

137 FERC ¶ 61,241
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
and Cheryl A. LaFleur.

Mississippi Power Company

Docket No. ER12-337-000

ORDER ACCEPTING AND SUSPENDING PROPOSED RATE SCHEDULE AND
ESTABLISHING HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued December 29, 2011)

1. In this order, we accept for filing Mississippi Power Company's (Mississippi Power) proposed revision to its MRA Cost Based Tariff (Tariff) and suspend the Tariff revision for a nominal period, to become effective January 1, 2012, as requested, subject to refund. We also establish hearing and settlement judge procedures.

I. Background

2. On November 2, 2011, as corrected on November 14, 2011, Mississippi Power filed proposed revision to its Tariff.¹ The revision modifies charges related to the provision of wholesale, all-requirements electric service to Mississippi Power's seven electric power association customers, South Mississippi Electric Power Association (South Mississippi), East Mississippi Electric Power Association (East Mississippi), Coast Electric Power Association, Pearl River Valley Electric Power Association, Singing River Electric Power Association, Dixie Electric Power Association, and Southern Pine Electric Power Association, and one municipal utility customer, the City of Collins, Mississippi (collectively, Tariff Customers). The tariff revision proposes to increase base rates for requirements service to Mississippi Power's Tariff Customers by \$31,552,854.²

¹ Specifically, Mississippi Power filed Rate Schedule MRA-23 to replace Rate Schedule MRA-22 of its Tariff.

² Mississippi Power November 2, 2011 Transmittal Letter at 1 (Mississippi Power Transmittal).

3. On November 14, 2011, Mississippi Power filed corrected Period I Statements. It states that, due to an administrative error, it originally filed erroneous Period I Statement data from a previous rate change filed in Docket No. ER11-1871-000. Mississippi Power states that it notified its Tariff Customers of the errors in the November 2, 2011 filing and provided them with electronic copies of the corrected statements, work-papers, and testimony errata sheets.³

4. Mississippi Power states that most of this proposed rate increase stems from construction work in progress (CWIP) related to Mississippi Power's Kemper County Integrated Gasification Combined Cycle new generation project (Kemper Project) currently under construction in Kemper County, Mississippi, and the addition of environmental controls at two of Mississippi Power's existing generation units. Mississippi Power also states that the "cost of doing business" has increased as a result of re-investment, environmental compliance, price escalation, aging generating units, and other factors.⁴

5. Mississippi Power asserts that the rate increase of \$31,552,854⁵ reflects the following significant accounting issues:

- The inclusion of 100 percent of pollution control CWIP and 50 percent of non-pollution control/fuel conversion CWIP in rate base;
- The establishment of a regulatory asset for the Kemper Project-related costs not permitted to be capitalized;
- Accounting treatments related to the purchase of two combined cycle units at Mississippi Power's Plant Daniel; and
- The establishment of a regulatory asset for costs related to the potential retirement or partial retirement of generation units as a result of new, stringent environmental compliance requirements.

³ Mississippi Power November 14, 2011 Supplemental Filing at 2.

⁴ Mississippi Power Transmittal at 2.

⁵ Mississippi Power asserts that the actual amount for the requested increase should be \$32,692,356. However, because the preliminary review requirement Mississippi Power provided to its customers included an increase of only \$31,552,854, that is all it is seeking. *See id.*, Shaw Affidavit at 3.

II. Notice of Filing and Responsive Pleadings

6. Notice of Mississippi Power's filing was published in the *Federal Register*, 76 Fed. Reg. 70,436 (2011), with interventions and protests due on or before November 23, 2011. East Mississippi and South Mississippi filed timely motions to intervene and protests.⁶ South Mississippi also moved to reject the filing and for summary disposition. On December 8, 2011, Mississippi Power filed an answer to South Mississippi's protest. On December 21, 2011, South Mississippi filed an answer to Mississippi Power's answer to South Mississippi's protest.

7. South Mississippi requests that the Commission reject Mississippi Power's filing as deficient. It states that Mississippi Power failed to provide baseline documentation with regard to Mississippi Power's claimed pollution control CWIP,⁷ so that there is insufficient information to be able to conclude that all of Mississippi Power's claimed pollution control CWIP qualifies as pollution control facilities under the requirements in section 35.25(c)(1)(ii) of the Commission's regulations.⁸ South Mississippi states, for example, that Mississippi Power proposes to include the pollution control CWIP for the Kemper Project in its rate base, notwithstanding that no agency has certified this pollution control CWIP in conformance with, or as required by, a pollution control program.⁹

8. Additionally, South Mississippi states that the pollution control CWIP included in Mississippi Power's cost-of-service study includes a "not clearly delineated amount" due to the commencement of construction of a flue gas desulfurization system on the company's Plant Daniel Units 1 and 2, which have not yet been certified by the Mississippi Public Service Commission.¹⁰ South Mississippi adds that, while Mississippi Power has sought a Certificate of Public Necessity and Convenience for this project, this matter has been in litigation for over a year, and the fate of this project is uncertain.¹¹

⁶ South Mississippi filed a motion to intervene and protest on November 14, 2011. On November 23, 2011, South Mississippi filed a supplement to its original protest. South Mississippi November 23, 2011 Protest (South Mississippi Second Protest).

⁷ South Mississippi Second Protest at 8.

⁸ *Id.* at 9 (citing 18 C.F.R. § 35.25(c)(1)(ii) (2011)).

⁹ *Id.* at 9-10.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 11.

Moreover, South Mississippi contends that Mississippi Power's filing is so deficient with regard to the Kemper Project and the Daniel facilities that it does not clearly identify the components of its pollution control CWIP.¹² Because, according to South Mississippi, Mississippi Power has not satisfied the Commission's rate filing requirements and has failed to provide the required information to demonstrate that all claimed pollution control CWIP meets the Commission's requirements to qualify as pollution control facilities, South Mississippi asks the Commission to reject Mississippi Power's filing.¹³

9. In addition to excessive pollution control CWIP, South Mississippi argues that Mississippi Power did not properly consider the potential impact of its rising costs and the possibility of losing wholesale load in the future. On this point, South Mississippi argues that Mississippi Power's filing assumes that South Mississippi will remain a customer indefinitely though Mississippi Power has no reasonable assurance that South Mississippi will do so beyond the 10-year notice provision in South Mississippi's current contract with Mississippi Power.¹⁴ South Mississippi further argues that Mississippi Power has proposed no mechanism for South Mississippi to benefit from the Kemper Project or repay South Mississippi for additional CWIP-related costs for the Kemper Project in the event that South Mississippi terminates Mississippi Power's MRA service. Consequently, South Mississippi argues that Mississippi Power has not met its obligation under section 35.25(c)(4) of the Commission's regulations, which requires Mississippi Power to consider "any customer's plans . . . for future alternative or supplementary power supplies."¹⁵

10. South Mississippi further argues that it has entered into an asset purchase agreement with Mississippi Power under which it will acquire a 17.5 percent ownership interest in the Kemper Project, with the closing of the acquisition to occur on or before June 30, 2012, which is approximately six months after the effective date of Mississippi Power's rate filing. It notes, however, that Mississippi Power has included a 100 percent, rather than an expected 82.5 percent, ownership interest in the plant for the full twelve months of its Period II test year. Accordingly, South Mississippi asserts that Mississippi Power will be responsible for only 82.5 percent of the Kemper project costs

¹² South Mississippi Second Protest at 11.

¹³ *Id.* at 7-13.

¹⁴ *Id.* at 14-15.

¹⁵ *Id.* at 15 (quoting 18 C.F.R. § 35.25(c)(4) (2011)).

for the full test year and that it should remove 17.5 percent of the Kemper-related CWIP included in the Period II cost of service.¹⁶

11. South Mississippi also considers Mississippi Power's proposed rate of return on common equity (ROE) of 10.27 percent excessive and it alleges that Mississippi Power's analysis contains a number of defects. South Mississippi argues that Mississippi Power's witness, Dr. James H. Vander Weide, used discounted cash flow (DCF) analyses that deviate from Commission precedent. More specifically, South Mississippi states that only two of the three analyses that Dr. Vander Weide performed using two different proxy groups apply the Commission's preferred single-state, constant growth DCF formulation; the third analysis applies a quarterly DCF model that the Commission has "consistently rejected."¹⁷ It further argues that the two analyses where Dr. Vander Weide applies the correct application methodology used proxy group selection criteria that the Commission has "soundly rejected."¹⁸ On this point, South Mississippi argues that the Commission requires the use of a bond rating selection criterion that includes only companies with ratings that are within a range of one ratings notch above or below the rating of the subject utility. For this reason, it contends that Dr. Vander Weide's proxy group should have only included companies with ratings of A-, A, or A+ and that the proxy groups in Vander Weide's Schedule 1 and Schedule 2 analyses do not comply with Commission precedent.¹⁹

12. South Mississippi further states that Dr. Vander Weide's Schedule 2 analysis, which it argues most nearly follows Commission precedent, produces an ROE range of between 6.8 and 15.3 percent with a midpoint, median, and mean of 11.1 percent, 9.6 percent, and 9.6 percent, respectively. Based upon this information, South Mississippi concludes that the Commission should not allow Mississippi Power an ROE higher than the median result of 9.6 percent. Moreover, it argues that the ROE should be even lower, because Mississippi Power has a lower risk than Dr. Vander Weide's proxy group average. South Mississippi states that it reproduced the DCF results from Dr. Vander Weide's Schedule 2, added the S&P and Moody's credit ratings for each company, and made adjustments to ensure closer conformity to current Commission precedent. It states that this analysis produces an ROE range of 7.4 percent to 11.0 percent, with a midpoint of 9.2 percent, a mean of 9.3 percent, and a median of

¹⁶ *Id.* at 17.

¹⁷ South Mississippi Second Protest at 18.

¹⁸ *Id.* at 19.

¹⁹ *Id.*

9.3 percent. South Mississippi states that an ROE of 9.3 percent reduces Mississippi Power's rate increase by 12.1 percent.²⁰

13. Additionally, South Mississippi states that Mississippi Power's reliance on the DCF range midpoint for its proposed ROE is inconsistent with Commission policy and results in a significantly overstated ROE. It asks the Commission to reject the use of the midpoint rather than the median and to direct Mississippi Power to submit a compliance filing using the median in its DCF analysis. South Mississippi therefore argues that the Commission should reject these analyses or require that Mississippi Power correct them to conform with established Commission practice.²¹

14. South Mississippi also argues that Mississippi Power's estimated Period II debt costs are unreasonable. South Mississippi's analysis, using what it considers conservative estimates of 5.25 percent for Mississippi Power's forecasted long term senior notes and 4.75 percent for its long term DOE guaranteed loans, reduces the estimated average cost of long term debt from 5.684 percent to 4.907 percent and reduces Mississippi Power's rate increase by approximately 5.3 percent.²² South Mississippi also argues that Mississippi Power has failed to include the most recently available retained earnings consistent with section 35.13(h)(3) of the Commission's regulations.²³

15. South Mississippi next argues that Mississippi Power's allocation of its claimed CWIP to the MRA class appears to be erroneous. According to South Mississippi, the allocation of CWIP in accordance with its analysis results in an MRA rate base reduction of 2.0 percent of the proposed increase.²⁴

16. South Mississippi states that, if the Commission does not reject Mississippi Power's filing, it should suspend the filing for the full five months and set it for hearing subject to refund.²⁵ It maintains that Mississippi Power's rate increase is excessive and meets the *West Texas Utilities Company* standard for a full five-month rate suspension.²⁶

²⁰ *Id.* at 22.

²¹ *Id.* at 23-24.

²² South Mississippi Second Protest at 25.

²³ 18 C.F.R. § 35.13(h)(3) (2011).

²⁴ South Mississippi Second Protest at 27.

²⁵ *Id.* at 28.

²⁶ *Id.* at 13, 28 (citing 18 FERC ¶ 61,189 (1982) (*West Texas*)).

17. Finally, South Mississippi's answer to Mississippi Power's answer reiterates its positions as stated in the body of this order.²⁷

18. East Mississippi concurs with South Mississippi's characterization of Mississippi Power's rate increase as excessive and incorporates South Mississippi's protest by reference.²⁸

19. Mississippi Power's answer reaffirms its positions from its November 2, 2011 filing. It states that the motion to reject and for summary disposition is without merit and should be denied in its entirety. Alternatively, Mississippi Power requests that the Commission suspend the rate filing for a nominal period of time and allow it to go into effect January 1, 2012, subject to refund. Mississippi Power further requests that the Commission set this matter for further proceeding and hearing in accordance with its Rules of Practice and Procedure.²⁹

III. Discussion

A. Procedural Matters

20. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2011), South Mississippi's and East Mississippi's timely, unopposed motions to intervene serve to make them parties to this proceeding.

21. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2011), prohibits an answer to a protest or answer unless otherwise ordered by the decisional authority. We will accept Mississippi Power's and South Mississippi's answers, because they provided information that assisted us in our decision-making process.

B. Request for Change of Action Date.

22. South Mississippi asks the Commission to consider the filing date of Mississippi Power's rate filing to be November 14, 2011 instead of November 2, 2011, because, on that date, Mississippi Power submitted an amendment to its initial filing that contains a "full set of new Period I Statements for an entirely different historical test year" and revisions to seven of the required Period II Statements.³⁰ South Mississippi argues that

²⁷ See *id.* at 7-16.

²⁸ East Mississippi November 22, 2011 Protest at 3-4.

²⁹ Mississippi Power December 8, 2011 Answer at 18.

³⁰ South Mississippi Second Protest at 5.

pursuant to *Duke Power Company*,³¹ the information contained in this amendment constitutes “supporting cost and other data required to be filed” and that the filing date, the 60-day notice period, and the effective date should “flow from [this] date.”³²

23. We note that Order No. 714, issued after *Duke*, revised the Commission’s regulations and the *Duke* policy as applied to amendments.³³ However filings, such as Mississippi Power’s here, that do not revise a rate schedule, tariff, or service agreement section, but instead only add or revise supplemental materials submitted as part of the initial application (such as revised testimony or revised exhibits) are considered on an individual basis to determine whether such changes are so significant that they would constitute an amendment that operates to extend the date by which the Commission must act.³⁴ We find that the Mississippi Power November 14, 2011 Supplemental Filing does not constitute an amendment, and therefore, no changes to the original filing date and effective date are warranted. Furthermore, we are setting this proceeding for hearing and settlement judge procedures and the Administrative Law Judge and the parties to the proceeding can deal with any issues resulting from the submission of the new Period I Statements.

C. Hearing and Settlement Judge Procedures

24. Mississippi Power’s proposed rate revision raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below.

25. Our preliminary analysis indicates that Mississippi Power’s proposed rate revision has not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. In addition, we deny South Mississippi’s request for a five-month suspension. In *West Texas*, the Commission explained that, when the Commission’s preliminary analysis indicates that proposed rates

³¹ 57 FERC ¶ 61,215 (1991) (*Duke*).

³² South Mississippi Second Protest at 4 (quoting 18 C.F.R. § 35.2(d) (2011)).

³³ *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 80-82 (2008). *See also* 18 C.F.R. § 35.17(b) (2011).

³⁴ *See supra* note 34; *see, e.g., Stetson Wind II, LLC*, Docket No. ER10-426-001 (Feb. 12, 2010) (delegated letter order), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12263515>; *Entergy Serv., Inc.*, Docket No. ER10-3357-000 (Jul. 27, 2011) (delegated letter order), <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=12716823>.

may be unjust and unreasonable and substantially excessive, the Commission will generally impose a maximum suspension (i.e., five months).³⁵ In the instant proceeding, our preliminary analysis indicates that the proposed rates may not be substantially excessive. Therefore, we will accept Mississippi Power's proposed rate revision for filing, suspend it for a nominal period, make it effective January 1, 2012, subject to refund, and set it for hearing and settlement judge procedures.

26. While we are setting these matters for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures are commenced. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.³⁶ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise, the Chief Judge will select a judge for this purpose.³⁷ The settlement judge shall report to the Chief Judge and the Commission within 30 days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) Mississippi Power's proposed rate revision is hereby accepted for filing and suspended for a nominal period, to become effective January 1, 2012, as requested, subject to refund, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and by the Federal Power Act, particularly sections 205 and 206 thereof, and pursuant to the Commission's Rules of Practice and

³⁵ *West Texas*, 18 FERC ¶ 61,189 at 61,374-75 (the Commission will suspend a proposed rate for the maximum period, five months, if the proposed rate increase is found to be substantially excessive); *Tucson Elec. Co.*, 76 FERC ¶ 61,235, at 62,147 & n.25-26 (1996).

³⁶ 18 C.F.R. § 385.603 (2011).

³⁷ If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

Procedure and the regulations under the Federal Power Act (18 C.F.R., Chapter I), a public hearing shall be held concerning Mississippi Power's proposed revisions to its MRA Cost Based Tariff. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2011), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five (5) days of the date of this order.

(D) Within thirty (30) days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty (60) days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within fifteen (15) days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, N.E., Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.