ARK. PUB. SERV. COMM.
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BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

FILED

IN THE MATTER OF THE APPLICATION OF ENTERGY ARKANSAS, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE THE PLEASANT HILL TO QUITMAN 161 KV TRANSMISSION LINE AND ASSOCIATED SWITCHING FACILITIES, IN CONWAY AND FAULKNER COUNTIES, ARKANSAS	)	DOCKET NO. 98-141-U

RESPONSE TO APPLICATION FOR
REHEARING OF ORDERS NOS. 9 AND 10

COMES NOW ENTERGY ARKANSAS, INC. ("EAI" or the "Company"), and for its Response to Application for Rehearing of Orders Nos. 9 and 10 that was filed in this Docket on January 11, 1999, by Lionel Smith, Lyman Smith, Jimmy Hart, Nancy Hart, and Margaret Hart, states as follows:

I. Introduction.

On January 11, 1998, the intervenors Lionel Smith, Lyman Smith, Jimmy Hart, Nancy Hart, and Margaret Hart, filed with the Arkansas Public Service Commission ("APSC" or the "Commission"), an Application for Rehearing of Orders Nos. 9 and 10 in this Docket. Order No. 9, issued by the presiding Administrative Law Judge ("ALJ"), on October 19, 1998, granted EAI a Certificate of Environmental Compatibility and Public Need ("CECPN") for a proposed new

switching station near Pleasant Hills after finding that the station and its related facilities were needed and would serve the public interest, convenience, and necessity. Order No. 10, issued by the ALJ on December 1, 1998, overruled EAI's objections to the intervention of the Smiths and the Harts but approved, with modifications, the route proposed by EAI for a new 161 kV transmission line from Pleasant Hills to Quitman (with the switching station, the "Proposed Electrical Facilities"). The approved route crossed farmland owned by Lionel and Lyman Smith, who are brothers, and other farmland owned by Jimmy and Nancy Hart, who are husband and wife, and by Margaret Hart, who is Mr. Hart's mother. A more complete summary of the procedural history of this case is provided in Paragraphs 1 - 5 of EAI's Petition for Rehearing and Motion to Dismiss filed in this Docket on January 21, 1999.

If the Commission does not dismiss the Application for Rehearing, as requested in EAI's Petition and Motion, the Commission should, for the reasons stated more fully below, deny the intervenors' Application as wholly without merit.

II. The Smiths and the Harts Were Not Denied Due Process of Law.

The basis of the applicants' due process argument is that they were granted intervenor status on August 5, 1998, the day after the ALJ heard public comments in this case, and then required to proceed with the hearing on August 12. They summarized their argument as follows:

> The short period allowed before resumption of the hearing and the effective prevention of discovery combined to deprive the Hart Intervenors of procedural due process and denied them a meaningful opportunity to prepare and present a direct case in opposition to EAI's request or to develop a proper case to show the benefits of the South Alternative. Application at 5.

This is not true. The Smiths and the Harts were not treated unfairly, and the procedures followed by the ALJ in this case do not raise any constitutional issues of due process. There is no right, either statutory or constitutional, to intervene in a proceeding before a utility regulatory commission. Intervention in an administrative proceeding, it is generally understood, is at the discretion of the trier of fact, Gary Transit, Inc. v. Indiana Public Service Commission, 161 Ind. App. 7, 314 N.E.2d 88 (1974), as are interventions generally. See, Bank of Quitman v. Phillips, 270 Ark. 53, 603 S.W.2d 450 (Ark. App. 1980). As a matter of constitutional law, the requirement of due process in an administrative proceeding applies only to "individualized deprivations" of rights, as opposed to decisions that may have some adverse impact on a broad group of individuals, such as the landowners along the route of a proposed transmission line. See, Davis and Pierce, Administrative Law Treatise, 3rd ed. § 9.2. This is the difference between an eminent domain proceeding, in which land is taken from an individual, and a CECPN proceeding, in which a group of landowners may be affected, but none of whom suffers an actual taking.

To create a constitutional issue of a denial of due process, an individual must be deprived of life, liberty, or property. The United States Supreme Court

made clear in Board of Regents v. Roth, 408 U.S. 564 (1972), that government action may adversely affect an individual without constituting a denial of that individual's life, liberty, or property which would require the protection of due process. "Since 1972, the Court has continually held that the government need not give someone a procedure to determine the fairness of how it has treated that individual unless its actions fall within distinct rulings as to the meanings of 'life', 'liberty' and 'property'". Rotunda, Nowak, and Young, Treatise on Constitutional Law: Substance and Procedure § 17.2. An alleged property interest, moreover, must have its source in positive law – state common law, a statute, or a contract – to be characterized as "property" for due process purposes. Leis v. Flynt, 439 U.S. 438 (1979).

Under the Utility Facility Act (the "Act"), the Smiths and the Harts had a right to have their petition to intervene considered by the Commission only if they complied with all the statutory requirements of the Act and with the relevant provisions of the Commission's Rules of Practice and Procedure ("RPP"). See, Ark. Code Ann. § 23-18-517(c). As explained in the Petition for Rehearing and Motion to Dismiss, which EAI filed on January 21, the Smiths and the Harts did not abide by the rules. Even if they had followed the rules, they have no vested liberty or property right of intervention to which due process protections could apply. The APSC has itself recognized that "[i]ntervention in a Commission Docket is a matter clearly within the Commission's sole discretion...." Re

Arkansas Electric Cooperative Corporation, Docket No. 87-111-TD, Order No. 8 (November 13, 1987). The Smiths' and Harts' land clearly constitutes a protected property right, but that right is not being taken in this proceeding.

Even if the Commission finds that the constitutional requirements of due process must be afforded to the Smiths and the Harts, it does not follow that they were denied due process because they were not allowed to delay the hearing and conduct extensive discovery. Ark. Code Ann. § 23-18-518(d) permits an untimely intervention only if it is made ten days before the start of the hearing, if it is for good cause, and if it "will not delay the proceedings." RPP 3.04(a)(2) likewise provides that an untimely intervention may be granted only if it "will not delay the proceedings." It is the normal rule of procedure that intervenors must accept a proceeding as they find it. See generally, "Parties", 59 Am.Jur.2d, § 173.

Courts and commentators alike have recognized that due process is a flexible term, and that every proceeding subject to the requirements of due process may not require all the extensive safeguards of a contested judicial proceeding. See, Davis and Pierce, Administrative Law, 3rd ed. § 9.5. The U. S. Supreme Court balances three factors in determining the type of procedures necessary to ensure due process in any particular case: (1) the private interest to be affected by the official action; (2) the risk of error in the challenged procedures and the value of additional safeguards; and (3) the state's interest in

avoiding more extensive procedural safeguards. See, Gilbert v. Homer, 520 U.S. 924 (1997); Mathews v. Eldridge, 424 U.S. 319 (1976).

Nothing in this test suggests that a continuance was constitutionally mandated to ensure due process to the Smiths and the Harts. As to the first prong of the test, although the intervenors have a legitimate interest in the use of their land, their Application for Rehearing raises issues – such as the alleged impact of the Proposed Electrical Facilities on Native American burial grounds along the route – that are of no direct or unique interest to them and which cannot be afforded much weight in deciding what kind of procedural safeguards are due them because of their individual property interests. As to the second prong of the test, after the Staff's review of EAI's CECPN application and supporting testimony, seven days of public hearings, post-hearing briefs, and two well-considered ALJ orders approving construction of the Proposed Electrical Facilities along the preferred route, it seems unlikely that Orders Nos. 9 and 10 were afflicted with substantial factual or legal errors regarding the need for the facilities or the appropriate location of the line. And it seems unlikely further proceedings would produce a different result.

Perhaps most compelling in concluding that the Smiths and the Harts were not denied due process is the state's, and the public's, interest in avoiding undue delay in a CECPN case. Delay in construction of electrical facilities can raise costs and jeopardize service reliability. As the ALJ recognized in Order No.

10, the Arkansas General Assembly specifically declared that its intention in adopting the Act was to provide "'for the expeditious resolution of all matters concerning the location, financing, construction and operation of electric generating plants and electric ... transmission lines and associated facilities....' (emphasis supplied) Ark. Code Ann. 23-18-502(e)." Order No. 10 at 7. Order No. 10 also pointed to the statutory requirements that a hearing be commenced within 90 days of a CECPN application, that untimely interventions be allowed only if they will not delay the proceeding, and that a final order must be issued within 60 days of the close of the hearing as further evidence of the legislature .. desire to expedite the resolution of CECPN cases. Id. at 7-8.

The intervenors suggested that the ALJ could have circumvented the requirement in Ark. Code Ann. § 23-18-516(a)(1) that a hearing in a CECPN case be commenced within 90 days after the filing of a CECPN application by technically commencing the hearing for a day and then recessing it indefinitely to allow the intervenors to conduct additional discovery and supplement the record. This suggestion is unconvincing. It ignores the mandate in Section 23-18-516(a)(1) that the Commission "shall conclude the proceeding as expeditiously as practicable" and the intent of the General Assembly to expedite the certification of major utility facilities.

Further delay in this case would have caused precisely the kinds of problems the Act was intended to avoid. Pushing site and foundation work for

the switching station later into the winter would have increased the risk that bad weather would raise costs and construction time. The new line is projected to be placed in service during a scheduled outage at ANO in 1999. If ANO were to be required to reduce load at a later date to permit connection of the Pleasant Hill switching station, EAI's customers could incur as much as $20 million in replacement, purchased power costs. The scheduled in-service date for the Proposed Electrical Facilities is June 1, 2000. In the words of Charles Newell, EAI's Senior Lead Engineer, the Company has concluded that shifting the in-service date to the peak load months of the year 2000 "could create a situation resulting in extremely unreliable conditions to the electrical system in this area and would place existing electrical equipment in a severely over-loaded state." EAI Exhibit 2. These facts weighed strongly against a continuance to give the intervenors additional time to investigate a CECPN application that had been subject to public, Staff and Commission scrutiny since May 1998, and they demonstrate a serious state interest in concluding this proceeding within a reasonable period of time.

Whatever the precise weight that might be assigned to the three factors the Court considers in determining what process is due, the intervenors in this proceeding could not possibly be entitled to more than the fundamentals of due process, which do not include a right to extensive discovery. Notice and hearing are recognized as fundamental to a fair proceeding, United States v. James

Daniel Good Real Property, 510 U.S. 43 (1993), as is the right to an impartial decision-maker. See, Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust, 508 U.S. 602, 617-618 (1993). Other measures generally considered fundamental to due process include the right to counsel, the right to present evidence and cross-examine opposing witnesses, and the right to a written decision based on a formal record. See, Friendly, Some Kind of Hearing, 123 U. Pa. L. Rev. 1267 (1975). The right to conduct pre-trial discovery, however, is, like the right to a jury trial, usually found to exist "only in connection with criminal trials or formal judicial process of some type." Rotunda, et al., Treatise on Constitutional Law § 17.8.

In this case, the intervenors actively participated in a hearing lasting seven days before an experienced, conscientious, and impartial ALJ. They received two written, final orders based on an extensive record. They were represented by two diligent attorneys, both of whom were well versed in utility regulation and administrative law. Their lawyers cross-examined all EAI and Staff witnesses. Samantha Bell-Smith, the daughter of Lionel Smith, testified on behalf of her father and uncle, once during public comments and again during the contested phase of the hearing. The Harts testified on their own behalf at both hearings. The intervenors called their own witnesses, including three experts. They filed a lengthy post-hearing brief, and requested and received an extension of the filing deadline for the brief.

It is true the intervenors conducted little discovery, but unlike the normal lawsuit, the Company's direct case, including testimony and exhibits, had been filed with the APSC and was a matter of public record for months before the hearing. It is probably not an exaggeration to say that because of the APSC's filing requirements and its use of prefiled testimony and exhibits, the intervenors at the start of the hearing in this Docket probably knew as much, if not more, about EAI's case than the typical litigant would know about an opposing party in ordinary civil litigation. The intervenors' problems, if any, in preparing for the second phase of hearings, stemmed largely from their refusal to retain counsel until after being granted intervenor status. This was their decision. On this record, it is simply not credible to say they were denied due process of law.

As has been previously noted in EAI's Petition for Rehearing and Motion to Dismiss, there are a number of points raised in the intervenors' Application for Rehearing that EAI believes are now moot and which the Commission no longer has jurisdiction to rehear. Any issue that has to do with need for the Proposed Electrical Facilities, or any other matter decided in Order No. 9, is no longer subject to rehearing because the time to seek a rehearing of that order expired long ago. Despite this fact, the Company will address the substance of the intervenors' Application below.

III. The Allegation that EAI Failed to Prepare a "Proper Economic Analysis" is without Merit.

The intervenors have alleged that the Company did not submit an economic analysis of the impact of the Proposed Electrical Facilities on the applicable local community, even though the Smiths and the Harts actually cite sections of the Company's Environmental Impact Statement ("EIS") (Sections 5.8, 5.8.1, 5.8.12) which directly discuss and address the economic impact of the project on the local area. The intervenors' rehearing petition baldly states that this is not adequate, without any support for the assertion and even though the analysis is similar to the economic analyses of transmission projects which have been used and approved by the Commission during the 20-year life of the Act. Additionally, the intervenors failed to point out that Section 5.7.3 of the EIS also discusses the economic effects on commerce and industry in Conway and Faulkner counties.

The intervenors also assert that the EIS concludes that the positive, economic effects of the proposed construction on the area and the Company are "minimal". This is a correct statement, but it is legally irrelevant and certainly no basis for a rehearing. The Act does not require that an applicant for a CECPN show that the proposed project will have a major, positive impact on the local economy or even that there be a positive impact at all. It is conceivable that the economic impact might be negative. However, while this factor may be one of

the factors considered by the Commission in determining whether or not to issue a CECPN, it is not in itself controlling. All the statute requires is that the subject matter be addressed. The subject was addressed and, despite the intervenors' unsupported allegations to the contrary, the EIS meets any logical, reasonable definition of the substantial evidence needed to support the ALJ's findings. While there are no minutely detailed analyses of the economic impacts of the Proposed Electrical Facilities, one must remember that this is not a project such as a major generating plant which takes four to five years to construct, employs thousands of construction workers and hundreds of employees for a 30 – to 40 – year period, who might adversely affect local housing, schools and other infrastructure, or which might have many quantifiable economic and financial benefits. In a larger project, the analysis of economic impact, benefits, and detriments might require a more detailed investigation and discussion. This project is a single transmission line and switching station that will be constructed in a relatively short period of time, will have very few construction employees, and practically no permanent employees staffing the Proposed Electrical Facilities. Consequently, it is unreasonable to contend that a complex analysis of what has already been defined as a "minimum" impact should be required.

Finally, EAI does not recall any issue being raised during the hearing, by any party, as to the adequacy or inadequacy of the economic impact statement.

Common sense would indicate that maintaining a reliable electric system is essential to the economic health of north central Arkansas.

IV. The ALJ Applied the Proper Legal Standard in Approving the Preferred Route.

In their rehearing application, the intervenors argued that the Utility Facility Act requires every applicant for a CECPN to submit an EIS "describing the comparative merits and demerits of each alternative location or route proposed by the applicant and a statement of the reasons why the proposed location or route or was selected." Application for Rehearing at 8. While this is not an incorrect statement – the record reflects that EAI did analyze the merits of alternative routes – the description is taken out of context and used to make a vast leap to an unjustified conclusion that the utility has the burden of showing that the route chosen was the very best possible. While the Act does require that alternative possibilities that were considered be described and compared and that a significant amount of other information be furnished, it is clear that the Act anticipates that the utility will be afforded some discretion in exercising its best judgment in selecting a complete proposed project. In the case of the transmission line, this would also include selecting the routing of the line.

The intervenors' assertion that the ALJ stated in Order No. 10 that the Commission would follow a "balancing of the interest rule" is also misplaced.

The discussion on page 12 is preceded by a citation and an extensive quote from a previous Commission case, Re Arkansas Cooperative Corporation, 129 PUR4th 201 (Ark. 1991), in which it is patently clear that the balancing of interests rule is a balancing of interests of the "collective public interest" against any resulting private harm. Nowhere is it ever suggested in Order No. 10 or in the quotation cited by the ALJ that the balancing of interests is referring to an evaluation of possible alternative transmission line routes, which is what the intervenors apparently proceed to do. The intervenors' statement on page 9 of the Application for Rehearing that the ALJ's approach in Order No. 10 conflicts with the comparative standard adopted in the aforementioned statutes is absolutely incorrect. It compares apples and squash. One has absolutely nothing to do with the other.

There is absolutely no basis in the law to support the intervenors' suggestion that the standard of the Commission should be to require a utility to prove that the route selected was "the most cost-effective meant to accomplish a public purpose." Application for Rehearing at 9. Another overstatement in the Application for Rehearing is the assertion that the ALJ apparently changed the burden of proof and placed burdens upon the intervenors which the statute does not allow. EAI can find nothing in Order No. 10 which does any such thing. As a matter of fact, the overall burden of proving its case was on EAI. Any fair reading of Order No. 10 would reflect that the ALJ considered all of the evidence

of the intervenors, the Staff, and EAI in concluding that EAI's choice of the preferred proposed route was a reasonable choice and that it complied with the statutory requirements. No burdens of proof were shifted and no undue burdens were placed upon the intervenors, and substantial evidence was, beyond question, presented to support the ALJ's findings.

While the Act does grant the APSC the authority to review and modify an application, and there is nothing in the Act to suggest that the discretionary powers of the Commission do away with the initial weight that should be given to the judgment of the utility. Judicial history indicates that, in exercising that amount of discretion, the Commission would have to have found, based on substantial evidence, that the decision or discretion of the utility has been abused or that the preferred route was arbitrary and unreasonable, not, as intervenors suggest, simply that the Commission thought that the utility might have exercised better judgment in selecting a route that the Commission thought might be slightly better.

A quite recent case effectively rebuts the intervenors' arguments in this portion of the rehearing petition. In Harness v. APSC, 60 Ark. App. 265, 962 S.W.2d 364 (1998), the Court of Appeals specifically addressed one of the APSC decisions cited by the ALJ, In Re Arkansas Power & Light Co., 118 PUR4th 156, (Ark. 1990) as setting forth the guiding principle for selection of a transmission line route. In approving this APSC policy, the Court stated:

> 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.

There is no merit to the intervenor assertions that the ALJ should have used a different standard in reviewing the preferred route.

V. The Intervenors' Objections to the Environmental Impact Statement Submitted by EAI Do Not Constitute Grounds for Rehearing.

In their Application for Rehearing, the Smiths and the Harts allege that the EIS submitted by EAI failed to comply with Ark. Code Ann. § 23-18-511. Application for Rehearing at 10-13. Specifically, they argue that the EIS failed to fully develop the four factors set forth in Section 23-18-511(8)(B), which requires that the EIS shall set out the environmental impact of the proposed project, any adverse environmental effects which cannot be avoided, a description of the comparative merits and disadvantages of each alternate location, and any irreversible and irretrievable commitments of resources involved in the project. The intervenors fail to specify which of the four factors were not set out in the EIS, which was attached as Exhibit E to EAI's CECPN Application in this Docket.

A review of the EIS will demonstrate that it addressed each of the required factors.

The argument of the intervenors appears to be that flaws exist in the EIS and that mistakes in the EIS render the entire filing deficient. However, no authority is cited for the proposition that errors in an EIS, whether major or minor, amount to failure to comply with statutory filing requirements. More to the point, Order No. 10 considered and disposed of each claim now alleged by the intervenors as mistakes in the EIS.

In making their argument that the EIS did not identify wetlands along the preferred route, the Smiths and the Harts point out that EAI witness Thomas Varhol of Black & Veatch testified at the hearing that, after the EIS was prepared, his firm did a pedestrian survey which did in fact identify wetlands along the route. This survey indicated that although wetlands existed on the preferred route, they were less extensive than those to the south.

The initial wetlands assessment was based on aerial photography and U.S. Geological Survey Maps, which are fairly accurate. (T. at 372-373) Using the maps and photographs is a customary and appropriate practice in preparing such studies. (T. at 385). The EIS acknowledged that locations in the Cadron Creek Valley may contain wetlands subject to Clean Water Act regulations. The EIS also put all parties to this action on notice that: "[a] pedestrian survey of the proposed route will be conducted to delineate wetlands and other waters for the

purpose of Clean Water Act permitting. Delineation procedures will follow the *Corps of Engineers Wetland Delineation Manual* (Environmental Laboratory, 1987). " EAI, it should be noted, is required to obtain a permit from the U. S. Army Corps of Engineers (the "Corps") to cross an area classified as a wetlands by federal law.

A pedestrian survey was later preformed on the proposed route. (T. at 384). A certified, wetland biologist did the actual assessment of wetlands and conducted tests for the soil, vegetation, and water conditions necessary to identify a wetlands. (T. at 1510-1511, 643-644). At the time of hearing, the draft assessment report indicated that the proposed route crossed four wetlands totaling 1370 feet in length. Three of the wetlands were forested or emergent wetlands, and one was a farmed wetland. (T. at 642-643). The largest of the three was 750 feet in width and occurs near an angle in the route, but it is possible that the angle can be moved further west to avoid the wetland. (T. at 645-646). The other two wetlands are smaller, one about 150 feet in width and the second about 250 feet across. They could easily be spanned without having to place a structure in the wetlands area itself. (T. at 649-650).

Mr. Varhol testified that small, scattered wetlands of this type are typical of what is found throughout the project area in the Cadron Creek Valley and that there would probably be more wetlands found on the southern route if a pedestrian survey were done there. (T. at 647). Mr. Varhol also testified that the

streams, ponds, and wetlands identified on the proposed route can all be spanned. (T. at 264, 1498). Alternatively, with the latitude usually given by the Commission to deviate up to 500 feet from the approved route, EAI might be able to merely build around the wetlands. (T. at 396).

Mr. Neeley testified for the Staff that even with the additional wetlands on the preferred route that were identified during the hearing, it was still a reasonable route, and he supported it with a few modifications. (T. at 983).

As seen in the Affidavit of Murray Witcher, attached hereto as EAI Response to Application for Rehearing Exhibit 1, EAI has submitted to the Corps a final wetlands assessment, which the Corps must consider prior to issuing a permit for the project. Mr. Witcher states that the final wetlands assessment did not differ in substance from the initial assessment presented by Mr. Varhol at the hearing before the ALJ.

As noted in EAI's Petition for Rehearing, the depth of the intervenors' interest in protecting wetlands is subject to question, as is their credibility. At the public comment phase of the hearing, Jimmy Hart said that he preferred that the line run through flood-prone areas, swamps, and wetlands such as those on the south alternate route. However, at the continuation of the hearing a few days later, he suddenly became concerned about wetlands crossed by the preferred route, which he then believed should be avoided. Mr. Hart testified that wetlands occurred along the preferred route, with one on the west side of Cadron Creek

being 800 feet in width. (T. at 1245). Mr. Hart has no formal training or certification that would qualify him as a wetlands expert. Mr. Hart, for example, did not know the difference between an emerging wetland and an emergent wetland. (T. at 1309). Although he stated that he was familiar with the Corps criteria for wetlands, he did not take soil samples in the areas he identified as wetlands and was only vaguely familiar with the Corps' Wetlands Delineation Manual. (T. at 1310-1312). In addition, he testified that it was difficult for him to even determine the exact location of the line while he was trying to do his wetlands survey. (T. at 1319).

Now, the intervenors raise the wetlands issue once again. In their Application for Rehearing, at pages 11 and 18-19, the intervenors rely on rank hearsay citing alleged comments by Bill Townsend and Donny R. Sudmeyer concerning the wetlands issue. Such comments are not in the record of this proceeding, and they do not appear in the affidavits attached to the intervenors' Application. This attempt to introduce new testimony through counsel's narrative in the Application itself, should be ignored. Even if the comments had been presented directly by affidavit, their content might be relevant to permitting processes before the Corps, but they would not justify rehearing before this Commission.

The ALJ reviewed the issue of wetlands and found that nothing in the evidence caused the preferred route to be unreasonable. The wetlands issue is

now before the Corps as part of the permitting process. Nothing in the Application for Rehearing justifies the taking of additional evidence on wetlands or the need for this Commission to consider the matter further. EAI met its statutory filing requirements, and the ALJ's decision that the preferred route is reasonable was clearly supported by substantial evidence.

The intervenors also attempt to raise the specter of some endangered species along the preferred route, with no credible evidence to support their claims. They argue that "there may very will be species of endangered plant and wildlife along or near the proposed preferred route of the transmission line." Application for Rehearing at 11. They rely solely upon the prior testimony of lay witness Jimmy Hart, but the Application itself presents no new evidence. At the hearing, Mr. Hart testified that, during a field inspection of the preferred and southern routes, he observed what he thought were several endangered or threatened species, both plant and animal. (T. at 1232-1241). He stated that many of the species, such as ones he called the bristly greenbrier, the Ozark chinquapin, and the bald eagle, occur on both routes. (T. at 1240-1241, 1270).

During cross-examination, however, Mr. Hart admitted that he was not familiar with any field guides to birds; that he could not compare the physical characteristics of various woodpeckers or other birds; that he did not know what types of birds might make their homes in an old rotten tree; that he did not use binoculars in bird watching; that he did not know the difference between various

types of birds; and that he only knew the names after recently looking at some pictures at the library. (T. at 1280-1289). Neither was he familiar with the name of the bristly greenbrier before the hearing, calling it "sawbrier". (T. at 1307). Mr. Hart, moreover, had no qualifications to testify as to which species were endangered and which ones were not.

Mr. Varhol for EAI testified that it is customary to rely on various public agencies for information about species in the area in the line routing process. Sections 4 and 5 of the EIS addressed possible impacts on plant and animal life, finding them to be acceptable and recording the contacts made by EAI with appropriate governmental agencies on these issues, none of whom expressed any serious concerns. (T. at 400-401). Even if some threatened or endangered species does exist along the proposed route, the agencies with the primary responsibility to protect them have notified EAI that the area is not "critical habitat" and that the species should not be affected. (Ext. at 143-157).

Mr. Varhol testified that if bald eagles were nesting along the proposed route, then construction would be scheduled to minimize the impact on the nesting pair. The line might have to be moved slightly, within the 500 foot variance, to avoid placing the tree with a nest in the right-of-way, but that otherwise the line could proceed. (T. 402-403). No evidence was introduced to counter Mr. Varhol, and no reason exists to reject the proposed line based on the record evidence. The ALJ considered the evidence on plant and animal

species and he remained steadfast in his opinion that the preferred route was reasonable. Order No. 10 at 12-13.

The Smiths and the Harts devote a single paragraph of their Application to again argue that the EIS contained a misleading analysis of the number of occupied structures along the south alternative. Application for Rehearing at 11-12. The EIS stated that there were 19 occupied structures within 500 feet of the proposed route and 49 on the southern alternate route. (Ext. at 166). Mr. Hart and Ms. Bell-Smith testified that they had driven and walked along the preferred and southern routes. (T. at 1276). Mr. Hart said, based on his visual inspection, that there were only about 20 occupied structures on the southern route. (T. at 1277). But he admitted that it was hard to know the exact location of the line, and buildings in relation to the line, working only with a general map of the area. See, Hart Cross Examination Exhibit 1. (T. at 1319). He did not use aerial photographs. (T. at 1319). Ms. Bell-Smith also admitted confusion about the location of the line at various times. (T. at 403). She did not actually measure any distances involved but relied on a visual estimate. She had never before attempted to site a line, walk it, and measure distances to various objects. (T. at 1422). Ms. Bell-Smith and Mr. Hart relied in part on pink flags which they thought were placed by EAI to mark the line, although it was never conclusively established that the flags they saw had been placed by EAI or were intended to mark the route. (T. at 1423).

Murry Witcher for EAI testified that various sets of pink flags were placed in the area marking different modifications to the route, and that some of the flags were not part of any of the routes currently under consideration. (T. 1488-1490). He further stated that only someone with experience in utilizing route management, route selection, and topographical interpretation would be able to place the proposed route with the maps available to the intervenors. (T. 1493). Personnel with Black & Veatch who conducted the count of occupied structures have a great deal of experience with such counts, as contrasted with the inexperience of Mr. Hart and Ms. Bell-Smith. In this case, as in others, they relied on aerial photography and U.S. Geological Service survey quadrangle maps, as well as field verifications to identify buildings that are currently in use. (T. at 339, 367). The ALJ reasonably relied on this expert testimony and should be affirmed.

Even if the southern route and the proposed route both have 20 occupied structures, it would prove nothing and it would not justify rejection of the proposed route. Regardless of whether the southern alternative has 49 occupied structures or 20, the proposed route is still reasonable. The ALJ reviewed the comparative merits of the preferred and southern routes, including occupied structures, and concluded that the Company's selection of the preferred route was reasonable. Order No. 10 at 13. The intervenors present no new evidence on this issue to justify rehearing.

The Smiths and the Harts rely on an affidavit attached to their Application from Leslie C. Stewart-Abernathy, an archeologist. After reviewing materials provided to him by the intervenors and a limited investigation, Dr. Stewart-Abernathy concludes, at paragraph 44 of his affidavit, that "... it is imperative that the proposed route be clearly marked, and competently checked for archeological sites, and the significance of those sites evaluated by the SHPO [State Historic Preservation Officer], prior to construction of the transmission line." The intervenors and Dr. Stewart-Abernathy, however, fail to inform the Commission that EAI is undertaking just such survey.

Attached as EAI Response to Application for Rehearing Exhibit 2 hereto is the Affidavit of Wilbur J. Bennett, Jr., the president of Archeological Assessments, Inc., an archeologist who has conducted archeological projects in Arkansas for over 20 years. His firm has been retained by EAI to perform an archeological survey of the entire preferred route. The survey is part of the Corps' permitting procedures, the last step in the regulatory process needed to complete the project. It will ensure that the project does not cause any unmitigated adverse effects on significant cultural resources. The methodology for the survey was developed in consultation with the Little Rock office of the Corps and the Arkansas Historic Preservation Program ("AHPP"). In fact, Dr. Bennett met with Dr. Stewart-Abernathy to review information gathered by the latter regarding possible archeological site locations in the project area.

In his affidavit, Dr. Bennett explains the methodology for the survey, in which the Corps and AHPP have concurred. A final report of the survey will be submitted to both agencies for their review. Dr. Bennett states it was essential that the exact route of the transmission line be established so that the Company could mark it on the ground, including staking and flagging the center line. A reliable archeological survey could not be performed without the center line being marked, which could not be accomplished until the Commission approved the transmission route. Dr. Bennett indicates that no ground-disturbing activities will be undertaken by EAI along the transmission line right of way until a finding of no significant impact on significant cultural resources has been made by the Corps. Based on his research to date, it is Dr. Bennett's opinion that "it is highly unlikely that the Project area will include a significant cultural resource which would suffer any potential adverse impacts that cannot be either avoided or mitigated through data recovery investigations done in consultation with the Corps and AHPP officials." Bennett Affidavit at Paragraph 6.

This issue, like that of wetlands, is before the Corps, and offers no justification for rehearing this case.

VI. Contrary to the Intervencrs' Assertions, Substantial Evidence Supports the Need for an Off-site Power Source at Arkansas Nuclear One.

As previously stated, EAI believes that all assertions of error in Order No. 9 are now moot because the time has long expired for filing a rehearing petition on that order. However, the intervenors' assertions of the nature of the evidence, and the absence of evidence with regard to the Arkansas Nuclear One ("ANO") requirements for an alternative power supply are grossly incorrect and, cannot be allowed to stand without correction. It is totally incorrect to contend that EAI's need for an additional off-site power source at ANO to satisfy the requirements of the Nuclear Regulatory Commission ("NRC") is based on the hearsay testimony of Staff witness James Neeley. That is not true. The testimony of EAI witness David McNeill is replete with statements concerning the risks to ANO's continued operation unless the off-site source is resolved and that the NRC had been affirmatively pursuing the matter with EAI. Mr. McNeill explained that NRC regulations require that there be two physically independent, reliable sources of off-site power for a nuclear unit, and that ANO's existing 161 kV off-site power source will not met NRC requirements under load conditions forecasted for the year 2000. (T. at 749-751, T. 762-771).

The intervenors' assertions of the hearsay nature of the ANO testimony is also unsupportable. Not only is the Commission not bound by the rules of evidence, the testimony of Mr. McNeill, an obvious expert in the area, would be admissible even in a court of law. Order No. 9 at 9. Mr. McNeill was not only relating his interpretation of the NRC regulations, but he was also relating what

NRC officials have communicated to the Company concerning the NRC's demands. (Tr. at 765). Experts may offer opinions based on material that would not otherwise be admissible if it is the kind of material experts in the relevant field reasonably utilize. Rule 703 of the Arkansas Rules of Evidence. This is exactly what Mr. McNeill did, and his testimony was corroborated by Mr. Neeley.

This claim is completely non-meritorious and should be rejected out of hand.

VII. The Intervenors Err when Arguing that the ALJ Failed to Address the Issue of Electromagnetic Fields and that No Evidence was Presented Concerning the Possible Health Effects of Induced Currents.

The intervenors erroneously claim that in Order No. 10, although addressing stray voltage, "the ALJ did not address related problems caused by electromagnetic fields created or existing under high voltage lines such as those which will cross the property owned by the Hart intervenors." Application for Rehearing at 16. Claiming further that "Order No. 10 is silent on this issue," they go on to complain, without justification, that the ALJ should have considered the testimony of EAI witness Dr. William Bailey who, according to their application, "indicated there could be a significant problem with such fields." Such statements are wholly fallacious.

In reality, the ALJ specifically addressed possible adverse health effects from both "electromagnetic fields (EMF) produced by transmission lines and from a phenomenon known as stray voltage." Order No. 10 at 15-17. In fact, more discussion is given to EMF than to stray voltage, and there are specific references to the testimony of Dr. Bailey. The ALJ found that "the only conclusion that can be drawn from the testimony of Dr. Bailey is that the overwhelming body of scientific evidence amassed to date is that EMF do not cause cancer or other harmful health effects in adults, children or animals." Order No. 10 at 16. Furthermore, the ALJ in his Finding of Fact No. 8 states: "The phenomenon of EMF has not been proven to constitute a threat to human or animal health at the low levels likely to be produced by the transmission line being proposed in this proceeding." It is obvious from any fair reading of the ALJ's decision that he addressed EMF and relied heavily on the testimony of Dr. Bailey, which is understandable: Dr. Bailey is a renowned expert in his field, and he is one of the country's foremost authorities on electricity and public health issues. See, Rebuttal Testimony filed July 30, 1998, at 2-7, with attached curriculum vitae.

In seeking a rehearing, the Smiths and the Harts attempt to rely on the Affidavit of William O. English, a registered professional engineer lacking any scientific training or experience in the fields of public health, neuropharmacology, or environmental toxicology, to suggest that the record in this proceeding

contains no evidence addressing "the problem likely to be experienced from induced currents at dairy and cattle farms, separate and apart from the stray voltage issue ...." This is wrong. The Commission is referred to the Surrebuttal Testimony of Dr. William H. Bailey filed August 11, 1998. (T. at 620-629). Dr. Bailey first distinguishes EMF-induced current from stray voltage and then discusses the possible health effects of EMF-induced currents on people and animals. (T. at 620-625). Dr. Bailey concludes that based on scientific research there are no harmful effects to people or animals resulting from the 161 kV transmission line proposed in this proceeding. (T. at 625-628).

In this proceeding, the intervenors failed to offer expert testimony to rebut or in any way call into question the opinions of Dr. Bailey. In their Application, they have presented no justification to rehear evidence related to EMF or EMF-induced currents or stray voltage.

VIII. The Intervenors Are Unpersuasive in Urging the South Alternative and Offer No Valid Grounds to Reopen the Record.

The intervenors are unpersuasive in urging the Commission to adopt the south alternative and they offer no valid grounds to reopen the record. The Smiths and the Harts assert that, in light of modifications to the preferred route made by the ALJ to placate the Harts and other property owners, the south alternate route is now less costly than the southern route. Application for

Rehearing at 15-16. Aside from begging the issue of whether the preferred route is a reasonable one, the intervenors' argument fatally oversimplifies the problem of routing a transmission line. It should be obvious that any route proposed by the Company is likely to be modified by the ALJ. The south alternate is not likely to lack concerned property owners who might want that route modified, and thus the cost of the south alternate is understated at this juncture. Moreover, property owners along the south alternate may raise their own archeological, ecological and environmental concerns. As noted elsewhere in this Response, Mr. Hart's first foray into this case was to urge the south alternate because it contained many more "worthless" wetlands, as contrasted to the preferred route. Now, Mr. Hart claims the high ground as a guardian of wetlands.

EAI and the Staff have shown the preferred route to be reasonable, and the intervenors have failed to rebut that result. They prefer the south alternate because it spares their property, not because the weight of the evidence establishes that it is superior or that the route approved by the ALJ was unreasonable.

At the conclusion of their Application, the intervenors rehash other previously mentioned allegations to derive a list of reasons to urge reopening the record. They cite the archeological survey recommended by Dr. Stewart-Abernathy, which EAI already was undertaking pursuant to the permitting procedures of the U.S. Army Corps of Engineers. They restate the unfounded

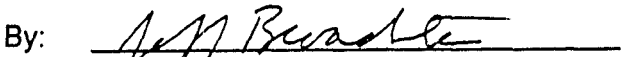
concerns of Mr. English that induced currents from transmission lines were not addressed in this Docket. They rely on the affidavit of Mr. English to urge further consideration of so-called alternatives to building the transmission line, even though the ALJ considered alternatives and rejected them. Finally, they refer to hearsay comments of Mr. Townsend and Mr. Sudmeyer concerning wetlands, but fail to include those comments in their affidavits for scrutiny at this time, while ignoring that EAI is before the Corps to justify its wetlands permit.

The Application for Rehearing has failed to make a persuasive case to reopen the evidentiary record.

WHEREFORE, EAI prays that the Application for Rehearing of Orders Nos. 9 and 10 filed by Lionel and Lyman Smith, and Jimmy, Nancy, and Margaret Hart be denied, and for all other necessary and proper relief.

Respectfully submitted,

ENTERGY ARKANSAS, INC.

By: 

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ATTORNEYS FOR ENTERGY
ARKANSAS, INC.

CERTIFICATE OF SERVICE

I, Jeff Broadwater, do hereby certify that a copy of the foregoing has been served on all parties of record this 25th day of January, 1999.

Jeff Broadwater

EXHIBIT 1

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF ENTERGY ARKANSAS, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE THE PLEASANT HILL TO QUITMAN 161 KV TRANSMISSION LINE AND ASSOCIATED SWITCHING STATION FACILITIES, IN CONWAY AND FAULKNER COUNTIES, ARKANSAS	)	DOCKET NO. 98-141-U

EAI RESPONSE TO APPLICATION

FOR REHEARING

EXHIBIT 1

AFFIDAVIT OF MURRY K. WITCHER

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF ENTERGY ARKANSAS, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE THE PLEASANT HILL TO QUITMAN 161 KV TRANSMISSION LINE AND ASSOCIATED SWITCHING FACILITIES, IN CONWAY AND FAULKNER COUNTIES, ARKANSAS	)	*DOCKET NO. 98-141-U*

AFFIDAVIT OF MURRY K. WITCHER

STATE OF ARKANSAS)
)SS
COUNTY OF PULASKI)

1. *I am Murry K. Witcher, a resident of North Little Rock, Arkansas. I am a Right-Of-Way Agent for Entergy Services, Inc., an affiliate of Entergy Arkansas, Inc. ("EAI" or the "Company"). My business address is P.O. Box 551, Little Rock, Arkansas 72203. My office is located at 5115 Thibault Road, Little Rock, Arkansas. In my capacity as Right-Of-Way Agent, I assist with the Company's assessment of landowner concerns relating to the location of construction projects for EAI generation and transmission facilities, the appraisal of real property required for location of these facilities, the acquisition of real property, the settlement of damage claims arising from construction activities, the maintenance of real estate records, and the leasing of EAI owned property held for transmission facilities.*

2. *I am giving this affidavit on behalf of EAI to affirm that EAI has retained Archeological Assessments, Inc. ("AAI"), to conduct a cultural resources study of the proposed Pleasant Hill switching station site and the preferred route of the Pleasant Hill to Quitman 161 kV transmission line ("Proposed Electrical Facilities"). Also, below I briefly comment on the permitting process in which EAI is involved concerning wetlands.*

3. *EAI must obtain a permit from the U.S. Army Corps of Engineers (the "Corps") to cross wetlands protected by federal regulation. The permitting process is underway concerning the Proposed Electrical Facilities and EAI has submitted to the Corps its final wetlands assessment. Such assessment does not differ in substance from the draft wetlands assessment described by EAI witness Thomas Varhol in his oral testimony before the Administrative Law Judge at the hearing in this case.*

I hereby swear and affirm that the foregoing is true and correct to the best of my information, knowledge , and belief.

Murry Witcher
MURRY K. WITCHER

SUBSCRIBED AND SWORN to before me this 22 *day of January, 1999.*

Barbara H. Chapman
Notary Public

(SEAL)

My Commission Expires:
Nov 8, 2001

EXHIBIT 2

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF ENTERGY ARKANSAS, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE THE PLEASANT HILL TO QUITMAN 161 KV TRANSMISSION LINE AND ASSOCIATED SWITCHING STATION FACILITIES, IN CONWAY AND FAULKNER COUNTIES, ARKANSAS	)	DOCKET NO. 98-141-U

EAI RESPONSE TO APPLICATION

FOR REHEARING

EXHIBIT 2

AFFIDAVIT OF WILBUR J. BENNETT

EXHIBIT 2

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION OF ENTERGY ARKANSAS, INC. FOR A CERTIFICATE OF ENVIRONMENTAL COMPATIBILITY AND PUBLIC NEED TO CONSTRUCT AND OPERATE THE PLEASANT HILL TO QUITMAN 161 KV TRANSMISSION LINE AND ASSOCIATED SWITCHING STATION FACILITIES, IN CONWAY AND FAULKNER COUNTIES, ARKANSAS	)	DOCKET NO. 98-141-U

EAI RESPONSE TO APPLICATION

FOR REHEARING

EXHIBIT 2

AFFIDAVIT OF WILBUR J. BENNETT

BEFORE THE
ARKANSAS PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE APPLICATION	)	
OF ENTERGY ARKANSAS, INC. FOR A	)	
CERTIFICATE OF ENVIRONMENTAL	)	
COMPATIBILITY AND PUBLIC NEED	)	
TO CONSTRUCT AND OPERATE THE	)	DOCKET NO. 98-141-U
PLEASANT HILL TO QUITMAN 161 KV	)	
TRANSMISSION LINE AND ASSOCIATED	)	
SWITCHING FACILITIES, IN CONWAY	)	
AND FAULKNER COUNTIES, ARKANSAS	)	

AFFIDAVIT OF WILBUR J. BENNETT, JR.

STATE OF ARKANSAS)
)ss
COUNTY OF PULASKI)

1. I am Wilbur J. Bennett, Jr., a resident of Nashville, Arkansas. I am vice president of Archeological Assessments, Inc. located at # 2 Pleasant Mountain, P.O. Box 1631, Nashville, Arkansas. My qualifications, capability and experience are found in Exhibit 1 attached hereto. I am an archeologist and have conducted archeological projects in Arkansas for over twenty years. I hold a Ph.D. from Drew University in Madison, New Jersey.

2. I am giving this affidavit on behalf of Entergy Arkansas, Inc. ("EAI" or the "Company") to explain the archeological survey (the "Survey") that I have been retained to perform for the Company related to the Pleasant Hill to Quitman transmission line (the "Project").

3. The purpose of the Survey is to insure that this Project does not cause any unmitigated adverse effects on significant cultural resources. This Survey is part of the U.S. Corps of Engineers' permitting procedures required to authorize completion of the Project. The methodology for this Survey is being developed in consultation with the Little Rock District Corps of Engineers ("Corps") and the Arkansas Historic Preservation Program ("AHPP"). My findings and interpretations will be reviewed by both agencies.

4. The Survey is being conducted as a result of landowners along the proposed route of the transmission line providing cultural artifacts to the Arkansas Archeological Survey, which in turn contacted AHPP, which then contacted EAI and the Corps of Engineers. As a result of discussions with both agencies, the Company has agreed to conduct the Survey along the entire length of the proposed transmission line and at the location of the proposed switching station. In consultation with both agencies, and on behalf of the Company, my firm is investigating all archeological sites reported or otherwise determined to be within the transmission line right of way. I have met with Dr. Leslie C. Stewart-Abernathy of the Arkansas Archeological Survey and reviewed information regarding possible site locations in the Project area of which he has been made aware by local residents.

5. The Survey methodology includes a background study containing the results of a geomorphological analysis of the project area landscape to determine likely or possible areas which have high archeological potential, a review of historic maps and

other data, and a review of appropriate aerial photography. Data from the background research are integrated into a project geographic information system ("GIS"). Maps generated by the GIS will be used to determine specific field methods for the Survey. Field methods, in general, will include a pedestrian examination of the entire length of the transmission line corridor. Sub-surface examination within the corridor will be done using shovel tests (hand-dug holes approximately twelve inches in diameter and twelve inches deep) where the ground surface is obscured. Shovel tests generally will be set at 25 meter intervals throughout the corridor. Areas noted as previously-recorded archeological sites or as having archeological potential will be investigated at a greater intensity. Specific Project methodology has been reviewed with officials from the Corps and the AHPP. Both agencies concurred with the methodologies proposed. A detailed report of project methods and results will be prepared for review by the Corps and AHPP.

6. Based on research to date, it is my best judgment that it is highly unlikely that the Project area will include a significant cultural resource which would suffer any potential adverse impacts that cannot be either avoided or mitigated through data recovery investigations done in consultation with the Corps and AHPP officials.

7. In order to conduct and conclude the Survey, it was essential that the exact route of the transmission line be established so that the Company could mark it on the ground, including staking and flagging the center line. Without the center line having been marked, my firm would be unable to produce a reliable Survey. Exact ground locations are

critical to the integrity of the Survey. The Company was unable to supply my firm with the exact center line until a final order had been rendered by the Arkansas Public Service Commission.

8. It is my understanding that no ground-disturbing activities will be undertaken by the Company within the Project right of way until a finding of no significant impact on significant cultural resources has been made by the Corps of Engineers.

I hereby swear and affirm that the foregoing is true and correct to the best of my information, knowledge and belief.

WILBUR J. BENNETT, JR.

SUBSCRIBED AND SWORN to before me this 15th day of January, 1999.

BOBBIE JAMES NOTARY PUBLIC PULASKI COUNTY, ARK. (SEAL)

Notary Public

My Commission Expires:

February 2, 2005