C.A. NO. 22-0682

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Plaintiff-Appellant

v.

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

Defendant-Appellees

Appeal from the United States District Court for the Northern District of Vandalia

BRIEF OF DEFENDANT-APPELLEES

Team 35
Counsel for Appellees

February 1, 2023

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STATEMENT OF JURISDICTION

Appellant appeals the final judgment entered against it on August 15, 2022. Appellant filed an appeal of that order on August 29, 2022. The District Court had jurisdiction pursuant to 28 U.S.C §1331. This Court has jurisdiction under 28 U.S.C §1291.

ISSUES PRESENTED

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

STATEMENT OF THE CASE

Vandalia has long powered the nation. (Order, 4). Today, Vandalia is a net supplier of electricity to the regional grid and is among the top states in interstate transfers of electricity. (Order, 4). This case involves challenges to Vandalia's authority to produce energy in the way it sees fit.

Vandalia PSC's Capacity Factor Order

The Vandalia Public Service Commission (PSC) is a state agency empowered with a broad grant of authority under Title 24 of the Vandalia Code to set "just and reasonable rates" for the utilities subject to its jurisdiction. Vand. Code § 24-2-3; (Order, 6). The PSC is specifically directed by the Vandalia legislature to ensure coal's continued dominance in Vandalia (Order, 6).

LastEnergy and Mid-Atlantic Power Co. ("MAPCo") are Vandalia's two public utilities, which the PSC regulates. (Order, 4). They are headquartered elsewhere but serve Vandalia and operate generation facilities in Vandalia. (Order, 4).

Both utilities submit annual filings to Vandalia in order to implement the power cost adjustment (PCA). (Order, 7). The PCA is a mechanism whereby the utilities make up the difference between the projected cost of electricity and the actual cost of electricity. (Order, 7). The utilities also submit their "capacity factor," which measures how often a plant is running at maximum power. (Order, 7).

In response to lagging production levels, the PSC issued a Capacity Factor Order, which directed the utilities to "operate their coal-fired plants to achieve a capacity factor of not less than 75 percent." (Order, 8). The Order, issued in May 2022, included a finding of fact that operation of the jurisdictional coal-fired plants at a 75 percent capacity factor would be economical. (Order, 8). It also expressly authorized LastEnergy and MAPCo to recoup losses from ratepayers if, in complying with the 75 percent capacity factor requirement, the cost to produce electricity at Vandalia's coal-fired plants is greater than the market-clearing price in PJM. (Order, 8).

Native Transmission Protection Act

On May 3, 2014, Vandalia instituted a state right of first refusal law for the construction of electric transmission lines, providing as follows:

> An incumbent electric transmission owner has the right 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 electric transmission owner. If such incumbent electric transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line.

Vand. Code § 24-12.3(d). The statute defines "incumbent electric transmission owner" as "any public utility that owns, operates, and maintains an electric transmission line in this state; . . . or any … entit[y] … engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia. Vand. Code § 24-12.2(f).

ACES and The Proceedings Below

Plaintiff-Appellant Appalachian Clean Energy Solutions, Inc., (ACES), is a global energy company that owns a variety of electricity generating resources, but it generates electricity solely for resale in wholesale markets. (Order, 4). ACES announced plans in April 2020 to construct a natural gas-fired generating plant—tentatively named the "Rogersville Energy Center"—in southwestern Pennsylvania. (Order, 5).

To support output from the Rogersville Energy Center, ACES plans to construct and own a transmission line, called the Mountaineer Express, which will pass through Vandalia. (Order, 5-6). Mountaineer Express was approved by the PJM Board of Managers for inclusion in the Regional Transmission Expansion Plan ("RTEP") in March 2022. (Order, 6).

On June 6, 2022, after being denied state permits by the Vandalia PSC, ACES brought this multi-issue suit in the U.S. District Court for the Northern District of Vandalia, alleging that Vandalia's Capacity Factor Order is preempted by the FPA, that the ROFR is preempted by FERC regulations, and that the state's ROFR violates the dormant Commerce Clause by discriminating against interstate commerce. (Order, 14). Upon the PSC's motion, the District Court dismissed each of ACES' claims. ACES timely filed an appeal of the District Court's order. (Order, 14).

SUMMARY OF THE ARGUMENT

The Supremacy Clause provides that federal law generally preempts state law, but it also abides structures of cooperative federalism. The dormant Commerce Clause, meanwhile, bars states from making themselves units of economic protectionism. ACES contends that the PSC's Capacity Factor Order is preempted by the Federal Power Act (FPA). It also argues that Vandalia's ROFR is preempted by the FPA or that it violates the Dormant Commerce Clause. None of ACES' arguments are persuasive. Instead, as the District Court held, Vandalia is squarely within its lane.

First, ACES lacks standing to challenge the Capacity Factor Order because it did not suffer an "injury in fact." The Capacity Factor Order only applies to Vandalia's retail utilities, of which ACES is not. Even if ACES has standing, the Federal Power Act neither field nor conflict preempts the Capacity Factor Order. The Order, unlike Maryland's policy *Hughes*, does not condition receipt of a state subsidy on wholesale market participation. Nor does the Order distort prices in FERC's admittedly impure market. Without a tether or any clear damage to federal goals, the Federal Power Act and the Capacity Factor Order must coexist.

The Supremacy Clause does not preempt Vandalia's Native Transmission Protection Act either. When it enacted Order 1000, FERC took careful steps to ensure that it did not trespass on the state's well-established power to regulate electric energy transmission in tandem with the federal government. Though the Order eliminated the right of first refusal at the regional ISO planning stage, it specifically acknowledged the state's authority over certain matters that are relevant to transmission planning and expansion, such as permitting, siting, and construction of transmission facilities. Order 1000 itself stated that nothing in the Order is intended to preempt or affect state laws governing the construction of transmission facilities, including authority over siting and permitting of transmission facilities.

Finally, Vandalia's ROFR does not violate the dormant Commerce Clause. As a threshold matter under *Tracy*, ACES is not similarly situated to the incumbent entities, who operate as state utilities and provide power to a captive market. Moreover, the ROFR does not facially discriminate against interstate commerce because it draws a "neutral distinction" between in-state and out-of-state entities. Nor does it unduly burden interstate commerce under the *Pike* balancing test.

The District Court correctly concluded that all of ACES' arguments lacked merit. This Court should affirm the District Court's holdings and preserve Vandalia's traditional state authority to regulate its generation and transmission of electricity.

ARGUMENT

Standard of Review

This Court reviews de novo the District Court's dismissal of ACES complaint. *U.S. ex rel. Raynor v. Nat'l Rural Utils. Coop. Fin. Corp.*, 690 F.3d 951, 955 (8th Cir. 2012). "In deciding a motion to dismiss under Rule 12(b)(6), a court assumes all facts in the complaint to be true and construes all reasonable inferences most favorably to the complainant." *Id*.

I. ACES Lacks Standing to Challenge the PSC's Capacity Factor Order Because It Is Not Subject to the Capacity Factor Order, Nor Is It a Ratepayer.

To establish standing, a plaintiff must satisfy three elements: (1) a plaintiff must have suffered an "injury in fact," (2) there must be a" causal connection between the injury and the conduct complained of," and (3) it must be "likely" 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 [all three] elements." *Id.*

An "injury in fact" requires a showing of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.*

The "injury in fact" test requires not just an identifiable interest but also that the party seeking review "be among the injured." *Id.* At 563.

Here, ACES is not "among the injured." The Capacity Factor Order only applies to retail utilities. (Order, 7). ACES does not operate as a retail-facing generator within Vandalia, is not subject to the Capacity Factor Order, and therefore cannot claim actual injury from its existence.

Any theory that the Capacity Factor Order could potentially affect the economics of building and operating the Rogersville Energy Facility is hypothetical and thus not an "injury in fact." In *City of Los Angeles v. Lyons,* the Supreme Court found that the prospect of a future harm by law enforcement officers was insufficient to establish standing because the threat to the plaintiffs was not "sufficiently real and immediate." 461 U.S. 95, 102-3 (1983). Here, ACES assumes that the Capacity Factor Order will cause noneconomic to be sent into the grid. But findings of fact demonstrate "that it would be economical for coal plants within Vandalia to run at 75 percent capacity." (Order, 14). ACES' apprehension is not "sufficiently real and immediate" to constitute an injury in fact. And without an injury, it is unlikely that a favorable decision by this Court could offer any redress cognizable to the requirements of Article III standing.

II. Even if ACES Has Standing, The Federal Power Act Does Not Preempt the PSC's Authority to Regulate Its Utilities' Generation Level – A Role Clearly Left to the States.

The Supremacy Clause makes the laws of the United States "the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2; *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 162 (2016). Nonetheless, all claims of federal supremacy "start with the assumption that the historic police powers of the States were not to be superseded by [federal law] unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

If Congress has not expressly preempted a state statute, it may do so implicitly through either "field" or "conflict" preemption. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 49 (2d Cir. 2018). Field preemption is found where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan*., 489 U.S. 493, 509 (1989). Conflict preemption arises "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 384 (2015). In general, however, when "coordinate state and federal efforts 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 Federal Power Act (FPA)—a marquee example of a "coordinate" framework— vests in the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale sales of electricity in the interstate market. *Hughes*, 578 U.S. at 153; 16 U.S.C. § 791a et seq.[1] But the Act leaves "significant" power to the states, too. *New York v. FERC,* 535 U.S. 1, 24 (2002).[2] Namely, states retain control over utility generation and resource portfolios, *id*., the facilities used therefor, *Hughes*, 578 U.S. at 154, as well as "any other sale—most notably, any retail sale—of electricity." *EPSA*, 577 at 265. The Act particularly distinguishes "production" from wholesale

[1] Under such charge, FERC regulates the all-important interstate wholesale auctions that occur region by region, seeking to ensure that rates are "just and reasonable," primarily through breaking down "regulatory and economic barriers that hinder a free market in wholesale electricity." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016).

[2] *See also Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind*., 332 U.S. 507, 517–18 (1947) ("The Act, though extending federal regulation, had no purpose or effect to cut down state power. On the contrary, perhaps its primary purpose was to aid in making state regulation effective, by adding the weight of federal regulation to supplement and reinforce it in the gap created by the prior decisions. The Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way.").

"sales," in that states have plenary authority regulate the former, leaving FERC to regulate the latter.[3] *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan*., 489 U.S. 493, 499 (1989).

"That statutory division generates a steady flow of jurisdictional disputes." *EPSA*, 577 U.S. at 265.[4] This is in part because the FPA's regulatory target—wholesale interstate electricity—is a moving one, as are the statute's jurisdictional lines. *Id*. Despite the blur, states are afforded latitude under the Act such that they "may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Hughes*, 578 U.S. at 164.

The *Hughes* Test

When jurisdictional disputes do arise—from state action, specifically—courts apply the *Hughes* test to determine whether a state action intrudes on FERC's turf by containing a "tether" which compels participation in interstate wholesale markets. *Hughes*, 578 U.S. at 163. Such an action flouts FERC's singular authority to set wholesale rates under the FPA. *Id*. Contrariwise, if the state is merely "encouraging production . . . through measures untethered to a generator's wholesale market participation," the state operates within its lane. *Hughes*, 578 U.S. at 163.

Hughes involved a Maryland program that sought to encourage in-state electric generation through a state subsidy. *Id*. at 159. But the program had a "fatal defect." *Id*. at 166. Under the Maryland policy, the state solicited proposals for a developer who would construct a new generation facility in the state and sell the energy produced into the PJM auction. *Id*. at 159. In return, the state would require its utilities to pay the generator, via a twenty-year "contract for

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[3] *Compare Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan*., 489 U.S. 493 (1989) (Northwest Central) (state permitted to regulate production of its in-state wells, even though they sold to interstate pipelines) *with N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 94 (1963) (Northern Natural) (state not permitted to regulate the purchasing patterns by interstate pipelines).

[4] *See also* Laura Hunter Dietz, *Preemption of State Law by Federal Power Act,* 16 U.S.C.A. §§ 792 et seq., 32 A.L.R. Fed. 3d Art. 9 (Originally published in 2018) (regularly updated database of all cases in which courts have discussed state law preemption issues under the Federal Power Act, including whether a state law or its application is preempted by a provision of the Act).

differences," the difference between the clearing price and the state-determined contract price, assuming the generator's bid cleared the market. *Id*. This effectively guaranteed the lucky generator a pre-established rate of return for its electricity, irrespective of the rate set in the wholesale market auction—a subsidy, in other words. *Id*.

The "fatal defect" was that the generator was required to sell into the PJM auction in order to be eligible for the subsidy. *Id.* at 166. Because the auction is FERC's mechanism to set prices, Maryland's attempt to compel generators to bid into the auction while guaranteeing them a rate of return distinct from the auction clearing price was tantamount, in the Court's eyes, to Maryland setting its own interstate prices. *See id*. Thus, preemption was in order. *Id*.

But *Hughes* hardly went further. Noting that the fatal defect was the "tether[ing]" of subsidy eligibility on the generator's participation in wholesale markets, the Court cabined its holding: "So long as a State does not condition payment of funds on capacity clearing the auction," the state's program would survive."[5]

Here, hoping to broaden *Hughes*, ACES argues that the Federal Power Act preempts the PSC's order in three ways. The District Court rejected all of them. First, ACES argues that the PSC's Capacity Factor Order "sets an interstate wholesale rate," contravening the FPA's division of authority between state and federal regulators. Second, ACES contends that the Capacity Factor Order compels coal-burning utilities to sell their energy into PJM. Finally, ACES argues that the Capacity Factor Order will seriously distort the PJM auction's price signals, thus interfering with the method designed by FERC to achieve the goals under the FPA.

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[5] Indeed, following *Hughes*, the Court has dismissed certiorari petitions from litigants challenging state electricity sector policies "untethered to a generator's wholesale market participation." *Id*. at 1299; see Elec. Power Supply Ass'n v. Star, 904 F.3d 518, 523 (7th Cir. 2018); Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41, 51 (2d Cir. 2018). "This suggests that states still have broad latitude to subsidize their preferred energy sources under the FPA." Philip N. Killeen, *Ferc's Tether Tantrum: Why Suppressing State Support for Renewable Energy Violates the Federal Power Act and Threatens U.S. Climate Leadership*, 70 AM. U. L. REV. 271, 291 (2020).

ACES' arguments are unavailing. As demonstrated below, PSC's order satisfies the *Hughes* test because it does not compel utilities' sales into the PJM auction. Appellant's suggestion to the contrary conflates the effect of PSC's order, which sets an output level, with the effect of the contracts between LastEnergy, MAPCo, and PJM, which require the utilities to sell into the grid. Vandalia cannot be faulted for utilities' independent business decisions or barred from regulating the output of an intrastate producer just because the producer then sells interstate.

Nor does PSC's order distort auction signals so gravely as to present an insurmountable "obstacle" to the accomplishment of Congress's "full purposes and objectives" under the FPA. Few generators sell into the grid completely unsupported by the state, and to raise market distortion alarms based on LastEnergy and MAPCo recouping costs through ratepayers overestimates the purity of FERC's markets and runs the risk of invalidating a broad spectrum of state-utility relationships. Given the range of powers left to the states under the FPA, especially the use of subsidies and other incentives to spur generation, this Court should preserve Vandalia's closely-held prerogative to regulate intrastate generation and reject ACES' calls for federal preemption.

A. The Capacity Factor Order is not field preempted by the FPA because, under *Hughes, Rochester Gas,* and the ZEC line of cases, the Order does not amount to a compulsory tether to participation in the PJM auction.

Hughes was "limited." 578 U.S. at 165. The illegal tether in *Hughes* was a state providing subsidies contingent on a generator's "wholesale market *participation*, not prices." *Coal. for Competitive Elec.*, 906 F.3d at 51 (2d Cir. 2018). This distinction between a participation tether and a price tether was borne out in an earlier case, *Rochester Gas & Electric Corporation v. Public Service of New York*, 754 F.2d 99, 104 (2d Cir. 1985), in which the Court held that a state may permissibly tether its subsidies to auction *prices*. *Zibelman*, 906 F.3d at 52. There, New York PSC's tethered intrastate retail rates to a "reasonable estimate" of wholesale sales revenues.

Rochester Gas, 754 F.2d at 101. In effect, the PSC policy "allowed generators to keep operating, regardless of wholesale revenue," because cost recovery was guaranteed through retail rates attached to the generators' expected performance at auction. *Zibelman*, 906 F.3d at 52.

Challengers of the New York PSC policy argued that promising cost recovery through retail rates, based on forecasted auction performance, was effectively setting interstate wholesale rates and should be preempted by the FPA. *Rochester Gas*, 754 F.2d at 102. But the Court rejected this argument. It noted that a state actor, as well as FERC, can "take into account activities it cannot regulate in setting rates for activities that it may regulate." *Rochester Gas*, 754 F.2d at 103. The Court questioned whether the PSC policy compelled generators "to do anything" at all. *Id*. at 102. Instead, the Court distiguished between "regulating incidental sales," on one hand, and "reflecting the profits from a reasonable estimate of those sales in jurisdictional rates," on the other—the latter of which the Second Circuit held is not preempted by the FPA. *Rochester Gas*, 754 F.2d at 105.

An illegal tether, then, is one that forces an entity to participate in the FERC-regulated auctions in order to receive a state benefit or comply with a state policy. *Zibelman*, 906 F.3d at 51. The Court in *Zibelman* set a high, literalist bar for what amounts to compulsion, holding that the state—which provides a subsidy to a generator—cannot be blamed for a generator's decision to sell into interstate wholesale markets. *Id*. at 52.

ZEC Line of Cases

At issue in *Zibelman* was a policy of the New York PSC (again) called the Zero Emissions Credit (ZEC) program. *Id.* at 47. The program subsidized select nuclear generation facilities by providing them with sellable credits—ZECs—for the amount of emission-free energy they produced.[6] *Id.* The nuclear facilities involved in the program sold their energy into FERC-

[6] The ZEC program aimed to prevent nuclear generators that do not emit carbon dioxide from retiring until renewable sources of energy can pick up the slack. The value of the ZECs was connected to the social cost of carbon and the

regulated wholesale markets, but they sold their ZECs to a state board. *Id.* The PSC then required its state utilities to purchase the ZECs from the board, relative to the utilities' electric load. *Id.* In turn, the utilities passed along these costs to consumers. *Id.*

The question for the Court was whether the ZECs—essentially subsidies provided to select nuclear generators, who happened to sell into interstate wholesale markets—intruded on FERC's jurisdictional turf by compelling wholesale market *participation*. *Id.* at 51. The Court answered in the negative, reasoning that nothing in the ZEC program itself "require[d] the ZEC plants to participate in the wholesale market." *Id.* at 52. Instead, the Court noted that the plants were required to sell into interstate auctions only by way of their contracts with their respective RTOs, in which they were deemed "Exempt Wholesale Generators" ("EWGs") and were "legally required to sell their output into wholesale markets." *Id*.

The Court further noted that the plants could "relinquish" their contractual postures—their EWG status—"in order to sell directly to consumers . . . and still receive ZECs." *Id.* Thus, because the ZEC subsidy was not contingent on wholesale market participation, it was not a compulsory tether. *Id*. ("[A] generator's decision to sell power into the wholesale markets is a business decision that does not give rise to preemption concerns.").[7]

ACES incorrectly argues that Vandalia's program sets an interstate wholesale rate.

First, the Capacity Factor Order nowhere compels participation in interstate wholesale markets. LastEnergy and MAPCo are required to sell into PJM auctions only by way of their

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wholesale market for electricity. The value of the ZECs would drop if lots of new renewable energy came on the market, thereby acting as a proxy market indicator of when nuclear should be taken offline. *Zibelman*, 906 F.3d at 47-51.

[7] *See also Electric Power Supply Association v. Star*, 904 F. 3d 518 (7th Cir. 2018) (concluding Illinois's ZEC program was not preempted because nuclear generators need not sell their power in an interstate auction and are therefore "untethered to a generator's wholesale market participation"); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 99 (2d Cir. 2017) ("[T]he fact that the statutes authorize the DEEP Commissioner to "direct" utilities to "enter into" contracts with specific bidders is not sufficient to render plausible Allco's claim that utilities will be "compelled," under the 2015 RFP, to accept specific bids.").

contracts with PJM, just as in *Zibelman*, where the nuclear plants at issue were obliged to sell into auction markets only by way of their RTO contracts. LastEnergy and MAPCo are required to sell into PJM by way of their Fixed Resource Requirement (FRR) status, specifically. But the utilities' FRR status resulted from freely-negotiated contracts with PJM—independent "business decision[s] that do[] not give rise to preemption concerns."

Unlike *Hughes*, where the Maryland state program explicitly required the selected electric generator to sell into the PJM auction if it was to participate in the state program, the Capacity Factor Order merely compels a certain level of output. LastEnergy and MAPCo are not the winning bidders of a state program which requires them to sell into PJM's grid to reap their reward. State regulators are requiring that they operate at a certain capacity—a traditional state power—and their independent business contracts require that such capacity to be transmitted to the PJM grid. The combined result is not an illegal tether.

Second, the Capacity Factor Order does not condition the receipt of a subsidy on market participation. This is because, to the extent that the Order is alleged to contain a subsidy, the subsidy is available irrespective of market participation. The alleged subsidy arises from the Capacity Factor Order authorizing utilities to recoup their costs through retail rates based on their auction performance. However, subsidies of this nature were in effect (and presumably went unchallenged) before the Capacity Factor Order was issued.

Specifically, Vandalia's power cost adjustment mechanism (PCA), "authorized by previous Vandalia PSC orders," allows each utility to mark-up ratepayers' bills to reflect the "actual power costs incurred by such utility." Thus, at least since the PCA mechanism was introduced, Vandalia has consistently provided a subsidy which allows utilities to recover costs based on a number of factors. Indeed, this reflects the traditional state-utility operating model, in which utility commissions allow for cost recovery according to the utilities' operating and capital costs. The record nowhere indicates that the PCA mechanism would be unavailable to a utility who chooses not to sell into PJM. The only ripple added by the Capacity Factor Order is that utilities, in negotiating rates and setting adjustments with the PSC, can factor in the *market* costs incurred at the PJM auction.

In this light, a (hypothetical) Vandalia utility who chooses not sell into PJM—an independent business decision—and instead sells directly to the Vandalia consumers, is likely still eligible for cost recovery through the PCA mechanism; that utility would simply not account for PJM auction costs it did not incur. The Court in *Zibelman* held the ZEC subsidy program was not an illegal tether since the nuclear plants could participate irrespective of their participation in FERC auctions. Here, although the record does not indicate it explicitly, Vandalia utilities are presumably subject to the Capacity Factor Order and eligible for the PCA mechanism irrespective of their participation in PJM auction markets. Thus, it is simply not true to claim, as ACES does, that Vandalia utilities are only eligible for cost recovery—the subsidy—by way of their participation in the interstate auction. The Capacity Factor Order is simply doing what the PSC already does: authorizing a certain amount of cost recovery through retail rates, according to the utilities' capital and operating costs, which here include market costs specific to the PJM auction.

And as *Rochester Gas* indicated, an illegal tether does not arise simply because cost recovery authorization is connected to interstate auction prices. Just as the New York PSC in *Rochester Gas* was permitted to authorize cost recovery relative to forecasted auction performance—which effectively "allowed generators to keep operating, regardless of wholesale revenue"—so too can Vandalia promise its utilities' cost recovery based on auction performance without creating an illegal tether.

B. The Capacity Factor Order is not conflict preempted, because ACES has failed to identify any clear damage to federal goals.

State law may be conflict preempted when it "stands as an obstacle to the accomplishment and execution of the full purposes" of federal law, *Oneok, Inc.*, 575 U.S. at 377, or "interferes with the method by which the federal statute was designed to reach this goal," *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). But when a dual regulatory regime apportions power between the federal and state governments, conflict preemption analysis "must be applied sensitively . . . so as to prevent the diminution of the role Congress reserved to the States." *Northwest Central*, 489 U.S. at 515.[8] Under this standard, where a state "regulate[s] production or other subjects of state jurisdiction" in pursuit of "matters of legitimate state concern," no conflict preemption exists "unless clear damage to federal goals would result." *Northwest Central*, 489 U.S. at 522.

The FPA is one such statute that envisions a federal-state relationship marked by "interdependence" and preserved state powers. *Hughes*, 578 U.S. at 167 (Sotomayor, J., concurring). The statute's goals include ensuring "just and reasonable" wholesale rates—a regulatory end isolated to federal means. *See* 16 § 824d(a); *Hughes*, 578 U.S. at 168 (Sotomayor, J., concurring). But the statute further strives, as the *Hughes* Court "rightly recognize[d]," to protect "the States' ability to contribute" to a sustainable supply of efficient and price-effective energy. *Id*. at 168. Indeed, in passing the FPA, Congress sought to preserve state authority to regulate generation facilities, utility "generation and resource portfolios," and retail sales. 16 U.S.C. § 824(b); *New York*, 535 U.S. at 24. Thus, the relevant inquiry is whether Vandalia's Capacity Factor Order works "clear damage" not only to the federal goal of ensuring just and

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[8] *See also Hughes*, 578 U.S. at 167 (Sotomayor, J., concurring) ("Courts must avoid mistaking the congressionally designed interplay between state and federal regulation for impermissible tension that requires pre-emption under the Supremacy Clause.").

reasonable wholesale rates, but also to the broader goal of preserving cooperative federalism in the domain of energy regulation.

ACES argues that the Order "seriously distort[s] the PJM auction's price signals, thus interfering with the method designed by FERC to achieve the goals under the FPA." It claims, therefore, that the Order should be conflict preempted by the FPA. The District Court disagreed.

This Court should affirm the District Court's rejection of the conflict preemption claim, because (1) the Capacity Factor Order only indirectly and permissibly affects wholesale rates, and (2) the Order appropriately preserves state authority to regulate generation. No "clear damage" to federal goals exists.

1. The Capacity Factor Order Does Not Directly Affect Prices or Interfere with FERC's Auction Mechanism.

"FERC has sanctioned state programs that increase capacity or affect wholesale market prices, so long as the states regulate matters within their jurisdiction." *Zibelman*, 906 F.3d 41, 56. In this light, states may "grant loans, subsidies or tax credits to particular facilities on environmental or policy grounds," *Cal. PUC*, 133 FERC ¶ 61,059, P 31 n.62, even when that makes certain forms of generation "more competitive" or "allow[s] states to affect" the price, *S. Cal. Edison Co*., 71 FERC ¶ 61,269, 62,080 (1995). Indeed, states may go as far as to "require retirement of existing generators" or "take any other action in their role as regulators of generation," even though it may "affect[ ] the market clearing price." *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009).[9]

[9] *See also New England States Comm. on Elec. v. ISO New England Inc*., 142 FERC ¶ 61,108, at 61,490 (2013) (LaFleur, Comm'r, concurring) ("[S]tates have the unquestioned right to make policy choices through the subsidization of capacity."); *N.Y. State PSC, 158 FERC* ¶ 61,137, 2017 WL 496267, at *11 (2017) (Bay, Comm'r, concurring) (observing that "all energy resources" receive subsidies, and that "an idealized vision of markets free from the influence of public policies ... does not exist").

Here, the Capacity Factor Order comes nowhere close to distorting auction signals so gravely as to present an insurmountable "obstacle" to the accomplishment of Congress's "full purposes and objectives" under the FPA. It is true that LastEnergy and MAPCo may sell energy into the PJM grid at lower-than-average prices, since they can recoup costs and would otherwise prefer to sell energy based on cheaper resources, such as natural gas. But states have the latitude to require a certain level of output or a certain resource mix or "take any other action in their role as regulators of generation," even though such action may "affect[ ] the market clearing price."

No doubt the Capacity Factor Order is ultimately predicated upon Vandalia's statutory directive that "no more coal plants close," an explicit effort to shirk market forces. Vand. Code § 24-1-1D(5). But that is not illegal. All production subsidies aim to support preferred resources that would not be developed or retained based on expected electricity-sales revenue alone. In doing so, states do not cross a red line unless they directly interfere with auction prices. Here, the Capacity Factor Order crossed no such line. The Order may augment or stabilize LastEnergy and MAPCo's wholesale sales revenue, but so did the ZEC program in *Zibelman*, which was upheld. In requiring an output level, Vandalia has not directly interfered with auction prices.

Furthermore, it is hard to see how ACES can complain about receiving distorted auction prices when those rates are established via the FERC-approved auction process and are by definition the rates that FERC has determined to be "just and reasonable." Given that few generators sell into the grid completely unsupported by the state, it is itself a distortion to claim that the market goes awry based on LastEnergy and MAPCo producing at a state-required level and later recouping costs. Such a claim overestimates the purity of FERC's markets and runs the risk of invalidating a range of state-utility relationships. States may permissibly "affect[] the market clearing price" in the regulation of production levels. That is all Vandalia has done here.

2. The Capacity Factor Supports the FPA's Goal of Preserving State Authority to Regulate Generation.

As noted, Congress and the FPA share an interest in preserving "the States' ability to contribute" to a sustainable supply of efficient and price-effective energy. *Hughes*, 578 U.S. at 168 (Sotomayor, J., concurring). For this reason, among others, states retain authority to regulate generation facilities, utility generation and resource portfolios, and retail sales under the FPA. *New York*, 535 U.S. at 24.

ACES argues unpersuasively that the Capacity Factor Order harms the FPA's goal to promote "just and reasonable rates," while at the same time ignoring the statute's goal to preserve state authority. Preempting the Capacity Factor Order under the auspices of protecting the FPA's rate-related goal would ultimately harm the statute's goal to promote cooperative federalism, ensure sustainable supply, and preserve state self-government.

The Capacity Factor Order could hardly remain more faithful to the sphere of power delegated to the states. The Order, derived from a state policy choice that a coal-heavy resource mix is best for its citizens and its economy, seeks to encourage the operation of coal-fired plants "at maximum reasonable output and for the duration of the life of the plants." It does so by requiring that its state-regulated, coal-fired utilities—no one else—operate at a 75% annual capacity factor. Mandating production levels to achieve state policy goals is squarely within states' authority under the FPA. Thus, Vandalia's decision should be left alone in order to further the FPA's goal of promoting cooperative federalism.

Furthermore, Vandalia is a net supplier of electricity to the regional grid and is among the top states in interstate transfers of electricity. The state did not achieve that status by being subject to federal preemption; it did so by retaining discretion over its policies and production decisions. The Capacity Factor Order is one such decision. Indeed, the Order represents a continuation of the same—maintaining production at levels near the state's historical output. By all accounts, then, the Order reflects Vandalia's intention to remain a top transferor of interstate electricity, and it also aligns with the FPA's goal of ensuring that states contribute to a "sustainable supply" of energy for the grid. For these reasons, the Order works no "clear damage" to the FPA and its federal goals.

Because the Capacity Factor Order neither contains an illegal tether nor clearly damages federal goals, Vandalia's authority to regulate production should be preserved and ACES' preemption claims should be again dismissed.

III. The District Court Correctly Determined the Native Transmission Protection Act was Not Preempted Because Order 1000 States That It Does Not Preempt State Law.

Under the FPA, states have traditionally assumed all jurisdiction over the approval and denial of permits for siting and construction of electric transmission facilities. *See Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009); *see also LSP*, 954 F.3d at 1030 (holding that state regulatory power over utilities inherently involves siting, permitting, and constructing transmission lines).

FERC did not change state rights of first refusal in Order 1000. Though the Order eliminated the right of first refusal at the regional ISO planning stage, it preserved states' rights to govern construction of transmission facilities within their borders: "We acknowledge that there is longstanding state authority of certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction. However, nothing in this Final Rule involves an exercise of siting, permitting, and construction authority." 136 FERC ¶ 61,051 at PP 107. The order further stated, "[N]othing 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." 136 FERC ¶ 61,051 at PP 227.[10]

ACES' argument that Vandalia's ROFR law is preempted by Order 1000 is unfounded. The Supremacy Clause doctrine and federal preemption categories established by the Supreme Court and discussed *supra* are incorporated herein for reference.

A. Vandalia's ROFR is not explicitly preempted by FERC Order 1000—on the contrary, it is explicitly *not* preempted.

Here, there is no language in Order 1000 explicitly preempting state law governing the construction of electric transmission facilities. Instead, there is explicit language to the contrary. FERC left no doubt that Order 1000 does not preempt the Native Transmission Protection Act by precisely stating that "[n]othing 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." 136 FERC ¶ 61,051 at PP 227 (2011) (emphasis added). Though Order 1000 blocked the federal ROFR at the broader regional transmission planning stage, FERC was deliberate not to trespass on the longstanding authority of the state to pass laws regarding the construction of transmission facilities throughout the state to serve its citizens. *See Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009).

As preemption is "fundamentally a question of congressional intent", the inquiry should end with FERC's specific instruction in the Final Rule that it did not intend to preempt "state or

[10] In the wake of Order 1000, several states, including Vandalia, enacted state ROFR laws in accordance with the Order 1000's directive that they remained in control over siting, permitting, and construction of transmission facilities. *See*, *e.g.*, Vand. Code § 24-12.3(d); Minn. Stat. § 216B.246; Ind. Code Ann. § 8-1-38-9 (West); N.D. Cent. Code §49-03-02.2; S.D. Codified Laws §49-32-20; Neb. Rev. Stat. § 70-1028; 17 O.K. Stat. § 292; Tex. Util. Code § 37.-56(e); Iowa Code § 478.16.

local laws or regulations with respect to construction transmission facilities." This Court need not attempt to infer federal preemption here when the lawmakers carefully spelled out for us that Order 1000 does not preempt the very state law at issue. There is no ambiguity to unpack with inferential analysis because FERC directly addressed preemption in Order 1000.

Only the Fifth and Eighth Circuit courts have been faced with challenges to the constitutionality of state ROFR provisions written in response to Order 1000 that protect incumbent electric transmission providers. *See LSP Transmission*, 954 F.3d 1018; *see also NextEra Energy Cap. Holdings, Inc. v. Lake,* 48 F.4th 306 (5th Cir. 2022). However, due to the explicit language in Order 1000, neither plaintiff in either case raised a preemption argument.

B. Even if conflict preemption were not present, FERC Order 1000 left plenty of space for Vandalia to legislate in the area of transmission line siting and construction.

Assuming Congress has not expressly stated its intent in Order 1000, the Native Transmission Protection Act is not preempted under field preemption. States have traditionally assumed all jurisdiction over the approval and denial of permits for siting and construction of electric transmission facilities, *Piedmont*, 558 F.3d at 310, thus requiring a "clear and manifest purpose of Congress" to preempt state law. *Rice v. Santa Fe Elevator Corp*., 331 U.S. at 230.

Here, no such clear and manifest purpose exists because FERC both acknowledged the longstanding state authority over siting, permitting, and construction of transmission facilities and articulated that nothing in the Final Rule of Order 1000 "involves an exercise of siting, permitting, and construction authority." 136 FERC ¶ 61,051 at PP 107. As such, Order 1000 left plenty of room for state supplementation in the area of transmission facility construction.

Furthermore, federal law does not so dominate the field of electric transmission that it should be assumed to preclude enforcement of state laws on the same subject. Though FERC has jurisdiction over the transmission of electric energy in interstate commerce, it is not absolute—it "extend[s] only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). State regulation of the electrical industry has long been recognized as a valid exercise of a state's police powers, particularly when it comes to the permitting, siting, and construction of electric facilities. *Piedmont Envt'l Council*, 558 F.3d at 310. Here, the Vandalia legislature properly exercised its police power in enacting the Native Transmission Protection Act, and the Vandalia PSC properly exercised its power to approve or deny transmission construction permits. *See also LSP*, 954 F.3d at 1030 (state regulatory power over utilities inherently involves and permitting constructing transmission lines).

C. Conflict preemption does not apply in these circumstances as the NTPA poses no obstacle to the accomplishment of Order 1000's objectives.

Finally, federal and state law have always co-existed in the arena of electric transmission and the same can be said for FERC's Order 1000 and Vandalia's Native Transmission Protection Act ("NTPA"). It is certainly possible for parties to adhere to the Native Transmission Protection Act without it becoming an obstacle to the objectives FERC hoped to accomplish with Order 1000. In upholding the Midcontinent ISO's ("MISO") incorporation of a Minnesota ROFR provision in the MISO tariff, FERC held that state ROFR laws do not prevent Order 1000 from achieving its purpose and objective of facilitating the "selection of transmission projects that are more efficient or cost-effective than would have been developed but for [Order 1000]." 150 FERC ¶ 61,037, 61,176.

The Vandalia ROFR does not prevent competition at the regional planning stage where projects such as ACES' Mountaineer Express are selected—it simply allows in-state utility providers to construct the parts of the transmission lines that connect to facilities owned by said utility providers so that reliability and consistency in the provision of electricity to Vandalians can be maintained. This is a legitimate state interest that does not stand in the way of FERC's removal of the federal ROFR. *See Arkansas Elc. Co-op. Corp. v. Arkansas Public Service Com'n.,* 461 U.S. 375, 377 (1983) ("[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States.")

Order 1000 instituted more competitive project selection practices at the regional planning stage to give non-incumbent electric transmission providers a fair chance to have their project proposals chosen. This method has operated unfettered by the NTPA, as ACES—a nonincumbent energy company in the PJM coverage area—saw its Mountaineer Express proposal approved by the PJM Board of Managers in March 2022 as part of the Regional Transmission Expansion Plan. This affords ACES the opportunity to distribute energy 400-plus miles down the eastern seaboard from its plant in Pennsylvania—a project that may have been taken over entirely by incumbent PJM electricity distributors in a world before Order 1000. Though the NTPA allows Vandalia utility companies to construct and own the portions of the line passing through their exclusive service area, the project as a whole and the electricity being transmitted will still belong to ACES. This is what FERC intended when it enacted Order 1000: innovation and competition at the interstate planning stage, while still affording states the right to ensure predictability and reliability at the local level through the siting and construction of transmission facilities.

IV. Vandalia's Statutory Right of First Refusal Does Not Violate The Dormant Commerce Clause of the U.S. Constitution.

The Commerce Clause grants Congress the authority to "regulate Commerce … among the several States …" U.S. Const. art. I, § 8, cl. 3. In turn, states are impliedly prohibited from enacting barriers to the free flow of that commerce. *Tenn. Wine and Spirits Retailer Association v. Thomas,* 139 S. Ct. 2449, 2459 (2019). Courts have billed this "negative" aspect of the Clause—prohibiting economic protectionism—as the "dormant Commerce Clause." *Wyoming v. Oklahoma*, 504 U.S. 437, 454 (1992). Thus, the Commerce Clause operates as "a limitation upon state power" even in the absence of a state-limiting federal statute. *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 350 (1977).

However, the dormant Commerce Clause is "not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Management Authority,* 550 U.S. 330, 343 (2007). Further, limitations on state power imposed by the Commerce Clause are "by no means absolute," and "the states retain authority under their general police powers to regulate matters of 'legitimate local concern' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

State laws can violate the dormant Commerce Clause if they expressly "mandate 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). Alternatively, a state law may violate the Commerce Clause if its purpose or effect is to burden interstate commerce. *Hunt*, 432 U.S. at 350. In these cases, the court adopts a balancing test and will uphold a statute so long as its burden on interstate is not "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

However, before ever reaching the above analysis, courts first determine the "threshold question" of whether the entities are "similarly situated for constitutional purposes." *General Motor Corp. v. Tracy*, 519 U.S. 278, 299 (1997). When allegedly competing entities provide different products or serve different distinct markets, they may continue to do so "even if the supposedly discriminatory burden were removed." *Id.* Thus, removing the state regulation "would not serve the dormant Commerce Clause's fundamental objective of preserving a national market for competition." *Id.*

Here, ACES' claim that Vandalia's ROFR violates the dormant Commerce Clause fails on all fronts. First, ACES is not similarly situated to the incumbent entities as a constitutional matter and is thus foreclosed from claiming overt discrimination. Second, even if ACES and the incumbent entities are similarly situated, Vandalia's ROFR does not facially discriminate against interstate commerce. Third, Vandalia's ROFR does not unduly burden interstate commerce. Thus, this Court should affirm the decision of the District Court and find that Vandalia's ROFR is a valid exercise of state power.

A. ***Tracy*** **forecloses petitioner's claim of overt discrimination.**

The threshold question for a dormant Commerce Clause analysis is whether "in state and out-of-state entities are 'substantially similar'" to one another. *Tracy,* 519 U.S. at 299. When entities are not "substantially similar" or "similarly situated"—i.e., when they do not compete with one another or offer different products—there is no risk that favoring one over the other violates the dormant Commerce Clause. *Id.* This is because, in the "absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market, there can be no local preference . . . to which the dormant Commerce Clause may apply." *Id*. At 300.

In *Tracy*, at issue before the Court was whether Ohio violated the Commerce Clause when it taxed the sale of natural gas from all sellers, whether in-state or out-of-state, but exempted from the tax its public utilities that meet Ohio's statutory definition of a "natural gas company." *Id.* at 281-82. General Motor Corporation (GMC), who purchased virtually all the natural gas for its Ohio plants from out-of-state marketers, argued that denying the tax exemption to sales by the out of state marketers violated the dormant Commerce Cause. *Id.* at 285. But the Court found that the tax exemption did not violate the Commerce Clause—even though it clearly favored in-state utilities compared to out-of-state gas marketers—because the utilities and the marketers were not similarly situated. *Id.* at 303.

The Court distinguished the out-of-state marketers from the tax-exempt natural gas companies by highlighting the fact that the tax-exempt companies' core markets were captive and comprised of residential consumers. *Id.* at 301. Indeed, the Court noted that the natural gas companies, subject to state regulation, produced a "noncompetitive bundled gas product" for residential consumers that distinguished themselves from independent marketers "to the point that the enterprises should not be considered 'similarly situated.'" *Id.* at 310. Accordingly, the Court reasoned that eliminating the sales tax exemption would be inadequate to create competition between the natural gas utilities and marketers for the utilities' core residential market. *Id.* at 302.

GMC further argued that the natural gas utilities and the out-of-state marketers could compete for the noncaptive market of bulk energy buyers. *Id.* at 303. But, recognizing the "obligation to proceed cautiously" in order to avoid disrupting the delivery of natural gas "to the noncompetitive captive market," the Court gave controlling weight to the captive market and held that the entities were not similarly situated. *Id.* at 304.

Here, like in *Tracy*, ACES is not similarly situated to Last Energy and MAPCo. Both LastEnergy and MAPCo serve a combined 1,050,000 retail customers in Vandalia. (Order 4). ACES, on the other hand, generates electricity "solely" for resale in the wholesale markets. (Order 4). Thus, akin to the natural gas utilities in *Tracy*, the incumbent entities in Vandalia serve a largely captive market consisting of residential consumers. ACES is not competing with LastEnergy or MAPCo for a share of the retail market in Vandalia and, in turn, eliminating the ROFR would not further such competition.

While LastEnergy and MAPCo may have the ability to compete with ACES in the sale of energy to the energy market, this Court should give controlling weight to the captive market, as it did in *Tracy*. It is true that eliminating the ROFR might make the market for wholesale electricity more competitive. However, this Court has an "obligation to proceed cautiously" to avoid the disruption of energy "to the noncompetitive captive market." Here, eliminating the ROFR would substantially disrupt the flow of energy to the noncompetitive market, because the ROFR keeps transmission lines in the hands of "more responsive in-state companies" that actually supply Vandalia residents with electricity.

B. Even if *Tracy* does not foreclose petitioner's claim of overt discrimination, Vandalia's ROFR does not facially discriminate against interstate commerce.

Under the dormant Commerce Clause, "discrimination" means the "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *United Haulers,* 550 U.S. at 338). A discriminatory law that is motivated by "simple economic protectionism" is virtually always invalid. *Id.* However, proving discrimination rests on the party challenging the validity of the statute. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

Among other forms of "discrimination," courts have wrestled with whether a state may favor "incumbents" (i.e., entities already operating in the state, broadly speaking), but they have also noted that an "incumbency bias" is "not a surrogate for" a negative impact on interstate commerce. *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016) (explaining that "incumbency is not the focus of the dormant Commerce Clause" and upholding State's issuance of medical certificates of need to incumbents). In the electric generation sector, the incumbency question relates particularly to whether states may regulate transmission lines in such a way that favors those incumbents who already own or operate lines in the state. *LSP,* 954 F.3d 1018, 1028–29 (8th Cir. 2020); *NextEra Energy,* 48 F.4th 306 (5th Cir. 2022).

To start, FERC has acknowledged "longstanding state authority over certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction" of transmission lines. Order 1000 at 33 ¶ 107. It has explicitly ruled that ruled that RTOs and other planning entities are "authorized to consider state laws," including ROFR provisions, "in the regional transmission planning process." *LSP*, 954 F.3d at 1024. From there, however, the circuit courts disagree on whether a law is facially discriminatory when it benefits incumbents at nonincumbents' expense. *See NextEra Energy*, 48 F.4th 306 (5th Cir. 2022).

The Eighth Circuit, in *LSP Transmission Holding, LLC v. Sieben*, found that an ROFR enacted by Minnesota did not facially discriminate against interstate commerce even when it gave priority to incumbent electric transmission owners. 954 F.3d at 1028-29. Incumbents were defined as "any public utility that owns, operates, and maintains an electric transmission line in this state" and were given priority right to build transmission infrastructure approved by a state board. *Id.* at 1027. Importantly, if the incumbents did not exercise that right within 90 days, other entities—even those without a Minnesota transmission facility—could seek to enter the market. Minn. Stat. § 216B.246, subdiv. 3.

LSP, a non-incumbent, out-of-state transmission developer, argued that the ROFR discriminated against out-of-state business and thus violated the Commerce Clause. *Id.* But the Court found otherwise: "[T]he statute draws a neutral distinction between existing electric transmission owners . . . and all other entities, regardless of whether they are in-state or out-of-state." *Id.* On this reasoning, the Court held that the ROFR did not violate the Commerce Clause, because it merely showed a "preference" for incumbent electric transmission owners. *Id.*

The Fifth Circuit, in *NextEra Energy*, 48 F.4th 306 (5th Cir. 2022), adopted an approach that appeared to go the other way, finding that a state preference for incumbents violated the Commerce Clause. *NextEra*, 48 F.4th at 322. There, a Texas law granted incumbent transmission owners exclusive rights to develop connections to their transmission lines. *Id.* But such rights were not time-bound; they were permanent (at least as statutes go). *Id.* This effectively barred companies without a Texas presence from ever building or operating transmission lines that connected to existing ones, absent outright acquiring an incumbent. *Id.* The Court held this was clear discrimination against out-of-state actors and therefore violative of the dormant Commerce Clause. *Id.* "What matter[ed] . . . is that the Texas law prevents those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas." *Id.* at 324.

Here, Vandalia's ROFR pales in comparison to the Texas statute in *NextEra*. Instead, it is more akin to the one upheld by the Eighth Circuit and does not facially discriminate against interstate commerce. First, Vandalia's ROFR draws a "neutral distinction between existing electric transmission owners" and all other entities by requiring incumbency status—just as the Minnesota statute did in *LSP*. Such incumbency status does not reflect or depend on where the entities are headquartered, where they do their primary business, or any other consideration relevant to understanding whether out-of-state actors are discriminated against.

Second, and more importantly, Vandalia's statutory preference for incumbents is only temporary. Whereas the Texas law in *NextEra* was so egregious because it permanently prevented new entrants into the market, Vandalia's ROFR expires within 18 months if not exercised by incumbents. Vandalia's ROFR cannot discriminate against out-of-state interests if it gives out-of-state interests like LastEnergy and MAPCo pick of the litter, especially when based on a state decision to leave transmission expansion in the hands of those already running the lines. If or when LastEnergy and MAPCo refuse the opportunity, the transmission business in Vandalia is just as open to interstate competition as it was before.

C. Vandalia's ROFR does not unduly burden interstate commerce.

As noted above, a state statute might still be struck down as violating the dormant Commerce Clause if it unduly burdens interstate commerce. A statute that regulates "evenhandedly" to promote a "legitimate local public purpose" with only incidental effects on interstate commerce will be upheld so long as the burden on commerce is not "clearly excessive in relation to the putative local benefits." *Pike,* 397 U.S. 137, 142 (1970). When a legitimate local purpose is found "the question becomes one of degree." *Id.* Whether the burden will be upheld depends on "the nature of the local interest" and on if it could be "promoted as well with a lesser impact on interstate activities." *Id.* Thus, the court will engage in a balancing test, weighing the local interests against any incidental burden to interstate commerce. *Id.* at 143.

Here, if there is any burden on interstate commerce it is not "clearly excessive" to the legitimate local benefits. Courts have long recognized that a state's power to regulate commerce is at its apex when it concerns matters "traditionally of local concern." *Washington Apple Advertising Comm'n*, 432 U.S. at 350. The regulation of transmission lines that run through Vandalia is a quintessential matter of local concern. Rather than imposing a "clearly excessive" burden on interstate commerce, the Vandalia ROFR carves out room for future entities to construct transmission lines after only 18 months.

CONCLUSION

For the reasons set forth above, Vandalia PSC respectfully request this Court to affirm the decision of the United States District Court for the Twelfth Circuit.

DATED this 1st day of February, 2023.

Respectfully submitted,

Team No. 35

CERTIFICATE OF SERVICE

Pursuant to *Official Rule IV*, *Team Members* representing Respondent 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. 35