C.A. No. 22-0682

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

Appalachian Clean Energy Solutions, Inc.,

Petitioner/Appellant,

v.

Chairman Will Williamson, *in his official capacity*,
Commissioner Lonnie Logan, *in his official capacity*, and
Commissioner Evelyn Elkins, *in her official capacity*,

Respondent/Appellee.

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

BRIEF FOR THE RESPONDENT/APPELLEE

Team 7
February 1, 2023
Counsel for Respondent/Appellee

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JURISDICTIONAL STATEMENT

The United States District Court from the Northern District of Vandalia had jurisdiction of the case docketed as No. 22-0682 pursuant to 28 U.S.C. § 1331, which states, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

The United States Court of Appeals for the Twelfth Circuit has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, because "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

The final judgment of the district court, which disposed of all issues regarding the Federal Power Act litigation, was entered on August 15, 2022, in favor of the Defendant, the Vandalia Public Service Commission. The Plaintiff, Appalachian Clean Energy Solutions, Inc., filed a timely appeal of the final judgment on August 29, 2022. This Court ordered review of the appeal on December 28, 2022.

STATEMENT OF THE ISSUES PRESENTED

I. Whether ACES has Article III standing to challenge PSC's Capacity Factor Order.

II. Whether PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution due to FPA preemption.

III. Whether Vandalia's statutory ROFR violates the Supremacy Clause of the U.S. Constitution due to FERC Order 1000 preemption.

IV. Whether Vandalia's statutory ROFR violates the Dormant Commerce Clause of the U.S. Constitution.

STATEMENT OF THE CASE

Statement of Facts

Appalachian Clean Energy Solutions, Inc. (ACES) is a global energy company that constructs and operates electric generating plants and interstate transmission lines. R. 1. ACES intends to build a natural gas-fired generating plant in Pennsylvania to sell into PJM Interconnection (PJM), the mid-Atlantic regional wholesale electricity market. R. 1. It also seeks to build a high voltage transmission line that crosses Vandalia, a mid-Atlantic state in PJM's region. R. 1.

The Vandalia Public Service Commission (PSC) has taken two actions to protect its incumbent electric transmission owners and the State of Vandalia's dominance in coal-powered utilities. R. 6. First, it has adopted a "Capacity Factor Order" (CFO) requiring coal plants in Vandalia to continually operate at seventy-five percent capacity. R. 1. Second, Vandalia's legislature enacted a right of first refusal (ROFR), which gives incumbent transmission owners a temporary exclusive right to build new transmission facilities within Vandalia. R. 2.

The State of Vandalia

Coal mining is a way of life in Vandalia. R. 4. For decades, it was the biggest industry in the state; just two years ago, Vandalia was the third-largest coal producer and the fourth-largest reserve base in the United States. R. 4. Ninety-one percent of Vandalia's total electricity is generated from coal-fired electric power plants. R. 4. Vandalia is not only a net electricity supplier to the PJM regional grid, but is also one of the top five states in interstate electricity transfers. R. 4. Vandalia, and its political climate, are deeply rooted in the tradition of coal mining for electricity generation. R. 4.

The Vandalia Public Service Commission

The PSC is the state's government agency responsible for regulating utility retail service providers within Vandalia.[1] R. 6. Under Vandalia Code § 24-2-3, the Vandalia PSC is charged with regulating the services and practices of its public utilities, including setting "just and reasonable rates." R. 6. Additionally, the Vandalia Legislature encouraged the PSC to develop Vandalia's utilities "in ways consistent with the productive use of the state's energy resources, such as coal". R. 6.

Appalachian Clean Energy Solutions, Inc.

ACES generates electric resources "solely for resale in the wholesale markets."[2] R. 4. It has bilateral power purchase agreements with retail electric utilities, and participates in various competitive regional wholesale markets, including PJM. R. 4. Additionally, ACES is the largest independent electricity transmission company in the United States. R. 5.

The Federal Power Act: Wholesale Electricity Rates

Congress passed the Federal Power Act (FPA) in 1935.[3] R. 13. Under the FPA, States retain jurisdiction over "retail sale of electricity and the generation, transmission, and distribution of electricity in intrastate commerce." *See* 16 U.S.C. § 824(b)(1). R. 13. The Federal Energy Regulatory Commission (FERC) regulates "interstate transmission of electricity and sale of electricity at wholesale interstate commerce." *Id.* R. 13.

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[1] Its three current commissioners, Lonnie Logan, Evelyn Elkins, and Will Williamson, the agency's Chairman and chief administrative officer, acting in their official capacity, are named parties in this case. R. 6.

[2] ACES is a merchant electric generation plant, and owns no retail electric utilities. R. 4-5.

[3] Historically, state and local agencies regulated almost all electricity generation, transmission, and distribution. R. 13. In 1927, the Supreme Court held that, under the Commerce Clause, states cannot regulate wholesale interstate electricity transactions. *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927). R. 13. The FPA was Congress's response to this decision.

The FERC ensures that all rates and charges are "just and reasonable" by promoting competition in the U.S. wholesale electricity markets. § 824(d)(a). R. 13. Under FERC Order 888, transmission-owning utilities must provide “open, fair, non-discriminatory access” to transmission lines. R. 3. The FERC suggested that existing power pools use Independent System Operators (ISOs) to achieve this non-discriminatory goal. R. 3. Under FERC Order 2000, transmission-owning utilities are required to “participate in a regional transmission organization (RTO).” R. 3. This promoted competition in the market through FERC-regulated competitive regional auctions. R. 13.

PJM is the RTO/ISO for the mid-Atlantic region, including Vandalia R. 3. PJM operates both energy and capacity markets R. 3. Energy markets are real-time markets that enable PJM to buy and sell electricity to distributors for real-time delivery. R. 3. All Vandalia electricity generators must sell all the energy they produce into the PJM market, pursuant to their status and contracts with PJM. R. 3. PJM then determines the wholesale electricity price through competitive auctions. R. 3.

Conversely, PJM’s capacity markets are forward looking, and ensure that enough capacity is being built ahead of time to meet growing demand. R. 3. Capacity generators also participate in the competitive auctions. R. 3. Both markets are designed to provide efficient supply and demand, and incentivize construction of new power plants when necessary. R. 3.

The Capacity Factor Order

Two retail utilities, LastEnergy and Mid-Atlantic Power Co. (MAPCo), both of which have multiple operating coal-fired power plants in Vandalia, serve the PJM grid. R. 4. In October 2021, both utilities projected that capacity factors for their coal-fired power plants “could be expected to remain at or below [sixty] percent going forward.” R. 7. This was likely due to the

availability of "lower cost power from the wholesale market (PJM)" and from "other energy suppliers in the mid-Atlantic region." R. 7.

In April 2020, ACES announced plans to construct the "Rogersville Energy Center," a combined-cycle natural gas-fired generating plant, in Pennsylvania. R. 5. On May 15, 2022, the Vandalia PSC issued the Capacity Factor Order (CFO) only to coal-fired power plants in Vandalia. R. 8. The CFO directed LastEnergy and MAPCo to "operate their coal-fired plants to achieve a capacity factor of not less than [seventy-five] percent, as measured over a calendar year." R. 8. The CFO included factual findings that the capacity factor would be economical. R. 8. Further, the CFO "expressly authorize[d] cost recovery in [the utilities'] retail rates" if, in compliance with the CFO, "the cost to produce electricity at the coal-fired plants is greater than the market-clearing price in PJM." R. 8.

FERC Order 1000: Rights of First Refusal and Transmission Lines

Historically, RTO/ISO tariffs contained federal ROFR provisions, under which existing transmission facilities had an exclusive right to construct new transmission facilities in their region. R. 9. In 2011, FERC issued Order 1000, which eliminated federal ROFR provisions for regional transmission facilities from RTO/ISO tariffs. R. 9, 14. The order also required new transmission projects to be "competitively and regionally planned by entities like PJM." R. 9. The order is consistent with the FERC's purpose of regulating regional electric grids while retaining state authority to regulate electric transmission lines. R. 14.

PJM, the mid-Atlantic regional RTO/ISO, is responsible for maintaining and operating its regional transmission grid. Pursuant to Order 1000, PJM removed its federal ROFR from its tariff. R. 14. R. 3. Notably, although public and independent transmission owners must seek and obtain PJM's approval to build new transmission facilities, states within the PJM region,

including Vandalia, retain traditional authority over siting, routing, and permitting of those transmission facilities. R. 3.

Vandalia's Right of First Refusal for Transmission Lines

On May 3, 2014, in response to Order 1000, Vandalia passed the "Native Transmission Protection Act," (NTPA), a statutory ROFR that gives incumbent transmission owners the exclusive right to build transmission lines within Vandalia for eighteen months. R. 9. A representative from MAPCo stated that the bill gives "Vandalia utilities . . . the first opportunity to invest in federal regionally planned transmission projects." R. 9.

In order to increase the mid-Atlantic regional power grid's capability to accommodate the electrical output from its proposed Rogersville plant, ACES also intends to construct and own a high-voltage transmission line, Mountaineer Express. R. 5. In March 2022, the PJM Board of Managers approved Mountaineer Express for inclusion in its Regional Transmission Expansion Plan. R. 6. On April 1, 2022, ACES submitted its application for a Certificate of Public Convenience and Necessity for construction of Mountaineer Express through Vandalia. R. 10.

Because ACES owns no existing transmission facilities within Vandalia, it is not an incumbent transmission owner under the NTPA.[4] R. 10. Therefore, it cannot exercise any ROFR on its proposed transmission lines. R. 10. Further, under the NTPA, LastEnergy and MAPCo, the incumbent electric transmission owners in Vandalia, have the option to exercise their ROFR until September 30, 2023, when the ROFR expires.[5] R. 10. As a result, the Vandalia PSC has not

[4] An "incumbent transmission owner" is defined as "any public utility that owns . . . an electric transmission line in [Vandalia]" or any entity that "own[s], operat[es], maintain[s], or control[s]" electric transmission facilities in Vandalia. Vand. Code § 24-12.2(f).

[5] Additionally, ACES wishes to utilize LastEnergy's right of way (ROW) for Mountaineer Express, but LastEnergy denied ACES its ROW access. R. 10. A right of way is an easement or agreement that electric utilities acquire from property owners to construct, operate, and maintain

acted on ACES' application. R. 10. In response, ACES brought suit against the Vandalia PSC to challenge both its CFO and its ROFR. R. 2.

Procedural History

On June 6, 2022, ACES filed suit against the Vandalia PSC over the CFO, arguing that the Order is preempted by the FPA because it allegedly (i) contravenes the FPA's division of authority between state and federal regulators, (ii) will distort the PJM auction's price signals, interfering with FERC's goals under the FPA, and (iii) compels coal-burning facilities to sell their energy into PJM. R. 14.

In the same Complaint, ACES brought two additional claims to challenge Vandalia PSC's ROFR. R. 15. ACES argued that the ROFR is prohibited by FERC Order 1000 because it supposedly jeopardizes the construction of transmission projects selected in an Order 1000 competitive solicitation, thereby nullifying the FERC-set rate. R. 15. ACES additionally argued that the ROFR violates the Dormant Commerce Clause due to its similarity to a Texas ROFR that was struck down by the Fifth Circuit. R. 15. ACES erroneously claimed that Vandalia's ROFR overtly discriminates against out-of-state entities, or at least was designed with the intent of favoring in-state utilities at the expense of foreign entities. R. 15. In the alternative, ACES argued that even if the ROFR was not overtly discriminatory or designed with a discriminatory purpose, the burden imposed on commerce is excessive in relation to its putative local benefits. R. 15-16.

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transmission lines and other equipment, along necessary routes. R. 10. On December 13, 2022, in a proceeding commenced by ACES, the Vandalia PSC ruled that ACES was not a public utility, and therefore, ACES cannot use LastEnergy's ROW in Vandalia. R. 11.

On June 27, 2022, the PSC moved to dismiss the CFO challenge for failure to state a claim. R. 14. First, ACES is not a ratepayer and therefore is not subject to the CFO. R. 14. As a result, it is far too speculative that a favorable decision by the Court could redress the alleged injury. R. 15. Second, in the unlikely event that ACES did have standing, the CFO is not preempted because it is not "tethered" to the wholesale market as ACES claims. R. 15.

Vandalia PSC also moved to dismiss ACES ROFR claims. R. 16. First, because there is no preemption and many other states have enacted similar legislation without a single objection from FERC. R. 16. Second, regarding the Dormant Commerce Clause, there is no discrimination against out-of-state entities, whether overt or under a burden test, because the ROFR makes no distinction between in-state and out-of-state entities. R. 16. Rather, it merely requires an eighteen-month waiting period for incumbent utilities to decline their exercise of the ROFR, which is far less egregious than the ROFR analyzed by the Fifth Circuit. R. 16.

On August 15, 2022, the District Court granted Vandalia PSC's motion to dismiss on all of ACES's claims. R. 16. First, it determined that ACES lacked standing to bring its Supremacy Clause claim, and even if ACES did have standing, the CFO does not violate the Supremacy Clause. R. 15. Second, the District Court held that Vandalia's ROFR is not preempted by FERC Order 1000, nor does it violate the Dormant Commerce Clause. R. 16.

Following this decision, ACES filed a timely appeal of that order on August 29, 2022.

STANDARD OF REVIEW

I. Capacity Factor Order: Lack of Standing

The district court granted Vandalia PSC's motion to dismiss regarding the CFO, correctly holding that ACES lacked standing to bring its Supremacy Clause claim. Because standing is a question of law, this court's standard of review is *de novo,* and it owes no deference to the district court's decision on the standing claim. *See U.S. v. Amezcua*, 276 F.3d 445, 447 (8th Cir. 2002).

II. Capacity Factor Order: The Supremacy Clause and Preemption

The district court granted Vandalia PSC's motion to dismiss regarding the CFO, correctly holding that the Order is not preempted by the FPA and thus does not violate the Supremacy Clause. Because this is a question of law, this court's standard of review is *de novo*, and it owes no deference to the district court's decision on the Supremacy Clause claim. *Id.*

III. Right of First Refusal: The Supremacy Clause and Preemption

The district court granted Vandalia PSC's motion to dismiss relating to the ROFR, correctly holding that the ROFR is not preempted by Order 1000 and thus does not violate the Supremacy Clause. Because this is a question of law, this court's standard of review is *de novo*, and it owes no deference to the district court's decision on the Supremacy Clause claim. *Id.*

IV. Right of First Refusal: The Dormant Commerce Clause

The district court granted Vandalia PSC's motion to dismiss regarding the ROFR, correctly holding that the ROFR does not discriminate against out-of-state entities or substantially burden commerce and thus does not violate the Dormant Commerce Clause. Because this is a question of law, this court's standard of review is *de novo*, and it owes no deference to the district court's decision on the Dormant Commerce Clause. *Id.*

SUMMARY OF THE ARGUMENT

Because ACES has not suffered an injury in fact that is redressable by the court, this Court should find that ACES does not have standing required to challenge Vandalia PSC's CFO. ACES is unable to show that it suffered an injury in fact because the alleged injuries it asserts are hypothetical in nature. If a plaintiff cannot show that it suffered or will suffer an injury in fact, the courts cannot exercise federal court power within the confines of the U.S. Constitution. U.S. Const. art. III, § 2, cl. 1. The injuries ACES asserts are conjectural and indefinite, and the interest that ACES has in the CFO's validity is insufficient to establish standing. Moreover, ACES cannot satisfy the redressability requirement of standing because it is not subject to the CFO. ACES cannot show that those subject to the CFO will act or fail to act in a way that causes injury to ACES. Thus, ACES does not have standing to challenge the PSC's CFO.

Even if ACES is found to have standing, the CFO is not expressly or implicitly preempted by the FPA because the FPA does not state such a preemption exists and there is no tether to the wholesale market. First, it is not expressly preempted by the FPA because the FPA does not explicitly state that it preempts orders such as the CFO, nor does it suggest that Congress intended for federal law to occupy the entire energy regulation field. 16 U.S.C.A. § 824. Second, the CFO does not conflict with the FPA because it lacks a tether to the wholesale market, and thus it does not implicitly preempt the FPA. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 52 (2d Cir. 2018). Thus, the CFO is not preempted by the FPA.

Vandalia's statutory ROFR is not preempted by FERC Order 1000 because the Order explicitly maintains traditional state authority over electric transmission lines. Order 1000 does not expressly preempt ROFR laws that are established by states. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49 (D.C. Cir. 2014). Nor does the Order impliedly preempt state ROFR laws

because these laws do not directly target Order 1000's competitive solicitation process and do not nullify the FERC-set rate. Thus, the ROFR is not federally preempted.

Additionally, Vandalia's ROFR does not violate the Dormant Commerce Clause because it does not discriminate against foreign entities and is not overly burdensome. First, the ROFR does not facially discriminate against out-of-state competitors because the statute does not prohibit foreign entities from building, owning, and maintaining transmission lines in Vandalia. Second, the ROFR does not have a discriminatory purpose because it is not designed primarily to protect in-state interests. Nor does the statute have a discriminatory effect because utilities like MAPCo and LastEnergy, which are headquartered outside Vandalia, would not be able to operate in the state.

Even if the ROFR was discriminatory in purpose or effect, the burden it imposes is not excessive compared to the local benefits it provides. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The goal of the statute is to preserve the status quo of transmission lines in Vandalia, and this type of aim is within the purview of a state's legitimate local interest. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1031 (8th Cir. 2020). Thus, the ROFR does not violate the Dormant Commerce Clause.

ARGUMENT

I. ACES CANNOT ESTABLISH ARTICLE III STANDING BECAUSE IT CANNOT SHOW THAT IT HAS SUFFERED AN INJURY IN FACT THAT IS REDRESSABLE BY THE COURT, AS REQUIRED BY WELL-ESTABLISHED PRECEDENT.

This Court should find that Appalachian Clean Energy Solutions, Inc. (ACES) does not have the standing required to challenge Vandalia Public Service Commission's (PSC) Capacity Factor Order (CFO) because ACES has not suffered an injury in fact that is redressable by the court. ACES cannot show that it suffered an injury in fact because the injuries it asserts are

hypothetical in nature. ACES also cannot show that a favorable court decision will redress its alleged injuries because ACES is not subject to the CFO and cannot show that the action or inaction of those subject to the order will cause an injury to ACES that is redressable by a court.

A. ACES cannot show that it has suffered an injury in fact because the injuries it asserts are hypothetical and conjectural in nature.

This Court should find that ACES does not have standing to challenge the PSC's CFO because ACES cannot show that it has suffered an injury in fact. U.S. Const. art. III, § 2, cl. 1 limits federal judicial power to resolving "cases" and "controversies." To preserve the separation of powers, the Supreme Court has inferred several requirements from this limitation which must be present for a case to be heard in federal court, including the doctrine of standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 480–81 (1923). Standing determines "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

There are three requirements that a litigant must prove to establish standing: 1) the party must have suffered an injury in fact, 2) there must be a causal connection between the injury and the conduct complained of, and 3) it must be likely that a favorable court decision will redress the injury. *Lujan*, 504 U.S. at 560–61. The burden to prove these elements falls to the party invoking federal jurisdiction. *Id.* at 561. The injury in fact condition requires that the injury suffered by the party be actual or imminent, not "conjectural or hypothetical," as well as "concrete and particularized." *Id.* at 560. These terms do not have definitions that allow for a "mechanical" application of the constitutional standing requirement, but case law provides guidance on applying the law of standing. *See e.g., Allen v. Wright*, 468 U.S. 737, 751 (1984); *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454

U.S. 464, 469–70 (1982). If the plaintiff lacks an injury in fact, the exercise of federal court power is inconsistent with the requirement of standing. *Lujan*, 504 U.S. at 560–62.

The Supreme Court has held that the complainant must "clearly and specifically" demonstrate facts sufficient to establish standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Allegations of "possible future injury" are not sufficient for these purposes. *Id.*; *see also Lujan*, 504 U.S. at 564 (stating that allegations of a future harm at some indefinite time cannot be an "actual or imminent injury"). The injury in fact limitation requires more than just a perceptible injury; the party seeking review must be among those *actually* injured by the defendant's actions. *Sierra Club v. Morton*, 405 U.S. 727, 734–35 (1972).

In *Lujan*, 504 U.S. at 556, the Court held that a wildlife group did not have standing to challenge the geographic scope of Section 7(a)(2) of the Endangered Species Act of 1973. The wildlife group contended that its members would suffer an injury in fact because they would be denied the opportunity to observe endangered animals at some point in the future. *Lujan*, 504 U.S. at 556. However, the court found that such injuries are "purely speculative" and consequently do not demonstrate a "concrete" or "imminent" injury, because of the "indefinite" timeline of the injury and conjectural nature of the potential damages. *Id.*

In *Sierra Club*, a corporation requested a declaratory judgment that construction of a proposed resort in a national game refuge would violate federal laws, along with preliminary and permanent injunctions restraining the approval of the project. 405 U.S. at 727. The Court found that an interest in a problem, such as the violation of federal laws, regardless of how established the interest is and no matter how qualified the organization might be to evaluate the problem, is not sufficient to establish standing. *Id.* at 739–740. While it is possible for an organization to have an interest in consumer protection, a "special interest" is not enough; injury to the party

bringing suit is required. *Id.* at 739. If a party does not show that it has suffered an injury, it cannot establish standing. *Id.* at 738.

In this case, ACES cannot show it suffered or will suffer an injury in fact to establish standing. First, ACES has not demonstrated an imminent injury as necessary for the injury in fact requirement of standing. *Whitmore*, 495 U.S. 149 at 155. ACES is not subject to the CFO, and instead relies on the speculation that at some point in the future, the CFO will distort PJM price signals. R. 14. However, this is a hypothetical assertion, and does not meet the imminent injury requirement to establish standing. *Lujan*, 504 U.S. at 560; R. 14. The PSC provided findings of fact that it would be economical for the coal plants within Vandalia to run at seventy-five percent capacity as required in the CFO, meaning that the CFO may never affect energy prices. R. 8. Also, the CFO allows MAPCo and LastEnergy to recover actual costs from retail rates, not the market-clearing price of electricity sold into the PJM market. R. 8. Therefore, ACES's proposition that the CFO will impact wholesale market rates is far removed from the actual impact of the CFO, and again, speculative. R. 8.

Though the CFO could "theoretically" impact the building of the ACES Rogersville Energy Facility, this injury is speculative because there is no guarantee that rates will actually be affected by the CFO. R. 14. Much like the wildlife group in *Lujan*, ACES cannot show the imminence of the CFO's effect on PJM price signals, if it has any effect at all, because the time of injury is "indefinite." 504 U.S. at 556; R. 8. The injury ACES asserts is purely speculative, not particularized, and indefinite, and thus not sufficient to establish standing. *Lujan*, 504 U.S. at 556.

Second, ACES cannot show that it is among those who would allegedly be injured by the PSC CFO. *Sierra Club*, 405 U.S. at 734–35; *Lujan*, 504 U.S. at 556. ACES is not subject to the

CFO, nor is it a ratepayer affected by the CFO. R. 14. Though ACES may have a small interest in the CFO's validity, such an interest is not efficient to establish standing unless ACES itself will suffer an injury from the CFO. *Sierra Club*, 405 U.S. at 727. Interest in the CFO's validity is insufficient to establish standing in this case because ACES cannot show that it suffered or will suffer an actual injury due to the CFO. R. 14; *Sierra Club*, 405 U.S. at 727.

If the plaintiff cannot show that it suffered or will suffer an injury in fact, the courts cannot exercise federal court power within the limits of the United States Constitution. U.S. Const. art. III, § 2, cl. 1; *Lujan*, 504 U.S. at 560–62. The injuries ACES alleges are conjectural and indefinite, and the interest that ACES has in the CFO's validity is insufficient to establish standing. *Sierra Club*, 405 U.S. at 727. Therefore, the Court should find that ACES does not have standing to challenge the PSC's CFO.

B. ACES cannot satisfy the redressability requirement of standing because it is not subject to the Capacity Factor Order.

This Court should find that ACES does not have standing to challenge the PSC's CFO because ACES is not subject to the CFO. R. 14. There are three requirements that a plaintiff must show to establish Article III standing: 1) an injury in fact, 2) caused by the defendant, 3) that is redressable by the court. *Lujan*, 504 U.S. at 560–61.

The redressability condition of standing depends upon whether the plaintiff is the object of the action at issue when the suit challenges the legality of government action. *Id*. at 561. If the party invoking federal jurisdiction is the object of the action at issue, it is easy to demonstrate that a judgment preventing the action at issue will redress the injury. *Id.* at 561–62. However, if the plaintiff's asserted injury arises from government regulation of someone else, redressability relies on the action or inaction of the third parties to the government regulation. *Id.* at 562 (citing *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). In such a case, it becomes the plaintiff's

burden to show that these choices "have been or will be" made in a manner that produces an injury to the plaintiff which can be redressed by the court. *Lujan*, 504 U.S. at 562. Such a burden is "substantially more difficult" to prove. *Id.* If the plaintiff is unable to show that it has suffered an injury in fact that is redressable by the court, the party lacks standing. *Id.* at 560–62.

Here, ACES is not the object of the CFO. R. 14. The CFO only applies to the coal plants operating in Vandalia, MAPCo and LastEnergy, with which ACES has no affiliation. R. 2, 4. Since ACES is not the object of the CFO, it must show that the actions or inactions of MAPCo or LastEnergy in relation to the CFO have or will cause ACES to suffer an injury, which it cannot do. *Lujan*, 504 U.S. at 562. The PSC has provided findings of fact that it would be economical for MAPCo and LastEnergy to run at seventy-five percent capacity as required by the CFO. R. 8. Based on these findings, it is speculative to assert that MAPCo or LastEnergy will ever have to recover production costs through increased retail prices. R. 14. Therefore, the injuries alleged by ACES due to MAPCo or LastEnergy's compliance, or noncompliance, with the CFO are hypothetical in nature. R. 14. Such hypothetical injuries do not show that MAPCo and LastEnergy's choices "have been or will be" made in a manner that produces an injury to ACES which can be redressed by the court. *Lujan*, 504 U.S. at 561.

Since ACES is not subject to the CFO and cannot show that the objects of the CFO will act or fail to act in a way that causes an injury to ACES, which would then be redressable by a court, this Court should find that ACES does not have standing to challenge the PSC's CFO. R. 14; *Lujan*, 504 U.S. at 561.

II. IF ACES IS FOUND TO HAVE STANDING, THE PSC CFO IS NOT PREEMPTED BY THE FPA BECAUSE THERE IS NO TETHER TO THE WHOLESALE MARKET.

If ACES is found to have standing, the Court should find that the PSC CFO is not preempted because, unlike the order in *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150,

153 (2016), the PSC CFO lacks an impermissible "tether" to wholesale market participation. U.S. Const. art. VI, cl. 2, states that "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." A state statute may be expressly preempted when the preemptive intent is explicitly stated in the federal statute which preempts state law. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001). Alternatively, a state statute may be implicitly preempted when a federal statute legislates in a way that suggests that Congress intends for federal law to occupy the field, with no room for state to supplement. *Northwest Central Pipeline Corp. v. State Corp. Commission of Kansas*, 489 U.S. 493, 509 (1989); *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Such implied preemption is called "field preemption." *Id.* Implied preemption also arises when state law conflicts with the federal law, but the federal law does not expressly preempt the state law; this is known as conflict preemption. *Id.* If a state law is found to be expressly or implicitly preempted by the court, the state law is displaced by the federal law. *See Hughes*, 578 U.S. at 153.

In preemption cases involving the Federal Power Act (FPA), courts have found that there must be a balance between federal and state interests in their respective roles as energy regulators. *See e.g., Northwest Central Pipeline Corp.,* 489 U.S. at 494; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 55 (2d Cir. 2018). The FPA establishes that the Federal Energy Regulatory Commission (FERC) has exclusive power to regulate "the sale of electric energy at *wholesale* in interstate commerce," including wholesale electricity rates and practices "affecting" wholesale electricity rates. 16 U.S.C.A. § 824(a), 824(b), 824e(a) (West) (emphasis added). The FPA's language indicates that FERC's jurisdiction only applies to practices that "*directly* affect the [wholesale] rate." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016) (citing *California*

Independent System Operator Corp. v. FERC, 372 F.3d 395, 403 (2004)). The FPA leaves the regulation of other sales of electricity, notably retail sales, to the states. *FERC*, 577 U.S. at 266; *see also Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 105 (2d Cir. 1985) (holding that a public service commission's policy was not preempted by the FPA because it did not regulate wholesale rates).

The United States Court of Appeals for the Second Circuit held that a New York Public Service's Commission Zero Emission Credits (ZEC) program was not preempted by the FPA in *Coal. for Competitive Elec., Dynergy Inc.,* 906 F.3d at 56–57 (2d Cir. 2018). The ZEC program created state-issued subsidy credits for qualifying nuclear energy producers. *Id.* at 45–57. The basis for reevaluating the subsidy credit amount for ZEC qualified producers was based on wholesale market prices, and producers received the value of the ZEC credits in addition to what was earned in the wholesale market. *Id.* at 48. The plaintiffs argued that the ZEC program is tethered to the wholesale prices because it required utilities to purchase ZECs, and the utilities passed these costs along to consumers. *Id.* at 51. However, the court found that the ZEC program was not preempted by the FPA because, among other reasons, the commission did not require the ZEC plants to participate in the wholesale market. *Id.* at 52. Without a tether to participation in the energy wholesale market, state regulations aimed at encouraging certain types of generation are not preempted. *Id.* at 51 (citing *Hughes*, 578 U.S. at 166).

Similarly, in *Elec. Power Supply Ass'n v. Star*, the United States Court of Appeals for the Seventh Circuit reasoned that an equivalent credit program in Illinois was not preempted by the FPA. 904 F.3d 518, 523–24 (7th Cir. 2018). The plaintiffs in this case alleged that zero emission credit systems *regulate* the price of wholesale power, which impedes FERC's regulatory authority. *Id.* at 522. However, the court found that Illinois only required producers to generate

power and left the decision on where to sell that power up to the producers. *Id.* at 523. And, since states retain authority over power generation, state policies that affect price by increasing the amount of power available are not preempted by state law. *Id.* at 524. So long as states do not condition payment of funds on capacity clearing the wholesale market auctions, state programs are not preempted. *Id.* (citing *Hughes*, 578 U.S. at 164).

Coal. for Competitive Elec., Dynergy Inc. and *Elec. Power Supply Ass'n* are distinguished from *Hughes* because in *Hughes*, 578 U.S. at 166, the state program was preempted since it required generators to participate in wholesale auctions. In *Coal. for Competitive Elec., Dynergy Inc.*, 509 F.3d at 52, and *Elec. Power Supply Ass'n*, 904 F.3d at 523, wholesale auction prices were used as a mechanism to determine credits paid to qualified producers. While such programs may affect retail prices, they do not require producers to participate in the wholesale market. *Coal. for Competitive Elec., Dynergy Inc.*, 509 F.3d at 52; *Elec. Power Supply Ass'n*, 904 F.3d at 523.

The FPA does not expressly preempt the CFO because the FPA does not explicitly state that it preempts state regulatory orders. 16 U.S.C.A. § 824. In fact, the language of the FPA has been interpreted to provide FERC regulatory power over wholesale market rates, while leaving retail rates and several other regulatory matters to the states. *FERC*, 577 U.S. at 266, 278. The PSC CFO allows MAPCo and LastEnergy producers to recuperate potential losses from the prices of retail rates which are based on wholesale prices, but does not require them to participate in the wholesale market. R. 14. Such losses are hypothetical, as previously established; but, if recuperation was required, the only rates affected by the CFO would be retail rates. R. 8–9. Since states have regulatory power over retail rates, the CFO is not expressly preempted by the FPA. *FERC*, 577 U.S. at 766.

Similarly, the CFO is not preempted by the FPA based on field preemption because the FPA has not been interpreted to suggest that Congress intended for federal law to occupy the field of energy regulation with no room for state supplement. *FERC*, 577 U.S. at 278; *Nw. Cent. Pipeline Corp.*, 489 U.S. at 509.

Finally, conflict preemption does not apply in this case because the CFO is not in conflict with the FPA. 16 U.S.C.A. § 824. Just like the credit programs in *Coal. for Competitive Elec., Dynergy Inc.*, 509 F.3d at 52, and *Elec. Power Supply Ass'n*, 904 F.3d at 523, the CFO uses the wholesale market price as a mechanism to determine retail rates payable to MAPCo and LastEnergy in cases of loss. R. 8. The CFO is not like the program in *Hughes* because the CFO does not require producers to participate in wholesale auctions, or base credits on wholesale market participation. 578 U.S. at 166; R. 8. Since the CFO does not require producers to participate in the wholesale market, or condition payment of funds on capacity clearing the wholesale market auctions, the order lacks a "tether" to the wholesale market. *Coal. for Competitive Elec., Dynergy Inc.*, 509 F.3d at 52; *Elec. Power Supply Ass'n*, 904 F.3d at 523; *Hughes*, 578 U.S. at 166. Accordingly, the CFO is not in conflict with the FPA's delegation of wholesale market regulatory power to FERC and is therefore not preempted by the FPA. *FERC*, 577 U.S. at 266.

The CFO is not preempted by the FPA because of the nature of the order. R. 7–8. The FPA does not explicitly state that it preempts orders such as the CFO, so the CFO is not expressly preempted by the FPA, nor does the FPA suggest that Congress intended for federal law to occupy the entire energy regulation field. 16 U.S.C.A. § 824. Additionally, the CFO does not conflict with the FPA because the CFO lacks a tether to the wholesale market. *Coal. for Competitive Elec., Dynergy Inc.*, 509 F.3d at 52; *Elec. Power Supply Ass'n*, 904 F.3d at 523;

Hughes, 578 U.S. at 166. Therefore, the Court should find that the CFO is not expressly or implicitly preempted by the FPA.

III. VANDALIA'S STATUTORY ROFR IS NOT PREEMPTED BY FERC ORDER 1000, BECAUSE FERC ORDER 1000 EXPLICITLY RETAINS TRADITIONAL STATE AUTHORITY OVER ELECTRIC TRANSMISSION LINES.

Under U.S. Const. art. VI, cl. 2, the Twelfth Circuit Court of Appeals should affirm the district court's motion to dismiss, because state right of first refusal laws (ROFRs) are not expressly preempted by FERC Order 1000. Further, FERC Order 1000 does not impliedly preempt state ROFR laws, because they do not directly target Order 1000's competitive solicitation process and do not nullify the FERC-set rate.

Under the Supremacy Clause of the United States Constitution, "[t]his Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Congress may therefore preempt or supersede state law "through federal legislation." *Coal. for Competitive Elec., Dynergy Inc.*, 906 F.3d at 49. First, Congress may, through use of explicit statutory language, expressly preempt state law. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78 (1990). Second, without explicit statutory language, Congress may impliedly preempt state law through either "field" or "conflict" preemption. *Id.* at 79. State law is preempted if it regulates conduct in a field that "Congress intended the Federal Government to occupy exclusively." *Id.* Alternatively, state law is preempted if it conflicts with federal law. *Id.*

When evaluating a preemption question, courts generally assume that a federal statute or regulation does not supersede state law "unless that [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). If Congress's intent is not explicit, courts may infer its intent to preempt a field through "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to

supplement it." *Id.* Alternatively, courts may infer conflict preemption where state law "'stands as an obstacle'" to the execution of the "'full purposes and objectives of Congress.'" *Freightliner Corp. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

However, where a shared regulatory scheme exists between federal and state governments, "'conflict preemption analysis must be applied sensitively'" to preserve the roles of both governments. *Coal. for Competitive Elec., Dynergy Inc.*, 906 F.3d at 55 (quoting *Northwest Central Pipeline Corp.* 489 U.S. at 515). If a state is regulating under its jurisdiction using methods plausibly "related to matters of legitimate state concern," no conflict preemption exists unless "clear damage to federal goals would result." *Id.* If a conflict exists, the state law must always yield to the act of Congress, regardless of the importance of the State's interests. *See Gibbons v. Ogden*, 1824 WL 2697, 211 (U.S. 1824).

Here, Appellant contends that FERC Order 1000, pursuant to the FPA, preempts Vandalia's ROFR, because Order 1000 expressly prohibited ROFRs. R. 15. First, neither the FPA, nor FERC Order 1000 contain explicit statutory language preempting state ROFRs. Conversely, Order 1000 explicitly prohibits federal ROFRs. *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., 136 FERC 61051, ¶ 7 (2011) (Order 1000). Under Order 1000, FERC directs utility transmission providers to remove from their tariffs "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." *Id.* at 3, ¶ 7 (emphasis added); R. 14. Therefore, state ROFRs, including Vandalia's, are not expressly preempted by FERC Order 1000.

Further, state ROFRs are not implicitly preempted by FERC Order 1000, because Congress did not intend exclusive federal regulation of transmission and sale of electricity. *See*

Elec. Power Supply Ass'n, 904 F.3d at 522–23 (stating the FPA "divides regulatory authority between states and the FERC"). In fact, the FPA expressly authorized states to regulate retail sale of electricity and facilities used for electricity generation. *See Coal. for Competitive Elec., Dynergy Inc.*, 906 F.3d at 50 (citing 16 U.S.C. § 824(b)).

Courts have agreed that FERC Order 1000 intended states to retain their traditional authority. *See, e.g.*, *FERC*, 577 U.S. at 260 (finding Order 1000 "is consistent with the Federal Power Act in leaving room for state regulation"); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 49 (D.C. Cir. 2014) (stating Order 1000 took "great pains to avoid intrusion on the traditional role of the States" in regulating transmission facilities). Therefore, state ROFRs, including Vandalia's, are not field preempted by FERC Order 1000, because the FPA and FERC clearly intended states to retain some authority in energy transmission regulation.

Finally, Vandalia's ROFR is not implicitly preempted, because it does not conflict with FERC Order 1000. Appellees argue that many states have enacted ROFRs without FERC's objection. R. 16. In response to Order 1000, several states enacted statutory ROFRs. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1024 (8th Cir. 2020). Pursuant to Order 1000, the RTO MISO replaced its federal ROFR with Minnesota's ROFR in its tariff, which was then approved by the FERC. *Id.* (citing *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC 61037, 61176, ¶ 25 (2015)). LSP, a regional transmission company, challenged MISO's tariff, but FERC ruled that MISO was "authorized to consider state laws in the regional transmission planning process." *Id.*

In *MISO Transmission Owners v. FERC*, 819 F.3d 329, 337 (7th Cir. 2016), LSP filed a petition for review against FERC, which the Seventh Circuit Court of Appeals denied. The Court held that Order 1000 "terminated only federal [ROFRs]," and that it did not "'limit, *preempt*, or

otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'" *Id.* at 337 (emphasis added) (quoting Order 1000 at 72, ¶ 227). Further, the court stated that FERC's goal "to avoid intrusion on the traditional role of the States in regulating . . . construction of transmission facilities" was proper, "*even though* state laws . . . might interfere with regional transmission development." *Id*. (emphasis added)

Here, Appellant argues that Vandalia's ROFR directly targets the order's purpose by "jeopardizing the construction of transmission projects selected in an Order 1000 competitive solicitation process." R. 15. Therefore, Appellant concludes, Vandalia's ROFR is preempted, because its targeting nullifies the wholesale rate effectively set by the FERC. R. 15. But, Vandalia's ROFR does not directly target the Order 1000 competitive solicitation process. R. 9. Vandalia, like Minnesota in *MISO Transmission Owners*, enacted its ROFR, in direct response to Order 1000. R. 9. Vandalia's ROFR similarly provided incumbent transmission owners the exclusive right to build transmission lines in Vandalia for a limited period. R. 9. Although Appellant's proposed transmission line was approved by PJM for inclusion in the regional competitive planning process, Vandalia may regulate construction of transmission facilities through its ROFR even if it "interfere[s] with regional transmission development." *See MISO Transmission Owners*, F.3d at 337. R. 6.

Additionally, Vandalia's ROFR is "plausibly . . . related to matters of legitimate state concern," *Coal. for Competitive Elec., Dynergy Inc.*, 906 F.3d at 55 (citing *Nw. Cent. Pipeline Corp.*, 489 U.S. at 515), because its purpose is to give Vandalia utilities "the first opportunity to invest in federal regionally planned transmission projects." R. 9. Finally, Vandalia's ROFR does not cause "clear damage to federal goals," because either the ROFR will expire, and Appellant may build its proposed transmission lines, or Vandalia's incumbent transmission owners will

exercise the ROFR to build the transmission lines. *Id.*; R. 10. In either scenario, the transmission lines are built under PJM's competitive regional planning process, pursuant to Order 1000. Therefore, Vandalia's ROFR does not conflict with Order 1000, because it does not directly target Order 1000's purpose and does not nullify the FERC-set rate.

The Twelfth Circuit Court of Appeals should affirm the district court's motion to dismiss, because Vandalia's ROFR is not preempted by FERC Order 1000 and is therefore constitutional under the Supremacy Clause.

IV. VANDALIA'S STATUTORY ROFR DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE BECAUSE IT DOES NOT DISCRIMINATE AGAINST FOREIGN COMPETING INTERESTS AND IT IS NOT OVERLY BURDENSOME.

U.S. Const. art. I, § 8, cl. 3, referred to as the Commerce Clause, states that Congress has the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." While the Commerce Clause is primarily focused on the power of the federal government, it also indirectly restricts the power of the states through what is known as the Dormant Commerce Clause. Cornell Law School, *Commerce Clause*, Legal Information Institute, https://www.law.cornell.edu/wex/commerce_clause (last updated July 2022). "The Dormant Commerce Clause refers to the prohibition, implicit in the Commerce Clause, against states passing legislation that discriminates against or excessively burdens interstate commerce." *Id.* If a state's legislation expressly amounts to simple economic protectionism—i.e., "regulatory measures designed to benefit *in-state* interests by burdening out-of-state competitors"—it is facially discriminatory and violates the Dormant Commerce Clause. *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992) (emphasis added).

These facially discriminatory laws are subject to strict scrutiny review, which requires a state to demonstrate that the law has a non-protectionist purpose and there is no less-

discriminatory alternative to accomplish that legitimate local purpose. *Maine v. Taylor*, 477 U.S. 131, 151 (1986). Courts will also apply strict scrutiny if a law directly regulates commerce occurring wholly outside the state's borders. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 582 (1986). If a state's laws are not facially discriminatory, but instead have the effect or purpose of burdening interstate commerce, courts use a balancing test to determine whether that burden is "clearly excessive in relation to [its] putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). The courts also created a market participant exception to the Dormant Commerce Clause, under which a state government is not subject to the Dormant Commerce Clause if it acts as a market participant, rather than a market regulator. *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988).

In *NextEra Energy Cap. Holdings, Inc. v. Lake*, the Fifth Circuit held that a Texas statute which provides that only an owner of an existing facility can build, own, or operate new transmission lines that directly connect with an existing utility facility was facially discriminatory under the Dormant Commerce Clause. 48 F.4th 306, 329 (5th Cir. 2022). The statute prevented those without a presence in Texas from entering the portions of the interstate transmission market that crossed into Texas. *Id.* at 314. Thus, the only way a company without a Texas presence could enter its transmission line market would be to buy a utility that already owns a facility in the State. *Id.* As a result, the Fifth Circuit rejected this statute as mere protectionism, which the Dormant Commerce Clause protects against. *Lake*, 48 F.4th at 326.

Importantly, the Fifth Circuit contrasted *Lake* with an Eighth Circuit case that addressed a similar issue. *Id.* at 323. In *LSP Transmission Holdings, LLC v. Sieben*, the court explained that a Minnesota law grants incumbent utilities a ROFR to construct, own, and maintain new transmission lines. 954 F.3d 1018, 1022 (8th Cir. 2020). If the incumbent does not exercise its

ROFR within ninety days, however, any approved entity may enter the market. *Lake*, 48 F.4th at 323. The Eighth Circuit held that this ROFR law "draws a neutral distinction between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state. *Sieben*, 954 F.3d at 1027. In other words, the Minnesota statute is not facially discriminatory. The Fifth Circuit admitted as much in *Lake*, stating that "[Minnesota's statute] does not go nearly as far as the Texas law in banning new entrants outright." *Lake*, 48 F.4th at 323.

Because the court determined the Minnesota statute was not facially discriminatory, the question before the court turned on whether the law had a discriminatory purpose or effect, and if so, whether it was unduly burdensome. *Sieben*, 954 F.3d at 1026. First, the court held that the statute had no discriminatory purpose because the law is "not primarily aimed at protecting in-state interests but at maintaining a regulatory system that has worked and provided 'adequate and reliable services at reasonable rates. . . .'" *Id.* at 1029. Moreover, "state police power includes regulating utilities" and "such regulation inherently involves siting, permitting, and constructing transmission lines." *Id.* at 1029–30. Second, the court held Minnesota's statute had no discriminatory effect because "[s]tates have traditionally regulated utilities" and the State's decision to allow independent transmission companies to qualify as incumbents does not favor in-state interests. *Id.* at 1030.

Finally, the Eighth Circuit ruled that Minnesota's statute was not unduly burdensome because the state's ROFR was enacted to eliminate regulatory uncertainty resulting from Order 1000 and to preserve the status quo, which is "within the purview of a [s]tate's legitimate interest in regulating the intrastate transmission of electric energy." *Id.* at 1031. Although the court admitted that the ROFR could impact the ability of LSP to build transmission lines in Minnesota,

it noted that "from an aggregate standpoint, this record does not establish that the cumulative effect of state ROFR laws would eliminate competition" completely since incumbents are not obligated to exercise their ROFRs. *Id.*

In the immediate case, Vandalia's ROFR law (Native Transmission Protection Act or *Vand. Code § 24–12.3(d)*) is more like Minnesota's ROFR than Texas'. Vandalia's ROFR gives incumbent transmission owners in the state an exclusive right to construct, own, and maintain new electric transmission lines in Vandalia, which expires after eighteen months. R. 2. If the incumbent transmission owners do not exercise their ROFR, or a nonincumbent acquires an existing incumbent, a nonincumbent utility has the right to build a transmission line with approval from PJM. R. 2–3.

First, just like the Minnesota ROFR, Vandalia's ROFR is not facially discriminatory because it does not expressly distinguish between in-state and out-of-state entities concerning the constructing, maintaining, and owning of transmission lines. R. 9. In fact, both LastEnergy and MAPCo are incorporated in Ohio, and both were allowed to construct transmission lines. R. 16. Nowhere in the text or application of Vandalia's ROFR law does it discriminate against out-of-state entities. R. 9. Instead, the statute explains that after the eighteen-month exercise period, "another entity may build the electric transmission line." R. 9. The time frame may be longer than Minnesota's, but the effect is the same in that it still provides the possibility of nonincumbent utilities constructing new lines. R. 15. This is unlike the Texas ROFR, which had no exercise period and instead completely blocked any nonincumbent utility from entering the transmission market. *Lake*, 48 F.4th at 329.

Second, Vandalia's ROFR does not have a discriminatory purpose, nor does it have a discriminatory effect. Its purpose is not discriminatory because it is "not primarily aimed at

protecting in-state interests . . . ." *Sieben*, 954 F.3d at 1029. If it was, the language of the statute would be analogous to Texas' statute, which effectively provides no avenue for out-of-state entities to enter the transmission market. Tex. Util. Code § 37.056. Additionally, the effect of Vandalia's ROFR is not discriminatory because if it were, utilities like MAPCo and LastEnergy would not be able to operate in the State since they are headquartered outside of it. R. 16. As the Eighth Circuit noted in *Sieben*, allowing independent transmission entities to qualify as incumbents does not favor in-state interests and thus does not have the effect of discrimination. 954 F.3d at 1030.

Even if Vandalia's ROFR was determined to be discriminatory in purpose or effect—which it is not—that burden is not clearly excessive when compared to the local benefits it provides. *Pike*, 397 U.S. at 142. This test from the U.S. Supreme Court in *Pike* requires "balancing a legitimate local public interest against its incidental burden on interstate commerce." *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002). ACES's burden claim originates from its perceived inability to compete for PJM's transmission line business. R. 15. Incumbents are not obligated to exercise their ROFR, however, and it is entirely possible that they will not. R. 9. The purpose of Vandalia's ROFR is to preserve the status quo of construction and maintenance of electric transmission lines that existed prior to Order 1000. R. 9. As already highlighted, the Eighth Circuit explained that this type of goal is well within the purview of a state's legitimate local interest. *Sieben*, 954 F.3d at 1031. Indeed, "states retain authority over the location and construction of electrical transmission lines." *Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013). In other words, the burden imposed by Vandalia's ROFR on nonincumbent utilities is outweighed by Vandalia's legitimate interest in regulating its electric industry.

This is true despite ACES's claim that Vandalia's ROFR "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." R. 15. But the Dormant Commerce Clause is not a guarantee of success; it is merely a prohibition on discriminatory practices by a state. U.S. Const. art. I, § 8. Vandalia's ROFR may make it arduous for ACES to be competitive, but it does not discriminate against ACES simply because it is based in West Virginia. R. 16.

Finally, because Vandalia's ROFR is merely the State conferring a benefit on incumbent transmission owners and not Vandalia itself engaging in the buying and selling of goods or services, analysis under this exception is not necessary. Cornell Law School, *Market Participant Exception*, Legal Information Institute, https://www.law.cornell.edu/wex/market_participant_ exception (last visited Jan. 17, 2023).

Because Vandalia's ROFR does not facially, in purpose, or in effect, discriminate against ACES, and the statute's local benefits outweigh its burden, this court should find that the ROFR does not violate the Dormant Commerce Clause of the U.S. Constitution.

CONCLUSION

This Court should affirm the dismissal of the Capacity Factor Order challenges and the State Right of First Refusal challenges granted to the Vandalia PSC by the U.S. District Court from the Northern District of Vandalia.

APPENDIX: CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appellee certify that our *Team* emailed the brief (PDF version) to the *West Virginia University Moot Court Board* in accordance with the *Official Rules* of the National Energy Moot Court Competition at the West Virginia University College of Law. The brief was emailed before 1:00 p.m. Eastern time, February 1, 2023.

Respectfully submitted,
Team No. 7
Counsel for the Respondent/Appellee
February 1, 2023