

No. 24-1045

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

TRANSOURCE PA, LLC
Appellees

v.

STEVEN 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 *AMICUS CURIAE* STOP TRANSOURCE FRANKLIN COUNTY
IN SUPPORT OF APPELLANTS**

Benjamin C. Dunlap, Jr., Esquire
COHEN SEGLIAS PALLAS GREENHALL &
FURMAN, P.C.

240 North Third Street, 7th Floor
Harrisburg, PA 17101
Phone: (717) 480-5303
Fax: (717) 213-0731

May 17, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF IDENTIFICATION.....	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. Due Process Considerations	3
II. Public Interest Considerations.....	7
CONCLUSION	12

TABLE OF AUTHORITIES

Page(s)

CASES

<i>California Wilderness Coalition v. DOE</i> , 631 F.3d 1072 (9th Cir. 2011)	8-9
<i>Ky. West Virginia Gas Co. v. Pa. Public Utility Comm’n</i> , 791 F.2d 1111 (3rd Cir. 1986)	8
<i>Mathews v. Eldridge</i> , 424 U.S. 319 (1976)	4, 5
<i>Rogan v. Bensalem Township</i> , 616 F.2d 680 (3rd Cir. 1980)	4
<i>Southern Pacific Co. v. City of Portland</i> , 221 F.R.D. 637 (D. Or. 2004)	6
<i>U.S. v. James Daniel Good Real Estate</i> , 510 U.S. 43 (1993)	3
<i>Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.</i> , 454 U.S. 464 (1982)	6

STATUTES

15 Pa.C.S. § 1511(c)	5
16 U.S.C. § 824p	8
16 U.S.C. § 824p(a)(1)	8
16 U.S.C. § 824p(a)(2)	9
16 U.S.C. § 824p(b)	9

RULES

Fed. R.App.P. 29(a)(2).....	1
Fed. R.App.P. 29(a)(4)(E).....	1

STATEMENT OF IDENTIFICATION

This Amicus Brief is being filed by Stop Transource Franklin County (“STFC”), which is an association of Franklin County, Pennsylvania residents, who advocate against the Transource PA, LLC (“Transource”) project which is the subject of this litigation. STFC members own land in and around the right-of-way for the proposed HV transmission lines, and live, work and operate businesses, including agricultural businesses, in and near the proposed right-of-way.

STFC intervened and fully participated in the proceedings of the Pennsylvania Public Utility Commission (“PUC”) below, which denied the Application of Transource on the basis of need, as well as in the successful appeal of that decision to the Pennsylvania Commonwealth Court. STFC further sought intervention in the District Court proceeding which is the subject of this appeal. STFC’s intervention was denied by Judge Jennifer P. Wilson in her Order dated July 23, 2021, based upon the matters before the District Court being legal issues for which its interests are shared with and will be represented by the PUC.

Amicus files this brief with the consent of all parties. See Fed. R.App.P. 29(a)(2). No party or party’s counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than amicus and its counsel contributed money that was intended to fund preparing or submitting the brief. See Fed. R.App.P. 29(a)(4)(E).

SUMMARY OF ARGUMENT

STFC fully supports the arguments of the PUC made in its Appellants' Brief filed on May 10, 2024. STFC likewise concurs in and fully supports the arguments of amicus curiae Pennsylvania Office of Consumer Advocate ("OCA") filed in support of the PUC on May 17, 2024. STFC files its own brief to address a single issue not discussed in the briefs of the PUC or OCA, *i.e.*, the procedural due process violations of STFC members' rights under the District Court's decision granting summary judgment to Transource. These violations warrant reversal of the District Court's Order of December 6, 2023, or, in the alternative, require remand to the District Court for a hearing on the otherwise unreviewed agency determination of need for the line should this Court find in favor of Transource on the Supremacy and Dormant Commerce Clause issues before this Court on appeal.

Under the District Court's decision, the arbiter of need for the transmission line under consideration is PJM Interconnection, LLC ("PJM"), a Regional Transmission Organization ("RTO") under the Federal Energy Regulatory Commission ("FERC"). If, as the District Court suggests, PJM's decision is determinative as to whether the line should be built, there would be no forum in which parties who will be directly affected by the presence of the proposed transmission line can register opposition to the need or alternatives to the construction of the line. The District Court's decision cannot be correct because

affected landowners are then left without due process, as they cannot intervene with PJM.

State-level proceedings such as those of the PUC present a forum to address these concerns, and thus the District Court decision should be reversed. However, if Transource prevails on the legal questions before this Court, and the matter is simply remanded to the PUC for a further hearing on those issues that all parties agree are within its jurisdiction, PJM's determination of need will evade review. If the District Court decision is not reversed, remand to that Court for a hearing on need would provide a forum to challenge PJM's determination, fulfilling both due process and public interest considerations.

ARGUMENT

I. Due Process Considerations

There can be no doubt that the taking of private property for a high voltage transmission line deprives affected landowners of a significant, protected property interest. See *U.S. v. James Daniel Good Real Estate*, 510 U.S. 43, 53-54, 114 S.Ct. 492, 501 (1993) ("Good's right to maintain control over his home, and to be free from governmental interference, is a private interest of historic and continuing importance.").

Before a governmental body may deprive a landowner of a property interest, it must provide due process. The exact process required

varies with the demands of the particular situation in question. A balancing test has been articulated by the Supreme Court to determine the requirements of due process for any given situation. . . . The Court has identified the following as elements of due process: (1) notice of the basis of the governmental action; (2) a neutral arbiter; (3) an opportunity to make an oral presentation; (4) a means of presenting evidence; (5) an opportunity to cross-examine witnesses or to respond to written evidence; (6) the right to be represented by counsel; and (7) a decision based on the record with a statement of reasons for the result. Whether all or any one of these safeguards are required in a particular situation depends on the outcome of the balancing test mentioned above.

Rogan v. Bensalem Township, 616 F.2d 680, 694 (3rd Cir. 1980), *citing*, *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903 (1976).

In the present case, the District Court approached its examination of the legal issues before it on summary judgment through the lens that PJM, through its benefit-cost analysis, has already determined the need for the project. JA45-46. While affected landowners will still be able to challenge the transmission line project on the basis of other considerations under the PUC's purview, such as environmental, health and safety reasons, predetermination of the core factor of need virtually ensures construction of the line.

In particular, landowners will lose the ability to challenge condemnations otherwise permitted "only after the Pennsylvania Public Utility Commission, upon application of the public utility corporation, has found and determined, after notice and opportunity for hearing, 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).

Thus, Transource will be permitted to condemn private property for the project without landowners having the ability to challenge the condemnation under the state law authorizing the condemnations.

Accepting for purposes of this brief that the determination of need must be made on the federal rather than state level for interstate transmission market efficiency projects under the Federal Power Act (“FPA”), procedural due process requires some forum for landowners who would be deprived of their protected property interests through construction of the power line to be heard. What due process is required in the particular situation is dependent upon the Supreme Court balancing test referenced in the *Rogan* decision, which in its original formulation was stated as follows:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, supra, 424 U.S. at 335, 96 S.Ct. at 903.

Here, without the ability to challenge PJM's determination of need on the merits, STFC¹ will be deprived of five of the seven elements of procedural due process cited in the *Rogan* decision. There will be no neutral arbiter; no opportunity to make an oral presentation; no means of presenting evidence; no opportunity to cross-examine witnesses; and no decision based on the record with a statement of reasons for its ruling on need. Instead, here there was a determination of need that FERC delegated to PJM, based upon a formula which FERC never formally approved. See OCA Amicus Brief, pg. 13, and citations therein.

If this Court determines that it is legally proper for FERC, through PJM, to make that determination of need, there must be some forum for those individuals whose protected property interests will be affected to challenge PJM's need determination on the merits. Otherwise, there could be an erroneous deprivation of that property interest due to the unavailability of any procedures to challenge that agency decision. If the District Court decision is otherwise affirmed, remand to the District Court has high value as a procedural safeguard against an erroneous deprivation of this protected property interest absent any opportunity for review.

¹ An association has standing, on behalf of its members, to intervene in legal proceedings where its members have suffered some actual or threatened injury; the injury can be traced to the challenged conduct; and the injury can be redressed by a favorable judicial decision. *Southern Pacific Co. v. City of Portland*, 221 F.R.D. 637, 640 (D. Or. 2004), citing, *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472, 102 S.Ct. 752 (1982).

On the other side of the balancing scale, judicial review of PJM's decision would be akin to review of any other decision of a governmental agency by a court. The fiscal and administrative burdens of such review would not be anything out of the ordinary.

Here the real property interests of landowners' homes, farms and businesses would be affected by the action; there is a high risk of erroneous deprivation of their property interests without a remand, as there would be no means to challenge PJM's determination of need; and a remand for district court review would be an ordinary means of preserving affected landowners' procedural due process rights. Thus, the balance weighs very much in favor of remand to the District Court to enable STFC to challenge PJM's determination of need, if this Court should otherwise affirm the District Court decision rather than reverse it.

II. Public Interest Considerations

A remand in which Transource would be required to prove a need for the proposed transmission line project, based upon procedural due process grounds, would also have the salutary effect of serving the public interest by not causing ratepayers to outlay nearly a half billion dollars on this project if it is not truly necessary. In other words, the same type of evidence that would be presented to

support and refute need for the project to satisfy due process requirements would at the same time address public interest concerns.

Much evidence was presented by the parties in the PUC proceedings below that led the Administrative Law Judge hearing the evidence and the full Commission to decide, and the Commonwealth Court to affirm, that there was no need for the project. While the federal court would owe no “comity” or deference to those decisions if this Court should uphold the District Court’s determination that those state decisions are preempted, *Ky. West Virginia Gas Co. v. Pa. Public Utility Comm’n*, 791 F.2d 1111, 1117 (3rd Cir. 1986), remand would provide the PUC as well as STFC and other intervenors the opportunity to have input on these important public interest concerns.

First, as the PUC and OCA point out in their respective briefs, federal authority over transmission line siting and construction approval is quite limited. Section 216 of the FPA, codified as 16 U.S.C. § 824p, limits such authority to areas within a National Interest Electric Transmission Corridor (“NIETC”). The process for the designation of a NIETC under the statute is extensive.

It first requires “a study of electric transmission capacity constraints and congestion” made “in consultation with affected States and Indian Tribes.” 16 U.S.C. § 824p(a)(1). The study submitted by the Department of Energy (“DOE”) for two proposed NIETCs was rejected in *California Wilderness Coalition v. DOE*,

631 F.3d 1072 (9th Cir. 2011), *inter alia* due to DOE's failure to conduct the congestion study "in consultation with affected states."

Following a properly conducted congestion study, DOE then issues a report in which, "after considering alternatives and recommendations from interested parties (including an opportunity for comment from affected States and Indian Tribes)" it "may designate as a national interest electric transmission corridor any geographic area" that meets certain standards. 16 U.S.C. § 824p(a)(2).

Finally, FERC may issue construction permits within a NIETC, based upon findings made "after notice and an opportunity for hearing" that certain criteria are met, including that "the proposed construction or modification is consistent with the public interest." 16 U.S.C. § 824p(b).

It is simply inconceivable that this level of State input and due process would be required for a high priority NIETC project, but no public input whatsoever is permitted into the determination of need for a lower priority market efficiency transmission line. The District Court's decision, without a means to challenge PJM's determination of need, would in effect provide PJM carte blanche to authorize the construction of new interstate transmission lines. In addition to supporting reversal of the District Court decision for violation of STFC members' due process rights, these NIETC requirements support that public interest

considerations weigh very much in favor of State input into the current project, warranting at the very least a remand.

Furthermore, there was much criticism below as to the benefit-cost methodology utilized by PJM to justify the supposed benefits of the project. In its analysis, the cost benefits of the project in some transmission zones were weighed, but the countervailing cost increases in other transmission zones were not included. Specifically, according to PJM's own calculations, the projected cost of the project in 2019 was \$496 million and the resulting cost savings would be \$845 million. However, PJM projected the increase in net load payments in other transmission zones would be \$812.5 million as a result of the project, providing a net benefit of just \$32.5 million. Looked at another way, \$496 million would be spent to construct the project for a net savings of just \$32.5 million.² See OCA Amicus Brief, pg. 11, n.3, and citations therein.

That certainly does not appear to be a prudent investment, meaning that Transource might not be pursuing the project if true market forces were at work.

² Evidence submitted in the PUC proceeding showed that congestion on the AP South Reactive Interface, which was the main driver of this project, diminished to a large extent in the years following the decision to proceed with the project in 2014. See PUC Brief, pgs. 13-14 and citations to the record therein. As 10 years has now passed since that initial decision, need from that standpoint could also be examined in a remand to the District Court. With so much time having passed, and this not being a market reliability project, it would seem prudent to reexamine the efficacy of this market efficiency project.

Here, however, Transource is entitled to recover all costs for the project as well as all expenditures that exceed the project's estimated cost from the benefitting transmission zones. Transource PUC Application, Att. 2, App. 2.3. That would of course not be the situation in a truly market-based scenario.

Thus, remand would also serve the public interest, which would otherwise remain unexamined if the District Court decision is affirmed.

CONCLUSION

STFC concurs with the PUC that the PUC Opinion and Order at issue before the District Court does not violate the Constitution's Supremacy Clause or the Dormant Commerce Clause, and the District Court Order should be reversed. However, if this Court should affirm the District Court's decision on either basis, remand to that Court is required to uphold the rights of STFC members to procedural due process on the question of need for the project. A remand would serve both protected individual rights as well as the public interest, if the District Court decision is not reversed.

Respectfully submitted,

**COHEN SEGLIAS PALLAS
GREENHALL & FURMAN, PC**

/s/ Benjamin C. Dunlap, Jr.

Benjamin C. Dunlap, Jr., Esquire

PA Bar I.D. #66283

240 North Third Street, 7th Floor

Harrisburg, PA 17101

Telephone: (717) 480-5303

bdunlap@cohenseglias.com

Counsel for:

Amicus Curiae

Stop Transource Franklin County

Date: May 17, 2024

COMBINED CERTIFICATIONS

1. Pursuant to Third Circuit L.A.R. 28.3(d), I am a member in good standing of the bar of this Court.

2. This brief complies with the word limit of Fed. R. App. P. 29(a)(5) because this document contains 2,580 words. This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced 14-point serif font (Times New Roman), using Microsoft Word.

3. Pursuant to Third Circuit L.A.R. 31.1(c), the text of the electronic version of this document is identical to the text of the paper copies filed with the Court.

4. Pursuant to Third Circuit L.A.R. 31.1(c), CrowdStrike Falcon Sensor version 7.13.18308.0 has been run on this electronic file and no virus was detected.

/s/ Benjamin C. Dunlap, Jr.

Benjamin C. Dunlap, Jr.

PA Bar I.D. #66283

Dated: May 17, 2024

CERTIFICATE OF SERVICE

I, Benjamin C. Dunlap, Jr., Esquire, hereby certify that on this 17th day of May, 2024, that I filed the foregoing Brief via CM/ECF system, which will send a Notification of Electronic Filing to all counsel of record.

VIA ECF

Darryl A. Lawrence, Esquire
David T. Evrard, Esquire
Melanie Joy El Atieh, Esquire
Pennsylvania Office of Consumer
Advocate
555 Walnut Street
5th Floor, Forum Place
Harrisburg, PA 17101-1923

Michael J. Scarinci
Senior Deputy Attorney General
Sean A. Kirkpatrick
Chief Deputy Attorney General
Appellate Litigation Section
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

Matthew E. Price, Esquire
Jenner & Block LLP
1099 New York Avenue, N.W.
Suite 900
Washington, D.C. 20001-4412

VIA UPS OVERNIGHT

7 hard copies

Office of the Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

/s/ Benjamin C. Dunlap, Jr.
Benjamin C. Dunlap, Jr.
PA Bar I.D. #66283