IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
C.A. No. 22-0682

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,	)	
Appellant,	)	
-v.-	)	C.A. No. 22-0682
CHAIRMAN WILL WILLIAMSON, *in his official capacity*, COMMISSIONER LONNIE LOGAN, *in his official capacity*, and COMMISSIONER EVELYN ELKINS, *in her official capacity*,	)	
Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF VANDALIA

COUNSEL FOR APPELLANT
TEAM NO. 6

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JURISDICTIONAL STATEMENT

This Court has jurisdiction over the present appeal. The United States District Court for the Northern District of Vandalia exercised proper jurisdiction because Appalachian Clean Energy Solutions, Inc. presented claims arising under the U.S. Constitution and the Federal Power Act, each yielding federal jurisdiction under 28 U.S.C. § 1331. The district court granted the Vandalia Public Service Commission's motion to dismiss on August 15, 2022, and Appalachian Clean Energy Solutions, Inc. filed a timely petition for appeal with this Court on August 29, 2022. R. at 16. This Court also has jurisdiction to hear this timely appeal because federal appeals courts have jurisdiction over the final decisions of all district courts. 28 U.S.C. § 1291.

STATEMENT OF THE 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 intrudes on the actions of the Federal Energy Regulatory Commission ("FERC") under the FPA.
3. Whether Vandalia's statutory ROFR is preempted under the Supremacy Clause of the U.S. Constitution due to its subversion of FERC's Order 1000.
4. Whether Vandalia's statutory ROFR violates the dormant Commerce Clause of the U.S. Constitution because it discriminates against or unduly burdens interstate commerce.

STATEMENT OF THE CASE

I. The Federal Energy Regulatory Commission requires participation in the PJM Interconnection.

In 1996, The Federal Energy Regulatory Commission ("FERC") issued Order 888 to promote competition in the wholesale electricity markets in the U.S.; the order requires

transmission-owning utilities to provide "open, fair, and non-discriminatory access to their transmission lines." R. at 3. The establishment of Independent System Operators ("ISOs") followed so existing power pools could satisfy the requirement to provide non-discriminatory access to energy transmission. *Id.* In 2000, FERC issued Order 2000, mandating that transmission-owning utilities participate in a regional transmission organization ("RTO"). *Id.* "The RTO/ISO serving the mid-Atlantic region is the PJM Interconnection ("PJM"), which is responsible for maintaining and operating the transmission grid in Vandalia and in thirteen other states and the District of Columbia." *Id.*

PJM is the sole authority approving the construction of new transmission facilities to serve the PJM grid, while the states within the PJM region retain authority over siting, routing, and permitting of new transmission facilities. *Id.*

PJM also operates energy and capacity markets that are designed to balance supply and demand. *Id.* In the energy market, PJM buys and sells electricity in real-time. *Id.* All electricity generators in Vandalia must sell the energy they produce in the PJM energy market pursuant to their status and contracts with PJM, except insofar as they enter bilateral contracts for the sale of electricity, "which are wholesale transactions also subject to FERC jurisdiction." *Id. n. 2.* Pricing for wholesale energy is determined by auction, where suppliers offer a price for a specified number of megawatt-hours of power and if accepted, that offer "clears" the market. *Id.* at 3. When supply meets demand (when the last supplier with the most expensive offer is successful in their bid) the most expensive price for megawatt-hours of power is said to be the "'market-clearing price'" and becomes the wholesale price of power. *Id.*

The capacity market is a forward-looking system that ensures that enough electricity is produced ahead of time to meet future demand. *Id.* PJM predicts demand three years in advance

and assigns a portion to each regional load-serving entity. *Id.* Owners of capacity then bid their electricity at auction for sale to PJM at the rates they set, and PJM continues to accept bids until enough capacity is purchased to satisfy anticipated demand. *Id.*

II. Appalachian Clean Energy Solution, Inc. obtained PJM approval for its plant and transmission line.

Appalachian Clean Energy Solutions, Inc ("ACES") is a global energy company headquartered in Springfield, West Virginia. R. at 4, 16. *Id.* ACES sells electricity through power purchase agreements or competitive regional wholesale markets throughout the Eastern Interconnection of the U.S. *Id.* ACES does not serve retail customers. *Id.* at 4-5. ACES has set a goal of achieving zero carbon emissions by 2050 and is working to decarbonize its electric generating facilities by closing existing coal plants and adding renewable and zero-carbon energy facilities. *Id.* at 5

ACES plans to retire its Franklin Generating Station, a coal-fired power plant built in 1979 in Ohio, as part of its decarbonization effort. R. at 5. The plant has been unsuccessful in the PJM capacity auctions and has had low-capacity factors in recent years. *Id.* In order to comply with the EPA's 2020 regulations, the plant would need environmental upgrades, but ACES has determined this would be uneconomic, so it will not be able to operate past 2028. *Id.*

ACES announced plans in April 2020 to construct an 1,800 megawatt ("MW") combined-cycle natural gas-fired generating plant, the Rogersville Energy Center, in Greene County, Pennsylvania. *Id.* In September 2022, ACES modified its design to enable the use of carbon capture and storage technology to qualify for the 45Q federal tax credit included in the Inflation Reduction Act (2022) and it plans to take advantage of the natural gas supplies from the Marcellus Shale. *Id.* Additionally, Pennsylvania established a statutory scheme for carbon sequestration in 2022. *Id.* The estimated cost of the Rogersville Energy Center is $3.1 billion. *Id.*

ACES is planning to construct a 500-kilovolt high-voltage transmission line called the Mountaineer Express from Rogersville to Raleigh, North Carolina, which would enable the regional grid to accommodate the output of the Rogersville Energy Center. *Id.* The line will consist of two single-circuit 500 kV lines, capable of transmitting either 3,000 MW of power as two AC lines or 4,500 MW as one AC and one DC line. R. at 5-6. The total capital cost is estimated at $1.7 billion. R. at 6.

PJM implemented a competitive planning process in accordance with FERC Order 1000, to give non-incumbent transmission developers the chance to participate in regional planning and expansion of the PJM bulk electric system. R. at 6. The criteria established were intended to facilitate cost-effective and timely solutions to ensure a reliable electricity system. *Id.* In March 2022, the PJM Board of Managers approved the Mountaineer Express project as part of the Regional Transmission Expansion Plan ("RTEP"). *Id.*

III. Vandalia's Public Service Commission issued a "Capacity Factor Order" to protect incumbent coal companies.

Vandalia's only retail utility companies, LastEnergy and Mid-Atlantic Power Co. (MAPCo.), operate a total of five coal plants in the state. R. at 4. The companies file annual reports with the Vandalia PSC to implement the power cost adjustment ("PCA") mechanism. *Id.* at 7. The PCA allows these companies to collect power cost surcharges from retail customers, totaling the actual power costs sustained over a year-long period. *Id.* In the October filings, LastEnergy's Byrd facility had a capacity factor of 62.3 percent, and Fort William's station was 46.1 percent. *Id.* MAPCo.'s Ohio County, Robert Andy, and Rambler plants had factors of 34.7, 49.6, and 57.3 percent, respectively. *Id.* The companies expect these coal pants to remain at or below a capacity factor of 60 percent. *Id.* These low-capacity factors are due to cheaper energy supplies available in the wholesale market through bilateral contracts and the PJM energy

market. *Id.* In short, more efficient energy suppliers are outbidding the Vandalian coal plants. *See Id.*

The PSC was concerned with the low-capacity factors and, after proceedings investigating the matter, the Commission issued the "Capacity Factor Order" ("the Order") *Id.* at 7-8. This market-altering decree required the coal companies to "maximize" the amount of coal burned in their facilities. *Id.* at 8. Specifically, the Order demands the companies to maintain a capacity factor of 75 percent or higher. *Id.* In the Order, the Commission found that the operation of these coal-fired plants at 75 percent capacity factor would always be economical; however, the Vandalia Citizens Action Group presented evidence that these facilities could profitably operate only 40 to 60 percent of the time. R. at 8-9. PSC recognized this Order would repel investors, so it created a "fail-safe" for the companies to recover money in retail rates if the price of production exceeded the PJM market clearing price. *Id.* If the market clearing price to enter PJM is higher than the production price, the companies will burden retail ratepayers to pay the difference. *Id.*

On June 6, 2022, ACES filed suit against the Vandalia PCS over its enforcement of the Order. R. at 14. ACES fielded three arguments that the Order violated the Supremacy Clause. *Id.* First, under *Hughes v. Talen Energy Marketing, LLC,* the Federal Power Act ("FPA") preempts the Order because it effectively sets an interstate wholesale rate, contradicting the FPA's division of authority. 578 U.S. 150 (2016); R. at 14. Second, ACES argued that the Capacity Factor Order will distort PJM auctions' price signals, undermining the FERC's goals under the FPA to ensure "[a]ll rates . . . shall be just and reasonable." 16 U.S.C. § 824d(a); R. at 14. Third, ACES argued the FPA preempts the Order because the latter requires coal-burning utilities to sell their energy into PJM–thus encroaching on Congressional authority. R. at 14.

On June 27, 2022, the PCS filed a motion to dismiss for failure to state a claim. *Id.* On August 12, 2022, the district court granted PCS's motion to dismiss, first finding that ACES lacked standing to bring a claim against the Capacity Factor Order, and second, that even if ACES had standing, the Order is permissible under the post-*Hughes* "zero emission credit" cases. R. at 15-16.

IV. Vandalia's statutory ROFR for incumbent transmission owners halts construction of the Mountaineer Express.

Before 2011, non-incumbent transmission owners were burdened with unfair competition from incumbent transmission owners who had a federal right of first refusal. R. at 9. In 2011, FERC issued Order 1000 which eliminated right-of-first-refusal provisions and required regional transmission projects to be competitively and regionally planned by entities like PJM. *Id.*

In 2014, the Vandalia state legislature responded to Order 1000 with the "Native Transmission Protection Act" ("NTPA"), which grants incumbent transmission owners an exclusive right to construct transmission lines in Vandalia for 18 months once a "federally registered planning authority" approves the construction of a transmission line and that line "connects to facilities owned by the incumbent electric transmission owner*." Id*.; Vand. Code § 24-12.3(d). The statute also narrowly defines "incumbent transmission owners."[1] ACES does not fall under this definition. R. at 4, 9.

Mountaineer Express was approved by the PJM Board of Managers in March 2022 and ACES submitted its application for a Certificate of Public Convenience and Necessity with the

[1] "[A]ny public utility that owns, operates, and maintains an electric transmission line in this state; 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 § 24-12.3(f)

Vandalia PSC in April 2022 as required by section 24-7-2 of the Vandalia Code. *Id.* at 10. However, due to the NTPA, LastEnergy and MAPCo have eighteen months until September 30, 2023, to decide whether to exercise their Right of First Refusal. *Id.* The Vandalia PSC has previously made a determination that because ACES is not a "public utility" within the meaning of Vandalia code section 24-8-1(h)[2], it is not entitled to use MAPCo or LastEnergy's rights of way in the construction of Mountaineer Express, increasing both construction costs and environmental impact. *Id.* at 11.

On June 6, 2022, ACES also brought suit against the PSC to challenge Vandalia's statutory ROFR. R. at 15. First ACES argued the FPA preempts the ROFR, and the latter violates the Supremacy Clause by usurping the FERC's authority set out in Order 1000. *Id.* Second, ACES argued the Vandalia ROFR violates the dormant Commerce Clause because it discriminates against out-of-state actors. *Id.* ACES likened the ROFR in Vandalia's *NTPA* to Texan legislation struck down by the Fifth Circuit. *Id.* Even though the Texas law had no time period provision, while the NPTA provides an 18-month period for incumbents to exercise the ROFR, ACES argued that the period is so long as to harm competition by dissuading new entrants. *Id.* Finally, ACES argued that even if the NTPA was not overtly discriminatory and had no discriminatory purpose, it imposed a burden on commerce too excessive compared to the alleged local benefits. *Id.* at 15-16.

PCS also sought to dismiss ACES's ROFR claims in its June 27th, 2022, motion. *Id.* at 16. The district court granted the motion to dismiss on August 15, 2022. *Id.* First, it found that the Vandalia ROFR was not preempted by the FERC's Order 1000. *Id.* Second, it found that Vandalia's ROFR does not violate the dormant Commerce Clause. *Id.* The district court arrived

at this conclusion after rejecting the Fifth Circuit's approach in *NextEra Energy Cap. Holdings, Inc. v. Lake* and instead holding that the place of incorporation controls in-state or out-of-state status. 48 F.4th 306, 324 (5th Cir. 2022); R. at 16. The district further determined that under the *Pike v. Bruce Church, Inc.* balancing test, the burden imposed by the NTPA on interstate commerce was not greater than the local benefits intended by the Vandalian legislature. 397 U.S. 137, 142 (1970); R. at 16. ACES filed this petition for appeal with this Court on August 29, 2022. R. at 16.

STANDARD OF REVIEW

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Appellate review of a district court's denial to grant a motion to dismiss is reviewed *de novo*. *See Loftus v. Bobzien*, 848 F.3d 278, 284 (4th Cir. 2017); *Palin v. N.Y. Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019).

SUMMARY OF THE ARGUMENT

ACES has standing to challenge Vandalia PSC's Capacity Factor Order. To gain Constitutional standing and invoke the jurisdiction of a federal court, a party must allege that it has suffered a (1) redressable (2) injury-in-fact (3) causally connected to the defendant. Appalachian Clean Energy Solutions has standing to challenge Vandalia's Capacity Factor Order because it suffers a competitive injury. Vandalia's Order will artificially depress and distort wholesale prices for capacity, an injury that courts have implicitly and explicitly recognized.

This harm is fairly traceable to the pricing mechanism set forth in the Order and by invalidating the law, a court would redress ACES injuries.

The Vandalia PSC's Capacity Factor Order is preempted pursuant to the Supremacy Clause. Federal law preempts contrary state law. Congress can explicitly preempt state law, or a court can infer preemption if federal law occupies an entire field of regulation, or the state law harms federal goals. The Federal Power Act ("FPA") grants FERC exclusive jurisdiction to regulate wholesale prices for electricity. FERC regulates the structure of the competitive auctions, run by RTOs, and ensures that wholesale auction prices are just and reasonable. The Capacity Factor Order is both field and conflict preempted. The Order is field preempted because it impedes on FERC's regulatory turf through the regulation of wholesale electricity prices and by compelling the coal plants to participate in wholesale auctions. Vandalia's law is conflict preempted because it seriously impinges on FERC's authority to regulate the reasonableness of prices by distorting the market-clearing prices.

Vandalia's statutory ROFR is preempted pursuant to the Supremacy Clause. Pursuant to the Supremacy Clause, federal law preempts state law that erects an obstacle to the full accomplishment of regulatory purposes and objectives. FERC issued Order 1000 to fulfill its duties under the FPA to ensure reasonable and nondiscriminatory rates for electricity. That Order prohibits ROFRs for transmission facilities approved for construction through a regional transmission planning process for cost allocation. PJM implemented a regional planning process for cost allocation; part of that plan is that ACES will construct the Mountaineer Express, a transmission line spanning several states. Vandalia's NTPA threatens this plan, and therefore, the purposes and objectives of Order 1000. This Court should hold that the district court erred in concluding that Order 1000 does not preempt Vandalia's NTPA.

Vandalia's statutory ROFR violates the dormant Commerce Clause. The Commerce Clause grants Congress the power to regulate interstate commerce. From this proposition the Court has inferred that states may not pass laws that discriminate against interstate commerce. This inference is called the "dormant Commerce Clause." Such state laws, when found to discriminate via their texts, purposes, or effects, are subjected to the strictest scrutiny and are usually invalid *per se*. Vandalia's ROFR has the purpose or effect of discriminating against interstate commerce because it amounts to a presence requirement for transmission line owners. Vandalia cannot justify the ROFR by any factor other than economic protectionism. Therefore, the ROFR violates the dormant Commerce Clause. Even if the ROFR does not discriminate against interstate commerce, it nevertheless has an adverse effect on interstate commerce that is clearly excessive compared to its putative local benefits, and thus violates the dormant Commerce Clause. The appellate court should reverse the district court's contrary ruling.

ARGUMENT

I. Appalachian Clean Energy Solutions, Inc. has Article III standing to challenge Vandalia Public Service Commission's Capacity Factor Order as preempted by federal law.

The district court improperly granted the defendant's motion to dismiss for failure to state a claim because ACES has Article III standing to challenge Vandalia's Capacity Factor Order. To establish Article III standing, the plaintiff must meet three elements. First, the plaintiff suffered an injury-in-fact, a "concrete and particularized" harm to a protected legal interest that is "actual or imminent" and not "conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Second, the injury must be "fairly traceable" to the defendant's actions. *Id.* Third, a favorable judgment will redress the wrongdoing. *Id.*

Courts have frequently found "competitive injuries" to meet the requirements for constitutional standing. *See, e.g.*, *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970); *United States Telecom. Ass'n v. FCC,* 295 F.3d 1326, 1331 (D.C. Cir. 2002); *Cooper v. Tex. Alcoholic Bev. Comm'n*, 820 F.3d 730, 737-38 (5th Cir. 2016). In *Louisiana Energy & Power v. FERC*, FERC injured the plaintiff company when it approved an application from a competitor, allowing it to sell energy at a market-based rate. 141 F.3d 364, 365 (D.C. Cir. 1998). There, the appellant challenged a FERC Order that would allow a competitor to increase price competition. *Id.* FERC claimed that the appellant did not have standing because the "injury remain[ed] 'conjectural or hypothetical' because [appellant] ha[d] not demonstrated that predatory pricing, as opposed to lower competitive pricing, '[would] occur' under" the order. *Id.* at 367. The court held that the allegation that FERC's increased price competition action was actual and imminent, not hypothetical. *Id.* Further, the Court held that the allegation of increased competition was "fairly traceable" to FERC's decision to allow a competitor to price differently and that a court order would likely redress this harm. *Id.*

Furthermore, "[t]o reach the merits of a case, an Article III court must have jurisdiction," including standing. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). In fact, several courts, including the Supreme Court, have reached the merits on cases nearly identical to the issue at bar. *See Hughes,* 578 U.S. at 158-59 (2016); *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014); *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241 (3d Cir. 2014). In *Hughes*, the plaintiff generators faced injury from a Maryland program. *See* 578 U.S. at 158-59. The State solicited bids to build a new power plant and guaranteed the winner a specified price for its energy, guaranteeing that the plant would always clear the auction in the PJM market. *Id.* at 159. While the Supreme Court did not specifically address standing in

Hughes, it reached the merits of case and affirmed the Fourth Circuit's decision in *Nazarian*. *Id.*; 753 F.3d at 467. Likewise, the Third Circuit reached the merits in *Solomon*. *See* 766 F.3d at 241. Given that there must be standing for a court to reach the merits, all of these generators must have had proper standing. Ultimately, ACES has standing to challenge Vandalia's Capacity Factor Order.

ACES has adequately asserted a plausible claim of injury to survive a motion to dismiss. In dismissing this case, the lower court accepted PSC's argument that ACES's injuries (economic impacts on the Rogersville Station) are hypothetical because it thought the coal companies would be able to operate at a 75 percent capacity factor R. at 14. This argument reflects a flawed understanding of the law and the facts of this case.

First, the order will have a direct impact on the Rogersville Station. The new merchant plant, which the company has concretely planned and methodically prepared for, will contribute to the PJM grid. R. at 3, 5. By participating in PJM, the plant will compete with MAPCo and LastEnergy in the wholesale markets. *See Id.* at 5, 8. Vandalia's Order effectively allows the coal companies to depress the prices because PJM allows companies to bid their capacity at zero dollars and guarantee they clear the market, lowering the overall clearing price. Vandalia's Order effectively allows the coal companies to depress the prices. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 523 (7th Cir. 2018) (explaining how a similar subsidy effectively depresses prices). Artificially deflated prices will steep competition in favor of Vandalian Coal, at the expense of Rogersville energy—ACES faces a cognizable injury. R. at 5-6; *see also Louisiana Energy & Power*, 141 F.3d at 365.

Second, PSC argues these injuries are "hypothetical" because it expects the coal plants to profitably run at a 75 percent capacity factor, so the companies will never need to employ the

"fail-safe" to clear their capacity at a market-efficient rate. R. at 14. Yet, this argument ignores that the coal companies admitted that they have not been able to operate profitably at a capacity factor even remotely close to 75 percent. *Id.* at 7. PSC's findings are groundless. *Id.* Even if it were certain that the effects of this Order would not affect the economics of the Rogersville station, ACES still has a cognizable injury. *See Louisiana Energy & Power*, 141 F.3d at 365. ACES's Franklin plant also competes in the PJM markets, R. at 7, and it will face the same competitive injuries as the plaintiffs in *Louisiana Energy & Power*. *See Id.*

Finally, ACES has properly alleged causation and redressability. ACES's injury is traceable to the defendants in this case. *See Lujan*, 504 U.S. at 560. Just like the FERC regulation in *Louisiana Energy & Power*, the competitive injury ACES faces are "fairly traceable" to the PSC's issuance of the Capacity Factor Order because it is that program that insulates the coal generators from market realities. *See* 141 F.3d at 367. By invalidating the Order, this court would redress the injury by stopping Vandalia from instituting a program that distorted the market-clearing prices of electricity in PJM. Because ACES faces competitive injury at the hands of the Vandalia PCS and redress is readily available, this Court should reverse the district court's order to dismiss for lack of standing.

II. The District Court erred in concluding that the Federal Power Act does not preempt the Capacity Factor Order.

Vandalia's Capacity First Order violates the Supremacy Clause. The Constitution makes federal laws the supreme laws of the land. U.S. Const. Art. VI, cl. 2. "Put simply, federal law preempts contrary state law." *Hughes*, 578 U.S. at 162. Congressional intent is key in determining if a law is preempted. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 49 (2d Cir. 2018). If Congress does not explicitly preempt a law, there are two methods of inferring implicit preemption: (1) state law is "field" preempted when there is "no room for states to

supplement federal law." *Id.* (2) a law is "conflict" preempted when it presents an obstacle to federal goals. *Id.* The FPA conflict and field preempts Vandalia's Order.

The Federal Power Act grants FERC the authority to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). FERC has the responsibility to ensure that "rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable." *Id.* § 824d(a). FERC regulates these prices through ISO/RTOs (like PJM interconnection), which regulate transmission facilities and the wholesale energy markets. *See Hughes*, 578 U.S. at 155. The FPA allows states to regulate matters traditionally within the state's authority, like retail rates and in-state generation. *Id.* at 154.

A. The FPA field preempts the Order.

Vandalia's Capacity First Order is Field preempted by the Federal Power Act in two ways: (1) the Order effectively sets an interstate wholesale rate, and (2) the Order compels coal-burning utilities to sell their energy into PJM. A court renders a state law field preempted when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989).

i. The Order effectively sets an interstate wholesale rate.

The Supreme Court recently addressed a similar field preemption claim in *Hughes*. *See* 578 U.S. at 162-63. The Court held that a Maryland program violated the Supremacy Clause because it "set[] an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Id.* at 163. The Maryland Public Service Commission promulgated an order that required utilities to enter into a "contract for differences" with a

specified generating plant. *Id.* at 158. The contract included a price set by the generator, which would then participate in the PJM capacity auction. *Id.* The program guaranteed the generator would clear the capacity auction because PJM allows producers to bid energy at zero dollars and ensure their capacity is dispatched. *Id.* If the clearing price were higher than the contract price, the utility companies would have to pay the difference to the power plant. *Id.* The Court found this program unconstitutional because Maryland "condition[ed] payment of funds on capacity clearing the auction," invading FERC's exclusive regulation of the wholesale markets. *Id.* at 166. Importantly, the Court assured states that "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures' untethered to a generator's wholesale market participation.'" *Id.*

The *Hughes* court came to this determination by, in part, relying on past case law to highlight the balance of state and federal power under the FPA. First, in *FERC v. Elec. Power Supply Ass'n* ("*EPSA*"), the Court made clear that "[t]he FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for *regulation that would indirectly achieve the same result*." 577 U.S. 260, 288 (2016) (emphasis added) (internal quotation marks omitted). Second, the *Hughes* majority relied on *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986), and *Mississippi Power & Light v. Miss.*, 487 U.S. 354, 373 (1988), for the proposition that "[s]tates interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." *Hughes*, 578 U.S. at 165.

The FPA field preempts Vandalia's Order; the Order sets an interstate wholesale rate. MAPCo and LastEnergy made it clear that none of their plants could profitably achieve a 75 percent capacity factor. *See* R. at 7-8. To avoid the inevitable financial destruction of these

companies, the PSC created a reimbursement mechanism that allowed them to recover, through retail rates, the difference between their costs and the clearing price of the PJM market. *Id.* at 8. Vandalia interfered with FERC's jurisdiction by setting interstate wholesale rates. Similar to the program in *Hughes*, Vandalia's Order made a simple promise, if a company clears the market and the wholesale price is lower than the production price, the company could recover the exact difference. *See* 578 U.S. at 163. Vandalia's program uses a pricing mechanism that insulates the MAPCo and LastEnergy from market fluctuations, guaranteeing that the companies will not have to compete in the market because they will always be able to recover the cost of production. *See id.* This regime impinges FERC's authority under the FPA, which grants FERC exclusive jurisdiction over "rates and charges . . . received . . . for or in connection with" wholesales. *See* 16 U.S.C. § 824d(a).

Yet, the district court dismissed this case because it erroneously believed that the Zero Emission Credit ("ZEC") line of cases was dispositive. R. at 15. However, dependence on these cases was improper because those courts relied on a narrow reading of *Hughes*, and the programs are functionally different. After *Hughes*, several circuits addressed similar preemption arguments in cases dealing with ZEC programs. *Zibelman,* 906 F.3d at 41; *Star*, 904 F.3d at 518. ZECs are financial credits that attach economic value to emission-free generators. *Zibelman*, 906 F.3d at 45. The state assigns ZECs to nuclear power plants to keep them from shuttering. *Id.* at 47. The state buys ZECs from the plants and requires emissions-producing generators to repurchase them from the state. *Id.*; *Star*, 904 F.3d at 521-22. The ZEC price is the "social cost of carbon" (a federal inter-agency group's estimate of the hypothetical damage caused by the retirement of a nuclear generator) minus a part of the cost already captured from a different program and then multiplied that result by the amount of carbon avoided (tons/MWh). *Zibelman*, 906 F.3d at 47.

Each qualifying generator will receive the ZEC price for every MWh it generates on top of the amount received from the RTO auctions. *Id.*

In *Zibelman*, the court rejected a preemption challenge to New York's ZEC program. 906 F.3d at 55. A group of electric generators sued the State alleging that *Hughes* field preempted the program. *Id.* at 56. That court rejected the plaintiff's argument that New York had created an impermissible tether under *Hughes*, because the program did not explicitly require the generators to participate in the wholesale market to receive the subsidy. *Id.* at 51. Further, the ZEC price depended on an independent variable (the social cost of carbon), not constantly fluctuating with the market-clearing price in RTO auctions, differing from the *Hughes* program. *Id.* The Seventh Circuit reached the same conclusion in a challenge to a similar Illinois program. *Star*, 904 F.3d at 524.

The district court's reliance on these cases was faulty because those courts read *Hughes* so narrowly that they confined FPA preemption to those facts. *See id.*; *Zibelman*, 906 F.3d at 55. The only real difference between *Hughes* and Vandalia's programs is that the former expressly conditioned (or tethered) the payment on clearing the auction. *See* 578 U.S. at 160. This minute detail is insufficient to save Vandalia's program. The *EPSA* Court clarified that the FPA preempts laws even if they only "indirectly" regulate the wholesale price. *See* 577 U.S. at 288. Moreover, *Hughes* "ma[de] clear that States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." 578 U.S. at 165. By invoking these cases, the *Hughes* Court indicated that a state program should not be able to escape preemption just because its law does not express conditions regulating market participation, instead focusing on what the real effect of the state's regulation. *See id.* The ZEC

courts wrongfully focused on the "tethering" language at the end of the *Hughes* opinion. *See Zibelman*, 906 F.3d at 51. The Supreme Court was describing specifically what was wrong with Maryland's program, not declaring that the *only* way to face preemption is to explicitly tether a subsidy to wholesale market participation. *See Hughes*, 578 U.S. at 165. To read *Hughes* in this manner encourages formalistic application of preemption claims, where states can subvert congressional intentions by creating programs that do not technically condition payment on market participation but utilize market conditions to effectively require this sort of regime.

Additionally, the ZEC programs had a key distinction from the PSC Order: the ZECs were not directly based on the market-clearing prices. *See Zibelman*, 906 F.3d at 47. The ZEC programs did not insulate the nuclear generators from market fluctuations, instead basing the recovery rate on a factor independent of market participation (social cost of carbon). *See Zibleman*, 906 F.3d at 51. This difference from Vandalia's program is what truly allows it to survive. While there are economic incentives for ZEC recipients to sell into the wholesale market, the effects are virtually unrelated to market prices and do not effectively set a wholesale price. *See id.* Here, ACES has properly alleged that the FPA preempts the Order because Vandalia guaranteed a distinct rate from the market, but directly correlated to the market, which effectively sets the interstate wholesale rate.

ii. The Order compels wholesale market participation

The First Capacity Order Compels MAPCo and LastEnergy to sell into PJM, invading FERC's jurisdiction. As the *Zibleman* court made clear, states cannot "compel[] wholesale market participation." 906 F.3d at 51. The plaintiff/appellants in *Zibelman* complained that the ZEC program effectively compelled market participation by taking advantage of the generators's status as an Exempt Wholesale Generator ("EWG"). *Id.* This program gives generators business incentives in exchange for only selling their capacity in the wholesale markets. *Id.* The Second

Circuit held that participation in the program was a financial decision and nothing in the ZEC program forced the generators to sell their output in the wholesale markets; thus, the ZEC program did not wrongfully compel the generators. *Id.*

The First Capacity Order is field preempted because it compels MAPCo and LastEnergy to sell their energy in the wholesale market, an area of regulation reserved for FERC. Vandalia's program "expressly authorizes" the reimbursement program to depend on the PJM market-clearing price. R. at 8. While the coal companies do have to sell their capacity into PJM according to their Fixed Resource Requirement ("FRR"), Vandalia's Order still wrongfully compels the generators. *See id.* at 8. Since the subsidy amount directly depends on the wholesale price, the utilities are so financially tied to the market that it is entirely illogical to sell anywhere but PJM. So, while the FRR and the EWG from *Zibelman* are similar, the difference between the cases lies in the pricing mechanism. *See* 906 F.3d at 51. New York's pricing mechanism factored in a forecast of wholesale prices, while Vandalia's Order directly tied the reimbursements to the price of PJM. *Id.*; R. at 8. Thus, the key distinction between the programs is what makes *Zibelman*'s provision permissible and Vandalia's preempted. *See* 906 F.3d at 51; *see also Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 102 (2d Cir. 1985) (holding that a retail rate adjustment, which factored in an estimate of the wholesale clearing price, was not preempted because it would not "materially affect sales decisions.").

B. Vandalia's Order is Conflict Preempted.

Vandalia's Order is conflict preempted by the FPA because it interferes with FERC's methods of ensuring just and reasonable rates. A provision is conflict preempted when "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc*., 576 U.S. 373, 376 (2015) (internal quotation marks omitted). The

Federal Power Act charges FERC to ensure wholesale rates are "just and reasonable." 16 U.S.C. § 824(a). To carry out this mandate, FERC issued Orders 888 and 2000, which created the RTO system that manages the wholesale auctions. R. at 3. Specifically, FERC ensures that the auctions produce a reasonable clearing price, which is "the price an efficient market would produce." *EPSA*, 577 U.S. at 268 (2016).

The FPA does envision a role for states, where they regulate matters in their jurisdiction even if it incidentally affects wholesale prices. *See Zibleman*, 906 F.3d at 56. The Second Circuit dealt with a similar conflict preemption claim in *Zibelman*. *See id.* at 55. That court found that the New York ZEC program was not conflict preempted because there was no clear damage to federal goals. *See id.* at 57. Those plaintiffs argued that the ZEC program would damage federal goals because it would distort wholesale price signals. *Id.* at 56. Yet, the court found that this price distortion was incidental because it allowed generators profitably to increase supply while holding demand constant. *Id.* Critically, the ZEC program did not "guarantee a certain wholesale price that displaces the NYISO auction price." *Id.* at 57.

Unlike the ZEC program, the Vandalia Order does not escape conflict preemption. The Order significantly interferes with FERC's goal that auction prices be just and reasonable. *See Learjet, Inc.,* 576 U.S. at 376. Vandalia's program would artificially deflate the clearing price by allowing the coal plants to bid their capacity at zero dollars per MWh, knowing that the State will fully compensate the generators no matter the clearing price. *See* R. at 8; *Hughes*, 578 U.S. at 156-57. While the FPA does not preempt states from incidentally affecting market rates when they regulate their domain, Vandalia's program goes too far. *See Zibelman*, 906 F.3d at 56. Unlike the ZEC program, Vandalia's Order allows complete subversion of market operations by guaranteeing a certain wholesale price. *See id.* Ultimately, the FPA conflict preempts the

Capacity Factor Order since Vandalia's law is an obstacle to FERC effectuating its duty of ensuring just and reasonable rates.

III. The District Court erred in concluding that Order 1000 does not preempt Vandalia's Native Transmission Protection Act.

The Supremacy Clause reads: "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, § 1, cl. 2. This Clause invalidates state laws that "interfere with, or are contrary to," federal law. *Hillsborough Cty., Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 712 (1985). Federal regulations hold the same preemptive power as federal statutes. *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). Unlike statutes, however, regulations' preemptive effects do not depend on congressional authorization to displace state law. *Id.* When an agency regulates in an area traditionally regulated by states, thereby creating a conflict, the Supreme Court has limited judicial review to determine whether the agency's choice "'represents a reasonable accommodation of conflicting policies that were committed to the agency's care by statute.'" *Id.* at 154 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)). Hence, this Court's review should answer (1) whether FERC's Order 1000 was promulgated within the authority delegated to it by Congress, and (2) if so, whether Vandalia's NTPA conflicts with FERC's Order 1000. *See Id.*

A. The Federal Energy Regulatory Commission issued Order 1000 to effectuate its statutory duty under Section 206(a) of the Federal Power Act to ensure nondiscriminatory rates.

Section 201(b) of the Federal Power Act (FPA) extends FERC's jurisdiction to "the transmission of electric energy in interstate commerce" 16 U.S.C. § 824(b). The Supreme Court interprets Congress's language as "delegating to [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce ...." *New Eng.*

Power Co. v. New Hampshire, 455 U.S. 331, 340 (1982) (citing *United States v. Pub. Utils. Comm'n of Cal.*, 345 U.S. 295 (1953)). Section 206(a) instructs FERC to "remedy 'any ... practice' that 'affect[s]' a rate for interstate electricity transmission services 'demanded' or 'charged' by 'any public utility' if such practice 'is unjust, unreasonable, unduly discriminatory or preferential.'" *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (quoting 16 U.S.C. § 824(a)).

Before Order 1000, RTO tariffs included federal rights of first refusal to incumbent utilities. R. at 9. These rights discouraged non-incumbents from proposing transmission facilities because they would likely never see the benefits of their proposal nor recoup the costs of identifying the need for the proposal in the first place. *South Carolina Pub. Ser. Auth.*, 762 F.3d at 72 (citing Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 77 Fed. Reg. 32184 (Aug. 11, 2011) [hereinafter "Order 1000"]). "The Commission feared" that the barrier to competition would create "unjust and unreasonable rates" for customers in violation of Section 205 of the FPA. *Id.* (citing Order 1000 ¶¶ 228–30, 76 Fed. Reg. at 49,880–81). FERC fears were exacerbated because of the need for a significant increase in transmission capabilities as "renewable energy sources [are] integrated into the grid." *Id.* (citing Order 1000 ¶¶ 29, 44–47, 76 Fed. Reg. at 49,849, 49,851–52).

FERC implemented a ban on rights of first refusal, but only applied it to facilities whose costs would be allocated according to the regional transmission plan. *Id.* at 73 (citing Order 1000 ¶¶ 253–56, 76 Fed. Reg. at 49,885–86). Rights of first refusal are still allowed for facilities located wholly within the service territory of an incumbent whose development costs would not be spread to other parties. *Id.* (citing Order 1000 ¶¶ 63, 258, 76 Fed. Reg. at 49,854, 49,886.).

B. Vandalia's Native Transmission Protection Act conflicts with Order 1000.

Conflict preemption turns on "the identification of 'actual conflict,' and not on an express statement of pre-emptive intent." *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000) (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990). Federal law preempts state law to the extent that state law conflicts with federal law—"'when compliance with both federal and state regulations is a physical impossibility,'" *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 372 U.S. 132, 142-43 (1963)), or "when state law 'stands as an obstacle to the accomplishment of the full purposes and objectives'" of federal law. *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The Supreme Court's opinion in *Geier* illustrates circumstances where state law creates an obstacle to the accomplishment of the full purposes and objectives of a federal regulation. 529 U.S. 861. In that case, an injured motorist sued an automobile manufacturer under District of Columbia tort law, claiming the automobile had a defective design due to its lack of airbags. *Id.* at 865. The Court held that the Department of Transportation's ("DOT") 1987 automobile safety standards preempted the action because those standards required airbags in some automobiles but not all. *Id.* at 881-84. DOT concluded that it could require passive seatbelts or airbags but not both due to a variety of conflicting factors. *Id.* at 877-82. Because the state tort action would have imposed a duty requiring all manufacturers to install airbags, it "[stood] as an obstacle to the accomplishment and execution of…federal objectives" and was preempted. *Id.* at 881 (internal quotations omitted).

Vandalia's NTPA prevents the accomplishment of the full purposes and objectives of FERC Order 1000. *See* R. at 15. While other courts have considered issues related to Order 1000 and state ROFRs, this is the first to present the issue of a direct conflict between an RTO's cost allocation plan and a state's ROFR under the Supremacy Clause. *See generally MISO*

Transmission Owners v. FERC, 819 F.3d 329 (7th Cir. 2016) (holding, *inter alia*, FERC can allow RTOs to include provision in tariff honoring state and local ROFRs); *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022) (evaluating, *inter alia*, direct conflict between RTO plans and state ROFR under the dormant Commerce Clause).

FERC banned rights of first refusal for facilities that are approved for construction in accord with regional transmission plans for cost allocation. Order 1000 ¶¶ 253–56, 76 Fed. Reg. at 49,885–86. The Commission implemented this ban "to eliminate practices that have the potential to undermine the identification and evaluation of more efficient or cost-effective alternatives to regional transmission needs, which in turn can result in rates…that are unjust and unreasonable…." Order 1000 ¶ 226; 76 Fed. Reg 49880.

PJM created its Regional Transmission Expansion Plan (RTEP) to implement Order 1000's directives. R. at 6. In March 2022, as a part of that plan, the PJM Board of Managers approved the ACES's Mountaineer Express project, a transmission line spanning several states. *Id.* Costs are allocated according to the RTEP. *See* PJM, *Project Status & Cost Allocation*, https://www.pjm.com/planning/project-construction (last visited Jan. 27, 2023). The Mountaineer Express is the exact type of transmission facility that is protected from rights of first refusal. *See* Order 1000 ¶¶ 253, 76 Fed. Reg. at 49,885 ("The Commission concludes that there is a need to…remove provisions…that grant incumbent transmission providers a federal right of first refusal to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation.") Because Vandalia's NTPA provides incumbent transmission providers a right of first refusal, subverting PJM's RTEP, it stands "as an obstacle to the accomplishment and execution of…federal objectives" and is therefore preempted. *Geier*, 529 U.S. at 881 (internal quotations omitted).

IV. The district court erred in granting appellee's motion to dismiss ACES's dormant Commerce Clause claim against Vandalia's right of first refusal.

ACES alleges a violation of the Commerce Clause and the facts in ACES's complaint are sufficient to state such a claim. The Commerce Clause states Congress has the power "to regulate Commerce … among the Several states …." U.S. Const. Art. I, § 3, cl. 3. The contrapositive of this proposition has come to be accepted in the "dormant Commerce Clause:" a state may not pass a law discriminating against or burdening interstate commerce. *See, e.g.*, *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). "A law can discriminate against interstate commerce by its text (or 'face'), effects, or purpose." *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 321 (5th Cir. 2022) (citation omitted). Vandalia's ROFR discriminates against interstate commerce and has the purpose or effect of discriminating against out-of-state economic interests. Even if the ROFR lacks discriminatory language, effect, or purpose, the law places a burden on interstate commerce that is clearly excessive relative to the purported local benefits. Accordingly, the ruling of the district court should be reversed.

A. The NTPA discriminates against interstate commerce.

i. Presence requirements discriminate against interstate commerce.

ACES's claim for relief is plausible because Vandalia's ROFR expressly mandates differential treatment of in-state and out-of-state economic interests with the goal of promoting economic protectionism. The Court has subjected such discriminatory legislation to "virtually *per se*" invalidity, as in *Philadelphia vs. New Jersey*, 437 U.S. 617, 624 (1978), or to strict scrutiny review. *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979). To determine whether the legislation is discriminatory, the district court erroneously favored a formalistic inquiry that merely examined where the affected parties are incorporated, rather than the functional operation of the law. R. at 16. Vandalia's NTPA affects discrimination through its definition of "incumbent

electric transmission owner," which is limited to utilities and entities already owning transmission facilities in Vandalia. Vand. Code § 24-12.2(f); R. at 10.

The Supreme Court looks down on residency requirements and they are treated as invalid *per se* for discriminating against interstate commerce. *See Granholm v. Heald*, 544 U.S. 460, 475-76 (2005). Similarly, the Court has not permitted state laws that "discriminate[] among affected business entities according to the extent of their contacts with the local economy" to escape scrutiny under the dormant Commerce Clause. *Lewis v. BT Inv. Managers*, 447 U.S. 27, 42 (1980). In *NextEra Energy Cap. Holdings, Inc. v. Lake*, the Fifth Circuit recognized that a presence requirement for electricity transmission utilities serves the same impermissible protectionist goals as a residency requirement, and thus should be treated with the same skepticism. 48 F.4th at 326.

The NTPA's definition of incumbency acts as a presence requirement on transmission owners because it allows only those owners with operations already present in the state to escape being subject to another incumbent's ROFR. R. at 10. If a transmission line owner does not already own a line in Vandalia, it is at the mercy of incumbents MAPCo and LastEnergy to build one, except in the unlikely scenario that either fails to act in 18 months. *Id.* A presence requirement is distinguished from a residency requirement, in that the latter confers a benefit to a business based on residence in the relevant state, while subjecting non-resident businesses to more strenuous requirements. *See Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963). Corporations like ACES, MAPCo, and LastEnergy have residency where they are incorporated and where they are headquartered. 28 U.S.C. § 1332 (c)(1); *Hertz Corp. v. Friend*, 559 U.S. 77, 81 (2010).

The district court merely observed that MAPCo and LastEnergy are incorporated outside of Vandalia and concluded there was no discrimination against out-of-state commerce. R. at 4, 16. The district court's approach ignores the way that federal courts have traditionally approached dormant Commerce Clause questions, as well as the economic realities that attend the construction of electricity transmission lines. In analyzing dormant Commerce Clause issues, first it should be determined "whether [the challenged law] clearly discriminates against interstate commerce in favor of intrastate commerce, or whether it regulates evenhandedly with only incidental effects on interstate commerce." *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007). Vandalia's ROFR for incumbents clearly discriminates against out-of-state interests in commerce because it amounts to a presence requirement designed to advance protectionist goals.

ii. The discriminatory law is not justified by a valid local purpose.

A discriminatory law will only stand if it is "demonstrably justified by a valid factor unrelated to economic protectionism." *Wyoming v. Oklahoma*, 502 U.S. at 454. This valid goal must be of a sort that "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 101 (1994). The ROFR provision does not advance a legitimate, non-protectionist local purpose. In response to the NTPA's passage, representatives from MAPCo and LastEnergy praised the bill for the business it would bring to their respective companies. R. at 9. Both representatives alluded to the bill keeping transmission lines out of the hands of non-incumbents. *Id.*

The NTPA's protectionist motive is shown in the legislative intent to counteract Order 1000, which was a measure undertaken to enhance competition in the market for constructing transmission lines. *Id.* at 9, 13. The only purpose of the NTPA's ROFR is to create an advantage

for Vandalia's incumbent transmission line owners, that is, those who already have a presence in Vandalia, and discourage new entrants—those who do not have a presence in Vandalia. In this respect, Vandalia's ROFR is not much different from the Texan ROFR considered by the Fifth Circuit, where the court allowed the claim to go forward. *NextEra Energy Capital Holdings, Inc.*, 48 F.4th at 327-28. Even if it is found that the ROFR advances a legitimate local purpose, e.g., giving financial advantage to local businesses in a broad sense, the Vandalia legislature could have instead advanced the same purpose by nondiscriminatory means, such as a tax cut for transmission line owners in Vandalia. Because the ROFR advances an illegitimate, protectionist local purpose to which there were ready alternatives, the provision violates the dormant Commerce Clause.

B. The NTPA burdens interstate commerce clearly in excess of local benefits.

Even in the case that the ROFR provision of the NTPA does not expressly discriminate against interstate commerce through its language, purpose, or effects, it creates a burden on interstate commerce that is "clearly excessive in relation to putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). A state policy challenged on these grounds should be judged based on its "overall economic impact" on interstate commerce, rather than the impact on a particular plaintiff. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 96 (2d Cir. 2009) (citing *Pike*, 397 U.S. at 142).

Vandalia's ROFR frustrates interstate commerce by conditioning the construction of new transmission lines, including those connecting Vandalia and other states, on the approval or denial of LastEnergy and MAPCo. R. at 9-10. Constructing an interstate transmission line like Mountaineer Express is already a cumbersome matter without the ROFR. ACES first had to succeed in a competition for the approval of the PJM Board of Managers for inclusion in the Regional Transmission Expansion Plan (RTEP). *Id.* at 6, 10. The RTEP is an interstate project to

provide for, among other things, the construction of new transmission lines for the benefit of the American people. PJM, *Project Status & Cost Allocation*, https://www.pjm.com/planning/project-construction, (last visited Jan. 27, 2023). While the cost of constructing Mountaineer Express is not known, PJM estimates a cost of four million dollars to build a new line from Brandon Shores, MD to Riverside, MD, a distance of only forty miles. *Id.* Given than Mountaineer Express will run more than four hundred miles from Greene County, PA to Raleigh, NC, the cost would be at least forty million dollars. R. at 5. The Vandalia PCS previously determined that ACES is not entitled to use LastEnergy's or MAPCo's easements for the construction of Mountaineer Express; LastEnergy has refused ACES the use of its easements for this purpose. *Id.* at 9-10. Thus, ACES will face higher costs associated with the construction of Mountaineer Express than if it could use the easements.

The ROFR erects a barrier that is potentially fatal to the project, based entirely upon the whim of LastEnergy and MAPCo. Indeed, Vandalia's ROFR reproduces the economic problems that led FERC to issue Order 1000; the ROFR makes it less certain whether companies like ACES will be able to recoup the losses associated with making a proposal. *South Carolina Pub. Serv. Auth.*, 762 F.3d at 72 (citing Order 1000, ¶¶ 256–57, 76 Fed.Reg. at 49,886). This situation creates financial incentives for companies like ACES to not make proposals for new lines at all, to the detriment of interstate commerce and society at large. The 18-month time limit to use the ROFR does little to ease the burden on ACES and those who are similarly situated, because the possibility that the project may be barred for reasons completely outside of the applicant's control would seriously dissuade any creditors from financing such an endeavor. In contrast, the ROFR's "putative local benefits" amount to little besides ensuring the continued dominance of Vandalia's incumbent transmission line owners without them needing to engage in competition.

The burdens on interstate commerce, and on Americans who would benefit from the completion of Mountaineer Express, clearly exceed these meager "benefits." Vandalia's ROFR violates the dormant Commerce Clause and the district court's ruling should be reversed.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests that this Court reverse the order of the District Court for the Northern District of Vandalia granting Appellee's Motion to Dismiss. This Court should find (1) ACES has standing to challenge PSC's Capacity Factor Order; (2) ACES has made a facially plausible claim that PSC's Capacity Factor Order violates the Supremacy Clause; (3) ACES has made a facially plausible claim that Vandalia's ROFR violates the Supremacy Clause; and (4) ACES has made a facially plausible claim that Vandalia's ROFR violates the dormant Commerce Clause.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Appalachian Clean Energy Solutions, Inc. 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. 6