

TCEQ Docket No. 2011-2199-IWD

IN THE MATTER OF	§	BEFORE THE TEXAS
SOUTHWESTERN ELECTRIC	§	
POWER COMPANY'S PIRKEY	§	
POWER PLANT RENEWAL AND	§	COMMISSION ON
AMENDMENT OF TPDES PERMIT	§	
NO. WQ0002496000	§	ENVIRONMENTAL QUALITY

APPLICANT'S RESPONSE TO REQUEST FOR CONTESTED CASE HEARING

TO THE HONORABLE MEMBERS OF TEXAS COMMISSION ON ENVIRONMENTAL QUALITY;

COMES NOW, Southwestern Electric Power Company, ("Applicant" or "SWEPCO") and files this Response to Sierra Club's and Public Citizen's Request for Contested Case Hearing in the above-referenced matter. Applicant requests that the Texas Commission on Environmental Quality ("TCEQ") Commissioners deny these requests and in support shows the following:

I. PROCEDURAL BACKGROUND

SWEPCO operates the Henry W. Pirkey Power Plant near Hallsville, Texas, in Harrison County ("Pirkey") pursuant to Texas Pollution Discharge Elimination System ("TPDES") Permit No. WQ0002496000. On August 31, 2010, SWEPCO timely filed an application to renew and amend Pirkey's existing TPDES permit. TCEQ declared the permit administratively complete on October 25, 2010. Notice of Receipt of Application and Intent to Obtain a Permit was published in English on October 29, 2010 in the *Marshall News Messenger* and in Spanish on November 3, 2010 in the *La Opinion*. TCEQ declared the permit technically complete on May 11, 2011 and prepared a draft permit on July 2, 2011. Notice of Application and Preliminary Decision was published on July 13, 2011 in English in the *Marshall News Messenger* and in Spanish in the *La Opinion*, triggering the 30 day public comment period. Public Citizen submitted timely comments on August 11, 2011 and the 30-day comment period closed on August 12, 2011. The TCEQ Office of the Chief Clerk filed

the Executive Director's Response to Comment ("Response") on October 5, 2011 and the Decision of the Executive Director on the permit application was issued October 7, 2011. Sierra Club joined by Public Citizen filed a timely request for a Contested Case Hearing on November 4, 2011.

II. REQUIREMENTS UNDER APPLICABLE LAW

A. Requirements for Hearing Requests

The applicable regulations provide that a written request for a contested case hearing must substantially comply with the requirements set forth in 30 TAC § 55.201(d).

- (1) give the name, address, daytime telephone number, and, where possible, fax number of the person who files the request. If the request is made by a group or association, the request must identify one person by name, address, daytime telephone number, and, where possible, fax number, who shall be responsible for receiving all official communications and documents for the group;
- (2) identify the *person's personal justiciable interest* affected by the application, including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the proposed facility or activity that is the subject of the application and how and why the requestor believes he or she will be adversely affected by the proposed facility or activity *in a manner not common to members of the general public*;
- (3) request a contested case hearing;
- (4) list all relevant and material disputed issues of fact that were raised during the public comment period and that are the basis of the hearing request. To facilitate the commission's determination of the number and scope of issues to be referred to hearing, the requestor should, to the extent possible, specify any of the executive director's responses to comments that the requestor disputes and the factual basis of the dispute and list any disputed issues of law or policy; and
- (5) provide any other information specified in the public notice of application. (emphasis added)

Additionally, the Commission has promulgated specific requirements that must be met for Groups or Associations to succeed with a hearing request. 30 TAC § 55.205(a) requires that requests from such entities must meet all of the following requirements:

- (1) one or more members of the group or association would otherwise have standing to request a hearing in their own right;
- (2) the interests the group or association seeks to protect are germane to the organizations purpose; and
- (3) neither the claim asserted nor the relief requested requires the participation of the individual members in the case.

The Texas Water Code § 5.115(a) defines “affected person,” or “person affected,” or “person who may be affected” to mean “a person who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the administrative hearing. An interest common to members of the general public does not qualify as a personal justiciable interest. The commission shall adopt rules specifying factors which must be considered in determining whether a person is an affected person in any contested case arising under the air, waste, or water programs within the commission’s jurisdiction and whether an affected association is entitled to standing in contested case hearings.” (emphasis added). Implementing this legislation, TCEQ adopted regulations under 30 TAC § 55.203(a), similarly defining an affected person as “one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest.” (emphasis added).

Pursuant to Texas Water Code § 5.115, TCEQ promulgated rules specifying “factors” which must be considered in the determination of whether a person is affected. TCEQ did so at 30 TAC § 55.203(c). These include but are not limited to:

- (1) whether the interest claimed is one protected by the law under which the application will be considered;

- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) likely impact of the regulated activity on the health and safety of the person, and on the use of the property of the person;
- (5) likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

In *City of Waco*, the Court explained the “consideration of the factors” to mean that “while each of the factors may potentially be relevant to determining whether the required personal justiciable interest is present, the legal significance of a given factor in regard to a particular hearing request must turn on the extent to which the factor informs the ultimate inquiry under the specific circumstances of the case.” *City of Waco v. TCEQ*, 346 S.W. 3d 781, 808 (Tex. App.—Austin 2011, *no pet. h.*), *citing City of El Paso v. Public Util. Comm’n*, 883 S.W.2d 179, 184 (Tex. 1994).

To summarize, for a Group or Association such as Sierra Club and Public Citizen to make and maintain a request for a contested case hearing, they each must meet all of the requirements of 30 TAC §§ 55.201 (setting out criteria for a request for a contested case hearing), 55.203 (defining “affected person”) and 55.205 (specifying requirements for a request from a Group or Association). The shared criterion among the aforementioned sections being that an individual member of the group must demonstrate that they have “standing” by a demonstration that they have a “personal justiciable interest” in the application as an “affected person” by evaluating the “factors.”

TCEQ rules at 30 TAC § 55.211(c) require that the Commission grant a timely request for a contested case hearing by an *affected person* if the request: (1) raises disputed issues of fact raised during the comment period, that are not withdrawn and that are relevant

and material to the commission's decision on the application; (2) is pursuant to a right to hearing authorized by law; and (3) complies with the requirements of 30 TAC § 55.201. The determination of standing as an affected person is tantamount to proceeding to the determination of whether a hearing will be granted.

B. Requirements for Responses to Hearing Requests.

Under 30 TAC § 55.209(e) a response to hearing requests must specifically address:

- (1) whether the requestor is an affected person;
- (2) which issues raised in the hearing request are disputed;
- (3) whether the dispute involves questions of fact or law;
- (4) whether the issues were raised during the public comment period;
- (5) whether the hearing request is based on issues raised solely in a public comment withdrawn by the commenter in writing by filing a withdrawal letter with the chief clerk prior to the filing of the Executive Director's Response to Comment;
- (6) whether the issues are relevant and material to the decision on the application;
- (7) a maximum expected duration for the contested case hearing

Therefore, the determination of whether the Sierra Club and Public Citizen can maintain their request begins with the discussion of whether the groups meet the requirements of "affected person."

III. DISCUSSION

A. Public Citizen fails to identify a member who is an "affected person" and Sierra Club is not an "affected person" because they present no legally protected interest and therefore do not have standing to request a contested case hearing.

1. Insufficient Request.

Public Citizen fails to identify an individual member that “would otherwise have standing to request a hearing in their own right” and therefore fails to meet the requirements for an affected party based on 30 TAC § 55.205(a). For this reason the TCEQ Commissioners should deny the request as it relates to Public Citizen. No further analysis is warranted for Public Citizen’s request. Further, 30 TAC § 55.201(d)(1) expressly requires that a hearing request must identify the purported personal justiciable interest of the requestor. Thus, since Public Citizen as a group did not name in its hearing request a specific member of the group that has standing to request a hearing, Public Citizen should not be allowed to offer-up such an after-the-fact member of Public Citizen if none was identified in its hearing request. Therefore, Public Citizen has failed to substantially comply with 30 TAC § 55.201(d)(1) and 30 TAC § 55.205(a) and should not be allowed to take a second bite at the apple by offering-up new members that have not yet been identified in any reply that may be filed by Public Citizen.

Sierra Club’s and Public Citizen’s request for a contested case hearing asserts generally that members live and recreate near Pirkey and receiving water bodies and also use water from the Sabine River as drinking water for themselves and livestock. Sierra Club also alleges that these members will be adversely impacted by continued and potentially increased discharge of Pirkey’s wastewater and that members will be affected by Pirkey’s cooling water system’s adverse impact on waterbodies and aquatic life. Mr. Richard LeTourneau is offered by the Sierra Club as the “example” member or one who would otherwise have standing in their own right. Mr. LeTourneau’s interest is described as utilizing the Sabine River for kayaking and fishing - in other words a recreation interest.

Turning to the requirement that the request must explain why he or she will be adversely impacted in a manner not common to the general public, Sierra Club has failed to demonstrate that any interest claimed by Mr. LeTourneau is no different from the interest of members of the general public. There is nothing that differentiates this Sierra Club member from any other resident in Harrison County and the surrounding counties.

2. No Legally Protected Interest Distinct from the General Public.

As previously stated, TCEQ rules at 30 TAC § 55.203(a) implement Texas Water Code § 5.115 relating to who is an affected person, and provides that:

. . . an affected person is one who has a personal justiciable interest related to a legal right, duty, privilege, power or economic interest affected by the application. An interest common to members of the general public does not qualify as a personal justiciable interest. (emphasis added).

The same basic principles governing whether a party has standing to challenge governmental action in court also govern whether a party is an “affected person” entitled to a contested case hearing on a TCEQ permit. *Bosque River Coalition v. TCEQ*, 347 S.W.3d 366 (Tex.App. – Austin 2011) citing *City of Waco*, 346 S.W.3d at 801-802. In *City of Waco*, the Court noted that “the type of legally protected interest, rooted in property rights, that constitute legally protected interests, [are] distinct from those of the general public” *City of Waco*, 346 S.W. 3d at 809. Further, the Court in the *City of Waco* cites to several other cases in which interests not related to property rights were determined not to be interests that were different than those of the general public. *City of Waco*, 346 S.W. 3d at 809-810, citing *Save Our Springs Alliance v. City of Dripping Springs*, 304 S.W.3d 871 (Tex. App.—Austin 2010, *pet. denied*) (concluding that plaintiffs who claimed “environmental,” “scientific,” and “recreational” interests in a public water body, but not property interests affected by alleged pollution of it, had not established an injury distinct from that of the general public), *Persons v. City of Fort Worth*, 790 S.W.2d 865 (Tex. App. – Fort Worth 1990, *no writ*)(a resident lacked standing because while he claimed to have used and enjoyed the parkland in various ways, he failed to identify a personal justiciable interest in using the park-land that distinguished him from any other citizen of the city). The Court in *Save Our Springs Alliance* bluntly concluded that, “In sum, we do not find any Texas case in which an alleged injury to a plaintiff’s environmental, scientific, or recreational interests conferred standing in the absence of allegations that the plaintiff has an interest in property affected by the defendant’s actions.” *Save Our Springs Alliance*, 304 S.W.3d at 880.

Thus, based on the foregoing legal authority, Mr. LeTorneau cannot be an affected person based on his recreational interests, and if Mr. LeTorneau cannot be an affected person, then the Sierra Club has failed to meet the requirements of 30 TAC § 55.205(a)(1) which mandates that one or more members of the group would have standing to request a hearing in their own right. Further, the Sierra Club should not be allowed to rehabilitate its deficient hearing request by asserting that another member besides Mr. LeTourneau is an affected party in its reply. The reason is that like Public Citizen, the Sierra Club has failed to substantially comply with TAC § 55.201(d)(1) and 30 TAC § 55.205(a) by failing to name a member of the group who is an affected party, and the Sierra Club should not be allowed to take a second bite at the apple.

3. Application of “Factors”.

Considering the factors in 30 TAC § 55.203(c) that apply to Mr. LeTourneau’s stated interest in determining if he qualifies as an “affected person,” the only conclusion can be that Mr. LeTourneau does not possess a personal justiciable interest in his own right in the proposed TCEQ action and thus, the Sierra Club’s request should be denied.

In addition, below are the factors under 30 TAC § 55.203(c) and the reasons why neither Mr. LeTourneau, the Sierra Club, nor Public Citizen can be an affected person:

Factor 1: The interest claimed by Sierra Club and Public Citizen must be one protected by the law under which the application is being considered:

Neither Sierra Club nor Public Citizen made such a showing. The applicable law under which the application is being reviewed does not recognize “concerns” as a protected interest. No evidence is offered by Sierra Club that the issuance of the permit may impact the quality of the water or how issuance will adversely impact Mr. LeTourneau or other members. The information in the application and TCEQ’s proposed permit support that the permitting action does not involve a new source, effluent, or increased discharge and therefore no new or additional pollutants are being introduced to Pirkey’s discharge through the permit’s

issuance. Further Mr. LeTourneau's concern about navigability of the Sabine cannot be addressed under the applicable law and this comment is irrelevant. As previously explained, the interest Mr. LeTourneau is claiming in the receiving waters is recreational; an interest that does not equate to a "legal right, duty, privilege, power, or economic interest" protected by law. Mr. LeTourneau's recreational interest is indistinct from the interest of the general public.

Factor 2: Distance restrictions and other limitations imposed by law on the affected interest:

Mr. LeTourneau purportedly lives approximately 6 miles from Pirkey. Sierra Club makes no claim that he owns real property adjacent to, or any legal water right in a watercourse receiving any of the facility's discharge. Mr. LeTourneau allegedly kayaks and fishes in a section of the Sabine River approximately four miles from the discharge from Brandy Branch Reservoir. Referring to the segment that Mr. LeTourneau describes, SWEPCO estimates that the distance from the segment is actually closer to six miles from the Brandy Branch Reservoir. Beyond a general statement, Sierra Club offers no other relevant information or documentation on how the permitting decision will specifically impact Mr. LeTourneau's recreational use of the Sabine other than to state that it will, regardless of the proximity of Mr. LeTourneau's recreational activities. In contrast, the permit and related documents demonstrate that there will be no change in the volume or makeup of the discharge from Pirkey and designated uses will be maintained. Response, p. 5. Additionally, historically, Pirkey discharges (commingled with waters in Brandy Branch Reservoir and/or comingled waters in the tributaries of Hatley Creek) ultimately enter into the Sabine River only during or immediately after significant storm events so that any discharge by Pirkey would realistically be influenced by runoff from rain events.

Factor 3. Whether a reasonable relationship exists between the interest claimed and the activity regulated:

As stated above, Sierra Club made no demonstration in its request of how permit issuance will impact its members' interests beyond a bald statement. Mr. LeTourneau's recreational interest, which has been estimated to be kayaking approximately eight times per year, likely will rarely, if ever, coincide with when Pirkey is discharging. As discussed above, Pirkey historically has discharged once or twice a year during or following a significant storm event. SWEPCO assumes that the likelihood that Mr. LeTourneau will be recreating during or immediately after a significant storm or rain event is low. However, even if he does, the corresponding quality of water in the Sabine River would be overwhelmingly impacted by all of the commingled storm water run-off from the entire area upstream, and not from any distinguishable (of which there are none) parameter(s) that may be alleged to be coming from the facility.

Factor 4. Likely impact of the regulated activity on the health and safety of the person, and on the use of the property of the person:

Likewise, Sierra Club made no specific showing how Mr. LeTourneau or its members' health and safety, beyond a "concern" would be adversely impacted. No showing has been made that Mr. LeTourneau or any other Sierra Club member is an adjacent landowner to the discharge or otherwise has a property interest that will be impacted by the proposed action.

Factor 5 Likely impact of the regulated activity on the use of the impacted natural resource by the person:

The request by Sierra Club does not point to any adverse impact to a natural resource. In the Response, TCEQ reports that all receiving streams to Pirkey's discharge are maintaining their designated uses and the only impaired downstream parameter is Biological Oxygen Demand ("BOD"), which TCEQ

does not attribute to Pirkey and no evidence exists that would connect downstream BOD with Pirkey. Response, p. 7.

IV. RESPONSE REQUIREMENTS TO ADDRESS

Having concluded that Sierra Club and Public Citizen are not affected persons in relation to the proposed permit action because they have not espoused a legally protected interest that is distinct from the interest of the general public, SWEPCO nonetheless will address the additional points required in this response pursuant to 30 TAC § 55.209 that have not been answered heretofore. In SWEPCO's response to the issues raised in the hearing request, the items listed in 30 TAC § 55.209(e)(2)-(6) will be addressed below.

A. Issues in Dispute.

In its request for Contested Case Hearing, Sierra Club raises issues similar to those raised during the comment period and new issues, that were not raised during the public comment period. Below is a partial response to the salient issues raised by Sierra Club and Public Citizen that are questions of law, policy or fact.

1. Draft permit fails to include any technology-based limits for toxic pollutants, including selenium and barium, contained in the flue gas desulphurization waste, that is ultimately discharged through Outfall 004.

Technology-based limits for the parameters that Sierra is seeking *do not exist* in law. The applicable regulations at 40 CFR Part 423 do not contain technology-based effluent limitations for flue gas desulfurization (FGD) wastes, selenium and barium are not characterized or regulated as “toxic” by EPA, and Pirkey does not discharge FGD wastes. Sierra Club admits in their request that EPA is in the *process* of updating technology-based guidelines for steam electric power plants. Since these new rules *have not been issued* by EPA, they are not applicable to this permit. As TCEQ notes in its Response to Comments, EPA's interim guidance is not applicable to the Pirkey discharges. Response, p. 10-11. Sierra Club attempts

to make a case that TCEQ must adhere to these guidelines. Implying that interim guidelines, which have not been through the rulemaking and public vetting process, are nonetheless binding on TCEQ and must be included in the current permit action is untrue.

Within this same comment, Sierra Club posits that Pirkey has a history of “problematic discharge of selenium.” As demonstrated from a review of Pirkey’s compliance history, Appendix A to the permit application, and the Response, Pirkey is in compliance with water-quality based effluent limitations. TCEQ’s Fact Sheet notes that “no permit action is proposed for a single exceedance of total selenium.” TCEQ Fact Sheet and Executive Director’s Preliminary Decision dated June 13, 2011, p. 3 (“Fact Sheet”). More recent and relevant data demonstrates that selenium levels have been on the decline in recent years in Brandy Branch Reservoir.

Whether or not interim guidelines must substantively apply to a permit is a question of law or policy, not fact.

2. Permit does not contain adequate monitoring requirements to ensure enforcement of effluent limitations.

With respect to the outfalls that have reduced monitoring frequencies in the proposed permit, as Sierra Club states, Pirkey has demonstrated “full” compliance during the prior permit term’s (5 year) limits at Outfalls 102, 302, Outfall 004 and 006. Outfalls 102 and 302 are internal outfalls. Outfall 006, seldom, if ever, discharges due to the utilization of this water in the facility’s FGD system. Reduction in the frequency of monitoring at these outfalls will bring monitoring frequency in line with other monitoring at plant Outfalls creating a more consistent monitoring schedule for plant personnel. Given the strong history of compliance at these outfalls, TCEQ exercised its permitting discretion to approve

the amendments related to reduced monitoring frequency. See U.S. EPA's Interim Guidance for Performance-based Reductions of NPDES Permit Monitoring Frequencies, EPA Policy Document, April 1, 1996 and U.S. EPA's NPDES Permit Writer's Manual, September 2010, §8.13 ("Permit Writer's Manual")

Sierra Club misunderstands the implementation of weekly monitoring frequency. The plant does not consistently discharge from Outfall 004. The permit requirement specifies that when discharge *is occurring* monitoring must occur at least once during that week. In fact, the new draft permit limits discharge from Outfall 004 to six consecutive days. Because of the infrequency of discharge, the facility must conduct its monitoring in the first day or two to ensure that monitoring has occurred at least "once per week" or "weekly."

Notwithstanding, that Sierra Club's confusion over the monitoring requirements and disregard for Pirkey's excellent compliance history do not amount to an issue of disputed fact, this potential issue may be characterized as disputed. In any event, this particular issue was not addressed during the public comment period.

3. TCEQ failed to exercise best professional judgment to determine the "best technology available" at two sets of cooling water structures.

First, Pirkey utilizes only one "cooling water intake structure" as that term is defined in 40 CFR Part 125. The pump station, which is located 19 miles away, near Lake 'O the Pines, does not equate in any shape or form to a cooling water intake structure. This pump station is an independently operated structure used solely for the purpose of providing make-up water to Brandy Branch Reservoir, is not physically connected to the Pirkey cooling system and does not provide water directly to the plant for any purpose. Water travels in an underground pipe, not a "waterway," and is released several hundred feet from the reservoir where it flows

overland before entering a holding pond area where it overflows into the tail-race waters of the facility's cooling water discharge and into the reservoir. The water in the reservoir is used for recreation, fishing and industrial purposes. Sierra Club's broad interpretation is inaccurate and irrelevant to the proposed permitting action.

Sierra Club references "developing rules for cooling water intake structures at facilities like Pirkey" and would have the Commission magically grant legal status to EPA's Proposed Rule on cooling water intake structures. TCEQ is within its authority to apply an EPA Draft Fact Sheet as appropriate.

Notwithstanding SWEPCO's position that the pump station is not a cooling water intake structure, whether or not the pump station on Lake 'O the Pines is a "cooling water intake structure" is a question of fact. Whether or not EPA's Draft Fact Sheet substantively applies to this permit is a question of law or policy, not fact.

4. TCEQ has not performed a legally sufficient anti-degradation analysis.

As TCEQ discussed in the Fact Sheet to the proposed permit and in its Response, it did conduct an anti-degradation analysis. Response, p. 4-5 and Fact Sheet, p. 8 – 9. Sierra Club claims that because the review was not available to them, then the review must be legally insufficient. Sierra Club either chose to ignore or didn't take the time to review the permit application and the proposed permit that clearly supports the fact that there will be no new waste streams and no additional loading. Therefore, existing water quality at least as far as this permit is concerned will be maintained. Additionally, the facility has repeatedly complied with its permitting limitations as proven by its compliance history. A consistent demonstration of compliance through more frequent monitoring justified the request and approval of reduced monitoring frequency. Permit Writer's Manual,

p. 8 – 6. To suggest that pond maintenance, reduced freeboard during heavy rain events and reduced monitoring frequency equates to an increased risk of discharge of pollutants and risk of anti-degradation completely ignores the permitting record and disingenuously suggests that Pirkey will violate its permit. Support for such adverse results does not exist. This comment is directed at Sierra Club's policy positions which have no place in this forum.

However, the potential issue of whether or not TCEQ performed a legally sufficient anti-degradation analysis may be characterized as a question of fact.

5. The permit inadequately addresses threats to groundwater, and how discharges to groundwater through improperly lined discharge ponds might ultimately affect surface waters with which the groundwater is hydrologically connected.

Again, Sierra Club has completely ignored the permitting record. All of Pirkey's ponds are built with the appropriate clay liners that meet TCEQ's specifications to prevent the seepage of wastewater into the subsurface. Sierra Club offers no documentation to demonstrate that there is a hydrological connection between the groundwater and surface water at or near the facility.

However, the potential issue of whether or not the proposed permit inadequately addresses threats to groundwater may be characterized as a question of fact.

With respect to comments made by Public Citizen and incorporated into Sierra Club's and Public Citizen's request for contested case hearing that were not specifically addressed in the hearing request letter, SWEPCO supports the ED's Responses to those comments and incorporates them by reference herein.

B. Relevant and Material Issues

SWEPCO urges the Commission to deny the hearing requests for the reasons stated herein.

However, based on the foregoing, should the Commission choose to grant one or more hearing requests, SWEPCO believes that the following are the only issues that are referable based on 30 TAC § 55.211(b)(3)(A) since these are the only disputed issues of fact that were raised by Sierra Club during the comment period, not withdrawn, and that are relevant and material to the Commission's decision on the application.

1. Whether or not the pump station on Lake 'O the Pines is a "cooling water intake structure."
2. Whether the draft permit includes adequate protections for the attainable and designated uses of the receiving waters, and whether or not TCEQ performed a legally sufficient anti-degradation analysis.
3. Whether or not the proposed permit adequately addresses threats to groundwater.

As explained in more detail above and also in the Response, all of the other issues raised in the comment letter and incorporated into the hearing request letter are not referable to a hearing because the issue is a question of law or policy rather than a question of fact or is not applicable to the application. For example, the issue related to technology-based limits is not applicable and an evaluation of the waste handling capacity of the Lone Star Publically Owned Treatment Works is outside the scope of the application.

Concerning the requirement to address the expected duration of a contested case hearing if a hearing is granted, SWEPCO urges the Commission to require that the hearing take no longer than 6 months.

V. PRAYER

For these reasons, SWEPCO, respectfully requests that the Commission deny Sierra Club's and Public Citizen's request for a contested case hearing and in line with the position of the Executive Director, approve the Pirkey TPDES permit. Neither Public Citizen nor the

Sierra Club have met their burden of showing that they are an affected person. In the alternative, SWEPCO has provided a narrow list of issues that could be referred to hearing.

Dated: February 13, 2012

RESPECTFULLY SUBMITTED,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2012, the original of Southwestern Electric Power Company's Response to Sierra Club and Public Citizen's Request for Contested Case Hearing was filed with the Chief Clerk of the TCEQ via electronic filing, and a copy was served to all persons listed on the attached mailing list via electronic mail or U.S. Postal Service Mail.

L. Elizabeth Gunter