**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held February 28, 2019 |
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| Commissioners Present:Gladys M. Brown, ChairmanDavid W. Sweet, Vice ChairmanNorman J. KennardAndrew G. Place John F. Coleman, Jr.  |  |
| Applications 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.Petitions of Transource Pennsylvania, LLCfor a finding that a building to shelter control equipment at the Rice Substation in Franklin County, Pennsylvania and the Furnace Run Substation in York County, Pennsylvania are reasonably necessary for the convenience or welfare of the public.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-2017-2640195A-2017-2640200P-2018-3001878P-2018-3001883A-2018-3001881, *et al*. |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is a Petition for Interlocutory Review and Answer to Material Question (Petition) filed on February 1, 2019, by Transource Pennsylvania, LLC (Transource or Petitioner) in the above-captioned proceedings.[[1]](#footnote-2) The Petitioner filed a Brief in Support of the Petition on February 11, 2019. On that same date, the Office of Consumer Advocate (OCA), Citizens to Stop Transource, York County (Citizens of York County ), and Stop Transource Franklin County (Stop Transource) each filed a Brief in Opposition to the Petition.

The Petitioner seeks interlocutory review and an answer in the affirmative by the Commission to the following Material Questions:

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?

Petition at 2.

 For the reasons discussed more fully below, we shall grant interlocutory review and answer the Material Questions in the affirmative, consistent with our authority under Section 5.303 (a)(4) of Commission regulations, 52 Pa. Code §  5.303(a)(4) (pertaining to Commission action on petition for interlocutory review and answer).[[2]](#footnote-3) Accordingly, we shall return the matter to the Office of Administrative Law Judge (OALJ), for such further proceedings as deemed necessary, consistent with this Opinion and Order.

**I. History of the Proceeding**

On December 27, 2017, Transource Pennsylvania, LLC (Transource or Petitioner) filed two Applications for siting electric transmission lines related to the project known as the Independence Energy Connection Project (IEC or Project). The Project was approved by the Regional Transmission Organization (RTO), Pennsylvania New Jersey Maryland Interconnection, LLC (PJM) to alleviate transmission congestion constraints in Pennsylvania, Maryland, West Virginia, and Virginia. Two segments of the Project are proposed and are known as the IEC East Project in Portions of York County[[3]](#footnote-4) and the IEC West Project in Portions of Franklin County.[[4]](#footnote-5)

In support of the Siting Applications, Transource filed six witness statements to satisfy the requirements of Subchapter G of the Commission’s regulations at 52 Pa. Code § 57.71-76 (pertaining to Commission Review of Applications for Siting and Construction of Electric Transmission Lines).

Eight public input hearings were held in Franklin and York Counties in May 2018. After Transource filed the late-added eminent domain applications, the presiding ALJs, Elizbeth H. Barnes and Andrew Calvelli, issued a Third Procedural Order dated June 26, 2018, which permitted additional public input hearings in September 2018 in Franklin and York Counties, and extended the due date for Direct Testimony to September 25, 2018.

After the public input hearings were conducted, and the other parties served their Direct Testimony, Transource filed its Rebuttal Testimony, which consisted of sixteen statements. Transource’s Rebuttal Testimony included witness statements regarding the necessity of the Siting Applications to prevent potential future reliability violations on the bulk electric system.[[5]](#footnote-6)

In response to Transource’s Rebuttal Testimony, the OCA, York County Citizens, and Stop Transource each filed a Motion for Extension of the Procedural Schedule on December 7, 2018, December 10, 2018, and December 13, 2018, respectively, to adequately address Transource’s newly raised claims regarding necessity of the proposed transmission line to address reliability violations. Further, York County Citizens argued that the testimony regarding reliability violations should be stricken and reserved the right to seek such relief.

In the alternative to an extension of the procedural schedule, Stop Transource moved that Transource’s rebuttal testimony regarding the Siting Applications’ necessity for reliability of the system should be stricken because it violated Section 5.243(e) of the Commission’s regulations, by introducing as rebuttal, new *direct testimony* regarding a basis for necessity of the Project which had not been raised in Transource’s Direct Testimony. 52 Pa. Code § 5.243(e).[[6]](#footnote-7) Stop Transource requested that the rebuttal testimonies of Judy Chang, Steven Herling, Kent Herzog, and Stephen Stein be stricken from the record to the extent that they are introducing new direct testimony regarding “necessity” for reliability that is properly characterized as Direct. Stop Transource Motion to Strike at 4.

On December 16, 2018, Transource filed its opposition to the Motion to Strike, and argued that its rebuttal testimony complied with 52 Pa. Code §5.243 (pertaining to scope of rebuttal testimony). Transource asserted that its original Applications have not changed and that its case-in-chief included direct testimony that the projects would have reliability benefits, consistent with the ongoing evaluation of the Project’s cost/benefit analysis. Further, Transource asserted the testimony at issue was relevant to rebut OCA’s challenges to the assertions in Transource’s direct testimony that the projects had reliability benefits. Transource December 17, 2018 Answer to Motion at 8, citing OCA Statement No. 1 at 6, 18, 19, 35, 44; OCA Statement No. 2 at 10.

Transource maintained that its rebuttal testimony was relevant to establish that the originally asserted need for the project, and subsequent re-evaluations of the need for the project always included the need to address potential reliability issues. As approved by the RTO, PJM, the Project’s primary focus is market efficiency subject to ongoing and ancillary cost/benefit analysis of the project, which included, *inter alia*, reliability benefits. The Project’s primary focus is market efficiency subject to ongoing and ancillary cost/benefit analysis of the project, which included reliability benefits. Based on the assertion that the original Applications had not changed, Transource objected to a further delay in the litigation schedule. Transource December 17, 2018, Answer to Motion at 8.

On December 28, 2018, the ALJs issued the Sixth Prehearing Order (*Sixth Prehearing Order*) which granted, in part, Stop Transource’s Motion to Strike, finding:

By introducing as a reason to approve the siting applications potential reliability violations that would occur without the construction of Project 9A, Transource PA has effectively altered the scope and complexity of issues that are to be addressed by intervening parties and landowners subject to the Applications for eminent domain.

\* \* \*

As Transource PA still claims the primary purpose of the project is market efficiency and the approval requested has not changed, we are persuaded to grant Citizens and Stop Transource’s alternative motion to strike Transource witnesses Chang, Herling, Herzog and Stein testimonies to the extent they are introducing direct testimony as rebuttal

testimony. . . . [S]pecific issues relating to reliability should have been set forth in the siting applications and direct testimonies of Transource PA.

*Sixth Prehearing Order* at 4-5. (Citing *Pa. Pub. Util. Cmm’n v. UGI Utilities, Inc. (Electric Division),* Docket No. R-00932862, 1994 Pa. PUC LEXIS 137 at \*133-34 (Pa. PUC July 27, 1994)(avoid trial by ambush and the prevention of surprise by confining the parties to the scope of their direct case)).

After the *Sixth Prehearing Order*, on January 11, 2019, Stop Transource filed a Motion to Designate Stricken Testimony Pursuant to the *Sixth Prehearing Order*, which requested that the ALJs clarify the *Sixth Prehearing Order* by specifically designating the portions of the rebuttal testimony to be stricken, by transcript. OCA filed an Answer in support on January 16, 2019. On January 17, 2019, Transource filed an Answer in opposition.

By *Seventh Prehearing Order* dated January 24, 2019 (*January 24 Order*), the ALJs granted, in part, the Motion of Stop Transource and designated the rebuttal testimony offered by Transource which should be stricken pursuant to the *Sixth Prehearing Order* and reiterated that the *Sixth Prehearing Order* operated to confine Transource’s Rebuttal Testimony to the scope of evidence offered in Transource’s case-in-chief. *January 24 Order* at 2.

On February 1, 2019, pursuant to 66 Pa. C.S. § 333(h) and 52 Pa. Code § 5.302, Transource filed the present Petition for Interlocutory Review and Answer to a Material Question regarding the rebuttal testimony excluded by the ALJ’s *January 24 Order* (Petition). As noted, the Material Questions set forth in the Petition were:

1. Whether the 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?

Petition at 2.

 On February 11, 2019, the Petitioner filed a Brief in Support of the Petition, and OCA, Citizens of York County, and Stop Transource each filed a Brief in Opposition to the Petition.

**II. Background**

 Transource is a public utility certificated by the Commission by Order entered January 23, 2018, at Docket Nos. A-2017-2587821 and G-2017-2587822, recognizing Transource as a “a new type of entity in this Commonwealth,” formed solely to carry out the Transource market efficiency project known as “Project 9A.”

In its Siting Applications, Transource proposes contsruction of two 230 kV tranmission lines through portions of Franklin and York Counties based on market efficiency needs addressed by Project 9A.

Formal challenges to Transource’s asserted basis for need of the transmission lines were raised by the intervening parties, OCA, Citizens of York County and Stop Transource. Incident to those challenges, Stop Transource filed a Motion to Strike portions of Transource’s rebuttal tesimony regarding the “necessity of the project to address reliability issues” on the grounds that Transource’s Siting Applications and direct testimony had represented “market efficiency “ as the need which justified the Commission’s approval of the project, pursuant to 57 Pa. Code § 57.72 (5)(pertaining to application’s statement of need for HV lines) and 57 Pa. Code § 57.75 (e)(1)(pertaining to evidence of present and future necessity of proposed HV lines). Stop Transource Motion to Strike.

The ALJs found that portions of Transource’s rebuttal testimony *i*ntroduced “reliability” as a new “need basis” for Commission approval of Project 9A, which had not been asserted in the Siting Applications or in Transource’s direct testimony. Because Transource asserted it did not intend to amend the original Siting Applications to introduce a new “need basis” for approval of the project, the ALJs concluded that the testimony regarding necessity of the Project for reliability must be stricken. *Sixth Prehearing Order* at 8.

Stop Transource then filed a second Motion to Designate Stricken Testimony Pursuant to the *Sixth Preheaing Order*, because the *Sixth Prehearing Order* had not specified which portions of Transource’s rebuttal testimony was to be stricken. On January 24, 2019, the ALJs issued the Seventh Prehearing Order (*Seventh Prehearing Order)* designating the specific portions of Transource’s rebuttal testimony which was to be stricken*.*

In the present Petition, Transource seeks interlocutory review by the Commission to reverse the presiding ALJs’ determination (*i.e.*, the *January 24 Order*) which specifically designates the stricken portions of Transource’s rebuttal testimiony.

**III. Discussion**

**A. Legal Standards**

As a preliminary matter, we note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

Generally, a party seeking interlocutory review of a presiding officer’s ruling must file a Petition in accordance with Section 5.302 of the Commission’s regulations, 52 Pa. Code § 5.302[[7]](#footnote-8) (pertaining to petitions for interlocutory review and answer to material question), within fifteen days of the entry of the order at issue, per Section 5.572(c) of Commission regulations, 52 Pa. Code § 5.572 (c)[[8]](#footnote-9) (pertaining to petitions for relief).

Commission regulations expressly state that the Commission will not permit interlocutory review from the rulings made by a presiding officer, unless authorized in the Public Utility Code or by Commission regulations. 52 Pa. Code § 5.301. Therefore, the general rule is that petitions for interlocutory review are disfavored and allowed only in the most extraordinary circumstances. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009), at 3.

The requisite elements for granting a petition for interlocutory review and answer to material question raised by a party, are set forth at Section 5.302(a). In such case, the petitioner must provide a statement of “the question to be answered and the *compelling reasons* why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings.” 52 Pa. Code § 5.302(a). (emphasis added).

Under case law construing Section 5.302(a), the “compelling reasons” for interlocutory review are the reasons establishing such review is *necessary* to either prevent substantial prejudice or expedite the conduct of the proceeding. In other words, a petition under Section 5.302(a) must allege compelling reasons why the alleged error, and any alleged prejudice flowing therefrom, could not be rectified during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.,* Docket No. A-310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.,* Docket No. R‑00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc*., 59 Pa. P.U.C. 538 (1985).

Therefore, for a Section 5.302(a) petition for interlocutory review to be properly before the Commission for consideration, the pertinent consideration is whether the asserted reasons establish that interlocutory review is *necessary* under the circumstances. Based on the Commission’s determination whether interlocutory review is necessary to either prevent the alleged substantial prejudice or expedite the proceedings, the Commission will then either: (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. 52 Pa. Code § 5.303(a)(1)-(4).

In a petition for interlocutory review involving a ruling by the presiding ALJ on the admissibility of evidence, the Commission will consider the presiding ALJ’s relevant authority to rule on the scope of and admissibility of evidence in a proceeding, as set forth in statute at Section 331(d)(3) of the Public Utility Code, 66 P.C.S. § 331(d)(3) (pertaining to authority of the presiding officer), and Commission regulations, including: at Sections 5.483(pertaining to authority of presiding officer); 5.403 (pertaining to control of receipt of evidence); 5.103(pertaining to authority to rule on motions); 5.222 (pertaining to prehearing conference in nonrate proceedings to oversee evidentiary matters for orderly conduct and disposition of the proceeding and furtherance of justice); and 5.223(pertaining to authority of presiding officer at conferences). 52 Pa. Code §§ 5.483, 5.403, 5.103, 5.222, and, 5.223.

As noted, generally, petitions for interlocutory review regarding admissibility of evidence are not favored. The preferred approach is to permit proceedings to move forward in the normal course to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. See, *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3. Further, review of a trial court’s determinations regarding admissibility of evidence is generally disfavored and is only permitted in limited circumstances. *MCI WorldCom Communications, Inc. v. Verizon Pennsylvania* *Inc*., Docket No. C-00015149 (Order entered November 13, 2001). Finally, where a request for interlocutory review involves a presiding ALJ’s ruling, the correctness of the ALJ’s ruling is not the determinative issue as to whether the regulatory requirements for grant of review are satisfied. *Saucon Creek Assoc., Inc. v. Borough of Hellertown,* 69 Pa. P.U.C. 467 (1989).

**B. Positions of the Parties**

 **1. The Petitioner**

Transource’s Petition and the proposed Material Questions assert that the Commission’s interlocutory review and reversal of the ALJs’ exclusion of the Petitioner’s rebuttal testimony by the *January 24 Order* is necessary to prevent substantial prejudice to the Petitioner and to expedite the conduct of the proceedings.

The Petitioner contends that an answer to the first Material Question (Whether the 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) in the affirmative is necessary to prevent the violation of the Petitioner’s rights under Section 332(c) of the Public Utility Code, 66 P. C. S. § 332(c) and denial of procedural due process rights of law. Petition at 2.

The Petitioner asserts that the ALJs’ exclusion of the rebuttal testimony deprives the Petitioner of its right to present evidence, including rebuttal, required for a full disclosure of facts. Section 332(c). Petitioner asserts that the deprivation of the statutory right to present rebuttal evidence regarding the Project’s reliability benefits amounts to violation of the party’s right to be heard, in violation of the constitutionally protected right to due process of law.[[9]](#footnote-10)

The Petitioner also contends that an answer in the affirmative to the second Material Question (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) is necessary for the development of the complete and full record upon which to review the Siting Applications at issue. Petition at 2.

The compelling reasons asserted by the Petitioner include that: (1) the Petitioner’s rebuttal testimony was based on reliability violations which occurred subsequent to the filing of the original Siting Applications; (2) the rebuttal testimony was related to the Petitioner’s Direct testimony on the same subject, and to Direct testimony that PJM would continue to reevaluate the project for substantive changes to costs and/or benefits; (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. Petition at 2-3, Petitioner’s Brief at 2-3.

The Petitioner further asserts that interlocutory review and reversal of the ALJs’ exclusion of the rebuttal testimony 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. Petition at 3.

Finally, the Petitioner asserts that the Commission’s interlocutory review and reversal of the ALJ’s exclusion of rebuttal testimony is necessary to expedite the proceeding to prevent the substantial delay caused by the need for remand if the error is not immediately corrected. Petitioner asserts that, if remand is necessary:

The delay could cause irreparable harm to Transource PA by jeopardizing its contractual obligations regarding the Project’s in-service date also and delays benefits to customers.

Petition at 3.

**2. The OCA**

The OCA submits that the Commission should answer the material questions in the negative. The OCA avers that the presiding ALJs properly excluded the rebuttal testimony regarding potential future reliability violations because it was not in accordance with Section 5.243(e) of the Commission’s Regulations, 52 Pa. Code Section 5.243(e). The OCA maintains that the ALJs’ evidentiary ruling was proper and did not infringe upon Transource’s due process rights. OCA Brief in Opposition at 6-9.

Additionally, the OCA states that if the Commission were to reverse the presiding ALJs’ ruling and grant the relief of an expedited hearing as requested by Transource, the Commission would violate the intervenors’ procedural due process rights because the parties would not have adequate time to respond to new testimony concerning alleged potential future reliability violations. *Id*. at 10.

**3. Citizens of Yok County**

 Citizens of York County avers that Transource’s Petition fails to meet the applicable legal standard for granting a petition for interlocutory review, and that the Material Questions should be answered in the negative. Citizens avers that Transource asserts only one basis why review is necessary, *i.e.*, that remand to correct the ALJs’ ruling would cause delay and interfere with Transource’s ability to meet contractual obligations regarding the in-service date for Project 9A. Citizens Brief in Opposition at 7‑8. Citizens maintains that facilitating Transource’s ability to fulfill contractual obligations is not a reason for the Commission to grant interlocutory review. *Id*.

 Additionally, Citizens of York County maintains that the presiding ALJs’ evidentiary ruling is demonstrably correct. Therefore, Transource’s petition is without merit. *Id*. at 8-13.

Finally, Citizens of York County asserts the same concern for due process raised by the OCA – that in the event the Commission reverses the ALJs’ evidentiary ruling, the intervening parties be provided a meaningful opportunity to respond to the new claims regarding necessity for reliability reasons, raised by Transource’s rebuttal testimony. *Id*. at 13-15.

**4. Stop Transource**

 Stop Transource argues that the Material Questions should be answered in the negative because Transource offers no compelling reason why the Commission should deviate from the normal review process where: (l) the ALJs’ routine evidentiary ruling is not subject to interlocutory review; (2) Transource’s desire to avoid the delay of remand is not a “*compelling reason*” for review under applicable case law. Stop Transource Brief in Opposition at 2 and 8-11. Citing, *Saucon Creek Assocs., Inc. ,*69 Pa. P.U.C. 467 (Apr. 27, 1989) .and *Petition of the Borough of Cornwall for a Declaratory Order*, Docket No. P-2015-25-5794, 2015 WL 7575479 (Pa. P.U.C.) (Order dated November 19, 2015)(stating that the ALJ’s exclusion of a witness’s testimony is a routine evidentiary ruling which does not warranted interlocutory review).

Further, Stop Transource argues that the ALJs’ ruling was correct as a factual and legal matter. Therefore, Stop Transource maintains, the presiding ALJs’ properly excluded evidence presented by Transource for the first time on rebuttal which was not raised in Transource’s case-in-chief. *Id*. at 13-14.

 Finally, Stop Transource asserts that reversal of the ALJs’ evidentiary ruling would violate the due process rights of the intervening parties. Stop Transource argues that if the Commission reverses the ruling, approving the introduction of new evidence by Transource at the rebuttal phase effectively deprives the intervening parties of a meaningful opportunity to fully develop a record on the new evidence. Therefore, Stop Transource maintains that reversal of the ALJs’ ruling is inappropriate.

*Id*. at 15.

**C. Disposition**

Based on our review of the instant Petition, the Positions of the Parties, and the applicable law, we find that Transource asserts compelling reasons for exercising our discretion to grant interlocutory review. We again note that interlocutory review is disfavored, particularly where the Material Questions pertain to an evidentiary ruling by the presiding ALJ. Our grant of interlocutory review in the present case is restricted to the circumstances presented and the unique nature of the siting applications incident to a major multistate transmission line construction project approved by and subject to the ongoing project evaluation and cost/benefit analysis of the RTO, PJM.

**1. Timeliness of the Petition**

As a preliminary procedural matter, we first address whether the Transource Petition is timely, as the opposing parties noted that the Petition was filed in response to the *Seventh Prehearing Order*, while the ALJs’ *Sixth Prehearing Order* was the first to order testimony to be stricken. We find that Transource’s Petition is timely.

In the *Sixth Prehearing Order*, issued on January 11, 2019, the ALJs granted Stop Transource’s Motion to Strike testimony which the ALJs concluded should have been included in direct testimony. However, the *Sixth Prehearing Order* did not identify specific testimony to be stricken. Stop Transource filed another motion which asked the ALJs to designate the specific testimony to be stricken. On January 24, 2019, the ALJs issued the *Seventh Prehearing Order* designating the specific portions of the testimony which were to be stricken. The present Petition followed on February 1, 2019.

While the ALJs’ *Sixth Prehearing Order* granted the Motion to Strike certain testimony, the parties were not on notice of the specific portions of the testimony designated to be stricken until the issuance of the *Seventh Prehearing Order* on January 24, 2019. Transource then filed its present Petition on February 1, 2019, well within the fifteen-day requirement of the Commission’s regulations at Section 5.572(c), 52 Pa. Code §  5.572 (c) (pertaining to time for filing petitions for relief). Accordingly, we find that Transource’s Petition for Interlocutory review was timely filed.

**2. Sufficiency of the Petition**

Next, our analysis turns to whether the Petition raises compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceedings. 52 Pa. Code § 5.302(a). 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: (l) 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.[[10]](#footnote-11)

Transource presents the following as compelling reasons to grant the Petition:

(l) 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. 52 Pa. Code § 5.303(a) (1) – (4). Petition at 2, Petitioner’s Brief at 2-3.

Transource 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.

Transource indicated early in the proceeding 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. The ALJs also indicated that the intervenors would be afforded an opportunity to address this evidence in their surrebuttal testimonies. *See*, Fourth Prehearing Order (July 30, 2018) at 13.

Transource also claims that a Commission ruling is necessary to expedite the proceeding to prevent the substantial delay caused by the need for remand if the error is not immediately corrected. Transource 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.” Petition at 3.

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. OCA Brief in Opposition at 10. York County Citizens 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. Citizens of York County Brief in Opposition at 7. Stop Transource 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, Stop Transource reinforces the due process arguments made by the other two parties opposing this Petition. Stop Transource Brief in Opposition at 10-14.

As previously mentioned, generally, 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 than a HV transmission line siting case, which by its unique nature relies upon the findings of PJM, as the RTO which approved the Project and conducts ongoing evaluations of the Project’s effectiveness and costs/benefits, a different result here would be likely.

PJM, as the RTO, 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 disposition of the applications is based upon a fully developed record.[[11]](#footnote-12) Therefore, in view of these compelling reasons, we shall grant the Petition, and answer the material questions in the affirmative.

However, we agree with the OCA, and other Intervenors, 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 Transource’s allegations regarding the Project’s necessity for reliability purposes. OCA Brief in Opposition at10. The presiding ALJs should provide the parties with adequate time to respond to Transource’s testimony regarding reliability benefits to ensure 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.[[12]](#footnote-13)

Therefore, we find that the present Petition for Interlocutory review and Answer to Material Question asserts compelling reasons why interlocutory review is necessary to prevent substantial prejudice and expedite the conduct of this proceeding.

**IV. Conclusion**

Based on our review of the Petition, the positions of the Parties, and the applicable law, we find that the Petition states compelling reasons why interlocutory review is necessary to ensure a complete record for the Commission’s review and disposition of the Siting Applications. Accordingly, we shall return this matter to the OALJ consistent with this Opinion and Order; **THEREFORE,**

 **IT IS ORDERED:**

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

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?

Answered in the affirmative.

1. 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 such further proceedings deemed necessary consistent with this Opinion and Order.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: February 28, 2019

ORDER ENTERED: March 20, 2019

1. Procedurally, the material questions are asserted by Transource pursuant to a party’s right to seek interlocutory review and answer to a material question, under Section 5.302 of Commission regulations, 52 Pa. Code § 5.302. [↑](#footnote-ref-2)
2. We note that interlocutory review of an ALJ’s evidentiary ruling is generally disfavored and typically would not be warranted, however, under the unique circumstances of this case, involving the siting application for transmission lines, we find that review is warranted in the interest of a full and complete record upon the Commission may review the applications. [↑](#footnote-ref-3)
3. 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 IEC East Project in Portions of York County, Pennsylvania, docketed at A-2018-2640195). [↑](#footnote-ref-4)
4. 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 IEC West Project in Portions of Franklin County, Pennsylvania, Docketed at A‑2017-2640200. Additional Transource filings related to the Project were filed on May 15, 2018, including: 133 eminent domain applications at Docket Nos. A‑2018-3001881, *et al*.; and two Petitions for findings that a building to shelter control equipment at the proposed Rice Substation in Franklin County and for the Furnace Run Substation in York County are reasonably necessary for the convenience or welfare of the public, at Docket Nos. P-2018-3001878, and P-2018-3001883. [↑](#footnote-ref-5)
5. Under 52 Pa. Code § 57.75 (e)(1), the ALJs review of the Siting Applications will accept evidence and render a determination based on, *inter alia*, the “the present and future necessity of the proposed HV line in furnishing service to the public.” [↑](#footnote-ref-6)
6. 52 Pa. Code § 5.243 provides:

(e) A party will not be permitted to introduce evidence during a rebuttal phase which:

	* 1. Is repetitive.
		2. *Should have been included in the party’s case-in chief.*
		3. *Substantially varies from the party’s case-in-chief.*(emphasis added). [↑](#footnote-ref-7)
7. **§ 5.302. Petition for interlocutory Commission review and answer to a material question.**

(a) During the course of a proceeding, a party may file a *timely* petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition must be in writing with copies served on all parties and the presiding officer and state, in not more than three pages, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

(emphasis added). [↑](#footnote-ref-8)
8. **§5.572(c) Petitions for relief**

**\* \* \***

(c) Petitions for reconsideration, rehearing, reargument, clarification, supersedeas *or others shall be filed within 15 day after the Commission order involved is entered* or otherwise becomes final.

(emphasis added). [↑](#footnote-ref-9)
9. The Commission is bound by the due process provision of the constitutional law, and fundamental fairness. *Pittsburgh v. Pa. P.U.C*., 171 Pa. Super. 391, 395, 90 A.2d 850 (1952). [↑](#footnote-ref-10)
10. 52 Pa. Code § 5.303(a)(1)-(4). [↑](#footnote-ref-11)
11. Pursuant to Section 57.75(e) of our regulations, the Commission’s review of siting applications includes the acceptance and consideration of evidence of, *inter alia*, matters related to the present and future necessity of a proposed transmission line project. 52 Pa. Code § 57.75(e) (1)-(4). Therefore, in the present case, it is appropriate to allow evidence of and to consider PJM’s ongoing and up-to-date evaluation of the Projects’ costs/benefits, including reliability benefits, as *inter alia*, additional relevant evidence for the Commission’s review and determination of the Siting Applications. However, evidence regarding reliability benefits realized under the Project may or may not be found to support the asserted need for the project, as averred in the original Siting Applications, under 52 Pa. Code §57.72 (c)(5). [↑](#footnote-ref-12)
12. 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. [↑](#footnote-ref-13)