161-kV solution proposed by SWEPCO to solve the problem identified in 2006-2007. He said that SPP overruled it in favor of the proposed 345-kV facilities. Nowhere in the record is there analysis demonstrating that the proposed 345-kV facilities constitute a “more comprehensive regional solution” to real problems than whatever SWEPCO's original 161-kV proposal was.

#### **E. Findings of Fact Regarding the EIS and Application**

58. The SWEPCO EIS and application have obvious defects and omissions in failing to address impacts on Army Corps properties including impacts on lakes and rivers. *See* Costner Surrebuttal Exhibit 5 (Army Corps letter).

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<sup>34</sup> Ozark Transmission Study, p. 14.

<sup>35</sup> Merrill Surrebuttal, p. 23, lines 13-15.

59. The decision to build a new transmission line versus other alternatives was made in 2008, prior to considering environmental impacts and alternatives in the EIS. TR, 9/26/2013, Hassink, p. 294.

60. 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...” Costner Surrebuttal Exhibit 5.

61. 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...”

62. 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.”

63. 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. Costner Surrebuttal Exhibit 5.

64. SWEPCO has not sat down with the Army Corps to attempt to address the Corps' concerns about adverse environmental impacts and omissions in the EIS. TR 8/27/2013, Thornhill, p. 843.

65. The EIS also on its face fails to address the available and feasible alternatives to the project identified in the direct testimony of Dr. Hyde Merrill that solve the problem identified by SWEPCO in the Application and by SPP in the Notice to Construct as creating the need.

66. Dr. Merrill's alternative solutions resolve this prior identified need with dramatically less environmental impacts and at dramatically lower cost. There is nothing in the EIS that provides a counter analysis.

67. The EIS also does not address (and neither does the Application) the connection of the project to the Entergy system, which SPP and SWEPCO admit is required to complete the project.

68. Neither does the EIA address the impacts from or alternatives to the chosen location for the new Kings River substation.

69. As noted *supra*, karst data will not be collected until after the Commission decides the issue of the Certificate. This omission precluded the EIS from adequately addressing impacts from the project on cave dwelling species including the endangered Indiana Bat.

70. Cotton, APSC engineer, admitted that he does not consider two of the three remaining Routes, Routes 108 and 109, as reasonable based on his review of the EIS and the unknowns regarding Route 109 extending into Missouri. TR 08/30/13, Cotten p. 2436.

71. Harm to private property was not addressed in the EIS, and APSC engineer Cotton did not directly evaluate this factor in his review. TR 8/30/2013, Cotton, p. 2379.

72. Constructability was removed as a factor to be used in evaluating and screening alternative routes after the scores were computed and reviewed. TR 8/27/2013, Thornhill, p. 772-74.

**F. Findings of Fact Regarding Notice to Missouri Landowners on Proposed Route 109**

73. It is not disputed that numerous landowners along the portion of proposed Route 109 that extends into Missouri have yet to receive notice via certified mail.

74. SWEPCO admits it has not attempted to serve notice on these Missouri landowners.

75. The Missouri landowners who did not receive timely notice from SWEPCO of its Application include Jamie Harvey and several others for whom Ms. Harvey submitted affidavits. TR 08/26/13 Harvey pp. 152-54.

**G. Findings of Fact Regarding Public Notice via Publication in a Newspaper**

76. It is undisputed that the notice published by SWEPCO in a newspaper was not in a newspaper having circulation in the affected counties of more than 10%.

77. SWEPCO posted a public notice of this APSC filing in the Arkansas Democrat-Gazette on Monday, April 1, 2013 and Tuesday, April 2, 2013.

78. This newspaper notice in the Arkansas Democrat-Gazette had the potential to reach at most only 10% of the homes in Carroll and Madison counties.

79. There are other newspapers that serve these counties with more substantial circulation (i.e. Ozark Trader, Carroll County News).

**II. CONCLUSIONS OF LAW**

**A. Conclusions of Law Regarding Federal and State Environmental Permits**

1. Arkansas law requires that the Commission consider the relevant environmental permits as part of the Commission's deliberations on whether to issue the Certificate. Arkansas Code § 23-18-519(b)(4) specifically 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).

2. This statutory provision, as a logical necessity, requires SWEPCO to obtain the relevant environmental permits and submit these permits to the Commission with its Application so that the Commission may "consider" these permits prior to deciding whether to deny or grant the requested Certificate. This language explicitly requiring consideration by the Commission of any environmental permits for the proposed major utility facility was added by a statutory amendment in 2011, following the Arkansas Court of Appeals and Arkansas Supreme Court decisions in the *Hempstead* case, *Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2010 Ark. 221, 384 S.W.3d 477 (2010) and *Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 324 S.W.3d 697 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

3. This statutory language is clear and mandatory and the Commission like the Courts has a duty to apply this requirement literally.

Clearly, though, this court has a duty to review the findings and conclusions of the PSC, and, similarly, the PSC, as an arm of the legislature, has a duty to regulate and approve new plant construction under the statutory criteria.

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2010 Ark. 221, 21 384 S.W.3d 477, 485 (2010) (concurring opinion).

4. There is no exemption for major utility facilities from the requirements to obtain permits from State (or federal) agencies relating to air or water pollution.

(a) This subchapter does not affect the:

(1) Jurisdiction of the Arkansas Department of Environmental Quality or the Arkansas Pollution Control and Ecology Commission with respect to water and air pollution control or other matters within the jurisdiction of the department or the Arkansas Pollution Control and Ecology Commission; and

(2) Requirement that a person apply for and obtain a permit from the department as provided by the Arkansas Water and Air Pollution Control Act, §§ 8-4-101 -- 8-4-106, 8-4-201 -- 8-4-229, and 8-4-301 -- 8-4-313.

(b) This subchapter does not confer upon the Arkansas Public Service Commission any authority or jurisdiction conferred by law upon the department or the Arkansas Pollution Control and Ecology Commission.

(c) Notwithstanding the exemption provisions of § 23-18-504, each major utility facility constructed in Arkansas is subject to the environmental rules and regulations of the state and federal regulatory bodies having jurisdiction over the air, water, and other environmental impacts associated with the major utility facility.

Ark. Code § 23-18-506.

5. Because SWEPCO has not yet obtained the required 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).

6. Under an earlier version of the controlling statute, the Commission may have had the option to issue the Certificate first and add a condition that no construction commence until all required permits are obtained later. However, while such an approach would satisfy a statute that simply required that applicable permits be obtained prior to construction of the project, which may have been the law in Arkansas prior to the 2011 amendment to Arkansas Code § 23-

18-519(b)(4), this approach will not satisfy the amended 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.

7. The Commission's Rules of Practice and Procedure 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. *See* Commission Rules 4.01 and 4.02.

8. 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.

9. For these reasons, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be denied.

## **B. Conclusions of Law Regarding Analysis of the Economic and Financial Impacts**

10. SWEPCO is required by statute to provide an application for the certificate along with an EIS which adequately addresses the economic and financial impacts of the project on the local communities affected and the Applicant.

**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:**

\* \* \*

(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;

Arkansas Code § 23-18-511 (emphasis added).

11. Further, the Commission shall not grant a Certificate for a major utility facility unless it finds and determines each of the following:

\* \* \*

(2) That the major utility facility **will serve the public interest**, convenience, and necessity;

\* \* \*

(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**, \* \* \*

(5) **The nature of the probable economic impact** of the major utility facility;

(6) That the major utility facility financing method either as proposed or as modified by the commission **represents an acceptable economic impact, considering economic conditions** and the need for **and cost** of additional public utility services;

\* \* \*

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

12. There is a need for an analysis of adverse economic impacts of this project before the Commission can even consider issuing a Certificate allowing the project to proceed.

13. This is not a case where there needs to be a careful review by the Commission of competing expert testimony on technical details in order to determine whether there has been compliance with the applicable statute. In this case, non-compliance by SWEPCO is apparent due to the complete failure by SWEPCO to perform any analysis of the adverse economic impacts of the project on the specific local communities affected such as Eureka Springs.

14. For these reasons, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be denied.

**C. Conclusions of Law Regarding Analysis of the Costs of the Proposed Facility**

15. The Commission shall not grant a Certificate for a major utility facility unless it finds and determines each of the following:

\* \* \*

(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, \* \* \* and other pertinent considerations;**

\* \* \*

(5) **The nature of the probable economic impact** of the major utility facility;

(6) That the major utility facility financing method either as proposed or as modified by the commission represents **an acceptable economic impact, considering economic conditions** and the need for **and cost of additional public utility services;**

\* \* \*

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

16. These statutory provisions were clearly intended and properly read to require a total cost analysis. *See* Arkansas Code § 23-18-502.

(b) The General Assembly further finds that it is essential to the public interest to minimize any adverse effect upon the environment and upon the quality of life of the people of the state that the new facilities might cause **and to minimize the economic costs to the people of the state** of obtaining reliable, clean, safe, and adequate energy supplies.

(c)(1) **The General Assembly further finds that laws and practices relating to the location, financing, construction, and operation of the utility facilities should provide for** the protection of environmental values, encourage the development of alternative renewable and nonrenewable energy technologies that are energy-efficient, **and take into account the total cost to society of the facilities, including without limitation the cost of providing safe, reliable, and cost-effective energy resources.**

Ark. Code § 23-18-502 (emphasis added).

17. Costs analysis is a key factor in the statutorily required determination of whether the environmental impacts from a proposed utility project are acceptable.

*c. Nature and Economics of the Proposal*

One frightening aspect of the Turk plant is its eventual cost. Although no one seriously maintains that the original cost estimate of \$1.334 billion made in 2005 is close to what the cost will ultimately be, the PSC's order used the original estimate. Contrary to that estimate, these facts seemed to be accepted by the parties:

- At the PSC hearing on September 7, 2007, SWEPCO CEO, Venita McCellon–Allen, testified that cost would be no less than \$1.754 billion. That was three years ago.
- In addition to the \$1.754 cost estimate, congressional and administrative regulation of carbon dioxide generated by the Turk plant are estimated to cost hundreds of millions of dollars more, according to PSC expert David Schlissel. PSC Chairman Paul Suskie and Commissioner Bassett seemed influenced in their decision by potential volatility in natural gas prices and diversification of fuel sources. What is largely undisputed, however, as already mentioned, is that the imminent regulation of carbon dioxide will cause the cost of the coal-fired plant to soar. The price tag, as noted, could quickly reach \$3 billion and more. Yet, the PSC used the 2005 estimate in its analysis, which is an unrealistic figure.

\* \* \*

To summarize, ... , the ultimate cost of the plant is considerably higher from original 2005 estimates and an unknown, customer need was determined in a non-public arena, analysis of alternative sites has been given short shrift in the PSC's order, and the preference given to coal over natural gas seems arbitrary in light of cost and the higher toxic emissions associated with coal. I conclude that the burden of substantial evidence has not been met based on these criteria so as to render the adverse impact acceptable, and for that reason, I would also deny the certificate for these additional reasons

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2010 Ark. 221, 15-19, 22, 384 S.W.3d 477, 488 (2010) (concurring opinion).

18. Again, this is not a case where there needs to be a careful review by the Commission of competing expert testimony on technical details in order to determine whether there has been compliance with the statute. In this case, non-compliance by SWEPCO is apparent due to the complete failure by SWEPCO to perform any comparative analysis of the

costs of the project versus alternatives or alternative routes or even a complete cost assessment of the project preferred route alone.

19. For these reasons, SWEPCO’s Application is incomplete and in non-compliance with the controlling statute and must be denied.

**D. Conclusions of Law Regarding Demonstration of Need for the Proposed Facility**

20. SWEPCO’s is required by statute to provide an application for the certificate along with an EIS which adequately demonstrates the need for 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:

\* \* \*

(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;

\* \* \*

Arkansas Code § 23-18-511 (emphasis added).

21. Arkansas law further provides that the Commission shall not grant a Certificate for a major utility facility unless it finds and determines each of the following:

(1)(A) **The basis of the need for the major utility facility.**

\* \* \*

(2) That the major utility facility **will serve the public interest, convenience, and necessity;**

\* \* \*

(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, . . . , **and the various alternatives**, if any, and other pertinent considerations;

\* \* \*

(6) That the major utility facility financing method either as proposed or as modified by the commission represents an acceptable economic impact, considering economic conditions **and the need for** and cost of additional public utility services;

\* \* \*

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

22. These statutory requirements for a demonstration and determination of need have been recognized by the Arkansas courts.

Arkansas Code Annotated section 23–18–511(3) (Supp.2007) requires an applicant for a CECPN to include in its application “[a] statement of the need and reasons for construction of the facility.” Further, and of critical importance in this proceeding, the very first finding required of the APSC before it may grant a CECPN is “[t]he basis of the need for the facility.” Ark.Code Ann. § 23–18–519(b)(1) (Supp.2007).

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 17, 324 S.W.3d 697, 708 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

Without appreciating that a finding of need is a critical part of the proof SWEPCO must present to obtain a CECPN, the APSC denied appellants an opportunity to challenge SWEPCO's proof by binding them to a decision made in a docket to which they were not parties and were not given notice.

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 26-27, 324 S.W.3d 697, 712-13 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

*Also see, Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2010 Ark. 221, 15-16, 22, 384 S.W.3d 477, 485, 488 (2010) (concurring opinion).

23. There are significant differences between N-1, N-1-1, and N-2 scenarios. Reliability isn't black or white, but can have different grades – for instance, basic or robust or

extra or super. There is a trade-off between reliability and cost (including costs that cannot be measured in dollars, like environmental impact).

24. Neither SWEPCO nor SPP demonstrated a need for the proposed new 345 kV transmission line in the traditional sense of the term “need”. Rather, SPP, and SWEPCO apparently only because SPP requires it to, argue for a project that provides more than what is needed, “head space”, essentially arguing that a new expensive and environmentally damaging project can be justified based on the desire for super-reliability in the transmission system.

25. There is no basis in law for SPP or SWEPCO’s position. For these reasons, SWEPCO’s Application is incomplete and in non-compliance with the controlling statute and should be denied.

#### **E. Conclusions of Law Regarding the EIS and Application**

26. SWEPCO’s is required by statute to provide an application for the certificate that includes an EIS which adequately addresses the environmental impacts of the project including several specific categories of impacts specified by statute, as well as alternatives.

**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:

\* \* \*

**(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 (emphasis added).

27. With regard to this information

... before the APSC may grant a CECPN, Arkansas Code Annotated section 23–18–519(b)(4) requires the APSC to find and determine that “the 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, and the various alternatives, if any, and other pertinent considerations.”

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 18-19, 324 S.W.3d 697, 708-09 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

28. The Commission shall not grant a Certificate for a major utility facility unless it finds and determines each of the following:

\* \* \*

**(3) The nature of the probable environmental impact of the major utility facility;**

**(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) (emphasis added).

29. Note that the language in § 23-18-519(b)(4) requires the Commission (and therefore the applicant) to consider alternatives generally, not only alternative locations or routes.

30. The Arkansas courts have recognized the statutory requirement that the EIS include an analysis of alternatives in the EIS.

We hold SWEPCO's application, including the EIS, did not provide sufficient information regarding alternative locations or the comparative merits and detriments of each alternate location to satisfy sections 23–18–511(2) and (8)(b)(iii).

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 20, 324 S.W.3d 697, 709 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

31. The pros and cons of alternatives must be considered.

The PSC's ultimate finding of an acceptable adverse environmental impact also seems arbitrary where the PSC fails to fully consider and analyze the pros and cons of alternative sites in its order.

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2010 Ark. 221, 15-16, 21-22, 384 S.W.3d 477, 485, 488 (2010) (concurring opinion).

The PSC has concluded by a vote of two to one, based on the record before it, that a coal-fired generating plant in Hempstead County “represents an *acceptable* adverse environmental impact.” That is a finding and determination that the PSC must make in its order under the Utility Code to grant the certificate to SWEPCO. Ark.Code Ann. § 23–18–519(b)(4) (Repl.2002). In making this mandated finding and determination of an acceptable adverse environmental impact, the statute

directs that the PSC must consider, among “other pertinent considerations,” the following:

- a) the state of available technology;
- b) the requirements of the customers of the applicant utility service;
- c) the nature and economics of the proposal; and
- d) the various alternatives.

Hence, a decision by the PSC in SWEPCO's favor based on these factors is essential for there to be an acceptable adverse environmental impact.

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2010 Ark. 221, 15-16, 384

S.W.3d 477, 485 (2010) (concurring opinion).

The Utility Act requires that, before the APSC can issue a CECPN, it must identify the nature of the probable environmental impact of the facility and find that the facility represents an acceptable adverse environmental impact. *See* Ark.Code Ann. § 23–18–519. ... APSC staff witness Clark Cotten testified that, to a large extent, it is his position and the staff's position that the APSC doesn't deal with environmental issues—that's somebody else's job—the Arkansas Department of Environmental Quality (ADEQ). Furthermore, after deferring issues to the ADEQ, the APSC in Order No. 11 acknowledged that it was granting SWEPCO a CECPN to build the Turk Plant before the ADEQ had issued its final determination concerning whether the Turk Plant will meet all environmental rules and regulations.

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 29-

30, 324 S.W.3d 697, 714 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010)

(concurring opinion).

32. Again, this is not a case where there needs to be a careful review by the Commission of competing expert testimony on technical details in order to determine whether there has been compliance with the statute. In this case, non-compliance by SWEPCO is apparent due to the complete failure by SWEPCO to address fundamentally important issues in the statutorily required EIS.

33. For these reasons, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be denied.

**F. Conclusions of Law Regarding Notice to Missouri Landowners on Route 109**

34. Arkansas law requires that each landowner along a proposed route for a new major utility facility transmission line be notified by the Applicant via certified mail of the filing of an application for a Certificate from the Commission. *See* Arkansas Code § 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.

\* \* \*

(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 (emphasis added).

35. Arkansas law further requires that the project must be shown to conform as closely as practicable to applicable state, regional, and local laws as well, as a condition precedent to the Commission issuing a Certificate.

\* \* \*

**(10) That the location of the major utility facility as proposed conforms as closely as practicable to applicable state, regional, and local laws and regulations issued thereunder,** except that the commission may refuse to apply all or part of any regional or local law or regulation if it finds that, as applied to

the proposed major utility facility, the law or regulation is unreasonably restrictive in view of the existing technology, factors of cost or economics, or the needs of consumers whether located inside or outside of the directly affected government subdivisions;

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

36. This provision is reasonably read to require compliance with the applicable laws of Missouri for that portion of Route 109 that extends into Missouri.

37. Although the APSC does not have the power to decide what utility projects will be built in Missouri (i.e. cannot mandate that a project be built over the objections of Missouri officials), the APSC under the laws cited *supra* is nonetheless authorized to reject a Certificate for a proposed major utility facility to be built in part in Arkansas if any of the alternatives presented to the APSC include, as here, a route that extends into Missouri and the applicant has not demonstrated compliance with applicable Missouri laws, such as statutory or constitutional provisions requiring notice before the government takes or harms the property of a citizen.

38. SWEPCO has not identified what Missouri laws would be applicable here but at minimum Due Process would apply under both State and Federal constitutions.

39. For these reasons, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be denied.

#### **G. Conclusions of Law Regarding Public Notice via Publication in a Newspaper**

40. Arkansas law requires that the public be notified by the Applicant of the filing of an application for a Certificate from the Commission for a new major utility facility including a new major transmission line facility via publication of notice in a newspaper having substantial circulation in the affected counties. *See* Arkansas Code § 23-18-513(d).

Application for certificate--Service or notice of application

\* \* \*

**(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.

Arkansas Code § 23-18-513 (emphasis added).

41. Note that subsection “(e)” of Arkansas Code § 23-18-513 in regard to notice via certified mail to landowners does not appear to apply by its plain language referring only to subsections (a) and (c) to the newspaper notice required in subsection “(d)”.

42. This subsection “(e)” provides that inadvertent failure by the Applicant to provide notice to the specified landowners and public entities can be cured in some circumstances via late notice and some accommodations by the Commission as necessary to allow the late notified parties to be able to fully participate in the proceeding before the Commission regarding the requested Certificate.

43. Consequently, a failure by the Applicant to provide the required newspaper notice to the public (in a newspaper having substantial circulation in the affected counties), even if inadvertent, is not curable by late publication in an appropriate newspaper or by accommodations afforded to late-coming parties by the Commission.

44. The Arkansas Legislature made clear the importance of an applicant and the Commission providing adequate notice and opportunity to participate before the Commission on

an application for a Certificate to all those affected by the proposed major utility project. *See* Arkansas Code § 23-18-502.

(d) Furthermore, **the General Assembly finds that there should be provided an adequate opportunity for individuals, groups interested in energy and resource conservation and the protection of the environment, state and regional agencies, local governments, and other public bodies to participate in timely fashion in decisions regarding the location, financing, construction, and operation of major utility facilities.**

Ark. Code § 23-18-502 (emphasis added).

45. The importance of allowing all affected persons the opportunity to participate before the Commission was further emphasized by the Arkansas Legislature in discussing the streamlining and consolidating of multiple prior agency review processes into a single proceeding before the Commission.

(e)(1) The General Assembly, therefore, declares that it is the purpose of this subchapter to provide an exclusive forum with primary and final jurisdiction, except as provided in §§ 23-18-505 and 23-18-506, for the expeditious resolution of all matters concerning the location, financing, construction, and operation of a major utility facility in a single proceeding **to which access will be open to individuals, groups, state and regional agencies, local governments, and other public bodies to enable them to participate in these decisions.**

Ark. Code § 23-18-502.

46. The Arkansas courts have likewise recognized the importance of strict compliance by applicants and the Commission with the public notice requirements of the statute.

The plain language of the statute states the legislature's objective to provide an adequate opportunity for timely participation in decisions regarding the location, financing, construction, and operation of major facilities

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 324 S.W.3d 697, 704 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

The APSC is statutorily required to structure a comprehensive evaluation based upon service needs and the most economical and environmentally safe means to

meet the needs of the people served. The participation of the people served is essential to that process

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 16, 324 S.W.3d 697, 707 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

Moreover, pursuant to section 23–18–502(e), the proceedings before the Commission are provided to assure that “access will be open to individuals, groups, state and regional agencies, local governments, and other public bodies to enable them to participate in these decisions.” The proceeding in the Needs Docket failed to provide the requisite opportunity for participation.<sup>5</sup> The Commission erred in deferring to the finding made in that docket.

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2010 Ark. 221, 384 S.W.3d 477, 485 (2010).

Arkansas Code Ann. section 23–18–513 is a very detail statute that requires, among other things, proof of service of the CECPN application on certain county and municipal officials and members of the General Assembly, the director or administrative head of specified Arkansas agencies, the offices of the Governor and the Attorney General, the head of any governmental agency charged with the duty of protecting the environment or of planning land use, and 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. It also requires that the CECPN application be made available for public inspection in the public libraries in each county where the facility is to be located. Public notice must also be given by publication in a newspaper having substantial circulation in the municipalities and counties where the facility is to be located.

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 27, 324 S.W.3d 697, 713 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

Without appreciating that a finding of need is a critical part of the proof SWEPCO must present to obtain a CECPN, the APSC denied appellants an opportunity to challenge SWEPCO's proof by binding them to a decision made in a docket to which they were not parties and were not given notice. The “public notice” that appellees contend was given—all APSC filings are available in real time on its website—is largely illusory. Posting filings on the APSC website does not come close to meeting the requirements of Ark.Code Ann. § 23–18–513. [footnote omitted] This procedure denied appellants that statutory right under the Utility Act, which mandates an “adequate opportunity for individuals, groups interested in energy and resource conservation and the protection of the environment, state and regional agencies, local governments, and other public bodies to participate in

timely fashion in decisions regarding the location, financing, construction, and operation of major facilities.” Ark.Code Ann. § 23–18–502(d). The significance of Entegra's petition to intervene demonstrates that the APSC was aware that evidence was available that could controvert SWEPCO's need for additional resources, but this evidence was not allowed and, therefore, was not considered by the APSC before it made its finding on SWEPCO's needs application. Certainly, it could not be developed by appellants, because they were not notified of the needs proceeding and, therefore, were not parties to it

*Hempstead Cnty. Hunting Club, Inc. v. Arkansas Pub. Serv. Comm'n*, 2009 Ark. App. 511, 26-27, 324 S.W.3d 697, 712-13 (2009) *aff'd as modified*, 2010 Ark. 221, 384 S.W.3d 477 (2010).

47. The notice published by SWEPCO was not posted in a newspaper having substantial circulation in the two affected counties.

48. For this reason, SWEPCO's Application is incomplete and in non-compliance with the controlling statute and should be denied.

## **H. General Conclusions of Law**

49. SWEPCO's Application is incomplete.

50. SWEPCO has not met its burden to demonstrate compliance with the controlling statutory provisions that require submission to the Commission for consideration all relevant environmental permits.

51. SWEPCO has not met its burden to demonstrate compliance with the controlling statutory provisions that require submission to the Commission of an adequate analysis of projected economic and financial impacts on the local affected communities.

52. SWEPCO has not met its burden to demonstrate compliance with the controlling statutory provisions that require submission to the Commission of an adequate analysis of costs of the project; d) submission of an adequate demonstration of need.

53. SWEPCO has not met its burden to demonstrate compliance with the controlling statutory provisions that require submission to the Commission of an adequate EIS.

54. SWEPCO has not met its burden to demonstrate compliance with the controlling statutory provisions that require notice by certified mail to affected landowners along Route 109 in Missouri.

55. SWEPCO has not met its burden to demonstrate compliance with the controlling statutory provisions that require Notice to the public via publication in a newspaper having substantial circulation in the affected counties.

56. SWEPCO's application to the Commission for the Certificate of environmental Compatibility and Need should be denied for the reasons stated herein.

Respectfully submitted,

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Counsel for STO

**CERTIFICATE OF SERVICE**

The undersigned certifies that on October 1, 2013, a true and correct copy of the foregoing STO Proposed Findings of Fact and Conclusions of Law was served on all parties of record by electronic mail.

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