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November 6, 2017

VIA E-MAIL  
VIA U.S. MAIL

Katherine Collier, Esq., Executive Secretary  
Mississippi Public Service Commission  
501 North West Street, Suite 201A  
Jackson, MS 39201

In Re: **Encouraging Stipulation of Matters in Connection with the Kemper County IGCC Project  
Docket No. 2017-AD-112**

Dear Katherine:

On behalf of Mississippi Power Company I have enclosed the original and twelve (12) copies of the Company's Rebuttal to the Mississippi Public Utilities Staff's Response to the Company's Motion to Strike in the above-referenced matter. I have also included a copy of this letter, which I appreciate you file-stamping and returning to me in the enclosed, self-addressed, stamped envelope.

Thank you for your assistance in this matter.

Very truly yours,



Ben H. Stone

BHS:hr

Attachment

cc: All Parties of Record  
Mr. Virden Jones  
Frank Farmer, Esq.  
Chad Reynolds, Esq.  
Mr. Billy Thornton  
Mr. Stephen Stiglets  
Mr. Ben Vance

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

MISSISSIPPI POWER COMPANY  
EC-120-0097-00

DOCKET NO. 2017-AD-112

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

**REBUTTAL OF STAFF'S RESPONSE TO MPC'S MOTION TO STRIKE**

COMES NOW, Mississippi Power Company ("Company" or "MPC") and pursuant to RP 12 of the Mississippi Public Service Commission's ("Commission") Rules of Practice and Procedure files this its Rebuttal to Mississippi Public Utilities Staff's ("Staff") Response to MPC's Motion to Strike filed with the Commission in the above referenced docket:

**INTRODUCTION**

1.       On October 27, 2017, MPC filed its Motion to Strike ("Motion") in this docket. On November 3, 2017, the Staff filed its Response to MPC's Motion ("Response"). As discussed below, MPC objects to the Staff's Response for many of the same reasons MPC has objected to the other aspects of the Staff's overall participation in this proceeding.

2.       In short, the Staff's participation in this docket has frequently relied upon *post hoc* justifications that are simply inconsistent with law, Mississippi practice, the Kemper Project's history, and in some instances, even with positions the Staff has taken in the past. All of these inconsistencies seem motivated by a desire to support a pre-determined outcome that is neither lawful nor fair. While these issues are addressed in detail by MPC's Rebuttal Filing and supporting testimony submitted on even date herewith, MPC will also address with specificity in this filing the misstatements and "after-the-fact" justifications in Staff's Response. Further,

MPC will address more generally the Staff's and the Company's disagreement as to the proper scope of this docket.

### **ARGUMENT**

3. MPC's efforts to negotiate a settlement with the Staff have been hamstrung by the Staff's fluid approach to the law, facts, or policy guidelines supporting the Staff's negotiating positions. For instance, while the Staff argued in 2013 that MPC enjoyed a presumption of prudence, the Staff now argues that MPC must "make its case."<sup>1</sup> While the Staff's IM's found only \$200-\$300 million of "inefficiency" on the entire Project after the Kemper CC had been completed, the Staff has now argued that MPC's Kemper CC (which represents only a small portion of the overall Project) costs should be reduced by up to nearly \$400 million.<sup>2</sup> This sort of hide-the-ball approach has made a settlement agreement elusive and, while MPC's Rebuttal Filing and testimony have addressed examples of inconsistency in the Staff's testimony, MPC will address herein several examples arising from the Staff's discovery responses.

#### **I. The Staff's Post-Hoc Justifications**

4. In its Motion, MPC sought to strike specific portions of Dr. Dismukes' testimony related to utility cost benchmarking. In support of this request, MPC cited data request MPC-  
MPUS 2-20, wherein the Company asked the Staff to:

[p]lease provide any and all electric utility cost benchmarking analyses prepared by or for the Staff during the last five years.

The Staff objected on the following grounds:

MPUS objects to the request for "all electric utility cost benchmarking analyses" prepared during the last five years because it is overbroad and encompasses analyses that are completely unrelated to the instant proceeding and therefore the

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<sup>1</sup> MPC Rebuttal Filing, MPSC Docket No. 2017-AD-112, p. 18 (Nov. 6, 2017)(citing 2013 brief wherein Staff argued in favor of a "general rule of a presumption of prudence"); *but see* Direct Testimony of Dr. Craig Roach, Ph.D, MPSC Docket No. 2017-AD-112, pp. 30-31 (Oct. 23, 2017).

<sup>2</sup> *Id.* at 6.

question seeks information that is not relevant and is not likely to lead to the discovery of admissible evidence.

Because the Staff's testimony, filed almost contemporaneously with that objection, included cost benchmarking analyses, MPC asked that the Staff's testimony be struck on the basis that the Staff itself acknowledged this topic was irrelevant.

5. The Staff's Response presents a number of justifications that were clearly fabricated after-the-fact in an effort to justify Dr. Dismukes' testimony.

6. For instance, the Response claims that the Staff's objection was to the "overbroad scope of MPC's data request," and, specifically, to the time period included in MPC's request, which sought analyses "during the last five years." According to the Response, "an analysis from 2013, while within the scope of MPC's request, would not be relevant to this proceeding."

7. MPC's data request 2-20, issued on October 12, 2017, mirrored the scope of the Staff's October 5, 2017 data request MPUS 1-30 exactly. In that request, the Staff sought "any and all rate benchmarking analyses prepared by or for the Company during the last five years." (emphasis added). The scope of this proceeding did not change between October 5<sup>th</sup> and October 12<sup>th</sup>. The Staff has merely attempted, again, to create a *post hoc* justification for its "trial by ambush" tactics after being challenged.

8. Further, it is disingenuous for the Staff to argue that it objected only to the production of utility cost benchmarking analyses prepared more than a year or two ago; the Staff is well aware that no "older" analyses exist, because it did not conduct any benchmarking analyses prior to preparation for this case, when it ambushed MPC with flawed benchmarking data two weeks before final testimony was due. Indeed, on October 24, 2017, in response to MPC-MPUS 2-20, the Staff indicated that "[t]o MPUS' knowledge, Dismukes' analysis is the

first time it [i.e, the Staff] has done this [i.e., commissioned a benchmarking study of MPC's costs]."

9. Finally, Staff also responded to MPC's assertion that this information was withheld during discovery by claiming "the calendar refutes MPC's allegation. Staff received Data Request 2-20 on October 12, 2017," which means that its benchmarking analyses would not have been due until October, 23, 2017, when Dr. Dismukes' testimony was filed. The Staff ignores MPC's first set of data requests, from mid-September, when the Company requested this information to avoid exactly this sort of issue.

10. Weeks earlier, on September 19, 2017, MPC requested "the documents supporting the factual basis for the testimony and opinions for each 'testifying expert.'"<sup>3</sup> The purpose of this request was to elicit detailed information, similar to that which MPC has produced to the Staff again and again over the years, which would ultimately support the Staff's contentions in testimony. This request, if timely responded to, would have, at a minimum, foreshadowed that Dr. Dismukes was preparing testimony on "benchmarking."<sup>4</sup> In turn, this would have provided MPC additional time to research the facts underlying Dr. Dismukes' analysis and, in addition to being fair to MPC, might have allowed the Company and Staff to address these issues informally before testimony was filed, such that Dr. Dismukes could have avoided presenting an obviously flawed analysis.<sup>5</sup> The clear errors contained in Dr. Dismukes'

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<sup>3</sup> MPC-MPUS 1-1.

<sup>4</sup> MPC did not anticipate that any benchmarking testimony would be filed until October 23, 2017, when MPC received Dr. Dismukes' testimony. MPC asked data request MPC-MPUS 2-20, seeking benchmarking data, only to mirror the Staff's request of MPC, as discussed above. The Staff's October 13, 2017 supplemental response to MPC-MPUS 1-1 identified Dr. Dismukes' scope of testimony as relating to "credit rating and rate impacts."

<sup>5</sup> Staff argues, on page 5 of the Response, that it did provide responsive information in discovery, by citing materials produced by the Staff in response to data request MPC-MPUS 1-19. This information was not used to support Dr. Dismukes' analysis, which is derived from FERC Form 1 data; rather, the documentation provided by the Staff presents rate information that was produced in response to a separate

testimony are addressed by Ms. Shaw's rebuttal testimony in this case. Instead, the Staff by default objected to essentially all of MPC's discovery requests until it could complete and file its case-in-chief on October 23<sup>rd</sup>.

11. MPC understands that the Commission may feel it is inappropriate, despite its expansive scope and questionable (i.e., trial-by-ambush) underpinnings, to strike this testimony from the record. Nevertheless, the Company would ask that the Commission not rely upon an improper or "unripe" testimony when reaching a final decision in this case.

## **II. The Scope of the Kemper Settlement Docket**

12. Although MPC has already addressed this matter in prior pleadings, the scope of this proceeding, again, merits some brief discussion.

13. The Response argues that MPC has wrongly sought "to confine Staff's testimony to a replay of the discussions and rationales presented at the negotiation table, impugning any other evidence as 'post hoc'." Further, the Response indicates that, to the contrary, the Commission, "invite[d] parties to (1) give any and all evidence that supports their own proposals and/or counters the proposals and supporting testimony of others, whether or not that evidence was presented at the negotiating table." Fundamentally, the Staff has interpreted the Commission's "invitation" more broadly than MPC has. While the Commission can interpret what it meant by its Order, MPC would only acknowledge the significant risks of expanding this case beyond the scope of a "settlement." Although it is, admittedly, unclear what the proper scope of a "settlement docket" is, MPC would submit that this scope must be more narrow than the scope of a full rate case (which is governed by numerous statutory requirements).

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data request and which had little to do with the beyond-the-scope analyses contained in Dr. Dismukes' testimony.

14. Indeed, while the Staff argues that Dr. Roach's testimony properly "lays out precise options for cost recovery for the Kemper CC," these options are not appropriately before the Commission outside the context of a rate case.<sup>6</sup> They haven't been proposed, much less adopted as a "settlement", by any other party. MPC has argued repeatedly that the only options before the Commission are to approve or reject a settlement to which MPC is a party. The Commission's July 6, 2017 Order requested a settlement and specifically addressed the scenario in which a settlement was not approved, or was not presented at all. The Commission did not indicate, however, nor does the law allow, that in this scenario this proceeding should be converted into a "full rate case" where MPC's uppermost cost recovery for over \$4.0 billion of eligible Kemper Project costs would be limited by its initial settlement offer (which itself resulted from a major, \$2.8 billion concession). MPC therefore reiterates its concerns that the Commission's procedure in this case risks depriving MPC of important rights, to the extent the Commission believes it would be proper to "adopt" one of Dr. Roach's non-settlement "cases."

15. Further, in light of all of the above, MPC does not agree with the Staff that striking the testimony referenced in MPC's Motion would "result in a dangerous, stifling precedent that would doom future negotiations to failure." MPC has not argued that any settlement negotiations should be limited in any way whatsoever; rather, MPC has only argued that for purposes of this "settlement docket," where the stated Commission intention is to evaluate the reasonableness of the parties' most recent settlement offers, it is inappropriate to allow (and therefore require MPC to rebut) expansive testimony regarding issues not discussed during negotiations, and not shared by the Staff during discovery despite pointed requests from

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<sup>6</sup> The Staff attempts to equate Dr. Roach's alternative revenue requirement "cases" with the Company's \$209 traditional revenue requirement presented in Mr. Feagin's direct testimony. The Company, however, has not argued that the \$209 million revenue requirement presented in Mr. Feagin's testimony is currently before the Commission and, importantly, Mr. Feagin's \$209 million calculation was presented to the Staff during negotiations, and therefore has not been sprung upon the Staff at the 11th hour.

MPC—particularly in light of the time constraints imposed by this docket's schedule. The parties may still negotiate, and may still present a settlement offer. Conversely, the Commission may request that MPC file a full rate case, as permitted by law. Neither has happened to this point.

WHEREFORE, PREMISES CONSIDERED, Mississippi Power Company respectfully requests that the Commission strike from the record the testimony identified in MPC's October 27, 2017 Motion to Strike in this docket.

Respectfully submitted on this, the 6th day of November, 2017.

MISSISSIPPI POWER COMPANY

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### CERTIFICATE OF SERVICE

I, Ben H. Stone, counsel for MPC in the above and foregoing filing with the Mississippi Public Service Commission on even date herewith, do hereby certify that in compliance with Rule 6.112 of the Mississippi Public Service Commission's Public Utilities Rules of Practice and Procedure:

(1) An original and twelve (12) copies of the filing have been filed with the Commission by delivery of the same to:

Katherine Collier, Esq., Executive Secretary  
Mississippi Public Service Commission  
501 North West Street, Suite 201A  
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(2) An electronic copy of the Notice has been filed with the Commission via e-mail to the following address:

[efile.psc@psc.state.ms.us](mailto:efile.psc@psc.state.ms.us)

(3) A copy of the filing has been mailed via U.S. Mail and electronic mail to all parties of record as detailed below:

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This the 6th day of November, 2017.

  
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