

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' RESPONSE TO SWEPCO'S LIMITED PETITION FOR REHEARING

Intervenor Petitioner not-for-profit corporation Save the Ozarks (STO) hereby, by counsel, respectfully submits its response in opposition to SWEPCO's Petition for Rehearing in the above captioned matter. STO opposes SWEPCO's "limited" petition for rehearing and for issuance of a CECPN for Route 33 for the reasons stated below.

1. SWEPCO's Claims Are Incorrect that There Was Not a Sufficient Finding that Route 33 was Unreasonable and that a CECPN Should Have Been Granted to SWEPCO for this Route.

Order Nos. 32 and 33 are **not sufficient to find Route 33 unreasonable because although** they include a summary of various concerns expressed by some Intervenor, there is no sufficient finding of fact by the PO that such concerns are factually accurate or that those concerns cannot be ameliorated by minor modifications. Absent specific findings indicating such, it **cannot be** said that Route 33 is unreasonable. **And, where the route** proposed by the utility is "**not unreasonable,**" it should be approved.

SWEPCO Petition at 4 (emphasis by SWEPCO).

However, it is clear from the Commission's reasoning in Orders 32 and 33, that the unreasonableness of Route 33 is linked to its aesthetic (and resulting economic) impacts, which are based on its greater residential proximity and more crossings of major roads.

As such, Route 109 has a lower residential proximity and visibility, and crosses fewer parcels and major roads. Although Route 109 extends into Missouri and will require SWEPCO to obtain additional regulatory approvals from the appropriate Missouri agency, it has a lesser impact on residential areas and a lesser aesthetic impact. After weighing the evidence presented in this case and in consideration of the above listed factors, I find Routes 33 and 108 are unreasonable, and Route 109 is the only reasonable route.

Order 33, p. 1-2 (emphasis added).

The Commission rightly put a greater weight on the factor of aesthetic displeasure when issuing its CECPN for Route 109 than did SWEPCO in its decision to present Route 33 as its preferred route. Route 109 causes the least aesthetic displeasure, as observed by the ALJ. Order 32, p. 101. The Commission noted that Route 109 has 104 residences within 1000 feet with an unobstructed view of the powerline, whereas Route 33 has 171 residences with an unobstructed view. Order 32, p. 19.

SWEPCO had come to the conclusion that only minimal, if any, effects to the aesthetics of the area are expected from this proposed powerline, Order 32, p. 34, which has a right of way of 150 feet and poles 150 feet high. SWEPCO's assertion of minimal, if any aesthetic impacts, however is contradicted by thousands of written and oral public comments, by statements given by STO and other intervenors and by concerns expressed by federal and state agencies, cities, and political representatives, all pointing to the aesthetic impacts of the project, as has been documented by the ALJ throughout Order 32. (see especially p. 7-15 and p. 53-76). When it comes to public comment, the Commission states that it received an "unusually large number of written public comments and possibly the largest number ever received in a siting docket," Order 32, p. 7-8, and then adds:

Almost all of the comments, whether written or oral, opposed the location of the proposed line on the basis that the facilities would adversely impact the economic value and the use and enjoyment of their respective property, present health concerns or for aesthetic reasons.

Order 32, p. 8-9.

As can be seen from the statements of intervenors summarized in Order 32, p. 53-76, it is obvious that the economic value, the use and enjoyment of their properties, are tightly linked to aesthetics. The same is true for the tourism industry in the area. STO points out that the Commission, in deciding to issue a CECPN for Route 109 and declaring Route 33 unreasonable, showed that it was willing to respect public input and concern at least insofar as it acknowledges the validity of the aesthetic concerns by giving more weight to “aesthetic displeasure” than SWEPCO and choosing the route with the least aesthetic displeasure, which is Route 109. Order 32, p. 19, 101, 103.

Therefore, STO maintains that Order 32 and 33 include more than sufficient evidence to justify the Commission’s decision that Route 33 is unreasonable.

2. SWEPCO’s Argument That It Is Not The Function Of A Public Utility Regulatory Agency To Substitute Or Superimpose Its Judgment For That Of A Utility As To The Location Of Proposed New Transmission Facilities Is Without Merit

SWEPCO refers to APSC Docket 94-003-U, Order No. 7, page 8, *In re Southwestern Electric Power Company*, 155 P.U.R.4th 316 (1994):

It is not the function of a public utility regulatory agency to substitute or superimpose its judgment for that of a utility as to 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, p. 5.

SWEPCO argues that Route 33 is preferred by SWEPCO, by its consultant Burns and McDonnell (B&M), and ASPC General Staff Clark Cotton, based on ASPC’s seven routing

criteria. SWEPCO, p. 5-6. These routing criteria include costs of the facility, health and safety, engineering and technical concerns, ecological/environmental disruption, disruption to or interference with existing manmade property uses, disruption to or interference with planned manmade property uses; and aesthetic displeasure. Order 32, p. 102. SWEPCO seems to claim that the Commission has not met the requirement of showing special or very unusual circumstances that would allow the Commission to reject the route preferred by a utility.

However, the Commission asserts:

These seven factors have no particular rank or order of priority and are not all inclusive. In *Re Arkansas Power & Light Company*, 118 PUAR 4th 156 (1990). The guiding issue that governs in such cases is whether the route proposed best serves the public interest and results in the least amount of private harm. In *Re Arkansas Electric Cooperative Corporation*, 129 PUR 4th 201 (1991).

This Commission does not view its role in siting cases as that of a super planning commission for the utilities of the State and does not undertake to initiate route selection for utilities. It is only in unusual circumstances that the Commission will order a major change in the route of a transmission line from the route proposed and preferred by the utility. However, this is clearly within the Commission's authority, and the Commission has a duty to "...render a decision...either granting or denying the application as filed or granting it upon such terms, conditions, or modifications of the location ...of the major utility facility as the [C]ommission may deem appropriate." See Ark. Code Ann. § 23- 18-519(a).

Order 32, p. 101-102.

STO also maintains that the Commission was ultimately presented with three proposed routes, all chosen by SWEPCO, and the Commission rejected the preferred route, but the Commission approved, without change, one of those routes, Route 109. It did so in full compliance with the law cited by SWEPCO on page 7, and by Order 32 on p. 101-102 of its Petition for Limited Rehearing in support of its plea for approval to modify Route 33. As SWEPCO acknowledges, "Arkansas Code Annotated § 23-18-519 (a)(1) permits the

Commission to grant a CECPN upon such modifications of the location as the Commission may deem appropriate."

As shown above under, much evidence is summarized in Order 32 pointing to concerns about aesthetic and related economic impacts from the proposed powerline, which the Commission was made aware of through an unprecedented number of written public comments, as well as through testimony given by intervenors, and statements by federal and state agencies. STO maintains that this overwhelming expression of concern about a massive project (150 feet high poles and a 150 right of way) constitutes "special and unusual circumstances" for declaring Route 33 as unreasonable, since it has greater aesthetic impacts than the route preferred by SWEPCO, as established in Order 32, p. 19, 101, 103.

3. SWEPCO Misrepresents the Army Corps of Engineers' Statement about Route 33

SWEPCO asserts: "And, the U.S. Army Corps of Engineers—the only federal agency from which a permit would be required—had no objection to Route 33." SWEPCO p. 6.

This is a misrepresentation. What the letter by the U.S. Army Corps of Engineers actually said was that "(a)ll of the proposed routes cross Corp of Engineers property. Our preference is that impacts to Corp property be avoided..." "The Corps of Engineers prefers Routes 33, 108, or 109 as opposed to the other alternate routes." It also stated the following: "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, WPA 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." (US ACOE letter from 7-10-2013)

4. STO Response To SWEPCO Proposing Modifications That Would Make Route 33 Reasonable Via Variance Granted Or An Amendment To The Route.

SWEPCO states that "(a)ny concerns with Route 33 can be resolved via "ordering minor deviations in the route." SWEPCO, p. 7

Specifically, SWEPCO asks the Commission to consider a variance that would place Route 33 further from the Garfield Elementary School. SWEPCO, p. 7. Similarly, SWEPCO proposes that the concerns about Gateway City Park could be resolved by moving the line within a 500 foot variance on properties outside the park. SWEPCO, p. 8. Further, SWEPCO has explored a modification of Route 33 that would allow SWEPCO to bypass the expansion areas contemplated by the National Park Service for Pea Ridge National Military Park, and requests the opportunity to present evidence related to that modification to the Commission. SWEPCO p. 9-10. SWEPCO claims no evidence was presented concerning this possible modified configuration because the specific concerns expressed by the NPS did not arise until receipt of the public comment letter, mid-hearing on August 27, 2013. SWEPCO, p. 10.

However, STO maintains that SWEPCO should not be given the opportunity for offering these modifications on several grounds:

a. Contrary to SWEPCO's assertion that the specific concerns by the NPS related to Route 33 did not arise until mid-hearing on August 27, 2013, most if not all of these same concerns were addressed by the NPS in its letter to the APSC of May 14, 2013. In addition, the Department of Arkansas Heritage also expressed concern about the proximity of Route 33 to the Pea Ridge Military Park in its letter of April 15, 2013, to Brian Johnson of American Electric Power (AEP).

b. By moving the line, both within and outside the variance, different properties than before will be affected, as SWEPCO itself admits. SWEPCO p. 7-11.

c. Some of these landowners have yet to be notified of the existence and nature of SWEPCO's project, while others may have been notified before, and did not choose to intervene at the time, but would have done so if they had been presented with the modified routes. Even if these landowners are notified immediately, they cannot have full participation in the Commission's decision-making process, as is their right under state law and the Fourteenth Amendment of the Constitution, because the Commission is now in the final stage of its consideration of this project, and property owners will not have opportunity to challenge the project for example based on failure to demonstrate need. 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). 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. (Emphasis added).

- d. SWEPCO proposes two new segments linking Route 33 to Route 86/91 -- one to the west of the Pea Ridge Park and one on the east. Contrary to SWEPCO's assertion that these two new segments are "minor deviations in the route," they are substantial in nature. The proposed new segments have an estimated combined length of almost 3 miles and will traverse the properties of many landowners.
- e. SWEPCO claims regarding the National Park Service concerns about impacts of Route 33 on Pea Ridge that "(t)he NPS filed no written testimony and did not otherwise participate in the APSC proceedings. Consequently, SWEPCO had no opportunity to cross-examine witnesses or point out a number of facts which undermine the Park's assertions in the public comment letter." SWEPCO, p. 9. Thus, SWEPCO argues that it has "good cause for having omitted the evidence of utilizing a portion of Segment R and the new, short segments to move Route 33 further south of the Pea Ridge National Military Park." SWEPCO, p. 11. But as has been shown above, NPS already addressed its concerns in its letter to the APSC of May 14, 2013. Therefore, SWEPCO should not now be given opportunity to provide evidence it could have provided much earlier in the proceedings.
- f. SWEPCO outlines a plan to skirt the concerning area of the National Park with a proposed route modification on page 10-11. That could have been done back when the problems first arose in April and May, 2013. Instead SWEPCO now proposes to offer new evidence supporting these new routes through properties that have not received proper notice, and that

have not been subjected to review by state or federal agencies, nor have cultural and environmental implications been studied.

g. SWEPCO states that the Rogers School District did not file to intervene or comment regarding Garfield Elementary School. SWEPCO, p. 8. STO points out that SWEPCO responded to a data request by the APSC by providing a list of properties traversed by the six routes initially proposed, as well as the names and addresses of the property owners who had been sent notification. The Rogers School District does not appear on the list, and SWEPCO has provided no record of having notified the District. SWEPCO states that segment R, which would be part of the Pea Ridge modification, “ will traverse the southernmost section of Dunigan's farm and run parallel and south of an existing 69kV transmission line that presently traverses Dunigan's farm,” and then adds that this portion of Dunigan's farm is “already considerably impacted by modern intrusions.” SWEPCO p. 12-13.

SWEPCO's contention that already existing modern intrusions on this historic site are justification for further, even more egregious intrusions suggests a guiding principle of ‘one bad turn deserves another.’ SWEPCO also ignores the need to identify specific historic and archeological sites on Dunigan's farm as well as all other properties traversed by the proposed new segments and to assess and minimize cumulative impacts. Consequently, STO opposes the opportunity for SWEPCO to present its modifications and the issuance of a CECPN for a modified Route 33.

5. STO Response To SWEPCO’s Arguments Related To HY 62 Through Garfield’s New Future Business District

SWEPCO is also asking for reconsideration of Order 32 related to Route 33 along the future, widened Highway 62 through Garfield’s new future business district. SWEPCO states

that Route 33 would run parallel to the highway, about 200-220 feet north of it, and states that “(b)businesses will certainly be able to operate along the south side of the highway and the transmission line will traverse land behind those businesses wishing to locate along the north side of the highway. It is noteworthy that at this time, neither the highway nor any businesses exist.” SWEPCO , p. 8. In discussing Garfield’ s Highway 62 expansion, SWEPCO claims that transmission lines are commonly compatible with commercial business districts. SWEPCO, p. 8.

STO states that as shown in the attached map from the Arkansas Highway and Transportation Department, widening of Highway 62 has been completed to the western side of Avoca and is now progressing rapidly along the 7 miles to Garfield. There is no question that the widened highway, with a total width of 70-80 feet, will have an enormous impact on the aesthetics of this tiny town of 502 people. Due to its immediate proximity to the Pea Ridge National Military Park, Garfield derives considerable economic benefit from the many tourists who visit the park each year. The cumulative effect of the 70-80-foot wide highway and a 150-foot right-of-way with 150-foot towers running through the middle of the town, parallel to and within 200 feet of the highway, will complete the destruction of any remaining small-town aesthetic that Garfield has. The likelihood that investors will be willing to construct buildings and operate businesses within the 200-foot zone between highway and transmission line seems at best remote. See Arkansas Highway & Transportation Department map.

SWEPCO further states related to HY 62:

And second, Order No. 32 is in conflict with APSC precedent by suggesting that routing transmission lines along a highway is undesirable. SWEPCO deliberately routed the line so that it would follow this highway corridor. In previous Dockets, the APSC has expressed the opinion that routing along highways—or planned highways as in this case—is desirable as it minimizes the impact to surrounding properties. For Order No. 32 to suggest the opposite leaves SWEPCO and other utilities guessing as to which highways should be followed and where utilities should strike out on new

paths. Order Nos. 32 and 33 should be reconsidered in order to give clarity on this important routing question.

SWEPCO Petition, p. 9.

While it may be correct that routing a power line alongside a highway was preferred in previous dockets, again SWEPCO fails to take into consideration the enormous size of the poles and the width of the right of way claimed by this 345 kV line, and its probable disruptive visual effect on roads considered scenic and travelled by tourists. STO points out that SWEPCO cites a case Docket 13-029-U, Order No. 4, involving a 25-mile long, 230 kV transmission line in Chicot and Desha Counties. These counties in the southeast corner of Arkansas are flat, delta farmland where the already sparse population is declining, unemployment is endemic and is perhaps the most poverty-stricken area of Arkansas with a per capita income that is far below the national average. In such an area, visual impacts of transmission lines are inescapable and there is no tourism-based economy to suffer from the effects of visual pollution by an extra high voltage transmission line.

6. STO Response To SWEPCO's Statement That It Agrees With The PO's Determination That This Transmission Line Is Needed And Believes That Only A Limited Reconsideration Of The Route Path Is Needed.

STO does not agree with the PO's determination that the 345 kV transmission line is needed. The reliability problem that SWEPCO presented to the APSC as the basis of need for this transmission line and associated new substation no longer exists. This fact was established in testimony by both the expert witness for the project's opponent, Save the Ozarks, and the expert witness for the project's proponent, the Southwest Power Pool (SPP). Indeed, even at the time when the reliability problem was thought to exist, SWEPCO itself saw no need for a new 345 kV transmission line and proposed to SPP that a 161 kV line be constructed to resolve the problem.

This less costly, less environmentally and economically damaging alternative was not disclosed to the APSC and the public in SWEPCO's application or its Environmental Impact Statement.

STO's legal argument that need for this powerline has not been established, is fully developed in STO's Petition for Rehearing, p.23-33.

STO opposes a rehearing or issuance of CECPN for Route 33 on the basis that no need for it has been established.

7. SWEPCO Has Not Obtained Or Submitted To The Commission A Number Of Environmental Permits Required For Route 33, And Does Not Plan To Do So Until After The Commission's Decision On Whether To Issue The Certificate.

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

It is undisputed that SWEPCO has not obtained or submitted to the Commission a number of environmental permits required for a new major transmission line, and does not plan to do so until after the Commission's decision on whether to issue the Certificate. TR 8/27/2013, Thornhill, p. 755-56,757, 839-41, 847-49, and see, p. 873-74; TR 8/30/2013, Cotten, p. 2426, 2376, 2377, 2376-77. According to the 7-10-2013 letter by the Corps of Engineers to APSC, Route 33 will cross the White River, and "(a) ny impacts to Corps of Engineers property associated with crossing Beaver Lake, Table Rock Lake, or the White River will require ... a Regulatory Section 10 Permit..."

SWEPCO has 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.

Please note that STO's legal argument related to permits was more fully developed in STO's Petition for Rehearing, p. 2-8.

For these reasons, the Commission's decision granting SWEPCO a CECPN for Route 33, and any other routes, is contrary to law.

8. Arkansas Law Requires SWEPCO to Prepare and Submit to the Commission an EIS with Its Application that Meets Specific Statutory Requirements Including an Analysis of Alternatives, but SWEPCO's EIS Ignored and Omitted Analysis of Key Alternatives to Its Preferred Route 33 Including the 161kV Alternative that SWEPCO Itself Privately Proposed to SPP

SWEPCO is required by statute to provide an application for the certificate that includes an EIS which adequately addresses not only the environmental impacts of the project but alternatives to the Project as well, more specifically "(a) description of the comparative merits and detriments of each alternate location considered for the major utility facility;" and "(a) statement of the reasons why the proposed location and production process were selected for the major utility facility;.."Arkansas Code § 23-18-511.

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.

The record shows no meaningful consideration by SPP or SWEPCO of less costly and less intrusive alternatives to the proposed new 345kV line, assuming that there was a need. The "alternatives" Mr. Nickell referred to were generally alternatives in addition to the proposed new facilities rather than alternatives to them. For example, see Nickell Cross Examination, p. 1759, lines 19-25.

Dr. Merrill however proposed several reasonable less costly alternatives having less adverse environmental and economic impacts which SWEPCO had not addressed in its Application or EIS.

Nickell in his testimony did refer to an undefined 161-kV solution proposed by SWEPCO to solve the problem identified in 2006-2007. Nowhere in the record is there a comparative analysis of SPP/SWEPCO's currently proposed 345-kV facilities versus SWEPCO's original 161-kV proposal. The EIS also on its face fails to address the clearly 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. Dr. Merrill testifies that his alternative solutions resolve this prior identified need with dramatically less environmental impacts and at dramatically lower cost. There is nothing in the EIS or hearing record that provides a reasonable counter analysis.

SWEPCO asserts that the Route 33 alternative was identified as the preferred alternative because it had the least adverse impacts and cost, but came to that conclusion without considering the SWEPCO 161 kV alternative or any other alternative approaches as proposed by Dr. Merrill. Therefore, the Commission should not issue a CECPN for Route 33. Please note that STO's petition for Rehearing includes a thorough legal analysis of this issue on p. 33-38.

9. Arkansas Law Requires SWEPCO to Prepare and Submit to the Commission an Adequate Analysis of the Environmental Impacts of the Proposed Major New Utility Facility but the Record is Devoid of Any Evidence Concerning Significant Adverse Impacts from the Proposed Project that Are Certain to Occur Including Adverse Impacts on Karst Environments and Ecosystems

SWEPCO is required by statute to provide an application for the certificate that includes an EIS which adequately addresses the environmental impacts as well as alternatives. Arkansas Code § 23-18-511

The record reflects that data on the location and nature of karst features, environments, and ecosystems impacted by the Project will not be collected until after the Commission decides the issue of the Certificate and the Project is being constructed on the ground. TR 08/27/13,

Coffman, pp. 468-9, TR 08/27/13, Thornhill, pp. 824-5. This omission precluded the EIS from adequately addressing impacts from the project on cave dwelling species including the federally protected and endangered Indiana Bat. Significant adverse impacts on karst ecosystems from the project are anticipated and should have been analyzed. *See* Direct and Surrebuttal testimony of STO Expert Thomas Aley, 13-041-U Doc. 183 and Doc. 307.

An obvious omission in the EIS was pointed out by a federal agency. SWEPCO's EIS fails to address impacts of Route 33 on Army Corps properties including impacts on lakes and rivers. *See* Exhibit 5 to Costner Surrebutal Testimony (July 10, 2013 Letter from Army Corps to the Commission). "The SWEPCO Environmental Impact Statement dated March 2013 associated with this project does not fully address all potential impacts to Corps of Engineers property." *Id.* The letter also noted 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.

In this case, it is apparent from the record that there was a complete failure by SWEPCO to address fundamentally important adverse impacts in the statutorily required EIS and there is no evidence in the record to support the Commission's decision that SWEPCO complied with the Arkansas law requirements to assess such impacts. Therefore, the Commission should not issue a CECPN for Route 33.

Please note that STO has provided a more in depth legal analysis of this issue in it Request for Rehearing, p. 41-45.

10. Arkansas Law Requires that the EIS Submitted with an Application for a Certificate of Environmental Compatibility and Public Need Assess Adverse Impacts from a Proposed New Utility Project on Parks, Recreation Areas, and Historic Sites. But the

Record Shows that Federal and State Agencies Had Unresolved and Unaddressed Concerns Regarding Such Adverse Impacts for Route 33.

SWEPCO is required by statute to provide an application for the certificate along with an EIS which adequately addresses the environmental impacts of the project including adverse impacts on parks, recreation areas, and historic sites. *See* Arkansas Code § 23-18-511.

However, here the SWEPCO EIS and application have obvious defects and omissions in failing to address impacts by Route 33 (which crosses the White River) on Army Corps properties including impacts on lakes and rivers. *See* US Corps of Engineers letter to APSC from 7-10-2013.

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 from Route 33 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. *See* letter from 7-10-2013. 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.

State agencies also expressed similar concerns regarding impacts to parks, recreation areas, and historic sites. *See*, Hearing Exhibits 3 and 4. Contrary to SWEPCO’s assertions and the apparent conclusion of the Commission in its Order, many of these agency concerns have yet to be resolved. For example:

The Arkansas Natural Heritage Commission of DAH ("ANHC") expressed its concern that the northern routes, including Routes 33 and 109, would result in clearing of significant amounts of forest and woodland habitat. This would result in forest fragmentation which can promote the introduction and expansion of exotic invasive plants and animals which can out-compete native species. ANHC also expressed concern that the use of herbicides to maintain the right-of-way would be detrimental to glade flora and that clearing for the right-of-way will cause erosion and that these issues will be more significant in the northern routes. Given these concerns, ANHC stated it preferred Route 108.

Order 32, p. 12.

AHPP of the Department of Arkansas Heritage indicated that the cultural resources background research was inadequate; that the EIS ignores all but direct impacts; that the EIS does not address the amount of forest clearing and resulting forest fragmentation; and that it disagreed with the number of archeological sites which would be impacted. AHPP listed each route and specifically listed its concerns for that route. It concluded that Route 109 would have the least adverse impact on historic properties and strongly recommended against the preferred Route 33.

Order 32, p. 13.

Please note that there is a more fully developed legal analysis of this issue included in STO's Rehearing Petition, p. 8-10.

For these reasons, a Commission decision granting SWEPCO a CECPN for Route 33 would be contrary to law.

11. Route 33 Must be rejected for Other Reasons

SWEPCO's requested rehearing on Route 33 and the issuance of a CECPN for that route is without merit for all the reasons more thoroughly developed in STO's Petition for Rehearing of March 18, 2014, opposing the issuance of a CECPN for Route 109.

a. Arkansas Law Requires SWEPCO to Provide Public Notice of Its Application via Publication in a Newspaper with Substantial Circulation in the Affected Counties.

The notice published by SWEPCO in a newspaper was not in a newspaper having substantial circulation in the affected counties, as Arkansas Code requires. *See* Arkansas Code §

23-18-513(d). 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. SWEPCO admits that its public newspaper notice in the Arkansas Democrat-Gazette had the potential to reach only 10-20% of the homes in Carroll and Madison counties. 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 the Commission's approval of SWEPCO's request for a CECPN for Route 33, or any Route, is contrary to law. Please note that the legal argument related to this issue was more fully developed in STO's Petition for rehearing, p. 13-17.

b. Arkansas Law Requires SWEPCO to Prepare and Submit to the Commission an Analysis of the Projected Economic and Financial Impact on the Local Communities in which the Major Utility Facility Is to Be Located

The statutory requirements that economic impacts be addressed are not limited to positive or favorable economic impacts. However, no such economic analysis was conducted or presented to the Commission with the SWEPCO Application or EIS. 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 property values, tourism, the arts, or other businesses in local communities such as Eureka Springs. Intervenors have offered considerable evidence, both expert and fact testimony as well as documentary evidence, to support their conclusion that the proposed SWEPCO transmission line will cause significant adverse economic impacts on the local communities through which the lines will pass including Eureka Springs, in particular through significant adverse impacts on tourism. *See* 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. Clearly 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.

Non-compliance by SWEPCO with Arkansas statutes is apparent due to the complete failure by SWEPCO to perform any analysis of the adverse economic impacts of the project on the local communities affected such as Eureka Springs. For these reasons, SWEPCO's Application and EIS are incomplete and in non-compliance with the controlling statute and the Commission's decision approving a CECPN for SWEPCO is arbitrary and unreasonable.

Please note that the legal argument related to this issue is more fully developed in STO's petition for rehearing, p. 20-22.

c. Arkansas Law Requires SWEPCO to Prepare and Submit to the Commission an Adequate Analysis of the Costs of the Proposed Major New Utility Facility but the Record is Devoid of Any Evidence Concerning the Major Cost Factors of Constructability Generally and Construction in Karst Environments Specifically

Costs analysis is a key factor in the statutorily required determination of whether the environmental impacts from a proposed utility project are acceptable. Ark. Code § 23-18-502 ; Arkansas Code § 23-18-519(b). SWEPCO's expert admitted that 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. Geotechnical surveys have not been done for the project. TR 08/29/13 Johnson p.1424; TR 08/30/13 Cotten p.2390-91. No cost assessment for construction in karst has been prepared. TR 8/26/2013, Hassink, p. 334. No comparative cost assessment was done that would support the conclusion that the proposed project was the most cost effective for rate payers, and 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. 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. Thornhill admitted that total cost of the project was not a criterion 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. 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 (such as Route 109, the Route approved by the Commission). TR 8/28/2013, Jackson, p. 1160-61. Costs were not part of the criteria used to evaluate and rate alternative routes. TR 8/28/2013, Thornhill, p. 955. Johnson testified that he did not task Burns & McDonnell to include a cost analysis in the EIS. TR 8/28/2013 Johnson, p. 1380.

In this case, it is apparent that there was a complete failure by SWEPCO to perform any comparative analysis of the costs of the project or even a complete cost assessment of the SWEPCO preferred Route 33. For these reasons, the Commission should not issue a CECPN for Route 33. Please note that the legal argument related to this issue is more fully developed in STO's Petition for Rehearing, p. 38-41.

12. **STO Response to SWEPCO Requests for Clarification**

SWEPCO also includes several requests for clarification regarding Order 32 in its petition for rehearing. SWEPCO proposes alternative wording in several instances related to who can initiate route modifications within a 500 foot variance, Paragraph (d) , SWEPCO p. 15-16, regarding right-of-way clearing and maintenance, Paragraph (h), SWEPCO, p. 16-17, herbicide use and landowner right-of-way maintenance SWEPCO , Paragraph (j), p. 17-19, and notice to beekeepers Paragraph (k), SWEPCO p. 19-20. ASPC's General Staff responded to

these requests for clarification and proposed additional modifications. Staff Response, 13-041-u-432.

B. Right-of-way clearing and maintenance

SWEPCO asks for clarification of paragraph (h) in Order 32 and first expresses concerns about the phrase "leaving as much right-of-way as possible uncleared" as follows:

- "Testimony clearly indicated that all woody vegetation would be cleared from the right-of-way except possibly in areas where the transmission line spans from high-point to high-point sufficient to provide the required clearances without the removal of mature trees. ³¹

SWEPCO ends by calling for completely replacing paragraph (h) with the following text:

- "(h) SWEPCO shall mitigate the effects of the environmental impacts arising from right-of-way clearing and maintenance according to NERC, FERC, AEP and ADEQ standards and the right-of-way shall be maintained in a safe manner."

SWEPCO offers no credible support for its opposition to the phrase in question or for changing the text of paragraph (h), although support for both the phrase and paragraph as written can be found in testimony cited by SWEPCO, in FERC reports and documents, and in the NERC Reliability Standard that addresses vegetation management covering tree trimming on rights-of-way, FAC-003-2.

Paragraph (h) should be retained as written.

To support SWEPCO's objection to the phrase, "leaving as much right-of-way as possible uncleared," SWEPCO cited rebuttal and oral testimony by Brian Johnson. However, Mr. Johnson's rebuttal testimony, does not support SWEPCO's contention because Mr. Johnson does not address the clearing of rights-of-way.¹ Similarly, Mr. Johnson's oral testimony provides no support for SWEPCO's contention and instead, provides support for paragraph (h) as written. Asked if it is "possible that even in places where there are not valleys that if the trees are low-growing enough, they could be left intact in the right-of-way," Mr. Johnson replied, "It's possible, but I don't know that that is SWEPCO's policy." Asked if NERC's vegetation policy provides the opportunity "to allow for some woody vegetation under power lines as long as the clearance allowances are met," Mr. Johnson replied, "My understanding as you asked would be that provided the vegetation does not create a clearance issue and the utility is comfortable that it would not create a clearance issue or result in a potential outage situation." ²

Further support for maintaining paragraph (h) as written is provided by FERC. FERC offers the following information with respect to the clearing of rights-of-way:²

- "In order to prevent power outages, federally approved reliability standards require utilities to manage vegetation growth along the path of their larger power transmission lines to prevent trees or other vegetation from contacting the power lines. However, **federally approved reliability standards do not mandate or prohibit clear-cutting or any other particular method of vegetation management ...**" (Emphasis added)

FERC offers the following information regarding the role of easement agreements in determining how a utility right-of-way is managed and maintained: ³

- Each utility develops and implements its own tree trimming or vegetation management plan. Each plan must conform to requirements of state or local authorities and **any applicable right-of-way or easement agreement with the property owner.** (Emphasis added)

FERC also notes that the rights of landowners with respect to clear-cutting, tree trimming or other vegetation management on rights-of-way are usually formalized in easement agreements. ³

FERC designated NERC as the Electric Reliability Organization with the responsibility to develop and enforce standards to ensure the reliability of the Bulk Power System, including the Reliability Standard that addresses vegetation management covering tree trimming on rights-of-way, FAC-003-2.⁴ FAC-003-2 notes, "There are many acceptable approaches to manage vegetation and avoid Sustained Outages ..." and does not prescribe the methods of vegetation management that utilities must use but presents "Minimum Vegetation Clearance Distances," minimum distances required to prevent Flash-over... ." ⁵

Based on Table 2 in FAC-003-2 and elevations in Barry, Benton, Carroll and McDonald Counties, the **MVCD for a 345 kV transmission line in this region is 3.26 to 3.53 feet.** However, FAC-003-2, also observes that "prudent vegetation maintenance practices dictate that substantially greater distances will be achieved at time of vegetation maintenance." ⁵

In conclusion, paragraph (h) should be retained as written.

¹Brian Johnson surrebuttal Docket 13-041-u-Doc. 271, p. 9

²Transcript of Oral Testimony by Stephen Thornhill, August 27, 2013, pages 876-879.

³Federal Energy Regulatory Commission, 2012. FERC: Help - Frequently Asked Questions (FAQs) - Tree Trimming and Vegetation Management Landowners May 30, 2012.
<https://www.ferc.gov/help/faqs/tree-veget.asp>

⁴Federal Energy Regulatory Commission, 2013. FERC: Electric Reliability: Tree Trimming & Vegetation Management. September 19, 2013.<https://www.ferc.gov/industries/electric/indus-act/reliability/vegetation-mgt.asp>

⁵FAC-003-2 — Transmission Vegetation Management,

<http://www.ferc.gov/industries/electric/indus-act/reliability/vegetation-mgt/fac-003-2.pdf>

SWEPCO seeks revision of paragraph (j) so that it includes language stating clearly that SWEPCO is responsible for ensuring that the maintenance of rights-of-way meets federal reliability standards. SWEPCO claims, "Requiring landowner approval prior to the use of herbicides presents a significant logistical challenge," and that " it could prove impractical to obtain either a written or verbal permission from each landowner prior to right-of-way

maintenance." For several years now, other utilities, such as Carroll Electric Cooperative Corporation, have successfully operated programs allowing landowners to "opt out" of herbicide applications on easements traversing their properties. It seems likely that they would be willing to share their experience and expertise with SWEPCO.

To reflect certain of SWEPCO's concerns related to this paragraph, as well as concerns of Save the Ozarks, the following alternate paragraph is proposed:

- "(j) SWEPCO shall ensure that right-of-way vegetation management meets federal reliability standards. SWEPCO shall avoid construction and maintenance practices that are inconsistent with the landowner's or tenant's use of the land, particularly the use of fertilizer, herbicides or other pesticides. To that effect, SWEPCO shall enact an "opt-out" program that allows the landowner or his or her designee to enter into a contract with SWEPCO such that SWEPCO ensures no herbicides are used on the right-of-way traversing his or her land. Additionally, any landowner may elect to carry out vegetation maintenance on the right-of-way that traverses his or her property. SWEPCO shall permit such landowners to carry out vegetation maintenance on the right-of-way as long as such maintenance meets federal reliability standards. All herbicides that are used on the right-of-way shall be applied in a safe and cautious manner so as to avoid nontargeted vegetation or animal life, karst features including springs, losing streams, caves and sinkholes, and as to not damage property, including crops, orchards, tree farms, or gardens, or impair the water quality of groundwater, private wells, springs, losing streams, creeks, rivers and lakes."

Regarding notice to beekeepers, Paragraph (k) , STO notes that the register/club selected by SWEPCO, the Northwest Arkansas Beekeepers' Association, does not reach the majority of beekeepers in Carroll County, who are involved primarily with the Carroll County Beekeepers Association. Save the Ozarks further notes that prior notice of fourteen days does not allow sufficient time to notify beekeepers in Carroll County where communication is often slow due to lack of computers and access to the internet. In order to accommodate these limitations, Save the Ozarks proposes the following alternate language for paragraph (k):

"(k) SWEPCO shall also, at least thirty (30) calendar days prior to the application, provide notice to the Northwest Arkansas Beekeepers' Association

and the Carroll County Beekeepers Association. The notice will indicate the location and day the company intends to apply herbicide so that precautionary measures may be taken by the beekeeper."

CONCLUSION AND RELIEF REQUESTED

For all of the foregoing reasons, SWEPCO's "Limited" Petition for Rehearing should be denied.

Respectfully submitted,

/s/ Mick G. Harrison

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CERTIFICATE OF SERVICE

The undersigned certifies that on March 24, 2014, a true and correct copy of the foregoing STO Response to SWEPCO Petition for Rehearing was served on all parties of record by electronic mail.

/s/ Mick G. Harrison

Mick G. Harrison, Esq.