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' COMBINED REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT & BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants (Defendants or PUC), by and through counsel, hereby file this Combined Reply Brief in Support of their Motion for Summary Judgment and Brief in Opposition to Plaintiff's Motion for Summary Judgment pursuant to this Court's Order (Doc. 145) and Local Rules 7.6 and 7.7. There is no dispute of any material fact and Defendants are entitled to judgment as a matter of law.

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I. INTRODUCTION

The crux of the Parties' divergent points of view boils down to a single question—whether the PUC Decision is a siting and permitting decision or a "transmission planning" decision. Defendants maintain that the PUC Decision is a siting and permitting decision, an area solely and exclusively reserved to the States. Transource, on the other hand, argues that the PUC Decision is a "transmission planning" decision, an area reserved to FERC's jurisdiction.

"Transmission planning is a process that occurs prior to the interconnection and coordination of transmission facilities." *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 transmission planning process, therefore, begins and ends entirely before any coordination of utility transmission facilities occurs and merely serves as a procedural tool to both evaluate the current electric utility landscape and to enable the brainstorming process of how to plan for future developments; the transmission planning process is not a mandate that any given plan be actually developed. *See id.* In fact, FERC is explicitly clear that the transmission planning process does not "create any obligations to interconnect or operate in a certain way." *Id.*

Transource, in its third-bite-at-the-apple, attempts to get yet another "do-over" in federal court. Transource's argument, when taken to its logical conclusion, essentially is that the PUC had no choice but to "rubber stamp" the project and decide in Transource's favor allowing the IEC project to be constructed. (Doc. 158 at 34 ("States still get to decide where to site a line and what types of measures must be put into place, for example to mitigate local environmental effects.").) "Rubber-stamping" is not the role of State regulatory entities. Rather, State regulatory entities ensure that the project presented before it complies with State law for siting and permitting concerns. There is no direct conflict between the PUC Decision and federal law because the PUC Decision does exactly what it has the statutory authority to do, make a siting and permitting decision.

Additionally, the PUC Decision does not violate the dormant Commerce Clause. The PUC Decision considered the entire PJM region, not just Pennsylvania. Transource has not, and cannot, point to any competent, admissible evidence that an alleged price disparity actually exists between Pennsylvania and other states.

Notwithstanding these fatal issues with Transource's case, its claims are also barred by claim preclusion because Transource waived its right to invoke an *England* Reservation by not raising it in the quasi-judicial PUC proceeding, in which Plaintiff had a full and fair opportunity to litigate its claims and Defendants objected to

Transource's *England* Reservation notice and did not acquiesce to the splitting of claims.

For the reasons advanced within this brief and Defendants' initial opening brief (Doc. 148), Defendants' Motion for Summary Judgment should be granted and Transource's Motion for Summary Judgment should be denied.

II. COUNTER STATEMENT OF FACTS & PROCEDURAL HISTORY

As there are cross-motions for summary judgment pending wherein all Parties submitted their own statements of material fact and responses to the other party's separately submitted facts, in the interests of judicial economy, Defendants do not restate those facts here. Defendants cite to their own statement of facts where appropriate herein.

III. COUNTER-ISSUES PRESENTED

A. Whether Defendants are entitled to summary judgment on the preemption claim because (i) the PUC Decision is a valid exercise of its siting authority; (ii) there is no direct conflict between the PUC Decision and federal law; (iii) the PUC Decision is not an obstacle to federal objectives; and (iv) PJM's tariff does not preempt the PUC's siting and permitting authority?

B. Whether Defendants are entitled to summary judgment on the dormant Commerce Clause claim because the PUC Decision neither discriminates against nor burdens interstate commerce?

C. Whether all of Transource's claims are claim precluded because Transource waived its right to invoke the *England* Reservation and Defendants did not acquiesce in Transource's splitting of claims?

Suggested Answer to All: Yes.

IV. COMBINED REPLY & OPPOSITIONAL ARGUMENTS

A. THE PUC DECISION IS NOT PREEMPTED BY FEDERAL LAW

Transource argues that the PUC Decision is preempted because it allegedly directly conflicts with federal law and stands as an obstacle to Congress' objectives. (Doc. 158 at 19-25.) The PUC anticipated and addressed these arguments in its initial brief, demonstrating that the FPA and FERC orders implementing the FPA specifically reserve siting and permitting authority for transmission projects like the IEC Project to the States. (Doc. 148 at 19-33.) Moreover, "[g]iven the FPA's dual regulatory scheme, conflict-pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 55 (2d Cir. 2018).

Transource admits that "the PUC has authority over the siting of new transmission lines", (Doc. 158 at 1), but argues that the PUC, in exercising that authority, somehow encroached upon FERC's separate and independent authority over regional transmission planning. (*See, e.g.*, *id*. at 19 ("[s]tates may not regulate in areas where FERC has properly exercised its jurisdiction.").) Put another way, Transource argues that the PUC's Order was not a siting decision at all, but "a [transmission] planning decision." (*Id*. at 25.) Far from "prevent[ing] the diminution

of the role Congress reserved to the States[,]" Transource would relegate the PUC's role in siting to "rubber-stamping" un-reviewed PJM planning analyses.

i. The PUC Decision Was a Valid Exercise of its Siting Authority

It is undisputed that FERC has jurisdiction over *transmission planning*. (Order No. 1000 at 49,861.) However, FERC's authority is not implicated here because the PUC's determination was a siting and permitting decision, an area left solely by Congress to the States, not FERC. "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).

"Transmission planning is a process that occurs ***prior to*** the interconnection and coordination of transmission facilities [and] does not create any obligations to interconnect or operate in a certain way." (*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) (emphasis added).) The transmission planning process, therefore, begins and ends entirely before any coordination of utility transmission

facilities occurs,[1] *i.e.*, building and connecting new transmission lines to the existing grid.

FERC states that "[t]he transmission planning and cost allocation requirements of [Order 1000], are associated with the processes used to ***identify and evaluate transmission system needs and potential solutions to those needs*** . . ." but "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." (*Id*. at 49,869 (emphasis added).) Therefore, "[n]othing in [Order 1000] 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." (Order 1000 at 49,854.)

While transmission planning has relatively narrow objectives—identifying potential solutions to transmission issues and allocating projected costs of those solutions—siting and permitting a project involves a broader inquiry into the public interest "need" for the project. The PUC defined the applicable "legal standard" as follows:

> [O]ur determination turns on our consideration of the weight of all the evidence, whether need has been established by a preponderance of the evidence, consistent

[1] FERC describes "interconnection and coordination" as "the coordinated operation" of facilities. (Order No. 1000 at 49860.)

> with our discretion under Section 1501 of the [Public Utility] Code, to determine whether the service to be provided is "reasonable and necessary and in the public interest," and our discretion under Commission Regulation, to determine whether Transource has established need, by a preponderance of the evidence required for approval of the siting of the proposed transmission lines, per 52 Pa. Code § 57.76(a)(1).

(Doc. 1-2 at 60.)

Applying this standard, the PUC "recognized the asserted regional planning goals of the IEC Project but found, after weighing the evidence, that the evidence offered to support that the IEC Project satisfied the Pennsylvania standards for approval was not persuasive for a variety of reasons[,]" (Doc. 90-1 at 32), including that "congestion in the APSRI had decreased since the initial study that supported PJM's need determination, and that there was insufficient proof of the potential NERC reliability violations." (*Id.* at 34.)

The PUC's application of a robust public interest standard for transmission lines is fully consistent with the standard FERC applies when it exercises its "backstop" siting and permitting authority under FPA Section 216.[2] When FERC

[2] Under FPA § 216, FERC may exercise siting and permitting authority over transmission lines located in Department of Energy (DOE)-designated "national interest electric transmission corridors" if a state has denied or failed to issue a permit. 16 U.S.C.A. § 824p(b). In exercising this authority, FERC must consider whether "the proposed construction or modification is consistent with the public interest." 16 U.S.C.A. § 824p(b)(3). To be sure, no party contends that the IEC Project is in such a corridor or that FERC has siting or permitting authority over the

promulgated rules to implement this authority, a commenter proposed that FERC "rebuttably presume a need for a project subject to the independent oversight of [an RTO] [since] participants must already make showings of local or regional need to gain approval from an [ ] RTO." *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, 117 FERC ¶ 61,202 at *10. FERC rejected that proposal, finding that "determinations of an [RTO] should be given due weight in [FERC's] assessment of whether a particular facility is needed to protect or benefit customers," and it would instead "consider any such independent determinations as a factor, along with all other relevant factors, in determining whether the statutory criteria have been met." *Id*. at *10-11. That is precisely what the PUC did here: it considered PJM's congestion analysis related to the IEC Project, along with the cross-examination of that evidence and other evidence presented, but ultimately determined that other factors dictated that the project was not in the public interest.

Another difference between PJM's transmission planning process and the PUC's siting and permitting process is procedure. PJM's process is a closed loop in which the PJM Board approves recommendations brought forward by PJM staff, based on PJM staff's analysis of projects submitted by prospective transmission

project. FERC's analysis of its siting and permitting rule under FPA § 216 is relevant because under that section, FERC plays the role normally filled by the States.

owners and internal conversations with the PJM Board. In selecting projects for inclusion in the RTEP, the PJM Board does not conduct evidentiary hearings, develop a factual record, take sworn testimony, permit cross-examination, briefing or argument by interested parties. (Doc. 164-1 (Ex. A, David Souder Dep. Tr., at 58 ("[PJM Staff] perform the analysis, [PJM Staff] perform sensitivities around that. And if [PJM Staff] determine that the benefit-to-cost analysis is no longer to the correct level, which then [PJM Staff] would actually have conversations internally and then have conversations with the PJM board. And then we would make a decision as to whether the project is cancelled based on no longer seeing the benefit-to-cost ratio as a need."); *and see id.* at 126 ("[PJM Staff] select the project, [PJM Staff] bring it to the board. The board approves it, [PJM Staff] put it in our model."); *and see id.* at 148-49 (describing the entire PJM project submission, analysis and approval process).)

By contrast, the PUC's subsequent findings were based on a fully-litigated record, (*see* Doc. 1-2 at 4-18 (describing proceedings before the PUC)), which indicated that the congestion identified by PJM had declined precipitously since PJM's initial analysis and that the total costs of the project far outweighed its benefits, for purposes of permitting actual siting and construction of the project. (Doc. 147 at 9-10 (¶¶ 41-48)). In this way, the PUC process provides an important procedural check on the un-litigated, un-reviewed conclusions reached by PJM

based on its unpublished models, and further justifies FERC's decision to preserve and protect a siting and permitting role for the states.

Taken to its logical conclusion, Transource's argument would render meaningless FERC's direct instruction in Order 1000 that all siting and permitting decisions are left to the States and cause this Court to push FERC's jurisdiction into a new area, one that was not previously in FERC's jurisdiction but preserved to the States. Also, it would relieve transmission developers of PJM's own tariffed obligation to "obtain[] all necessary authorizations and approvals, including but not limited to, state approvals," (Doc. 157-4 at 34 (PJM Operating Agreement Schedule 6 § 1.5.8(j)), including those required under 52 Pa. Code § 57.76(a)(1). Thus, Transource would require all states to simply disregard their own State laws and "rubber-stamp" every RTO-approved transmission line application before them. (*See gen.* Order No. 1000 at 32,216.)

The Court need not reach those issues because FERC has clearly instructed that its jurisdiction did not reach siting and permitting, and left that area solely to the States. In this case, the PUC Decision made a siting and permitting decision to not build the project as presented to it ***after*** the transmission planning process was completed. The PUC Decision, therefore, was a valid exercise of its siting authority.

ii. The PUC Decision Does Not Conflict With Federal Law

Transource points to three cases to allegedly support its position that the PUC Decision conflicts with federal law—*Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), and *Appalachian Power Co. v. Public Service Commission of West Virginia*, 812 F.2d 898, 905 (4th Cir. 1987). Doc. 157 at 22-23. Each of these cases is irrelevant to this Court's determination in the present case. ***All*** of them are premised on FERC's exclusive jurisdiction over interstate ***ratemaking***[3] which is not at issue here.[4] Further, ***none*** of Transource's cases involve State siting and permitting authority for transmission lines (which is dispositive here).

As the PUC Decision was a siting and permitting decision and not a transmission planning decision, it does not conflict with Federal law.

iii. The PUC Decision Is Not An Obstacle To Federal Objectives

Transource argues that the PUC Decision is an obstacle to federal objectives because Pennsylvania benefited from regional planning in the past and now the

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[3] *See Nantahala*, 476 U.S. at 953 ("Nantahala filed a proposed wholesale rate increase with FERC, which has exclusive jurisdiction over interstate wholesale power rates."); *Mississippi Power & Light*, 487 U.S. at 371 ("FERC has exclusive authority to determine the reasonableness of wholesale rates."); *and Appalachian Power*, 812 F.2d at 902 ("FERC's jurisdiction over interstate wholesale rates is exclusive.").

[4] Transource instead argues that FERC "has authority over interstate electric transmission planning." (Doc. 157 at 1.)

denial of the construction of the project frustrates that same regional planning process. (Doc. 158 at 24-25.) The PUC Decision is not an obstacle to federal objectives.

First, Transource points to both the alleged existence of congestion in the region and a pricing disparity between Pennsylvania and other States. (*Id.*) However, Transource points to no competent, admissible evidence that either congestion or a pricing disparity actually exists. (*Id.*)

In fact, the Pennsylvania Commonwealth Court specifically held that while the Project was initially designed to resolve congestion, congestion in the region has decreased significantly since 2014. (Doc. 90-1 at 41.) Any challenge to the Commonwealth Court decision is barred by *res judicata*. *Kentucky W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 721 F. Supp. 710, 715-16 (M.D. Pa. 1989), *aff'd*, 899 F.2d 1217 (3d Cir. 1990).

Nor has Transource come forward with any evidence, during the PUC proceeding, discovery, or with its motion for summary judgment in this matter that a pricing disparity actually exists or would exist in the future. (Doc. 1-3 at 92; Doc. 147 at ¶50; *see also* Doc. 159 at ¶50 ("Undisputed.").) Transource attempts to avoid this issue by discussing projections of wholesale discrepancies but does not explain, in any fashion, how this is at all relevant or should be a concern in this case. Nor

does Transource provide any evidence of a wholesale disparity. (Doc. 159 at ¶50 ("Undisputed.").) Therefore, this is an irrelevant red herring.

Transource cannot rely upon its own legal conclusions and hypothetical speculation to either overcome or prevail on summary judgment. *See Goode v. Nash*, 241 F. App'x 868, 869 (3d Cir. 2007) ("[A]lthough the party opposing summary judgment is entitled to 'the benefit of all factual inferences in the court's consideration of a motion for summary judgment, the nonmoving party must point to some evidence in the record that creates a genuine issue of material fact,' and 'cannot rest solely on assertions made in the pleading, legal memoranda or oral argument.'").

Further, Transource misstates the true federal objectives at issue here and focuses solely on remediating perceived congestion to justify construction of a new transmission line. But the federal objectives at issue are related entirely to creating a transmission plan—which happened here and was completed at the time the IEC Project was submitted to the RTEP. The PUC did not interfere with that transmission planning process but instead made a subsequent siting and construction decision to deny the siting application presented before it by Transource.

Transource also misunderstands PJM's own objectives. PJM's own designee testified in his deposition that the customers that may experience harm as a result of the congestion were retail consumers. (Doc. 147 at ¶¶49-50.) That same PJM

designee further 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. . . ." (*See id.* ¶50.) There, PJM said that this project was to affect wholesale pricing disparities but, rather, was about retail prices. (*See id.* ¶49-50.)

The PUC Decision requires only that Transource adhere to what Order 1000 and Pennsylvania law require—to obtain both federal approval and State regulatory approval before constructing a new utility line. All the while, electricity continues to flow and be accessible for all citizens, no matter the State or part of the region in which they live. The PUC Decision is not an obstacle to federal objectives. Defendants, therefore, are entitled to judgment on the preemption claim.

iv. PJM's Tariff Does Not Preempt the PUC's Siting & Permitting Authority

Throughout its brief, Transource relies on PJM's tariff as an independent source of preemption. (*See e.g.*, Doc. 158 at 61 ("the tariff itself has preemptive force.").) However, for at least two reasons, PJM's tariff fails to carry the preemptive weight Transource asserts.

First, the tariff itself acknowledges that following approval of a project's inclusion in the RTEP, the transmission developer must then obtain "all necessary authorizations and approvals, including but not limited to, state approvals." (Doc. 157-4 at 34.) Further, the tariff makes clear that any obligation to build the project

is "[s]ubject to the requirements of applicable law, government regulations and approvals, including, without limitation, requirements to obtain any necessary state or local siting, construction and operating permits." (*Id*. at 43.) Much as Transource may wish otherwise, PJM's tariff does not qualify its obligation to obtain state siting and permitting approvals, whether limited to findings of "need," or otherwise.

Second, FERC itself has affirmed that transmission planning tariffs and agreements do not preempt state siting authority:

> We affirm [our] finding in Order No. 1000 that the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states, such as transmission construction, ownership or siting. As the Commission explained in Order No. 1000, the nonincumbent ***transmission developer reforms are focused solely on public utility transmission provider tariffs and agreements subject to the Commission's jurisdiction and 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, 77 FR 32184-01, *32243-44 (emphasis added). Against this expansive statement of FERC's own deference to State siting authority, including tariffs implementing FERC's transmission planning orders, Transource can offer no meaningful rebuttal.

The PUC Decision, therefore, is not preempted by federal law because it was a valid exercise of its siting authority, it does not conflict with federal law, is not an obstacle to federal objectives, and PJM's tariff does not preempt the PUC's siting and permitting authority. Defendants, therefore, are entitled to summary judgment on the preemption claim asserted within the operative complaint.

B. THE PUC DECISION DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

Transource argues that the PUC Decision violates the dormant Commerce Clause. (Doc. 158 at 34.) In so doing, Transource argues that the PUC Decision is (1) *per se* invalid because it discriminates against non-Pennsylvanians on its face, and (2) disproportionally burdens interstate commerce and fails under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) because the denial effectively blocks cost savings to non-Pennsylvanians who would allegedly benefit from the project with the targeted goal of keeping low costs in Pennsylvania. (*Id.* at 42-43.) Defendants vehemently disagree; Transource is wrong.

i. The PUC Decision Is Not A Per Se Violation Of The Dormant Commerce Clause

Transource hinges its entire dormant Commerce Clause argument on the premise that there is a pricing disparity that exists between Pennsylvania and neighboring states. (*Id.* 35, 43.) In so doing, however, Transource fails to come forward with any competent, admissible evidence to prove that any price disparity

exists. (*See id.* at 35, 43, 49.) Instead, Transource only directs the Court to the Administrative Law Judge's and PUC's Findings of Facts within Paragraphs 94 and 106 of its Statement of Facts. (*Id.* at 49.)

Neither Paragraph 94 nor Paragraph 106 of Transource's Statement of Facts establishes via competent and admissible evidence that an actual pricing disparity exists between Pennsylvania and other States. Instead, these Paragraphs merely summarize Transource's arguments that the PUC could not consider effects on Pennsylvania within a determination of need under Pennsylvania law before the ALJ and PUC, and the ALJ's and PUC's rejection of those arguments. The PUC's decision to consider the effects on Pennsylvania does not establish that any pricing disparity existed or currently exists. With no evidence of any price disparity before the Court, Transource's dormant Commerce Clause argument fails as a matter of law.

Moreover, Transource's continued reliance on an alleged price disparity between Pennsylvania and other states is further evidence that there is no need for the project. FERC has jurisdiction over the rates and prices of electricity. 16 U.S.C. § 824(a). FERC, therefore, could address those prices on its own without any new construction to be built. *See gen. id.*

Transource argues that the consideration of the consequences of the project on Pennsylvanians equates to impermissible economic protectionism. (Doc. 158

at 44-45.) This is false. Transource's self-serving argument is belied by the fact that it cherry picks only one of the many factors, the effects on some Pennsylvanians, that the PUC considered in its determination for the need of the project as the basis for its protectionism argument, and ignores the rest. The PUC Decision expressly indicates that, when making its determination, the PUC considered "the PJM region as a whole"—not solely Pennsylvania. (Doc. 1-3 at 97.) Pennsylvania is part of the region and exclusion of consideration of Pennsylvania is impermissible.

The cases cited by Transource, (Doc. 158 at 48), are inappropriately cited and not persuasive in this case because each deals with the sale of goods that are already in existence within the stream of interstate commerce. This case is about the construction of a new utility line not currently in existence and is not about, in any fashion, the sale of currently existing goods across state lines.

The PUC Decision in no way interfered with the transmission of electricity, rather, it denied a siting application filed by Transource. Electricity has and continues to flow from Pennsylvania to other States. Transource has not pointed to any competent, admissible evidence that Pennsylvania affected this flow of electricity. Thus, the PUC Decision not a *per se* violation of the dormant Commerce Clause.

ii. The PUC Decision Does Not Burden Interstate Commerce In A Disproportionate Manner to Legitimate Local Benefits

Transource argues that the PUC Decision disproportionately burdens interstate commerce because it effectively blocks cost savings to non-Pennsylvanians to keep prices low in Pennsylvania by not addressing the region's alleged congestion issue. (Doc. 158 at 46-47.) Transource is incorrect.

Again, as discussed above, the Commonwealth Court definitively held that there is no congestion in the region, this issue, therefore, is barred by *res judicata* as a factual matter. (Doc. 90-1 at 41); *Kentucky W. Va. Gas*, 721 F. Supp. at 715-16.

If the issue were purely about prices, then FERC has jurisdiction over setting rates for electricity under the FPA. *See* 16 U.S.C. § 854(b). However, this is not a case about prices or rates but of siting and construction. The PUC Decision, therefore, does not burden interstate commerce. Accordingly, Defendants are entitled to judgment on the dormant Commerce Clause claim.

C. ALL OF TRANSOURCE'S CLAIMS ARE CLAIM PRECLUDED

Transource argues that its claims are not barred by claim preclusion because it preserved them pursuant to *England* within its appeal to the Pennsylvania Commonwealth Court. (Doc. 158 at 50-52.) Transource also contends that the PUC acquiesced in its *England* Reservation by virtue of its conduct before the Commonwealth Court. (*Id.* at 56.) This is not true—Transource waived its ability to invoke the *England* Reservation because it did not properly invoke the doctrine at

the earliest opportunity during the pendency of the state administrative proceeding, and Defendants did not acquiesce in Transource's attempt to invoke *England*.

i. Transource Waived Its Right To Invoke The England Reservation Because It Did Not Invoke The Doctrine Before The PUC, A Quasi-Judicial Body, & Raised It For The First Time On Appeal

Transource asks this Court to reconsider its prior Order, (Doc. 118), and contends that it "properly reserved its ability to litigate its claims in this Court under *England*" because it asserted its *England* reservation within its appeal to the Commonwealth Court (Doc. 158 at 51.) This is incorrect.

First and foremost, Local Rule 7.10 states that any motion for reconsideration or re-argument must be filed within fourteen days of the date of the order to which it concerns. *See* Local Rule 7.10. Plaintiff's request for this Court to reconsider its prior Order (Doc. 118) is untimely and improper under Local Rule 7.10.

Even if the Court were to reconsider its prior Order (Doc. 118), Plaintiff failed to properly invoke the *England* reservation. In *Bradley*, the Third Circuit held that the party properly invoked the *England* Reservation during the pendency of the state administrative proceeding. *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072-73 (3d Cir. 1990).

Here, Transource waived its right to invoke *England* because it "freely and without reservation submit[ed its] federal claims for decision by the state courts," *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 419 (1964), in this case,

the quasi-judicial proceeding before the PUC. (Doc. 118 at 8.) In fact, Transource expressly concurred in the submission of the issue of "need" to the jurisdiction of the PUC. (Doc. 147 at 8 (¶ 34).) Instead, Transource waited several long and arduous years after the quasi-judicial PUC proceeding concluded and attempted to make its untimely reservation for the first time within its appeal to the Pennsylvania Commonwealth Court. (Doc. 157 at ¶¶117-19.) This was too late.

As Transource was required to invoke *England* at the earliest opportunity before the PUC, in order to appropriately and properly invoke its reservation, and it failed to do so, Transource's reservation is procedurally improper. Its federal claims, therefore, are barred by claim preclusion.

ii. The PUC Did Not Acquiesce In Transource's England Reservation

Transource also argues that Defendants failed to *properly* object within their first filing in the Commonwealth Court matter and, therefore, acquiesced in the splitting of Transource's claims. (Doc. 158 at 50.) This is incorrect—Defendants objected to Transource's reservation and did not acquiesce in any claim splitting.

Being bound by the Pennsylvania Rules of Appellate Procedure, Defendants objected to Transource's untimely reservation at the earliest opportunity within their Brief in Opposition to Transource's Petition for Review. (Doc. 147-9 at ECF pgs. 55-56.) Transource filed an Application for Emergency Relief with the Pennsylvania Commonwealth Court pursuant to Pennsylvania Appellate Procedure Rule 123. (*See*

gen. Doc. 157 at ¶124 (Transource admits to filing an Application for Expedited Review) The specific relief Transource sought in this Application was for expedited treatment of its state appeal. (*See id.*)

Under the Pennsylvania Rules of Appellate Procedure, there is no provision in Rule 123 providing for anything more than an Answer being filed to an Application for Emergency Relief. *See* Pa. R.A.P. 123 (a) and (b). Transource is essentially arguing that the PUC should have filed a New Matter with its Answer to Transource's Application for Emergency Relief, which is not permitted under the Pennsylvania Rules of Appellate Procedure. *See id.*

Furthermore, to the extent Transource argues that the PUC relied on Transource's concurrent federal case against the PUC to justify denying the Application for Emergency Relief in state court, the PUC was without knowledge of how the federal case was going to proceed. The PUC filed its Answer to Transource's Application for Emergency Relief in the Commonwealth Court on July 6, 2021, and the Middle District Court entered its order on August 26, 2021 staying the federal case, (Docs. 83, 157-36). As such, the PUC cannot be faulted for relying on the ongoing federal case at the time it responded to Transource's Application for Emergency Relief before the Commonwealth Court.

As Defendants objected and did not acquiesce to Transource's attempt to split its claims, the claims at issue in this matter are barred by claim preclusion.

V. CONCLUSION

Defendants respectfully request that this Court deny Transource's Motion, grant Defendants' Motion, and enter judgment in Defendants' favor.

Respectfully submitted,
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Date: April 19, 2023

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	:	*Complaint Filed 06/22/21*
Defendants	:	

CERTIFICATE OF SERVICE

I, Mary Katherine Yarish, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that that this brief contains 4,926 words in accordance with this Court's Order, (Doc. 145 at ¶(c)). In making this certificate, I have relied on the word count of the word processing system used to prepare this brief.

CERTIFICATE OF SERVICE

I also hereby certify that on April 19, 2023, I caused to be served a true and correct copy of the foregoing document titled *Defendants' Combined Reply Brief In Support Of Their Motion For Summary Judgment & Brief In Opposition To Plaintiff's Motion For Summary Judgment* to:

VIA ELECTRONIC FILING

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