

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

TRANSOURCE PENNSYLVANIA,  
LLC,

Plaintiff,

v.

GLADYS BROWN DUTRIEUILLE,  
Chairman, Pennsylvania Public Utility  
Commission; DAVID W. SWEET,  
Vice Chairman, Pennsylvania Public  
Utility Commission; JOHN F.  
COLEMAN, JR. and RALPH V.  
YANORA, Commissioners,  
Pennsylvania Public Utility  
Commission, all in their official  
capacities, and the PENNSYLVANIA  
PUBLIC UTILITY COMMISSION,

Defendants.

Case No. 1:21-cv-01101-JPW  
(Judge Jennifer P. Wilson)

**MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Under Federal Rule of Civil Procedure 7(b) and Local Rule 7.1, PJM Interconnection, L.L.C. hereby moves for leave to file an *amicus curiae* brief to be considered in connection with Plaintiff Transource Pennsylvania, LLC's motion for summary judgment and Defendants' anticipated motion to dismiss. The grounds for this motion are set forth in PJM's accompanying brief in support. PJM's proposed *amicus* brief accompanies this motion as well.

July 19, 2021

Respectfully submitted,

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**RULE 7.1 CERTIFICATE OF CONCURRENCE/NON-CONCURRENCE**

Pursuant to Local Rule 7.1, counsel for PJM Interconnection, L.L.C. certifies that it sought concurrence in this motion from all parties. Plaintiff Transource Pennsylvania, LLC consents to PJM filing an *amicus* brief. At this time, Defendants do not consent to PJM filing an *amicus* brief.

/s/ Mark J. Stanisz  
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**BRIEF IN SUPPORT OF PJM INTERCONNECTION, L.L.C.'S  
MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

PJM Interconnection, L.L.C. seeks leave to file an *amicus curiae* brief to be considered in connection with Plaintiff Transource Pennsylvania, LLC's motion for summary judgment and Defendants' anticipated motion to dismiss.

PJM is the independent regional transmission organization for a multi-state area covering much of the Mid-Atlantic Region. As part of its federally mandated responsibilities, PJM administers a highly regulated process for identifying new

electricity transmission facilities needed by the system. The transmission project that Plaintiff Transource Pennsylvania, LLC seeks to construct, and which is the subject of this case, was selected through that process to address transmission constraints in the multi-state PJM Region. Defendants (collectively, the Pennsylvania Public Utility Commission or “PAPUC”) denied Transource the approvals needed to construct the project. PJM was not a party to the proceedings before the PAPUC, nor does it seek to participate as a party to this litigation. PJM is seeking to file the accompanying *amicus* brief to offer the Court the benefit of its unique perspective and experience as the organization responsible for regional transmission planning in the Mid-Atlantic Region.

### **BACKGROUND**

The Federal Power Act grants the Federal Energy Regulatory Commission (“FERC”) exclusive jurisdiction over the transmission of wholesale electricity. 16 U.S.C. § 824d(a). Under that authority, FERC has established independent regional transmission organizations responsible for managing electrical grids in different parts of the country. 18 C.F.R. § 35.34(k).

PJM is the regional transmission organization for a multi-state area covering much of the Mid-Atlantic Region. *See PJM Interconnection, L.L.C.*, 101 FERC ¶61,345 (2002). PJM’s responsibilities include congestion management and regional transmission planning to identify needs for new transmission facilities. *See*

Order No. 2000, *Regional Transmission Organizations*, 89 FERC ¶61,285, 65 Fed. Reg. 810, 887-88 (2000); Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, F.E.R.C. Stats. & Regs. ¶31,241, 72 Fed. Reg. 12,271, 12,275-76 (2007); Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. Stats. & Regs. ¶31,323, PP 78-84, 76 Fed. Reg. 49,842, 49,856-58 (2011); *PJM*, 101 FERC ¶61,345 at 62,451. PJM's FERC-approved tariff specifies in detail the process and criteria PJM must use to identify where new transmission facilities are needed by the system and select projects to satisfy any needs. *See* PJM Operating Agreement, Schedule 6, <https://agreements.pjm.com/oa/4777>.

Following its FERC-approved process and applying FERC-approved criteria, PJM identified a need for additional transmission facilities to alleviate transmission congestion in the multi-state PJM Region, and selected Transource's IEC Project to satisfy that need. *See* PAPUC Opinion and Order, Dkt. 1-2 at 3-4. Transource was then responsible for seeking, and sought, siting approval from the PAPUC. *See id.* at 5-6. The PAPUC denied Transource's application because, in the PAPUC's view, the project was not needed and would "lead to a substantial increase in utility rates within" Pennsylvania. *Id.* at 58-59, 62-63.

On June 22, 2021, Transource filed this lawsuit challenging the PAPUC's decision on preemption and dormant Commerce Clause grounds. Dkt. 1. On July

2, 2021, Transource moved for summary judgment and requested expedited treatment of that motion. Dkt. 20; Dkt. 21. This Court entered a scheduling order requiring Defendants to oppose Transource’s motions by July 27, 2021, and to file any motion to dismiss by July 23. Dkt. 31. On July 15, 2021, PJM notified Transource and Defendants of its intent to move for leave to file an *amicus* brief on July 19, 2021.

### **QUESTIONS INVOLVED**

Whether the Court should grant PJM leave to file an *amicus* brief.

### **ARGUMENT**

The Court should grant PJM leave to file its *amicus* brief. A court may grant leave to file an *amicus* brief where the information offered is “useful” and “timely.” *Waste Mgmt. of Pa., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995). PJM respectfully submits that its brief is both.

This case raises important issues concerning whether the Federal Power Act, and FERC’s exercise of authority under it, preempts the PAPUC from determining that a transmission project is not needed when a regional transmission organization (PJM)—following a FERC-approved regional transmission planning process and applying FERC-approved criteria—has determined that the project satisfies a need to relieve congestion. As an independent organization responsible for regional transmission planning under FERC-approved tariffs, PJM has a special interest in

and unique perspective on that legal question. *See Waste Mgmt.*, 162 F.R.D. at 37 (EPA had “special interest” in environmental case); *Pennsylvania Env’t Defense Found. v. Bellefonte Borough*, 718 F. Supp. 431, 435 (M.D. Pa. 1989) (similar). It is “especially proper” to consider the views of *amici* in cases, like this one, that involve “important public interests.” *Liberty Res., Inc. v. Philadelphia Housing Auth.*, 395 F. Supp. 2d 206, 209-10 (E.D. Pa. 2005); *see* 16 U.S.C. § 824(a) (“the business of transmitting . . . electric energy for ultimate distribution to the public is affected with a public interest”). PJM often participates as an *amicus* in cases arising under the Federal Power Act, including cases that have the potential to affect regional transmission organizations.<sup>1</sup> PJM also has a wealth of relevant experience with the federal statutes, orders, and tariffs that are central to the issues in this case. Accepting PJM’s *amicus* brief would give the Court the benefit of PJM’s experience and perspective in understanding regional transmission planning, the conflicts with federal law that the PAPUC’s decision creates, and the potential impacts of the PAPUC’s decision on matters affected with a public interest.

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<sup>1</sup> *See, e.g.*, Brief of PJM Interconnection, L.L.C. as *Amicus Curiae* in *Nat’l Parks Conservation Ass’n v. Semonite*, No. 18-5179 (D.C. Cir.) (filed Oct. 30, 2018); Brief of PJM Interconnection, L.L.C. as *Amicus Curiae* in *Conn. Dep’t of Pub. Util. Control v. FERC*, No. 07-1375 (D.C. Cir.) (filed Oct. 16, 2008); Brief of PJM Interconnection, L.L.C. as *Amicus Curiae* in *Me. Pub. Utils. Comm’n v. FERC*, No. 06-1403 (D.C. Cir.) (filed Dec. 31, 2007).



PJM's brief is also timely. This Court has accepted *amicus* briefs submitted even after motions are fully briefed. *See Waste Mgmt.*, 162 F.R.D. at 35-36 (accepting *amicus* brief filed two months after motion was briefed); *Pennsylvania Env't*, 718 F. Supp. at 433, 435. Here, PJM is submitting its *amicus* brief in advance of the deadlines for Defendants to file a motion to dismiss (July 23) and to oppose Transource's motion for summary judgment (July 27). *See* Dkt. No. 31. This prompt filing ensures all parties will have an opportunity to address PJM's views.<sup>2</sup>

### **CONCLUSION**

The Court should grant PJM leave to file an *amicus* brief and accept its brief for filing.

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<sup>2</sup> Some decisions have considered whether an *amicus* has a “specific pecuniary” or business interest that will be “directly” affected by a ruling. *Land v. Del. River Basin Comm'n*, No. 3:16-cv-897, 2016 WL 7256945, at \*3 (M.D. Pa. Dec. 15, 2016) (noting that parties “with pecuniary and policy interests have been regularly allowed to appear as *amici*”). PJM does not have a pecuniary interest in this case. It is not seeking to construct a transmission facility and is independent from the utilities that own generation and transmission facilities. PJM's interest is in ensuring that the regional planning process FERC has charged PJM with administering is capable of identifying and meeting public transmission needs in the manner FERC has directed.

July 19, 2021

Respectfully submitted,

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**BRIEF OF PJM INTERCONNECTION, L.L.C. AS *AMICUS CURIAE***

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## STATEMENT OF INTEREST<sup>1</sup>

PJM Interconnection, L.L.C. is the federally regulated regional transmission organization for an area spanning all or portions of 13 States and D.C. in the Mid-Atlantic Region. PJM is an independent entity, separate from the companies that own electric generation and transmission facilities, that has been authorized by the Federal Energy Regulatory Commission (“FERC”) to provide transmission service and otherwise administer the bulk power system in its region. As relevant here, FERC requires PJM to engage in regional transmission planning to identify system needs for new transmission facilities. That process is highly regulated by PJM’s tariffs—FERC-approved documents carrying the force of federal law. PJM has an interest in ensuring that it can fulfill its responsibilities in the manner FERC has directed, and that its regional transmission need determinations are implemented consistent with FERC-approved policies.

Here, PJM followed its FERC-mandated planning process to identify a need to address system constraints (*i.e.*, congestion) in the multi-state PJM Region. It then applied a FERC-approved benefit-cost formula to select the Transource IEC Project, which would construct new transmission facilities between Pennsylvania

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<sup>1</sup> No party’s counsel authored this brief in whole or part. No party, party’s counsel, or person other than PJM and its counsel contributed money to fund the brief’s preparation or submission.



and Maryland, as the more efficient or cost-effective solution for satisfying that need. The Pennsylvania Public Utilities Commission (“PAPUC”) nonetheless denied Transource permission to site the project in Pennsylvania (despite the grant of such permission in Maryland). In doing so, the PAPUC rejected PJM’s need determination and substituted its own, based on its disagreement with how PJM’s FERC-approved tariff requires the project’s benefits and costs to be measured. PJM was not a party to that proceeding because constructing utilities (*e.g.*, Transource), not PJM, are responsible for obtaining regulatory approvals.

PJM submits this brief to assist the Court in understanding PJM’s role in the FERC-mandated regional planning process and the impact of the PAPUC decision on that process.

## **ARGUMENT**

### **I. Under the Federal Power Act and FERC-approved tariffs, FERC has delegated PJM responsibility for regional transmission planning.**

The Federal Power Act grants FERC exclusive jurisdiction over the transmission of wholesale electricity. 16 U.S.C. § 824d(a); *Metro. Edison Co. v. Pennsylvania Pub. Util. Comm’n*, 767 F.3d 335, 341 (3d Cir. 2014). FERC is responsible for ensuring that all rates and practices affecting the transmission of electricity are “just and reasonable.” 16 U.S.C. §§ 824d(a), 824e(a).

FERC does so through filed “tariffs” that govern the “classifications, practices, and regulations” of regulated entities. *N.J. Bd. of Pub. Utils. v. FERC*,

744 F.3d 74, 83 (3d Cir. 2014); *see* 16 U.S.C. § 824d(c). Once filed with FERC, a tariff has the force of federal law, akin to a statute or regulation. *See Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373 (1988); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966-67 (1986). FERC-filed tariffs therefore preempt contrary determinations by state utility commissions or by courts. *Entergy Louisiana, Inc. v. Louisiana Pub. Serv. Comm’n*, 539 U.S. 39, 47 (2003); *Montana-Dakota Utilities Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (“not even a court can authorize commerce . . . on other terms”). A tariff’s preemptive power extends to all terms and conditions of the tariff. *See Nantahala*, 476 U.S. at 966.<sup>2</sup>

FERC exercises its authority over electricity transmission in two particularly relevant ways. First, FERC has approved independent regional transmission organizations (“RTOs”) that are responsible for managing regional electrical grids. 18 C.F.R. § 35.34(k); Order No. 2000, *Regional Transmission Organizations*, 89 FERC ¶61,285, 65 Fed. Reg. 810 (2000). FERC has designated PJM as the RTO for an area covering much of the Mid-Atlantic Region, including Maryland and

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<sup>2</sup> The principle that a filed tariff has the force of federal law is sometimes referred to as the “filed rate doctrine.” The “rate” that must be given preemptive effect is not limited to “prices or volumes of purchases”; it extends to all substantive aspects of the tariff. *Nantahala*, 476 U.S. at 966.

Pennsylvania. *PJM Interconnection, L.L.C.*, 101 FERC ¶61,345 (2002); *see Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292-93 (2016).

One of PJM’s responsibilities as an RTO is “congestion management.” 18 C.F.R. §35.34(k)(2); Order No. 2000, 65 Fed. Reg. at 887. Congestion is caused by “transmission bottlenecks” where existing facilities lack sufficient capability for power to flow unimpeded between different areas. *PJM Interconnection, L.L.C.*, 123 FERC ¶61,051, 61,411-12 (2008). Electricity becomes “trapped” behind the bottleneck, producing inefficiencies on both sides: Prices are artificially high in places the electricity cannot reach, and artificially low in places the electricity cannot escape. *See id.* As an RTO, PJM is required to develop market mechanisms for mitigating transmission congestion. 18 C.F.R. § 35.34(k)(2); Order No. 2000, 65 Fed. Reg. at 887-88.

Second, and relatedly, FERC requires RTOs—including PJM—to engage in regional transmission planning to identify needs for new transmission facilities. In orders adopted in 2007 and 2011, FERC recognized that existing transmission planning practices were “inadequate,” and threatened to produce unjust and unreasonable rates, because they could “thwart the identification of more efficient and cost-effective transmission solutions.” *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 66-67 (D.C. Cir. 2014); *see* Order No. 890, *Preventing Undue Discrimination and Preference in Transmission Service*, F.E.R.C. Stats. & Regs. ¶31,241, 72 Fed.

Reg. 12,266, 12,271, 12,275-76 (2007); Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, F.E.R.C. Stats. & Regs. ¶¶31,323, PP78-84, 76 Fed. Reg. 49,842, 49,856-58 (2011).<sup>3</sup> Exercising its authority to ensure just and reasonable transmission rates and practices, FERC mandated that RTOs conduct an ongoing regional planning process to identify ““regional solutions to regional needs.”” *S.C. Pub. Serv. Auth.*, 762 F.3d at 67 (quoting Order No. 1000, P320, 76 Fed. Reg. at 49,897).

FERC has delegated PJM responsibility for the planning process within its region. *See PJM*, 101 FERC ¶¶61,345 at 62,451. PJM does so under a FERC-approved tariff—specifically, Schedule 6 of PJM’s Operating Agreement. *See Amended and Restated Operating Agreement of PJM Interconnection, L.L.C.*, Schedule 6, section 1.1, <https://agreements.pjm.com/oa/4777>. That tariff, which carries the force of federal law, sets out in detail the criteria PJM must apply to identify where new transmission projects are needed. Schedule 6, section 1.5.7(d)-(e).<sup>4</sup>

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<sup>3</sup> FERC Order Nos. 890 and 1000, and FERC’s basis for adopting them, are discussed at length in *South Carolina Public Service Authority*, 762 F.3d at 50-54.

<sup>4</sup> PJM’s FERC-approved governing documents include its Operating Agreement, Open Access Transmission Tariff, and Reliability Assurance Agreement, all of which are referred to as “tariffs.” This brief generally uses “tariff” to refer to Schedule 6 of the Operating Agreement, which governs the regional transmission planning process at issue here.

Consistent with its congestion-management obligations, PJM's regional planning process includes evaluating the need to mitigate congestion-based system restraints. Projects designed to mitigate congestion are known as market-efficiency projects or "economic-based enhancements or expansions." Schedule 6, section 1.5.7(b). When PJM identifies a need for new transmission, it evaluates proposed solutions based on criteria set forth in the tariff. For market-efficiency projects, PJM must apply a specific "benefit-cost" formula approved by FERC. Schedule 6, section 1.5.7(d). Only projects with a benefit-cost ratio of at least 1.25:1 are eligible for further consideration. Schedule 6, section 1.5.7(d); *see* Order No. 1000, P 646, 76 Fed. Reg. at 49,940 (prohibiting use of higher ratio absent FERC approval).

PJM's tariff specifies what qualifies as a "benefit" or "cost." Benefits generally include reduced energy prices in areas currently suffering from congestion, while costs generally include amounts needed to construct new facilities. *See* Schedule 6, section 1.5.7(d). The tariff does *not* permit PJM to count as a "cost" the increased energy prices that some areas will experience when congestion is alleviated. *See PJM Interconnection, L.L.C.*, 173 FERC ¶61,258 (2020). As noted above, prices in those areas had been artificially suppressed because energy could not flow unimpeded to other, higher-cost areas. Increased prices in those areas after the congestion is relieved thus do not represent costs of the project, but the elimination of the very inefficiency the project was designed to address. FERC has

repeatedly approved PJM’s market-efficiency planning process and formula—including over objections that increased prices in some areas (*i.e.*, “zonal load costs”) should be counted as costs. *See, e.g., PJM*, 173 FERC ¶¶61,258; *PJM Interconnection, L.L.C.*, 166 FERC ¶¶61,114 (2019).

Regional planning is a transparent process with multiple opportunities for stakeholders, including States, to weigh in long before any project is ultimately selected pursuant to the FERC-approved criteria. PJM’s tariff provides for open, transparent stakeholder meetings throughout the planning process, and requires that “electric utility regulatory agencies within the States in the PJM Region” have the opportunity to participate, including through various PJM committees. Schedule 6, sections 1.3(a)-(e). Those committees include, among others, the Planning Committee and the Transmission Expansion Advisory Committee (“TEAC”). The TEAC, in particular, offers stakeholders an open, transparent public forum to provide advice and recommendations throughout the development of the regional transmission expansion plan.

PJM conducts its tariffed regional planning process by first developing the study scope and assumptions to be used in identifying system needs. Schedule 6, sections 1.5.2-1.5.4, 1.5.6(b), (d); 1.5.7(a), (c)(i)-(iii). Following identification of system needs, PJM reviews proposed solutions and vets the selection and recommendation of proposed solutions with the TEAC before presenting them to

PJM’s independent Board of Managers for review and approval. Schedule 6, sections 1.5.7(c)(iii), 1.5.8(d), 1.6. The TEAC is also involved in review of project modifications and annual re-evaluations of market-efficiency projects. Schedule 6, sections 1.5.7(f), 1.5.8(k).

Upholding PJM’s FERC-approved planning process is critical to ensure the efficient movement of wholesale electricity across the PJM region. If needed transmission projects are not built, the problems that led FERC to mandate regional planning under its authority to ensure just and reasonable rates will continue. Relevant to this case, congestion will persist and price inefficiencies that cost customers real money will continue, despite PJM’s identification of mitigation measures.

**II. The PAPUC’s order impermissibly interferes with PJM’s FERC-approved regional transmission plan.**

Through its FERC-mandated regional planning process, PJM identified a need for additional transmission facilities in the multi-state PJM Region. Insufficient transmission capability in that area had produced congestion—electricity became “trapped” in Pennsylvania, producing artificially low prices in Pennsylvania and artificially high prices in Maryland, Virginia, West Virginia, and D.C. *See* PAPUC Opinion and Order, Dkt. 1-2 at 3 (“PAPUC Op.”).

Applying the criteria dictated by its tariff—and following the FERC-mandated transparent process—PJM selected the Transource IEC Project to alleviate

that congestion. PAPUC Op. 3-4. That result of PJM’s FERC-mandated process carries FERC’s stamp of approval. *See Hughes*, 136 S. Ct. at 1297 (addressing PJM’s FERC-approved capacity-auction process).<sup>5</sup>

Because state regulators retain authority over siting, permitting, and construction of transmission projects included in PJM’s regional plan, *see* Order No. 1000, PP107, 161, 227, 76 Fed. Reg. at 49,861, 49,870, 49,880; *S.C. Pub. Serv. Auth.*, 762 F.3d at 62-63, Transource needed to receive permission (*i.e.*, certificates of public convenience and necessity) from the Pennsylvania and Maryland public utility commissions. Under the Supremacy Clause, however, States do not have authority to simply second-guess FERC’s authority over transmission practices and rates—including FERC’s implementation of that authority through tariffs that mandate regional transmission planning and specify the criteria to be used for evaluating whether a project is needed to relieve system congestion. *See New York v. FERC*, 535 U.S. 1, 19-20 (2002); *PPL Energyplus, LLC v. Solomon*, 766 F.3d 241, 253 (3d Cir. 2014) (FERC tariffs “issued pursuant to [Congressional] authority have no less preemptive effect than federal statutes”). “[I]f FERC has jurisdiction over a

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<sup>5</sup> Under its FERC-approved tariff, PJM has regional planning authority over both reliability and market-efficiency transmission projects. *See* Schedule 6, sections 1.5.1(a), 1.5.3, 1.5.7; *see generally* Schedule 6, section 1.1. The Transource IEC Project was selected as a market-efficiency project.



subject, the States cannot have jurisdiction over the same subject.” *Mississippi Power*, 487 U.S. at 377 (Scalia, J., concurring).

Consistent with that authority, Maryland granted Transource permission to site the project. Maryland recognized that it was bound by the FERC-sanctioned process through which PJM identified the need for congestion relief and selected Transource’s project to satisfy that need. *In re the Application of Transource Maryland LLC*, No. 89571, 2020 WL 3977589, at \*41 (¶142) (Md. Pub. Serv. Comm’n June 30, 2020).

The PAPUC, by contrast, denied Transource’s application because it disagreed with the criteria used by PJM to determine that the project was needed to relieve system congestion. PAPUC Op. 52-55, 63-64. Specifically, the PAPUC rejected the benefit-cost approach required under PJM’s FERC-approved tariff, finding that “[t]he methodology performed by PJM to determine the benefit-cost ratio of the IEC Project is deficient” under Pennsylvania law. Recommended Decision of ALJ, Dkt. 1-3 at 98 (“ALJ Op.”); *see* PAPUC Op. 53 (adopting ALJ findings unless expressly rejected or modified). The PAPUC objected that PJM’s FERC-approved formula does not consider as part of a project’s costs the fact that “alleviat[ing] the economic congestion *on a regional level* . . . would result in higher rates *in Pennsylvania*,” where congestion has kept prices artificially low. PAPUC Op. 59 (emphasis added). And it criticized the “data relied upon by PJM to

determine the need to alleviate congestion.” PAPUC Op. 60. The PAPUC ultimately determined that the Transource Project was not needed because it would “lead to a substantial increase in utility rates within the Commonwealth.” PAPUC Op. 58-60, 63; *see* ALJ Op. 100 (“increased wholesale power prices are real costs to customers that show no need for the project”).

That is a clear conflict between federal and state law. By approving PJM’s tariff, FERC determined that price increases in areas currently benefitting from transmission inefficiencies are not to be considered when assessing the need for regional transmission projects. *See* PJM Letter Revisions to Economic Planning Process, FERC Dkt. No. ER-14-1394, p. 8 (Feb. 28, 2014), *accepted by delegated letter order dated* Apr. 23, 2014. In rejecting the Transource IEC Project, the PAPUC substituted its own methodology (which factored in those price increases) for the FERC-sanctioned methodology (which excludes them). PAPUC Op. 59. The conflict with federal law is apparent.

The Supreme Court has found similar state actions preempted because they interfered with processes governed by a FERC-approved tariff. In *Hughes*, for example, a State dissatisfied with PJM’s FERC-approved auction process for capacity sales established a program that guaranteed certain generators a rate different from what they would receive under PJM’s tariffed process and thus interfered with FERC’s wholesale ratemaking authority. 136 S. Ct. at 1294-96. The

Supreme Court held that, by “[d]oubting FERC’s judgment” about how to produce “just and reasonable rates” and substituting its own preferred approach, the State impermissibly “invade[d] FERC’s regulatory turf.” *Id.* at 1297. The same logic applies here. FERC approved PJM’s planning process—including its criteria for determining the need to alleviate system congestion—under its authority to ensure that transmission rates and practices are just and reasonable. By second-guessing that FERC-sanctioned process and substituting its own approach for the need determination, the PAPUC impermissibly “invade[d] FERC’s regulatory turf.” *Id.*; *see also Mississippi Power*, 487 U.S. at 370-74; *Nantahala*, 476 U.S. at 966-69.

To be clear, PJM does not contend that the PAPUC is required to rubber-stamp every PJM-selected transmission project presented to it. State commissions like the PAPUC play an important role in transmission siting, including determining what routes transmission lines will follow and where new buildings will be constructed. In making its determination here, the PAPUC could have legitimately considered various factors, such as a project’s impact on public health and safety (would high-voltage lines run through a dense neighborhood?), natural resources (would the project require clearcutting timberland?), and environmental impact. *Cf.* 52 Pa. Code § 57.76(a)(2)-(4).<sup>6</sup> But the PAPUC expressly disclaimed reliance on

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<sup>6</sup> In discussing “public need,” the PAPUC has previously observed that its 1970s-era siting regulations “do not adequately address the evolving nature of transmission

any of these other factors. PAPUC Op. 64. It denied Transource’s application based *solely* on its view that there was no “need” to alleviate congestion, based on its substitution of its own methodology for the FERC-approved one. Such a decision cannot stand. The fact that a state commission is acting in an area of “traditional [state] authority” (*e.g.*, siting) does not render it immune from a federal tariff’s preemptive force. *Hughes*, 136 S. Ct. at 1299; *see Mississippi Power*, 487 U.S. at 370-71. That is particularly true here, where the PAPUC’s decision was based solely on a rejection of PJM’s FERC-approved methodology, and not on other siting factors or the consideration of alternative routes. Indeed, the PAPUC directly rejected FERC’s regional planning authority and PJM’s implementation of its federally approved tariff.

Allowing the PAPUC to displace the need-determination factors FERC requires PJM to apply would undermine the regional planning process that FERC has declared necessary to ensure just and reasonable rates. Order No. 1000, P 12, 76 Fed. Reg. at 49,846. PJM selects transmission projects through a transparent, years-long process that provides ample opportunities for public and state input, with the purpose of identifying “regional solutions to regional needs.” Order No. 1000,

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planning from a fundamentally intrastate activity to a regional planning process” mandated by federal law. *Re: Interim Guidelines for the Filing of Electric Transmission Line Siting Applications*, Dkt. No. M-2009-2141293, 2010 WL 4496792, at \*25 (Pa. Pub. Util. Comm’n Nov. 5, 2010).

P320, 76 Fed. Reg. at 49,897. That exhaustive, federally mandated process would be hamstrung if a state agency could effectively veto the outcome years later based solely on its own, state-centric concept of “need.”<sup>7</sup>

Finally, PJM notes that swift resolution of this dispute is in the interest of all stakeholders—including PJM, state commissions, utilities, and consumers. PJM’s planning models evaluate future transmission needs on the assumption that previously approved projects included in the model will be constructed. Schedule 6, sections 1.5.7(c)(iii), 1.6 (approved projects included in plan). Prolonged uncertainty over the Transource IEC Project’s fate frustrates efforts to plan for future system needs in the Baltimore-Washington metropolitan area, as well as the broader PJM region.

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<sup>7</sup> It makes no difference that the Transource IEC Project is designed to address a market-efficiency need, not principally a reliability need. To the extent the PAPUC attempted to distinguish its prior decision in *Application of TransAllegheny Interstate Line Company (TrAILCo Case)* on that ground, see PAPUC Op. 56, it did not appreciate that reliability and market-efficiency projects are both governed by PJM’s federal tariff and the FERC-mandated regional planning process.

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