IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE

TWELFTH CIRCUIT

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| **Appalachian Clean Energy Solutions, Inc.**, | ) | |
| *Appellant*, | ) | |
| **-v.-** | ) | C.A. No. 22-0682 |
| **Chairman Will Williamson**, | ) | |
| *Appellee*. | ) | |
| ---------- | ) | |
| **Vandalia Alliance for Clean Energy**, | ) | |
| *Petitioner*, | ) | |
| **-v.-** | ) | |
| **Commissioner Lonnie Logan**, | ) | C.A. No. 22-0682 |
| *Appellee*, | ) | |
| ---------- | ) | |
| **Vandalia Alliance for Clean Energy**, | ) | |
| *Petitioner*, | ) | |
| **-v.-** | ) | |
| **Commissioner Evelyn Elkins**, | ) | C.A. No. 22-0682 |
| *Appellee*, | ) | |

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

**Team #37**

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## JURISDICTIONAL STATEMENT

This court has jurisdiction over the proceedings consolidated in this case. The District Court had authority over the proceeding under federal question jurisdiction per 28 U.S.C. §1331, as the dispute arose under the Federal Power Act, 16 U.S.C. §824. The issue of the Capacity Factor Order and the Native Transmission Protection Act were challenged pursuant to the Supremacy Clause in U.S. Const. art. VI, §2. The Native Transmission Protection Act was also challenged pursuant to dormant Commerce Clause, U.S.C.A. Const. Art. I § 8, cl. 3. This Court has jurisdiction over these appeals pursuant to 29 U.S.C. §1291 because the judgements appealed were final judgements by the U.S. District Court for the Northern District of Vandalia. The final judgment that is being appealed originates from the district court`s decision to grant the Defendant`s, Public Service Commission`s, motion to dismiss on all the issues on August 15, 2022. The Plaintiff, Appalachian Clean Energy Solutions, Inc., filed a timely appeal on August 29, 2022.

## STATEMENT OF THE ISSUES PRESENTED

1. As a generator that bids capacity into the PJM auction and expects to receive a just and reasonable rate, does ACES have standing to challenge Vandalia's Capacity Factor Order compelling generators to bid capacity into the market at below-cost prices with a cost-recovery guarantee?
2. Is Vandalia`s Capacity Factor Order field preempted because it compels a generator to bid its capacity in a manner that threatens to artificially depress the PJM`s auction clearing price?
3. Does the FERC Order 1000 have the right to preempt the Native Transmission Protection Act based on the Supremacy Clause, even if the state's legislation is found to not have harmed public interest?
4. Does Vandalia's ROFR expressly discriminate between in-state and out-of-state entities in so that it conflicts with the Dormant Commerce Clause?

## STATEMENT OF THE CASE

### Procedural History

On June 6, 2022, Appalachian Clean Energy Solutions (ACES) filed suit against the Public Service Commission in the U.S. District Court for the Northern District of Vandalia claiming that the Capacity Factor Order was preempted by the Federal Power Act. 16 U.S.C. §824. In that same action, ACES brought suit against the PSC challenging the ROFR as well.

On June 27, 2022, the PSC moved to dismiss both of ACES` claims. On August 15, 2022, the district court granted the PSC`s motion to dismiss both issues before the court. ACES then timely appealed that order on August 29, 2022.

## Statement of Facts

### 1. Capacity Factor Litigation

In December 2021, the Vandalia Public Service Commission released several orders in which it expressed concern about the low capacity factors for Vandalia coal plants owned and operated by LastEnergy and MAPCo. On May 15, 2022, the Public Service Commission issued the Capacity Factor Order. The Order directs Vandalia coal-fired power plant generators, LastEnergy and MAPCo, to operate their plants in a manner to achieve a capacity factor of not less than 75% over the calendar year. The order further compels the Vandalia generators to enter their capacity into the PJM wholesale auction and provides them a cost-recovery mechanism, to be financed by ratepayers, should the PJM market-clearing price fall below their cost of generation.

Appalachian Clean Energy Solutions (ACES) is a global energy company that generates electricity solely for resale in the wholesale markets. On June 6, 2022, ACES filed suit against the PSC arguing that the Capacity Factor Order was preempted by the Federal Power Act. On June 27, 2022, the PSC moved to dismiss the action arguing that ACES failed to state a claim. The district court granted the PSC`s motion to dismiss. (R. at 15).

### 2. ROFR Litigation

In 2014, the State of Vandalia passed the "Native Transmission Protect Act," which grants incumbent transmission owners the exclusive right, for 18 months, to construct transmission lines within Vandalia. (R. at 9). Since ACES owns no existing transmission facilities within Vandalia, they do not qualify as an "incumbent electric transmission owner." (R. at 10). The FERC Order was intended to avoid a problem such as the above since it wanted to eliminate rights of first refusal, at least at the federal level. (R. at 9).

About 3 months after the PJM board approved of ACES' project for the Mountaineer Express, they were subsequently blocked by Vandalia's ROFR. ACES then filed suit against the PSC, arguing that Vandalia's ROFR infringes on FERC's authority and that the ROFR discriminates against out-of-state actors as well. (R. at 15). On June 27, 2022, the PSC moved to dismiss both of ACES' ROFR claims, arguing that there is no preemption because many states have enacted similar legislation where FERC has expressed no qualms and that there is no discrimination against out-of-state entities. (R. at 15-16). The district court granted PSC's motion and dismissed the case. *Id*.

## SUMMARY OF THE ARGUMENT

**Issue I**

This court should find that ACES has standing to challenge the Capacity Factor Order. As a generator that produces energy exclusively for resale into wholesale markets, ACES has a legitimate interest in receiving a just and reasonable price for its capacity. The Vandlia PSC`s Capacity Factor Order, by compelling and facilitating the sale of capacity into the PJM auction at a below-cost price, artificially depresses the clearing price that generators rely upon to clear their capacity. As such, ACES falls into the category of generators that will receive a lower clearing price should an otherwise inefficient entrant be able to enter capacity as a $0 bid taker due to a state scheme that allows for cost recovery. As such, ACES shows the imminence of an injury to its legitimate interest, traces it to the Capacity Factor Order, and demonstrates that its injury will be relieved if the court enjoins the Order.

**Issue II**

This court should find that Vandalia`s Capacity Factor Order is field preempted under the Federal Power Act because it intrudes into a field that Congress intended to be the sole domain

of the Federal Energy Regulatory Commission. 16 U.S.C. §824. The Capacity Factor Order runs afoul previous Supreme Court decisions that have held similar state schemes to be field preempted because they compel in-state generators to sell their capacity into PJM wholesale auctions in order to remain complaint with the order. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (U.S. 2016). By providing Vandalia generators a cost-recovery mechanism, the Capacity Factor Order allows LastEnergy and MAPCo to bid their capacity at below-cost prices that will result in the auction clearing price being artificially depressed as a result. As such, efficient entrants will endure a lower clearing price due to an inefficient Vandalia generator being able to recover any cost difference from ratepayers. As such, not only does the Capacity Factor order compel the sale of energy into the federally regulated interstate market, but it seeks to do so in a manner that threatens to distort price signals and depresses clearing prices, directly harming efficient entrants such as ACES.

**Issue III**

This court should find that the Native Transmission Protection Act violates the Supremacy Clause, C. The plain language in the FPA directly grants FERC with the authority to regulate electric energy practices in interstate commerce and since the project contains a line that runs through multiple states, this would imply that FERC has jurisdiction over the maintenance of that line. Since FERC has authority, it can remove unjust and unreasonable practices which are present within Vandalia's ROFR because it has the potential to harm public interest. Even if the court does not find that this legislation is not preempted by the FERC Order 1000, there is still the possible concern of undue delay and contributing to a more productive electric transmission market if the ROFR were to stand.

**Issue IV**

This court should find that Vandalia's ROFR violates the Dormant Commerce Clause, U.S. Const. art. I, §8. The state legislation overtly discriminates against interstate commerce because it factors in-state economic interests while disregarding the out-of-state economic interests through a discriminatory purpose and effect. Even if the court does not find that the Native Transmission Protection Act discriminates against interstate commerce, it still fails to support a legitimate local purpose or implement nondiscriminatory alternatives that are available. This is because the effects on interstate commerce are far more than "incidental" to support a legitimate local purpose. *Pike v. Bruce Church, Inc*., 397 U.S. 137 (1970). In addition, a state should not be able to disregard nondiscriminatory alternatives simply due to "longstanding approaches." *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1029 (8th Cir. 2020).

## ARGUMENT

**Standard of Review**

The Court reviews "a District Court's grant of a motion to dismiss de novo," and must "accept all well-pleaded facts as true and view those facts in the light most favorable to the plaintiff." *Whitley v. Hanna*, 726 F.3d 631, 637 (5th Cir. 2013).

### I. ACES has standing to challenge the Capacity Factor Order.

#### A. Standing requires a showing of an actual injury that is traceable and redressable by the court's favorable decision.

In order to establish standing, a claimant must show 1) an actual injury, 2) fairly traceable to the challenged, and 3) it will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (U.S. 1992). In this context, "injury" is defined as "an invasion of a legally protected interest which is" (a) concrete and particularized, (b) actual or imminent. *Lujan*, 504 U.S. at 560 (U.S. 1992).

### 1. Generators that participate in the PJM Wholesale Market have an 'interest' in receiving a just and reasonable rate for the Capacity they enter.

The very nature of the PJM wholesale auction, and the forward capacity market more broadly, is to encourage the entry of efficient generators through a "competitive bidding" process that results in a price that is both reliable and fair to consumers. *Connecticut Dep`t of Pub. Util. Control*, 569 F.3d 477, 480 (D.C. Cir. 2009). In cases where price suppression and price signal distortion are likely to result, courts have recognized the ability of generators to bring an action that seeks to highlight how such actions contravene "precedent regarding just and reasonable rates." *NextEra Energy Res., LLC v. FERC*, 898 F.3d 14, 22 (D.C. Cir. 2018). Generators that participate in the PJM wholesale market, have an interest in receiving a just and reasonable price for the capacity they enter. Therefore, a case in which a market entrant depresses capacity prices interferes with this interest and presents an actual injury to the generator.

### 2. ACES is a generator with such an interest in receiving a just and reasonable rate that is not artificially depressed.

ACES participation in various competitive regional wholesale markets, including the PJM, categorizes it as a generators whose success at the wholesale auction depends significantly on the competitiveness of other bids. Any depression of the prices received at the PJM auction will, therefore, impact the price received by ACES, personally, bringing its injury into the "particular" distinction outlined by *Lujan*. 504 U.S. at 560. (U.S. 1992). ACES` standing to sue is further established because that "interest" is "within the zone of interests to be protected or regulated by FERC under the applicable statute." *Moreau v. F.E.R.C.*, 982 F.2d 556 (D.C. Cir. 1993).

## II. The Capacity Factor Order is field preempted because it intrudes on the interstate energy wholesale market regulated exclusively by FERC.

### A. Congress, through the FPA, has empowered FERC to regulate all matters regarding the sale of electric energy in interstate commerce.

In passing the Federal Power Act, the Congress placed all matters regarding "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce" in the exclusive control of the federal government." 16 U.S.C. §824(a). The Supreme Court has interpreted the Federal Power Act to confer such a power to the federal government in this field that it has declared the regulation of wholesale energy to be "fundamentally interstate from beginning to end." *Public Utils. Comm'n v. Attleboro Steam & Elec. Co*., 273 U.S. 83, 89 (U.S. 1927). Therefore, any state effort that invades this jurisdiction of the federal government is fundamentally at odds with the Congress' prerogative to regulate matters of interstate commerce. In effecting the Federal Power Act, Congress has vested the responsibility of energy sales and transmissions to FERC. *Energy La., Inc. v. La. Pub. Serv. Comm'n,* 539 U.S. 39 (U.S. 2003). This power belongs to FERC alone.

#### 1. Any action that seeks to interfere FERC's regulatory power in the interstate sale of electric energy is not within the state's control and is field preempted under the Supremacy Clause.

The FPA is clear in that FERC has the exclusive authority to regulate matters related to the sale of electric energy at wholesale in interstate commerce. 16 U.C.S.C. §791a. The Act "leaves no room" for state regulations aimed at directly interfering with the prices of interstate energy for wholesale, or for state regulations which would indirectly achieve the same result. *N. Natural Gas Co, v. State Corp. Comm'n*, 372 U.S at 91. To this point, courts have extended the

scope of FERC's jurisdiction in this realm to preempt even state regulatory policies that, either intentionally or inadvertently, "intrude" indirectly on this area of exclusive federal authority." *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 830 (D. Md. 2013). Furthermore, courts have consistently treated matters disputed under the Supremacy Clause by inferring the intent of Congress to preempt all state law in a particular area where federal regulation is sufficiently comprehensive. *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2nd Cir. 2018).

Any state effort that seeks to interfere with the efforts of FERC in managing the interstate sale of energy at a PJM wholesale auction falls into a category of actions that are field preempted. Field preemption can be understood as a pre-emption that applies when a state law conflicts with Congress` intent (either expressly or plainly implied) to exclude state regulation. *NE Hub Partners, L.P. v. CNG Transmission Corp.*, 239 F.3d 333 (3rd Cir. 2001). While Congress has made it clear that states shall retain control over the "need for new power facilities, their economic feasibility, and rates and services" within their boundaries, any attempt to interfere with the pricing of capacity at a PJM wholesale auction would be beyond the state`s reach. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (U.S. 1983). Therefore, should any state effort intrude into this federal field that is exclusively regulated by FERC, federal law will preempt its effect and render it invalid. *Farina v. Nokia Inc.*, 625 F.3d 97, 115 (3rd Cir. 2010).

### B. Compelling the sale of energy into the PJM market served to directly intrude on the federally regulated PJM interstate market.

The PSC argues that its cost-recovery mechanism is a mere fail-safe that incentivizes production of energy by Vandalia generators in response to decreasing generator productivity

due to the market proliferation of cheaper, more attractive, energy source alternatives that set a wholesale clearing price unattainable for coal-based generators, such as LastEnergy and MAPCo. The PSC determined that the FERC authorized scheme for interstate sale of electricity failed to provide sufficient incentive for the generation of new electricity in the state. In response, their Capacity Factor Order operates as a regulatory program aimed at promoting the productivity of its existing coal-based generation facilitates. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (U.S. 2016). The problem with this scheme is that its cost-recovery mechanism, allowing Vandalia generators to clear the PJM wholesale market without the fear of failing to break even with its costly coal-based electricity generation, is conditioned on, and compels sales into the wholesale market. As such, the PSC has intruded into a field that Congress intended to be the sole province of the FERC. *PPL EnergyPlus, LLC. v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). Therefore, even if it is found that a collision of the state regulation into the federally exclusive field is not an "inevitable consequence," the court should find it sufficiently likely to invalidate the program "in order to assure the effectuation of the comprehensive federal regulation ordained by Congress." *Northern Natural Gas Co. v. State Corp Comm'n*, 372 U.S. 84, 92 (U.S. 1963). While this brings both direct and indirect consequences into scrutiny, the present case is far more direct as the Capacity Factor Order expressly compels the sale of the generator`s capacity into the PJM market.

**1. Compelling the sale of energy into the federally regulated market is sufficient issue for the court to enjoin the capacity factor order, even in the absence of express price-setting.**

Although its does not "set the rate per se," the court should take problem with the fact that the order obliges the generators to clear the federal market in order the receive the difference

between its clearing and production prices. *Appalachian Power Co. v. Public Service Com.*, 812 F.2d 898 (4th Cir. 1987). By compelling the sale of energy into the federally regulated PJM auction, the PSC`s cost recovery payments can "plainly qualify as compensation for interstate sales at wholesale." *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013). The 'fatal defect' that the Supreme Court highlighted within the Maryland program in *Hughes* is apparent in the present case. In *Hughes*, the fact that any payment obligation under a contract for differences only arises when capacity would clear the PJM auction deemed the program unacceptable to the Supreme Court. *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150 (U.S. 2016). Similarly, the District Court in *PPL Energyplus, LLC v. Nazarian* found that a state program seeking to provide Maryland generators with a contract for differences was, itself, unacceptable when it too dictated the obligation for payment "only arises if the generation facility actually sells its output into the interstate PJM markets." *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790, 848 (D. Md. 2013).

### C. Compelling the sale of capacity in the PJM at Below-Cost Distorts the Clearing Price Distortion of Price Signals.

Appellee's contention that the Capacity Factor Order is not connected to the wholesale electricity energy market is incorrect on grounds separate and distinct from the fact that it expressly compels the sale of capacity into the market by Vandalia generators. By providing power generators a cost-recovery guarantee, the Vandalia PSC infringes on "FERC`s exclusive control over the price received for interstate sales of capacity" and is, therefore, subject to field preemption. *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 250 (3rd Cir. 2014).

By design, the cost-recovery mechanism of the PSC`s scheme is built on the premise that, but for the ability to recover the difference in cost and clearing price, Vandalia generators would

not be able to clear the PJM wholesale capacity auction. In essence, the PSC seeks to insulate Vandalia generators from suffering any losses at the PJM market by passing the cost to state ratepayers. In doing so, however, the PSC`s efforts to supplement Vandalia generators indirectly impacts the PJM wholesale auction prices.

**1. By compelling Vandalia generators to sell their capacity into the PJM auction, the PSC guarantee the generators a price beyond the auction price they would have otherwise received.**

The Capacity Factor Order results in a Vandalia generator`s bid "artificially lowering the auction price." *PPL EnergyPlus, LLC v. Solomon*., 2011 U.S. Dist. LEXIS 120848 (D.N.J. 2011). By commanding Vandalia generators to sell their capacity into the PJM auction, the PSC not only facilitates the entry of an artificially low bid but does so by guaranteeing the generators a price beyond the "auction price they would have otherwise" received." *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 253 (3rd Cir. 2014). Should the Vandalia generator bid the 75% capacity mandated by the Capacity Factor Order, in the absence of the cost-recovery mechanism it guarantees, it is likely the generator will fall beyond the clearing price and be unable to recover its cost of production. In essence, the capacity factor order allows Vandalia generators to exchange their position from 'unlikely to clear the market' to 'competitive bidder.'
Bidding at $0 not only guarantees that the bidder will be able to clear the market and receive the clearing price but acts to artificially depress the market by introducing a bid that it otherwise would not have been able to due to. Generators without the guarantee of state authorized cost recovery measures will, given the discrepancy between their cost and the clearing price, will be unable to clear their capacity into the market should they be unable, in many instances, to submit a $0 asking bid themselves.

### D. The order is not a subsidy or comparable to a zero-emission credit.

In previous proceedings, Appellee's emphasize that their actions in declaring a Capacity Factor Order does not run afoul the declared jurisdiction of FERC as "states plainly retain substantial latitude in directly regulating generation facilities." *PPL EnergyPlus, LLC v. Nazarian,* 753 F. 3d 467, 476 (4th Cir. 2014). Recognizing the breadth of powers left to states in regulating intra-state generation and transmission of energy, the Supreme Court declares that problems only arise when the "Constitution sanctions the particular means" chosen by a state to exercise the powers when those means "threaten effectuation of the federal regulatory scheme." *N. Natural Gas Co, v. State Corp. Comm`n,* 372 U.S. 84, 652 (U.S. 1963). Appellees contend that the PSC`s Capacity Factor Order is comparable to other state programs that grant subsidies in order to encourage the production of new and cleaner energy, particularly those that grant zero-emission credits to subsidize existing nuclear power plants.

#### 1. The PSC's comparison of the Capacity Factor Order to a Zero-Emission Credit acts as a cloak to avoid judicial scrutiny.

The PSC attempts to cloak its efforts to compel Vandalia coal-reliant generators to sell its capacity into the open PJM market as a subsidy similar to those granted by states seeking to incentivize the construction of new sources of renewable energy, arguing this power is well within the rights of individual states. In support of this point, Appellee points that the Federal Power Act reserves to states the authority to control and construct new in-state facilities for energy generation. 16 U.S.C.S. §824(b)(1). However, the Supreme Court has frowned upon such efforts and noted that, although states do retain the power to regulate their own energy generation facilities, efforts to do so may not encroach on the domain of federally regulated interstate energy markets. *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308 (U.S. 1988) (Supreme

Court rules that states are barred from relying on mere formal distinctions in an attempt to evade preemption and regulate matters within FERC`s exclusive jurisdiction). In the present case, any attempt to mask the PSC`s efforts as a state subsidy of a struggling domestic industry, or to a renewable energy credit regulating intrastate energy production, should be viewed in the light of a mere formality. The Supreme Court further reiterates this point in *Hughes* by noting states may not seek to intrude on FERC`s authority over the interstate wholesale rates even if such efforts appear "legitimate through regulatory means." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (U.S. 2016).

**2. The capacity order is not a true subsidy nor is it outside the jurisdiction of FERC.**

The PSC is not directly funding or providing financing for the generators through taxes, municipal bonds, or any other source of Vandalia revenue. *PPL Energyplus, LLC v. Nazarian*, 974 F. Supp. 2d 790 (D. Md. 2013). Rather than provide state funding, the PSC authorizes cost-recovery from retail rate payers within Vandalia, placing the financial risk on them, making it distinct from a direct subsidization. *Alliance for Clean Coal v. Miller*, 44 F.3d 591 (7th Cir. 1995).

The comparison of the PSC`s Capacity Factor Order to the same regulatory scheme employed with zero emission credits further fails on the grounds that such credits are outside of scope of FERC regulation, whereas the present case deals with a matter well within FERC`s reach. The Capacity Factor Order deals with the generations of electricity from coal-fired plants and the subsequent sale of that energy to the PJM wholesale auctions. In regard to zero emission credits "there is no wholesale when ZECs change hands" and FERC does not have the jurisdiction to determine the reasonableness of ZEC transactions as it does for the sale of energy. *Coalition for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 52 (2nd Cir. 2018). Here,

unlike in *Zibelman*, the Capacity Factor Order definitively relates to the sale of wholesale electricity rather than the compulsory sale of ZECs which courts have found to be outside the reach of FERC. Even so, the present case if further distinguishable in that, having established its relation to the wholesale electricity market, it is compelling the sale of electricity into said market. The ZEC program in *Zibelman* does not expressly mandate that the plants receiving ZEC subsidies bid into" their respective auctions. As such, it becomes clear that under such scrutiny, the PSC`s comparison to a zero emissions credit fails.

## III. Vandalia's Native Transmission Protection Act violates the Supremacy Clause of the U.S. Constitution because it is preempted by the FERC Order 1000.

The Supremacy Clause establishes that the constitution and the laws of the United States shall be the supreme law of the land. U.S. Const. art. VI, §2. In evaluating whether the Native Transmission Protection Act, or Vandalia's ROFR, violates the Supremacy Clause, the Court starts with the assumption that State powers are not superseded by a Federal act unless that is the clear purpose of Congress. (R. at 12)

The question then is, whether the FERC Order 1000 preempts the Native Transmission Protection Act. This court should find that the federal interest does dominate and that Vandalia's ROFR stands as an objection to the purpose of the FERC Order 1000 based on two reasons. First, the FPA grants FERC jurisdiction over electric energy in interstate commerce which essentially is a result of a congressionally delegated duty. Second, if the Court were to allow the ROFR to exist, it would harm public interest through anti-competitive measures and thus prompt conflict preemption.

### A. The FPA grants FERC jurisdiction over electric energy in interstate commerce.

An examination of the plain text of the FPA indicates that FERC has jurisdiction over the transmission of electric energy in interstate commerce and that they are acting within the scope of its congressionally delegated authority.

The language of the FPA directly gives FERC jurisdiction over the "transmission of electric energy in interstate commerce, without regard to whether the transmissions are sold to a reseller or directly a consumer" which thereby makes FERC's exercise of their power valid. *New York v. FERC*, 535 U.S. 1, 62 (2002). Nothing in §201(b) suggests that FERC takes away the power of the state to regulate its own delivery of electricity to retail customers. On the contrary, FERC, from the beginning, has identified its goal as facilitating competitive wholesale electric power markets while trying to not step on the toes of intrastate commerce. *Id*. Indeed, "the transmission of electric current from one state to another, like that of gas…" is considered interstate commerce. *Mill Creek Coal & Coke Co. v. Pub. Serv. Comm'n*, 84 W. Va. 662, 669 (1919).

The FPA essentially charged FERC's predecessor with undertaking "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." 535 U.S. at 6. This means that this federal agency will now be able to regulate interstate commerce rather than the states. This was further explored in *Public Util. Comm'n of R.I.*, where the Court found that since the forwarding state had no more authority than the receiving state to place a direct burden upon interstate commerce. This resulted in an Attleboro Gap, which is one that Congress could only fill and did so by implementing the FPA which

ultimately bestowed the power of regulation within the hands of FERC. 273 U.S. 83, 89–90 (1927).

On the other hand, an agency has no power to act unless and until Congress confers power upon it. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986). And this is when a federal agency may preempt state law because it would be within the scope of its congressionally delegated authority. *Id*. Based on this analysis, the court has held that Congress has given FERC the power to act as it has. The text of §201(b) of the FPA "unambiguously authorizes FERC to assert jurisdiction over two separate activities (transmitting and selling)" and so FERC's exercise of this power is valid. *Id*. at 374.

In this case, FERC does have the authority to regulate the electric energy over the interstate commerce that takes place partly in Vandalia. As mentioned above the transmission of electric energy is interstate commerce and here, the transmission of electric energy is taking place across multiple states. 100 S.E. 557 (1919). Congress provided FERC with the opportunity to regulate this electric transmission through the FPA. Even though the State of Vandalia passed legislation which would prompt state regulation, this was done after the FPA granted FERC the authority to regulate such commission. Even if the State of Vandalia passed this act prior to FERC regulation, FERC would still be able to come in after the effect to regulate the wholesale sales. This is because the FPA authorizes regulation of this even if it was previously subject to state regulation. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927). Therefore, FERC has the authority to regulate electric energy in interstate commerce for the State of Vandalia.

### B. FERC has the authority to remove unjust and unreasonable practices, including ROFR's, because they ultimately stand as an objection to the goals of Congress.

FERC has always been concerned about electric utilities' use of their market power to "deny their wholesale customers access to competitively priced electric generation" and thereby "denying consumers the substantial benefits of lower electricity prices." 535 U.S. at 42. Furthermore, FERC has the authority under §206 to require removal of federal ROFR's upon finding that they were "unjust and unreasonable practices affecting rates, and that determination was supported by substantial evidence and was not arbitrary or capricious." *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 48 (D.C. Cir. 2014).

PJM has taken this into consideration when they implemented a competitive planning process for new transmission facilities so that they would be in compliance with the FERC Order 1000. (R. at 6). 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. *Id*. By soliciting solutions from competing transmission developers, PJM hopes to "encourage innovative, cost-effective, and timely solutions to the challenges of building and maintaining a highly reliable electric system." *Id*. Yet, the Native Transmission Protection Act conflicts directly with this federal purpose because it has been shown to harm public interest. The seventh circuit has described ROFR's, like the Native Transmission Protection Act, that are self-protective and anti-competitive as cartel-like. *MISO Transmission Owners v. F.E.R.C.*, 819 F.3d 329 (7th Cir. 2016). While FERC's goal is "to avoid intrusion on the traditional role of the States in regulating the siting and construction of transmission facilities," the state ROFR, when dealing with interstate commerce, still needs to avoid harming public interest as per the federal

purpose of the FPA. Since the ROFR does not comply with the federal purpose, the Court should find that conflict preemption exists. This is primarily due to how the Native Transmission Protection Act harms public interest and therefore, does not overcome the Mobile-Sierra Provision.

**1. The Native Transmission Protection Act is not protected by the Mobile-Sierra provision because it would adversely affect transmission development.**

Based on the Mobile-Sierra presumption, in order for a contract rate to be set aside, this requires a finding of 'unequivocal public necessity' or 'extraordinary circumstances.' *Morgan Stanley Cap. Grp. Inc v. Pub. Util. Dist. No. 1*, 554 U.S. 527 (2008). Courts have previously found that severe harm to the public constitutes extraordinary circumstances. *Id*. Therefore, where FERC makes a finding of such harm, it makes a requisite finding of extraordinary circumstances. Once this bar is cleared, courts have been comfortable moving forward in striking federal ROFR's, but the same could be said in support of how the FERC Order 1000 preempts the Native Transmission Protection Act, which essentially functions as an ROFR.

In analyzing whether an ROFR overcomes the Mobile-Sierra provision, a "particularized" analysis is required and not just generalized public interest goals. *Texaco Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998). In *Texaco Inc. v. FERC*, the court found that the ROFR in the ISO-New England Transmission Operating Agreement would adversely affect transmission development because FERC determined that retaining the existing rate structure would inflict "anticompetitive" harm on the pipeline's main competitor. *Id.*

Here, the court found this a particularized finding that overcomes the Mobile-Sierra presumption. Even "in circumstances where it would be difficult or even impossible to marshall

empirical evidence that an ROFR harms public interest, FERC is free to act based upon reasonable predictions rooted in basic economic principles." 762 F.3d at 76.

Further, the Court has previously identified that rights of refusal create "a pre-existing barrier to entry" for non-incumbent transmission owners. *Id*. In *South Carolina Public Service Authority v. FERC*, the Court found that the ROFR would impeded identification of some cost-efficient projects which would result in the development of transmission facilities "at a higher cost than necessary." *Id*. at 72. These higher costs would be passed on to customers, which would then yield rates that were "not just and reasonable." *Id*. Therefore, the Court reasoned that since the inclusion of ROFR's are a practice that affects a rate, the FERC is authorized then to regulate the ROFR to the extent it found the inclusion of the ROFR as unjust or unreasonable. Since the ROFR was considered unjust or unreasonable, FERC has the authority to ban such legislation. While some may argue that this ban is "arbitrary, capricious…or otherwise not in accordance with law," incumbents, even with the ban, would still have incentives to propose projects in the regional transmission planning process. *Id*. at 78.

On the other hand, when ROFR's do not create a barrier to entry, then the ROFR is most likely to stand since it would be less likely to affect the rate and thus harm public interest. *Cent. Transmission, LLC v. PJM Interconnection*, 131 FERC ¶61,243 (2010). In *Central Transmission LLC v. PJM Interconnection*, the court found that since the nonincumbent developers were free to build their PJM expansion projects as merchant developers apart from the PJF Tariff, then the ROFR did not create a barrier to entry and therefore it was allowed to stand. *Id*. Therefore, if there are other alternative measures that nonincumbents can pursue, even if the ROFR stands, then the ROFR does not adversely affect transmission development.

In this case, allowing the Native Transmission Protection Act to stand would severely harm public interest and thus, defeat the federal purpose of the FPA. While there is empirical evidence that the Native Transmission Protection Act would harm public interest, the Court can make reasonable economic predictions which would indicate otherwise. 762 F.3d at 76. If Vandalia's ROFR were to stand, then ACES would not be able to build Mountaineer Express for 18 months and this could ultimately harm public interest because within that time, costs for utility could increase without this transmission line. This is unlike the *Central Transmission LLC* case because ACES would not have an alternative method of building the line, which further demonstrates how Vandalia's ROFR creates a barrier to entry. 131 FERC ¶61,243 (2010). Vandalia's ROFR would essentially block the production of the line which would be less efficient and the opposite of an effective solution. This supports the assertion that Vandalia's ROFR would adversely affect transmission development and therefore is not supported by the Mobile Sierra provision.

## IV. Vandalia's Native Transmission Protection Act violates the Dormant Commerce Clause of the U.S. Constitution because it expressly mandates differential treatment between in-state and out-of-state competing interests.

The Commerce Clause, also known as Article I, Section 8, provides Congress with the power "to regulate commerce with foreign nations, and among several states, and with Indian tribes." U.S. Const.art. I, §8. Within this clause, Courts have inferred a restriction on State power which is known as the "dormant Commerce Clause." (R. at 12). This clause prohibits a state from discriminating against or unduly burdening interstate commerce, which could ultimately have the potential to doom the new union between the States. *Id.*

Under the dormant commerce clause, courts will strike down a State law if it expressly mandates a differential treatment of in-state or out-of-state competing economic interests in a way that benefits the former and burdens the latter. *Id*. at 12. This is evaluated based on a strict scrutiny standard. The standard requires a State to demonstrate that the law has a non-protectionist purpose and that there are no less discriminatory means for achieving that purpose. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). This standard can also apply if a law controls commerce which is occurring wholly outside the boundaries of the state. *Id*. Even if the statute is not facially discriminatory, the Courts can still strike down the law if it's effect or purpose burden's interstate commerce.

The question then is, whether the Native Transmission Protection Act regulates only "incidental" effects on interstate commerce or expressly mandates differential treatment of in-state or out-of-state competing economic interests. 397 U.S. at 137. In consideration of this question, this Court should find that the act does produce differential treatment for three reasons. First, Vandalia's ROFR has a discriminatory purpose and effect because of the timing of the law and the weak alleged local benefit of reliability. Second, if the Court were to find that the Native Transmission Protection Act does not facially discriminate against out-of-state actors, the statute still fails to serve a legitimate local purpose. Third, even if the Court believed that the act did serve a valid purpose, other nondiscriminatory means were available to preserve the local interests at stake rather than implementing the Native Transmission Protection Act.

### A. The Native Transmission Protection Act overtly discriminate against interstate commerce because the law benefits in-state economic interests while also burdening out-of-state economic interests.

The Fifth Circuit explicitly stated that "requiring boots on the ground discriminates against interstate commerce." *NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 327 (5th Cir. 2022). The Native Transmission Protection Act essentially promotes this very idea because the act has a discriminatory purpose and effect on nonincumbent transmission owners. And even though some of the other utilities that are present in Vandalia are incorporated elsewhere, this does not preclude the discrimination issue. This is because local presence is ultimately more relevant than place of incorporation and the ROW adds an additional obstacle of building for nonincumbents even if the act is considered nonprotectionist.

**1. Vandalia's ROFR exhibits a discriminatory purpose because it is aimed at protecting in-state interests since the timing of its enactment directly follows the implementation of the FERC Order 1000.**

In evaluating whether the Native Transmission Protection Act has a discriminatory purpose, there are four factors which the courts can take into consideration: 1) Whether a clear pattern of discrimination emerges from the effect of the state action; 2) the historical background of the decision; 3) the specific sequence of events leading up to the challenged decision, including departures from normal procedures; and (4) the legislative or administrative history of the state action, including contemporary statements by decision makers. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). The most relevant of these factors for the purposes of this brief pertains to the specific sequence of events that led up to Vandalia's ROFR. For instance, the Fifth Circuit has been able to identify a plausible inference of discrimination based on the timing of a law that was passed in Texas. 48 F.4th at 327. In that case, the legislature seemed to have enacted the law just after the Midwest Independent System Operator (MISO) had

selected NextEra's bid to build a new line within the state of Texas. *Id.* The court, in this case, considered this plausible enough to consider the statute containing a discriminatory purpose.

On the other hand, the eighth circuit has found that ROFR's do not always contain a discriminatory purpose as long as the main focus is not on protecting in-state interests. In *LSP Transmission Holdings, LLC v. Sieben*, the court found that since the Minnesota ROFR was primarily focused on maintaining a regulatory system that has worked and provided reasonable rates to residents, it did not exhibit a discriminatory purpose. *LSP Transmission Holdings, Inc.*, 954 F.3d at 1029. In other words, while the ROFR does benefit in-state residents, they are more so trying to maintain the status quo of a successful overall energy system.

In this case, the Court should find that the Fifth Circuit ruling prevails as the applicable standard. Similar to how the Texas ROFR was passed directly after NextEra, a nonincumbent, had their bid approved, the Vandalia legislature passed their own ROFR soon after FERC issued Order 1000; this was three years later to be exact. The Vandalia ROFR ultimately bans these nonincumbents from entering into this transmission market, which replicates the purpose that NextEra demonstrated based on the Texas ROFR in that case. In addition, while the purpose identified in the LSP case may have satisfied a nondiscriminatory purpose, the Vandalia ROFR is doing much more than simply maintaining the status quo. While utilities such as MAPCo and LastEnergy encourage Vandalia to not allow third party utilities to build lines, they provide no reason as to why this should be the case. (R. at 9). ACES has established a strong reputation within the electric transmission market. While it may not have experience within maintaining a line in Vandalia, the company has been successful in maintaining infrastructure elsewhere. So, it would be more likely that ACES would continue to uphold the status quo, especially since the company has reputable experience and the PJM Board of Managers had already approved what is

predicted to be a "highly reliable electric system." (R. at 6). Therefore, without support for the status quo reason, it is likely for the Court to find that the Native Transmission Protection Act conveys a discriminatory purpose and should be struck down based on this analysis.

**2. The Native Transmission Protection Act also has a discriminatory effect on out-of-state interests because it will maintain an outright ban on future nonincumbents of the energy industry and nullify the FERC Order 1000.**

Vandalia's ROFR also produces a discriminatory effect on those who do not own and maintain transmission lines within the state. While the state may claim that keeping third parties out of their transmission market may promote a local benefit of reliability, the fifth circuit has identified this claim as "insignificant and illusory." 48 F.4th at 327. In *NextEra Energy Capital Holdings v. Lake*, the state asserted that a way to maintain the reliability of their electric grid, was to ensure that only those with a track record can build new lines in the state. *Id*. Yet, the court find that this still doesn't avoid the conclusion that the Texas ROFR has a discriminatory effect. This is because only "companies with existing transmission lines in Texas may continue to compete in the transmission line market" and companies without any lines here cannot build future ones. *Id*. at 326. If the law were to stand, then this would bar future nonincumbents from ever building a line within the state because they do not meet the initial hurdle contained within the ROFR. In other words, a "law can discriminate against interstate commerce even though most of the incumbent transmission-line providers that benefit from the Texas law are incorporated or headquartered outside Texas." 48 F.4th at 321.

Yet, other courts have found that if the ROFR still allows other types of entities to enter the transmission-line market then this might not be as indicative of a possible discriminatory

effect. For instance, *LSP Transmission Holdings, LLC v. Sieben*, even though 16 of the incumbents were Minnesota based and only 5 were based elsewhere, the court found that this did not produce discriminatory effects. 954 F.3d 1018. This was because the ROFR did allow other entities, apart from utilities, to qualify as incumbents and so this would allow out-of-state interests to succeed in certain cases which would then demonstrate a lack of discriminatory effect. Another concern that the courts have tried to deal with is the idea that state ROFR's might have an aggregate effect. Essentially, "if every state were to adopt a ROFR statute, the cumulative effect of such statutes would nullify the FERC Order 1000 and eliminate competition in the market." *Id*. at 1030. While this has the potential to undermine the goals of the commerce clause, the court found that this would be unlikely since incumbents are not obligated to exercise their ROFR's and some might be obligated to even comply with federally-approved transmission lines.954 F.3d 1018.

In this case, the Court should be able to find that the Native Transmission Protection Act has a discriminatory effect against out-of-state entities. The PSC has argued that there is no discrimination because the two main entities that run transmission lines within Vandalia are both incorporated out-of-state; with LastEnergy and MAPCo both being incorporated in Ohio. But, as the court declared in the *NextEra* case, the law can still discriminate even with incumbents that are incorporated elsewhere. Therefore, just because LastEnergy and MAPCo are not incorporated or headquartered within the state, does not mean that this bars the Court from considering that the law still has a discriminatory effect; especially since LastEnergy and MAPCo maintain a huge presence within the state of Vandalia anyways.

The PSC also asserts that ACES will be able to build the line in 18 months even if the incumbents do not exercise the ROFR's, but this seems highly unlikely. With the ROW in place, ACES faces an additional hurdle of dealing with private contractors which drives up costs and produces an even greater obstacle with building. This is unlike *LSP Transmission Holdings, LLC v. Sieben*, where other types of entities that were not considered utilities could still qualify as an incumbent. 954 F.3d 1018. But, here, ACES is already not considered as a utility and cannot work around this to build because they would not have the appropriate agreements approved to design the line due to the presence of the ROW. While the incumbency requirement that is present in this case, may have been less egregious than the one involved in the fifth circuit, it still produces a burden on interstate commerce. In fact, this burden is greatly multiplied with the introduction of the ROW and thus, could increase the changes of the line ceasing to exist. The line is jeopardy solely because of the discriminatory effect of the Native Transmission Protection Act.

### B. Even if Vandalia's ROFR is not discriminatory against interstate commerce, it still fails to serve a legitimate local purpose.

The Native Transmission Protection Act does not support serving a legitimate Vandalia purpose. In order to evaluate whether there is a legitimate local public interest, the statute has to regulate this interest evenhandedly and its effects on interstate commerce can only be incidental, "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. For instance in *Pike v. Bruce Church*, the court found that a state statute, which required business operations to be performed within the home state even though they could be more efficiently performed elsewhere, was an interest that could not be justified. *Id*. In fact, this requirement would result in a material increase for costs and this

represents an unconstitutional burden, one that is even considered "virtually illegal per se." *Id*. at 145.

More specifically, the court has identified that an ROFR which attempts to maintain the status quo can prove a legitimate interest for that state. For instance, in *LSP Transmission Holdings, LLC v. Sieben*, the state of Minnesota enacted an ROFR and they stated that their goal was to "preserve the historically-proven status quo for the construction and maintenance of electric transmission lines." 954 F.3d at 1031. The court found this to be a legitimate local interest and supported this finding by reiterating that "the states retain authority over the location and construction of electrical transmission lines." *Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013).

In this case, Vandalia's ROFR does not truly serve a legitimate purpose because the effects on interstate commerce are far more than "incidental." By imposing an 18 month time restriction on non-incumbents, the ROFR is essentially imposing a straitjacket on interstate commerce. This piece of legislation materially increases costs, just as was present in *Pike v. Bruce Church*, because it would require ACES to use other means in order to circumvent not only the Native Transmission Protection Act but also the ROW. In addition, while it does seem that a legitimate local purpose could be maintaining electric transmission lines, as was stated in *LSP Transmission Holdings, LLC v. Sieben*, there should be a prerequisite that the maintenance of these lines is done so in a productive manner. 954 F.3d 1018. The Vandalia Citizens Action Group has already "presented evidence that the coal-fired generating units could be expected to run economically only 40 to 60 percent of the time" based on the historical records of the incumbent providers. (R. at 8-9). This clearly does not meet the barrier for capacity which indicates that perhaps, the "status quo" in how the lines are currently being maintained is not

economically efficient. Not only does there seem to be limited local benefits, but there is also an unduly burden on interstate commerce since there are so many roadblocks to ACES building the Mountaineer Express through the state of Vandalia. Based on this evidence and the above analysis, this weakens the legitimacy of the local purpose which the Native Transmission Protection Act relies on.

### C. Even if the Court finds that the act did serve a valid local purpose, there were nondiscriminatory alternatives that were available to preserve the local interest at stake rather than implementing the Native Transmission Protection Act.

The implementation of Vandalia's ROFR was not necessary in order to preserve local interests since there were nondiscriminatory alternatives that would have achieved a similar objective. In order for a state regulation, such as the Native Transmission Protection Act, to be found discriminating against interstate commerce, this would require that one demonstrate that there are nondiscriminatory options that are available for achieving a specific local purpose. 441 U.S. 322 (1979). For instance, in *Hughes v. Oklahoma*, the court found that the statute was the choice of the most discriminatory means even though nondiscriminatory alternatives would have likely fulfilled the state's purpose of the sale of the minnows. *Id*. The court went on to further state that "when a wild animal becomes an article of commerce, its use cannot be limited to the citizens of one state and to the exclusion of citizens of another state." *Id*. at 323.

In addition, some courts have also found that even when alternatives were considered, these alternatives did not support the local purpose in the same way that the ROFR would. Specifically, in *LSP Transmission Holdings, LLC v. Sieben*, the court found that while the Minnesota legislature considered alternatives to the ROFR, they were more concerned with the

"longstanding, successful regulatory approach for selecting the owners/operators of transmission lines." 954 F.3d at 1029. Furthermore, if the ROFR is producing such success, there may be less emphasis on implementing the non discriminatory alternative instead.

In this case, there were several possible alternatives that the Vandalia legislature could have implemented rather than promoting the ROFR. Some nondiscriminatory alternatives could possibly include allowing projects that are already approved by the PJM board to just go through. Regardless of incumbency status, a PJM board approval demonstrates that there is potential for this line to foster a stronger electric system. Another alternative could include ACES and the PSC discussing the possibility of using the Mountaineer Express as a means of also providing electricity to citizens of Vandalia since this would not be the case if the project otherwise got approved currently. While this might be costly for ACES, it would eliminate several obstacles regarding easements and fulfill the local interest of the state by supplying their citizens with reliable electricity. 954 F.3d 1018.

## CONCLUSION

For the reasons set forth above, appellant respectfully requests that this Court reverse the decision of the district court and hold that:

1. ACES has standing to challenge the Capacity Factor Order and field preempted under the Federal Power Act.
2. Vandalia's ROFR is preempted by the FPA and thus, violates the Supremacy Clause.
3. The Native Transmission Protection Act violates the dormant Commerce Clause because it has a discriminatory purpose, and discriminatory effect against out-of-state entities.

## CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing ACES 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. 37*