Case No. 22-0682

IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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.

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

Brief for Appellees
Team No. 22

Filed January 31, 2023

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Jurisdictional Statement

ACES' preemption and Commerce Clause challenges implicate interpretation of the U.S. constitution thus presenting federal questions. The District Court had subject matter jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), and 16 U.S.C. § 825(p), which provides federal district courts with jurisdiction to enjoin any violation of the FPA and FERC rules or orders adopted thereunder.

This brief arises from a timely appeal of the Twelfth Circuit Court of Appeals' order on December 28, 2022, directing appellees to brief the issues presented.

Statement of the Issues Presented

I. Whether ACES has standing to challenge the PSC's Capacity Factor Order under the Supremacy Clause;

II. Whether the PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is preempted by the actions of the FERC under the FPA;

III. Whether Vandalia's statutory ROFR violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000; and

IV. Whether Vandalia's statutory ROFR violates the dormant Commerce Clause of the U.S. constitution.

Statement of the Case

The Vandalia Public Service Commission ("PSC") and Vandalia legislature adopted two policies, a "Capacity Factor Order" and right of first refusal ("ROFR") related to the state's regulation of energy generation and transmission and retail electricity rates. R. at 1. Appalachian Clean Energy Solutions, Inc. ("ACES") sued PSC members in their official capacity, challenging the Capacity Factor Order under the Supremacy Clause, and the ROFR under the Supremacy Clause and dormant Commerce Clause. R. at 22.

The Capacity Factor Order, promulgated in May 2022, directs Vandalia's two retail utilities, LastEnergy and Mid-Atlantic Power Co. ("MAPCo") to achieve a capacity factor of at least 75 percent each year for each of their coal plants. R. at 8. LastEnergy is headquartered and incorporated in Akron, Ohio; serves customers in Ohio, Pennsylvania, Maryland, New Jersey, and West Virginia; and operates two coal-fired power plants in Vandalia. R. at 4. MAPCo is headquartered and incorporated in Columbus, Ohio; serves customers in Vandalia, Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia; and operates three coal-fired power plants in Vandalia. *Id*. Both utilities exclusively sell into PJM Interconnection pursuant to their Fixed Resource Requirement ("FRR") status with the regional transmission organization ("RTO"). R. at 8.

The PSC enacted the Capacity Factor Order in response to low capacity factors from the utilities' coal plants and expectations by the utilities that the capacity factors will remain at or below 60 percent in the future, due to the availability of cheaper power. R. at 7. The PSC determined that the public interest would be better served by higher utilization of coal-fired power plants. R. at 8. The Order included fact-finding that operating the coal plants at 75 percent capacity factor would be economical, but, as a "fail safe," if the cost of coal production is greater than the PJM market-clearing price, the utilities will be permitted to recover the actual cost of coal production in complying with the Order. R. at 8-9.

ACES, an energy company headquartered and incorporated in Vandalia has no retail electric customers, so it is not subject to the Capacity Factor Order. R. at 4. ACES owns electric generation that it sells in wholesale markets or through bilateral contracts, and the company plans to build a gas-fired power plant in Pennsylvania to sell electricity into PJM. R. at 4–5. The company argues that the Capacity Factor Order will make it more difficult to build new capacity in the region by distorting price signals in PJM and that the rule is preempted by the Federal Power Act's ("FPA") regulation of wholesale markets. R. at 1-2.

The Vandalia legislature adopted the ROFR in the 2014 "Native Transmission Protection Act." R. at 9. The ROFR gives incumbent transmission owners the exclusive right to build new transmission in the state, but this right expires after 18 months, after which non-incumbent utilities have a right to build new transmission. R. at 2. FERC Order No. 1000 directed RTOs to remove the federal ROFR provisions from FERC-approved tariffs, so the Vandalia legislature adopted its own ROFR to prioritize transmission ownership by more responsive in-state companies. R. at 9.

ACES plans to build a transmission line, the Mountaineer Express, from its anticipated new power plant in Pennsylvania to North Carolina. R. at 5. The transmission line, which was approved by PJM, would go through Vandalia. R. at. 6. ACES is not an incumbent owner of transmission in Vandalia, so the company must either wait eighteen months to build transmission in the state or acquire an existing incumbent transmission owner in the state. R. at. 2. ACES contends that Vandalia's ROFR is preempted by FERC Order 1000 and violates the dormant Commerce Clause. *Id*.

The U.S. District Court for the Northern District of Vandalia granted Appellees' Motions to Dismiss regarding ACES' challenges to both the Capacity Factor Order, under the Supremacy Clause, and Vandalia's ROFR, under the Supremacy Clause and dormant Commerce Clause. R. at 2. ACES appeals.

Summary of the Argument

I. Appellants lack standing because they fail to allege anything more than a conjectural injury-in-fact and court resolution in their favor would not resolve their alleged injury. Appellants do not meet the constitutional minimums required to establish standing.

II. The Capacity Factor Order is neither field nor conflict preempted by the FPA because it does not (a) regulate the price of wholesale electricity and impede federal goals for efficient wholesale markets nor (b) compel participation in wholesale markets. (a) Cost recovery under the Capacity Factor Order does not regulate the price of wholesale electricity because it does not make cost recovery contingent on participation in wholesale markets, and the rule has the potential to only indirectly impact wholesale market prices. Both Vandalia retail utilities sell exclusively into PJM, but this is a result of their FRR status with the RTO, not the Capacity Factor Order. The rule allows recovery of the actual cost of producing coal without conditioning recovery on clearing wholesale markets. Any downward impact on wholesale prices is merely incidental. By using traditional state authority over setting retail rates, the rule does not override wholesale market mechanisms, nor conflict with federal goals for an efficient wholesale market. (b) The rule does not compel new sales into wholesale markets but rather directs utilities to use coal generation for the sales they already make. State authority to regulate generation allows for determinations of types and quantities of generation that best serve the public interest.

III. Vandalia's ROFR statute is not preempted by Order No. 1000 because the Order fails to address state ROFRs in its text and demonstrates an intent to render state ROFRs untouched as elements of states' traditional jurisdiction over transmission permitting and siting. Vandalia's ROFR is not expressly preempted because Order No. 1000's text explicitly abrogates only the federal ROFR and details the areas of state jurisdiction that would remain untouched. Similarly, Vandalia's ROFR is not field preempted because Order No. 1000 lists an array of areas of transmission development governance where state law continues to govern, exhibiting a clear intent not to preempt the entire field of transmission development. Finally, both the Order and FERC decisions made pursuant to the Order demonstrate that both Congress and FERC believe that state ROFR statutes are both an appropriate exercise of traditional state powers and not in conflict with Order No. 1000's competition goals.

IV. Vandalia's ROFR statute does not violate the dormant Commerce Clause because it is not facially discriminatory, does not have a discriminatory purpose nor the effect of favoring utilities incorporated in-state over utilities incorporated out-of-state, and does not unduly burden out-of-state transmission utilities. The language of Vandalia's ROFR statute, providing incumbent utilities with an eighteen-month ROFR, is not discriminatory, and the legislative history indicates no discriminatory purpose for its enactment. Further, the effect of the statute does not discriminate between in-state and out-of-state transmission utilities. Finally, even though Vandalia's ROFR statute is not discriminatory, Vandalia's ROFR still may not impose an undue burden on interstate commerce unless there is a legitimate state interest and local benefit that outweighs that burden. The benefit to Vandalia of maintaining the utility market's status quo and protecting its regulatory system outweighs any incidental burden on interstate commerce.

Standard of Review

Appeals of motions to dismiss under Rule 12(b)(6) are reviewed *de novo*. *See Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 48 (2d Cir. 2018). For each of the following issues, the appellant's motion to dismiss is reviewed *de novo.*

Argument

I. ACES does not have Standing to Challenge PSC's Capacity Factor Order.

ACES challenges Vandalia's Capacity Factor Order, which "requires coal plants to run 75 percent of the time, regardless of the availability of lower-cost power supplies in the region and from PJM." R. at 1. Under Article III of the Constitution, ACES must meet an "irreducible constitutional minimum" to show standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). As the 4th Circuit acknowledged, "when the asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, satisfying standing requirements will be substantially more difficult. *Frank Krasner Enter., Ltd. v. Montgomery Cnty.*, MD, 401 F.3d 230, 234–35 (4th Cir. 2005) (internal citation omitted). To show that it has standing, ACES must show that (1) they suffered an actual or imminent concrete, particularized injury-in-fact, (2) the conduct complained of has a causal connection to the injury, and (3) the injury is likely to be redressed by a favorable decision. *Id.* ACES fails to meet any of these constitutional minimums. ACES, though headquartered and incorporated in Vandalia, has no existing transmission lines in the state, but plans to construct the "Rogersville Energy Center" in Greene County, Pennsylvania. R. at 5. As part of this project, ACES plans to construct a 460-mile 500 kV transmission line.

ACES contends that the CFO will "distort[s] price signals in the PJM market, which makes it more difficult to build new capacity in the region." R. at 2. However, because ACES is not "the object" of regulation, standing is "substantially more difficult" to establish. *Lujan*, 504 U.S. at 562. Because ACES only quibbles with the potential injurious financial impact of the market clearing price, their alleged injury-in-fact is purely conjectural and fails to give rise to Article III standing. *McCray v. Fid. Nat'l Title Ins. Co.*, 682 F.3d 229, 243 (3d Cir. 2012).

Further, Courts have virtually always acknowledged that this market clearing price is "for all purposes, the legal rate." *Keogh v. Chicago & Nw. Ry. Co.,* 260 U.S. 156, 163 (1922). Auction rules that give rise to this market clearing price are "unassailable in judicial proceedings." *Simon v. KeySpan Corp.,* 694 F.3d 196, 204 (2d Cir. 2012), *cert. denied,* 133 S. Ct. 1998 (2013). Lastly, ACES fails to establish that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000). ACES seeks redress for their conjectural injury by challenging PSC's Capacity Factor Order on preemption grounds. However, even were the Capacity Factor Order struck down, there is no guarantee ACES would not be subject to unfavorable price signals from other policy instruments. ACES fails to meet any of the constitutional minimums required to show standing.

II. The Vandalia PSC's Capacity Factor Order is not Preempted by the Federal Power Act because the Rule does not Regulate the Price of Wholesale Electricity nor Compel Participation in Wholesale Markets.

The U.S. Constitution's Supremacy Clause establishes the principle that federal law is the supreme law of the land. *See* U.S. CONST. art. VI, cl. 2. Under the doctrine of preemption, in instances of conflict between state and federal law, state laws are "preempted" and federal law governs. *See San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 241-42 (1959). Congress must intend to preempt, either directly through statute or by granting a federal agency preemption authority, making the question of Congressional intent critical to any preemption analysis. *McCulloch v. Maryland*, 17 U.S. 316, 369 (1819).

There are three types of preemption: express preemption, where statutes directly state that state or local governments have no authority over specific areas of federal jurisdiction; field preemption, where a federal regulation is "so pervasive as to make reasonable the inference that

Congress left no room for the States to supplement it"; and conflict preemption, where compliance with a state regulation makes it impossible to comply with or conflicts with the objectives of a federal regulation. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947) (discussing field preemption); *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (discussing conflict preemption); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (discussing conflict preemption). Field preemption and conflict preemption are both types of implied preemption.

Congress delegated to FERC the exclusive authority to regulate the transmission and sale of wholesale electric energy through the Federal Power Act (FPA). *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982). States have jurisdiction over "any other sale," like retail sales of electricity, and can regulate energy production and generation facilities, considering the need and economic feasibility of generation facilities. *See* 16 U.S.C. § 824(b); *Pac. Gas & Elec. Co v. State Energy Res. Conservation & Dev. Comm'n*, 46 U.S. 190, 205 (1983). These respective areas of jurisdiction were designed to coordinate with each other, but if state regulation intrudes on FERC's exclusive jurisdiction over interstate wholesale energy, the state regulation is field preempted by the Federal Power Act. *Hughes v. Talen Energy Mktg.*, *LLC*, 578 U.S. 150, 151 (2016). States have broad discretion to enact rules that subsidize, tax, or otherwise encourage or discourage certain types of energy generation if these rules do not intrude on FERC's wholesale energy jurisdiction by (a) regulating the price of wholesale energy or (b) compelling participation in wholesale energy markets. *See Id.*; *see also Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 754 F.2d 99, 102 (2d Cir. 1985).

The Vandalia PSC's Capacity Factor Order stays within the bounds of state jurisdiction over energy generation and retail rates to increase coal generation without impermissibly regulating the price of wholesale electricity or compelling LastEnergy and MAPCo to participate in wholesale energy markets, so it is not field preempted by the FPA.

A. Vandalia's Capacity Factor Order does not Directly or Indirectly Regulate the Price of Wholesale Electricity nor Conflict with FERC Goals for Competitive Wholesale Markets.

State supplemental payments to generators participating in wholesale markets do not regulate the price of wholesale energy and are therefore not field or conflict preempted by the FPA if the payments are not (1) tethered to a generator's participation in wholesale markets and (2) are made pursuant to traditional state authority without directly or indirectly setting the price for wholesale electricity. *See Hughes*, 578 U.S. at 166; *Zibelman*, 906 F.3d at 57.

1. Because Payment is not Contingent upon Participation in Wholesale Markets, the Rule is not Tethered to Wholesale Markets.

Vandalia's regulation does not tether cost recovery for coal plants to participation in PJM wholesale markets, so the regulation does not intrude on FERC's jurisdiction over wholesale market regulation. Payments are not tethered to a generator's participation in wholesale markets when the payment is not contingent on a generator clearing a wholesale energy or capacity auction. *Hughes*, 578 U.S. at 166; *Zibelman*, 906 F.3d at 45; *see also Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 523 (7th Cir. 2018).

In *Hughes,* the Court found that a Maryland Commission rule ordering Maryland retail utilities to contract for long-term generation with wholesale generators was preempted by the FPA. *Hughes*, 578 U.S. at 151. Motivated by concerns about high wholesale power prices in PJM, this rule directed utilities to enter contracts with generators to set the long-term price of electricity. *Id*. If the generation cleared the capacity auction, generators would pay the utility the difference between the higher auction price and the contract price, or the utility would pay the generators the difference between the contract price and the lower auction price. *Id*. at 159. By conditioning payments on energy clearing the auction, the rule tethered payment to a generator's wholesale market participation, intruding on FERC's jurisdiction. *Id*. at 166.

The *Hughes* Court kept their holding narrow, declaring that the opinion should not foreclose states from encouraging production of generation through measures "untethered to a generator's wholesale market participation" and that "so long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id*.

In *Zibelman*, a New York regulation subsidized nuclear generators with Zero Emissions Credits (ZECs), which could be sold to utilities. *Zibelman*, 906 F.3d at 45. Plaintiffs alleged that the rule should be preempted because the ZECs were only available to generators selling energy into NYISO wholesale auctions. *Id*. at 54. The challenge failed, and the court reasoned that, even though all ZEC-eligible nuclear generators sell energy into NYISO wholesale auctions, nuclear generators receive ZECs for the production of energy regardless of how it is sold. *Id*. Nothing in the New York regulation requires the generators to participate in wholesale auctions. *See Id.*; *see also Elec. Power Supply Ass'n*, 904 F.3d at 523 (holding that an Illinois ZEC program was not preempted because generators were not required to sell power into wholesale markets to receive the credits).

Like payments for ZECs, the Capacity Factor Order does not make cost recovery from operating coal plants conditioned on their participation in wholesale markets. LastEnergy and MAPCo can recover any actual costs of operating coal-fired plants at a seventy-five percent capacity factor, with no mention that they must first clear energy or capacity auctions. Like the nuclear generators in *Zibelman*, both Vandalia utilities sell coal generation into PJM, but this is the result of a FERC-jurisdictional agreement between the utilities and PJM, not a requirement of cost recovery under the regulation.

The Capacity Factor order does not make cost-recovery contingent on coal plants' participation in wholesale markets, so the cost-recovery is not impermissibly "tethered" to wholesale markets.

2. **Because the Rule Utilizes State Authority over Retail Rates and may have Only Incidental Impacts on the Price of Wholesale Electricity, the Rule does not Regulate the Price of Wholesale Electricity nor Interfere with Federal Objectives for Efficient Wholesale Markets.**

Vandalia's Capacity Factor Order does not regulate the price of wholesale electricity, so it should not be preempted by the Federal Power Act. Payment schemes regulate the price of wholesale electricity if they set the price wholesale electricity will receive regardless of the price set by the wholesale market. *See Hughes*, 578 U.S. at 166. Payments with merely incidental impacts on wholesale prices do not impermissibly regulate the price of wholesale electricity. *See e.g.*, *Zibelman*, 906 F.3d at 54; *Elec. Power Supply Ass'n*, 904 F.3d at 524; *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 101 (2d Cir. 2017).

In *Hughes*, the Maryland regulation at issue impermissibly regulated the price of wholesale electricity by mandating utilities to enter contracts that guaranteed the long-term price of electric generation sold in wholesale markets. *See Hughes*, 578 U.S. at 151. This payment scheme intruded on FERC's authority over wholesale rates by disregarding and overriding competitive wholesale auction prices. *See id*. at 166.

Alternatively, in both *Zibelman* and *Electric Power Supply Association*, the court upheld regulations that subsidize nuclear generators by giving them the value of ZECs in addition to what they earn in the wholesale markets. *See Zibelman*, 906 F.3d at 54; *Elec. Power Supply Ass'n*, 904 F.3d at 524. Even though receiving compensation from ZECs has the practical effect of lowering wholesale electricity prices, because nuclear generators can bid into markets at a lower rate knowing they will receive additional compensation in the form of ZECs, "that incidental effect is insufficient to state a claim for field preemption under the FPA." *Id.* at 54; *see also Allco*, 861 F.3d at 101 ("[T]he incidental effect on wholesale prices does not, however, amount to a regulation of the interstate wholesale electricity market that infringes on FERC's jurisdiction.").

Plaintiffs in *Zibelman* also argued that by distorting price signals, the ZEC program interfered with FERC objectives to establish efficient wholesale markets, so the law is conflict preempted. *Zibelman*, 906 F.3d at 56. However, the court concluded that state regulation of matters within their jurisdiction, like generation capacity, that has incidental effects on wholesale markets is not conflict preempted. *Id*. The court supported this conclusion with references to instances of FERC-sanctioned state subsidies that increased generation capacity and impacted wholesale energy prices. *See N.Y. State PSC*, 158 FERC ¶ 61,137, 2017 WL 496267, at *11 (2017) (Bay, Comm'r, concurring) ("[A]ll energy resources" receive subsidies and "an idealized vision of markets free from the influence of public policies ... does not exist.").

Similar to the ZEC rules, under Vandalia's Capacity Factor Order, coal generators in Vandalia may receive payment in the form of cost recovery in addition to what they receive on the wholesale market. Rather than overriding wholesale market mechanisms by guaranteeing a set price for wholesale energy, like the contracts from *Hughes* the energy will be bought and sold at the rate set by the PJM auctions. Like ZECs, the guaranteed cost recovery, based on the actual cost of producing coal, will serve as a subsidy for coal generators and could place downward pressure on wholesale electricity costs. However, since this impact would be merely incidental, the rule does not impermissibly regulate the price of wholesale electricity.

Cost recovery from the Capacity Factor Order is somewhat tied to the price of wholesale electricity because utilities can recover the difference between wholesale prices and actual costs of coal generation. Importantly, unlike the rule at issue in *Hughes*, the Vandalia PSC utilized traditional state authority over generation and retail rates, rather than implementing a scheme that overrides FERC-jurisdictional competitive wholesale market prices. Vand. Code § 24-2-3; *see FPC v. Hope Nat. Gas Co.* 320 U.S. 605, 616-17 (1944) (holding that states have discretion to determine methodologies for utility retail rates, including which utility costs are recovered); *see also Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310-12 (1989) (affirming *Hope* and the discretion of Pennsylvania's Public Utility Commission to determine utility cost-recovery through ratemaking); *Rochester*, 754 F.2d at 106 (upholding a policy guaranteeing cost recovery through retail rates, regardless of the actual wholesale revenue of generators). By using state jurisdiction over generation capacity and retail rates, the Capacity Factor Order, like the subsidies in *Zibelman*, avoids conflict preemption as well.

Because any additional cost recovery for coal plants under the Capacity Factor Order is accomplished through traditional state authority over retail rates and would have merely incidental effects on wholesale market prices, the Capacity Factor Order does not regulate the price of wholesale energy nor conflict with federal goals for efficient wholesale markets.

B. Vandalia's Capacity Factor Order Regulates the Type of Energy that Utilities Must Use for the Sales They Choose to Make Rather than Compel Participation in Wholesale Markets.

The Capacity Factor Order does not compel participation in wholesale markets, so it does not impermissibly regulate wholesale electricity sales. FERC has exclusive jurisdiction over wholesale market regulation, so any state regulation that compels wholesale transactions that would not have taken place without the state involvement is field preempted by FERC and the FPA. *See Allco*, 861 F.3d at 97. A policy does not compel wholesale participation if it does not order a utility to begin making new sales into wholesale markets or make unreasonable estimations about the level of sales needed for the utility to recover its authorized rate of return. *See Rochester*, 754 F.2d at 105.

In *Rochester*, plaintiffs challenged a New York PSC regulation that calculated retail rates based on expected sales in wholesale markets, arguing that the policy amounted to compulsion by forcing the utility to actually make the expected level of sales to earn its authorized rate of return. *Id*. at 102. The court reasoned that the policy did not compel wholesale participation because the PSC made reasonable estimates of incidental sales and did not order the utility to begin making new incidental sales. *Id*. at 105. The NY PSC used traditional state jurisdiction over retail ratemaking to set rates based on revenue from wholesale transactions that the utility chose to make. *Id*.

Much like the New York PSC in *Rochester*, the Vandalia PSC did not order the utilities to begin making new incidental sales, and the PSC supported the reasonableness of the rule with fact-finding about its economic feasibility. R. at 8. Vandalia utilities already sell energy into PJM markets as a result of their FERC-jurisdictional FRR status, so the Capacity Factor Order is not the force that compels wholesale transactions.

Rather than compelling new sales, the Capacity Factor Order utilizes state authority to direct utilities to use a certain type of generation for the sales they would already be making. As regulators of generation, states have the authority to make determinations of need for types and quantities of generation to serve the public interest. *See Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3dd 477, 481 (D.C. Cir. 2009) ("State authorities retain the right to forbid new entrants from providing new capacity, to require the retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or take any other action in their role as regulators of generation facilities"); *Allco*, 861 F.3d at 101 ("[I]t is settled law that specifying the sizes and types of generators that may bid into the 2015 RFP… lies well within the scope of Connecticut's power to regulate its utilities."). The Vandalia PSC is mandating the operation of coal plants based on its determination of public interest, much like New York and Illinois did by mandating zero-emission energy through ZECs based on their determinations of public interest. *See Zibelman*, 906 F.3d at 47; *Elec. Power Supply Ass'n*, 904 F.3d at 521. Vandalia's local supply of coal will ensure the reliability of a state energy system served by coal generation, and courts and FERC have affirmed that regulators can prioritize reliability when shaping energy policies. *See e.g., LSP Transmission Holdings II, LLC v. FERC*, 45 F.4th 979, 998 (D.C. Cir. 2022) (upholding a reliability exception from competitive bidding).

The Vandalia PSC used its authority over generation planning and retail rates to mandate the operation of and allow cost recovery of coal generation without regulating the price of wholesale electricity or compelling participation in wholesale markets. The Capacity Factor Order does not intrude on FERC and FPA regulation of wholesale markets, so the rule is not field-preempted.

III. The Supremacy Clause does not Preempt Vandalia from Exercising a State ROFR in its Intrastate Commerce.

The Federal Power Act ("FPA") Section 206 ordered FERC to ensure that interstate utility electricity rates are "just and reasonable" and gave FERC jurisdiction over "any rule, regulation, practice, or contract affecting such rate[s]". 18 U.S.C. 824(d)(a); 18 U.S.C. 824(e)(a); *see also Okla. Gas and Elec. Co. v. FERC*, 827 F.3d 75, 77 (D.C. Cir. 2016). In pursuit of just and reasonable rates, FERC promulgated Order No. 1000 in 2011. *See* 136 FERC ¶ 61051 [hereinafter Order No. 1000].

FERC's preemption power derives from the FPA rather than a direct delegation of such powers to the agency by Congress. While FERC lacks independent power to preempt states, it retains exclusive jurisdiction over "just and reasonable" wholesale rates. 16 U.S.C. § 824(d)(a). FERC, like every federal agency interpreting its own statute, can interpret its own authority to act. *See City of Arlington v. FCC*, 569 U.S. 290, 296-98 (2013). In *South Carolina Public Service Authority*, the D.C. Circuit affirmed FERC's interpretation of 16 U.S.C. § 824d-e, giving the agency authority to abrogate the federal right of first refusal ("ROFR"), as a reasonable interpretation of its FPA authority. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014). Since FERC's authority has not been successfully challenged to date, its interpretation assumes the preemptive power of the FPA. *See e.g.*, *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, 1187 (D.C. Cir. 2020) ("[B]ecause FERC has the exclusive authority to determine who may participate in the wholesale markets, the Supremacy Clause – not Order No. 841 – requires that States not interfere.").

A. Order No. 1000's Language Explicitly Addresses Only the Federal ROFR.

Order No. 1000 cannot expressly preempt state ROFRs when it fails to reference them even once in the Order's text. Express preemption occurs only when the intent to preempt state law is "explicitly stated in the statute's language." *Jones v. Rath Packing Co.,* 430 U.S. 519, 525 (1977). Such explicit language often comes in the form of a specific preemption clause. *See e.g.*, *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62–64 (2002) (analyzing the express preemption clause in the Federal Boat Safety Act).

Order No. 1000's relevant section directs regional transmission operators "to remove provisions from [FERC] jurisdictional tariffs and agreements that grant incumbent transmission providers a *federal right of first refusal* to construct transmission facilities selected in a regional transmission plan for purposes of cost allocation." Order No. 1000, at ¶ 253 (emphasis added).

The language clearly abrogates the federal ROFR but is silent as to state ROFR statutes. However, the Order qualifies this abrogation by clarifying "that nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Order No. 1000 at ¶ 227.

First, Order No. 1000 lacks any express preemption clause for state ROFRs; in fact, it does not directly refer to state ROFRs in any part of the order. *See* Order No. 1000. Second, the deference to traditional state regulatory powers over aspects of transmission development indicates FERC's desire that its new rule be interpreted narrowly. *See S.C. Pub. Serv. Auth.*, 762 F.3d at 76 (citing Order No. 1000) (affirming states' "authority over siting or permitting of transmission facilities"). Third, FERC could have easily preempted all incumbent ROFRs by leaving out the word "federal" yet chose not to do so. Each of these textual choices is best understood to avoid preemption of state ROFRs and, taken together, underscore the degree to which Order No. 1000 expressly focused only on the federal ROFR.

B. FERC's Intended to Leave Traditional State Powers over Transmission Planning Untouched.

Nor can intent to preempt state ROFRs be implied from Order No. 1000. Implied preemption takes two main forms: field and conflict preemption. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). However, the U.S. Supreme Court maintains a "strong presumption against pre-emption of state police power regulations" in instances of implied preemption. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 505 (1992); *see also Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (limiting this presumption to instances of implied preemption). Moreover, "[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 166–167 (1989). Determinations of preemption are guided by the principle that "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485 (1996) (internal quotation marks omitted). In both the promulgation of Order No. 1000 and FERC decisions made pursuant to the Order, FERC demonstrates a clear intent to limit its preemption exclusively to the federal ROFR used against interstate transmission projects.

1. Order No. 1000's Explicit Designation of Spheres of State Governance over Transmission Development Makes Field Preemption Impossible.

The breadth of transmission planning powers retained by states after the promulgation of Order No. 1000 indicates the impossibility of field preemption over the entire transmission planning process. Field preemption occurs when courts determine that a federal statute "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. *See English*, 496 U.S. at 79.

Order No. 1000 was promulgated to insert competition into interstate electricity markets but took "great pains to avoid intrusion on the traditional role of the States" in siting and permitting transmission facilities. *S.C. Pub. Serv. Auth.*, 762 F.3d at 76; *see Piedmont Env't Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009). Electric industry regulation has long been considered among states' police powers and Congress specified in the FPA that "[t]he States would retain authority over…'transmission of electric energy in intrastate commerce.'" *S.C. Pub. Serv. Auth.*, 762 F.3d at 49; *see also LSP Transmission Holdings LLC v. Lange*, 329 F.Supp. 3d 695, 700 (D. Minn. 2018) ("Under the FPA, states have traditionally assumed all jurisdiction over the approval or denial of permits for the siting and construction of electric transmission facilities."). Such statements evidence Congress's awareness of state activity in this field of law and its desire not to disrupt the existing balance of powers. FERC followed this Congressional directive by confirming that regional transmission operators should "recognize state or local laws or regulations…in the regional transmission planning process." *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61037, 2015 WL 285969, at ¶ 25 [hereinafter *MISO Tariff*]. Given the breadth of transmission governance, FERC reserved for the states, transmission planning cannot be entirely field preempted by the federal government.

2. Neither FERC nor the Courts Perceive a Conflict between State ROFRs and Order No. 1000.

Conflict preemption occurs when it would either be "impossible for a private party to comply with both state and federal requirements" or where the state law "stands as an obstacle" to the goals or purpose of a federal statute. *English*, 496 U.S. at 80 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Since FERC has determined that it is possible for a state to comply with both Order No. 1000 and simultaneously retain a state ROFR for intrastate transmission projects, Vandalia's ROFR does not cause impossibility preemption. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020) (affirming FERC's decision to allow a state ROFR in a MISO tariff). Second, a review of FERC's intent in promulgating Order No. 1000 demonstrates that FERC perceives no conflict between state ROFR statutes and the Order's competition goals.

(a) FERC Embraced a Delicate Balance between States' Rights and Increasing Competition in Interstate Markets.

FERC specified that Order No. 1000 "struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states." *MISO Tariff* at ¶ 27. Moreover, courts "owe considerable deference to FERC's expertise" when balancing the dual needs of reliability and competition into the electricity market. *LSP Transmission Holdings II*, 45 F.4th at 993. In fact, FERC explicitly considered ROFR statutes in a later compliance filing and reiterated that Order No. 1000's "decision to focus on *federal* (not state) right of first refusal provisions in Commission-jurisdictional tariffs was an exercise of remedial discretion designed to ensure that its nonincumbent transmission developer reforms do not result in the regulation of matters reserved to the states." *Midwest Indep. Sys. Operator*, 147 FERC ¶ 61127, 2014 WL 1997986, at ¶156.

In *LSP II*, the D.C. Circuit affirmed FERC's decision to allow MISO to exclude projects "whose costs are shared regionally" from competitive bidding. 45 F.4th at 993. The court determined that Order No. 1000 sought to balance competition with other electric market goals, specifically, ensuring reliability. *See id.* at 998–99. The court approved FERC's deference to states in deciding how to prioritize and meet competing electric market needs even where such authority diminished FERC's efforts to inject competition into electricity markets. *See id.* Vandalia's ROFR statute furthers similar local reliability needs. The statute was passed to improve the efficiency and stability of the intrastate electricity market, including by ensuring that companies with a proven track record of responsiveness to state regulators were given the first opportunity to develop transmission infrastructure in the state. R. at 9–10. It employs a different tool to achieve the same result – limiting federal competition policies where such policies might undermine a state's other electricity market priorities.

(b) FERC's Approval of RTO Tariffs with State ROFR Statutes Indicates FERC's Belief that State ROFR Statutes are Compliant With Order No. 1000.

FERC implicitly endorsed state ROFR statutes by approving a MISO tariff that included a state ROFR soon after Order No. 1000 was promulgated. Federal agencies can make rules through adjudication; thus, FERC had the opportunity to correct course and ban state ROFR statutes during that tariff adjudication. *See Transmission Access Pol'y Study Grp. v. FERC*, 225 F.3d 667, 724 (D.C. Cir. 2000) (affirming "FERC's discretion to proceed through adjudication rather than by generic rule" in rejecting a challenge to a utility's application for stranded cost recovery); *see also SEC v. Chenery Corp.*, 332 U.S. 194 (1947). However, FERC did nothing. Following the federal ROFR's abrogation, MISO incorporated Minnesota's state ROFR into its tariff. *See MISO Tariff*. FERC then approved that tariff and explicitly referenced its intent to "honor the state ROFR laws". *See Lange*, 329 F.Supp.3d at 702 (citing *MISO Tariff* at ¶ 25). In affirming FERC's decision, the reviewing court recounted:

> Congress and FERC have both indicated that Minnesota is entitled to make the policy decision to adopt a right of first refusal to build new transmission lines. And as it has been noted many times before, Congress, FERC, and the Minnesota legislature are 'better-situated than the courts' to 'determine the economic wisdom and the health and safety effects' of a decision on the correct balance between competition and a right of first refusal in the area of the building of electric transmission facilities. *Lange*, 329 F.Supp.3d at 708.

At no time in the past seven years has FERC exercised its authority to promulgate new rules banning state ROFRs.

Vandalia's ROFR statute is not so different from Minnesota's as to warrant disparate treatment. Vandalia's statute grants incumbent electric transmission owners a ROFR for eighteen months, at which point "another entity may build the electric line". Vand. Code § 24-12.3(d) (2014). Minnesota's statute requires incumbent electricity transmission owners to give notice within ninety days of approval transmission plan approval if they plan to pursue construction. *See* MINN. STAT. § 216B.246, subdiv. 3. Then, like Vandalia, it then requires incumbent transmission developers to file for a certificate of need within eighteen months. *See id*. However, an incumbent owner could easily indicate their intent to build and then use the eighteen months to make a more reasoned and thoughtful decision. This eighteen-month timeline mitigates the notice benefit of a ninety-day "intent to develop" requirement. More importantly, since FERC review of the MISO tariff focused exclusively on states' traditional domain of authority rather than the details of Minnesota's statute, FERC would not distinguish these statutes based on a ninety-day intent statement deadline. *See Miso Tariff* ¶¶ 25-27. Particularly since FERC defers to a state's "economic wisdom" regarding the balance between ROFRs and competition policies. *See Lange*, 329 F.Supp.3d at 708 (quoting *Allco*, 861 F.3d at 107).

(c) FERC's Inclusion of The Word "Federal" Indicates Intent to Leave State ROFRs Unaffected.

Finally, Congressional intent to exempt state ROFR statutes from its prohibition on the exercise of traditional incumbency advantages is evident from the stark absence of anything referring to state ROFRs in the order. The statutory interpretation doctrine *expressio unius est exclusio alterius* suggests that "expressi[on of] one item of a commonly associated group or series excludes another left unmentioned." *United States v. Vonn*, 535 U.S. 55, 65 (2002).

ROFR statutes can exist at all levels of government. *See e.g.* 12 U.S.C. § 2219a (federal ROFR example); MINN STAT. § 216B.246, subdiv. 3 (state ROFR example); Henry County, N.Y., Cable Ordinance (Feb. 24, 1998) (local ROFR example). Thus, presumably, FERC was on notice about the possibility that either state or local ROFR statutes could inhibit the competition goals of Order No. 1000. Given FERC's repeated references to areas of traditional state authority, the inclusion of "federal" before "right of first refusal" demonstrates intent to leave state ROFR laws untouched.

Order No. 1000 cannot preempt Vandalia's ROFR without either more explicit language abrogating state ROFRs or clear evidence of Congressional intent to preempt such state statutes. The evidence of such intent is at best ambiguous and is better understood as a deliberate effort to avoid intruding on traditional areas of state authority over the transmission development process and deference to state judgments in the governance of that process.

IV. The Dormant Commerce Clause does not Prevent Vandalia from Preserving its Longstanding Local Utility Practices, as Vandalia did when it Enacted the Native Transmission Protection Act.

Congress has the power to "regulate Commerce ... among the several States." U.S. CONST. art. I, § 8, cl. 3. This power to regulate interstate commerce "can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant." *Gibbons v. Ogden*, 22 U.S. 1, 189 (1824). This dormancy is an implicit limitation on states' power to regulate interstate commerce, referred to as the dormant Commerce Clause. *See Healy v. Beer Inst*., 491 U.S. 324, 326 n. 1 (1989). State statutes with discriminatory effects on out-of-state commerce in favor of in-state commerce are typically *per se* violations of the dormant commerce clause. *See id.* at 336. Even where state regulations are not discriminatory, states generally may not institute regulations that impose an undue burden on interstate commerce. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). If an undue burden to interstate commerce is imposed by the statute, it will only be deemed constitutional where a legitimate state interest and local benefit outweigh that burden. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Under Vandalia's Native Transmission Protection Act, local transmission utilities are granted the right of first refusal (ROFR) to build new transmission lines. Vand. Code § 24-12.3(d). This exclusive right lasts for eighteen months, after which nonincumbents such as ACES may build. *Id*. Because appellant ACES owns no existing transmission facilities in Vandalia, their application for construction of the proposed transmission line will not be eligible for action until September 30, 2023, when the ROFR expires. R. at 10. ACES contends that this violates the dormant Commerce Clause. But, because NTPA is not discriminatory "on its face, in its purpose, or through its effects," *R & M Oil & Supply, Inc. v. Saunders*, 307 F.3d 731, 734 (8th Cir. 2002), and the law does not create an undue burden on interstate commerce, "the dormant Commerce Clause has no job to do." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 303 (1997). Where ACES challenges Vandalia's ROFR law as favoring local utilities over out-of-state, the combined precedent of *Tracy* and *Pike* instructs not to disrupt the captive market.

A. Because the Native Transmission Protection Act is not Facially or Purposefully Discriminatory and does not Create a Discriminatory Effect, it does not Violate the Dormant Commerce Clause.

The purpose of the dormant Commerce Clause is to prevent states from distorting competition. Regulations violate the dormant Commerce Clause if they are discriminatory either facially, purposefully, or in effect. The state violates the dormant Commerce Clause when its laws create "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005).

1. The Native Transmission Protection Act is not Facially Discriminatory.

A facially discriminatory state law is one that benefits the interests of in-state actors to the detriment of the interest of out-of-state actors on its face. *See City of Phila. v. New Jersey*, 437 U.S. 617, 624 (1978). For example, a law taxing out-of-state goods, but not similar state-produced products violates the dormant Commerce Clause because it is facially discriminatory. *See W. Lynn Creamery, Inc. v. Healy,* 512 U.S. 186, 193 (1994). ACES contends that Vandalia's ROFR law "violates the dormant Commerce Clause in that it discriminates against *out-of-state* actors like ACES." R. at 15 (emphasis added). Yet, the district court below correctly found that place of incorporation, not market access, determines who qualifies as in-state or out-of-state. R. at 16. The current Vandalia incumbents, LastEnergy and Mid-Atlantic Power Co. (MAPCo), are retail utilities headquartered and incorporated in Akron, Ohio and Columbus, Ohio, respectively. R. at 4. ACES, however, is headquartered and incorporated in Vandalia. Further, Vandalia's law applies to all utilities regardless of whether they are in-state or out-of-state. Incumbent electric transmission owners are defined in Vandalia law as "any public utility that owns, operates, and maintains an electric transmission line in this state" Vand. Code § 24-12.2(f). Vandalia's ROFR law preferences *incumbent* facilities, and, as such, "applies evenhandedly to all entities," whether they are Vandalia-based or not. *Sieben*, 954 F.3d at 1028. "[I]ncumbency is not the focus of the dormant Commerce Clause," and any preference for incumbency does not alone violate the dormant Commerce Clause. *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016). The rule itself makes no reference to the incorporation location of the utility, in-state or out-of-state, and is not discriminatory on its face.

Further, ACES does not serve the same market as MAPCo or LastEnergy [hereinafter "Incumbents"]. If there is no "actual or prospective competition between the supposedly favored and disfavored entities in a single market… the dormant commerce clause has no job to do." *Tracy*, 519 U.S. at 278. ACES, a wholesale energy provider headquartered and incorporated in Vandalia, is a nonincumbent and argues that this status is discriminatory. R. at 16. However, incumbents provide energy to end-users in Vandalia while ACES sells energy to other companies nationwide. The services offered by ACES are fundamentally different from those provided by Incumbents. In *Tracy*, General Motors challenged an Ohio law exempting state-regulated natural gas utilities from sale and use taxes as discriminatory to interstate commerce. *See* 519 U.S. at 281–83. The Court queried whether in-state and out-of-state natural gas utilities were "substantially similar" for purposes of a dormant commerce clause analysis. *Id*. at 298–99. Because the in-state utilities had monopolies in their area, the local utilities and the out-of-state marketers were not similarly situated because they were not in competition. *Id.* at 302–03. The court found no commerce clause violation, explaining that "eliminating the tax or other regulatory differential would not serve the dormant Commerce Clause's fundamental objective of preserving a natural market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors." *Id*. at 299.

Where there is a possibility for competition between utilities in and out of state, the dormant Commerce Clause may come into force. However, "[w]here a choice is possible [] the importance of traditional regulated service to the captive market makes a powerful case against any judicial treatment that might jeopardize [the utilities'] continuing capacity to serve the captive market." *Id.* at 304. As in *Tracy*, the Vandalia's ROFR statute reflects "a typical blend of limitation and affirmative obligation" in the regulated market. *Id*. at 295. Because incumbents are already subject to the burdens of Vandalia regulations, they are necessarily dissimilar from wholesaler ACES when considered in a dormant Commerce Clause framework.

2. There is no Evidence Indicating that the Native Transmission Protection Act was Enacted with Discriminatory Purpose.

Regulations are not discriminatory when they are enacted with a purpose "unrelated to economic protectionism." *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992). Economic protectionism occurs when "regulatory measures [are] designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* at 454. When a state enacts economic protectionist regulations, courts apply a "virtually per se rule of invalidity." *City of Philadelphia*, 437 U.S. at 624. A discriminatory purpose is ascertained by looking at direct and indirect evidence of purpose including:

> (1) statements by lawmakers; (2) the sequence of events leading up to the statute's adoption, including irregularities in the procedures used to adopt the law; (3) the State's consistent pattern of disparately impacting members of a particular class of

> persons (4) the statute's historical background, including any history of discrimination by the [state]; and (5) the statute's use of highly ineffective means to promote the legitimate interest asserted by the state. *Smithfield Foods, Inc. v. Miller*, 367 F.3d 1061, 1065 (8th Cir. 2004) (citations omitted).

NTPA does not differentiate between in-state and out-of-state utilities, but, rather, allows for incumbents to assert their right of first refusal for eighteen months. The Vandalia legislature's expressed intent in enacting their regulatory framework was to (1) "[e]ncourage the well-planned development of utility resources" and (2) "ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." Vand. Code § 24-1-1(a)(3); Vand. Code § 24-1-1D(12). Local transmission utilities described the Act as "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." Vandalia's primary aim is not to protect in-state utilities, but, rather, to protect a regulatory system that works well and provides reliable service. There is no colorable argument that the Native Transmission Protection Act was enacted with discriminatory purpose.

3. The Native Transmission Protection Act does not have a Discriminatory Effect.

Permissible regulations must be effectuated with a "legitimate local purpose" that "could not be served *as well* by available [non-discriminatory] means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (emphasis added). In 2020, the 8th Circuit upheld a ROFR allowing Minnesota incumbents to assert their ROFR for ninety days, calling Minnesota's ROFR statute an "incidental hurdle" to other entities seeking to build new transmission facilities in Minnesota. *Sieben*, 954 F.3d at 1030; *see also Lange,* 329 F.Supp.3d at 707 ("The reasons cited in support of giving greater weight to the monopoly market in *Tracy* apply here; namely, to avoid any jeopardy or disruption to the service of electricity to the state electricity consumers and to allow for the provision of a reliable supply of electricity."). ACES contends that NTPA is more analogous to a Texas ROFR struck down by the Fifth Circuit. R. at 15; *see also NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022). However, the Texas law, SB 1938, operated as a "complete ban on new entrants." *NextEra Energy*, 48 F.4th at 327. ACES argument that the eighteen-month ROFR is "so long that it essentially prevents any new entrants into the market" is illusory; NTPA is not a complete ban on new entrants like the unconstitutional Texas ROFR, but, rather, merely gives incumbents the first bite at the apple as in *Sieben* and furthers the legitimate state interest in providing a reliable electricity supply. R. at 15.

B. ACE's Claim Fails the Pike Balancing Test because the Native Transmission Protection Act does not Create an Undue Burden on Interstate Commerce.

Even though NTPA is not discriminatory, the second tier of dormant Commerce Clause analysis requires "balancing a legitimate local public interest against its incidental burden on interstate commerce." *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002). If "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," then the regulation in question fails the test. *Pike*, 397 U.S. at 142. In *Pike*, an appellee cantaloupe grower contested the Arizona Fruit and Vegetable Standardization Act, which prohibited the shipment of his cantaloupes unless they were packed in an approved manner. *Id.* at 139–140. Appellant maintained that the order was necessary to identify cantaloupes as being of Arizona origin. In deciding whether this packaging requirement violated the dormant Commerce Clause, the *Pike* Court promulgated a balancing test:

> When a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. *Id.* at 142 (citations omitted).

The Court ultimately found that the order was unduly burdensome to interstate commerce in violation of the dormant Commerce Clause. Arizona's order would require Bruce Church, Inc.'s operation to move from outside the state to inside the state at a personal cost of $200,000. *Id.* at 140–142. The Court held that the Constitution "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. Though the Court "has rarely invoked *Pike* balancing to invalidate state regulation under the Commerce Clause," *S. Union Co.*, 289 F.3d at 509 (citation omitted), appellants' arguments would nonetheless fail the *Pike* balancing test.

When applying the *Pike* balancing test, the Court must consider the aggregate effects of the examined statute. *R & M Oil*, 307 F.3d at 736. Utility regulation is "one of the most important of the functions traditionally associated with the police power of the [state]." *Ark. Elec. Coop. Corp. v. Ark Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)). Vandalia's statute granting local transmission utilities the right of first refusal (ROFR) to build new transmission lines does not impose an excessive burden compared to Vandalia's legitimate regulatory interest in maintaining long-standing local utility practices. *See Am. Elec. Power Co. v. Ky. Pub. Serv. Comm'n*, 787 F.2d 588, at *3 (6th Cir.1986) (unpublished table decision) ("There is little question… that the regulation of consumer electric rates is an important state interest.") Courts have consistently found that the state's interest in regulating utilities outweighs any incidental burden on interstate commerce. *See e.g.*, *Balt. Gas & Elec. Co. v. Heintz*, 760 F.2d 1408, 1425 (4th Cir. 1985) (upholding that a law requiring public service companies to obtain approval from the State before purchasing stock in public services companies because the "legitimate interest in regulating the structure of public utilities and their holding companies" outweighed any incidental burden on interstate commerce); *Alliant Energy Corp.,* 330 F.3d at 918 (Without the power to regulate utilities, the State "would lose considerable power to police the rates charged for the provision of utility service. The burden on interstate commerce, *however significant it may be*, is not enough to outweigh this interest." (emphasis added)); *see also MISO Transmission Owners v. FERC*, 819 F.3d 329, 335 (7th Cir. 2016) ("[The] justification for this departure from the order's emphasis on promoting competition is the benefit, which is surely very considerable, of a quick resolution of reliability problems."). The local benefits of maintaining the status quo and protecting Vandalia's regulatory system that provides reliable service outweigh any incidental burden on interstate commerce. As such, the ROFR statute does not impose an undue burden on interstate commerce.

Conclusion

The judgment of the lower court should be affirmed because neither the Vandalia PSC's Capacity Factor Order nor Vand. Code § 24-12.3(d) is preempted by federal law nor does Vand. Code § 24-12.3(d) violate the dormant Commerce Clause.

Certificate of Service

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

Respectfully submitted,

Team No. 22