Case No. 22-0682

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.
Appellants,

v.

CHAIRMAN WILL WILLAMSON,
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 DISTRICT of VANDALIA

BRIEF FOR APPELLANT

Team No. 8

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Jurisdictional Statement

The District Court had jurisdiction of case No. 22-0682 under 28 U.S.C. § 1331 federal question, which grants the district courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

This Court has jurisdiction under 28 U.S.C. § 1291, which gives the court of appeals jurisdiction over "appeals from all final decisions of the District Courts of the United States."

The final judgment that is being appealed was entered on August 15, 2022, in favor of Appellees, the Vandalia Public Service Commission. The appellant, Appalachian Clean Energy Solutions, Inc., filed a timely appeal of that order on August 29, 2022.

This appeal is from the final order of the District Court for case No. 22-0682 granting Appellee's Motion to Dismiss for failure to state a claim on all issues regarding Vandalia's Capacity Factor Order and right of first refusal.

Statement of the Issues Presented

I. Whether Appalachian Clean Energy Solutions, Inc. (ACES) has standing to challenge the Vandalia Public Service Commission's (PSC) Capacity Factor Order under the Supremacy Clause of the United States Constitution

II. Whether the PSC's Capacity Factor Order violates the Supremacy Clause of the United States Constitution because Federal Energy Regulatory Commission (FERC) under the Federal Power Act (FPA) preempts it.

III. Whether Vandalia's statutory Right of First Refusal (ROFR) violates the Supremacy Clause of the United States Constitution because it is preempted by FERC Order 1000

IV. Whether Vandalia's statutory ROFR violates the Dormant Commerce Clause of the United States Constitution because it burdens or discriminates against interstate commerce

Statement of the Case

Appellant, Appalachian Clean Energy Solutions, Inc. (ACES) is an energy company headquartered and incorporated in Springfield, Vandalia. R. at 4. ACES resources include coal-fired plants, natural gas-fired plants, three nuclear plants, and renewable wind and solar facilities. R. at 4. ACES generates electricity for resale in the wholesale markets, either by bilateral power purchase agreements with retail electric utilities or participation in the competitive regional wholesale markets in the Eastern Interconnection of the United States. R. at 4. These competitive regional wholesale markets referred to as "ISOs" include the Midcontinent Independent System Operator (MISO), the PJM, the New York Independent System Operator (NYISO), and ISO New England (ISO-NE). ACES has no retail electricity customers nor owns any electric utilities. R. at 4-5.

ACES has recently decided to decarbonize its electric generating facilities by adding renewable and zero-carbon energy facilities. R. at 5. This decarbonization plan includes retiring its Franklin Generating Station, a coal-fired plant that has been unsuccessfully bidding into the PJM market for the past two years. R. at 5. To continue operating, ACES would have to install environmental upgrades to comply with the Steam Electric Power Generating Effluent Guidelines and Standards adopted by the EPA; however, ACES has determined it would be uneconomic to install these upgrades. R. at 5. Without the upgrades, the plant cannot operate; thus, ACES has decided to retire the Franklin Generating Station R. at 5.

With the announcement of the Franklin Generating Station retiring, ACES announced that it intends to create a new 1,800-megawatt (MW) combined-cycle natural gas-fired generating plant called the Rogersville Energy Center in Greene County, Pennsylvania. R. at 5. The plant will take advantage of the natural gas supply from the Marcellus Shale, which will enable it to use carbon capture and storage technology. R. at 5. The plant will capture 75 percent of its carbon emissions, qualifying it for the 45Q federal tax credit in the Inflation Reduction Act. R. at 5. The cost of the Rogersville Energy Center is estimated to be $3.1 billion. R. at 5.

To increase the grid's capability to accommodate the electrical output from the Rogersville Energy Center, ACES plans to build and own a 500-kilovolt (kV) transmission line from Rogersville to Raleigh, North Carolina. This line, called the Mountaineer Express, will cost $1.7 billion. R. at 6. The PJM created a planning process for new transmission facilities to implement FERC Order 1000. R. at 6. The process provides nonincumbent transmission developers with an opportunity to participate in the regional planning and expansion of the PJM bulk electric system. R. at 6. The PJM Board approved the Mountaineer Express of Managers for inclusion in the Regional Transmission Expansion Plant (RTEP) in March 2022. R. at 6.

Appellee, The Vandalia Public Service Commission (PSC) is a government agency that regulates the rates and practices of utilities providing retail service in Vandalia. R. at 6. Its three commissioners are Will Williamson, Lonnie Logan, and Evelyn Elkins. R. at 6. The PSC has a broad grant of authority under Title 24 of the Vandalia Code to set “just and reasonable rates” for the utilities subject to its jurisdiction. R. at 6. Additionally, the PSC is responsible for ensuring coal’s continued dominance as a source of energy in Vandalia. R. at 6. The Vandalia code requires the PSC to “ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained.” R. at 6. The coal industry has been declining

nationally; however, coal still plays a prominent role in Vandalia as it remains the third-largest coal producer in the nation. R. at 4. Vandalia is served by two retail utilities, LastEnergy and Mid-Atlantic Power Co. (MAPCo). R. at 4. LastEnergy is headquartered and incorporated in Akron, Ohio, and MAPCo is headquartered and incorporated in Columbus, Ohio. LastEnergy has two coal-fired plants in Vandalia, while MAPCo has three. R. at 4.

LastEnergy and MAPCo submit annual filings to implement the power cost adjustment (PCA) mechanism. R. at 7. Under the PCA, each electric utility can collect a power cost surcharge from retail customers that reflects the actual power costs incurred over 12 months. R. at 7. To establish new rates effective January 1, 2022, both LastEnergy and MAPCo filed information in October 2021 regarding the capacity factors for their coal plants during the 12-month period. R. at 7. Both utilities projected that their capacity factors should be expected to remain at or below 60 percent due to the availability of lower-cost power from the wholesale market, such as the PJM. R. at 7. The lower-cost power from the wholesale market minimized costs imposed on retail consumers by using cheaper renewable energy sources. R. at 7. The PSC was dissatisfied with the projected 60 percent capacity factor and released a general order, known as the Capacity Factor Order (the Order), that requires LastEnergy and MAPCo to operate their plants to achieve a 75 percent capacity factor over a 12-month period. R. at 8. The Order included a finding of fact that the operation of the coal-fired plants at a 75 percent capacity factor would be economical. R. at 8. Additionally, the order authorizes cost recovery in LastEnergy's and MAPCo's retail rates if, in complying with the 75 percent capacity factor requirement, the cost to produce electricity is greater than the PJM's market-clearing price. R. at 8. Thus, the Order allows for actual costs to be recovered. R. at 8. The Vandalia Citizens Action

Group opposed this order, presenting further evidence that LastEnergy and MAPCo can only run economically 40 to 60 percent of the time.

Before FERC issued Order 1000, many FERC-approved ISO tariffs had right-of-first-refusal (ROFR) provisions, giving owners of existing transmission facilities (incumbents) the right to construct new facilities before any other developers. R. at 9. ROFR provisions applied even when a nonincumbent transmission owner had submitted the proposal for the new facility and when said the owner could build and operate the facility more efficiently than the incumbents. R. at 9. ROFR provisions essentially allow incumbents to take nonincumbents' ideas for new transmission facilities and build them without competing for them. R. at 9. FERC's Order 1000, issued in 2011, required ISOs to eliminate ROFR provisions from FERC-approved tariffs and agreements so that new projects could be competitively and regionally planned. R. at 9. In response to this order, the legislature in Vandalia passed the "Native Transmission Protection Act," which gave incumbent transmission owners in Vandalia the right to choose to construct new transmission lines in Vandalia within 18 months of their proposal. R. at 9. It defined incumbent transmission owners as any entities that own, operate, or maintain existing transmission facilities or equipment in Vandalia. R. at 10. The senator who introduced the bill described the act as a direct response to Order 1000 and the elimination of federal ROFRs. R. at 9. A representative from LastEnergy, the most prominent incumbent in Vandalia, argued the act was "necessary to keep transmission lines in the hands of purportedly more responsive in-state companies and to restore the 'status quo' from before Order 1000." R. at 9. A representative from MAPCo stated the act gave "Vandalia utilities…the first opportunity to invest in" regional projects. R. at 9. ACES is a nonincumbent because it does not own any existing facilities or equipment in Vandalia, unlike LastEnergy and MAPCo. R. at 10. Thus, the act gives those two

entities 18 months to exercise their ROFRs to build the Vandalia portions of the Mountaineer Express before ACES can. R. at 10.

On June 6, 2022, ACES filed suit against the PSC over the Capacity Factor Order. ACES argued that the Order is preempted by the FPA pursuant to *Hughes v. Talen Energy Mktg*., LLC, 578 U.S. 150 (2016). R. at 14. ACES argued in the lower court that the program sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators. R. at 14. ACES additionally argued that the Order distorts the auction's price signals, which interferes with the method designed by FERC to achieve the goals under the FPA. R. at 14. Finally, ACES argued that the Order compels LastEnergy and MAPCo to sell their energy into the PJM, violating the FPA's authority. R. at 14.

On June 27, 2022, the PSC moved to dismiss the action for failure to state a claim. R. at 14. The PSC first argued that ACES lacked standing because ACES was not subject to the Order, nor was ACES a ratepayer affected by the Order. R. at 14. Second, the PSC argued that even if ACES had standing, the Order is not preempted because there is no tether to the wholesale market. R. at 15. The PSC additionally argued that the case at hand was more similar to zero-emission credit cases (ZEC cases) rather than *Hughes*. R. at 15. The District Court granted the PSC's motion to dismiss, finding that ACES lacked standing and that even if they had standing, the Order does not violate the Supremacy Clause when analyzed under the ZEC cases. R. at 15.

In the same Complaint as the Capacity Factor Order litigation, ACES filed suit to contest Vandalia's ROFR. R. at 15. ACES's first argument was that the ROFR is preempted by FERC Order 1000 and nullifies the FERC competitive solicitation process for constructing new projects. R. at 15. Its second argument was that the ROFR violates the dormant Commerce Clause by discriminating against out-of-state entities and is nearly identical to a Texas ROFR

struck down by the Fifth Circuit in *NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022). R. at 15. Additionally, it argued that the 18-month ROFR period is so long that it essentially blocks new developers from entering the market due to the uncertainty and risks, along with excessively burdening interstate commerce. R. at 15-16.

The PSC also moved to dismiss ACES's ROFR claims on June 27, 2022. R. at 16. The PSC argued that there was no preemption by FERC and many states had been allowed to have similar ROFRs. R. at 16. It also argued that there was no discrimination against out-of-state-entities because LastEnergy and MAPCo are not incorporated in Vandalia. R. at 16. It distinguished Vandalia's ROFR law from Texas's by pointing out how the incumbency requirement here was "far less egregious" due to the 18-month waiting period. R. at 16. The district court found that the ROFR was not preempted by Order 1000 and did not violate the dormant Commerce Clause. R. at 16. It rejected the Fifth Circuit's approach to ROFRs and determined the burden imposed on interstate commerce did not exceed the local benefits. R. at 16. The district court granted PSC's motion to dismiss on all issues on August 15, 2022. R. at 16. ACES filed a timely appeal on August 29, 2022. R. at 16.

Summary of the Argument

This Court should reverse the District Court's order granting PSC's Motion to Dismiss for failure to state a claim because ACES lacked standing. Under Article III, § 2 of the Constitution, and Supreme Court Cases such as *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41 (2nd Cir. 2018) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), ACES has met all three factors the Supreme Court has required of plaintiff appellants to satisfy standing. This Court should find that ACES has suffered an injury of fact, there is a causal

connection between ACES's injury and the PSC's Capacity Factor Order, and the injury could be redressed by a favorable decision.

Additionally, this Court should reverse the District Court's order granting PSC's Motion to Dismiss because the Capacity Factor Order is not preempted under the United States Constitution's Supremacy Clause. This case is similar to the case in *Hughes v. Talen Energy Mktg*., LLC, 578 U.S. 150 (2016), rather than the zero-emission credit cases (ZEC cases). The Capacity Factor Order sets an interstate wholesale rate that violates the FPA's authority. Additionally, the Order's 75 percent capacity factor requirement interferes with the mission and purpose of FERC under the FPA.

Furthermore, under the Constitution's Supremacy Clause, this Court should reverse the District Court's order granting PSC's Motion to Dismiss ACES's challenge of Vandalia's ROFR because it is preempted by FERC Order 1000. Vandalia's ROFR law comes into conflict with the purpose of FERC's ban on federal ROFRs by creating a barrier to new cost-effective, efficient energy transmission facilities. The ROFR law discourages nonincumbent transmission owners from proposing new transmission projects, which is the exact opposite of what FERC wanted to result from its elimination of federal ROFR laws. Vandalia's law produces a result inconsistent with FERC's objective creating an obstacle to its accomplishment and thus is preempted by FERC Order 1000.

Lastly, under the dormant Commerce Clause of the Constitution, this Court should reverse the District Court's decision to grant PSC's Motion to Dismiss ACES's challenge of Vandalia's ROFR law because it is facially discriminatory. Vandalia's ROFR law is facially discriminatory because it amounts to economic protectionism by blocking the construction of electric transmission facilities by non-incumbents simply because these developers have no in-

state presence. Even if the court finds that the law is not facially discriminatory, the law also violates the dormant Commerce Clause by placing an excessive burden on interstate commerce under the *Pike* balancing test. There has been no legitimate local public interest clearly stated by the PSC, which would justify the burden placed on non-incumbent developers.

Argument

I. The District Court erred in finding that ACES does not have standing to challenge the PSC's Capacity Factor Order under the Supremacy Clause

The District Court erred in finding that ACES lacked standing to bring its Supremacy Clause claim against PSC's Capacity Factor Order. The purpose of the standing doctrine is to limit the category of citizens with the ability to seek redress for wrongdoing, as well as prevent the judicial process "from being used to usurp the powers of the political branches," effectively confining the federal courts to their role as the judiciary. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Article III, § 2 of the United States Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 57 (2nd Cir. 2018). If a plaintiff has no standing, there is no case or controversy for the court to consider. *Id*. Generally, the doctrine of standing requires a federal court to "satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction." *Id.* at 58.

The Supreme Court has established three elements a plaintiff must meet to obtain the constitutional minimum of standing. The first element requires that the plaintiff suffer an "injury in fact" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The plaintiff's injury in fact must be "concrete and particularized," as well as actual and imminent, rather than conjectural or hypothetical. *Id*. The second element requires a causal connection between the injury and the conduct complained of. *Id*. The causal connection must be "fairly… trace[able] to the challenged

action of the defendant, and not … th[e] result [of] the independent action of some third party not before the court. *Id*. (quoting *Simon v. Eastern KY. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). Finally, it must be likely, rather than speculative, that the injury will be "redressed by a favorable decision." *Id*. at 561.

The District Court erred in determining that ACES does not have standing to challenge the PSC's Capacity Factor Order. This Court should find that ACES has standing because ACES has suffered an injury of fact, there is a causal connection between the injury and the Capacity Factor Order, and a favorable decision could rectify the injury sustained by ACES.

A. This Court should find that ACES suffered an injury of fact.

The Vandalia PSC argues that ACES lacks standing because ACES is not subject to the Capacity Factor Order, nor is it a ratepayer that could be affected by the order. R. at 14. The PSC additionally argued that while the order could theoretically impact the economics of the construction and operation of the ACES Rogersville Energy Facility, the injury is hypothetical because it would be economical for coal plants within Vandalia to run at 75 percent capacity. *Id*. The PSC was incorrect in arguing that ACES's injury would be hypothetical because it would be economical for coal plants to run at 75 percent capacity. Rather, ACES suffered a concrete and imminent injury.

The PJM auction enables PJM to buy and sell electricity to distributors for delivery between an hour and 24 hours. R. at 3. The price for wholesale electricity (the "market-clearing price") is determined by an auction where generating resources offer a price to supply a specific number of megawatt-hours of power. R. at 3. The cheapest resource to bid will clear the market first, which continues until demand is met. R. at 3. When the supply matches the demand, the market is cleared. R. at 3. The price of the last resource offered becomes the market-clearing

price and the wholesale price of power. R at 3. In their power cost adjustment (PCA) filings, LastEnergy and MAPCo projected that because of the availability of lower-cost power from the PJM, their capacity factors would remain at or below 60 percent. However, the Capacity Factor Order requires that the coal plants maintain a 75 percent capacity factor. R. at 8.

The PSC argues that ACES injury is "hypothetical" because the PSC has findings of fact that it would be economical for coal plants within Vandalia to run at 75 percent capacity. R. at 8. While the PSC certainly might have findings of fact that point to that conclusion, the fact that the Order is economical for coal plants within Vandalia does not mean that it would be economical for other energy sources, including ACES. The Supreme Court in *Lujan* stated that the first factor "requires that the party seeking review to be himself among the injured" and "directly affected" 504 U.S. at 563. Here, the Order distorts price signals within the PJM market, creating roadblocks that make it more challenging to build new capacity in the Vandalia area. By distorting the price signal in the PJM market, effectively causing a depressive effect on energy and capacity prices, ACES faces roadblocks because their bids fail to clear auctions they otherwise would have. *See Zibelman*, 906 F.3d at 48 (where plaintiffs similarly argued that the price distortion caused by the commission resulted in their bids failing to clear auctions). The difficulties ACES faced through this order created a loss of possible profits it would have gained had it had the opportunity to build in Vandalia. Failing to clear auctions that ACES otherwise would have, ACES is directly injured by the order, suffering an actual and imminent rather than a speculative or hypothetical injury.

B. <u>This Court should find that there is a causal connection between the injury sustained by ACES and the Capacity Factor Order</u>

The second element necessary to establish Article III standing is the requirement for a causal connection between the injury and the conduct complained of so that the injury can be

"fairly traceable" to the defendant's action rather than an independent action of a third party. *Lujan*, 504 U.S. at 560. Here, it is clear that the injury ACES has suffered is directly related to the Vandalia PSC's Capacity Factor Order. The Capacity Factor Order "directs that LastEnergy and MAPCo operate their coal-fired plants to achieve a capacity factor of not less than 75 percent, as measured over a calendar year." R. at 8. As previously mentioned, the 75 percent capacity factor order distorts the price signals in the PJM market, making it more challenging to build new capacity in the region as their bids fail to clear auctions. By interfering with lower-cost energy solutions' ability to build in markets such as Vandalia, those energy companies, including ACES, suffer a loss of profits. Not only does ACES suffer a loss of direct profits, but they suffer the loss of the estimated potential profits they would have obtained had they been able to build on their scheduled timeline. Moreover, many investors will be dissuaded from investing in these new low-cost energy solutions if the companies cannot build as planned, or even clear the market with their bids. This lack of profit is what is occurring in the present case. As the Capacity Factor Order requires a 75 percent capacity factor, the PJM market becomes distorted, and ACES cannot build in Vandalia. Thus, the PSC's Capacity Factor Order is the direct cause of the loss of profit and setback in building the Rogersville Energy Center.

C. <u>This Court should find that the injury ACES suffered can be redressed by a favorable decision.</u>

The final element necessary to establish standing is that a favorable decision will likely redress the injury. *Lujan*, 504 U.S. at 561. This element is clearly established due to the significant impact of the Capacity Factor Order on ACES's ability to build the Rogersville Energy Center. The Capacity Factor Order distorts price signals within the PJM market, making it more difficult to build a new capacity in the region. If the Court found that the Capacity Factor Order violates the Supremacy Clause, the Order would not have any authority, and its impact on

the market would be nonexistent. This is unlike the case in *Lujan*, where the court found that requiring the Secretary to revise the regulation would not necessarily mean that the agencies responded to that revision. 504 U.S. at 568. In the present case, the appellees are the PSC Commissioners, who have complete control and authority to revise the Capacity Factor Order, which is the source of ACES injury. Thus, if the court required the commissioners to revise the regulations, the commissioners could remove the 75 percent capacity factor requirement and replace it with the 60 percent that the coal companies have estimated. In turn, this would halt the distortion of price signals caused by the Capacity Factor Order and make it easier to build new capacity in the region. If it becomes easier to build new capacity in the area, this will grant ACES the opportunity to build the Rogersville Energy Center and the Mountaineer Express.

* * *

Thus, because ACES has satisfied all three necessary factors required for standing, this Court should reverse the District Courts order granting the PSC's Motion to Dismiss, and find that under Article III § 2 of the United States Constitution, ACES has standing to sue the PSC's Capacity Factor Order under the Supremacy Clause.

II. The District Court erred in finding that the Capacity Factor Order does not violate the Supremacy Clause of the United States Constitution

The District Court erred in finding the Capacity Factor Order does not violate the Supremacy Clause when analyzed under the "zero emission credit" or ZEC line of cases. R. at 15. Article VI, § 2 of the United States Constitution, also known as the "Supremacy Clause," establishes that the Constitution and the laws of the United States shall be "the supreme Law of the Land." While courts typically start with the assumption that Federal does not supersede State

powers, the Supremacy Clause grants Congress the authority to preempt or supersede State law. *Rice v. Santa Fe Elevator Corp*. 331 U.S. 218, 230 (1947).

Under the Supremacy Clause, State powers can be preempted or superseded in numerous ways. *Id*. Congress can do so expressly with explicit statutory language "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id*. If Congress has not expressly preempted a state statute, it may do so through implicit field preemption or conflict preemption. Field preemption occurs when Federal law occupies the same field in which "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Id*. Additionally, courts can infer that Congress implicitly preempted a state statute through "conflict preemption." *Zibelman*, 906 F.3d at 49. Conflict preemption occurs when there is a conflict between a State law and a Federal statute or regulation. *Id*. The Supreme Court has held that implied conflict preemption occurs when it is "impossible for a private party to comply with both state and federal requirements" *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) or where State law "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

The most common Federal law that comes into play when preempting state regulation of electricity is the Federal Energy Regulatory Commission (FERC). Prior to the ruling in *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83 (1927), state and local agencies maintained broad authority to regulate public utilities such as electricity generation, transmission, and distribution. *New York v. F.E.R.C.*, 535 U.S. 1, 5 (2002). However, the ruling in *Attleboro* held that the Commerce Clause bars the states from regulating specific interstate electricity transactions, such as wholesale sales across state lines. 273 U.S. at 90 (1927). The

Attleboro ruling created what is known as the "Attleboro gap," which became a regulatory void that only Congress could fill. *F.E.R.C.*, 535 U.S. at 6. As a result of the regulatory void, Congress created the Federal Power Act (FPA), which authorized federal regulation in areas beyond state power, such as the "Attleboro gap." *Id.*

The FPA gave the Federal Power Commission, FERC's predecessor, jurisdiction over the transmission of electric energy in interstate commerce and "the sale of electric energy at wholesale in interstate commerce." *Id.*; 16 U.S.C. § 824(b)(1). Under the FPA, FERC also has the responsibility for ensuring that "[a]ll 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" 16 U.S.C. § 824d(a). While FERC has maintained that control over the sale of electric energy, pursuant to 16 U.S.C. § 824d(b)(1), FERC does not have jurisdiction over facilities used for the generation of electric energy, facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter. Thus, states retain jurisdiction over the sale of electricity and its generation, transmission, and distribution in intrastate commerce. *F.E.R.C.*, 535 U.S. at 23.

The District Court erred in holding that the Capacity Factor Order does not violate the Supremacy Clause. The District Court, in this case, incorrectly compared the case at hand to "zero-emission credits cases" ("ZEC cases"). The PSC's Capacity Factor Order does not reflect the zero-emission credit programs in the ZEC cases; rather, it resembles Maryland's program in *Hughes v. Talen Energy Mktg.*, LLC, 578 U.S. 150 (2016). This Court should find that the Capacity Factor Order violates the Supremacy Clause through conflict preemption for two reasons. First, the Capacity Factor Order sets an interstate wholesale rate that contravenes the

FPA's authority between state and federal regulators. Second, the 75 percent capacity factor requirement distorts the PJM auctions' price signals, thus violating the Supremacy Clause by interfering with the goals and purpose of the FPA and FERC.

A. This Court should find that the Capacity Factor Order sets an interstate wholesale rate that contravenes the FPA's authority

Conflict preemption occurs "where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hughes*, 578 U.S. at 163 (quoting *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000)). Congress has granted FERC authority over all rules or practices directly affecting the wholesale rate. *See F.E.R.C. v. Electric Power Supply Ass'n*, 577 U.S. 260, 275 (2016). A wholesale sale is a "sale of electric energy to any person for resale." § 824(d). Under the FPA, FERC has the responsibility of ensuring that "[a]ll 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." § 824(a). These "just and reasonable" wholesale rates are enhanced by an auction in an attempt to "break down regulatory and economic barriers that hinder a free market in wholesale electricity." *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty*., 554 U.S. 527, 536 (2008). Regarding the PJM capacity auction, FERC takes extensive care in ensuring that the auction balances supply and demand while producing just and reasonable clearing prices. *Hughes*, 578 U.S. at 157.

The Supreme Court established in *Hughes* that "states may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over the interstate wholesale rates." *Id*. at 164. In *Hughes*, Maryland created a regulatory program due to concerns that the PJM auction was failing to encourage the development of in-state generation.

Id. at 151. Maryland's program set a contract price that the companies were supposed to receive rather than the clearing price determined in the PJM auction. *Id*. The problem identified in Vandalia's Capacity Factor Order mirrors the problem identified in *Hughes*. Similar to Maryland's worries, the Vandalia PSC expressed concern that the coal companies "may not be maximizing the utilization of its owned power plants and is reducing their operation in response to wholesale system sales opportunities" R. at 8. Additionally, like Maryland's program, which set a contract price that the companies were supposed to receive, the PSC has promised LastEnergy and MAPCo that, irrespective of the PJM market clearing price, they will receive the entire amount in retail rates. R. at 8; *See also PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 476, 473 (4th Cir. 2014) (finding the scheme to be preempted because it "effectively supplants the rate generated by the auction with an alternative rate preferred by the state").

The Vandalia PSC is likely to argue that Maryland had a contract for a specific price point, regardless of the market clearing price, which is not similar to the Capacity Factor Order. However, that argument would be misguided. The Capacity Factor Order does similarly defy FERC and the FPA by promising LastEnergy and MAPCo that they will recover the entire amount in retail rates, regardless of what the market clearing price is determined to be. R. at 8. This promise, like Maryland's, is directly intruding on FERC's authority over interstate wholesale rates and compromises the integrity of the FPA. While states do traditionally exercise control over retail rates, the court in *Hughes* has clearly held that regardless of how legitimate or commendable the program might be, "[o]nce FERC sets such a rate . . . a state may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." 578 U.S. at 165. The Supreme Court's holding in *Hughes* is applicable in this case. FERC determines what it sees as a fair and reasonable market-clearing price in the PJM auction. The Capacity Factor Order

effectively undermines that price by setting an interstate wholesale rate, displaying that the Vandalia PSC believes the market-clearing price is not just or reasonable. *See also Nazarian*, 753 F.3d at 477 (holding that the Order "supersede[d] the PJM rates" that the company would otherwise earn, which were "rates established through a FERC-approved market mechanism."). Thus, this Court should find that the Capacity Factor Order effectively contravenes the FPA's authority between state and federal regulators in violation of the Supremacy Clause.

B. This Court should find that the 75 percent capacity factor requirement interferes with the purpose of FERC.

The Capacity Factor Order additionally violates the Supremacy Clause by distorting the PJM auction's price signals which "interferes with the methods by which the federal statute was designed to reach [its] goal." *Public Utility Dist. No. 1 of Grays Harbor County Wash v. IDACORP*, 379 F.3d 641, 651 (9th Cir. 2004) (quoting *Ting v. AT&T*, 319 F.3d 1126, 1137 (9th Cir. 2003)). PJM's price signals are "the product of a finely-wrought scheme" that is "intended to promote a variety of objectives, including incentivizing new generation sources" *Nazarian*, 753 F.3d at 473-78; *See also PJM* Interconnection, *LLC*, 132 FERC ¶ 61,173, at 61, 870 (2010). Additionally, FERC emphasized in Order 888 that the Commission's goal through the auction is to "remove impediments to competition in the wholesale bulk power marketplace and to bring more efficient, lower cost power to the Nation's electricity consumers." 18 C.F.R Parts 35 and 385.

The Capacity Factor Order violates the Supremacy Clause because it overrules the incentive for new generation sources and places impediments in the auction. The Order requires that the coal companies reach a capacity factor of 75 percent, even when the companies have expressly stated that the plants cannot run any more than 60 percent of the time. R. at 8-9. Additionally, the Order authorizes cost recovery in that if the cost to produce electricity is greater

than the market-clearing price in the PJM, the coal plants are allowed to recover the entire amount. R. at 8. Increasing revenue for the coal plants increases the supply of electricity, and places downward pressure on the PJM market, causing a depressive effect on energy and capacity prices. *See Zibelman*, 906 F.3d at 46. As the capacity factor distorts the price, it becomes difficult for ACES to have their bids clear the auction. In turn, there is an expectation from the financial community that investors need certainty regarding costs; without this certainty, and without being able to clear the auction, ACES faces a roadblock in attempting to build its plant in Vandalia.

Thus, the purpose of FERC's jurisdiction over the auction, which is to "ensure that it efficiently balances supply and demand, producing a just and reasonable clearing price," is shadowed by the Capacity Factor Order, thus violating the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives." *Hughes*, 578 U.S. at 157-63.

* * *

Therefore, this Court should reverse the order from the District Court granting the PSC's Motion to Dismiss for lack of standing. This Court should find that the Capacity Factor Order sets an interstate wholesale rate, much like the order in *Hughes* that violates the FPA's authority under the Supremacy Clause. Furthermore, this Court should find that the Capacity Factor Order violates the Supremacy Clause by requiring the 75 percent capacity factor requirement, which interferes with the purpose and goal of FERC.

III. The District Court erred in finding that Vandalia's statutory right of first refusal does not violate the Supremacy Clause of the United States Constitution.

The Appellate Court for the Twelfth Circuit should reverse the order from the U.S. District Court in the Northern District of Vandalia granting PSC's Motion to Dismiss regarding

ACES's challenge of Vandalia's ROFR law under the Supremacy Clause of the Constitution. Vandalia's ROFR law violates the Supremacy Clause because it is preempted by FERC Order 1000. State law is preempted by Federal law when Congress' clear purpose to do so is present in statutory language, when Congress has comprehensively legislated in that field, or when the State law produces a result that conflicts with the purpose of the Federal law. *Rice*, 331 U.S. 218, 230.

A. This Court should find that the right of first refusal is preempted by Order 1000 under conflict preemption.

There are three instances in which Congress is empowered to preempt state law: explicit statutory language/express intent, field preemption, and conflict preemption. *Id.* The type of preemption applicable in this case is conflict preemption which applies when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines*, 312 U.S. at 67.

The court in *Hines* discussed how one would determine what the purposes or objectives of an act of Congress are. It stated that though there is no rigid rule, the Supreme Court has used various expressions when evaluating State and Federal laws on the same subjects, such as "conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Id.* at 67. Courts must also consider the particular circumstances of cases including what Congress and the state legislature sought to achieve with their respective laws, the kind of obligations that the laws imposed, and the kind of power Congress exerted when creating the law in question. *Id.* at 70. Pennsylvania created the law at issue in the *Hines* case to tighten restrictions on immigrants by making them register annually and carry around an identification card which they must show to any police officer if requested. *Id.* at 59-60. The federal act on the other hand, did not require immigrants to register

more than once, nor did it require they carry an identification card. *Id.* at 60-61. The court ruled that the Pennsylvania law was preempted because of Congress' supremacy in the field of foreign affairs and because it was directly contrary to the federal act's purpose. *Id.* at 62, 74. Congress acted in consideration of the criticisms that past restrictive laws had faced, along with the purpose of creating a "harmonious whole" when it came to immigration laws. *Id.* at 72. The Pennsylvania law clearly conflicted with this purpose by imposing restrictions inconsistent with the federal act. The court in *Rice* also discussed the various types of preemption including conflict preemption. 331 U.S. 230. It noted how State law can be preempted by Federal law when the State law "may produce a result inconsistent with the objective of the federal statute." *Id*.

The court in *S.C. Pub. Serv. Auth. v. FERC*, 412 U.S. App. D.C. 41 (2014) discussed FERC's purpose in creating Order 1000. The court specifically examined the purpose and authority behind FERC's decision to ban the federal right of first refusal (ROFR). It stated that "the Commission rested its right of first refusal ban on competition theory, determining that rights of first refusal posed a barrier to entry that made the transmission market inefficient, that transmission facilities would therefore be developed at higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers." *Id.* at 77. The Commission believed that removing the federal ROFRs would make it more likely that non-incumbent developers would participate in the process of transmission development, which would, in turn, make the field more competitive and help keep rates reasonable. *Id.* Without the ban, non-incumbents were not likely to participate in this process because they would not be the ones to ultimately pursue their proposed projects. *Id.* at 74. The court concluded that it was reasonable

for the Commission to regulate rights of first refusal because in practice they often negatively affect the rates paid by consumers. *Id.* at 76-77.

The Commission itself also reaffirmed FERC's objectives and purpose in enacting Order 1000 in a 2012 decision. Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, *order on reh'g and clarification*, 139 F.E.R.C. ¶ 61,132 (May 17, 2012). The decision echoed what the court in *S.C. Pub. Serv. Auth.* discussed regarding the negative effects of rights of first refusal. 412 U.S. App. D.C. at 77. The Commission reiterated a point made in one of its previous decisions that, "[t]he ability of an incumbent transmission provider to discourage or preclude participation of new transmission developers through discriminatory rules in a regional transmission planning process, and in particular, the inclusion of a federal right of first refusal, can have the effect of limiting the identification and evaluation of potential solutions to regional transmission needs." Transmission Planning ¶ 358. The Commission also pointed out how the Federal Trade Commission has supported its conclusion regarding the barrier for non-incumbents that rights of first refusal create. *Id.* ¶ 76. It also noted how the inclusion of non-incumbent developers could lead to more efficient and/or cost-effective solutions to energy needs which may not come to light if rights of first refusal disincentivized these developers from even participating in regional planning. *Id.* ¶ 78.

Under the Constitution's Supremacy Clause, this Court should reverse the District Court's decision to grant PSC's Motion to Dismiss ACES's challenge of Vandalia's ROFR. Vandalia's ROFR law is preempted by FERC's Order 1000 because it comes into conflict with the purpose of FERC's ban on federal ROFRs. FERC has discussed the reasons why it decided to eliminate federal ROFRs as noted above in the Transmission Planning decision and in *S.C. Pub. Serv. Auth.*. 412 U.S. App. D.C. at 77. FERC sought to remove federal ROFRs because they

were a barrier to creating cost-effective, efficient energy transmission facilities. Transmission Planning ¶ 77. Though the federal order initially removed this barrier, Vandalia swiftly rebuilt it by enacting its Native Transmission Protection Act. R. at 9. Like the Pennsylvania immigration act in *Hines,* Vandalia's ROFR is an obstacle to the accomplishment of FERC's purpose for banning federal ROFRs. 312 U.S. 67. It creates the same problems that federal ROFRs did, and so the ban does not accomplish its objective of opening up the market for energy transmission. In fact, the senator who introduced the bill in Vandalia stated that it was "a direct response to Order 1000 and its elimination of 'a federally recognized right of first refusal.'" R. at 9. This act gave incumbent transmission owners in Vandalia the exclusive right to build new transmission facilities in the state for the first eighteen months following the facilities' proposals. R. at 9. It has left little incentive for non-incumbent developers to propose new energy projects in Vandalia by giving incumbent electric transmission owners the right to claim said projects first. As the court in *S.C. Pub. Serv. Auth.* noted, FERC decided to ban federal ROFRs based on competition theory and the fact that ROFRs keep non-incumbents with cost-effective solutions out of the energy market, leaving incumbents with no competition and the ability to charge consumers higher rates. 412 U.S. App. D.C. at 77. So not only has Vandalia's ROFR law discouraged non-incumbents from entering Vandalia's market, but it has eliminated competition for incumbents in said market which could negatively affect rates paid by consumers.

Though the PSC may argue that non-incumbent developers can still pursue their projects when incumbent owners do not want to do so, non-incumbents are forced to wait eighteen months for incumbents to possibly exercise their right. This can hinder non-incumbents' ability to get financing for their projects due to the uncertainty and delays in construction. R. at 15. The act discourages non-incumbent developers from proposing projects at all which in turn deprives

consumers in Vandalia and possibly the whole region from better rates for their electricity and newer, more eco-friendly electricity options. This is exactly what FERC was attempting to avoid by banning the federal ROFRs, "[t]he ability of an incumbent transmission provider to discourage or preclude participation of new transmission developers through discriminatory rules." Transmission Planning ¶ 358. As the court in *Rice* noted, State law can be preempted by Federal law when it produces a result inconsistent with the federal government's objective. 331 U.S. 230. Vandalia's ROFR is preempted by Order 1000 because it discourages new development and project proposals from non-incumbents which is inconsistent with Order 1000's objective.

* * *

The Appellate Court for the Twelfth Circuit should reverse the order from the District Court granting PSC's Motion to Dismiss ACES's challenge of Vandalia's ROFR law under the Supremacy Clause of the Constitution because Vandalia's law is preempted by FERC's Order 1000. Vandalia's ROFR law is preempted because it is in direct conflict with FERC's purpose for banning the federal ROFRs. It has created a barrier for the development of new cost-effective, efficient transmission facilities, caused a lack of competition in the energy market, and discouraged non-incumbent developers from proposing new projects.

IV. The District Court erred in finding that Vandalia's statutory right of first refusal does not violate the dormant Commerce Clause of the United States Constitution.

The Appellate Court for the Twelfth Circuit should reverse the order from the District Court granting PSC's Motion to Dismiss ACES's challenge of Vandalia's ROFR law under the dormant Commerce Clause of the Constitution. Vandalia's law discriminates against electric transmission owners who do not currently have an in-state presence in Vandalia and places an

undue burden on interstate commerce. A defendant violates the dormant Commerce Clause when it facially discriminates against or excessively burdens interstate commerce. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008).

A. This Court should find that Vandalia's statutory right of first refusal is facially discriminatory.

Article I, Section 8 of the Constitution is known as the Commerce Clause and it gives Congress the power to regulate commerce among states, foreign countries, and the Indian tribes. U.S. Const. art. I, § 8, cl. 3. From this, the courts have inferred a doctrine known as the "dormant Commerce Clause," which prohibits states from discriminating against interstate commerce or excessively burdening it. *Dep't of Revenue,* 553 U.S. at 338. Under this doctrine, courts will normally block state laws that mandate differential treatment that benefits in-state entities and burdens out-of-state ones out of concern about economic protectionism. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Facially discriminatory laws are subject to strict scrutiny and the court requires that "the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism." *Id.* at 274. This form of strict scrutiny also applies when the state law in question controls commerce that occurs fully outside of the boundaries of the state. If the statute controls conduct in another state, it could lead to inconsistent legislation being applied to the same activities. *Brown-Forman Distillers Corp. v. NY State Liquor Auth.*, 476 US 573 (1986).

The court in *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) discussed the matter of laws that facially discriminate against interstate commerce. In this case, the court was dealing with a New Jersey law which blocked waste from outside of the state from being imported there for disposal. The state claimed it was protecting the environment by doing this as its landfills were close to being completely filled. The court stated that it did not matter what the state's

purpose was in enacting this law because said purpose, "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 627. This is because the legislation blocked the flow of interstate commerce at the state's borders which subjected the law to a virtually per se rule of invalidity as it amounted to economic protectionism. *Id.* at 624. The court also stated that New Jersey could achieve its purposes of reducing waste disposal costs or protecting the environment by slowing the flow of all waste, not just waste from out-of-state. *Id.* at 627.

The court in *Granholm v. Heald*, 544 U.S. 460, 474 (2005) also dealt with a law that discriminated against out-of-state producers. The law at issue regulated which producers could ship wine directly to consumers within the state of New York. The law allowed in-state producers access to licenses so that they could ship their wine directly to consumers while it forced out-of-state producers to open an office and warehouse within the state to have access to limited licenses to ship to consumers. *Id.* at 474-475. The court ruled that, "New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)) *Id.* at 475. The court also stated that, "[t]he 'burden is on the State to show that 'the discrimination is demonstrably justified,'" (quoting *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334, 344 (1992)). *Id.* at 492. In this case, the state failed to satisfy this standard. *Id.* at 493.

Under the dormant Commerce Clause of the Constitution, this Court should reverse the District Court's decision to grant PSC's Motion to Dismiss ACES's challenge of Vandalia's ROFR law because it is facially discriminatory. Vandalia's ROFR law is facially discriminatory

and amounts to economic protectionism because it blocks the construction of electric transmission facilities by non-incumbents simply because these developers have no previous in-state presence. In doing so, the law protects the local economy and incumbent electric transmission owners by eliminating competition. The court in *Philadelphia* stated, "where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected." 437 U.S. 624. Applying what the court stated about the law at issue in *Philadelphia*, Vandalia cannot accomplish its purpose with its ROFR law by "discriminating against articles of commerce coming from outside the State unless there is some reason, apart from their origin, to treat them differently." *Id.* at 627. Vandalia has failed to provide a reason why non-incumbent developers should be treated differently aside from the fact that they have no in-state presence which is essentially discriminating against them based on their origin.

Vandalia's ROFR law requires developers to either acquire an existing incumbent transmission owner or wait eighteen months to pursue their proposed projects. This is similar to the law at issue in *Granholm*, which was blocked for requiring an "out-of-state firm 'to become a resident in order to compete on equal terms.'" 544 U.S. at 475. According to the Supreme Court, a state cannot have an in-state presence requirement like this. *Id*. Though it is true that LastEnergy and MAPCo are not incorporated in Vandalia, they have an in-state presence, which makes them incumbents and eligible for a right of first refusal. Vandalia's ROFR law requires an in-state presence for developers to equally compete for projects. Thus, it is invalid like the New York law in *Granholm*. *Id*. at 466. In addition, Vandalia failed to meet their burden of proving the discrimination against non-incumbent developers was, "demonstrably justified", because they gave no clear justification for the law other than economic protectionism. *Id*. at 493.

B. <u>This Court should find that Vandalia's statutory right of first refusal unduly burdens interstate commerce under the *Pike* balancing test.</u>

If the law is not facially discriminatory, it can still be struck down if the effects of the law excessively burden interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). These types of laws are occasionally evaluated under strict scrutiny, but mostly under what is known as the *Pike* balancing test. This test evaluates whether the burdens created by the law are "clearly excessive in relation to the putative local benefits." *Id.* The court in *Pike* set out the standards for this test, stating that if the law regulates fairly for a legitimate local public interest, it will be upheld if its burdens on interstate commerce are incidental and not excessive. *Id.* It also stated that if there is found to be a legitimate local interest, the balancing will depend on the nature of the interest and if "it could be promoted as well with a lesser impact on interstate activities." *Id.* The issue in the *Pike* case concerned an Arizona law that required a cantaloupe producer within Arizona to package its cantaloupes within the state. The local interest was merely to enhance the reputation of other producers in Arizona by making it clear that these cantaloupes were also produced in Arizona. This interest did not outweigh the burden on the cantaloupe producer of constructing and operating an unnecessary $200,000 packing plant in Arizona to meet the state's requirement. The court stated that, "[i]f the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment, then surely it cannot permit a State to require a person to go into a local packing business solely for the sake of enhancing the reputation of other producers within its borders." *Id.* at 146.

Even if the court finds that the law is not facially discriminatory, the law violates the dormant Commerce Clause by placing an undue burden on interstate commerce under the *Pike* balancing test. The *Pike* balancing test can be applied here because the purpose or effect of Vandalia's ROFR law burdens interstate commerce. 397 U.S. 142. The District Court previously applied this test but came to the wrong conclusion. The burden imposed on interstate commerce

did exceed the local benefits of the Native Transmission Protection Act. It is unclear what those local benefits even are aside from maintaining the state's existing relationships with LastEnergy and MAPCo or possibly blocking competition with their coal facilities. R. at 9. The burden on interstate commerce is obvious, non-incumbent developers are faced with the risks of proposing projects which they may never be able to pursue themselves and that they may have trouble financing due to the uncertainty involved with the eighteen-month right of first refusal period. R. at 15. There has been no legitimate local public interest clearly stated by the PSC which would justify the burden placed on non-incumbent developers. The nature of the state's interest in protecting the coal facilities adds little weight to the balancing test. Maintaining the pre-existing coal facilities at such a high capacity is already not cost effective or good for the environment, nor is it even desired by the citizens of Vandalia. R. at 8-9. Allowing new developers into the state could make use of the natural gas produced in Vandalia's Marcellus Shale and provide electricity to its citizens at more reasonable rates. Thus, Vandalia's ROFR law creates burdens that are not "excessive in relation to the putative local benefits," under the *Pike* balancing test. 397 U.S. 142.

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The Appellate Court for the Twelfth Circuit should reverse the order from the District Court granting PSC's Motion to Dismiss ACES's challenge of Vandalia's ROFR law under the dormant Commerce Clause of the Constitution because Vandalia's law is facially discriminatory and unduly burdens interstate commerce. The law is invalid for discriminating against interstate commerce for no reason other than that non-incumbents lack an in-state presence in Vandalia. The law also fails the *Pike* balancing test because it causes excessive burdens to interstate commerce that are not outweighed by the local benefits.

Conclusion

The Appellate Court for the Twelfth Circuit should reverse the order from the District Court granting the PSC's Motion to Dismiss. This Court should find that ACES has standing under Article III § 2 of the United States Constitution to challenge the PSC's Capacity Factor Order under the Supremacy Clause. Furthermore, this Court should find that the PSC's Capacity Factor Order violates the Supremacy Clause of the Constitution by contravening the FPA's authority and interfering with the purpose and goals of FERC, which were intended by Congress. This Court should also find that Vandalia's ROFR law violates the Supremacy Clause of the Constitution by directly contradicting and conflicting with FERC's purpose for banning federal ROFRs, which means that Vandalia's law is preempted by FERC's Order 1000. Finally, it should find that Vandalia's ROFR law violates the dormant Commerce Clause of the Constitution because it is facially discriminatory and unduly burdens interstate commerce.

Appendix A

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. 8