IN THE UNITED STATES COURT OF APPEALS FOR THE

TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

v. C.A. No. 22-0682

CHAIRMAN WILL WILLIAMSON,
in his official capacity,
COMMISSIONER LONNIE LOGAN,
in his official capacity, and
COMMISSIONER EVELYN ELKINS,
in her official capacity,

Appellees.

BRIEF FOR APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.

Team 20
Attorneys for Appalachian Clean Energy Solutions, Inc.

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction over this matter under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. On August 15, 2022, the District Court granted Defendant's motion to dismiss Appalachian Clean Energy Solutions, Inc. ("ACES")'s claims on all issues. This Court has jurisdiction over this matter because this is an appeal from a final judgment of the United District Court of Vandalia. 28 U.S.C. § 1291. ACES filed a timely appeal of that order on August 29, 2022.

STATEMENT OF THE ISSUES

1. **Does ACES have standing to challenge the Vandalia Public Service Commission's Capacity Factor Order?**
2. **Under the Supremacy Clause, does the Federal Power Act preempt the Vandalia Public Service Commission's Capacity Factor Order because the Order sets wholesale rates and compels coal-burning utilities to enter the PJM market?**
3. **Under the Supremacy Clause, does the Federal Power Act and the Federal Energy Regulatory Commission's Order 1000 preempt Vandalia's Native Transmission Protection Act because the statute regulates interstate transmission of electricity by granting right of first refusal to incumbent transmission owners?**
4. **Does Vandalia's Native Transmission Protection Act violate the dormant Commerce Clause by granting businesses with existing facilities in the State the exclusive right to build interstate transmission lines passing through Vandalia?**

STATEMENT OF THE CASE

I. Legal Background

The Federal Energy Regulatory Commission and The Federal Power Act

Prior to the enactment of the Federal Power Act ("FPA"), the Supreme Court ruled that the Commerce Clause bars states from regulating wholesale sales across state lines. *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927). This case created the "*Attleboro* gap," a regulatory void which only Congress could fill. *Id.* at 90. Congress responded by passing the FPA in 1935. *New York v. F.E.R.C*, 535 U.S. 1, 6 n.3 (2002). The FPA charged the Federal Power Commission ("FPC"), predecessor of the Federal Energy Regulatory Commission

("FERC"), to "provide effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *Id*. at 6. Under the FPA, FERC regulates the interstate transmission of electricity and wholesale sales of electricity, while states maintain jurisdiction over retail sales of electricity and the intrastate generation, transmission, and distribution of electricity. 16 U.S.C. § 824(b)(1). A wholesale sale is "a sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

The Interstate Electricity Market

Many state energy markets were historically dominated by vertically integrated monopolies. *Allco Fin., Ltd v. Klee*, 861 F.3d 82, 88 (2d Cir. 2017). Since the passing of the FPA, electricity has become an increasingly competitive interstate business. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154 (2016). Many states now have deregulated energy markets. *Id.* In a deregulated market, independent power generators sell electricity wholesale to load serving entities ("LSEs"). *Id* at 155. These LSEs, also referred to as utilities, sell and transmit electricity directly to retail consumers. *Allco*, 861 F.3d at 88. A third-party transmitter transmits the energy from generators to LSEs. *Id*.

To promote competition in these increasingly deregulated interstate wholesale markets, FERC adopted policies resulting in the creation of Regional Transmission Organizations ("RTOs") and Independent System Operators ("ISOs"). Record ("R.") at 3; Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Pub. Utilities*, 75 F.E.R.C ¶ 61,080; 61 Fed. Reg. 21,540 (Apr. 24, 1996) (hereinafter "Order 888"); Order No. 2000, *Reg'l Transmission Organizations*, 89 FERC ¶ 61,285 (Dec. 20, 1999) (hereinafter "Order 2000"). Together, these RTOs and ISOs manage certain segments of the national electricity grid. *Hughes*, 578 U.S. at 150. The RTO/ISO that covers the mid-Atlantic

region, including the state of Vandalia, is the PJM Interconnection ("PJM"). R. at 3. PJM is tasked with approving the construction of all new transmission facilities, whether constructed by a public utility or an independent transmission company, within the PJM grid. *Id.* Once approved, PJM includes the facilities in the Regional Transmission Expansion Plan ("RTEP"). *Id*. at 6.

PJM also operates the energy and capacity wholesale markets. *Id*. at 3. The energy market allows PJM to purchase electricity from generators and sell to LSEs in real-time, for delivery within 24 hours. *Id*. Generators offer their power into the auction at a price at which they can provide a certain quantity of power. *Id*. The cheapest bids clear the market first. *Id*. The price of the last bid to clear, which represents the point at which demand is met, becomes the "market-clearing price." *Id*. All bids that clear the market are then sold at this market-clearing price, known as the wholesale price of power, even if the initial bid was lower than the clearing price. *Id*. The capacity auction deals with the sale of future capacity. *Id*. PJM predicts demand three years into the future and allocates this future demand to LSEs. *Hughes*, 578 U.S. at 150. Generators with capacity to produce electricity over the next three years bid that capacity into the auction. *Id*. PJM accepts bids until it has enough to satisfy anticipated demand. *Id*. LSEs then purchase enough future capacity from PJM to meet their assigned share of overall expected demand. *Id*. Similar to the energy auction, the highest bid to clear the auction sets the "clearing price." *Id*. The auctions are extensively regulated by FERC to ensure they effectively balance supply and demand to produce a "just and reasonable clearing price." *Id*.

Generators and LSEs may also engage in wholesale transactions outside of the auction process by entering into bilateral contracts for the sale of electricity. *Id*. These independent bilateral contracts are still subject to FERC jurisdiction and review. R. at 3, n.2. While this method of executing wholesale transactions is available in some states, all generators within the state of

Vandalia are required to sell the energy they produce directly into the PJM energy market pursuant to contracts with PJM. *Id*. at 3.

II. Factual Background

Appalachian Clean Energy Solutions, Inc.

ACES is a global energy company with multiple generating resources that sells power into the wholesale energy market throughout the eastern United States. R. at 4. ACES does not own any retail electric utilities and does not sell energy directly to retail customers. *Id*. In addition to energy generation, ACES constructs and maintains transmission lines, and is one of the largest independent electricity transmission companies in the country. *Id*. at 5. ACES is committed to the development of clean energy and plans to achieve zero carbon emissions by 2050. *Id*.

In furtherance of this goal, ACES plans to construct a new 1,800 MW combined-cycle natural gas-fired generating plant, known as Rogersville Energy Center ("Rogersville"), in southwestern Pennsylvania. *Id*. The facility is expected to capture 75 percent of its carbon emissions. *Id*. ACES plans to sell energy from the Rogersville facility through the PJM wholesale market. *Id*. at 1. The total expected cost of Rogersville is $3.1 billion. *Id*. at 5. To increase the region's ability to accommodate the new electricity generation from Rogersville, ACES plans to build a new high-voltage transmission line, the "Mountaineer Express," from Rogersville, Pennsylvania, to Raleigh, North Carolina. *Id.* The proposed route will run through portions of Vandalia. *Id*. at 10. The Mountaineer Express was approved by the PJM Board of Managers for inclusion in the RTEP in March 2022 and has an expected cost of $1.7 billion. *Id*.

Vandalia Coal Generators and the Capacity Factor Order

Vandalia is one of the largest coal producers in the nation. R. at 4. Vandalia is serviced by only two retail utility companies, LastEnergy and Mid-Atlantic Power Co. ("MAPCo"). *Id*.

LastEnergy has two coal-fired power plants in Vandalia, while MAPCo has three. *Id*. Both companies supply power to electricity consumers in Vandalia as well as in other states throughout the region. *Id*. LastEnergy and MAPCo are both headquartered and incorporated in Ohio. *Id.*

Recently, the coal-generated power plants operated by LastEnergy and MAPCo in Vandalia have struggled to compete with more cost-effective generators. Capacity factors for these local Vandalia plants ranged from 34.7 to 62.3% for the 12-month period ended June 30, 2021. R. at 7. Both utilities expect their capacity to remain at or below 60% moving forward due to the availability of cheaper energy sources in the region. *Id*.

The Vandalia Public Service Commission ("PSC") is the local government agency charged with regulating retail utility rates and practices in the state of Vandalia. R. at 6. Title 24 of the Vandalia Code gives the PSC the authority to set "just and reasonable rates" for utilities within the state. *Id*. The entity is also directed to ensure that the robust Vandalia coal industry is maintained. *Id*.

To increase local coal-generated power, the PSC issued the Capacity Factor Order ("CFO") in May 2022. R. at 8. The order requires LastEnergy and MAPCo to operate at an average of not less than 75% capacity during a calendar year. *Id*. Based on capacity factors from the past year, this mandate would result in an increase of up to 40% capacity at Vandalia coal plants. The PSC found that operation of local coal plants at 75% capacity would be economically efficient, but this finding conflicts with evidence presented by the Vandalia Citizens Action Group. *Id*. at 8-9.

In addition to mandating minimum levels of production, the order allows LastEnergy and MAPCo to offset their high cost of production at these artificially elevated capacity rates by increasing retail rates charged to Vandalia utility consumers. *Id*. LastEnergy and MAPCo exclusively sell power from their coal-fired plants into PJM pursuant to their Fixed Resource

Requirement ("FRR") status. *Id*. at 8, n. 7. If their actual cost of production is higher than the PJM clearing price, the order authorizes LastEnergy and MAPCo to increase retail rates to cover the difference between the cost and the wholesale rate. *Id*. The policy therefore guarantees LastEnergy and MAPCo a wholesale energy rate at least as high as their cost of production.

Rights of First Refusal

Before 2011, many ISO tariffs contained right-of-first-refusal ("ROFR") provisions, which gave owners of existing transmission facilities, called "incumbents," the exclusive right to construct new transmission facilities in their service areas. R. at 9. In 2011, FERC, finding that ROFRs "creat[e] a barrier to entry that discourages nonincumbent transmission developers from proposing alternative solutions" and "can result in rates for Commission-jurisdictional services that are unjust and unreasonable or otherwise result in undue discrimination," ordered all public utility transmission providers to remove federal ROFRs from Commission-jurisdictional tariffs and agreements. Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utilities*, 136 FERC ¶ 61,051, at ¶¶ 226, 257, 313 (July 21, 2011) (hereinafter "Order 1000").

In response to Order 1000, Last Energy and MAPCo, two incumbent utilities in Vandalia, urged the State legislature to pass the Native Transmission Protection Act ("NTPA") to restore the incumbent utilities' ROFRs for federal regionally planned transmission projects in Vandalia. R. at 9. The law, passed in 2014, provides as follows:

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

Vand. Code § 24-12.3(d).

ACES is not an incumbent electric transmission owner because it does not own any existing transmission facilities in Vandalia. R. at 10. Therefore, LastEnergy and MAPCo claim ROFRs to build the Mountaineer Express transmission facilities in Vandalia. *Id*. Because the incumbents have until September 30, 2023, to exercise their rights, the PSC has not taken any action on ACES's application for a Certificate of Public Convenience and Necessity ("CPCN") for the Vandalia portions of the Mountaineer Express. *Id*. ACES may not begin construction until the PSC issues the certificate. Vand. Code § 24-7-2.

III. Procedural Background

On June 6, 2022, ACES filed suit against the PSC. R. at 14. ACES challenged the CFO, arguing that it is preempted by the FPA under the Supreme Court's precedent in *Hughes v. Talen Energy Marketing, LLC*. R. at 14. ACES also challenged the NTPA, arguing that (a) the FPA preempts State ROFR laws that target transmission projects selected in an Order 1000 competitive solicitation, and (b) similar to Texas's invalidated statute in *NextEra Energy Capital Holdings, Incorporated v. Lake*, the NTPA violates the dormant Commerce Clause by impermissibly interfering with the interstate transmission market. R. at 15-16.

On August 15, 2022, the district court granted the PSC's motion to dismiss on all issues. *Id*. at 16. The court found (1) that ACES lacked standing to challenge the CFO, (2) that the CFO does not violate the Supremacy Clause, citing decisions by the Second Circuit and Seventh Circuit Courts of Appeals[1] concerning state "zero emission credits," or "ZECs," (3) that Order 1000 does not preempt the NTPA, and (4) that the NTPA does not violate the dormant Commerce Clause because place of incorporation determines out-of-state status. *Id*. at 15-16. ACES filed a timely appeal from the district court's order to this Court on August 29, 2022. *Id*. at 16.

[1] Coal. for Competitive Elec. v. Zibelman, 906 F.3d 41 (2d Cir. 2018); Elec. Power Supply Ass'n v. Star, 904 F.3d 518 (7th Cir. 2018).

SUMMARY OF THE ARGUMENT

ACES has standing to challenge the CFO. By flooding the grid with power from five Vandalia coal plants, the CFO manipulates the PJM energy and capacity markets and precludes "just and reasonable" wholesale rates while allowing cost recovery from retail rate payers. An invalidation of the CFO on Supremacy Clause grounds will redress this injury-in-fact. FERC has exclusive jurisdiction over the regulation of interstate wholesale electricity rates. The CFO violates the Supremacy Clause by directly setting wholesale electricity rates in the region by requiring the Vandalia coal plants, who are compelled to sell to the PJM market, to maintain inefficiently high capacity factors.

The NTPA, which grants ROFRs to incumbent electric transmission owners for any proposed transmission facility in Vandalia, also violates the Supremacy Clause because it is preempted by the FPA and FERC's regulation of interstate transmission. The FPA expressly limits state jurisdiction over electricity transmission to regulation of facilities used in local distribution. The NTPA exceeds Vandalia's authority by regulating the ownership of interstate transmission lines. It also directly conflicts with Order 1000, which removed ROFRs from the regional transmission planning process.

In addition, the NTPA violates the dormant Commerce Clause by discriminating against out-of-state transmitters. The NTPA is facially discriminatory because it grants additional rights to entities who already have assets in Vandalia. Proponents of the bill made abundantly clear that its purpose was discriminatory—to give in-state transmitters an advantage over outsiders. The statute also has a discriminatory effect because it allows in-state transmitters to stifle their own competition and preserve market inefficiencies that advantage them. Finally, the NTPA fails the

Pike balancing test because the burden it places on PJM's regional transmission planning is clearly excessive in relation to the speculative and insignificant local benefits.

STANDARD OF REVIEW

All issues presented on this appeal are questions of law, which this Court reviews *de novo*. *Highmark Inc. v. Allcare Health Mgmt. Sys. Inc.*, 572 U.S. 559, 563 (2014).

ARGUMENT

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

To establish Article III standing a plaintiff must show that 1) they have suffered an "injury in fact", 2) the alleged illegal conduct caused the injury, and 3) the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 557 (1992). ACES concedes that the CFO does not regulate them directly and only sets a minimum production level and price guarantee for LastEnergy and MAPCo. R. at 8. Nevertheless, a plaintiff is not precluded from having standing simply because they are not directly regulated by the government action that is being challenged. *Lujan*, 504 U.S. at 562. ACES possesses all three requirements of injury, causation, and redressability.

a. ACES suffered a concrete and actual "injury-in-fact."

ACES suffered an injury-in-fact because the CFO directly denies ACES access to a competitive PJM interstate wholesale market: an interest which is protected by FERC and the FPA. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (stating that FERC "undertakes to ensure just and reasonable wholesale rates by enhancing competition—attempting . . . to break down regulatory and economic barriers that hinder a free market in wholesale electricity") (internal quotations omitted). To establish an "injury-in-fact," the plaintiff must show an invasion of a legally protected interest which is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560. To be concrete, an injury must actually exist,

but need not necessarily be tangible. *Spokeo Inc. v. Robins*, 578 U.S. 330, 340 (2016). To be particularized, an injury must "affect the plaintiff in a personal and individual way." *Id.* at 339.

ACES's injury is concrete and particularized. Courts have found that utility companies who were denied fair access to an energy market had standing to make preemption claims. *Allco*, 861 F.3d at 91 (finding that the plaintiff's claims that they were harmed because the state would have been required to accept their bids but-for the state's policy was sufficiently "concrete and particularized" to constitute an "injury-in-fact"). The injury is concrete because the damage to the wholesale marketplace and the resulting effects on ACES's business exist now. While the extent of the damage may be challenging to quantify monetarily, an injury need not necessarily be tangible or easily quantified to be "concrete" —it must only be real. *Spokeo*, 578 U.S. at 339. The injury is particularized because ACES actively sells energy on the PJM wholesale market and plans to construct a new 1,800 MW plant which will also be connected to PJM. R. at 4-5. This harm does not apply to every citizen or even every participant in the PJM market and is unique to them.

The injury is also both actual and imminent. ACES's current participation in the PJM wholesale market means the enactment of the CFO resulted in actual, immediate harm as soon as it was implemented. ACES has a portfolio of electric generating resources totaling over 6.5 gigawatts and transactions on the PJM energy market happen daily, in real time. R. at 4. Additionally, ACES's lack of access to a just and competitive PJM wholesale market leaves them at an imminent risk of continued monetary losses, both in the form of reduction in sales from their existing generators and the inability to implement their $3.1 billion investment in Rogersville. ACES's plans for Rogersville and the connected Mountaineer Express transmission line are certainly more imminent than the vague "some day" intentions that have been rejected by the Supreme Court. *See Lujan*, 504 U.S. at 555-564. ACES officially announced their plans for

Rogersville, completed a cost estimate of both projects, and received PJM Board of Managers approval for the Mountaineer Express line. R at 5-6.

Appellees argue that ACES has not suffered an injury in fact because the CFO included a finding of fact that operation of the Vandalia coal plants at 75 percent capacity factor is economical. *Id*. at 8. The Vandalia Citizens Action Group made a contradictory finding. *Id*. at 9. The question of whether the coal plants can run economically up to 75% capacity, and therefore whether the integrity of the PJM wholesale market would be adversely impacted by the CFO, is a question of fact that need not be determined at this point in the pleading process. At the motion to dismiss stage, a plaintiff must allege "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). ACES's allegation is directly supported by the historical capacity rates at LastEnergy and MAPCo. Both utilities disclosed in their PCA filings that their 2021 capacity factors, which ranged from 34.7% to 62.3%, were a result of the availability of lower cost power from the wholesale market, and that capacity was expected to remain at these rates moving forward. R. at 7. These factual allegations are more than sufficient for a reasonable inference to be made that the CFO unfairly disrupts the economics of the PJM market.

b. The Capacity Factor Order caused the injury.

Vandalia's illegal regulation of the interstate wholesale market via the CFO caused unfair distortion of the PJM wholesale market. As discussed above, Plaintiffs have alleged sufficient facts for a reasonable inference to be made that the CFO causes unfair distortion of the PJM auction, and therefore causes injury to ACES.

c. A favorable ruling and subsequent repeal of the Capacity Factor Order would redress the injury.

ACES seeks a finding that the CFO is preempted by the FPA and therefore invalid. The removal of the CFO would remove the unfair barrier to competition described above and allow the wholesale auction to freely establish just and reasonable pricing. This court should reverse the lower court's order and find that ACES has standing to sue because of the injury they suffered from the CFO.

II. PSC's Capacity Factor Order violates the Supremacy Clause because it is preempted by FERC's jurisdiction under the FPA.

The Supremacy Clause of the U.S. Constitution states that the laws of the United States "shall be the supreme Law of the Land…anything in the Constitution or laws of any State to the contrary notwithstanding." U.S Const. art. VI, cl. 2. Generally, this means that federal law preempts conflicting state law. *Hughes*, 578 U.S. at 162. There are three circumstances under which state law can be preempted by federal law: 1) express preemption, 2) implied field preemption, and 3) conflict preemption. Express preemption occurs where "Congress' command is explicitly stated in the statute's language," and no further inquiry is required. *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977). Courts infer field preemption when there is a "scheme of federal regulation…so pervasive" that it leaves "no room for the States to supplement it" or where the federal interest in a field is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Courts infer conflict preemption where a federal law and a state law are in such conflict that it would be effectively impossible to comply with both or where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress*." Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

The FPA explicitly designates that the federal government has the power to regulate interstate wholesale sales of electric energy, while states maintain jurisdiction over intrastate generation, transmission, and distribution of electricity and retail electricity sales. See 16 U.S.C. § 824(b)(1). PSC's CFO is an illegal intrusion on FERC's jurisdiction to regulate wholesale electricity sales. The CFO violates the Supremacy Clause because it 1) sets a wholesale electricity rate other than the PJM auction price that is nevertheless contingent upon participation in the PJM auction, and 2) directly manipulates wholesale electricity pricing by compelling coal-burning utilities to enter the PJM market.

a. The Capacity Factor Order sets a wholesale electricity rate other than the PJM auction price that is nevertheless contingent upon auction participation.

In *Hughes* the Supreme Court found that a state policy which provided subsidies to certain generators through state-mandated contracts intruded on FERC's exclusive jurisdiction to set wholesale rates. 578 U.S. at 166. The policy required LSEs to enter into a 20-year contract with a specific generator, CPV Maryland, LLC ("CPV"), for the purchase of CPV's capacity. *Id.* at 151. The program impermissibly infringed on FPAs jurisdiction because it "set[] an interstate wholesale rate" other than the auction clearing price while at the same time "condition[ing] payment of funds on capacity clearing the auction." *Id*. at 163, 166. The CFO shares these characteristics with the Maryland policy at issue in *Hughes* and is therefore preempted by the FPA.

i. The Capacity Factor Order directly establishes an interstate wholesale rate.

The Maryland policy in *Hughes* directly sets wholesale rates by requiring LSEs to purchase capacity from CPV at a contractually defined rate other than the market clearing price. 578 U.S. at 166. The contract nevertheless requires CPV to sell its capacity through the PJM auction. *Id.* at 159. The difference between the PJM market clearing price and the contract price is reconciled in the form of subsequent payments made by LSEs or CPV outside of the auction. *Id*. Similarly, for

any units sold to the PJM market where costs exceed the clearing price, the CFO directly sets a wholesale price for MAPCo and LastEnergy at least equal to cost: a price other than the market clearing price. R. at 8. The difference between cost and the market clearing price is reconciled in the form of payments made by purchasers after the fact. *Id*.

The CFO functionally establishes an interstate wholesale rate even though it only directly touches intrastate production and intrastate retail rates. States intervene on FERC's authority "by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or…in-state generation." *Hughes*, 578 U.S. at 165. The CFO only applies to LastEnergy and MAPCo, which are vertically integrated utilities that perform generation, transmission, and distribution. R at 8. The Vandalia requirement that these vertically integrated utilities sell all production through the PJM market breaks the purely intrastate nature of the production chain. Even though the CFO only stipulates for the reimbursement of costs through the raising of retail rates, the reimbursements still represent payments for wholesale purchases. While the *Hughes* scheme called for these reimbursements to be paid by LSEs, the expectation was that these additional costs or savings would still ultimately be passed on to consumers in the form of lower or higher retail prices. *Hughes*, 578 U.S. at 159. The CFO should not be treated differently than the Maryland policy in *Hughes* simply because it specifies that LSEs may pass these higher costs onto retail customers while the Maryland policy does not.

Other state energy policies which courts have found permissible under *Hughes* had a much less direct impact on wholesale rates. The New York Public Service Commission's policy at issue in *Coalition for Competitive Electricity v. Zibelman* awarded state-issued credits (ZEC credits) to zero-emission nuclear power plants. 906 F.3d 41, 45 (2d Cir. 2018). The policy required local utilities to purchase ZECs in proportion to their share of the total state electrical load. *Id*. at 48.

The incidental impact of the program on wholesale rates was not enough to constitute field preemption under the FPA. *Id.* at 53. The ZEC price was based on an estimate of the damage from carbon emissions. *Id*. at 47. It was recalculated every two years and could be adjusted based on forecast wholesale prices. *Id*. at 48. Generators were still exposed to market risk if wholesale market prices fell. *Id.* at 51. Similarly, the ZEC price in *Electric Power Supply Association v. Star* was only indirectly and partially based on average auction prices. 904 F.3d at 521. In contrast, the reimbursements provided for by the CFO are directly based on current wholesale market clearing prices. R. at 8. For any units produced where the cost exceeds the clearing price, LastEnergy and MAPCO are not exposed to the risk of losses, consistent with the policy in *Hughes*. While other factors such as the amount of renewable energy impact the ZEC price in *Zibelman*, the CFO reimbursement is based on the market clearing price alone. 906 F.3d at 51. The CFO therefore directly sets an alternative price for certain wholesale units, as opposed to a subsidy which reimburses generators in amounts that are loosely tied to the market clearing price.

ii. The Capacity Factor Order is significantly "tethered" to PJM market participation.

Critical to the court's conclusion in *Hughes* was the finding that the payment of funds under Maryland's program was contingent on capacity clearing the auction. 578 U.S. at 166. Other measures such as tax incentives or land grants that are "untethered to a generator's wholesale market participation" may be permissible. *Id*. The CFO is highly tethered to wholesale market participation because MAPCo and LastEnergy's FRR status requires them to sell exclusively into PJM. R. at 8, n.7. MAPCo and LastEnergy's receipt of a state-approved alternative wholesale price pursuant to the CFO is therefore contingent on their capacity clearing the auction. The same "fatal defect that render[ed] Maryland's program unacceptable" is present here. *Hughes*, 578 U.S. at 166.

The reason for this tether to the wholesale market should not matter to the court's analysis. In *Zibelman*, the court found that New York's ZEC credit program was not field preempted because the plaintiffs "failed to identify an impermissible 'tether'" under *Hughes*. *Zibelman*, 906 F.3d at 45. While there was nothing in the order that required ZEC plants to participate in the wholesale market, the participating generators were still required to sell their output into the wholesale market due to their "Exempt Wholesale Generators" ("EWG") status. *Id*. at 52. The court held that the policy was not sufficiently tethered to the wholesale market because "a ZEC plant may relinquish EWG status in order to sell directly to consumers…and still receive ZECs." *Id.* This analysis is not persuasive because it does not consider the extent to which the "tether" to the wholesale market results in manipulation of the auction regardless of how the "tether" was created. A policy that provides for a price other than the clearing price applied to an entity that is required to make all energy sales through the market results in unfair manipulation of the PJM auction, regardless of whether it is the policy itself or other factors which "tether" the sales to the auction.

iii. The wholesale rates set by the Capacity Factor Order are not reviewed by FERC for reasonableness by any other means.

The CFO is not a bilateral contract that is reviewed by FERC for reasonableness outside of the auction process. Interstate wholesale transactions typically occur through two mechanisms: 1) the competitive auctions administered by RTOs and ISOs and 2) bilateral contracts entered into between LSEs and generators. *Hughes*, 578 U.S. at 155. Bilateral contracts between two independent businesses with equal bargaining power are presumed to be just and reasonable if they are entered into through good-faith arm's-length negotiation. *See Morgan Stanley Cap. Group Inc. v Pub. Util. Dist. No. 1*, 554 U.S. 527, 546-48 (2008). In *Hughes*, the Supreme Court found that the Maryland policy could not be considered a traditional bilateral contract for capacity because it

"did not transfer ownership of capacity from one party to another outside of the auction." 578 U.S. at 151. Similarly, the CFO does not call for the transfer of ownership of energy outside of the auction. All energy must be sold through the PJM auction. R. at 15. Given that the wholesale rate established by the CFO is not reviewed by FERC for reasonableness through any other means and is set by the state, instead of arms-length business negotiation, the order impermissibly intrudes on FERC's jurisdiction to regulate wholesale rates.

b. The Capacity Factor Order compels coal-burning utilities to enter the PJM auction and unfairly distorts the PJM auction price signals.

Even if the court finds that the CFO does not directly set wholesale rates under *Hughes*, the policy should be preempted because it compels coal-burning utilities to enter into the PJM market and distorts the PJM auction price signals. Multiple circuit courts have determined that a policy that compels private actors to enter into a market may warrant preemption. *See Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 754 F.2d 99, 105 (2d Cir. 1985) (holding that a state policy is not preempted by the FPA because it does not compel or regulate incidental sales); *see also Allco*, 861 F.3d at 97-98 (holding that a state policy is not preempted by the FPA because it only "directs" and does not require or "compel" utilities to accept specific bids). The CFO directly disrupts the metrics of the wholesale market that are critical to its ability to effectively set fair wholesale prices and should therefore be preempted by the FPA.

The CFO compels LastEnergy and MAPCo to enter capacity into the wholesale market that they otherwise would not. All the energy produced by coal-burning plants in excess of the capacity they would otherwise run at up to 75% represents forced sales on the PJM market at a fixed price. LastEnergy and MAPCo have historically operated at capacity lower than 75% because of their inability to compete with cheaper energy supplies in the region. R. at 7. There is no evidence of any changes in the market to suggest that these metrics will change. *Id*. In *Rochester*

Gas & Electric, the court found that the state's use of wholesale rates as part of their calculation for permissible retail rates did not "compel" additional wholesale transactions. 754 F.2d at 102. This policy only indirectly compelled market participation by incentivizing retail utilities to make the amount of sales required to optimize profit. *Id*. at 102. Courts similarly found that a Connecticut policy did not "compel" market participation because it did not obligate utilities and generators to enter into state-mandated purchase agreements. *Allco*, 861 F.3d at 98. The utilities were still responsible for negotiating the terms of the final agreement. *Id*. In contrast, the CFO requires LastEnergy and MAPCo to enter into additional wholesale transactions on the PJM market, with no room for negotiation. The policy acts not as an incentive, but as a mandate for generators to make more bids into the PJM wholesale market.

The CFO is also conflict preempted because it distorts PJM auction price signals and stands as a significant obstacle to Congress' goals under the FPA. While the receipt of a wholesale price other than the clearing-price is only triggered if the bid clears the market, there is nothing in the scheme which prevents generators who are protected by the CFO from entering energy or capacity into the auction at an artificially low price to ensure that it clears. This directly impacts the auction clearing price and unfairly distorts the metrics of the auction. *See Hughes*, 578 U.S. at 158 (2016) (noting that FERC rejected a proposal that allowed certain generators to enter the auction at $0 because it would "improperly favor new generation over existing generation" and throw the "auction's market-based price-setting mechanism out of balance"). The FPA obligates FERC to regulate wholesale rates as well as "the panoply of rules and practices affecting them." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. at 277. The clearing price is the price an "efficient market would produce." *Id*. at 268. FERC promotes "just and reasonable" wholesale prices by enhancing competition and diminishing the "regulatory and economic barriers that hinder a free market." *Id*.

at 267. The ability for bidders to enter $0 bids without risk of loss is a direct intrusion on the basic rules of free competition and efficient markets on which the auction is based.

III. The NTPA violates the Supremacy Clause by regulating the construction of interstate transmission facilities passing through Vandalia.

Under the preemption doctrine, "the Supremacy Clause invalidates state laws that 'interfere with, or are contrary to the laws of Congress.'" *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)). The FPA expressly confines state jurisdiction to regulation of facilities used in local distribution. 16 U.S.C. § 824(b)(1). The NTPA is preempted by the FPA and Order 1000 because it seeks to establish an ROFR for federally approved interstate transmission projects with facilities in Vandalia. In addition, the NTPA operates "in actual conflict" with FERC's orders mandating regional transmission planning and removing federal ROFRs from interstate transmission projects, and preemption can be inferred from this conflict. *Freightliner*, 514 U.S. at 287.

a. The FPA provides a clear boundary separating FERC and State jurisdiction, and the NTPA crosses the line by regulating interstate transmission.

The FPA grants FERC "jurisdiction over all facilities for [interstate] transmission or sale of electric energy." 16 U.S.C. § 824(b)(1). This provision "unambiguously authorizes FERC to assert jurisdiction over two separate activities—transmitting and selling," and, while "FERC's jurisdiction over the *sale* of power has been specifically confined to the wholesale market… FERC's jurisdiction over electricity *transmissions* contains no such limitation." *New York v. FERC*, 535 U.S. at 19-20. The States, meanwhile, retain jurisdiction "over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1).

i. FERC's Orders further define the line between Federal and State jurisdiction.

FERC's various orders specify where state jurisdiction ends and reaffirm FERC's authority over the entire field of interstate transmission regulation. In Order 888, FERC acknowledges that the FPA does not disrupt the States' "significant control over local matters" such as facility construction and siting. *New York v. FERC*, 535 U.S. at 24 (citing Order 888 at ¶ 543). The States maintain "jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities." *Piedmont Env'tl Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009).

Additionally, Order 888 resolves the ambiguity regarding the meaning of "facilities used in local distribution" under 16 U.S.C. § 824(b)(1). FERC set forth seven factors "for determining what constitutes 'facilities used in local distribution.'"[2] FERC made clear that, under the FPA, it does not have jurisdiction over these facilities. *New York v. FERC*, 535 U.S. at 23.

Finally, in issuing Order 1000, FERC clarified it is not "intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities." 136 FERC ¶ 61,051 at ¶ 227. The PSC misuses this state and local carve out as a basis for its attempt to grant an ROFR for a PJM-approved interstate transmission line. However, FERC included this language in recognition of its own jurisdictional limitations—FERC cannot order a State to remove an ROFR for facilities under that State's jurisdiction. FERC's inclusion of the state and local carveout does not expand the States' jurisdictional authority to include interstate transmission facilities. FERC has authority over interstate transmission facilities, while the States may control local distribution facilities in their boundaries. 16 U.S.C. § 824(b)(1). In stating that

[2] (1) Local distribution facilities are normally in close proximity to retail customers. (2) Local distribution facilities are primarily radial in character. (3) Power flows into local distribution systems; it rarely, if ever, flows out. (4) When power enters a local distribution system, it is not reconsigned or transported on to some other market. (5) Power entering a local distribution system is consumed in a comparatively restricted geographical area. (6) Meters are based at the transmission/local distribution interface to measure flows into the local distribution system. (7) Local distribution systems will be of reduced voltage. Order 888 at ¶ 402.

Order 1000 does not preempt state or local laws, FERC does not alter this structure—it merely acknowledges it.

ii. The NTPA ignores its jurisdictional limitations and regulates all transmission facilities in Vandalia, regardless of their intended use.

Vandalia has the authority to 1) regulate construction and siting of all facilities in the State through the CPCN, and 2) regulate facilities used in local distribution and intrastate transmission. The NTPA exceeds the State's authority under the Supremacy Clause. The NTPA grants an incumbent transmission owner an ROFR for any "electric transmission line that has been approved for construction in a federally registered planning authority transmission plan." Vand. Code § 24-12.3(d). The Mountaineer Express is a PJM-approved interstate transmission project that merely passes through Vandalia. R. at 5. Because the Mountaineer Express is not a facility used in local distribution, Vandalia's authority is limited to the CPCN, and deciding which entities may construct the line is a vast usurpation of its jurisdictional limitations.

In *City of Dalton*, the Eleventh Circuit addressed whether FERC had jurisdiction to authorize construction of a direct delivery connection, which allowed an end-user of natural gas to bypass a local distribution company by purchasing directly from the owner of an interstate pipeline. *Bd. of Water, Light and Sinking Fund Comm'rs of City of Dalton, Ga. v. FERC*, 294 F.3d 1317, 1319, n.1 (2002). Agreeing with other circuits that had reached this issue[3], the court found that FERC acted "well within its jurisdictional mandate in approving the direct delivery connection." *Id*. at 1322. Like the FPA, the Natural Gas Act ("NGA") grants FERC regulatory power over the transportation and sale of natural gas in interstate commerce, while leaving states authority over "the local distribution of natural gas." 15 U.S.C. § 717(b). Citing *New York v. FERC*,

[3] *Cascade Natural as Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992); *Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295, 1299-1300 (6th Cir. 1989); *Michigan Consolidated Gas Co. v. FERC*, 883 F.2d 117, 121 (D.C. Cir. 1989); *Midwestern Gas Transmission Co. v. McCarty*, 270 F. 3d 536, 538 (7th Cir. 2001).

the Eleventh Circuit found that FERC had jurisdiction over the direct delivery connection because it was an interstate transport of natural gas. *City of Dalton*, 294 F.3d at 1327. Like the direct delivery connection, the Mountaineer Express is not a facility used in local distribution—it is a facility for transportation of energy from one state to another. Therefore, "states' authority to regulate local retail sales does not act as a limit" on FERC's jurisdiction in this case. *Id*.

b. The NTPA stands as a destructive obstacle to Order 1000's mandate for a competitive market for interstate transmission facilities.

Even if the FPA and Order 1000 do not expressly preempt state ROFRs, the NTPA is preempted because it conflicts with FERC's regulatory scheme. Conflict preemption occurs "where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (quoting *Hines v. Davidowitz*, 312 U.S. at 67). FERC issued Order 1000 to limit barriers to entry in the regional transmission grid and the NTPA directly conflicts with this purpose. In Order 1000, FERC "require[s] public utility transmission providers to participate in a regional transmission planning process that evaluates transmission alternatives at the regional level" to provide electricity transmission more efficiently and cost-effectively. 136 FERC ¶ 61,051 at ¶ 6.

FERC also ordered the removal of federal ROFRs with respect to facilities selected in a regional transmission plan "because [such ROFRs] may result in the failure to consider more efficient or cost-effective solutions to regional needs and, in turn, the inclusion of higher-cost solutions in the regional transmission plan." *Id*. at ¶ 284. In *S.C. Public Service Authority v. FERC*, the D.C. Circuit upheld Order 1000's regional planning mandate as a reasonable interpretation of the FPA's requirement that FERC remedy practices that unjustly or unreasonably affect rates for interstate electricity transmission services. 762 F.3d 41, 55 (2014); 16 U.S.C. 824e(a).

The NTPA impedes PJM's ability to conduct regional transmission planning. The statute is anticompetitive on its face, granting two incumbent parties astounding power over the region's electricity transmission system. Through Order 1000, FERC "[eliminated] federal rights of first refusal from Commission-jurisdictional tariffs and agreements…in accordance with [FERC's] duty to maintain competition." 136 FERC ¶ 61,051 at ¶ 286. If every state within PJM's region granted ROFRs for an interstate project to its incumbent utilities, the RTEP would be meaningless and impossible to carry out. These anticompetitive practices are "an obstacle to the accomplishment and execution of the full purposes and objectives of" Order 1000. *Freightliner*, 514 U.S. at 287. FERC instructed PJM to engage in transmission planning and expansion, which PJM carries out through the RTEP. Order 2000, 89 FERC ¶ 61,285 at ¶ 485. In Order 1000, FERC ordered the removal of ROFRs from this process. 136 FERC ¶ 61,051 at ¶ 291. Vandalia is preempted from regulating interstate transmission of electricity by granting an ROFR for a PJM-approved interstate transmission project.

IV. The NTPA violates the dormant Commerce Clause by providing unconstitutional benefits to incumbent transmitters.

Article III of the Constitution grants Congress the authority to regulate commerce between Nations, States, and Indian Tribes. U.S. Const. art. I, § 8, cl. 3. While the Clause does not expressly restrain States from restricting interstate commerce, the Supreme Court recognizes a negative implication of the Clause known as the dormant Commerce Clause. *Dep't of Revenue v. Davis*, 553 U.S. 328 (2008) (citing *Cooley v. Bd. of Wardens*, 53 U.S. 299 (1852)). The dormant Commerce Clause prohibits economic protectionism: regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988).

FERC Commissioner Bay concurred in a 2015 Order regarding Order 1000, stating: "State laws that discriminate against interstate commerce—that protect or favor in-state enterprise at the expense of out-of-state competition—may run afoul of the dormant commerce clause." *PJM Interconnection, L.L.C.*, 150 FERC ¶ 61,038, 61211-12 (Jan. 22, 2015). The Twelfth Circuit should follow the reasoning of the Fifth Circuit and rule that the NTPA violates the dormant Commerce Clause for three reasons. First, the NTPA facially discriminates against out-of-state transmitters like VACE. Second, the NTPA has a discriminatory purpose and effect. Finally, the NTPA fails the *Pike* balancing test.

a. The NTPA facially discriminates against out-of-state transmitters.

In all but the narrowest circumstances, state laws violate the dormant Commerce Clause when they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). When a statute is discriminatory, a virtual *per se* rule of invalidity applies rather than the *Pike* balancing test. *Or. Waste Sys. v. Dep't of Env't Quality*, 511 U.S. 93, 100 (1994) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979)). Justifications for discriminatory restrictions on interstate commerce must pass "the strictest scrutiny." *Id.* A state's burden of justification is so high that "facial discrimination by itself may be a fatal defect." *Id*. at 101.

The NTPA facially discriminates against out-of-state transmitters by preventing them from entering the market. The Act gives incumbent transmitters 18 months to prevent non-incumbents from building transmission lines in Vandalia by exercising the ROFR. R. at 9. Incumbency status requires companies to own transmission facilities in Vandalia, which are solely controlled by MAPCo and LastEnergy. *Id*. at 10. By requiring ownership of transmission facilities in Vandalia, the Act de facto prevents anyone besides MAPCo and LastEnergy from operating in Vandalia through the ability to exercise their ROFR. R. at 9. Out-of-state transmitters cannot gain

incumbency status if MAPCo and LastEnergy continue to exercise their ROFR, which they are incentivized to do so they can maintain their monopoly status as the only transmitters operating in Vandalia. By providing incumbent utilities a ROFR to build high-voltage transmission lines, states discriminate against out-of-state actors that would potentially create a more vibrant interstate power market and reduce electricity costs for states and regions, particularly for renewable energy. Alexandra Klass & Jim Rossi, Revitalizing Dormant Commerce Clause Review for Interstate Coordination, 100 Minn. L. Rev. 129 (2015).

b. The district court erred in following the Eighth Circuit's place of incorporation test to determine that the NTPA was not facially discriminatory.

While the Eighth Circuit ruled that Minnesota's ROFR did not violate the dormant Commerce Clause, Minnesota's ROFR is distinguishable from Vandalia's and the Eighth Circuit erred by considering the place of incorporation in a dormant Commerce Clause claim. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (2020). In *Sieben*, LSP's transmission line connects two substations: Xcel's Wilmarth substation north of Mankato, Minnesota, and ITC's Huntly substation, south of Winnebago, Minnesota. *Id*. at 1025. The Eighth Circuit upheld Minnesota's ROFR largely because state police powers include regulating utilities. *Id*. at 1029.

Unlike the Huntley-Wilmarth line, ACES's line, Mountaineer Express, connects two out-of-state substations owned by ACES: one at its Rogersville Energy Center in Pennsylvania, and the other at the Wake County substation outside Raleigh North Carolina. R. at 5-6. Minnesota's interest in regulating utilities is stronger than Vandalia's because the Huntley-Wilmarth line is solely intrastate whereas Mountaineer Express is an interstate transmission line. Minnesota's concern for grid stability is also stronger than Vandalia's because LSP wanted to connect two existing incumbent transmission facilities, whereas ACES is seeking to connect its own energy facility to another facility in North Carolina. R. at 6. Because the concerns of the Eighth Circuit

are not applicable to ACES and The Mountaineer Express line is more intertwined with interstate commerce than the Huntley-Wilmarth line, the Eighth Circuit's opinion is not persuasive.

Additionally, the Eighth Circuit dismissed LSP's facial discrimination claim because some Minnesota incumbents were incorporated out-of-state, and thus the law drew a neutral distinction between in-state and out-of-state transmitters. *Id*. at 1027. However, most Circuits have rejected the idea that in-state and out-of-state status is determined based on place of incorporation. *NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 323 (5th Cir. 2022); *see also Fla. Transp. Servs. v. Miami-Dade Cty.*, 703 F.3d 1230, 1259 (11th Cir. 2012) (stating that if the place of incorporation alone controlled, "then a state['s] dormant Commerce Clause liability would turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies."); *see also Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005).

Having place of incorporation control whether a dormant Commerce Clause claim proceeds strikes at what the Supreme Court has recognized as a primary concern of the dormant Commerce Clause: "when the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected." *Id*. at 323 (citing *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 345 (2007) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 767-68 (1945)). A dormant Commerce Clause claim considers whether in-state economic interests can obtain favorable treatment compared to out-of-state interests. *NextEra*, 48 F.4th at 323. Because a majority of Circuits have rejected place of incorporation controlling whether a dormant Commerce Clause claim fails, the Twelfth Circuit should as well.

c. The NTPA has a discriminatory purpose and effect.

A statute that is facially neutral still violates the dormant Commerce Clause if it has a discriminatory purpose or effect. *Sieben,* 954 F.3d at 1026. Courts consider direct and indirect evidence to determine whether a statute has a discriminatory purpose. *Id*. at 1029. This evidence includes statements by lawmakers, the sequence of events preceding the statute's adoption, and the statute's historical background. *Id*. at 1029. The Fifth Circuit ruled that NextEra raised plausible allegations that SB 1983, Texas' statutory ROFR, had a discriminatory purpose because "at incumbents' prodding, the legislature suddenly enacted the law excluding new entrants after MISO selected NextEra's bid to build the Hartburg-Sabine Line." *NextEra,* 48 F.4th at 327.

A representative from LastEnergy, one of two incumbent transmitters in Vandalia, testified in support of the Act and stated that "it was necessary to keep transmission lines in the hands of purportedly more responsive in-state companies and to restore the 'status quo' from before Order 1000." R. at 9. MAPCo, the other transmitter, also testified and asked the Senate not "to encourage third-party transmission owners to buy and build transmission service in Vandalia." R. at 9. There is no record of any testimony from nonincumbent transmitters on the harmful effects of the Act, suggesting the Act's purpose was to benefit in-state incumbent transmitters. As the Eighth Circuit stated, laws that limit competition to incumbents are subject to dormant Commerce Clause review because incumbent "is just another word for an entity that already has a presence." *NextEra,* 48 F.4th at 325. The Goal of the NTPA is to ensure incumbent transmitters maintain their monopoly over electricity transmission in Vandalia.

Regulations have a discriminatory effect when they favor in-state economic interests over out-of-state interests. *Sieben,* 954 F.3d at 1030 (citing *IESI AR Corp. v. Nw. Ark. Reg'l Solid Waste,* 433 F.3d 600, 605 (8th Cir. 2006)). Vandalia's ROFR favors in-state economic interests by creating significant business uncertainty for out-of-state transmitters by requiring them to wait 18

months before their CPCN petition will be reviewed. R. at 10. Mountaineer Express has an estimated capital cost of $1.7 billion, however, if ACES is forced to delay construction for 18 months, market conditions and other factors can lead to an increase in costs, which could cause more delays to any construction and harm consumers who end up paying for the construction. *Id*. at 6. Additionally, ACES plans to use the high-voltage Mountaineer Express transmission line to power their energy facility in Rogersville, which has an estimated cost of $3.1 billion. *Id*. at 5. Requiring ACES to wait 18 months creates uncertainty regarding ACES's ability to accommodate the electrical output from Rogersville. *Id*. at 5. Finally, because of an existing Right-of-Way easement and until the Vandalia PSC grants ACES a CPCN, ACES will have to construct their transmission lines assuming the absence of eminent domain authority, which will greatly increase ACES's costs to build Mountaineer Express because ACES may be forced to bargain with individual landowners to have easements granted. *Id*. at 11. As long as the NTPA is in effect, nonincumbent transmitters will be prevented from accessing Vandalia's transmission market due to the uncertainty of whether incumbents will exercise the ROFR over the 18-month period.

d. The NTPA fails the *Pike* balancing test under Fifth Circuit precedent.

Even if the Court finds that Vandalia's NTPA is not facially discriminatory and does not have a discriminatory purpose or effect, Vandalia still fails the *Pike* balancing test. When a regulation only has incidental effects on interstate commerce, "it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). If a legitimate local interest is found, it becomes a question of degree, whereby the extent of the burden that will be tolerated depends "on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id*. at 142. The *Pike* inquiry requires assessing both the burdens and benefits of law and is just as fact dependent as discriminatory purpose claims. *NextEra*, 48 F.4th at 327. In

NextEra the Fifth Circuit reversed a summary judgment motion for NextEra's claim that Texas's ROFR failed the *Pike* balancing test because NextEra plausibly alleged the claimed local benefit of reliability was insignificant and illusory. *Id*. at 327 (citing *United Transp. Union v. Foster*, 205 F.3d 851, 863 (5th Cir. 2000); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 546 (4th Cir. 2013) (reversing the dismissal of the plaintiffs' *Pike* claim because it "present[ed] issues of fact that cannot be properly resolved on a motion to dismiss")).

Like Texas' ROFR, the NTPA imposes an excessive burden on interstate commerce weighed against any local benefits the Act was designed to provide. According to representatives from MAPCo and LastEnergy, the NTPA would "keep transmission lines in the hands of purportedly more responsive in-state companies." R. at 9. To the extent that Vandalia's ROFR would achieve this purpose, these benefits are outweighed by the harm to interstate commerce. ACES plans to construct transmission lines through Vandalia to accommodate the electrical output from Rogersville, which will cost ACES $3.1 billion. *Id*. at 5. If ACES cannot construct the Mountaineer Express, the regional grid will receive less electrical output from Rogersville which harms customers by stunting electricity generation. PJM approved the Mountaineer Express in the RTEP and has already found it to be necessary and beneficial to the region. *Id*. at 6. Additionally, while Vandalia's ROFR is not indefinite like the one in Texas, 18 months is so long that it creates too much uncertainty for nonincumbent transmitters to adequately plan and construct transmission lines in Vandalia. ACES's CPCN application will not be considered until September 30, 2023, and at any point until then, MAPCo or LastEnergy could exercise their ROFR, leaving the out-of-state transmitter with nothing except the costs associated with the planning process. *Id*. at 10. Constructing high-voltage transmission lines is very costly and providing incumbents 18 months

to exercise the ROFR creates uncertainty and risk that prevents out-of-state transmitters from operating in Vandalia.

CONCLUSION

For the foregoing reasons, the district court's order granting the PSC's motion to dismiss should be reversed.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Appalachian Clean Energy Solutions, Inc. 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,

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