C.A. No. 22-0682

IN THE

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,

Defendants-Appellees.

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

BRIEF OF PLAINTIFF-APPELLANT APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.

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Attorneys for Appellant Appalachian Clean Energy Solutions

DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant-Appellee New Somerset Ethics Panel hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

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Attorneys for Appellant Appalachian Clean Energy Solutions

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Appellant respectfully submits that this appeal is appropriate for oral argument.

STANDARD OF REVIEW

This appeal concerns whether the District Court of Vandalia improperly granted Vandalia Public Service Commission's motion to dismiss, and this appeal must be reviewed *de novo*. Reviewing *de novo* requires this Court to credit the plaintiff's material factual allegations and construed those facts with reasonable inferences in favor of the plaintiff. *New Hampshire Right to Life PAC v. Gardener*, 99 F.3d 8, 12 (1st Cir. 1996); *see, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see generally*, *Zinermon v. Burch*, 494 U.S. 113, 118 (1990).

JURISDICTIONAL STATEMENT

The District Court of Vandalia has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because the issue of this claim is the constitutionality of the Vandalia Public Service Commission's Capacity Factor Order and the right-of-first-refusal established by Vandalia's Native Transmission Protection Act. The District Court of Vandalia granted the Public Service Commission's Motion to Dismiss on all issues on August 15, 2022. Appalachian Clean Energy Solutions, Inc. filed a notice of appeal on August 29, 2022. This Court has appellate jurisdiction pursuant to 28 U.S.C § 1291 because this appeal is from a final order disposing of all claims.

ISSUES ON APPEAL

1. Appalachian Clean Energy Solutions has standing if it can show an injury in fact, a sufficient causal connection between its injury and the challenged conduct, and that its injury is likely to be redressed favorably. The Capacity Factor Order will cause significant financial harm by distorting the price signals in the PJM market, and the

Order, facially preempted, conflicts with and intrudes in a field regulated by the federal government. Does Appalachian Clean Energy Solutions have standing?

2. Vandalia's Capacity Factor Order is both conflict and field preempted if it intrudes on the exclusive field of federal regulation and directly interferes with the goals of the federal government. Vandalia's Capacity Factor Order intrudes in the field reserved exclusively for the Federal Energy Regulatory Commission by the Federal Power Act, and the Order conflicts with the Federal Energy Regulatory Commission's chosen market-based regulatory approach. Does the Vandalia Public Service Commission's Capacity Factor Order violate the Supremacy Clause of the U.S. Constitution?
3. A state's law is preempted by federal law when the state's law directly interferes with the purpose set forth by federal law. Vandalia's right-of-first-refusal deliberately interferes with the Federal Energy Regulatory Commission's authority of approval for transmission lines as prescribed by the Federal Energy Regulatory Commission's Order No. 1000. Does Vandalia's statutory right-of-first-refusal violate the Supremacy Clause of the U.S. Constitution?
4. The Native Transmission Protection Act violates the dormant Commerce Clause if it discriminates against interstate commerce and the burden is more than incidental. The Act, enacted in response to the loss of a federally recognized right-of-first-refusal, grants exclusive rights to in-state transmission line owners for eighteen months, during which it prohibits a nonincumbent utility from building energy transmission lines through the state. Does the Act violate the dormant Commerce Clause?

STATEMENT OF THE CASE

Appalachian Clean Energy Solutions, Inc. ("ACES") is a global energy company headquartered and incorporated in Springfield, Vandalia. (R. at 4). In response to the growing need for reliable and renewable green energy, in June of 2020, ACES adopted a company-wide goal of achieving zero carbon emissions by 2050. (R. at 5).

As part of its decarbonization effort, ACES is planning to retire its Franklin Generating Station because it would be uneconomic to install the necessary environmental upgrades to comply with the Steam Electric Power Generating Effluent Guidelines and Standards adopted by the Environmental Protection Agency in 2020. (R. at 5) With the anticipated retirement of the Franklin Generating Station, ACES announced plans in April 2020 to construct an 1,800 MW combined-cycle natural gas-fired generating plant—tentatively named the "Rogersville Energy Center"—in Greene County in southwestern Pennsylvania, near Rogersville. *Id.* For its fuel supply, the Rogersville plant will take advantage of the abundant natural gas supplies from the Marcellus Shale, which covers a four-state region including large portions of Pennsylvania. *Id.*

In order to further shift to zero carbon emissions, ACES has sought to increase the capability of the regional grid to accommodate the electrical output from the Rogersville Energy Center. (R. at 5). To do this, ACES plans to construct and own a 500 kilovolt (kV) high-voltage transmission line from Rogersville to Raleigh, North Carolina, a distance of about 460 miles. *Id.* The Mountaineer Express would begin at the Rogersville substation and terminate at the Wake County substation outside Raleigh. (R. at 6). Intermediate substations may also accommodate integration of additional resources throughout the length of the line. *Id.* The Mountaineer Express was approved by the PJM Board of Managers for inclusion in the Regional Transmission Expansion Plan in March 2022. *Id.*

ACES began implementing this PJM approved plan by submitting its application for a Certificate of Public Convenience and Necessity ("CPCN") for construction of the Vandalia portions of Mountaineer Express with the Vandalia Public Service Commission ("PSC") on April 1, 2022. (R. at 10).

However, because of the Native Transmission Protection Act, the Vandalia PSC has not taken any action on the application. (R. at 10). LastEnergy and MAPCo, incumbent electric transmission owners, have eighteen months—until September 30, 2023—to decide whether to exercise their right-of-first-refusal ("ROFR"). *Id.* The senator who introduced the Native Transmission Protection Act described it as a *direct* response to combat the loss of the "federally recognized [ROFR]." (R. at 9). A MAPCo representative wanted to discourage third-party transmission owners from buying and building in Vandalia. *Id.* Additionally, because of the Right of Way Order and unless and until the Vandalia PSC grants it a CPCN, ACES has conducted its right of way planning as if there will be no eminent domain authority. (R. at 11). Because of the PCS' order, ACES is uncertain if it can build the Mountaineer Express. *Id.*

Even if ACES succeeds in building transmission lines through Vandalia, ACES is facing another hurdle: the Capacity Factor Order. (R. at 7-9). This order directs incumbent transmission owners to operate coal-fired plants at least 75% capacity. *Id.* The Capacity Factor Order distorts price signals, and the cost recovery system will burden the taxpayers. *Id.* The Vandalia Citizens Action group, an intervenor, presented evidence that the coal-fired units will run economically only 40-60% of the time. (R. at 8-9). One of the chairmen argued that the cost recovery was only a "fail-safe" and he expected the coal-fired systems to meet the 75% minimum expectation. *Id.*

In response to this uncertainty, ACES filed suit against the PSC on June 6, 2022. (R. at 14). The district court granted the PSC's motion to dismiss. (R. at 15). It first found that the

ROFR was not preempted by Order No. 1000. *Id.* Next, the district court determined that Vandalia's ROFR does not violate the dormant Commerce Clause. *Id.* The court then rejected the Fifth Circuit's approach and instead found that the place of incorporation controls. *Id.* The court further determined that, under the *Pike* balancing test, the burden imposed on interstate commerce did not exceed the local benefits the Vandalia legislature intended to protect when enacting the Native Transmission Protection Act. *Id.*

On December 28, 2022, ACES filed this appeal. (R. at 16).

SUMMARY OF ARGUMENT

In response to the growing need for green reusable energy, ACES, an energy company, aims for zero carbon emissions by 2050. To achieve this goal, ACES has commenced its newest project, which requires transmission lines through multiple states and the most practical and economic path for those energy transmission lines includes Vandalia.

Vandalia enacted an order providing a ROFR to incumbent energy transmission providers, which favors existing energy companies operating in Vandalia over those which do not currently operate in Vandalia. Additionally, the ROFR effectively prohibits nonincumbent energy transmission providers from establishing new transmission lines through Vandalia without waiting eighteen months.

ACES faces an imminent injury even if it succeeds in establishing energy transmission lines in Vandalia. Vandalia's Capacity Factor Order threatens ACES, and others, with severe economic harm. The Order will distort price signals, making it more difficult for new capacity in Vandalia.

Additionally, Vandalia's Capacity Factor Order violates the Supremacy Clause. The Capacity Factor Order artificially alters the market and the market clearing price. Congress,

through the Federal Energy Regulatory Commission ("FERC") under the Federal Power Act ("FPA"), has preempted Vandalia's actions. Binding precedent–in contrast with the District Court of Vandalia's order–holds that the FPA expressly preempts state programs that disregard FERC approved wholesale auction rates. A state cannot act contrary when Congress has manifested intent and established itself a field, nor can a state enact a statute in direct conflict with federal statutory authority. Therefore, Vandalia's Capacity Factor Order is both conflict and field preempted by the FPA.

Vandalia's ROFR also violates the Supremacy Clause. It is preempted by FERC's Order No. 1000. Order No. 1000 requires federal independent system operators to order new transmission product projects to be competitively and regionally planned by entities and to eliminate ROFR provisions for regional transmission facilities.

Finally, Vandalia's ROFR violates the dormant Commerce Clause. The burden on interstate commerce here is more than incidental. Therefore, the Native Transmission Protection Act granting the ROFR discriminates on its face.

Because of this, this court should reverse and remand the District Court's judgment.

ARGUMENT

ACES has standing to challenge the Capacity Factor Order. A plaintiff has standing when he can show an injury in fact, a sufficient causal connection between the injury and the conduct, and a likelihood that the injury will be redressed favorably. *E.g.*, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-158 (2014). ACES satisfies all of these elements.

Additionally, the PSC's Capacity Factor Order violates the Supremacy Clause of the United States Constitution because it is preempted by the actions of FERC under the FPA. When a state's action directly conflicts with the federal branch's authority, where Congress has

established a "clear and manifest purpose," then that state action is preempted by the Supremacy Clause. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Here, the PSC's Capacity Factor Order directs two incumbent transmission owners to operate their coal-fired plants to achieve a capacity factor of not less than seventy-five percent, as measured over a calendar year. This order conflicts with the actions of FERC authorized by the FPA and is therefore, preempted by direct conflict preemption and field preemption.

Further, Vandalia's ROFR is preempted by FERC's Order No. 1000. If a state's action directly conflicts with federal authority, where Congress has instituted a "clear and manifest purpose," then that state action is preempted. *Id.* at 565. Vandalia's ROFR does exactly this, and it is therefore preempted by FERC's Order No. 1000.

Finally, Vandalia's ROFR in the Native Transmission Protection Act violates the Supremacy Clause and the dormant Commerce Clause. When a state's restriction burdens interstate commerce and is more than incidental, a state statute will be subject to strict scrutiny; the statute is "virtually *per se* invalid." *See Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99-101 (1994).

I. ACES HAS STANDING TO CHALLENGE THE CAPACITY FACTOR ORDER.

ACES has standing because the Capacity Factor Order threatens ACES with imminent injury, and ACES is likely to prevail in its legal challenge. A plaintiff has Article III standing when he can show (1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of, and (3) a likelihood that the injury will be redressed by a favorable decision. *E.g.*, *Susan B. Anthony List*, 573 US at 157-58; *see also W.R. Huff Asset Mgmt. Co., LLC v. Deloitte & Touche LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). ACES is facing severe economic harm from the Capacity

Factor Order, which artificially inhibits market growth. The PSC's Capacity Factor Order directs two incumbent transmission owners to operate their coal-fired plants to achieve a capacity factor of at least seventy-five percent of the time. (R. at 1, 7-9). Precedent informs that ACES will likely succeed in its challenge because the Capacity Factor Order is superseded by the Federal Power Act. Therefore, ACES satisfies the elements of standing.

A. ACES' injury-in-fact is clearly connected to the Capacity Factor Order.

The Capacity Factor Order threatens ACES with serious economic injury. An injury does not need to have occurred if it is "certainly impending" and "fairly traceable." *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401-02, 409-10 (2012). An injury satisfies the Article III requirements when it is "concrete and particularized" and "actual or imminent." *Lujan*, 504 U.S. at 560. An allegation of future injury is sufficient when the threatened injury is "certainly impending," or there is a "substantial risk that the harm will occur." *Clapper*, 568 U. S. 398, at 409-10, 414 (cleaned up).

In *New Hampshire Right to Life PAC v. Gardner*, the challenged statute had a $1,000 cap for lobbying expenditures per election. 99 F.3d 8, 10 (1st Cir. 1996). In addressing standing, the court held that, "the party who invokes a federal court's authority must show that (1) he or she personally has suffered some actual or threatened injury as a result of the challenged conduct; [and] (2) the injury can fairly be traced to that conduct . . . ." *Id.*, at 13. Finally, the *New Hampshire Right to Life* court held that the fear must be objectively reasonable. *See id.*, at 14.

In *Clapper*, respondents brought a Fourth Amendment challenge because of an act authorizing the government to electronically surveil without probable cause. *See Clapper*, 568 U.S. at 402, 404, 406-07. The Supreme Court held that an injury that is certainly impending and fairly traceable constitutes an injury in fact. *Id.* at 401-02, 410. The respondents' mere speculation and

use of a "chain of possibilities" as to whether the government would imminently target their communications was not sufficient. *Id.* at 410-11. The respondents in *Clapper* took self-protective measures to ensure confidential communications, and this did not constitute a fairly traceable injury since their fears were speculative. *Id.* at 415-16. The Court did not want to open the door to the creation of standing through self-inflicted injury. *See id.* at 402, 416.

In *Allco Fin., Ltd. v. Klee*, on appeal from a motion to dismiss, the Second Circuit held that a solar energy provider had standing to challenge a state's renewable energy program. *See Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 95 (2d Cir. 2017). Allco suffered an injury in fact because certain Allco facilities were disqualified from the 2015 RFP. *See id*. Allco alleged "smaller generating facilities were excluded from the 2015 RFP by virtue of that RFP's minimum size requirement, and because the RFP imposed unlawful fees on bidders." *Id*. The court found these claims to be concrete, particularized, and fairly traceable. *See id*. The court also held that the claims had Article III redressability. *See id.*, at 96.

ACES's fear is "objectively reasonable." *See New Hampshire Right to Life PAC*, 99 F.3d at 14. ACES is losing out on time and faces significant economic harm because of Vandalia's Capacity Factor Order. (R. at 7-9). The Capacity Factor Order is in place, and is not a hypothetical or removed injury. *See id.* The Capacity Factor Order is not ACES conjecture.

Further, like the standard explained in *Clapper*, ACES' injury is certainly impending and fairly traceable. *See Clapper*, 568 U.S. at 401-02, 410. The respondents in *Clapper* speculated that the government might target them – this was insufficient. *See id.*, at 410-11. The respondents took self-protective measures to ensure confidential communications, and their fears were speculative at best. *See id.*, at 415-16. Here, the PJM Board of Managers approved the Mountaineer Express for inclusion in the Regional Transmission Expansion Plan ("RTEP") in March 2022. (R. at 6).

But ACES is stuck for eighteen months, unable to move forward. (R at 2). Once ACES can proceed, it faces an even bigger hurdle: the Capacity Factor Order. (R. at 7-9). Vandalia's Capacity Factor Order will distort the market price and force taxpayers to bear the burden in a shrinking market. *See id.*

Finally, ACES has an injury in fact. In *Allco Fin., Ltd. v. Klee*, smaller generators were excluded from the 2015 RFP and the RFP imposed unlawful fees on bidders. *See Allco*, 861 F.3d at 95. These claims were concrete, particularized, and fairly traceable, and the court held that Allco suffered an injury in fact. *See id*. Likewise, ACES is excluded from an *accurate* market without distorted prices, and the distorted price signals inhibit the new capacity. (R. at 1-2). ACES has a certainly impending injury. The capacity market is forward looking; PJM predicts demand three years ahead and accepts suppliers based on this. (R. at 3). The Vandalia Citizens Action Group, an intervener representing residential customers, presented evidence that coal fired units are expected to run economically only 40-60% of the time. (R. at 8-9). One of the chairmen argued that coal generators would be able to economically run at the 75% capacity factor. (R. at 9). He further argued that the assurance of recovering financially through retail ratepayers was just a "fail-safe." (R. at 8-9). The suggestion that the "fail-safe" is so surely not needed raises the question of why, then, is it included. ACES will suffer economically, and retail ratepayers will be forced to pay more than market cost. (R. at 1, 7-9). The Order artificially alters the market clearing price through its Capacity Factor Order. *Id.*

Therefore, ACES has standing, and this court should reverse and remand accordingly.

B. ACES will likely succeed on the merits of its case because precedent directs a finding that the Capacity Factor Order is preempted, therefore violating the Supremacy Clause.

ACES will likely succeed in its case because the FPA created by FERC preempts Vandalia's capacity order. A state is not permitted to regulate the wholesale electricity price as it pertains to interstate commerce. *See e.g., Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016).

In *Hughes*, the Supreme Court held that a state's program was preempted by the FPA because it did not properly regulate wholesale electricity rates, affecting interstate commerce. *See id.*, at 166. The regulatory scheme chosen by FERC to regulate the wholesale energy market contains an auction-based market which ensures just and reasonable rates. *See id.*, at 153. No matter what rate they listed in their original bids, all accepted capacity sellers receive the highest accepted rate, which is called the "clearing price." *See id.*, at 155-56. Load Servicing Entities (LSEs) then must purchase from PJM, at the clearing price, enough capacity to satisfy their PJM-assigned share of overall projected demand. *See id.*, at 156. "A high clearing price in the capacity auction encourages new generators to enter the market, increasing supply and thereby lowering the clearing price in same-day and next-day auctions three years' hence; a low clearing price discourages new entry and encourages retirement of existing high-cost generators." *Id*. In direct conflict, Maryland enacted its own regulatory scheme incentivizing new generators to offer low bids while driving the capacity price down. *See id*. The bidders would not receive the market clearing price, but rather their contract price. *See id*.

The Court in *Hughes* found that "while Maryland may retain traditional state authority to regulate the development, location, and type of power plants within its borders, the District Court explained, the scope of Maryland's power is necessarily limited by FERC's exclusive authority to

set wholesale energy and capacity prices." (cleaned up) *Id.*, at 161. Further, "state laws are preempted when they deny full effect to the rates set by FERC, even though they do not seek to tamper with the actual terms of an interstate transaction." (cleaned up) *Id.*, at 161-62 (quoting *PPL EnergyPlus, LLC v. Nazarian*, 753 F. 3d 467, 476 (2014)). Finally, the Court found that,

> "Maryland's program . . . functionally sets the rate that CPV receives for its sales in the PJM auction, a FERC-approved market mechanism. By adopting terms and prices set by Maryland, not those sanctioned by FERC . . . Maryland's program strikes at the heart of the agency's statutory power."

(cleaned up) *Id.*, at 162. The Court went on to explain that this was the same problem "identified in *Mississippi Power & Light Co. v. Miss.*, 487 U.S. 354 (1988) and *Nantahala Power & Light Co. v. Thornburg*, 476 U. S. 953 (1986) . . . [and,] in those cases . . . the State therefore prevented a utility from recovering—through retail rates—the full cost of wholesale purchases." *Id*. The Court did not accept Maryland's program "because it disregards an interstate wholesale rate required by FERC." *Id.* at 166. The Court found that Maryland's regulatory scheme "impermissibly intruded" on the wholesale market. *See id.*, at 153.

Vandalia's Capacity Factor Order also "disregards an interstate wholesale rate required by FERC." *See Hughes*, 578 U.S. at 166; (R. at 1, 7-9). Like Vandalia's Order that distorts the market's price signals, under Maryland's scheme, the bidders would receive their contract price, not the market clearing price. *See Hughes*, 578 U.S. at 153. This is in place even though "[t]he FERC has *exclusive* authority to regulate the sale of electric energy at wholesale in interstate commerce." *Id.*, at 154. Vandalia's Capacity Factor Order, like Maryland's scheme, should be held invalid. Since the *Hughes* Court did not accept Maryland's program "because it disregards an interstate wholesale rate required by FERC," *id.* at 166, Vandalia's scheme will also likely be found in violation of the Supremacy Clause, giving ACES a favorable result.

Therefore, this Court should reverse the lower court's decision to dismiss the case and remand accordingly because ACES has standing to challenge the PSC's Capacity Factor Order.

II. PSC'S CAPACITY FACTOR ORDER VIOLATES THE SUPREMACY CLAUSE.

The Vandalia PSC's Capacity Factor Order violates the Supremacy Clause of the United States Constitution because it is preempted by the actions of FERC under the FPA. The PSC's Capacity Factor Order directs two incumbent transmission owners to operate their coal-fired plants to achieve a capacity factor of not less than seventy-five percent, as measured over a calendar year. (R. at 1, 7-9). This order conflicts with FERC's authority and is therefore, preempted by direct conflict preemption and field preemption.

Section 824d(a) of the FPA preempts all state laws and regulations that intrude on the exclusive field of federal wholesale rate regulation by FERC. The Capacity Factor Order intrudes on the field reserved exclusively for FERC by the FPA, and is therefore, field preempted. The Capacity Factor Order also conflicts with FERC's chosen market-based regulatory approach, and therefore, is conflict preempted as well.

Additionally, the District Court of Vandalia's holding is in direct conflict with the Supreme Court's holding in *Hughes*. The *Hughes* court held that the FPA expressly preempts state programs that disregard FERC-Approved wholesale auction rates which is incompatible with the District Court of Vandalia's holding. 578 U.S. at 154, 166.

Therefore, because the District Court of Vandalia erred in its holding that the PSC's Capacity Factor Order did not violate the Supremacy Clause, this Court should reverse the lower court's decision to dismiss the case and remand accordingly.

A. Vandalia's Capacity Factor Order is both conflict and field preempted by the FPA.

The PSC's Capacity Factor Order is both conflict and field preempted by the FPA. Congress has granted exclusive authority to FERC to promulgate "rules or practices affecting wholesale rates," however, this authority is limited to "rules or practices that directly affect the [wholesale] rate" so that FERC's jurisdiction does not "assum[e] near-infinite breadth." *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 774 (2016). When a state action directly conflicts with the authority of the federal branch in an area which Congress has established a "clear and manifest purpose," then the state action is preempted by the Supremacy Clause. *Wyeth*, 555 U.S. at 565.

Congress, through the FPA, confers on FERC exclusive jurisdiction over "the sale of [electric] energy at wholesale in interstate commerce." 16 U.S.C. § 824(a). Further, the FPA grants FERC exclusive authority to regulate the "sale of electric energy at wholesale in interstate commerce." *Id*. Finally, the FPA makes FERC solely responsible for ensuring that "[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable." 16 U.S.C. § 824d(a).

Vandalia's Capacity Factor Order directly conflicts with Congress' clear conferral of power to FERC to regulate wholesale energy. The Capacity Factor Order was issued in response to two incumbent utility companies that are currently operating in Vandalia. (R. at 7-8). The two incumbent utility companies projected that their capacity factors for their coal-fired power plants were expected to remain at or below sixty percent going forward, given the availability of lower cost power from the wholesale market (i.e., PJM) and from other energy suppliers in the mid-Atlantic region. (R. at 7). Vandalia's PSC expressed apprehension about the low capacity factors for the coal plants owned and operated by each utility and therefore, issued the Capacity Factor

Order on May 15, 2022. (R. at 7-8). The Capacity Factor Order orders the two utilities to operate at no less than seventy-five percent capacity factor. *See id*.

From this order it is apparent that Vandalia intends to interfere with the wholesale of energy into the PJM by requiring these incumbent utilities to produce an increased amount of energy than what the PJM market has established to be just and reasonable. (R. at 1, 7-9). Vandalia's intent to interfere with the federally controlled PJM market can also be seen in its authorization of utilities to recover costs at retail rates if the cost to produce electricity at Vandalia's coal-fired plants is greater than the market-clearing price in PJM. (R. at 8-9).

If Vandalia's Capacity Factor Order is allowed to stand, then this will destroy FERC's ability to regulate the market in a uniform and coherent manner. FERC has chosen a market-based approach to regulation, in which some generators sell their output into a wholesale auction. Such a market-based system cannot function as FERC intended if states are free to coerce wholesale transactions that, but for the states' intervention into the wholesale marketplace, would never have taken place. This would allow Vandalia and other states unlimited ability to compel wholesale transactions that support the political whims of a state.

The Supreme Court's long-standing interpretation is that if FERC has jurisdiction over a subject, the states cannot have jurisdiction over the same. *See e.g., Mississippi Power & Light Co. v. Mississippi*, 487 U.S. 354, 377 (1988) (Scalia, J., concurring). Vandalia's actions both intrude on the field reserved exclusively for FERC, and are field preempted; and also conflict with FERC's chosen market-based regulatory approach, making them conflict preempted as well.

B. The District Court of Vandalia's holding is incompatible with the Supreme Court's holding in *Hughes*.

The District Court of Vandalia's holding is incompatible with the Supreme Court's holding on preemption in *Hughes*. As stated by the Court in *Northern Natural Gas* and affirmed by the

Court of *Hughes*, even if a state regulation does not formally regulate wholesale rates, it is nonetheless preempted if that is its practical effect. *See Northern Natural Gas Co. v. Kansas Corp. Comm'n*, 372 U.S. 84, 91 (1963) ("The FPA leaves no room either for direct state regulation of the prices of interstate wholesales . . . or for regulations that would indirectly achieve the same result."). Further, "States interfere . . . by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." *Id.* at 1298-99. Therefore, the analysis of whether a state's actions are preempted does not turn on what goals the state claims to advance, or even if it is acting in an area traditionally reserved for state authority—it is the means the state chooses that impermissibly intrude on FERC's exclusive jurisdiction.

In *Hughes*, Maryland attempted to guarantee the petitioner, CPV Maryland, LLC ("CPV"), a rate distinct from the clearing price for its interstate capacity sales to PJM. CPV sold its capacity to PJM through the auction. Maryland's program required loading service entities and CPV to exchange money based on the cost of CPV's capacity sales to PJM. *See Hughes*, 578 U.S., at 166. Therefore, CPV would receive the contract price rather than the clearing price for these sales to PJM. Because of this, Maryland's program adjusted the interstate wholesale rate, and Maryland's program contravenes the FPA's division of authority between state and federal regulators. *See id*.

Maryland was attempting to encourage construction of new in-state generation, but this does not save its program. States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates, as Maryland has done here. See *Mississippi Power*, 487 U. S. at 373; *Nantahala Power*, 476 U. S. at 966.

Vandalia's Capacity Factor Order effect is identical to the effect created by Maryland's Capacity Order, which the Supreme Court held was preempted. Like the Maryland program the

Supreme Court held preempted in *Hughes*, Vandalia's Capacity Factor Order intrudes on FERC's exclusive authority; the Order forces the two incumbent utilities to generate a different capacity factor than the level the wholesale PJM auction would dictate as economically beneficial to the two incumbent utilities. (R. at 7-8). This shows that Vandalia's Capacity Factor Order does exactly what *Hughes* forbids by attempting to "[second guess] the reasonableness of interstate wholesale rates." *Hughes*, 378 U.S., at 165.

Additionally, the Capacity Factor Order was enacted in direct response to what the Vandalia PSC perceived to be unacceptably low capacity factors and unacceptable plant. This directly interferes with the federally controlled PJM market. (R. 7-8). The federally controlled PJM market is designed to determine the economically efficient market-clearing price. (R. at 3). If Vandalia was allowed to continue to dictate the amount of energy the incumbent utilities are to produce and sell in the wholesale market, then the functionality of the market-based system selected by FERC will be greatly harmed because such production levels within Vandalia would never have taken place if not for Vandalia's Capacity Factor Order.

Both Vandalia and Maryland are conflict and field preempted by FERC under the FPA because Vandalia is attempting to interfere with the wholesale of energy which FERC has exclusive control over. Yet the District Court of Vandalia has interpreted *Hughes* as holding the opposite: that only direct regulation via an express bid and clear requirement is preempted. This interpretation is incorrect with the Supreme Court's long standing preemption jurisprudence.

In conclusion, the District Court of Vandalia erred in its holding that the PSC did not violate the Supremacy Clause because the FPA preempts the Vandalia's PSC's Capacity Factor Order and the Court's holding in *Hughes* is incompatible with the District Court of Vandalia's holding. Therefore, this Court should reverse the lower court's decision to dismiss the case and remand.

III. VANDALIA'S ROFR VIOLATES THE SUPREMACY CLAUSE.

Vandalia's ROFR is preempted by Order No. 1000, and therefore, the ROFR violates the Supremacy Clause. FERC found that ROFR provisions discourage nonincumbents from investing in transmission because a nonincumbent would not want to risk the significant investment necessary to develop a proposal if it would have to hand the project over to an incumbent once the project is approved. *See* 136 FERC P61, 051, at 81 (2011). FERC concluded that ROFR provisions undermine the identification and evaluation of more efficient and cost-effective solutions to regional transmission needs and deprive customers of the benefits and savings that competition produces. *Id.* at 81-86. Therefore, FERC issued Order No. 1000, which required federal Independent System Operators ("ISOs") to eliminate ROFR provisions for regional transmission facilities from their FERC-approved tariffs and agreements and ordered new transmission projects be competitively and regionally planned by entities. *See id.*, at 81; *see also, S.C. Pub. Serv. Auth. v. F.E.R.C.*, 762 F.3d 41, 76-77 (D.C. Cir. 2014) (affirming FERC's authority to order the removal of ROFR provisions from ISO tariffs); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 333 (7th Cir 2016), *cert denied*, 137 S.Ct. 1223 (2017) (recognizing FERC's abrogation of the ROFR).

Vandalia's Native Transmission Protection Act grants incumbent transmission owners the exclusive right, for a prescribed period, to construct transmission lines within Vandalia directly conflicts and obstructs the economic purpose of FERC's Order No. 1000. The NTP states: "[a]n 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) (R. at 9).

This ROFR, established by the Native Transmission Protection Act, interferes with the authority of FERC's RTO/ISO the PJM Interconnection ("PJM"). The ROFR can either elongate the process of approval within Vandalia by eighteen months or make the construction of a transmission line impossible if an incumbent utility chooses to exercise their ROFR. The PJM intentionally implemented a competitive planning process for new transmission facilities. "The process was designed to provide nonincumbent transmission developers an opportunity to participate in the regional planning and expansion of the PJM bulk electric system." (R. at 6). PJM implemented this process "to encourage innovative, cost-effective, and timely solutions to the challenges of building and maintaining a highly reliable electric system." *Id*.

The ROFR undermines the PJM's identification and evaluation of ACES as being the most efficient and cost-effective solution to regional transmission needs. Additionally, the ROFR can deprive customers of the benefits and savings that this competition between new and incumbent utilities produces. Finally, Vandalia's ROFR will make it much more costly for new utilities to enter the market.

Therefore, Vandalia's deliberate interference through its ROFR with FERC's authority of approval for transmission lines is preempted by FERC's Order No. 1000. Because of this, this Court should reverse the lower court's decision to dismiss the case and remand.

IV. VANDALIA'S ROFR VIOLATES THE DORMANT COMMERCE CLAUSE.

Vandalia's statute providing for the ROFR violates the dormant Commerce Clause of the U.S. Constitution. A statute violates the dormant Commerce Clause when the burden on interstate commerce is more than incidental. *See e.g.*, *Oregon Waste Sys.*, 511 U.S. at 99. Vandalia's Native

Transmission Protection Act was enacted in direct response to the loss of a federally recognized ROFR. (R. at 9). The Act grants incumbent transmission line owners exclusive rights for a period, causing any nonincumbent to wait for up to eighteen months, and stalling energy transmission from state to state. (R. at 9).

In *Wyoming v. Oklahoma*, Wyoming challenged Oklahoma's statute requiring generators to burn at least ten percent Oklahoma coal. *See Wyoming v. Oklahoma*, 502 U.S. 437 (1992). Wyoming produced coal for Oklahoma and Oklahoma's statute cost Wyoming its severance tax. *See id*., at 447. Wyoming argued Oklahoma's statute was a *per se* violation of the dormant Commerce Clause. *See id.*, at 441. The Supreme Court held that Oklahoma's act discriminated on its face and in practice against interstate commerce. *See id.*, at 455.

> "Section 939 of the Act expressly reserves a segment of the Oklahoma coal market for Oklahoma-mined coal, to the exclusion of coal mined in other States. Such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin. The stipulated facts confirm that from 1981 to 1986 Wyoming provided virtually 100% of the coal purchased by Oklahoma utilities. In 1987 and 1988, following the effective date of the Act, the utilities purchased Oklahoma coal in amounts ranging from 3.4% to 7.4% of their annual needs, with a necessarily corresponding reduction in purchases of Wyoming coal."

(cleaned up) *Id*). Even if the act were accepted as state regulatory authority, it is still subject to scrutiny under the dormant Commerce Clause. *See id.*, at 458. The Court held for Wyoming.

New Eng. Power Co. v. N.H. answered the question of whether a state can reserve the economic benefit for its own citizens by prohibiting the exportation of hydroelectric energy. *See New England Power Co. v. N.H.*, 455 U.S. 331 (1982). The commerce clause prohibits a state from regulating interstate trade in energy products. *See id*., at 343-44. The Federal Power Act does not grant states this authority. *Id.* at 344. The New Hampshire statute stated: "No corporation engaged in the generation of electrical energy by water power shall engage in the business of transmitting

or conveying the same beyond the confines of the state, unless it shall first file notice of its intention so to do with the public utilities commission and obtain an order of said commission permitting it to engage in such business." *Id.*, at 335. The state discontinued permission for electrohydraulic energy to be exported. *See id.*, at 336. New England Power needed to service the state only for the "public good." *Id*. In 1935, Congress enacted Part II of the Federal Power Act which delegated to the [FERC] exclusive authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce, without regard to the source of production." *Id.* at 340. "Section 201(b) of the Act provides, *inter alia*, that [a state shall not be deprived] of its lawful authority now exercised over the exportation of hydroelectric energy transmitted across a state line. This provision is in no sense an affirmative grant of power to the states to burden interstate commerce." (cleaned up) *Id.* at 341 (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761 (1945)). New Hampshire could not restrict the flow into interstate commerce of privately owned and produced electricity because this was in violation of the commerce clause. *Id.* at 344.

In *Oregon Waste Systems*, Oregon levied a surcharge on waste disposal, but charged almost three times as much for disposal out of state instead of within the state. *See Oregon Waste*, 511 U.S. at 96. "[T]he Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Id.*, at 98. In analyzing commerce clause issues, courts first look to see whether the burden is nondiscriminatory and only incidental, or whether the act or statute in question discriminates and is "virtually *per se* invalid." *See id.*, at 99. If a state is found to discriminatorily restrict interstate commerce, the statute must pass strict scrutiny. *See id.*, at 101. "Because respondents have offered no legitimate reason to subject waste generated in other States to a

discriminatory surcharge approximately three times as high as that imposed on waste generated in Oregon, the surcharge is facially invalid under the negative Commerce Clause." *Id.* at 108.

The Supreme Court said it best: "Such a preference for coal from domestic sources cannot be characterized as anything other than protectionist and discriminatory, for the Act purports to exclude coal mined in other States based solely on its origin." *Wyoming*, 502 U.S. at 455. Vandalia's ROFR shows a preference for in-state energy transmission facilities. (R. at 9). The FERC issued Order No. 1000 in 2011, and three years later Vandalia passed the Native Transmission Protection Act in response to Order No. 1000. *Id*. The senator who introduced the bill described it as a *direct* response, and an attempt to combat the loss of the "federally recognized [ROFR]." *Id*. A MAPCo representative wanted to discourage third-party transmission owners from buying and building in Vandalia. *Id.* In *Wyoming*, petitioners argued that the preference for in-state coal was a *per se* violation of the commerce clause. *Wyoming*, 502 U.S. at 441. The Supreme Court held that Oklahoma's act discriminated on its face *and* in practice against interstate commerce. *Id.* at 455. Similarly, here, Vandalia's Act discriminates on its face against out of state transmission owners; it discriminates in practice because it requires an eighteen-month waiting period, if the nonincumbent can get in at all. (R. at 9). This attempt to limit which companies can build and transmit energy, and the unnecessarily long waiting period, has a direct impact on interstate commerce and the market outside of Vandalia. This Court should find a *per se* violation.

The commerce clause *prohibits* a state from regulating interstate trade in energy products. *See New England Power*, 455 U.S. at 343-44. Under the Federal Power Act, a state does not have the authority to reserve the market for its own citizens. *Id*. In *New England Power*, New Hampshire tried to keep the electrohydraulic energy within the state. New England argued it was

for the "public good." *Id.*, at 336. The authority granted to the states in energy transmission regulation does not provide the state with the right to burden interstate commerce. *See id.*, at 341. Vandalia is trying to do this. Vandalia wants Vandalian owned transmission companies only, and if not, requires an eighteen month wait. (R. at 9). Likewise, New Hampshire tried to restrict energy transmissions, but its Act was overturned. *New England Power*, 455 U.S. at 344. ACES can design, plan, secure billions of dollars in financing with a goal of eliminating carbon emissions, and still not have a guarantee that the transmission lines can go through Vandalia. (R. at 5, 9). This places a heavy burden on any non-Vandalian company and has a direct effect on interstate commerce. Vandalia's Native Transmission Protection Act is in direct violation of the dormant commerce clause.

Oregon Waste holds that a court first looks to see if the burden on interstate commerce is merely incidental. *Oregon Waste*, 511 U.S. at 99. If it discriminates, it is basically *per se* invalid. *Id*. If a state is found to discriminate against interstate commerce, then the statute is evaluated under strict scrutiny. *See id.*, at 101. If evaluated under strict scrutiny, "[t]he State's burden of justification is so heavy that facial discrimination by itself may be a fatal defect." (cleaned up) *Id*. Vandalia's Native Transmission Protection Act, even in its name, discriminates on its face and should be held facially invalid.

Therefore, this court should find that Vandalia's ROFR violates the dormant Commerce Clause and reverse and remand.

CONCLUSION

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For the foregoing reasons, this Court should reverse and remand.

Dated: 02/01/2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because this brief contains 7,132 words (within the 13,000 word limit), excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 16.48 in 12 point Times New Roman font.

Dated: 02/01/2023

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UNITED STATES COURT OF APPEALS FOR THE TWELTH CIRCUIT

CERTIFICATE OF SERVICE

Appeal No. 22-0682

Pursuant to *Official Rule* IV, *Team Members* representing [Party Name] 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.

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