

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	:	Electronically Filed Document
and PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	Complaint Filed 06/22/21
Defendants	:	

DEFENDANTS’ SUPPLEMENTAL REPLY BRIEF
IN FURTHER SUPPORT OF THEIR MOTION TO DISMISS

Transource’s supplemental opposition brief boils down to two faulty propositions.¹

First, Transource contends that it “made an express *England* reservation at the outset of the state court proceeding” when it raised *England* for the first time during its appeal of the PUC decision to the Commonwealth Court. Doc. 105 at 8 (citing *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964)). Transource is wrong. The state court proceeding originated with the PUC, which “acted in a judicial capacity and resolved the issues that [Transource] had the opportunity to litigate, and . . . did in fact litigate” before it. *Respond*

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.

Power LLC v. Pa. Pub. Util. Comm'n, 2021 WL 446097, at *8 (Pa. Commw. Ct. Feb. 9, 2021). The state court proceeding did not originate with Transource's appeal of the PUC decision to the Commonwealth Court. *See Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 767 F.3d 335, 356 (3d Cir. 2014) ("if a [PUC] proceeding is judicial, appellate review of that proceeding is also judicial"). Thus, in order to "properly preserv[e]" its federal claims Transource was required to make an *England* reservation before the PUC prior to its appeal of the PUC decision. *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 820 (3d Cir. 1994). Transource neglected to do so and *England* is therefore inapplicable.²

Transource argues that the foregoing is "illogical" because "*England* is a rule about the forum for judicial review of state action." Doc. 105 at 6 (emphasis in original). But Transource is not seeking judicial review of state action. Rather, Transource is seeking appellate review of "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*, 767 F.3d

² Transource's assertion that the Commonwealth Court determined that Transource had "made an effective [*England*] reservation" is false. Doc. 105 at 8. The Commonwealth Court simply noted in a footnote that it "will not address the federal claims that Transource has reserved for consideration in the District Court and focus instead on whether the Commission's decision is correct under Pennsylvania law." Doc. 90-1 at 17 n.12 (emphasis in original).

at 355-56. The PUC functioned in a judicial capacity as the state trial court and Transource was therefore required to make an *England* reservation before the PUC in order to preserve its federal claims. Transource failed to do so and its failure is dispositive. *See Instructional Sys.*, 353 F.3d 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).³

Second, Transource’s federal claims are based on illogical and precluded factual allegations. In particular, Transource’s preemption claim is based on the simple fact that PJM made one determination regarding the need for Transource’s utility project while the PUC made a “separate” “conflicting” determination. Doc. 105 at 16. But Transource does not (and cannot) argue that PJM was right and the PUC was wrong because the Commonwealth Court found exactly the opposite. The court expressly affirmed the PUC’s finding that Transource’s project would result in “considerable increases in prices to ratepayers in both Pennsylvania and

³ The cases cited by Transource are completely inapposite because they do not concern a situation like this one in which a party to a quasi-judicial state administrative proceeding neglected to raise *England* before the state trial tribunal and instead first sought to make a reservation during an appeal of the tribunal’s decision. *See Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1072 (3d Cir. 1990) (“Here, as in *England*, the plaintiff first filed his section 1983 action in federal district court raising numerous federal constitutional claims, and he entered the state proceedings only after having filed in federal court.”) (emphasis added); *Bernardsville Quarry v. Borough of Bernardsville*, 929 F.2d 927, 929 (3d Cir. 1991) (holding that *England* did not apply when the plaintiff failed to inform the state trial court “that it wished to pursue its federal claims in federal court”).

elsewhere in the PJM Region” and that the alleged potential for lower prices outside of Pennsylvania therefore “did not support the grant of the Siting Applications.” Doc. 90-1 at 28. Stated differently, a project that raises costs for virtually everyone benefits practically no one (other than Transource, which will receive a return on equity from the project irrespective of its costs if the project is built). The PUC’s factual determination “is res judicata” and it makes no sense that PJM’s determination of need would preempt the PUC’s determination when PJM was wrong and the PUC was right. *Ky. W. Va. Gas Co. v. Pa. Pub. Util. Comm’n*, 837 F.2d 600, 617 (3d Cir. 1988).

Ultimately, Transource is attempting to place a dangerous and unreviewable discretion in the hands of PJM with respect to determinations of need for utility projects – even when they are wasteful and uneconomical, like Transource’s project. *See* Doc. 90-1 at 39 (noting that “PJM’s cost-benefit analysis” was “criticized” by “PJM’s own Independent Market Monitor who suggested that its market efficiency process, which includes the cost-benefit analysis, be reevaluated and that the actual costs and benefits of a project should be considered and not ignored in determining whether a market efficiency project is needed”). In this regard Transource calls on the Court to stretch the notion of preemption beyond its breaking point and the Court should decline Transource’s invitation to do so here.

Similarly, Transource's Commerce Clause claim is based on the allegation that the PUC rejected its application to build the utility project "because the resulting commerce would raise prices for in-state customers." Doc. 105 at 17. But that allegation was explicitly rejected by the Commonwealth Court which, as described above, found "that the PUC's review was not limited to the impacts in Pennsylvania . . . ; rather, it examined the impacts throughout the PJM Region, much of which would see increases in their energy prices as a result of the IEC Project." Doc. 90-1 at 22. In other words, the PUC found that Transource's project would raise electricity prices for people throughout the PJM Region across state lines and not just in Pennsylvania. Accordingly, Transource's Commerce Clause claim is based on a false and precluded allegation and must therefore be rejected.

For these reasons, and for the reasons described in Defendants' prior briefing, Defendants' motion to dismiss should be granted. *See* Doc. 58, 72 and 99.

Respectfully submitted,

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Date: July 14, 2022

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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 July 14, 2022, I caused to be served a true and correct copy of the foregoing document titled Defendants' Supplemental Reply Brief in Further Support of their Motion to Dismiss to the following:

VIA ELECTRONIC FILING

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