

Thirteenth Annual Energy and Sustainability Moot Court Competition
West Virginia University College of Law
March 2023

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 22-0682

ORDER

APPALACHIAN CLEAN ENERGY)
SOLUTIONS, INC.,)
)
Appellant,)
)
-v.-)
)
CHAIRMAN WILL WILLIAMSON,)
in his official capacity,)
COMMISSIONER LONNIE LOGAN,)
in his official capacity, and)
COMMISSIONER EVELYN ELKINS,)
in her official capacity,)
)
Appellees.)

C.A. No. 22-0682

Appalachian Clean Energy Solutions, Inc. (“ACES”) is a global energy company engaged in the construction and operation of electric generating plants and interstate electric transmission lines. ACES is seeking to build a large natural gas-fired electric generating plant in southwestern Pennsylvania, to sell into the regional wholesale electricity market (PJM Interconnection). It also intends to build a high voltage transmission line from Greene County, Pennsylvania, to Wake County, North Carolina. The route of the proposed transmission line crosses Vandalia (a fictional state in the mid-Atlantic region of the U.S.).

ACES faces two major roadblocks, however. First, the Vandalia Public Service Commission (“PSC”) has adopted a policy that requires coal plants within Vandalia to continue operating even if doing so may be uneconomical for ratepayers. Specifically, the Vandalia PSC adopted a “Capacity Factor Order” that requires coal plants to run 75 percent of the time, regardless of the availability of lower-cost power supplies in the region and from PJM. ACES contends that this decision effectively sets wholesale rates in violation of the Federal Power Act (“FPA”) and

distorts price signals in the PJM market, which makes it more difficult to build new capacity in the region.

Second, the State of Vandalia enacted a right of first refusal (“ROFR”) for electric transmission lines that gives incumbent transmission owners in Vandalia an exclusive right to build new transmission facilities in the State. The exclusive right expires after eighteen (18) months, after which a nonincumbent utility—such as ACES—would have the right to build the transmission line. But under the State law as written, unless ACES acquires an existing incumbent transmission owner in Vandalia or waits 18 months, it cannot build its proposed transmission line through Vandalia.

Facing these issues, ACES sued the PSC members in their official capacity,¹ challenging the Capacity Factor Order and the ROFR. This case involves an appeal from a U.S. District Court order from the Northern District of Vandalia:

- granting Defendants’ Motion to Dismiss regarding ACES’s challenge to the PSC’s Capacity Factor Order under the Supremacy Clause; and
- granting Defendants’ Motion to Dismiss regarding ACES’s challenge of the State’s ROFR law under the dormant Commerce Clause and the Supremacy Clause.

With respect to this appeal, the Court hereby orders that ACES and the Vandalia PSC brief the following issues:

Issue 1: Whether ACES has standing to challenge the PSC’s Capacity Factor Order;

Issue 2: Assuming ACES has standing, whether the PSC’s Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is preempted by the actions of the Federal Energy Regulatory Commission (“FERC”) under the FPA;

Issue 3: Whether Vandalia’s statutory ROFR violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000; and

Issue 4: Whether Vandalia’s statutory ROFR violates the dormant Commerce Clause of the U.S. Constitution.

SO ORDERED

Entered this 28th Day of December of 2022

[NOTE: No decisions rendered or documents dated after December 28, 2022, may be cited either in briefs or in oral arguments.]

¹ The PSC commissioners were sued in their official capacity under *Ex Parte Young* because the Vandalia PSC is a state agency and thus has sovereign immunity. *Verizon Md., Inc. v. Pub. Serv. Comm’n of Md.*, 535 U.S. 635, 645 (2002). However, for purposes of this problem and the competition, competitors can and should refer to the Defendants as the Vandalia PSC.

FACTUAL BACKGROUND

A. PJM Interconnection

For the past thirty years, the Federal Energy Regulatory Commission (“FERC”) has adopted policies promoting competition in the wholesale electricity markets in the U.S. In 1996, FERC issued Order 888, which required the transmission-owning utilities to provide open, fair, and non-discriminatory access to their transmission lines, thereby removing impediments to competition in the wholesale bulk power marketplace and enabling more efficient, lower-cost power to be delivered to electricity consumers. One response to Order 888 was the creation of Independent System Operators (“ISOs”); FERC suggested the concept of an Independent System Operator as one way for existing power pools to satisfy the requirement of providing non-discriminatory access to transmission. This was followed in 2000 by FERC’s issuance of Order 2000, which effectively required transmission-owning utilities to participate in a regional transmission organization (“RTO”). The RTO/ISO serving the mid-Atlantic region is the PJM Interconnection (“PJM”), which is responsible for maintaining and operating the transmission grid in Vandalia and in thirteen other states and the District of Columbia.

While states within the PJM region retain their traditional authority over siting, routing, and permitting of new transmission facilities, it is PJM, not the states, that decides whether to approve the construction of new transmission facilities to serve the PJM grid. If any public utility or independent transmission owner wants to build new transmission facilities within PJM, it must seek and obtain PJM’s approval.

In addition to responsibility for the transmission grid, PJM operates both energy and capacity markets. The energy market is essentially a real-time market that enables PJM to buy and sell electricity to distributors for delivery within the next hour or 24 hours. All generators of electricity in Vandalia are connected to PJM and, pursuant to their status and contracts with PJM, they must sell all the energy they produce into the PJM energy market.² The price for wholesale electricity—the “market-clearing price”—is determined by an auction in which generating resources offer in a price at which they can supply a specific number of megawatt-hours of power. If a resource submits a successful bid and will therefore be contributing its generation to meet demand, it is said to “clear” the market. The cheapest resource will “clear” the market first, followed by the next cheapest option, and so forth until demand is met. When supply matches demand, the market is “cleared,” and the price of the last resource to offer in (plus other market operation charges) is the “market-clearing price” and becomes the wholesale price of power.

The capacity market is different—it is more forward looking, and it ensures that enough capacity is being built ahead of time to meet growing demand. For the capacity market, PJM predicts demand three years into the future and assigns a share of that demand to each participating load-serving entity in the region. Owners of capacity to produce electricity in three years’ time then bid that capacity into the auction for sale to PJM at rates the sellers set in their bids. PJM accepts bids until it has purchased enough capacity to satisfy anticipated demand.

Both the capacity and energy markets are designed to efficiently allocate supply and demand, a function which has the collateral benefit of incentivizing the construction of new power plants when necessary. Clearing prices occasionally differ based on geographical subdivisions

² Except to the extent that electric utilities and independent power producers may enter into bilateral contracts for the sale of electricity, which are wholesale transactions also subject to FERC jurisdiction.

designed by FERC to stimulate new construction by signaling that certain regions are prone to supply shortages.

B. Legacy Coal Plants in Vandalia

Ever since companies began extracting coal from the Vandalia hills, coal mining has been a way of life in many parts of the state. Vandalia has historically been an energy rich state, with enormous reserves of coal deposits and, more recently, shale gas produced in the Marcellus Shale play. Coal mining was the biggest industry in the state for decades, and the historical roots of coal mining—and the generation of electricity with coal—still run deep when it comes to the political climate.

While the coal industry has been on the decline nationally since the shale revolution, coal still plays a prominent role in Vandalia’s economy. In 2021, Vandalia was the third-largest coal producer in the nation, after Wyoming and West Virginia, and accounted for 7 percent of U.S. total coal production. Vandalia also had 9 percent of recoverable coal reserves at producing mines, the fourth-largest reserve base in the nation, after Wyoming, Illinois, and West Virginia. Coal-fired electric power plants accounted for 91 percent of Vandalia’s total electricity net generation in 2021.

According to the U.S. Energy Information Administration, Vandalia typically uses about half of the electricity generated in the state. As a result, Vandalia is a net supplier of electricity to the regional grid and is among the top states in interstate transfers of electricity. In 2021, only four other states sent more of their electricity generation out of state.

Vandalia is served by two retail utilities, LastEnergy and Mid-Atlantic Power Co. (“MAPCo”). LastEnergy is headquartered and incorporated in Akron, Ohio, and serves customers in Ohio, Pennsylvania, Maryland, New Jersey, and West Virginia, in addition to the 600,000 customers served in Vandalia. LastEnergy has two operating coal-fired power plants in Vandalia, the Byrd Power Station (2,000 megawatts (MWs), built in 1974 and located in Fernwood) and the Fort William Power Station (1,100 MWs, built in 1968 and located in Butler). MAPCo is headquartered and incorporated in Columbus, Ohio, and serves customers in Indiana, Kentucky, Michigan, Ohio, Tennessee, Virginia, and West Virginia, in addition to the 450,000 customers served in Vandalia. MAPCo has three operating coal-fired power plants in Vandalia, the Ohio County Plant (1,600 MW, built in 1971 and located in Hillsdale), the Robert Andy Power Plant (2,900 MW, built in 1973 and located in Warfield), and the Rambler Power Station (1,300 MWs, built in 1980 and located in Leonard).

C. Appalachian Clean Energy Solutions, Inc.

Appalachian Clean Energy Solutions, Inc. (“ACES”) is a global energy company headquartered and incorporated in Springfield, Vandalia. ACES has a portfolio of electric generating resources totaling over 6.5 gigawatts (GWs), including coal-fired plants, natural gas-fired plants, three nuclear plants, and renewable facilities (both wind and solar). ACES generates electricity solely for resale in the wholesale markets, either through bilateral power purchase agreements with retail electric utilities or participation in the various competitive regional wholesale markets throughout the Eastern Interconnection of the United States, including the Midcontinent Independent System Operator (“MISO”), PJM, the New York Independent System Operator (“NYISO”), and ISO New England (“ISO-NE”). ACES has no retail electricity

customers, nor does it own any retail electric utilities as part of its corporate structure.³ ACES is gradually decarbonizing its fleet of electric generating facilities, through closure of its existing coal plants and addition of renewable and zero-carbon energy facilities. In June 2020, ACES adopted a company-wide goal of achieving zero carbon emissions by 2050.

In addition to its merchant electricity generation activities, ACES constructs and maintains electric transmission lines. ACES is the largest independent electricity transmission company in the United States. It owns and operates high-voltage transmission infrastructure throughout the Eastern Interconnection, serving a combined peak load exceeding 26 GWs along 16,000 circuit miles of transmission line.

As part of its decarbonization effort, ACES is planning to retire its Franklin Generating Station, a 1,300 MW coal-fired power plant constructed in 1979 in Pleasants County, Ohio, near Newport. The Franklin plant sells its output into PJM, and has been an unsuccessful bidder into the PJM capacity auctions in both 2020 and 2021. While it has had some success selling into PJM's energy markets, its recent capacity factors⁴ were 46.9 percent in 2020 and 38.2 percent in 2021. ACES has determined that it would be uneconomic to install the necessary environmental upgrades to comply with the Steam Electric Power Generating Effluent Guidelines and Standards adopted by the Environmental Protection Agency (“EPA”) in 2020. Without such upgrades, the Franklin plant cannot operate after December 31, 2028.

With the anticipated retirement of the Franklin Generating Station, ACES announced plans in April 2020 to construct an 1,800 MW combined-cycle natural gas-fired generating plant—tentatively named the “Rogersville Energy Center”—in Greene County in southwestern Pennsylvania, near Rogersville. For its fuel supply, the Rogersville plant will take advantage of the abundant natural gas supplies from the Marcellus Shale, which covers a four-state region including large portions of Pennsylvania. In September 2022, ACES announced that it was modifying the plant's design to enable it to use carbon capture and storage technology, to take advantage of the expanded 45Q federal tax credit included in the Inflation Reduction Act, signed by President Biden in August 2022, to incentivize carbon capture and sequestration for power generation. To qualify for the 45Q federal tax credit, the Rogersville facility will be designed to capture 75 percent of its carbon emissions for subsequent storage and sequestration in to-be-determined geologic formations in the region. During the 2022 legislative session, the state of Pennsylvania passed a statutory scheme establishing state rules for carbon sequestration, thereby making the Greene County site an ideal location for a new power plant. With the modifications, the estimated cost of the Rogersville Energy Center is about \$3.1 billion.

To increase the capability of the regional grid to accommodate the electrical output from the Rogersville Energy Center, ACES plans to construct and own a 500 kilovolt (kV) high-voltage transmission line from Rogersville to Raleigh, North Carolina, a distance of about 460 miles. The line, Mountaineer Express, comprises two single-circuit 500 kV transmission lines located next to

³ The generating plants owned and operated by ACES are referred to as “merchant” plants. Rather than being dedicated to serving retail customers as in the case of a traditional vertically integrated utility owning generation, transmission and distribution, a merchant plant has no “captive” retail customers and instead sells its output into the competitive wholesale markets.

⁴ A plant's capacity factor measures how often a plant is running at maximum power. A plant with a capacity factor of 100 percent means it is operating at full capacity all of the time. A plant's capacity factor is less than 100 percent when the plant is taken off-line for maintenance, a forced outage, or due to economic dispatch (i.e., cheaper power is available from other sources, so the plant is not dispatched).

each other. The lines may be operated as two 500 kV alternating current (AC) lines capable of transmitting 3,000 MW of power, or they may be operated as one 500 kV AC and one 500 kV direct current (DC) line, capable of transmitting 4,500 MW of power, out of southwestern Pennsylvania to central North Carolina. The proposed line would begin at the Rogersville substation and terminate at the Wake County substation outside Raleigh, with the potential for intermediate substations to accommodate integration of additional resources throughout the length of the line. The total capital cost of Mountaineer Express is estimated at \$1.7 billion.

PJM implemented a competitive planning process for new transmission facilities to implement FERC Order 1000. 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. By publishing a set of criteria violations and soliciting solutions from competing transmission developers, PJM hoped “to encourage innovative, cost-effective, and timely solutions to the challenges of building and maintaining a highly reliable electric system.”⁵ Mountaineer Express was approved by the PJM Board of Managers for inclusion in the Regional Transmission Expansion Plan (“RTEP”) in March 2022.

D. The Vandalia Public Service Commission

The Vandalia Public Service Commission (“Vandalia PSC”) is the government agency charged with regulating the rates and practices of utilities providing retail service within the state of Vandalia. Its three commissioners are appointed by the Governor, subject to confirmation by the Vandalia State Senate, and serve six-year terms. The current commissioners are Will Williamson, Lonnie Logan, and Evelyn Elkins, with Williamson designated as Chairman of the agency, who serves as its chief administrative officer. The Vandalia PSC has a broad grant of authority under Title 24 of the Vandalia Code to set “just and reasonable rates” for the utilities subject to its jurisdiction. *Vand. Code* § 24-2-3. The Vandalia PSC is also charged 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).

In addition, the Legislature has enacted specific directives to the PSC to ensure coal’s continued dominance as a source of energy in Vandalia:

It is the purpose and policy of the Legislature in enacting this chapter to confer upon the Public Service Commission of this state the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to: . . . (3) Encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the state’s energy resources, such as coal.

. . .

It is imperative the State of Vandalia take immediate steps to reverse these undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained.

⁵ PJM, *Planning, Competitive Bid Process*, available at <https://www.pjm.com/planning/competitive-planning-process>.

...

Public electric utilities in Vandalia should be encouraged to operate their coal-fired plants at maximum reasonable output and for the duration of the life of the plants.

Vand. Code § 24-1-1(a)(3); id. § 24-1-1D(5); id. § 24-1-1D(12).

Three recent actions of the Vandalia PSC have implications for ACES’s plans to construct the Rogersville Energy Center and the Mountaineer Express transmission line.

1. The Capacity Factor Order

Both LastEnergy and MAPCo submit annual filings to implement the power cost adjustment (“PCA”) mechanism authorized by previous Vandalia PSC orders. Under the PCA mechanism, each electric utility is allowed to collect a power cost surcharge from retail customers that reflects the actual power costs incurred by such utility over a 12-month period. In their October 2021 filings to establish new rates to be effective on January 1, 2022, both utilities included information regarding the capacity factors for their respective coal plants during the 12-month period ending June 30, 2021. These capacity factors were as follows:

LastEnergy	Capacity Factor (%)
Byrd	62.3
Fort William	46.1
MAPCo	
Ohio County	34.7
Robert Andy	49.6
Rambler	57.3

In their PCA filings, both utilities projected that capacity factors for their coal-fired power plants could be expected to remain at or below 60 percent going forward, given the availability of lower cost power from the wholesale market (i.e., PJM) and from other energy suppliers in the mid-Atlantic region. In their testimony in the PCA filings, both utilities explained that the low capacity factors for the coal-fired units were due to the availability of cheaper energy supplies in the region, either through bilateral contracts with other energy suppliers or through purchases in the PJM energy market. In other words, the utilities were operating their power supply portfolio in a manner that minimized the costs imposed on retail consumers, by displacing more expensive coal-fired generation with cheaper sources of energy.⁶

In orders issued by the Vandalia PSC in December 2021 for LastEnergy’s and MAPCo’s respective PCA filings, the Commission expressed apprehension about the low capacity factors for the coal plants owned and operated by each utility. In the Commission’s MAPCo order, for example, the Commission stated that:

⁶ The relatively low capacity factors for the coal plants reflect that the prices bid by the plant operators into the PJM energy market exceeded the market-clearing price most of the time, and thus the plants were “out of the money” and not dispatched by PJM.

We are concerned that MAPCo may not be maximizing the utilization of its owned power plants and is reducing their operation in response to wholesale system sales opportunities. We conclude that the public interest is better served by MAPCo reversing that trend, and focusing on maximizing generation from its owned power plants.

The Commission followed its orders in the utilities' respective PCA proceedings with commencement of a generic proceeding in early 2022 to investigate Coal Plant Capacity Factors and Electricity Rates. That process culminated in a general order ("Capacity Factor Order") applicable to both electric utilities, issued on May 15, 2022, stating as follows:

We find that the capacity factors of the coal plants operated by the Vandalia jurisdictional electric utilities have been unacceptably low over the past several months, and it is unacceptable for this low plant utilization to continue into the future. The public interest is better served by LastEnergy and MAPCo managing their power supply portfolio in a manner that maximizes generation from their owned coal-fired power plants. Consistent with the statutory obligation of this Commission to encourage the operation of coal-fired plants "at maximum reasonable output and for the duration of the life of the plants," the Commission hereby directs that LastEnergy and MAPCo operate their coal-fired plants to achieve a capacity factor of not less than 75 percent, as measured over a calendar year. We expect higher capacity factors if more favorable market conditions occur in the future. We further direct both utilities to procure the necessary coal supplies to maintain a sufficient inventory on site for each of their coal plants to operate in a manner consistent with this order.

Capacity Factor Order, p 7.

The Commission in the Capacity Factor Order included a finding of fact that operation of the jurisdictional coal-fired plants at a 75 percent capacity factor would be economical. Even so, acknowledging the expectation of the financial community that investors need certainty regarding cost recovery in order to allow Vandalia utilities to continue to be able to raise necessary capital at a reasonable costs, the Order expressly authorizes cost recovery in LastEnergy's and MAPCo's retail rates if, in complying with the 75 percent capacity factor requirement, the cost to produce electricity at Vandalia's coal-fired plants is greater than the market-clearing price in PJM.⁷ The Order thus allows for the actual costs to be recovered. For example, if PJM's market-clearing price is \$50 per MWh but the actual costs of producing electricity at a particular coal plant is \$70 per MWh, the PSC would allow the utility owning the coal plant to recover the entire amount (i.e., \$20 per MWh in excess of the market-clearing price) in retail rates, which would be recovered from retail ratepayers.

On reconsideration of the Capacity Factor Order, the Vandalia Citizens Action Group (an intervenor representing residential customers in PSC proceedings) expressed opposition to the 75 percent capacity factor requirement, and presented evidence that the coal-fired generating units

⁷ All of the coal-fired power plants within Vandalia are connected with and exclusively sell into PJM pursuant to their Fixed Resource Requirement ("FRR") status. Under Schedule 8.1 of the Reliability Assurance Agreement between the utilities and PJM, an eligible load serving entity is generally obligated to obtain sufficient capacity for all load and expected load growth in its FRR service area.

could be expected to run economically only 40 to 60 percent of the time, as evidenced by LastEnergy’s and MAPCo’s historical capacity factors. In a separate statement in the PSC’s order denying reconsideration, Chairman Williamson stated his expectation that the coal plants “would almost always be able to run economically at the 75 percent capacity factor” and the PSC’s assurance regarding cost recovery “was just a fail-safe to ensure the company would not run the risk of an under-recovery in the event the circumstances change.”⁸

2. *Right of First Refusals for Transmission Line*

Until 2011, many FERC-approved ISO tariffs contained right-of-first-refusal (“ROFR”) provisions. These provisions gave owners of existing transmission facilities the exclusive right to construct new transmission facilities in their service areas. This ROFR for incumbent transmission owners applied even if the proposal for a new transmission facility had been submitted to the ISO by a nonincumbent transmission owner, and even if the nonincumbent could construct and maintain the new facility more efficiently than the incumbent. In practice, these provisions allowed incumbents to wait for nonincumbents to identify promising opportunities for new transmission facilities and then exercise their ROFR to construct and operate those facilities without having to compete. In 2011, FERC issued Order 1000, which required ISOs to eliminate ROFR provisions for regional transmission facilities from their FERC-approved tariffs and agreements and ordered new transmission projects to be competitively and regionally planned by entities like PJM.

In response to Order 1000, the state legislature in Vandalia in 2014 passed the “Native Transmission Protection Act,” which grants incumbent transmission owners the exclusive right, for a prescribed period, to construct transmission lines within Vandalia. The senator who introduced the bill described it as a direct response to Order 1000 and its elimination of “a federally recognized right of first refusal.” A representative from LastEnergy, the largest incumbent transmission line owner in Vandalia, testified in support of the bill and argued that it was necessary to keep transmission lines in the hands of purportedly more responsive in-state companies and to restore the “status quo” from before Order 1000. A representative from MAPCo described the bill as giving “Vandalia utilities ... the first opportunity to invest in federal regionally planned transmission projects” and urged the Senate Committee not “to encourage third-party transmission owners to buy and build transmission service in Vandalia.”

The bill was passed by the Senate and House, and it was signed into law on May 3, 2014. Specifically, the law provides as follows:

An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner. If such incumbent electric transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line.

Vand. Code § 24-12.3(d). The statute defines “incumbent electric transmission owner” as:

⁸ 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.

[A]ny public utility that owns, operates, and maintains an electric transmission line in this state; any generation and transmission cooperative electric association; any municipal power agency; any power district; any municipal utility; or any ... entit[y] ... engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia.

Vand. Code § 24-12.2(f). ACES owns no existing transmission facilities within Vandalia, and thus does not qualify as an “incumbent electric transmission owner.”

As noted above, Mountaineer Express was approved by the PJM Board of Managers for inclusion in the Regional Transmission Expansion Plan (“RTEP”) in March 2022. Thereafter, ACES submitted its application for a Certificate of Public Convenience and Necessity (“CPCN”) for construction of the Vandalia portions of Mountaineer Express with the Vandalia PSC on April 1, 2022.⁹ Due to the operation of the Native Transmission Protection Act, the Vandalia PSC has not taken any action on the application; as the incumbent electric transmission owners in Vandalia, LastEnergy and MAPCo, have eighteen months—until September 30, 2023—to decide whether to exercise their ROFR.

3. *State ROW Easement Utility Issues*

A right of way is a type of easement or agreement that grants a utility the right to use, access, or transit a piece of property according to the terms of the easement. This easement is typically granted by property owners to an electric utility for the purpose of constructing, operating, and maintaining power lines and other equipment. Before a power line is built, the utility acquires easements from property owners along the selected route as necessary. Easement rights include managing trees and other vegetation, either inside or outside the easement, that pose a threat to the reliability of the electric system. Easement rights also include keeping the right of way free and clear of encroachments and obstructions. Both LastEnergy and MAPCo have obtained easements and agreements with local communities and property owners that allow them to build and maintain their distribution and transmission power lines.

Title 24 of the Vandalia Code, which pertains to the authority of the Vandalia PSC, contains a section governing the use of such electric utility easements. Section 24-8-2 provides that electric utility easements may be used by any “public utility” for the location and use of distribution and transmission facilities. Section 24-8-1(d) defines “public utility” as “any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business involving the provision of electricity, gas, water, or any other service or commodity furnished to the public for compensation, whether herein enumerated or not.” “Incumbent utility,” in turn, is defined as “the entity that is the owner of the easement.” *Section 24-8-1(h)*.

In its route design for Mountaineer Express, ACES sited several segments of the line to traverse the same rights of way utilized by LastEnergy in Vandalia, in an effort to minimize the

⁹ The siting statute in Vandalia states that that “unless a certificate of public convenience and necessity for the construction is first obtained from the Commission, a public utility may not begin construction of an overhead transmission line that is designed to carry a voltage in excess of 69,000 volts or exercise a right of condemnation with the construction.” *Vand. Code § 24-7-2*. “Public utility” for purposes of this provision is defined in § 24-8-1(h).

environmental impact of construction and maintenance of the line. In preliminary discussions between ACES and LastEnergy, however, LastEnergy took the position that, as the “incumbent utility,” it had the right to prohibit ACES’s use of its rights of way for Mountaineer Express inasmuch as ACES is not a “public utility” in Vandalia as that term is defined in § 24-8-1(h). ACES thereafter commenced a proceeding at the Vandalia PSC to obtain a declaratory ruling that it met the requirements of a “public utility” under § 24-8-1(h), and therefore was eligible to use the electric utility rights of way within Vandalia owned by LastEnergy.

In an order issued December 13, 2022 (“Right of Way Order”), the Vandalia PSC ruled that ACES was not a “public utility” as that term is defined in § 24-8-1(h) of the Vandalia Code inasmuch as it is not an entity furnishing electricity to the “public” for compensation in Vandalia. According to the PSC’s Order,

ACES is not now providing electricity services to the public for compensation in Vandalia. As a merchant power plant operator and merchant transmission line operator, its services are rendered entirely in wholesale, rather than retail, markets. That circumstance will not change even if ACES is able to complete the planned Mountaineer Express. The line will not provide utility service to any member of the public, for compensation, in Vandalia.

Right of Way Order, p. 3.

Because of this order, ACES cannot use LastEnergy’s preexisting rights of way in Vandalia. Moreover, ACES is concerned that the ruling foreshadows an unfavorable ruling from the PSC on its pending CPCN application for Mountaineer Express (assuming neither LastEnergy nor MAPCo exercises its ROFR to construct the line).

Thus, because of the Right of Way Order and unless and until the Vandalia PSC grants it a CPCN, ACES has conducted its right-of-way planning assuming the absence of eminent domain authority. Not only will this dramatically increase ACES’s costs of building Mountaineer Express because new narrow strips of land must be razed to make way for the transmission line, but also ACES may have to bargain with landowners individually by private contract—one landowner not wanting to give ACES a right of way could significantly change the course of the line or prevent it from being built altogether. The PSC’s order therefore creates grave uncertainty that Mountaineer Express can even be built by ACES.

LEGAL BACKGROUND

A. The Supremacy Clause of the U.S. Constitution¹⁰

Article VI, Section 2 of the Constitution, known as the Supremacy Clause, establishes that the Constitution and the laws of the United States “shall be the Supreme law of the land.” The Supremacy Clause empowers Congress to preempt or supersede State law. Congress can do so expressly with explicit statutory language or by implication when a Federal law occupies the same field as or conflicts with State law.

¹⁰ This background description of the Supremacy Clause is excerpted from *State Power Project*, Environment and Energy Law Program, Harvard Law School, available at <https://statepowerproject.org/supremacy-clause/>.

In evaluating whether a State law is preempted by a Federal statute or regulation, courts typically start with the assumption that State powers are not superseded by a Federal act unless that is the clear purpose of Congress. When Congress has not expressly stated its intent, courts can infer Congress' intent to occupy a given field of regulation if it has legislated comprehensively, leaving no room for States to supplement. Similarly, courts can infer "field preemption" if Congress' act relates to a field where the Federal interest is so dominant that the Federal system can be assumed to preclude enforcement of State laws on the same subject.

Courts can also infer "conflict preemption" when there is a conflict between a State law and a Federal statute or regulation. Courts can identify such a conflict when a State law "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives."¹¹ When a Court determines that there is a conflict, the relative importance of the State's interest is immaterial; State law must always yield to Federal interests.

The Federal law that frequently comes into play to preempt State regulation of electricity is the Federal Power Act, discussed below, and FERC's actions thereunder.

B. The Dormant Commerce Clause of the U.S. Constitution¹²

Article I, Section 8 of the Constitution, known as the Commerce Clause, provides Congress with the power to "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." From this authorization of Congressional power, Courts have inferred a restriction on State power known as the "dormant Commerce Clause." This doctrine prohibits a State from discriminating against or unduly burdening interstate commerce. According to the Supreme Court, this prohibition on interfering with interstate commerce was rooted in the Framers' concern that economic Balkanization had the potential to doom the new union between the States.¹³

Under dormant Commerce Clause precedent, courts will typically strike down a State law if it expressly mandates differential treatment of in-state and out-of-state competing economic interests in a way that benefits the former and burdens the latter. Such laws are considered facially discriminatory, and courts subject them to strict scrutiny review. This exacting standard requires a State to demonstrate that the law has a non-protectionist purpose and that there is no less discriminatory means for achieving that purpose. Courts will also apply strict scrutiny if a law controls commerce occurring wholly outside the boundaries of the State. Courts look at whether the statute controls conduct in another State, which could give rise to inconsistent legislation being applied to the same activity.

A law that is not facially discriminatory can still be struck down by a court as unconstitutional under the dormant Commerce Clause if the effect or purpose of the law is to burden interstate commerce. In some cases, Courts apply strict scrutiny in evaluating these laws, but in other cases Courts use a balancing test that evaluates whether the burdens on interstate commerce are "clearly excessive in relation to the putative local benefits."¹⁴

¹¹ *Freightliner Corp. Myrick*, 514 U.S. 280, 287 (1995).

¹² This background description of the dormant Commerce Clause is excerpted from *State Power Project*, Environment and Energy Law Program, Harvard Law School, available at <https://statepowerproject.org/dormant-commerce-clause/>.

¹³ *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979).

¹⁴ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

C. FERC and the FPA

In the early 20th century, state and local agencies oversaw nearly all generation, transmission, and distribution of electricity. But the Supreme Court held in *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927), that the Commerce Clause bars the States from regulating certain interstate electricity transactions, including wholesale sales (i.e., sales for resale) across state lines. That ruling created what became known as the “Attleboro gap”—a regulatory void which, the Court pointedly noted, only Congress could fill. Congress responded to that invitation by passing the FPA in 1935. The Act charged FERC’s predecessor agency with undertaking “effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce.” *New York v. FERC*, 535 U.S. 1, 6 (2002).

1. *Wholesale Rates*

Pursuant to the FPA, FERC regulates interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce. *See* 16 U.S.C. § 824(b)(1). States, however, retain jurisdiction over the retail sale of electricity and the generation, transmission, and distribution of electricity in intrastate commerce. *Id.*

A wholesale sale is defined as a “sale of electric energy to any person for resale.” *Id.* § 824(d). The FPA assigns to FERC responsibility for ensuring that “[a]ll rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable.” *Id.* § 824d(a). FERC ensures these “just and reasonable” wholesale rates by enhancing competition—attempting “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 Cnty.*, 554 U.S. 527, 536 (2008).

As described in the discussion of the PJM Interconnection above, FERC adopted policies over the past thirty years to promote competition in the wholesale markets, including the issuance of Orders 888 and 2000. Those initiatives resulted in the creation of RTOs/ISOs to manage wholesale markets on a regional basis. Seven such wholesale market operators now serve areas with roughly two-thirds of the country’s electricity “load” (an industry term for the amount of electricity used). Each administers a portion of the grid, providing generators with access to transmission lines and ensuring that the network conducts electricity reliably. And still more important for present purposes, each operator conducts a competitive auction to set wholesale prices for electricity. FERC extensively regulates the structure of these competitive auctions to ensure that they efficiently balance supply and demand, producing a just and reasonable clearing price. *See FERC v. Electric Power Supply Ass’n*, 577 U.S. 260, 268 (2016) (the clearing price is “the price an efficient market would produce”).

2. *ROFR and Transmission Lines*

As described in the discussion of the PJM Interconnection above, ISOs oversee the operation and expansion of electric transmission grids. Each ISO issues a tariff, which establishes the terms by which its members build and operate grids. These tariffs are subject to the approval of FERC. Prior to FERC’s Order 1000, these tariffs previously allowed incumbent public utility transmission providers to exercise a federal ROFR under which incumbents held priority status in choosing to construct new electric transmission lines in their respective service territories.

FERC saw the problems that the federal ROFR was causing—“leading to rates . . . that are unjust and unreasonable,” in large part because “it is not in the economic self-interest of incumbent[s] to permit new entrants to develop transmission facilities,” even if those facilities “would result in a more efficient or cost-effective solution.” *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., 136 FERC 61051, ¶ 256 (2011) (Order 1000). Thus, as described above, Order 1000, among other things, eliminated the federal ROFR. *See* Order 1000 at 3 ¶ 7. Order 1000 specifically “direct[s] public utility transmission providers to remove from their [Open Access Transmission Tariffs] or other Commission-jurisdictional tariffs and agreements any provisions that grant a federal right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation.” Order 1000 at 3 ¶ 7.2.

In substance, FERC’s Order 1000 reformed “its electric transmission planning and cost allocation requirements for public utility transmission providers.” Order 1000 at 1 ¶ 1 (citing 16 U.S.C. § 824e). Order 1000 is also consistent with FERC’s effort to manage electric grids on a regional level but recognizes that states can continue to regulate electric transmission lines.

In accordance with Order 1000, PJM removed the federal ROFR provisions from its tariff. The Vandalia legislature thereafter proceeded with enactment of its Native Transmission Protection Act in 2014.

PROCEDURAL BACKGROUND

A. Capacity Factor Litigation

On June 6, 2022, ACES filed suit against the PSC over the Capacity Factor Order, arguing that it is preempted by the FPA pursuant to *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016). ACES argued that Vandalia’s program, in effect, sets an interstate wholesale rate, contravening the FPA’s division of authority between state and federal regulators.” *Hughes*, 578 U.S. at 163. ACES also argued that the Capacity Factor Order will seriously distort the PJM auction’s price signals, thus interfering with the method designed by FERC to achieve the goals under the FPA. *See* *EPSCA*, 570 U.S. at 268 (the clearing price is “the price an efficient market would produce”). Finally, ACES argued that the Capacity Factor Order is preempted by the FPA because it compels coal-burning utilities to sell their energy into PJM. *See* *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm’n of State of N.Y.*, 754 F.2d 99, 102 (2d Cir. 1985); *see also* *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 52 (2d Cir. 2018) (“What mattered in *Rochester Gas* was whether the retail rate adjustment, which factored in expected wholesale revenues, intruded on FERC’s jurisdictional turf by compelling wholesale market participation.”); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 97 (2d Cir. 2017) (arguing that “[c]ompelling a wholesale transaction—one that would not have taken place but for the State’s compulsion—plainly involves the regulation of wholesale sales and thus falls squarely within the field that Congress has occupied” in the FPA).

On June 27, 2022, the PSC moved to dismiss the action for failure to state a claim for two reasons. First, the PSC argued that ACES lacked standing because ACES was not subject to the Capacity Factor Order, nor is it a ratepayer that could be affected by the Order. While the Order could theoretically impact the economics of building and operating its Rogersville Energy Facility, the PSC argued that such injury is still hypothetical, particularly because the PSC had findings of fact that it would be economical for coal plants within Vandalia to run at 75 percent capacity. Thus,

the PSC argues that it is too speculative that a favorable decision by the Court could redress the injury.

Second, the PSC argued that, even if ACES had standing, the Capacity Factor Order is not preempted because, unlike in *Hughes*, there is no “tether” to the wholesale market. *Hughes*, 578 U.S. at 166 (nothing in this opinion should foreclose states “from encouraging production of new or clean generation through measures untethered to a generator’s wholesale market participation”). The PSC asserted that while LastEnergy and MAPCo do have to sell into PJM in order to comply with the Capacity Factor Order, that is by nature of LastEnergy’s and MAPCo’s FRR status with PJM, not the Order. The PSC also pointed to follow-up cases to *Hughes* analyzing state programs designed to subsidize operation of existing nuclear power plants through issuance of “zero emission credits,” or “ZECs,” which it asserts are more comparable to the situation at issue here.¹⁵

The district court granted the PSC’s motion to dismiss. It first determined that ACES lacked standing to bring its Supremacy Clause claim. Second, it found that, even if ACES had standing, the Capacity Factor Order does not violate the Supremacy Clause when analyzed under the ZEC line of cases.

B. ROFR Litigation

Not willing or able to wait the full 18 months to see if either LastEnergy or MAPCo would exercise its ROFR, on June 6, 2022, in the same Complaint as the FPA litigation, ACES brought suit against the PSC to contest Vandalia’s ROFR.¹⁶

ACES brought two challenges. First, ACES argues that Vandalia’s ROFR is preempted by the FPA and infringes on FERC’s authority, as set out in Order 1000. Second, ACES argues that the ROFR violates the dormant Commerce Clause in that it discriminates against out-of-state actors like ACES.

As to preemption, ACES argued that Order 1000 clearly prohibited ROFRs and that state ROFR laws, including Vandalia’s, directly target that process by jeopardizing the construction of transmission projects selected in an Order 1000 competitive solicitation. Thus, because such targeting nullifies the FERC-set rate, it is preempted. As to its dormant commerce clause argument, ACES argued that this law is essentially the same as the ROFR adopted by Texas, which was struck down by the Fifth Circuit—just like the Texas law, the Native Transmission Protection Act prevents those without a presence in the state from entering the portions of the interstate transmission market that cross into Vandalia. *See NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022). Further, even though there is a time period for the Native Transmission Protection Act—whereas Texas’s ROFR did not have one—an 18-month ROFR is so long that it essentially prevents any new entrants into the market because of the uncertainty and additional risk associated with a proposed transmission project, which hinders the ability to secure the necessary financing for such a massive construction project. ACES also argued that, even if there is no overt discrimination or discriminatory purpose, the burden imposed by the Native

¹⁵ *Coalition for Competitive Electricity v. Zibelman, supra*, and *Electric Power Supply Association v. Star*, 904 F.3d 518 (7th Cir. 2018).

¹⁶ “Because the PUCT oversees Texas’s electric utilities, the individual Commissioners of the PUCT are the proper parties in this case.” *NextEra Energy Cap. Holdings, Inc. v. Walker*, No. 1:19-CV-626-LY, 2020 WL 3580149, at *4 (W.D. Tex. Feb. 26, 2020). The same is true here in Vandalia.

Transmission Protection Act on commerce is clearly excessive in relation to the putative local benefits.

On June 27, 2022, the PSC also moved to dismiss ACES's ROFR claims. First, the PSC argued that there is no preemption and that many states have enacted similar legislation, without objection by FERC. As to the dormant Commerce Clause, the PSC argued that there is no discrimination against out-of-state entities—for instance, ACES is incorporated in Vandalia and both LastEnergy and MAPCo are incorporated in Ohio. Further, unlike the Texas law, this allows ACES to build the transmission line in 18 months if the incumbent utilities decline to exercise their ROFR. Thus, while there is an incumbency requirement, this ROFR is far less egregious than the one analyzed in the Fifth Circuit. Because of this, the burden on interstate commerce is far less than that in Texas.

The district court granted the PSC's motion to dismiss. It first found that the ROFR was not preempted by Order 1000. Next, the district court determined that Vandalia's ROFR does not violate the dormant Commerce Clause. The court rejected the Fifth Circuit's approach and instead found that the place of incorporation controls. Further, it determined that, under the *Pike* balancing test, the burden imposed on interstate commerce did not exceed the local benefits the Vandalia legislature intended to protect when enacting the Native Transmission Protection Act.

* * *

The district court granted the PSC's motion to dismiss on all issues in the same order on August 15, 2022. ACES filed a timely appeal of that order on August 29, 2022.