

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

TRANSOURCE PENNSYLVANIA,	:	
LLC,	:	
	:	
Plaintiff	:	
	:	No. 1:21-CV-1101
	:	
v.	:	
	:	Judge Wilson
	:	
STEPHEN M. DEFRANK,	:	
KIMBERLY M. BARROW,	:	Electronically Filed Document
RALPH V. YANORA, KATHRYN	:	
L. ZERFUSS, JOHN F.	:	<i>Complaint Filed 06/22/21</i>
COLEMAN, JR. and	:	
PENNSYLVANIA PUBLIC	:	
UTILITY COMMISSION,	:	
	:	
Defendants	:	

**DEFENDANTS’ REPLY BRIEF IN FURTHER SUPPORT OF THEIR
MOTION FOR JUDGMENT ON THE PLEADINGS**

Defendants, by and through counsel, hereby file this Reply Brief in further support of their Motion for Judgment on the Pleadings (Doc. 173) pursuant to Local Rule 7.7.

Defendants maintain that based upon the Pleadings in the matter, the Complaint (Doc. 1), and the Answer and Affirmative Defenses (Doc. 124), any Section 1983 claim asserted against the PUC must be dismissed because it is not a “person” for purposes of this statute, and Defendants are entitled to immunity.

REPLY ARGUMENTS

I. DEFENDANTS ARE ENTITLED TO ELEVENTH AMENDMENT IMMUNITY BECAUSE TRANSOURCE’S REQUESTED RELIEF IS RETROACTIVE

In essence, Transource argues that it seeks only prospective injunctive and declaratory relief against Defendants. (Doc. 176 at 2-3, 15-17.) Transource argues that because its requested relief is like the relief sought in *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, 535 U.S. 635, 645 (2002), it is classified as prospective injunctive relief. (*Id.*) Defendants disagree and argue that Transource’s requested relief is retroactive and barred by the Eleventh Amendment.

The Third Circuit recently applied *Verizon Maryland* in an analogous case and stated that “[a]lthough . . . earlier actions may have present effect, that does not mean that they are ongoing” for the purposes of an *Ex parte Young* analysis. *Merritts v. Richards*, 62 F.4th 764, 771-72 (3d Cir. 2023). In *Merritts*, the Pennsylvania Department of Transportation (PennDOT) filed a condemnation action against Meritts in the Pennsylvania Court of Common Pleas and thereby acquired easements across Meritts’ land. *Merritts*, 62 F.4th at 770. Meritts appealed to the Pennsylvania Commonwealth Court, to no avail. Meritts then filed suit in federal district court pursuant to *Ex parte Young*, seeking to enjoin PennDOT from (1) claiming ownership to his property, (2) physically intruding onto his property, (3) denying him just compensation for his property, and (4) interfering with his property rights

via its prior action of filing a declaration of taking. *Merritts*, 62 F.4th at 771. The *Merritts* plaintiff also sought a declaratory judgment that PennDOT violated his federal constitutional rights. *Id.* at 772.

The Third Circuit held that “there is no ongoing violation of federal law” because “[t]he lingering effects of [PennDOT’s] discrete past action do not convert it into an ongoing violation[.]” Instead, “[b]y seeking an injunction to cure past injuries – PennDOT’s alleged wrongful acquisition of the easements and the alleged lack of just compensation – Merritts asks for a reparative injunction.” *Id.*

Transource’s requested relief is similar to the relief sought by the *Merritts*’ plaintiff. Like *Merritts*, Transource seeks a declaration that Defendants violated its constitutional rights by virtue of an action in the past – in this case, Defendants’ denial of Transource’s application to construct transmission lines. As did the Third Circuit in *Merritts*, this Court should similarly find that this type of declaratory relief is “reparative” and “cannot be fairly characterized as prospective.”

Also like the injunctive relief sought in *Merritts* that sought to enjoin the lingering effects that existed after the governmental entity’s prior act of filing a document (declaration of taking), Transource seeks to enjoin the lingering effects of Defendant’s entry of its prior Decision and Order. That is, Transource essentially wants this Court to undo the PUC’s denial of Transource’s application, with the hope that one day the PUC might decide differently based on a new application. As did

the Third Circuit in *Merritts*, this Court should find that this requested relief is also retroactive as it seeks to correct lingering effects from a past, completed action, which does not convert that prior act into an ongoing violation.

Moreover, to the extent that Transource argues that Defendants are not entitled to Eleventh Amendment immunity from suit because the PUC is not an arm of the Pennsylvania State government, such claim fails. Transource is objectively clear in its opposition that it asserts its claims and relief pursuant to *Ex parte Young*. (*See gen. Doc. 176.*) In so doing, Transource accepts the premise that the PUC is a Pennsylvania State agency because, if it was not so, Plaintiff's Section 1983 and *Ex parte Young* claims would not be feasible. In addition, as set forth in Defendants' Brief in Opposition to Motion for Summary Judgment, (Doc. 61 at 37-44) and Defendants' brief, (Doc. 174 at 6-7, 11-12), both the Pennsylvania State Supreme and Commonwealth Courts have determined that the PUC is a Commonwealth agency and is entitled to Pennsylvania State sovereign immunity. As an arm of the Pennsylvania State government it should be afforded Eleventh Amendment immunity. (*Id.* at 6-7.) It would not be logical for the PUC to be a Commonwealth agency in one court and not in another. Further, as argued in greater detailed below, Transource itself pleads that the PUC is a "Commonwealth of Pennsylvania government agency." (Doc. 1 at ¶ 9.)

As such, Defendants respectfully request that this Court find that Transource’s requested relief is retroactive and is not available, even under an *Ex parte Young analysis*. Accordingly, Defendants are entitled to Eleventh Amendment immunity.

II. THE PUC IS A STATE AGENCY, AND, THEREFORE, IT IS NOT A PERSON FOR PURPOSES OF SECTION 1983

Transource argues that because its Preemption Clause claim is brought against the Commissioner Defendants in their official capacity pursuant to *Ex parte Young*, “[t]he Court need not address whether the PUC is a “person” for purposes of Section 1983.” (Doc. 176 at 7.) Defendants disagree.

Entry of judgment on an issue pursuant to a Rule 12(c) motion is entirely appropriate where there are not enough facts “to raise [a plaintiff’s] right to relief above the speculative level.” *See gen.* Fed. R. Civ. P. 12(c); *see also Brautigam v. Fraley*, 684 F. Supp.2d 589, 591 (M.D. Pa. 2010). So, even if every other claim in the operative complaint survives Defendants’ Rule 12(c) Motion, resolution of the narrow issue of whether the dormant Commerce Clause claim brought pursuant to Section 1983¹ should survive is entirely appropriate under the Rule 12(c) standard. Therefore, Defendants continue to request that the Court address the issue as to whether the PUC is a person for the purposes of Section 1983 liability.

¹ Transource states that “the only Section 1983 claim in this suit is the dormant Commerce Clause claim.” (Doc. 176 at 7.)

Resolution of this issue is necessary because Transource argues that Defendants have “failed to establish that the PUC is not a proper Section 1983 defendant” as they have not met their burden to prove that the PUC is an “arm of the state.” (Doc. 176 at 9.) Transource seems to argue that case law illustrating that the PUC was entitled to state sovereign immunity is insufficient to establish that it is an “arm of the state.” (*Id.* at 10.) Defendants disagree.

Albeit in a different context, both the Pennsylvania State Supreme and Commonwealth Courts have determined that the PUC, is a Commonwealth agency and is entitled to Pennsylvania State sovereign immunity. (Doc. 174 at 6-7.) The PUC cannot be a Commonwealth agency in one court and not in another.

Further, despite their argument in this Motion, Transource has already admitted, within its Complaint, that the PUC is a “Commonwealth of Pennsylvania government agency”. (Doc. 1 at ¶ 9.) The Third Circuit previously stated that “[a] fact asserted in a pleading, which is both unequivocal and which would normally require evidentiary proof, constitutes a judicial admission.” *Judon v. Travelers Prop. Cas. Co. of Am.*, 773 F.3d 495, 502 n.6 (3d Cir. 2014) (citing *In re Teleglobe Commc’ns Corp.*, 493 F.3d 345, 377 (3d Cir.2007), *as amended* (Oct. 12, 2007); *Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 275 (3d Cir.2004) (facts “expressly conceded” in a complaint constitute judicial admissions).).

A party is bound by their judicial admissions. *See id.* (citing *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 181 (3d Cir.2008) (holding that a claim was foreclosed based on an admission in the plaintiff's complaint)); *see also Aul v. Correct Care Sol.*, 2021 WL 1837571, at *3 (M.D. Pa. May 7, 2021) (Wilson, J.) (“It is axiomatic that facts plead in a verified complaint constitute judicial admissions that are binding on a party.”)).

Transource, therefore, is bound by its judicial admission that the PUC is a “Commonwealth of Pennsylvania government agency” and cannot argue to the contrary in opposition to this Motion. *See gen. id.*

In conjunction with its Eleventh Amendment argument presented, Defendants request that this Court dismiss all Section 1983 claims asserted against the PUC as it is a Pennsylvania State agency and is, therefore, not a person for Section 1983 purposes.

III. DEFENDANTS’ MOTION IS TIMELY PURSUANT TO RULE 12(c) FEDERAL RULES OF CIVIL PROCEDURE

Transource argues that this Court should dismiss Defendants’ Motion as it is an untimely dispositive motion and was filed contrary to this Court’s case management order. (Doc. 176 at 5.) Defendants disagree. Defendants have abided by this Court’s case management order by filing its cross motion for summary judgment and supporting materials within those time constraints. (*See Docs. 146-47, 165.*)

Moreover, a plain reading of this Court’s case management order, (Docs. 123, 145), illustrates that this Court did not set any deadline with respect to Rule 12(c) motions in this matter. (*See id.*) As such, the relative deadline for Defendants’ Motion remains governed by Rule 12(c) of the Federal Rules of Civil Procedure. Defendants’ have done so as they have filed their Motion well before any trial date is to be set and, therefore, their Motion does not “delay trial.”

Additionally, Transource has not alleged any prejudice it would experience from amending the Scheduling Order to permit the PUC’s Motion for Judgment on the Pleadings. Not only has trial not yet been scheduled in this matter, but this Court has not yet adjudicated both parties’ respective Motions for Summary Judgment. As Transource’s silence on this point demonstrates, consideration of Defendants’ motion would not unfairly prejudice Plaintiff in any way. Transource has fully briefed the issues set forth in the Motion and those issues are ripe for disposition by the Court.

CONCLUSION

Defendants respectfully request that this Court grant their Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I further certify that on October 2, 2023, I caused to be served a true and correct copy of the foregoing document titled *Defendants' Reply Brief in further support of their Motion for Judgment on the Pleadings* to the following:

VIA ELECTRONIC FILING

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