No. 13-787

IN THE

Supreme Court of the United States

STATE OF MISSOURI EX REL. KCP & L GREATER MISSOURI OPERATIONS COMPANY,
Petitioner,

v.

MISSOURI PUBLIC SERVICE COMMISSION AND DOGWOOD ENERGY, LLC,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

REPLY IN SUPPORT OF PETITION

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Taken together, the briefs in opposition and the *amicus* brief make very clear that this case presents an important constitutional issue and will have wide-reaching and harmful ramifications on the balance of power between the federal and state governments in the regulation of energy delivery. Respondent Missouri Commission unabashedly argues that States can constitutionally excise federally-approved interstate transmission costs from retail rates paid by their resident customers. Respondent Dogwood hopes that such reasoning will spread contagiously to other states. *Amicus* Edison Electric Institute, representing 70 percent of the Nation's electric generation and 60 percent of its transmission lines, worries that this new "Missouri loophole" in the filed rate doctrine will cause devastating consequences to FERC's major policy initiatives of the last two decades. EEI Br. 5 (The opinion below is "positioned to spread like a virus to other States," and threatens to "inflic[t] irreparable damage on the Nation's interstate wholesale electricity markets."). The constitutional issue here is both squarely presented and important.

There are no vehicle problems. Claims that this case is still unripe *and also* already moot hardly bear their own logical weight. And Respondents' denial that § 1257 jurisdiction exists is unbecoming. An entire section of the opinion below discusses federal preemption and works hard to distinguish the same United States Supreme Court precedents on which the Petition relies.

Beyond the procedural smokescreens, Respondents' factual concessions starkly present the

constitutional issue. As the Missouri Commission correctly explains, the Company was "permitted" to "use power from Crossroads [in Mississippi] to serve ratepayers in Missouri," and "[t]o use that power, GMO must move it through transmission lines owned by Entergy, and must pay Entergy's federally-approved rate to do so." Comm'n Br. 3, 30. Nonetheless, the Commission and the Court of Appeals refused to allow the Company to recover those transmission costs, and instead "required GMO's shareholders, rather than its ratepayers, to bear that cost." Comm'n Br. 3, 30. To sum it all up in the Commission's own words: the State "permitted GMO to . . . use power from Crossroads to serve ratepayers in Missouri . . . [and] denied GMO's request to include the costs of transmission from Crossroads to Missouri in rates." *Id.* at 3. These are the only facts that matter here.

Under the Supremacy Clause and filed-rate doctrine, a State cannot "permit" a company to use an out-of-state power source but "require[] [its] shareholders rather than its ratepayers" to "bear [the] cost" of the "federally-approved rate" that "must" be paid to transmit the power to the ratepayers. It cannot "trap," or refuse to pass through, the federally-set component costs of prudent power sources. *E.g., Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986) (A "state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price.").

Respondents seek to bypass the applicable constitutional rule, and argue instead that the

State's jurisdiction over retail rate-making allows it to ignore federally-approved component costs. Comm'n Br. 27 (urging that the Commission acted within its authority in excluding transmission costs); Dogwood Br. 11 (expressing hope that the opinion below "would indeed prove to be contagious"). That position—which directly conflicts with a long line of state precedent and at least three United States Supreme Court cases—puts an exclamation point on the need for Supreme Court review in this case. The opinion below is not a constitutional fluke, but an intentional (and dangerous and improper) use of a very common State action: retail rate-setting.

1. Respondents' unpersuasive efforts to buttress the opinion below only further demonstrate the immediate need for certiorari.

The Commission asserts that the Court of Appeals did not err because this issue falls entirely within state jurisdiction—within its own power to set retail rates. Comm'n Br. 30, 32. That position assaults the Supremacy Clause and filed rate doctrine. And such a vigorous defense of the opinion below by the Commission (the same body that sets rates in Missouri going forward) only proves the Company's point that this is a problematic issue going forward.

Respondents claim that the Court of Appeals simply affirmed the state Commission doing its job (setting retail rates) and that the Commission "made no finding with respect to the lawfulness or reasonableness of Entergy's federal transmission

tariff," and did "not call a federal tariff into question." Comm'n Br. 17, 3.

That misses the point. The State here did not *directly* steal FERC's job by objecting to interstate transmission rates on their face. But the State *did* label that federally-set transmission cost "excessive" and held it "not just and reasonable" to include in retail rates. Pet. App. 77a–78a; *id.* at 77a (calling the transmission rate an "excessive cost" that would be "disallowed from expenses in [retail] rates"); Pet. App. 17a (describing the Commission's holding as a finding that it would be "unreasonable . . . to pass through . . . transmission costs to ratepayers").

The Commission persistently clings to its idea that this was constitutional—that *its own* sense of fairness is a valid reason to disallow federally-approved interstate transmission costs. Comm'n Br. 32. The Court of Appeals referred to this as objecting to the "concept" of placing transmission costs into retail rates. Pet. App. 17a; *see also* Dogwood Br. 8 (opining that ratepayers should not have to pay transmission costs because Crossroads was "beneficial to [Petitioner's] parent company," and that in doing so "the Missouri Commission stayed well within the bounds of its intrastate ratemaking authority").

But the Supreme Court rejected that idea outright in *Nantahala*, where North Carolina's view was identical to Respondents' here—specifically, that "concealed benefits" to a parent company justified requiring shareholders to pay federally-approved rates, and that such a decision fell "well within [the State's] rate making authority." *State ex rel. Utils.*

Comm'n v. Nantahala Power & Light, 332 S.E.2d 397, 440-441, 449 (N.C. 1985), *reversed*, 476 U.S. at 961 (specifically correcting the North Carolina court on this point).

The *Nantahala* rule is that regardless of a State's own view of the fairness of various component costs for obtaining power, "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."[1] 476 U.S. at 966. State courts are in broad agreement about this. *E.g., E. Edison Co. v. Dep't of Pub. Utils.*, 446 N.E.2d 684, 689 (Mass. 1983) ("Courts which have considered this question have agreed that the Federal Power Act requires that a utility's costs based on an FERC-filed rate must be treated as a reasonable operating expense for purposes of setting an appropriate retail rate."); *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 702 (N.H. 1985) (holding that the state commission was "preempted from selectively disallowing portions of [the FERC-accepted] cost of wholesale power"). In sum, the fact that the State retains jurisdiction over retail electric rates does not, and cannot, hide the preemption principle that the Court of Appeals here refused to obey.

Grasping for any piece of precedent to prop up the Court of Appeals' decision, Respondents claim

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[1] The Commission's claim that *Nantahala* does not control because it addressed "wholesale" rates, while this case is about transmission rates, is a red herring. Comm'n Br. 17. The Federal Power Act treats wholesale and transmission rates identically. Pet. 5 n.1. Similarly, the Commission's efforts to distinguish *MP&L* and *Entergy* by deeply delving into irrelevant facts simply mimics the Court of Appeals' error, thus missing the gist of those cases—that a state commission may not "trap" federally-approved electric costs.

that the opinion below followed the principles of *Pike County* (a case it never mentioned). Comm'n Br. 31-32; Dogwood Br. 13. Under *Pike County*, although a state commission cannot single out federally-approved rates as unreasonable costs, it can review a utility's power-purchase alternatives and allow into rates only the cost of the overall prudent choice. *Pike Cnty. Light & Power Co. v. Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983). Trying to cram this case into *Pike County*'s mold, Dogwood urges that the best way to interpret the holding here is that the Commission did not actually find Crossroads prudent, but instead found prudent only a "surrogate" Crossroads plant located in Missouri. Dogwood Br. 6, 9, 13.

That argument gets nowhere. No imaginary "Crossroads in Missouri" was ever presented for the Commission to choose. Pet. App. 143a-144a (describing the three options presented to the Commission). Moreover, "Crossroads in Missouri" would be nonsense. The great benefit of Crossroads is its location in Mississippi, where the natural gas needed to run the plant is cheaper than in Missouri. Thus, the Commission did not select a "Crossroads in Missouri" which does not and could not exist. But most importantly, even if the Commission *had* invented and then selected such an option, that would not hide the constitutional problem here. Such a holding would still amount to the same thing—one State taking the benefits of low-cost power generated out of state, but refusing to pay the federally-set interstate transmission costs necessary to receive that power.

2. This issue is justiciable under § 1257, is ripe, and is not moot.

Jurisdiction under § 1257. By denying that jurisdiction exists under 28 U.S.C. § 1257, Respondents confuse federal jurisdiction with their view of the merits of this issue. Dogwood Br. 2, 14–15; Comm'n Br. 1. The federal issue here is obvious on the face of the Court of Appeals' opinion, which spent several pages discussing "FERC preemption," and addressed multiple Supreme Court cases, including *Nantahala* and *MP&L*. Pet. App. 15a–20a. There should be no dispute that the opinion below is a final state court judgment on a federal issue, and that § 1257 jurisdiction therefore exists.

Next, Respondents oddly urge that this case has been brought to the Supreme Court too soon (it is unripe), and *also* too late (it is moot). Neither of these conflicting assertions is correct.

Ripeness. In analyzing a ripeness issue, this Court "consider[s] both the fitness of the issues for judicial decision and the hardship of withholding court consideration." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 670 n.2 (2010). Here, whether the Court of Appeals erroneously affirmed the "trapping" of federally-approved costs is perfectly fit for review and there is no reason to wait.

First, this is a pure legal issue, and as the Commission admits, pure legal issues are ideal for immediate review. Comm'n Br. 9; *see also Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985) (finding an issue ripe when it was "purely

legal, and [would] not be clarified by further factual development"). The Commission, however, urges that the "decision to disallow transmission costs . . . is highly fact-specific" and thus not ready for review. Comm'n Br. 10.

But the question here is not whether the opinions below *correctly* disallowed transmission costs given these "specific" facts. The Question Presented is a legal one—whether the Court of Appeals can, *as a matter of law, ever* disallow recovery of federally-approved transmission costs on a prudent power purchase. The answer is simply no. That legal issue is perfectly suited for immediate judicial review.

Second, Respondents claim there would be no hardship if this case were unripe because the same Court of Appeals is already facing the same issue again. Comm'n Br. 10; Dogwood Br. 2.

The Company is now paying more than $400,000 per month for transmission costs that it cannot recover in retail rates. The Company has a strong interest in a rapid ruling from this Court on the constitutional error here because such a ruling would at least begin to stop that steady financial bleed. And as *amicus* Edison Electric Institute points out, this case is contagious and cert-worthy now. EEI Br. 12–14 (expressing concern that the opinion below encourages state commissions to illegally trap billions of dollars of investment currently being spent on new energy infrastructure, including grid security and renewable energy expansion). A precedential opinion that allows a state commission to accept cheap power from a plant

out of state, but hand the transmission bill back to the utility, is by its very nature a ruling in need of quick constitutional correction.

Additionally, there is no special reason to believe that the Court of Appeals in the next case will ignore *stare decisis*, reverse itself, and correct its constitutional error—even though the Company wishes it would. In fact, it is ironic that the Commission urges this Court to deny certiorari by implying that the Court of Appeals may correct itself, when the Commission agrees with the erroneous ruling and has urged that court to *follow* it, thus repeating its error. There is always a theoretical chance that a Court of Appeals may eventually correct its constitutional error in a future case. That vague possibility, however, certainly does not make this case unripe—on the contrary, the immediate following case indicates, if anything, the importance and recurring nature of the issue.

Mootness. Evidently in the alternative, the Commission urges that this issue is moot. Comm'n Br. 11. The Commission, however, never responded to the Petition's clear application of the federal "capable of repetition, while evading review" exception to mootness. *See Turner v. Rogers*, 131 S.Ct. 2507, 2514–15 (2011); Pet. 32-34. Instead, the Commission argues about mootness only under state law, which is not identical to Article III and is irrelevant.

Under the controlling federal standard, to satisfy the "capable of repetition, while evading review" exception, first, the issue must be recurring against the same aggrieved party. The Commission

admits this prong is satisfied here. Comm'n Br. 13 (arguing that the case is moot "despite . . . the recurring nature of the Crossroads transmission issue"). Indeed, the issue is already in the process of recurring against the Company. Pet. 33.

Second, the issue must "evade review," typically by disappearing before the Supreme Court can review it. *Turner*, 131 S.Ct. at 2515. The Commission all but concedes this point as well by observing that "the 2011 rates at issue in this case were effective only until January of 2013." Comm'n Br. 22 n.4. Indeed, as the Court of Appeals noted, new rate filings form a steady stream. Pet. App. 8a. Here, the Company itself is planning yet another rate filing for 2015. Utilities cannot afford to freeze their rates for years on end in order to allow rate cases to pass through all levels of appellate review. The "capable of repetition, while evading review" exception to mootness exists precisely to allow review in cases like this.

3. This case presents an issue of national importance.

Respondents attempt to downplay the importance of this case by claiming that the factual scenario here is unusual and unlikely to recur in precisely the same way, Comm'n Br. 7, 33, though Dogwood undermines this claim by hoping that the opinion below will be "contagious." Dogwood Br. 6, 11, 8. Mining the record for rare-sounding factual nuggets, Respondents delve deeply into the history of the Crossroads plant and the separate issue of the plant's valuation.

But, as Dogwood admits, the issue of Crossroads' valuation was separate enough that the Court of Appeals did not even address it, and it is no part of the Petition here. Pet. App. 10a (declining to address valuation); Dogwood Br. 6 ("[T]he Missouri Court of Appeals did not address the issue of plant valuation."). Nor does Crossroads' supposed history as a "distressed" asset after the Enron scandal matter here.

The facts *that do matter* to this Petition are exceedingly simple. The Commission itself explains them several times in its brief in opposition. Comm'n Br. 3, 30. The Company, in Missouri, sought to take power from Crossroads in Mississippi, and to recover those costs by incorporating them into its retail electric rates. To accomplish that, it needed approval from the Missouri Commission. The Company then demonstrated to the Commission that, on an all-in basis, electricity from Crossroads was the lowest-cost and prudent option for Missouri consumers. The Commission accepted this, and specifically rejected as imprudent the only two other options suggested by others. Pet. App. 75a, 77a. But in accepting the prudency of using Crossroads, the Commission singled out the transmission cost component (which was based on a federally-approved tariff) and refused to allow the Company to recover that portion of Crossroads' cost.

Rate proceedings like the one below in this case happen frequently in front of state commissions across the country, as EEI, which represents most of the Nation's investor-owned utilities, confirmed. EEI Br. 1, 2, 5. In those proceedings, the state commissions constantly must evaluate which electric

sources are prudent, and how to allow utilities to recover the costs of those prudent sources. *Id.* at 5.

For that reason, the "Missouri loophole"—the idea that a state commission can lawfully "trap" or disallow federally-approved cost components of an overall-prudent power source—is "uniquely positioned to spread like a virus to other States." EEI Br. 5. This will undo decades of work by FERC to eliminate barriers to competition in electric markets. *Id.* at 10–12. Just as in *Nantahala, MP&L,* and *Entergy*, Supreme Court review is necessary once again to address a State ruling that chips away at federal regulation of interstate electric markets.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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