IN THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Case No. 22-0682

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC *Appellant*,	)	Appeal from the United States District Court for the Eastern District of Vandalia
v.	)	Case 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*, *Appellee*.	)	

APPELLEE'S BRIEF

Team No. 11

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Materials

Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

To obtain judicial review, Appalachian Clean Energy Solutions, Inc. (ACES) must establish constitutional standing, including an injury-in-fact that is actual or imminent. As demonstrated in Argument Section I *infra*, petitioners cannot establish the requisite injury to challenge Vandalia Public Service Commission's (PSC) Capacity Factor Order (CFO). Accordingly, the Court does not have jurisdiction to hear ACES' argument regarding whether the Federal Energy Regulatory Commission's (FERC) actions under the Federal Power Act (FPA) preempt the PSC's CFO.

The district court had jurisdiction to adjudge Vandalia's statutory Right of First Refusal (ROFR) under 28 U.S.C. § 1331. The district court granted the PSC's motion to dismiss on all issues on August 15, 2022. R. at 16. The Twelfth Circuit has jurisdiction over this appeal under 28 U.S.C. § 1291. On August 29, 2022, ACES timely appealed to the Twelfth Circuit. *Id.*

ISSUES PRESENTED

I. Does ACES have standing to challenge the PSC's CFO?

II. Does PCS's CFO violate the Supremacy Clause of the U.S. Constitution because it is preempted by the actions of FERC under the FPA?

III. Does Vandalia's statutory ROFR violate the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000?

IV. Does Vandalia's statutory ROFR violate the dormant Commerce Clause of the U.S. Constitution?

STATEMENT OF THE CASE

I. Statutory Background

Before the FPA, states and local agencies oversaw electricity generation, transmission, and distribution. Then, the Supreme Court found that the Commerce Clause bars states from regulating

certain interstate electricity transactions, creating the "Attleboro gap." *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927). To fill the Attleboro gap, Congress passed the FPA.

The FPA is the primary statute governing the wholesale transmission and sale of electric power. 16 U.S.C. §§ 791–828. The FPA's jurisdiction is limited to "the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). The FPA defines "wholesale" as a sale for resale. 16 U.S.C. § 824(d). Intrastate transmission and distribution of electricity, and intrastate and retail sale of electricity, are largely regulated by states.

II. Factual Background

A. PJM Interconnection and Vandalia

PJM Interconnection's (PJM) origins lie in the FERC's Orders 888 and 2000. FERC's Order 888 required transmission-owning utilities to provide non-discriminatory access to their transmission lines. *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,540 (May 10, 1996). FERC further suggested the concept of an independent system operator (ISO) to comply with Order 888. *Id.* at 21,551. An ISO is an independent non-profit organization that handles electric grid operations and bulk electric system planning. *Id.* In Order 2000, FERC established the closely related category of system operators called regional transmission organizations (RTOs). *Regional Transmission Organizations*, 65 Fed. Reg. 809 (Jan. 6, 2000). All FERC jurisdictional ISOs are also certified as RTOs. *See* 18 C.F.R. §§ 35.34(c)–(h).

The RTO/ISO serving the mid-Atlantic region is the PJM. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 155 (2016). PJM is responsible for maintaining and operating the transmission

grid in Vandalia, thirteen other states, and the District of Columbia. R. at 3. PJM decides whether to approve the construction of new transmission facilities to serve the PJM grid. *Hughes*, 578 U.S. at 155. Meanwhile, states retain authority over siting, routing, and permitting. R. at 3.

PJM also operates energy and capacity markets. *Hughes*, 578 U.S. at 155. The energy market is a "real-time" market that enables PJM to buy and sell electricity to distributors for delivery within the next hour or 24 hours. R. at 3. All electricity generators in Vandalia are connected to PJM and are contractually obligated to sell all electricity they produce in the PJM energy market under their Fixed Resource Requirement (FRR) status. *Id.* at 8.

To determine the wholesale electricity price in its energy market, PJM operates an auction. *Id.* In the auction, offers to sell power are stacked in increasing order. *Hughes*, 578 U.S. at 156–57. The lowest offer "clears" the market first, followed by the next lowest, until demand is met. *Id.* at 150. The price of the highest offer to clear the market is the "market-clearing" price. R. at 8. All generators receive the market-clearing price.[1]

PJM also operates a forward-looking capacity market. *Hughes*, 578 U.S. at 155. The capacity market ensures future energy demand will be met. *Id.* at 150. PJM predicts demand three years into the future and assigns a share of that demand to each participating load-serving entity in the region. R. at 8. Like its real-time energy market, PJM's capacity market relies on an auction, which results in a single clearing price for capacity. *Id.* The capacity and energy markets efficiently allocate supply and demand, incentivizing new plant construction when necessary.

[1] For example, if there are three offers, one at $1,000 per megawatt-hour (MWh), one at $1,500 per MWh, and one at $2,000 per MWh, and electricity demand would be met by combining the $1,000 and $1,500 offer, $1,500 per MWh is the market clearing price. The generators that offered $1,000 per MWh and $1,500 per MWh will receive $1,500 per MWh. The generator that offered $2,000 per MWh would not sell its electricity.

B. Parties

Mid-Atlantic Power Co. (MAPCo) and LastEnergy are utilities that serve Vandalia. R. at 4. LastEnergy and MAPCo have two and three coal-fired power plants in Vandalia, respectively. *Id.* LastEnergy generates 3,300 megawatts (MW) of power, serving 600,000 customers in Vandalia. *Id.* MAPCo generates 5,800 MW of power, serving 450,000 customers in Vandalia. *Id.* LastEnergy is headquartered and incorporated in Akron and MAPCo in Columbus, Ohio. *Id.*

ACES is a global energy company seeking to build a natural gas-fired electric generating plant in southwestern Pennsylvania. R. at 4. ACES is headquartered in Springfield, Vandalia, and generates electricity solely for resale in the wholesale market. *Id.* [2] Upon completion of its plant in Pennsylvania, ACES would sell the electricity at wholesale into PJM. R. at 4–5.

ACES operates the Franklin Generating Station, a 1,300 MW coal-fired power plant in Ohio. R. at 5. The merchant plant sells output into PJM and has been an unsuccessful bidder in the PJM capacity auctions in 2020 and 2021. *Id.* The plant's recent capacity factors were 46.9 percent in 2020 and 38.2 percent in 2021, meaning that it usually does not operate at maximum power. *Id.*

With the anticipated retirement of the Franklin Generating Station, ACES plans to construct the Rogersville Energy Center, an 1,800 MW combined-cycle natural gas-fired generating plant. R. at 5. The Center will be in Greene County, Pennsylvania. *Id.* To accommodate increased electrical output from the Center, ACES also plans to build Mountaineer Express, a high-voltage transmission line from Greene County, Pennsylvania, to Wake County, North Carolina. *Id.* The proposed transmission line route crosses Vandalia. R. at 6.

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[2] There are some inconsistencies in the record regarding the headquarters of ACES. *Compare* R. at 4 (noting headquarters in Springfield, Vandalia), *with* R. at 16 (noting headquarters in West Virginia). For purposes of this argument, it is assumed ACES is headquartered in Vandalia.

PJM implemented a competitive planning process for new transmission facilities, like that proposed by ACES, to implement Order 1000 and build out PJM's bulk electric system. R. at 6. The PJM Board of Managers approved Mountaineer Express for inclusion in the Regional Transmission Express Plan (RTEP) in March 2022. *Id.*

The PSC is a government agency charged with regulating rates and practices of utilities providing retail service within Vandalia. R. at 6. The PSC has a broad grant of authority to set "just and reasonable rates" for utilities. Vand. Code § 24-2-3. The PSC also regulates public utilities' practices, services, and rates to "provide the availability of adequate economical and reliable utility services." *Id.* § 24-1-1(a)(2).

C. The Cultural and Economic Significance of Coal to Vandalia Informs Policy

Mining is integral to life in Vandalia as the state is rich in plenary coal deposits and natural gas reserves. R. at 4. In 2021, coal-fired electric power plants accounted for 91 percent of Vandalia's total electricity net generation. *Id.* Vandalia is a net supplier of electricity to the regional grid since it uses approximately half of the electricity it generates. *Id.*

Given the importance of coal to Vandalia's economic and cultural vitality, the Legislature has enacted directives to the PSC to ensure coal's continued dominance as a source of energy in Vandalia. R. at 6. The Legislature has directed the PSC to "[e]ncourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the state's energy resources, such as coal." Vand. Code § 24-1-1(a)(3). Further, the Legislature clearly articulated the dangers of current trends, finding that "[i]t is imperative the State of Vandalia take immediate steps to reverse [coal plant closures] to ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." *Id.* § 24-1-1D(5). And finally: "Public electric utilities in Vandalia should be encouraged to operate their coal-fired plants at maximum reasonable output." *Id.* § 24-1-1D(12).

1. CFO

To fulfill its statutory directive, the PSC promulgated the CFO. R. at 7. The capacity factor measures how often a plant is running at maximum power. *Id.* The CFO requires coal plants to run 75 percent of the time. R. at 8. The CFO ensures coal retains a "prominent role in Vandalia's economy" and "a way of life for the community." R. at 4. Before the CFO, capacity factors for utilities using coal plants ranged between 34 and 62 percent, meaning the coal plants were underutilized. R. at 7. The PSC found the public interest "is better served by LastEnergy and MAPCo managing their power supply portfolio in a manner that maximizes generation from their owned coal-fired power plants." R. at 8 (citing CFO at 7). The PSC found the CFO was consistent with its statutory obligation to encourage the operation of coal-fired plants "at maximum reasonable output and for the duration of the life of the plants." *Id.*

The CFO is based on a finding of fact that the required capacity factor is economical, although it authorizes cost recovery in a narrow set of circumstances. R. at 8. The CFO authorizes cost recovery if, in complying with the CFO, the cost to produce electricity at Vandalia's coal-fired plants is greater than the market clearing price. *Id*. The cost would be recovered through increased retail rates passed onto ratepayers. *Id.* PSC Chairman Williamson expects that coal plants "would almost always be able to run economically." *Id.* at 9. Hence, the cost-recovery provision will rarely, if ever, be used.

2. ROFR

Before 2011, FERC used the same ROFR policy Vandalia enacted into state law, favoring incumbent utilities for new transmission projects. Then, in 2011, FERC issued Order 1000, which allows states to make their own regulatory choices about selecting builders. *Transmission Planning & Cost Allocation*, 76 Fed. Reg. 49,841 (Aug. 11, 2011). Order 1000 allows states to adopt a competitive approach but does not mandate such an approach. *Id.* FERC made clear that Order

1000 would not "limit, preempt, or otherwise affect" these "state or local laws or regulations." *Id.* at 49,880, 49,885 n.231, 49,891.

After Order 1000, many states, including Vandalia, enacted state ROFR laws. *See, e.g.*, Minn. Stat. § 216B.246, subd. 2; N.D. Cent. Code §49-03-02.2; S.D. Codified Laws §49-32-20; Neb. Rev. Stat. § 70-1028; 17 O.K. Stat. § 292. Vandalia's law provides:

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

Vand. Code § 24-12.3(d). An "incumbent electric transmission owner" is defined as:

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

Vand. Code § 24-12.2(f).

LastEnergy and MAPCo are both incumbent transmission line owners. R. at 9. ACES is not an incumbent owner under the ROFR because it does not own any existing transmission facilities within Vandalia. R. at 10. To comply with the statutory ROFR, ACES would simply need to wait eighteen months to build its proposed transmission line in Vandalia.

3. State ROW Easements and Utilities

Before building a power line, utilities acquire right of way (ROW) easements from property owners along the route. R. at 10. The ROW grants the utility the right to use or access property according to the easement. *Id.* The Vandalia Code governs the use of electric utility easements in Section 24-8-2: electric utility easements may be used by any "public utility" for the location and use of distributions and transmission facilities. Vand. Code § 24-8-2. A "public utility" is defined

as "any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business involving the provision of electricity, gas, water, or any other service or commodity furnished to the public for compensation, whether herein enumerated or not." *Id.* § 24-8-1(d). "Incumbent utility" is defined as "the entity that is the owner of the easement." *Id.* § 24-8-1(h).

LastEnergy and MAPCo have obtained easements that allow them to build and maintain their distribution and transmission power lines. R. at 10. In preliminary discussions between ACES and LastEnergy, LastEnergy took the position that, as the "incumbent utility," it had the right to prohibit ACES' use of its ROWs for the Mountaineer Express Project because ACES is not a "public utility" in Vandalia as that term is defined in Section 24-8-1(h). R. at 11. ACES thereafter commenced a proceeding at the PSC to obtain a declaratory ruling that it met the requirements of a "public utility" under Section 24-8-1(h) and was therefore eligible to use LastEnergy's electric utility ROWs within Vandalia. *Id.*

In the Right of Way Order (RWO), issued December 13, 2022, the PSC ruled that ACES was not a "public utility" under Section 24-8-1(h) because it is not an entity furnishing electricity to the "public" for compensation in Vandalia. R. at 11. According to the PSC's Order:

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

R. at 11 (citing RWO at 3).

Because of the RWO, ACES cannot use LastEnergy's preexisting rights of way in Vandalia. R. at 11. Since the RWO, ACES has conducted its ROW planning, assuming the absence

of eminent domain authority. *Id.* This would increase ACES' costs of building Mountaineer Express, casting doubt about whether the Mountaineer Express will be built. *Id.*

III. Procedural Background

On June 6, 2022, ACES sued the PSC, challenging the CFO and ROFR. R. at 14–15. On June 27, 2022, the PSC moved to dismiss both actions for failure to state a claim. R. at 14, 16. On August 15, 2022, the U.S. District Court for the Northern District of Vandalia granted the PSC's motion to dismiss the CFO and ROFR. R. at 16. The court found that ACES did not have standing to challenge the CFO, and even if it did, the CFO does not violate the Supremacy Clause. *Id.* Further, the court found that the ROFR is not preempted by Order 1000 and does not violate the dormant Commerce Clause. R. at 16. ACES filed a timely appeal on August 29, 2022. *Id.*

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's rulings on all issues. First, this Court should affirm the district court's finding that ACES does not have standing to challenge the CFO. ACES has failed to show it "suffered an injury-in-fact" that is "fairly traceable to the challenged conduct" and is "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1547 (2016). ACES' alleged injury-in-fact is neither concrete, nor imminent, but speculative. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). ACES argues that the CFO "will seriously distort the PJM's price signals," R. at 14, pointing to an injury that is not "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 401 (2013). The PSC has found that it will be economical for coal plants within Vandalia to run at 75 percent capacity. R. at 9. Moreover, ACES has not established that it will be able to build the Rogersville Energy Center. R at 5. Lastly, a favorable judicial decision will not redress ACES' injury because it needs to build its power plant without eminent domain authority, likely making the project prohibitively expensive. R at 11.

Second, even if the Court finds that ACES has standing, the CFO is not preempted by the FPA because it neither sets interstate wholesale rates nor compels utilities to sell their energy into PJM. R. at 14. The CFO does not conflict with FERC's goals because the CFO is "untethered" to interstate markets. *Hughes*, 578 U.S. at 166. The CFO does not guarantee a fixed price for coal-burning plants, nor does it change their bidding incentives. This means the CFO is not an obstacle to FERC's goals in interstate markets. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). Any incidental effects the CFO has on interstate markets do not amount to conflict preemption. *PPL EnergyPlus, LLC v. Solomon*, 766 F.3d 241, 246 (3d Cir. 2014). The CFO is also not field-preempted because states can subsidize and require minimum amounts of certain energy types. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 51 (2d Cir. 2018). Lastly, the CFO does not compel coal-burning utilities to sell energy into PJM. ACES' argument rests on *Rochester Gas & Elec. Corp. v. Pub. Serv. Com*, 754 F.2d 99, 102 (2d Cir. 1985). Like in *Rochester Gas*, the CFO does not compel sales into PJM, but merely recognizes its existence. *Id.* at 102–03.

Third, Vandalia's statutory ROFR is not preempted by FERC Order 1000. FERC's Order 1000 expressly refused to encroach on the traditional role of states in regulating siting and construction of transmission facilities. Order 1000 did not limit the ability of states to enact statutory ROFRs. Rather, the Court should defer to FERC's interpretation. Vandalia's statutory ROFR is not preempted but within the power of the state.

Finally, Vandalia's statutory ROFR is also valid under the dormant Commerce Clause. Incentivizing the intrastate production of certain fuels, like coal, does not amount to a discriminatory effect on out-of-state utilities like ACES. Under the *Pike* balancing test, even if Vandalia's statutory ROFR poses some burden to interstate commerce, it is not excessive in relation to Vandalia's state interests in providing economical and efficient electricity. This Court

should echo the Eighth Circuit in *LSP Transmission* and affirm the district court's dismissal of Vandalia's statutory ROFR. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020). Accordingly, this Court should affirm the district court's ruling on all issues.

STANDARD OF REVIEW

When reviewing an appeal to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court should accept all allegations in the complaint as true, *Ashcroft v. Iqbal*, 556 U. S. 662, 678 (2009), and review the decision de novo. *James v. City of Wilkes-Barre*, 700 F.3d 675, 679 (3d Cir. 2014).

ARGUMENT

I. ACES Does Not Have Standing to Challenge the PSC's CFO

The district court correctly held that ACES lacks standing to challenge the CFO because its injuries are hypothetical. R. at 15. Article III standing requires a plaintiff to have (1) suffered an "injury-in-fact" (2) that is "fairly traceable" to the challenged conduct and (3) that is "likely to be redressed by a favorable decision." *Spokeo*, 136 S. Ct. at 1547; U.S. Const. art. III, § 2; *Lujan*, 504 U.S. at 560; *Allen v. Wright*, 468 U.S. at 753. ACES does not have standing because it has not suffered an injury-in-fact, nor can this Court provide redress.

A. ACES Has Not Alleged a Sufficient Injury-in-Fact

An injury-in-fact must be concrete, imminent, and not speculative. *Clapper*, 568 U.S. at 401. The threat of future injury must be "certainly impending" to establish standing. *Id.* ACES' purported injury is not "actual or imminent" but "hypothetical," so it is insufficient to establish standing. *Lujan*, 504 U.S. at 560; *Spokeo*, 136 S. Ct. at 1548.

ACES claims the CFO will impact the Rogersville Energy Facility's bids at auction. R. at 14. But ACES has not alleged any decline in profits or current distortion of the PJM clearing prices. Rather, ACES argues the CFO "*will* seriously distort the PJM's auction price signals." R. at 14

(emphasis added). Notably, the CFO is currently in effect, so if the CFO *actually* distorted price signals, such information would be alleged in the Complaint. To meet the standard for hypothetical future injuries, Appellants must show such market effects are "certainly impending." *Clapper,* 504 U.S. at 401. ACES fails to meet this high bar for two reasons.

First, the PSC has found that it would be economical for coal plants within Vandalia to run at 75 percent capacity, so any shortfalls between the market clearing rate and wholesale rate have not yet occurred. R. at 9. Just because LastEnergy and MAPCo *may* clear the market does not mean ACES has an injury. Moreover, coal-fired plants are unlikely to utilize the CFO's cost-recovery mechanism because it only allows recovery of costs, rather than profit from the production of electricity. *See infra* Argument Part II.A.2.

Second, ACES has not established that the Rogersville Energy Center will even be built. The Rogersville Energy Center requires the Mountaineer Express to transmit electricity. R. at 5. However, after the RWO,[3] the Mountaineer Express is unlikely to be built. *Id*. at 10. Unless the PSC grants ACES a Certificate of Public Convenience and Necessity, ACES will need to construct the Mountaineer Express without eminent domain authority. *Id*. at 11. This feat will prove difficult, as just one landowner not giving ACES a ROW would change the course of the line. *Id.* Constructing the Mountaineer Express without eminent domain will quickly become prohibitively expensive. *Id.* Without the Mountaineer Express, there is no Rogersville Energy Center, and thus no injury. Accordingly, ACES fails to establish that its injury is "certainly impending."

B. ACES Fails to Establish Redressability

Even if this Court invalidated the CFO, ACES' purported injuries would not be redressed because it has no generation plants which would be subject to the CFO, or retail consumers which

[3] The RWO is not the subject of the appeal and thus cannot help ACES establish an injury.

could be affected by its application. At issue here is not an inability to purchase wholesale power on ACES' desired terms but intrastate regulation of retail rates. *See Orangeburg v. FERC*, 862 F.3d 1071, 1077–79 (D.C. Cir. 2017). This Court should affirm the district court's dismissal based on standing because, not only are ACES' interests not within the scope of Vandalia's CFO, but invalidating the CFO would not redress Appellant's asserted injuries.

States have the power to regulate intrastate electricity transmission and generation, as the FPA expressly allows. Should this Court conclude that ACES has standing, ACES has failed to state a preemption claim. The PSC acted within the authority reserved for states and has not intruded upon FERC's exclusive authority over wholesale electric rates.

II. The PSC's CFO Is Not Preempted by the FPA

ACES alleges that the CFO is preempted by the FPA, which gives FERC the power to regulate the "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); R. at 14. Preemption, unless explicit, must occur through either "conflict preemption" or "field preemption," neither of which occur here. *Zibelman*, 906 F.3d at 49. Importantly, the FPA limits FERC's jurisdiction "only to those matters which are not subject to regulation by the States." *Id.* § 824(a). The CFO is one such matter reserved for the state of Vandalia. The district court correctly dismissed ACES' claims on the merits. *See* R. at 16. This Court should affirm.

A. The CFO Is Not "Tethered" to the Wholesale Market

Conflict preemption arises when "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, 575 U.S. at 377 (internal quotes omitted). ACES asserts the CFO will seriously distort PJM's wholesale auction price signals, thus rendering it conflict preempted by the FPA. R. at 14. The CFO does not act as an obstacle to the FPA's purpose.

1. The CFO Does Not Affect Vandalia Utilities' Bidding Incentives in Wholesale Markets

In *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016), the Maryland PSC unconstitutionally interfered with PJM's interstate markets. Maryland solicited proposals to construct a new power plant and selected CPV Maryland, LLC's (CPV) proposal at a predetermined price. *Id.* at 158. CPV bid that plant's capacity into PJM's auction markets. *Id.* However, CPV did not necessarily earn the market-clearing price, which FERC considered "just and reasonable" under the FPA. *Id.* at 157. Instead, Maryland required its load serving entities (LSEs) to enter into a contract with CPV, known as a "contract for differences." *Id.* at 158. Through this contract, the LSEs would either subsidize or receive money from CPV such that CPV received the price in its proposal to Maryland, rather than PJM's market-clearing price. *Id.* As a result, CPV had an incentive to bid into PJM's auctions at zero; that ensured that its bid was accepted into the PJM market while still receiving the proposal's price from Maryland LSEs. *Id.* at 159.

Unlike the Maryland order, Vandalia PSC's CFO is untethered to the PJM auction. The CFO simply requires that Vandalia utilities "operate their coal-fired plants to achieve a capacity factor of not less than 75 percent." R. at 8. This requirement does not guarantee Vandalia utilities a predetermined contract price. *Id.* Because of that, Vandalia utilities still have an incentive to operate efficiently and offer competitive bids at their marginal cost. *Id.* at 8. This incentive to offer bids at their marginal cost is exactly the just and reasonable outcome FERC and PJM intended when creating interstate auction markets. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 268 (2016) ("the marginal cost — i.e., the added cost of meeting another unit of demand— [is] the price an efficient market would produce."). While the Maryland program "insulated generators from fluctuations in wholesale prices by guaranteeing [the price] they would receive," Vandalia's CFO still exposes coal plants to the variability of the PJM market and is therefore not an "obstacle" to FERC's goals. *Zibelman*, 906 F.3d at 51; *Oneok*, 575 U.S. at 377.

2. The CFO's Cost-Recovery Provision Does Not Allow Utilities to Earn a Profit

The PSC was thoughtful and deliberate in its reasoning when choosing the 75 percent threshold. The PSC's findings of fact show that operating at a 75 percent capacity would still be economical for coal-fired plants owned by LastEnergy and MAPCo. R. at 8–9.

However, in the event the coal plants' actual costs exceed the market clearing price, the CFO does include a provision allowing LastEnergy and MAPCo to recover those costs through increased retail rates, which are unambiguously within the PSC's jurisdiction. R. at 8; *see also* 16 U.S.C. § 824(b). ACES argues this cost-recovery provision implicitly sets interstate wholesale rates and will distort PJM's auction prices. Contrary to Appellants claim, this does not incentivize LastEnergy and MAPCo to bid below their marginal costs like the Maryland scheme in *Hughes.* If Vandalia utilities bid below their marginal cost to increase the chance of their bids being accepted, they are only allowed to recover up to their actual costs. R. at 8. This leaves no room for profit and thus no incentive for Vandalia utilities to act in this manner. Moreover, Vandalia does not "condition payment of funds on capacity clearing the market," which was Maryland's fatal defect. *Hughes,* 578 U.S. at 166. Vandalia conditions its cost-recovery provision on utilities' actual costs being higher than the market-clearing price.

In other words, Vandalia's CFO starkly contrasts with Maryland's policy in *Hughes*. Maryland's policy ensured CPV earned a profit by reimbursing the utility for any difference between the contract price and the PJM clearing price, thus incentivizing CPV to bid low and consistently clear the PJM market. *Id.* at 159. It is this incentive that tethers the Maryland scheme to interstate markets. *Id.* at 163. As Chairman Williamson of the PSC opined, the CFO's cost-recovery provision is better understood as a "fail-safe" to assuage fickle investors rather than a provision that distorts PJM's markets. R. at 9.

3. The CFO's Incidental Effects Do Not Amount to Conflict with the Wholesale Market

Although the CFO does not conflict with PJM's wholesale markets, there is a possibility that the CFO will have some effects on wholesale markets. R. at 8. For example, increased coal-fired generation may increase overall electricity capacity or crowd out other sources of generation. This may disincentivize investment in cheaper energy resources. R. at 7. However, these effects are incidental and do not conflict with the overall purpose of PJM's markets.

The *Hughes* court acknowledges that "[s]tates, of course, may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Hughes*, 578 U.S. at 164. In this case, Vandalia is regulating well within its assigned domain, which includes the power to procure its own portfolio of energy generation. 16 U.S.C. § 824(a); *see also Hughes*, 578 U.S. at 166 (listing permissible methods by which states can encourage electricity production). Any effects in the wholesale market due to the CFO are only incidental because they are smaller in magnitude and an indirect consequence of the PSC fulfilling its mission to "[e]ncourage the well-planned development of utility resources . . . in ways consistent with the productive use of the state's energy resources, such as coal." R. at 6.

Any crowding out of non-coal resources or increase in capacity due to the CFO will not amount to preemption by conflict, as seen in *PPL EnergyPlus*, 766 F.3d at 254. In *Solomon*, the Third Circuit held that New Jersey's policy to give domestic generators preferential rates encroached onto "a field of regulation" exclusively reserved for the federal government. *Id.* at 246. However, the court was clear to stop short of holding that New Jersey's policy "poses an obstacle to PJM's market and has been conflict preempted." *Id.* at 254. The Third Circuit acknowledges that the policy could affect interstate market prices by increasing the supply of capacity. *Id.* at 255. Yet the court notes that "the law of supply-and-demand is not the law of preemption." *Id.*; s*ee also 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.") Similarly, Vandalia's CFO may have tangential effects on PJM markets, such as the crowding out of non-coal generators or an increase in overall capacity. However, those tangential effects do not conflict with PJM's wholesale markets and thus are not preempted.

B. The CFO Is a Permissible Exercise of the State of Vandalia's Powers

Under field preemption, "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). ACES asserts that the CFO is field preempted because it, in effect, unconstitutionally sets an interstate wholesale rate. R. at 15. However, the CFO does not operate in a field fully occupied by Congress.

1. The CFO Is a Permissible Policy Decision to Subsidize Specific Energy Types

Hughes left the door open for states to operate in a manner untethered to a utility's participation in interstate wholesale markets. Two cases upholding zero emission credit (ZEC) schemes represent examples of permissible state policies in the field of energy subsidization. In *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 47 (2d Cir. 2018), the court upheld New York's program that grants ZECs to nuclear plants, which subsidizes their operation. The court regarded ZECs as New York's way of "encouraging production of new or clean energy through measures *untethered to a generator's wholesale market participation.*" *Id.* at 51 (emphasis in original). Vandalia follows this principle and makes its own policy choice about which new energy sources to encourage. In most instances, coal plants will not receive any subsidy and will not run afoul of *Hughes* because operating at a 75 percent capacity factor was found to be economical. R. at 8; *see also supra* Argument Part I.A.2. In the subset of cases in which actual costs exceed the market clearing price, however, coal-based generators will still receive a subsidy

untethered to their wholesale market participation; instead, their subsidy is tethered to the actual costs of operating their generator, which is a permissible subsidy akin to *Zibelman*.

The Seventh Circuit upheld Illinois' ZEC program in a similar case. *Illinois Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 521 (7th Cir. 2018). The subsidy starts at a fixed rate but can fall based on a "market-price index," which is the annual average of energy prices in PJM's auction. *Id.* at 521–22. Petitioners challenged this subsidy, arguing that the ZEC program "indirectly regulates the [interstate] auction by using average auction prices as a component in a formula that affects the cost of a credit." *Id.* at 522. Even though the subsidy is, in part, a function of PJM's market prices, the *Star* court deemed this permissible. That is because "what (indeed, whether) a producer bids in the interstate auction does not determine the amount it receives." *Id.* at 523. Similarly, any subsidy that coal-based generators may receive through Vandalia's CFO is not based on what it bids. Rather, it is based on the generator's cost of service, which is independent of its bid. This type of subsidy is untethered to PJM's auction market and is, as mentioned previously, best characterized as a fail-safe for investors.

2. The CFO Is a Permissible Policy Decision to Require a Minimum of Specific Energy Types

Because nothing in the FPA precludes resource-specific energy requirements, 38 states have enacted policies that mandate minimum levels of renewable electricity at the retail level, often called renewable portfolio standards (RPSs). Brannon P. Denning, *Environmental Federalism and State Renewable Portfolio Standards*, 64 CASE W. RES. L. REV. 1519, 1529 (2014). Congress has yet to enact a national RPS, thus allowing the field to be occupied by states. *Id.* ("[T]he states are – so far – writing on a blank slate.").

Vandalia's CFO, which requires that coal plants have a capacity factor of more than 75 percent, is permissible under the same principle. Just as some states can require minimum levels of renewable energy through its RPSs, so too can Vandalia require that its energy mix primarily

consist of coal. So long as Congress does not enact resource-specific requirements of its own, states are not field preempted from doing the same within their borders.

C. The CFO Does Not Compel Coal-Burning Utilities to Sell Their Energy Into PJM

Compelling generators to sell their energy into PJM is plainly preempted by the FPA because it is considered regulation of interstate wholesale sales. *Rochester Gas*, 754 F.2d at 102; *see also Zibelman*, 906 F.3d at 52; *Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 97 (2d Cir. 2017) [hereinafter *Allco II*]. ACES further argues the CFO is field preempted by the FPA because it compels utilities to sell their energy into PJM. R. at 14. However, following the precedent of *Rochester* and its progeny, the CFO does not compel LastEnergy and MAPCo to sell into PJM.

In *Rochester Gas*, the court reviewed the New York utility company's allegations that it was compelled to sell its energy into interstate wholesale markets. 754 F.2d at 102. In a ratemaking case, the New York PSC calculated the total revenue that Rochester Gas & Electric (RG&E) should make, which included estimated revenue from selling into wholesale markets. *Id.* at 100. RG&E challenged this inclusion, arguing that the PSC "compelled" RG&E to make these wholesale sales or risk falling short of its authorized rate of return. *Id.* at 101. The court rejected this argument, noting that RG&E did not allege it would make a lesser level of wholesale sales but for the PSC's policy. *Id.* at 102. The PSC's recognition of existing interstate sales in its own ratemaking proceeding is not equivalent to regulating those sales.

The facts here are similar to those in *Rochester Gas*. Even before the CFO was proposed, all of the coal-fired power plants exclusively sold into PJM because of their FRR status. R. at 8. Therefore, the CFO will not change the behavior of any coal-fired plant and fails to meet the "compel" standard laid out in *Rochester Gas*. 754 F.2d at 102. After all, to compel is to force an action that would otherwise not occur. *Compel*, OXFORD ENG. DICTIONARY, https://www.oed.com/view/Entry/37514 (last accessed Jan. 25, 2023).

ACES may argue that coal-burning utilities may terminate their FRR status after a minimum five-year term. PJM, RELIABILITY ASSURANCE AGREEMENT AMONG LOAD SERVING ENTITIES IN THE PJM REGION 143 (2010). If utilities terminate their FRR status, they may choose to sell their electricity outside PJM, say in bilateral contracts. *Id.* However, the CFO will still not amount to compulsion under this circumstance. The CFO ensures coal-fired plants "achieve a capacity factor no less than 75 percent" but does not mandate the market in which these plants sell. R. at 8. The cost-recovery provision will still be triggered by low market-clearing in the PJM market, even if a coal-fired plant enters into a bilateral contract outside of the PJM capacity market. Accordingly, no portion of the CFO compels utilities to sell into the PJM market. This Court should dismiss all CFO claims on the merits because the CFO is not conflict preempted or field preempted by the FPA.

III. Vandalia's Statutory ROFR Is Not Preempted by FERC Order 1000

Under the Supremacy Clause, state laws that conflict with federal statutes will be preempted because the Constitution is the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. The Supreme Court has made clear that rules made pursuant to delegated authority may preempt state law. *Ridgway v. Ridgway*, 454 U.S. 46, 52–56 (1981); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). Still, just like with statutes, courts must reconcile the two and only find preemption in the case of irreconcilable conflict or obstacle. 430 U.S. at 525–526; *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152 (1982).

Two issues preclude finding that Vandalia's statutory ROFR is preempted by FERC Order 1000: (1) the longstanding presumption against preempting state authority in areas traditionally subject to state regulation, *California v. ARC Am. Corp.*, 490 U.S. 93 (1989); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157 (1978), and (2) FERC did not mean to preempt Vandalia's statutory ROFR

according to the language of Order 1000 and FERC's interpretation of the order. *Fid. Fed. Sav. & Loan Ass'n*, 458 U.S. at 154.

A. ACES Cannot Overcome the Longstanding Presumption Against Preemption of an Area Traditionally Subject to State Regulation

When regulation is of a field traditionally occupied by states, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 231 (1947). This principle also applies when an agency acts to preempt state regulation. *Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985).

States have historically regulated electricity generation, transmission, and distribution. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 767 (2016). Congress enacted the FPA to merely fill in gaps in federal and state regulation after *Attleboro*, not usurp state's roles in regulating energy.[4] In *Attleboro*, the Court found that states could not regulate the interstate transmission of electricity, creating the "Attleboro gap" in the regulation of electricity. 273 U.S. 83 (1927). After *Attleboro*, Congress enacted Part II of the FPA to close that gap. Accordingly, the presumption against preemption of an area traditionally left to states applies, and neither Congress nor FERC intended to overcome that presumption here.

Notably, the FPA's text includes a presumption against preemption of state regulatory authority over electricity. The statute states that "federal regulation is to extend only to those matters which are not subject to regulation by the States." 16 U.S.C. § 824(a). Congress intended

[4] S. Rep. No. 74-621, at 48 (1935) ("[Section 201(a)] also declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States . . . but not to impair or diminish the powers of any State commission."); H.R. Rep. No. 74-1318, at 7–8 (1935) ("The bill takes no authority from State commissions and . . . the new parts are so drawn as to be a complement to and in no sense a usurpation of State regulatory authority . . . .").

for FERC to regulate the interstate transmission of electricity and the sale of electricity at wholesale in *interstate* commerce under the FPA. 16 U.S.C. § 824(b)(1). However, states retain jurisdiction over the retail sale of electricity and the generation, transmission, and distribution of electricity in *intrastate* commerce. *Id.* § 824(b)(1). Thus, because the presumption against preemption applies, and Congress made clear that it did not want to override that presumption, Vandalia's statutory ROFR is not preempted. Further, Order 1000 and FERC's interpretation of Order 1000 show that FERC did not preempt Vandalia's ROFR.

B. FERC Did Not Preempt Vandalia's Statutory ROFR

Order 1000 terminated the federal ROFR, not the state ROFR. *See S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 76 (D.C. Cir. 2014); *MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016); *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1024–25 (8th Cir. 2020). Order 1000 allows states to adopt a competitive approach, but it does not mandate such an approach. FERC did not intend to preempt Vandalia's statutory ROFR. In fact, FERC explicitly says so throughout Order 1000. FERC explains:

> [N]othing in this Final Rule 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 ¶ 227. FERC further explained that "[e]liminating a *federal* right of first refusal in Commission-jurisdictional tariffs and agreements does not . . . result in the regulation of matters reserved for states." Order 1000 ¶ 287. Instead, FERC deferred to states by allowing them to choose whether to maintain incumbent providers or adopt policies to encourage new providers. *Id.* ("[T]here may be restrictions on the construction of transmission facilities by nonincumbent transmission providers under rules or regulations enforced by other jurisdictions[, but Order 1000 would not] . . . limit, preempt, or otherwise affect state or local laws or regulations.")

If the Court finds that Order 1000's language is ambiguous, the Court should defer to FERC's interpretation of Order 1000 under *Kisor* deference. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). FERC has affirmed its stance of allowing states to regulate how to choose builders of regionally planned transmission lines. FERC has explained that "state-granted rights of first refusal . . . still exist under state or local law . . . and nothing in Order No. 1000 changes that law or regulation, for Order No. 1000 is clear that nothing therein is 'intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities.'" *S.C. Elec. & Gas Co.*, Order on Rehearing, 147 FERC P 61126, P 127 (May 15, 2014). FERC has found that a federal policy of cooperating with and deferring to states advances the "purpose of Order No. 1000 . . . to facilitate the likelihood that needed transmission facilities will move forward." *Id.*, P 128; *see also PJM Interconnection, L.L.C. Indicated PJM Transmission Owners PJM Interconnection, L.L.C. Pub. Serv. Elec. & Gas Co.*, Order On Rehearing, 147 FERC P 61128, PP 61730–32 (May 15, 2014). Further, FERC has approved many state ROFRs similar to Vandalia's. For example, Minnesota's state ROFR has the same operative language as Vandalia's, and FERC endorsed it. *Midwest Indep. Transmission Sys. Operator, Inc.*, 150 FERC ¶ 61037, 2015 WL 285969, at ¶ 25. As FERC itself explained, Order 1000 was not meant to encroach on the traditional role of states in regulating siting and construction of transmission facilities. *MISO*, 819 F.3d at 336.

In sum, ACES' argument that Vandalia's ROFR threatens to reduce the competition FERC sought to establish in Order 1000 is incorrect for two reasons. First, Order 1000 targets *federal* ROFRs but does not affect state ROFRs. The Court should not adopt ACES' attempt to interpret the regulations based on an overbroad statement of Order 1000's purpose, especially when that interpretation is contrary to the regulation's text. Second, FERC disagrees with ACES' position.

FERC has approved state ROFRs with the same operative language as Vandalia's ROFR. The Court should defer to FERC's interpretation of its own regulations. *Auer v. Robbins,* 519 U.S. 452, 462 (1997); *see also Kisor v. Wilkie*, 139 S. Ct. 2400 (2019). Accordingly, the Court should affirm the district court and find that Order 1000 does not preempt Vandalia's statutory ROFR.

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

Not only is the ROFR not preempted by FERC, but it is also constitutional. Vandalia's statutory ROFR, codified at Vandalia Code § 24-12.3(d), is a legitimate, non-discriminatory exercise of Vandalia's power to regulate electric infrastructure located within its borders in the public interest. *See* R. at 9. The district court correctly dismissed ACES' challenge of Vandalia's statutory ROFR under the dormant Commerce Clause. R. at 16. This Court should affirm.

A statutory ROFR must still be valid under the Commerce Clause. *See Wyoming v. Oklahoma,* 502 U.S. 437, 458 (1992). The Commerce Clause grants Congress the power to regulate interstate commerce. U.S. CONST. art. I, § 8, cl. 3. But implicit within the Commerce Clause is a "dormant feature that prevents individual states from regulating interstate commerce," meaning states cannot enact laws that "discriminate against or unduly burden interstate commerce." *IESI AR Corp. v. Nw. Ark. Reg'l Solid Waste,* 433 F.3d 600, 604 (8th Cir. 2006) (quoting *United Waste Sys. of Iowa, Inc. v. Wilson,* 189 F.3d 762, 765 (8th Cir. 1999); *S.D. Farm Bureau, Inc. v. Hazeltine,* 340 F.3d 583, 592 (8th Cir. 2003)). Still, courts cannot use the dormant Commerce Clause to "prohibit States from exercising their lawful sovereign powers in our federal system." *South Dakota v. Wayfair, Inc.,* 138 S. Ct. 2080, 2096 (2018). First, the Court should analyze whether there is "overt" discrimination or if the law "ha[s] a discriminatory purpose or a discriminatory effect" to determine if a state law discriminates in interstate commerce. *LSP*, 954 F.3d at 1026 (citing *Hampton Feedlot, Inc. v. Nixon,* 249 F.3d 814, 818 (8th Cir. 2001); *U & I Sanitation v. City of Columbus,* 205 F.3d 1063, 1067 (8th Cir. 2000); *Cherry Hill Vineyards, LLC*

v. Lilly, 553 F.3d 23, 431–32 (6th Cir. 2008). Second, if the law is not discriminatory, the Court should establish whether the state law's burden on interstate commerce exceeds its local benefit, also called the *Pike* balancing test. *LSP*, 954 F.3d at 1026 (citing *Hampton Feedlot*, 249 F.3d at 818; *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970)).

Because state ROFRs are valid under the dormant Commerce Clause, the PSC should be allowed to delay action on the application for construction of the Vandalia portions of the Mountaineer Express under the state's Native Transmission Protection Act.

A. Vandalia's Statutory ROFR Is Not Facially Discriminatory

First, would-be competitors like ACES are not similarly situated to regulated, incumbent electric transmission facility owners, so Vandalia's statutory ROFR does not discriminate against ACES. Under the statute, Vandalia's incumbent electric transmission owners have the "right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner." Vand. Code § 24-12.3(d). Because ACES does not own any existing transmission facilities within Vandalia, it does not qualify as an "incumbent electric transmission owner." R. at 10. ACES is a global energy company with a portfolio of electric generating resources totaling over 6,500 MW, while MAPCo has three plants that generate 5,800 MW, and LastEnergy has two plants that generate 3,300 MW. R. at 4. ACES is "the largest independent electricity transmission company in the United States," operating at 26 gigawatts along its high-voltage transmission infrastructure at peak load. R. at 5. Given its large operation, ACES is not similarly situated to the incumbent electric transmission facility owners under Vandalia's ROFR, and thus the statute is not facially discriminatory. *See General Motors Corp. v. Tracy*, 519 U.S. 278, 310 (1997) (holding regulated local gas utilities and unregulated producers in Ohio receiving differential tax treatment were differently situated, and thus the state's statutory

regulation of transmission companies did not violate the dormant Commerce Clause through discrimination); *LSP*, 954 F.3d at 1027.

Furthermore, ACES is a "merchant transmission line operator," not a "public utility" as defined in Vandalia Code § 24-8-1(h) because it does not furnish electricity to the "public" for compensation in Vandalia. R. at 11 (citing RWO at 3 (Dec. 13, 2022)). The Statutory ROFR does not regulate ACES but entities providing utility service to any member of the Vandalia public, which "will not change even if ACES is able to complete the planned Mountaineer Express." *Id.* Because ACES is not a public utility, it is not similarly situated to LastEnergy and MAPCo, and the statutory ROFR is not facially discriminatory. *See Allco II,* 861 F.3d at 103–04.

Even accepting ACES and the incumbent electric transmission owners *are* similarly situated because they are direct competitors, the statute is still not facially discriminatory. *See LSP*, 954 F.3d at 1027–28. All the possible electric transmission owners and operators in Vandalia could choose to, or choose not to, locate their operations in the state. LastEnergy and MAPCo are the relevant incumbent electric transmission owners eligible for exercising their ROFR in the first eighteen months, both of which are headquartered and incorporated in Ohio. R. at 4. ACES is headquartered and incorporated in Springfield, Vandalia. *Id.* Vandalia is not providing any advantage to *in-state* operators because eligible electric incumbent transmission owners are actually headquartered *out-of-state*. The statutory ROFR is merely giving public utilities that "own[], operate[], and maintain[] an electric transmission line" in the state of Vandalia, or other state "municipal power agenc[ies]," "power district[s]," and "municipal utilit[ies]," an opportunity to operate electric transmission lines within the state. Vand. Code § 23-13.2(f) (defining "incumbent electric transmission owner"). If anything, Vandalia's ROFR in this case seems to *favor* out-of-state operators like ACES, not discriminate against them. As held by the district court,

this Court should find that the place of incorporation controls and affirm its dismissal of ACES' dormant Commerce Clause claims. R. at 16.

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

Vandalia's statutory ROFR has no discriminatory purpose, which is assessed by a review of direct and indirect evidence, including legislative history and the state's historical actions. *IESI AR Corp.*, 433, F.3d at 604. As the state senator introducing the bill described, Vandalia enacted its ROFR law as part of the Native Transmission Protection Act in response to Order 1000 and its elimination of "a federally recognized right of first refusal." R. at 9. Although LastEnergy, testifying in support of the bill, stated that the Native Transmission Protection Act was "necessary to keep transmission lines in the hands of purportedly more responsive in-state companies," one testifying supporter does not in itself render the law discriminatory toward out-of-state companies. *Id.* Rather, Vandalia PSC has the duty and authority to set "just and reasonable rates" and to provide "adequate, economical, and reliab[le]" rates for the utilities in its jurisdiction. Vand. Code §§ 24-2-3, 24-1-1(a)(2). Vandalia passed the ROFR to protect legitimate state interests—reliable and cost-effective electricity distribution—not to discriminate against out-of-state utilities.

Vandalia's statutory ROFR also has no discriminatory effect, which exists if the regulation in effect "favors in-state economic interests over out-of-state interests." *LSP,* 954 F.3d at 1030 (citing *IESI AR Corp.,* 433 F.3d at 605). Here, incumbent electric transmission owners are not obligated to exercise their ROFRs—they have eighteen months to do so, then the opportunity opens up to all competitors. Vand. Code § 24-12.3(d); *see also LSP,* 954 F.3d at 1031. The regulation of utilities is traditionally a role of the state, and Vandalia's in-state exercise of that power does not create a discriminatory effect out-of-state. *LSP*, 954 F.3d at 1030. ACES simply does not own an existing transmission line in Vandalia. R. at 2. Vandalia has not erected a "trade barrier of the type forbidden by the Commerce Clause" but merely incentivized in-state electrical

transmission. *Hughes v. Alexandria Scrap,* 426 U.S. 794, 809–10 (1976). As held by the Supreme Court, subsidies or incentives for in-state operations do not burden the free flow of commerce. *Alexandria Scrap*, 426 U.S. at 806. ACES' dormant Commerce Clause claim should fail because Vandalia's statute 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." *LSP*, 954 F.3d at 1027.

Because Vandalia's statutory ROFR does not treat in-state and out-of-state competing economic interests differently, nor is it purporting to control commerce occurring wholly outside the boundaries of Vandalia, it is not facially discriminating and should not be subject to a strict scrutiny review. *See Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979); *Am. Beverage v. Snyder*, 735 F.3d 362, 370 (6th Cir. 2013); *cf. Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1257 (11th Cir. 2012) (failing the *Pike* balancing test and avoiding the discrimination challenge). But even if the Court did apply a strict scrutiny standard, Vandalia's ROFR is valid under the dormant Commerce Clause because it does not have a discriminatory purpose or effect.

C. Vandalia's Statutory ROFR Does Not Unduly Burden Interstate Commerce

Rather than applying a strict scrutiny review based on discrimination, under which petitioners' claim fails anyway, the Court should use a balancing test. *Pike*, 397 U.S. at 142. This Court should not invalidate the state ROFR under the deferential *Pike* standard. First, the Supreme Court has rarely invoked the *Pike* balancing test to invalidate state regulation under the Commerce Clause, and this Court should not begin so here. *See LSP*, 954 F.3d at 1031; *S. Union Co. v. Missouri Pub. Serv. Comm'n*, 289 F.3d 503, 509 (8th Cir. 2002). Second, even under *Pike*, Vandalia's statutory ROFR does not impose a burden on interstate commerce "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142.

Vandalia's statutory ROFR imposes no undue burden on interstate commerce because ACES' allegedly suppressed ability to build PJM-approved transmission lines in Vandalia does not, in the aggregate, have a cumulative effect of eliminating competition in the market. *See LSP*, 954 F.3d at 1031. Electrical transmission is a regulated monopoly, and here Vandalia has regulated the monopoly by reducing competition—not eliminated it. *Cf., e.g., Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (holding it was immaterial whether both in-state and out-of-state interests were burdened by the regulation of a product not traditionally controlled by the state—milk). States have the power to regulate intrastate electric transmission, which includes authority over the location and construction of electrical transmission lines. *See* 16 U.S.C. § 824(b)(1); *Ill. Comm. Comm'n v. FERC,* 721 F.3d 764, 773 (7th Cir. 2013); *Energy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 417 (2d Cir. 2013) ("[S]tates have broad powers under state law to direct the planning and resource decisions of utilities under their jurisdiction."). *LSP*, 954 F.3d at 1031. Thus, even if Vandalia's statutory ROFR does burden interstate commerce, the burden is not excessive in relation to the state's legitimate local public interest in the law's enactment. Rather, any burden is incidental. *See Allco II*, 861 F.3d at 103–108. Electrical transmission lines like the Mountaineer Express line both burden and benefit the communities in which they are located, giving states like Vandalia a legitimate local interest in regulating their construction, ownership, and operation. The burden imposed by Vandalia's ROFR law is incidental to Vandalia's legitimate electric industry regulation interests. *See id.*

Finally, because the facts are similar to the case at hand, this Court should not follow the Fifth Circuit's ruling in *NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022), but echo the Eight Circuit's rejected dormant Commerce Clause challenge to a statutory ROFR enacted in Minnesota. *See LSP*, 954 F.3d at 1025; *see also MISO*, 819 F.3d at 336

(upholding state-enacted ROFR laws and FERC's Order 1000). *NextEra Energy* did not involve a time period in the ROFR at all, unlike the eighteen months in Vandalia's ROFR. R. at 15. Like Appellees here, LSP Transmission Holdings, LLC (LSP) argued Minnesota's ROFR placed an undue burden on interstate commerce. *LSP*, 954 F.3d at 1025. Minnesota's ROFR provides that an incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that connects to facilities which it owns and which has been approved by MISO. *Id.* at 1024*;* Minn. Stat. § 216B.246, subdiv. 2. In reviewing the burdens on interstate commerce and discrimination against out-of-state operators, the court held that both in-state and out-of-state owners could use the ROFR, and thus the law applied equally to all incumbent electric transmission owners. *LSP*, 954 F.3d at 1024 (citing *Tracy*, 519 U.S. 278). Even under the *Pike* balancing test, the *LSP* court did not find a discriminatory purpose or effect to the state ROFR. *Id.* The court further held that Minnesota's interest in regulating its own local electricity market outweighed any incidental effects on interstate commerce, meaning the ROFR not only did not discriminate, but it did not place an undue burden on interstate commerce. *Id.* Like Minnesota in *LSP*, the state of Vandalia has a legitimate state interest in regulating its electric industry.

On balance, any possible burden on interstate commerce imposed by Vandalia's statutory ROFR is outweighed by the legitimate local interests and the traditional role of the state in regulating intrastate electric transmission and generation. This Court should affirm the dismissal of ACES' dormant Commerce Clause challenge to Vandalia's statutory ROFR.

CONCLUSION

For the foregoing reasons, ACES lacks standing to challenge the CFO, and the CFO and ROFR are constitutional. Accordingly, this Court should affirm the district court's decision.

Certificate of Service

Pursuant to Official Rule IV, Team Members representing Team No. 11 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. 11