No. 13-787

In The Supreme Court of the United States

MISSOURI, ex. rel. KCP&L GREATER MISSOURI OPERATIONS COMPANY

Petitioner,

v.

MISSOURI PUBLIC SERVICE COMMISSION, et al.

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of Missouri, Western District

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

This case involves tariffs that have been superseded and there is a pending appeal on the subsequent tariffs presenting the same question that has not been finally adjudicated by the state court. In addition, the Respondent Public Service Commission of the State of Missouri engaged only in setting just and reasonable intrastate retail rates for a vertically integrated utility subject to state regulation and did not make any finding in contravention of any order issued by the Federal Energy Regulatory Commission or make any finding that is properly within the jurisdiction of the federal agency.

Thus, the appropriate questions presented are:

1. Does this Court have jurisdiction over tariffs that are no longer in force and where a case involving superseding tariffs involving the same question is still pending in state court?

2. Does this Court have jurisdiction over challenged tariffs that do not implicate the Filed Rate Doctrine or the Supremacy Clause of the United States Constitution?

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OBJECTION TO JURISDICTION

The Court should decline to exercise jurisdiction under 28 U.S.C. 1257(a). This case does not present a justiciable issue. The final judgment rendered in this case is no longer effective because the tariffs challenged in that final judgment have been superseded by later-filed tariffs and are no longer in effect. The subsequent tariffs raise an issue identical to the issue presented here and those tariffs have been appealed by Petitioner KCP&L Greater Missouri Operations Co. That appeal has not been adjudicated to a final judgment in the state court and review by this Court is premature.

STATEMENT OF THE CASE

Petitioner KCP&L Greater Missouri Operations Co. (GMO or the utility) is a public utility serving retail electric customers in western Missouri. (Pet. App. 2a). The Respondent Public Service Commission of the State of Missouri (Commission) is responsible for the regulation of investor-owned utilities within Missouri, including GMO. (Pet. App. 2a). Respondent Dogwood Energy, LLC (Dogwood) is a supplier of wholesale electricity and a retail electric customer of GMO. (Pet. App. 3a).

GMO is a vertically-integrated intrastate utility in Missouri which also owns a generation asset in Mississippi. GMO came to own this Mississippi generation facility because its predecessor engaged in unregulated merchant generation activities. (Pet. App. 70a). Before its acquisition by Great Plains

Energy, Inc. in 2008, GMO was Aquila, Inc. (Pet. App. 2a). Aquila Merchant, an unregulated affiliate of Aquila, Inc., purchased eighteen 75 megawatt (MW) combustion turbines. (Pet. App. 9a). Four of these turbines were installed at the Crossroads Energy Center (Crossroads) in Clarksdale, Mississippi. (Pet. App. 9a). Following the acquisition of Aquila Inc.'s regulated electric operations by Great Plains Energy, Inc. and the change of the utility's name, the Crossroads assets were transferred to the regulated books of GMO in 2008. (Pet. App. 10a). Crossroads is a peaking facility and is not used to supply baseload power.[1] (Res. App. 114a) Crossroads is used only in the summer and has never been used to supply power to Missouri customers in the winter. (Pet. App. 174a). Although power from Crossroads is only used intermittently during one part of the year, GMO must pay for continuous access to transmission. (Pet. App. 63a). GMO generates most of the rest of the power it requires to serve its load in Peculiar, Missouri. (Pet. App. 9a).

On June 4, 2010 GMO filed new tariffs with the Commission. (Pet. App. 39a-40a). The proposed tariffs were designed to increase retail rates for GMO customers. (Pet. App. 6a). The total rate increase requested amounted to $97.9 million per year. (Pet. App. 23a). This rate increase request was GMO's first since its acquisition of Aquila's assets. (Pet. App. 2a). GMO voluntarily extended the proposed effective date of the tariffs to allow for full rate case

[1] A peaking facility is used only to provide additional power during spikes in demand that exceed a utility's normal (or baseload) demand for electricity.

proceedings. (Pet. App. 40a). Dogwood was granted intervention and was permitted to participate in the rate case before the Commission. (Pet. App. 40a).

As part of its rate increase request, GMO sought inclusion of the Crossroads facility in its rate base.[2] (Pet. App. 53a). GMO sought to include power from Crossroads in its plan to serve customers in Missouri. (Pet. 53a). GMO also requested rate recovery of transmission costs associated with the transmission of power from the Crossroads facility in Mississippi to GMO ratepayers in Missouri. (Pet. App. 10a). Part of that transmission path requires transmission through lines belonging to Entergy Services, Inc. (Entergy). (Pet. App. 15a). Entergy has a transmission service tariff on file with the Federal Energy Regulatory Commission (FERC). (Pet. App. 15a).

After hearing, the Commission issued a report and order resolving the contested issues in the case and allowing GMO to file tariffs designed to grant the utility a retail rate increase amounting to $54.9 million annually. (Pet. App. 5a). The Commission permitted GMO to include Crossroads in its rate base and to use power from Crossroads to serve ratepayers in Missouri. (Pet. App. 67a; Pet. App. 73a). The Commission denied GMO's request to include the costs of transmission from Crossroads to Missouri in rates. (Pet. App. 15a). The Commission's report and order does not call a federal tariff into

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2 "Rate base" refers to the assets of a regulated utility upon which the utility is entitled to earn a return on its investment in assets used to serve the public.

question and makes no finding about the justness and reasonableness of Entergy's transmission tariff. (Pet. App. 16a).

GMO filed an application for rehearing from the Commission's 2011 report and order. (Pet. App. 153a). The Commission denied the application for rehearing. (Res. App. 2a). GMO sought a writ of review in the Circuit Court of Cole County, Missouri (circuit court). (Pet. App. 92a-93a). The circuit court affirmed the Commission's report and order. (Pet. App. 94a-95a). GMO then filed a notice of appeal to the Missouri Court of Appeals for the Western District (Western District). That appeal was assigned Western District case number WD75038.

While its appeal was pending at the Missouri Court of Appeals, GMO initiated a new rate case at the Commission. (Pet. App. 6a). The new rate case (ER-2012-0175) raised two of the same Crossroads issues as the pending appeal. (Pet. App. 7a). In light of the superseding tariffs, the Western District declined to address the issue of the proper valuation of Crossroads because the issue had been mooted by the subsequent rate case. (Pet. App. 10a). The Western District opted to decide the issue of transmission costs associated with Crossroads. (Pet. App. 10a). The Western District affirmed the Commission's decision to disallow recovery of transmission costs associated with Crossroads in rates. (Pet. App. 20a).

GMO sought rehearing of the WD75038 opinion or transfer to the Supreme Court of Missouri from the Western District. (Pet. App. 120a). The Western District denied rehearing and transfer. (Pet. App.

98a). GMO then sought transfer to the Supreme Court of Missouri. (Pet. App. 100a). The Supreme Court of Missouri denied transfer. (Pet. App. 96a). GMO then filed a petition for writ of certiorari in this Court.

While the appeal of the 2011 rate case was still pending, the Commission issued a report and order to resolve the issues in GMO's second-filed rate case (ER-2012-0175). (Pet. App. 171a). The Commission once again disallowed the recovery of transmission costs associated with Crossroads in GMO's rates. (Pet. App. 175a). GMO again filed an application for rehearing with the Commission, based in part on the disallowance of transmission costs associated with Crossroads. (Res. App. 29a-45a). The Commission denied the application for rehearing of ER-2012-0175). GMO filed a notice of appeal of ER-2012-0175. The Western District has assigned case number WD76167 to GMO's appeal. WD76167 has been briefed, argued, and submitted to the Western District, but the Western District has not yet issued an opinion.

The 2011 tariffs and the report and order upon which those tariffs are based have been superseded by the tariffs which went into effect in 2013. The 2011 tariffs are no longer in effect and rates are not collected under the 2011 tariffs. The state-level judicial review process of the 2013 report and order and resulting tariffs is not yet complete.

SUMMARY OF ARGUMENT

Before any review of the substance of the case, the Court must determine whether the case is justiciable. *Allen v. Wright,* 468 U.S. 737, 792, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984). Among the justiciability doctrines arising out of Article III are ripeness and mootness. *Nat'l Treasury Emp. Union v. U.S.*, 101 F.3d 1423, 1427 (D.C. Cir. 1996). Both ripeness and mootness doctrines are applicable to this case. The petition for writ of certiorari should be denied because the issues presented in the petition are not ripe for review in light of the fact an appeal in state court involving the exact same issue is still pending. The petition for writ of certiorari should be denied because the issue presented in this appeal is moot because the Commission order and 2011 tariffs that are challenged in the petition have been superseded by later-filed and approved tariffs which became effective in 2013. The issue presented in this petition has not evaded appellate review because this same issue is part of the appeal of the 2013 rates.

GMO relies on three cases from this Court in support of its petition for writ of certiorari. The cases relied on, however, do not support GMO's petition. GMO also relies on several cases from state courts in support of its petition from writ of certiorari. The state cases relied on also do not support GMO's petition. All of the federal and state cases relied on involve a state-regulated utility's relationship with a federally-regulated wholesale affiliate. That factual situation is not present in this case and that differing

factual situation in this case compels a different result that than the results reached in the state and federal cases upon which GMO relies. This case is more analogous to the *Pike County* case that GMO attempts to distinguish than it is similar to the other cases upon which GMO relies.

The facts of this case are unique, and they do not lend themselves to comparisons of other cases. This case does not involve the relationship of a state-regulated utility with a federally-regulated affiliate. The case turns on an unusual situation where a state-regulated utility uses a distant generation source to supply its intrastate needs. This is not a situation that is likely to recur often, as can be seen from the very different fact patterns presented in the cases cited by GMO.

REASONS FOR DENYING THE WRIT

I. THE ISSUE PRESENTED IN THE PETITION IS NOT RIPE FOR REVIEW BECAUSE THE TARIFFS AT ISSUE ARE ALREADY SUPERSEDED AND AN APPEAL ON THE REVISED TARIFFS IS PENDING IN A LOWER COURT.

"Ripeness is a justiciability doctrine designed 'to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been finalized

and its effects felt in a concrete way by the challenging parties.'" *Nat'l Park Hospitality Ass'n v. Dep't of Interior,* 538 U.S. 803, 807-08, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003), quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). The ripeness doctrine is grounded in the case or controversy requirement of Article III as well as prudential considerations for refraining from the exercise of jurisdiction in a particular case. *Id.* at 808, quoting *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57n.18, 113 S.Ct. 2485, 125 L.Ed.2d 38 (1993). Ripeness is a matter of timing, and the current situation controls, rather than the situation that prevailed at the time of the lower court decision that is under review. *Anderson v. Green,* 513 U.S. 557, 559, 115 S.Ct. 1059, 130 L.Ed.2d 1050 (1995) (per curiam), quoting *Reg'l Rail Reorganization Acts Cases*, 419 U.S. 102, 140, 95 S.Ct. 335, 42 L.Ed.2d 320 (1974). When a non-justiciable case is before the court, an important question is "'whether the party seeking relief from the judgment below caused the [nonjusticiability] by voluntary action.'" *Id.* at 560, quoting *U.S. Bancorp Mortgage Co. v. Bonner Mill P'ship*, 513 U.S. 18, 25, 115 S.Ct. 386, 130 L.Ed.2d 233 (1994).

In cases involving administrative action, the ripeness determination turns on two considerations: "(1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hospitality Ass'n.*, 538 U.S. at 808, citing *Abbott Labs.*, 387 U.S. at 149. The question of fitness rests mainly on whether additional factual development would aid the case. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 867

(8th Cir. 2013), quoting *Pub. Water Supply Dist. No. 10 of Cass Cnty v. City of Peculiar*, 345 F.3d 570, 573 (8th Cir. 2003)(internal quotation omitted). Cases that involve purely legal questions are generally more suitable for resolution. *Id.* The hardship determination requires consideration of several factors, including whether the agency action under review "command[s] anyone to do anything or to refrain from doing anything; [whether it] . . . grant[s], withhold[s], or modif[ies] any formal legal license, power, or authority; [whether it] . . . subject[s] anyone to any civil or criminal liability; [and whether it] . . . create[s] . . . legal right[s] or obligations." *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998).

Under Missouri law, tariffs that have been superseded by later-filed tariffs are not subject to consideration on judicial review. *Pub. Serv. Comm'n v. Mo. Gas Energy,* 388 S.W.3d 221, 230 (Mo. Ct. App. W.D. 2012), quoting *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 328 S.W.3d 329, 334 (Mo. Ct. App. W.D. 2010). Superseded tariffs are not subject to correction after the fact. *Id.* Under the filed rate doctrine, a utility may charge only the rates that are currently on file with the appropriate regulatory agency. *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 311 S.W.3d 361, 365 (Mo. Ct. App. W.D. 2011) (citation omitted).

GMO's petition for writ of certiorari does not satisfy the criteria for ripeness. The Court should refrain from exercising its jurisdiction in this case because the 2011 tariffs that GMO is challenging

have been superseded by later-filed tariffs that became effective in 2013. GMO itself caused the current situation that renders the tariffs they are challenging in this petition unripe for review. GMO initiated a new rate case that caused the Commission to approve later-filed tariffs and put new rates into effect for GMO. The tariffs that GMO is challenging in this petition no longer govern GMO's rates and terms of service. The judicial review of the new tariffs is incomplete. GMO has an appeal of the Commission's 2013 rate order still pending in the Western District Court of Appeals.

Neither of the ripeness factors that apply to review to administrative actions weigh in favor of granting certiorari in this case. The Commission's decision to disallow transmission costs associated with transmitting power from Crossroads in Mississippi to ratepayers in Missouri is highly fact-specific and involves many factors related to the unique situation that GMO faces in providing generation for its customers and the acquisition of Crossroads as part of its purchase of the failed utility Aquila. The fact-specific nature of the Commission's decision in the underlying case indicates that the case is not fit for decision in light of the fact that the challenged tariffs no longer have an impact on the rates that GMO is charging. The outcome of GMO's appeal of the 2013 on tariffs is unknown. Whatever the outcome in the Western District, it is possible that the Supreme Court of Missouri will once again be asked to take up the question, and it is unknown whether the Supreme Court of Missouri will accept transfer of the case from the Western District.

There is no hardship to GMO if the Court declines to grant certiorari. The tariffs that GMO is challenging in this case are no longer in effect. GMO charges its customers based on the tariffs that became effective in 2013, not the 2011 tariffs that are at issue here. No matter the outcome of this case, the 2013 tariffs are the only ones that presently govern GMO's rates and terms of service. The appellate process challenging the Commission report and order that led to the implementation of the 2013 tariff is still ongoing. If GMO is dissatisfied with the outcome of that appeal, it will again have the opportunity to petition the Court for certiorari.

Because this case is not ripe for review, the Court should deny the petition for writ of certiorari on this point.

II. THE GMO PETITION PRESENTS NO EXCEPTION TO THE MOOTNESS DOCTRINE AND FAILS TO PRESENT A JUSTICIABLE ISSUE.

A public utility may only charge ratepayers in accordance with the rates set out in the tariffs currently on file with the appropriate regulator. *State ex rel. AG Processing, Inc.*, 311 S.W.3d at 365. "When tariffs are superseded by subsequent tariffs that are filed and approved, the superseded tariffs are generally considered moot and therefore not subject to consideration because superseded tariffs cannot be corrected retroactively." *State ex rel. Praxair, Inc.*, 328 S.W.3d at 334 (internal quotation omitted). It is not uncommon for new tariffs to be filed before an appeal of the prior tariffs is complete. *State ex rel. KCP&L Greater Mo. Operations Co. v.*

Pub. Serv. Comm'n, 408 S.W.3d 153, 160 (Mo. Ct. App. W.D. 2013).

Moot cases do not present justiciable issues. *Armstrong v. Elmore,* 990 S.W.2d 62, 64 (Mo. Ct. App. W.D. 1999). If a case is moot, no practical relief is available and a ruling from the court would have no practical effect. *Id.* "When an event occurs that makes granting effectual relief by the court impossible, the case is moot and generally should be dismissed." *Id.*, citing *State ex rel. Chastain v. City of Kansas City,* 968 S.W.2d 232, 237 (Mo. Ct. App. W.D. 1998). Appellate courts do not render advisory opinions nor decide non-existent issues." *Armstrong,* 909 S.W.2d at 64, citing *Mo. Cable Television Ass'n v. Pub. Serv. Comm'n*, 917 S.W.2d 650, 652 (Mo. Ct. App. W.D. 1996). Appellate courts may consider matters outside the record in determining whether or not a case is moot. *State ex rel. Reed v. Reardon*, 41 S.W.3d 470, 473 (Mo.banc 2001).

Appellate courts will exercise discretion to make an exception to the mootness doctrine "when it is demonstrated that the case in question presents an issue that[:] is of general public interest; (2) will recur; and (3) will evade appellate review in future live controversies." *Id.*, quoting *Praxair, Inc.,* 328 S.W.3d at 334-35. The Western District has held that public utility rates are "inherently" a matter of public interest. *Praxair, Inc.*, 328 S.W.3d at 335. (emphasis in original) The issue of the exclusion of transmission costs associated with Crossroads arose in the rate case that led to the rates that went into effect in 2011. *KCP&L Greater Mo. Operations Co.*, 408

S.W.3d at 161. That issue recurred in the rate case that led to the rates that went into effect in 2013.

GMO's petition for writ of certiorari does not meet the criteria for invoking an exception to the mootness doctrine, despite the public interest in utility rates and the recurring nature of the Crossroads transmission issue. This issue does not fall within an exception to the mootness doctrine because this issue has not evaded review in a later appeal. The Western District considered and decided the issue in the appeal of the 2011 rate case. *Id.* at 161-66. The Western District is again considering the issue in the appeal of the 2013 rate case. That case has been argued and submitted to the Western District. Consideration of this extra-record fact is proper in this Court's determination on the mootness question.

Because this case does not satisfy the exceptions to the mootness doctrine, the Court should deny the petition for writ of certiorari on this point.

III. THE FEDERAL CASES CITED AS CONFLICTS ALL INVOLVE INTERSTATE UTILITIES SUBJECT TO FERC REGULATION, WHEREAS THE GMO MATTER IS ENTIRELY INTRASTATE.

GMO is an "electrical corporation" within the meaning of Mo. Rev. Stat. § 386.020(15) (2000) (2013) and a "public utility" within the meaning of Mo. Rev. Stat. § 386.020(43) (2000) (2013). GMO is subject to regulation by the Commission under Section 386.250 (2000). The Commission has the duty to determine GMO's "just and reasonable" rates. Mo. Rev. Stat.

§ 393.130.1 (2000) (2013). In setting rates, the Commission must balance the interests of the ratepayers with the interests of the utility's shareholders. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 625 (Mo. Ct. App. W.D. 1988). Intrastate retail electric rates are solely within the jurisdiction of state regulatory commissions. 16 U.S.C. § 824(a). FERC does not generally have jurisdiction over electrical generation facilities. 16 U.S.C. § 824(b)(1).

A. *Nantahala Power and Light Co. v. Thornburg* Is Not Controlling.

The FERC regulates only matters that are not regulated by the states. 16 U.S.C. § 824(a). The federal preemption and filed rate doctrines arose as a means to govern the relationship between the federal authority and state commissions. *KCP&L Greater Mo. Operations Co.*, 408 S.W. 3d at 164. The doctrines arose out of the Supremacy Clause in ARTICLE VI, CL. 2 of the Federal Constitution. *Id.*

In *Nantahala Power and Light Co. v. Thornburg*, this Court held "that the [North Carolina Utilities Commission's] allocation of entitlement and purchased power is pre-empted by federal law." 476 U.S. 953, 955, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986). *Nantahala Power and Light Co.* involved an allocation of electricity between two affiliated utilities. *Id.* at 954. Nantahala Power and Light Co. (Nantahala) and Tapoco were each a wholly-owned subsidiary of Aluminum Company of America (Alcoa). *Id.* at 954-55. Each utility owned a hydroelectric power plant. *Id.* at 955. The majority of the power from these power plants was put onto the

grid of the Tennessee Valley Authority (TVA). *Id.* In exchange, the utilities jointly got a fixed supply of low cost "entitlement power" from TVA. *Nantahala Power and Light Co.*, 476 U.S. at 955. Nantahala[3] also bought higher-cost power from TVA. *Id.*

Nantahala, Tapoco, and TVA formed an apportionment agreement to impute the allocation of low-cost entitlement power from TVA to Nantahala and Tapoco. *Id.* The agreement provided that Tapoco would receive 80% of the entitlement power and Nantahala would receive 20% of the power. *Id.* at 956. The apportionment agreement was filed with FERC as "an appendix to a proposed wholesale rate schedule." *Id.* Nantahala's wholesale power sales were set by FERC, but its intrastate retail rates were set by the North Carolina Utilities Commission (NCUC). *Id.*

During a wholesale rate proceeding, FERC determined that the allocation agreement was unfair. *Id.* at 958. FERC determined that a 22.5% allocation of low-cost power to Nantahala would result in "just and reasonable" wholesale rate. *Nantahala Power and Light Co.,* 476 U.S. at 958. Nantahala was required to file revised rates and to refund excess amounts collected under the prior allocation. *Id.*

In a subsequent retail rate proceeding, the NCUC determined that Nantahala's retail rates should be calculated using the assumptions that Nantahala and Tapoco should be treated as a single

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[3] Tapoco sold all of its power to the parent company Alcoa and did not serve retail customers.

entity for rate-making purposes and that Nantahala received a 24.5% allocation of low-cost power from TVA. *Id.* at 960-61. The decision by the NCUC "employed an allocation of entitlement power that nowhere takes into account FERC's allocation of that same power." *Id.* at 961. The North Carolina Supreme Court affirmed the NCUC's decision, finding that it did not violate the Supremacy Clause or the Commerce Clause. *Id.*

This Court reversed. *Nantahala Power and Light Co.*, 476 U.S. at 973. With respect to the filed rate doctrine, the Court found the following:

> FERC clearly has jurisdiction over the rates to be charged Nantahala's interstate wholesale customers. [citations omitted]. Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority. . . . Here FERC's decision directly affects Nantahala's wholesale rates by determining the amount of low-cost power that it may obtain, and FERC required Nantahala's wholesale rate to be filed in accordance with that allocation. FERC's allocation of entitlement power is therefore presumptively entitled to more than the negligible weight given it by NCUC.

Id. at 966-67.

The Court also held that the NCUC's decision left Nantahala subject to "trapped" costs. *Id.* at 971-72. This conclusion arose from the fact that: "[Nantahala] must, under NCUC's order, pretend that it is paying less for the power it receives from TVA, under agreements not subject to NCUC's jurisdiction, than is in fact the case." *Id.* at 971. The Court found that the NCUC was obligated to abide by the FERC-mandated allocation of the low-cost entitlement power in setting retail rates. *Id.* at 972.

GMO's reliance on *Nantahala* is misplaced. FERC has not ordered GMO to take power from Crossroads. FERC could not make such an order because GMO is regulated by the Commission and GMO's intrastate retail rates are within the Commission's exclusive jurisdiction. FERC does not have jurisdiction over the Crossroads generation facility or sales of power from that facility. This is not a case where GMO has a wholesale rate established by the FERC that is in conflict with a retail rate established by the Commission. GMO is not buying wholesale power from Crossroads. This is also not a situation where GMO is buying power from a wholesale supplier at one price and selling it to retail ratepayers at a lower price because of a Commission rate-setting order that conflicts with a FERC rate-setting order. The only federal tariff involved in this case is the Entergy transmission tariff, which is on file with the FERC. The Commission made no finding with respect to the lawfulness or reasonableness of Entergy's federal transmission tariff. This case involves the highly unusual situation of a state-regulated utility using its own rate-based generation assets in a distant state (Mississippi) to meet its

retail needs in the state where its rates are set (Missouri). It would have been within the Commission's discretion to disallow the inclusion of Crossroads in GMO's regulated rate base and to disallow the use of power from Crossroads entirely.

The Western District recognized the distinctive nature of this case in finding that *Nantahala* is distinguishable:

> Here, there is no FERC-required allocation of power between affiliates that the [Commission] is disturbing and, likewise, no dueling allocation percentages advocated by the [Commission] in contradiction to a FERC allocation percentage. In short, the [Commission's] 2011 Report and Order does not conflict with any FERC orders and, as such, the *Nantahala* case is inapposite to the present appeal.

KCP&L Greater Missouri Operations Co., 408 S.W.3d at 165.

B. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* Is Not Controlling.

The appellant utility in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore* engaged in both wholesale sales of electricity regulated by the FERC and in retail sales of electricity regulated by the Mississippi Public Service Commission. 487 U.S. 354, 357, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988). The utility Mississippi Power & Light (MP&L) was one of four companies wholly-owned by common holding company Middle South Utilities (MSU). *Id.* The four companies "operate as an integrated power

pool, with all energy in the entire system being distributed by a single dispatch center located in Pine Bluff, Arkansas." *Id.* Wholesale transactions between the four interconnected operating companies were completed under a series of system agreements filed with FERC. *Id.*

MSU organized another subsidiary, Middle South Energy, Inc. (MSE) to finance, own and operate new nuclear power facilities that were initially intended to provide baseload power for the four operating utilities, including MP&L. *Id.* at 357-58. MP&L was responsible for the construction of two nuclear facilities in accordance with the plan to provide new baseload capacity for the four operating companies. *Mississippi Power & Light*, 487 U.S. at 358. MSE and MP&L sought a certificate of convenience and necessity from the Mississippi Public Service Commission to authorize construction of nuclear power plants assigned to MP&L. *Id.* The state commission granted the certificate, recognizing that MP&L was part of an integrated system and the new facilities would help meet baseload needs for the whole system. *Id.*

The capacity additions planned by the system turned out to be unnecessary because of lower-than-forecast demand. *Id.* at 359. Other factors, including regulatory delay, inflation, and additional construction requirements caused the construction of the second nuclear facility to be called off, although construction of the first facility was completed under the assumption that the low cost of producing nuclear power would make the plant less expensive than the use of other fuel sources. *Id.* Cost of

completing the project was six times greater than projected. *Mississippi Power & Light Co.*, 487 U.S. at 359. As a result, the wholesale cost of power from the nuclear facility was much higher than the cost of power produced in other facilities in the system. *Id.* at 360.

MSU filed a new agreement with the FERC to allocate the high-cost power from the nuclear facility. *Id.* Under that agreement, MP&L was required to buy 31.63% of the nuclear facility's capacity. *Id.* The agreement was submitted to FERC to determine whether it was just and reasonable. *Id.* at 360-61. FERC determined that MP&L's just and reasonable capacity allocation percentage was 33%. *Mississippi Power & Light Co.*, 487 U.S. at 363. FERC did not explicitly address the prudence of building the nuclear facility and making it part of the grid. *Id.* FERC rejected the argument that its decision deprived state commissions of their authority to make determinations about the prudence of the construction of new facilities. *Id.* at 364.

While the FERC proceedings were ongoing, MP&L filed a request to increase its retail rates with the Mississippi Public Service Commission. *Id.* at 365. The state commission initially denied any rate relief related to the costs of the nuclear facility. *Id.* at 365. The state commission eventually allowed an increase in retail rates associated with costs from the nuclear facility because the state commission determined that the utility would become insolvent if such relief was denied. *Mississippi Power & Light Co.,* 487 U.S. at 365. The state commission's rate relief order did not make any findings as to the

prudence of the initial investment in the nuclear facility. *Id.* at 366. On appeal of that order to the state supreme court, the appellants argued that the Mississippi Public Service Commission had unlawfully granted a retail rate increase without considering the prudence of the investment in the nuclear facility. *Id.*

This Court framed the pertinent question as "whether the FERC proceedings have pre-empted such prudence inquiry by the State Commission." *Id.* at 357. The Court reversed the Mississippi Supreme Court, finding that the state commission could not review MP&L's managerial prudence with respect to costs incurred as a result of an allocation mandated by FERC. *Id.* at 369. After applying its decision in *Nantahala,* the Court concluded: "States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair. FERC-mandated allocations of power are binding on the States and States must treat those allocations as fair and reasonable when determining retail rates." *Mississippi Power & Light Co.*, 487 U.S. at 371. The Court also concluded that a state commission may not prevent a utility recovering "as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." *Id.* at 373.

GMO's reliance on *Mississippi Power & Light* is misplaced. In this case, FERC has not made any allocation of power between affiliated utilities. GMO has not been ordered to buy power from Crossroads, nor has GMO been ordered to purchase wholesale

power from an unaffiliated wholesaler. FERC has not weighed in on the prudence of GMO's use of Crossroads to serve retail customers, nor could it do so because GMO's intrastate utility service and its retail rates are wholly within the Commission's jurisdiction. The disallowance of transmission costs associated with the use of Crossroads does not put GMO at risk of insolvency. (Pet. App. 20a). The assertion that GMO stands to lose $100 million is pure puffery, since it is based on a speculative 30-year projection, whereas these tariffs were obsoleted after only 2 years.[4] Crossroads was not constructed for the purpose of serving customers in Missouri. (Pet. App. 54a-55a). Crossroads was installed so that GMO's predecessor Aquila could participate in unregulated energy markets. (Pet. App. 53a-54a). Crossroads is used for serving Missouri customers only in the wake of the collapse of that market and the failure of Aquila's unregulated operations. (Pet. App. 54a-55a). The Commission allowed this use of Crossroads, but determined that it was not just and reasonable for Missouri ratepayers to pay for

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[4] The result of the underlying case at the Commission was to allow GMO a revenue increase of nearly $55 million per year. GMO's assertion that the Commission's decision will cost $100 million over thirty years is based on a number of assumptions that find no support in the record, such as that the current rate structure will be used for that period of time, that Crossroads will be in use that far into the future, that lower fuel costs that currently make Crossroads a cost-effective option will persist over time, that GMO will not acquire any new sources of generation in that time, and so on. The weakness of those assumptions is highlighted by the fact that the 2011 rates at issue in this case were in effect only until January of 2013.

transmission costs under the peculiar facts of this case. (Pet. App. 63a).

The Western District also distinguished *Mississippi Power & Light Co.* because the facts of that case are inapposite to the facts presented in GMO's appeal:

> Again, the facts of this case and *Mississippi Power* are distinguishable, as FERC has not ordered KCP&L-GMO to purchase power from Crossroads to meet its energy-supply needs in Missouri; furthermore, no FERC-approved cost allocations between affiliated energy companies have been subjected to reevaluation in this state ratemaking proceeding. Thus, *Mississippi Power* is equally inapposite to this appeal.

KCP&L Greater Missouri Operations Co., 408 S.W.3d at 165. (emphasis in original)

C. *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n* Is Not Controlling.

The issue of federal preemption in the area of FERC-approved cost allocation methods among affiliated utilities came before the Court again with respect to allocations among the various Entergy utilities, the successors to the affiliated utilities in *Mississippi Power & Light. Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 42-8, 123 S.Ct. 2050, 156 L.Ed.2d 34 (2003). In *Entergy Louisiana, Inc.*, Entergy Louisiana, Inc. (ELI) served customers in Louisiana and shared capacity with affiliated utilities operating in Arkansas, Mississippi, and Texas. *Id.* at 42. The affiliated utilities operated

under a capacity sharing agreement that allowed "short" companies to access additional capacity when they produced less power than needed and for "long" companies to sell their excess capacity when they produced more power than needed. *Id.* The costs associated with the benefit of having excess capacity available to the entire system were shared among all of the utilities. *Id.* The utilities had a system sharing agreement on file with FERC. *Id.*

The determination of whether a particular utility was "long" or "short" was made on a monthly basis. *Id.* The short companies were obligated to pay the long companies for the capacity they used in a given month. *Entergy Louisiana, Inc.*, 539 U.S. at 42. Because the calculations were made monthly, the service schedule operated as an automatic adjustment clause under § 205(f) of the Federal Power Act. *Id.*

As a result of over-capacity on the entire system in the 1980s, the utilities began the Extended Reserve Shutdown (ERS) program. *Id.* at 43. Under the ERS program, certain generating units were deemed unnecessary for capacity needs and were inactivated. *Id.* Because the operating units could be brought back into service, those units were still considered as available capacity for calculating the monthly cost equalization payments. *Id.* Counting those units had the effect of making ELI, usually a short utility, even more so. *Entergy Louisiana, Inc.*, 539 U.S. at 44.

Proceedings were initiated at the FERC to review the practice of counting the ERS units as available. *Id.* The Louisiana Public Service

Commission intervened at the FERC, arguing that the ERS units should not be counted in calculating the monthly equalization payments and refunds should be made to ELI as a result of overpayments made under the faulty calculations. *Id.* FERC determined that the ERS units should not have been counted for calculating the cost equalization payments but that refunds were not warranted because the cost allocations were not "unjust, unreasonable, or unduly discriminatory." *Id.*

In an annual retail rate filing by ELI before the Louisiana Public Service Commission, the Louisiana Public Service Commission considered the question of whether the payments for the ERS units should be included in ELI's revenue requirement or not. *Id.* at 45. The Louisiana Public Service Commission determined that it was pre-empted from determining whether the FERC tariff had been violated. *Entergy Louisiana, Inc.*, 539 U.S. at 45. The Louisiana Public Service Commission restricted its review to costs incurred after the date of the FERC order finding that the inclusion of the ERS units in the cost allocation violated the utilities' system operating agreement. *Id.* The Louisiana Public Service Commission determined that it was not pre-empted from examining whether the operating companies' subsequent system operations agreement and its method of cost allocation was imprudent. *Id.* at 46. The Louisiana Public Service Commission found that the utilities' treatment of the ERS units was imprudent and disallowed their recovery in retail rates. *Id.* "In other words, though ELI made the [equalization payments] to its "long" corporate

siblings, it would not be allowed to recoup those costs in its retail rates." *Id.*

The Supreme Court granted certiorari to determine "whether a FERC tariff that delegates discretion to the regulated entity to determine the precise cost allocation [ ] pre-empts an order that adjudges those costs imprudent." *Entergy Louisiana, Inc.*, 539 U.S. at 42. The Court applied *Nantahala* and *Mississippi Power & Light* to the facts and determined that the Louisiana Public Service Commission's order "impermissibly 'traps' costs that have been allocated in a FERC tariff." *Id.* at 49. The Court found that the filed rate doctrine applied even to FERC tariffs that allowed the cost allocations to automatically adjust on a monthly basis, even though the specific cost allocations were not mandated by the FERC. *Id.* at 49-50. The Court also held that the fact that FERC had not ruled on the precise prudence issue presented to the state commission did not preclude pre-emption where the FERC had approved the underlying tariff. *Id.* at 50.

GMO's reliance on *Entergy Louisiana, Inc.* is misplaced. The underlying tariffs in that case were FERC tariffs that allowed for an automatic adjustment clause based on an approved formula. GMO does not have tariffs relevant to its Missouri retail rates on file with the FERC. GMO is not required by any FERC order or federal tariff to take power from Crossroads. GMO does not buy wholesale power from Crossroads. FERC has not approved any cost allocation between GMO and an affiliated company. FERC has not considered any aspect of GMO's Missouri retail rates because it does not have

jurisdiction to set retail rates for GMO. The only federal tariffs that are even tangentially related to this case are the Entergy transmission tariffs. The justness and reasonableness of those Entergy transmission tariffs was never at issue in the Commission proceeding. The issue that was presented to the Commission was whether, in light of the particular facts in this case, it was just and reasonable for GMO to collect transmission costs associated with using its distant asset to serve Missouri customers. That question is within the Commission's discretion to set just and reasonable retail rates.

None of the three Supreme Court cases relied upon by GMO compel a different result that the one reached by the Commission and affirmed by the Western District. The petition for writ of certiorari should be denied on this point.

IV. THE PETITIONER MAKES A WEAK SHOWING OF A STATE COURT CONFLICT, CITING A RHODE ISLAND DECISION THAT IS IRRELEVANT AND WHOLLY DISTINGUISHABLE FROM THE MATTER AT HAND

The Commission has the authority under Missouri law to determine the treatment of a utility's operating expenses:

> [T]he statutory power and authority which the commission has to pass on the reasonableness and lawfulness of rates and to determine and pass upon the question of what rates are necessary to permit a utility

> to earn a fair and reasonable return [internal citations omitted] necessarily includes the power and authority to determine what items are properly includable in a utility's operating expenses and decide what treatment should be accorded such expense items.

State ex. rel. City of West Plains v. Pub. Serv. Comm'n, 310 S.W. 2d 925, 928 (Mo.banc 1958). The Commission has broad discretion to set rates, and the Commission has the duty to balance the interests of the utility with the interests of the utility's shareholders. *Union Elec. Co.*, 765 S.W.2d at 625.

A. *Narragansett Elec. Co. v. Burke* Is Distinguishable.

In *Narragansett Elec. Co. v. Burke* a state-regulated utility (Narragansett) bought wholesale electricity from an affiliated interstate wholesale supplier (NEPCO). 381 A.2d 1358, 1360 (R.I. 1977). NEPCO's rates were regulated by the Federal Power Commission (FPC). *Id.* NEPCO raised its rates. *Id.* The state public utilities commission (PUC) found that it could determine what amount of the NEPCO rate increase could be passed on to Narragansett's retail ratepayers. *Id.* at 1361. Specifically, the PUC examined four issues with respect to NEPCO's rates: 1) cost of common equity; 2) capital structure; 3) cash working capital; and 4) treatment of costs associated with NEPCO's abandonment of a project to build additional generation. *Id.* The Rhode Island Supreme Court agreed with Narragansett that the state PUC was pre-empted from investigating NEPCO's

interstate wholesale rates. *Narragansett Elec. Co.*, 381 A.2d at 1361.

The Rhode Island Supreme Court determined that the state PUC had to recognize the rates paid to NEPCO as an operating expense of Narragansett, although the operating expense must be reasonable: "When the operating expense being investigated by the PUC is one incurred through a contract of the utility company with an affiliate, the burden is on the utility to establish the reasonableness of that expense. If unpersuaded, the PUC may disallow all or part of the requested rate change." Under the filed rate doctrine, the PUC was required to treat NEPCO's rate as a reasonable operating expense. *Id.* at 1363.

The PUC was not, however, required to automatically adjust Narragansett's rates in response to the increase in its interstate wholesale rates. *Id.* Rather, the matter was remanded to the state PUC. *Id.* The state PUC could look at the utility's overall rate structure to determine whether the increase in wholesale electricity rates was offset by cost reductions in other areas, as long as the NEPCO rate was treated as an actual operating expense. *Id.*

The *Narragansett* case does not compel a different result than the one reached by the Commission and affirmed by the Western District. As in all of the Supreme Court cases that GMO relies on, *Narragansett* involves a relationship between a state-regulated utility and a federally-regulated interstate wholesale affiliate. That relationship is not present in this case. Crossroads is not a federally-

regulated wholesale energy supplier with interstate rates regulated by the FERC. Crossroads is part of GMO's state-regulated rate base and it is a generation asset used by a state-regulated utility to provide service in its state-regulated service area.

The Commission recognized that the transmission costs associated with getting power from Crossroads in Mississippi to ratepayers in Missouri is an operating expense that GMO incurs to provide service using Crossroads for generation. (Pet. App. 63a). GMO's preference was to use Crossroads. (Pet. App. 62a). The Commission agreed that GMO could use Crossroads as a source of peak power. (Pet. App. 62a). To use that power, GMO must move it through transmission lines owned by Entergy, and it must pay Entergy's federally-approved rate to do so. But the Commission took no issue with Entergy's federally-approved rate. (Pet. App. 63a-64a). Instead, the Commission allowed GMO to use power from its preferred generation source, but required GMO's shareholders, rather than its ratepayers, to bear that cost. (Pet. App. 62a-64a). The Commission engaged in no examination of the justness or reasonableness of Entergy's transmission rates. Its exercise of discretion was related entirely to the justness and reasonableness of GMO's retail rates. GMO's retail rates are entirely within the Commission's authority.

B. The Commission's Decision in This Case Is Similar to the Pennsylvania Public Utilities Commission in *Pike Cnty. Light & Power Co.-Elec. Div. v. Pa. Pub. Util. Comm'n.*

The facts of this case are more analogous to the facts of *Pike Cnty. Light & Power Co.-Elec. Div. v.*

Pa. Pub. Util. Comm'n, 465 A.2d 735 (Pa. Commw. Ct. 1983). In *Pike County*, the state PUC found that the state-regulated utility's reliance on a federally-regulated affiliate as a source of wholesale purchased power was an abuse of the utility management's discretion. 465 A.2d at 271. As a result of this determination, the state PUC reduced the utility's requested retail rate increase from $438,500 to $361,000. *Id.*

The *Pike County* court acknowledged that any attempt by the state PUC to regulate the relationship between the state-regulated utility and its federally-regulated affiliate would be pre-empted by federal law. 465 A.2d at 273. The court found, however, that the PUC's action was not pre-empted because it did not attempt to regulate the affiliate's wholesale rates or find those rates unjust or unreasonable. *Id.* Instead, the state PUC examined only the state-regulated utility's cost of service and comparisons with "alternative costs of purchased power." *Id.* While the state had no jurisdiction to examine the cost of service for the federally-regulated utility, the FERC likewise had no jurisdiction to examine the costs of service for the state-regulated utility. *Id.* at 274. The court found:

> The regulatory functions of the FERC and the PUC thus do not overlap, and there is nothing in the federal legislation which preempts the PUC's authority to determine the reasonableness of a utility company's claimed expenses. In fact, we read the Federal Power Act to expressly preserve that important state authority.

Pike Cnty. Light & Power Co., 465 A.2d at 275.

As in *Pike County*, the Commission in this case has done nothing to disturb any finding made by the FERC. The only federal rates at issue here are the federally-approved transmission rates charged by Entergy. The Commission has made no finding that those rates are in any way unjust or unreasonable. The Commission has instead found that directly passing those costs on to Missouri consumers would be unjust and unreasonable in the specific situation presented by this case, where GMO is using a distant generation source that is included in its state-regulated rate base to serve customers in Missouri instead of serving Missouri customers using a generation source that would not incur the transmission costs incurred by its use of its Crossroads facility. While the transmission costs do represent an operating expense for GMO, the Commission, not the FERC, has the jurisdiction to determine how GMO's operating expenses are to be treated for state rate-making purposes. In this case, GMO's relationship with the federally-regulated utility is even more attenuated than in *Pike County* because GMO and Entergy are not affiliated in any way.

The state law cases relied on by GMO do not support its petition for writ of certiorari. GMO's effort to distinguish *Pike County* is unsuccessful, as in each case a state commission examined only the state-regulated utility's rates and concluded what ratemaking treatment should be afforded the utility's relevant operating expenses. The petition for writ of certiorari should be denied on this point.

V. THE FACTS OF THIS CASE ARE UNIQUE AND OF LITTLE VALUE AS PRECEDENT.

It is true, as GMO asserts, that FERC Order 888 requires transmission owners to "unbundle" their services so that transmission service is available to other producers. (Pet. Br. 29). It is also true that the FERC has jurisdiction over interstate transmission rates. 16 U.S.C. § 824(b)(1). State commissions do not have jurisdiction over interstate transmission rates. *Id.* It is even true, as GMO asserts, that many utilities have given up traditional vertical integration where generation, distribution, and transmission assets were all owned by a single utility for a restructured environment where these three functions are performed by different utilities. (Pet. Br. 29). As a result, there has been a shift in the direction of FERC regulation for wholesalers and transmission owners.

But contrary to GMO's assertion, this case will not disturb the current balance of state-federal jurisdiction and it will not serve as precedent for cases that more directly challenge that balance. This case does not implicate the open access requirements of FERC Order 888. GMO is not the relevant transmission owner. Crossroads is not a wholesale supplier. Neither GMO nor Crossroads has an open access tariff with the FERC that is being disturbed by the Commission. GMO is a vertically-integrated intrastate utility which also has a generation asset located in Mississippi that is used to serve customers in Missouri and is part of the Missouri utility's rate base. The unusual factual underpinnings of this case were closely examined by the Western District when

it examined the Commission's decision to allow GMO to place Crossroads in its rate base and to use it as a generation source but disallowed the cost of transmission:

> What the PSC did decide was that it would be unjust and unreasonable to allow KCP&L-GMO to both reap the benefit of energy producing cost savings at Crossroads (due in part to short-term pricing disparities and utilization of regionally lower-priced natural gas used in energy production) and to recover the otherwise unnecessary transmission costs of the energy from Mississippi to Missouri. In fact, Staff went so far as to argue that the otherwise unnecessary cost of energy transmission justified, in part, removing Crossroads from KCP&L-GMO's cost of service entirely (as Crossroads was not the only energy production option available to KCP&L-GMO to service the two relevant rate districts in Missouri). The [Commission] rejected Staff's recommendation regarding Crossroads and, instead, included Crossroads in KCP&L-GMO's rate base but disallowed the cost of energy transmission (from Mississippi to Missouri) from chargeable rate expenses.
>
> In effect, the [Commission] relented and granted KCP&L-GMO its requested option of using a distant energy producing facility so that it could take advantage of revenue opportunities, but required KCP&L-GMO to bear the burden of getting that energy to

> Missouri since other Missouri energy production options in the relevant Missouri rate districts bore no transmission expense whatsoever. The [Commission] did not conclude that Entergy's transmission service rate was unreasonable; instead the [Commission] concluded that it was unreasonable for KCP&L-GMO to pass through otherwise unnecessary trans-mission costs to ratepayers when KCP&L-GMO is the one that wanted to conduct energy speculation operations in a transmission constricted location hundreds of miles away. It was not the amount of Crossroads transmission costs that the [Commission] disallowed; it was the concept of requiring ratepayers to pay for any Crossroads transmission costs in the first place.

KCP&L-Greater Missouri Operations Co., 408 S.W.3d at 164-65. (emphasis in original)

The factual situation in this case is unrelated to the many cases involving a state-regulated utility's relationship with a federally-related affiliate. That relationship is not present in this case. The Commission has not undertaken to regulate in any area that is in FERC's exclusive jurisdiction. The Commission has not found any FERC-approved rate to be unjust or unreasonable. The Commission has only performed its duty of determining a just and reasonable rate for GMO. In setting that rate, the Commission was required to, and did, balance the interests of the utility in earning a fair rate of return

on its investments with the interests of GMO's customers in paying a fair and appropriate price for electricity. The balance reached by the Commission in this case is a fair one, and one that does not infringe on any matter within FERC's sole jurisdiction. GMO's rates are instead a matter within the exclusive jurisdiction of the Commission.

Because the Commission correctly confined itself to its appropriate sphere of rate-setting in the unusual factual situation presented here, the petition for writ of certiorari should be denied on this point.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully Submitted,

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