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

Transource Pennsylvania LLC,	:	
Plaintiff	:	
	:	
v.	:	**No. No. 1:21-CV-1101**
	:	
Gladys Brown Dutrieuille,	:	**Judge Wilson**
Chairman, Pennsylvania Public	:	**Electronically Filed Document**
Utility Commission, David W. Sweet,	:	***Complaint Filed 06/22/21***
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		

DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MOTION FOR SPEEDY HEARING UNDER FRCP 57

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INTRODUCTION

For the reasons set forth in the PUC's brief in support of its motion to dismiss (*see* Doc. 58), this action should be dismissed because Plaintiff lacks standing. The PUC raised a factual challenge to standing under Rule 12(b)(1) and Plaintiff must provide evidence sufficient to establish standing in order to defeat the motion and proceed with this case under Article III of the United States Constitution. Plaintiff has not done so and the action should be dismissed for this reason alone. In addition, Plaintiff's claims should also be dismissed under Rule 12(b)(6) because they are barred by the doctrines of issue preclusion and claim preclusion and fail substantively as a matter of law. Thus, there is no reason for the Court to decide Plaintiff's motion for summary judgment at all because each of these threshold issues is dispositive of Plaintiff's complaint.

However, as described below, there are also a number of disputed issues of material fact that need to be explored before judgment may be awarded. The impropriety of judgment is highlighted by the following list of representative fact issues:

- How did PJM reach a determination in 2014 that there was a need for additional utility infrastructure in Pennsylvania to alleviate congestion? Who was present when the determination was made? Was the PUC, other entities or people who would be affected by the decision involved in PJM's planning process? Why or why not?
- Is PJM's determination of need still valid today when the congestion it identified in 2014 has declined dramatically and is practically non-existent?

- What is the effect of recent legislation in Virginia, Maryland and the District of Columbia promoting local renewable generation on PJM's projected congestion estimates made in 2014? Why has PJM refrained from reassessing its determination of need in order to consider these developments?
- Are the IEC Projects – which would cost nearly $500 million – cost effective given the precipitous decline in congestion?
- What is the most recent estimate of the costs of the IEC Projects, and what costs does PJM include in its cost-benefit analysis? Does PJM include sunk costs in reevaluating the cost-benefit of the project? Why or why not?
- What did PJM mean when it testified during that PUC proceeding that: "the Commission should make an independent determination of the need for the IEC Project, considering the likely costs (including environmental and land-use impacts) and benefits, as set forth in Pennsylvania law and regulations"?
- Does AEP exert any influence over PJM? What is the relationship between the numerous AEP subsidiaries that are members of PJM and PJM's management and Board that are allegedly independent? How much in fees and contributions do AEP subsidiaries pay to PJM on an annual basis? Where does the money go?
- What evidence is there that the denial of Transource's siting applications would lead to higher energy prices for customers in other states? How many customers would be affected? What studies have been conducted on this topic? Have any such customers come forward to raise any concerns? Why or why not?
- Has AEP requested that PJM not remove the IEC Projects from the RTEP? If so, when did AEP made such request(s) and to whom?
- Has PJM management provided a recommendation to the PJM Board about keeping or removing the EIC Projects from the RTEP? If so, when was the recommendation made and what was it?
- How does the PJM Board give public notice of the date, time, and location of its meetings? Where does the PJM Board list the agenda for its meeting? What opportunities for public participation and attendance of PJM Board meetings exist?
- Is the PUC a state entity entitled to Eleventh Amendment immunity? How would the PUC satisfy an award of attorneys' fees under 42 USC §1988 when any award would likely be in excess of its yearly budget and the PUC has a very limited ability to generate

additional funds independently of the Pennsylvania General Assembly? What level of autonomy does the PUC have?

The foregoing is but a sampling of the factual issues that would have to be explored before judgment could be awarded. Determination of each of these issues would further involve an assessment of interrelated factual issues, the credibility of witnesses, the persuasiveness of experts, and all the usual nuances of fact determination. Plaintiff's motion for summary judgment asks the Court to conduct a trial on paper before any fact discovery has occurred and before any of the issues of material fact have been decided. This is improper under Rule 56 and the motion should also be denied for these reasons and those described further below.

I. Procedural History

On June 22, 2021, Plaintiff filed a two-count complaint against Defendants for preemption and violation of the dormant commerce clause. Doc. 1 at 32 and 36. Ten days later, on July 2, 2021, Plaintiff filed a motion and brief in support of its motion for summary judgment, and a motion and brief in support of its motion for speedy hearing. Docs 20, 20-1, 21, and 21-1. Plaintiff also filed a statement of undisputed material facts. Doc. 20-3. Defendants' responses to Plaintiff's statement of material facts are being filed contemporaneously.[1] On July 23, 2021,

[1] Defendants have submitted, pursuant to LR 56.1, Defendants' Response to Plaintiff's Statement of Undisputed Material Facts.

Defendants filed a motion to dismiss under F.R.C.P. 12(b)(1) and 12(b)(6) and a brief in support. For the reasons set forth below, Plaintiff's motions should be denied.

A. Pennsylvania Public Utility Commission's ("PUC" or "Commission") Proceedings

At the heart of this matter is a lengthy electric transmission siting and eminent domain proceeding concerning a utility transmission project that developed dynamically over the course of more than three years. The applicant in that proceeding is also the Plaintiff in this proceeding—a public utility company that builds electric transmission facilities. Plaintiff revised its justification for the project on multiple occasions. Doc. 20-4 at 18-20, 64-5. Additionally, the regional transmission provider—PJM Interconnection, L.L.C. ("PJM")—that plans parts of the regional transmission grid, evaluates, and selects certain transmission projects for inclusion in its transmission plan changed its methodology for evaluating electric transmission projects of this type while the PUC proceeding was ongoing. Doc. 20-6 at 31-3. There was a temporary stay of the proceeding to pursue settlement discussions, at the request of Plaintiff, a proposed revision to the location of one part of the project's route with a new co-applicant, a partial settlement, and an adjudication by an Administrative Law Judge ("ALJ") of the PUC. Doc. 20-4 at 8-22.

To say that this application was contested would be an understatement. There were over eighty interventions before the PUC, many in response to the 133 eminent domain applications filed by Plaintiff, as well as multiple protests, including protests filed by the Pennsylvania Office of Consumer Advocate ("PAOCA") and Franklin County. Doc. 20-4 at 10-12. Over the course of the following three years, the ALJ issued fifteen prehearing orders, held several days of evidentiary hearings, admitted thousands of pages of record, and issued a recommended decision on December 23, 2020 ("ALJ's R.D.") that the siting application be denied. Doc. 20-4 at 8-22. The ALJ concluded that the applicants had failed to show need for the project within the meaning of the PUC's regulations and Pennsylvania Public Utility Code, 66 Pa.C.S. §§101 *et seq*., and that the project would have detrimental economic and environmental impacts on real estate values, farming practices, natural springs, trout fishing, an elementary school, the Tim Cook Memorial Cross Country Course, businesses, the Owl's Club, local government, and tourism in Franklin County. Doc. 20-6 at 7.

Under the applicable Pennsylvania statute, each public utility is obligated to furnish and maintain adequate, efficient, safe, and reasonable service and facilities. 66 Pa.C.S. §1501. In addition, public utilities proposing to locate and construct an overhead transmission line with a voltage design greater than 100 kV need to seek and obtain approval by the PUC prior to commencing construction. 52 Pa. Code

§§57.1, 57.71. Hearing, notice, and opportunity to intervene and participate in the siting process by affected parties are essential elements of the due process provisions in the Commission's siting regulation. *See* 52 Pa. Code §57.75(a)–(d).

The Commission may not grant a siting application for a proposed transmission line unless it finds that all of the following four requirements are met:

> (1) There is a need for it;
> (2) That it will not create an unreasonable risk of danger to the health and safety of the public;
> (3) That it is in compliance with applicable statutes and regulations providing for the protection of the natural resources of the Commonwealth;
> (4) That it will have minimum adverse environmental impact, considering the electric power needs of the public, the state of available technology and the available alternatives.

52 Pa. Code §57.76(a).

During its hearing, the Commission is required to accept relevant evidence in support of these four requirements, including, but not limited to: 1) the present and future necessity of the proposed transmission line in furnishing service to the public; 2) the safety of the proposed line; 3) the efforts which have been and will be made to minimize the impact of the proposed line on land use, soil and sedimentation, plant and wildlife habitats, terrain hydrology, landscape, archeologic areas, geologic areas, historic areas, scenic areas, wilderness areas, and scenic rivers; and 4) the availability of reasonable alternative routes. 52 Pa. Code

§57.75(e). The applicant has the burden of proof to show that all four requirements are met. 52 Pa. Code §57.76(a), 66 Pa.C.S. §332(a).

In addition, a public utility may not exercise eminent domain authority to condemn property for the purposes of constructing aerial transmission or distribution facilities without first obtaining a finding from the Commission that the taking is "necessary or proper" under Pennsylvania statutory law:

> (c) The powers conferred by subsection (a) [for the running of aerial electric facilities] may be exercised to condemn property … only after the Pennsylvania Public Utility Commission, upon application of the public utility corporation, has found and determined, *after notice and opportunity for hearing*, that the service to be furnished by the corporation through the exercise of those powers is necessary or proper for the service, accommodation, convenience or safety of the public.

15 Pa.C.S. §1511(c) (emphasis added).

The ALJ found that the Plaintiff and its co-applicant, PPL Electric Utilities Corporation ("PPL"), failed to meet three of the four elements of the Commission's siting regulations and raised concerns about the fourth. Doc. 20-6 at 132-135. The instant complaint is filed by only one of the two co-applicants, Transource Pennsylvania LLC, and challenges only one of the four legal determinations made by the ALJ—the "need" element under the Commission's siting regulations at 52 Pa. Code §57.76(a)(1). Therefore, a finding of legal error by the Commission regarding its need determination will not result in a reversal of

the ALJ's determinations regarding the remaining siting requirements in 52 Pa. Code §57.76(a)(2)–(4).

On January 12, 2021, Transource and PPL jointly filed with the Full Commission Exceptions[2] to the ALJ's R.D., arguing, among other things, that the ALJ's R.D. "confuses federal and state roles" and that the determination of need by PJM is controlling and "clearly satisfied the need requirements under Pennsylvania law." Doc. 58-5 at 26, 16. The companies also sought reversal of the ALJ's determination regarding the other siting requirements independent of need.

On May 24, 2021, the PUC issued an order granting, in part, and denying, in part, the Exceptions, and adopting the ALJ's R.D., as modified by the Order ("PUC's May 2021 Order"). Doc. 20-4 at 6. The Commission denied the siting application because Plaintiff failed to establish, by a preponderance of the evidence, the need for the proposed transmission lines; rejected the authorizations to exercise eminent domain; and directed that Transource's provisional certificate to operate as a public utility in Pennsylvania be rescinded. *Id.* The PUC concluded that because "the evidence is insufficient to establish the required element of 'need' under 52 Pa. Code §57.76(a)(1), the arguments related to the other required elements under 52 Pa. Code §57.76(a)(2)–(4) are rendered moot and

[2] Under the Commission's governing statute, exceptions to an ALJ's recommended decision serve as an appeal to the entire Commission. 66 Pa.C.S. §335(b)–(c).

shall not be addressed." *Id*. at 67-8. The PUC's May 2021 Order became a final appealable order, and the Commission relinquished jurisdiction of this matter upon receipt of service of Transource's and PPL's petition for review in the Pennsylvania Commonwealth Court.

B. Procedural and Substantive Differences Between the PUC's Siting Process and PJM's Transmission Planning and Selection Process

The ALJ's R.D. is the product of a quasi-judicial, on-the-record proceeding that includes a presiding ALJ who has the power to administer oaths, conduct evidentiary hearings, allow for cross-examination, rule on motions, review briefs submitted by the parties, and issue recommended decisions with findings of fact and conclusions of law. *See* 66 Pa.C.S. §331; 2 Pa.C.S. §§504–507. Pursuant to the Administrative Act and Judicial Code, the PUC's May 2021 Order reviewing the ALJ's R.D. is a final order subject to appellate judicial review by the Commonwealth Court of Pennsylvania. 2 Pa.C.S. §§701–704 (Judicial Review of Commonwealth Agency Action); 42 Pa.C.S. §763.[3] These procedural protections

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[3] Appellate review is limited to determining whether (1) a constitutional violation or error has occurred; (2) the decision is in accordance with the law; and (3) the necessary findings of fact are supported by substantial evidence. *PECO v. Pa. Pub. Util. Comm'n*, 791 A.2d 1155 (Pa. 2002); 2 Pa.C.S. §704.

are essential because the Commission's ultimate determination may affect parties' property and constitutional rights.[4]

By contrast, PJM is a federally regulated public utility, a limited liability company registered under Delaware law that also serves as a regional transmission provider. *See Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.,* ("PJM's OA") Section 2, ("Exhibit A" at 66-70), also available at: https://pjm.com/directory/merged-tariffs/oa.pdf. PJM consists of members, including Plaintiff and its parent companies, Transource Energy LLC, and American Electric Power ("AEP"). *See* https://www.pjm.com/about-pjm/member-services/member-list.aspx ("Exhibit B"); *see also* Doc. 1-3 at 20 and 56. AEP is also PJM's largest transmission-owning member and describes itself as owning "the nation's largest electricity transmission system." *See* https://www.aep.com/about/businesses/transmission ("Exhibit C" at 1). PJM collects annual dues from its corporate members as a condition of their membership. *See* https://www.pjm.com/about-pjm/member-services/membership-enrollment ("Exhibit D" at 1). Members have voting rights in various PJM committees and stakeholder activities. PJM's OA, Sections 11.6-7, ("Exhibit E" at

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[4] As a government action, the PUC's application of its siting regulations must be consistent with the Environmental Rights Amendment, Article I, Section 27 of the Pennsylvania Constitution. *See Pa. Envtl. Def. Fund. v. Commonwealth*, 161 A.3d 911, 930 (Pa. 2017) (*PEDF*).

10-12), also available at https://pjm.com/directory/merged-tariffs/oa.pdf. Section 11.4 of PJM's OA states that "[m]embers shall participate in regional transmission expansion planning in accordance with the Regional Transmission Expansion Planning Protocol set forth in Operating Agreement, Schedule 6." Exhibit E at 8.

Sections 1.5.6 and 1.5.7 of Schedule 6 charge PJM's Office of Interconnection with the responsibility to develop a Regional Transmission Expansion Plan ("RTEP") and detail the process that PJM uses to develop economic-based enhancement or expansions such as Plaintiff's project at issue here. *See* Doc. 20-8 at 14-26. The process includes an opportunity for review of and comment regarding PJM's assumptions by the Transmission Expansion Advisory Committee ("TEAC") of PJM after which the PJM Board can accept or reject the *recommendation* provided by PJM's Office of Interconnection. *Id.*

While the TEAC is open to non-members, its meetings are limited to review of PJM's assumptions and providing feedback. Unlike a governmental body that is obligated to follow principles of due process, PJM is not subject to requirements to provide notice to all affected persons, hold on-the-record proceedings, provide planning information subject to oath, conduct or allow for evidentiary hearings or discovery, provide an opportunity for cross-examination, nor—most importantly—support the PJM Board's ultimate determination with actual findings of fact regarding what specific recommendations were accepted, what evidence was

considered relevant and persuasive, and what conclusions of law the Board reached regarding how the specific elements of PJM's tariff were met. Quite to the contrary—the PJM Board's decision to accept or reject the *recommendation* provided by PJM's Office of Interconnection is made behind closed doors and communicated to the rest of the world after the fact. PJM's process does not contain any semblance of an official governmental action, and the suggestion that it may be sufficient to adjudicate certain elements, *such as need or necessity*, of affected parties' rights regarding their constitutional claims of taking or environmental rights under Pennsylvania's constitution is deeply flawed.

Furthermore, because PJM's TEAC process and the PJM Board's decision take place before the Commission's siting application process—where the Commission acts in an adjudicatory capacity with respect to PJM's project selection and the rights of affected parties—the Commission does not participate actively in the TEAC, other than the occasional and infrequent monitoring for informational purposes. Moreover, by the time a siting application is before the Commission, staff employed by PJM's Office of Interconnection will often serve as witnesses for the applicant regarding PJM's selection of the project and its "need". This case was no exception, and PJM's employees Timothy Horger and Steven Herling served as primary witnesses for Plaintiff regarding the "need" determination. Doc. 1-3 at 74-77, 78-81. As with any witness being presented in an adversarial proceeding,

PJM's employees are subject to cross-examination to test the veracity and credibility of their proffered testimony.

C. Plaintiff's Contemporaneous Appeal of the Commission's Determination in State Court

On June 23, 2021, Plaintiff and co-applicant PPL filed with the Commonwealth Court of Pennsylvania a Petition for Review of the PUC's May 2021 Order. ("Exhibit F"). The petition argues that the Commission "improperly determined that PJM's analysis and approval of the Project is insufficient to meet the need standard under Pennsylvania law;" that it improperly "rejected the results of PJM's FERC-approved process for evaluating market efficiency projects as insufficient evidence on need under Pennsylvania law;" and that "the PUC Order violates both the Supremacy Clause and the Commerce Clause of the United States Constitution." Exhibit F at 9, 14. Thus, it is clear that Plaintiff intends to include the preemption claim that it first raised in the PUC administrative proceeding in its appeal to the Commonwealth Court as well irrespective of any arguments to the contrary.[5] It is undisputed that the Commonwealth Court has jurisdiction to adjudicate challenges to the Supremacy Clause and the Commerce Clause of the

[5] Plaintiff and the other petitioner attempt to conceal their preemption argument under the auspices of challenges to state law, and one of them even asserts an *England Reservation* for its preemption and Dormant Commerce Clause arguments raised in this Court. *See England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964); *see* Exhibit F at 9, 13.

United States Constitution. *Kentucky W.*, 837 F.2d 600 (3d. Cir. 1998); *Pike Cnty. Light & Power v. Pa. Pub. Util. Comm'n*, 465 A.2d 735 (Pa. Commw. Ct. 1983); *Pa. Power Co. v. Pa. Pub. Util. Comm'n*, 561 A.2d 43 (Pa. Commw. Ct. 1989), *aff'd* 587 A.2d 312 (Pa. 1991), *cert. denied* 502 U.S. 821 (1991), *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n.*, 413 A.2d 1037 (Pa. 1980), *Indianapolis Power & Light Co. v. Pa. Pub. Util. Comm'n*, 711 A.2d 1071 (Pa. Commw. Ct. 1998).

Finally, petitioners also challenge the Commission's determination regarding the remaining siting requirements under state law. Exhibit F at 14-15.

QUESTION PRESENTED FOR REVIEW

1. Has Plaintiff Met the Burden for Entry of Summary Judgment?

   Suggested Answer: No.

2. Has Plaintiff Met the Burden of Proof for Speedy Hearing Under F.R.C.P. 57?

   Suggested Answer: No.

ARGUMENT

Summary judgment is appropriate "if the pleadings, the discovery [including depositions, answers to interrogatories, and admissions on file] and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." F.R.C.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 340 (3d Cir. 1990). At the summary judgment stage, the court must consider all evidence and inferences drawn therefrom in the light most favorable to the non-moving party. *Andreoli v. Gates*, 482 F.3d 641, 647 (3d Cir. 2007).

A dispute over facts that might affect the outcome of the suit under the governing substantive law, *i.e.,* the material facts, precludes the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is only appropriate when a reasonable jury could not find for the non-movant even if it accepted his version of the facts. *Id*. at 249. In ruling on summary judgment motions, the Court must perform the "threshold inquiry of determining whether … there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Wishkin v. Potter*, 476 F.3d 180, 184 (3d Cir. 2007).

I. Plaintiff's Preemption Claim Fails

Plaintiff asks for summary judgment on its preemption claim alleging that "the federal need determination preempts the PUC's contrary decision." Doc. 20-1 at 13.

A. Plaintiff's Preemption Claim Is Barred By Issue Preclusion

The Court need not address Plaintiff's substantive claim of preemption, because Plaintiff has fully litigated this claim in the PUC administrative proceeding and preclusion law applies to PUC proceedings under binding Third Circuit and Pennsylvania state court precedent. The "decisions of [a] state agenc[y] responsible for utility regulation" like the PUC "should be given preclusive effect to the extent afforded under [Pennsylvania] law." *Crossroads Cogeneration Corp. v. Orange & Rockland Utils., Inc.*, 159 F.3d 129, 135 (3d Cir. 1998). Under Pennsylvania law, "decisions of Commonwealth administrative agencies, such as the [PUC], are entitled to res judicata and collateral estoppel effect where the agency is acting in a judicial capacity and resolves disputed issues of fact properly before it, which parties had an opportunity to litigate." *Respond Power LLC v. Pa. Pub. Util. Comm'n*, 2021 WL 446097, at *8 (Pa. Commw. Ct. Feb. 9, 2021), *Kentucky W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 721 F. Supp. 710, 715 (M.D. Pa. 1989); *aff'd*, 899 F.2d 1217 (3d Cir. 1990). Therefore, preclusion law applies to the PUC May 2021 Order.

Specifically, Transource argued before the PUC that any independent determination of need by the PUC was "preempted by the federal power pursuant to which PJM conducts its selection process for regional transmission planning purposes, including Project 9A." Doc. 1-2 at 60; Doc. 58-5 at 26-28. The issue of preemption was actually litigated because the PUC considered and "expressly reject[ed]" Transource's arguments. Doc. 1-2 at 60. In addition, the PUC's May 2021 Order is a final and valid judgment, and the issue of preemption was central to the judgment.

For these reasons, and those more fully briefed in Defendants' Brief in Support of Their Motion to Dismiss the Complaint, Transource's attempt to relitigate the issue of preemption in this forum is barred by the doctrine of issue preclusion and Transource's preemption claim should be dismissed.

B. The PUC's Decision Is Not Preempted

Throughout its brief, Plaintiff conflates PJM's Office of Interconnection's *recommendation* and PJM Board's selection of the project for inclusion in the RTEP with a specific established "need" for that project that has been reviewed and approved by FERC and is somehow "binding" on the PUC's siting determination. Plaintiff claims that the Commission's decision 1) directly conflicts with federal law, 2) stands as an obstacle to the accomplishment of federal

objectives, and 3) is not a valid exercise of the state's siting authority. Plaintiff's conclusions are neither grounded in law, nor based on undisputed issues of fact.

1. The PUC's Decision Does Not Conflict With Federal Law

Before and after the passage of the Federal Power Act ("FPA"), 16 U.S.C. §824 *et seq*., states have regulated public utilities through the exercise of their police powers. The FPA created a jurisdictional divide in the regulation of public utilities between the states and the federal government by declaring federal regulation "relating to the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" as necessary in the public interest, but with the caveat that "such Federal regulation... [extends] only to those matters which are not subject to regulation by the States." 16 U.S.C. §824(a). Before and after the passage of the FPA, states continued to exercise their siting authority over electric transmission facilities—an authority that is separate and apart of FERC's transmission and wholesale electricity *ratemaking* authority. *See Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) ("states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities").

It was not until the passage of the Energy Policy Act of 2005 ("EPAct 2005"), P. L. 109-58 (8/8/2005), that Congress gave FERC its first and only transmission "backstop" siting authority, which applied only to designated

"national interest electric transmission corridors" ("NITC") and only where a state "has withheld approval for more than one year after the filing of an application." 16 U.S.C. §824p. FERC received its authority in order to ameliorate "electric energy transmission capacity constraints or congestion." 16 U.S.C. §824p(a)(2).

It is undisputed that Plaintiff's project is not located within a NITC and is not subject to FERC's backstop siting authority. Doc 20-4 at 52. However, even if it were located in a NITC, FERC would still be without authority to reverse a state's denial of siting authority. This very issue was presented in *Piedmont Environmental,* where the Fourth Circuit Court of Appeals addressed the issue of whether FERC's final rulemaking order—asserting that it had authority to exercise backstop siting authority after a state had denied siting authority within the one-year statutory time frame—was contrary to the plain meaning of the statute. The court held that the language was unambiguous and that a state's denial did not constitute withholding approval:

> Under [FERC's] reading it would be futile for a state commission to deny a permit based on traditional considerations like cost and benefit, land use and environmental impacts, and health and safety. It would be futile, in other words, for a commission to do its normal work. When the five circumstances in §216(b)(1) are considered together, they indicate that *Congress intended only a measured, although important, transfer of jurisdiction to FERC*. … Indeed, if Congress had intended to take the monumental step of preempting state jurisdiction *every time* a state commission denies a

> permit in a national interest corridor, it would surely have said so directly.
>
> ***
>
> … when a state commission denies an application outright, it acts with transparency and engages in a legitimate use of its traditional powers.

Piedmont Environmental at 314-5.

The Fourth Circuit was clear that no conflict arises where a state denies siting authority to a transmission project selected for inclusion in a NITC and designed to alleviate congestion. Furthermore, FERC's grant of authority over "the transmission of electric energy in interstate commerce" is limited to matters "not subject to regulation by the States." 16 U.S.C. §824(a).[6] Plaintiff's project is neither located in a NITC, thereby invoking FERC's backstop siting authority, nor within FERC's general grant of authority under the FPA. It is well settled law that FERC cannot do indirectly that which it cannot do directly. *S. Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1091-92 (9th Cir. 2010) (citing *Altamont Gas Transmission Co. v. FERC,* 92 F.3d 1239, 1248 (D.C. Cir. 1996)).

The PUC's May 2021 Order specifically rejected Plaintiff's argument that FERC's authority over transmission planning exercised under Order 1000 in any

[6] EPAct 2005 also gave FERC authority over electric reliability of the bulk power system to approve mandatory reliability standards. 16 U.S.C. §824o. Importantly, Congress added a savings provision in the law stating that "this section does not authorize … the Commission to order the construction of additional generation or transmission capacity". 16 U.S.C. §824o(i)(2).

way preempts state's siting and construction decisions. Doc. 20-4 at 60-62. The Commission concluded that its siting proceeding was "for the express purpose of deciding 'what needs to be built, where it needs to be built, and who needs to build it,'" citing to FERC's disavowal that such decisions are within its authority. Doc. 20-4 at 62. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 57–58 (D.C. Cir. 2014). Tellingly, Plaintiff, in relying on *S.C. Pub. Serv. Auth.,* provides only a partial quote of FERC's disavowal and omits the relevant part that "what needs to be built," in FERC's opinion, is part of the state's siting prerogative. Doc. 20-1 at 11. This was not only FERC's opinion, but in fact was also PJM's testimony during the siting process:

> **Q. In your opinion, again as a matter of regulatory policy and not as a question of law, should PJM's selection of the IEC Project affect this Commission's determination of need for the IEC Project?**
>
> A. In my opinion, as a matter of sound public policy, the Commission should make an independent determination of the need for the IEC Project, considering the likely costs (including environmental and land-use impacts) and benefits, as set forth in Pennsylvania law and regulations.
>
> OCA St. 1 at 43-44 (footnotes omitted).

Doc. 20-6 at 105.

This is exactly what the Commission did. It reviewed PJM's projected levels of congestion against actual congestion levels and observed a marked decline from 2014 when congestion costs on the AP South Reactive Interface were

approximately $486.8 million, or 25.2 percent of total PJM congestion costs, relative to subsequent years. In 2016, congestion costs had fallen to $16.8 million, or 1.6 percent of total PJM congestion costs; in 2017, they represented $21.6 million, or 3.1 of total costs; in 2018, levels were at $20.8 million, or 1.6 percent of total costs; in 2019, they were down to $14.5 million; and for the first quarter of 2020, they amounted to a miniscule $900,000, failing to reach the 25 most congested constraints on the PJM system. Doc. 20-6 at 27-8, 96-7. The ALJ found that since the selection of Plaintiff's project by PJM, peak demand for electricity in the PJM region and the specific regions that the project was designed to address has decreased substantially. Doc. 20-6 at 18. This downward trend is continuing during the coronavirus pandemic. *Id*. At the same time, the project's capital cost is estimated at $496.17 million and can continue to grow, because the project is not subject to cost caps and is entitled to seek any reasonable and prudent expenses that exceed the estimated cost. *Id*. at 39. The ALJ noted that Monitoring Analytics, LLC, PJM's Independent Market Monitor, charged by FERC with monitoring and promoting robust, competitive, and nondiscriminatory electric power market in PJM recommended in its most recent PJM State of the Market Report that PJM's market efficiency process be eliminated. *Id*. at 39.

Finally, Plaintiff provides no siting decisions in support of its strained conflict preemption argument. Instead, it relies on decisions addressing FERC's

ratemaking authority over wholesale electricity sales and transmission rates under the FPA or different statutes altogether. If a siting decision where a state's traditional siting authority was found to be preempted by FERC existed, Plaintiff would have brought it to the Court's attention. That Plaintiff did not show clearly that no such authority exists.

2. The PUC's Decision Is Not An Obstacle To Federal Objectives

Plaintiff challenges the legality of the PUC's examination of PJM's analysis and assumptions that lead to PJM's inclusion of Plaintiff's project in the RTEP. According to Plaintiff, the only reasonable and lawful conclusion that the Commission could have reached on the issue of need is one that arrives at the same result as PJM, even though PJM stated unambiguously during the PUC proceeding that the Commission "should make an independent determination of the need for the IEC Project." Doc. 20-6 at 105. Plaintiff further decries the "Pennsylvania-also" standard that the Commission used in its evaluation of the project but fails to mention that the ALJ assessed the impact of this project on a regional basis and specifically discussed the effect on all PJM zones and states. Doc. 20-6 at 37-40. Furthermore, the ALJ's findings did not only focus on "parochial interests," as Plaintiff claims, but also noted that, under PJM's model, certain zones in Western Pennsylvania would experience decreased prices while other zones would experience increased prices. Doc. 20-6 at 38. Additionally, the ALJ found that the

passage of recent legislation in Virginia, Maryland and the District of Columbia promoting local renewable generation could significantly lower PJM's projected congestion estimate and that this material development was not included in PJM's model. Doc. 20-6 53-4.

The PUC's decision did not serve as an obstacle to federal objectives by examining PJM's analysis and making a determination on "what needs to be built, where it needs to be built, and who needs to build it." *See S.C. Pub. Serv. Auth.* at 57–58. This is precisely what our system of cooperative federalism was intended to achieve when Congress reserved to the states their traditional siting authority and granted FERC authority over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" as long as "such Federal regulation … extend only to those matters which are not subject to regulation by the States." 16 U.S.C. §824(a).

Plaintiff does not allege that PJM is incapable of improving its projected congestion costs modeling that bear little resemblance to actual levels, taking into consideration relevant state legislation that would have the effect of reducing congestion costs, or promptly reflecting the impacts of actual peak demand in the PJM model. Instead, Plaintiff's primary concern appears to be that the more appropriate, accurate modeling envisioned by the ALJ and PUC would show that

there is no longer a need for the project. Plaintiff's self-interested concern does not create a preemption issue.

3. The PUC's Decision Is A Valid Exercise Of Its Siting Authority

Plaintiff asserts that the PUC's determination that there was not a need for Project 9A under Pennsylvania law was not a genuine siting consideration. Plaintiff is wrong. The ALJ's R.D. concluded that the Plaintiff failed to meet its burden of proof on at least three of the four siting requirements under Pennsylvania law. Doc. 20-6 at 132-135. Plaintiff's attempt to raise conflict preemption by attacking the validity of the PUC's order ignores the fact that, apart from the negative ruling that it received on need, the ALJ also determined that Plaintiff had failed to meet its burden on the natural resources and environmental requirements.

While Plaintiff purports to offer suggestions on how the PUC can protect its residents' "legitimate interests," it omits the fact that among those residents' interests is their constitutionally protected due process right that PJM's process intentionally excludes. That right includes receiving notice and an opportunity to examine Plaintiff's and PJM's evidence presented during the state siting process, ask questions and receive answers under oath, introduce evidence that shows the inaccuracies and weaknesses of PJM's modeling projections and assumptions, compare the same against actual historical PJM data, attend evidentiary hearings, and conduct cross-examination. After all, PJM is comprised of for profit members

from the very same industry that Plaintiff asserts PJM is independent from, including Plaintiff and its corporate parents. Plaintiff's assertion that the PJM RTEP process, which, as described above, is a closed door and opaque process, has the force of federal law is not only flawed, but also dangerous. Plaintiff would place an unreviewable discretion in PJM Board decisions regarding determinations of need—which very well may be influenced (if not driven) by the profit needs of its members—above the health, safety, and environmental needs of the public that the PUC is required under law to protect.

II. Plaintiff's Dormant Commerce Clause Claim Fails

Plaintiff's commerce claim is barred by the doctrine of claim preclusion and, alternatively, fails on the merits.

A. Plaintiff's Claim Is Barred By Claim Preclusion

"Claim preclusion prevents a party from prevailing on issues he might have but did not assert in the first action." *Gregory v. Chehi*, 843 F.2d 111, 116 (3d Cir. 1988); *see Balent v. City of Wilkes-Barre*, 669 A.2d 309, 313 (Pa. 1995). "For claim preclusion to apply, Pennsylvania requires that the two actions share the following four conditions: (1) the thing sued upon or for; (2) the cause of action; (3) the persons and parties to the action; and (4) the capacity of the parties to sue or be sued." *R & J Holding Co. v. Redevelopment Auth.*, 670 F.3d 420, 427 (3d Cir. 2011). All conditions are satisfied here.

The thing sued upon is the same in both proceedings because Transource initiated the PUC administrative proceeding to seek approval of its siting applications and Transource has initiated this federal action to challenge the PUC's denial of these same siting applications. *See Kentucky W. Va. Gas*, 721 F. Supp. at 715. The cause of action is the same in both proceedings because "[t]he events giving rise to the various legal claims are the same" – i.e., the consideration of Transource's siting applications and the decision to deny those applications. *Vega v. Dep't of Transp.*, 2020 WL 4570061, at *3 (M.D. Pa. Aug. 7, 2020) (Wilson, J.). In addition, since Transource was a party in the PUC administrative proceeding and is now bringing suit against the PUC as a party in this proceeding, "[t]he third and fourth criteria" of claim preclusion "are also satisfied here." *Kentucky W. Va. Gas*, 721 F. Supp. at 715 n.11.

B. The PUC's Order Is Not In Violation Of The Dormant Commerce Clause

The PUC's May 2021 Order does not violate the Dormant Commerce Clause of the United States Constitution. Plaintiff's claim fails because the PUC's denial of Transource's siting applications did not discriminate against out-of-state utilities in favor of instate utilities. Transource was "a public utility in Pennsylvania" at the time its siting applications were considered and denied by the PUC. Doc. 1 ¶43. Thus, the PUC did not (and could not) discriminate against Transource as an out-of-state utility because Transource and its co-applicant were both instate

Pennsylvania utilities and the PUC treated them exactly the same. In these circumstances there can be no violation of the dormant Commerce Clause. *See Heffner v. Murphy*, 745 F.3d 56, 73 (3d Cir. 2014).

Instead, Transource attempts to step in the shoes of out-of-state electricity consumers and claim their alleged harm for itself. Transource's Dormant Commerce Clause argument requires this Court to make a wholly unsupported presumption that the PJM data it presented is undisputed and that the PUC based its decision in disregard of the PJM data Transource provided. The United States Supreme Court has held that "[t]he Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description in connection with the State's regulation of interstate commerce." *New Energy Co. of In. v. Limbach*, 486 U.S. 269, 278 (1988) (emphasis removed). In analyzing an alleged Dormant Commerce Clause violation, the Court must determine whether the challenged law discriminates against interstate commerce or whether the law imposes a burden on interstate commerce that is clearly excessive in relation to putative local benefits. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008). In Transource's Motion for Summary Judgment, Plaintiff alleges that the Commission's decision is both *per se* discriminatory and imposes an excessive burden on interstate commerce in relation to local benefits. Transource's Commerce Clause claim fails under both theories.

1. The PUC's Decision To Deny Transource's Application For Siting Is Not Per Se Discriminatory

Transource's *per se* Dormant Commerce Clause claim is based entirely on the unsupported presumption that PJM's data on congestion must be accepted as fact and that the PUC denied Transource's siting application because it found PJM's congestion data accurate that it would provide a substantial benefit to residents outside of Pennsylvania. Transource's heavy reliance on *New England Power Co. v. N.H.*, 455 U.S. 331 (1982), is misplaced. *New England Power Co.* involved an order by the New Hampshire Commission (NHC) that directed New England Power to stop exporting energy generated from existing infrastructure to other states in order to reduce energy prices for New Hampshire residents. *Id*. at 335. In the NHC's report accompanying its order, the NHC opined:

> New Hampshire's population and energy needs were increasing rapidly; that, primarily because of its low "generating mix" of hydroelectric energy, the Public Service Company of New Hampshire, the State's largest electric utility, had generating costs about 25% higher than those of New England Power; and that if New England Power's hydroelectric energy were sold exclusively in New Hampshire, New Hampshire customers could save approximately $25 million a year. The Commission therefore concluded that New England Power's hydroelectric energy was "required for use within the State" of New Hampshire, and that discontinuation of its exportation would serve the "public good."

Id. at 336.

The facts of this case are not at all similar. First and foremost, *New England Power Co.* did not address the construction of new utility infrastructure, which is a matter specifically reserved for the states under the FPA. *See* 16 U.S.C. §824(a) ("such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States") and §824(i)(2) ("this section does not authorize … the Commission to order the construction of additional generation or transmission capacity").

Furthermore, unlike the NHC, the PUC did not deny Transource's siting application based on the impact of wholesale electricity prices to Pennsylvania residents alone. Instead, the ALJ assessed the impact of this project on a regional basis and specifically discussed the effect on all PJM zones and states, noting that some would see increased electricity prices while others would see decreases. Doc. 20-6 at 37-40. The same result would apply to Pennsylvania where certain zones would experience decreased prices while other zones would experience increased prices. Doc. 20-6 at 38. The PUC's May 2021 Order also noted that the ALJ conducted a thorough analysis of the Public Utility Code and the PUC's regulations to determine whether Plaintiff's project demonstrated a need. Contrary to Transource's view, the PUC conducted its analysis under Section 1501 of the Public Utility Code, 66 Pa.C.S. §1501, and 52 Pa. Code §57.76(a)(1) of its

regulations. The PUC specifically stressed the importance of appropriate regional consideration in its determination:

> We note that our reading of the holding in [*In re: Application of Trans-Allegheny Interstate Line Co*., Docket No. A-110172, 2008 Pa. PUC LEXIS 60 (Opinion and Order entered December 12, 2008) (*TrAILCo Case*)] is not to imply that our consideration of the weight of the evidence excludes the relevant and important regional planning issues which Project 9A was designed to address, *i.e.*, economic congestion on the regional level. Regional 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 elements of need will be found, as it was in *TrAILCo Case*.
>
> * * *
>
> In the present case, the ALJ found the opposing Parties' arguments persuasive 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: *i.e.*, PJM's own data reflects 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. [Doc. 20-6 at 86-109]. Based upon our view of the record, we agree with the ALJ's analysis of the weight of the evidence.

Doc. 20-4 at 65.

Transource's *per se* Dormant Commerce Clause claim requires the unsupported presumption that the congestion data from PJM that Transource

presented to the ALJ must be accepted as undisputed fact and that the evidence and witness testimony submitted by Transource's opponents should be rejected in their entirety. At the hearing, it was incumbent on Transource to establish by a preponderance of the evidence that there was a need for its project. The ALJ accepted the congestion data Transource presented from PJM, but the ALJ was also required to consider the evidence Transource's opponents presented.

This is immediately distinguishable from the circumstances in *New England Power Co.* Unlike the NHC which concluded in its evidentiary findings that exporting New Hampshire's hydroelectric power *would* negatively impact electric prices to its citizens, the PUC determined that the evidence before it did not prove by a preponderance of the evidence that there was significant congestion that would be alleviated by Transource's project. In fact, the PUC expressly found Transource's opponents' evidence of congestion more accurate than the PJM study and that obviated the need for Transource's project. Transource's reliance on *New England Power Co.* does not support granting its Motion for Summary Judgment Plaintiff's *per se* Dormant Commerce Clause claim relies wholly on unsupported presumptions that PJM's congestion data is factually uncontested. This issue of disputed material fact precludes this Court from granting Plaintiff's Motion for Summary Judgment based on *per se* Dormant Commerce Clause theory.

2. The PUC's Decision To Deny Transource's Project Does Not Burden Commerce Disproportionately To Legitimate Local Benefits

Like Transource's *per se* Dormant Commerce Clause argument, Transource's *Pike* Test Dormant Commerce Clause claim also relies on its unsupported presumption that PJM's congestion data is infallible and must be accepted as fact. "Even if not *per se* unconstitutional, a state law may violate the Commerce Clause if it fails to pass muster under the balancing test outlined in *Pike v. Bruce Church, Inc.*,[397 U.S. 137 (1970)]." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Ks.*, 489 U.S. 493, 525 (1989). Where the challenged law "regulates evenhandedly to effectuate a legitimate local public interest" and "its effects on interstate commerce are only incidental" the law in question will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 142 (1970) (*citing Huron Portland Cement Co. City of Detroit*, 362 U.S. 440, 443 (1960)).

In this matter, there is a substantial factual determination that must occur to determine whether the PUC's decision correctly found that PJM's congestion data was unpersuasive in proving Transource's Project 9A would alleviate congestion. The PUC opined:

> [W]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 Commission's review of the PJM-approved project warrants examination of the underlying data and congestion trends which PJM relied upon in assessing the need to alleviate economic congestion. In such cases, 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.

Doc. 20-4 at 64.

The PUC made it clear that its review of the ALJ's R.D. required it to review the evidence that PJM relied upon to determine whether Transource demonstrated need for the project. The PUC recognized that there would be a substantial burden on some, but not all, Pennsylvania customers, as well as customers in other states, but that was only one factor in the Commission's evaluation of the evidence. Doc. 20-4 at 57, Doc. 20-6 at 37-40. The PUC also determined that PJM's data regarding congestion was speculative and far removed from observed actual congestion levels reported by PJM's Independent Market Monitor. Doc. 20-4 at 57, Doc 20-6 at 27-8, 96-7.

The ALJ opined:

> Throughout the majority of the proceedings, the exclusive reason for the project was to alleviate congestion on the AP South Interface and now Transource ignores much of the drastically reduced congestion data after 2016 to support its argument because this data undermines the main reason for the project. Actual congestion costs were significantly less at $56.2 million in 2015 and $14.5 million in 2019. OC

> St. 2, p. 17, Table 3, Monitoring Analytics, LLC *2019 States of the Market Report for PJM* at p. 543. Transource misstates the accuracy of PJM's forecasted congestion as it combines the congestion of the APSRI interface with purported "related constraints" and ignores any inaccuracies of PJM's forecasted congestion. *The historical data shows that the IEC Project is not necessary* pursuant to 66 Pa.C.S. §1501.

Doc. 20-6 at 89 (emphasis added).

Transource contends that in assessing the burden on interstate commerce, the Court must consider the implications that would be incurred if other states adopted the PUC's process. *U & I Sanitation v. City of Columbus*, 205 F.3d 1063 (8th Cir. 2000). But it is apparent that there would be no burden on interstate commerce.

To the contrary, where the evidence provided on the record at a state siting proceeding does not show, by a preponderance of the evidence, that congestion on the system exists to a level sufficient to approve a project that nears half a billion dollars – as happened here – then the denial of a siting application will serve the regional transmission system's goal of facilitating cost-efficient wholesale electricity. The opposite is also true. If Transource had provided sufficient evidence to meet its burden, then its siting application would have been granted.

As the PUC attributed more weight to the congestion data that Transource's opponents provided, the Commission ultimately rendered a decision that was not based on simply protecting electricity prices for some Pennsylvania citizens. The ALJ's R.D. and the PUC's May 2021 Order show based on all the evidence the

Commission presented, Transource failed to demonstrate that there was congestion at the AP South Reactive Interface, its only basis for the project. As such, this Court should deny Transource's Motion for Summary Judgment based on the Dormant Commerce Clause.

III. The PUC's Sovereign Immunity Bars Plaintiff's Complaint

The PUC acted in its judicial capacity in rendering its decision to deny Transource's siting application and is immune from this lawsuit pursuant to the Eleventh Amendment of the United States Constitution.

This Court must refrain from considering Transource's Motion for Summary Judgment because Transource's lawsuit violates the Eleventh Amendment of the United States Constitution. The Eleventh Amendment provides. . .

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. Amend. XI.

The Eleventh Amendment extends to a party that is considered an "arm of the state for sovereign immunity purposes when the state is the real substantial party in interest." *Patterson v. Pa. Liquor Control Bd.*, 915 F.3d 945, 950 (3d Cir. 2019) (*quoting Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945) (quotation marks omitted)). The Court must conduct a critical analysis of

the relationship between the State and the entity in question. *Id*. (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)).

In determining whether a state entity is entitled to the immunity under the Eleventh Amendment, the following factors weigh in favor of providing immunity:

> 1) whether, in the event the plaintiff prevails, the payment of the judgment would come from the state (this includes three considerations: whether the payment will come from the state's treasury, whether the agency has sufficient funds to satisfy the judgment, and whether the sovereign has immunized itself from responsibility for the agency's debts); (2) the status of the agency under state law (this includes four considerations: how state law treats the agency generally, whether the agency is separately incorporated, whether the agency can sue and be sued in its own right, and whether it is immune from state taxation); and (3) what degree of autonomy the agency enjoys.

Christy v. Pa. Tpk. Comm'n, 54 F.3d 1140, 1144–45 (3d Cir. 1995).

With regard to the PUC's immunity under the Eleventh Amendment, Courts in the Third Circuit have reached conflicting holdings. *See Smart v. Pa. Pub. Util. Comm'n.*, No. CIV. 96-3586, 1996 WL 442618 (E.D. Pa. August 2, 1996) (holding that since the PUC is an agency under the control of the Commonwealth of Pennsylvania, the Eleventh Amendment bars suit against the PUC in federal court) and *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n.*, No. Civ. A. 86-5357, 1997 WL 597963 (E.D. Pa. Sept. 15, 1997) (holding that the PUC was not entitled

to Eleventh Amendment immunity).[7] These conflicting holdings were recognized in the Western District of Pennsylvania and the Court opined that:

> [T]he record is underdeveloped concerning PA PUC's funding, status, and autonomy. Unlike PennDOT, which is a state agency, PA PUC is an independent commission by state law. *See* 71 Pa. Stat. §61(a). Accordingly, because the Eleventh Amendment immunity analysis is generally "fact-intensive," *Karns,* 879 F.3d at 513, and because the State Defendants have made no showing relative to PA PUC's entitlement to Eleventh Amendment immunity, the Court declines to dismiss Plaintiffs' §1983 claims against PA PUC on immunity grounds.

Erie CPR v. Pa. Dep't of Transp., 343 F.Supp.3d 531, 558 (W.D. Pa. 2018).

As will be discussed, the record currently before this Court is no further developed than that with which the Third Circuit District Courts have been presented in the past. The PUC should be afforded time for discovery in order to develop the factual record on this issue.

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[7] In *Nat'l R.R. Passenger Corp.*, 1997 WL 597963, the Eastern District analyzed the PUC under the three factors, giving the most weight to the source of a judgment payout to the plaintiff. *Id*. at *6. The Eastern District relied heavily on the fact that the PUC obtains its annual budget from a percentage of the "total gross intrastate operating revenues of the public utilities under its jurisdiction for the preceding calendar year." *Id*. at *7 citing 66 Pa.C.S. §510(a). These funds go into the General Fund of the State Treasury but are then earmarked for redistribution to the Commission and are not available for other uses. *Id*. citing 66 Pa.C.S. §511(a) and (b). However, this decision failed to take into consideration that the PUC is incapable of indemnifying itself from large money damages and that it is limited in the amount it can assess the utilities it regulates. Given the Eastern District's substantial lack of factual analysis, this Court should reject its holding.

A. A Judgment Against The PUC Would Come From The State Treasury

The PUC does not have an independent source of funds to satisfy a monetary component of a judgment in this matter, including an award of attorneys' fees pursuant to 42 U.S.C. §1988 *See* Doc. 1 at 41. Courts in the Third Circuit place the most emphasis on where payment of potential damages would come from in the event damages are awarded to the plaintiff when considering whether state governmental entities are subject to the Eleventh Amendment. *Id*. (*citing Fitchik v. N.J. Transit Rail Operation, Inc*., 878 F.2d 655, 659 (3d Cir. 1989) (*in banc*). Here, the PUC is in unchartered territory because it has never before been in a position where it has had to satisfy a money judgment.

Pennsylvania law recognizes the PUC as being immune from lawsuits which obviates any need for the Legislature to anticipate the PUC being sued and ultimately being liable for damages. The PUC does not have the authority to purchase liability insurance to prevent shortfalls that could arise from large money judgments so that the State would be insulated from any effect on its treasury. *See Maliandi v. Montclair State Univ.*, 845 F.3d 77 (3d Cir. 2016) (*citing Bolden v. Southeastern Pa. Transp. Auth.*, 953 F.2d 807 (3d Cir. 1991) and *Fitchik*, 873 F.2d 655). If the Legislature intended to have the PUC be a separate entity without governmental immunity, it would have been incumbent on the Legislature to direct the PUC to indemnify itself in anticipation of lawsuits from the public. The PUC is

further restricted in the amount it can assess public utilities. In developing its budget, the Public Utility Code provides:

> [T]he commission shall estimate its total expenditures in the administration of this part for the fiscal year beginning July of the following year, which estimate *shall not exceed three-tenths of 1% of the total gross intrastate operating revenues of the public utilities and licensed entities under its jurisdiction for the preceding calendar year*, except that the estimate may exceed this amount to reflect Federal funds received by the commission and funds received from other sources to perform functions that are unrelated to the regulation of public utilities and licensed entities.

66 Pa.C.S. §510 (emphasis added).

The PUC must also subtract from its final estimate the estimated fees to be collected pursuant to Section 317 (related to fees for services rendered by the PUC) and the balance of appropriation carried over from the previous fiscal year. 66 Pa.C.S. §510(a)(1) and (2). Accordingly, the PUC is effectively precluded from indemnifying itself from damages resulting from a lawsuit and would have no choice but to turn to the State Treasury to satisfy such a judgment.

The complete absence of any statute commanding the PUC to indemnify itself weighs in favor of finding that damages awarded against the PUC would ultimately be indemnified by the Pennsylvania State Treasury. As the PUC has never been presented with the situation of having to payout damages in a lawsuit that would exceed the money the PUC has on hand in its yearly allocation, this is a factual determination that the PUC would have to develop through testimony of

the PUC's administrative staff. As the assets in physical possession of the PUC are ultimately the property of the Commonwealth of Pennsylvania, the PUC would not even be capable of liquidating assets to cover a damage award that exceeds the PUC's yearly budget.

Accordingly, this Court should not grant Transource's Motion for Summary Judgment as there is still a factual determination to be made as to whether the PUC could afford a damage payout and how the PUC would handle a payout shortfall.

B. The PUC Is Recognized In Pennsylvania As A State Entity Entitled To Sovereign Immunity

Under state law, the PUC is recognized as an entity of the state. The PUC is recognized as an independent administrative commission of Pennsylvania established by the Act of March 31, 1937, P.L. 160, and continued by Section 301 of the Public Utility Code, 66 Pa.C.S. §301. As recently as 2012, the Pennsylvania Supreme Court recognized the PUC as an independent agency based upon the reading of the Public Utility Code and the Judicial Code. *See Mercury Trucking Inc. v. Pa. Pub. Util. Comm'n.*, 55 A.3d 1056 (Pa. 2012).

Pennsylvania's Legislature has formally codified its intent that the Commonwealth and its agencies are recognized as having sovereign immunity. Pennsylvania Consolidated Statutes generally provides:

> Pursuant to section 11 of Article 1 of the Constitution of Pennsylvania, it is hereby declared to be the intent of the General Assembly that *the Commonwealth, and its officials and employees acting within the scope of their duties, shall continue to enjoy sovereign immunity and official immunity and remain immune from suit except as the General Assembly shall specifically waive the immunity*.

1 Pa.C.S. §2310 (emphasis added).

Recently, the Pennsylvania Commonwealth Court affirmed the PUC's status as a Commonwealth agency for purposes of sovereign immunity when it extended the *nullum tempus ocurrit regi* doctrine to a breach-of-contract action the PUC commenced. The Pennsylvania Commonwealth Court opined:

> The Public Utility Code clearly classifies the PUC as an "independent administrative commission." 66 Pa.C.S. §301(a). The PUC thus fits rather comfortably into the description of an "independent agency" under the Judicial Code, defined in relevant part as: "[b]oards, *commissions*, authorities and other agencies and officers of the Commonwealth government which are not subject to the policy supervision and control of the Governor ...." 42 Pa.C.S. §102 (emphasis added). As in *Bradley*[*v. Pa. Tpk. Comm'n.*, 550 A.2d 261 (Pa. Cmmw. 1988)] moreover, there is existing case law that recognizes the PUC's status as a Commonwealth agency. Our Supreme Court in *Mercury Trucking* stated that, as an "independent administrative commission," the PUC "is a Commonwealth agency for the purposes of the Judicial Code ...." *Mercury Trucking*, 55 A.3d at 1068 n.4.

Pa. Pub. Util. Comm'n v. Delaware Valley Reg'l Econ. Dev. Fund, ---A.3d--- 491 M.D. 2018, 2021 WL 1773550, at *9 (Pa. Cmwlth. May 5, 2021) (emphasis in

original). Furthermore, the PUC is not separately incorporated, and it is immune from state taxation. *See generally* 66 Pa.C.S. §§301–321.

Given the codification of the PUC's sovereign immunity under state law and the recent recognition of the PUC's sovereign immunity under Pennsylvania law, this factor weighs heavily in favor of recognizing the PUC as an arm of the state for purposes of Eleventh Amendment Immunity.

C. The PUC's Level Of Autonomy From The Legislature And Executive Branch Further Weighs In Favor Of The PUC's Eleventh Amendment Immunity

The Commissioners of the PUC are appointed by the executive and legislative branches of Pennsylvania. 66 Pa.C.S. §301(a). (Five Commissioners are appointed by the Governor with the advice and consent of the Senate). The Governor also appoints the Chairman of the Commission. 66 Pa.C.S. §301(a). The PUC lacks the authority to enter into contracts in its own name; it cannot purchase or own property; and it has a limited source of independent funding. *See* 62 Pa.C.S. §§301–332 and 1501–1504. Despite the fact that the Commissioners adjudicate matters independent of the executive and legislative branches, this independence is necessary for the PUC to operate as an unbiased agency when it regulates and adjudicates utility matters. Accordingly, as the PUC is largely dependent on the Commonwealth for its administrative operations and not its

statutorily defined duties, the level of autonomy the PUC weighs in favor of finding immunity under the Eleventh Amendment.

In sum, the PUC satisfies the three factors for finding immunity under the Eleventh Amendment. Even if the Court were to find that fact issues remain with respect to the PUC's entitlement to Eleventh Amendment immunity, the Court should deny Transource's Motion for Summary Judgment and provide the PUC with an opportunity to develop the relevant facts.

IV. Plaintiff's Motion For Speedy Hearing Under FRCP 57 Should Be Denied

Plaintiff moves for a speedy hearing pursuant to FRCP 57 for two reasons: (1) because "[e]xpedited hearing is necessary to avoid irreparable harm" to Plaintiff (Doc. 21-1 at 1); and (2) because Plaintiff's claims "implicate no material factual disputes and require no discovery." *Id*. at 2. As set forth below, Plaintiff's alleged harm does not rise to the level of "irreparable harm," and is, in fact, illusory. Further, Plaintiff fails to acknowledge the many factual disputes that remain unresolved in this case. For these reasons, Plaintiff's motion for speedy hearing should be denied.

A. Plaintiff Fails to Show Irreparable Harm

According to Plaintiff's own "nutshell version of this case," Doc. 21-1 at 1:

> Transource's contract with PJM requires it to secure necessary state permits by September 30, 2021—and if it does not, PJM may deem Transource in breach and

> cancel the project. That would impose irreparable harm on Transource, which has already invested more than seven years of work and over $86 million in the project. While Transource may be able to recover some of those costs through a regulatory proceeding at FERC, that is uncertain.

Thus, Plaintiff admits that its proffered "irreparable harm" is (1) purely monetary in nature; and (2) subject to two independent factors beyond this court's control, i.e., that "PJM may deem Transource in breach and cancel the project" and that "Transource may be able to recover [its] costs through a regulatory proceeding…." As such, Plaintiff's showing fails to meet the definition of "irreparable harm."

Financial loss alone is not sufficient to constitute irreparable harm. It is settled law that "temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury." *Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 801 (3d Cir. 1989). While "substantial loss of business and the threat of bankruptcy can be sufficient for a finding of irreparable harm." *Newlife Homecare Inc. v. Express Scripts, Inc.*, No. 3:07CV761, 2007 WL 1314861, at *4 (M.D. Pa. May 4, 2007), "the law requires convincing proof that a business will in fact cease to exist or be forced into bankruptcy for such an eventuality to be considered irreparable harm." *Id.*, at *5. Here, Transource's unsubstantiated claim

of "$86 million"[8] in potential losses, and its utter failure to allege any long-term impact on its solvency, financial health or ability to continue operations, even as it admittedly may seek to recover its losses, fails to meet the burden for irreparable harm based on financial loss.

Further, "[i]n order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial...." *Instant Air Freight*, 882 F.2d, at 801.[9] Here, Plaintiff itself acknowledges two potential forms of redress other than relief in the form of expedited treatment from this court. First, Plaintiff's witness states that "PJM … will sometimes extend deadlines while an administrative process is ongoing," Doc. 21-6, at ¶11, and that "on November 18, 2020, PJM and Transource Energy agreed to extend the deadline for the milestone described in Paragraph 10 to September 30, 2021," *Id*., but "[n]ow that the PUC's administrative process has concluded, PJM is under no obligation to extend the DEA's milestone deadlines, even if the PUC's decision is being challenged in court." *Id*., at ¶13. But having raised the possibility of a deadline waiver by PJM, Plaintiff nowhere explains to this court whether, when or how it even bothered to ask PJM whether it is willing

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[8] Transource's sole proof to support this amount is the declaration of its own Vice-President that "Transource estimates that it has spent approximately $86 million in capital costs that have not been recovered yet in rates." Doc. 21-6 at ¶8.

[9] Plaintiff has alleged "irreparable harm" and that concept generally arises in the context of a preliminary injunction.

to grant or deny a further extension. Presumably, PJM would be inclined to grant a further extension if it is true, as Plaintiff alleges, that "[i]f the project is removed from PJM's RTEP, it will take even longer for PJM to address the congestion issues that PJM approved Transource to remedy because PJM will need to start over from scratch." *Id*. at ¶14(d).

In addition to seeking an extension from PJM, Plaintiff may seek recovery of stranded costs (to include the alleged "$86 million in capital costs") under FERC procedures designed for scenarios exactly like Plaintiff's current situation. Again, Plaintiff acknowledges that it "may be able to recover some of those amounts through a later regulatory proceeding it would initiate at FERC," but argues that "the timeline and outcome are uncertain..." *Id*. at ¶14(a). Plaintiff substantially undersells its ability to recover its cost through the regulatory process. In fact, it previously requested and received regulatory relief from exactly the kind of potential loss it now asks the Court to help it forestall. *See* Doc. 58-3 and Doc. 58-4.

On November 28, 2016, PJM submitted, on behalf of Plaintiff, "a request for authorization to utilize certain incentive rate treatments for a competitively assigned project in Pennsylvania and Maryland," namely, PJM Market Efficiency Project 9A. *See* Doc. 58-3 at 3. In support of this request Plaintiff averred:

> that it faces several categories of risks associated with the DEA entered into between PJM and Transource Energy,

> because it contains binding obligations not generally required of utilities undertaking non-competitive transmission development. Transource explains that Schedule C of the DEA contains a development schedule with mandatory project milestones and provides that the failure to meet any of the milestone dates would constitute a breach of the DEA, which could result in default of the DEA, and if not cured, could result in the termination of the DEA. Transource further explains that this type of risk is significant, considering the many regulatory and site control challenges in the Project, and that potential investors in the Project would need to evaluate the risk of termination when determining whether to allocate capital to this type of project.

Doc. 58-3 at 10.

Based on these and other representations made by Plaintiff, FERC decided to "grant [Plaintiff's] request for recovery of 100 percent of prudently-incurred costs associated with abandonment, provided that abandonment is a result of factors beyond [Plaintiff's] control." Doc. 58-3 at 19. Thus, Plaintiff has a clear path to recover 100% of its alleged stranded costs. This fact alone suffices to defeat Plaintiff's claim of irreparable harm, since "[t]he possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Instant Air Freight Co.*, 882 F.2d, at 801.

Finally, to the extent Plaintiff relies on unsubstantiated speculation that "Transource will be further injured in the considerable loss associated with not completing the project and the loss of revenue and return on equity expected over

the several decades the project will serve the public if constructed," *Id*. at ¶14(a), or that third-party consumers and "the Nation's energy goals" will somehow suffer, Doc. 21-1 at 9-10; Doc. 21-6, ¶14(b)-(e), it suffices to note that "[s]peculative injury does not constitute a showing of irreparable harm." *Brown v. Rodarmel*, No. 3:CV-10-293, 2012 WL 13075229, at *2 (M.D. Pa. July 23, 2012).

B. This Case is Rife with Disputed Facts

As Defendants have demonstrated in the introduction and through this brief, *supra*, this case is not limited to pure questions of law, and, therefore, Plaintiff may not rely on the cases it references. *See* Doc. 21-1, at 10, n.4. For example, in the most recent case Plaintiff cites, the Western District of Pennsylvania ruled that "[e]xpedited proceedings on a motion for declaratory judgment are appropriate where the determination is largely one of law, and factual issues (while expedited discovery is permitted and frequently granted) are not predominant." *Ctny. of Butler v. Wolf*, No. 2:20-CV-677, 2020 WL 2769105, at *2 (W.D. Pa. May 28, 2020). Here, Plaintiff's claims involve multiple prominent and contested issues of fact, including whether the level of congestion in the PJM system justifies the projects, the actual levels of peak demand on the allegedly congested areas, the effect of recent legislation in neighboring states on any remaining congestion, the continuing impacts of the coronavirus pandemic on PJM's load forecast, what opportunities exist for meaningful public participation in PJM's transmission

planning process, as well as the PUC's entitlement to Eleventh Amendment immunity. For these reasons, the Court should not order a speedy hearing.

CONCLUSION

For the foregoing reasons, Plaintiff's motions for summary judgment and speedy hearing should be denied.

Respectfully submitted,

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

Transource Pennsylvania LLC,	:	
Plaintiff	:	
	:	
v.	:	**No. No. 1:21-CV-1101**
	:	
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,	:	**Judge Wilson** **Electronically Filed Document** ***Complaint Filed 06/22/21***
Defendants	:	

CERTIFICATE OF WORD COUNT

I, Aspassia V. Staevska, Assistant Counsel for the Pennsylvania Public Utility Commission, hereby certify that the foregoing brief contains 11,890 words.

CERTIFICATE OF SERVICE

I further certify that on July 27, 2021, I caused to be served a true and correct copy of the foregoing document titled, Defendants' Brief In Opposition To Plaintiff's Motion For Summary Judgment And Motion For Speedy Hearing Under FRCP 57, to the following:

VIA ECF
ALL COUNSEL OF RECORD

/s/ Aspassia V. Staevska
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