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

TRANSOURCE PENNSYLVANIA, LLC, *Plaintiff*, v. GLADYS BROWN DUTRIEUILLE, Chairman, Pennsylvania Public Utility Commission, DAVID W. SWEET, Vice Chairman, Pennsylvania Public Utility Commission, JOHN F. COLEMAN, JR. and RALPH V. YANORA, Commissioners, Pennsylvania Public Utility Commission, all in their official capacities, and the PENNSYLVANIA PUBLIC UTILITY COMMISSION, *Defendants*.	Case No. 1:21-cv-01101-JPW (Judge Jennifer P. Wilson)

CONSOLIDATED REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND EXPEDITED CONSIDERATION

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INTRODUCTION

The Pennsylvania Public Utility Commission ("PAPUC") opens with 12 single-spaced bullets of "disputed issues of material fact" that allegedly "need to be explored before judgment may be awarded." ECF No. 61 ("MSJ Opp.") 1–3. The balance of its brief, however, proves this claim wrong. The PAPUC does not even attempt to show, in its substantive arguments, that this laundry list is actually *material*. And on each dispositive legal question, settled precedent establishes that Transource is correct.

First, on preemption, the PAPUC concedes that it rejected the federal-law need determination of PJM Interconnection, L.L.C. ("PJM") and substituted its own conflicting method that treated as a project *cost* the very *benefit* federal law aims to achieve: reducing wholesale energy pricing inefficiencies that result from transmission bottlenecks. The PAPUC argues that the inefficiencies were not as large as PJM concluded. But that is irrelevant. PJM reached its conclusion following a methodology set forth in a federal tariff that has the preemptive force of federal law. The PAPUC has no answer to the long line of cases holding that state commissions may not "disregard" federal decisions in areas of federal jurisdiction. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 969 (1986).

Indeed, the PAPUC's position, if accepted, would gut the regional transmission planning process created by the Federal Energy Regulatory

Commission ("FERC"). If Pennsylvania can veto regional projects based on its own reweighing of benefits and costs, and can do so to keep unearned benefits it reaps from inefficiencies in a multi-state system, then every state can do so. That will be the end of regional planning to address regional inefficiencies.

Second, on the dormant Commerce Clause, this case comes down to a simple legal principle: States may not prevent interstate commerce because they fear adverse economic consequences for in-state interests. To the contrary, "[p]reservation of local [benefits] by protecting" in-state interests from interstate commerce is "the hallmark of the economic protectionism that the Commerce Clause prohibits." *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994). Here, the PAPUC has done exactly what the dormant Commerce Clause forbids: It has prevented the construction of a new channel of interstate commerce because the resulting commerce will raise in-state prices.

Alternatively, the PAPUC insists that it has not discriminated at all. But on its face, the PAPUC's order shows the opposite. The PAPUC (and the ALJ decision it adopted) conceded that the project would bring regional benefits. But the PAPUC invoked the interests of in-state customers who would face higher wholesale energy prices and prevented the project from going forward. The dormant Commerce Clause does not tolerate such discrimination.

Third, the PAPUC's Eleventh Amendment arguments are meritless. Transource has sued the PAPUC's commissioners in their official capacities and seeks prospective declaratory and injunctive relief. Under long-settled law, the Eleventh Amendment is no bar to such suits.

Fourth, a speedy hearing under Rule 57 is warranted. Absent a prompt decision, Transource risks being in breach of its obligations to PJM, and PJM may move to eliminate the project from its plans. And if the project is eliminated, the harm will befall not only Transource but the out-of-state customers whom the project would serve. That easily justifies a favorable exercise of this Court's broad Rule 57 discretion, particularly given—as Transource shows elsewhere—the absence of any genuine factual dispute.

Accordingly, the Court should promptly grant Transource's motion for summary judgment.

ARGUMENT

I. PJM's Need Determination Preempts the PAPUC's Contrary "No Need" Determination.

The PAPUC's order violates the Supremacy Clause: As the PAPUC admits, PJM found a need for the project "under the applicable federal standards imposed by FERC and implemented by PJM." ECF No. 20-3 ("SMF") ¶ 67 (Order at 54);

ECF No. 62 ("SMF Resp.") ¶ 66.[1] The PAPUC, however, overrode that federal need determination by substituting its own benefit-cost calculation, which does just what PJM and FERC have rejected: It treats the increased prices incurred by Pennsylvania customers benefiting from congestion as a "cost" weighing against the project, even though the project's point (as approved by PJM) is to eliminate that disparity. ECF No. 20-1 ("MSJ Mem.") 11–12; SMF ¶ 71; SMF Resp. ¶ 70. That decision conflicts with federal law as reflected in PJM's federal tariff, and frustrates the purposes and objectives of federal law by allowing one state to veto—based on parochial interests—the regional planning FERC has directed. MSJ Mem. 9–14.

Although the PAPUC opens with a long list of allegedly "disputed issues of material fact," MSJ Opp. 1, its argument confirms that the *truly* material facts are undisputed. It admits that, applying FERC-approved standards, PJM found the project needed. MSJ Opp. 1, 18, 24. And it admits that it reweighed PJM's need determination because it disagreed with how PJM assessed benefits and costs. MSJ Opp. 22–23, 25–26. It simply argues that doing so was lawful and that states benefiting from pricing inefficiencies resulting from congestion can reject efforts to address the congestion undertaken under federal law. In advancing that claim, the PAPUC relies heavily and repeatedly on the incorrect claim that a PJM witness

[1] The PAPUC's response to the SMF misses a paragraph of the SMF somewhere between paragraphs 27 and 30, with later paragraphs misaligned by one.

testified that the PAPUC "should make an independent determination of … need." MSJ Opp. 2, 22, 24. That testimony, however, was not PJM's. It came from Scott Rubin, a witness for the Pennsylvania Office of Consumer Affairs, who opposed Transource's applications. ECF No. 20-6 ("Recommended Decision") 98–99. PJM's actual views are set forth in the filings it has made in this Court:

> Allowing the PAPUC to displace the need-determination factors FERC requires PJM to apply would undermine the regional planning process that FERC has declared necessary to ensure just and reasonable rates…. PJM selects transmission projects through a transparent, years-long process that provides ample opportunities for public and state input, with the purpose of identifying "regional solutions to regional needs." … That exhaustive, federally mandated process would be hamstrung if a state agency could effectively veto the outcome years later based solely on its own, state-centric concept of "need."

ECF No. 40-1 ("PJM Br.") 13–14; *see* ECF Nos. 40, 41, and 66. PJM's actual view thus highlights the conflict between the PAPUC's order and federal law.

A. The PAPUC's Decision Directly Conflicts With Federal Law And Poses An Obstacle To Federal Objectives.

The conflict here is stark. PJM determined, using the methodology mandated by its FERC tariff, *see* SMF ¶¶ 21–30; SMF Resp. SMF ¶¶ 21–29; ECF No. 20-8 at 12–14, that congestion warranted new interstate transmission lines across the AP South Reactive Interface. SMF ¶¶ 31–38, 42–46; SMF Resp. ¶¶ 30–37, 42–45. Both FERC and the federal courts have held that interstate transmission planning falls "squarely within [FERC's] jurisdiction." *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities,* FERC Order

No. 1000, 76 Fed. Reg. 49,842-01, 49,862 (Aug. 11, 2011); *see S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 62–64 (D.C. Cir. 2014) (per curiam). A federal tariff, moreover, has the preemptive force of federal law. *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003); *Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 762 (9th Cir. 2004). Yet the PAPUC substituted its own judgment for FERC's and inverted the methodology in PJM's tariff by treating as a "cost" the very *benefit* that FERC's regional planning process aims to provide—the reduction of wholesale energy pricing disparities when congestion is eliminated. MSJ Mem. 11–12.[2] Based on that conflicting method, the PAPUC reached a conflicting conclusion as to "need" for the project. SMF ¶¶ 69–72; SMF Resp. ¶¶ 68, 70–71.

The PAPUC ignores the long line of controlling precedents deeming similar orders preempted. MSJ Mem. 12–13. These decisions hold that state commissions may not "disregard" FERC-approved decisions in areas of federal jurisdiction,

[2] Quoting language from FERC's letter order accepting PJM's filing, the PAPUC suggests that FERC did not approve PJM's methodology but just performed the "ministerial action of accepting" PJM's filing. SMF Resp. ¶ 19. But "[r]egardless of whether [rate filings] submitted under FPA section 205 are accepted or approved, or whether made effective via delegated letter order or by Commission-voted order, they constitute the filed rate." *Harbor Cogeneration Co., LLC v. S. Cal. Edison Co.*, 169 FERC ¶ 61,067, at P 38 (2019), *aff'd on reh'g*, 171 FERC ¶ 61,221, at PP 23–30 (2020); *id.* at P 39. The PAPUC does not dispute that a federal tariff has the preemptive force of federal law, nor that PJM's tariff implements FERC's policy set forth in Order No. 1000, and that is what matters here.

Nantahala, 476 U.S. at 969, "alter FERC-ordered" determinations "by substituting their own determinations of what would be just and fair," *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988), or undertake "identical, independent inquiries regarding [a project's] merits" but "from the perspective of different public interests" to "reach conflicting conclusions," *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898, 905 (4th Cir. 1987). The PAPUC faults Transource for not citing decisions concerning orders issued in *siting* proceedings—but that is because since 2011, when FERC issued Order No. 1000, no state has chosen to disregard a federal need determination. *Cf.* MSJ Mem. 13 n.3 (noting that Maryland treated PJM's determination as binding). The principle applied in *Nantahala*, *Mississippi Power*, and *Appalachian Power* applies fully here: States may not "regulate in areas where FERC has properly exercised its jurisdiction," create "unavoidable conflict" between state and federal regulation, or "target" a federal law determination. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 386, 389 (2015).

The PAPUC's order also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Farina v. Nokia Inc.*, 625 F.3d 97, 122 (3d Cir. 2010); *see* MSJ Mem. 13–14. Under Order No. 1000, PJM's federal tariff determines which new transmission projects are needed to meet the needs of the multi-state region. PJM must "use its reasoned judgment to weigh

the relevant considerations and determine how best to prioritize between [competing] objectives" to ensure reliable and cost-effective transmission. *Farina*, 625 F.3d at 123. The tariff does not allow consideration of the increased wholesale prices Pennsylvania residents will pay when the transmission bottleneck that artificially advantages them disappears. That is for good reason: Today's artificially low prices are the very inefficiency that new transmission is needed to redress. SMF ¶ 29; SMF Resp. ¶¶ 28–29. The PAPUC, however, nonetheless weighted the higher wholesale energy prices that Pennsylvania customers will pay when it evaluated need. SMF ¶¶ 70–71; SMF Resp. ¶¶ 69–70.

The PAPUC thus undermines the very purpose of Order No. 1000's regional planning process: to "meet transmission needs more efficiently and cost-effectively" on "the regional level." Order No. 1000, 76 Fed. Reg. at 49,845. The PAPUC's order turns the very benefit PJM identified in its planning process—more efficient wholesale energy prices, resulting from the elimination of transmission congestion—into a cost justifying a no-need finding. The order thereby frustrates Order No. 1000's federal regime.

B. The PAPUC's Preemption Arguments Are Meritless.

1. The PAPUC Was Not Exercising Traditional Siting Authority.

The PAPUC claims it merely exercised a state's "traditional siting authority," and cites the Federal Power Act's ("FPA") disclaimer of authority over matters

"subject to regulation by the States." 16 U.S.C. § 824(a); *see* MSJ Opp. 19–23, 25. Transource has already addressed this argument at length. MSJ Mem. 15–17; ECF No. 68 ("MTD Opp.") 24–27. In short: Regional transmission planning is within federal (not state) jurisdiction, and the disclaimer the PAPUC invokes cannot be used to target the express determination made by PJM pursuant to its federal tariff, which implements FERC's own jurisdiction over transmission and wholesale rates. MTD Opp. 26; *see New York v. FERC*, 535 U.S. 1, 22 (2002).

The PAPUC asserts that under Order No. 1000, states get to decide "what needs to be built, where it needs to be built, and who needs to build it." MSJ Opp. 25 (quoting *S.C. Pub. Serv. Auth.*, 762 F.3d at 57–58). It is taking that quote out of context. In Order No. 1000, FERC said that it was not mandating the construction of any particular transmission line, but instead establishing a planning process, under which the need for lines would be determined *by regional planners like PJM*. *See* Order No. 1000, 76 Fed. Reg. at 49,852 ("Such planning may require *public utility transmission providers* … to determine what needs to be built, where it needs to be built, and who needs to build it..." (emphasis added)); *accord S.C. Pub. Serv. Auth.*, 762 F.3d at 57-58 ("The substance of a regional transmission plan and any subsequent formation of agreements to construct or operate regional transmission facilities remain within the discretion of the decision-makers in each planning region").

To be sure, states normally will still ultimately decide whether and where transmission facilities get built—but in exercising that siting authority, a state may not override the very need determination that FERC placed into regional planners' hands to "ensur[e] the proper functioning of the interconnected grid spanning state lines." *S.C. Pub. Serv. Auth.*, 762 F.3d at 63. Instead, states can evaluate siting applications on other grounds that PJM does not consider, such as health and safety, environmental, or natural resources. Moreover, PJM does not conduct a need analysis on every project.[3] But for lines like the one at issue here—intended to eliminate congestion leading to wholesale pricing inefficiencies in a multi-state region—PJM *does* conduct such a need analysis under its federal tariff. And for such lines, states cannot base a siting refusal on a conflicting conclusion regarding "need," derived from a conflicting methodology.

That is the narrow preemption rule the PAPUC violated here. The PAPUC made a regional planning decision and concluded—contrary to PJM, and using a methodology that expressly conflicted with PJM's—that there was no need to

[3] For example, for "Supplemental Projects" addressing aging equipment on existing lines, improved operational flexibility, enhanced infrastructure resilience, and customer service demands, PJM conducts no cost-benefit analysis and does not assess need. *E.g.*, *Regional Transmission Expansion Planning: Planning the Future of the Grid Today*, PJM 3 (2019), https://pjm.com/-/media/library/reports-notices/2019-rtep/regional-transmission-expansion-planning-planning-the-future-of-grid-today.ashx. Whether and to what degree states may consider project need in those circumstances is beyond the scope of this case.

address regional congestion. *Supra* at 3–4. The PAPUC reexamined "the underlying data and congestion trends which PJM relied upon in assessing the need to alleviate economic congestion." SMF ¶ 72 (Order at 60); SMF Resp. ¶ 71. And in doing so, it considered economic "impact which may or may not be part of the PJM approval criteria and methodology." SMF ¶ 71 (Order at 58); SMF Resp. ¶ 70. FERC's Order No. 1000 did not give states authority to thwart the very regional planning process Order No. 1000 created.

Alternatively, the PAPUC asserts that the ALJ recommended denying Transource's application based on "natural resources and environmental" grounds. MSJ Opp. 26. But the PAPUC *expressly refused to address* those alternative grounds, because its need determination "rendered [them] moot." SMF ¶ 63; SMF Resp. ¶ 62. The ALJ's additional conclusions, which the PAPUC did not even consider, cannot transform the PAPUC's need determination into a siting decision.

2. The PAPUC's Discussion of Backstop Siting Authority Is Irrelevant.

The PAPUC engages in a lengthy discussion of FERC's backstop siting authority, relying on *Piedmont Environmental Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009). MSJ Opp. 19–21. That case is irrelevant. The Energy Policy Act allows FERC, in certain circumstances, to override a state's failure to grant a siting permit and undertake states' siting authority for itself. 16 U.S.C. § 824p. *Piedmont*

clarified that Congress only granted FERC that power if a state neglects to act, not if it expressly denies an application. 558 F.3d at 313–15.

That holding, and the backstop siting authority of Section 824p, is irrelevant. Neither FERC nor PJM has overridden the PAPUC's siting authority. Nor does Transource argue here that federal law compels the PAPUC to approve Transource's siting applications or reinstate its certificate. Transource narrowly contends that the Supremacy Clause forecloses the PAPUC from rejecting PJM's federal determination of need based on a conflicting methodology. The PAPUC is free to examine other state-law grounds and, if consistent with the law (including the dormant Commerce Clause) and the evidence, can deny siting authority on those other grounds. What it *cannot* do is override PJM's specific findings using a conflicting methodology.

3. The PAPUC's Remaining Arguments Fail.

The PAPUC's remaining arguments are equally meritless. It is irrelevant that the ALJ *also* considered regional interests. MSJ Opp. 24–25. Nor does it matter that a minority of Pennsylvania residents would benefit from reducing congestion. *Id.* at 24. What matters is that the ALJ and the PAPUC applied a methodology that conflicts with PJM's FERC-authorized methodology, in order to decide that there was no need to address any regional inefficiency. The ALJ considered the "prospective impact upon the Commonwealth" and its citizens' electricity prices,

and the PAPUC "conclude[d] that the ALJ properly considered the negative impacts to Pennsylvania in evaluating the 'need'" for a transmission system. SMF ¶ 71 (Order at 59); SMF Resp. ¶ 70. PJM's federal tariff, by contrast, "excludes [from its analysis] increased costs that are experienced as a result of constructing [a] project," SMF ¶ 29; SMF Resp. ¶¶ 28–29, because the point of removing a bottleneck is to address such pricing disparities. By including the very costs to Pennsylvania residents that federal law forbids PJM from considering, the PAPUC overrode the federal policy embodied in PJM's tariff and frustrated federally mandated regional planning.

C. The PAPUC's Brief Confirms That Its Alleged "Disputed Issues" Are Irrelevant.

The PAPUC contends at length that PJM's regional planning process is flawed. The PAPUC's "disputed issues" suggest that PJM erred by finding a need to eliminate regional congestion in 2014, that this finding has been overtaken by events, and that PJM's supposedly "closed door" proceedings provide insufficient "due process." MSJ Opp. 26–27.

These assertions are irrelevant to the legal issues at hand. State utility commissions may not "disregard" FERC tariffs in areas of federal jurisdiction, *Nantahala*, 476 U.S. at 969, by insisting that they are right and the federal determination is wrong. Nor can the PAPUC do so by attacking PJM's processes as inadequate when FERC has approved those very processes. FERC has determined,

as Order No. 1000 requires, that PJM's processes ensure that "stakeholders have an opportunity to express their needs, have access to information and an opportunity to provide information, and thus participate in the identification and evaluation of regional solutions." Order No. 1000, 76 Fed. Reg. at 49,868; PJM Br. 7–8, 13 (describing "multiple opportunities for stakeholders, including States, to weigh in" under PJM tariffs); ECF No. 66 ("PJM Reply") 4–5 & nn.4–6 (describing PJM's rules for ensuring independence from members and opportunities for stakeholders to participate). The PAPUC had the right to participate in FERC's proceedings approving PJM's procedures. If the PAPUC disagrees with FERC's decision, or disapproves of PJM's governance structures, it must address its concerns to FERC. SMF ¶¶ 18–19 & ECF No. 20-11, Ex. 8; SMF Resp. ¶¶ 18–19; PJM Reply 4 n.5.

As PJM's Operating Agreement and FERC's orders require, the PAPUC also had the opportunity to participate in PJM's regional planning process. Each year, the results of the PJM planning process are filed with FERC and subject to public comment. *See* SMF ¶ 13 (describing annual Regional Transmission Expansion Plan process); SMF Resp. ¶ 13; ECF No. 20-8, Ex. 5 (PJM Operating Agreement Schedule 6) § 1.6 (detailing process for approval of final plan). FERC will entertain and adjudicate arguments that PJM failed to comply with its tariff in developing the regional transmission plan. *See generally PJM Interconnection, LLC*, 156 FERC ¶ 61,120 (2016) (rejecting requests to remove a particular project from the regional

transmission plan based on allegations that PJM's benefits analysis was faulty). So again, if the PAPUC disagreed with PJM's regional plan, it had the chance to take up the issue with FERC. Contrary to the PAPUC's argument, this Court will not resolve the preemption questions here by holding a *trial* on whether PJM's FERC-approved processes are adequate or whether its FERC-authorized methodology yielded the right result. MSJ Opp. 1–2. Courts decide preemption cases by enforcing the supremacy of federal law, as the Supremacy Clause demands.

Underscoring that the PAPUC's purported factual disputes are irrelevant, the PAPUC has not submitted an affidavit or declaration under Federal Rule of Civil Procedure 56(d) attesting that it is unable to present "facts essential to justify its opposition." Fed. R. Civ. P. 56(d); *see Pa. Dep't of Public Welfare v. Sebelius*, 674 F.3d 139, 157 (3d Cir. 2012) (affidavit must establish "what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not previously been obtained" (quotation marks omitted)). "Vague or general statements," like the PAPUC's here, are not enough. *Malouf v. Turner*, 814 F. Supp. 2d 454, 459–60 (D.N.J. 2011).

Nor, in any event, is there any substance to the PAPUC's claim that PJM's modeling is inadequate or outdated. The PAPUC suggests that PJM's process stopped when it approved the IEC Project in 2016. MSJ Opp. 22–23, 35–36. That is incorrect. SMF ¶¶ 38–39; SMF Resp. ¶¶ 37–38. As the ALJ acknowledged, PJM

reevaluated the data five times between its initial approval in August 2016 and October 2019. Recommended Decision at 66–67. Each time, PJM found "[t]he benefit-cost ratio for Project 9A has always exceeded 1.25." SMF ¶ 42 (Recommended Decision at 67). PJM will continue to evaluate the data and update its benefit-cost ratio at least annually until construction begins—and, if the analysis warrants, terminate the IEC Project. SMF ¶ 30; SMF Resp. ¶¶ 29–30.

D. Issue Preclusion Does Not Bar Transource's Preemption Claim.

The PAPUC argues that Transource's preemption claim is barred by issue preclusion because the PAPUC, in the decision under review, declared its actions non-preempted. MSJ Opp. 17–18; ECF No. 58 ("MTD") 19–20. Transource has responded to this argument in full and will not rehash those points here. *See* MTD Opp. 8–18. In short, courts (including the Third Circuit) hold that state agencies' unreviewed decisions about constitutional and preemption issues do not carry preclusive effect—because state agencies otherwise would be the arbiters of their own power under federal law. *Id.* 10–12. That conclusion applies with particular force here because Transource sued within the time for seeking review in state court (when even Pennsylvania courts do not treat the PAPUC's decisions as preclusive) and because the PAPUC lacked power under state law to hold that its own statutes and regulations, as it interpreted them, are preempted. *Id.* at 16–18.

II. The PAPUC's Decision Violates The Dormant Commerce Clause.

The PAPUC violated the dormant Commerce Clause by "impos[ing] restrictions" on interstate commerce "that benefit in-state economic interests at out-of-state interests' expense." *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 210 (3d Cir. 2002). By impeding interstate commerce for the sake of preserving in-state consumers' lower prices, the PAPUC's order clashes with the dormant Commerce Clause's central purpose: to "restrict[] state protectionism." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019). This purpose is essential to the "constitutional scheme," because "removing state trade barriers was a principal reason for the adoption of the Constitution." *Id.* The Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *W. Lynn Creamery*, 512 U.S. at 206 (quotation marks omitted). It thus prohibits attempts to protect local interests from the consequences of "an integrated interstate market." *Id.* at 203, 205.

The PAPUC's order does precisely what the Commerce Clause forbids. It discriminates against interstate commerce (and thus is *per se* invalid) and imposes burdens on interstate commerce that are "'clearly excessive in relation to the putative local benefits'" (failing the *Pike* test). *Cloverland-Green*, 298 F.3d at 210–11.

A. The PAPUC's Decision Is Discriminatory and Thus *Per Se* Invalid.

As the PAPUC's brief makes clear, the discrimination claim comes down to one legal issue and one factual issue. The legal issue is whether the dormant Commerce Clause prohibits states from using utility regulation to block the flow of power out-of-state in order to preserve cheap power for in-state customers. Transource says yes; the PAPUC says no. The factual issue is whether the PAPUC did so here. Again, Transource says yes; the PAPUC insists otherwise. The law and undisputed facts show that Transource is correct and is entitled to judgment.

The Supreme Court's decision in *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), resolves the contested legal issue. There, a state utility commission prohibited the export of a utility's hydroelectric power. *Id.* at 335. It believed the "energy was 'required for use within the State,'" and that keeping the energy in-state would save domestic customers $25 million per year. *Id.* at 336. The Supreme Court invalidated the decision because it was "designed to gain an economic advantage" for in-state "citizens at the expense of … customers in neighboring states" and placed "direct and substantial burdens" on interstate commerce to do so. *Id.* at 339.

New England Power disposes of the PAPUC's argument that the dormant Commerce Clause forbids only discrimination in favor of in-state *utilities*. MSJ Opp. 28–29. That decision invalidated a utility-commission decision that prevented

the flow of commerce to out-of-state customers, at the behest of a utility that sought to serve those customers, just as Transource seeks. Nor does *New England Power* stand alone. The Supreme Court has long held that "[e]conomic protectionism" barred by the dormant Commerce Clause "may include attempts to give local consumers an advantage over consumers in other States." *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 580 (1986).

Alternatively, the PAPUC tries to distinguish *New England Power* on its facts. MSJ Opp. 30–33. First, the PAPUC argues that *New England Power* involved "existing infrastructure" instead of "the construction of new utility infrastructure." MSJ Opp. 30–31. But this is a distinction without a difference. The Commerce Clause applies to *all* discrimination against interstate commerce, whether undertaken via existing infrastructure or new. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 387, 389 (1994) (discrimination favoring "new solid waste transfer station").

Second, the PAPUC avers that its actions concerned "matter[s] specifically reserved for the states under the FPA." MSJ Opp. 31. Transource disagrees. *Supra* at 8–10. But regardless, even when states act within their reserved powers, their actions must comport with the Commerce Clause. *See Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992) ("Even if the [challenged] Act is accepted as part of the State's rate-regulating authority, we cannot accept the submission that it is exempt from

scrutiny under the Commerce Clause.”). The only exception is when Congress affirmatively authorizes states to discriminate against interstate commerce. *Id.* The PAPUC, however, cannot point to any federal law satisfying the stringent standard that applies. *Id.* (noting there is “nothing in the statute or legislative history” of the FPA “‘evinc[ing] congressional intent “to alter the limits of state power otherwise imposed by the Commerce Clause”’” (citation omitted) (bracket in original)).

Third, the PAPUC says that it did not deny Transource’s applications based on harms to “Pennsylvania residents alone.” MSJ Opp. 31. The dormant Commerce Clause, however, prohibits *any* discrimination against interstate commerce. So it is no answer to say that the PAPUC discussed some considerations *in addition to* discrimination against interstate commerce. *See, e.g.*, *Or. Waste Sys., Inc. v. Dep’t of Env’t Quality of Or.*, 511 U.S. 93, 106 (1994) (“To give controlling effect to respondents’ characterization of Oregon’s tax scheme as seemingly benign cost spreading would require us to overlook the fact that the scheme necessarily incorporates a protectionist objective as well.”).

The PAPUC also argues that some Pennsylvania customers would also have benefitted from the IEC Project (even as most would pay higher prices). That, too, is irrelevant. The dormant Commerce Clause prohibits discrimination favoring in-state entities even when the burdens fall on *both* in-state and out-of-state entities. *See, e.g.*, *C & A Carbone*, 511 U.S. at 391 (“The ordinance is no less discriminatory

because in-state or in-town processors are also covered by the prohibition."); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 & n.4 (1951) (holding that city ordinance "plainly discriminates against interstate commerce" by "erecting an economic barrier protecting a major local industry against competition from without the State," and finding it "immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription"). Likewise, the *size* of the burden is irrelevant. "[W]here discrimination is patent, … neither a widespread advantage to in-state interests nor a widespread disadvantage to out-of-state competitors need be shown." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 276 (1988).

In sum, *New England Power* controls, and the PAPUC does not claim that its order can satisfy the "rigorous scrutiny" applicable to discriminatory regulations. MSJ Mem. 20. That leaves only the question of whether the PAPUC in fact discriminated in favor of in-state customers. The PAPUC denies that it did. MSJ Opp. 31–33. The *actual decisions*, however, show otherwise.

The ALJ found a lack of need because "PJM's failure to consider increased wholesale power prices in Pennsylvania when calculating the benefit-cost ratio … cast doubt on the benefits, if any to Pennsylvania." SMF ¶ 59 (Recommended Decision at 98); SMF Resp. ¶ 58. In particular, the ALJ was "persuaded" by testimony that the IEC Project would "save utilities in Maryland, Virginia, and the District of Columbia almost a billion dollars over 15 years," while "if you don't

build that project, that same power is going to be used in Pennsylvania" and other upstream states "at a cost of about $970 million." Recommended Decision at 97.[4] In the ALJ's view, the "increased wholesale power prices" that Pennsylvanians would pay if the IEC Project were built "are real costs to customers that show there is no need for the project." *Id.* at 100. In short, because the ALJ weighed the higher prices in-state consumers would pay in the "need" determination, she concluded that "[t]his is a costly project *to Pennsylvania* compared to the net benefit." *Id.* at 97 (emphasis added).

The PAPUC adopted the ALJ's reasoning. It emphasized that "[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania is [the PAPUC's] concern, and … is properly within the scope" of the PAPUC's consideration of need. SMF ¶ 71 (Order at 59); SMF Resp. ¶ 70. The PAPUC treated it as undisputed that "the consequences of Project 9A would be to alleviate the economic congestion on a regional level, which in turn would result in higher rates in Pennsylvania." SMF ¶ 71 (Order at 58–59); SMF Resp. ¶ 70. And the PAPUC concluded that "the ALJ properly considered the negative impacts to

[4] *Accord* Recommended Decision at 97 (crediting PJM's projection "that this Project will decrease wholesale power prices by approximately $845 million primarily for transmission zones south of the AP South Reactive Interface, while at the same time increasing wholesale power prices by $812 million for transmission zones primarily to the north and east of the AP South constraint")

Pennsylvania" in evaluating "need." SMF ¶ 71 (Order at 58–59); SMF Resp. ¶ 70.

Indeed, the PAPUC reweighed PJM's need determination *precisely because* it perceived that the freer flow of electricity in interstate commerce would harm in-state consumers. The PAPUC acknowledged that, given the length of the state approval process, "[i]t is neither necessary nor advisable that in every instance, PJM should be subjected to state commissions' concerns that each project's data be proven to be calibrated under current existing conditions." SMF ¶ 72 & Order at 60, ECF No. 20-4; SMF Resp. ¶ 71. But because PJM's "regional planning involve[d] alleviating economic congestion" across state lines, "*the result of which is predicted to lead to a substantial increase in utility rates within the Commonwealth*," the PAPUC declared that its "review … warrants examination of the underlying data and congestion trends which PJM relied upon in assessing … need." SMF ¶ 72 (Order at 60) (emphasis added); SMF Resp. ¶ 71. Then, when the PAPUC undertook its reweighing, its reexamination led the PAPUC to block a new channel of interstate commerce because of the anticipated effects on Pennsylvania.

In seeking to protect Pennsylvania consumers, however, the PAPUC "ignore[d] … that [they] are part of an integrated interstate market," and that "[t]his diversion necessarily injures the [electricity consumers] in neighboring States." *W. Lynn Creamery*, 512 U.S. at 203. It does not matter that the PAPUC considered other factors along the way, including (its own calculations of) regional impact. MSJ

Opp. 31–32. What matters is that the PAPUC blocked interstate commerce that would benefit the region because of its concern for "[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania." SMF ¶ 71 (Order at 59); SMF Resp. ¶ 70. Such "[d]iscrimination against interstate commerce in favor of local business or investment is *per se* invalid"; states may not "hoard a local resource … for the benefit of local" interests. *C & A Carbone*, 511 U.S. at 391–92.

B. The PAPUC's Order Burdens Commerce Disproportionately To Any Legitimate Local Benefits.

Transource has also demonstrated that the PAPUC's order fails the *Pike* test. *Pike* requires courts to weigh benefits against burdens, and to invalidate state actions when "the burden" imposed on interstate commerce "is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Here, the PAPUC does not identify any legitimate local benefit its actions served. The only putative local benefit is that the order avoids "a substantial increase in utility rates within the Commonwealth" that would occur if Transource's project helps electricity flow more freely to neighboring states. SMF ¶ 72 (Order at 60); SMF Resp. ¶ 71. This supposed "benefit," however, warrants no weight. "[S]imple economic protectionism," *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), is not a legitimate local interest. A state may not act out of a desire to give "its residents … a preferred right of access, over out-of-state consumers[,] to" electricity "located within its borders." *New England Power*, 455 U.S. at 338.

That dooms the PAPUC's order under *Pike*. Only "[i]f a *legitimate* local purpose is found" does a court balance that interest against the burden on interstate commerce. *Pike*, 397 U.S. at 142 (emphasis added). And the PAPUC "has been unable to 'identify any actual benefit'" from its order, *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 735 (8th Cir. 2002) (citation omitted), much less "provide evidence," *Cloverland-Green*, 298 F.3d at 216, that its order provides benefits other than protecting Pennsylvanians from the consequences of interstate commerce. Any substantial burden on interstate commerce is clearly excessive as compared to such nonexistent local benefits. "As the adage goes, something … beats nothing." *See Union Pac. R.R. Co. v. Pipeline & Hazardous Materials Safety Admin.*, 953 F.3d 86, 90 (D.C. Cir. 2020).

In fact, the PAPUC's order *severely* burdens interstate commerce. It maintains congestion that artificially raises prices in Virginia, Maryland, and Washington, D.C.—to the tune of $800 million in 2012-2016. MSJ Mem. 22. The ALJ credited testimony that building the IEC Project would save those in Maryland, Virginia, and the District of Columbia almost $1 billion over fifteen years by increasing interstate electricity transmission. Recommended Decision at 97. Denying Transource's applications keeps that electricity bottled up in Pennsylvania and other upstream states. The PAPUC's order thus impedes the free flow of electricity across state lines, at out-of-state consumers' expense, to protect the

economic interests of in-state consumers. And its actions, if followed across the country, would give states a veto over federal planning decisions that alleviate interstate market distortions, solely because some states benefit from distortions. MSJ Mem. 22.

The PAPUC insists it did not violate *Pike* because it determined that PJM's congestion calculations were wrong. MSJ Opp. 34–37. But even if (counterfactually) the PAPUC could lawfully reweigh PJM's need finding, *but see supra* at 5–8, that claim is irrelevant to *Pike*. If the PAPUC's order significantly burdens interstate commerce (as it does), the precise dollar amount of congestion does not matter given the absence of any legitimate, non-protectionist interest. "[W]hen a statute provides little or nothing in the way of demonstrable legitimate local benefit, any significant burden on interstate commerce is burden too much." *R & M Oil & Supply*, 307 F.3d at 737. The PAPUC does not and cannot deny that its order inhibits the free flow of electricity across state lines. No matter whether one uses PJM's metrics or the PAPUC's,[5] the burdens the PAPUC's order imposes on interstate commerce far outweigh its nonexistent local benefits.

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[5] Even improperly considering the artificial price advantage in-state consumers would lose, the PAPUC still calculated that the IEC Project would provide millions of dollars of net benefits to interstate commerce. Order at 49; Recommended Decision at 97.

C. Claim Preclusion Does Not Bar Transource's Dormant Commerce Clause Claim.

The PAPUC argues that claim preclusion bars the Commerce Clause claim. MSJ Opp. 27–28; MTD 22–24. Transource has addressed that argument elsewhere. MTD Opp. 18–21. In short: claim preclusion, like issue preclusion, does not prevent review of arguments that a state agency violated federal law. That is especially so here. Transource had no meaningful opportunity to bring the claim earlier because it *arose out of* the PAPUC's decision, and the PAPUC lacked authority to depart from its interpretation of what state law required.

Indeed, the PAPUC's arguments in combination would provide state agencies complete immunity from federal claims in federal court. Claims raised before the agency (like preemption) would be issue-precluded, and claims not raised before the agency (like the dormant Commerce Clause) would be claim-precluded. The law, however, does not provide such immunity—which is why federal courts routinely entertain federal-law arguments like those here. MTD Opp. 11–12 & n.4.

III. Sovereign Immunity Does Not Bar Declaratory Or Injunctive Relief.

Transource's claim for declaratory and injunctive relief is not barred by the Eleventh Amendment. Under *Ex parte Young*, 209 U.S. 123, 159–60 (1908), to determine whether a complaint "avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as

prospective'" against individual officials sued in their official capacities. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (citation omitted) (approving suit for injunctive and declaratory relief against state regulatory commissioners). Here, Transource seeks just that: a declaration that the PAPUC's decision violates federal law and an injunction against enforcing that decision. ECF No. 1 ("Compl.") 40–41. And it has sued not just the PAPUC but the Commissioners in their official capacities. There is no Eleventh Amendment bar.[6]

Because Transource may proceed "against the individual commissioners in their official capacities" under *Ex parte Young*, this Court "need not decide" whether the PAPUC is immune from suit under the Eleventh Amendment. *Verizon Md.*, 535 U.S. at 645. That is exactly the approach the Supreme Court took in *Verizon Maryland*, which properly guides this Court here. *Id.* That approach renders irrelevant the intra-circuit dispute over whether the PAPUC *itself* receives Eleventh Amendment immunity.[7] MSJ Opp. 38–39.

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[6] *Accord, e.g.*, *Telespectrum, Inc. v. Pub. Serv. Comm'n of Ky.*, 227 F.3d 414, 419–20 (6th Cir. 2000) (applying *Ex parte Young* to action seeking declaratory and injunctive relief relating to denial of certificate of public convenience). *Verizon Maryland* also recognized that even where a prayer for declaratory relief "seeks a declaration of the *past*, as well as the *future*, ineffectiveness of [a state regulatory commission's] action," it is not barred under the Eleventh Amendment where it does not implicate the "past liability of the State." 535 U.S. at 646.

[7] *See Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, No. 86-cv-5357, 1997 WL 597963, at *6–10 (E.D. Pa. Sept. 15, 1997); *Erie CPR v. Pa. Dep't of Transp.*, 343 F. Supp. 3d 531, 558 (W.D. Pa. 2018); *Chase v. Pub. Util. Comm'n of Pa.*, No.

The PAPUC also asserts that it cannot be required to pay attorneys' fees under 28 U.S.C. § 1988. MSJ Opp. 2–3, 40–42. But "an award of attorney's fees ancillary to prospective relief is not subject to the strictures of the Eleventh Amendment." *Missouri v. Jenkins*, 491 U.S. 274, 279 (1989). Nevertheless, Transource commits that it will not seek attorney's fees from the PAPUC in the event it prevails.

IV. The Court Should Grant Transource's Motion For Expedited Hearing.

This Court has already granted most of the relief Transource sought via its Motion for Speedy Hearing by setting an expedited briefing schedule and expedited hearing on Transource's Motion for Summary Judgment. The only question now is whether this Court will issue a decision as quickly as practicable. And on that point, the PAPUC's arguments lack merit.

A. Absent An Expedited Decision, There Is A Significant Risk Of Irreparable Harm.

Principally, the PAPUC disputes whether Transource has adequately established irreparable harm, relying largely on decisions concerning whether to grant preliminary injunctions. But, to begin, a Rule 57 speedy-hearing request differs from a request for a preliminary injunction. A plaintiff need not "establish immediate and irreparable injury." *Cnty. of Butler v. Wolf*, No. 20-cv-677, 2020 WL 2769105, at *5 n.3 (W.D. Pa. May 28, 2020)). Rather, courts have "broad

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05-cv-2375, 2006 WL 8451164, at *3 (M.D. Pa. Nov. 14, 2006) (all declining to dismiss claims against the PAPUC on immunity grounds).

discretion" to grant speedy hearing. *Id.* at *2; ECF No. 24 ("Speedy Hearing Br.") 7–8. And speedy hearing is especially appropriate for "imminent or ongoing violations of important rights," as well as where "the determination is largely one of law, and factual issues … are not predominant." *Cnty. of Butler*, 2020 WL 2769105, at *2. That describes this case exactly.

While irreparable harm is not *necessary* to justify a Rule 57 speedy hearing, it is sufficient. And here, the risk of irreparable harm is clear. Transource imminently risks being in breach of the Designated Entity Agreement with PJM, due to an upcoming "milestone" deadline for state siting approvals of September 30, 2021. Speedy Hearing Br. 6. At that point, PJM has no obligation to extend Transource's milestone deadline further. And if the PAPUC's decision has not been set aside, PJM may well decline to do so. If this happens, Transource faces the possibility of default under the DEA, termination of that agreement, and removal from PJM's expansion plan. *Id.* The result will be that Transource cannot construct the IEC Project at all.

The PAPUC largely misconstrues the irreparable harm as Transource's "[f]inancial loss." MSJ Opp. 46. That, however, is not the only critical harm that looms. Transource seeks to build the IEC Project not just to earn a return but to *serve customers* who stand to benefit from the project. And if the project does not

proceed, the irreparable harm will fall on those customers. That public interest weights the balance overwhelmingly to favor a speedy decision.

Indeed, barriers to constructing a project of this scale—and the risk of breach of an agreement—are precisely the kind of injury that courts have found to constitute irreparable harm (even where, unlike here, the legal standard requires irreparable harm). For example, in *Columbia Gas Transmission, LLC v. 1.01 Acres, More or Less in Penn Township*, the Third Circuit held that risks to a natural gas company's "safety, reputation, and economic interests" caused by potential delay in pipeline construction constituted irreparable harm—even where the project was not at risk of termination. 768 F.3d 300, 315–16 (3d Cir. 2014). Myriad decisions agree.[8]

The PAPUC also avers that Transource has not proven irreparable harm because PJM has the power to extend the milestone deadlines. MSJ Opp. 47–48. But again, this misstates the legal standard. Under Rule 57, Transource need not show that irreparable harm *will definitely* result. And the significant risk of irreparable harm that exists here amply suffices to justify a favorable exercise of this

[8] *Tenn. Gas Pipeline Co. v. 0.018 Acres of Land in the Twp. of Vernon*, No. 10-cv-4465, 2010 WL 3883260, at *3 (D.N.J. Sept. 28, 2010) ("[F]ailure of Tennessee gas to meet its in-service deadline would likely result in delayed delivery of the gas that FERC determined was needed in the areas to be serviced. Therefore, the Court finds that there is a likelihood of irreparable harm …."); *Columbia Gas Transmission, LLC v. 252.071 Acres More or Less in Baltimore Cnty.*, No. 15-cv-3462, 2016 WL 1248670, at *16–17 (D. Md. Mar. 25, 2016) (irreparable harm based on potential that party would not receive extension to build pipeline).

Court's Rule 57 discretion. To be clear, Transource will *of course* ask PJM to extend its milestone deadlines and preserve its project regardless of how this Court rules. But the reality is that PJM is under no obligation to do so and could decide to attempt to remove the project from its plans, particularly if the PAPUC's decision remains standing as of September 30.

B. The PAPUC's Purported Fact Disputes Are Immaterial And Do Not Stand In The Way Of Speedy Resolution.

Transource has already refuted the PAPUC's claim that resolving the Motion for Summary Judgment implicates "multiple prominent and contested issues of fact." MSJ Opp. 50. Indeed, the PAPUC's illustrative list of the alleged "disputes" illustrates that the PAPUC's claim lacks merit:

> whether the level of congestion in the PJM system justifies the projects, the actual levels of peak demand on the allegedly congested areas, the effect of recent legislation in neighboring states on any remaining congestion, the continuing impacts of the coronavirus pandemic on PJM's load forecast, [and] what opportunities exist for meaningful public participation in PJM's transmission planning process….

Id. at 50–51. This list presumes that this Court will resolve this case by weighing for itself who is correct about the need for the IEC Project, PJM or the PAPUC. But the *whole point* of Transource's argument is that the FPA vests authority to make these determinations in FERC and its designee PJM—not the PAPUC, or this Court.

Confirming the point is the PAPUC's response to Transource's Statement of Undisputed Material Facts. ECF No. 62. In virtually no paragraph does the PAPUC

actually *deny* Transource's facts (which come almost exclusively from the PAPUC's order and the ALJ's recommended decision). Instead, the PAPUC's spare factual "denials" almost universally contest the relevance of the stated facts, take issue with the characterizations of the Recommended Decision and the PAPUC's Order, or portray the stated facts as conclusions of law. Nor does the PAPUC's brief show that any (nonexistent) factual dispute is material to the legal questions the Court must decide. Instead, the PAPUC argues that it is entitled to second-guess PJM's federal need determination and to privilege the interests of Pennsylvania customers even to the point of blocking interstate commerce. The law, however, is to the contrary.

CONCLUSION

The Court should expeditiously grant Transource's motion for summary judgment.

August 10, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 7.8(b)(2) and the Court's Order of August 9, 2021 (ECF No. 69) because it contains 7,997 words, as measured by the word-count feature of Microsoft Word 2016, excluding the Caption, Table of Contents, Table of Authorities, signature block, Certificate of Compliance, and Certificate of Service.

/s/ Matthew E. Price
Matthew E. Price

CERTIFICATE OF SERVICE

I hereby certify that on August 10, 2021, I electronically filed the foregoing Opposition to Motion to Dismiss with the Clerk of the Court by using the CM/ECF system, and served the same on all counsel of record via the CM/ECF system.

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