

  
**Curtin & Heefner** LLP  
ATTORNEYS AT LAW

2005 S. EASTON ROAD • SUITE 100 • DOYLESTOWN, PA 18901  
(267) 898.0570 • (800) 773.0680 • FAX (215) 340.3929  
WWW.CURTINHEEFNER.COM

CELEBRATING OVER 80 YEARS

JOANNA A. WALDRON  
JAW@curtinheefner.com

December 13, 2018

**Via Electronic Filing**

Rosemary Chiavetta, Secretary  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: Application of Transource Pennsylvania, LLC Filed Pursuant to 52 Pa. Code Chapter 57 Subchapter G, for Approval of the Siting and Construction of the 230kV Project in Portions of Franklin County, Pennsylvania  
Docket No. A-2017-2640200**

**Application of Transource Pennsylvania, LLC filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the 230kV Transmission Line Associated with the Independence Energy Connection-East Project in Portions of York County, Pennsylvania  
Docket No. A-2017-2640195**

Dear Secretary Chiavetta:

Attached for filing is a Motion of Stop Transource Franklin County to Amend the Procedural Schedule and to Strike Certain Testimony to be filed in the above-referenced matter. Thank you.

CURTIN & HEEFNER LLP



BY: \_\_\_\_\_

Joanna A. Waldron, Esq.  
*Counsel for Stop Transource Franklin County*

cc: Per Certificate of Service

**BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Transource Pennsylvania, LLC  
for approval of the Siting and Construction of the  
230 kV Transmission Line Associated with the  
Independence Energy Connection - East and West Projects  
in portions of York and Franklin Counties, Pennsylvania. A-2017-2640195  
A-2017-2640200

Petition of Transource Pennsylvania, LLC  
for a finding that a building to shelter control equipment  
at the Rice Substation in Franklin County, Pennsylvania  
is reasonably necessary for the convenience or welfare of the public. P-2018-3001878

Petition of Transource Pennsylvania, LLC  
for a finding that a building to shelter control equipment  
at the Furnace Run Substation in York County, Pennsylvania  
is reasonably necessary for the convenience or welfare of the public. P-2018-3001883

Application of Transource Pennsylvania, LLC  
for approval to acquire a certain portion of the lands of  
various landowners in York and Franklin Counties, Pennsylvania  
for the siting and construction of the 230 kV Transmission Line  
associated with the Independence Energy Connection –  
East and West Projects as necessary or proper for the service,  
accommodation, convenience or safety of the public. A-2018-3001881,  
*et al.*

**MOTION OF STOP TRANSOURCE FRANKLIN COUNTY TO AMEND THE  
PROCEDURAL SCHEDULE AND TO STRIKE CERTAIN TESTIMONY**

Stop Transource Franklin County (“STFC”), by and through its attorneys, respectfully  
files this Motion to Amend the Procedural Schedule in the above-referenced Applications of  
Transource Pennsylvania, LLC (“Transource”) and related proceedings, by an additional 150  
days to allow STFC sufficient opportunity to conduct discovery and respond to the direct  
testimony offered as Rebuttal Testimony on November 27, 2018, and to strike the improper legal

opinion Rebuttal Testimony of former Commissioner James H. Cawley offered in Transource Statement 9-R.

The Commission's regulations prohibit the introduction of rebuttal testimony that should have been included in a party's case-in-chief, and rebuttal testimony that substantially varies from the case-in-chief. Given Transource's substantial violations of this prohibition, STFC requests, at a minimum, that the procedural schedule be amended to provide additional time. Additional time is necessary to avoid violating the due process of the parties, including STFC. As discussed below, Transource: a) raised several completely new issues on the alleged need and benefits of the IEC Project, including newly-identified reliability violations, which should have been provided as direct; b) offered a legal opinion of James Cawley that should be stricken; and c) extended voluntarily the in-service date of the IEC Project, affirming that an extension will not prejudice Transource.

## **I. BACKGROUND**

On December 27, 2017, Transource Pennsylvania, LLC ("Transource") filed two Applications for siting electric transmission lines, one proposed line for Franklin County, which is the subject of Transource's Application filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the 230 kV Transmission Line Associated with the Independence Energy Connection West Project in Portions of Franklin County, Pennsylvania, docketed at A-2018-2640200 and one proposed line in York County, which is the subject of the Application filed Pursuant to 52 Pa. Code Chapter 57, Subchapter G, for Approval of the Siting and Construction of the 230 kV Transmission Line Associated with the Independence Energy Connection East Project in Portions of York County, Pennsylvania,

docketed at A-2018-2640195 (hereinafter, collectively, “Siting Applications”). Transource filed six (6) witness statements in its case-in-chief to support its Applications.

On May 15, 2018, Transource Pennsylvania, LLC (“Transource” or “Company”) filed 133 eminent domain applications (“Eminent Domain Applications”), and two Petitions for findings that building to shelter control equipment at the proposed Rice Substation in Franklin County (Docket No. 2018-3001878, hereinafter “Franklin County Shelter Petition”), and for the Furnace Run Substation in York County (Docket No. 2018-3001883, hereinafter “York County Shelter Petition”) (collectively, “Shelter Petitions”). Prior to Transource filing its Siting Applications, on December 23, 2017, the Commission approved a settlement of Transource’s application for certification under Docket Nos. A-2017-2587821 and G-2017-2587822, recognizing that Transource was “a new type of entity in this Commonwealth” that was formed solely to carry out a particular market efficiency project.

Eight public hearings were held in Franklin and York Counties in May of 2018. After Transource filed the late-added eminent domain applications, Administrative Law Judges Barnes and Calvelli issued a Third Procedural Order dated June 26, 2018, which permitted additional public input hearings in September of 2018 in Franklin and York Counties, and extended the due date for Direct Testimony to September 25, 2018. After all of the public input hearing were conducted, and the other parties’ Direct Testimony was served, Transource filed its Rebuttal Testimony, which consisted of sixteen (16) statements. Transource’s statements include those that introduce completely new support for its Applications, as well as the improper legal opinion of Mr. Cawley.

## II. LEGAL STANDARDS

Under the Commission's regulations, an extension of time can be granted for good cause upon written motion to the presiding officer. 52 Pa. Code § 1.15(b). Under 52 Pa Code § 5.483, the presiding officer has "the power to exclude irrelevant, immaterial or unduly repetitive evidence...to schedule...and to otherwise regulate the course of the proceeding." 52 Pa. Code § 5.483. Further, under the Commission's regulations, a party is prohibited from introducing evidence at the rebuttal phase that "should have been included in the party's case-in-chief" and that "substantially varies from the party's case-in-chief." 52 Pa. Code § 5.243(e). *See also, City of Lancaster (Sewer Fund) v. Pa. P.U.C.*, 793 A.2d 978 (Commw. Ct. 2005) (rejecting direct evidence of a wage increase proffered in the rebuttal phase, and remanding the case for further proceedings).

Transource is permitted to amend its application with new direct testimony only if "every party, utility, agency or municipality affected by the amendment is given reasonable notice thereof and an opportunity to present evidence with respect to the amendment." 52 Pa. Code 57.75(f).

It is black-letter law that experts may not give legal opinions. The Pennsylvania Rules of Evidence speak of experts aiding the *trier of fact* in understanding the evidence or determining *a fact* in issue, not advocating. Pa.R Ev. 702. Legal opinions by definition do not aid in making findings of fact. *See Rhodes v. DEP*, 2009 EHB at 239. Similarly, Rule 703 speaks about the need to use *facts* and *data* as a basis for expert opinion. Pa.R.Ev. 703.

## III. LEGAL ARGUMENT

The procedural schedule must be amended to permit additional discovery, or, in the alternative, Transource's Rebuttal Testimony, must be stricken. Transource waited until after the

public input hearings, and after the due date for the Direct Testimony by the Intervenors, precluding the parties from conducting discovery. Transource has indicated no reason why this information on reliability and benefits could not be provided on direct. STFC must be afforded adequate time to conduct discovery, review discovery responses, and prepare any Surrebuttal Testimony. The volume of Transource’s “Rebuttal” Testimony itself—over 300 pages of testimony—suggests that use of the existing procedural schedule is too short. The nature of the “Rebuttal” Testimony, however, confirms that the current procedural schedule is inadequate. The parties require additional time to conduct discovery and present evidence on the sixteen “rebuttal” statements Transource served November 27, 2018. As evidenced by volume of opposition to the IEC project, the impact of this project is potentially catastrophic to the citizens and lands of Franklin County. The potential impact of this proceeding demands that the Commission afford the highest level of due process to the public while balancing the need to expeditiously resolve the proceedings.

**A. Transource Introduces New Testimony on the Need, Costs and Benefits of the IEC Project**

Transource offers Rebuttal Testimony that contains evidence that should have been provided as Direct Testimony. Further, Transource offers no reason why the information was not provided until now, well after the public input hearing and well after other parties’ Direct Statements were required. Accordingly, additional time is required to probe those statements through discovery and to present evidence; in the alternative, the testimony should be stricken.<sup>1</sup>

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<sup>1</sup> In the interest of expeditiously resolving the proceeding, and recognition of the Motions for Extensions of the Schedule filed by the Citizens to Stop Transource and the Office of Consumer Advocate, STFC suggests amending the procedural schedule by a minimum of 150 days to allow adequate time address the testimony, rather than moving to require that Transource file an amended application. In the alternative, STFC moves to strike the offending testimony. Furthermore, STFC reserves the right to move to strike additional portions of testimony as necessary.

Transource offers two statements by PJM employees, Mr. Herling and Mr. Horger, both of which introduce reliability violations as the basis for the “need” of the project, as well as the Rebuttal Testimony of Mr. Ali, who now asserts for the first time that the IEC Project would remove “specific reliability violations” and addresses “local reliability needs.” Ali, Transource Statement 2-R at p. 2-3. Further, the rebuttal statements of Judy Chang, and the Statement of Stephen Stein introduce new benefits that should have been set forth in Transource’s case in chief.

No party has had any opportunity to address newly-identified reliability concerns as a basis for need. Mr. Herling repeatedly refers to the “stakeholder process” and the “opportunity to participate” in PJM planning. *See, e.g.*, Herling Transource Statement, 7-R, at pp. 8, 14. However, the general public, and many members of STFC do not have the opportunity to participate with PJM. STFC is entitled to a “reasonable notice and opportunity to present evidence” about the reliability needs. Further, no experts have had a chance to analyze the newly-identified reliability violations that allegedly will occur if the IEC Project is not constructed.

Transource introduced Rebuttal Testimony that should have been introduced as direct testimony. The Commission should preclude testimony an applicant overlooked in filing its direct case, and should prohibit its insertion on rebuttal, to avoid “trial by ambush.” *See Pa. P.U.C. v. UGI Util., (Elec. Div.)*, 1994 WL 843074 (Docket No. R-00932862).<sup>2</sup> Transource has improperly attempted to “shore up inadequate direct at the rebuttal phase of this case.”

Ms. Chang’s statement, Transource Statement 10-R, discusses “several benefits of the IEC Project that are not considered in PJM’s estimate of the benefits from the Project.” Chang,

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<sup>2</sup> STFC reserves the right to move to strike testimony.

Transource Statement 10-R at 3. The statement offers no reason why the benefits discussed were not offered on direct.

Mr. Stein is the Director of Transmission Projects for American Electric Power, and provided testimony on “the cost, construction and schedule for the IEC project.” Transource Statement No. 11-R at 1. Mr. Stein did not previously offer testimony in this proceeding. Mr. Stein *Id.* Mr. Stein could have offered testimony on direct about the reevaluation and cost updates that were certainly anticipated (albeit not completed) at the time the Application was filed. Likewise, the reliability benefits should have been anticipated, if not identified, before the Rebuttal Testimony.

Mr. Herling repeatedly maintains that the IEC Project has reliability benefits, and that PJM knew and anticipated that it would provide reliability benefit. Nevertheless, Transource failed to raise this issue on direct. Mr. Herling is “responsible for overseeing the RTEP process....including both reliability criteria and market efficiency analysis.” Transource Statement No. 7-R at P. 5. Mr. Herling states that “trends that drive congestion, if continued, often result in reliability criteria violations, which is the case in this instance.” Mr. Herling’s statement confirms that PJM recognized well before the November 2018 Rebuttal Statements by Transource that the IEC Project would have reliability benefits.

If Transource is permitted to raise new issues and provide direct testimony as rebuttal, the parties need additional time on the procedural schedule to conduct discovery related to the reliability and benefits issues, which directly impact the question of the need for this project. In the alternative, the opinions of Ms. Chang, Mr. Herling, Mr. Herzog, and Mr. Stein, should be stricken to the extent that they are introducing testimony that is properly characterized as Direct.



**B. The Expert Testimony of James Cawley Must be Stricken As An Improper Legal Opinion**

Transource offers Statement 9-R, the testimony of James H. Cawley, practicing attorney and former Commissioner. Mr. Cawley offers his opinion on two subjects: “PJM’s expertise in transmission planning” and “the importance of regional planning regard less of whether Pennsylvania benefits from a particular project or whether the project is designed to increase reliability or reduce congestion constraints.” 9-R at p.2. Much of Attorney Cawley’s background experience is based on his service as *counsel* to the Pennsylvania Senate Committee. When not serving on the Commission, Mr. Cawley was and is a practicing attorney in a law firm. He also served on the Board of Directors of several utilities, but does not reference that experience in any way in his testimony.

First, Mr. Cawley’s testimony offers conclusions of law including Mr. Cawley’s opinion on statutory construction of the Public Utility Code. The Commonwealth Court, in reviewing testimony on statutory construction provided by an attorney, noted that “It is well-settled that an expert is not permitted to give an opinion on a question of law. MCCORMICK ON EVIDENCE 12 at 62 (6<sup>th</sup> Ed. 2006). This means that an expert witness may not be offered to testify ‘as to the governing law’ or ‘what the law required.’” *Waters v. State Employees Ret. Bd.*, 955 A.2d 466, 471 n. 7 (Pa. Commw. Ct. 2008) (*citations omitted*).

Second, Mr. Cawley’s testimony on the Public Utility Code is irrelevant. Relevant and material evidence is admissible. 52 Pa. Code § 5.401. Evidence is “relevant” when it tends to make the existent of a fact more or less probably than it would be without the evidence. see F.R.E. 401. Irrelevant evidence should be excluded from this proceeding under 52 Pa. Code § 5.483. Further, this Commission “cannot be bound by the remarks or understanding of an

individual representative when endeavoring to ascertain legislative intent.” *Hoffman v. Penna. Crime Victim’s Compensation Bd.*, 405 A.2d 1110 n 2 (Pa. Commw. Ct. 1979).

Neither the Administrative Law Judges, nor the Commission need Mr. Cawley’s legal opinion to understand the Public Utility Code, or to understand basic rules of statutory interpretation. Transource is attempting to substitute Mr. Cawley’s legal opinions for those Administrative Law Judge’s and the current Commission’s own determination. It is evident in reviewing Mr. Cawley’s testimony on pages 8 – 15 that the testimony reads like a legal brief, with discussion and citation of prior Commission decisions and proposed statutory interpretation. Such testimony does not qualify as proper expert testimony. The statement primarily consists of Mr. Cawley’s opinions on questions of law, which are excluded under the Rules of Evidence. Mr. Cawley’s advocacy for regional planning, and his interpretation of statutory authority does not aid the Administrative Law Judges in evaluating this Application, and therefore should be stricken.

**C. Transource Will Not Be Prejudiced By An Extension of the Procedural Schedule**

Transource had the option to include additional direct testimony, such as the testimony of Ms. Chang, as Direct Testimony, well before it served its November 27, 2018 Rebuttal Testimony. Transource voluntarily extended the in-service date of the IEC Project by five (5) months, or approximately 150 days, to November 2020, pursuant to Mr. Stein’s testimony. Further, the proceedings before the Maryland Service Commission, are on track to conclude well after the Pennsylvania hearings currently scheduled for February and March 2019. Extending the schedule to accommodate discovery and necessary statements to address new direct testimony will not prejudice Transource.

**III. CONCLUSION**

For all the foregoing reasons, STFC respectfully that requests that STFC's Motion to Amend the Procedural Schedule, or in the Alternative to Strike All Inappropriate Rebuttal Testimony, and to Strike the Statement of James H. Cawley be granted.

CURTIN & HEEFNER LLP



By: \_\_\_\_\_  
Jordan B. Yeager (Pa. I.D. No. 72947)  
Mark L. Freed (Pa. I.D. No.63860)  
Joanna A. Waldron (Pa. I.D. No. 84768)  
2005 South Easton Road, Suite 100  
Doylestown, PA 18901

Dated: December 13, 2018

## CERTIFICATE OF SERVICE

### Consolidated Docket Nos. A-2017-2640200 and A-2017-2640195

I hereby certify that a true and correct copy of the Motion of Stop Transource Franklin County to Amend the Procedural Schedule and to Strike Certain Testimony has been served upon the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a participant).

### VIA E-MAIL & FIRST CLASS MAIL

Honorable Elizabeth Barnes  
Honorable Andrew M. Calvelli  
Administrative Law Judges  
PA Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265  
[ebarnes@pa.gov](mailto:ebarnes@pa.gov)  
[acalvelli@pa.gov](mailto:acalvelli@pa.gov)

Teresa K. Harrold, Esquire  
Tori L. Giesler, Esquire  
FirstEnergy Service Company  
2800 Pottsville Pike, PO Box 16001  
Reading, PA 19612-600  
*Mid-Atlantic Interstate Transmission  
& West Penn Power Company*  
[tharrold@firstenergycorp.com](mailto:tharrold@firstenergycorp.com)

Darryl A. Lawrence, Esq.  
Philip David Demanchick, Jr., Esq.  
David T. Evrard, Esquire  
Dianne E. Dusman, Esquire  
Office of Consumer Advocate  
555 Walnut Street, Forum Place 5<sup>th</sup> Floor  
Harrisburg, PA 17101-1923  
[dlawrence@paoca.org](mailto:dlawrence@paoca.org)  
[PDemanchick@paoca.org](mailto:PDemanchick@paoca.org)  
[devrard@paoca.org](mailto:devrard@paoca.org)  
[DDusman@paoca.org](mailto:DDusman@paoca.org)  
[Transource@paoca.org](mailto:Transource@paoca.org)

Kimberly A. Klock, Esquire  
Michael J. Shafer, Esquire  
PPL Services Corporation  
Two North Ninth Street  
Allentown, PA 18101  
*PPL Electric Utilities Corporation*  
[kklock@pplweb.com](mailto:kklock@pplweb.com)  
[mshafer@pplweb.com](mailto:mshafer@pplweb.com)

Romulo L. Diaz, Jr., Esquire  
Jack R. Garfinkle, Esquire  
Jennedy S. Johnson, Esquire  
PECO Energy Company  
2301 Market Street  
Philadelphia, PA 19103  
*PECO*  
[Romulo.diaz@exeloncorp.com](mailto:Romulo.diaz@exeloncorp.com)  
[jack.garfinkle@exeloncorp.com](mailto:jack.garfinkle@exeloncorp.com)  
[jennedy.johnson@exeloncorp.com](mailto:jennedy.johnson@exeloncorp.com)

Thomas J. Sniscak, Esquire  
Kevin J. McKeon, Esquire  
Whitney E. Snyder, Esquire  
100 North Tenth Street  
Harrisburg, PA 17101  
*York County Planning Commission*  
[TJSniscak@hmslegal.com](mailto:TJSniscak@hmslegal.com)  
[kjmckeon@hmslegal.com](mailto:kjmckeon@hmslegal.com)  
[wesnyder@hmslegal.com](mailto:wesnyder@hmslegal.com)

Sharon E. Webb, Esquire  
Office of Small Business Advocate  
300 North Second Street, Suite 202  
Harrisburg, PA 17101  
[swebb@pa.gov](mailto:swebb@pa.gov)

Karen O. Moury, Esquire  
Eckert Seamans Cherin & Mellot, LLC  
213 Market Street, 8<sup>th</sup> Floor  
Harrisburg, PA 17101  
*Citizens to Stop Transource*  
[kmoury@eckertseamans.com](mailto:kmoury@eckertseamans.com)

Anthony D. Kanagy, Esq.  
Lindsay A. Berkstresser, Esq.  
David MacGregor, Esq.  
Post & Schell PC  
17 North Second Street, 12<sup>th</sup> Floor  
Harrisburg, PA 17101-1601  
*Transource Pennsylvania LLC*  
[akanagy@postschell.com](mailto:akanagy@postschell.com)  
[LBerkstresser@PostSchell.com](mailto:LBerkstresser@PostSchell.com)  
[dmacgregor@postschell.com](mailto:dmacgregor@postschell.com)

Amanda Riggs Conner, Esquire  
Hector Garcia, Esquire  
American Electric Power Service Corp  
1 Riverside Plaza  
29th Floor  
Columbus, OH 43215  
*Transource PA, LLC*  
[arconner@aep.com](mailto:arconner@aep.com)  
[hgarcial@aep.com](mailto:hgarcial@aep.com)

Linus E. Fenicle, Esquire  
Reager & Adler PC  
2331 Market St.  
Camp Hill, PA 17011  
*Quincy Township*  
[lfenicle@reageradlerpc.com](mailto:lfenicle@reageradlerpc.com)

Jan & Georgiana Horst  
826 New Franklin Road  
Chambersburg, PA 17202

Curtin & Heefner LLP



By: \_\_\_\_\_  
JOANNA A. WALDRON

Date: 12/13/18