

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

MISSISSIPPI PUBLIC SERVICE COMMISSION

DOCKET NO. 2017-AD-112

IN RE: ENCOURAGING STIPULATION OF MATTERS IN CONNECTION
WITH THE KEMPER COUNTY IGCC PROJECT

ORDER DENYING MOTION FOR RECONSIDERATION

THIS MATTER is before the Mississippi Public Service Commission (“Commission”), on the Motion of the Mississippi Power Company, Inc. (“MPCo” or “the Company”) to Reconsider the September 12, 2017 Order Setting Hearing and Scheduling Order (“Motion for Reconsideration”). For the reasons set forth below, MPCo’s motion lacks merit and is denied.

I. BACKGROUND AND PROCEDURAL HISTORY

1. On July 6, 2017,¹ the Commission opened the instant settlement docket (“Settlement Docket”) in connection with a pending and separate Rate Filing Docket² to encourage the parties to each proceeding to negotiate a stipulation with regard to MPCo’s integrated gasification combined cycle electric generating project in Kemper County (“Kemper Project”). The Order Opening Docket gave the parties forty-five days to negotiate and file a stipulation with the Commission and stated that if an appropriate settlement is filed, the Commission will hold a public hearing, subject to an appropriate scheduling order, within 45 days of the settlement filing.

¹ IN RE: ENCOURAGING STIPULATION OF MATTERS IN CONNECTION WITH THE KEMPER COUNTY IGCC PROJECT, Order Opening Docket, Docket No. 2017-AD-112 (“Order Opening Docket”).

² IN RE: NOTICE OF MISSISSIPPI POWER COMPANY FOR A CHANGE IN RATES SUPPORTED BY A CONVENTIONAL RATE FILING OR, IN THE ALTERNATIVE, BY A RATE MITIGATION PLAN IN CONNECTION WITH THE KEMPER COUNTY IGCC PROJECT, Docket No. 2015-UN-AD-80, which is stayed pending further order.

2. Among other things, the Order Opening Docket placed conditions on and noted the Commission's preference for a settlement resulting in a rate reduction. The Commission's ordering paragraph (Paragraph 95 of the Order Opening Docket) set forth the three goals of any settlement that should be resolved between MPCo, Staff, and intervening parties in "any settlement that is presented to the Commission." The three stated goals are as follows:

- a. Any costs resulting from the settlement and assigned to MPCo customers shall result in, at a minimum, no rate increase to MPCo customers. The Commission encourages serious discussions that would lead to a rate reduction, with a particular focus on residential customers.
- b. The settlement should seek to remove the risk of ratepayers bearing any of the costs associated with the gasifier and related assets.
- c. The settlement should include modification or amendment of the certificate issued in Docket No. 2009-UA-014 to allow only for ownership and operation of a natural gas facility at the location of the Kemper County In-Service Assets.

3. On August 21, 2017, MPCo filed an offer to settle the rate issues associated with the Kemper Project based on parameters acceptable to MPCo, and Staff filed a Proposed Term sheet outlining terms acceptable to Staff for a stipulation. MPCo and Staff did not reach agreement on terms for a joint stipulation.

4. To continue to encourage a joint Company-Staff stipulation, the Commission extended the deadline for MPCo, Staff, and any other parties to file a stipulation to September 5, 2017, which was later extended to September 8, 2017 following a motion by Staff. By September 8, 2017, the parties still had not reached a consensus. Accordingly, on September 12, 2017, the Commission issued its Order Setting Hearing and Scheduling Order,³ which is the subject of MPCo's Motion for Reconsideration.

³ IN RE: ENCOURAGING STIPULATION OF MATTERS IN CONNECTION WITH THE KEMPER COUNTY IGCC PROJECT, Order Setting Hearing and Scheduling Order, Docket No. 2017-AD-112 ("September 12 Order").

5. Among other things, the September 12 Order treated the proceeding as a contested matter and (i) adopted a new Scheduling Order to accommodate the filing of testimony and exhibits in support of each party's position, rebuttal testimony thereto, data requests, and discovery; and (ii) established a pre-hearing conference and set the docket for hearing.

6. On September 15, 2017, MPCo filed its Motion for Reconsideration. MPCo's motion argues that Staff is not an indispensable party to settlement and that the Commission should accept MPCo's stipulation and set it for hearing.

7. On September 18, 2017, Intervenor Thomas A. Blanton filed a response to MPCo's Motion for Reconsideration, requesting that the Commission deny MPCo's motion. Mr. Blanton argued, among other things, that certain entities that have entered into the MPCo stipulation were not intervenors as of August 21, 2017, the filing date of the stipulation. Mr. Blanton also questions the conditions of the City of Gulfport's joinder. Mr. Blanton submits that there is a long list of parties that have not reached a settlement with MPCo, including himself; Staff; and Intervenor Chevron Products Company, a Division of Chevron U.S.A. Inc. ("Chevron"), the Federal Executive Agencies ("FEA"), Walmart, Sam's Club, Chemours Chemical, and Greenleaf CO₂ Solutions, LLC ("Greenleaf").

8. On September 21, 2017, Greenleaf filed a response to MPCo's Motion for Reconsideration, asking the Commission to deny the motion and pursue the process set forth in the September 12 Order because MPCo's non-unanimous stipulation is not an "appropriate settlement" under the Commission's Order Opening Docket. (Greenleaf Response at p. 2.) Greenleaf also argues that MPCo's "threat" to seek recovery of gasifier-related costs is not credible due to MPCo's recent decision to write off \$2.8 billion in gasifier-related costs, which leaves the gasifier-related costs impaired. Greenleaf claims that even if MPCo could find a way to reverse its decision, made in concert

with its outside auditors, to write off the gasifier and its associated costs, it would be unable to meet the statutory requirements to charge those costs back to ratepayers. (Greenleaf Response at pp. 4-5.)

9. On September 22, 2017, FEA, Chevron, and Staff filed responses to MPCo's Motion for Reconsideration, urging the Commission to deny the motion and proceed with hearing pursuant to the September 12 Order.

10. FEA argued that MPCo's offer of stipulation failed to meet the Commission's minimum requirements for settlement by, among other things, failing to garner support from any of the parties to Docket No. 2015-UN-080, who "had substantial interests, devoted substantial resources to understand the complexities of Kemper, and actively participated in the prior case." (FEA Response at pp. 3-4.) FEA, Chevron, Greenleaf, and Staff all filed substantial testimony about the Kemper Project in Docket No. 2015-UN-080, and were automatically made parties to this proceeding by the Order Opening Docket. FEA argued that MPCo's failure to reach agreement with Staff or any of the intervenors who were automatically made parties to this proceeding demonstrated that MPCo's stipulation failed to meet the requirements set by the Commission's Order Opening Docket.

11. Chevron argued that MPCo's motion should be rejected because (i) the Commission's Order Opening Docket "made clear that any settlement or stipulation submitted should include [MPCo], Staff, and intervening parties," and (ii) MPCo had publicly acknowledged that settlement would require agreement among the parties (Chevron Response at 1, citing 2016 Company Annual Report at p. 33).

12. Staff's response dismissed MPCo's references to potential claims for recovery related to the lignite mining and gasification, noting that the Order Opening Docket established that the issues in this proceeding are limited to the "appropriate recovery level associated with Kemper CC costs alone." (Staff Response at 2, citing Order Opening Docket at ¶ 95(b).) Staff also argued that, given the disparities between MPCo's and Staff's filings, a hearing to fully explore both proposals is

necessary to “facilitate[] the search for truth.” (*Id.* at 3) Finally, Staff noted that MPCo’s ability to reach agreement with certain stakeholders does not provide a reason to limit the scope of the upcoming hearing to only MPCo’s submission because the stakeholders who signed on to MPCo’s proposal have interests in common with MPCo – interests other than those common to ratepayers. (*Id.*)

II. DECISION

13. MPCo asserts that the Commission should reconsider its September 12 Order on the grounds that Staff is not an “indispensable party” to a settlement agreement and therefore there is no basis to treat consensus from Staff as necessary for accepting MPCo’s stipulation. Motion for Reconsideration at ¶ 9. MPCo’s argument misses the point that the Commission expressly initiated this docket to promote settlement between MPCo, Staff, and other intervenors. The Commission found that MPCo’s stipulation does not satisfy the objectives laid out in the Order Opening Docket to achieve a joint stipulation to resolve all issues related the Kemper project, subject to the three goals quoted above. MPCo now appears to substitute its interpretation for the Commission’s as to whether it has satisfied the Order Opening Docket. For the reasons noted below, the Commission continues to find that the limited stipulation provided by MPCo does not satisfy the Order Opening Docket, and thus it denies reconsideration.

14. Throughout the Order Opening Docket, the Commission contemplated that Staff would be a party to the stipulation. Staff, Greenleaf, FEA, and Chevron correctly noted in their responses to MPCo’s motion that MPCo’s filing did not fulfill the Commission’s directives. In Paragraph 90 of the Order Opening Docket the Commission stated that “[a]ny agreement or stipulation entered into *between Staff, MPCo and any other parties* shall be considered by the Commission after a stipulation is filed” (emphasis added). In Paragraph 91, the Commission reserved its “rights and powers with respect to any and all matters negotiated *between MPCO, the Staff and other parties*” (emphasis added). In Ordering Paragraph 95, the Commission stated that “the following areas should

be resolved, or largely resolved, *by MPCo, Staff, and intervening parties* in any settlement that is presented to the Commission” (emphasis added) (citing the three goals for settlement quoted to above).

15. In Paragraph 97 of the Order Opening Docket, the Commission caveated approval of any stipulation as follows: “If an appropriate settlement is not reached and approved, the Commission reserves its right to exercise its full authority to resolve all issues associated with the Kemper Project, including an order to show cause and subsequent proceeding, which could potentially result in revocation of the Kemper Project certificate.” As contemplated throughout the Order Opening Docket, including the passages cited above, an “appropriate settlement” is one consistent with the Order and is between, at a minimum, MPCo and Staff. While all intervenors need not agree, in this case MPCo must at least reach a stipulation with Staff to satisfy the three goals of settlement.

16. Given Staff’s role in the various Kemper proceedings, MPCo itself observed repeatedly in its public filings that resolution of the Kemper proceeding would likely require MPCo and Staff to agree on a settlement. Southern Company’s June 5, 2017 SEC Form 8-K acknowledges that “timely resolution of such filing will likely require a settlement between Mississippi Power and the Mississippi Public Utilities Staff (and other parties).” *See* Order Opening Docket at ¶ 80. MPCo’s 2016 Annual report acknowledged the need to have Staff as a party: “the Company also expects that that timely resolution of the 2017 Rate Case will likely require a negotiated settlement agreement” and that, “in the event an agreement acceptable to both the Company and MPUS (and other parties) can be negotiated and ultimately approved by the Mississippi PSC, it is reasonably possible that full regulatory recovery of all Kemper IGCC costs will not occur.” 2016 Mississippi Annual Report at p.6, 33 (cited in Order Opening Docket at n. 113).

17. In short, in the Order Opening Docket, the Commission directed the parties to file a stipulation. MPCo’s stipulation, while endorsed by several parties to this proceeding, was not endorsed by all parties, and particularly, not by Staff. Staff’s point that the parties who endorsed MPCo’s

proposal have certain interests that are aligned with MPCo rather than the interests common to ratepayers is well-taken. More importantly, MPCo did not garner support from any “opposing” party (i.e., any party that could be described as having interest that are not aligned with MPCo’s). The Commission does not agree with MPCo’s suggestion that just any filed stipulation satisfies the requirements of the Commission’s July 6 Order Opening Docket.⁴ MPCo’s suggestion that any stipulation will do fails to recognize the significant role that Staff plays in ensuring that the rates, terms and conditions associated with the limited service Mississippi customers will receive from the Kemper Plant will be just and reasonable and in the public interest, and disregards the Commission’s goal of achieving a settlement that fairly reconciles the differences between MPCo’s interests and interests common to ratepayers.

18. MPCo also argues that any process that allows for the submission of testimony on “competing” settlement offers is unnecessary.⁵ Accordingly, MPCo asks that the Commission set a hearing on the Company’s Settlement Rate Filing.⁶ The Commission disagrees and denies MPCo’s request.

19. As noted above, the parties failed to submit a stipulation consistent with the Commission’s Order Opening Docket. An uncontested, or largely uncontested, joint stipulation was important to help the Commission assess whether the rates resulting from the settlement would be just and reasonable. That is because a settlement should achieve the reasonable goals of a majority of the parties, *including* Staff and MPCo. MPCo’s interest, broadly stated, is in recovering the costs of, and a reasonable return on, the assets of the combined cycle portion of the Kemper Project, that are in-service, used and useful. Staff’s interest, similarly stated, is in ensuring, on behalf of Mississippi rate

⁴ Motion for Reconsideration at ¶ 10.

⁵ Motion for Reconsideration at ¶ 13.

⁶ *Id.* at p. 7.

payers, that MPCo does not charge Mississippi rate payers for facilities that provide no benefit to Mississippi customers, or whose costs are otherwise improperly inflated. Rather than focus solely on MPCo's non-unanimous stipulation, the Commission's September 12 Order invited each party to file testimony in support of its proposed filing and in opposition to filings by others, and to present rebuttal testimony. The Commission's approach is reasonable, within its discretion, and is likely to lead to relevant evidence. In particular, the Commission expects that Staff's testimony challenging MPCo's proposed rate base and other terms of MPCo preferred approach, and responsive testimony by MPCo, will assist the Commission in determining whether MPCo's proposed recovery is appropriate. The Commission observes that Staff's term sheet assigns significantly different values to, among other things, MPCo's gross plant in service and net plant in service, which the Commission expects will be addressed, along with other differences, in the respective parties' testimony.⁷ The procedure ordered by the Commission will lead to data supporting whether the proposals are just and reasonable.

20. It should be noted, in support of the procedures ordered by the Commission, that the Commission has broad discretion to interpret its own rules and decisions, and it is well-established that Commission orders are presumptively valid.⁸ As part of its settlement authority, the Commission has broad discretion when it comes to settlement agreements entered into by the parties in proceedings

⁷ MPCo's Stipulation, at ¶¶ 49-52, proposes to include "the entire available capacity of the Kemper CC ("Kemper CC Capacity") and the costs associated with such Kemper CC Capacity" in rate base, which it claims can be calculated to cost \$915 to \$960 million and which it asserts supports a revenue requirement of \$126 million. Staff's term sheet argues for a \$122.055 million revenue requirement, based on a total allowed CCGT plant cost of \$829.4 million, not including transmission. The Commission seeks testimony concerning these differences and any other material differences between the parties.

⁸ *State ex rel. Pittman v. Miss. Public Serv. Com'n*, 538 So. 2d 387, 394 (Miss. 1989) ("the order of the regulatory body, the PSC, presumptively is considered valid"); *Mississippi Public Service Com'n v. South Central Bell Telephone*, 464 So.2d 1133, 1134-35 (Miss. 1984) ("It is established that the order of the regulatory body – the public service commission – presumptively is considered valid."); *Mississippi Public Service Com'n v. Mississippi Power Co.*, 429 So. 2d 883 (Miss. 1983) ("The order of the commission is *presumptively valid*." (emphasis in original)); *Loden v. Mississippi Pub. Serv. Com'n*, 279 So.2d 636, 641 (Miss. 1973) ("As we have held many times, the findings of the public service commission are *prima facie* correct and as a reviewing court, we will not substitute our judgment for the judgment of the commission.").

before the Commission: “The commission may accept and adopt as its own, the agreements between any or all interested parties of record, or any portion thereof, resulting from the prehearing conference and allow such changes in rates, without requiring any further proceedings, to become effective immediately.”⁹

21. This statutory authority is broad; it provides a right for the regulator to accept full or partial settlements, between one or more parties, with no additional proceedings.¹⁰ The Commission has promulgated rules that “encourage agreement, settlements and stipulations between the parties,”¹¹ which, consistent with the statute’s provision for the immediate implementation of settlement terms, provide the Commission broad discretion to deny requests for additional process to non-settling parties.¹²

22. While the Commission’s settlement authority is expansive, it is not without limits. In accepting a settlement, the Commission must review the proposed stipulation and the entire record in the proceeding, and find that the rates proposed in the stipulation do not exceed what is just and reasonable and in the public interest.¹³

⁹ Miss. Code § 77-3-39(6) (relating to accepting or rejecting settlements after the prehearing conference is held, even without a full hearing).

¹⁰ *Id.*

¹¹ Miss. PSC Rules of Procedure (RP) 13.103(1).

¹² RP 13.103(2) (“Parties failing to stipulate to matters agreed upon by the filing utility and the Staff may, *in the Commission’s discretion*, be afforded an opportunity to cross-examine and to submit written briefs, documentation, or additional prefiled testimony”) (emphasis added). *See also, In Re: Notice of Intent of Mississippi Power Company for a Change in Rates Supported by a Conventional Rate Filing or, in the Alternative, by a Rate Mitigation Plan in Connection with the Kemper County IGCC Project*, Final Order, Commission Docket No. 2015-UN-80, at ¶¶ 31-32 (Dec. 3, 2015) (“Both state law and Commission Rules unequivocally provide for and promote settlements between and among parties and have been a long-established practice at the Commission. By statute, the Commission may accept any agreement between the parties, forego a hearing, and allow corresponding rate changes to take effect immediately.” (citing Miss. Code § 77-3-39(6) and RP 13.102 and 13.103)).

¹³ *See* Miss. Code § 77-3-33(1) (“No rate made, deposit or service charge demanded or received by any public utility shall exceed that which is just and reasonable.”); *see* Miss. Code §§ 77-3-41 and 77-3-43(1); *see* *GEO Petroleum Energy Transmission, Ltd; In Re: Notice of GEO Petroleum Energy Transmission, Ltd of Intent to Change Rates for Gas Service in its Certificated Area in Pearl River County, Mississippi*, Order Approving Joint Stipulation, Commission Docket No. 02-UN-0116, at ¶ 6 (Jul. 9, 2002) (rates resulting from settlement are “just and reasonable and in the public interest”).

23. The Commission’s discretion to interpret its rules and decisions includes discretion to determine the manner in which the Commission will conduct the proceeding and receive evidence into the record. “Due to its expertise, the [Commission] is the trier of facts and . . . has the right to determine the weight of the evidence, the reliability of estimates and the credibility of the witnesses . . .”¹⁴ The Commission is not bound by “definite rules and formulas” in exercising its statutory authority over public utilities, but rather, may “exercise [] sound discretion and independent judgment in each case.”¹⁵ In this case, the Commission believes that it is important to elicit testimony on MPCo’s, Staff’s and any other proposals provided to meet the Commission’s statutory obligations.

24. Finally, we note that MPCo has issued an “ultimatum” of sorts – that in the absence of setting its stipulation for hearing, it reserves the right to seek recovery of gasification facility and their costs. Motion for Reconsideration at ¶ 13. Just as the Commission has reserved the ability in the Order Opening Docket to take any appropriate action in the best interests of all stakeholders (which could include (i) reinstating the Docket No. 2015-UN-80 proceeding to determine, among other things, whether the accelerated amortization period is complete and rates should be established with fully amortized assets removed from rate base (amortization ended July 31, 2017), and (ii) considering whether to issue a show cause order addressing whether revocation of the Kemper Project’s certificate is in the public interest),¹⁶ the Company is free to take any action it sees appropriate to protect the interest of its shareholders. However, the Commission believes the process it has established in this docket, including proceeding to a hearing in accordance with the September 12 Order, is the best avenue for protecting the interests of all stakeholders in this matter, and is the correct avenue to

¹⁴ *State ex rel. Pittman v. Miss. Public Serv. Com’n*, 538 So. 2d 387, 394 (Miss. 1989); *see also, Capital Electric Power Ass’n v. Mississippi Power & Light Co.*, 216 So.2d 428 (Miss. 1968); *Southern Bell T. & T. Co. v. Mississippi Pub. Serv. Com’n*, 237 Miss. 157, 113 So.2d 622 (1959).

¹⁵ *State ex rel. Pittman v. Miss. Public Serv. Com’n*, 538 So. 2d 387, 394 (Miss. 1989) (*citing Mississippi Public Service Com’n v. South Central Bell Telephone*, 464 So.2d 1133, 1134-35 (Miss. 1984)).

¹⁶ Settlement Docket Order at ¶ 2.

resolve all Kemper issues. The Commission will continue to act, as it has throughout this proceeding, in the best interests of all stakeholders.

III. ORDER

25. Based on the foregoing, the Commission denies MPCo's motion.

26. This order shall be deemed issued on the day it is served upon the parties herein by the Executive Secretary of this Commission who shall note the service date in the file of this Docket.

SO ORDERED on this the 5th day of October, 2017.

Chairman Brandon Presley voted aye; Vice Chairman Cecil Brown voted aye; and Commissioner Samuel F. Britton voted aye.

SO ORDERED by the Commission on this 5th day of October, 2017.

MISSISSIPPI PUBLIC SERVICE COMMISSION



[Handwritten signature of Brandon Presley]

Brandon Presley, Chairman

[Handwritten signature of Cecil Brown]

Cecil Brown, Vice Chairman

[Handwritten signature of Samuel F. Britton]

Samuel F. Britton, Commissioner

ATTEST: A TRUE COPY

[Handwritten signature of Katherine Collier]
KATHERINE COLLIER
Executive Secretary

Effective this the 5th day of October, 2017.