In the
United States Court of Appeals
for the Twelfth Circuit

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Plaintiff-Appellant,

v.

CHAIRMAN WILL WILLIAMSON;
COMMISSIONER LONNIE LOGAN;
COMMISSIONER EVELYN ELKINS;
In their capacities as members of the Vandalia Public Service Commission

Defendants-Appellees

On Appeal from the United District Court for the
Northern District of Vandalia
Civil Action No. 22-0682

BRIEF OF APPELLEE
VANDALIA PUBLIC SERVICE COMMISSION

TEAM 1
COUNSEL FOR DEFENDANT-APPELLEE

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JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Vandalia had jurisdiction over this matter under 28 U.S.C. §1331. The District Court granted appellee's motion to dismiss on all issues on August 15, 2022. Appellant filed a timely appeal of that order on August 29, 2022. This Court has jurisdiction under 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether ACES has standing to challenge the PSC's Capacity Factor Order;
2. Assuming ACES has standing, whether the PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is preempted by the actions of the Federal Energy Regulatory Commission ("FERC") under the FPA;
3. Whether Vandalia's statutory ROFR violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000; and
4. Whether Vandalia's statutory ROFR violates the dormant Commerce Clause of the U.S. Constitution.

STATEMENT OF THE CASE

Electric transmission and generation not only powers Vandalia's homes, schools, and workplaces; it also powers Vandalia's economy through jobs in infrastructure, mining, and operation. As a result, Vandalia views its regulation of the electrical sector as vital to the State's welfare. In pursuit of this goal, Vandalia has exercised its authority to regulate the electrical industry in Vandalia within the gaps left by the Federal Energy Regulatory Commission ("FERC") and the Federal Power Act ("FPA").

Vandalia's Legislature has enacted specific directives instructing the Vandalia Public Service Commission ("PSC") to ensure the continued operation of coal power plants within Vandalia at their maximum reasonable output. Record at 6. Coal-fired electric power plants account for the vast majority of Vandalia's net electricity generation. Record at 4. Vandalia's Legislature felt compelled to act as the coal industry continues to decline. These directives supplement PSC's enabling act which provides PSC a broad grant of authority to set "just and reasonable rates" for utilities subject to PSC's jurisdiction. Record at 6. PSC is also charged with "regulating… public utilities in order to 'provide the availability of adequate, economical and reliable utility services.'" Record at 6.

In October 2021, the electric utilities operating coal power plants in Vandalia (LastEnergy and MAPCo) submitted annual filings with PSC to justify new rates starting January 1, 2022. Record at 7. These utilities serve both Vandalia and many other states in the local region. Record at 4. In reviewing these findings, PSC became concerned with what it believed to be capacity factor plans below the maximum reasonable output of the coal plants owned by LastEnergy and MAPCo. Record at 7. After expressing these concerns to the utilities, PSC began a generic proceeding in early 2022 investigating Coal Plant Capacity Factors and

Electricity Rates. Record at 7. The proceeding culminated in a general order ("Capacity Factor Order") applicable to both utilities and mandating that they operate their plants in Vandalia, "not less than 75 percent, as measured over a calendar year." Record at 7. All coal fired power plants within Vandalia, including those of LastEnergy and MAPCo, are connected with and exclusively sell into PJM pursuant to their PJM mandated Fixed Resource Requirement ("FRR") status. Record at 7. While the Capacity Factor Order provides a finding of fact that this 75 percent capacity factor would be economical, to reduce investor skepticism, the Order also expressly authorizes LastEnergy and MAPCo to recover any excess costs suffered as a result. Record at 8. PSC allows the utilities to recoup these potential costs with rate increases reflected back to Vandalia retail ratepayers. Record at 8.

Vandalia has also regulated the electric industry through the enactment of a right-of-first-refusal ("ROFR") provision. Record at 9. This 2014 enactment followed in response to FERC, in 2011, removing a similar federal right from its regulations. Record at 9. While the Federal ROFR granted owners of existing transmission facilities the right within their service areas, Vandalia's ROFR allows electric transmission owners, incumbent to Vandalia, to exercise the right within the state. Record at 9. These incumbents have 18 months after a project is proposed to exercise this right after which a non-incumbent utility may build the project. Record at 2. Both parties agree that Appellant, Appalachian Clean Energy Solutions, Inc. ("ACES"), is not an incumbent electric transmission owner and thus must wait 18 months before building a project in Vandalia. Record at 9.

ACES is a global energy company headquartered and incorporated in Vandalia. Record at 4. ACES does not own any retail electric utilities or serve retail customers. Record at 4. In August of 2020, ACES announced plans for a new shale gas powerplant in southwestern

Pennsylvania. Record at 5. Two years later, in 2022, the PJM Interconnection ("PJM") approved a plan proposed by ACES (entitled "Mountaineer Express") to run a transmission line from their prospective Pennsylvania power plant to Raleigh, North Carolina. Record at 6. In order to accomplish this, the transmission line plans to take the express path through Vandalia Record at 6. Despite going through its backyard, ACES' proposed power line does not currently plan to provide Vandalia with any of its 4,500 MW of power. Record at 6.

On June 6, 2022, ACES filed suit against PSC seeking federal relief related to Vandalia's Capacity Factor Order and ROFR. Record at 14. On June 27, 2022, PSC moved to dismiss all of ACES claims. Record at 14. The district court granted PSC's motion. Record at 14. Regarding the Capacity Factor Order, the district court first found that ACES lacked standing to bring a Supremacy Clause claim and that, even if it did, the *ZEC* line of cases provide that the Order is not preempted. Record at 14. The district court also dismissed ACES claims regarding the ROFR, finding that it was not preempted by FERC Order 1000 and that the ROFR did not violate the Dormant Commerce Clause. Record at 15. The district court used a corporation's place of incorporation as controlling for the Dormant Commerce Clause analysis and additionally found that the benefits Vandalia intended to protect are not outweighed by any burden to interstate commerce. Record at 15.

SUMMARY OF THE ARGUMENT

Appellant challenges Vandalia's Capacity Factor Order contending that it is preempted by FERC's exclusive jurisdiction over wholesale energy rates. Appellant also challenges Vandalia's statutory ROFR arguing it is preempted by FERC Order 1000, or alternatively, that the ROFR violates the Dormant Commerce Clause of the U.S. Constitution.

Vandalia PSC asserts that both its Capacity Factor Order and statutory ROFR are valid exercises of its police power, granted to it by the U.S. Constitution and the system of federalism. Additionally, Vandalia asserts that Appellant does not have standing to challenge the Capacity Factor Order as they are not Vandalia ratepayers and, therefore, are not in any way affected by the Order.

As to the first issue, the Appellant does not have standing to contest the Capacity Factor Order. Standing requires a redressable injury that is not merely hypothetical. As such, ACES has the burden to show that the Capacity Factor Order has caused or will imminently cause concrete harm. ACES fails to meet this burden. ACES argues that the Capacity Factor Order impacts the economics of building and operating its Rogersville Energy Facility. However, ACES is not covered by the order because it is not a ratepayer. The order requires coal plants in Vandalia to operate at 75% capacity. ACES owns no generation facilities in Vandalia and is therefore not subject to the order.

As to the second issue, the Capacity Factor Order is not preempted by any FERC act under the FPA. For federal law to preempt state law, at least one of three criteria must be met: (1) Congress has included statutory language explicitly stating its intent to preempt state law, (2) Congress has legislated to occupy an entire field, leaving no room for state supplement, or (3) the state law in question conflicts with federal law. Congress specifically reserved certain regulatory authority to the states in enacting the FPA, foreclosing the possibility of "field preemption." This reserved authority encompasses the issues regulated by the Capacity Factor Order. The Capacity Factor Order is consistent with the goals of Congress in enacting the FPA, the transmission and wholesale sale of energy in interstate commerce, and utilities can comply with both U.S. and

Vandalia law. The possibility of dual compliance and consistency with Congressional goals forecloses the possibility of "conflict preemption."

As to the third issue, Vandalia's Native Transmission Protection Act, a state ROFR, is not preempted by FERC's Order 1000. First, FERC's Order expressly acknowledges the limits of FERC's authority, stating unequivocally that its power does not extend to siting, permitting, and construction of a transmission line. Second, Congress' intent in enacting the Federal Power Act ("FPA") and creating FERC was to establish an entity that would regulate interstate wholesale sales of energy and regulate prices. Both the text of FERC's Order 1000, as well as FERC's purposes as drawn by Congress suggest that states retain jurisdiction over the construction of transmission lines within their own state. Congress' goals are not obstructed, as their goal was to leave certain matters to the states as consistent with federalism. Similarly, Congress (and FERC) did not legislate so comprehensively as to leave no room for the states.

As to the fourth issue, Vandalia's ROFR does not violate the Dormant Commerce Clause. The ROFR does not discriminate on the basis of interstate commerce, awarding projects to entities whether-or-not they represent in-state or out-of-state interests. Instead, the ROFR favors incumbent transmission owners and has granted the right to two out-of-state corporations while denying it to an in-state corporation. Finally, the local benefits Vandalia receives from the ROFR are not outweighed by any incidental burden on interstate commerce.

ARGUMENT

STANDARD OF REVIEW

Appellate courts review the constitutionality of a statute de novo. *First Choice Chiropractic, LLC v. DeWine*, 969 F.3d 675 (6th Cir. 2020). All of the following issues are questions about the constitutionality of Vandalia's state statutes.

I. ACES lacks standing to sue under Article III of the Constitution.

ACES has no standing to challenge the Capacity Factor Order ("the Order") in this suit. "To establish standing under Article III of the Constitution, a plaintiff must demonstrate (1) that he or she suffered injury in fact that is concrete, particularized, and actual or imminent; (2) that the injury was caused by the defendant; and (3) that the injury would likely be redressed by the requested judicial relief." *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615, 1618 (2020). ACES suffered no injury, actual or imminent, as a result of the Order, and judicial remedy will not redress any perceived injury. ACES' claim against the Order fails on each element, and the claim is barred.

A. Standing requires an actual or imminent injury that is concrete and particularized, but ACES suffers no injury from the Capacity Factor Order.

ACES sustained no injury, actual or imminent, as a result of the Order, so ACES lacks standing to bring this suit. Plaintiffs must show that they have sustained a concrete, particularized injury that is either actual or imminent to have standing. *Id.* In the context of FERC-related energy claims, this element is satisfied when the plaintiff was "(1) ready, willing, and able to perform" the construction contracts for which it wished to compete, and (2) the challenged action 'deprived the company of the opportunity to compete for the work.'" *Coal. Of MISO Transmission Customers v. FERC*, 45 F.4th 1004, 1015 (D.C. Cir. 2022). In *MISO*, the plaintiff, a transmission developer, satisfied the first element because it showed that it was an

active transmission developer, that it would actually compete for projects if given the opportunity, and that the challenged location-based cost allocation directly and intentionally deprived them of the opportunity to compete. *Id.* The D.C. Circuit placed great weight on the fact that the challenged program denied the plaintiffs' ability to bid on "*all* Baseline Reliability Projects, full stop." *MISO*, 45 F4th at 1021 (alteration in original). The plaintiff was "walled off from an entire category of projects for which it is qualified, prepared, and eager to compete." *MISO*, 45 F4th at 1015.

ACES claims that it has sustained an injury as a result of the Vandalia Public Service Commission's ("PSC") Capacity Factor Order. The Order mandates that coal-fired power plants in Vandalia, and specifically those owned and operated by LastEnergy and MAPCo, average a 75% capacity factor over the course of a calendar year. The Order further directs both utilities to maintain sufficient supplies of coal on-site in order to run at the required capacity factor. ACES owns no power generation facilities in the state of Vandalia and is under no obligations as a result of the Order. ACES seeks to build its plant in Pennsylvania, untouched by the regulations of the Vandalia PSC. Even if ACES stands "ready, willing, and able" to break ground on the Pennsylvania location, the Order is no bar to such action. *Id.* ACES is free to construct its facility in accordance with Pennsylvania law.

The Order also authorizes retail sellers of energy in Vandalia to pass costs on to consumers as a result of complying with its mandates. ACES does not sell energy to retail consumers. ACES operates only to sell energy for resale in wholesale markets. Because ACES does not operate in the retail space, it is likewise untouched by the cost-passing authorization provided to LastEnergy and MAPCo. ACES has not been "walled off" from any category of projects by the Order, as it has chosen not to compete in the retail market. *Id.* Put simply, ACES

has sustained no injury, actual or imminent, as a result of the Order and has no standing to bring this claim.

B. Standing requires redress of the injury through judicial relief, and a judicial remedy cannot alleviate ACES' claims.

A judicial remedy will not redress what ails ACES, therefore ACES lacks standing to bring suit stemming from the Order. The capacity for judicial redress stems from plaintiff's having a concrete "stake" in the suit. 140 S. Ct. at 1619. This concept is based on the notion that plaintiffs must stand to gain something in victory or lose something in defeat. *Id.* In *Thole*, the Supreme Court held that the plaintiff's lacked standing because their benefit payments would not change whether they won or lost the suit. *Id.* The Court found this sufficient to hold the plaintiffs were lacking a stake in the suit. *Id.* Additionally, the Court held that attorney's fees were insufficient to create an Article III case or controversy where none exists on the merits. *Id.*

ACES seeks to have this Court subsidize its ability to compete on the wholesale market. The only "injury" ACES could link to the Order is its inability to compete with Vandalia's coal-fired plants on the wholesale market. This inability to compete with affected generators cannot be remedied by this Court outside judicial overreach. ACES claims that the cost-passing provisions of the Order function to subsidize Vandalia's generators and drive down costs on the market. No action of this Court, however, will make ACES' planned facility more competitive. Many generators and load-serving entities function as "price takers." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 157 (2016). These entities bid their capacity into the wholesale auctions at $0 and take whatever clearing price is set in a given auction. *Id.* Even if this Court were to hold for ACES, price takers still exist on the wholesale market and will be in competition with ACES. Win or lose, ACES' claim against competition in the marketplace cannot be remedied by this Court, so ACES lacks standing.

C. In the alternative, any claimed injury by ACES is hypothetical and does not constitute a concrete harm, so ACES lacks standing.

ACES has suffered no concrete harm, therefore, it lacks standing to bring suit against the Order. Succinctly: "no concrete harm, no standing." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2200 (2021). In assessing the concreteness of a harm, courts must determine whether the asserted harm has a "close relationship" to a harm traditionally recognized as providing a basis for a lawsuit. *Id.* The Supreme Court explicitly rejected the statutory prohibition or obligation as sufficient to establish concrete harm. *Id.* at 2205. A court cannot treat an injury as concrete under Article III on the word of Congress alone. *Id.* (citing *Trichell v. Midland Credit Mgmt., Inc.*, 964 F. 3d 990, 999, n. 2 (CA11 2020)). There is a distinction between a statutory cause of action stemming from violation of federal law and a plaintiff's suffering harm due to such a violation. *Id.* An injury in law is not an injury in fact. *Id.* at 2206. A suit by an uninjured plaintiff is not seeking remedy but compliance with regulatory law. *Id.* "Those are not grounds for Article III standing." *Id.* Absent the requirement of concrete harm, Congress could authorize virtually any citizen to bring a statutory damages suit against virtually any defendant who violated virtually any federal law. *Id.* For the risk of a future harm to be concrete, plaintiffs must establish a serious likelihood of materialization. *Id.* at 2212. The Court in *TransUnion* was also persuaded by the argument that time will reveal whether the risk of future harm materializes into actual harm, and, if so, the actual harm would form the basis for damages. *Id.* at 2211-12.

ACES complains of the risk of future harm brought on by the Order. It claims the Order interferes with FERC's authority to regulate wholesale markets and poses a risk to future wholesale energy rates. There is no present harm to ground ACES' claim outside present statutory damages, and that route is closed by *TransUnion*. Because ACES cannot demonstrate a present harm, it cannot sue merely to compel statutory compliance. 141 S. Ct. at 2206.

Additionally, any risk to future wholesale rates is speculative and cannot form the basis for a present suit. A multitude of factors go into determining wholesale rates. As Justice Kavanaugh stated for the Court, time will reveal whether the Order causes an actual harm to ACES, and at that point the actual harm would form the basis for a complaint. *Id.* at 2211. Time may also reveal that the Order causes no harm to ACES as other market factors adjust to its enactment. Because ACES can demonstrate no concrete harm, nor can it bring a suit merely for a statutory violation, it has no standing.

II. The Capacity Factor Order is an authorized exercise of state regulatory authority consistent with the Supremacy Clause.

The Order treads only upon ground Congress has authorized for state regulation, so it is not preempted by FERC's federal authority granted under the FPA. The Supremacy Clause makes the laws of the United States the "supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 162 (2016) (citing U.S. Const., Art. VI, cl. 2). Federal law preempts contrary state law, and a court's investigation into the scope of a statute's preemptive effect is ruled by the purpose of Congress in enacting the federal statute. *Id.*

State law is preempted by federal law in one of three ways: (1) Congress may include statutory language to explicitly state its intent to preempt, (2) Congress may legislate comprehensively to occupy an entire field of regulation, leaving no room for states to supplement federal law, or (3) where the state law at issue conflicts with federal law, either because it is impossible to comply with both, or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives. *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). These methods are referred to as "express",

"field", and "conflict" preemption, respectively. Regarding FERC and the FPA, Congress only affords FERC authority over the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale in interstate commerce. 16 USCS § 824(b)(1). Retail sales and generation are within the jurisdiction of the several states. *Id.* The Order only regulates retail sales and generation, both of which are reserved to the states' jurisdiction by the FPA, so the Order is not preempted by FERC's actions under the FPA.

A. The Order is not field preempted because Congress reserved authority to the states to regulate generation and retail sales.

Congress specifically reserved regulatory authority over retail sales and generation facilities to the states, so the Order is not field preempted. State law is field preempted when Congress legislates to encompass an entire field. 489 U.S. at 509. For field preemption, courts examine whether Congress envisioned federal regulation as encompassing an entire field to the limit of constitutional power, and courts look to grants of power to a federal agency as well as areas where the regulatory power does not extend. *Id.* at 510. Express reservations of state power and legislative history may also be considered in determining whether a state law is field preempted. *Id.* at 510-11. In holding that the Natural Gas Act ("NGA") did not preempt state regulation of gas generation, the Supreme Court highlighted Congress' careful division of regulatory power over the natural gas industry. *Id.* at 510. The NGA prescribed the "intended reach of [federal] power" and specified restrictions on that power. *Id.* The NGA gave FERC control of sale and transportation of natural gas at wholesale and reserved to the states the power to regulate production of natural gas. *Id.*

Similar logic was employed in *Hughes* to strike down a contract-for-differences program because the program required wholesale market participation. 578 U.S. at 163. The Supreme Court stated that the opinion should not be read to foreclose programs "untethered to a

generator's wholesale market participation." *Id.* at 166. Tying retail prices, a matter of state jurisdiction, to estimates of wholesale revenues, regulated by FERC, was held permissible due to a distinction between a state regulating wholesale sales and a state reflecting the profits from a reasonable estimate of those sales when acting under granted authority. *Coalition for Competitive Elec. V. Zibelman*, 906 F. 3d 41, 55 (2d Cir. 2018) (citing *Rochester Gas & Elec. Corp. v. Pub. Serv. Com.*, 754 F. 2d 99, 105 (2d Cir. 1985)). The Court held a state program for zero emission credits, functionally a subsidy for retail sellers of nuclear produced energy, was not field preempted because the credits were not contingent on wholesale market participation, avoiding encroachment on federal jurisdiction. *Id.* at 46. The dispositive issue in *Rochester Gas* and *Hughes* was compelled wholesale market participation. *Id.* at 52.

The Order and subsequent authorization for cost-passing are analogous to the zero emission credits in *Zibelman* and are not preempted by FERC action. As with the NGA in *Northwest*, Congress has expressly carved out state authority over generation and retail sales. *See* 489 U.S. 493; 16 USCS § 824(b)(1). In doing so, Congress signaled its intent that states hold jurisdiction in these areas, not FERC. Additionally, the Order is not field preempted under *Hughes* because the ability to pass costs to retail consumers is not "impermissibly tethered" to wholesale market participation. 906 F. 3d at 52. LastEnergy and MAPCo are not required to sell into the wholesale market because of the Order; that is a result of their FRR status, similar to the Exempt Wholesale Generators in *Zibelman*. *Id.* As in *Zibelman*, nothing in the Order requires MAPCo or LastEnergy to participate in the wholesale market. *Id.* The cost-passing authorization is further tied to retail sales, rather than wholesale, and price-tying is not impermissible under *Hughes*. For these reasons, the Order is an appropriate exercise of state regulatory authority that is not field preempted under the Supremacy Clause.

B. There is no conflict preemption because the order does not obstruct Congress' goals, and utilities can comply with both the Order and FERC regulations.

MAPCo and LastEnergy can comply with the Order and FERC regulations, and the Order is not an obstacle to achieving Congress goals in passing the FPA, thus there is no conflict preemption. A state law may be conflict preempted if it is an obstacle to the accomplishment and execution of the goals of Congress or if it interferes with the methods by which the federal statute empowers an agency to achieve those goals. 906 F. 3d at 51-52 (citing *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015)); *Id.* (citing *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). When Congress enacts a dual regulatory scheme, conflict preemption analysis must be applied sensitively to maintain the roles Congress reserved to the states and the federal agency. 489 U.S. at 514-15. A mere impact on purchasing decision, and by extension interstate pipelines, was not, on its own, enough for the Supreme Court to find conflict preemption in *Northwest* due to interference. *Id.* at 516. This tangential connection was not enough to invoke preemption, the Court reasoned, because the state sought to protect correlative rights and balance gas field exploitation, matters within the state's purview. *Id.*

A state law may also be preempted if it is impossible to comply with both state and federal law. 489 U.S. at 515-16. This method of preemption relies on the physical impossibility of dual compliance by one engaged in interstate commerce. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963). As an example, the Court used the hypothetical of a federal ban on picking any avocado testing more than 7% oil, while a state law excludes any avocado measuring less than 8%. *Id.* at 143. No entity could comply with both laws, as they were directly contradictory.

The Order does not directly contradict FERC orders, nor does it interfere with achievement of Congress' goals in passing the FPA. No FERC regulation mandates a capacity factor below 75%, and FERC does not prohibit cost-passing. In fact, FERC has sanctioned state programs that increase capacity or affect wholesale market prices, and it allows states to offer loans, subsidies, and tax credits to facilities on environmental or policy grounds. 906 F. 3d at 56 (citing Cal. PUC , 133 F.E.R.C. P61,059, 61268 (F.E.R.C. October 21, 2010)). The Vandalia Legislature empowered the PSC to enact the Order to "[e]ncourage the well-planned development of utility resources . . . in a manner consistent with the productive use of the state's energy resources, such as coal." Vand. Code § 24-1-1(a)(3); *id*. § 24-1-1D(5); *id*. § 24-1-1D(12). The legislature further sought to prevent plant closure, prevent further job loss, and ensure state prosperity by maximizing electric output at coal-fired plants for the life of the plants. *Id.*

The text of § 824 makes it clear that the purpose intended by Congress is protection of the public interest in federal regulation of the transmission and sale of electric energy in interstate commerce. 16 USCS § 824. The Order has no impact on transmission, and it does not impact wholesale sales. Its sole effect in this area is a possible impact on price of energy at wholesale, and, as in *Northwest*, a mere impact on price, and by extension sales, is not enough on its own to justify preemption. Because utilities can comply with both FERC regulations and the Order, and because the Order is consistent with the purpose Congress had in passing the FPA, conflict preemption is inapplicable.

III. Vandalia's statutory ROFR does not violate the Supremacy Clause because the ROFR is not preempted by FERC Order 1000.

The Supremacy Clause of the United States Constitution states that "this Constitution, and the Laws of the United States shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Supremacy Clause allocates power between the federal government and the government of

the many states. *White Mountain Apache Tribe v. Williams*, 810 F.2d 844, 848 (9th Cir. 1985). State laws that directly conflict with, "interfere with, or are contrary to" federal law are preempted. *Hillsborough Cnty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712–13 (1985). Preemption of state action through federal law can occur as the result of: (1) "the Constitution itself," (2) "a valid act of Congress," and/or (3) "regulations duly promulgated by a federal agency*." City of Charleston, S.C. v. A Fisherman's Best, Inc*., 310 F.3d 155, 168–69 (4th Cir. 2002).

Consideration under the Supremacy Clause "starts with the basic assumption that Congress did not intend to displace state law." *S. Blasting Servs., Inc. v. Wilkes Cnty*., N.C., 288 F.3d 584, 589–90 (4th Cir. 2002). This presumption is strongest when Congress legislates in a field which "the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Aside from Congress expressly preempting state law, there are two main types of federal preemption: conflict preemption and field preemption. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604–05 (1991). Conflict preemption occurs where state law "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Field preemption occurs when federal law occupies a "field" of regulation "so comprehensively that it has left no room for supplementary state legislation." *Murphy v. Natl. Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1480 (2018). Neither of these forms of preemption are present here.

A. Vandalia's ROFR does not conflict with FERC Order 1000, nor does it occupy the same field as FERC's order.

FERC's Order 1000 itself denies that it would preempt a state law concerning siting and permitting transmission construction within a state. Furthermore, Vandalia's law occupies a matter belonging purely to the states—building and operating transmission lines within Vandalia.

Vandalia passed a law called "The Native Transmission Protection Act," which gives an incumbent electric transmission owner the right to "construct, own, and maintain" an electric transmission line that has been federally approved and connects to facilities owned by that transmission owner. Vand. Code § 24-12.3(d). If the incumbent transmission owner fails to exercise that right within eighteen months, another entity may build the line. Vand. Code § 24-12.3(d). The statute defines "incumbent electric transmission owner" as

> any public utility that owns, operates, and maintains an electric transmission line in [Vandalia]; any generation and transmission cooperative electric association; any municipal power agency; any power district; any municipal utility; or any … entit[y] … engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia.

Vand. Code § 24-12.2(f). Both parties agree that ACES is not an incumbent transmission owner, as it owns no existing transmission facilities in Vandalia. Record at 10.

1. The text of FERC's Order 1000 expressly states that it should not be construed so as to infringe on a state's right to select its own transmission builders.

The language of FERC's order makes clear that it will not preempt a state law restricting siting and permission to build transmission lines within the state. Vandalia's statutory ROFR is exactly that—a state law that concerns permission to build transmission lines in the state.

When reviewing an agency's interpretation of a statute, the Court must apply established canons of statutory construction. *Quezada-Bucio v. Ridge*, 317 F.Supp.2d 1221, 1228 (W.D. Wash. 2004), citing *I.N.S. v. Cardoza–Fonseca*, 480 U.S. 421, 431 (1987). The Court must begin its analysis of the regulation by "reviewing its language to ascertain its plain meaning." *Contract Services, Inc. v. United States*, 104 Fed.Cl. 261, 275 (2019). When there is no ambiguity in a regulation, the courts must enforce it according to its obvious terms and not "insert words and

phrases, so as to incorporate [therein] a new and distinct provision." *Insight Systems Corp. v. United States*, 110 Fed.Cl. 564, 576 (2013).

FERC Order 1000 requires ISOs to eliminate the federal right of first refusal. Specifically, Order 1000 directs public utility transmission providers to "remove from their [Open Access Transmission Tariffs] or other Commission-jurisdictional tariffs and agreements any provisions that grant a federal right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation." F.E.R.C. Order 1000 at 3 ¶ 7.2., 18 C.F.R. Part 35 (2011).

FERC Order 1000 states that it provides "flexibility" for public utility transmission providers in each region "to propose, in consultation with stakeholders, how best to address participation by nonincumbents" as a result of removal of the federal ROFR. F.E.R.C. Order 1000 at 176 ¶ 227, 18 C.F.R. Part 35 (2011). The Commission explicitly notes that "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Id*. In fact, FERC emphasizes the importance of states determining their own needs when it states that "[p]ublic utility transmission providers must establish this framework in consultation with stakeholders and we encourage stakeholders to fully participate." *Id*.

FERC's Order 1000 is not ambiguous. It removed a federal ROFR while expressly leaving states to address their particular needs when it comes to building transmission lines. FERC repeatedly reassured commenters in its final rule that eliminating a federal right of first refusal in Commission-jurisdictional tariffs and agreements does not result in the regulation of matters reserved to the states: "[t]he reforms are focused solely on public utility transmission provider

tariffs and agreements subject to the Commission's jurisdiction." F.E.R.C. Order 1000 at 227 ¶ 287, 18 C.F.R. Part 35 (2011). FERC's goal was to include different transmission options for states, not determine which facilities should be constructed.

Throughout FERC's Order, it discusses *federal* rights of first refusal. Under the surplusage canon, the word 'federal' gives meaning and context to what is being addressed, and it should not be ignored in order to expand the scope of FERC's rule to all statutes containing a right of first refusal.

Vandalia's right of first refusal was not explicitly preempted by FERC's Order 1000, nor is it implied by field preemption. The Order's plain meaning leaves little doubt that the Order removes a federal right of first refusal but does not outlaw such restrictions when imposed by states.

2. Congress's intent in creating FERC was to regulate interstate power markets, not to strip states of the power to determine how their transmission lines are built.

FERC's stated purpose and history further support the interpretation that FERC's Order 1000 does not prohibit states from enacting their own ROFR statutes by field preemption.

A court's inquiry into the scope of a statute or regulation's preemptive effect is guided by the rule that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Hughes v. Talen Energy Marketing*, LLC, 578 U.S. 150 (2016). When considering preemption, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 605 (1991).

Congress passed the Federal Power Act ("FPA") in 1935 in response to the Supreme Court case in *Public Util. Comm'n of R.I. v. Attleboro Steam*, which held that the Commerce Clause bars the States from regulating certain interstate electricity transactions, including wholesale sales.

Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co., 273 U.S. 83, 89–90 (1927). The FPA was the vehicle for Congress to create the Federal Energy Regulatory Commission ("FERC"). *New York v. FERC*, 535 U.S. 1, 6 (2002).

FERC exercises authority over the interstate transmission of electric energy and its sale at wholesale in interstate commerce. 16 U.S.C. § 824(b)(1). At the same time, under the FPA, states have traditionally assumed all jurisdiction over the approval or denial of permits for the siting and construction of electric transmission facilities. *LSP Transm. Holdings, LLC v. Lange*, 329 F.Supp.3d 695, 700 (2018) aff'd sub nom. *LSP Transm. Holdings, LLC v. Sieben*, 954 F.3d 1018 (2020). Congress passed the FPA precisely to eliminate vacuums of authority over the electricity markets. The FPA makes federal and state powers "complementary" and "comprehensive," so that "there [will] be no 'gaps' for private interests to subvert the public welfare." *Fed. Power Comm'n v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972). Some entity must have jurisdiction to regulate each and every practice that takes place in the electricity markets. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 289, as revised (Jan. 28, 2016).

In *PPL Energyplus v. Nazarian*, the U.S. District Court of Maryland found that the Maryland Public Service Commission's order was impliedly preempted because the order occupied the same field as FERC—namely, wholesale energy and capacity sales and price setting. *PPL Energyplus, LLC v. Nazarian*, 974 F.Supp.2d 790, aff'd, 753 F.3d 467, aff'd sub nom. *Hughes v. Talen Energy Marketing*, LLC, 578 U.S. 150 (2016). The order directed Maryland utilities to enter into contract for differences with generator involving construction of new generation facility. *Id*. Unlike Vandalia's ROFR, Maryland's order invaded the territory of wholesale sales. The court reasoned that after a generator physically comes into existence and participates in the wholesale electric energy market, "the prices or rates received" by that generator in exchange for wholesale

energy and capacity sales are within the purview of the federal government. *Id*. at 829. Here, Vandalia's law gives a limited right of first refusal that expires after eighteen months. It does not set prices or have anything else to do with wholesale sales. The FPA does not grant FERC authority over the siting or building of a physical generation facility, the direct financing of the construction of a power plant, or the encouragement of or limitations on certain types of power plants within its borders, such as environmental regulation. *Id*. at 827.

Congress did not intend to exceed federal authority when it created FERC, but rather drew a clear line between federal issues of energy markets and purely state matters.

B. The lower court correctly ruled against ACES because its interpretation would give FERC more authority than was granted under the FPA.

Appellant's interpretation of FERC Order 1000 presents serious federalism issues. If FERC's Order 1000 prevents states from determining which utility companies can construct transmission lines within their own states, then FERC has exceeded the authority granted to it by Congress under the FPA. The Court must not interpret FERC's order so as to create a Constitutional problem.

FERC has the authority to regulate interstate wholesale sales of electricity. The states retain jurisdiction "over the retail sale of electricity and the generation, transmission, and distribution of electricity in intrastate commerce." *LSP Transm. Holdings, LLC v. Sieben*, 954 F.3d 1018, 1023 (2020). Before Order 1000, incumbent transmission owners held priority status in all of the service territories. *See LSP Transm. Holdings, LLC v. Sieben*, 954 F.3d 1018, 1023 (2020). ACES' interpretation does not comport with the many states who have enacted their own ROFRs with no problem from FERC. Following Order 1000, Minnesota enacted its own ROFR, and the Midcontinent Independent System Operator ("MISO") incorporated the ROFR into its tariff. FERC approved the tariff. *Id*. at 1024. The Seventh Circuit recognized that state ROFRs were

permitted by FERC and honored by MISO. *MISO Transm. Owners v. FERC*, 819 F.3d 329, 336 (2016).

The Court should avoid constitutional problems by interpreting FERC's Order 1000 as consistent with federal powers, while leaving issues of transmission siting and permitting to Vandalia.

IV. Vandalia's statutory ROFR is consistent with the Dormant Commerce Clause.

The Commerce Clause grants Congress the power "[t]o regulate Commerce… among the several states" Art. 1, §8, cl.3. "Although the Commerce Clause is written as an affirmative grant of power to Congress… *in some instances,* it imposes limitations on the States**.**" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018)(emphasis added). These few instances of State limitation outline what has become known as the Dormant Commerce Clause. *See Id.* A two-part test is used to evaluate if a state regulation violates the Dormant Commerce Clause: "[f]irst, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *South Dakota*, 138 S. Ct. at 2091 (2018). Step one of this test invalidates discriminatory state regulation. *See e.g. Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992), *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, (1994). Step two is an undue burden analysis that favors upholding state regulations. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). In fact, "state laws frequently survive this [step two] scrutiny." *Dep't of Revenue v. Davis*, 553 U.S. 328, 339 (2008) (citing cases upholding state regulations after the undue burden analysis). This is because to be unconstitutional, a regulation's burden on interstate commerce must be "clearly excessive in relation to… local benefit" *Pike*, 397 U.S. 137.

A careful application of this two-part test shows that Vandalia's statutory ROFR does not violate the Constitution's Dormant Commerce Clause.

A. Vandalia's statutory ROFR is indifferent to interstate commerce.

Vandalia's ROFR statute does not discriminate on the basis of interstate commerce. In fact for the project at issue, Vandalia granted the ROFR to out-of-state corporations. Appellant, meanwhile, is a Vandalia resident. Compare this fact to the Supreme Court definition of laws that violate the Dormant commerce clause: "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-338 (2008). In order to succeed on their claim, the Appellant must show Vandalia's ROFR somehow burdens out-of-state competitors despite granting the right to them. "The burden to show discrimination rests on the party challenging the validity of the statute." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Non-resident corporations are granted the ROFR as the statute grants said right to any "incumbent electric transmission owner…" Vand. Code §24-12.3(d). The statute defines an incumbent electric transmission owner broadly as "any… entity… engaged in the business of owning, operating, maintaining, or controlling in this state [transmission] equipment." *Id.* Additionally, the project must "*connect[s] to facilities owned by* that incumbent electric transmission owner." *Id* (emphasis added). In short, the statute reserves the right to anyone, regardless of state residency, owning transmission equipment in Vandalia and to whom the project connects. The incumbent electric transmission owner is also limited to only eighteen months before non-incumbents may build the project. *Id.*

The below table helps illustrate an application of §24's plain text. If the statute were to discriminate against out-of-state competitors, then it would show differing results dependent on

residency status. Dormant Commerce Clause analysis presupposes "any notion of discrimination assumes a comparison of substantially similar entities." *GMC v. Tracy,* 519 U.S. 278, 299 (1997). The table shows how §24 discriminates—between entities who do or do not connect to the proposed project.

Table 1: Application of §24 to Corporation Factors

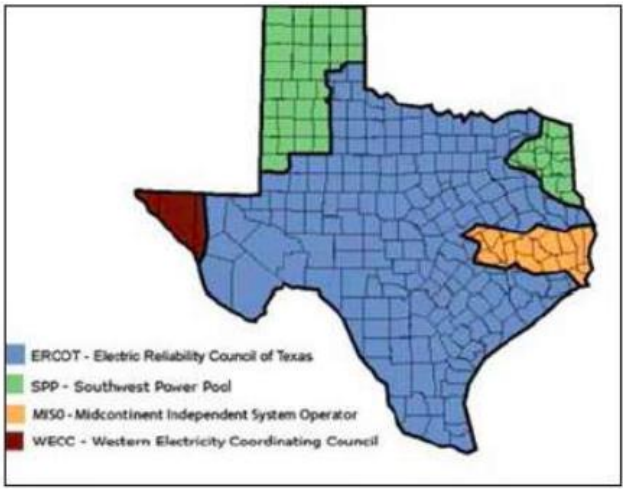
	Resident Corporation	Non-Resident Corporation
Project connects to facilities	Granted ROFR	Granted ROFR
Project does not connect	Denied ROFR	Denied ROFR

The 8th Circuit, in *LSP Transmission Holdings, LLC v. Sieben,* applied the above reasoning and upheld a Minnesota ROFR law identical to Vandalia's. 954 F.3d 1018, 1027 (8th Cir. 2020)(analyzing Minn. Stat. § 216B.246). In addition, the 8th Circuit significantly noted that a state's traditional police power includes regulating utilities. *Id,* at 1029. This aligns with FERC's own analysis from Order 1000. 136 F.E.R.C. P61,051, Order 1000 at 33 ¶ 107. Finally, the 8th Circuit noted the 18-month restriction on the right, granting non-incumbents the ability to construct the project if incumbents do not. *LSP Transmission Holdings, LLC,* 954 F.3d at 1030. The 8th Circuit could not find discrimination in Minnesota's ROFR. *Id.*

Appellant points this Court to *NextEra Energy Capital Holdings, Inc. v. Lake,* a 5th Circuit case that expressly disapproves of *LSP* and the 8th Circuit's analysis. 48 F.4th 306 (5th Cir. 2022). In *NextEra,* the 5th Circuit struck down an indefinite ROFR Texas had granted to incumbent transmission owners. *Id.* In so doing the 5th Circuit reasoned that incumbent transmission owners are, no matter corporate residency, considered in-state interests. *Id.* at 323.

While the 5th Circuit expressly disapproved of the 8th Circuit's reasoning in *LSP,* there are certain realities of Texas's transmission grid that may serve to make incumbent transmission

owners more akin to in-state interests. Unlike the rest of the country, the vast majority of Texas's transmission grid is intrastate. Only small scarcely populated portions of the state participate in interstate electricity transmission (subject to the SPP and MISO ISO's). The 5th Circuit provided the following map to showcase this fact. *NextEra*, 48F.4th at 314.



In order for a company to build in the interstate regions of Texas (SPP and MISO) they must already own Transmission equipment in the state, the vast majority of which they do not have access to (ERCOT.) Vandalia, on the other hand, is entirely within the PJM interconnect. Utilities serving Vandalia, and specifically those granted the ROFR, also serve many other sister states in the PJM interconnect. The Dormant Commerce Clause is intended to avoid the economic balkanization of states serving their own interests and isolating their markets from interstate commerce. *See Hughes v. Oklahoma,* 441 U.S. 322, 325 (1979). In Texas, an indefinite ROFR further sequesters the state into a market of its own. Within Vandalia, the limited ROFR reinforces the interests of utilities serving the entire PJM region.

B. The benefits derived from Vandalia's ROFR statute outweigh any incidental burden on interstate commerce.

Vandalia's ROFR provides the region stability, itself breeding safety and reliability; local benefits that greatly outweigh any incidental burden on interstate commerce. Even if these local

benefits ended up being minimal, the statute would still survive as Appellant cannot show the burdens are "clearly excessive in relation to… local benefit" *Pike,* 397 U.S. 137 (1970). This is why "state laws frequently survive this [step two] scrutiny," due in part to "federalism favoring a degree of local autonomy" *Dep't of Revenue v. Davis*, 553 U.S. 328, 339 (2008).

Regarding utility regulation, this local autonomy serves as one of "the most important functions…traditionally associated with… the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 377 (1983). The economic and human costs of Texas's recent grid failures provide ample evidence as to why a state would prioritize its energy infrastructure. *See.* Garret Golding, et. al., *Cost of Texas' 2021 Deep Freeze Justifies Weatherization,* Federal Reserve Bank of Dallas (April 15, 2021) https://www.dallasfed.org/research/economics/2021/0415. By enacting a ROFR, Vandalia can address these concerns by creating stability within its transmission grid.

A ROFR encourages stability by reducing the number of styles, interpretations, and standards that can be found in a State's transmission grid. Utilities standardize almost everything within a transmission system, from the size of hardware used to the distance between equipment or lines[1]. Utilities use these standards to ensure the compatibility of electrical systems as well as an institutional familiarity with any system on the transmission grid. *See* Footnote 1. This can be particularly helpful when an area is looking to restore power quickly after a storm and must train linemen who have traveled to help from far away. *See* Amy Fishbach, *Linemen Travel to Hard-*

[1] *Compare* First Energy, *Transmission Planning and Protection,* (August 6, 2021)https://www.pjm.com/-/media/planning/plan-standards/private-fe/fcr-facilities-connection-requirements.ashx and AEP, *Requirements for Connection of New Facilities Rev 03,* (July 30, 2022). Both of these utilities are members of the PJM ISO and yet also have different standards on such topics as how to build fences around substations. AEP even has a separate document detailing their fence standards to more detail. *See* AEP, *Requirements for Connection of New Facilities,* at 25.

hit Areas to Restore Hurricane Dorian Outages, T&D World (September 5, 2019) https://www.tdworld.com/disaster-response/article/20973063/linemen-travel-to-hardhit-areas-to-restore-hurricane-dorian-outages.

The ROFR provides Vandalia the benefit of a more standardized transmission system. Any burden felt by interstate commerce does not outweigh these benefits. Vandalia's ROFR is constitutional under the Dormant Commerce Clause.

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that this Court affirm the lower court decision.

Certificate of Service

Pursuant to Official Rule IV, Team Members representing the Vandalia Public Service Commission certify that our Team emailed the brief (PDF version) to the West Virginia University Moot Court Board in accordance with the Official Rules of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 1, 2023.

Respectfully submitted,

Team No. __1__