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

PETITIONER'S BRIEF IN RESPONSE TO THE UNITED STATES

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The United States agrees that "[t]he filed-rate doctrine would be ineffectual if a State could circumvent it by objecting to the 'concept' of passing on the FERC-approved rate to ratepayers." U.S. Br. 12. That is precisely and unambiguously what happened here.

The Missouri Court of Appeals held that the state Commission could trap $406,000 per month in federally-approved transmission costs based on its own fairness concerns. Pet App. 16a–17a. The Court of Appeals reasoned that the trapping did not violate the Supremacy Clause or filed-rate doctrine because the Commission objected to "the concept of requiring ratepayers to pay any Crossroads transmission costs in the first place." Pet. App. 17a.

The United States recognizes that such reasoning cannot stand. U.S. Br. 12 ("Petitioner is correct . . . that a 'state Commission's own fairness concerns cannot justify excluding a FERC-approved component cost of a prudent power source.'"); *id.* ("To the extent the court of appeals distinguished [*Nantahala et al.*] on the ground that the PSC here was . . . objecting . . . to 'the concept of requiring ratepayers to pay for any Crossroads transmission costs in the first place,' the court was in error.").

As the petition and *amicus* explain, the Missouri decision is poised to spread, *see* EEI Br. 5, Pet. 29–30, Pet. Reply Br. 11–12, and the United States never suggests otherwise. U.S. Br. 17. Irreversible decisions about where to build electric generation—particularly about the use of faraway renewable resources like wind power—will be

distorted by fears that States can now lawfully "trap" transmission costs if they object to "the concept" of paying, say, to bring wind power hundreds of miles from the Great Plains. Billions of dollars are now being spent on infrastructure and renewable projects across the country.

Nonetheless, the Solicitor General suggests that this Court take a pass based on two baffling putative vehicle issues.

First, the Solicitor General expresses uncertainty over which of two erroneous paths the Missouri Commission traveled. That concern is the Solicitor General's alone. Neither the Commission (respondent) nor the Company (petitioner) are uncertain. The argument and factual description in the brief in opposition alone prove that a straightforward and broad legal issue is at stake: whether a State may excise federally-approved interstate transmission costs from retail rates paid by its resident customers. Oddly, the Solicitor General spends more time on the Commission's machinations than the Court of Appeals decision—the one that actually gives license to state regulators to disregard FERC-approved costs with which they disagree.

Second, the Solicitor General mentions the concern that the case "may be" moot. But the Solicitor General does *not* mention that the Company continues to lose $406,000 every month because of the Court of Appeals' precedent below. Nor does the Solicitor General deny that a ruling here in the Company's favor would stop the improper trapping of costs and thus provide meaningful relief. To the extent the new tariff—containing the same error as

the old tariff—suggests mootness, this is textbook "capable of repetition, yet evading review."

1. The Court of Appeals' holding is clear and the Commission defended its merits in opposing certiorari.

Lost in the Missouri Commission's lengthy order, the Solicitor General devotes much effort to hand-wringing over alleged confusion below. The Solicitor General theorizes that a grant of certiorari would lead to a messy argument in which "the parties would focus on the meaning of the particular 2011 Order and of the decision below, rather than any legal principles of general applicability." U.S. Br. 12. That is a false alarm.

For several reasons, the morass imagined by the Solicitor General is unrealistic.

First, the Court of Appeals' holding is clear—and clearly wrong—on its face, regardless of things that go bump in the 222-page Commission order. The Court of Appeals held that the "decision to disallow the transmission expense associated with bringing power from Crossroads to Missouri is lawful." Pet. App. 20a. The key piece of reasoning was the court's belief that the State did "nothing to call a FERC-approved Entergy tariff in question" because it objected not to "the *amount* of Crossroads transmission costs" but instead to "the concept of requiring ratepayers to pay for any Crossroads transmission costs." Pet App. 16a–17a. That is, the Court of Appeals held that State-level fairness concerns justified accepting electricity from an out-

of-state source, then trapping the "unfair" federally-approved transmission costs.

The Solicitor General concedes that such reasoning is dead wrong. "Petitioner is correct . . . that a 'state Commission's own fairness concerns cannot justify excluding a FERC-approved component cost of a prudent power source.'" U.S. Br. 12. "To the extent the court of appeals distinguished [Supreme Court] precedents on the ground that the PSC here was . . . objecting . . . to 'the concept of requiring ratepayers to pay for any Crossroads transmission costs in the first place,' the court was in error." *Id.*; *id* (agreeing that "holding that the 'just and reasonable' amount of transmission costs [is] zero *is* a finding that the actual transmission rate is too high").

Second, the Commission's brief in opposition defends the Court of Appeals' erroneous holding. The Commission urges that *Nantahala*, *MP&L*, *Entergy*, and *Narragansett* are distinguishable, not that the order below is indecipherable. Comm'n Br. 13–32. The Commission contends that its order in this case fell within its authority to set retail rates; that federal law was irrelevant because FERC had not ordered the Company to purchase Crossroads power, performed allocations, or conducted a prudency review. *Id.* at 17, 19, 22, 26, 29, 30 ("GMO's retail rates are entirely within the Commission's authority.").

Far from disputing what happened below, the Commission *admits* every fact necessary for this Court to understand what happened here. In the Commission's own words, it "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." Comm'n Br. 3. The Commission also concedes that although it barred GMO from recovering transmission costs, GMO still "must pay Entergy's federally-approved [transmission] rate." *Id.* at 30. Thus, the Commission itself outlined its own "trapping"—denying recovery of federally-approved costs in retail rates—for this Court.

Third, the putative uncertainty that distracts the Solicitor General *does not matter*. The Solicitor General cannot decide whether, on one hand, Missouri found Crossroads "prudent" then denied recovery of the transmission component, or on the other hand, Missouri believed Crossroads was *only* prudent without its transmission element. U.S. Br. 11–17; *id.* at 13. For this Court's purposes, there is no difference.

Either way, it is undisputed that the State "permitted GMO to . . . use power from Crossroads," Comm'n Br. 3, but refused to permit recovery of federally-approved transmission costs that were necessary to move power from Crossroads to Missouri. Comm'n Br. 30.

Given those simple facts, the Commission's precise route to error is irrelevant. This Court need only hold that a State commission cannot carve out federally-approved transmission costs (either at the beginning or end of its prudency analysis). Whether

Crossroads is a prudent source under proper analysis remains, at most, a question for remand.[1]

2. This case is not moot.

The suggestion of mootness is puzzling in a case where the Company continues to lose $406,000 per month because of the holding and precedent below. No party denies that figure. No party denies that if this Court reverses the Court of Appeals, the State could no longer improperly trap those transmission costs and the injury visited every month on the Company would cease. The mootness wrinkle exists here only because the specific tariff challenged at the Court of Appeals had already been superseded by a new tariff. Pet. App. 6a. That new tariff, however, adopted exactly the same unlawful "trapping" as the first one, for exactly the same reasons.

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[1] The Company is confident that Crossroads is the prudent power source, and that the Commission so ruled. All agree that the Commission rejected the only two alternatives to Crossroads, U.S. Br. 5, and authorized recovery of some $61.8 million based on the *value* of Crossroads—a recovery that would be unheard-of if Crossroads were an imprudent source. Pet. App. 73a.

Further, although the Commission has noted that Crossroads runs only during peak times in the summer, Comm'n Br. 2, Crossroads ran for nine days during the recent "polar vortex"—at a time when gas pipelines to Missouri were so fully subscribed that neither alternative power source could have operated. Even the Commission originally recognized that this diversity of supply favored finding Crossroads prudent. Pet App. 67a.

As the Solicitor General recognizes, there are several ways to solve mootness in this case. U.S. Br. 18 (raising the possibility that the case may "continu[e] to present a live controversy . . . [based on] preclusive effect it may have under Missouri law"). *See also Ne. Fla. Chapter of Associated Gen. Contractors v. City of Jacksonville*, 508 U.S. 656, 662 (1993) (finding a case not moot when the offending ordinance had been repealed but replaced with a new one that injured plaintiffs "in the same fundamental way").

In this case, the Court of Appeals and the parties focused on the well-established "capable of repetition, yet evading review" exception to mootness.[2] Pet. App. 8a; Pet. 30–33; Pet. Reply Br. 9–10. The Solicitor General declines to take any real position on this matter, concluding only that "a serious question exists whether this Court has jurisdiction." U.S. Br. 21. But this case presents a textbook application of the "capable of repetition, yet evading review" exception to Article III mootness.

First, the Solicitor General worries that there is no "information in the record" for the Court to "resolve [the] factual issue" of whether rate cases in Missouri *typically* have been too short in duration to

[2] The Court has frequently blurred any distinction between cases that are "not moot" as an original matter and cases that satisfy this "exception" to mootness. *E.g., Turner v. Rogers*, 131 S. Ct. 2507, 2514–15 (2011) (ignoring a dispute about mootness by jumping to the "capable of repetition, yet evading review" exception); *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 126 (1974) (finding a case not moot but noting in the alternative that the mootness exception would apply).

be fully litigated before new rate cases are filed. U.S. Br. 19.

But in this very case the Missouri Court of Appeals resolved exactly that problem—as it has for nearly a decade now. Pet. App. 8a ("We have recognized that '[i]t is not unusual in public-utility rate cases for new tariffs to overtake proceedings involving old tariffs'"); quoting *State ex rel. Praxair, Inc. v. P.S.C.,* 328 S.W.3d 329, 333–34 (Mo. Ct. App. 2010); quoting in turn *State ex rel. City of Joplin v. P.S.C.*, 186 S.W.3d 290, 296 (Mo. Ct. App. 2005). In both *Praxair* and *City of Joplin*, the Court of Appeals agreed to hear challenges to rates that had since been superseded. In *Praxair*, the appeal was from a 2007 rate case that had been superseded by a 2008 rate, with a 2010 rate pending. 328 S.W.3d at 333, 335. As the Missouri Court of Appeals has long recognized, electric rates are frequently superseded before this Court can adjudicate them, Pet. App. 8a, and the "short in duration" prong of the mootness exception is easily satisfied.

Second, the Solicitor General observes that Missouri has recently changed its law so that rates overturned on appeal can be retroactively corrected. U.S. Br. 19–20, citing Mo. Stat. Ann. § 386.520.2. The Solicitor General says this legislative solution means that future questions like this one will "not evade review." U.S. Br. 20. That is backwards. Under the new Missouri law, questions like this one *will not become moot in the first place.* In other words, Missouri has moved to solve under state law the same problem that Article III's "capable of repetition, yet evading review" doctrine solves for this Court. The Solicitor General's suggestion that a

change in state law that *expands* state court authority to her cases somehow *reduces* this Court's constitutional authority to review cases is bizarre. When a state court claims authority to resolve an issue and its ruling aggrieves a party—to the tune of $400,000 a month—this Court can grant review. *ASARCO Inc. v. Kadish*, 490 U.S. 605 (1992).

Third, the Solicitor General points out that, in proceedings below, the Company told the Missouri Supreme Court that this issue was moot under Missouri law. U.S. Br. 20–21. But the Company has never told any court that this issue is moot under Article III. And regardless, parties often (and properly) change position on jurisdictional issues. In fact, the Commission—now opposing certiorari in part on mootness grounds, see Comm'n Br. 11–13—itself once took the position that this case was capable of repetition yet evading review. Attached App. 3a–4a (suggesting the mootness exception and explaining why each prong applies). On this federal jurisdictional issue it just does not matter what the parties said below under Missouri law.

3. Delay would cause permanent, systemic distortions in the rapidly evolving energy markets.

Representing 70 percent of U.S. electric generation and 60 percent of transmission, EEI has urged that the decision below is "uniquely positioned to spread like a virus to other States." EEI Br. 5. The Solicitor General does not deny this.

Instead, the Solicitor General states only that the Company "has not pointed to any other decisions of the Missouri PSC or the Missouri Court of Appeals reflecting a misapplication of the filed-rate doctrine." U.S. Br. 17. Not so. Just three months ago, the Missouri Court of Appeals doubled down, re-affirming its ruling in this case. Pet. Supp. Br. 2–3 (quoting the Missouri Court of Appeals stating that "[w]e are confident our previous analyses accurately set forth the law and correctly applied it"). The Company promptly notified this Court that the errant Court of Appeals decision was becoming entrenched. Pet. Supp. Br. 2 ("The Court of Appeals emphatically did not correct its own constitutional error . . . it hewed firmly to its earlier decision.").

More importantly, the problem is hardly limited to Missouri. This is a $100 million case, but it is only the beginning. States are under intense pressure—both political and fiscal—to protect their ratepayers from expenses they consider unreasonable. For instance, in *Illinois Commerce Commission v. FERC*, 721 F.3d 764 (7th Cir. 2013), Illinois and Michigan vigorously opposed a FERC-approved cost allocation for large transmission projects designed to move wind power. Michigan, in particular, complained that the FERC-approved rate hung far too much cost on its state utilities. *Id.* at 775. Michigan's argument failed—leaving its state utility commission presumably in search of a way to avoid passing those allegedly too-high costs on to Michigan citizens.

Similarly, EPA's new regulations on coal emissions will force utilities to close many coal-fired electric generation facilities in the coming years.

Trip Gabriel, *Democrats in Coal Country Run from E.P.A.*, N.Y. Times, June 3, 2014, at A1. Because they force investment in renewable energy, EPA's new regulations will likely increase transmission distances and cost, often over the objection of state commissions that control retail electricity rates. Those state commissions will naturally search for ways to protect citizens from those costs—costs they may object to "the concept of requiring ratepayers to pay . . . in the first place." Pet. App. 17a.

Equally important, the change in the wind brought by the Missouri decision will cause permanent distortions that this Court cannot review, much less fix, years down the road. Few utilities have interest in constitutional warfare against their state commissions; fewer still can carry those battles up the winding state court path and all the way back to this Court. Huge numbers of rate cases are settled, and those negotiations turn on both governing and likely-applicable precedents—including that of the Court of Appeals here.

The standing precedent that a State may accept power from a certain source but "trap" federally-approved, necessary component costs of receiving that power will distort infrastructure decisions. It will make utilities in and around the Southwest Power Pool skittish about faraway renewable resources. It will encourage utilities to view States as separate fiefdoms in the energy grid.

Decisions about where to put new plants, which renewable resources to pursue (wind is far away from most population centers, giving it high transmission costs), and decisions about the

efficiency of various sources, distances, and routes are rapidly being made. EEI Br. 4 (noting "the enormous investment challenges presently confronting the electric utility industry"); EEI Motion at 2–3 ("EEI is concerned with the risk the Missouri decisions pose for . . . billions of dollars of costs incurred in connection with the interstate transmission of electricity, particularly . . . to deliver electricity from renewable sources of energy"). Once those decisions are made, steel is laid, and it cannot be picked up and moved after the Solicitor General may eventually admit the time has come for this Court's intervention. *Cf.* U.S. Br. 17.

Likely because this Court understands the potential for harmful and permanent distortions on the Nation's energy policy, this Court often has not waited for State decisions subverting the filed-rate doctrine to "catch on" before stepping in to correct them. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986); *Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354 (1988); *Entergy La. Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003). It should not wait now.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX

[SEAL]

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March 15, 2013

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Terence G. Lord
Clerk of Court
Missouri Court of Appeals, Western District
Kansas City, MO 64106

RE: WD75038 State ex rel. Kansas City Power & Light-Greater Missouri Operations v. Public Service Commission

Dear Mr. Lord:

The Public Service Commission of the State of Missouri (Commission) submits this letter brief in response to the Court's request of March 5, 2013 following oral argument on March 1, 2013, The Commission submits the following responses to the questions posed by the Court:

(1) The tariffs at issue in this case have been superseded by the tariffs arising out of ER-2012-0175, the most recent rate case for Kansas City Power & Light-Greater Missouri Operations (KCP&L-GMO). That rate case has been appealed to this Court. (WD76166).

(2) Although the legislature has amended the judicial review procedures for Commission orders and decisions made after July 1, 2011, the general rule has been that once tariffs have been replaced by new tariffs, the replaced tariffs are superseded and cannot be corrected retroactively. *State ex rel. City of Joplin v. Pub. Serv. Comm'n*, 186 S.W.3d 290, 297 (Mo. Ct. App. W.D. 2005). The Commission lacked the authority to refund money to customers in cases of overpayment and could not remedy past under-collection by a utility when setting prospective rates. *Id*. Monetary relief was only available when a stay fund had been established by the circuit court under Section 386.520, RSMo (2000). *Id*.

The report and order in this case was issued before the statutory change took effect on July 1, 2011. No stay fund was established by the circuit court. Ag Processing, Inc., a Cooperative (Ag Processing) has asserted that the rates set were too high with respect to customers in the L&P district. Because no stay fund has been established, there is no opportunity to refund

money to L&P customers if the Court finds that the rates were set too high. KCP&L-GMO has asserted that the rates were set too low. But even if the Court finds that the rates were set too low, the Commission dries not have the authority to allow KCP&L-GMO to recover those past under-collections in future rates. Under these circumstances, there is no monetary relief available to either Ag Processing or KCP&L GMO.

As a practical matter, a favorable decision for KCP&L-GMO could have consequences for future rates because the Commission would take this Court's findings into consideration when setting future rates. Although the no monetary relief is available to L&P customers, Ag Processing could also benefit from a favorable decision in this case, in that if Ag Processing prevails on its issues, the Court's finding on the lawfulness of the Commission's actions would affect its actions in future cases.

* * * *

(4) Even in cases that are technically moot because the tariffs at issue have been superseded, there is an exception to the mootness doctrine for issues that are of general public interest, are likely to recur, and will evade review if not addressed. *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 328 S.W.3d 329, 334-35 (Mo. Ct. App, WD. 2010) (internal citations and quotation omitted). This Court has held retail utility rates are "*inherently*" a matter of public interest. *Id* at 335 (emphasis in original). Issues that are the subject of a later but related appeal are recurring in nature and it is prudent to resolve them in the first instance. *Id*. The mootness doctrine should not be invoked when there are issues at stake that have not been previously decided and judicial guidance would be helpful in the future. *City of Joplin*, 186 S.W.3d at 295. It is common

for new utility rates to supersede rates that are on appeal, which could cause review to be evaded unless the exception to the mootness doctrine is invoked. *Id*.

The public interest prong of the mootness exception applies because this case involves judicial review of retail rates paid by a large number of customers. The second prong of the mootness exception applies because of the issues of a recurring nature. The valuation of the Crossroads facility, the treatment of transmission costs associated with the facility, and the treatment of accumulated deferred income taxes (ADIT) associated with the facility are all issues relevant to the appeal of KCP&L-GMO's most recent rate case. While the issues raised by KCP&L-GMO are also issues in WD76166, the case law shows a preference for deciding issues in the first instance, although fact-specific inquiries are individually reviewed for reasonableness.

The issues raised by Ag Processing relate to the extent of the Commission's statutory—authority to set rates for a rate district that are higher than the rates requested by the utility for that rate district in its initial rate case filing and in the notice of the rate proceeding that is provided to customers. Those ssues have not been previously decided by the Court and judicial guidance will be helpful in future cases because notice must be given in every rate case and the Commission must exercise its discretion to set just and reasonable rates in every rate case. The issues raised by Ag Processing did not arise in ER-2012-0175, so those issues would evade review if not decided.

One issue raised by Public Counsel is whether the Commission has the statutory authority to shorten only the 30-day notice period or both the notice and publication period, This question is one of lawfulness,

This issue can recur in the future and judicial guidance would be beneficial, The question of whether the Commission acted reasonably in its treatment of the tariff effective date in this case is a question of reasonableness, That question is fact-specific and an opinion from the Court would have more limited value as precedent under the reasonableness standard.

* * * *

Respectfully submitted,

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