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)

TRANSOURCE'S REPLY TO DEFENDANTS' SUPPLEMENTAL BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

In this suit, Transource claims that the decision of the Pennsylvania Public Utilities Commission ("PAPUC") denying permission to build Project 9A is preempted by the Federal Power Act ("FPA") and violates the dormant Commerce Clause. As the Complaint alleges, the PAPUC may not deny approval on grounds that are inconsistent with federal law. The Commonwealth Court has now affirmed the PAPUC's decision as consistent with *Pennsylvania* law. ECF No. 90-1 at 44.[1] But it expressly did not address Transource's *federal* claims—because Transource reserved them for federal court under *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964). The Commonwealth Court explained that Transource had not briefed its federal claims in that court and "[a]ccordingly, we will not address the federal claims that Transource has reserved for consideration in the District Court." ECF No. 90-1 at 17–18 n.12.

The PAPUC nonetheless claims that the Commonwealth Court's decision improves the claim- and issue-preclusion arguments it previously made. ECF No. 99 at 1–7. Transource's *England* reservation fully answers this argument. *England* "held that a party may preserve its right to return to federal court by making an express reservation in the state court" and specifying "'that he intends, should the state courts hold against him on the question of state law, to return to the District

[1] All page numbers refer to the numbers marked by the Court's ECF system.

Court for disposition of his federal contentions.'" *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 820 (3d Cir. 1994) (quoting *England*, 375 U.S. at 421). Indeed, *England* emphasized that "the litigant is in no event to be denied his right to return to the District Court unless it clearly appears that he voluntarily … and fully litigated his federal claims in the state courts." *England*, 375 U.S. at 421. Hence, as the Third Circuit has held, "the traditional rules of res judicata [*i.e.*, claim preclusion] and collateral estoppel [*i.e.*, issue preclusion] do not apply to state proceedings that follow … abstention and an *England* reservation." *Instructional Sys.*, 35 F.3d at 822. The *England* reservation thus ensured that the Commonwealth Court proceeding would not claim-preclude Transource from asserting its federal claims in this Court. And because Transource did not actually litigate those federal issues in the Commonwealth Court and because the Commonwealth Court did not decide them, its decision cannot be issue preclusive, either.

The PAPUC's sole response—that Transource was required to make its *England* reservation *before the PAPUC* in order to preserve it—is unsupported and illogical. *England* is a rule about the forum for *judicial review* of state action. Accordingly, both the Supreme Court and the Third Circuit have held that a litigant need only reserve its federal claims in *state court*. Tellingly, the PAPUC cites no case in the 58 years since *England* supporting its position.

The PAPUC also reiterates its previous arguments that the PAPUC's decision carries claim- and issue-preclusive effect, and contends that the Commonwealth Court's decision improves the merits of its preemption and Commerce Clause arguments. These arguments fail for reasons detailed below. The Court should deny the PAPUC's motion to dismiss and grant Transource's motion for summary judgment as expeditiously as practicable.

ARGUMENT

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

A. Under *England*, Transource's Federal Claims Are Not Precluded by the State Court Judgment.

The PAPUC argues that Transource abandoned its federal claims by not pursuing them in the state-court appeal. ECF No. 99 at 5–7. This argument fails due to Transource's *England* reservation. If Defendants were right, *England* reservations would be meaningless—because state-court judgments would always claim-preclude the federal claims that plaintiffs reserved for federal court. But as explained above, "claim preclusion does not apply to state court proceedings when [a] proper *England* reservation [is] made." *Instructional Sys.*, 35 F.3d at 822. Instead, *England* carves an exception to preclusion, in order "to balance the parties' rights to a federal forum with … federalism concerns." *Id.* at 820.

Here, Transource made an express *England* reservation at the outset of the state court proceeding and reiterated it throughout. ECF No. 61-6 at 11 ("Should it become necessary in the event that this Court reaches final judgment before the federal court, Transource PA reserves its right to continue to seek adjudication of these federal law claims in federal court." (citing *England*, 375 U.S. 411)); *see* ECF No. 90-1 at 17 n.12 (noting that Transource's reservation was "reiterated in [its] main brief and reply brief"). Before the Commonwealth Court, the PAPUC argued that Transource's reservation was insufficient. *See id.* But the Commonwealth Court resolved that dispute, holding that Transource made an effective reservation, and that the court thus would "not address the federal claims that Transource ha[d] reserved for consideration in the District Court." ECF No. 90-1 at 18 n.12.

The PAPUC nevertheless contends that Transource failed to adequately assert *England* because Transource had to make an *England* reservation before *the PAPUC* itself. ECF No. 99 at 4–5. *England*, however, requires no such thing. Here is how *England* states its rule: a litigant must "inform the state *courts* that he is exposing his federal claims there only for [compliance purposes] and that he intends, should the state *court*s hold against him on the question of state law, to return to the District Court for disposition of his federal contentions." 375 U.S. at 421 (emphasis added). And here is how the Third Circuit—in *Instructional Systems*, on which the PAPUC itself relies—reiterates the rule: A "party may preserve its right to return to federal

court by making an express reservation *in the state court*." 35 F.3d at 820 (emphasis added); *see id.* at 822 (party "can preserve his right to a federal forum for his federal claims by informing the state court of his intention to return to federal court on his federal claims following litigation of his state claims in state court" (quoting *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 85 n.7 (1984))). Other examples abound.[2] Tellingly, the PAPUC does not cite a single case in the 58 years since *England* was decided—from any court anywhere—supporting its position that *England* must be invoked at the agency.

More than that, the Third Circuit rejected the PAPUC's position in *Metropolitan Edison Co. v. PAPUC*, 767 F.3d 335 (3d Cir. 2014). The PAPUC posits that an *England* reservation in state court is effective only if the agency lacked authority to address the plaintiff's federal claims. ECF No. 99 at 6. To begin, the PAPUC here likewise lacked authority to decide Transource's Commerce Clause claim. *Infra* at 8-9. But the more fundamental response is this: In *Metropolitan Edison*, the Third Circuit addressed federal claims the agency *did* have authority to decide (whether the Federal Power Act required allowing recovery of certain costs).

[2] *See, e.g.*, *Bernardsville Quarry v. Borough of Bernardsville*, 929 F.2d 927, 929 (3d Cir. 1991) ("[A] party is generally required to inform the state court that it intends to return to federal court for litigation of its federal claims, in the event that the state court rules against it."); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1071 (3d Cir. 1990) (a party "may reserve his federal claims for federal adjudication by informing the *state court* of the nature of his federal claims . . . ").

767 F.3d at 350. And the Third Circuit expressly affirmed that the plaintiff "could have withdrawn [its] federal issues from the state proceeding"—namely, "the Commonwealth Court"—and "brought them in federal court, as has been done before." *Id.* at 367 (citing *Ky. W. Va. Gas v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 604 n.2 (3d Cir.1988)). The PAPUC's sole response—distinguishing the case the Third Circuit cited, *Kentucky West Virginia*, as involving a facial constitutional challenge, ECF No. 99 at 6—does not avoid *Metropolitan Edison*'s on-point affirmation that litigants may reserve federal claims in exactly the circumstances here. Nor can that distinction make up for the PAPUC's inability to cite any affirmative authority supporting its unprecedented limit on *England*.

The PAPUC also cites *DePolo v. Board of Supervisors Tredyffrin Township*, 835 F.3d 381 (3d Cir. 2016), for the proposition that an agency decision is a "final judgment on the merits that is entitled to preclusive effect in federal court." ECF No. 99 at 5. *DePolo*, however, did not involve an *England* reservation. Moreover, *DePolo* contemplated that, if the plaintiff had taken appropriate steps, "[t]hat would have allowed the District Court to narrowly address the question of preemption." 835 F.3d at 387 & n.18. While *DePolo* specifically addressed one mechanism of reserving federal claims ("stay[ing] the matter in state court, while … federal claims were resolved," *id.* at 387 n.18), *Metropolitan Edison* recognizes that a stay is not the only way to avoid preclusion; any valid "withdraw[al]" will do. 767 F.3d at 367;

see ECF No. 68 at 19-21 & n.5 (further addressing the PAPUC's authorities). And in the typical *England* case—including *England* itself—federal-court review of federal issues follows federal-court abstention pending completion of state-court review, just as happened here. *See England*, 375 U.S. at 521; *Instructional Sys.*, 35 F.3d at 820.

B. The PAPUC Decision Does Not Itself Result in Claim Preclusion of Transource's Federal Claims.

With *England* so squarely foreclosing any argument that the Commonwealth Court's decision carries claim-preclusive effect, the PAPUC reiterates its arguments that the agency decision *itself* does so. ECF No. 99 at 2–3. These arguments still lack merit. *See* ECF No. 68 at 18–22; ECF No. 70 at 27.

First, a hornbook requirement for claim preclusion is that the prior proceeding must have involved "the same parties or their privities." *See United States v. Athlone Indus., Inc.*, 746 F.2d 977, 983 (3d Cir. 1984). The PAPUC proceedings do not meet that requirement: The PAPUC was the adjudicator there, not a party. *See, e.g.*, *Matson Navigation Co. v. Haw. Pub. Utils. Comm'n*, 742 F. Supp. 1468, 1479 (D. Haw. 1990) ("claim preclusion cannot operate to preclude" a claim against a state commission when the commission was "the adjudicator, not a party" in prior proceeding); *Harper v. Pub. Serv. Comm'n of W. Va.*, 416 F. Supp. 2d 456, 480 (S.D. W. Va. 2006) (same). Nor does it matter that the PAPUC was a party "in the

Commonwealth Court"—because, under *England*, as discussed above, that proceeding carries no claim-preclusive effect. *Cf.* ECF No. 99 at 3.

The PAPUC now suggests that mutuality of parties is not required for claim preclusion. *See* ECF No. 99 at 2. But the case the PAPUC cites—*Sheridan v. NGK Metals Corp.*, No. Civ. A. 06-5510, 2008 WL 2156718, at *11 (E.D. Pa. May 22, 2008), *aff'd*, 609 F.3d 239 (3d Cir. 2010)—does not support its position. *Sheridan*'s point was that the *addition* of parties cannot defeat claim preclusion. *See id.*

Second, as Transource previously explained, claim preclusion does not apply to claims that could not have been brought in the earlier proceeding. *See* ECF No. 68 at 20–21; *Davis v. Wells Fargo*, 824 F.3d 333, 342 (3d Cir. 2016). Here, Transource's Commerce Clause claim was not ripe until the PAPUC issued its final decision to prevent interstate commerce to keep prices low for Pennsylvania customers. *See, e.g.*, *Keystone Redevelopment Partners, LLC v. Decker*, 674 F. Supp. 2d 629, 655 (M.D. Pa. 2009) ("[T]he claims raised by Keystone in the instant proceeding arose out of [a state board's] licensing decision, as memorialized in the [board's Adjudication and Order], meaning that they did not exist, and were incapable of resolution, prior thereto[.]"), *rev'd on other grounds*, 631 F.3d 89 (3d Cir. 2011); *Palazzolo v. Rhode Island*, 533 U.S. 606, 607 (federal constitutional claim was not ripe until agency reached final decision). Transource had urged the

PAPUC to reach a different result. But the PAPUC interpreted Pennsylvania law to require preferential treatment of in-state customers. *See* ECF No. 1–2 at 59.

Moreover, the PAPUC understood Pennsylvania law to require it to apply state law as it did—and the Commonwealth Court has now affirmed that interpretation. As an administrative agency, the PAPUC has no authority to depart from Pennsylvania law. Thus, raising a Commerce Clause claim would have been futile. *See* ECF No. 68 at 25; *United Servs. Auto. Ass'n v. Muir*, 792 F.2d 356, 365–66 (3d Cir. 1986).

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

The PAPUC contends that issue preclusion bars Transource from litigating its preemption claim in this court because the PAPUC already decided the preemption issue, and the Commonwealth Court has now affirmed that decision. ECF No. 99 at 1–2. The PAPUC is wrong again.

First, the Commonwealth Court decision cannot have issue-preclusive effect for either of Transource's federal claims. This is because issue preclusion arises when an issue is "actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." *Nat'l R.R. Passenger Corp. v. Pa. Pub. Util. Comm'n*, 288 F.3d 519, 525 (3d Cir. 2002) (quotation marks omitted). Here, Transource did not litigate its federal claims before the Commonwealth Court, and the Commonwealth Court did not decide them. *See* ECF No. 90-1 at 18 n.12

("[W]e will … focus instead on whether the Commission's decision is correct under Pennsylvania law"). Thus, the Commonwealth Court decision cannot have any issue preclusive effect on Transource's federal claims.

Second, the PAPUC decision—which did address preemption—likewise has no issue-preclusive effect. As Transource has explained in its brief and at oral argument, a state agency's unreviewed conclusion on a matter of federal constitutional law does not receive preclusive effect as a matter of federal common law.[3] *See* ECF No. 68 at 10–11; *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 189 (3d Cir. 1993); *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 794 (1986). This is because an "agency consisting of lay persons [does not have] the expertise to issue binding pronouncements [on] federal constitutional law." *Edmundson*, 4 F.3d at 193; *see* ECF No. 68 at 10 (showing that the PAPUC is a lay commission).

The PAPUC's determination that its decision was not preempted by federal law has not been reviewed by any court. The Commonwealth Court did not review this determination because Transource permissibly withheld the issue for federal court review, as discussed above. *See* ECF No. 90-1 at 18 n.12 ("[W]e will … focus instead on whether the Commission's decision is correct under Pennsylvania law").

[3] By contrast, "when a state agency 'acting in a judicial capacity … resolves disputed issues of *fact* properly before it which the parties have had an adequate opportunity to litigate,' federal courts must give the agency's *factfinding* the same preclusive effect to which it would be entitled in the State's courts." *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986) (omission in original) (citation omitted) (emphasis added).

Thus, according issue-preclusive effect to the PAPUC's preemption determination would allow it to "issue binding pronouncements [on] federal constitutional law," which it may not do. *Edmundson*, 4 F.3d at 193.

III. The Commonwealth Court's Decision Does Not Improve The PAPUC's Merits Arguments

The Commonwealth Court's decision does not bolster the PAPUC's merits arguments either. ECF No. 99 at 8. Transource's preemption and dormant Commerce Clause claims are based solely on *the PAPUC's own findings* of fact and conclusions of law. *See generally* ECF Nos. 20-3, 23, 61, 62. The Commonwealth Court "affirm[ed]" the PAPUC's decision in full and did not set aside or modify any of the PAPUC's findings of fact or conclusions of law. ECF No. 90-1 at 44. All of Transource's merits arguments thus continue to apply with full force.

To the extent the Commonwealth Court decision is relevant, it only underscores why the PAPUC's decision is preempted under the Federal Power Act and violates the dormant Commerce Clause. Transource's preemption claim alleges that the PAPUC improperly "disregarded [PJM's] FERC-approved methodology, applied a different and incompatible methodology for weighing costs and benefits, and reached a contrary need determination in opposition to that reached by PJM under federal law." ECF No. 1 ¶ 70. In particular, the PAPUC's conflicting method treated as a project "cost" the very benefit federal law aims to achieve: reducing wholesale energy pricing inefficiencies that result from transmission bottlenecks, which trap

low-cost power on one side of the bottleneck, suppressing prices there, while forcing customers on the other side of the bottleneck to rely on more expensive electric generators, causing higher prices there. *Id.* ¶¶ 66–74.

The Commonwealth Court's decision *reaffirms* that the PAPUC rejected PJM's method and applied its own conflicting method to weigh benefits and costs differently. The Court endorsed the PAPUC's conclusion that "Pennsylvania law" required it to undertake an "independent" determination of need, separate from PJM's. ECF No. 90-1 at 27. And the Court recognized that, when the PAPUC made that determination, it "considered all the costs and benefits of the IEC Project, not just those considered by PJM." *Id.* at 28. In particular, the PAPUC treated as a cost the "increases in prices to ratepayers in both Pennsylvania and elsewhere in the PJM Region" that result from Project 9A's elimination of transmission congestion, *id.*—even though the *whole point* of PJM's FERC-approved method is that a price increase for customers who benefited from artificially suppressed prices due to a transmission bottleneck is not a project cost. ECF No. 1 ¶¶ 26–30; ¶ 40.

The PAPUC relies heavily on the Commonwealth Court's statement "that the Commission did not engage in a Pennsylvania-only review of the costs and benefits of the IEC Project," as if that statement undermines Transource's arguments. ECF No. 99 at 8. Transource, however, never based its argument in this Court on the claim that the PAPUC took a "Pennsylvania-only" approach. Transource instead

argued that the PAPUC improperly "applied its own 'Pennsylvania-also' benefit-cost calculation, different from PJM's, that included as a project cost the increased costs incurred by Pennsylvania customers who benefit from inefficient congestion." ECF No. 20-1 at 8; *see id.* at 14 ("The PAPUC's 'Pennsylvania-also' standard, by granting greater solicitude to in-state residents, shortchanges the interests of the region at large."); ECF No. 1 ¶ 54 (the PAPUC "conclude[d] that while the project is indisputably necessary or proper to meet regional needs as exclusively determined by PJM, Transource also had to prove that building the project was economically advantageous on a 'Pennsylvania-also' basis in order to receive state approval . . . .").

The PAPUC's Commerce Clause arguments similarly attack a straw man. Transource did not argue that the PAPUC entirely ignored non-Pennsylvania costs and benefits. The problem is that, when push came to shove, the PAPUC prevented the construction of a new channel of interstate commerce because the resulting commerce would raise prices for in-state customers (as well as "elsewhere in the PJM Region" benefitting from congestion," ECF No. 90-1 at 28).

That is exactly what the dormant Commerce Clause forbids. If Pennsylvania can veto interstate channels of commerce in order to hoard low-cost power for its citizens, then every state can do so. Nothing in the Commonwealth Court's opinion

rejects the PAPUC statement that "[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania is our concern." ECF No. 1–2 at 59.[4]

CONCLUSION

For the foregoing reasons, Transource reaffirms its request that this Court deny the PAPUC's motion to dismiss.

July 1, 2022

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[4] The Supreme Court has squarely rejected the PAPUC's suggestion that it cannot have violated the dormant Commerce Clause because its protectionism also benefits some out-of-state interests ("in other parts of the PJM region," ECF No. 99 at 8). *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 & n.4 (1951); ECF No. 70 at 20–21.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rule 7.8(b)(2) because it contains 3,415 words, as measured by the word-count feature of Microsoft Word 2016, excluding the Caption, Table of Contents, Table of Authorities, Certificate of Compliance and Certificate of Service.

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