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

DOGWOOD ENERGY, LLC'S OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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OBJECTION TO QUESTION PRESENTED

Petitioner presents a question that is based on a false premise. As discussed further herein, the Missouri Public Service Commission did not "recognize[ ] the prudency of obtaining electric power from a plant in another state, but then bar[ ] the utility from recovering the FERC-approved transmission costs of importing that power." (Petition, page i). Instead, because Petitioner's parent required it to acquire an interest in the otherwise-unwanted Crossroads generation plant by means of an accounting transfer with an unregulated affiliate rather than an arms-length free market transaction, the Commission only "recognized" the prudence of a surrogate plant located in Missouri (not Mississippi) that did not use any interstate transmission or have any such transmission costs.

RULE 29.6 STATEMENT

Dogwood Energy, LLC is owned by Kelson Energy, Inc., which is not a publicly held company.

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As Petitioner indicates at page 31 of the Petition, while its appeal of the Missouri Public Service Commission decision that is the direct subject of the Petition was still pending, on January 9, 2013 the Commission issued another decision addressing the same issue of unnecessary interstate transmission costs in a subsequent rate case that had been commenced by Petitioner. However, the Commission did not "simply adopt[ ] its previous ruling regarding the transmission costs of Crossroads" as Petitioner contends at page 31. Instead, the Commission incorporated its prior decision by reference and then made additional findings based on the evidence adduced in the second proceeding. The Commission held that "no party has shown that the Commission should change its previous rulings." (App. 172a). The Commission "incorporates, as if fully set forth, its findings of fact and conclusions of law from the previous rulings and recapitulates only the most salient facts . . . only as necessary to show how the movants for change have failed to meet their burden of proof." (Id.).[1] Further, the Commission noted that even if Petitioner had met its burden of proof, the Commission would have declined to change its prior decision due to the pending

[1] Principles of *stare decisis* do not confine the Commission, but concomitantly it is not compelled to examine a recurring issue with total disregard of prior decisions. As the Commission indicated in its second decision, it must be persuaded to change a prior decision, perhaps even by "clear and satisfactory evidence." (App. 173a-174a, citing Sections 386.430 and 386.490 RSMo.).

appeal, stating that "departure from the previous rulings before the Court of Appeals has reviewed them invites confusion and uncertainty." (Id. at 174a).

Petitioner also fails to mention that in addition to (unsuccessfully) seeking a second bite at the apple by raising the issue of Crossroads transmission costs before the Commission in the subsequent rate case, it has also asked the Missouri Court of Appeals to reconsider its decision on the transmission cost issue in an appeal of the Commission's subsequent decision. Petitioner's appeal of the second Commission decision has been briefed, and was argued and submitted to the Missouri Court of Appeals, Western District, on December 17, 2013.[2] (Case Nos. WD76166 and 76167). Two weeks later Petitioner submitted its Petition to this Court, raising the same arguments.

JURISDICTION

The Missouri Court of Appeals' affirmation of the Missouri Public Service Commission's exercise of its ratemaking authority under state law is not a matter reviewable by this Court under 28 U.S.C. § 1257.

[2] Unlike the appeal of the first Commission decision, there was no judicial review at the circuit court level the second time around. The judicial review statutes were amended in 2011 to provide for direct appeal to the Court of Appeals regarding Commission decisions issued on and after July 1, 2011. *See* Sections 386.510 et seq. RSMo.

OPPOSITION TO PETITIONER'S STATEMENT OF THE CASE

This matter has no federal preemption implications. The Court should decline to review a discretionary ratemaking decision of a state utility regulatory agency that has already been affirmed upon state court review, has been remade by the agency in a subsequent proceeding, and is the subject of additional still-pending state court review.

Petitioner KCP&L Greater Missouri Operations Company ("GMO" or "Company"), did not "contract[ ] to purchase power from a generating plant out of state." (Petition page 2). Instead, GMO's parent Great Plains Energy acquired both GMO (formerly known as Aquila) and a non-regulated affiliate known as Aquila Merchant Services in a merger. Aquila Merchant was the original party to a tolling agreement for the capacity and energy of the Crossroads generation plant, which is owned and operated by the City of Clarksdale, Mississippi. Aquila Merchant had entered into the agreement with the City in 2002 in order to use the plant in the unregulated energy market. Those plans went awry when Enron and the market collapsed. Aquila Merchant was able to dispose of some of the other generating turbines it had acquired at distressed prices, but it was not able to sell its interest in the Crossroads plant. Great Plains Energy did not negotiate a specific price for the interest in the Crossroads plant in the merger, but rather simply had to accept it as a liability. Great Plains Energy also could not sell off the plant, and after contemplating

abandoning the plant (to the point of quantifying abandonment in SEC filings), it ultimately decided to assign the tolling agreement by accounting book transfer to GMO in 2008. (App. 53a-78a).

With the interest in the Crossroads plant assigned to its books, GMO sought to include the plant in its rate base. It did not simply seek to include amounts paid out-of-pocket on a purchase power contract as operating expenses to potentially be recovered dollar-for-dollar in rates charged to customers, but rather sought to include the plant as an asset, so that it could potentially recover not only annual expenditures but also depreciation and a return (profit) on the value of the plant. (App. 49a-53a).

Faced with this request, the Commission did not, as Petitioner GMO states, "concede[ ] that the decision to obtain power from the Mississippi plant was prudent." (Petition p. 2). Nor did the Commission "single[ ] out the federally-approved interstate transmission costs of importing that power as not a 'just and reasonable' expense." (Id.).

Instead, the Commission determined that it should place a surrogate value on the paper transaction between affiliated parties, in accordance with its rules, because it was not an arms-length free market transaction. In setting that value, the Commission stated: "It is incomprehensible that GPE would pay book value for generating facilities in Mississippi to serve retail customers in and about Kansas City,

Missouri. And it is a virtual certainty that GPE management was able to negotiate a price for Aquila that considered the distressed nature of Crossroads as a merchant plant which Aquila Merchant was unable to sell despite trying for several years." (App. 71a).

In connection with that valuation process, the Commission explained that it needed to treat the plant as if it were located in Missouri in order to derive a prudent surrogate value. It stated: "**If** [Crossroads is] included in rate base at fair market value, rather than the higher net book value paid to [GMO's] affiliate, and except for the additional cost of transmission from Mississippi to Missouri . . . [**then** GMO's] decision to add the Crossroads generating facility to the MPS generation fleet [was] prudent and reasonable." (App. 76a, emphasis added). Conversely, the Commission found that a decision to add such a plant at the higher value and at the Mississippi location (i.e., without the Commission's adjustments) would not be prudent and reasonable.

Thus, while the Commission was satisfied that GMO's proposed use of the Crossroads plant was less expensive than other options GMO considered in a 2007 analysis, it also concluded that the appropriate costs to include in rates were even lower because the company had artificially inflated the value of the plant and included costs of transmission that could have been avoided with more prudent generation resource planning. (App. 70a, 77a). All of these

aspects of the Commission's decision were interrelated. (App. 76a-77a).

Contrary to GMO's assertion at page 2 of the Petition, the Commission did not "trap" any interstate transmission rates. Nor did the Commission take issue in any way with the rates that the FERC had approved for such interstate transmission. Instead, in lieu of totally disallowing the costs related to the Crossroads plant, the Commission allowed GMO to recover the costs of a surrogate plant at a lesser value as if located in Missouri. In contrast to the Crossroads plant, a Missouri plant would not need any interstate transmission and no such costs would be incurred. As a result, the Commission did not allow such costs to be recovered in GMO's rates. (Id.).

Although the Missouri Court of Appeals did not address the issue of plant valuation in the first appeal (on the grounds that the subsequent Commission valuation decision had rendered that aspect of the first decision moot), the Court affirmed the Commission's related decision regarding transmission costs. The Court recognized that the transmission cost issue was part of the dispute over GMO's efforts to include the plant in its rate base, and that in rejecting recommendations to exclude the plant completely, the Commission had "relented" in including the plant at "an appropriate value," without "unnecessary transmission costs." (App. 12a-13a, 16a-17a).

The Missouri Court of Appeals decision and the underlying Commission decisions do not contradict

principles of federal preemption. Neither the Court nor the Commission took any issue whatsoever with interstate transmission rates established before the FERC. Instead, they concluded that no interstate transmission service would have been required had GMO acted prudently. But rather than totally excluding all costs related to the Crossroads plant for imprudence as proposed by the Commission's staff and others, with supporting evidence, the Commission instead allowed an adjusted amount to be included based on a surrogate valuation that assumed a Missouri location and thereby obviated any need for interstate transmission. The Missouri court affirmed this exercise of the Commission's authority to assure ratepayers only pay for costs prudently incurred by the utility. (App. 13a-17a).

I. Legal Framework

While states indeed cannot second guess rates set by FERC, they can, as was done here, reject imprudent discretionary purchasing decisions of utilities that implicate FERC-approved rates. *See, e.g., Pike County Light & Power Co.-Elec. Div. v. Pennsylvania Pub. Util. Comm'n*, 77 Pa. Cmwlth. 268, 465 A.2d 735, 738 (1983); *Kentucky W. Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988); 2 *Law of Independent Power Appendix 8* (2012) at note 121.

This Court in *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 972, 106 S. Ct. 2349, 90

L. Ed. 2d 943 (U.S.N.C. 1986), accepted the analysis in *Pike County Light & Power Co.-Elec. Div.*, 465 A.2d 735 as valid (albeit inapplicable to the case then before it), stating:

> Without deciding this issue, we may assume that a particular *quantity* of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere, even though the higher cost power actually purchased is obtained at a FERC-approved, and therefore reasonable, *price*.

This Court also denied certiorari in *Kentucky W. Virginia Gas Co*.

FERC has not mandated any use of Crossroads by GMO and the Missouri Commission stayed well within the bounds of its intrastate ratemaking authority in determining that GMO should not be allowed to impose unusual and unnecessary transmission costs on its ratepayers just because it was beneficial to its parent company.

II. Facts

GMO did conduct an analysis and decide that using the Crossroads plant would cost less than the other options it considered. (App. 61a). But, for the reasons discussed above, the Commission decided that GMO could have done better for ratepayers. Accordingly, it adjusted the costs by deriving a surrogate

value of a plant in Missouri that did not require interstate transmission. (App. 76a-78a).

III. Proceedings Below

As indicated above, the Commission acknowledged GMO's self-serving analysis of costs related to the Crossroads plant, but the Commission did not decide that inclusion of that plant in the generation fleet at those costs was prudent. The Commission decided instead that it would be prudent to include a surrogate plant, having "an appropriate value" and at an assumed location that eliminated the need for transmission costs. (App. 67a-68a, 75a-77a).

The Missouri Court of Appeals affirmed, expressly rejecting the same arguments GMO now presents in its Petition to this Court. (App. 15a-20a). The dissenting judge agreed with the substance of the opinion, but would have declined to address the issues due to mootness. (App. 30a). The full Court of Appeals denied rehearing and the Missouri Supreme Court declined to exercise its discretion to examine the case on transfer. (App. 96a-98a).

GMO presented the same issues again to the Commission while the appeal of the first decision was still pending, which led to the mootness concerns at the state appellate court. (App. 7a-8a). The Commission did not change its decision. (App. 172a-174a). GMO has appealed the second decision to the Missouri Court of Appeals, which appeal has been

briefed, argued and submitted to the court. (Case Nos. WD76166 and 76167).

OPPOSITION TO GRANTING THE PETITION

There is no reason (or jurisdiction) for this Court to examine a state regulatory commission's exercise of its discretionary authority to protect ratepayers from imprudence by a utility. No federal issues are implicated and state courts have not only already examined and affirmed the decision, but are also engaged in yet another round of appellate review concerning the same issues.

Neither the Commission nor the state courts found that FERC-approved interstate transmission rates were excessive. To the contrary, both the Commission and the state courts expressly acknowledged that they could not take such action. (App. 15a-20a, 175a-176a).[3] Instead, the Commission and the state courts determined that no interstate transmission would be necessary if GMO had acted prudently. The Commission stated: "Paying the additional transmission costs required to bring energy all the way from Crossroads and including Crossroads at net book

[3] GMO did not raise the issue of federal preemption until its Application for Rehearing to the Commission in the first case. (App. 153a). The Commission denied the motion without discussion of the issue. (App. 89a-90a). But it explained its denial in its second decision. (App. 175a-176a).

value with no disallowances, is not just and reasonable. . . .” (App. 68a). The Missouri Court of Appeals stated: “What the PSC *did* decide was that it would be unjust and unreasonable to allow KCP&L-GMO . . . to recover the otherwise unnecessary transmission costs of the energy from Mississippi to Missouri.” (App. 16a).

The Commission, with state court affirmation, simply protected ratepayers from being overcharged as a result of Great Plains Energy foisting on its regulated subsidiary GMO a contract interest in a power plant in another state that was an unwanted vestige of the pre-Enron era. Again, the Commission did so by using an appropriate value and an appropriate in-state location for ratemaking purposes. As the Commission succinctly stated in its second decision, “to recognize the marginal value of purchased power from Crossroads does not constitute an endorsement of its inflated cost.” (App. 176a).

The facts surrounding the Crossroads plant would seem to be quite unusual. But if another regulated utility were to try to force its ratepayers to pay inflated costs for an electric plant that would otherwise be abandoned, one would hope that the Missouri Commission’s decisions and related court opinions would indeed prove to be “contagious” and embolden regulators to push back.

I. The Court of Appeals' decision did not violate the filed rate doctrine or the Supremacy Clause.

GMO argues from false premises. The Missouri Court of Appeals and the Commission did not exercise "a line-item veto" to remove or trap federally-approved transmission costs, but rather appropriately adjusted the value of a questionable asset. The Commission did not find acquisition of the plant to be prudent in the absence of regulatory adjustments. The Commission did not find FERC-approved rates to be excessive.

Determining that GMO should not be using a plant in Mississippi and, therefore, should not be incurring interstate transmission costs, does not equate to a finding that FERC transmission rates are too high. Reciting the results of GMO's self-serving analysis of generation options does not equate to accepting that the Company proved prudence. As shown above, the Commission and the state courts made plain that instead of totally rejecting the plant as imprudent, they were approving inclusion of the plant with adjustments as to both value and location/need for transmission.

Regarding GMO's "aside" at page 15 of the Petition, in fact because GMO only uses the plant on an infrequent basis for its regulated operations (App. 174a), and because GMO can take advantage of short-term gas price disparities (App. 62a), it does have opportunities to generate profits by using the plant

for other purposes as noted by the Court of Appeals. (App. 17a). But the main benefit of the Commission's decision for GMO was that it did not totally disallow costs related to Crossroads as the Commission Staff had advocated because of the distressed nature of the plant, its distant location, and its ill-fated energy-speculation origins.

II. The Court of Appeals' decision does not split with state court precedent.

The Missouri Court of Appeals did not hold that the Commission could determine that FERC-approved rates were unjust and unreasonable. Likewise, the court's opinion does not conflict with the *Narragansett*[4] decision discussed by Petitioner.

Instead, the Court of Appeals affirmed the Commission's determination that the purchase of interstate transmission was in this instance unnecessary and imprudent. Specifically, the Commission determined that a prudent plant would be located in Missouri and not require any interstate transmission. (App. 67a-68a, 75a-77a).

GMO undermines its Petition by conceding such decision would be lawful. GMO states: "Under *Pike County*, if the Company's decision to use Crossroads power had been imprudent as a whole, the Commission could have set retail rates on the basis of some

[4] 381 A.2d 1358 (RI 1977).

other alternative source of power." (Petition, p. 19-20).[5]

III. The Court of Appeals' decision does not conflict with Supreme Court precedent.

The Missouri Court of Appeals expressly and correctly rejected GMO's contention that this Court's precedent required reversal of the Commission's decision to make a prudency adjustment by valuing the Crossroads plant as a distressed asset located in Missouri that did not require interstate transmission. Notwithstanding Petitioner's efforts to re-characterize the Commission and Court of Appeals decisions, neither decision accepted the prudency of using Crossroads without adjustments, and neither decision runs afoul of this Court's opinions in *Nantahala, MP&L,* and *Entergy.*[6]

IV. This case does not present an important federal and constitutional issue.

This case only involves state utility regulatory ratemaking adjustments, which Petitioner concedes are "routine." (Petition p. 30). Ratepayers have simply been protected from imprudent costs related to an electric plant that was on the verge of being

[5] Contrary to Petitioner's argument, the Commission did defend its decision on these grounds. (App. 180a-185a).

[6] 476 U.S. 953 (1986), 487 U.S. 354 (1988), 539 U.S. 39 (2003), respectively.

abandoned. There was no interstate animus. The case does not implicate principles of federal preemption. It is not within the Court's jurisdiction under 28 U.S.C. § 1257.

V. This matter is not ripe for discretionary review.

In addition to this matter being beyond the Court's jurisdiction as established by 28 U.S.C. § 1257, it is also not ripe for discretionary review. The Missouri Court of Appeals has rendered a final decision in GMO's appeal of the first Commission proceeding, rejecting GMO's contention that the Commission had violated principles of federal preemption. But GMO raised the issue again in a subsequent Commission case, while the first appeal was still pending. After the Commission rejected its arguments again, GMO appealed again. That appeal, which raises the same issues as its Petition to this Court, remains pending before the Missouri Court of Appeals and has been briefed, argued and submitted.

Technically, there is a final state judgment that this Court could review, if it had jurisdiction. However, given that GMO has asked the Missouri Court of Appeals to reconsider the same issue in a currently-pending appeal which could be decided at any time, the matter is not ripe for discretionary review by this Court. *See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.,*

389 U.S. 327 (1967) (case not ripe for review due to remand).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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