

**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**

**FINDINGS OF FACT**  
**AND CONCLUSIONS OF LAW**

**FILED BY JEFFREY W DANOS**  
**ON BEHALF OF JEFFREY W DANOS**

**OCTOBER 1, 2013**

From the Application, and Exhibits thereto, including the EIS, the testimony of the witnesses of all Parties, the filings in this Docket, and all other matters of Record, I make the following findings of fact and conclusions of law:

1. **FACT:** SWEPCO is an Arkansas corporation and a public utility as defined by Ark. Code Ann. § 23-1-101, having its principal place of business at 428 Travis Street, Shreveport, Louisiana. SWEPCO is engaged in the business of generating, transmitting, and distributing electrical power and energy in the State, at retail and wholesale.

1. **CONCLUSION:** The Arkansas Public Service Commission (APSC) has jurisdiction and authority over SWEPCO's Application in this proceeding pursuant to Ark. Code Ann. § 23-18-501 *et seq.* Under this law, SWEPCO is required to file an Environmental Impact Statement (EIS), as a part of, or in support of, its CECPN Application. The Proposed Electrical Facilities which are the subject of this Application constitute a "major utility facility", giving the APSC jurisdiction over Application for a CECPN pursuant to Ark. Code Ann. § 23-18-501 *et seq.*, known as the *Utility Facility Environmental and Economic Protection Act*, and Rule 7.08 of the Commission's *Rules of Practice and Procedure (RPP)* which governs the authorization and placement of major utility facilities.

2. **FACT:** Arkansas Public Service Commission RPP Rule 3.03 Section (b)(3) requires that: "*The applicant for a Certificate of Environmental Compatibility and Public Need shall give notice as required by Ark. Code Ann. § 23-18-513, Rule 7.08 of these Rules, and such other notice as the Commission may require in each case, pursuant to Ark. Code Ann. § 23-18-513.*" Section (a) of Ark. Code Ann. § 23-18-513 lists the owners of record, government organizations and officials that must be provided with a copy of the CECPN, and states that each application **shall be accompanied** by proof

of service of a copy of the application. On April 24, 2013, SWEPCO filed an Affidavit of Notice<sup>1</sup> listing owners of record that were mailed notice of the filing of SWEPCO's application for CECPN on March 29, 2013. On April 24, 2013, SWEPCO also filed an additional Affidavit of Notice<sup>2</sup> indicating that an additional 40 owners of record which were "*inadvertently left off the list*" were subsequently mailed notice of the filing of their application for CECPN on April 22, 2013. This was followed on June 7, 2013 by yet another Affidavit of Notice<sup>3</sup> indicating that another "*possibly traversed*" owners of record was subsequently mailed notice of the filing of their application. SWEPCO admitted to the use of an incomplete GIS data set when identifying owners of record along the proposed routes.

3. **CONCLUSION:** The Affidavits of Notice for all owners of record did not "accompany" the application, as submitted on 04/03/2013. Instead, they were provided as supplements, subsequent to the application's filing. In addition, the owners of record that received late notice were unjustly disadvantaged by SWEPCO's use of an incomplete GIS data set, as they did not receive the same time as other impacted parties to review the application and EIS, raise legal funds, secure an attorney, and prepare testimony. Additionally, the procedural schedule was not modified to accommodate the impacts of the late notice on their delayed participation.

4. **FACT:** Ark. Code Ann. § 23-18-513 Section (d)(1) requires that "*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.*" The *Arkansas Democrat-Gazette*, selected by SWEPCO as the newspaper for public notice in this application, has only 10% circulation in Carroll County and 8% circulation in Madison County.

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1 [http://www.apscservices.info/pdf/13/13-041-u\\_13\\_1.pdf](http://www.apscservices.info/pdf/13/13-041-u_13_1.pdf)

2 [http://www.apscservices.info/pdf/13/13-041-u\\_14\\_1.pdf](http://www.apscservices.info/pdf/13/13-041-u_14_1.pdf)

3 [http://www.apscservices.info/pdf/13/13-041-U\\_120\\_1.pdf](http://www.apscservices.info/pdf/13/13-041-U_120_1.pdf)

4. **CONCLUSION:** The *Arkansas Democrat-Gazette* does not meet APSC public notice requirements, as it does not have substantial circulation in Carroll and Madison Counties, as required by Ark. Code Ann. § 23-18-513 Section (d)(1).

5. **FACT:** The Kings River is crossed by all of SWEPCO's proposed routes. As noted by the U.S. Department of the Army, all of SWEPCO's proposed routes also cross Corps of Engineers property.<sup>4</sup> Routes 33 and 109 cross the White River at the headwaters of Table Rock Lake. Proposed Route 108 crosses a portion of Beaver Lake, parallel to Highway 412. Proposed Routes 62, 86, and 91 cross Corps of Engineers property in the undisturbed "Indian Creek" area of Beaver Lake. Eminent domain is not applicable to federal property. The Corps of Engineers also notes, *"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."*<sup>5</sup>

5. **CONCLUSION:** SWEPCO's submitted EIS is inadequate, not compliant with NEPA standards as required by the Corps of Engineers, and their application for CECPN is incomplete.

6. **FACT:** Ark. Code Ann. § 23-3-501 Section (2) defines a "Navigable water crossing" to mean *"The crossing of a navigable waterway by a public service facility" or "That portion of the public service facility which is extended over, under, or across a navigable waterway, whether such a crossing is effected by suspending the public service facility from any overhead structure or by laying the public*

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4 [http://www.apscservices.info/ReceivedDocs/1528\\_7\\_07172013\\_3\\_1.pdf](http://www.apscservices.info/ReceivedDocs/1528_7_07172013_3_1.pdf)

5 [http://www.apscservices.info/ReceivedDocs/1528\\_7\\_07172013\\_3\\_1.pdf](http://www.apscservices.info/ReceivedDocs/1528_7_07172013_3_1.pdf)

*service facility upon or under the bed of the navigable waterway." A public service utility as defined by Ark. Code Ann. § 23-3-501 Section (4)(A) includes that of an "Electric power line". Ark. Code Ann. § 23-3-501 Section (3) defines a "Navigable Waterway" as "any navigable river, lake, or other body of water used, or susceptible of being used in its natural condition as highways for commerce, located wholly or partly within this state." The Code of Federal Regulations Title 33, Chapter II, § 329.6 states that in determining a waterbody's capability of use by the public for purposes of transportation of commerce that, "sufficient commerce may be shown by historical use of canoes, bateaux, or other frontier craft, as long as that type of boat was common or well-suited to the place and period. Similarly, the particular items of commerce may vary widely, depending again on the region and period. The goods involved might be grain, furs, or other commerce of the time. Logs are a common example; transportation of logs has been a substantial and well-recognized commercial use of many navigable waters of the United States. Note, however, that the mere presence of floating logs will not of itself make the river "navigable"; the logs must have been related to a commercial venture. Similarly, the presence of recreational craft may indicate that a waterbody is capable of bearing some forms of commerce, either presently, in the future, or at a past point in time."*

6. **CONCLUSION:** The Kings River, White River, Table Rock Lake, and Beaver Lake are each popular destinations for recreational watercraft, and are also historical sources of waterway commerce as defined by the Code of Federal Regulations. They therefore qualify as "navigable waterways" as defined by Ark. Code Ann. § 23-3-501 Section (3) and The Code of Federal Regulations Title 33, Chapter II, § 329.6.

7. **FACT:** Ark. Code Ann. § 23-3-503 section (a) states *"The Arkansas Public Service Commission shall have jurisdiction over all navigable water crossings."* Ark. Code Ann. § 23-3-503 section (b) states *"The commission shall have the power, authority, and responsibility, subject to the further provisions of this subchapter, to require that a navigable water crossing be constructed or operated in a manner consistent with the public safety and in such a manner as to cause no unlawful interference with some other paramount public or private use of the navigable waterway or its underlying bed at the point of the crossing."*

7. **CONCLUSION:** The APSC must not allow SWEPSCO to cause *"unlawful interference"* by constructing transmission lines that interfere with areas of the Kings River, Table Rock Lake, White River, and Beaver Lake used by recreational watercraft and other forms of water-based commerce related to tourism.

8. **FACT:** Ark. Code Ann. § 23-3-504 states that the APSC *"shall require any river crossing proprietor operating or proposing to operate a navigable water crossing to file a verified petition with the commission showing such data and specifications in relation thereto as the commission may reasonably prescribe. The petition may include the following: (1) The name of the river crossing proprietor and the nature of its organization and the nature of its business; (2) The river crossing proprietor's principal office and place of business; (3) A map, based upon a ground survey, showing the location of the public service facility at the point of the existing or proposed navigable water crossing, a drawing showing in some detail the specifications of the proposed crossing, and a profile plat showing, with respect to the mean surface level and the bed of the navigable waterway, the elevations of the existing or proposed public service facility; (4) A general description of the physical nature of the bed underlying the navigable waterway at the point of the existing or proposed navigable water crossing, if the crossing is to be constructed on the underlying bed; (5) A description of materials*

*and the type of construction employed or to be employed in effecting the navigable water crossing; (6) The size, capacity, and purpose of the public service facilities at the point of the navigable water crossing, together with operating conditions and safety factors; (7) A showing of approval or permissive authorization of the existing or proposed navigable water crossing by the Secretary of Defense or the Secretary of the Army of the United States or other federal agency having jurisdiction to consent to erections in navigable waterways; and (8) A prayer that the legality of the existing or proposed navigable water crossing be recognized pursuant to this subchapter."*

8. **CONCLUSION:** A verified petition showing such data and specifications, as required by Ark. Code Ann. § 23-3-504, has not been filed with the APSC. SWEPCO has also not provided an approved permit or permissive authorization from the Secretary of Defense or the Secretary of the Army of the United States for the proposed navigable water crossing, and SWEPCO's application is therefore incomplete.

9. **FACT:** SWEPCO's proposed alternate Route 109 passes through the state of Missouri, where SWEPCO is not an approved utility company. SWEPCO did not provide any notice to the potentially traversed property owners in Missouri, and did not post a public notice in any newspaper or library in Missouri to inform them that a route had been submitted for consideration that could possibly traverse their property. The APSC has no jurisdiction over land in Missouri.

9. **CONCLUSION:** The alternate Route 109 can not be considered by the APSC, as without Missouri Public Service Commission approval, it "dead-ends" at the Arkansas-Missouri border. In addition, the APSC cannot comprehensively compare the impacts and benefits of the proposed Route 109, in comparison to those routes that traverse only lands in Arkansas. SWEPCO would have to provide legal notice to the owners of record in Missouri, solicit their participation, and also receive approval from the Missouri Public Service Commission to make Route 109 a viable alternative.

**10. FACT:** By Order Number 7 in Docket 94-003-U, the APSC set forth the appropriate scope of inquiry that it should consider in granting a CECPN. This order states, "*it is not the function of a public utility regulatory agency to substitute or superimpose its judgment for that of a utility as the location of proposed new transmission facilities. If the route selected by the utility is not unreasonable and appears to have been chosen after consideration of the seven factors previously enumerated and any other factors which may be relevant in that specific case, then in the absence of special or very unusual circumstances, the governmental regulatory body reviewing the application for a Certificate of Public Convenience and Necessity should confine itself to only ordering minor deviations in the route*". SWEPCO's application in this matter would affect nearly 50 miles of the Arkansas Ozark Highlands, an area unique to the State. It has triggered a deluge of global public opposition unlike any other case before the APSC.

**10. CONCLUSION:** The application SWEPCO has submitted before this commission has resulted in "*special or very unusual circumstances*" and the Commission should therefore not limit itself to only ordering minor deviations in the route.

**11. FACT:** The first of the seven factors established by the APSC for evaluation is the "*cost of the facilities*." SWEPCO has not included the entire cost of this project in their estimate. The affects of karst features have not been factored into the cost estimates. SWEPCO cannot provide an accurate estimate without on-the-ground surveys, as admitted by SWEPCO witness Coffman during the hearing.<sup>6</sup> The cost effects of rugged terrain and steep slopes were not considered. In fact, constructability was removed entirely as a criteria during the route selection process of the EIS.<sup>7</sup>

**11. CONCLUSION:** The APSC has not been presented with a comprehensive cost analysis

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<sup>6</sup> Hearing p. 479, Line 5

<sup>7</sup> Hearing p. 773, Line 9



of the project and the comparative economic merits of the various proposed routes, and therefore cannot effectively evaluate the cost of the facilities and their future impact on ratepayers. If the "*cost of the facilities*" are truly a consideration, the comprehensive construction costs of the project need to be provided and assessed, and the less expensive technological alternatives presented by Dr. Merrill should not be dismissed by APSC staff and SWEPCO.

**12. FACT:** The second of the seven factors established by the APSC for evaluation is "*health and safety.*" SWEPCO has failed to address the concerns of citizens with regards to the health and safety of these lines. Regarding EMF concerns, SWEPCO's expert witness Mr. Hosek stated that the scientific studies that were presented by Intervenors, including an actual case-only study of interactions between DNA repair genes, had "no value" because they were all epidemiological studies. However, as he admitted during the hearing, he made this conclusion without even reading them.<sup>8</sup> The EIS presented by SWEPCO also failed to address health and safety concerns with regards to the application of herbicides, and the potential adverse effects of these lines on household pets and livestock.

**12. CONCLUSION:** SWEPCO has failed to fully address the health and safety concerns surrounding this project, and therefore the APSC cannot effectively evaluate them.

**13. FACT:** The third of the seven factors established by the APSC for evaluation is "*engineering and technical concerns.*" As previously stated, the possibility of karst features, rugged terrain, steep slopes, and constructability have not been factored into the route selection process. SWEPCO has stated on numerous occasions that they will simply "span" any problematic feature they discover while on site. This fails to consider the possibility of features that could exist from one end of

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<sup>8</sup> Hearing p. 1239, Line 9

a span to another. It also fails to consider the possibility of karst features at or near a change in the line's direction. If karst features are discovered, for example, near an angled change in the direction of the line, the karst feature cannot simply be "spanned" as has been suggested as the line would be running to a pole situated at the change in direction. That pole would have to be moved, if an unavoidable feature as discovered. This may require that the route be altered, or that another angle be added to maneuver around it, potentially affecting the route length. As SWEPCO witness Thornhill has stated during the hearing, *"longer lengths are going to be more difficult to construct"* and that *"Routes with more angles are going to be more difficult to construct."*<sup>9</sup>

**13. CONCLUSION:** The engineering technical concerns that can only be identified by in-depth, on-the-ground surveys have not been addressed by SWEPCO in their application, and therefore the APSC cannot effectively evaluate them.

**14. FACT:** The fourth of the seven factors established by the APSC for evaluation is *"ecological and environmental disruptions."* Because SWEPCO has failed to conduct on-the-ground surveys along each route, the comparative merits of their ecological and environmental disruptions to endangered species, karst features, local wildlife, and habitats has not been presented.

**14. CONCLUSION:** The APSC has not been presented with the details required to evaluate the *"ecological and environmental disruptions"* of the project, and its proposed alternate routes.

**15. FACT:** The fifth of the seven factors established by the APSC for evaluation is *"disruption to, or interference with, existing manmade property uses."* Without conducting an on-the-ground survey, and without contacting individual property owners to ascertain the existing use of their property, SWEPCO cannot claim to have a comprehensive understanding of how these properties are

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<sup>9</sup> Hearing p. 804, Line 12

being used.

15. **CONCLUSION:** Without a comprehensive understanding of the existing manmade use of the many traversed properties along the proposed routes, an evaluation of the projects potential disruptions cannot be made by the APSC.

16. **FACT:** The sixth of the seven factors established by the APSC for evaluation is "*disruption to, or interference with, planned manmade property uses.*" Again, without contacting the individual owners to ascertain the planned use of their property, SWEPCO cannot claim to have a comprehensive understanding of how these properties are to be used in the future. This is not strictly limited to the planned use of property owned by private individuals, but any planned manmade use. The National Park Service submitted a letter expressing concerns over the traversing of planned park additions at Pea Ridge National Military Park, for example. In previous docket # 01-208-U, it was determined that "*in order for interference with future development plans to constitute a compelling reason to alter the route of a proposed transmission facility, such plans for development must be definite and real, must actually exist in fact with evidence of some overt action by the property owner toward pursuing a development plan, and cannot simply be an unacted upon idea which may or may not materialize at some unidentifiable future point in time.*"<sup>10</sup> Clearly, the planned additions as identified in the NPS 2006 General Management Plan (GMP)<sup>11</sup> for a possible boundary adjustment constitute a "plan for development" that is definite and real.

16. **CONCLUSION:** SWEPCO has failed to address the "*disruption to, or interference with, planned manmade property uses*", and therefore the APSC cannot evaluate this factor when considering the application.

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10 [http://www.apscservices.info/pdf/01/01-208-u\\_9\\_1.pdf](http://www.apscservices.info/pdf/01/01-208-u_9_1.pdf) Page 6, Paragraph 2

11 [http://www.apscservices.info/ReceivedDocs/1528\\_7\\_08272013\\_48\\_1.pdf](http://www.apscservices.info/ReceivedDocs/1528_7_08272013_48_1.pdf)

17. **FACT:** The last of the seven factors established by the APSC for evaluation is *"aesthetic displeasure."* SWEPCO has failed to take into account the aesthetic displeasure of the different routes, and no study was conducted to assess their potential affects on areas reliant on tourism.<sup>12</sup> The aesthetic displeasure of the preferred line's proximity to Pea Ridge National Military Park was also not considered.<sup>13</sup> Impacts to the Trail of Tears National Historic Trail were also missing in the EIS, and dismissed by SWEPCO witnesses during the hearing because, *"It's already been adversely affected considerably."*<sup>14</sup> Ark. Code Ann. § 13-14-104 Section (b)(3) and (4) designates Arkansas Heritage Trails to include *"American Indian removal routes designated by the Department of Parks and Tourism, including without limitation land and water routes for Cherokee, Choctaw, Muscogee (Creek), Chickasaw, and Seminole tribes; and Civil War troop movement routes designated by the department."* Ark. Code Ann. § 13-14-103 states that *"The purpose of a heritage trail is the identification and protection of the historic route and its historic remnants and artifacts for public use and enjoyment."* Sections (2)(A) and (B) do not preclude Heritage Trails that have been impeded by some development. In fact, they state that a heritage Trail shall *"Accurately follow the historic route with some deviations as necessary to avoid difficult routing through subsequent development or to enhance the public's enjoyment of the heritage trail."* **[emphasis added]** and that *"Trail segments no longer possible to travel by trail due to subsequent development as motorized transportation routes may be designated and marked as segments that link to the historic trail."*

17. **CONCLUSION:** SWEPCO's EIS and application has failed to adequately assess the potential *"aesthetic displeasure"* of their application, and as such the APSC cannot evaluate this factor when considering the application.

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12 Hearing p. 765, Line 10

13 [http://www.apscservices.info/ReceivedDocs/1528\\_7\\_08272013\\_48\\_1.pdf](http://www.apscservices.info/ReceivedDocs/1528_7_08272013_48_1.pdf) Page 2, Paragraph 3

14 Hearing p. 1005, Line 4

18. **FACT:** Ark. Code Ann. § 23-18-511 Section (6) requires that an application include *"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."* APSC Staff Witness Cotten confirmed during the hearing that no such analysis for any of the local communities had been provided by the applicant, and only for *"for the project as a whole, not some specific area or specific community that the project crosses"*<sup>15 16</sup>

18. **CONCLUSION:** The EIS and application presented by SWEPCO included statements, not analysis, on the general economic benefits of the project (purchase of construction material, lodging, gasoline) on the general study area of 704,037 acres, but did not address the potential economic impacts (both positive and negative) on any of the local communities within the study area. SWEPCO's EIS and application are incomplete, and the APSC does not have the required information to evaluate whether the project meets the factors required for approval.

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15 Hearing p. 2464, Line 12

16 Hearing p. 2468, Line 12

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I do hereby certify that I have on this 1st day of October, 2013, served a copy of the foregoing instrument on all persons identified in the Commission's official service list maintained in this proceeding by electronic mail.

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