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)

REPLY BRIEF IN SUPPORT OF TRANSOURCE'S
CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE RULINGS

OTHER AUTHORITIES

INTRODUCTION

The Court should grant summary judgment to Transource. The PUC denied Transource permission to build a transmission project based on the PUC's express disagreement with FERC about how to count the benefits and costs of reducing congestion on the regional grid. The new line would allow energy to flow more freely from Pennsylvania into other states within the PJM region, and the PUC gave weight to increased wholesale energy prices that Pennsylvania customers would pay as a result—an approach that FERC has specifically rejected. The PUC's decision is preempted because it aims at, and directly conflicts with, the methodology approved by FERC. Moreover, the PUC's claimed authority would seriously impede FERC's ability to ensure just and reasonable wholesale energy prices and an efficient interstate grid. Every new congestion-reducing transmission line will result in higher prices in front of the bottleneck. If a state could veto a line on that basis, new interstate lines to reduce congestion would never get built.

The PUC's decision also violates the dormant Commerce Clause because it prevents the free flow of electricity across state lines in order to preserve the low wholesale prices Pennsylvania customers currently enjoy due to transmission constraints. Preventing interstate commerce to preserve local economic benefits is classic economic protectionism forbidden by the dormant Commerce Clause.

1. The PUC frames the preemption question as "boil[ing] down" to whether the PUC's denial of a certificate was "a siting and permitting decision or a 'transmission planning' decision." PUC Resp. Br., ECF 165, at 1. To be sure, the decision was made in a siting proceeding and labeled by the PUC as a siting decision. But preemption is not determined by how a state labels its actions. Instead, "a proper analysis requires consideration of what the state law in fact does." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013).

Here, in substance, the PUC's decision aimed at and conflicted directly with FERC's decision regarding regional planning. FERC adopted a particular method for measuring the benefits and costs of constructing a new line to reduce *regional congestion*. The PUC disagreed with that method because of its impact on the wholesale rates that Pennsylvania customers would pay. So the PUC overrode FERC's method in favor of its own. The PUC's "effort to invade the province of federal authority must be rejected." *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 377 (1988).

Moreover, even if the decision here could somehow be labeled a "siting" decision that did not conflict directly with FERC, it would still be preempted because of its effects. A state commission cannot exercise its police power in a manner that would pose an obstacle to the achievement of federal objectives. And if states could deny siting approval to preserve the benefits of transmission congestion (lower

prices on the side of the bottleneck with lower-cost energy) for their own citizens, the grid would end up fragmented and inefficient, frustrating FERC's efforts to ensure just and reasonable energy prices for *all* customers connected to it. The PUC makes no effort to refute that consequence of its position.

Bizarrely, the PUC's main defense in its Response brief is to claim the absence of any evidence of pricing disparities resulting from congestion. But congestion is, *by definition*, pricing disparities that arise when the transmission of electricity is constrained. The PUC found as much. The PUC also asserts that congestion has declined since 2014. But that is irrelevant: congestion was not eliminated, and the project continues to be needed to reduce the congestion that remains. And congestion recently has increased again. There is no dispute that PJM reevaluates each year whether the project is needed and found each year that it is. *See* Transource Resp. to PUC Statement of Facts, ECF 159, ¶41; Transource SMF ("SMF") Ex. 31, ECF 157-31, at 5.

The PUC also contends Transource would relegate the state to "rubber stamping" a project. PUC Resp. Br. 5. Not so. In deciding a siting application, state commissions can consider important questions, including route and environmental compatibility. Such considerations can be a legitimate basis for denying approval notwithstanding the need to reduce regional congestion.

2. Regarding the Commerce Clause, the PUC's intent was clear: "The potential negative and practical impact on the citizens and consumers of Pennsylvania is our concern." SMF Ex. 1, ECF 157-1 ("PUC Order"), at 59. Therefore, the PUC rejected "the PJM-approved criteria and methodology." *Id.* It explained: "[T]he 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." *Id.* Blocking an instrumentality of interstate commerce to preserve in-state economic advantages (here, lower prices) is a paradigmatic dormant Commerce Clause violation. *See New England Power Co. v. New Hampshire*, 455 U.S. 331, 339 (1982) (holding New Hampshire violated dormant Commerce Clause when it blocked the export of cheap hydropower).

3. Finally, the PUC raises two new arguments on preclusion. First, it criticizes Transource for not moving for reconsideration regarding an aspect of the Court's motion-to-dismiss order. But the Court directed Transource to make its arguments on summary judgment instead. *See* 8/11/22 Tr. 12:7-13:6 (attached as Exhibit A). Second, the PUC argues that Transource should have raised its *England* reservation before the PUC. That makes no sense, as Transource's claims arise from the PUC's decision. *England* is a doctrine about where *challenges* to state action may be brought. Here, Transource is challenging the PUC's decision. Accordingly, it made its *England* reservation at the earliest possible moment—upon filing its

challenge in court. Last, the PUC does not respond to Transource's argument that even if *England* did not apply, the Commonwealth Court acquiesced to Transource's pursuit of its federal claims in federal court. Under Pennsylvania law, claim preclusion therefore does not apply. The PUC has waived any response to this point.

ARGUMENT

I. Transource Is Entitled to Summary Judgment on Its Preemption Claim.

A. Preemption Depends on Substance, Not Labels.

The PUC asserts that its order was a "siting and permitting decision," PUC Resp. Br. 5, because it was issued in a siting proceeding and resulted in the denial of a siting permit. *Id.* at 5-6. But in a preemption case, courts do not accept the labels a state uses to describe its actions. They look at what the state actually *does*. *See Wos*, 568 U.S. at 637 ("a proper analysis" "[i]n a pre-emption case … requires consideration of what the state law in fact does," not how a regulator "might choose to describe it"); *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452, 464 (2012) (holding that characterization of state statute as non-preempted based purely on how it was "fram[ed]" would "make a mockery of the … preemption provision").

That is the lesson of cases like *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), *Mississippi Power & Light ex rel. Moore*, 487 U.S. 354 (1988), and *Appalachian Power Co. v. Public Service Commission of West Virginia*, 812 F.2d 898 (4th Cir. 1987). The PUC minimizes those cases because they involve

ratemaking, PUC Resp. Br. 11, but their *principle* is broader: in each, the state *purported* to be exercising an authority reserved to it by Congress—in those cases, setting retail rates—but *in substance* the state was using that purported authority to override a FERC-approved tariff. The state action was therefore preempted.

In *Mississippi*, for example, FERC allocated the costs of a nuclear power plant among various utilities based on a systemwide assessment of the utilities' needs. Mississippi, purportedly exercising its retail ratemaking authority to assess prudence, asserted that fewer costs should be allocated to the state's customers "in light of local conditions." 487 U.S. at 376. The Supreme Court held this was preempted: the state commission "lack[ed] jurisdiction to reevaluate the reasonableness of those transactions" because doing so would "travers[e] matters squarely within FERC's jurisdiction." *Id.*

This case is analogous. FERC has approved a methodology for determining whether a transmission line is needed to reduce congestion on the regional grid. Pennsylvania, purporting to exercise its siting authority, expressly rejected that methodology in favor of one that gave weight to "the potential negative impact, including rate increases, to the customers in the Commonwealth." PUC Order at 59. As in *Mississippi*, "a state agency's efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." *Mississippi*, 487 U.S. at 377.

B. The PUC's Decision—That the Project Was Not Needed to Reduce Regional Congestion—Directly Conflicts With FERC's.

The PUC claims its decision "was a siting and permitting decision," PUC Resp. Br. 5, but offers only *ipse dixit*. Regardless of the label, however, the Order is preempted because it directly conflicts with FERC's pronouncement on the same subject: whether a line is needed to reduce congestion on the regional grid.

First, the Supreme Court has emphasized the importance of "the target at which the state law aims in determining whether that law is pre-empted." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 385 (2015). Here, the PUC took aim directly at PJM's FERC-approved planning process, as its own words show:

> [W]here, as here, the proposed regional planning involves alleviating economic congestion, the result of which is predicted to lead to a substantial increase in utility rates within the Commonwealth, the Commission's review of the PJM-approved project warrants examination of the underlying data and congestion trends which PJM relied upon in assessing the need to alleviate economic congestion.

See PUC Order at 60. The PUC then rejected PJM's FERC-approved methodology for determining whether new transmission was needed to remediate region congestion and applied its own preferred methodology. *Id.* at 59-61. Even the Market Monitor, on whom the PUC relies, acknowledged that the PUC's methodology for weighing regional costs and benefits is "not consistent" with and "absolutely" conflicts with the FERC-approved policy. SMF ¶53.

Second, evaluating the costs and benefits of reducing congestion on the interstate grid is at the core of FERC's regional transmission planning. As FERC explained in Order 1000 (in a passage quoted by the PUC, Resp. Br. 6), regional transmission planning includes "the processes used to identify and evaluate transmission system needs and potential solutions to those needs," and FERC expressly distinguished the identification of such needs and solutions from "specific substantive matters traditionally reserved to the states," such as siting. *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, FERC Order No. 1000, 76 Fed. Reg. 49,842, P 107 (2011) ("Order 1000"). The D.C. Circuit then affirmed FERC's authority to oversee the evaluation of transmission system needs, rejecting a claim that Order 1000 intruded on state authority. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 63-64 (D.C. Cir. 2014) (per curiam). The D.C. Circuit could not have reached that decision if the evaluation of regional transmission system needs, including the determination of when a new line is needed to reduce congestion on the interstate grid, was a *siting* decision reserved exclusively to states.

Third, the ordinary meaning of the term "siting" does not encompass evaluating regional needs. "[S]iting" is specific to a particular location. *See* Site, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/site ("[T]o place on a site or in position"). Tellingly, the PUC cannot point to any other state

commission that has denied siting approval based on a rejection of the FERC-approved methodology for determining whether a line is needed to reduce regional congestion. Indeed, the Maryland Public Service Commission refused to entertain such an argument, holding correctly that whether the line was needed to reduce congestion on the regional grid was controlled by PJM's FERC-approved tariff. *See In re Application of Transource Maryland LLC*, No. 9471, 2020 WL 3977589, at *41, P 142 (Md. Pub. Serv. Comm'n June 30, 2020) (discussed at Transource Br. 23).

Fourth, the PUC's theory has no limiting principle: any rationale, no matter how clearly preempted, could be labeled a "siting" decision so long as the rationale was used to deny siting permission. Suppose, for example, that the PUC agreed to site the line only on condition that Transource accepted a PUC-dictated rate for its transmission service. Under the PUC's theory, that too would be a "siting" decision—even though it plainly intrudes on FERC's authority to set transmission rates. 16 U.S.C. § 824(b).

C. The PUC's Remaining Arguments Are Without Merit.

The PUC's other arguments regarding preemption are equally without merit.

First, the PUC contends that FERC and Congress did not intend to preempt state authority over siting. PUC Resp. Br. 10, 14-15. That just begs the question. As discussed above, the PUC's decision was not in substance a siting decision, and

the Supremacy Clause leaves no room for states to override FERC when FERC has spoken directly to a matter, as it has here regarding whether lines are needed to reduce regional congestion.

Second, the PUC contends that planning does not create any obligation to build; that transmission developers must still get state approvals; and that state commissions are not a "rubber stamp." PUC Resp. Br. 5-7, 10, 14. All of these arguments are directed at a straw man. Transource does not contend that a PJM determination of need means a line *must* be constructed; it does not deny that transmission developers must get state approvals; and it does not reduce the state approval process to a rubber stamp. To the contrary, state commissions retain authority over important issues genuinely related to *siting*—for example, environmental compatibility and mitigation. Here, for instance, the ALJ considered at length the environmental impact of the IEC Project and would have denied siting approval on that basis. *See* SMF Ex. 7, ECF 157-7 ("Recommended Decision"), at 107-24. Transource disagrees with the merits of that recommendation—which the PUC did not reach, PUC Order at 54-56—but does not dispute that environmental considerations are legitimately within the scope of the state's review. *See also, e.g.*, *Application of PPL Elec. Util. Corp.*, 2015 Pa. PUC LEXIS 77, at *77-78 (Pa. Pub. Util. Comm'n Feb. 27, 2015) (recommending approving transmission line application on condition that utility avoid archeological resources by, for example,

rerouting access roads and relocating work areas), *adopted*, Order, A-2014-2430565 (Pa. Pub. Util. Comm'n Apr. 23, 2015).

Transource's argument in this case is narrow: what a state may *not* do under the rubric of "siting" is reject PJM's FERC-approved methodology for assessing whether a line is needed to reduce congestion on the regional grid and impose its own conflicting methodology in place of PJM's. That is all—but that is exactly what the PUC did here.

Third, the PUC asserts that "need" is a broad term that encompasses more than just a transmission planning determination. PUC Resp. Br. 6.[1] Maybe so, but here the PUC did not engage in any broader assessment of the public interest. Its need discussion focused on disagreement with how PJM calculated the benefits and costs of removing congestion—specifically, PJM's decision (with FERC's express approval, *see* Ex. 8, ECF 157-8 ("2008 FERC Order"), P 67) to exclude from

[1] The PUC cites a FERC order regarding whether FERC should treat need determinations by regional transmission organizations ("RTOs") as binding when FERC exercises its "backstop" siting authority under 16 U.S.C. § 824p. PUC Resp. Br. 7-8 & n.2. FERC did not exercise that authority here, but in any event, the cited passage does not help the PUC. Section 824p contains numerous statutory criteria that must be satisfied for FERC to site a transmission line. Accordingly, FERC observed that it would give the RTO approval due weight but would also consider "all other relevant factors[ ] in determining whether the statutory criteria have been met." *Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities*, FERC Order No. 689, 117 FERC ¶ 61,202, PP 37, 43-44 (2006).

consideration the increased wholesale energy prices that would be paid by the Pennsylvania residents currently benefiting from congestion. PUC Order at 52-64.[2] The PUC's decision is a direct assault on the PJM methodology, not a consideration of other dimensions of the public interest.

Fourth, the PUC argues that congestion has declined since 2014. PUC Resp. Br. 12. But some congestion still remains, and under the FERC-approved methodology the line is still needed. PJM's FERC-approved tariff provides a process for annually re-evaluating whether projects like the IEC Project are still needed to reduce congestion. *See* SMF Ex. 4, ECF 157-4, § 1.5.7(f). Although congestion declined, PJM nevertheless continued to determine annually that the project remains needed: its benefit-cost ratio has at all points remained above the 1.25:1.0 threshold. *See* SMF ¶79; *see also* Transource Response to PUC Suppl. SMF ¶141.[3] And in the most recent re-evaluation of the IEC Project, the benefit-cost ratio was at least 2.48:1.0, due to an increase in congestion. *See* SMF ¶¶115-116. Given

[2] Those customers will not pay any costs of constructing the project itself; under the FERC-approved tariff, those costs will be borne solely by the customers whom the project will benefit through lower wholesale energy prices. SMF ¶41.

[3] The PUC has cited one occasion where PJM estimated the benefit-cost ratio to be 1.0:1.0. *See* PUC Answer to Transource SMF, ECF 164, ¶¶79, 141. But as that document shows, the benefit-cost ratio even at that time was 1.44:1.0. *See* PUC Reply Ex. B, ECF 164-2, at 88. The PUC erroneously relies on a comparison of benefits to costs that include sunk costs. Multiple witnesses, including PJM's, explained why that is not the proper metric. *See* Transource Response to PUC Suppl. SMF ¶141.

PJM's annual re-evaluations, the PUC's reliance on congestion data to argue that the line is no longer needed just underscores its conflict with FERC. PJM's FERC-approved methodology shows that the line continues to be needed, notwithstanding changes in congestion.

Nothing in the Commonwealth Court decision holds otherwise, *contra* PUC Resp. Br. 12. The Commonwealth Court accepted the PUC's conclusion that congestion had *decreased* on the AP South Reactive Interface (and thus no longer supported a need for the IEC Project)—but did not find that congestion was *eliminated*.[4] The Commonwealth Court did not find that the IEC Project failed to satisfy PJM's benefit-cost methodology, and for that matter did not even address the 2022 reassessment of the project. *See* SMF Ex. 38, ECF 157-38, at 39-42.

Finally, the PUC disparages PJM's decision-making process as a "closed loop" and complains that PJM's decisions are "unreviewed." PUC Resp. Br. 8-10. That is false: the PJM planning process is open to stakeholder participation in a variety of ways. *See* Transource Response to PUC Suppl. SMF ¶137; SMF Ex. 5,

[4] The PUC's brief asserts that "the Commonwealth Court definitively held that there is no congestion in the region." PUC Resp. Br. 19. But the Commonwealth Court did not so hold. It held only that "congestion … has decreased significantly since 2014." Ex. 38, ECF 157-38, at 41. The Commonwealth Court also stated that the remaining congestion "no longer supports the need for the IEC Project," *id.*, but that was so as a matter of state law, which is all that the Commonwealth Court considered. As discussed above, under the FERC-approved methodology used by PJM, the remaining congestion does still support the need for the project.

ECF 157-5 ("Herling Report"), at 13-14. And if the PUC believes a PJM decision is unsupported by evidence or conflicts with PJM's tariff, the PUC can challenge the decision at FERC under Section 206 and obtain an evidentiary hearing when appropriate. *See* 16 U.S.C. § 824e(a); *see, e.g.*, *PJM Interconnection, L.L.C.*, 156 FERC ¶ 61,120 (2016) (entertaining but rejecting on the merits requests to remove a particular project from the regional transmission plan based on allegations that PJM's benefits analysis was faulty). The PUC can also urge FERC to change PJM's tariff. *See* 16 U.S.C. § 824e(a). But the PUC cannot take matters into its own hands and override the FERC-approved tariff. "The only appropriate forum for such a challenge is before [FERC] or a court reviewing [a relevant] Commission[ ] order," *Mississippi*, 487 U.S. at 375—a challenge that the PUC has never raised.

D. The PUC Order Is an Obstacle to Federal Objectives.

Even if the PUC order did not directly conflict with FERC's policy or were regarded as a siting decision in substance, it still would be preempted. Even when a state acts within the scope of its police power, its regulation is still preempted if the regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona v. United States*, 567 U.S. 387, 399 (2012). That is the case here.

"The goal of the [PJM's transmission planning] process is to address transmission system constraints that may relate to reliability issues and persistent

congestion at a system-wide level." Herling Report at 11. And, as Transource has explained, *any time* congestion is alleviated, wholesale electricity payments will rise for some customers and fall for others. *See* Transource Br. 24-25. This is a "basic mathematical reality…. [T]he elimination of a transmission constraint will reduce energy prices on one side of the constraint while increasing energy prices on the other side. Constraints prevent the delivery of the cheapest energy to load, raising the price of energy to customers on the constrained side and lowering it on the source side. Eliminating that constraint allows that resource to deliver its energy, lowering the price on the previously constrained side and raising it on the source side." Herling Report at 28.

If states could veto a project solely to retain the benefits of congestion for their citizens, no congestion-reducing transmission projects would ever get built, and FERC would be substantially hampered in its efforts to achieve an efficient interstate electric grid and ensure just and reasonable wholesale electricity rates. *See South Carolina*, 762 F.3d at 55-64 (describing FERC's interests in regional transmission planning).[5]

[5] As Mr. Herling explains: "Planning transmission to reduce or eliminate unhedged congestion seeks to ensure that the transmission system is efficient, economical, and equitable, ideally so that the lowest-cost generation can be used before higher-cost generation is called upon, so that customers in one area do not persistently pay higher costs for energy than customers in other areas…. [I]t would not be fair to customers in one area to consistently pay higher prices than others simply because the system's

The PUC's principal response is that the record somehow lacks "competent" or "admissible" evidence of congestion or a pricing disparity. PUC Resp. Br. 12-13. This is puzzling, since the very premise of the PUC's order is that the line would reduce congestion and thereby increase prices for Pennsylvania customers. *See* PUC Order at 59 ("Transource does not dispute 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."); ECF 164, PUC Answer to Transource SMF ¶72 (admitting that, if the line were built, transmission zones in Pennsylvania would "no longer have the benefit of [the] lower-cost power.").

As described above, congestion persists (even if it has decreased), *supra* at 12-13, and by definition, where there is congestion, there are price disparities. As Mr. Herling explains, "[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." Herling Report at 12. As the PUC admits, "[T]hose difference[s] in prices … is called congestion." ECF 164, PUC Answer to Transource SMF ¶43 (quoting the Market Monitor).

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design prevented the former customers from accessing the lowest-cost electricity[.]" Herling Report at 17.

The PUC concedes that "congestion" on the transmission grid "occurs when the least costly resources that are available to serve load in a given region cannot be dispatched because transmission facility limits constrain power flow on the system." *Id.* ¶10. The PUC further concedes that "[w]ithout a process for identifying economic transmission, PJM's customers located in load pockets and 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.*; *see* 2008 FERC Order, P 26. The $845 million more that customers largely in Virginia, Maryland, and the District of Columbia will pay if the line is not constructed is simply the aggregate, over the next 15 years, of the pricing disparities that the line would eliminate. Recommended Decision at 97 ("If approved, PJM projects that this Project will decrease wholesale power prices by approximately $845 million primarily for transmission zones south of the AP South Reactive Interface" over 15 years). The Court should reject the argument that there is no evidence of pricing disparities.

The PUC also attempts to inject confusion by citing a Transource discovery response regarding the IEC Project's effect on *retail* price disparities. The PUC's Order and PJM's transmission planning process are both focused on the effect of congestion on *wholesale* prices. FERC's jurisdiction is over *wholesale* energy sales. *See Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 153-54 (2016); 16 U.S.C.

§824(b). The table showing "Change in 15-Year Net Present Value of Net Load Payment," *see* SMF Ex. 26, ECF 157-26, on which the PUC relied in denying "need," *see* Recommended Decision at 31-32 (Findings of Fact #106-110); *id.* at 97, shows changes in "*wholesale* power prices" made in the aggregate for each utility in PJM. *Id.* at 97 (emphasis added). Wholesale prices of course will affect retail prices; as the PUC concedes, load serving entities will ultimately "pass those costs on to actual people who are consuming electricity." PUC SMF ¶49. But the price paid by any *particular* retail customer is a subject of state jurisdiction, *Hughes*, 578 U.S. at 154, and will depend on "retail ratemaking policies that may differ across states and retail consumers." *See* PUC SMF Ex. H, ECF 147-8, at 8. That is why Transource responded that it could not (and cannot) state the precise change in retail prices that any particular retail customer would experience due to the IEC Project. But nothing in Transource's position depends on identifying the rate impact for any particular retail customer.

Finally, the PUC asserts that its countermanding of the FERC-approved methodology for assessing need will not impair the "true federal objectives at issue." PUC Resp. Br. 13. In the PUC's view, those objectives "are related entirely to creating a transmission plan." *Id.* But transmission planning is critical to ensuring just and reasonable wholesale prices and the efficient operation of the grid. *See* Order 1000, P 4 (goal of transmission planning is to "meet transmission needs more

efficiently and cost-effectively"); *see also id.* P 12 (Order 1000 "will fulfill our statutory obligation to ensure that Commission-jurisdictional services are provided at rates, terms, and conditions of service that are just and reasonable"). The PUC's rationale opens the door for any state commission to veto any transmission project that improves the efficiency of the regional grid and produces lower costs overall, just because a given state benefits from the status quo. *See* Transource Br. 24-25. Plainly, that would frustrate FERC's objectives.

II. Transource Is Entitled to Summary Judgment on Its Dormant Commerce Clause Claim.

Transource is entitled to judgment under the dormant Commerce Clause.

A. The PUC Order Is a *Per Se* Violation of the Dormant Commerce Clause Because It Explicitly Hoards Lower-Cost Energy for Pennsylvania Residents.

Transource's opening brief established that the PUC Order is *per se* invalid because it discriminates on its face against interstate commerce. The PUC Order is transparent in its intent: the PUC found that alleviating "economic congestion on a regional level … in turn would result in higher rates in Pennsylvania" by allowing electricity to flow freely to other states, so it declined to allow a project that would alleviate the congestion. PUC Order at 59.

The PUC's main response is to assert the lack of any evidence that congestion causes a pricing disparity between Pennsylvania and neighboring states. PUC Resp. Br. 17-18. As discussed above, *supra* at 16-18, that is wrong.

The PUC also claims that FERC could just set new rates to eliminate the pricing disparity. PUC Resp. Br. 17. That is irrelevant: the Constitution does not allow Pennsylvania to block interstate commerce based on speculation that the federal government could solve the problem differently. Moreover, FERC cannot just eliminate the pricing disparity through regulatory fiat. The PUC ignores the law of supply and demand. Wholesale energy prices are set by auction markets at the lowest price sufficient to meet demand.[6] When congestion prevents power from flowing across state lines, the result is that higher-cost plants must be dispatched on the other side of the bottleneck—and prices rise accordingly. *See* Herling Report at 6, 12-13, 24-25.[7] If FERC did as the PUC seems to suggest and just mandated lower prices on the higher-cost side of the bottleneck, the higher-cost plants would not be able to cover their costs and would not run, and there would be blackouts.

That is why new transmission is needed: to carry lower-cost power into regions that must currently rely on higher-cost power plants (and, as a result, face higher wholesale electricity prices). And Pennsylvania seeks to hoard that lower-cost power for itself by preventing the flow of commerce that the new line would

[6] *See Market for Electricity*, PJM Interconnection, L.L.C., https://learn.pjm.com/electricity-basics/market-for-electricity.aspx (last visited May 3, 2023); FERC, Energy Primer 87 (Apr. 2020), https://www.ferc.gov/sites/default/files/2020-06/energy-primer-2020_0.pdf.

[7] *See also* FERC, Energy Primer, at 64-65.

facilitate. That is a textbook dormant Commerce Clause violation. *See New England Power*, 455 U.S. at 339 (rejecting "protectionist regulation" that was "designed to gain an economic advantage" for state residents by preventing the export of low-cost power) (discussed in Transource Br. 36-37). The PUC says that Transource's cases do not apply because they are about goods in the stream of commerce, PUC Resp. 18—but so is this case. Electricity is a quintessential good in the stream of interstate commerce, yet Pennsylvania has used its regulatory authority to impede its flow by blocking new transmission facilities, in order to preserve an economic benefit for in-state residents.

Finally, the PUC claims it was not protectionist because it considered "the PJM region as a whole." PUC Resp. Br. 17-18. That just underscores why its action was preempted. For purposes of the dormant Commerce Clause, however, what is important is the PUC's *intent*—not the data it considered. And here, the PUC's own words show that it was motivated by concern for Pennsylvania residents specifically: "The potential negative and practical impact on the citizens and consumers of Pennsylvania is our concern." PUC Order at 59.

B. The PUC Order Also Fails the *Pike* Balancing Test.

As for Transource's separate dormant Commerce Clause argument based on *Pike*, the PUC offers essentially no defense at all. It asserts that the Commonwealth Court held there is no congestion in the region. PUC Resp. Br. 18. This is wrong,

as discussed above. *Supra* at 12-13. The PUC also ignores the consequences for interstate commerce if every state refused to allow new transmission lines that would result in higher prices in-state. *See* Transource Br. 39.

The PUC also disclaims responsibility for burdens on interstate commerce, asserting that FERC has jurisdiction over electricity rates. PUC Resp. Br. 19. That is no answer at all. As discussed above, FERC supervises a market that sets prices based on supply and demand. For that market to be efficient, electricity must be able to flow freely over the grid. The PUC's decision here impedes that flow. *See* Herling Report at 12-13, 17; *supra* at 15 & n.5. Transource is entitled to summary judgment on this claim. The state has no legitimate interest in reducing wholesale energy prices for its citizens by impeding the flow of interstate commerce, and if states could exercise such authority, the negative impact on interstate commerce would be significant. The burden on commerce is clearly excessive in relation to the legitimate local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

III. Transource's Claims Are Not Barred by Claim Preclusion.

The PUC concedes, by its silence, that Transource's claims are not barred by issue preclusion, as the PUC's preemption holding has not been reviewed by any court. *See* Transource Br. 50-51. Instead, the PUC argues only that Transource's

claims are barred by claim preclusion due to the Commonwealth Court proceeding. And it raises two new arguments concerning Transource's *England* reservation.

First, the PUC contends that Transource is bound by the Court's discussion of *England* in its motion-to-dismiss order because Transource did not move for reconsideration. *See* PUC Resp. Br. 20. But at a court conference days after that ruling, Transource asked whether the Court would prefer for Transource to file a motion for reconsideration or instead wait until summary judgment. The Court responded "expressly" that "all of the issues in this case" should be "addressed in the summary judgment motions." Ex. A at 12:7-13:6. That direction was consistent with the Court's order resolving the PUC's Motion to Dismiss, which denied the motion "without prejudice to renewal of these issues at the summary judgment stage of this case." ECF 118, at 12.

Second, the PUC also argues for the first time that Transource was required to invoke *England* in the PUC proceedings. PUC Resp. Br. 20-21. That makes little sense. *England* is a doctrine about the type of court—federal or state—in which a federal-law challenge to state action may be brought. *See England v. La. Bd. of Med. Examiners*, 375 U.S. 411, 421-22 (1964). Here, Transource is challenging the PUC's decision, so it would have been nonsensical to make an *England* reservation before the PUC. There was no federal claim to reserve for federal court until *after* the PUC acted.

The PUC cites *Bradley v. Pittsburgh Board of Education*, 913 F.2d 1064 (3d Cir. 1990), PUC Resp. Br. 20, but that case does not hold otherwise. *Bradley* described the *England* doctrine as follows: "Under *England* a party who has been forced to litigate *in state court* may reserve its federal claims for federal adjudication *by informing the state court* of its reservation of those claims." 913 F.2d at 1071 (emphases added). In other words, *England* is about parallel *court* proceedings that challenge state action. It is true that, in *Bradley*, a litigant seeking review of a school board decision cited *England* in his administrative appeal to the Secretary of Education. *Id.* at 1068. But the Third Circuit did not hold that he was *required* to do so (rather than waiting until state court). *Id.* at 1072. And, to the extent he was, that is because the Secretary provided the first stage of appellate review of the challenged state action (the school board decision). The PUC here is like the school board in *Bradley*—it made the decision to be reviewed. But unlike in *Bradley*, here there was no administrative appeal. The first stage of review was court, and upon seeking review, Transource invoked *England* at the first opportunity.

The PUC also repeats its argument that it did not acquiesce. That is incorrect, *see* Transource Br. 48-49, but more importantly gets the law backward. As the Supreme Court held in *England*, "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state court

determination of the federal question." *England*, 375 U.S. at 422 n.13. The PUC had no ability to veto Transource's *England* reservation.

Finally, even if Transource's *England* reservation were ineffective and Pennsylvania's law of judgments therefore applied, the Commonwealth Court expressly reserved Transource's ability to litigate its federal claims before this Court—and under Pennsylvania law, that means the Commonwealth Court judgment does not preclude Transource's federal claims here. *See* Transource Br. at 49-50. Transource's brief made this point, *id.*, and the PUC did not respond. Accordingly, it waived the issue.

CONCLUSION

The Court should grant summary judgment to Transource.

May 3, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the Court's Order dated February 1, 2023 because it contains 5,993 words, as measured by the word-count feature of Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2023, I electronically filed the foregoing Reply Brief in Support of Transource's Cross-Motion for Summary Judgment with the Clerk of the Court and with counsel of record for Defendants by using the CM/ECF system.

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