

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

MISSISSIPPI POWER COMPANY

DOCKET NO. 2013-UN-14

IN RE: NOTICE OF INTENT OF MISSISSIPPI POWER COMPANY FOR
A CHANGE IN RATES RELATED TO THE KEMPER COUNTY
IGCC PROJECT

ORDER ON REMAND

This Order on Remand is before the Commission and is being issued pursuant to the decision and mandate of the Mississippi Supreme Court in Cause No. 2012-UR-01108-SCT consolidated with Cause No. 2013-UR-00477-SCT. In its decision, the Supreme Court, *inter alia*, reversed the Commission's order in this case allowing recovery of "mirror" CWIP and instructed the Commission, on remand, to

(1) fix by order the rates in existence prior to its order of March 5, 2013; (2) fix no rate increases until the Commission is in compliance with this Court's opinion; and (3) enter an order refunding the monies attributable to the rate increases allowed by the March 5, 2013, Order.¹

The Court further ordered that "the Commission enter an order *confestim* directing that the funds be refunded to the ratepayers."²

¹ *Miss. Power Co. v. Miss. Pub. Serv. Comm'n, et al.*, ___ So.3d ___, 2015 WL 3824153 at *5 (Miss. June 11, 2015).

² *Id.* at *7.

I.

Prior to the issuance of the Court's mandate, Thomas Blanton moved the Commission to enter an order requiring Mississippi Power Company, Inc. ("MPC") to issue refund checks to ratepayers immediately.³ MPC responded that the Court's instructions were not clear and that, according to basic rules of sentence construction, the Court required the Commission "to merely *enter an order immediately*."⁴ MPC contends that Blanton's interpretation would have the Mississippi Supreme Court setting rates, which is solely the province of the Commission, and that the Commission must interpret the decision and mandate in a manner that avoids "directives contrary to the law."⁵

MPC also noted that the Court required the Commission "to fix by order the rates in existence prior to its order of March 5, 2013."⁶ MPC pointed out several non-Kemper related rate matters that the Commission has addressed since March 2013 and opined that the result ordered by the Court was unclear and potentially unlawful, leaving it to the Commission to interpret the decision and mandate.⁷ Additionally, MPC identified several technical and procedural issues that it asserted needed resolution prior to issuing any rebates.⁸ Blanton noted in rebuttal

³ Mot. for order (June 18, 2015).

⁴ Resp. to mot. for order, at 2 (June 23, 2015).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 2-3.

⁸ *Id.* at 3-4.

that MPC's records should be sufficient to identify each customer and what they were charged; and therefore, MPC should issue refund checks immediately.⁹

As explained in parts II and III below, the Commission orders MPC to cease collecting the "mirror" CWIP rates effective with the August billing cycle, which should begin on, or about, July 20, 2015. MPC is also ordered to file within fourteen (14) days a plan for refunding the amounts collected pursuant to the Commission's "mirror" CWIP order. The refund plan should aim to complete the refunds within ninety (90) days of the Commission's approval of the refund plan (which the Commission will address at its August Open Meeting). In developing its plan for compliance with the Court's mandate, MPC shall allow ratepayers the option of receiving a refund check within the 90-day period noted above or taking a refund via bill credits over a longer period of time, with interest accruing at MPC's weighted average cost of capital. Additionally, the refund plan shall provide for a third-party audit, accountable to the Commission, of the refund program.

Recognizing that MPC was not restricted from spending the funds collected and does not hold the "mirror" CWIP funds in a bank account, if MPC thinks it will be unable to execute refunds within ninety (90) days to any ratepayer or class of ratepayers, then MPC shall explain in its refund plan filing why it is unable to do so, with such explanation supported by testimony, affidavit or other appropriate evidence. Parties to this proceeding may respond to MPC's refund plan filing within seven (7) days.

⁹ Rebut. in sup. of mot. for order, at 2-3 (June 29, 2015).

II.

The Commission does not read the Court's decision and mandate as requiring rates be reset and refunds issued for all rate increases that might have occurred since the Commission's Final Order dated March 5, 2013, granting the recovery of "mirror" CWIP. The only rate challenge (and probably not coincidentally, the only Kemper-related rate in effect) before the Court was the "mirror" CWIP rate. Stated differently, there exists no challenge to any rate treatment applicable to MPC's non-Kemper related service. The Commission does not read the Court's decision to create ambiguity where there is none.

According to the Mississippi Supreme Court, courts possess the authority to restrain the imposition of a rate found to be confiscatory, but do not possess the authority to set rates, which is a legislative power vested in the Commission.¹⁰ The Court's decision found the "mirror" CWIP rates unlawful and requires that the Commission order MPC to cease charging and collecting rates for "mirror" CWIP, that is, to fix rates going forward so that charges and collections reflect the absence of the "mirror" CWIP rate approved on March 5, 2013.

In both its compliance filing and the approved tariffs, MPC identified and established a separate Kemper Rate Factor ("KRF"), which amount was charged customers to recover the revenue requirement approved in the "mirror" CWIP Final

¹⁰ *Miss. Pub. Serv. Comm'n v. Miss. Power Co.*, 337 So. 2d 936, 940 (Miss. 1976).

Order. For example, the Residential Electric Service Rate Schedule “R-54”¹¹ set the KRF for a residential customer in the summer billing months at 2.319 cents per kWh for the first 650 kWh, escalating to 3.018 cents per kWh for the next 350 kWh, and escalating again to 3.076 cents per kWh for every kWh over 1000 kWh. Given the establishment of the separate KRF, there does not appear to be any undue difficulty ceasing the charging of the rates approved to collect the “mirror” CWIP revenue requirement. Therefore, the Commission orders that MPC shall cease collecting rates associated with the “mirror” CWIP Final Order with the August billing cycle, which begins on, or about, July 20, 2015.

III.

Neither the Court’s decision nor its mandate identified a time period over which refunds should occur. In its conclusion, the Court “order[ed] the Commission to enter an order *confestim* directing that the funds be refunded to the ratepayers.”¹² The phrase “order *confestim*” is not a legal term of art; rather, *confestim* is a Latin adverb with an English equivalent meaning immediately or forthwith.¹³ MPC contends that the location of the adverb clearly means that the Court intended the Commission immediately enter an order addressing the refunds, while Blanton interprets the Court’s language to require that the Commission enter an order requiring the refunds occur immediately. For three reasons, the

¹¹ Effective date December 17, 2013.

¹² *Miss. Power Co.*, 2015 WL 3824153 at *7.

¹³ Charleton T. Lewis and Charles Short, *A Latin Dictionary* (Clarendon Press 1879) (accessible at <http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.04.0059%3Aentry%3Dconfestim>).

Commission does not think there need be a conflict between the parties as to the Court's intention.

First, the Court did not identify a time period over which refunds should occur; thereby, implicitly recognizing the need for Commission discretion in developing and overseeing an orderly refund plan.¹⁴ Supporting the Commission's discretion to implement an orderly process, the Court's mandate provides "that execution *and further proceedings as may be appropriate* forthwith be had consistent with this judgment[.]"¹⁵ Although Blanton would clearly like to see refund checks issued immediately, he did not attempt to define a time period that would fit that definition and allow for consideration of the various challenges in developing and implementing a large refund program.

Second, and related to the first, the Commission does not think the Court would order what is in practice impossible to achieve. The Commission's "mirror" CWIP Final Order did not restrict MPC from spending the funds collected; rather, the Commission required that MPC record the funds in a regulatory liability account for the benefit of ratepayers. The funds do not exist in a bank account in the name of each ratepayer. MPC must raise the funds to repay the ratepayer, and among other things, MPC must identify how much is due each ratepayer, including those ratepayers that have come and gone during the period the funds were

¹⁴ By not setting a time for refunds, the Court's decision avoids the potential separation of powers issue identified by MPC relating to the Commission's legislative rate setting authority. *See Miss. Pub. Serv. Comm'n*, 337 So. 2d at 940.

¹⁵ Mandate, Case No. 2012-UR-01108-SCT (Miss. July 2, 2015) (emphasis added).

collected. This will take some time to plan and implement and could not occur the day after the Court issued its mandate.

Third, the Legislature has provided a procedure applicable to refunds closely analogous to the present situation. Where an appeal is taken from a Commission decision setting rates and where a utility implements rates under bond, or other arrangement, the law addresses refunds, as follows:

Should the final judicial determination of an appeal of a commission's final order rendered pursuant to subsection (9) hereof result in a schedule of rates less than what the commission allowed, the commission shall by order require the refund to customers of any amounts collected by a utility under bond, or other arrangements, during the appellate process which the courts found to be in excess of the amounts that should have been allowed by the commission in its final order. Such refunds shall be made in full, including interest at the lawful rate and shall be made within ninety (90) days after such final judicial determination. In lieu of payment, the utility may credit the service account with the amount due under this subsection if the consumer entitled to the refund is, at that time, a consumer of the utility.¹⁶

While the statute above does not address the precise circumstances, here, (i.e., a judicial determination resulting in a schedule of rates less than the Commission allowed but no amount collected under bond), it is not certain that the statute does *not* apply.¹⁷ At minimum, the statute offers compelling guidance.

Given the considerations above, the Commission orders MPC to file within fourteen (14) days a plan for refunding the amounts collected pursuant to the Commission's "mirror" CWIP Final Order. The refund plan should aim to complete the refunds within ninety (90) days of the Commission's approval of the refund plan

¹⁶ Miss. Code. Ann. § 77-3-39(12).

¹⁷ Additionally, Miss. Code Ann. § 77-3-39(13) contemplates the prompt payment of refunds.

(which the Commission will address at its August Open Meeting). In developing its plan for compliance with the Court's mandate, MPC shall allow ratepayers the option of receiving a refund check within the 90-day period noted above or taking a refund via bill credits over a longer period of time, with interest accruing at MPC's weighted average cost of capital, as some ratepayers may value more highly rate stability or mitigation of future rate increases than a lump sum check.¹⁸ Additionally, the refund plan shall provide for a third-party audit, accountable to the Commission, of the refund program.

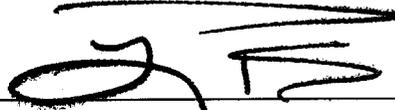
If MPC thinks it will be unable to execute refunds within ninety (90) days to any ratepayer or class of ratepayers in the manner contemplated, then MPC shall explain in its refund plan filing why it is unable to do so, with such explanation supported by testimony, affidavit or other appropriate evidence. Parties to this proceeding may respond to MPC's refund plan filing within seven (7) days.

SO ORDERED, this the 7th day of July 2015.

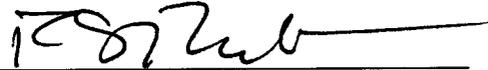
Chairman Lynn Posey voted aye; Vice Chairman R. Stephen Renfroe voted aye; and Commissioner Brandon Presley voted aye.

¹⁸ Although this may be true of any ratepayer, it may be particularly true of certain classes of ratepayers such as large commercial or industrial customers.

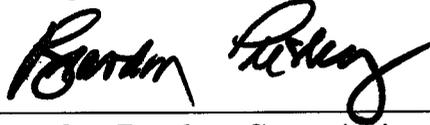
MISSISSIPPI PUBLIC SERVICE COMMISSION



Lynn Posey, Chairman

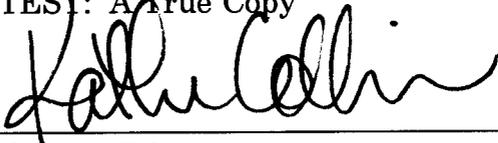


R. Stephen Renfroe, Vice Chairman



Brandon Presley, Commissioner

ATTEST: A True Copy



Katherine Collier
Executive Secretary

Effective this the 7th day of July

