IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2011-CA-00350

SIERRA CLUB — APPELLANT

VS.

MISSISSIPPI PUBLIC SERVICE COMMISSION and
MISSISSIPPI POWER COMPANY, INC. — APPELLEES

APPEAL FROM THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE
MISSISSIPPI PUBLIC SERVICE COMMISSION

ORAL ARGUMENT NOT REQUESTED

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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 of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

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SO CERTIFIED, this the 22nd day of June, 2011.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

State Cases

Page

Federal Cases

Statutes

Rules

INTRODUCTION

As Sierra Club and this Court know well, when a Mississippi appellate court reviews an agency decision "it is concerned only with the reasonableness of the administrative order, not its correctness." *Sierra Club v. Miss. Dept. of Environmental Quality Bd.*, 943 So. 2d 673, 678 (Miss. 2006). An agency is not required to make what anyone else thinks is the best policy choice. It is not even required to make what some evidence may show is a better policy choice. An agency only has to make a policy choice that is supported by more than a scintilla of evidence in the record before it. The only issue now facing this Court is a simple one: whether an agency's decision complied with that minimal standard.

In this case, Sierra Club disputes a Final Certificate Order issued by the Mississippi Public Service Commission (the "Commission" or "PSC"). On June 3, 2010, the Commission granted Mississippi Power Company ("Mississippi Power" or "MPC") a Certificate of Public Convenience and Necessity to construct and operate the Kemper County Integrated Gasification Combined Cycle Project ("the Kemper Project" or "Kemper"). Construction of the Kemper Project is already underway, having spent approximately $332 million with nearly $1.2 billion committed for equipment, material and construction projects. Independent monitoring confirms that the Kemper Project appears on budget and on schedule.

Kemper will employ innovative technology to use low-cost, Mississippi lignite coal to fuel a base load electricity generating facility. Hundreds of jobs have and will be created through the construction and operation of the facility. Kemper's unique technology will benefit the environment by capturing and sequestering at least sixty-five percent (65%) of all carbon dioxide gas emissions, which will comply with expected regulatory emission standards and provide an offsetting revenue stream from use in the enhanced oil recovery industry. When completed, the

Kemper Project will diversify Mississippi Power's ability to generate electricity, allow it to satisfy Mississippi's growing demand for electrical power, and give Mississippi customers much needed long-term rate stability.

Sierra Club wants to side-track the Kemper Project because it thinks the facility was an incorrect environmental policy choice. But, the Kemper Project's environmental prudence is not at issue on appeal. This Court cannot re-weigh the evidence and make a different policy choice. Instead, this appeal asks only whether the Commission made a choice supported by the evidence. The Commission's discretionary findings, based on substantial evidence in the thirty-thousand page record developed below, were reasonable. The relief sought by Sierra Club is remand for the Commission to develop a bigger record or re-write its orders. That relief is not warranted. The record is complete, and so are the Commission's findings. This Court should affirm the Commission's policy choice.

STATEMENT OF THE CASE

I. The Commission's Policy-making Authority.

The Commission is a Mississippi state agency with exclusive jurisdiction over the intrastate business and property of public utilities. The Mississippi Legislature has delegated certain functions for which the Commission is afforded policy-making deference due to its special expertise regarding matters pertaining to public utilities. *See Capital Electric Power Ass'n v. Miss. Power & Light Co.*, 216 So. 2d 428, 430 (Miss. 1968). The relevant policy goals carried out by the Commission are specifically defined by statute and require a balancing of interests between utilities and ratepayers. *See* MISS. CODE ANN. § 77-3-2. The goals, among many others, include fair regulation of public utilities in the interest of the public, encouragement and promotion of harmony between public utilities, users and the environment, and encouragement of the continued study and research for new and innovative rate-making procedures to protect the State, the public, ratepayers and utilities. *Id.*

One of the Commission's many functions is to issue "Certificates of Public Convenience and Necessity" for the construction of new facilities engaged in the manufacture, generating, transmitting or distributing of electricity. *See* MISS. CODE ANN. § 77-3-11(2). In carrying out that delegated function, the Commission exercises its discretion and considers whether the present and future public convenience and necessity requires, or will require, the construction of new electricity facilities. *Id.* The Commission's consideration of whether to issue a Certificate follows a comprehensive regulatory process including investigation, information gathering, hearings, public comment, and participation by parties. *See* MISS. CODE ANN. § 77-3-1 *et seq.*

Recently, in May 2008, the Legislature passed the "Base Load Act" and thereby enhanced the Commission's general authority to issue Certificates of Public Convenience and Necessity for

new electricity facilities. The Act was passed to enable and encourage new construction that will enhance the electricity base load generation capacity in Mississippi,[1] and thereby promote stability in the availability and price of electricity for Mississippians in the future, foster economic development, and further the expressed goal of energy independence for Mississippi by relying on the State's own natural resources. *See* MISS. CODE ANN. § 77-3-101 *et seq.* The Base Load Act specifically empowers the Commission to examine proposed construction costs of new base load electricity facilities, issue orders regulating whether, and to what extent, construction costs may be funded through rates for current services before new facilities are put to use, and supervise those costs throughout the construction process. *See* MISS. CODE ANN. § 77-3-105.

II. Proceedings Before the Commission.

On January 16, 2009, Mississippi Power petitioned the Commission for a Certificate of Public Convenience and Necessity for the Kemper Project. A certificate is required before a public utility may construct new electricity facilities. MISS. CODE ANN. § 77-3-11(2). Several parties intervened to present their views regarding the Kemper Project, including Sierra Club and eleven other intervenors.

A. Phase One: a source of additional base load capacity was needed.

From the outset, due to the volume of information and complexity of the Commission proceedings, evaluation of the Kemper petition was bi-furcated into two phases. Phase One evaluated Mississippi Power's need for additional base load capacity. On November 9, 2009, after extensive proceedings, the Commission unanimously determined that the public

[1] "Base load," in the context of electricity generation, is the minimum amount of power that a utility must make available to its customers, or the amount of power required to meet minimum demands at particular times based on reasonable expectations of customer requirements. A "base load facility" generally refers to a plant or unit that runs twenty-four hours a day, seven days a week.

convenience and necessity requires, or will require, Mississippi Power to create additional base load capacity to serve its customers in the future. [November 9, 2009 Order, FP 18997-19013].[2] The Sierra Club has conceded the Commission's determination in Phase One was correct. The Phase One determination is not at issue on this appeal.

B. Phase Two: Kemper was a reasonable solution.

Phase Two evaluated the Kemper Project as the solution to Mississippi Power's undisputed need for additional base load capacity. The ultimate issue presented to the Commission was the public convenience and necessity of the Kemper Project as the means to meet the undisputed future need for base load capacity. The Kemper proposal was evaluated by comparing it to hypothetical base load generation options, such as natural gas powered alternatives. The purpose of the theoretical options was to evaluate the Kemper Project's competitiveness as a long-term electricity solution. The alternatives were not proposals for facilities that would actually be implemented to address the unquestioned requirement for new generation.[3]

Phase Two was a complicated task for the Commission due to the high volume of technical information, and the time and care required for a determination. The Commission proceedings produced more than thirty-thousand pages of documents, including, but not limited

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[2] Citations to the record contained herein are identified by document and page number (*e.g.*, "Order at pp. XX-XX) and by reference to the page identification numbers used in the Final Pleadings File generated at the Commission level (*e.g.*, "FP 0XXXXX") that has been reproduced and provided to the Court in digital format. This brief also includes some citations to the Chancery Court Clerk's Papers (*e.g.*, "C.P. XX"), transcripts from the Commission proceedings (*e.g.*, "Tr. XX"), and record excerpts submitted by Sierra Club (*e.g.*, Appellant R.E. "X"), where appropriate.

[3] As discussed below, Sierra Club has often confused this issue in litigating against Kemper. The Commission was never faced with a decision to require Mississippi Power to build a natural gas plant instead of Kemper. The Commission's Phase Two undertaking was simply to determine whether or not Kemper comported with the policy goals and statutory guidelines provided by the Legislature and satisfied the test for public convenience and necessity.

to, hundreds of data requests and responses, filed testimony, twenty-five hundred pages of testimony transcripts, expert reports and evaluations, numerous motions, extensive briefing, and orders. Mississippi Power and twelve intervenors, including Sierra Club, participated in the proceedings. Among Mississippi Power and the twelve intervenors below, Sierra Club is the only party who has appealed from the Commission's final determination.

1. The Commission's April 29, 2010 Order.

On April 29, 2010, the Commission entered its initial order on Phase Two ("April 2010 Order"). [April 2010 Order at pp. 1-50; FP 29534-583; Appellant R.E. "5"]. The Commission found the evidence showed at least thirteen benefits associated with the Kemper Project, such as, superior balance of cost and performance, economic viability, fuel diversity, price stability and less volatility compared with natural gas, mitigation of future costs associated with environmental regulation, availability of federal, state and local incentives, elimination of fuel transport costs due to proximity of resources to the plant site, and both direct and indirect economic development through the use of Mississippi lignite coal. [*Id.* at pp. 5-6; FP 29538-39]. The Commission also recognized that natural gas prices nearly doubled between 2000 and 2008, and Mississippi Power's customer rates increased by fifty-four percent (54%) since 2003 with eighty percent (80%) of that increase due to fuel cost. [*Id.* at pp. 6-7; FP 29539-40]. The Kemper Project would diversify Mississippi Power's fuel sources by using lignite coal, the cost of which is lower and more stable than natural gas and higher-ranked coals. [*Id.* at p. 7; FP 29540]. That evidence enhanced Kemper's benefits, and supported the need for greater fuel diversity consistent with the policy considerations set out by the Base Load Act. [*Id.* at p. 18; FP 29551 (quoting MISS. CODE ANN. § 77-3-101)]. In accord with legislative policy, Kemper would make electricity rates less volatile in the long run by reducing dependence upon natural gas to produce

electricity.

The Commission found that, without question, the "physical project itself" would benefit Mississippi Power's ratepayers for a number of reasons detailed in the order. [*Id.* at p. 2; FP 29535]. For example, Dr. Craig Roach, of Boston Pacific, Inc. (an independent expert), testified that the Kemper Project was competitive with natural gas alternatives for purposes of long-term implementation. [*Id.* at pp. 24-26; FP 29557-59].[4] Evidence submitted by Mississippi Power also confirmed that conclusion. [*Id.* at pp. 5-7; FP 29538-40 (explaining "MPC based its conclusion that Kemper was the best resource option on the following evidence that it presented through witnesses"].

Nevertheless, the Commission's order also expressed concern over ratepayer risk associated with the proposed project. The most significant ratepayer concerns centered on the facility's overall price tag, particularly the cost of construction. Additionally, Mississippi Power requested that Kemper be funded, in part, by supervised "construction work in progress" ("CWIP") payments which would require modest rate increases.

"CWIP" is a unique feature of the Base Load Act. *See* MISS. CODE ANN. § 77-3-105(1)(a). The Base Load Act granted the Commission authority to include money spent by a utility in pre-construction, construction, and on other operating and related costs of an electric generating facility in a public utility's rate base and rates. In order to recover CWIP, the utility must prove that all such expenditures were prudently-incurred and are used and useful components of furnishing electric service. As a practical matter, recovery of CWIP for the

[4] Dr. Roach participated in the proceedings as the Independent Evaluator, an independent expert hired to assist the Commission. In addition to all the testimony, expert evaluations, and submissions of the parties (Mississippi Power and twelve intervenors), the Commission considered testimony and submissions from other sources, such as, accountants with Larkin & Associates and experts with the National Regulatory Research Institute. [*See* April 2010 Order at pp. 8-9; FP 29541-42; Appellant R.E. "5"].

Kemper Project means that Mississippi Power may, subject to specific determinations by the Commission in the future, offset construction costs through increases in electricity rates.

CWIP benefits Mississippi Power as a source of construction financing reimbursement and helps manage construction debt. CWIP also benefits ratepayers because the payments offset expenditures proximate to when they are incurred, instead of in the future when rate increases would be used to pay down more expensive debt. Furthermore, CWIP reduces the potential for "rate shock," in other words, ratepayers' electric bills gradually increase over time instead of increasing all at once.

Mississippi Power's evidence favoring Kemper mirrored the policy considerations demanded by the Base Load Act, and the Commission never doubted the benefits of the Kemper Project as presented by Mississippi Power. Rather, the Commission's primary focus was the balance between the long-term benefits of Kemper versus the associated risks, given some of the uncertainties about the Kemper Project's construction costs and operational efficiency.

Accordingly, the original framework for Kemper proposed by Mississippi Power required modification because of various risks related to the overall construction costs, potential cost overruns, and operational uncertainties. [April 2010 Order at pp. 27-35; FP 29560-68; Appellant R.E. "5"]. In the Commission's judgment, on balance, the project's construction risks (on terms as originally proposed by Mississippi Power) did not provide an adequate allocation of the burden to be shared between Mississippi Power and its ratepayers. Consequently, the Commission proposed specific conditions designed to more appropriately balance the risks while achieving the benefits of the Kemper project. [*Id.* at pp. 36-49; FP 29569-82].

The Commission's proposed conditions to reduce ratepayer risks principally included: (1)

a $2.4 billion "hard-cap"[5] on construction, based upon Mississippi Power's cost estimates; (2) operational caps/guarantees once the facility was brought on-line; (3) deferral of decisions on CWIP recovery; and (4) Commission management of periodic prudence reviews. [*Id.* at pp. 36, 39-43; FP 29569, 29572-76]. These proposed conditions put the onus on Mississippi Power to either comply with the conditions, or pursue other modifications with the Commission.

Mississippi Power chose the second route. On May 10, 2010, the company filed a "Motion in Response to the April 29 Order, or in the Alternative, Motion for Alteration or for Rehearing" seeking to modify the four principal conditions of the Commission's April 2010 Order. [Motion in Response, FP 29604-42]. The Commission afforded all of the parties before it (including Sierra Club) a chance to respond to Mississippi Power's motion. Two parties filed a response, but Sierra Club did not.

2. The Commission's May 26, 2010 Order.

On May 26, 2010, after considering the motion, the record evidence, the responses, and a hearing, the Commission issued a revised order again focused on Phase Two of the proceedings (the "May 2010 Order"). The Commission conditionally approved the Kemper project again, but parts of its four principal conditions were adjusted. First, as to the "hard-cap," the Commission accepted a proposed twenty percent (20%) "hard-cap" increase over Mississippi Power's original construction estimates. The increase was supported by Dr. Roach's testimony as explained in the May 2010 Order. [May 2010 Order at p. 9; FP 29802; Appellant R.E. "6"].

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[5] As explained in detail in the Commission's orders, this "cap" figure set the outer limit on what Mississippi Power could spend on construction of the project *and* potentially, if many future conditions were satisfied, recoup some construction costs through future rates it charges for electricity over the forty year projected life of the facility. Of course, Mississippi Power is free to spend less in construction and save everyone money. But the overarching point of the cap condition was that if construction expenditures exceed the cap, then, subject to specific future conditions, Mississippi Power cannot recover the excess through increased electricity rates.

Second, as to the operational caps/performance guarantees once the facility went on-line, and contrary to Mississippi Power's request, no modifications were made. [*Id.* at 15, 19-20; FP 29808, 29812-13]. Mississippi Power was ordered to comply with stringent operational caps and performance guarantees as a condition for the certificate, as originally provided in the April 2010 Order. [*Id.*].

Third, as to the deferred issue regarding CWIP, Mississippi Power was not allowed to apply for CWIP until 2012. [*Id.* at pp. 17-18; FP 29810-11]. The Commission retained the right to continually supervise CWIP recovery consistent with the Base Load Act. [*Id.*]. Mississippi Power was required to periodically demonstrate CWIP benefits to customers throughout the construction process before any CWIP recovery could be approved. [*Id.*]. In addition, the Commission specified that CWIP issues could be revisited should the company's credit rating fall below an "A" rating. [*Id.*].

Fourth, as to the prudence review conditions, Mississippi Power previously sought conditions allowing it to dictate the review schedule and terms. The Commission rejected that argument and retained authority to control prudence review scheduling. [*Id.* at pp. 15, 19-20; FP 29808, 29812-13]. In addition to analyzing all the issues, citing the record, and fully setting forth its reasoning, the Commission summed up the May 2010 Order as follows:

> ...in consideration of the full record in this proceeding, including the significant updates provided by the Company in its Motion as part of its reporting obligation, and based upon the arguments made by the Company in its Motion contending that the April 29 Order conditions would prevent the Company from proceeding with the Project, and based upon certain proposals for modified conditions offered by the Company in its Motion and revised by the Commission, we find that there is substantial evidence supporting this Order. 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, are supported by substantial evidence in the record, and will serve the public interest[.]

[*Id.* at p. 10; FP 29803]. Mississippi Power agreed to the modified conditions. Subsequently, on June 3, 2010, the Commission issued its Final Order granting a Certificate of Public Convenience and Necessity for the Kemper Project based on its findings in the May 2010 Order. [Final Commission Order, FP 29841-42].

III. Sierra Club Appeals From the Commission's Certificate Award.

After failing to respond to Mississippi Power's "Motion in Response to the April 2010 Order," or otherwise seeking rehearing on the Commission's final resolution of Phase Two, Sierra Club appealed portions of the Commission's findings to Harrison County Chancery Court pursuant to Miss. Code Ann. § 77-3-67. The Chancery Court affirmed the Commission's Final Order after extensive briefing and oral argument. [Judgment, C.P. 531-550].

Specifically, the Chancery Court affirmed by explaining that "[g]iven the vast amount of documentary evidence and lengthy testimony contained in the transcripts of the hearings, there is sufficient evidence in the record to support the decision reached by the Commission." [Judgment at p. 20; C.P. 550; Appellant R.E. "2"]. The Chancery Court recognized that it "...does not sit as a fourth Commissioner, but as an appellate court with limited standard of review." [*Id.* at p. 19; C.P. 549]. Furthermore, the Chancellor found that the Commission's order met the "minimum statutory standards," expended "...a great deal of time and effort reaching a decision," and "...was thorough in its review of MS Power's Petition." [*Id.*].

Sierra Club now brings its second appeal based on the same arguments rejected the first time around. Sierra Club disputes the Commission's ultimate decision. Its dispute is limited to a finite number of findings in the April 2010 and May 2010 Orders, and the evidentiary support for them in the thirty-thousand page record at the Commission. The seven issues listed in Sierra Club's brief boil down to the following four questions:

1. Whether the Commission's conditional approval of a twenty percent (20%) "hard cap" increase for construction cost was supported by substantial evidence;

2. Whether the Commission's conditional approval of certain CWIP recovery was supported by substantial evidence;

3. Whether, under Mississippi law, the Commission's orders sufficiently explained its findings; and

4. Whether Sierra Club followed proper procedure for obtaining confidential information submitted in the proceedings below.

Each of these issues should be resolved against Sierra Club. This Court, applying the same standard of review as the Chancery Court, should defer to the technical expertise of the Commission and the policy-making authority conferred upon it by the Legislature. The Commission and the Chancery Court should be affirmed.

SUMMARY OF THE ARGUMENT

As the Harrison County Chancery Court determined on Sierra Club's first appeal, the Commission's policy-making decisions in this case should be affirmed. The Commission's decisions that Sierra Club complains about were all founded on substantial evidence. Furthermore, the Commission clearly and comprehensively set forth the issues before it, the policy decisions it made, and the reasons for those decisions. There is no basis in Mississippi law to overturn the Commission's Kemper decisions because of the manner in which it wrote those decisions down.

Before entertaining any of Sierra Club's specific arguments, this Court should recognize four general reasons that Sierra Club's central argument – claiming that ratepayers got a raw deal at the Commission – has no merit. First, the Commission's rulings include numerous provisions

that are expressly designed to protect ratepayers. Conditions such as the construction cost "hard-cap," operational caps and guarantees, ongoing Commission oversight of CWIP recovery, and regular prudence reviews provide ratepayers with numerous protections against unreasonable rate increases on account of the Kemper Project. The project will meet the undisputed need for additional electricity in Mississippi Power's service area. Meanwhile, in the Commission's reasonable judgment, and based on the evidence presented to it, ratepayers are assured they will not have to overpay if Mississippi Power spends too much to build Kemper, or if the plant ever becomes an underperforming asset.

Second, the Commission's task was not to find the cheapest solution for Mississippi Power to meet the undisputed need for more electricity. The Commission's decisions were guided by policy considerations dictated by the Legislature, and reasonable for a long-term power solution, based on the record evidence.

Third, and related, the Commission was tasked with determining whether the Kemper Project met the test for public convenience and necessity. It was not charged with implementing a natural gas alternative simply because Sierra Club believes that to be a more environmentally friendly solution.

Fourth, the Commission's decisions should not be confirmed just because the record presented to it is enormous. Rather, substantial evidence in that record supports the decisions it made.

Beyond these four general fallacies in Sierra Club's case, Sierra Club's more specific attacks on the Commission orders likewise have no merit. The Commission is entitled to deference and its orders may not be overturned since they are based on substantial evidence in the thirty-thousand page record accumulated below.

The Commission's decision to impose a twenty percent (20%) "hard-cap" on construction costs over Mississippi Power's original estimate of $2.4 billion was appropriate. Sierra Club does not have a valid legal challenge to that decision because the Commission went beyond simply applying the statutorily mandated procedure for approving Mississippi Power's construction estimates. Sierra Club has no room to complain since the Commission did more than required to protect Mississippi Power's customers. Even assuming Sierra Club does have a right to complain about the cap, the "hard-cap" decision was based upon substantial evidence in the record. It was supported by the testimony of the Independent Evaluator assigned to this matter. Furthermore, the "hard-cap" condition was one of several conditions imposed by the Commission to ensure ratepayers get the full benefit of the bargain for Kemper in the next forty years.

Likewise, the Commission's conclusion that Mississippi Power could recover limited CWIP payments to offset financed construction debt was based on substantial evidence. CWIP recovery is guided by policy set forth by the Legislature. The CWIP conditions imposed on the Kemper Project are designed to provide protection to ratepayers while affording Mississippi Power the ability to build Kemper in the most efficient manner. Most important, the Commission's CWIP decision was based on substantial evidence presented to the Commission, which it was fully entitled to credit in making a reasonable determination.

The Commission's orders in the Kemper matter adequately explained its reasoning. The orders complied with the Commission's statutory duty to set forth its findings and opinions such to allow meaningful appellate review. The Commission's task here was not to draw out every issue raised by the thirteen parties in the Commission proceedings or cite every item included in the thirty-thousand page record that supported the Commission's decisions. Rather, the

Commission was supposed to set forth its decisions, the reasons, and analysis in a form that would enable appellate review. It did so.

Moreover, Mississippi law does not even require the Commission to go that far. Mississippi agencies are required to set out a finding of "ultimate fact" in their orders. This Court has previously said as much in a case similar to this one, involving a controversy over the Commission's review of a petition for a Certificate of Public Convenience and Necessity. The failure to include "detailed enough" findings is not grounds to reverse Commission orders that state findings of "ultimate fact" that are supported in the record. *See Miss. Pub. Serv. Comm'n v. AAA Anserphone, Inc.*, 372 So. 2d 259, 265 (Miss. 1979). The Commission's orders exceed the *Anserphone* standard in this instance. Sierra Club's form challenge to the Commission's conclusions is off-base.

Last, Sierra Club's allegation that the Commission acted improperly by not turning over documents Mississippi Power designated as "confidential" is invalid. The Commission followed its procedures in place at the time of Sierra Club's request during the proceedings below. Sierra Club did not properly seek the "confidential" documents by way of a Public Records request during the Commission proceedings. Furthermore, this tempest-in-a-teapot issue created by Sierra Club is moot. Reportedly, Mississippi Power has released the information Sierra Club seeks through public records requests. Sierra Club is not entitled to declaratory relief or any other remedy. This Court should accordingly affirm the Commission, and the Harrison County Chancery Court, and uphold the Commission's orders challenged on this appeal.

ARGUMENT

I. Sierra Club's Misconceptions Must be Set Aside.

The Commission's role in the Kemper proceedings is defined by statute. The Commission has exclusive policy-making authority for public utilities. It was specifically charged with deciding whether the Kemper Project met public convenience and necessity. The Commission has been given that legislative authority to make difficult policy decisions regarding Kemper, such as the need and means for base load electric generation capacity, because of its specialized expertise regarding matters in that field. *See* MISS. CODE ANN. §§ 77-3-2, 77-3-5. As such, the Commission served as the trier-of-fact in the proceedings below. It was charged with deciding whether Kemper was a reasonable policy choice.

Sierra Club's brief understandably attempts to muddy the record, the Commission's statutory guideposts, and the nature of the proceedings below. That is understandable because Sierra Club's objective is to short-circuit the Kemper Project – and any other new coal generated facilities or advancements in that technology – because of its view of environmental policy. On appeal, the Commission must therefore set the record straight on four general points before addressing Sierra Club's specific challenges to the Commission's decision.

A. The Commission's findings protect ratepayers.

Sierra Club mistakenly argues that the Commission's decision does nothing to protect Mississippi ratepayers. That is untrue. The Commission did not write Mississippi Power a blank check to charge ratepayers whatever the company wants and wash its hands of the Kemper Project.

Sierra Club de-emphasizes, or otherwise altogether ignores, the import of the ongoing conditions included in the Commission's May 2010 Order. [May 2010 Order, FP 29794-818;

Appellant R.E. "6"]. For example, Sierra Club conveniently disregards the fact that the Commission went far beyond its statutory duty to protect ratepayers in fashioning a "hard-cap" on Kemper's construction cost. State law says that an applicant for a Certificate of Public Convenience and Necessity must file an **estimate** of construction costs for a proposed new facility and provide as much detail as the Commission requires. MISS. CODE ANN. § 77-3-14(4). In other words, the Commission can require more detail, but shall accept the applicant's estimate as the cost evidence considered in the petition process.

Statutes further require that the Commission maintain ongoing supervision over the construction with progress reporting and other measures. *See* MISS. CODE ANN. § 77-3-13(4) & § 77-3-14(5). Meanwhile, nothing in the Code or the Commission Rules mandates a "hard-cap" on construction costs for a proposed facility. The "hard-cap" imposed here – even though only Mississippi Power's construction estimate was required for a certificate – particularly protects ratepayers' interests by setting the outer limit on costs that *might* be part of future rate increases. It is a unique feature of the Kemper Project, and a unique action by the Commission, that goes beyond all legal requirements to appropriately balance the benefits and risks of the Kemper Project.[6]

Not only were the Commission's "hard-cap" restrictions above and beyond what was statutorily required to protect ratepayers, those restrictions also illustrate another fallacy in Sierra

[6] In addition to the "hard-cap" restrictions imposed by the Commission, it is also worthy of note that the Commission's orders are consistent with its statutory duties regarding continual regulation of Mississippi Power's activities. The Commission specifically retained oversight and supervision of the construction and operation of the Kemper Project. As examples, the Commission has protected ratepayers with further involvement in periodic prudence determinations, extensive and ongoing review of CWIP allowances, independent monitors, enforcement of Mississippi Power's continuing obligation to demonstrate that the project is in the public interest, and numerous other specific conditions on the Kemper Project. [*See* May 2010 Order at pp. 15-24; FP 29808-17; Appellant R.E. "6"].

Club's constant efforts to misconstrue the facts. Presently, the "hard-cap" has not yet even come into play. There is no certainty, or even likelihood, that construction costs will exceed Mississippi Power's estimates or that any such costs will spark inordinate rate increases. To the contrary, at this point, construction is on schedule, and on budget.

Meanwhile, Sierra Club alleges that Kemper's **possible** costs will unduly burden ratepayers in the future and conditions on the "hard-cap" and CWIP recovery do not do enough. That argument lacks evidentiary support. At this stage, there has not been a single Commission determination regarding specific CWIP recovery or any proposed rate increase. CWIP is not even available to Mississippi Power until 2012. No construction cost prudency determinations have been necessary yet. There has not been any injury or detriment to ratepayers as a consequence of the Commission's decision. Nevertheless, Sierra Club complains of ratepayer injury based on nothing more than speculation over how the construction process will play out.

In summary, Sierra Club ignores the Commission's "hard-cap," CWIP, and other conditions that are designed to protect ratepayers. Sierra Club's theme (*i.e.*, that the Commission chose between ratepayers and Kemper, and the ratepayers lost) has no foundation.

B. The Commission was not required to find the cheapest solution.

The Commission's duty in this instance was not simply ordering up the *cheapest* short-term method for Mississippi Power to produce electricity. Rather, the Commission's precise inquiry was whether the "public convenience and necessity requires, or will require" construction of the Kemper Project, not some other alternative. MISS. CODE ANN. § 77-3-14(1). In doing so, the Commission had to balance risks between Mississippi Power and ratepayers. The issue involved a complex interaction of numerous statutes guiding the Commission's policy decisions. *See* MISS. CODE ANN. §§ 77-3-2, -11, -13, -14, -33, -43. Additionally, the Commission had to

consider specific legislative policies for new generation facilities spelled out in the Base Load Act, including: (1) diversity for future sources of fuel used to create electricity; (2) a reliable and stable electric system; (3) electricity production that uses advances in technology and reduction of regulated air emissions; (4) financial incentives provided by the federal government; (5) economic development; and (6) future energy independence for the State of Mississippi. MISS. CODE ANN. § 77-3-105.

Sierra Club unfairly and inaccurately insinuates that the Commission was supposed to find the least expensive way to achieve these, and other, statutory goals. But, the Kemper decision was not anything like blindly awarding a government contract to the lowest bidder. Instead, the Commission had to consider the stated policy objectives and all the risks and benefits of the Kemper proposal, and not just the price tag.

C. A natural gas alternative was never on the table.

On a related matter, the Commission was not presented with an explicit choice between Kemper and other natural gas alternatives. It did not have to decide whether other proposals, submitted for the Commission to make future performance comparisons to Kemper, should be implemented in Kemper's stead. Nobody but Mississippi Power was applying for a Certificate of Public Convenience and Necessity to address Mississippi's base load needs.

The Kemper Project was the only project brought for formal consideration. The Commission's April 2010 Order spent a lot of time discussing certain assumptions surrounding the overall cost of the Kemper Project and then compared the assumed cost with alternatives submitted by certain Independent Power Producers ("IPPs"), as well as a Mississippi Power self-built natural gas facility. [April 2010 Order at pp. 19-27; FP 29552-60; Appellant R.E. "5"]. All of those hypothetical alternatives relied on natural gas as the fuel for generation. [*Id.* at p. 24; FP

29557]. However, none of those alternatives were considered for certification in lieu of the Kemper Project. At the Commission's direction, each of the proposals, including the Kemper Project, were evaluated by Mississippi Power and the Independent Evaluator, Dr. Roach. Although there were some disagreements between Mississippi Power's evaluation and Dr. Roach's analysis regarding the methods employed to compare different proposals (such as the comparative value or treatment of the proposals for time periods shorter than the Kemper Project's forty year life expectancy), the evidence proved that the Kemper Project was competitive with the hypothetical comparators. [*Id.* at pp. 24-26; FP 29557-59].

One exception, however, existed and has been wrongly seized upon by Sierra Club. The Commission observed that the proposals which included "fixed gas prices" under Dr. Roach's Modified Annuity Method indicated that the Kemper Project might be less economic under that comparison. [*Id.* at p. 26; FP 29559]. Dr. Roach noted that the feasibility of short term solutions "very much depended upon the Commission's judgment of the credibility of fixed gas proposals." [*Id.*]. Mississippi Power resolved against the fixed gas proposals because it determined, after investigation, that such proposals were not credible. [*Id.* at p. 24; FP 29557]. Meanwhile, the Commission resolved the issue by choosing the Kemper Project based upon its forty year time horizon. [*Id.* at pp. 26-27; FP 29559-60].

As the Commission found in the April 2010 Order, the Kemper Project over its forty year life span was a credible solution as compared to the natural gas alternatives. Particularly so, as supported by Dr. Roach's testimony, when coupled with operational caps and guarantees that were ultimately imposed as one of the many conditions on Commission approval of the Kemper Project. [*Id.* at p. 27; FP 29560].

For these reasons, Sierra Club's rhetoric suggesting it would have been more appropriate

to authorize a natural gas plant (or multiple natural gas plants) misses the mark. Phase One of the proceedings determined that Mississippi Power established a future need for additional base load generation capacity. [Phase One Order at p. 16; FP 19012]. The Commission's obligation was not to decide whether Mississippi Power should choose between Kemper or some other natural gas plant(s). The question before the Commission was whether the Kemper Project met the test for public convenience and necessity in light of the policy guidelines dictated by the Legislature. Any suggestions that the record evidence mandated a finding that Mississippi Power must defer to a natural gas alternative, or that any natural gas alternatives (submitted only for comparison purposes) had to be implemented, are wrong. Those were not the issues for the Commission to decide.

D. The Commission is not claiming the size of the record alone validates its decision.

Nobody contends the Commission's decision was satisfactory just because the record is voluminous. The mere size of the record at the Commission illustrates the depth and complexity of the evidence considered. Beyond that, the record's real import here is its quality. Given the Commission was the sole judge of the weight and credibility to be afforded all the evidence, the ample record supports its finding that Kemper met the test for public convenience and necessity. The depth of the record is indeed substantial. But, it also contains substantial evidence to support the Commission's findings. This Court "must look at the full record before it in deciding whether the agency's findings were based on substantial evidence." *Pub. Employees' Ret. Sys. v. Shurden*, 822 So. 2d 258, 263 (Miss. 2002). No one is asking that the Commission be affirmed

simply on volume alone.[7]

This Court should instead turn to the limited standard of review applicable to the Commission's decision-making while keeping these previous four points in mind. In light of the applicable standard of review, the Commission's orders should be affirmed because (1) the Commission's decision to allow an increased "hard-cap" was supported by substantial evidence; (2) the Commission's decision to permit restricted CWIP recovery was supported by substantial evidence; and (3) the issues, the Commission's reasoning, and its conclusions were adequately set forth in its orders. At a minimum, the orders satisfied the "ultimate fact" rule. Additionally, just as the Chancellor below found, Sierra Club is not entitled to any declaratory relief premised on the treatment of "confidential" documents during the Commission proceedings. The Commission's Kemper policy choice should be affirmed.

II. "Substantial Evidence" Standard of Review.

Under Mississippi law, agencies are afforded substantial deference on review. The standard of review applicable to the Commission's orders is very limited, and the same as it was on Sierra Club's first appeal to Harrison County Chancery Court. Specifically, this Court need only determine whether the Commission's decisions (1) were supported by substantial evidence, (2) were arbitrary or capricious, (3) were beyond the power of the administrative agency to make,

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[7] Although only a marginal matter, Sierra Club's brief constantly refers to Commissioner Presley's dissenting opinions levied at the Commission's conditional approval of Kemper. Sound bites from Commissioner Presley's opinions, and the fact that he dissented from the certificate award, do not weigh against affirming the Commission on appeal. To the contrary, the dissenting voice shows that the Commission's orders *should be* affirmed. When the record evidence would both support the grant or denial of a petition, an agency's decision must be affirmed. *See, e.g., Miss. Dept. of Marine Resources v. Brown*, 903 So. 2d 675, 677 (Miss.2005) (reasoning that "[t]he Commission's decision on this petition could have gone either way. Since the agency's denial of the petition is supported by substantial evidence, the appellate courts must give deference to that decision."). Even if this Court thinks Commissioner Presley's view of the evidence was more correct, the standard of review requires that the majority's opinion be affirmed as long as more than a scintilla of evidence in the record supports their decision.

or (4) violated some statutory or constitutional right of the complaining party. *BellSouth Telecommunications, Inc. v. Miss. Pub. Serv. Comm'n*, 18 So. 3d 199, 201 (Miss. 2009) (citing *Town of Enterprise v. Miss. Pub. Serv. Comm'n*, 782 So. 2d 733, 735 (Miss. 2001)). *See also* MISS. CODE ANN. § 77-3-67(4). Administrative findings are presumed valid when based on substantial evidence. *Ohio Oil Co. v. Porter*, 82 So. 2d 636, 638 (Miss. 1955). On appeal, Sierra Club has the burden of proof because it is the only "party seeking to vacate an order of [the] commission." MISS. CODE ANN. § 77-3-77.

Sierra Club says this case concerns both the "substantial evidence" and "arbitrary or capricious" grounds set out above. In reality, it only involves one standard. "Substantial evidence means more than a scintilla or a suspicion." *Miss. State Dep't of Health v. Natchez Cmty. Hosp.*, 743 So. 2d 973, 977 (Miss. 1999). This Court has further explained that substantial evidence is "such relevant evidence as reasonable minds might accept as adequate to support a conclusion." *Pub. Employees' Ret. Sys. v. Marquez*, 774 So. 2d 421, 425 (Miss. 2000). In has also been said that "substantial evidence" is "something less than a preponderance of the evidence but more than a scintilla or glimmer." *Miss. Dept. of Environmental Quality v. Weems*, 653 So. 2d 266, 280-81 (Miss. 1995).

> "Arbitrary" and "capricious" are also well defined in Mississippi administrative law:
>
> > [a]n administrative agency's decision is arbitrary when it is not done according to reason and judgment, but depending on the will alone. An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles.

Natchez Cmty. Hosp., 743 So. 2d at 977. The concepts of "substantial evidence" and "arbitrary or capricious" are interrelated. "If an administrative agency's decision is not based on substantial evidence, it necessarily follows that the decision is arbitrary and capricious." *Id.* On the other

hand, "'[i]f an agency's decision is supported by substantial evidence, then it is not arbitrary or capricious.'" *Pannell v. Tombigbee River Valley Water Mgmt. Dist.*, 909 So. 2d 1115, 1122 (Miss. 2005) (quoting *Miss. Transp. Comm'n v. Anson*, 879 So. 2d 958, 964 (Miss. 2004)).

Given that "substantial evidence" and "arbitrary or capricious" are so intertwined, at the end of the day, the question here is whether Sierra Club can prove the findings of the Commission were unsupported by substantial evidence. On every point advanced, the answer is a resounding "no."

III. Increasing the Construction Cost "Hard-Cap" Was Supported by Substantial Evidence.

Sierra Club's first "lack of substantial evidence" argument wrongfully claims that the May 2010 Order's construction cost "hard-cap" increase of twenty percent (20%) over the $2.4 billion cap proposed in the April 2010 Order is unsupported by the record. That argument is wrong for at least three reasons. First, Sierra Club's argument is inappropriate because the "hard-cap" provides protections beyond the Commission's statutory duty to approve estimates and monitor construction. Second, even assuming Sierra Club could legally challenge the Commission's efforts, the Commission was entitled to believe the evidence that supported an increased cap. Third, the cap increase cannot be judged in isolation. Ignoring other conditions by focusing exclusively on the "hard-cap" feature of the May 2010 Order is misguided. Other modified construction conditions, supported by the record, make the Commission's conclusion as to the final "hard-cap" figure consistent with public convenience and necessity.

A. The "hard-cap" offers ratepayer's additional protection that is not subject to legal challenge by Sierra Club.

As an initial matter, Sierra Club's evidentiary argument against the Commission's decision to increase the "hard" construction cap from $2.4 billion to $2.88 billion has no legal

basis. Sierra Club's contention is a bit presumptuous because nothing in the statutes requires the Commission to identify, much less impose, a construction cost cap in order to approve a certificate of public convenience and necessity. This begs the question: If the Commission's requirement of a cost cap provides a greater safeguard than those minimum protections afforded by the statutes, does the Sierra Club have any legal grounds upon which to challenge the cost cap, regardless of the amount? Stated differently, if the construction cap, as proposed by the Commission and agreed to by Mississippi Power, goes beyond what the law requires then Sierra Club cannot challenge the cap for any reason.

The point above is best exemplified by recounting the traditional, statutory-based procedures for addressing construction costs. Mississippi law requires every petitioner for a Certificate of Public Convenience and Necessity to file a construction cost *estimate* with the Commission:

> [a]s a condition for receiving such certificate, the utility shall file an estimate of construction costs in such detail as the commission may require. The commission shall hold a public hearing on each application, and no certificate shall be granted unless the commission has approved the estimated construction costs.

MISS. CODE ANN. § 77-3-14(4). While the Commission can require detailed cost estimates, construction monitoring, progress reports, and review estimate revisions,[8] the statute does not require a construction cost cap. Normally, a utility presents its cost estimate, the estimate is approved, a certificate issues and the utility builds the facility. Actual construction costs, compared to the approved estimates, are reviewed in subsequent proceedings to determine whether the costs incurred were prudent. Naturally, imprudent costs are not allowed in rate base; thus, ratepayers do not bear unnecessary costs.

[8] Miss. Code Ann. § 77-3-13(4) & § 77-3-14(4),(5).

As Sierra Club has pointed out, the Commission approved Mississippi Power's Kemper construction estimate of $2.4 billion, concluding that the record contained "no evidence supporting a higher cost estimate" and "no alternative evidence to support a higher number." [April 2010 Order at pp. 28, 25; FP 29568, 29571]. Having approved Mississippi Power's cost estimate, the Commission, in accordance with statutory authority, could have stopped and relied solely on subsequent prudency hearings and the rate-making process to hold Mississippi Power accountable and protect ratepayers. The Commission, however, chose to go beyond the minimal statutory safeguards and take the unprecedented action of conditioning approval upon a construction *cap*, a boundary beyond which the Commission would not consider any cost recovery from the ratepayer.

Sierra Club has no legal grounds upon which to challenge the cost cap. Extra-statutory mechanisms, like the cost cap, are not legal requirements. While the Commission must approve a cost estimate before issuing a certificate, the Commission is not required to identify and approve a cost cap. Equally, while the Commission may only allow the recovery of prudently incurred costs, the Commission is not required on the front end of a project to identify the outer limit at which no recovery from ratepayers will be allowed. Such additional imposition on the utility and corresponding benefit to the ratepayer is in excess of the statutory minimum.[9] Neither Sierra Club, nor any actual ratepayer, can be burdened or injured by the provision of additional protections; thus, Sierra Club has no legal basis upon which to challenge the cost cap.[10]

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[9] While the Commission's broad authority permits it to condition certificates on adoption of measures like cost caps, no statute requires such creative protections.

[10] Without any injury, Sierra Club lacks standing to challenge the Commission's "hard-cap" conditions. As this Court has explained, "[q]uite simply, the issue adjudicated in a standing case is whether the particular plaintiff had a right to judicial enforcement of a legal duty of the defendant or...whether a party plaintiff in an action for legal relief can show in himself a present, existent actionable title or interest, and demonstrate that this right was complete

Any persuasive value to Sierra Club's argument requires an assumption that Kemper will cost $2.88 billion, rather than the estimated $2.4 billion or any number in between. The $2.88 billion backstop is not a blank check or even a construction estimate. The hard cap does not pre-approve all Kemper expenditures up to its limit. Whether Mississippi Power expends $2 billion, $2.4 billion or $2.88 billion, incurred costs will be reviewed for prudency. Those reviews have yet to occur, and no construction costs have been charged to the ratepayer. The hard cap stands as an additional protection to ratepayers beyond traditional prudency reviews and rate-making, while offering Mississippi Power some limited flexibility on cost recovery should the Kemper Project experience cost overruns. In no sense can the imposition of a cost cap, which offers additional protection beyond prudency reviews, be found a detriment to the ratepayer or contrary to the public convenience and necessity.

As a matter of sound policy, this Court should not entertain Sierra Club's challenge to the "hard-cap" because it improperly interjects this Court into matters properly left to the discretion and technical expertise of the Commission. The Kemper Project is an innovative endeavor the benefits of which are uncontested and which perfectly match the Legislative policy directives of the Base Load Act. Yet, like most unique and cutting-edge projects, Kemper presented risks and a corresponding lack of certainty, both in cost and operations. Bold projects, like Kemper, require regulators to respond to the challenges that such projects pose. The Commission responded by going beyond the statutory minimums to ultimately craft fair conditions, like the construction cost cap and operational guarantees, that protect the ratepayers and provide Mississippi Power the flexibility needed to complete the project. As certain resources diminish

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at the time of the institution of the action." *City of Picayune v. Southern Regional Corp.*, 916 So. 2d 510, 526 (Miss. 2005) (internal citations omitted).

and others are discovered, this Commission will face future decisions of equal or greater complexity than that presented by Kemper. This Court should not entertain suits that challenge the Commission's deliberate and creative efforts to balance the need for new generation at reasonable rates while affording ratepayer's *additional* protections.

In sum, only construction estimates from Mississippi Power were required for Commission approval. Going further, the Commission used the estimates to establish a "hard-cap" as an additional ratepayer protection. As a consequence, Sierra Club cannot credibly say the Commission's "hard-cap" conditions do not protect ratepayers. In truth, the Commission went far beyond what was required to ensure Kemper gets built for a reasonable cost. Even so, should this Court determine that Sierra Club's challenge may proceed from this point, the Court will find that the "hard-cap" was supported by substantial evidence.

B. The increased cap was supported by the record.

Even assuming Sierra Club has the right to challenge the "hard-cap" increase set by the Commission, that decision was well-founded on record evidence. The facts, considered without Sierra Club's spin on them, are important here. The Commission's April 2010 Order proposed a $2.4 billion "hard-cap" figure on Kemper construction costs recoverable through potential future rate increases. That figure was based on undisputed testimony and Mississippi Power's estimates of construction costs. [April 2010 Order at pp. 37-39; FP 29570-72; Appellant R.E. "5"]. The original "hard-cap" was also subject to several specific conditions for increasing it in the future. [*Id.*]. Meanwhile, it is true – as Sierra Club so prominently points out – that the Commission's April 2010 Order commented on the record by stating:

> [t]he 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 that ratepayers should bear. 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. If a cost estimate is conservative, and if MPC's experts are confident in those estimates, exceeding them is not a necessity.

[*Id.* at p. 38; FP 29571].

However, in response to the order, Mississippi Power filed a "Motion in Response to Commission Order, or, in the Alternative for Alteration or Rehearing." [Motion in Response at pp. 1-39; FP 29604-42]. The motion identified reasons why a twenty percent (20%) cap increase over Mississippi Power's estimates was justified. The reasons included increased financing risks, specific testimony concerning cost estimates, and project updates. [*Id.* at pp. 25-26; FP 29628-29].

After considering the motion, reviewing the record again, and a hearing, the Commission found that a twenty percent (20%) increase was appropriate:

> **a. Construction Cost Cap.** The Commission strongly encourages the Company to meet its construction cost estimates of which its experts expressed confidence; however, the Commission will allow a variance of 20% above the $2.4 billion construction cost estimate (net government construction cost incentives in the amount of $296 million), as more specifically provided hereinafter. This modification is based upon the Phase Two hearing testimony of Dr. Craig Roach, the Commission's Independent Evaluator, that a twenty percent (20%) cost cap would be on the high end of the acceptable range of cost caps that this Commission could expect to be possible on a Project like Kemper, but which would still make Kemper the best overall choice for customers. (Tr. 1882-1889.) Further, in relation to the choices for customers, there was much discussion with Dr. Roach in the Phase Two hearing about the evaluation of sixteen (16) scenarios, the different methodologies used for comparisons of Kemper and other resource options and the credibility of "fixed" gas prices offered by Independent Power Producers. (Tr. 1864-1891.)

[May 2010 Order at p. 9; FP 29802; Appellant R.E. "6"]. The evidentiary basis for the decision was specifically set forth in the order (including precise citation to Dr. Roach's testimony).

Sierra Club disagrees with Dr. Roach's testimony, and the Commission's reliance on it, but surely must acknowledge that it is more than a "scintilla" of evidence. Sierra Club knows that the Commission was free to credit the testimony, and any other evidentiary basis for the "hard-cap" increase. Therefore, Sierra Club can only suggest that the Commission is somehow conclusively bound by earlier comments in its April 2010 Order, or argue that Dr. Roach did not say what he said under oath. Both contentions are wrong and, of course, inconsistent with the deferential standard of review applicable to the Commission's decision.

1. The Commission had a right to reconsider its April 2010 Order.

First, an argument hanging on statements in the April 2010 Order may be superficially appealing to detractors from the Kemper Project, but below the surface it makes no sense. The Commission has specific authority to "rescind or amend any order or decision" that it makes. *Rankin Utility Co., Inc. v. Miss. Pub. Serv. Comm'n*, 585 So. 2d 705, 710 (Miss. 1991); MISS. CODE ANN. § 77-3-61. It is also certainly within that authority to re-examine the record after a decision is made and cite evidence that may be contrary to a prior order.

In that respect, the Commission functions much like any trial or appellate court in Mississippi. When a party moves for reconsideration on a motion, a trial court can go back and revise its order. When a party moves for reconsideration on appeal, this Court can go back and revise its opinion, and even do away with the original opinion altogether. The original opinion is not binding on this Court in any way. Following the same basic logic, Sierra Club cannot use the Commission's April 2010 Order to trump the May 2010 Order.

2. Dr. Roach's testimony clearly supports the cap increase.

Second, Sierra Club cannot credibly contend that Dr. Roach's testimony does not support the "hard-cap" increase that the Commission ordered. The Commission is the sole judge of the

reliability and credibility of testimony presented. It is well-established that

> [t]he public service 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. The commission is free to accept or reject recommendations of any of the witnesses.

Miss. Pub. Serv. Comm'n v. South Central Bell Tel. Co., 464 So. 2d 1133, 1135 (Miss. 1984) (collecting authorities).

Dr. Roach testified that a cost cap at twenty percent (20%) above Mississippi Power's $2.4 billion construction estimate would still make the Kemper Project a reasonable choice according to his analysis of the proof. His testimony clearly supported such an increase:

> Commissioner Presley:...would you just enumerate for 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 be looking for guarantee wise?
>
> Dr. Roach: I think this would [be] the subject of negotiation. Let me try to be as –
>
> ***
>
> Commissioner Presley: That's assuming the Commission says **40 [years]** and all those other things.
>
> Dr. Roach: Right.
>
> ***
>
> Commissioner Presley: Well, let's just say we wanted to **look long-term at 40.**
>
> Dr. Roach: All right. Okay.... 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 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....

I also – **that would be the cost cap** – beyond that, I would have the Commission have its own what I would call owner's engineer, owner's auditor.... Commissioner Presley: Those two main things, the cost caps and then some sort independent engineering/auditor mechanisms.

Dr. Roach: Right.

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Commissioner Presley: That's **20 percent**, plus escalation, plus contingency.

Dr. Roach: That's right.

Commissioner Presley: Okay. That would be around – we'll just say an 800 to $900 million figure subject to us adding and making it all correct. So 800 to 900 million would be our target on a **20 percent cost overrun** using up every dime within the budget for contingencies.

Dr. Roach: Well, I think it just has to be achieved for the Mississippi ratepayer. I don't think we have to guess at how bad it could get, but I think it's important that the Commission judge how bad it would be willing to accept for the people of Mississippi....

Commissioner Presley: But, Dr. Roach, when I look at E-25 in your table, in your report, in E-25, that's **assuming a 20 percent cost overrun**, but Kemper is not winning any of those.

Dr. Roach: Yeah, and the reason –

Commissioner Presley: If we were to say okay, you can do it **plus 20 percent cost overruns**, according to this table, hypothetically, that would – how does that work? I mean it would have to be less at 20, wouldn't it?

Dr. Roach: Yeah. The – the difference here, **a core difference**, is that under E-25 your accepting a **20-year deal**. That's why, from day one, I've said, you know, whatever time horizon you want –

Commissioner Presley: **40-year deal with the 20 [cost cap] and Kemper wins.**

Dr. Roach: Yeah. If you're saying I want a 40-year solution, then over that whole 40 years, that's when we get to the conclusions.

[Dr. Roach Testimony, Tr. at 1882-89 (emphasis added)]. The Commission was free to accept and rely upon Dr. Roach's testimony in setting the construction "hard-cap" at twenty percent

(20%) above Mississippi Power's estimate.

It was also reasonable for the Commission to rely on Dr. Roach's expert report in addition to his testimony. [*See* Roach Expert Report, FP 028970-73]. His testimony echoed the results of tests explained in the report. The testing compared Kemper to several different hypothetical alternatives. At the end of the day, the Kemper Project, even assuming a twenty percent (20%) cost overrun was competitive, and even prevailed, under several different methods and scenarios. [*Id.*]. The Commission did not simply accept Mississippi Power's estimates and arbitrarily add more money on top to come up with a number. Dr. Roach's testimony and independent evaluation proved the "hard-cap" increase was reasonable, and, therefore, surely supported by substantial evidence.

C. The "hard-cap" increase cannot be viewed in isolation.

Sierra Club's "lack of substantial" evidence claim as to the "hard-cap" is also wrong because it fails to account for other features of the May 2010 Order that bring the Kemper Project within the public convenience and necessity. Even if Dr. Roach's testimony was somehow not enough, other construction cost conditions, that were supported by substantial evidence, justified imposing a twenty percent (20%) "hard-cap" increase over original estimates. Stated differently, the Commission did not whimsically say "Mississippi Power gets another 20%." Other conditions brought the "hard-cap" decision, and indeed, the overall Certificate decision, within the public convenience and necessity.

An appropriate balance between the risks and benefits of Kemper was struck with these other conditions. For example, in addition to all the other modified conditions, the May 2010 Order requires Mississippi Power to justify its costs that exceed $2.4 billion through future prudence reviews (if any excess costs are actually incurred) on an ongoing basis. [May 2010

Order at pp. 12-14; FP 29805-07; Appellant R.E. "6"].

As another example, the Commission's May 2010 Order included the same operational guarantees set forth in the original conditions included in the April 2010 Order. [*Id.* at p. 15; FP 29808]. The Commission kept those operational guarantees in place despite Mississippi Power's opposition to them in its reconsideration motion. The parameters, based upon Mississippi Power's operational assumptions, meant that Kemper would have to perform as intended or Mississippi Power's future cost recovery would suffer.[11] Ratepayers would not be left holding the bag if assumptions such as lignite availability, plant performance, and by-product revenues did not meet the future operational expectations that the Kemper proposal were founded upon.

Nobody can single out the "hard-cap" increase by itself and ignore all other conditions placed on Kemper's construction and operation. The Commission was justified in relying on all the conditions, all supported by the record, to ensure the Kemper Project satisfied the test for public convenience and necessity.

IV. Allowing CWIP Recovery From 2012 Through 2014 Was Supported By Substantial Evidence.

Sierra Club's second "lack of substantial evidence" argument wrongfully claims there is no evidentiary basis for the Commission's CWIP recovery allowance from 2012 to 2014. The Commission was entitled to re-evaluate Mississippi Power's CWIP request when it modified the conditions included in the May 2010 Order. The Commission was further well within its

[11] For example, the plant's availability factor is determined by taking the quotient of the amount of kilowatt hours that the plant is expected or does have available to produce over a period, divided by the number of hours in the period, and multiplying it by the capacity of the plant. Mississippi Power's testimony provided Kemper would operate at fifty-nine (59%) availability initially, and grow to eighty-nine percent (89%) availability by 2021. This operational cap, and many others, imposed by the Commission's conditions require Mississippi Power to meet those estimates. Otherwise, ratepayers will not have to pay extra for Kemper's under-performance in the future. [*See* April 2010 Order at p. 24; FP 29557; Appellant R.E. "5" & May 2010 Order at p. 15; FP 29808; Appellant R.E. "6"].

authority to set CWIP conditions with specific protections for ratepayers throughout the Kemper construction process. The overall objective was crafting conditions to make Kemper consistent with the public convenience and necessity.

A. The Commission had discretion to assign CWIP.

First, and importantly, a decision on CWIP allowance is purely a matter for the Commission's discretion. The Mississippi Legislature vested that authority in the Commission expressly:

> (1)(a) The commission is **fully empowered and authorized** to include in an electric public utility's rate base and rates, **as used and useful components of furnishing electric service, all expenditures determined to be prudently-incurred pre-construction, construction, operating and related costs that the utility incurs in connection with a generating facility (including but not limited to all such costs contained in the utility's "Construction Work in Progress" or "CWIP" accounts)**, whether or not the construction of any generating facility is ever commenced or completed, or the generating facility is placed into commercial operation. However, all costs incurred before the passage of this act may be reflected in rates only upon an order of the Public Service Commission after a finding of prudency.

MISS. CODE ANN. § 77-3-105(a) (emphasis added). Furthermore, as the statute explains, incurred costs for CWIP treatment are still subject to later prudence determinations. It is an ongoing process. The Commission's May 2010 decision did not mean Mississippi Power could charge customers whatever it wanted, whenever it wanted.

B. The record justified CWIP allowance.

Second, and once again, the actual facts, rather than Sierra Club's mis-characterizations of them, are important. The Commission recognized in its April 2010 Order that Mississippi Power originally sought recovery of the financing costs on CWIP from the beginning of the project. [April 2010 Order at p. 40; FP 29573; Appellant R.E. "5"]. Leading up to the April 2010 Order, Mississippi Power contended CWIP recovery was necessary because, without that

recovery, the company's "A" credit rating might be downgraded and make access to capital markets more difficult. [*Id.* (citing Turnage Phase II Testimony, Tr. 17-18, 21-22)] Additionally, Mississippi Power admitted that "timely collection of financing costs of Kemper during construction will save retail customers at least $500 million over the life of the generation facility." [*Id.* (citing Tr. 1620-1621)]. The issue came down to whether CWIP recovery would make Kemper a better deal for ratepayers over the long-term.

The Commission initially was not persuaded and explained that "although the Company's arguments for CWIP return have merit conceptually, its request...is too general to support a Commission finding." [*Id.*]. The Commission's April 2010 Order also identified certain factors, such as economic and financing costs, that needed further consideration before authorizing CWIP recovery. [*Id.* at pp. 40-41; FP 29573-74]. Mississippi Power was told to be more specific. The Commission explained "that there can be positive benefits associated with CWIP;" and therefore, "invit[ed] the Company to submit evidence supporting its request for CWIP[.]" [*Id.* at p. 41; FP 29574]. The final decision on CWIP was deferred by the April 2010 Order. [*Id.*].

Mississippi Power subsequently filed its "Motion in Response to Commission Order, or, in the Alternative for Alteration or Rehearing" in response to the April 2010 Order. [Motion in Response at pp. 1-39; FP 29604-42]. Mississippi Power was the only party that offered evidence related to CWIP. [*Id.* at p. 29; FP 29632]. That evidence showed "that without CWIP in rate base during construction and recovery of financing costs on that CWIP balance, MPC's overall credit rating, access to capital and financing costs for this Project and the rest of MPC's business will be adversely affected." [*Id.*]. Additionally, the evidence proved that regulatory support from the Commission was also important for a strong credit rating. [*Id.* at pp. 29-31; FP 29632-34 (quoting rating agency opinions)].

Mississippi Power further identified other important considerations by pointing out that

> [t]he Commission appears to be focusing on only the quantitative measures, which only tell half the story. Qualitative measures (i.e. regulatory support in the form of assurance of cost recovery) have just as much impact on MPC's credit rating.

[*Id.* at p. 29; FP 29632]. The Commission needed to re-balance any burden or risk to ratepayers against the financial impact that its regulatory decision (*i.e.*, whether to allow CWIP or not), would have on Mississippi Power's financiers and credit ratings agencies. Re-evaluating the financial impact on Mississippi Power's credit was important to ratepayers as well. Higher up-front capital costs for Kemper would ultimately increase ratepayers' future costs for electricity.

Mississippi Power also candidly admitted that new federal funding made immediate CWIP allowance unnecessary. [*Id.* at p. 31; FP 29634]. The company therefore requested that CWIP be excluded for 2011 but fully allowed for 2012 through 2014. [*Id.*]. Mississippi Power also suggested that the Commission add an additional condition and reserve the right to revisit CWIP recovery issues if Mississippi Power's credit rating fell below the "A" category. [*Id.*].

The Commission ruled on Mississippi Power's motion in its May 2010 Order. The Order explained precisely what record evidence it considered, the relevant standards, and imposed certain CWIP conditions. The Commission did not allow CWIP recovery "unconditionally." The evidence, the Commission's reasoning, and *all* of the CWIP conditions are important. The Commission pointed out evidence as to the impact of a lack of CWIP on Mississippi Power's credit rating and ultimate costs to consumers:

> 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 CWIP, provides a periodic and expedited prudence review process, and**

establishes a special rate mechanism for cost recovery. (pp. 17-18; p. 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).

[May 2010 Order at p. 16; FP 29809; Appellant R.E. "6" (emphasis added)]. The Base Load Act's specific allowance for a tailored CWIP process was also relevant:

> 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 base rate, 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) 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.**

[*Id.* (emphasis added)].

Next, considering all these factors and record evidence, CWIP was allowed, but subject to specific conditions, and only for certain time periods:

> [t]he 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 and 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.

[*Id.* at p. 17; FP 29810 (emphasis added)]. The order also contained conditions dependent upon Mississippi Power's credit rating and future prudency reviews to support any proposed rate increases:

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 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 Company may, based upon substantial evidence, make a finding that is specific to current conditions and may adjust such amounts up or down based on 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 date of this Order, file with the Commission a rate mechanism designed to provide timely recovery of these construction financing costs during the construction period. To the extent the Company's proposed CNP can be modified to carry out the findings and purposes of that 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 will then adjust rates for the next period to correct any discrepancy in the prior period. The mechanism will thus result in ratepayers paying no more than MPC's actual financing costs associated with prudent actual capital expenditures through the period.**

[*Id.* at p. 18; FP 29811 (emphasis added)]. Finally, the Commission set a deadline for May 1, 2014 representing the last date Mississippi Power could expect to receive any CWIP recovery, except upon a specific showing, and in no event inconsistent with the project's "hard-cap" conditions:

> **[t]he Commission will not allow CWIP beyond May 1, 2014, 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 recovery of CWIP on amounts exceeding the Commission's approved cap or prudent construction costs, whichever is less.**

[*Id.* at p. 19; FP 29812 (emphasis added)].

Even a casual observer can see that the evidence supporting the CWIP decision, and the extensive ongoing regulation of Mississippi Power's CWIP recovery over the course of construction, received thorough consideration in the May 2010 Order. Sierra Club's "lack of substantial evidence" argument has no merit because it pretends none of that evidence or reasoning exists.

Furthermore, just like the Commission's reconsideration on the conditions for a "hard-cap" on construction costs, comments in the Commission's earlier April 2010 Order to the effect that "economic and financing factors needed to be considered in its CWIP determination" do not prove the Commission made a judgment error. The Commission was free to re-evaluate the case and review the record in response to Mississippi Power's motion. As such, Sierra Club has not

met its burden of establishing that the CWIP conditions in the May 2010 Order were not supported by substantial evidence.

V. The Commission's Orders Sufficiently Explain Its Findings.

On top of its quantum of evidence arguments, Sierra Club makes a form argument that should be disposed of in short order. Essentially, Sierra Club says it would have been better form for the Commission to cite and quote more of the thirty-thousand page record in its orders. Its form over substance argument is wrong. This Court should hold that, consistent with Mississippi law, the seventy-five pages of Commission findings in this case provided sufficient detail. The case should not be remanded to make the Commission further elaborate on its extensive findings.

A. The orders satisfy the applicable statute.

Statutory law instructs the Commission to make findings and provide enough detail in its findings, orders and opinion so that an appellate court may review them:

> [t]he Commission shall make and file its findings and order, and its opinion, if any. All findings shall be supported by substantial evidence presented and shall be in sufficient detail to enable the court on appeal to determine the controverted questions presented, and the basis of the commission's conclusion.

MISS. CODE ANN. § 77-3-59.[12] The Commission's orders satisfy the statute here. The analysis is simple. The first question is: did the Commission orders identify the controverted questions presented? **Yes.** In this case, the Commission's Orders clearly identify numerous issues related to its determination of whether the Kemper Project satisfied the public convenience and

[12] Notably, another statute is also relevant to the appellate review purposes inherent in Section 77-3-59. The statute which authorizes appeals from Orders of the Commission to chancery court states that an "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." MISS. CODE ANN. § 77-3-67(4). The failure to make sufficient findings of fact in an order does not fall within those limited reasons allowing for reversal, in whole or in part.

necessity. [*See* April 2010 Order, FP 29534-83; Appellant R.E. "5" & May 2010 Order, FP 29794-818; Appellant R.E. "6"].

The second question is: did the orders set forth the basis for the Commission's conclusion? **Yes.** Here, the Commission's ordered analyzed each of the issues, including specific citations to the evidence and reasons for its decision.

The third question is: did the Commission state its conclusions? **Obviously, yes.** With regard to the Kemper orders, the Commission's conclusion on each issue was separately set forth in both. The Commission's conclusions are easy for the Court, or anyone else who reads the orders, to discern.

The Commission was not required, as Sierra Club suggests, to sift through the thirty-thousand page record, discuss every piece of evidence or argument advanced by someone, and write down thousands of conclusions. In that respect, the standard Sierra Club seeks to impose is clearly an unworkable one. The Commission, delegated the responsibility as trier-of-fact in proceedings before it, functions much like a jury, or a trial judge sitting without a jury. Mountains of evidence may be presented at a trial. The trier-of-fact is required to sort through all the evidence and render a conclusion. But it is not required to comment on every document, witness, or other form of proof presented to it for that conclusion to be valid.

The standard which Sierra Club has manufactured and seeks to impose upon the Commission is unrealistic and inconsistent with the Commission's role as the finder-of-fact. That is particularly true in a complex proceeding involving the issues and proof presented with regard to the Kemper Project. Under the circumstances of this case, given the record evidence and ample Commission findings contained in it, plainly, the Commission's orders include sufficient detail as required by statute and should be affirmed.

B. The orders also satisfy the "ultimate fact" rule.

Even assuming for the sake of argument that the Commission should have elaborated more, Sierra Club still cannot win this appeal. This Court has previously analyzed Commission orders and held that they are only required to include a finding of "ultimate fact" based in the record. *Miss. Pub. Serv. Comm'n v. AAA Anserphone, Inc.*, 372 So. 2d 259, 265 (Miss. 1979). In *AAA Anserphone*, this Court analyzed a Commission order that could have been more detailed in awarding a certificate of public convenience and necessity. *Id.* at 264-65. It was difficult to review the Commission's decision because of "a lack of facts stated in the order of the administrative agency on which its finding is predicated." *Id.* at 264. But that did not mean that the Commission's decision had to be reversed. This Court explicitly held that:

> 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.*, 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 cases such as this is basis for reversal.

AAA Anserphone, 372 So. 2d at 265. The Commission's failure to make sufficiently detailed findings was **not reversible error.** *Id. See also Mississippi State Bd. of Nursing v. Wilson*, 624 So. 2d 485, 495-96 (Miss. 1993) (upholding the agency's finding while noting that "...embellishment may have been preferable, any defect in [the amount of detail] is not fatal.") *Illinois Central R.R. Co. v. Jackson Ready-Mix Concrete*, 137 So. 2d 542 (Miss. 1962) ("state agencies are not required to make detailed finding of fact, but an ultimate finding is sufficient").

At a very minimum, the Commission's orders in this case are consistent with *Anserphone*. Even if this Court finds that the orders could or should have included more detail,

that is not a reason to reverse the Commission's decision. *See also, supra*, fn. 12.

Furthermore, to the extent Sierra Club argues that the *Anserphone*'s "ultimate fact" rule is unsound, other basic principles of Mississippi agency law support it. Reversing an agency decision just because its order could have been better would abdicate the reviewing court's role in the process. A reviewing court "must look at the full record before it in deciding whether the agency's findings were supported by substantial evidence." *Marquez*, 774 So. 2d at 427. Indeed, the reviewing court "is not relegated to wearing blinders." *Miss. State Bd. of Exam'rs for Social Workers & Marriage and Family Therapists v. Anderson*, 757 So. 2d 1079, 1084 (Miss. Ct. App. 2000). Sierra Club's proposed departure from *Anserphone*'s holding would put blinders on the Court. As long as the Commission's ultimate decision is set out in its orders, and supported by the record, the decision must be affirmed. At the very least, that is the case here.

In order to avoid *Anserphone* and the sound principles it relied upon, Sierra Club cites some distinguishable authorities as a smokescreen. For example, *Total Environmental Solutions, Inc. v. Miss. Pub. Serv. Comm'n*, 988 So. 2d 372 (Miss. 2008) ("*TESI*") was not a case where the agency was reversed for failure to provide sufficient factual detail. *TESI* was a rate-making case where the Commission's decision was unsupported by substantial evidence in the record. *Id.* at 376. Likewise, Sierra Club's other authority, *White Cypress Lakes Water, Inc. v. Miss. Pub. Serv. Comm'n*, 703 So. 2d 246 (Miss. 1997), was also a rate-making case where the denial of a rate increase was not supported by substantial evidence in the record. *Id.* at 249.

In both *TESI* and *White Cypress*, the record did not contain **any evidence** to support the Commission's findings. *See TESI*, 988 So. 2d at 376; *White Cypress*, 703 So. 2d at 249. Sierra Club's best cases did not squarely address its "sufficient detail" issue. Nobody here can seriously contend that the record does not contain the evidence cited in the Commission's orders. Not

even Sierra Club. Lack of substantial evidence findings involving different records on appeal, such as those in *TESI* and *White Cypress*, are no reason to remand this matter to the Commission.

In short, this Court can read the orders and see what the Commission did, and why. That is all Section 77-3-59 requires. But even assuming Sierra Club's form argument has any ounce of merit (which it does not), *Anserphone* dictates this case should not be sent back to the Commission just so it can make the same findings, but state them differently in a more elaborate order. The case should not be remanded for "lack of sufficient detail."

VI. Sierra Club Improperly Requested Confidential Documents.

Last, Sierra Club faults the Commission for an error made by Sierra Club. Its last-ditch argument on appeal claims that the Commission should have released some confidential documents submitted by Mississippi Power during the proceedings below. The Commission followed the rules, but Sierra Club did not. There is no valid reason to reward Sierra Club with declaratory relief for its own error.

While the matter was pending at the Commission, Sierra Club moved to make public certain documents that had been filed as "confidential." [*See* Sierra Club Motion, FP 18948]. In this appeal, Sierra Club has never specified what documents it contends were improperly deemed "confidential," what prejudice it suffered, or a basis for any relief.

Regardless, the Commission Rules (that had been in place long before the Kemper petition was filed) allowed Mississippi Power to submit documents designated "confidential" and not subject to public disclosure. The Commission was unable to remove that "confidential" designation as Commissioner Presley pointed out in his dissenting opinion to the April 2010 Order:

> [t]he [MPC's] proposal and filing in this case keep confidential and out of the

> public's view the possible rate impacts associated with this project. *Although current Commission rules allow for this practice*, the majority should have made public disclosure of the rate impact a condition that must be met by [MPC] to make the application [for Certificate of Public Convenience and Necessity] consistent with public interest. ...The Commission should amend its rules to prohibit utilities from designating rate impact information confidential.

[April 2010 Order, Presley dissent at p. 12; FP 29595; Appellant R.E. "5" (emphasis added)]. Sierra Club's proper method to obtain the information was to file a public record request under the Public Records Act. *See* MISS. CODE ANN. § 25-61-3 through § 25-61-9. Sierra Club never filed any such records request.

The current Commission rules, amended January 7, 2011, provide a different method for taking up issues of confidentiality. *See* MISS. PUB. SERV. COMM'N R. OF PRACTICE AND PROC. 6.109. But that means was not available during the Commission proceedings below.

Simply put, Sierra Club did not follow the proper procedure for disclosure at the proper time. *See Pro Football Weekly, Inc. v. Gannett Co., Inc.*, 988 F.2d 723, 725 (7th Cir. 1993) (explaining proceedings concluded under prior rules are guided by those rules). The declaratory relief it now seeks on appeal over a year after-the-fact is inappropriate.

Furthermore, as the Commission appreciates it, Mississippi Power has made the information public at several points since the Commission proceedings ended. Sierra Club cannot complain about the process it failed to follow, and cannot complain that the information has never been available to it. At best, Sierra Club's failure to follow the rules is now a moot issue and not grounds to disturb any of the Commission's findings. *See Ladner v. Fisher*, 269 So. 2d 633, 634 (Miss. 1972) ("This Court will not entertain an appeal where there is no actual controversy."); *Insured Savings & Loan Ass'n v. State, ex rel. Joe T. Patterson*, 135 So. 2d 703, 706-07 (Miss. 1961) (finding that appellate courts will not review "immaterial, unnecessary, or

moot questions."). This Court should not grant declaratory relief or give credence to Sierra Club's argument that it has suffered any detriment due to treatment of "confidential" documents at the Commission level.

CONCLUSION

In summary, the Commission's Kemper Project determinations are entitled to deferential review and Sierra Club has not presented any grounds to overturn them. The Commission's decisions to require an increased "hard-cap" and allow restricted CWIP recovery were supported by substantial evidence. The Commission's orders provided sufficient detail and met its statutory duty. At a very minimum, the Commission made findings of "ultimate fact" required by Mississippi law. Additionally, Sierra Club is not entitled to declaratory relief to obtain documents it never properly sought and that have apparently become available to the public in the meantime. This Court should affirm the Chancery Court of Harrison County and the Commission's Kemper Project findings.

THIS the 22nd day of June, 2011.

Respectfully submitted,

MISSISSIPPI PUBLIC SERVICE COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellee, Mississippi Public Service Commission, has been served via U.S. Mail, properly addressed and postage prepaid, to the following persons:

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