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)

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Plaintiff Transource Pennsylvania, LLC ("Transource") submits this memorandum in opposition to the Motion to Dismiss filed by Defendants Gladys Brown Dutrieuille, David W. Sweet, John F. Coleman, Ralph V. Yanora, and the Pennsylvania Public Utilities Commission (collectively, the "PAPUC").

INTRODUCTION

The PAPUC violated federal law when it rejected a federal-law determination that new transmission lines were needed (triggering preemption) in order to prevent the outflow of low-cost electricity from Pennsylvania (violating the dormant Commerce Clause). The PAPUC's arguments seeking dismissal fail.

First, the PAPUC argues that Transource lacks standing to contest the denial of its own application. But under hornbook law, when an agency unlawfully denies a plaintiff's permit application or revokes a certificate to operate a business, the plaintiff has standing to challenge those actions.

Second, the PAPUC asserts that preclusion provides total immunity to a state agency charged with violating the Constitution. It contends that claims raised before the agency (preemption) are issue-precluded, while claims not raised before the agency (the dormant Commerce Clause) are claim-precluded. The law, however, does not provide such immunity.

On issue preclusion, the PAPUC cites no case holding that an unreviewed state-agency decision about whether the agency's *own conduct* is preempted

precludes federal courts from making an independent determination. There is a good reason the PAPUC can cite no such cases: The rule the PAPUC advocates would leave the state agency as the arbiter of its own power under federal law. Courts nationwide, including the Third Circuit, have recognized that litigants like Transource may raise preemption in federal court.

On claim preclusion, the PAPUC contends that Transource cannot invoke the Commerce Clause in federal court because it did not cite the Commerce Clause below. But claim preclusion does not apply when a state agency interprets its enabling statute and regulations in a manner that violates federal law. Indeed, the PAPUC lacked authority under state law to depart from what it viewed state law to require.

Third, on the merits, the PAPUC contends that it is free to second-guess a federal need determination because the Federal Power Act ("FPA") exempts from its scope anything states choose to regulate. The PAPUC is wrong. It relies on a policy statement that courts have held does not oust FERC's jurisdiction over transmission and wholesale rates—which is the basis for the federal need determination here. Thus, when a state's determination conflicts with a federal determination, the state must give way under the Supremacy Clause. Alternatively, the PAPUC avers that it has authority over *siting* and made its decision in a siting proceeding. But courts assessing preemption look to substance, not labels. And in

substance, the PAPUC impermissibly reweighed—and, upon reweighing, impermissibly abrogated—a federal determination that new transmission was needed.

Fourth, the PAPUC asserts that it cannot have violated the dormant Commerce Clause because it discriminated against out-of-state *customers*, not out-of-state businesses. The dormant Commerce Clause, however, protects both. And a business seeking to serve out-of-state customers can invoke the dormant Commerce Clause to protect its ability to do so.

BACKGROUND

The FPA grants the Federal Energy Regulatory Commission ("FERC") exclusive jurisdiction to regulate interstate electricity transmissions and the sale of energy at wholesale. *New York v. FERC*, 535 U.S. 1, 18–20 (2002). Pursuant to these powers, FERC promulgated Order No. 1000, which is designed to identify "efficient or cost-effective solution[s] to regional transmission needs." Compl. ¶ 22, ECF No. 1. Under Order No. 1000, FERC regulates a "coordinated regional transmission planning" process led by regional transmission organizations that oversee multi-state, regional electric grids. *Id.* ¶ 21.

PJM Interconnection, L.L.C. ("PJM") is one such organization; its grid covers Pennsylvania and 12 other states. *Id.* ¶ 13. PJM's activities, including transmission planning, are governed by tariffs and rules reviewed and approved by FERC. *Id.* As

required by FERC, PJM conducts an annual Regional Transmission Expansion Plan ("RTEP") process and applies a FERC-approved methodology to determine when projects are needed for reliability or efficiency. *Id.* ¶¶ 22–28, 30 & n.7.

PJM has identified transmission "congestion"—meaning that transmission wires have less capacity than needed to transmit electricity efficiently—resulting in inefficiently low prices in parts of Pennsylvania (where a bottleneck traps low-cost power), and inefficiently high prices in Virginia, Maryland, and the District of Columbia (where, absent the bottleneck, low-cost power would flow). *Id.* ¶¶ 34–35. PJM solicited proposals to address this congestion. *Id.* ¶ 36. Transource PA's parent company, Transource Energy, proposed "Project 9A"—also known as the Independence Energy Connection Project or the "IEC Project"—to address the congestion by building transmission from Pennsylvania into Maryland. *Id.* ¶ 37.

PJM applied its FERC-approved methodology to determine whether the new facilities would improve efficiency and whether its benefits exceeded its costs by the FERC-approved ratio of 1.25 to 1. *Id.* ¶ 39. In determining costs, the FERC-approved methodology disregards the higher wholesale energy prices that may result in regions where today low-cost power is trapped—because low wholesale energy prices resulting from a transmission bottleneck are an inefficiency that regional planning aims to correct. *Id.* ¶ 40. PJM approved the project, and PJM and

Transource executed a Designated Entity Agreement that was filed with FERC. *Id.* ¶¶ 39, 41.

Transource then applied to the PAPUC for siting approval. *Id.* ¶ 42. It received from the PAPUC a provisional grant of a certificate of public convenience allowing it to become a Pennsylvania public utility and begin work. *Id.* ¶ 43. After more than three years, however, the PAPUC on May 24, 2021 denied the siting applications and revoked the certificate. *Id.* ¶¶ 58, 63. The PAPUC concluded that state law authorized it to make an "independent" determination of whether the project was needed. And in doing so, the PAPUC interpreted state law to require that it treat, as a project cost, the higher wholesale energy prices in parts of Pennsylvania that will result from alleviating the congestion. *Id.* ¶¶ 50–62. That is, the PAPUC treated the core project *benefit* identified by the FERC-approved planning process—that eliminating congestion would make wholesale energy prices more efficient, by decreasing them in some places and increasing them in others—as a *cost* warranting disapproval.

In this suit, Transource challenges the PAPUC's decision as preempted under the Supremacy Clause and unlawful under the Commerce Clause. Transource has also moved for summary judgment and to expedite. ECF Nos. 20, 21. The PAPUC has opposed summary judgment, ECF No. 61, and moved to dismiss, ECF No. 58 ("PAPUC Mot."). Transource responds here to the motion to dismiss.

ARGUMENT

I. Transource Has Standing.

Transource has standing. Standing requires (1) "an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Cottrell v. Alcon Lab'ys*, 874 F.3d 154, 162 (3d Cir. 2017) (quotation marks omitted). The PAPUC does not challenge traceability. And Transource readily shows injury and redressability.

First, Transource is injured because the PAPUC's decision deprived Transource of siting permits and revoked its certificate of public convenience. The PAPUC builds its standing argument on the false premise that Transource's sole injury is prospective economic loss, which the PAPUC says is too contingent. PAPUC Mot. 11–16. That premise is wrong. Transource does not ground its standing principally on potential financial injury. Transource's injury-in-fact is the loss of its permit and certificate, which prevent it from moving forward with the projects. Compl. ¶¶ 4, 63–64. "Injury-in-fact is not Mount Everest," *Danvers Motor Co. v. Ford Motor Co.*, 432 F.3d 286, 294 (3d Cir. 2005) (Alito, J.), and similar injuries routinely suffice.[1]

[1] *See, e.g.*, *Anderson Grp., LLC v. City of Saratoga Springs*, 805 F.3d 34, 46 (2d Cir. 2015) (standing to challenge "denial of an entity's special use permit application"); *Addiction Specialists, Inc. v. Twp. of Hampton*, 411 F.3d 399, 403 (3d Cir. 2005) (standing where town "rescinded … approval of … Application"); *Sammon v. N.J.*

Second, the relief Transource seeks would redress its injuries.[2] For redressability, "[i]t is sufficient for the plaintiff to establish a 'substantial likelihood that the requested relief will remedy'" its injury. *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 143 (3d Cir. 2009) (citation omitted). By declaring the PAPUC's decision unlawful and restoring Transource's certificate, this suit necessarily would remedy Transource's injuries.

The PAPUC argues that Transource's permits subsequently could be denied, and its certificate subsequently revoked, on other grounds that the PAPUC has not yet reached. PAPUC Mot. 16–18. That is irrelevant: When a plaintiff "seek[s] *immediate* relief from a federal court as a necessary antecedent to the *ultimate* relief he seeks from a different entity, like an administrative agency," the plaintiff "must demonstrate that a favorable decision from the federal court likely would provide him immediate relief, but need not demonstrate that it likely would provide him the ultimate, discretionary relief sought from the agency." *Townes v. Jarvis*, 577 F.3d 543, 547 (4th Cir. 2009). Thus, "[i]f a reviewing court agrees that [an] agency misinterpreted the law, it will set aside the agency's action and remand

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Bd. of Med. Exam'rs, 66 F.3d 639, 642 (3d Cir. 1995) (standing from inability to obtain midwife's license due to licensing requirements); *cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 607 (2013) ("impermissible denial of a governmental benefit is a constitutionally cognizable injury").

[2] Transource also meets the traceability requirement. The PAPUC's order is directly responsible for Transource's lost permit and certificate.

the case—even though the agency … might later, in the exercise of its lawful discretion, reach the same result." *FEC v. Akins*, 524 U.S. 11, 25 (1998); *see also, e.g.*, *Soc'y Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 177 (3d Cir. 2000) (finding standing to challenge aesthetic injuries from construction grant because the injuries "may well be redressed if the City is required to more fully evaluate the environmental and historic impacts of the proposed project").

Here, while the ALJ recommended denying Transource's siting permits on additional grounds, Recommended Decision at 127–28, ECF No. 1-3, the PAPUC declared those findings "moot" and did not address Transource's objections. Compl. ¶ 62. Thus, Transource could prevail on those issues. Because more than "one disposition is possible as a matter of law" if Transource succeeds here, *Ricketts v. Att'y Gen. United States*, 955 F.3d 348, 351 (3d Cir. 2020) (quotation marks omitted), its injury is redressable.

II. Issue Preclusion Does Not Bar Transource's Preemption Claims.

Transource contends that the PAPUC overstepped its jurisdiction, and violated the Supremacy Clause, by rejecting a FERC-approved need determination. The PAPUC, however, contends that the Court cannot consider this argument because the PAPUC itself—whose violation of federal law is at stake—declared its decision *not* unlawful. But under federal law, state agencies do not get to be the judges of their own power. Instead, "there is no doubt … that if the federal courts

believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). The PAPUC cites no federal case according issue-preclusive effect to a state agency's unreviewed conclusion that its own actions were not preempted. And many cases reject similar arguments.

A. Issue Preclusion Does Not Apply To A State Agency Decision Finding Its Own Actions Non-Preempted.

This case falls outside the limited circumstances in which unreviewed state agency decisions receive preclusive effect. Congress in 28 U.S.C. § 1738 made state *court* judgments preclusive, which also yields preclusion for *reviewed* state agency decisions. *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993). But that statute "is not applicable to … unreviewed" decisions. *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 794 (1986). Instead, "federal common-law rules" govern. *Id.* The Supreme Court has explained that the "suitability" of preclusion "may vary according to the specific context of the rights at stake, the power of the agency, and the relative adequacy of agency procedures." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109–10 (1991).

Consistent with those principles, *Elliott* held that "when a state agency 'acting in a judicial capacity … resolves *disputed issues of fact* properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give *the agency's factfinding* the same preclusive effect to which it would be entitled in the

State's courts." 478 U.S. at 799 (emphasis added) (omission in original) (citation omitted). The Supreme Court, however, has never accorded preclusive effect to a state agency's unreviewed *legal conclusions*. Here, in this proceeding, Transource does not dispute the agency's factfinding.[3] And for two reasons, preclusion does not apply to the PAPUC's views on the legal issue of preemption.

Constitutional issues. First, this case involves a constitutional question—whether the PAPUC violated the Supremacy Clause. In *Edmundson*, the Third Circuit applied preclusion to an agency's "factual findings" but it held—in a § 1983 suit alleging violations of the federal Constitution—that the "legal issue, the … constitutional ruling, … is beyond the scope of" issue preclusion. 4 F.3d at 192. It explained that an "agency consisting of lay persons [does not have] the expertise to issue binding pronouncements [on] federal constitutional law." *Id.* at 193. And given the alleged constitutional violations, *Edmundson* held that "only state administrative factfinding is entitled to preclusive effects … when the agency ruling remains unreviewed." *Id.* at 189; *see Swineford v. Snyder Cnty.*, 15 F.3d 1258, 1268 (3d Cir. 1994).

Edmundson controls. Like *Edmundson*, this case concerns federal constitutional violations—with the only difference being the procedural vehicle for

[3] In its state-court appeal, by contrast, Transource plans to challenge a number of the PAPUC's factual conclusions as unsupported.

litigating those violations (§ 1983 in *Edmundson*; *Ex parte Young* here, for the preemption claim). And like in *Edmundson*, the PAPUC is a lay commission. The PAPUC's statute imposes no qualifications except that each commissioner "shall be a resident of this Commonwealth," "shall have been a qualified elector therein for a period of at least one year," and "shall also be not less than 25 years" old. 66 Pa. Cons. Stat. § 301(b). Under *Edmundson*, federal common law does not empower such individuals to "issue binding pronouncements [on] federal constitutional law." 4 F.3d at 193.

Preemption of the agency's own actions. This case, moreover, concerns an issue for which preclusion is especially inappropriate. The "right[] at stake," *Astoria*, 501 U.S. at 110, is whether the PAPUC's *own conduct* is preempted. Federal law does not vest in state agencies the power to authoritatively resolve that question. *Compare id.* (appropriateness of preclusion varies based on "the relative adequacy of agency procedures"), *with Williams v. Pennsylvania*, 136 S. Ct. 1899, 1906 (2016) ("no man can be a judge in his own case").

Federal courts regularly review state agency decisions on preemption grounds.[4] None of these decisions treat the state agency's preemption conclusions

[4] *See, e.g.*, *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 76–77 (2013); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 642-43, 647 (2002); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 249, 252–55 (3d Cir. 2014); *Freehold*

as preclusive; otherwise, federal review would be meaningless. Indeed, myriad courts have *specifically held* that state agency decisions on preemption are not preclusive. *See Iowa Network Servs., Inc. v. Qwest Corp.*, 363 F.3d 683, 690 (8th Cir. 2004) ("common law doctrines [of res judicata and issue preclusion] ... are trumped by the Supremacy Clause if the effect of the … judgment or decree [or administrative ruling] is to restrain the exercise of the United States' sovereign power by imposing requirements that are contrary to important and established federal policy" (alteration in original) (quoting *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213, 1219 (10th Cir. 2001)); *Evans v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*, 994 F.2d 755, 761 (10th Cir. 1993) (deferring to state agency's factual conclusions but reviewing de novo "whether the County's application of its local regulations to the facts as they interpreted them are preempted"); *Town of Springfield v. McCarren*, 549 F. Supp. 1134, 1149 (D. Vt. 1982) ("When a state administrative agency takes jurisdiction over a matter committed to exclusive federal jurisdiction, its rulings are … subject to collateral attack."), *aff'd*, 722 F.2d 728 (2d Cir. 1983) (unpublished table decision).

The Third Circuit, too, has contemplated federal review of preemption issues in analogous circumstances. In *DePolo v. Board of Supervisors Tredyffrin*

Cogeneration Assocs., L.P. v. Bd. of Regul. Comm'rs of N.J., 44 F.3d 1178, 1184–87, 1194 (3d Cir. 1995).

Township, 835 F.3d 381 (3d Cir. 2016), a local zoning board's rejection of a preemption argument was issue-preclusive only because the plaintiff failed to seek timely review in state court. *Id.* at 383. Given that "unique procedural history," *id.*, the Third Circuit treated the decision as if it had been reviewed. But the court emphasized that, had the plaintiff appealed to state court, "[t]hat would have allowed the District Court to narrowly address the question of preemption." *Id.* at 387 & n.18. In other cases, too, the Third Circuit has recognized that preemption litigants may avoid issue preclusion by "withdraw[ing] their federal issues from the state proceeding and [bringing] them in federal court." *Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 767 F.3d 335, 367 (3d Cir. 2014) (citing *Ky. W. Va. Gas v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 604 n.2 (3d Cir. 1988)). Transource has done just that.[5]

The PAPUC's contrary position would make little practical sense and invite gamesmanship by state agencies. Had the PAPUC promulgated a regulation *expressly* stating that the PAPUC would reweigh PJM's FERC-approved need

[5] *DePolo* discussed the plaintiff "stay[ing] the matter in state court, while his federal claims were resolved." 835 F.3d at 387 n.18. *DePolo* contemplated a stay because if the state court reaches preemption and rules *against* the plaintiff, that judgment will be preclusive. As *Metropolitan Edison* recognizes, however, a stay is not the only way to avoid that result; any "withdraw[al]" will do. 767 F.3d at 367. Here, the Commonwealth Court has declined to expedite Transource's state-court appeal, which ensures—as in *DePolo*—that this Court will reach the merits first. Transource has also included an "*England* Reservation" in its state-court papers, explaining its intent to raise federal claims in federal court. ECF No. 61 at 13 n.5.

determination, Transource could have sued in federal court to enjoin that policy. And federal courts do not shut their doors just because the PAPUC reached that result in interpreting its regulation when addressing Transource's application.

The PAPUC's cases do not support it. In *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129 (3d Cir. 1998), the Third Circuit accorded issue-preclusive effect to certain legal conclusions of a state utility commission. It did so, however, because the relevant federal statute—the Public Utility Regulatory Policies Act ("PURPA")—"specifically required" "state agencies … to implement FERC regulations" and federal law. *Id.* at 135; 16 U.S.C. § 824a-3(f)(1). "Given the substantial role given state utility agencies by Congress in enacting PURPA" to implement FERC's regulations, it made sense for the court—in that unique context—to accord preclusive effect as a matter of federal common law to state-agency decisions regarding the meaning of those regulations. *Crossroads*, 159 F.3d at 135. Even in that unique context, however, the court *still* reserved the question of whether issue preclusion would apply to a preemption claim. *Id.* (stating that court "need not resolve" whether preclusion applied to decision as to whether the federal statute "preempts the state agency from acting").

Here, by contrast, Congress has *not* channeled the implementation of federal law to state agencies. PJM, not the PAPUC, is responsible for regional transmission planning under FERC's Order No. 1000, and PJM does so under federal tariffs that

FERC reviews and approves. *See infra* at 22–23. Thus, the special reasons for according preclusive effect in *Crossroads* are absent.

The PAPUC's other cases also do not support it. *Metropolitan Edison* accorded preclusive effect to *a state court order* affirming a utility-commission determination. 767 F.3d at 347–48, 350–51; *see supra* at 9. Likewise, *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 721 F. Supp. 710 (M.D. Pa. Apr. 27, 1989), *aff'd*, 899 F.2d 1217 (3d Cir. 1990) (unpublished table decision), could hardly be more different. The court applied *claim* preclusion (not *issue* preclusion) to prevent a utility from litigating certain costs it could have sought to recover in prior commission proceedings that had already been the subject of judicial review in federal court. *Id.* at 715–16. The court explained that the PAPUC in "setting rates need not consider costs in years past which could have been, but were not, raised in prior administrative proceedings." *Id.* at 716. Here, there was no prior commission proceeding at all, let alone a prior commission decision that has already been reviewed in federal court.

Further underscoring the lack of merit in the PAPUC's position is what happened in the *earlier* federal decisions described in *Kentucky West Virginia*: The Third Circuit decided the utility's preemption and Commerce Clause challenges to the PAPUC's orders on the merits, and applied issue preclusion *only* to PAPUC factfinding. *See Ky. W. Va. Gas Co. v. Pa. Pub. Utils. Comm'n*, 837 F.2d 600, 602,

611 (3d Cir. 1988); *see generally Ky. W. Va. Gas Co. v. Pa. Pub. Utils. Comm'n*, 862 F.2d 69 (3d Cir. 1988) (addressing district court conclusions of law on the merits). That is the very opposite of the PAPUC's position here.

B. Issue Preclusion Is Inapplicable For Additional Reasons.

Even if a state agency's unreviewed preemption decisions *could* receive preclusive effect under some circumstances, the PAPUC's preclusion argument here would still fail. For issues where preclusion potentially applies, the rule is as follows: "[W]hen a state agency 'acting in a judicial capacity … resolves disputed issues … properly before it which the parties have had an adequate opportunity to litigate,' federal courts … give the agency's [determination] the same preclusive effect to which it would be entitled in the State's courts." *Elliott*, 478 U.S. at 799 (first ellipsis in original) (citation omitted).

First, the PAPUC's decision is not, today, preclusive in state courts in the relevant sense because Transource has sought review within the required time period. In *Coastal Distribution, LLC v. Town of Babylon*, 216 F. App'x 97 (2d Cir. 2007), the plaintiff—like Transource—brought a preemption suit in federal court during the period when it could have "timely" challenged the agency decision in state court. *Id.* at 102–03. The Second Circuit explained that, during that period, even as to the agency's *factual findings*, the state court "would not have given the [agency] findings issue-preclusive effect: it would have reviewed them" on the

merits. *Id.* at 102. And that meant, the Second Circuit held, that the findings were not issue-preclusive in federal court. *See id.* at 102–03 ("*Elliott* does not hold that state law supplies the standard of review when a municipal administrative decision is timely challenged on federal preemption grounds in the federal forum[,] … [an issue that] was never reviewed by any court, state or federal.").

The conclusion in *Coastal Distribution* applies with even greater force here, where Transource only raises questions of law. Transource sued within the time for seeking review in state court. And in such proceedings, Pennsylvania courts do not treat the PAPUC's legal conclusions as *preclusive*; they review the merits. State courts will set aside the PAPUC's decisions if they are "in violation of … constitutional rights …, or … not in accordance with law." 2 Pa. Cons. Stat. § 704. Litigants expressly may "question[] the validity of the statute" at issue. *Id.* § 703(a). And a reviewing court can consider, in addition to questions raised before the agency, "[q]uestions involving the validity of a statute" and "[q]uestions involving the jurisdiction of the government unit over the subject matter of the adjudication." Pa. R. App. P. 1551(a). This Court may do the same. Tellingly, all the Pennsylvania decisions cited by the PAPUC accord preclusive effect only after the time for seeking review has expired.[6]

[6] Indeed, *Respond Power* also expressly addressed only preclusion as to "disputed issues *of fact*." *Respond Power, LLC v. Pa. Pub. Util. Comm'n*, 250 A.3d 547, 2021

Second, the PAPUC is not an adequate forum because, under Pennsylvania law, the PAPUC lacked authority to determine that its statute or regulations—as it interprets them—violate federal law. Pennsylvania law is clear that the PAPUC lacks such authority. *See, e.g.*, *United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 365–66 (3d Cir. 1986) ("It appears to be settled law in Pennsylvania that an administrative agency may not determine the constitutionality of the statutes it applies."); *accord In re Mun. Reapportionment of Twp. of Haverford*, 873 A.2d 821, 833 n.18 (Pa. Commw. Ct. 2005); *City of Phila. v. Kenny*, 369 A.2d 1343, 1353 n.9 (Pa. Commw. Ct. 1977). True, the PAPUC *purported* to address Transource's preemption arguments on the merits. But the PAPUC is hardly an adequate forum when it lacked the authority to reach the opposite result and hold that Pennsylvania law, as the PAPUC interpreted it, was preempted.

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

The PAPUC's claim preclusion argument—that Transource may not raise its Commerce Clause claim because it did not expressly invoke that clause before the PAPUC—requires little additional discussion. If the Court agrees with Transource

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WL 446097, at *8 (Pa. Commw. Ct. 2021) (unpublished table decision) (emphasis added). And *City of McKeesport v. Pennsylvania Public Utilities Commission*, 442 A.2d 30 (Pa. Commw. Ct. 1982), did not say that preclusion always applies to PAPUC decisions with "full force"; it says PAPUC decisions may be preclusive when "the reasons for the uses of the rule in court proceedings are present in full force." *Id.* at 31.

that the PAPUC's decision expressly rejecting Transource's preemption argument does not preclude relitigation here, it would make no sense to bar litigation in this Court simply because Transource did not cite the dormant Commerce Clause before the PAPUC. Had Transource done so, this Court would still review the issue on the merits. After all, "[i]f the unreviewed legal conclusions of a local administrative agency are not entitled to preclusive effect when actually raised and determined by such agency, it follows that claim preclusion based upon plaintiff's decision not to raise such issues before the local agency cannot apply to bar plaintiff's constitutional claims in this Court." *Slater v. Borough of Quarryville*, No. 93-cv-4254, 1995 WL 30596, at *4 (E.D. Pa. Jan. 26, 1995).

Indeed, the same considerations that foreclose the PAPUC's issue-preclusion argument apply with equal force here. Again, the federal common law of preclusion does not make state agencies judges in their own case by vesting in them authority to authoritatively resolve whether *their own actions* accord with federal law. *Supra* Section II.A; *accord Gjellum v. City of Birmingham*, 829 F.2d 1056, 1064–65 (11th Cir. 1987) (declining to accord claim-preclusive effect to unreviewed state agency decision because of, *inter alia*, "the importance of the federal rights" at stake and the absence of any "risk of inconsistent results" if the court considered issues "not adjudicated before the state agency").

Moreover, Transource again had no genuine opportunity to prevail on its dormant Commerce Clause claims before the PAPUC. Those claims became ripe when the PAPUC issued a decision preferring Pennsylvania customers over others. *See, e.g.*, *Keystone Redevelopment Partners, LLC v. Decker*, 674 F. Supp. 2d 629, 655 (M.D. Pa. 2009) ("[T]he claims raised by Keystone in the instant proceeding *arose out of* [a state board's] licensing decision, as memorialized in the [board's Adjudication and Order], meaning that they did not exist, and were incapable of resolution, prior thereto[.]"), *rev'd on other grounds*, 631 F.3d 89 (3d Cir. 2011). Transource had urged the PAPUC to find that state law did not require this result, but instead required the PAPUC to follow PJM's weighing of costs and benefits (as the Maryland Commission did under Maryland law).[7] Instead, the PAPUC interpreted Pennsylvania law to require preferential treatment for Pennsylvania customers.[8] And as Transource has explained, the PAPUC did not have authority under Pennsylvania law to depart from Pennsylvania law as the PAPUC interpreted

[7] *See* Exceptions of Transource Pennsylvania, LLC and PPL Electric Utilities Corp. at 12–15, 30, ECF No. 58-5.

[8] Order, ECF No. 1-2, at 59 ("The potential negative and practical impact on the citizens and consumers of Pennsylvania is our concern, and it is properly within the scope of our consideration of the weight of all the evidence on the issue of 'need.'"); *id.* at 60 (requiring "examination of the underlying data and congestion trends which PJM relied upon" only because alleviating congestion "is predicted to lead to a substantial increase in utility rates within the Commonwealth").

it. *Supra* at 18; *see, e.g.*, *Muir*, 792 F.2d at 365–66. Hence, raising a dormant Commerce Clause claim would have been futile.

Claim preclusion is inapplicable for another reason, too. It applies only when the "persons and parties to the action" are identical. *Reisinger v. Luzerne Cnty.*, 712 F. Supp. 2d 332, 356–57 (M.D. Pa. 2010), *aff'd*, 439 F. App'x 190 (3d Cir. 2011). Courts have held that this requirement is unmet in cases like this one, where the agency and its officers were not *parties* to the underlying proceeding but were *deciders*. *Matson Navigation Co. v. Haw. Pub. Utils. Comm'n*, 742 F. Supp. 1468, 1479 (D. Haw. 1990) ("claim preclusion cannot operate to preclude" a claim against a state commission where commission and plaintiff "were not adversaries in the prior litigation"); *see Harper v. Pub. Serv. Comm'n of W. Va.*, 416 F. Supp. 2d 456, 480 (S.D. W. Va. 2006).

The PAPUC again cites no case adopting its claim-preclusion argument. Its only case according claim-preclusive effect to an unreviewed agency decision is *Kentucky West Virginia*. As Transource has explained, that case could not be more different. The utility in that case sought to contest the exclusion of certain costs from a commission rate order, even though it had neglected to litigate those same costs in two prior commission proceedings in which it could have done so, and where one of those proceedings had been challenged in federal court. Given those facts, and the ample opportunity the utility had to litigate the issue in two prior

administrative proceedings and a prior federal lawsuit against the PAPUC challenging its orders, the court applied claim preclusion. 721 F. Supp. at 716. Here, there were no prior proceedings.

IV. Transource Has Pleaded A Preemption Claim.

Transource's Complaint pleads (and its Motion for Summary Judgment proves) that the PAPUC's order violates the Supremacy Clause. FERC has statutory jurisdiction over both interstate electricity transmission and rules and practices affecting the rates for wholesale energy sales. 16 U.S.C. §§ 824(b)(1), 824d(a), 824e(a). FERC exercised that jurisdiction in its Order No. 1000 to impose a "regional transmission planning process," to identify "transmission solutions that may be more efficient or cost-effective." Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32,184, 32,215 (May 31, 2012). Thus, regional transmission organizations like PJM have federal authority to determine if there is an economic need for new transmission. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 48 (D.C. Cir. 2014) (per curiam).

Pursuant to that authority, PJM filed tariff provisions detailing its methodology for determining need, including how to measure costs and benefits of a potential line and the standard for determining whether a new line is cost-justified. Compl. ¶¶ 13, 23. Those tariffs carry the force and effect of federal law, *e.g.*,

Cahnmann v. Sprint Corp., 133 F.3d 484, 488 (7th Cir. 1998), and have preemptive effect, *see Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39, 47 (2003). Applying its FERC-approved methodology, PJM found a need for the IEC Project under FERC's federal standards. Compl. ¶¶ 3, 39–41, 69.

The PAPUC, however, nullified PJM's economic need finding by applying its own conflicting benefit-cost calculation—which does just what PJM and FERC have rejected: Even though the project's entire point (as approved by PJM) is to eliminate transmission congestion that results in inefficiently low prices for Pennsylvania customers and inefficiently high prices for customers to the south, the PAPUC treated the increased prices for Pennsylvania customers that would result from eliminating the congestion as a "cost" warranting rejection of the project. Compl. ¶¶ 54–55. From FERC and PJM's point of view, the goal is to make prices more equal—yet the PAPUC sought to obstruct that goal because it did not want the pricing inefficiency to be addressed.

The Supremacy Clause preempts the PAPUC's conflicting choice. "Federal law can preempt state law" through, *inter alia*, "conflict preemption." *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010). Conflict preemption exists (1) "[w]here state and federal law 'directly conflict,'" *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011), or (2) "where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet,*

Inc., 575 U.S. 373, 377 (2015) (citation omitted). The PAPUC's decision both conflicts with federal law and frustrates its objectives. ECF No. 20-1, at 10–14.

Indeed, the PAPUC does not so much as mention the long line of cases holding that it is "inconsistent" with the "federal regulatory scheme" for state agencies to "disregard" FERC-approved decisions in areas of federal jurisdiction. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 969 (1986). Under these cases, "States may not 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). Instead, state utility commission decisions are preempted when they undertake "identical, independent inquiries regarding [a project's] merits" but "from the perspective of different public interests" and thereby "reach conflicting conclusions." *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898, 905 (4th Cir. 1987); *accord Oneok*, 575 U.S. at 389 (states may not "'regulate in areas where FERC has properly exercised its jurisdiction'" or create "'unavoidable conflict between' state" and federal regulation (citation omitted)). That is what has happened here.

The PAPUC nonetheless makes two arguments for dismissal, both meritless.

First, the PAPUC points to prefatory language in the FPA saying that federal regulation of wholesale rates "extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Per the PAPUC, Pennsylvania law

calls for regulating need, so federal law does not even apply to the PAPUC's need determination. PAPUC Mot. 25–26. This argument—that anything a state chooses to regulate becomes exempt from federal jurisdiction—misreads the FPA and would turn the Supremacy Clause on its head.

The Supreme Court has held that statutory language the PAPUC invokes is "a mere policy declaration." *New York v. FERC*, 535 U.S. at 22 (internal quotation marks omitted). It "cannot nullify a clear and specific grant of jurisdiction [to FERC]." *Id.* (quotation marks omitted). While Congress chose not to displace state authority in certain traditional areas of state regulation, it did provide "'a clear and specific grant of jurisdiction' to FERC over interstate [electricity] transmissions," *id.*, and practices directly affecting wholesale energy prices. 16 U.S.C. § 824d(a). This is precisely why the D.C. Circuit upheld Order No. 1000's "planning mandate," which "is directed at ensuring the proper functioning of the interconnected grid spanning state lines," and at providing "cost-effective development of new transmission facilities … to ensure just and reasonable rates." *S.C. Pub. Serv. Auth.*, 762 F.3d at 63–64 (internal quotation marks omitted).

Once FERC acts within its jurisdiction, its action preempts conflicting state action. *See, e.g.*, *California v. FERC*, 495 U.S. 490, 506–07 (1990). Here, PJM makes need determinations under FERC's planning mandate, to alleviate regional congestion that is directly affecting wholesale energy prices. Compl. ¶¶ 22–23, 69.

And because PJM made its need determination under a specific grant of federal jurisdiction, that overrides "the 'prefatory' statement of federalism 'policy' in" Section 824(a). *S.C. Pub. Serv. Auth.*, 762 F.3d at 64. The PAPUC cannot use its residual authority under state law to target the express determination made by PJM pursuant to its FERC-authorized tariff, which implements FERC's own jurisdiction over transmission planning and wholesale rates. *Oneok*, 575 U.S. at 385 (emphasizing the "importance of considering the target at which the state law aims in determining whether that law is pre-empted.").

Second, the PAPUC tries a narrower argument: Because Order No. 1000 disclaims federal authority over "the siting, permitting, and construction of transmission facilities," 77 Fed. Reg. at 32,215, and because the PAPUC made its need determination as part of its siting process, the PAPUC claims its actions cannot be preempted. PAPUC Mot. 26–27.

This narrower argument gets the PAPUC no further than its broader one. "In a pre-emption case, … a proper analysis requires consideration of what the state law in fact does, not how" a regulator "might choose to describe it." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013). Here, while the PAPUC labeled its action a siting decision, in substance the PAPUC targeted PJM's regional planning decision. As the PAPUC itself observed when FERC first created regional transmission organizations, the FPA leaves to states only "specific siting, land use

and condemnation issues"—but "where a transmission network spans several states," the "arbiter and policymaker with respect to long term planning, policy and resource allocation issues" is the "federal or regional entity." ECF No. 20-3, ¶ 69 n.2.

The PAPUC here impermissibly took over that federal function for itself. Under Order No. 1000, FERC vested regional planning authority in regional transmission organizations, including PJM. Order No. 1000 provides that FERC—and thus PJM, acting under its FERC-approved tariff—has authority over "transmission planning and cost allocation requirements … used to identify and evaluate transmission system needs and potential solutions to those needs." Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49,842, 49,861 (Aug. 11, 2011). Yes, FERC reserved state authority over "siting." *Id.* But it did not permit states to make the *very determination* that it placed into regional authorities' hands to "ensur[e] the proper functioning of the interconnected grid spanning state lines." *S.C. Pub. Serv. Auth.*, 762 F.3d at 63. Likewise, to the extent PAPUC argues that Order No. 1000 reserved additional "traditional" authorities to the states beyond siting and construction, PAPUC Mot. 21–22, 26–27, that reservation did not include the federal assessment of regional economic need that Order No. 1000 vested in PJM. Whatever a state commission's authority might be where federal authorities have not acted, it cannot

issue a decision in direct conflict with a determination made under a FERC-approved tariff. *See, e.g.*, *Nantahala*, 476 U.S. at 969–70.

V. Transource Has Pleaded A Dormant Commerce Clause Claim.

The dormant Commerce Clause "prohibits the states from imposing restrictions 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) (citation omitted). Here, the PAPUC's decision violates that rule by impeding the flow of low-cost power from Pennsylvania to advantage in-state electricity customers. The PAPUC's contrary arguments lack merit.

A. The PAPUC's Order Discriminates Against Interstate Commerce.

To start, the order "discriminates against interstate commerce" both "'on its face [and] in practical effect.'" *Cloverland-Green*, 298 F.3d at 210 (citation omitted). The PAPUC subjected PJM's decision and its underlying data to heightened scrutiny precisely because the PAPUC predicted a "substantial increase in utility rates within the Commonwealth" due to the elimination of congestion. Order at 60, ECF No. 1-2. The PAPUC also endorsed the ALJ's reweighing of PJM's analysis, *id.* at 53, 58–59, which the ALJ based on the view that "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," Recommended Decision at 98.

The PAPUC's order thus discriminates on its face against interstate commerce: The order seeks to protect Pennsylvania residents' artificially low electricity prices at the expense of the out-of-state customers Transource seeks to serve. And because the order impedes the flow of low-cost electricity to out-of-state customers, it also discriminates in effect. Compl. ¶¶ 78, 82. As a result, the order "is *per se* invalid" unless Pennsylvania has no other means of advancing a legitimate local interest. *Cloverland-Green*, 298 F.3d at 210–11 (quotation marks omitted). But the PAPUC relied purely on protectionism, Order at 59, which is not a legitimate state interest, *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982).

Relying on an out-of-context quote from *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014), the PAPUC asserts that the dormant Commerce Clause only applies to discrimination between in- and out-of-state *businesses*. PAPUC Mot. 28–29. Not so. The dormant Commerce Clause applies *whenever* a regulation would "benefit in-state economic interests at out-of-state interests' expense." *Am. Trucking Ass'n v. Whitman*, 437 F.3d 313, 318 (3d Cir. 2006). That includes the interests of out-of-state consumers: "Economic protectionism is not limited to attempts to convey advantages on local merchants; it 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); *accord Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577–78 & n.11 (1997).

This rule extends to states' decisions about provision of energy. Under the Commerce Clause, "state utility regulation" is not "judged by different standards than other state regulation." *Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. Cnty.*, 48 F.3d 701, 713 (3d Cir. 1995). As the Supreme Court has warned, "a State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders." *City of Phila. v. New Jersey*, 437 U.S. 617, 627 (1978). The Court has thus invalidated state utility commission orders precisely because they were "designed to gain an economic advantage for [in-state] citizens at the expense of [the plaintiff utility's] customers in neighboring states." *New England Power*, 455 U.S. at 339. The PAPUC's order does just that.

The PAPUC's remaining arguments lack merit.

First, Transource does not ground its standing on the interests of non-parties (*i.e.*, out-of-state customers). *Contra* PAPUC Mot. 29. Transource has its own harm: The denial of permits, and the lost chance to serve the customers its new lines would help. *Supra* at 6. Indeed, Transource is in the same position as the *New England Power* plaintiff. There, a domestic New Hampshire utility sued to invalidate a state utility commission order that prevented the company from exporting hydroelectric power. 455 U.S. at 335–38. The Court noted probable jurisdiction, heard the case, and invalidated the order. *Id.* at 338. It found that the

commission's order violated the dormant Commerce Clause both because it was "designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states," and because it "places direct and substantial burdens on transactions in interstate commerce." *Id.* at 339. Likewise here, the PAPUC's order was designed to aid Pennsylvania citizens "at the expense of" Transource's potential "customers in neighboring states," *id.*, and prohibited Transource's project *because* Transource sought to transmit electricity in interstate commerce. The same harms as in *New England Power*, and the same Commerce Clause interests, are at stake.

Second, the PAPUC is wrong to label its order a mere "construction" decision, issued under "even handed[]" laws, rather than one that restricts the flow of exports. PAPUC Mot. 29. The PAPUC's order "reserved to Pennsylvania customers the economic advantage supplied by current constraints on the interstate PJM-run electric transmission network." Compl. ¶ 82. It did, indeed, "restrict[] the flow of … exports," PAPUC Mot. 29, by blocking bottlenecked electricity from being released and delivered to out-of-state consumers. And it did so to benefit in-state customers, who enjoy artificially low prices as a result of the bottleneck.

B. The PAPUC Has Waived Any Argument Concerning Transource's *Pike* Claim.

Under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), even non-discriminatory regulations that only "incidentally" burden interstate commerce are

void if the burdens are "clearly excessive in relation to the putative local benefits," *Cloverland-Green*, 298 F.3d at 211 (quotation marks omitted). The Complaint pleads that the PAPUC's order violates *Pike*. Compl. ¶¶ 83–87. The PAPUC does not address this claim. It has thus waived any argument for dismissal. *Corbeil v. Cahill*, No. 13-cv-1323, 2014 WL 1234488, at *4 & n.3 (M.D. Pa. Mar. 25, 2014).

CONCLUSION

The Court should deny the PAPUC's motion to dismiss.

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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 4, 2021 (ECF No. 65) because it contains 7,658 words, as measured by the word-count feature of Microsoft Word 2016, excluding the Caption, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service.

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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 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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