THIRTEENTH ANNUAL ENERGY AND SUSTAINABILITY MOOT COURT COMPETITION
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
MARCH 2023

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 22-0682

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

v.

CHAIRMAN WILL WILLIAMSON
in his official capacity,
COMMISSIONER LONNIE LOGAN,
in his official capacity, and
COMMISSIONER EVELYN ELKINS,
in her official capacity,

Appellees.

BRIEF OF APPELLEE

RESPECTFULLY SUBMITTED,
TEAM NUMBER 41

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1331 over ACES claims, which were brought under 42 U.S.C. § 1983. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. ACES appeals from a final judgment disposing of all claims that was entered in the district court on August 29, 2022. ACES timely filed an appeal of that order on August 29, 2022.

STATEMENT OF ISSUES PRESENTED

I. Whether ACES has standing to challenge the Capacity Factor Order ("CFO") when they allege no hypothetical market distortion and generalized rate increases.

II. Whether Vandalia's Capacity Factor Order is preempted by the actions of FERC under the FPA when FERC's statutory authority does not extend to energy generation or retail rates, nor does the Capacity Factor Order conflict with any FERC orders.

III. Whether Vandalia's statutory right of first refusal regulating local transmission lines is preempted by FERC Order 1000 when FERC's authority does not extend to state siting, routing, and permitting of state utilities.

IV. Whether Vandalia is prohibited by the dormant Commerce Clause of the U.S. Constitution in enacting a facially neutral regulation granting a right of first refusal to energy transmission infrastructure owners within its borders to provide safe and reliable electricity to its citizens.

STATEMENT OF THE CASE

The Federal Power Act ("FPA"), 41 Stat. 1063, as amended, 16 U.S.C. § 791a *et seq.,* divides jurisdiction over the energy sector between the states and the federal government. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 167 (2016) (Sotomayor, J., concurring). It grants the Federal Energy Regulatory Commission ("FERC") jurisdiction over interstate transmission of energy and interstate wholesale rates and charges them with ensuring that rates are "just and reasonable." 16 U.S.C. § 824(a). States maintain exclusive jurisdiction over the regulation of construction and siting of energy utilities, energy production, the retail sale of energy to consumers. § 824(b); *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 267 (2016). Constructing jurisdictional lines this way, Congress fashioned the Federal Power Act as a collaborative federalism statute, characterized by federal-state interdependence. *Hughes*, 578 U.S. at 167 (Sotomayor, J., concurring).

In 1996, seeking to promote competition in interstate wholesale markets, FERC issued Order 888, which required transmission-owning utilities to provide open, fair, and non-discriminatory access to their transmission lines and suggested that creation of Independent System Operators ("ISOs") would ensure this access. *See* FERC Order 888. Four years later, FERC Order 2000 effectively required transmission-owning utilities' participation in a system of Regional Transmission Operators ("RTOs") that are responsible for maintaining and operating the transmission grid. *See* FERC Order 2000. In between generators who produce electric energy and load-serving entities who deliver energy to customers, RTO/ISOs monitor energy transmission across state lines. *Hughes*, 578 U.S. at 167 (Sotomayor, J. concurrinng). PJM Interconnection LLC's ("PJM") service region contains Vandalia plus thirteen other states and the District of Columbia. Record ("R.") at 3.

Frequently, "just and reasonable" wholesale rates are ensured through energy and capacity auctions administered by RTO/ISOs like PJM. *Hughes*, 578 U.S. at 150. These auctions function to set competitive prices for wholesale energy. R. at 4. For each auction, PJM determines how much energy will be needed to satisfy demand. *Id.* at 3. Then, each power generator bids its energy at a price it is willing to receive for that energy. *Id.* PJM accepts bids, beginning with the lowest ones, until it satisfies demand. *Id.* Accepted bids are said to "clear" the market. *Id.* The last bid PJM accepts sets the wholesale rate, and each power generator whose bid was accepted receives that final bid's price, or the "market-clearing price." *Id.* Capacity markets function using the same kind of auction system, but are forward looking and seek to ensure that enough energy will exist to meet future demand by creating a stream of revenue for generators. *Id.* PJM predicts demand three years out and assigns a share of that demand to each load-serving entity in its region to purchase. *Id.* It then solicits and accepts bids from generators until a market-clearing price is established. *Id.* This method of operation is designed to efficiently allocate supply and demand across large swaths of the country. *Id.*

In December 2021, Vandalia's Public Service Commission ("PSC") took note that some of its coal plants' bids were not clearing the auction and were often operating far below capacity. *Id.* at 7. The plants are owned by LastEnergy and MAPCo, two power companies who own all the power utilities in Vandalia, including generation, transmission, and delivery. *Id.* Plants operate at capacity when they are firing on all cylinders 100 percent of the time, and a capacity factor represents the percentage of time that a particular plant is fully operational. *Id.* Capacity factors fall when a plant is down for maintenance or when the energy it can generate is not sellable on the market. *Id.* Like many states who seek to ensure that investments in power generation inside their borders have not been wasted, Vandalia enacted a program to ensure that its plants were able to continue to operate into the future. *Id.* The PSC's Capacity Factor Order ("CFO") mandated that coal-fired plants operate at a capacity factor of no less than 75 percent and included a finding of fact that to do so would be economical. *Id.* Vandalia Citizen's Action Group submitted evidence to show that plants would only be economical operating at between 40 and 60 percent capacity, citing operations data from recent years. *Id.* The order also provided a fail-safe in the event a coal plants' costs exceeded the market-clearing price by allowing the plant to recover the costs through a surcharge on retail rates. *Id.* at 8.

In 2014, Vandalia passed the Native Transmission Protection Act ("NTPA"), enacting a state right of first refusal ("ROFR"). *Id.* The eighteen-month ROFR grants an "incumbent transmission owner" the "right to construct, own, and maintain an electric transmission line" that is federally-approved and connects to that transmission owner's facilities. *Vand. Code § 24-12-3(d).* Three years prior, FERC Order 1000 had addressed federal ROFR provisions and charged RTO/ISOs with removing federal ROFRs from their tariffs. R. at 8. However, since ROFRs regulate transmission lines, Order 1000 made explicit that FERC did not intend to intrude upon areas of state jurisdiction, like permitting and siting of new facilities. *See* FERC Order 1000.

Appellant, Appalachian Clean Energy Solutions, Inc. ("ACES"), is a global energy company headquartered in Springfield, Vandalia. R. at 4. Its power plants generate electricity solely for sale in interstate markets, and ACES sells its power in the PJM auction as well as auctions held by three other ISOs. *Id.* at 4-5. They do not have any coal plants in Vandalia. *Id.* After PJM approved the Mountaineer Express Pipeline, a high-power transmission line, ACES applied to PSC for a Certificate of Public Convenience and Necessity ("CPCN") to construct the Vandalia portions, which Vandalia has not yet acted upon. *Id.* at 10. ACES filed suit against the Vandalia PSC in federal court, claiming that the CFO and ROFR are unconstitutional because they are preempted by FERC Order 1000 and impermissible under the dormant Commerce Clause respectively. The District Court granted PSC's Motions to Dismiss regarding ACES' challenge to PSC's CFO under the Supremacy Clause and to the State's ROFR law under the Dormant Commerce Clause and the Supremacy Clause. ACES has filed a timely appeal before this court.

SUMMARY OF THE ARGUMENT

At issue in this case is whether Vandalia's Capacity Factor Order and Native Transmission Protection Act violate the United States Constitution's Supremacy Clause or dormant Commerce Clause. They do not. Vandalia's PSC was created by its people through a legislative act, and they trusted it with the responsibility of ensuring that they have access to "adequate, economical, and reliable utility services." *Vand. Code § 24-1-1(a)(2).* The core of Vandalia's energy production sector is a historic coal mining industry that has supplied generations of citizens with reliable power and economic security. R. at 4.The NTPA directed the PSC to regulate energy practices in a manner that encourages the use of coal as an energy source. R. at 8. Through the CFO, the PSC ordered local utilities to increase their production of coal burning power plants to meet the goals of the legislative mandate. R. at 7.

First, ACES lacks standing to challenge the CFO because they are not directly subject to the order and cannot allege an injury in fact caused by the order which is redressable by the Court. ACES operates coal plants outside of Vandalia, so they are not subject to the CFO generation's requirements. ACES asserts that they will suffer the harm of "market distortion" caused by the CFO, but this hypothetical market price distortion is not an injury-in-fact because it is speculative, cannot be "fairly traced" to the CFO, and is not adequately redressable by a court. Further, ACES – who is headquartered in Vandalia – cannot assert standing solely as a ratepayer because any increase in retail rates are not certain, nor are they felt by ACES in an individualized way.

Even if ACES has standing to challenge the CFO, the order is not preempted by the actions of FERC because FERC's authority only applies to wholesale rate setting, not retail rate setting. The FPA was envisioned as a cooperative federalism statute, which allows both federal and state entities to work together while maintaining autonomy in certain areas. In the FPA context, FERC manages wholesale rates while States regulate production and retail sales. The CFO required in-state producers to increase coal production and could be subsidized by ratepayers under certain conditions. Courts have held that states may encourage production using subsidies and that such conduct does not violate FERC's authority to set wholesale rates.

Vandalia's statutory ROFR is not preempted by Order 1000 because FERC's authority does not extend to siting, routing, or permitting of state utilities. FERC's jurisdiction is limited to rates and charges relating to the wholesale sale or transmission of electricity. FERC explicitly stated that Order 1000 was not intended to limit or preempt state laws relating to transmission facilities. Because FERC's statutory authority does not extend to state ROFRs and because FERC expressly stated that Order 1000 did not preempt state transmission facilities, Vandalia's ROFR is unlikely preempted by FERC Order 1000.

Vandalia's NTPA does not violate the dormant Commerce Clause by discriminating against out-of-state companies. ACES cannot even establish that the NTPA "discriminates" for the purpose of the Commerce Clause. Further, the Supreme Court has held that states may regulate utilities in a manner that either burdens or benefits the regulated utility, and the ROFR granted under the NTPA offers incumbent energy producers a benefit while serving the State's interest in procuring reliable and economic energy for its citizens. The NTPA treats in-state and out-of-state entities identically, so the statute is not facially discriminatory, nor is it discriminatory in purpose or effect. Vandalia has proved that it has a recognized interest in procuring safe and reliable energy for the health and safety of its citizens. Thus, any incidental undue burden placed upon interstate commerce is likely to be outweighed by Vandalia's interest in receiving energy for its citizens.

STANDARD OF REVIEW

Appellant is challenging all four issues at the motion to dismiss phase; this is reviewed *de novo*. *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman,* 906 F.3d 41, 49 (2d Cir. 2018).

ARGUMENT

I. ACES LACKS STANDING TO CHALLENGE THE CAPACITY FACTOR ORDER BECAUSE THEIR ALLEGED INJURY-IN-FACT IS HYPOTHETICAL, RESTS ON DISPUTED FACTS, IS TOO ATTENUATED TO BE ASCRIBED TO THE CFO, AND IS TOO SPECULATIVE TO BE REDRESSED BY A COURT.

The District Court properly held that ACES lacks standing to challenge the CFO because their alleged future harms are hypothetical, speculative, and attenuated. Litigants seeking legal remedies from a federal court must establish constitutional standing, consisting of (1) an injury in fact that is "concrete and particularized" and "actual and imminent"; (2) a causal connection such that the alleged injury is "fairly traceable" to the defendant's action; and (3) a "likelihood" that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.*

a. ACES' alleged harms, market distortion and retail surcharges, do not satisfy the requirement of "injury in fact" for the purposes of constitutional standing.

An injury in fact is an invasion of a legally protected interest which is "concrete," *i.e.,* "real" and not "abstract," *Spokeo, Inc. v. Robbins*, 578 U.S. 330, 340 (2016), and "particularized," meaning it must affect the plaintiff in a "personal and individual way." *Lujan*, 504 U.S. at footnote 1. An "actual and imminent" injury is neither "conjectural" nor "hypothetical." *Lujan*, 504 U.S. at 560. Alleged future injury rises to injury in fact if the threat of harm is "certainly impending." *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 409 (2013) (citing *Whitmore v. Arkansas*, 495 U.S. 149 (1990)). Courts have allowed petitioners to assert standing as a ratepayer with direct evidence of existing economic injury. *See Environmental Action v. F.E.R.C.*, 996 F.2d 401, 406 (D.C. Cir. 1993) (finding injury-in-fact when appellant provided an "affidavit attesting that some of its members live within the . . . service area and *have suffered* economic injury as a consequence of [a FERC order]" (emphasis added)). Harm from an order redetermining rates does not "meet[] the rigorous constitutional standards for an injury-in-fact" when "it is unclear whether ratepayers will actually pay more or whether they will pay an improperly high rate." *AT&T Commc'ns of New Jersey, Inc. v. Verizon New Jersey, Inc.*, 270 F.3d 162, 170 (3d Cir. 2001) (distinguishing the matter from *Environmental Action*, 996 F.2d., based on the unclear nature of the rate increase).

ACES' claim of direct injury-in-fact based on market distortion caused by an increase in energy produced is abstract, hypothetical, and generalized. ACES contends that the CFO effectively sets wholesale rates in violation of the FPA and has the potential to distort price signals in the PJM market, making it more difficult to build new capacity in the region. R. at 1-2. Essentially, ACES asserts a theory based on supply-and-demand: the CFO's subsidy of coal-fired power plants through retail surcharges will ultimately impact the wholesale market rate, causing harm to ACES. ACES is not even subject to the CFO. R. at 5. The CFO directs in-state coal plants to operate at 75 percent capacity, and if production costs exceed the wholesale rate, it allows LSEs to impose a retail surcharge on consumers. R. at 7. ACES, who owns no plants in Vandalia, does not have any change in operations resulting from the CFO. R. at 4-5. Market distortion, as an abstract theory derived from macroeconomic analysis based on supply and demand, is not only hypothetical: the harm, if it occurs, is not particularized because a market distortion would affect every single competitor in the market. *See Lujan*, 504 U.S. at 560. Further, this future injury does not warrant standing because the change in wholesale rates based on the energy increase mandated by the order rests on disputed facts and, thus is not "certainly impending." *Clapper*, 568 U.S. at 398. ACES cites the Vandalia Citizen Action Group report to establish that plant running at 75 percent capacity will be uneconomical, and thus the retail rates will be raised to recover costs, distorting the wholesale market. R. at 7-8. However, PSC stresses their data says it is economical to run coal-fired plants at 75 percent capacity; further, PSC maintains that the cost-recovery assurance is a "fail-safe in the event circumstances change" and not intended to be commonly employed. R. at 7. Thus, ACE's alleged market distortion is speculative.

ACES may contend that since they are headquartered in Vandalia and purchase electricity as consumers, they are ratepayers who will experience injury from rate increases, but this claim is not particularized because the rate increase will affect every single ratepayer in Vandalia and does not affect ACES in an "personal and individual way." *Lujan*, 504 U.S. at footnote 1.

Moreover, any injury ACES may experience as a ratepayer is not "certainly impending." *Clapper,* U.S. at 409. In *AT&T*, the Court was not satisfied that harm from a potential rate change was sufficiently imminent. 270 F.3d at 170. Here, because PSC's finding of facts show that coal plants running at 75 percent capacity will be economical, it is not clear if power companies will ever actually impose a surcharge. R. at 8. In *Environmental Action*, the appellant established standing by an affidavit which attested to the injury and its causation, but here, ACES has produced nothing of the sort. 996 F.2d at 406. Thus, ACES' status as a Vandalia ratepayer is not sufficient to confer standing because at this time the unclear status of the rate change would not be ripe for review.

b. Market distortion is not "fairly traceable" to a single state rule, so the court cannot find that a "causal connection" exists between the CFO and ACES's alleged harm, nor is it redressable by the court.

In the event that ACES's harm by market distortion rises to injury in fact, ACES still cannot prove causation because the market effects of the CFO are too attenuated to be "fairly traceable" to the CFO. Constitutional causation requires that the plaintiff show that the harm is "fairly traceable" to the defendant's actions. *Lujan*, 504 U.S. at 560–61. There are uncountable market conditions that could lead to price changes in wholesale rates, and since it is impossible to trace a particular fluctuation through the labyrinth of energy regulations to a mandated increase one state's coal plants' energy outputs, market distortions are not "fairly traceable" to one event, let alone to an increase in power of a few plants of between 15 and 25 percent, which is alleged to cause legible change in regional wholesale energy prices.

Concerning redressability, ACES' alleged future injury of market distortion is too speculative to constitute injury in fact and the CFO's effect on markets is too dilute to be the cause of the alleged harm. Since no action that the court could take regarding the CFO would be sure to "undistort" wholesale energy markets, the injury is not adequately redressable by a court.

II. PSC'S CFO IS NOT PREEMPTED BY THE ACTIONS OF FERC UNDER THE FPA BECAUSE FERC'S STATUTORY AUTHORITY DOES NOT EXTEND TO ENERGY GENERATION OR RETAIL RATES, NOR DOES THE CFO DIRECTLY CONFLICT WITH ANY FERC ORDERS.

A state program regulating energy generation and retail sales which has an incidental effect on wholesale rates is not preempted by FERC's authority under the FPA. *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 167 (2016) (Sotomayor, J., concurring) (explaining that FPA authorizes the states to regulate energy production and the ultimate sale of energy to consumers, while the federal government steps in in the middle to regulate wholesale purchases and energy transmission). Under the Supremacy Clause, federal law is "the supreme Law of the Land; . . . anything in the Constitution or law of any state to the contrary notwithstanding." U.S. Const, Art. VI, cl 2. Federal law preempts state law, and in inquiring into whether a state rule is preempted, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (citing *Maryland v. Louisiana,* 451 U.S. 725, 746 (1981). "Field preemption" arises where "Congress has legislated comprehensively[,] . . . leaving no room for the States to supplement federal law," *Northwest Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U.S. 493, 509 (1989), and "conflict preemption" results when "compliance with both state and federal law is impossible, or . . . the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Oneok v. Learjet, Inc.*, 535 U.S. 373, 377 (2015); *but see Hughes*, 578 U.S. at 150 (2016) ("In [the FPA] context, our general exhortation not to rely on talismanic pre-emption vocabulary exists with special force.")

The FPA is a collaborative federalism statute, and "envisions a federal-state relationship marked by interdependence." *Hughes*, 578 U.S. at 167 (Sotomayor, J., concurring). In this context, where "state and federal interests exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *New York State Dept. of Social Servs. v. Dublino*, 413 U.S. 405, 421 (1973).

The Court has "consistently recognized" the "significant distinction" for purposes of preemption in the Natural Gas Act context between "measures *aimed directly* at interstate purchasers and wholesales for resale, and those aimed at subjects left to the States to regulate." *Oneok,* 575 U.S. at 385 (emphasis in original) (citations omitted) (upholding a state statute regulating retail rates which incidentally affected wholesale rates); *see Hughes,* 578 U.S. at footnote 10 (citing *Oneok*, saying"[t]his Court has routinely relied on [Natural Gas Act] cases in determining the scope of the FPA, and vice versa"). Section 824e(a)'s proscription that FERC has jurisdiction over all rules and practices "affecting" wholesale rates is limited to those that "*directly* affect the [wholesale] rate." *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260 (2016) (emphasis in original) ("[A] non-hyper literal reading is needed to prevent the statute from assuming near-infinite breadth.").

a. The CFO's regulations of energy production and retail sales are not "field preempted" by FERC's orders because FERC's authority extends only to practices directly affecting wholesale rates.

In the FPA context, a state rule is "field" preempted by FERC if the rule "invades FERC's regulatory turf" by "adjusting" an interstate wholesale rate. *Hughes*, 578 U.S. at 163, 165. But a program's "downward pressure on wholesale electricity markets" is an "incidental effect . . . insufficient to state a claim for field preemption under the FPA." *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F.3d 41, 54-55 (citing *Northwest Central Pipeline Corp. v. State Corp. Comm. of Kan.*, 489 U.S. 493 (1989) (explaining that it would be "strange indeed" if "Congress intended to allow the states to regulation production, but only if doing so did not affect interstate rates.")). In *Hughes*, the court held a Maryland Public Service Commission program enforcing LSEs to enter a "contract for differences" with a power plant was preempted. 578 U.S. at 158. By order, the Maryland PSC required LSEs to enter a pricing "contract for differences" with a generator. *Id.* Under the contract, the generator was required to bid its capacity into the PJM auction, and if its bid cleared, Maryland guaranteed that the power plant received a set contract price from LSEs, by way of correcting the difference: if the clearing price was above the contract price, the power plant would pay the LSEs the overage, and if it fell below the contract price, the LSEs would pay the shortfall to the generator, ensuring that generators received a consistent wholesale price for their energy. *Id.* Rejecting the program because it interfered with FERC's authority to set "just and reasonable" wholesale rates, the Court explained, "[o]nce FERC sets such a rate, . . . the State may not conclude [. . .] the FERC-approved wholesale rates are unreasonable." *Id.* at 165 (quoting *Mississippi Power & Light Co. v. Mississippi ex rel. Moore,* 487 U.S. 354, 373 (1988) and citing *Nantahala Power & Light Co. v. Thornburg,* 476 U.S. 953, 956-62 (1988)). The Court limited the holding to programs which "disregard[] an interstate wholesale rate required by FERC[,]" and clarified that states could "encourag[e] production . . . through measures untethered to a generator's wholesale market participation[,]" such as "tax incentives, land grants, direct subsidies, construction of state-owned facilities, or re-regulation of the energy sector." *Hughes*, 578 U.S. at 166 (citations omitted).

Applying *Hughes*, courts have upheld state subsidies that contemplated wholesales rates when determining how much money to award plants for their energy generation. *See Electric Power Supply Association v. Star*, 904 F.3d 518 (7th Cir. 2018); *Zibelman,* 906 F.3d 41. A New York "zero emissions credit" program awarded nuclear power plants for generating clean power with credits whose value based on the "social cost of carbon," and could reduce the price of the credits depending on forecasts of wholesale rates. *Zibelman*, 906 F.3d at 47. The Second Circuit upheld the regulation because it "regulate[d] the environmental attributes of energy generation and in the process considers forecasts of wholesale pricing." *Id.* at 53. The Seventh Circuit, similarly upheld a zero emissions credits program, explaining that the program's effect on interstate rates was "an inevitable consequence of a system in which power is shared between state and national governments." *Star*, 904 F.3d at 524.

Here, Vandalia's Capacity Factor Order is distinguishable from Maryland's order, and resembles subsidy programs that both courts and FERC have contemplated and held viable. Whereas under Maryland's program, "a [generator] is entitled to receive, for its wholesale sales into the capacity auction, something other than what FERC has decided that generators should receive[,]" *Hughes*, 578 U.S. at 169 (Thomas, J., concurring in the judgment), in Vandalia, the Capacity Factor Order does not regulate the wholesale price that coal-powered generators receive for sales through PJM's auction, and instead allows generators to recoup costs through retail surcharges, a matter where states retain complete authority. R. at 7; § 824(b). Where the Maryland order compelled generators to participate in the auction and tethered receipt of the set contract price to capacity clearing the auction, *Hughes*, 578 U.S. at 158, Vandalia's generators are free to sell their capacity into the auction, to enter into traditional bilateral contracts, or to sell energy at wholesale intrastate (sales which are also outside of FERC's jurisdiction), and they can recoup costs equal to the difference between the market-clearing price and the actual cost of production from consumers, regardless of what mechanism they use to sell their capacity. R. at 7. ACES argues that a fatal participation-based "tether" exists because the CFO only contemplates cost recovery when generators participate in the PJM auction. *See Hughes*, 578 U.S. at 166. But nothing in the CFO indicates that LastEnergy or MAPCo could not impose retail surcharges if they sold their energy outside of the auction. R. at 7. Regardless, if such a rule's effect on wholesale rates renders it within FERC's jurisdiction, it is for FERC to rectify "by order," and outside of the scope of this case. § 824(a). In any event, FERC has typically declined to prevent states from enacting these rules, and has preferred to modify its auction to accommodate state policy and ensure that the auction is fair. *Star*, 904 F.3d at 524 (quoting a FERC order enacting auction modifications saying, "States may continue to support to support their preferred types of resources in pursuit of state policy goals.")

ACES contends that the CFO's consideration of wholesale prices is a fatal "tether" under *Hughes.* But applying *Hughes*, New York's and Illinois's subsidies to power companies were upheld when they considered wholesale rates in calculating credit prices, and were awarded credits based on power generation, which they sold to LSEs. *Zibelman*, 906 F.3d at 47; *Star,* 904 F.3d at 524. Vandalia's program considers wholesale rates in calculating surcharges which it can charge to retail customers. R. at 7. Though Vandalia's CFO considers wholesale rates more directly than New York's and Illinois's programs, it too avoids the "fatal defect" of Maryland's program because Vandalia's generators recover their costs only through retail surcharges, which are squarely within the purview of Vandalia's regulatory authority. *Id*. Vandalia's Capacity Factor Order does not invade FERC's jurisdiction by directly affecting wholesale rates, so it is not "field" preempted by FERC's orders.

b. The CFO is not an "obstacle" to FERC's orders because it does not interfere with FERC's wholesale auctions.

State programs that support local generation and regulate retail rates do not conflict with federal laws because they do not cause "clear damage to federal goals." *Zibelman*, 906 F.3d at 46 (citing *Northwest Central Pipeline Corp. v. State Corp. Commission of Kan.,* 489 U.S. 493, 518 (1989)). Conflict preemption arises when a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" or "interferes with the method by which the federal statute was designed to reach this goal." *Zibelman*, 906 F.3d at 55 (citing *Oneok*, 135 S.Ct. at 1595, then *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494

(1987)). “There is a presumption against preemption in conflict preemption cases, and Congress is required to speak clearly to preempt all state action.” *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218 (1947). FERC has indicated that states are “free” to adopt subsidy programs. *Zibelman,* 906 at 56 (quoting *Hughes* U.S. Amicus Brief at 33). Commenting as an *amicus curiae* in *Star,* FERC opined, “Illinois’s [subsidy] program does not interfere with interstate auctions and is not otherwise preempted.” 904 F.3d at 522.

Vandalia’s subsidy program allows plants to increase revenue through retail surcharges and requires plants to increase the supply of electricity, which has the effect of lowering auction prices. R. at 8. In the Second Circuit, a New York subsidy program was upheld when it “increased revenues for qualifying nuclear plants, which in turn increases the supply of electricity, which in turn lowers auction clearing prices,” because the subsidies did not interfere with federal goals by “guarantee[ing] a certain wholesale price that displaces the NYISO auction price.” *Zibelman*, 906 F.3d at 57. Vandalia’s program, like New York’s, does not guarantee a certain wholesale price different from PJM’s auction price, and should be upheld. R. at 7. When the Seventh Circuit sought FERC’s opinion on an almost identical Illinois program, FERC stated that it was not preempted, *Star*, 904 F.3d at 522, and since the Capacity Factor functions similarly to Illinois’s program, it too is not preempted. Vandalia’s program is not an “obstacle” to FERC’s federal goals of ensuring “just and reasonable” wholesale rates.

III. VANDALIA’S STATUTORY RIGHT OF FIRST REFUSAL IS NOT PREEMPTED BY FERC ORDER 1000 BECAUSE FERC’S AUTHORITY DOES NOT EXTEND TO STATE SITING, ROUTING, AND PERMITTING OF STATE UTILITIES, NOR IS IT AN OBSTACLE TO FERC’S FEDERAL GOAL OF ENSURING “JUST AND REASONABLE” TRANSMISSION RATES.

Under the Supremacy clause, federal law is “the supreme Law of the Land; . . . any Thing in the Constitution or Law of any state to the Contrary notwithstanding.” U.S. Const, Art. VI, cl 2. Federal law preempts state law, and when inquiring into whether a state rule is preempted, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Altria*, 555 U.S. at 76 (citing *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). Preemption may be "express," and is compelled when Congress' command is "explicitly stated." *FMC Corp. v. Holliday,* 498 U.S. 52, 56 (1990) (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)). FERC has jurisdiction over "[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[.]" § 824d(a). Congress extended this authority "only to those matters which are not subject to regulation by the states." § 824(a). There is "longstanding state authority" over parts of transmission relevant to "siting, permitting, and construction" of transmission facilities. *South Carolina Public Service Authority v. FERC*, 762 F.3d 41, 62 (D.C. Cir. 2014) (quoting FERC Order 1000 ¶107). Regarding its removal of federal ROFRs in Order 1000, FERC was explicit: "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state laws with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." FERC Order 1000 ¶227. It added, "eliminating federal [ROFRs] does not . . . result in the regulation of matters reserved to the states, such as transmission ownership, construction, or siting." *Id.* at ¶287; *see also MISO Transmission Owners v. FERC,* 819 F.3d 329, 336 (7th Cir. 2016) (rejecting a transmission company's complaint that FERC allowed an ISO to honor state and local ROFRs based on Order 1000).

Vandalia's right of first refusal regulates permitting and construction of in-state transmission facilities, a matter inside "longstanding state authority." R. at 9; *S.C. Pub. Serv. Auth.*, 762 F.3d at 41. FERC's jurisdiction regarding transmission extends to rates, not to facilities. § 824d(a). FERC has been explicit that Order 1000 was not intended to intrude upon such matters, and as such, Vandalia's ROFR is allowed under Order 1000.

IV. VANDALIA'S NTPA GRANTING A RIGHT OF FIRST REFUSAL REGARDING ELECTRICAL TRANSMISSION INFRASTRUCTURE DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The Commerce Clause of the U.S. Constitution grants affirmative authority to Congress to regulate interstate commerce and "imposes limitations" on States' ability to regulate, even in the absence of Congress action. *South Dakota v. Wayfair*, 138 S. Ct. 2080, 2089 (2018). Its "dormant implication" prohibits state regulations from discriminating in a way that "unduly burdens interstate commerce, . . . impeding free private trade in the national marketplace." *GMC v. Tracy*, 519 U.S. 278, 287 (1997) (citing *Reeves, Inc. v. Stake*, 447 U.S. 429, 437 (1980). But the dormant Commerce Clause does not prevent states from "exercising their lawful sovereign powers in our federal system." *Wayfair*, 138 S. Ct. at 2096 (2018). At the threshold of a discrimination claim, when two companies sell products in different markets, it must be established that they are "similarly situated." *Tracy*, 519 U.S. at 299. Then, an overtly discriminatory state act will be invalidated unless the state can show under strict scrutiny that it has no other means to advance a legitimate local interest. *LSP Transmission Holdings v. Sieben*, 954 F.3d 1018, 1026 (8th Cir. 2020). Overt discrimination may be facial, or can arise from a law's purpose or effect. *Id.* Further, a statute may be non-discriminatory in purpose but have "incidental" effects on interstate commerce; it will be upheld when it "regulates even-handedly to effectuate a legitimate local public interest," unless the burden on such commerce clearly exceeds the putative local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

a. Vandalia's differential treatment of incumbent and non-incumbent companies does not meet the threshold question of discrimination, since the companies are not participants in the same market, and because Vandalia may choose to treat regulated incumbents differently from new-to-market competitors.

The threshold question for alleged dormant Commerce Clause discrimination is whether it treats "similarly situated" companies differently. *See GMC. v. Tracy*, 519 U.S. 278, 298-99

(1997). In-state and out-of-state companies, or incumbent and non-incumbent companies, operating in different markets are not "similarly situated." *See Tracy*, 519 U.S. at 299 (1997); *see also Colon Health Centers of America, LLC v. Hazel*, 813 F.3d 145 (4th Cir. 2016) (explaining that incumbency bias may not evidence out-of-state discrimination). In *Tracy*, petitioner General Motors, who operated an in-state facility powered by out-of-state energy, challenged Ohio's imposition of a five percent sales tax on natural gas sold by out-of-state entities on grounds that it discriminated against out-of-state companies, but the Court held that differential tax treatment of public utilities in a competitive market did not discriminate for purposes of the dormant Commerce Clause. 519 U.S., at 281-84, 306. The Court explained that intrastate utility providers, as established providers of both utility and transmission services whose core market was local customers, were in a unique position that was significantly dissimilar from out-of-state entities. *Id.* The court then granted deference to the Ohio Public Service Commission and recognized that courts should be reluctant to invalidate state law when to do so might jeopardize a local utility company's capacity to serve the public, emphasizing "the need to accommodate state health and safety regulation in applying dormant Commerce Clause principles." *Id.* at 304-06. States regulating public goods like natural gas are not limited to regulatory actions that impose a burden upon regulated entities, and can also make rules that foster the continued existence and delivery of the critical utility. *Id.* In doing so, a state is not required to extend those benefits to out-of-state utility providers, because those entities are not subject to the same regulatory burdens as in-state providers. *Id.*

Vandalia's ROFR is not discriminatory for purposes of the constitution, first, because incumbent transmission line owners are not "similarly situated" to new-to-market companies, and second, because Vandalia may accommodate state health and safety by offering an ROFR to established providers that currently provide a steady flow of a critical utility: electricity. In *Tracy*, the court ruled the appellant could not evince "discrimination" under the dormant Commerce Clause because out-of-state companies were not "similarly situated" to in-state utilities, in part because they served different markets. 519 U.S. at 304. Here, Vandalia grants ROFRs for new lines attached to existing lines to incumbent transmission line owners. R. at 9. Since ACES, a non-incumbent transmission line owner, does not sell energy to Vandalia residents, nor does it intend to, and incumbent transmission owners LastEnergy and MAPCo both sell energy to retail consumers, the companies operate in different markets and are not "similarly situated" for the purposes of the dormant Commerce Clause, so there can be no discrimination. 519 U.S. 278; R. at 9. Additionally, in *Tracy*, that the statute's benefit to in-state utility providers ensured those utilities could continue to serve the public rendered it beyond judicial scrutiny. 519 U.S. at 306. Here, Vandalia's ROFR for incumbents ensures a reliable flow of electricity in order to safeguard the health and safety of its citizens, and so it is permissible under the dormant Commerce Clause.

b. Vandalia's NTPA does not discriminate against out-of-state transmission owners because the NTPA privileges "incumbents," who may be out-of-state companies.

When statutory language applies evenhandedly, affording out-of-state companies a "benefit . . . on the same terms as an [in-state] company," the statute is not facially discriminatory. *LSP Transmission Holdings, LLC v. Lange*, 329 F.Supp.3d 695, 709 (D. Minn. 2018), *aff'd sub nom, Sieben*, 954 F.3d; *see Sieben*, 954 F.3d at 1028-29. When determining a statute is discriminatory in purpose, courts consider both direct and indirect evidence. *See Sieben*, 954 F.3d at 1029-30 (citing *IESI AR Corp.*, 433 F.3d at 604 and finding that the statute's legislative history and that incumbent transmission owners were headquartered out of state proved that the statute was not discriminatory in purpose). Discrimination in effect arises if, in practice, a statute favors in-state economic interests over out-of-state interests. *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

In *LSP Transmission Holdings v. Sieben*, the Eighth Circuit held that Minnesota's grant of a time-limited right of first refusal to existing transmission owners for new transmission lines connected to that transmission's companies power lines was not facially discriminatory and not discriminatory in purpose or effect. 954 F.3d at 1026-30. The law was not facially discriminatory: since it drew a line at incumbent transmission owners, and out-of-state companies could be considered incumbent transmission owners, it applied evenhandedly to in- and out-of-state companies. *Sieben*, at 1027. Nor was the law discriminatory in purpose. 954 F.3d at 1029-30. LSP argued that the statute's legislative history suggested that it was adopted to "insulate incumbent transmission owners from competition introduced by Order 1000." *Id*. But Minnesota introduced evidence that its purpose in adopting the statute was to maintain a regulatory system that provided reasonably priced, reliable services to Minnesota residents. *Id*. at 1030. Minnesota's rationale showed that it did not intend to discriminate in enacting its ROFR. *Id.* Furthermore, Minnesota's decision to allow other entities beyond utilities to engage in the transmission line industry showed they did not preference an in-state utility. *Id.* Finally, Minnesota's ROFR was not discriminatory in effect because the fact that in-state companies might face the same hurdles as out-of-state companies in building transmission lines combined with the fact that some incumbent companies were headquartered out of state meant that the statute did not in practice favor in-state entities. *Id.* at 1030. It was also convincing that if an incumbent provider did not exercise its ROFR, then a non-incumbent entity could enter the market.

Vandalia's ROFR does not discriminate against out-of-state interests. In *Sieben*, a Minnesota ROFR which drew "a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state" was not facially discriminatory because out-of-state companies could receive the same benefits as in-state ones. *Sieben*, 954 F.3d at 1027. Here, the Vandalia statute applies to all "incumbent electric transmission owners," defined as "any public utility that owns, operates, and maintains an electric transmission line in Vandalia," and does not exclude out-of-state companies, so it is facially neutral. *Vand. Code § 24-12.3(d)*; *§ 24-12.2(f)*. Minnesota's ROFR was not discriminatory in purpose because Minnesota showed that it was enacted to provide reliable, well-priced energy to it citizens. Here, Vandalia's ROFR was enacted to ensure that transmission lines belong to "more responsive" incumbent companies who currently serve Vandalia's citizens and can better serve Vandalia's citizens than new-to-market companies, so it is not discriminatory in purpose. Problem at 9. Finally, Minnesota's ROFR was not discriminatory in effect, because out-of-state companies did in fact own in-state transmission lines. Here, all of Vandalia's current incumbent electric transmission owners are headquartered in Ohio, meaning that out-of-state companies are receiving a benefit under the law, so the law is not discriminatory in either purpose or effect.

c. Vandalia's NTPA does not place an undue burden on interstate commerce which exceeds the putative local benefits.

After finding neither discriminatory purpose nor effect, the *Sieben* court found that Minnesota's ROFR did not place an undue burden on interstate commerce that was "clearly excessive in relation to the putative local benefits." 954 F.3d at 1027 (citing *Pike* 397 U.S. at 142). Minnesota alleged that the statute was passed in response to the uncertainty surrounding Order 1000 and stated that the goal of the statute was to preserve the "historically proven status quo for the construction and maintenance of electrical transmission lines." *Id.*, at 1031. The Court found that Minnesota's goal was within the purview of a state's legitimate interest in regulating intrastate transmission of electric energy and found that the record could not support LSP's claim that the cumulative effect of statutes like Minnesota's would ultimately eliminate competition in the national transmission line market. *Id.* Because the legitimate state interest in ROFRs outweighed potential effects on commerce, the court upheld the statute.

Here, the Vandalia ROFR law was passed as a direct response to Order 1000, which required ISOs to eliminate ROFR provisions for regional transmission facilities from their FERC-approved tariffs and agreements and ordered new transmission projects to be competitively and regionally planned entities like PJM. *Id*. The legislative history of the bill shows that the bill was "necessary to keep lines in the hands of more responsive in-state companies and to restore the status quo from before Order 1000." *Id*. The law provides that incumbent electric transmission owners have the right, for 18 months, to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent transmission owner. *Vand. Code §24-12.3(d)*. The statute defines "incumbent electric transmission owner" as "[a]ny public utility that owns, operates, and maintains an electric transmission line in [Vandalia] . . . or any entity . . . engaged in the business of owning, operating, maintaining, or controlling in [Vandalia] equipment or facilities for furnishing electric transmission service in Vandalia. *Vand. Code § 24-12.2(f)*.

The putative local benefits of Vandalia's ROFR outweigh any incidental undue burdens on interstate commerce. ACES argues that proponents of the bill seek to "protect" or "insulate" in-state entities from out-of-state competition, and that this form of "insulation" is clearly excessive in relation to the putative local benefits. However, the Vandalia PSC has a legitimate interest in passing the NTPA: supplying its citizens with adequate, economical, and reliable utility services. Like in *Sieben*, the Vandalia legislature passed the NTPA in the wake of Order 1000, which removed a federal ROFR. But while ACES may point to the legislative history of the NTPA to show potential preservationist rationale for passing the bill, the legislature passed the bill to restore transmission operations to status quo operations from before Order 1000. Furthermore, the NTPA contains only an 18-month ROFR. ACES may argue that the waiting period places an undue burden on interstate commerce by eliminating competition in the transmission market, but the time-limit does not place an obligation on incumbents to exercise their ROFR, and they could abandon it immediately if they so choose. Vandalia has a legitimate state interest in supplying electricity to its citizens through reliable sources and the ROFR does not require incumbent owners to act, thus leaving an entry point for out-of-state entities to compete in Vandalia, preventing the interstate market from being overly burdened. Because the statute is not discriminatory in purpose nor effect and passes the *Pike* balancing test, it is valid under the traditional dormant Commerce Clause.

d. *NextEra Energy* is distinguishable because the Texas ROFR had no expiration date.

At issue in *NextEra Energy Cap. Holdings, Inc. v. Lake* was a Texas statute that allowed incumbent only electric transmission line owners to build, own, or operate lines within the state. 48 F.4th 306 (5th Cir. 2022). The court began by carefully distinguishing its case from *Sieben* and four other cases that had upheld ROFRs. *Id.* Unlike the provision in *Sieben*, which allowed for a 90-day ROFR, the Texas law completely prohibited the entry of companies that did not already have a presence within the state's transmission line operations. *Id.* The Court held that the Texas statute was facially discriminatory because the statute required an in-state presence to enter the transmission market, thus violating dormant Commerce Clause jurisprudence. *Id.* at 325. Regarding the statute's purpose, the Court allowed the appellant to present evidence to show that the bill was adopted only after appellant was selected by MISO to build its new transmission line project. *Id.* at 327. Though the Court found that the record was too sparse to complete a full *Pike* analysis, because the statute was facially discriminatory, and because the appellant sufficiently showed that the benefits of the statute were "insignificant and illusory," the court overturned the lower court's Rule 12(b)(6) dismissal and remanded the case for further proceedings. *Id.* at 329.

Here, the Vandalia statute is distinguishable from the Texas statute and the court should use *Sieben* as a guide. Unlike the Texas statute, which is unlimited in time, the Vandalia NTPA allows only for an 18-month ROFR, after which any non-incumbent can build a transmission line in Vandalia. R. at 9. Furthermore, unlike *NextEra*, where specified discrimination was found, ACES is unable to allege facts of specified discrimination against their entry into the Vandalia market. Though ACES was approved by PJM for inclusion in the Mountaineer Express Pipeline, the approval came eight years after the passage of the NTPA, thus preventing any similarity between ACES and NextEra. R. at 9. Lastly, while the record in *NextEra* was insufficient for a full *Pike* analysis, the record in this case shows that the local putative benefits of the NTPA far outweigh any incidental burdens placed on interstate commerce. Because Vandalia's NTPA does not discriminate facially nor specifically against out-of-state entities, it does not violate the dormant commerce clause.

<u>**CONCLUSION**</u>

For the aforementioned reasons, this Court should uphold the District Court's decision to dismiss.

Certificate of Service

Pursuant to *Official Rule* IV, *Team Members* representing Chairman Will Williamson, Commissioner Lonnie Logan, and Commissioner Evelyn Elkins 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. 41