

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) DOCKET NO: 13-041-U
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)

SWEPCO’s RESPONSE TO STO’S PETITION FOR REHEARING

Comes now Southwestern Electric Power Company (“SWEPCO”) and for its Response to Save the Ozarks’ (“STO”) Petition for Rehearing of Commission Order 37 states:

1. On March 25, 2015, the Arkansas Public Service Commission (“APSC” or the “Commission”) entered Order No. 37. This Order allowed SWEPCO to withdraw its Application for a Certificate of Environmental Compatibility and Public Need (“CECPN”). The Order rejected STO’s request that the CECPN application be denied and also rejected STO’s request to be declared the prevailing party in this Docket. Finally, Order 37 denied both STO’s Motion to file Surreply and the Joint Parties’ Motion to Strike STO’s surreply.

2. SWEPCO asserts that Order 37 was proper and should be affirmed, except that STO’s untimely filed Surreply should have been stricken from the record.¹ The Order should be affirmed on the following issues:

¹ SWEPCO has filed a Motion for Limited Rehearing (Document No. 453) which discusses why STO’s untimely filed Surreply (Document No. 449) should be stricken from the record.

A. The APSC correctly determined that SWEPCO properly withdrew its CECPN application on December 30, 2014.

B. In Arkansas, an award of attorney's fees is not allowed “except where expressly provided for by statute.” *Harris v. City of Fort Smith*, 366 Ark. 277, 280, 234 S.W.3d 875, 878 (2006). The general statutory language “all things [] necessary or expedient,” does not create sufficient authority for the APSC to award attorney fees. The Common Fund Doctrine is inapplicable and it is not a basis for attorney fees. STO is not entitled to attorneys’ fees, and its Motion for Rehearing should be denied.

C. STO’s claims of discovery abuse and misconduct are evidence of its lack of understanding of Regional Transmission Organizations and of regional transmission planning. There was no discovery abuse and/or misconduct in this Docket.

D. The Commission’s Order No. 37 was amply supported by the evidence, is consistent with Arkansas law and should be affirmed.

A detailed discussion of each of these four points follows.

3. STO’s Motion for Rehearing should be denied. The Commission has already correctly ruled upon each of these arguments, and Order 37 should be affirmed as it relates to each.

A. The APSC properly determined that SWEPCO withdrew its CECPN application on December 30, 2014.

On April 3, 2013, SWEPCO filed an Application for a CECPN to construct a new 345 kV transmission line from its existing Shipe Road Station near Centeron, Benton County, Arkansas to a proposed Kings River Station near Berryville, Carroll County, Arkansas. The CECPN Application was predicated upon a Notification to Construct dated February 13, 2008 and issued

by the Southwest Power Pool (“SPP”), the Regional Transmission Organization of which SWEPCO is a member.² The Notification to Construct required the proposed transmission facilities to be in service by June 2016.

Subsequently, on December 29, 2014, SWEPCO received a letter from SPP which stated that the transmission facilities proposed in the CECPN Application were no longer needed because updated load forecasting showed lower future electric demand in Northern Arkansas. On December 30, 2014, SWEPCO filed notice that it withdrew its CECPN Application.³ On January 12, 2015, STO requested that SWEPCO not be permitted to withdraw its Application and that STO be declared the prevailing party in order to recover attorney fees.⁴

The APSC has specific, legislative authority to enact its own rules of practice and procedure. Ark. Code Ann. § 23-2-305. Accordingly, proceedings before the Arkansas Public Service Commission are governed by the Commission’s Rules of Practice and Procedure (“RPP”). RPP 1.03 provides, “The RPPs shall apply to all practices and procedures before the Commission unless otherwise specifically stated.” Rule 3.10 further allows for a party to seek relief by motion, “including motions available under the Arkansas Rules of Civil Procedure.”

Rule 41 of the Arkansas Rules of Civil Procedure allows that “any action may be dismissed without prejudice [] by the plaintiff before the final submission of the case [] to the court where the trial is by the court.” This dismissal or “absolute right to nonsuit” exists at any time prior to the “submission of the case to the jury or to the court.” *White v. Perry*, 348 Ark. 675, 681, 74 S.W.3d 628, 631 (2002) (granting nonsuit even where the defendant asserted res

² The NTC was attached as Exhibit “JPH-2” to the Direct Testimony of J. Paul Hassink, Document No. 4.

³ Document No. 445, SWEPCO submits its Notice of Withdrawal of its Application for a CECPN.

⁴ Document No. 446, STO’s Response to SWEPCO’s Notice of Withdrawal of SWEPCO’s Application for a Certificate of Environmental Compatibility and Public Need.

judicata in an illegal-exaction suit because argument had not closed). Arkansas recognizes the “absolute right to a nonsuit” even where the case has “come to a hearing,” provided that the argument was not yet closed. *Duty v. Watkins*, 298 Ark. 437, 438, 768 S.W.2d 526, 527 (1989).

In this Docket, the proceedings were on-going. Via Order No. 36,⁵ the APSC ordered additional testimony, more recent, comprehensive evidence of need, evaluation of alternative transmission facilities to meet requirements and comparative costs and environmental impact of these options. With so much information still required, argument was not closed. During the course of obtaining and preparing the additional evidence ordered by the Commission, SPP determined that the transmission facilities were no longer necessary and notified SWEPCO that the Notification to Construct would be rescinded. Accordingly, SWEPCO withdrew its Application for a CECPN as allowed by APSC Rules of Practice and Procedure 3.10 and Arkansas Rules of Civil Procedure 41.

Under Arkansas law, neither side is declared the “prevailing party” when the case is nonsuited under Rule 41. The Arkansas Supreme Court has held that a nonsuit or “dismissal without prejudice does not sufficiently conclude the matter such that a determination of the prevailing party can be stated with certainty.” *Burnette v. Perkins & Associates*, 343 Ark. 237, 242, 33 S.W.3d 145, 149-50 (2000). The “argument” in this Docket was on-going when SWEPCO filed its motion to withdraw the CECPN application. This withdrawal is permissible under Arkansas Rules of Civil Procedure 41 and incorporated by the APSC’s RPP 3.10. When an action is thus voluntarily dismissed, there is no prevailing party.

⁵ Document No. 442 filed June 8, 2014.

Consistent with Arkansas Rules of Civil Procedure, long-standing case law and its own Rules of Practice and Procedure, this Commission correctly denied STO's motion requesting to be declared the prevailing party.⁶ The Petition for Rehearing on this issue should be denied.

B. In Arkansas, an award of attorney's fees is not allowed "except where expressly provided for by statute." STO is not entitled to attorneys' fees, and its Motion for Rehearing should be denied.

Without question, the Arkansas General Assembly has granted the Commission with broad authority to act within its sphere—which is the regulation of public utilities and the protection of public health and safety. *Arkansas Gas Consumers, Inc. v. Arkansas Pub. Serv. Comm'n*, 80 Ark. App. 1, 19, 91 S.W.3d 75, 87 (2002)(reversed on other grounds 354 Ark. 37, 118 S.W.3d 109 (2003)). Yet, the APSC's authority does have some limitations. "[T]he PSC is a creature of the General Assembly with its power and authority limited to that which the legislature confers upon it." *Arkansas Gas Consumers, Inc. v. Arkansas Pub. Serv. Comm'n*, 354 Ark. 37, 49, 118 S.W.3d 109, 116 (2003). When the APSC has acted outside of its legislatively authorized sphere, Arkansas Courts have reversed. *See e.g., Arkansas Cnty. v. Desha Cnty.*, 342 Ark. 135, 141, 27 S.W.3d 379, 383 (2000)(finding that the Commission did not have the vested authority to resolve boundary disputes even where utilities were involved). The Arkansas General Assembly has authorized the APSC to "find and fix just, reasonable, and sufficient [utility] rates;" "determine the reasonable, safe, adequate, and sufficient service to be [] furnished [] by any public utility;" and establish "reasonable standards, classifications, regulations, practices and services to be [] followed by [] all public utilities." Ark. Code Ann. § 23-2-304(a). The Commission is also empowered to establish rules "pertaining to the operation, accounting, service, and rates of public utilities." Ark. Code Ann. § 23-2-305.

⁶ Order No. 37, Document No. 451, page 13.

STO has asserted that the Commission is authorized to award attorneys' fees pursuant to Arkansas Code Annotated § 23-2-301. In its entirety, this section 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.”

Although section 23-2-301 grants the Commission authority to “do all things,” it is inherently restricted to “all things” which would otherwise be permissible under Arkansas law.

In Arkansas, an award of attorney's fees is not allowed “except where expressly provided for by statute.” *Harris*, 366 Ark. at 280 (determining an award of attorney's fees was improper under the FOIA statute). Even where the parties have contractually agreed to the recovery of attorney fees, there is no authority to award them without a statutory basis. *St. Francis Cnty. v. Joshaway*, 346 Ark. 496, 500, 58 S.W.3d 361, 364 (2001) (denying attorney fees because there was no statutory authority); *White v. Associates Commercial Corp.*, 20 Ark. App. 140, 144, 725 S.W.2d 7, 9 (1987) (denying attorney's fees because there was no specific statutory authority).

STO's reliance upon *Brandon v. Arkansas Pub. Serv. Comm'n*, 67 Ark. App. 140 (1999) is misplaced.⁷ Contrary to STO's assertions, the Court in *Brandon* determined that the APSC could hear class actions because of the language in Arkansas Code Annotated section 23-3-119—not Arkansas Code Annotated § 23-2-301. More specifically, the Arkansas Court of Appeals first analyzed and interpreted section 23-3-119(f), which grants the commission “quasi-judicial jurisdiction to adjudicate public rights and claims in individual cases in addition to the commission's traditional legislative authority to act generally and prospectively in the interest of the public.” The key dispute was whether the word “individual” prohibited class actions before

⁷ Document No. 452, STO's Petition for Rehearing filed April 24, 2015, pages 2-7.

the APSC. *Brandon*, 67 Ark. App. at 146-47. In reviewing the legislative history, the Court found that Act 758 of 1985 which created Arkansas Code Annotated § 23-3-119(f)

“clearly demonstrate[d] a legislative intent to place primary jurisdiction over consumer disputes in the Commission, and we disagree that the use of the word ‘individual’ in section 23–3–119(f) was intended by the legislature to deny the Commission the authority to hear consumer disputes brought in a representative capacity.” *Brandon*, 67 Ark. App. at 146.

Only after determining that a class action was permitted under Arkansas Code Annotated § 23-3-119 did the Court turn to the more general section of Arkansas Code Annotated § 23-2-301.

This sequence of evaluation is important because it shows the proper interpretation of the statutes granting the APSC legislative authority. In *Brandon*, the Court first determined that class actions were permitted under the statutory provisions authorizing the Commission to hear consumer complaints in general. The authority to hear class actions was not merely asserted as a generic “all things [] necessary or expedient,” but which was not otherwise mentioned or provided for elsewhere in statute. Furthermore, the *Brandon* Court also makes it very clear that “attorneys' fees are not chargeable as costs in litigation unless specifically permitted by statute.” *Brandon*, 67 Ark. App. 140, 152 (1999). Unlike the present Docket, the attorney fees at issue in *Brandon* were sought pursuant to the Common Fund Doctrine. *Id.*

It is worth noting that although STO also asserts the Common Fund Doctrine, it in no way qualifies. The Common Fund Doctrine is relevant where one party has “created or augmented a common fund or where assets have been salvaged for the benefit of others as well as himself.” *Millsap v. Lane*, 288 Ark. 439, 442, 706 S.W.2d 378, 379-80 (1986). Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.” *Fox v. AAA U-Rent It*, 341 Ark. 483, 489-90, 17 S.W.3d 481, 485 (2000). There

was no common fund created in this Docket. While STO may have raised private funds to pay its legal expenses, that does not constitute a “common fund.”

A recent case involving a certified class action suit against the Arkansas Department of Finance and Administration for erroneous collection of corporate taxes is illustrative. *Fox v. AAA U-Rent It*, 341 Ark. 483, 17 S.W.3d 481 (2000). In *Fox*, a group of corporations brought suit and incurred attorney fees to challenge the assessment of corporate taxes. *Id.* at 484-85. Many corporations who did not contribute to litigation costs nonetheless received tax refunds. *Id.* at 491. The attorneys who had represented the class sought to recover their fees via the Common Fund Doctrine. *Id.* The Arkansas Supreme Court, however, held that there was “[n]o common fund under chancery court control [that] was created by the actions of DFA in this case.” *Id.* The Court recognized that nonpaying corporations had received refunds as a result of the attorneys’ actions, but nevertheless, the Court held:

“those facts do not offset the fact that no common fund was created by the Attorneys’ actions. Moreover, at no point did the nonpaying corporations agree to legal representation by the Attorneys or authorize them to take any action on their behalf.” *Id.*

Precisely the same could be said in this Docket. STO claims to have benefitted “all ratepayers,” but there simply is no common fund. Likewise, all the ratepayers have not authorized STO’s counsel to represent them, and many other ratepayers who did not authorize STO’s counsel to represent them in this Docket. In fact, there were a number of other parties who hired their own counsel to represent them in this Docket. There can be no payment of legal fees under the Common Fund Doctrine where there is no common fund, and there can be no common fund where there was no common representation.

There is no basis for STO’s claim of attorney fees. Arkansas follows the nationwide rule: “every litigant to bear his or her attorney’s fees, absent a state statute to the contrary.” *Fox*, 341

Ark. at 489. There is no specific statutory basis for attorney fees in this case, and the Commission has correctly declined to award them in Order No. 37. STO's Motion for Rehearing should be denied on this point and Order No. 37 affirmed.

C. STO's claims of discovery abuse and misconduct are evidence of their lack of understanding of Regional Transmission Organizations and of regional transmission planning. There was no discovery abuse and/or misconduct in this Docket.

Finally, STO asserts that the Commission should award it attorneys' fees as a "sanction for discovery abuse and misconduct."⁸ It cannot be overstated that there has been no discovery abuse or misconduct. STO's assertions are all founded upon its misunderstanding of the relationship between a regional transmission organization and its member utilities.

Regional Transmission Organizations were created in 1999 by the Federal Energy Regulatory Commission ("FERC") because the electric grid is a multi-state, multi-utility system. Regional Transmission Organizations are independent entities, separate from the utility companies that provide generation and transmission. The Regional Transmission Organization is required to plan transmission upgrades and coordinate the various utility companies within its grid, on a regional level. The Southwest Power Pool ("SPP") is a Regional Transmission Organization and is responsible for planning of the transmission grid in all or parts of Arkansas, Kansas, Louisiana, Nebraska, Missouri, New Mexico, Oklahoma and Texas. The SPP RTO does not own the power grid infrastructure; they independently ensure reliable supplies of power, adequate transmission infrastructure, and competitive wholesale prices of electricity are available for customers. SPP has no interest in building unnecessary transmission facilities and receives no benefits or gains by doing so.

⁸ Document 452, STO Petition for Rehearing, pages 7-10.

As of August 2006, APSC authorized SPP to functionally control SWEPCO's transmission facilities. As the Regional Transmission Organization, SPP also controls the transmission facilities of other electric utilities in the region. It is SPP, and not SWEPCO, who is responsible for planning and directing transmission construction. As a member of SPP and pursuant to the SPP Open Access Transmission Tariff, SWEPCO is obligated to build transmission projects as instructed by SPP. In this case, SPP instructed SWEPCO to build the 345 kV transmission line via the Notification to Construct.⁹

STO fails to comprehend the nature and of Regional Transmission Organizations, and incorrectly assumes misconduct because "SWEPCO submitted its application for the 345 kV line and its representations of need for the same to the Commission apparently only because SPP required it to do so."¹⁰ As was summarized above, Regional Transmission Organizations do "require" their member utilities to "do so." As a member of SPP, SWEPCO was obligated to construct any transmission facilities identified and required by SPP. Therefore, it was also obligated to file a CECPN application for this project. No secret was made of the fact that SPP had mandated the project. SWEPCO participated in the planning process, but was required to follow the dictates of its RTO to build the facilities determined by the RTO to be necessary and beneficial to the entire region. The Notification to Construct is referenced in the Application¹¹ itself and discussed at length in the Direct Testimony of J. Paul Hassink¹² filed concurrently with the Application. A copy of the Notification to Construct was filed as an exhibit to Hassink's Direct Testimony.¹³ STO mistakenly believes SWEPCO's CECPN application for a 345 kV line

⁹ The NTC was attached as Exhibit "JPH-2" to the Direct Testimony of J. Paul Hassink, Document No. 4.

¹⁰ Document 452, STO Petition for Rehearing, pages 8.

¹¹ Document 2, CECPN Application, pages 3-4.

¹² Document No. 4, Direct Testimony of J. Paul Hassink, Exhibit JPH-2.

¹³ Document No. 4, Direct Testimony of J. Paul Hassink, Document No. 4

to be evidence of abuse, but in reality it is simply the result of regional transmission planning. Sanctions are unwarranted and would be inappropriate. There has been no discovery abuse and no basis for sanctions based on misconduct.

D. The Commission's Order No. 37 was amply supported by the evidence, is consistent with Arkansas Law and should be affirmed.

The Commission's Orders have been supported by substantial evidence and are reasonable and consistent with Arkansas law. Order No. 37 should be affirmed and STO's Petition for Rehearing denied in its entirety. The Commission's rulings were amply supported by the evidence and Arkansas law. The Commission acted entirely within its authority to permit the CECPN application to be withdrawn pursuant to Arkansas Rule of Civil Procedure 41. Similarly, the Commission correctly refused to declare STO the prevailing party and correctly refused to grant STO attorneys' fees. Finally, there was no basis for sanctions.

SWEPCO prays that the Commission reject STO's Petition for Rehearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sarah L. Waddoups, attorney for SWEPCO, state that I have on this 4th day of May, 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/ Sarah L. Waddoups
Sarah L. Waddoups