BEFORE THE SUPREME COURT OF MISSISSIPPI

NO. 2008-CC-01618

HAROLD GREEN — **APPELLANT**

v.

CLEARY WATER, SEWER AND FIRE DISTRICT — **APPELLEE**

APPELLEE'S BRIEF IN SUPPORT OF THE DECISION BY THE MISSISSIPPI PUBLIC SERVICE COMMISSION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE ISSUES 1

STATEMENT OF THE FACTS 2

SUMMARY OF THE ARGUMENT 7

STANDARD OF REVIEW 8

ARGUMENT 9

A. This Court Lacks Jurisdiction Over the 2000 Decision 9
B. Green Lacks Standing 10
C. Green May Not Attempt to Establish Error Based Upon Claims Never Submitted to the Commission 13
D. Green's Failure to Cite Authority Bars His Claims 13
E. The Mississippi Public Service Commission May Refuse to Allow Futile Amendments to Pleading 14
F. The Mississippi Public Service Commission is Expressly Authorized to Dismiss a Complaint Without a Hearing 16
G. Green is Not Above the Mississippi Legislature and Cannot Create a New and Different Method for the Cancellation of Certificates of Convenience and Necessity 18
H. This Court Should Not Overturn Delta Electric Power Ass'n 19
I. The Mississippi Public Service Commission Did Not Commit Reversible Error in Dismissing Green's Complaint 20

CONCLUSION 21

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

CASE LAW

Appeal of Public Service Commission
604 So.2d 218 (Miss. 1992) 10,11

Arnold Line Water Ass'n., Inc. v. Mississippi Public Service Commission
744 So.2d 246 (Miss. 1999) 16

Brotherhood of R.R. Trainmen v. Illinois Central Railroad Co.
243 Miss. 851, 138 So.2d 908 (1962) 10

City of Starkville v. 4-County Electrical Power Ass'n.
909 So.2d 1094 (Miss. 2005) 4

Codd v. Velger
429 U.S. 624, (1977) 17

Davis v. Attorney General
935 So.2d 856 (Miss. 2006) 11

Delta Electric Power Ass'n. v. Mississippi Power & Light Co.
250 Miss. 482, 149 So.2d 504 (1963) 1,19

Gill v. Mississippi Dept. of Wildlife Conservation
574 So.2d 586 (Miss. 1990) 16

Green v. Cleary Water, Sewer & Fire District
910 So.2d 1022 (Miss. 2005) 8,9,12

Hancock Bank v. Gaddy
328 So.2d 361 (Miss. 1976) 17

Hill Bros. Const. & Engineering Co. v. Mississippi Transportation Commission
909 So.2d 58 (Miss. 2005) 8

Knotts by Knotts v. Hassell
659 So.2d 886 (Miss. 1995) 16

Landmark Structures, Inc. v. City Counsel
826 So.2d 746 (Miss. 2002) 8

Moore v. Sanders
569 So.2d 1148 (Miss. 1990) 9

Newell v. Jones County
731 So.2d 580 (Miss. 1999) 5

Paige v. Cisneros
91 F.3d 40 (7th Cir. 1996) 17

Puerto Rico Aqueduct Sewer Authority v. U.S. EPA
35 F.3d 600 (1st Cir. 1994) cert. denied, 513 U.S. 1148, (1995) 17

South Central Turf, Inc. v. City of Jackson
536 So.2d 558 (Miss. 1988) 10

State ex rel. Pittman v. Mississippi Public Service Commission
538 So.2d 367 (Miss. 1989) 18

State Oil & Gas Board v. McGowan
542 So.2d 244 (Miss. 1989) 16

Tedder v. Board of Supervisors of Bolivar County
214 Miss. 717, 59 So.2d 329 (1952) 13

University of Mississippi Medical Center v. Easterling
2006 WL 871302, (Miss. 2006) 10

Wilson v. St. Regis Pulp & Paper Corp.
240 So.2d 137 (Miss. 1970) 20

STATUTES

Mississippi Code Annotated(1972) §19-5-151 3
Mississippi Code Annotated (1972) §19-5-177 4
Mississippi Code Annotated (1972) §19-5-257 3
Mississippi Code Annotated (1972) §77-1-35 5,10
Mississippi Code Annotated (1972) §77-1-38 5
Mississippi Code Annotated (1972) §77-3-11 4,12
Mississippi Code Annotated (1972) §77-3-12 4
Mississippi Code Annotated (1972) §77-3-13 18,21
Mississippi Code Annotated (1972) §77-3-21 12,18
Mississippi Code Annotated (1972) §77-3-45 6
Mississippi Code Annotated (1972) §77-3-47 6,14,16,21
Mississippi Code Annotated (1972) §77-3-67 10,11

Mississippi Code Annotated (1972) §77-3-81 10

RULES

Mississippi Public Service Commission Rule 11B(1) 11
Mississippi Public Service Commission Rule 11B(4) 5
Mississippi Public Service Commission Rule 101(4) 5

OTHER

10A C. Wright, A. Miller & M.Kane, Federal Practice and Procedure
Section 2725 (1983) 18

2 Admin. L. & Prac. § 5.42 (2d ed.) 18

Ernest Gelhorn and William Robinson, *Summary Judgment in Administrative Adjudication*,
84 Harv.L.Rev. 612, 630–631 (1971)) 18

I. STATEMENT OF THE ISSUES

1. DOES THE COURT HAVE JURISDICTION TO REVIEW THE DECISIONS MADE BY THE MISSISSIPPI PUBLIC SERVICE COMMISSION IN 2000?

2. DOES GREEN HAVE STANDING TO MAINTAIN AN ACTION OR APPEAL?

3. CAN GREEN ATTEMPT TO SHOW ERROR BY THE MISSISSIPPI PUBLIC SERVICE COMMISSION BASED UPON CLAIMS NEVER SUBMITTED TO THE MISSISSIPPI PUBLIC SERVICE COMMISSION?

4. CAN GREEN ATTEMPT TO SHOW ERROR BY THE MISSISSIPPI PUBLIC SERVICE COMMISSION WHEN HE FAILS TO PROVIDE AUTHORITIES?

5. MAY THE MISSISSIPPI PUBLIC SERVICE COMMISSION REFUSE TO ALLOW A REQUESTED AMENDMENT TO A COMPLAINT WHERE THE AMENDMENT SOUGHT IS FUTILE?

6. IS THE MISSISSIPPI PUBLIC SERVICE COMMISSION ALLOWED TO DISMISS A COMPLAINT WITHOUT A HEARING?

7. CAN GREEN ATTEMPT TO SHOW ERROR BY THE MISSISSIPPI PUBLIC SERVICE COMMISSION BASED UPON CLAIMS NEVER SUBMITTED TO THE MISSISSIPPI PUBLIC SERVICE COMMISSION?

8. SHOULD THIS COURT PLACE GREEN ABOVE THE MISSISSIPPI LEGISLATURE AND ALLOW GREEN TO CREATE A NEW AND DIFFERENT METHOD FOR THE CANCELLATION OF CERTIFICATES OF CONVENIENCE AND NECESSITY PREVIOUSLY ISSUED BY THE MISSISSIPPI PUBLIC SERVICE COMMISSION?

9. SHOULD THIS COURT OVERTURN **DELTA ELECTRIC POWER ASS'N V. MISSISSIPPI POWER & LIGHT CO.**, 250 MISS. 482, 149 SO.2D 504 (1963) TO ACCOMMODATE GREEN?

10. DID THE MISSISSIPPI PUBLIC SERVICE COMMISSION COMMIT REVERSIBLE ERROR IN DISMISSING GREEN'S COMPLAINT?

II. STATEMENT OF THE FACTS

Introduction

Currently, and for many previous years, Harold Green ("Green") has enjoyed water service and fire protection provided by the Cleary Water, Sewer & Fire District ("District"). Green became incensed and litigious after the District undertook to regulate his previously unregulated discharge of wastewater into the District's groundwater and thereafter began a multi-front legal attack on the District before the Chancery Court of Rankin County, Mississippi, the Mississippi Court of Appeals, the Mississippi Supreme Court, the United States Supreme Court, the Rankin County Board of Supervisors and the Mississippi Public Service Commission. Across the board, Green has been successful only in causing the District's customers to bear the expense of defending his protracted litigation and in refusing to have his on-site waste treatment plant inspected and, if necessary, repaired.

The present case involves Green's attack on the District before the Mississippi Public Service Commission ("MPSC"). On appeal Green now seeks to raise issues and arguments he never submitted to the MPSC. The Chancery Court of Rankin County, Mississippi correctly denied his appeal. This Court should also deny his appeal.

The District

The District provides regulation[1] and water, sewer and fire protection services to a large area

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[1] §19-5-173 of the Mississippi Code of 1972, as amended, provides that "[t]he board of commissioners [of the District] shall have the power to make regulations to secure the general health of those residing in the district; to prevent, remove and abate nuisances; to regulate or prohibit the construction of privy-vaults and cesspools, and to regulate or suppress those already constructed; and to compel and regulate the connection of all property with sewers." **See also** §19-5-175 of the Mississippi Code of 1972, as amended, provides that "[any district created pursuant to the provisions of Sections 19-5-151 through 19-5-207 shall be vested with all the

located in southwest Rankin County, Mississippi. Approximately 706 households and other customers obtain their potable water from the District. The water which the District provides to these families and other customers comes from groundwater aquifers also located in the District.[2] The District operates a sewer system with a centralized sewage plant, non-centralized components and also regulates the on-site processing and discharge of wastewater within the boundaries of the District.

History Of The District

On May 16, 1980, the Governor of the State of Mississippi approved local and private legislation which created the Cleary Heights Water and Sewer District. This legislation provided that "[h]ereafter ... the Cleary Heights Water and Sewer District[3] ... shall have all powers granted to a water and sewer district under the provisions of Section 19-5-151 through 19-5-257, Mississippi Code of 1972, as now or hereafter amended, whether or not such powers were enumerated in the resolution of the board of supervisors creating the Cleary Heights Sewer District." The boundaries of the District were fixed by the Mississippi Legislature in the special legislation which created the

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powers necessary and requisite for the accomplishment of the purpose for which such district is created. No enumeration of powers herein shall be construed to impair or limit any general grant of power herein contained nor to limit any such grant to a power or powers of the same class or classes as those enumerated. Such districts are empowered to do all acts necessary, proper or convenient in the exercise of the powers granted under such sections." As can be seen the District's regulatory authority is entirely independent of the Mississippi Public Service Commission.

[2] Green's on-site water treatment plant discharges into the District's groundwater.

[3] In 1986, the District adopted a resolution to change its name to the "Cleary Water and Sewer District." Also in that year the District adopted a resolution to combine its operations with the Cleary Fire Protection District and to continue joint operations under the name "Cleary Water, Sewer and Fire District." Since November 3, 1986, the Rankin County Board of Supervisors has appointed joint commissioners to the Cleary, Water, Sewer and Fire District.

District.

In accordance with §19-5-177 of the Mississippi Code of 1972, as amended,[4] the District holds Certificates of Convenience and Necessity from the MPSC for the operation of water and sewer systems. These certificates define the area where such systems may be operated and exclusive[5] services provided.[6] These areas are known as "certificated areas" or "certificated service areas." See **City of Starkville v. 4-County Elec. Power Ass'n**, 909 So.2d 1094, 1099 (Miss. 2005).

Prior to 2000, the area within Cleary's boundaries for which Cleary held a certificate to "construct, acquire, extend or operate equipment or facilities for collecting, transmitting, treating or disposing of sewage" was smaller than the area within its boundaries for which Cleary held a certificate to "construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing ... water."[7] On September 18, 2000 the Mississippi Public Service Commission entered an order to make these certificated areas identical by expanding the area certificated for sewer operations and services.

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[4] Unless otherwise noted all references to statutes shall be to provisions of the Mississippi Code of 1972, as amended.

[5] **See** §77-3-12.

[6] §77-3-11(1) provides that no "person shall construct, acquire, extend or operate equipment for manufacture, mixing, generating, transmitting or distributing ... water, for any intrastate sale to or for the public for compensation, ... without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facility." §77-3-11(3) provides that no "person shall construct, acquire, extend or operate equipment or facilities for collecting, transmitting, treating or disposing of sewage, or otherwise operating an intrastate sewage disposal service, to or for the public for compensation, without first having obtained from the commission a certificate that the present or future public convenience and necessity require or will require the operation of such equipment or facilities." No certificate is needed to provide fire service.

[7] The area certificated for water was bigger than the area certificated for sewage.

On or about August 12, 2004, Green filed a Complaint before the MPSC.[8] This Complaint is three (3) brief paragraphs. The Complaint requested that the MPSC vacate its September 18, 2000 Order which made identical the areas for which the District holds certificates for water and sewer.[9] Paragraph No. 1 of the Complaint recites the action taken in 2000. The next paragraph of the Complaint alleged that:

2.

> Paragraph five (5) of the [Mississippi Public Service Commission's] Order [dated September 18, 2000] states, "Construction on the proposed sewer system shall be commenced within six (6) months from the effective date of this Order or this Certificate may be cancelled." Although approximately forty-eight (48) months have passed since said Order was made effective, Cleary has failed to commence construction of the proposed sewer system.

The Complaint goes on, in paragraph no.3, to quote §77-1-35 and §77-1-38 of the Mississippi Code of 1972, as amended, and in a remarkable leap states "[b]ecuase Cleary has failed to begin construction on the proposed sewer system, it is evident false statements were made by persons representing Cleary in order to obtain a Supplemental Certificate of Public Convenience and Necessity."

On or about September 7, 2004, pursuant to Rule 11B(4) of the MPSC,[10] Cleary offered to

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[8] Green filed his complaint long after the right to appeal the 2000 order had run. §77-3-67 provides that "[i]f an application for rehearing has not been filed, an appeal must be filed within thirty (30) days after the entry of the commission's order." Similar time periods have been held by the Mississippi Supreme Court to be "mandatory and jurisdictional." **See Newell v. Jones County**, 731 So.2d 580, 582 (Miss. 1999).

[9] As noted in the Order of the MPSC, in 2000, Cleary "petitioned the Commission to grant it a [Supplemental Certificate of Public Convenience and Necessity] so that its sewer area would be identical to the area Cleary was providing water and fire protection services."

[10] The language of Rule 11B(4) is now found in Commission Rule 101(4): "If the respondent desires to satisfy the complaint, he may file with the Commission, within the time

run a sewer line to Green's residence. Green never responded to this offer, and Cleary subsequently filed its Answer praying that the Complaint be dismissed.

On or about December 6, 2004, Green filed a "Motion to Amend Complaint" and sought leave to assert that "the only notice given to residents in the area affected by Cleary's application to enlarge its certificated area for sewer service ... is shown in its Proof of Publication .... No mention was made in the Notice that Cleary intended to form a decentralized sewer system .... Thus, it is alleged that residents of the area affected, such as petitioner, were not given adequate information of Cleary's intentions ...." See Appellee's Excerpt No. 1.

On February 23, 2005, the MPSC, by unanimous vote of all three (3) Commissioners, denied Green's Motion to Amend. The MPSC noted that the Mississippi Legislature had proscribed the notice requirements in certification cases[11] and that in 2000, the MPSC had found that "due and proper notice had been given as required by law." The MPSC also noted that Green was not claiming that he had not received notice but instead sought to complain that the notice "did not advise 'of the intentions of Cleary to attempt to create a decentralized sewer system.' In other words,

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allowed for answer, a statement of the relief which he is willing to give, with Certificate of Service of a copy thereof on the complainant endorsed thereon. The complainant shall have seven (7) days in which to file with the Commission a statement accepting the satisfaction offered, or rejecting it, with Certificate of Service of a copy thereof on the respondent. If the offer of satisfaction is accepted by the complainant and approved by the Commission, no further proceedings will be taken."

[11] The Commission Order references §77-3-45 but the language quoted indicates that the proper citation is to §77-3-47 which provides: "Notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi, and, in a proceeding for a facility certificate or an area certificate, by publication in a newspaper of general circulation in the county or counties where the facility or area is located."

Movant contends that Cleary was required to give notice of the type or kind of sewer treatment facility it was going to use. Movant seeks to impose a notice requirement on Respondent that the law does not require and for that reason the Motion should be denied."

On April 5, 2005, the MPSC, by unanimous vote of all three (3) Commissioners, dismissed Green's Complaint.[12] The MPSC noted that Green "bases his Complaint entirely on the allegation that Cleary ... did not begin construction within six months of the issuances of the [Supplemental Certificate of Public Convenience and Necessity (Supp. CCN)]. [Green] alleges further that there were false statements made by people representing Cleary, ostensibly about when construction was to commence in order to obtain the Supp. CCN and that those people were 'guilty of perjury' and should be 'deemed a felon.'"

On or about April 21, 2005, Green filed an appeal asserting only the following:

1. This is an appeal from an Order dismissing the Complaint filed by Harold Green with the MPSC asking the Commission in this action, dated August 12, 2004, to revoke or vacate the Order heretofore granting a Supplemental Certificate of Public Convenience and Necessity to Cleary Water, Sewer & Fire District dated September 18, 2000, in its Docket No. 00-UA-491.

2. This is also an appeal from an Order denying Mr. Green's Motion to Amend Complaint as described above.

III. SUMMARY OF THE ARGUMENT

This appeal represents the last gasp in Green's quixotical attempt to avoid having his on-site wastewater treatment system inspected and, if necessary, repaired. In this appeal Green improperly seeks to avoid the matters he raised before the MPSC and instead seeks to raise issues for the first

[12] The Mississippi Legislature has specifically provided in §77-3-47, that the "commission may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights."

time, go outside the record and re-litigate those matters resolved against him in previous litigation with the District. **See Green v. Cleary Water, Sewer & Fire Dist.**, 910 So.2d 1022 (Miss. 2005).[13]

At all times it should be remembered that it was Green who framed the issues before the MPSC with his pleadings. Ironically Green, having gone through three (3) lawyers, tries to recast the issues to make the MPSC look unprofessional and arbitrary. Green's pleadings were inadequate and were dealt with in the summary fashion which they deserved.

IV. STANDARD OF REVIEW

The standard of review to be employed when reviewing an administrative agency's decision is to determine whether the decision: (1) was supported by substantial evidence; or (2) was arbitrary or capricious; or (3) was beyond the power of the lower authority to make; or (4) violated some statutory or constitutional right of the complaining party. See **Landmark Structures, Inc. v. City Council**, 826 So.2d 746, 749 (Miss.2002) (citations omitted). "A rebuttable presumption exists in favor of the action of an administrative agency, and the burden of proof is on the party challenging an agency's action." **Hill Bros. Const. & Engineering Co., Inc. v. Mississippi Transp. Com'n,** 909 So.2d 58, 64 (Miss. 2005) (citations omitted).

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[13] It should be noted that the sole issues on remand in **Cleary v. Green**, concerns the alleged "taking" and whether the District's regulations are more restrictive than the regulations of the Mississippi State Department of Health. Green has not brought these issues forward on remand. The reason is that the matter is moot. The District long ago amended its Ordinance to do away with any requirements concerning property rights and instead now only requires that private on-site systems be annually inspected and repaired, if necessary. To the detriment of his neighbors and the safety of his community Green simply refuses to have his system inspected and repaired, if necessary.

V. ARGUMENT

A. This Court Lacks Jurisdiction Over the 2000 Decision.

In addition to seeking to re-litigate those issues resolved against him by the Mississippi Supreme Court, Green, in this appeal, improperly seeks to gain appellate review of a decision which the MPSC made on September 18, 2000, in Docket No. 2000-UA-491, to expand the area in which the District is the exclusive provider of sewer services.

In **Green v. Cleary,** the Mississippi Supreme Court expressly mentioned the fact that in "2000, Cleary obtained a supplemental certificate from the [Mississippi] Public Service Commission which enlarged the area in which it was authorized to provide its [sewer] services. Cleary sought to address a perceived problem of untreated or undertreated sewage being discharged onto the ground within the Cleary District by adopting the 'Decentralized Wastewater Use Ordinance' which plaintiffs Harold Green, et al. ... challenge here." 910 So.2d at 1025.

§77-3-67 mandates that "an appeal [of a commission order] must be filed within thirty (30) days after the entry of the commission's order." [14] No where in the record does Green deny notice of the public hearing before the MPSC on the District's 2000 application to enlarge its certificated area. No where in the record does Green deny actual notice of the 2000 actions of the MPSC. Yet years later Green seeks to have these actions reviewed on appeal in 2006.

§77-3-67 is mandatory and jurisdictional. In **Moore v. Sanders,** 569 So.2d 1148 (Miss. 1990), the Mississippi Supreme Court stated:

> Furthermore, it has long been the law of this state that statutes limiting the time within which appeals may be taken are both mandatory and jurisdictional. An appeal

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[14] Green initiated his other litigation on August 23, 2002. **Green v. Cleary,** 910 So.2d 1022, 1025 (Miss. 2005).

not perfected with the time prescribed by statute confers no jurisdiction on the appellate court. Such an appeal should be dismissed either on the motion of the appellee or by the appellate court of its own motion.... (Citation omitted).

569 So.2d at 1149. [15] If an untimely appeal is made, then any action other than dismissal is "extra-jurisdictional and void." **South Cent. Turf, Inc. v. City of Jackson**, 526 So.2d 558, 563 (Miss. 1988).[16]

B. Green Lacks Standing.

1. Green Can Not Prosecute Criminal Charges Before The Mississippi Public Service Commission Or Any Other Body.

In his "Complaint" Green inarticulately references §77-1-35 and §77-3-81 and makes the outlandish and unsupported allegation that 'false statements were made by persons representing Cleary...." The MPSC has no authority to convict anyone of an alleged criminal offense. **See Brotherhood of R. R. Trainmen v. Illinois Cent. R. Co.**, 243 Miss. 851, 138 So.2d 908, 910 (Miss. 1962). Moreover Green does not possess an office or status which allows him to prosecute criminal charges before the MPSC or any other body.

2. Green Lacked Standing To Raise Any Issues Concerning The 2000 Order.

The Mississippi Legislature has expressly limited the persons who have standing to invoke

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[15] **See also University of Mississippi Medical Center v. Easterling**, 2006 WL 871302, *5 (Miss. 2006) (The Courts have a "constitutional mandate to faithfully apply the provisions of constitutionally enacted legislation.").

[16] Moreover Green was not a party to the 2000 proceedings before the MPSC. In **Appeal of Public Service Com'n,** 604 So.2d 218 (Miss. 1992), persons who were not a party to a proceeding before the MPSC sought to appeal the Commission's actions to chancery court pursuant to §77-3-67. The Mississippi Supreme Court held that the chancery court did not have jurisdiction over the claims of these non-parties. The Court stated that "the chancery court had no jurisdiction of this matter and its, apparently routine, finding to the contrary is manifest error." 604 So.2d at 222.

§77-3-67 to appeal a decision of the MPSC. In **Appeal of Public Service Com'n.**, the Mississippi Supreme Court noted:

> The statute lodging appellate authority in the chancery court provides that "any party aggrieved by any final finding" of the [M]PSC shall have the right of appeal to that court. Miss. Code Ann. § 77-3-67 (1991). We have distinguished statutes allowing a right of appeal to aggrieved "parties" from those allowing appeal to aggrieved "persons" (**see e.g.**, Miss. Code Ann. § 11-51-75 (1991) providing for appeals from decisions of boards of supervisors or municipal authorities). We have held that "statutes which allow a 'party' to appeal, as a rule, limit the right to those who were original parties to the action or proceeding." (Citation omitted). Appellees, then, never acquired standing to take an appeal.

604 So.2d at 222.

In the present case Green seeks to appeal the 2000 decision of the MPSC. Because Green was not a party to the 2000 action he lacks standing to appeal the 2000 decision.[17]

3. Green Lacked Standing To Assert A Complaint In 2004.

As noted by the MPSC in its ruling, Rule 11B(1) of the Commission's Rules on Practice and Procedure required that Green "must affirmatively show that ... [he] has a direct and substantial interest in the subject matter of the Complaint...." Green's Complaint does recite that he is a resident of the District but wholly fails to allege any other status, injury or harm or to present any justiciable claim or substantial interest. Green did not seek leave to amend to allege any other status, injury or harm or to present any justiciable claim or substantial interest.

Green did not allege that he was not receiving service. In fact when connection to the District's centralized sewage treatment plant was offered to Green he did not even respond. Green

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[17] **See also Davis v. Attorney General,** 935 So.2d 856, 863-864 (Miss. 2006) ("'Under Mississippi law, res judicata or collateral estoppel precludes re-litigation of administrative decisions.'... [citations omitted].... '[o]nce an agency decision is made and the decision remains un-appealed beyond the time to appeal, [re-litigation] is barred by administrative res judicata or collateral estoppel.'" (citations omitted)).

did not allege inadequate service. In fact until the Chancery Court, in the previous litigation that resulted in **Green v. Cleary,** 910 So.2d 1022, 1025 (Miss. 2005), threw out his unfounded claims, he had obtained an injunction which prevented the District from providing him with service under the Decentralized Wastewater Use Ordinance.

Thus to the MPSC, it was clear from the materials on file that Green was not interested in obtaining any wastewater service from the District. Nor was he claiming that any service provided by the District was inadequate.[18] In addition his pending lawsuit against the District made it obvious that he was just trying to continue his unregulated discharge of wastewater into the District's groundwater free of modest governmental regulation requiring him to have his system inspected and repaired, if necessary.

In part, Green's lack of standing is rooted in the role of the MPSC in relation to the District. The MPSC has jurisdiction over whether a district is the exclusive utility provider in a defined area. However, the MSPC has little if any jurisdiction over other operational issues such as the rates and charges of a district, §19-5-177 or, as discussed below the equipment and methods by which the District provides services.[19] It is in its role as rate maker that the MPSC becomes concerned about the capital improvements employed by a certificate holder. **Mississippi Public Service Com'n v. Dixie Land & Water Co., Inc.,** 707 So.2d 1086, 1090 (Miss. 1998). In addition it should be noted

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[18] §77-3-11(5) provides that upon "complaints filed by not less than ten percent (10%) of the total subscribers or three thousand five hundred (3,500) subscribers of a public utility, whichever is less, then the commission shall hold a hearing on the adequacy of service as contemplated in Section 77-3-21." Simply put, if Green was attempting to assert a claim for inadequate service, he did not have standing to assert such a claim.

[19] See infra n. 23.

that the Mississippi Supreme Court has expressly forbade the MPSC to consider "quality of service" when the MPSC is exercising its role in establishing rates for non-district certificate holders. **Id.** at 1092. The **Dixie Land** Court made this distinction absolute:

> No where in this explanation [of the standards for establishing rates] does the Court address the issue of adequacy of service. The authority for addressing the issue of service for a public utility is found in an unrelated statute of the Mississippi Code of 1972. See Miss. Code Ann. §77-3-21 (Supp. 1997). However, this statute specifically states, "Nothing in this paragraph shall be construed to include service for water and sewage." Miss. Code Ann. § 77-3-21 (Supp.1997). In 1995, the Mississippi Legislature, pursuant to section 77-3-22 of the Mississippi Code Annotated of 1972, provided a way that the MPSC could, upon the finding of inadequate service, petition the chancery court to attach the assets of the privately owned water or sewer utility and place it under the sole control of a receiver. Miss. Code Ann. § 77-3-22 (Supp.1997). The MPSC seems to be confusing the issue of adequate service with the rate increase issue. Each issue is considered apart from the other and the quality of service being provided should not influence the decision to either grant or deny a rate increase.

Id.[20]

C. Green May Not Attempt To Establish Error Based Upon Claims Never Submitted To The Commission.

Green now argues matters not set forth in his three (3) paragraph Complaint or this proposed amendment. These are claims and issues which were never asserted by Green before the MPSC and he can not raise them for the first time on appeal. See **Tedder v. Board of Sup'rs of Bolivar County**, 214 Miss. 717, 59 So.2d 329, 331 (1952).

D. Green's Failure To Cite Authority Bars His Claims.

In ***Entergy Mississippi, Inc. v. Bolden,*** 854 So.2d 1051 (Miss. 2003), the Court noted:

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[20] This regulatory scheme wherein the MPSC is not to be concerned with the details of sewer plants, facilities and processes employed, outside of issues of establishing reasonable rate, is obviously a recognition that the such details are fully reviewed and highly regulated by the Federal Environmental Protection Agency ("EPA"), the Mississippi Department of Environmental Quality ("MDEQ") and the Mississippi State Department of Health (MSDH"). See infra n. 23.

> ¶ 18. We have consistently held that "an argument unsupported by cited authority need not be considered by the Court." ***Dowdle Butane Gas Co. v. Moore***, 831 So.2d 1124, 1136 (Miss.2002). In addition, we have expressly held that "[i]t is the duty of an appellant to provide authority in support of an assignment of error." ***Jones v. Howell***, 827 So.2d 691, 702 (Miss.2002). Where an assertion of error is not supported by authority, that assertion is deemed abandoned. Id. This Court is therefore procedurally barred from considering unsupported assertions on appeal. ***Webb v. DeSoto County***, 843 So.2d 682, 685 (Miss.2003).

Entergy Mississippi, Inc. v. Bolden 854 So.2d 1051, 1057 (Miss. 2003).

E. The Mississippi Public Service Commission May Refuse To Allow Futile Amendments To Pleading.

§77-3-47 provides: "Notice of all such hearings shall be given the persons interested therein by mailing such notice to each public utility which may be affected by any order resulting therefrom and by publication in a newspaper of general circulation published in Jackson, Mississippi, and, in a proceeding for a facility certificate or an area certificate, by publication in a newspaper of general circulation in the county or counties where the facility or area is located." The MPSC held that the notice statute did not require that a notice contain information which Green wanted to make the focal point of his proposed amended complaint. As noted by the MPSC in its Order dated February 23, 2005, Green sought to amend his Complaint to assert that the notice of hearing published in relation to the expansion of Cleary's area certificated for sewage services "did not advise 'of the intentions of Cleary to attempt to create a decentralized sewer system.' In other words, [Green] contends that Cleary was required to give notice of the type or kind of sewer treatment facility it was going to use."[21] As further noted by the MPSC, the law simply does not require that a certificate seeker give notice of the type of process, facilities or equipment which will be used to collect and treat sewage.

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[21] By publication, Green was given notice that Cleary Water, Sewer and Fire District had asked the MPSC to enlarge Cleary's "Certificated Area for sewer service to make said area identical to its Certificated Area for Water and Fire Protection."

See MPSC Order Denying Leave To Amend.

Imagine the chaos which would ensue if one (1) disgruntled customer could, years after MPSC approval, seek to vacate every certificate approved and issued by the MPSC, based upon the allegation that in the original notice concerning the certificated area, the service provider failed to disclose which technical processes, chemicals, equipment or facilities the providers were planning to utilize to transmit voice and data, or produce and distribute electricity, or produce and distribute natural gas or produce and distribute water or to collect and process sewage. Imagine still the wasted money and effort which would occur if the MPSC had to process Complaints and conduct full blown hearings each time one (1) disgruntled customer alleged that a notice published years ago in relation to a certificate (approved long ago) did not adequately disclose the technical processes, equipment or facilities the providers were planning on using and implementing in their certificated areas.[22]

Basically Green failed, and continues to fail, to comprehend the nature of the proceedings conducted by the MPSC in 2000 with reference to the expansion of Cleary's certificated areas. The issue – expressly set forth in the notice – was whether Cleary should be issued the expanded certificate. The issue was not what technology, processes, facilities or equipment which Cleary would bring to bear in providing service. These issues are the providence of other regulatory agencies such as the EPA, MDEQ and the MSDH.[23]

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[22] If such a requirement existed then providers would not implement new and different cost saving technologies for fear that their certificates might be attacked because the new process, equipment or facilities were different from those described in a notice.

[23] **See e.g.**, §49-17-29(g): "Each applicant for a permit for a new outlet for the discharge of wastes into the waters of the state who is required to obtain a certificate of public convenience and necessity from the Public Service Commission for such wastewater system shall submit financial and managerial information as required by the Public Utilities Staff. Following review of that information, the Executive Director of the Public Utilities Staff shall certify in writing to

Because the Law as written, as interpreted and as applied by the MPSC[24] did not require a notice which disclosed technology, processes, facilities or equipment, the amendment sought by Green was a waste of time and was properly denied by the MPSC.[25] **See Arnold Line Water Ass'n, Inc. v. Mississippi Public Service Com'n,** 744 So.2d 246, 251 (Miss. 1999) (claim that litigant did not receive proper notice was without merit and was denied).

F. The Mississippi Public Service Commission Is Expressly Authorized To Dismiss a Complaint Without a Hearing.

Controversies within the original administrative jurisdiction of the MPSC are subject to the rules and regulations of the MPSC. **See State Oil & Gas Bd. v. McGowan,** 542 So.2d 244, 248 (Miss. 1989). §77-3-47 expressly provides that the MPSC "may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights." In **Arnold Line Water,** *supra.*, the Mississippi Supreme Court recognized that the law provides for the MPSC to dismiss a complaint without a hearing. 744 So.2d at 252 n. 2.

In the present case the MPSC decided that the complaint should be dismissed because a hearing was not necessary in the public interest or for the protection of substantial rights. The only

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the executive director of the department [of Environmental Quality], the financial and managerial viability of the system if the Executive Director of the Public Utilities Staff determines the system is viable. The Permit Board shall not issue the permit until the certification is received."

[24] The Mississippi Supreme Court has "accepted an obligation of deference to agency interpretation and practice in areas of administration by law committed to their responsibility." **Gill v. Mississippi Dept. of Wildlife Conservation,** 574 So.2d 586, 593 (Miss. 1990).

[25] The Mississippi Rules of Civil Procedure do not apply. **State Oil & Gas Bd. v. McGowan,** 542 So.2d 244, 248 (Miss. 1989) ("'It is a rare day when we will reverse the Commission for an action taken in the implementation and enforcement of its own procedural rules.'"). However even under the rules of court the amendment was properly denied. **Compare Knotts by Knotts v. Hassell,** 659 So.2d 886, 889 (Miss. 1995) (leave to amend may be withheld where amendment sought is futile).

valuable or substantial right found by the MPSC was the District's rights in its certificate. Moreover the MPSC found that the public interest was served by the District's continued operation in the certificated area.

The Mississippi Legislature has placed the MPSC in the role of arbiter of the public interest in this area and the identifier of substantial rights. Obviously the MPSC placed the value of the District's certificate and the protection of the public and the District's groundwater from unregulated on-site sewage systems above one man's cynical attempt to avoid inspection of his waste water system and its repair, if necessary.

This ability to summarily dismiss a complaint is fully consistent with the controlling principles of administrative law.[26] A proceeding before the MPSC "is not an adversary proceeding in the true sense of the term, nor is it a judicial proceeding. The full panoply of pleadings and processes for discovery provided for full-fledged litigants in law and equity courts is not available for use before an administrative board." **See Hancock Bank v. Gaddy**, 328 So.2d 361, 364 (Miss.1976) (Banking Board).

In **Puerto Rico Aqueduct Sewer Auth. v. U.S. EPA**, 35 F.3d 600, 608 (1st Cir.1994), cert. denied 513 U.S. 1148, 115 S.Ct. 1096, 130 L.Ed.2d 1065 (1995), a federal district court noted that due process "simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way. (Citation omitted). It follows that administrative summary judgment, properly configured, is an acceptable procedural device." **See also Codd v. Velger,** 429 U.S. 624, 628, 97 S.Ct. 882, 884

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[26] **Paige v. Cisneros,** 91 F.3d 40, 44 (7th Cir. 1996) ("Agencies no less than courts can grant summary judgment, and the due process clause does not require a hearing where there is no disputed issue of material fact to resolve....").

(1977) (no hearing was necessary where a claimant "at no stage of the litigation affirmatively" asserted facts requiring a hearing).[27]

In the present case the issue of revocation could only be resolved one way. The MPSC aptly pointed out that it is the MPSC, and not Green, who may invoke the permissive language of the 2000 Order to revoke and that institution of a revocation proceeding under §77-3-21 "was and is not warranted or advisable in this instance."

G. Green Is Not Above the Mississippi Legislature And Can Not Create A New And Different Method For The Cancellation Of Certificates Of Convenience And Necessity.

In **State ex rel. Pittman v. Mississippi Public Service Com'n**, 538 So.2d 367 (Miss. 1989), the Mississippi Supreme Court restated that the "legislative grant of authority [to the MPSC] places ... limitations on the Commission's power and authority...." 538 So.2d at 373.

§77-3-13 is part of that "legislative grant" and sets forth the only procedure by which a

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[27] Factual disputes that are irrelevant or unnecessary will not be counted. **See generally** 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2725, pp. 93-95 (1983). A leading treatise on Administrative Law states:

> The question of whether any disputed facts may be "material" is easier in administrative proceedings. First there are no juries. In a jury trial a trial judge is reluctant to decide facts, even where there is no dispute over evidentiary facts, but administrative presiding officers do not have that problem. They may therefore feel free to make whatever use they want of indisputable evidentiary fact, e.g., draw certain inferences. In addition, the presiding official is conceded more expertise to range further afield in his use of indisputable facts. They should not feel reluctant to make conclusions as to legislative facts or to policy questions in particular.

2 Admin. L. & Prac. § 5.42 (2d ed.) (Citing Ernest Gelhorn and William Robinson, *Summary Judgment in Administrative Adjudication*, 84 Harv.L.Rev. 612, 630–631 (1971)).

certificate can be revoked or cancelled by the MPSC.[28] This section provides that "if the utility so ordered to correct such a failure [to render reasonably adequate service] fails to comply with such order of the commission and the commission finds that cancellation of its certificate would be in the best interest of the consuming public served by the holder of the certificate, its certificate for the area affected may be revoked and cancelled by the commission."[29] The Commission can undertake action under this section *sua sponte* or upon "complaints filed by not less than ten percent (10%) of the total subscribers or three thousand five hundred (3,500) subscribers of a public utility, whichever is less ...." Miss. Code Ann. §77-3-11.

There are simply no other methods authorized by the Mississippi Legislature for the MPSC to revoke or cancel a certificate. This Court should refuse Green's request that the Court legislate some other method into existence.

H. This Court Should Not Overturn Delta Electric Power Ass'n.

Green has apparently abandoned his argument that the Court should overturn **Delta Elec. Power Ass'n v. Mississippi Power & Light Co.,** 250 Miss. 482, 149 So.2d 504, 511 (1963) ("The statutory expression of one method for cancellation of certificates is justly to be construed as an exclusion of other methods.").

The Mississippi Legislature has stated that there is only one (1) method to revoke or cancel a certificate. The MPSC has stated that there is only one (1) method to revoke or cancel a certificate.

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[28] **Delta Elec. Power Ass'n v. Mississippi Power & Light Co.,** 250 Miss. 482, 149 So.2d 504, 511 (1963).

[29] §77-3-13 provides that prior to an acquisition of a utility "the commission shall first determine if such service area, certificate of public convenience and necessity, or operating right, or portions thereof, should be cancelled as provided in Section 77-3-21."

The Mississippi Supreme Court has stated that there is only one (1) method to revoke or cancel a certificate. This Court should not abandon the principle of *stare decisis et non quieta movere*.[30]

I. The Mississippi Public Service Commission Did Not Commit Reversible Error In Dismissing Green's Complaint.

Green desires to substitute his judgment, via his appeal, for the judgement of the MPSC. Green's motives are purely petty and selfish. The MPSC, like the District, must be concerned with the health and welfare of everybody that takes a sip of the District's water, now and in the future. Protecting the District's groundwater is an integral part of meeting these responsibilities. The record clearly establishes that the decision of the MPSC was supported by substantial evidence; was not arbitrary or capricious; was not beyond the power of the MPSC to make; and did not violate some statutory or constitutional right of Green.

The sole basis of Green's claim that the decision of the MPSC was arbitrary or capricious is the allegation that the MPSC does not know the difference between a centralized sewer plant and a decentralized sewer system. Green offers no factual support for this unfounded allegation.[31] The MPSC has been granting certificates for decentralized systems for several years. See **e.g., In re Mississippi Wastewater, Inc.**, 2003-UA-266 (decentralized system operating in Rankin County, Mississippi). Decentralized systems and their components are merely tools, just as a centralized

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[30] "The maxim, '*stare decisis et non quieta movere*' to stand by precedents and not to disturb what is settled-has been accepted by all civilized systems of judicature. This doctrine was the cornerstone of the English Common Law which brought stability to the law, not only to English speaking people, but to all civilization. The doctrine is simple; it is that when a point of law is once clearly decided by a court of final jurisdiction, it becomes a fixed rule of law to govern the future actions of the judiciary." **Wilson v. St. Regis Pulp & Paper Corp.**, 240 So.2d 137, 143-144 (Miss. 1970) (Rodgers, J) (dissenting).

[31] Green offers no legal support for the position that the MPSC must busy itself with the scientific details of waste disposal or the mechanics involved.

plant and pump stations are tools. Indeed the configuration and components of centralized plants are limited only by the imagination of engineers and the cost and effectiveness of their processes. Some use mechanical aerators, some chemicals and still others use holding pools filled with plants. Likewise decentralized systems have widely varying components. It is simply not within the providence of the MPSC to concern itself with processes and components outside of the issues of "financial and managerial viability of the [new] system" seeking a permit from MDEQ, **see** §49-17-29, or whether an existing system is providing adequate service in the context of a proceeding under §77-3-13. In sum, the MPSC was right to refuse Green's request that it exceed its legislative mandate.

The sole basis of Green's claim that the decision of the MPSC was not based upon substantial evidence is that "the MPSC refused to allow Petitioner the opportunity of a hearing in regard to his claims."[32] Again Green fails to recognize that he defined the issues and that even his misguided attempt to amend sought to have the MPSC engage in a fool's errand and a futile waste of taxpayer money. The MPSC responded as warranted to the issues raised by Green and in the manner authorized by the Mississippi Legislature.

CONCLUSION

The Mississippi Public Service Commission reasonably and properly handled the ill drafted and misguided pleadings of Green. Green tactlessly blundered into a simple but rigid area of administrative law and demanded an agency do his bidding. The agency properly declined to do so.

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[32] In effect Green asks this Court to strike down the provision of §77-3-47 which provide that the MPSC "may dismiss any complaint without a hearing if in its opinion a hearing is not necessary in the public interest or for the protection of substantial rights." Green has improperly failed to notify the Mississippi Attorney General that he is seeking to have this provision of law declared unconstitutional. See Miss. R. Civ. P. 24(d).

Green's appeal should be dismissed, and he should be ordered to pay all of the attorney's fees, costs and expenses incurred by Cleary Water, Sewer & Fire District in responding to his appeal and motions.

WHEREFORE PREMISES CONSIDERED Cleary Water, Sewer & Fire District prays that the appeal of Harold Green be dismissed and that Harold Green be ordered to pay all of the attorney's fees, costs and expenses incurred by Cleary Water, Sewer & Fire District in responding to his appeal and motions. The District prays for such other and further relief to which it may be entitled.

Respectfully submitted,

Cleary Water, Sewer and Fire District

By: _____
James A. Bobo, Its Attorney

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Attorneys For Cleary Water Sewer and Fire District

CERTIFICATE OF SERVICE

I, James A. Bobo, attorney for Cleary Water Sewer and Fire District. do hereby certify that I have this day caused to be sent, via First Class United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing, to the following:

Harold Green
558 Mullican Road
Florence, Mississippi 39073

This the 1st day of April, 2009.

James A. Bobo

Respectfully submitted,

Cleary Water, Sewer and Fire District

By: _____
James A. Bobo, Its Attorney

James A. Bobo
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Attorneys for Cleary Water, Sewer & Fire District

CERTIFICATE OF SERVICE

I, James A. Bobo, attorney for Appellee, do hereby certify that I have this day, mailed via United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

Harold Green
558 Mullican Road
Florence, Mississippi 39073

Honorable Dan Fairly
Chancery Court of Rankin County
Post Office Box 1437
Brandon, Mississippi 39043-1437

This the 1st day of April, 2009.

_____
James A. Bobo

CERTIFICATE OF SERVICE

I, James A. Bobo, attorney for Cleary Water Sewer and Fire District. do hereby certify that I have this day caused to be sent, via First Class United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing, to the following:

Harold Green
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This the 1st day of April, 2009.

James A. Bobo