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

| | | |
|---|---|---|
| **TRANSOURCE PENNSYLVANIA, LLC,** | : | |
| **Plaintiff** | : | |
| | : | **No. 1:21-CV-1101** |
| **v.** | : | |
| | : | **Judge Wilson** |
| **GLADYS BROWN DUTRIEUILLE, DAVID W. SWEET, JOHN F. COLEMAN, RALPH V. YANORA** *and* **PENNSYLVANIA PUBLIC UTILITY COMMISSION,** | : | **Electronically Filed Document** |
| | : | *Complaint Filed 06/22/21* |
| **Defendants** | : | |

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT**

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

Page(s)

**Cases**

**Statutes**

**Rules**



**Regulations**

Defendants (collectively, the "PUC" or "Commission") hereby submit this brief in support of their motion for summary judgment.

## INTRODUCTION

Plaintiff Transource Pennsylvania, LLC ("Transource") is seeking to build two utility transmission lines in Pennsylvania (the "IEC Project") that will impose costs of more than $500 million on customers in multiple states in order to eliminate a purported "inefficiency" of only $32 million. Stated succinctly: "this project makes no sense." Doc. 1-3 at 97. Transource, however, will receive full reimbursement for its capital costs as well as a guaranteed return on equity of 10.4 percent over the life of the project if it is built. Thus, the IEC Project makes perfect sense for Transource. State law serves as a longstanding and crucial check on Transource.

"The states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) (emphasis added). Here, the PUC "exercise[d] [its] authority over those specific substantive matters traditionally reserved to the states" and denied Transource's petition to construct the facilities in Pennsylvania. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Federal Energy Regulatory Commission Order No. 1000, 76 Fed. Reg. 49,842, 49,861

(Aug. 11, 2011) ("Order No. 1000"). The PUC's decision was based on its determination that Transource had failed to demonstrate a "need" for the project as required by 52 Pa. Code § 57.76(a)(1). And as the Pennsylvania Commonwealth Court has already held in this matter, "the Commission's findings are supported by substantial evidence and support the Commission's conclusion that Transource did not meet its burden of proof" under Pennsylvania law. Doc. 90-1 at 37.

Notwithstanding the foregoing, Transource asserts federal claims against the PUC based on allegations that the PUC decision violates the Supremacy and dormant Commerce Clauses of the United States Constitution. In particular, Transource argues that the PUC's decision is preempted because PJM Interconnection, LLC ("PJM") – a federally regulated regional transmission organization ("RTO") – has determined that the IEC Project was needed pursuant to the methodology in its Operating Agreement and the Federal Energy Regulatory Commission ("FERC") has approved PJM's Operating Agreement. Transource also argues that the PUC's decision discriminates against and burdens interstate commerce by favoring the interests of Pennsylvania customers over the interests of customers in other states. Transource is wrong on both counts and its claims fail for the following reasons.

***First***, Transource's preemption claim is in direct conflict with FERC's interpretation of the limits of its own authority. FERC has stated expressly that

"tariffs and agreements subject to [FERC's] jurisdiction" like the PJM Operating Agreement "are not intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Federal Energy Regulatory Commission Order No. 1000-A, 77 Fed. Reg. 32,184, 32,244 (May 31, 2012) ("Order No. 1000-A") (emphasis added). The PUC decision that Transource contends is preempted is the very same state authority that FERC has said is not preempted.

***Second***, FERC does not have statutory authority to preempt the PUC decision. The plain language of § 201 of the Federal Power Act ("FPA") makes clear that FERC only has jurisdiction over the transmission of energy in interstate commerce that passes through existing transmission facilities that have already been constructed. *See* 16 U.S.C. § 824. Section 201 does not provide FERC with jurisdiction over the construction of new transmission facilities, which is the issue in this case.

***Third***, there is no direct conflict between federal law and the PUC decision. The FERC orders addressing the methodology in PJM's Operating Agreement are narrow in scope and "do not make the kind of categorical statements that lead to pre-emption[.]" *Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 767 F.3d 335, 362

(3d Cir. 2014). In addition, the PUC decision did not reject the methodology in the PJM Operating Agreement. Rather, the PUC rejected Transource's arguments regarding the weight that Transource believed should be afforded to PJM's methodology under Pennsylvania law.

***Fourth***, Transource's dormant Commerce Clause claim fails because the undisputed facts show that the PUC's decision neither discriminates against nor burdens interstate commerce. To the contrary, the PUC's decision furthers interstate commerce by preventing the construction of an expensive and wasteful utility transmission project that would impose costs on the region as a whole that far exceed any projected benefit.

***Fifth***, Transource's claims are barred by claim preclusion. This Court has held that "the PUC proceeding was quasi-judicial in nature, and that the Full Faith and Credit Statute is applicable to this case." Doc. 118 at 8. In addition, the record before the Commonwealth Court clearly shows that the PUC "objected to Transource's notice of its intent to split its claims" before the Commonwealth Court and this Court. *Id*. at 11. Accordingly, claim preclusion applies.

For these reasons, as described further below, the PUC's motion for summary judgment should be granted.

## PROCEDURAL HISTORY

Transource filed the Complaint in this action on June 22, 2021 and the PUC filed a motion to dismiss on July 23, 2021. *See* Doc. 57. The PUC argued, among other things, that Transource's claims were barred by issue preclusion and claim preclusion. *See* Doc. 58 at 25-31. Transource also filed a direct appeal of the PUC decision with the Pennsylvania Commonwealth Court on June 23, 2021. *See* Doc. 82 at 28 n.20. On August 26, 2021 this Court issued an Order "abstain[ing] from exercising its jurisdiction until final resolution of" Transource's state court appeal. Doc. 83 ¶ 2. On May 5, 2022 the Commonwealth Court issued a decision affirming the PUC decision. *See* Doc. 90-1. On August 8, 2022 this Court issued an Order "den[ying] the motion to dismiss as to Defendants' issue preclusion argument." Doc. 118 at 12. The Court concluded that "the issues that Transource seeks to raise in federal court . . . were unreviewed" by the Commonwealth Court, "and the PUC's decision is therefore not entitled to preclusive effect." *Id*. (citing *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993)).[1]

[1] The PUC respectfully contends that the Court overlooked the Third Circuit's decision in *Crossroads Cogeneration Corporation v. Orange & Rockland Utilities Inc.*, 159 F.3d 129 (3d Cir. 1998) when making this ruling. *Crossroads* "addressed the preclusive effect of decisions of state agencies responsible for utility regulation" and held that the "unreviewed" "factual findings and legal conclusions of [a state utility commission] should be given preclusive effect to the extent afforded under [state] law." *Id*. at 135. *See also Shank v. E. Hempfield Twp.*, 2010 WL 2854136, at *12-13 (E.D. Pa. July 20, 2010) (stating that "*Edmundson* may best be understood as being limited to administrative agency rulings on First

With respect to claim preclusion, the Court found that "while the PUC's decision could be entitled to preclusive effect under Pennsylvania law if Transource should have raised its federal claims before the Commonwealth Court, but chose not to, the court cannot answer this question without impermissibly making a fact determination: whether Defendants objected to Transource's notice of its intent to split its claims." Doc. 118 at 10-11. "Therefore, the court denie[d] Defendants' motion to dismiss on claim preclusion grounds without prejudice to renewal at the summary judgment stage." *Id*. at 11.

## STATEMENT OF FACTS

### A. Transmission Constraints And Transmission Congestion Are Different Concepts

As explained by the United States Department of Energy:

> Transmission constraints and transmission congestion are closely related but are different concepts. Transmission constraints are physical limits on the amount of electricity flow the system is allowed to carry in order to ensure safe and reliable operation. Transmission congestion refers to the economic impacts on the users of electricity that result from operation of the system within these limits.

Doc. 147 ¶ 1.

---

Amendment issues"). If the Court were willing to reconsider its ruling on issue preclusion then the PUC respectfully requests an opportunity to provide supplemental briefing.

"Congestion is an economic issue, not necessarily a reliability issue. Sufficient generation is still available to maintain an uninterrupted supply of electricity" even when there is congestion. *Id*. at ¶ 2. Congestion just means "that sometimes, more expensive generation is all that is available in a given area to meet the demand." *Id*. Thus, "the simple existence of congestion is not inefficient." *Id*. at ¶ 3.

### B. PJM Is Responsible For Managing Transmission Congestion; PJM Is Not Responsible For Eliminating Transmission Congestion

One of PJM's responsibilities is to "manage transmission congestion." 18 C.F.R. § 35.34(k)(2). "One way" PJM manages congestion "is by re-dispatching generation around transmission constraints." Doc. 147 ¶ 4. PJM also manages congestion "by administering a market for Financial Transmission Rights (FTRs), which are the equivalent of insurance policies for electric distribution companies to protect themselves against congestion costs." *Id*. at ¶ 5. Notably, PJM is not tasked with eliminating congestion, since the elimination of congestion would not be economically feasible. *Id*. at ¶ 6.

### C. PJM's Solicitation of Market Efficiency Projects

To fulfill its responsibilities "PJM prepares an annual Regional Transmission Expansion Plan ("RTEP")." *Id*. at ¶ 7. "As part of its RTEP, PJM conducts a market efficiency analysis to find areas where congestion exists and

seeks solutions to reduce congestion." *Id*. at ¶ 8. "When congestion is identified on the bulk transmission grid and no currently approved projects can alleviate that congestion, PJM opens up a competitive selection process soliciting proposals from third parties to mitigate this congestion." *Id*. at ¶ 9. "PJM considers only those project proposals as submitted through its competitive proposal windows. All project proposals submitted are reviewed by PJM." *Id*. at ¶ 10.

**D. PJM's Cost-Benefit Methodology**

"During its review process, PJM performs a cost-benefit analysis on each project submission to determine whether the new facilities can lower costs to customers, and that the benefits of the project exceeds its costs by or above a certain required ratio." *Id*. at ¶ 11. "In order for a market efficiency project" like the IEC Project "to be considered for approval" by PJM, "the benefit-cost ratio must exceed a ratio of 1.25:1." *Id*. at ¶ 12.

"The purpose of a cost-benefit analysis is to attempt to capture the likely consequences of an activity, and to express those consequences in the same units (dollars, in this case) so that they can be compared." *Id*. at ¶ 13. PJM's cost-benefit methodology, however, does <u>not</u> achieve this result. Instead, "[w]hen measuring the benefits of a market efficiency project, PJM excludes increased costs that are experienced as a result of constructing that project." *Id*. at ¶ 14. "PJM's reasoning for removal of these costs in the calculation . . . was to align the

benefits of the project with the transmission zones that would be responsible for the cost of the project and to increase the number of projects that can qualify as a market efficiency project." *Id*. at ¶ 15. PJM's own Independent Market Monitor ("IMM") testified that "[c]learly," PJM's methodology "will bias the outcome in favor of the project." *Id*. at ¶ 16.[2]

The IMM has also noted the following "fundamental flaws" in PJM's methodology:

> The current rules governing the benefit/cost analysis of competing transmission projects do not accurately measure the relative costs and benefits of transmission projects. The current rules explicitly ignore the increased zonal load costs that a project may create. Further, the current rules do not account for the fact that the project costs are nonbinding estimates and that the benefits of projects are uncertain and highly sensitive to the modeling assumptions used. These flaws have contributed to PJM approving market efficiency projects with forecasted, and realized, costs that are higher than the forecasted benefits.

*Id*. at ¶ 18. Accordingly, the IMM has "recommended that PJM's market efficiency process be eliminated." *Id*. at ¶ 19.

---

[2] The IMM "is responsible for guarding against the exercise of market power in PJM's markets and assisting in the maintenance of competitive and nondiscriminatory markets in PJM. The IMM operates independently from PJM staff and members to objectively monitor, investigate, evaluate and report on PJM's markets." *Id*. at ¶ 17.

### E. FERC Order No. 1000

Transource alleges that PJM's current cost-benefit methodology was adopted "[a]s part of its continuing compliance with FERC's Order No. 1000," which was issued by FERC in 2011. Doc. 1 ¶ 27. Order No. 1000 expanded on Order No. 890, which "required each transmission provider to establish an open, transparent, and coordinated transmission planning process that complied with nine planning principles." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 51 (D.C. Cir. 2014). Order No. 1000 provides:

> Each transmission provider must participate in a regional transmission planning process that complies with the planning principles in Order No. 890, produces a regional transmission plan for development of new regional transmission facilities, and includes procedures to identify transmission needs driven by public policy requirements established by federal, state, or local laws or regulations and evaluate potential solutions to those needs.

*Id*. at 52.

### F. Project 9A And The IEC Project

"On October 30, 2014, PJM opened a long-term RTEP proposal window to . . . solicit market efficiency proposals in order to alleviate congestion on the AP South Reactive Interface" ("APSRI"). *Id*. at ¶ 21. "In response to that solicitation, Transource Energy, the parent of Transource, submitted Project 9A." *Id*. at ¶ 22. "Project 9A is a set of 4,500 kV transmission lines originating in West Virginia

and terminating in Maryland." *Id*. at ¶ 23. "The IEC Project is the Pennsylvania portion of Project 9A, and consists of IEC West, located in Franklin County, and IEC East, located in York County, and involves HV transmission lines from new substations in those counties to the Pennsylvania/Maryland border." *Id*. at ¶ 24.

According to the IMM, "Project 9A is an example of a PJM approved market efficiency project that passed PJM's 1.25 benefit/cost threshold test despite having benefits, if accurately calculated, that were less than forecasted costs." *Id*. at ¶ 25.

> The initial study had a benefit to cost ratio of 2.48, with a capital cost of $340.6 million. The sum of the positive (energy cost reductions) effects was $1,188.07 million. The sum of negative effects (energy cost increases) was $851.67 million. The net actual benefit of the project in the study was therefore $336.40 million, not the $1,188.07 used in the study. Using the total benefits (positive and negative) to compare to the net present value of costs, the benefit to cost ratio was 0.70, not 2.48. The project should have been rejected on those grounds.

*Id*.

Nonetheless, "[a]fter evaluation and review of the IEC Project, the PJM Board approved Project 9A on August 2, 2016." *Id*. at ¶ 26. PJM's evaluation and review "process is narrowly focused on whether the proposed project meets the requirements set forth in PJM's Operating Agreement and manuals." *Id*. at ¶ 27.

### G. Transource's Interest In Project 9A

Transource has a substantial financial interest in completing Project 9A. Transource will be reimbursed for the costs of building the project and FERC has also authorized Transource to receive a guaranteed annual rate of return of 10.4 percent over the life of the project. *Id*. at ¶ 28. Transource anticipates that the assets will last 60 to 75 years "on a conservative basis." *Id*. at ¶ 29. Transource also expects to earn additional revenue from the various repairs and upgrades that will be necessary to maintain the assets over time. *Id*. at ¶ 30. Moreover, "[t]he transmission line investment once made is not subject to performance testing and not subject to any penalties . . . for not living up to what the forecast was" at the time the project was approved. *Id*. at ¶ 31.

### H. The DEA

On November 2, 2016, PJM and Transource Energy executed a Designated Entity Agreement (the "DEA"). *Id*. at ¶ 32. Under the DEA, Transource "is responsible for the construction, ownership, maintenance, and operation of the . . . IEC Project." *Id*. The DEA also states that Transource "shall be solely responsible for . . . obtaining all necessary permits, siting, and other regulatory approvals. [PJM] shall have no responsibility to manage, supervise, or ensure compliance or adequacy of same." *Id*. at ¶ 33.

## I. The Siting Applications And The PUC Proceeding

Under Pennsylvania law, a public utility like Transource must submit a siting application to the PUC and the PUC must approve the application before construction of an electric transmission line can begin. *See* 52 Pa. Code § 57.71. A public utility must satisfy the following conditions by a preponderance of the evidence in order to obtain approval of a siting application:

> (1) That 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 this 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).

On September 21, 2017, Transource submitted a joint letter to the PUC in which it acknowledged that: "[a]s with all siting applications filed with the Commission, Transource PA will be required to demonstrate the need for the [IEC] Project at the time that it is filed and all parties reserve their rights, without prejudice, to challenge the need for the [IEC] Project when it is filed." Doc. 147 ¶ 34.

On December 27, 2017, Transource filed its siting applications for the IEC Project to the PUC. *Id*. at ¶ 35. Transource's applications were then assigned to an Administrative Law Judge ("ALJ") for disposition. *Id*. at ¶ 36. On December 22, 2020, the ALJ issued a Recommended Decision, which recommended denying the siting applications. *Id*. at ¶ 37. The ALJ held that the threshold issue was whether Transource had demonstrated, by substantial evidence, that the IEC Project was needed and that Transource had not shown need for the IEC Project as required by Pennsylvania law. *Id*. at ¶ 38. Transource then appealed the Recommended Decision to the PUC. *Id*. at ¶ 39. On May 24, 2021, the PUC entered an Opinion and Order denying Transource's siting applications and adopting the ALJ's determinations that Transource had failed to show that the IEC Project was needed under Pennsylvania law. *Id*. at ¶ 40.

**J. The PUC Decision Was Supported By Substantial Evidence**

Transource filed a direct appeal of the PUC decision with the Commonwealth Court on June 23, 2021. Transource argued on appeal that "the Commission made several errors in reviewing and rejecting Transource's evidence in this matter." Doc. 90-1 at 32. First, Transource argued that the PUC "erred in rejecting PJM's determination of the need for the IEC Project, which was presented as evidence to establish need under" Pennsylvania law. *Id*. Second, Transource asserted that the PUC's "finding that the IEC Project is not necessary

to resolve congestion . . . is not supported by substantial evidence[.]" *Id*. at 33. The Commonwealth Court rejected both arguments.

The court concluded that the PUC did not err in its review of PJM's determination of need because PJM "did not consider the negative impacts of the IEC Project on other ratepayers or that the data used to support the ongoing need for the IEC Project was outdated, ultimately, and inaccurate, and it did not include other means of resolving the alleged congestion, such as future potential generation sources." *Id*. at 39. The court also found that the findings of fact adopted by the PUC "reflect that the IEC Project was designed to resolve congestion on the APSRI, and that congestion on the APRSI has decreased significantly since 2014, such that it no longer supports the need for the IEC Project." *Id*. at 41.

With respect to this second point, congestion costs on the APSRI had dropped from approximately $486.8 million in 2014 to $14.5 million in 2019 and only $900,000 through the first quarter of 2020. Doc. 147 ¶ 41. Moreover, PJM's own analysis of the IEC Project demonstrated that while the project would decrease wholesale power prices in certain transmission zones by approximately $845 million it would increase wholesale power prices in other transmission zones by approximately $812 million for a net benefit of only $32 million. *Id*. at ¶ 42. On top of the increase in power prices, the IEC Project also had a revenue requirement of at least $509 million that benefitting transmission zones would be

expected to pay. *Id*. at ¶ 43. Thus, "PJM forecast[ed] a net benefit of approximately $32.5 million to the PJM region over a period of 15 years with a total revenue requirement of at least $509 million over that same period of time." *Id*. at ¶ 44. "All of this [wa]s to address a congestion constraint that had diminished to very low levels since th[e] [IEC] Project was selected." *Id*. at ¶ 45.

Nor were PJM's projections of price increases confined to Pennsylvania. To the contrary, the PUC found that the IEC Project would also increase prices in Maryland, New Jersey, Delaware, Kentucky, Ohio, and Illinois. *Id*. at ¶ 46. Thus, "[w]hile evidence of the detrimental impact to Pennsylvania ratepayers was cited and considered as part of the conclusion that Transource did not meet its burden of proof, the Commission also examined the detrimental impacts to ratepayers in other parts of the PJM Region in reaching that conclusion." *Id*. at ¶ 47. The court held that it was not "an abuse of discretion for the Commission to consider evidence of <u>increased</u> consumer prices and weigh the competing cost impacts of the IEC Project to determine the necessity of that project" under Pennsylvania law. Doc. 90-1 at 39 (emphasis in original).

As summed up by the "credible testimony" of an Office of Consumer Advocate witness: "this project makes no sense. I don't care how you run the numbers or how you talk about it. Those are the latest numbers we have, and you can exclude them if you want to but that's reality." Doc. 147 ¶ 48.

### K. The Complaint

Based on the foregoing facts, Transource asserts that the PUC decision violates the Supremacy and dormant Commerce Clauses of the United States Constitution. *See* Doc. 1 ¶¶ 67-74, 76-87.

## STATEMENT OF QUESTIONS PRESENTED

I. Is the PUC entitled to summary judgment on Transource's preemption claim when (i) the claim is in direct conflict with FERC's interpretation of the limits of its own authority; (ii) FERC does not have statutory authority to preempt the PUC decision; and (iii) there is no direct conflict between federal law and the PUC decision?

Suggested answer: yes.

II. Is the PUC entitled to summary judgment on Transource's dormant Commerce Clause claim when the PUC decision neither discriminates against nor burdens interstate commerce?

Suggested answer: yes.

III. Is the PUC entitled to summary judgment on both of Transource's claims when the claims are barred by claim preclusion?

Suggested answer: yes.

## ARGUMENT

Summary judgment should be rendered "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Material facts are those "that could alter the outcome" of the litigation, and "disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the

burden of proof on the disputed issue is correct." *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 262 (3d Cir. 2010) (quoting *Clark v. Modern Grp. Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993)). In order to defeat a motion for summary judgment, the party opposing the motion must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Here, there is no genuine dispute as to any material fact and the PUC is entitled to judgment as a matter of law on both of Transource's claims.

## I. THE PUC IS ENTITLED TO SUMMARY JUDGMENT ON TRANSOURCE'S PREEMPTION CLAIM

The PUC is entitled to summary judgment on Transource's preemption claim for three reasons. *First*, the claim is in direct conflict with FERC's interpretation of the limits of its own authority. *Second*, FERC does not have statutory authority to preempt the PUC decision. *Third*, there is no direct conflict between the PUC decision and federal law. The PUC's motion should be granted for each of these reasons.

### A. Transource's Preemption Claim Is In Direct Conflict With FERC's Interpretation Of The Limits Of Its Own Authority

#### 1. FERC has stated that Order No. 1000 does not preempt traditional state authority to deny a permit for the construction of a transmission facility.

Transource's preemption claim is based on its allegation that PJM used a "federally approved methodology" when PJM identified a "need" for the IEC Project pursuant to its Operating Agreement. Doc. 1 ¶ 69. Transource contends that the PUC "disregarded th[is] FERC-approved methodology" when the PUC denied Transource's siting applications pursuant to 52 Pa. Code § 57.76(a)(1). *Id.* at ¶ 70. The PUC is entitled to summary judgment on Transource's preemption claim because the claim is in direct conflict with FERC's interpretation of the limits of its own authority.

"It is well-settled that [FERC] does not have authority over the siting and construction of electric transmission facilities" and that "[a]ll such matters should be resolved at the state and local level." *PacifiCorp*, 72 FERC ¶ 61,087, 61,488 (1995) (emphasis added). As such, "[t]he states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) (emphasis added). It is therefore the "normal work" of state utility commissions like the PUC "to deny a permit based on traditional considerations

like cost and benefit," which is precisely what the PUC did here pursuant to 52 Pa. Code § 57.76(a)(1). *Id*. at 314.

Far from preempting this traditional state authority, Order No. 1000 expressly preserves it:

> We acknowledge that there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction. However, nothing in this Final Rule involves an exercise of siting, permitting, and construction authority. The transmission planning and cost allocation requirements of this Final Rule, like those of Order No. 890, are associated with the processes used to identify and evaluate transmission system needs and potential solutions to those needs. In establishing these reforms, the Commission is simply requiring that certain processes be instituted. This in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states, including integrated resource planning, or authority over such transmission facilities. For this reason, we see no reason why this Final Rule should create conflicts between state and federal requirements.

Order No. 1000, 76 Fed. Reg. at 49,869 (emphasis added).

"[T]he designation of a transmission project as a 'transmission facility in a regional transmission plan'" like the IEC Project "only establishes how the developer may allocate the costs of the facility in Commission-approved rates if such facility is built." *Id*. at 49,854 (emphasis added). It does not establish a binding determination of need under federal law:

> Nothing in this Final Rule requires that a facility in a regional transmission plan or selected in a regional transmission plan for purposes of cost allocation be built, nor does it give any entity permission to build a facility. Also, nothing in this Final Rule relieves any developer from having to obtain all approvals required to build such facility.

*Id*. (emphasis added).

FERC was also explicit that "tariffs and agreements subject to [FERC's] jurisdiction" like the PJM Operating Agreement "are not intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Order No. 1000-A, 77 Fed. Reg. at 32,244 (emphasis added). The PUC decision that Transource contends is preempted by the PJM Operating Agreement is this very same state authority that FERC has said is not preempted. *See id*. at 32,215 ("[T]hese reforms are not intended to dictate substantive outcomes, such as what transmission facilities will be built and where. We recognize that such decisions are normally made at the state level.").

Accordingly, the PUC is entitled to summary judgment on Transource's preemption claim because FERC has said there is no such preemption.

2. The PUC decision does not frustrate the objectives of Order No. 1000.

Nor does the PUC decision frustrate the objectives of Order No. 1000. "At its core, the set of reforms adopted in [Order No. 1000] require the public utility transmission providers in a transmission planning region, in consultation with their stakeholders, to create a regional transmission plan." 76 Fed. Reg. at 49,846. "If public utility transmission providers' regional transmission processes satisfy these requirements, then they will be in compliance with Order No. 1000's regional transmission planning requirements." 77 Fed. Reg. at 32,215.

FERC was also clear that the federal planning process in Order No. 1000 does not displace separate and independent state planning processes.

> By requiring public utility transmission providers to participate in an open and transparent regional transmission planning process that leads to the development of a regional transmission plan, the Commission has facilitated the identification and evaluation of transmission solutions that may be more efficient or cost-effective than those identified and evaluated in the local transmission plans of individual public utility transmission providers. This will provide more information and more options for consideration by public utility transmission providers and state regulators . . . .

*Id*.

Here, the federal process had run its course and served its purpose as soon as PJM created the RTEP in consultation with its stakeholders and submitted the IEC

Project to the PUC as an "option" for state regulatory approval. *Id*. At that point the federal regional transmission process had concluded and the state process had begun. The "decisions made [earlier] in the regional transmission planning process" by PJM should not "interfere with these state-jurisdictional processes" administered by the PUC. *Id*. "[E]ven where more efficient or cost-effective transmission solutions are identified and selected in [a] regional transmission plan" – which is what Transource argues here – "such solutions may not ultimately be constructed should the developer not secure the necessary approvals from the relevant state regulators." *Id*. That is exactly what happened here when the PUC denied Transource's siting applications. *See Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028, 2022 WL 1198450, at *87 (2022) ("the states' role in siting [regional] transmission facilities" "include[s] consideration of the costs and benefits when making state public interest determinations").

Consequently, the PUC decision is entirely consistent with and did not frustrate any of the objectives of Order No. 1000.

### B. FERC Does Not Have Statutory Authority To Preempt The PUC Decision

The PUC is also entitled to summary judgment on Transource's preemption claim because FERC does not have statutory authority to preempt the PUC decision. As described above, Transource asserts that the methodology for

determining need in the PJM Operating Agreement preempts the PUC's denial of Transource's citing applications pursuant to 52 Pa. Code § 57.76(a)(1). *See* Doc. 1 ¶ 70. In other words, Transource is arguing that "a given state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority." *New York v. FERC*, 535 U.S. 1, 17-18 (2002). As such, a "presumption against pre-emption" applies. *Id*. at 17.

This presumption "start[s] with the assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Hillsborough Cnty v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985) (internal quotation omitted). *See Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) ("the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States"). "If a federal statute is ambiguous with respect to whether it pre-empts state law, then the presumption against pre-emption should ordinarily prevent a court from concluding that the state law is pre-empted." *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 681 n.4 (2003) (Thomas, J., concurring). Courts should "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting

federal encroachment upon a traditional state power." *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) (internal citation omitted).

Transource cannot defeat that presumption here.

1. Congress has not evinced any intent in § 201 of the FPA to preempt the state laws that were applied by the PUC.

In Pennsylvania, the traditional state authority to approve or deny permits for the siting and construction of electric transmission facilities is codified in 52 Pa. Code § 57.76, 66 Pa. C.S. §§ 102, 1101, which the PUC applied when it denied Transource's siting applications. Transource asserts that FERC has the authority to preempt these state laws under § 201 of the FPA. *See* Doc. 1 ¶ 67. Transource is wrong.

Section 201(a) of the FPA confers power upon FERC to regulate "the transmission of electric energy in interstate commerce . . ., such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Similarly, § 201(b) provides FERC with jurisdiction over facilities used for "the transmission of electric energy in interstate commerce[.]" 16 U.S.C. § 824(b)(1). Finally, § 201(c) provides that "electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof[.]" 16 U.S.C. § 824(c).

Thus, the plain language of § 201 makes clear that FERC only has authority over existing transmission facilities through which electric energy is flowing in interstate commerce. Planned transmission facilities that have not yet been constructed – like the IEC Project – are not transmitting electric energy in interstate commerce and FERC therefore lacks jurisdiction over them. *See S.C. Pub. Serv. Auth.*, 762 at 63 ("transmissions on the interconnected grids that have now developed 'constitute transmissions in interstate commerce'" under § 201) (quoting *New York*, 535 U.S. at 16) (emphasis added); *Jersey Cent. Power & Light v. Fed. Power Comm'n*, 129 F.2d 183, 195 (3d Cir. 1942) (holding that FERC had jurisdiction under § 201 because "[s]ome part of the electricity passing from the Jersey Central system to the Public Service system moved in interstate commerce and reached the Staten Island Company").

If Congress "had intended to take the monumental step of preempting state jurisdiction" to approve or deny permits for the siting and construction of electric transmission facilities "it would surely have said so directly." *Piedmont*, 558 F.3d at 314. But § 201 says exactly the opposite. *See* 16 U.S.C. § 824(a) (FERC's jurisdiction "extend[s] only to those matters which are not subject to regulation by the States"); *Jersey Cent.*, 129 F.2d at 194 (noting that the legislative history of § 201 states that "[t]he bill takes no authority from State commissions") (emphasis added) (quotation omitted).

In sum, Transource cannot overcome the presumption against preemption because Congress did not express a clear and manifest intent in § 201 of the FPA to preempt the traditional state authority that was exercised by the PUC. *See Pennsylvania v. Navient Corp.*, 967 F.3d 273, 288 (3d Cir. 2020) ("The presumption [against preemption] applies with particular force when the state is exercising its police power."). The PUC is entitled to summary judgment on Transource's preemption claim for this separate reason as well.

2. Congress was explicit in § 216 of the FPA when it intended to preempt traditional state authority.

Moreover, Congress has been explicit in other sections of the FPA when it intends to preempt traditional state authority. In particular, § 216 of the FPA requires the Secretary of Energy "to conduct a study of electric transmission capacity constraints and congestion" every three years and issue a report "which may designate as a national interest electric transmission corridor ["NIETC"] any geographic area that (i) is experiencing electric energy transmission capacity constraints or congestion that adversely affects consumers; or (ii) is expected to experience such energy transmission capacity constraints or congestion." 16 U.S.C. § 824p(a). In addition, § 216 vests FERC with authority to grant a permit to a developer like Transource to construct a transmission facility in an NIETC after a "state Commission" like the PUC "has denied an application seeking approval pursuant to applicable law[.]" 16 U.S.C. § 824p(b)(1)(C)(iii).

Thus, Congress has shown in § 216 that it knows how to preempt state authority over transmission planning and construction expressly when that is the intent. The direct permitting authority that § 216 grants to FERC is the specific method that Congress has established to preempt a state commission that has denied approval for a market efficiency project, not the PJM Operating Agreement. FERC was explicit that "nothing in Order No. 1000 is intended to leverage the regional transmission planning or interregional transmission coordination reforms to exceed [FERC]'s section 216 backstop authority." 77 Fed. Reg. at 32,215 n.248. But this is precisely what Transource is arguing here.

### C. There Is No Direct Conflict Between Federal Law And The PUC Decision

Finally, there is no preemption because there is no direct conflict between federal law and the PUC decision. "Conflict preemption exists (1) where it is impossible for a private party to comply with both state and federal requirements, or (2) where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Farina v. Nokia, Inc.*, 625 F.3d 97, 122 (3d Cir. 2010) (internal quotation omitted). Here, FERC has issued two orders concerning the cost-benefit methodology in the PJM Operating Agreement that are relevant to this case. In 2008 FERC stated: "We find this approach reasonable because it would match the project selection process to the existing cost allocation method." *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,051, 61,416

(2008). In 2014, FERC stated that a submission made by PJM with revisions to its methodology "is accepted for filing, effective April 30, 2014, as requested." Doc. 20-11 at 1. Transource contends that these orders and the PJM Operating Agreement "pre-empt contrary state regulations" like the Pennsylvania laws that were applied by the PUC. Doc. 1 ¶¶ 68, 72 n.17 (citing *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003) and *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986)). Transource's contention is misplaced in two separate respects.

*First*, there is no direct conflict between the FERC orders and the PUC decision. The FERC orders "do not make the kind of categorical statements that lead to pre-emption . . . ." *Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 767 F.3d 335, 362 (3d Cir. 2014). Instead, the orders make narrow statements that are limited to the specific issues that were presented to FERC at particular points in time. Indeed, FERC had no reason to even consider the issue of preemption when it issued the 2008 order because the order predated the planning reforms adopted in Order No. 1000 by more than three years. In addition, the 2014 order was a "staff-issued delegated letter orde[r] and do[es] not constitute legal precedent that is binding on the Commission." *Wolverine Power Supply Coop., Inc.*, 135 FERC ¶

61,165, 61,963 (2011).[3] Neither order mandates or even implies that a state utility commission is precluded from considering an increase in consumer prices when assessing need under an applicable state law. *See* Doc. 90-1 at 39.

Given these omissions, there is no direct conflict between the FERC orders and the PUC decision. *See Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 22 A.3d 353, 365 (Pa. Commw. Ct. 2011) ("Because FERC's opinions have not expressly stated that line loss costs are transmission costs, there is no direct conflict between the Commission's Order and FERC. . . ."); *see also Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.,* 489 U.S. 493, 514 (1989) (holding that federal law did not preempt a state regulation concerning the timing of gas production from a gas field within a state, even though the regulation might have affected the costs and prices of interstate wholesale sales that are subject to FERC's jurisdiction); *Metro. Edison*, 767 F.3d at 362 n.34 (holding that FERC orders did not preempt the PUC even when FERC may not "endorse what the PUC and the Commonwealth Court decided").

*Second*, there is also no direct conflict between the PJM Operating Agreement and the PUC decision. Transource asserts that the PUC "disregarded" the cost-benefit methodology in the PJM Operating Agreement when it denied

[3] The 2014 order states expressly that: "This acceptance for filing shall not be construed as constituting approval of the referenced filing. . . ." Doc. 20-11 at 2 (emphasis added).

Transource's siting applications. Doc. 1 ¶ 70. Not so. "As with all siting applications filed with the Commission, Transource PA w[as] . . . required to demonstrate the need for the [IEC] Project" under 52 Pa. Code § 57.76(a)(1). Doc. 147 ¶ 34. "[T]he determination of whether a utility meets the requisite burden of proof under Pennsylvania law is an independent one." Doc. 90-1 at 27 (emphasis in original). Transource argued before the PUC "that the factors relied upon by PJM and the methodology and process for PJM-approval of a project should be the only criteria relevant to th[e] Commission's review and such criteria is not subject to critical analysis" under Pennsylvania law. Doc. 1-2 at 54. Transource's arguments concerned the weight of the evidence required to demonstrate need under Pennsylvania law and they were rejected by the PUC.

The PUC concluded that "while PJM's methodology and process for selection of Project 9A is relevant to the Commission's consideration of the [sic] Transource's siting Applications," the ALJ properly "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)." *Id*. at 55. This is exactly what Pennsylvania law requires:

> The Commission's role is to regulate utilities for the purposes of Pennsylvania law and to determine if the proposed services and facilities comport with Pennsylvania law. That is what it did here; it examined the Siting Applications, the evidence offered in support of and opposition to those applications, and made a

> determination as to whether Transource met its burden of proof on those Siting Applications under Pennsylvania law.

Doc. 90-1 at 27-28.

The PUC's rejection of Transource's arguments concerning the weight of this evidence and the PUC's consideration of all the evidence regarding need is not a rejection of PJM's methodology. Nor is it an application of an "incompatible methodology." Doc. 1 ¶ 70. Rather, it is precisely the type of comprehensive assessment that a factfinder must make to resolve a disputed issue in any quasi-judicial administrative proceeding. *See* Doc. 90-1 at 36 ("It is well settled that the Commission 'is the ultimate factfinder[] and makes all decisions as to the weight and credibility of evidence.'") (quoting *Borough of Duncannon v. Pa. Pub. Util. Comm'n*, 713 A.2d 737, 739 (Pa. Commw. Ct. 1998)) (alterations in original).

Consequently, there is no direct conflict between the PJM Operating Agreement and the PUC decision. *See Metro. Edison*, 767 F.3d at 365 (holding that a FERC order concerning line-loss costs did not preempt a PUC decision when "the classification of the [plaintiffs'] line-loss costs for retail billing was an issue made relevant by the voluntarily agreed-upon terms of [a] Settlement Agreement" that was submitted to the PUC for approval); *see also PJM Interconnection, L.L.C.*, 147 FERC ¶ 61,128, 61,731 (2014) (ruling that the PJM Operating Agreement can "account for the existence of state or local laws or regulations that impact the

siting, permitting, and construction of transmission facilities" because "ignoring these state or local laws or regulations at the outset of the regional transmission planning process would be counterproductive and inefficient").[4]

In sum, there is no direct conflict between the PUC decision and federal law. The PUC is also entitled to summary judgment on Transource's preemption claim for this reason.

## II. THE PUC IS ENTITLED TO SUMMARY JUDGMENT ON TRANSOURCE'S DORMANT COMMERCE CLAUSE CLAIM

The PUC is entitled to summary judgment on Transource's dormant Commerce Clause claim because the PUC decision neither discriminates against nor burdens interstate commerce.

The Commerce Clause empowers Congress to "regulate commerce . . . among the several States." U.S. Const., Art. I, § 8, Cl. 3. Although the Clause is phrased as an affirmative grant of congressional power, it has been long been interpreted as containing a negative, or "dormant," aspect that "denies the States

[4] The PUC decision in this case is very different from the state regulations that were struck down in cases like *Entergy* and *Nantahala*. *Entergy* held that a state regulation disallowing certain costs that had been explicitly allocated in a FERC-approved tariff was preempted. *See* 539 U.S. at 49-50. Similarly, *Nantahala* "held that FERC's express allotment of entitlement power to two owners of hydroelectric power plants pre-empted a state agency's retail rate-making order allocating entitlement power differently." *Metro. Edison*, 767 F.3d at 362. Unlike the regulations in these cases, the PUC in this case did "not seek to challenge the reasonableness of any rates expressly approved by FERC." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 389 (2015).

the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Or. Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 98 (1994).

"In considering whether a state law violates the dormant Commerce Clause, the inquiry is twofold: a court considers first whether 'heightened scrutiny' applies, and, if not, then considers whether the law is invalid under the *Pike* balancing test." *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. 2006). *See Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). "Heightened scrutiny applies when a law 'discriminates against interstate commerce' in its purpose or effect." *Cloverland-Green*, 462 F.3d at 261. "The party challenging the statute has the burden of proving the existence of such discrimination[.]" *Id.* If discrimination exists, the State must demonstrate that the law is narrowly tailored to "advanc[e] a legitimate local purpose." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

Under the *Pike* test, courts will uphold laws that only incidentally affect interstate commerce unless "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

### A. The PUC Decision Does Not Discriminate Against Interstate Commerce In Purpose Or Effect

Transource asserts that the PUC decision discriminates against interstate commerce because (i) the PUC was attempting to benefit the interests of

Pennsylvania customers at the expense of customers in other states; (ii) the PUC was engaging in "local protectionism"; and (iii) the "economic status quo" that the PUC decision preserves is discriminatory. *See* Doc. 1 ¶¶ 77-79, 82. Transource is wrong on all counts.

*First*, the PUC was not attempting to benefit Pennsylvania customers at the expense of customers in other states. The PUC found that "the following states would experience increased wholesale power prices as a result of the IEC Project: portions of Pennsylvania, Maryland, New Jersey, Delaware, Kentucky, Ohio, and Illinois." Doc 147 ¶ 46. Thus, "[w]hile evidence of the detrimental impact to Pennsylvania ratepayers was cited and considered as part of the conclusion that Transource did not meet its burden of proof, the Commission also examined the detrimental impacts to ratepayers in other parts of the PJM Region in reaching that conclusion." Doc. 90-1 at 32. Moreover, other portions of Pennsylvania would actually benefit from the project and "Pennsylvania's share of the benefits measured approximately 44.75 percent." Doc. 1-3 at 34 (Finding of Fact 123). These facts show that the PUC considered the overall projected economic impact of the IEC Project to "the PJM region as a whole" and not just to Pennsylvania. *Id.* at 97.

*Second*, the PUC did not engage in local protectionism. To the contrary, the PUC denied approval for the construction of a massive transmission facility on

Pennsylvania soil that did not previously exist and cannot legally exist unless the requirements of Pennsylvania law are satisfied. This is not local protectionism but the very essence of state sovereignty. *See Piedmont*, 558 F.3d at 314-15 ("when a state commission denies an application" to construct a transmission facility "it . . . engages in a legitimate use of its traditional powers").[5]

*Third*, there is no evidence that the economic status quo is in any way discriminatory. Transource asserts that congestion is a form of price discrimination. In particular, Transource alleges that "[c]ustomers in front of the bottleneck are paying artificially low prices and customers behind the bottleneck are paying artificially high prices." Doc. 1 ¶ 29.[6] But Transource has failed to present any evidence that supports this allegation. Not a single retail customer from any area in the PJM region has testified "that rates were too high or prices discriminatory. . . ." Doc. 1-3 at 92. Nor has Transource produced any study, analysis, or other documentation showing that an artificial disparity in rates

[5] The cases cited by Transource are inapposite because they did not concern the constitutionality of a state regulation that prevented the construction of a utility facility on state land. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (state regulation withdrawing from power company permission to export hydroelectric power); *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978) (state statute banning import of out-of-state waste); *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1 (1928) (state statute limiting export of shrimp).

[6] PJM's designee testified that "the customers would be the zones, the ultimate load serving entities, which I assume they will pass those costs on to actual people who are consuming electricity, their customers." Doc. 147 ¶ 49.

actually exists. Similarly, there is absolutely no evidence that the IEC Project would eliminate any such disparity. Transource has conceded "that it cannot determine whether the IEC Project, if constructed, would have any particular effect on the rates paid by any particular retail customer . . . in Pennsylvania and elsewhere in the PJM territory. . . ." Doc. 147 ¶ 50. Thus, the IEC Project is, at best, a highly speculative solution to an entirely theoretical problem.

For these reasons, the PUC decision does not discriminate against interstate commerce.

**B. The PUC Decision Does Not Burden Interstate Commerce**

Transource contends that the PUC decision burdens interstate commerce because the PUC required that "in-state interests take precedence over the interests of the region as a whole." Doc. 1 ¶ 85. Transource gets things backwards. "[T]he Commission considered all the costs and benefits of the IEC Project, not just those considered by PJM, and, because there were considerable increases in prices to ratepayers in both Pennsylvania and elsewhere in the PJM Region, found that this did not support the grant of the Siting Applications." Doc. 90-1 at 28 (emphasis added). In other words, the PUC found 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 at 97 (emphasis added).

PJM, on the other hand, only considered the projected economic impact of the IEC Project on the specific regional zones that were expected to benefit from the project. PJM did not consider the economic impact to the zones that were not expected to benefit. *See* Doc. 1-3 at 23 (Finding of Fact 61). Thus it was PJM that used "local, parochial interests" when evaluating the costs and benefits of the IEC Project, not the PUC. Doc. 1 ¶ 5. *See* Doc. 147 ¶ 51 (PJM is seeking "to impose costs on an area through higher energy prices as a result of making costs lower for a particular set of participants").

Accordingly, the PUC decision does not burden interstate commerce.

## III. TRANSOURCE'S CLAIMS ARE BARRED BY CLAIM PRECLUSION

The PUC is entitled to summary judgment on both of Transource's claims because the claims are barred by claim preclusion. The Court has previously held that "the PUC proceeding was quasi-judicial in nature, and that the Full Faith and Credit Statute is applicable to this case." Doc. 118 at 8. The Court also held that "the PUC's decision could be entitled to preclusive effect under Pennsylvania law if . . . Defendants objected to Transource's notice of its intent to split its claims." *Id*. at 10-11. The PUC did object. The PUC argued in its opening brief before the Commonwealth Court that "Transource's Supremacy Clause and Dormant Commerce Clause arguments, though only raised before this Court by implication, must be addressed. Under the circumstances, both claims fail. The Commission's

Order did not violate the Constitution." Doc. 147 ¶ 52. Claim preclusion therefore applies and the PUC's motion for summary judgment should be granted for this reason as well.

## CONCLUSION

For the foregoing reasons, the PUC's motion for summary judgment should be granted.

**Respectfully submitted,**

**MICHELLE A. HENRY**
**Acting Attorney General**

**By:** ***s/ Alexander T. Korn***

**ALEXANDER T. KORN**
**Deputy Attorney General**
**Attorney ID 323957**

**KAREN M. ROMANO**
**Chief Deputy Attorney General**
**Civil Litigation Section**

**Office of Attorney General**
**15th Floor, Strawberry Square**
**Harrisburg, PA 17120**
**Phone: (717) 712-2037**

**akorn@attorneygeneral.gov**

**Date: March 7, 2023**

**JOSEPH P. CARDINALE**
**Assistant Counsel**
**Attorney ID 308140**
**jcardinale@pa.gov**

**KRISS E. BROWN**
**Deputy Chief Counsel**
**Attorney ID 89036**
**kribrown@pa.gov**

**CHRISTOPHER F. VAN DE VERG**
**Assistant Counsel**
**Attorney ID 330088**
**cvandeverg@pa.gov**

**Pennsylvania Public Utility Commission**
**PO Box 3265**
**Harrisburg, PA 17105-3265**
**Phone: (717) 425-740**
**Counsel for Defendants**

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

| | | |
|---|---|---|
| **TRANSOURCE PENNSYLVANIA, LLC,** | : | |
| **Plaintiff** | : | |
| | : | **No. 1:21-CV-1101** |
| **v.** | : | |
| | : | **Judge Wilson** |
| **GLADYS BROWN DUTRIEUILLE, DAVID W. SWEET, JOHN F. COLEMAN, RALPH V. YANORA** *and* **PENNSYLVANIA PUBLIC UTILITY COMMISSION,** | : | **Electronically Filed Document** |
| | : | *Complaint Filed 06/22/21* |
| **Defendants** | : | |

## CERTIFICATE OF WORD COUNT

I, Alexander T. Korn, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that the foregoing brief contains 8,965 words.

## CERTIFICATE OF SERVICE

I further certify that on March 7, 2023, I caused to be served a true and correct copy of the foregoing document titled Defendants' Brief in Support of their Motion For Summary Judgment to the following:

**VIA ELECTRONIC FILING**

**Allison N. Douglis, Esquire**
**Jenner & Block LLP**
**919 Third Avenue, 39th Floor**
**New York, NY 10022**

**Erin R. Kawa, Esquire**
**James J. Jutz, Esquire**
**Lindsay Berkstresser, Esquire**
**Post & Schell, PC**

**adouglis@jenner.com**
*Counsel for Plaintiff*

**17 North Second Street, 12th Floor**
**Harrisburg, PA 17101**
**ekawa@postschell.com**
**jkutz@postschell.com**
**lberkstresser@postschell.com**
*Counsel for Plaintiff*

**Matthew Price, Esquire**
**Jenner & Block LLP**
**1099 New York Avenue, NW**
**Suite 900**
**Washington, DC 20001-4412**
**mprice@jennercom**
*Counsel for Plaintiff*

***s/ Alexander T. Korn***
**ALEXANDER T. KORN**
Deputy Attorney General