C.A. No. 22-0682

In the
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

On appeal from the United States District Court for the Norther District of Vandalia

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC., Appellant, v. VANDALIA PUBLIC SERVICES COMMISSION, Appellee	BRIEF FOR THE RESPONDENTS TEAM NUMBER 32, Attorneys for Appellee

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III. JURISDICTIONAL STATEMENT

The district court had jurisdiction of the case that is docketed as C.A. No. 22-0682 pursuant to 28 U.S.C. §1441. The district Court's federal question jurisdiction was based on an alleged violations of the Supremacy Clause to the United States Constitution, the Commerce Clause to the United States Constitution, and the Federal Power Act 16 U.S.C.S §12.

The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. §1291. The final order that is being appealed from disposed of all issues in this cause and was entered on August 15, 2022. The Notice of Appeal was timely filed on August 29, 2022.

IV. STATEMENT OF THE ISSUES PRESENTED

A. Under federal law, does Appalachian Clean Energy Solutions have standing to bring suit against the Vandalia PSC seeking to enjoin enforcement of an order that directs existing coal plants in Vandalia to operate at a 75% capacity factor, when there are findings of fact that the policy would be economical?

B. Under the Supremacy Clause of the U.S. Constitution, is Vandalia PSC's Capacity Factor Order preempted by the actions of the Federal Energy Regulatory Commission, when Vandalia PSC did not tether the order to wholesale market participation and the order is related to matters of legitimate state concern?

C. Under the FPA, is Vandalia's NTPA preempted by Order 1000 when FERC explicitly stated that States should retain authority to regulate construction of transmission facilities?

D. Under the dormant Commerce Clause, does the NTPA violate the Constitution when it has a minor and incidental effect on the interstate transmission market?

V. STATEMENT OF THE CASE

Vandalia Public Service Commission ("Vandalia PSC") is the government agency within Vandalia that is responsible for regulating the rates and practices of utilities providing retail service. Factual Background at 6, C.A. No. 22-0682. Vandalia PSC is tasked with regulating practices, services, and rates of public utilities in Vandalia according to specific directives from

the legislature. *Id.* In particular the legislature ordered Vandalia PSC to encourage the development of utility resources in a manner consistent with state needs and consistent with the use of Vandalia's natural energy resources, such as coal. *Id.*

To comply with the directives of the legislature, Vandalia PSC issued a capacity factor order directed at the five remaining legacy coal plants in Vandalia. *Id* at 7-8. This order, in light of concerning recent trends of plants closing, jobs being lost, and reduction in state prosperity, requires the remaining plants to operate at a 75% capacity factor. *Id* at 8. The capacity factor of 75% was determined after an extensive finding of fact operation that determined that 75% would be the economical rate to operate the remaining legacy plants. *Id*.

To incentivize investor compliance with the order, Vandalia PSC included a safety net subsidy that allowed the legacy plants to recover the difference in the actual cost to produce energy and the wholesale market clearing price in the PJM Interconnection. *Id*. Assuming that Vandalia PSC's finding of fact that the 75% capacity order is economical, the subsidies would not be redeemed as the actual cost to produce would be lower than the market clearing price. *Id*. At the request of the Vandalia Citizens Action Group, Vandalia PSC reviewed and reaffirmed its finding of fact that the 75% capacity factor would be economical. *Id* at 9.

Under the Capacity Factor Order the legacy coal plants are not required to bid their capacity into the PJM Auction. *Id* at 8. Independent from the order, all of the legacy plants individually entered into fixed resource requirements with PJM. *Id*. Pursuant to the fixed resource requirements between the legacy plants and PJM, all legacy plants in Vandalia sell all of their capacity exclusively to PJM. *Id*.

The Federal Energy Regulatory Commission (FERC) seeks to promote competition and efficiency in U.S. wholesale energy markets. *Id* at 3. A major factor contributing to inefficiency and discrimination in the wholesale markets was the ability of incumbent electric transmission owners to include federal right-of-first-refusal (ROFR) provisions in their FERC-approved ISO tariffs. *Id.* at 9. In 2011, the FERC Issued Order 1000, which eliminated the federal ROFR in order to prevent incumbent transmission owners from stifling competition in the interstate transmission markets. *Id.* In 2014, Vandalia passed the Native Transmission Protection Act (NTPA), which grants incumbent transmission owners the exclusive right, for up to eighteen months, to build new transmission lines in the state. *Id.* After the eighteen-month period, any entity may build the lines. *Id*.

Vandalia has two incumbent transmission owners, MAPCo and LastEnergy, which both serve retail customers in the State. Representatives from each service stated that the NTPA was a necessary response to Order 1000 because it would help to ensure that retail customers continue to receive reliable and predictable service. See *Id.* MAPCo and LastEnergy also identified promising potential transmission routes in Vandalia and obtained right-of-way (ROW) easements from owners of property along those routes. *Id.* at 10.

Appalachian Clean Energy Solutions, Inc. ("ACES") is an energy company headquartered and incorporated in Vandalia. *Id.* at 4. ACES does not operate any of the legacy plants in Vandalia and therefore is not subject to the capacity factor order. *Id*. at 14. Various existing ACES holdings and a planned natural gas plant in Pennsylvania exclusively sell capacity to, and therefore compete in, the PJM wholesale capacity auction. *Id.* at 4.

ACES is engaged in construction of the PJM-approved Mountaineer Express transmission line, which is intended to run from Pennsylvania to North Carolina through Vandalia. *Id.* at 1. ACES filed for a Certificate of Public Convenience and Necessity in order to construct the portions of Mountaineer Express that would cross through Vandalia, but the Vandalia PSC has not taken action on ACES' application because the eighteen-month window for MAPCo and LastEnergy to exercise their state ROFR has not expired. *Id.* at 10. The proposed route of Mountaineer Express through Vandalia would require access to the ROW easements held by MAPCo and LastEnergy, and both have indicated that they will not grant ACES access to the easements. *Id.* at 10-11. In December 2022, the Vandalia PSC issued an order stating that ACES is not a "public utility" and therefore is not entitled to use of the ROW easements. *Id.* at 11.

On June 6, 2022, ACES filed suit against Vandalia PSC arguing that the capacity factor order and the right of first refusal order violated the Federal Power Acts grant of FERC exclusive jurisdiction to regulate and determine interstate wholesale capacity rates. *Id* at 3-4. ACES also claimed that the NTPA was preempted by FERC Order 1000 and that it violated the dormant Commerce clause of the Constitution, further asserting that the law creates uncertainty as to whether the Vandalia portion of Mountaineer Express can even be built by ACES. *Id* at 4, 11.

On August 15, 2022 the U.S. District Court for the Northern District of Vandalia granted PCS's motion to dismiss on all claims. *Id* at 16. The District Court determined that ACES did not have standing to bring this suit and even if it had neither the capacity factor order or the right of first refusal were preempted by federal law and the dormant commerce clause had not been

violated. *Id* at 15-16. On August 29, 2022, the ACES filed a timely appeal to the District Courts grant of the motion to dismiss. *Id* at 16.

VI. SUMMARY OF THE ARGUMENT

ACES does not have standing to challenge the capacity factor order. ACES has not pleaded any facts that have a tendency to prove that it has suffered an injury in fact as a result of the order. Any injury as a result of the capacity factor order is merely hypothetical because of the finding of fact on the part of Vandalia PSC that the capacity factor order would be economical. Further any potential injury is not imminent because if the order is economical no subsidies would be paid out and there would be no effect on the wholesale auction clearing price as a result of the order.

Assuming that ACES does have standing to challenge the capacity factor order, the order is not preempted by the FPA and FERC's exclusive jurisdiction over interstate wholesale rates. It is not field preempted because the capacity order is not tethered to the legacy plants clearing the wholesale capacity auction. The order is also not subject matter preempted because it advances the proper objective of the state, promoting intrastate industry and commerce, and the order does not clearly damage federal goals since it has been found to be efficient by Vandalia PSC.

The NTPA is not preempted by FERC Order 1000. In the Order, FERC explicitly stated that it did not intend to interfere with States' ability to regulate the construction of transmission facilities. This demonstrates lack of intent by Congress to prevent States from granting ROFR to incumbent transmission services. Further, the NTPA does not conflict with FERC's purposes and goals because it does not intrude in the wholesale market. The NTPA also does not violate the Constitution's dormant Commerce clause because it is not discriminatory on its face, in its purpose, or in its effects. Further, the NTPA serves important local interests and does not impose

an undue burden on interstate commerce that is excessive in relation to the value of those interests.

VII. ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT ACES DOES NOT HAVE STANDING TO BRING THIS PREEMPTION CLAIM BECAUSE ACES HAS NOT SUFFERED AN INJURY IN FACT SINCE THERE IS A REASONABLE FINDING OF FACT THAT THE CAPACITY FACTOR ORDER IS EFFICIENT.

No person or entity has standing to bring a claim in federal court if they have not suffered an injury in fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Further the injury must be causally connected to the challenged action of the defendant. *Id*. Lastly, it must be likely that the injury will be remedied by a favorable decision. *Id* at 561. The facts plead by ACES, even when viewed in the most favorable light toward the plaintiff, do not establish an injury in fact, the first element of standing; therefore, the district court did not err in dismissing this case.

A plaintiff establishing standing in federal court must show that they have suffered an injury in fact. *Id* at 560. The Supreme Court held in *Lujan* that an injury in fact is an injury which is concrete and particularized and actual or imminent. *Id*. ACES does not have standing under the *Lujan* test because it failed to plead an injury that was concrete as well as actual or imminent.

An injury is concrete when it is "distinct and palpable" as opposed to merely abstract. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). Put another way, the Supreme Court just last year described concrete injuries as injuries that are "real." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Some injuries are more obviously concrete than others. Injuries such as physical or monetary harms are more readily determined to be concrete rather than intangible harms, but some intangible harms may still be found to be concrete. *Id.*

An intangible harm is concrete when that harm is closely related to a harm that has been traditionally used as the basis for a lawsuit. *Id* at 579. In *TransUnion* a class sued a credit reporting agency for violating the Fair Credit Reporting Act alleging that the agency provided misleading credit reports. *Id.* The Court determined that the members of the class whose incorrect information had been disseminated had suffered a concrete injury. *Id.* This intangible harm was considered to be concrete because its close proximity to a defamation claim which had been traditionally used as the basis for a lawsuit. *Id* at 590.

On top of burden of establishing a concrete injury, to have standing a plaintiff must also establish that the injury is actual or imminent. *Lujan* 504 U.S. 560. In *Lujan* the plaintiff attempted to establish actuality or imminence of an injury through the plans to some day return to an area no longer covered by the Endangered Species Act. *Id* at 564. The court expressly ruled that "some day" intentions are not actual or imminent. *Id.*

Imminence is admittedly a loose concept, but the Supreme Court has repeatedly reaffirmed that imminence is satisfied when the threatened injury is certainly impending. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Further it is not sufficient for the plaintiff to offer merely allegations of a possible future injury. *Id*. In *Clapper*, the plaintiff tried to establish imminence based off of an objectively reasonably likelihood that confidential communications would be intercepted in the future under the Foreign Intelligence Surveillance Act. *Id* at 401. The Supreme Court held that even and objectively reasonable likelihood of future injury is too speculative and imminence requires the injury to be certainly impending. *Id.*

For ACES to have successfully pleaded an injury in fact, ACES must have established a harm that is obviously concrete or is intangible yet still concrete. ACES has not plead an intangible yet concrete injury, and any obviously concrete harm has not actually happened and

are not certainly impending. An injury in fact cannot be established, thus the trial court was correct in granting the motion to dismiss based on a lack of standing. That decision is reviewed de novo.

Since ACES is not a ratepayer and is not subject to the Capacity Factor Order, there are two routes that ACES can potentially claim an obviously concrete harm, both of which would be monetary harms. Both routes are contingent on establishing that by issuing the order, PSC has, in effect, set an illegitimate interstate wholesale rate. That new rate could potentially affect the economics of building and operating ACES's new Rogersville Energy Facility or it could affect the economics of ACES's existing energy facilities that compete and receive the interstate wholesale rate in question.

No interpretation of the facts of this case can lead to the determination that ACES suffered a monetary harm that is actual. ACES has not plead that they have lost any money because of the legacy coal plants in Vandalia operating at an increased capacity and receiving the actual cost of energy creation instead of the market clearing rate. ACES has also failed to plead any facts tending to establish that the economics of building their new Rogersville Energy Facility has been impacted by the legacy coal plants operating according to the Capacity Factor Order. Prior to initiating this suit, the Capacity Factor Order had been in effect for a little over month and ACES has yet to provide any evidence that the order has affected wholesale market rates at all.

Without actual harm, ACES must establish that the harm resulting from the order is certainly impending. Plainly, it is not possible for ACES to show certain impending harm. This is a result of PSC's finding that it would be economical for the plants to run at a 75% capacity factor. If it is economical to run at that capacity, there will be no difference between the market

clearing price and the actual price of production for these plants. If there is no difference between the prices the then provision in the order allowing for cost recovery will never kick in. If there is no price recovery on the part of the Vandalia coal plants, then the wholesale market rate will never be affected by the capacity factor order. Without an effect to the wholesale market rate no monetary harm will have occurred to ACES.

ACES will argue that the finding of facts by the Commission was incorrect and that is evidenced by the Vandalia Citizens Action Group's evidence presented on request for PSC to reconsider the order. The Chairman of PSC reviewed this evidence and found it unpersuasive. At best the existence of two separate findings of fact shows the harm is not CERTAINLY impending. At worst for PSC, the findings by the Commission are more reliable and should be trusted to show that no harm will occur because the legacy coal plants operating at 75% capacity is economical.

The findings by the Commission are more reliable because the Vandalia Citizens Action Groups findings are only backwards looking. They used the historical capacity factors for the coal plants to project what would be economical in the future. This historical view fails to see changed conditions in the present.

The particular changed condition in the present is the global energy crisis as a result of Russia's invasion of Ukraine. In 2022, as a result of the Ukraine invasion, Russia has exported much less natural gas to Europe and the United States has stepped in to fill that role, increasing its exports by approximately 137%.[1] Increased demand for the United States' natural gas globally

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[1]Gavin Maguire, *Column: U.S. LNG exports both a lifeline and a drain for Europe in 2023*, REUTERS (2022), https://www.reuters.com/business/energy/us-lng-exports-both-lifeline-drain-europe-2023-maguire-2022-12-20/#:~:text=U.S.%20PREEMINENCE,in%20piped%20shipments%20from%20Russia. (last visited Jan 31, 2023).

and an increase in natural gas prices domestically leads to it being more economical to burn coal instead.[2]

Given these changed circumstances, the court should either accept the Commission's finding of fact or accept that the finding of fact is disputed. Neither a disputed finding of fact nor accepting the Commission's finding of facts establish that harm is certainly impending and the ACES has not plead facts to establish that an actual harm has occurred. Without a showing of an actual harm or a certainly impending harm this should affirm the district court's dismissal of this claim based on a lack of standing due to there being no injury.

B. ASSUMING ACES HAS STANDING, THE DISTRICT COURT DID NOT ERR IN DETERMINING THAT THE CAPACITY FACTOR ORDER IS NOT PREEMPTED BY THE FEDERAL POWER ACT BECAUSE THE ORDER DOES NOT DIRECTLY AFFECT THE WHOLESALE RATE AND THE ORDER IS RELATED TO MATTERS OF LEGITIMATE STATE CONCERN.

The Supremacy Clause of the U.S. Constitution plainly states that the laws of the federal government are the supreme law of the land. U.S. CONST., art. VI, cl. 2. In effect this means that federal law will preempt a contrary state law. *Hughes v. Talen Energy Mktg*., LLC, 578 U.S. 150, 162 (2016). There are two separate ways in which a state law may be preempted by federal legislation, field preemption and conflict preemption. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015) (citing *Arizona* v. *United States*, 567 U. S. 387, 401 (2012)).

A state regulation is field preempted when Congress, by passing legislation, intended to foreclose all state regulation in that area. *Id* at 377. Conversely, a state law is conflict preempted

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[2] Herman K Trabish, *Ukraine war could extend bump in US coal use, but utilities remain confident in decarbonization path*, UTILITY DIVE (2022), https://www.utilitydive.com/news/ukraine-war-could-extend-bump-in-us-coal-use-but-utilities-remain-confiden/620307/ (last visited Jan 31, 2023).

when the state is allowed to take action in that field, but complying with state and federal law is impossible or the state law is an obstacle to the purposes and objectives of the acts of Congress. *California* v. *ARC America Corp.*, 490 U. S. 93, 100, 101 (1989).

The Capacity Factor Order by Vandalia PCS is neither field nor conflict preempted. The order is not field preempted because the order does not effectively set an interstate wholesale rate as ACES suggests. The order is also not conflict preempted because the order does not prevent attainment of FERC goals and the order was made to achieve a proper state purpose.

i. The Capacity Factor Order promulgated by Vandalia PCS is not field preempted because, as the Order is not tethered to wholesale market participation like the order in *Hughes,* it does not effectively set an interstate wholesale rate.

It is undisputed that FERC and the federal government have exclusive authority under the FPA to regulate the transmission and sale of electric energy in interstate commerce. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016) (*EPSA)*(quoting 16 U. S. C. §824(b)(1)). Further, the FERC has the duty, not just the authority under 16 USCS § 824d(a), to make sure all rules and regulations affecting the wholesale rates or charges are just and reasonable. 16 U.S.C.S. § 824(d). The Supreme Court in *EPSA* determined that this duty to ensure rules and regulations affecting wholesale rates extends only to rules and regulations that *directly* affect wholesale rates. *Id* at 774 (emphasis added).

A Maryland regulation was field preempted by the FERC when that regulation required wholesale market participation and guaranteed that the power producer would receive a rate separate from the wholesale rate required by the FERC. *Hughes* 578 U.S. at 159. The Maryland regulatory scheme included a guaranteed 20-year contract in which once the power producer's bid cleared the PJM market auction, the producer would also receive the difference between the contract price and auction clearing price. *Id.* The Supreme Court held this scheme to be

preempted because it set a wholesale market rate by requiring the producer to clear the auction and then guaranteeing that producer a rate completely separate than the market clearing rate. *Id* at 165-166. The Court then clarifies that as long as a State regulatory scheme does not condition payment of funds on capacity clearing the auction then the scheme does not suffer from the same defect that makes Maryland's program unacceptable. *Id* at 166.

Hughes does not extend to state laws that do not expressly condition payment on clearing the wholesale auction. *Vill. of Old Mill Creek v. Star*, No. 17 CV 1163, 2017 U.S. Dist. LEXIS 109368, at *40 (N.D. Ill. July 14, 2017) (aff'd sub nom. *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018)). In *Vill. of Old Mill Creek*, the court was faced with determining whether an Illinois program that gave zero emission credits to qualified nuclear energy producers was preempted in light of *Hughes*. See Generally *Vill. of Old Mill Creek.* In spite of the nuclear energy producers selling all of their capacity into the wholesale market, the court determined that credits were not preempted by the FERC's exclusive jurisdiction to set wholesale rates because Illinois' credit system did not require wholesale capacity auction participation *Id* at 38-39. The requirement to participate in the wholesale auction is a requirement of PJM and the generators are not required to clear the auction by state law, instead choosing to as a business decision. *Id*.

State actions that affect the wholesale price in some way are not inherently state actions that set the wholesale rate. *Coalition for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 571-572 (2017). In *Zibelman*, the plaintiff attempted to argue that Zero Emission Credits inherently depressed the auction market clearing price by subsidizing the price nuclear power plants and allowing them to operate as price takers. *Id* at 571. The court applied the Supreme Court's ruling in *EPSA* to determine that the standard for determining whether the state sets a wholesale rate are the same as in the retail rate setting context. *Id* at 572. That is, a rate is set

when the state action establishes the amount of money a consumer will hand over in exchange for power. *Id* at 572.

To establish that merely affecting the wholesale price would justify preempting state action by setting a rate contrary to the FERC's wholesale market rate would invalidate all state subsidies of power production in the United States. Any subsidy, tax credit, or other compensatory program will affect the bottom line for producing power and ultimately affect the auction bid by the producer. In *Hughes*, the Supreme Court expressly decided not to invalidate all subsidies, instead invalidating subsidies that are tethered to the capacity clearing the auction. *Hughes* 578 U.S. at 166.

The capacity factor order promulgated by Vandalia PCS is not tethered to legacy coal plants capacity clearing the auction. No part of the capacity factor order requires the legacy coal plants to clear the auction. Admittedly due to their Fixed Resource Requirement with PJM, the legacy coal plants exclusively sell into the PJM wholesale capacity auction. That is not a requirement of the capacity order and instead is much more reminiscent of the nuclear power generators in Illinois exclusively selling to PJM in *Village of Old Mill Creek*.

Neither the ZEC scheme in *Village of Old Mill Creek* nor the order by Vandalia PSC expressly required wholesale capacity auction clearance as a requisite to receiving funding. The capacity factor order instead requires that the legacy coal plants operate at a 75% capacity. This order is silent on the methods for which the coal plants must sell their capacity.

ACES also attempts to argue that by enacting this order, Vandalia PSC is compelling a wholesale transaction that otherwise would not occur. This argument is similar to the plaintiff's argument in *Allco Fin., Ltd. v. Klee* which the 2nd Circuit Court of Appeals found to not be

compelling. *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 97 (2d Cir. 2017). This argument is equally not compelling now that it is being brought by ACES.

ACES argument that the order is compelling a wholesale transaction that otherwise would not have occurred is not compelling because the Commission has a finding of facts that shows that a 75% capacity factor would be efficient. If that finding of fact is correct, as discussed previously, then any additional wholesale transaction could have occurred without the capacity factor order.

The FERC is the best situated fact finder to make a determination on whether or not the Commission's finding of fact is correct. The FERC already monitors and regulates the competitive auctions where these wholesale transactions occur. Since the capacity factor order is not tethered to capacity clearing the auction and per se field preempted under *Hughes*, the FERC should be the entity responsible for determining whether any rate as a result of the order is unjust or unreasonable, not this court. ACES could even file a complaint with the FERC requesting an administrative review of this policy, but ACES has yet to show that they have taken any action to exhaust any of their available administrative remedies.

ii. The Capacity Factor Order is not conflict preempted by the FPA because the Order is not an obstacle to the purposes and objectives of FERC.

A state law is conflict preempted 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 376. ACES has not plead any federal law that it is impossible for them to comply with as a result of Vandalia PSC. As a result, for the capacity factor order to be conflict preempted the order must instead be an obstacle to the purposes and objectives of Congress.

Congress in the FPA very carefully created a dual regulatory scheme when it comes to regulation of energy in the United States. *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 55 (2d Cir. 2018). When Congress creates such dual regulatory schemes, courts must apply conflict pre-emption very sensitively to prevent diminution of the role reserved to the States while still attempting to preserve the federal role. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 515 (1989). When a state regulates a matter within state control and that regulation is plausibly related to a proper purpose, FERC's exercise of its authority must accommodate for the state, unless a clear damage to federal goals would result. *Id* at 521-522.

The FPA explicitly preserves for the state the authority to regulate generation facilities and retail sales. 16 U.S.C.S. § 824(b)(1). The Capacity Factor Order exists under this clause. It regulates in state generation facilities and FERC has previously approved of state programs that increase capacity or affect wholesale prices and regulate under this reservation of jurisdiction to the state. *Zibelman*, 906 F.3d at 56.

ACES contests that the Capacity Factor Order is conflict preempted because it disrupts pricing signals thus distorting the FERC's chosen method to structure the wholesale markets based on market principles. Even assuming this to be true, under *Nw. Cent. Pipeline Corp*. the regulation would not be preempted as long as the regulation is plausibly related to a proper purpose. *Nw. Cent. Pipeline Corp,* 489 U.S. at 515.

The capacity factor order is related to a proper purpose. ACES may contest that burning coal is not a proper purpose because does not promote green energy like the ZEC cases mentioned above. But green energy is not the only proper purpose available. The capacity factor order is directly tied to the public interest of the citizens of Vandalia. The public interest is best

suited by operating the plants at a greater and efficient capacity because it promotes intrastate commerce in a state that has been tied to the coal industry for over a century.

Additionally, Coal Mining has been one of the biggest industries in Vandalia for decades. It is undoubtedly within the public interest for the state government to compel and reward efficient use of the State's most valuable natural resources.

Since the regulation is tied to the proper purposes of efficient uses of natural energy and promotion of intrastate industry and commerce, the only remaining avenue under *Nw. Cent. Pipeline Corp*. for the order to be preempted is if it would clearly damage federal goals. As discussed extensively above, this capacity factor order does not clearly damage anything because there are reasonable findings of facts that the order may be efficient and the subsidies and any potential effects on pricing signals may never occur.

If sometime in the future the legacy coal plants in Vandalia are required to operate at an inefficient capacity as a result of this order, the FERC can address the issue at that time. It would be well within their jurisdiction to review that potential effect on the wholesale auction rate and determine if it is just and reasonable. But we are not currently at that time and the hypothetical existence of that issue at some point in the future does not show that the capacity factor order clearly damages federal goals in the present.

C. THE DISTRICT COURT DID NOT ERR IN FINDING THAT THE NTPA DOES IS NOT PREEMPTED BY FERC ORDER 1000.

FERC Order 1000 does not preempt Vandalia's Native Transmission Protection Act. Congress granted FERC the authority to regulate regional wholesale power transmission markets and services under the FPA. Federal courts have consistently recognized FERC's authority to regulate transmission facilities when it is necessary in order to promote competition and efficiency in the wholesale market, and they have also consistently respected FERC's decision to

leave as much regulatory power to the States as possible. While Order 1000 eliminated federal Rights of First Refusal (ROFR) from transmission tariffs, FERC clearly stated that it did not intend to impede States' ability to create laws or regulation with respect to construction of transmission facilities and it has not challenged ROFR provisions established under state laws. The Native Transmission Protection Act does not conflict with Order 1000, and FERC explicitly reserved to the States the authority to enact such legislation.

The Supremacy Clause states that federal laws are "the supreme Law of the Land" and that they may supersede or preempt contrary state laws. U.S. Const. art. VI, cl. 2. The Supreme Court held that a state law is preempted when Congress has legislated so comprehensively as to foreclose state legislation in the same field, or where the state law impedes or frustrates the purposes and objectives of Congress or where a federal agency acting within its congressionally-delegated authority expresses a clear intent to preempt state law. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 153 (2016); *New York v. FERC*, 535 U.S. 1 17-18 (2002); *Louisiana Pub. Serv. Comm'n v. F.C.C.,* 476 U.S. 355, 368-369 (1986). Where a state law appears to conflict with Federal Government authority, the Court begins its review with the assumption that the States' police powers must not be superseded unless it was the clear purpose of Congress. *New York v. FERC* at 18.

The Court acknowledged that the FPA grants FERC jurisdiction over the "transmission of electric energy in interstate commerce…" *New York v. FERC* at 18-19 (quoting 16 U.S.C. § 824(b); see also *Hughes v. Talen Energy Marketing, LLC* at 153 (Court held that a Maryland regulatory law improperly intruded on the wholesale electricity market, which Congress exclusively reserved to FERC). In that *New York v. FERC*, the Court addressed several petitions challenging FERC Order 888 which created open access requirements for wholesale market

participants and sought to remedy discrimination market caused by utility services' "bundling" electrical generation and transmission services. *Id.* at 11. By bundling services, utility companies could establish monopolies and effectively prevent new competition within their markets. In addition to the open access requirements, Order 888 requires "functional unbundling" of those wholesale services in order to promote competition. *Id.* The Court held that Congress had granted FERC the power, under section 206 of the FPA, to act as it had in order to serve the interests of the interstate market. *Id.* at 22. The Court also noted that FERC explicitly stated that it did not have authority to regulate local generation and transmission facilities and that those should be regulated by the state. *Id.* at 22-23.

Like order 888, FERC issued Order 1000 pursuant to section 206 of the FPA for the purpose of promoting efficiency and competition in interstate power transmission. *Transmission Plan. & Cost Allocation by Transmission Owning & Operating Pub. Utilities,* 136 FERC 61051, 91 ¶ 284 (2011)(Order 1000). Order 1000 eliminates federal ROFR for public utility transmission providers and them to remove from ROFR provisions from their Open Access Transmission Tariffs. Order 1000 at 3 ¶ 7; see also *Oklahoma Gas & Elec. Co. v. FERC*, 827 F.3d 75, 77 (D.C. Cir. 2016) (the court upheld FERC's authority to require petitioner to remove ROFR provisions from its RTO membership agreement). While courts recognize FERC's authority to regulate transmission in order to prevent discrimination and promote competition in the wholesale market, FERC explicitly stated that Order 1000 is not intended to interfere with state authority over matters related to siting, permitting, and construction of transmission facilities. Order 1000 at 33 ¶ 107. The Court of Appeals for the Eighth Circuit upheld a state law granting ROFR to incumbent transmission providers, citing Order 1000 in support of the finding that FERC did not intend to bar States from enacting their own ROFR laws. *LSP Transmission*

Holdings, LLC v. Sieben, 954 F.3d 1018, 1024 (8th Cir. 2020). The Court of Appeals for the Seventh Circuit also acknowledged FERC's preservation of state ROFR laws. *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016) (the court dismissed a complaint alleging, in part, that Order 1000 should bar from RTO tariffs provisions honoring ROFR created by state laws).

iii. The NTPA does not conflict with Order 1000.

Like the state laws upheld by federal courts in *LSP Transmission Holdings* and *MISO Transmission Owners*, Vandalia's Native Transmission Protection Act was passed in response to Order 1000 as a means of ensuring continued reliability and pricing for the States captive retail market. The law states that incumbent transmission owners have the right to "construct, own, and maintain" an approved electric transmission line, but another entity may construct the line if the incumbent fails to exercise its ROFR within eighteen months. Vand. Code § 24-12.3(d). The term "construct" in the language of the statute necessarily involves the processes of citing and permitting, and FERC deliberately left those matters under the authority of the States. The NTPA properly regulates construction of in-state transmission facilities without interfering with FERC's regulatory authority.

iv. The NTPA does not legislate in a field explicitly reserved by Congress.

ACES may argue that The NTPA will impact wholesale interstate transmission rates and, by extension, the wholesale market and therefore the law stands in conflict with Order 1000 and occupies a field over which Congress intended retain authority. This argument must fail because any effect on wholesale rates and market competition caused by the law would be minor an incidental given that the law does not fully eliminate competition by non-incumbent entities.

The Supreme Court held in *Hughes v. Talen Energy Marketing, LLC* that States may regulate in fields left to them by Congress even if their laws incidentally affect areas under FERC's authority. 578 U.S. at 164. If Congress had intended to prevent States from enacting their own ROFR laws, it would have made its intention explicit in the language of the FPA or required FERC to regulate ROFR legislation as broadly as possible. On the contrary, FERC's refusal to regulate state ROFR legislation demonstrates that Congress did not intend to legislate or exercise authority in this area.

The Native Transmission Protection Act regulates the construction and maintenance of transmission facilities within Vandalia without conflict with Order 1000. The law does not interfere with FERC's purpose of promoting competition and efficiency in wholesale energy markets and it does not prevent new entities from ever building transmission facilities in Vandalia. The law also does not regulate in a field that Congress clearly intended to control. FERC explicitly declined to ban state ROFR laws and left the States with authority to regulate construction of their own transmission facilities, thereby demonstrating that neither FERC nor Congress intended to prevent States from regulating in that area. Because The NTPA does not conflict with FERC's purpose and does not occupy a field already controlled by Congress, the court below correctly presumed and held that the law is not preempted by Order 1000.

D. THE DISTRICT COURT CORRECTLY HELD THAT THE NTPA DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE

The District Court correctly held that the NTPA does not violate the dormant Commerce Clause. The law does not discriminate against interstate commerce or out-of-state entities, and does not interfere with any entity's ability to conduct business outside the state. The law regulates the construction and maintenance of power transmission lines in Vandalia and gives incumbent utility companies the ability to ensure predictable and consistent service to the local

retail market. Further, the law's effects on interstate commerce are incidental and minor in relation to the important State and local interests it serves.

Article I §8(3) of the Constitution, the Commerce Clause, grants Congress the power to regulate commerce among states. U.S. Const. art. 1, § 8, cl. 3. Though the Commerce Clause is framed as a positive grant of power, the Supreme Court held that it prohibits state laws that discriminate against or unduly restrict interstate commerce in order to prevent States from adopting protectionist economic measures and practices. *Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2459 (2019)*; *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542, 549 (2015); *NextEra Energy Cap. Holdings, Inc*. v. Lake, 48 F.4th 306, 316 (5th Cir. 2022)(*NextEra)*. A state law that discriminates against out-of-state economic actors may be sustained upon a showing that it is narrowly tailored to "advance a legitimate local purpose." *Tennessee Wine & Spirits Retailers Ass'n v. Thomas* at 2461 (quoting *Department of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008). When a state law is not facially discriminatory but has incidental effects on interstate commerce, it should be upheld unless the burden imposed on interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970); *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of State of Or*., 511 U.S. 93, 99 (1994); see also *Arkansas Elec. Co-op. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 393 (1983) (the Court expressed its preference for the *Pike* analysis over rigid inquiries that do not consider the needs and objectives served by burdensome state laws).

As a threshold matter, the concept of discrimination for the purposes of the Commerce Clause "assumes a comparison of substantially similar entities" that participate in the same markets. *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-299 (1997). In *General Motors Corp*.,

the state of Ohio imposed a tax on the purchase and supply of natural gas from out-of-state producers and marketers. The tax was intended ensure stability in supply and pricing to customers in the captive local retail market, and was therefore not applied to sales of gas by local distribution companies (LDCs). The Court in that case determined that the LDCs and the interstate producers and marketers were not similarly situated, for the purposes of the Commerce Clause, because only the LDCs participated in the local captive market. *Id*. at 310. While the LDCs also participate in the interstate market, the Court stated that "where a choice is possible, as it is here, the importance of traditional regulated service to the captive market makes a powerful case against any judicial treatment that might jeopardize LDCs' continuing capacity to serve the captive market." *Id.* at 304. The Court also noted that removal of the allegedly discriminatory regulation from the non-competitive retail market would not serve the purpose of the Commerce Clause because it would not actually promote competition in the interstate market. *Id.* at 299, 303.

In *Oregon Waste Sys., Inc*., the Supreme Court explained that a state law is discriminatory if it engages in differential treatment of economic entities on the basis of their in-state or out-of-state status. 511 U.S. at 99. In that case, the State imposed a surcharge on disposal of solid waste generated out-of-state that was almost three times higher than the charge for waste generated in-state and the Court declared the regulation facially discriminatory. *Id*. In contrast, the Court of Appeals for the Eighth Circuit found no facial discrimination in a Minnesota law which grants ROFR to incumbent electric transmission owners to construct, own, and maintain approved electric transmission lines, with no consideration of the owners' in-state or out-of-state status. *LSP Transmission Holdings, LLC v. Sieben* at 1027-1028. The appellant, LSP, also asserted that the Minnesota law had a discriminatory purpose, citing hearing testimony

that lawmakers sought to protect incumbent owners from FERC Order 1000. *Id.* at 1029. The Eighth Circuit rejected that argument, noting that the law was not primarily designed to protect in-state economic interests but also to maintain an adequate and reliable regulatory system. *Id.* at 1029-1030. Further, the court found no discriminatory purpose in the law against out-of-state entities because many of the allegedly favored entities were incorporated out-of-state. *Id.* at 1028. The LSP court also found no discriminatory effect in the law, noting that the law places the same "incidental hurdle" in front of all non-incumbent entities regardless of whether they are located in-state or out-of-state. *Id.* at 1030.

Discriminatory purpose and effect are not found only where laws favor in-state entities, but also where they bar new entrants to a State's market. *NextEra*, 48 F.4th at 322. In *NextEra*, Texas enacted a law stating that only transmission companies with an existing physical presence in the State could construct or operate new transmission lines there. The court held that the law violated the Commerce Clause because it completely barred out-of-state entrants to the market and prevented incumbents from designating replacements. The court explained that it did not matter that some of the incumbents were incorporated in other states, arguing that place of incorporation alone does not control the Commerce Clause analysis. *Id.* at 322-323. The court noted that several states have restored ROFR to incumbent services via state legislation, but pointed out that those laws were distinguishable from the Texas law because they limited the length of ROFRs and did not completely eliminate competition in their intrastate markets. *Id.* at 313.

When a law is found not to be discriminatory but nonetheless places a burden on interstate commerce, the *Pike* balancing test should be applied. 397 U.S. at 142; *Arkansas Elec. Co-op. Corp.*, 461 U.S. at 393; *LSP Transmission Holdings, LLC* at 1030. The aim of the *Pike*

test is to prevent states from engaging in economic protectionism. *Arkansas Elec. Co-op. Corp.* at 394; *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 105 (2d Cir. 1985) (court held that a New York law regulating intrastate utility rates did not violate the Commerce Clause because states have a vital interest in regulating local utilities). In determining whether a burden is excessive courts consider the nature of the local interest and whether it could be served by some other less-burdensome means. *Pike* at 142. *In LSP Transmission Holdings, LLC*, the Eighth Circuit held that Minnesota's ROFR law served the State's "legitimate interest in regulating the intrastate transmission of electric energy." 954 F.3d at 1031 (citing 16 U.S.C. § 824(b)(1)). The court in that case noted that the goal of the law was "to preserve the historically-proven status quo for the construction and maintenance of electric transmission lines." *Id*. The court then stated that Minnesota's law did not impose an excessive burden on interstate commerce because while the law could have affected LSP's ability to build transmission lines within the state, it did not eliminate competition in the market completely because incumbents could choose not to exercise their ROFRs. *Id*

i. The NTPA does not discriminate against out-of-state commercial entities

As a threshold matter, ACES and the incumbent utility owners, MAPCo and LastEnergy (the incumbents), are not substantially similar for the purposes of the Commerce Clause because they do not compete in the same market. Like the LDCs in *General Motors Corp.*, the incumbents are retail utilities that provide electricity to a captive local market, while ACES participates solely in wholesale electricity markets. ACES may highlight the fact that the incumbents produce more electricity than is required by the local market and sell the excess into the wholesale market and argue that this places them in the same market. However, the Court in *General Motors Corp.* addressed the same issue and determined that the parties in that case were

not substantially similar in spite of the fact that the LDCs participated in the interstate gas market in addition to providing services to local customers. See 519 U.S. at 303-305. Likewise, the Vandalia incumbents and ACES are not substantially similar even though the incumbents participate to some extent in the interstate market. Because the entities serve different markets, the NTPA cannot be found to discriminate against ACES or any other entity that only serves wholesale markets.

Even if the incumbents and ACES participated in the same market, the NTPA does not discriminate against out-of-state entities. The law is not facially discriminatory because, like the Minnesota law in *LSP Transmission Holdings, LLC*, the language of the NTPA grants ROFR to any "incumbent" transmission service and does not indicate or imply that incumbents cannot be out-of-state entities. See Vand. Code § 24-12.3(d). The language of the NTPA is virtually identical to the Minnesota law upheld by the Eight Circuit. See Minn. Stat. Ann. § 216B.246 (2012).

The NTPA also does not contain any discriminatory purpose or create any discriminatory effect. The incumbents are both out-of-state companies, which demonstrates that the law does not seek to prevent out-of-state companies from participating in either the Vandalia market or the interstate wholesale market. Further, ACES is incorporated in Vandalia, which undermines its argument that the law improperly favors in-state entities. ACES argued that the place of incorporation is not relevant to the question of whether a company is an in-state or out-of-state entity for the purposes of the Commerce Clause, citing *NextEra*. However, the Fifth Circuit did not hold in that case that place of incorporation is irrelevant, but only that it was not sufficient on its own to defeat an allegation of discrimination. See *NextEra* at 323. The NTPA instead falls into the class into the class of state laws that the Fifth Circuit recognized as distinguishable from

Texas' unconstitutional law in that case. See *Id.* at 314. Unlike the Texas law, the NTPA places clear limits on incumbents' ability to exercise their ROFR and does not bar new entrants to the State's transmission market by imposing any kind of physical presence requirement. The NTPA bears almost no similarity to the Texas law, but instead closely resembles the Minnesota law upheld in *LSP Transmission Holdings, LLC*. Because the NTPA does not eliminate competition in the intrastate transmission market, does not completely prevent non-incumbent entities from entering the market, and limits the ability of incumbents to exercise their ROFR, there is no basis for the claim that the NTPA contains any discriminatory purpose or effect.

ii. The NTPA does not unduly burden interstate commerce

Absent a showing that the NTPA is discriminatory, ACES must show that the law fails the *Pike* analysis by placing an undue burden on interstate commerce that is clearly excessive in relation to the law's local benefits. Like Ohio's differential tax on natural gas sales in *General Motors Corp.*, Vandalia enacted the NTPA to ensure that local markets would continue to receive reliable and predictable service and pricing, and the Supreme Court recognized States' interest in preserving reliable services to captive markets. *General Motors Corp.* at 305. The NTPA is also intended to preserve the proven status quo for energy transmission within the state, which the Eight Circuit recognized as a legitimate state interest. *LSP Transmission Holdings, LLC.* at 1031.

The incidental effect of the NTPA on interstate commerce is minor in relation to the importance of the benefits to the Vandalia's legitimate state interests. The law does not prevent out-of-state entities from ever building interstate transmission lines in Vandalia, but requires only that they wait a maximum of eighteen months before doing so, assuming that those entities are not able to procure or contract with incumbent services. ACES argues that the eighteen-

month period essentially prevents any new entrants into the market because it creates uncertainty for proposed transmission projects, making it difficult to secure financing. However, the law does not require incumbents to wait the full period before deciding whether to exercise their ROFR and nothing in the law would prevent ACES or PJM from consulting with the incumbents early in the planning process in order to minimize any uncertainty. Further, ACES has not established any reason why it should take the incumbents less than eighteen months to study the Mountaineer Express proposal and choose the course of action that best serves the State's interests. The eighteen-month period may be inconvenient for non-incumbents, but ACES has not demonstrated that it is excessive in relation to its benefits to the local market or that it prohibits competition.

ACES also asserts that the NTPA is excessive in light of the Mountaineer Express project timeline, and that it allows the incumbents to take on transmission projects for which they did not have to compete. Both of these assertions fail to account for the face that the incumbents control right-of-way easements covering a large part of the planned Mountaineer Express route. The incumbents are not obligated to allow ACES to use the right-of-way easements and eliminating or modifying the NTPA would do nothing to change that fact. The Vidalia PSC declared in its Right of Way Order that ACES would not be considered a public utility entitled to access to those easements even if it completed the Mountaineer Express line. In other words, neither modification or elimination of the NTPA would create a less burdensome means of serving the State's interests because it would not remove the obstacle created by the easements. The incumbents' control of the easements also undermines the argument that the NTA allows them to take advantage of the market by avoiding competition. The incumbents competed in the

market when they identified promising locations for transmission facilities and procured the right-of-way easements needed to construct them.

Because the NTPA does not discriminate against interstate commerce on its face, in its purpose, or in its effects, ACES must show that the law places an excessive burden on interstate commerce. ACES has failed to make that showing. On the contrary, the law serves important state interests using the least burdensome means possible. ACES has asserted that the NTPA is inconvenient to the Mountaineer Express project, but it has not shown that the law is more burdensome than it needs to be in order to serve Vandalia's needs. Further, removal of the NTPA would do nothing to promote interstate competition or improve ACES' ability to construct the proposed transmission lines because the incumbents would still control the right-of-way easements. The District Court correctly held that the NTPA does not violate the Dormant Commerce Clause, and because its removal would not promote interstate commerce or competition, the law should be upheld.

VIII. CONCLUSION

ACES had no standing to bring suit because they did not plead an injury-in-fact, and the Capacity Factor order is not preempted by the FPA. The NTPA is not preempted by FERC Order 1000, nor does it violate the dormant Commerce Clause. For the foregoing reasons, this Court should affirm the decision of the lower court and uphold dismissal of each of ACES' complaints.

IX. CERTIFICATE OF COMPLIANCE

Submitted contemporaneously with and separately from this document per the Official Rules of the 2023 National Energy and Sustainability Moot Court Competition.

X. CERTIFICATE OF SERVICE

Submitted contemporaneously with and separately from this document per the Official Rules of the 2023 National Energy and Sustainability Moot Court Competition.