2011-CA-00350 RT

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INTRODUCTION

In its April 29, 2010 order the Public Service Commission specifically found that at any cost greater than $2.4 billion the Kemper plant *did not* serve the public convenience and necessity. It relied on Mississippi Power's ("MPC's") own testimony and evidence in the Anderson Table, which demonstrated that with any significant cost increase over $2.4 billion, building a natural gas fired plant is a cheaper and less risky alternative for the ratepayer.

Yet less than a month later, at the urging of MPC, the Commission granted the company an additional $480 million in cost overruns, and did not even mention the natural gas self-build alternative and the Anderson Table. Instead the Commission cited seven pages of testimony by Dr. Craig Roach, characterizing this testimony as stating "that a twenty percent (20%) cost cap would be on the high end of the acceptable range of cost caps that the Commission could expect to be possible on a project like Kemper, but which would still make Kemper the best overall choice for customers."[1] The Roach testimony did not state this, and in fact to even accept the Roach testimony requires making strategic decisions about fuel prices, the length of a generating solution and other issues that the Commission has expressly disclaimed making. Mississippi Power did not even cite Dr Roach's testimony as a reason for granting it the additional the half billion dollars.

The Commission's approach to its own April findings and the Anderson Table is simple: it ignores both of them, and warns the Court that the Commission is entitled to blanket deference so long as there is an "ultimate finding of fact" and some kind of factual record. Mississippi Power takes a different tack, and argues in passing that in its

[1] FP-P 029802.

May order the Commission must have chosen to "follow the guidance and recommendations of the its independent expert Dr. Roach rather than use the Anderson Table,"[2] This is quite an ironic position given that in the Commission MPC attacked Dr. Roach and proffered the Anderson testimony itself.

The fact of the matter is that there is no rational basis for the Commission's May 2010 flip flop on whether Kemper meets the public convenience and necessity. This is true because the Commission did not exercise its expertise, and did not make the findings necessary to give a rational basis for its decision. This is in part because the Commission did not address the issues necessary to underpin any rational decision. It is also true, however, because the Commission ignored the natural gas self-build alternative set out in the Anderson Table, an alternative that the Commission itself said was cheaper and less risky at the price for the project which the Commission approved.

As they did in the court below, the Commission and MPC argue that this Court essentially has no authority to review the Commission's finding so long as there is some kind of factual record. To reach this result, the appellees misread the Mississippi caselaw in a way that would make Mississippi jurisprudence out of step with the rest of the country, encourage bad decisionmaking by agencies, and undermine good public policy.

I. WAS IT RATIONAL TO REVERSE, WITHOUT EXPLANATION, THE APRIL FINDING THAT KEMPER DID NOT MEET THE PUBLIC CONVENIENCE AND NECESSITY?

A. It Is Patently Irrational to Completely Ignore the Commission's April Findings and the Anderson Table

The Commission's brief in this Court does not acknowledge the clear factual findings in the April 29, 2010 order. Most notably, the Commission does not

[2] MPC Brief at 44.

acknowledge its own statement that by approving Kemper at the $2.4 billion level, "the Commission already imposes on [ratepayers] the risk that some better alternative might emerge during the next few years of uncertainty. **To impose even more risk on ratepayers is not consistent with the public interest.**"[3] In fact, even in its May 2010 order the Commission reiterated that the April order "found that a project with this magnitude of cost risk does not satisfy the public convenience and necessity test."[4] Yet imposing more risk on the ratepayer - $480 million more - is exactly what the Commission did less than one month later.

In this Court and below, the Commission has simply refused to address the Anderson table, which demonstrates that **at the cost approved by the PSC there is a cheaper and less risky alternative for the ratepayer than Kemper.** This decision to ignore critical testimony from MPC itself is inexplicable on any rational basis, particularly given that in its April order the Commission itself repeatedly cited the Anderson testimony:

> MPC submitted calculations showing how an increase in Kemper's construction cost would affect its standing relative to these sixteen (16) scenarios. (p. 11 of Anderson Phase Two Rebuttal Testimony, Figure 1). The table revealed the following:
>
> a. Kemper at its projected cost was already inferior to the natural gas combined cycle alternative in the low gas price cases.
>
> b. A thirteen percent (13%) increase in construction cost would make Kemper inferior in all the moderate gas price cases.
>
> c. A twenty percent (20%) increase in construction cost would make Kemper more costly in all but the high price gas cases.
>
> Based on the nine percent (9%) increase that has occurred even before detailed design has been complete and even before ninety percent (90%) of the

[3] FP-P 029569 (emphasis supplied).
[4] FP-P 029798.

> construction costs have become "known" (in MPC's terminology), and given that a plant with this technology and this size has never been completed, the Commission finds it plausible that the final construction cast could exceed a level that would make Kemper uneconomic relative to a majority of these scenarios. **This plausibility, by itself, causes the Commission to find that MPC has not met its burden of showing that its proposal is consistent with the public interest.**[5]
>
> * * *
>
> MPC argues that this thirty-three percent (33%) increase, in conjunction with other features of its proposal, are below the cost of plausible alternatives. But according to Mr. Anderson's Rebuttal Testimony at page 11, Figure 1, Kemper at this hard cap is more expensive than a natural gas combined cycle self-build alternative in fourteen (14) of the sixteen (16) cases presented. There is no persuasive basis in the record for the Commission to impose this additional $1 billion risk on ratepayers; **no evidence supporting a higher cost estimate.** [6]

What the Anderson Table means is that in what even MPC agrees are the most likely future circumstances, there is an option for the ratepayer that is not just cheaper by a few bucks, but cheaper by hundreds of millions of dollars, and without the myriad other environmental and financial risks of the Kemper project. Yet the self-build natural gas alternative and the Anderson table are never mentioned at all in either the May decision or the Commission's briefing here. This is the essence of irrational decision-making.

For its part MPC at least acknowledges the Anderson Table,[7] but argues that the Commission chose to "follow the guidance and recommendations of its independent expert Dr. Roach rather than use the Anderson Table." MPC Brief at 44. This is a rather ironic development, since Thomas Anderson was MPC's own witness, and in the Commission MPC frequently attacked Dr. Roach's testimony as unreasonable and unreliable.[8]

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[5] FP-P 029566 (emphasis supplied).
[6] FP-P 029568 ((emphasis supplied).
[7] In the court below, Mississippi Power also refused to address the Anderson Table in its briefing.
[8] *E.g.* FP-P 029245 (Roach testimony on gas offers unreliable); 029267 (Roach analytical method flawed).

MPC's passing argument on this key issue also encapsulates the reasons that MPC and the Commission's articulation of the standard of review this Court should apply is wrong. MPC and the Commission argue that no matter what the Commission said, this Court must scour the record to find some reason to affirm the Commission's decision. Yet in this case that requires the Court to conjure up some rational reason for the Commission to completely overturn factual findings and credibility determinations.

B. It Is Patently Irrational to Ignore the Commission's Own Findings That at Any Cost Greater Than $2.4 Billion the Kemper Project Does Not Serve the Public Convenience and Necessity

The Commission also does not acknowledge its own repeated finding that capping the recoverable cost of Kemper at $2.4 billion is "no more stringent than necessary to align the Company's proposal with the 'public convenience and necessity' requirement,"[9] and "the conditions expressed in this [April 29] order are necessary, but no more than necessary, to ensure that the certificate, if granted, is consistent with the statute's 'public convenience and necessity' test." [10] It is clearly irrational for the Commission to ignore its own previous findings that $2.4 billion is as far as the cost of Kemper can go and still meet the public convenience and necessity test.

Rather than meeting this argument head on, the PSC argues that the other conditions associated with the certificate in the May order "bring the Kemper Project within the public convenience and necessity."[11] Yet these same conditions were in the April Order, when the Commission found that at any cost greater than $2.4 billion, the Kemper Project simply placed too much risk on the public, and therefore did not meet the public convenience and necessity.

[9] FP-P 029569.
[10] FP-P 029581.
[11] PSC Brief at 33.

MPC also argues that the Commission gave MPC the extra $480 million in exchange for removing an incentive mechanism which would have let MPC keep some of the savings if the plant came in under budget. According to MPC, this supposed tradeoff balances the ledger and leaves the public in exactly the same "risk position" it was in under the April order. In fact, Mississippi Power itself requested that the Commission remove the incentive mechanism, citing that the mechanism "as currently drafted is too vague, and as a result could lead to unfair results for both the Company and our customers."[12] The claim that the removal of the incentive mechanism balances out the half billion is not a finding that the Commission made. Instead it is an argument constructed by attorneys casting about to supply a basis – any basis - for the Commission's reversal of its previous order. Again, the claim that the Commission needed to "shift the balance of risk back to the ratepayer" simply emphasizes the incredibly risky nature of this project.

C. The Reason MPC Asked for the Extra $480 Million Is Because the Markets Thought the Project Was Too Risky to Finance Without a Cost Guarantee

The very reason that MPC had to ask for the extra $480 million was that, according to the Company "the conditions [imposed by the Commission in the April order] . . . will prevent the Company from being able to finance and construct the Project without seriously jeopardizing the financial condition and *ultimately the viability of the Company.*"[13] In other words, if the Company had to take responsibility for building the plant on budget, it might put the Company into bankruptcy.

This fact demonstrates the basic underlying problem with Kemper: the plant is so fabulously expensive that there is basically no way to take the risk off the ratepayer. As

[12] FP-P 029630-31.
[13] FP-P 029612.

the dissenting Commissioner put it plainly, Kemper is so expensive that it will quickly become "too big to fail." MPC itself has repeatedly argued that if the Company has to take responsibility for the cost, it will put the Company in the doghouse with the credit markets, which will ultimately make electric service more expensive for the captive ratepayer.[14] If the Commission allows the Company to pass on the increased costs to the ratepayer, keeping the credit markets happy, it will make electric service more expensive for the captive ratepayer. Even with the conditions in the Commission's order, the evidence shows that the ratepayer bears the risk.

It is plain that the Commission's decision and its failure to articulate a decision on these risks cannot stand muster under any standard of review, since it ignores without explanation the uncontradicted evidence in the Anderson Table showing a cheaper, less risky deal for the ratepayer.

D. The Roach Testimony Does Not Provide a Rational Basis for the $480 Million Cost Overrun

The Commission and MPC again assert, as they must, that Dr. Roach's testimony at pages 1882-89 of the transcript constitutes "substantial evidence" supporting the reversal of the April cost cap and the $480 million cost increase. This is the only actual evidence the Commission cites to support the $480 million decision.

The Commission ignores what the Roach testimony actually says in favor of a series of quotes read out of context.

First, the Commission actually disavows what Dr. Roach said was a necessary precondition of making decisions based on his testimony: the Commission had to make some strategic decisions about the term of a generating solution, natural gas prices, and

[14] *E.g.* FP-P 029243-44 (arguing that any cost cap will lower credit ratings and increase cost to customers).

asset ownership.[15] For example, as Dr. Roach put it, "[t]he proper time horizon is a matter for the Commission to decide.....the Commission's choice of a time horizon – ten or twenty years on the one hand and forty on the other – has a lot to do with which option is said to offer the best deal to Mississippi ratepayers."[16]

Yet even while citing the Roach testimony, which explicitly demands that the Commission make strategic decisions on underlying factual issues, the Commission argues, as explained in the next section of this reply, that it did not and was not required to make any strategic decisions. If the Commission is going to rely on nothing but seven pages of Dr. Roach's testimony to stick the ratepayer with another $480 million in risk, it must accept the basis of that testimony, and the basis is that the Commission has to make some strategic decisions. The Commission admits it did not do that, and claims it does not have to.

Second, Dr. Roach's testimony was about the tables in his report, which show how Kemper compares to *the bids submitted by Independent Power Producers. His tables and testimony do not address the natural gas self-build alternative in the Anderson Table.* Dr. Roach made it clear that the testimony at pages 1882-87 of the transcript was illustrative, based on one quantitative set of assumptions contained in Table E-29 of his report. As Dr. Roach said "that table, that set of numbers is a quantitative justification of going with Kemper . . . All these are assumptions now. I'm just kind of trying to give you something to shoot at." [17]

Table E-29 in his report assumed that the strategic preferences were for a 40 year time frame, that only plants in Mississippi would be considered (a condition which might

[15] FP-P 028918, Sierra Club RE 2.
[16] FP-P 28148 – 28190.
[17] RE 5 at 2.

violate the Commerce Clause of the U.S. Constitution), and that all the offers from Independent Power Producers to provide natural gas at a fixed price would be disregarded.[18] Other tables in this same discussion showed that with different strategic assumptions, Kemper did not win any of the future scenarios. For example, at page 1888 of the passage cited by the Commission, Dr. Roach confirmed that in his table E-25, Kemper did not win any future scenarios with a 20% cost overrun.

Accepting the idea that Dr. Roach's testimony establishes that Kemper is the best deal for the ratepayer even with a $480 million dollar increase in cost requires the assumption that the Commission made the strategic decision to accept all of the conditions of Table E-29. In addition, since Table E-29 did not compare Kemper to the natural gas self-build option set out in the Anderson Table, it requires the assumption that the Commission rejected the Anderson Table, which proved that the alternative of having Mississippi Power build a gas fired power plant itself was cheaper and less risky at a 20% cost overrun. Since the Commission itself cited the Anderson Table as a basis for its previous decision, this in turn requires a finding that the Commission decided to silently reverse this credibility determination.

The Commission did not do any of this, and the Commission argues here that it did not need to do any of this. Indeed, Mississippi Power argues that it was just Dr. Roach who thought that decisions on strategic preferences were needed, and the Commission does not need to make any findings on the best way forward.[19] This is of course a curious position given that it is Dr. Roach's testimony that MPC now relies on to justify the $480 million in cost overruns.

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[18] Tr. p. 1875, FP-P 028972.
[19] MCP Brief at 26.

In fact, in the May 2010 order the two commissioners in the majority specifically disclaimed making any decision on the merits of shorter term solutions, disclaimed any decision on the fixed gas offers, certainly never demanded a plant in Mississippi, and did not even mention the Anderson Table:

> That the Company chose as its basis of comparison a series of 40-year, gas-only scenarios does not mean that those are the only alternatives; and the Commission did not so find. The record contains shorter-term, gas-only alternatives, on whose merits the Commission did not opine in its April 29 Order other than to discuss the considerable testimony challenging the credibility of "fixed" gas resource options offered by Independent Power Producers.
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> * * *
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> While the forty (40) year projections of gas prices certainly reflected uncertainty, the Commission never found that the only Kemper alternative was forty (40) years of gas purchases. Further, the uncertainties associated with the shorter-term gas purchase options were on a much smaller scale than the uncertainties associated with a multibillion dollar Project of uncertain technology.[20]

It is also true that the Roach testimony was already in the record when the April order was issued, and the Commission found that no cost overrun was justified, and a $2.4 billion cost to the ratepayer was the most that the public convenience and necessity would permit. Mississippi Power did not even cite Dr. Roach's testimony as a reason to award it an extra $480 million. The Anderson Table still establishes that a natural gas self-build alternative is cheaper and less risky in the most likely future scenarios.

Given all this, how could it be rational to grant an extra $480 million in cost overruns, and reject the self-build alternative without discussion?

Recognizing this, Mississippi Power and the Commission both base their arguments on the idea that the Commission did not really need to consider alternatives or make any decision on strategic preferences at all, and that the Court is obligated to find some basis in the record to affirm the Commission's decision. As the next sections

[20] FP-P 029796, 029798.

shows, this is a convenient argument, but essentially implies that the entire Kemper proceeding was unnecessary.

E. The Entire Proceeding Below Was Premised on Considering Alternatives and Finding the Best Deal for the Ratepayer, a Proposition Which the Commission Now Rejects

The Commission charges the Sierra Club with failing to appreciate that "[t]he Commission's duty in this instance was not simply ordering up the *cheapest* short-term method for Mississippi Power to produce electricity." [21] The Commission argues that it did not need to make any findings on alternatives at all, since the inquiry was whether the 'the public convenience and necessity requires, or will require' construction of the Kemper Project, not some other alternative." The Commission seems to be arguing that the determination whether a $2.8 billion proposal like Kemper meets the public convenience and necessity takes place without reference to whether there is a less expensive, less risky alternative, and without deciding key underlying questions like the appropriate temporal term of a generating solution. Indeed, the Commission seems to be arguing that it can ignore alternatives and cost to the ratepayer in favor of various legislative policies set out in the Baseload Act.[22]

This argument essentially rejects the entire premise of the Kemper proceeding and the Commission's own findings in its April order. If the Commission does not make some finding on what method of proceeding is the best deal for ratepayers – including cost, risks, preferences and all the subsidiary facts that go into that decision - how can it make a finding that a generating project serves the public convenience and necessity?

[21] Commission Brief at 18 (emphasis in original).
[22] *Id.* at 19.

This certainly was the entire premise of the proceeding below. In its certificate filing MPC compared Kemper to the alternative of a natural gas fired plant, arguing that Kemper was the better alternative. The Commission itself defined Phase Two of the Kemper proceeding as addressing "what resources are available to meet the need determined in Phase One, and what are the likely costs of those resources. . . Parties may propose alternatives to meet the need established in Phase One.[23]

The Commission then invited bids from the IPPs and others, and the bidding parties were charged five thousand dollars ($5,000)[24] to cover the cost of having MPC evaluate their bids.[25] The Commission's consultant, Boston Pacific, prepared an extensive report evaluating the different proposals, and of course advised the Commission that *its choice depended on making strategic decisions about term, guarantees and the like.* Section VI of the Commission decision is entitled "Consideration of Alternatives to Kemper IGCC Project." In its April decision, the Commission specifically cited cost of alternatives in rejecting Kemper as proposed, for example stating that "Kemper at this hard cap is more expensive than a natural gas combined cycle self-build alternative in fourteen (14) of the sixteen (16) cases presented."[26]

The Commission's sudden contention that it did not need to make any decision on the risks and benefits of alternatives to Kemper would render the entire proceeding nonsensical. This is perhaps the reason that the Commission did not make this argument in the Court below, instead arguing cryptically that "the credibility of the fixed natural

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[23] FP-P 0191017.
[24] The power companies submitting proposals may have been surprised to learn that they had to pay $5000 to have their proposals analyzed "only for comparison purposes."
[25] FP-P 019371.
[26] FP-P 029566.

gas options were put to rest in both the April 29 and May 26 Orders," [27] and ignoring the Anderson Table altogether.

In short, it is plain that both an evaluation of the viability of alternatives and a decision on strategic preferences are necessary for a decision on whether the Kemper Project meets the public convenience and necessity standard.

F. The Commission's New Argument That the Cost Cap Issue Is Unreviewable

The Commission has had varied explanations for why giving MPC an additional $480,000,000 was OK, even after the Commission said any cost over $2.4 billion would not meet the public convenience and necessity. In the court below the Commission asserted – again rather cryptically - that it never said that the $2.4 billion was the only *cost cap* supported by substantial evidence, but rather only said that $2.4 billion was the only *cost estimate* in the record.[28] Thus, the argument apparently ran, the Commission could simply approve a different estimate.

Perhaps recognizing the inherent contradiction between its April order and its position in the lower court, the Commission now argues that any decision to condition issuance of a certificate on a cost cap is not reviewable at all. The argument now appears to be that making the cap on costs a condition of granting the certificate was just lagniappe for the ratepayer. As the Commission puts it in its brief, "[h]aving 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."[29] As part of this new argument, the Commission then goes on to argue that "only construction

[27] FP-P 029796.
[28] Commission Chancery brief at19-20.
[29] Commission Brief at 26.

estimates from Mississippi Power were required for Commission approval."[30] It is not clear exactly what the Commission means by this, although it seems to suggest that the Commission views its job as to approve the Kemper cost estimate first and make the decision on public convenience and necessity later.

The essential problem with this new gambit is that the two Commissioners themselves stated that at any cost in excess of $2.4 billion the Kemper project *did not* meet the public convenience and necessity standard. Without a $2.4 billion cost cap, this project – at least according to the two Commissioners – did not meet the statutory standard, and therefore no certificate could be issued. Despite this fact, the Commission raised the cost cap to $2.88 billion. According to the Commission itself, at $2.88 billion the project does not meet the statutory standard. The Sierra Club is clearly entitled to raise that issue.

II. INTELLIGIBLE CONCLUSIONS ON THE BASIC ISSUES UNDERPINNING A DECISION ARE NECESSARY FOR A VALID DECISION

As expected, in this Court the Commission and MPC argue for a standard of review they call the "ultimate fact finding standard." The Commission also adds a new tack to the administrative review argument it articulated below, asserting that the Court must ignore the Commission's April order altogether, that the Commission may reverse its factual findings without explaining the reasons, and that the reversal is entitled to complete deference from any reviewing Court. This is neither good law or good policy. Indeed, the Commission's reliance on deference rather than a reasoned basis for its decision really lends support to the idea that the Commission gave Mississippi Power an extra $480,000,000 just because the Company demanded it.

[30] Commission Brief at 28.

A. Agency Reversals of Previous Fact Finding Require Explanation on the Record

Like the "ultimate finding of fact" standard the Commission also champions, the claimed right to simply reverse a previous finding of fact without explanation is bad law and bad policy. The U.S. Supreme Court recently addressed this issue in *Federal Communications Commission v. Fox Television Stations, Inc.*, 129 S.Ct. 1800 (2009). In that case the Supreme Court reiterated that when changing a policy position an agency must meet the familiar standard (albeit rejected by the Commission and MPC here) that it "examine the relevant data and articulate a satisfactory explanation for its action." *Motor Vehicle Mfrs. Assn. of United States, Inc.* v. *State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29., 43 (1983). The Court recognized, however, that a new policy position involving a repudiation of previous factual findings requires an even more detailed explanation of the reasons for the agency decision:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. See *United States* v. *Nixon*, 418 U. S. 683, 696 (1974). And of course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency *believes* it to be better, which the conscious change of course adequately indicates. This means that the agency need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.
>
> Sometimes it must—when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account. *Smiley* v. *Citibank (South Dakota), N. A.*, 517 U. S. 735, 742 (1996). It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; *but that a reasoned explanation is needed for disregarding*

facts and circumstances that underlay or were engendered by the prior policy.[31]

In this case the Commission first found that Kemper at any cost greater than $2.4 billion does not meet the public convenience and necessity standard, citing the Anderson Table, and further found that there was *no evidence* to support any cost greater than $2.4 billion. The Commission then reversed that decision and gave MPC an additional $480 million cost overrun, citing as its only basis the seven pages of the Roach testimony. This testimony was already in the record when the Commission's April decision was made. Why did the Commission ignore this testimony in the April decision, yet credit it as the sole source of support for a 20% cost overrun in the May decision? Why did the Commission base its decision on the Anderson Table in the April 29 decision and ignore it completely in the May 26 decision, less than a month later?

Rather than supplying an explanation, in their May order the two Commissioners made a protective reference to the "substantial evidence" standard, stating that "[w]e recognize that there is a range of reasonableness within which the Commission can base its decisions and be supported by substantial evidence in the record." FP-P at 029801. Here the Court is presented with the unusual, and at least in counsel's experience unprecedented, situation of an agency justifying its reversal of previous factual findings not by explaining the reasons for the reversal, but instead by appealing in advance to the protection of the deferential standard of review that a court would apply.

This argument by the Commission certainly dovetails with the Commission and MPC's idea that approval of the Kemper project is the result of a "public negotiation," in

[31] 129 S.Ct. at 1811 (emphasis supplied).

which MPC could bid on behalf of the Company, and the Commission could bid on behalf of the public to reach some kind of compromise on the public convenience and necessity standard. For example, MPC characterizes the Commission's April 29 order as not an actual agency decision, but "one of several counterproposals submitted in the 'public negotiations' conducted between the Commission and all of the parties throughout Phase Two."[32]

It seems that the Commission believes that even if it has made a clear factual finding – for example, that there was no evidence to support a cost greater than $2.4 billion, and that the public convenience and necessity was not served at any cost greater than $2.4 billion – as part of the "public negotiations" it could reverse that finding to give MPC more of what the company wanted – in this case half a billion in cost overruns. As the dissenting Commissioner put it, *'In Commission decision making one pole is fixed: that pole is the public interest. It does not get moved in response to the other party's needs."*[33] The Commission and MPC's position that the $480 million was "negotiated" frankly supports the dissenting Commissioner's view that "the only reason the majority has changed its mind in this case is because Mississippi Power . . . insisted."[34] This is not a justification for reversing findings of fact, and renders the Commission's decision irrational.

B. The Commission's Failure to Make Findings of Fact Violates Miss. Code Ann. 77-3-59

The Commission accepts – at least in this Court – that Section 77-3-59 does in fact say what it says, and requires that the Commission's findings be in sufficient detail to

[32] MPC Brief at 36.
[33] FP-P 029821 (emphasis in original).
[34] FP-P 029820.

allow "the court on appeal to determine the controverted questions presented, and the basis of the Commission's conclusion." The Commission then argues that it did supply reasons for its decision that allow the Court to determine the "basis of the Commission's conclusions":

> The second question is: did the orders set forth the basis for the Commission's conclusion? **Yes.** Here the Commission's order analyzed each of the issues, including specific citations to the evidence and reasons for its decision.[35]

This passage in the Commission's brief is notable for one thing: its lack of citation to the Commission's actual decision.

The issue in this appeal is not whether the Commission's orders summarized the factual testimony and arguments of the parties. They did. Indeed, in the April order the Commission made some clear findings on underlying issues, including that Kemper posed risks that could not be countenanced without a $2.4 billion cost cap. What the Commission did not do in either its April or May orders was make findings on future gas prices, the length of a generating solution, and how the conditions it proposed interacted with these key facts that had to underpin any decision on the public convenience and necessity.

The court below even recognized this, expressly finding that "the Commission's orders lacked specific findings concerning the balancing of risks through the conditions it specified as necessary for a certificate of public convenience and necessity to issue . . ." But without a finding on these issues – which is what the whole year long proceeding was about – how can a reviewing court determine "the basis of the Commission's conclusion?"

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[35]Commission Brief at 42 (emphasis in original)

The practical effect of this lack of factual findings on the underlying reasons for the decision is that the attorneys get to speculate, and this speculation is exactly what the Court is getting in the briefing here. In the Court below and in its briefing here Mississippi Power Company states without citation to the Commission's orders that "the Commission also found in its April Order that Kemper's baseload IGCC technology would be the best overall generating alternative to meet MPC's needs over the long term,"[36] "the Commission determined that . . . the Kemper Project provided tremendous benefits to customers and the public as a whole,[37] "the energy benefits provided by the Kemper Project far outweigh the initial capital costs to construct,"[38] "a majority of the Commission intended at all times to approve the Kemper Project, because of the significant benefits that would accrue to MPC's customer, the Nation, the State, and Kemper County,"[39] "the Commission had to find a way to approve the Kemper Project, while adjusting the balance of risk to conform with the requirements of the law,"[40] and so on.

For their part, the Commission's attorneys asserted below that the Court should "infer" that the Commission rejected the Independent Power Producers alternatives as not credible, that the Commission "*ipso facto* stated its preference for a 40 year solution,"[41] that the Commission found Kemper offered "tantalizing benefits," "the numerous benefits of Kemper were well-regarded,"[42] and "the Commission never doubted the

[36] MPC Brief at 9.
[37] MPC Chancery Brief at 10.
[38] *Id.* at 12.
[39] *Id.* at 16.
[40] *Id.*at 18.
[41] Commission Chancery Brief at 27.
[42] *Id.*at 18.

benefits of the Kemper Project as proposed by Mississippi Power."[43] Of course, these statements are not cited to the Commission's orders either.

Where the Commission does actually cite to its orders in the briefing, it actually cites parts of its orders as if the Commission were making findings on contested issues, when in fact the orders are just summarizing the testimony of witnesses or the contentions of the parties. For example, the Commission's attorneys state in their brief that "*[t]he Commission found* the evidence showed at least 13 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, . . . and both direct and indirect economic development . . ."[44] This is cited to page 5 of the Commission's April 2010 order (FP-P 029538).

Yet if the Court goes to page 5 of the April order, it will see that the order states clearly that "*MPC* based its conclusion that the Kemper Project was the best resource option on the following evidence that it presented through its witnesses . . .,"[45] with a 13 point summary of MPC's contentions following. So, what we have here is a summary of MPC's contentions being cited to suggest that these were the Commission's own findings.

This tactic by the Commission is problematic on a number of levels. But as a practical matter what it demonstrates is that the "basis of the Commission's conclusions" being cited in this Court is a bunch of *ipse dixits* by attorneys seeking after the fact to

[43] Commission Brief at 8.
[44] Commission Brief at 6 (emphasis supplied).
[45] FP-P 029538 (emphasis supplied).

support a decision. But if the attorneys have to articulate for the Court what the Commission's basis for its conclusions is, how can the Commission be said to have supplied that information in its findings, as required by both Miss. Code Ann. 77-3-59 and the caselaw?

The legislative mandate in Section 77-3-59 is clear, and must be followed. As set out in the next section, MPC and the Commission bend the Mississippi caselaw far out of shape in an attempt to escape this legislative mandate and meaningful judicial review.

C. The "Ultimate Finding of Fact" Standard is Inconsistent with Miss. Code Ann. 77-3-59

MPC and the Commission assert again that *Mississippi Public Service Commission v. AAA Answerphone*, 372 So.2d 259 (Miss. 1979) stands for the proposition that demonstrating a rational basis in factual findings is merely "good form," but is never required. In fact, they put it rather baldly, arguing that "the Supreme Court has not required an agency's adoption of meaningful findings of fact . . ."[46]

The Commission's reading of *AAA Answerphone* must be rejected because it in fact judicially overrules the legislative enactment in Section 77-3-59. If all that is required of the Commission is a statement that "Kemper meets the public convenience and necessity," how is it possible to be consistent with the requirement of that statute that the Court be able to determine the basis of the decision?

Moreover, the Commission's reading of *AAA Answerphone* sets up a standard of review that is inconsistent with other Mississippi jurisprudence. In this Court's formulation, it is clear that failure to make findings of fact is excused *only* when "the only defect is the tribunal's failure to recite expressly the facts found, but that it otherwise

[46] MPC Chancery Brief at 26.

proceeded upon a correct theory of law, or *where it is manifest that the omission does not impede proper review by the reviewing court." Duckworth v. Miss. State Board of Pharmacy,* 583 So.2d 200, 202 (Miss. 1991) (emphasis supplied). *See also Sierra Club v. Ms. Dep't of Env'l Quality*, 819 So.2d 515 (Miss. 2002) (Commission's order must contain adequate factual findings to allow the reviewing court to determine the basis of an agency's decision); *McGowan v. Ms. State Oil & Gas Board,* 604 So.2d 312, 317 (Miss. 1992) (conclusory statements must be substantiated if they are to be upheld on appeal, because conclusory remarks alone do not equip a court to review the agency's reasoning).

These formulations are different in wording but certainly consistent in intent with the more common formulation in other jurisdictions, which states that the courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974).

AAA Anserphone is not in fact inconsistent with these principles. In that case the Court stated "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." 372 So.2d at 263. Yet it was also clear that the Court in that case was not handicapped by the findings presented, and could determine what the basis of the Commission's conclusions on the controverted issues.

This case clearly demonstrates that the lack of factual findings does impede "proper review by the reviewing court." The Commission's April order found that the Kemper Project did not serve the public convenience and necessity at a cost greater than

$2.4 billion. The Commission's May order found that the Kemper project served the public convenience and necessity at a cost of $2.88 billion. According to the Commission and MPC the Court is now required to search the record and find some rational basis to justify these and other directly opposing findings. If this does not "impede review" it is hard to see what would.

The Sierra Club would also note that the quotes Mississippi Power takes out of context from *AAA Answerphone* and other cases did not involve issues remotely as far-reaching as this proceeding. *AAA Answerphone* involved a proposal to set up a mobile telephone apparatus to broadcast out of Pearl, in a 35 mile radius. Nobody was required to use this service or to pay for it if they did not want to. In 1979 there was very little mobile phone usage. *Mississippi State Board of Nursing v. Wilson*, 624 So.2d 485 (Miss. 1993) involved the revocation of a nurse's license based on allegations of cocaine addiction.

Illinois Central Railroad v. Jackson Ready-Mix Concrete, 137 So.2d 542 (Miss. 1962) actually stated that there was no statute requiring a detailed finding of fact on a railroad rate case. *Illinois Central* in fact cites a now superseded principle to the effect that "[t]he great weight of authority is to the effect that rate-fixing commissions should make an 'ultimate' finding of fact as differentiated from 'detailed' finding of fact." This is of course completely inconsistent with the Court's more current precedent, which admonishes administrative agencies – and particularly the Commission in ratemaking cases – to make sufficient findings of fact. *E.g., Mississippi Power Co. v. Mississippi Public Service Commission*, 291 So.2d 541, 554-55 (Miss. 1974) (admonishing the Commission to evidence its expertise by setting out "cogent reasons" for its decision).

In contrast to the cases cited by MPC and the Commission for the "ultimate fact finding" principle, this case involves a mandated increase in electric rates of at least 33%, and perhaps more, for at least 40 years. It involves tying the hands of hundreds of thousands of captive ratepayers. This case is no *AAA Answerphone*.

The permanent and far reaching character of this decision also demonstrates why MPC and the Commission's attempt to distinguish *Total Environmental Solutions, Inc. v. Mississippi Public Service Commission,* 988 So.2d 372 (Miss. 2008) and *White Cypress Lakes Water, Inc. v. Mississippi Public Service Commission*, 703 So.2d 246, 249 (Miss. 1997) is flawed. The basic argument seems to be that ratemaking cases are more numbers oriented, while certificate cases are more discretionary. This distinction is not made in Section 77-3-59, and it also has no support in the caselaw. *State ex rel. Pittman v. Miss. Pub. Serv. Comm'n,* 538 So.2d 387, 394 (Miss.1989). ("reasonableness of public utility rates is not determined by definite rules and legal formulas, but is a fact question requiring the exercise of sound discretion and independent judgment in each case").

More to the point, rates are not permanent and can always be revisited. Once Kemper has been built, the ratepayers are stuck with it for at least 40 years. Regardless of any protections, if Kemper does not work, or even if it does, the bills of working people are going to go up. This fact clearly dictates more careful decision making, not less.

In short, the Commission and MPC are wrong about both the requirements of Miss. Code Ann. 77-3-59 and this Court's precedent on the adequacy of an administrative decision. If necessary, the Court should clarify the Mississippi caselaw on this point.

D. The Commission's "Parade of Horribles" is Not Persuasive

The Commission and MPC are quick to suggest that the Sierra Club argues for detailed fact findings on every issue raised in 30,000 pages of record. It is certainly true that sticking ratepayers with a 40 year, $2.8 billion commitment that will raise their rates by double digits is deserving of some fairly detailed factual findings on the underlying issues.

But really, this is just what Judge John Brown of the United States Court of Appeals for the Fifth Circuit used to call "parading the horribles."[47] It is a well established principle of administrative law that the courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 286 (1974). Where the record and nature of the decision warrant it, the Court need not require detailed factual findings. This record and this decision, which will burden ratepayers for 40 years and cost billions of dollars, plainly deserve full and transparent fact finding, on the record.

MPC also argues that actually requiring meaningful findings of fact to support a $2.8 billion decision would actually be bad policy, because the Commission has relied on that standard in this case and "thousands of others." According to the Company, "[t]o overrule the ultimate fact finding standard in a case of paramount importance to MPC's customers, the State of Mississippi, and the Nation fillies in the face of traditional common law principles and principles of statutory construction." [48]

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[47] Counsel first became familiar with this rhetorical device through Judge Brown. *E.g. Umanzor v. Lambert,* 782 F.2d 1299, 1306 (5th Cir. 1986)(Brown, J. dissenting). However, subsequent research has shown that the phrase appears in U.S. Supreme Court opinions over 40 times dating back to at least1948, *e.g. Shapiro v. U.S.,* 335 U.S. 1, 53 (1948), as well as in the opinions of various other courts including one Mississippi opinion. *Mississippi Gaming Commission v. Six Electronic Video Gambling Devices,* 792 So.2d 321 (Miss. Ct. App. 2001). The University of Pennsylvania's Language Log website suggests that the term derives from a tradition of including various characters in grotesque costumes in Fourth of July parades. http://languagelog.ldc.upenn.edu/nll/?p=31

[48] MPC Brief at 31.

Of course, the fact of the matter is that the only decision that will be upset by applying the legally and practically correct standard of review in this case, and requiring meaningful findings of fact, is the Kemper decision. And regardless of what risks MPC may have decided to take while this appeal was pending,[49] if the decision to approve that project was not properly taken, the decision should be reversed. The decision whether the ratepayer or MPC bears the consequences of MPC's decision to plow ahead with a project that was not properly approved is one for the Commission to make on remand. It is not a reason for this Court to apply a standard that does not comport with Mississippi law, the law of the rest of the U.S., or good public policy.

As the Sierra Club noted in its opening brief, how is the public know why it is being saddled with the $2.8 billion level of risk on this project? The Commission didn't say why, and the court below didn't say why. Given that the Anderson Table shows that there is a better deal at the $2.8 million price tag, it is hard to find any rational explanation for what the Commission did, and it is hard to imagine why the Commission would not simply provide that rational explanation by making a decision and sticking to it. The Commission deserves deference when it uses its expertise, not when it refuses to do so and uses deference as a shield against having to make hard decisions.

The bottom line is that the Commission's position is that its decision is unreviewable in the courts so long as there is a factual record of some kind. The Sierra

[49] Notably, Mississippi Power goes outside the appellate record to argue that this project is too far down the road to stop. MPC also argues, based on extra-record assertions, that the Sierra Club is simply out to get its project for ideological reasons, such as an unreasoned opposition to fossil fuels. Of course, this kind of *ad hominem* attack is a smokescreen, and irrelevant to the legal issues. Kemper must stand or fall on its own merits, not whether MPC thinks the Sierra Club is being mean for ideological reasons. A fair question to MPC might be, however, how its portrait of the Sierra Club as ideologically anti-fossil fuel squares with the fact that the Sierra Club has recognized in this case that a natural gas fired alternative is the cheaper and less risky alternative.

Club submits that this is not the standard, and that this Court has real authority to review a decision that like the one below has no rational basis.

III. THE COMMISSION'S REVERSAL ON CWIP IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

In the Court below and here the Commission and MPC defended the reversal on the CWIP issues on essentially the same basis as they defended the $480 million: they argued that "rebalancing the risks" was necessary to allow MPC to borrow the money to build Kemper. In other words, the capital markets thought Kemper was just too risky without immediate rate treatment of financing.

This is simply more after the fact reasoning, which is directly contrary to the Commission's factual findings in April. Here is what the Commission said in April:

> The strength of the national economy; the availability of capital and its cost generally; the financial community's perceptions of the utility industry, of Southern Company generally, and of MPC's operations other than Kemper – all these factors will affect the necessity and desirability of CWIP. Committing ratepayer dollars to CWIP, without regard for these changing factors, **would lack a basis in substantial evidence** and would not be just and reasonable. [50]

The Commission did not in its May decision, and does not here, cite any new information on the strength of the national economy, the availability of capital, the financial community's perceptions of the utility industry, or MPC's operations other than Kemper. It does not cite any now. Instead it argues that the testimony of MPC's witnesses established that CWIP was necessary in order to protect the Company's credit rating.

In fact, the Commission quotes Mississippi Power, which argues that the real reason to do this was that if the Commission did not, the credit markets might take it the wrong way. As MPC put it, "[q]ualitative measures (i.e. regulatory support in the form

[50] FP-P 029573-74 (emphasis supplied).

of cost recovery) have just as much impact on MPC's credit rating."[51] In effect, MPC threatened the Commission that if it did not give MPC what it wanted, the credit markets would not lend the money for Kemper. The Commission now touts this threat as a basis for its decision to grant CWIP without the information the Commission previously said was necessary for the decision. This circular reasoning – that is, we can't build Kemper without CWIP, and therefore we must have CWIP whether there is proof to support it or not – is the essence of irrational decision making.

MPC also argues that CWIP will save the ratepayer money. But if the factual underpinning for the CWIP decision is not there – and the Commission itself said that it was not – how can a decision to grant CWIP be rational?

For all the reasons set out above, the reversal on CWIP must be overturned, because the Commission failed to provide any reasoned explanation for its reversal. It was simply another concession to allow MPC to finance a project that the capital markets considered too risky for traditional utility financing.

IV. THE COMMISSION ERRED IN ALLOWING MPC TO MAKE RATE IMPACTS CONFIDENTIAL AND REFUSING TO PROVIDE INFORMATION

As the Sierra Club noted in its opening brief, the Commission permitted MPC to designate all of the rate impacts of the Kemper plant as confidential. The Commission now argues – for the first time ever – that the Sierra Club should have filed an open records act request for the information that MPC either refused to produce or designated as confidential. The Commission again argues that the whole question is moot due to a change in the Commission's rules.

[51] Commision Brief at 37, quoting MPC at FP-P29632.

First of all, there is nothing in the Commission's rules that states that the Commission could not rule on an overly broad or abusive designation of confidentiality. The Commission's attempts to blame the Sierra Club for the Commission's own failure to run an open and transparent proceeding, and protect the ratepayers also finds no support in the Open Records Act. There is nothing in the statutes which requires an intervenor in a Commission proceeding to resort to extra-Commission statutes, subpoenas or other devices in order to obtain information that ought to be freely available as an intervenor with full rights in the proceeding.

It bears repeating that the Commission did not hold a hearing on the Sierra Club's motion, nor did it even issue a decision. It abdicated its decision-making authority, and left the choice of what would be supplied to the public and the Sierra Club up to Mississippi Power Company. This is the functional equivalent of a judge refusing to even hear a motion filed by a litigant, and allowing the opposing party to simply decide that information would be provided or not. This was a fundamental failure of process on the part of the agency, and trying to blame the Sierra Club for the Commission's own failing should not be countenanced.

The Commission is, as it frequently reminds us all here, an independent agency of state government. If the Commission wanted to act responsibly to make sure that the ratepayers had all the information about the project they were being saddled with, it could have done so.

The Sierra Club further notes that the rate information is still confidential. The new rule has made no difference whatsoever in that fact. It is within the Court's jurisdiction to instruct the Commission as to the proper means of proceeding, just as the

Mississippi Supreme Court has in the past. *E.g. White Cypress Lakes,* 703 So.2d at 249-50 (instructing Commission to make adequate findings on remand).

CONCLUSION

For the reasons set out above and in the previous briefing, the Sierra Club submits that the proper course in a matter of this nature is for the Court to vacate the decision of the Commission and the underlying certificate of public convenience and necessity, and remand the matter to the Commission for further action in accordance with its opinion.

This the 8th day of July, 2011.

Respectfully submitted,
MISSISSIPPI CHAPTER SIERRA CLUB

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CERTIFICATE OF SERVICE

I, the undersigned, Robert B. Wiygul, of counsel to the Appellant, do hereby certify that I have this day emailed and/or mailed a correct copy by U.S. Mail, postage prepaid, of the REPLY BRIEF to:

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This the 8th day of July, 2011.

_____
Robert B. Wiygul

CERTIFICATE OF SERVICE ON TRIAL JUDGE

I, Robert B. Wiygul, counsel of record to the Appellant, do hereby certify that I have this day filed a copy of the foregoing APPELLANT'S REPLY BRIEF by U.S. Mail with postage prepaid on the following person at this address:

Judge Jim Persons
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This the 8th day of July, 2011.

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SIERRA CLUB **APPELLANT**

V. **CASE NO.: 2011-CA-00350**

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

I hereby certify that on this date, July 8, 2011, I will place the original and four (4) copies of the Reply Brief of Appellant in the captioned matter in the United States Mail, first class postage prepaid.

Maile Nguyen