
BEFORE THE ARKANSAS SUPREME COURT

**HEMPSTEAD COUNTY HUNTING CLUB, INC.,
SCHULTZ FAMILY MANAGEMENT COMPANY,
PO-BOY LAND COMPANY, INC. and YELLOW CREEK
CORPORATION**

APPELLANTS

VS.

CASE NO. CA08-128

**ARKANSAS PUBLIC SERVICE COMMISSION
AND SOUTHWESTERN ELECTRIC POWER
COMPANY**

APPELLEES

**ON APPEAL FROM THE ARKANSAS PUBLIC SERVICE COMMISSION
Paul Suskie, Chairman**

**PETITION FOR REVIEW
OF APPELLEE SOUTHWESTERN ELECTRIC POWER COMPANY**

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APPELLEE’S PETITION FOR REVIEW

On June 24, 2009, the Court of Appeals delivered its Opinion reversing the Public Service Commission’s (“APSC’s”) grant of a Certificate of Environmental Compatibility and Public Need (“CECPN”) to Southwestern Electric Power Company (“SWEPCO”) for the construction of the John W. Turk, Jr power plant (“Turk Plant”) based on its *de novo* review of a non-final APSC decision and a first-impression interpretation of the Utility Facility Environmental and Economic Protection Act, Ark. Code Ann. § 23-18-501 *et seq.* (“Act”).

I. Nature of Appeal

SWEPCO requested a CECPN for the Turk Plant to satisfy its legal duty to “furnish, provide, and maintain” electric power service to its customers that is both “adequate and efficient” (Ark. Code Ann. § 23-3-113), by meeting its requirement for an additional 600 megawatts of base-load power supply as determined by the APSC pursuant to the Regulatory Reform Act of 2003 (Ark. Code Ann. § 23-18-106). Order No. 11 in APSC Docket No. 06-154-U initially granted SWEPCO the Turk Plant CECPN. Following Appellants’ petition for rehearing, the APSC amended Order No. 11 and issued its final decision in Order No. 13, finally concluding the parties’ rights in the docket. Appellants did not appeal that final order.

The Court of Appeals reversed the grant of the CECPN, holding that the APSC’s long-standing procedure, pursuant to the Act, of processing CECPN applications for generation and transmission facilities in separate dockets was improper; that the APSC’s determination of SWEPCO’s system-wide need for additional power supply (as opposed to the need for a specific facility such as the Turk Plant) in a separate docket was erroneous; and that the APSC’s findings regarding alternative locations did not comport with the Act.

II. Grounds for Review

Pursuant to Ark. Sup. Ct. R. 2-4, SWEPCO respectfully petitions the Court to review this

case because the Court of Appeals erroneously reversed the APSC based on an incorrect construction of the Act. The Act has not previously been interpreted by the Courts and, therefore, this case presents issues of first impression involving a matter of substantial public interest: the APSC's timely certification of generation and transmission facilities. The Court of Appeals' Opinion (a) is in conflict with prior holdings of this Court regarding the final order rule and standard of review (b) otherwise errs with respect to issues of first impression in Arkansas, issues of substantial public interest, significant legal issues needing clarification or development, and substantial questions concerning the construction or interpretation of statutes. *See* Ark. Sup. Ct. R. 1-2(b)(1),(2), (4), (5) and (6). The specific grounds for review are summarized below:

1. Contrary to the Act, which provides that a "party aggrieved by the *final decision* of the [APSC] *on rehearing* may obtain judicial review *thereof*" (Ark. Code Ann. § 23-18-524(b)), the Court of Appeals not only reviewed, but also reversed, the APSC's initial, non-final Order No. 11, without addressing the APSC's final decision on rehearing (Order No. 13) which remains unchallenged by Appellants. This ruling abandons 150 years of final-order precedent. Ark. Sup. Ct. R. 1-2(b)(2), (5) and (6).

2. The Court of Appeals reviewed the APSC's decision *de novo* rather than applying the standard of review required by Ark. Code Ann. § 23-2-423 and underscored in *Ozark Gas Pipeline Corp. v. Ark. Pub. Serv. Comm'n*, 342 Ark. 591, 29 S.W.3d 730 (2000). Moreover, by reversing the APSC without a showing of harm to Appellants, the Opinion conflicts with the standard recited in *Consumers Utilities Rate Advocacy v. Ark. Pub. Serv. Comm'n*, 99 Ark. App. 228, 258 S.W.3d 758 (2007), that "something more than mere error is necessary" to overturn an APSC decision. Ark. Sup. Ct. R. 1-2(b)(2), (4) and (5).

3. The Court of Appeals erroneously applied the rules of statutory construction by requiring the review of multiple "major utility facilities" in a single proceeding when the plain

language of the Act as codified in Ark. Code Ann. §§ 23-18-503, 510 and 511 requires a separate CECPN for *each* major utility facility. Ark. Sup. Ct. R. 1-2(b)(1), (4), (5) and (6).

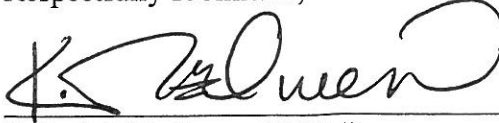
4. The Court of Appeal's review started and ended with a general legislative finding, which it deemed controlling (Opinion at 9). The Court of Appeals wholly ignored or disregarded the specific language of the Act's operative sections, including what facilities the Act governs (i.e. only those defined as a "major utility facility"). Indeed, the Court of Appeals termed the Act's definitions of that term "irrelevant" (Opinion at 14) even though the application requirements and findings of fact specified by the Act differ depending on the type of major utility facility proposed by the applicant. Ark. Code Ann. §§ 23-18-511, 519. This violated long-held rules of statutory construction discussed in *Southwestern Bell Tel. Co. v. Ark. Pub. Serv. Comm'n*, 20 Ark. App. 30, 727 S.W.2d 384 (1987). Ark. Sup. Ct. R. 1-2(b)(1), (2), (4)-(6).

5. The Court of Appeals substituted its judgment on the APSC's specific findings of fact regarding alternative locations (Opinion at 18), contrary to Ark. Code Ann. § 23-2-423 and *Consumers Utilities Rate Advocacy, supra*. Ark. Sup. Ct. R. 1-2(b)(2) and (4).

6. By requiring the APSC to determine a utility's system-wide power supply resource needs in a CECPN proceeding (Opinion at 18), the Court of Appeals disregarded the later-enacted Ark. Code Ann. § 23-18-106 and the Act's plain language that the APSC is only required to determine the "basis of the need for the facility" proposed in the CECPN application (Ark. Code Ann. § 23-18-519(b)(1)). Furthermore, by erroneously holding that the APSC relied exclusively on an order in a prior Resource Planning docket (Opinion at 17), the Court of Appeals ignored the APSC's specific findings regarding the need for the Turk Plant and the substantial evidence cited in support of those findings. Ark. Sup. Ct. R. 1-2(b)(1), (2), (4)-(6).

WHEREFORE, SWEPCO respectfully requests that its Petition for Review be granted.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Review has been served upon all parties of record electronically and by U.S. Mail, postage prepaid, this 29th day of June, 2009.

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A handwritten signature in black ink, appearing to read "K. McQueen", written over a horizontal line.

Kelly M. McQueen