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 SUPPORT OF TRANSOURCE'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Federal Energy Regulatory Commission ("FERC") has authority over interstate electric transmission planning. Exercising that authority, FERC approved a specific method to determine whether a new transmission line is needed to reduce congestion on the interstate grid, so that wholesale energy prices remain fair for all customers. The multistate grid operator, PJM Interconnection, L.L.C. ("PJM"), applied that federally approved method and determined that a transmission project developed by Plaintiff Transource Pennsylvania, LLC ("Transource") was needed to alleviate grid congestion harming customers mainly in Virginia, Maryland, and Washington, D.C. The project would be paid for entirely by the customers benefiting from it.

But when Transource applied to the Pennsylvania Public Utility Commission ("PUC") for permission to site the new lines, the PUC denied approval based on its disagreement with FERC and PJM about the proper method for assessing whether the lines were needed to reduce congestion. No one disputes that the PUC has authority over the siting of new transmission lines. But whether interstate congestion should be addressed is a question of regional transmission planning, not siting authority, and that is a domain over which FERC has exercised its jurisdiction. Accordingly, under the Supremacy Clause, the PUC may not misuse its siting authority to block a transmission line based on a conflicting view about whether

congestion on the interstate grid should be addressed. Tellingly, the PUC cannot cite a single case in which a state commission has invoked its siting authority to override a regional planning determination made pursuant to a FERC-approved tariff.

The PUC asserts that its decision will not frustrate FERC's regional transmission planning objectives, but the obstacle to FERC's policy is clear. Regional transmission planning will inevitably affect different states differently. FERC's interstate planning authority would be eviscerated if every state could veto an interstate solution to an interstate problem solely because the state's own residents might pay higher prices as a result. That would turn the Supremacy Clause on its head.

Moreover, the PUC's rationale for disagreeing with FERC was blatantly protectionist in violation of the dormant Commerce Clause. Congestion is akin to a traffic jam on the interstate grid that prevents the free flow of electricity. Here, the congestion prevented electricity from flowing from Pennsylvania into other portions of the 13-state PJM region. As the PUC forthrightly acknowledged, it blocked the construction of an instrumentality of interstate commerce—two interstate transmission lines—because it wanted to perpetuate the low prices Pennsylvania enjoys when low-cost power cannot flow freely out of the state. The dormant

Commerce Clause does not allow states to block the flow of interstate commerce for their own economic advantage.

Finally, the PUC contends, wrongly, that Transource's federal-law claims are claim precluded because Transource also sought review of the PUC's decision in state court. But consistent with the Supreme Court's *England* doctrine, which is an exception to the Full Faith and Credit statute, Transource litigated only its state-law claims in state court and expressly reserved its right to pursue its federal claims in federal court. That preserved Transource's ability to pursue its federal claims here. The PUC's consent was not required. Moreover, even if Pennsylvania preclusion law did apply, it would not bar Transource's ability to pursue its federal claims here. As for issue preclusion, the PUC has not renewed that contention, and regardless, this Court correctly determined that the PUC's unreviewed determination that its decision was not preempted could not preclude Transource's claims.

BACKGROUND

I. PJM Facilitates a FERC-Approved Regional Transmission Planning Process.

The Federal Power Act ("FPA") vests FERC with the authority to regulate wholesale sales of electricity and the transmission of electricity in interstate commerce, as well as practices affecting the rates for such activities. 16 U.S.C. §§824(b), 824e(a). In turn, FERC encouraged the formation of "regional transmission organizations" ("RTOs") to operate the transmission system and plan

new transmission projects needed to ensure reliability and improve the grid's efficiency. *See Regional Transmission Organizations*, Order No. 2000, 89 FERC ¶ 61,285, 1999 WL 33505505, at *2 n.3 (1999). PJM is the RTO responsible for maintaining the interstate bulk transmission system and operating a regional energy market in a 13-state region that includes Pennsylvania. Transource Statement of Material Undisputed Facts ("SMF") ¶¶1-5.

To identify interstate transmission needs and solutions, PJM undertakes an annual Regional Transmission Expansion Plan ("RTEP") pursuant to tariff provisions approved by and filed with FERC.[1] *Id.* ¶¶11, 36-42. As part of the RTEP, PJM assesses proposed transmission projects that would mitigate persistent "congestion"—*i.e.*, areas of the grid where electricity cannot flow freely because of insufficient transmission capacity. *Id.* ¶¶10-12. Congestion results in locational disparities in the wholesale prices for energy. "[C]ustomers on the constrained side will pay higher prices for energy—as they will need to rely on higher cost generation available to them—than they would if the transmission system were capable of transmitting electricity freely across the entire grid." SMF Ex. 5 ("Herling Report") at 12; SMF ¶10. Meanwhile, customers on the other side will pay lower energy prices, as their area benefits from low-cost power that cannot make it past the

[1] PJM's "tariffs" are simply the collection of rules and practices filed with FERC that govern PJM's activities. SMF ¶¶6-9.

transmission bottleneck. SMF ¶10; *see* Herling Report at 13. In this way, "congestion grants a financial windfall to one group of customers at the expense of another group due to inefficiencies in the grid." Herling Report at 21.

II. PJM's FERC-Approved Methodology for Assessing the Need for a New Line to Address Congestion.

In 2006, PJM submitted to FERC proposed changes to its tariff to address persistent congestion, including a process for identifying needed "market efficiency" projects—that is, transmission projects that help make the wholesale energy markets more efficient by mitigating persistent congestion. In response, FERC directed PJM to propose a "formulaic approach" that would "describe[ ] exactly how any metrics will be calculated, weighed, considered and combined" in evaluating market efficiency projects. *See PJM*, 119 FERC ¶61,265, PP 30-31 (2007) (SMF Ex. 11).

In 2007, PJM proposed that it would measure a project's congestion-reducing benefits and assess the total cost of constructing the project, and then take the ratio of these benefits to costs. The benefit-cost ratio of any given project needed to meet a threshold of at least 1.25:1.0 to be included in the RTEP. *PJM*, Compliance Filing, Docket No. ER06-1474-004 (Oct. 9, 2007), at 5-6 (SMF Ex. 12). To calculate the benefits for the class of transmission facilities relevant here (known as Lower Voltage Facilities, though they are still high-voltage lines), PJM proposed to sum up the expected change in energy payments over the next 15 years "for only those zones that [would] experience reduced energy payments [as a result of the project]—which

are the zones that would be assigned the costs of these facilities." *PJM*, 123 FERC ¶61,051, P 67 (2008) (SMF Ex. 8) ("2008 FERC Order"). Those benefits would not be offset by the expected increase in energy payments in zones that currently enjoy lower prices due to congestion. *Id.* To calculate the costs, PJM would determine the present value of "the revenue requirement of the economic-based enhancement or expansion"—that is, the cost of constructing the project—which would be paid solely by the zones that would benefit from the line. *Id.* P 17. Thus, the method for assessing benefits matched the cost responsibility. *Id.* P 67.

The PUC intervened in that FERC proceeding, but did not object to PJM's proposal. SMF ¶23. Various parties, however, did protest the filing, including some who argued that PJM's proposed method for measuring benefits and costs was flawed. They contended that the benefits from reducing congestion should be offset by the higher energy payments that would result for areas advantaged by congestion. 2008 FERC Order, P 67.

In 2008, FERC approved the relevant portion of PJM's 2007 filing. *See id.* It emphasized the importance to federal regulatory goals of a planning process that can identify transmission expansions "that are critically needed to support competition as well as reliability needs.'" *Id.* P 26. It explained that "without a process for identifying economic transmission, PJM's customers … separated from the rest of

the system by congested transmission bottlenecks[ ] will have few opportunities to access alternative resources that have lower prices for electricity." *Id.*

FERC specifically approved PJM's method for assessing the benefits and costs of building a new transmission line to reduce congestion and rejected opponents' arguments. FERC found the "approach reasonable because it . . . would evaluate the load payment benefits of those loads that will be assigned the costs of the new" line. *Id.* P 67. PJM then incorporated this methodology into its tariff.

In 2011, FERC issued Order 1000, which reaffirmed the central importance of regional transmission planning to the federal regulatory scheme. *See Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, FERC Order No. 1000, 76 Fed. Reg. 49,842 (2011) ("Order 1000"). Order 1000's primary objectives were: (1) to "[e]nsure that transmission planning processes at the regional level … produce a transmission plan that can meet transmission needs more efficiently and cost-effectively"; and (2) to "ensure that the costs of transmission solutions chosen to meet regional transmission needs are allocated fairly to those who receive benefits from them." *Id.* at 49,845.

In 2014, PJM made some tweaks to the method for evaluating benefits and costs of Lower Voltage projects, but left undisturbed the prior decision not to consider the increase in energy payments that would be experienced by customers currently benefiting from congestion. PJM Transmittal Letter, *PJM*, Docket No.

ER14-1394-000 (Feb. 28, 2014), at 9 (SMF Ex. 15). FERC accepted these additional adjustments and they became part of PJM's tariff. FERC Letter Order, *PJM*, Docket No. ER14-1394-000 (Apr. 23, 2014) (SMF Ex. 16); SMF ¶¶36-42; SMF Ex. 4.

III. PJM's Approval of the Transource Project.

In the RTEP process, PJM identified persistent congestion on the AP South Reactive Interface—a set of four 500 kV transmission lines that originate in West Virginia and terminate in Maryland—and related constraints running through Pennsylvania. This transmission bottleneck prevents low-cost power from flowing across the grid to Virginia, Maryland, and D.C., instead trapping it predominantly in parts of Pennsylvania. SMF ¶¶61, 71-72. From 2012 to 2016, the congestion raised total energy payments in constrained zones, largely in Virginia, Maryland, and D.C., by more than $800 million. *Id.* ¶62.

Under its FERC-approved tariff, PJM solicited proposals to alleviate this congestion. *Id.* ¶63. Transource Energy, Transource's parent company, submitted "Project 9A," the main component of which is the "IEC Project" consisting of two new transmission lines spanning the Pennsylvania-Maryland border. *Id.* ¶¶64-66. Once built, it would lower wholesale energy payments in constrained zones (again, mainly Virginia, Maryland, and D.C.) by $845 million over 15 years, but would—by freeing lower-cost electricity currently stuck behind a constraint—raise wholesale energy payments elsewhere, largely in central and eastern Pennsylvania,

by $812 million over 15 years. *Id.* ¶¶73, 77. The cost of constructing the project—approximately $509 million—would be borne solely by the customers who would benefit from the lower wholesale energy payments. *Id.* ¶¶41, 78.

PJM applied its FERC-approved method for determining whether the project was needed to reduce congestion, and determined that the project passed the test. The total benefits of $845 million in reduced wholesale energy payments exceeded the total project cost of $509 million by more than a 1.25:1.0 ratio. *Id.* ¶¶67-79. Consistent with the FERC-approved method, PJM's benefit-cost analysis did not consider the $812 million in increased wholesale energy payments that would be experienced largely by the Pennsylvania customers currently benefiting from congestion. *Id.* Under the FERC-approved methodology, those customers had no legitimate entitlement to continue paying wholesale energy prices that were suppressed by a transmission bottleneck impeding the free flow of electricity across the interstate grid.

In 2016, PJM and Transource Energy executed (and in January 2017, FERC approved) a Designated Entity Agreement, which made Transource Pennsylvania responsible for constructing the portion of the IEC Project located in Pennsylvania. *Id.* ¶¶80-81. In January 2017, FERC also approved a request by Transource for certain transmission incentives available to new transmission that "is needed to connect new generation sources and to reduce congestion." *Promoting*

Transmission Investment Through Pricing Reform, 71 Fed. Reg. 43,294, 43,298 (2006); *PJM*, 158 FERC ¶ 61,089, PP 14-19 (2017) (approving Transource for incentives) (SMF Ex. 29).

Subsequently, PJM has studied Project 9A annually and, although congestion has varied over time, the project continues to be needed. SMF ¶¶113-116. Most recently, the benefit-cost ratio of Project 9A was 3.64 after excluding costs that already have been incurred, and 2.48 based on total costs. *Id.* ¶115.

IV. The PUC Denies Transource's Siting Application.

Although FERC has authority over interstate transmission planning, it generally cannot mandate a project's construction. Instead, states retain authority over siting and construction—where exactly a project will go and how it will be built. *E.g.*, *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 62-64 (D.C. Cir. 2014) (per curiam). In Pennsylvania, the PUC oversees siting and construction. SMF ¶83. It also authorizes entities to act as Pennsylvania public utilities that can exercise eminent domain authority. 66 Pa. Cons. Stat. §1102(a)(1). Therefore, Transource applied to the PUC for public-utility status and a certificate of public convenience authorizing construction. SMF ¶¶84-85.

An administrative law judge ("ALJ") recommended the denial of Transource's application on several grounds, including that Transource had "*failed to show need* for the project within the meaning of [PUC] Regulations and the

Pennsylvania Public Utility Code." SMF Ex. 1 at 17-18 ("PUC Order"); SMF ¶89. The ALJ acknowledged that PJM had determined the project was needed to reduce congestion, but nevertheless concluded that the PUC had "exclusive jurisdiction over … whether the proposed transmission infrastructure is needed." SMF Ex. 7 at 80-83, 85-86 ("Recommended Decision"); SMF ¶¶90-94. Citing the record showing the $812 million increase in expected energy payments if congestion were alleviated, largely impacting Pennsylvania customers, the ALJ determined that Transource had not shown "need" under Pennsylvania law. Recommended Decision at 97; SMF ¶94. Adopting the very method for weighing benefits and costs that FERC had explicitly rejected in the 2008 Order, the ALJ offset the $845 million in benefits of reduced congestion by the $812 million in increased wholesale energy prices, and concluded that the project would bring only $32 million of net benefit. *Id.* Although the ALJ recognized that "Pennsylvania has benefitted from its participation in PJM and through regional transmission planning," the ALJ concluded that "under these particular circumstances" the "project does not provide sufficient benefits to Pennsylvania or the PJM region as a whole." *Id.*

Transource challenged the ALJ's decision before the PUC. On May 24, 2021, the PUC affirmed the ALJ's determination that Transource had not shown "need" under Pennsylvania law. PUC Order; SMF ¶¶97-98. Per the PUC, "need, established under the applicable federal standards imposed by FERC and

implemented by PJM, do[es] not necessarily satisfy the requirement for 'need'" under state law. PUC Order at 54; *see* SMF ¶102. The PUC then went on to endorse the ALJ's benefit-cost analysis that directly conflicted with the FERC-approved method. It acknowledged that "Project 9A would … alleviate the economic congestion on a regional level," but emphasized that its "concern" was "*[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania*." PUC Order at 59 (emphasis added); SMF ¶106. The PUC therefore applied its own "Pennsylvania-also" benefit-cost method that considered "the importance of prospective impact upon the Commonwealth." *Id.* Relying on the ALJ's findings, the PUC observed that reducing congestion by building Project 9A "would result in higher rates *in Pennsylvania*," and held that "the ALJ properly considered the negative impacts to Pennsylvania in evaluating" whether the project was "needed" under state law. *Id.* (emphasis added). Accordingly, the PUC found that Transource had not shown "need" and, based solely on that finding, denied Transource's application and rescinded its certificate of public convenience. PUC Order at 63-66, 69-72; SMF ¶¶108-112.

V. Procedural History and Parallel State Court Litigation.

On June 22, 2021, Transource filed a complaint with this Court seeking declaratory and injunctive relief (the "Federal Complaint"). ECF No. 1. The Federal

Complaint raises two grounds for relief: (1) the PUC's Order is preempted by federal law; and (2) the PUC's Order violates the dormant Commerce Clause.

Transource subsequently filed a Petition for Review of the PUC Order in the Commonwealth Court of Pennsylvania (the "State Petition"). SMF ¶117. The State Petition raised exclusively state-law grounds for reversal of the PUC Order: it contended that the PUC Order violated the relevant Pennsylvania statutes and regulations; was unsupported by substantial evidence; and was inconsistent with prior PUC precedent. *Id.* ¶118. Transource apprised the Commonwealth Court of the Federal Complaint in its petition for review and its brief, and it expressly reserved its right to litigate its federal claims in federal court under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). SMF ¶¶119-121. Transource moved for expedited consideration in the Commonwealth Court, and the PUC opposed, specifically citing the concurrent federal litigation. SMF ¶¶124-126.

Back in this Court, Transource initially moved for summary judgment and for a speedy hearing. *See* ECF Nos. 20, 21. The PUC opposed both motions, *see* ECF No. 61, and moved to dismiss the Federal Complaint, arguing, in relevant part, that Transource's claims were barred by claim and issue preclusion, *see* ECF No. 57. This Court issued a decision on these motions on August 26, 2021. In relevant part, the Court abstained under the *Brillhart*/*Wilton* doctrine, pending the Commonwealth Court's decision on the State Petition. ECF No. 82 at 11-32.

On May 5, 2022, the Commonwealth Court issued a decision rejecting the state-law challenges to the PUC Order. SMF ¶127. The Commonwealth Court expressly did not address or decide Transource's federal claims. Instead, it acknowledged that Transource had reserved its federal claims in the state-court proceedings, *rejected* the PUC's argument that Transource had impliedly placed the federal issues before the Commonwealth Court, and ultimately stated: "[W]e will not address the federal claims that Transource has reserved for consideration in the District Court and focus instead on whether the Commission's decision is correct under Pennsylvania law." SMF ¶¶128-129 (emphasis added).

Transource notified this Court of the Commonwealth Court's decision, ECF No. 90, at which point this Court lifted the stay, ECF No. 91. Following supplemental briefing and discovery, the parties agreed to file dispositive cross-motions for summary judgment. The PUC moved for summary judgment on March 7. Transource now files its combined Cross-Motion for Summary Judgment and Opposition to the PUC's Motion.

QUESTIONS INVOLVED

1. Whether the PUC's Order denying Transource's siting application is preempted because it directly conflicts with the federally approved method for determining whether a new transmission line is needed to reduce congestion? Suggested answer: Yes.

2. Whether the PUC's Order to deny Transource's siting application based on the PUC's Pennsylvania-focused determination of need violates the dormant Commerce Clause? Suggested answer: Yes.

3. Whether Transource properly preserved its right to litigate its federal claims in federal court? Suggested answer: Yes.

ARGUMENT

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[A]ll facts should be viewed in the light most favorable to the non-moving party, with all reasonable inferences [drawn] in that party's favor." *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 288 (3d Cir. 2018) (alteration in original). However, "the substantive law will identify which facts are material," and "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).[2]

I. The PUC's Denial of Transource's Application Conflicts With and Is Preempted by Federal Law.

The PUC Order is preempted. The PUC recognized that the need for the project had been "established under the applicable federal standards imposed by

[2] Transource argues for summary judgment in its favor and responds to the PUC's motion regarding the merits together, as the two are intertwined.

FERC and implemented by PJM." PUC Order at 54; SMF ¶102. Yet it overrode that federal determination based on its own conflicting benefit-cost method, which did exactly what FERC rejected: affirming the ALJ, the PUC counted as an offsetting cost the increased wholesale energy payments for Pennsylvania customers that would result from reducing congestion. PUC Order at 59; SMF ¶¶105-107.

That decision conflicts directly with the FERC-approved method for determining whether a new transmission line is needed to reduce congestion on the interstate grid and is an obstacle to efficient regional planning by FERC. The PUC found the project was not needed because it sought to preserve the very pricing disparity that the federal planning process seeks to mitigate. If states could override FERC by applying a conflicting method for determining need, solely to preserve the benefits of congestion for their own citizens, that would eviscerate FERC's ability to plan the interstate transmission grid in an efficient and fair manner.

A. FERC Has Authority to Regulate Regional Transmission Planning.

FERC has authority to regulate regional transmission planning. *South Carolina*, 762 F.3d at 55-64. FPA Section 201 gives FERC power to regulate "transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce", as well as "jurisdiction over all facilities for such transmission … of electric energy." 16 U.S.C. §824(a), (b). Courts have held that "Section 201 … vests [FERC] with comprehensive and exclusive jurisdiction

over the rates, terms, and conditions of service for the transmission and sale of wholesale electric energy in interstate commerce." *Ameren Ill. Co. v. FERC*, 58 F.4th 501, 502-03 (D.C. Cir. 2023).

FERC's authority over regional transmission planning is rooted in both its authority over the transmission of energy in interstate commerce and its mandate to ensure just and reasonable wholesale energy prices. First, regional transmission planning helps to ensure that there is adequate transmission capacity for the grid to function reliably and efficiently. "[E]nsuring the proper functioning of the interconnected grid spanning state lines … fits comfortably within Section 201(b)'s grant of jurisdiction over 'the transmission of electric energy in interstate commerce.'" *South Carolina*, 762 F.3d at 62-64 (citation omitted).

Second, regional planning to address congestion on the interstate grid is intertwined with FERC's regulation of wholesale energy prices. *See id.* at 55-56; Order 1000, P 52; 16 U.S.C. §824e(a) (FPA Section 206). Congestion prevents the free flow of power from one area of the grid to another area, directly impacting wholesale rates. Reducing persistent congestion ensures that all customers, no matter where they are located on the grid, can be served by the lowest-cost power plants. *See supra* at 4-5. Accordingly, the D.C. Circuit upheld FERC's authority over regional transmission planning against various challenges. *South Carolina*, 762 F.3d at 55-64.

B. FERC Exercised Its Authority by Approving a Method for Determining Whether a New Transmission Line Was Needed to Reduce Congestion.

In 2008, FERC approved a change to PJM's Operating Agreement adopting a specific method for determining whether a transmission line is needed to reduce persistent congestion. 2008 FERC Order, P 67. As discussed above, that method determines the economic benefits over the next 15 years of reducing persistent congestion and compares the benefits of reduced wholesale energy payments to the cost of constructing the project. If the benefits exceed the costs by a ratio of 1.25 or more, then the project is needed to reduce the congestion. *Id.* P 79. FERC specifically rejected consideration of increased wholesale energy payments for customers currently enjoying low prices due to congestion. Those customers would not be paying the cost of the new line, and had no entitlement to low wholesale energy prices that were suppressed due to insufficient transmission capacity. 2008 FERC Order, P 67; SMF ¶¶10, 22, 43.

In response to FERC's Order, PJM filed tariff provisions adopting the FERC-approved method: Schedule 6, Section 1.5.7(d) of the PJM Operating Agreement commits PJM to "determin[ing] the economic benefits of … constructing additional Economic-based Enhancements or Expansions" and specifically incorporates the FERC-approved benefit-cost methodology. SMF ¶¶36-42; SMF Ex. 4.

C. The PUC's Order Violates Conflict Preemption Principles.

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). 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. *Id.* at 386, 389.

Here, both types of conflict preemption are present. The PUC's Order directly conflicts with FERC's method for determining whether a new line is needed to reduce congestion on the interstate grid. It also is a clear obstacle to federal objectives. The purpose of planning a new line to reduce congestion is to reduce wholesale pricing disparities resulting from transmission bottlenecks. Yet the PUC claims the right to veto a new line precisely because it wants to preserve that very wholesale pricing disparity. If states had that authority, no new line to address congestion would ever get built, and FERC's effort at regional planning would be pointless.

1. The PUC Order Directly Conflicts with Federal Law.

"The Supreme Court's preemption case law indicates that regulatory situations in which an agency is required to strike a balance between competing

statutory objectives lend themselves to a finding of conflict preemption." *Farina v. Nokia Inc.*, 625 F.3d 97, 123 (3d Cir. 2010). Here, FERC considered how best to determine the benefits and costs of transmission projects aimed at reducing persistent congestion. It opted for an approach that considered the benefits to the customers who would pay for the line, and decided to disregard increased energy payments by customers currently benefiting from the congestion. Those customers had no entitlement to benefit from congestion that efficient transmission planning seeks to mitigate. *See* 2008 FERC Order, P 67; *see also* SMF ¶¶10, 22, 43. FERC balanced the benefits and costs across the affected region, and used its "reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives." *Farina*, 625 F.3d at 123. "Allowing state law to impose a different standard permits a re-balancing of those considerations"—and a "state-law standard that is more protective of one objective may result in a standard that is less protective of others." *Id.*

That is exactly what happened here. The PUC acknowledged that the FERC-approved benefit-cost methodology does not weigh the increase in wholesale energy payments that would be made by customers currently benefiting from congestion. *See* SMF ¶102. However, it asserted the authority to adopt a conflicting methodology under state law, stating that "'need' from a PJM planning perspective may or may not be … 'consistent with the standard for need under Pennsylvania

law.' It is for [the PUC], not PJM, to decide whether the PJM planning perspective is, or is not, in line with the Pennsylvania standard for 'need'…." PUC Order at 54-55; SMF ¶102.

The PUC then went on to expressly reject the FERC-approved method for determining the benefits and costs of reducing persistent congestion:

> With respect to consideration of the potential negative impact, including rate increases, to the customers in the Commonwealth, Transource asserts that this Commission is required to disregard such negative impact and weigh only the assertion of "need" for the proposed project as calculated under the PJM-approved criteria and methodology. We disagree. 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."

PUC Order at 59; SMF ¶106.

The PUC then affirmed the ALJ's calculation of benefits and costs which, in direct conflict with the FERC-approved method, *included* the change in net load payments for transmission zones that would see an overall increase as a result of constructing the new transmission lines. PUC Order at 58-60; Recommended Decision at 97; SMF ¶¶94, 106. It is hard to imagine a more blatant conflict with federal law. Indeed, to justify its approach, the PUC relies in its brief on an analysis from Monitoring Analytics, LLC ("Market Monitor") proposing that PJM's benefit-cost analysis should account for such cost increases. PUC Mem. 9, 11. But even

the Market Monitor conceded that methodology is "not consistent" with and "absolutely" directly conflicts with PJM's methodology. SMF ¶53. The Market Monitor also acknowledged FERC has not adopted the Market Monitor's proposed changes despite multiple submissions advocating for them. *Id.* ¶¶47-54.

The Supreme Court has repeatedly rejected states' attempts to disregard federal determinations in just the way the PUC has done here. In *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), for example, the Supreme Court rejected a state's attempt to override FERC's determination of how certain costs should be allocated by adopting a different and conflicting allocation methodology. It held: "Once FERC sets … a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority." *Id.* at 966; *see also Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988) ("States may not alter FERC-ordered allocations of power by substituting their own determinations of what would be just and fair."). The same analysis applies here: once FERC has adopted a methodology for determining that an interstate transmission line is needed to reduce wholesale pricing disparities, a state may not adopt a conflicting approach.

Moreover, state utility commission decisions are preempted not just when they "disregard" FERC-filed rates, but also 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). That is exactly what the PUC did here: while FERC considered whether the lines were needed to reduce congestion from the standpoint of the entire region, the PUC undertook the same inquiry focused on the "potential negative and practical impact on the citizens and consumers of Pennsylvania." PUC Order at 59; SMF ¶106.

Transource is not aware of any other occasion on which a state has flouted the FERC-approved methodology in this manner. Notably, the Maryland Public Service Commission ("Maryland PSC") was faced with the similar argument that the Maryland benefits did not exceed the Maryland costs by a large enough ratio to justify approving the Maryland portion of the Transource project. Rejecting those arguments, it held that federal law controls: "pursuant to FERC Order No. 1000 and PJM's Tariff," need for the line "must be evaluated on a regional, not on a state-specific basis." *See In re Application of Transource Maryland LLC*, No. 9471, 2020 WL 3977589, at *41 (¶142) (Md. Pub. Serv. Comm'n June 30, 2020).

2. The PUC Order Is Also an Obstacle to Federal Objectives.

The PUC's rejection of the FERC-approved methodology also "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Farina*, 625 F.3d at 122 (citation omitted).

Anytime a new line is built to reduce congestion, it will increase wholesale energy payments in some places while reducing them in others—indeed, reducing wholesale energy price disparities is the whole point of such a project. If a state commission could decide that the very rationale for the project—reducing the wholesale pricing disparities caused by congestion—was a permissible reason to deny siting approval, FERC's regulatory scheme would obviously be obstructed: transmission projects intended to enhance the efficiency of the interstate transmission grid would become all but impossible to build, as the states benefiting from congestion would have every incentive to veto such projects as "unneeded." *See* Herling Report at 29. This would "essentially Balkaniz[e] the planning process and requir[e] solutions to be designed within individual states where needs exist and benefits can locally be proven, and in direct contradiction to regional transmission planning goals identified by FERC." *Id.*

As the PUC itself has acknowledged in the past, "States … carry[ing] out their individual State jurisdictional responsibilities … cannot interfere with the national goals of creating a strong and fair wholesale energy market." SMF ¶56. Having

accepted the benefits of federal planning, and having encouraged its development, Pennsylvania should not be allowed to obstruct that federal policy when it comes to new transmission lines needed in Pennsylvania to reduce persistent interstate congestion.

D. The PUC's Arguments Defending Its Order Are Without Merit.

The Court should reject the PUC's various arguments concerning preemption.

1. The PUC Order Is Not a Valid Exercise of the PUC's Siting Authority.

The PUC primarily invokes its authority over siting, which FERC has not preempted. PUC Mem. 19-23. Transource does not dispute that states have authority over siting. But the PUC's determination—applying a methodology that directly conflicts with FERC's regarding whether a line is needed to reduce congestion on the regional grid—was not a siting decision, even though it was made in the context of a siting proceeding. Rather, it was a planning decision. "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).

That this was a planning decision, not a siting decision, follows directly from the fact that FERC had authority to approve PJM's tariff on the subject. If the need to address congestion were really a siting question, FERC would have been powerless to approve a method for evaluating such need, as it has no authority over

siting. But the PUC raised no jurisdictional objection back in 2008 when FERC acted, and for good reason: FERC *does* have authority over regional transmission planning, *see supra* at I.A, and whether a line is needed to reduce congestion is a planning decision. As FERC explained in Order 1000, "*transmission planning … requirements …* are associated with the processes used to identify and evaluate *transmission system needs and potential solutions to those needs*." Order 1000, P 107 (emphasis added) (quoted by PUC Mem. 20). Identifying such needs and potential solutions "in no way involves an exercise of authority over … matters traditionally reserved to the states," such as siting. *Id.* States still get to decide where to site a line and what types of measures must be put into place, for example, to mitigate local environmental effects. But as the Maryland PSC recognized, *see supra* at 23, when FERC's methodology indicates there is a regional need, states cannot second-guess that planning decision in the guise of a siting proceeding.

Once the PUC's mistaken conflation of planning and siting is cleared away, its argument collapses. All of its authorities generally confirm state authority over siting and construction. *See* PUC Mem. 19-20. But none holds that the kind of decision the PUC has made here, regarding the need for a project to reduce congestion on the interstate grid, is properly considered a siting decision.

The PUC asserts that nothing requires it to site a line just because, under the FERC-approved method, the line is needed to reduce congestion. PUC Mem. 19-

21; *see also* Franklin County Amicus Br. ("Franklin Br.") 12-13, 17 (discussing other considerations related to line-siting decision). That is true but beside the point. Transource does not contend that the PUC must allow the project to be built in a particular place or manner. The PUC can deny permission to site a line for any number of reasons that are truly siting-related. For example, the PUC can evaluate the route over which the transmission line will traverse, and impose requirements to mitigate the impacts of construction on public health and safety, the environment, and natural resources.[3] The PUC can even decide need with respect to local transmission projects regarding which PJM has made no determination of regional need. Transource's narrow argument is simply that when PJM *has* applied a FERC-approved methodology and determined that a line is needed to reduce congestion on the regional grid, the PUC cannot reject that conclusion based on a conflicting methodology.

Likewise, FERC's statements that it does not intend to preempt authority over siting or permitting, *see* PUC Mem. 20-21, are beside the point, because, again, the PUC has made what is in substance a planning decision. As the PUC itself has previously observed, the FPA leaves to states "specific siting, land use and condemnation issues"—but "where a transmission network spans several states," the

[3] The PUC cannot, however, use these bases as a pretext to deny siting permission because of a disagreement regarding whether congestion needs to be addressed.

"arbiter and policymaker with respect to long term planning, policy and resource allocation issues" is the "federal or regional entity," not each state. SMF ¶55.

Nor can the PUC find support in FERC's statement that Order 1000 was not mandating "what needs to be built, where it needs to be built, and who needs to build it," *see* Franklin Br. 6; Order 1000, P 49. Order 1000 directs public utility transmission providers like PJM to establish processes for conducting regional planning. "The substance of a regional transmission plan … remain[s] within the discretion of the decision-makers in each planning region." *South Carolina*, 762 F.3d at 57-58. PJM, unlike many other regions, already had such a process in place, and in the 2008 FERC Order, FERC approved tariff provisions that *do* dictate what needs to be built to address congestion. 2008 FERC Order, PP 26, 67.

The PUC also argues that FERC did not intend to displace "separate and independent state planning processes." PUC Mem. 22. But the authority it block-quotes in support of this proposition counterposes the FERC-supervised regional transmission planning process with "the *local transmission plans* of individual public utility transmission providers." *Id.* (quoting FERC Order No. 1000-A, 77 Fed. Reg. 32,184, 32,215 (2012)) (emphasis added). This case does not involve *local* transmission planning. It involves *regional* transmission planning. While states may appropriately still consider costs and benefits of proposed *local* projects,

that does not give the PUC authority to override FERC's method for determining whether a *regional* project is needed to reduce *regional* congestion.

For similar reasons, the PUC's citation to *Piedmont* is misplaced. *Cf.* PUC Mem. 19 (citing *Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009)). There, the Fourth Circuit spoke in passing and in general terms about state commissions' consideration of costs and benefits in approving new transmission lines. The court was not confronted with, and did not address, the specific issue here—where a state commission has expressly overridden the FERC-approved method for determining whether a line is needed to reduce regional congestion.[4]

2. FERC Has Authority to Preempt the PUC Order.

The PUC next contends that FERC lacks the statutory authority to preempt the PUC Order. As an initial matter, the presumption against preemption does not apply here, because states have not traditionally regulated interstate transmission planning. *Cf.* PUC Mem. 24-27. That is FERC's domain. The PUC identifies no case holding otherwise.

[4] The PUC also cites a passage from a proposed rulemaking, *Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶61,028, 2022 WL 1198450, at *87 (2022). PUC Mem. 23. But that rulemaking applies nationwide, including to regions that do not have RTOs like PJM conducting regional transmission planning. In those non-RTO regions, there is no federally approved method for determining whether a transmission line is needed to reduce congestion.

As for FERC's statutory authority, Transource has addressed that above. *See supra* at I.A. The PUC's argument that FERC's authority is limited to "existing transmission facilities," PUC Br. 26, is obviously overbroad. For one thing, the implication is that FERC had no authority to issue Order 1000, which is about transmission *planning*. But the D.C. Circuit emphatically rejected that very argument when it affirmed Order 1000. *South Carolina*, 762 F.3d at 55-56 (rejecting argument that FERC was limited to "investigat[ing] the reasonableness of the terms of *existing* utility-customer relationships" (alteration in original)).

Moreover, the PUC's argument overlooks the connection between regional transmission planning—particularly regarding persistent congestion—and wholesale energy prices, which are directly impacted by such congestion. Under 16 U.S.C. §824e(a), FERC has authority to regulate "practice[s]" directly affecting wholesale energy rates, and it has relied on that authority in asserting jurisdiction over regional transmission planning. *See South Carolina*, 762 F.3d at 55-56 (affirming Order 1000 under FERC's jurisdiction over practices "affect[ing]" rates because transmission planning processes have "a direct and discernable [e]ffect … on rates" (citation omitted)); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 277 (2016) (FPA gives FERC "the authority—and, indeed, the duty—to ensure that rules or practices [directly] 'affecting'" rates are just and reasonable).

The PUC also cites Section 216 of the FPA, which authorizes FERC to "issue" a construction "permit" for a transmission line even when the state has denied that permit, if the transmission line is located in an area designated as a "national interest electric transmission corridor." 16 U.S.C. §824p(b). The PUC says that if Congress wanted to give that authority here, it knew how to do so. PUC Mem. 26. The PUC's argument misses the mark, though, because Transource is not claiming that FERC has anything like that authority here. Transource's proposed project is not a national interest electric transmission corridor, and FERC has no authority to issue a construction permit notwithstanding the state's denial. The issue here is much narrower: whether the PUC can rely on its siting authority to override a FERC-approved method for determining whether a line is needed to reduce interstate congestion. The PUC cannot.

3. The PUC Cannot Avoid the Direct Conflict with Federal Law.

As explained above, FERC approved a tariff provision setting forth a specific methodology for evaluating the benefits and costs of a proposed regional transmission project to reduce congestion. *See* 2008 FERC Order, PP 67, 79. And it specifically rejected the alternative methodology advanced by the PUC. *Id.* P 67. That distinguishes this case from cases like *Metropolitan Edison*, on which the PUC relies, where FERC had been silent on the issue before the state. *See* PUC Mem. 30 (citing, *inter alia*, *Metro. Edison Co. v. Pa. Pub. Util. Comm'n*, 22 A.3d 353, 365

(Pa. Commw. Ct. 2011) and *Metro. Edison Co. v. Pa. Pub Util. Comm'n*, 767 F.3d 335 (3d Cir. 2014)).[5] Here, FERC has spoken directly to the issue.

To the extent the PUC believes that FERC's approval of PJM's tariff can be preemptive of conflicting state law only where FERC expressly indicates it is preempting, *cf.* PUC Mem. 29, the PUC gets the law wrong. Conflict preemption is a type of *implied* preemption. It does not rely on an express statement. *E.g.*, *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 395-96 (3d Cir. 2010), *aff'd*, 565 U.S. 625 (2012). Rather, state action is preempted where it is "effectively an attempt to 'regulate in areas where FERC has properly exercised its jurisdiction….'" *Oneok*, 575 U.S. at 389 (quoting *Miss. Power*, 487 U.S. at 374). That is precisely what happened here. Moreover, the tariff itself has preemptive force. "A tariff filed with a federal agency is the equivalent of a federal regulation[.]" *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998); *Old Dominion Elec. Coop. v. PJM*, 24 F.4th 271, 275 (4th Cir. 2022) (filed tariffs "'[c]arry the force of federal law,' in the same sense as ordinary federal regulations" (citation omitted)).

Accordingly, when FERC exercises its jurisdiction to approve a tariff that directly affects rates subject to FERC's jurisdiction, that approval preempts a state decision adopting a rationale that "runs directly counter to FERC's order," and that

[5] Specifically, FERC had approved a methodology requiring PJM to make a certain calculation, but that did not bear on the specific issue that the PUC was deciding. *Metro. Edison*, 767 F.3d at 362.

undercuts the federal scheme. *See Nantahala*, 476 U.S. at 968. This is so even where the state agency purports to exercise traditional state functions. *Id.* at 970 (finding preemption even where state was purporting to set retail rates within its jurisdiction).

4. The PUC Cannot Challenge the Merits of PJM's FERC-Approved Tariff in Court.

At points, the PUC attempts to argue the merits of PJM's FERC-approved methodology: relying on the Market Monitor,[6] the PUC contends that a proper benefit-cost analysis would account for any increase in energy payments by customers currently benefiting from congestion. The Market Monitor acknowledged that this view is in direct conflict with FERC's. *See supra* at 21-22.

This is not the appropriate forum to decide whether PJM's tariff is good or bad. Case law is clear that "tariffs duly adopted by a regulatory agency are not subject to collateral attack in court." *Granite State Ins. Co. v. Star Mine Servs., Inc.*, 29 F.4th 317, 321 (6th Cir. 2022) (citation omitted); *see also, e.g.*, *George E. Warren LLC v. Colonial Pipeline Co.*, 50 F.4th 391, 397-98 (3d Cir. 2022) (rejecting "back-door," "collateral attack" on a party's rights under a filed tariff). If the PUC or any

[6] The Market Monitor is a PJM-employed consultant with "no authority to enforce or to interpret the PJM Agreement or Tariff, to direct changes in the market's operations, to alter market rules, or to police individual members' compliance." *Old Dominion Elec. Coop. v. FERC*, 892 F.3d 1223, 1233 (D.C. Cir. 2018); SMF ¶¶44-47.

other state commission disagrees with the tariff FERC approved, it can file a complaint at FERC and urge FERC to change its policy. *See* 16 U.S.C. §824e; *e.g.*, *PJM*, 156 FERC ¶61,120 (2016) (considering requests to remove a particular project from the regional transmission plan based on allegations that PJM's benefits analysis was faulty). If FERC denies the complaint, the PUC can seek judicial review under the Administrative Procedure Act. 16 U.S.C. §825*l*. Under the Supremacy Clause, however, the PUC cannot override PJM's FERC-approved methodology for determining whether a line is needed to reduce congestion based on a belief that FERC's policy is bad.[7]

II. The PUC Order Violates the Dormant Commerce Clause in Purpose and Effect.

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).

[7] The PUC questions the binding force of the 2014 revisions to PJM's Operating Agreement. PUC Mem. 29-30. But the methodology at issue here was adopted in 2008 in a fully reasoned FERC order. *See* 2008 FERC Order, P 67. Moreover, "the Supreme Court has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review"; rather, "the doctrine applies as long as the agency has in fact authorized the challenged rate." *McCray v. Fid. Nat'l Title Ins. Co.*, 682 F.3d 229, 238-39 (3d Cir. 2012).

First, if state regulation is "motivated by simple economic protectionism," it is "subject to a virtually *per se* rule of invalidity, which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose." *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007). This "stricter rule of invalidity" applies where a state acts with "discriminatory purpose," *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984), or if the regulation "discriminates against interstate commerce 'either on its face or in practical effect.'" *Cloverland-Green*, 298 F.3d at 210-11.

Second, under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), even "even-handed[]" regulation that merely "incidentally" burdens interstate commerce is invalid if the burdens are "'clearly excessive in relation to the putative local benefits,'" *Cloverland-Green*, 298 F.3d at 211.

Here, the PUC's Order is both *per se* invalid and fails *Pike*.

A. The PUC Order Is Discriminatory and Thus *Per Se* Invalid.

The PUC Order discriminates on its face against interstate commerce. In short, the PUC blocked the development of an instrumentality of interstate commerce expressly because it sought to preserve the low prices for Pennsylvania customers that result when the flow of power across the interstate grid is impeded. That is a textbook violation of the dormant Commerce Clause.

The PUC found 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." PUC Order at 59. In deciding not to allow the development of a new instrumentality of interstate commerce, *i.e.*, a new transmission line, the PAPUC concluded that, despite the regional benefits, "[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania is [the PUC's] concern." PUC Order at 59. The PUC denied Transource's application specifically to avoid that "negative impact [on] the citizens and consumers of the Commonwealth." *Id.* at 58-59.

This economically protectionist basis for denying approval contravenes on-point Supreme Court precedent. In *New England Power Co. v. New Hampshire*, 455 U.S. 331, 339, 344 (1982), the Supreme Court invalidated a New Hampshire Public Utilities Commission order prohibiting a utility from selling low-cost hydroelectric power outside the state. The New Hampshire Commission, like the PUC, "made clear that its order is designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states" by preventing the export of low-cost power. *Id.* at 339. The Supreme Court held

that the order was "precisely the sort of protectionist regulation that the Commerce Clause declares off-limits." *Id.*[8]

In seeking to protect Pennsylvania consumers from price increases, the PUC "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, Inc. v. Healy*, 512 U.S. 186, 203 (1994). 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, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391-92 (1994).

The PUC Order cannot survive the "rigorous scrutiny" that applies to economically protectionist measures: the PUC has the burden to show its actions were the only way to achieve a legitimate local interest. *Cloverland-Green*, 298 F.3d at 210-11. And "simple economic protectionism" in the form of preserving lower prices for in-state residents is not a legitimate state interest. *New England Power*, 455 U.S. at 339.

[8] It is true that New Hampshire banned exports of hydroelectricity by statute, whereas the PUC has sought to prevent electricity exports by applying a state regulation. *Cf.* PUC Mem. 36 n.5. But that purported distinction is irrelevant. A burden does not need to amount to a total prohibition to violate the dormant Commerce Clause; any burden will do. *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).

B. The PUC Burdens Commerce in a Manner Disproportionate to Any Legitimate Local Benefits.

The PUC's Order should also be overturned because it flunks *Pike*'s balancing test. *Pike* invalidated a facially neutral state law because its "burdens" on interstate commerce were "clearly excessive in relation to the putative local benefits." 397 U.S. at 142. Routinely, courts have applied *Pike* to invalidate state actions that unduly burden interstate commerce.[9]

The PUC Order burdens interstate commerce by preventing the alleviation of congestion across state lines. The congestion PJM seeks to alleviate through the IEC Project "cause[s] load-serving entities in Virginia, Maryland, and Washington D.C. to rely on higher-cost generation." Recommended Decision at 51; SMF ¶61. From 2012-2016, largely out-of-state customers paid $800 million more for electricity because congestion prevented them from accessing lower-cost power. SMF ¶62. And the ALJ credited testimony that building the IEC Project would benefit those customers by almost $1 billion over fifteen years by increasing the free flow of electricity across state lines. Recommended Decision at 97; SMF ¶94. By denying Transource's application related to the IEC Project, the PUC is blocking those cost

[9] *See, e.g., Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1261-62 (11th Cir. 2012); *Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc.*, 401 F.3d 560, 573-74 (4th Cir. 2005); *Alliant Energy Corp. v. Bie*, 330 F.3d 904, 912-14 (7th Cir. 2003); *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1069-72 (8th Cir. 2000).

savings and keeping that low-cost electricity constrained in Pennsylvania and other upstream states.

Moreover, in assessing the above burdens on interstate commerce, the Court must further consider the implications if other states adopt the PUC's approach. *See U & I Sanitation*, 205 F.3d at 1071 (courts "must ascertain 'what effect would arise if not one, but many or every, jurisdiction adopted similar [regimes]'" (quoting *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989) (alteration omitted)). The PUC's Order invites state regulators to veto transmission projects that reduce congestion on the interstate grid—no matter how great the regional and national benefits—whenever a particular project does not bring sufficient local benefits. That will enable the very fragmentation of the interstate market that the dormant Commerce Clause seeks to prevent.

C. The PUC's Arguments Are Meritless.

The PUC's few arguments in response are easily rejected. First, with respect to both *per se* discrimination and the *Pike* balancing test, the PUC suggests that it also considered increased power prices to other states and made a determination about "the overall projected economic impact of the IEC Project to 'the PJM region as a whole' and not just to Pennsylvania." PUC Mem. 35, 37; *see also* Franklin Br. 7-8. In short, the PUC insists that it knows better than the regional planner, PJM, what is needed to enhance the efficiency of the regional grid. The record of the

PUC's Order belies this self-serving characterization. Its decision was permeated by a focus on protecting Pennsylvania interests at every turn. *See supra* at 36.

Whether residents of other states might also be incidentally benefited by the PUC's protectionism, *cf.* PUC Mem. 35, is irrelevant under the dormant Commerce Clause. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 349, 350-54 (1977) (holding that North Carolina statute limiting ability to label food in specific way violated dormant Commerce Clause, despite fact that six other states would benefit); *Jones v. Gale*, 405 F. Supp. 2d 1066, 1081 (D. Neb. 2005) ("The Supreme Court has found that legislation favoring in-state economic interests is facially invalid under the dormant Commerce Clause, even when such legislation also burdens some in-state interests or includes some out-of-state interests in the favored classification."), *aff'd*, 470 F.3d 1261 (8th Cir. 2006); *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 279-80 (1988) (holding that scheme was discriminatory despite providing benefits to certain other states). It is likewise irrelevant (*cf.* PUC Mem. 35) that some Pennsylvania customers are harmed by the current congestion and would benefit from the project. *See Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 n.4 (1951). All that matters is Pennsylvania's decision to impede the flow of electricity across state lines because of its concern for "[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania" in the form of price increases. PUC Order at 59; SMF ¶106. If anything, the PUC's assertion that

it was really looking out for the region's interest just underscores the importance of a federal standard for regional planning.

Second, the PUC argues that its actions cannot constitute protectionism because they are "the very essence of state sovereignty." PUC Mem. 36. But the point of the dormant Commerce Clause is to constrain how states may exercise their sovereignty. "No one disputes that a State may enact laws pursuant to its police powers that have the purpose and effect of encouraging domestic industry. However, the Commerce Clause stands as a limitation on the means by which a State can constitutionally seek to achieve that goal." *Bacchus*, 468 U.S. at 271.

Finally, the PUC suggests that there is no evidence that any pricing disparity exists. PUC Mem. 36-37. This is belied by the PUC's own findings, which, as discussed above, show that customers in Maryland, Virginia, and D.C. suffer higher prices because of congestion; that reducing congestion through the IEC Project would benefit PJM as a whole; but that Pennsylvania customers would pay higher prices as the electricity currently bottled up in Pennsylvania could flow freely to other markets. SMF ¶¶94, 106.[10] The problem is not theoretical, nor is the solution speculative. *Cf.* PUC Br. 37.

[10] The PUC invokes an alleged "conce[ssion]" by Transource that it cannot determine whether the IEC Project "would have any particular effect on the rates paid by any particular retail customer." PUC Mem. 37. This is disingenuous. Transource did produce evidence of the aggregate effect on net load payments; this just does not yield conclusive information about the rates paid by any particular retail

III. Transource's Federal Claims Were Properly Preserved.

The PUC's assertion of claim preclusion fails for two reasons. PUC Mem. 38-39. First, it misapprehends the *England* doctrine, which is an *exception* to ordinary claim-preclusion principles. Second, even under Pennsylvania's claim-preclusion law, Transource's claims are not precluded both because the PUC acquiesced in the Commonwealth Court and because the Commonwealth Court expressly preserved Transource's ability to pursue its federal claims in this Court.

A. The PUC's Claim Preclusion Argument Fails Because of Transource's Proper *England* Reservation.

In *England v. Louisiana State Board of Medical Examiners*, the Supreme Court held that a party challenging state action under both federal and state law may pursue state-court review of its state-law claims, and reserve its federal claims for federal court. 375 U.S. at 415. *England* is an *exception* to the Full Faith and Credit Statute, 28 U.S.C. § 1738, which otherwise would apply state rules of preclusion to the state court decision. *See Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 821-22 (3d Cir. 1994). The Court held that a party only forgoes its right to litigate federal claims in federal court when it "freely and *without reservation*

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customer because any particular customer's rates "reflect retail ratemaking policies that may differ across states and retail customers." Transource Resp. to PUC SMF ¶50.

submits [the] federal claims for decision by the state courts, litigates them there, and has them decided there." *England*, 375 U.S. at 419 (emphasis added).

To preserve the right to litigate the federal claims in federal court, the party must only "inform [the state] courts what his federal claims are, so that the state statute may be construed 'in light of' those claims." *Id.* at 417 (citation omitted). Here, Transource properly reserved its ability to litigate its federal claims in federal court, and so its federal claims are not barred by claim preclusion.

1. Transource's *England* Reservation Was Effective.

Here, Transource properly reserved its ability to litigate its claims in this Court under *England*. Transource initially filed suit in this Court. Because this Court could not adjudicate Transource's state-law claims against state officials under the Eleventh Amendment, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), Transource then filed its state claims in the Commonwealth Court. In accordance with *England*, Transource informed the state court of its federal claims. *See England*, 375 U.S. at 417. At no point did Transource "voluntarily ... and fully litigate[ ] [its] federal claims in the state courts." *Id.* at 421. Nor did the state court decide those claims. SMF ¶¶128-129. As a result, its *England* reservation was valid.

In light of Transource's *England* reservation, the Commonwealth Court judgment does not bar Transource's ability to pursue its federal claims here. The Third Circuit has held that that "the traditional rules of res judicata and collateral

estoppel as applied by [the Full Faith and Credit Statute] do not apply to state proceedings that follow … abstention *and* an *England* reservation." *Instructional Sys.*, 35 F.3d at 822 (emphasis added).[11]

England carves an exception to the Full Faith and Credit Statute in order "to balance the parties' rights to a federal forum with … federalism concerns." *Id.* at 820. This makes sense, because if *England* were *not* an exception to ordinary claim-preclusion principles, *England* reservations would be meaningless; state-court judgments would always claim-preclude the federal claims that the plaintiffs reserved for federal court. Thus, as *Instructional Systems* explains, an *England* reservation means that the Full Faith and Credit Statute (and therefore state preclusion law) does not apply. *Id.*

[11] *Instructional Systems* dealt with *Pullman* abstention, but the Third Circuit has applied *England* to cases involving other abstention doctrines and judicial stays as well. *See Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071-72 (3d Cir. 1990) (applying *England* where the federal court did not abstain, but only stayed the action while state-court proceedings were also pending); *N.J. Educ. Ass'n v. Burke*, 579 F.2d 764, 772-75 (3d Cir. 1978) (applying *England* where litigants did not "press" certain federal claims in the state proceedings following dismissal under *Younger*); *see also Metro. Edison*, 767 F.3d at 367 (noting that the plaintiffs "could have withdrawn their federal issues from the state proceeding and brought them in federal court" when they filed a state petition for review of a PUC Order prior to bringing a federal action).

2. Defendants' Acquiescence Is Not Required for an *England* Reservation To Be Valid.

In its decision on the Motion to Dismiss, the Court suggested that the validity of an *England* reservation depended upon a defendant's acquiescence to claim-splitting. ECF No. 118 at 9-10. It is true that a defendant's acquiescence is one scenario in which claim-splitting is permitted under Pennsylvania law, discussed further in Section III.B.1 below. But Pennsylvania law is not relevant if the *England* reservation was valid—precisely because the *England* reservation is an exception to the Full Faith and Credit Statute. And the validity of an *England* reservation does not depend upon a defendant's acquiescence.

Indeed, the Third Circuit has expressly *rejected* the notion that the actions of third parties determine whether an *England* reservation is effective. Rather, "[i]t is the actions of the displaced litigant which are controlling." *Instructional Sys.*, 35 F.3d at 820-21; *see also Kovats v. Rutgers*, 749 F.2d 1041, 1047 (3d Cir. 1984) (holding that "when a state court resolves issues beyond those upon which the federal court abstained, the federal court must be careful not to deprive plaintiffs of their right to a federal adjudication of a federal claim"). Once again, this is consistent with *England*'s fundamental premise: that a reservation of federal claims for federal court is ineffective only when *the litigant* has "freely and without reservation litigated his federal claims in the state courts." *England*, 375 U.S. at 419-20. If third

parties such as the opposing party could obstruct an *England* reservation simply by declining to give consent, *England* would be a nullity.

In suggesting that the defendant's acquiescence matters, the Court cited two Third Circuit cases considering *England* reservations, *R&J Holding Co. v. Redevelopment Authority of County of Montgomery*, 670 F.3d 420 (3d Cir. 2011), and *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064 (3d Cir. 1990). But neither case holds that the acquiescence of the defendant is required for an *England* reservation to be effective. In *Bradley*, the plaintiff filed a suit in federal court while local dismissal proceedings were ongoing. The district court did not formally abstain, but stayed the federal proceedings during the state proceedings. *Bradley*, 913 F.2d at 1072. The Third Circuit determined *both* (1) that the plaintiff "validly reserved his federal claims in the state court proceedings" *and* (2) that exceptions to claim preclusion applied under the Restatement (Second) of Judgments because both the opposing party and the state courts had acquiesced to the splitting of the plaintiff's claims. *Id.* at 1070-73. Multiple courts have recognized that these were distinct holdings: the first concerned the validity of the *England* reservation, which does not depend on whether the exceptions to claim-splitting in the Restatement (Second) of Judgments are satisfied. *See R&J Holding*, 670 F.3d at 429 n.6 (describing these as "two entirely independent holdings"); *Coover v. Saucon Valley Sch. Dist.*, 955 F. Supp. 392, 409 (E.D. Pa. 1997) ("The Third Circuit in *Bradley*

relied on *two separate grounds* when it held that claim preclusion did not apply."). Although *Bradley* noted the acquiescence of the defendant and the state tribunal in the plaintiff's *England* reservation, it specifically stated that it was *not* "deciding the general parameters of an *England* reservation" and at no point suggested that such acquiescence was mandatory. 913 F.2d at 1072.

In turn, *R&J Holding* involved a specific context—a federal challenge to state condemnation proceedings—where the Supreme Court at the time had at least strongly suggested that an *England* reservation was not available. *See R&J Holding*, 670 F.3d at 428 (discussing *San Remo Hotel v. City & Cnty. of San Francisco*, 545 U.S. 323 (2005)). However, the Third Circuit did not need to address whether an *England* reservation continued to be available in that specific context, because the defendants had independently failed to object to the plaintiff's claim splitting. *Id.* at 428-29. Like *Bradley*, *R&J* does not suggest that the opposing party's or state court's acquiescence is *required* for an *England* reservation to be effective—it holds only that an objection to an *England* reservation can be waived.

Finally, to the extent the Court held otherwise in ruling on the PUC's Motion to Dismiss, the Court is not bound to adhere to that reasoning. "Interlocutory orders … remain open to trial court reconsideration, and do not constitute the law of the case." *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 493 (3d Cir. 2017) (citation and alterations omitted). Accordingly, "[a] court has the power

to revisit prior decisions of its own … in *any circumstance*." *Fouad v. Milton Hershey Sch. & Sch. Tr.*, No. 19-cv-253, 2020 WL 5775018, at *4 (M.D. Pa. Sept. 28, 2020) (Wilson, J.); *Myers v. City of Wilkes-Barre*, 448 F. Supp. 3d 400 (M.D. Pa. 2020) (Wilson, J.). Thus, to the extent necessary, the Court can and should reconsider its prior order and find that the *England* reservation was properly made.

B. Even if Pennsylvania Preclusion Law Applied, Transource's Claims Would Not Be Precluded.

Even if there were no *England* reservation and Pennsylvania's law of preclusion did apply, that body of law recognizes exceptions to the rule against claim-splitting. One exception, as the Court recognized, is where the defendant acquiesces in claim splitting. *See Bradley*, 913 F.2d at 1072. Another exception is where "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." *Id.* Both exceptions apply here.

1. The PUC Acquiesced in Transource's Reservation of Its Federal Claims for This Court.

The PUC acquiesced in Transource's claim-splitting. At the outset of the state litigation, the PUC opposed Transource's motion to expedite on the grounds that Transource's "action at the federal level increases the likelihood that PJM will remove the transmission project from [the RTEP]." SMF ¶¶124-125. The court then denied expedition. *Id.* ¶126. Having persuaded the Commonwealth Court to deny expedition based on the federal litigation, the PUC cannot now contend the federal

litigation is precluded. *See Perelman v. Adams*, 945 F. Supp. 2d 607, 619-20 (E.D. Pa. 2013).

2. The Commonwealth Court Expressly Reserved Transource's Right to Litigate Its Federal Claims Before This Court.

Additionally, the Commonwealth Court expressly reserved Transource's right to pursue its federal claims here. It noted the PUC's argument that Transource "impliedly placed the federal issues before [the state court] ... by arguing that the Commission had to accept PJM's determinations." SMF ¶¶128-129. It also acknowledged that this Court had abstained due to uncertainty over whether Transource would "protectively brief" the federal claims before the state court.

However, the Commonwealth Court recognized that Transource ultimately had *not* protectively briefed its federal claims, and "read [Transource's] arguments regarding the Commission's consideration of the PJM determinations as relating to substantial evidence, rather than relating to federal preemption." SMF ¶129. The Commonwealth Court determined that accordingly, it would "*not address the federal claims that Transource has reserved for consideration in the District Court* and [would] focus instead on whether the Commission's decision is correct under Pennsylvania law." *Id.* (emphasis added); *contra* Franklin Br. 16-17.

This was an "express reservation" of Transource's right to maintain its federal court action. *See, e.g., Dodd v. Hood River Cnty.*, 59 F.3d 852, 862 (9th Cir. 1995) (finding that the state courts had reserved a federal issue by repeatedly

acknowledging that the federal constitutional claims were not before them); *Torres v. City of Albuquerque ex rel. Albuquerque Police Dep't*, No. 12-cv-1048, 2015 WL 13665376, at *5 (D.N.M. Mar. 2, 2015). Thus, claim preclusion does not apply, even if Pennsylvania law were relevant.

C. The PUC Has Waived Its Issue Preclusion Argument.

In a footnote in the background section to its brief, the PUC mentions its prior issue preclusion argument. PUC Mem. 5-6 n.1. "[A]rguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived." *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997); *accord Orner v. Int'l Lab'ys, Inc.*, No. 20-cv-449, 2020 WL 9749413, at *2 n.2 (M.D. Pa. Dec. 21, 2020) (Wilson, J.). Moreover, the PUC's not-quite-request for supplemental briefing should be rejected. The PUC had the chance to reargue the issue. *See Bomba v. Pa. Dep't of Corr.*, No. 16-cv-1450, 2019 WL 177471, at *2 (M.D. Pa. Jan. 11, 2019) (rejecting request for supplementary briefing on additional summary judgment theories raised by defendants). The Court should not permit the PUC to attempt to resurrect this argument in its next brief.

In any event, this Court correctly ruled that the PUC's Order is not entitled to issue-preclusive effect and the PUC offers no argument as to why it should be reconsidered. ECF No. 118 at 12. A state agency's legal determination on a matter of constitutional law is "beyond the scope" of issue preclusion until that

determination is reviewed by a court. *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 192-93 (3d Cir. 1993); *see also* ECF No. 68 at 10-13. Indeed, federal courts routinely review whether state agency decisions are preempted without treating those agencies' own determination on preemption as preclusive. *See id.* at 11-12.

The PUC notes *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129 (3d Cir. 1998). PUC Mem. 5-6 n.1. But that case involved a federal statute that explicitly granted state agencies a role in implementing FERC regulations, and the Third Circuit held that it "need not resolve" in that case whether preclusion generally applies to whether a state agency decision is preempted. 159 F.3d at 135; *see also* ECF No. 68 at 14. As for *Shank v. East Hempfield Township*, No. 09-cv-2240, 2010 WL 2854136 (E.D. Pa. July 20, 2010), that unpublished decision does not explain why *Edmundson* should be limited to the First Amendment context, other than asserting that First Amendment issues "particularly … lie within the expertise of courts, not the expertise of administrators." *Id.* at *12. That is true of constitutional law generally, including the Supremacy Clause. *Edmundson* itself did not expressly limit its rule to First Amendment cases and there is no principled reason for doing so.

CONCLUSION

The Court should grant summary judgment to Transource.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order dated February 1, 2023 because it contains 11,985 words, as measured by the word-count feature of Microsoft Word 2016.

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