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

APPELLANTS' REPLY BRIEF

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

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SUMMARY OF ARGUMENT

Despite all the complexities surrounding the split state-federal regulatory authority over interstate transmission lines, the PUC's argument is straightforward: a state-siting proceeding has always encompassed a determination on whether the transmission line is needed. This need showing is required regardless of whether the proposed line is intra-state or interstate. Courts, legal scholars, and FERC have all recognized this. Indeed, FERC has disclaimed that federal law preempts state law on the need requirement. The authority against Transource's position is overwhelming.

Unthwarted, Transource points to the Federal Power Act and PJM's tariff as preempting the state law requirement of need. But this general language from the Federal Power Act does not demonstrate that it was Congress's clear and manifest intent to preempt state law. And reliance on PJM's tariff is even more tenuous. That tariff relates to regional transmission planning, not siting. FERC has disclaimed that the two are the same.

Transource's position finds no support in federal law. Even worse, Transource's position would violate the major questions doctrine. Transource is claiming that Congress has delegated to PJM, a non-governmental authority, an unheralded power to determine whether a transmission line is needed, a power that not even FERC has under the circumstances of this case. And, according to

Transource, PJM can make a determination of need without any input from landowners (in violation of their due process rights) or from the States (who traditionally made a determination on need). Such a transformative grant of power to a non-governmental entity requires more than the general terms of the Federal Power Act.

This case is the paradigmatic example of why Congress has left it to the States to determine need. They are better able to assess need. PJM now acknowledges that Project 9A is not needed and would, in fact, increase congestion. The PUC's review prevented this wasteful and counterproductive project.

The PUC's decision also does not violate the dormant Commerce Clause. Congress has expressly authorized the States (outside a very limited exception) to make a siting determination, which includes whether a transmission line is needed. Although the PUC did not raise the express authorization of Congress below, this Court may nevertheless reach this issue because of its importance to the public.

Further, many statements from the PUC's decision proves that it considered need on a regional basis, and was not engaged in economic protectionism. And in reviewing the PUC's decision, the Commonwealth Court correctly concluded that the PUC considered need on a regional basis. Instead of making a contradictory finding, the district court should have given the Commonwealth Court's finding preclusive effect.

For these reasons, the district court's decision must be reversed.

ARGUMENT

I. Transource Has Not Carried its Burden of Demonstrating that Pennsylvania Law is Preempted.

A. The presumption against preemption applies.

There are "two cornerstones of preemption jurisprudence." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Thus, "all preemption arguments 'must be grounded in the text and structure of the statute at issue.'" *Kansas v. Garcia*, 589 U.S. 191, 208 (2020), quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *see Medtronic*, 518 U.S. at 486.

Second, "because the States are independent sovereigns in our federal system, [a court] presume[s] that Congress does not cavalierly preempt" state law. *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 n.10 (2013); *Farina v. Nokia, Inc.*, 625 F.3d 97, 116 (3d Cir. 2010). As we explained in our opening brief, this is a "presumption against preemption." Brief at 34-35, citing *New York v. FERC*, 535 U.S. 1, 17-18 (2002). This presumption "applies with particular force in fields within the police powers of the state, but does not apply where state regulation has traditionally been absent." *Farina*, 625 F.3d at 116; *see New York*, 535 U.S. at 17-18. Where the presumption applies, Congress's intent to preempt state law must be "clear and manifest." *Medtronic*, 518 U.S. at 485; *Farina*, 625 F.3d at 117. Consequently, when the text of a statute is ambiguous, a court must "accept the

reading that disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008); *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 489 (3d Cir. 2013). But even where the presumption against preemption does not apply, the burden remains with the party asserting it. *See Maine Forest Prods. Council v. Cormier*, 51 F.4th 1, 6 (1st Cir. 2022); *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d 71, 84 (3d Cir. 2017).

Moreover, because Congress decided with the Federal Power Act to subject the interstate electricity industry to a dual state-federal regulatory scheme, "pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States, while at the same time preserving the federal role." *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 514-15 (1989). So long as a state is "regulat[ing] . . . subjects of state jurisdiction, and the means chosen [are] at least plausibly . . . related to matters of legitimate state concern," there is no conflict preemption "unless clear damage to federal goals would result." *Id.* at 518, 522.

Before addressing the plain text of the Federal Power Act, a word about the presumption against preemption. Transource argues that the presumption does not apply because the relevant "domain" of regulation is not siting but rather the "determination of need based on the impact that reducing congestion would have on wholesale pricing disparities across an interstate region." Brief at 38. Transource

provides no authority for such a narrow definition of the regulatory field at issue. And this Court's precedent is contrary to Transource's position.

For example, in *Farina*, the plaintiff brought a class action lawsuit against manufacturers and retailers of cell phones, alleging that cell phones emit dangerous levels of radio frequency radiation in violation of state and federal law. 625 F.3d at 104-05, 107-08. The defendants maintained that the plaintiffs' claims were preempted by the Federal Communications Act, as amended by the Telecommunications Act of 1996. *Id.* at 108. In arguing against the presumption against preemption, the defendants asserted that "radio communications have been within the purview of Congress since the advent of the technology." *Id.* at 116. In particular, the defendants added, the Federal Communications Commission has "'exclusive' control over the technical aspects of radio communications." *Id.* This Court, however, rejected the defendants' narrow definition of the relevant domain of regulation. *Id.* at 116. Although, this Court noted, "Congress has long exerted control over radio communications, state governments have traditionally regulated the field of public health and welfare." *Id.* Therefore, this Court concluded, "[s]tate-law actions based on the risks associated with [radio frequency] emissions fall squarely within the traditional police power" and applied the presumption against preemption. *Id.* at 116-17.

Much like the defendants in *Farina*, Transource defines the relevant domain of regulation far too narrowly. As we explained in our opening brief, this case concerns the regulation of land use—whether to construct miles of high voltage transmission lines. Brief at 34-35. This "is a quintessential state and local power." *Raponos v. U.S.*, 547 U.S. 715, 738 (2006).

But even under Transource's narrow definition, they are still wrong. States have traditionally made a determination of need, whether for intrastate or interstate transmission lines. Our opening brief detailed how at the advent of electricity, technology did not allow for interstate transmission lines, only intrastate lines. Brief at 27-29. Thus, only the States regulated the siting of transmission lines. Of course, before a State would permit the seizure of private lands and construction of a transmission line, a utility had to show that the line was needed. Yet, even as technology advanced, the States continued to regulate the siting of transmission lines, even for interstate lines. We cited to many examples of this in our opening brief. Brief at 29-31, 48-49, citing *e.g.* 66 Pa.C.S. § 1501; 52 Pa. Code § 57.76(a)(1); *Mississippi Power & Light Co. v. Conerly*, 460 So.2d 107, 112 (Miss. 1984); *Clark v. Gulf Power Co.*, 198 So.2d 368, 371-72 (Fla. Dist. Ct. Appeal 1967). Accordingly, the presumption against preemption applies here.

B. The Federal Power Act does not preempt the state law requirement to show "need" for a transmission line.

Contrary to Transource's contention, the Supreme Court has never held that the States lack the authority to make a need determination for interstate transmission lines. Brief at 38. And Transource's reliance on *Attleboro* to support that contention is misplaced. *Id.* Transource also cannot point to any provision of the Federal Power Act that clearly preempts the state law requirement to show need.

In *Attleboro,* a Rhode Island electric generation company (Narragansett Electric Lighting Company) sold electricity to a Massachusetts supplier (Attleboro Steam & Electric Company) for distribution to retail users. *Public Utilities Comm'n of Rhode Island v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 84 (1927). At Narragansett's request, the Rhode Island Commission approved a rate increase from the parties' current contract. *Id.* at 85. Attleboro challenged that rate increase, and the High Court held that neither Rhode Island nor Massachusetts could regulate the wholesale price of electricity without running afoul of the Commerce Clause. *Id.* at 89. The Court added that if "regulation is required it can only be attained by the exercise of the power vested in Congress." *Id.*

Thus, *Attleboro* is about the regulation of "wholesale, interstate electricity transactions." *New York,* 535 U.S. at 20. Interstate "transmissions were not of concern in *Attleboro*." *Id.* at 21.

Next, citing to just a few clauses in the Federal Power Act, Transource purports to show that state law is preempted on the requirement to show need. Brief at 26-27. Transource points to provisions in the Federal Power Act stating that "*the provisions of this subchapter* shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce," 16 U.S.C. § 824(b), to ensure that wholesale electricity prices are "just and reasonable." Brief at 26-27, citing16 U.S.C. § 824d(a), 824e(a) (emphasis added).

Transource does not specify which "provisions of this subchapter" preempt the state law requirement to show need for an interstate transmission line. The reason why is obvious—there is nothing. Therefore, Transource can cite only to general statutory language. This falls far short of demonstrating that it was Congress' "clear and manifest" intent to preempt existing state law. *See Medtronic*, 518 U.S. at 485. Even if the presumption against preemption does not apply, this general language does not suffice to satisfy Transource's burden. *See Lusnak v. Bank of Am.*, 883 F.3d 1185, 1191 (9th Cir. 2018); *In re Vehicle Carrier Servs. Antitrust Litig.*, 846 F.3d at 84.

Moreover, the implications of Transource's argument are astounding. According to Transource, the authority Congress gave to FERC to ensure that rates are just and reasonable extends to anything that touches ratemaking, even if only

tangentially. Under that theory, FERC could order the construction of transmission lines, even though Congress has limited FERC's authority to do that. 16 U.S.C. § 824p. FERC could also order the construction of generation facilities, even though Congress gave FERC no authority to do that. *See* 16 U.S.C. § 824o(i)(2). After all, as Transource asserts, the construction of transmission lines and the generation of electricity affect electricity rates.

But "FERC is a creature of statute." *Atlantic City Elec. Co. v. FERC*, 295 F.3d 1, 8 (D.C. Cir. 2002). It has "no constitutional or common law existence or authority, but *only* those authorities conferred upon it by Congress." *Id.* (emphasis in original). And FERC cannot "do indirectly what it [can] not do directly." *Altamont Gas Transmission Co. v. FERC*, 92 F.3d 1239, 1248 (D.C. Cir. 1996). Transource's position violates all these principles as it would create limitless authority for FERC. Transource's position would also violate the major questions doctrine and the due process rights of landowners (discussed in detail below).[1]

[1] Transource's reliance on cases such as *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354 (1988), *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953 (1986), and *Appalachian Power Co. v. Public Service Comm'n of W. Virginia*, 812 F.2d 898, 905 (4th Cir. 1987) is misplaced. Brief at 33-35. These three cases were all premised on FERC's exclusive authority over interstate ratemaking. *See Mississippi Power*, 487 U.S. at 371 ("FERC has exclusive authority to determine the reasonableness of wholesale rates"); *Nantahala*, 476 U.S. at 953 ("Nantahala filed a proposed wholesale rate increase with FERC, which has exclusive jurisdiction over interstate wholesale power rates"); *Appalachian Power*, 812 F.2d at 902 ("FERC's jurisdiction over interstate wholesale rates is exclusive.").

Amicus PJM relies on an entirely different provision of the Federal Power Act as preempting state law. Brief at 4, citing 16 U.S.C. § 824q(b)(4). It seems that Transource and PJM cannot agree on the relevant preemptory federal law. But the Court need not even address PJM's injection of Section 824q(b)(4) into this appeal, for "[a]n amicus cannot expand the scope of an appeal with issues not presented by the parties on appeal." *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 300 n.10 (3d Cir. 2012); *DIRECTV, Inc. v. Pepe*, 431 F.3d 162, 164 n.2 (3d Cir. 2005).

Even if this Court were to address Section 824q(b)(4), it would be of no help to PJM. That provision provides that FERC shall exercise its authority "in a manner that *facilitates* the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities . . . ." 16 U.S.C. § 824q(b)(4) (emphasis added). That provision says nothing about FERC having exclusive authority over a need determination. And, as we explained in detail in our opening brief, States have traditionally made a need determination in deciding whether to permit a utility to site a transmission line. Brief at 27-45. We also previously explained how planning and siting are related and yet distinct, a fact that FERC itself has repeatedly recognized. *Id.* at 35-37; *see infra* at 16-17. Moreover, the key phrase in Section

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This is not a ratemaking case. This is an interstate transmission line case involving siting and permitting authority.

824q(b)(4) is "facilitates," which means "to make easier, help bring about." *See* Merriam-Webster's Collegiate Dictionary, *facilitate*, p.447 (11th ed. 2020). Facilitating something is not the same as having the exclusive authority over it.

C. PJM's tariff also does not preempt Pennsylvania law.

Both Transource and PJM also claim that state law is preempted because, in the context of PJM's role in transmission planning, FERC has approved of PJM's cost-benefit methodology for determining whether a transmission line is needed, and PJM incorporated that methodology into its tariff, giving it the force of law. Transource Brief at 27-28; PJM Brief at 5-10. According to Transource and PJM, a state determination on need impedes the federal objective of transmission planning with respect to reducing congestion. Transource Brief at 28-29; PJM Brief at 12-15. Transource and PJM are wrong. As we detailed in our opening brief, transmission planning and siting are related and yet distinct, and, outside of very limited circumstances, FERC itself has disclaimed any authority to regulate siting, which encompasses a need determination, including for interstate transmission lines. We briefly review those points again.

At the advent of electricity, technology did not allow for interstate transmission lines, only intrastate lines. Brief at 27-29. Consequently, only the States determined whether a transmission line was needed. As technology advanced, and it was capable to construct interstate transmission lines, the States still made a need

determination. *See Mississippi Power & Light Co.*, 460 So.2d at 112 ("public necessity" for 51 miles of high voltage transmission lines from Mississippi to Louisiana was lacking, as "not one Mississippi consumer will receive electricity directly from the line"); *Clark*, 198 So.2d at 371-72 ("one way transmission line" from Florida to Georgia, "from which the citizens of Florida will not derive one iota of benefit," was not needed); Associated Press, *Arizona Kills Edison Power Line*, L.A. Times Archive (May 31, 2007), available at https://tinyurl.com/5a9srhdf (Arizona Corporation Commission rejected a 230-mile transmission line route to California, a "giant extension cord," that would have benefitted "California utility customers at the expense of their Arizona counterparts"). This need determination is made in the context of a siting proceeding.

To repeat, a state-siting proceeding necessarily encompasses a determination on whether the transmission line is needed. *See e.g.* 66 Pa.C.S. § 1501; 52 Pa. Code § 57.76(a)(1). Courts and legal scholars have all recognized this. *See Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) ("the states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities."); Kevin Decker, *Allocating Power: Toward a New Federalism Balance for Electricity Transmission Siting*, 66 ME. L. REV. 229, 253 (2013) (noting that "[i]n many states," regulatory approval to site "a new transmission line is conditioned on demonstrated public need," and need

typically means "the necessity of the new transmission facility within the state only"); Sandeep Vaheesan, *Preempting Parochialism and Protectionism in Power*, 49 HARV. J. ON LEGIS. 87, 97-98 & n.69 (2012) (acknowledging that the states "retain primary jurisdiction over the siting of transmission lines," which involves a "state-level cost-benefit analysis," including, historically, whether the line would "benefit" "in-state customers").

And, this is why some of those scholars lamented when Congress gave FERC only limited backstop siting authority. *See* 16 U.S.C. § 824p. These scholars wanted FERC (not the states) to have the exclusive authority to determine need. *See* PUC Brief at 42 n.17, citing Alexandra B. Klass, *The Electric Grid at Crossroads: A Regional Approach to Siting Transmission Lines*, 48 U.C. DAVIS L. REV. 1895, 1917, 1943 (2015) (promoting a "federal siting and eminent domain framework"); Elena P. Vekilov, *If It's Broke, Fix It: Federal Regulation of Electrical Interstate Transmission Lines*, 2013 U. ILL. L. REV. 695, 753, 759 (2013) (arguing that the federal government should have "full siting authority over all electrical transmission lines"); *see also* Decker *supra* at 260 (noting that "some commentators have called for a complete federal preemption of state and local siting authority by granting FERC full authority to approve the siting of interstate transmission lines"). This only begs the question, if Congress already had given this power to these non-governmental RTOs, such as PJM, why the lamentation?

The answer is that RTOs do not have the exclusive authority to determine need. Indeed, in Orders 1000 and 1000-A, FERC "disclaim[ed]" that RTOs have any such authority. *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 62 (D.C. Cir. 2014). We highlighted those multiple disclaimers from FERC in our opening brief. Brief at 36-37, citing FERC Order 1000, 76 Fed.Reg. 49842-01, ¶¶49, 107, 156, 159, 227, 253 & n.231 (2011). Transource does not address any of this language. Instead, it dismissively waives its hand stating that these are only "general statements." Brief 31. Transource fails to acknowledge, however, that FERC knows what a siting determination entails, and that is a determination of need.

One of FERC's Commissioners, Mark Christie, made this point in several orders subsequent to the district court's decision here. Commissioner Christie (in an unusual move) criticized the district court for failing to recognize that while FERC regulates the "transmission planning process" for RTOs, such as PJM, that "in no way . . . represent[s] any intent to preempt the states' decades-old authority to conduct [certificate of public necessity] proceedings that consider issues of *need* . . . ." *Order on Abandoned Plant Incentive re Baltimore Gas*, 187 FERC ¶ 61,030, ¶1 n.3 (Apr. 23, 2024) (emphasis added); *see also Order on Abandoned Plant: In re PJM Interconnection, LLC*, 188 FERC ¶ 61045, ¶4 (July 12, 2024) (Christie, Commissioner, dissenting on different grounds), *available at* https://tinyurl.com/4vzty6ks; *Order on Transmission Rate Incentives: In re*

GridLiance West LLC, 187 FERC ¶ 61223, ¶4, 2024 WL 3306123 (June 28, 2024) (Christie, Commissioner, dissenting on different grounds) (all stating the same).

We highlighted FERC Commissioner Christie's statement in our opening brief, and Transource did not respond to it at all. Courts, commentators, FERC, and Commissioner Christie all agree that state law requires a utility to demonstrate need, including for interstate transmission lines, and that federal law has not preempted state law. Transource can only retort that we offered "no support" for our "view" by closing its eyes to the pages of authority we cited in our opening brief and now again here. Opening Brief at 29-31, 35-44.

Where Transource gets confused—and we explained this at length in our opening brief—is in conflating transmission planning with siting. Brief at 35-39. RTOs have authority over transmission planning, States have authority over siting, and the two, while related, are not the same. FERC emphasized this in both Order 1000 and Order 1000A: "The authority to authorize construction and siting of new transmission facilities is *distinct* from the authority to require public utility transmission providers to engage in an open and transparent regional transmission planning process." Order 1000-A, 77 Fed.Reg. 32184-01, ¶359 (2012) (emphasis added).

Moreover, regional planning and siting pursue different objectives. The "point" of "coordinated regional planning" (Transource Brief at 41), as mandated by

Order 1000, was to allow for only a single regional transmission plan. That single regional transmission plan identifies transmission system needs (such as congestion or reliability issues) and potential solutions to those needs. FERC Order 1000, 76 Fed.Reg. 49842-01, ¶107. Before Order 1000, the regional transmission planning process 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). Regional transmission planning is, therefore, concerned with "processes" and "potential solutions." FERC Order 1000, 76 Fed.Reg. 49842-01, ¶107.

Siting, however, is the "substantive" decision on whether to construct a transmission line. *Id.*, ¶¶12, 107, 156. And, again, that "substantive" decision under almost every State's law requires a showing of need. *See* Opening Brief at 40; Amicus General Assembly Brief at 13. That "substance" and "process" are not the same thing is evident throughout the law.

The federal objective of creating a single regional transmission plan was accomplished here with the 2014-15 Regional Transmission Expansion Plan ("RTEP"). A need was identified and Transource proposed Project 9A, which PJM included in its 2014-15 RTEP. JA84-85 (ALJ Rec. Dec.). Once that process was

completed, it was for the PUC to make a substantive decision on "what needs to be built." Order 1000, 76 Fed.Reg. 49842-01, ¶49.

Accordingly, the PUC's substantive decision on siting poses no obstacle to the accomplishment of the federal objective regarding planning. There is no preemption here.

D. Transource's theory violates the major questions doctrine.

Transource position would also violate the major questions doctrine. Under the major questions doctrine, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 324 (2014). In other words, an agency must "point to clear congressional authorization" when "the history and the breadth of the authority that the agency has asserted" (or more rightly here, asserted by non-governmental entities on behalf of an agency), "and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *W. Virginia v. E.P.A.*, 597 U.S. 697, 721 (2022).

Here, Transource and PJM claim an "unheralded power." *Utility Air*, 597 U.S. at 324. They can point to no court that has ever held that a state law requiring a

showing of need is preempted by an RTO's determination of need.[2] As the briefs from the General Assembly and the National Association of Regulatory Utility Commissioners ("NARUC") emphasize, the district court's holding here was "novel." General Assembly Brief at 4, 25; NARUC Brief at 4, 10.

Transource and PJM claim to have discovered the exclusive authority over a need determination in the Federal Power Act. But, as we have explained, they can point only to general statutory language, nothing specific. *See W. Virginia*, 597 U.S. at 723 (stating that "[e]xtraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices'"), quoting *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Had Congress granted to RTOs such a power, it would be "transformative." *W. Virginia*, 597 U.S. at 724. It would allow an RTO to make an exclusive determination of need, even though such a determination has traditionally been committed to the States, and the RTO could make that determination without any

[2] In another example of Transource's lack of care in reading our opening brief, they accuse us of setting up a "straw man." Transource Brief at 37. Transource says that the PUC would not have to "rubber stamp" a siting application because the PUC could still deny such an application for other reasons, such as adverse environmental impacts. *Id.*, citing 52 Pa. Code § 57.76(a)(2)-(4). But we were careful in our brief to point out that the "rubber stamp" would be with respect to *need*, not other factors. Brief at 39 ("Transource (and PJM) are effectively advocating . . . [that] the PUC was supposed to rubber stamp the project *as needed*") (emphasis added); *see also* General Assembly Brief at 20.

input from the landowners impacted, in violation of their due process rights, and lead to the awesome power to condemn their property. And PJM purportedly has this right even though Congress has limited the authority of FERC itself to consider the benefits (or need) for an interstate transmission line, 16 U.S.C. § 824p(b)(1)(A)(ii), and FERC, in Orders 1000 and 1000-A, and one of its sitting commissioners, in other matters before FERC, have disclaimed the authority to trump the state law requirement of need. *See* FERC Order 1000, 76 Fed.Reg. 49842-01, ¶¶107, 159, 227, 253 & n.231 (2011); FERC Order 1000-A, 77 Fed.Reg. 32184-01, ¶¶99, 186-191, 342, 377 (2012); *Order on Abandoned Plant Incentive re Baltimore Gas*, 187 FERC ¶ 61,030, ¶1 n.3 (Apr. 23, 2024) (Christie, Commissioner, dissenting on different grounds).

E. Transource's theory also violates the due process rights of landowners.

Both the PUC and amici highlighted that Transource's position violates the due process rights of landowners. PUC Brief at 44-45; NARUC Brief at 5, 19-20; Office of Consumer Advocate at 4-5, 9-11. Transource characterizes these "procedural concerns" as a "red herring." Transource Brief at 41. But FERC Commissioner Christie does not think so. He called the "notion that regional transmission planning is somehow equivalent to a state [certificate of public convenience] proceeding" "flawed." *In re PJM Interconnection, LLC*, *supra* at 188 FERC ¶ 61045, ¶4; *Order on Transmission Rate Incentives: In re GridLiance West*

LLC, 187 FERC ¶ 61223, ¶4, 2024 WL 3306123 (June 28, 2024) (Christie, Commissioner, dissenting on different grounds). He highlighted that "the regional planning process in a transmission planning organization *is not remotely* the equivalent of a serious litigated state [certificate of public convenience] (or its individual state equivalent) process." *In re GridLiance West LLC*, *supra*, 187 FERC ¶ 61223, at ¶4 (emphasis added). That state process includes "witness cross-examination and is open to intervenors such as consumer advocates." *Id.* The planning process does not include these protections.

Transource posits that the PUC or, presumably, the average Pennsylvanian, could file a complaint with FERC about PJM's methodology. Brief at 41. But this would be futile because, again, PJM's methodology is relevant to transmission planning, not siting. And FERC would stress, as it has in Order 1000 (and again in Order 1000-A) that transmission planning does not "involve[] an exercise of siting, permitting, and construction authority." FERC Order 1000, 76 Fed.Reg. 49842-01, ¶107.

To the extent that Transource contends that the PUC could intervene in PJM's RTEP process, Transource is mistaken. Brief at 41. During that process, PJM's Transmission Expansion Advisory Committee reviews proposals from utilities on how to address reliability or congestion issues. JA687; Opening Brief at 7-8. If PJM

and a utility decide to pursue such a proposal, the utility would have to obtain the PUC's approval, meaning that utility would have to come before the PUC.

The PUC is an adjudicatory body. *See Elkin v. Bell Telephone Co. of Pa.*, 420 A.2d 371, 374 (Pa. 1980) (noting that the PUC is "the appropriate forum for the *adjudication* of issues involving the reasonableness, adequacy and sufficiency of public utility services") (emphasis added). Even assuming the PUC could obtain sufficient information about a particular proposal during the RTEP process (and, as we explained in our opening brief, the RTEP process is a "closed loop," Opening Brief at 44), the PUC could not challenge that proposal without violating its statutory obligation as a neutral arbiter. 66 Pa.C.S. § 331(c) (functions of all presiding officers shall be conducted in an "impartial manner"); 66 Pa.C.S. § 334 (prohibiting PUC officers from outside consultation and ex parte communication). In other words, under such circumstances, the PUC would be inappropriately prejudging the proposal and acting as an advocate. *See Pa. Pub. Util. Comm'n v. Laurel Pipe Line Co.*, 370 A.2d 1252, 1254 (Pa. Cmwlth. 1977) ("[T]he PUC [C]ommissioners are not advocates of anything").

F. The PUC's decision prevented a project that would have increased congestion.

The PUC was right—Project 9A was not needed. JA281-85. PJM's own analysis acknowledges this now. In a June 4, 2024 "Market Efficiency Update," PJM noted that Project 9A would have a benefits-to-costs ratio of just 0.81, far below the

1.25 ratio PJM requires for a utility to proceed with a project. PJM, Market Efficiency Update, slide 20 (June 4, 2024), available at https://tinyurl.com/5b86r5ad. But more than that, Project 9A actually "increases uncontrollable congestion." *Id.* at slide 23. The PUC's review prevented this wasteful and counterproductive project. *See* Opening Brief at 33, citing Klass & Rossi, *Reconstituting the Federalism Battle in Energy Transportation*, 41 HARV. ENVT'L L. REV. 423, 472 (2017) (emphasizing that state review has prevented projects that, "in hindsight, were neither cost-effective nor environmentally sound").

Unfortunately, Transource has already sunk $107.96 million into Project 9A. PJM, Market Efficiency Update, *supra* at slide 21. Ratepayers are on the hook for that amount because FERC granted Transource an "Abandoned Plant Incentive." *Order on Transmission Formula Rate Proposal and Incentives: In re PJM Interconnection, LLC*, 158 FERC ¶ 61089, ¶¶ 50-51, 2017 WL 444174 (Jan. 31, 2017). But, because the PUC rightly determined that Project 9A was not needed, the PUC saved ratepayers over $300 million. Project 9A. PJM, Market Efficiency Update, *supra* at slide 21 (noting that assumed "in-service cost" in 2014/15 was $420.94 million).

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

A. The issue of Congress's consent to state regulation over siting, although not raised below, warrants this Court's review because this issue is important to the public.

Although the PUC raised Congress's consent to state regulation over siting for the first time on appeal, this Court may nevertheless, in the exercise of its discretion, address that issue. *See U.S. v. Dowdell*, 70 F.4th 134, 140 (3d Cir. 2023); *Tri-M Grp., LLC v. Sharp*, 638 F.3d 406, 416 (3d Cir. 2011). The general rule regarding forfeiture is relaxed when the circumstances are extraordinary. *See Dowdell*, 70 F.4th at 140. Such extraordinary circumstances include "where refusal to reach the issue would result in a miscarriage of justice or where the issue's resolution is of public importance." *Webb v. City of Phila.*, 562 F.3d 256, 263 (3d Cir. 2009). Where the forfeited issue also involves a "pure question of law," this Court has been "less reluctant" to enforce the forfeiture rule. *See Barna v. Bd. of Sch. Dir's of Panther Valley Sch. Dist.*, 877 F.3d 136, 147 (3d Cir. 2017). Ultimately, the question of whether this Court should reach a forfeited issue turns "on the facts of individual cases." *Tri-M Grp.*, 562 F.3d at 416,

The issue of Congress's consent to state regulation over siting fits neatly within the extraordinary circumstances exception to the forfeiture rule. That issue is a "pure question of law." *Barna*, 877 F.3d at 147; *Webb*, 562 F.3d at 263. The Court

need only look at several federal statutes and decide whether Congress intended to authorize the States to regulate siting.

This issue is also one of "public importance." *Tri-M Grp.*, 638 F.3d at 416-17 (reviewing unpreserved argument because the "legal dispute entail[ed] crucial and unresolved issues of state sovereignty and state procurement spending, and test[ed] the limits of the dormant Commerce Clause"). As we have explained, Transource is claiming an extraordinary power on behalf of PJM—that PJM, a non-governmental entity, has the exclusive authority to determine need. That authority, again, has been traditionally reserved to the States. And once PJM has that authority it leads to the ability to authorize construction of transmission lines that cost ratepayers hundreds of millions of dollars. If the district court's decision stands, PJM (and other RTOs) will claim this same right for every interstate transmission line throughout the United States.[3]

Lastly, this Court has added reason to consider the issue of whether Congress authorized the states to regulate siting—that issue "is closely related to arguments that the parties did raise" in the district court. *Tri-M Grp.*, 638 F.3d at 417 (citation omitted). Before the district court, the parties extensively litigated the question of whether the PUC's decision violated the dormant Commerce Clause. And subsumed

[3] The fact that the Pennsylvania General Assembly has filed an amicus brief in support of the PUC also demonstrates how important this issue is to the public.

within that question is whether it was impossible for the PUC to violate the dormant Commerce Clause because Congress authorized the States to regulate siting.

B. Congress has expressed its intent not to disturb State authority over siting in several ways.

Congress expressed its intent not to disturb the States' traditional authority over siting in both 16 U.S.C. § 824(a) and the Energy Policy Act of 1992 (P.L. 102-486, § 731; 16 U.S.C. § 796, State Authorities). Those two statutes must be considered in conjunction with the limited backstop siting authority Congress gave to FERC. 16 U.S.C. § 824p. When considered together, Congress's intent is unmistakable—except for that limited backstop siting authority, the States have exclusive authority over siting, and that includes whether a transmission line is needed. *See Western & Southern Life Ins. Co. v. State Bd. of Equalization of California*, 451 U.S. 648, 652-53 (1981); *Tampa Elec. Co. v. Garcia*, 767 So.2d 428, 436 (Fla. 2000).

C. The district court's decision contradicts the Commonwealth Court's finding that the PUC considered need on a regional basis.

One purpose of preclusion (whether issue or claim) is to prevent "inconsistent decisions." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The Commonwealth Court found that the PUC considered need on a regional basis. JA744; *see Lukens Steel Co. v. Pa. PUC*, 499 A.2d 1134, 1137 (Pa. Cmwlth. 1985) ("The question is not whether the granting of the application will be for the convenience and

accommodation of some of the public, but whether it will be for the convenience, accommodation and advantage of the public generally and considered as a whole"). That should have been the end of the district court's dormant Commerce Clause analysis—the PUC was not engaged in economic protectionism. Instead, the district court ignored that finding and concluded that the PUC was "focused on protecting the interests of Pennsylvanians." JA63. As a result, the decisions of the Commonwealth Court and the district court are in conflict. The district court should have given preclusive effect to the Commonwealth Court's finding since all the elements of issue preclusion were satisfied. Opening Brief at 52-53.

Transource retorts that the Commonwealth Court's finding was not a finding at all, it was a characterization. Brief at 49. But the Commonwealth Court did make a finding. JA744. Indeed, that finding was essential to the Commonwealth Court's holding that the PUC did not violate its state statutory obligation to work with RTOs and FERC when the PUC denied Transource's siting application. *See* 66 Pa.C.S. § 2805.

Transource next argues that allowing Pennsylvania to consider need on a regional basis only "supercharges" its preemption argument. Brief at 49. Again, Transource can only make this assertion if transmission planning and siting are the same thing; they are not. Further, Congress has encouraged the states to consider need on a regional basis or otherwise face the construction of transmission lines

under FERC's limited backstop siting authority. *See* 16 U.S.C. § 824p(b)(1)(A)(ii) (authorizing FERC to issue a construction permit for transmission lines in a national interest electric transmission corridor if FERC finds that a state "*does not have the authority*" to consider interstate or interregional benefits) (emphasis added). And Transource's position would result in the invalidation of those state laws that permit consideration of need on a regional basis. *See* Vaheesan, *supra* at 115-16 (noting that some state regulators have the discretion to consider regional benefits of transmission upgrades); *see also* NARUC Brief at 5, 7 (highlighting that the district court's decision "will have a national impact").

D. The PUC's decision does not discriminate against interstate commerce on its face or in effect.

Besides the preclusive effect of the Commonwealth Court's finding, that court was also right—the PUC considered need on a regional basis (and that region includes Pennsylvania). We highlighted the PUC's statements on this point in our opening brief. Brief at 54. The PUC was not engaged in economic protectionism; rather, it was preventing what is now clear even to PJM—Project 9A does not benefit the PJM region. *See supra* at 25.

Transource asserts that the PUC does not dispute that the *Pike* balancing test is satisfied here. Brief at 51. That, of course, is wrong. Transource cannot even get to the *Pike* balancing test because it has not first shown that the PUC's decision is discriminatory for all the reasons previously discussed. *Nat'l Pork Producers*

Council v. Ross, 598 U.S. 356, 377-78 (2023). In any case, the benefits of Project 9A are substantially outweighed by its costs, as even PJM now acknowledges. *See supra* at 25.[4]

[4] The notion that electricity is "trapped" in Pennsylvania is baseless. Transource Brief at 2, 14, 44. Pennsylvania "sends more electricity outside its borders over the regional electric grid than any other state." U.S. Energy Information Admin., *Pennsylvania State Profile and Energy Estimates* (last updated Dec. 21, 2023), available at https://www.eia.gov/state/analysis.php?sid=PA

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 6,452 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: August 14, 2024