No. 13-787

In the Supreme Court of the United States

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

v.

MISSOURI PUBLIC SERVICE COMMISSION, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the Missouri Court of Appeals violated the filed-rate doctrine in upholding the Missouri Public Service Commission's order barring petitioner from recovering the cost of transmitting electricity from a generation facility located in Mississippi.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Miscellaneous:

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This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. The sale of electricity in the United States is governed by both federal and state regulatory authorities. Under the Federal Power Act, 16 U.S.C. 791 *et seq.*, the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction over the rates charged for "the transmission of electric energy in interstate commerce" and for the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). FERC must ensure that "[a]ll rates and charges" within its jurisdiction are "just and reasona-

ble" and that utilities do not "grant any undue preference or advantage to any person." 16 U.S.C. 824d(a) and (b). The Federal Power Act, however, generally reserves to the States jurisdiction "over facilities used for the generation of electric energy" and "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. 824(b)(1). States thus regulate "retail" sales—*i.e.*, sales made to consumers of electricity, such as households and businesses. See *New York* v. *FERC*, 535 U.S. 1, 17 (2002).

To harmonize federal authority to regulate interstate rates with state authority to regulate retail rates, this Court has developed the "filed rate doctrine." That preemption principle holds that "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003) (citation omitted). Thus, in determining what rates a utility may charge retail customers, a state utility commission may not prevent the utility from recovering the costs that it incurred in paying a FERC-approved rate to purchase the electricity or transmit it across state lines. Such "[t]rapping of costs runs directly counter to the rationale for FERC approval of cost allocations * * * because when costs under a FERC tariff are categorically excluded from consideration in retail rates, the regulated entity cannot fully recover its costs of purchasing at the FERC-approved rate." *Id.* at 48 (internal citation and quotation marks omitted).

Lower courts have recognized what has come to be known as the "*Pike County* exception" to the prohibi-

tion on retail rate trapping, after *Pike County Light & Power Co.* v. *Pennsylvania Public Utility Commission*, 465 A.2d 735 (Pa. Commw. Ct. 1983). Under the *Pike County* exception, a State may deem "a particular quantity of power procured by a utility from a particular source * * * 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." *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 972 (1986) (emphasis omitted) (acknowledging without approving lower-court decisions applying exception). The *Pike County* exception has been applied to permit a state utility commission to evaluate the prudence of a utility's decision to purchase power from a particular source so long as the state commission's findings would not duplicate or interfere with a FERC finding. See *Kentucky W. Va. Gas Co.* v. *Pennsylvania Pub. Util. Comm'n*, 837 F.2d 600, 608-609 (3d Cir.), cert. denied, 488 U.S. 941 (1988); *Appalachian Power Co.* v. *Public Serv. Comm'n*, 812 F.2d 898, 903-905 (4th Cir. 1987).

2. a. Petitioner is a public utility that sells electricity to over 300,000 customers in western Missouri. See Pet. App. 2a, 43a, 45a. In 2010, petitioner filed a revised tariff with the Missouri Public Service Commission (Missouri PSC) seeking permission to increase the rates it charges customers. *Id.* at 39a-40a, 44a. Part of the basis for that request was petitioner's desire to recover costs associated with obtaining power from Crossroads Energy Center (Crossroads), a natural gas-fired generation facility in Mississippi that petitioner had obtained the right to use after its acquisition of another company in 2008. See *id.* at

53a-61a. Those costs included both the value of the Crossroads plant and the costs of transmitting power from the plant to customers in Missouri.

The power generated by Crossroads is transmitted over infrastructure owned by Entergy Services, Inc. (Entergy). Because Entergy transmits power across state lines, it is required to obtain approval of its rates from FERC. Pet. App. 15a. FERC has certified that the rates that Entergy charges customers, including petitioner, are just and reasonable under the Federal Power Act. *Id.* at 16a.

b. In 2011, the Missouri PSC issued an order (2011 Order) rejecting petitioner's proposed tariffs and ordering petitioner to file revised tariffs. See Pet. App. 3a-4a, 39a-78a. As relevant here, the Missouri PSC approved petitioner's decision to recover the value of the Crossroads facility from ratepayers, but it disallowed the recovery of the cost of transmitting power from Crossroads to Missouri. *Id.* at 67a-68a. The PSC found that "[t]he cost of transmission to move energy from Crossroads to customers * * * [in Missouri] is a very significant cost that is far greater than the transmission costs for power plants located in [Missouri]." *Id.* at 63a. In the PSC's view, it was "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." *Ibid.* The PSC summarized its findings by stating that petitioner's "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." *Id.* at 67a.

In the course of its analysis, the PSC rejected the argument by its staff that instead of using the Crossroads facility, petitioner should have installed two additional turbines at a different facility called "South Harper" located in Peculiar, Missouri, and therefore that petitioner should be permitted to recover only the costs that would have been associated with those two "phantom turbines." Pet. App. 59a-61a, 60a n.297, 77a. The PSC found "that the decision not to build two more * * * turbines at South Harper was not imprudent." *Id.* at 67a. It also rejected the argument that petitioner should obtain power from the Dogwood Energy, LLC plant, a natural gas-fired plant in Missouri, after finding that "Dogwood has not been the lowest cost resource option." *Id.* at 74a-75a.

Petitioner filed revised tariffs complying with the PSC's order. Pet. App. 4a. Those tariffs went into effect in June and July 2011. See *id.* at 4a-5a.

3. Petitioner sought review of the PSC's order in the Circuit Court of Cole County (a trial-level court). See Mo. Ann. Stat. § 386.510 (West 2010); Pet. App. 5a. The circuit court summarily affirmed the PSC's order. See Pet. App. 5a, 92a-95a.

4. Shortly after the circuit court entered its judgment, petitioner filed a new proposed tariff with the Missouri PSC seeking further revenue increases. See Pet. App. 6a. In that filing, petitioner again sought recovery of the cost of transmitting power from Crossroads to Missouri. See *id.* at 172a. In January 2013, the PSC issued an order (2013 Order) rejecting the proposed tariffs and again disallowing the recovery of the Crossroads transmission costs. See *id.* at 171a, 175a-176a. In that order, the PSC explained that although it had authority to revisit its prior rul-

ing, petitioner had "not carried its burden of proof on transmission costs." *Id.* at 175a; see *id.* at 173a. In particular, although petitioner had "allege[d] that the lower price of fuel in Mississippi outweighs the cost of transmission" from Crossroads, "[t]he Commission * * * found that the evidence preponderates otherwise." *Id.* at 175a. "The high cost of transmission," the PSC found, "is not outweighed by lower fuel costs in Mississippi." *Ibid.*

Petitioner then filed new tariffs in compliance with the 2013 Order. See Pet. Supp. Br. App. 6a. Those tariffs superseded the tariffs at issue in this case. See Pet. App. 6a-8a.

5. In a divided decision, the Missouri Court of Appeals affirmed the 2011 Order in relevant part. See Pet. App. 1a-29a.

a. The court of appeals first addressed whether the case was moot in light of the parties' acknowledgement at oral argument that the challenged tariffs had been superseded by the tariffs filed in compliance with the 2013 Order. See Pet. App. 6a-7a & n.3. The court noted that "[w]hen 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." *Id.* at 7a-8a (quoting *State* v. *Public Serv. Comm'n*, 328 S.W.3d 329, 334 (Mo. Ct. App. 2010)). The court held, however, that with respect to "issues in th[e] case [that] involve whether the PSC lawfully exercised its authority," an exception from mootness for issues capable of repetition yet evading review applied. *Id.* at 8a. Those issues, the court held, were "of general public interest," "are recurring in nature," and "are suscep-

tible to evading appellate review." *Ibid.* The court held that other issues did not fall within the exception. See *ibid.*

b. The court of appeals then affirmed the PSC's decision to bar petitioner from recovering costs associated with transmitting power from Crossroads to Missouri customers. See Pet. App. 10a-20a. As relevant here, the court rejected petitioner's argument that the PSC's order was preempted by FERC's determination that the transmission rate charged by Entergy was lawful under the Federal Power Act. See *id.* at 15a-20a.

The court of appeals began by acknowledging that under the filed-rate doctrine, "interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intrastate rates." Pet. App. 16a (quoting *Nantahala Power & Light Co.*, 476 U.S. at 962). Accordingly, the court explained, the "doctrine prohibits a state regulatory commission from 'trapping' FERC-approved costs by preventing a distributor from fully recovering those costs from its retail customers." *Ibid.* (quoting *Nantahala Power & Light Co.*, 476 U.S. at 970).

The court of appeals agreed with the PSC, however, 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." Pet. App. 16a. The court stated that "[w]hat the PSC *did* decide was that it would be unjust and unreasonable to allow [petitioner] to *both* reap the benefit of energy producing cost savings at Crossroads * * *

and to recover the otherwise unnecessary transmission costs of the energy from Mississippi to Missouri." *Ibid.* "In effect," the court continued, "the PSC * * * granted [petitioner] its requested option of using a distant energy producing facility so that it could take advantage of [the] revenue opportunities, but required [petitioner] 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." *Id.* at 17a.

The court of appeals did not understand that determination to reflect a judgment that "Entergy's transmission service rate was unreasonable." Pet. App. 17a. Rather, the court understood the PSC to have determined that "it was unreasonable for [petitioner] to pass through otherwise unnecessary transmission costs to ratepayers when [petitioner] 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." *Ibid.* In other words, the court said, "[i]t 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." *Ibid.*

c. Judge Ahuja filed an opinion concurring in part and dissenting in part. See Pet. App. 29a-38a. He argued that the entire appeal should have been dismissed as moot, although he emphasized that he did "not disagree with the majority opinion's substantive resolution of the issues it decides." *Id.* at 30a. With respect to the FERC preemption question, Judge Ahuja explained that the question "is very likely to

arise again in a future, live controversy, in which it would not evade review." *Id.* at 32a. He specifically pointed to "multiple other appeals currently pending before" the court of appeals raising "[i]ssues concerning the rates [petitioner] may charge, and specifically how those rates should be influenced by [petitioner's] acquisition of an interest in the Crossroads plant." *Id.* at 36a.

Judge Ahuja also explained that a change in the relevant judicial-review statute would prevent questions about the lawfulness of petitioner's rates from evading appellate review. An amendment applicable to PSC orders issued after July 1, 2011, he wrote, "authorizes the Commission to adjust prospective rates where a judicial decision determines that the rates the Commission previously approved were unlawful or unreasonable." Pet. App. 37a (citing Mo. Ann. Stat. § 386.520.2 (West Supp. 2012)). Going forward, therefore, "a judicial decision concerning the lawfulness of * * * superseded tariffs could have real consequences" because a utility will be able to obtain compensation for an erroneous order. *Ibid.*

d. The court of appeals denied rehearing, and the Supreme Court of Missouri denied petitioner's request for discretionary review. See Pet. App. 96a-99a.

6. After petitioner filed the petition for a writ of certiorari in this Court, the Missouri Court of Appeals issued an opinion upholding the 2013 Order. See Pet. Supp. Br. App. 1a-17a. (As a result of a change in Missouri law, PSC orders issued after July 1, 2011, are challenged directly in the Missouri Court of Appeals. See Mo. Ann. Stat. § 386.510 (West Supp. 2014); S.B. 48, § A, 96th Gen. Assemb., Reg. Sess. (Mo. 2011).) The court noted that in its decision up-

holding the 2011 Order, it had rejected the argument "that the disallowance [of the recovery of Crossroads transmission costs] violated the Filed Rate Doctrine and the Supremacy Clause," and that "to the extent [petitioner's] arguments challenge those PSC rulings, they lack merit and are rejected." Pet. Supp. Br. App. 12a. The court was "confident that [its] previous analyses accurately set forth the law and correctly applied it." *Id.* at 12a-13a.

The court of appeals did consider, however, petitioner's "challenges to the findings supporting the PSC's decision to maintain its previous ruling concerning the transmission costs." Pet. Supp. Br. App. 13a. The court explained that in the 2013 Order, the PSC had "stated that the evidence weighted heavily against [petitioner's] position that the lower price of fuel in Mississippi outweighed the substantially higher transmission costs" and therefore had found that petitioner had "failed to meet its burden." *Ibid.* The court determined that the PSC's factual conclusion was supported by the record evidence. *Id.* at 13a-14a.

On April 29, 2014, the court of appeals denied petitioner's request for rehearing of its decision sustaining the PSC's 2013 Order, and for transfer to the Supreme Court of Missouri. See Letter from Terrence G. Lord, Clerk of Missouri Court of Appeals, to All Attorneys of Record (Apr. 29, 2014). Petitioner has sought review of the judgment in the Supreme Court of Missouri. See 5/9/14 Pet. Appl. for Transfer.

DISCUSSION

Petitioner argues (Pet. 3) that a state public utility commission, after "accepting the overall prudency of an interstate power purchase," may not "single out a specific, federally-approved portion of those costs and

bar that cost from retail rates." That is a correct statement of the law. But it is unclear whether the Missouri PSC, in its 2011 Order, did in fact find that the Crossroads facility was an "overall" prudent option for purchasing power—and whether the court of appeals understood the order to have done so. And in fact, the PSC's 2013 Order, which has superseded the 2011 Order in operative effect, found that the record evidence refutes petitioner's contention that "the lower price of fuel in Mississippi outweighs the cost of transmission" from Crossroads. Pet. App. 175a; see Pet. Supp. Br. App. 13a-14a. That more recent order, moreover, raises a serious mootness question, the resolution of which depends on questions of Missouri statutory law and factual issues not apparent from the record. Accordingly, this case would be a particularly poor vehicle for this Court to consider application of the filed-rate doctrine. Further review is not warranted.

A. This Case Is A Poor Vehicle To Consider The Filed-Rate Doctrine Because The Order Under Review Is Materially Ambiguous

Petitioner argues that a state utility commission may not approve a source of purchased power as a prudent option for a utility in light of the available alternatives, but then refuse to allow the utility to recover FERC-approved transmission costs associated with obtaining power from the source. That is correct. But it is not clear from the record that the Missouri PSC found that Crossroads was a prudent option in light of all costs, nor that the court of appeals understood the PSC's order to have done so. Accordingly, if this Court were to grant review, there is a significant chance that the dispute between the

parties would focus on the meaning of the particular 2011 Order and of the decision below, rather than any legal principles of general applicability.

1. Petitioner is correct (Pet. 16) that a "state Commission's own fairness concerns cannot justify excluding a FERC-approved component cost of a prudent power source." This Court's filed-rate doctrine precedents require state utility commissions to "allow, as reasonable operating expenses, costs incurred as a result of paying a FERC-determined" rate. *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 965 (1986); see *Entergy La., Inc.* v. *Louisiana Pub. Serv. Comm'n*, 539 U.S. 39, 47-50 (2003); *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 372-373 (1988). To the extent the court of appeals distinguished those precedents on the ground that the PSC here was not objecting to the "amount" of Crossroads' transmission costs, but instead to "the concept of requiring ratepayers to pay for any Crossroads transmission costs in the first place," the court was in error. Pet. App. 17a; see *id.* at 17a-20a. As petitioner explains (Pet. 14), "logically, holding that the 'just and reasonable' amount of transmission costs [is] zero *is* a finding that the actual transmission rate is too high." The filed-rate doctrine would be ineffectual if a State could circumvent it by objecting to the "concept" of passing on the FERC-approved rate to ratepayers at all rather than to the "amount" of that rate.

Petitioner does not argue, however, that if the Missouri PSC had concluded that Crossroads was *not* a prudent choice relative to the alternatives, taking into account all costs, the PSC nevertheless would have been required to approve Crossroads as a prudent

power source if the facility's non-FERC-approved costs were less than the alternatives. In other words, petitioner does not contend that a state utility commission must ignore FERC-approved transmission costs in assessing the overall prudence of a source of purchased power. To the contrary, petitioner appears to concede (Pet. 19-20) that "if [its] 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." Petitioner's argument is that once a power source has been deemed prudent "as a whole" under state law, the state utility commission may not prohibit a utility from recovering the FERC-approved cost of transmitting power from that source. See Pet. 3, 11-14, 16, 19, 22, 24-25.

Although the United States agrees with that legal proposition, it is unclear from the PSC's order whether the PSC actually found that Crossroads was an "overall" prudent power source. The PSC's key finding was that petitioner's "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*." Pet. App. 67a (emphasis added). That conclusion does not state whether the PSC found that Crossroads had the lowest overall cost among the available alternatives or whether instead it found that Crossroads was a prudent option only *after* excluding transmission costs. The PSC also found that "the lower natural gas prices at Crossroads are offset by much higher electric transmission costs," without indicating whether that meant that Crossroads was a less prudent option overall than the alternatives. *Id.*

at 62a. The PSC's other references to its finding reflect the same ambiguity. See *id.* at 76a ("The Commission concludes that if included in rate base at a fair market value, * * * and except for the additional cost of transmission from Mississippi to Missouri, * * * the Company's decision to add the Crossroads generating facility to [its] generation fleet [was a] prudent and reasonable decision[]."); *id.* at 78a ("The Commission further determines that it is not just and reasonable for [petitioner's] customers to pay the excessive cost of transmission from Mississippi.").[1]

That ambiguity is also found in the court of appeals' opinion. In response to petitioner's argument that "the PSC's disallowance of transmission costs associated with the delivery of power from Crossroads from [petitioner's] rate base was logically inconsistent with its conclusion that Crossroads was the prudent choice because it was the overall lowest cost option," the court stated that the PSC had determined that the inclusion of Crossroads in the generation fleet "was prudent—with the exception of the additional transmission expense." Pet. App. 12a-13a. Nowhere in its opinion did the court of appeals expressly validate

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[1] Petitioner, in fact, appeared to agree in a letter submitted in response to a question by the court of appeals that the Missouri PSC's order was unclear. The court had asked "whether the PSC considered the 12 months of energy transmission costs of Crossroads in its cost comparison analysis with other generation options." Pet. App. 194a. Petitioner answered that "[w]hile the evidence shows that energy transmission costs were included with other types of costs to compare the three generation options (Crossroads, Dogwood Energy, and Staff's phantom South Harper turbines), it is unclear what the Commission actually considered." *Ibid.*

petitioner's contention that the PSC had found that the Crossroads facility was the overall prudent option.

Moreover, in its arguments seeking further review of the court of appeals' decision in Missouri courts, petitioner repeatedly characterized the court's opinion as having concluded that the PSC did *not* find that Crossroads was an overall prudent option because its higher transmission costs outweighed its lower fuel costs. For example, in petitioner's request for Missouri Supreme Court review, petitioner stated that the court of appeals had "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." Pet. App. 113a (quoting court of appeals' opinion at *id.* at 17a). Petitioner's motion for rehearing in the court of appeals similarly stated that although the court of appeals' decision had agreed at one point that Crossroads "was overall the lowest-cost option," the opinion had then "reversed this finding or overlooked the fact that Crossroads was the lowest-cost option." *Id.* at 121a-122a; see *id.* at 122a (arguing that court of appeals "overlooked or misinterpreted facts showing * * * that Crossroads was overall the cheapest source of power, even with the higher transmission costs"); *id.* at 127a ("The Court * * * 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.").[2] In our view, there is no clear answer to whether the court of appeals understood the PSC to have found Crossroads to be the lowest-cost

[2] Petitioner has consistently maintained, however, that the PSC concluded that "Crossroads was the superior choice" as compared to the two alternatives that the PSC considered. Pet. App. 144a.

option. But the fact that petitioner, in the Missouri courts, itself read the decision to reflect the view that Crossroads was *not* an overall prudent option further underscores that this case is not a suitable vehicle for this Court's review.

2. Recent developments have cast further doubt on petitioner's current reading of the 2011 Order. In the 2013 Order, the PSC stated directly that "[t]he high cost of transmission [from Crossroads] is not outweighed by lower fuel costs in Mississippi," and it therefore rejected petitioner's argument that "the lower price of fuel in Mississippi outweighs the cost of transmission." Pet. App. 175a. And on judicial review of the 2013 Order, the court of appeals recognized that the PSC had "stated that the evidence weighted heavily against [petitioner's] position that the lower price of fuel in Mississippi outweighed the substantially higher transmission costs." Pet. Supp. Br. App. 13a. Neither the PSC nor the court of appeals suggested that this finding represented a departure from the 2011 Order.

In any event, even if this Court were to conclude that, notwithstanding the 2013 Order, the 2011 Order found that Crossroads was a prudent option overall, the 2013 Order likely deprives the question presented of ongoing significance even for the parties in this case. If this Court were to hold that the PSC erroneously barred petitioner from recovering costs for an overall prudent power source, that holding would not cast doubt on the 2013 Order, which determined that "[t]he high cost of transmission" associated with Crossroads "is not outweighed by lower fuel costs." Pet. App. 175a. And to the extent that petitioner contends that the 2013 Order contains some ambiguity about whether Crossroads was a prudent option over-

all, that question of state law should be decided by the Supreme Court of Missouri.

3. The decision below, even if erroneous, does not indicate that the Missouri PSC or Missouri courts have been ignoring or misapplying the filed-rate doctrine. The PSC has long recognized that "a state commission cannot decide that the FERC-approved interstate transportation rate that the local distribution company * * * is paying is too high and refuse to allow the [company] to include those costs in its rates." *In re Missouri Gas Energy's Purchased Gas Adjustment Tariff Revisions*, No. GR-2001-382, 2002 WL 31492304, at *2-*3 (Mo. PSC Sept. 10, 2002) (quoted at Pet. App. 146a); see, *e.g.*, *In re Union Elec. Co.*, 422 S.W.3d 358, 363 (Mo. Ct. App. 2013) (explaining that in a 2012 order the "PSC noted that under the filed-rate doctrine, [a utility] must be able to recover [FERC-approved] transmission charges in some manner"). Petitioner has not pointed to any other decisions of the Missouri PSC or the Missouri Court of Appeals reflecting a misapplication of the filed-rate doctrine (or any decisions of other state commissions containing a similar error as the one assertedly committed here). Accordingly, even if this case reflects an erroneous application of the filed-rate doctrine, there does not appear to be any compelling need for this Court's intervention at this time.

B. This Case May Not Satisfy The Mootness Exception For Issues Capable Of Repetition Yet Evading Review

1. The court of appeals unanimously concluded that this case no longer presents a live controversy because the 2011 Order under review has been superseded by the 2013 Order approving revised tariffs and because under the Missouri statutes that apply here,

petitioner would not be entitled to any retrospective relief if it prevailed in its challenge to the 2011 Order. See Pet. App. 6a-8a, 29a-30a. But the majority found that the issue of whether the PSC had erred in excluding recovery of the FERC-approved transmission costs for Crossroads was a "legal issue[] of general public interest," was "recurring," and was "susceptible to evading appellate review." *Id.* at 8a. At the request of the parties, the court therefore "elect[ed] to exercise [its] discretion" to consider that issue. *Id.* at 8a-9a.

To assure itself that it has jurisdiction over this case, however, this Court would be required to determine whether, as a matter of federal law under Article III of the Constitution, this case falls within the mootness exception for "disputes that are capable of repetition, yet evading review." *United States* v. *Juvenile Male*, 131 S. Ct. 2860, 2865 (2011) (per curiam) (internal quotation marks and citations omitted); see *Turner* v. *Rogers*, 131 S. Ct. 2507, 2514-2515 (2011) (holding that evading-review exception applied to a case that had ceased to be a live controversy before the state-court decision under review); *id.* at 2521 n.1 (Thomas, J., dissenting) (reaching same conclusion). As this Court has explained, "in the absence of any live case or controversy, [this Court] lack[s] jurisdiction and thus also the power to disturb the state court's judgment." *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 621 n.1 (1989). Petitioner has not argued that the judgment below continues to present a live controversy (such as because of any preclusive effect it may have under Missouri law), but rather only that the mootness exception for issues capable of repetition yet evading review applies. See Pet. 30-33; Cert. Reply

Br. 9-10. Respondent argues that the petition "does not meet the criteria for invoking an exception to the mootness doctrine." Br. in Opp. 13.

Resolving that disagreement on the threshold issue of this Court's jurisdiction may prove difficult on this record. The exception for issues capable of repetition yet evading review "applies where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Davis* v. *FEC*, 554 U.S. 724, 735 (2008) (citations and internal quotation marks omitted). It is not clear that, as a factual matter, the first requirement is met here. It is true that in this case, the order under review became moot before the appellate process could be completed, because petitioner itself filed a new proposed tariff. But it is true in every case of mootness that the particular controversy under review did not last long enough to permit full appellate review. For the exception to apply, however, it must be that the issue is likely to evade appellate review in the run of cases. See *DeFunis* v. *Odegaard*, 416 U.S. 312, 318-319 (1974) (per curiam). In this case, the answer to that question turns on whether, in light of Missouri law and business realities, new tariff filings must occur so often that PSC decisions will evade review by this Court. The parties have not pointed to any information in the record that would enable the Court to resolve that factual issue.

In any event, it appears that because of a change in Missouri law, PSC orders concerning the recovery of transmission costs, including the 2013 Order, will no longer become moot when a superseding tariff is filed.

As Judge Ahuja explained, PSC orders issued after July 1, 2011, are subject to Mo. Ann. Stat. § 386.520.2 (West Supp. 2014). See S.B. 48, § A, 96th Gen. Assemb., Reg. Sess. (Mo. 2011). That provision states that "[i]f the effect of the unlawful or unreasonable commission decision was to increase the public utility's rates and charges by a lesser amount than what the public utility would have received had the commission not erred * * *, then the commission shall be instructed on remand to approve temporary rate adjustments designed to allow the public utility to recover from its then-existing customers the amounts it should have collected plus interest." Mo. Ann. Stat. § 386.520.2(3) (West Supp. 2014). Accordingly, "it appears that * * * a judicial decision concerning the lawfulness of the superseded tariffs could have real consequences." Pet. App. 37a (Ahuja, J., concurring in part and dissenting in part). If, for example, the 2013 Order were vacated by the Supreme Court of Missouri, petitioner may be able to obtain rate adjustments to compensate it for the period in which the PSC erroneously required it to charge rates that were too low. If that is so, determinations made in tariff decisions, such as the transmission-costs recovery question that the PSC decided here, will not evade review. Judge Ahuja, however, noted that it is an open question whether the new rate-adjustment authority is unconstitutional under Missouri case law. See *id.* at 38a n.3.

2. In seeking further review of the court of appeals' decision in Missouri courts, petitioner argued that the issue here would not evade appellate review. See Pet. App. 121a; see also *id.* at 123a-126a. In particular, petitioner agreed with Judge Ahuja that be-

cause the Crossroads issues "were raised in the 2013 rate case and are now on appeal," and because of the amendment to Missouri law allowing rate adjustments to compensate for PSC errors, "[c]learly, none of the Crossroads issues will evade appellate review." *Id.* at 125a-126a.

Petitioner contends (Pet. 32 n.3) that its mootness arguments below were directed only to the question whether this case "was moot under Missouri law," not federal law. But petitioner does not identify how the relevant inquiry would differ in this context. If, as petitioner contended, "the facts demonstrated that none of the Crossroads issues would evade appellate review," Pet. App. 121a, then the federal mootness exception does not apply. Of course, petitioner may change its position on a jurisdictional issue. But its arguments below illustrate that, at minimum, a serious question exists whether this Court has jurisdiction. The resolution of that question depends on the interpretation of Missouri law and factual issues not apparent from the record.

Because of those questions going to the Court's jurisdiction, in addition to the ambiguous and temporally limited scope of the court of appeals' decision, this case is not a suitable vehicle to consider the filed-rate doctrine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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