No. _____

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.

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

PETITION FOR A WRIT OF CERTIORARI

JOHN D. ADAMS
Counsel of Record
NOEL SYMONS
MATTHEW A. FITZGERALD
McGuireWoods LLP
2001 K Street N.W.,
Suite 400
Washington, D.C. 20006
(202) 857–1700
jadams@mcguirewoods.com

QUESTION PRESENTED

Whether the filed rate doctrine and Supremacy Clause permit a state public service commission to "trap" federally-approved costs with a utility by recognizing the prudency of obtaining electric power from a plant in another state, but then barring the utility from recovering the FERC-approved transmission costs of importing that power.

RULES 14.1 AND 29.6 STATEMENT

In the Missouri Court of Appeals, appellants were: KCP&L Greater Missouri Operations Company; AG Processing, Inc.; and Office of the Public Counsel. Respondent was the Missouri Public Service Commission. Dogwood Energy, LLC intervened as a party respondent.

KCP&L Greater Missouri Operations Company is a wholly owned subsidiary of Great Plains Energy Incorporated, which is a publicly traded company.

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The opinion of the Missouri Court of Appeals, Western District, is reported at 408 S.W.3d 153 (Mo. Ct. App. 2013). App. 1a. The decision of the Circuit Court of Cole County, Missouri is unpublished. App. 92a. The Report and Order of the Missouri Public Service Commission, No. ER 2010–0356, is unpublished. App. 39a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Missouri Court of Appeals affirmed the Commission's Order on May 14, 2013. App. 1a. The Missouri Supreme Court denied transfer of the case on October 1, 2013. App. 96a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent provisions of the Federal Constitution (the Supremacy Clause, art. VI, § 2), the Federal Power Act (16 U.S.C. §§ 824(b), 824d(a)), and the Missouri Revised Statutes (Mo. Rev. Stat. 393.130.1) are reprinted at App. 197a–198a.

STATEMENT

In this case, a utility serving electric customers in Missouri contracted to purchase power from a generating plant out of state. The Missouri Public Service Commission conceded that the decision to obtain power from the Mississippi plant was prudent, but singled out the federally-approved interstate transmission costs of importing that power as not a "just and reasonable" expense. Accordingly, the state Commission refused to allow that transmission cost into retail rates. The state Commission thereby "trapped" at least $5,000,000 per year—until 2032—with the utility. Put differently, the utility will foot the bill for at least $100,000,000 that it now cannot pass through in the electric bills of hundreds of thousands of Missouri consumers. The Missouri Court of Appeals affirmed, seeing no conflict between FERC's approval of the transmission rate and the Commission's finding that the same rate was an "excessive cost" that should be "disallowed from expenses in rates." App. 77a.

Longstanding federal preemption principles under the Supremacy Clause and filed rate doctrine should have governed here. In short, local consumers may not get discounts because a *state* utility commission thinks *federally-approved* wholesale or transmission costs are not "just and reasonable" expenses. A "state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986).

The Missouri Court of Appeals' decision thus squarely contradicts an entire line of preemption cases. In particular, it cannot be reconciled with *Nantahala* or with *Narragansett Electric Co. v. Burke*, a widely-cited leading decision in this field. 381 A.2d 1358, 1363 (R.I. 1977) ("We conclude, therefore, that for the purpose of fixing intrastate rates, the [commission] must treat [the] interstate rate filed with the FPC [now FERC] as a reasonable operating expense.").

The Court of Appeals' lengthy effort to distinguish *Nantahala* and other Supreme Court precedent "on the facts of this case" only makes its decision more treacherous. Indeed, in this area of the law, state court decisions (even state intermediate appellate courts) are widely cited and considered highly persuasive precedent. *See, e.g.*, *Pike County Light & Power Co. v. Pa. Pub. Utility Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983) (cited by 12 state courts, four federal courts of appeal, and the Supreme Court in *Nantahala*).

Under the Court of Appeals' holding, a state commission—even accepting the overall prudency of an interstate power purchase—can single out a specific, federally-approved portion of those costs and bar that cost from retail rates. Three times before, this Court has granted certiorari to a state court that allowed or encouraged its commission to "trap" costs. *Nantahala*, 476 U.S. 953; *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). Each time, this Court reversed. The Court of Appeals' decision here warrants the same treatment.

1. Legal Framework

Regulation of electric service is an interlocking state and federal scheme.

State utility commissions, such as Missouri's here, set retail rates for electric service under authority granted by various state laws. That system dates to the early 1900s and was based on most utilities being dominant in their geographic areas, minimally interconnected, and vertically integrated (owning their own generating plants and transmission lines, and charging one "bundled" rate for service). State law generally requires commissions to set "just and reasonable" retail power rates. That analysis often involves undertaking a "prudency" review to identify the "prudent" alternative for obtaining power, so that the utility may recover the costs of the prudent alternative. *E.g.*, Mo. Rev. Stat. §§ 393.130, -140, -150.

At the same time, under the Federal Power Act, FERC maintains exclusive federal jurisdiction over "the transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). *See also New York v. FERC*, 535 U.S. 1, 5–9 (2002). Accordingly, FERC establishes "just and reasonable" wholesale and transmission rates. 16 U.S.C. § 824d(a). Under the filed rate doctrine, the FERC-filed or FERC-accepted rate must be considered reasonable. *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("[T]he right to a reasonable rate is the right to the rate which [FERC] files or fixes.").

Utilities thus face the risk of being caught in a regulatory pinch. On one hand, the utility must pay federally-approved wholesale rates and transmission costs for power obtained in interstate commerce. On the other, it must recover those costs through retail rates that *state* commissions must approve.

The law solves that problem by applying the filed rate doctrine "to state regulators . . . as a matter of federal pre-emption through the Supremacy Clause." *Entergy*, 539 U.S. at 47. In *Nantahala*, 476 U.S. at 965, this Court adopted the rule that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." That is, "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable."[1] *Id.* at 966.

2. Facts

In the early 2000s, Aquila, Inc. was a public utility providing electric service to western Missouri. App. 53a–54a. In 2002, an Aquila subsidiary built the Crossroads plant, a 300-megawatt, natural-gas fired peaking electric generating plant near Clarksdale, Mississippi. App. 54a. For tax purposes, Crossroads has always been owned by the

[1] In *Nantahala*, the FERC-approved costs were *wholesale* rates; here, they are *transmission* rates. FERC has exclusive statutory jurisdiction over both wholesale and transmission rates, and there is no meaningful distinction between the two for filed rate doctrine or Supremacy Clause purposes. *See* 16 U.S.C. § 824(b) ("The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce.").

municipality of Clarksdale, but prior to 2008 Aquila operated it as a merchant facility that sold power in wholesale energy markets.

In 2008, Great Plains Energy Incorporated acquired Aquila and changed its name to KCP&L Greater Missouri Operations Company ("GMO," or "the Company"). App. 2a. The Company is a fully regulated public utility that provides electric service to approximately 312,000 customers in western Missouri. App. 43a.

As part of the acquisition of Aquila, the Company analyzed whether to place the Crossroads plant in its rate base as a source of power for Missouri consumers. Because Crossroads was located 500 miles away in Mississippi, that analysis factored in the transmission costs of moving power from Mississippi to Missouri. App. 61a; App. 140a–141a. Transmission would occur over lines owned by a third party, Entergy, which had a FERC-filed tariff governing the rate for its use. App. 15a. In short, Crossroads carried a higher transmission cost than other alternatives, but a lower fuel cost because the plant was located near gas fields. On an all-in basis, Crossroads power was "the lowest cost option for meeting [the Company's power] requirements." App. 61a.

So, in August 2008, Crossroads was "transferred to the regulated books of GMO." *Id.* That is, the Company pays to maintain and operate the plant, and has the long-term right to its capacity and energy. App. 65a–66a (explaining the arrangement). The Company uses Crossroads as part of its generating fleet for reliably providing power to Missouri electric customers.

3. Proceedings Below

In June 2010, the Company filed for a general electric rate increase with the Missouri Public Service Commission (the "Commission"). App. 44a. The Company sought permission to raise its rates approximately 14 percent on its Missouri customers. *Id*. Within that rate increase, the Company sought to recover its Crossroads costs.

In its Order, the Commission first acknowledged that the Company's analysis "showed that Crossroads would result in the lowest 20-year net present value of revenue requirements," App. 61a. The Commission also agreed that using Crossroads would diversify the Company's sources of natural gas and could create benefits from generating electricity where the gas prices were low. App. 62a. The Commission thus ruled that the "Company's decision to add the Crossroads generating facility to the . . . generation fleet [was a] prudent and reasonable decision." App. 76a, 67a ("[T]he decision to include Crossroads in the generation fleet at an appropriate value was prudent."). As part of that decision, the Commission expressly rejected the two offered alternative sources of power, both involving generation in Missouri. App. 75a, 77a.

However, the Commission balked at the transmission costs of moving power from Mississippi to Missouri. Noting that the transmission costs were estimated at $406,000 per month, the Commission observed that this expense greatly exceeded any transmission costs for local power plants. App. 63a. Repeatedly referring to "excessive" transmission costs, App. 64a, 67a, 77a, 78a, the Commission held

that it was "not just and reasonable for GMO customers to pay the excessive cost of transmission from Mississippi and it shall be excluded [from rates]." App. 78a; *see also* App. 67a (calling Crossroads "prudent with the exception of the additional transmission expense").

The Company filed a motion for clarification, reconsideration, or rehearing. In that motion, the Company contended that "the Commission's disallowance of FERC-approved transmission costs violates the filed-rate doctrine and the Supremacy Clause of the U.S. Constitution because it unlawfully 'traps' such costs." App. 153a–154a. The Commission denied the motion and denied rehearing on June 25, 2011. App. 98a.

The Circuit Court of Cole County, Missouri affirmed the Commission order in a 1-page ruling in February 2012. App. 94a. The Company timely appealed to the Missouri Court of Appeals. App. 96a.

The Company's brief to the Court of Appeals again raised and preserved the federal issue presented here. Citing *Nantahala*, the Company noted that the transmission costs of moving power from Mississippi to Missouri were FERC-filed rates, and that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." App. 145a (quoting *Nantahala*, 476 U.S. at 965). The Company thus urged that the Commission had unlawfully "trapped" federally-approved costs by opining that they were "excessive" and refusing to allow the Company to recover them. App. 147a, 149a. The Commission's order, the Company urged, "violated the Filed Rate

Doctrine and r[a]n afoul of the Supremacy Clause." App. 152a.

In its opinion, the Missouri Court of Appeals first addressed the issue of mootness. The Court observed that in February 2012, the Company had filed a new tariff with the Commission. App. 6a. On January 9, 2013, the Commission had approved the new tariff, which all parties agreed thereby superseded the tariff being questioned in this appeal. App. 7a. However, the Court held that the issue of "whether the [Commission] lawfully exercised its authority" was a "legal issue[] of general public interest . . . recurring in nature, and . . . susceptible to evading appellate review." App. 8a. Accordingly, the Court chose to "exercise [its] discretion under the exception to the mootness doctrine" and to rule on GMO's point "regarding the PSC's disallowance of transmission costs from recovery in rates." App. 8a–9a.[2]

On the merits, the Court held that the Commission's "decision to disallow the transmission expense associated with bringing power from Crossroads to Missouri is lawful." App. 20a. Although the Court acknowledged the filed rate doctrine, it ruled that disallowing transmission costs in this case "had nothing to do with whether the transmission rates . . . to transport power from Crossroads in Mississippi to Missouri are just and

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[2] One judge, in partial dissent, would have found the case moot entirely and not addressed any issue. App. 29a. Judge Ahuja believed that the Court should not have reached the "FERC preemption issue" because he thought that it was "very likely to arise again in a future, live controversy, in which it would not evade review." App. 32a.

reasonable." App. 16a. Presented with *Nantahala* and *MP&L*, the Court of Appeals found both "distinguishable" on "the facts of this case," and thus "inapposite to the present appeal." App. 18a, 19a. The Court of Appeals held that the Commission had acted within its "'power and authority to determine what items are properly includable in a utility's operating expenses.'" App. 19a–20a (citation omitted).

The Company timely sought rehearing or a transfer to the Missouri Supreme Court. App. 100a. The Company contended that the Court of Appeals had misapplied its own mootness doctrine by deciding the case, and also that the Court of Appeals had erred on the FERC preemption and filed-rate doctrine issue. App. 103a; App. 120a. The Court of Appeals denied rehearing and transfer in June 2013. App. 98a. The Missouri Supreme Court denied transfer on October 1, 2013. App. 96a.

REASONS FOR GRANTING THE PETITION

The error here and the split it creates are plain. In 1986, in a case analogous to this one, the Supreme Court held that "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." *Nantahala*, 476 U.S. at 966. Here, the Missouri Court of Appeals allowed its state Commission to determine that a FERC-approved transmission rate was an "excessive cost," was "not just and reasonable," and thus could be excluded from retail rates. App. 77a–78a. That holding cannot be reconciled with *Nantahala*. Even the *reasoning* employed by the Court of Appeals here parallels that rejected in *Nantahala*.

This case itself is important. Under the decision as it now stands, the utility will pay at least $100,000,000 in FERC-approved interstate transmission costs over the next two decades. Those costs are federally approved and are necessary to deliver power to Missouri consumers. Excluding them from retail rates under the facts of this case violates the Supremacy Clause and filed rate doctrine.

Moreover, the decision below is published and precedential, in a field where state appellate court decisions are widely cited and highly persuasive across the United States. The decision's effort to distinguish *Nantahala* and *MP&L* only makes it more contagious. Left undisturbed, the decision below creates a new avenue for states to evade the filed rate doctrine: by finding it prudent to purchase power from a certain source out of state, but *not*

prudent to pay the FERC-approved transmission rates to import that power.

The issue presented here—and thus the constitutional problem created by the Court of Appeals—is recurring. State commissions across the country regularly set retail electric rates. In doing so, they routinely encounter FERC-approved transmission and wholesale costs. The Supremacy Clause and filed rate doctrine require those commissions to consider federally-approved rates reasonable costs, but they do not always do so. For that reason, three times this Court has found it necessary to defend federal rates against the creeping power of state commissions, and granted certiorari to a state court on this issue. Three times, this Court forced the state commissions to allow FERC-approved costs into retail rates. Once again, this Court's review is needed.

1. The Court of Appeals' decision violated the filed rate doctrine and the Supremacy Clause by finding FERC-approved transmission costs unreasonable and excluding them from rates.

A "State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." *Nantahala*, 476 U.S. at 966. Applying that principle to this case demonstrates how far off-track the Missouri Court of Appeals (and Commission) veered. Rather than following that rule, they performed a line-item veto to excise the federally-approved transmission costs of Crossroads power from Missouri retail rates.

The error began with the Commission. In this case, the Company held a contract to obtain power from Crossroads, located in a different state. FERC approved the interstate transmission rate for delivering that power. App. 147a. The Company then went to the Missouri Commission and demonstrated to the Commission's satisfaction that Crossroads was *overall* the prudent, least-cost alternative. App. 61a (conceding that a "thorough analysis of available options" had "determined the 300 MW Crossroads Energy Center was the lowest cost option"); App. 67a (concluding that "the decision to include Crossroads in the generation fleet at an appropriate value was prudent.").

But even as it decided that Crossroads "was prudent," the Commission added "with the exception of the additional transmission expense." App. 67a. The Commission observed that the Company's alternatives—electric generating plants in Missouri, which it had already found the Company prudently declined—would have carried no comparable transmission costs. App. 63a. The Commission then stated *three times* that the FERC-approved transmission costs were "not just and reasonable." App. 63a ("It is not just and reasonable to require ratepayers to pay for the added transmission costs of electricity generated so far away . . . . Thus, the Commission will exclude the excessive transmission costs from recovery in rates."); App. 67a; App. 78a. Repeatedly the Commission called the FERC-approved transmission rate an "excessive cost." App. 64a, 67a, 77a, 78a.

The Missouri Court of Appeals affirmed. Its decision, however, was based on a collection of erroneous rationales.

The Court of Appeals' first justification was that the Commission had not objected to "the *amount* of Crossroads' transmission costs," but instead objected to "the concept of requiring ratepayers to pay for any Crossroads transmission costs in the first place." App. 17a. Therefore, according to the Court, the Commission's decision "had nothing to do with whether the transmission rates . . . to transport power from Crossroads in Mississippi to Missouri are just and reasonable." App. 16a.

That rationale does not work. The Commission clearly held that the transmission costs were "excessive" and that it would not be "just and reasonable" to include them in retail rates. App. 63a, 67a, 78a. And logically, holding that the "just and reasonable" amount of transmission costs are zero *is* a finding that the actual transmission rate is too high. Moreover, transmission costs are an unavoidable component of Crossroads power, and the Company proved that on an all-in basis, Crossroads remained the lowest cost option. Missouri's buffet-style ratemaking means that it selected the overall lowest-cost option for its ratepayers, then gave them a discount on *that* rate by disallowing recovery of the transmission component. But there is no physical way to move power from Mississippi to Missouri without using Entergy-owned transmission lines, and paying FERC-allocated transmission costs. Simply put, the FERC rate scheme does not allow a state commission to object to the "concept" of paying for transmission. App. 17a.

The Court of Appeals' lengthier justification is even more problematic. Rather than denying that it was "trapping" $406,000 per month in FERC-approved costs, the Court of Appeals instead held that the trapping was lawful, and within the Commission's powers based on its own fairness concerns.

The Court of Appeals repeatedly hinted that the Company somehow would derive special profit from purchasing fuel at Crossroads, and for that reason should not be allowed to *also* pass on transmission costs to ratepayers. *E.g.*, App. 16a (stating that the Company would "reap the benefit of energy producing cost savings at Crossroads"); App. 17a (stating that Crossroads would allow the Company to "take advantage of revenue opportunities" and "conduct energy speculation operations"); *id.* (stating that the Company was "the one that wanted to conduct . . . operations . . . hundreds of miles away"). In light of these concerns, the Court of Appeals held that it was within the Commission's usual "just and reasonable" power to exclude the transmission costs. App. 19a–20a.

As an aside, those concerns are misplaced. Since 2008, Crossroads has been on the "regulated books" of the Company, as the Court itself recognized. App. 10a. Therefore, there are no "energy speculation operations" at Crossroads, and the lower operating cost at Crossroads is, roughly speaking, passed through to Missouri consumers. Seeking recovery of the FERC-approved transmission costs of moving power from Crossroads is not a ploy to gain double profit. Those costs are

baked into the costs of obtaining Crossroads' power—which is *overall* still the lowest-cost option.

More importantly, a Court of Appeals or state Commission's own fairness concerns cannot justify excluding a FERC-approved component cost of a prudent power source. While the Commission could consider fairness to the Missouri ratepayer as part of its prudency analysis, here, Crossroads was prudent and the Commission recognized that. The Commission and Court of Appeals were therefore obligated to consider the FERC-approved component costs of Crossroads' power reasonable costs, and to allow them into retail rates. Doing otherwise subverted the filed rate doctrine and the Supremacy Clause. The basic thrust of the law on this point is that state commissions cannot use their jurisdiction over retail rates to second-guess federally-approved costs and thus trap them with the utility company. That is exactly what happened here.

2. The Court of Appeals' decision splits with a long line of state court precedent.

The Court of Appeals held that the state commission could decide that the FERC-approved transmission costs baked into a prudent power purchase were not just and reasonable expenses, and so exclude that component of the Company's cost from its retail rates. App. 15a–20a. That holding splits from a long line of state and federal precedent.

A. *This decision directly conflicts with* Narragansett.

This case both parallels and contradicts the pathmarking 1977 decision of the Rhode Island Supreme Court—*Narragansett Electric Co. v. Burke*, 381 A.2d 1358.

First, this case parallels *Narragansett*. In both cases, a public utility held a contract to obtain power. 381 A.2d at 1360; App. 10a. In both cases, FERC set a significant component of the cost of obtaining that power—in *Narragansett*, it raised the wholesale rate; here, it accepted the transmission rate. *Id.*; App. 15a. Neither state commission found the basic purchase of the power imprudent or improper, but both believed they could undertake a "just and reasonable" review to determine whether to pass the FERC-approved rate through to consumers. *Id.* at 1361 (planning to exclude "strikingly" or "glaringly unreasonable" costs); App. 78a. Both commissions found it "unreasonable" to pass through the FERC-approved rate to consumers. *Id.* at 1361 (allowing only $5.3 million of the $9.3 million increase into retail rates); App. 77a–78a (excluding the transmission cost entirely from retail rates).

The Rhode Island Supreme Court properly quashed its state commission's decision. The court acknowledged that the commission generally was empowered to weigh the reasonableness of Narragansett's operating expenses. 381 A.2d at 1362. However, citing the Supremacy Clause and the filed rate doctrine, the court held that the federal rate was, by law, reasonable. *Id.* Thus, "for the purpose of fixing intrastate rates," the commission

was obligated to accept the federal rate "as a reasonable operating expense." *Id.* at 1363.

By contrast, the Court of Appeals here affirmed the exclusion of FERC-approved transmission costs from retail rates. It relied on the general power of the Commission to evaluate the Company's operating expenses, App. 19a–20a, and accepted the Commission's position that it would have been unfair to pass through the transmission costs. App. 16a.

B. *This case does not satisfy any exception to the* Narragansett *doctrine.*

This case does not fall within the *Narragansett* qualification or the *Pike County* prudency exception to the general rule that FERC-approved rates must be placed into retail rates as reasonable costs. Indeed, the Commission did not even defend its order in the Court of Appeals on these grounds. App. 180a–185a.

In *Narragansett*, the court noted that, although the commission must consider the FERC-increased wholesale rate a "reasonable operating expense," it could still examine "the overall financial structure of Narragansett to determine whether the company has experienced savings in other areas which might offset the increased price for power." 381 A.2d at 1363. In short, *Narragansett* recognized that a commission need not grant a rate hike if "savings in other areas" would cause a windfall to the utility. The Supreme Court embraced this qualification, calling it "perfectly sensible" that when

one rate goes up, if another cost comes down, overall expenses may stay flat. *Nantahala*, 476 U.S. at 968.

This qualification does not apply here. First, beyond question the Commission order in this case found the transmission cost itself unreasonable, and excluded it for that reason. App. 63a, 67a, 78a. Second, although fuel costs at Crossroads are lower, there would have been no windfall here for the Company. That is, the Company did not "experience savings in other areas," 381 A.2d at 1363, to offset the transmission costs because the lower fuel costs and higher (FERC-approved) transmission costs are inseparable components of delivered power from Crossroads. App. 61a. The Company sought retail rates based on the actual all-in cost of obtaining power from the overall lowest cost option: Crossroads.

Nor does this case fit within the *Pike County* exception. In *Pike County Light & Power Co. v. Pa. Pub. Utility Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983), the court held that although a state commission could not single out FERC-approved rates as unreasonable, it could review a utility's power-purchase alternatives and allow into rates only the cost of the overall prudent choice. As later described by this Court, a state commission on prudency review may address "the reasonableness of purchasing from a particular *source* of . . . FERC-approved power." *Nantahala*, 476 U.S. at 972 (emphasis added).

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 other alternative source of power. 465 A.2d at 738. Indeed, that is what Dogwood and the Staff urged the Commission to do, using the hypothetical costs either of the Dogwood plant or of two unbuilt "phantom turbines," all located in Missouri. App. 74a. However, the Commission selected Crossroads as the prudent source, and rejected the alternatives. App. 77a–78a. Thus, *Pike County* and its progeny provide no cover for the decision below.

In sum, the Court of Appeals here split from essentially the entire line of *Narragansett–Pike County* cases. "Courts which have considered this question have agreed that the Federal Power Act requires that a utility's costs based on [a] FERC-filed rate must be treated as a reasonable operating expense for purposes of setting an appropriate retail rate." *E. Edison Co. v. Dep't of Pub. Utilities*, 446 N.E.2d 684, 689 (Mass. 1983); *N. States Power Co. v. Hagen*, 314 N.W.2d 32, 38 (N.D. 1981) ("for purposes of fixing intrastate rates, the Public Service Commission must treat [the] filed interstate wholesale rates as a reasonable operating expense"); *Appeal of Sinclair Mach. Prods., Inc.*, 498 A.2d 696, 702 (N.H. 1985) (holding that the state commission was "preempted from selectively disallowing portions of [the FERC-accepted] cost of wholesale power"); *Appeal of N. Utilities, Inc.*, 617 A.2d 1184, 1188 (N.H. 1992) (holding that the Commission "must pass through [into retail rates] all FERC-approved costs that the [Commission] admits were prudently incurred").

3. The Court of Appeals' decision conflicts with Supreme Court precedent.

Three times before, this Court has enforced the Supremacy Clause and filed rate doctrine against state commissions and courts seeking to undermine or evade the *Narragansett* doctrine. In all three cases, this Court struck down state decisions that attempted to "trap" federally-approved costs by refusing to include those costs in retail rates. *See Nantahala*, 476 U.S. at 966 (reversing when the state commission had decided not to pass through FERC-allocated wholesale costs to retail consumers); *MP&L,* 487 U.S. at 372 n.12 (reversing to disallow a prudency determination when its "only purpose . . . was to determine whether the costs FERC had directed MP&L to pay for its allocation of Grand Gulf power should be 'trapped' or passed on to . . . retail customers); *Entergy*, 539 U.S. at 49–50 (reversing when the state commission had prevented recovery in retail rates of payments the utility made under a FERC-approved adjustable tariff). The same problem is presented again here.

A. *This decision directly conflicts with* Nantahala.

This Court embraced the *Narragansett* doctrine in *Nantahala*. In that case, FERC had required a utility to pay a wholesale rate for power based on receiving a certain percentage of low-cost power. 476 U.S. at 958. The state commission, on the other hand, set retail rates as if the utility were receiving a greater percentage of low-cost power. *Id.* at 960. The retail rates thus lowballed the utility, forcing it to "pretend that it is paying less for the

power it receives . . . under agreements not subject to [the state commission's] jurisdiction, than is in fact the case." *Id.* at 971.

This Court refused to let that "trapping" happen—the commission could not prevent the utility from recovering wholesale costs FERC had found reasonable. Under the Supremacy Clause and filed rate doctrine, "a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." *Id.* at 966.

The Court of Appeals here violated that principle. The Company is contractually obligated to pay FERC-approved transmission costs for power received from Crossroads in Mississippi. App. 15a. The Commission accepted the prudence of purchasing Crossroads power, but set retail rates as if the Company had no transmission costs. The retail rates thus force the Company to "pretend that it is paying less for the power it receives . . . under agreements not subject to [the state commission's] jurisdiction, than is in fact the case." 476 U.S. at 971. Under *Nantahala*, the Court of Appeals should have refused to let that "trapping" of costs occur.

Even the Court of Appeals' *reasoning* in this case closely tracks the reasoning this Court rejected in *Nantahala*.

As described in the *Nantahala* opinion below, the North Carolina commission believed that the FERC-adjusted agreement between utilities carried "concealed benefits" to the utilities' shared parent company. For that reason, the commission believed that the company, not retail consumers, should "bear

the corresponding costs." *State ex rel. Util. Comm'n v. Nantahala Power & Light Co.,* 332 S.E.2d 397, 449 (N.C. 1985). The North Carolina court justified the commission's action by claiming that it had acted "well within its rate making authority" and "nothing contained in [the commission's] order purports to change or modify a single word of the [FERC-approved] contracts." 476 U.S. at 961 (quoting 332 S.E.2d at 440–41). This Court reversed.

The Court of Appeals in this case employed the same rejected line of reasoning. As in *Nantahala*, the Court of Appeals here repeatedly opined that the Company "could take advantage" of cost benefits from using Crossroads based on "short-term pricing disparities" and "lower priced natural gas," but should therefore "bear the burden of getting that energy to Missouri." App. 16a, 17a. And just as in *Nantahala*, the Court of Appeals justified the Commission's decision by claiming that it fell within the ordinary "authority to determine what items are properly includable in a utility's operating expenses," and "does nothing to call a FERC-approved [transmission] tariff into question." App. 19a–20a, 16a.

B. *Efforts to distinguish* Nantahala *and* MP&L *failed.*

The Court of Appeals found both *Nantahala* and *MP&L* "distinguishable" on the "facts of this case." App. 18a–19a. The Court of Appeals noted that in *Nantahala*, there had been a "FERC-required allocation of power," and a commission order that "contradict[ed]" the "FERC allocation percentage." App. 18a. Similarly, the Court of Appeals observed

that in *MP&L* there also had been a "FERC-ordered allocation[ ] of power" that Mississippi had sought to reevaluate. App. 19a. Unlike in those cases, said the Court of Appeals, here "FERC has not *ordered* [the Company] to purchase power from Crossroads to meet its energy supply needs in Missouri." *Id.*

Neither precedent can be set aside on that ground, for at least two reasons.

First, the Supremacy Clause and filed rate doctrine do not require "specific mandates" of cost allocation by FERC. *Entergy*, 539 U.S. at 49. Indeed, in *Entergy* this Court rejected the theory that *Nantahala* and *MP&L* were unique cases because their "cost allocations were specific mandates." *Id.* at 49–50. Under *Entergy*, a FERC-approved agreement that leaves room for discretion about how to count costs still bars a state commission from "trapping" those costs. *Id.* This Court specifically held that "*Nantahala* and *MP&L* rest on a foundation that is broad enough . . . to require pre-emption" of such a trapping order. *Id.* at 46 (citation omitted).

Second, the federal and constitutional violation here occurred even though FERC did not specifically require the Company to buy Crossroads power. Crossroads was the prudent power source. *See Pike County*, 465 A.2d at 738. Accordingly, retail rates should have been set based on the costs of using Crossroads. In particular, the filed rate doctrine and Supremacy Clause required the Commission to respect the federally-approved transmission component of Crossroads' costs. That is true whether FERC specifically ordered the Company to use Crossroads or not. The fact that a

state commission may analyze the overall prudency of different power sources does *not* give it the authority to refuse to pass through the FERC-approved component costs of the source it chooses. The Commission and Court of Appeals robbed the filed rate doctrine of all meaning by accepting the prudency of using Crossroads, but refusing to allow the Company to recover the cost incurred under the filed rate to deliver that power across state lines.

Thus, this case shapes up like *Nantahala*. *See* 476 U.S. at 969. Exactly as in *Nantahala*, the state commission's opinion about what specific costs are just and reasonable to its ratepayers has run afoul of what FERC has already decided are just and reasonable wholesale or transmission rates. Exactly as in *Nantahala*, the Company here "must pretend it is paying less for the power it receives . . . under agreements not subject to [state commission] jurisdiction, than is in fact the case." 476 U.S. at 971. And exactly as in *Nantahala*, the Company "cannot fully recover its costs of purchasing at the FERC-approved rate if [the commission's] order is allowed to stand." *Id.* at 970.

4. This case presents an important federal and constitutional issue.

A. *This error goes to the heart of the Supremacy Clause.*

State commissions sometimes seek to use their powers to benefit local consumers at the expense of other states or utility companies. *E.g., Mass. Dep't of Pub. Utilities v. United States*, 729 F.2d 886, 888 (1st Cir. 1984) (Breyer, J.) ("[E]ach state would prefer a

rate structure that benefitted its residents to the detriment of its neighbors."). FERC's federal power to set wholesale and transmission rates greatly limits that problem—but only if state commissions treat those federally-approved expenses as reasonable in retail rate-setting.

Each time this Court has accepted certiorari on this question, it has reversed a state court subverting that system—that is, allowing or inviting a discount for local power consumers by trapping FERC-approved costs with the utility. *See supra*, at 20–21; *Nantahala*, 476 U.S. at 966; *MP&L*, 487 U.S. at 372 n.12*; Entergy*, 539 U.S. at 46.

Likewise, the Commission's order and the Court of Appeals opinion in this case are peppered with protectionism. For years, the Missouri Commission Staff had opined that the Company should have built more generating capacity on its home turf in Missouri instead of purchasing power from other states. App. 57a, 60a. In its order, even as it accepted that Crossroads was the lowest-cost option, the Commission opined that the "excessive" $406,000 per-month transmission costs from Crossroads were caused by "the location of Crossroads," which the Commission called "so far away." App. 77a, 63a. The Commission found that it would not be "just and reasonable" to require its "native load customers" to pay for "added transmission costs" of moving power interstate from Mississippi. App. 63a. The Court of Appeals' opinion accepted this reasoning in its entirety. App. 16a–17a.

In other words, the Commission and Court of Appeals simply believed that Missouri consumers should not have to pay transmission costs for Mississippi power. They thus gave local rate payers a discount from a prudent and necessary rate by trapping $406,000 per month in FERC-approved interstate costs with the utility. That sort of rationale is exactly what the Supremacy Clause and filed rate doctrine preempt.

B. *State courts are trailblazers in this field.*

State appellate courts are center stage for appeals from state commission orders. Thus, in this area of the law, the Supreme Court needs to, and has, paid special attention to state court developments.

For instance, *Pike County*—a 1983 decision by an intermediate appellate court in Pennsylvania—has been cited in 12 different state courts, four federal courts of appeal, and was discussed by this Court in *Nantahala*, 476 U.S. at 972. *Pike County*'s holding that a state commission could still determine the overall prudency of a power purchase as compared to alternatives, even though it cannot find FERC rates unreasonable, has become a mainstay of this area of the law. *E.g., Pub. Serv. Co. v. Patch*, 167 F.3d 29, 35 (1st Cir. 1998) (adopting the *Pike County* rule; noting that the Third Circuit and FERC itself had expressly accepted it and that the Supreme Court had twice assumed it arguendo).

Similarly, the *Narragansett* case was decided by the Rhode Island Supreme Court in 1977. Since

then, it has since been cited in 14 different states' courts, five federal circuit courts, and was discussed at length by this Court in *Nantahala*, 476 U.S. at 967–68. *E.g., Gulf States Utilities Co. v. PUC*, 841 S.W.2d 459, 464 (Tex. App. 1992) (referring to the "preemption doctrine of *Narragansett*" and stating that "federal preemption principles preclude state regulatory practices that effectively challenge the reasonableness of FERC-set rates").

These cases arise in the state appellate courts because every state has a regulatory body that sets retail electric rates, and state law typically provides for judicial review of commission orders through state-court appellate channels. 64 Am. Jur. 2d Public Utilities § 183; *e.g.,* Mo. Rev. Stat. § 386.510 (describing Missouri's procedure for appealing from the commission to the state appellate courts).

Therefore, these cases naturally percolate through state appellate courts. All three recent Supreme Court cases on the topic came on certiorari to state courts: *Nantahala* from North Carolina in 1986, *MP&L* from Mississippi in 1988, and *Entergy* from Louisiana in 2003.

C. *The modern unbundled energy market makes this error even more important.*

FERC's 1996 unbundling order made the Court of Appeals' error more likely and makes its precedent more dangerous.

For most of the history of public utilities in the United States, utilities' ownership and control of

their transmission lines allowed them "to refuse to deliver energy produced by competitors or to deliver competitors' energy on terms and conditions less favorable than those they apply to their own transmissions." *New York v. FERC*, 535 U.S. 1, 8–9 (2002). In 1996, FERC deemed this practice discriminatory. To remedy it, FERC ordered "'functional unbundling' of wholesale generation and transmission services." 535 U.S. at 11 (citing Order 888). Put another way, FERC required "each utility to state separate rates for its wholesale generation, transmission and ancillary services." 535 U.S. at 11.

First, unbundling subtly encouraged the Court of Appeals' error by greatly increasing the visibility and importance of the component parts of a utility's rates. Unbundling led directly to the adoption of the Entergy transmission tariff, and allowed the Company to purchase power from one entity (Crossroads) but transmission from another (Entergy). This created the illusion that the two are separable expenses, even though Missouri customers could not consume Crossroads power without Entergy transmission. Once the transmission cost was singled out, the Commission somehow held it not "just and reasonable," even though it was, as a matter of physics and the overall FERC rate scheme, an inseparable component of obtaining Crossroads power, and Crossroads was the prudent option. If given credence, such buffet-style ratemaking is likely to be far more prevalent today than it was in the pre-unbundling world of *Nantahala* and *MP&L*. Equally serious, this type of ratemaking resurrects financial barriers to open transmission—barriers that FERC's unbundling policy sought to destroy under the Federal Power Act. *New York*, 535 U.S. at 11.

Second, the unbundled world makes the Court of Appeals' decision more contagious because if left unchecked, other courts may see the decision as an evolution in doctrine precipitated by a changed circumstance. The filed rate doctrine and its application through the Supremacy Clause were largely settled law by the late 1980s, especially after *Nantahala* and *MP&L*. Coming as it does so long after those precedents, the Court of Appeals' decision here may be viewed as a leading precedent in the post-1996 unbundled era. (*Entergy*, in 2003, did not address a commission singling out unbundled transmission or wholesale rates for review and exclusion, *see* 539 U.S. at 39). The Court of Appeals' efforts to distinguish *Nantahala* and *MP&L* further encourage other courts to see this case as a new development in the law, not an improper split.

In sum, state commissions across the country routinely perform prudency reviews and "just-and-reasonable" analyses. As it now stands, the decision below encourages them to view unbundling as an open invitation to disallow FERC-approved cost components of prudent power sources.

5. This issue is not moot.

This issue is not moot; it is "capable of repetition, while evading review." *Turner v. Rogers*, 131 S. Ct. 2507, 2514–15 (2011) (marks and citation omitted). The "question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction." *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (citation omitted).

This case is an appeal from the June 2011 Commission order setting retail electric rates. On January 9, 2013, the Missouri Commission issued a new rate order that all parties agreed superseded the old rate. App. 6a–7a. The Commission's new order simply adopted its previous ruling regarding the transmission costs of Crossroads. App. 172a. Thus, the same constitutional violation survives in Missouri's electric rates; however, the order appealed from here technically is no longer in effect.

After considering each issue in the case separately, the Court of Appeals found that certain issues were moot and declined to address them. App. 10a. However, the Court of Appeals held that the issue here—whether the Commission acted lawfully in excluding FERC-approved transmission costs—is "recurring in nature" and "susceptible to evading appellate review." App. 8a. Accordingly, the Court of Appeals reached the merits of this issue.[3]

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[3] One judge would have found this issue moot under Missouri law. App. 29a (Ahuja, J., concurring in part and dissenting in part). Judge Ahuja conceded that this issue was "very likely to arise again," but he believed that in those future cases, the issue "would not evade review" largely because of a 2011 change in Missouri law regarding retroactive ratemaking. App. 32a, 37a. But whether *future* Missouri rate-case appeals will be more difficult to moot has no apparent relevance to applying the federal mootness doctrine to this case.

Likewise, the Company's positions below on whether this case was moot under Missouri law should not affect the federal analysis here. *See, e.g.*, App. 188a, 190a (responding to the Court of Appeals' mootness question by asserting that "these issues are of great public interest," (which matters under Missouri law) and "will continue to evade appellate review" in the absence of a ruling by the Court of Appeals); *with* App. 126a (on rehearing, having lost on the merits, expressing concern

Applying this Court's "capable of repetition, while evading review" standard yields the same result. *See, e.g., Mich. Bell Tel. Co. v. Pub. Serv. Comm'n*, 270 N.W.2d 546, 547–48 (Mich. Ct. App. 1978) (citing Supreme Court precedent on "capable of repetition, yet also capable of evading review," and holding that a superseding rate did not moot the utility's challenge to the earlier rate approval). Under this Court's rule, a "dispute remains live if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again." *Turner*, 131 S.Ct. at 2515 (marks and citation omitted).

First, the Commission order here did not last long enough to be fully litigated. The "challenged action" in this appeal—the Commission's June 2011 order—was superseded in January 2013, after just 19 months. By comparison, in *Turner* this Court held that earlier cases with an "18–month period" and a "2–year period" had been "too short" and thus threatened to evade review. 131 S.Ct. at 2515. Indeed, the order here certainly did not last long enough to be "fully litigated"; even the Missouri

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that the Court of Appeals' majority had misapplied Missouri law, and predicting that "none of the Crossroads issues will evade appellate review" *in future cases* under the 2011 change in Missouri rate-making law, which does not apply to this case).

At this stage, it no longer matters whether this case was moot under Missouri law. The Court of Appeals reached, decided, and erred in a precedential ruling on a federal and constitutional issue. For this Court's purposes, all that matters is whether *this issue*, under federal law, is moot. It is not.

Court of Appeals did not issue its opinion until four months after the new Commission order.

Further, this issue is clearly "capable of repetition." After all, "it is not unusual in public-utility rate cases for new tariffs to overtake proceedings involving old tariffs." App. 8a (citation omitted). Here, the issue *already* came up again against the Company in the new January 2013 rate order. The Commission simply adopted its previous ruling, excluding Crossroads' transmission costs from retail rates. App. 172a. And given that the Court of Appeals in the decision below this petition affirmed the Commission's initial view on this issue, it seems unlikely that the Commission will take a different, more constrained view of its authority in the future.

If this Court finds this case moot, the Court of Appeals' precedential decision—and constitutional error—will stand. Given the clear application of the "capable of repetition, while evading review" federal rule, there is no barrier to certiorari here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

John D. Adams
Counsel of Record
Noel Symons
Matthew A. Fitzgerald
McGuireWoods LLP
2001 K Street N.W.
Suite 400

Washington, D.C. 20006
(202) 857–1700
jadams@mcguirewoods.com

December 30, 2013

APPENDIX

APPENDIX A

MISSOURI COURT OF APPEALS,
WESTERN DISTRICT.

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Nos. WD 75038, WD 75057, WD 75058.

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STATE OF MISSOURI *EX REL*.
KCP &L GREATER MISSOURI OPERATIONS COMPANY,
AG PROCESSING, INC., AND
OFFICE OF THE PUBLIC COUNSEL,

Appellants,

v.

MISSOURI PUBLIC SERVICE COMMISSION
and Dogwood Energy, LLC,

Respondents.

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May 14, 2013

Application for Transfer Denied Oct. 1, 2013.

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MOTION FOR REHEARING AND/OR TRANSFER
TO SUPREME COURT DENIED JUNE 25, 2013.

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OPINION

MARK D. PFEIFFER, Presiding Judge.

This appeal challenges the Public Service Commission's ("PSC") May 4, 2011 Report and Order, as clarified and modified by Order issued May 27, 2011, that ordered KCP & L Greater Missouri

Operations Company ("KCP & L-GMO") to file tariffs comporting with the PSC's findings in that Report and Order and Order of Clarification and Modification. Three parties to the proceedings before the PSC appeal: KCP & L-GMO, AG Processing, Inc. ("AGP"), and the Office of the Public Counsel ("OPC"). Dogwood Energy, LLC, was allowed to intervene and participate as a party respondent in this appeal.

Factual and Procedural Background[1]

The PSC is a state agency established by the Missouri legislature to regulate public utilities operating within the state. KCP & L-GMO is an electrical corporation within the meaning of section 386.020(15), and a public utility within the meaning of section 386.020(43), subject to the jurisdiction, control, and regulation of the PSC.[2] KCP & L-GMO was formerly known as Aquila, Inc. ("Aquila"). It changed its name after being acquired in 2008 by Great Plains Energy, Inc. ("GPE"), the parent of Kansas City Power & Light Company. KCP & L-GMO's service area is divided into two separate rate districts, referred to as MPS and L & P. The MPS rate district includes parts of Kansas City, Lee's Summit, Sedalia, Warrensburg, and surrounding areas. The L & P rate district is in and around St. Joseph, Missouri. To serve its customers, KCP & L-GMO owns generating capacity and also purchases power.

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[1] We view the facts together with all reasonable supporting inferences in the light most favorable to the PSC's order. *State ex rel. AGProcessing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 735 (Mo. banc 2003).

[2] All statutory citations are to the Revised Statutes of Missouri, as updated though the 2011 Cumulative Supplement, unless otherwise indicated.

KCP & L-GMO initiated this case on June 4, 2010, by filing proposed tariff sheets with the PSC. The tariffs were designed to implement a general rate increase for electrical service in KCP & L-GMO's Missouri service area. KCP & L-GMO's proposed tariffs were designed to recover an additional $75.8 million per year in rate revenues from its customers in the MPS rate district, and an additional $22.1 million per year in rate revenues from its customers in the L & P rate district. The tariff sheets proposed an effective date of May 4, 2011, but KCP & L-GMO voluntarily extended the tariff effective date until June 4, 2011. Notice of the filing of the proposed tariffs was issued by the PSC on June 22, 2010. The PSC allowed AGP, Dogwood, and nineteen others to intervene in the matter. AGP is an agricultural cooperative that operates a major soybean processing facility in St. Joseph, Missouri, and is among the largest electrical customers of KCP & L-GMO in the L & P rate district. Dogwood is both a retail power customer of KCP & L-GMO and a wholesale power supplier to KCP & L-GMO.

Subsequently, the PSC held local public hearings in six cities. The main evidentiary hearing in this matter was held from January 14 through February 4 and February 14 through February 17, 2011. A true-up hearing was held on March 3-4, 2011.

The PSC's Report and Order rejecting the tariffs was issued on May 4, 2011. It required KCP & L-GMO to file tariffs in compliance with the Report and Order by May 12, 2011, which KCP & L-GMO did. Staff requested changes to the fuel adjustment clause ("FAC") sheets, and KCP & L-GMO filed revised and substituted tariff sheets on May 16 and 17. On May 16, 2011, KCP & L-GMO filed its request to shorten

the effective date of the compliance tariffs to June 4, 2011, which the PSC granted.

On May 26, 2011, the PSC held an on-the-record argument of the points raised in multiple applications for rehearing, motions for clarification, and objections to the tariff sheet submissions. The next day, the PSC issued its May 27, 2011 Order of Clarification and Modification, with an effective date of June 3, 2011. The Order rejected certain proposed tariff sheets and ordered KCP & L-GMO to file new tariff sheets to comply with the PSC's clarifications and modifications. The PSC set a deadline of June 2, 2011, for parties to file objections to the revised tariffs to allow them to go into effect on June 4, 2011. The PSC found good cause to grant expedited treatment of all but certain portions of KCP & L-GMO's compliance tariffs to become effective on less than thirty days' notice under section 393.140(11). The May 27 Order also extended the effective date of the FAC tariffs to July 2, 2011.

On May 31, 2011, KCP & L-GMO filed revised compliance tariffs to become effective on June 4, 2011, and FAC compliance tariffs to become effective on July 1, 2011. On June 1, 2011, KCP & L-GMO filed substitute tariff sheets with an effective date of June 4, 2011. The OPC objected to the compliance tariffs on June 1 and June 2. In response to the objections to the revised compliance tariffs, the PSC ordered that the compliance tariffs be suspended until June 18, 2011. The PSC set a deadline of June 8 for any additional objections to be filed. The OPC filed further objections and responses to KCP & L-GMO's arguments on June 8, 2011. The PSC found good cause to allow the tariffs to go into effect on less than thirty days' notice, and ordered the May 31 compliance tariffs to go into effect

on June 25, 2011, and the May 31, 2011 FAC compliance tariffs to go into effect on July 2, 2011. The PSC had rejected KCP & L-GMO's request of a $97 9 million rate increase in favor of a $59 4 million rate increase, allocating $30,142,949 to the MPS rate district and $29,293,182 to the L & P rate district.

Petitions for review were filed in the Circuit Court of Cole County on June 24, 2011, by KCP & L-GMO; on June 30, 2011, by AGP; and on July 19, 2011, by the OPC. These matters were consolidated. The circuit court granted Dogwood's motions to intervene in the consolidated cases. On February 16, 2012, the circuit court issued its Judgment, finding that the PSC's Report and Order was both lawful and reasonable, and affirming the Report and Order in all respects.

KCP & L-GMO, AGP, and the OPC each filed a separate notice of appeal from the circuit court. The appeals were ordered consolidated, and Dogwood's motion to intervene as a respondent was sustained. Further details regarding the relevant disputed issues will be presented as applicable in the analysis section following.

Standard of Review

On appeal, we review the decision of the PSC rather than that of the circuit court. *State ex rel. Praxair, Inc. v. Mo. Pub. Serv. Comm'n*, 344 S.W.3d 178, 184 (Mo. banc 2011). "Under section 386.510, the appellate standard of review of a PSC order is two-pronged: first, the reviewing court must determine whether the PSC's order is lawful; and second, the court must determine whether the order is reasonable." *Id*. (internal quotation omitted). The PSC's order is *prima facie* lawful and reasonable. § 386.270. The burden of proof is upon the party attacking the order to show by

clear and satisfactory evidence that the order or determination of the PSC is unlawful or unreasonable. § 386.430.

"The lawfulness of an order is determined by whether statutory authority for its issuance exists, and all legal issues are reviewed de novo." *Praxair, Inc*., 344 S.W.3d at 184 (internal quotation omitted).

"The decision of the [PSC] is reasonable where the order is supported by substantial, competent evidence on the whole record[,] the decision is not arbitrary or capricious or where the [PSC] has not abused its discretion." *Id*. (internal quotation omitted).

The PSC is required to make and file written findings of fact "upon all matters concerning which evidence shall have been introduced before it *which in its judgment have bearing on the value of the property*" of the electrical corporation affected. § 393.230.2 (emphasis added). "The [PSC's] factual findings are presumptively correct, and if substantial evidence supports either of two conflicting factual conclusions, [we are] bound by the findings of the administrative tribunal." *State ex rel. AG Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 735 (Mo. banc 2003) (internal quotation omitted).

Mootness

On February 27, 2012, KCP & L-GMO again filed tariffs seeking revenue increases for its MPS and L & P rate districts. At oral argument, the parties conceded that the tariffs that are the subject of this appeal have been superseded by tariffs approved by the PSC in a Report and Order with an issue and

effective date of January 9, 2013.[3] Certain of the issues addressed in the January 9, 2013 Report and Order, which is now on appeal before this court, had also been ruled upon in the May 4, 2011 Report and Order, which is the subject of this appeal.

In light of this intervening event, we must first decide whether we should dismiss this appeal in its entirety or in part because the issues are moot. "A threshold question in any appellate review of a controversy is the mootness of the controversy." *State ex rel. Praxair, Inc. v. Pub. Serv. Comm'n*, 328 S.W.3d 329, 333-34 (Mo.App. W.D.2010) (internal quotation omitted). An issue or a case is moot when "intervening events make a decision unnecessary[,] and it is impossible for this [c]ourt to grant effectual relief'; that is, when "the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." *Id*. at 333-34 (internal quotation omitted).

"When tariffs are superseded by subsequent tariffs that are filed and approved, the superseded tariffs are generally considered moot and therefore not subject to

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[3] Though all parties were aware of the January 9, 2013 Report and Order and were equally aware of the principle of law that a tariff superseded by a subsequent tariff generally renders the superseded tariff moot, the 2013 Report and Order was not brought to this Court's attention until February 27, 2013—two days before oral argument—and only then by one party for the purpose of supporting its argument as to the Accumulated Deferred Income Tax issue and not as a means of notifying this Court of the mootness issue. Not only would this Court have appreciated a much earlier notification of the 2013 Report and Order, we will expect more timely candor in future appeals that will inevitably be filed in other rate cases, some of which may include some or all of the same parties to this appeal.

consideration because superseded tariffs cannot be corrected retroactively." *Id*. at 334 (internal quotation omitted). However, the parties have requested that we exercise our discretion to invoke an exception to the mootness doctrine and review the issues in this case. We have recognized that "[i]t is not unusual in public-utility rate cases for new tariffs to overtake proceedings involving old tariffs.' " *Id*. at 334 (quoting *State ex rel. City of Joplin v. Pub. Serv. Comm'n*, 186 S.W.3d 290, 296 (Mo.App. W.D.2005)). "Invocation of [an] exception to the mootness doctrine is within this [c]ourt's discretion when it is demonstrated that the case in question presents an issue that[:] (1) is of general public interest; (2) will recur; and (3) will evade appellate review in future live controversies." *Id*. at 334-35.

Certain of the issues in this case are currently pending appellate review in a present live controversy or are fact specific and have been superseded by new or additional facts evaluated by the PSC in the January 9, 2013 Report and Order. We thus believe not only that those issues are moot, but that they also fail to fall within the exception to the mootness doctrine justifying the exercise of our discretion to examine those issues: the OPC's point alleging unlawfully approved tariff sheets with an effective date less than the statutorily prescribed length of time; KCP & L-GMO's Point I regarding the valuation of Crossroads Energy Center; and KCP & L-GMO's Point III regarding the PSC's calculation of Crossroads' Accumulated Deferred Income Tax. Other issues in this case involve whether the PSC lawfully exercised its authority. These are legal issues of general public interest, the issues are recurring in nature, and these issues are susceptible to evading appellate review; thus, we elect to exercise our

discretion under the exception to the mootness doctrine to examine the following issues in this case: KCP & L-GMO's Point II regarding the PSC's disallowance of transmission costs from recovery in rates and AGP's points relating to the difference between the PSC's rates and allocations and those requested by the utility.

Analysis

KCP & L-GMO's Appeal

The three issues raised by KCP & L-GMO in its appeal all relate to the determinations made by the PSC with regard to Crossroads Energy Center ("Crossroads"). KCP & L-GMO sought recovery of costs associated with adding Crossroads to the MPS energy generation fleet.

Background

Located in Clarksdale, Mississippi, Crossroads is a 300 megawatt ("MW") simple-cycle electric generation peaking plant that consists of four natural gas-fired combustion turbines. Aquila Merchant purchased eighteen 75 MW combustion turbines and used four of them at Crossroads and installed ten of them at its two Illinois energy centers. Aquila Merchant sold both of its Illinois energy centers to Union Electric Company, d/b/a AmerenUE, at substantially below book value in 2006.

Aquila relied exclusively on purchased power to meet its retail customers' demands for electricity until it built South Harper, a regulated generating unit, in 2005 in Peculiar, Missouri. Because KCP & L-GMO decided to install only three instead of five combustion turbines at the regulated generating unit, KCP & L-GMO had to satisfy the remainder of its capacity

needs by purchasing power. KCP & L-GMO determined that Crossroads was the lowest cost option for meeting its purchased power requirements.

In February 2007, GPE announced that it was seeking to acquire the Missouri regulated electric operations of Aquila, KCP & L-GMO's predecessor, and Crossroads. In 2008, after GPE acquired Aquila, the Crossroads unit was transferred to the regulated books of KCP & L-GMO.

Valuation of Crossroads

In its first point, KCP & L-GMO asserts that the PSC's Order is unlawful and unreasonable because the PSC erred in valuing Crossroads at $61.8 million

Given the fact-specific nature of this rate issue that has been superseded by a subsequent rate order involving additional facts not present in the record relating to the current proceeding, KCP & L-GMO's Point I is denied, as the issue on appeal is moot.

Disallowance of Transmission Costs

In its second point, KCP & L-GMO argues that the PSC erred in disallowing transmission costs associated with delivering power from Crossroads to KCP & L-GMO's customers in Missouri from recovery in rates. KCP & L-GMO contends that the PS C's findings of fact and conclusions of law on this issue are insufficient, that the disallowance was logically inconsistent with its conclusion that Crossroads was the prudent choice because it was the overall lowest cost option, and that the disallowance unlawfully "traps" transmission costs incurred under a federally approved rate in violation of the filed rate doctrine and the Supremacy Clause.

Sufficiency of Findings of Fact

KCP & L-GMO asserts that the PSC's findings of fact and conclusions of law on the transmission cost issue are conclusory and do not explain the PSC's rationale for disallowing the transmission costs. Part of Staffs argument for removing Crossroads from KCP & L-GMO's cost of service was the cost of transmission to move energy from Crossroads in Mississippi to KCP & L-GMO's service territory in Missouri. KCP & L-GMO argued that the cost of transmission was offset by the lower gas reservation costs. Whenever an investigation is made by the PSC, section 386.420.2 requires it to "make a report in writing in respect thereto, which shall state the conclusions of the commission, together with its decision, order or requirement in the premises." The PSC is to avoid making findings of fact that are completely conclusory. State ex rel. Aquila, Inc. v. Pub. Serv. Comm'n, 326 S.W.3d 20, 28 (Mo.App. W.D.2010). "Section 386.420 does not define what constitutes adequate findings of fact, but Missouri courts have filled this gap by applying [section] 536.090, RSMo 2000, from the state's administrative procedures statutes." Id. Section 536.090 provides that "[t]he findings of fact shall be stated separately from the conclusions of law and shall include a concise statement of the findings on which the agency bases its order."

"Whether or not the commission made adequate findings of fact is an issue of law for our independent judgment." *State ex rel. Pub. Counsel v. Pub. Serv. Comm'n*, 274 S.W.3d 569, 577 (Mo.App. W.D.2009). Our standard of review is flexible. *Id*. Findings are adequate if they are "sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision

intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence." *Id.* (internal quotation omitted). "Findings are inadequate if they cause us to speculate as to which part of the evidence the commission believed." *Id*.

We have no difficulty understanding the basis for the PSC's decision to disallow the excessive transmission costs from recovery in rates. Those findings include the following. The PSC found that the estimated monthly cost of transmission to move energy from Crossroads to customers served by MPS was $406,000, which is far greater than the transmission costs for power plants located in the MPS district. The PSC noted that while this higher transmission cost is ongoing and will be paid every year that Crossroads is operating to provide electricity to customers located in and around Kansas City, Missouri, KCP & L-GMO does not incur any transmission costs for its other production facilities located in the MPS district that provide service in the district. The PSC excluded the excessive transmission costs from recovery in rates because "[i]t is not just and reasonable to require ratepayers to pay for the added transmission costs of electricity generated so far away in a transmission constricted location."

Logical Inconsistency

KCP & L-GMO argues that the PSC's disallowance of transmission costs associated with the delivery of power from Crossroads from KCP & L-GMO's rate base was logically inconsistent with its conclusion that Crossroads was the prudent choice because it was the overall lowest cost option. The PSC determined that KCP & L-GMO's decision to include Crossroads in KCP & L-GMO's generation fleet at an appropriate

value was prudent—with the exception of the additional transmission expense. One of the benefits of Crossroads was that the natural gas shipped to Crossroads typically comes from a different supply region than natural gas shipped to KCP & L-GMO's generating station located in Peculiar, Missouri. Thus, with Crossroads in its portfolio, KCP & L-GMO could take advantage of short-term pricing disparities and generate electricity from a region with lower priced natural gas. However, the lower prices at Crossroads are offset by significantly higher electric transmission costs, estimated at $406,000 per month.

The PSC found that it would be unjust and unreasonable to require ratepayers to pay for the added transmission costs of electricity generated at Crossroads in a transmission constricted location in Mississippi. The ongoing transmission cost associated with Crossroads is a cost that KCP & L-GMO does not incur for its generating station located in Peculiar, Missouri.

The PSC has the duty to set rates that are "just and reasonable"; any unjust or unreasonable charge is prohibited. § 393.130.1. The PSC employs a "prudence" standard to determine whether a utility's costs meet this statutory requirement. *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 528 (Mo.App. W.D.1997). If a utility's costs satisfy this standard, the utility is entitled to recover those costs from its customers. *Id*. The PSC has defined its prudence standard:

> [A] utility's costs are presumed to be prudently incurred. . .. However, the presumption does not survive a showing of inefficiency or improvidence. . . . [W]here some other participant in the proceeding creates a serious doubt as to the

> prudence of an expenditure, then the applicant has the burden of dispelling these doubts and proving the questioned expenditure to have been prudent.

Id. (internal quotation omitted). In this case, Staff raised a serious doubt about the prudence of including the transmission costs. In fact, Staff argued that the cost of transmission to move energy from Crossroads in Mississippi to KCP & L-GMO's service territory justified, in part, removing Crossroads from KCP & L-GMO's cost of service entirely.

In order to disallow a utility's recovery of costs from its ratepayers, the PSC must find both that "(1) the utility acted imprudently, [and] (2) such imprudence resulted in harm to the utility's ratepayers." *Id*. at 529. In its decision, the PSC explains how the presumption of prudence was overcome by the fact that the cost of transmission to move energy from Crossroads to customers served by MPS was far greater than the transmission costs for power plants located in the MPS rate district. The PSC also determined that the estimated annual transmission cost of $406,000 per month would be an ongoing cost paid every year that Crossroads operates to provide electricity to customers located in and around Kansas City, Missouri. In contrast, KCP & L-GMO does not incur any transmission costs for its other production facilities located in its MPS rate district that are used to serve customers in that district. The PSC found that it would not be just and reasonable to require ratepayers to pay for the added transmission costs of the electricity generated at Crossroads. Because the PSC made the decision on the recoverability of transmission costs based on a prudency analysis that considered both the prudence of including the

transmission costs and the resulting harm to the ratepayers if such costs were included, the PSC's decision denying recovery was lawful. We also conclude that the PSC's decision to deny KCP & L-GMO recovery of transmission costs was reasonable.

FERC Preemption

As part of the transmission path to get power from the Crossroads plant in Mississippi to the Kansas City area, KCP & L-GMO takes transmission service from Entergy Services, Inc. ("Entergy"), an integrated energy company engaged primarily in electric power production and retail distribution operations.[4] Entergy's transmission service tariff is filed with and approved by the Federal Energy Regulatory Commission ("FERC"). The issue raised by KCP & L-GMO is whether the PSC's order disallowing the transmission cost component in KCP & L-GMO's rate improperly eliminates the tariff rate approved by FERC, thus "trapping" those costs in violation of the filed rate doctrine and the Supremacy Clause of the United States Constitution, Article V I, Clause 2. In other words, does the fact that Entergy's transmission service rate was filed with the FERC affect the PSC's authority to disallow KCP & L-GMO's transmission costs in setting KCP & L-GMO's tariff?

The federal preemption and filed rate doctrine invoked by KCP & L-GMO involves the relationship between the federal and state rate-setting authorities. FERC regulates the transmission and sale of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce; however, such regulation extends only to those matters that are

[4] ENTERGY, http://www. entergy. com/about_entergy/

not subject to regulation by the states. 16 USC § 824(a). "Because of the potential conflict between the federal and state rate-setting agencies, the filed rate doctrine' was developed as an outgrowth of straightforward principles of [f]ederal preemption and the Supremacy [C]lause." *Associated Natural Gas Co*., 954 S.W.2d at 530 (citing *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963, 106 S.Ct. 2349, 90 L.Ed.2d 943 (1986); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981)). The filed rate doctrine requires "that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Nantahala*, 476 U.S. at 962, 106 S.Ct. 2349. The filed rate doctrine prohibits a state regulatory commission from "trapping" FERC-approved costs by preventing a distributor from fully recovering those costs from its retail customers. *Id*. at 970, 106 S.Ct. 2349.

The PSC points out that its decision had nothing to do with whether the transmission rates charged by Entergy to transport power from Crossroads in Mississippi to Missouri are just and reasonable, and therefore does nothing to call a FERC-approved Entergy tariff into question. We agree.

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 PSC rejected Staffs 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 PSC 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 PSC did not conclude that Entergy's transmission service rate was unreasonable; instead, the PSC concluded that it was unreasonable for KCP & L-GMO to pass through otherwise unnecessary transmission 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 from the rate districts to be serviced. It was not the *amount* of Crossroads transmission costs that the PSC disallowed; it was the concept of requiring ratepayers to pay for any Crossroads transmission costs in the first place.

KCP & L-GMO relies on *Nantahala*, 476 U.S. 953, 106 S.Ct. 2349, in which the Supreme Court considered the preemptive effect of a FERC order that reallocated the respective shares of two affiliated companies' entitlement to low-cost energy. Under an agreement between the two affiliated companies,

Nantahala, a public utility selling to both retail and wholesale customers in North Carolina, had been allocated 20% of the low-cost energy purchased from the Tennessee Valley Authority ("TVA"), while 80% was reserved for the affiliate whose only customer was their common parent company. *Id.* at 956, 106 S.Ct. 2349. FERC found that the agreement was unfair to Nantahala and ordered it to file a new wholesale rate schedule based on an entitlement to 22.5% of the low-cost energy purchased from TVA. *Id*. at 958, 106 S.Ct. 2349. Subsequently, in a retail rate proceeding, the North Carolina Regulatory Commission ("NCRC") reexamined the issue, pooled the various sources of power available to the affiliates, and then allocated the pooled power according to demand, which resulted in an allocation of energy that did not take into account FERC's allocation of that same energy. *Id*. at 960-61, 106 S.Ct. 2349. The Court held that the NCRC could not order *Nantahala* to calculate its rate based on a different allocation percentage than that ordered by FERC. *Id*. at 969, 106 S.Ct. 2349. The facts of this case and Nantahala are distinguishable. Here, there is no FERC-required allocation of power between affiliates that the PSC is disturbing and, likewise, no dueling allocation percentages advocated by the PSC in contradiction to a FERC allocation percentage. In short, the P SC'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-GMO also relies on *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 356, 108 S.Ct. 2428, 101 L.Ed.2d 322 (1988), in which the Mississippi Public Service Commission ("MPSC") granted an electric utility an increase in its retail rates to enable it to recover the cost of purchasing an allocation of nuclear plant power *mandated* by FERC.

The Mississippi Supreme Court reversed the decision, holding that the MPSC exceeded its authority by adopting retail rates to pay nuclear power plant expenses without first determining that the expenses were prudently incurred and that such prudence inquiry would not violate the Supremacy Clause. *Id*. The Supreme Court held that FERC proceedings preempted the MPSC's inquiry into prudence of management decisions that led to construction and completion of the nuclear power plant. *Id*. at 370, 108 S.Ct. 2428. According to the Court, "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." *Id*. at 371, 108 S.Ct. 2428. 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, the *Mississippi Power* is equally inapposite to this appeal.

More to the point of this rate case, the Missouri Supreme Court has stated that:

> [T]he statutory power and authority which the [PSC] 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 . . . necessarily includes the power and authority to determine what items are properly

> includable in a utility's operating expenses and to determine 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). For reasons previously identified herein, we find that the PSC's decision to disallow the transmission expense associated with bringing power from Crossroads to Missouri is lawful, reasonable, and supported by substantial and competent evidence in the record.

KCP & L-GMO's Point II is denied.

Calculation of ADIT

In its third point, KCP & L-GMO asserts that the PSC erred in calculating the amount of Crossroads' Accumulated Deferred Income Tax ("ADIT").[5]

Given the fact-specific nature of this rate issue that has been superseded by a subsequent rate order involving additional facts not present in the record relating to the current proceeding, KCP & L-GMO's Point III is denied, as the issue on appeal is moot.

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[5] The income tax expense item deducted in arriving at cost of service is not the taxes KCP & L-GMO actually paid, but is the amount that the company would have paid had the straight line depreciation method been used in figuring its income tax. *State ex rel. Util. Consumers Council of Mo., Inc. v. Pub. Serv. Comm'n*, 606 S.W.2d 222, 224 (Mo.App. W.D.1980). "The deferred tax reserve[,'] to which the deferred amounts are credited, is an unfunded reserve. It creates, while it is in existence, a cost-free addition to capital." *Id*. It is an amount upon which the utility pays no interest. *Id*. "The amount of [the deferred tax reserve] is excluded from the rate base so the rates charged to the ratepayers do not include a return upon the reserved amount" *Id.* "The reserve therefore inures to the benefit of the ratepayers in that the rates do not reflect any cost for the use of the money." *Id.*

AGP's Appeal

Both of AGP's points assert that the PSC erred in granting rate increases in excess of the amount requested by the utility. In considering AGP's challenge to the PSC's rates and allocations, we start from the premise that the rates are lawful and reasonable. *State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n*, 976 S.W.2d 485, 492 (Mo.App. W.D.1998). *See* § 386.270. The burden of proof is on AGP to prove otherwise by clear and convincing evidence. § 386.430.

Rate Increase

In its first point, AGP contends that the PSC erred by exceeding its statutory authority and violated due process in granting KCP & L-GMO a rate increase for the L & P service area of $7 million in excess of the $22 1 million annual rate increase sought in KCP & L-GMO's filed tariffs, contained in the public hearing notice, and on which both public and technical hearings were held.[6]

When an electrical corporation files any schedule stating a new rate or charge, the PSC has the authority, "*upon reasonable notice*, to enter upon a hearing concerning the propriety of such rate." § 393.150.1 (emphasis added). " 'Due process requires notice and a hearing; moreover, the adequacy of the notice and the hearing must be evaluated in the

[6] As the factual summary indicates, the rates set by the PSC were not higher than KCP & L-GMO sought; in fact, the rates were lower than KCP & L-GMO originally proposed ($97.9 million requested; $59.4 million granted). The PSC decision with which AGP disagrees is the PSC's allocation of the costs of Iatan 2 between the MPS and L & P rate districts differently than that proposed by KCP & L-GMO.

context of the specific procedure at issue, in this case, an administrative proceeding.' " *Harter v. Mo. Pub. Serv. Comm'n*, 361 S.W.3d 52, 58 (Mo.App. W.D.2011) (quoting *State ex rel. Mo. Pipeline Co. v. Mo. Pub. Serv. Comm'n*, 307 S.W.3d 162, 174 (Mo.App. W.D.2009)). In an administrative proceeding:

> [D]ue process is provided by affording parties the opportunity to be heard in a meaningful manner. The parties must have knowledge of the claims of his or her opponent, [and] have a full opportunity to be heard, and to defend, enforce and protect his or her rights.

Id. (quoting *Weinbaum v. Chick*, 223 S.W.3d 911, 913 (Mo.App. S.D.2007)).

Here, the PSC ordered KCP & L-GMO to provide an individual notice to each of its customers in its Missouri service areas of the public hearings scheduled on KCP & L-GMO's rate increase request. Included in the notice was the following information:

> On June 4, 2010, KCP & L Greater Missouri Operations Company filed an electric rate case with the Missouri Public Service Commission seeking to increase annual electric operating revenues by approximately $75 8 million in its MPS service territory and approximately $22.1 million in its L & P territory.
>
> If approved in full, a typical Missouri residential customer—one who uses a monthly average of 1130 kWh in the summer and 780 kWh in the winter—would see a less than $15 per month increase in charges.

The notice also included the dates, times, and locations of the public hearings and invited members

of the public to make their views on the request known to the PSC. After providing reasonable notice to interested persons, a full hearing on KCP & L-GMO's tariff request, and consideration of all relevant factors, the PSC entered its Report and Order. We conclude that the notice reasonably apprised ratepayers of the nature and the extent of the possibility of rate increases and the public hearings reasonably afforded ratepayers with the opportunity to be heard with regard to the proposed rate increases. Accordingly, the constitutional requirements of due process were satisfied in this case.

AGP also argues that the tariff filed by the utility with the PSC fixes the aggregate level of revenues in the case, and the PSC is without statutory authority to approve rates in excess of the utility's request. Because, as the factual summary indicates, the *aggregate* rates set by the PSC were *not* higher than KCP & L-GMO sought (in fact, the rates were *lower* than KCP & L-GMO originally proposed: $97.9 million requested; $59 4 million granted), AGP is, in essence, arguing that the PSC erred in adopting a different method of *allocating* the supply/costs of Iatan 2 between the MPS and L & P rate districts than that proposed by KCP & L-GMO. KCP & L-GMO proposed allocating 41 MW of Iatan 2 to the L & P service area, and the remaining 112 MW to the MPS service area; Staff recommended allocating 53 MW of Iatan 2 to the L & P rate jurisdiction and 100 MW to the MPS service area. Staffs recommendation would necessarily result in a higher percentage rate increase to L & P customers than that proposed by KCP & L-GMO in its overall *aggregate* rate increase request.

The cost allocation issue was analyzed by PSC Staff in the Cost of Service Report filed with the PSC on

November 17, 2010, more than two months before the hearing, and was discussed in detail at the evidentiary hearing. In the Report and Order, the PSC made findings of fact as to why this allocation of latan 2 between MPS and L & P would be "just and reasonable and in the public interest." The PSC found that Staffs proposal more correctly matched the proper level of Iatan 2 costs to the customers who originally supported the Iatan plant facility and who needed replacement of the base load purchased power capacity that had expired. The PSC determined that the L & P service area had more base load energy needs than MPS and, therefore, should be allocated more of Iatan 2. Furthermore, the PSC found that KCP & L-GMO's proposal would have the effect of widening the gap between KCP & L-GMO's retail rates for L & P and MPS, while Staffs proposal did not. As a result of this determination, which the PSC compares to a rate design[7] determination, the PSC allocated to the L & P base rate a larger portion of KCP & L–GMO's rate increase than proposed by KCP & L-GMO in its aggregate rate increase request. With this allocation, both L & P and MPS will receive some of the Iatan 2 base load capacity. In addition, the PSC recognized that although L & P customers receive a larger percentage increase in rates than proposed by KCP & L-GMO, they are currently paying significantly lower rates than MPS customers and will benefit long-term from the lower-cost generation.

The impact of the PSC's Order was *not* to grant KCP & L-GMO a greater *aggregate* rate increase than that

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[7] "'Rate design' is the method used to determine the rates to be charged to individual classes of customers." *State ex rel. Monsanto Co. v. Pub. Serv. Comm'n*, 716 S.W.2d 791, 791 (Mo. banc 1986).

requested; instead, the PSC's Order granted an *aggregate* rate increase that was $38 5 million less than KCP & L-GMO requested along with a corresponding *allocation* of that rate increase that was different than that requested by KCP & L-GMO. "[A] public utility may by filing schedules *suggest* to the [PSC] rates and classifications which it believes are just and reasonable, and, if the [PSC] accepts them, they are authorized rates [;] but the [PSC] alone can determine that question and make them a lawful charge." *May Dep't Stores Co. v. Union Elec. Light & Power Co.*, 341 Mo. 299, 107 S.W.2d 41, 50 (1937) (emphasis added). *See also State ex rel. Util. Consumers' Council of Mo., Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 56 (Mo. banc 1979).

"If the PSC's decision is based on purely factual issues, we may not substitute our judgment for that of the PSC." *State ex rel. Midwest Gas Users' Ass'n v. Pub. Serv. Comm'n*, 976 S.W.2d 485, 491 (Mo.App. W.D.1998). The PSC had the discretion to allocate the cost of Iatan 2 between KCP & L-GMO's MPS and L & P rate districts in its rate design, and its cost allocation was reasonable and supported by the record. *See State ex rel. City of West Plains*, 310 S.W.2d at 933.

AGP's Point I is denied.[8]

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[8] AGP similarly argues that in granting the rate increases in this case, the PSC was unlawfully substituting its judgment for that of the utility's management and attempts to support this assertion by relying on *State ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 416 S.W.2d 109, 113 (Mo. banc 1967). However, the *Southwestern Bell* case is inapposite. In that case, the PSC ordered Southwestern Bell to provide service to an area where the company had not offered service. *Id.* The court held that, notwithstanding that Southwestern Bell was

Phase-In

In its second point, AGP restates its first point of error and further asserts that the PSC erred in ordering the phase-in of a rate increase for the L & P service area in excess of the amount the utility sought in its filed tariffs. AGP argues that section 393.155.1, the "phase-in statute," limits the amount to be phased in to the amount requested by the utility. Based upon our resolution of AGP's first point, we find no support for AGP's argument that the rate set by the PSC is limited to the amount requested by the utility.

Before this rate case, KCP & L-GMO's rate base was $190,457,404. As a result of this case, KCP & L-GMO's rate base is $422,039,507. This "unusually large increase" in KCP & L-GMO's rate base resulted from the inclusion of Iatan 2. The PSC allocated Iatan 2 between KCP & L-GMO's L & P and MPS service areas, with the L & P service area allocated a greater portion of the increase than KCP & L-GMO originally asked to be attributed to that service area. Thereafter, the PSC determined that a phase-in of the rate increase in the L & P service area was a just and reasonable method of implementing this large increase. The PSC concluded that rates for the L & P

"employing its plant and equipment in a public service, they still remain its private property, and the public may not assume the role of general manager and require such property to be used in a service to which the owner has not voluntarily dedicated it" *Id*. In this case, KCP & L-GMO serves customers in both the L & P and MPS rate districts, and the issue decided by the PSC was the appropriate rate to be charged in KCP & L-GMO's existing service area. As our ruling today confirms, the PSC—not a utility company—is vested with the ultimate authority to set just and reasonable rates within the relevant rate districts. §§ 393.130, 393.140.

service area should initially be set at an amount equal to the $22 1 million originally proposed by KCP & L-GMO, with the remaining increase plus carrying costs phased-in in equal parts over a two-year period.

Under section 393.155.1, when, after hearing, the PSC determines that an electrical corporation should be allowed a total increase in revenue that is primarily due to an unusually large increase in the corporation's base rate, the PSC is permitted to phase-in that unusually large increase in base rate over a reasonable number of years. "Any such phase-in shall allow the electrical corporation to recover the revenue which would have been allowed in the absence of a phase-in and shall make a just and reasonable adjustment thereto to reflect the fact that recovery of a part of such revenue is deferred to future years." § 393.155.1. The statute further provides that the PSC may, in its discretion, implement the phase-in by approving tariff schedules that take effect from time to time after the phase-in is initially approved. *Id*. The statute is applicable to this case, where KCP & L-GMO's rate base changed significantly due to the addition of Iatan 2 to its rate base. The PSC's decision to allow a phased-in increase due to the addition of Iatan 2 to KCP & L-GMO's rate base is lawful under section 393.155.[9]

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[9] In its attempt to support its argument that the PSC does not have the authority to establish a phase-in that exceeds the amount the utility requested, AGP relies upon a 1974 Jackson County circuit court order (which was not appealed) interpreting the phase-in statutory framework in a manner consistent with AGP's argument on appeal. AGP asserts that this is the law in Missouri. We disagree. "[A] court's decision has stare decisis effect upon a lower court or one of the same rank but not upon a

Furthermore, the PSC's decision was reasonable to mitigate rate shock to customers in the L & P rate district. In fact, it should come as no surprise that the PSC would invoke a phase-in of the L & P territory rate increase. As was recounted in the PSC's Order of Clarification and Modification, it was AGP that "suggested as a possible solution that the rate increase for L & P customers be phased-in. This phase-in option was argued in-depth during the on-the-record session on May 26, 2011." On appeal, AGP now contends that the PSC erred in adopting *the approach that AGP suggested*. Under the invited error rule, a party cannot complain on appeal of an alleged error created by the party or in which the party joined or acquiesced. *See Tate v. Dep't of Soc. Servs.*, 18 S.W.3d 3, 7 (Mo.App. E.D.2000). Thus, though we find no error in the PSC's decision to phase-in the L & P rate increase, any argued error by AGP on this topic was invited by AGP below and is not properly argued as error before this court.

AGP's Point II is denied.

OPC's Appeal

The OPC's point on appeal argues that the PSC unlawfully approved tariff sheets with an effective date less than the statutorily prescribed length of time.

We deny this point as moot. The tariff at issue in this proceeding has been superseded by a subsequently approved tariff in the previously mentioned January 2013 Report and Order. And, presently pending before this court is the OPC's

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court higher in rank than the court in which the decision is cited as precedent." 20 AM. JUR. 2D*Courts* § 142 (2005).

Petition for Writ of Mandamus (Case No. WD76079) arising from the January 2013 Report and Order in which OPC has lodged the same general argument as it has presented on this appeal. On March 13, 2013, this court issued a preliminary writ of mandamus and directed the PSC to file a written answer to the OPC's Petition for Writ of Mandamus and for the parties to otherwise conform to a briefing schedule in accordance with the schedule set forth in Rule 84.24(i). These procedural details reflect that this issue, albeit one of general public interest and recurring in nature, is being addressed by appellate review in a presently pending live controversy. Thus, this issue does not fall within the exception to the mootness doctrine, and we decline to exercise discretion to examine this issue in the context of a mooted tariff case. The OPC's Point is denied, as the issue on appeal is moot.

Conclusion

KCP & L-GMO's Point I and III and the OPC's point on appeal are denied as moot. In all other respects, the circuit court's judgment upholding the PSC's May 4, 2011 Report and Order, as clarified and modified by Order issued May 27, 2011, is affirmed.

VICTOR C. HOWARD, Judge, concurs.

ALOK AHUJA, Judge, concurs in part and dissents in part in separate opinion.

ALOK AHUJA, Judge.

I concur in the majority opinion to the extent it recognizes that all of the issues in this case are moot in light of the Public Service Commission's January 2013 approval of tariffs for KCP & L which supersede the tariffs at issue in this appeal. As the majority explains, because of the Commission's approval of the

superseding tariffs, and because no party sought to stay the effectiveness of the tariffs authorized in 2011, this Court cannot provide the parties with any meaningful relief with respect to the 2011 order. Quite simply, the appeal is moot because a decision by this Court would have no real-world impact whatsoever.

I also concur in the majority opinion to the extent that it declines to address issues concerning the valuation of KCP & L's interest in the Crossroads generating facility, the proper treatment of KCP & L's accumulated deferred income tax ("ADIT") associated with the Crossroads facility, and the Commission's establishment of accelerated effective dates for certain of KCP & L's tariff filings.

I dissent, however, from the majority's decision to address the merits of the other issues raised by the parties, despite their acknowledged mootness. In my view, none of the issues presented in this moot appeal justify resolution, because those issues are fact- and record-specific, and do not present novel legal questions of relevance beyond the circumstances of this case; to the extent these issues will ever recur, they will arise on a different factual record, and will not evade appellate review in future proceedings.

At the outset, I emphasize that my disagreement with the majority opinion concerns only the procedural issue of the justiciability of this appeal; I do not disagree with the majority opinion's substantive resolution of the issues it decides. But for the mootness issue, I would fully concur in the majority opinion without hesitation.

Analysis

As we explained in *Public Service Commission v. Missouri Gas Energy,* 388 S.W.3d 221 (Mo.App.

W.D.2012), we will decide an issue presented on appeal, even if it is moot, "when it is demonstrated that the case in question presents an issue that (1) is of general public interest; (2) will recur; and (3) will evade appellate review in future live controversies." *Id.* at 229 (citations and internal quotation marks omitted). "We will exercise this discretionary jurisdiction if there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance." *Id.* (citations and internal quotation marks omitted). The issues presented in this appeal do not meet these standards.

1. Most of the issues the majority decides are dependent on the particular facts of, and record in, this case. Because the issues are so fact-specific, the majority opinion announces no "legal principle ... not previously ruled," and will not provide meaningful precedent for future cases; the issues are therefore not "of general public interest." *Id.*

For example, the PSC's decision to prohibit KCP & L from recovering the costs of transmission of electricity from the Crossroads facility, despite its determination that KCP & L's acquisition of an interest in Crossroads was otherwise prudent, is a highly fact-dependent question. Resolution of the question depends on, among other things: the distance between Crossroads and KCP & L's service area, and the transmission infrastructure available to transport electricity from one to the other; the amount of KCP & L's transmission costs; the difference between the cost of generating electricity in Mississippi and in Missouri (which may offset in whole or in part the increased transmission expense); KCP & L's cost to acquire its interest in the Crossroads facility; and the

alternatives available to KCP & L to supply the same electricity needs.

The only *legal* principles at stake in connection with the transmission-cost issue are: that Commission decisions must be supported by sufficient competent evidence on the record as a whole; that the Commission must make sufficiently detailed factual findings to support its decisions and enable meaningful appellate review; and that the Commission must set utility rates at a level that is just and reasonable. But those are commonplace legal principles, which we have recited in countless cases. Moreover, the majority opinion does not *announce* those principles; it merely *applies* them to the specific factual circumstances involved here. There is no pressing need for this Court to issue yet another decision applying these well-established principles.

The Commission's refusal to permit KCP & L to recover its interstate transmission costs, despite the fact that those costs are regulated by the Federal Energy Regulatory Commission ("FERC"), *does* present a purely legal issue, on which no Missouri caselaw currently exists. Even this issue does not require decision in this moot appeal, however. First, decision of the FERC preemption issue may be unnecessary, depending upon whether the Commission's decision to disallow recovery of transmission costs was supported by the record evidence. Moreover, as I explain below, the FERC preemption issue is very likely to arise again in a future, live controversy, in which it would not evade review.

AG Processing has attempted to characterize the issues it raises, concerning the rates set by the Commission for the L & P rate district, as issues of broad legal significance concerning the power of the

Commission to establish rates higher than those requested by a utility. But the issue presented in this case is in fact far narrower. Ratepayers in the L & P district were notified of the aggregate rate increase KCP & L sought, as well as the portion of that rate increase KCP & L proposed to extract from L & P ratepayers. And, as the majority explains, the Commission's decision does not award KCP & L more than it asked for: to the contrary, the Commission awarded KCP & L a total rate increase far below the aggregate increase that it sought. The Commission did, however, reallocate some of KCP & L's proposed rate increase to the L & P rate district, based on the Commission's determination that, on the facts of this case, L & P ratepayers should shoulder a greater share of the costs of the Iatan generating plant than KCP & L had proposed. This is, once again, a highly fact-specific issue. Moreover, given that KCP & L is now aware of the allocation of Iatan-related costs which the Commission deems appropriate, this issue (where KCP & L proposes one allocation of such costs, and the Commission adopts another) is unlikely to recur, even with respect to KCP & L.[1]

An additional factor counsels against deciding the transmission-cost issue here. The PSC has informed us that additional evidence related to the issue was presented to the Commission in the proceedings which

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[1] I also find it significant that the principal legal authority on which AG Processing relies is an unappealed 1974 decision of the Jackson County Circuit Court. It may be that AG Processing was unable to cite more recent authority, or authority from a higher court, because the approach the PSC has taken in this case is contrary to the accepted understanding of the law in the intervening thirty-nine years; but it seems just as likely that the issue is simply not recurrent, nor of general public interest.

resulted in the January 2013 Report and Order, and the 2013 order itself makes additional factual findings concerning the issue, beyond the findings contained in the 2011 order we review in this appeal. Although the transmission-cost issue raised in this appeal, and the issue that will be raised in the appeals of the 2013 order, may be similar, the resolution of the issue in the later appeal will necessarily depend on the evidence contained in the record of the proceedings which resulted in the 2013 order, and on the findings the Commission made in the 2013 order. Given a different record, and different findings, a decision concerning the transmission-cost issue in this moot appeal may be of only limited relevance to the resolution of the same or similar issues in the appeals of the 2013 order.

State ex rel. Missouri Public Service Co. v. Fraas, 627 S.W.2d 882 (Mo.App. W.D.1981), is perhaps the leading case applying mootness principles to Commission proceedings. *Fraas* holds that it may be appropriate to decide questions which have been mooted by the Commission's adoption of superseding tariffs, where those questions present recurrent legal issues of general public interest. *Id.* at 885. *Fraas* emphasizes, however, that "[i]f the matter in dispute is simply a question of fact dependent upon the evidence in the particular case, there is no necessity for a declaration of legal principle such as to call the exception into play." *Id. Fraas* itself refused to decide a majority of the issues presented, finding that the issues were "peculiar to this case, with the ruling being confined to the particular facts here." *Id.* at 890; *see also, e.g., State ex rel. Pub. Counsel v. Pub. Serv. Comm'n,* 328 S.W.3d 347, 353 (Mo.App. W.D.2010). The same could be said in this case: the issues the majority decides are "question[s] of fact dependent upon the evidence in th[is] particular case," which

have significance "confined to the particular facts here."[2] We should follow *Fraas'* lead, and refuse to consider any of the questions presented.

I recognize that in *State ex rel. Praxair, Inc. v. Public Service Commission,* 328 S.W.3d 329 (Mo.App. W.D.2010), we suggested that issues "regarding the cost at which retail electric services are provided to the public at large in certain portions of Missouri" were "*inherently* 'of general public interest' " within the meaning of the exception to the mootness doctrine. *Id.* at 335. Of course, the fact that issues raised in a utility ratemaking case may be of "general public interest" cannot alone justify deciding those issues in a moot case: the issues must also be recurrent, and it must be likely that the issues will evade appellate review in future proceedings, when they recur. But I also question whether the statement in *Praxair* can be taken literally: I fail to see how an issue decided in a prior ratemaking proceeding is of "general public interest" where the rates approved in that proceeding are no longer in effect, and where no relief is available with respect to the past period during which those rates were in effect. At that point, it seems to me, the issue is of only academic or historical interest, unless it presents a legal question on which a decision will

[2] The highly fact-specific issues raised in this appeal can be contrasted with the stark legal issue presented in *Missouri Gas Energy:* "the ability of the Commission to allow a utility company to include an exculpatory clause in a tariff that immunizes the company from liability for any personal injury or property damage caused by the company's negligence occurring on the customer's property and gas utilization equipment." 388 S.W.3d at 229. Resolution of *that* legal issue, even in an appeal in which the issue was technically moot, could have far-reaching significance in future proceedings, including proceedings involving other utilities. The same cannot be said here.

have precedential value in future cases. Even if a particular issue *may have been* of "general public interest" when it actually affected the prices ratepayers paid, it *ceases to be* of "general public interest" when it has no real-world effects, without some indication that a decision of the issue will materially affect future proceedings.

2. Quite apart from the fact-specific nature of the issues presented here, decision of the issues is also unjustified because, to the extent similar issues recur in the future, those issues will not evade appellate review.

Issues concerning the rates KCP & L may charge, and specifically how those rates should be influenced by KCP & L's acquisition of an interest in the Crossroads plant, are presented in multiple other appeals currently pending before this Court. Besides this appeal, some of the appellants have also appealed from the Commission's approval of the tariffs KCP & L submitted to comply with the 2011 order (No. WD75437); and multiple appeals have been filed from the Commission's January 2013 Report and Order concerning KCP & L's subsequent rate requests (Nos. WD76164, WD76166). A review of the 2013 Report and Order reflects that it decided issues concerning the valuation of the Crossroads facility, KCP & L's right to recover the costs of transmitting electricity from the Crossroads facility, and the appropriate amount of ADIT KCP & L could recognize, which are very similar to issues presented here. In addition, as the majority notes, the Office of Public Counsel has raised issues concerning the Commission's establishment of accelerated effective dates for compliance tariffs implementing the 2013 Report and Order in a petition for extraordinary writ (No. WD76079); this Court issued

a preliminary writ of mandamus in that case on March 13, 2013, and set the matter for full briefing. There may well be other proceedings pending in this Court which concern the same underlying factual circumstances.

To the extent issues similar to those involved here are raised in any of these other proceedings, the issues will not evade appellate review in those other cases. In the mandamus proceeding, we have stayed the effectiveness of the challenged Commission order; issues concerning its validity will therefore not become moot. Moreover, the PSC orders which are challenged in the other appeals were issued after July 1, 2011. Those orders are accordingly subject to § 386.520.2, RSMo Cum.Supp.2012, which authorizes the Commission to adjust prospective rates where a judicial decision determines that the rates the Commission previously approved were unlawful or unreasonable. Therefore, it appears that, even if no party sought a stay of the Commission's later orders, and those orders were then superseded by yet further Commission orders, the issues would *not* be mooted, because a judicial decision concerning the lawfulness of the superseded tariffs could have real consequences in light of the rate-adjustment authority provided by § 386.520.2, RSMo Cum.Supp.2012. The fact that the issues will not evade review in future proceedings provides yet another reason for this Court to decline to address these issues now.[3]

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[3] In *Praxair,* we suggested that this Court was justified in considering moot questions where the same, or similar, issues were being raised in appeals challenging Commission orders approving subsequent tariffs. 328 S.W.3d at 335. But in *Praxair,* the Court was concerned that the issues presented would

Conclusion

This Court is not, and should not be, in the business of issuing advisory opinions which will have no immediate impact, and which will have no (or at best limited) precedential value in future cases. Our reluctance to decide moot questions should only be heightened when the issues presented are capable of being presented, and decided, in a future live controversy. Because I believe the majority opinion disregards these principles by deciding the merits of *any* of the issues presented in this appeal, I respectfully dissent in part.

"continually evade review," as tariffs challenged in judicial review proceedings were repeatedly superseded by later tariffs. *Id.* By virtue of § 386.520.2, RSMo Cum.Supp.2012, that sort of infinite regress is no longer an issue. I recognize that some decisions have suggested that the prohibition on retroactive ratemaking, or the prohibition on adjusting future utility rates to reflect prior over- or under-collections, may have constitutional underpinnings. *See, e.g., State ex rel. Pub. Counsel v. Pub. Serv. Comm'n,* 328 S.W.3d 347, 352 (Mo.App. W.D.2010) (quoting *Lightfoot v. City of Springfield,* 361 Mo. 659, 236 S.W.2d 348, 354 (1951)); *State ex rel. City of Joplin v. Pub. Serv. Comm'n,* 186 S.W.3d 290, 299 & n. 8 (Mo.App. W.D.2005).

If that suggestion is accurate, there may be an argument that § 386.520.2, RSMo Cum.Supp.2012, is unconstitutional. Statutes are presumed to be constitutional until the contrary is shown, however, *see, e.g., Missouri Roundtable for Life, Inc. v. State,* 396 S.W.3d 348, 350–51 (Mo. banc 2013); I therefore disregard any potential constitutional infirmities of § 386.520.2 for present purposes.

APPENDIX B

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

File No. ER-2010-0356

[SEAL]

Issue Date: May 4, 2011
Effective Date: May 14, 2011

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service.

REPORT AND ORDER

* * * *

IN MEMORIAM

The Commissioners and all the employees at the Commission express their deepest sympathy to Curtis Blanc's family, friends, and colleagues for his untimely death which occurred on February 16, 2011, while he was in Jefferson City in order to attend the scheduled hearings for these cases.

PROCEDURAL HISTORY

On June 4, 2010, KCP&L Greater Missouri Operations Company (GMO) submitted to the Commission proposed tariff sheets, effective for service on and after May 4, 2011, that are intended to

implement a general rate increase for electrical service provided in its Missouri service area. GMO's proposed tariffs would increase its Missouri jurisdictional revenues by approximately $75.8 million and $22.1 million for its MPS and L&P service territories, respectively. According to GMO, this represented a 14.43% rate increase for MPS based on current Missouri jurisdictional revenue, including fuel adjustment clause revenue of approximately $525 million. It also represents a 13.87% increase for L&P based on current Missouri jurisdictional revenues, including a fuel adjustment clause revenue of approximately $159 million. The Commission issued an Order and Notice on June 11, in which it gave interested parties until July 1 to request intervention.[1] GMO voluntarily extended the tariff effective date until June 4, 2011.

The Commission received timely intervention requests from: Dogwood Energy, LLC; the City of Kansas City, Missouri; Ag Processing, Inc., a Cooperative; the Sedalia Industrial Energy Users Association (SIEUA); Union Electric Company, d/b/a Ameren Missouri; the City of Lee's Summit, Missouri; the Hospital Intervenors,[2] Missouri Gas Energy, a Division of Southern Union Company; Robert Wagner; the Federal Executive Agencies; the American Association of Retired Persons (AARP), the Consumers Council of Missouri, The Empire District Electric Company; Missouri Retailers Association; the Missouri Department of Natural Resources; and the

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[1] Calendar dates refer to 2010 unless otherwise noted

[2] Consisting of Lee's Summit Medical Center, Liberty Hospital, Research Belton Hospital, Saint Luke's East—Lee's Summit, St. Mary's Medical Center, Saint Luke's Northland Hospital—Smithville Campus, and North Kansas City Hospital.

City of St. Joseph, Missouri. The Commission granted these requests.

The test year is the 12 months ending December 31, 2009, updated for known and measureable changes through June 30, 2010, and trued-up through December 31, 2010.[3] Portions of the hearings in this case were held simultaneously with the hearings in ER-2010-0355 for Kansas City Power & Light Company (KCP&L). Common issues were also addressed in the Report and Order in ER-2010-0355 but will be repeated in this order. The Commission held local public hearings in Nevada, St. Joseph, Kansas City, Riverside, Lee's Summit, and Carrollton. The evidentiary hearing went from January 18 through February 4, 2011, February 14 through February 17, 2011, and the true-up hearing was held on March 3-4, 2011.

Non-Unanimous Stipulations and Agreements

The Commission received seven Non-unanimous Stipulations and Agreements from February 2 to March 23, 2011. With regard to GMO, those stipulations resolved: depreciation, amortizations, an Economic Relief Pilot Program, employee severance cost, Supplemental Executive Retirement Pension cost, advertising cost, bad debt expense, cash working capital imputed accounts receivable program, Proposition C expenses, call center reporting, tracker use for Iatan operation and maintenance expenses, transmission expense and revenue tracker, outdoor lighting, class cost of service and rate design, MGE rate design issue, pensions and other post-employment benefits, and Iatan common costs.

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[3] Ex. GMO 210, p. 8.

No parties objected to the nonunanimous stipulation and agreements. Therefore, as permitted by Commission Rule 4 CSR 240-2.115, the Commission will treat the stipulations as if they were unanimous. The Commission finds the above-referenced stipulations reasonable and approves them.

GENERAL FINDINGS OF FACT

The Missouri Public Service Commission, having considered all of the competent and substantial evidence upon the whole record, makes the following findings of fact and conclusions of law. The positions and arguments of all of the parties have been considered by the Commission in making this decision. Failure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision. When making findings of fact based upon witness testimony, the Commission will assign the appropriate weight to the testimony of each witness based upon their qualifications, expertise and credibility with regard to the attested to subject matter.[4]

1. Kansas City Power & Light Company ("KCP&L") and KCP&L Greater Missouri Operations Company ("GMO") are both wholly owned by Great Plains Energy, Inc. ("GPE"). Their service areas in

[4] Witness credibility is solely within the discretion of the Commission, who is free to believe all, some, or none of a witness' testimony. *State ex. rel. Missouri Gas Energy v. Public Service Comm'n*, 186 S.W.3d 376, 389 (Mo. App. 2005).

Missouri are shown on Schedule 2 to the direct testimony of Cary G. Featherstone.[5]

2. Collectively, KCP&L and GMO operate and present themselves to the public under the brand and service mark "KCP&L." The workforce for GMO consists of KCP&L employees; GMO has no employees of its own. Before it was acquired by GPE, GMO was named Aquila, Inc., and before that, Utilicorp United, Inc.[6]

3. KCP&L serves approximately 509,000 customers, of which about 450,000 are residential customers, about 57,000 are commercial customers and the remaining about 2,000 are industrial, municipal and other utility customers. To serve these customers, KCP&L owns and operates 571 MW of nuclear generating capacity and, with Iatan 2, about 2,774 MW of coal capacity,[7] and with Spearville 2, 148 MW of wind capacity, 829 MW of natural gas-fired combustion turbine capacity, and 302 MW of oil-fired combustion turbine capacity. It also purchases power.[8]

4. GMO has approximately 312,000 customers, of which about 273,500 are residential customers, about 38,000 are commercial customers and the remaining about 500 customers are industrial, municipal and other utility customers. To serve these customers, GMO owns, with Iatan 2, 2,128 MW of generating capacity, of which 1,045 MW is coal capacity,[9] 1,019

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[5] Ex. KCP&L 215.

[6] Ex. KCP&L 210, p. 1; Ex. KCP&L 215, pp. 3-4 & 12; Ex. GMO 210, p. 1; Ex. GMO 215, pp. 3, 11.

[7] Iatan 2 ownership is 54.7% of 850 MW, equaling 465 MW.

[8] Ex. KCP&L 210, pp. 1-2; Ex. KCP&L 215, p. 43.

[9] Iatan 2 ownership is 18% of 850 MW, equaling 153 MW.

MW is natural gas-fired combustion turbine capacity, and 64 MW is oil-fired combustion turbine capacity. Like KCP&L, it also purchases power.[10]

5. These two rate cases started on June 4, 2010, when KCP&L and GMO filed applications and proposed tariff changes to implement general electric rate increases. The cases are File Nos. ER-2010-0355 and ER-2010-0356, respectively. KCP&L stated its application was designed to recover an additional $92.1 million per year in rate revenues, a 13.8% increase.[11] By its true-up direct case filed on February 22, 2011, KCP&L stated its revenue deficiency is $55.8 million.[12] In its true-up direct case filed that same day, Staff recommended an annual increase in revenue requirement of $9.6 million.[13]

6. GMO's service area is divided into two separate rate districts referred to as MPS and L&P. The MPS rate district includes parts of Kansas City, Lee's Summit, Sedalia, Warrensburg and surrounding areas. The L&P rate district is in and about St. Joseph, Missouri. GMO stated its application was designed to recover an additional $75.8 million per year in rate revenues from its customers in its MPS rate district, a 14.4% increase, and an additional $22.1 million per year in rate revenues from its customers in its L&P rate district a 13.9% increase.[14] By its true-up direct

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[10] Ex. GMO 210, pp. 1-2; Ex. GMO 215, p. 34.

[11] Ex. KCP&L 215, pp. 10-11; Ex. GMO 215, pp. 3-4.

[12] Ex. KCP&L 114, p. 1; Ex. KCP&L 117, p. 1 (but per the Staff's reconciliation, KCP&L's requested revenue increase is $66.5 million).

[13] Ex. KCP&L 304, p. 4.

[14] Ex. GMO 210, p. 7; Ex. GMO 215, pp. 3, 10; Ex. KCP&L 215, Sch. 2.

case filed on February 22, 2011, GMO stated its revenue deficiency for MPS is $65.2 million and its revenue deficiency for L&P is $23.2 million.[15] In its true-up direct case filed that same day, Staff recommended an annual increase in revenue requirement for MPS of $4.6 million and an increase of $16.6 million for L&P.[16]

GENERAL CONCLUSIONS OF LAW

Conclusions of Law Regarding Jurisdiction

1. GMO is an electric utility and a public utility subject to Commission jurisdiction.[17] The Commission has authority to regulate the rates GMO may charge for electricity.[18]

2. The Commission is authorized to value the property of electric utilities in

Missouri.[19] Necessarily, that includes property and other assets proposed for inclusion in rate base. In determining value, "the commission may consider all facts which in its judgment have any bearing upon a proper determination of the question . . . ."[20] The courts have held that this statute means that the

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[15] Ex. GMO 58, p. 1.

[16] Ex. KCP&L 304, p. 4.

[17] Section 386.020(15), (42), RSMo 2010 (all statutory cites to RSMo 2010 unless otherwise indicated).

[18] Section 393.140(11).

[19] Section 393.230.1, RSMo.

[20] Section 393.270.4, RSMo.

Commission's determination of the proper rate must be based on consideration of all relevant factors.[21] Relevant factors include questions raised by stakeholders about the prudency and necessity of utility construction decisions and expenditures.

3. In making its determination, the Commission may adopt or reject any or all of any witnesses' testimony.[22] Testimony need not be refuted or controverted to be disbelieved by the Commission.[23] The Commission determines what weight to accord to the evidence adduced.[24] "It may disregard evidence which in its judgment is not credible, even though there is no countervailing evidence to dispute or contradict it.[25] The Commission may evaluate the expert testimony presented to it and choose between the various experts.[26]

4. The Staff of the Commission is represented by the Commission's Staff Counsel, who has been delegated the duties of the Commission's General Counsel, an employee of the Commission authorized by statute to "represent and appear for the commission

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[21] *State ex rel. Missouri Water Co. v. Public Service Commission*, 308 S.W.2d 704, 719 (Mo. 1957); *State ex rel. Midwest Gas Users' Association v. Public Service Commission*, 976 S.W.2d 470, 479 (Mo. App., W.D. 1998); *State ex rel. Office of Public Counsel v. Public Service Commission of Missouri*, 858 S.W.2d 806 (Mo. App., W.D. 1993).

[22] *State ex rel. Associated Natural Gas Co. v. Public Service Commission*, 706 S.W.2d 870, 880 (Mo. App., W.D. 1985).

[23] *State ex rel. Rice v. Public Service Commission*, 359 Mo. 109, 116, 220 S.W.2d 61, 65 (banc 1949).

[24] *Id*.

[25] *Id.*

[26] *Associated Natural Gas, supra*, 706 S.W.2d at 882

in all actions and proceedings involving this or any other law [involving the commission.][27] The Public Counsel is appointed by the Director of the Missouri Department of Economic Development and is authorized to "represent and protect the interests of the public in any proceeding before or appeal from the public service commission[.]"[28] The remaining parties include governmental entities, other electric utilities, and consumers.

Burden of Proof

5. "At any hearing involving a rate sought to be increased, the burden of proof to show that the increased rate or proposed increased rate is just and reasonable shall be upon the . . . electrical corporation . . . and the commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible."[29]

Ratemaking Standards and Practices

6. The Commission is vested with the state's police power to set "just and reasonable" rates for public utility services,[30] subject to judicial review of the question of reasonableness.[31] A "just and reasonable"

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[27] Section 386.071.

[28] Sections 386.700 and 386.710.

[29] Section 393.150.2.

[30] Section 393.130, in pertinent part, requires a utility's charges to be "just and reasonable" and not in excess of charges allowed by law or by order of the commission. Section 393.140 authorizes the Commission to determine "just and reasonable" rates.

[31] *St. ex rel. City of Harrisonville v. Pub. Serv. Comm'n of Missouri*, 291 Mo. 432, 236 S.W. 852 (Mo. banc. 1922); *City of*

rate is one that is fair to both the utility and its customers;[32] it is no more than is sufficient to "keep public utility plants in proper repair for effective public service, [and] . . . to insure to the investors a reasonable return upon funds invested."[33] In 1925, the Missouri Supreme Court stated:[34]

> The enactment of the Public Service Act marked a new era in the history of public utilities. Its purpose is to require the general public not only to pay rates which will keep public utility plants in proper repair for effective public service, but further to insure to the investors a reasonable return upon funds invested. The police power of the state demands as much. We can never have efficient service, unless there is a reasonable guaranty of fair returns for capital invested. * * * These instrumentalities are a part of the very life blood of the state, and of its people, and a fair administration of the act is mandatory. When we say "fair," we mean fair to the public, and fair to the investors.

7. The Commission's guiding purpose in setting rates is to protect the consumer against the natural

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Fulton v. Pub. Serv. Comm'n, 275 Mo. 67, 204 S.W. 386 (Mo. banc. 1918), *error dis'd*, 251 U.S. 546, 40 S.Ct. 342, 64 L.Ed. 408; *City of St. Louis v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 509, 207 S.W. 799 (1919); *Kansas City v. Pub. Serv. Comm'n of Missouri*, 276 Mo. 539, 210 S.W. 381 (1919), *error dis'd*, 250 U.S. 652, 40 S.Ct. 54, 63 L.Ed. 1190; *Lightfoot v. City of Springfield*, 361 Mo. 659, 236 S.W.2d 348 (1951).

[32] *St. ex rel. Valley Sewage Co. v. Pub. Serv. Comm'n*, 515 S.W.2d 845 (Mo. App. 1974).

[33] St. ex rel. Washington University et al. v. Pub. Serv. Comm'n, 308 Mo. 328, 344-45, 272 S.W. 971, 973 (Mo. banc 1925).

[34] *Id.*

monopoly of the public utility, generally the sole provider of a public necessity.[35] "[T]he dominant thought and purpose of the policy is the protection of the public . . [and] the protection given the utility is merely incidental."[36] However, the Commission must also afford the utility an opportunity to recover a reasonable return on the assets it has devoted to the public service.[37] "There can be no argument but that the Company and its stockholders have a constitutional right to a fair and reasonable return upon their investment."[38]

8. The Commission has exclusive jurisdiction to establish public utility rates,[39] and the rates it sets have the force and effect of law.[40] A public utility has no right to fix its own rates and cannot charge or collect rates that have not been approved by the Commission;[41] neither can a public utility change its rates without first seeking authority from the Commission.[42] A public utility may submit rate schedules or "tariffs," and thereby suggest to the Commission rates and classifications which it believes

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[35] *May Dep't Stores Co. v. Union Elec. Light & Power Co*., 341 Mo. 299, 107 S.W.2d 41, 48 (Mo. App. 1937).

[36] *St. ex rel. Crown Coach Co. v. Pub. Serv. Comm'n*, 179 S.W.2d 123, 126 (1944).

[37] *St. ex rel. Utility Consumers Council, Inc. v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 49 (Mo. banc 1979).

[38] *St. ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. 1981).

[39] *May Dep't Stores, supra*,107 S.W.2d at 57.

[40] *Utility Consumers Council, supra*, 585 S.W.2d at 49.

[41] *Id*.

[42] *Deaconess Manor Ass'n v. Pub. Serv. Comm'n*, 994 S.W.2d 602, 610 (Mo. App. 1999).

are just and reasonable, but the final decision is the Commission's.[43] Thus, "[r]atemaking is a balancing process."[44]

9. Ratemaking involves two successive processes: first, the determination of the "revenue requirement," that is, the amount of revenue the utility must receive to pay the costs of producing the utility service while yielding a reasonable rate of return to the investors.[45]

10. The second process is rate design, that is, the construction of tariffs that will collect the necessary revenue requirement from the ratepayers. Revenue requirement is usually established based upon a historical test year that focuses on four factors: (1) the rate of return the utility has an opportunity to earn; (2) the rate base upon which a return may be earned; (3) the depreciation costs of plant and equipment; and (4) allowable operating expenses. The calculation of revenue requirement from these four factors is expressed in the following formula:

$$RR = C + (V - D) R$$

where: RR = Revenue Requirement;

C = Prudent Operating Costs, including Depreciation Expense and Taxes;

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[43] *May Dep't Stores, supra*,107 S.W.2d at 50.

[44] *St. ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. App. 1988).

[45] *St. ex rel. Capital City Water Co. v. Missouri Pub. Serv. Comm'n*, 850 S.W.2d 903, 916 n. 1 (Mo. App. 1993).

V = Gross Value of Utility Plant in Service;

D = Accumulated Depreciation; and

R = Overall Rate of Return or Weighted Cost of Capital.

11. The return on the rate base is calculated by applying a rate of return, that is, the weighted cost of capital, to the original cost of the assets dedicated to public service less accumulated depreciation.[46]

12. The Public Service Commission Act vests the Commission with the necessary authority to perform these functions. The Commission can prescribe uniform methods of accounting for utilities, and can examine a utility's books and records and, after hearing, can determine the accounting treatment of any particular transaction.[47] In this way, the Commission can determine the utility's prudent operating costs. The Commission can value the property of electric utilities operating in Missouri that is used and useful to determine the rate base.[48] Finally, the Commission can set depreciation rates and adjust a utility's depreciation reserve from time-to-time as may be necessary.[49]

13. The Revenue Requirement is the sum of two components: first, the utility's prudent operating expenses, and second, an amount calculated by

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[46] *See St. ex rel. Union Elec. Co*., 765 S.W.2d at 622.

[47] Section 393.140.

[48] Section 393.230. Section 393.135 expressly prohibits the inclusion in electric rates of costs pertaining to property that is not "used and useful."

[49] Section 393.240.

multiplying the value of the utility's depreciated assets by a rate of return. For any utility, its fair rate of return is simply its composite cost of capital. The composite cost of capital is the sum of the weighted cost of each component of the utility's capital structure. The weighted cost of each capital component is calculated by multiplying its cost by a percentage expressing its proportion in the capital structure. Where possible, the cost used is the "embedded" or historical cost; however, in the case of Common Equity, the cost used is its estimated cost.

14. Because the parties have no dispute regarding rate design or depreciation, the Commission will resolve the issues below generally in the following order: rate base, rate of return, and expenses.

THE ISSUES

Being unable to agree on how to phrase many issues, GMO (jointly with KCPL) and Staff submitted separate lists of issues for determination by the Commission. The Commission phrases and resolves the issues herein. The issues listed at the beginning of each section may be phrased differently than those presented and may not be inclusive of all issues decided. The Commission has previously decided the issues common to KCPL and GMO[50] and those decisions will be repeated here as they apply to GMO.

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[50] File No. ER-2010-0355, *In the Matter of the Application of Kansas City Power & Light Company for Approval to Make Certain Changes in its Charges for Electric Service to Continue the Implementation of Its Regulatory Plan*, Report and Order (issued April 12, 2011); and Order of Clarification (issued April 19, 2011).

B. Crossroads

Was the decision to add the approximately 300 MW of capacity from Crossroads prudent?

If the decision to add Crossroads was prudent, what is the appropriate valuation of Crossroads?

If Crossroads is included in rate base, should the accumulated deferred taxes associated with Crossroads be used as an offset to rate base?

If Crossroads is included in rate base, should the transmission expense to get the energy from Crossroads to MPS's territory be included in expenses?

If transmission expense is included, should the Commission reflect any transmission cost savings to the Company resulting in its future participation in SPP as a network service customer related to the Crossroads plant be an offset?

Findings of Fact—Crossroads

219. GMO seeks recovery of costs associated with its capacity planning,namely: (1) the construction of three 105 MW combustion turbines at South Harper and a 200 MW system-participation based purchased power agreement ("PPA"); and (2) adding Crossroads Energy Center ("Crossroads") to the MPS generation fleet. Staff, the Industrials, and Dogwood Energy dispute the prudence of these decisions and their associated costs.

HISTORY AND PRUDENCE

220. The Crossroads issues have their genesis from GMO's (then known as Aquila, Inc.) anticipation in the late 1990's and early 2000's of the deregulation and decoupling of generation from regulated electric utility operations in Missouri and its participation in the

energy market in Missouri and other states through a non-regulated subsidiary, Aquila Merchant Services, Inc.

221. As part of its merchant generation activities, in 2000, Aquila Merchant, with Calpine, built the Aries Plant (now known as Dogwood). The Aries Plant is a natural gas-fired, 585 MW, combined-cycle, intermediate generating facility within Aquila, Inc.'s MPS service area. A five-year PPA with Aquila, Inc. that expired in May 2005 was used as an anchor for building the facility.[280]

222. Aquila Merchant also purchased eighteen 75 MW model 7EA combustion turbines from General Electric and, in 2002, at least three 105 MW model 501D combustion turbines from Siemens-Westinghouse.[281]

223. Aquila Merchant used four of the 75 MW combustion turbines at the facility it built near Clarksdale, Mississippi in 2002—Crossroads.[282] Aquila Merchant sold, at substantial discounts from its cost, three of the 75 MW combustion turbines to unaffiliated entities in 2003. Aquila Merchant released one of the 75 MW combustion turbines back to the manufacturer, and in 2003 installed six of them at the Goose Creek Energy Center and the other four at the Raccoon Creek Energy Center, both in Illinois.[283] Aquila Merchant kept the three 105 MW Siemens-Westinghouse combustion turbines it purchased in 2002 intending to install them at the 585

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[280] Ex. GMO 210, p. 91.

[281] Ex. GMO 215, pp. 39, 48.

[282] Ex. GMO 216, p. 4.

[283] Ex. GMO 215, pp. 47-51.

MW, combined-cycle generating facility for a purchased power agreement with GMO after the 5-year purchased power agreement with GMO expired in May 2005. When it could not sell them, they were stored until 2005 when they were installed as regulated units at South Harper to be used for the MPS service area.[284]

224. Aquila Merchant sold both its Goose Creek Energy Center and its Raccoon Creek Energy Center to Union Electric Company d/b/a AmerenUE (now d/b/a Ameren Missouri) at substantially below book value in 2006.[285]

225. The table that follows shows the installed cost per kilowatt of 17 of the combustion turbines Aquila Merchant bought and took delivery of, and the price per kilowatt it received when it disposed of them:[286]

[284] Ex. GMO 215, pp. 39-40.

[285] Ex. GMO 215, p. 47.

[286] Ex. GMO 215, p. 51; Ex. GMO 262, Staff MPS Accounting Schedules 3-1, 3-2, 6-1 and 6-2.

Installed site	No. of Turbines	Date Installation / Sold	Cost	Capacity	Price per kilowatt
Raccoon Creek **Goose Creek**	4 6	2003 installed 2006 sold to Ameren	$175 million	850,000 kW	**$205.88**
South Harper	3	2001 Purchased 2005 installed	At Dec 31, 2010 Plant $120.4 million Reserve $24.4 Net $95.9	315,000 kW	**$382.16**
Crossroads	4	2002 installed 2008 transferred to MPS regulated	At Dec 31, 2010 Plant $119.2 million Reserve 32.1 Net $87.1 million Transmission upgrades (intangibles) Plant $22.5 million Reserve 4.4 Net $18.1 million Total Plant $141.7 million Reserve 36.5 Net $105.2 million	300,000 kW	**$427.46**

226. Although every other investor-owned electric utility in Missouri built generation, Aquila, Inc. had a corporate policy not to build regulated generating units that it followed until it built South Harper in 2005.[287] Instead, Aquila, Inc. relied exclusively on purchased power to meet its retail customers' increasing demands for electricity.

227. In 2000, Aquila, Inc. entered into the five-year purchased power agreement for power from the Aries Plant. That agreement, which expired in May 2005, provided for 500 MW of capacity in the summer and 320 MW in the winter.[288]

228. Aquila, Inc. knew in 2000 when it began taking power under the five-year purchased power agreement

[287] Ex. GMO 217, pp. 34 and 39.

[288] Ex. GMO 210, p. 91; Ex. GMO 233, p. 4.

that it would have to replace that capacity by June of 2005.[289]

229. In 2001, Aquila, Inc. began exploring what options might be available in 2005 to replace the 500 MW of capacity. It did so by issuing a request for proposals ("RFPs") in the spring of 2001 for delivery of energy beginning in June of 2005. Because of changes in the industry, Aquila, Inc. reissued those RFPs in early 2003.[290]

230. Staff has criticized and challenged GMO's[291] capacity planning in rate cases over the past decade. It did so in File Nos. ER-2001-672 and ER-2004-0034, criticizing Aquila, Inc. for entering into the five-year purchased power agreement for power from a 585 MW natural gas-fired combined cycle generating unit built by Calpine and Aquila, Inc.'s affiliate Aquila Merchant Services, Inc., instead of building generation it owned. Staff also criticized Aquila, Inc. in File No. ER-2005-0436, challenging the prudency of how Aquila, Inc. built South Harper in the face of opposition to the siting of that facility and its decision to only install three 105 MW combustion turbines instead of five. And Staff had criticism again in File Nos. ER-2007-0004 and ER-2009-0090, taking issue with the

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[289] Ex. GMO 3601, pp. 3-5 and 8-11. Other capacity issues which will also create pressure for GMO to find new capacity solutions include the expiration of a 75 MW purchased power agreement with the Nebraska Public Power District ("NPPD") in 2014 (Ex. GMO 11, p. 6; and Tr. 4045) coal plant retirements, and integration of intermittent resources such as wind generation (Ex. GMO 3601, pp. 4 and 10-13).

[290] Ex. GMO 210, Appendix 5, Sch. LMM-1,p. 1.

[291] Even when it was known as Aquila, Inc.

prudency of Aquila, Inc./GMO for installing three 105 MW combustion turbines in 2005 instead of five.

231. At Aquila, Inc.'s June 26, 2003, resource planning update meeting with Staff and the Office of the Public Counsel, it presented the results of its analysis of the proposals it received. With the exception of one proposal, the proposals were for purchased power agreements, with the source of the capacity and energy varying among wind, coal, combustion turbines, and combined-cycle units. Aquila, Inc. also disclosed then that one bid for 600 MW of capacity which Aquila, Inc. considered to be — excellent‖ had been made. By September 10, 2003, however, the bid had been withdrawn and not replaced.[292]

232. On January 27, 2004, only sixteen months before its 500 MW capacity agreement would expire, Aquila, Inc. met with and informed Staff of Aquila, Inc.'s power acquisition process for the following five years. In that meeting GMO presented its preferred/proposed resource plan to build what became South Harper, and enter into three-to-five year purchased power agreements for the balance of its resource needs based on the responses to the spring 2003 request for proposals. Staff responded it was concerned that Aquila, Inc. would become overly dependent on short-term purchased power agreements and needed to evaluate adding baseload generation.[293]

233. At its next resource planning update, on February 9, 2004, Aquila, Inc., based on a twenty-year

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[292] Ex. GMO 210, Appendix 5, Sch. LMM-1 at pp. 1-2.

[293] Ex. GMO 210, Appendix 5, Sch. LMM-1 at p. 2.

planning period, disclosed that its least cost resource plan was to build five 105 MW combustion turbines in 2005 and buy a small amount of capacity from the market in 2005, meet load growth with additional market purchases until 2009, when it would build an additional 105 MW combustion turbine and a second in 2010, as well as pursue adding baseload capacity for 2010. Therefore, in February of 2004, about sixteen months before its five-year 500 MW purchased power agreement expired, Aquila, Inc.'s least cost resource plan included building five 105 MW combustion turbines in 2005.[294]

234. At its following semi-annual update to Staff and the Office of the Public Counsel, held on July 9, 2004, GMO disclosed it had entered into an agreement to purchase 75 MW of power from NPPD, but that its least cost plan still included building five 105 MW combustion turbines in 2005, although its preferred plan still was to build three 105 MW combustion turbines in 2005 and rely on purchased power for the balance of its needs. Therefore, in July of 2004, about eleven months before its five-year 100 MW purchased power agreement expired, Aquila, Inc.'s least cost resource plan included building five 105 MW combustion turbines in 2005. [295]

235 After prudently exploring and planning its capacity needs following the expiration of its five-year 500 MW purchased power agreement in May of 2005, GMO elected not to build five combustion turbines, and instead built three 105 MW combustion turbines at South Harper, a site designed for up to six 105 MW combustion turbines, and entered into PPA that

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[294] Ex. GMO 210, Appendix 5, Sch. LMM-1 at p. 3

[295] Ex. GMO 210, Appendix 5, Sch. LMM-1 at p. 3.

included base load capacity in order to diversify its resource portfolio additions. "GMO concluded that it would be prudent to spread the execution and operating risks from the resource additions between building combustion turbines and adding a PPA that contained some level of base load capacity."[296]

236. Staff argues that its adjustments[297] "reflect the continuation of Staff's position that GMO should have prudently addressed its capacity needs for MPS to replace the Aires PPA when it expired on May 31, 2005."[298] Notably, Staff's conclusion is based on the same analysis as that developed and used by the Company in deciding to pursue the three combustion turbine/system-participation PPA.

237. The difference between Staff's preferred five combustion turbine plan and the Company's three Combustion turbine/system-participation PPA plan is minimal.[299] Even Staff witness Lena Mantle testifies that she did not believe the cost difference between the Company's preferred plan and Staff's five combustion turbine option over 20 years was significant,[300] and that she did not find the Company's decision based on this difference to be imprudent.[301]

238. Ultimately, the Company did not precisely implement its preferred plan. Based on the 2004

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[296] Ex. GMO 11, p. 4.

[297] The Company denotes the two additional 105 MW combustion turbines Staff would impute to GMO instead of Crossroads as "phantom turbines."

[298] Ex. GMO 210, p.103.

[299] Ex. GMO 217, Sch. 119.

[300] Tr. 4090.

[301] Tr. 4091.

analysis, the preferred plan called for three 105 MW combustion turbines and a 200 MW system PPA. The three combustion turbines were completed in the summer of 2005, but the Company was unable to complete the system PPA. Instead, the Company entered into a 9-year 75 MW base load contract with the Nebraska Public Power District ("NPPD") and purchased power from Crossroads short-term for the remaining 200 MW.[302]

239. After a thorough analysis of available options, the Company determined the 300 MW Crossroads Energy Center was the lowest cost option for meeting its requirements.

240. In August 2008, after the Great Plains Energy acquisition of Aquila, the Crossroads unit was transferred to the regulated books of GMO.[303]

241. In 2010, per the Stipulation and Agreement in GMO's last rate case, GMO conducted a 20-year analysis to determine a preferred plan after reviewing and analyzing the responses from a 2007 Request for Proposals for supply resources.[304] The analysis showed that Crossroads would result in the lowest 20-year net present value of revenue requirements ("NPVRR").

DELIVERED NATURAL GAS PRICES

242. Historically the prices of natural gas delivered to Crossroads (Clarksdale, Mississippi) have been higher than the prices of natural gas delivered to South Harper (Peculiar, Missouri).[305] More recently, in

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[302] Ex. GMO 210, Appendix 5, Sch. LMM-1, pp. 1 and 3.

[303] Ex. 216, p. 5.

[304] Ex. GMO 11, p. 8.

[305] Ex. GMO 217, p. 43.

the first ten months of 2010, the average commodity cost for natural gas shipped to Crossroads was less than gas shipped to South Harper. Moreover, the average delivered cost of natural gas to Crossroads was about half the average delivered cost of natural gas to South Harper.[306] The explanation is that while the commodity prices of natural gas are higher at Crossroads than at South Harper, adding the firm transportation costs to the commodity price for natural gas at South Harper results in a higher natural gas price at South Harper than the natural gas price that was paid at Crossroads the past two years—2009 and 2010.[307]

243. One of the benefits of Crossroads over the two turbines at South Harper "is that natural gas shipped to Crossroads typically comes from a different supply region than natural gas shipped to South Harper. This allows the GMO to take advantage of short-term pricing disparities."[308] With Crossroads in the portfolio "the Company can choose to generate electricity from the region with the lower priced natural gas."[309] However, the lower natural gas prices at Crossroads are offset by much higher electric transmission costs, discussed below.[310]

TRANSMISSION COST

244. Staff argues that the cost of transmission to move energy from Crossroads in Mississippi to GMO's service territory justifies, in part, removing

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[306] Ex. GMO 8, p. 2.

[307] Ex. GMO 217, p. 44.

[308] Ex. GMO 8, pp. 4-5.

[309] Ex. GMO 8, p. 5.

[310] Ex. GMO 217, p. 44.

Crossroads from GMO's cost of service. The Company argues that the cost of transmission is offset by the lower gas reservation costs.

245. The cost of transmission to move energy from Crossroads to customers served by MPS is a very significant cost that is far greater than the transmission costs for power plants located in the MPS district.[311] The annual energy transmission cost was estimated as $406,000 per month.[312] This is also substantially higher on an annual basis than the transmission plant costs for the Aries site where the three South Harper Turbines were originally planned to be installed.[313]

246. This higher transmission cost is an ongoing cost that will be paid every year that Crossroads is operating to provide electricity to customers located in and about Kansas City, Missouri. GMO does not incur any transmission costs for its other production facilities that are located in its MPS district that are used to serve its native load customers in that district. This ongoing transmission cost GMO incurs for Crossroads is a cost that it does not incur for South Harper, and is the cause of one of the biggest differences in the on-going operating costs between the two facilities.

247. It is not just and reasonable to require ratepayers to pay for the added transmission costs of electricity generated so far away in a transmission constricted location. Thus, the Commission will

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[311] Ex. GMO 217, p.7; Ex. GMO 11, p. 10.

[312] Tr. 4050.

[313] Ex. GMO 217, p. 7.

exclude the excessive transmission costs from recovery in rates.

SPECIAL PROTECTION SCHEME

248. Crossroads faces local (Mississippi) transmission constraints, because the existing lines cannot carry the full load of the plant under certain circumstances.[314] As a result, it is subject to a special protection scheme mandated by the Southwest Power Pool ("SPP").[315]

249. The special protection scheme requires the ramp down of the output of one of its four combustion turbines if a particular one of the two transmission lines used to move energy from Crossroads to MPS becomes unavailable. This risk of capacity loss is one of the transmission-related risks of Crossroads. GMO's MPS retail customers should bear neither the costs nor risks associated with the transmission limitations in getting electricity from Crossroads to MPS.[316] In determining that transmission costs will be excluded, the Commission has sufficiently addressed these risks and costs.

PLANT MANAGERIAL OVERSIGHT

250. Staff also expressed concern with GMO's ability to provide appropriate management oversight of a plant located in Mississippi.

251. To reduce transmission losses and outages power plants are built close to where the electricity is

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[314] Tr. 4050.

[315] Ex. GMO 3601, p. 8; Tr. 4051, Ex. GMO 3603, p. 14 and pp. 31-33; Tr. 4125.

[316] Ex. GMO 233, pp. 5-6.

needed—close to customers.[317] Crossroads, however, is located over 9 hours and 525 miles from Kansas City, Missouri.[318]

252. No KCPL employees operate Crossroads, rather, GMO has contracted with the City of Clarksdale, Mississippi to operate Crossroads under an agreement with the Clarksdale Public Utilities Commission.[319]

253. A tolling agreement for the capacity and energy of the plant was originally held by MEP Clarksdale Power, LLC, which became Aquila Merchant Services, which assigned the agreement to Aquila, Inc., which is now GMO. The agreement runs through 2032 with a right to extend up to ten more years. GMO also holds a purchase option, but does not intend to exercise it because the advantages of tax exempt financing would be lost.[320] The municipal ownership facilitated tax exempt financing.[321]

254. GMO witness Rollison identifies the agreement as a "Generation, Operations and Maintenance Agreement" between Clarksdale and GMO. The agreement "permits GMO to receive the output of the plant in exchange for payments that cover fixed and variable costs to produce the electrical output, as well as to maintain and operate the facility."[322] The Generation Agreement between the

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[317] Ex. GMO 217, p. 42.

[318] Ex. GMO 217, p. 42.

[319] Ex. GMO 31, p. 2

[320] Ex. GMO 3601, p. 7-8; Ex. GMO 31, p. 2; Ex. GMO 42, p. 55; Tr. 4053 and 4059.

[321] Tr. 4053.

[322] Ex. GMO 31, p. 2-3.

Clarksdale Public Utilities Commission and GMO states that "GMO has the right to review and approve the annual Operating Plan which constitutes a comprehensive and detailed plan for operating the facility for [the] coming two-year period."[323] In addition, GMO has the authority to review and approve the annual operating plan and budget, as well as to audit costs and inspect the facility.[324]

255. GMO is supposed to pay Clarksdale an "Availability Incentive Bonus Fee" for increased availability of generation and has the right to invoke an "Availability Liquidated Damages" clause for reduced availability, although there is no evidence as to whether or how often such clauses have actually been applied.[325] There would be no comparable internal fees if GMO owned and operated the plant itself.[326]

256. The City agrees to protect GMO from various risks by means of an indemnification clause.[327]

257. With the exceptions of the Wolf Creek nuclear plant (of which KCPL is a minority owner) and the Jeffrey Energy Center (of which GMO is a minority owner), KCPL employees operate all other KCPL and GMO plants.[328]

258. GMO also has ownership interest in other generating facilities operated and managed by non-

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[323] Ex. GMO 31, p. 3.

[324] Ex. GMO 31, p. 3; Tr. 4078-79.

[325] Tr. 4076.

[326] Tr. 4076.

[327] Ex. GMO 31, p.4.

[328] Tr. 4054, 4075 and 4079.

GMO employees. It is not uncommon in the industry to have plants run by someone other than the owner. For example, KCP&L runs plants for Westar, Empire, GMO and MJMEUC. Further, other utilities run Wolf Creek and Jeffrey Energy Center, of which KCP&L and GMO, respectively, are minority owners.

259. GMO personnel have visited the site six times over the past two years.[329]

260. The ability of GMO to provide managerial oversight to the plant is only slightly hampered by the long distance location of the plant facilities.

261. The management oversight has not proven to be a problem and therefore is not a reason for denial of recovery.

ULTIMATE FINDING REGARDING PRUDENCE OF CROSSROADS

262. Considering the costs involved, the fact that this was an affiliate transaction rather than an arms-length transaction, the relative reliability of transmission, the excessive costs of that transmission, the reduced costs for natural gas and the alternative supply source, the distance of the power in location to the customers served, and the other facts set out above, the Commission finds that the decision not to build two more 105 MW combustion turbines at South Harper was not imprudent. In addition, the decision to include Crossroads in the generation fleet at an appropriate value was prudent with the exception of the additional transmission expense, when other low-cost options were available. Paying the additional

[329] Ex. GMO 3601, pp. 4-5; Tr. 4052-54; and Tr. 4078-79

transmission costs required to bring energy all the way from Crossroads and including Crossroads at net book value with no disallowances, is not just and reasonable and is discussed in detail below.

VALUATION OF CROSSROADS

263. With regard to the valuation of Crossroads, Staff's primary recommendation is that Crossroads should be disallowed in its entirety.[330] It argues alternatively that if the Commission decides to allow Crossroads in GMO's cost of service, then the value of Crossroads for ratemaking purposes is $51.6 million or another alternative of $61.8 million. GMO believes its valuation of Crossroads at $104 million is appropriate.[331]

264. GMO argues that because it did not dismantle the plant and it was able to obtain transmission from Crossroads to GMO, the value of the plant was $94.75 million, assuming that $20 million in transmission upgrades would be required. GMO was ultimately able to obtain transmission service with only a minimal transmission investment of $145,000, bringing its estimated value of Crossroads to $114.60 million.[332] This value is more than the net book value of $104 million GMO has requested for ratemaking treatment in this case.[333]

265. At December 31, 2010, the plant and transmission facilities values for Crossroads were:[334]

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[330]. Ex. GMO 210, p. 92.

[331] Ex. GMO 12, p. 3.

[332] Ex. GMO 12, p. 3.

[333] Ex. GMO 12, p. 3.

[334] Ex. GMO 262, Schs. 3-1, 3-2, 6-1 and 6-2.

Plant in Service	$119.1 million
Depreciation Reserve	$ 32.1 million
Net Plant	$ 87.0 million
Transmission Rights—Intangible	$ 22.5 million
Reserve	$ 4.4 million
Net Transmission	$ 18.1 million
Total Crossroads Plant	$141.7 million
Reserve	$ 36.5 million
Net Plant	$105.2 million

266. Aquila, Inc. attempted to sell Crossroads, but was unable to sell it.[335] It follows that, absent a write-down which GMO has not taken, the market value of Crossroads is less than its booked value.

267. In February 2007, Great Plains Energy announced that it was seeking to acquire Aquila, Inc. Given several recent divestitures by Aquila, Great Plains acquisition amounted to simply the Missouri regulated electric operations as well as the Crossroads Energy Center. Over the next several months, Great Plains made three separate filings with the Securities Exchange Commission regarding the —fair value" of the Crossroads unit. As Great Plains indicated:

> The preliminary internal analysis indicated a fair value estimate of Aquila's non-regulated Crossroads power generating facility of approximately $51.6 million. This analysis is significantly affected by assumptions regarding the current market for sales of units of similar capacity. The $66.3 million adjustment reflects

[335] See the specifics regarding bids in the "Highly Confidential" Information at Ex. GMO 216, p. 13.

> the difference between the fair value of the combustion turbines at $51.6 million and the $117.9 million book value of the facility at March 31, 2007. Great Plains Energy management believes this to be an appropriate estimate of the fair value of the facility.[336]

The valuations disclosed by Great Plains to the Securities Exchange Commission were made under oath.

268. GMO claims that the fair market value of Crossroads is established by an RFP conducted in March 2007, prior to the SEC disclosures. GMO postulates that, the responses to this RFP, demonstrate that fair market value is comparable to the proposed net book value. GMO fails to explain, however, given the alleged results of the RFP, why it announced to the Securities Exchange Commission, mere months later, that "fair value" was only $51.6 million.

269. GMO's assertion is also inconsistent with real world evidence as to the diminution in value experienced by these deregulated generating assets. The evidence indicates that, following the crash of the deregulated electric market and the bankruptcy of Enron, many deregulated generating assets, including combustion turbines identical to those in service at Crossroads, experienced a significant devaluation.[337] Specifically, the evidence indicates that Aquila sold General Electric combustion turbines, identical to those installed at Crossroads in 2006. At that time,

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[336] Ex. GMO 216, p. 12 (citing to Great Plains Energy & Aquila Joint Proxy Statement / Prospectus, filed with the SEC on May 8, 2007, at page 175).

[337] Ex. GMO 215, p. 58; Ex. GMO 217, p. 6.

Aquila also sold its ownership interest in Raccoon Creek and Goose Creek in Illinois to AmerenUE. Given the deterioration in the deregulated market, Aquila took a write-off, from net book value, of $99.7 million.[338] Aquila sold other General Electric turbines to Nebraska and Colorado utilities.[339] Again, the price received by Aquila was significantly affected by the deterioration in the deregulated energy market.[340]

270. These sales by Aquila, of combustion turbines identical to those installed at Crossroads, are not only a good indicator of the fair market value, but also clearly show that the fair market value of these General Electric combustion turbines was significantly below the net book value.

271. When conducting its due diligence review of Aquila's assets for determining its offer price for Aquila, GPE would have considered the transmission constraints and other problems associated with Crossroads.[341] 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. Further, it is equally likely that GPE was in as good a position to negotiate a price for Crossroads as AmerenUE was when it negotiated the purchases of Raccoon Creek

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[338] Ex. GMO 215, p. 51.

[339] Ex. GMO 215, p. 48.

[340] Ex. GMO 215, p. 48.

[341] Ex. GMO 216, p. 7.

and Goose Creek, both located in Illinois, from Aquila Merchant in 2006.

272. The ten 75 MW General Electric model 7EA combustion turbines installed at Raccoon Creek and Goose Creek that Aquila Merchant sold to AmerenUE in 2006 are ten of the eighteen combustion turbines Aquila Merchant bought at the same time. Four of those eighteen were installed at Crossroads. The turbines sold at an average installed cost of $205.88 per kW.[342] Based on that average installed cost of $205.88 per kW, the 300 MW of combustion turbines at Crossroads would have an installed cost of $61.8 million.

273. Aquila Merchant purchased a total of 21 combustion turbines. It offered three of them at below its cost to several entities, including KCPL, in 2002 before it stored them. These turbines were eventually installed at South Harper and are in MPS's rate base at a discount from what Aquila Merchant paid for them. Aquila merchant also sold thirteen other combustion turbines below its cost to buy them as follows:[343]

- Goose Creek—6 General Electric turbines sold to AmerenUE in 2006.
- Raccoon Creek—4 General Electric turbines sold to AmerenUE in 2006.
- Utility in Beatrice, Nebraska—2 General Electric turbines sold in 2002.
- Utility in Colorado—1 General Electric turbines sold in 2002.

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[342] Ex. GMO 215, pp. 50-51.

[343] Ex. GMO 216, pp. 47 and 49.

274. All the above generating assets are now serving customers at prices consistent with the turbine market after the Enron collapse.[344] Even Aquila wrote-down from what Aquila Merchant paid for them the combustion turbines it installed at South Harper to comply with the Commission's affiliated transaction rule.[345] Yet, in this case GMO is seeking to include the full value of Crossroads on its books, without a write-down, in MPS's rate base.

275. Considering the depressed market as exhibited by the sale of similar turbines to Ameren, and the valuation of these assets reported to the SEC by GPE, the Commission finds that $61.8 million is an accurate reflection of the fair market value of Crossroads as required by the affiliate transaction rule as of July 14, 2008.

DEFERRED INCOME TAXES

276. Since Crossroads became part of the non-regulated operations of Aquila Merchant in 2002, deferred income taxes accumulated.[346] In all instances, KCPL and GMO use deferred income taxes relating to regulated investment assets as an offset (reduction) to rate base, except now for Crossroads.[347] It is GMO's position that since Crossroads was not part of its regulated operations when those deferred taxes were created, they should not be used as an offset to MPS's rate base now. If the Commission authorizes GMO to rate base Crossroads in this case, then it is Staff's position that all the accumulated deferred income

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[344] Ex. GMO 215, pp. 48-51.

[345] Ex. GMO 216, pp. 17-18.

[346] Ex. GMO 210, p. 109.

[347] Ex. GMO 210, p. 109.

taxes associated with Crossroads should be offset against rate base attributable to MPS.

277. The accumulated deferred taxes associated with Crossroads should be applied as an offset to MPS's rate base.[348]

DOGWOOD

278. Dogwood Energy, LLC (Dogwood) is both a retail power customer of GMO and a wholesale power supplier to GMO.[349] As a customer, Dogwood supported Staff's disallowance of Crossroads and imputation of two phantom turbines in order "to protect GMO's retail customers, including Dogwood, against exorbitant rates."[350] With regard to its interest as a wholesale supplier to GMO, Dogwood suggests that the Commission discourage GMO from using the Crossroads facility and instead replace it with a local unit—such as Dogwood's combined cycle facility.[351]

279. Dogwood argues that the cost of natural gas to Dogwood is cheaper than to Crossroads, transmission service to Crossroads is problematic and the Company's resource planning analyses are flawed because the Company failed to contact Dogwood. In addition, Dogwood makes a number of legal challenges to inclusion of Crossroads in rates.

280. Contrary to Dogwood's arguments, the testimony and evidence presented in this case demonstrate that the delivered cost of natural gas is cheaper to Crossroads than to Dogwood, however that

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[348] Ex. GMO 210, p. 110.

[349] Ex. GMO 3601, p. 3.

[350] Ex. GMO 3601, p. 4.

[351] Ex. GMO 3601, p. 4.

cost is offset by the transmission costs. In addition, GMO's firm transmission service is reliable and sufficient and GMO has repeatedly considered Dogwood in its resource planning decisions, including the Company's recent 2010 Stipulation 8 Capacity Study.

281. Dogwood has not been the lowest cost resource option.

Conclusions of Law—Crossroads

24. This issue concerns the appropriate valuation to place on the Crossroads generating unit recently devoted by GMO to serving its ratepayers. The Supreme Court has held that the utility must be permitted to earn a return on the "fair value" of the property devoted to the public convenience.

> The corporation may not be required to use its property for the benefit of the public without receiving just compensation for the services rendered by it. . . . We hold, however, that the basis of all calculations as to the reasonableness of rates to be charged by a corporation . . . must be the *fair value of the property being used by it for the convenience of the public*. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be extracted from it than the services rendered by it are reasonably worth.[352]

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[352] *Smyth v. Ames*, 169 U.S. 466, 546-547 (1898) (emphasis added).

25. The Commission's authority to establish the valuation of an electric corporation's plant has also been memorialized in Section 393.230:

> *The commission shall have the power to ascertain the value of the property of every . . . electrical corporation . . . in this state and every fact which in its judgment may or does have any bearing on such value*. The commission shall have power to make revaluations from time to time and to ascertain all new construction, extensions and additions to the property of every . . . electrical corporation. (emphasis added).

26. Recognizing that Crossroads was transferred from a non-regulated affiliate to the Missouri regulated operations, the Commission's affiliate transaction rule is implicated. The affiliate transaction rule, as it applies to the immediate issue, provides that the purchase of "goods or services" from an affiliate shall be "the *lesser* of: (a) fair market price; or (b) the fully distributed cost."[353]

27. The Commission concludes that if included in rate base at a fair market value, rather than the higher net book value paid to its affiliate, and except for the additional cost of transmission from Mississippi to Missouri, the Company's 2004 decision to pursue the construction of three 105 MW combustion turbines at South Harper and pursue a 200 MW system-participation based purchased power agreement, and the Company's decision to add the Crossroads generating facility to the MPS generation fleet were prudent and reasonable decisions.

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[353] 4 CSR 240-20.015(2)(A) (emphasis added).

28. The Commission rejects Staff's adjustment to disallow the recovery of the entirety of Crossroads in the Company's cost of service and instead recover the cost of the "phantom turbines." The Commission concludes, however, that GMO is requesting the Commission value these turbines based on that overly high valuation (net book value) and that Crossroads includes significantly higher transmission costs it will incur over the life of Crossroads. The Commission concludes that Crossroads should be included in rate base at a value of $61.8 million based on the average installed dollar per kilowatt basis AmerenUE paid for the combustion turbines at Raccoon Creek and Goose Creek.

29. In addition to the valuation, the Commission concludes that but for the location of Crossroads customers would not have to pay the excessive cost of transmission. Therefore, transmission costs from the Crossroads facility, including any related to OSS shall be disallowed from expenses in rates and therefore also not recoverable through GMO's fuel adjustment clause ("FAC").

30. The Commission concludes deferred taxes shall be an offset to rate base.

31. The Commission rejects the Industrials' position to the extent and for the same reasons set out in response to Staff's arguments.

Decision—Crossroads

The Commission rejects Staff's adjustment to disallow the recovery of Crossroads in the Company's cost of service and replace it with the cost of two—phantom turbines.‖ The Commission also rejects GMO's inclusion of Crossroads in rate base at its net book value. The Commission determines that given

Great Plains' statements to the Securities Exchange Commission shortly before the transfer of the Crossroads unit to the Missouri regulated operations, as well as the arms-length sale of other General Electric combustion turbines by Aquila, that the fair market value of Crossroads at the time of transfer (August 2008) was $61.8 million. Given the subsequent 32 months, the fair market value of Crossroads for purposes of establishing rate base in this case should also reflect 32 months of depreciation on that unit.

The Commission further determines that it is not just and reasonable for GMO customers to pay the excessive cost of transmission from Mississippi and it shall be excluded. Finally, deferred income taxes shall also be an offset to rate base.

C. Jeffrey FGD Rebuild Project

Should the Jeffrey Rate Base Additions be included in rate base in this proceeding?

Should the Commission presume that the costs of the Jeffrey Rate Base Additions were prudently incurred until a serious doubt has been raised as to the prudence of the investment by a party to this proceeding?

Has a serious doubt regarding the prudence of the Jeffrey Rate Base Additions been raised by any party in this proceeding?

* * * *

APPENDIX C

STATE OF MISSOURI
PUBLIC SERVICE COMMISSION

File No. ER-2010-0356

At a session of the Public Service Commission
held at its office in Jefferson City
on the 27th day of May, 2011.

In the Matter of the Application of
KCP&L Greater Missouri Operations Company
for Approval to Make Certain Changes in its
Charges for Electric Service

Issue Date: May 27, 2011
Effective Date: June 3, 2011

ORDER OF CLARIFICATION AND
MODIFICATION

On May 4, 2011, the Commission issued its Report and Order. Timely applications for rehearing were filed by KCP&L Greater Missouri Operations Company (GMO), Ag Processing Inc., a cooperative, the Office of the Public Counsel, and Dogwood Energy, LLC. After receiving additional responses and arguments, the Commission held a brief on-the-record question and answer session on May 26, 2011, in order to better understand the requests for rehearing and clarification regarding the Iatan allocation issue.

Section 386.500.1, RSMo Cum. Supp. 2010, states that the Commission shall grant an application for rehearing if "in its judgment sufficient reason therefor be made to appear." With the exception of the portions of the applications for rehearing addressed below, those applications merely restate positions and arguments the Commission has previously rejected in its Report and Order. Except as set out below, in the judgment of the Commission, the parties have not shown sufficient reason to rehear the Report and Order and the Commission denies the applications for rehearing.

With regard to the requests for clarification, the Commission also finds no sufficient reason to clarify the Report and Order except as set out below.

STIPULATION AND AGREEMENT

GMO and Staff filed a Second Non-unanimous Stipulation and Agreement Regarding Pensions and Other Post-Employment Benefits on May 13, 2011. The agreement was intended to revise the previously approved agreement settling these issues in accordance with the allocation of Iatan 2 to the MPS and L&P service areas. No objections to the stipulation and agreement were received. Under 4 CSR 240-2.115 if no party objects to an agreement and no hearing is requested, then it is deemed to be a unanimous agreement. The Commission has reviewed the agreement and finds it just and reasonable. Therefore the agreement is approved.

CORRECTION

On May 13, 2011, Ag Processing and the Sedalia Industrial Energy Users' Association (SIEUA) filed a motion for clarification. The motion requests that the

Commission correct an error in the Report and Order at page 100, which included the wrong number of months of depreciation for the Crossroads facility. GMO requested a similar clarification in its May 13, 2011 pleading. The Commission will correct this error.
Crossroads Accumulated Deferred Income Tax Reserve Amount

GMO further requested clarification of the Report and Order regarding the accumulated deferred income tax reserve amount for the Crossroads facility. GMO argues that because the Commission valued Crossroads at $61.8 million, which is less than the valuation put forth by GMO, the amount of accumulated deferred income tax also needs to be recalculated based on that lower valuation.

Ag Processing and SIEUA oppose this clarification. Ag Processing and SIEUA argue that because Aquila Merchant was not profitable, it would have never been able to take the benefits of a depreciation deduction without its affiliation with a profitable regulated business. Secondly, Ag Processing and SIEUA argue that, as found by the Commission, Great Plains Energy (GPE) would have considered this deferred tax balance in its valuation of Crossroads when conducting its due diligence before the purchase. Third, AG Processing and SIEUA argue that the Commission's valuation of Crossroads is already generous and thus, the Commission should not further "increase" the value by recalculating the deferred income tax reserve amount.

The Commission agrees with Ag Processing and SIEUA's assessment. The Commission set the value of Crossroads considering all relevant factors presented and found that GPE had conducted due diligence in its

purchase of Aquila, Inc. Therefore, the Commission need not clarify this point in the Report and Order.

REBASED FUEL AND PURCHASED POWER AMOUNTS

In its request for clarification, GMO requested that the Commission clarify whether GMO's MIDASTM model or Staff's historical model should be used to calculate the revenue requirement fuel numbers for the "rebased" fuel and purchased power amounts. GMO indicated that the revenue requirement filing made by Staff on May 11, 2011, uses the Staff's historical model for these costs. In addition, GMO argues that Staff's model does not include many of the energy costs which the Commission stated in its Report and Order should be rebased to match the FAC. GMO filed an additional response on May 25, 2011, which included specific revenue requirement numbers to support its clarification request.

Ag Processing and SIEUA oppose this clarification and argue that the fuel and purchased power expense should not be clarified in this manner and questioned GMO's motives for requesting the clarification.

Staff also filed a response to the fuel and purchased power clarification request. In its response Staff agrees that it erred in not including certain fuel-related costs in its model. Staff also agrees that those items should be included in determining revenue requirements for GMO. Staff indicates that to include the additional items in the fuel-related costs would increase those items by a total of $5.5 million for GMO ($5.1 million for MPS and $479,000 for L&P).

To the extent needed the Commission will clarify the Report and Order. The Report and Order is clear that the Commission determined the MIDASTM model should be used for spot market purchased power prices. In addition, the Commission adopted the method presented by GMO for determining natural gas costs. All other variable components should be calculated as presented to the Commission using Staff's traditional historical model. In addition, the Report and Order intends for the items admittedly missing from Staff's calculations but ordered to be included in the FAC calculation to be included in the revenue requirement.

IATAN 2 ALLOCATION BETWEEN MPS AND L&P

The Commission received applications for rehearing from Ag Processing and Public Counsel based on the decision of the Commission to allocate the L&P portion of GMO's rate increase to an amount that was greater than the amount GMO originally asked to be attributed to the L&P division. The specific objection was to the lack of notice to the L&P customers of a 21% increase since the original notices stated that the company was requesting a 13.78% increase. GMO also requested that the Commission reconsider or rehear its decision with regard to the Iatan allocation and adopt instead the allocation presented by the company. And, the City of St. Joseph filed a response urging the Commission to reconsider its decision with regard to the severe effect that a 21% increase in base rates would have on L&P customers.

In addition to the requests for rehearing and reconsideration, the Commission received objections from Ag Processing and SIEUA and Public Counsel to the compliance tariffs filed by GMO alleging that the

compliance tariffs should not become effective for the same reasons as argued in the applications for rehearing. Ag Processing also suggested as a possible solution that the rate increase for L&P customers be phased-in. This phase-in option was argued in-depth during the on-the-record session on May 26, 2011.

Section 393.155.1, RSMo, states that the Commission may phase in a rate increase that is "primarily due to an unusually large increase in the corporation's rate base." Rate base in GMO's previous rate case[1] was $190,475,404. Rate base as a result of this case is $422,039,507. Thus, there is an "unusually large increase" in rate base in this case.

The Commission previously heard evidence on the effect a large rate increase would have on GMO's customers.[2] In fact, the Commission has already taken that effect into consideration in deciding how much of Iatan 2 to allocate between the MPS and L&P service territories.[3] After reviewing the requests for rehearing and the objections to the tariffs, and after hearing additional oral arguments on the allocation issue, the Commission has reconsidered the effect on the customers. The Commission determines that it has made a just and reasonable determination as to the proper allocation of Iatan 2 between the MPS and L&P territories. However, because of the large increase in rate base in this case, and considering the effects of such an unusually large increase on L&P's customers, a just and reasonable alternative is to phase in the

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[1] File No. ER-2009-0090.

[2] *Report and Order*, Finding of Fact 546.

[3] *Report and Order*, Finding of Facts 546-557.

rate increase for the L&P customers pursuant to Section 393.155.1, RSMo 2000.

The Commission observes that although the Report and Order had an effective date of May 14, 2011, it is well settled law that an order lacks finality "while it remains tentative, provisional, or contingent, subject to recall, revision or reconsideration by the issuing agency."[4] The Commission's decisions are not final decisions while applications for rehearing are pending.[5]

Based upon its review of the record, the Commission will, on its own motion, modify its Report and Order with regard to the allocation of Iatan 2 between the L&P and MPS rate classes by adding the following Conclusions of Law at page 204 of the Report and Order:

> 65A. Section 393.155.1, RSMo, states that the Commission may phase-in a rate increase that is "primarily due to an unusually large increase in the corporation's rate base." Because of the magnitude of the rate increase and the effects on the ratepayers in the L&P service area, the Commission determines that, in its discretion, a phase-in of the rate increase is a just and reasonable method of implementing this large

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[4] *City of Park Hills v. Public Service Comm'n of State of Mo*., 26 S.W.3d 401, 404 (Mo. App. 2000).

[5] *State ex rel. AG Processing, Inc. v. Public Service Comm'n*, 276 S.W.3d 303 (Mo. App. 2008). Furthermore, Missouri courts have recognized the Commission's authority to amend or abrogate its prior orders pursuant to Section 386.490, RSMo 2000, even after an order has become final. *State ex rel. Jackson County v. Public Service Commission*, 532 S.W.2d 20, 29 -30 (Mo. banc 1975).

> increase. The Commission further concludes that rates for L&P service area should initially be set at an amount equal to the $22.1 million originally proposed by GMO with the remaining increase being phased-in in equal parts over a two year period.
>
> 65B. In addition, GMO shall be allowed "to recover the revenue which would have been allowed in the absence of a phase-in . . . ."[6]

And, the Report and Order shall be modified by adding the following sentences to the end of the Decision paragraph on page 204:

> Because of the magnitude of the rate increase and the effects on the ratepayers in the L&P service area, the Commission determines in its discretion that a just and reasonable method of implementing this large increase is by phasing it in over a reasonable number of years. The Commission further concludes that rates for L&P service area should initially be set at an amount equal to the $22.1 million originally proposed by GMO with the remaining increase plus carrying costs being phased-in in equal parts over a two year period.

COMPLIANCE TARIFFS AND MOTIONS FOR EXPEDITED TREATMENT

In order to comply with the Commission's Report and Order as issued on May 4, 2011, GMO filed tariffs on May 12, 2011, and revised tariffs sheets on May 16 and 17, 2011. GMO filed motions requesting expedited

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[6] Section 393.155.1.

treatment of the tariffs so that they would become effective in less than 30 days on June 4, 2011.

As previously mentioned, objections to the tariffs were filed by Public Counsel and Ag Processing on the basis of the allocation of Iatan 2 between the MPS and L&P service territories. Public Counsel, Ag Processing, and the Sedalia Industrial Energy Users' Association (SIEUA) also objected to the fuel adjustment clause (FAC) portions of the tariff sheets.

On May 17, 2011, Staff filed a recommendation to approve the tariffs. Staff indicated that in its opinion, the tariff sheets comply with the Report and Order.

Public Counsel, Ag Processing, and SIEUA argue that the FAC portion of the tariffs cannot become effective on June 4, 2011 as requested, but rather, must become effective on the first of the month following the effective date of the Commission order approving the FAC. Public Counsel, Ag Processing, and SIEUA argue that Section 386.266.4(2), RSMo Cum. Supp. 2010, states that an FAC must provide for "an annual true-up which shall accurately and appropriately remedy any over- or under-collections, including interest . . ."[7] Public Counsel further argues that the Commission promulgated 4 CSR 240-3.161(1)(G) in order to implement this requirement. That definition provides:

> True-up year means the twelve (12) month period beginning on the first day of the first calendar month following the effective date of the commission order approving a RAM [rate adjustment mechanism] unless the effective date is on the first day of the calendar month.

[7] Emphasis added.

GMO filed a response to Public Counsel, Ag Processing, and SIEUA on May 25, 2011. In its response, GMO argues "the request that the tariffs become effective on June 4 does not relate to the definition of 'true-up year' in the regulations." The Commission disagrees.

As Public Counsel, Ag Processing, and SIEUA argue, this rule is designed around the fact that utilities keep financial records on a monthly, not a daily, basis. Thus, the FAC could not have an accurate true-up as required by Section 386.220.4 if the true-up begins on a day other than the first day of the month.

The Commission does agree, however, with GMO's next argument that the Commission is not prohibited from determining a different effective date of a tariff if good cause exists to do so.[8] In this case, however, there is no good cause to do so for the FAC portion of the tariffs. Because the current FAC will remain in effect until replaced by these tariff sheets, GMO will not be harmed by the delay. The only way to reconcile the language of the statute requiring an accurate true-up with the language of the regulation under the facts of this case is for the FAC to become effective on the first of the month, because the evidence demonstrated that the utility maintains financial records on a monthly basis and not a daily basis.

The Commission, therefore, denies the motions for expedited treatment with regard to the FAC portion of the tariffs. Because the Commission has made other decisions in this order which will affect the FAC tariffs, the Commission will reject those tariff sheets and require GMO to file revised tariff sheets to

[8] Section 393.140(11), RSMo.

implement the FAC, with a tariff effective date of July 1, 2011.

Because the Commission has clarified and modified its Report and Order, new tariff sheets must be filed to comply with those clarifications and modifications. The tariffs as filed will be rejected. The Commission finds good cause, however, to grant expedited treatment for all but the FAC portions of GMO's compliance tariffs to become effective on less than 30 days notice and GMO need not file an additional motion requesting expedited treatment with its new tariff filing.

THE COMMISSION ORDERS THAT:

1. The Second Non-unanimous Stipulation and Agreement Regarding Pensions and Other Post-Employment Benefits is approved. The signatories of that agreement are ordered to comply with its terms.

2. The Motion for Clarification filed by Ag Processing, Inc. a cooperative, and the Sedalia Industrial Energy Users' Association and similar request made by KCP&L Greater Missouri Operations Company to correct the number of months of depreciation for the Crossroads facility is granted. Page 100 of the Report and Order is corrected to read:

> Given the subsequent 29 months through the ordered true-up date, the fair market value of Crossroads for purposes of establishing rate base in this case should also reflect 29 months of depreciation on that unit.

3. Except as set out in the ordered paragraphs above, the Motion for Clarification and/or Reconsideration and Application for Rehearing of

KCP&L Greater Missouri Operations Company on May 13, 2011, is denied.

4. Dogwood Energy, LLC's Application for Rehearing is denied.

5. Public Counsel's Application for Rehearing is denied.

6. The Application for Rehearing by Ag Processing Inc., a cooperative, is denied.

7. The requests for clarification are determined as set out in the body of this order and the Report and Order is clarified as indicated above. All other requests for clarification are denied.

8. With regard to the allocation of Iatan 2 between the MPS and L&P service areas, the Report and Order is modified as stated in the body of this order.

9. The motions for expedited treatment are granted in part and denied in part as set out above.

10. The fuel adjustment clause (FAC) tariff sheets, Tariff No. YE-2011-0577, are rejected, and KCP&L Greater Missouri Operations Company is authorized to refile those tariff sheets in compliance with this order including an effective date of July 1, 2011.

11. The remaining compliance tariff sheets, Tariff No. YE-2011-0567, are rejected and KCP&L Greater Missouri Operations Company is authorized to refile those tariff sheets in compliance with this order and may file those tariff sheets with an effective date of June 4, 2011, without the need for filing an additional motion for expedited treatment.

12. KCP&L Greater Missouri Operations Company shall file any revisions necessary to comply with the

correction and clarifications set out in this order no later than May 31, 2011, at 1:00 p.m.

13. Any objections to the compliance tariffs containing a June 4, 2011 tariff effective date shall be filed no later than June 2, 2011, at 9:00 a.m.

14. This order shall become effective on June 3, 2011.

BY THE COMMISSION

/s/ Steven C. Reed

Steven C. Reed
Secretary

[SEAL]

Gunn, Chm., Davis, Jarrett, and Kenney, CC., concur;

Clayton, C., dissents, with separate dissenting opinion to follow; and certify compliance with the provisions of Section 536.080, RSMo.

Dippell, Deputy Chief Regulatory Law Judge

APPENDIX D

NOTICE OF ENTRY
(SUPREME COURT RULE 74.03)

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In The 19th Judicial Circuit Court
Cole County, Missouri
301 E High, Jefferson City, MO

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CASE NO. : 11AC-CC00415

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STATE OF MO EX REL KCP&L
v
MO PUBLIC SERVICE

To: KARL ZOBRIST
Suite 1100
4520 Main Street
Kansas City, MO 64111

YOU ARE HEREBY NOTIFIED that the court duly entered the following:

Filing Date	Description
08-Feb-2012	Tried by Court-Civil Scheduled For: 08-Feb-2012 1:30 PM; Daniel Richard Green, Cole Circuit Event Location: 301 E. High, Jefferson City, MO
16-Feb-2012	Judgment Entered IT IS ORDERED ADJUDGED AND DECREED that the Report and Order of the MO PSC in Er-2010-0356 is AFFIRMED. /s/DRG/rd

Associated To: DANIEL RICHARD GREEN

/s/
Clerk of Court

CC: JENNIFER LEIGH HEINTZ
KARL ZOBRIST
LISA ANN LITTELL SMITH GILBREATH
SHELLEY ELIZABETH SYLER-BEUEGGEMANN
STUART W CONRAD

ECC:

Date Printed : 24-Feb-2012

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

STATE OF MISSOURI *ex rel*. KCP&L GREATER MISSOURI OPERATIONS COMPANY,

Relator,

v.

MISSOURI PUBLIC SERVICE COMMISSION,

Respondent.

Case No. 11AC-CC00415
Consolidated With 11AC-CC00432
AND 11AC-CC00474

JUDGMENT

These consolidated petitions for writ of review came before the Court for hearing on February 8, 2012. Having considered the briefs and hearing the arguments of the parties, the Court finds that the Commission's Report and Order in ER-2010-0356 is lawful and reasonable. The Court enters judgment affirming the Commission's Report and Order in ER-2010-0356 in all respects.

All issues raised by KCP&L-Greater Missouri Operations in its writ of review and brief in case number 11AC-CC00415 are preserved for appellate review. All issues raised by AG Processing, Inc., a Cooperative in its writ of review and brief in case number 11AC-CC00432 and consolidated with case number 11AC-CC00415 are preserved for appellate review. All issues raised by the Office of Public

Counsel in its writ of review and brief in case number 11AC-CC00474 and consolidated with case number 11AC-CC00415 are preserved for appellate review. It is ordered, adjudged and decreed that the Report and Order of the Missouri Public Service Commission in ER-2010-0356 is AFFIRMED.

So ordered on this 16 day of February, 2012.

/s/ Daniel Green
DANIEL GREEN, Judge
19th Judicial Circuit

APPENDIX E

SUPREME COURT OF MISSOURI
en banc

SC93545
WD75038 (consolidated with
WD75057 and WD75058)

September Session, 2013

STATE OF MISSOURI *ex rel*. KCP&L GREATER MISSOURI OPERATIONS COMPANY, AG PROCESSING, INC., AND OFFICE OF THE PUBLIC COUNSEL,

Appellants,

vs. (TRANSFER)

MISSOURI PUBLIC SERVICE COMMISSION AND DOGWOOD ENERGY, LLC,

Respondents.

Now at this day, on consideration of the Appellant KCP&L Greater Missouri Operations Company's application to transfer the above-entitled cause from the Missouri Court of Appeals, Western District, it is ordered that the said application be, and the same is hereby denied.

STATE OF MISSOURI-Sct.

I, Bill L. Thompson, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of

said Supreme Court, entered of record at the September Session, 2013, and on the 1st day of October, 2013, in the above-entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of October, 2013.

[Seal]

/s/ Bill L. Thompson Clerk

/s/ [Illegible] Deputy Clerk

APPENDIX F

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

WD75038

June 25, 2013

IMPORTANT NOTICE

To: All Attorneys of Record

Re: STATE OF MISSOURI *ex rel* KCP&L GREATER MISSOURI OPERATIONS COMPANY, APPELLANT; AG PROCESSING INC., APPELLANT; OFFICE OF PUBLIC COUNSEL,

Appellant,

vs.

MISSOURI PUBLIC SERVICE COMMISSION AND DOGWOOD ENERGY, LLC,

Respondent.

Please be advised that Appellant KCP&L's motion for Rehearing is OVERRULED and motion for transfer to Supreme Court is DENIED. See Rule 83.04.

/s/Terence G. Lord
Clerk

cc: STEVEN CARROLL REED
CARL JAMES LUMLEY
JENNIFER LEIGH HEINTZ
LEWIS ROBINSON MILLS
STUART W CONRAD

KARL ZOBRIST
JEREMIAH D FINNEGAN
ROGER WILLIAM STEINER
LISA ANN LITTELL SMITH GILBREATH

APPENDIX G

IN THE SUPREME COURT OF MISSOURI
COURT OF APPEALS, WESTERN DISTRICT
CIRCUIT COURT FOR COLE COUNTY

Supreme Court No. 11AC-CC00415
Court of Appeals No. WD75038

STATE OF MISSOURI *ex rel*. KCP&L GREATER MISSOURI OPERATIONS COMPANY, AG PROCESSING, INC. AND OFFICE OF THE PUBLIC COUNSEL

Appellants,

vs.

MISSOURI PUBLIC SERVICE COMMISSION AND DOGWOOD ENERGY, LLC,

Respondents.

APPLICATION FOR TRANSFER

Is transfer sought prior to opinion _____ or after opinion___x_____

(Check appropriate option)

[Please complete all of the following that are applicable:]

The date the record on appeal was filed	7/11/2012
The date the Court of Appeals opinion was filed	5/14/2013
The date the motion for rehearing was filed	5/29/2013
and ruled on	6/25/2013

The date the application for transfer was filed in the Court of Appeals and ruled on	5/29/2013 6/25/2013

List every party involved in the case, indicate the position of the party in the circuit court (e.g., Plaintiff, Defendant, Intervenor) and in the court of appeals (e.g., Appellant or Respondent), and indicate the name and address of the attorney of record for each party. List first the parties applying for transfer and place a check mark in the space following to indicate each party applying for transfer.

Party		Attorney
KCP&L Greater Missouri Operations Company (Relator in Circuit Court and Appellant in Court of Appeals)	x	Karl Zobrist, MBN 28325 Lisa A. Gilbreath, MBN 62271 Dentons US LLP 4520 Main St. Suite 1100 Kansas City, MO 64111 Roger W. Steiner, MBN 39586 1200 Main St. Suite 1100 Kansas City, MO 64105
Missouri Public Service Commission (Respondent in Circuit Court and Respondent in Court of Appeals)	_	Jennifer L. Heintz P.O. Box 360 Jefferson City, MO 65102

Party	Attorney
Office of the Public Counsel (Relator in Circuit Court and Appellant in Court of Appeals)	_ Lewis R. Mills, Jr. P.O. Box 2230 Jefferson City, MO 65102
Ag Processing, Inc. (Relator in Circuit Court and Appellant in Court of Appeals)	_ Stuart W. Conrad Jeremiah D. Finnegan 3100 Broadway St. Suite 1209 Kansas City, MO 64111
Dogwood Energy, Inc. (Intervenor in Circuit Court and Respondent in Court of Appeals)	_ Carl J. Lumley 130 S. Bemiston Suite 200 St. Louis, MO 63105

APPENDIX H

APPELLANT'S REASONS FOR SEEKING TRANSFER

Transfer of this case is of general interest and importance because:

1. Reviewing courts need guidance as to whether it is acceptable to find that two issues related to one subject were moot and no exception applied, whereas a third issue related to the same subject was an exception to the mootness doctrine, when all of the factual and legal issues relating to the subject were tried in a single proceeding before the Commission and are presently on appeal in a separate case before the Court of Appeals.

2. Reviewing courts need guidance as to whether the mootness doctrine exception regarding evasion of appellate review is a firm "will" standard or a more subjective "susceptibility" standard. The Court of Appeals' decisions on mootness in this case are contrary to *State ex rel. Praxair, Inc. v. PSC*, 328 S.W.3d 329, 334-35 (Mo. App. W.D. 2010); *State ex rel. City of Joplin v. PSC*, 186 S.W.3d 290, 295-96 (Mo. App. W.D. 2005); and *State ex rel. Mo. Pub. Serv. Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. App. W.D. 1981).

3. Reviewing courts need guidance as to whether it is appropriate for a state regulatory commission to completely exclude costs that are reflected in an interstate electric transmission tariff approved by the Federal Energy Regulatory Commission. The Court of Appeals' holding on this issue is contrary to *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986); *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246, 251 (1951); and *State*

ex rel. Associated Natural Gas Co. v. PSC, 954 S.W.2d 520, 530-31 (Mo. App. W.D. 1997).

SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

This case should be transferred because the Court of Appeals' decision to apply the mootness doctrine to two out of three issues related to a subject and decline jurisdiction, but to find an exception to the mootness doctrine for the third issue related to the same subject and assert jurisdiction should be reviewed by the Supreme Court. The Court of Appeals' decisions on issues relating to the Crossroads Energy Center ("Crossroads"), an electric generation plaint located in Clarksdale, Mississippi, were inconsistent and contradictory.

1. Statement of Facts.

The issues in this appeal arose in a general rate case filed at the Missouri Public Service Commission ("Commission" or "PSC") by KCP&L Greater Missouri Operations Company ("GMO" or the "Company") in June 2010, *In re Application of KCP&L Greater Missouri Operations Co. for Approval to Make Certain Changes in its Charges for Elec. Service*, No. ER-2010-0356 ("2010 rate case"). These issues were decided by the Commission in its May 4, 2011 Report and Order ("Report and Order").

Thereafter, GMO filed a subsequent general rate case in February 2012 ("2012 rate case"), which the Commission decided in its January 9, 2013 Report and Order, with tariffs becoming effective January 26, 2013. GMO and other parties filed notices of appeal of this decision, which are pending before the Court of Appeals in No. WD76166.

In both the 2010 and 2012 rate cases, the Commission made three determinations with regard to Crossroads: (1) the valuation of the Crossroads plant, (2) the disallowance of all interstate electric transmission costs related to Crossroads, and (3) the proper calculation of accumulated deferred income tax related to Crossroads. GMO filed a timely Petition for Review of the 2010 rate case Report and Order in the Circuit Court of Cole County, which issued its Order and Judgment in favor of the Respondent Commission on February 16, 2012. GMO appealed the Commission's 2010 rate case Crossroads determinations to the Court of Appeals on March 16, 2012. GMO also appealed the Commission's 2012 rate case Crossroads determinations on valuation and electric transmission cost on February 28, 2013.

Oral argument in the 2010 rate case appeal was held before the Court of Appeals on March 1, 2013. On March 5, 2013, the Court of Appeals requested that the parties to the appeal submit supplemental letter briefs to address whether the issues raised on appeal are rendered moot by the Commission's January 9, 2013 Report and Order issued in GMO's 2012 rate case. The Court of Appeals further requested that the supplemental letter briefs address whether the issues raised on appeal involve legal issues "which are of general interest and importance, recurrent, and will evade future appellate review, and should therefore be decided in this appeal." GMO timely filed its Supplemental Letter Brief on March 15, 2013.

On May 14, 2013, the Court of Appeals issued its opinion in this matter, *State ex rel. KCP&L Greater Missouri Operations Co. v. PSC*, 2013 WL 1964835 (Mo. App. W.D. May 14, 2013). While the Court found that the first and third issues raised on appeal (the

valuation of Crossroads and the calculation of deferred taxes) were moot and failed to fall within the exceptions to the mootness doctrine, in a 2-to-1 decision it found an exception to the mootness doctrine for the second issue (interstate transmission cost) and asserted jurisdiction.

2. The Court of Appeals Inconsistently Applied the Exception to the Mootness Doctrine.

Because all the Crossroads issues were raised by GMO and decided by the Commission in its Report and Order in the 2012 rate case, and are now pending before the Court of Appeals in No. WD76166, the Supreme Court should review the lower Court's mootness decisions in this case.

The Court of Appeals provided no factual or legal analysis to distinguish its determination that the Crossroads valuation and tax issues were moot and no exception applied, from its determination that an exception to the mootness doctrine applied to the interstate transmission cost issue presently on appeal in a separate case. Where all of the factual and legal issues relating to Crossroads were tried in a single proceeding before the Commission, it is unusual that the Court of Appeals found an exception to the mootness doctrine on only one issue. Consideration of these issues by the Supreme Court will review the propriety of the Court of Appeals' decision and provide guidance to other reviewing courts when these issues are faced in the future.

3. The Court of Appeals Applied a Subjective "Susceptibility" Standard in Determining Exceptions to the Mootness Doctrine, Contrary to Appellate Caselaw.

In deciding the transmission cost issue, the Majority Opinion of the Court of Appeals stated that this issue was "susceptible to evading appellate review." *KCP&L Greater Missouri Operations Co*., 2013 WL 1964835 at *4. This conclusion overlooked or misinterpreted the proper legal standard for finding an exception to the mootness doctrine and invoking that Court's jurisdiction.

The general rule is that a reviewing court should not review the Commission's decisions in a rate case when new tariffs as a result of a subsequent rate case are now in effect. Errors made in the earlier case "cannot now be corrected retroactively to give relief for the period of time that the old tariffs here questioned were in effect." *State ex rel. Mo. Pub. Serv. Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. W.D. 1981) ("*Fraas*"). Because of the inability of the reviewing court to give any relief, issues under the old, superseded tariffs "are generally considered moot and therefore not subject to consideration." *Id*.

An exception is made if three reasons are shown: "Where an issue is presented of a recurring nature, is of general public interest and importance, and will evade appellate review unless the court exercises its discretionary jurisdiction." *Id. See PSC v. Missouri Gas Energy*, 388 S.W.3d, 221, 229 (Mo. App. W.D. 2012); *State ex rel. Praxair Inc. v. PSC*, 328 S.W.3d 329, 334 (Mo. App. W.D. 2010).

The Court of Appeals has stated that the "question of whether to exercise this discretionary jurisdiction

comes down to whether there is some principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance." *Fraas*, 627 S.W.3d at 885. If the dispute "is simply a question of fact dependent upon the evidence in the particular case, there is no necessity for a declaration of legal principle such as to call the exception into play." *Id.*

In this appeal, the Majority Opinion erroneously applied these tests to the Crossroads issues. Whereas the Majority found that the Crossroads valuation and deferred tax issues were moot and failed to fall within the exception, it erroneously found that the transmission cost issue should be heard.

First, the Court of Appeals failed to find that the transmission expense issue "will evade appellate review" in future live controversies. *Id*. (emphasis added). Instead, the Court applied a different and improper test when it found that "these issues are susceptible to evading appellate review." *KCP&L Greater Missouri Operations Co*., 2013 WL 1964835 at *4 (emphasis added). Susceptibility is not the proper test. The proper test enunciated by the appellate courts of Missouri is whether the issue "will evade appellate review."

The Court of Appeals also stated that it would decide the Crossroads transmission expense issue because it "involve[s] whether the PSC lawfully exercised its authority." *Id*. Whether the Commission exercised its lawful authority is not a proper standard to evaluate the exception to the mootness doctrine. Because all three Crossroads issues were raised in the 2012 rate case and are now on appeal before this Court in No. WD76166, "there is no necessity for a declaration of legal principle such as to call the exception into play."

Fraas, 627 S.W.2d at 885. As the Dissent stated, "none of the issues presented in this moot appeal justify resolution" because they are "fact- and record-specific, and do not present novel legal questions of relevance beyond the circumstances of this case." *KCP&L Greater Missouri Operations Co.,* 2013 WL 1964835 at *14 (emphasis in original). The Dissent properly noted that the transmission cost issue is "fact-specific" and was analyzed by the Majority under "commonplace legal principles, which we have recited in countless cases." *Id*. at *15. Most importantly, it concluded that the issues heard by the Court "will not evade appellate review" because of the pending appellate case. *Id*. at *14, 16, 17.

The Supreme Court should provide guidance on whether the mootness doctrine exception regarding evasion of appellate review is a firm "will" standard or a more subjective "susceptibility" standard. These issues of mootness have become of major interest and importance to parties appearing before the Public Service Commission and to the Commission itself. Therefore, transfer should be granted.

4. The Court of Appeals Improperly Excluded Costs Reflected in an Interstate Tariff Approved by FERC, Contrary to Appellate and Federal Caselaw.

In affirming the Commission's decision to disallow entirely the Crossroads transmission expense, the Court of Appeals failed to analyze a series of state cases which held that transmission expenses arising from a tariff that is approved by the Federal Energy Regulatory Commission ("FERC") are per se reasonable operating expenses and must be included in state rates, and misinterpreted a number of important facts in its application of the law of federal

preemption and the Filed Rate Doctrine. *See Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co.*, 341 U.S. 246, 251 (1951); *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 127 So.2d 404, 419-20 (Miss. 1961); *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1363 (R.I. 1977).

The Supreme Court should accept transfer of this case to decide whether it is appropriate for a state regulatory commission to completely exclude costs that are reflected in an interstate electric transmission tariff approved by FERC. It is clear under both federal and state law that a state utility commission cannot adjust or discount a FERC tariff. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986).

The Filed Rate Doctrine, which developed as an outgrowth of federal preemption and the U.S. Constitution's Supremacy Clause, "holds that interstate power rates fixed by the FERC must be given binding effect by state utility commissions determining intrastate rates." *Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530 (Mo. App. W.D. 1997). Consequently, "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala*, 476 U.S. at 965. "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." *Id*. at 966.

In finding that the Commission is not barred from determining the prudence of buying power from

Crossroads, the Court of Appeals misinterprets a key holding of the United States Supreme Court in *Nantahala*, and overlooked or misinterpreted a number of important facts related to the Crossroads transmission expense issue when it distinguished *Nantahala*. *KCP&L Greater Missouri Operations Co*., 2013 WL 1964835 at *7-8.

The *Nantahala* Court considered the preemptive effect of a FERC order that reallocated the respective shares of two affiliated companies' entitlement to low-cost power purchased from the Tennessee Valley Authority. Finding that the instant case and *Nantahala* are distinguishable because there is no FERC-required allocation of power between affiliates here, as there was in *Nantahala*, the Court of Appeals held that the Commission's Report and Order in the 2010 rate case "does not conflict with any FERC orders" and thus *Nantahala* is inapposite. *KCP&L Greater Missouri Operations Co*., 2013 WL 1964835 at *8.

Such finding misinterprets *Nantahala*, which reviewed a decision of the North Carolina Supreme Court that state court cases, including *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358 (R.I. 1977), did not "preclude state authority to determine whether these costs should be automatically passed through to retail consumers in the form of higher rates." *Id*. As the Supreme Court of the United States pointedly observed: "This interpretation of the *Narragansett* line of cases is at best an oversimplification, and in any event does not save [the North Carolina Utilities Commission's] action from preemption." *Nantahala*, 476 U.S. at 967. While state commissions may review "costs other than those resulting from purchases of FERC-regulated power," they may not permit the

"trapping" of costs that are set by FERC under the guise of state regulation. Id. at 967 (original emphasis), 970.

In *Narragansett*, 381 A.2d at 1360, the utility had previously entered into a power purchase agreement with an interstate wholesale supplier of electricity. FERC never ordered Narragansett to take power from the wholesaler or any other particular source. However, once it entered into a contract to purchase electricity in interstate commerce, Narragansett was required under federal law to pay the tariff rate approved by FERC.

The Rhode Island Supreme Court held that its state utility commission committed error when it only allowed $5.3 million of the $9.3 million in increased power expenses to be passed through to customers in rates. Following the Supreme Court's ruling in *Montana-Dakota Utilities Co. v. Northwestern Public Serv. Co*., 341 U.S. 246, 251 (1951), the Rhode Island Court observed that a reasonable rate fixed by the federal authorities in an interstate electric transmission contract cannot be second guessed. It quoted the Supreme Court, which declared that "not even a court can authorize commerce in the commodity on other terms." *Narragansett*, 381 A.2d at 1362.

Because FERC "has exclusive jurisdiction over interstate wholesale rates," state commissions are "precluded from disallowing the filed rate as an operating expense" and "must treat" the federally-approved interstate rate "as a reasonable operating expense." *Id*. at 1362-63. *See also Connecticut Light & Power Co. v. Department of Pub. Util. Control*, No. CV 980492697S, 1999 WL 185101 at *6 (Conn. Super. Mar. 9, 1999); *Eastern Edison Co. v. Department of Pub. Utilities*, 446 N.E.2d 684, 687-88 (Mass. 1983);

United Gas Corp. v. Mississippi Pub. Serv. Comm'n, 127 So.2d 404, 420 (Miss. 1961); *State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530 (Mo. App. W.D. 1997).

In addition to failing entirely to analyze these cases, the Court of Appeals misinterpreted a number of important facts related to the Crossroads transmission expense issue when it distinguished this case from *Nantahala*. Although the Court noted that GMO "determined that Crossroads was the lowest cost option for meeting its purchased power requirements," it erroneously concluded that only GMO would "reap the benefit of energy producing cost savings at Crossroads" "so that it could take advantage of revenue opportunities," implying that this was only to its advantage and not to that of consumers. *KCP&L Greater Missouri Operations Co*., 2013 WL 1964835 at *4, 8. The Court then erroneously concluded that "the burden of getting that energy to Missouri" in the form of higher transmission prices was *not* offset by the cheaper natural gas. *Id*. at *8. Moreover, the Court's reference to GMO being "the one that wanted to conduct energy speculation operations in a transmission constricted location hundreds of miles away from the rate districts to be serviced" has absolutely no basis in the record. *Id*.

Nevertheless, the Court of Appeals found that the Commission's actions were not federally preempted because the PSC merely decided "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." *Id.* This statement is both factually incorrect and ignores the evidence that it is the electric transmission expense that makes access to cheaper fuel at Crossroads possible.

Under the facts of this case, the Commission has not simply adjusted the rate of a FERC tariff. It has entirely disallowed the FERC-approved tariff charges under the guise of their being an inappropriate and imprudent expense. Essentially, the Commission arbitrarily removed the transmission expense portion of the costs of obtaining energy from Crossroads. In upholding this determination, the Court of Appeals relies upon conclusions that have absolutely no basis in the record. The Supreme Court should examine this case to determine whether the Commission is permitted to do indirectly what it cannot do directly. The Supreme Court should accept transfer of this case to decide whether it is appropriate for a state regulatory commission to completely exclude costs that are reflected in an interstate electric transmission tariff approved by FERC.

WHEREFORE, Appellant KCP&L Greater Missouri Operations Company respectfully requests that this Application for Transfer be granted.

Respectfully submitted,

/s/ Karl Zobrist

KARL ZOBRIST MBN 28325
LISA A. GILBREATH MBN 62271
DENTONS US LLP
4520 Main Street
Suite 1100
Kansas City, MO 64111

(816) 460-2545 (Telephone)
(816) 531-7545 (Fax)
karl.zobrist@dentons.com
lisa.gilbreath@dentons.com

Roger W. Steiner MBN 39586
Corporate Counsel
Kansas City Power & Light Company
1200 Main Street
Kansas City, MO 64105
(816) 556-2314 (Telephone)
(816) 556-2787 (Fax)
roger.steiner@kcpl.com

Attorneys for Appellant KCP&L Greater Missouri Operations Company

CERTIFICATE OF SERVICE

A true and correct copy of the Application for Transfer was served via email on July 10, 2013 to the following parties:

JENNIFER L. HEINTZ
MISSOURI PUBLIC SERVICE COMMISSION
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
jennifer.heintz@psc.mo.gov

LEWIS R. MILLS, JR.
OFFICE OF THE PUBLIC COUNSEL
P.O. Box 2230
200 Madison Street
Suite 650
Jefferson City, MO 65102
Attorney for Office of the Public Counsel
lewis.mills@ded.mo.gov

STUART W. CONRAD
JEREMIAH D. FINNEGAN
FINNEGAN, CONRAD AND PETERSON, L.C.
3100 Broadway
Suite 1209
Kansas City, MO 64111
Attorney for Ag Processing, Inc.
stucon@fcplaw.com
jfinnegan@fcplaw.com

CARL J. LUMLEY
CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.
130 S. Bemiston
Suite 200
St. Louis, MO 63105
Attorney for Dogwood Energy, LLC
clumley@lawfirmemail.com

/s/ Karl Zobrist
Attorney for Appellant KCP&L Greater Missouri Operations Company

APPENDIX I

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Court of Appeals No. WD75038

STATE OF MISSOURI ex rel. KCP&L GREATER MISSOURI OPERATIONS COMPANY, AG PROCESSING, INC. AND OFFICE OF THE PUBLIC COUNSEL

Appellants,

vs.

MISSOURI PUBLIC SERVICE COMMISSION AND DOGWOOD ENERGY, LLC,

Respondents.

NOTICE OF APPLICATION FOR TRANSFER

NOTICE IS HEREBY GIVEN, pursuant to Supreme Court Rules 83.04 and 83.05, that Appellant KCP&L Greater Missouri Operations Company shall file and present to the Clerk of the Missouri Supreme Court on July 10, 2013 an Application for Transfer of the above-captioned cause.

Respectfully submitted,

/s/ Karl Zobrist

KARL ZOBRIST MBN 28325
LISA A. GILBREATH MBN 62271
DENTONS US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2545 (Telephone)
(816) 531-7545 (Fax)
karl.zobrist@dentons.com
lisa.gilbreath@dentons.com

ROGER W. STEINER MBN 39586
Corporate Counsel
KANSAS CITY POWER & LIGHT COMPANY
1200 Main Street
Kansas City, MO 64105
(816) 556-2314 (Telephone)
(816) 556-2787 (Fax)
roger.steiner@kcpl.com

Attorneys for Appellant KCP&L Greater Missouri Operations Company

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JENNIFER L. HEINTZ
MISSOURI PUBLIC SERVICE COMMISSION
200 Madison Street,
Suite 800
P.O. Box 360
Jefferson City, MO 65102
jennifer.heintz@psc.mo.gov

LEWIS R. MILLS, JR.
OFFICE OF THE PUBLIC COUNSEL
P.O. Box 2230
200 Madison Street
Suite 650
Jefferson City, MO 65102
Attorney for Office of the Public Counsel
lewis.mills@ded.mo.gov

STUART W. CONRAD
JEREMIAH D. FINNEGAN
FINNEGAN, CONRAD AND PETERSON, L.C.
3100 Broadway
Suite 1209
Kansas City, MO 64111
Attorney for Ag Processing, Inc.
stucon@fcplaw.com
jfinnegan@fcplaw.com

CARL J. LUMLEY
CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.
130 S. Bemiston
Suite 200
St. Louis, MO 63105
Attorney for Dogwood Energy, LLC
clumley@lawfirmemail.com

/s/ Karl Zobrist

Attorney for Appellant KCP&L Greater Missouri Operations Company

APPENDIX J

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD75038 Consolidated
with Case Nos. WD75057 and WD75058

STATE OF MISSOURI *ex rel*. KCP&L GREATER MISSOURI OPERATIONS COMPANY,

Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION,

Respondent.

MOTION FOR REHEARING AND APPLICATION FOR TRANSFER OF APPELLANT KCP&L GREATER MISSOURI OPERATIONS CO.

Pursuant to Missouri Rules of Civil Procedure 83.02 and 84.17, Appellant KCP&L Greater Missouri Operations Company ("GMO" or "Company") respectfully requests that the Court rehear this case or, in the alternative, transfer the matter to the Missouri Supreme Court. If rehearing is denied, such transfer would be appropriate as this case is of general interest and importance because: (1) the Court applied the mootness doctrine to certain issues but found an exception to the mootness doctrine for similar issues; (2) in so doing, the Court applied a subjective "susceptibility" standard; and (3) the Court found it appropriate for the Missouri Public Service Commission ("Commission" or "PSC") to exclude

completely costs that are reflected in an interstate electric transmission tariff approved by the Federal Energy Regulatory Commission.

The Court unanimously agreed that the three issues raised by GMO concerning its Crossroads Energy Center electric generation plant ("Crossroads") were moot because of the superseding tariffs implemented by the Commission earlier this year in a subsequent general rate case, now on appeal to the Court. *See* Opinion at 6-7 ("Majority Opinion"); Opinion Concurring in Part and Dissenting in Part at 5-7 ("Dissent"). *See also* Report and Order, *In re KCP&L Greater Mo. Operations Co*., No. ER-2012-0175 (Mo. P.S.C., Jan. 9, 2013), *appeal docketed*, No. WD76166 and WD76167 (Mo. App. W.D., Mar. 4, 2013).

However, in a 2-to-1 decision the Court invoked its discretionary jurisdiction under the exception to the mootness doctrine and decided one of the three moot issues, which related to electric transmission expenses. The Court's application of the exception to the mootness doctrine misinterpreted and misapplied long-standing principles where the facts demonstrated that none of the Crossroads issues would evade appellate review.

The Court also overlooked and misinterpreted material matters of law and fact in its decisions regarding the Crossroads transmission expense issues. The Majority Opinion appeared to agree with the Commission's finding that Crossroads, located in Clarksdale, Mississippi, was properly placed in rate base (Majority Opinion at 14), and that it was overall the lowest-cost option to meet GMO's need for generation capacity to serve its customers (*id*. at 8).

However, the opinion either reversed this finding or overlooked the fact that Crossroads was the lowest-cost option by concluding that the cost to transmit electricity from Crossroads in Mississippi to GMO's customers in Missouri was not justified and was properly disallowed by the PSC because such expense would not have been incurred had the plant been built in Missouri. *See* Majority Opinion at 9-13. This conclusion overlooked or misinterpreted facts showing that it was Crossroads' presence in Mississippi that allowed GMO to take advantage of lower-priced natural gas to fuel the plant, and that Crossroads was overall the cheapest source of power, even with the higher transmission costs.

The Majority Opinion additionally misinterpreted principles of federal preemption by finding that the PSC's total disallowance of costs represented by rates charged under a tariff approved by the Federal Energy Regulatory Commission ("FERC") to transmit electricity in interstate commerce from Mississippi to Missouri was lawful. *Id*. at 13-17.

SUGGESTIONS IN SUPPORT OF THE MOTION FOR REHEARING

I. THIS APPEAL SHOULD BE REHEARD BECAUSE UNDER RULE 84.17 THE COURT'S OPINION OVERLOOKS OR MISINTERPRETS MATERIAL MATTERS OF LAW AND FACT.

A. The Majority Opinion Wrongly Invoked the Exception to the Mootness Doctrine by Deciding the Crossroads Transmission Expense Issues When all Three Crossroads Issues are the Subject of a Pending Appeal of Superseding Tariffs in No. WD76166 and WD76167.

The issues in this appeal arose in a general rate case filed at the Commission by GMO in June 2010. These issues were decided by the PSC in its May 4, 2011 Report and Order, with tariffs becoming effective on June 25 and July 2, 2011. *See* Majority Opinion at 1-4.

Thereafter, GMO filed a subsequent general rate case in February 2012, which the Commission decided in its January 9, 2013 Report and Order, with tariffs becoming effective January 26, 2013. *Id*. at 6. GMO and other parties filed notices of appeal of this decision, which are pending before this Court in WD76166 and WD76167.

The Commission decided issues related to Crossroads in both the 2011 and the 2013 cases. These issues related to (1) the valuation of Crossroads, (2) the disallowance of all electric transmission costs related to Crossroads, and (3) the proper calculation of accumulated deferred income tax ("ADIT") related to Crossroads. The Majority Opinion found that all three issues were moot because of the appeals of the 2013

Report and Order, but proceeded to decide the transmission cost issues, finding an exception to the mootness doctrine.

In deciding the transmission cost issues, the Court stated that they were "susceptible to evading appellate review." *See* Majority Opinion at 7. This conclusion overlooked or misinterpreted the proper legal standard for finding an exception to the mootness doctrine and invoking the Court's jurisdiction.

The general rule is that a reviewing court should not review the Commission's decisions in a rate case when new tariffs as a result of a subsequent rate case are now in effect. Errors made in the earlier case "cannot now be corrected retroactively to give relief for the period of time that the old tariffs here questioned were in effect." *State ex rel. Mo. Pub. Serv. Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. W.D. 1981) ("*Fraas*"). Because of the inability of the reviewing court to give any relief, issues under the old, superseded tariffs "are generally considered moot and therefore not subject to consideration." *Id*.

An exception is made if three reasons are shown: "Where an issue is presented of a recurring nature, is of general public interest and importance, and will evade appellate review unless the court exercises its discretionary jurisdiction." *Id*. *See PSC v. Missouri Gas Energy*, 388 S.W.3d, 221, 229 (Mo. App. W.D. 2012); *State ex rel. Praxair Inc. v. PSC*, 328 S.W.3d 329, 334 (Mo. App. W.D. 2010).

This Court has stated that the "question of whether to exercise this discretionary jurisdiction comes down to whether there is some principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance." *Fraas*, 627

S.W.3d at 885. If the dispute "is simply a question of fact dependent upon the evidence in the particular case, there is no necessity for a declaration of legal principle such as to call the exception into play." *Id*.

In this appeal the Majority Opinion erroneously applied these tests to the Crossroads issues. Whereas the Court found that the Crossroads valuation and ADIT issues were moot and failed to fall within the exception, it erroneously found that the transmission expense issues should be heard.

First, the Court failed to find that the transmission expense issues "will evade appellate review in future live controversies." Instead, the Court applied a different and improper test when it found that "these issues are *susceptible* to evading appellate review." *See* Majority Opinion at 7 (emphasis added). Susceptibility is not the proper test. The proper test enunciated by the appellate courts of Missouri is whether the issue "will evade appellate review."

The Court also stated that it would decide the Crossroads transmission expense issues because they "involve whether the PSC lawfully exercised its authority." *Id*. Whether the Commission exercised its lawful authority is not a proper standard to evaluate the exception to the mootness doctrine. Since all three Crossroads issues were raised in the 2013 rate case and are now on appeal before this Court in WD76166 and WD76167, "there is no necessity for a declaration of legal principle such as to call the exception into play." *Fraas*, 627 S.W.2d at 885. As the Dissent stated, "none of the issues presented in this moot appeal justify resolution" because they are "fact- and record-specific, and do not present novel legal questions of

relevance beyond the circumstances of this case."[1] The Dissent properly noted that the transmission expense issues are "fact-specific" and were analyzed by the Majority under "commonplace legal principles, which we have recited in countless cases." *See* Dissent at 2-3. Most importantly, it concluded that the issues heard by the Court "will not evade appellate review" because of the pending cases. *Id*. at 7.[2]

The Dissent also observed that the amendments to Section 386.520.2, which became effective July 1, 2011, apply to the 2013 Commission decisions in GMO's rate case. Section 386.520.2 now permits rate adjustments that were unavailable under the prior law applicable to the 2011 Report and Order that decided GMO's previous rate case and that is the subject of this appeal. *See* Dissent at 8. Clearly, none of the Crossroads issues will evade appellate review.

Because the Court overlooked or misinterpreted the exception to the mootness doctrine, it should grant rehearing.

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[1] *See* Dissent at 2. Judge Ahuja refers to the Company as "KCP&L," when in fact the utility in this case is KCP&L Greater Missouri Operations Company, formerly known as Aquila, Inc. The abbreviation "KCP&L" is used to refer to Kansas City Power & Light Company, a separate regulated public utility.

[2] Judge Ahuja cites WD76166, which is the appeal by an industrial group of consumers of the Commission's 2013 decision. However, he erroneously cites WD76164, which is an appeal involving Kansas City Power & Light Company. The citation should have been to WD76167, which is GMO's appeal of the Commission's 2013 Report and Order.

B. The Majority Opinion Wrongly Determined Key Facts and Principles of Federal Preemption Related to Crossroads Transmission Expense Issues.

The Court overlooked or misinterpreted a number of important facts related to the Crossroads transmission expense issues. Although the Court noted that GMO "determined that Crossroads was the lowest cost option for meeting its purchased power requirements" and that the PSC did not commit error in allowing Crossroads to be placed into rate base (Majority Opinion at 8, 14), it overlooked the fact that Crossroads was the lowest-cost option because it was located in Mississippi which is closer to cheaper sources of natural gas. The Court found that GMO "could take advantage of short-term pricing disparities and generate electricity from a region with lower priced natural gas." *Id*. at 11. However, it erroneously concluded that only GMO itself would "reap the benefit of energy producing cost savings at Crossroads" "so that it could take advantage of revenue opportunities," implying that this was only to its advantage and not to that of consumers. *Id*. at 14. The Court then erroneously concluded that "the burden of getting that energy to Missouri" in the form of higher transmission prices was not offset by the cheaper natural gas.

The Court focused only on the increased cost of transmission, without conducting any analysis and overlooking key facts regarding the benefit that consumers receive in the form of lower-priced natural gas used to generate electricity at Crossroads.

Moreover, the Court's reference to GMO being "the one that wanted to conduct energy speculation operations in a transmission constricted location

hundreds of miles away from the rate districts to be serviced" has absolutely no basis in the record. *See* Majority Opinion at 15. While GMO's predecessor Aquila did conduct merchant, non-regulated energy operations from Crossroads before it was acquired in 2008 by Great Plains Energy Incorporated, after the acquisition Aquila was renamed GMO and its operations became entirely regulated in nature, as both the Majority and the Commission recognized.[3] Once that occurred, there were absolutely no "energy speculation operations" at Crossroads. The Court's reference to such operations is clearly erroneous and the product of a gross misreading of the record.

In concluding that the Commission's findings of fact were sufficient, the Majority cites only three findings at the bottom of page 10 of its slip opinion which simply note the higher transmission cost. But, they fail to discuss the off-setting lower natural gas costs in Mississippi in the context of the higher gas costs that Crossroads would have incurred had it been built in Missouri.

In the section addressing GMO's claim that the Commission was logically inconsistent by finding Crossroads was the lowest-cost option but disallowing the transmission expense, the Court again overlooked or misinterpreted facts which demonstrated that it was Crossroads' location in Mississippi that allowed it to generate electricity at a lower cost than if it had

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[3] Majority Opin. at 8; Report and Order F/F ¶ 240 at 85 ("In August 2008, after the Great Plains Energy acquisition of Aquila, Crossroads unit was transferred to the regulated books of GMO") (LR 07127), 98 ("Crossroads was transferred from a non-regulated affiliate to Missouri regulated operations) (LR 07140), 100 ("transfer of the Crossroads unit to the Missouri regulated operations") (LR 07142).

been built in Missouri. While the Majority Opinion at page 12 focuses, as did the Commission, only on the facts related to the higher annual transmission expense, it overlooked and misinterpreted all of the facts regarding cheaper natural gas that made Crossroads overall the lowest-cost option. *See* GMO Ex. 11 at 10 & Sched. BLC 2010-10 at 30-31, 36, 42 (Crossroads' annual cost of $5.0 million less than the next cheapest option at $5.3 million); Ex. GMO 8 at 2, 4-5; Ex. GMO 217 at 11. *See also* Report and Order at 85-86, 97, *In re KCP&L Greater Mo. Operations Co*., No. ER-2010-0356 (Mo. P.S.C., May 4, 2011) (LR 07126-27, 07138).

On the federal preemption point, the Court fails to analyze a series of state cases which held that transmission expenses represented by a FERC-approved tariff are per se reasonable operating expenses and must be included in state rates. *See Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1363 (R.I. 1977) ("*Narragansett*"). *See Eastern Edison Co. v. Department of Pub. Utilities*, 446 N.E.2d, 684, 687-88 (Mass. 1983); *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 127 So.2d 404, 419-20 (Miss. 1961).

In the instant case, the Commission did not simply adjust the rate of a FERC tariff. It entirely disallowed the tariff's charges under the guise of their being an inappropriate and imprudent expense. The Court should not permit the Commission to do indirectly what it cannot do directly. *State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530 (Mo. App. W.D. 1997) ("interstate power rates fixed by the FERC must be given binding effect by state utility commissions determining intrastate rates").

APPLICATION FOR TRANSFER

Transfer of this case is of general interest and importance because:

1. Reviewing courts need guidance as to whether it is acceptable to find that two issues related to one subject were moot and no exception applied, whereas a third issue related to the same subject was an exception to the mootness doctrine, when all of the factual and legal issues relating to the subject were tried in a single proceeding before the Commission and are presently on appeal in a separate case before the Court of Appeals.

2. Reviewing courts need guidance as to whether the mootness doctrine exception regarding evasion of appellate review is a firm "will" standard or a more subjective "susceptibility" standard.

The Court's decisions on mootness are contrary to *State ex rel. Praxair, Inc. v. PSC*, 328 S.W.3d 329, 334-35 (Mo. App. W.D. 2010); *State ex rel. City of Joplin v. PSC*, 186 S.W.3d 290, 295-96 (Mo. App. W.D. 2005); and *State ex rel. Mo. Pub. Serv. Co. v. Fraas*, 627 S.W.2d 882, 885 (Mo. App. W.D. 1981).

3. Reviewing courts need guidance as to whether it is appropriate for a state regulatory commission to completely exclude costs that are reflected in an interstate electric transmission tariff approved by the Federal Energy Regulatory Commission. The Court's holding on this issue is contrary to *State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530-31 (Mo. App. W.D. 1997).

SUGGESTIONS IN SUPPORT OF APPLICATION FOR TRANSFER

I. IF THE COURT DENIES REHEARING, THIS CASE SHOULD BE TRANSFERRED TO THE MISSOURI SUPREME COURT BECAUSE THE ISSUES PRESENTED ARE OF MAJOR INTEREST AND IMPORTANCE UNDER RULE 83.02.

This case should be transferred because the Court's decision to apply the mootness doctrine to certain issues related to a subject and decline jurisdiction, but to find an exception to the mootness doctrine for other issues related to the same subject and assert jurisdiction should be reviewed the Supreme Court. Although prior decisions of the appellate courts on mootness issues have resulted in certain issues being heard and others not,[4] the Court's decisions relating to Crossroads issues were inconsistent and contradictory.

While the Court found that issues related to the valuation of Crossroads and the calculation of ADIT were moot and failed to fall within the exceptions to the mootness doctrine, the Court provided no factual or legal analysis to distinguish its determinations from those regarding the transmission expense issues. Since all the Crossroads issues were raised by GMO and decided by the Commission in its 2013 Report and Order, and are now pending before this Court in WD76166 and WD76167, the Supreme Court should review the Court's mootness decisions in this case. Where all of the factual and legal issues relating to

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[4] *Fraas*, 627 S.W.2d 882 (Mo. App. W.D. 1981); *State ex rel. Laclede Gas Co. v. PSC*, 600 S.W.2d 222, 225-26 (Mo. App. W.D. 1980).

Crossroads were tried in a single proceeding before the Commission, it is unusual that Court found that two issues were moot and no exception applied, whereas the transmission expense issues were an exception to the mootness doctrine. Consideration of these issues by the Supreme Court will review the propriety of the Court of Appeals' decision and provide guidance to other reviewing courts when these issues are faced in the future.

Moreover, the Supreme Court should provide guidance on whether the mootness doctrine exception regarding evasion of appellate review is a firm "will" standard or a more subjective "susceptibility" standard. If this Court denies rehearing, it should transfer this matter to the Supreme Court because these issues of mootness have become of major interest and importance to parties appearing before the Public Service Commission and to the Commission itself under Rule 83.02. Therefore, transfer should be granted.

Regarding the matter of federal preemption, if the Court chooses to deny rehearing, it should transfer this case to the Supreme Court to decide whether it is appropriate for a state regulatory commission to completely exclude costs that are reflected in an interstate electric transmission tariff approved by FERC. It is clear under both federal and state law that a state utility commission cannot adjust or discount a FERC tariff. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986).

However, under the facts of this case, the Commission has not simply adjusted the rate of a FERC tariff. It has entirely disallowed the tariff's charges under the guise of their being an inappropriate and imprudent expense. The Supreme

Court should examine this case to determine whether the Commission is permitted to do indirectly what it cannot do directly. If a straight forward adjustment or reduction of a FERC rate is inappropriate, why is it appropriate for a state commission to entirely disallow a FERC rate?

Other state supreme courts have held that while there may be other areas subject to state regulation and expense that can be examined for prudence and reduced or disallowed, because FERC "has exclusive jurisdiction over interstate wholesale rates," state commissions are "precluded from disallowing the filed rate as an operating expense." *Narragansett*, 381 A.2d at 1362; *United Gas Corp. v. Mississippi Pub. Serv. Comm'n*, 127 So.2d 404, 420 (Miss. 1961) (state commission's "duty was to allow" the federal rate increase as "an operating expense," such allowance being the utility's "statutory and constitutional right"). *See State ex rel. Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530 (Mo. App. W.D. 1997) ("The filed rate doctrine holds that interstate power rates fixed by the FERC must be given binding effect by state utility commissions determining intrastate rates").

WHEREFORE, Appellant KCP&L Greater Missouri Operations Company moves the Court to rehear the matter or, in the alternative, to transfer this case to the Missouri Supreme Court.

Respectfully submitted,

/s/ Karl Zobrist

KARL ZOBRIST MBN 28325
LISA A. GILBREATH MBN 62271

DENTONS US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
(816) 460-2545 (Telephone)
(816) 531-7545 (Fax)
karl.zobrist@dentons.com
lisa.gilbreath@dentons.com

ROGER W. STEINER MBN 39586
Corporate Counsel
KANSAS CITY POWER & LIGHT COMPANY
1200 Main Street
Kansas City, MO 64105
(816) 556-2314 (Telephone)
(816) 556-2787 (Fax)
roger.steiner@kcpl.com

Attorneys for Appellant KCP&L Greater Missouri Operations Company

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served utilizing the court's electronic notification system, on May 29, 2013 to the following parties:

JENNIFER L. HEINTZ
MISSOURI PUBLIC SERVICE COMMISSION
200 Madison Street,
Suite 800
P.O. Box 360
Jefferson City, MO 65102
jennifer.heintz@psc.mo.gov

STUART W. CONRAD
JEREMIAH D. FINNEGAN
FINNEGAN, CONRAD AND PETERSON, L.C.
3100 Broadway
Suite 1209
Kansas City, MO 64111
Attorney for Ag Processing, Inc.
stucon@fcplaw.com
jfinnegan@fcplaw.com

LEWIS R. MILLS, JR.
OFFICE OF THE PUBLIC COUNSEL
P.O. Box 2230
200 Madison Street
Suite 650
Jefferson City, MO 65102
Attorney for Office of the Public Counsel
lewis.mills@ded.mo.gov

CARL J. LUMLEY
CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.
130 S. Bemiston
Suite 200
St. Louis, MO 63105
Attorney for Dogwood Energy, LLC
clumley@lawfirmemail.com

/s/ Karl Zobrist

Attorney for Appellant KCP&L Greater Missouri Operations Company

APPENDIX K

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

———

Case No. WD75038 Consolidated with
Case. Nos. WD75057 and WD75058

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

Appellant,

v.

MISSOURI PUBLIC SERVICE COMMISSION,

Respondent.

———

AMENDED BRIEF OF APPELLANT KCP&L GREATER MISSOURI OPERATIONS COMPANY

November 9, 2012

KARL ZOBRIST MBN 28325
LISA A. GILBREATH MBN 62271
WADE CARR MBN 62786
SNR DENTON US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Phone: (816) 460-2400
Fax: (816) 531-7545
karl.zobrist@snrdenton.com
lisa.gilbreath@snrdenton.com
wade.carr@snrdenton.com

ROGER W. STEINER MBN 39586
Corporate Counsel
KANSAS CITY POWER & LIGHT COMPANY
1200 Main Street
Kansas City, MO 64105
Phone: (816) 556-2314
Fax: (816) 556-2787
roger.steiner@kcpl.com
Attorneys for Appellant KCP&L Greater Missouri Operations Company

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JURISDICTIONAL STATEMENT

On May 4, 2011, the Missouri Public Service Commission ("PSC" or "Commission") issued its Report and Order rejecting KCP&L Greater Missouri Operations Company's ("GMO" or "Company")[1] proposed tariff sheets filed on June 4, 2010, and ordering GMO to file tariffs that comport with the Commission's findings in that Report and Order. (LR 7041, Appendix at 1). GMO filed a motion for clarification and/or reconsideration and application for rehearing, which the Commission denied on May 27, 2011. (LR 7919, Appendix at 224). GMO then filed an application for rehearing of that denial, which the

[1] Aquila, Inc. ("Aquila") changed its name to KCP&L Greater Missouri Operations Company after it was acquired in 2008 by Great Plains Energy Incorporated ("GPE"). GPE, a Kansas City-based utility holding company, also owns Kansas City Power & Light Company ("KCP&L").

Commission denied on June 29, 2011. (LR 8011, Appendix at 235).

GMO, AG Processing, Inc. ("AGP"), and the Office of the Public Counsel ("OPC") each filed timely Petitions for Review in the Circuit Court of Cole County, pursuant to Section 386.510.[2] The three cases were then consolidated on July 12, 2011. Judge Daniel R. Green entered his Order and Judgment in favor of the Respondent Commission on February 16, 2012.

GMO filed a timely appeal from that judgment, which is final. This matter falls within the general appellate jurisdiction of this Court, as referenced in Section 386.540 of the Public Service Commission Law, and is not within the exclusive jurisdiction of the Missouri Supreme Court.

* * * *

STATEMENT OF FACTS

This appeal challenges the Commission's Report and Order, *In the Matter of the Application of KCP&L Greater Missouri Operations Co. for Approval to Make Certain Changes in its Charges for Elec. Service*, Case No. ER-2010-0356 (May 4, 2011) ("Report and Order") (LR 07041, Appendix at 1).

GMO is a regulated electric public utility doing business pursuant to Chapters 386 and 393 of the Missouri Revised Statutes under the jurisdiction of the PSC. In proceedings before the Commission, rates are set to give a regulated public utility an opportunity to earn a reasonable return on its investment after recovering its prudently incurred expenses. *State ex*

[2] Unless otherwise indicated, all statutory references are to the Missouri Revised Statutes (2000), as amended.

rel. Utility Consumers Council of Missouri, Inc. v. PSC, 585 S.W.2d 41, 47-49 (Mo. en banc 1979); *State ex rel. Washington Univ. et al. v. PSC*, 272 S.W. 971, 973 (Mo. en banc 1925); *State ex rel. Missouri Public Service Co. v. Fraas*, 627 S.W.2d 882, 886 (Mo. App. W.D. 1981). In setting a regulated public utility's rates, the Commission must determine the utility's annual revenue requirement (the amount of money it should get from its customers each year) and must design rates that will equitably collect that revenue requirement from the utility's customers. *State ex rel. Capital City Water Co. v. PSC*, 850 S.W.2d 903, 916 n.1 (Mo. App. W.D. 1993). To determine a utility's revenue requirement, the Commission focuses on four factors: (1) the "rate of return," or the profit the utility has an opportunity to earn; (2) the "rate base," or the total investment upon which a return may be earned; (3) the accumulated and ongoing depreciation of plant and equipment; and (4) the utility's reasonable and prudent operating expenses. *See* Report and Order C/L[3] ¶ 10 at 17 (LR 07058, Appendix at 18).

The Commission held an evidentiary hearing in January and February 2011 in Jefferson City, and a true-up hearing in early March. Portions of the hearing were conducted simultaneously with the hearing in Case No. ER-2010-0355, the general rate case filed by KCP&L.[4]

The three issues raised by GMO in this appeal all relate to determinations the PSC made with regard to the Crossroads Energy Center ("Crossroads"). Located

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[3] "C/L" denotes the Commission's Conclusions of Law in its Report and Order.

[4] The Commission's decision in that rate case was not appealed.

in Clarksdale, Mississippi, Crossroads is a 300 megawatt ("MW") simple-cycle electric generation peaking plant that consists of four natural gas-fired combustion turbines. *See* Tr. 4052-53; Crawford Rebuttal, Sch. BLC 2010-10 at 13 (Ex. GMO-11).

* * * *

The second issue raised by GMO in this appeal is the Commission's exclusion from recovery in rates the transmission costs associated with delivering power from Crossroads to GMO's customers in Missouri. *See* Report and Order F/F ¶ 247 at 87 (LR 07128, Appendix at 88); Report and Order Decision - Crossroads at 100 (LR 07141, Appendix at 101).

However, in 2007 GMO conducted a thorough analysis of the available options for adding additional resources to its supply portfolio, and concluded that the addition of Crossroads and a baseload purchased power agreement was the lowest cost option to meet GMO's electricity resource requirements. *See* Crawford Rebuttal at 8-10, Sch. BLC 2010-9 (October 2007 presentation to Staff), and Sch. BLC 2010-10 (GMO April 2010 Capacity Study) (Ex. GMO-11).

After screening a range of options submitted in response to GMO's March 2007 request for proposals for energy supply resources, GMO conducted a 20-year net present value analysis to determine a preferred resource plan. *See* Crawford Rebuttal at 8 (Ex. GMO-11). This analysis concluded that the Crossroads Energy Center would result in the lowest 20-year net present value of revenue requirement ("NPVRR") of all scenarios analyzed by GMO. *See* Report and Order F/F ¶ 241 at 85 (LR 07126, Appendix at 86); Crawford Rebuttal at 9 (Ex. GMO-11). The results of this analysis and selection of the preferred plan were

presented to the Staff of the Commission in October 2007. *See* Crawford Rebuttal, Sch. BLC 2010-9 (Ex. GMO-11).

Although GMO pays a transmission rate to move energy from Crossroads in Mississippi to its Missouri service territory, those costs are offset by lower natural gas costs. *See* Crawford Rebuttal at 10 (Ex. GMO-11); Blunk Rebuttal at 2-7 (Ex. GMO-8). The cost of transmission service for Crossroads was included in the 2007 analysis and a subsequent 2010 analysis that demonstrated that Crossroads was the lowest cost solution in meeting GMO's requirements. *See* Crawford Rebuttal at 8-10, Sch. BLC2010-9, and Sch. BLC2010-10 (Ex. GMO-11). Thus, when all costs were considered (including the transmission cost component), Crossroads was the lowest total cost option. *Id.*

* * * *

On June 2, 2011, GMO filed its Application for Rehearing of the May 27 Order of Clarification and Modification pursuant to Section 386.500. *See* June 2 Application for Rehearing (LR 08111, Appendix at 235). GMO requested rehearing on the Crossroads accumulated deferred income tax reserve amount, as the Commission's May 27, 2011 Order of Clarification declined to clarify or reverse its decision with regard to this issue.

On June 29, 2011, the Commission issued an order denying all pending applications for rehearing, reconsideration, or clarification. *See* Order Denying Applications for Rehearing at 2 (LR 08227).

The Commission's Report and Order was affirmed by the Cole County Circuit Court in its Order of February 16, 2012, in consolidated Case No. 11AC-

CC00415. *See* Judgment (LR 08413). GMO appealed to this Court on March 16, 2012, in Case No. WD75038. *See* GMO Notice of Appeal (LR 08415). AGP also appealed to this Court in Case No. WD75057 (LR 08420), and OPC appealed in Case No. WD75058 (LR 08425). On April 4, 2012, this Court consolidated all three appeals under Case No. WD75038.

POINTS RELIED ON

* * * *

ARGUMENT

* * * *

II. The Missouri Public Service Commission Erred in Disallowing Transmission Costs Related to the Crossroads Plant from Recovery in Rates Because This Disallowance Is Unlawful and Unreasonable, and Reviewable by This Court Pursuant to Section 386.510, Because It Is Not Based on Appropriate Findings of Fact and Conclusions of Law as Required Under Sections 386.420.4 and 536.090, Is Unreasonable, and Violates the Filed Rate Doctrine and the Supremacy Clause, Article VI, Clause 2 of the U.S. Constitution, in That:

A. The Commission's Report and Order's Findings of Fact and Conclusions of Law on Transmission Costs Are Conclusory and Provide an Insufficient Basis for the Commission's Disallowance.

B. The Commission's Disallowance of Transmission Costs Is Logically Inconsistent With Its Conclusion That Crossroads Was The Prudent Choice

Because It Was the Overall Lowest Cost Option.

C. The Commission's Disallowance of Transmission Costs Unlawfully "Traps" Such Costs Incurred Under a Federally Approved Rate and Prevents Them From Being Recovered by Appellant GMO.

All decisions of the Commission must be lawful, with statutory authority to support its actions, as well as reasonable. *State ex rel. Ag Processing, Inc. v. PSC*, 120 S.W.3d 732, 734-35 (Mo. en banc 2003). In a contested case, the Commission is required to make findings of fact and conclusions of law. Section 536.090; *Deaconess Manor v. PSC*, 994 S.W.2d 602, 612 (Mo. App. W.D. 1999). These findings of fact and conclusions of law must be sufficient to permit a reviewing court to determine if the Commission's order is based upon competent and substantial evidence. *State ex rel. Noranda Aluminum, Inc. v. PSC*, 24 S.W.3d 243, 246 (Mo. App. W.D. 2000); *State ex rel. Monsanto Co. v. PSC*, 716 S.W.2d 791, 795 (Mo. en banc 1986). "Findings of fact that are completely conclusory, providing no insights into how controlling issues were resolved are inadequate." *Monsanto*, 716 S.W.2d at 795.

The Commission determined that GMO's decision to include Crossroads in its generation fleet was prudent when compared with two alternatives: a hypothetical proposal from Staff that assumed the construction of two "phantom turbines," and an actual proposal from intervenor Dogwood Energy LLC ("Dogwood").

Staff asserted that it would have been cheaper for GMO to have constructed two additional combustion turbines at the South Harper plant in Cass County,

Missouri. *See* Report and Order F/F ¶¶ 236-237 at 84 (LR 07125, Appendix at 85). The Commission, however, rejected "Staff's adjustment to disallow the recovery of Crossroads in the Company's cost of service and replace it with the cost of two phantom turbines." *See* Report and Order Decision - Crossroads at 100 (LR 07141, Appendix at 101).

Similarly, the Commission rejected the proposal from Dogwood, which owns a non-regulated merchant power plant in Pleasant Hill, Missouri. The plant, known as a combined cycle plant, is different from Crossroads which is a more basic, less expensive simple-cycle plant. Both use natural gas to fuel their operations. Comparing the combined-cycle Dogwood plant with the simple-cycle Crossroads plant, the Commission found that Dogwood "has not been the lowest cost resource option." *See* Report and Order F/F ¶¶ 278-281 at 97 (LR 07138, Appendix at 98).

Despite its conclusion that Crossroads was the superior choice, the Commission determined that transmission costs from the Crossroads facility should be disallowed as an expense in rates. *See* Report and Order Decision - Crossroads at 100 (LR 07141, Appendix at 101). In making that determination, the Commission failed to make appropriate findings of fact and conclusions of law, failed to analyze and consider GMO's evidence regarding its least-cost analysis of Crossroads, and unreasonably removed from the lowest-cost Crossroads option one element of its cost.

Furthermore, the Commission's decision to eliminate the transmission cost component from retail rates is unlawful and arbitrary. In excluding from rates the cost of transmission required to bring energy from Crossroads to GMO's service territory, the Commission improperly ordered the elimination of the

tariff rate approved by the Federal Energy Regulation Commission ("FERC"), thus "trapping" such costs in violation of the Filed Rate Doctrine and the Supremacy Clause of the U.S. Constitution, Article VI, Clause 2. (Appendix at 360).

* * * *

C. The Commission's Disallowance of Transmission Costs Unlawfully "Traps" Such Costs Incurred Under a Federally Approved Rate and Prevents Them From Being Recovered by Appellant GMO.

The Commission's disallowance of FERC-approved transmission costs violates the Filed Rate Doctrine and the Supremacy Clause of the U.S. Constitution because it unlawfully "traps" such costs and prevents them from being recovered by the Company. By excluding Crossroads transmission costs from rates, the Commission denied recovery of expenses that are the subject of a FERC-approved tariff, which is a violation of the Filed Rate Doctrine.

The Filed Rate Doctrine developed as an outgrowth of federal preemption and the U.S. Constitution's Supremacy Clause. It "holds that interstate power rates fixed by the FERC must be given binding effect by state utility commissions determining intrastate rates." *See Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530 (Mo. App. W.D. 1997). Consequently, "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986). "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." *Id.* at 966.

The PSC has discussed the impact of the filed rate doctrine where a state commission's rate determinations touch upon federally determined rates:

> The filed rate doctrine precludes the various state public utility commissions from treading on the authority of the Federal Energy Regulatory Commission (FERC) by second-guessing the rates for interstate transport of natural gas that are established by FERC. The filed rate doctrine recognizes that under the supremacy clause of the U.S. Constitution, the states must defer to the regulatory authority of the federal government.
>
> At its most obvious, the filed rate doctrine means that a state commission cannot decide that the FERC-approved interstate transportation rate that the local distribution company (LDC), such as MGE, is paying is too high and refuse to allow the LDC to include those costs in its rates.

See Order Consolidating Cases, *In re Mo. Gas Energy's Purchased Gas Adjustment Tariff Revisions*, Case No. GR-2001-382, 2002 WL 31492304 *2 (Sept. 10, 2002). (Appendix at 363).

Ironically, in this proceeding the Commission has done exactly what it previously declared it lacks authority to do. It has decided that the FERC-approved interstate transmission rate that GMO is paying for power from Crossroads is too high, and has, in effect, ordered the FERC tariff to be reduced to zero by refusing to allow the Company to recover the costs

related to such service in its rates. By determining that "it is *not just and reasonable* for GMO customers to pay the *excessive* cost of transmission from Mississippi," the Commission has explicitly treaded on the authority of FERC, violated the Filed Rate Doctrine, and run afoul of the Supremacy Clause. *See* Report and Order Decision - Crossroads 100 (emphases added), Report and Order F/F ¶ 247 at 87 (LR 07128, Appendix at 88). This is contrary to the record, which demonstrates that the FERC-determined transmission costs from Crossroads are both just and reasonable as a matter of law. *See* Ex. GMO-48 (Entergy Trans. Service Rates) and Ex. GMO-49 (Entergy Services, Inc. Point-To-Point Trans. Service Tariff and Network Integration Trans. Service Tariff dated Dec. 31, 2009) (detailing Crossroads FERC Transmission Rates).

By prohibiting the recovery in retail rates of all Crossroads transmission costs, the Commission has effectively recalculated the federally approved rates to zero and violated the Filed Rate Doctrine, which bars a state regulatory commission from "trapping" FERC-determined costs.

The Supreme Court of the United States in *Nantahala* considered the preemptive effect of a FERC order that reallocated the respective shares of two affiliated companies' entitlement to low-cost power purchased from the Tennessee Valley Authority. FERC found that Nantahala, the regulated utility, was entitled to 22.5% of the low-cost power, while the non-regulated affiliate was entitled to the remainder. 476 U.S. at 958. Subsequently, in a retail rate proceeding, the North Carolina Utilities Commission ordered Nantahala to calculate its costs for retail ratemaking purposes as though it had received 24.5%

of the low-cost power, finding that any share less than 24.5% was unfair. *Id.* at 960-61. In its reallocation of the low-cost power, the North Carolina Commission not only rejected the fairness of the FERC-determined allocation, but it failed to take into account FERC's allocation of that power. *Id.*

The effect of the North Carolina order was to force Nantahala to calculate its retail rates as though FERC had allocated it a greater share of the low-cost power, while denying Nantahala the right to recover the costs that it had incurred in paying rates that FERC had determined to be just and reasonable. "By adopting a different allocation, NCUC imputes to Nantahala a different average cost of power . . . . Consequently, Nantahala is exposed to 'trapped' costs." 476 U.S. at 971. The Supreme Court rejected the arguments that the North Carolina Commission's order did not require Nantahala to violate the FERC order and that the state commission was not expressly contradicting a FERC finding. *Id.* at 961-62, 970. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) (explaining the Court's reasoning in *Nantahala*).

The Supreme Court found instead that the effect of the North Carolina Commission's order was a substitution of its own determination of what would be just and fair. 476 U.S. at 970.

> The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the

> wholesaler-as-seller from recovering the costs of paying the FERC-approved rate.

Id. Therefore, *Nantahala* prohibited the "trapping" of the FERC-determined costs where a state commission denied a utility recovery of FERC-determined costs, in violation of the Filed Rate Doctrine. *Id.* at 970.

Two years after *Nantahala*, the Supreme Court revisited the doctrine in *Mississippi Power & Light*, 487 U.S. at 369-75, where it held that a state court cannot compel a state regulatory commission to set rates based on second-guessing a FERC order that a utility purchase certain amounts of wholesale power. Although the Mississippi Supreme Court directed the Mississippi Public Service Commission to conduct a "prudence review" to determine whether the costs FERC had directed the utility to pay were prudent, the Supreme Court held that such an order was improper:

> In this case as in *Nantahala* we hold that "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price . . . . 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 plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." . . . Thus we conclude that the Supremacy Clause compels the [Mississippi Public Service Commission] to permit [Mississippi Power & Light] to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power.

487 U.S. at 373.

Both cases involved a state's substitution of its judgment of what was a "just and reasonable" wholesale rate, which under the Federal Power Act, 16 U.S.C. Section 792, et seq., is a matter reserved for FERC's judgment. *See* 16 U.S.C. § 824 (2005). Because "States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates," the trapping of federally mandated costs was preempted. *Mississippi Power & Light*, 487 U.S. at 372.

State courts have recognized these concepts in determining the effect of FERC-approved wholesale power rates on retail rates for electricity. In *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1363 (R.I. 1977), the Rhode Island Supreme Court addressed whether a wholesale transmission rate, similar to the rate GMO pays for bringing power from Crossroads to Missouri, must be included without adjustment or reduction in retail rates. Citing principles of preemption under the Supremacy Clause and the Federal Power Act, the Court stated that a state commission was precluded from disallowing the filed rates as an operating expense and that in the case before it, "the [Rhode Island] PUC must treat [New England Power Company's] R-10 interstate rate filed with the [Federal Power Commission] as a reasonable operating expense" of Narragansett Electric Co. *Id.* at 1362-63. *Accord Eastern Edison Co. v. Department of Pub. Utilities*, 446 N.E.2d 684, 687-88 (Mass. 1983); *Connecticut Light & Power Co. v. Department of Pub. Util. Contro*l, No. CV 980492697S, 1999 WL 185101, at *6 (Conn. Super. Mar. 9, 1999) (Appendix at 459).

Missouri courts have explicitly recognized and honored these concepts of federalism and the Filed

Rate Doctrine. In *Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 531 (Mo. App. W.D. 1997), this Court noted that federal preemption principles require that a utility be allowed to recover all costs that have been approved by FERC. The Court, therefore, found unlawful the Commission's determination that Associated Natural Gas could never recover its FERC take-or-pay ("TOP") fuel costs because it had not yet filed the requisite purchased gas adjustment tariffs. It concluded that such a determination had trapped the TOP costs in violation of the Filed Rate Doctrine. *Id.* at 531-32.

The facts of GMO's Crossroads transmission rate are easily aligned with the holdings of *Nantahala*, *Mississippi Power & Light*, and the state cases cited therein. Nantahala involved a recalculation of the FERC-determined allocation of low-cost power from 22.5% to 24.5%. 476 U.S. at 971-72. The *Mississippi Power & Light* case questioned FERC's allocation to a utility of 33% of a power plant's capacity costs. 487 U.S. 365-66. In the *Narragansett* case the Rhode Island Commission reduced the utility's recovery of FERC-approved transmission expenses from $9.3 million to $5.3 million. 381 A.2d at 1361.

In GMO's case the Commission did not simply recalculate or reduce the costs allowed by a FERC transmission tariff. Here the PSC *entirely* disallowed such costs! Despite finding GMO's use of Crossroads to be prudent, the Commission has explicitly called the FERC-approved transmission costs to move wholesale power in interstate commerce from Crossroads to Missouri "not just and reasonable" and "excessive" (Report & Order at 100) (LR 07141, Appendix at 101), and has trapped those expenses by completely disallowing their recovery.

Such a result intrudes on FERC's jurisdiction under the Federal Power Act, runs afoul of the Supremacy Clause, and violates the Filed Rate Doctrine. The Commission's refusal to allow the Company to recover transmission costs from a generation source that it found prudently included in its rate base is unreasonable and unlawful.

* * * *

APPENDIX L

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Case No. ER-2010-0356

In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service

---

MOTION FOR CLARIFICATION AND/OR RECONSIDERATION AND APPLICATION FOR REHEARING OF KCP&L GREATER MISSOURI OPERATIONS COMPANY

KCP&L Greater Missouri Operations Company ("GMO" or "Company") moves for clarification and/or reconsideration of certain portions of the Commission's Report and Order issued on May 4, 2011 ("Report and Order"). The Company further applies, pursuant to MO. REV. STAT. § 386.500.1 (2000) and 4 CSR 240-2.160, for rehearing of the Report and Order. In support of its motion and application, the Company states as follows:

* * * *

(3) The Commission's Disallowance of FERC-approved Transmission Costs Violates the Filed Rate Doctrine and the Supremacy Clause of the U.S. Constitution Because it Unlawfully

"Traps" such Costs and Prevents them from being Recovered by the Company.

53. In making its prudence determination regarding Crossroads, the Commission found "that the decision not to build two more 105 MW combustion turbines at South Harper was not imprudent" and that Dogwood was not the lowest cost option. *See* Report & Order F/F ¶¶ 262, 278-81. In short, after a review of all relevant cost factors, the Commission found that GMO acted prudently when it put Crossroads in its generation fleet. However, the Commission then improperly excluded from GMO's rates the transmission component of the cost of service to utilize Crossroads power, even though Crossroads was overall (including the transmission cost component) the least cost solution to meet GMO's resource needs. By excluding Crossroads transmission costs from rates, the Commission denied recovery of costs that are the subject of a FERC-approved tariff which is a violation of the Filed Rate Doctrine.

54. The Filed Rate Doctrine developed as an outgrowth of federal preemption and the U.S. Constitution's Supremacy Clause. It "holds that interstate power rates fixed by the FERC must be given binding effect by state utility commissions determining intrastate rates." *See Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530 (Mo. App. W.D. 1997). Consequently, "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986). "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." *Id.* at 966.

55. This Commission has discussed the impact of the filed rate doctrine where a state commission's rate determinations touch upon federally-determined rates:

> The filed rate doctrine precludes the various state public utility commissions from treading on the authority of the Federal Energy Regulatory Commission (FERC) by second-guessing the rates for interstate transport of natural gas that are established by FERC. The filed rate doctrine recognizes that under the supremacy clause of the U.S. Constitution, the states must defer to the regulatory authority of the federal government.
>
> At its most obvious, the filed rate doctrine means that a state commission cannot decide that the FERC-approved interstate transportation rate that the local distribution company (LDC), such as MGE, is paying is too high and refuse to allow the LDC to include those costs in its rates.

See Order Consolidating Cases, Finding Jurisdiction to Proceed, and Directing the Parties to File a Proposed Procedural Schedule, *In re Missouri Gas Energy's Purchased Gas Adjustment Tariff Revisions*, Case No. GR-2001-382, 2002 WL 31492304 *2 (Sept. 10, 2002).

56. Ironically, in this proceeding the Commission has done exactly what it previously declared it lacks authority to do. It has decided that the FERC-approved interstate transmission rate that GMO is paying for power from Crossroads is too high, and has,

in effect, ordered the FERC tariff to be reduced to zero by refusing to allow the Company to recover the costs related to such service in its rates. By determining that "it is *not just and reasonable* for GMO customers to pay the *excessive* cost of transmission from Mississippi," the Commission has explicitly treaded on the authority of FERC, violated the Filed Rate Doctrine, and run afoul of the Supremacy Clause. *See* Report and Order Decision - Crossroads 100 (emphasis added), Report and Order F/F ¶ 247 at 87. This is contrary to the record which demonstrates that the FERC-determined transmission costs from Crossroads are both just and reasonable. *See* Entergy Services, Inc., Point-To-Point Transmission Service Tariff and Network Integration Transmission Service Tariff (Dec. 31, 2009) (GMO Ex. 49).

57. By prohibiting the recovery in retail rates of any transmission costs, the Commission has effectively recalculated the federally-approved rates to zero and violated the Filed Rate Doctrine which bars a state regulatory commission from "trapping" FERC-determined costs.

58. The Supreme Court of the United States in *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986), considered the preemptive effect of a FERC order that reallocated the respective shares of two affiliated companies' entitlement to low-cost power purchased from the Tennessee Valley Authority. FERC found that Nantahala, the regulated utility, was entitled to 22.5% of the low-cost power, while the non-regulated affiliate was entitled to the remainder. Subsequently, in a retail rate proceeding, the North Carolina Utilities Commission ("NCUC") ordered Nantahala to calculate its costs for retail ratemaking purposes as though it had received 24.5%

of the low-cost power, finding that any share less than 24.5% was unfair. In its reallocation of the low-cost power, the North Carolina Commission not only rejected the fairness of the FERC-determined allocation, but it failed to take into account FERC's allocation of that power. *Id.* at 960-61.

59. The effect of the NCUC order was to force Nantahala to calculate its retail rates as though FERC had allocated it a greater share of the low-cost power, while denying Nantahala the right to recover the costs that it had incurred in paying rates that FERC had determined to be just and reasonable. "By adopting a different allocation, NCUC imputes to Nantahala a different average cost of power.... Consequently, Nantahala is exposed to 'trapped' costs." 476 U.S. at 971. The Supreme Court rejected the arguments that the North Carolina Commission's order did not require Nantahala to violate the FERC order and that the State commission was not expressly contradicting a FERC finding. *Id.* at 961-62, 970; *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) (explaining in the context of another Filed Rate Doctrine case, discussed below, the Court's reasoning in *Nantahala*).

60. The Supreme Court found instead that the effect of the North Carolina Commission's order was a substitution of its own determination of what would be just and fair. 476 U.S. at 970. "The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the

FERC-approved rate." *Id.* Therefore, *Nantahala* prohibited the "trapping" of the FERC-determined costs where a state commission denied a utility recovery of FERC-determined costs, in violation of the Filed Rate Doctrine. *Id.* at 970.

61. Two years after *Nantahala*, the Supreme Court revisited the doctrine in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 369-375 (1988), where it held that a state court cannot compel a state regulatory commission to set rates based on second-guessing a FERC order that a utility purchase certain amounts of wholesale power. Although the Mississippi Supreme Court directed the Mississippi Public Service Commission to conduct a "prudence review" to determine whether the costs FERC had directed the utility to pay were prudent, the Supreme Court held that such an order was improper. "In this case as in *Nantahala* we hold that 'a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price.... 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 plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.' ... Thus we conclude that the Supremacy Clause compels the [Mississippi Public Service Commission] to permit [Mississippi Power & Light] to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." 487 U.S. at 373.

62. Both cases involved a state's substitution of its judgment of what was a "just and reasonable"

wholesale rate, which under the Federal Power Act, 16 U.S.C. Section 792, et seq., is a matter reserved for FERC's judgment. Because "States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates," the trapping of federally-mandated costs was preempted. *Mississippi Power & Light*, 487 U.S. at 372.

63. State courts have recognized these concepts in determining the effect of FERC-approved wholesale power rates on retail rates for electricity. In *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1363 (R.I. 1977), the Rhode Island Supreme Court addressed whether a wholesale transmission rate, similar to the rate GMO pays for bringing power from the Crossroads unit to Missouri, must be included without adjustment or reduction in retail rates. Citing principles of preemption under the Supremacy Clause and the Federal Power Act, the Court stated that a state commission was precluded from disallowing the filed rates as an operating expense and that in the case before it, "the [Rhode Island] PUC must treat [New England Power Company's] R-10 interstate rate filed with the [Federal Power Commission] as a reasonable operating expense" of Narragansett Electric Co. *Id.* at 1362-63. *Accord, Eastern Edison Co. v. Department of Pub. Utilities*, 446 N.E.2d 684, 687-88 (Mass. 1983); *Public Serv. Co. of Colorado v. Public Utilities. Comm'n*, 644 P.2d 933, 938-940 (Colo. 1982).

64. Missouri courts have explicitly recognized and honored these concepts of federalism and the Filed Rate Doctrine. In *Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 531 (Mo. App. W.D. 1997), the Court of Appeals noted that federal preemption principles require that a utility be allowed to recover all costs which have been approved by FERC. The Court,

therefore, found unlawful the Commission's determination that Associated Natural Gas could never recover its take-or-pay ("TOP") fuel costs because it had not yet filed the requisite PGA tariffs. It concluded that such a determination truly trapped the TOP costs and prevented recovery by the utility, all in violation of the Filed Rate Doctrine. *Id.* at 531-32.

65. The facts of GMO's Crossroads transmission rate are easily aligned with the holdings of *Nantahala*, *Mississippi Power & Light* and the state cases cited therein. *Nantahala* involved a recalculation of the FERC-determined allocation of low-cost power from 22.5% to 24.5%. 476 U.S. at 971-72. The Mississippi case questioned FERC's allocation to a utility of 33% of a power plant's capacity costs. 487 U.S. 365-66. In the Narragansett case the Rhode Island Commission reduced the utility's recovery of FERC-approved transmission expenses from $9.3 million to $5.3 million. 381 A.2d at 564. In GMO's case the Commission has not proposed a review, a recalculation, or a reduction a FERC transmission tariff rate, which would be problematic enough. Here the Commission has taken a far more draconian step.

66. Despite finding GMO's use of Crossroads to be prudent, the Commission has explicitly called the FERC-determined transmission costs to move wholesale power in interstate commerce from Crossroads to GMO "not just and reasonable" and "excessive" (Report & Order at 100), and has trapped those expenses by completely disallowing their recovery. Such a result intrudes on FERC's jurisdiction under the Federal Power Act, runs afoul of the Supremacy Clause, and violates the Filed Rate Doctrine.

67. The Commission's refusal to allow the Company to recover transmission costs from a generation source that is in rate base is unreasonable, arbitrary, and capricious, and runs afoul of federal jurisdiction.

68. As a result, the Report and Order is unjust, unreasonable, arbitrary, capricious, unlawful, not supported by substantial and competent evidence of record, and not supported by adequate findings of fact and conclusions of law.

* * * *

APPENDIX M

IN THE CIRCUIT COURT OF
COLE COUNTY, MISSOURI
19th JUDICIAL CIRCUIT

———

Case No. 11AC-CC00415

———

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

Relator,

v.

MISSOURI PUBLIC SERVICE COMMISSION,

Respondent.

———

BRIEF OF RELATOR KCP&L GREATER MISSOURI OPERATIONS COMPANY

KARL ZOBRIS MBN 28325
LISA A. GILBREATH MBN 62271
SNR DENTON US LLP
4520 Main Street, Suite 1100
Kansas City, Missouri 64111
Phone: 816.460.2400
Fax: 816.531.7545
karl.zobrist@snrdenton.com
lisa.gilbreath@snrdenton.com

ROGER W. STEINER MBN 39586
Corporate Counsel
KANSAS CITY POWER & LIGHT COMPANY
1200 Main Street
Kansas City, MO 64105
Phone: (816) 556-2314
Roger.Steiner@kcpl.com

JAMES M. FISCHER MBN 27543
FISCHER & DORITY, PC
101 Madison, Suite 400
Jefferson City MO 65101
Phone: (573) 636-6758
Fax: (573) 636-0383
jfischerpc@aolcom

Attorneys for Relator KCP&L Greater Missouri Operations Company

September 9, 2011

* * * *

C. The Commission's Disallowance of Transmission Costs Is Unlawful In That

It Violates the Filed Rate Doctrine and the Supremacy Clause of the U.S. Constitution.

The Commission's disallowance of FERC-approved transmission costs violates the Filed Rate Doctrine and the Supremacy Clause of the U.S. Constitution because it unlawfully "traps" such costs and prevents them from being recovered by the Company. By excluding Crossroads transmission costs from rates, the Commission denied recovery of costs that are the

subject of a FERC-approved tariff which is a violation of the Filed Rate Doctrine.

The Filed Rate Doctrine developed as an outgrowth of federal preemption and the U.S. Constitution's Supremacy Clause. It "holds that interstate power rates fixed by the FERC must be given binding effect by state utility commissions determining intrastate rates." *See Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 530 (Mo. App. W.D. 1997). Consequently, "a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 965 (1986). "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." *Id*. at 966.

This Commission has discussed the impact of the filed rate doctrine where a state commission's rate determinations touch upon federally-determined rates:

> The filed rate doctrine precludes the various state public utility commissions from treading on the authority of the Federal Energy Regulatory Commission (FERC) by second-guessing the rates for interstate transport of natural gas that are established by FERC. The filed rate doctrine recognizes that under the supremacy clause of the U.S. Constitution, the states must defer to the regulatory authority of the federal government.

> At its most obvious, the filed rate doctrine means that a state commission cannot decide that the FERC-approved interstate transportation rate that the local distribution company (LDC), such as MGE, is paying is too high and refuse to allow the LDC to include those costs in its rates.

See Order Consolidating Cases, Finding Jurisdiction to Proceed, and Directing the Parties to File a Proposed Procedural Schedule, *In re Missouri Gas Energy's Purchased Gas Adjustment Tariff Revisions*, Case No. GR-2001-382, 2002 WL 31492304 *2 (Sept. 10, 2002).

Ironically, in this proceeding the Commission has done exactly what it previously declared it lacks authority to do. It has decided that the FERC-approved interstate transmission rate that GMO is paying for power from Crossroads is too high, and has, in effect, ordered the FERC tariff to be reduced to zero by refusing to allow the Company to recover the costs related to such service in its rates. By determining that "it is *not just and reasonable* for GMO customers to pay the *excessive* cost of transmission from Mississippi," the Commission has explicitly treaded on the authority of FERC, violated the Filed Rate Doctrine, and run afoul of the Supremacy Clause. *See* Report and Order Decision - Crossroads 100 (emphasis added), Report and Order F/F ¶ 247 at 87 (LR 07129). This is contrary to the record which demonstrates that the FERC-determined transmission costs from Crossroads are both just and reasonable as a matter of law. *See* Entergy Transmission Service Rates (GMO Ex. 48); Entergy Services, Inc., Point-To-Point Transmission Service Tariff and Network Integration Transmission Service Tariff (Dec. 31, 2009) (GMO Ex. 49).

By prohibiting the recovery in retail rates of all Crossroads transmission costs, the Commission has effectively recalculated the federally-approved rates to zero and violated the Filed Rate Doctrine which bars a state regulatory commission from "trapping" FERC-determined costs.

The Supreme Court of the United States in *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953 (1986), considered the preemptive effect of a FERC order that reallocated the respective shares of two affiliated companies' entitlement to low-cost power purchased from the Tennessee Valley Authority. FERC found that Nantahala, the regulated utility, was entitled to 22.5% of the low-cost power, while the non-regulated affiliate was entitled to the remainder. Subsequently, in a retail rate proceeding, the North Carolina Utilities Commission ("NCUC") ordered Nantahala to calculate its costs for retail ratemaking purposes as though it had received 24.5% of the low-cost power, finding that any share less than 24.5% was unfair. In its reallocation of the low-cost power, the North Carolina Commission not only rejected the fairness of the FERC-determined allocation, but it failed to take into account FERC's allocation of that power. *Id*. at 960-61.

The effect of the NCUC order was to force Nantahala to calculate its retail rates as though FERC had allocated it a greater share of the low-cost power, while denying Nantahala the right to recover the costs that it had incurred in paying rates that FERC had determined to be just and reasonable. "By adopting a different allocation, NCUC imputes to Nantahala a different average cost of power.... Consequently, Nantahala is exposed to 'trapped' costs." 476 U.S. at 971. The Supreme Court rejected the arguments that

the North Carolina Commission's order did not require Nantahala to violate the FERC order and that the State commission was not expressly contradicting a FERC finding. *Id*. at 961-62, 970. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) (explaining the Court's reasoning in *Nantahala*).

The Supreme Court found instead that the effect of the North Carolina Commission's order was a substitution of its own determination of what would be just and fair. 476 U.S. at 970. "The filed rate doctrine ensures that sellers of wholesale power governed by FERC can recover the costs incurred by their payment of just and reasonable FERC-set rates. When FERC sets a rate between a seller of power and a wholesaler-as-buyer, a State may not exercise its undoubted jurisdiction over retail sales to prevent the wholesaler-as-seller from recovering the costs of paying the FERC-approved rate." *Id*. Therefore, *Nantahala* prohibited the "trapping" of the FERC-determined costs where a state commission denied a utility recovery of FERC-determined costs, in violation of the Filed Rate Doctrine. *Id*. at 970.

Two years after Nantahala, the Supreme Court revisited the doctrine in Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 369-375 (1988), where it held that a state court cannot compel a state regulatory commission to set rates based on second-guessing a FERC order that a utility purchase certain amounts of wholesale power. Although the Mississippi Supreme Court directed the Mississippi Public Service Commission to conduct a "prudence review" to determine whether the costs FERC had directed the utility to pay were prudent, the Supreme Court held that such an order was improper. "In this

case as in *Nantahala* we hold that 'a state utility commission setting retail prices must allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined wholesale price.... 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 plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.' ... Thus we conclude that the Supremacy Clause compels the [Mississippi Public Service Commission] to permit [Mississippi Power & Light] to recover as a reasonable operating expense costs incurred as the result of paying a FERC-determined wholesale rate for a FERC-mandated allocation of power." 487 U.S. at 373.

Both cases involved a state's substitution of its judgment of what was a "just and reasonable" wholesale rate, which under the Federal Power Act, 16 U.S.C. Section 792, et seq., is a matter reserved for FERC's judgment. Because "States may not bar regulated utilities from passing through to retail consumers FERC-mandated wholesale rates," the trapping of federally-mandated costs was preempted. *Mississippi Power & Light*, 487 U.S. at 372.

State courts have recognized these concepts in determining the effect of FERC-approved wholesale power rates on retail rates for electricity. In *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358, 1363 (R.I. 1977), the Rhode Island Supreme Court addressed whether a wholesale transmission rate, similar to the rate GMO pays for bringing power from the Crossroads unit to Missouri, must be included without adjustment or reduction in retail rates. Citing principles of preemption under the Supremacy Clause

and the Federal Power Act, the Court stated that a state commission was precluded from disallowing the filed rates as an operating expense and that in the case before it, "the [Rhode Island] PUC must treat [New England Power Company's] R-10 interstate rate filed with the [Federal Power Commission] as a reasonable operating expense" of Narragansett Electric Co. *Id*. at 1362-63. *Accord*, *Eastern Edison Co. v. Department of Pub. Utilities*, 446 N.E.2d 684, 687-88 (Mass. 1983); *Public Serv. Co. of Colorado v. Public Utilities. Comm'n*, 644 P.2d 933, 938-940 (Colo. 1982).

Missouri courts have explicitly recognized and honored these concepts of federalism and the Filed Rate Doctrine. In *Associated Natural Gas Co. v. PSC*, 954 S.W.2d 520, 531 (Mo. App. W.D. 1997), the Court of Appeals noted that federal preemption principles require that a utility be allowed to recover all costs which have been approved by FERC. The Court, therefore, found unlawful the Commission's determination that Associated Natural Gas could never recover its take-or-pay ("TOP") fuel costs because it had not yet filed the requisite PGA tariffs. It concluded that such a determination truly trapped the TOP costs and prevented recovery by the utility, all in violation of the Filed Rate Doctrine. *Id*. at 531-32.

The facts of GMO's Crossroads transmission rate are easily aligned with the holdings of *Nantahala*, *Mississippi Power & Light* and the state cases cited therein. *Nantahala* involved a recalculation of the FERC-determined allocation of low-cost power from 22.5% to 24.5%. 476 U.S. at 971-72. The Mississippi case questioned FERC's allocation to a utility of 33% of a power plant's capacity costs. 487 U.S. 365-66. In the *Narragansett* case the Rhode Island Commission

reduced the utility's recovery of FERC-approved transmission expenses from $9.3 million to $5.3 million. 381 A.2d at 1361. In GMO's case the Commission has not proposed a review, a recalculation, or a reduction a FERC transmission tariff rate, which would be problematic enough. Here the Commission has taken a far more draconian step.

Despite finding GMO's use of Crossroads to be prudent, the Commission has explicitly called the FERC-determined transmission costs to move wholesale power in interstate commerce from Crossroads to GMO "not just and reasonable" and "excessive" (Report & Order at 100) (LR 07142), and has trapped those expenses by completely disallowing their recovery. Such a result intrudes on FERC's jurisdiction under the Federal Power Act, runs afoul of the Supremacy Clause, and violates the Filed Rate Doctrine. Thus, the Commission's refusal to allow the Company to recover transmission costs from a generation source that is in rate base is unreasonable and unlawful.

* * * *

APPENDIX N

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

[SEAL]

Issue Date: January 9, 2013
Effective Date: January 9, 2013

IN THE MATTER OF KANSAS CITY POWER & LIGHT COMPANY'S REQUEST FOR AUTHORITY TO IMPLEMENT A GENERAL RATE INCREASE FOR ELECTRIC SERVICE

File No. ER-2012-0174
Tracking No. YE-2012-0404

and

File No. Er-2012-0715
Tracking No. YE-2012-0405

IN THE MATTER OF KCP&L GREATER MISSOURI OPERATIONS COMPANY'S REQUEST FOR AUTHORITY TO IMPLEMENT A GENERAL RATE INCREASE FOR ELECTRIC SERVICE

REPORT AND ORDER

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* * * *

On those grounds, the Commission independently makes its findings of fact, reports its conclusions of law,[4] and orders relief as follows.

* * * *

i. Crossroads

The parties dispute the value for MPS rate base of the Crossroads as to physical plant, depreciation, accumulated tax set-off and transmission costs. The Commission already ruled on these issues in GMO's last general rate action ("previous rulings"), which was in File No. ER-2010-0356.[80] GMO asks to increase the amounts in rate base attributable to Crossroads. Dogwood Energy, LLC, ("Dogwood,") which owns a generating facility), and Staff oppose that claim. MECG, MEUG, and Ag Processing, Inc. a Cooperative ("Ag Processing," a customer) ask to reduce those amounts. No party has shown that the Commission should change its previous rulings. 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 relevant to Crossroads' valuation only as necessary to show how the movants for change have failed to meet their burden of proof.

Generally. The following matters relate generally to both valuation and transmission costs.

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[4] Section 386.420.2, RSMo 2000.

[80] *In the Matter of the Application of KCP&L Greater Missouri Operations Company for Approval to Make Certain Changes in its Charges for Electric Service*, Report and Order, issued May 4, 2011.

FINDINGS OF FACT

1. GMO's MPS service area receives part of its power from Crossroads Energy Center ("Crossroads"), a generating facility in Clarksdale, Mississippi.

2. In the previous rulings, the Commission determined that the fair market value of Crossroads was $61.8 million before depreciation and deferred taxes.

3. In the previous rulings, the Commission denied the costs of transmitting power from Crossroads to MPS territory.

DISCUSSION, CONCLUSIONS OF LAW, AND RULING

The parties may seek review of matters already determined under the previous rulings before the current Commission, which may alter those rulings.

> Every order or decision of the commission . . . shall continue in force either for a period which may be designated therein or until changed or abrogated by the commission [81]

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[81] Section 386.490.2, RSMo 2000. Another standard of proof appears in the statutes for "[a]ll proceedings arising under the provisions of" chapter 386, RSMo: A "party . . . seeking to set aside any . . . order of said commission [must] show by clear and satisfactory evidence that the . . . order of the commission complained of is unreasonable or unlawful as the case may be. Section 386.430, RSMo 2000. Clear and satisfactory evidence is a standard higher than the preponderance of the evidence. *State ex rel. Taylor v. Anderson*, 254 S.W.2d 609, 615 (Mo. Div. 1, 1953). Missouri courts equate it with clear and convincing evidence. *Hackbarth v. Gibstine*, 182 S.W.2d 113, 118 (St.L. Ct. App. 1944). The Commission need not decide whether the higher standard applies because GMO did not meet the lower preponderance of evidence in addressing the previous rulings.

But even if GMO met its burden of proof, administrative and judicial economy would support a reservation of ruling in this report and order. That is because the previous rulings are pending before the Court of Appeals.[82] Departure from the previous rulings before the

Court of Appeals has reviewed them invites confusion and uncertainty to these matters for all involved.

* * * *

Transmission Costs. GMO asks the Commission to depart from the previous rulings and include in MPS rates the costs of transmitting power from Crossroads to MPS territory but it has not carried its burden of proof on that claim.

FINDINGS OF FACT

1. Crossroads is 500 miles from GMO's MPS territory.

2. Between the territory of MPS and Crossroads are the territories of regional transmission organizations ("RTOs"). RTOs collect payment for the transmission of power through their territories. GMO does not belong to all those RTOs so GMO must pay higher fees for transporting power than to an RTO of which GMO is a member.

3. There are generating facilities closer, including Dogwood's facility and the South Harper plant. Even though Crossroads provides power for GMO only during half of the days in the summer, GMO pays about $5.2 million to transmit power from Crossroads

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[82] Case No. WD75038, *KCPL&L v. Missouri Public Service Comm'n*.

all year round. The high cost of transmission is not outweighed by lower fuel costs in Mississippi.

DISCUSSION, CONCLUSIONS OF LAW, AND RULING

GMO has not carried its burden of proof on transmission costs. GMO alleges that the lower price of fuel in Mississippi outweighs the cost of transmission. The Commission has found that the evidence preponderates otherwise.

GMO also argues that the Commission must include transmission costs because FERC has approved a rate for that service. In support, GMO cites opinions providing that the Commission cannot nullify FERC's rate or any other FERC ruling.

But as Dogwood explains, and Staff and MECG agree, those opinions do not bar the Commission from determining the prudence of buying power from Crossroads. For example:

> 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. [90]

In other words, FERC's rate-setting for a facility requires neither the purchase of power, nor approval of that purchase, from that facility.

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[90] *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 972 (1986).

Moreover, in the presence of a FERC-approved rate, the courts have opined that review of cost prudence remains within the Commission's jurisdiction.

> Regarding the states' traditional power to consider the prudence of a retailer's purchasing decision in setting retail rates, we find no reason why utilities must be permitted to recover costs that are imprudently incurred; those should be borne by the stockholders, not the rate payers. Although Nantahala underscores that a state cannot independently pass upon the reasonableness of a wholesale rate on file with FERC, it in no way undermines the long-standing notion that a state commission may legitimately inquire into whether the retailer prudently chose to pay the FERC-approved wholesale rate of one source, as opposed to the lower rate of another source. [91]

And to recognize the marginal value of purchased power from Crossroads does not constitute an endorsement of its inflated cost.

Therefore, the Commission concludes that including the Crossroads transmission costs does not support safe and adequate service at just and reasonable rates, and the Commission will deny those costs.

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[91] *Kentucky W. Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 609 (3d Cir. 1988).

APPENDIX O

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

Case No. WD75038
Consolidated with Case No. WD75057 and WD75058

STATE OF MISSOURI EX REL. KCP&L GREATER MISSOURI OPERATIONS COMPANY; AG PROCESSING INC., A COOPERATIVE, AND OFFICE OF PUBLIC COUNSEL,

Appellants,

vs.

MISSOURI PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI,

Respondent.

RESPONDENT'S BRIEF OF PUBLIC SERVICE COMMISSION OF THE STATE OF MISSOURI IN RESPONSE TO THE BRIEF FILED BY KCP&L GREATER MISSOURI OPERATIONS COMPANY

JENNIFER HEINTZ MoBar #57128
PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI
200 Madison Street, Suite 100
P.O. Box 360
Jefferson City, MO 65102
(573) 751-8701
(573) 522-4016
jennifer.heintz@psc.mo.gov

Attorney for Respondent
Public Service Commission

December 10, 2012

* * * *

II

The Commission's decision to exclude transmission costs associated with transmission of power from the Crossroads facility in Mississippi to customers in Missouri must be affirmed in that this decision is lawful and reasonable within the meaning of Section 386.510 because the Commission is authorized to determine the ratemaking treatment of operating expenses and the Commission did not intrude on any area of ratemaking that is properly within the sphere of the Federal Energy Regulatory Commission.

A. The Commission's findings of fact and conclusions of law are adequate.

The Commission's factual findings are presumed to be correct, and if there is substantial evidence in support of two conflicting factual conclusions, the reviewing court is bound by the Commission's findings. *State ex rel. Ag Processing, Inc. v. Pub. Serv. Comm'n*, 120 S.W.3d 732, 735 (Mo.banc 2003). Substantial evidence is evidence that is probative of the issue. *Friendship Vill.*, 907 S.W.2d at 345. Substantial evidence "necessarily implies competent, not incompetent, evidence. *Id.*

The adequacy of the Commission's factual findings is an issue of law subject to the independent judgment of the reviewing court. *Aquila, Inc.*, 326 S.W.3d at 28:

> The findings of fact must be sufficiently definite and certain or specific under the circumstances of the particular case to enable the court to review the decision intelligently and ascertain if the facts afford a reasonable basis for the order without resorting to the evidence. Findings are inadequate

> if they cause us to speculate as to which part of the evidence the commission believed.

Id. at 28-29 (other citations and internal quotation marks omitted).

B. The Commission has the statutory authority to determine which assets are properly included in a utility's rate base.

A utility's rate base consists of the assets on which the utility is entitled to earn a return. *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 765 S.W.2d 618, 622 (Mo. Ct. App. W.D. 1989), transfer denied March 14, 1989. To be included in rate base, assets must be in use and must be serving the ratepayers. *Id*.; Section 393.135, RSMo (2000). The Commission has the authority to set the value of any property that is included in rate base. Section 393.230, RSMo (2000). The Commission has a duty to set rates that are just and reasonable. Section 393.130, RSMo (2000).

The Commission determined that it would be unjust and unreasonable for ratepayers to have to pay for the additional cost of transmission of power from the Crossroads plant in Mississippi to Missouri. The additional transmission cost would not exist but for the utility's decision to add Crossroads as a source of electricity for Missouri customers rather than building more generation capacity in Missouri. The monthly amount of transmission cost is significant. The Commission concluded that the transmission costs, particularly in light of the fact that Crossroads is in a transmission-constricted location, were excessive in comparison to the transmission costs associated with other generating options. The report and order sets out in sufficient detail the facts supporting the Commission's decision. The report and order provides

a reasonable basis for the reviewing court to determine the lawfulness and reasonableness of this decision. The report and order is lawful and reasonable and should be affirmed on this point.

C. The Commission did not intrude on any area of law that is reserved to the Federal Energy Regulatory Commission.

The authority of the Federal Energy Regulatory Commission (FERC) extends only to the interstate aspects of utility service. *State ex rel. Associated Natural Gas v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 530 (Mo. Ct. App. W.D. 1997). The "filed rate" doctrine holds that interstate power rates that have been approved by the FERC are binding on state utility commissions. *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 962 (1986). In *Thornburg*, the FERC allocated the percentage of low cost power that should go to each of two affiliates under a supply contract between the owner of the affiliates and the Tennessee Valley Authority. *Id*. at 955. One of the two affiliates was regulated by the North Carolina utility commission and one affiliate was unregulated. *Id*. at 953. The Supreme Court of the United States held that the state utility commission could not order its regulated utility to calculate its rates based on a different allocation percentage than the allocation percentage that had been ordered by the FERC. *Id*. at 953.

In this case, KCP&L-GMO is regulated entirely by the Missouri Commission.[3] FERC does not have any

[3] KCP&L-GMO is a single utility with two separate rate districts. The Commission had to allocate costs between these two rate districts, a task which is completely with the Commission's

jurisdiction over KCP&L-GMO's retail rates in Missouri. There is no FERC-mandated allocation of power between affiliates in this case. KCP&L-GMO is not required by FERC to get any specific allocation of power from Crossroads. No unlawful "trapping" of costs occurred. *Thornburg* is not on point.

Mississippi Power and Light Co. v. Moore, 487 U.S. 354 (1988) is also not on point. In that case, the Mississippi Public Service Commission permitted a state electric utility to increase its retail rates based on a FERC order that required the utility to purchase an allocation of nuclear power. *Id*. at 357. The Mississippi Supreme Court reversed the decision of the Mississippi Public Service Commission and ordered the utility commission to undertake a prudence review of whether the construction of the nuclear plant was prudent. *Id*. The Supreme Court of the United States held that the state utility commission was preempted from making such a prudence inquiry because the FERC had ordered the utility to purchase a specific portion of the power produced by the nuclear plant based on the FERC's allocation order. *Id.*

The facts of this case are distinguishable. FERC has not ordered KCP&L-GMO to purchase power from Crossroads to meet its supply needs in Missouri. The FERC has also not made any other relevant power allocation between companies. Rather, the issue was whether it was prudent for KCP&L-GMO to use Crossroads to supply some of its generation needs despite the fact that Crossroads is located hundreds of miles away and power generated there must be

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authority. *State ex rel. City of West Plains v. Pub. Serv. Comm'n*, 310 S.W.2d 925 (Mo. banc 1958).

brought into Missouri from a transmission-restricted location. This issue is not preempted by federal law because KCP&L-GMO is regulated by the Commission and the Commission must determine what KCP&L-GMO's just and reasonable rates are, taking into account issues of fairness to ratepayers while still allowing KCP&L-GMO the opportunity to earn a reasonable return on its investments devoted to public use. The Commission determined that, given the generation options available, it was prudent for the utility to rely on Crossroads to meet some generation needs but that ratepayers should not have to pay for transmission costs from Crossroads when those costs do not exist for the utility's other generation options. The Commission's decision is a reasonable balancing of the interests of the utility and the ratepayers.

The Commission in this case had to determine whether or not to include Crossroads in KCP&L-GMO's rate base and whether the utility would be allowed to earn a return on that asset. The Commission allowed KCP&L-GMO to include Crossroads in its rate base. The Commission could have determined that Crossroads would be entirely excluded from the utility's rate base. The treatment of Crossroads as a rate base item was completely within the Commission's ratemaking discretion.

In *Narragansett Elec. Co. v. Burke*, 381 A.2d 1358 (1977), the Rhode Island Public Utility Commission held hearings on the reasonableness of a request to increase a FERC-approved contract rate. *Id*. at 1361. The Rhode Island commission was without authority to set the rate at which the interstate wholesaler sold electric power to the regulated utility. *Id*. The court found that the state commission could recover from its customers only a portion of the increased costs

associated with a FEC-approved rate increase by the wholesaler. *Id*. The court found, however, with respect to operating expenses:

> 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. Section 39-3-30. If unpersuaded, the PUC may disallow all or part of the requested rate change.

Id. See also, *Union Elec*., 765 S.W.2d at 623 (stating that the Commission has the discretion to determine which items are included or excluded from a utility's budget and how excluded items should be handled).

In *Pub. Serv. Co. of Colorado v. Pub. Util. Comm'n*, 644 P.2d 933 (Colo. 1982), the court held that the state commission had to consider the wholesale price of natural gas to be a reasonable operating expense, but the state commission was not required to allow the utilities to automatically pass the cost of the increase on to customers through the purchased gas adjustment. *Id.* at 940-41.

The *Associated Natural Gas* case addressed the situation faced by the interstate pipelines and local distribution companies when the FERC restructured the natural gas market in the 1980s. 954 S.W.2d 520. The court determined that "take or pay" contract costs could be recovered through the use of the actual cost adjustment mechanism used by local distribution companies to pass fuel costs on to their retail customers. *Id*. at 531.

Interstate natural gas pipelines are regulated by the FERC. Local distribution companies, who serve retail customers, are regulated by state utility commissions.

Local distribution companies pass gas costs directly on to customers through mechanisms known as purchased gas adjustments because the state commissions cannot set the price of gas. The state commissions set only the local distribution company's fixed costs. On the other hand, state commissions must set the price of electricity for retail customers including both the commodity (electricity) and the distribution costs. KCP&L-GMO is an electric company, not a natural gas local distribution company. The Commission's retail rate-setting decision is a matter of state law only. Given the differences between the two markets, reliance on natural gas cases for this issue is misplaced.

The cases cited by KCP&L-GMO involve a state commission's interference with interstate electricity or natural gas rates that have been set by the FERC. Those cases are not on point. The Commission's decision in this case had nothing to do with whether the transmission rates charged by Entergy to transport power from Crossroads in Mississippi to Missouri are just and reasonable. The report and order does nothing to call a FERC-approved Entergy tariff into question. The Commission made no inquiry into the transmission rates charged by Entergy. The Commission did not find that the rates charged by Entergy are unjust or unreasonable. What the Commission did was decide that it would be unjust and unreasonable to allow KCP&L-GMO to recover the costs of that transmission from Mississippi to Missouri. The Commission is not preempted from disallowing recovery of this expense, which is associated with KCP&L-GMO's decision to use assets in Mississippi to supply power in Missouri.

The Commission's decision to disallow the transmission expense associated with bringing power from Crossroads to Missouri is lawful because the Commission has a duty to set just and reasonable rates under Section 393.130 and the decision to disallow transmission expenses is reasonable because it is supported by substantial and competent record evidence. The report and order must be affirmed on this point.

* * * *

APPENDIX P

KARL ZOBRIST
Partner
SNR DENTON US LLP
4520 Main Street
Suite 1100
Kansas City, MO 64111-7700
D +1 816 460 2545
T +1 816 460 2400
F +1 816 531 7545
karl.zobrist@snrdenton.com
snrdenton.com

March 15, 2013

MR. TERENCE G. LORD
Clerk of the Court
MISSOURI COURT OF APPEALS, WESTERN DISTRICT
1300 Oak Street
Kansas City, MO 64106-2970

Re: *State ex rel. KCP&L Greater Missouri Operations Co., et al. v. Public Service Commission* No. WD75038 (consolidated with WD75057 and WD75058)

Dear Mr. Lord:

This letter brief is provided to Division One, pursuant to your letter of March 5, 2013, on behalf of the appellant KCP&L Greater Missouri Operations Co. ("GMO").

We will refer to the Commission's decision in its January 9, 2013 Report and Order in Case Nos. ER-2012-0174 and ER-2012-0175 as the "2013 Order." Similarly, we will refer to the Commission's decision

before the Court of Appeals in this case, issued on May 4, 2011 in No. ER-2010-0356, as the "2011 Order."

In your letter the Court raised the following issues:

1. Whether the tariffs approved in the 2013 Order, and/or in subsequent compliance orders, supersede the tariffs approved in the 2011 Order.

Yes. The tariffs approved in the 2013 Order superseded the tariffs approved in the 2011 Order.

2. Whether a decision in this appeal would have any practical effect, financial or otherwise, on GMO, ratepayers or others, given the 2013 Order.

Yes. While Missouri law governing this case generally prohibits retroactive ratemaking and retroactive adjustments of rates previously charged and paid, the Crossroads issues in this case concern important procedural and substantive decisions by the Commission regarding (a) plant valuation (GMO Issue I), (b) determination of electric transmission expenses (GMO Issue II), and (c) accumulated deferred income tax ("ADIT") (GMO Issue III) that are not moot or constitute exceptions to the mootness doctrine.

As the 2013 Order shows, the Commission continues to make determinations regarding these issues which will have ongoing financial implications for GMO and its ratepayers.

3. Whether the resolution of the ADIT issue in this appeal would have any future effect given the 2013 Order's resolution of that issue.

Yes. Given the position taken by the Commission in the 2011 Order in this appeal and the contrary position taken in the 2013 Order, which has been appealed (WD76166 and 761167), there has been no resolution of the ADIT issue.

GMO has argued in this appeal that if the Court affirms the Commission's lower regulatory valuation for Crossroads, ADIT must be computed based on that valuation and not arbitrarily tied to some higher valuation. *See* GMO Br. at 49 (citing Application for Rehearing at 2-3 and Attach. 1 (LR 07526-27, 07555)).

While the 2013 Order appears to reflect GMO's position, basing its ADIT calculation on Crossroads' regulatory valuation (2013 Order at 58), the issue raised in this appeal is far from settled. Midwest Energy Consumers' Group, in its January 18, 2013 Application for Rehearing, specifically challenged the Commission's decision regarding Crossroads' ADIT, requesting that ADIT be calculated as it was in the 2011 Order.

This Court can provide guidance to the Commission by conclusively establishing that ADIT must be calculated on the basis of an asset's regulatory valuation.

4. Whether some or all of the issues in this appeal of the 2011 Order should be decided, even if the appeal is technically moot.

While the Commission's 2013 Order addresses the Crossroads issues before the Court in this appeal, these issues are of great public interest. The Court should invoke its discretionary jurisdiction and provide the Commission with guidance for future decisions on these recurring issues.

"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." *PSC v. Missouri Gas Energy*, 388 S.W.3d 221, 229 (Mo. App. W.D. 2012). But, "an

exception to the mootness doctrine exists where the issue raised is one of general public interest and importance, recurring in nature and will otherwise evade appellate review unless the court exercises its discretionary jurisdiction." *Id*. The Court "will exercise this discretionary jurisdiction if there is some legal principle at stake not previously ruled as to which a judicial declaration can and should be made for future guidance." *Id.*

This Court has noted that because an appeal "regarding the cost at which retail electric services are provided to the public at large ... is inherently 'of general public interest,'" it will proceed to hear the matter. *State ex rel. Praxair, Inc. v. PSC*, 328 S.W.3d 329, 335 (Mo. App. W.D. 2010) (original emphasis).

In Issue I, GMO asked the Court to determine whether the Commission correctly valued Crossroads on the basis of (a) the sale of other plants in another state over two years before Crossroads was placed into rate base and (b) preliminary valuations subject to market adjustments disclosed in a joint proxy statement filed at the SEC. Because determining the value of a plant is of major importance in setting rates, this issue is of great significance to ratepayers and utilities alike. Therefore, the methods employed by the Commission to determine value have broad implications for future Commission decisions.

In this appeal GMO has argued that the method by which the Commission valued the Crossroads facility as of August 2008 improperly focused on the Goose Creek and Raccoon Creek plants in Illinois that were sold in early 2006 and on disclosures in an SEC filing

made in May 2007.[1] *See* GMO Br. at 15-26. If the Court fails to address this issue on appeal, the Commission will continue to value plants improperly.

Issue II concerns the Commission's determination that GMO could not recover the cost of transmitting electricity pursuant to a FERC tariff from Crossroads in Mississippi to GMO' s territory in Missouri. Because this is a continuing operating expense, the decision will affect the utility and ratepayers for the foreseeable future. Furthermore, the decision implicates federal preemption principles because the Commission has, in effect, disallowed 100% of a federally approved tariff even though Crossroads was found to be the most prudent option for a new plant. *See* GMO Br. at 34-41.

The recoverability of transmission costs arose in the Commission's 2013 Order as well, where the Commission simply re-adopted its decision from the 2011 Order. Without guidance from the Court, this issue will continue to evade appellate review.

Issue III concerns the calculation of ADIT, addressed in Question 3, above. GMO has asked the Court to determine whether the Commission properly applied ADIT to its regulatory valuation of the Crossroads facility. Because ADIT ensures that income taxes are properly and fairly considered in a utility's rate base, such calculations affect both ratepayers and utilities. As noted above, the Commission re-addressed this issue in the 2013 Order, coming to a different conclusion than the 2011 Order.

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[1] As noted at oral argument, GMO' s brief inadvertently reversed the dates of the contract and the sale of the Illinois plants (2005-06) with Crossroads being placed into rate base (2008). The dates in the 2011 Order are correct.

Without guidance from the Court, the Commission risks miscalculating ADIT in future actions.

5. Whether some or all of the issues raised in this appeal are inherently fact-specific and dependent on the evidentiary record created in this appeal, and, therefore, whether a decision of issues in this appeal would have limited precedential value.

A decision by the Court in this appeal will not have limited precedential value.

The issues raised by GMO regarding Crossroads involve important questions that the Commission faces on a regular basis, including the valuation of utility plant, the allowance of prudent expenses, the state/federal relationship regarding the interstate transmission of electricity, and the calculation of ADIT.

6. Whether the 2013 Order decided issues concerning (a) the valuation of the Crossroads facility, (b) the recoverability of GMO's costs for transmitting electricity from Crossroads, and (c) the proper treatment of ADIT, by simply following the 2011 Order under review in this appeal.

(a) Yes. The Commission adhered to its ruling on the valuation of Crossroads (GMO Issue I). GMO has appealed the Crossroads valuation in the 2013 Order, just as it has appealed the valuation decision in the pending case.

(b) Yes. The Commission adhered to its decision to disallow expenses related to the transmission of electricity from Crossroads to GMO's Missouri service territory (GMO Issue II). GMO has also appealed that decision, as it has in the pending appeal.

(c) No. Despite incorporating its findings of fact and conclusions of law from the 011 Order into the 2013 Order, the Commission did not come to the same decision on the ADIT issue (GMO Issue III). In Paragraph 7 on page 55 of the 2013 Order, it calculated ADIT on the regulatory valuation of Crossroads at $61.8 million. However, in the 2011 Order it rejected that calculation which was requested by GMO, and instead permitted ADIT to be calculated on Crossroads' net book value of over $100 million.

7. Whether the 2013 Order decided the issues in Question 6 on a different or broader factual record than the record created in this appeal.

The record in both cases on the Crossroads issues was generally the same, although not identical.

On the valuation question of GMO Issue I (discussed on pages 55-58 of the 2013 Order), the Commission's conclusions were based upon two findings that GMO claims were improper.

First, the Commission found that the sale price of the turbines at the Goose Creek and Raccoon Creek plants in Illinois to Ameren, agreed to on December 15, 2005, governed the valuation of the Crossroads plant on August 31, 2008 when it was transferred to GMO's regulated operations.

Second, the Commission relied upon statements in an SEC Form S-4 Joint Proxy Statement that Aquila and Great Plains Energy issued in May 2007 that a "preliminary internal analysis indicated a fair value estimate" of Crossroads "of approximately $51.6 million" and that the "adjustment reflects the difference between the fair value of the combustion turbines at $51.6 million and the $118.9 million book value of the facility." The S-4 stated on page 175 that

this value "could be materially affected by changes in fair value prior to the closing of the merger" and on page 168 that "[f]inal determinations of fair value may differ materially from those presented herein." Nonetheless, the Commission used this preliminary number to support its valuation of Crossroads at $61.8 million. It did so despite relying on GMO Ex. 215,[2] where a Staff witness testified at pages 44-45 that turbines were seeing "dramatic" and "substantial increases" in price in 2007-08 over 2005-06 levels.

On GMO Issue II, the Commission's decision to disallow the cost to transmit electricity from Crossroads to GMO's service territory (2013 Order at page 58) is quite similar to its findings in the 2011 Order. The Commission found that the expense to transmit electricity from Mississippi to Missouri would not be present if an option in Missouri had been chosen. Although it found that Crossroads was overall the most prudent choice (having rejected the Missouri alternatives of the Dogwood plant and Staff's concept that Aquila should have built turbines at its South Harper plant), in both the 2011 and 2013 Orders it disallowed the transmission expense, even though Crossroads' location in Mississippi is what made it the lowest cost option.

Therefore, the questions before the Court on the valuation and transmission cost issues are the same, and GMO's factual and legal record is substantially the same, although additional evidence was presented in the case decided by the 2013 Order.

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[2] The Commission relied on Ex. 215 for its Crossroads valuation findings on pages 78-79 and 93-95 in the 2011 Order.

The ADIT issue is the same in both the 2011 and 2013 Orders, however, the Commission came to opposite conclusions.

8. Whether the 2013 Order involved procedural issues similar to those raised in this appeal by OPC and/or by AG Processing.

No. Neither OPC nor AG Processing has appealed the 2013 Order. To GMO's knowledge, there is no rate phase-in issue in the 2013 Order, as has been raised by AGP in this appeal. Whether another appellant will raise the tariff issues presented by OPC in this appeal remains to be seen.

9. Crossroads Transmission Cost Issue.

In the second full paragraph of your March 5 letter, the Court asked whether the PSC considered the 12 months of energy transmission costs of Crossroads in its cost comparison analysis with other generation options.

While the evidence shows that energy transmission costs were included with other types of costs to compare the three generation options (Crossroads, Dogwood and Staff's phantom South Harper turbines), it is unclear what the Commission actually considered.

GMO contends that if the PSC had considered all expenses, it would not have disallowed the transmission expense. Crossroads was the lowest cost option because it was located in Mississippi. Its total electric transmission and gas costs were lower than the other two options.

We know that the Commission considered both the delivered cost of natural gas and electric transmission costs because the 2011 Order stated at page 97: "Dogwood has not been the lowest cost resource

option." The 2011 Order at page 86 also cited Burton Crawford's Rebuttal Testimony (GMO Ex. 11) and GMO's April 2010 analysis, which showed that Crossroads would result in the lowest 20-year net present value of revenue requirement. This analysis, known as the Stipulation 8 Capacity Study ("Capacity Study"), was included as Schedule BLC2010-10 to Mr. Crawford's Rebuttal Testimony.

Mr. Crawford testified: "While the cost of electric transmission for Crossroads is currently higher than it would be if the plant were located in the GMO area, these costs were included along with other plant-related costs in the [2010] analysis." (GMO Ex. 11 at p. 10). The analysis of the Capacity Study showed that Crossroads was the lowest overall cost option, including transmission costs. *See* Schedule BLC 2010-10 at pp. 30-31, 36, Crawford Rebuttal Testimony (GMO Ex. 11).

Table 19 on page 42 of the Capacity Study shows that the $5.0 million cost of 300 MW from Crossroads and the $5.3 million cost of 300 MW from Dogwood included both annual gas *and* annual energy transmission costs. Nevertheless, the Commission disallowed one cost component of what was the lowest cost option. If the Commission had considered the data at page 42 of Capacity Study, it would have found that Crossroads' cost of $5.0 million was less than Dogwood's $5.3 million.

The PSC should have used this evidence to confirm the Capacity Study's conclusion on page 36: "The Crossroads Energy Center is providing the lowest-cost option of capacity for the GMO system." *See* Sched. BLC 2010-10 at 36, Crawford Rebuttal Testimony, GMO Ex. 11.

Respectfully yours,

/s/ Karl Zobrist

Attorney for KCP&L Greater Missouri Operations Co.

KZ:cjf

cc: Ms. Jennifer L. Heintz
Mr. Lewis R. Mills
Mr. Jeremiah Finnegan
Mr. Carl Lumley

APPENDIX Q

U.S. Const. Art. VI, § 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

* * *

16 U.S.C. § 824(b): "(1) The provisions of this subchapter shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this subchapter and subchapter III of this chapter, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter."

* * *

16 U.S.C. § 824d(a): "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and

any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

* * *

Mo. Rev. Stat. § 393.130.1: "Every gas corporation, every electrical corporation, every water corporation, and every sewer corporation shall furnish and provide such service instrumentalities and facilities as shall be safe and adequate and in all respects just and reasonable. All charges made or demanded by any such gas corporation, electrical corporation, water corporation or sewer corporation for gas, electricity, water, sewer or any service rendered or to be rendered shall be just and reasonable and not more than allowed by law or by order or decision of the commission. Every unjust or unreasonable charge made or demanded for gas, electricity, water, sewer or any such service, or in connection therewith, or in excess of that allowed by law or by order or decision of the commission is prohibited."