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**

JOINT REPLY TO RESPONSE OF SAVE THE OZARKS RESPONSE TO SWEPCO'S NOTICE OF WITHDRAWAL OF APPLICATION FOR CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED

COMES now Southwestern Electric Power Company (hereinafter "SWEPCO" or the "Company"), Southwest Power Pool, Inc. ("SPP") and Arkansas Electric Cooperative Corporation ("AECC") and for their Joint Reply to the Response of Save the Ozarks ("STO") to SWEPCO's Notice of Withdrawal of its Application for a Certificate of Environmental Compatibility and Public Need ("CECPN") state:

1. On April 3, 2013, SWEPCO filed with the Arkansas Public Service Commission ("APSC" or "Commission") its Application for a CECPN to construct a new 345 kV transmission line from SWEPCO's Shipe Road Station near Centerton, Benton County, Arkansas to a proposed Kings River Station northwest of Berryville in Carroll County, Arkansas and for the new Kings River Station ("Facilities"). The Application was predicated upon a Notification to Construct ("NTC") dated February 13, 2008 from SPP, the Regional Transmission Organization ("RTO") of which SWEPCO is a member. The NTC required the Facilities to be in service by June 2016. Although SWEPCO was the lone applicant in this proceeding, both

SPP and AECC intervened in support of the Application, and both parties offered pre-filed and live witness testimony at the initial hearing of this matter.

2. On December 29, 2014, SWEPCO received a notification letter from SPP stating that updated electric load forecasts showing lower future electric demand in North Arkansas than prior forecasts for the area critical to the proposed Facilities, and the recent cancellation of several large, long-term transmission service reservations, establish that the Facilities are no longer needed to meet the reliability needs in the region. The notification letter further indicates that SPP is initiating the process to withdraw the NTC, which it expects to be finalized in January 2015.

3. On December 30, 2014, SWEPCO filed notice that it no longer seeks the relief requested and thereby withdrew its Application for a CECPN in order that this Docket could be closed. The notification letter from SPP was attached to SWEPCO's Notice of Withdrawal, marked exhibit "A".

4. On January 12, 2015, STO filed its Response to SWEPCO's Notice of Withdrawal and asked the Commission to not allow SWEPCO to withdraw its Application, but instead to declare the Application "denied" and identify STO and the other opposing intervenors as "prevailing parties" in order that they might seek an award of attorneys' fees.

5. STO posits that SWEPCO cites to no statutory provision or Commission rule that provides for withdrawal of an application or for closing a Commission docket simply by filing a unilateral notice. However, Rule 3.10 of the Commission's *Rules of Practice and Procedure* provides that a party may seek relief by motion, including motions available under the *Arkansas Rules of Civil Procedure ("Ark.R.Civ.P.").* Rule 41 of the *Ark.R.Civ.P.* provides that "any action may be dismissed without prejudice to a future action by the plaintiff before the final

submission of the case … to the court where the trial is by the court." The dismissal is a matter of right and is effective upon entry of an order dismissing the action. The Commission has followed this process and has allowed numerous applicants to provide notice of withdrawal of various applications for many years. In practice, after a notice of withdrawal was filed, the docket would be closed by Commission order soon thereafter.

6. STO suggests by analogy that the Arkansas courts do not allow unilateral voluntary dismissals at such a late stage in litigation and neither should the Commission. However the very cases that STO cites point out that a case may be dismissed as a matter of right before it has been finally submitted where "the argument has not yet closed" *See Duty v. Watkins* 298 Ark. 437, 768 SW 2nd 526 (1989). In this Docket, the matter was litigated before the Commission's designated Administrative Law Judge ("ALJ") and a CECPN was granted by the ALJ but both SWEPCO and STO sought rehearing. On rehearing the Commission vacated the CECPN granted by the ALJ and pursuant to Rule 4.09 required the production of further evidence upon the question of the need for the Facilities, and stated its intention to establish a subsequent procedural schedule. That procedural schedule was delayed pending additional study by SPP. Thus, "the argument has not yet closed." This situation is akin to a circuit court proceeding being resolved by final order and appealed, reversed and remanded for further proceedings. In that situation the argument would not be closed and the plaintiff would be entitled to a voluntary nonsuit as a matter of right.

7. There is in fact precedent for an applicant withdrawing a pending application before the Commission over objections of intervening parties. In Docket Number 09-059–U, *In The Matter of an Interim Rate Schedule of Entergy Arkansas, Inc.("Entergy") Imposing a Surcharge to Recover Costs and Expenses Required by Law Relating to the Protection of the*

Public Health, Safety and the Environment, Entergy filed a Notice of Withdrawal after several months of litigation. Both the General Staff of the Commission ("Staff") and the Attorney General ("AG") objected to the withdrawal and proposed a suspension of the docket instead. However the Commission found that because there was no procedural schedule in place Entergy was entitled to withdraw its application. The Commission indicated that if another surcharge recovery case required by law relating to the protection of public health, safety and the environment were initiated and if Staff and AG's concerns still existed they were free to submit their objections at that time.

Likewise there is precedent for a party being allowed to withdraw a pending application even in the face of pending discovery responses. In Docket Number 92–218-U, *In the Matter of an Alternative Regulation Plan for Southwestern Bell Telephone Company* ("SWBT"), the company filed a Notice of Withdrawal and Motion to Dismiss Petition for proposed alternative regulation plan. The AG filed a motion to compel stating that the AG had served discovery requests on SWBT and that the same were overdue. The Commission denied the AG's motion and stated that SWBT had withdrawn from consideration the only matter at issue in the docket and thus there were no longer any issues pending in the docket which were the appropriate subject for discovery. The Commission did not question SWBT's right to voluntarily withdraw its application.

8. STO's Response is predicated upon the mistaken belief that if it is deemed the "prevailing party" it can then be awarded attorneys' fees. STO argues that the Commission's plenary power found in Ark. Code Ann. § 23-2-301 can be read so broadly as to include the authority to award attorneys' fees. In this case there is no prevailing party given the Commission's reversal of the ALJ's ruling granting SWEPCO a CECPN, granting of rehearing,

the lack of a rehearing procedural schedule, and, therefore, the absence of a final appealable ruling by the Commission on rehearing.

In *Brandon v. Arkansas Public Service Commission*, 67 Ark. App. 140, 992 S.W.2d (1999), one of the issues addressed by the court was whether the Commission has the authority to award attorneys' fees in consumer complaint cases brought under Ark. Code Ann. § 23-3-119. The court determined that because § 23-3-119 does not specifically provide for the award of attorneys' fees, and because relevant legislative history demonstrates that in enacting that statute the Arkansas Legislature specifically considered and rejected a provision that would have provided for attorneys' fees, the Commission does not have authority to award attorneys' fees in conjunction with a complaint brought under that statute. *Brandon* has been cited several times by Arkansas courts and the Commission for the precedent that the Commission does not have authority to award attorneys' fees. *See, e.g., CenterPoint Energy, Inc. v. Miller County Circuit Court*, 370 Ark. 190, 203, 258 S.W.3d 336, 345 (2007); *Arkansas Tech University v. CenterPoint Energy Arkla*, Docket No. 04-009-C, Order No. 3, p. 5 (Arkansas Public Service Commission, 2004); *Tyson Foods, Inc. v. Woodruff Electric Cooperative Corporation*, Docket No. 07-148-C, Order No. 7, p. 2 (Arkansas Public Service Commission, 2009); *Maverick USA, Inc. v. First Electric Cooperative Corporation*, Docket No. 08-148-C, Order No. 3, pp. 10-11 (Arkansas Public Service Commission, 2009); and *In the Matter of a Class Action Complaint by Diane Schumacher and Gordon Watkins Against Carroll Electric Cooperative*, Docket No. 11-077-C, Order No. 3, pp. 15-16.

In attempting to distinguish the current case, STO correctly points out that *Brandon* only addressed a consumer complaint under § 23-3-119, and the current case was brought by SWEPCO under the Utility Facility Environmental and Economic Protection Act (the "CECPN

Act"). This is a distinction without a difference because the principles set out in *Brandon* and other Arkansas case law regarding the award of attorneys' fees, as discussed below, apply to all actions at the Commission, and not just to consumer complaint actions.

STO also correctly notes that the court in *Brandon* in part relied on the broad grant of authority given to the Commission by the Arkansas Legislature under Ark. Code Ann. § 23-2-301 in determining that the Commission has authority to hear class actions, see *Brandon*, 67 Ark. App. at 149-152, 992 S.W.2d at 839-841. Section 23-2-301 states:

> The commission is vested with the power and jurisdiction, and it is made its duty, to supervise and regulate every public utility defined in § 23-1-101 and to do all things, whether specifically designated in this act, that may be necessary or expedient in the exercise of such power and jurisdiction, or in the discharge of its duty.

STO then leaps to the conclusion, without any supporting authority, that if this broad grant of authority allows the Commission to hear class actions, it surely is broad enough to allow the Commission to award attorneys' fees. STO's conclusion is contrary to Arkansas statutory and case law, and should be rejected by the Commission. In *Brandon* the Court declined to utilize §23-2-301 to grant the Commission the authority to award attorneys' fees, even after using that statute to determine that the Commission has authority to hear class actions, and in the face of a forceful concurring opinion urging the value of the Commission being imbued with the authority to award attorneys' fees.

In addressing the issue of whether the Commission has the authority to award attorneys' fees in the context of a consumer complaint under § 23-3-119, the court in *Brandon* reaffirmed that Arkansas follows the "American rule" that each litigant must pay his or her own attorneys' fees unless specifically permitted by statute to be chargeable as litigation costs. 67 Ark. App. at 152, 992 S.W. 2d at 841. *See, also, Harper v. Wheatley Implement Co.*, 287 Ark. 27, 36, 643

S.W.2d 537, 541 (1982) ("We have previously held that attorney's fees are not allowed except when **expressly** provided for by statute." (Emphasis added.)); *Romer v. Leyner,* 224 Ark. 884, 892, 227 S.W.2d 66, 71 (1955) (holding that allowance of attorneys' fees is a penalty on the right to litigate, unless such allowance is provided by statute). The court then considered whether attorneys' fees could be awarded under the "common fund" doctrine in spite of the American and Arkansas attorneys' fees rule.

The court concluded that absent any statutory authority, and especially in light of the Arkansas Legislature's specific rejection of attorneys' fees authority language in enacting § 23-3-119, the Commission did not have authority to award attorneys' fees under the common fund doctrine. *Brandon,* 67 Ark. App. at 152-157, 992 S.W.2d at 841-844.

In the current case, STO alternatively argues that in spite of the American and Arkansas rule, the Commission has authority to award attorneys' fees under the common fund doctrine. The court in *Brandon* described the common fund doctrine as follows:

> "[W]hen many persons have a common interest in one fund, and one of them for the benefit of all brings a suit for its preservation, and retains counsel at his own cost, a court of equity will order a reasonable amount to be paid to him out of the funds in the hands of the receiver in reimbursement of his outlay."

Brandon, 67 Ark. App. at 152-153, 992 S.W.2d at 841 (*quoting Bradshaw v. Bank of Little Rock,* 76 Ark. 501, 504, 89 S.W. 316, 317 (1905)). *See, also, Alyeska Pipeline Service Co. v. Wilderness Society,* 95 S.Ct. 1612, 1621-1622, 421 U.S. 240, 257-258 (1975) (the Court acknowledged "the historic power of equity to permit … a party … recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund … or directly from the other parties enjoying the benefit.").

Contrary to STO's assertions, the common fund doctrine has no applicability in this case. The common fund doctrine is an exception to the American and Arkansas rule because the attorneys' fees awarded are taken only from either a recovered fund that benefits a class or something analogous to a class, or directly from those benefitted by the recovered fund. Unlike in a consumer complaint proceeding, in a proceeding under the CECPN Act, the Commission has no authority to make a monetary award to STO or any other party. There will not be a monetary "fund" recovered in this case by STO from which attorneys' fees could be awarded under the common fund doctrine. STO argues:

> Although there is no already collected fund of rate payer moneys here due to the timing and nature of this CECPN action, here STO litigated and prevailed in a challenge to a new major electric power transmission line that would have cost rate payers approximately $125 million and would have caused significant environmental damage, negative economic impacts, and aesthetic harm.

STO's Response at p. 10. With STO's admission that there is no fund in this case, STO's only other avenue for recovery of attorneys' fees under the common fund doctrine is directly from the other parties enjoying the supposed benefit created by STO, another litmus test not met here. *See Alyeska Pipeline Service Co.* STO may not recover attorneys' fees under the common fund doctrine from SWEPCO, SPP, or any other party that did not benefit from the result of the case.

In its Response, STO cites no express or specific statutory authority for an award of attorneys' fees by the Commission in a CECPN Act proceeding, or any other Commission jurisdictional proceeding, and with good reason because no such express or specific statutory authority exists. STO cannot avoid the fact that absent express and specific statutory authority, the American and Arkansas rule regarding attorneys' fees bars the Commission from granting attorneys' fees in this case.

House Bill 393 of 1985 provided for both utilities and/or complainants being awarded attorneys' fees upon prevailing, The General Assembly recognized that authorizing the Commission to award attorneys' fees to "prevailing parties" would in actuality place a chilling effect on ratepayers, environmental groups, and special organizations such as STO participating in Commission proceedings. The prospect of losing a contested case against a utility and then being exposed to covering the utilities' legal fees would curtail the number of contested cases before the APSC. Thus the attorney's fees provisions were removed from House Bill 393 prior to its passage.

The Commission has recently addressed the question of whether it has authority to award attorneys' fees. In Docket Number 11-077-C, *In the Matter of a Class Action Complaint by Diane Schumacher and Gordon Watkins Against Carroll Electric Cooperative,* at page 15 of 17 the Commission stated:

> Finally, it is clear that the Commission does not have power to award attorney's fees. *Brandon v. Arkansas Public Service Commission, supra.* Although Complainants assert that *Brandon* only disallows attorney fee recovery from a "common fund," it is clear from the legislative history recited in *Brandon* that the Arkansas General Assembly considered an amendment in 1985 to authorize the award of attorneys' fees in circumstances broader than the "common fund" scenario, and rejected such amendment by deleting the proposed language from House Bill 393, which became Act 758 of 1985. Additionally, the Arkansas Supreme Court in *Centerpoint, supra*, cited *Brandon* for the proposition that "the [Commission] may not award attorneys' fees…" 370 Ark. at 203.

Order No. 3 (September 18, 2012). This decision, of course, makes great sense. Notwithstanding the concurring opinion in *Brandon*, the Commission possesses the same powers as the General Assembly while acting within its legislatively delegated powers. Although it has very broad discretion in exercising those powers, the Commission was created to act for the

General Assembly. As a creature of the legislature, it performs, by delegation, legislative functions. However, the General Assembly does not possess the Constitutional right to award attorneys' fees, nor has it ever attempted to do so. The Commission certainly has no more powers than its creating body.

9. Finally, STO suggests that the Commission should award attorneys' fees to "sanction misconduct of a party". STO believes that because the Commission has authorized sanctions for discovery failures and abuses it follows that it has the authority to sanction for other misconduct. However no case law, statute, or Commission rule would authorize such an action. More importantly, there has been no misconduct in this Docket. Throughout the process, SWEPCO and SPP have sought to fulfill their prescribed responsibilities for maintaining a reliable electric transmission system across the region.

Through its filings and public comments of its members, both oral and written, STO has expressed a belief that first SWEPCO and now SWEPCO and SPP have intentionally set upon a course to build a transmission line solely for utility purposes and profit at the expense of the environment and the economy of the Ozarks. However, STO offers no motive for any "misconduct" by either SWEPCO or SPP.

SPP has no interest in building transmission that is not needed and receives absolutely no benefits or gains based on building transmission. SPP's primary interest and responsibility is to ensure reliability of the transmission grid. SWEPCO is a regulated public utility with a duty to serve its customers according to the rules and regulations of the APSC. Although SWEPCO was solely responsible for its transmission planning, certificating and construction for many years, that all changed with the creation of RTOs.

The electric utility industry has undergone substantial change as a consequence of three decades of federal policy efforts to introduce and foster wholesale electric generation competition and thereby provide the opportunity for more affordable electricity for all Americans.

Utilizing the authority under the Federal Power Act of 1935 to prevent undue discrimination in transmission service, the Federal Energy Regulatory Commission ("FERC") issued Order No. 888 in April 1996. FERC recognized that the transmission system is a multistate, multi-utility grid, whose physical operation and planning is most efficiently conducted on a regional basis rather than a utility- by- utility basis. FERC then entered Order No. 2000 in December 1999 which encouraged the voluntary formation of RTOs. A RTO is "an entity that is independent from all generation and power marketing interests and has exclusive responsibility for grid operations, short-term reliability, and transmission service within a region." One of its legal requirements is to plan and coordinate necessary transmission additions and upgrades.

SPP is a RTO and is thus responsible for the operation and planning of the transmission grid in its region. It covers all or parts of Arkansas, Kansas, Louisiana, Nebraska, Missouri, New Mexico, Oklahoma and Texas.

In August 2006, the APSC authorized the transfer of functional control of SWEPCO's transmission facilities to SPP. SPP then became responsible for planning and directing transmission construction under its coordinated planning criteria and under the SPP Open Access Transmission Tariff ("OATT"). As a member of SPP, SWEPCO is required to build transmission projects as directed by SPP, if SPP determines those projects are necessary in

accordance with the SPP OATT. This project was identified by SPP as necessary to meet reliability-related requirements.

SPP and SWEPCO are required to plan transmission facilities according to the SPP OATT and North American Electric Reliability Corporation ("NERC") reliability standards. NERC reliability standards define the reliability requirements for planning and operating the North American bulk power system. Their purpose is to ensure the bulk electric system operates reliably for the region and country.

The prior SPP study, on which the NTC was based, showed that by 2016, the Beaver-Eureka 161 kV and East Rogers-Avoca 161 kV lines would overload if there was an outage of the Flint Creek to Brookline 345 kV line. NERC standards required that SPP and SWEPCO resolve these future overloads before 2016. Although it is true that SWEPCO originally proposed a local area solution to resolve these future overloads, that proposal was determined by SPP at that time to not be the best long-term solution. A 161 kV solution could have solved the reliability issues for a short period of time; however, SPP is obligated to develop a more cost effective regional solution that provides long-term benefits to its members and consumers. SPP's studies were performed in a manner consistent with its OATT and NERC standards. Contrary to STO's statement, SPP did not apply an N-2 standard[1] as the sole basis for the project. Furthermore, the allegation that there is no concrete record of SPP applying criteria beyond N-1 other than in the 2013 reevaluation is not correct. NERC Standards require both N-1 and N-2 analyses. SPP does and has done both types of analyses in its review to maintain system reliability for the future overloads described above. NERC Standards also obligate the Planning Coordinator (SPP) to determine and use the modeling assumptions it believes appropriate for the

[1] An N-2 standard refers to electric transmission reliability planning assuming the unplanned outage of two separate transmission facilities whereas an N-1 standard assumes the unplanned outage of only one transmission facility.

area being studied. In the 2007 Ozark Study and in the 2013 reevaluation, SPP appropriately evaluated the impacts of area low-hydro dispatch assumptions in its N-1 analysis. SPP has also considered low-hydro dispatch assumptions in past planning studies with the most recent study that looked at this being the SPP- Associated Electric Cooperative, Inc. Joint Planning Study, which was completed in 2014. SPP has also included a future scenario in the 2015 Integrated Transmission Planning 10-Year Assessment that considered reduced hydro dispatch in the modeling assumptions. SPP analyzed low hydro as a system condition consistent with NERC standards requiring the RTO to evaluate appropriate system conditions in modeling generation dispatch. Contrary to what STO asserts, the appropriateness of SPP's decision to include low-hydro dispatch assumptions in its N-1 analysis is supported by drought conditions that have occurred in the North Arkansas area three times in the last ten years.

None of these study processes were misrepresented, nor did SPP fail to disclose how it conducted its study. SPP's OATT and required processes are public. In fact, all of these issues were so thoroughly litigated that, as STO has pointed out, its own witness was able to offer corrections to a results table in Mr. Nickell's testimony that Mr. Nickell was then able to correct certain transcription errors through an errata filing and address them in cross examination at the hearing. Mr. Nickell testified in his pre-filed testimony about the reasons supporting a 345 kV solution instead of a 161 kV solution. STO may not agree with the NERC standards and FERC-approved planning process defined in SPP's OATT or how SPP applied these requirements, but there was certainly no misrepresentation or omission of material facts. SPP must follow NERC standards and the FERC-approved planning process set forth in its OATT as part of its obligations as an RTO and did so, in good faith, with its performance of the 2007 Ozark Study,

the 2007 SPP Transmission Expansion Plan, the 2013 reevaluation, and again with the latest reevaluation.

Just as SWEPCO is dependent upon its RTO for direction on building transmission facilities, and does not possess the ability to operate on its own, SPP is dependent upon its members for load forecasts and predictions in order to plan on a regional basis rather than a utility-by-utility basis.

Utility planning is not, and will never be, precise when looking into the future. Planning for reliability inherently calls for watching forecasts, developing trends, and making adjustments when planning inputs change. That is precisely what occurred in this Docket. The Commission asked for an updated study. SPP performed that study. There have been recent material changes in load growth projected by the load-serving entities in the North Arkansas area and a cancellation of long-term transmission service reservations, as noted in SPP's December 29, 2014 letter to SWEPCO, which greatly altered the reliability needs in the area. These changes dictated the change in reliability needs, and these changes occurred after SPP's 2013 reevaluation. This is not an isolated occurrence of changes in demand and projected demand resulting in the reevaluation of a project. In other instances, SPP's reevaluations have resulted in confirmation that projects are still needed. Some, however, as is the case here, have resulted in project cancellations and the withdrawal of an NTC. This phenomenon is certainly not indicative of planning studies being done in bad faith but rather indicative of the fact that the assumptions used had changed.

The fact that new load growth projections from other SPP members and neighboring utilities and the termination of two significant long-term transmission service transactions had occurred since SPP's 2013 reevaluation does not mean that SWEPCO's filing in April of 2013

was in bad faith. The CECPN Act requires an applicant to state the "need and reasons for construction of the facility." Ark Code Ann § 23-18-511. That is precisely what SWEPCO presented in its Application and testimony. It informed the Commission that it had received a NTC from its FERC and Commission-approved RTO and that it was therefore required to seek authority to construct the Facilities. It is not, and should not be, incumbent upon a RTO member to go behind a RTO decision and challenge all of the load growth forecasts of the other RTO members, check the future likelihood of existing long-term transmission service transactions, or otherwise balk at following the RTO's directives before filing an application for authority to construct transmission facilities. SPP followed the FERC-approved planning processes, and as transmission-owning member of SPP, SWEPCO followed its SPP obligations to pursue identified transmission reliability facilities and followed the APSC process to request approval of an SPP directed project. SPP performs annual and long-term planning processes and in that process, recent conditions changed from when SWEPCO had filed its Application and even after the APSC hearing. An award of attorneys' fees as a sanction against a utility attempting to do what its regulators and RTO directed it to do will inevitably result in the failure of the regional transmission planning concept.

WHEREFORE, SWEPCO, SPP and AECC all respectfully ask the Commission to deny STO's requests for relief, including its request for further scheduling and briefing, and pray for an Order of the Commission closing this Docket.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David R. Matthews, attorney for SWEPCO, state that I have on this 20th day of January, 2015, provided a true and correct copy of the above and foregoing instrument to all parties of record electronically, by first class mail or both.

/s/ David R. Matthews
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