2011-CA-00350 T

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Sierra Club
2. Robert B. Wiygul, Attorney for Sierra Club
3. Mississippi Public Service Commission
4. Shawn Shurden, Attorney for Mississippi Public Service Commission
5. Mississippi Power Company, Inc.
6. Ben H. Stone, Attorney for Mississippi Power Company, Inc.
7. Christopher Lomax, Office of the Attorney General

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STATEMENT OF ISSUES ON APPEAL

1. Miss. Code Ann. 77-3-59 mandates that all findings of the Public Service Commission "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**"(emphasis supplied). The court below found that, with respect to Mississippi Power Company's proposed $2.8 billion Kemper power plant, " 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 . . . " [1] Was it legal error for the court below to nonetheless find that the existence of a voluminous factual record meant that the Commission's findings could not be reversed, despite the lack of specific findings on the key issue in its decision?

2. Did the court below err in stating, without any specific references to the record, that the record supported the decision to issue a certificate for the $2.88 billion Kemper Power Plant and allow a 20% cost overrun, when Mississippi Power's own testimony showed that with a 20% cost overrun there was a cheaper alternative for ratepayers?

3. Did the court below apply an incorrect legal standard in accepting Mississippi Power Company's argument that the Public Service Commission need only make an "ultimate fact finding" in the form of a statement that the relevant statutory standard had been met, without making any underlying findings of fact on the record?

4. Did the Court below err in finding that the testimony of Dr. Craig Roach supported the Commission's finding that Mississippi Power could be granted an additional $480 million in cost overruns on the Kemper Plant and the plant would still be the best deal for

[1] R. Ex. 2, pp 19-20.

the ratepayer, when Dr. Roach's testimony in fact said nothing of the kind, and when Mississippi Power's own evidence demonstrated that a $480 million cost overrun would make a natural gas fired power plant a better alternative for the ratepayer?

5. Whether the Court below erred by taking on the role of finder of fact, since it both stated that the Commission's orders "lacked specific findings concerning the balancing of risks it specified as necessary for a certificate of public convenience and necessity to issue," and also stated, without reference to any specific part of the record, that "the Commission's findings . . . adequately address the risks to ratepayers."

6. Whether it was arbitrary and capricious for the PSC to allow MPC early recovery of costs, without having before it any of the factual evidence the Commission had previously stated was necessary for a decision.

7. Whether the Public Service Commission erred in failing to rule on a request that the rate impacts of the Kemper plant and other information be made public during the course of the proceeding at the PSC.

STATEMENT OF THE CASE

I. NATURE OF THE CASE AND PROCEEDINGS BELOW

A. The Public Service Commission's Decision and Reversal of that Decision on the Kemper Power Plant

This appeal is from the decision of a divided Mississippi Public Service Commission to grant a certificate of public convenience and necessity (the "Certificate") to MPC's proposed Kemper County lignite-fired electric generating facility ("the Kemper plant" or sometimes just "Kemper").[2] The Commission's split decision was originally appealed to the Chancery Court of Harrison County, Mississippi, under the terms of Miss. Code Ann. 77-3-67.

The Kemper plant is one of the most expensive single projects of any kind ever to be built in the state of Mississippi. As of December 2009 Mississippi Power estimated the price tag at $2.7 billion dollars, not including a number of other necessary capital costs.[3] Although federal subsidies could reduce the capital cost by about $300 million, according to the evidence at the hearing, building Kemper will raise power bills in Mississippi Power's service area by as much as 45%.[4] Under the Mississippi statute called the Baseload Act, the ratepayer will have to start footing the bill before the plant produces one bit of electricity. This plant will very quickly become "too big to fail," as the dissenting commissioner put it.

As the Commission itself found, Kemper is also is a risky proposition for

[2] As the court is aware, the very professional work of the Public Service Commission staff has allowed the record in this matter to be submitted in digital form. The citations in this brief are primarily to two of the composite digital files in the Commission record, the Final Pleadings File – Public, and the Final Transcript – Public. These are abbreviated to "FP-P" and "Commission Tr." respectively. The documents required by the appellate rules, as well as a few key documents from the Commission records, are included the Record Excerpts submitted with this brief. These are generally referenced in the brief as "R. Ex." The transcript of the hearing in the Chancery Court is referenced as "Chancery Tr."

[3] FP-P 023436.

[4] Response to Entegra Data Request 3-3a (designated confidential).

environmental and financial reasons. The plant's $2.7 billion cost estimate assumes that everything goes exactly according to plan, and that costs do not increase. Yet at the time of Commission approval, no more than 10% of the construction cost of the plant was actually fixed.[5] Moreover, the plant's economic projections depend on multiple controversial predictions regarding the future price of natural gas, whether carbon dioxide (CO2) emissions are taxed, whether there is a market for captured CO2, the cost for mining lignite, and maintenance costs for the plant. Committing the ratepayer to the enormous capital cost of Kemper effectively eliminates the opportunity to respond to changing conditions later.

After considering a year's worth of evidence from a range of interested parties, in an April 29, 2010 order, all three Commissioners found that – in the Commission's own words - there was *no evidence* to support a finding that Kemper, in the form proposed by MPC would serve the public convenience and necessity.[6]

Two commissioners went on to find, however, that Kemper could be approved if Mississippi Power committed to cap expenditures for construction costs at $2.4 billion.[7] However, in finding that the plant should be approved at a cost of $2.4 billion, the two Commissioners did not make the necessary underlying factual findings on likely natural gas prices or other risks associated with the Kemper plant.

The two Commissioners also denied MPC's request for early recovery of costs under the statute called the Baseload Act, finding that MPC failed to provide adequate information to allow a decision.[8]

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[5] Commission Tr. 1138.
[6] FP-P 029535.
[7] FP-P 029664.
[8] FP-P 029573.

Commissioner Brandon Presley dissented from the decision to permit Kemper. In his dissent, Commissioner Presley detailed the reasons that the evidence did not support building the Kemper plant at all, at any cost or under any rate regime.[9]

On May 26, 2010, less than one month after the initial order, the two Commissioners in the majority reversed themselves at the request of Mississippi Power, and without any new evidence, allowed Mississippi Power an additional 20% cost overrun, or *four hundred eighty million dollars* ($480,000,000) on the Kemper plant.[10]

In addition, without any new evidence, the two commissioners also allowed the Company to pass on financing costs beginning in 2012, before the plant is even completed.[11] Commissioner Brandon Presley again dissented.[12]

B. The Chancery Court's Decision

After some initial procedural wrangling over whether this Court had exclusive jurisdiction, the Sierra Club's appeal proceeded in the Chancery Court for Harrison County. A briefing schedule was set, and oral argument was held on February 14, 2011.

On February 28, 2011, the Chancery Court issued its decision. The lower court recounted the factual background of the matter as set out in the Commission's orders, and the factual reversals between the April and May orders. As set out in more detail later in this brief, the court below found that the Commission did not make any specific findings to support its decision that the Kemper Plant was best for ratepayers, but that the decision nonetheless had to be upheld because the Commission had compiled a large factual record. This appeal followed from that decision.

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[9] FP-P 029585, et seq.
[10] FP-P 029794.
[11] FP-P 029802-03.
[12] FP-P 029820.

II. FACTUAL BACKGROUND RELEVANT TO THE ISSUES PRESENTED

A. The Proposed Kemper Plant

On January 16, 2009, Mississippi Power filed its Petition with the Public Service Commission seeking a certificate of public convenience and necessity for a 582 MW Integrated Gasification Combined Cycle ("IGCC") power plant to be located in Kemper County, Mississippi.[13] The Kemper plant consists of two major systems: (1) a gasification island that would manufacture synthesis gas, CO_2, ammonia and sulfuric acid, using lignite, and (2) a combined cycle unit that generates electricity fueled by either the synthesis gas or natural gas.[14] No plant of this kind and scale has ever been built in the U.S.[15]

The Kemper plant proposes to use lignite from a 12 square mile strip mine located adjacent to the plant.[16] The plant would be a demonstration project for a new type of Integrated Combined Cycle Gasification (IGCC) technology called "TRIG," never before used at a commercial scale.[17] In essence, the technology would take large amounts of extremely low heating value lignite and turn it into a gas, which is then used to power a combined cycle turbine, which in turn powers a generator.[18]

Mississippi Power contends that it will capture the majority of the carbon dioxide associated with the burning of the gasified lignite, and claims that it would sell the CO2 to unidentified oil companies who would then sequester it in unidentified geological formations as part of an "enhanced oil recovery" process.[19] The revenues

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[13] FP-P 000010.
[14] Commission Tr. 1252.
[15] *E.g.*, Commission Tr. 1216-17.
[16] Commission Tr. 1203.
[17] Commission Tr. 1216-17.
[18] FP-P 002375-77.
[19] Commission Tr. 1332-35; FP-P 000010-11.

from these so-called "byproduct sales" are critical to the finances of the plant, with a predicted net present value of $787-850 million.[20]

The Kemper plant itself will produce about 820 megawatts of power. However, not all of that will go to customers. Only 582 MW (71%) will be available to ratepayers and 237 MW (29%) will be needed to run the various parts of the plant, including the equipment to capture CO2.[21]

B. The Commission Hearings

1. *MPC Argues That Kemper Cannot Be Built If the Certificate Is Not Issued by August 2009*

Mississippi Power Company initially submitted an order to the Public Service Commission insisting that a hearing on the Kemper plant be held in June, 2009, and with a final order issued in August, 2009.[22] In a March 5, 2009 letter, the attorneys for the Company reiterated this demand. According to this letter, if the Commission did not approve Kemper on the schedule MPC demanded, the Company could not commit to purchases of major pieces of equipment, which would lead to higher costs and result in the loss of over $100 million in federal investment tax credits.[23] Mississippi Power sounded a similar theme throughout the hearing process in the PSC, arguing that Kemper was not financially feasible without federal subsidies comprising about 10% of the capital cost of the project.[24]

The Commission did not accept MPC's schedule, but set out a schedule providing for exchange of information, submission of testimony, and several weeks of hearings.

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[20] FP-P 02834.
[21] Commission Tr. 1254-1256.
[22] This order does not appear to be in the record.
[23] FP-P 001300.
[24] *E.g.* Commission Tr. 560 ("highly unlikely" that project would move forward without federal funding).

The Commission established a hearing schedule that divided the hearings into two phases, the first addressing need for generation capacity, and the second addressing how that need could potentially be met.

2. *The Phase I Hearing on Need*

Phase I was held on October 5-9, 2009, with the following defined purpose:

> In Phase One, the Commission will establish a reasonable range of forecasts of customer load and a census of existing and likely resources. The Commission also will take into account the likely results of demand-side initiatives (e.g., rate design and energy efficiency programs) currently in place. At the close of Phase One, the Commission will determine whether there will exist a gap between forecasted load and resources, and if so, when that gap will appear. If a need is determined in Phase One, the Commission will proceed to Phase Two.[25]

By order dated November 9, 2009, the Commission found that Mississippi Power had shown that there would be a need for additional generating capacity in 2014 ranging from 304 to 1276 megawatts. The need would arise primarily from Mississippi Power's decision to retire some old natural gas fired generation facilities, and the possibility that some other coal fired generation facilities might be retired due to new pollution restrictions.[26]

It is important to understand that the PSC did ***not*** find that the lights would go out somewhere if additional power plants were not built by 2014. Mississippi and adjacent states have plenty of capacity to generate electricity, and power can be readily purchased on the open market through short or longer term contracts.[27]

The Commission's Phase I finding is not at issue in this appeal.

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[25] FP-P 011305.
[26] FP-P 018997.
[27] *E.g.*, FP-P 014806, 023823-24.

3. *The Phase II Hearing on the Means Available to Meet the Need*

Based on its Phase I finding, the Commission went on to hold Phase II of the proceeding, to assess ways – including Kemper – to meet that need.

The Commission identified the purpose of Phase II as follows:

> Phase Two will address what resources are available to meet the need determined in Phase One, and what are the likely costs of those resources. Resources include, but are not limited to, utility-built resources, purchased power (including power purchased through competitive bidding), and demand-side resources. Parties may propose alternatives to meet the need established in Phase One.[28]

The Phase II hearing was held on February 1-5, 2010. Significant parts of the hearing – including those dealing with rate impacts - were designated confidential and closed to the public.[29]

One of the Commission's consultants rather aptly framed the possible outcomes of the Phase II hearing as "Kemper now, Kemper maybe, Kemper never."[30] The Kemper proposal's financial feasibility and comparison to alternatives is dependent on a large number of major economic and technical assumptions which are unique to the project, and each of which presents its own risks. By contrast, purchase power agreements or a self-build natural gas option are subject to one main variable: natural gas prices. This aspect of the hearing was summed up by Dr. Craig Roach, a utility expert hired by the Commission to assist it as an Independent Evaluator of the issues in the Kemper proceeding, ". . . what you're doing if you build Kemper, you're just legitimately making a bet that natural gas prices will be above a certain level. If they

[28] FP-P 019101.
[29] *E.g.*, Commission Tr. 364-402.
[30] Commission Tr. 1839.

don't turn out to be that way, then rates could be higher than they would have been had you stuck with gas."[31]

The key factual issues in the hearing revolved around these issues of fuel cost, operational reliability, and other costs. These included different projections regarding natural gas prices,[32] different alternatives be compared using different scenarios for future carbon emission costs[33] The capital cost of Kemper versus other, less risky alternatives was a key issue. Sub-issues under this heading included whether MPC would make any commitments regarding the cost of the Kemper plant, whether MPC had firm commitments for the cost of key items, and whether ratepayers should receive protection from cost increases.

As part of the Phase II hearing process, the Commission invited other parties to submit proposals to supply the electric generation need identified in Phase I. These proposals were to be submitted less than one month later, on December 7, 2009.[34] Despite the short time frame, three bids were submitted by the operators of independent natural gas powered generating plants.[35]

As part of the hearing preparation process, the parties carried out document and data exchanges. At the insistence of Mississippi Power Company, the Commission designated the information regarding the actual rate impacts of the Kemper plant as confidential.[36] The Sierra Club moved to have this information made public, but the Public Service Commission never took any action on this motion.[37] As a consequence,

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[31] Commission Tr. 1603.
[32] FP-P 019018.
[33] FP-P 019018.
[34] FP-P 019017.
[35] FP-P 024092, 24753, 24854.
[36] MPC Reponse to Integra Data Request 4-4a (filed confidentially).
[37] FP-P 18948.

the very persons who will have to pay for the Kemper plant have never been told the actual rate impacts of the plant. This Commission failure prevented the public from fully participating or being informed of the impacts of the Kemper plant.

Dr. Roach, the Commission's independent evaluator, prepared comparisons of the Kemper plant and the proposals submitted by other parties. Understanding Dr. Roach's analyses, and what they did and did not cover, is critical to this appeal. Dr. Roach's testimony at pages 1882-89 of the PSC Phase II hearing transcript is the sole support cited by the Commission for allowing Mississippi Power an extra $480 million in cost overruns, when there was, according to Mississippi Power's own testimony in the Anderson table, a cheaper option available.

Dr. Roach supplied a report evaluating the relative costs of bid submissions of the Independent Power Producers and the Kemper plant considering differing combinations of natural gas prices, CO2 prices, and possible strategic preferences by the Commission.[38] Dr. Roach's report made it clear that evaluating the Kemper proposal against alternatives would require that the Commission make strategic choices. For example, "[t]here is no analytic or business reason to require all options to offer a forty-year solution. The 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."[39]

[38] FP-P 28912; R. Ex. 4.
[39] FP-P 28148 – 28190.

The comparisons of Kemper and the proposals submitted by the Independent Power Producers were summarized in a series of 29 tables.[40] Dr. Roach *did not* compare the Kemper plant to the option of having Mississippi Power itself build a natural gas fired power plant. As we have noted, Mississippi Power itself prepared a comparison of the Kemper plant to the "self-build option" and determined that at a 20% cost overrun – the same size overrun that the Commission approved after reversing its initial decision – *the Kemper plant was the worst choice for the ratepayer in the most likely future scenarios.*

Dr. Roach also recommended strongly that, if the Commission approves the Kemper project, it should include a requirement of performance guarantees in the certificate. Dr. Roach also pointed out that the need for performance guarantees was greatly increased by the use of the Baseload Act, which committed ratepayers to pay for a plant before it was ever completed, and before the actual costs could be determined to be prudent in the context of the construction of the entire plant:

> Moreover, the need for and appropriateness of these pay-for performance tools is increased by the approach to prudence review taken in the Baseload Act . . .with the Baseload Act there is pre-approval of construction expenditures in the sense that the Commission is asked to judge prudence before the expenditure is made and before the plant is in commercial service. [41]

4. *Primary Issues at the Phase II Hearing*

Ultimately, all of the factual issues cited above and addressed in Phase II of the Kemper proceeding can be distilled into three key questions:

(1) How much would it cost to build Kemper, and would Mississippi Power commit that those construction costs would not exceed the company's projections?

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[40] R. Ex. 4
[41] FP-P 028935, R. Ex. 4, p.20

(2) Beyond construction costs, what were the other financial and operational risks associated with the Kemper plant?

(3) What would it cost to use other, less risky, alternative sources, like natural gas, to generate electricity?

5. *How Much Would It Cost to Build Kemper?*

Testimony showed that, for a project of this size, surprisingly few budget components were firm, and the cost estimates have been steadily increasing. MPC warned that the Commission must approve Kemper exactly as proposed, including preconstruction costs and without any cost caps, or it could not be built.

MPC confirmed at the hearing that only 10% of the current estimated $2.695 billion construction costs for Kemper was "known." According to MPC: "[a]nd to date, we have about 10% of our cost estimate in that known cost area."[42] In particular, only 10% of the cost could be categorized as "known costs" because the costs were either based on a contract, a letter of intent or memorandum of understanding, or have actually gone out to various competing vendors and have received bids back.[43] Thus, the remaining 90% of the costs were unknown in that they remained based on estimates and unconfirmed.

MPC also confirmed at the hearing that it had not started detailed design for the construction of the gasification island as yet. According to MPC: ". . . we do not have hardly any of the detailed design done."[44] MPC stated that the only thing it started is detailed design on the very early phases of the site work.[45] MPC confirmed that the

[42] Commission Tr. 1138.
[43] Commission Tr. 1138.
[44] Commission Tr. 1268.
[45] Commission Tr. 1270.

company does plan to, at some point, do detailed designs and then it will go to the contractors and ask for specific prices based on the detailed designs.[46]

The evidence showed that the cost of the Kemper plant has been climbing ever since it was proposed four years ago. In 2006, when Mississippi Power originally conceived the plan to build the Kemper plant, it believed the cost would be $1.1 billion. When Mississippi Power applied for a Certificate for the Kemper County IGCC plant in 2009, it stated that the cost of the plant would be approximately $2.5 billion. This estimate was close to twice the value of the generating facilities owned by Mississippi Power, and would make the Kemper Plant among the most expensive generating facility ever proposed in Mississippi, or just about anywhere else for that matter. However, less than a year later, the estimate ballooned again to $2.695 billion.[47]

Remarkably enough, the $2.695 billion Kemper capital cost estimate did not even include the full costs of owning and operating the plant. It does not include the capital costs of owning the lignite mine;[48] capital expenditures budgeted for post-construction to improve performance of the plant;[49] $354 million of ratepayer financing that will be recovered during the plant construction;[50] or the undetermined costs of a CO_2 pipeline that MPC is considering adding to the project.[51]

Even at the cost Mississippi Power presented, it was clear that the Kemper Plant would cost about four times as much as a natural gas fired alternative.[52]

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[46] Commission Tr. 1270.
[47] FP-P 023436.
[48] Commission Tr. 1239, 1352 (confidential section).
[49] Commission Tr. 1258.
[50] MPC response to Entegra Data Request 4-6; MPC includes these costs in its economic analysis but not in its list of capital costs.
[51] Commission Tr. 1241-1242.
[52] Commission Tr. 120.

Although Kemper's cost estimate had already increased several times, Mississippi Power argued that the risk of cost overruns from the current projection was "unlikely and comparatively insignificant" because it has considerable expertise in building power plants, the Company had performed a front end engineering and design ("FEED") study, and it has included contingency amounts in the project estimates.[53] However, Sierra Club expert witness Dr. David Schlissel confirmed that Duke Power and Appalachian Power, both similarly large and sophisticated companies, have experienced massive inflation in coal fired power plant projects.[54] Dr. Roach testified he did not believe any engineering company would state that a FEED study was "better than 10% accurate."[55] By contrast, Mississippi Power could not provide an accuracy range, or margin of error, for its estimates.[56]

The evidence also showed that MPC plans to use an MPC affiliate contractor to construct Kemper. If MPC chose to employ an independent contractor to build the plant, the contractor could be held to performance objectives. Instead, MPC's customers miss the protections associated with an independent contractor, and also those associated with having an independent engineer. [57]

Mississippi Power's witnesses stated repeatedly at the Phase II hearing that the Company could not provide any guarantee that the Kemper IGCC plant could be built for the Company's estimate of $2.7 billion, or indeed any larger number. The Company stated that any limit on capital costs would be "harmful to our customers," because it

[53] *E.g.*, Commission Tr. 1140, 1144.
[54] FP-P 023857, et seq.
[55] Commission Tr. 1195.
[56] Commission Tr. 1145-46.
[57] FP-P 028937, R. Ex. 4, p.22

would cause credit rating agencies to downgrade the Company's debt.[58] Thus, according to the Company, the rating agencies would downgrade the Company's debt simply because the Company had taken on the risk of capital cost overruns. At the same time, Mississippi Power told the Commission that the risk of overruns was an "unlikely and comparatively insignificant risk" and the Commission should not be concerned about placing it on the ratepayers.[59] Mississippi Power thus asked the Commission to second-guess the rating agencies and the capital markets, and find that capital cost risks too dangerous for the Company to bear should be placed on the shoulders of the ratepayers. In fact, the rating agencies downgraded Mississippi Power's debt anyway, based on the risk that this enormous project posed for the company.

6. *How Did Kemper Compare to Other Less Risky Options?*

Mississippi Power did not consider the option of buying power on the open market or purchasing an existing gas fired power plant as a comparison for the Kemper plant, arguing that these methods would not meet the company's objectives. Indeed, MPC's treatment of the Independent Power producers who submitted bids was rather adversarial, arguing that they would leave the customers swinging in the breeze at the first sign of trouble.[60] Instead, MPC used a "self-build natural gas fired option," in which the company projected that instead of building Kemper it would build a natural gas fired turbine plant of generally the same size.[61]

As noted in the statement of the case, Thomas Anderson, MPC's vice president for generation development, testified about the point at which capital cost increases

[58] Commission Tr. 1200, 1461.
[59] This testimony appears in a confidential portion of the transcript of Phase II, Day 2. The citation will be supplied when it is available.
[60] *E.g.*, Commission Tr. 1456-57 (IPP bids "myths," "fiction").
[61] FP-P 024464 (comparing self-build combined cycle to Kemper).

would make the Kemper plant more expensive than the less risky natural gas powered alternative. The "Anderson Table" – reproduced on the following page - is a critical piece of testimony, and should be examined carefully.

What the table shows is 16 possible future combinations of two variables that are important to determining the best way to generate electricity: the price of natural gas, and the cost of emitting a ton of carbon dioxide, a greenhouse gas pollutant which all parties agreed is likely to be regulated in some fashion. The vertical axis of the table is the price of natural gas, and the horizontal axis is the future cost – whether through a tax or some other penalty - for emitting a ton of carbon dioxide. For example, the cell with the numbers "$180" and "8%" appears at the junction of the "MOD" row and "$10 CO2" column of the table. This cell represents a set of future circumstances in which the price of natural gas is in the moderate range, and the cost to emit a ton of CO2 is $10.

The "$180" in this cell represents the capital cost overrun in millions of dollars that makes the Kemper project – according to Mississippi Power's own projections – equivalent to the alternative of building the less risky natural gas fired power plant. The "8%" represents the percentage of the projected Kemper budget the $180 million cost overrun represents. Thus, this cell in the table means that MPC projects that in a future in which gas prices are moderate, and there is a $10 penalty for emitting CO2, a $180 million capital cost overrun, or 8% of the total construction budget, will make the Kemper project equivalent to the less risky natural gas alternative. At any cost overrun greater than $180 million or 8%, Kemper becomes more expensive for the ratepayer than the less risky natural gas alternative.

In addition, MPC Witness David Schmidt testified that the $10 and $20 CO2

scenarios, and the moderate and moderate with volatility gas scenarios, are qualitatively most likely to occur.[62] Thus, at least in the Company's view, the middle 4 cells presented in this 16 cell table – those outlined in heavy blue in the table as reproduced below - are the highest probability scenarios. Thus, in the most likely scenarios according to MPC, cost overruns in excess of 4-15% turn the Kemper project into a loser based on cost.

Figure 1 Capital Cost Sensitivity of Kemper IGCC versus
Natural Gas Combined Cycle Self-Build Alternative

	$0 CO2	**$10 CO2**	**$20 CO2**	**$30 CO2**
HIGH	**$ 920** **38%**	**$ 550** **23%**	**$ 660** **28%**	**$ 820** **34%**
VOL	**$ 490** **20%**	**$ 330** **14%**	**$ 370** **15%**	**$ 450** **19%**
MOD	**$320** **13%**	**$ 180** **8%**	**$ 90** **4%**	**$ 210** **9%**
LOW	**($ 20)** **(1%)**	**($ 140)** **(6%)**	**($ 170)** **(7%)**	**($ 110)** **(5%)**

[63]

Notably, Mr. Anderson's comparison takes into account capital cost overruns only, and does not take into account the possibility of shortfalls in byproduct revenues and the like. If even one of these assumptions proves false – for example, if MPC fails to realize the projected $787-850 million in byproduct sales, Kemper will become even

[62] FP-P 022659-60; R. Ex. 8.
[63] R. 026464 (red shading and blue borders added); R. Ex. 3.

more uneconomic.

Thus, the Anderson table shows any cost overrun greater than 4-15% – *even assuming every other financial projection associated with the project is correct* – would make Kemper a worse choice than the natural gas alternative in what MPC itself considers to be the most likely future scenarios. As explained below, the Anderson table figured prominently in the two Commissioner's first decision, but inexplicably was not mentioned at all in their second decision, which allocated another $480 million to Mississippi Power. Likewise, the Anderson table was never mentioned in the Chancery Court's decision.

Several other points regarding Kemper's comparison with natural gas options are important. First, MPC natural gas costs projections were biased high. MPC's claim that the natural gas self build option was much riskier than Kemper was fundamentally based on the idea that natural gas prices will rise consistently and steeply for forty years into the future, and this posed a grave risk to MPC's customers. To the contrary, there was ample evidence that natural gas supplies will remain plentiful, and prices will remain substantially lower than those projected by Mississippi Power or the Southern Companies.[64] Even Christopher Ross, who testified on behalf of Mississippi Power, agrees that "shale gas has potentially changed the landscape for natural gas in the U.S. in the short term."[65] While uncertainties remain about gas prices, as with any other future event, will remain, the evidence is strong that natural gas supplies will remain reasonable for some years.

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[64] *E.g.* FP-P 023845; (Southern Company's estimate substantially higher than AEO or NYMEX); Commission Tr. 304 ("the basic supply picture is firming up as one of a steady supply that we know is going to be available in reasonable quantities at reasonable costs, probably for a longer period of time than the market has expected prior to now.").

[65] FP-P 023759.

Second, the evidence showed that cost overruns are common in the industry. The evidence at the Phase II hearing demonstrated that cost overruns in the 10-20% range are foreseeable and indeed probable. First, Sierra Club witness David Schlissel's direct testimony demonstrated that costs have soared even in the period of a few months in recent power plant proceedings. Dr. Schlissel cited cost estimates that have increased by 80 percent over a year's time. Dr. Schlissel also noted the Virginia Corporation Commission recently refused to approve an IGCC plant because the cost estimate for the project was not credible. *Id.*[66] Dr. Craig Roach, the Commission's consultant, noted in his testimony at the hearing that cost increases of 10-20% were in his judgment "fairly probable" increases.[67]

The testimony below also included the fact that Entergy, a Louisiana based power company that also operates in Mississippi, recently, suspended work on a project to convert a Louisiana power plant to coal because it was unlikely that natural gas prices would be sustained in the $9-10 range needed for the project to make economic sense. Entergy also advised the Louisiana Public Service Commission that natural gas power technology is the only safe bet right now because it is highly efficient and can function in multiple supply roles including peaking, load following, and also baseload if gas prices stay low.[68]

In short, MPC's own testimony showed that with cost overruns far below 20%, Kemper was not competitive with the natural gas generation option. Moreover, the evidence showed that cost overruns were quite likely. These facts were later cited by the Public Service Commission in its initial order on the Kemper plant.

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[66] FP-P 023859.
[67] Commission Tr. 1888.
[68] FP-P 015269.

7. *What Are the Risks of Kemper Beyond Capital Costs and Natural Gas Prices?*

Among the major risks associated with the Kemper plant is that it would be the first full-scale plant to incorporate TRIG gasifiers and other key technologies. Even a study for Mississippi Power identified the risk that all of the systems would not work well together as severe and with some likelihood of occurrence.[69] The cost estimate also contains considerable uncertainty regarding: ash storage costs, lignite-lease costs, byproduct revenues, mine operating costs, rights-of-ways, and transmission lines.

For example, MPC's cost estimates for its lignite fuel supply are uncertain because they are based substantially on estimates and not on locked-in lignite and land leases. MPC has finalized lignite leases for only about 50% of the 40 year lignite supply needed for operation of Kemper. In particular, MPC has secured leases for only about 5,000 acres out of the 10,000 acres that it will need to mine the lignite. Moreover, MPC has only locked-in leases for somewhere between 50-80% of the additional 20,000 acres that will be needed for the related mining activities, such as haul roads and maintenance roads.[70] MPC confirmed that if the additional half of the lignite leases end up costing more than the Company's cost estimates, then the expense would be passed on to the ratepayers.[71]

C. Mississippi Power Proposes That It Be Guaranteed an Additional $1 Billion above Its Cost Estimate

In Commission-ordered post-hearing briefing, Mississippi Power Company abandoned its repeated testimony that the credit markets would not allow the Company to take any of the risk of capital cost overruns. Instead, the Company proposed that the

[69] FP-P 002434.
[70] Commission Tr. 1248-1249.
[71] Commission Tr. 1251.

Commission allow it to exceed its cost estimate by as much as 33%, or $1 billion.[72] Mississippi Power further requested full CWIP financing on the project immediately.[73]

The Sierra Club adopted the Independent Evaluator's proposal that, if a Certificate were granted, the Commission should impose a hard cap on the cost of the plant.[74] As the Sierra Club noted in briefing, in the majority of forecasts a 20% cost overrun – let alone a 33% overrun - would make the Kemper plant more expensive for ratepayers than if Mississippi Power built a natural gas fired plant. Simply contracting for power from one of the existing gas-fired power plants, or purchasing an existing plant, would in fact be even cheaper in many scenarios.

D. A Unanimous Commission Finds Kemper as Proposed Does Not Serve the Public Convenience and Necessity

In an order dated April 29, 2010, the Commission unanimously found that the Kemper County IGCC plant, as proposed by Mississippi Power Company, did *not* serve the public convenience and necessity. The entire opinion commanded the votes of only two commissioners, Commissioners Bentz and Posey.[75] As explained below, Commissioner Presley wrote a separate concurrence and partial dissent.

The Commission's order begins with a description of the project, recounting of the Phase I and Phase II hearing process, and a description of the law granting the Commission jurisdiction.[76] Section V of the April 29 order, titled Scenarios, Factors and

[72] FP-P 029568 (description of MPCO proposal).
[73] FP-P 029272.
[74] FP-P 029378-79.
[75] FP-P 029534.
[76] FP-P 029536 – 029552.

Assumptions, summarizes Mississippi Power's contentions and modeling exercises regarding the Kemper proposal.[77]

Section VI, titled "Consideration of Alternatives to Kemper IGCC Project" contains a number of significant findings. First, while finding that MPC cannot meet its entire projected need for generation capacity through additional demand side management measures, the Commission expressly disclaimed any finding that MPC's measures in this area were adequate, or that additional energy efficiency measures could not be implemented.[78]

In Section VII, "Risks of the Kemper IGCC Project," the Commission identified the risks discussed at the hearing and summarized earlier in this brief, and introduced its discussion with the finding that "[b]ecause of these uncertainties, the Commission finds that MPC *has not* carried its burden of proving that its proposal is in the public interest."[79] The Commission broke the uncertainties down into the two broad areas of Construction Cost uncertainties and Operating and Performance uncertainties. Construction Cost uncertainties were further broken down into two general sources of uncertainty and nine specific uncertainties.

The two General Uncertainties included "(i) Only ten percent (10%) of the construction costs are 'known,' even these 'known' costs are uncertain," and "(ii) Since MPC filed its petition, construction cost estimates have risen by nine percent (9%)." The nine specific uncertainties included (i) plant design, (ii) ash landfill storage costs, (iii) pipelines and related rights of way, (iv) lignite leases and mine acquisition, (v)

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[77] FP-P 029552.
[78] FP-P 029555 ("The Commission is rather taking the current programs for what they are, and finding that by themselves they are not sufficient to meet the company's needs.")
[79] FP-P 029561 (emphasis in original).

transmission upgrades, (vi) revenue from byproducts, (vii) liquidated damage protections, (viii) environmental permits, and (ix) project subsidies or incentives.

Surprisingly, the two commissioners never articulated their findings on the merits of the IPP bids vs. Kemper, the appropriate term of a generation option, or any of the strategic preferences that were identified as critical decision points by the Independent Evaluator. The Commissioners did find that because Kemper's capital cost was so large, any increase in costs or failure of performance would place the company and ratepayers at risk. As a consequence, the Commission concluded that "[t]his risk supports the Commission's finding that MPC's proposal, in its current form, does not satisfy the statutory "public convenience and necessity" test."[80]

In a key passage, the two Commissioners in the majority specifically relied on the table in Thomas Anderson's rebuttal testimony cited earlier in this brief:

> 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.
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> 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 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 cost could exceed a level that would make Kemper uneconomic relative to a majority of these scenarios.

[80] FP-P 029565.

> 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.[81]

The two Commissioners in the majority specifically found that there was *no evidence* in the record to support a cost higher than that in MPC's testimony:

> The Commission appreciates MPC's efforts to craft these amendments, but finds that they do not remove the concerns set forth in this Order, concerns that preclude the Commission from finding that the Petition is consistent with the "public convenience and necessity" test. For construction costs, MPC proposed a "hard cap" of thirty-three percent (33%) above the estimates in its Petition, approximately $3.2 billion. "Hard cap," as defined by MPC, does not mean that it would not seek cost recovery above that number; only that it would not insist that prudent costs, if exceeding that number, would as a matter of law require recovery. The ratepayers therefore would definitely be at risk of an additional $1 billion of prudent costs, possibly more. 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.** (In particular there is no evidence to indicate that the construction will be thirty-three percent (33%) higher than the figure of which the Company's expert witnesses said they were "confident.")[82]

The two Commissioners went on to find 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."[83]

In Section IX of the April Order, the Commission reiterated that "the Commission finds that MPC's request for a facilities certificate, in its original form and as

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[81] FP-P 029566.
[82] FP-P 029568 (emphasis supplied).
[83] FP-P 029569.

supplemented, does not satisfy the 'public convenience and necessity requirement."[84]

The two Commissioners then instructed the utility on what it needed to do to meet that requirement:

> The Commission has no statutory obligation to assist a utility in obtaining a certificate. Given the possible benefits of Kemper and the Company's efforts to date, however, the Commission has decided to give guidance in the form of conditions. The Commission has designed these conditions so that they (a) have an evidentiary basis in the record and (b) are no more stringent than necessary to align the Company's proposal with the "public convenience and necessity" requirement.[85]

The conditions set out by the Commissioners included a cost cap consisting of the following:

> The initial capital cost consists of the construction cost ($2.4 billion) plus the record cost estimates of the following items, to the extent not already included in the $2.4 billion number, each of which the Company shall specify (along with record citations) in its Motion accepting these conditions: land for ash storage, lignite mine cost, and gas pipeline cost. The total cost recoverable from ratepayers must not exceed this $2.4 billion total . . . : [86]

The Commission reiterated that "the record contains *no* alternative evidence to support a higher number."[87]

The Commission further found that based on the record before it, CWIP financing could not be granted. The Commission stated that CWIP could only be granted if additional specific information were provided:

> Applying this principle to the record evidence, the Commission finds that although the Company's arguments for CWIP return have merit conceptually, its request for a return on 100% of its investment is too general to support a Commission finding. Further, even if present conditions supported 100% CWIP, there is no reason to assume those conditions will persist, without change, for the entire construction period. The necessity and desirability of CWIP will vary as financial conditions

[84] FP-P 029569.
[85] FP-P 029569.
[86] FP-P 029570.
[87] FP-P. 029570 – 029571.

> vary. The strength of the national economy; the availability of capital and its cost generally; the financial community's perceptions of the utility industry, of Southern Company generally, and of MPC's operations other than Kemper; all these factors will affect the necessity and desirability of CWIP. **Committing ratepayer dollars to CWIP, without regard for these changing factors, would lack a basis in substantial evidence and would not be just and reasonable.**[88]

The two Commissioners in the majority ordered Mississippi Power to advise the Commission within 20 days of the date of the order whether it would accept the conditions necessary to make the project compatible with the public convenience and necessity.

E. Commissioner Presley's Dissent

Commissioner Brandon Presley filed a dissent which may fairly be described as blistering. Commissioner Presley concurred that MPC had not carried its burden due to the many uncertainties associated with the project.[89] Commissioner Presley dissented, however, from the majority's conditions which would let the project move forward, stating that "[the conditions placed upon the certificate by the majority are insufficient and short-sighted for the protection of MPC ratepayers, the Company's financial status, and the public interest and to some extent serve as mere "window dressing."[90] The dissent went on to state in detail the reasons that the factual record did not support approving the Kemper proposal, and the reasons that the project would very quickly become "too big to fail," leaving the ratepayer holding the bag regardless of consequences. [91]

Perhaps most telling, Commissioner Presley noted that "[t]here is no reason to think that the Kemper option won't still be here in a few years: the technology, the lignite, the

[88] FP-P. 029573 – 029574 (emphasis supplied).
[89] FP-P 029584.
[90] FP-P 029585.
[91] FP-P 029590 .

basic economics."[92] As the Commissioner noted, many of the key uncertainties regarding gas prices, carbon prices and other issues will be resolved in five to ten years time.

F. MPC Scales Back Its Cost Overrun Request to $480,000,000

On May 10, 2010, Mississippi Power Company filed a Response to Order and Motion for Rehearing. In this motion Mississippi Power Company alleged that it would not be able to build the Kemper plant under the conditions the Commission had found would be necessary to make the project serve the public convenience and necessity.[93] According to Mississippi Power, shifting the risk of cost overruns to ratepayers was necessary in order to allow the project to go forward. Mississippi Power backed off further from its earlier proposal that it be allowed a 33% cost overrun, and requested a 20% cost overrun above its $2.4 billion net estimate (*i.e.*, the $2.8 billion cost of the project reduced by the amount of federal subsidies), or an additional $480,000,000.[94] Mississippi Power argued again that it must be granted 100% CWIP treatment based on the current record. [95]

MPC told the Commission it wanted a decision by May 28.

G. The Two Commissioners Reverse Their Previous Decision and Give MPC an Extra $480,000,000 in Cost Overruns, Plus Early Cost Recovery

By order dated May 26, 2010, two days before the deadline MPC requested in its motion, Commissioners Bentz and Posey reversed the key factual finding of the April 29 decision, and granted Mississippi Power the right to a 20% cost overrun, or $480,000,000.[96]

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[92] FP-P 029596.
[93] FP-P 029604.
[94] FP-P029628-29.
[95] FP-P 029631.
[96] FP-P 029794.

According to the new order, this 20% cost overrun was based on the testimony of Dr. Craig Roach, the Commission's 'independent evaluator, which the Commission characterized 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."[97] The Commission cited the testimony of Dr. Roach appearing at pages 1882-89 of the hearing transcript for this proposition. Dr. Roach's testimony in fact does not support this statement at all, and is included as Excerpt 7 in the excerpts of record.

As in their previous decision, the two commissioners did not address the question of the appropriate timeframe for considering alternatives, the uncertainties about the natural gas market, the credibility of the IPP bids, or other strategic preferences. In fact, in the May order the two commissioners specifically disclaimed making any decision on these key issues:

> 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.[98]

The two commissioners did not explain how their finding that a $2.88 billion cost was acceptable could be squared with their previous finding that there is *no* evidence to

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[97] FP-P 029802.
[98] FP-P 029796, 029798.

support a cost of over $2.4 billion, or that with a 20% cost overrun the Kemper plant would not be competitive save in the high natural gas cost scenarios.

Commissioners Bentz and Posey further granted Mississippi Power 100% CWIP treatment on financing costs beginning in calendar year 2012 and continuing through 2014.[99] The two commissioners did not cite any information regarding economic conditions or any other factors, which they had found was legally required for any CWIP recovery in their previous order. Nor did the Commissioners explain why this kind of information was no longer necessary for 100% CWIP recovery in 2012-14.

Commissioner Brandon Presley again dissented, stating that "[i]t seems that the only reason the majority has changed its mind in this case is because Mississippi Power ('MPC' or the 'Company') insisted."[100] Commissioner Presley pointed out that the majority's action was not supported by the record, was contrary to its previous findings, and was therefore arbitrary and capricious.[101]

One day after the order was issued, on May 27, 2010, Mississippi Power notified the Commission of its agreement to the conditions set out in the May 26 order. On June 3, 2010, the Commission issued its final order granting the certificate of public convenience and necessity on the terms set out in the May 26 order.[102]

H. The Court Below Affirms the Decision Despite Holding that the Commission Made No Findings on the Key Issue of Risks to Ratepayers

At oral argument the court below expressed its concern with the risks identified by the Commission, and the fact that the public service Commission's orders do not state how "if you comply with these requirements, how the concern we've expressed before,

[99] FP-P 029809-10.
[100] FP-P 029820.
[101] FP-P 029821.
[102] FP-P 029841.

unproven technology on this scale, the cost, the risk that there may be a substantial delay in securing permits, how these conditions give -- satisfactions of these conditions or the company's agreement to these conditions gives the Commission comfort that the public convenience, the public interest is adequately protected."[103]

The court below was plainly troubled by both the risks and the Commission's failure to explain how the conditions in its orders addressed the risks of the project, noting that " if you look at part of the Commission's orders, frankly, it will scare you to death . . . They don't tell us how these conditions eliminate the risk of this project." The Court went on to state that "This is an unprecedented project in terms of cost and scope, but the orders, at least in my view, don't go as far as they should."[104]

The February 28 judgment by the court below largely recounts the Commission's own recounting of the hearings undertaken and the various arguments presented. The real meat of the decision below is confined to paragraphs 34-42.

In paragraph 34, the Chancellor stated that the Commission's findings as to the balancing of risks were supported by the record and by testimony of Dr. Craig Roach, but did not provide any further explanation as to what part of the record or Dr. Roach's testimony it was referencing:

> The Court further finds that Commission's findings that the increased construction cost cap of $2.88 billion together with the conditions accepted by MS Power, including operations caps and the use of independent monitors during the construction period, and possibly continuing after construction, adequately address the risks to the ratepayers from the uncertainties it described in the April and May Orders. The Commission findings on this point are supported by the record, including the testimony of Dr. Roach, and are not arbitrary and capricious.[105]

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[103] ChanceryTr. p. 63.
[104] *Id.*
[105] R. Ex. 2, p.17

The Court then went on to find that the Commission did not make any specific findings to support its decision that the Kemper Plant was best for ratepayers, but that the decision nonetheless had to be upheld because the Commission had compiled a large factual record

> Although the Court finds 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, the decision of the Commission cannot be reversed on that ground alone when the record provides at least the statutorily required minimum evidence to support the Commission's decision. Given the vast amount of documentary evidence and the lengthy testimony contained in the transcripts of the hearings, there is sufficient evidence in the record to support the decision reached by the Commission. Accordingly, the Court must give deference to the Commission's findings and decision.[106]

The Chancellor evidently accepted Mississippi Power's argument that the Commission's decision could not be reversed for failure to make adequate findings and state its conclusions. The court below cited the following language from *Mississippi Public Service Commission v. AAA Answerphone*, 372 So.2d 259 (Miss. 1979:

> The failure of the Commission's order to contain a detailed finding of fact in *Mississippi Power Co. v. Miss. Public Service Commission,* 291 So. 2d 541, 554-555 (Miss. 1974), was the *subject of comment in* this Court where it was said that detailed findings should be made as an aid to the Court on appeal and in *Mississippi State Tax Commission v. Piggly Wiggly Alabama Distributing Co., Inc., 369 So. 2d* 501 (1979), we took note of the Tax Commission's failure to make detailed findings of fact. We do not know and have not had cited to us any holding of our Court that failure to make findings of fact in cases such as this is basis for reversal.[107]

In effect, the Chancellor accepted the Commission and Mississippi Power's invitation to become the finder of fact, and defer to the Commission based simply on the

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[106] R. Ex. 2, pp.19-20
[107] R. Ex. 2, p.18

fact that there was a large record.

Despite the emphasis placed on it in briefing, in the Commission's April Order, and at oral argument, the Chancellor did not mention the Thomas Anderson testimony establishing that, at the $2.88 billion cost approved by the Commission for Kemper, the natural gas self-build option was actually a better deal for the ratepayer.

SUMMARY OF ARGUMENT

The Kemper power plant is the biggest utility project that has ever been built in this state. It will have a lasting impact on the utility bills of hundreds of thousands of Mississippians. It comes at a time of unparalleled uncertainty in the utility field and natural gas markets. As the Public Service Commission itself found, the project poses unprecedented risks, from its massive capital commitment to the application of its technology at an unprecedented scale.

Despite the lack of articulated findings to support this $2.88 billion project, the Chancellor below found that no such findings were required, and that the decision could be affirmed simply because there was a large factual record. In effect, the Chancellor accepted that the Court should be the finder of fact in this matter, since the Commission did not say how its decision met the statutory standard. This decision relied on an erroneous standard, and ignored the mandate of Miss. Code Ann. 77-3-59, which plainly requires adequate development of factual findings and conclusions by the Commission.

Despite the evidence that was submitted by the parties, the two Commissioners in the majority did not make any decision at all on the key strategic questions that had to be answered. How did the various measures adopted by Kemper adequately address the risks of the project? Should the Commission look for a short or long term solution? How

credible were the IPP bids compared to Kemper? How did the numerous additional risks imposed by Kemper stack up against the single uncertainty of natural gas price fluctuations? Instead of assessing these matters, the two commissioners simply accepted MPC's case for the Kemper plant as presented. This decision lacks articulated factual findings and does not contain a rational connection between the facts found and the conclusions drawn, and as a consequence must be reversed.

The two Commissioners in the majority acted without any rational basis in allowing MPC a $480,000,000 cost overrun. The same two Commissioners had said a month earlier that there was *no* evidence in the record to justify any amount higher than MPC's initial estimates. They also clearly found that more evidence was needed before CWIP could be awarded. The sole point cited in allowing the $480,000,000 overrun is the testimony of Dr. Craig Roach at pages 1882-89 of the Commission transcript, and this testimony does not support such a cost overrun. The reversal of the previous finding that no evidence supported a cost greater than $2.4 billion is clearly arbitrary and capricious, and requires reversal and a remand.

The Commission's decision should be reversed, and the matter remanded to the Commission.

ARGUMENT

I. UNDER MISS. CODE ANN. 77-3-57, WAS THE COMMISSION REQUIRED MAKE FINDINGS ADEQUATE TO ALLOW THE COURT ON APPEAL TO DETERMINE THE BASIS OF THE COMMISSION'S CONCLUSION?

A. Statutory Provisions Governing Certificates of Public Convenience and Necessity

The Public Service Commission exercises an authority that rivals that of any branch of government: it makes the ultimate decision whether to approve utility's

requests to build new electric generation facilities whose costs will be borne by ratepayers. The Commission's great pursebook power is, however, constrained by specific statutory requirements as well as the tenets of administrative law. The principal statutory provisions containing the procedures and requirements for the Commission to issue a certificate of convenience and necessity for a capital project like a power plant are found in Chapter 3 of Title 77 of the Mississippi Code. Among the key legislative statements of policy in Miss. Code Ann. 77-3-2 are:

> (a) To provide fair regulation of public utilities in the interest of the public;
>
> (b) To promote the inherent advantage of regulated public utilities;
>
> (c) To promote adequate, reliable and economical service to all citizens and residents of the state;
>
> (d) To provide just and reasonable rates and charges for public utility services without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices and consistent with long-term management and conservation of energy resources by avoiding wasteful, uneconomic and inefficient uses of energy

There is no specific statutory or regulatory definition of "public convenience and necessity," and as a practical matter the term is applied on a case by case basis. It is clear, however, that the Public Service Commission must provide for fairness in regulation, adequate, reliable and economical service, and just and reasonable rates and charges.

B. Burden of Proof at the Public Service Commission and Standard of Review on Appeal

On appeal in this Court, an order of the PSC "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 statutory authority or jurisdiction of the Commission, or violates constitutional rights." Miss.Code Ann. 77-3-67 (2000). The statutes also provide that the burden in the reviewing court rests with the party, like the Sierra Club, challenging the PSC decision. Miss.Code Ann. § 77-3-77 (1972) ("the burden of proof shall be on the party seeking to vacate an order of the Commission.").

The standard of review for PSC decisions reflects the familiar standard for reviewing administrative decisions in general,[108] with one difference: the statutory standard also requires that the decision be overturned when it is contrary to the manifest weight of the evidence. First, any factual decision the administrative body makes must be supported by substantial evidence. With respect to factual findings, appellate review under the substantial evidence "is by no means a 'rubber stamp.'" *McFadden v. Ms. St. Bd. of Medical Licensure*, 735 So.2d 145, 151 (Miss. 1999). This Court is not "relegated to wearing blinders" by confining itself to the order below, but instead must look at the full record to determine whether there is "such relevant evidence as accepted as adequate to support a conclusion." *Miss. St. Bd. Of Examiners v. Anderson*, 757 So.2d 1079, 1085 (Miss. App. 2000). Substantial evidence is "more than a mere scintilla of evidence" or "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).

Second, the decision must not be arbitrary and capricious. The Mississippi Supreme Court has defined arbitrary and capricious as follows:

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[108] *E.g. Bellsouth Telecommunications v. Mississippi Public Service Commission, supra.* ("The applicable standard of review is whether the order of the administrative agency 1) was unsupported by substantial evidence, 2) was arbitrary or capricious, 3) was beyond the power of the administrative agency to make, or 4) violated some statutory or constitutional right of the complaining party.).

> "Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequate determining principle; not done according to reason or judgment, but depending upon the will alone,-absolute in power, tyrannical, despotic, nonrational,-implying either a lack of understanding of or a disregard for the fundamental nature of things. "Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles.[109]

Green v. Cleary Water, Sewer & Fire Dist., 17 So.3d 559, 570 (Miss.2009) (citing *Hill Bros. Constr. & Eng'g Co., Inc. v. Mississippi Transp. Comm'n,* 909 So. 2d 58, 70 (Miss. 2005). A decision is arbitrary when it is done "without reason," or without any rational basis expressed in the findings of the agency. *Id.*

C. The Commission is Required by Statute to Make Findings in Sufficient Detail to Allow for Adequate Review

While decisions by the Commission are entitled to the deferential standard of review cited above when properly supported, those decisions must by statute articulate the factual findings and policy decisions which lead to issuance or denial in sufficient detail to allow this Court to determine the basis of the Commission's conclusions:

> The 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 (emphasis supplied).

Whether this statute was followed is a key question in this appeal.

D. The Court Below Found that the Commission Did Not Make Findings to Support Its Decision, But Applied an Incorrect Standard of Review in Order to Affirm the Decision

It is clear that the Public Service Commission has two broad, underlying statutory

[109] R. Ex. 2, p.11

obligations in making decisions on certificates of public convenience and necessity:

(1) To provide adequate, reliable and economical electrical service at just and reasonable rates, and

(2) In carrying out this goal, to insure that its decisions are "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.

The real issue in the Kemper proceeding was balancing the multiple risks posed by Kemper's massive capital and operating costs with the risks posed by reliance on natural gas generation, which has much lower capital costs, but could have higher fuel costs. Making a rational decision on whether Kemper should be approved, or some other option explored, required the Commission to consider these issues and make factual findings on them.

Both the April and May orders provided an extensive summary of the contentions of the parties, and the risks associated with Kemper. Yet instead of making findings on the strategic considerations and how to balance risks, the two Commissioners moved straight to deciding that Kemper could be approved, as long as it cost $2.4 billion or less, and generally operated as planned.

Indeed, as noted above in the May order the two commissioners in the majority expressly denied that they had made any decision at all on the merits of the bids by other parties seeking to provide electricity, or the proper time frame for evaluating a the different options for generating electricity:

> 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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> * * *
>
> 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.[110]

As the record and the Commission's own opinions show, there was a lot of evidence on all of the key aspects of this decision: whether a short or long term solution is appropriate given the state of the natural gas markets, the risks associated with all aspects of Kemper, and so on.

Yet despite this voluminous factual record, the parties and this Court are left to guess at the underlying factual findings – if indeed there were any – that led the two commissioners to approve Kemper at a $2.88 billion, or even a $2.4 billion, price to the ratepayer.

Again, Miss. Code Ann. 77-3-59 requires the findings and conclusions that the Commission did not provide here:

> The 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 (emphasis supplied).

The court below plainly stated in its judgment 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."

[110] FP-P 029796, 98; R. Ex. 6, p.5

This echoed the court's concern at oral argument that "[t]hey don't tell us how these conditions eliminate the risk of this project." Tr. 63.

After having clearly found that it could not determine the "basis of the Commission's conclusion" on just why Kemper was approved, as required by the statute, the Court below then stated that the decision of the Commission "cannot be reversed on that ground alone when the record provides at least the statutorily required minimum evidence to support the Commission's decision. Given the vast amount of documentary evidence and the lengthy testimony contained in the transcripts of the hearings, there is sufficient evidence in the record to support the decision reached by the Commission."[111]

Mississippi Power and the Commission in effect argued below, and the Chancery Court evidently accepted, that Section 77-3-59's mandatory language on the need for the Commission to articulate its findings and conclusions was trumped by other language in several of this Court's decisions. MPC and the Commission argued that *Mississippi Public Service Commission v. AAA Answerphone*, 372 So.2d 259 (Miss. 1979) stands for the proposition that argue that fact finding is merely "good form," but is never required. Mississippi Power further cited Judge Southwick's dissent in *Mississippi Department of Marine Resources v. Brown*, 905 So.2d 649 (Miss. Ct. App. 2004), *reversed by* 903 So.2d 675 (Miss. 2005). In that dissent Judge Southwick noted his belief that "[u]nfortunately, the general rule in Mississippi administrative practice is that findings of "ultimate facts" are sufficient." Judge Southwick also noted that he has also "argued that the rule ought to be changed to bring us in line with the usual and helpful practice of most states and of federal law . . ." 905 So.2d at 653.

[111] R. Ex. 2, p.20

In the court below, MPC and the Commission pointed to the 70 pages of Commission orders and the lengthy record in this matter for the proposition that the Commission *must have* made sufficient findings of fact on the proper time horizon and the credibility of alternatives, and those findings must have a basis in substantial evidence. This is a time honored way of defending a decision of this kind, but it is wrong. The Commission's order summarized the factual testimony and arguments of the parties. No one argues with that. What it did not do was make findings on the fact issues that had to underpin any decision on the public convenience and necessity.

The Sierra Club believes that given the requirements of the statute, the contention that the Commission need only state "ultimate facts" and point to the fact that there is a large factual record is wrong. Further, this legal error by the court below was outcome determinative in this appeal.

First of all, the Sierra Club notes that Miss. Code Ann. 77-3-59 is statutory law, which must be applied as written. As this Court once (rather pithily) put it: "Courts cannot pass judgment upon the wisdom, practicality or even folly of a statute. We must follow it unless it clearly impinges upon some Constitutional mandate, and our Constitution neither gives wise statutes passing grades nor flunks the improvident ones." *Presley v. Mississippi State Hwy. Com'n,* 608 So.2d 1288 (Miss.1992).

The question under Section 77-3-59 is not whether there is a large factual record, but whether the reviewing court can "determine . . . the basis of the Commission's conclusion." As the court below put it plainly, "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."

Second, the Sierra Club believes that the rule enunciated by the legislature in Section 77-3-59 is in fact consistent with this Court's decisions. While this Court defers to the Commission's expertise where appropriate, the Court has also recognized the principle that the Commission must make cogent findings to show that it used that expertise:

> [T]he Public Service Commission in fixing rates should evidence its expertise by incorporating in its order cogent reasons for its decision based on a finding of facts pertinent to the particular inquiry before it. Such order should set forth the basis on which the rates are fixed in accordance with the law applicable thereto; otherwise, courts are seriously hampered in the review of such order.

Mississippi Power Co. v. Mississippi Public Service Commission, 291 So.2d 541, 554-55 (Miss. 1974).

In several other cases, the Court has plainly instructed the PSC that it must support its decisions with sufficient findings, and essentially defined the failure to make sufficient findings as a subset of situations in which a decision is "not supported by substantial evidence or contrary to the manifest weight of the evidence." In *White Cypress Lakes Water, Inc. v. Mississippi Public Service Commission*, 703 So.2d 246, 249 (Miss. 1997), the Court reversed the PSC's decision to deny a rate increase, noting that it was difficult to discern the reasoning behind the Commission's decision:

> ¶ 9. The Commission's denial of a rate increase appears to have been based on its finding that the Utility was not providing adequate service. Without the benefit of a detailed finding of fact, it is difficult to discern the reasoning behind the Commission's decision; however, it appears that the denial of the rate increase was punitive. At the very least, the Commission's decision was "not supported by substantial evidence" and was "contrary to the manifest weight of the evidence."

Id. at 249. The Court then went on to cite Miss. Code Ann. 77-3-59, and state that "[t]herefore, on remand, the Commission is instructed to make detailed findings, **as mandated by law."** *Id.* at 250 (emphasis supplied).

In *Total Environmental Solutions, Inc. v. Mississippi Public Service Commission,* 988 So.2d 372 (Miss. 2008) applied this principle again:

> ¶ 12. In its final order, the Commission found the evidence presented by TESI to be "unpersuasive to support the provisions and numerical adjustments requested particularly in light of the current conditions of the area." Also, the Commission did not accept the recommendation of the Staff and stated that it was "excessive and not supported by the evidence when viewed in light of the totality of the circumstances." The Commission went on to state further that the increase in net rate base of $3,359,320 and the operating expenses of $1,277,377 were not just and reasonable in light of the circumstances. The Commission then imposed a rate increase of $7.20, but gave no support or finding of fact as to how it reached this amount. On appeal before the chancery court, the chancellor asked upon what the Commission based its rate increase. The Commission responded that, "[t]here really wasn't a deep explanation of what numbers were not accepted and why they were not accepted." In fixing the rate, the Commission did not "evidence its expertise by incorporating in its order cogent reasons for its decision based on a finding of facts pertinent to the ***376** particular inquiry before it." *White Cypress,* 703 So.2d at 249. In fact, the Commission set forth no basis at all on which the flat rate was fixed and the metered rate was abolished.

988 So.2d at 375.

It is worth noting that in the *Total Environmental Solutions* decision the PSC made a quintessential credibility determination: it rejected the testimony of witnesses as "excessive and not supported by the evidence when viewed in light of the totality of the circumstances." The Commission then set out a finding of ultimate fact – that a rate increase of $7.20 was appropriate. Had this Court given blanket deference to those determinations - as Mississippi Power suggests it must - it would have affirmed rather than reversed the decision.

These cases, which deal specifically with the Public Service Commission are consistent with other cases from this Court. *E.g., 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).

E. If Necessary, the Court's Decisions on the Need for Agencies to Adequately State the Basis of their Decisions Should be Clarified to Promote Sound Public Policy

There are of course literally hundreds of other cases from other jurisdictions which stand for this same principle – that an agency's reasoning must be articulated and that the decision can be affirmed only on the grounds the agency articulated.

The United States Supreme Court has repeatedly held that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfr. 's Ass'n v. State Farm,* 463 U.S. 29, 43 (1983). "Without such findings, a reviewing court is unable to perform its function of ascertaining that the ultimate conclusions are derived from the record before the agency and not the result of discretion exercised in an arbitrary and capricious manner." *Argo Collier Truck Lines v. ICC,* 611 F.2d 149 (6th Cir. 1979). Equally important, an agency's action "cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order .... There must be such a responsible finding." *S.E.C. v. Chenery Corp.,* 318 U.S. 80, 94 (1943). In addition, an agency may not defend its decision by relying on the post-hoc rationalizations of counsel, and the courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

The state courts also follow this basic rule.[112] Indeed, although there may be state decisions which have followed the "ultimate fact" rule that Judge Southwick articulated and the Commission and MPC rely upon, counsel for the Sierra Club could not readily locate any. Indeed, the requirement of adequate explanation on the record is the basic organizing principle of appellate review of administrative agency decisions, and the Sierra Club suggests that the Court may wish to consider whether, as Judge Southwick suggested, there should be some clarification to the case law which might be read to state that the Mississippi courts are an outlier to this basic principle.

The reasons an administrative agency must be required to articulate its reasoning – especially when committing ratepayers to what amounts to a 40 year rate increase to pay for a $2.88 billion dollar power plant – are compelling. One is that the very reason for deference to administrative decisions is that the agencies are assumed to have extensive expertise in their subject area. *E.g., Mississippi Power Co. v. Mississippi Public Service Commission*, 291 So.2d 541, 554-55 (Miss. 1974). A part of the agency's authority is to use this expertise to choose the factual and policy bases for its decisions, within the bounds set by the legislature. Yet if the agency does not articulate its factual

[112] The following is just a sample of the many state decisions applying the rule that an administrative agency must make its reasoning clear in order for the decision to be affirmed: *Wyoming, Department of Transportation v. Samuel Legarda*, 77 P.3d 708 (Wyoming 2003); *Transport Oil Inc. v. Maurice G. Cummings*, 54 Wis.2d 256, 195 N.W.2d 649 (Wisconsin 1972) ; *John Griffis v. County of Mono*, 163 Cal.App.3d 414, 209 Cal.Rptr. 519 (California 1985); *Elizabeth Ann Reinhardt v. Board Of Education of Alton Community Unit School District No. 11*, 61 Ill.2d 101, 329 N.E.2d 218 (Illinois 1975); *Hugh J. Courtney v. Board of Trustees of the Maryland State Retirement Systems*, 285 Md. 356, 402 A.2d 885 (Maryland 1979); *The Irish Partnership v. Herbert F. Rommel et al.*, 518 A.2d 356 (Rhode Island 1986); *Hattie Kollock v. Sussex County Board of Adjustment*, 526 A.2d 569 (Delaware 1987); *Abramson Associates, Inc. v. District of Columbia Department of Employment Services*, 596 A.2d 549 (District of Columbia 1991); *John F. Dekoevend v. Board of Education of West End School District Re–2*, 688 P.2d 219 (Colorado 1984); *Mary E. Williams v. SAIF Corporation*, 310 Or. 320, 797 P.2d 1036 (Oregon 1990); *City of El Paso v. El Paso Electric Company*, 851 S.W.2d 896 (Texas 1993); *Robert Alfree v. Johnson Controls, Inc.*, 1996 WL 190015 (Del.Super.) (Delaware 1996).

findings and reasoning, a court is essentially required to use its own judgment to assess the weight and credibility of the evidence and supply the reasoning behind the decision. Thus, affirming an agency decision without articulated reasoning from the agency actually results in the courts exercising the authority which rightly belongs to the administrative body. And if Mississippi Power Company's position is accepted, the courts must search the tens of thousands of pages of this record and find some basis – any basis – to affirm. In effect, this means that appeals like this one cannot be won.

It is also critical for the reasoning behind agency decisions to be articulated as a matter of governmental accountability. As the Chancellor below stated, "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."[113] The dissenting Commissioner put it like this: that "[i]t seems that the only reason the majority has changed its mind in this case is because Mississippi Power ('MPC' or the 'Company') insisted."[114] The ratepayers have no idea why the Commission actually chose to irreversibly obligate the ratepayers to a $2.88 billion project for the next 40 years, when there was a cheaper alternative available according to MPC's own testimony. The Commission's reasoning is unarticulated, unexplained and ultimately unknowable, but it is hard to even project any reasoning that would actually support the decision made. The court below also did not articulate any reasoning, evidently because it found that it had no authority to do anything other than note that there was a very large record. Thus the decision on appeal also does nothing to tell ratepayers why they are being saddled with this multibillion dollar, 40 year obligation.

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[113] R. Ex. 2, p.19-20
[114] FP-P 029820.

Ultimately, the public will never know why Kemper was permitted at a $2.88 billion cost. The Commission did not make the findings to tell the public how it balanced the risks to choose that number. The court below stated that the Commission did not have to make these findings. The court below did not make the findings itself. Nowhere at any level is there a finding that the public can look at and say, "this is why this decision was made." This is wrong as a matter of public policy, and it undermines confidence in governmental institutions.

The Sierra Club notes that the principle of requiring a reasoned explanation of an administrative decision is not a straitjacket. It is also 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). Thus, on some factual records the courts may well be able to work out the agency's reasoning with some accuracy. This prevents the rule from becoming so rigid it works against common sense and efficiency.

General findings might well be sufficient if this decision was about a right of way, or a power substation. It is not. It is about a $2.8 billion project that will effectively determine a big chunk of the economic future of the entire bottom tier of counties in this state, and raise electrical rates by as much as 45%. It is not unreasonable, and indeed it required by law, that the Commission make factual findings so we can all understand why it made the decision it did, and that decision can be adequately reviewed.

The Sierra Club submits that, to the extent that AAA Answerphone or any other decisions of the Court have suggested that the Public Service Commission may simply state an ultimate finding of fact, without further elaboration, and receive deference, these

decisions are distinguishable or should be overruled. This is necessary both in the context of this important case, and in the greater context of providing reasonable certainty, transparency, and confidence in governmental decisions.

II. THE COMMISSIONERS' REVERSAL OF THEIR EARLIER DECISION, AND DECISION TO GRANT MPC AN EXTRA $480 MILLION IN COST OVERRUNS PLUS CWIP, WAS ARBITRARY AND CAPRICIOUS

A. The Commission Failed to Cite Any New Evidence After Stating There Was No Evidence to Support a Cost above $2.4 Billion

Beyond the failure to provide an adequate basis for review, the Commission's May order is clearly arbitrary and capricious in that it did not offer any new evidence to support the reversal of the key findings of the April order.

The April order made one absolutely clear factual finding: there was *no evidence* to support a finding that Kemper served the public convenience and necessity at any cost greater than $2.4 billion. The two Commissioners' April order states on two separate occasions that there is no basis in the record to approve a cost higher than the $2.4 billion estimated by Mississippi Power. [115] In the April order the two commissioners also specifically found on two separate occasions that the $2.4 billion hard cap on costs was "no more stringent than necessary to align the company's proposal with the 'public convenience and necessity' requirement."[116]

Again, the Commissioners supported this conclusion with the testimony of Thomas Anderson, Mississippi Power's own witness:

> 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:

[115] FP-P 029568 ("no evidence supporting a higher cost estimate"); FP-P 029571 ("The record contains no alternative evidence to support a higher number.").
[116] FP-P 029569, 029581.

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 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.[117]

Yet in its May order, the Commission approved a 20% cost overrun, or $480 million, based on the idea that a cost overrun of this magnitude would still make Kemper "the best overall choice for customers." As the Anderson table shows, at a 20% cost overrun Kemper loses in fifteen out of twenty scenarios, ties in one, and only wins four. Again, according to MPC's testimony, the middle four scenarios in this table are those that are qualitatively most likely to occur.[118] In each of these scenarios Kemper loses by a substantial margin.

The May 26th order cites no reasoning or additional evidence as such for the decision to reverse this key finding and commit the ratepayer in advance to half a billion dollars in cost overruns. The sole factual basis cited for granting the 20% cost overrun is the testimony of Dr. Craig Roach at pages 1882-89 of the transcript, which the majority opinion characterizes as stating "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

[117] FP-P 029566.
[118] FP-P 026659-60; R. Ex. 4.

possible on a project like Kemper, but which would still make Kemper the best overall choice for customers. (Tr. 1882-1889.)"[119]

Even a casual review of Dr. Roach's testimony, which is included as Record Excerpt 5, shows that this is not what this witness said. It is not anything remotely like what he said. At that point in the transcript, Dr. Roach was discussing the different scenarios he tested, and the conditions under which his analysis made Kemper compare more or less favorably to the IPP bids. 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. Dr. Roach did not even run scenarios on the natural gas self build option that is the basis of MPC's testimony in the Anderson table. Characterizing Dr. Roach's testimony as stating the simplistic proposition that Kemper is best for the ratepayer at a 20% cost overrun is completely arbitrary and capricious.

The failure of the two commissioners to address the real underlying issues of cost and risk renders its decision arbitrary and capricious in the most basic sense, entirely apart from any obligation imposed by Miss. Code Ann. 77-3-59. Leaving out all the electric industry jargon, with Kemper you commit a pile of money up front and take a lot of other financial risks based on the assumption that you're going to get a less expensive fuel at a relatively predictable price. With natural gas fired generation and additional energy conservation, you commit a lot less money up front and take a lot fewer risks, but the risk that you do take is that natural gas may become more expensive.

Of course, if you spend too much money up front on Kemper, then the only way ratepayers save money is if natural gas prices go through the roof. And that is the fundamental problem with what the two commissioners did here: according to

[119] FP-P 029802.

Mississippi Power's own figures, with the 20% cost overrun the two commissioners reversed themselves and approved, Kemper is the worst choice for ratepayers in three quarters of the future scenarios. It is the worst choice in the scenarios that MPC itself said were most likely. If Mississippi Power's predictions on the costs of carbon sequestration, sales of byproducts, strip mine remediation costs and the like do not pan out, then the deal for the ratepayer gets even worse. Yet the two commissioners did not even address these issues.

B. The Reversal of the Decision on CWIP was Arbitrary and Capricious

For many decades, the Mississippi Code provisions relating to certificates of public convenience and necessity and utility ratemaking reflected a two part regulatory structure. First, the PSC issues certificates prior to the construction of facilities, and at a later date, the costs of those facilities are included in rates through a separate proceeding. The statutory provisions covering recoupment of expenditures through rates charged to customers are covered principally in Miss. Code §§ 77-3-37, 77-3-39, and 77-3-105. Expenditures can only be passed on to the ratepayers if they are *both* "prudent" and "used and useful" in providing the ratepayer with electricity. The Mississippi Supreme Court explains the concept of "used and useful" as follows:

> "[a] public utility company is entitled to a fair return only upon the value of such of its property as is useful and being used in service for the customers' benefit," and..."[I]f the property will be employed within a reasonable time, and if the utility's management can show a definite plan as to how the property will be employed for public service, then the property's value may be included in the rate base."

Rankin Utility Co. v. Mississippi Public Service Com'n, 585 So.2d 705, 712 (Miss. 1991)(quoting *State ex rel. Allain v. Mississippi Public Service Comm'n*, 435 So.2d 608 (Miss.1983) and *South Hinds Water Co. v. Mississippi Public Service Comm'n*, 422

So.2d 275 at 283 (Miss.1982)). Traditionally expenditures for construction work in progress on power plants have not been considered "used and useful" unless the utility proves with specificity what percentage of the assets under construction would go "on-line" during the particular months of the test year upon which rates are based. *See Mississippi Power & Light, et al. v. Mississippi Public Service Comm'n*, 435 So.2d 608, 626 (Miss.1983). This is the traditional structure of the facilities approval and ratemaking process. *E.g., Nuclear Power Rate Regulation after Eastern Enterprises: Are Ratepayers Being Taken for a Ride,* 28 Boston College Environmental Affairs Law Review 191, 204 (2006).

Mississippi Power has made it clear throughout this proceeding that the Kemper project cannot be financed unless it can recover hundreds of millions in financing costs from ratepayers during the course of construction. In other words, Kemper is so risky that the financial markets will not allow Mississippi Power to take the risk of building the plant itself. Without the ratepayer being on the hook irrevocably and in advance, the Kemper is economically infeasible.

Thus one of the most important issues in the proceeding below was an application of a 2008 statute called the Baseload Act, which granted the Public Service Commission discretion to consider pre-completion expenditures as "used and useful" during the course of construction, or even if a facility is never completed. Miss. Code Ann. 77-3-105. In effect, the Baseload Act permits the Commission – if it has sufficient evidence - to shift some of the risk that a generating facility will never be "used and useful" from investors to ratepayers. This type of early recovery is typically referred to as "Cash Earnings on Construction Work in Progress," or "CWIP."

In addition, and equally important, the Commission may make early determinations of "prudence" of particular investments in the facility, before the plant is even partially completed. Miss. Code Ann. 77-3-105(2) Once the Commission makes a decision that an expenditure is "prudent," the ratepayer is stuck with the cost of the plant for good, regardless of whether the plant ever produces any electricity. As the statute states, "Any such prudence determinations shall be binding in all future regulatory proceedings affecting such generating facility, unless the generating facility is imprudently abandoned or cancelled." Miss. Code Ann. 77-3-105 (2)(a).

In its April order the Commission found that committing ratepayers to CWIP without substantial additional information would not be supportable:

> 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.

Yet a month later, with no new evidence in the record, the two commissioners granted MPC CWIP treatment unconditionally, starting in 2012. At this point, the ratepayer has no idea what CWIP is going to look like, yet the decision has already been made and must be appealed. This abrupt reversal, with no factual findings to support it, is the essence of arbitrary and capricious action.

III. THE COMMISSION ERRED IN ALLOWING MPC TO MAKE RATE IMPACTS CONFIDENTIAL AND REFUSING TO ACT ON THE SIERRA CLUB'S MOTION TO REMOVE CONFIDENTIALITY

The Sierra Club objected to MPC's overly broad confidentiality designations and refusal to provide documents, and made a timely motion in the Commission to require

additional production and remove the confidentiality designation.[120] However, the Commission never even acted on this motion. It appears that the Commission believes that the utility controls what is designated confidential in the proceeding.

The Commission's failure to provide adequate discovery prejudiced the Sierra Club in this proceeding, and should be the subject of declaratory relief, at a minimum. In addition, MPC's practice of designating all information regarding rate impacts as confidential is damaging to the public's interest. MPC has made numerous public pronouncements, and run extensive advertising campaigns, touting the rate benefits to customers of the Kemper IGCC facility. These claims are apparently based on the information and projections that MPCO has designated as confidential in this proceeding. If Mississippi Power runs a public relations campaign for this facility based on this information, it should be available to the public so the public can adequately evaluate the statements.

At a minimum, given that the Commission declined to even rule on the Sierra Club's motion, declaratory relief is appropriate. Mississippi Power should not be allowed to keep the very information that would establish the kind of rate impacts a project will have from the public that will have to pay for it.

CONCLUSION

As set out above, the court below applied an erroneous principle of law in allowing the Public Service Commission to make a $2.7 million decision without saying why it was making it. The court below further erred in deferring to the Commission simply because there was a voluminous record.

The decision of the two commissioner majority in the April 26 and May 29, 2010

[120] FP-P 18948

orders approving the certificate of public convenience and necessity for the Kemper plant was also arbitrary and capricious, and was not supported by substantial evidence in the following respects, as well as others:

(1) The majority failed to cite any new evidence justifying the reversal of its factual finding that there was no evidence in the record to support a finding that the Kemper plant would serve the public convenience and necessity if it cost the ratepayer more than $2.4 billion.

(2) The majority failed to make any finding at all on the necessary underlying factual issues affecting the relative risk of Kemper and other options, including:

(a) Natural gas prices

(c) Whether byproduct revenues will be realized

(c) Additional pollutant risks from Kemper

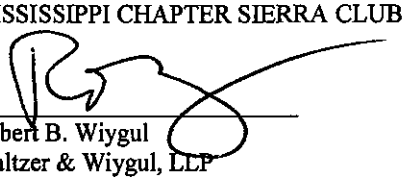
(d) Whether early recovery of financing costs is justified based on market conditions.

RELIEF REQUESTED

The proper course in a matter of this nature is for the Court to reverse the decision of the Chancery Court, 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 23rd day of May, 2011.

Respectfully submitted,
MISSISSIPPI CHAPTER SIERRA CLUB

By: 

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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 foregoing APPELLANT'S BRIEF to:

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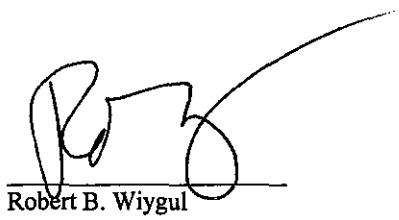
This the 23rd day of May, 2011.



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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 BRIEF by U.S. Mail with postage prepaid on the following person at this address:

Judge Jim Persons
Chancery Court of Harrison County
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This the 23rd day of May, 2011.

By: _____

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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, May 23, 2011, I will place the original and four (4) copies of the Brief and Record Excerpts of Appellants in the captioned matter in the United States Mail, first class postage prepaid.

Maile Nguyen