PUC DOCKET NO. 40443
SOAH DOCKET NO. 473-12-7519

APPLICATION OF SOUTHWESTERN ELECTRIC POWER COMPANY FOR AUTHORITY TO CHANGE RATES AND RECONCILE FUEL COSTS	**§ § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

DISSENT TO ORDER ON REHEARING
OF
COMMISSIONER KENNETH W. ANDERSON, JR.

In all but one aspect, I agree with the Order on Rehearing in this docket. I write separately to dissent from the Commission's treatment of the allowance for funds used during construction (AFUDC). For the remainder of the Order on Rehearing, I join my colleagues for the reasons stated in the Order on Rehearing.

With respect to AFUDC, the majority's Order on Rehearing in this docket rests on an interpretation of a 2008 Commission order approving a certificate of convenience and necessity (CCN) in Docket No. 33891 (the Turk CCN Order).[1] In that 2008 case, this Commission set a cap on the capital costs that Southwestern Electric Power Company (SWEPCO) could recover from Texas ratepayers for an ultra-supercritical, coal-fired generation plant in Arkansas (the Turk Plant). The cap was established to limit ratepayer exposure to rising capital costs attributable to delay associated with obtaining an Arkansas permit necessary to begin construction of the Turk Plant. In its entirety, the Turk CCN Order's cost cap states "[t]he cap on the capital costs that Texas retail customers may be responsible for is the Texas jurisdictional allocation of $1.522 billion."[2]

In the Order on Rehearing, the majority determines that the Turk CCN Order is ambiguous, and therefore it does not conclusively state whether the Commission intended to

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[1] *Application of Southwestern Electric Power Company for a Certificate of Convenience and Necessity Authorization for Coal Fired Power Plant in Arkansas*, Docket No. 33891, Order (Aug. 12, 2008).

[2] *Id.* at 20.

include AFUDC in the cap on capital costs.[3] In light of this purported ambiguity, the majority looks beyond the Turk CCN Order to the underlying record evidence in Docket No. 33891 to determine the intent of the Commission in establishing the cost cap. The majority now concludes that AFUDC was a separately calculated component of capital costs that was not intended to be subject to the cost cap because some witnesses in Docket No. 33891 provided testimony explaining that the total estimate for Turk Plant capital costs was $1.522 billion, exclusive of AFUDC. Consequently, the Order on Rehearing concludes that the cost cap does not apply to approximately $250 million representing AFUDC, and SWEPCO may recover the Texas jurisdictional share of those costs from ratepayers.[4] I disagree with the majority's interpretation of the cost cap as it applies to AFUDC, and I dissent accordingly.

I. AFUDC IS A CAPITAL COST

Fundamental principles of accounting and this Commission's historical treatment of AFUDC strongly support its inclusion in the cost cap. AFUDC is a component of invested capital representing financing costs incurred during construction of facilities. As such, AFUDC is invested capital which regulated utilities include in rate base and upon which they may earn a rate of return.[5] The Financial Accounting Standards Board explains that utility "rates are based on allowable cost that include an allowance for the cost of funds used during construction."[6]

No party to this proceeding, including SWEPCO, has argued that AFUDC is not a capital cost. Nonetheless, the majority has determined that AFUDC falls outside of the category of capital costs for purposes of applying the cost cap, and AFUDC is therefore separately recoverable from Texas ratepayers. The majority makes this determination even though the language establishing the cost cap makes no exception for AFUDC. Furthermore, the majority makes this determination even though the Turk CCN Order declares that "it is unreasonable to

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[3] *Application of Southwestern Electric Power Company for Authority to Change Rates and Reconcile Fuel Costs*, Docket No. 40443, Order on Rehearing at 9, 27 (Mar. 6, 2014).

[4] *Id.* at 10, 27.

[5] JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES, 248 (2d. ed. 1988); *see also* P.U.C. SUBST. R. 25.72(g).

[6] Financial Accounting Standards Board, Summary of Standard No. 71 (available at http://www.fasb.org/summary/stsum71.shtml).

expect Texas retail consumers to be responsible for the Texas jurisdictional allocation of *any additional costs* that exceed $1.522 billion."[7]

Because standard accounting principles and Commission precedent designate AFUDC as a component of capital costs, it must be presumed that the set of capital costs subject to the cost cap includes AFUDC unless the Turk CCN Order expressly states otherwise. However, nowhere does the Turk CCN Order suggest that AFUDC is a special component of capital costs not subject to the cost cap. Further, by SWEPCO's own account, the amount of AFUDC totaled $306 million at the time this Commission approved construction of the Turk Plant.[8] Shifting this substantial cost to ratepayers would certainly warrant explicit recognition in the Turk CCN Order if the Commission, in fact, intended that Texas ratepayers pay for their jurisdictional share of AFUDC while limiting other capital costs. The Turk CCN Order simply does not include language indicating that AFUDC is an exceptional category of capital costs so it should be treated as all other capital costs subject to the cost cap.

II. THE TURK CCN ORDER IS UNAMBIGUOUS

When the Commission interprets a previous order it must do so according to traditional principles of statutory construction.[9] Those principles dictate that state agencies must interpret their own orders based on the plain meaning of words when that language is unambiguous.[10] Reference to extrinsic evidence to determine the meaning of a state agency's order is only appropriate when an ordinary reading of the words in the order generates more than one reasonable interpretation of its meaning.[11]

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[7] Docket No. 33891, Order at 7 (emphasis added).

[8] SWEPCO's Motion for Rehearing at 15 (Oct. 30, 2013).

[9] *Public Utility Commission of Texas v. Houston Power & Lighting Company*, 645 S.W.2d 645, 646 (Tex. App.—Austin 1983, writ ref'd n.r.e.).

[10] *AEP Texas Central Company v. Public Utility Commission of Texas*, 286 S.W.3d 450, 460 (Tex.App.—Corpus Christi 2008, pet. denied).

[11] *See Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 437 (Tex.2009) ("only when . . . words are ambiguous do we 'resort to rules of construction or extrinsic aids.'"). Words are ambiguous if they are "capable of being understood in two or more possible senses or ways." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 77 (1987).

In this case, the majority has determined that the following sentence in the Turk CCN Order is vulnerable to multiple interpretations: "The cap on the capital costs that Texas retail customers may be responsible for is the Texas jurisdictional allocation of $1.522 billion."[12] The majority reasons that because the cost cap is silent with respect to AFUDC the cost cap may or may not include AFUDC, and the cap is therefore ambiguous. In the face of this silence, the majority finds it necessary to review extrinsic evidence to determine what the cost cap really means. However, silence does not signify ambiguity.[13] In my view, the cost cap means exactly what it says: the cap on the capital costs that Texas retail customers may be responsible for is the Texas jurisdictional allocation of $1.522 billion. No reasonable reading of the Turk CCN Order infers that the Commission intended to create a subset of capital costs that would be exempt from the cap's coverage, and that AFUDC would fall into that exemption.

When the Commission wishes to indicate AFUDC as a separate component of capital costs it does so explicitly by identifying a general category of capital costs then carving out specific subcategories from the general designation. Numerous orders preceding the Turk CCN Order demonstrate the Commission's ability to distinguish capital cost components. For example, in approving an amendment to a CCN for an El Paso Electric Company generating unit in Sunland Park, New Mexico, this Commission stated that the "estimated capital cost of the Rio Grande Unit 9 project *(excluding interconnection costs and carrying costs in the form of allowance for funds used during construction (AFUDC))* is estimated to be $75 million."[14] In a CCN proceeding approving a SWEPCO generating project in northwest Arkansas, this Commission stated that "[t]he capital cost of the Tontitown Project as presented in the bid proposal *(excluding carrying costs in the form of allowance for funds used during construction (AFUDC))* is estimated to be $100.4 million."[15] In approving yet another SWEPCO CCN

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[12] Docket No. 33891, Order at 20.

[13] *TGS-NOPEC Geophysical Company v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011) ("We presume that the Legislature chooses a statute's language with care, including each word chosen for a purpose, while purposefully omitting words not chosen.").

[14] *Application of El Paso Electric Company for a Certificate of Convenience and Necessity for a Peaking Generating Unit at the Rio Grande Site in New Mexico*, Docket No. 38717, Order at 7 (Apr. 8, 2011) (emphasis added).

[15] *Application of Southwestern Electric Power Company for Certificate of Convenience and Necessity Authorization for Power Plant in Arkansas*, Docket No. 32918, Order at 7 (Jan. 19, 2007) (emphasis added).

amendment for a generating unit in Shreveport, Louisiana, this Commission stated that "[t]he capital cost of the Arsenal Hill project as presented in the bid proposal *(excluding carrying costs in the form of allowance for funds used during construction (AFUDC))* is estimated to be $277 million."[16] These orders demonstrate that the Commission knew precisely how to distinguish AFUDC from other capital costs when it issued the Turk CCN Order, and that it did not intend to make this distinction when setting the cost cap on capital expenses for the Turk Plant.[17] The Commission's silence with respect to AFUDC in the cost cap therefore leads to one, unambiguous conclusion: the cost cap does not exclude AFUDC.

The appropriate time to clarify the meaning of the Turk CCN Order was immediately after its issuance in SWEPCO's motion for rehearing. Commission rules allow parties to move for rehearing to object to claimed errors in Commission orders. Our rule provides that a party's motion for rehearing must state the order's error with specificity.[18] After issuance of the Turk CCN Order, SWEPCO had an opportunity to object to the language of the cap on capital costs, but it did not do so. Instead, SWEPCO challenged the Commission's authority to establish the cost cap in the first place.[19] With the expiration of the motion for rehearing period in Docket 33891, SWEPCO's opportunity to object to the wording of the cost cap in the Turk CCN Order also expired. SWEPCO appealed the Commission's authority to implement the cost cap through the Texas courts, and the Court of Appeals for the Seventh Judicial District upheld the

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[16] *Application of Southwestern Electric Power Company for Certificate of Convenience and Necessity Authorization for a Combined Cycle Plant in Louisiana*, Docket No. 33048 at 7 (Mar. 8, 2007) (emphasis added).

[17] SWEPCO identifies a single CCN order, *Application of El Paso Electric to Amend its Certificate of Convenience and Necessity for Generating Units Montana 1 and 2 at the Montana Site in El Paso County*, Docket 40301, Order (Dec. 13, 2012), in which a parenthetical exclusion does not distinguish AFUDC from other capital costs as support that the Commission generally excludes AFUDC from findings of estimated capital costs. SWEPCO's Motion for Rehearing at 12 (Oct. 30, 2013). However, that order makes a separate finding as to the amount of AFUDC immediately after the finding of estimated capital costs. Docket No. 40301, Order at 8. The Turk CCN at issue in this case makes no such separate finding identifying the amount of AFUDC. Again, the order in Docket No. 40301 demonstrates that the Commission knows how to identify AFUDC as a separate capital cost component when it wishes to do so.

[18] P.U.C. PROC. R. 22.264(b).

[19] *See generally Application of Southwestern Electric Power Company for Certificate of Convenience and Necessity for a Coal-fired Power Plant in Arkansas*, Docket No. 33891, SWEPCO's Motion for Rehearing (Aug. 29, 2008).

Commission's cost cap as established in the Turk CCN Order.[20] During the appeal process, SWEPCO did not argue that AFUDC should be exempt from the cost cap and the Texas Court of Appeals did not rule on this issue.[21] Because SWEPCO has exhausted its opportunity to challenge the treatment of AFUDC as it relates to the cost cap in its motion for rehearing before the Commission and in appellate proceedings in Texas courts, the rate case in this docket is not the proper forum to change the language of the cost cap to exclude AFUDC.

III. EXTRINSIC EVIDENCE DOES NOT SUPPORT EXCLUSION OF AFUDC FROM THE COST CAP

Even if the Commission resorts to extrinsic evidence to determine the meaning of the Turk CCN Order, that evidence does not provide a firm basis to exclude AFUDC from the cost cap. Although the majority refers to cost estimates for construction and AFUDC associated with the Turk Plant in witness testimony, other evidence surrounding the establishment of the cost cap does not indicate that the Commission intended to carve out any subset of capital costs as exempt.

The cost cap resulted from rising cost estimates attributable to a delayed construction start date for the Turk Plant. During the pendency of Docket No. 33891, SWEPCO sought approval from the Arkansas Department of Environmental Quality for an air quality permit necessary to begin construction. The delay associated with obtaining the air quality permit entailed increased cost estimates for the Turk Plant. At the Commission's July 3, 2008 open meeting, then-Chairman Smitherman expressed concern about the increased costs associated with the delay and explained that a possible solution would be to fix the overall costs of the Turk Plant so that Texas ratepayers would not be responsible for escalating costs during an open-ended period for the Arkansas Department of Environmental Quality to issue the permit.[22] He explained, "I would like to try to fix the price at some point such that if those delays continued—and they're totally outside of our control—that Texas ratepayers are not responsible for picking

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[20] *Southwestern Electric Power Company v. Public Utility Commission of Texas*, No. 07-10-00108-CV (Tex. App.—Amarillo 2011, pet. denied) (not designated for publication).

[21] *Id.* at *12-13.

[22] Open Meeting Tr. at 54 (Jul. 3, 2008).

them up."[23] Neither Chairman Smitherman nor the other commissioners advanced any exclusion or qualification to the price cap, and ultimately the Turk CCN Order reflected the same.

After issuance of the Turk CCN Order, SWEPCO moved for rehearing and requested that the Commission eliminate the cap on capital costs.[24] At the Commission's September 24, 2008 open meeting, Chairman Smitherman reiterated his rationale for establishing the cap, noting that the Turk CCN Order included "carefully crafted conditions"[25] associated with the project's approval. He stated unequivocally "[f]or capital costs, the Commission placed the cap at $1.522 billion."[26]

In light of Chairman Smitherman's repeated explanations that the cost cap protected ratepayers from increasing costs, the majority's determination that the cap excludes AFUDC defeats the rationale for the capital cost cap and is illogical. Chairman Smitherman had significant experience on the Commission at the time of the Turk CCN Order's issuance, and he had substantial experience in utility accounting practices, not to mention extensive experience as a public finance investment banker.[27] Chairman Smitherman signed multiple orders designating AFUDC as a separate capital cost in previous CCN proceedings. Undoubtedly, Chairman Smitherman was aware that increasing costs for the Turk Plant would entail proportional increases in AFUDC. Yet nowhere—not in the Turk CCN Order and not in open meeting discussions—did Chairman Smitherman or the other commissioners indicate that AFUDC would be excluded from the cost cap or treated as a separate category of capital costs. Consistent with Chairman Smitherman's open meeting statements, the Turk CCN Order reflects the policy determination that the cap on capital costs was to limit the financial risk to Texas ratepayers because of the looming uncertainty surrounding the commencement of construction. The record provides no basis to suggest that Chairman Smitherman believed that Texas ratepayers should not be responsible for rising capital costs unless those costs were attributable to financing during

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[23] *Id.*

[24] Docket No. 33891, SWEPCO Motion for Rehearing at 2 (Aug. 29, 2008).

[25] Open Meeting Tr. at 104 (Sep. 24, 2008).

[26] *Id.*

[27] Office of the Governor Press Release, Governor Perry Names Smitherman Chairman of Public Utility Commission (Nov. 7, 2007) (available at http://governor.state.tx.us/news/appointment/2725/).

construction of Turk Plant facilities. But that is precisely how the majority interprets the Turk CCN Order in this docket.

Today the majority re-writes an order issued over five years ago based on contrived ambiguity and excerpts of witness testimony in a closed docket. The appropriate time to address interpretation of the Turk CCN Order was in motions for rehearing immediately after its issuance and on appeal in the courts; not today when a half decade separates our Order on Rehearing and the Turk CCN Order.

If AFUDC is a capital cost then it should be included in the cost cap of the Turk CCN Order based on the plain language establishing the cap. If AFUDC is something other than a capital cost then it should not be considered invested capital included in rate base and is not eligible for a return on investment. That is my interpretation of the Turk CCN Order. The majority's determination that AFUDC is not a capital cost for purposes of the cost cap is an extraordinary and erroneous rendering of the Turk CCN Order. It requires that the Commission simultaneously declare that AFUDC is a capital cost and that AFUDC is not a capital cost. The only argument supporting this view is an inference that the Commission forgot to include words in the cost cap creating an exception for AFUDC. This is an unreasonable interpretation of the Turk CCN Order so I dissent.

SIGNED AT AUSTIN, TEXAS the 6th day of March 2013

PUBLIC UTILITY COMMISSION OF TEXAS

KENNETH W. ANDERSON, JR., COMMISSIONER