IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1045

TRANSOURCE PENNSYLVANIA LLC

v.

STEVEN M. DEFRANK, Chairman, Pennsylvania Public Utility Commission; KIMBERLY M. BARROW, Vice Chairman, Pennsylvania Public Utility Commission; JOHN F. COLEMAN, JR., Commissioner, Pennsylvania Public Utility Commission, in his official capacity; RALPH V. YANORA, Commissioner, Pennsylvania Public Utility Commission, in his official capacity; PENNSYLVANIA PUBLIC UTILITY COMMISSION; KATHRYN L. ZERFUSS, Commissioner, Pennsylvania Public Utility Commission, in her official capacities,

Appellants

BRIEF FOR APPELLANTS AND JOINT APPENDIX VOL. I

APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
ENTERED DECEMBER 6, 2023

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STATEMENT OF JURISDICTION

This is a civil rights action brought pursuant to 42 U.S.C. § 1983, over which the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

This appeal is from a final order, over which this Court has jurisdiction by virtue of 28 U.S.C. § 1291. The district court's order was entered on December 6, 2023. The notice of appeal was filed on January 4, 2024.

STATEMENT OF ISSUES

The Pennsylvania Public Utility Commission denied an application to site high voltage transmission lines because it was not needed. In making that determination, the PUC considered not only the potential benefits to Pennsylvania, but to other neighboring states. The applicant challenged that determination in state court. The Commonwealth Court concluded that the PUC's decision was consistent with state law, and that, in fact, the PUC considered need on a regional basis.

The questions presented are,

I. Since a siting decision normally encompasses consideration of public need, and the Federal Energy Regulatory Commission has repeatedly reaffirmed in its orders that the authority to site high voltage transmission lines is reserved to the States, does the PUC's decision violate the Supremacy Clause?

II. Because Congress has expressly consented to state authority over siting determinations and, in any event, because the PUC considered need on a regional basis (not Pennsylvania alone), does the PUC's decision violate the dormant Commerce Clause?

III. Was the district court precluded from reaching these federal claims because the applicant did not properly reserve them consistent with *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964)?

STATEMENT OF THE CASE

Transource Pennsylvania, LLC,[1] commenced this action against the Pennsylvania Public Utility Commission and its Commissioners (collectively the PUC).[2] Transource alleged that in denying its applications to site high voltage transmission lines through parts of Pennsylvania, the PUC violated the Supremacy Clause and the dormant Commerce Clause of the United States Constitution. The district court stayed that ligation on abstention grounds pending resolution of a petition for review that Transource had filed in the Commonwealth Court against the PUC. Ultimately, the Commonwealth Court concluded that the PUC's determination was consistent with state law, as there was not a public "need" for the proposed project. JA739-40. Indeed, the Commonwealth Court concluded that the project would have detrimentally impacted, not only electricity ratepayers in Pennsylvania, but also those outside of Pennsylvania. JA744.

Thereafter, the parties returned to federal court and filed competing motions for summary judgment. The district court granted Transource's cross motion and

[1] Transource Pennsylvania, LLC, is a wholly owned subsidiary of Transource Energy, LLC, which is majority-owned by American Electric Power Company (AEP). JA84 (ALJ Order).

[2] The Commissioners are Steven M. DeFrank (Chairman), Kimberly M. Barrow (Vice Chairman), John F. Coleman, Jr., Ralph V. Yanora, and Kathryn L. Zerfuss. Chairman DeFrank's first name is actually Stephen.

denied the PUC's motion. The court held that the PUC's decision violated the Supremacy and dormant Commerce Clauses, and that its review of those claims was not precluded.

A. Statement of Facts

The material facts are not in dispute. With the exception of a single paragraph (¶ 115), Transource acknowledged before the district court that it was not disputing the Administrative Law Judge's (ALJ) findings of fact (adopted by the PUC) with respect to the issue of need. JA484 (Transource Response to Interrogatories); *see* JA275 (PUC Decision (Dec.)).

The Problem of Congestion on the Electrical Grid

Transmission constraints and transmission congestion, although related, are different concepts: "transmission constraints are physical limits on the amount of electricity flow the system is allowed to carry in order to ensure safe and reliable operation," while transmission congestion is "the economic impacts on the users of electricity that result from operation of the system within these limits." JA431 (Department of Energy, Nat'l Elec. Transmission Congestion Study). In other words, congestion occurs when the least costly generation sources that are available to serve the demand of end-use consumers in a given area (often referred to as "load") cannot be delivered because transmission limits constrain power flow on the grid. JA89, ¶35 (ALJ Recommended (Rec.). Decision (Dec.)); JA567 (Herling Report). Because

of congestion, higher-cost generation sources are dispatched to serve the load. JA567 (Herling Report).

Congestion is an "economic issue, not necessarily a reliability issue." JA434 (PJM Bulletin); *see* 123 FERC ¶ 61,051 at PP 2 n.2 (Apr. 17, 2008). It is present throughout the grid. JA456 (Heitmeyer dep.).[3] Because congestion is influenced by many factors and, so, "changes from year to year," it is "hard to predict." JA438 (Bowring dep.).[4] Yet, not all congestion is "bad." JA437-39 (Bowring dep.); JA463 (Horger dep.).[5] The "simple existence of congestion is not inefficient." JA437 (Bowring dep.). Indeed, it would be "highly inefficient" to attempt to eliminate all congestion, as it is not economically feasible to do so. JA438-39 (Bowring dep.).

There are several different ways to address congestion. One way is to build additional transmission lines. JA439 (Bowring dep.). Another way is to build more (local) generation sources. *Id.* A third way is through the sale of financial transmission rights (FTRs). JA434 (PJM Bulletin). FTRs are a type of investment. *Id.* They allow market participants to offset potential losses (or hedge) relative to the

[3] Chad Heimeyer is a managing director for competitive transmission development for American Power Service Corporation. JA452.

[4] Joseph Bowring is the market monitor for PJM. JA436.

[5] Timothy Horger is the senior director of forward market operations and performance compliance at PJM. JA461.

price risk of delivering energy to the grid. JA465 (Horger dep.); *See Citadel FNGE Ltd. v. FERC*, 77 F.4th 842, 850 (D.C. Cir. 2023).[6]

PJM Interconnection's Regional Transmission Expansion Plan

PJM Interconnection, LLC (hereinafter, PJM), "operates the electric transmission system or grid for all or part of 13 states," including most of Pennsylvania. *See* FERC, *An Introductory Guide for Participation in PJM Processes*, available at, https://tinyurl.com/v87un7wf; JA84, ¶4 (ALJ Rec. Dec.)). PJM is a Regional Transmission Organization (RTO), meaning that the owners of the transmission system (the lines, poles, and other equipment), such as PPL Corp., have delegated operational control of that system to PJM, a not-for-profit entity. *Introductory Guide*, *supra*; JA538 (PJM "Who We Are"); JA540 (PJM History); *Illinois Commerce Comm'n v. FERC*, 721 F.3d 764, 769 (7th Cir. 2013) (Posner, J.). The purpose of this delegation is to promote the efficient and non-discriminatory use

[6] As the D.C. Circuit explained, although FTRs can help protect market participants against high congestion costs, FTRs can also create liability. *See Citadel FNGE Ltd v. FERC*, 77 F.4th 842, 850 (D.C. Cir. 2023). The market participant purchases the FTR at a fixed-price guarantee associated with the use of a certain transmission path. If actual congestion costs are higher than the price of the FTR, then the market participant redeems the FTR and receives the difference. But if the congestion costs are lower, the market participant then pays that difference. *See id.*; *see also* Energy KnowledgeBase by Enerdynamics, "Financial Transmission Rights (FTRs), available at, https://tinyurl.com/2k7eab33.

of the grid. JA565 (Herling Report); *see N.J. Bd. of Pub. Util. v. FERC*, 744 F.3d 74, 82 (3d Cir. 2014).

Under federal law, PJM is required to prepare an annual Regional Transmission Expansion Plan (RTEP) of the PJM Region. JA84, ¶5 (ALJ Rec. Dec.). Think of this as mandated group-work: every public utility transmission provider must participate in the regional transmission planning process in order to produce a single regional transmission plan that satisfies certain transmission planning principles such as coordination, transparency, and regional participation. FERC Order 890, 72 Fed.Reg. 12,266, ¶444 (2007); FERC Order 1000, 76 Fed.Reg. 49842-01, ¶68 (2011). Before FERC Orders 890 and 1000, regional transmission planning for upgrades to the grid, whether for reliability or market efficiency (explained below), was an "ineffective, inefficient and chaotic and balkanized process in which each individual transmission owner plan[ned] only for its own commercial interests." JA676 (2009 PUC Comment); JA687 (Transmission Expansion Advisory Committee Recommendations).

As part of its RTEP, PJM conducts a market efficiency analysis to find areas where transmission congestion exists. JA84, ¶6. The purpose of the market efficiency process is to reduce or eliminate unhedged congestion. JA463, 466 (Horger dep.). Recall, market participants can purchase FTRs to hedge against congestion costs. JA465 (Horger dep.). Where "congestion is hedged, then there

really is no cost" for transmitting higher cost energy. JA464 (Horger dep.). In contrast, unhedged congestion occurs when FTRs are insufficient to cover the additional cost. JA464-65 (Horger dep.).

When PJM conducted its market efficiency analysis for its 2014/2015 RTEP—the first market efficiency cycle under Order 1000—PJM identified congestion on the AP South Reactive Interface (AP South), a set of four 500 kV (Kilovolt) transmission lines that originate in West Virginia and terminate in Maryland. JA84, ¶7 (ALJ Rec. Dec.); JA446 (Comments of PJM's Independent Market Monitor). PJM received 41 proposals from transmission providers to address this congestion, including Transource's Project 9A. JA85, ¶9 (ALJ Rec. Dec.).

Transource's IEC Project

The Independence Energy Connection Project (or the IEC Project) is the Pennsylvania portion of Project 9A, and it consists of IEC East and IEC West. JA86, ¶¶15-18 (ALJ Rec. Dec.); JA717 (Commonwealth Ct. Op.). For IEC East, Transource proposed running 12.7 miles of 230 kV transmission lines from the Pennsylvania/Maryland border to a proposed substation in York County, Pennsylvania. JA344 (complaint); JA86, ¶¶17-18 (ALJ Rec. Dec.); JA717-78 (Commonwealth Ct. Op.). For IEC West, Transource planned to run 24.4 miles of 230 kV transmission lines from the Pennsylvania/Maryland border to a proposed substation in Franklin County, Pennsylvania. JA344 (complaint); JA86, ¶¶15-16;

JA717-18 (Commonwealth Ct. Op.). Transource believed that, through these additional transmission lines, cheaper generation sources from western Pennsylvania could be dispatched to northern Virginia, Maryland, and the District of Columbia. JA579 (Herling Report); JA680 (PJM White Paper). These parts of the PJM region would not have to rely on closer, more expensive generation sources. JA579-80 (Herling Report). However, the additional transmission lines would remove low cost power from Pennsylvania consumers. JA264 (ALJ Rec. Dec.).

PJM approved Project 9A. JA85, ¶10. In doing so, PJM concluded that the economic benefits of building Project 9A outweighed its costs by a ratio of 1.25 to 1 (or by 25%), projected over the next 15 years. JA90-91, ¶¶40-41 (ALJ Rec. Dec.). Critically, PJM's ratio did not include "the higher costs that would result in other regions (including Pennsylvania) because they would no longer have the benefit of that same lower-cost power," as that power would be dispatched elsewhere. JA94, ¶¶61-62 (ALJ Rec. Dec.); JA491, ¶45. Instead, PJM counted only "the reduced power costs (primarily in MD-DC-VA) from being able to import lower-cost power into that region." JA94, ¶62 ; JA547 (PJM Operating Agreement). PJM justified the exclusion of regions that would pay a higher-cost in its methodology because the regions that benefit from the reduced cost of power are assigned the costs of building the project. 123 FERC ¶ 61051 at PP 67 (Apr. 17, 2008). This fact, of course, does

nothing to defray the higher cost of electricity for the consumers in the regions PJM excluded from its calculus. Their financial pain is simply ignored.

PJM adopted this methodology, excluding higher energy costs, in 2008. 123 FERC ¶ 61051 at PP 67; JA497, ¶19 (Transource SMF); JA573 (Herling Report). The Federal Energy Regulatory Commission (FERC) found that PJM's approach was "reasonable." 23 FERC ¶ 61051 at PP 67; JA498, ¶21 (Transource SMF); JA788, ¶21 (PUC Response to Transource's SMF).

In 2014, PJM modified its methodology again. This time PJM amended the benefit metric (again, the benefits must outweigh the costs by 25%) from a 70/30 weighted split: 70% of the benefit was based on production costs, with the other 30% based on the change in net load payments (or energy payments), but only for those zones expected to see a decrease in energy costs. JA95, ¶67 (ALJ Rec. Dec.). PJM limited the benefit metric solely to net load payments. *Id.*; JA505, ¶38 (Transource SMF). In other words, 100% of the benefit metric is based on the net load payments, but, again, only for those zones expected to see a decrease in energy costs. JA505, ¶38 (Transource SMF).

Following PJM's approval of Project 9A, PJM and Transource executed a designated entity agreement. JA85, ¶10 (ALJ Rec. Dec.). Under that agreement, Transource is expected to obtain "all necessary permits, siting, and other regulatory approvals." JA425, ¶33 (PUC SMF).

Transource then filed applications with the PUC for a certificate of public convenience and to site the proposed transmission lines in Pennsylvania. JA73 (ALJ Rec. Dec.).[7] The parties "reserved the right to challenge the need for the [IEC] Project." JA227 (PUC Dec.); JA73 (ALJ Rec. Dec.). Thus, "[a]s with all siting applications filed with the [PUC]," Transource would "be required to demonstrate the need for the" IEC Project. JA458. In addition, Transource filed 133 eminent domain applications pertaining to land in York and Franklin counties. JA76 (ALJ Rec. Dec.).

B. Procedural History

Following the filing of Transource's application with the PUC, the matter proceeded through administrative review (the ALJ and the PUC), and then judicial review (both state and federal).

Administrative Litigation

The PUC assigned the matter to an ALJ. JA74 (ALJ Rec. Dec.). The ALJ recommended denying the siting applications, and the PUC adopted that recommendation. JA224 (PUC Dec.).

[7] The PUC granted Transource a provisional certificate of public convenience. JA224 (PUC Dec.).

The ALJ Found No Need for the IEC Project Because Congestion Costs and Demand for Electricity Along AP South Had Decreased Over the Past Several Years, and the Project Would Increase Costs for Consumers in Many States in the PJM Region.

The proceedings before the ALJ were extensive. JA74-83. The ALJ issued a 154-page decision with 233 paragraphs of factual findings. JA67-219. In the ALJ's recommended decision, she determined that Transource had not established, by a preponderance of the evidence, that there was a "need" for the IEC Project, as required by Pennsylvania law. JA125-27, 174, citing 66 Pa.C.S. § 1501, and 52 Pa. Code. § 57.76.[8]

At the outset, the ALJ rejected Transource's contention that because FERC has jurisdiction over the transmission planning process, and PJM determined that there was a "need" for Project 9A through that process, that the PUC was preempted from determining need under Pennsylvania law. JA156-57. The ALJ explained that under the Federal Power Act, although FERC has "exclusive jurisdiction over the interstate transmission of electric energy and electric wholesale rates," Congress limited that authority of FERC and RTOs "to those matters which are not subject to

[8] Section 1501 of the Public Utility Code permits improvements to service and facilities as are "*necessary* or proper for the accommodation, convenience and safety of . . . the public." Section 57.76 of PUC's Regulations provide, the PUC "will not grant the [siting] application . . . unless it finds and determines as to the proposed [high-voltage] line . . . [t]hat there is a *need* for it."

regulation by the States." JA156, citing 16 U.S.C. § 824(a). Further, FERC itself, in its Order No. 1000, recognized this jurisdictional limitation, as the States have "longstanding . . . authority" over siting, permitting, and construction. *Id.* FERC "in no way" was exercising authority "over those specific substantive matters traditionally reserved to the states." *Id.*, quoting FERC Order 1000. Thus, as the D.C. Circuit Court of Appeals concluded, "'[t]he *substance* of a regional transmission plan . . . remain[s] within the discretion of the decision-makers in each planning region,'" those decision-makers being public utility commissions. *Id.*, n.13, quoting *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 57-58 (D.C. Cir. 2014) (emphasis added). Accordingly, "FERC's authority does not pre-empt the [PUC's] determination in this proceeding." *Id.*

The ALJ next explained that there was no need for the IEC Project because the congestion costs along AP South had dropped so precipitously since 2014 that there was "no longer significant congestion." JA155. In 2014, congestion costs along AP South were $486.8 million, or 25.2% of total PJM congestion costs for that year. JA92, ¶51. But, by 2016, the congestion costs for AP South had markedly decreased, to $16.8 million or 1.6% of total PJM congestion costs for that year. *Id.*, ¶52. Although congestion costs fluctuated slightly over the next several years (up to $21.6 million in 2017), they decreased both in 2019 ($14.5 million) and in 2020

($900,000). JA92-93, ¶¶53-56. In short, without Project 9A being built, the congestion costs had declined by over $400 million. JA72.

In addition to a decrease in congestion costs, demand for electricity had also decreased over the past several years. JA93, ¶¶57-60. This reduction in demand meant that the projected benefits of the IEC Project would be less. *Id.*, ¶60.

The ALJ highlighted that Transource projected that certain zones of the PJM region would experience a decrease of $845 million in wholesale power prices over 15 years. *Id.*, ¶65. Other zones, however, would see an $812 million increase in wholesale power prices over that same time period. *Id*. These zones included portions of Maryland, New Jersey, Delaware, Kentucky, Ohio, and Illinois. JA102, ¶¶107-108. Pennsylvania itself would experience a $400 million increase. JA166.

Of course, under PJM's methodology, it excluded that $812 million increase from its cost-benefits analysis. This, the ALJ determined, was inappropriate when considering "need" under Pennsylvania law. JA169, 171. "[I]ncreased wholesale power prices are real costs to consumers." JA171. Indeed, PJM's independent market monitor had reached a similar conclusion. JA172; *see* JA667-70 (Comments of Independent Market Monitor). Thus, the ALJ emphasized, "[a]ll costs directly related to the construction of the IEC Project should be taken into consideration, regardless of whether that impact is beneficial or detrimental." JA171. Once all costs were included in the analysis, Project 9A resulted in only a $32 million benefit over

15 years ($842 million - $812 million). To construct a $509 million project to realize only a $32 million benefit, where congestion had diminished to "very low levels," "makes no sense." JA168. Accordingly, the ALJ concluded, "the IEC Project as a market efficiency project does not provide sufficient benefits to Pennsylvania *or the PJM region as a whole*." JA168 (emphasis added). And, as such, Transource had not established a need for Project 9A. JA174.

In addition to the lack of need, the ALJ detailed the negative impacts of the IEC Project. The project would have "detrimental economic and environmental impacts on real estate values, farming practices, natural springs, trout fishing, an elementary school, [a] cross country course, businesses . . . local government, and tourism." JA72.

The PUC Adopted the ALJ's Findings that the IEC Project Would Increase Costs for Many Consumers in the PJM Region.

Transource filed exceptions to the ALJ's Recommended Decision. JA223. The PUC issued an 84-page decision adopting the ALJ's recommendation on the need issue. JA224, 274-86.

The PUC rejected Transource's contention that federal law preempted PUC's separate determination of need, required by the General Assembly under Pennsylvania law. JA278. The transmission planning process, mandated by federal law, is concerned with "process," not substantive outcomes. JA279-80. Like the ALJ, the PUC highlighted that FERC itself acknowledged in Order 1000 (and the

D.C. Circuit Court of Appeals recognized in *South Carolina Pub. Serv. Auth.*, 762 F.3d at 57-58) that FERC does not have authority over siting, permitting, and constructing of transmission lines, a necessary component of which is public need. *Id*. Although PJM, through the transmission planning process had found a need for Project 9A, it was for the PUC to decide whether that need determination was consistent with Pennsylvania law. JA277-78. Thus, the transmission planning process by which PJM approved Project 9A does not extend to the siting and construction of transmission lines within Pennsylvania, nor to the PUC's associated authority to permit the exercise of eminent domain. JA277-80.

The PUC next concluded that Transource had not demonstrated a need for the project. JA281-85. The PUC concluded that the ALJ properly took into account the negative impacts and increased costs that Project 9A would have on Pennsylvania consumers. JA281. The PUC rejected Transource's contention that the ALJ considered the question of need "on a Pennsylvania-only basis." *Id.* Rather, the ALJ "viewed the regional planning proposal on a '*Pennsylvania-also basis*," in that the review included consideration of the importance of prospective federal regional planning objectives and the importance of prospective impact upon the Commonwealth." *Id.* (emphasis added)

The PUC acknowledged that "[r]egional planning matters" are "of significance," and that the PUC, in the past, had found "need" for regional projects,

as it did in *In Re: Application of Trans-Allegheny Interstate Line Co.*, 103 Pa. P.U.C. 554, 2008 WL 57865072 (Pa. P.U.C. 2008) (hereinafter *Trail Co.*). JA282. But, here, the weight of the evidence showed substantial fluctuations in congestion, a "marked decline" in congestion on AP South, and negative impacts to Pennsylvania consumers. JA281-82. Accordingly, Transource had not carried its burden of proof on the issue of need. JA285-86.

Federal and State Court Litigation

Transource filed its complaint in federal district court. JA326-27. Transource alleged that the PUC's decision violated the Supremacy Clause and the dormant Commerce Clause of the U.S. Constitution. Specifically, Transource asserted that FERC's approval of PJM's methodology for determining need preempted the PUC's separate determination of need. JA358-59. And the PUC had violated the dormant Commerce Clause because it denied the siting applications in order to protect Pennsylvania consumers from higher energy costs. JA362. As relief, Transource sought a declaration that the PUC's decision violated the Supremacy and dormant Commerce Clauses, and an injunction prohibiting the PUC from enforcing its decision. JA365-66.

The next day, Transource filed a petition for review in the Commonwealth Court. JA18 (District Ct. Op.). Transource claimed that the PUC's determination on need was inconsistent with state law and not supported by substantial evidence.

Transource Pa., LLC v. Pa. PUC, 278 A.3d 942, 946. (Pa. Cmwlth. 2022); JA714. Transource asserted in its petition for review that, pursuant to *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411 (1964), it was reserving its federal claims for adjudication in federal court (hereinafter *England* reservation). JA729, n.12.

The federal district court abstained from exercising its jurisdiction over Transource's federal complaint until the Commonwealth Court resolved the petition for review. The district court highlighted "the interplay between state and federal law," among other reasons, for abstaining. JA392.

The Commonwealth Court affirmed the PUC's decision because it "was in accordance with Pennsylvania law" and "supported by substantial, credited evidence of record." JA756. At the outset, the Commonwealth Court concluded that the PUC's need determination is "an independent one." JA739. The court highlighted that "Pennsylvania law sets forth different requirements and considerations for approving [high-voltage] transmission lines than may be addressed in PJM's proceedings." JA740. The PUC, the court pointed out, "considered all the costs and benefits of the IEC Project, not just those considered by PJM and, because there were considerable increases in prices to ratepayers in *both Pennsylvania and elsewhere in the PJM Region*, found" that denial of the siting applications was warranted. *Id*. (emphasis added). In addition, congestion in AP South had "decreased significantly over the years." JA741.

The Commonwealth Court rejected Transource's contention that "it is unlikely or nearly impossible to establish a public need for a [high-voltage] transmission line." JA743. To the contrary, the PUC "and this Court have addressed numerous such applications and findings of public need have been made which support approving those lines," including *Trail Co. Id.* Yet, the court stressed, it had to "remain cognizant that the standards for siting [high-voltage] transmission lines" had to be read in the context of the Pennsylvania Constitution's Environmental Rights Amendment, "with which the [PUC's] Regulations were promulgated to be consistent." *Id.*

Finally, on the need issue, the PUC did not violate its statutory mandate, under 66 Pa.C.S. § 2805(a), "to work with regional transmission planning groups and the Federal Government." JA744. The PUC "recognized the asserted regional planning goals of the IEC Project" but concluded that Transource had not provided persuasive evidence of need "for a variety of reasons." *Id.* The court explicitly rejected Transource's contention that the PUC conducted "a Pennsylvania-only review of the costs and benefits of the IEC Project." *Id.* Rather, although "evidence of the detrimental impact to Pennsylvania ratepayers was cited and considered as part of the conclusion that Transource did not meet its burden of proof, the [PUC] also

examined the *detrimental impacts to ratepayers in other parts of the PJM Region* in reaching that conclusion." *Id.* (emphasis added).[9]

Upon the parties return to federal court, they both moved for summary judgment. JA415, 488-89.[10] The district court denied the PUC's motion and granted Transource's cross motion. JA66. Although the court issued a 62-page decision, the court spent the bulk of its opinion recounting the parties' contentions, rather than wrestling with them.

On pre-emption, the court concluded that the PUC's decision to deny the siting applications because need was lacking posed an obstacle to the achievement of the federal transmission planning objectives of reducing congestion and achieving just and reasonable rates. JA42-57.[11] According to the court, the PUC could not include increased costs to consumers when "PJM's FERC-approved benefit-cost methodology" excluded such costs. JA45. The PUC was supposedly "attempting to supplant the role of the RTO and expand its state authority into the regulatory territory occupied by the federal government." JA46.

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[9] In a footnote, the court stated that it would not address Transource's federal claims because Transource had reserved them for consideration by the district court. JA729 n.12.

[10] PJM filed an amicus brief in support of Transource, while Franklin County filed an amicus brief in support of the PUC. Doc. 155, 172.

[11] The court declined to rule on whether the PUC's decision directly conflicted with federal law. JA37-42.

Even though the authority to site transmission lines is reserved to the States, and public need is a necessary showing to site transmission lines (not only in Pennsylvania, but for many states), the district court was "not persuaded that the PUC's decision was, in substance, about siting." JA56. Reasoning from the dictionary definition of "siting," the court concluded that the PUC's denial was "not related to the particular place of the Project." *Id.* In short, according to the court, although the PUC characterized "its denial as an exercise of siting authority, it was regional transmission planning in reality." JA57. And because the PUC had not shown that its decision was a valid exercise of siting authority, that decision was preempted by federal law. *Id.*

Next, over a mere two pages of analysis, the court concluded that the PUC's decision violated the dormant Commerce Clause. JA63-65. Purportedly citing the "PUC's own words," the court found that the PUC's decision "was a per se violation of the dormant Commerce Clause driven by economic protectionism." JA63. This was so even though the Commonwealth Court had already concluded that the PUC considered the impacts of Project 9A, not only on Pennsylvania, but to other states in the PJM region.

In addition to a per se violation, the district court concluded that the PUC decision had the practical effect of discriminating against interstate commerce. JA64. Pennsylvania was benefitting from congestion at the expense of other states,

and the PUC somehow had not shown that its decision to deny Transource/PJM eminent domain power over Pennsylvanians' private property advanced a legitimate state purpose. *Id*. The district court also held that the PUC's decision violated the *Pike* balancing test.[12] JA64-65.

Finally, the court found that it was not precluded from reviewing Transource's claims. JA24-31. The court determined that Transource had properly reserved its federal claims in the Commonwealth Court under *England*. JA30. The court disagreed with the PUC that Transource submitted its federal claims, without reservation, for adjudication by the PUC. JA31. According to the court, there was "no evidence" that Transource submitted its federal claims to the PUC, even though the PUC specifically addressed Transource's preemption argument at the administrative level. JA31.

[12] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

STATEMENT OF RELATED CASES

This case has not previously been before the Court. It is related to *Transource Pennsylvania, LLC v. Pa. PUC*, 278 A.3d 942 (Pa. Cmwlth. 2022), JA713-57, in which the Commonwealth Court concluded that the PUC's denial of Transource's siting applications was consistent with state law.

SUMMARY OF ARGUMENT

The PUC's decision does not violate the Constitution. The PUC properly exercised the authority reserved to it, and without discriminating against interstate commerce.

The States have traditionally assumed all jurisdiction to approve or deny permits for the siting of high-voltage transmission lines. A siting decision requires a state to consider whether the project is needed. Congress, FERC, and the federal courts all know this. Indeed, FERC has repeatedly reaffirmed in its orders the authority of the States regarding siting, permitting, and construction.

Moreover, regional transmission planning determinations are distinct and serve different objectives than siting determinations. With Order 1000, FERC required transmission providers to work together, along with the RTO, to fashion a single regional transmission plan. Before then, regional transmission planning was a balkanized process, with individual transmission owners planning only for their own commercial interests. The federal objective—the creation of a single regional transmission plan—was accomplished here with the 2014-15 RTEP. After a plan was created, the PUC made a determination on siting—that is, PUC decided what, if anything, needed to be built. The needs determination, therefore, is part of the States' historical authority to approve or deny siting applications, which the PUC did here. As FERC itself has said, in distinguishing between planning and siting,

planning is concerned with the processes to identify and evaluate transmission system needs and potential solutions to those needs, while siting is a substantive decision that is reserved to the States. The federal government has not preempted that authority.

The PUC's decision also does not violate the dormant Commerce Clause because Congress has expressly authorized the States to consider the need for the project as part of its siting determination. Under the Federal Power Act, the federal government's regulation of transmission extends only to those matters which are not subject to regulation by the States. Ninety years since that Act, Congress has disturbed the States' siting authority only a single time, under very limited circumstances, which do not apply here. In addition, in the Energy Policy Act of 1992, Congress again expressly deferred to the primacy of state regulation over siting. Thus, because Congress has consented to the States' authority over the regulation of siting, the States' siting determinations are immune from a dormant Commerce Clause challenge.

In any event, the PUC's decision does not violate the dormant Commerce Clause. Pennsylvania law is facially neutral on the issue of need. The PUC applied that law in a non-discriminatory way. As the Commonwealth Court has already found, the PUC considered need, not with respect to Pennsylvania alone, but on a regional basis. The district court was bound by the Commonwealth Court's factual

finding under principles of collateral estoppel. Since the PUC considered need on a regional basis and, therefore, did not discriminate against interstate commerce, there can be no dormant Commerce Clause violation.

Finally, the district court should not have even reviewed these claims. Issue preclusion barred reconsideration of the PUC's determination on preemption. Claim preclusion prohibited Transource from raising its dormant Commerce Clause claim because it could have raised that claim with the PUC but did not. Although Transource attempted to reserve its federal claims under *England* before the Commonwealth Court, by then it was too late. Transource had to reserve these issues at the administrative level. It failed to do so.

ARGUMENT

Standard of Review: This Court's review of an order awarding summary judgment is plenary, applying the same test as the district court. *See e.g. Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 867 (3d Cir. 2012). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a).

I. The PUC's Decision Does Not Violate the Supremacy Clause.

The PUC's decision denying Transource's applications to site high voltage transmission lines does not violate the Supremacy Clause. A siting determination encompasses consideration of public need, and FERC has repeatedly reaffirmed in its orders that siting authority is reserved to the States.

A. The States' broad authority to determine whether there is a need to build transmission lines on their soil is a longstanding police power, one Congress chose not to preempt.

With the advent of electrical transmission in the late 19th century, power was dispatched over copper lines using direct current. Brown & Sedano, *Electricity Transmission: A Primer*, at 2 (Nat'l Council on Electricity Policy 2004), available at https://tinyurl.com/3yptdwpe. Because this method was highly inefficient, it required placing the generating source near the end-consumer, often less than a mile away. *Id*. As more power plants appeared, they followed this same model. *Id.* With the development of alternating current, however, electricity could be moved over

long distances with high-voltage transmission lines. *Id.* This spurred the construction of high-voltage transmission lines and larger generators. *Id.* This model of electrical transmission favored large monopolistic companies (rather than the initial model of small power plants and local distribution systems), who "vertically integrated" by constructing "their own power plants, transmission lines, and local delivery systems." *New York v. FERC*, 535 U.S. 1, 5 (2002); *see* Brown & Sedano, *supra* at 2-3.

As the electrical industry consolidated, state governments took notice and extended the jurisdiction of their regulatory commissions to electric companies. Brown & Sedano, *supra* at 2-3. By 1914, 43 state regulatory commissions had oversight of electric utilities. *Id.* at 3. Before 1935, the States had broad authority to regulate all aspects of electricity (generation, transmission, and distribution). *See FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 265-66 (2016); *New York*, 535 U.S. at 6. That changed in 1935 when, in response to the Supreme Court's decision in *Public Utility Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927),[13] Congress passed the Federal Power Act (16 U.S.C. § 824, *et seq.*).

[13] In *Attleboro*, the Court held that the dormant Commerce Clause barred the States from regulating certain interstate electricity transactions. 273 U.S. at 90.

Under that statute, the Federal Power Commission (the predecessor to FERC) was charged with regulating "the transmission of electric energy in interstate commerce" and "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). Yet, Congress also declared, as a matter of policy, that federal regulation of transmission and sale was "to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Thus, the States retained their traditional authority over the siting of transmission lines. *See Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009); *PacifiCorp.*, 69 FERC ¶ 61,099, 61,382 (1994); Brown & Sedano, *supra* at 3. And, as part of that siting determination, Pennsylvania, and many other states (discussed below), have required a showing of public need. *See* 52 Pa. Code 57.76(a)(1);[14] *see Phillips v. Pa. Pub. Util. Comm'n*, 124 A.2d 625, 627 (Pa. Super, 1956) (inquiring as to whether "the proposed line [is] supported by evidence of necessity"); Jim Rossi, *The Trojan Horse of Electric Power Transmission Line Siting Authority*, 39 ENVTL. L. 1015, 1019 (2009) ("Historically, state and local regulators have focused on determining the 'need' for a power line before giving siting approval"). This cooperative federalism

[14] In addition to need, the proposed line must not "create an unreasonable risk of danger to the health and safety of the public," be "in compliance with applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth," and "have minimum adverse environmental impact, considering the electric power needs of the public, the state of available technology and the available alternatives." 52 Pa. Code. § 57.76(a).

(between state and federal regulators) remained in much the same form for the next 50 years. *See* Brown & Sedano, *supra* at 3.

Congress shifted that balance of power, but only slightly, with its enactment of the Energy Policy Act of 2005. Pub. L. 109-58, 119 Stat. 594. Specifically, Congress authorized FERC to issue permits to site interstate transmission lines in areas specifically designated as National Interest Electric Transmission Corridors. 16 U.S.C. § 824p; *see Piedmont*, 558 F.3d at 313.[15] This case does not involve a national interest corridor.

But even in these specifically designated areas, FERC could only issue a siting permit if a State "withheld approval for more than 1 year after the filing of a [permit] application." 16 U.S.C. § 824p; *see Piedmont*, 558 F.3d at 313. Thus, the States still retained primary authority over siting even over projects of significant national interest. Klass & Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENVT'L L. REV. 423, 453 (2017). This federal authority is colloquially termed "*backstop*" siting authority. Elena P. Vekilov, *If It's Broke, Fix It: Federal Regulation of Electrical Interstate Transmission Lines*, 2013 U. ILL. L.

[15] In *Piedmont*, the Fourth Circuit held that "withheld approval" did not mean a state's denial of an application. 558 F.3d at 315. Congress later amended Section 824p, replacing "withheld approval" to "has not made a determination," and added that FERC could site transmission lines in a National Interest Electric Transmission Corridor even if a state denied a siting application. P.L. 117-58, § 40105.

REV. 695, 703 (2013). And, to date, FERC has never exercised its limited, backstop siting authority. FERC Proposed Rules, *Applications for Permits to Site Interstate Electric Transmission Facilities*, 88 Fed.Reg. 2770-01, ¶2 (Jan. 17, 2023) (FERC itself recognizing that Congress "established a limited Federal role in electric transmission siting"); ASHLEY LAWSON, CONG. RESEARCH SER., R47627, ELECTRICITY TRANSMISSION PERMITTING REFORM PROPOSALS (2023), available at https://tinyurl.com/3dyjxykv.

In addition, the Energy Policy Act of 2005 authorized "three or more contiguous states," subject to Congress's approval, to enter a compact establishing a regional transmission siting agency. 16 U.S.C. § 824p(i)(1). Through this legislation, Congress sought to "facilitate siting of future electric energy transmission facilities within those States," and for those States to "carry out" their "electric energy transmission siting responsibilities." *Id.*

In light of this history, outside of FERC's very limited backstop siting authority—which is not applicable here—Congress has not disturbed the States' longstanding historical authority to approve or deny siting permits for the construction of electric transmission facilities. *See Piedmont*, 558 F.3d at 310; Kevin Decker, *Allocating Power: Toward a New Federalism Balance for Electricity Transmission Siting*, 66 ME. L. REV. 229, 253 (2013) ("states have almost exclusive jurisdiction over siting decisions"). This makes sense; after all, while electricity

moves across state lines, the transmission lines and their supporting structures sit on land within the State. *See Grice v. Vermont Elec. Power Co., Inc.*, 956 A.2d 561, 570 (Vt. 2008). And the construction of transmission towers and other facilities often requires condemnation of private property through eminent domain. Vekilov, *supra* at 706.

How Congress regulates electricity transmission is in stark contrast to how it regulates natural gas. In 1938, Congress explicitly preempted state authority to regulate the transportation and sale of natural gas, vesting that authority exclusively in FERC's predecessor. Natural Gas Act, Pub. L. No. 75-688, 52 Stat. 831 (1938) (codified as amended at 15 U.S.C. §§ 717-717z (2006)); Klass & Rossi, *supra* at 436. Thus, a company seeking to transport natural gas must seek permission from FERC. 15 U.S.C. § 717f. Congress could have done the same with electricity transmission (and some commentators have called for this), but it has not done so. Sandeep Vaheesan, *Preempting Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 125 (2012). There are good reasons for this.

Siting of transmission lines impacts the environment, affects property values, and often results in the condemnation of property. Vekilov, *supra* at 715. Congress's decision not to preempt electrical transmission, 90 years after it first enacted the Federal Power Act, reflects that it understands that state agencies are far better equipped to hear and address these significant local concerns and to weigh them

against the need for the project, rather than a federal agency far off in Washington D.C. *See* Letter from FERC Commissioner Mark C. Christie at 4 (Mar. 24, 2023), available at https://tinyurl.com/4ndavhy5; FERC Proposed Rules, *supra* at 88 Fed.Reg. 2770-01, ¶3 (FERC Commissioner Christie concurring); *see also* James Moeller, *Interstate Electric Transmission Lines and States' Rights in the Mid-Atlantic Region*, 40 B.C. EVNT'L L. Rev. 77, 79 (2013) ("State public service commissions . . . are responsive to local concerns with high-voltage transmission lines that may cross over productive farmland, pristine countryside, historic locations, and national or state forests"); Klass & Rossi, *supra* at 472 (emphasizing that state review has prevented projects that, "in hindsight, were neither cost-effective nor environmentally sound"); Vekilov, *supra* at 715 ("A state-based system is best for maintaining private property rights . . . .").[16]

Yet, according to Transource and PJM, the federal government transferred this need determination, traditionally made as part of a state utility commission's decision on siting and that leads to the awesome power to condemn private property for public use, to non-governmental actors, such as PJM. They are mistaken.

[16] The ALJ highlighted the many negative consequences the IEC Project would have had on residents in the path of the proposed lines. JA109-17, ¶¶149-214; JA191-95. The IEC Project would have "detrimental economic and environmental impacts on real estate values, farming practices, natural springs, trout fishing, an elementary school, [a] cross country course, businesses . . . local government, and tourism." JA72.

B. The PUC's siting determination does not impede federal objectives concerning transmission planning.

The Supremacy Clause provides that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. CONST., Art. VI, cl. 2. There are two types of conflict pre-emption, express and implied, but only the latter is at issue. *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 487-95 (3d Cir. 2013). Implied conflict pre-emption applies when (1) state and federal law directly conflict, making it impossible for a party to comply with both laws, or (2) when the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). The district court declined to rule on whether there was a direct conflict because it concluded that the PUC's siting decision impeded federal objectives concerning transmission planning. The district court was mistaken.

1. The district court erred in not applying a presumption against pre-emption.

As an initial matter, the district court erred in refusing to apply a presumption against pre-emption. JA47 n.14. As we have already detailed, the siting of transmission lines is a matter falling within the domain of the States' "historic police powers." *New York*, 535 U.S. at 17-18; *see Rapanos v. U.S.*, 547 U.S. 715, 738 (2006) (recognizing that the "[r]egulation of land use . . . is a quintessential state and local power"). The district court mischaracterized the operative area, not as siting,

but as transmission planning. As we explain below, siting and transmission planning, although related, are distinct. But, the court was also wrong in asserting that the "States have not traditionally regulated interstate transmission planning." JA47 n.14; *see Emera Maine v. FERC*, 854 F.3d 662, 674 (D.C. Cir. 2017) (noting the "States' traditional regulation of transmission planning"); Gina Warren, *Vanishing Power Lines & Emerging Distributed Generation*, 4 WAKE FOREST J.L. & POL'Y 347, 390 (2014) ("Historically, transmission planning occurred through a bottom-up approach with states and local governments and planning agencies deciding whether and how to develop"). Since siting is a traditional state power, the presumption applies. Accordingly, Transource bears the burden of demonstrating that it was the "clear and manifest purpose of Congress" to supersede state law. *New York*, 535 U.S. at 18. Transource did not meet its burden.

2. The district court erred in conflating the planning and siting stages.

Transmission planning and siting decisions are distinct parts of the process that serve different purposes. Before FERC Orders 890 and 1000, public utility transmission providers were not required to develop a regional transmission plan. FERC Order 1000, 76 Fed.Reg. 49842-01, ¶3. And, as we previously explained, regional transmission planning at that time was an "ineffective, inefficient and chaotic and balkanized process in which each individual transmission owner plan[ned] only for its own commercial interests." JA676 (2009 PUC Comment); *see*

JA467-82 (Horger dep.); JA687 (Transmission Expansion Advisory Committee Recommendations).

Through Orders 890 and 1000, FERC required transmission providers to engage in regional transmission planning, so that transmission providers would be encouraged to "identify solutions to regional needs that [were] more efficient than those that would have been identified if needs and potential solutions were evaluated only independently by each individual transmission provider." FERC Order 1000, 76 Fed.Reg. 49842-01, ¶347. Thus, under Order 1000, "each public utility transmission provider [must] participate in a regional transmission planning process that produces a regional transmission plan and complies with existing Order No. 890 transmission planning principles." *Id.*, ¶68; *see id.*, ¶¶70, 80-81, 118, 146-48, 152, 160. Transmission providers were forced to get along during the planning stage.

These orders did not, however, affect the States' longstanding authority to determine need during the substantive *siting* stage of the process. In fact, FERC explicitly acknowledged that "there is longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction." *Id.*, ¶107. Order No. 1000 "*in no way* involve[d] an exercise of authority over those specific *substantive* matters traditionally reserved to the states, including . . . authority over siting, permitting, and construction of transmission solutions." *Id.*, ¶¶107, 156 (emphasis added).

FERC explained that Orders 890 and 1000 are "associated with the *processes* to identify and evaluate transmission system needs and *potential solutions* to those needs." *Id.*, ¶107 (emphasis added). FERC "repeatedly reaffirmed" throughout Order 1000 this authority of the States over siting, permitting, and construction. Vekilov, *supra* at 753, citing Order 1000, 76 Fed.Reg. 49842-01, ¶107; *see* 76 Fed.Reg. 49842-01, ¶49 (Order 1000 "reforms processes and is not intended to address" "what needs to be built, where it needs to be built, and who needs to build it"), *id.*, ¶159 ("We also decline to impose obligations to build . . . .").

This is the difference between transmission planning and siting: transmission planning is concerned with processes and potential solutions, whereas siting is the substantive decision that follows. Transmission planning can be thought of as a screening process, and siting as the final decision. Therefore, Order 1000 "creates [no] conflicts between state and federal requirements" and is "not intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." 76 Fed.Reg. 49842-01, ¶¶107, 227, 253 & n.231.

Upon requests for rehearing and clarification of Order 1000, FERC issued Order 1000-A. 77 Fed.Reg. 32184-01 (2012), ¶12. In Order 1000-A, FERC reiterated what it said in Order 1000: that the regional transmission planning process

is not intended to preempt state authority over the substantive decision concerning siting. *Id.*, ¶¶99, 186-191, 342, 377. The authority traditionally reserved to the States to authorize the construction and siting of new transmission facilities "is *distinct*" from the authority given to FERC under the Federal Power Act "to require public utility transmission providers to engage in an open and transparent regional transmission planning process designed to ensure that the more efficient or cost-effective solutions to regional transmission needs are selected in the regional transmission plan for purposes of cost allocation." *Id.*, ¶359 (emphasis added); *see id.*, ¶105; *see also* Doc. 172 (PJM Amicus brief) at 19 (recognizing the "distinct" state and federal authority over, respectively, siting and planning).

Thus, solutions proposed during the planning process "may not ultimately be constructed should the developer not secure the necessary approvals from the relevant state regulators." 77 Fed.Reg. 32184-01, ¶190. Accordingly, FERC stated, the transmission planning reforms of Order 1000 "respect the jurisdictional authority of the states regarding siting, permitting, and constructing of transmission facilities." *Id.*, ¶188; *see also* FERC Proposed Rules, *supra* at 88 Fed.Reg. 2770-01, ¶22 (FERC "continues to recognize the primacy of the States' role in siting transmission infrastructure").

Given all this language, when the South Carolina Public Service Authority claimed that, through Orders 1000 and 1000-A, FERC had infringed on "the States'

traditional regulation of . . . siting and construction," the D.C. Circuit promptly rejected that claim. The orders "expressly and repeatedly disclaim authority over those matters." *South Carolina Pub. Serv. Auth.*, 762 F.3d at 62. "The orders neither require facility construction *nor allow a party to build without securing necessary state approvals*." *Id.* (emphasis added).

Transource (and PJM) are effectively advocating for that here, that they be allowed to build without state approval. According to them, once PJM concluded that the IEC Project satisfied its cost-benefit methodology, which FERC found was reasonable, the PUC was supposed to rubber stamp the project as needed. Strikingly, though, when Transource filed its application with the PUC, it acknowledged that it would "be required to demonstrate the need for the" IEC Project. JA458. PJM, too, has previously stated that "it does not play a role in siting transmission facilities[,]" and that Transource, as "the entity designated to build the RTEP project bears the responsibility . . . to obtain the necessary state and local approvals." JA685 (PJM Paper).

However, once the ALJ recommended denying the siting applications on the basis that the IEC Project was not needed, Transource reversed course (and so did PJM, as it later explained in its amicus brief before the district court). According to them, the PUC had not made a siting decision, but a planning decision, even though the PUC's decision was made in the context of a siting proceeding. Doc. 158 at 33

(Transource brief); Doc. 172 at 20 (PJM Amicus Brief). The district court agreed that "[t]he PUC's decision was not an exercise in siting." JA48. However, rather than plumb the breadth and the depth of FERC's own language in its orders, the district court turned to the dictionary definition of "siting." JA56-57. The district court concluded that the PUC did not make a siting determination because its denial "was not related to the particular place" of the IEC Project. JA57. Even under that facile analysis, the district court was mistaken. Logically, before deciding where exactly to place transmission lines, one must first determine if there is a need to put the lines there at all.

But that aside, when FERC issued Orders 1000 and 1000-A, it obviously knew that "public need" is a component of a state's siting determination. "Need" is a nearly universal state requirement, and has been since long before Order 1000. *See* Fla. Stat § 403.537; 35-A Me. Rev. Stat. § 3132; MD Public Util. § 7-207(f)(1)(i); Mont. Code Ann. § 75-20-301; N.Y. Pub. Serv. Law §122; 66 Pa.C.S. § 1501; TX Util. § 37.051 (all requiring a showing of need); *see also* Alexandra B. Klass, *The Electric Grid at Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1916 (2015) (noting that transmission siting laws generally require the transmission operator "to establish the 'need' for the line"); Brown & Rossi, *Siting Transmission Lines in a Changed Milieu: Evolving Notions of the 'Public Interest' in Balancing State and Regional Considerations*, 81 U. COLO. L.

REV. 705, 724 (2010) ("All state siting laws require a balancing of need against the non-economic effects of the proposed facility"). FERC's orders must be read in that light, that FERC understood that when it said it was not encroaching on state authority over siting, this included a state's authority to determine need.

Congress, too, has recognized that, in the course of a siting determination, state regulators consider the benefits of the proposed transmission lines. Under FERC's limited backstop siting authority, it is only when a state "does not have the authority to . . . consider the interstate *benefits* or interregional benefits" of transmission facilities in a National Interest Electric Transmission Corridor that FERC may step-in and issue a construction permit. 16 U.S.C. § 824p(b)(1)(A)(ii) (emphasis added).

Likewise, the Fourth Circuit has stated that a state utility commission's consideration of a siting application traditionally considers costs and benefits. *Piedmont*, 558 F.3d at 314. This is a state commission's "normal work." *Id.*

The district court criticized the PUC's explanation of this division of federal and state authority over planning and siting as promoting an inefficiency. JA44 (characterizing the PUC's argument as suggesting "that the only federal objective at play . . . is . . . to create an essentially *academic* plan") (emphasis added). Respectfully, that is a public policy decision for Congress, not the district court.

Some commentators have similarly criticized the state of the law as being inefficient. To these commentators, it would be more efficient for the federal government to assume all siting authority.[17] But, regardless of the merits of that position (for the moment), these commentators understand (unlike the district court) that the siting of transmission lines is reserved to the States, and this includes a determination on whether those lines are needed. This is the law.

As the Supreme Court recognized, Congress "sometimes is moved to respect state rights and local institutions even when some degree of efficiency of a federal plan is thereby sacrificed." *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 530 (1945). Perhaps it would be more efficient for RTOs, such as PJM, to make an exclusive determination on need during the planning process and bulldoze over the local concerns of the States and property owners. But Congress recognized, by declining to preempt state authority on siting, that sacrificing some efficiency on planning is worth respecting the rights of States because they are better suited to make these need determinations during a siting

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[17] *See* Vekilov, *supra* at 753 (lamenting "the states' role in the siting and permitting of transmission lines [a]s the largest problem stalling line development," and FERC's "insistence that states' authority is not being preempted or challenged effectively renders any regional [need] consideration secondary to states' already established priorities of intrastate benefits"); Klass, *supra* at 9 (asserting that "[t]he problem with individual states determining whether there is a 'need' for an interstate transmission line or whether the line is a public use is that a single state . . . will necessarily focus on the need of the citizens of its own state").

proceeding. *See* P.L. 102-486, § 731, 16 U.S.C. § 796, State Authorities, Construction ("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 interfere with, the authority of any State . . . relating to . . . the siting of facilities").

Thus, contrary to the district court's conclusion, the PUC is not "attempting to supplant the role of [PJM] and expand its state authority into the regulatory territory occupied by the federal government." JA46. It was the district court who upended the balance of power between the States and the federal government, and shifted that power to non-governmental entities, such as PJM. This Court must restore the proper balance of power.

One FERC Commissioner has already spoken out about the district court's errors in this case, and the need to reaffirm the proper spheres of state and federal regulation: "In light of [the *Transource*] decision, [FERC] must make it clear once again – as it did in Order No. 1000 – that while FERC regulates RTOs such as PJM, in no way does that regulatory oversight represent any intent to preempt the states' decades-old authority to conduct [certificate of public convenience and necessity] proceedings that consider issues of need and prudence." *Order on Abandoned Plant Incentive re Baltimore Gas*, 187 FERC ¶ 61,030 (Apr. 23, 2024) (Christie, dissenting on different grounds), available at https://tinyurl.com/3ur9n39d.

Again, the regional planning process and siting determination are distinct. And the PUC's needs determination was one of siting, not planning. PJM, through its 2014/2015 RTEP, identified and evaluated transmission system needs and *potential* solutions to those needs in a single regional plan. FERC Order 1000, 76 Fed.Reg. 49842-01, ¶107. This was more efficient than having multiple transmission providers independently evaluate the expansion needs of the grid, which is what Orders 890 and 1000 were designed to address. That federal objective, directed to a *process* (not a substantive result), was accomplished in PJM's 2014/2015 RTEP.

Importantly, PJM's transmission planning process and the PUC's siting and permitting process consist of different procedures. PJM's process is a closed loop in which the PJM Board approves recommendations brought forward by PJM staff, based on PJM staff's analysis of projects submitted by prospective transmission owners and internal conversations with the PJM Board. In selecting projects for inclusion in the RTEP, the PJM Board does not conduct evidentiary hearings, develop a factual record, take sworn testimony, permit cross-examination, briefing or argument by interested parties. (Doc. 164-1 (Ex. A, David Souder Dep. Tr., at 59 (ECF pagination) ("[PJM Staff] perform the analysis, [PJM Staff] perform sensitivities around that. And if [PJM Staff] determine that the benefit-to-cost analysis is no longer to the correct level, which then [PJM Staff] would actually have conversations internally and then have conversations with the PJM board. And then

we would make a decision as to whether the project is cancelled based on no longer seeing the benefit-to-cost ratio as a need."); *and see id*. at 127 ("[PJM Staff] select the project, [PJM Staff] bring it to the board. The board approves it, [PJM Staff] put it in our model."); *and see id*. at 149-50 (describing the entire PJM project submission, analysis and approval process).)

By contrast, the PUC's subsequent findings were based on a fully litigated record, (JA223-36 (describing proceedings before the PUC)), which indicated that the congestion identified by PJM had declined precipitously since PJM's initial analysis and that the total costs of the project far outweighed its benefits, for purposes of permitting actual siting and construction of the project. JA427-28 (PUC SMF). In this way, the PUC process provides an important procedural check on the un-litigated, un-reviewed conclusions reached by PJM based on its unpublished models, and further justifies FERC's decision to preserve and protect a siting and permitting role for the states.

Thus, after PJM's process was completed in this matter, the PUC made a *substantive* decision on siting, after holding hearings where all interested parties, including landowners facing condemnation of their property, had an opportunity to present evidence and be heard. And the PUC found that the IEC Project was not needed. This is a decision FERC has recognized is reserved to the States. Accordingly, the PUC's decision does not violate the Supremacy Clause.

II. The PUC's Decision Does Not Violate the Dormant Commerce Clause.

The PUC's decision does not violate the dormant Commerce Clause for two reasons: *first*, Congress consented to state regulation over siting and, *second*, the PUC did not discriminate against interstate commerce because the PUC considered the region as whole, not just Pennsylvania, in denying the siting applications.

A. Congress has expressly authorized the States' regulation of siting.

The Commerce Clause grants Congress power "to regulate Commerce . . . among the several states." U.S. CONST. Art. I, § 8, cl. 3. Although "framed as a positive grant of power to Congress," the Supreme Court has held that this language contains "a further, negative command, known as the dormant Commerce Clause." *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 548-49 (2015). States may not enforce certain economic regulations even when Congress has been dormant, that is, declined to legislate on that subject. *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 368 (2023). Congress, however, is free to permit the States to "regulate an aspect of interstate commerce." *Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652-53 (1981). If Congress so acts, its exercise of the commerce power is not dormant and, therefore, "any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Ins. Co.*, 451 U.S. at 653. Congress's intent to remove state regulation from

Commerce Clause scrutiny must be clearly expressed. *See Wyoming v. Oklahoma*, 502 U.S. 437, 458 (1992); *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 430 (3d Cir. 2011).

Here, Congress manifested its intent not to disturb the States' traditional authority over siting in two ways. In the Federal Power Act, enacted in 1935, Congress expressly declared that federal regulation "of the transmission of electric energy in interstate commerce" would "extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a).[18] As previously explained, at that time, the States had broad authority to regulate the siting of transmission lines. Since that time, outside of FERC's limited backstop siting authority, little has changed. The States largely enjoy that same broad authority over siting. Although Section 824(a) is a "policy declaration" that "cannot nullify a clear and specific grant of jurisdiction," *see New York*, 535 U.S. at 22, Congress's decision, nearly 90 years after it enacted the Federal Power Act, not to disturb the States' siting authority, manifests its intent. This is in contrast to the construction of a hydropower plant, and

[18] The purpose of the Federal Power Act was "to extend federal regulation to matters that *could not* be regulated by the states and also to exert Federal authority to strengthen and assist the states in the exercise of their regulatory powers and not to impair or diminish the proper powers of any state commissions." *Indiana and Michigan Power Co. v. State*, 275 N.W. 450, 455 (Mich. 1979) (emphasis added).

an interstate gas pipeline, both of which Congress decided requires FERC approval. *See* 15 U.S.C. § 717f ; 16 U.S.C. § 799.

Congress again expressed its intent in the Energy Policy Act of 1992. Congress expressly deferred to the primacy of state regulation over siting, declaring that "[n]othing 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." P.L. 102-486, § 731; 16 U.S.C. § 796, State Authorities, Construction; *See Western & Southern Life Ins. Co.*, 451 U.S. at 653 (statutory provision declaring that "[t]he business of insurance . . . shall be subject to the laws of the several States which relate to the regulation or taxation of such business" was an unequivocal expression of Congress's intent to permit the States to regulate and tax the business of insurance); *see Tampa Elec. Co. v. Garcia*, 767 So.2d 428, 436 (Fla. 2000) (summarily rejecting dormant Commerce Clause challenge to Florida's power plant siting statute because Congress "expressly left to the States" siting and needs determination).

Congress enacted these provisions knowing "that state oversight . . . would have some effect on interstate commerce." *Northwest Central Pipeline Corporation v. State Corp. Commission of Kansas*, 489 U.S. 493, 524 (1989). Even before 1992, there were real-world examples of state siting authority affecting interstate commerce. *See Mississippi Power & Light Co. v. Conerly*, 460 So.2d 107, 112 (Miss.

1984) (dismissing petitions to condemn land for construction of 51 miles of high voltage transmission lines from Mississippi to Louisiana because "public necessity" for condemnation was lacking, as "not one Mississippi consumer will receive electricity directly from the line"); *Clark v. Gulf Power Co.*, 198 So.2d 368, 371-72 (Fla. Dist. Ct. Appeal 1967) (holding that power of eminent domain could not be used for a "one way transmission line" from Florida to Georgia "from which the citizens of Florida will not derive one iota of benefit"). Yet Congress determined that preserving States' historic authority in this area was worth some inefficiencies in the process.

In short, regardless of any impact state siting authority has on interstate commerce, Congress has expressed its intent that this authority is reserved to the States. Accordingly, the PUC's decision cannot violate the dormant Commerce Clause.

B. The PUC's decision does not discriminate against interstate commerce on its face or in effect, nor did it violate the *Pike* balancing test.

Assuming *arguendo* that Congress has not consented to state regulation over siting, the PUC decision still does not violate the dormant Commerce Clause. At the "very core" of the Supreme Court's dormant Commerce Clause jurisprudence lies an "anti-discrimination principle." *Nat'l Pork Producers*, 598 U.S. at 369. The Commerce Clause "prohibits the enforcement of state laws driven by economic protectionism," that is, laws that are designed to "benefit in-state economic interests

at out-of-state interests' expense." *Id.*; *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 192-93 (1994).

The initial inquiry is whether the state regulation discriminates against interstate commerce "either on its face or in practical effect." *Maine v. Taylor*, 477 U.S. 131, 138 (1986); *Tri-M Grp*, 638 F.3d at 427. If so, then "heightened scrutiny applies." *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Marketing Bd.*, 298 F.3d 201, 210 (3d Cir. 2002). Such discrimination is virtually "*per se* invalid," and the regulation will survive only if the State can demonstrate "that it has no other means to advance a legitimate local interest." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

If, however, the regulation is facially non-discriminatory and regulates evenhandedly to effectuate a legitimate local public interest and merely incidentally burdens interstate commerce, then the *Pike* balancing test applies. *See Pike*, 397 U.S. at 142. Under that test, the regulation "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* Recently, however, the Supreme Court has clarified that there is a "congruity" between "the *Pike* lines of cases" and the Court's "core antidiscrimination precedents" (*per se* invalid cases). *Nat'l Pork Producers*, 598 U.S. at 377. Thus, before *Pike* balancing applies, the challenger must show that the law is discriminatory. *Id.* at 377-78 (noting that by examining a law's "practical effects,"

Pike "serves to smoke out" "the presence of a discriminatory purpose"), citing with approval, *Park Pet Shop, Inc. v. City of Chicago*, 872 F.3d 495, 501-02 (7th Cir. 2017) ("*Pike* balancing is triggered only when the challenged law discriminates against interstate commerce in practical application").

On the issue of need for transmission lines, Pennsylvania law is facially neutral. Under PUC Regulation 57.76(a)(1), the PUC will not grant an application to site and construct high-voltage transmission lines unless "there is a need for it." 52 Pa. Code § 57.76(a)(1). Section 1501 of the Public Utility Code similarly requires a showing of "public necessity." 66 Pa.C.S.§ 1501; JA740 (Commonwealth Ct. Op.) ("[n]ecessity and need are corollaries"). Nothing from the text of Section 57.76(a)(1) or Section 1501 suggests that Pennsylvania law favors consideration of in-state need, rather than need on a regional basis. Thus, these laws are facially neutral. *See Nat'l Pork Producers*, 598 U.S. at 371-72 (California law that imposed uniformly strict regulations on the production of all pork sold in the State, regardless of where it was produced (in-state or out-of-state), applied uniformly); *Truesdell v. Friedlander*, 80 F.4th 762, 770 (6th Cir. 2023) (where a Kentucky law required applicants to obtain a certificate of need before providing ambulance services, there was "nothing on the face" of the law that favored in-state providers over out-of-state providers).

Moreover, the PUC's practical application of these facially-neutral laws to the IEC Project did not favor in-state need. As the PUC explained in its decision, the

ALJ "viewed the regional planning proposal on a '*Pennsylvania-also basis*, in that the review included consideration of the importance of prospective federal regional planning objectives and the importance of prospective impact upon the Commonwealth." JA281. Indeed, when Transource challenged the PUC's decision in state court, the Commonwealth Court affirmed that, "contrary to [Transource's] arguments, the [PUC] did not engage in a Pennsylvania-only review of the costs and benefits of the IEC Project." JA744. Rather, the PUC "examined the detrimental impacts to ratepayers in other parts of the PJM Region" in concluding that Transource had not established need. *Id.*

The district court should have given the Commonwealth Court's factual finding that the PUC considered need on a regional basis preclusive effect. Under 28 U.S.C § 1738, when a prior case has been adjudicated in state court, a federal court is required to give full faith and credit to the state court judgment, applying the same preclusion rules as the state court. *See Edmundson v. Borough of Kennett Square,* 4 F.3d 186, 189 (3d Cir. 1993). This includes "state administrative decisions that have been reviewed by [a] state court." *Id.*, citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 479-85 (1982).

The issue in the Commonwealth Court is identical to the one presented here (whether the PUC considered need on a regional basis), the Commonwealth Court rendered a final judgment on the merits, Transource was a party in the

Commonwealth Court, and Transource had a full and fair opportunity to litigate this issue. *See Jones v. UPS*, 214 F.3d 402, 405-06 (3d Cir. 2000) (applying Pennsylvania law), citing *Rue v. K-Mart Corp.*, 713 A.2d 82, 84 (Pa. 1998). The district court, therefore, was barred by collateral estoppel from concluding that "the PUC's own words make clear that it was focused on protecting the interests of Pennsylvanians." JA63; *see Kentucky West Virginia Gas Co. v. Pa. Pub. Util. Comm'n*, 837 F.2d 600, 611 (3d Cir. 1988) (where PUC's findings that gas costs were excessive and imprudently incurred were supported by substantial evidence, those findings were entitled to preclusive effect); *see also Jones*, 214 F.3d at 405-06 (where a Pennsylvania Workers' Compensation Judge found that claimant had fully recovered from his work-related injury and was able to return to work, claimant's ADA claim had to be considered "in light of [that] irrefutable fact"); *see Bradley v. Pitt. Bd. of Educ.*, 913 F.2d 1064, 1073 (3d Cir. 1990) (teacher was collaterally estopped from challenging state court's finding that his conduct constituted negligence and persistent violations of school law under Pennsylvania Public School Code), citing RESTATEMENT (SECOND) OF JUDGMENTS § 86, comment f, illustration 7 (1982). The irrefutable fact, as found by the Commonwealth Court, is that the PUC considered need on a regional basis. *See Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 823 (3d Cir. 1994) (even where there is an *England*

reservation, issue preclusion applies to the state law question decided by the state court, "as well as the factual and legal findings necessary to that answer").

Even if issue preclusion did not apply, the district court's decision, contradicting the Commonwealth Court's finding that the PUC considered need on a regional basis, was plainly wrong. The district court overlooked the many statements in the decisions of both the ALJ and the PUC that they considered the need for the project on a regional basis. JA281 (PUC Dec.); JA102-03, ¶¶107-08, and JA168 (ALJ Rec. Dec.) ("the IEC Project as a market efficiency project does not provide sufficient benefits to Pennsylvania *or the PJM region as a whole*") (emphasis added).

It is nothing new for the PUC to consider regional needs. The PUC has approved siting for regional projects when there is a need. As the PUC explained in its decision, and the Commonwealth Court affirmed, "[r]egional planning matters are recognized to be of significance, and where the weight of the evidence indicates that the 'need' for the project is established by a preponderance of the evidence, the element of need will be found, as it was in the *TrAILCO Case*." JA282 (PUC Dec.); JA743 (Commonwealth Ct. Op.) (citing *TrAILCO*, among other cases, as showcasing that the PUC has found on "numerous" occasions public need for high voltage transmission lines); *see* 66 Pa.C.S. § 2805(a) (the PUC "shall take all

necessary and appropriate steps to encourage interstate power pools to enhance competition and to complement industry restructuring on a regional basis").

Finally, for the same reasons, Transource cannot show a dormant Commerce Clause violation under the *Pike* balancing test. Transource cannot even trigger the balancing test itself because it cannot demonstrate that the PUC's decision was discriminatory. Again, the PUC considered need on a regional or "Pennsylvania-also" basis. JA281.[19]

As one FERC Commissioner has recognized, "the whole mantra that goes 'the states are blocking needed transmission all over the country!' is simply a political and special-interest narrative." FERC Proposed Rules, *supra* at 88 Fed.Reg. 2770-01, ¶3 (Christie concurring). "[I]f the line is truly needed, the State regulators will in all likelihood approve it." *Id.* After considering the IEC Project on a regional basis, the PUC concluded that the lines were not needed, and so it did not approve Transource's siting applications. That determination was reserved for the PUC, not

[19] Even if the PUC had considered only the costs to Pennsylvania, Transource's entire claim stands the dormant Commerce Clause on its head. Transource is proposing that Pennsylvania must permit the construction of transmission lines *within its own borders* in order to benefit citizens outside its borders, even if those lines will not benefit Pennsylvanians. In other words, Pennsylvania must discriminate against itself. The dormant Commerce Clause requires no such martyrdom.

FERC, and not any non-governmental actor whose interests do not align with the States. Accordingly, the PUC did not violate either the Supremacy Clause or the Dormant Commerce Clause.

III. The District Court Should Not Have Reviewed Transource's Claims Because They Were Precluded.

The district court should not have reached Transource's federal claims. Transource is barred under issue preclusion (collateral estoppel) from challenging the PUC's decision on preemption. Transource's failure to raise its dormant Commerce Clause claim before the PUC means review of that claim in federal court now is precluded (res judicata). Although Transource later invoked an *England* reservation of its federal claims before the Commonwealth Court, by then it was too late. Transource had to reserve at the administrative level.

The district court concluded that "there is no evidence . . . that Transource submitted its federal claims to the PUC." JA31. Once again, the district court was incorrect. Transource argued to the PUC that it lacked the authority to determine need pursuant to FERC Order 1000. JA273, 276-80 (PUC Dec.). This was clearly an argument based on the Supremacy Clause, and the PUC rejected it. And Transource could have challenged the PUC's decision in the Commonwealth Court, but did not.

Under Pennsylvania law, administrative determinations, even those unreviewed by a court, are entitled to collateral estoppel effect. *See City of*

McKeesport v. Pa. Pub. Util. Comm'n, 442 A.2d 30, 31 (Pa. Cmwlth. 1982); *Pa. Elec. Co. v. Pa. Pub. Util. Comm'n*, 433 A.2d 620, 625 (Pa. Cmwlth. 1981). Even if this Court applied federal common-law rules, collateral estoppel would still apply because of the PUC's "expertise." *See Edmundson*, 4.F3d at 192-93 (agency must possess "the expertise to issue binding pronouncements in the area of federal constitutional law"); *Crossroads Cogeneration Corp. v. Orange & Rockland Util., Inc.*, 159 F.3d 129, 135 (3d Cir. 1998). The Pennsylvania Supreme Court itself has recognized the expertise of the PUC (and other administrative agencies) to address an "as-applied constitutional challenge," stating that the failure to raise a constitutional issue at the administrative level results in waiver. *See HIKO Energy, LLC v. Pa. Pub. Util. Comm'n*, 209 A.3d 246, 262 (Pa. 2019).

Further, although an *England* reservation is an exception to claim preclusion, *see Instructional Sys., Inc.*, 35 F.3d at 822, Transource did not timely reserve. Once the ALJ issued its adverse recommended decision, Transource should have invoked an *England* reservation before the PUC. Transource simultaneously could have filed its federal claims in federal court and sought abstention while the PUC considered the state law claims. This is precisely what other litigants have done under similar circumstances. *See Bradley*, 913 F.3d at 1068 (teacher facing dismissal invoked *England* before the Secretary of Education, and Secretary acquiesced from addressing federal claims); *see also Ivy Club v. Edwards*, 943 F.2d 270, 275 (3d Cir.

1991) (club reserved its rights under *England* before ALJ); *Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1304-05 (11th Cir. 1992) (outlining the proper procedure under *England*). Requiring a party to reserve at the administrative level is consistent with the general rule protecting a defendant "'from being harassed by repetitive actions based on the same claim.'" *Bradley*, 913 F.2d at 1072, quoting RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(a), comment a (1982); *see also Sharpley v. Davis*, 786 F.2d 1109, 1112 n.2 (11th Cir. 1986) (requiring litigant to reserve federal claims at "earliest administrative level").[20] Transource was simply too late when it attempted to invoke the *England* reservation for the first time in the Commonwealth Court.

Review of the dormant Commerce Clause claim is barred by claim preclusion. Transource could have raised that claim before the PUC, or they could have reserved it under *England* in the PUC. *See Edmundson*, 4 F.3d at 189 (noting that claim preclusion is broader in effect than issue preclusion). They did neither. Therefore, Transource was prohibited from raising that claim in the district court.

[20] Although the Eleventh Circuit in *Sharpley* required a litigant to invoke *England* at the earliest administrative level, it said that preclusive rules would not apply unless subsequent state court review occurred. 786 F.2d at 1112. Such a rule is inconsistent with protecting a defendant from twice defending against the same claim. It also allows for gamesmanship as a litigant can obtain the agency's view on the federal law claim before suing in federal court.

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Michael J. Scarinci, Senior Deputy Attorney General, hereby certify as follows:

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

2. That the text of the electronic version of this brief is identical to the text of the paper copies.

3. That the following virus detection program – SYBARI ANTIGEN Version 8.00.1470 – was run on the file and no virus was detected.

4. That this brief contains 13,000 words within the meaning of Fed. R. App. Proc. 32(a)(7)(B). In making this certificate, I have relied on the word count of the word-processing system used to prepare the brief.

/s/ Michael J. Scarinci

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CERTIFICATE OF SERVICE

I, Michael J. Scarinci, Senior Deputy Attorney General, do hereby certify that I have this day served the foregoing Brief For Appellants, via electronic service, on all registered CM/ECF users.

Seven copies were also sent by first class mail to the Clerk of the United States Court of Appeals for the Third Circuit in Philadelphia, Pennsylvania.

/s/ Michael J. Scarinci

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DATE: May 10, 2024