

ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF)
SOUTHWESTERN ELECTRIC POWER COMPANY)
FOR A CERTIFICATE OF ENVIRONMENTAL)
COMPATIBILITY AND PUBLIC NEED FOR THE)
CONSTRUCTION, OWNERSHIP, OPERATION AND)
MAINTENANCE OF THE PROPOSED 345 KV)
TRANSMISSION LINE BETWEEN THE SHIPE)
ROAD STATION AND THE PROPOSED KINGS)
RIVER STATION AND ASSOCIATED FACILITIES)
TO BE LOCATED IN BENTON, CARROLL AND/OR)
MADISON AND WASHINGTON COUNTIES,)
ARKANSAS)

DOCKET NO. 13-041-U
ORDER NO. 36

ORDER

On April 3, 2013, Southwestern Electric Power Company (SWEPCO) filed with the Arkansas Public Service Commission (Commission) an Application for a Certificate of Environmental Compatibility and Public Need (CECPN). SWEPCO seeks approval to construct a new 345 kV transmission line more than 45 miles in length from its Shipe Road Station in Benton County, Arkansas, to its proposed Kings River Station in Carroll County, Arkansas. SWEPCO originally proposed six possible routes, but the Company later withdrew three routes from consideration and narrowed its request to three remaining routes: Routes 33 (SWEPCO's preferred route), 108, and 109. SWEPCO also seeks approval to construct a new Kings River substation and related facilities. SWEPCO attached to its Application a map of its proposed routes and an Environmental Impact Statement.

The Commission designated Administrative Law Judge Connie C. Griffin as Presiding Officer (PO) to handle proceedings in the Docket. Order No. 1. More than 30 parties sought leave to intervene and at least 18 intervenors filed written testimony in

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the Docket; approximately six thousand written public comments were also received. The PO held public comment hearings in Eureka Springs and Rogers on July 15-17, 2013, and 289 persons presented oral comments at those hearings. An evidentiary hearing was held on August 26-30, 2013, where, in addition to the presentation of testimony and other evidence by the parties, 4 more persons presented oral public comments. Following the hearings, the parties and intervenors filed proposed findings of fact and conclusions of law as well as post-hearing briefs.

The PO issued her decision on January 17, 2014. The PO resolved several outstanding motions, determined that there was a need for the facilities, and concluded that the Environmental Impact Statement met the requirements of law. Order No. 32, at 77-92, 96, and 106. On selection of a route for the proposed transmission line, the PO found that Route 109, which crosses Northwest Arkansas and Southwest Missouri, best “fulfills the requirements of Ark. Code Ann. § 23-18-501 *et seq.*,” “is both feasible and reasonable” and is “the best route.” *Id.* at 103. The PO concluded that “Routes 33 and 108 are unreasonable, and Route 109 is the only reasonable route.” Order No. 33 at 2. The PO’s order became the Order of the Commission on February 16, 2014. See Arkansas Public Service Commission Rules of Practice and Procedure 4.06(d)(1).

The Commission thanks the parties, intervenors, and members of the public who have already participated in this Docket. The input from the public and intervenors has been very helpful. The Commission would also like to express its great appreciation for Judge Griffin's legal expertise, her hard work, and the professional manner in which she has conducted all aspects of the lengthy proceedings.

This Order addresses two petitions for rehearing: SWEPCO's *Petition for Limited Rehearing of Order Nos. 32 and 33 and Motion for Clarification of Order No. 32* (SWEPCO's Petition) and Intervenor Save the Ozarks' *Petition for Rehearing* (STO's Petition).

SWEPCO's Petition

In its Petition, SWEPCO contends that the PO failed to find facts sufficient to reject SWEPCO's preferred Route 33. SWEPCO argues that concerns about Route 33 could be ameliorated by minor changes, and that Route 33 should be approved. SWEPCO Petition at 4. Alternatively, SWEPCO requests that the Commission grant "reconsideration and any additional hearings the Commission deems necessary in order to enter an order selecting Route 33 with modifications and amendments." Petition at 7. The modifications would necessitate notice to landowners along the route who have not previously been notified. *Id.* at 12.

SWEPCO also requests that the Commission clarify certain language in the PO's order regarding permissible route modifications within the 500-foot variance granted by the PO, right-of-way clearing and maintenance, herbicide use, including notice to beekeepers, and landowner right-of-way maintenance.

Several parties filed responses to SWEPCO's Petition. The Bennett Intervenor claim that SWEPCO lacks standing to seek rehearing because SWEPCO "got exactly what it sought, permission to build on one of its six routes." Bennett Response at 1. They also state that the PO's decision that Route 33 is unreasonable is supported by the record.

Intervenor City of Garfield asks that SWEPCO's Petition be denied, because the decision of the PO rejecting Route 33 is "well-reasoned and supported by sufficient findings of fact." City of Garfield Response at 1. The City further states, however, that if the Commission decides to allow additional evidence, it should consider evidence of the general economic, social, and aesthetic impacts of Route 33 on the City, and the effects of routing the proposed 345 kV transmission line close to the historically significant Garfield Elementary School. *Id.* at 2.¹

Intervenor Save the Ozarks (STO) says that the PO correctly found that Route 33 is unreasonable given its "aesthetic (and resulting economic) impacts, which are based on its greater residential proximity and more crossing of major roads." STO Response at 1. STO also says: the Commission did not improperly substitute its judgment for that of SWEPCO as to the location of the line; SWEPCO misrepresents the Army Corps of Engineers' statement about Route 33; SWEPCO should not be allowed to present additional evidence on Route 33; and SWEPCO's assessment of the line's impact on the City of Garfield fails to adequately to consider the size of the poles and the width of the right-of-way.

Staff states that it has no objection to granting SWEPCO's request for rehearing. Staff Response at 8.

¹ The City of Garfield attached exhibits to its Response containing affidavits from parents of children attending the school expressing their concern as well as a registration form for placing the School on the National Register of Historic Places. On March 28, 2014, SWEPCO filed a Motion to Strike, or, in the alternative, to treat the affidavits filed by the City as public comments rather than evidence, on the ground that the persons signing the affidavits are not parties to the Docket. Given the Commission's disposition of the pending petitions for rehearing in this Order, the Motion to Strike is denied as moot.

STO's Petition

Intervenor STO also argues that rehearing should be granted, but for different reasons. STO contends that SWEPCO failed to prove the proposed 345 kV project is needed and failed fully to address available alternatives. STO also says: SWEPCO failed to obtain federal and state environmental permits under A.C.A. § 23-18-519(b)(4) prior to applying for a CECPN; SWEPCO failed to resolve concerns of federal and state agencies about adverse impacts on parks, recreation areas, and historic sites, citing A.C.A. § 23-18-511; SWEPCO failed to demonstrate compliance with applicable Missouri law for Route 109, citing A.C.A. § 23-18-519(b)(10); SWEPCO failed to provide notice to landowners along the Missouri portion of Route 109, citing A.C.A. § 23-18-513; and SWEPCO published notice in an Arkansas newspaper having a circulation of less than 20% in the affected counties and in no Missouri newspaper, citing A.C.A. § 23-18-513 (d).²

SWEPCO responds that it demonstrated the need for the proposed project, that it properly relied upon Southwest Power Pool (SPP) as the RTO to do planning and that the testimony of STO's witnesses did not present viable alternatives. Response at 25. SWEPCO also says: Arkansas law does not require an applicant to obtain environmental permits for a project before seeking a CECPN; the EIS submitted by SWEPCO provided

² STO's Petition raises certain additional arguments for rehearing, including: SWEPCO provided a "one-sided" analysis that "ignored the adverse impacts" and addressed only the positive economic impacts on the local communities; SWEPCO relied on a "post hoc" and "demonstrably unreliable" analysis of need, when even SWEPCO did not believe a 345 kV line was needed; SWEPCO's EIS omits analysis of key alternatives including the 161 kV alternative that SWEPCO itself initially proposed to SPP, citing A.C.A. § 23-18-511 and § 23-18-519(b)(4); SWEPCO's evidence fails to address the full costs of construction, in general, and the cost of constructing transmission facilities in "karst" topography, in particular; and SWEPCO's evidence fails to address significant adverse impacts that are certain to occur, including adverse impacts on karst environments and ecosystems.

substantial evidence on which the Commission could base its decision and a federal National Environmental Policy Act EIS is not required; Arkansas law gives the Commission no jurisdiction in Missouri and no notice was required to Missouri landowners of this Arkansas proceeding; the notice published in the Arkansas Democrat-Gazette was sufficient; SWEPCO did not rely upon "post hoc" evidence; SWEPCO's Application sufficiently accounted for the costs of construction, including possible karst terrain, and included ample evaluation of potential environmental impacts, including impacts to karst environments; and the analysis of alternative routes for the transmission line complied with applicable law, citing A.C.A. § 23-18-511 and §23-18-519(b)(4).

AECC states that the PO's finding of need is supported by substantial evidence and the Commission should apply the same standard of review in considering petitions for rehearing as the Arkansas Court of Appeals applies in reviewing a Commission order.

SPP disagrees with STO's assertion that the need for the project was not established. SPP Response at 1. SPP points to the 2007 Ozark Transmission Study, to the 2007 SPP Transmission Expansion Plan, and to the supplemental evaluation conducted by SPP in this docket. SPP states it has responsibility for both transmission planning and expansion within its region, and is better suited to plan for the reliability of the region than a single entity, or STO's witness Dr. Merrill. *Id.* at 3-5.

SPP contends that Dr. Merrill's alternatives are "short-sighted and do not consider what is best for the long term." *Id.* at 18. SPP says that its planning process is based on a "long-term vision" for the region, "not only to ensure reliability but also to

ensure that [the transmission grid] is developed in a way that yields greater levels of economic, environmental, and public policy benefits.” *Id.* SPP states that the proposed 345 kV line “complies with FERC and NERC planning requirements and is capable of yielding a broader range of more significant benefits for Arkansas ratepayers in Northwest Arkansas, as well as the SPP region.” *Id.* at 20.

Staff responds that Arkansas law does not require an Applicant to obtain all state and federal permits prior to filing for a CECPN; although Arkansas law does not require resolution of all state and federal agency concerns prior to issuance of a CECPN, relevant environmental concerns were addressed; STO’s assertion that SWEPCO had to comply with Missouri laws under A.C.A. § 23-18-519(b)(10) is incorrect; the Commission only has jurisdiction to approve those portions of the line intended to be constructed in Arkansas, and notice to Missouri landowners was not required; the PO’s finding that the Arkansas Democrat-Gazette was a newspaper of substantial circulation complies with Arkansas law; substantial evidence supported the cost analysis performed by SWEPCO; “harm to private property” is not a distinct, mandatory factor for consideration; and that SWEPCO’s Application contained a statement of need as required by Arkansas law, which the Commission is charged with evaluating prior to granting a certificate.

APPLICABLE LAW

SWEPCO and STO have both sought rehearing on SWEPCO's request for a Certificate of Environmental Compatibility and Public Need (CECPN) to build a transmission line and related facilities. Under Arkansas law, the Commission is authorized to take appropriate action on a rehearing petition, including granting or

denying rehearing, affirming or modifying its order, or reopening the record for the purpose of receiving additional evidence. Ark. Code Ann. § 23-2-422.

The General Assembly has given the Commission exclusive authority to grant a CECPN for construction of any major utility facility, including transmission lines such as the one SWEPCO has proposed here:

"(a) (1) Except for persons exempted as provided in subsection (c) of this section and §§ 23-18-504(a) and 23-18-508, a person shall not begin construction of a major utility facility in the state without first obtaining a certificate of environmental compatibility and public need for the major utility facility from the Arkansas Public Service Commission.

(2) The replacement or expansion of an existing transmission facility with a similar facility in substantially the same location or the rebuilding, upgrading, modernizing, or reconstruction for the purposes of increasing capacity shall not constitute construction of a major utility facility if no increase in width of right-of-way is required.

Ark. Code Ann. Sec. 23-18-510 (a).

In considering a request for a certificate for construction of a major utility facility, including SWEPCO's Application here, Arkansas law provides:

"(b) The commission shall not grant a certificate for the location, financing, construction, operation and maintenance of a major utility facility . . . unless it finds and determines:

(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;

(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 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[.]

A.C.A. § 23-18-519 (Supp. 2013).

In addition to the provisions cited above, the Commission is guided by the General Assembly's findings on the purpose and intent of the CECPN statutes:

(a) (1) The General Assembly finds and declares that there is at present and will continue to be a growing need for electric and gas public utility services that will require the construction of major new facilities.

(2) It is recognized that the facilities cannot be built without affecting in some way the physical environment in which the facilities are located and without the expenditure of massive amounts of capital.

(3) It is also recognized that the future economic development of the state requires the ready availability of public utility energy resources to serve industrial, commercial, and residential customers.

(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.

(2) (A) Without further clarification, present laws may result in undue costly delays in new construction, may encourage the development of energy technologies that are relatively inefficient, and may increase costs, which will eventually be borne by the people of the state in the form of higher utility rates.

(B) Interpretations of existing laws could threaten the ability of utilities to meet the needs of the people of the state for economical and reliable utility service, and thus, the existing laws require further clarification.

(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.

(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.

(2) The matters identified in subdivision (e)(1) of this section that were formerly under the jurisdiction of multiple state, regional, and local agencies are declared to be of statewide interest.

(f) It is the intent of the General Assembly to provide for the expeditious and efficient review of the siting of major utility facilities.

A.C.A. § 23-18-502 (Supp. 2013).

DECISION

Once a utility files an application for approval of a CECPN for a particular project, it is the duty of the Commission under Arkansas law to determine the “basis of the need” for the proposed project. A.C.A. § 23-18-519(b)(1)(A). The Commission must also decide whether the proposed project serves the “public interest, convenience and necessity,” A.C.A. § 23-18-519(b)(2), and whether it represents an “acceptable adverse environmental impact considering . . . the various alternatives, if any, and other pertinent considerations.” A.C.A. § 23-18-519(b)(4).

Intervenor STO contends that SWEPCO has not demonstrated need for its proposed 345 kV project, and did not adequately consider alternatives that could satisfy transmission requirements. Merrill Testimony at T. 1931. SWEPCO and SPP contend, on the other hand, that there is a long range need for additional transmission facilities

in Northwest Arkansas and Southern Missouri and that SWEPCO was required to comply with SPP's Notice to Construct a 345 kV project. Hassink Testimony at T. 222, 282; Nickell Testimony at T. 1717- 1738.

As SWEPCO and SPP each point out, the Commission has previously recognized the benefits of transmission planning by Regional Transmission Organizations (RTOs) such as SPP. The Commission stated in Docket 04-137-U: "An RTO, operating transmission independently across the regional market, is an appropriate institution for providing such service and for planning a transmission system that is interconnected and robust enough to facilitate access to a broader array of regional resource options." Order No. 6, Docket 04-137-U. The Commission also noted in that Docket, however, that transfer of operation and planning of transmission facilities to RTOs does "not diminish [the Commission's] ability to ensure just and reasonable rates for Arkansas electricity customers. Each transmission owner remains under the Commission's jurisdiction with respect to retail electric rates and all related electricity facility operations, facility siting, financing, reliability, etc." Order No. 6 at 23, 37, ¶ 8. Similarly, FERC has made clear that even with regional planning "states must approve the siting of transmission facilities that are called for in an RTO expansion plan." Order 2000 at 626.

While the evidence on need is disputed, the record in this Docket does contain evidence that future reliability requires new or upgraded transmission facilities in Northwest Arkansas. SPP conducted two long range studies, the 2007 Ozark Study and the 2007 SPP Transmission Expansion Plan, and provided a more recent, non-comprehensive re-evaluation of the need during the proceedings in this Docket. The

original studies concluded that there was a general need for transmission facilities to address potential future reliability issues. Hassink at T. 225; Nickell at T. 1698-1699. SWEPCO's witness Mr. Hassink states that the Ozark Study "provides long-range expansion plans for the north Arkansas and south Missouri region" and "[t]he upgrades evaluated in this study are intended to provide guidance for future reinforcements to the transmission system in this area." T. 260. SWEPCO witness Brian Johnson says that "[i]n order to meet usage demands in the North Arkansas/South Missouri area and for SWEPCO to comply with SPP's Notification to Construct, additional transmission capacity is required to serve Carroll County Arkansas." T. 1300.

STO's witness Dr. Hyde Merrill testifies that whatever may be the general transmission needs of Northwest Arkansas, SWEPCO has failed to demonstrate the need for this particular 345 kV project. T. 1931. He testifies that alternative solutions were apparently not considered that would be much less expensive and have fewer adverse environmental effects. T. 1932. Dr. Merrill lists six such alternatives: (1) doing nothing; (2) opening the Avoca-Beaver 161 kV line; (3) opening the Avoca-Beaver 161 kV line and building a second East Rogers-Avoca 161 kV line; (4) installing a special protection scheme that opens the Avoca-Beaver 161 kV line if the Flint Creek-Brookline 345 kV line trips; (5) installing a phase-angle regulator, to limit the flows on the Avoca-Beaver 161-kV line; and (6) installing a flexible alternating current transmission system device, to limit the flows on the Avoca-Beaver 161-kV line. T. 1947.

Dr. Merrill contends that modification of existing 161 kV transmission lines or addition of 161 kV facilities, possibly using existing rights-of way, may be sufficient to meet any increased transmission facility demands. Merrill at T. 1931-48. SPP's witness

Nickell states that he is unable say how long modification of existing 161 kV transmission lines or building additional 161 kV lines might address the needs of the area. T. 1833-34. Mr. Nickell notes that the record contains no exhibits comparing the cost of a 161 kV solution with the proposed 345 kV line, T. 1844, nor any document comparing the potential transmission reliability problems solved by a 345 kV line versus a 161 kV line. T. 1834. He states that SWEPCO originally proposed rebuilding its existing 161 kV lines to increase transmission capacity, but SPP rejected that idea in favor of a 345 kV line. T. 1843.

SWEPCO confirms that prior to the issuance of SPP's notice to construct (NTC), "SWEPCO proposed to upgrade the existing 161 kV transmission system rather than construct the 345 kV transmission line described in the NTC." SWEPCO Post Hearing Brief at 8. Based on SWEPCO's statement, STO asserts that a "no-new terrain alternative" may well be sufficient based on "upgrading existing 161 kV systems." STO Post-Hearing Reply Brief at 8; STO Petition for Rehearing at 33. The Bennett Intervenors state that "If a new 161 kV line were needed, it could be run along the existing line corridor" Bennett, Proposed Findings of Fact and Conclusions of Law, at 3, ¶ 17.

Considering all the evidence provided to date, the Commission finds that, while some transmission development in the area appears warranted, the record is presently insufficient to determine: the need for the particular 345 kV project that has been proposed, whether that project is consistent with the public convenience and necessity, and whether the project represents an "acceptable adverse environmental impact,

considering . . . the various alternatives, if any, and other pertinent considerations.”

A.C.A. § 23-18-519 (b)(4).³

Accordingly, the Commission grants rehearing for consideration of additional evidence on the need for, and the potential environmental impact of, the proposed 345 kV project. The parties should provide additional testimony and more recent, comprehensive evidence on whether the proposed 345 kV project is needed, whether transmission requirements in the region might be met by alternative options, such as expanding, upgrading, or building lower capacity facilities, including 161 kV lines, and if not why not, the comparative costs associated with the options, the environmental impact of the options, and the long term sufficiency of the options.⁴

The Commission also grants rehearing for consideration of additional evidence on the routing of the proposed transmission line. The parties should provide additional evidence on SWEPCO's proposed routes. If SWEPCO chooses to propose or modify a route, it should submit proof that all landowners have received the statutory notice.

With regard to routing, the parties should provide evidence whether existing 161 kV

³ There is some debate among the parties whether the language of A.C.A. § 23-18-519(b)(4)(Supp. 2013) requires consideration of alternatives to the proposed line, or only alternative routes proposed for a particular transmission line as stated in A.C.A. § 23-18-511 (8)(B)(iii)(Supp. 2013). See e.g., T. 325-326. It is not necessary to determine this issue herein, because, at the very least, alternatives to the proposed line would be an “other pertinent consideration,” for purposes of that subsection, particularly where, as here, the Applicant utility originally proposed a lesser-voltage alternative solution to SPP.

⁴ STO's Petition is denied on its claims other than need, including (1) that SWEPCO was required to obtain federal and state environmental permits under A.C.A. § 23-18-519(b)(4) prior to applying for a CECPN; (2) that SWEPCO has not resolved all concerns by federal and state agencies regarding adverse impacts on parks, recreation areas, and historic sites, citing A.C.A. § 23-18-511; (3) that SWEPCO failed to demonstrate compliance with applicable Missouri law for Route 109, citing A.C.A. § 23-18-519(b)(10); (4) that SWEPCO failed to provide notice to landowners along the Missouri portion of Route 109, citing A.C.A. § 23-18-513; (5) that SWEPCO published notice in an Arkansas newspaper having a circulation of less than 20% in the affected counties and in no Missouri newspaper, citing A.C.A. § 23-18-513 (d).

lines could be upgraded or existing rights-of-way used or expanded so as to limit adverse environmental impacts.⁵

Because the Commission grants rehearing for consideration of additional evidence, the prior grant of the CECPN for Route 109 is vacated. Whether a CECPN for transmission facilities should be granted and, if so, along what route will be determined after consideration of all the evidence.

By separate order the Commission will set a procedural schedule for additional testimony and hearings.

BY ORDER OF THE COMMISSION.

This 9th day of June, 2014.

I hereby certify that this order, issued by the Arkansas Public Service Commission, has been served on all parties of record on this date by the following method:

- U.S. mail with postage prepaid using the mailing address of each party as indicated in the official docket file, or
- Electronic mail using the email address of each party as indicated in the official docket file.

Colette D. Honorable, Chairman

Olan W. Reeves, Commissioner

Elana C. Wills, Commissioner

Michael Sappington, Secretary of the Commission

⁵ Because the Commission grants rehearing to consider additional evidence, SWEPCO's request that Route 33 be immediately approved is denied. Because rehearing has been granted, SWEPCO's request for modification or clarification of the PO's Order is moot.