C.A. No. 22–0682

THE UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

-v.- C.A. No. 22-0682

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

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR VANDALIA

BRIEF FOR APPELLEES

TEAM 19

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JURISDICTIONAL STATEMENT

The U.S. District Court for the Northern District of Vandalia accepted jurisdiction under 28 U.S.C. § 1331 as a case arising under the laws of the United States and the U.S. Constitution. Namely, the issues were raised under the Federal Power Act ("FPA"), 16 U.S.C. § 824(b)(1) *et seq*., the Supremacy Clause of the US Constitution, US Const. Art. VI, cl. 2, and the Commerce Clause of the US Constitution, US Const. Art. I, cl. 8. The court's judgement, granting the defendant's (Vandalia PSC's) motion to dismiss, was filed on August 15, 2022. The plaintiff, (ACES) filed a timely appeal of that order on August 29, 2022. This court has jurisdiction to hear this appeal under 28 U.S.C. §1291, because the judgment below is a final judgment of a United States District Court.

STATEMENT OF ISSUES PRESENTED

(1) Does ACES have constitutional standing to challenge the Capacity Factor Order issued by the Vandalia PSC?

(2) Does the PSC's Capacity Factor Order violate the Supremacy Clause of the US Constitution because it is preempted by actions of the Federal Energy Regulatory Commission ("FERC") under authority of the FPA?

(3) Does the Native Transmission Protection Act ("NTPA") violate the Supremacy Clause because it is preempted by FERC Order 1000?

(4) Does the NTPA violate the "dormant" Commerce Clause under the US Constitution?

STATEMENT OF THE CASE

A. Brief Summary Of Proceedings

i. The Capacity Factor Order

After learning of the below-standard capacity factors of the Vandalia-based coal-fired power plants, the Vandalia PSC enacted a Capacity Factor order on May 15, 2022, directing the plants to operate at "maximum reasonable output and for the duration of the life of the plants," specifically directing the plants to achieve a capacity factor of not less than 75 percent, as measured over a calendar year. (Record at 8). The order was issued under authority from the Vandalia State Legislature, which charges the Vandalia PSC with regulating the practices, services, and rates of public utilities in order to "provide the availability of adequate, economical, and reliable utility services." VAND. CODE § 24-1-1(a)(2). Similarly, the Legislature expressed its intent to compel the PSC to "reverse these undesirable trends… to ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." VAND. CODE § 24-1-1D(5). Thus, the Capacity Factor Order was issued pursuant to these legislative directives.

ii. The Right Of First Refusal

The Federal Energy Regulatory Commission ("FERC") issued Order 1000 in 2011, requiring Independent System Operators ("ISO"s) to eliminate Right of First Refusal ("ROFR") provisions from FERC-approved tariffs and agreements. FERC Order 1000 (R. at 13). FERC instead ordered that new transmission projects were to be competitively and regionally planned by entities such as the PJM Interconnection ("PJM"). In 2014, the Vandalia State Legislature then passed the Native Transmission Protection Act ("NTPA"), granting incumbent transmission line owners the exclusive right to erect transmission lines in the state, so long as it exercises the right

within eighteen (18) months. VAND. CODE § 24-12.3(d). After the 18-month period ends, if no incumbent owners have constructed a transmission line, other entities may bid to build the lines.

iii. ACES' Challenge of the Capacity Factor Order and NTPA

On June 6, 2022, ACES filed a complaint in the District Court for the Northern District of Vandalia against the commissioners of the Vandalia PSC, alleging that the Capacity Factor Order and the NTPA were both preempted by federal law. (R. at 14–15). The complaint similarly alleged the NTPA was in violation of the "dormant" Commerce Clause of the U.S. Constitution, as ACES argues it discriminates against out-of-state transmission line companies. (R. at 15). On June 27, 2022, the PSC moved to dismiss all claims, arguing that ACES lacked standing to challenge the Capacity Factor Order, that both the Order and the NTPA were not preempted by federal law, and that the NTPA does not violate the Commerce Clause. (R. at 14–15). The district court agreed with the PSC, and it granted the motion to dismiss in an order on August 15, 2022.

B. Statement Of Facts

i. Legacy of Coal in Vandalia

Vandalia's coal industry and electricity generation is unparalleled in the nation. The state produces the third-most amount of coal of any state, and uses it to produce ninety one (91) percent of the state's electricity. (R. at 4). Because of these vast reserves and capability, the state is a net supplier of energy to the regional grid. *Id.* Because of the wealth of natural resources and dependence in the region, Vandalia's economy and livelihood is closely tied to the industry. The state enjoys the continued operation of five coal plants, owned and ran by LastEnergy and Mid-Atlantic Power Co. ("MAPCo"). *Id*. These plants are located in Fernwood, Butler, Hillsdale, Warfield, and Leonard, and provide a combined 8,900 megawatts (MW) to the regional grid. *Id.*

at p.5 When these coal plants come into compliance with the Capacity Factor Order, they can be expected to produce over 13,700 MW, an increase of fifty four (54) percent. This would surely benefit the state economy and livelihoods of Vandalians, while competing on the wholesale market to provide lower prices across the PJM's service area.

ii. The Vandalia Public Service Commission

The Vandalia Public Service Commission ("PSC") is a government agency, charged by the state Legislature with setting "just and reasonable rates" as well as regulating the states public utilities to "provide the availability of adequate, economical, and reliable utility services." VAND. CODE § 24-2-3; *Id*. at § 24-1-1(a). The PSC is operated by three commissioners (the named defendants), who are appointed by the governor of Vandalia and serve six-year terms. The commissioners often work with FERC and the utilities that operate in Vandalia to meet its objectives.

iii. Appalachian Clean Energy Solutions

Appalachian Clean Energy Solutions ("ACES") is a global energy company incorporated and headquartered in Springfield, Vandalia. It plans on building the Rogersville Energy Center in Pennsylvania, as well as the Mountaineer Express transmission lines, which would cross through Vandalia if built. (R. at 5). ACES is the largest independent electricity transmission company in the United States, and often sells and purchases energy through the wholesale PJM market and retail markets in the states where it operates.

SUMMARY OF THE ARGUMENT

Issue I

This court should affirm the district court's dismissal of ACES' claims regarding the Capacity Factor Order for lack of standing. In order for the plaintiff to meet the Article III "case-

or-controversy" standard, it must show first that is has suffered an "injury-in-fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Because ACES does not operate a single coal plant in Vandalia, and almost exclusively operates transmission lines, it has not shown that the Order will negatively affect its ability to compete in the wholesale market. The only way the Order could affect ACES is if it imposes the injury on itself out of a fear of competition, the precise type of "injury" rejected by the Supreme Court for meeting the standing requirement. *See Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013). ACES also cannot show there is sufficient "traceability" between the PSC's Order and the supposed injuries. *See Frank Krasner Enters. Ltd. V. Montgomery Cnty., Md*., 401 F.3d 230, 234–35 (4th Cir. 2005).

Issue II

If this court finds that ACES does have standing to challenge the Capacity Factor Order, it should similarly affirm the district court's dismissal on the merits, finding that the Order is not preempted by the Federal Power Act. The Supreme Court held that state's enjoy broad power in regulating public energy facilities, and state actions are only preempted under the FPA when they are unnecessarily "aimed" at or "tethered" to wholesale market participation. *Hughes v. Talen Energy Marketing*, 578 U.S. 150, 166 (2016). Here, the Capacity Factor Order is clearly intended to bolster the coal-fired plants in Vandalia, and while the plants' greater success may affect other companies' ability to compete, such a disconnected connection to wholesale rates cannot be found to be inextricably "tethered." Even if the program affects wholesale prices downstream, courts have found that such results are not sufficient to establish preemption. *See PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). As such, the Order is well-within the state's regulatory powers, and should not be found to usurp federal authority.

Issue III

The statutory ROFR program is similarly not preempted by FERC's Order 1000, and this court should affirm the district court's dismissal of that claim. Though the Constitution provides the federal law is the "supreme law of the land," such preemption only exists when a state law treads on federal "regulatory turf," which was not the case here. *MISO v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016). The ROFR as enacted in the NTPA is a legitimate state goal, well within Vandalia's rights, as evidenced by FERC's own actions and Supreme Court precedent. Regulation of transmission line siting is clearly a power reserved for the states, and the ROFR is simply an exercise of this power.

Issue IV

This court should similarly affirm the district court's finding that the ROFR statutory scheme is not barred by the "dormant" Commerce Clause. US CONST. art. I cl. 8. This is because the statute does not have a discriminatory purpose nor discriminatory effect, and does not wholly prevent out of state transmission line companies from participating in the energy market in Vandalia. While the law may have an incidental effect on interstate commerce, the state's interest in inexpensive, efficient energy transmission clearly outweighs the burden on commerce.

ARGUMENT

I. ACES has not shown that it has standing to challenge the Capacity Factor Order, as it does not operate any plants that are subject to the order, and could not have its purported injury redressed by this court.

The Courts of Appeals review de novo the grant of a motion to dismiss for lack of standing, accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff. *Trustees of Upstate New York Engineers Pension Fund v. Ivy Asset Mgmt*., 843 F.3d

561, 566 (2d Cir. 2016). However, even with the court construing the facts in favor of ACES, it should affirm the district court's dismissal of the claims for lack of standing.

Standing as a legal doctrine originates in the Constitution, as an "essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To clear this constitutional hurdle, the Supreme Court has required the plaintiff to show (1) it has suffered an injury-in-fact, (2) there is a causal connection between the injury and conduct at issue, and (3) the injury must be likely to be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992). Similarly, the Federal Power Act provides "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order..." 16 U.S.C. § 825l(b). Parties are "aggrieved" under the Federal Power Act if they satisfy both the constitutional and prudential requirements for standing, distinguishing "aggrieved" parties from those with a mere interest in the problem. *See City of Orrville, Ohio v. F.E.R.C.,* 147 F.3d 979, 985 (D.C. Cir. 1998)*; Exxon Mobil Corp. v. F.E.R.C*., 571 F.3d 1208, 1219 (D.C. Cir. 2009); *Hydro Investors, Inc. v. F.E.R.C*., 351 F.3d 1192, 1195 (D.C. Cir. 2003). Here, the district court properly found that ACES fits in the latter category, as a mere "interested" party, not an "aggrieved party" under the FPA because it could not meet its burden under *any* of the standing requirements.

A. **ACES cannot show that is suffered an injury-in-fact by PSC's adoption of the Capacity Factor Order**.

To prove that it has suffered such an injury-in-fact, ACES must show that the Capacity Factor Order was "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. ACES has not shown that it suffered an injury-in-fact. The Capacity Factor Order was

adopted in response to the Vandalia legislature's specific directives to keep in-state coal-fired plants running economically. *See* VAND. CODE § 24-1-1(a)(3) *et seq.* ACES currently does not and has no plans to own or operate coal-fired plants in Vandalia, and is unaffected by the Order. The only way this order, adopted to protect the interests of a state grown and sustained by coal, could affect ACES is in a hypothetical future wherein its Rogersville plant is successfully built and the Mountaineer Express transmission lines are erected. If both happen, then ACES would hypothetically be competing with the Vandalia-based plants in the wholesale market.

This scheme closely mirrors a case decided by the D.C. Circuit in which the court affirmed a dismissal based on the lack of standing as the regional transmission line entity could not show it was harmed by a decision that would take three hypothetical future steps to materialize into a cognizable injury. *See New York Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) ("This theory stacks speculation upon hypothetical speculation, which does not establish an 'actual or imminent' injury."). Thus, without a concrete and particularized injury, ACES' attack lodged against the Capacity Factor Order is simply aimed to root out its future competitors. Given the evidence proffered by the PSC in support for the seventy five percent capacity requirement, ACES may have good reason to fear. Coal is a well-established source of dependable energy in the region, and the Order is only likely to assist in its supremacy in the regional markets, thus ACES' challenge. However, fear of competition for hypothetical future utilities is insufficient for standing. *See Lujan*, 504 U.S. at 560; *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 416 (2013) ("respondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending.") Here, the only harm that the Order could cause immediately would have to be self-inflicted by

ACES. As such, they have not carried their burden in showing that there is any cognizable injury-in-fact, and this court should affirm the district court's dismissal for lack of standing.

B. ACES' supposed injuries would be the result of actions by FERC or the PJM, not the Vandalia PSC, thus the causation and redressability requirements cannot be met.

If this court, however, finds that ACES has suffered an injury-in-fact, it should find that the state's program is not the direct cause of ACES' grievance, and any favorable decision or reversal of the district court's decision would not redress ACES' grievances, as required for standing. *Lujan,* 504 U.S. at 560. The Supreme Court has found that it is "substantially more difficult" for a plaintiff to meet the standing requirements when the plaintiff is "not the direct subject of government action, but rather when the asserted injury arises from the government's alleged regulation… of *someone else*." *Frank Krasner Enters. Ltd. V. Montgomery Cnty., Md*., 401 F.3d 230, 234–35 (4th Cir. 2005) (emphasis added) (citations omitted). In that case, the court laid out a "traceability test" for determining if the government action is closely traceable to the supposed injury. *Id.* For the gun-show operator *in Frank Krasner*, the court found he was "once-removed" from the county's actions, and therefore could not show the causation or possible redressability requisite for standing. *Id.* Here, ACES is claiming that the Capacity Factor Order will negatively impact other utility companies, who will *then* sell into the wholesale market, will *then* have their power transmitted via lines that ACES possibly owns, *or* compete with ACES proposed Rogersville plant, *if* it is built. If the Fourth Circuit court easily found *one* step of removal too far a reach to find causation and redressability for a standing claim, this court should surely find that it strains credulity to find the requirement met through three or four hypothetical steps. *Id*. Similarly, the effect the Order may have on the market would be felt through the PJM sales and FERC regulations or tariffs, both third parties that are "not before the court." *Id.*; *see*

also Mirant Potomac River, LLC v. EPA, 577 F.3d 223, 230 (4th Cir. 2009). Any action taken by this court would have to filter through layers of possible steps in order to have any probability of affecting the appellant. Therefore, the order of the district court should be affirmed in finding ACES did not have standing to challenge the Capacity Factor Order.

II. The Capacity Factor Order is not preempted by federal law, thus this court should affirm the district court.

Courts of Appeals review preemption determinations de novo, accepting allegations in the plaintiff's complaint as true and construing them in a light most favorable to the plaintiffs. *Cavalieri v. Avior Airlines C.A*., 25 F.4th 843, 847 (11th Cir. 2022); *Williams v. Nat'l Football League*, 582 F.3d 863, 873 (8th Cir. 2009). Even with construing facts in favor of ACES here, the court should affirm the finding by the district court that the Capacity Factor Order is not preempted by the Federal Power Act, nor does it encroach into the regulatory field occupied by FERC.

If this court finds ACES has standing to challenge the Capacity Factor Order, the court should similarly affirm the district court in its determination that the Order was not preempted by federal law. The Supremacy Clause of the Constitution provides that federal law is the "supreme law of the land," and any state law that attempts to usurp federal authority is preempted. U.S. Const., Art. VI, cl. 2. This can be found in three circumstances, (a) when there is "express preemption," wherein Congress has made its intent clear through explicit statutory language, (b) when the state law attempts to regulate conduct in a field that congress intended the Federal Government to occupy exclusively, and (c) when the state law actually conflicts with federal law. *English v. Gen. Elec. Co.,* 496 U.S. 72, 78–79 (1990). Each of these are discussed below in turn. However, this court should find that ACES has not shown any of these three possibilities

are met, and thus the Capacity Factor Order is not preempted by the Federal Power Act and is thus constitutional, affirming the trial court's decision.

A. While the Federal Power Act contains an express preemption clause, congressional intent shows a desire to expressly limits federal authority, and does not preempt the Capacity Factor Order.

Express preemption is perhaps the most straightforward constitutional challenge to a state's action. Simply put, if Congress has enacted legislation that specifically prevents states from acting in a way contrary to the legislation, the state action is preempted. See *Altria Grp., Inc. v. Good*, 555 U.S. 70, 78 (2008) (finding the Labeling Act contained two express preemption provisions, both of which preempted state action); *Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 95–98 (1983). Similarly, where Congress, through the statutory language, clearly intended to occupy an entire regulatory arena consistent with its enumerated powers, the states are preempted from attempting to usurp this authority. *See Jones v. Rath Packing Co*., 430 U.S. 519, 525 (1977). In assessing whether a state action is expressly preempted, the Supreme Court found, "Preemption fundamentally is a question of congressional intent." *English*, 496 U.S. at 78–79. ("when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.") For some aspects of energy regulation, Congress has been quite clear in the powers it intended to give FERC, and those it preferred the states to handle. The Supreme Court found that the FPA specifically gave FERC jurisdiction to regulate "rates and charges… received… for or in connection with" interstate wholesale sales. *See Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 163 (2016). However, the PSC has never, and certainly did not in this case attempt to set or influence a wholesale rate. Rather, under state direction, the PSC has simply mandated the coal-fired plants to run more of the time and produce more energy, thus leading to likely success on the wholesale market. Even in *Hughes*, the Supreme Court found

that the statute did not expressly preempt the Maryland scheme when the state would guarantee its producers an entirely separate rate, instead turning to field preemption to defeat the regulation. *Hughes*, 578 U.S. at 163.

In fact, the Supreme Court has repeatedly held that in enacting the FPA, Congress was clear that, in granting authority to FERC, it was also limiting such power, and the act "thereby maintains a zone of exclusive state jurisdiction." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016) (hereafter *EPSA*). The Court has similarly cautioned that when considering possible preemption, a court should "find preemption only where detailed examination convinces [the court] that a matter falls within the preempted fields as defined by our precedents." *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 385 (2015). In interpreting this precedent, the court has found that FERC's authority over wholesale rates is rather constrained to "rules or practices that *directly* affect the [wholesale] rate" so that FERC's authority does not "assum[e] near-infinite breadth." *EPSA*, 577 U.S. at 278 (emphasis added). Thus, this court should be wary not to find preemption where the Supreme Court has thus been silent, or in fact openly endorsed the possibility of such state regulation like the Capacity Factor Order.

As such, the FPA does not expressly preempt state actions like the Capacity Factor Order, and this court should thus affirm the district court's findings.

B. FERC's authority to regulate in the field of wholesale rates is in no way impeded by the Capacity Factor Order.

Similarly, this court should affirm the district court in denying ACES' claim that the Capacity Factor Order is in some way "field preempted" by the FPA. State regulatory schemes are considered field preempted when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law," *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan*., 489 U.S. 493, 509 (1989). In other

words, because the FPA specifically gives authority over wholesale rates to FERC, any state law that substantially limits FERC's control over these rates is preempted. *See Hughes*, 578 U.S. at 163. However, that has not happened here.

In *Hughes*, the court rejected Maryland's attempt to effectively ignore the PJM process by contracting for separate rates with its load serving entities. *Id.* at 164. The court stressed that while the "aim" of the Maryland scheme was well-within its rights to control in-state generating facilities, its methods infringed on FERC's jurisdiction in the field, by specifically attempting to work around FERC's price-setting authority. *Id.* ("States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates."). In fact, the Supreme Court constrained its own holding, rejecting the program "*only* because it disregards an interstate wholesale rate required by FERC." *Id.* at 166 (emphasis added). The court went on to endorse "other measures states might employ to encourage development of new or clean generation…" going so far as endorsing direct subsidies and land grants. *Id.*

The statutory scheme and subsequent orders by the state of Vandalia are clearly within these bounds. Not only does the Capacity Factor Order not affect the wholesale rates, but it entirely disconnects the regulatory scheme from these rates. It does this by allowing for possible cost-recovery rates, charged to retail customers. By raising their capacity, in some cases by almost double, the Vandalia-based coal-fired plants will have a much stronger chance to "clear" the wholesale market at a favorable price, and will likely not need to recover any costs. While this new capacity may end up affecting the wholesale price, it surely does not run afoul of FERC's authority. Just as a producer of corn would not be said to step on the regulatory toes of the US Department of Agriculture because she had a bountiful harvest, the Vandalia coal plants'

success in meeting this capacity mandate in no way tramples on federal authority. In fact, a booming coal sector in Vandalia is likely to be mutually beneficial to FERC, the PJM, consumers, and likely even ACES in the long run. *See* Vandalia PSC, Generic Investigation of Coal Plant Capacity Factors and Electricity Rates, *Order Denying Reconsideration*, June 15, 2022, Separate Statement of Chairman Williamson, p. 5.

In *Hughes*, the court offered a new test for these field preemption questions, asking whether a state's regulatory program is tethered to wholesale market participation and sales. 578 U.S. at 166. ACES will surely argue the Vandalia order is tethered to the wholesale market by mandating coal-fired plants to maintain capacity, thus ending up more competitive in the wholesale auction. However, unlike the program in *Hughes*, the Capacity Factor Order did not condition any payment or assistance on the generators clearing the market, but instead attempts to bolster the energy economy and regulate in an area entirely separate from the wholesale participation. While a burgeoning coal economy is sure to benefit the markets through lower consumer prices and competitive market-clearing price, the regulation is in no way aimed at the wholesale market, and cannot be considered necessarily tethered to participation in an unconstitutional manner.

In fact, the Supreme Court has repeatedly rejected claims for preemption simply because costs and rates *may* be affected as the result of market forces after a regulation. See *Northwest Central Pipeline Corporation*, 489 U.S. at 514 ("there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations."); *Oneok,* 575 U.S. at 385 ("[laws] "aimed at 'subjects left to the States to regulate,' … are not field preempted because their impact on interstate wholesale rates is incidental or indirect.").

C. The Capacity Factor Order does not stand as an obstacle to federal goals, as FERC has specifically endorsed such state actions, so the Order is not conflict preempted.

Similarly, the court rejected arguments that the dividing line between FERC authority and the state's regulatory power should be strict. *See EPSA*, 577 U.S. at 281 ("It is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other."). This blurry line is what led to this appeal, however, this court should find that the regulatory program enacted by the PSC is well-clear of the line, standing firmly within the state's regulatory jurisdiction over generating facilities. This type of implied preemption under the Supremacy Clause is often referred to as "conflict preemption," where the state's regulation "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Oneok*, 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). However, when analyzing claims of conflict preemption, the Supreme Court has explicitly found that "So long as a state is "regulat[ing] *production* or other subjects of state jurisdiction, and the means chosen [are] at least plausibly ... related to matters of legitimate state concern," there is no conflict preemption "unless *clear damage* to federal goals would result." *Northwest Central*, 489 U.S. at 518, 522 (emphasis added). Here, the state is clearly regulating production by stimulating the coal-fired plants' capacities, and the inspiration is clearly a legitimate state concern. After all, Vandalia is one of the highest coal-producing states, and many of its towns rely on the continued success of the coal industry. The Second Circuit found that a New York regulatory program awarding "Zero Emission Credits" to generating facilities was not preempted, primarily on finding the state's measures were connected to a legitimate concern and were not expressly tethered to the

wholesale rates. *See Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 57 (2d Cir. 2018).

Though the appellants will certainly argue the regulatory program is "tethered" to wholesale prices pursuant to the test laid out in *Hughes*, FERC itself disagrees. *See New England States Comm. on Elec. v. ISO New England Inc.*, 142 FERC ¶ 61, 108 (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) (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"). FERC even went so far as to submit an Amicus Brief in *Hughes* arguing that states are "free" to adopt such programs, "even if the price signals in the regional wholesale capacity market indicate that no [such] resources are needed." *Brief for United States*, *as Amici Curiae Supporting Respondents*, *Hughes v. Talen Energy Mktg.,* 578 U.S. (No. 14-614) at 33. FERC's clear acquiescence to state regulatory programs that subsidize capacity—whether through direct payments or mandates such as here—necessarily defeats any claim of conflict. ACES cannot claim on behalf of FERC that its "regulatory turf" has been trod upon when FERC itself has denied it outright. For these reasons, this court should affirm the district court's dismissal of the defendant's claims of preemption.

Similarly, FERC has been clear that its goal in setting rates is to attempt to "break down regulatory and economic barriers that hinder a free market in wholesale electricity." *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 536 (2008). Here, the Vandalia State Legislature has prioritized a revitalization of the coal industry and is clearly within its regulatory authority to increase competition in the wholesale market.

Doing so may "affect the pool of bidders" which then may affect "the market clearing price for capacity." *Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009), cert, denied, 558 U.S. 1110 (2010). However, with Vandalia specifically regulating in-state, coal-fired producers, the program's incidental effects on interstate commerce do "not render the program invalid." *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 255 (3d Cir. 2014). The Order here will only serve to increase competition on the wholesale market, furthering FERC's stated goals. Thus, the Vandalia Capacity Factor Order is within regulatory boundaries for the state's power in the federalist system of energy regulation.

III. The Native Transmission Protection Act does not violate the Supremacy clause of the U.S. Constitution because the FPA creates a collaborative, cooperative federalism scheme between the state and federal govt, and specifically leaves to the states the right to control energy transmission decisions.

Courts of Appeals review preemption determinations de novo, accepting allegations in the plaintiff's complaint as true and construing them in a light most favorable to the plaintiffs. *Cavalieri v. Avior Airlines C.A*., 25 F.4th 843, 847 (11th Cir. 2022); *Williams v. Nat'l Football League*, 582 F.3d 863, 873 (8th Cir. 2009). Even construing facts in favor of the appellant, the court should affirm the district court and find the Native Transmission Protection Act is not preempted by FERC Order 1000.

The Supremacy Clause establishes Federal law and the Constitution as "the Supreme Law of the land; and anything in the Constitution or Laws of any state to the contrary notwithstanding". US CONST. art. VI, cl. 2. In other words, federal law preempts state law. To disentangle preemption issues, "the purpose of Congress is the ultimate touchstone". *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963). That being said, courts must tread carefully when considering preemption issues in light of the "congressionally designed interplay between state and federal regulation." *Northwest Central Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489

U.S. 493, 518 (1989). Courts recognize two situations in which a statute faces preemption issues. The first, express preemption, involves a direct statement from Congress establishing the federal law's supremacy. *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 98 (1992). The second, implied preemption, occurs when a Federal action leaves no room for states to regulate, or the state law conflicts with Federal law. *Id.*

In *Hughes v. Talen Energy Marketing*, the court added another wrinkle to the preemption analysis for cases involving energy regulation and FERC. The court made clear, "states may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates". 578 U.S. 150, 164. However, the court further stipulated, "our holding is limited . . . nothing in this opinion should be read to foreclose Maryland and other states from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation'". *Id.* at 166. Here, transmission line siting does not pose a close enough connection to the wholesale energy market to trigger *Hughes*. *Hughes* does not foreclose the argument that Vandalia's ROFR may still exist alongside FERC's Order 1000. The following will analyze the NPTA through express, implied, and Hughes preemption analyses and find that it is not preempted by FERC Order 1000.

A. The NPTA is not express preempted because FERC Order 1000 does not include an express clause to preempt state law.

The NPTA, Vandalia's right of first refusal, is not expressly preempted because FERC Order 1000 does not expressly prohibit the states from exercising their historical authority to regulate transmission decisions. When Congress directly states the law's supremacy in the statute, express preemption applies. *Gade*, 505 U.S. at 98. In Order 1000, FERC did the exact opposite of expressly stating the states' inability to regulate their energy transmission. FERC made clear its intention to eliminate only Federal rights of first refusal, and not state rights of first refusal, in

stating its decision would not "limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission lines, including but not limited to authority over siting or permitting of transmission facilities". Order 1000, 136 FERC ¶ 287. Without an express statement to preempt state right of first refusal laws, the court should uphold the district court's decision and find the NPTA does not present express preemption issues.

B. The NPTA does not face implied preemption issues because Congress left room for the states to regulate transmission siting and Vandalia's law does not stand in the way of FERC's goals for implementing Order 1000.

The NPTA does not present implied preemption issues because Congress intentionally left room for the states to regulate energy transmission and the NPTA does not stand in the way of FERC's goals in implementing Order 1000. Without an explicit statement to trigger express preemption, implied preemption may occur in two ways, field preemption or conflict preemption. *Gade*, 505 U.S. at 98. As with express preemption, the "touchstone" of the implied preemption analysis is congressional intent. *Retail Clerks*, 375 U.S. at 103. In her concurrence in *Hughes*, Justice Sotomayor further warned, "Where 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." 578 U.S. at 167 (Sotomayor, S., concurrence) (citations omitted). The following will analyze the NPTA under both field and conflict preemption and determine Vandalia is not preempted from implementing a state right of first refusal.

1. The field of energy transmission is not so pervasively occupied by FERC as to leave the states with no room to regulate.

Field preemption occurs "where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it". *Gade*, 505 U.S. at 98 (citations omitted). The NPTA does not face field preemption issues because FERC

does not dominate the field of transmission siting, but rather accepts state involvement as a part of the complementary regulatory scheme. FERC's intention to allow state regulation in energy transmission is supported in two main ways.

First, as noted above, FERC directly stated its intention to maintain the historical complimentary regulatory scheme of energy transmission in Order 1000 by stating that it in no way meant to "limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities". Order1000, 136 FERC ¶ 287. In *South Carolina Public Service Authority v. FERC.*, the court decided this statement showed that FERC took "great pains to avoid intrusion on the traditional role of the States . . . Thus, States retain control over the siting and approval of transmission facilities." 762 F.3d 41, 76 (D.C. Cir. 2014).

FERC's actions following Order 1000 further support this position. Many states enacted rights of first refusal laws in response to Order 1000, and their respective RTO's incorporated the state ROFR's into their FERC-approved tariffs. *See e.g.,* MINN. STAT. §216B.246; N.D. CENT CODE §49-03-02.2; S.D. CODIFIED LAWS §49-32-20; NEB. REV. STAT. § 70-1028; 17 OKLA. STAT. § 292. FERC approved the tariffs—seeing, approving, and acquiescing to the states' ROFRs in absent of the federal ROFR. *LSP Transmission Holdings LLC v. Sieben*, 954 F.3d 1018, 1024 (8th Cir. 2020) (citations omitted). In fact, in the face of a company directly challenging a state ROFR, FERC directly required the company to honor state rights of first refusal orders included in the RTO tariff. *MISO v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016). Each action shows that FERC does not dominate the field of transmission siting and leaves room for states to implement their own regulations like a right of first refusal.

Second, FERC explicitly acknowledges that a RTO approved project is subject to state approval before the project moves forward. FERC decided, "it would be an impermissible barrier

to entry to require, as part of the qualification criteria, that a transmission developer demonstrate that it either has, or can obtain, state approvals necessary to operate in a state, including . . . the right to eminent domain" *MISO*, 819 F.3d at 337. After the RTO approves the project as part of the regional plan, the state still oversees easements and rights of way laws for the project. (R. at 10–11). The state also retains the right to refuse permits for Certificate of Public Convenience and Necessity. (R. at 11). Acknowledgment of state approval processes and eminent domain laws demonstrates that the field of transmission siting is not completely dominated by FERC. The acknowledgment of state land use laws also shows the field of energy transmission is not dominated by the Federal government and so not preemptive of state ROFR's.

2. The NPTA does not stand in the way to FERC's goals behind Order 1000.

Conflict preemption occurs when complying with both the state and federal laws is a "physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Gade*, 505 U.S. at 98 (citations omitted). Specifically in energy regulation, "conflict-pre-emption analysis must be applied sensitively in this area, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role". *Northwest Central Pipeline*, 489 U.S. at 515.

First, tariffs removing the federal ROFR and implementing state ROFR's is not a physical impossibility. As stated above, FERC acknowledges that companies comply with both federal law and state law before their project comes to fruition, including state ROFR's. *MISO*, 819 F.3d. at 336. Second, Vandalia's ROFR does not interfere with FERC's stated goals for Order 1000. FERC explained its reasoning behind Order 1000 as wanting to encourage "the benefits of competition in transmission development and associated potential [consumer energy] savings." Order 1000, 136 FERC ¶ 285. FERC's rationale for extinguishing federal ROFR's came from a

realization that competition in bidding for projects ultimately drives down electricity costs for consumers. *Id.* The following will address each of FERC's goals in turn and find Vandalia's ROFR does not stand in the way of their accomplishment.

The NPTA does not prevent competition in regional transmission. Companies still must submit bids for regional transmission lines with the RTO and compete. With the NPTA, non-incumbents also will compete in negotiations with incumbents to acquire a Vandalia transmission line before the right of refusal period ends. Then after only a year and a half, a non-incumbent is free to build a transmission line in Vandalia and instantly become an incumbent. The NPTA only applies to projects proposed within the state of Vandalia. The PJM encompasses 14 states and the District of Colombia. (R. at 3). Vandalia's right of refusal only applies in one state of the vast interconnected region the PJM serves. One state ROFR does not have the impact of completing derailing FERC's encouragement of competition across the region. Clearly it has not had the impact of decreasing the appellant's competitiveness in energy transmission; ACES is the largest transmission utility company in the United States. (R. at 5).

Further, the court should not conflate the ability to exercise a ROFR with the assumption that every company will exercise it in every project. In fact, in the present case, the ROFR window is over a year into effect and neither incumbent transmission company has exercised their right to first refusal. (R. 10). Just because a company can exercise an ROFR, does not mean they will. A non-incumbent may also negotiate and acquire a transmission line before the ROFR period ends. The NPTA also does not hinder FERC from achieving its goal of lowering consumer energy costs. It may, in actuality, advance that goal further. ROFR's drive energy costs down because the transmission company serving the area already has the infrastructure, network, and the relevant state permits and rights of way in place. The court should affirm the district

court in finding the NPTA is not preempted by FERC Order 1000.

IV. The Native Transmission Protection Act does not violate the dormant Commerce Clause of the U.S. Constitution because it is not discriminatory against out-of-state energy transmission companies and the state's interest in ensuring reliable electricity outweighs the incidental burden on interstate commerce.

When the relevant facts are not in dispute, the Court of Appeals shall review claims alleging violations of the constitutional Commerce Clause *de novo*. *See Jones v. Gale,* 470 F.3d 1261, 1267 (8th Cir. 2006). Vandalia's ROFR, the NPTA, does not violate the dormant Commerce Clause because it is not facially discriminatory, it does not have a discriminatory purpose or effect, and the state's interest in regulating local energy transmission outweighs any burden imposed on interstate commerce. The Constitution delegates to Congress the authority "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. CONST. art. I, § 8, cl. 3. While the Constitution frames the regulation of interstate commerce as a positive delegation of power, courts have overtime recognized a "negative" implication of the power which restricts the states from enacting laws to interfere with interstate commerce. *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 273 (1988); *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). Recognizing the fear of "Balkanization" of the States implicit in the founding fathers' minds at the Constitution's drafting, Courts use the dormant Commerce Clause to prevent states from enacting protectionist legislation which obstructs the free flow of interstate commerce. *Id.*

Although energy regulation involves public utilities that have government-approved monopolies, "there is no public utilities exception to the dormant commerce clause". *General Motors Corp. v. Tracy*, 519 U.S. 278, 291 n.8 (1997). Further, the field of electricity transmission is a competitive market despite being a part of the broader government controlled

monopoly of utility services. Therefore, the holding in *Tracy* does not prevent, as a threshold matter, the court from engaging in a traditional commerce clause analysis.

The dormant commerce clause analysis is two-fold. First, the court must determine whether the law discriminates against out-of-state companies. The court may find the law discriminates on its face, through a discriminatory purpose or a discriminatory effect. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984). Next, the court decides the level of scrutiny according to the law's classification. If the statute discriminates in any of the three ways, it faces strict scrutiny. *Tennessee Wine*, 139 S. Ct. at 2461. Meaning, unless the government can demonstrate a legitimate purpose which cannot be advanced through other non-discriminatory ways, the law will be struck down as unconstitutional. *Id.* On the other hand, if the court finds the law does not discriminate against out-of-state companies, but has an incidental effect on interstate commerce, the court balances whether the state's interest outweighs any burdens on interstate commerce, or rational basis review. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The following will walk through both steps of the dormant Commerce Clause analysis and determine that the NPTA survives the constitutional challenge.

A. The Native Transmission Protection Act is not discriminatory because it does not discriminate against out-of-state companies on its face, or have the purpose or effect of discriminating against out-of-state companies.

Three different categories of discrimination exist in the context of the dormant Commerce Clause exist. *Bacchus Imports*, 468 U.S. at 270. The law may be facially discriminatory, facially neutral with a discriminatory purpose, or facially neutral with a discriminatory effect. *Id.* The following will analyze each and determine that the NPTA is not discriminatory under any of the three categories and the court should affirm the district court's decision.

1. The Native Transmission Protection Act does not facially discriminate because the law favors incumbent utility transmission owners, not Vandalia companies.

Facially discriminatory laws include language in the statute benefitting in-state companies over out-of-state companies. *See Granholm v. Heald*, 544 U.S. 460, 472 (2005). If a court determines a law is facially discriminatory, strict scrutiny applies. *Tennessee Wine*, 139 S. Ct. at 2461. For the law to survive, the government must show "that it is narrowly tailored to advance a legitimate government purpose". *Id.*

Here, the NPTA is not facially discriminatory because the text of the statute differentiates between companies based on incumbency status, not state residency. The NPTA draws no distinction between Vandalia-based companies and non-Vandalia-based companies. A company with headquarters, place of incorporation, and primary business contacts in another state could fall under the ROFR by simply building or acquiring a transmission line in Vandalia.

The Fifth Circuit and Eighth Circuit disagree on whether a ROFR for incumbent energy transmission owners is facially discriminatory for the purposes of the dormant commerce clause. The disagreement comes down to a determination of whether incumbency equates to residency. In *LSP Transmission Holdings v. Sieben*, the Eighth Circuit grappled with an incumbency-based ROFR nearly identical to the NPTA. 954 F.3d 1018, 1024 (8th Cir. 2020). The Minnesota ROFR at issue provided incumbent transmission line owners with a right of refusal window of ninety days. *Id.* at 1027–28 (citing MINN. STAT. § 216B.246). Incumbent transmission line owners in Minnesota included companies headquartered in Minnesota, Iowa, North Dakota, South Dakota, and Wisconsin. *Id.* The court held the law did not facially discriminate because, "Minnesota's preference is for electric transmission owners who have existing facilities, and its law applies

evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere." *Id.* at 1028.

In *NextEra Energy v. Lake*, however, the Fifth Circuit held an energy transmission ROFR in Texas facially discriminated against out-of-state companies. 48 F.4th 306, 326 (5th Cir. 2022). The court reasoned that incumbency, by its dictionary definition, gives a preference to in-state companies no matter their place of incorporation or headquarters. *Id.* at 325. The court argued that "local presence" matters more than headquarters or incorporation because of the dormant commerce clause's "underlying concern about local clout leading to protectionist legislation". *Id.* at 324. The court struck down the Texas ROFR because it "prevents those without a presence in the state of Texas from ever entering the portions of the interstate transmission market that cross into Texas". *Id.*

This court should adopt the view of the Eighth Circuit and hold that the NPTA is not facially discriminatory. To begin, the facts of this case more closely resemble *Sieben*. Like in *Sieben*, incumbent companies in Vandalia have only a short window to elect their right of first refusal. The Texas ROFR the court invalidated in *NextEra* barred companies from ever entering the transmission market if they did not have a facility in-state before 2019. Also like the facts in *Sieben*, the two incumbent utility companies in Vandalia are headquartered and incorporated out-of-state. (R. at 4). ACES, while not having a transmission facility in Vandalia, is incorporated and headquartered in Vandalia. *Id.* Both facts drive to the point made in *Sieben*—the ROFR law makes no distinction about contacts, headquarters, or incorporation. The NPTA only gives a short window for any company with a facility in-state to elect to build a new transmission line before a non-incumbent company, or sell their facility to a non-incumbent. The underlying concern of the dormant commerce clause, local political power creating protectionist laws, does

not apply here. The appellant has a presence, political power, and opportunity to enter the transmission market in Vandalia, as it has across the country. (See R. at 4–5).

Second, the type of limited ROFR at issue here looks nothing like the "in-state presence requirements" cases the court relies on in *NextEra*. *See* 48 F.4th at 324–25. In her dissent in *NextEra*, Judge Elrod points out the "majority needs a further inferential step to conclude that [the Texas ROFR] amounts to discrimination against out-of-state entities". *Id.* at 330 (Elrod, J.W., dissenting). Facially discriminatory laws, she contends, need no further inferential step to show that they prefer in-state companies over out-of-state companies in the text of the law. *Id.* In *Tennessee Wine*, *Granholm*, and *Dean Milk*, the Supreme Court cases the majority cites, the invalidated statute says on its face the company must establish a residence in-state to ever do business there. *See* 48 F.4th at 324–25. Here, the statute does nothing close to that. The NPTA only acknowledges a pre-existing physical presence in existing transmission lines, and gives the incumbent a short window to elect to use their infrastructure in a new federal project, sell to a non-incumbent, or take no action at all. It does not require a non-incumbent to build a transmission line in Vandalia to ever do business there. The court has never required a second, inferential step to decide a statute discriminates against out-of-state companies on its face and it should not do so in this case.

Looking at the facts, the appellants may assert that the NPTA effectively does favor companies with an in-state presence. However, both incumbent companies, MAPCo and LastEnergy can hardly be said to be "Vandalia companies" with any more of a presence in Vandalia than they have throughout the PJM Interconnection. They each have as significant of a presence out-of-state as they do in-state. MAPCo is headquartered and incorporated in Ohio, and it serves customers in eight states across the PJM. (R. at 4). It serves only 450,000 customers in

Vandalia. *Id.* LastEnergy is also incorporated and headquartered in Ohio and serves customers in seven states in the PJM. *Id.* It serves only 600,000 customers in Vandalia. *Id.* ACES, on the other hand, is both incorporated and headquartered in Vandalia. *Id.* Even if the court accepts the notion of incumbency being a pretext for residency, the NPTA does not even favor its in-state companies.

2. The Native Transmission Protection Act does not have a discriminatory purpose or effect because the law ensures inexpensive, reliable energy transmission for consumers and benefits both in-state and out-of-state companies alike.

The court may determine the law is facially neutral, but discriminatory in purpose or effect. *Bacchus Imports*, 468 U.S. at 270. Courts determine discriminatory purpose through looking into the legislative history, legislative intent, and surrounding circumstances at the time of the bill's passing. *See id.*

Here, the Senator who introduced the NPTA called it a direct response to Order 1000. (R. at 9). The two incumbent companies also testified in support of the bill. (R. at 9). These statements seem to indicate a protectionist purpose; however, in the context of historical state actions in energy, the NPTA came from a concern for maintaining reliable, efficient, and affordable energy in Vandalia. States have a vested interest in ensuring low-price, reliable energy throughout the state. The legislature sought to allow companies in the region they serve to continue coordinating transmission, like they did before FERC 1000. In practice, Vandalia's two incumbent transmission facilities are neither headquartered nor incorporated in Vandalia, and they serve the broader PJM Interconnection as well. (R. at 4). FERC's rationale for having a federal ROFR was due to a recognition of the cost-effectiveness and reliability associated with allowing incumbent utility companies to continue managing transmission in their service areas.

See Order 1000, 136 FERC ¶ 7. Because the state only hoped to continue providing energy for its citizens, the NPTA does not have a discriminatory purpose.

A law is discriminatory in effect if its net effect benefits in-state corporations over out-of-state corporations. *Tennessee Wine*, 139 S. Ct. 2449 at 2471. Courts typically look closely at the facts of the case to determine if the law negatively impacts out-of-state companies and leaves in-state companies relatively untouched. *See Id.* In this case, the NPTA does not have a discriminatory effect because the two incumbents are out-of-state companies, while the non-incumbent is an in-state company. In *LSP v. Sieben*, the court confronted the question of discriminatory effect of a ROFR applying to eleven in-state incumbents and five out-of-state incumbents. 954 F.3d at 1029. The court held that while the law incidentally favored more in-state companies, it did not have a discriminatory effect. *Id.* at 1030. Because the law allowed any company to become an incumbent, whether a utility or private corporation, simply by purchasing a transmission line in Minnesota, the law did not favor in-state companies over out-of-state companies. *Id.*

The case for the NPTA being not discriminatory in effect is even stronger here. Both incumbents are out-of-state companies, and the law places no limit on companies having to be utilities to qualify later as incumbents. The law does not have discriminatory effect because any company may become an incumbent through purchasing a transmission line in Vandalia, and two out-of-state companies have done so.

B. The Native Transmission Protection Act does not unduly burden interstate commerce because of the state's important interest in providing reliable, inexpensive energy outweighs the small impact on the transmission industry.

The dormant commerce clause also prevents states from enacting legislation that places an undue burden on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Specifically, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits". *Id.* Breaking the *Pike* test down further, there must be first a legitimate government interest identified, and second, the government interest must outweigh the incidental effect on interstate commerce.

Many authorities, including the courts and FERC itself, have long opined the importance of state regulation of electricity. The monopolization of energy came due to a realization of the state's great interest in ensuring the public had inexpensive and reliable electricity in their homes. The state has few compelling interests as important as ensuring their towns and cities continue providing electricity for nearly everything its citizens do on a daily basis. This idea is reflected in the FPA's explicit statement to give states the final determination over transmission projects in their states. §16 U.S.C. § 201(b)(1), 824(b)(1). The NPTA has the incidental burden of requiring non-incumbent companies to either wait for the ROFR period to end or negotiate with existing providers to purchase a transmission line in Vandalia. The state only hopes to ensure the service providers already providing energy in their area continue to provide reliable service.

To invalidate the ROFR, the burden needs to be "clearly excessive" compared to the state interest. Already establishing the importance of electricity transmission, we turn to the incidental burden. The PJM encompasses fourteen states and the District of Colombia. (R. at 3). Vandalia is only a small part of the vast electricity region and ACES presence. The Mountaineer Express is only 460 miles of ACES 16,000 miles of electricity transmission lines throughout the country, about 3% of its total transmission lines. (R. at 5–6). Even though Vandalia is among the top

states in energy production, that fact does not apply here. (R. at 4). ACES only hopes to go through Vandalia to connect its two plants, and not use Vandalia's energy in the grid. (R. at 5–6). Also, ACES has many options to enter the transmission market in Vandalia. During the eighteen month window, it may acquire an incumbent transmission facility, or wait for the period to end and move forward with its project. Since the state interest is so well established, and the impact on interstate commerce so small, the court should uphold the district court's decision in finding the NPTA does not violate the dormant commerce clause.

CONCLUSION

For the foregoing reasons, this Court must affirm the district court's well-reasoned opinion on all four issues. First, this Court should find the appellants lacked standing to challenge the Capacity Factor Order. However, even if standing requirements *were* met, this court should similarly find the Order was not preempted by the FPA, nor was the ROFR statute preempted by FERC Order 1000. Finally, this court should find the ROFR did not violate the "dormant" Commerce Clause.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* III.C.9, *Team Members* representing the Vandalia PSC 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. 19