BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

MISSISSIPPI POWER COMPANY
EC-120-0097-00

DOCKET NO. 2015-UN-80

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

GREENLEAF CO2 SOLUTIONS, LLC'S MOTION FOR REHEARING

I. INTRODUCTION

Greenleaf CO2 Solutions, LLC (Greenleaf) submits this motion for rehearing to address (1) procedural defects in the Commission's pre-hearing and hearing process, which led to the adoption of an improper Final Order in this case on December 3, 2015 (Order), and (2) substantive points of error contained in the Order. Pursuant to Miss. Code Ann. § 77-3-65, this motion for rehearing is timely filed. For the reasons addressed below, Greenleaf respectfully requests that the Mississippi Public Service Commission (Commission) grant rehearing to correct these errors.

II. PROCEDURAL DEFECTS IN PREHEARING AND HEARING CONDUCT

A. The Commission's process violated due process requirements.[1]

In its Order, the Commission incorrectly found that "all parties have had the opportunity to engage in motion practice, conduct discovery, present testimony and other evidence, cross examine adverse witnesses and participate in public hearings."[2] The requirement for due process is not just allowing participation; rather, it is allowing ***meaningful*** participation.

[1] Greenleaf re-urges the substantive points made in its Motion to Stay (Oct. 19, 2015), Motion to Compel (Oct. 28, 2015), and its Objections to Evidence (Nov. 9, 2015) presented to the Commission and incorporates those by reference herein.

[2] Final Order at 2.

In a prior appeal involving the Kemper Project, the Mississippi Supreme Court ordered this Commission to afford intervening ratepayers all due process— "the opportunity to be heard ... at a meaningful time and in a meaningful manner"[3]—in further proceedings related to that project. Those due process directives are binding on the Commission pursuant to the mandate rule and law of the case doctrine.[4] This Commission also may not deprive intervenors of their due process rights under both the federal and state constitutions.[5]

Due process requires that parties be given a *meaningful opportunity* to analyze and prepare to refute the evidence presented by MPC to support its request for a rate increase.[6] More specifically, administrative litigants are owed "a reasonable opportunity to know the claims of the opposing party ***and to meet them.***"[7] Such due process protections are uniquely important in administrative proceedings, which "must be conducted in a fair and impartial manner, free from any suspicion of prejudice, unfairness, fraud or oppression."[8] As the Supreme Court has noted, "[d]ue process always stands as a constitutionally grounded procedural safety net in administrative proceedings."[9]

Due process also extends to the procedures followed at the hearing on the merits. In order to satisfy due process, an agency must provide a hearing that is "appropriate to the nature of the

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[3] *Mississippi Power Co. v. Mississippi Public Service Commission*, 168 So.3d 905, 916 (Miss. 2015).

[4] *See Miss. Dep't of Human Servs. v. McNeel*, 10 So.3d 444, 460 (Miss. 2009). Once decided by the Mississippi Supreme Court on appeal, a legal issue may not be reexamined or deviated from by the administrative agency on remand. *Med. Ctr. Pharmacy v. Holder*, 634 F.3d 830, 834 (5th Cir. 2011).

[5] *See* U.S. Const. amend. XIV; Miss. Const. art. 3 § 4.

[6] *Mississippi Power*, 168 So.3d at 916; *see also Hurdle & Son v. Holloway*, 976 So.2d 386, 398 (Miss. Ct. App. 2008) ("It is an 'immutable' aspect of due process that a person against whom evidence is to be used be afforded an opportunity to refute the evidence.").

[7] *Id.* (emphasis added).

[8] *McFadden v. Miss. State. Bd. of Med. Licensure*, 735 So.2d 145, 158 (Miss. 1999).

[9] *Id.*

case."[10] When an agency is asked to decide significant issues that will have far-reaching consequences, more precautions are necessary to satisfy due process requirements.[11] Importantly, among other requirements, administrative agencies should refrain from accepting new or additional evidence without providing interested parties with a fair opportunity to respond to that evidence or supplement their own.[12]

For the reasons discussed below, and due to a refusal to provide certainty regarding (a) the issues being litigated and (b) the process that would be followed, the Commission left the parties to this case without due process necessary to obtain and present their cases. While the Commission has substantial discretion to carry out its statutory duties, that discretion is not unfettered. As noted above, the Commission is required to allow intervenors adequate access to information and a meaningful opportunity to be heard. The process in this case did not follow those precedents and appears to have been little more than a pre-determined "rush to judgment" to provide Mississippi Power Company (MPC) with an unlawful and unprecedented recovery. On numerous occasions, which are more fully described below, the Commission should have either required MPC to withdraw its case and refile, or stayed the matter and adopted a new procedural schedule that afforded the necessary due process. The Commission's failure to do so deprived the parties of due process.

Despite the fact that the Commission clearly believed that MPC's original notice of intent was improper, rather than require MPC to withdraw the original Notice of Intent, at the July 7, 2015 Open Meeting, the Commission suggested a path for MPC to request different rate relief

[10] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982).

[11] *See id.*

[12] *PERS v. Wright*, 949 So.2d 839, 843-44 (Miss. Ct. App. 2007).

without restarting the case.[13] This resulted in the First Supplemental Filing, which materially reframed MPC's original petition to request emergency and permanent rate relief related only to portions of the Kemper Project (subsequently referred to as the "In-Service Asset Proposal"). Oddly, the First Supplemental Filing contained no evidence or testimony specific to the In Service Asset Proposal, but was devoted entirely to emergency rate relief. Because of MPC's evolving request for relief, the first procedural schedule in this case was not issued until August 12, over a month after the First Supplemental Filing.[14] Until that time, parties were completely unclear as to what the schedule would be and what issues would be taken up by the Commission in this proceeding. In fact, this Scheduling Order provided the first notice that the Commission intended to rule on the In-Service Asset Proposal before the end of the year. Rather than allowing parties with sufficient time to conduct discovery on this new relief and to prepare their cases effectively, the Commission adopted a schedule which failed to afford the parties adequate time to satisfy due process. The Commission then refused to modify this schedule, as explained more fully below, despite repeated changes in the information being presented by MPC and despite MPC's improper withholding of information from the intervenors.

Subsequently, on September 11, 2015, nearly a month after litigation began in earnest on the In-Service Asset Proposal, MPC attempted to change the nature of the case ***yet again*** through a Second Supplemental Filing, which added more than 1900 pages of new material well outside of the time allotted for supplementation.[15] Greenleaf and Chevron Products Company, a division

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[13] At the July 7, 2015 Open Meeting, Commissioner Renfroe said: "I would encourage [MPC] to consider giving this Commission another option and – the one I had – the particular one I have in mind would consider the equipment that's already in operation. . . . I think that you might reduce the risk of having nothing approved if you gave us another option that would include the – at least the equipment that's already in service, as well as other costs that could be identified that would be ripe for recovery."

[14] *See* Scheduling Order (Aug. 12, 2015).

[15] Second Supplemental Filing (Sept. 11, 2015).

of Chevron U.S.A. Inc. (Chevron) filed a joint Motion to Strike the Second Supplemental Filing on September 18.[16] The Commission never ruled on this motion. Instead, the Commission, acting *sua sponte*, gave a small amount of additional time to react to the filing, which was insufficient to allow for proper review, discovery, and the development of responsive testimony.[17] Faced with this, Greenleaf was forced to file an interlocutory appeal to the Mississippi Supreme Court, and only then did MPC withdraw the offending Second Supplemental Filing, which occurred on October 8, the day before intervenor testimony was due.

Throughout this process, the Commission continued to allow MPC to mislead the intervenors and misdirect the process. As an example, ten days before the hearing, MPC filed its required list of exhibits to be introduced as evidence at the hearing, which included thousands of pages of materials from prior cases including witness testimony from persons that were not participating in this case. Much of this material was not even available for review by the intervenors. After objections, on the eve of hearing, MPC once again changed direction, indicating that it did not intend to introduce these exhibits. This apparently purposeful confusion, which was allowed by the Commission, impaired the parties' ability to meaningfully participate in this case. Similarly, for unexplained reasons, MPC chose not to have four witnesses whose testimony and exhibits were on the Exhibit List present for the hearing. Greenleaf only learned of their unavailability on November 9, 2015, the evening before the hearing, when Greenleaf's counsel was finalizing preparation for cross examination of Mr. Holland and emailed MPC to ask which witness panel would include Mr. Holland. MPC responded that Mr. Holland would not be at the

[16] Motion to Strike MPC's Second Supplemental Filing (Sept. 18, 2015).

[17] The Commission never addressed the substantive matters in Greenleaf's motion or even expressly denied the motion, but only said, "Without excusing MPC's failure to move for permission to file the supplemental testimony, the Commission resolve's [sic] Greenleaf's motion to strike and motion for an extension of time by amending the scheduling order." Order Amending Scheduling Order (Sept. 23, 2015) at 2.

hearing. Upon further questions, MPC informed Greenleaf that in addition to Mr. Holland, Dr. Galloway, Mr. Armstrong and Mr. Wathen would not be present, and MPC would not introduce testimony or exhibits from any of these witnesses.[18]

Furthermore, significant confidential information that had never been provided to the parties was admitted at the hearing. No opportunity was given to review or respond to this information, and no stay of the proceedings or other modifications to the procedural order were granted. MPC's Exhibit List included 89 documents filed in Docket 2013-UA-189 (the 2013 Case) and 13 documents filed in Docket 2014-UA-195 (the 2014 Case). Of those documents, fourteen (14) were filed confidentially.[19] Twelve (12) of the documents on the Exhibit List are not available on the Commission's online docket for the 2013 Case.[20] There is no indication that these documents were filed confidentially; they are simply not posted to the online docket file. An additional twelve documents on the Exhibit List are from prior dockets and publicly available only in redacted form.[21] Of the 102 documents filed in prior dockets, supposedly incorporated by reference in this docket, and specifically identified on the Exhibit List, 38 were either not publicly available at all or available only in redacted form. These documents were made available solely to the Commission and Staff, not to Greenleaf or any other parties. Under the Commission's Rules,

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[18] Significant uncertainty exists regarding whether the Commission relied on improperly excluded evidence in this case. The Order states that the "pleadings, data, documentation, and exhibits submitted in connection with the Company' Notice of Intent, First Supplemental Filing, and otherwise in the matter, being a part of the full record in this matter, comply with the applicable requirements of law and the rules, regulations, and orders of the Commission." Order at 42-43. This includes "the testimony and evidence previously filed in Docket Nos. 2013-UA-189 and 2014-UA-195." Order at 12. While MPC made clear that it was not offering testimony from witnesses that were not present, it appears that the Commission may have improperly relied on such testimony anyway, further undermining the legality of the Order and further supporting this rehearing request.

[19] See Exhibit List, Docket 2013-UA-189 items 4, 8, 18, 23, 29, 59, 65, 67, 77, 82, 84, and 88 and Docket 2014-UA-195 items 4 and 7.

[20] *See* Exhibit List, Prudence Docket 2013-UA-189 items 19-22, 24-28, 30, 42 and 50.

[21] *See* Exhibit List, Prudence Docket 2013-UA-189 items 5, 9, 60, 66, 68, 78, 82, 85, and 89, and Docket 2014-UA-189 items 3, 4 and 7.

a party may file a request to obtain copies of confidentially filed documents.[22] However, the Commission is required to notify the utility of the request, and the utility is allowed thirty (30) days to obtain a protective order from a court.[23] Because MPC filed the Exhibit List only ten days before the hearing, the hearing would have been completed long before the above procedure was complete. Such a system simply cannot meet the requirements of due process when the Commission-approved schedule is so compressed. While the Commission must follow its rules, it also must take them into account in adopting a process that comports with legal requirements.

Commission processes must comport with the due process rights of the parties, which exist under binding Mississippi Supreme Court precedent. The Commission failed in this respect and therefore, the Order is unlawful and the matter should be reheard.

B. The Commission erred by refusing to modify the procedural schedule to address MPC's late-filed discovery responses and inappropriate withholding tactics, depriving Greenleaf of access to critical information required to prepare its case.

Foundational to the Order is the Commission's unsupported finding that all parties had a fair and full opportunity to be heard and present testimony.[24] However, MPC's pattern of late responses and withheld information, together with the Commission's failure to remedy the problems caused by MPC's actions, belie the Commission's statement. Without the parties' full and fair participation, the Order was improper. The Commission should therefore rehear this case to remedy this defect.

The Commission erred by failing to require MPC to provide timely and complete responses to Greenleaf's discovery requests, and by failing to stay the proceedings or revise the procedural schedule when MPC inappropriately withheld relevant information in the discovery process. In

[22] RP 4.100.3, 4.101.3

[23] *Id.*

[24] Order at 11.

particular, the Commission erred in denying Greenleaf's Motion to Stay and Request for Expedited Ruling to address ongoing discovery abuses by MPC, thereby depriving Greenleaf of timely access to the information required to prepare testimony.[25]

Due process includes an appropriate opportunity for administrative discovery.[26] In this case, the parties were entitled to receive adequate and timely responses to their data requests, as well as a proper objection log. Mississippi courts have found that a state administrative agency's failure to follow the discovery procedures laid out in its own rules implicates an administrative litigant's due process rights.[27]

Greenleaf submitted three sets of data requests within the initial discovery period,[28] on August 31, September 3, and September 11. Under the procedural schedule, responses to all of those requests were due twenty days after submission. On Greenleaf's first set of data requests, MPC provided a partial response to Greenleaf's first data request *three days after* they were due. After Greenleaf complained to MPC, it provided additional materials on September 24 and September 30. The last information provided was *nine days late* and, more importantly, *after* the

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[25] Order Denying Greenleaf CO2 Solutions, LLC's Motion to Stay and Request for Expedited Ruling (Nov. 3, 2015).

[26] *State Oil & Gas Bd. v. McGowan*, 542 So. 2d 244, 248 (Miss. 1989) ("Since this controversy is within the original administrative jurisdiction of the Oil & Gas Board, McGowan is subject to hearing under the rules and regulations of that Board. ***If those rules authorize discovery, then McGowan is entitled to have it***; since the rules do not authorize administrative discovery, he is not.") (emphasis added).

[27] *See Bermond v. Casino Magic*, 874 So. 2d 480, 484-85 (Miss. Ct. App. 2004) ("The concern that the Commission follow its own rules is not merely academic, because ***the failure to abide by recognized discovery rules impacts whether a decision is seen as arbitrary and capricious, and a violation of due process*** . . . . While administrative agencies are to be given deference is applying their rules, ***what conveys due process is the very fact that agencies abide by these rules when making decisions***.") (emphasis added) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 523 (1978)); *Robinson Prop. Group, Ltd. P'ship v. Newton*, 975 So. 2d 256, 260 (Miss. Ct. App. 2007) ("while the [Worker's Compensation] Commission is to be given deference in applying and interpreting its own rules, the concern of ensuring due process still remains. ***Due process dictates that the Commission is to follow its own procedural due process principles in conducting its duties***.") (emphasis added).

[28] The initial discovery period ended on October 5, 2015.

initial deadline for intervenor testimony.[29] The prejudice created by MPC's failure to comply with these procedural deadlines was magnified due to the limited time being afforded to process this case. Through its tactics, MPC effectively shielded its data responses from being included in or addressed by the testimony of the intervenors' expert witnesses.

Not only were MPC's responses late, they were also incomplete, with an unspecified number of responsive documents withheld pursuant to a multitude of overlapping, often inapplicable *pro forma* objections that were presented with little or no explanation. Although RP 6.122(5) requires an objecting party to provide (along with its response) a log itemizing each document being withheld and explaining the related objections, MPC did not provide such a log. Instead, MPC waited until Greenleaf specifically requested the log and then took significant additional time to provide it. Due to this delay, Greenleaf did not receive its first indication of the scope of the documents being withheld and the actual substantive reasoning for MPC's objections until after 4:30 pm on October 8—*the evening before* the deadline for intervenor testimony under the Amended Scheduling Order, *seventeen days* after MPC's responses to Greenleaf's first data requests were due, and *three days* after the discovery deadline had passed.

Without the required objection log, Greenleaf lacked the information necessary to even argue for production of potentially critical documents. In an attempt to acquire time to obtain the requested documents and use them in testimony, Greenleaf filed a Motion to Stay on October 19.[30] The next day, more than two weeks after the initial discovery deadline and eleven days after intervenor testimony was due, the Commission, without hearing Greenleaf's Motion to Stay, entered a *fourth* scheduling order (the Fourth Scheduling Order) that granted intervenors until

[29] MPC was late answering Greenleaf's second set of data requests as well.

[30] Greenleaf CO2 Solutions, LLC's Motion to Stay and Request for Expedited Ruling (Oct. 19, 2015).

October 28 to file supplemental testimony.[31] However, the Commission did not further extend the discovery deadline or address any of Greenleaf's discovery complaints against MPC, and without the documents that MPC was withholding, Greenleaf was prevented from filing meaningful supplemental testimony. Significant portions of Greenleaf's data requests remained unanswered by the October 28 deadline for supplemental testimony. Greenleaf filed a Motion to Compel on that day in a last-ditch effort to gain access to the documents that it had been denied.[32] The Commission waited until just a week before the hearing to rule on Greenleaf's Motions to Stay and Compel, denying both and leaving Greenleaf without critical information.[33]

In addition, the Commission also failed to require MPC to provide documents responsive to Greenleaf's discovery requests based on an unsupported claim the documents were not in MPC's possession, improperly denying Greenleaf's motion to compel. MPC withheld documents responsive to Greenleaf 1-28 and 1-32 on claims that they were "Non-MPC Information" in possession of MPC's parent, Southern Company. The Commission's order denying Greenleaf's Motion to Compel claimed that MPC "specifically noted that Greenleaf's request covered documents in the possession of Southern Company and were, therefore, beyond the care, custody, and control of MPC."[34] However, at no point in MPC's Response to Greenleaf's Motion to Compel did MPC claim that the documents in question were in the sole possession, custody, or control of Southern Company. Instead, MPC merely stated that it could not *force* Southern Company to

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[31] *See* Order (Oct. 20, 2015).

[32] Motion to Compel Production of Documents (Oct. 28, 2015).

[33] *See* Order Denying Greenleaf CO2 Solutions, LLC's Motion to Stay and Request for Expedited Ruling (Nov. 3, 2015); Order Denying Greenleaf CO2 Solutions, LLC's Motion to Compel (Nov. 3, 2015).

[34] Order Denying Greenleaf CO2 Solutions, LLC's Motion to Compel at 10 (Nov. 3, 2015).

produce them. However, joint control does not protect documents,[35] and had the documents been outside of MPC's care, custody, and control it should have said so. It never did. MPC inappropriately withheld these documents, which prevented Greenleaf from effectively presenting its case at the hearing. Contrary to the Commission's arguments in its various orders denying Greenleaf's Motion to Compel and Motion to Stay, the ability to present and cross-examine witnesses ***does not by itself*** offer the opportunity for a full hearing or cure the ills inherent in compromising Greenleaf's discovery rights in order to conclude this case before the end of the year.[36] It is impossible to present witnesses or conduct effective cross examination at a hearing without first having had full, fair, and timely access to all relevant information.

The Commission erred by failing to grant Greenleaf's motion to compel, and by declining to stay the proceedings or otherwise modify the procedural schedule to give Greenleaf a meaningful opportunity to review MPC's late-filed discovery responses, objection schedules, and improperly withheld documents. The Commission deprived Greenleaf of information necessary to prepare its case and materially prejudiced Greenleaf's ability to participate and present evidence in violation of its due process rights, which necessitates rehearing.

C. Greenleaf was improperly denied access to documents that it was entitled to review as an intervenor.

The Commission erroneously found that the "Commission and all parties have had the

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[35] *See Smith v. Tougaloo Coll.*, 805 So.2d 633, 639 (Miss. Ct. App. 2002) (holding bank records were technically in the control of the plaintiff and had to be produced even though the records were not in the plaintiff's physical possession).

[36] *See* Order Denying Greenleaf CO2 Solutions, LLC's Motion to Compel at 12-13 (". . . ***the ability to present and cross-examine witnesses offers the opportunity for a full hearing and cures many, if not all ills***, inherent in attempting to balance a meaningful discovery process with the need to achieve a timely final resolution.") (emphasis added); *see also* Order Denying Greenleaf CO2 Solutions, LLC's Motion to Stay and Request for Expedited Ruling at 9 ("Greenleaf will have the opportunity as an Intervenor in this docket to appear and present evidence and testimony at the November 10 hearing. . . . ***Greenleaf's right of cross-examination thus cures any remaining alleged ills here***.") (emphasis added).

opportunity to . . . conduct discovery" and that, "[a]s a result, the Commission has been presented substantial evidence upon which to base its Order."[37] Despite Greenleaf's extensive discovery efforts, important evidence was available only to the Commission and the Staff. The "opportunity" to conduct discovery was not fulfilled, and the parties were denied access to evidence that the Order relies on. These errors require rehearing by the Commission.

To this point, despite the fact that Greenleaf and MPC had executed a comprehensive confidentiality agreement, MPC withheld or redacted many documents on the basis of confidentiality. This unacceptable and baseless discovery tactic prevented Greenleaf from reviewing relevant documents in a timely manner or, in many cases, at all. The Commission's failure to compel MPC to provide these documents to Greenleaf in response to its motion to compel or stay the proceedings until Greenleaf had an opportunity to review the documents materially prejudiced Greenleaf's ability to participate in this case.

Claiming a "privilege" of "confidentiality," MPC withheld or redacted many documents despite the fact that Greenleaf had executed a Confidentiality Agreement with MPC specifically so that Greenleaf's counsel and expert witnesses could access confidential information. Even where MPC eventually produced some of these allegedly confidential documents, MPC created needless delay by withholding them in the face of a confidentiality agreement specifically designed to deal with concerns about disclosure and creating explicit protections for MPC. MPC's delay and refusal to produce certain documents at all prejudiced Greenleaf's ability to prepare its case and meaningfully participate in this proceeding.

[37] Order at 2.

Without squarely addressing the fact that MPC admitted to withholding documents from Greenleaf, the Commission denied Greenleaf's Motion to Stay the proceedings based on an incorrect interpretation of RP 6.109(6)(f), which provides:

> No issue related to confidential designation shall constitute a basis to stay a docket proceeding if the Commission and Staff have received access to the information in dispute and other parties have been given the opportunity to enter into protective agreements to obtain such information.

The Commission read this passage to imply that since Greenleaf had entered into a confidentiality agreement with MPC and MPC had provided confidential documents to Staff and the Commission, there was no basis for Greenleaf's requested stay. However, RP 6.109(6)(f) clearly ***assumes that parties will freely produce documents subject to a confidentiality agreement***, which was not the case with MPC throughout this litigation. RP 6.109(6)(f) is designed to prevent parties that have refused to subject themselves to a confidentiality agreement from holding up proceedings due to not receiving access to confidential documents. It is not designed to allow MPC to enter into a confidentiality agreement with Greenleaf, ignore that agreement, refuse to produce confidential documents, and then claim that there are no due process implications to its conduct. The Commission's handling of MPC's behavior prejudiced Greenleaf's due process rights, which requires rehearing to correct.

D. The Commission improperly admitted evidence from prior cases that was irrelevant to MPC's requested relief and beyond the scope of this proceeding.

The Commission also erred by allowing MPC to introduce into evidence, through "incorporation by reference," documents that were completely unrelated to the In-Service Asset request. Admitting irrelevant evidence is improper and prejudicial.

From the time MPC filed its First Supplemental Filing and narrowed its request to a finding of prudence for the In-Service Assets,[38] MPC agreed that information not directly and specifically related to the In-Service Assets was not relevant to this hearing.[39] The Commission also acknowledged this limitation, stating in one of the amended scheduling orders that it would only hear matters related to the In-Service Assets at the November 10 hearing[40] and that a ruling on "the Company's In-Service Asset Proposal and corresponding prudence determinations" would be made subsequently.[41] Yet, after objecting to discovery regarding any information that was not specifically related to the In-Service Assets, MPC indicated just ten days before the hearing that it planned to introduce over 175 documents that were filed, either in this case or previous cases, before the First Supplemental Filing and that were not limited to the In-Service Assets.

The Order states unequivocally that the Commission considered the hearing in this case to be limited to the In-Service Assets.[42] And yet, the Commission allowed MPC to enter into evidence voluminous material that had nothing to do with that request. Each of the documents that MPC incorporated by reference from the 2013 Case or the 2014 Case was prepared and introduced before the 2015 Case was commenced, at least a year and in some cases two years before MPC decided to file the In-Service Asset Proposal.[43] As the Commission noted, the 2013 Case requested a prudence review of all Kemper Project assets incurred as of March 31, 2013.[44]

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[38] First Supplemental Filing at 3 (July 10, 2015).

[39] Response to Greenleaf's Motion to Compel at 12 (Oct. 30, 2015).

[40] Order Amending Scheduling Order (Sept. 23, 2015).

[41] Final Order at 9.

[42] Final Order at 30.

[43] As shown on the Exhibit List, the documents from the 2013 Prudence Case were filed over a period of time from June 8, 2013 through May 23, 2014, and the documents from the 2014 Case were filed on August 18, 2014.

[44] Final Order at 4.

These documents are not limited to the allegedly In-Service Assets, and were never intended to reflect an analysis of the In-Service Assets. Importantly, the Notice of Intent that MPC originally filed on May 15, 2015 was not limited to the In-Service Assets. The near-term completion of the entire Kemper Project and MPC's financial position were expressly among the reasons MPC cited for the Notice of Intent.[45] With respect to the evidence submitted with the Notice of Intent, including the documents incorporated by reference from the 2013 Case and the 2014 Case, MPC said that it was "presenting volumes [of] documentation sufficient to both support a finding of prudence and, at the very least, attached a presumption of prudence to the *Kemper Project expenditures*."[46] Therefore, even if incorporation of these documents from prior dockets was allowable in connection with the Notice of Intent, their inclusion in the record after the filing of the In-Service Asset Proposal was improper.

The Commission's Order states that "MPC lawfully incorporated by reference testimony and evidence previously filed in Docket Nos. 2013-UA-189 and 2014-UA-195, pursuant to the authority provided by RP 6.114 of the Commission's Procedural Rules."[47] The Order goes on to state that with respect to certain documents filed in those cases, "Greenleaf should have been aware of their incorporation into the record before MPC submitted its Exhibit List on October 30, 2015,"[48] and that "[t]he pleadings, data, documentation, and exhibits submitted in connection with the Company's Notice of Intent, First Supplemental Filing, and otherwise in this matter, being a part of the full record in this matter, comply with the applicable requirements of law and the rules,

[45] Notice of Intent at 2 (May 15, 2015).

[46] Notice of Intent at 8 (emphasis added)

[47] Final Order at 12.

[48] Final Order at 13.

regulations and orders of the Commission."[49] This response to the issues raised by Greenleaf fails to address the prejudicial impact of allowing MPC to enter into evidence voluminous information that had nothing to do with its requested relief, and requiring parties to comb through this information and attempt to prepare for a hearing on an extremely compressed timeframe. Moreover, as discussed previously, the information included information that was not publicly available, and confidential information unavailable even to intervenors having executed confidentiality agreements. Against this backdrop, the Commission's admission of voluminous information irrelevant to the requested relief, some of which was unavailable to the intervenors, warrants rehearing this matter.

III. SUBSTANTIVE LEGAL ERRORS IN THE COMMISSION'S ORDER

A. MPC has no CCN for a stand-alone CCGT, so allowing rate recovery for this asset independent of the overall Kemper Project violates Mississippi law.

The Commission erred in granting rate recovery for an asset that does not have a CCN. Mississippi Code § 77-3-11 requires a utility to obtain a CCN to construct or to operate a generation plant, providing in pertinent part:

> No person shall construct, acquire, extend ***or operate*** equipment for manufacture, generating, transmitting or distributing electricity for any intrastate or interstate sale to or for the public for compensation without first having obtained from the commission a certificate ***that the present and future public convenience and necessity require or will require the operation*** of such equipment or facility.[50]

It is undisputed that MPC was never granted a CCN to construct a stand-alone CCGT independent of the broader Kemper Project.[51] It is even clearer that MPC was not granted a certificate to

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[49] Final Order at 42-43.

[50] (emphasis added).

[51] *See* Commission Orders in 2009-UA-14 dated April 29, 2010, May 17, 2010, May 26, 2010, June 3, 2010, and April 24, 2012.

operate the Kemper Project as a gas-fired CCGT facility, which is a separate requirement under the statute.[52] In fact, in the CCN dockets for the Kemper plant, the Commission ***explicitly rejected*** certificating a stand-alone CCGT operating on natural gas.[53] Because MPC was not granted authority to construct or operate a stand-alone, gas-fired CCGT, the Commission's order granting rate relief for a such a facility contravenes Mississippi law.

In the original petition for a CCN for the Kemper Project, MPC sought to construct "a new integrated gasification combined cycle baseload electric generating facility."[54] In a series of orders, the Commission granted a CCN for the IGCC subject to a number of conditions that related specifically to the new "coal gasification" technology proposed by MPC.[55] In the final 2012 Order, the Commission granted a CCN for the Kemper County IGCC Project, citing the following reasons: (1) fuel diversity from the use of lignite as the primary fuel, (2) "immense lignite reserves" near the IGCC, (3) greater flexibility for environmental compliance regarding carbon emissions, (4) state-of-the-art equipment for the capture of CO_2 emissions and benefits related to "the passage of climate change legislation which the Commission finds to be probable," (5) governmental financial incentives related to clean coal technology (6) local economic impact, including mineral royalties from coal mining, (7) expanded lignite business opportunities for Mississippi (8) economic development from federal emphasis on clean coal technologies and sequestration of greenhouse gases, (9) enhanced oil recovery projects to increase oil production in Mississippi, (10) a finding that the Kemper IGCC Project was the most economic alternative available, having been

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[52] Final Order on Remand at 108, 2009-UA-14 (April 24, 2012); Hearing Tr. at 48:17-50:3.

[53] Final Order on Remand at 89-93, 2009-UA-14 (April 24, 2012).

[54] Petition for Facilities Certificate for the Kemper County IGCC Project at 1, 2009-UA-14 (Jan. 16, 2009).

[55] *See* Commission Orders in 2009-UA-14 dated April 29, 2010, May 17, 2010, May 26, 2010, June 3, 2010 and April 24, 2012.

carefully selected "from a variety of alternatives, including nuclear, pulverized coal, ***combined cycle natural gas fired, and combustion turbine natural gas fired,***" and (11) a finding that the Kemper IGCC Project was the "clear economic choice ***when compared to . . . the natural gas self-build option***."[56]

Each of the above Commission's findings supporting the CCN for the Kemper Project relate to the *overall* Kemper IGCC project—that is, a gasification plant fueled by lignite. None of the Commission's findings authorize or contemplate a stand-alone CCGT. Indeed, the last two findings explicitly set out the Commission's opinion that a CCN was not and should not be issued for a stand-alone CCGT such as the "In-Service Asset." When discussing the availability factor requirement, which was a condition for granting the CCN, the Commission stated:

> By "availability factor," we mean the availability to burn lignite, not natural gas, because the Company's ratepayer cost estimates for Kemper assume the low and stable cost of lignite rather than the volatile cost of gas, a contrast the Company emphasized.[57]

Having previously defined the availability factor for the Kemper Project to be based on its performance using lignite, the Commission cannot now redefine the term to suit its current desire to provide MPC rate relief. It is undisputed that the Kemper Project is not currently fueled on lignite at all, making its availability zero, as defined in the Kemper Project CCN, which MPC and the Commission attempt to rely on. This highlights the point that neither MPC nor the Commission can rely on the prior CCN, which specifically noted that running on natural gas does not count as being available. Because the Commission never granted a CCN for a stand-alone, gas-fired CCGT like the "In-Service Asset," the Order in this case is unlawful and contravenes Mississippi law.

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[56] Final Order on Remand at 89-93, 2009-UA-14 (April 24, 2012) (emphases added).

[57] Final Order on Remand at 108, 2009-UA-14 (April 24, 2012).

In addition, the stand-alone CCGT could not obtain a CCN at this juncture because § 77-3-11 requires a concurrent showing of "present and future" need.[58] It is undisputed that MPC does not ***need*** new capacity to serve its customers.[59] Given this, the Order allows unlawful recovery of costs for a stand-alone CCGT for which there is no CCN and without a showing that there is a present and future need for the In Service Assets. This requires rehearing.

B. The Order violates prior Commission orders and MPC's request should be reheard.

In its August 5, 2014 Order in Docket No. 2013-UA-0189, the Commission unequivocally ordered that any prudence hearings on the Kemper Project should be delayed until such time as "the Kemper Project is placed in commercial operation and demonstrates, for a reasonable period, its availability,[60] as indicated by the Commission and Public Utilities Staff in consultation with Independent Monitors."[61] The Order is also inconsistent with the Commission's prior CCN orders, as discussed above.[62] Because the Order in this case makes prudence findings regarding discrete portions of the Kemper Project in direct contravention of these prior orders, the Commission must rehear the matter.

C. The Commission afforded no process or hearing on the reasonableness of the Stipulation and therefore the Order adopting the stipulation lacks appropriate support.

The stipulation was presented to the parties the night before the hearing on the merits. Since the stipulation was not final, it was not entered into the record and the Commission made clear that the hearing would not be on the stipulation.[63] On November 17, 2015, the Commission

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[58] Miss. Code Ann. §77-3-11(2) (2013).

[59] Direct Testimony of Charles S. Griffey (Griffey Direct) at 9:1-3; Hearing Tr. at 50:19-51:2.

[60] Note that the CCN order defines availability as operation on lignite. *See* Section III.A; Final Order on Remand at 108, 2009-UA-14 (April 24, 2012).

[61] Order Cancelling Hearing at 1, 2013-UA-0189 (Aug. 5, 2014).

[62] *See* Section III.A.

[63] Hearing Tr. at 101:5-102:3.

issued an order outlining post-hearing submission deadlines. Subsequently, the final stipulation was filed by MPC and the Commission Staff. The Commission did not allow discovery on the stipulation and did not have a hearing on it. Accordingly, the Order adopting the stipulation is unlawful, and therefore the Commission should grant rehearing.

D. The Order violates the legal requirement that customers receive the lowest-cost resource to serve their actual needs.

The Mississippi Supreme Court has previously determined that utility customers should only have to pay costs that are reasonable and necessary to serve a demonstrated need.[64] The Order violates this clear legal requirement by allowing MPC to recover costs without demonstrating a current need for the service provided, and without demonstrating that the costs were reasonable and necessary to meet that need.[65] The amount the Commission allowed MPC to include in its rates ($126 million) also dramatically exceeds the reasonable cost of the service being provided—electricity from a stand-alone, gas-fired CCGT. Simply put, the Order allows recovery of costs for a service that is not needed, and at a level that far exceeds what a prudent utility would have incurred to develop a similar plant.

The evidence overwhelmingly demonstrates that the cost of the In-Service Asset proposal significantly exceeds the reasonable cost of a stand-alone CCGT based on independent industry estimates. The United States Energy Information Administration (EIA), a governmental agency that provides independent information regarding the energy industry,[66] estimates that the cost of a new CCGT in Mississippi is $835/KW.[67] The record demonstrates that after adjusting for

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[64] *State, ex. rel. Allain v. Mississippi Public Service Com'n*, 435 So.2d 608, 613 (Miss. 1983) ("What the public is entitled to demand is that no more be exacted from the rate payers than the services are reasonably worth.").

[65] *See* discussion above.

[66] http://www.eia.gov/.

[67] Griffey Direct at 7:4-5.

financing costs, heat rate differential and other factors, the estimated cost of constructing a new CCGT in Mississippi is no greater than $841/KW.[68] Based on this estimate, a reasonable estimate of the cost to construct a facility with a 730 MW generating capacity is approximately $614,151,850,[69] including all ancillary investment costs (such as transmission) and excluding regulatory assets that are wholly unrelated to a stand-alone CCGT (such as independent monitoring costs, which are unnecessary for a stand-alone CCGT project).

To further illustrate this point, the evidence shows that a reasonably priced stand-alone CCGT would yield an annual revenue requirement of $44.7 million.[70] The Order erroneously states that the authorized CCGT costs are less than the amount that Mr. Griffey stated would be prudently incurred for a stand-alone CCGT,[71] but the order excludes certain additional costs in making this inapt comparison. Specifically, the Stipulation sets the authorized cost at $575 million ***solely for the CCGT***. This total does not include the costs of land, transmission, or AFUDC, which are all separately stated and in addition to the $575 million. In contrast, Mr. Griffey's "prudently incurred" cost of $522 million is comprehensive and includes all related costs.[72] As the attachments to the Stipulation show, the total cost that is equivalent to Mr. Griffey's $522 million recommendation is actually the "Gross Plant in Service" cost of $684 million (Stipulation Exhibit A, line 1). When you include the regulatory assets net of AFUDC, this amount balloons to $789 million—a cost that is wholly unjustified by the evidence in this case.[73] Accordingly, the

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[68] *Id.* at 7:5-7.

[69] *Id.* at 7:7-9.

[70] Joint Parties' Post-Hearing Brief at 12-17.

[71] Order at 25.

[72] Griffey Direct at 7:1-18.

[73] Griffey Direct at 29:2-5.

Commission erred in adopting the annual revenue requirement of $126 million, which far exceeds the reasonable cost of a stand-alone CCGT and therefore violates the requirement to meet customers' needs at the lowest cost. This necessitates rehearing by the Commission.

E. The Order unlawfully includes costs associated with a plant (the overall Kemper Project, including the IGCC) that is not serving customers, which far exceed the reasonable costs for a stand-alone, gas-fired CCGT.

The Kemper IGCC is not in service, has not been judged prudent, and has not been found to be "used and useful" to the public.[74] Therefore, contrary to the recovery allowed in the Order, it is not just or reasonable to charge customers for costs associated with the Kemper IGCC.[75]

It is undisputed that the Order includes costs that would not have been incurred for a stand-alone CCGT. The Order admits this, stating that the Commission is using the Kemper Project's site, including the increased costs associated with it, as the basis to set the revenue requirement.[76] This is unsupported and constitutes legal error. Unrebutted testimony in the case shows that removing costs related to the overall Kemper project from the total amount MPC sought for the stand-alone CCGT yields costs that are much lower and quite close to the EIA estimated cost for a plant providing comparable capacity. The following are examples of costs that were driven by the overall Kemper Project, and would not be incurred for a typical stand-alone CCGT:

- $112 million of expenses for transmission facilities would not have been necessary for a new stand-alone CCGT built in a prudent location
- $31 million of the land costs claimed by MPC are not necessary for the CCGT

[74] Final Order at 28-30; Hearing Tr. at 11:22-24 (Commissioner Posey: "The Commission is not determining the prudence of the entire Kemper project or whether the Kemper project is used and useful."); Hearing Tr. 25:25-29 (the Kemper plant is not operating on lignite or syngas); Hearing Tr. at 97:10-19 (there has been no prudence or used and useful finding for the entire Kemper project).

[75] *See South Hinds Water Company v. Mississippi Public Service Commission*, 422 So.2d 275, 283 (Miss.1982) (finding that assets held for future development should not be included in a prudence finding, since "[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.").

[76] Order at 36.

- $45 million of AFUDC would not have been incurred for a new CCGT
- $105 million in regulatory assets are related to the IGCC and not a CCGT
- $53 million of expenses for the IGCC are attributable to the difference in heat rate between a new natural gas fueled CCGT and the CCGT that was built as part of the Kemper IGCC[77]

Removing the costs that would not have been incurred but for the overall Kemper Project, and allowing only the $596 million of cost directly associated with the CCGT, would result in a per-KW cost of approximately $816/KW for the stand-alone CCGT, which is remarkably close to the EIA estimate[78] for the cost of a new CCGT in Mississippi.[79] The Order rejects this analysis, allowing unlawful recovery of costs that were driven by the overall Kemper Project (which is not currently operational and not serving customers), and that were not needed to provide service from a stand-alone CCGT. Based on this, the Commission must rehear this matter.

F. The Order's finding that the Kemper CCGT is beneficial to customers is unlawful because it is contrary to the evidence.

The Order makes findings that the Kemper CCGT is "benefitting"[80] customers and provides "energy savings."[81] The evidence in the case does not support this finding. As discussed at the hearing, although MPC claims $15 million in fuel savings, this is nowhere in the record of the case.[82] In fact, the only evidence in the record estimates fuel savings between $2 million and $4 million per year from running the CCGT.[83]

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[77] Griffey Direct at 28:12-29:5.

[78] EIA's cost estimates include *all* costs, such as transmission and land, and not just the basic plant.

[79] *Id.*

[80] Order at 3.

[81] Order at 26.

[82] Hearing Tr. at 53:1-18.

[83] Griffey Direct at 10:10-16; Hearing Tr. at 53:1-18.

Further, even if MPC's unsupported $15 million fuel savings number is accepted at face value, MPC admitted that any fuel savings would need to be measured against other costs before the Commission could determine whether running the stand-alone CCGT provides economic benefits to customers. It is undisputed that the fuel savings from the CCGT do not come anywhere close to offsetting the annual revenue requirement approved in the Commission's Order.[84] In fact, the purported fuel savings do not even offset the operation and maintenance costs set forth in MPC's own rebuttal testimony.[85] As discussed at the hearing, to calculate "savings" from operating the combined cycle assets, all of these costs must be included. The evidence does not support any net economic benefit of operating the combined cycle, contrary to the Commission's findings.

The evidence presented at the hearing does not comport with the Stipulation's finding that the stand-alone CCGT provides a reliable source of power. To the extent that the Commission has adopted the Stipulation, the Order is incorrect on this as well. The Stipulation states that "For over a year, the Kemper CC has served as a reliable and economic source of energy for MPC's customers, with an overall EFOR rate of less than 2.4% cumulatively and generating over 3.5 MWh of energy."[86] As Greenleaf Exhibit 27 demonstrates, the stand-alone CCGT has experienced outages far beyond the claimed forced outage rate of only 2.4%.[87] The Order's findings on these points are unlawful and contrary to the evidence before the Commission.

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[84] Whether one were to use the unsupported $15 million number or the $2-$4 million estimate, those "savings" pale in comparison to the $126 million revenue requirement contained in the Stipulation.

[85] Rebuttal Testimony of Sam G. Sumner at 4:9-10 (estimating an annual O&M budget of $24 million).

[86] Stipulation at 4.

[87] MPC Response to MPUS(CTC)1-6 (Aug. 21, 2015).

The Order's conclusion that the In-Service Assets are providing any net benefits to customers is not supported by the evidence and is in error. Accordingly, the matter must be reheard.

IV. CONCLUSION

For the reasons stated above, the Commission should grant rehearing in this matter to correct the significant procedural and substantive defects in the Order.

Respectfully submitted on January 4, 2016.

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AFFIDAVIT

COMES NOW, John H. Geary, Jr., who after being duly sworn, certifies that he is one of the attorneys for Greenleaf CO2 Solutions, LLC, and as such is authorized to make this affidavit and that the facts and matters set forth in the above and foregoing Motion for Rehearing are true and correct as stated therein, to the best of his knowledge, information and belief.

John H. Geary, Jr.

SWORN TO and subscribed before me on January 4, 2016.

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, John H. Geary, Jr., counsel for Greenleaf CO2 Solutions, LLC, do hereby certify that pursuant to Rule 6.102(d) of the Mississippi Public Service Commission Public Utility Rules of Practice and Procedure, the foregoing was this day filed electronically with the Commission via website at www.psc.state.ms.us, and that in compliance with Rule 6.112, an original and twelve (12) copies of the filing will be furnished within three (3) business days to:

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This the 4th day of January, 2016.

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