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' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT

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INTRODUCTION

The PUC's motion to dismiss should be granted for the following reasons.[1]

First, Transource lacks standing because it has failed to provide any evidence showing that it has suffered any economic harm. Transource asserts that the denial of its permit and certificate to construct the IEC Projects is an injury sufficient in itself to confer standing even in the absence of any economic harm to Transource. *See* Doc. 68 at 13. But Transource is a special purpose entity that only possesses economic interests and it is therefore not capable of suffering a non-economic injury. Thus, in the absence of any economic harm, Transource lacks standing. Transource also lacks standing because it cannot seek a declaratory judgment to remedy a past injury.

Second, Transource's claims are barred by issue preclusion and claim preclusion under binding Third Circuit precedent. Indeed, the Third Circuit has held that there are only "limited avenues into federal court" for a plaintiff like Transource that seeks to challenge a decision made by a state administrative agency, none of which are present here. *DePolo v. Bd. of Supervisors Tredyffrin Twp.*, 835 F.3d 381, 387 n.18 (3d Cir. 2016) (emphasis added).

Third, Transource's claims fail substantively as a matter of law.

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[1] Capitalized terms used herein and not otherwise defined are as defined in the PUC's opening brief. *See* Doc. 58.

For these reasons, and for the reasons described in the PUC's opening brief, the PUC's motion to dismiss should be granted.

ARGUMENT

I. TRANSOURCE LACKS STANDING

A. Transource Has Failed To Provide Evidence Demonstrating That It Has Suffered An Injury-In-Fact

Transource is a special purpose entity that was formed by AEP to develop, construct and operate the IEC Projects in Pennsylvania in order to generate profits for AEP and its shareholders. *See* Doc. 58-1 at 10, 40, 409. Transource has no other purpose and Transource possesses no other interest. Thus, in order to have standing, Transource must provide evidence that the PUC caused it to suffer some type of economic injury because Transource does not have any non-economic interests and is incapable of suffering a non-economic injury. Transource has failed to provide any such evidence. *See* Doc. 58 at 19-23.

Instead, Transource asserts that the "injury" giving rise to this suit is the denial of its siting permit and the rescinding of its certificate of public convenience. *See* Doc. 68 at 13. Transource asserts that this purported injury is sufficient in itself to confer standing even in the absence of any economic harm to Transource. Transource is wrong. The permit and certificate are only relevant to Transource to the extent that they assist Transource in fulfilling its one and only

mission – generating profits for AEP. Accordingly, in the absence of any economic harm to Transource, Transource lacks standing to bring this action.

Transource cites to the Second Circuit's decision in *Anderson Group LLC v. City of Saratoga Springs*, 805 F.3d 34 (2d Cir. 2015) in support of its assertion that it has been injured. In *Anderson* a developer who planned to build a residential housing project filed suit against a city based on allegations that the city's rezoning of the underlying property "perpetuated racial segregation and had a disparate impact on African Americans and families with children, thereby violating the Fair Housing Act ('FHA'), 42 U.S.C. § 3604." *Id*. at 38. The plaintiff "introduced evidence demonstrating that it expended $81,000" on the project and that the investment "became worthless upon the City's February 2005 zoning decision and permit denial . . . ." *Id*. at 46. The Second Circuit held that the developer's "actual expenditures . . . are economic losses that constitute concrete and particularized injuries for standing purposes." *Id*.

The facts here could not be more different. Unlike the developer in *Anderson*, Transource has presented no evidence that its investment has become worthless. To the contrary, the evidentiary record shows that Transource will not even face the prospect of any economic loss at all unless or until a number of contingent events occur that have not yet occurred and may never occur. *See* Doc. 58 at 19-21. Transource does not dispute this. Moreover, Transource has received

a commitment from FERC that it will recover "100 percent" of its "prudently-incurred" expenditures on the IEC Projects as well as a 9.9 percent return on its investment. Doc. 58-3 ¶ 50; *see* Doc. 58-4 ¶ 25. A 9.9 percent return is the exact opposite of an economic loss, and, without an economic loss, Transource lacks standing. *See Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (Transource "ha[s] the burden of proof that jurisdiction does in fact exist" by establishing standing); *cf Anderson*, 805 F.3d at 46 ("In sum, we hold that, under the specific circumstances of this case, [the plaintiff's] lost up-front economic expenditures . . . , coupled with the denial of a necessary special use permit, constitute injuries-in-fact").[2]

[2] The other cases cited by Transource are completely inapposite. *See Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 405-08 (3d Cir. 2005) (holding that a challenge brought by an operator of drug counseling and treatment facilities to a zoning ordinance prohibiting the operator from opening a methadone clinic was not barred from bringing suit under prudential standing rules); *Sammon v. N.J. Bd. of Med. Exam'rs*, 66 F.3d 639, 642 (3d Cir. 1995) (holding that aspiring midwives who challenged a New Jersey licensing statute regulating the practice of midwifery had standing because their "assertion of a right to practice their chosen profession is a legally cognizable one"); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013) (holding that an individual landowner had stated a claim against a local water management district based on allegations that the district's coercive denial of a land use permit violated the unconstitutional conditions doctrine).

B. Transource Does Not Have Standing To Seek A Declaratory Judgement To Remedy A Past Injury

Transource also lacks standing because Transource cannot seek a declaratory judgment to remedy a past injury. "To satisfy the standing and 'case or controversy' requirements of Article III, a party seeking a declaratory judgment must allege facts from which it appears there is a substantial likelihood that he will suffer injury in the future." *Blakeney v. Marsico*, 340 F. App'x 778, 780 (3d Cir. 2009) (internal quotation omitted) (emphasis added). As described above, Transource asserts in its opposition brief that it suffered an injury when the PUC denied its permit and certificate.[3] To redress this purported injury, Transource seeks a declaratory judgment that the PUC's past decision is "unlawful." Doc. 68 at 14. But Transource does not have standing to seek such a declaratory judgment because "[d]eclaratory judgment is not meant to adjudicate alleged past unlawful activity." *Wenzig v. Serv. Emp. Int'l Union Local 668*, 426 F. Supp. 3d 88, 100 (M.D. Pa. 2019), *aff'd*, 972 F.3d 262 (3d Cir. 2020). Transource's purported injury and the allegedly unlawful conduct of the PUC have already taken place and

[3] In its Complaint and motion to expedite, Transource alleged that its injury was the hypothetical loss of the $86 million it invested in the IEC Projects, the return on equity that it "expected" from the projects, and the higher prices that out-of-state customers would purportedly have to pay for electricity if PJM were to abandon the projects. Doc. 21-6 ¶ 14; *see* Doc. 1 ¶ 65. For the reasons described in the PUC's brief in support, these purported injuries are not injuries-in-fact to Transource and are not redressable by the relief Transource is seeking in this case. *See* Doc. 58 at 19-25.

Transource "does not allege that [it] will be subjected to that alleged conduct in the future." *Blakeney*, 340 F. App'x at 780. "Accordingly, even if [the PUC] violated [Transource's] rights in the past as [it] alleges, [Transource] is not entitled to a declaration to that effect." *Martin v. Keitel*, 205 F. App'x 925, 928 (3d Cir. 2006).

Transource lacks standing for this separate reason as well.

C. Transource's Request For Injunctive Relief Is Moot

Although not reflected in Transource's opposition brief, Transource's Complaint also mentions injunctive relief. *See* Doc. 1 at 41. If Transource is still seeking this relief then it is moot. The PUC's role has concluded and Transource has appealed the May 24 Decision to the Commonwealth Court. Thus, there is nothing left for the Court to enjoin with respect to the PUC because Transource "is not seeking prospective injunctive relief governing [the PUC's] future conduct." *O'Callaghan v. X*, 2016 WL 374744, *3 (E.D. Pa. Feb. 1, 2016), *aff'd*, 661 F. App'x 179 (3d Cir. 2016). Transource's request for injunctive relief is therefore moot.[4]

[4] Notably, Transource is not asserting any claim for damages in this case nor is it seeking any attorneys' fees. As explained by the Third Circuit, "a given plaintiff may have standing to sue for damages yet lack standing to seek [declaratory or] injunctive relief." *Brown v. Fauver*, 819 F.2d 395, 400 (3d Cir. 1987). *See id*. ("Because the plaintiff must establish that a favorable decision will be likely to redress his injury, the form of relief sought is often critical in determining whether the plaintiff has standing.").

II. TRANSOURCE'S CLAIMS FAIL

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

Transource does not (and cannot) dispute that the preemption claim it is raising in this federal proceeding "was the same as that involved in the prior" PUC administrative proceeding and was also "actually litigated" by Transource in the earlier proceeding. *Peloro v. U.S.*, 488 F.3d 163, 174 (3d Cir. 2007). Indeed, Transource itself made the tactical decision to raise the issue of preemption before the PUC. Now, after the conclusion of a lengthy and complex four-year proceeding in which the issue of preemption was litigated and decided at Transource's behest, Transource asserts that it can pull the rug out from under the PUC by simply raising the preemption issue anew in this federal proceeding. Transource is mistaken.

Crossroads Controls. In *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129 (3d Cir. 1998), the Third Circuit considered "the preclusive effect of decisions of state agencies responsible for utility regulation" when the "administrative agency decisions . . . have not been first reviewed by a state court." *Id.* at 135 (emphasis added). The Court held that "the factual findings and legal conclusions of the [New York Public Service Commission]" – which is "the state agency responsible for regulating electric utilities" in New York – "should be given preclusive effect to the extent afforded

under New York law." *Id*. at 133, 135 (emphasis added). *Crossroads* is the controlling law of this Circuit and therefore the legal conclusions of the PUC – which is the state agency responsible for regulating electric utilities in Pennsylvania (*see* Doc. 1 ¶ 9) – must also be given preclusive effect to the extent afforded under Pennsylvania law. *See DePolo*, 835 F.3d at 387 (holding that a ruling by a Pennsylvania administrative agency "is a final judgment on the merits that is entitled to preclusive effect in federal court") (citing *Crossroads*).[5]

Transource asserts that *Crossroads* does not apply because the Public Utility Regulatory Policies Act ("PURPA") at issue in *Crossroads* "specifically required state agencies to implement FERC regulations" and in this case "the special reasons for according preclusive effect in *Crossroads* are absent." *Id*. at 21-22. Transource has it backward. *Crossroads* held that "applying preclusive effect to legal conclusions made by state agencies is favored as a matter of general policy" and that the policy applied because there was no provision in the PURPA "that seeks to limit common law rules of preclusion from applying to state agency decisions relating to utility regulation." 159 F.3d at 135 (internal quotation omitted) (emphasis added). The same "general policy" applies in this case because

[5] Transource's contention that the Third Circuit's decision in *Edmundson v. Borough of Kennett Square*, 4 F.3d 186 (3d Cir. 1993) controls is puzzling. *See* Doc. 68 at 17. *Edmundson* was decided five years before *Crossroads* and *Edmundson* concerned the preclusive effect of a decision by an unemployment compensation board.

"there is nothing" in the Federal Power Act "that preempts state authority regarding transmission planning, including authority over the siting, permitting, and construction 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, 32,215 (May 31, 2012). Thus, just like the PURPA at issue in *Crossroads*, the Federal Power Act at issue here "still provides a substantial role to state agencies in regulating" transmission planning, permitting and construction. 159 F.3d at 135. Accordingly, *Crossroads* controls and issue preclusion applies.

Transource's Preemption Claim Is Not Beyond The Scope Of Issue Preclusion. Transource contends that its preemption claim is jurisdictional and "'beyond the scope of' issue preclusion." Doc. 68 at 17 (quoting *Edmundson*, 4 F.3d at 192). That is incorrect. In *Metropolitan Edison Co. v. Pennsylvania Public Utility Commission*, 767 F.3d 335 (3d Cir. 2014) the Third Circuit considered the preclusive effect that should be afforded to a PUC decision rejecting a preemption claim. The Court noted the general rule that "state tribunals" have jurisdiction over federal issues so long as "an arguable basis for jurisdiction" exists. *Id*. at 359. And the Court held that because "the PUC and the Commonwealth Court were not divested of authority to act altogether" under the Federal Power Act, "we cannot say that the PUC and the Commonwealth Court 'lacked even an arguable basis for

jurisdiction'" to decide a preemption claim. *Id*. at 364 (quoting *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010)). Therefore, issue preclusion applied to the PUC's decision in *Metropolitan Edison* and it also applies here. *See id*. ("As the PUC and the Commonwealth Court were not divested of authority to act altogether, the result of the state proceeding is not void on that ground."); *Crossroads*, 159 F.3d at 135 ("generally speaking, a tribunal's determination of its own jurisdiction is accorded the same status for issue preclusion purposes as the merits of a dispute").[6]

Issue preclusion applies under Pennsylvania law. As described in the PUC's opening brief, issue preclusion applies under Pennsylvania law because all of the elements of issue preclusion are satisfied. *See* Doc. 58 at 26-27. Transource does not dispute this. Instead, Transource asserts that issue preclusion is inapplicable because (i) issue preclusion only applies to "disputed issues of fact" (Doc. 68 at 24 n.6); (ii) "Transource has sought review" in federal court "within the required time period" for an appeal of the PUC decision (*id*. at 23); and (iii)

[6] Transource argues that *Metropolitan Edison* is distinguishable because the plaintiff in *Metropolitan Edison* completed its appeal of the PUC's decision in the Commonwealth Court before commencing an action in federal court while Transource's appeal remains pending. *See* Doc. 68 at 22. That is a distinction without a difference. A ruling of a state administrative agency "is final unless or until it is reversed on appeal. The pendency of an appeal does not defeat finality for purposes of preclusion." *Shank v. East Hempfield Twp*., 2010 WL 2854136, at *13 (E.D. Pa. July 20, 2010) (internal quotation and citations omitted).

Transource has withdrawn its preemption claim from its appeal in the Commonwealth Court. *See id.* at 20. Transource is wrong on all counts.

First, Pennsylvania courts do not limit preclusion to issues of fact. Indeed, in *City of McKeesport v. Pennsylvania Public Utility Commission*, 442 A.2d 30 (Pa. Commw. Ct. 1982), the Commonwealth Court applied preclusion to an issue of law. *See id*. at 31 (holding that an issue of law was precluded when "[t]he identical issue was briefed, considered at length and reviewed by an Administrative Law Judge whose decision was adopted by the Commission"). The PUC "is a state administrative agency acting in a quasi-judicial capacity. It resolved this dispute by issuing a written determination containing final findings of fact and conclusions of law." *DePolo*, 835 F.3d at 387 (emphasis added). Both categories of findings are "entitled to preclusive effect in federal court" under Pennsylvania law. *Id.*[7]

Second, the timing of Transource's commencement of this action in federal court has no bearing on the applicability of issue preclusion because the ruling of a

[7] Transource also cites to inapposite cases in which Pennsylvania courts have held that "an administrative agency may not determine the constitutionality of the statutes it applies." Doc. 68 at 25 (quoting *United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 365–66 (3d Cir. 1986)). But Transource has not challenged the constitutionality of any Pennsylvania statutes. Moreover, it is blackletter law that Pennsylvania "administrative agencies can and should correct their mistaken interpretations of [a] statute," which is what Transource is alleging here. *Cutler v. State Civil Serv. Comm'n*, 924 A.2d 706, 717 n.18 (Pa. Commw. Ct. 2007).

state administrative agency "is final unless or until it is reversed on appeal. The pendency of an appeal does not defeat finality for purposes of preclusion." *Shank*, 2010 WL 2854136 at *13. Transource cites to *Coastal Distribution, LLC v. Town of Babylon*, 216 F. App'x 97 (2d Cir. 2007), an unpublished decision in which the Second Circuit declined to apply issue preclusion to a state administrative decision. *See* Doc. 68 at 23. But unlike Transource in this case, the plaintiff in *Coastal Distribution* did not seek review of the administrative decision in state court. Instead, the plaintiff sought exclusive review in federal court and the federal court stepped into the shoes of the state court. *See Coastal Distribution*, 216 F. App'x at 102.[8] The situation here could not be more different. In this case Transource is litigating its appeal of the PUC's decision in the Commonwealth Court while "contemporaneously" seeking review of that same decision in federal court. Doc. 21-1 at 10. Unlike the federal court in *Coastal Distribution*, this Court cannot step

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[8] As the explained by the Second Circuit:

> [I]f the appellees had brought suit in an Article 78 state court proceeding—which would have been timely as of the date of the federal complaint—rather than an action in federal court, the state court would not have given the [the board's] findings issue-preclusive effect: it would have reviewed them using a deferential standard of review after hearing any additional evidence it deemed necessary.

Id.

into the shoes of the state court because the Commonwealth Court has already stepped into its own shoes and is adjudicating Transource's appeal.

Nor has Transource obtained a stay of its state court appeal. The Third Circuit held in *DePolo* that there are only "limited avenues into federal court" for a plaintiff like Transource that seeks to challenge a decision made by a state administrative agency. 835 F.3d at 387 n.18. In particular, Transource could "sta[y] the [appeal] in state court, while [its] federal claims [a]re resolved" in this Court. *Id*. In that situation the state court would be deferring to the jurisdiction of the federal court by granting a stay. But Transource has neither sought nor obtained a stay of its appeal in the Commonwealth Court. Moreover, "[b]inding precedent instructs that, 'when a state proceeding presents a federal issue, even a pre-emption issue, the proper course is to seek resolution of that issue by the state court.'" *Metro. Edison* 767 F.3d at 359 (quoting *Chick Kam Choo v. Exxon Corp*., 486 U.S. 140, 149–50 (1988)) (emphasis added). That precedent controls here.

Third, Transource has not withdrawn its preemption claim from its appeal in the Commonwealth Court. *See* Doc. 61-6 at 9. To the contrary, the only thing Transource has done is "includ[e] an '*England* Reservation' in its state court papers" and the only thing the Commonwealth Court has done is "declin[e] to expedite" Transource's appeal. Doc. 68 at 20 n.5.

In sum, issue preclusion applies to the May 24 Decision and Transource's assertions to the contrary are meritless in all respects.

B. Transource's Dormant Commerce Clause Claim Is Barred By Claim Preclusion

As described in the PUC's opening brief, the elements of claim preclusion are also satisfied and Transource's dormant Commerce Clause claim is barred. *See* Doc. 58 at 29-31. Transource asserts that claim preclusion does not apply because it "had no genuine opportunity to prevail on its dormant Commerce Clause claim before the PAPUC." Doc. 68 at 27. This is false. Transource could have argued before the PUC that the ALJ's Recommended Decision violated the dormant Commerce Clause. Moreover, "when a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987). Having failed to even attempt to raise this claim below Transource is barred from raising it here.

Transource also asserts that claim preclusion is inapplicable because the parties to the actions are not "identical." *Id*. at 28. Transource reads this requirement far too literally. In *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 721 F. Supp. 710 (M.D. Pa. 1989), *aff'd*, 899 F.2d 1217 (3d Cir. 1990), this Court held that there is an identity of persons and parties

to the action when a party to a prior PUC administrative proceeding subsequently brings suit against the PUC in a federal proceeding challenging the outcome of the earlier PUC proceeding. *See id.* at 715 n.11. That holding clearly applies here. *See DePolo*, 835 F.3d at 387 (preclusion applied to claims asserted against a Pennsylvania zoning board of appeals in federal court when the plaintiff was a party to an earlier board administrative proceeding).[9]

C. Transource Fails To State A Preemption Claim

Transource's preemption claim should also be dismissed because it fails substantively as a matter of law. Transource concedes (as it must) that neither FERC nor PJM have any "authority over 'the siting, permitting, and construction of transmission facilities.'" Doc. 68 at 33 (quoting Order No. 1000-A, 77 Fed. Reg. at 32,215). That authority is expressly reserved to the states under 16 U.S.C. § 824(a). *See* 77 Fed. Reg. at 32,215 ("We recognize that such decisions are normally made at the state level."). Nonetheless, Transource asserts that the PUC's decision denying Transource's application to build the IEC Projects was preempted because the PUC used an impermissible criteria that "targeted PJM's

[9] Transource asserts that *Kentucky West Virginia* is distinguishable because there were "two other prior administrative proceedings and a prior federal lawsuit against the PAPUC" in that case. Doc. 68 at 28-29. But the federal lawsuit was not relevant to the question of claim preclusion and Transource fails to explain the relevance of the prior administrative proceedings. *See Kentucky W. Va.*, 721 F. Supp. at 714 ("Defendant's reliance upon the proceedings in this court in *Kentucky West I* is misplaced.").

regional planning decision" to reach an otherwise permissible result. Doc. 68 at 33. There are two fundamental problems with that assertion.

First, it is a non-sequitur. Because federal law expressly preserves state authority over the "siting, permitting, and construction of transmission facilities," it necessarily follows that state authority is also preserved over the criteria used by a state regulator when making a siting, permitting or construction related decision. 77 Fed. Reg. at 32,215. Otherwise the preservation of state authority would be meaningless. Stated differently, states cannot have authority over "what needs to be built, where it needs to be built, and who needs to build it," on the one hand, without also having authority over the criteria used to make these decisions, on the other. *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, Federal Energy Regulatory Commission Order No. 1000, 76 Fed. Reg. 49,842, 49852 (Aug. 11, 2011). FERC has stated expressly that RTO's like PJM are prohibited from "doing anything indirectly that we cannot do directly." 77 Fed. Reg. at 32,215. But that is precisely what Transource is trying to do here.

Second, FERC has also made explicit that PJM's regional transmission planning authority pursuant to Order No. 1000 is not exclusive. Federal regional transmission planning is "concerned with process;" it is "not intended to dictate substantive outcomes, such as what transmission facilities will be built and where."

Id. Nor was the federal planning process intended to displace separate and independent state planning and siting 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 and, therefore, can hardly be seen as detrimental to state-sanctioned integrated resource planning.

Id. (emphasis added).

Here, the federal process had run its course and served its purpose as soon as the IEC Projects were approved by PJM and presented as an "option" to the PUC 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." *Id*. (emphasis added). "[E]ven where more efficient or cost-effective transmission solutions are identified and selected in [a] regional transmission plan" prepared by PJM – which is what Transource alleges here – "such solutions may not ultimately be constructed should the developer not secure the necessary approvals from the relevant state

regulators." *Id*. That is precisely what happened when the PUC denied Transource's applications for the IEC Projects.

In sum, the PUC was not preempted from applying the requirements of Pennsylvania law – including an independent determination of "need" pursuant to the express terms of 52 Pa. Code § 57.76(a)(1) – because there is nothing in FERC's authority or that of PJM "that preempts state authority regarding transmission planning, including authority over the siting, permitting, and construction of transmission facilities." 77 Fed. Reg. at 32,215. (emphasis added). Transource's preemption claim fails and should be dismissed.

D. Transource Fails To State A Dormant Commerce Clause Claim

Transource's dormant Commerce Clause claim also fails. Transource concedes that the PUC did not discriminate against out-of-state utilities in favor of instate utilities when it denied Transource's applications to build the IEC Projects. *See* Doc. 58 at 34-36. Instead, Transource asserts that it has stated a dormant Commerce Clause Claim because the PUC discriminated against and burdened interstate commerce when it "restrict[ed] the flow of exports" "by blocking bottlenecked electricity from being released and delivered to out-of-state consumers." Doc. 68 at 38. Transource's assertion is flawed in two separate respects.

First, the May 24 Decision did not restrict the flow of exports or block electricity. To the contrary, the decision denied approval for the construction of a massive energy transmission facility on Pennsylvania soil that did not previously exist and cannot legally exist unless the requirements of Pennsylvania law are satisfied. The dormant Commerce Clause is not implicated by that decision because the clause only applies to state laws that "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) (emphasis added). The denial of a construction permit for a new transmission facility simply maintains the status quo and is in no way equivalent.[10]

Second, the May 24 Decision did not discriminate against out-of-state consumers or burden interstate commerce at all. While the interests of Pennsylvania and out-of-state consumers were considered by the PUC, this was one factor among several that led to a determination that Transource had failed to show a "need" for the IEC Projects within the meaning of 52 Pa. Code § 57.76(a)(1). The findings that congestions levels had decreased dramatically since

[10] Transource cites to *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), but that case did not concern the construction of a power facility. To the contrary, *New England Power* concerned a New Hampshire regulation that prohibited a power company from exporting electricity that was already generated from existing facilities in New Hampshire to out-of-state consumers. The PUC's decision in this case is not at all comparable.

the projects were first approved and that the projects' costs had more than doubled to $497 million were of far greater significance. *See* Doc. 1-3 at 28-29, 97-98. Especially relevant was the fact that "PJM did not conduct reliability testing":

> PJM's projections regarding congestion cost have not been consistently accurate over time and there are not enough facts to support a finding of need when the congestion concern initially raised in the applications is gone or fluctuating outside of projections and the standard reliability tests were not performed by PJM. Further, the benefit/cost calculation seems to have changed since 2014 in addition to the congestion cost figures.

Id. at 91. As summarized by the ALJ:

> Where the congestion costs . . . once represented 25% of the total congestion costs in 2014 of PJM Interconnection, LLC (PJM), that percentage has decreased to a range of 1–4% of total PJM congestion costs experienced per year for the past four years. Additionally, any projected net benefit to the PJM region of $32.5 million over a period of 15 years, is outweighed by a projected increase in wholesale power prices in Pennsylvania by $400 million on a net basis.

Id. at 8.

Thus, Transource again has things backward. The PUC's rejection of Transource's application to build the IEC Projects did not discriminate against out-of-state energy consumers or burden interstate commerce. Rather, it was Transource and PJM that were burdening consumers and burdening commerce

with a gratuitous and wasteful energy project that could no longer be justified by its costs.

CONCLUSION

For the foregoing reasons, and for the reasons described in the PUC's opening brief, the PUC's motion to dismiss should be granted.

Date: August 13, 2021

Respectfully submitted,

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	:	*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 4,991 words.

CERTIFICATE OF SERVICE

I further certify that on August 13, 2021, I caused to be served a true and correct copy of the foregoing document titled Defendants' Reply Brief in Further Support of Their Motion to Dismiss to the following:

VIA ELECTRONIC FILING

ALL COUNSEL OF RECORD

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