UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

C.A. No. 22-0682

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,	)	
Appellant,	)	
-v.-	)	C.A. No. 22-0682
CHAIRMAN WILL WILLIAMSON, *in his official capacity*, COMMISSIONER LONNIE LOGAN, *in his official capacity*, and COMMISSIONER EVELYN ELKINS, *in her official capacity*,	)	
Appellees.	)	

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR VANDALIA

BRIEF FOR THE APPELLEE

Team No. 40

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INTRODUCTION

ACES is asking this Court to upend a State's legitimate interest in regulating utilities in favor of out-of-state interests in electric energy. The development of electric transmission and generation facilities, however, are distinctly under the authority of the States, as recognized by the Federal Power Act ("FPA"), the Federal Energy Regulatory Commission ("FERC"), and courts.

For generations, Vandalia has properly exercised its authority to regulate the operations of its historic coal plants and protect its public interest. Pursuant to this power, its Public Service Commission ("VPSC") recently issued a Capacity Factor Order ("Order") that mandates its coal plants achieve a certain level of annual operational capacity to serve the public interest. In pursuance of its limited federal authority over transmission and electric energy sales, FERC removed a federal right of first refusal ("ROFR") from transmission tariffs in 2011. Vandalia responded to Order 1000 by enacting the Native Transmission Protection Act ("NTPA"), in 2014, which provided a ROFR to incumbent transmission owners in the state for a period of 18 months.

First, ACES challenges the Order as preempted by the FPA under the Supremacy Clause. However, ACES lacks standing to challenge the Order because (i) it's injury-in-fact is not concrete; (ii) its injury claim relies on unpredictable actions of third parties years in the future; and (iii) ACES' injury is not redressable by this Court because Vandalia's coal plants are not subject to this case, and therefore could achieve the operational capacity ACES fears without the Order's mandate. Moreover, the Order is not preempted because it regulates generation and retail sales which are squarely within Vandalia's police powers. It does not "impermissibly intrude" upon the wholesale market and federal authority because (i) the auction price is not "disregarded," instead Vandalia's bidders will receive exactly the auction clearing price the same as all other bidders; and (ii) the Order does not compel its generators to participate in the wholesale market.

Second, ACES challenges Vandalia's ROFR as being preempted by FERC's Order 1000 under the Supremacy Clause or violative of the dormant Commerce Clause. Order 1000 does not preempt Vandalia's ROFR because (i) it does not supersede State authority in transmission siting, (ii) Order 1000 indicates it does not supersede State transmission construction laws, and (iii) FERC has recognized State ROFRs in transmission tariffs. Vandalia's ROFR does not violate the dormant Commerce Clause under three prongs. One, the ROFR is not facially discriminatory because it is neutral, time limited, and benefits out-of-state entities. Two, the ROFR does not discriminate by purpose or effect because the law was enacted in response to Order 1000, is aimed at maintaining a status quo level of responsiveness in transmission, and applies equally to in- and out-of-state entities. Three, the burden of Vandalia's ROFR on interstate commerce is not clearly excessive in relation to the state's interest in regulating transmission utilities and maintaining status quo.

JURISDICTIONAL STATEMENT

The district court for the Norther District of Vandalia has jurisdiction of ACES claims under 28 U.S.C. § 1331. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291. ACES is appealing the Order granting the PSC's Motions to Dismiss entered on August 15, 2022. ACES timely filed its notice of appeal under Fed. R. App. P. 4(a) on August 29, 2022.

ISSUES PRESENTED

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

STATEMENT OF THE CASE

I. Regulatory Background

Regulation of utilities, including electric companies, is a legitimate use of State's police powers. *See Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The FPA establishes a cooperative approach to electricity regulation: the federal government has limited jurisdiction over the regulation of transmission and sole jurisdiction of wholesale electric markets, while States retain authority over transmission siting, electricity generation facilities, and retail sales. 16 U.S.C. § 824(b)(1); *New York v. FERC*, 535 U.S. 1, 24 (2002). The States' authority includes control over "siting and approval of transmission facilities." *S.C. Pub. Serv. Auth. V. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014). States' generation authority broadly includes actions that do not "impermissibly intrude upon the wholesale energy market." *Hughes v. Talen Energy Mktg.*, LLC, 587 U.S. 150, 153 (2016). Moreover, "States alone" regulate retail electricity sales. *See id.* at 150 (quoting *FERC v. Electric Power Supply Ass'n.*, 577 U.S. 260, 265 (2016).

Independent system operators ("ISOs") are FERC-approved entities that administer both interstate transmission grids and wholesale markets . *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1024 (8th Cir. 2020); 16 U.S.C. § 824d; *Hughes,* 578 U.S. at 150. In wholesale sales, ISOs operate "capacity auctions" where generators bid their ability to generate energy three years from that point. *Id*. ISOs then accept all bids needed to fulfill projected energy demand. *Id*. All winning bidders, regardless of the price bid, receive the "clearing price," which is equivalent to the highest accepted rate. *Id*. This clearing price is considered "just and reasonable," thus fulfilling FERC's FPA mandate. *See* 16 U.S. Code § 824d; *Hughes*, 578 U.S. at 150.

In transmission, ISOs operate interstate transmission grids by applying FERC-approved tariffs. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1024 (8th Cir. 2020); 16 U.S.C. § 824d. Historically, incumbent transmission providers had a federal ROFR for

construction of new transmission lines in their service territory. *LSP Transmission Holdings*, 954 F.3d at 1023. In 2011, FERC issued Order 1000 as a reform for transmission planning and cost allocation, which removed the federal ROFR. *Id.* Order 1000 acknowledged, however, that it did not preempt State regulations on siting, permitting and construction of transmission facilities. *Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities*, Order No. 1000, 136 FERC ¶ 61051, at P 227, 287 (July 11, 2011).

After Order 1000, several states enacted laws restoring ROFRs for incumbent transmission providers. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 314 (5th Cir. 2022). Since then, FERC has approved ISO tariffs incorporating state ROFRs, *LSP Transmission Holdings*, 954 F.3d at 1024, and two federal circuit courts have upheld State ROFRs. *Id.* (upholding in 8th Cir.); *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016). (upholding in 7th Cir.).

II. Factual Background

The VPSC is the electricity regulator in Vandalia. The VPSC has broad authority to set "just and reasonable" rates for utilities subject to its jurisdiction, and regulates the practices, services, and rates of public utilities in order to "provide the availability of adequate, economical and reliable utility services." Vand. Code § 24-2-3; *id.* § 24-1-1(a)(2). The VPSC requires utilities to obtain a certificate of convenience and necessity for transmission construction. *Id.* § 24-7-2.

Vandalia is one of the largest coal producers in the U.S. Coal power plants account for 91 percent of Vandalia's net electric generation energy needs. The PJM Interconnection ("PJM") administers the energy and capacity markets and transmission grid in Vandalia. Two utilities provide retail electricity and transmission in Vandalia, LastEnergy and Mid-Atlantic Power Co. ("MAPCo"). Both utilities are incorporated in Ohio and subject to VPSC and FERC jurisdiction.

Vandalia's legislature directed the VPSC to encourage coal plants operation at maximum reasonable output and ensure no more coal plants close, no more coal jobs are lost, and long-term

state prosperity is maintained. Vand. Code. § 24-1-1D(5), D(12). Accordingly, the VPSC issued a Capacity Factor Order requiring the state's coal plant operators to achieve a capacity factor of 75 percent in a year, finding that operating level to be economical. This Order allows operators to request retail rate increases to recover costs incurred by operating in compliance with this mandate.

Historically, incumbent transmission providers in Vandalia could exercise a federal ROFR to develop new transmission lines. However, Order 1000, in 2011, removed such federal ROFR. To return the status quo after Order 1000, Vandalia's legislature enacted the NTPA, providing a ROFR to incumbent electric transmission owners for the construction of new transmission lines connected to the incumbent's facilities. The NTPA limited the ROFR to 18 months and does not require incumbents to use it. Vand. Code § 24-12.3(d). Vandalia's ROFR applies to incumbent electric transmission owners, regardless of whether these are in- or out-of-state entities. *Id.*

Appalachian Clean Energy Solutions, Inc. ("ACES") is an energy company, incorporated in Vandalia, that sells electricity in wholesale markets. ACES does not own transmission facilities in Vandalia, but constructs and maintains transmission lines out of the state. In April 2020, ACES announced it planned to construct a natural gas generating plant in Pennsylvania, the Rogersville Energy Center, and a transmission line, the Mountaineer Express, to accommodate its electrical output in the grid and PJM's wholesale market. In April 2022, ACES sought a certificate from the VPSC to construct the Mountaineer Express portion located in Vandalia. The VPSC has not ruled on the certificate because LastEnergy and MAPCo have 18 months to exercise their ROFR.

III. Procedural Background

On June 6, 2022, ACES filed suit against the PSC to contest the Capacity Factor Order. ACES argued: 1) the FPA preempted the Capacity Factor Order pursuant to *Hughes*, 578 U.S. 150; 2) VPSC's Order sets an interstate wholesale rate and will distort PJMs auction price signals; and 3) the FPA preempts the Capacity Factor Order because it compels utilities to sell energy into PJM.

VPSC moved to dismiss ACES's preemption claim on June 27, 2022. The PSC made two arguments: 1) ACES lacks standing because it is not subject to the Capacity Factor Order and any potential economic injury is hypothetical; and 2) even if ACES has standing, the FPA does not preempt the Capacity Factor Order because there is no tether to the wholesale market and other states have programs subsidizing operation of a particular source generation.

On August 15, 2022, the district court granted the motion to dismiss on two grounds: 1) ACES lacked standing to bring a preemption claim; and 2) even if it had standing, the Order is not preempted when compared to other states' subsidies for a particular generation source.

On the same June 6, 2022 Complaint, ACES brought two challenges against the PSC to contest Vandalia's ROFR. First, ACES argued that the FPA preempts Vandalia's ROFR and the ROFR infringed on FERC's authority under Order 1000. ACES argued that Order 1000 prohibited state ROFR laws and that state ROFR laws nullify FERC-set rate by jeopardizing the construction of transmission projects selected in an Order 1000 competitive solicitation. The PSC moved to dismiss ACES's preemption claim on June 27, 2022. The PSC argued there is no preemption and that many states have enacted ROFRs without objection by FERC. On August 15, 2022, the district court granted the motion to dismiss finding that Order 1000 did not preempt the ROFR.

In its second challenge to Vandalia's ROFR on the June 6, 2022 Complaint, ACES argued that Vandalia's ROFR violated the dormant Commerce Clause. ACES raised three arguments: (i) that Vandalia's ROFR is essentially the same as Texas's ROFR, which the Fifth Circuit found to be plausibly discriminatory; (ii) that an 18-month time-limit prevents new entrants into the market; and (iii) that even if there is no overt discrimination, the burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. The PSC moved to dismiss ACES's dormant Commerce Clause claim on June 27, 2022. The PSC argued (i) that there is no

discrimination because the incumbent transmission providers are out-of-state entities; (ii) that Vandalia's ROFR law is different from the Texas law because it allows ACES to build the transmission line in 18 months if the incumbents did not exercise their ROFR; and (iii) that the burden of Vandalia's ROFR is far less than the one analyzed by the Fifth Circuit. On August 15, 2022, the district court granted the motion to dismiss finding that Vandalia's ROFR does not violate the dormant Commerce because the place of incorporation of the incumbents controlled, and the burden imposed on interstate commerce did not exceed the local benefits the Vandalia legislature sought to protect in enacting the ROFR. This appeal followed.

SUMMARY OF THE ARGUMENT

ACES is asking this Court to upend Vandalia's legitimate state police power to regulate utilities. The district court appropriately rejected ACES's challenges. This Court should affirm.

This Court lacks jurisdiction to rule on the merits of this dispute because ACES lacks standing to bring its claim. Standing has three elements that all must be satisfied–failure to meet any one element mandates a court dismiss the case. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Here, ACES fails to meet all three elements. First, ACES lacks a sufficiently "concrete" injury in fact. *See id*. Their alleged injury is a possible future economic harm they believe will occur due to a series of assumptions they have made to answer presently-unanswerable questions. Second, ACES' alleged future injury is not "fairly traceable" to VPSC's Order. *See id*. ACES is not subject to the Order so VPSC cannot inflict direct harm. Instead, ACES argues it suffers from the actions third parties may take in complying with, or reacting to, the Order. Predicting that future relies upon impermissibly unpredictable speculation and assumptions. Third, this Court cannot redress ACES' alleged future injury. *See id*. ACES alleges its future economic harm will result in part because Vandalia's coal plants will be operating at 75 percent of their capacity or more. However, these coal plants are not subject to this Court or any possible

order it issues. Therefore, nothing in this case will prevent these coal plants from operating at exactly the levels this Order requires. Because ACES fails to satisfy any one of these elements, this Court must dismiss this matter for lack of jurisdiction due to deficient standing.

VPSC's Order is not preempted by the FPA because it acted within its police powers. Under the FPA, states can regulate generation and retail sales while wholesale sales are solely within the federal domain. Federal Power Act, 16 U.S.C. § 824(b)(1). Appropriately, the Order requires Vandalia's coal plants to achieve an operational standard and allows them to recover any costs for achieving this standard by requesting higher retail rates. R. at 8. The Order does not intrude upon the federal boundary around wholesale markets because it avoids the fatal errors in Maryland's scheme. *See Hughes*, 578 U.S. at 163. First, the wholesale auction rate is not disregarded, changed, or substituted by the Order. Generators will receive only the wholesale auction clearing price if their bids are successful. Second, no generator is compelled to participate in the wholesale market. The Order attaches no strings to receiving its only financial compensation mechanism–higher retail prices. Further, this Court has two strikes against finding the FPA preempts VPSC's Order: 1) courts must assume no federal preemption occurred in areas of traditional state authority, as is the case here with generation and retail rates; and 2) preemption arguments about laws with a "collaborative federalism" model are "less persuasive." *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983) (citation omitted); *Hughes*, 578 U.S. at 167-68 (Sotomayor, J., concurring). With these two strikes and the Order staying within Vandalia's police powers, we urge this court against a finding of preemption.

FERC's Order 1000 does not preempt Vandalia's exercise of its police power in enacting a ROFR law. Under the Supremacy Clause, a federal law does not supersede the State's police powers unless Congress has expressed a clear purpose to do so. *New York*, 535 U.S. at 17–18. The

FPA limits federal jurisdiction over the regulation of transmission and sale of electricity and leaves authority over transmission siting to States. *Id.* at 24; 16 U.S.C. § 824(b)(1). FERC's Order 1000 even confirmed that States retain authority over transmission siting and construction, and denied federal preemption of that authority. Order 1000 at P 287. Moreover, FERC has approved–and federal courts upheld–a tariff incorporating state ROFRs. *MISO Transmission Owners*, 819 F.3d at 337. Accordingly, Congress, FERC, and the federal courts agree that Order 1000 does not preempt a State's legitimate authority over transmission siting.

Vandalia's ROFR is also valid under the dormant Commerce Clause because the law does not discriminate against interstate commerce on its face or through its purpose, nor imposes an undue burden on it. The law does not facially discriminate against interstate commerce because it is time-limited, distinguishes transmission providers based on incumbency status, and applies to out-of-state transmission entities. *LSP Transmission Holdings*, 954 F.3d at 1024–29. Vandalia's ROFR does not have a discriminatory purpose because the legislature, in response to Order 1000, to maintain a status quo on transmission responsiveness it in response, and it applies equally to entities from Vandalia or out-of-state. *Id.* at 1024–30. Vandalia's ROFR is not unduly burdensome because the state has a legitimate interest in regulating transmission utilities and maintaining status quo, and incumbents are not obligated to exercise the ROFR. *Id.* at 1029–31 (citing *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983)). Moreover, FERC has recognized that ROFRs can provide benefits such as certainty in transmission development and support reliability, and has proposed to reinstate a conditional federal ROFR. Notice of Proposed Rulemaking*, Building for the Future Through Electric Regional Transmission Planning and Cost Allocation and Generator Interconnection*, 179 FERC ¶ 61,028, at P 366, 372–74 (Apr. 21, 2022).

ARGUMENT

I. ACES lack standing to Challenge VPSC's Capacity Factor Order

"Standing" is a Constitutional hurdle that each litigant must overcome before a federal court may rule on a dispute. *See* U.S. CONST. art. III, § 2, cl. 1. With no standing, a federal court cannot issue a ruling. *See Whitmore v. Arkansas*, 495 U.S. 149, 154-55 (1990). To demonstrate standing, a litigant must meet each of these elements: 1) Injury in Fact: an invasion of a legally protected interest that is a) concrete and particularized, and b) actual or imminent, not "hypothetical"; 2) Fairly Traceable: it must have a causal connection between the injury and conduct complained of, injury must be the result of a defendant's actions and not a third party not before the court; and 3) Redressable: it must be "likely" the court can redress the injury by a favorable decision. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). Litigants bear the burden of establishing each element is satisfied, *id.* at 561, by "clearly … alleg[ing] facts" that support each element. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

Here, ACES fails to satisfy any of the standing elements. First, their alleged injury-in-fact is too speculative because it is based on many assertions to presently-unanswerable questions. Second, their alleged injury is not fairly traceable to this Order because any injury would be caused by the unpredictable acts of third parties. Finally, this Court cannot redress ACES' injury because Vandalia's coal plants may still operate at 75 percent capacity even after a favorable ruling for ACES. For these reasons, ACES lacks standing and therefore this Court must dismiss this case.

a. ACES Alleged Injury Is Not Concrete.

First, a litigant must have suffered an "Injury in Fact"–harm to a party's protected interests that is both concrete and particular. *See Lujan*, 504 U.S. at 560-61. "Concrete" injuries "must actually exist and cannot be "abstract." *Spokeo, Inc.*, 578 U.S. 330, 340 (2016). Litigants must "plausibly and clearly allege a concrete injury." *See Thole v. U. S. Bank N.A*, 140 S. Ct. 1615, 1621

(2020). This becomes challenging for litigants raising claims for future injuries. Standing for future injuries only when the harm is "certainly impending." *Compare Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (finding a plaintiff established a future injury because the plaintiff intended to violate the challenged law), *with Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013) (finding plaintiffs "objectively reasonable likelihood" of future harm is not sufficiently impending to establish injury in fact because based on too many unknowns).

Here, ACES future injury is not "certainly impending." Their alleged injury appears to be economic harm to their planned natural gas plant Pennsylvania when it is operational. R. at 5. First, VPSC has a finding of fact that complying with this order will be "economical," R. at 8, which means this Order will have no injurious effect on ACES.Second, ACES has not shown how complying with this Order will cause harm to others in the wholesale market. Third, this plant is years from operation and is undergoing significant changes in its functions and funding. In September 2022, ACES shifted its plans to capture carbon and fund its construction in part through federal tax credits. R. at 5. This creates many unanswerable questions. Will the facility ever actually open? When finally open, how much many of its planned functions will have changed? Will it sell its energy on the wholesale market? Will it rely on tax credits and incentives instead of revenue from the wholesale market? Will Vandalia's utilities participate in the wholesale market when ACES' facility opens? Even if it is an objectively reasonable likelihood that ACES' facility will participate in the wholesale market alongside VPSC Order-compliant generators, alleging harm to a facility that is undergoing significant design, functionality, and financing changes and is years from operation, is simply too speculative to be a concrete injury in fact.

b. <u>ACES' Alleged Injury Is Not "Fairly Traceable" to VPSC's Order.</u>

Second, a litigant's injury must be "Fairly Traceable" to the defendant's actions. *See Lujan*, 504 U.S. at 560-61. Specifically, injuries are not fairly traceable to a defendant when the chain of

causation "rest[s] on speculation about the decisions of independent actors." *DOC v. New York*, 139 S. Ct. 2551, 2566 (2019) (citation omitted). Standing claims that depend on the actions of third parties are traceable to a defendant only if the third party's actions are "predictable." *Id*. (finding non-citizens taking the census are predictable because of their relatively unified goals of remaining in the U.S. and because of reliable data on past actions makes their future behavior "predictable").

Here, ACES is not subject to the Order–it has no coal plants in Vandalia. Therefore, it can only satisfy this element by speculating about third parties' behavior at an unknown point years in the future. Unlike in *DOC*, where non-citizens taking the census in where a group has relatively unified motivations, *id*., the PJM auction market is filled with many third parties including generators of all kinds, states with divergent goals, and a federal government with shifting priorities. Further, PJM, state, or federal authorities could issue new orders that change participants behavior, rendering data on prior market actions less reliable. To succeed here, ACES must establish that these actors will behave predictably. It is simply too speculative to capably predict how market participants may behave when ACES' facility opens at some point years in the future.

c. <u>This Court Cannot Redress ACES' Alleged Injury.</u>

Third, a court must be likely to redress the litigant's injury if awarded a favorable decision. *See Lujan*, 504 U.S. at 560-61. Redressability is more difficult in matters that depend on third parties' behavior. For injuries that involve third parties, the court must "know" how they would act if the plaintiff received a favorable decision, and whether this would result in the outcome the plaintiff seeks. *See N. Laramie Range All. v. FERC*, 733 F.3d 1030, 1038 (10th Cir. 2013). Moreover, the party that can resolve the injury must be subject to a possible court order in the plaintiff's favor. *See Lujan*, 504 U.S. at 571 (finding a plaintiff's claim was not redressable because the actual party causing the injury was not before the Court and was not subject to a possible order in the plaintiff's favor).

Here, finding the Order is preempted would not redress ACES' alleged injury because it would not stop Vandalia's coal generators from operating at 75 percent capacity or more at some point in the future. Neither the coal plants nor their operators are subject to the outcome of this case. This Court cannot reliably assure ACES it will not feel the effects of the coal plants operating at much higher capacities in the future. Therefore, ACES' injury is not redressable.

d. <u>This Court Lacks Jurisdiction Over This Matter Due to ACES' Deficient Standing</u>

This Court lacks must dismiss this matter due to lack of subject matter jurisdiction due to ACES' deficient standing. First, ACES' alleged injury-in-fact is insufficiently concrete. Second, unpredictable third-party actions that may or may not occur render this matter unfairly traceable to VPSC's Order. Third, this Court cannot redress ACES' alleged injury because Vandalia's coal plants will be free to operate at or above the capacity mandated in VPSC's Order, thereby rendering a positive ruling for ACES meaningless. This Court must dismiss for lack of standing.

II. <u>VPSC's Order is Not Preempted by the Federal Power Act</u>

Congress carefully crafted the FPA to solve Constitutional challenges created by the electric industry. States exercise authority over generation facilities and retail sales, while federal regulators alone set policy in the wholesale electricity market. Federal Power Act, 16 U.S.C. § 824(b)(1); *see Hughes v. Talen Energy Mktg*., *LLC*, 578 U.S. 150, 167-68, (2016). These divisions can get blurred and may raise Constitutional questions when states pursue regulations that ultimately affect or involve the wholesale energy market.

The Supremacy Clause provides that federal laws, and federal regulations "shall be the Supreme law of the land." U.S. CONST., art. VI, cl. 2. Thus, federal acts can displace, or preempt, state law explicitly or implicitly. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947).

State acts may be impliedly preempted in two ways: 1) field preemption, where "congress has legislated so comprehensively to occupy an entire field of regulation," or 2) "conflict

preemption," where the state law is an "obstacle" to Congress accomplishing its "full purposes and objectives." *See Hughes,* 578 U.S. at 162-63. To find field preemption, courts must determine the state's act "impermissibly intrude[ed]" on an area exclusively under federal jurisdiction. *Id.* at 153. In this analysis, consider the state's intended target: whether its policy is "aimed" at a matter within state or federal authority. *See Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 385 (2015). To find conflict preemption in disputes regarding electric generation policies, courts must determine the state "disregards" the federal action and substitutes its own action. *See, e.g*., *Hughes*, 578 U.S. at 166 (finding a state program that substitutes FERC's wholesale market-clearing price for its own state-determined rate is preempted); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 369 (1988) (finding a state may not declare the FERC-established wholesale rate is unreasonable by altering the amount the wholesale seller may recover); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970-78 (1986) (finding a state rule that, in effect substituted FERC's wholesale rate for its own state-determined rate, is preempted).

a. <u>This Court Must Assume the FPA Does Not Preempt VSPC's Order</u>

Before any statutory analysis begins, courts must be highly skeptical of implied preemption claims when asserted in an area of traditional state power or regarding a law that expressly creates cooperative schemes between federal and state authority. When analyzing an area of traditional state power, courts must assume in their case-specific inquiry that there is no preemption unless preemption "was the clear and manifest purpose of Congress." *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983) (citation omitted). Further, preemption arguments are "less persuasive" when raised regarding laws that deliberately designed an "interplay between state and federal regulation." *See Hughes*, 578 U.S. at 167-68 (Sotomayor, J., concurring) (citing *New York State Dept. of Social Servs. v. Dublino*, 413 U. S. 405, 421 (1973)).

Electric generation, its economic feasibility, and setting retail rates are all traditional state powers, *see Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n,* 461 U.S. 375, 377 (1983), and therefore courts must assume there is no preemption in cases involving these matters. Determining the "economic feasibility" of electric generation facilities has been a state power for more than 100 years. *See Pac. Gas & Elec. Co.*, 461 U.S. 190, 205 (1983). Further, states alone set retail rates. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265 (2016).

Preemption arguments involving the jurisdictional disputes within the FPA are "less persuasive" because it is a "collaborative federalism" law. *See Hughes*, 578 U.S. at 167-68 (Sotomayor, J., concurring). States and federal governments share authority out of necessity– Congress established this power-sharing arrangement to "fill the [*Attleboro*] gap," where state regulation of electric sales and some elements of transmission must end at a state's borders. *See Ark. Elec. Coop. Corp.*, 461 U.S. at 377-380.

Here, this Court must assume there is no preemption and therefore may find preemption only if that was Congress "clear and manifest purpose." This Order is focused on matters of traditional state authority, including generation facilities and retail rates. Further, VPSC issued this Order partly in response to its legislative mandate to "to ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." Vand. Code § 24-1-1(a)(3). These are all policies traditionally established and managed by state authority. Additionally, this Court must find ACES' preemption arguments "less persuasive" because they are challenging the cooperative, power-sharing relationship between state and federal governments that Congress carefully created in the FPA. Therefore, this Court must begin its analysis of this preemption question with these two strikes against a finding of preemption.

b. VPSC's Order is Not Field Preempted Because It Respects the Auction Price and Does Not Compel Activity in the Auction Market

i. States Have Wide Power to Regulate their Generation Facilities.

The FPA gives FERC sole authority to regulate the field of the wholesale energy market. *Hughes*, 578 U.S. at 153. State actions that "impermissibly intrude" on this federal jurisdiction are preempted. *Id*. Conversely, states may regulate generation and retail sales largely without interference from federal acts. *See, e.g.*, *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 52 (2d Cir. 2018) (finding a state credit aimed at preserving certain generators were not intruding on federal authority despite bidding into the wholesale market); *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) ("[B]ecause states retain authority over power generation, a state policy that affects price only by increasing the quantity of power available for sale is not preempted by federal law"); *Rochester Gas & Elec. Corp*., 754 F.2d 99 (2d Cir. 1985) (finding a state setting retail rates in part by considering projected future wholesale rates is not preempted).

States intrude on federal control of the wholesale market, and are therefore preempted, on a narrow basis–when they either: 1) disregard the FERC-approved wholesale price; or 2) compel participation in the wholesale auction market. *Hughes*, 578 U.S. at 166 (2016). States are freely encouraged to explore other measures that "incentivize" certain types of generation facilities if they do not exceed these two boundaries. *Id*.

Disregarding the FERC-approved price occurs when a state effectively substitutes the wholesale auction clearing price for a different, state-determined rate. *Id*. at 163-165. State actions that merely "incidentally affect" the clearing price is not sufficient to "disregard" the federal price. *Id.* at 165 (citing *Oneok*, 575 U.S. at 385). *See Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 369 (1988) (finding a state rule that fixed its own wholesale rate is preempted); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 970-78 (1986) (same).

States compelling generators to participate in the auction market is found only when they expressly direct generators to bid into the auction market. *Compare Hughes*, 578 U.S. at 163 (2016) (finding that a state mandate that generators must "participate in the PJM capacity auction" to receive the special state-created clearing price is preempted), *with Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 523 (7th Cir. 2018) (finding a state credit given to certain generators who simply "generate power" are not compelled to participate in the auction market when they have "discretion" to join or eschew the auction process). A generator choosing to participate in the auction market is not sufficient to find they were compelled to do so. *See Star*, 904 F.3d at 523.

Both the price and compulsion violations occurred in *Hughes*. Maryland scheme disregarded the fluctuating wholesale auction price "by guaranteeing that [generators] would receive 'the difference between… the clearing price' and the state-determined 'price guaranteed in the contract for differences.'" *See Zibelman*, 906 F.3d at 5 (quoting *Hughes*, 578 U.S. at 159). However, generators may receive that guaranteed price *only if* their bid cleared the PJM auction. *Hughes*, 578 U.S. at 159-60. Therefore, generators were compelled to participate in the auction which created an impermissible intrusion into the federal authority over the wholesale market.

ii. <u>VPSC's Order Does Not Disregard the Auction Clearing Price</u>

Unlike *Hughes*, VPSC's Order does not disregard the auction clearing price. The Order does not guarantee a fixed price or declare the auction clearing price "unreasonable." To the contrary, this Order gives generators nothing. Generators must bear the risk of profit or loss in their wholesale bids alone. This is a market-based approach to regulating Vandalia's coal plants.

Rather than setting the wholesale rate itself, Vandalia properly exercises its police powers by allowing its utilities to recover their costs from potential losses in the auction through possible retail rate increases. Specifically, Order-compliant generators may request VPSC raise their retail rates if their cost for bidding capacity into the wholesale auction market exceeds the market-

clearing price. R. at 8. Setting retail rates is indisputably within a state's police powers. *See* Federal Power Act, 16 U.S.C. § 824(b)(1); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265 (2016).

When setting retail rates, VPSC may consider wholesale market profits and losses when setting these retail rates. *See, e.g.*, *Rochester Gas & Elec. Corp*., 754 F.2d 99 (2d Cir. 1985) (finding a PSC acted properly when setting retail rates based in part upon PSC-projected wholesale rates). Establishing retail rates based in part on the wholesale market does not effectively require generators to bid a certain price or participate in the auction process at all. *Id*. Accounting for wholesale prices when setting retail rates is a common practice for PSCs. *Id*. Moreover, these retail rates must be "just and reasonable" so there is likely a limit on how high and how often these rates may be set. *See* Vand. Code § 24-2-3.

These rate increases mirror the FPA-compliant generation regulations in New York's nuclear energy credit program. New York's PSC created a subsidy that "aims to prevent nuclear generators… from retiring." *Zibelman*, 906 F.3d at 47. Eligible generators are paid a sum that changes every two years that is based in part on PSC-projected ISO capacity prices. Id. However, the credit's value does not shift on a transaction-by-transaction basis to ensure profit or provide a fixed price. *Id*. Eventually, the cost of this credit is "pass[ed] along… to consumers." *Id*. at 48. Here, VPSC issued its order in part to prevent coal plants from retiring. Vand. Code § 24-1-1D(5). Vandalia's utilities may be granted retail rate increases based in part on projected future wholesale capacity prices, but the retail rates will not be adjusted on a transaction-by-transaction basis to ensure a certain return. Finally, costs of a projected loss in the wholesale market would be passed to consumers. R. at 8; *see Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018) (finding an Illinois program that mirrors New York's not preempted because the subsidy does not change on a transaction-by-transaction basis to ensure generators are profitable).

Cost recovery through higher retail rates is permissible even if this "affects the costs of and the prices of interstate wholesale sales." *See Oneok*, 575 U.S. at 385 (citation omitted). This Court should reject any argument that asserts the effects this Order may have on generators' bids into the wholesale market renders it preempted.

Finally, VPSC's aim in this Order is to support the public interest and carry out its legislative mandate to achieve goals that are all within Vandalia's police power. The Vandalia legislature commands the VPSC to "ensure no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." Vand. Code § 24-1-1(a)(3). These are aims squarely within the state's domain.

VPSC's Order is not preempted because it does not disregard the wholesale auction price. The Order does not set a fixed price. It does not declare the wholesale price "unreasonable." It properly allows cost recovery without stepping into federal jurisdiction. Its aims are matters within the state's jurisdiction. For these reasons, the Order is not preempted due to auction price effects.

iii. VPSC's Order Does Not compel Auction Market Participation

VPSC does not compel market participation. Nothing in the Order mandates these generators make bids into the capacity market. To qualify for the only financial incentive for complying with the Order, possible retail rate increases, a generator must simply generate power equivalent to at least 75 percent of its capacity. R. at 8. Generators may choose to sell their power in any way they see fit–via the auction market or in bilateral contracts. *Compare Hughes*, 578 U.S. at 163 (2016) (finding that an explicit state requirement that generators "participate in the PJM capacity auction" to receive the special state clearing price renders the program preempted), *with Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 523 (7th Cir. 2018) (finding a state does not compel auction market participation because its generators have "discretion" to sell their power in

any manner they see fit). VPSC does not mandate participation in the wholesale market to request increased retail rates. Therefore, this Order does not intrude on federal authority.

c. VPSC's Order is Not Conflict Preempted Because Vandalia's Generators Will Receive the Auction Market-Clearing Price

VPSC's Order is not conflict preempted because it is compatible with achieving Congress' purpose in creating the FPA. Congress' purpose in the FPA is, in part, to ensure that wholesale rates are "just and reasonable." 16 U.S.C. § 824(b)(1). Market-clearing prices resulting from the RTO/ISO auction prices are presumed reasonable. *Hughes*, 578 U.S. at 153. Therefore, state acts that contravene or alter that FERC-approved auction price are preempted.

Here, there is no conflict preemption because Vandalia's generators will receive the PJM market-clearing wholesale price. At no point will the state substitute its own price. VPSC does not guarantee a different, fixed price. In *Hughes*, Maryland's program was conflict preempted because it guaranteed eligible generators a fixed price for their capacity that was wholly different from that which is set by the auction market. 578 U.S. at 164. Moreover, Vandalia will not restrict the amount paid buy a wholesale buyer nor the amount collected by a wholesale seller. *See, e.g.*, *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 369 (1988) (finding a state act that disallowed a wholesale seller to recover the full price as set by FERC that it was owed from a wholesale buyer effectively declares the FERC rate unreasonable and is therefore preempted). Congress' purpose of setting "just and reasonable" wholesale rates will not be frustrated by this Order.

d. VPSC's Order is Neither Field Nor Conflict Preempted

VPSC's Order is not field nor conflict preempted. It is not field preempted because the Order does not disregard the capacity market auction price, nor does it compel activity. It is not conflict preempted because the Order is compatible with the FPA's goals and does not substitute or alter the market-clearing price. Finally, this Court must analyze ACES' preemption claim with two strikes against it: first, this Court must assume no preemption occurred because generation is

traditionally governed by states, and second, the FPA establishes a cooperative power arrangement and arguments to disrupt that balance are "less persuasive." For the reasons above, this Court should not find the Order is preempted by the FPA.

III. FERC's Order 1000 Does Not Preempt Vandalia's ROFR

The Supremacy Clause provides that the Constitution and the laws of the United States "shall be the Supreme law of the land." U.S. Const., art. VI, cl. 2. Federal regulation may displace State law expressly in their statutory language or by inference when it leaves no room for States to supplement it. *Rice*, 331 U.S. at 230. Courts, in reviewing State law preemption claims, start with the assumption that a federal statute does not supersede the State's police powers unless Congress expressed a clear purpose to do so. *Id.*; *New York*, 535 U.S. at 17–18.

a. Congress, FERC, and Federal Courts Agree that States Have Authority over Siting, Permitting, and Construction of Electric Transmission Facilities

First, the FPA defines the federal government's role in the regulation of the electric energy transmission and sale. 16 U.S.C. § 824 et seq. (2018). This role is limited. Under the FPA, there is federal authority to regulate "transmission of electric energy in interstate commerce and … the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). This federal authority, nowadays, lies on FERC. 42 U.S.C. § 7134 (2018).

The FPA, however, also recognized the role of States in regulating transmission and sale of electric energy. 16 U.S.C. § 824(b)(1). In the FPA, Congress expressly identified States' jurisdiction over facilities used for "the generation of electric energy," "local distribution," and "transmission of electric energy in intrastate commerce." *Id.* Accordingly, Congress left to the States the regulation of transmission facilities and did not express an intent to do otherwise.

Second, while the FPA did not expressly address preemption, the Supreme Court has identified a presumption against preemption of state law by federal law when a state authority

conflicts with the existence of federal authority. *New York*, 535 U.S. at 17–18. In reviewing FERC's authority over transmission sales, the Court has recognized that States retain authority over transmission siting even when the federal government asserted jurisdiction over sales of unbundled transmission. *New York*, 535 U.S. at 24. The lower courts continue to follow this precedent recognizing States jurisdiction over electric transmission infrastructure under the FPA– specifically, over siting, permitting and construction of electric transmission facilities. *See Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009), *Ill. Com. Comm'n v. Fed. Energy Regul. Comm'n*, 721 F.3d 764, 773 (7th Cir. 2013). Moreover, even courts in ROFR litigation have clarified that States retain control over siting and approval of transmission facilities. *S.C. Pub. Serv. Auth* , 762 F.3d at 76 (D.C. Cir. 2014) (challenging FERC's authority to regulate ROFRs); *LSP Transmission* Holdings, 954 F.3d at 10231 (upholding Minnesota's ROFR); *NextEra Energy Capital Holdings, Inc.*, 48 F.4th at 313 (challenging a State ROFR); *MISO Transmission Owners*, 819 F.3d at 337 (allowing MISO to honor state ROFRs in tariff).

Third, FERC has confirmed State's authority over transmission. Order 1000, 136 FERC ¶ 61051, at P 287 (July 11, 2011). In Order 1000, FERC highlighted that regulation of transmission construction, ownership, and siting was reserved to the states. *Id.* FERC's authority over electric transmission is focused on transmission tariffs and agreements, not transmission construction. *Id.*

The States' authority over transmission siting is clear. There is consensus between the legislative, executive, and judicial branches that the States have jurisdiction over the transmission siting and construction. Vandalia's ROFR is an exercise of such State power over siting and construction of electric transmission facilities. Congress, FERC, and the courts agree that Order 1000 does not supersede such State right. Therefore, FERC's Order 1000 does not preempt Vandalia's ROFR because it does not expressly remove the State's transmission siting authority.

b. Order 1000 Confirms No Preemption of State Transmission Siting Laws

The Supreme Court, in *New York v. FERC*, held that FERC did not exceed its federal authority over electric transmission when the text of its rule, Order 888, recognized that States retained authority over transmission siting. *New York*, 535 U.S. at 24 (citing Order No. 888, *Promoting Wholesale Competition Through Open Access Non–Discriminatory Transmission Services by Public Utilities*, F.E.R.C. Stats. & Regs. ¶ 31,036 at 31,782 n. 544). Order 1000, like Order 888, expressly denies federal preemption of State's rights over construction of transmission construction. Order 1000, at P 227. FERC specifies–thrice–that nothing in Order 1000 "is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Order 1000 at P 227, 253 n. 231, 287. FERC's Order 1000 language is clear; it confirms there is no federal preemption of State transmission siting laws.

c. FERC Has Approved Recognition of State ROFRs in Transmission Tariffs

ACES's challenge that State ROFRs nullifies FERC's authority over transmission rates because it jeopardizes transmission construction is misplaced. FERC's actions after implementing Order 1000 demonstrate that State ROFRs do not nullify the federal transmission rate-setting authority. FERC, in executing its transmission rate-setting authority, has approved inclusion of state ROFRs in MISO's Open Access Transmission Tariff (OATT). *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC 61037, 61176 ¶ 25 (2015). Seven states participating in MISO–Iowa, Indiana, Michigan, Minnesota, North Dakota, South Dakota, and Texas–have a state ROFR law in place. *See* IA Code § 478.16(2), (3); IN Code §8-1-38-9; MCL §460.593; Minn. Stat. § 126B.246; N.D. Cent Code § 49-03-02; S.D Codified Laws § 49-32-20; TX Util. Code § 37.051. At least one of these State ROFR laws–Minnesota's–was upheld when challenged in two different federal circuits. *MISO Transmission Owners*, 819 F.3d 329 at 337 (upholding ROFR in 7th Cir.);

LSP Transmission Holdings, 954 F.3d at 1031 (upholding ROFR in 8th Cir.). Moreover, two of the MISO states with ROFRs–Indiana and Michigan–also participate in PJM. PJM, Territory Served, https://www.pjm.com/about-pjm/who-we-are/territory-served (May 10, 2021). As such, upholding Vandalia's ROFR would confirm and align State authority in MISO and PJM.

FERC's approval of a tariff incorporating state ROFRs and the upholding of State ROFRs incorporated under such tariff in two different circuit courts demonstrate that State ROFRs do not nullify its transmission rate-setting authority. State ROFR laws and FERC's transmission rate-setting authority can coexist without conflict. Thus, Order 1000 did not preempt State ROFR laws.

III. Vandalia's ROFR Does Not Violate the Dormant Commerce Clause

The Commerce Clause provides Congress the authority to regulate interstate commerce. *LSP Transmission Holdings*, 954 F.3d, at 1026; U.S. Const. art I, § 8, cl 3. Under the Commerce Clause, courts recognize an implicit dormant Commerce Clause keeping states from enacting laws that discriminate against or are unduly burdensome on interstate commerce. *LSP Transmission Holdings*, 954 F.3d, at 1026. In reviewing dormant Commerce Clause claims, courts consider whether the law is discriminatory on its face, whether it has a discriminatory purpose or effect, and whether it benefits local interest by placing an undue burden on interstate commerce. *Id.* at 1018, 1026 (citing *U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1067 (8th Cir. 2000)); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

Two federal circuit court cases have addressed dormant Commerce Clause challenges on State ROFR laws–*NextEra v. Lake* in the Fifth Circuit and *LSP Transmission Holdings* in the Eight Circuit. *LSP Transmission Holdings*, 954 F.3d, at 1029–30; *NextEra Energy Capital Holdings, Inc.*, 48 F.4th, at 313. Both laws established a ROFR for incumbents in transmission construction. Minn. Stat. § 216B.246; TX Util. Code § 37.051. The *NextEra* court found a plausible case for

interstate discrimination when Texas enacted an unlimited ROFR in response to an ISO awarding a transmission project to a non-incumbent. 48 F.4th, at 313. The *LSP Transmission Holdings* court upheld a time-limited ROFR enacted in response to Order 1000. 954 F.3d, at 1029–30.

a. <u>Vandalia's ROFR Is Not Facially Discriminatory</u>

In reviewing ROFR claims under the dormant Commerce Clause, the courts initially determine whether the State law, in its text, facially discriminates against out-of-state interests. 954 F.3d, at 1027; 48 F.4th, at 321. The *LSP Transmission Holdings* court held that Minnesota's ROFR law was not facially discriminatory against out-of-state entities when the incumbents within the State included entities headquartered in five different states and the law applied "evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere." 954 F.3d, at 1028–29. That court also identified that States have longstanding authority over the siting, permitting, and construction of transmission, as FERC recognized in Order 1000. *Id.*

In *NextEra*, the court held that petitioners stated a claim that Texas's ROFR law discriminated against interstate commerce and remanded the case for the district court to determine whether Texas had no other means to advance its legitimate local purpose. 48 F.4th, at 326. The *NextEra* court indicated that a State ROFR law can discriminate against interstate commerce even though most incumbent transmission providers benefitting from it were headquartered outside of the State. *Id.* at 324. The court differentiated Texas's ROFR law from Minnesota's ROFR explaining that Minnesota's law did not ban "new entrants outright" because it had a time limit. *Id.* at 323. The court described Texas's law as "lifetime ban on building lines for interstate grids that reach into the state." *Id.* at 326. Furthermore, the court also indicated that companies that had not built transmission lines in Texas before enactment of the ROFR law, could never build transmission lines in the state. *Id.* at 325. However, the *NextEra* dissent expressed that Texas's

ROFR law was not facially discriminatory because it drew a neutral distinction based on incumbency status, not on state of residency. *Id.* at 325 (Elrod, J., dissenting).

By its text, Vandalia's ROFR law is more like Minnesota's law than Texas's. Like Minnesota's, Vandalia's law provides a time limit for incumbents to exercise their ROFR, after which non-incumbents may pursue transmission construction in the incumbent's area. Vand. Code § 24-12.3(d). Vandalia's law specifies that "[i]f such incumbent electric transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line." *Id.* Unlike Texas, Vandalia's ROFR law is not a lifetime ban on non-incumbents; and, it does not ban new entrants outright because it has a time limit. *Id.* Vandalia's law neutrally distinguishes transmission providers based on incumbency status. *Id.* Moreover, it applies evenhandedly to in- and out-of-state entities. Therefore, it is not facially discriminatory.

In applying the text of the law, the operation and administration of transmission services in Vandalia, and benefits derived thereof, are also more alike to those in Minnesota than Texas. In Minnesota, transmission services are governed by a single interstate transmission organization, MISO. *LSP Transmission Holdings*, 954 F.3d at 1024. Entities from five different states are incumbent transmission providers in Minnesota, many of which provide transmission services in other states. *Id.* at 1028. Moreover, Minnesota's ROFR law applies equally to both in- and out-of-state entities, benefitting incumbent regardless of their state of domicile. *Id.*

In contrast, while three interstate transmission organizations cover part of Texas, a single intrastate transmission organization, the Electric Reliability Council of Texas (ERCOT) covers most of the State. *NextEra*, 48 F.4th, at 313. According to ERCOT, its grid covers seventy-five (75) percent of Texas's land and it manages about ninety (90) percent of Texas's electric load. ERCOT, ERCOT to Provide Real-Time Energy Generation Usage (Dec. 15, 2022)

https://www.ercot.com/news/release/2022-12-15-ercot-to-provide. Thus, Texas's law will almost exclusively derive benefits in state, and only a tenth or less of the benefits will flow out-of-state.

Like Minnesota, a single interstate organization–PJM–governs Vandalia's transmission services. Even benefitting more out-of-state interests than Minnesota, Vandalia's two incumbent transmission providers are out-of-state entities, MAPCo and LastEnergy. Accordingly, the benefits derived from Vandalia's ROFR will exclusively benefit out-of-state interests. Because Vandalia's ROFR is neutral, time-limited, and benefits out-of-state entities it is not facially discriminatory.

b. Vandalia's ROFR Does Not Have a Discriminatory Purpose or Effect

In reviewing whether a state ROFR law has discriminatory purpose or effect, courts perform a factual development of the events leading up to the challenged decision. *NextEra*, 48 F.4th, at 326–27. In *NextEra,* the court found it plausible that Texas's ROFR law had a discriminatory purpose because the state's legislature enacted the law, in 2019, after MISO–an interstate transmission organization–selected a non-incumbent out-of-state entity to construct a transmission line in the state. *Id.* at 327. The *NextEra* court did not elaborate on the "effects-focused" claims beyond stating those were "just as, if not more, fact dependent." *Id.*

In *LSP Transmission Holdings*, the court held that Minnesota's ROFR law did not have a discriminatory purpose when the legislature enacted the law, in 2012, in response to FERC's Order 1000 removal of the federal ROFR. *LSP Transmission Holdings*, 954 F.3d, at 1024; Minn. Stat. § 216B.246. The *LSP Transmission Holdings* court found that the legislative history revealed that the law aimed to maintain adequate and reliable transmission services at reasonable rates under a longstanding successful regulatory approach. 954 F.3d, at 1029. Additionally, the *LSP Transmission Holdings* court held that Minnesota's ROFR law did not have a discriminatory effect because it placed the same incidental hurdle on any entity that did not own transmission facilities in the state, regardless of whether they were a Minnesota or out-of-state entity. *Id.* at 1030.

Like Minnesota, Vandalia enacted its ROFR law in 2014 in response to Order 1000. Vandalia's legislature did not enact its ROFR law in response to the selection of an out-of-state non-incumbent entity for the construction of transmission facilities, as Texas's legislature did. Moreover, Vandalia's ROFR law legislative history reveals that the legislature aimed to restore the status quo from before Order 1000 and maintain the state's transmission lines under responsive companies. Vandalia's ROFR, like Minnesota's, places the same initial hurdle on nonincumbent transmission entities, regardless of whether they are from Vandalia or out-of-state. Consequently, because Vandalia's ROFR law was enacted in response to Order 1000, is aimed at maintaining a status quo level of responsiveness in transmission, and applies equally to Vandalia and out-of-state entities it does not have a discriminatory purpose or effect.

c. <u>Vandalia's ROFR Is Not Unduly Burdensome</u>

In reviewing undue burden of state ROFR laws, the courts apply the *Pike* balancing test, which assesses the interstate burden and local benefits of the state law. *LSP Transmission Holdings*, 954 F.3d at 1030; *Pike*, 397 U.S. at 142. In *LSP Transmission Holdings*, the court recognized that "the Supreme Court has rarely invoked [the] *Pike* balancing [test] to invalidate state regulation under the Commerce Clause." 954 F.3d at 1031 (citing *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 509 (8th Cir. 2002). The *LSP Transmission Holdings* court identified that regulating utilities is within the state police power, including state regulation on the siting, permitting and construction of transmission lines. *Id.* at 1029–30 (citing *Ark. Elec. Coop. Corp.* 461 U.S. at 377). In *LSP Transmission Holdings*, the State's local interest for its ROFR law was to preserve the proven status quo for maintenance and construction of transmission lines. *Id.* at 1031. In its burden analysis, the court identified that the cumulative effect of the ROFR law would not eliminate market competition because incumbents were not obligated to exercise the ROFR, and incumbents not selected in regional transmission plans for purposes of cost allocation still

retained a federal ROFR under Order 1000. Accordingly, the court held the burden imposed by the ROFR law was not clearly excessive in relation to the state's legitimate interest in regulating transmission utilities and maintaining status quo.

Like Minnesota, Vandalia has an interest in regulating utilities, including those siting and constructing transmission lines in the state. Vandalia, like Minnesota, sought to preserve the status quo for maintenance and construction of transmission lines through its ROFR. Moreover, the incumbents in Vandalia are also not obligated to exercise their ROFR and may retain a federal ROFR if not selected in a transmission plan for cost allocation purposes. Therefore, the burden of Vandalia's ROFR is not clearly excessive in relation to the state's interest in regulating transmission utilities and maintaining status quo.

In the opposite case, *NextEra*, the court identified promoting reliability as the ROFR law's local benefit. *NextEra*, 48 F.4th, at 327–28. However, the *NextEra* court held that petitioners established a plausible allegation that the benefit of reliability was insignificant and illusory. *Id.* at 327. The court explained that NextEra pointed to FERC's rejection of the notion that allowing only incumbents to build new lines promotes reliability, MISO's reliability requirements, and that out-of-state companies had a successful record running transmission lines in Texas. *Id.*

NextEra's basis in alleging that the reliability benefits are "insignificant and illusory" is improper and muddles the issue. NextEra's argument that FERC rejects the notion that allowing only incumbent transmission providers to build new lines promotes reliability misconstrues Order 1000. In Order 1000, FERC recognized that "incumbent transmission providers may have unique knowledge of their own transmission systems, familiarity with the communities they serve, economies of scale, experience in building and maintaining transmission facilities, and access to

funds needed to maintain reliability." *Id.* at P 260. In other words, under FERC's viewpoint, there are significant benefits in offering ROFRs to incumbent transmission owners, including reliability.

Lastly, in an April 2022 Notice of Proposed Rulemaking (NOPR), FERC concluded that Order 1000's remedy of eliminating all federal ROFRs for entirely new transmission facilities selected in a regional transmission plan was overly broad. 179 FERC ¶ 61,028, at P 352. FERC recognized that investment in transmission has not increased since Order 1000 and that elimination of the federal ROFR may inadvertently discourage incumbents from developing transmission facilities beyond their local distribution footprint. *Id.* at P 349–50. FERC's NOPR proposes reestablishing a federal ROFR conditioned on the incumbent transmission provider establishing a joint ownership with a nonincumbent entity. *Id.* at P 366. FERC believes this ROFR would promote efficiency and openness in transmission planning, decrease financial and siting risks, provide certainty in transmission development, and offset construction costs for transmission facilities needed to maintain reliability. *Id.* at P 372–74. In sum, FERC believes that ROFRs promote transmission development and provide reliability benefits. *Id.* thus, Vandalia's ROFR does not create an excessive burden in relation to the state's legitimate interest over transmission maintenance and construction, and is valid under the dormant Commerce Clause.

CONCLUSION

For the reasons set forth above, this Court should affirm the judgment of the district court.

Respectfully submitted,

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Certificate of Compliance (Brief)

Pursuant to *Official Rule* III.C.9, Vandalia Public Service Commission certifies that its brief contains 30 pages in Times New Roman 12-point font.

We further certify that we have read and complied with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the *Team Members* of *Team No. 40*, and the *Team Members* of *Team No*. *40* have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

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