No. 24-1045

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TRANSOURCE PENNSYLVANIA, LLC

Appellees

v.

STEVEN M. DEFRANK, ET AL.,

Appellants

On Appeal from the United States District Court for the Middle District of Pennsylvania, No. 1-21-CV-01101

BRIEF OF *AMICI CURIAE* SELECT MEMBERS OF THE PENNSYLVANIA GENERAL ASSEMBLY IN SUPPORT OF APPELLANTS

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STATEMENT OF IDENTIFICATION OF *AMICI CURIAE*

The following select Members of the Pennsylvania General Assembly appear as *Amici Curiae* in this action:

- Senator Kim Ward represents the 39th Senate District and is the elected President Pro Tempore of the Pennsylvania State Senate.
- Representative Joanna McClinton represents the 191st Legislative District as is the elected Speaker of the Pennsylvania House of Representatives.
- Senator Joe Pittman represents the 41st Senate District and is the elected Majority Leader of the Pennsylvania State Senate.
- Senator Jay Costa represents the 43rd Senate District and is the elected Minority Leader of the Pennsylvania State Senate.
- Representative Matthew Bradford represents the 70th Legislative District and is the elected Majority Leader of the Pennsylvania House of Representatives.
- Representative Bryan Cutler serves the 100th Legislative District and is the elected Minority Leader of the Pennsylvania House of Representatives.
- Senator Patrick Stefano represents the 32nd Senate District and is the Majority Chairman of the Senate Consumer Protection and Professional Licensure Committee.

- Senator Lisa Boscola represents the 18th Senate District and is the Minority Chair of the Senate Consumer Protection and Professional Licensure Committee.
- Representative Robert Matzie represents the 16th Legislative District and is the Majority Chairman of the House Consumer Protection, Technology and Utilities Committee.
- Representative Jim Marshall represents the 14th Legislative District and is the Minority Chairman of the House Consumer Protection, Technology and Utilities Committee.

Each of the named *Amici* have a direct interest in seeing that the laws of the Commonwealth of Pennsylvania are faithfully executed and implemented. In this case, *Amici*'s interest concerns the validity of section 1501 of the Pennsylvania Public Utility Code, 66 Pa.C.S. § 1501, and accompanying regulations which authorize the Pennsylvania Public Utility Commission ("PUC") to conduct a public "need" assessment for the siting of electric transmission facilities in the Commonwealth. This is required by law as the result of the needs assessment will determine whether the public utility is also authorized to exercise Pennsylvania's inherent power of eminent domain to condemn private property necessary for the project. In the matter before this Court, the PUC did conduct such an assessment as is evidenced by the voluminous materials filed by the Attorney General and

counsel for the PUC. The District Court rejected the PUC's denial of Appellee Transource Pennsylvania's siting and eminent domain applications because it conducted its own public "need" analysis under state law and ultimately disagreed with PJM's finding.

Amici argue that the PUC's decision cannot be federally preempted because Congress has not provided a clear and manifest intent to supersede Pennsylvania's historic police powers in this space. *Amici* will also address the alarming consequence of the District Court's decision to supplant the PUC's authority to analyze the "need" for such a project – delegating the Commonwealth's duty to decide who may exercise its inherent sovereign power of eminent domain. If left uncorrected, the District Court's decision will disrupt Pennsylvania's regulatory siting scheme and threaten over a century of constitutional and statutory law governing the States' rights of siting electric transmission facilities and conferring eminent domain.

Counsel for the parties to this action have consented to the filing of this brief by *Amici Curiae*. Further, Counsel for *Amici Curiae* is wholly responsible for the preparation and submission of this brief and no other party contributed funds or assisted with the preparation or submission of this brief.

ARGUMENT

This controversy is not just about whether or where Transource Pennsylvania, LLC, will site its planned high voltage transmission lines in Pennsylvania. It concerns the potential nullification of validly enacted state laws and the constitutional duty of Pennsylvania and *Amici* to serve the interests of its citizens.

While federal preemption issues are not novel, this is a novel judicial decision that smacks of the precise kind of federal overreach with which the States were concerned during the birth of the U.S. Constitution. Responding to such concerns that the Union would become too powerful and override local needs, the constitutional framers assured us that "[t]he powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the state." THE FEDERALIST NO. 45 (James Madison).

In accordance with this intent, respectfully, the District Court should not invalidate well over a century of Pennsylvania public utility law or, consequently, compel Pennsylvania to delegate its own sovereign power of eminent domain to a utility just because a federal entity – the regional transmission organization ("RTO") – found a "need" for the utility's project.

I. The PUC's decision cannot be federally preempted because Congress has not provided a clear and manifest intent to supersede Pennsylvania's historic police powers.

The District Court concluded that the PUC's decision was conflict preempted under the Supremacy Clause of the U.S. Constitution, U.S. Const. art. VI, cl. 2, because it presented obstacles to the Federal Energy Regulatory Commission's ("FERC") federal objectives of "reducing congestion through its approval process" and to ensure "just and reasonable rates." *Transource Pennsylvania, LLC v. DeFrank*, 1:21-CV-01101, 2023 WL 8457071, at *17 (M.D. Pa. Dec. 6, 2023).

Specifically, the court – without analyzing the PUC's cited authority - rejected both the PUC's evidence that PJM's finding of "need" to reduce congestion no longer exists as well as its ability to consider projected rate increases for areas that benefit from the congestion. *Id.* It found that this conflicted with PJM's "FERC-approved benefit-cost methodology," which does not consider projected rate increases to consumers in these areas, when it is selecting congestion-reducing projects with benefits that exceed their costs under federal regulations. *Id.* (citing 18 C.F.R. § 35.34(k)(7) ("It is undisputed that RTO's like PJM are responsible for 'planning, and [ ] directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such

efforts with the appropriate state authorities.'")). As a result, the court decided the PUC did not engage in siting but instead was "attempting to supplant the role of the RTO and expand its state authority into the regulatory territory occupied by the federal government," i.e., "transmission planning," in violation of the Supremacy Clause. *Id.*

It further concluded that the PUC engaged in "transmission planning," as opposed to siting, because it evaluated the "need" for Transource's project after PJM already concluded there was a "need" to reduce grid congestion. *Id.* at *21 ("[T]he court is convinced that the PUC's decision was, in fact a substantive determination of need in the form of an exercise of siting authority."). Even though Pennsylvania law authorizes the PUC to grant *siting* approval only if the applicant demonstrates a public "need" for the electric transmission facilities, the court found that an analysis of transmission system needs is a part of transmission *planning* and not *siting*. *See* 66 Pa.C.S. § 1501; 52 Pa. Code § 57.76 (a)(1). In doing so, it cited to both FERC's requirement that RTOs identify and evaluate transmission system needs in FERC Order No. 1000 and to the Oxford dictionary definition of "siting" as the "action of locating something in a particular place." *Id.* at *21 (citing FERC Order No. 1000, 76 Fed. Reg. 49842-01, 49, 861 (2011)). According to the court, the PUC's denial "was not related to the particular place" of the proposed project. *Id.* Disregarding the Pennsylvania law's longstanding

requirement that siting includes a finding of public "need" altogether, the court decided the PUC failed to show its decision constituted "a valid exercise of its siting authority." *Id.* at *22.

However, the District Court failed to apply U.S. Supreme Court precedent demanding a "presumption against preemption" be applied in this case. Where, like here, "a state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority," the state authority is entitled to a presumption against federal preemption. *New York v. F.E.R.C.*, 535 U.S. 1 (2002) (internal citations omitted) (Rejecting New York's challenge to a FERC Order regulating unbundled retail transmissions of electricity but not bundled retail transmissions). In cases regarding a conflicting state law or regulation, courts must apply the "assumption that the historic police powers of the States were not to be superseded . . . unless that was the clear and manifest purpose of Congress." *Id*. (quoting *Hillsborough County v. Automated Medical Laboratories, Inc.,* 471 U.S. 707, 715 (1985)). Congress has provided no clear or manifest purpose to supersede Pennsylvania's authority here.

A. For over a century, Congress has repeatedly refused to remove transmission siting authority from the States.

States have traditionally assumed jurisdiction to approve or deny siting and construction of electric transmission lines. *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009). This is because Supreme Court precedent requires

Congress to speak clearly and specifically if it desires to supersede the States' jurisdiction. *New York*, 535 U.S. at 22. In a century of public utility law changes, Congress has never clearly granted itself with the States' historical siting authority.[1]

Prior to the Federal Power Act ("FPA"), states broadly regulated electric transmission facilities except where courts determined their regulations directly burdened interstate commerce. *New York*, 535 U.S. at 5-6 (discussing U.S. Supreme Court's holding in *Public Utility Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927), prohibiting Rhode Island's regulation of rates charged by a Rhode Island electric plant to a Massachusetts company that resold it to the city of Attleboro, Massachusetts as a direct burden on interstate commerce). When Congress passed the FPA in 1935, with these court decisions in mind, it created and charged the Federal Power Commission (FERC's predecessor) with jurisdiction to regulate matters of interstate wholesale sales and interstate transmissions. *Id*. at 20-21. At the same time, it made a point to limit those powers "only to those matters which are not subject to regulation by the

[1] In the Energy Policy Act of 2005, discussed *infra* p. 11, Congress narrowly granted FERC the power to authorize certain construction and modification permits for electric transmission facilities in areas designated as national interest corridors. 16 U.S.C. § 824p(a). Although this does not apply in this case as it is not within a designated national corridor, it demonstrates Congress will be clear when it grants any federal authority over siting where it did not previously exist.

States." *Id.* at 20. (quoting 16 U.S.C. § 824(a)); *See also* Michael Panfil, *From Attleboro to EPSA: The Pace of Change and Evolving Jurisdictional Frameworks in the Electricity Sector*, 38 UCLA J. Envtl. L. & Pol'y 1, 7 (2020). As the District Court below highlighted, the Supreme Court described this language as a "mere policy declaration that cannot nullify a clear and specific grant of jurisdiction." *Id.* at 22 (internal quotation marks omitted). But the bottom line is the same. Congress's intent must be "clear and specific." It left the States' siting authority intact in 1935.

Congress left it intact in 1978 too. In 1978, Congress enacted the Public Utility Regulatory Policies Act requiring FERC to promulgate rules obligating utilities to buy electricity from "qualifying cogeneration and small power production facilities." *Id.* at 9 (quoting *FERC v. Mississippi*, 456 U.S. 742, 751 (1982); citing 16 U.S.C. § 824a-3(a)). Congress's aim was to encourage the development of new generation but, again, not to alter the States' siting authority.

Congress then passed the Energy Policy Act of 1992 to address discrimination in the interstate market by empowering FERC to order utilities to provide transmission services to "unaffiliated wholesale generators" on a "case-by-case basis." *Id*. (citing 16 U.S.C. §§ 824j-824k). Yet again, Congress did not alter state siting authority. In fact, the legislation explicitly stated, "Nothing in this title or in any amendment made by this title shall be construed as affecting or intending

to affect, or in any way to interfere with, the authority of any State . . . relating to . . . the siting of facilities." 16 U.S.C. § 796.

In 1996, FERC issued Order No. 888 to require open access for third-party wholesalers of power to electric utilities' transmission facilities but did not alter State's traditional siting authority. *Id.* at 10 (citing FERC Order No. 888 (1996)). FERC then issued Order No. 890 in 2007 and Order No. 1000 in 2011 to require regional transmission planning and transmission providers to engage in that process. FERC Order No. 890, 72 Fed. Reg. 12,266 (2007); FERC Order No. 1000, 76 Fed. Reg. 49842-01 (2011). And while addressing the federal goal of regional transmissions and cost allocation in Order No. 1000, FERC explicitly cautioned that the transmission planning outlined in the Order "in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states," i.e., siting. FERC Order No. 1000, 76 Fed. Reg. 49842-01. FERC likewise never altered the States' traditional siting authority.

Finally, while Congress chose to provide FERC with some siting authority through passage of the Energy Policy Act of 2005, it was only in limited circumstances that do not apply in this matter. The 2005 legislation authorized FERC to issue permits for construction or modification of electric transmission facilities in areas the U.S. Secretary of Energy designates as "National Interest Electric Transmission Corridors" when states have withheld siting approval for

more than one year. *Piedmont Envtl. Council*, 558 F.3d at 310 (citing 16 U.S.C. § 824p(a)). This is often referred to as FERC's "backstop" siting authority.

After passage of the act, FERC issued Order No. 689 allowing it to exercise this "backstop" siting authority when state siting authorities not only "withhold approval" for one year in one of the designated "national interest corridors," but also when they deny such approvals within that one-year timeframe. FERC Order No. 689, 71 Fed. Reg. 69440 (2006). The Fourth Circuit rejected FERC's broad interpretation of the law in 2009 consistent with States' traditional jurisdiction to approve or deny siting permits because, once more, Congress's statutory language did not reveal a clear and manifest intent to allow FERC's action. *Piedmont Envtl. Council*, 558 F.3d 304, 315.

In response, Congress *chose to speak clearly* in 2021 by amending the "backstop" siting authority with passage of the Infrastructure Investment and Jobs Act, P.L. Act of Nov. 15, 2021, Pub. L. No. 117-58, 135 Stat. 429. The act effectively enacted FERC's interpretation in Order No. 689. ASHLEY LAWSON AND ADAM VANN, CONG. RESEARCH SER., R47862, ELECTRICITY TRANSMISSION: WHAT IS THE ROLE OF THE FEDERAL GOVERNMENT? (2023).[2] Once more, although it did

[2] On May 13, 2024, FERC adopted new rules to implement this new "backstop" siting authority, effective 60 days from the date of publication in the Federal Register. The new rule includes items such as requiring applicants to "demonstrate good-faith efforts to engage" with landowners, but it does not allow simultaneous processing of state and FERC siting applications. FERC Order No. 1977, 187

not limit state siting authority outside of the context of national interest corridors, Congress's demonstrated through its *clear action* that it may address state siting authority whenever it desires.

Through a century of federal modifications to public utility regulation, States are still vested with jurisdiction to approve or deny siting and construction of electric transmission lines. Congress never said otherwise.

B. For over a century, Congress has repeatedly refused to supersede the public "need" requirement of Pennsylvania and other States' public utility laws.

The state public need requirement has existed for so long, that expectations – indeed, entire public utility regulatory schemes existing decades before passage of the Federal Power Act in 1935 and recent FERC Orders – have been built around it. As in many other States at the turn of twentieth century, the 1907 Pennsylvania General Assembly began to build the same regulatory scheme. And despite many opportunities, Congress never clearly demanded otherwise.

Currently, Pennsylvania law requires entities seeking to site and construct high voltage transmission lines within its borders to establish, by a preponderance of the evidence, that there is a public "need" for the project. 66 Pa.C.S. § 1501 and 52 Pa.Code § 57.76. Section 1501 of the Pennsylvania Public Utility Code

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FERC ¶ 61,069 (issued May 13, 2024) (to be codified at 18 C.F.R. parts 50 and 380), at https://www.ferc.gov/media/e-2-rm22-7-000.

requires all public utilities to demonstrate their projects are "necessary or proper" for the service of the "public." 66 Pa.C.S. § 1501.

Consistent with this requirement, the PUC's regulations also dictate that it will grant approval to site a high voltage electric transmission line within Pennsylvania if the applicant satisfies four criteria by a preponderance of the evidence, the first being "[t]hat there is a need for it." 52 Pa. Code § 57.76(a) (emphasis added). *Transource Pa., LLC v. Pa. PUC*, 278 A.3d 942, 959 (Pa. Cmwlth. 2022). To determine whether there is a "need," the PUC considers evidence on, among other items, the "present and future *necessity* of the proposed [high voltage] line in furnishing service to the public." 52 Pa. Code § 57.75(e)(1) (emphasis added).

These requirements are not unique to Pennsylvania. Over forty states require state permits and siting approval for high voltage electric transmission facilities within their state lines. James J. Hoecker and Douglas W. Smith, *Regulatory Federalism and Development of Electric Transmission: A Brewing Storm?*, 35 Energy L.J. 71, 82 (2014). And most state siting authorities require some showing of public interest or "need." Steven J. Eagle, *Securing A Reliable Electricity Grid: A New Era in Transmission Siting Regulation?*, 73 Tenn. L. Rev. 1, 20 (2006) ("In order to gain approval [for a state certificate of public convenience and necessity], a utility must typically demonstrate that the planned expansion of the transmission

capacity satisfies a public need in that it is 'required by the present or future public convenience or necessity.'").

State certification requirements for public utilities first soared at the turn of the twentieth century. After decades of incorporating separately by special acts of the state legislatures in the nineteenth century, thirty-two states enacted legislation between 1905 and 1920 requiring certification or a similar authority for entry into the public utility industry – Pennsylvania included. William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 429-30, 454 (1979) (Reasons for the movement away from separate incorporation statutes included a corruption and disruption of the legislative process and lack of flexibility of such statutes as inevitable changing circumstances occurred.).

In 1907, the General Assembly authorized the Pennsylvania Railroad Commission to give notice and a hearing to common carriers for which any "repairs, additions, alterations, or changes . . . are *necessary*" or "any change . . in the mode of operating the railroad . . . are reasonable and expedient in order to promote the security, convenience, and accommodation of the *public*." Act of May 31, 1907, No. 250, § 17, 1907 Pa. Laws 337 (repealed by Public Service Company Law, Act of July 26, 1913, No. 854, 1913 Pa. Laws 1374) (emphasis added). If the railroad refused to comply, the commission could certify the same to the Secretary

of Internal Affairs and State Attorney General "for their action according to the law, *as the public interests may require*." *Id.* (emphasis added).

In 1913, the General Assembly passed the Public Service Company Law – the predecessor to Pennsylvania's modern public utility law. Public Service Company Law, Act of July 26, 1913 (P.L.1374, No.854) (repealed by the Public Utility Law, Act of May 28, 1937 (P.L.1053, No.286)). In it, the General Assembly once again emphasized the public interest in similar terms. It authorized the Public Service Commission to issue certificates of public convenience and necessity to utilities, including electric utilities, and imposed a "duty . . . [t]o furnish and maintain such service, including facilities, as shall in all respects be just, reasonably adequate, and practically sufficient for the accommodation and safety of its patrons, employees, and the public." *Id.* art. II, § 1.

Similar to Section 1501 of the modern Public Utility Code, the 1913 commission could grant approval for any application made under the act "only if and when the said Commission shall find or determine that the granting or approval of such application is *necessary or proper* for the service, accommodation, convenience, or safety of the public." *Id.* art. V, § 19 (emphasis added). The Pennsylvania courts viewed this language as an "exercise of the police power inherent in our State as delegated to the commission by the provisions of the Public Service Company Law." *Jenkins Tp. V. Public Service*

Commission, 65 Pa. Super. 122, 131 (1916) (Upholding the Public Service Commission's denial of entry for a street lighting charter approved by the township, when there was an incumbent providing the same services in the township at reasonable rates, because such charters are subject to the Commonwealth's state constitutional police powers); *see* Jones, *supra* at 465-467 (discussing Pennsylvania's 1913 Public Service Company Law and jurisprudence).

Finally, in 1937 the General Assembly replaced its Public Service Company Law with the Public Utility Law, Act of May 28, 1937 (P.L.1053, No.286) (repealed by the Public Utility Code, 66 Pa.C.S. §§101 et seq.). The 1937 statute introduced identical language to what is now Section 1501 of the current Public Utility Code: "Every public utility . . . shall make all such . . . improvements . . . as shall be *necessary or proper for* the accommodation, convenience, and safety of its patrons, employees, and *the public*." *Id.* at § 401 and 66 Pa.C.S. § 1501.

This historical state requirement to satisfy a public "need" has existed for over a century. Congress could have attempted to supersede this requirement during any one of its modifications to federal regulatory power over electric transmission and chose not to.

C. The PUC's decision, made according to Pennsylvania law, is entitled to a presumption against federal preemption and there is no Supremacy Clause violation.

Given the lack of a clear and manifest intent on the part of Congress to change the States' public need requirement and undermine the States' historic police powers, Pennsylvania is entitled to the presumption against federal preemption. Any interpretation to the contrary threatens to invalidate over a century of validly-enacted state regulatory laws.

As discussed *supra*, the District Court relied heavily on its conclusion that the PUC engaged in transmission *planning* rather than *siting*. The court used this mischaracterization of the PUC's analysis under Pennsylvania law to summarily dismiss the PUC's argument that it is entitled to a "presumption against preemption." Supreme Court precedent dictates that courts must apply a presumption against federal preemption where, like here, "a state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority." *New York*, 535 U.S. 1. However, via a footnote, the court swiftly (and erroneously) disregarded this rule because – again - the court wrongly concluded the PUC was engaged in transmission planning and not siting. *Transource*, 2023 WL 8457071, at *17 n. 14. Since transmission planning is not a state authority, the presumption against preemption did not apply. *Id.* This is wrong.

This is precisely the situation the Supreme Court described in *New York* requiring a presumption against preemption, in which a "state authority" – here, the PUC's siting decision and Pennsylvania's statutory public "need" requirement – allegedly conflicts with "the existence of Federal Government authority – the federal transmission planning authority. *See New York*, 535 U.S. at 18. The PUC acted under Pennsylvania *siting* law to make a *siting* decision about whether or not to permit *siting* of Transource's transmission lines. Whether or not the District Court determines some aspect of the PUC's decision constituted an *improper* exercise of that siting authority does not change the fact that the PUC was making a siting decision pursuant to siting law. Since the District Court threatened the PUC's decision to follow state law and regulations when it assessed, among other factors, public "need" for the project, it most certainly "concern[s] the validity of a conflicting state law or regulation." *Id.*

When such a conflict arises, the "Court 'starts with the assumption that the historic police powers of the States were not to be superseded … unless that was the clear and manifest purpose of Congress.'" *Id.* (quoting *Hillsborough Cnty., Fla. V. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)). And even when that presumption does not apply, a federal agency "literally has no power to . . . preempt the validly enacted legislation of a sovereign State, unless and until

Congress confers power upon it." *New York*, 535 U.S. at 18. Again, Congress must speak clearly but has repeatedly chosen not to.

Even more alarming here is the consequence that necessarily follows federal preemption of the PUC's decision to deny the project for a lack of "need" for it – the invalidation of Pennsylvania law. The District Court did acknowledge this problem. Nevertheless, "'[e]ven where Congress has not completely displaced state regulation in a specific area, state law is ***nullified*** to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility.'" *Hillsborough Cnty., Inc.*, 471 U.S. at 715 (1985).

The Supreme Court In *Hillsborough County, Fla. V. Automated Med. Labs., Inc.* explained that although the local laws will not be preempted unless Congress does so in "express terms," "Congress's intent to pre-empt all state law in a particular area *may be inferred* where the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation." *Id.* at 713 (internal citations omitted). In *Hillsborough*, the Supreme Court ruled that a local ordinance regulating blood plasma collection was not preempted by Food and Drug Administration regulations governing the same subject. *Id*. This was because the FDA explained in a statement accompanying the regulations that "[t]hese regulations are not intended

to usurp the powers of State or local authorities to regulate plasmapheresis procedures in their localities." *Id.* at 714 (quoting 38 Fed.Reg. 19365 (1973)).

Just as the federal agency's express statement that its regulations do not preempt state or local authorities saved the local ordinance in *Hillsborough* from implicit preemption, so too here. FERC Order No. 1000 expressly states that nothing in the Order involves the exercise of authority traditionally reserved to the States. Thus, siting and the public "need" requirement are traditionally reserved to the States here. There is no preemption.

The District Court should have applied a presumption against federal preemption. But in any case, there is no clear and manifest intent of Congress to preempt Pennsylvania or the PUC's siting authority. The PUC's decision does not violate the U.S. Supremacy Clause.

II. Pennsylvania's inherent *sovereign* power of eminent domain cannot be dealt like a deck of cards to any utility corporation just because a federal agency decides its project serves a public "need."

At bottom, the District Court's decision requires the PUC to rubber stamp PJM's finding of "need" for Transource's projects in lieu of complying with its own state law. Even worse, Pennsylvania law allows a public utility that satisfies a public "need" to also exercise eminent domain to condemn private property for purposes of siting and constructing aerial transmission facilities. By supplanting Pennsylvania's decision on "need" with PJM's, the District Court is giving PJM the

power to confer Pennsylvania's own sovereign power of eminent domain to public utilities as it sees fit. This bludgeons the protections against takings of private property under the U.S. and Pennsylvania Constitutions.

"[T]he power of eminent domain is an inherent one possessed by the Commonwealth, as sovereign, which permits it to take private property for public use if the landowner receives just compensation for the taking." *Robinson Twp. V. Commonwealth*, 147 A.3d 536, 586 (Pa. 2016) (internal citations omitted) (The Pennsylvania Supreme Court struck down a provision of state law authorizing the taking of private property for the storage of natural or manufactured gas as "repugnant to both the Fifth Amendment to the U.S. Constitution and Article I, section 10 of the Pennsylvania Constitution."). The Commonwealth may choose to delegate it, but it is restrained by the federal and state constitutional command that private property may only be taken to serve a "public use" under the Takings Clause of the Fifth Amendment to the U.S. Constitution[3] and Article I, section 10 of the Pennsylvania Constitution.[4] *Id.* A valid "public use" is one in which "the

[3] The Takings Clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const., Amend. 5.
[4] Article I, section 10 states, in relevant part: "[N]or shall private property be taken or applied to public use, without authority of law and without just compensation being first made or secured." Pa. Const. art. I, § 10. Many states have similar "public use" restrictions contained in either their constitutions or statutes. *Kelo v. City of New London, Conn.*, 545 U.S. 469, 489 (2005).

public must be the primary and paramount beneficiary of the taking," and not a "mere incidental benefit to the public." *Id.*

A public utility is empowered to exercise eminent domain to run aerial electric transmission lines if the PUC determines there is a need for it. Specifically, the Business Corporations Law of 1988 authorizes a public utility to exercise eminent domain after the PUC "has found and determined . . . that the service to be furnished by the corporation through the exercise of those powers is *necessary or proper* for the service, accommodation, convenience or safety of the public." 15 Pa. C.S. § 1511(c). The Commonwealth has long conferred such authority on public utilities "in furtherance of the public good." *Robinson Tp.*, 147 A.3d at 587. The standard for such a taking is similar to that required for a certificate of public convenience in Pennsylvania, *see* 66 Pa.C.S. § 1501, and it will satisfy a public purpose if "necessary" to provide electrical service to the public who would otherwise be unserved by public electric utilities. *Condemnation by Valley Rural Elec. Coop.*, 982 A.2d 566 (Pa.Cmwlth. 2009).

Certainly, the "need" for transmission lines is becoming more of a regional and national issue. But courts have long recognized that a state cannot use its power of eminent domain for the primary benefit of another state's citizens, let alone delegate to a regional out-of-state actor the decision of who may exercise it. Eagle, *supra* at 14 n. 118. This does not altogether prohibit the State from

considering regional benefits as part of its public "need" analysis; rather, it merely acknowledges that "the sovereign is obligated to protect and promote the health, safety, morals, and welfare of citizens of the individual state." *Id.* In fact, many states consider regional benefits as indirect benefits to its citizens for purposes of satisfying a public purpose. *Compare Kohl v. U.S.*, 91 U.S. 367, 373-74 (1875) (Considering the federal government's authority to condemn property in the States under the federal constitution, the Supreme Court explained "the right of eminent domain . . . is a right belonging to a sovereignty to take private property for its own public uses, and not for those of another."), *with Square Butte Elec. Coop. v. Hilken*, 244 N.W.2d 519, 525 (N.D. 1976) (In holding that an electric cooperative could use eminent domain to condemn property in North Dakota to construct a transmission line for purposes of providing power in Minnesota, the North Dakota Supreme Court stated, "[T]he public benefit, while not confined exclusively to the state authorizing the use of the power . . . is nonetheless inextricably attached to the territorial limits of the state because the state's sovereignty is also so constrained.")).

So too here. Not only does Pennsylvania consider regional benefits as a direct benefit to its citizens, such as "greater economies of operation" and grid reliability, but the PUC did so in this matter. *See Stone v. Pa. PUC*, 162 A.2d 18 (Pa.Super. 1960) (upholding the use of Pennsylvania's eminent domain power for

condemnation of in-state property to construct a high-voltage transmission line connecting grids in Philadelphia and Baltimore because interconnection would lead to direct benefits to Pennsylvania citizens through greater economies of operation, the ability to meet growing load demands, and greater grid reliability); *see also* 66 Pa.C.S. § 2805 (requires Pennsylvania to work with the Federal Government and other states in the region to support transmission planning). The PUC "did not engage in a Pennsylvania-only review of the costs and benefits" of Transource's project, but it examined *both* the "detrimental impact to Pennsylvania ratepayers" *and* "ratepayers in other parts of the PJM Region" when it rejected the "need" for the project. *Transource Pa., LLC v. Pa. PUC*, 278 A.3d 942, 962 (Pa. Cmwlth. 2022).

Here, Transource is seeking approval of seventy-seven eminent domain applications to condemn Pennsylvanians' private properties in Franklin County, down from what began with 133 applications for properties spanning York and Franklin Counties in 2018. The evidence presented before the PUC's administrative law judge illustrated that the Transource project would have "detrimental economic and environmental impacts on real estate values, farming practices, natural springs, trout fishing, an elementary school, the Tim Cook Memorial Cross Country Course, businesses, the Owl's Club, local government, and tourism" in Franklin County. *In Re: Applications of Transource Pennsylvania,*

LLC., Docket Nos. A-2017-2640195, 2021 WL 2143699, at *1 (ALJ Recommended Decision, Dec. 22, 2020).

Even if the PUC did not consider regional benefits in its analysis – which it did – Pennsylvania's power of eminent domain is an "inherent one possessed by the Commonwealth, as sovereign." *See Robinson Twp*., 147 A.3d at 586. It is for Pennsylvania to decide whether a taking of its citizens' private property is permitted for a "public use" under this inherent power, not PJM. It cannot be dealt like a deck of cards to any utility corporation just because PJM decides its project serves a public "need" for purposes of regional transmission planning. The District Court's ruling requiring, in effect, the PUC to adopt PJM's public "need" finding will, as a consequence, do just that.

CONCLUSION

This matter is no longer about whether or where Transource will site its planned high voltage transmission lines in Pennsylvania. The broader implications of the District Court's novel decision concern the potential nullification of validly enacted state laws and the constitutional duty of Pennsylvania and *Amici* to serve the interests of their citizens when it confers eminent domain. For the foregoing reasons, the Court should reverse the judgement of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with the Federal Rules of Appellate Procedure and the Local Rules of this Court, I hereby certify as follows:

1. I am a member of the bar of this Court.

2. This brief contains 5,735 words within the meaning of Fed. R. App. 32(a)(7)(B). This brief complies with the typeface requirement of Rule 32(a)(5) because it has been prepared in the proportionally spaced typeface (14-point Times New Roman) using Microsoft Word.

3. The text of the electronic copy of this brief is identical to the text in the paper copies of the brief.

4. A virus detection program, Microsoft Security Intelligence Version 1.411.205.0, was performed on this electronic brief and that no virus was detected.

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CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2024, I electronically filed the foregoing Brief of *Amici Curiae* Select Members of the Pennsylvania General Assembly with the Clerk of the Court of the United States Court of Appeals for the Third Circuit using the CM/ECF system. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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