

**PENNSYLVANIA PUBLIC UTILITY COMMISSION
HARRISBURG PENNSYLVANIA 17120**

**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**

**Public Meeting held February 28, 2019
2640195-OSA
Docket Nos. A-2017-2651195, A-2017-
2650200, P-2018-3001878
P-2018-3001883, A-2018-3001881, et al.**

MOTION OF VICE CHAIRMAN DAVID W. SWEET

Before the Commission is a Petition for Interlocutory Review and Answer to a Material Question (Petition) filed on February 1, 2019 by Transource Pennsylvania LLC (Transource). Transource filed a brief in support of its Petition, and briefs in opposition were filed by the Office of Consumer Advocate (OCA), Citizens to Stop Transource, York County (CSTY), and Stop Transource Franklin County (STFC).

The questions presented are:

1. Whether the Administrative Law Judges (ALJs) erred by striking Transource PA's rebuttal testimony regarding the Project's reliability benefits, thereby violating 66 Pa. C.S. § 332(c) and denying Transource PA due process of law?
2. Whether the ALJs' error unreasonably prevents the development of a full and complete record and denies the PUC access to the most recent available information in determining the need for this transmission line project?

First, I want to be very clear that interlocutory review of evidentiary rulings of ALJs is frowned upon and will not be entertained without providing extraordinary reasons. Rarely will there be a valid reason to interrupt the normal progress of a litigated case because a party is unhappy with a routine evidentiary ruling. However, there are exceptions to this rule. In this instance, in the interest of a full and complete record for Commission review, I will move that the Commission answer these questions.

Here, the Transource applications are to construct two 230 kV transmission lines through portions of Franklin and York Counties. The Project was approved by PJM to alleviate transmission congestion constraints in Pennsylvania, Maryland, West Virginia, and Virginia, primarily relating to market efficiency with ancillary reliability benefits. Transource's direct testimony is in support of the Project's purpose as stated, and the opposition to these Applications is also based on this claim. Transource indicated early on in the process that the Project's evaluation would likely be updated by PJM during the litigation, and the ALJs encouraged Transource to update the cost/benefit ratio and environmental studies reports through its rebuttal testimony in November, and indicated that the intervenors would be afforded an opportunity to address this evidence in their surrebuttal testimonies.¹

¹ Fourth Prehearing Order (July 30, 2018) at 13.

In PJM's September 2018 Transmission Expansion Advisory Committee (TEAC) evaluation, for the first time, specific reliability violations were identified that could be addressed by the Transource Project. Transource raised these in its Rebuttal testimony in November, and both CSTY and STFC sought and were granted an extension of the procedural schedule to address the rebuttal. STFC also asked that the Transource testimony regarding reliability be stricken as it introduced new evidence in the form of a new basis for the Project that had not been raised in the direct testimony.

In their Sixth Prehearing Order,² the ALJs granted the motion to strike testimony which should have been included in direct testimony but did not identify specific statements. STFC filed another motion which asked the ALJs to specify which statements had been stricken, and the Seventh Prehearing Order granted that motion.³ This Petition followed on February 1, 2019.

The first argument to be addressed is whether Transource filed the Petition timely, as the opposing parties argue that the Petition should have been filed in response to the Sixth Prehearing Order, not the Seventh. However, the parties were not clear on exactly which statements had been stricken until the issuance of the Seventh Prehearing Order on January 24, 2019, and the Petition was filed on February 1, 2019, well within the 15-day requirement of the Commission's regulations.⁴

Next, the analysis turns to whether the Petition raises compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings.⁵ In other words, there must be allegations of why the alleged error could not be rectified during the normal course of the Commission review process. If necessary, then the Commission may take one of four actions: (1) continue, revoke or grant a stay of the proceedings, if necessary; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or (4) answer the question.⁶

Transource presents the following as compelling reasons:

- (1) Its rebuttal testimony was based on reliability violations that occurred subsequent to the filing of the original application;
- (2) The rebuttal testimony was related to its direct testimony on the same subject;
- (3) The rebuttal testimony was responsive to assertions by other parties' testimony that the Project had no reliability benefits; and
- (4) The other parties have had sufficient time to seek additional discovery regarding the potential reliability violations which will be resolved by the Project.⁷

Transource also points out that the interlocutory review and reversal of the ALJs' ruling regarding reliability benefits is necessary so that the Commission's review of the underlying Siting Applications is based upon a factually accurate and complete record, which requires the most up-to-date information related to the overall benefits of the project. It also claims that a Commission ruling is necessary to expedite the proceeding to prevent the substantial delay

² January 11, 2019.

³ January 24, 2019.

⁴ 52 Pa. Code § 5.572(c).

⁵ 52 Pa. Code § 5.302(a).

⁶ 52 Pa. Code § 5.303(a)(1)-(4).

⁷ Petition at 2-3.

caused by the need for remand if the error is not immediately corrected. Transource further claims that this delay could be “irreparable,” by jeopardizing Transource’s contractual obligations regarding the Project’s in-service date and by delaying the benefits to customers.⁸

The OCA argues that Commission intervention here would violate the intervenors’ procedural due process rights because they would not have time to respond to new testimony concerning alleged potential future reliability violations.⁹ CSTY points out that Transource’s ability to fulfill contractual obligations is not an appropriate reason for the Commission to grant this Petition, and echoes the concerns for due process set forth by OCA.¹⁰ STFC argues that Transource’s desire to avoid the delay of remand is not a compelling reason within the meaning of the law to grant this Petition and argues further that the ALJs’ ruling was correct. Finally, STFC reinforces the due process arguments made by the other two parties opposing this Petition.¹¹

As mentioned earlier, as a general rule, review and reversal of an evidentiary ruling of ALJs is disfavored, and there must be some actual harm that results from the ruling, not simply the correctness of the ruling itself. In fact, if this were any case other a transmission line siting case, which by its very nature relies upon the findings of PJM, a different result here would be likely.

But PJM plays an important role here, and its own transmission planning evaluations are subject to periodic change. It is critical that the Commission have access to the most recent PJM reports and evaluations so that the Commission’s decision is based upon a fully developed record. Therefore, I will move that the Commission grant the Petition, and answer the material questions in the affirmative.

I agree with the OCA that due process requires that, if the Commission answers the questions in the affirmative, the subsequent procedural schedule must allow additional time for the intervening parties to submit written testimony responsive to the Transource allegations.¹² The parties should be provided adequate time to ensure that the requirements of due process are met. Therefore, the parties will be given an opportunity to confer with the ALJs to develop an appropriate procedural schedule based on all the evidence.¹³

THEREFORE,

I MOVE:

1. That the Petition for Interlocutory Review and Answer to Material Question (Petition) filed on February 1, 2019 by Transource Pennsylvania LLC be answered as follows:

⁸ Petition at 3.

⁹ OCA Brief in Opposition at 10.

¹⁰ CSTY Brief in Opposition.

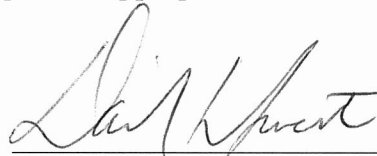
¹¹ STFC Brief in Opposition.

¹² OCA Brief in Opposition at 10.

¹³ Reportedly, Transource has delayed the in-service date of the Project in Maryland by five months, from June 2020 to November 2020, and the hearings in Maryland are not scheduled to begin until June 2019, so there will be no prejudice to Transource in the additional time necessary to provide due process to all parties involved. OCA Brief in Opposition at 11.

- a) Whether the Administrative Law Judges (ALJs) erred by striking Transource PA's rebuttal testimony regarding the Project's reliability benefits, thereby violating 66 Pa. C.S. § 332(c) and denying Transource PA due process of law? Answered in the affirmative.
 - b) Whether the ALJs' error unreasonably prevents the development of a full and complete record and denies the PUC access to the most recent available information in determining the need for this transmission line Project? Answered in the affirmative.
2. That this matter be returned to the Office of Administrative Law Judge for additional proceedings consistent with this Motion.
 3. That the Office of Special Assistants prepare an appropriate order consistent with this Motion.

February 28, 2019
DATE



DAVID W. SWEET
VICE CHAIRMAN