

APPENDIX

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APPENDIX A

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

No. 24-1045

TRANSOURCE PENNSYLVANIA, LLC

v.

**STEVEN M. DEFRANK, Chair, Pennsylvania Public
Utility Commission; KIMBERLY M. BARROW, Vice
Chair, Pennsylvania Public Utility Commission;
JOHN F. COLEMAN, JR.; RALPH V. YANORA; and
KATHRYN L. ZERFUSS,
Commissioners, Pennsylvania Public Utility Commis-
sion, all in their official capacities; and the
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants**

(M.D. Pa. No. 1:21-cv-01101)

**Present: SHWARTZ, MATEY, and MCKEE, Circuit
Judges**

1. Motion by the Attorney General of Pennsylvania to withdraw as counsel for Appellants, to intervene in this appeal and extend the time for the Proposed Intervenor to file a Petition for En Banc Review;
2. Response by Appellee Transource Pennsylvania LLC to the Attorney General's motion to extend the time for the proposed intervenor to file a Petition for En Banc Review;
3. Response by Appellee Transource Pennsylvania LLC in Opposition to Pennsylvania Attorney General's Omnibus Motion to withdraw as counsel, intervene in

this appeal and extend the time for the proposed Intervenor to file a Petition for En Banc Review;

4. Reply by the Attorney General of Pennsylvania in further support of the Omnibus Motion.

Respectfully,
Clerk/JK

ORDER

The foregoing Motion to Withdraw as Counsel and Intervene in this Appeal filed by the Pennsylvania Attorney General is DENIED. The 30-day extension of time to file a petition for rehearing *en banc* included in the October 21, 2025, order is vacated as MOOT.

By the Court,
s/Theodore A. McKee
Circuit Judge

Dated: November 6, 2025
JK/cc: All Counsel of Record

APPENDIX B

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

No. 24-1045

TRANSOURCE PENNSYLVANIA, LLC

v.

STEVEN M. DEFRANK, Chair, Pennsylvania Public
Utility Commission, **KIMBERLY
M. BARROW**, Vice Chair, Pennsylvania Public Utility
Commission, **JOHN F. COLEMAN, JR.**, **RALPH V.
YANORA**, and **KATHRYN L. ZERFUSS**, Commission-
ers,

Pennsylvania Public Utility Commission, all in their
official capacities, and the **PENNSYLVANIA PUBLIC
UTILITY COMMISSION**,

Appellants

(M.D. Pa. No. 1:21-cv-01101)

Present: **SHWARTZ**, **MATEY**, and **MCKEE**, Circuit
Judges

1. Petition by Proposed Intervenors the Common-
wealth of PA and Consumer Advocate for Rehearing
before original panel and the court en banc, construed
as Motion for Reconsideration of the Court's order of
November 6, 2025, with request for referral to the en
banc court pursuant to 3d Cir. IOP 10.3.3.

Respectfully, Clerk/jk

ORDER

The foregoing Petition by Proposed Intervenors the
Commonwealth of PA and Consumer Advocate for Re-
hearing before original panel and the court en banc,
construed as Motion for Reconsideration of the Court's

order of November 6, 2025, with request for referral to the en banc court pursuant to 3d Cir. IOP 10.3.3. is denied.

By the Court,
s/Theodore A. McKee
Circuit Judge

Dated: December 15, 2025
JK/cc: All Counsel of Record

APPENDIX C

PRECEDENTIAL

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

No. 24-1045

TRANSOURCE PENNSYLVANIA, LLC

v.

STEVEN M. DEFRANK, Chair, Pennsylvania Public
Utility Commission, KIMBERLY M. BARROW, Vice
Chair,
Pennsylvania Public Utility Commission, JOHN F.
COLEMAN, JR., RALPH V. YANORA, and
KATHRYN L.

ZERFUSS, Commissioners, Pennsylvania Public Util-
ity Commission, all in their official capacities, and the
PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellants

On Appeal from the United States District Court for
the Middle District of Pennsylvania

(D.C. No. 1:21-cv-01101)

District Judge: Honorable Jennifer P. Wilson

Argued December 5, 2024

Before: SHWARTZ, MATEY, and McKEE, *Circuit
Judges*

(Opinion filed: September 5, 2025)

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OPINION OF THE COURT

McKEE, *Circuit Judge*.

This appeal arises from an order of the Pennsylvania Public Utility Company denying plaintiff-appellee Transource Pennsylvania LLC's applications to build electricity-transmission lines in Pennsylvania. Transource's applications were part of a project selected through a federal process aimed at identifying and relieving regional congestion. The District Court held that the PUC order was invalid under the Supremacy Clause of the U.S. Constitution, because it posed an obstacle to federal objectives. The court also held the application invalid under the dormant Commerce Clause, because it was driven by economic protectionism and because it impermissibly burdened interstate commerce. Defendants-appellants the PUC,

its Chairman, Vice Chairman, and Commissioners appeal those decisions. They also argue that Transource was precluded from raising its federal constitutional arguments before the District Court.

For the reasons that follow, we will affirm the District Court’s order. Because we hold that the PUC’s actions clearly violate the Supremacy Clause, we need not reach the issues raised under the dormant Commerce Clause.

I. Background¹

As is usually the case, context is helpful. Accordingly, we begin with the evolution of the electricity-transmission industry. In the early twentieth century, “most electricity was sold by vertically integrated utilities that had constructed their own power plants, transmission lines, and local delivery systems.”² These utility systems operated primarily as “local monopolies” within the states.³ “States possessed broad authority to regulate public utilities,” subject to the dormant Commerce Clause’s limitation on regulations burdening interstate commerce.⁴ Short of such Commerce Clause concerns, however, states exercised general police powers over electricity generation, transmission, and distribution.⁵ In 1927, the Supreme Court

¹ Because our discussion necessarily involves numerous acronyms for various agencies and organizations, a glossary of terms is included at the end of this opinion for the convenience of the reader.

² *New York v. FERC*, 535 U.S. 1, 5 (2002).

³ *Id.*

⁴ *Id.*

⁵ See *FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 265–

invalidated a Rhode Island utility commission's order purporting to set rates for electricity sold from a Rhode Island plant to a Massachusetts supplier (the Attleboro Steam & Electric Company).⁶ The Rhode Island commission's order would have overridden the parties' contractual rate, which the commission found to be inadequate and therefore unreasonable.⁷ "The Attleboro Company was . . . the only customer of the [Massachusetts supplier] to which this new schedule would [have applied]."⁸ The Rhode Island utility's rate impacted an interstate rate, thus "plac[ing] a direct burden upon interstate commerce."⁹ The Court observed that this type of interstate transmission could only be regulated through "the power vested in Congress."¹⁰ In reaching this conclusion, the Court identified a regulatory vacuum that came to be known as the "Attleboro gap."¹¹ The Court explained:

[T]he paramount interest in the interstate business carried on between the two companies is not local to either state, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it

66 (2016).

⁶ *Pub. Util. Comm'n v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), *overruled in part by Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 391–93 (1983).

⁷ *Id.* at 85–86.

⁸ *Id.* at 85.

⁹ *Id.* at 89.

¹⁰ *Id.* at 90.

¹¹ *New York*, 535 U.S. at 6.

can only be attained by the exercise of the power vested in Congress.¹²

A. Federal Power Act

In 1935, Congress enacted the Federal Power Act (FPA).¹³ In 1938, it enacted similar legislation concerning natural gas, the Natural Gas Act (NGA).¹⁴ “Congress adopted the FPA . . . and the NGA . . . to close the regulatory gaps the Constitution imposed on states regulating interstate energy markets beyond their borders.”¹⁵ The NGA is not germane to our discussion as it is concerned with regulation and transmission of natural gas. We mention it only because it is part of the regulatory history of the interstate regulation and transmission of energy and was part of the congressional attempt to fill the Attleboro gap.

The FPA was aimed at regulating transmission of electricity and electricity sales in interstate commerce.¹⁶ The FPA “declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest,” and that federal regulation of that business “is necessary in the public interest.”¹⁷

¹² *Attleboro*, 273 U.S. at 90.

¹³ See Ch. 687, §§ 201–13, 49 Stat. 803, 847–63 (1935) (codified as amended at 16 U.S.C. § 791a, et seq.).

¹⁴ Ch. 556, 52 Stat. 821 (1938) (codified as amended at 15 U.S.C. § 717 et seq.).

¹⁵ Jim Rossi, *The Brave New Path of Energy Federalism*, 95 *Tex. L. Rev.* 399, 407 (2016).

¹⁶ See Federal Power Act § 201(a) (codified at 16 U.S.C. § 824(a)).

¹⁷ *Id.*

The FPA empowered the Federal Power Commission, the predecessor to the Federal Energy Regulatory Commission (FERC), with new authority and responsibility over interstate transmission and wholesale sales.¹⁸ The Commission was instructed “to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy” and “to promote and encourage such interconnection and coordination.”¹⁹ In addition, the Commission became responsible for ensuring that rates for electricity transmissions or sales within the Commission’s jurisdiction, as well as rules and practices pertaining to such rates, be “just and reasonable.”²⁰ To that end, the FPA prohibited public utilities from granting “any undue prejudice or disadvantage” or “maintain[ing] any unreasonable difference in rates, charges, service, facilities,

¹⁸ See *id.* § 201(b) (codified at 16 U.S.C. § 824(b)); *Metro. Edison Co. v. Pa. Pub. Util. Comm’n*, 767 F.3d 335, 341 n.2 (3d Cir. 2014).

¹⁹ Federal Power Act § 202(a) (codified at 16 U.S.C. § 824a(a)).

²⁰ *Id.* § 205(a) (codified at 16 U.S.C. § 824d(a)) (“All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable[.]”); see also *id.* § 206(a) (codified at 16 U.S.C. § 824e(a)) (“Whenever the Commission . . . shall find that any rate, charge, or classification . . . [or] any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order.”).

or in any other respect, either as between localities or as between classes of service.”²¹

Congress noted that this new federal authority would extend “only to those matters which are not subject to regulation by the States.”²² Notwithstanding this provision—which the Supreme Court later described as “a mere policy declaration”²³—the FPA did reach areas that had historically been the province of state regulation. States previously could regulate aspects of interstate wholesale sales that did not directly burden interstate commerce.²⁴ The FPA authorized FERC to regulate precisely such wholesale sales “that had been previously subject to state regulation.”²⁵ The Supreme Court subsequently resolved any tension between states’ historical authority to regulate certain local matters and FERC’s apparent grant of authority to FERC to regulate intrastate sales. The Court explained, the “policy declaration” in the FPA “cannot nullify a clear and specific grant of jurisdiction [to FERC].”²⁶ The FPA also authorized FERC to regulate interstate transmission, which was not at issue in *Attleboro*.²⁷ The law therefore did much more than fill the *Attleboro* gap. It marked a significant shift in the balance of state and federal authority.

²¹ *Id.* § 205(b) (codified at 16 U.S.C. § 824d(b)).

²² *Id.* § 201(a) (codified at 16 U.S.C. § 824(a)).

²³ *New York*, 535 U.S. at 22 (quotation marks omitted).

²⁴ *See id.* at 21 (discussing *Attleboro*, 273 U.S. at 85–86).

²⁵ *Id.*

²⁶ *Id.* at 22 (quotation marks omitted).

²⁷ *See id.* at 20, 22.

B. The Evolution of the Electricity Industry and FERC's Responses

In the decades following the enactment of the FPA, technological advancements transformed the production and transmission of electricity. Electricity came to be “delivered over three major networks, or ‘grids,’ in the continental United States.”²⁸ As a result, “any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce.”²⁹ Accordingly, “it is now possible for power companies to transmit electric energy over long distances at a low cost.”³⁰ By the mid-1990s, “long-distance transmission had become increasingly economical, and smaller, lower-cost plants had begun to emerge as competitors to the vertically integrated utilities.”³¹ Yet the state utilities retained control over much of the transmission infrastructure, including “transmission lines that must be used by their competitors to deliver electric energy to wholesale and retail customers.”³² FERC became concerned that state utilities’ economic interest lay in “denying transmission

²⁸ *Id.* at 7.

²⁹ *Id.*

³⁰ *Id.* at 7–8.

³¹ *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49–50 (D.C. Cir. 2014) (per curiam) (citing Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities, 61 Fed. Reg. 21540, 21543–46 (May 10, 1996) (codified at 18 C.F.R. pts. 35, 385)).

³² *New York*, 535 U.S. at 8.

or offering it only on inferior terms to emerging competitors.”³³

FERC responded by issuing a series of orders aimed at checking state utilities’ promotion of their own self-interest. The FERC orders promoted transparency and regional coordination. In 1996, Order No. 888³⁴ required each transmission provider to “file an open-access transmission tariff . . . containing minimum terms of non-discriminatory transmission service.”³⁵ In other words, this order compelled utilities to offer transmission services to other market actors at the same rates as would be charged to the utilities themselves.³⁶ In addition, “[t]o promote development of competitive markets, [FERC] encouraged the formation of regional transmission organizations (‘RTOs’) . . . to coordinate transmission planning, operation, and use on a regional and interregional basis.”³⁷ We explain the role of RTOs in greater detail in the following section.

³³ *S.C. Pub. Serv. Auth.*, 762 F.3d at 50 (paraphrasing Order No. 888, 61 Fed. Reg. at 21567).

³⁴ 61 Fed. Reg. 21540.

³⁵ *S.C. Pub. Serv. Auth.*, 762 F.3d at 50 (citing Order No. 888, 61 Fed. Reg. at 21541, 21551–52).

³⁶ See Order No. 888, 61 Fed. Reg. at 21541; see also *Metro. Edison Co.*, 767 F.3d at 342 (“Each electric utility must apply the same rate for wholesale transmission services to itself and others so as to provide open access to transmission services.”).

³⁷ *S.C. Pub. Serv. Auth.*, 762 F.3d at 50 (citing Order No. 888, 61 Fed. Reg. at 21552, 21666–67).

FERC built on these reforms in 2007 with Order No. 890.³⁸ Opining once again on the anticompetitive tendencies of the transmission market, FERC explained that “vertically-integrated utilities do not have an incentive to expand the grid to accommodate new entries or to facilitate the dispatch of more efficient competitors.”³⁹ At the same time, there was a “critical need for new transmission infrastructure,” as existing systems could not support the increase in consumer demand.⁴⁰ To this end, Order No. 890 called for “an open, transparent, and coordinated transmission planning process,”⁴¹ and required providers “to open their transmission planning process to customers, coordinate with customers regarding future system plans, and share necessary planning information with customers.”⁴²

Order No. 890 also responded to FERC’s growing concern that grid congestion imposed “significant cost impacts on consumers.”⁴³ “Congestion” refers to limits on the electricity grid’s ability to carry traffic, which restricts the flow of energy from where it is generated to where it is needed.⁴⁴ When congestion exists down-

³⁸ Order No. 890, Preventing Undue Discrimination and Preference in Transmission Service, 72 Fed. Reg. 12266 (Mar. 15, 2007) (codified at 18 C.F.R. pts. 35, 37).

³⁹ *Id.* at 12275.

⁴⁰ *Id.*

⁴¹ *Id.* at 12267.

⁴² *Id.*

⁴³ *Id.* at 12276

⁴⁴ See *Transource Penn., L.L.C. v. DeFrank*, 705 F. Supp. 3d 266, 274 (M.D. Pa. 2023) (“Congestion occurs when the least costly resources that are available to serve load in a given region cannot

stream of cheap power generation, it can force consumers to purchase from a more expensive power source.⁴⁵ Order No. 890, responding to “increasing transmission congestion,” sought to develop a planning process that would prevent and deter “undue discrimination” that arises from congestion.⁴⁶

Notwithstanding Order No. 890’s reforms, concerns persisted about the capacity of the nationwide grid to reliably meet rising demand for electricity.⁴⁷ In 2011, FERC issued Order No. 1000,⁴⁸ which built upon Order No. 890 by requiring that: (1) each transmission provider participate in a regional transmission planning process that would identify “regional solutions to regional needs,”⁴⁹ and “produce[] a regional transmission plan”⁵⁰; (2) neighboring regions establish interregional coordination procedures for transmission planning;⁵¹ (3) transmission providers relinquish rights of first refusal for incumbent transmission developers to construct new facilities included in regional transmission

be dispatched because transmission facility limits constrain power flow on the system.”) (quotation marks omitted).

⁴⁵ See Order No. 890, 72 Fed. Reg. at 12276 (discussing studies showing that “[t]ransmission congestion has created fairly small local load pockets” and “can have significant cost impacts on consumers”).

⁴⁶ *Id.*

⁴⁷ See *S.C. Pub. Serv. Auth.*, 762 F.3d at 51–52.

⁴⁸ Order No. 1000, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 76 Fed. Reg. 49842 (Aug. 11, 2011) (codified at 18 C.F.R. pt. 35).

⁴⁹ *Id.* at 49897.

⁵⁰ *Id.* at 49854.

⁵¹ *Id.* at 49846, 49907.

plans;⁵² and (4) regional planning processes set qualification criteria for developers and use a selection process that is transparent and not unduly discriminatory.⁵³ The preemption issue in this appeal arises from this federally mandated regional planning process.

C. RTOs and the Regional Planning Process

RTOs, or regional transmission organizations, supervise interstate transmission and planning of electricity. FERC encouraged the formation of RTOs by requiring utilities to report their progress towards developing and participating in RTOs to FERC.⁵⁴ FERC explained that its objective was “for all transmission-owning entities in the Nation, including non-public utility entities, to place their transmission facilities under the control of appropriate RTOs in a timely manner.”⁵⁵

The purposes of RTOs include “promoting efficiency and reliability in the operation and planning of the electric transmission grid and ensuring non-discrimination in the provision of electric transmission services.”⁵⁶ To that end, FERC regulations require that

⁵² *Id.* at 49846, 49895–96.

⁵³ *Id.* at 49846, 49897–99; *see also S.C. Public Serv. Auth.*, 762 F.3d at 52–53 (summarizing key provisions of Order No. 1000).

⁵⁴ *See* Order No. 2000, Regional Transmission Organizations, 65 Fed. Reg. 810, 811 (Jan. 6, 2000) (codified at 18 C.F.R. pt. 35).

⁵⁵ *Id.* at 811.

⁵⁶ 18 C.F.R. § 35.34(a) (2025).

each RTO have “operational authority for all transmission facilities under its control”⁵⁷ and “exclusive authority for maintaining the short-term reliability of the grid that it operates.”⁵⁸ FERC further has mandated that RTOs (1) administer transmission tariffs,⁵⁹ (2) “ensure the development and operation of market mechanisms to manage transmission congestion,”⁶⁰ (3) provide for objective market-monitoring to ensure “reliable, efficient and not unduly discriminatory transmission service,”⁶¹ and (4) “be responsible for planning, and for directing or arranging, necessary transmission expansions, additions, and upgrades that will enable [provision of] efficient, reliable and non-discriminatory transmission service.”⁶²

PJM Interconnection, LLC, is the RTO responsible for maintaining the bulk electricity transmission system of a 13-state region that includes most of Pennsylvania.⁶³ Pursuant to the FERC-mandated regional planning process, PJM produces an annual Regional

⁵⁷ *Id.* § 35.34(j)(3).

⁵⁸ *Id.* § 35.34(j)(4).

⁵⁹ *Id.* § 35.34(k)(1). In this context, a tariff is a published rule concerning the provision of electric service “offered on a generally applicable basis,” and the rates, charges, classifications, practices, rules, or regulations relating to that service. *Id.* § 35.2(c)(1); *see also N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 83 (3d Cir. 2014) (noting that a tariff is “the term of art used to refer to the classifications, practices, and regulations a public utility uses to establish electricity rates”) (internal quotation marks omitted).

⁶⁰ 18 C.F.R. § 35.34(k)(2).

⁶¹ *Id.* § 35.34(k)(6).

⁶² *Id.* § 35.34(k)(7).

⁶³ *See* PJM Interconnection, L.L.C., 101 FERC ¶ 61345, 62444–45 (2002) (FERC order granting PJM status as an RTO).

Transmission Expansion Plan (RTEP) that identifies areas of congestion and proposes solutions to reduce that congestion.⁶⁴

In 2007, FERC directed PJM to submit a proposal for evaluating the benefits and costs of congestion-mitigation projects for inclusion in the RTEP.⁶⁵ Such projects are also known as “market-efficiency projects.”⁶⁶ PJM proposed that market-efficiency projects could be considered cost-justified if the benefit-cost ratio over a 15-year span exceeded 1.25 to 1.0.⁶⁷ PJM proposed to calculate the benefit of a project by accounting for the decreases in wholesale electricity costs in regions previously experiencing congestion—that is, regions downstream of the congestion.⁶⁸ But PJM’s methodology would exclude from the calculation price increases in regions that previously enjoyed low prices as a result of congestion—that is, regions on the same side of the congestion as the cheap electricity.⁶⁹ FERC approved this approach in 2008, deeming it reasonable to exclude

⁶⁴ See *PJM Interconnection L.L.C., Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.*, sched. 6, §§ 1.1, 1.5 (2025) [hereinafter PJM Operating Agreement], <https://perma.cc/S3GD-3D44>; Order No. 1000, 76 Fed. Reg. at 49842 (requiring utilities to “participate in a regional transmission planning process that produces a regional transmission plan”).

⁶⁵ *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61265, 62488 (2007).

⁶⁶ PJM Operating Agreement, sched. 6, § 1.5.7(b)–(c).

⁶⁷ See *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61051, 61409–10 (2008). The parties do not dispute that this methodology applies to the project at issue in this litigation.

⁶⁸ *Id.* at 61409–10, 61416.

⁶⁹ *Id.*

price-increases in regions that previously benefited from congestion because those regions would not have to shoulder the costs of constructing the new facilities.⁷⁰ PJM accordingly has continued to apply this methodology in the intervening years, and FERC has rejected requests to revisit the methodology.⁷¹

D. State Siting Authority

Even though FERC has come to exercise increasingly broad authority over interstate aspects of electricity transmission, especially regional transmission planning and expansion, state regulators retain spheres of authority over intrastate aspects of the industry. In particular, the states historically have held

⁷⁰ *Id.* at 61416.

⁷¹ See *PJM Interconnection, L.L.C.*, 173 FERC ¶ 61258, 62725 (2020) (FERC declining intervenor’s request to revisit methodology on the basis that it “ignore[s] the increased zonal load costs that a project may create”). Amicus the Pennsylvania Office of Consumer Advocate (OCA) asserts that FERC did not, in fact, approve this methodology. For support, OCA notes that in 2014, PJM submitted a letter to FERC proposing revision of the market-efficiency calculation for Regional Facilities and Necessary Lower Voltage Facilities to account only for zones where customer load payments were projected to decrease. According to OCA, while FERC accepted this letter for filing, it never expressly approved it. But OCA does not provide support for its premise that the project at the heart of this dispute falls into the category of projects covered by this 2014 filing. Instead, the parties agree that the methodology approved in 2008 applied to Transource’s project and was unaffected by the 2014 filing. *PJM Interconnection, L.L.C.*, 123 FERC at 614416).

exclusive authority over siting,⁷² permitting, and construction of transmission lines.⁷³

The FPA as originally enacted did not authorize FERC to exercise any siting authority. In 2005, Congress amended the FPA by enacting the Energy Policy Act,⁷⁴ which for the first time authorized FERC to exercise limited authority over transmission-line siting. This Act directed the Department of Energy to designate transmission-constrained or congested areas of the country as National Interest Electric Transmission Corridors (NIETCs).⁷⁵ Within NIETCs, FERC could issue permits to construct or modify electricity transmission facilities, but only under specified conditions, such as if the state in question withheld approval for more than a year after the filing of a permit application.⁷⁶ This is sometimes referred to as FERC’s “backstop siting authority.” An NIETC may be designated based on

⁷² “[S]iting” is not clearly defined in relevant law. We use that term to refer to the decision to approve building transmission facilities in a particular place, consistent with how FERC uses the term. *See, e.g.*, Order No. 1000, 76 Fed. Reg. at 49885 n.231 (referring to state regulation of “construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities”).

⁷³ *See* Order No. 1000, 76 Fed. Reg. at 49861 (noting that “there is longstanding state authority over . . . matters relevant to siting, permitting, and construction”); *id.* at 49880 (“[N]othing in this Final Rule is 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.”).

⁷⁴ Energy Policy Act, Pub. L. No. 109–58, 119 Stat. 594 (2005).

⁷⁵ *Id.* § 1221(a) (codified at 16 U.S.C. § 824p(a)).

⁷⁶ *Id.* § 1221(b)(1)(C)(i) (codified at 16 U.S.C. § 824p(b)(1)(C)(i)).

a finding that a geographic area experiences or is expected to experience “electric energy transmission capacity constraints or congestion that adversely affects consumers.”⁷⁷ In other words, the Energy Policy Act carved out a unique circumstance wherein FERC could supersede the states’ traditional authority over siting decisions.

Outside of NIETCs, however, siting remains the province of the states. The PUC reviews and rules upon the application of any public utility to construct high-voltage electricity transmission lines in Pennsylvania.⁷⁸ State law requires the PUC to hold a hearing⁷⁹ and make the following findings before approving the construction of any such line:

- (1) That there is a need for it.
- (2) That it will not create an unreasonable risk of danger to the health and safety of the public.
- (3) That it is in compliance with applicable statutes and regulations providing for the protection of the natural resources of [Pennsylvania].
- (4) That it will have minimum adverse environmental impact, considering the electric power needs of the public, the state of

⁷⁷ *Id.* § 1221(a)(2) (codified as amended at 16 U.S.C. § 824p(a)(2)(i)–(ii)).

⁷⁸ 52 Pa. Code §§ 57.71–76.

⁷⁹ *Id.* § 57.75.

available technology and the available alternatives.⁸⁰

E. Summary of Regulatory Scheme

The aforementioned evolution of electricity regulation can thus be summed up as follows: The federal government, through FERC, regulates interstate electricity transmission and interstate wholesale sales. FERC has directed RTOs to manage regional transmission planning and develop regional plans to reduce congestion and ensure grid reliability. Concomitantly, with the limited exception of NIETCs, states retain authority over transmission-line siting, permitting, and construction, and apply state law in reviewing transmission-line applications.

II. Factual and Procedural History⁸¹

A. Project 9A

PJM conducted studies that identified “persistent congestion” along the Pennsylvania-Maryland border affecting a subregion called the AP South Reactive Interface (APSRI).⁸² APSRI is “a set of four 500 kV transmission lines that originate in West Virginia and terminate in Maryland.”⁸³ PJM assessed that this congestion had “imposed economic transmission constraint costs totaling approximately \$800 million from 2012 through

⁸⁰ *Id.* § 57.76(a).

⁸¹ The parties largely do not dispute the ALJ’s factual findings, with very limited exceptions not relevant to the facts recounted here.

⁸² JA 681 (PJM 2018 white paper).

⁸³ *Id.* at 84 ¶ 7.

2016.”⁸⁴ PJM further determined that the costs of congestion were “borne by residents, commercial businesses and industrial customers” in the eastern part of PJM’s region.⁸⁵ As explained in the report of Transource’s expert witness:

The fundamental problem on the AP South reactive interface is how to avoid having too much energy flowing across the lines that make up the interface, which would result in unacceptable low voltages. . . . If [flows] are low enough, lower-cost generation may be dispatched from Pennsylvania or states to the West to serve a need for power in Maryland, Virginia, and the District of Columbia. If the anticipated flow across the interface is too high, however, PJM operators will direct increased higher-cost generation from Maryland and Virginia, and will limit lower-cost generation output from Pennsylvania and elsewhere to prevent the flow across the interface from exceeding the voltage-based limits. In other words, lower-cost power is “trapped” and cannot get to where there is a demand for that power in other portions of the PJM region, due to the constraints on the AP South reactive interface.⁸⁶

Relieving this congestion would reduce electricity costs in Maryland, Virginia, West Virginia, and the

⁸⁴ *Id.* at 681.

⁸⁵ *Id.*

⁸⁶ *Id.* at 580 (expert report of Steven R. Herling).

District of Columbia. It would, however, increase the cost of electricity in areas, such as Pennsylvania, currently benefiting from this congestion in the form of lower electricity costs.

In October 2014, as part of its RTEP process, PJM solicited proposals for “technical solutions” to alleviate this congestion.⁸⁷ PJM selected a proposal submitted by Transource Energy, L.L.C., to build, among other things, two new transmission lines spanning the Pennsylvania-Maryland border.⁸⁸ The Transource proposal is known as Project 9A. The Pennsylvania-specific portions of the proposal are known as the Independence Energy Connection Project, comprising the IEC East Project, which would connect to a proposed substation in York County, Pennsylvania, and the IEC West Project, which would connect to a proposed substation in Franklin County, Pennsylvania. PJM evaluated Project 9A according to its FERC-approved benefit-cost methodology, described *supra* in Section I.C. PJM concluded that Project 9A would be expected to provide economic benefits that exceed the 1.25 threshold over the 15-year horizon. Although the precise figures have shifted as the project is periodically reevaluated, PJM estimates that the project could lower wholesale electricity costs in congestion-constrained regions by as much as \$845 million over 15 years. At the same time, the cost of constructing the project would be roughly \$509–528 million. PJM’s periodic reevaluations of

⁸⁷ *Id.* at 681.

⁸⁸ Transource Energy, L.L.C. is the parent company to Transource Pennsylvania, L.L.C., the plaintiff-appellee in this litigation. Transource Pennsylvania, L.L.C. is an electricity transmission company and public utility that was established for the purpose of building Project 9A. This opinion refers to Transource Pennsylvania, L.L.C. as “Transource.”

the project consistently have yielded a benefit-cost ratio greater than 1.25 to 1.⁸⁹ PJM initially calculated the ratio at 2.48.

It is undisputed that Project 9A also would yield higher wholesale electricity costs for customers currently benefiting from the congestion that the project seeks to alleviate. In practice, this would mean that customers in regions including central and eastern Pennsylvania, where low-cost electricity has been trapped, would see their costs increase by as much as \$812 million over 15 years. As explained above, PJM's FERC-approved methodology for evaluating benefits and costs does not account for this increase in costs to Pennsylvania consumers.

PJM's Board approved Project 9A "as the more efficient, cost-effective project to address persistent congestion identified in forward-looking economic studies on the AP-South Interface."⁹⁰ In January 2017, FERC approved the project, determining that it would "reduce the cost of delivered power by reducing transmission congestion."⁹¹

⁸⁹ Periodic reevaluations have yielded ratios of 1.30, 1.32, 1.42, 1.40, 2.17, and 2.10. But, as will be discussed *infra*, the Administrative Law Judge who reviewed Transource's siting applications emphasized that congestion costs may have declined by as much as \$400 million without Project 9A being built. In addition, Defendants contend in their reply that PJM's most recent evaluation—conducted after the District Court ruled in this case—fell below the 1.25 threshold.

⁹⁰ JA 683.

⁹¹ *Transource*, 705 F. Supp. 3d at 275 (citation omitted); see also PJM Interconnection, L.L.C., 158 FERC ¶ 61089, 2017 WL 444174, at *5 (Jan. 31, 2017).

B. Administrative Proceeding

Transource applied to the PUC for all necessary certificates and approvals to construct Project 9A. Transource obtained a provisional “certificate of public convenience,” which would confer status as a public utility and enable it to file siting applications.⁹² Transource proceeded to file siting applications for the East Portion and West Portion of Project 9A. Transource also filed eminent-domain applications for the property that would need to be condemned to construct Project 9A. Numerous private organizations and individuals obtained intervenor status in the proceeding and filed objections to Transource’s applications.

An ALJ received written submissions and presided over an evidentiary hearing concerning Transource’s applications. Thereafter, the ALJ issued a recommended decision advising the PUC to deny Transource’s applications. The ALJ’s analysis focused on the first of the four elements that the PUC would need to consider under Pennsylvania law before ap-

⁹² JA 73, 227.

proving the siting applications: the need for the project.⁹³ The ALJ framed the need inquiry as “broad,” noting that while the PUC “may consider regional needs,” a primary focus is on “impacts to Pennsylvania.”⁹⁴

First, the ALJ rejected the premise that congestion was a problem in the APSRI, finding that “[a]ctual congestion costs” had decreased since PJM approved Project 9A.⁹⁵ Specifically, the ALJ found that while congestion costs on the APSRI totaled \$486.8 million in 2014, in subsequent years, these costs hovered between \$14.5–21.6 million. According to the ALJ, at the time of the administrative proceeding, “there [wa]s no longer significant congestion for the IEC Project to resolve on the AP South Interface.”⁹⁶ The ALJ also rejected the notion that the purported congestion caused discriminatory prices, characterizing congestion as “an appropriate market-based response to the wholesale power market.”⁹⁷

Next, the ALJ explained that even if congestion were an issue in the region, “those concerns would be

⁹³ As noted, Pennsylvania law provides that the PUC may approve an application if it finds: “(1) That there is a need for it. (2) That it will not create an unreasonable risk of danger to the health and safety of the public. (3) That it is in compliance with applicable statutes and regulations providing for the protection of the natural resources of [Pennsylvania]. (4) That it will 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).

⁹⁴ JA 153.

⁹⁵ *Id.* at 154.

⁹⁶ *Id.* at 155; see also *id.* at 162 (“[T]he IEC Project is no longer needed for the purpose for which it was designed in 2016.”).

⁹⁷ *Id.* at 163.

weighed against the detrimental impacts” of the project within Pennsylvania.⁹⁸ Whereas PJM had selected Transource’s project based on its FERC-approved benefit-cost methodology, the ALJ characterized that methodology as “deficient when measured against the constitutional, statutory, and regulatory standards of Pennsylvania law.”⁹⁹ The ALJ thus rejected PJM’s approach of comparing the cost of building the project to the benefits only in regions that would pay for the project. According to the ALJ, the \$812 million in increased costs to Pennsylvania consumers—which would result from relieving the congestion—should be considered as a counterweight to the \$845 million in efficiency gains in other states. The ALJ therefore assessed the benefit of the project to be only \$32.5 million over 15 years, against a cost of at least \$509 million to build.¹⁰⁰ Thus, the ALJ wrote, “[t]his is a costly project to Pennsylvania compared to the net benefit to address vague constraints.”¹⁰¹

The ALJ recommended denying the applications because “no need has been proven.”¹⁰² The ALJ also found that Transource failed to establish two of the other elements required under Pennsylvania law for approval of the siting applications: protection of natural resources and minimal environmental impact.

⁹⁸ *Id.* at 166.

⁹⁹ *Id.* at 169.

¹⁰⁰ This number is reached by subtracting the \$812.5 million in increased costs from the \$845 million in savings from relieving the congestion.

¹⁰¹ *Id.* at 168.

¹⁰² *Id.* at 195.

Transource filed exceptions to the ALJ's recommended decision before the PUC. The PUC subsequently issued an order denying Transource's siting applications and adopting and incorporating the ALJ's ruling. This denial turned on Transource's "fail[ure] to establish . . . the need for the proposed HV transmission lines."¹⁰³ The PUC held that Pennsylvania law authorizes and requires the PUC to conduct its own need analysis, which is not necessarily coterminous with PJM's benefit-cost determination. The PUC wrote:

The premise underlying Transource's arguments that the element of need has been satisfied under the Pennsylvania standards is Transource's assertion that the factors relied upon by PJM and the methodology and process for PJM-approval of a project should be the only criteria relevant to this Commission's review and such criteria is not subject to critical analysis. However, Transource's argument is flawed in a material respect: need, established under the applicable federal standards imposed by FERC and implemented by PJM, do[es] not necessarily satisfy the requirement for "need" as that element is examined and weighed under [Pennsylvania law].¹⁰⁴

The PUC—like the ALJ—evaluated the issue of "need" by focusing primarily on "[t]he potential negative and practical impact on the citizens and consumers

¹⁰³ *Id.* at 224.

¹⁰⁴ *Id.* at 276.

of Pennsylvania.”¹⁰⁵ Despite acknowledging that PJM’s planning may not account for the most current data, particularly when a project is tied up in years of litigation, the PUC deemed it appropriate to consider purported declines in congestion levels since PJM selected Project 9A because “[Pennsylvania] is expected to suffer serious consequences” if the project is built.¹⁰⁶ The PUC therefore adopted the ALJ’s recommended conclusion that Transource had failed to establish the requisite “need” for Project 9A, explaining,

[W]e find that the ALJ properly construed the state versus federal roles regarding regional transmission planning in the analysis and application of the relevant statutory authority, applicable regulations, and case law to the present case [W]e conclude that in the present circumstances Transource fails to carry the burden of persuasion by a preponderance of the evidence to establish need for the proposed siting Applications, pursuant to . . . 52 Pa. Code Section 57.76(a)(1).¹⁰⁷

Relying on this conclusion, the PUC denied Transource’s siting applications, as well as the accompanying petitions for zoning exemptions and eminent domain. The PUC also rescinded Transource’s provisional certificate of public convenience.

¹⁰⁵ *Id.* at 281.

¹⁰⁶ *Id.* at 282.

¹⁰⁷ *Id.* at 285.

C. Federal and State Court Proceedings

Transource responded by suing the PUC, along with its Chairman, Vice Chairman, and Commissioners in federal district court. Transource's complaint asserted that the PUC decision violated the Supremacy Clause and the dormant Commerce Clause of the U.S. Constitution. It pled causes of action pursuant to 28 U.S.C. § 2201 and 42 U.S.C. § 1983. The complaint asked the District Court to declare the PUC's need determination unlawful, and to enjoin enforcement of the PUC order.

The day after filing its federal-court complaint, Transource filed a petition for review of the agency determination in the Pennsylvania Commonwealth Court. Transource sought reversal on the grounds that the ruling contained errors of law, was not supported by substantial evidence, and constituted an abuse of agency discretion. Transource's submissions to the Commonwealth Court expressly reserved Transource's Supremacy Clause and dormant Commerce Clause claims and explained that Transource intended to litigate those issues in federal court if it did not prevail before the Commonwealth Court.

The District Court stayed the federal proceeding pending resolution of the state proceeding. Several months later, the Commonwealth Court affirmed the PUC decision. Accordingly, the federal District Court lifted the stay, denied Defendants' motion to dismiss, and authorized limited discovery. Upon completion of discovery, both sides moved for summary judgment.

D. District Court Summary Judgment Ruling

The District Court entered summary judgment for Transource. The District Court began its analysis in a very thorough and well-reasoned opinion, by rejecting

Defendants’ arguments that preclusion doctrines prevented it from reaching the merits of the dispute. First, the District Court held that, consistent with the Supreme Court’s opinion in *England v. Louisiana State Board of Medical Examiners*,¹⁰⁸ Transource had avoided claim preclusion in state court by informing the Pennsylvania court that it was reserving its constitutional claims for adjudication in federal court. Second, the District Court declined to reach the merits of Defendants’ issue-preclusion argument, concluding that argument had not been properly raised as it was presented only in a footnote in Defendants’ summary-judgment brief.

In analyzing the Supremacy Clause claim, the District Court explained that the FPA grants FERC “the power to regulate regional transmission planning.”¹⁰⁹ The District Court declined to rule on whether the PUC order created a direct conflict with federal law. Instead, the District Court concluded that the PUC order must fall under the doctrine of implied conflict preemption because it erected an obstacle to federal objectives. As the District Court explained, a core goal of federal regulation in the area of interstate electricity transmission is for RTOs such as PJM to analyze, select, and ultimately build “congestion-reducing projects with benefits that exceed their costs by the required ratio,” subject to local permitting constraints.¹¹⁰ The District Court reasoned that “by disagreeing with PJM’s FERC-approved benefit-cost methodology,” the PUC “under-

¹⁰⁸ 375 U.S. 411 (1964).

¹⁰⁹ *Transource*, 705 F. Supp. 3d at 285.

¹¹⁰ *Id.* at 288.

cut the foundational goal of congestion-alleviating projects.”¹¹¹ The court concluded, “[b]ecause the PUC’s decision presents an obstacle to achieving federal objectives, it is conflict preempted and violates the Supremacy Clause.”¹¹²

The District Court also held that “the PUC’s decision was a per se violation of the dormant Commerce Clause driven by economic protectionism.”¹¹³ The court explained that the purpose of Project 9A is “to better facilitate commerce across regional and state boundaries,” whereas the PUC’s opposition was rooted in maintaining Pennsylvania’s “access to low-priced electricity” resulting from congestion.¹¹⁴ Yet the PUC failed to show, as it must under the dormant Commerce Clause, that this discriminatory policy was narrowly tailored to advance a legitimate state purpose.¹¹⁵ The District Court also concluded that the PUC decision would violate the dormant Commerce Clause pursuant to the balancing test described in *Pike v. Bruce Church, Inc.*,¹¹⁶ noting that “if other states adopted a regime similar to the PUC, it would eviscerate FERC’s attempts to reduce congestion.”¹¹⁷

¹¹¹ *Id.* at 288–89.

¹¹² *Id.* at 289.

¹¹³ *Id.* at 296.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 296–97.

¹¹⁶ 397 U.S. 137 (1970).

¹¹⁷ *Transource*, 705 F. Supp. 3d at 297.

The District Court therefore granted Transource’s motion for summary judgment and entered final judgment in favor of Transource. Defendants now appeal that order.¹¹⁸

III. Discussion¹¹⁹

A. Preclusion

We first address Defendants’ contention that issue preclusion bars Transource from raising its preemption argument.¹²⁰ The District Court declined to consider issue preclusion because the argument was raised only

¹¹⁸ In addition to the issues addressed in Section III, Defendants in their reply contend that Transource’s theory in this litigation violates the major questions doctrine. “As a general matter, the courts of appeals will not consider arguments raised on appeal for the first time in a reply brief.” *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 204 n.29 (3d Cir. 1990). We see no “exceptional circumstances,” *id.*, that would justify deviating from that standard default rule here. Defendants offer no explanation for raising this issue late. Nor can we readily discern such a reason, as their arguments concerning the major questions doctrine rely upon case law decided before they filed their opening brief. *See id.* This issue also does not appear to have been raised before the District Court, making it even more inappropriate for appellate consideration. *See Harris v. City of Philadelphia*, 35 F.3d 840, 845 (3d Cir. 1994). We therefore do not address the major questions doctrine.

¹¹⁹ The District Court exercised jurisdiction over Transource’s claims pursuant to 28 U.S.C. § 1331. We have appellate jurisdiction over the District Court’s final order pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment de novo, applying the same standard as a district court. *Levy v. Sterling Holding Co., L.L.C.*, 544 F.3d 493, 501 (3d Cir. 2008). Summary judgment is appropriate when there is no genuine dispute of material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a).

¹²⁰ Defendants also argue that claim preclusion bars consideration of Transource’s dormant Commerce Clause claim because

in a footnote in Defendants’ summary judgment briefing. Defendants offer no basis for concluding that the argument is not now forfeited, and this is reason enough for us to reject it.¹²¹

However, even if the argument had been preserved, it would not succeed. Issue preclusion bars relitigation of previously decided issues where, among other requirements, “there was a final adjudication on the merits,” and the issue was “essential to the judgment.”¹²² The PUC did not address federal preemption. The PUC did use the word “preempted” in “reject[ing] any argument that the authority [to resolve siting applications] is preempted.”¹²³ However, the PUC never analyzed the Supremacy Clause or federal preemption case-law. It is not clear that such authorities were even presented to the PUC, as Defendants’ description of Transource’s argument in the administrative proceeding conspicuously omits mention of the Supremacy Clause.

Transource could have raised this argument in the agency proceeding before the PUC but failed to do so. Because we do not reach the dormant Commerce Clause issue, we need not analyze this preclusion argument.

¹²¹ See *In re Niaspan Antitrust Litig.*, 67 F.4th 118, 135–36 (3d Cir. 2023) (declining to consider argument presented to the district court in a footnote and therefore forfeited); *Higgins v. Bayada Home Health Care Inc.*, 62 F.4th 755, 763 (3d Cir. 2023) (same).

¹²² *Metro. Edison Co.*, 767 F.3d at 351 (explaining that Pennsylvania law governs the issue-preclusive effect of a state-court decision reviewing a PUC order, and summarizing requirements under Pennsylvania law) (quoting *Off. Disciplinary Counsel v. Kiesewetter*, 889 A.2d 47, 50–51 (Pa. 2005)).

¹²³ JA 278.

Moreover, the PUC order was not a “final adjudication.”¹²⁴ The PUC is not a tribunal of last resort, and Transource pursued review of the PUC decision in the Commonwealth Court. We have held that a federal court “should grant preclusive effect *to a state court decision upholding*” an agency’s determination when that state-court decision would have preclusive effect in state court.¹²⁵ But the Commonwealth Court never reviewed the PUC decision through the lens of federal preemption. Instead, Transource filed an *England* reservation, preserving its federal-law arguments for review in federal court. Pursuant to *England*, a party required to litigate in state court may reserve parallel federal claims for resolution in federal court so long as the party “inform[s] those [state] courts what his federal claims are, so that the state statute may be construed in light of those claims.”¹²⁶ Because Transource made a proper *England* reservation, “the traditional rules of res judicata and collateral estoppel . . . do not apply to [the] state proceeding[]” with respect to those federal claims.¹²⁷

Defendants do not question the validity of Transource’s *England* reservation. Instead, their argument seems to be that to the extent the PUC order touched at all on preemption, the PUC order is preclusive, despite the fact that the Commonwealth Court never reached the issue. Defendants write that “Transource could have challenged the PUC’s decision

¹²⁴ *Metro. Edison Co.*, 767 F.3d at 351.

¹²⁵ *Dici v. Pennsylvania*, 91 F.3d 542, 547 (3d Cir. 1996) (emphasis added).

¹²⁶ 375 U.S. at 420 (quotation marks omitted).

¹²⁷ *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 822 (3d Cir. 1994).

[on preemption] in the Commonwealth Court, but did not.”¹²⁸ This is irreconcilable with *England*, which made clear that a party who properly invokes federal-court jurisdiction may not be compelled to forego the federal forum even if his claims require parallel state proceedings.¹²⁹ Defendants identify no authority to support issue preclusion applying where the state agency’s decision has been challenged but not affirmed on the at-issue grounds, and the cases they rely upon are readily distinguishable.¹³⁰

¹²⁸ Appellants Br. 56.

¹²⁹ See *England*, 375 U.S. at 415 (“There are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court’s determination of those claims.”).

¹³⁰ See *City of McKeesport v. Pa. Pub. Util. Comm’n*, 442 A.2d 30, 31 (Pa. Commw. Ct. 1982) (explaining that a PUC decision that was never appealed could have claim-preclusive effect in the Commonwealth Court, where the issue had been briefed, considered, and decided by an ALJ and adopted by the PUC and “the reasons for the uses of the rule in court proceedings are present in full force”); *Phil. Elec. Co. v. Pa. Pub. Util. Comm’n*, 433 A.2d 620, 625–26 (Pa. Commw. Ct. 1981) (concluding that, in the particular case, “the desirability of giving finality to decisions and preventing the relitigation of issues involving precisely the same facts as those in finished litigation . . . apply”) (emphasis added); *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 135 (3d Cir. 1998) (concluding that a decision by a New York agency concerning the terms of a purchase agreement held preclusive effect because of the “substantial role given state utility agencies by Congress in enacting [their enabling statute]”); *Edmundson v. Borough of Kennett Square*, 4 F.3d 186, 193 (3d Cir. 1993) (holding state civil service commission’s resolution of a First Amendment issue *did not* have preclusive effect because the agency lacked “the expertise to issue binding pronouncements in the area of federal constitutional law”).

Defendants therefore fail to establish that issue preclusion poses a bar to our review of Transource’s preemption argument.

B. Preemption

The District Court held that the PUC order denying Transource’s siting applications was preempted because it posed an obstacle to federal objectives by “undercut[ting] the foundational goal of congestion-alleviating projects.”¹³¹ Defendants challenge this determination on appeal, arguing that the PUC order was an exercise of Pennsylvania’s siting authority, which is distinct from regional planning and over which the federal government lacks jurisdiction.

1. The Supremacy Clause

The Supremacy Clause of the U.S. Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.¹³²

This means that “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”¹³³ Federal law

¹³¹ *Transource*, 705 F. Supp. 3d at 288–89.

¹³² U.S. Const. art. VI, cl. 2.

¹³³ *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

may preempt state law either expressly—by declaring an intent to displace state law—or implicitly.¹³⁴ Implied preemption occurs either when Congress legislates so as to “foreclose any state regulation in the area,” known as field preemption, or when federal law conflicts with state law, known as conflict preemption.¹³⁵ Conflict preemption, at issue in this appeal, “exists where ‘compliance with both state and federal law is impossible,’ or where ‘the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹³⁶ Where such conflict exists, “federal law must prevail.”¹³⁷

We have identified “two principles” that guide our analysis “[i]n every preemption case.”¹³⁸ “First, the intent of Congress is the ‘ultimate touchstone’ of preemption analysis.”¹³⁹ Congress’s purpose may be apparent from the face of a statute. We also may consider the

¹³⁴ See *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376–77 (2015).

¹³⁵ *Id.* at 377 (emphasis omitted) (quoting *Arizona v. United States*, 567 U.S. 387, 401 (2012)).

¹³⁶ *Id.* (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100, 101 (1989)).

¹³⁷ *Id.*

¹³⁸ *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3d Cir. 2010).

¹³⁹ *Id.* (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); see also *Deweese v. Nat’l R.R. Passenger Corp. (Amtrak)*, 590 F.3d 239, 246 (3d Cir. 2009) (“In analyzing a potential conflict between federal and state law, we must be ‘guided . . . by the rule that the purpose of Congress is the ultimate touchstone in every preemption case.’”) (quoting *Holk v. Snapple Beverage Corp.*, 575 F.3d 329, 334 (3d Cir. 2009)).

“structure and purpose of the statute as a whole,” analyzing “the way in which Congress intended the statute and its surrounding regulatory scheme to affect business, consumers, and the law.”¹⁴⁰ To this end, we have observed that “regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption.”¹⁴¹ In such situations, Congress “intends the agency to use its reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives.”¹⁴² Permitting state authorities to “impose a different standard” would undermine this congressional intent by “re-balancing” the considerations already weighed by the agency.¹⁴³

The second guiding principle is “the basic assumption that Congress did not intend to displace state law.”¹⁴⁴ This presumption against preemption does not apply in all cases, however. It does not apply “where state regulation has traditionally been absent.”¹⁴⁵ And the presumption is “overcome where . . . the existence of a conflict is clear and manifest.”¹⁴⁶

¹⁴⁰ *Farina*, 625 F.3d at 115 (quoting *Medtronic*, 518 U.S. at 486).

¹⁴¹ *Id.* at 123.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 116.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 117 (quoting *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 249 (3d Cir. 2008) (quotation marks omitted)).

2. Federal Electricity-Industry Objectives

To determine whether the PUC order stands as an obstacle to federal objectives, we first must distill the federal objectives in regulating the electricity industry, as revealed through acts of Congress and FERC rule-making.¹⁴⁷ As explained *supra* in Section I, the FPA directed FERC to (1) exert “jurisdiction over all facilities for such [interstate] transmission or [wholesale] sale of electric energy”¹⁴⁸ ; (2) “divide the country into regional districts” and “promote and encourage [regional] interconnection and coordination”¹⁴⁹ ; (3) ensure “just and reasonable” rates for transmission and sales subject to FERC’s jurisdiction,¹⁵⁰ 150 and (4) prevent any undue preferences or advantages in connection with such rates.¹⁵¹ With the Energy Policy Act, Congress instructed FERC to “facilitate[] the planning and expansion of transmission facilities to meet the reasonable needs of load-serving entities.”¹⁵²

FERC’s orders pursuant to this legislation explain that carrying out these mandates entails counteracting state utilities’ naturally anticompetitive tendencies.

¹⁴⁷ See *Holk*, 575 F.3d at 339 (“Both federal statutes and regulations have the force of law and can preempt contrary state law.”); *Fellner*, 539 F.3d at 243–44 (discussing circumstances in which federal agency actions have preemptive effect, which include but are not limited to the formal, notice-and-comment rule-making at issue in this appeal).

¹⁴⁸ 16 U.S.C. § 824(b)(1).

¹⁴⁹ *Id.* § 824a(a).

¹⁵⁰ *Id.* § 824d(a).

¹⁵¹ *Id.* § 824d(b); see also *id.* § 824e(a).

¹⁵² *Id.* § 824q(b)(4).

With the evolution of the transmission industry, FERC “concluded that the economic self-interest of electric transmission monopolists lay in denying transmission or offering it only on inferior terms to emerging competitors.”¹⁵³ FERC construed its mandate of ensuring just and reasonable rates as requiring it to foster a competitive, interconnected marketplace.¹⁵⁴

The regional planning process is one tool that FERC developed to support competition and deter preferential practices. FERC has explained that it “encouraged the creation of RTOs to address important operational and reliability issues and eliminate any residual discrimination in transmission services that can occur when the operation of the transmission system remains in the control of a vertically integrated utility.”¹⁵⁵ As for the objective of reducing congestion, FERC noted that “the ability and incentive to discriminate increases as the transmission system becomes more congested.”¹⁵⁶ These priorities serve the purpose of “ensur[ing] that transmission infrastructure is constructed on a nondiscriminatory basis and is otherwise sufficient to support reliable and economic service to all eligible customers.”¹⁵⁷ In other words, the regional

¹⁵³ *S.C. Pub. Serv. Auth.*, 762 F.3d at 50 (citing Order No. 888, 61 Fed. Reg. at 21567).

¹⁵⁴ *See id.*

¹⁵⁵ Order No. 890, 72 Fed. Reg. at 12270 (emphasis added).

¹⁵⁶ *Id.* at 12275

¹⁵⁷ *Id.*; *see also* Order No. 1000, 76 Fed. Reg. at 49845 (explaining FERC’s purpose in building on Order No. 890 with Order No. 1000 “to ensure that rates for [FERC]-jurisdictional service are just and reasonable in light of changing conditions in the industry” and to “address opportunities for undue discrimination by public utility transmission providers”).

planning process developed as a counterweight to state interests, and precisely because FERC determined that it could not depend on the states to address regional concerns such as congestion and grid reliability.

FERC acted in furtherance of these considerations when it directed PJM to propose a benefit-cost ratio for evaluating market-efficiency projects that reduce congestion.¹⁵⁸ FERC insisted that PJM come up with a fixed, “bright-line” formula for evaluating the economics of a project, explaining that such a formula was necessary to provide fairness and certainty to investors and to avoid relitigating each project approved by PJM.¹⁵⁹ FERC explained in approving the benefit-cost methodology that it provided the requisite certainty and was “consistent with the FPA because it promotes an economically efficient transmission system, and is not unduly discriminatory.”¹⁶⁰

Carrying out these objectives requires FERC to balance competing policy considerations. FERC is tasked on the one hand with ensuring just and reasonable rates and facilitating regional interconnection, while on the other hand regulating “only . . . those matters which are not subject to regulation by the States.”¹⁶¹ FERC repeatedly has articulated its intent not to impinge the authority of state utilities and regulators over certain predominantly intra-state aspects of the

¹⁵⁸ See *PJM Interconnection, L.L.C.*, 119 FERC at ¶ 62488.

¹⁵⁹ *Id.* at ¶ 62492–93.

¹⁶⁰ *PJM Interconnection, L.L.C.*, 123 FERC at ¶ 61412.

¹⁶¹ 16 U.S.C. § 824(a).

electricity-transmission industry, including siting.¹⁶² At the same time, FERC considers one of its core objectives to be countering state utilities' economic self-interest, which it repeatedly has characterized as a force that undermines the goal of nondiscriminatory rates and practices.¹⁶³ Thus, the Supreme Court has ob-

¹⁶² See Order No. 1000, 76 Fed. Reg. at 49861 (“We acknowledge 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. However, nothing in this Final Rule involves an exercise of siting, permitting, and construction authority.”); Order No. 1000-A, Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32184, 32215 (May 31, 2012) (affirming that “[FERC] may undertake Order No. 1000’s reforms without intruding on state jurisdiction,” including the states’ role in “siting, permitting, and construction of transmission facilities”); Order No. 2000, 65 Fed. Reg. at 910 (“Currently, state and local governments . . . have exclusive authority over the siting process. Therefore, an RTO’s planning and expansion process must be designed to be consistent with these state and local responsibilities.”); Order No. 890, 72 Fed. Reg. at 12328 (describing “State siting issues” as an area “over which [FERC] does not have jurisdiction”); *id.* at 12336 (noting that states “have primary transmission siting authority”).

¹⁶³ See Order No. 888, 61 Fed. Reg. at 21567 (identifying FERC’s objective to correct “unduly discriminatory and anticompetitive practices” resulting from “the economic self-interest of transmission monopolists . . . to deny transmission or to offer transmission on a basis that is inferior to that which they provide themselves”); Order No. 890, 72 Fed. Reg. at 12318 (explaining that FERC needed to build on the provisions of Order No. 888 because “[w]e cannot rely on the self-interest of transmission providers to expand the grid in a nondiscriminatory manner”); Order No. 1000, 76 Fed. Reg. at 49886 (identifying a need to eliminate incumbent rights of first refusal because “it is not in the economic self-interest of incumbent transmission providers to permit new entrants to develop transmission facilities”).

served that FERC is entitled to “great deference” in effectuating “[t]he statutory requirement that rates be ‘just and reasonable,’” for that phrase entails judgment calls and policy considerations “incapable of precise definition.”¹⁶⁴

To summarize, Congress intended to establish a system of federal supervision over interstate electricity transmission and wholesale sales to ensure just, reasonable, and nondiscriminatory rates and practices, while promoting regional interconnection. FERC reasonably construed its mandate to comprise facilitating competitive transmission and wholesale markets, in part by checking the inherent economic self-interest of state utilities, while reducing regional congestion and ensuring grid reliability.

3. The Conflict Between the PUC Ruling and Federal Objectives

The conflict between the PUC order at issue here and the foregoing federal objectives is clear. As described herein, PJM, acting pursuant to its mandate to “ensure the development and operation of market mechanisms to manage transmission congestion,”¹⁶⁵ identified the need to reduce congestion in the APSRI region. PJM evaluated Transource’s proposal, Project 9A, according to the FERC-mandated benefit-cost methodology. PJM selected Transource’s proposal because it “provided the most benefits” by reducing congestion while complying with the approved benefit-cost

¹⁶⁴ *Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 532 (2008).

¹⁶⁵ 18 C.F.R. § 35.34(k)(2).

ratio.¹⁶⁶ The PUC applied a different benefit-cost analysis—explicitly departing from the methodology FERC had directed PJM to apply. It concluded that there was no “need” for the project. Based on this determination, the PUC declined to issue Transource a permit for the project, foreclosing construction of the IEC lines in Pennsylvania.

The problem with the PUC’s denial is that it is the result of second-guessing the FERC-approved benefit-cost methodology. FERC’s methodology serves the broader purpose of reducing regional congestion to ensure just, reasonable, and nondiscriminatory rates. The PUC, however, disagreed with PJM’s evaluations of regional congestion and with FERC’s determination of how the consequences of that congestion should be weighed. No party disputes—and the PUC expressly acknowledged—that the congestion at issue here results in lower rates for Pennsylvania customers at the expense of out-of-state customers. It thus contributes to a regional rate disparity that Project 9A seeks to remedy. However, this objective is thwarted by the PUC order based upon an impermissible “re-balancing of those considerations”¹⁶⁷ that FERC has already weighed in mandating the regional-planning process and approving PJM’s benefit-cost methodology. Moreover, FERC has considered—but declined to adopt—the very approach that the PUC applied by treating price increases from relieving congestion as a “cost” of the project.¹⁶⁸ Thus, FERC’s ability to fulfill its mandates

¹⁶⁶ JA 688 (PJM 2016 white paper).

¹⁶⁷ *Farina*, 625 F.3d at 123.

¹⁶⁸ See *PJM Interconnection, L.L.C.*, 123 FERC at ¶ 61416 (considering but rejecting objections to the exclusion of “the expected energy payment increases, if any,” in zones that would not

would be fatally undermined if state agencies could veto congestion-reducing projects based on a disagreement with the federal actors' reasons for selecting or approving a project. The PUC order therefore “poses an obstacle to the full achievement of federal purposes.”¹⁶⁹

In a different but instructive context, the Supreme Court has consistently found “the States’ attempts to second-guess the reasonableness” of FERC tariffs preempted pursuant to the filed-rate doctrine.¹⁷⁰ That doctrine provides “that interstate power rates filed with FERC or fixed by FERC must be given binding effect by state utility commissions determining intra-state rates’ . . . as a matter of federal pre-emption through the Supremacy Clause.”¹⁷¹ Once FERC determines that a rate is “reasonable,” state utilities cannot impose any inconsistent rate—even when acting in an

pay for the project); *PJM Interconnection, L.L.C.*, 173 FERC at ¶ 62725 (declining intervenor’s request to revisit methodology because it “ignore[s] the increased zonal load costs that a project may create”).

¹⁶⁹ *MD Mall Assocs. v. CSX Transp., Inc.*, 715 F.3d 479, 495 (3d Cir. 2013).

¹⁷⁰ *Hughes v. Talen Energy Mktg.*, 578 U.S. 150, 165 (2016); see *id.* at 163 (holding preempted a Maryland program that effectively set an interstate wholesale rate because it “invade[d] FERC’s regulatory turf”); see also *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 369–74 (1988) (holding preempted a Mississippi agency’s “prudence inquiry” into nuclear power plant expenses that FERC had ordered utilities to purchase); *Nantahala Power & Light Co.*, 476 U.S. 953 (1986) (holding preempted North Carolina agency’s order allocating power between power plant operators in manner that differed from FERC’s allocation).

¹⁷¹ *Entergy La., Inc. v. La. Pub. Serv. Comm’n*, 539 U.S. 39, 47(2003) (quoting *Nantahala*, 476 U.S. at 962).

area of exclusive state jurisdiction.¹⁷² Thus, in *Nantahala Power and Light Co. v. Thornburg*, a state utility was preempted from reallocating power between plant operators based on the utility’s belief “that [one of the operators] should have obtained more of the low-cost, FERC-regulated power than [it was] in fact entitled to claim under FERC’s order.”¹⁷³ FERC had issued a tariff setting the allocation of power between the operators.¹⁷⁴ Because the state utility’s order rested on a premise “directly counter to FERC’s order,” it “c[ould] not withstand the preemptive force of FERC’s decision.”¹⁷⁵

Similarly, in *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, FERC had allocated the costs of constructing a power plant among several utilities, requiring each to purchase a portion of the plant’s output at FERC-determined rates.¹⁷⁶ The Mississippi Supreme Court directed a state agency to conduct a “prudence” review of the underlying construction of the plant,¹⁷⁷ which could be relevant to whether the FERC-mandated payments could be passed on to consumers through state retail rates.¹⁷⁸ The Supreme Court held this state action preempted because, even though Mississippi had authority over retail rates, “[o]nce FERC

¹⁷² *Id.*; see also *Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (“[T]he right to a reasonable rate is the right to the rate which the Commission files or fixes.”).

¹⁷³ 476 U.S. at 968.

¹⁷⁴ *Id.* at 956.

¹⁷⁵ *Id.* at 968.

¹⁷⁶ 487 U.S. at 362–63.

¹⁷⁷ *Id.* at 368.

¹⁷⁸ *Id.* at 372 n.12.

sets [a wholesale] rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable.”¹⁷⁹ The Supremacy Clause prohibited “any proceedings that challenge the reasonableness of FERC’s allocation.”¹⁸⁰

The Supreme Court reinforced these principles in *Hughes v. Talen Energy Marketing, LLC*.¹⁸¹ At issue there was a PJM capacity auction, which FERC had approved “as the sole ratesetting mechanism for sales of capacity to PJM.”¹⁸² Maryland sought to encourage in-state generation by guaranteeing a new power plant a set price for its capacity.¹⁸³ This had the effect of overriding the auction price, established through a process that FERC had determined made the price just and reasonable.¹⁸⁴ The Supreme Court explained that while the FPA left certain zones of authorities to the states, “States may not seek to achieve ends, however legitimate,” in a manner that would effectively undermine a FERC-determined rate.¹⁸⁵

Like the state agencies in *Nantahala*, *Mississippi Power*, and *Hughes*, the PUC here would substitute its determination for that of FERC on an issue that federal law places squarely in FERC’s hands: identifying regional planning needs and selecting projects to relieve congestion. FERC determined that the benefit-cost

¹⁷⁹ *Id.* at 373 (quoting *Nantahala*, 476 U.S. at 966).

¹⁸⁰ *Id.* at 374.

¹⁸¹ 578 U.S. 150.

¹⁸² *Id.* at 163.

¹⁸³ *Id.* at 158–59.

¹⁸⁴ *Id.* at 163.

¹⁸⁵ *Id.* at 164.

methodology PJM used in this case was “a just and reasonable means by which to measure whether an economic-based enhancement or expansion should be included in the RTEP.”¹⁸⁶ The PUC’s rejection of that measure arose from its disagreement with constructing the project. Much like the prudence inquiry in *Mississippi Power*, the PUC order here would “substitute[the PUC’s] own determination[] of what would be just and fair” for that of FERC.¹⁸⁷

The PUC order raises an obstacle to accomplishing federal objectives in a manner the Supremacy Clause does not permit. Because the conflict is clear and manifest, it overcomes our usual presumption against preemption. It is clearly preempted.¹⁸⁸

4. State Authority Over Siting

Defendants’ central argument for reversal is that the PUC, in denying Transource’s applications, was simply exercising traditional state siting authority. According to Defendants, the states have “longstanding historical authority to approve or deny siting permits for the construction of electric transmission facilities,” which Congress has never disturbed beyond granting FERC limited “backstop siting authority.”¹⁸⁹ Thus, Defendants would have us confine the federal sphere to the regional planning process—i.e., identifying the

¹⁸⁶ *PJM Interconnection, L.L.C.*, 123 FERC at ¶ 61417.

¹⁸⁷ *Mississippi Power*, 487 U.S. at 371.

¹⁸⁸ See *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 374 n.8 (2000) (explaining that state law presented “a sufficient obstacle to the full accomplishment of Congress’s objectives” to overcome any presumption against preemption).

¹⁸⁹ Appellants Br. 31.

need for projects—while leaving to states the substantive determination of whether a project ultimately can be built.

We agree that the task of approving construction in a particular place falls to state authorities. This is clear from the FPA, which in its original form did not empower the federal government with any authority over siting. Siting decisions therefore remained, by default, the province of the states.¹⁹⁰ Moreover, we realize that when Congress amended the FPA in 2005 by enacting the Energy Policy Act, it authorized FERC to exercise siting authority involving designated NIETCs, but only in select circumstances not applicable here.¹⁹¹ We therefore appreciate that this limited and highly restrictive authorization arguably gives rise to a negative inference that FERC otherwise lacks plenary authority over siting.¹⁹² FERC moreover has repeatedly reaffirmed that its regulations are not intended to intrude upon states' traditional siting authority.¹⁹³ Even Transource agrees that “states retain authority over siting and construction.”¹⁹⁴

That is not the end of the inquiry, however. Implied conflict preemption occurs when states act in ways that

¹⁹⁰ See 16 U.S.C. § 824(a).

¹⁹¹ *Id.* § 824p(b).

¹⁹² *Cf. Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (finding specific provision in one portion of statute, but absence of such provision elsewhere, gave rise to negative inference that application was limited to circumstances specifically described).

¹⁹³ See Order No. 1000, 76 Fed. Reg. at 49861; Order No. 1000 A, 77 Fed. Reg. at 32215; Order No. 2000, 65 Fed. Reg. at 910; Order No. 890, 72 Fed. Reg. at 12328, 12336.

¹⁹⁴ Appellee Br. 15.

impede the federal government from carrying out federal objectives, “even when [s]tates exercise their traditional authority.”¹⁹⁵ What matters for preemption purposes is that the PUC’s reasons for denying the siting applications amounted to “second-guess[ing] the reasonableness”¹⁹⁶ of PJM’s FERC-approved approach to determining which projects should be built. We appreciate that a state-law savings provision, like the one in the FPA, may “indicate Congress envisioned some role for state law in the field.”¹⁹⁷ However, that “does not ‘bar the ordinary working of conflict pre-emption principles.’”¹⁹⁸ The question before us is not whether the PUC was acting within the ordinary scope of state authority, but whether its action poses an obstacle to the accomplishment of federal objectives.¹⁹⁹ As we explained above, it clearly does.

If state siting authority permitted the PUC to reject a federal project on the same basis that the federally authorized RTO selected the project, the regional planning process would do nothing to check state utilities’ core economic self-interest. Congress recognized a need for federal regulation precisely because ensuring just

¹⁹⁵ *Hughes*, 578 U.S. at 165.

¹⁹⁶ *Id.*

¹⁹⁷ *Farina*, 625 F.3d at 121.

¹⁹⁸ *Id.* at 131 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000)).

¹⁹⁹ We therefore need not go so far as the District Court in characterizing the PUC’s decision as something other than siting. See *Transource*, 705 F. Supp. 3d at 293. Even assuming, arguendo, that the PUC was engaged in the siting process when it denied Transource’s applications, this does not obviate the conflict for preemption purposes.

and reasonable rates and reliable service on an interstate grid could not be left to the individual states.²⁰⁰ And FERC concluded that to ensure nondiscriminatory service, it needed to check states’ interests in advantaging domestic actors.

Defendants emphasize that states must retain the ability to reject siting applications on the basis of local concerns. To be clear, the PUC may, consistent with our opinion today, “grant[] or deny[]” a siting application for reasons other than a disagreement with PJM’s FERC-approved basis for selecting the project.²⁰¹ Pennsylvania law indicates that such reasons may include public safety and environmental concerns.²⁰²

As Defendants emphasize, Pennsylvania law also instructs the PUC to conduct its own need determination.²⁰³ Our holding today need not render state “need” inquiries entirely superfluous. According to Transource, “the vast majority of new transmission

²⁰⁰ *See supra* Section III.B.2.

²⁰¹ 52 Pa. Code § 57.76(a).

²⁰² *Id.* §§ 57.76(a)(2)–(4).

²⁰³ *Id.* § 57.76(a)(1). Defendants note that other siting state laws include similar “need” elements. *See, e.g.*, Fla. Stat. § 403.537; Me. Stat. 35-A § 3132(6); M.D. Code Ann., Pub. Util. § 7-207(f)(1)(i); Mont. Code Ann. § 75-20-301(1)(a); N.Y. Pub. Serv. Law § 122(1)(d). Defendants emphasize that FERC Commissioner Mark Christie has expressed a conviction that states’ historic siting authority properly comprises a need determination. *See Balt. Gas & Elec. Co.*, 187 FERC ¶ 61030, 2024 WL 2272575, at *7 (Apr. 23, 2024) (Christie, dissenting); *Duquesne Lighting Co., PJM Interconnection, L.L.C.*, 189 FERC ¶ 61181, ¶ 16 n.268, 2024 WL 5006632, at *34 (Dec. 6, 2024) (Christie, concurring in part and concurring in the result in part); *PJM Interconnection, L.L.C.*, 191 FERC ¶ 61056, 2025 WL 1165765, at *5 (Apr. 17, 2025) (Christie, concurring).

lines” did not originate with an RTO’s regional planning process, and instead address “local problems.”²⁰⁴ Defendants do not rebut this assertion or the evidence Transource cites in support. Accordingly, it is at least arguable that when the PUC reviews siting applications that do not originate with RTO regional planning, the PUC may evaluate need without running afoul of the Supremacy Clause and preemption issues.

On the other hand, when an RTO has selected a project for inclusion in a regional transmission plan as part of its federal mandate, a state regulator cannot, consistent with the Supremacy Clause, reject the project based on a lack of “need.” FERC explained in Order No. 1000 that regional planning was essential to “identify and evaluate transmission alternatives at the regional level that may resolve the region’s needs more efficiently or cost-effectively than solutions identified in the local transmission plans of individual public utility transmission providers.”²⁰⁵ FERC was understandably concerned that it could not rely upon local public utilities to fill this role. Local utilities “may not adequately assess the potential benefits of alternative transmission solutions at the regional level.”²⁰⁶ If local

²⁰⁴ Appellee Br. 4; *see also id.* at 36 n.10 (citing PJM document explaining that “supplemental projects” are developed outside of PJM’s process and “[t]ransmission owners develop these [supplemental] projects themselves to address local reliability needs”); *id.* at 36 (citing FERC notice of proposed rulemaking from 2022, which observes that the majority of investments since Order No. 1000 have gone toward local transmission facilities, not regional projects).

²⁰⁵ Order No. 1000, 76 Fed. Reg. at 49856.

²⁰⁶ *Id.* at 49857.

authorities cannot be depended upon to “adequately assess”²⁰⁷ regional planning goals, the other side of that coin is that they cannot veto regional projects because the project appears insufficiently valuable from a local perspective, as the PUC did here.

Defendants argue, however, that the PUC’s independent need determination was necessary to prevent a “wasteful and counterproductive project,”²⁰⁸ citing a purported decrease in congestion in the years since Project 9A was approved. Defendants assert that as of June 2024—after the District Court rendered its decision—PJM evaluated Project 9A and concluded that it then fell below the requisite 1:1.25 benefit-cost ratio. Nevertheless, the PUC’s attempt to weigh in on the current need for the project by recalculating congestion levels is just another way of redoing PJM’s benefit-cost evaluation. Transource has represented that PJM annually reevaluates RTEP projects to determine whether a project should be cancelled based on changing congestion patterns. The record supports that assertion. In addition, we note that federal law provides a process for challenging particular projects before FERC.²⁰⁹ This process has been used to challenge the inclusion of particular projects in PJM’s RTEP.²¹⁰ These are important tools in checking construction of a

²⁰⁷ *Id.*

²⁰⁸ Reply 23.

²⁰⁹ See 16 U.S.C. § 824e(a) (providing that a concerned party may file a “complaint” with FERC alleging that a “rule, regulation, practice, or contract” is “unjust, unreasonable, unduly discriminatory or preferential”).

²¹⁰ See *PJM Interconnection L.L.C.*, 156 FERC ¶ 61120, 2016 WL 4466386, at *2 (2016).

project that may no longer make economic sense because of changed conditions. Because the need determination falls in the first instance to PJM, however, the task of reevaluating need based on changing congestion patterns likewise belongs with PJM and not with the PUC.

5. Due Process and Eminent Domain Concerns

Finally, Defendants and amici National Association of Regulatory Utility Commissioners (NARUC), OCA, Members of the Pennsylvania General Assembly, and Stop Transource Franklin County (STFC) raise concerns about how the District Court's ruling impacts the due process rights of Pennsylvania property owners. These parties emphasize that states are better equipped than federal regulators to weigh the public need for siting projects alongside local interests. They also raise concerns that the District Court's opinion allows PJM to effectively wield eminent-domain power by determining whether a regional project is needed. Amici emphasize that PJM's process for selecting market-efficiency projects pursuant to a FERC-approved methodology does not afford adequate procedural protections to affected landowners and other citizens.

Landowners are of course entitled to procedural protections before their property can be condemned.²¹¹ We would therefore be concerned if PJM were wielding Pennsylvania's eminent-domain power, but it is not. This becomes clear when we consider how eminent domain works in Pennsylvania in the context of constructing transmission lines. Although the parties and

²¹¹ *Rogin v. Bensalem Twp.*, 616 F.2d 680, 694 (3d Cir. 1980) (“Before a governmental body may deprive a landowner of a property interest, it must provide due process.”).

amici failed to adequately address this in their briefing, we think it will be helpful for us to describe this process.

Pennsylvania’s Business Corporations Law provides that a public utility may “condemn property”²¹² for purposes that include “[t]he transportation of . . . electricity.”²¹³ However, a purported utility such as Transource—not PJM—only has the status of a public utility if it maintains a certificate of public convenience.²¹⁴ Thus, holding a certificate of public convenience is a prerequisite to exercising eminent domain authority.²¹⁵ The PUC grants a certificate of public convenience only upon a finding that “such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.”²¹⁶

A public utility may apply to the PUC to exercise eminent domain in siting a transmission line.²¹⁷ The

²¹² 15 Pa. Cons. Stat. § 1511(a).

²¹³ *Id.* § 1511(a)(2).

²¹⁴ 66 Pa. Cons. Stat. § 1101 (explaining that upon the approval of a certificate of public convenience, a “proposed public utility” may “begin to offer, render, furnish, or supply service” as a public utility).

²¹⁵ *See id.* § 1104 (“[N]o domestic public utility or foreign public utility authorized to do business in this Commonwealth shall exercise any power of eminent domain within this Commonwealth until it shall have received the certificate of public convenience[.]”); *Clean Air Council v. Sunoco Pipeline L.P.*, 185 A.3d 478, 482–83 (Pa. Commw. Ct. 2018) (“[Under] the Public Utility Code, Sunoco must possess [a certificate of public convenience] in order to exercise its eminent domain power as a public utility.”).

²¹⁶ 66 Pa. Cons. Stat. § 1103(a).

²¹⁷ *See* 52 Pa. Code §§ 57.75(i)(1)–(2).

proceedings on such an application may be consolidated with proceedings related to the underlying siting application.²¹⁸ The PUC's guidelines for reviewing siting applications and, if applicable, corresponding eminent-domain applications, provide for (1) notice to persons and property owners affected by a prospective project,²¹⁹ and (2) a hearing before the PUC, in which individuals and entities with "substantial interest in the proceeding" may participate.²²⁰ The hearing entails presentation of evidence and argument on the need, safety, and environmental impact of the proposed line, and the availability of alternative routes.²²¹

Even "[a]fter the PUC authorizes a utility to exercise the power of eminent domain, a condemnation is far from final."²²² Rather, the utility must still "prevail in a condemnation action at the Court of Common Pleas."²²³ The condemnor must file "a declaration of taking" and appropriate security with the court,²²⁴ in response to which the condemnee "may file preliminary

²¹⁸ *See id.*

²¹⁹ *See id.* § 57.72(c)(4); see also *id.* § 57.74(c).

²²⁰ *Id.* §§ 57.75(b), (d).

²²¹ *See id.* § 57.75(e).

²²² *Clean Air Council*, 185 A.3d at 487 (quoting *Se. Pa. Transp. Auth. v. Pa. Pub. Util. Comm'n*, 991 A.2d 1021, 1023 (Pa. Commw. Ct. 2010)).

²²³ *Id.* (quoting *Se. Pa. Transp. Auth.*, 991 A.2d at 1023); see also *id.* ("[A]lthough the issuance of the [certificate of public convenience] allows the public utility to commence proceedings under the Eminent Domain Code, success in the common pleas court is not guaranteed."); 15 Pa. Cons. Stat. § 1511(g) (describing procedure for eminent-domain proceedings).

²²⁴ 26 Pa. Cons. Stat. § 302(a)(1).

objections,”²²⁵ which are “the exclusive method of challenging” the condemnation.²²⁶

These provisions of Pennsylvania law demonstrate that PJM—which is not a public utility—does not exercise the power of eminent domain. Moreover, no party has explained how requiring the PUC to accept PJM’s benefit-cost determination would ipso facto authorize PJM to exercise eminent-domain authority over any particular plot of land. Amici’s argument seems to be that PJM, by determining whether a project is needed, would predetermine approval of the corresponding eminent-domain applications. But as we have explained, a public utility must also prevail in the hearing before the PUC and in an adversarial process before the Court of Common Pleas. Only then may a public utility like Transource—distinct from PJM—condemn private property.

Our opinion therefore cannot reasonably be read to suggest that the PUC is required to rubber-stamp either a siting application or an eminent-domain application related to a project that PJM has approved. It thus does not undermine the value of Pennsylvania’s “robust process for public involvement”²²⁷ in siting and eminent-domain applications. Nor does it improperly empower any private party to wield the sovereign power of eminent domain.

²²⁵ *Id.* § 306(a)(1).

²²⁶ *Id.* § 306(a)(3); see also *Se. Pa. Transp. Auth.*, 991 A.2d at 1023–24 (explaining that any “challenge to the authority of the utility to condemn is properly raised in proceedings before common pleas, not the PUC”).

²²⁷ OCA Br. 10.

IV. Conclusion

For the foregoing reasons, we conclude that Transource is not precluded from raising its preemption claim. We hold that the PUC's order rejecting Transource's siting applications runs afoul of the Supremacy Clause because it poses an obstacle to accomplishing federal objectives. The PUC's order therefore is preempted, and we will affirm the District Court's entry of judgment in favor of Transource.

Because our conclusion on preemption independently resolves the appeal, we need not discuss the question of whether the PUC's order also violates the dormant Commerce Clause.

V. Glossary of Terms

Term	Description
APSRI	AP South Reactive Interface, the subregion including the Pennsylvania-Maryland border experiencing the congestion that prompted PJM to solicit proposals for what became Project 9A.
FERC	Federal Energy Regulatory Commission, the federal agency with jurisdiction over, among other things, interstate wholesale electricity transmission.
FPA	Federal Power Act, the 1935 law that empowered the agency that became FERC to
	regulate interstate wholesale electricity rates and transmission.

NARUC	National Association of Regulatory Utility Commissioners, whose membership comprises state public utilities and who filed an amicus brief in support of Defendants in this appeal.
NIETC	National Interest Electric Transmission Corridor, a region designated by the federal government where FERC may exercise backstop siting authority.
OCA	Pennsylvania's Office of Consumer Advocate, a state agency that represents the interests of consumers, including before the PUC, and that filed an amicus brief in support of Defendants in this appeal.
PJM	The regional transmission organization for the region comprising most of Pennsylvania, empowered by FERC to develop projects to reduce congestion in interstate transmission. PJM conducted the benefit-cost analysis for Project 9A and filed an amicus brief in support of Transource in this appeal.
PUC	The Pennsylvania Public Utility Commission, the entity responsible for making siting decisions within Pennsylvania and a defendant-appellant in this litigation.
RTEP	Regional Transmission Expansion Plan, an annual project that PJM conducts to identify
	areas of congestion and projects to address them.

RTO	Regional Transmission Organization, an organization empowered by FERC to supervise interstate transmission planning and to develop projects to reduce regional congestion.
STFC	Stop Transource Franklin County, an interest group that filed an amicus brief in support of Defendants in this appeal.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF PENNSYLVANIA

TRANSOURCE Civil No. 1:21-CV-01101
PENNSYLVANIA, LLC, Judge Jennifer P. Wilson
Plaintiff

v.

STEVEN M. DEFRANK,
et al.,

Defendants.

Memorandum

This is a declaratory judgment action filed by Plaintiff Transource Pennsylvania, LLC (“Transource”) against the Pennsylvania Public Utility Commission (“PUC”) and its Commissioners (collectively, “Defendants”).

This case concerns federalism and the allocation of powers between federal and state entities. The federal government has reserved for itself the power to regulate the transmission of electric energy in interstate commerce, including in wholesale ratemaking and interstate and regional planning. The federal government exercises these powers through the Federal Energy Regulatory Commission (“FERC”). FERC has, in turn, delegated some of these powers to Regional Transmission Organizations (“RTOs”). The RTOs assess regional needs by methods approved by FERC, which include economic analyses. By contrast, the states retain the powers of siting, construction, and permitting for regional energy infrastructure.

In this case, the RTO at issue determined a need for regional transmission lines. But, when Transource, the entity with which the RTO was collaborating, submitted its application to the PUC, the application was denied. Specifically, the PUC made a determination that the project was not needed. In substance, the PUC did not base its determination on considerations of siting or construction, but instead on whether it was worthwhile to ensure that consumers across a region or across state lines have similar access to low-priced electricity.

The court must decide whether the PUC has violated the Constitution in making this determination. Specifically, the court must determine whether the PUC violated the Supremacy Clause, by issuing a decision directly conflicting with federal law or serving as an obstacle to federal objectives. The court must likewise determine whether the PUC's decision violated the dormant Commerce Clause either by denying the application out of economic protectionism or burdening interstate commerce. To some extent, these issues overlap, though the court will address them individually below. For the reasons explained in the following sections, the court finds that the PUC's decision violated the Supremacy Clause and the dormant Commerce Clause. Based on these findings, the court will deny Defendants' motion for summary judgment and grant Transource's motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹**A. Federal and state regulatory regimes**

In the Federal Power Act (“FPA”), Congress provided FERC with broad powers. 16 U.S.C. § 791a, et seq. Included among these powers are the authority to regulate wholesale sales of electricity and transmission of electric energy in interstate commerce. *Id.* at § 824. It also provided FERC with authority to regulate practices that affect the rates for these activities. *See id.* at §§ 824b, 824d, 824e. FERC must ensure the rates and practices which affect transmission of electricity are “just and reasonable.” *Id.* at §§ 824d(a), 824e(a).

The FPA empowers FERC with the ability to regulate “the transmission of electric energy in interstate commerce,” but with the caveat that “such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.” *Id.* at § 824(a). Despite this language, the Supreme Court has observed that the FPA expanded federal powers into areas historically regulated by states. The Court noted that the FPA did “a good deal more” than augment FERC’s powers to include areas hitherto exercised neither by federal nor state regulators. *New York v. FERC*,

¹ This section of this memorandum includes only the background relevant to the resolution of the motions for summary judgment. Any additional factual recitation that is necessary for the discussion of each specific issue is included in the Discussion section of this memorandum. In considering the instant motion for summary judgment, the court relied on the uncontested facts. Where facts were disputed, the court viewed the facts in the light most favorable to the nonmoving party and has drawn all inferences in favor of the nonmovant, pursuant to the relevant standard for deciding a motion for summary judgment. *See Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 362 (3d Cir. 2008).

535 U.S. 1, 21 (2002). Instead, the FPA “authorized federal regulation not only of wholesale sales that had been beyond the reach of state power, but also the regulation of wholesale sales that had been previously subject to state regulation.” *Id.* Two powers which the FPA reserved for the federal government were regulating interstate transmissions as well as interstate wholesale sales. *Id.*

In addition, the Supreme Court described the limiting language of federal powers in § 824(a) as “a mere policy declaration.” *Id.* at 22. The Court further noted that such a policy declaration “cannot nullify a clear and specific grant of jurisdiction [to FERC], even if the particular grant seems inconsistent with the broadly expressed purpose.” *Id.* (internal quotation marks omitted).

Under the FPA, FERC delegates some of its powers and responsibilities to RTOs. (Doc. 164, ¶ 1.) One such RTO is PJM Interconnection, L.L.C. (“PJM”). (Doc. 164, ¶ 1.) FERC charged PJM with maintaining the bulk electric transmission system of a 13-state region, which includes most of Pennsylvania. (*Id.*)

In 2011, FERC issued Order No. 1000, which had two primary objectives:

- (1) Ensure that transmission planning processes at the regional level consider and evaluate, on a non-discriminatory basis, possible transmission alternatives and produce a transmission plan that can meet transmission needs more efficiently and cost-effectively; and
- (2) ensure that the costs of transmission solutions chosen to meet regional transmission needs are allocated fairly to those who receive benefits from them.

Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, FERC Order No. 1000, 76 Fed. Reg. 49,842, 49,845 (2011) (“Order 1000”). Order 1000 made clear that the federal determination of regional transmission planning and cost allocation includes “the processes used to identify and evaluate transmission system needs and potential solutions to those needs.” *Id.* at 49,861. But it does not include state matters, such as “siting, permitting, and construction.” *Id.* As a result, even where regional planning identifies and selects a regional transmission plan or project, “such solutions may not ultimately be constructed should the developer not secure the necessary approvals from the relevant state regulators.” Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, FERC Order No. 1000-A, 77 Fed. Reg. 32,184, 32,215 (2012) (“Order 1000-A”).

Under the federal regime, the responsibilities of RTOs include “planning, and [] directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities.” 18 C.F.R. § 35.34(k)(7). As part of their planning process, an RTO “must encourage market-driven operating and investment actions for preventing and relieving congestion.” *Id.* at § 35.34(k)(7)(i).

While the federal government and RTOs are responsible for planning and directing non-discriminatory transmission, the state has a separate purview. The states’ authority encompasses issues of siting, permitting, and construction for regional transmission projects. As applicable in this case, Pennsylvania law

provides that before constructing an electric transmission line, public utilities like Transource must submit a siting application to the PUC. (Doc. 148, p. 20.)² The PUC is the Pennsylvania agency responsible for “oversight of the siting and construction of electric transmission lines.” (Doc. 164, ¶ 83.)

To obtain approval for their application, public utilities must satisfy the following requirements by a preponderance of the evidence:

- 1) That there is a need for it.
- 2) That it will not create an unreasonable risk of danger to the health and safety of the public.
- 3) That it is in compliance with applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth.
- 4) That it will 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).

B. PJM’s regional assessment

In addressing congestion, FERC directed PJM in June 2007 to “file a formulaic approach to choose eco-

² For ease of reference, the court utilizes the page numbers from the CM/ECF header.

There is no dispute as to the existence or characterization of the federal and state regulatory regimes that apply to the Project. Therefore, some references for this subsection are drawn from the parties’ briefing.

nomic projects proposed to reduce congestion that describes exactly how any metrics will be calculated, weighed, considered, and combined.” *PJM Interconnection, L.L.C.*, 119 FERC ¶ 61,265, 62,492–62,493 (2007); see also Doc. 164, ¶ 16. In October 2007, PJM proposed such a formulaic approach to FERC. (Doc. 164, ¶ 17.)

In the context of an electricity transmission grid, “[c]ongestion occurs when the least costly resources that are available to serve load in a given region cannot be dispatched because transmission facility limits constrain power flow on the system.” (Doc. 157, ¶ 10; Doc. 164, ¶ 10; Doc. 157-1, p. 18.) According to a 2008 FERC order, “without a process for identifying economic transmission, PJM’s customers located in load pockets and separated from the rest of the system by congested transmission bottlenecks, will have few opportunities to access alternative resources that have lower prices for electricity.” *PJM Interconnection, L.L.C.*, 123 FERC ¶ 61,051, 61,411–61,412 (2008) (“2008 FERC Order”).

In partial fulfillment of its RTO responsibilities, PJM creates an annual Regional Transmission Expansion Plan (“RTEP”). (Doc. 159, ¶ 7.) A component of the RTEP is a market efficiency analysis, in which PJM identifies areas where congestion exists and identifies solutions to reduce the identified congestion. (*Id.* ¶ 8.)

Under the approach that PJM proposed to FERC in October 2007, it would conduct market efficiency analysis for proposed projects. (Doc. 164, ¶ 17.) This analysis would provide a benefit-cost ratio for a given project over a 15-year span. (*Id.* ¶¶ 17–18.) For PJM to include a given project in its RTEP, the benefit-cost ratio must be at least 1.25 to 1.0. (*Id.* ¶ 18.) On April 17, 2008, FERC approved PJM’s proposed approach. (Doc. 164, ¶

21; Doc. 157-8; *see also* 2008 FERC Order, 123 FERC at 61,416.)

FERC acknowledged objections to PJM’s proposed method but explained that PJM’s approach was reasonable. (Doc. 164, ¶ 22.) In PJM’s approach, benefit and cost of a project would be analyzed by “summing the energy benefit . . . for only those zones that experience reduced energy payments – which are the zones that would be assigned the costs of these facilities.” (*Id.*) The calculation would not include “the expected energy payment increases, if any, in other zones.” (*Id.*) FERC found “this approach reasonable because it would match the project selection process to the existing cost allocation method. That is, it would evaluate the load payment benefits of those loads that will be assigned the costs of the new facilities.” (*Id.*)

C. The Project

Before soliciting projects for PJM’s 2014/2015 window, PJM identified congestion within its region, and specifically “on the AP South Reactive Interface” sub-region (“APSRI”). (Doc. 164, ¶¶ 61–62.)³ PJM found that congestion across the APSRI along the Pennsylva-

³ Defendants state that they dispute this fact, but fail to cite to any evidence that negates the existence of congestion. Instead, they assert that the amount of congestion dropped precipitously beginning in 2015. (Doc. 164, ¶ 62.) But this does not negate Transource’s assertion that PJM found congestion on the AP South Reactive Interface from 2012 to 2016. (*Id.*)

nia-Maryland border had imposed “economic transmission constraint costs totaling approximately \$800 million from 2012 through 2016.” (*Id.* ¶ 62.)⁴

In October of 2014, PJM opened a “long-term RTEP proposal window . . . to solicit market efficiency proposals in order to alleviate congestion” in the APSRI. (Doc. 159, ¶ 21.) In response to PJM’s solicitation, the parent company of Transource proposed a project (“Project”).⁵ (*Id.* ¶ 22.) The Project is a set of proposed transmission lines beginning in West Virginia and ending in Maryland. (*Id.* ¶ 23.) The portion of the Project at issue in this action would place high voltage transmission lines in Pennsylvania’s Franklin and York Counties, where they would run from new substations to the Pennsylvania/Maryland border. (*Id.* ¶ 24.)

The PJM Board approved the Project in 2016, determining that it was “the more efficient, cost-effective project” to address the congestion in the APSRI. (Doc. 164, ¶ 68.)⁶ The Project, if built, would benefit parts of Virginia, Maryland, Washington, D.C., and Western Pennsylvania. (*Id.* ¶ 71.) Meanwhile, other regions which benefit from the current congestion would “no

⁴ Defendants again state that they dispute this fact, but fail to cite to any evidence that negates the existence of congestion. Instead, they assert that the amount of congestion dropped precipitously beginning in 2015. (Doc. 164, ¶ 62.)

⁵ The Project is alternatively referred to as Project 9A or the Independence Energy Connection Project (“IEC Project”). (Doc. 159, ¶ 22.) But the IEC Project is also referred to as a subset of Project 9A. (*Id.* ¶ 24; Doc. 164, ¶¶ 64–66.) For ease of use and clarity, this memorandum uses the term “Project.”

⁶ Although Defendants dispute this fact, their citation to the record does not actually contradict this fact. (Doc. 164, ¶¶ 68, 137.)

longer have the benefit of [the] lower-cost power.” (*Id.* ¶¶ 71–72.)

As of March 2020, PJM projected that the Project would lead to lower costs in benefited areas by \$844,806,909.44. (*Id.* ¶¶ 73, 77.) At the time, the Project’s construction cost, which would be paid by the customers of benefiting areas, was estimated to be between \$509 million and \$528 million. (*Id.* ¶ 78.) The Project thus “exceeded the 1.25:1 benefit-cost threshold required under PJM’s Operating Agreement for market efficiency projects.” (Doc. 157-7, p. 57.)⁷

In November 2016, PJM and Transource’s parent company executed a Designated Entity Agreement (“DEA”), which allocated responsibilities between PJM and Transource for the Project. (Doc. 164, ¶ 80.) In January 2017, FERC approved the DEA. (*Id.* ¶ 81.) In the same order, FERC determined that the Project would “reduce the cost of delivered power by reducing transmission congestion.” (*Id.* ¶ 82.)

On February 8, 2017, Transource filed an application for the Project to the PUC. (Doc. 164, ¶ 84.) Throughout 2017 and 2018, the PUC granted various approvals to Transource applications, none of which

⁷ Although Defendants dispute this fact, their citation to the record does not contradict this fact. Transource relies on a 2020 ALJ recommendation which, in turn, states that “PJM’s basis for selecting the IEC Project is that it exceeded the 1.25:1 benefit-cost threshold required under PJM’s Operating Agreement for market efficiency project.” (Doc. 164, ¶ 79; Doc. 157-7, p. 57.) Defendants seek to contradict this assertion by relying on a 2022 PJM document which provides a “2021 Re-Evaluation of Project 9A,” including various benefit-to-cost ratios and one of 1.00. (Doc. 164, ¶ 79; Doc. 164-2, p. 95.) But Defendants’ citation, showing a later and different ratio, does not refute the accuracy of the earlier figure.

are relevant to the analysis in this memorandum. (*Id.* ¶¶ 84–88.)

On December 22, 2020, the PUC Administrative Law Judge (“ALJ”) issued a Recommended Decision, which recommended that the PUC deny Transource’s siting applications because Transource had failed to show a need for the project. (*Id.* ¶ 89.) The ALJ stated that, in determining a need under Pennsylvania law, the PUC may consider economic and environmental impacts. (*Id.* ¶ 91.)

The ALJ determined that the benefit-cost methodology, approved by FERC and used by PJM to assess whether the Project was worthwhile, was “deficient when measured against the constitutional, statutory, and regulatory standards of Pennsylvania law.” (Doc. 157-7, p. 104.) The ALJ considered Transource’s argument that “congestion represents a form of rate discrimination.” (*Id.* at 105.) The ALJ disagreed and concluded that “[e]conomic congestion is not a form of rate discrimination, rather, it is a market-based response to a variety of factors.” (*Id.* at 106.)

The ALJ concluded that “Pennsylvania has benefited from its participation in PJM and through regional transmission planning; however, under these particular circumstances, the IEC Project as a market efficiency project does not provide sufficient benefits to Pennsylvania or the PJM region as a whole.” (Doc. 164, ¶ 94.) The ALJ was persuaded by witness testimony that, if the Project were built, it could save “utilities in Maryland, Virginia, and the District of Columbia almost a billion dollars over 15 years,” but if the Project were not built, the same power would be used “in Pennsylvania, Ohio, Illinois, and New Jersey at a cost of

about \$970 million.” (*Id.*) The ALJ concluded the following:

PJM’s failure to consider increased wholesale power prices in Pennsylvania when calculating the benefit-cost ratio, frequent changes to how the benefit-cost ratio is calculated even during this proceeding, changes to how the benefits are simulated, and the uncertain nature and extent to which transmission zones benefit all cast doubt on the benefits, if any to Pennsylvania.

(*Id.*) The ALJ concluded that “[i]ncreased wholesale power prices are real costs to customers that show there is no need for the project.” (*Id.*) For that reason, the ALJ recommended that the siting applications and eminent domain applications be denied because “no need ha[d] been proven.” (*Id.* ¶ 95.)

Transource appealed the ALJ’s Recommended Decision to the PUC. (Doc.159, ¶ 39; Doc. 164, ¶ 96.) On May 24, 2021, the PUC issued its order, which forms the basis of this litigation. (Doc. 159, ¶ 40; Doc. 164, ¶ 97; *see* Doc. 157-1.) The order denied Transource’s siting applications and “adopted and incorporated” the ALJ’s findings. (Doc. 159, ¶ 40; Doc. 164. ¶ 98.)

In considering Transource’s application, the PUC agreed with the ALJ that it was free to set aside PJM’s economic analysis in determining the need or benefit-cost ratio of the Project. (*See* Doc. 164, ¶ 106.) It stated that “[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania is our concern, and it is properly within the scope of our consideration of the weight of all the evidence on the issue of ‘need.’” (*Id.*)

The PUC concluded that “the federal authority under which PJM operates does not extend beyond PJM’s

approval process, where approval is sought from a state commission.” (*Id.* ¶ 104.) Instead, agreeing with and quoting the ALJ, the PUC found that “while the Federal Power Act (FPA) does grant FERC exclusive jurisdiction over the interstate transmission of electric energy and electric wholesale rates, the FPA limits FERC authority, including its designee, PJM, to ‘those matters which are not subject to regulation by the States.’” (Doc. 157-1, p. 61.)

In assessing whether a “need” existed for the Project under Pennsylvania law, the PUC rejected the PJM-approved criteria and methodology. (*See* Doc. 164, ¶ 106.) The PUC stated that “[t]he potential negative and practical impact on the citizens and consumers of Pennsylvania is our concern, and it is properly within the scope of our consideration of the weight of all the evidence on the issue of ‘need.’” (*Id.*)

On that basis, the PUC noted that relief of economic congestion on a regional level would result in higher utility rates in Pennsylvania. (*Id.*) The PUC concluded that “the ALJ properly considered the negative impacts to Pennsylvania in evaluating the ‘need’” under state law. (*Id.*) The PUC also questioned the data upon which PJM’s analysis rested, finding that it needed to better reflect “current and existing priority needs on the regional level” to have greater persuasive impact. (*Id.* ¶ 107.)

Because the PUC concluded that there was insufficient evidence to establish “need” under Pennsylvania law for the Project, it rescinded Transource’s provisional certificate of public convenience. (*Id.* ¶¶ 109–11.)

Once a market efficiency project, like the Project, is selected, PJM conducts annual re-evaluations to ensure said project still meets the required 1.25:1 benefit-

cost ratio. (*Id.* ¶ 113.) In a 2018 PJM white paper, PJM stated that, since 2016, it had evaluated the Project four times. (*Id.* ¶ 114.) PJM asserted that, in all four evaluations, including the most recent in September 2018, the Project had passed the required 1.25:1 ratio. (*Id.*) Further, in the most recent re-evaluation, in 2022, the Project had a ratio of 2.48, which included “sunk costs.” (*Id.* ¶ 115.)⁸ In re-assessing the Project’s benefits to consumers, PJM’s analyses account “for all of the underlying system fundamentals” that drive changes in congestion, including modeling parameters, new generation, and new load forecasts. (*Id.* ¶ 116.)

D. The present action

Transource filed its complaint in this action on June 22, 2021, seeking declaratory and injunctive relief. (Doc. 1.) Transource sought declaratory relief on the grounds that the PUC’s decision is preempted under federal law and violates the dormant Commerce Clause. (*Id.* at 40.) It also sought injunctive relief preventing enforcement of the PUC’s decision, including its revocation of Transource’s Certificate of Public Convenience. (*Id.* at 41.)

On June 23, 2021, Transource filed a direct appeal of the PUC’s decision revoking its provisional certificate to the Pennsylvania Commonwealth Court. (Pa. Commw. Ct. Docket No. 689 CD 2021.) In the appeal, Transource argued that the PUC “erred in rejecting PJM’s determination of the need for the [] Project, which was presented as evidence to establish need under” Pennsylvania law. (Doc. 148, p. 21.) It also argued

⁸ Although Defendants dispute this fact, their citation to the record does not contradict this fact

that the PUC’s “finding that the [] Project is not necessary to resolve congestion . . . is not supported by substantial evidence.” (*Id.* at 21–22.)

In the instant action, Transource filed a motion for summary judgment and a motion to expedite summary judgment on July 2, 2021. (Docs. 20, 21.) The parties submitted briefs on the motions. (Docs. 23, 24, 61, 70, 74.) Subsequently, on July 23, 2021, Defendants filed a motion to dismiss the action for lack of jurisdiction and failure to state a claim. (Doc. 57.) On August 17, 2021, the court held oral argument on the motions for summary judgment, to expedite, and to dismiss. (Doc. 74.)

On August 26, 2021, the court issued an opinion and order denying the motion to dismiss in part, deferring ruling on the remainder of the motion, and staying the case, on abstention grounds, pending the outcome of the parallel case pending before the Pennsylvania Commonwealth Court. (Docs. 82, 83.) On May 17, 2022, Transource notified the court that the case pending before the Pennsylvania Commonwealth Court had resolved and that the parties wished to proceed with the litigation in this court. (Doc. 90.) The court lifted the stay on the same date. (Doc. 91.) Thereafter, the court set a schedule for supplemental briefing on the pending motions and allowed limited fact discovery in connection with the motion to expedite. (Doc. 96.)

On August 5, 2022, the court denied Transource’s motion to expedite. (Doc. 116.) On August 8, 2022, the court found the motion for summary judgment was prematurely filed and denied it without prejudice to re-filing by the appropriate deadline set by the court. (Doc. 119.) Also on August 8, 2022, the court denied without prejudice Defendants’ motion to dismiss. (Doc. 118.) In so doing, the court addressed claim and issue

preclusion arguments which Defendants had raised. The court concluded that, under Third Circuit precedent, claim preclusion should be analyzed under Pennsylvania law, “regardless of whether the plaintiff has classified its reservation as an England⁹ reservation.” (*Id.* at 10.)

The court concluded the following:

[W]hile the PUC’s decision could be entitled to preclusive effect under Pennsylvania law if Transource should have raised its federal claims before the Commonwealth Court, but chose not to, the court cannot answer this question without impermissibly making a fact determination: whether Defendants objected to Transource’s notice of its intent to split its claims.

(*Id.* at 10–11.) The court further concluded that “[i]f Defendants did not object to Transource’s announced intention to split its claims, ‘[t]hey cannot now benefit from their silence.’” (*Id.* at 11 (quoting *R & J Holding Co. v. Redevelopment Auth.*, 670 F.3d 420, 428 (3d Cir. 2011)).)

On August 11, 2022, the court held an on-the-record conference call. (Doc. 122.) During that call, in response to Plaintiff’s counsel, the court stated the following: “[I]n light of the rulings I’ve made over the past week, what I’m clearly trying to convey to you, and now I will say expressly, is that I would like all of the issues in this case addressed in the summary judgment motions.” (Doc. 168-1, pp. 13–14.)

⁹ *England v. La. St. Bd. of Med. Exam’rs*, 375 U.S. 411 (1964).

In accordance with the on-the-record call, the court issued a case management order on August 12, 2022. (Doc. 123.) The final deadline that the order provided was for dispositive motions and supporting briefs to be submitted by February 15, 2023. (*Id.*) On February 1, 2023, the court granted a jointly proposed order to modify the briefing schedule provided in its case management order. (Doc. 145.) The court-approved order provided in part that Defendants should file their motion on or before March 8, 2023, and Transource should file its motion on or before March 29, 2023. (*Id.*) The parties filed their motions and supporting briefs in accordance with the court's order. (Docs. 146–48, 156–59, 164–65, 168–69.) Franklin County, Pennsylvania and PJM filed amici curiae briefs. (Docs. 155, 172.)¹⁰ The court has reviewed the filings and the motions for summary judgment are ripe for disposition.

On August 28, 2023, without moving to amend this court's established deadlines, Defendants filed a motion for judgment on the pleadings. (Doc. 173.) After the issue was briefed, Transource filed a motion, which the court granted, for leave to docket a sur reply because Defendants' reply brief expounded on legal arguments which their initial brief merely mentioned. (Docs. 181, 183.) The court addresses the motion for judgment on the pleadings in a separate memorandum and order.

¹⁰ The court has reviewed these briefs, along with those of the parties, and thanks Franklin County and PJM for their helpful contributions. Although the court found the amici briefs helpful, this memorandum cites to the filings submitted by the parties.

STANDARDS OF REVIEW

A court may grant a motion for summary judgment 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). A dispute of fact is material if resolution of the dispute “might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is not precluded by “[f]actual disputes that are irrelevant or unnecessary.” *Id.* “A dispute is genuine if a reasonable trier-of-fact could find in favor of the nonmovant’ and ‘material if it could affect the outcome of the case.” *Thomas v. Tice*, 943 F.3d 145, 149 (3d Cir. 2019) (quoting *Lichtenstein v. Univ. of Pittsburgh Med. Ctr.*, 691 F.3d 294, 300 (3d Cir. 2012)).

In reviewing a motion for summary judgment, the court must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party’s favor. *Jutrowski v. Twp. of Riverdale*, 904 F.3d 280, 288 (3d Cir. 2018) (citing *Scheidemantle v. Slippery Rock Univ. State Sys. of Higher Educ.*, 470 F.3d 535, 538 (3d Cir. 2006)). The court may not “weigh the evidence” or “determine the truth of the matter.” *Anderson*, 477 U.S. at 249. Instead, the court’s role in reviewing the facts of the case is “to determine whether there is a genuine issue for trial.” *Id.*

The party moving for summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). The non-moving party must then oppose the motion, and in doing so “may not rest upon the mere allegations or denials of [its] pleadings’ but, instead, ‘must set forth specific facts showing that there is a genuine issue for trial. Bare assertions, conclusory allegations, or suspicions will not suffice.” *Jutrowski*, 904 F.3d at 288–89 (quoting *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 268–69 (3d Cir. 2014)).

Summary judgment is appropriate where the non-moving party “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322. “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.” *Anderson*, 477 U.S. at 252. “Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

DISCUSSION

A. Arguments About Preclusion

1. Transource’s claims are not barred by claim preclusion.

Defendants argue that Transource’s claims are barred by claim preclusion. They point out that in this court’s prior order, Doc. 118, it held that “the PUC proceeding was quasi-judicial in nature, and that the Full Faith and Credit Statute is applicable to this case.” (Doc. 148, p. 45.) They also assert that, in the same order, this court held that “the PUC’s decision could be entitled to preclusive effect under Pennsylvania law if

. . . Defendants objected to Transource’s notice of its intent to split its claims.” (*Id.*)

In making this argument, Defendants alter the quotation in a way that fundamentally changes the meaning of this court’s finding. The court explained as follows in the prior order:

[W]hile the PUC’s decision could be entitled to preclusive effect under Pennsylvania law if Transource should have raised its federal claims before the Commonwealth Court, but chose not to, the court cannot answer this question without impermissibly making a fact determination: whether Defendants objected to Transource’s notice of its intent to split its claims. If Defendants did not object to Transource’s announced intention to split its claims, “[t]hey cannot now benefit from their silence.” Therefore, the court denies Defendants’ motion to dismiss on claim preclusion grounds without prejudice to renewal at the summary judgment stage.

(Doc. 118, pp. 10–11 (quoting *R & J Holding*, 670 F.3d at 428.)

In making their argument, Defendants cite only their brief to the Commonwealth Court. (Doc. 148, p. 45–46; Doc. 147, ¶ 52; Doc. 147-9, pp. 55–68.) That is to say, they focus only on whether the PUC “objected to Transource’s notice of its intent to split its claims” without providing facts or law to suggest that “Transource should have raised its federal claims before the Commonwealth Court.”

Transource counters that Defendants' argument on claim preclusion fails for two reasons. First, it misunderstands the *England* doctrine—an exception to ordinary claim preclusion. (Doc. 158, p. 50.) Second, even applying Pennsylvania claim preclusion law, Transource's claims are not precluded because the Commonwealth Court expressly preserved Transource's ability to pursue its federal claims in this court and because the PUC acquiesced. (*Id.*)

Transource asserts that England reservation is an exception to the Full Faith and Credit Statute, 28 U.S.C. § 1738. (*Id.* (citing *Instructional Sys., Inc. v. Comput. Curriculum Corp.*, 35 F.3d 813, 821–22 (3d Cir. 1994)).) When England reservation applies, the state preclusion rules no longer apply to the at-issue state court decision. (*See id.*) England explicitly held that a party has waived its right to litigate federal claims in federal court if it “freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there.” *England*, 375 U.S. at 419.

In order to preserve its federal claims for resolution in federal court, a party need only “inform [the state] courts what his federal claims are, so that the state statute may be construed ‘in light of’ those claims.” *Id.* at 420. Transource asserts that, under this standard, it properly reserved its federal arguments under *England*. Per *Pennhurst State School & Hospital v. Halderman*, it could not bring its state-law claims against Defendants, as state officials, in front of this court due to the Eleventh Amendment. (Doc. 158, p. 51 (citing 465 U.S. 89 (1984)).) But Transource brought its federal claims to this court and then its state claims in the Commonwealth Court. (*Id.*)

Transource argues that, because it never “voluntarily” and “fully litigated [its] federal claims in the state courts,” it should not be “denied [its] right to return to the District Court.” *England*, 375 U.S. at 421; Doc. 158, p. 51. For that reason, the Commonwealth Court’s judgement does not bar Transource’s claim in this court.

Transource also addresses an argument that Defendants raised in their motion to dismiss, though not in the current cross-motions. There, Defendants had argued that the validity of an *England* reservation was contingent on a defendant acquiescing to claim-splitting. (Doc. 158, p. 53 (citing Doc. 118, pp. 9–10).) Transource agrees that “defendant’s acquiescence is one scenario in which claim-splitting is permitted under Pennsylvania law.” (*Id.*) But, because *England* reservation is an exception to the Full Faith and Credit Statute, when this exception applies, Pennsylvania law is irrelevant. (*Id.*)

According to Transource, the Third Circuit explicitly rejected the proposition that a third party’s actions are determinative in whether *England* reservation is effective. (*Id.*) Instead, “[i]t is the actions of the displaced litigant which are controlling.” (*Id.* (quoting *Instructional Sys.*, 35 F.3d at 820–21) (citing *Kovats v. Rutgers*, 749 F.2d 1041, 1047 (3d Cir. 1984)).) If consent of the opposing party were required, it would render as meaningless the *England* court’s proclamation that reservation of federal claims for federal court is ineffective only when the litigant has “freely and without reservation litigated his federal claims in the state courts.” (*Id.* (quoting *England*, 375 U.S. at 420).)

Transource also addresses two cases that Defendants raised at the motion to dismiss phase. Specifically,

it argues that, contrary to Defendants' assertions, *R & J Holding Co. and Bradley v. Pittsburgh Board of Education* do not stand for the proposition that a defendant's acquiescence is required for an England reservation to be effective. (*Id.* at 54–55 (citing 670 F.3d 420; 913 F.2d 1064 (3d Cir. 1990)).) Instead, both cases hold only that an objection to an *England* reservation can be waived. (*Id.* at 55.)

Lastly, to the extent that this court held otherwise in its order denying Defendants' motion to dismiss, Transource points out that the court may reconsider. (*Id.* at 55–56.) As the Third Circuit has stated, “[i]nterlocutory orders . . . remain open to trial court reconsideration, and do not constitute the law of the case.” (*Id.* at 55 (quoting *United States ex rel. Petratos v. Genentech Inc.*, 855 F.3d 481, 493 (3d Cir. 2017)).)

In response, Defendants argue that Transource's request for reconsideration is untimely under Local Rule 7.10. (Doc. 165, p. 24.) They next argue that Transource failed to properly invoke England reservation. They posit that *Bradley* stands for the proposition that England reservation must be invoked during the pendency of the state administrative proceeding. (*Id.*) They submit that Transource had to raise its England reservation with the PUC. (*Id.* at 24–25.)

Lastly, Defendants argue that the PUC did not acquiesce to Transource's *England* reservation. (*Id.* at 25–26.) Instead, pursuant to the Pennsylvania Rules of Appellate Procedure, which they assert apply here, Defendants objected to Transource's untimely England reservation at the earliest opportunity. (*Id.* at 25.)

Transource counters that its arguments are timely pursuant to the court's instructions to raise all issues in this case in the motions for summary judgment.

(Doc. 168, p. 27.) Next, Transource asserts that Defendants' argument that Transource had to invoke England in the PUC proceedings makes little sense. (*Id.*) Specifically, "it would have been nonsensical to make an England reservation" to the PUC because there was no federal claim until "after the PUC acted." (*Id.*)

Transource argues that Defendants use Bradley to establish a principle that does not exist. They point to the following passage from Bradley: "Under England a party who has been forced to litigate in state court may reserve its federal claims for federal adjudication by informing the state court of its reservation of those claims." 913 F.2d at 1071. Transource argues that this quote shows that England pertains to parallel court proceedings which challenge state action. (Doc. 168, p. 28.) While the litigant in Bradley cited England in his administrative appeal, the Third Circuit in Bradley did not hold that he was "required to do so (rather than waiting until state court)." (*Id.*)

In the alternative, to the extent that the litigant in Bradley was required to raise England during his administrative appeal, that is due to a factual distinction in Bradley. (*Id.*) There, administrative appeal provided the first stage of appellate review of the challenged state action. (*Id.*) Here, the PUC decision is the challenged state action. (*Id.*)

Lastly, Transource argues that Defendants are wrong regarding their acquiescence in two ways. (*Id.*) First, it reasserts that Defendants acquiesced to *England* reservation. Next, it argues that acquiescence is immaterial because, as stated in *England*, "[o]nce issue has been joined in the federal court, no party is entitled to insist, over another's objection, upon a binding state

court determination of the federal question.” 375 U.S. at 422 n.13.

Transource has the prevailing arguments on this issue. England reservation is an exception to the Full Faith and Credit Statute. *Instructional Sys.*, 35 F.3d at 821. Defendants do not address this principle or the Third Circuit precedent of *Instructional Systems*. Here, there is no dispute that Transource informed the Commonwealth Court about its federal claims. There is similarly no dispute that Transource invoked *England* reservation at the Commonwealth Court. And Defendants have not provided binding precedent which required Defendants to acquiesce in order for Transource to successfully invoke *England* reservation. Further, this court will not deny Transource’s arguments as untimely simply because Transource followed the court’s explicit instructions regarding when to raise them.

Transource’s analyses of Third Circuit and Supreme Court precedent are correct. Defendants wish to stretch *Bradley* and *England* beyond their boundaries. *Bradley* is an example of a case in which a party properly raised *England* reservation throughout state administrative proceedings, but nowhere requires raising reservation at the administrative proceeding stage. And, in the present instance, Transource’s federal claims arise from the PUC decision.

Defendants argue that, by bringing its dispute to the PUC, Transource without reservation submitted its federal claims for decision by state courts, thereby waiving its right to invoke *England*. (Doc. 165, pp. 24–25.) But Defendants do not sufficiently support their argument that Transource “without reservation submit[ed its] federal claims for decision” to the PUC. (*Id.*)

Indeed, there is no evidence to which Defendants point to support their assertion that Transource submitted its federal claims to the PUC. Furthermore, this argument suggests that Transource was required to raise its federal claims with the PUC prior to the decision which gave rise to them. This simply makes no sense and Defendants have not cited any binding authority that supports this conclusion.

Moreover, Defendants fail to address Instructional Systems or Kovats, which show that Defendants were not required to acquiesce for Transource to invoke *England* reservation. Accordingly, Transource's federal claims are not precluded.

2. Issue preclusion does not apply.

Defendants, in a footnote in the brief in support of their motion for summary judgment, request the court reconsider its prior ruling on issue preclusion. (Doc.

148, pp. 5–6 n.1.) If the court will reconsider, Defendants request an opportunity to provide supplemental briefing. (*Id.*) But, as noted above, in an on-the-record conference with counsel, and in response to a request for reconsideration, the court unambiguously instructed that “all of the issues in this case” should be “addressed in the summary judgment motions.” (Doc. 168-1, pp. 13–14.)

Defendants' request for reconsideration fails to follow the court's clear instruction. Therefore, the court will not entertain this informal request. Further, as Transource states, “arguments raised in passing (such as, in a footnote), but not squarely argued, are considered waived.” (Doc. 158, p. 58 (quoting *John Wyeth & Bro. Ltd. v. CIGNA Int'l Corp.*, 119 F.3d 1070, 1076 n.6 (3d Cir. 1997).) For this reason, Transource argues that

Defendants have waived their issue preclusion argument. Defendants do not address this argument in their subsequent briefs. Therefore, the court deems that Defendants have indeed waived any argument regarding issue preclusion.

B. Merits Analysis

Transource argues that the PUC's denial of Transource's application conflicts with and is preempted by federal law. (Doc. 158, pp. 23–42.) In the alternative, Transource argues that the PUC's denial violates the dormant Commerce Clause in purpose and effect. (*Id.* at 42–49.)

Defendants respond that the PUC's decision is neither preempted by federal law nor in violation of the dormant Commerce Clause. Regarding preemption, they argue that the PUC decision neither directly conflicts with federal law nor is it an obstacle to federal objectives. (Doc. 165, pp. 8–18.) Instead, it is a valid exercise of siting authority, which is a power that Congress reserved for the states. (*Id.* at 18–20.) As for the dormant Commerce Clause, Defendants argue that the PUC decision neither discriminates against non-Pennsylvanians on its face, nor does it disproportionately burden interstate commerce. (*Id.* at 20–23.) Defendants' arguments fail for the reasons explained below.

1. The PUC's decision violates conflict preemption.

The Supremacy Clause of the Constitution provides that the Constitution and all laws “of the United States which shall be made in Pursuance thereof” are “the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. Consequently, courts “must not give effect to state laws that conflict with federal laws.” *Armstrong v. Excep-*

tional Child Ctr, Inc., 575 U.S. 320, 324 (2015). The Supremacy Clause “invalidates state law that interferes with or is contrary to federal law.” *Farina v. Nokia, Inc.*, 625 F.3d 97,115 (3d Cir. 2010). As such, federal law may preempt state law in three ways. *Id.* (citing *Free v. Bland*, 369 U.S. 663, 666 (1962)). One of these is conflict preemption. *Id.* (citing *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985)).

Under Supreme Court precedent, conflict preemption arises where (1) “state and federal laws ‘directly conflict,’” *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 617 (2011), or where (2) “the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Oneok, Inc. v. Learjet Inc.*, 575 U.S. 373, 377 (2015) (internal quotations omitted). States cannot “regulate areas where FERC has properly exercised its jurisdiction” or create an “unavoidable conflict.” *Oneok*, 575 U.S. at 386, 389. Transource asserts that both types of conflict preemption are implicated in this dispute. (Doc. 158, p. 27.)

Transource argues that the PUC’s order conflicts head on with FERC’s method of determining whether a project is needed. Transource also submits that the PUC’s decision is an obstacle to FERC’s objective of creating transmission lines which reduce congestion, in turn reducing pricing disparities. (*Id.*) In effect, Transource argues, the PUC is vetoing the project because it “wants to preserve that very wholesale pricing disparity” the Project seeks to resolve. (*Id.*) If states could exercise that power, no lines would ever get built to reduce congestion, and FERC’s regional planning efforts would be frustrated. (*Id.*)

Transource points out that the Third Circuit has interpreted the Supreme Court’s preemption case law as

indicating that “regulatory situations in which an agency is required to strike a balance between competing statutory objectives lend themselves to a finding of conflict preemption.” *Farina*, 625 F.3d at 123. Transource argues that is exactly the situation here.

Transource observes that, under the “applicable federal standards imposed by FERC and implemented by PJM,” there was a finding of a need for the Project. (Doc. 157-1, p. 58; Doc. 158, pp. 23–24; Doc. 164, ¶ 102.) In spite of that determination, the PUC rejected the FERC-approved method for evaluating need and instead adopted an approach that FERC itself had rejected: one that counted as a project cost increased energy prices resulting from the reduced congestion that would follow. (Doc. 157-1, p. 63.)¹¹

Transource points out that the PUC’s decision directly conflicts with the “FERC-approved method for determining whether a new transmission line is needed to reduce congestion on the interstate grid.” (Doc. 158, p. 24.) It submits that such an approach is an obstacle to FERC’s efficient regional planning. (*Id.*) According to Transource, this situation is untenable: “If states could override FERC by applying a conflicting method for determining need, solely to preserve the benefits of congestion for their own citizens, that would eviscerate FERC’s ability to plan the interstate transmission grid in an efficient and fair manner.” (*Id.*)

¹¹ Defendants contest Transource’s characterization insofar as it asserts that the PUC rejected FERC’s analysis. (Doc. 164, ¶ 105.) They instead rely on the PUC’s statement that, according to Order 1000, the PUC is the decision maker. (*Id.*) On that basis, the PUC stated that its decision was “not influenced by FERC authority, directly or via PJM.” (*Id.*)

FERC has the power to regulate regional transmission planning. (*Id.* at 24 (citing *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 55–64 (D.C. Cir. 2014)).) The FPA provides FERC the power to regulate “transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce,” and also “jurisdiction over all facilities for such transmission . . . of electric energy.” §§ 824(a), (b). And courts, such as the D.C. Circuit, have held that the FPA provides FERC with “comprehensive and exclusive jurisdiction over the rates, terms, and conditions of service of the transmission and sale of wholesale electric energy in interstate commerce.” *Ameren Ill. Co. v. FERC*, 58 F.4th 501, 502–03 (D.C. Cir. 2023) (citing *New York*, 535 U.S. at 7–8).

Transource asserts that FERC’s powers over regional transmission planning stem from two sources: its authority over transmission of energy in interstate commerce and its requirement to ensure just and reasonable wholesale energy prices. (Doc. 158, p. 25.) Regarding the first, by ensuring adequate transmission capacity, FERC’s regional transmission planning promotes reliability and efficiency. (*Id.*) And, as the D.C. Circuit has stated, “[e]nsuring the proper functioning of the interconnected grid spanning state lines . . . fits comfortably” within the FPA’s “grant of jurisdiction over ‘the transmission of electric energy in interstate commerce.’” *South Carolina*, 762 F.3d at 63.

As for the second, Transource observes that regional planning, which is used to address congestion in the interstate grid, is inextricably related to FERC’s regulation of wholesale energy prices.¹² (Doc. 158, p.

¹² For example, Section 206(a) of the FPA, 16 U.S.C. § 824e(a), provides that whenever FERC “shall find that any rate, . . . for any

25.) By reducing congestion, FERC ensures that all consumers throughout the grid have access to low-cost power plants in a way that is just and reasonable without being unduly discriminatory or preferential. (*See id.*)

Transource points out that, in the 2008 FERC Order, FERC specified the approved method by which PJM would assess whether a project was needed to reduce persistent congestion. 123 FERC at 61,416. PJM adopted the FERC-approved approach. (Doc. 158 p. 26; Doc. 164, ¶¶ 36–42.)

Defendants counter that the PUC’s decision neither directly conflicted with federal law nor was it an obstacle to Congress’ objectives. (Doc. 165, p. 8.) The court will address these arguments in turn.

i. **The court declines to rule on whether the PUC’s decision conflicts with federal law.**

Transource argues that, in adopting a methodology that directly conflicts with FERC’s methodology, the PUC’s order directly conflicted with federal law. The argument is that FERC determined the best approach for weighing the relative costs and benefits of those transmission projects designed to reduce congestion. (Doc. 158, p. 28.) It chose an approach that did not consider an increase in prices resulting from that reduced congestion as a cost which should be weighed. (*Id.*; *see also* 2008 FERC Order, 123 FERC at 61,416.) In doing

transmission or sale subject to the jurisdiction of” FERC “is unjust, unreasonable, unduly discriminatory or preferential,” FERC shall fix it. And Order 1000 makes clear that congestion is a factor that causes such discriminatory or preferential rates, which FERC is required to fix.

so, it determined that, in Transource’s words, customers currently benefiting from persistent congestion had no entitlement to that benefit, which efficient transmission planning aims at mitigating. (*Id.*)

Quoting the Third Circuit decision in *Farina*, Transource argues that, in the present instance, FERC assessed the situation region-wide and applied its “reasoned judgment to weigh the relevant considerations and determine how best to prioritize between these objectives.” 625 F.3d at 123. Accordingly, “[a]llowing state law to impose a different standard” would conflict with federal law through “re-balancing of those considerations.” *Id.* For example, a “state-law standard that is more protective of one objective may result in a standard that is less protective of others.” *Id.*

According to Transource, such is the case here, where the PUC expressly rejected the FERC-approved method for determining whether need exists for a congestion-solving transmission project. (Doc. 158, pp. 28–29.) The PUC stated that “potential negative and practical impact on the citizens and consumers of Pennsylvania [was its] concern.” (Doc. 157-1, p. 63.) The PUC then adopted its own methodology for determining “need” that conflicted with PJM’s FERC-approved approach.

Transource points out that even Independent Market Monitor (“Market Monitor”), an organization which Defendants invoke and rely upon in critiquing the FERC-approved approach, acknowledges that the PUC’s method directly conflicts with the FERC-approved approach. (Doc. 164, ¶ 53; see Doc. 148, pp. 16, 18.) Not only had FERC not agreed with or adopted the approach, after Market Monitor repeatedly pro-

posed it, the approach is “irreconcilable” with the methodology that FERC did approve. (Doc. 164, ¶¶ 47–51, 53–54.)

Transource urges that the court should apply here the same analysis from the Supreme Court’s decision in *Nantahala Power & Light Co. v. Thornburg*, 475 U.S. 953 (1986). (Doc. 158, p. 30.) The Court in *Nantahala* determined that a state utility commission could not apply a cost-allocation method that conflicted with FERC’s decision. 475 U.S. 966–67. It held that “Once FERC sets . . . a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress’ desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority.” (Doc. 158, p. 30 (quoting 475 U.S. at 966).) Transource argues that *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 371 (1988), similarly applies and requires the court to conclude, once FERC has approved a method in an area in which it exercises authority, a state may not adopt a conflicting method. (*Id.*)

Transource argues that these preemption principles are not limited to scenarios in which utility commissions disregard FERC-filed rates. They are equally applicable where a utility commission undertakes “identical, independent inquiries regarding [a project’s] merits” but take a “perspective of different public interests,” and as a result “reach conflicting conclusions.” (*Id.* at 31 (quoting *Appalachian Power Co. v. Pub. Serv. Comm’n of W. Va.* 812 F.2d 898, 905 (4th Cir. 1987)).) Such is the case here, according to Transource.

Transource points out that it is unaware of any instance in which a state has directly disregarded FERC-approved regional planning methodology in the same way as the PUC. (*Id.*) In Maryland, the Maryland Public Service Commission rejected an argument similar to that which the PUC accepted. It determined that it was “of no consequence” that the Project failed to meet the benefit-cost ratio when examined at the Maryland level. *In re Application of Transource Maryland LLC*, No. 9471, 2020 WL 3977589, at *41 (¶142) (Md. Pub. Serv. Comm’n June 30, 2020). Instead, it determined that, “pursuant to FERC Order No. 1000 and PJM’s Tariff—[the Project] must be evaluated on a regional, not on a state-specific basis.” *Id.*

Defendants provide a single argument to refute Transource’s assertion that the PUC’s decision conflicts with federal law. They point out that the cases on which Transource relies, *Nantahala, Mississippi Power & Light*, and *Appalachian Power*, all relate to FERC’s ratemaking authority. (Doc. 165, p. 15.) They assert that these cases are inapposite because the instant action relates instead to FERC’s authority over interstate electric transmission planning and not to ratemaking. (*Id.* at 15 & n.4.) Defendants cite no precedent in support of this distinction.

Although Transource has provided a well-reasoned argument, no binding precedent is directly on point. Defendants are correct that the cases Transource cites all relate to FERC’s ratemaking authority. It is true that cases such as *Nantahala*, make clear that a state’s actions need not precisely be ratemaking in order to interfere with FERC’s rate-making authority. 476 U.S. at 966. Indeed, the Supreme Court held that “[a] State must rather give effect to Congress’ desire to give FERC plenary authority over interstate wholesale

rates, and to ensure that the States do not interfere with this authority.” *Id.* In doing so, it explained that “the filed rate doctrine is not limited to ‘rates’ per se.” *See id.* at 967 (“[O]ur inquiry is not at an end because the orders do not deal in terms of prices or volumes of purchases.”) (citation omitted).

Yet, in each of these cases, there was an exceedingly close nexus between the action of the state utility commission and the exercise of FERC’s ratemaking powers. Although Transource urges that the same analysis should be applied to its regional transmission planning authority, it provides no federal appellate authority to support that assertion. (Doc. 158, pp. 30–31.)

Transource may be correct that the PUC’s decision does directly conflict with federal law. But because the court concludes that the PUC’s decision was conflict preempted for other reasons and also violated the dormant Commerce Clause, the court declines to rule on whether the decision directly conflicted with federal law since a ruling on this argument is not necessary to the resolution of the instant motion.

ii. The PUC’s order is an obstacle to federal objectives.

Transource also maintains that the PUC’s decision is an obstacle to federal objectives. (*Id.* at 32–33.) It points out that, by the very nature of building new transmission lines to reduce congestion, wholesale energy rates will go down in some areas and up in others—that is the entire purpose of such projects. (*Id.* at 32.) If a state could decide that disagreement with the FERC-approved methodology underlying such projects was a permissible reason to deny siting approval, then FERC’s regulatory scheme would be obstructed. (*Id.*)

Congestion-reducing projects would become nearly impossible to build because those states currently benefiting from congestion could simply deem the proposed projects as unnecessary. (*Id.*)

Transource views this outcome as untenable. It would contrast with the PUC's own admission that "States . . . carry[ing] out their individual State jurisdictional responsibilities . . . cannot interfere with the national goals of creating a strong and fair wholesale energy market." (*Id.*; Doc. 164, ¶ 56; Doc. 157-22, p. 16.) Transource argues that Pennsylvania may not reap the benefits from federal planning when it sues Pennsylvanians, but obstruct federal planning needed to reduce persistent interstate congestion. (Doc. 158, pp. 32–33.)

Defendants counter that the PUC's decision was not an obstacle to Congress' objectives. (Doc. 165, p. 8.) In furtherance of this argument, they contest the existence of the underlying congestion and alleged pricing disparity between Pennsylvania and other states. (*Id.* at 16.) Then they point to the Commonwealth Court opinion which, they assert, specifically held that the congestion—the existence of which they dispute—has decreased since 2014. (*Id.*) They also argue that Transource has failed to provide any evidence of pricing disparities resulting from said congestion. (*Id.*)

Defendants assert that Transource is incorrect in its assertion that congestion remediation is the applicable federal objective. (*See id.*) Instead, the real goal was the creation of a transmission plan, which was created when the Project was submitted to the RTEP. (*Id.*) Because the PUC did not interfere with that step of the

process, it is in essence incapable of now creating obstacles to federal objectives, which have been entirely achieved. (*See id.*)

In short, Defendants' argument is that the only federal objective at play in this dispute is for PJM to create an essentially academic plan to solve a problem that—in Defendants' view—does not actually exist. Once the plan has been created, the federal objective has been met and federal interests have been satisfied. The only legal authority Defendants include to support their argument is the Commonwealth Court's finding that congestion has decreased since 2014, Third Circuit precedent related to the summary judgment standard, and a passing unexplained citation to purportedly assert *res judicata*. (*See* Doc. 165, pp. 15–18.)

The court finds Defendants' arguments to be unsupported and unconvincing. It is undisputed that RTOs like PJM are responsible for “planning, and [] directing or arranging, necessary transmission expansions, additions, and upgrades that will enable it to provide efficient, reliable and non-discriminatory transmission service and coordinate such efforts with the appropriate state authorities.” 18 C.F.R. § 35.34(k)(7). As such, PJM “must encourage market-driven operating and investment actions for preventing and relieving congestion.” *Id.* At § 35.34(k)(7)(i). The apparent preliminary goal of regulations such as these and the 2008 FERC Order was for PJM to analyze and select congestion-reducing projects with benefits that exceed their costs by the required ratio. The ultimate goal is that such projects be built if they obtain the necessary state siting, construction, and permitting approvals, in order to remove the obstacle of congestion and thus achieve FERC's duty of ensuring that wholesale rates are just and reasonable.

Here, by disagreeing with PJM’s FERC-approved benefit-cost methodology, the PUC seeks to undercut the foundational goal of congestion-alleviating projects. The PUC insists that any benefit-cost ratio must include projected rate increases for areas that currently benefit from congestion—areas which will not contribute to payment for the Project. This directly contradicts PJM’s FERC-approved tariff.¹³ Furthermore, the PUC implicitly assumes that congestion-reduction is not a valid goal in its own right.

It is clear that FERC has determined that regional congestion is a problem and one that directly affects its core obligation of ensuring just and reasonable electric rates. As such, it is not within the PUC’s purview to pose obstacles to FERC’s pursuit of reducing congestion through its approval process. Nor is it within the PUC’s authority to pose obstacles to this federal objective when PJM pursues it under the auspices of a FERC-approved tariff.

Defendants’ arguments about the merits of PJM’s congestion analysis and how the Project should be assessed do them no favors in this legal context. These arguments only underscore the extent to which the

¹³ As the Third Circuit has explained, a “tariff” is “the term of art used to refer to the ‘classifications, practices, and regulations’ a public utility uses to establish electricity rates.” *N.J. Bd. of Pub. Utils. v. FERC*, 744 F.3d 74, 83 (3d Cir. 2014) (citing 16 U.S.C. § 824d(c)). Once a tariff has been filed with FERC and approved, either explicitly by FERC or by operation of law, it has the force of federal law. *See Mississippi Power & Light*, 487 U.S. at 373; *PJM Power Providers Grp. v. FERC*, Nos. 21-3068, 21-3205 & 21-3243, at *35 (3d Cir. Dec. 1, 2023) (“Congress established in § 205(d), and underscored in § 205(g), that a tariff may change by operation of law [.]”).

PUC's decision constitutes an obstacle to FERC achieving its goals of reducing congestion and achieving just and reasonable rates. The PUC is attempting to supplant the role of the RTO and expand its state authority into the regulatory territory occupied by the federal government. If permitted, the PUC's second-guessing of the methods sanctioned by federal law and employed by the RTO would severely handicap the ability of FERC to ensure just and reasonable rates. Because the PUC's decision presents an obstacle to achieving federal objectives, it is conflict preempted and violates the Supremacy Clause.

**iii. Congress' explicit preemption in
FPA § 216 does not diminish the exist-
ence of conflict preemption here.¹⁴**

Defendants argue that Congress has shown in the FPA that it is aware of the language required to preempt traditional authority and has not done so in this instance. (Doc. 148, pp. 34–35.) Section 216 applies to congestion projects in areas which the Secretary of Energy has designated as national interest electric transmission corridors. (*Id.* at 34 (citing 16 U.S.C. §

¹⁴ In Defendants' initial brief, they also argue that FERC lacks the statutory authority to preempt the PUC decision. (Doc. 148, pp. 30–32.) They argue that where, as here, a state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority, a "presumption against pre-emption" applies. (*Id.* at 31–31 (quoting *New York*, 535 U.S. at 17–18).) But Transource points out that the anti-pre-emption presumption applies to areas traditionally regulated by the states. (Doc. 158, p. 37.) States have not traditionally regulated interstate transmission planning. (*Id.*) Transource points out that Defendants identify no case holding to the contrary. And Defendants do not respond to Transource's arguments in their reply. Transource has the better argument on this point, too.

824P(a)).) Through § 216, the FPA provides a mechanism by which FERC may grant a permit to develop a congestion project despite a state commission denying the application. (*Id.* (citing §§ 824p(a), (b)(1)(C)(iii)).)

By contrast, FERC made clear that “nothing in” Order 1000 was “intended to leverage the regional transmission planning or interregional transmission coordination reforms to exceed [FERC]’s section 216 backstop authority.” Order 1000-A, 77 Fed. Reg. at 32,215 n.248. But, according to Defendants, that is exactly what Transource is arguing for. (Doc. 148, p. 35.)

Transource disagrees. It is not asserting that FERC has the authority to permit the Project in the face of a valid PUC denial. (Doc. 158, p. 39.) It acknowledges that the Project is not in a national interest electric transmission corridor, and FERC therefore has no authority to issue a construction permit. (*Id.*) Instead, the issue at hand is whether the PUC may rely on its siting authority to “override a FERC-approved method for determining whether a line is needed to reduce interstate congestion.” (*Id.*)

The court agrees with Transource that Defendants’ argument mischaracterizes the issue in this case. The preemption question before the court does not pertain to whether FERC may override an otherwise valid PUC decision related to Transource’s application or the Project at large. Instead, the issue relates to whether the PUC decision was an obstacle to achieving federal objectives. Thus, Congress’ express preemption in § 216 does not undermine Transource’s conflict preemption argument.

iv. The PUC's decision was not an exercise in siting.

Defendants also argue that the PUC's decision was not preempted because it was a valid exercise of a power which Transource concedes was reserved for the states: siting authority. (Doc. 165, p. 18–20.) While Defendants concede that FERC had jurisdiction over transmission planning, they argue that the PUC's decision constituted an exercise of its siting authority, a power which Congress has left exclusively to the states. (*Id.* at 9.) Invoking a FERC order, they assert that “[i]t is well-settled that [FERC] does not have authority over the siting and construction of electric transmission facilities. (*Id.* (quoting *PacifiCorp*, 72 FERC ¶ 61,087, 61,488 (1995)).) Instead, “[a]ll such matters should be resolved at the state and local level.” *PacifiCorp*, 72 FERC at 61,488. Courts have found that “states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities.” *Piedmont Env'tl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009).

According to Defendants, the distinction between transmission planning and siting is based on the sequence of decisions. (Doc. 165, p. 9.) They invoke Order 1000, in which FERC stated that, “[t]ransmission planning is a process that occurs prior to the interconnection and coordination of transmission facilities. 76 Fed. Reg. at 49,860. Defendants submit that transmission planning, therefore, “ends entirely before any coordination of utility transmission facilities occurs, i.e., building and connecting new transmission lines to the existing grid.” (Doc. 165, p. 9.)

Defendants concede that, pursuant to Order 1000, FERC has determined that the order's “transmission

planning and cost allocation requirements . . . are associated with the processes used to identify and evaluate transmission system needs and potential solutions to those needs.” (*Id.* (citation omitted).) But, by the language of Order 1000, nothing in it “requires that a facility in a regional transmission plan or selected in a regional transmission plan for purposes of cost allocation be built, nor does it give any entity permission to build a facility.” 76 Fed. Reg. at 49,854.

Defendants assert that, although transmission planning has narrow objectives, siting and permitting a project involve “a broader inquiry into the public interest ‘need’ for the project.” (Doc. 165, p. 10.) In making this assertion, Defendants do not quote any federal law or interpretation thereof. They instead invoke the PUC’s assessment of the Pennsylvania law which it applied in assessing Transource’s permit. (*Id.* at 10–11.) Defendants assert that the PUC’s determination was based on “the weight of all the evidence” to determine whether the Project is “reasonable and necessary and in the public interest” in order “to determine whether Transource has established need” for “approval of the siting” of the Project. (Doc. 165, pp. 10–11 (quoting Doc. 1-2, p. 60.)

Applying that standard, the PUC determined that there was insufficient need for the Project. (*Id.* at 11.) The factors they considered included the fact that congestion had decreased over the APSRI since the initial study showing need and “there was insufficient proof of the potential NERC reliability violations.”¹⁵ (*Id.*) De-

¹⁵ Defendants’ point is that the FERC-approved regional transmission planning is deficient. They do not define the term

fendants assert that the PUC's application of Pennsylvania law was in compliance with "the standard FERC applies when it exercises its 'backstop' siting and permitting authority under FPA Section 216." (*Id.* (footnote omitted).)

In determining the appropriate process regarding § 216 projects, "a commenter proposed that FERC 'rebutably presume a need for a project subject to the independent oversight'" because "participants must already make showings of local or regional needs to gain approval from an [] RTO." (*Id.* (quoting Regulations for Filing Applications for Permits to Site Interstate Electric Transmission Facilities, 117 FERC ¶ 61,202, at *10 (2006)).) FERC did not take this approach, and instead found that "determinations of an [RTO] should be given due weight in [FERC's] assessment of whether a particular facility is needed to protect or benefit customers." 117 FERC ¶ 61,202 at *10–11. Accordingly, FERC would "consider any such independent determinations as a factor, along with all other relevant factors, in determining whether the statutory criteria have been met." *Id.* Defendants argue that is exactly what the PUC did here. (Doc. 165, p. 12.)

The court finds this argument unconvincing. Defendants suggest that the PUC, by adopting FERC's approach to determining the need for a particular project, is not interfering with FERC's authority. But Defendants have provided no authority to suggest that public utility commissions are meant to exercise parallel functions as FERC. Therefore, Defendants have not persuaded the court that, by mirroring FERC'S approach to the determination of whether a project is

"NERC," which stands for North American Electric Reliability Council. (Doc. 90-1, p. 4.)

needed, the PUC's decision is somehow not an obstacle to federal objectives.

Defendants also argue that the PUC's decision related to siting, and not regional planning, because it was procedurally different from PJM's transmission planning process. (*Id.* at 12–14.) In support of this argument, they point to various ways in which PJM's process was purportedly faulty, whether by not conducting evidentiary hearings, taking sworn testimony, permitting cross-examination, or purportedly basing the benefit-to-cost analysis on stale information. (*Id.*) Meanwhile, the PUC's determination was based on timely information which provides, in Defendants' words, "an important procedural check on the un-litigated, un-reviewed conclusions reached by PJM." (*Id.* at 13.)

If they were not allowed this important procedural check, Defendants argue, state laws would merely be a "rubber-stamp [of] every RTO-approved transmission line application." (*Id.* at 14 (internal quotation marks omitted).) Defendants argue that the court need not parse the meaning of FERC's instructions in Order 1000 "because FERC has clearly instructed that its jurisdiction did not reach siting and permitting." (*Id.*) Here, the PUC's decision was made "after the transmission planning process was completed. The PUC decision, therefore, was a valid exercise of its siting authority." (*Id.*)

Transource responds that, although federal law reserves siting and permitting authority for the states, that authority does not support the PUC's decision. It asserts that the PUC's decision "was not a siting decision, even though it was made in the context of reviewing a siting proceeding. Rather, it was a planning decision." (Doc. 158, p. 33.) In support of this position,

Transource invokes Supreme Court precedent, which held that “[i]n a pre-emption case, . . . a proper analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it.” *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 637 (2013).

Transource argues that this is indisputably a planning decision in substance, as observed by the fact that FERC had the power to approve PJM’s tariff on the issue. (Doc. 158, p. 33.) By contrast, if it were actually a siting issue, FERC would have lacked the authority to evaluate the issue, as it has no authority regarding siting. (*Id.* at 33–34.) But, as FERC state in Order 1000, “transmission planning . . . requirements . . . are associated with the processes used to identify and evaluate transmission system needs and potential solutions to those needs.” Order 1000, 76 Fed. Reg. at 49,861. But the identification of these needs and solutions “in no way involves an exercise of authority over those specific substantive matters traditionally reserved to the states,” like siting. *Id.* Transource further points out that none of the authorities cited by Defendants held that a decision like the PUC’s was a siting decision. (Doc. 158, p. 34.)

Transource concedes that nothing requires the PUC to site a project or approve one merely because FERC approves it. (*Id.* at 34–35.) But then Transource maintains that its concession is immaterial—Transource is not asserting that the PUC must allow the project to be built in a specific place. (*Id.* at 35.) Instead, it is asserting that, although the PUC may deny projects for siting reasons, such as to “mitigate the impacts of construction on public health and safety, the environment, and natural resources,” it may not deny them on the basis of regional planning, which is reserved for FERC. (*Id.*)

Transource also concedes that the PUC could have legitimately denied its application based on a siting decision. (*Id.*) The PUC could have done so based on any number of factors. For example, it may “evaluate the route over which the transmission line will traverse, and impose requirements to mitigate the impacts of construction on public health and safety, the environment, and natural resources.” (*Id.*) But Transource contends that the PUC may not use these factors as a pretext for denying permission because it disagrees as to whether congestion needs to be relieved. (*Id.* at 35 n.3.)

Defendants maintain that the PUC’s decision was, indeed, an exercise of its siting authority. (Doc. 165, p. 9–14.) In support, they look to when in the Project’s timeline the PUC’s decision occurred. As FERC has stated, “[t]ransmission planning is a process that occurs prior to the interconnection and coordination of transmission facilities.” (*Id.* at 9 (quoting Order 1000, 76 Fed. Reg. at 49,861).) Further, it “does not create any obligations to interconnect or operate in any certain way.” (*Id.* (quoting Order 1000, 76 Fed. Reg. at 49,861).) It asserts that transmission planning occurs entirely before any “coordination of utility transmission facilities occurs, i.e., building and connecting new transmission lines to the existing grid.” (*Id.* at 9–10 (footnote omitted).)

Defendants assert, without support, that although transmission planning has the narrow objectives of “identifying potential solutions to transmission issues and allocating projected costs of those solutions—siting and permitting a project involves a broader inquiry into the public interest ‘need’ for the project.” (Doc. 165, p. 10.) In accordance with Defendants’ asserted broader

inquiry, the PUC followed the process mandated by Pennsylvania statute. (*Id.* 10–11.)

Defendants further urge that, “[g]iven the FPA’s dual regulatory scheme, conflict-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.” (Doc. 165, p. 8 (quoting *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 55 (2d Cir. 2018)).)

After carefully considering Defendants’ arguments, the court is not persuaded that the PUC’s decision was, in substance, about siting. Much of Defendants’ argument attempts to deconstruct PJM’s analysis, following FERC-approved methodology, for assessing the Project. (*See id.* at 11–14.) Defendants’ argument picks apart the FERC-approved methodology and whether it was sufficiently open, allowed for evidentiary hearings, permitted cross-examination, or allowed argument by interested parties. (*Id.* at 12–13.) But in making these arguments about the various flaws in PJM’s analysis of the need for the Project, Defendants have not provided a substantive basis for this court to conclude that the PUC’s decision actually related to siting as opposed to determining whether there was a need for the Project.

Instead, the court is convinced that the PUC’s decision was, in fact, a substantive determination of need in the form of an exercise of siting authority. The court finds two facts important in this determination. The first is that the PUC’s analysis in denying Transource’s application clearly overlaps with PJM’s regional transmission planning analysis. That analysis was undisputedly regional transmission planning when FERC

approved it and PJM carried it out. Why should it be something else when the PUC does the same kind of analysis?

Second, no party has presented any evidence or compelling law to suggest that the PUC's decision related to "siting" as the term is commonly understood. The Oxford English Dictionary defines "siting" as "[t]he action of locating something in a particular place." Siting, Oxford Dictionaries, https://premium.oxforddictionaries.com/us/definition/american_english/siting (last visited Nov. 6, 2023). But the PUC's denial was not related to the particular place of the Project.

The court is not convinced by Defendants' sequence-based argument that siting follows regional transmission planning and therefore anything that occurs sequentially after the regional transmission plan is, therefore, siting. Rather, as the Supreme Court has noted, in assessing preemption, "a proper analysis requires consideration of what the state law in fact does, not how the litigant might choose to describe it." *Wos.*, 568 U.S. at 637. Although the PUC now terms its denial as an exercise of siting authority, it was regional transmission planning in reality. That is the case even if though it occurred after PJM approved the Project.

Because Defendants have failed to show that the PUC decision was a valid exercise of its siting authority, Defendants fail to overcome the preemption analysis.

2. The PUC's decision violates the dormant Commerce Clause.

The Constitution's Commerce Clause provides Congress the power to "regulate commerce . . . among the several States." U.S. Const. art I, § 8, cl. 3.

The Supreme Court has interpreted the Commerce Clause as containing a “dormant” component that “denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.” *Or. Waste Sys., Inc. v. Dep’t of Env’tl Quality*, 511 U.S. 93, 98 (1994). The dormant Commerce Clause “prohibits the states from imposing restrictions that benefit in-state economic interests at out-of-state interests’ expense.” *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 210 (3d Cir. 2002) (“Cloverland I”).

There are two ways in which the dormant Commerce Clause invalidates state regulation. First, where a state regulation is “motivated by simple economic protectionism,” it will be “subject to a virtually per se rule of invalidity, which can only be overcome by a showing that the State has no other means to advance a legitimate local purpose.” *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338–39 (2007). This heightened scrutiny will apply where a state acts with “discriminatory purpose,” *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984), or the regulation “discriminates against interstate commerce ‘either on its face or in practical effect.’” *Cloverland I*, 298 F.3d at 210–11. Under this rule, “[t]he party challenging the [law] has the burden of proving the existence of such discrimination.” *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 462 F.3d 249, 261 (3d Cir. 2006) (“Cloverland II”). If there is discrimination, the state is required to show that the law is narrowly tailored to “advance a legitimate purpose.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

If heightened scrutiny does not apply, the Pike balancing test applies. *Pike v. Bruce Church, Inc.*, 397 U.S.

137 (1970). Under this test, an “even-handed” regulation that “incidentally” burdens interstate commerce will be found valid unless the burdens are “clearly excessive in relation to the putative local benefits.” *Cloverland I*, 298 F.3d at 211.

Transource argues that the PUC’s decision fails whether analyzed under the per se test or Pike. (Doc. 158, p. 43.) It fails the per se test because it discriminates on its face against interstate commerce. (*Id.*) Quite simply, the PUC denied the Project because the PUC wished to maintain low prices for Pennsylvania customers that benefit from congestion. (*Id.*)

Transource also argues that, even if the Pike test applies, the Defendants fail because the PUC’s decision burdens interstate commerce by preventing the alleviation of congestion across state lines. (Doc. 158, p. 46.) Transource observes that, when assessing burdens on interstate commerce, a court must evaluate not only the instant burden, “but also by considering how the challenged [regime] may interact with the legitimate regulatory regimes . . . if not one, but many or every, State adopted [a] similar [regime].” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 337 (1989).

On the other hand, Defendants argue there are three reasons why the PUC’s decision does not amount to a per se violation of the dormant Commerce Clause. First, Defendants reason that although some Pennsylvanians would pay more if the Project were completed, others would benefit. The PUC’s decision was not an attempt to benefit Pennsylvanians to the detriment of others, instead it was a holistic regional analysis. (Doc. 148, p. 42.)

Next, Defendants argue that the PUC’s decision was “not local protectionism but the very essence of

state sovereignty.” (*Id.* at 42–43 (citing *Piedmont*, 558 F.3d at 314–15).) Defendants argue this is distinct from other cases which Transource cites, like *New England Power Co. v. New Hampshire*, because that case did not relate to the constitutionality of a state regulation preventing the construction of a utility facility on public land. (*Id.* at 43 n.5 (citing 455 U.S. 331 (1982)).) Defendants do not explain the significance of this factual distinction. On this point, Defendants also dispute whether congestion or price disparities actually exist. (*Id.* at 43–44.)

Finally, Defendants argue that the PUC decision does not burden interstate commerce because it takes into account “all the costs and benefits” of the Project, including “considerable increases in prices to ratepayers both in Pennsylvania and elsewhere” in the region. (Doc. 148, p. 44.) By contrast, they argue that PJM applied “local, parochial interests” when assessing the benefits and costs of the Project. (*Id.* at 45.)

In response, Transource argues that Defendants’ arguments are meritless. Where Defendants argue that the PUC enacted a region-wide assessment that was not self-serving, the record disproves this assertion. (Doc. 158, pp. 47–48.) And, Transource maintains that it is irrelevant under the dormant Commerce Clause whether residents of other states incidentally benefit from the PUC’s protectionist approach. (*Id.* at 48 (citing *Hunt v. Wash. St. Apple Advert. Comm’n*, 432 U.S. 333, 349, 350–54 (1977)).) In further support, Transource cites numerous Supreme Court cases. (*See id.* at 48–49.)¹⁶

¹⁶ Defendants argue that none of these cases apply because “each deals with the sale of goods that are already in existence within the stream of interstate commerce.” (Doc. 165, p. 22.) By

Lastly, Transource argues that the PUC's allegation that no pricing disparity exists due to congestion, does not save them from the dormant Commerce Clause. (*Id.* at 49.) It points out that the PUC's own findings recognized higher prices in Maryland, Virginia, and D.C. due to congestion. (*Id.*) The PUC also recognized that the Project would benefit customers region-wide by reducing congestion, but Pennsylvanians would overall pay higher prices due to the reduced congestion. (*Id.*)

Transource likens the PUC's decision to New England Power, in which the Supreme Court held that the "order of the New Hampshire Commission, prohibiting New England Power from selling its hydroelectric energy outside the State of New Hampshire, is precisely the sort of protectionist regulation that the Commerce Clause declares off-limits to the states." 455 U.S. at 339. In that case, the utility commission issued its order to benefit citizens of New Hampshire to the detriment of those in neighboring states who could not have access to the low-cost power. *Id.*¹⁷

contrast, Defendants assert that this case is about "the construction of a new utility line not currently in existence." (*Id.*) Defendants provide no legal support for this analytical distinction. In any event, the court finds it unconvincing. While this case is about the denial of a permit for new transmission lines, the underlying issue is the flow of electricity across state lines. Electricity already existed and was already in the stream of commerce.

¹⁷ Transource recognizes that in New England Power, the problematic conduct was attributed to a state statute, whereas here the PUC's decision is based on a denial stemming from the application of a state regulation. (Doc. 158, p. 45 n.8.) But Transource asserts that the distinction makes no difference. (*Id.* (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 455 (1992).) Defendants do not respond to this argument.

Reviewing the PUC's decision, it is clear that the PUC determined that "the consequences of [the Project] would be to alleviate the economic congestion on a regional level, which in turn would result in higher rates in Pennsylvania." (Doc. 157-1, p. 63.) Regardless of the regional benefits of the Project, the PUC determined that the "potential negative and practical impact on the citizens and consumers of Pennsylvania is our concern." (*Id.*)

Here, the court finds that the PUC's decision was a *per se* violation of the dormant Commerce Clause driven by economic protectionism. Although various statements by the PUC place greater emphasis on Pennsylvania interests and others place more emphasis on regional interests, the PUC's own words make clear that it was focused on protecting the interests of Pennsylvanians. Importantly, the very nature of the Project is to improve the flow of wholesale electricity across state lines to places that currently have less access and therefore higher prices. The Project's sole purpose is to better facilitate commerce across regional and state boundaries. And the PUC's opposition to the Project is rooted in economic protectionism in the form of maintaining the status quo imbalance of access to low-priced electricity.

The court recognizes that the PUC also asserts that congestion may not even exist and the Project may not alleviate it. Even assuming that this argument has relevance to the dormant Commerce Clause analysis, neither assertion holds up based on the PUC's own analysis. The PUC contends that Pennsylvanians (and others), who will not be paying the costs of building the Project, will pay higher rates if the Project is completed. That contention is premised on two assumptions. The first is that congestion exists. The second is

that the Project, by reducing congestion, will increase prices for those currently benefitting from congestion. Accordingly, the PUC's own analysis defeats the argument it raises in this case that congestion did not exist and the Project would not solve it.

Although this finding of a per se violation is supported by the PUC's own language in its decision, the court also makes the same finding based on the practical effect of the PUC decision. By insisting on counting as a Project cost the projected increase in pricing to those who currently benefit from congestion, the PUC's decision recognizes congestion as a benefit. That is, it determines that similar access to low-cost electricity is only desirable to the extent that it does not raise prices to those who currently benefit from congestion. Thus, the court concludes that Transource has met its burden in proving the existence of discrimination.

Having made that finding, the state is now required to show that the law is narrowly tailored to "advance a legitimate purpose." *United Haulers*, 550 U.S. at 338–39. Defendants' arguments focus on whether there was a per se violation or whether the PUC's decision burdens interstate commerce. But they do not assert a legitimate local purpose. Because they fail to do so, they cannot show that the PUC decision is narrowly tailored to advance such a purpose.

The court also notes that the PUC's decision would violate the dormant Commerce Clause under Pike. In accordance with *Healy*, the court concludes that, if other states adopted a regime similar to the PUC, it would eviscerate FERC's attempts to reduce congestion. Instead, each state could put forth its own analysis and effectively deploy a veto as to whether regional

transmission projects were desirable as congestion-reducing projects.

For these reasons, the PUC's decision violated the dormant Commerce Clause.

CONCLUSION

For the reasons explained above, the court finds that the PUC's decision violated the Supremacy Clause and the dormant Commerce Clause. Based on these findings, the court will deny Defendants' motion for summary judgment and grant Transource's motion for summary judgment. (Docs. 146, 156.) An appropriate order will follow.

s/Jennifer P. Wilson
JENNIFER P. WILSON
United States District Judge
Middle District of Pennsylvania

Dated: December 6, 2023