

BEFORE THE MISSISSIPPI PUBLIC SERVICE COMMISSION

DOCKET NO: 2009-UA-14

**IN RE: PETITION OF MISSISSIPPI POWER COMPANY FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
AUTHORIZING THE ACQUISITION, CONSTRUCTION, AND
OPERATION OF AN ELECTRIC GENERATING PLANT,
ASSOCIATED TRANSMISSION FACILITIES, ASSOCIATED GAS
PIPELINE FACILITIES, ASSOCIATED RIGHTS-OF-WAY, AND
RELATED FACILITIES IN KEMPER, LAUDERDALE, CLARKE,
AND JASPER COUNTIES, MISSISSIPPI**

MOTION REQUESTING RECUSAL

The Mississippi Chapter of the Sierra Club respectfully moves the Commission for an order recusing Commission attorney Katherine Briggs Collier from any further substantive participation in this proceeding. We emphasize that the Sierra Club does not allege that Ms. Collier has acted unethically or improperly. However, the standard in recusal cases in judicial settings is the existence of circumstances in which impartiality might reasonably be questioned. *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995). This standard is applied to law clerks and other judicial personnel, as set out below.

Ms. Collier's impartiality with respect to the Kemper IGCC project might be reasonably questioned because her father, Mr. Eddie Briggs, is a principal in the company purchasing property for the project, and has a long term contract with Mississippi Power related to the purchase of leases and other property interests for the project. Given this is the most important matter to come before this Commission in decades, it is extremely important to all parties that the process be fair in fact and appearance.

The reasons for this motion are as follow:

- (1) The Sierra Club was advised last week that Ms. Collier, who appears to be the

sole attorney advising the Commission in this matter, is the daughter of Mr. Eddie Briggs. In the period since the Sierra Club has reviewed the law and researched the role Mr. Briggs appears to play in the Kemper project, and has determined that a motion for recusal is necessary and proper.

(2) Mr. Briggs was and apparently still is a principal and agent of Kemper Natural Resources, LLC, a company that has acted on behalf of Mississippi Power Company in purchasing lignite leases in connection with the proposed Kemper IGCC plant. As recently as the present date, Mr. Briggs is listed on the Secretary of State's website as the agent for service of process of Kemper Resources, LLC. See Exhibit 1. Data Requests MPUS(LA) 8-3c and 8-3d requested information regarding payments of \$206,000 and \$25,000 made to "Briggs Properties." In responses filed December 9, 2009, Mississippi Power stated the following:

Mr. Briggs represents Kemper Natural Resources, LLC as an agent. He assists in the acquisition of mineral leases to be used for the development of the lignite mine in conjunction with North American Coal Corp. and in other negotiations regarding land acquisitions for the proposed IGCC generating facility and related rights of way and fee properties.

See Exhibit 2. Mr. Briggs also appears in the responses on various confidential filings related to real property. A redacted copy of one such page is attached as Exhibit 3, showing Mr. Briggs as a "member/mgr" of Kemper Natural Resources. Finally, according to the response to MPUS(LA) 2-22 Supplemented, filed September 11, 2001, Mr. Briggs has a contract with Mississippi Power through January 19, 2020, described as "MOU-Consultation/development of coal mine in Kemper County." See Exhibit 4.

(3) In licensing proceedings, the Commission acts in a quasi-judicial capacity. Public Utilities Rules of Practice and Procedure Rule 102. Quasi-judicial bodies are analogous

to judges in terms of recusal issues. *Pearson v. Parsons*, 541 So.2d 447 (Miss. 1989).

(4) Ms. Collier is not acting directly in a judicial or quasi-judicial capacity in this matter. However, Commission attorneys advising the Commission play a particularly important role with respect to contested legal issues in proceedings of this nature. This role is similar to, although more important than, the role that a law clerk plays with respect to a judge in a more traditional courtroom setting. Advice given by the Commission's attorney may be outcome determinative in some instances. This is true in the present case. As set out below, attorneys advising the Commission should be held to the same standards as a judge, or in this case the Commissioners themselves.

(5) The Mississippi Code of Judicial Ethics provides in pertinent part as follows:

Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise provided by law, including but not limited to instances where:

* * *

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

* * *

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Canon 3, Code of Judicial Ethics. Further, the commentary to Canon 1 provides that a judge should avoid even "the appearance of impropriety." The Mississippi Code of Judicial Ethics applies not just to judges in traditional courtroom settings, but also to "[a]nyone, whether or not a lawyer, who is an officer of the judicial system and performs judicial functions . . ." Application of the Code, Section A..

(6) The Mississippi Code of Judicial Ethics does not directly address staff attorneys

or law clerks. The Commission itself has no policies or procedures of which counsel is aware addressing a situation like the present one. However, in analogous situations other judicial entities require recusal of a staff member.

(7) In the federal judicial system, the “clerk is forbidden to do all that is prohibited to the judge.” *E.g., Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983); *Hunt v. American Bank & Trust Company of Baton Rouge*, 783 F.2d 1011(11th Cir. 1983); *Price Bros. Co. v. Philadelphia Gear Corp.*, 629 F. 2d 444, 447 (6th Cir. 1980), cert. denied, 454 U.S. 1099 (1981); *Miller Industries, Inc. v. Caterpillar Tractor Co.*, 516 F.Supp. 84 (S.D. Ala. 1980). The Federal Code of Conduct for Judicial Employees applies essentially the same standard to judicial employees as is applied to judges by the Mississippi Code of Judicial Ethics:

(1) A judicial employee should avoid conflicts of interest in the performance of official duties. A conflict of interest arises when a judicial employee knows that he or she (or the spouse, minor child residing in the judicial employee's household, or other close relative of the judicial employee) might be so personally or financially affected by a matter that a reasonable person with knowledge of the relevant facts would question the judicial employee's ability properly to perform official duties in an impartial manner.

(2) Certain judicial employees, because of their relationship to a judge or the nature of their duties, are subject to the following additional restrictions:

(a) A staff attorney or law clerk should not perform any official duties in any matter with respect to which such staff attorney or law clerk knows that:

* * *

(iv) he or she, a spouse, or a person related to either within the third degree of relationship, or the spouse of such person (A) is a party to the proceeding, or an officer, director, or trustee of a party; (B) is acting as a lawyer in the proceeding; (C) **has an interest that could be substantially affected by the outcome of the proceeding**; or (D) is likely to be a material witness in the proceeding. (Emphasis supplied).

(8) The Conference of State Court Administrators Model Code of Conduct for

Nonjudicial Court Employees provides a similar standard as follows:

A court employee shall not participate in a matter in which a spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

* * *

(3) is known by the court employee to have an interest that could be substantially affected by the outcome of the proceeding. (emphasis supplied).

(9) In this matter the Commission has requested extensive briefing on the appropriate legal standards to be applied under the Baseload Act and the other provisions of the Mississippi Code dealing with certificate actions, rates and other key issues. These legal issues – particularly those relating to the allocation of risk between shareholders and ratepayers - may well be outcome determinative in this matter, as Mississippi Power has made clear. It appears Ms. Collier is the only attorney advising the Commission on these critical substantive legal issues. This is a plainly a situation in which recusal is appropriate, since her father has an interest that will certainly be affected by the outcome of the proceeding.

(10) We emphasize again that the Sierra Club does not contend that either Ms. Collier or Mr. Briggs has acted unethically or improperly. Undersigned counsel has known Mr. Briggs for a number of years and respects his abilities and professionalism. These attributes likely run in the family. However, the standard in recusal cases is not based on actual impropriety or bias, but rather the existence of circumstances in which impartiality might reasonably be questioned. *E.g.*, Mississippi Code of Judicial Ethics Canon 3; *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995). Judicial recusal, and its extension to staff and attorneys advising judges, is based on maintaining respect for the system and its decisions, and may at times require erring on the side of caution. This is the most important matter to come before this Commission in decades, and it is important to all

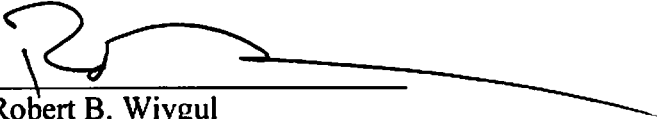
parties that the process be fair in fact and appearance. For all of these reasons, the Sierra Club requests that Ms. Collier be recused from further substantive proceedings in this matter.

(11) The Sierra Club is aware that the hearing on this matter is scheduled to begin on Monday, and that the Commission will require an attorney to deal with procedural and other matters. The Sierra Club is open to any reasonable means of dealing with this situation, and does not request any delay in the hearing itself.

This the 29th day of January, 2010.

Respectfully submitted,
Mississippi Chapter Sierra Club

By:



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CERTIFICATE OF SERVICE


I, Robert B. Wiygul, counsel for Sierra Club do hereby certify that in compliance with RP6.122(2) of the Commission's Public Utilities Rules of Practice and Procedure (the "Rules").

(1) One (1) original and twelve (12) true and correct copies of Sierra Club's Motion Requesting Recusal have been sent to the Commission by United States Postal Service this date to:

Brian U. Ray, Executive Secretary
Mississippi Public Service Commission
501 N. West Street, Suite 201-A
Jackson, MS 39201

(2) A true and correct copy of Sierra Club's Motion has been served by email or by United States mail, postage prepaid to the parties and intervenors at the addresses listed on the service list attached hereto as Exhibit "1" and incorporated herein.

This the 29th day of January, 2010.



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