No. 24-1045

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Transource Pennsylvania LLC,
Plaintiffs-Appellee,

v.

Steven M. DeFrank, Chairman, Pennsylvania Public Utility Commission; Kimberly M. Barrow, Vice Chairman, Pennsylvania Public Utility Commission; John F. Coleman, Jr, Commissioner Pennsylvania Public Utility Commission; Ralph V. Yanora, Commissioner Pennsylvania Public Utility Commission; and Kathryn L. Zerfuss, Commissioner Pennsylvania Public Utility Commission, all in their official capacities.
Defendants-Appellants.

ON APPEAL FROM THE U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
Civil No. 1:21-cv-01101 (December 6, 2023)
The Honorable Jennifer P. Wilson, Judge

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS SUPPORTING DEFENDANTS-APPELLANTS PETITION SEEKING REVERSAL

James Bradford Ramsay
GENERAL COUNSEL
National Association of Regulatory Utility Commissioners
1101 Vermont Avenue NW, Suite 200
Washington, DC 20005
Phone: 202.898.2207 Fax: 202.898.2213
jramsay@naruc.org

Attorney for Amicus National Association of Regulatory Utility Commissioners Supporting Defendants-Appellants

May 17, 2024

F.R.A.P. RULE 26.1/29(4)(A) DISCLOSURE STATEMENT

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental, nonprofit organization founded in 1889. Its members include the governmental bodies of the fifty states, the District of Columbia, Puerto Rico, and the Virgin Islands responsible for the intrastate operation of carriers and utilities. NARUC does not have a parent company, subsidiary, or affiliate. NARUC's General Counsel, James Bradford Ramsay, a member of the bar of this court, is NARUC's counsel of record.

[1] Full name of every party the attorney represents in this case:

National Association of Regulatory Utility Commissioners.

[2] NARUC's parent corporations, if any: None

Publicly held company with 10% of NARUC stock: None

[3] Information required by FRAP 26.1(b): N/A

[4] Debtor information required by FRAP 26.1 (c) 1 & 2: N/A

[5] Who will enter an appearance for NARUC:

/s/ James Bradford Ramsay GENERAL COUNSEL*

Address: 1101 Vermont Ave., NW Suite 200, Washington DC 20005
Phone: 202.898.2207 Fax: 202.898.2213
E-mail Address: jramsay@naruc.org

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Interest of Amicus[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental, nonprofit organization founded in 1889. For the last 135 years, NARUC has represented the interests of public utility commissioners from agencies of the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands. NARUC's member commissions include the State agencies engaged in the economic, rate, safety and reliability regulation of public utilities that provide electricity and natural gas services. These State officials have the obligation under State law to assure the establishment and maintenance of energy utility service and to ensure such services are provided at rates and conditions that are just, reasonable, and nondiscriminatory for all consumers.

Congress references NARUC as "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate

[1] *FRAP Rule 29(1)(2) Consent Declaration:* On Tuesday May 7, 2024, I consulted Pacer to determine the Parties to this proceeding and sent an email requesting consent for NARUC to file an *amicus* supporting the *Appellants* in this proceeding to the listed representatives for both parties. At 4:57 PM, Anthony D Kanagy, counsel to Transource, e-mailed consent and at 5:13 PM, Michael Scarinci, counsel to *Defendant-Appellants*, emailed consent.

operation of carriers and utilities.[2] Both Congress and the courts[3] have consistently recognized NARUC as a proper entity to represent the generic interests of every State's utility commission.

The Federal Power Act ("FPA") gives the Federal Energy Regulatory Commission ("FERC") broad jurisdiction over wholesale sales of electricity and the transmission of electricity in interstate commerce. However, Congress

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[2] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. §151 *et seq*., Pub. L. No. 101-104, 110 Stat. 56 (1996). *See* 47 U.S.C. §410(c) (1971) (NARUC nominates members to Federal-State joint boards which consider universal service, separations, and other issues and provide recommendations the FCC must act upon; Cf. 47 U.S.C. § 254 (1996) (describing the universal service board's functions). *See also*, *NARUC, et al. v. ICC,* 41 F.3d 721 (D.C. Cir 1994) ("[c]arriers, to get the cards, applied to [NARUC], an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued.")

[3] *See United States v. Southern Motor Carrier Rate Conference, Inc.,* 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds*,* 471 U.S. 48 (1985); (where the Supreme Court notes: "The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate." 471 U.S. 52, n. 10. *See also*, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); *Compare*, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985).

specified FERC's authority was "to extend only to those matters which are not subject to regulation by the states."[4]

Accordingly, both before and after the FPA became law, states, *including the bulk of NARUC's member commissions*,[5] had sole authority over electric transmission siting. The Energy Policy Act of 2005,[6] granted FERC "backstop" siting authority, but only in certain very limited circumstances.

Those circumstances are not present here.

Indeed, even FERC, the expert agency charged with implementing the FPA, has expressly, and on more than one occasion, acknowledged that states, not FERC (much less a Regional Transmission Organization like PJM), have the authority to "determine what [transmission facilities] needs to be built,

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[4] 16 U.S.C. § 824(a).

[5] Smith, William H., *Mini Guide on Transmission Siting: State Agency Decision Making* (National Council of Electricity Policy December 2021), at pp 3-4, online at: https://pubs.naruc.org/pub/C1FA4F15-1866-DAAC-99FB-F832DD7ECFF0 (Last accessed May 14, 2024). (In 33 states, NARUC member commissions are the state siting authority, while in a few other states, *e.g.,* Florida, Louisiana, and New Hampshire ". . . decisions about need and cost elements of the proposed project are decided by the Commission even where another agency or a Siting Board decides the locational aspects of the proposal.")

[6] Section 1221. Siting of Interstate Electric Transmission Facilities, *The Energy Policy Act of 2005*, Public Law 109-58, 119 STAT. 594,t 947 (August 8, 2005) online at: https://www.congress.gov/109/plaws/publ58/PLAW-109publ58.pdf (last accessed May 15, 2024).

where it needs to be built, and who needs to build it."[7] "'Order No. 1000's transmission planning reforms are concerned with process' and 'are not intended to dictate substantive outcomes.'"[8] Rather, "[t]he substance of a regional transmission plan and any subsequent formation of agreements to construct or operate regional transmission facilities remain within the discretion of the decision-makers in each planning region."[9]

With this statutory and historical backdrop, the district court's decision below breaks new ground.

Plaintiffs-Appellee Transource Pennsylvania LLC ("Transource") challenged the decision of the Pennsylvania Public Utility Commission ("PA PUC" or "PUC") to deny Transource's application to construct a portion of an interstate transmission line in Pennsylvania. Under Pennsylvania law, the PUC may grant an application only if it finds that there is a need for the project. Transource claimed, and the district court agreed, that the PUC's conclusion about "need" in this case is: 1) preempted by a PJM finding that

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7 *South Carolina Public Service Authority v. F.E.R.C.*, 762 F.3d 41, 57–58 (D.C. Cir. 2014) (*citing* Order No. 1000, ¶ 159, 76 Fed. Reg. at 49,852).

8 *Id*. at 58 (citing Order No. 1000–A, ¶ 188, 77 Fed. Reg. at 32,215)

9 *Id.* at 58.

Transource's project is economically beneficial; and 2) in violation of the dormant Commerce Clause.

This Court's disposition of this appeal in *Transource Pennsylvania, LLC v. DeFrank*, No. 1:21-CV-01101, 2023 WL 8457071 (M.D. Pa. Dec. 6, 2023) (J.A. 4 - 65) ("*Transource Decision*") will have a national impact.

If upheld, it will constrain future NARUC member state commission determinations of need under State law and precedent.

Indeed, if the district court's analysis is correct, logically FERC could exploit the false dichotomy presented by the opinion below by expanding the things that PJM must consider as part of the transmission planning process to trump literally <u>any</u> state commission's finding of need.

Although there are other public interest considerations a state must address, some determination of need is the foundation of any infrastructure siting exercise.[10] And the state's determination of need and the public interest is a broader inquiry than the PJM analysis relied upon by the court below – an inquiry necessary to protect the due process rights of individuals in the state

[10] Smith, William H., *Mini Guide on Transmission Siting: State Agency Decision Making* (National Council of Electricity Policy December 2021), at 3. ("[T]he [state] criteria for approval of a transmission line are relatively consistent. The need for the line must be demonstrated through analysis of the electrical system. The cost of the project compared to its benefits is usually considered.")

generally affected by the construction or directly affected though expropriation of their land. As FERC Commissioner Mark Christie noted just last month *citing directly to the decision on appeal in this proceeding*:

> With all due respect to PJM's transmission planners, whom I have frequently praised as experts who do a great job at what they are asked to do: the regional planning process is *not* remotely the equivalent of a litigated state CPCN process, which includes witness cross-examination and is open to intervenors such as consumer advocates . . . in light of a recent federal district court decision,[3] [] this Commission must make it clear ***once again*** – as it did in Order No. 1000 [] – that while FERC regulates RTOs such as PJM, in no way does that regulatory oversight represent any intent to preempt the states' decades-old authority to conduct CPCN proceedings that consider issues of need and prudence. {Citations omitted except for footnote 3 which cites to *Transource Pennsylvania LLC v. DeFrank*, No. 1:21-CV-01101, (M.D. Pa. Dec. 6, 2023)] [11]

This decision will inspire inefficient and expensive (to both ratepayers and taxpayers) copycat suits. On its face, it represents a significant intrusion into existing state siting authority and was the focus of extensive discussion at NARUC's February 2024 Winter Summit in Washington, D.C. As a result

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[11] *See,* FERC Commissioner Christie's Dissent to Award of Incentives to Exelon, ER24-1313 "Order on Abandoned Plant Incentive," *In the matter of Baltimore Gas and Electric Company, Delmarva Power & Light Company, PECO Energy Company PJM Interconnection, L.L.C. Potomac Electric Power Company*, 187 FERC ¶ 61,030 (April 23, 2024). Online at: https://www.ferc.gov/news-events/news/commissioner-christies-dissent-award-incentives-exelon-er24-1313 (Last Accessed May 14, 2024). {Emphasis Added}

of that discussion, NARUC's Board of Directors adopted a resolution that specifically instructed NARUC's General Counsel to file an amicus brief in this proceeding to oppose (i) "any overreach into state eminent domain authority;" (ii) "an overly narrow interpretation of state siting authority that constrains a state's authority to the Oxford Dictionary definition of the term "siting," especially given the scope of State siting authority under Section 216 of the Federal Power Act;" (iii) "any interpretation of the opinion that suggests that a state can never deny siting or eminent domain for a FERC transmission planning region's selected project;" and, (iv) "the Court's novel expansion of accepted dormant commerce clause jurisprudence regarding what is a per se violation of the dormant commerce clause."[12]

Amicus scrutinized the arguments presented by *Defendants-Appellants* to limit repetition. This brief will amplify some of those arguments as a backdrop to a focus on the likely broad national consequences if the district court decision is not reversed.

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[12] ***Resolution Supporting States' Jurisdiction to Render Needs-Based Transmission Permitting Authority*** (NARUC February 28, 2024). Before specifying the listed strong disagreements with the legal analysis presented by the court outlined, *supra,* the resolution does indicate that NARUC takes no position on the relative merits of Pennsylvania decision that the transmission line should not be sited.

Rule 29(a)(4)(E) Certification

The undersigned certifies that he authored the brief and that no other entity, party, or parties' counsel contributed funds to support its preparation or submission.

Argument Summary

The *Transource Decision* contends Congress' limited grant of authority to FERC to preempt state siting in FPA § 216 does not forestall any finding of "conflict preemption."[13] It can only reach that conclusion by ignoring 89 years of state siting history, numerous statements by the expert agency charged with interpreting the FPA,[14] as well as the obvious implications of Section 216. Congress *could have* assigned FERC *all* siting authority for interstate transmission lines in 2005 when it first created the FPA § 216 DOE-FERC backstop authority,[15] or in 2021 when it expanded it.[16] But it did not.

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13 *Transource Decision* at 1–22 (J.A. 47-54).

14 *Id.*

15 Section 1221. *The Energy Policy Act of 2005*, Pub. L. 109-58, 119 STAT. 594 at 947 (August 8, 2005).

16 Section 40105. *Infrastructure Investments and Jobs Act*, Pub. L. 117-58, 135 STAT. 429 at 934 (November 15, 2021).

The *Transource Decision* contends the PUC's decision was an obstacle to federal objectives because it conducted a broader, more rigorous, and updated determination of "need" - one that did not adequately consider "interregional benefits" and arrive at the same conclusion the PJM planning process. PJM concluded the project was needed to address congestion in a manner that "would benefit parts of Virginia, Maryland, Washington, D.C., and Western Pennsylvania."

This court's requirement for the PUC to defer to the PJM determination is incompatible with the balance between State and federal siting authority Congress struck in FPA § 216.

The *Transource Decision* contends the PUC may not "undercut" PJM's planning and may not "pose obstacles to FERC's pursuit of reducing congestion." [17] But § 216 indicates that is exactly what states may do in their siting decisions for infrastructure located outside a national interest corridor. They can deny the application. They can find that their legislature did not give them the authority to consider interregional benefits. They can condition the application such that "the proposed construction or modification will NOT significantly reduce transmission capacity constraints or congestion in

[17] *Transource Decision* at 17 (J.A. 45)

interstate commerce."[18] These are all elements the court below would find are "obstacle[s] to FERC achieving its goals of reducing congestion."[19] But Congress provided no authority for FERC to preempt those state decisions unless they are in a National Interest Electricity Transmission Corridor ("NIETC"). The *Transource Decision* essentially argues that FERC can, by approving a "planning process," allow PJM to do what Congress said FERC cannot: preempt a state siting decision when the project is NOT located in a NIETC.

Before the district court, PJM offered a novel theory that there are federally mandated differences between "siting" and "planning authority." The *Transource Decision* concedes Pennsylvania law requires the PUC in a siting docket to determine "that there is a need for it,"[20] and the Commonwealth Court found the PUC's action to be "in accordance with Pennsylvania laws." Still the court adopts the PJM approach, contending:

> 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.[21]

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18 16 U.S.C. § 824p(b)(4).

19 *Transource Decision* at 17 (J.A. 45)

20 *Id.* at 3 (J.A. 9).

21 *Id.*

Congress, in its exercise of Commerce Clause authority in the FPA, defined the siting process and included examining the need for the line in some detail. On its face, the district court's parsing of authority into planning and siting categories is clearly at odds not just with the Pennsylvania statute and the PA PUC's (along with many other State commissions') long-time practice, but also with Congress' explanation of what must be examined to site a transmission line. Assuming, *arguendo*, some form of conflict preemption is applicable in the circumstances below, FERC cannot claim conflict preemption as an excuse to harness the state's eminent domain authority.

Argument

I. Congress' explicit preemption in FPA § 216 does "diminish the existence of conflict preemption".

The explicit backstop siting provision in FPA § Section 216,[22] in tandem with the express reservation of state authority elsewhere in the statute, forestalls any finding of "conflict preemption." The court below argued that "Congress' explicit preemption in FPA 216 does not diminish the existence of conflict preemption." *Transource Decision* at 18 (J.A. 47).

The court was wrong.

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22 16 U.S.C. § 824p. (2021).

The *Transource Decision* outlines the background and changes to the FERC's backstop siting authority in FPA § 216. In § 216, the FPA provides a mechanism to allow FERC to grant a permit to develop a transmission project even if, as here, a state commission has denied the siting application. But there are very specific limitations on this exercise of authority. The most significant of these is that FERC has no authority to override a state decision not to site transmission facilities unless the proposed location lies within a National Interest Electric Transmission Corridor ("NIETC").

The *Transource Decision* contends Congress' limited grant of authority to FERC to preempt state siting in FPA § 216 "does not diminish the existence of conflict preemption."[23] It can only reach that conclusion by ignoring 89 years of state siting history (and related litigation where state actions impacted interstate transmission),[24] numerous and consistent statements by the expert agency charged with interpreting the FPA,[25] as well as the obvious implications of Section 216.

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[23] *Transource Decision* at 17–18 (J.A. 47).

[24] *See Defendant-Appellant Brief* at 46-49.

[25] *See, e.g., Transource Decision* at 18 (J.A. 47), conceding "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.")

A critical aspect of Congress' creation of FERC backstop siting authority in that section was to respect State authority as much as possible. After all, Congress *could have* assigned FERC *all* siting authority for interstate transmission lines in 2005 when it first created the constrained FPA § 216 DOE-FERC backstop authority,[26] or in 2021 when it expanded it.[27] Significantly, in both cases it made a specific choice not to do so. Rather, it chose to create a process that significantly constrains both where and how FERC can exercise its preemptive backstop authority.

A. Any logical reading of FPA § 216 confirms that the PUC was free to make its own independent finding of "need" based on state law.

The court's flawed and truncated analysis of **§** 216 is limited to two paragraphs:

> [T]he issue . . . is whether the PUC may rely on its siting authority to "*override a FERC-approved method for determining whether a line is <u>needed</u> to reduce interstate congestion*." (*Id.*) The court agrees with Transource . . .the issue relates to whether the PUC decision was an obstacle to achieving federal objectives.[28]

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[26] Section 1221. Siting of Interstate Electric Transmission Facilities, *The Energy Policy Act of 2005*, Pub. L. 109-58, 119 STAT. 594 at 947 (August 8, 2005).

[27] Section 40105. Siting of Interstate Electric Transmission facilities, *Infrastructure Investments and Jobs Act*, Pub. L. 117-58, 135 STAT. 429 at 934 (November 15, 2021).

[28] *Transource Decision* at 18 (J.A. 48) <u>{Emphasis added}</u>

The Court contends the PUC's decision was an obstacle to federal objectives because it conducted a broader, more rigorous, and updated determination of "need." In other words, the PUC conducted the typical State commission analysis of a transmission siting application.

According to the *Transource Decision*, regardless of the record evidence before it, the PUC was required to conclude, as PJM did – that the project was needed:

> to address the congestion in the APSRI. [] The Project, if built, would benefit parts of Virginia, Maryland, Washington, D.C., and Western Pennsylvania. [] Meanwhile, other regions which benefit from the current congestion would "no longer have the benefit of [the] lower-cost power." [29]

However, the *Transource Decision's* requirement to defer to the PJM determination is incompatible with the balance between State and federal siting authority that Congress struck in FPA § 216.

The cited PJM analysis of need falls squarely within § 216's text. Section 216 requires that a State located in a DOE-specified transmission corridor consider "the interstate benefits or interregional benefits expected to be achieved by the proposed construction or modification of transmission

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[29] *Transource Decision* at 4 (J.A. 13) {Emphasis added and internal citations omitted}

facilities in the State."[30] Section 216 specifies that a state that does NOT consider those interregional benefits because of its interpretation of state law – as the Court incorrectly concludes the PUC did here - can be preempted by the FERC though the backstop procedure.[31] But FERC can only preempt a state that does not examine those issues if the transmission project is located in a NIETC.

Here it is not so located.

The logical and obvious conclusion?

Congress *expected* that there would be state siting decisions that, under state law, might not adequately consider "interregional benefits" as part of their siting determination. However, it still explicitly did not give FERC backstop siting authority in all such situations. Rather, the clear statutory text

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30 16 U.S.C. § 824p(b)(1)(A)(ii) (2021).

31 Section 824p (b)(1)(A) allows FERC to site plants in DOE designated national corridors - where the state "lacks authority" to consider interregional benefits. The Court and Appellants effectively argue that the PUC did not consider those interregional benefits. *See, e.g., Transource Decision* at 24 (J.A. 63) concluding the "PUC's own words make clear that it was focused on protecting the interests of Pennsylvanians" over regional interests. If they are correct, given the State court concluded the PUC did comply with state law, (J.A. 392) one logical conclusion is that the state does not have the authority needed to properly consider such "interregional benefits."

indicates that if that state action occurred outside of a NIETC, FERC cannot preempt.

The district court's decision necessarily would allow FERC to somehow "delegate" authority to a private entity, in this case PJM, to do something Congress specified FERC cannot do itself: preempt a key part of the States' decision to deny the siting application where the targeted transmission project is not located in a NIETC.

According to the *Transource Decision*, the PUC may not "undercut" PJM's planning and may not "pose obstacles to FERC's pursuit of reducing congestion." [32]

Again, § 216 indicates that is exactly what states, like Pennsylvania, may do in their siting decisions for infrastructure located outside a national interest corridor.

They can deny the application. They can find that their legislature did not give them the authority to consider interregional benefits. They can condition the application such that "the proposed construction or modification will NOT significantly reduce transmission capacity constraints or congestion in interstate commerce."[33] These are all elements, according to the

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[32] *Transource Decision* at 17 (J.A. 45)

(Footnote Continued on Next Page)

Transource Decision's rationale, that are "obstacle[s] to FERC achieving its goals of reducing congestion and achieving just and reasonable rates."

But Congress provided no authority for FERC to preempt those state decisions to deny or condition a siting application unless they are in a NIETC. The *Transource Decision* finding that such state actions conflict with federal law cannot be squared with this statutory text.

Examination of other provisions in § 216 raise similar but duplicative Congressional refutations of the *Transource Decision's* rationale. For example, the prerequisite for FERC back stop siting authority is the Department of Energy ("DOE") making on-the-record findings that a geographic area is experiencing or expected to experience "electric energy transmission capacity constraints or congestion that adversely affects consumers"[34]

This provision necessarily means that DOE is limiting areas where FERC can preempt a state's denial of, or inaction upon, a siting request because of "transmission congestion" that adversely affects consumers. Transmission congestion identified in the PJM planning process resulted in this lawsuit. To be clear, if the Transource transmission project were located

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33 *Id.* {Emphasis added}

34 16 U.S.C. § 824p(a)(2)(i–ii) (2021) .

in a designated corridor, FERC could directly preempt the PUC's decision to deny the application because of the congestion cited in the PJM planning process.[35] But it is not located in a transmission corridor – so FERC cannot circumvent the statute to preempt by delegating findings of congestion to a private party in a constrained setting.

In a separate provision of Section 216, after DOE designates corridors, Congress specifies another duplicative basis for allowing FERC to permit facilities inside that corridor: a specific FERC finding that: **"**the proposed construction or modification will significantly reduce transmission congestion in interstate commerce and protect[] or benefit[] consumers."[36] This specific FERC finding is required after DOE has found congestion concerns are likely. That is, again, in essence what PJM determined in this case: that the proposed construction will significantly reduce transmission congestion "in the APSRI" and will "benefit consumers" in "parts of Virginia, Maryland, Washington, D.C., and Western Pennsylvania."

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[35] This assumes the congestion finding is supported by current record evidence and that FERC makes a similar congestion (or constraint) finding after the State proceeding has concluded.

[36] 16 U.S.C. § 824p(b) (4) (2021). Note this text tracks the § 216 text directing DOE to determine NIETCs.

The *Transource Decision* essentially argues that FERC can, by approving a "planning process," allow PJM to do what Congress said FERC cannot: preempt a state siting decision when the project is NOT located in a DOE designated corridor. Make no mistake – if the PUC's "need" finding is reversed, vacated, or deemed to be prohibited by the PJM analysis, the PUC will be forced to approve projects that could otherwise have been denied for not meeting state standards specified for siting infrastructure under Pennsylvania (and other states') laws. That in turn means, FERC can – by approving a planning process chosen by any transmission provider - effectively bypass Congress to preempt state siting authority in areas outside DOE designated corridors.

B. A logical reading of Section 216 rebuts the Court's finding that "the PUC's decision was not an exercise of "siting" authority." [37]

The court spends over twenty paragraphs setting up PJM's theory that there are federally mandated differences between "siting" and "planning authority." At the same time, the court highlights, as part of that discussion, the many reasons why the PUC's broader examination of need is necessary to protect the due process and property rights of others in the state (including

[37] *Transource Decision* at 18-21 (J.A. 48-57) {Emphasis added}

those that do not have the opportunity to participate in the PJM planning process) where the project is to be sited:

> [T]he PUC's decision [is] 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, [the PUC] point[s] 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."[38]

Then the court explains:

> 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.[39]

That particular sentence is a bit of a conundrum.

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38 *Transource Decision* at p. 21 (J.A. 52) {Emphasis added}

39 *Id.*

Part of siting any infrastructure project at the state or federal level necessarily includes some discussion of whether the project is needed or otherwise "in the public interest." Indeed, earlier in the opinion, the district court concedes that the PA PUC's siting procedure – at least as outlined by state law - requires a determination "that there is a need for it." [40]

Nevertheless, the lower court found that "Defendants have failed to show that the PUC decision [on need] was a valid exercise of its siting authority"[41] - a finding that conflicts directly with the Pennsylvania Commonwealth Court's view of Pennsylvania law. As *Defendant-Appellants* note in their brief, at 18: "The Commonwealth Court affirmed the PUC's siting decision because it 'was in accordance with Pennsylvania laws' . . .(JA 756)."

In passing, the court dismisses the PUC's arguments claiming:

> 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." . . . But the PUC's denial was not related to the particular place of the Project.[42]

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40 *Id.* at p. 3 (J.A. 9).

41 *Id.* at 21 (J.A. 57) {Emphasis added}

42 *Id* at 21 (J.A. 56-57)

The courts analysis ignores the PUC statutory requirements for an analysis of "need" and does not explore similar requirements in other state siting statutes. Instead, the court relied, at least in part, on an Oxford English Dictionary definition of the word "site." NARUC respectfully suggests it might be useful to see how Congress, in its exercise of Commerce Clause authority in the FPA, defined the siting process.

As referenced in the preceding discussion, in 16 U.S.C. § 824p, which is titled "Siting of Interstate Electric Transmission facilities," Congress specified its view that siting involves examining the need for the line in some detail. More specifically, in using its narrow authority to site transmission facilities, FERC is required to consider, among other things, the following:

(1) *"interstate benefits or interregional benefits expected to be achieved by the proposed construction or modification of transmission facilities in the State,"* 16 U.S.C. § 824p(b)(A)(ii);

(2) *whether the "applicant does not serve end-use customers in the State;* 16 U.S.C. § 824p(b)(1)(B);

(3) *whether "the proposed construction or modification will not significantly reduce transmission capacity constraints or congestion in interstate commerce or is not economically feasible,"* 16 U.S.C. § 824p(b)(1)(C)(ii);

(4) *whether "the proposed construction or modification is consistent with the public interest,"*16 U.S.C. § 824p(b)(3); *and*

(5) *whether "the proposed construction or modification will significantly reduce transmission congestion in interstate*

> *commerce and protects or benefits consumers."* 16 U.S.C. § 824p(b)(4).

On its face, the District Court's parsing of authority into planning and siting categories is clearly at odds not just with the Pennsylvania statute and the PA PUC's (along with many other State commissions') long-time practice, but also with Congress' explanation of what must be examined to site a transmission line. The requirements imposed by Congress on DOE and FERC can both be fairly characterized as parts of a record determination that the project is needed and/or necessary in the public interest.

Congress in this section, makes clear its view that the act of siting electric transmission lines requires the examination and likely re-examination of the question of "need." The district court's narrow dictionary-constrained analysis of the word "siting" is inapposite in the complex context of electric utility regulation.

C. Section 216 is the only source of FERC eminent domain power.

Exercises of eminent domain require a separate but also extensive analysis of need. FERC does have the authority to permit and site natural gas pipelines.[43] However, outside of a NIETC, FERC has zero authority to grant

[43] 15 U.S.C. § 717f (2006).

construction permits and eminent domain to electric transmission lines.[44] The contrast in FERC statutory grants for electricity and the Congressional grants to the agency in the Natural Gas Act highlights that disparity.[45] Assuming, *arguendo*, some form of conflict preemption is applicable in the circumstances below, FERC cannot claim conflict preemption as an excuse to harness the state's eminent domain authority.

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[44] 16 U.S.C. § 824f (1935).

[45] Compare, *Kentucky Utilities Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985) ("It is, of course, well settled that the comparable provisions of the Natural Gas Act and the Federal Power Act are to be construed in *pari materia*.")

CONCLUSION

The *Transource Decision* ignores history, repeated statements by the expert agency charged with implementing the controlling statute, and explicit congressional text to effectively vacate a State's denial of an application to site infrastructure. The only coherent application of law and precedent is to grant the relief sought by *Defendants-Appellants* and reverse the decision below.

Respectfully submitted,

/s/ James Bradford Ramsay

James Bradford Ramsay
GENERAL COUNSEL

National Association of Regulatory Utility Commissioners
1101 Vermont Avenue NW, Suite 200
Washington, DC 20005
Phone: 202.898.2207
jramsay@naruc.org

Attorneys for Amicus National Association of Regulatory Utility Commissioners Supporting Defendants-Appellants

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(5) in that this brief contains (5044) words. In making this certification, counsel has relied on the word count function of Microsoft Word, the word processing system used to prepare this brief.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in 14 pt. font Times New Roman type style.

/s/ James Bradford Ramsay

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James Bradford Ramsay
GENERAL COUNSEL
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
1101 VERMONT AVE., N.W., SUITE 200
WASHINGTON, D.C. 20005
TEL: (202) 898-2207
FAX: (202) 384-1554
E-MAIL: JRAMSAY@NARUC.ORG

Dated: May 17, 2024

CERTIFICATE OF SERVICE

I hereby certify that the electronic original of the foregoing Amicus Curiae Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Third Circuit on this 17th day of May, 2024 through the CM/ECF electronic filing system, and thus also served on counsel of record.

/s/ James Bradford Ramsay

James Bradford Ramsay
GENERAL COUNSEL
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
1101 VERMONT AVE., N.W., SUITE 200
WASHINGTON, D.C. 20005
TEL: (202) 898-2207
FAX: (202) 384-1554
E-MAIL: JRAMSAY@NARUC.ORG

Dated: May 17, 2024