IN THE MISSISSIPPI SUPREME COURT

NO. 2011-TS-00350

SIERRA CLUB **APPELLANT**

VERSUS

MISSISSIPPI PUBLIC SERVICE COMMISSION and MISSISSIPPI POWER COMPANY **APPELLEES**

ON APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

BRIEF OF APPELLEE MISSISSIPPI POWER COMPANY

ORAL ARGUMENT REQUESTED

Ben H. Stone (MB No. [redacted]
Tim A. Ford (MB No. [redacted]
William L. Smith (MB No. [redacted])
Ricky J. Cox (MB No. [redacted]
Leo E. Manuel (MB No. [redacted]
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501
Telephone: (228) 864-9900
Facsimile: (228) 864-8221
ATTORNEY FOR APPELLEE,
MISSISSIPPI POWER COMAPNY

IN THE MISSISSIPPI SUPREME COURT

NO. 2011-TS-00350

SIERRA CLUB **APPELLANT**

VERSUS

MISSISSIPPI PUBLIC SERVICE COMMISSION and MISSISSIPPI POWER COMPANY **APPELLEES**

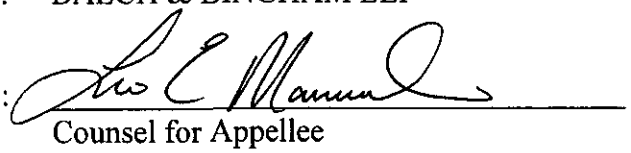
CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices may evaluate possible disqualification or recusal.

1. Sierra Club, Appellant;
2. Robert Wiygul, Esq. and Waltzer and Wiygul, Counsel for the Sierra Club;
3. Mississippi Public Service Commission, Appellee;
4. Brandon Presley, Lynn Posey and Leonard Bentz, Commissioners, Mississippi Public Service Commission;
5. Justin Matheny, Esq. and Shawn Shurden, Esq., Counsel for Mississippi Public Service Commission;
6. Mississippi Power Company, Appellee;
7. Ben H. Stone, Esq., Tim A. Ford, Esq., William L. Smith, Esq., Ricky J. Cox, Esq., Leo E. Manuel, Esq., and Balch & Bingham, LLP, Counsel for Appellee, Mississippi Power Company;
8. Honorable Judge Jim Persons, Chancellor, Harrison County Chancery Court.

MISSISSIPPI POWER COMPANY

BY: BALCH & BINGHAM LLP

BY: 
Counsel for Appellee

Ben H. Stone (MB No. [redacted])
Tim A. Ford (MB No. [redacted])
William L. Smith (MB No. [redacted])
Ricky J. Cox (MB No. [redacted])
Leo E. Manuel (MB No. [redacted])

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is an appeal from the Judgment of the Harrison County Chancery Court, First Judicial District, affirming the Mississippi Public Service Commission's ("Commission") Final Certificate Order issued on June 3, 2010, in MPSC Docket No. 2009-UA-014, granting Mississippi Power Company ("MPC" or the "Company") a certificate of public convenience and necessity authorizing, *inter alia*, the construction and operation of MPC's proposed baseload electric generating plant known as the Kemper County Integrated Gasification Combined Cycle Project (the "Kemper Project"). The Commission's Final Certificate Order represents the ultimate findings of the Commission and incorporates several interim orders issued throughout the proceeding and the many findings of fact and conclusions reached therein. Of the twelve different parties in the case, the Sierra Club is the sole appellant.

The Sierra Club does not and cannot allege that the evidentiary record is insufficient to support the Commission's decision. Since the passage of the 1956 Public Utility Act (the "Act"), no other proceeding in the history of the Commission has ever been developed so thoroughly, investigated so carefully, challenged so vigorously, and analyzed so thoughtfully before a decision was rendered. The record, containing over 30,000 pages (including approximately 2,500 pages of hearing transcript) reflects the importance of the Kemper Project to MPC, its customers, and in many respects the State's and Nation's future use of coal-based generation.

The weight of evidence in the record supporting the Commission's decision is overwhelming, and to challenge the record directly would be absurd. Instead, the Sierra Club ignores clear Supreme Court precedent and alleges the Commission's orders fail to provide enough detail on several secondary issues to support the Commission's ultimate conclusion that

the Kemper Project as approved satisfies the "public convenience and necessity." The Sierra Club also claims that the Commission acted arbitrarily when amending its May Order to increase the cost cap from $2.4 billion to $2.88 billion, despite the clear statutory authority and substantial evidentiary support to do so.

In reality, the Sierra Club has no other choice politically but to challenge the Commission's decision for the simple fact that it will allow another coal plant to be built in this country. Such an outcome "flies in the face" of the Sierra Club's stated political goals and objectives—to kill every coal plant regardless of circumstances.[1] They are certainly entitled to their view, but they are not the policy makers for the State of Mississippi.[2]

The Sierra Club's approach, which has proved successful in other parts of the country, is to attack coal-based generation at the policy level, at the regulatory level, and where necessary, in the courts. In doing so, the Sierra Club often rides the coattails of other stakeholders when convenient, such as advocating for the consumer by claiming coal will cause price hikes or disguising itself as a protector (or at least representative) of the public interest at large. Make no mistake; the Sierra Club is not a consumer advocate. In fact, the Sierra Club readily admits that its primary objective is to make fossil fuel use so expensive that other significantly more expensive energy sources become economic and more widely adopted, to the overall economic *detriment* of utility customers and the public at large.

With respect to the Kemper Project, the Sierra Club's approach was no different from its many attacks on other coal plants. The Sierra Club accurately positions the Kemper Project as a

---

[1] *See generally* http://www.sierraclub.org/coal/.

[2] Of the Sierra Club's 646,416 members nationwide, only 1,237 active members reside in the State of Mississippi (total population of almost 3 million). R. at 012734. Only 501 of the Mississippi members even reside in the 23 counties partially served by MPC. R. at 012735. Even assuming all 501 members were MPC customers, they would represent only a tiny fraction of the 186,000 retail customers currently served by MPC. R. at 000010.

significant and important endeavor for MPC's customers, Kemper County, our State and, indeed, the Nation. Such endeavors, however, are rarely undertaken (and never with the assistance of public funds) without an exhaustive review, evaluation, and approval process from both private and public stakeholders representing a broad array of interests and expertise. Several dozen governmental approvals are required before the Kemper Project will generate one megawatt of electricity or mine the first ton of Mississippi lignite—many of these approvals were required before construction commenced. The Sierra Club intervened and actively participated in many of those proceedings, including the Commission's certificate proceeding, in an attempt to persuade the governing body that approving the Kemper Project was not the right policy choice. But the Sierra Club refuses to take "no" for an answer. Having lost its political battle with every policy arm of federal, state and local government,[3] and its regulatory battle before the Commission, it now turns to this Honorable Court to stop the Kemper Project by misconstruing (or ignoring) the substantial evidence in the record, the standards governing Commission decisions, and the standard of review applicable to this Court in reviewing those decisions.

Under Mississippi law, the Sierra Club properly has a difficult task on appeal. As the appellant, the Sierra Club bears the burden of proof in this appeal. This burden is made more difficult, because this Court has long recognized the Commission's unique expertise in utility matters and, as a result, provides great deference to Commission decisions. This deference is heightened in policy matters such as granting a certificate. As the ultimate trier of fact, all

[3] The Sierra Club has attacked every effort to build Kemper since its inception. For example, the Sierra Club unsuccessfully opposed the passage of the Baseload Act by the Mississippi Legislature, the DOE's National Environmental Policy Act review of the Kemper Project, the Mississippi Department of Environmental Quality's issuance of a PSD air permit, the U.S. Army Corps of Engineers Water Certification and, finally, the Commission's grant of a certificate of public convenience and necessity. It should also be noted that the Sierra Club has now requested an injunction against all federal support for the Kemper Project from the Federal District Court for the District of Columbia in the hopes that by somehow delaying the incentives, construction of the Kemper Project will halt and the Project will be cancelled. This most recent tactic makes abundantly clear that the Sierra Club cares little about Mississippi or MPC's customers and only about its national political agenda to "kill coal."

Commission final orders are to be considered presumptively valid. As explained in this brief, the Commission's various orders issued in this proceeding are supported by substantial evidence in the record and contain findings of fact that more than adequately satisfy the requirements of the law, as previously interpreted by this Court and faithfully followed in Commission practice. MPC submits that the Sierra Club cannot meet its difficult burden in this case, and we respectfully request that this Court affirm the decisions of the Commission and the Chancery Court.

II. COURSE OF THE PROCEEDINGS

MPC's decision to pursue the Kemper Project was the result of an extensive Integrated Resource Planning ("IRP")[4] process that was authorized by the Commission in 2006 and spanned a total of three years.[5] During this exhaustive process, MPC evaluated several self-build generation alternatives, including nuclear, pulverized coal, natural gas combined cycle, and natural gas combustion turbine. In addition, MPC submitted two separate requests for proposals ("RFPs") to independent power producers ("IPPs")[6] asking for bids to evaluate the cost of

[4] IRP is a utility industry term used to describe a periodic planning process that is undertaken by a utility to determine the long-term supply and demand needs of the utility. MPC's IRP is conducted annually and is the fundamental planning tool used to ensure that the Company's customers continue to receive reliable service at the lowest practical cost through a diverse mix of resources. MPC's IRP involves the evaluation of many planning criteria including the scheduled and potential retirement dates of existing units, expected future customer load growth, fuel price risk, environmental regulation requirements, demand side management opportunities, and available new resource technologies.

[5] *See* the Commission's Orders approving MPC's Generation Screening and Evaluation Process. R. at 029980-86, R. at 030005-10, R. at 030032-38. It is also important to note that this filing was not the Commission's first look at the need for electric generation in the State. As required by Miss. Code Ann. § 77-3-14, the Commission periodically surveys the availability and need for new generation. The most recent proceeding was held in the summer of 2008, just prior to MPC's Certificate Filing. *See generally* MPSC Docket No. 2008-UA-477.

[6] IPPs own and operate "merchant" electric plants all over the country and are essentially unregulated by federal and state commissions, because they do not sell electricity to end consumers. Instead, they sell electricity in the unregulated "wholesale market" to other public utilities such as MPC. These transactions can be as short as a couple of hours and as long as 10 or 20 years. Four different IPPs intervened in the Kemper case, three of which ultimately provided multiple offers to sell power to MPC and none of which appealed the Commission's decision.

electric power on the wholesale purchase power market.[7] MPC's evaluation of self-build and market alternatives concluded that the Kemper Project was the most economic alternative and best addressed the significant strategic considerations and risks facing MPC and its customers over the next several decades. Therefore, on January 16, 2009, MPC filed with the Commission requesting a certificate of public convenience and necessity authorizing the construction and operation of the Kemper Project and approval of a cost recovery plan consistent with the authority provided under the Baseload Act.[8]

The Commission's and Mississippi Public Utilities Staff's ("Staff")[9] review of the Company's Certificate Filing was thorough and unprecedented. The Commission and the Staff separately retained expert consultants to assist them in independently evaluating MPC's filing and to participate in the investigation and hearings.

On behalf of the Commission, the National Regulatory Research Institute, through its principal, Scott Hempling, Esq., participated as an advisor to the Commission. In addition, Boston Pacific, Inc. ("Boston Pacific"), through its principal, Dr. Craig Roach, was hired by the Commission to participate as an independent evaluator and witness. Dr. Roach was tasked to review and evaluate the Kemper Project as well as the various other resource proposals submitted in Phase Two and to present a written report and testify at the hearings. In this capacity, Dr. Roach acted independently of all parties in the proceeding and acted independently of the Commission and its advisors.

---

[7] All of this analysis was conducted prior to the Commission's subsequent RFP and independent economic analysis that was performed in Phase Two of the Kemper proceeding.

[8] Codified at MISS. CODE ANN. §§ 77-3-101 *et seq.* (Rev. 2009).

[9] The Staff is an independent public body separate from the Commission that is generally charged with assisting the Commission and balancing the interest of public utilities and the public. *See generally* MISS. CODE ANN. §§ 77-2-1 *et seq.* (Rev. 2009).

The Staff actively participated in the proceeding through its Litigation Section. The Litigation Section hired Economic Insights to assist in the Staff's review of Phase One and Larkin & Associates to assist in the Staff's audit of the Kemper Project costs in Phase Two. Those members of the Staff not assigned to the Litigation Section were led by the Executive Director of the Staff and were designated as advisors to the Commission (i.e. not parties in the case), working closely with Mr. Hempling and the Commissioners.

Throughout the 16 months of proceedings before the Commission, extensive discovery and full participation was afforded all of the intervening parties. Over 1,000 separate data request responses (many containing subparts) were exchanged between and among the parties, all of which were submitted into the record. A number of intervenors including the U.S. Department of Energy ("DOE"), Mississippi Attorney General's Office, the Sierra Club and four IPPs also provided testimony, briefs and other documentation. Finally, many letters, emails, phone calls and hearing comments were received from the public.

To facilitate the evaluation and investigation of MPC's Certificate Filing, the Commission established a two phase procedural schedule. Phase One was designed to evaluate MPC's IRP and determine whether there was a need for additional generation, and if so, when that need would appear. Phase Two was designed to address what resources are available to meet the need determined in Phase One, and to identify the likely costs to customers of each of those resources. The results of this survey were to be used by the Commission to determine whether it should approve or deny the construction of the Kemper Project.

Following five days of evidentiary hearings, the Commission issued its Order Finding Need for Generating Capacity and Energy ("Phase One Order"), which found that "the evidence presented by the parties in this proceeding indicates that MPC has a capacity need beginning in

2014 under all sixteen scenarios"[10] and that "the public convenience and necessity requires or will require additional generating capacity and energy to serve MPC's customers."[11] No party disputed or challenged the Commission's conclusions regarding need and the Phase One findings are not at issue in this appeal.

Phase Two was designed to evaluate the Kemper Project and other resources available to meet the need determined in Phase One, and to identify the likely risks and costs to customers of each of those resources so as to determine whether the Kemper Project should be constructed. In addition to the Kemper Project, three different IPPs submitted a total of 19 alternative resource proposals. Importantly, the Sierra Club failed to propose any alternative to the Kemper Project in Phase Two. The same 16 scenario matrix[12] used in MPC's Phase One IRP was used by the Company to evaluate the relative economics of the Kemper Project versus the IPP bids. In addition, each proposal was evaluated by the Commission's independent evaluator, Boston Pacific.

The results of the Company's evaluation demonstrated convincingly that the Kemper Project best addresses the key strategic considerations of physical need, economic need and risk mitigation, and is the dominant economic solution across an overwhelming majority of the

---

[10] R. at 019011. Also provided in Tab 1 of MPC's Record Excerpts.

[11] R. at 019012. Also provided in Tab 1 of MPC's Record Excerpts.

[12] To properly analyze both MPC's physical and economic needs and the risks associated with various resource alternatives, MPC's IRP and economic evaluations consisted of a sophisticated modeling and planning process that evaluated 16 individual, internally consistent scenarios. The IRP modeled the relative impact of gas prices (i.e. low, moderate, moderate with volatility and high gas price forecasts) and carbon compliance costs (i.e. $0/ton, $10/ton, $20/ton and $30/ton) on all of the factors that affect need and economics, including MPC's expected load, plant retirements, energy efficiency programs, and demand-side management programs. The result of the IRP produced 16 individual, internally-consistent outlooks of correlated fuel prices and carbon compliance costs, electricity demand and prices, and capacity and energy mixes. This scenario approach was approved and adopted by the Commission and its expert Boston Pacific and served as the basis for all of the evaluations conducted in the proceeding and the Commission's ultimate decision to grant a certificate to construct Kemper.

scenarios analyzed.[13] The independent economic analysis conducted by Boston Pacific confirmed these results when the "fixed gas" bids were appropriately removed from the analysis.[14] After volumes of additional pre-filed testimony, another five (5) days of evidentiary hearings and several legal briefs, the Commission issued several orders that culminated with its Final Certificate Order finding that the Kemper Project satisfied the "present and future public convenience and necessity"—the primary requisite finding for approving requests to construct and operate new generating facilities.[15]

III. DISPOSITION OF THE COMMISSION

At the conclusion of the Phase Two Hearings, the Commission issued its Order for Post Hearing Information requesting that the parties propose customer protection measures to mitigate some of the risk borne by customers from Kemper and the IPP proposals.[16] It was clear that even at this early stage the Commission recognized the risk and uncertainties posed by Kemper and the IPP proposals—no risk-free proposal existed. Several parties submitted proposals on March 12, 2010, including MPC. MPC's revised Kemper proposal included a 30% construction cost cap, operational cost and performance measures, and equipment guarantees for certain portions of the first-of-a-kind gasification technology.[17] It should be noted that MPC's March proposal represented a significant compromise to the Company's original position taken in its Pre-Hearing Brief.[18] On April 29, 2010, the Commission issued an order as required by the Act and the Commission's Scheduling Order ("April Order").

---

[13] R. at 027899-028030. Also provided in Tabs 5 and 12 of MPC's Record Excerpts.

[14] R. at 028148-281. Also provided in Tab 13 of MPC's Record Excerpts.

[15] MISS. CODE ANN. §§ 77-3-11, -14 (Rev. 2009)

[16] R. at 029067-70. Also provided in Tab 7 of MPC's Record Excerpts.

[17] R. at 029281-316. Also provided in Tab 8 of MPC's Record Excerpts.

[18] R. at 028033-100.

In the April Order, the Commission approved the construction estimate for the Kemper Project, but also found that there were construction cost risks inherent in any estimate for a project as large as the Kemper Project. Typically, in regulatory orders approving facilities for a utility, the Commission approves an estimate, the Company constructs the facility, and the utility seeks rate recovery for the facility following construction. At that time, the Commission is able to compare the actual costs of the facility to the estimated costs of the facility and determine whether any variances in the costs were prudent. In this instance, given the magnitude of the project and MPC's request for relief under the Baseload Act, the Commission focused more deeply on the risks to both the Company and the customers. The April Order attempted to balance the cost and performance risks between the Company and its customers by requiring that the Company accept a cost cap exactly equal to the Company's construction estimate as a condition to the issuance of the certificate. In addition, the Commission included an incentive mechanism that would reward the Company financially for constructing the Kemper Project at a cost below the Company's approved estimate.

The Commission also found in its April Order that Kemper's base load IGCC technology would be the best overall generating alternative to meet MPC's needs over the long term, but found that there were risks associated with new technology and with gas and carbon compliance price forecasts. Therefore, the Commission included as a condition to the issuance of the certificate that the Company accept certain operational performance measures that would balance the risks between the Company and its customers.

Finally, the Commission's April Order deferred consideration of the Company's requests under the Baseload Act to defer a decision on MPC's request to recover CWIP financing costs during construction until additional information was provided. The Commission further declined

the Company's request to establish scheduled periodic prudence reviews until the Commission and Staff hired expert construction monitors to assist in their oversight duties.

In summary, the Commission concluded that the Kemper Project *as proposed* would satisfy the public convenience and necessity as required under the Act only if MPC agreed to certain "conditions" to approval. The Commission's original conditions were designed to adjust the balance of risk so that customers did not bear any more risk than the "public convenience and necessity" required, and still provide the means to finance and construct the Kemper Project.[19] Because the Commission cannot impose these conditions without agreement from MPC, the April Order directed the Company to agree in writing to the proposed conditions within twenty (20) days or the Company's petition would be deemed denied.[20]

In response, MPC filed its Motion in Response to Commission Order, or, in the Alternative, Motion for Alteration or Rehearing ("Motion").[21] By subsequent order of the Commission, the provisions of the April Order were stayed until the Commission could consider and rule upon the Company's Motion.[22] Other parties were also permitted to be heard on the Company's Motion by filing written responses to the Company's Motion.[23] Significantly and as noted by the Chancellor in his opinion, the Sierra Club opted not to respond to MPC's Motion nor did it raise any objection at the Commission's properly noticed open meetings.

In its Motion, MPC provided several significant and material updates to the Kemper Project that occurred since the Phase Two hearings held in February. These updates had the effect of mitigating or eliminating entirely some of the "uncertainties" discussed in the April

---

[19] R. at 029801. Also provided in Tab 11 of MPC's Record Excerpts.

[20] R. at 029582. Also provided in Tab 9 of MPC's Record Excerpts.

[21] R. at 029604-755. Also provided in Tab 10 of MPC's Record Excerpts.

[22] R. at 029777-78.

[23] R. at 029756-76; 29789-93.

Order, thereby lowering the overall risk profile of the Kemper Project to customers. In addition, the Company notified the Commission that MPC would be unable to move forward with the Kemper Project under the proposed conditions based upon several reasons previously articulated by the Company and fully evaluated during the course of the proceeding.

While the April Order contained several conditions, only four created concern to MPC: (1) $2.4 billion construction cost cap; (2) operational cost cap; (3) deferral of a decision on CWIP financing; and (4) deferral of a decision on a prudence review schedule. In its Motion, the Company offered alternative conditions for the Commission's consideration that, if adopted, would allow the Company to finance and construct the Kemper Project, albeit on substantially less than the Company's ideal terms.

On May 26, 2010, after several open meetings, the Commission issued its second Phase Two Order in response to the Company's Motion and the other parties' responses thereto ("May Order").[24] The May Order specifically addressed many of the issues raised by MPC's Motion and found that modifications to the proposed conditions were warranted. The Commission found that the modifications were required to "provide a reasonable measure of certainty to the Company, ratepayers and investors that should allow the Kemper Project to go forward and will satisfy the public interest and the public convenience and necessity."[25]

Specifically, the Commission (1) increased the construction cost cap from $2.4 billion to $2.88 billion, representing a 20% cap above MPC's approved Kemper Project estimate;[26] (2) removed the financial incentive mechanism that would have rewarded the Company for cost

[24] R. at 029794-825. Also provided in Tab 11 of MPC's Record Excerpts.

[25] R. at 029801 (emphasis added). Also provided in Tab 11 of MPC's Record Excerpts.

[26] It should be noted that the Act does not provide for a cost cap and was proposed to be implemented only if MPC agreed.

underruns;[27] and (3) provided 100% CWIP recovery in years 2012, 2013 and 2014, while still requiring that MPC establish annually that the CWIP recovery is needed and in the public interest. The Commission re-iterated that an appropriate balance of risk and benefits of the Kemper Project between the Company and customers remains paramount, and found that the proposed modifications achieve this objective.[28]

After a careful review of the modified conditions, MPC filed a Motion for Commission to Accept Petition, agreeing to the modified conditions imposed on the Kemper Project.[29] On June 3, 2010, the Commission issued its Final Certificate Order.[30]

IV. BENEFITS OF THE KEMPER PROJECT

Several benefits unique to the Kemper Project and un-refuted in the record support the Commission's decision to ultimately approve the plant's construction:

1. The Kemper Project will enhance the fuel diversity and asset mix of MPC's generating fleet, thereby mitigating the supply and price volatility risks associated with the predominant use of any one fuel. Specifically, the TRIG™ IGCC technology will allow MPC to use a third fuel source—lignite, a lower-rank (i.e. lower heating value) fuel whose cost is both lower and less volatile than the cost of natural gas and higher-ranked coals.[31]

2. The Kemper Project provides the Company and the Commission with far greater flexibility to address significant environmental compliance decisions that will face the Company in the near future with respect to the Company's existing generating fleet.[32]

3. The Kemper Project will include state-of-the-art equipment to reduce various emissions from the Plant, including equipment for the capture of approximately 65% of the Plant's CO_2 emissions, all of which will ensure compliance with

---

[27] This provision could be significant. The Commission was made aware of the possibility that the Kemper Project would receive up to $1.2 billion in "early mover" benefits, cutting the cost of Kemper in half, if certain legislation currently proposed in Congress was passed. R. at 023641-42.

[28] R. at 029801. Also provided in Tab 11 of MPC's Record Excerpts.

[29] R. at 029826-31.

[30] R. at 029832-33.

[31] R. at 029538. Also provided in Tab 9 of MPC's Record Excerpts.

[32] R. at 029539. Also provided in Tab 9 of MPC's Record Excerpts.

existing environmental laws and regulations and mitigate the future risk associated with the passage of climate change legislation.[33]

4. The support for clean coal technologies, such as that proposed for the Kemper Project, has been very strong at the federal, state and local levels. As a result, there are significant financial incentives available that help lower the overall cost of the Kemper Project to the Company and its customers.[34]

5. The Kemper Project is expected to have a considerable economic development impact at both the state and local levels. According to the un-refuted Company testimony, approximately 1,000 jobs will be created at the peak of the construction phase (500 jobs on average) and approximately 260 to 280 permanent, quality jobs will be created in both the power and mine facilities.[35]

6. Because the Plant will be fueled by Mississippi lignite, the Kemper Project will demonstrate the value of lignite and provide the catalyst to expand lignite business opportunities in the State. Mississippi has approximately four billion tons of recoverable lignite reserves, representing significant untapped potential for economic development in Mississippi and the region.[36]

7. The carbon capture capabilities of the Plant, beyond their potential environmental benefits, will foster the development of enhanced oil recovery ("EOR")[37] projects in the State. These EOR projects are expected to translate into an increase of domestic oil production of several million barrels a year.[38]

8. The results of the independent economic evaluations conducted by Boston Pacific and the Company's own economic evaluations clearly demonstrate that the Kemper Project is the most economic and best overall resource alternative available to meet MPC's identified need in the majority of the scenarios analyzed.[39]

---

[33] R. at 023425-28. Construction of the Kemper Project has commenced and the most recent estimates indicate that of the approximately $500 million of committed costs to date, over $250 million in contract commitments have been confirmed with Mississippi businesses and over 150 construction jobs have been filled by the Mississippi workforce.

[34] R. at 029538. Also provided in Tab 9 of MPC's Record Excerpts.

[35] R. at 000055.

[36] *Id.*

[37] EOR is a process that has been used by the oil companies since the 1960s to extract Original Oil in Place ("OOIP") from oil fields that have already utilized primary (gravity) and secondary (water flooding) oil recovery methods. EOR uses a compressed gas (i.e. CO_2) and under pressure injects it into the depleted oil field to mix with the OOIP and to facilitate its extraction. On average, the EOR process recovers up to approximately 20% of an oil field's OOIP. R. at 023426-27.

[38] R. at 023426-27.

[39] R. at 023636-48; 027899-28009; 028148-281.

V. RISK MITIGATION AND CUSTOMER PROTECTION MEASURES

Throughout the course of the proceeding, considerable effort was expended by intervenors, including the Sierra Club, to attempt to cast the Kemper Project as an undertaking too risky for customers, implying that a lower risk option was available. Every party agrees that the only alternative to the Kemper Project is more natural gas generation, whether bought or built.[40] The alternatives fueled by natural gas presented significant price risk to MPC's customers in the form of rising and volatile fuel costs.[41] Figure 1 below illustrates the significant increases in the volatility of natural gas markets and natural gas prices over the past 40 years, and particularly over the last decade. This issue is of paramount strategic importance to MPC's customers because fuel-related costs make up approximately 50% of a typical MPC retail customer's bill. Over time, MPC has become increasingly dependent on natural gas, and therefore subject to its higher price and price volatility.[42] From 2000 to 2008, the percentage of MPC's energy generation from natural gas increased from 17% to 33%.[43] In this same time frame, MPC's retail customers experienced a total increase in retail rates of 54% since 2003, over 80% of which was caused by rising fuel costs.[44] Those natural gas alternatives owned by

---

[40] The Sierra Club's brief seems to wrongfully imply that MPC's need can be adequately met with renewable energy or demand side management opportunities that yield megawatts several orders of magnitude less then conventional power plants powered by fossil fuels or nuclear. The Commission was clear on this point: "This Commission finds that the record clearly reflects that [demand side management programs] and renewables, although included in MPCo's planning scenarios, are inadequate to meet the identified need." R. at 019011. Also provided in Tab 1 of MPC's Record Excerpts.

[41] All of the parties and experts agreed that the primary risks facing utility planning are the increasing volatility and price of natural gas and the impending regulation of green house gases by the federal government. Natural gas is, at times, a very expensive fuel source and its price is extremely volatile. Tr. at 885. All of the parties, including the independent experts, agree that the uncertainties caused by the extreme level of volatility associated with the price of natural gas require that a range of forecasts be used. Tr. at 75, 112, 134 & 358.

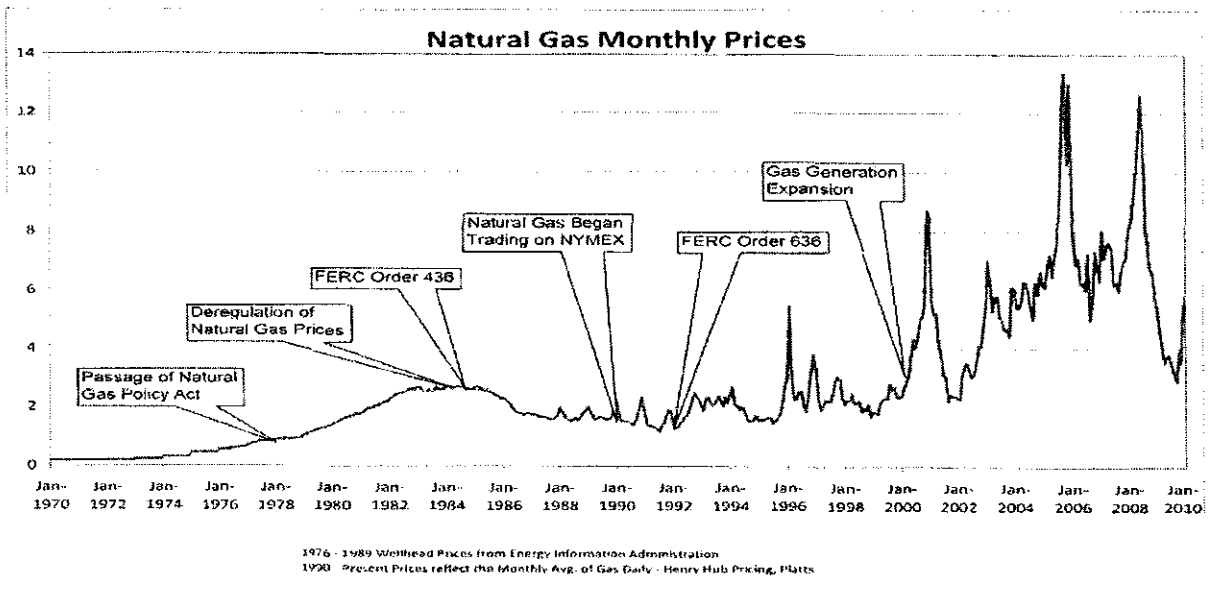
[42] Tr. at 13.

[43] Tr. at 14.

[44] Tr. at 13-14.

third-party IPPs combined this significant fuel risk with counter-party risks that are inherent in any large commercial contract.[45]

Figure 1: Historic Natural Gas Prices - 1970 to 2010



As the Commission recognizes in its April Order, the Kemper Project presents its own set of risks to customers. These include the risk of construction cost overruns, higher operational costs, first-of-a-kind technology risk that could produce lower than anticipated plant performance, and the potential loss of incentives.[46] All of these risks were discussed in a great deal of detail, and, in fact, were the primary focus of the Phase Two hearings. As was demonstrated at the hearings, a 20% capital cost overrun of Kemper would increase the life cycle cost of the Project by less than $1 billion over the life of the plant and would still be the best choice under all of the original 16 scenarios, since there is no credible fixed gas offer available.[47] However, depending upon the natural gas price used, the life-cycle cost of a natural gas proposal

[45] R. at 027938-39. Also provided in Tab 5 of MPC's Record Excerpts.

[46] R. at 029560-568. Also provided in Tab 9 of MPC's Record Excerpts.

[47] Tr. at 1463-64.

can vary by approximately $9 billion.[48] Therefore, the analysis provided at the hearings demonstrated that the natural gas fuel risk could represent approximately nine times the level of risk associated with even a 20% capital cost overrun on Kemper. In other words, the materiality of natural gas risk far exceeds the cost overrun risks associated with Kemper. The salient point is that no proposal presented a risk-free proposition for customers.

The Act has long provided specific customer protection measures designed to mitigate to some degree the risks borne by customers associated with large certificated utility projects.[49] The driving force behind the Commission's proposed conditions, however, was to further address certain risks of the Kemper Project that the Commission considered to be "unique" and "unprecedented." The cost cap's purpose is to insulate customers from large construction cost overruns by shifting this risk to the utility at a certain total cost level beyond which customers are no longer responsible even if the costs are found to be prudent. The operational cost cap applies similarly to the operational cost estimates assumed in the Company's analysis during the hearings, including the by-product revenue assumptions the Sierra Club considers to be "controversial." With respect to incentives, the Company must demonstrate that it used its "best

---

[48] Tr. at 1463-64.

[49] The "prudent investment rule" which is codified in the Act permits a utility to recover through rates only those costs deemed prudent by the Commission. *State ex rel. Pittman v. Miss. Pub. Serv. Comm'n*, 538 So. 2d 387, 394 (Miss. 1989). ("It always has been a guiding principle of rate regulation that costs should be allowed unless managerial decisions are found to have been imprudent when evaluated in the light of the circumstances existing at the time the decisions were made, without the benefit of hindsight."). In the context of the Kemper Project, this rule ensures that every penny spent to construct and operate Kemper is prudently incurred before customers are asked to reimburse the utility. This rule, however, does not protect against cost overruns beyond the control of the utility such as unforeseeable commodity cost increases, changes in law or force majeure events. In addition, the "used and useful" concept has been used by the Commission and sanctioned by this Court since 1956 to ensure that only those assets that are used and useful in providing electric service are included in rates. MISS. CODE ANN. § 77-3-33(1) (Rev. 2009). *See e.g., Rankin Utility Co., Inc. v. Miss. Pub. Serv. Comm'n*, 585 So. 2d 705 (Miss. 1991). As applied to the Kemper Project, the used and useful doctrine provides some measure of protection to customers in the event the first-of-a-kind TRIG™ technology underperforms or is otherwise unsuccessfully deployed at a commercial scale. This point was made clear by the Commission's counsel at the Chancery Court Oral Arguments on appeal. Chan. Tr. at 133-35.

efforts" to procure the incentives identified by the Company before recovering any additional costs from customers resulting from the loss of any incentive.[50] The Commission also required expert independent construction monitors and periodic reports regarding the continued economic viability of the Kemper Project.[51]

It is unreasonable and improper to review one of these customer protection measures in a vacuum to the exclusion of all others. Rather, the balance of risk between MPC and customers can only be discerned after evaluating the entire "package" of protections provided by the Commission. As explained below, this is where the Sierra Club's analysis of the April and May Orders logically fails. The Sierra Club's efforts to isolate the Commission's change to the cost cap without examining the entire package of conditions contained in the May Order is a feeble attempt to create the appearance of "arbitrary" behavior where none exists. To the contrary, an objective review of the record demonstrates clearly that the Commission examined all elements of risk to strike the appropriate overall balance between MPC and its customers. This is the exact conclusion that the learned chancellor came to after reviewing the case:

> The Court further finds that Commission's findings that the increased construction cost cap of $2.88 billion together with the conditions accepted by MS Power, including operations caps and the use of independent monitors during the construction period, and possibly continuing after construction, adequately address the risks to ratepayers from the uncertainties it described in the April and May Orders. The Commission findings on this point are supported by the record, including the testimony of Dr. Roach, and are not arbitrary and capricious.[52]

[50] R. at 029816. Also provided in Tab 11 of MPC's Record Excerpts.

[51] R. at 029817. Also provided in Tab 11 of MPC's Record Excerpts.

[52] Chancery Court Judgment, Cause No. C2401-10-02580(1), p. 17 (Feb. 28, 2011) (emphasis added) [hereinafter Chan. Ct. Judgment].

SUMMARY OF THE ARGUMENT

The most important point to be made in this appeal is that a majority of the Commission intended at all times to approve the Kemper Project, because of the significant benefits that would accrue to MPC's customers, the Nation, the State and Kemper County. The Commission's ultimate decision, based upon the various other findings contained in earlier orders in the proceeding, can be clearly discerned from the Commission's own words:

> We believe this Order will meet our objectives to approve the Project, which will provide a base load resource using a Mississippi natural resource to diversify the fuel mix of the Company, while also insulating customers from unreasonable risks.[53]

In support of this decision, the Commission made the statutorily required finding—that the Kemper Project satisfied the public convenience and necessity, so long as the Company accepted the conditions imposed in the May Order. Each condition was designed to address specific risks identified by the Commission in its April Order and specific references to the evidence were provided in support of each. Other than specific findings as to the approved construction cost estimate, which were contained in both orders,[54] no other standard in the law governs the Commission's decisions for the approval of facilities such as the Kemper Project.[55]

This Court must determine whether the Commission's decision was supported by substantial evidence, and, therefore, not arbitrary and capricious. To aid the courts in this inquiry, the law requires that the Commission provide findings of fact to support its decisions and conclusions, but given the great deference provided the Commission in certificate cases only the "ultimate fact finding" standard applies. Under this standard, the law merely requires that the

---

[53] R. at 029803 (emphasis added). Also provided in Tab 11 of MPC's Record Excerpts.

[54] R. at 029581-82. Also provided in Tab 9 of MPC's Record Excerpts. The May Order adopted these findings from the April Order unchanged. R. at 029804. Also provided in Tab 11 of MPC's Record Excerpts.

[55] *See* MISS. CODE ANN. §§ 77-3-11(4), -14(4) (Rev. 2009).

Commission make "nothing more than brief statements that the statutory standard being applied has been met or violated."[56] The Sierra Club contends this deferential administrative standard either does not or should not apply to this case. However, the Supreme Court precedent regarding the "ultimate fact finding" standard is clear and has been followed thousands of times by the Commission. Public policy dictates that this Court validate this long-standing rule. Regardless, both Commission orders contain more than enough factual findings to support the only two Commission actions legally required by the Act.

The fact that the Commission decided to approve the Kemper Project is, without question, supported by substantial evidence in the record.[57] The potential benefits of the Kemper Project to the nation, the State, the Company and its customers are numerous and un-refuted in the record. They are also unique to the Kemper Project—no other proposal would provide them. The record also conclusively demonstrates that the Kemper Project was the dominate economic option over a wide range of reasonable assumptions.[58] The Chancery Court agreed:

> Given the vast amount of documentary evidence and the lengthy testimony contained in the transcripts of the hearings, there is sufficient evidence in the record to support the decision reached by the Commission.[59]

Ultimately, the Commission's finding of public convenience and necessity was carefully crafted to satisfy the Commission's stated objective to approve the Kemper Project without creating unreasonable risks to MPC or to its customers. The Commission found a way to approve the Kemper Project, while adjusting the balance of risk to conform with the

---

[56] *Miss. Dep't. of Marine Resources v. Brown*, 905 So. 2d 649, 654 (Miss Ct. App. 2004) (Southwick, P.J., dissenting).

[57] *See generally* MPC's Post-Hearing Brief summarizing the evidence. R. at 029233-80. Also provided in Tab 8 of MPC's Record Excerpts.

[58] *See generally* MPC's Phase Two Supplemental Filing (R. at 027899-28030); Boston Pacific's Evaluation Report (R. at 028148-281). Also provided in Tabs 5, 12 and 13 of MPC's Record Excerpts.

[59] Chan. Ct. Judgment, p. 20.

requirements of the law. This was accomplished by placing "conditions" on the Kemper Project's approval, a strategy that even the Sierra Club suggested was well within the Commission's legal authority.[60] The learned chancellor also approved of this approach: "To balance the risks and shift more of the risk to MS Power, the Commission then gave guidance in the form of conditions because of the benefits of Kemper and the Company's efforts to date."[61]

In a very real sense, a "public negotiation" ensued between MPC, the intervenors and the Commission concerning the final conditions to be placed on the Kemper Project. This "negotiation" was contemplated by Dr. Roach, began with MPC's Phase Two Pre-Hearing Brief,[62] and continued with the Commission's Order for Post-Hearing Information,[63] MPC's Phase Two Post Hearing Submission,[64] the April Order,[65] MPC's Motion,[66] and finally the May Order.[67] While it may seem somewhat unorthodox, the existing legislative framework and procedural mechanisms existing under the Act and the Commission's Public Utility Rules of Practice and Procedure require this open, transparent and incremental process. This Court's review is limited to the culmination of that process, which is reflected in the Commission's May Order.

The Sierra Club's brief draws attention to certain Commission findings in the April Order that the Sierra Club describes as inconsistent with subsequent findings made in the May Order. It cites these differences in support of its claim that the Commission's decision to approve the

---

[60] R. at 029378-79; *see also* MISS. CODE ANN. § 77-3-13(3) (Rev. 2009).

[61] Chan. Ct. Judgment, p. 13.

[62] R. at 028033-100.

[63] R. at 029067-70. Also provided in Tab 7 of MPC's Record Excerpts.

[64] R. at 029233-80. Also provided in Tab 8 of MPC's Record Excerpts.

[65] R. at 029534-99. Also provided in Tab 9 of MPC's Record Excerpts.

[66] R. at 029604-755. Also provided in Tab 10 of MPC's Record Excerpts.

[67] R. at 029794-825. Also provided in Tab 11 of MPC's Record Excerpts.

Kemper Project was arbitrary and capricious. The Sierra Club would have this Court believe that the May Order approving the Kemper Project is diametrically opposed to the April Order—a gross mischaracterization of the findings in the May Order. The record is clear that the May Order merely modified the customer protection components and risk allocation provisions contained in the April Order.

As more fully explained below, the Commission's intent in both orders was to assure the plant would be built while properly balancing the risk borne by the Company and customers. The challenge for the Commission was that MPC would be unable to obtain the financing necessary to move forward with the Kemper Project under the conditions originally proposed in the April Order. Still intending to see that the Kemper Project's benefits were realized, the Commission modified its conditions based upon guidance provided by the Company in its Motion and substantial evidence in the record, including the expert testimony of Dr. Roach. This balance can be struck with several combinations of conditions. How the Commission, as the trier of fact and expert in utility matters, ultimately determines to strike this balance is not for the Sierra Club to question or this Court to review.

The Sierra Club's approach would greatly expand the purview of a reviewing court with respect to Commission decisions. In total disregard to the "ultimate fact-finding" standard, the Sierra Club has attempted in its brief to "re-try" the case in the hopes that the appellate court would improperly substitute its judgment for that of the Commission's. The Chancery Court rightfully refused to do so:

> The Court finds that it must give great deference to the Commission's decisions when the record provides substantial evidence, as defined by the Supreme Court, to support it. This Court does not sit as a fourth Commissioner, but as an appellate court with a limited standard of review. The Commission spent a great deal of time and effort in reaching a decision in this case. The Commission was thorough in its review of MS Power's

> Petition through the pre-hearing, hearing and post-hearing phases of the process.[68]

Having lost the first and second rounds, the Sierra Club now calls upon this Court to review the credibility of the evidence and to substitute its judgment for that of the Commission. This Court has consistently held: "The Commission with its expertise is the trier of facts and within this province it has the right to determine the weight of the evidence, the reliability of estimates and the credibility of the witnesses."[69] Thus, the Court should not substitute its judgment for that of the Commission.[70]

Given the limited issues presented on appeal, the Court's review is limited to whether the Commission's decision is supported by substantial evidence in the record.[71] Each order standing alone is supported by substantial evidence. The two sets of conditions in the April Order and May Order were both found by the Commission to satisfy the statutory requirements of public convenience and necessity. The fact that the conditions varied from the April Order to the May Order does not indicate that the Commission was arbitrary or capricious; only that the conditions in each order were different and required different analysis and support from the record. This reasoning is explained by the Commission in the May Order:

> **We recognize that there is a range of reasonableness within which the Commission can base its decisions and be supported by substantial evidence in the record.** Our stated objective in the April 29 Order to appropriately balance the risks and benefits of the Kemper Project between the Company and customers remains paramount, and we find the modifications herein to the April 29

---

[68] Chan. Ct. Judgment, p. 19. "Under the laws of this State, this Court must give great deference to the Judgment of the Commission. Its orders are presumptively valid and the party appealing a Commission decision has the burden of proof. This Court does not sit as a fourth Commissioner, but as an appeals court with a limited standard of review. It may not substitute its judgment for that of the Commission. The Court finds that the Commission met the minimum standards required." Chan. Ct. Judgment, p. 2.

[69] *State ex rel. Pittman v. Miss. Pub. Serv. Comm'n*, 481 So. 2d 382, 305 (Miss. 1985)

[70] *See Miss. Pub. Serv. Comm'n v. Miss. Power Co.*, 429 So. 2d 883, 891 (Miss. 1983).

[71] MISS. CODE ANN. § 77-3-69 (Rev. 2009).

> Order achieve that objective and provide a reasonable measure of certainty to the Company, ratepayers and investors that should allow the Project to go forward and will satisfy the public interest and the public convenience and necessity.[72]

Because Commission orders are presumptively valid, the Sierra Club, as the sole appellant, bears the burden of proving that the Commission's order is some how legally deficient. As explained below, the Sierra Club falls woefully short in meeting its burden and overcoming the several protections provided to Commission certificate decision under Mississippi law.

ARGUMENT

The Sierra Club presents two legal challenges to the Commission's actions. First, the Sierra Club generally attacks the Commission's orders claiming that the Commission failed to provide sufficient findings of fact as required by the Act.[73] Specifically, the Sierra Club alleges that the Commission did not decide what the Sierra Club refers to as "key strategic questions" in the case. Second, the Sierra Club claims the modifications made in the Commission's May Order are arbitrary and capricious, because they are not supported by substantial evidence in the record and/or are contrary to previous Commission findings made in the April Order. Because of these alleged legal deficiencies, the Sierra Club asks this Court to reverse and remand the Commission's decision. As MPC demonstrates below, the Sierra Club's legal arguments are fatally flawed and factual arguments are without merit. Therefore, MPC respectfully requests that the Honorable Court affirm the Commission's orders and the decision of the Chancery Court.

---

[72] R. at 029801 (emphasis added). Also provided in Tab 10 of MPC's Record Excerpts.

[73] MISS. CODE ANN. § 77-3-59 (Rev. 2009).

I. STANDARD OF REVIEW

It is well-established law that the regulation of public utilities is a legislative function.[74] In Mississippi, the Legislature has largely delegated (with a great deal of guidance) this responsibility to the Commission through the passage of the Act.[75] Under the Act, the Commission is vested with the authority and the exclusive, original jurisdiction to regulate the intrastate business of public utilities.[76] The Act is generally designed to provide the Commission great deference with respect to the manner in which it performs its statutory duties. This is why this Court consistently gives great deference to Commission decisions.[77] Final orders of the Commission are presumptively valid;[78] therefore, the burden shifts to the appellant (in this case, Sierra Club) to prove that a Commission's order is not valid.[79] This deference includes the interpretation and manner in which the Commission performs its statutory duties.[80] But this authority and discretion is not without limits. The Commission must act consistent with the public policies established by the Legislature and only within the authority granted to it by statute.[81]

---

[74] *See e.g., United Gas Corp. v. Miss. Pub. Serv. Comm'n*, 127 So. 2d 404, 420 (Miss. 1961).

[75] *Id.*

[76] *See* MISS. CODE ANN. §§ 77-3-2, -5 (Rev. 2009)

[77] "We have preached and preached that the legislative actions of the Public Service Commission are entitled to great weight and deference." *State ex rel. Pittman v. Miss. Pub Serv. Comm'n*, 538 So. 2d 367, 376 (Miss. 1989).

[78] *See e.g., Miss. Pub. Serv. Comm'n v. Hughes Tel. Co., Inc.*, 376 So. 2d 1074, 1077 (Miss. 1979) ("We set forth above the rule that the commission's order is presumptively valid.").

[79] *See e.g., Miss. Power Co.*, 429 So. 2d at 887 (Miss. 1983); MISS. CODE ANN. § 77-3-77 (Rev. 2009).

[80] "Unless the agency's interpretation is repugnant to the plain meaning of the statute thereof, the court is to defer to the agency's interpretation. Further, the interpretation given the statute by the agency chosen to administer it should be accorded deference." *His Way Homes, Inc. v. Miss. Gaming Comm'n*, 733 So. 2d 764, 767 (Miss. 1999).

[81] *See e.g., Miss. Bd. of Nursing v. Belk*, 481 So. 2d 826, 829 (Miss. 1985) ("It is clear under Mississippi law that an administrative agency cannot exceed the scope of authority which was granted to it by the legislature.").

Within the framework of the public policy established by the Legislature, the standard of review that this Honorable Court must apply is statutory:

> The [Commission] order shall not be vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order of the commission is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the commission, or violates constitutional rights.[82]

The basis of the Court's review of a Commission order is the substantial evidence rule.[83] "The Commission with its expertise is the trier of facts and within this province it has the right to determine the weight of the evidence, the reliability of estimates and the credibility of the witnesses."[84] Thus, the Court should not substitute its judgment for that of the Commission, but substantial evidence must exist to support the Commission's findings and its findings must not be manifestly against the weight of the evidence in the record.[85] The Court may not consider or hear new or additional evidence and shall decide the appeal only upon the record and evidence considered by the Commission in making its findings.[86]

II. THE COMMISSION'S APRIL AND MAY ORDERS CONTAIN SUFFICIENT FINDINGS UNDER THE LAW TO SUPPORT THE ULTIMATE CONCLUSION THAT THE KEMPER PROJECT MEETS THE PUBLIC CONVENIENCE AND NECESSITY

The Sierra Club argues that neither the Commission's April Order nor its May Order is legally valid, because each fails to answer certain "key strategic questions" that the Sierra Club deems important and necessary to the outcome of the case. Specifically, the Sierra Club contends that the Commission never determined its "strategic preference" for long-term versus short-term proposals, the relative credibility of the IPP bids versus the Kemper Project, or the

---

[82] MISS. CODE ANN. § 77-3-67 (Rev. 2009).

[83] *See Keith v. Bay Springs Tel. Co.*, 168 So. 2d 728, 730 (Miss. 1964).

[84] *Pittman*, 481 So. 2d at 30.

[85] *See Miss. Power Co.*, 429 So. 2d at 891.

[86] MISS. CODE ANN. § 77-3-67 (Rev. 2009).

relative risks associated with each proposal.[87] The Sierra Club's argument misses the point all together. The concept of selecting "strategic preferences" was espoused by Dr. Roach. Mississippi law does not require such findings in public utility certificate proceedings.

A. The Commission's Orders Make the Statutorily Required Findings.

Under the Act, the Commission is only required to make two findings in a certificate proceeding: (1) the proposal will satisfy the present or future public convenience and necessity;[88] and (2) approval of a construction cost estimate.[89] It is undisputed that the Commission made both findings. It is also clear that the Commission provided sufficient findings of fact to support each.

With respect to the "public convenience and necessity" requirement the Commission stated: "We find that the conditions expressed in this Order are necessary, but no more than necessary, to ensure that the certificate, if granted, is consistent with the statute's 'public convenience and necessity' test."[90] As explained above, the Commission described in detail in its April Order several risks and uncertainties associated with the Kemper Project as originally proposed.[91] Several of the risks discussed referenced specific evidence in the record for support. These findings were not modified by the May Order. To mitigate these risks, the Commission proposed conditions designed to be "no more stringent than necessary to align the Company's proposal with the 'public convenience and necessity' requirement."[92] These conditions were also each supported by specific references to evidence contained in the record. For example, Dr.

---

[87] Sierra Club Appeal Brief, p. 55.

[88] MISS. CODE ANN. § 77-3-14(1) (Rev. 2009)

[89] MISS. CODE ANN. §§ 77-3-11(4), -14(4) (Rev. 2009).

[90] R. at 029581.

[91] R. at 029560-568.

[92] R. at 029804.

Roach's testimony was cited in support of the 20% cost cap and operational cost cap provisions[93] and the un-refuted testimony of Ms. Frances Turnage and Mr. Steven Fetter were cited in support of the decision on CWIP.[94]

With respect to the cost estimate requirement, the Commission made the following findings:

> MPC's project estimates were based upon reasonable assumptions that are typical for projects of similar scope and size. MPC provided testimony that the engineering, procurement and construction portion of the project would be conducted and managed by SCS, an affiliate of MPC, who provides cost-based services to all of the Southern Company operating companies. Mr. Anderson and Ms. Shaw specifically testified that the rates and charges for SCS were reasonable and below prevailing industry rates for similar services. No party challenged these specific assumptions made by MPC regarding its estimates for labor, materials, property or services. Therefore, this Commission finds that MPC's estimates contained reasonable assumptions for labor, materials, property or services.[95]

As demonstrated, the Commission's orders contain more than sufficient findings with respect to the two issues that the law requires be addressed. To suggest that the Commission fell short with respect to either of the required findings is absurd and completely unsupported. In fact, the Commission's findings in support of its approval of the Kemper Project far exceed the deferential "ultimate fact finding" standard that actually applies in this case.

---

[93] R. at 029805-808.

[94] R. at 029809-812.

[95] R. at 029581-582.

B. The Commission's Orders Easily Comply with the Ultimate Fact-Finding Standard Applicable to Certificate Proceedings.

"State agencies are not required to make detailed findings of fact. Ultimate fact-finding is sufficient."[96] The "ultimate fact finding" standard is not the usual administrative review standard that is used in other jurisdictions and prominently cited by the Sierra Club in its brief, but instead is a more deferential standard that "usually requires nothing more than brief statements that the statutory standard being applied has been met or violated."[97] In light of this more deferential standard, the Supreme Court has not required an agency's adoption of detailed findings of fact, although the Court routinely "encourages" agencies to provide more specific findings by stating that it is "better practice."[98] However, the Sierra Club's reference to such dicta as primary authority in Mississippi, especially with respect to Commission certificate proceedings, is misplaced.

1. The Exception to the Ultimate Fact Finding Rule is Inapplicable.

The Sierra Club claims that Miss. Code Ann. § 77-3-59 creates an exception to the "ultimate fact finding" standard for all Commission decisions. The Sierra Club has cited several utility cases in support of this proposition, all of which are factually and legally distinguishable

---

[96] *Miss. Bd. of Nursing v. Wilson*, 624 So. 2d 485, 495-96 (Miss. 1993) (citing *Miss. Pub. Serv. Comm'n v. AAA Anserphone, Inc.*, 372 So. 2d 259 (Miss. 1979) and *Illinois Central Railroad Co. v. Jackson Ready-Mix Concrete*, 137 So. 2d 542 (Miss. 1962)).

[97] *Brown*, 905 So. 2d at 654 (Southwick, P.J., dissenting).

[98] "The great weight of authority holds it to be better form for a fact finding administrative agency or commission to make a finding of facts on which to base an award or reject a claim. [In] *Fortune Furniture Mfg. Co., Inc. v. Sullivan*, 279 So. 2d 644, 647 (Miss. 1973) [t]he Court noted that this is so because in a case where the evidence is adverse to the order of the commission, unless the commission makes a finding of fact, 'the reviewing court is in an awkward position of trying to ferret out sufficient evidence from the record to avoid holding that the order of the commission is arbitrary and capricious or that it is based on substantial evidence.' *Id.* However, failure to make findings of fact alone is generally not cause for reversal. This Court has noted that a lack of requisite findings of fact is not fatal where it is clear, from the circumstances, that the only defect is the tribunal's failure to recite expressly the facts found, but that it otherwise proceeded upon a correct theory of law, or where it is manifest that the omission does not impede proper review by the reviewing court." *Duckworth v. Miss. State Bd. of Pharmacy*, 583 So. 2d 200, 202 (Miss. 1991) (citations omitted) (emphasis added).

and none of which vacate or overturn this Court's interpretation of 77-3-59 for certificate proceedings established in the *AAA Anserphone* case.

First, none of the cases cited reversed a Commission for lack of detailed findings. Rather, the cases were reversed based upon a finding that the Commission's decisions were unsupported by substantial evidence in the record.[99] These decisions necessarily required that the Court review the record for evidence in support of the Commission's findings, which in those cases the Court determined did not exist. The Sierra Club has wrongfully chastised the Chancellor for following this same practice in affirming the Commission's decision in this case.

Second, all of these cases discuss specific fact findings, but only in the context of utility *rate* cases. This important distinction makes the Sierra Club's entire line of cases cited inapplicable to Commission certificate proceedings. Instead, the Supreme Court in *AAA Anserphone* has determined that the more deferential "ultimate fact finding" standard is to be used in certificate cases and the Commission has faithfully followed this rule in thousands of proceedings since this Court's decision:

> The failure of the Commission's order to contain a detailed finding of fact in *Mississippi Power Co. v. Miss. Public Service Commission,* 291 So. 2d 541, 554-555 (Miss. 1974), was the subject of comment in this Court where it was said that detailed findings should be made as an aid to the Court on appeal and in *Mississippi State Tax Commission v. Piggly Wiggly Alabama Distributing Co., Inc.,* 369 So. 2d 501 (1979), we took note of the Tax Commission's failure to make detailed findings of fact. **We do not know and have not had cited to us any holding of our Court that failure to make findings of fact in [certificate] cases such as this is basis for reversal.**[100]

---

[99] *Total Env'l Solutions, Inc. v. Miss. Pub. Serv. Comm'n*, 988 So. 2d 372 (Miss. 2008) ("[T]his Court finds that the Commission's order was not supported by substantial evidence and was contrary to the manifest weight of the evidence."); *White Cypress Lakes Water, Inc. v. Miss. Pub. Serv. Comm'n*, 703 So. 2d 246, 249-50 (Miss. 1997) (reversing and remanding because denial of rate increase was "unsupported by substantial evidence and was contrary to the manifest weight of the evidence" but requesting that the Commission provide more detailed findings on remand).

[100] *AAA Anserphone, Inc.*, 372 So. 2d at 265 (emphasis added).

This policy makes sense given the stark contrast between rate cases and certificate proceedings. In rate cases, the Commission is asked to establish a specific rate that must be calculated using specific variables, such as ratebase, operating expense and rate of return, all of which must be determined by the Commission from evidence in the record. Without a doubt, the Commission's failure to make specific findings concerning these specific rate variables and others would be contrary to the requirements of Miss. Code Ann. § 77-3-59 and make it difficult for the reviewing court to determine how the Commission set rates.[101]

Contrast this standard with the Commission's "public convenience and necessity" standard in certificate proceedings, which is designed to allow the Commission more discretion utilizing its expertise in utility matters. Even though thousands of public utility certificate applications have been brought before the Commission since 1956, Mississippi jurisprudence is not well-developed regarding the concept of "public convenience and necessity." However, the term has been extensively construed by other jurisdictions. The concept of "public convenience and necessity" requires that the Commission "evaluate *all* factors bearing on the public interest."[102] Stated differently, "public convenience and necessity" is not susceptible to a precise definition, but must be evaluated on a case-by-case basis.[103] Often times in certificate proceedings, the Commission is presented with less quantitative and more qualitative evidence

---

[101] *See e.g., Total Env'l Solutions, Inc.*, 988 So. 2d at 375. (Commission failed to set ratebase, expenses and rate of return and instead approved an arbitrary water rate); *Miss. Pub. Serv. Comm'n v. Miss. Power Co.*, 366 So. 2d 656 (Miss. 1979) (Commission failed to consider evidence concerning interest coverage ratios in approving an electric rate); *Hughes Tel. Co., Inc.*, 376 So. 2d 1074 (Miss. 1979) (Commission failed to set a ratebase or rate of return in approving a telephone rate).

[102] *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1945) (citing *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959)) (emphasis in original).

[103] "[I]t is well-settled that public convenience and necessity is a dynamic and flexible concept, which is not susceptible to a rigid or precise definition and, therefore, must be determined on a case-by-case basis." *Vacuum Truck Carriers of La., Inc. v. La. Pub. Serv. Comm'n*, 12 So. 3d 932, 936 (La. 2009) (citing *La. Household Goods Carriers v. La. Pub. Serv. Comm'n*, 781 So. 2d 545, 547 (La. 2001); *Matlack, Inc. v. La. Pub. Serv. Comm'n*, 622 So. 2d 640, 650 (La. 1993); *Florane v. La. Pub. Serv. Comm'n*, 433 So. 2d 120 (La.1983)).

upon which it must base a decision, which is why the Commission is afforded more discretion and less detailed fact-findings are required by law: "What constitutes the public convenience and necessity is within the discretionary powers of the Commission."[104] The Commission's orders in this case easily satisfy Mississippi's "ultimate fact finding" standard.

2. Public Policy Weighs Strongly Against a Change in Long-Standing Commission Jurisprudence.

Recognizing that the Ultimate Fact Finding standard applies in this case, the Sierra Club instead pleads for this Court to overrule its decision in *AAA Anserphone* on policy grounds. The ultimate fact finding standard and the jurisprudence in support of that standard have been in place for over three decades during which time the Act has been amended and re-enacted on several occasions. The Commission, as it has done in this case, has relied upon this standard to govern thousands of certificate proceedings handed down in this same time frame. To overrule the ultimate fact finding standard in a case of paramount importance to MPC's customers, the State of Mississippi and the Nation flies in the face of traditional common law principles and principles of statutory construction.

The Kemper Project will indeed set the stage for a prosperous future for MPC's customers due to the undeniable benefits the project brings to a wide-variety of interested stakeholders. MPC is more than a year into construction of the Kemper Project and has spent over half a billion dollars to date. To change the rules at this stage of the game on such an important and complicated decision could jeopardize the viability of a project that has enjoyed strong and consistent public support from the national, state and local levels of government for more than five years. Public policy strongly discourages such a drastic change in mid-course,

---

[104] *Citizens United For Responsible Energy Dev., Inc. v. Ill. Commerce Comm'n, et al.*, 673 N.E.2d 1159, 1165 (Ill. App. 1996) (citing *Egyptian Transp. Sys., Inc. v. Louisville & Nashville R.R. Co.*, 152 N.E. 510 (Ill. 1926)).

especially considering the significant time and effort spent by the Commission evaluating its options before making its final decision.

C. The Act Does not Require the Commission to Make Specific Findings Concerning the IPP Bids.

The Commission is granted broad authority and discretion to consider and weigh whatever evidence it deems relevant to this determination.[105] In this case, the Commission requested that alternative proposals be submitted so that the economics of these alternatives could be used as evidence of the Kemper Project's relative overall benefit to customers. There was no requirement in the Act for them to do so. The Sierra Club now seeks to punish the Commission's thoroughness by trying to attach additional requirements that do not exist in the law. Specifically, the Sierra Club wrongfully claims that the Commission's failure to make specific findings concerning resource alternatives that were not even the subject of MPC's certificate request is legal error.

1. The Act only Permits the Commission to Approve or Deny the Kemper Proposal.

The Sierra Club claims that the Commission failed to make findings concerning the relative credibility of all of the proposals, and as a result, the Commission's orders are legally deficient. The Sierra Club's argument is not consistent with the Act and must be rejected. The Commission's only duty in this proceeding was to make a determination of whether the *Kemper Project* met the public convenience and necessity. The certificate provisions of the Act clearly contemplate that a public utility propose electric generating projects designed to satisfy customers' needs over the long-term and the requirement that the Commission determine

[105] "The [Commission] is the trier of facts and within this province, it has the right to determine the weight of evidence, the reliability of estimates and the credibility of witnesses." *Miss. Pub. Serv. Comm'n v. Dixie Land & Water Co., Inc.*, 707 So. 2d 1086, 1091 (Miss. 1998).

whether the *proposed project* is in the best interest of the public and MPC's customers.[106] This interpretation is supported by the Commission's own order in this case.[107] In other words, the Commission only has the authority to approve or deny the utility's proposal; the Commission cannot unilaterally force the utility to build or buy another alternative against its will. Essentially, the Commission's certificate authority is limited by what the utility will ultimately agree to construct. This is also why the Commission structured its April Order and May Order to include a finding of public convenience and necessity "conditioned" on the Company's consideration and acceptance (instead of legally imposing them), and requested that the Company submit an alternative resource proposal should it not accept the Commission's conditions.[108]

Even though not required, the Commission's order describes the specific uncertainties related to the IPP bids, including the many shortcomings of the fictional fixed gas bids.[109] The Commission is not legally required to make a finding with respect to the IPP bids. This much is clear from the Commission's own language: "[t]he record contains shorter-term, gas-only alternatives, on whose merits the Commission did not opine in its April 29 Order other than to discuss the considerable testimony challenging the credibility of 'fixed' gas resource options offered by Independent Power Producers."[110] While not explicit in the orders, essentially, the Commission determined that the "fixed gas" bids as proposed and the Kemper Project as proposed each posed different risks to customers.

---

[106] *See* MISS. CODE ANN. §§ 77-3-13, -14 (Rev. 2009)

[107] R. at 029795-96. Also provided in Tab 11 of MPC's Record Excerpts.

[108] R. at 029536. Also provided in Tab 9 of MPC's Record Excerpts.

[109] R. at 029559-60. Also provided in Tab 9 of MPC's Record Excerpts.

[110] R. at 029796. Also provided in Tab 11 of MPC's Record Excerpts.

When confronted with this set of facts, the Commission decided to provide guidance to MPC in the form of conditions on the Kemper Project. In other words, the Commission relied upon testimony from Dr. Roach and others, as well as upon its own expertise as to how the Commission could enhance the Kemper Project proposal through cost caps, guarantees and other customer protection measures.[111] As the Commission acknowledges, the law did not require it do so.[112] This concept applies equally to the IPP bids; the Commission has no duty to "enhance the credibility" of the fixed gas bids. The fact that it chose not to is well within the Commission's authority and discretion. The manner in which the Commission crafted its order approving the Kemper Project made it unnecessary for the Commission to make a finding concerning the relative credibility of the alternatives. It chose instead to provide guidance to the Company on how it could enhance the Kemper Project proposal, thereby making it consistent with the public convenience and necessity.

2. Findings Concerning "Strategic Preferences" are not Required by the Act.

The Sierra Club's argument concerning the long term vs. short term strategic preference issue is also a red herring. Three different evaluation methodologies were used to evaluate the resource alternatives submitted in Phase Two: (1) BP Extension Method; (2) MPC Fill-in Method; and the (3) BP Modified Annuity Method. The first two were generally termed "long-term" evaluations and the third was a new methodology created by Boston Pacific to evaluate on a "short-term" basis.

---

[111] R. at 029796. Also provided in Tab 11 of MPC's Record Excerpts.

[112] "At this point, the Order could simply stop, leaving the Company with a denial of its Petition. The Commission has no statutory obligation to help a petitioner convert a rejected project into an approved one." R. at 029795. Also provided in Tab 11 of MPC's Record Excerpts.

Significant evidence was submitted concerning the credibility of all three methodologies, which is summarized in MPC's Phase Two Hearing Brief.[113] The Commission determined that the first two methods "produced results that concluded that Kemper was the best economic option for customers in the overwhelming majority of scenarios and across the many strategic preferences."[114] With respect to the third method the Commission found "[t]he results of the BP Modified Annuity Method indicated that the project was less economic than the 'fixed gas' proposals in the majority of scenarios, but still remained competitive with the other PPA and asset purchase bids when the fixed gas proposals were excluded."[115] As Dr. Roach testified and the Commission correctly determined, if the fixed gas bids are determined to lack credibility, it doesn't matter whether you rely on the short-term analysis or the long-term analysis—Kemper is still the overwhelming winner.[116]

Significant evidence was presented establishing that the "fixed gas" bids did not actually exist and were not credible offers.[117] Based upon the economic evidence presented by MPC and Boston Pacific, the Commission concluded that "the primary issue in the evaluation is the relative credibility of the fixed gas proposals and the Kemper cost and performance estimates."[118]

The real issue was the perceived risk of the Kemper Project versus the fictional fixed gas IPP bids—not whether the Commission should choose a long-term or Short-term strategic preference. As explained above, on that issue the Commission's conclusion is clear—it chose to create its own mechanism to enhance the Kemper Project proposal to mitigate the identified

---

[113] R. at 029259-69. Also provided in Tab 8 of MPC's Record Excerpts.

[114] R. at 029558. Also provided in Tab 9 of MPC's Record Excerpts.

[115] R. at 029559. Also provided in Tab 9 of MPC's Record Excerpts.

[116] Tr. at 1847-73. Also provided in Tab 6 of MPC's Record Excerpts.

[117] R. at 029254-59. Also provided in Tab 9 of MPC's Record Excerpts.

[118] R. at 029559. Also provided in Tab 9 of MPC's Record Excerpts.

risks. Once MPC agreed to the Commission's conditions, the Commission made a determination that the Kemper Project "satisfies the public interest and the present and future public convenience and necessity."[119] Because the Commission's modified conditions enhanced the Kemper Project proposal, and because the "fixed gas" bids lacked credibility, there was no need to decide on the long-term versus short-term strategic preference issue.

III. THE COMMISSION WAS NOT ARBITRARY AND CAPRICIOUS IN MODIFYING THE CONDITIONS OF THE APRIL ORDER

At all times during following the Phase Two hearings, the Commission's primary goal was to approve the Kemper Project and realize its significant benefits for MPC's customers. In doing so, however, the Commission was careful to ensure that the balance of risk was struck such that MPC could still finance and construct the project and the risk to customers was minimized. The April Order constituted one of several counterproposals submitted in the "public negotiations" conducted between the Commission and all of the parties throughout Phase Two. Based upon feedback received in MPC's Motion and other intervenors, the Commission again revised its risk mitigation proposal in the May Order and the Company accepted. The Commission's final order followed a logical and well thought out procedure and is far from arbitrary and capricious.

In order to fully explain the Commission's justifications for modifying its April Order, it would first help to understand the exact differences between the April and May Orders. Based upon the Commission's ultimate goal to approve the Kemper Project with terms that will (i) allow MPC to successfully build it; and (ii) maintain an appropriate level of risk protection for customers, the Commission made the following general modifications in its May Order:

1. Increased the construction cost cap from $2.4 billion to $2.88 billion, which corresponds to 20% above MPC's cost estimate for the Kemper Project;

---

[119] R. at 029832-33.

2. Added a force majeure exception to the construction cost and operational cost caps;

3. Removed the financial incentive mechanism rewarding the Company for cost underruns; and

4. Amended its findings and decisions to award MPC 100% CWIP financing in years 2012, 2013 and 2014, subject to an obligation of the Company to annually justify that the CWIP financing level will benefit customers.

For the Court's convenience, a redline document comparing the two sections "IX. Conditions on Approving the Certificate" from the April and May Orders is attached as Exhibit "A" hereto.

In support of the modifications, the Commission made the following findings:

> The Commission has thoroughly reviewed the Motion, responses thereto and the record in this case. We recognize that there is a range of reasonableness within which the Commission can base its decisions and be supported by substantial evidence in the record. Our stated objective in the April 29 Order to appropriately balance the risks and benefits of the Kemper Project between the Company and customers remains paramount, and we find the modifications herein to the April 29 Order achieve that objective and provide a reasonable measure of certainty to the Company, ratepayers and investors that should allow the Project to go forward and will satisfy the public interest and the public convenience and necessity.[120]

This finding from the Commission demonstrates two things. First, the Commission, as experts knowledgeable in the utility field, determined that while modified from its April Order, the conditions contained in the May Order, as a whole, struck the appropriate balance of risk between the Company and customers, such that the public convenience and necessity standard was met. Second, the Commission also determined that its modified conditions were based upon substantial evidence in the record as required by law.

[120] R. at 029801 (emphasis added). Also provided in Tab 11 of MPC's Record Excerpts.

A. The Commission is Authorized Under the Act to Modify and Amend its Orders.

Miss. Code Ann. §§ 77-3-61 specifically contemplates and authorizes the Commission to "rescind or amend any order or decision made by it."[121] The Commission's authority under these sections has likewise been recognized by this Court.[122] In modifying the conditions in the April Order, the Commission was exercising its authority expressly provided it by the Legislature under the Act, and the modifications were supported by substantial evidence. Therefore, the Court's review of the Commission's actions in this case is limited to the final May Order.

B. The Commission Modifications to the Cost Cap Conditions were Based Upon Substantial Evidence in the Record and Supported by Sufficient Findings of Fact.

In comparing the two orders, the Sierra Club wrongly insists on concentrating on one specific modification—the construction cost cap increase—to the exclusion of all others. Because the Commission's intent is to balance the overall risk of the Kemper Project, none of the conditions can be looked at in isolation. Several combinations of conditions can be crafted to strike the desired balance. Each combination, while discretely different, could achieve the overall desired effect of appropriately allocating risk between the Company and customers. Therefore, the proper inquiry is whether the conditions as a whole accomplish the Commission's objectives, meet the public convenience and necessity standard, and are supported by substantial evidence in the record.

In affirming the Commission's decision, the Chancery Court adopted this same approach:

> The imposition of $2.88 billion as a hard cost cap, with certain exceptions and the use of independent monitors and prudence reviews on a schedule to be set by the Commission, provide a

---

[121] MISS. CODE ANN. § 77-3-61 (Rev. 2009).

[122] *See Rankin Utility Co., Inc. v. Miss. Pub. Serv. Comm'n*, 585 So. 2d 705 (Miss. 1991).

> sufficient basis and more than a scintilla of evidence to support the Commission's findings.[123]

When analyzed in this context, it is clear that the Commission's modified conditions satisfy the requirements of the Act and support the Chancellor's ruling. The modified conditions increased the construction cost cap and added a limited force majeure exception to the cap. Both modifications shifted a portion of risk from the Company back to customers, when compared to the April Order. However, the Commission also removed the financial incentive to MPC, which shifted risk from the customers back to MPC.[124]

In general terms, the Commission's original proposal would insulate customers from paying any more than $2.4 billion for the Kemper Project (except under certain specific circumstances), but exposed customers to the very real possibility that customers would be required to pay more than the actual total cost of the Kemper Project, if completed under budget. The Commission's modified proposal widened the potential that customers could ultimately pay more than $2.4 billion for the Kemper Project (by increasing the cap and broadening the exceptions), but retained the customer's right to enjoy every dollar of savings if the Kemper Project is built under budget. As mentioned above, the Commission found that these modified conditions (just like the original conditions) met the public convenience and necessity standard. Therefore, in the Commission's expert opinion, which by law is to be given great deference, the modifications as a whole did nothing to change the overall balance of risk between MPC and customers. The only question for the Court is whether the Commission's finding is supported by substantial evidence in the record.

---

[123] Chan. Ct. Judgment, p. 15.

[124] The April Order contained a financial incentive that would have allowed MPC to place into rate base 50% of the difference between the actual total cost of the Project and the $2.4 billion estimate, if the Company completes the project under budget. This provision would have resulted in MPC's customers paying more than the actual cost of the plant if it was completed under budget. R. at 029572. Also provided in Tab 9 of MPC's Record Excerpts.

The cap modifications in the May Order are specifically supported by evidence contained in the record, including the report and testimony of Dr. Roach.[125] In its Motion, the Company discussed the primary issues with the construction cost cap as originally proposed:

> First, without reasonable assurances of recovery of their investment provided by allowing a reasonable margin above the Project estimate, creditors will be unwilling to lend the funds needed to finance the Project. MPC has confidence in its $2.4 billion estimate. Both MPC and the financial markets know, however, that there are factors that impact cost which neither MPC nor this Commission can control no matter how accurate or thorough MPC's estimates. In today's tight financial markets, lenders require certainty they will be repaid. Second, the proposed cap greatly increases the risk to MPC to a level that the Company believes jeopardizes its ability to adequately provide service to its customers. For these reasons, the Commission's imposed cap alone, which does not adequately allow for reasonable variances from the Company's estimates, will prevent the Company from moving forward with the Project.[126]

In relying on these arguments, the Commission "recognize[ed] the need for some limited variance from the Company's estimates."[127] It, therefore, "strongly encourage[d]" the Company to meet its estimate, but "allow[ed] a variance of 20% above the $2.4 billion construction cost estimate," all of which remains subject to prudence reviews by the Commission to approve the actual construction costs incurred.[128] In other words, even though the cap was increased, any cost determined to be imprudently incurred would be disallowed in rates, regardless of whether they are within the cap. The Sierra Club mischaracterizes this condition as a "blank check" for MPC to exceed its Commission-approved cost estimate. The Commission order is clear that every penny of the Kemper Project cost will be reviewed for prudence.

---

[125] R. at 029801-02. Also provided in Tab 11 of MPC's Record Excerpts.

[126] R. at 029628. Also provided in Tab 10 of MPC's Record Excerpts.

[127] R. at 029805. Also provided in Tab 11 of MPC's Record Excerpts.

[128] R. at 029802. Also provided in Tab 11 of MPC's Record Excerpts.

The removal of the incentive mechanism was not without consequence either. Throughout the proceeding, MPC maintained that its estimates were "conservative" and there was an equal probability that the Kemper Project could cost *less* than the $2.4 billion estimate.[129] The Commission's repeated reference to this testimony in both orders makes clear that the Commission considered this testimony to be credible.[130] In addition, the proof showed that the Kemper Project would receive up to $1.2 billion in "early mover" benefits, cutting the cost of Kemper in half, if certain legislation currently proposed in Congress was passed.[131] Thus, the effect of removing the incentive mechanism returned to customers the full cost savings should any of these possibilities become reality. In essence, the modified conditions widened the band of risk, but, most importantly, did so on both ends of the risk spectrum so as to maintain a reasonable overall balance.

Contrary to the Sierra Club's arguments, the Commission's reliance on Dr. Roach's independent expert testimony to support the modified 20% cap is dead on. Not only did Dr. Roach's report determine that Kemper was still the winner in a majority of cases even with a 20% construction cost overrun,[132] but he specifically testified in his expert opinion at the hearings that a 20% cap would be reasonable.[133] In fact, Dr. Roach's testimony during day three of the Phase Two hearings served as a basis for the Commission's entire set of conditions concerning the risk of cost overruns:[134]

> COMMISSIONER PRESLEY: Dr. Roach, I'd just like to follow up with a couple of questions. . . . Would you just enumerate for

---

[129] Tr. at 1144, 1461, 1548 & 1894. Also provided in Tab 6 of MPC's Record Excerpts.

[130] R. at 029534-99; 029794-825. Also provided in Tabs 9 and 11 of MPC's Record Excerpts.

[131] R. at 023641-42.

[132] R. at 028268-69. Also provided in Tab 13 of MPC's Record Excerpts.

[133] Tr. at 1876-80. Also provided in Tab 6 of MPC's Record Excerpts.

[134] Dr. Roach's full hearing testimony on this subject can be found in Tab 6 of MPC's Record Excerpts.

the Commission, when you say that the company should give some guarantees, that's your opinion. Tell us what those guarantees should be. What should we be looking for guarantee wise?

DR. ROACH: I think this would the subject of negotiation. Let me try to be as –

COMMISSIONER PRESELEY: Just some bright points in there would be helpful.

. . .

DR. ROACH: All right. Okay. So what I would do – if that table [Boston Pacific E-29] is your justification, then I would say – I would say to Kemper, again, I'm not signing a blank check. What I'm going to do is you still do okay with even a 20 percent capital cost overrun. So I'm going to tell you today – but if it went beyond that, you would begin to lose.

So I'm going to tell you today that I'm not going to entertain, once you're finished with this, the equivalent of anything above a 20 percent capital cost increase.

I'm just not going to entertain it. I'm not going to tell you that any cost increase is prudent today, but I'm just giving you a warning up front I'm not going over that number.

Now, you – can say to the company now, if you have a capital cost overrun but you offset that by lower lignite prices and you win a better deal there or higher by-product sales prices, I'll let you do that, but I'm telling you now that I'm not going to go above that.

I also – that would be the cost cap. I would – I would have – beyond that, I would have the Commission have its own what I would call owner's engineer, owner's auditor. And I would have that auditor responsible to judge all the components of what the ratepayer is paying for, monitor cost overruns on capital, cost of lignite, as well as operating costs, as well as by-product sales. Is that –

COMMISSIONER PRESELY: Those two main things, the cost caps and then some sort of independent engineer/auditor mechanisms.

DR. ROACH: Right.[135]

[135] Tr. at 1882-84 (emphasis added). Also provided in Tab 6 of MPC's Record Excerpts.

As the Court can easily discern, the Commission's modified cost cap conditions (*i.e.* Conditions #1 A, B, C and G) are essentially identical to Dr. Roach's general proposal described in the above testimony and cited by the Commission in its May Order. To suggest that the evidence in the record does not support the Commission's ultimate findings with respect to the cost cap conditions is disingenuous at best.[136] The Chancery Court agreed: "The testimony of Dr. Roach and Ms. Turnage provide sufficient basis for the Commission's findings increasing cost cap of $2.88 billion, particularly with the conditions agreed to by MS Power."[137]

The Sierra Club also points to specific Commission findings contained in the April Order that were changed or modified in the May Order in support of its claims of arbitrary and capricious behavior. By way of example, in arguing that the Commission's modification of its cost cap is arbitrary, Sierra Club cites the following quote over and over in its brief: "[t]he record contains no alternative evidence to support a higher number."[138] The Commission's findings in the April Order must be read in context with the specific set of conditions proposed in that order. If the Commission's intent was to establish a narrow range of risk to customers on both sides, then naturally the Company's $2.4 billion estimate is the only reasonable number to use—no other cost estimate is contained in the record. The Commission's intent, however, changed in the May Order. The modified cost cap conditions were established, in the exercise of the Commission's expertise and discretion, to widen the risk band on both sides in response to concerns from the Company that without such relief, it would be unable to obtain financing to build Kemper. The Commission was careful, though, not to widen the band further than

---

[136] To assist the Court's review of Dr. Roach's cost cap testimony, the Company has attached a copy of his full testimony on this subject as Tab 6 MPC's Record Excerpts.

[137] Chan. Ct. Judgment, p. 15.

[138] R. at 029571. Also provided in Tab 9 of MPC's Record Excerpts.

necessary nor beyond the point that the Kemper Project would become uneconomic. Dr. Roach's testimony was adopted to support this very approach.

The Sierra Club has continued to claim through out the appeal that the "Anderson Table" referenced by the Commission in the April Order was arbitrarily ignored by the Commission in its May Order when increasing the cap. Again the Sierra Club is off base. The Anderson Table was not cited in the April Order for the purpose of supporting the cost cap. Instead, the Anderson Table was cited to support a finding that there was a risk of construction cost overruns and the potential customer impacts of that risk. In revising the cap in the May Order, the Commission chose to follow the guidance and recommendations of its independent expert Dr. Roach rather than use the Anderson Table. The Commission as the trier of fact and expert in utility matters is charged with determining the credibility of testimony and cannot be overturned on this basis.

C. The Commission's Change in CWIP Treatment was not Arbitrary and Capricious Because it was Based Upon Substantial Evidence in the Record

Building a baseload plant today requires significant capital investment and takes several years to complete. As is widely acknowledged, without increased legislative and regulatory assurance of cost recovery, many utilities, including MPC, cannot afford to finance baseload plants under traditional financing and rate recovery methodologies.[139] In passing the Baseload Act, the Legislature gave the Commission broader ratemaking authority to be used, at its discretion, when increased regulatory certainty is deemed necessary to successfully build needed baseload plants. This authority can be summarized into three provisions: (1) a modification of the traditional "used and useful" rule to allow a utility to collect CWIP financing costs during

[139] R. at 000974-79.

plant construction;[140] (2) the authority to make binding prudence determinations of plant costs during construction;[141] and (3) increased cost recovery certainty for incurred costs in the event the plant is later prudently cancelled or abandoned.[142] When exercised, this new authority provides two primary benefits to the utility—increased cash flow during construction to allow timely debt repayment and increased assurance of ultimate cost recovery. Both are important to lenders providing construction financing for a baseload plant. The primary benefits to customers of the Baseload Act are that baseload plants, and all of their inherent benefits and advantages, remain a viable option in Mississippi, and, by paying for financing costs during construction, the total cost of the plant is significantly reduced.

The Commission addressed all of these authorizations in both its April and May Orders. As requested by MPC in its Motion, the Commission generally adopted the Company's revised proposal concerning CWIP recovery. Although requested to do so by the Company, the Commission declined to revise its conditions in the April Order concerning prudence reviews. Finally, the Commission's condition concerning plant cancellation rate treatment was never challenged, and is identical in both orders. Therefore, the Sierra Club's claims that the Commission was arbitrary and capricious can only logically be aimed at the CWIP issue.

In the April Order, the Commission did not make any definitive decision concerning CWIP financing. Specifically, the Commission found that "although the Company's arguments for a CWIP return have merit conceptually, its request for a return on 100% of its investment is too general to support a Commission finding."[143] The Commission stated that a blanket, irrevocable award of 100% CWIP financing required more specific proof concerning factors

---

[140] MISS. CODE ANN. § 77-3-105(1)(a), (b) & (c) (Rev. 2009).

[141] MISS. CODE ANN. § 77-3-105(2)(a) (Rev. 2009).

[142] MISS. CODE ANN. § 77-3-105(1)(e) (Rev. 2009).

[143] R. at 029573. Also provided in Tab 9 of MPC's Record Excerpts.

such as, current economic conditions, the strength of the national economy, current availability and cost of capital, financial community's perception of the utility industry and MPC specifically, and specific cost savings that would be generated from 100% CWIP financing.[144] Therefore, in its April Order, the Commission requested that the Company submit additional evidence supporting its request for 100% CWIP financing, and, based upon this new evidence, the Commission would make a more definitive ruling.

In its Motion, MPC explained that it could not "move forward with the Kemper Project without a definitive decision by the Commission up-front with respect to CWIP recovery."[145] The Motion also informed the Commission of several intervening Kemper Project updates that allowed for more flexibility with respect to the required amount of CWIP financing. Because of the additional federal incentives that were awarded to the Kemper Project after the Phase Two Hearings, the need for CWIP financing in 2011 had diminished. Therefore, the Company amended its request by seeking 100% CWIP financing in 2012, 2013 and 2014 only. In addition, to address the Commission's other concern of irrevocably awarding 100% CWIP up-front, the Company proposed that it periodically report to the Commission concerning many of the issues raised in its April Order, so that the Commission could periodically re-evaluate whether 100% CWIP financing was still required.

Specifically relying on the information provided in MPC's Motion, the Commission amended its CWIP decision:

> MPC presented evidence in its Motion that, because of the IRS allocation to the Project of all $279 million of Phase II ITCs that the Company applied for, and its stated expectation of receiving authority to advance the recognition of $245 million of CCPI2 funds for construction cost reductions, rate impacts of the Project can be deferred temporarily, but that full treatment of a return on

[144] R. at 029574-75. Also provided in Tab 9 of MPC's Record Excerpts.

[145] R. at 029607. Also provided in Tab 10 of MPC's Record Excerpts.

> CWIP is necessary beginning in 2012 through 2014. Recognizing the positive benefits that the recovery of CWIP financing costs can achieve and in order to provide certainty to the financial markets, the Commission will allow the Company's recommended treatment of CWIP as described hereinafter, provided that the amount of CWIP allowed is (i) reduced by the amount of government construction cost incentives received by the Company in excess of $296 million to the extent that such amount increases cash flow for the pertinent regulatory period and (ii) justified by a showing that such CWIP allowance will benefit customers over the life of the plant.[146]

The Commission recognized that 100% CWIP financing would be required in 2012, 2013 and 2014 in order for MPC to move forward. It also recognized that utilizing the CWIP treatment authorized under the Baseload Act would allow MPC to finance all of its debt at lower interest rates, saving customers money. Still desiring to periodically review its decision, however, the Commission directed MPC to file specific information annually supporting the continuation of 100% CWIP recovery. This provision in particular seemed to be of great importance to the Commission, based upon the Commission's hesitation in the April Order to grant MPC's original request of full CWIP for all construction years, without any means to re-evaluate the decision. Under the modified CWIP provisions, the Commission granted full CWIP recovery up-front, but reserved the right to periodically re-evaluate when circumstances dictated. It might also be noted that a significant difference in the Company's modified proposal was that customers would not see any rate impact until 2012. This will ensure that a greater portion of the Kemper Project costs will be "known" before customers are required to begin financing its construction.

The Sierra Club reads this turn of events to suggest that the Commission was arbitrary and capricious in modifying its initial CWIP condition. The Commission initially deferred its decision concerning CWIP, and, after reviewing additional information revised its findings

[146] R. at 029803. Also provided in Tab 11 of MPC's Record Excerpts.

accordingly. The Commission's findings in the May Order justify its revised CWIP condition, and are supported by substantial evidence in the record through the Company's filings and the testimony of its witnesses Frances Turnage and Steven Fetter.[147] In fact, no contrary testimony or evidence was provided by any other party questioning the justifications and impacts of implementing the Baseload Act. Further, the Commission specifically cites to the information provided in MPC's Motion in support for its revised findings. After reviewing the relevant Commission findings and the evidence in support, the Chancery Court agreed:

> The Commission based this [CWIP] change on the evidence submitted in MS Power's motion regarding government incentives and the fact that the rate impacts would be deferred temporarily as a result until 2012. . . . The record supports the Commission findings allowing recovery on the financing costs of CWIP by MS Power. The Court also notes that the CWIP allowance is specifically permitted by the Base Load Act.[148]

The CWIP issue is another example of the Sierra Club's insistence that a court overturn a decision made by the Commission, not based upon sound legal theory, but because the Sierra Club disagrees on policy grounds. The Sierra Club is not the trier of fact and is not the public utility policy maker in Mississippi. The Legislature delegated that job to the Commission over a half a century ago. The Commission's modified CWIP findings are supported by substantial evidence and should be affirmed by this Court.

---

[147] Ms. Turnage was the former Vice President, Treasurer and Chief Financial Officer of Mississippi Power Company and has over 30 years of experience in finance and the utility field. Mr. Fetter was a former Michigan Public Service Commissioner and former employee of Fitch, one of three major credit rating agencies that routinely rate the risk profile and credit ratings of public utilities. R. at 029632; Tr. at 1620-21, 2176-84.

[148] Chan. Ct. Judgment, pp. 16-17.

D. Because Awarding CWIP Financing During Construction does not Lower the Risk of the Company, the Balance of Risk Struck Between MPC and Customers Remain Unchanged.

It also appears that the Sierra Club argues that awarding CWIP financing somehow adjusts the risk balance between MPC and its customers, violating the Commission's own edict of not placing any more risk on customers than absolutely necessary. This argument is a red herring and contrary to all expert witness testimony provided on this issue. Both Ms. Turnage and Mr. Fetter testified that awarding CWIP would not make MPC more or less risky than normal to investors or creditors, because the Company would ultimately be entitled to recovery of construction financing costs under traditional "used and useful" ratemaking—the only difference is timing and cash flow. Under the traditional approach, the Company would not begin recovering these costs until the Kemper Project is completed. Under the Baseload Act, however, the Company would be allowed to recover these costs as they were incurred during construction. Ms. Turnage and Mr. Fetter both testified that because MPC is entitled to recovery in either scenario, the risk of non-recovery is not changed and, therefore, there is no change in the Company's risk profile.[149] No testimony was provided by any other party concerning this issue.

The benefit to the Company of CWIP recovery is not a reduction in Company risk, but an increase in cash flow. When the utility is required to raise significant amounts of additional capital to finance a large construction program but is not allowed to increase its revenue (which is based upon its current level of debt and not its projected level of debt) until several years later, one can quickly discern that a cash deficiency issue could arise. CWIP financing is designed to provide the utility the cash required to service the additional capital that is raised to construct

[149] Tr. at 2234-35.

large projects with long construction schedules. In other words, CWIP financing gives investors and creditors the assurance that they will be timely repaid.

The Commission's decision concerning CWIP did not disrupt in any way the balance of risk between the Company and its customers struck by the other conditions in the May Order, including the cost cap provisions discussed above. To be sure, some of the new authority in the Baseload Act, namely the prudence review provision, has the potential to lower the Company's risk.[150] But as explained, the Commission's findings concerning MPC's prudence review request did not materially change between the April Order and May Order. Thus, the Commission's modifications concerning CWIP were well within its discretion to make, supported by substantial evidence in the record and struck a reasonable overall balance of risk.

CONCLUSION

As the appellant, the Sierra Club bears the burden of proof in this appeal. In addition, the Supreme Court has long recognized the Commission's unique expertise and experience in utility matters and, as a result, provides great deference to Commission decisions. As the ultimate trier of fact, all Commission final orders are to be considered presumptively valid. As explained in this brief, the Commission's various orders issued in this proceeding, culminating in the May Order, are supported by substantial evidence in the record (containing over 30,000 pages) and are filled with findings of fact that more than adequately satisfy either the "ultimate fact-finding" standard applicable under the law in this case or the more stringent standard argued by the Sierra Club. For the reasons explained in this brief, MPC respectfully submits that the Sierra Club cannot meet its burden in this case, and we respectfully request that the Court affirm the decision of the Commission to approve the Kemper Project and the Chancery Court's decision affirming the Commission.

---

[150] Tr. at 2236-41.

Respectfully submitted, this 22nd day of June, 2011.

MISSISSIPPI POWER COMPANY

BY: BALCH & BINGHAM LLP

BY: _____
Of Counsel

Ben H. Stone [redacted]
Ricky J. Cox [redacted]
Leo E. Manuel [redacted]
BALCH & BINGHAM LLP
1310 Twenty Fifth Avenue
Gulfport, MS 39501
Telephone: (228) 864-9900
Facsimile: (228) 864-8221

William L. Smith [redacted]
Tim Ford [redacted]
BALCH & BINGHAM LLP
401 East Capitol Street, Suite 200
Jackson, MS 39201
Telephone: (601) 961-9900
Facsimile: (601) 961-4466

CERTIFICATE OF SERVICE

I, the undersigned counsel, do hereby certify that I have this day mailed, via e-mail and U. S. Mail, postage prepaid, a true and correct copy of the above and foregoing brief to:

Brian U. Ray, Executive Secretary
Mississippi Public Service Commission
501 North West Street, Suite 201-A
Jackson, MS 39201

Shawn S. Shurden, Esq.
Mississippi Public Service Commission
501 North West Street, Suite 301-B
Jackson, MS 39201

Robert B. Wiygul, Esq.
Waltzer & Associates
1011 Iberville Drive
Ocean Springs, MS 39564

Justin Matheny, Esq.
Office of the Attorney General
Walter Sillers Building
550 High Street, Suite 1200
Jackson, MS 39201

Honorable Judge Jim Persons
Harrison County Chancery Court
Post Office Box 457
Gulfport, MS 39502

This the 23rd day of June, 2011.

Of Counsel

IX. Conditions on Approving the Certificate

For all the reasons set forth in Part VII above, the Commission finds that MPC's request for a facilities certificate, in its original form and as supplemented, does not satisfy the "public convenience and necessity" requirement without conditions. Having weighed all the potential benefits and costs, the Commission finds that the proposal contains too many uncertainties to justify the ratepayers bearing the risk of these uncertainties in full.

The Commission has no statutory obligation to assist a utility in obtaining a certificate. Given the possible benefits of Kemper and the Company's efforts to date, however, the Commission has decided to give guidance in the form of conditions. The Commission has designed these conditions so that they (a) have an evidentiary basis in the record and (b) are no more stringent than necessary to align the Company's proposal with the "public convenience and necessity" requirement. If the Company chooses to accept these conditions, which the Commission considers necessary for Kemper to be the best overall alternative to meet its customers' needs for stable, low cost electricity, it must file in this Docket a Motion in the form set forth in Part XIII of this Order.

Condition #1: Risk mitigation for construction and operating costs.

This condition is necessary to mitigate the risk that the final Kemper cost to ratepayers, including both construction cost and operating cost, exceeds a reasonable level, defined as the level at which the Company's expert witnesses expressed confidence in their ability to perform. Specifically, MPC agrees to limit its ~~revenue requirement~~construction and operating costs associated with Kemper to the level associated with its ""confident"" estimates, subject to the following specifications and adjustments:

A. Construction cost cap.

The initial capital cost consists of the construction cost ($2.4 billion net of government construction cost incentives of $296 million) plus the ~~record~~ cost estimates of the following items, to the extent not already included in the $2.4 billion number, each of which the Company shall specify (along with record citations) in its Motion accepting these conditions: land and facilities for ash storage, lignite mine cost, ~~and gas pipeline cost. The~~gas pipeline cost and CO2 pipeline construction costs, all of which shall be excluded from the caps described herein to the extent not already included in the $2.4 billion number. Recognizing the need for some limited variance from the Company's estimates, this Commission finds that a cap of twenty percent

(20%) in excess of the cost estimate of $2.4 billion is appropriate, provided that no construction costs in excess of $2.4 billion will be approved unless the Company justifies such costs by demonstrating that they are prudent and required by the public convenience and necessity. Therefore, the total construction cost recoverable from ratepayers must not exceed this ~~$2.4~~2.88 billion total, (which figure ~~does not include amounts for government incentives or the cost of the three (3) items listed above in this paragraph) subject to the cap increases described below and the incentive mechanisms noted below~~is net of government construction cost incentives of $296 million), unless the $2.88 billion cap is increased pursuant to Condition#1B or Condition #2 which addresses government incentives that become unavailable.

B. Increases in the construction cost cap

The Commission will approve MPC's ~~advance~~ request for an increase in the recoverable amount for any or all of the following ~~three (3)~~ reasons:

1) The Company demonstrates that the purpose and effect of the construction cost increase is to produce efficiencies that will result in a neutral or favorable effect on the ratepayers, relative to the original proposal.

2) MPC accompanies its proposed cost increase with an equal-or-greater revenue requirement decrease associated with one (1) or more of the other estimates (e.g., operational performance, sales of ~~byproducts~~by-products,) in its original proposal.

3) To the extent the Commission does not allow 100% CWIP (which the Company assumed when making its $2.4 billion estimate), it will allow an increase in that figure to reflect the AFUDC cost that CWIP would have obviated.

4) The Company demonstrates the occurrence of force majeure events such as Acts of God, natural disasters, war, terrorism, sabotage or similar catastrophes which were unavoidable through prudent utility practice or a change in law or regulation effective after the date of this Order.

This cap is supported by substantial evidence in the record. To support its assertions that the construction cost would not exceed $2.4 billion (based upon MPC's request for recovery of financing cost on CWIP), MPC presented witnesses who described MPC's expertise and experience. These witnesses stated they were "confident" in MPC's ability to complete the construction consistent with those estimates, which they described as "conservative." (~~p~~pp. 6-7, p. 14 of Phase Two Rebuttal Testimony of Anderson; Tr. at p. 15, Topazi, CEO of MPC). They

also pointed to the expertise and experience of MPC, Southern Company and of Southern's construction affiliate. (p. 5 of Phase Two Rebuttal Testimony of Anderson; ~~ppp~~. 42-43, ~~ppp~~. 52-53 of Flowers Direct Testimony; ~~ppp~~. 7-8; p. 19 of Anderson Phase Two Direct Testimony). They based their estimates, their confidence and the assertion of conservatism not only on their expertise and experience, but on their research specific to this project. MPC studied various gasification technologies (p. 38 of Flowers Direct Testimony). This expert testimony constitutes substantial evidence of what Kemper's ~~maximum~~ cost should be. ~~The record contains no alternative evidence to support a higher number.~~ Consistent with the Company's and the Commission's obligation to protect customers from unnecessary costs, the Commission therefore adopts MPC's testimonial assertions as evidence of the ~~maximum cost~~amount that ratepayers should ~~bear~~reasonably expect the Project to cost. A Petition for a certificate must demonstrate "public convenience and necessity" for the construction. Costs exceeding the level for which MPC's experts have expressed confidence do not satisfy the "public convenience and necessity" test, unless the Company can demonstrate to this Commission the prudence of and necessity for such variations. If a cost estimate is conservative, and if MPC's experts are confident in those estimates, exceeding them is not a "necessity~~."~~," except as provided for in the limited circumstances set forth herein.

MPC's chief financial officer, Frances Turnage, argued against a cap. Her argument was not related to MPC's confidence in the estimates, ~~and therefore does not detract from the substantially of this evidence~~though. She testified instead that a construction cost cap would cause the financial community to view MPC differently from how it has viewed MPC in the past – as a company that bore substantial business risks rather than a company able to shift those business risks to ratepayers. ~~The Commission finds this argument too imprecise to credit, in that it involved no quantification of ratepayer cost that overrides the ratepayer protection resulting from capping the ratepayer cost at the level in which MPC's experts expressed confidence. Further, MPC gave no reason why the financial community should not have the same confidence in its cost estimates that MPC expects the Commission to have. This lack of a reason renders Ms. Turnage's statements less substantial than the statements of MPC's construction experts.~~

In granting MPC flexibility to exceed its original estimates for ~~three (3)~~the distinct reasons set forth herein, the Commission is following the principle that a utility's obligation to act prudently always includes making investments that reduce total lifetime cost to the

ratepayers. The Commission does not intend the ~~$2.4 billion cap~~construction cost caps to conflict with that principle. Thus, MPC may request permission to recover dollars exceeding ~~the cap, provided such request includes evidence that (a) the dollars spent now will reduce the project's lifetime cost to the ratepayers, or (b) MPC is committing to modify the operational performance parameters in a manner that makes the net result at least neutral in terms of lifetime cost to ratepayers. The Commission also notes that because the $2.4 billion estimate assumed 100% recovery of CWIP, the cap will need to rise to reflect AFUDC costs, to the extent the Commission allows less than 100% recovery of CWIP~~$2.4 billion, but not to exceed $2.88 billion except as provided for additional increases in the limited circumstances set forth herein.

C. Operations cost and operations revenues.

For the same reasons as the construction cost cap, namely, to mitigate the risk of costs exceeding reasonable levels (defined as the cost level in which the Company's expert witnesses expressed confidence in their ability to perform), the cost to ratepayers from operating the Kemper IGCC Project must not exceed the costs associated with the operational assumptions in MPC's original filing (specifically, the assumptions concerning availability factor, heat rate, lignite heat content, and by-product revenues), ~~subject to the incentive mechanism described in Condition #1.D below~~unless the operational parameters are modified in a manner that makes the net result at least neutral in terms of costs to ratepayers over the life of the plant or unless the Commission finds that the public interest would be served by any variance from the Company's operating assumptions due to force majeure events such as Acts of God, natural disasters, war, terrorism, sabotage or similar catastrophes which were unavoidable through prudent utility practice or a change in law or regulation effective after the date of this Order. By "availability factor," we mean the availability to burn lignite, not natural gas, because the Company's ratepayer cost estimates for Kemper assume the low and stable cost of lignite rather than the volatile cost of gas, a contrast the Company emphasized.

D. ~~Incentive mechanism~~

~~If MPC's performance on either the construction cost or the operational parameters beats the level that the Commission determines is a prudent level (based on the advice of its construction expert and other consultants), that is, its costs are lower or its operational performance is better than a prudent utility, MPC may keep fifty percent (50%) of the difference.~~

~~E.~~ **Used and useful is a separate upper limit on cost recovery.**

The Commission has determined that the risks associated with the Kemper ~~project~~Project make it inconsistent with the "public convenience and necessity" unless MPC agrees to comply with the cost caps and other conditions described in this Order, in which event the proposal will satisfy that standard. This determination does not diminish the Commission's authority, under §§77-3-33 and 77-3-43, to ensure that ratepayers do not pay for investments that are not "used or useful."

~~F~~E. CWIP Financing Costs.

MPC testified that maintaining a strong "A" credit rating will sustain its current low cost of financing, and that a credit rating downgrade would increase MPC's cost of capital, not just for this Project, but for MPC's entire business, while making access to capital markets more difficult. The Company's witnesses further asserted that MPC will not be able to proceed with Kemper unless the Commission allows recovery of 100% of the financing costs on ~~Construction Work In Progress (~~CWIP~~)~~, provides a periodic and expedited prudence review process, and establishes a special rate mechanism for cost recovery. (pp. 17-18; pp. 21-22 of Turnage Phase Two Direct Testimony). MPC projects that such timely collections of the financing costs of the Project during construction will save retail customers at least $500 million over the life of the generation facility. (Tr. at pp. 1620-~~1621).~~1621.)

MPC's requested treatment diverges from the customary ratemaking practice in this state, in which ratepayers pay for plant-related costs only when the plant enters commercial operation and thus provides benefits; at that time the amount that enters rate base (on which the company earns a return) includes not only the direct cost but AFUDC - allowance for funds used during construction. Miss. Code Ann. §77-3-105(1)(a), added by the Base Load Act, does allow for a different treatment, however. This provision authorizes the Commission to include "construction work in progress" in MPC's rate base, if the facility at issue is a "generating facility" as defined by §77-3-103(a). The Commission hereby finds that Kemper satisfies this definition.

While §77-3-105(1)(a) itself does not state a standard, the Commission assumes its authority to allow CWIP is bounded by the requirement of §77-3-33, that rates be "fair, just and reasonable." The Company therefore should receive CWIP to the extent, and only to the extent, necessary to ensure that electric rates meet this standard.

~~Applying this principle to the record evidence, the Commission finds that although the Company's arguments for a CWIP return have merit conceptually, its request for a return on 100% of its investment is too general to support a Commission finding. Further, even if present conditions supported 100% CWIP, there is no reason to assume those conditions will persist, without change, for the entire construction period. The necessity and desirability of CWIP will vary as financial conditions vary. The strength of the national economy; the availability of capital and its cost generally; the financial community's perceptions of the utility industry, of Southern Company generally, and of MPC's operations other than Kemper; -- all these factors will affect the necessity and desirability of CWIP. Committing ratepayer dollars to CWIP, without regard for these changing factors, would lack a basis in substantial evidence and would not be just and reasonable.~~

~~The Commission understands that there can be positive benefits associated with CWIP. The Commission therefore invites the Company to submit evidence supporting its request for CWIP that (a) is specific to current conditions, (b) specifically supports the percentage it requests, (c) demonstrates the specific savings associated with the A rating in relation to the cost to ratepayers of sustaining that A rating, (d) contains specific evidence on the relationship between the A rating and access to capital giving current market conditions, and (e) proposes a specific period during which the CWIP would apply. The Commission then will make a finding that is specific to current conditions, and that will apply for a specified period. The Company then can make subsequent requests for CWIP prior to the end of that period.~~

The Commission understands that there can be positive benefits associated with CWIP and desires that the Company remain in a financial position to fund the construction of the Project as well as the remainder of its on-going business operations at the lowest practical cost to customers. The Commission therefore finds that these positive benefits can be achieved by adopting the following CWIP treatment for the Project.

For 2010 and calendar year 2011, no CWIP for the Project will be included in retail rate base and no retail financing costs will be recovered during 2010 and 2011 for any of the construction costs incurred for the Project through 2011. The Company shall accrue AFUDC in 2010 and 2011. The Commission bases its decision for this recovery treatment in 2010 and 2011 on the information provided by the Company in its Motion. Specifically, the Company's additional allocation of $79 million more in Phase II § 48A Investment Tax Credits and its stated

expectation of receiving authority to advance the recognition of $245 million of CCPI2 funds for construction cost reductions, and in an effort to allow the Mississippi economy to rebound, this Commission finds that there is not a compelling reason to provide for CWIP recovery through 2011.

For calendar years 2012, 2013, and 2014, the Company is hereby authorized to include one hundred percent (100%) of all construction costs (subject to prudence reviews as provided herein) in CWIP for the purpose of allowing recovery of the financing costs therein, provided that the amount of CWIP allowed is (i) reduced by the amount of government construction cost incentives received by the Company in excess of $296 million to the extent that such amount increases cash flow for the pertinent regulatory period and (ii) justified by a showing that CWIP allowance will benefit customers over the life of the plant.

As part of its annual rate filings during construction beginning for the 2012 regulatory period, the Company shall present its CWIP requirements for the Project year (based upon 100% CWIP adjusted for government construction cost incentives described in the above paragraph) and shall include the Company's then current credit ratings from Moody's, Fitch's and Standard & Poor's. If the Company's credit rating has been downgraded below an "A" rating by any of the three rating agencies, this Commission may require the Company to submit additional information supporting its inclusion of CWIP. In such event, the Commission may, based upon substantial evidence, make a finding that is specific to current conditions and may adjust such amounts up or down based upon the evidence presented after notice to the Company and after an opportunity to be heard.

To implement the requirements in the preceding paragraph, MPC shall within twelve (12) months following the dates of this Order, file with the Commission a rate mechanism designed to provide timely recovery of these construction financing costs during the construction period. ~~The Commission will determine the percentage of construction costs if any, to which the return on CWIP will apply, and the rate of return to ensure that the amount recovered is the amount necessary to minimize the project's total cost and to maintain MPC's access to capital at reasonable costs~~To the extent the Company's proposed CNP can be modified to carry out the findings and purposes of the Order, the Commission directs the Company to file a modified CNP no later than twelve (12) months following the effective date of this Order. Because the statute limits CWIP recovery to a return on actual prudent costs, rather than estimated costs, the following true-up procedure is necessary. After the close of each period during which CWIP has been earned, the Company will report its actual expenditures. The Commission then will determine the portion of actual expenditures that were prudent expenditures. The Commission then will adjust rates for the next period to correct any discrepancy in the prior period. The

mechanism thus will result in the ratepayers paying no more than MPC's actual financing costs associated with prudent actual capital expenditures through the period.

The Commission will not allow CWIP beyond May 1, 2014, ~~the estimated commercial operation date, because to do so would cause the total construction to ratepayers to exceed the Company's $2.4 billion cost estimate,~~ unless the Company has demonstrated that such extra CWIP recovery is consistent with the conditions set forth in this Order. In no case shall the Commission allow the recovery of CWIP on amounts exceeding the Commission's approved cap or prudent construction costs, whichever is less.

~~The Company must submit information necessary to support continuation of any pre-existing CWIP award no later than two (2) months before the end of the period to which that award applies. The Commission reserves its authority to redetermine the CWIP percentage and return at any other time, after considering information provided by the Company on order of the Commission.~~

~~**G. Periodic prudence determinations**~~

F. Periodic prudence determinations

As authorized by Miss. Code Ann. §77-3-105(2)(a), added to our statutes by the Base Load Act, the Commission will conduct periodic prudence determinations, on a schedule to be determined by the Commission. The Company has requested that these determinations occur quarterly. The Commission will not establish a determinations schedule in this Order. To commit in this Order to a specific schedule would be contrary to the public interest. To determine prudence, the Commission must have sufficient perspective concerning the reasons for particular costs, the effectiveness of cost decisions, and the alternative ways to incur costs. That perspective does not always come into focus at pre-set time intervals; it depends on surrounding facts. The Commission recognizes the benefits associated with giving MPC certainty about cost recovery, and will take those benefits into account in determining the schedule for prudence determinations. Prior to establishing a schedule, it will seek MPC's and others' views on the appropriateness of prudence determination intervals.

Regardless of the schedule for prudence determinations, the Commission will establish a procedure for independent monitoring of cost accounting so that the Commission has full and current information of what dollars are spent and for what purpose. The Commission therefore will establish filing requirements including, in part, variance reports and ongoing analysis of resource options. Pursuant to Miss. Code Ann. §77-3-105(2)(b), added to our statutes by the

Base Load Act, the reasonable costs of a Commission-hired monitor and Staff-hired monitor will be borne by MPC and recovered from ratepayers.

Any determination of prudence under this Condition #1.~~G~~F would not diminish the Commission's authority under Miss. Code Ann. §77-3-105(1)(e), providing that in the context of an abandonment or cancellation without Commission approval, the Commission shall

> "determine whether the public interest will be served to allow (i) the recovery of all or part of the prudently incurred pre-construction, construction and related costs in connection with the generating facility and related facility, (ii) the recovery of a return on the unrecovered balance of the utility's prudently-incurred costs at a just and reasonable rate of return to be determined by the commission, or (iii) the implementation of credits, refunds or rebates to ratepayers to defray costs incurred for the generating facility."

~~H~~G. Commission-retained experts.

This Order has explained how Kemper's unprecedented scope, cost and uncertainties pose unprecedent risks to MPC's ratepayers. Mitigating these risks requires special measures. The Commission therefore will retain Independent Monitors to assist the Commission in its statutory duties by monitoring ~~project~~Project progress, reviewing costs and plans, and advising the Commission on questions of prudence and on the wisdom of continuing the project. The Independent Monitors may also have responsibilities concerning review of operations once construction is completed. To ensure the effective hiring and use of these Independent Monitors, the Commission orders as follows:

1. To assist the Commission in identifying and evaluating potential experts, the Commission directs MPC, and invites anyone else, whether or not parties to this case, to identify qualified companies and individuals with expertise in the subject areas relevant to Kemper, including but not limited to, TRIG gasification technology; carbon capture and sequestration expertise; and construction management, engineering and accounting generally. Such entities shall be independent of MPC and its affiliates. Anyone also may submit suggestions to the Commission on effective procedures for identifying additional candidates and for vetting those who indicate interest in performing this work. Submissions in response to this Order should be made no later than forty-five (45) days after the Company has submitted the Motion, described in Part XIII below, that accepts these conditions.

2. The Commission will retain these experts by contract, the Company will pay these experts' fees as approved by the Commission, and the Commission will expeditiously allow recovery from ratepayers of the Company's payments. MPC shall file a Rider Schedule that will ensure timely recovery of these incurred costs.

3. The Commission will develop procedures for how these Independent Monitors will submit reports to the Commission, and how the Company and others will comment on such reports, at a later time.

4. The Public Utilities Staff, pursuant to Miss. Code Ann. §77-3-13(4), will monitor the progress of ~~project~~Project construction. As part of its monitoring duties, the Staff will submit written progress reports to the Commission concerning any deviations or variances in the ~~project~~Project scope, cost schedule, and any other significant item found by the Staff that may affect MPC's ability to complete the ~~project~~Project on schedule and consistent with this Order's conditions. The Staff will make its reports public on a schedule set by the Commission. The Commission expects its consultants and the Staff to coordinate their actions and share the information. The Staff may retain and compensate experts for this purpose in like manner as provided herein for the Commission.

5. If the U.S. DOE provides loan guarantees for the ~~project~~Project, it may require similar oversight and review of ~~project~~Project costs. To minimize cost to customers, it is our intent to coordinate with DOE to the extent practical to avoid duplication and unnecessary work. To facilitate that coordination, the Commission orders MPC to report to the Commission on DOE oversight activities as they become known.

6. The Commission will require all independent consultants and monitors to execute any confidentiality and nondisclosure agreements the Commission deems necessary to protect information legitimately asserted to be proprietary or trade secret information related to the ~~project~~Project.

7. MPC shall provide and maintain, at its offices and at ~~project~~the Project construction site, office space and facilities sufficient to accommodate the Commission and Staff monitoring functions discussed here.

8. MPC shall allow the Commission's experts and the Staff and its experts access to any information or observations about the plant and its operations, and to any personnel employed or retained by MPC, to the extent deemed necessary by the Commission and Staff or ~~its~~their

experts. MPC shall ensure that any contractors it retains agree to grant comparable access to the Commission's experts.

~~I~~H. Implementation of caps on construction and operations caps.

Within twelve (12) months prior to commencement of Kemper's commercial operation, and from time to time thereafter as MPC or the Commission deems necessary, MPC shall file with the Commission proposed rate schedules and tariff change(s) to implement this Order's purpose of limiting Kemper-related cost recovery to the amounts set forth in MPC's original Petition, as modified in this Order, as discussed above.

MPC's initial submission shall include a proposal for how frequently the Commission should revisit these rate schedules and tariff changes to ensure that their effects are consistent with the purposes of these conditions.

J. ~~J.~~The Mississippi economy.

In light of the contribution that Mississippi ratepayers will make to the construction of this plant, and in light of the risks that this project involves to our ratepayers, it is important that benefits accrue to the state. The Commission therefore encourages MPC to utilize Mississippi labor, resources and services during the design, procurement, construction and operation of this ~~project~~Project, to the extent consistent with its legal obligations.

Condition #2: Government incentives.

MPC's Petition, including its confidence in a total construction cost of $2.4 billion, assumes the availability of various government incentives, such as loan guarantees, grants and tax credits. MPC has stated that based on its research of these matters and its communications with relevant government authorities, it is confident of these amounts. There is risk, however, that these amounts will not be available, thereby raising Kemper's cost to customers. Should any portion of these amounts become unavailable, the Commission will allow recovery of the resulting increase in Kemper cost, if MPC demonstrates: (a) it has made best efforts to procure the incentive before it became unavailable, and (b) the resulting increase in ratepayer cost is consistent with the public interest.

If MPC is successful in obtaining additional federal funding for the Kemper project, it shall file a Petition with this Commission notifying the Commission of the amounts and details of such funding.

Condition #3: Environmental permits.

The construction of Kemper requires environmental studies, permits and other approvals. MPC shall exercise diligence in obtaining the necessary permits and approvals and report to the Commission the receipt of the approvals and permits ~~prior to~~as soon as practical, provided that the Company shall not commence construction until it has obtained those permits necessary for the commencement of construction of the ~~project~~Project. Any legal challenges to such permits shall not prevent the Company from moving forward, so long as the Company keeps this Commission informed as to the status of such challenges.

Condition #4: MPC has a continuing obligation to ensure that Kemper is in the public interest.

Pursuant to Miss. Code Ann. §77-3-33 and applicable case law, MPC has an obligation to take all actions necessary to serve its retail ratepayers at a just and reasonable cost. That obligation includes using its expertise to ensure that the path that it has urged continues to be the best path. The Commission's granting of a certificate does not diminish this obligation. The experimental nature of this ~~project~~Project, its unprecedented size and cost, and the uncertainty concerning the cost of alternatives to Kemper, call for special measures to ensure that the certificate issued is consistent with the public convenience and necessity. The Commission therefore makes explicit what is implicit: MPC has a continuing obligation to ensure that Kemper remains consistent with the public convenience and necessity, in light of feasible alternatives. MPC shall therefore file with the Commission (a) annually, starting with May 1, 2011, (b) with each request for a prudence determination, and (c) at any other time that the facts require, a report that supports MPC's continuing conclusion that Kemper remains consistent with the public convenience and necessity.