

BEFORE THE ARKANSAS PUBLIC SERVICE COMMISSION

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| IN THE MATTER OF SOUTHWESTERN |) | |
| ELECTRIC POWER COMPANY’S PETITION |) | |
| FOR A DECLARATORY ORDER FINDING |) | |
| THAT INSTALLATION OF ENVIRONMENTAL |) | DOCKET NO. 12-008-U |
| CONTROLS AT THE FLINT CREEK POWER |) | |
| PLANT IS IN THE PUBLIC INTEREST |) | |

POST-HEARING BRIEF

Comes now the General Staff (Staff) of the Arkansas Public Service Commission (Commission), and submits its Post-Hearing Brief pursuant to Order No. 13.

INTRODUCTION

Order No. 13 requested that the parties submit briefs on the “Environmental Protection Agency regulations applicable to this specific case, including the current compliance deadlines for such regulations and the process and likelihood for securing extensions of such deadlines.”

The uncertainty of the likelihood for securing an extension of the Environmental Protection Agency’s (EPA) Mercury and Air Toxics Standards (MATS) regulations and the time required to pursue a possible extension would put continued operation of the Flint Creek Plant in jeopardy and could present a risk of reliability in Northwest Arkansas. The time frame for complying with the MATS regulations and the time requirements for acquiring or planning, designing, and constructing the alternatives to retrofitting Flint Creek constrain the potential viability of the various alternatives. Although it may be possible to expedite the Louisiana Market Based Mechanism (MBM) process, to obtain extensions for MATS compliance, and to pursue high priority planning and review through Southwest Power Pool (SPP), these options are uncertain at this time and the time it would take to pursue these options would likely result in

additional delays. The EPA compliance deadline and the risk and uncertainty in obtaining an extension to the deadline are critical factors in Staff's recommendation that the Commission approve the retrofit of Flint Creek in order to maintain reliability in Northwest Arkansas.

ARGUMENT

In the testimony filed subsequent to Order No. 10, Southwestern Electric Power Company (SWEPCO) affirmatively stated the Flint Creek plant must be retrofitted to comply with EPA regulations or it would be retired by April 2015.¹ SWEPCO and Arkansas Electric Cooperative Corporation (AECC) have stated that in the case of the retirement/transmission option proposed in the latest round of testimony, that it is impossible to complete the transmission upgrades and additions to replace Flint Creek capacity by April 2015 which would cause significant reliability concerns for the Northwest Arkansas load pocket.² However, Sierra Club (Sierra) argues that this April 2015 deadline amounts to "nothing more than an attempt to mislead and panic the Commission into approving SWEPCO's proposed retrofits, regardless of the existence of less-expensive alternatives."³ Sierra's witness, Paul Chernick, argues that the availability of a one-year compliance extension makes the effective deadline April 2016. Mr. Chernick also argues that, "The April 2016 deadline does not apply to units that are required for reliability."⁴ As such "a generator could continue to operate, without penalty, until at least April 2017."⁵ For support for his argument, Mr. Chernick relies on an EPA Memorandum dated December 16, 2011 (Memorandum).⁶ In this Memorandum, the EPA indicates that it will not pursue enforcement of the MATS compliance deadlines so long as the source complies with the terms of the Memorandum. However, as stated by Ms. McCellon-Allen, an assurance from EPA

¹ Direct Testimony of Venita McCellon-Allen, p. 30, l. 12-14 (January 11, 2013).

² Direct Testimony of Duane Highley, p. 6, l. 21-23 (January 11, 2013).

³ Paul Chernick, Second Supplemental Rebuttal Testimony, p. 7, l. 10-11 (March 14, 2013).

⁴ Id. at l. 14-15.

⁵ Id. at l. 17-18.

⁶ Exhibit PC-F3 to the Second Supplemental Rebuttal Testimony of Paul Chernick (March 14, 2013).

that it will not pursue enforcement of the deadline does not protect the Company from citizen suits from Sierra or others to enforce the statutory deadlines.⁷

The requirements for being granted the compliance extensions to this deadline are listed on page two of the Memorandum.⁸ The requirements may be stated as:

1. The unit must be critical for reliability;
2. The unit must be able to obtain a one year extension from the state permitting authority pursuant to Section 112(i)(3)(B) of the Clean Air Act; and
3. The unit must comply with all other terms of the policy.

It is only after complying with these requirements that a unit may obtain an additional one-year extension for compliance from the EPA pursuant to the Memorandum.⁹

Mr. Chernick fails to recognize the requirement contained within the statutory language of Section 112(i)(3)(B) of the Clean Air Act (CAA). This section, as cited in the Memorandum, states:

The Administrator (or a State with a program approved under subchapter V of this chapter) may issue a permit that grants an extension permitting an existing source up to 1 additional year to comply with standards under subsection (d) of this section **if such additional period is necessary for the installation of controls.** [emphasis added].

In other words, the state permitting authority may only grant the initial one-year extension (until 2016), if the extra time is needed to install controls. The statutory language does not provide any extensions on any other basis. Therefore, pursuant to the statutory language, Flint Creek must be in compliance by April 16, 2015, for any plans other than retrofit.¹⁰

⁷ T. 353.

⁸ “This enforcement policy is limited in application to units that are critical for reliability purposes. Some sources will be able to obtain a broadly available one year extension pursuant to Section 112(i)(3)(B). A source that qualifies for a one year extension from its permitting authority may also qualify for an [administrative order] at the end of its extension, provided that it falls within the terms of this policy.”

⁹ As stated above, however, this extension does not protect the company from citizen suits.

¹⁰ The Arkansas Department of Environmental Quality has already granted SWEPCO a one-year extension of the MATS compliance date for its retrofit plan for Flint Creek. See SWEPCO Hearing Exhibit 2.

Mr. Chernick appears to argue that so long as reliability issues exist, no deadline will be applicable pursuant to the Memorandum.¹¹ While it may be argued that EPA's Memorandum lacks clarity, a careful reading of the Memorandum does not support Mr. Chernick's interpretation. Even if it could be argued that the Memorandum allows deadline extensions for any plans other than retrofit, this position is clearly inconsistent with the statutory language. The law is well established that an agency has no authority to promulgate a rule that is contrary to a statute under which it was adopted. *McLane Co., Inc. v. Weiss*, 332 Ark. 284, 965 S.W.2d 109 (1998). Administrative regulations may not create a right that Congress has not created by statute. See, *Freeman v. Fahey*, 374 F.3d 663, footnote 2, (2004). If an agency may not create a right by regulation which is subject to the procedural safeguards of rulemaking, it certainly may not by a policy memorandum.

CONCLUSION

The CAA's statutory deadline for compliance with the MATS requirement for existing generating units is April 15, 2015. The CAA grants the unit the ability to obtain a one-year extension from the state permitting authority if such additional period is necessary for the installation controls. The state permitting authority does not have authority to grant a compliance extension on any other basis. The EPA has indicated by a non-enforceable policy memorandum that if this extension allowed by the CAA is granted by the state permitting authority, a unit may apply for a subsequent year's compliance extension from the EPA during which time it will not seek enforcement against the unit. The subsequent extension would not affect the rights of any private parties to bring citizen suits to enforce the compliance deadlines. As such, the Flint Creek unit may have up to April 2016 to comply with the MATS deadlines if it is retrofitted.

¹¹ Chernick, *supra*. at p. 14, l. 3-11.

Any other alternative would require compliance by April 2015. The Clean Air Act does not provide for further extensions and the EPA may not grant a right the Clean Air Act does not.

Furthermore, there is no history and no precedent which can guarantee which interpretation the EPA (or the courts) will take regarding the deadlines and available extensions to those deadlines. It is precisely this uncertainty which raises a major concern in this Docket. Relying on Sierra's untested theory regarding possible extensions places reliability in the Northwest Arkansas load pocket at risk, which is not an acceptable outcome.

The risks and uncertainties in the EPA compliance deadlines and in obtaining extensions to those deadlines is a critical factor in Staff's recommendation that the Commission approve the retrofit of Flint Creek. When considered along with (1) the other risks and uncertainties regarding timing related to implementing other alternatives, including the Louisiana MBM process and the high priority transmission planning and review through SPP; (2) the need for a generating resource in Northwest Arkansas to address reliability concerns; and (3) the Applicants' position that they will not convert Flint Creek to natural gas and will retire the unit if the Commission does not approve the retrofit, the retrofit of Flint Creek appears to be the only option available to comply with the MATS regulations within the prescribed deadline and that supports reliability in Northwest Arkansas.

Respectfully submitted,

General Staff of the Arkansas
Public Service Commission

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CERTIFICATE OF SERVICE

I, Valerie F. Boyce, do hereby certify that a copy of the foregoing has been served on all parties of record by electronic means or by U.S. mail, postage prepaid, this 19th day of April, 2013.

/s/ Valerie F. Boyce