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' SUPPLEMENTAL BRIEF
IN SUPPORT OF THEIR MOTION TO DISMISS

Defendants hereby submit this supplemental brief to address the impact of the Commonwealth Court decision rejecting Transource's appeal of the same PUC order that Transource is also seeking to challenge in this case. *See* Doc. 96 ¶ 2.[1] As described below, the Commonwealth Court's decision reinforces the grounds for dismissal of Transource's claims in a number of important respects.

First, the Commonwealth Court decision confirms that Transource's preemption claim is barred by the doctrine of issue preclusion. Transource argued previously that issue preclusion did not apply to its preemption claim because the Commonwealth Court had not yet reviewed the PUC decision. *See* Doc. 68 at 16-

[1] Capitalized terms used herein and not otherwise defined are as defined in the Court's Memorandum Opinion dated August 26, 2021. *See* Doc. 82.

22.[2] Transource's arguments failed then and are also moot now because the Commonwealth Court has reviewed and affirmed the PUC's decision. *See* Doc. 72 at 12-18; Doc. 90-1. Accordingly, Transource's own cases confirm that issue preclusion applies and that its preemption claim should be dismissed. *See Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3rd Cir. 1993) ("Decisions of state administrative agencies that have been reviewed by state courts are . . . given preclusive effect in federal courts."); Doc. 68 at 17 (arguing that "*Edmundson* controls").

Second, the Commonwealth Court decision also confirms that Transource's Commerce Clause claim is barred by the doctrine of claim preclusion. Transource argued previously that claim preclusion was inapplicable because the parties to the PUC proceeding were not "identical" to the parties in this federal action. Doc. 68 at 28. Transource was wrong then and is also wrong now. *See* Doc. 72 at 19-20. "Claim preclusion does not require that all parties to both actions are identical. Instead, the doctrine only requires that the parties against which preclusion is sought are the same." *Sheridan v. NGK Metals Corp.*, 2008 WL 2156718, at *11 (E.D. Pa. May 22, 2008). Claim preclusion applies here because Transource had "a full and fair opportunity to litigate the [Commerce Clause] claim" before the

[2] For ease of reference, Defendants utilize the page numbers from the CM/ECF header.

PUC and the Commonwealth Court but did not. *Allen v. McCurry*, 449 U.S. 90, 101 (1990); *see Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm'n*, 721 F. Supp. 710, 715 (M.D. Pa. 1989), *aff'd*, 899 F.2d 1217 (3d Cir. 1990) (applying claim preclusion in a federal action brought against the PUC when a party to an earlier PUC proceeding "omitted a claim which could have been argued, but which was not"). In addition, the PUC was also a party to the state proceeding because the PUC "actively contest[ed] Transource's appeal in the Commonwealth Court" and was named as a Respondent by Transource. Doc. 82 at 9; *see* Doc. 90-1. Thus, the parties in both actions are the same for purposes of claim preclusion.[3] For these reasons, claim preclusion applies and Transource's Commerce Clause claim should also be dismissed. *See Shank v. E. Hempfield Twp.*, 2010 WL 2854136, at *15 n.23 (E.D. Pa. July 20, 2010) ("Even if plaintiffs had not raised their claims before the zoning hearing board, their [federal] action would still be barred because claim preclusion applies . . . .").

Third, Transource did not properly preserve its federal claims in the state proceeding. Presumably, Transource will argue that preclusion is inapplicable pursuant to the doctrine set forth in *England v. Louisiana State Board of Medical*

[3] While the PUC commissioners are named as defendants in this federal action in their official capacities together with the PUC, "governmental officials sued in their official capacities for actions taken in the course of their duties are considered in privity with the governmental body." *Gregory v. Chehi*, 843 F.2d 111, 120 (3d Cir. 1988).

Examiners, 375 U.S. 411 (1964). *England* "held that a party may preserve its right to return to federal court by making an express reservation in the state court that 'he is exposing his federal claims there only for the purpose of complying with [*Government & Civic Employees Organizing Committee, CIO v. Windsor*, 353 U.S. 364, 366 (1957)], and that he intends, should the state courts hold against him on the question of state law, to return to the District Court for disposition of his federal contentions.'" *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 820 (3d Cir. 1994) (quoting *England*, 375 U.S. at 421). However, in order to properly preserve the right to a federal forum a party must expressly reserve its federal claims "throughout the course of the state proceedings." *Id*. Transource did not do so here.

To the contrary, Transource only sought to make an *England* reservation during its appeal to the Commonwealth Court after Transource had first litigated one of its federal claims before the PUC and after the PUC had issued a decision rejecting Transource's claim and denying its petition. *See* Doc. 68 at 20 n.5. This was too late. The PUC decision that Transource appealed was "the product of a quasi-judicial, on-the-record proceeding that include[d] a presiding ALJ who ha[d] the power to administer oaths, conduct evidentiary hearings, allow for cross-examination, rule on motions, review briefs submitted by the parties, and issue recommended decisions with findings of fact and conclusions of law." *Metro.*

Edison Co. v. Pa. Pub. Util. Comm'n, 767 F.3d 335, 355-56 (3d Cir. 2014). As such, Transource was required to make its *England* reservation during the PUC proceeding in order to "properly preserv[e]" its federal claims. *Instructional Sys.*, 35 F.3d at 820. Transource failed to do so. Consequently, the *England* doctrine is inapplicable and Transource's federal claims are precluded. *See id*. at 820-21 (holding that *England* applied because the party invoking *England* made the reservation "[a]t every stage of the state court proceedings") (emphasis added).

Fourth, Transource also did not preserve its federal claims by abandoning them during its appeal of the PUC decision. The PUC decision is a judgment on the merits that "is final unless or until it is reversed on appeal." *Shank*, 2010 WL 2854136, at *13 (internal quotation omitted). The Commonwealth Court has now affirmed the judgment of the PUC and Transource has declined to pursue any further discretionary appeals. *See* Doc. 90 at 2. Accordingly, the PUC decision is "a final judgment on the merits that is entitled to preclusive effect in federal court." *DePolo v. Bd. of Supervisors Tredyffrin Twp.*, 835 F.3d 381, 387 (3d Cir. 2016) (citing *Crossroads Cogeneration Corp. v. Orange & Rockland Utils. Inc.*, 159 F.3d 129 (3d Cir. 1998)). This ends the issue.

Nonetheless, Transource has argued previously that it could "avoid issue preclusion" by "withdrawing" its federal issues during its appeal of the PUC decision. Doc. 68 at 20. Transource is mistaken. Transource cherry-picks

language from *Metropolitan Edison*, in which the Third Circuit cited to *Kentucky West Virginia Gas v. Pennsylvania Public Utility Commission*, 837 F.2d 600 (3d Cir. 1988) for the principle that the plaintiffs "could have withdrawn their federal issues from the state proceeding and brought them in federal court, as has been done before." *Metro. Edison*, 767 F.3d at 367. But the circumstances in *Kentucky West Virginia Gas* are very different from the circumstances in this case.

In *Kentucky West Virginia Gas* the plaintiffs appealed an order of the PUC to the Commonwealth Court and also "filed suit in federal district court challenging the constitutionality" of the governing Pennsylvania statute. 837 F.2d at 604. The PUC could not have adjudicated the plaintiffs' federal claims because "an administrative agency may not determine the constitutionality of the statutes it applies." *United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 365–66 (3d Cir. 1986). Thus, the Commonwealth Court would have been the first court to hear those claims. In those circumstances the plaintiffs had the option of bringing their claims in federal court instead of the Commonwealth Court because either court would have been the court of original jurisdiction.

The circumstances in this case are in no way comparable. Transource is not challenging the constitutionality of any Pennsylvania statute and the PUC had the authority to adjudicate Transource's federal claims. *See 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"). Indeed, Transource consented to the jurisdiction of the PUC by making the tactical decision to raise the federal issue of preemption during the PUC trial proceeding. *See Metro. Edison*, 767 F.3d at 367 (faulting the plaintiffs "for not pursuing their claims in federal court in the first instance") (emphasis added). As a result, the issue of preemption was litigated by the parties and decided by the PUC at Transource's behest after the conclusion of a lengthy and complex four-year proceeding. Now Transource asserts that it can vitiate the judgment of the PUC on this very same issue and obtain another bite at the apple by simply abandoning its federal issues on appeal and raising the issues anew in this federal proceeding. Transource cannot "have it both ways" and its arguments "have the ring of post-hoc rationalization." *Id.*

This Court is not, and should not be, the de facto appellate court for federal law issues anytime a party receives an adverse decision in a quasi-judicial state administrative proceeding. *See id.* at 355. To the contrary, "[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.'" *Id.* at 364 (quoting *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149–50 (1988)). Transource attempts to turn this precedent on its head.

Fifth, the Commonwealth Court decision reaffirms that Transource's federal claims fail substantively as a matter of law. Transource's preemption claim is based on the allegation that "[t]he PAPUC has interpreted state law to give it a veto over regional congestion-relieving market efficiency projects that it believes do not sufficiently benefit in-state interests. . . ." Doc. 1 ¶ 71. Similarly, Transource's Commerce Clause claim is based on the allegation that the PUC engaged in "local protectionism" by seeking to preserve "lower prices for many Pennsylvania customers" at the expense of residents in other states. *Id.* at ¶¶ 78-79; *see id.* at ¶ 85 (alleging that the PUC required that "in-state interests take precedence over the interests of the region as a whole"). All of these allegations are in direct conflict with the binding factual determinations made by the PUC and the Commonwealth Court and must therefore be rejected. *See Ky. W. Va. Gas*, 837 F.2d at 617 ("The Pennsylvania Commonwealth Court has affirmed that [the PUC's] finding of fact was supported by substantial evidence. Their decision is res judicata.").

In particular, the Commonwealth Court found that, "contrary to [Transource's] arguments, the Commission did not engage in a Pennsylvania-only review of the costs and benefits of the IEC Project." Doc. 90-1 at 32 (emphasis added). "While 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*. "[B]ecause there were considerable increases in prices to ratepayers in both Pennsylvania and elsewhere in the PJM Region," the PUC "found that this did not support the grant of the Siting Applications." *Id*. at 28 (emphasis added). Indeed, the Commonwealth Court noted "that the cost-benefit analysis" performed by PJM to justify the utility transmission projects "was based on outdated data and inaccurate predictions" and was "criticized" by PJM's own Independent Market Monitor. *Id*. at 39-40. The totality of the evidence – "including [Transource's] own evidence" – revealed that the "congestion" the utility projects were designed to ameliorate "has decreased significantly since 2014, such that it no longer supports the need for the IEC Project." *Id*. at 41.

These determinations show that Transource's claims are based on false and precluded allegations. There was no preemption because there was no "congestion-relieving market efficiency project" that the PUC could have "veto[ed]." Doc. 1 ¶ 71; *see* Doc. 90-1 at 29 ("[T]he congestion . . . was rejected as being a valid basis for the IEC Project."). Likewise, there was no Commerce Clause violation because the PUC did not concern itself with "in-state interests" at the expense of regional interests, engage in "local protectionism" or "burden" interstate commerce at all. Doc. 1 ¶¶ 71, 78-79, 86-87. The binding factual determinations made by the PUC and the Commonwealth Court show exactly the

opposite. These facts show that it is Transource that is attempting to preempt the sovereignty of the Commonwealth and burden commerce by seeking to construct a massive and wasteful energy project on Pennsylvania soil that can no longer be justified by its costs.

For these reasons, and for the reasons described in Defendants' opening and reply briefs, Defendants' motion to dismiss should be granted. *See* Doc. 57, 58 and 72.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Alexander T. Korn, Deputy Attorney General for the Commonwealth of Pennsylvania, Office of Attorney General, hereby certify that on June 17, 2022, I caused to be served a true and correct copy of the foregoing document titled Defendants' Supplemental Brief in Support of their Motion to Dismiss to the following:

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