

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

TRANSOURCE PENNSYLVANIA, LLC, :

Plaintiff, :

v. :

Civil Case No. 1:21-cv-01101-JPW

Judge Jennifer P. Wilson

GLADYS BROWN DUTRIEUILLE, :
Chairman, :

Pennsylvania Public Utility Commission, :

DAVID W. SWEET, :

Vice Chairman, :

Pennsylvania Public Utility Commission, :

JOHN F. COLEMAN, JR. and :

RALPH V. YANORA, :

Commissioners, :

Pennsylvania Public Utility Commission, :

all in their official capacities, and the :

PENNSYLVANIA PUBLIC UTILITY :

COMMISSION, :

Defendants. :

BRIEF FOR *AMICUS CURIAE* THE COUNTY OF FRANKLIN

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STATEMENT OF INTEREST OF AMICUS CURIAE

Franklin County is a County of the Fourth Class, which is approximately 772.2 square miles, with an approximate population of more than 154,835 citizens. In this lawsuit, Plaintiff requests to declare illegal and enjoin enforcement of the Pennsylvania Public Utility Commission’s (the “PUC”) May 24, 2021 Order (the “PUC’s Order”) that denied Plaintiff’s applications to site and construct a new high voltage (“HV”) electric transmission line across more than 24 miles of Franklin County and the intrusive and drastic exercise of eminent domain over lands in which Franklin County holds recorded and fully enforceable easements and agricultural security areas. Plaintiff’s applications are associated with the Pennsylvania portion of the project known as the Independence Energy Connection Project (the “IEC Project”).

To protect the interests of the County and its citizens, Franklin County intervened and fully participated in the PUC proceedings. Before the PUC, Franklin County strongly urged denial of Plaintiff’s applications to protect the County, including the County’s protected lands, its residents, and all Pennsylvanians, focusing on the substantial evidence of the record demonstrating that the IEC Project is not needed, the IEC Project does not benefit and will be detrimental to the residents of Franklin County and Pennsylvania’s electric ratepayers, and the IEC Project will have a significant adverse environmental and economic impact on

Franklin County. Franklin County obtained an order in its favor from the PUC denying Plaintiff's applications in their entirety. Displeased with that result, Plaintiff now brings this action as an effort to reverse the effect of the PUC's Order.

The declaratory and injunctive relief sought by Plaintiff imperils the protected and enforceable legal rights of Franklin County. Those legal rights are the possible condemnation of agricultural security areas and lands subject to conservation easements in direct derogation of Franklin County's recorded interest in those parcels, and the possible economic and environmental impacts to Franklin County and its residents if Plaintiff is successful in this matter.

Plaintiff simultaneously filed an appeal to the Commonwealth Court and this federal action seeking to overturn the PUC's Order. On May 5, 2022, the Commonwealth Court affirmed the PUC's decision. Franklin County submits this brief in support of summary judgment against Plaintiff based on the fact that the PUC's decision does not discriminate against interstate commerce and the preclusion of Plaintiff's federal claims that were asserted and decided in Commonwealth Court.

INTRODUCTION

Beginning on December 27, 2017, Plaintiff filed applications with the PUC associated with the construction of the Pennsylvania portion of the IEC Project. Following “extensive testimony, discovery and six days of evidentiary hearings” resulting in a detailed record, on December 22, 2020, Administrative Law Judge Elizabeth H. Barnes issued a Recommended Decision (the “R.D.”). (*See* Doc. 1, ¶ 46.) The R.D. recommended denial of Plaintiff’s applications in their entirety, finding, in relevant part, that Plaintiff failed to meet its burden to demonstrate that the IEC Project is needed pursuant to the PUC’s Regulations and the Pennsylvania Utility Code.

Relevant here, Plaintiff filed Exceptions to the R.D. contending that the Federal Power Act preempts the PUC from rendering an independent determination of need for the IEC Project under the applicable Pennsylvania state standards. Specifically, Plaintiff argued that under the Federal Power Act (the “FPA”), the Federal Energy Regulatory Commission (“FERC”) has the exclusive jurisdiction over the interstate transmission of electricity and the wholesale power market. Plaintiff contended that because the IEC Project was approved and deemed necessary by PJM Interconnection, L.L.C. (“PJM”), a Regional Transmission Organization, pursuant to a FERC-approved transmission planning process, the IEC Project automatically indisputably satisfied Plaintiff’s burden to establish need for

the IEC Project under Pennsylvania's applicable standards. The PUC's Order expressly rejected Plaintiff's preemption argument, adopted the R.D., and denied Plaintiff's applications in their entirety for Plaintiff failing to meet its burden to establish a need for the IEC Project.

On June 22, 2021, Plaintiff filed this suit in federal court requesting this Court to reverse the force and effect of the PUC's Order based on its assertion that the PUC's determination that the IEC Project is not needed is preempted by the FPA and unlawful under the Commerce Clause. (*See* Doc. 1). The next day on June 23, 2021, Plaintiff also filed an appeal of the PUC's Order with the Commonwealth Court seeking to reverse the PUC's Order based on its assertion that the PUC's finding that there is no need for the IEC Project is unlawful. On May 5, 2022, the Commonwealth Court affirmed the PUC's Order. Plaintiff's federal and state actions are based on the same exact issue, that is, whether the PUC's independent determination of no need for the IEC Project pursuant to Pennsylvania law is unlawful because PJM found a need for and approved the IEC Project pursuant to PJM's FERC-approved transmission planning process.

ARGUMENT

Plaintiff's Commonwealth Court appeal arose from PUC proceedings that were judicial in nature and concerned the same issues Plaintiff raises in this case. Plaintiff initiated the underlying action with the PUC seeking approval to construct the IEC Project. Plaintiff was aware that in order to approve the IEC Project, the PUC regulations required the PUC to find a need for the IEC Project pursuant to the PUC's regulations and Pennsylvania law. And Plaintiff had the burden to establish that the IEC Project was needed under Pennsylvania standards. Based upon the thorough record created before the PUC from the "extensive testimony, discovery and six days of evidentiary hearings," the PUC found that Plaintiff failed to meet its burden to establish that the IEC Project is needed. (*See* Doc. 1, ¶ 46).

The underlying subject matter of this litigation is the authority of Pennsylvania, through the PUC, to regulate the construction and siting of HV electric transmission lines within its borders, namely deciding what transmission projects are needed and can be constructed in Pennsylvania. This determination encompasses what Pennsylvania lands can be used and condemned for that purpose and the environmental impacts to Pennsylvania permitted based on the need for the transmission facility - in other words, the authority of Pennsylvania to determine what transmission facility needs to be built, where it needs to be built, and who needs to build it. Further, the issue of land use, condemnation, and environmental impacts

with respect to a new transmission facility in Pennsylvania is of great significance to Pennsylvania.

Plaintiff argues that there is an equally important or more important federal interest in regulating interstate electric transmission facilities. This argument, like the merits of Plaintiff's claims, fails and is directly contrary to the FERC's recognition of its limited authority and transmission planning process. FERC expressly acknowledges, it is the states, not FERC or a Regional Transmission Organization like PJM, that have the authority to "determine what [transmission facilities] needs to be built, where it needs to be built, and who needs to build it." *S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 57–58 (D.C. Cir. 2014) (citing, Order No. 1000, ¶ 159, 76 Fed.Reg. at 49,852).

FERC has confirmed that "'Order No. 1000's transmission planning reforms are concerned with process' and 'are not intended to dictate substantive outcomes.'" *Id.* at 58 (citing Order No. 1000–A, ¶ 188, 77 Fed.Reg. at 32,215). Rather, "[t]he substance of a regional transmission plan and any subsequent formation of agreements to construct or operate regional transmission facilities remain within the discretion of the decision-makers in each planning region." *Id.* at 58.

In summary, Pennsylvania's particular important interests in land use and environmental impacts coupled with Pennsylvania's authority to determine what

transmission facility needs to be built in Pennsylvania and where remains vested in the law of the Commonwealth of Pennsylvania.

I. The PUC’s Decision Does not Discriminate Against Interstate Commerce.

Plaintiff incorrectly contends that “[t]his case is about the PUC’s attempt to use its intra-state authority over siting and construction to annul a determination of an inter-state and regional need made under federal law.” (*See* Doc. 1, ¶ 4). Plaintiff contends further that the PUC failed to “engage in a genuine assessment of siting considerations . . . [and] instead rejected PJM’s federally authorized determination of need.” (*See id.*). Plaintiff incorrectly argues that “[t]he PUC determined that the lines were not needed because eliminating the bottleneck would primarily help out-of-state customers, not in-state Pennsylvania customers.” (*See id.*). Plaintiff contends that PUC decision thereby violates the dormant Commerce Clause. Plaintiff’s argument is without merit.

A. The PUC decision considered the PJM regional need for the project in determining there was no need for the project.

Plaintiff incorrectly contends that the PUC Order only considered the need of the IEC Project to alleviate congestion for Pennsylvania and failed to consider the alleged need for the IEC Project to alleviate congestion for the PJM region. (*See* Doc. 1, ¶ 4). Plaintiff argues that the PUC’s determination of need for the IEC Project was based on a “Pennsylvania-only” or “Pennsylvania-also” focus by finding “that if the lines were built, wholesale energy prices paid by Pennsylvania customers

would increase, as energy could more easily flow out of state to customers in Maryland, Virginia, and the District of Columbia who currently pay higher prices. (*See id.*).

In fact, however, the PUC Order specifically found that the R.D. “expressly *did* consider PJM’s regional planning responsibilities, and weighed those considerations as part of, but not dispositive of, the weight of the evidence regarding ‘need’ under 52 Pa. Code § 57.76(a)(1).” (*See* Doc. 1-2, p. 59) (emphasis in original). Specifically, the R.D. considered the congestion needs and benefits of the Project for the entire PJM region in assessing need. (*See* Doc. 1-3, pp. 38-41). The R.D. dedicated a specific findings of fact section, including fifteen specific findings of fact, to the Project’s impacts on the PJM region as a whole. (*See id.*).

Moreover, the Commonwealth Court specifically held that “contrary to [Plaintiff’s] arguments, the Commission did not engage in a Pennsylvania-only review of the costs and benefits of the IEC Project.” (*See* Doc. 90-1, p. 32). In particular, the PUC “examined the detrimental impacts to ratepayers in other parts of the PJM Region[.]” (*See id.*). Clearly, the PUC considered the need for the IEC Project for the entire PJM region, not just Pennsylvania.

B. It was appropriate in this instance for the PUC decision to review need based on benefits to Pennsylvania.

Furthermore, Pennsylvania is part of the PJM region. (*See* Doc. 1, ¶ 14). To the extent some focus on Pennsylvania was prevalent in the R.D., it would not be

improper given that the impact of this project in the Commonwealth. (*See* Doc. 1-2 at 39-51). The record evidence established that if the IEC Project proceeds, Pennsylvania would experience a \$400 million increase in wholesale power prices over a 15-year period, the highest increase of any state in the PJM region. (*See* Doc. 1-3, pp. 8, 82, 88 n. 10, 102, 107). Further, the Project would have a substantial negative economic and environmental impact on Franklin County and Pennsylvania. (*See* Doc. 1-3, p. 8). In total, the Project will result in a net decrease of only \$32.5 million in wholesale power prices in the PJM region with a revenue requirement of at least \$509 million over a 15-year period. (*See* Doc. 1-3, pp. 8, 30 ¶ 65, 32 ¶ 110, 104, 109 n. 25). This does not even account for the fact that the Project is intended to resolve congestion that no longer exists. (*See* Doc. 90-1, p. 41).

The PUC Order recognizes that regional impact warrants prioritized consideration when the underlying data demonstrate a regional need and further explains that “[r]egional planning matters are recognized to be of significance, and where the weight of the evidence indicates that the ‘need’ for the project is established by a preponderance of the evidence, the element of need will be found[.]” (*See* Doc. 1-2, p. 64). But “where, as here, the proposed regional planning involves alleviating economic congestion, the result of which is predicted to lead to a substantial increase in utility rates within the Commonwealth, the Commissions’ review of the PJM-approved project warrants examination of the underlying data

and congestion trends which PJM relied upon[.]” (*See id.*).

Consequently, “where a state is expected to suffer serious consequences, the argument that the data should reflect current and existing priority needs on the regional level has a more persuasive impact.” (*See id.*). The PUC accordingly reviewed the underlying data, as discussed below, and found that it did not reflect current and existing needs on the regional level.

Plaintiff argues that the PUC “disregarded and acted directly contrary to the federally approved methodology used by PJM is assessing whether there is a regional need for new transmission, and applied a different methodology of its own, focused on local impacts, to conclude that the line was not needed.” (*See Doc. 1, § 58*). Plaintiff further argues that “the PUC explicitly based its findings on the unwelcome expected economic results for Pennsylvania customers” in determining that there was no need for the IEC Project. (*See Doc. 1, § 77*). Plaintiff argues further that “the PUC now requires that projects like the IEC Projects must meet a “Pennsylvania-also” standard regarding ‘need’ that requires that the project economically benefit in-state customers, and that those in-state interests take precedence over the interests of the region as a whole.” (*See Doc. 1, § 85*).

Plaintiff clearly misconstrues the “Pennsylvania-also” basis applied by the PUC. The PUC Order duly considered PJM’s methodology and found “that data relied upon by PJM to determine the need to alleviate congestion on the AP South

Reactive Interface was not reliable enough to form the basis of ‘need’ for Project 9A[.]” (*See* Doc. 1-2, p. 64).

Specifically, “PJM’s own data reflected substantial fluctuations in congestion; a marked decline in congestion on the AP South Reactive Interface is apparent when viewed over a period of years; and Transource’s shifting asserted basis for the need for Project 9A, which was originally and unambiguously for the purpose of alleviation of congestion on the AP South Reactive Interface [“APSRI”].” (*See id.* at 64-65 citing R.D. at 80-103; Doc. 1-3, pp. 87-110). The Commonwealth Court held that these “findings reflect that the IEC Project was designed to resolve congestion on the APSRI, and that congestion on the APSRI has decreased significantly since 2014, such that it no longer supports the need for the IES Project.” (Doc. 90-1, p. 41).

Since the underlying data relied upon by PJM was found to be flawed, it was appropriate to consider the consequences to Pennsylvania, i.e. “Pennsylvania-also.” This would not have been the case had the PJM regional data accurately reflected current and existing needs on the regional level. Accordingly, “the review included consideration of the importance of prospective federal regional planning objectives *and* the importance of prospective impact upon the Commonwealth.” (*See* Doc. 1-2, p. 63) (emphasis added).

C. The PUC did not engage in local protectionism.

Contrary to Plaintiff's assertion (*see* Doc. 1, § 79), there cannot be discriminatory local protectionism in finding that Pennsylvania has no need for the IEC Project based on the negative impacts on Pennsylvania when no bona fide regional need has been established. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (regulation only constitutes economic protectionism when it has either a discriminatory purpose or a discriminatory effect) (citations omitted).

Plaintiff asks this Court to ignore or substantially downplay the detrimental impacts the Project will have on Pennsylvania in assessing need. But doing so is contrary to the Commission's regulatory, constitutional, and statutory obligations. (*See* 66 Pa. C.S. § 1501; 15 Pa. C.S. § 1511(c); 52 Pa. Code § 57.76(a)(3), 52 Pa. Code § 57.76(a)(4); Pa. Const. art. I, § 27; Doc. 1-3, p. 123). Consistent with the Commission's obligations, the PUC Order and the R.D. considered the IEC Project's benefits and need for both the entire PJM region and Pennsylvania, and properly concluded that "the IEC Project as a market efficiency project does not provide sufficient benefits to Pennsylvania *or the PJM region as a whole.*" (Doc. 1-3, p. 104) (emphasis added).

Plaintiff's argument asserting that the PUC standard for 'need' requires that the project economically benefit in-state customers and prioritizes those in-state interests over the interests of the region as a whole is further flawed. The

Commission's purpose is to protect Pennsylvanians and ensure enforcement of Pennsylvania's laws as to regulated utilities. The Commission has a constitutional duty to prohibit the degradation, diminution, and depletion of Pennsylvania's public natural resources under the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution, as set forth by the Pennsylvania Supreme Court in *Pennsylvania Env'tl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017). Solely focusing on regional needs and ignoring the negative impacts of the IEC Project on Pennsylvania is contrary to Pennsylvania's regulatory, statutory, and constitutional standards. To comply with such standards, as part of its need inquiry, the Commission must weigh both the environmental and economic impacts to Pennsylvania. (*See* 66 Pa. C.S. § 1501; 15 Pa. C.S. § 1511(c); 52 Pa. Code § 57.76(a)(3)-(4); Pa. Const. art. I, § 27).

Based on the statutory, regulatory, and constitutional obligations stated above, the R.D. properly found that the Commission is not required to determine if the Project is necessary based on regional congestion needs only. (*See* Doc. 1-3, p. 89). Consistent with such obligations, the R.D. concluded the Commission's finding of need for the IEC Project is broad and must include the Project's significant adverse environmental and economic impacts on Pennsylvania. (*See* Doc. 1-3, pp. 89, 123-131; *see also Energy Conservation Council of Pa. v. Pa. Pub. Util. Comm'n*, 25 A.3d 440, 449 (Pa. Cmwlth. 2011) (citing 52 Pa. Code § 57.76(a)(3) that requires a PUC

finding of “minimum adverse environmental impact” before granting an application for a proposed HV line)). Further, as stated above, the R.D. considered the needs and benefits of the IEC Project for the entire PJM region.

Clearly, there was no dormant Commerce Clause violation as the PUC did not consider in-state interests at the expense of regional, interstate interests. Additionally, the PUC did not engage in local protectionism or discriminate against interstate commerce in concluding that there is no need for the IEC Project.

II. Transource’s Claims are Barred by Claim Preclusion.

Plaintiff’s federal and state actions are based on the identical issue of whether the PUC’s independent determination of no need for the IEC Project under Pennsylvania law is unlawful because PJM found a need for and approved the IEC Project pursuant to PJM’s FERC-approved transmission planning process.

Plaintiff has made its same arguments in the Commonwealth Court appeal. This “element is satisfied in the context of a state administrative proceeding when the federal claimant can assert his constitutional claims during state-court judicial review of the administrative determination.” *O’Neill v. City of Philadelphia*, 32 F.3d 785, 792 (3d Cir. 1994). Although Plaintiff does not use the terms “preemption” or “commerce clause” in its Commonwealth Court appeal, Plaintiff nonetheless makes the same arguments as in this case.

Plaintiff's complaint asserts federal preemption and constitutional commerce clause claims. Specifically, Plaintiff contends that the PUC erred by refusing to recognize the need for mitigation of regional market congestion and rejected PJM's FERC-approved process as insufficient evidence of need under Pennsylvania law. It does so, however, through the lens of the PUC's individual regulatory decision.

Plaintiff argued, incorrectly, that "[i]n elevating Pennsylvania interests over regional interests, the PUC ignored its statutory mandate to participate in regional planning." (*See* Plaintiff's Commonwealth Court Brief, p. 37, a true and correct copy of which is attached hereto as Exhibit A). Plaintiff styled this as a "Pennsylvania-first" approach, while it now calls this a "Pennsylvania-only" standard. (*See id.*; Doc. 1, ¶ 4). The underlying arguments, however, are exactly the same.

Here, Plaintiff contends that the PUC is "hoarding a resource for itself and burdening its export to other states for local economic advantage." (*See* Doc. 1, ¶ 6). Plaintiff argues that the PUC engaged in "local protectionism" by refusing to allow connections with Maryland for in-state economic reasons[,] specifically "to prevent commerce in order to hold onto an in-state economic advantage." (*See* Doc. 1, ¶¶ 78-79). In Commonwealth Court, Plaintiff argued that "[p]reventing overall wholesale rate benefits to the region and other states, such as Maryland, on the basis that the project may provide wholesale rate detriments to Pennsylvania defies the PUC's statutory obligation to participate in regional planning." (*See* Exhibit, p. 44).

Plaintiff's Commonwealth Court argument aligns with the dormant Commerce Clause argument it advances in this Court. In fact, they are the same argument.

Plaintiff further contends that the PUC is "imposing burdens on interstate commerce that substantially outweigh any local benefit." (*See* Doc. 1, ¶ 6). In Commonwealth Court, Plaintiff advanced this argument by asserting that "when assessing whether a line built to promote regional efficiency is 'proper' as a matter of state law, or 'needed' as a matter of PUC regulation, the Commission must consider the regional perspective[.]" (*See* Exhibit A, p. 42). Plaintiff asserted that Pennsylvania "[c]ustomers in front of the bottleneck are paying artificially high prices. The so-called 'benefits' of congestion, i.e., the fact that customers in front of the constraint are paying lower than competitive prices, are not benefits at all." (*See* Exhibit, p. 42). Again, Plaintiff has already made its dormant Commerce Clause argument in Commonwealth Court and now seeks a second bite of the apple in federal court.

Additionally, Plaintiff failed to preserve its federal law claims before the PUC. Plaintiff only attempted to reserve its federal law claims in Commonwealth Court after Plaintiff litigated the matter before the PUC. To properly preserve those claims, Plaintiff should have reserved its federal law claims before the PUC. A party must expressly reserve federal law claims "throughout the course of the state proceedings." *See Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d

813, 820 (3d Cir. 1994) (quoting *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411, 421 (1964)). Furthermore, the PUC properly objected to Plaintiff's attempted reservation of its federal claims in Commonwealth Court. (*See* Doc. 148, pp. 45-46).

Plaintiff takes umbrage with the fact that its Certificate of Public Convenience was revoked—not that it was subject to PUC review in the first place. In effect, proceeding with federal review would set the precedent for other utilities subject to adverse PUC decisions to seek relief through a “parallel, additional, federal, regulatory review mechanism” when prescribed state review felt unfavorable. *Bath Memorial Hosp. v. Maine Health Care Fin. Comm'n*, 853 F.2d 1007, 1013 (1st Cir. 1988).

Instead, proper review of how the PUC came to its discretionary decision to revoke Plaintiff's certificate should flow through state court proceedings so that coherent regulatory policy prevails. Plaintiff's complaint involving an individual regulatory decision entangles a “skein of state law that must be untangled before the federal case can proceed.” *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674 (1963). Therefore, this court should grant summary judgment against Plaintiff. Moreover, permitting such federal review would be devastating to state efforts to maintain regulatory policy due to the onslaught of challenges that would follow.

Because Plaintiff has raised each of its federal claims in Commonwealth Court that it raises again in this case, its claims are precluded in federal court. This Court should grant summary judgment against Plaintiff.

CONCLUSION

The PUC Order correctly considered the need for the IEC Project based on the entire PJM region. The Commonwealth Court held accordingly. Further, the “Pennsylvania-also” approach to determining need did not discount the regional need. In fact, the PUC recognized the significance of considering the regional need for the IEC Project, but correctly found that the underlying data did not reflect a current and existing regional level need.

The PUC did not engage in local protectionism in finding that Pennsylvania had no need for the IEC Project based on negative impacts on Pennsylvania. It could not have discriminated on interstate commerce when no bona fide regional need had been established. There was simply no dormant Commerce Clause violation where in-state interests were not considered at the expense of interstate interests.

Finally, the claims Plaintiff asserts are barred by claim preclusion because Plaintiff already raised and argued those claims in Commonwealth Court. While Plaintiff did not use the terms “preemption” or “commerce clause” in its

Commonwealth Court appeal, its underlying arguments were exactly the same. As reflected by the PUC's objection to Plaintiff's attempt to reserve its federal law claims in Commonwealth Court, those federal law claims were fully litigated in that state court. Accordingly, this Court should grant summary judgment against Plaintiff.

Respectfully submitted,

Date: March 13, 2023

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CERTIFICATE OF WORD COUNT

I, Scott T. Wyland, hereby certify that the foregoing brief contains 4,106 words in compliance with Local Rule 7.8(b).

Date: March 13, 2023

s/ Scott T. Wyland
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