

**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 OF PJM INTERCONNECTION, L.L.C. AS *AMICUS CURIAE*

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST.....	1
ARGUMENT	3
I. Under the Federal Power Act and FERC-approved tariffs, FERC has delegated PJM responsibility for regional transmission planning.	3
II. The PAPUC’s order impermissibly interferes with PJM’s FERC-approved regional transmission planning process.....	10
III. PJM’s regional transmission planning process falls squarely within FERC’s regulatory authority and would be hindered if the PAPUC’s order were left in force.	16
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm’n</i> , 539 U.S. 39 (2003).....	4
<i>George E. Warren LLC v. Colonial Pipeline Co.</i> , 50 F.4th 391 (3d Cir. 2022)	4
<i>Hughes v. Talen Energy Mktg., LLC</i> , 578 U.S. 150 (2016).....	passim
<i>Metro. Edison Co. v. Pennsylvania Pub. Util. Comm’n</i> , 767 F.3d 335 (3d Cir. 2014)	3
<i>Mississippi Power & Light Co. v. Mississippi ex rel. Moore</i> , 487 U.S. 354 (1988).....	passim
<i>Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.</i> , 341 U.S. 246 (1951).....	4
<i>N.J. Bd. of Pub. Utils. v. FERC</i> , 744 F.3d 74 (3d Cir. 2014)	3
<i>Nantahala Power & Light Co. v. Thornburg</i> , 476 U.S. 953 (1986).....	4, 14
<i>New York v. FERC</i> , 535 U.S. 1 (2002).....	11, 17
<i>PPL Energyplus, LLC v. Solomon</i> , 766 F.3d 241 (3d Cir. 2014)	11
<i>S.C. Pub. Serv. Auth. v. FERC</i> , 762 F.3d 41 (D.C. Cir. 2014).....	passim
<i>In re Application of Transource Maryland LLC</i> , No. 89571, 2020 WL 3977589 (Md. Pub. Serv. Comm’n June 30, 2020).....	11

Statutes

16 U.S.C. § 824(a)17

16 U.S.C. § 824d(a)3, 16

16 U.S.C. § 824d(c)4

16 U.S.C. § 824e(a)3, 16

16 U.S.C. § 824q(b)(4)16

Administrative Orders and Decisions

Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, 72 Fed. Reg. 12266-01 (Mar. 15, 2007).....*passim*

Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 76 Fed. Reg. 49842-01 (Aug. 11, 2011).....*passim*

Order No. 2000, *Regional Transmission Organizations*, 65 Fed. Reg. 810-01 (Jan. 6, 2000).....4, 5

PJM Interconnection, L.L.C., 101 FERC ¶61,345 (2002)5, 6

PJM Interconnection, L.L.C., 113 FERC ¶61,292 (2005)9

PJM Interconnection, L.L.C., 123 FERC ¶61,051 (2008)*passim*

PJM Interconnection, L.L.C., 166 FERC ¶61,114 (2019)8

PJM Interconnection, L.L.C., 173 FERC ¶61,258 (2020)8, 13

Other Regulatory Materials

18 C.F.R. § 35.34(k)4

18 C.F.R. § 35.34(k)(2)5

52 Pa. Code § 57.76(a)(2)-(4).....14

Amended and Restated Operating Agreement of
PJM Interconnection, L.L.C.,
<https://agreements.pjm.com/oa/4773>*passim*

STATEMENT OF INTEREST¹

PJM Interconnection, L.L.C. is the federally regulated regional transmission organization for an area spanning all or portions of 13 States and D.C. in the Mid-Atlantic Region. PJM is an independent entity, separate from the companies that own electric generation and transmission facilities, that has been authorized by the Federal Energy Regulatory Commission (“FERC”) to provide transmission service and otherwise administer the bulk power system in its region. As relevant here, FERC requires PJM to engage in regional transmission planning to identify system needs for new transmission facilities. That process is highly regulated by PJM’s tariffs—FERC-approved documents carrying the force of federal law. PJM has an interest in ensuring that it can fulfill its responsibilities in the manner FERC has directed, and that its regional transmission need determinations are implemented consistent with FERC-approved policies.

Here, PJM followed its FERC-mandated planning process to identify a need to address system constraints (*i.e.*, congestion) in the PJM Region. PJM then applied a FERC-approved benefit-cost formula to select the Transource IEC Project, which would construct new transmission facilities between Pennsylvania and Maryland, as

¹ No party’s counsel authored this brief in whole or part. No party, party’s counsel, or person other than PJM and its counsel contributed money to fund the brief’s preparation or submission.

the more efficient or cost-effective solution for satisfying that need. The Pennsylvania Public Utilities Commission (“PAPUC”) nonetheless denied Transource permission to site the project in Pennsylvania. In doing so, the PAPUC rejected PJM’s system planning need determination and substituted its own need determination, based on its disagreement with how PJM’s FERC-approved tariff requires the project’s benefits and costs to be measured. PJM was not a party to that proceeding because constructing utilities (*e.g.*, Transource), not PJM, are responsible for obtaining regulatory approvals.

PJM emphasizes its great respect for the authority and decisions of the PAPUC and other state commissions. PJM recognizes that state commissions are not required to approve every PJM-selected transmission project presented to them. When making siting determinations, state commissions retain significant authority to grant or deny permission to construct a PJM-selected project on grounds including impacts of a project’s route on public health and safety, natural resources, or the environment.

Authority over *siting*, however, is not the same as authority over *planning*. As FERC has explained, state siting authority does *not* extend to FERC-approved processes for identifying and evaluating transmission system needs. Thus, while the PAPUC possesses state siting authority, that authority does not allow it to second-guess the FERC-approved processes used to identify transmission system needs, or

PJM’s determination that a particular project addresses those needs. Instead, the criteria PJM uses to make need determinations for the identification and selection of projects fall squarely within FERC’s authority delegated to PJM.

The preemption claim in this case turns on discrete questions of law concerning the effect of PJM’s determination, under its FERC-approved tariff, that there is a system planning need to alleviate regional system congestion. As the entity FERC has charged with regional transmission planning in Pennsylvania and neighboring jurisdictions, PJM has unique expertise and perspective regarding those questions. PJM submits this brief to assist the Court in understanding PJM’s role in the FERC-mandated regional planning process and the impact of the PAPUC decision on that process.

ARGUMENT

I. Under the Federal Power Act and FERC-approved tariffs, FERC has delegated PJM responsibility for regional transmission planning.

The Federal Power Act grants FERC exclusive jurisdiction over the transmission of wholesale electricity. 16 U.S.C. § 824d(a); *Metro. Edison Co. v. Pennsylvania Pub. Util. Comm’n*, 767 F.3d 335, 341 (3d Cir. 2014). FERC is responsible for ensuring that all rates and practices affecting the transmission of electricity are “just and reasonable.” 16 U.S.C. §§ 824d(a), 824e(a).

FERC does so through filed “tariffs” that govern the “classifications, practices, and regulations” of regulated entities. *N.J. Bd. of Pub. Utils. v. FERC*, 744

F.3d 74, 83 (3d Cir. 2014); see 16 U.S.C. § 824d(c). Once filed with FERC, a tariff has the force of federal law, akin to a statute or regulation. See *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986). FERC-filed tariffs therefore preempt contrary determinations by state utility commissions or by courts. *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm’n*, 539 U.S. 39, 47 (2003); *Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (“not even a court can authorize commerce . . . on other terms”). That principle “has an ‘expansive reach.’” *George E. Warren LLC v. Colonial Pipeline Co.*, 50 F.4th 391, 395 (3d Cir. 2022). A tariff’s preemptive power extends to all terms and conditions of the tariff. See *Nantahala*, 476 U.S. at 966.²

FERC exercises its authority over electricity transmission in two particularly relevant ways. First, FERC has approved independent regional transmission organizations (“RTOs”) that are responsible for managing regional electrical grids. 18 C.F.R. § 35.34(k); Order No. 2000, *Regional Transmission Organizations*, 89 FERC ¶61,285, 65 Fed. Reg. 810 (2000). FERC has designated PJM as the RTO for an area covering much of the Mid-Atlantic Region, including Maryland and

² The principle that a filed tariff has the force of federal law is sometimes called the “filed rate doctrine.” The “rate” that must be given preemptive effect is not limited to “prices or volumes of purchases”; it extends to all substantive aspects of the tariff. *Nantahala*, 476 U.S. at 966.

Pennsylvania. *PJM Interconnection, L.L.C.*, 101 FERC ¶61,345 (2002); see *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016).

One of PJM’s responsibilities as an RTO is “congestion management.” 18 C.F.R. § 35.34(k)(2); Order No. 2000, 65 Fed. Reg. at 887. Congestion is caused by “transmission bottlenecks” where existing facilities lack sufficient capability for power to flow unimpeded between different areas. *PJM Interconnection, L.L.C.*, 123 FERC ¶61,051, 61,411-12 (2008). Electricity becomes “trapped” behind the bottleneck, producing inefficiencies on both sides: Prices are artificially high in places the electricity cannot reach, and artificially low in places the electricity cannot escape. See *id.* As an RTO, PJM is required to develop mechanisms for mitigating congestion. 18 C.F.R. § 35.34(k)(2); Order No. 2000, 65 Fed. Reg. at 887-88.

Second, and relatedly, FERC requires RTOs—including PJM—to engage in regional transmission planning to identify needs for new transmission facilities. In orders adopted in 2007 and 2011, FERC recognized that existing transmission planning practices were “inadequate” and threatened to produce unjust and unreasonable rates, because they could “thwart the identification of more efficient and cost-effective transmission solutions.” *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 66-67 (D.C. Cir. 2014); see Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, F.E.R.C. Stats. & Regs. ¶31,241, 72 Fed. Reg. 12,266, 12,271, 12,275-76 (2007); Order No. 1000, *Transmission Planning and*

Cost Allocation by Transmission Owning and Operating Public Utilities, F.E.R.C. Stats. & Regs. ¶31,323, PP78-84, 76 Fed. Reg. 49,842, 49,856-58 (2011).³ Exercising its authority to ensure just and reasonable transmission rates and practices, FERC mandated that RTOs conduct an ongoing regional planning process to identify ““regional solutions to regional needs.”” *S.C. Pub. Serv. Auth.*, 762 F.3d at 67 (quoting Order No. 1000, P320, 76 Fed. Reg. at 49,897).

FERC has delegated PJM responsibility for the planning process within its region. *See PJM*, 101 FERC ¶61,345 at 62,451. PJM does so under a FERC-approved tariff—specifically, Schedule 6 of PJM’s Operating Agreement. *See Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.*, Schedule 6, section 1.1, <https://agreements.pjm.com/oa/4773>. That tariff, which has the force of federal law, sets out in detail the criteria PJM must apply to identify needed transmission projects. Schedule 6, section 1.5.7(d)-(e).⁴

Consistent with its congestion-management obligations, PJM’s regional planning process includes evaluating the need to mitigate congestion-based system

³ FERC Order Nos. 890 and 1000, and FERC’s basis for adopting them, are discussed at length in *South Carolina Public Service Authority*, 762 F.3d at 50-54.

⁴ Among PJM’s FERC-approved governing documents are its Operating Agreement, Open Access Transmission Tariff, and Reliability Assurance Agreement, all of which are referred to as “tariffs.” This brief generally uses “tariff” to refer to Schedule 6 of the Operating Agreement, which governs the regional transmission planning process at issue here.

constraints. Projects designed to mitigate congestion are known as market-efficiency projects or “[e]conomic-based [e]nhancements or [e]xpansions.” Schedule 6, section 1.5.7(b)-(c). When PJM identifies a need for new transmission, it evaluates proposed solutions based on criteria set forth in the tariff. For market-efficiency projects, PJM must apply a specific “[b]enefit-[c]ost” formula approved by FERC. Schedule 6, section 1.5.7(d). Only projects that have and maintain a benefit-cost ratio of at least 1.25:1 are eligible for further consideration. Schedule 6, section 1.5.7(d); *see* Order No. 1000, P646, 76 Fed. Reg. at 49,940 (prohibiting use of higher ratio absent FERC approval). The benefit-cost assessment for a proposed project is reviewed annually. Schedule 6, section 1.5.7(f).

PJM’s tariff specifies what qualifies as a “benefit” or “cost.” Benefits generally include reduced energy prices in areas currently suffering from congestion, while costs generally include amounts needed to construct new facilities. *See* Schedule 6, section 1.5.7(d). For lower-voltage transmission projects (like the Transource IEC Project), the tariff does *not* permit PJM to count as a “cost” the increased energy prices that some areas will experience when congestion is alleviated. *See PJM*, 123 FERC ¶61,051, P67. As noted above, prices in those areas had been artificially suppressed because energy could not flow unimpeded to other, higher-cost areas. Increased prices in those areas after the congestion is relieved thus do not represent costs of the project, but the elimination of the very inefficiency

the project was designed to address. FERC has repeatedly approved PJM’s market-efficiency planning process and formula—including over objections that increased prices in some areas (*i.e.*, “zonal load costs”) should be counted as costs. *See id.*; *PJM Interconnection, L.L.C.*, 173 FERC ¶61,258 (2020); *PJM Interconnection, L.L.C.*, 166 FERC ¶61,114 (2019).

Consistent with FERC requirements, regional planning is an “open and transparent” process with multiple opportunities for stakeholders, including States, to weigh in long before any project is ultimately selected pursuant to the FERC-approved criteria. Order No. 1000, 136 FERC ¶61,051, P108, 76 Fed. Reg. at 49,861. PJM’s tariff provides for open, transparent stakeholder meetings throughout the planning process, and requires that “electric utility regulatory agencies within the States in the PJM Region”—such as the PAPUC—have the opportunity to participate, including through various PJM committees. Schedule 6, sections 1.3(a)-(e). Those committees include the Planning Committee and the Transmission Expansion Advisory Committee (“TEAC”). The TEAC, in particular, offers stakeholders an open, transparent public forum to provide advice and recommendations throughout development of the regional transmission expansion plan.⁵

⁵ State regulatory commissions have the opportunity to participate in PJM’s planning process not only individually, but also through the collective efforts of the Independent State Agencies Committee and the Organization of PJM States, Inc.

PJM conducts its tariffed regional planning process by first developing the study scope and assumptions to be used in identifying system needs. Schedule 6, sections 1.5.2-1.5.4, 1.5.6(b), (d); 1.5.7(a), (c)(i)-(iii). PJM identifies and posts system needs, Schedule 6, sections 1.5.3, 1.5.8(b), and, as appropriate, solicits proposals that address those needs, Schedule 6, section 1.5.8(c). PJM then evaluates proposed solutions and vets the selection and recommendation of proposed solutions with the TEAC before presenting them to PJM's independent Board of Managers for review and approval. Schedule 6, sections 1.5.7(c)(iii), 1.5.8(d), 1.6. The TEAC is also involved in review of project modifications and annual re-evaluations of market-efficiency projects. Schedule 6, sections 1.5.7(f), 1.5.8(k).

Upholding PJM's FERC-approved planning process is critical to ensure the efficient movement of wholesale electricity across the PJM region. If needed transmission projects are not built, the problems that led FERC to mandate regional planning under its authority to ensure just and reasonable rates will continue. Relevant to this case, congestion will persist and price inefficiencies that cost customers real money will continue, despite PJM's identification of mitigation measures.

("OPSI"). See Schedule 6, sections 1.3(a)-(e); *PJM Interconnection, L.L.C.*, 113 FERC ¶61,292, PP 32, 39 (2005) (finding OPSI will "benefit market participants by coordinating consideration of issues such as reliability, facility siting, and transmission planning," and approving a PJM tariff mechanism to fund OPSI).

II. The PAPUC’s order impermissibly interferes with PJM’s FERC-approved regional transmission planning process.

Through its FERC-mandated regional planning process, PJM identified a need for additional transmission facilities in the multi-state PJM Region. Insufficient transmission capability had produced congestion—electricity became “trapped” in Pennsylvania, producing artificially low prices in Pennsylvania and artificially high prices in Maryland, Virginia, West Virginia, and D.C. *See* PAPUC Opinion and Order, **Doc. 1-2 at 7** (“PAPUC Op.”).⁶

Applying the criteria dictated by its tariff—and following its FERC-mandated transparent process—PJM selected a regional solution, the Transource IEC Project, to alleviate that congestion. PAPUC Op. 7-8. That determination, resulting from PJM’s FERC-mandated process, carries FERC’s stamp of approval. *See Hughes*, **578 U.S. at 163** (addressing PJM’s FERC-approved capacity-auction process).⁷

Because state regulators retain authority over siting, permitting, and construction of transmission projects included in PJM’s regional plan, *see* Order No. 1000, PP107, 161, 227, **76 Fed. Reg. at 49,861**, 49,870, 49,880; *S.C. Pub. Serv. Auth.*, **762 F.3d at 62-63**, Transource needed to receive permission (*i.e.*, certificates of public

⁶ Citations to filings in this case use the page numbers from the CM/ECF headers.

⁷ Under its FERC-approved tariff, PJM has regional planning authority over transmission projects driven by reliability, market-efficiency, and public policy needs. *See* Schedule 6, sections 1.5.1(a), 1.5.3, 1.5.7; *see generally* Schedule 6, section 1.1. The Transource IEC Project was selected as a market-efficiency project.

convenience and necessity) from the Pennsylvania and Maryland public utility commissions. Under the Supremacy Clause, however, States do not have authority to simply second-guess FERC’s authority over transmission practices and rates—including FERC’s implementation of that authority through tariffs that mandate regional transmission planning and specify the criteria to be used for evaluating whether a project is needed to relieve system congestion. *See New York v. FERC*, 535 U.S. 1, 19-20 (2002); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014) (FERC tariffs “issued pursuant to [Congressional] authority have no less preemptive effect than federal statutes”). “[I]f FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject.” *Mississippi Power*, 487 U.S. at 377 (Scalia, J., concurring).

Consistent with that authority, Maryland granted Transource permission to site the project. Maryland refused to apply a “Maryland benefits-to-cost” analysis, recognizing that the project “must be evaluated” in accordance with the “regional,” FERC-approved methodology for assessing benefits and costs embodied in “PJM’s Tariff.” *In re Application of Transource Maryland LLC*, No. 89571, 2020 WL 3977589, at *41 (¶ 142) (Md. Pub. Serv. Comm’n June 30, 2020).

The PAPUC, by contrast, denied Transource’s application because it disagreed with the criteria used by PJM to determine that the project was needed to relieve system congestion. PAPUC Op. 56-59, 67-68. Specifically, the PAPUC

rejected the benefit-cost approach required under PJM’s FERC-approved tariff, finding that “[t]he methodology performed by PJM to develop the benefit-cost ratio of the IEC Project is deficient” under Pennsylvania law. Recommended Decision of ALJ, **Doc. 1-3 at 105** (“ALJ Op.”); *see* PAPUC Op. 57 (adopting ALJ findings unless expressly rejected or modified). The PAPUC objected that PJM’s FERC-approved formula does not consider as part of a project’s costs the fact that “alleviat[ing] the economic congestion *on a regional level* . . . would result in higher rates *in Pennsylvania*,” where congestion has kept prices artificially low. PAPUC Op. 63 (emphasis added). And it criticized the “data relied upon by PJM to determine the need to alleviate congestion.” PAPUC Op. 64. The PAPUC ultimately determined that the Transource Project was not needed because it would “lead to a substantial increase in utility rates within the Commonwealth.” PAPUC Op. 62-64, 67; *see* ALJ Op. 107 (“increased wholesale power prices are real costs to customers that show there is no need for the project”).

That is a clear conflict between federal and state law. By approving PJM’s tariff, FERC determined that price increases in areas currently benefitting from transmission inefficiencies are not to be considered when assessing the need for lower-voltage regional transmission projects like the Transource IEC Project. *See PJM*, 123 FERC ¶61,051, P67 (approving tariff revisions reflecting the method “not to include the expected energy payment increases, if any, in other zones” when

calculating costs of proposed transmission projects).⁸ In rejecting the Transource IEC Project, the PAPUC substituted its own methodology (which factored in those price increases) for the FERC-sanctioned methodology (which excludes them). PAPUC Op. 63. The conflict with federal law is apparent.

The Supreme Court has found similar state actions preempted because they interfered with processes governed by FERC-approved tariffs. In *Hughes*, a State dissatisfied with PJM's FERC-approved auction process for capacity sales established a program that guaranteed certain generators a rate different from what they would receive under PJM's tariffed process. 578 U.S. at 157-61. The Supreme Court held that improperly interfered with FERC's wholesale ratemaking authority. *Id.* at 163-65. By “[d]oubting FERC’s judgment” about how to produce “just and reasonable rates” and substituting its own preferred approach, the State impermissibly “invade[d] FERC’s regulatory turf.” *Id.* at 163. The same logic applies here. FERC approved PJM’s planning process—including its criteria for determining the need to alleviate system congestion—under its authority to ensure that transmission rates and practices are just and reasonable. By second-guessing that FERC-sanctioned process and substituting its own approach for the need determination, the

⁸ See also *PJM*, 173 FERC ¶61,258 P10 (approving revisions to PJM’s benefit-cost methodology despite objection that the methodology would continue to “ignore the increased zonal load costs that a project may create”).

PAPUC impermissibly “invade[d] FERC’s regulatory turf.” *Id.*; *see also Mississippi Power*, 487 U.S. at 370-74; *Nantahala*, 476 U.S. at 966-69.

PJM acknowledges state authority over siting, permitting, and construction of transmission facilities. *See* Order No. 1000-A, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 139 FERC ¶61,132, P 189, 77 Fed. Reg. 32,184, 32,215 (2012). State commissions like the PAPUC play an important role in transmission siting, including determining what routes transmission lines will follow and where new facilities will be constructed. In making its determination here, the PAPUC could have legitimately considered various factors, such as a project’s impact on public health and safety (would high-voltage lines run through a dense neighborhood?), natural resources (would the project require clearcutting timberland?), and environmental impact. *Cf.* 52 Pa. Code §57.76(a)(2)-(4). But the PAPUC expressly disclaimed reliance on any of these other factors. PAPUC Op. 68. It denied Transource’s application based *solely* on its view that there was no “need” to alleviate congestion, based on its substitution of its own methodology for the FERC-approved one. Such a decision cannot stand.

Authority over *siting* is not the same as authority over *planning*. As FERC has explained, state “‘siting, permitting, and construction authority’” does *not* extend to FERC’s required “‘processes used to identify and evaluate transmission system needs and potential solutions to those needs.’” Order No. 1000-A, P 186, 77

Fed. Reg. at 32,215; see Order No. 1000, 136 FERC ¶61,051, P 107, 76 Fed. Reg. at 49,861 (same). Thus, while the PAPUC possesses siting authority, that authority does not allow the PAPUC to second-guess the FERC-sanctioned processes used to identify and evaluate “transmission system needs,” or PJM’s determination that a particular project addresses those needs. Order No. 1000-A, P186, 77 Fed. Reg. at 32,215. Instead, the criteria PJM uses to arrive at need determinations for the identification and selection of projects falls squarely within FERC’s authority delegated to PJM.

Moreover, the fact that a state commission is acting in an area of “traditional [state] authority” (such as siting) does not render it immune from a federal tariff’s preemptive force. *Hughes*, 578 U.S. at 164-65 (state authority over electricity generation cannot interfere with FERC-approved process for ensuring just and reasonable wholesale energy rates); see *Mississippi Power*, 487 U.S. at 370-71 (state authority over retail electricity rates cannot interfere with FERC authority over wholesale electricity rates). That is particularly true here, where the PAPUC’s decision was based solely on a rejection of PJM’s FERC-approved methodology, and not on other siting factors or the consideration of alternative routes. The PAPUC directly rejected FERC’s regional planning authority and PJM’s implementation of its federally approved tariff.

III. PJM’s regional transmission planning process falls squarely within FERC’s regulatory authority and would be hindered if the PAPUC’s order were left in force.

Before this Court, the PAPUC suggests that regional transmission planning falls outside FERC’s statutory authority. See **Doc. 148** (“PAPUC Summary Judgment Br.”) at 32-34. That is mistaken. The Federal Power Act expressly directs FERC to “facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities” (*e.g.*, utilities that serve end-users). **16 U.S.C. § 824q(b)(4)**. Regional transmission planning also falls squarely within FERC’s authority to regulate the “transmission” of electricity and ensure that all “rates” and “practice[s]” affecting transmission are “just and reasonable.” **16 U.S.C. §§ 824d(a), 824e(a)**. As the D.C. Circuit recognized when upholding FERC orders mandating regional transmission planning, “transmission planning practices directly affect rates” and so fall comfortably within FERC’s regulatory authority. *S.C. Pub. Serv. Auth.*, **762 F.3d at 56** (citing Order No. 1000, P 112, **76 Fed. Reg. at 49,862**).

FERC’s authority over transmission thus is not limited to regulating “existing transmission facilities through which electric energy is flowing.” PAPUC Summary Judgment Br. 33. It also extends to measures—like regional transmission planning—aimed at ensuring efficient operations and just and reasonable rates into the future. See *S.C. Pub. Serv. Auth.*, **762 F.3d at 56, 63**. That makes sense: Actions taken (or not taken) today can have a profound effect on the rates for transmission

and sale of electricity years from now. That is why, for example, PJM’s tariff addresses not only “immediate delivery of electricity,” but also provides for “a ‘capacity auction’ to ensure the availability of an adequate supply of power . . . in the future.” *Hughes*, 587 U.S. at 155. Such forward-looking measures fall within FERC’s authority—and preempt contrary state action—even though they address electricity that is not presently “flowing.” *See id.* at 163-65 (holding a state commission order preempted because it interfered with PJM’s FERC-approved capacity-auction process).

The forward-looking regional transmission planning process FERC has directed PJM and other RTOs to administer is no different. Indeed, “the Commission possesses *greater* authority over electricity transmission than it does over [the wholesale energy] sales” that were at issue in cases like *Hughes* and *Mississippi Power. S.C. Pub. Serv. Auth.*, 762 F.3d at 63 (emphasis added); *see pp.* 13-14, 15, *supra*.

The PAPUC also invokes Federal Power Act Section 201(a)’s statement that federal regulation of transmission is “to extend only to those matters which are not subject to regulation by the States.” 16 U.S.C. § 824(a) (quoted at PAPUC Summary Judgment Br. 32). As the Supreme Court has explained, however, that prefatory language is “a mere policy declaration that cannot nullify a clear and specific grant of jurisdiction” to FERC. *New York*, 535 U.S. at 22 (internal quotation marks

omitted). “Because the FPA contains such ‘a clear and specific grant of jurisdiction’ to FERC over interstate transmissions”—and PJM’s regional transmission planning process falls squarely within that authority—“the prefatory language cited by [the PAPUC] does not undermine FERC’s jurisdiction.” *Id.* The D.C. Circuit rejected challenges to FERC’s “authority over transmission planning matters” on that basis. *S.C. Pub. Serv. Auth.*, 762 F.3d at 63-64.

The PAPUC mistakenly suggests that the 2008 FERC order approving PJM’s benefit-cost methodology (including its exclusion from costs of increased prices in zones currently benefitting from congestion), *see PJM*, 123 FERC ¶61,051, P67, cannot have preemptive effect because it “predated the planning reforms adopted in Order No. 1000.” PAPUC Summary Judgment Br. 36. FERC regulation of regional transmission planning did not start with Order No. 1000; it dates back at least to FERC Order No. 890, issued in 2007. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 58 (explaining that “Commission-mandated transmission planning is not new,” citing Order No. 890, P3, 72 Fed. Reg. at 12,267); pp. 5-6 & n.3, *supra*. That is the context in which FERC approved PJM’s benefit-cost methodology in 2008. Regardless, what matters is that PJM’s methodology is embodied in its FERC-approved tariff, which carries the force of federal law and preempts inconsistent state law and orders.

The PAPUC also argues that there is “no direct conflict” between PJM’s FERC-approved tariff and the PAPUC decision in this case. PAPUC Summary

Judgment Br. 37. To be sure, the mere fact that a state commission denies a permit to a project that has been selected through PJM's regional transmission planning process does not, in and of itself, create a conflict. The PAPUC decision here, however, was expressly based on its disagreement with how PJM's FERC-approved methodology calculates costs when assessing need to alleviate congestion. PAPUC Op. 63; *see* PAPUC Summary Judgment Br. 15 (expressing view that "PJM's cost-benefit methodology . . . does not achieve th[e] result" of capturing likely consequences of an activity). That *does* create a conflict: It replaces FERC's approved methodology for determining need to alleviate congestion with a state agency's contrary alternative.

It also makes no difference that the Transource IEC Project is designed to address a market-efficiency need, not principally a reliability need. To the extent the PAPUC attempted to distinguish its prior decision in *Application of TransAllegheny Interstate Line Company (TrAILCo Case)* on that ground, *see* PAPUC Op. 60, it did not appreciate that reliability and market-efficiency projects are both governed by PJM's federal tariff and the FERC-mandated regional planning process. Both "reliability needs" and "economic considerations" fall "squarely within [FERC's] jurisdiction" to ensure just and reasonable transmission rates. Order No. 1000, P 112, [76 Fed. Reg. at 49,862](#). The PAPUC's approach threatens to hinder

FERC’s mandated processes for addressing both kinds of transmission needs, and others in the tariff.

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. Order No. 1000, P 12, [76 Fed. Reg. at 49,846](#). 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.” Order No. 1000, P 320, [76 Fed. Reg. at 49,897](#). 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.”

CONCLUSION

The Court should hold that the PAPUC’s decision—rejecting PJM’s FERC-approved methodology for determining need to alleviate congestion that affects FERC-jurisdictional transmission rates, and substituting an alternative methodology for determining that need—is preempted by federal law. The Court should grant Transource’s motion for summary judgment and deny the PAPUC’s motion for summary judgment.

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* Limited appearance granted by the Court. See **Doc. 139 at 1** n.1.

CERTIFICATE OF WORD COUNT

I, Mark J. Stanisz, hereby certify that the foregoing *amicus* brief contains 4,469 words in compliance with Local Rule 7.8(b).

Date: April 5, 2023

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