Submission to the Mississippi Public Service Commission

Docket No. 2018-AD-64

In Re:
Order Establishing Docket to Investigate the Development and Implementation of an Integrated Resource Planning Rule

Supplemental
Written Testimony of
Erik Randolph
On Behalf of the Bigger Pie Forum

August 23, 2018

Q. What is the purpose of your supplemental testimony?

A. After reviewing on behalf of the Bigger Pie Forum ("BPF") the comments and testimonies of the other intervenors, I thought it would be helpful to the Commission for me to make specific suggestions addressing the following need: for the proposed IRP rule to state explicitly that the duly elected Mississippi Public Service Commissioners, not the courts, should be first to decide any issue of disclosure for information marked "confidential/proprietary" by a regulated utility in an IRP filing to ensure timeliness, accuracy and transparency. Further, that the Commission, not the utilities, designates information to be confidential; that is, the process explicitly requires the utilities to request protective orders of confidentiality from the Commission. This proposal is in line with the Commission's recently clarified exclusive original jurisdiction to ensure, "the accuracy or reliability of information submitted to the Public Service Commission by a public utility". § 77-3-5 Miss. Code Ann.

Q. What did you read in the comments and testimonies that raised your concern?

A. The comments for Mississippi Power Company ("MPC") put forth the Integrated Resource Plan ("IRP") rules of North Carolina and Oklahoma as providing "a level of detail and general framework consistent with MPC's comments, and which this Commission may want to consider." (p. 9)

Additionally, Exhibit C for Entergy included the following language:

> **Confidentiality**
> The Commission recognizes that resource planning involves the use and analysis of confidential commercial and financial information and trade secrets. The protection of confidential information benefits utility customers by ensuring that the rates they pay are not unnecessarily increased due to dissemination of market-sensitive data. Therefore, the public interest requires that confidential commercial and financial information and trade secrets of public utilities be protected to the full extent of the law. (Exhibit C, page 10)

The issue of confidentiality and how the Commission will handle it if it adopts an IRP Rule will be crucial to the success of the IRP process. Referring the Commission to North Carolina and Oklahoma will not be helpful when it comes to confidentiality because North Carolina and Oklahoma handle the issue differently. I strongly recommend against the North Carolina language in favor of an approach closer to the way it is handled in Oklahoma.

North Carolina's rule contains the follow language:

> If a utility considers certain information in its biennial or update report to be proprietary, confidential, and within the scope of G.S.

> 132-1.2, the utility may designate the information as "confidential" and file it under seal.[1]

In North Carolina, the electric companies make the determination whether information may be confidential. In practice, the state's consumer advocate, that is, the Public Staff, have access to the confidential information and review it on behalf of the consumers and routinely challenge whether information placed under seal should have been placed under seal. This process would not work in Mississippi because Mississippi's Public Utilities Staff has a different statutory role than North Carolina's Public Staff and would not exercise the same level of vigilance.

Placing the authority on determining confidentiality squarely with its commission, Oklahoma's regulatory language provides a better model than North Carolina's. Oklahoma's regulatory language is as follows:

> **Confidential Information**
> (a) If a utility is required by this Subchapter to submit information to the Commission that is alleged by the utility to be confidential, a motion for a protective order concerning such information may be filed requesting a determination to be made by the Commission to protect the information pursuant to 51 O.S., Section 24A.22.
> (b) Pending a determination regarding approval of any protective order by the Commission, the Commission and Attorney General, at their option, may review the information claimed to be confidential at a mutually agreed upon location, provided that for purposes of 51 O.S., Section 24A.22, the information shall be deemed confidential pending such determination by the Commission.[2]

Oklahoma's process has the important attribute that it is the commission, not the utility, who decides whether the information is confidential. Additionally, the Attorney General is invited to review the request. Given the current regulatory structure of Mississippi, the Public Utilities Staff would need to be added to those who review the material requested to receive a protective order.

Q. Have other states been struggling with the issue of confidentiality?

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[1] North Carolina R08-60 (h) (5). G.S. 132-1.2 is reference to the North Carolina General Statutes on Public Records, Confidential Information.

[2] Oklahoma Corporation Commission Permanent Rules § 165:35-37-2

A. Yes, this is a difficult regulatory topic among the states. The observable pattern is that electric utilities place or request to be placed information under protective orders that turn out to be or appear to be unjustified. This practice of overestimating what constitutes confidentiality reduces transparency and limits the ability of the public to participate in planning processes and other commission proceedings.

For example, the issue of confidentiality is part of the story of the recently abandoned nuclear reactor construction project in South Carolina. The Virgil C. Summer Nuclear Generating Station was a joint project between the SCANA, the parent company of South Carolina Electric and Gas Company ("SCE&G"), and the South Carolina Public Service Authority (Santee Cooper). A critical assessment of the project by the Bechtel Power Company was not released until Governor Henry McMaster himself used his statutory authority to secure a copy and released it. In my opinion, the South Carolina legislature contributed to creating a regulatory structure less conducive to handling these types of problems when it replaced its Office of Consumer Advocate with an Office of Regulatory Staff in 2004, four years prior to initiation of the V.C. Summer project in 2008.

Mississippi has the same regulatory defect as South Carolina in lacking an office of a consumer advocate. Therefore, it is of utmost importance that the IRP rule is very clear that it is the Commission who decides confidentiality and takes into account the tendency of utilities to overestimate what constitutes confidentiality.

Q. Other than Oklahoma, are there other state rules the PSC should look at?

A. Yes, I would look at Georgia's, which is far more detailed. (See Exhibit A for complete text.)

Georgia requires that upon filing a request for a protective order, the utility also files a "written affidavit" on "the legal and factual basis for its assertion that the protected information is a trade secret and should not be disclosed." Additionally, the utility shall provide the following information for each item it requests within a protective order:

> 1. Why the information derives economic value from not being generally known to others;
> 2. How others can obtain economic value from its disclosure; and
> 3. Procedures utilized by the affected party or utility to maintain its secrecy;[3]

[3] Georgia Comp. R. & Regs. R. 515-3-1-.11

The Georgia Rule also requires that the utility makes available a "public disclosure document."

Q. Why are you concerned that the Commission address issues of disclosure in the first instance in IRP proceedings rather than the courts?

A. BPF fought a court battle for two and a half years with Mississippi Power Company to obtain certain natural gas forecasts that MPC filed with the Commission in 2009 as part of its initial justification for the Kemper plant. BPF submitted its request on January 3, 2012, some months prior to the Commission's recertification of the plant in April 2012. MPC did not provide the information to BPF which it had filed as "confidential" with the Commission. Instead the Commission sent out a standard letter that the information was marked confidential and MPC could seek a protective order in the Chancery Court. MPC then filed a Petition for a Protective Order with the Hinds County Chancery Court, seeking to protect "a proprietary fuel price forecast" and "technical performance data developed ...concerning various electric generating technologies." The issue of disclosure, on which the MPSC held no hearings and took no position on the issue of the public interest involved, was not resolved until it was fought all the way up from the Chancery Court to the Supreme Court of Mississippi. The Supreme Court issued an Opinion in favor of BPF requiring disclosure in April 2014 (two years after the Kemper re-certification). Then the case went all the way back to the Chancery Court on Remand for the detailed final Order rendered in August 2014 setting forth exactly the portion of the documents that MPC would have to disclose to BPF. The information BPF ultimately obtained showed that Southern Company's own forecasts for natural gas (in the mid-double digits vs. less than $3.00/MMBtu today) were higher in the low and mid ranges than its own consultants were predicting.[4] Along the way, BPF expended two and one-half years and mounting legal fees to obtain the information, but too late for BPF to inform the public on an issue of vital importance that could have affected the outcome of the plant's recertification in April 2012.

Further, BPF never had the opportunity to argue for disclosure of the information before the Commission as the duly elected guardians of the public interest charged with the duty, "to provide fair regulation of public utilities in the interest of the public" and to "promote harmony between public utilities [and] ...their users." § 77-3-2 (a), (e) Miss. Code Ann. Moreover, it is the Commission that in the first instance has always had "exclusive original jurisdiction over the intrastate business and property of public utilities". § 77-3-5 Miss. Code Ann.

[4] Docket 2009-UA-14, Exhibit FSB-1 to the testimony of F. Sherrell Brazell at pp. 25-26.

Instead MPC was able to file a Motion for a Protective Order with the Chancery Court without a prior determination by the Commission on the issue of disclosure as balanced by the public interest. So, off the parties went into expensive, time consuming litigation before the courts without a submission of the issue on the merits to the Commission.

Yet, had BPF received and been able to criticize the forecasts before the Commission issued its recertification of the plant in April 2012, BPF would have been able to challenge the basis of the natural gas forecasts filed with the Commission to justify the plant at least in the court of public opinion before the Commission took up the final recertification of the Plant in April 2012.

Q. What is your suggestion for the IRP Rule?

A. It is important that the IRP Rule provide that if the electric utility wants confidential treatment of forecasts, comparisons of generation by fuel types, and other information it is submitting as part of an IRP, that the utility be required to make a Motion for a Protective Order in the first instance not to the Courts, but to the Commission justifying the request. The Rule should provide that the utility gives reasonable notice of the Motion by service of the Motion to all intervenors in this current Docket (the "Intervenors") so that the Intervenors have an opportunity to appear in the IRP filing docket and respond to the Motion. Intervenors should be able to challenge the Motion before the Commission and request disclosure to the public of the information in the public interest, which the Commission by statute is bound to weigh.

Further, so that an interested Intervenor can examine the information a utility seeks to protect, other than the utility's bare bones description, the IRP Rule should state an Intervenor is entitled to view the information marked "confidential" and/or "proprietary" by the utility upon signing a confidentiality agreement with the utility that the information can only be used or responded to by the Intervenor under seal in that proceeding, unless the Commission rules on the utility's Motion for a Protective Order that disclosure of the information, or parts thereof, to the broader public at large is in the public interest.

That way at the very least the Intervenor can argue to the Commission, even under seal, that the forecast or comparison is not accurate. Further, at the most, the Intervenor can then challenge the Motion for a Protective order and argue that the information is of such public import in the debate over a proposed IRP that it ought to be shared with the public at large in the public interest. In either case, the peoples' elected representatives on the Commission as the guardians of the public interest with exclusive jurisdiction over the business of the utilities would then be

able to make the first determination after full due process as to how the information marked confidential should be treated on the issue of disclosure.

Indeed, a court-only process that takes two and a half years to reach a conclusion on the issue of disclosure is so slow that it cannot assure the issue will be decided before a MPSC IRP submission has been accepted by the Commission. The risk is that the disclosure issue will be moot by the time the MPSC has made its final decision on the IRP which is an effective denial of due process for the party seeking disclosure to influence the outcome. Here justice delayed is indeed justice denied.

Q. What jurisdiction does the Commission have to require that disclosure issues be addressed in the first instance by the elected Public Service Commissioners?

A. The Mississippi Legislature in the last 2018 session clarified the statement of the Commission's "exclusive original jurisdiction over the intrastate business and property of public utilities" at § 77-3-5 Miss. Code Ann., effective July 1, 2018, adding following:

> ***Notwithstanding any other provision of law,*** and subject only to the limitations imposed in this chapter and in accordance with the provisions of this chapter, **the Public Service Commission shall have exclusive original jurisdiction over the intrastate business and property of public utilities *and, for purposes of clarification of the existing scope of said exclusive original jurisdiction, such exclusive original jurisdiction extends, but is not limited to:*** the establishment of retail rates; challenges, including customer complaints, to the amount of a retail rate or customer bill or whether such rate is just and reasonable; and ***challenges*** to the validity or accuracy of rates charged by a public utility, or ***to the accuracy or reliability of information submitted to the Public Service Commission by a public utility or other person*** in support of or in opposition to a proposed or approved rate, regardless of the legal theory upon which any such challenge is made.

(Emphasis added).

"Notwithstanding any other provision of law" includes notwithstanding any contrary citations a utility might attempt to make from the trade secrets and public records laws in an attempt to prevent the requirement of a Commission review of a disclosure issue prior to a court review of the issue (§ 79-23-1 and § 25-61-9 Miss. Code Ann.).

Moreover, to be sure, MPC argued before the Supreme Court in the BPF case, and in a case involving a challenge by Thomas A. Blanton to the initial Kemper CWIP rates, that information filed in a certification case is distinguishable from information filed in a rate case for the purposes of disclosure. The Supreme Court though in *Blanton* shut that argument down once and for all, noting that "long-range rate-impact information" filed in a Commission case all relates ultimately to rates regardless of the proceeding it is filed in, stating:

> ¶ 23. MPC not only sought rate increases but separately requested that the *long-range rate-impact information* furnished to the Commission be kept confidential, a direct violation of Section 77–3–37, which requires that information regarding changes in rates be "kept open to public inspection." Miss. Code Ann. § 77–3–37(1) (Rev.2009). The Commission improperly determined rate-impact information to be confidential, concealing from the ratepayers the amount of the projected increases. The Commission improperly sealed information to which the public was entitled.[16] The Commission and MPC claim that, since a specific rate increase was not requested in the initial petition, it was proper to seal that information. *That argument must fail, because the public has a right to know when and how much its rates will be increased at all stages of a proceeding.* The Commission's decision to govern in a cloak of secrecy and grant confidentiality to rate-impact information was arbitrary and capricious.
>
> (Emphasis added). *Mississippi Power Company, Inc. v. Mississippi Public Service Commission and Thomas A. Blanton,* 168 So.3d 905, 915 (Miss.2015).

It is precisely such "*long-range rate-impact information*" in an IRP filing that BPF seeks to preserve timely access to in the proposal it is making here—that the procedure for determining any issue of access or disclosure be right in the IRP Rule. Further, it is the "accuracy or the reliability" of the forecast information forming the basis of an IRP that an interested party like BPF should be able comment on before the Commission.

The Court also quoted Commissioner Presley at footnote 16 in the section quoted above:

> In his concurring-in-part and dissenting-in-part opinion, Commissioner Presley criticized the Commission's decision to keep rate-impact filings confidential. He stated:

> The Company's proposal and filings in this case keep confidential and out of the public's view the possible rate impacts associated with the project. Although current Commission rules allow for this practice, the majority should have made public disclosure of the rate impact a condition that must be met by the Company to make the application consistent with the public interest. *MPC ratepayers have a right to know what they will be faced with paying for such an essential service as electricity should the Company go forward with the project.* This is basic information that MPC ratepayers have a right to know.
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> (Emphasis original). *Ibid., 168 So.3d 915 at* Footnote 16.

Further, as noted above, the elected Commissioners have the duty in the first instance, "to provide fair regulation of public utilities in the interest of the public" and to "promote harmony between public utilities [and] ...their users." § 77-3-2 (a), (e) Miss. Code Ann. The electric utilities, after all, are regulated monopolies with exclusive area certificates and guaranteed rates of return, in turn for which there must be appropriate regulation. The electric utilities are not purely commercial business interests that can arbitrarily act to conceal information from the public by marking information "confidential/proprietary" at will without more. Moreover, the Legislature has given the Commission the power, "to prescribe, issue, amend and rescind such reasonable rules and regulations as may be reasonably necessary or appropriate to carry out the provisions of this chapter." § 77-3-45 Miss. Code Ann. The Commission therefore has full plenary power to include in the IRP Rule express provisions requiring that issues of public access and disclosure of information marked "confidential" or "proprietary" in an IRP filing be first sent to the Commission for determination, weighing the issues as elected officials in light of the public interest and the Commission's own expertise.

Indeed, as we have seen by the BPF's own experience in the courts, it is only the Commission, which holds regular monthly docket meetings at which Motions may be noticed, not the courts, that can make disclosure determinations timely enough to avoid such issues becoming moot in a pending IRP proceeding. Waiting two and a half years in the courts for a disclosure decision is too long to be of any use in a normal proceeding!

Q. How does your suggestion fit in with your earlier testimony filed in this Docket?

A. My testimony filed for BPF on July 31, 2018 (at p. 16) states as to BPF's prior experience in obtaining MPC's natural gas forecasts in the Kemper proceedings:

> If there had been an integrated resource planning requirement, this entire legal proceeding would have likely been avoided because natural gas forecasts are part of integrated resource plans and would have been disclosed. Having this critical piece of information before the public earlier may have made a difference in the process. Furthermore, the integrated resource plan would have been a critical component of the proceedings.

The Commission must ensure that long range forecasts, generation comparisons by fuel type, and similar information be disclosed on a timely basis in a long-range planning process where the public interest requires it. The IRP Rule therefore should address head on a process that allows the Commission in the first instance to determine in its judgment how information filed as part of an IRP Plan may be used or disclosed.

Respectfully submitted,

Erik Randolph
On behalf of Bigger Pie Forum

Exhibit A Georgia's Rule on Trade Secrets

Rule 515-3-1-.11. Trade Secrets

(1) In the event that any party or utility subject to the jurisdiction of the Commission is required to file with the Commission, or otherwise requested to provide to the Commission staff information which that party or utility considers to be a trade secret (as defined in O.C.G.A. Section 10-1-761(4)) (hereinafter referred to as "protected information"), then the following procedures shall apply:

(a) The affected party or utility shall submit, within the time specified or agreed to, the required or requested protected information under protective seal with the designation "TRADE SECRET" prominently attached to each page thereof; and

(b) The affected party or utility shall, at the same time, provide a version of the document containing protected information which can be used for public disclosure with the designation "PUBLIC DISCLOSURE DOCUMENT" prominently attached to each page thereof; and

(c) The affected party or utility shall, at the same time, provide by written affidavit the legal and factual basis for its assertion that the protected information is a trade secret and should not be disclosed, including, for each item claimed to be a trade secret:

1. Why the information derives economic value from not being generally known to others;

2. How others can obtain economic value from its disclosure; and

3. Procedures utilized by the affected party or utility to maintain its secrecy; and

(d) The affected party or utility shall maintain a master list of all documents submitted to the Commission pursuant to this rule, which list shall identify the document submitted, the number of copies submitted, and, if applicable, the docket in connection with which submission was made.

(2) Upon request by any person pursuant to the Georgia Open Records Act, O.C.G.A. Section 50-18-70, *et seq.*, for access to information which includes protected information, the Commission shall respond by providing that person with any non-protected information requested, the "public disclosure" version of the protected information, and written notice that certain information has been withheld as alleged protected information not subject to public disclosure.

(3) Any person who is a party or intervenor in a docket or non-docket matter, other than the Consumers' Utility Counsel, and desires access to protected information submitted to the Commission pursuant to this rule, may petition the Commission for such access. A hearing shall be held to consider the request, at which time the affected party or utility shall have

the burden of proving that the potential for economic harm to them outweighs the public benefit derived from allowing the party or intervenor access to such information.

(a) Any person who is granted access to protected information pursuant to paragraph (3) above, and the Consumer's Utility Counsel, shall be required to enter into a protective agreement with the affected party or utility which shall include, but not be limited to, the following terms:

1. Access to and use of the protected information shall be limited to matters relating to the docket or non-docket;

2. The protected information shall not be disclosed to any other person at any time unless such disclosure is required by an order of the Commission or a court of competent jurisdiction or authorized by the affected party or utility;

3. The protected information shall not be copied or otherwise reproduced by the party or intervenor;

4. The agreement shall apply to all employees, attorneys, agents, and consultants of the party or intervenor;

5. Any other terms or conditions as are reasonable to insure the confidentiality of the protected information.

(4) The Commission, upon request by the party or intervenor and after being provided with an executed copy of the protective agreement, shall provide the party of intervenor with the number of copies of the protected information agreed upon in the protective agreement, which copies shall be returned to the Commission not later than forty-five (45) days after the conclusion of the docket or non-docket, or the conclusion of judicial appeals relating to the matter.

(5) Within thirty (30) days of compliance by parties or intervenors with the provision of paragraph 4 above requiring the return of the protected information to the Commission, the Commission shall return all copies of the protected information in its possession to the affected party or utility, and the affected party or utility must preserve and maintain a master copy of said protected information for a period of seven (7) years.

(6) The public disclosure version of the protected information shall be utilized in the course of an open docket or public hearing, if necessary; provided, however, that, if the Commission staff or any party determines that protected information must be utilized in the course of an open docket or public hearing, then they shall meet or confer with the affected party or utility in a good faith effort to accommodate such use, or make an appropriate motion before the Commission for such use.

(7) Any party or intervenor, the Commission staff, the Consumers' Utility Counsel, or the Commission on its own motion, may challenge the designation of information as a "trade secret" by filing a motion to that effect with the Commission. In such a case, the affected party or utility shall have the burden of proving that the information constitutes a trade secret. If, after a hearing and an in-camera inspection, the Commission determines that the information provided does not constitute a trade secret or only a portion of the information is a trade secret, or that the protected information must be disclosed in part or in whole in connection with any hearing, or otherwise, then the Commission shall issue an order to that effect, which order shall be automatically stayed for thirty (30) days from the date of the order.

(8) The Commission, its staffs, attorneys, agents, and consultants, shall not disclose any protected information except as authorized by the affected party or utility, by Commission order, by court order, or by these rules, and shall take all reasonable and necessary measures to maintain the confidentiality of the protected information.

Verification

Docket No. 2018-AD-64

STATE OF PENNSYLVANIA
COUNTY OF DAUPHIN

PERSONALLY came and appeared before me, the undersigned authority in and for the jurisdiction aforesaid, the within named ERIK RANDOLPH, who after being duly sworn by me stated under oath as follows: that I am the Owner of Erik Randolph Consulting; that the foregoing Supplemental Testimony for and on behalf of Bigger Pie Forum and the matters and things set forth in said pleading are true and correct to the best of my knowledge, information and belief.

Erik Randolph

SWORN TO AND SUBSCRIBED before me on this the 23 day of August, 2018.

Notary Public

My Commission Expires:

Dec 11 2021

Commonwealth of Pennsylvania - Notary Seal
Patty Wachter, Notary Public
Dauphin County
My commission expires December 11, 2021
Commission number 1280654

Certificate of Service

I, Robert P. Wise, do hereby certify that I have this day caused the foregoing Supplemental Testimony to be served on all counsel of record in Docket 2018-AD-64 by email.

This the 4th day of September, 2018.

Robert P. Wise

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