UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC., Appellant,

v.

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

C.A. No. 22-0682

Brief for Appellee

<u>Oral Argument Requested</u>

Team #3

Counsel for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

JURISDICTIONAL STATEMENT

The district court had jurisdiction of the case pursuant to 28 U.S.C. § 1441. The district court's federal question jurisdiction was based on an alleged violation of the Supremacy Clause and the Commerce Clause of the United States Constitution and the Federal Power Act, 16 U.S.C. §§ 791-828c.

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

STATEMENT OF THE ISSUES PRESENTED

I. Whether ACES' claim challenging the CFO must be dismissed for lack of standing.

II. Whether the CFO regulates only electricity generation and retail sales, consistent with congressional intent as evidenced in the language of the FPA.

III. Whether Vandalia's statutory right-of-first-refusal (ROFR) violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000.

IV. Whether Vandalia's statutory ROFR violates the dormant Commerce Clause.

STATEMENT OF THE CASE

Vandalia is an energy rich state with a beloved, deep-rooted history of mining coal. R. at 4. Vandalia's economy is largely dependent on coal mining and supplying electricity to the regional grid. *Id.* Support for the coal industry is politically popular among Vandalians, who elect the legislature to implement their will. *Id.* Appellee Vandalia Public Service Commission (the "Vandalia PSC") is a Vandalia state agency. R. at 6. The Vandalia legislature charged the Vandalia PSC with "regulating the practices, services, and rates of public utilities in order to 'provide the availability of adequate, economically, and reliable utility services.'" *Id.* Specifically, the Vandalia legislature conferred onto PSC the authority to ensure "coal's continued dominance" as a Vidalia energy source. *Id.*

To achieve this goal, Vandalia PSC issued the Capacity Factor Order ("CFO"), which requires two retail utilities, LastEnergy and MAPCo, to operate their coal-fired plants to achieve a minimum capacity factor of 75 percent. R. at 8. The CFO applies only to five coal-fired plants that are physically located in Vandalia, a total of five. R. at 7-8. The CFO also expressly authorizes LastEnergy and MAPCo to recover cost recovery in retail rates if complying with the order's 75 percent capacity requirement causes the actual cost of electricity production to be greater than the PJM auction's market-clearing. R. at 8. The CFO does not require LastEnergy or MAPCo to participate in PJM capacity auctions. *See* R. at 3. LastEnergy and MAPCo must sell all of the energy they produce into the PJM energy market, solely because of their status and the contracts that the companies entered with PJM. R. at 3.

Appellant Appalachian Clean Energy Solutions ("ACES") is a global energy company that is headquartered and incorporated in Vandalia. R. at 4. Despite ACES's massive portfolio of electric generating resources, totaling over 6.5 gigawatts, they own zero retail electric utility companies and serve zero retail customers. R. at 4-5. Rather, the plants that ACES operates are known as "merchant" plants, which have no "captive" retail customers, instead selling its output directly into the wholesale market. R. at 5. ACES also constructs and maintains transmission lines. R. at 5. ACES has announced that they intend to close the Franklin Generating Station ("Franklin") approximately five years into the future. *Id.* In 2020, anticipating the closure of Franklin, ACES announced plans to construct the Rogerville Energy Center ("Rogerville") in Pennsylvania. *Id.* Despite the three year old announcement, there is no evidence that ACES has started construction of Rogerville, nor that Pennsylvania has even approved construction. Associated with this project, ACES plans to construct and own a 500 kilovolt high-voltage transmission line running from Rogersville, Pennsylvania to Raleigh, North Carolina. *Id.* Known as the Mountaineer Express, this proposed transmission line would begin at the nonexistent Rogerville and pass through Vandalia. R. at 6, 10.

In 2011, FERC issued Order 1000 pursuant to its notice and comment rulemaking power. R. at 9. Under Order 2011, FERC-approved ISO tariffs are required to eliminate ROFR provisions for regional transmission facilities, allowing new transmission projects to be competitively and regionally planned. *Id.* Subsequently, in 2014, the Vandalia legislature passed the "Native Transmission Protection Act," granting incumbent transmission owners an eighteen month exclusive right, for a prescribed period of 18 months, to construct transmission lines within Vandalia. *Id.* The law defines, in part, an "incumbent transmission owner" as "[a]ny public utility that owns, operates, and maintains an electric transmission line in this state." R. at 9-10. Because ACES does not own or operate an existing transmission facility within Vandalia, it does not qualify as an incumbent electric transmission owner. R. at 10.

SUMMARY OF THE ARGUMENT

Standing. ACES lacks constitution standing because (1) the future injury they alleged is too speculative to grant standing and (2) the alleged injury is not caused by Vandalia PSC, but by independent third parties. Therefore, ACES' challenge to the CFO must be dismissed for lack of subject matter jurisdiction. Additionally, ACES lacks prudential standing because it is barred by the prohibition against third party standing and the zone of interest test. The prohibition against third party standing bars ACES from asserting their claims that the FPA's division of authority contravenes the FPA's division of authority and that the CFO will interfere with the methos designed by FERC because those injuries belong to FERC, not ACES. Additionally, ACES' interest in reducing the competitive edge of Vandalia coal-fired generators is not within the zone of interest of the FPA, which seeks to promote competition. Finally, ACES is precluded from equitable standing because the detailed remedial scheme for the enforcement of the FPA by FERC triggers federalism principles that require judicial hesitation in permitting an action against a state officer pursuant to *Ex Parte Young*.

CFO preemption. The language of the FPA does not expressly preempt the CFO, but rather establishes a dual regulatory framework. The FPA does not implicitly preempt the CFO because the two subcategories, field preemption and conflict preemption, do not apply. The FPA does not field preempt the CFO because it permits states to regulate retail sales and electricity generation. The CFO only regulates retail sales and energy generation, and any potential effect the CFO will have on FERC controlled auctions is merely incidental and insufficient to rise to the level of regulation. The FPA does not conflict preempt the CFO because it is physically possible to comply with the CFO and the FPA simultaneously, and the CFO does not stand as an obstacle to the full purposes and objectives of Congress.

ROFR preemption. States have concurrent sovereignty with the Federal government, and state sovereignty is subject only to the limitations imposed by the Supremacy Clause. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see generally* U.S. Const. art. VI, cl. 2. In the absence of statutory language expressly preempting state law, the state law may be field or conflict preempted. *Coalition for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 567 (S.D.N.Y. 2017). Field preemption occurs when "Congress has forbidden the State to take action in the field that the federal statute pre-empts." *Id.* (citing Oneok, Inc. v. Learjet, Inc., 575 U.S. 373, 384 (2015)). Conversely, conflict preemption "exists where 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." *Id.* At issue is the scope of FERC's grant of authority under the Federal Power Act (FPA). FPA grants FERC the regulatory authority to manage "'the sale of electric energy at wholesale in interstate commerce,' including both wholesale electricity rates and any rule or practice 'affecting' such rates." *F.E.R.C. v. Electric Power Supply Ass'n*, 577 U.S. 260, 264 (2016) (citing 16 U.S.C. § 824(b), 824e(a)).

Commerce Clause Issue. The Commerce Clause of the U.S. Constitution provides that "Congress shall have [p]ower…[t]o regulate Commerce…among the several states." U.S. Const. Art. I, §8, cl. 3. In addition to this positive grant of authority, the Commerce Clause has also been construed to imply a "negative" restraint on the states, prohibiting them from discriminating against or unduly burdening interstate commerce in such a way that impedes free private trade in the national marketplace. *See Oregon Waste Systems v. Dep't of Environ. Quality*, 511 U.S. 93, 97 (1994); *See also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). This negative restraint is referred to as the "Dormant Commerce Clause." However, "[t]here is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 669 (1981). The Commerce Clause was not intended to prevent the States from legislating on subjects relating to the "health, life, and safety of their citizens," even if this legislation may have an indirect effect on interstate commerce. *Paul's Industrial Garage, Inc. v. Goodhue County*, 35 F.4th 1097, 1099 (8th Cir. 2022) cert. denied sub nom, *Flom Disposal, Inc. v. Goodhue Cnty., Minnesota*, 143 S. Ct. 372 (2022) (quoting *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 306 (1997).

Modern dormant Commerce Clause precedents reflect two primary principles: (1) state regulations may not discriminate against interstate commerce; and (2) states may not impose undue burdens on interstate commerce. *South Dakota v. Wayfair, Inc.*, 138 S.Ct. 2080, 2091 (2018). The level of scrutiny depends on its effect on interstate commerce: discrimination, triggering heightened scrutiny, and undue burden, triggering a deferential balancing test. The party challenging the validity of a law bears the burden of proving that it discriminates against interstate commerce. *Hughes v. Oklahoma*, 441 U.S. 456 (1981). Further, a discriminatory law may still be constitutional if it "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *See Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 338 (2008).

ARGUMENT

I. ACES DOES NOT HAVE STANDING TO CHALLENGE THE CFO UNDER THE FPA, THEREFORE THEIR CLAIM MUST BE DISMISSED.

Standing is a jurisdictional requirement that cannot be waived or forfeited. *Virginia House of Delegates v. Bethune-Hill*, 139 S.Ct. 1945, 1951 (2019). The question of standing, in essence, is whether the party bringing suit is entitled to have the court decide the merits of a dispute or of particular issues. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Standing inquiry includes constitutional limitations on the federal court jurisdiction and prudential limitations on its exercise. *Id.* When standing is questioned, the burdened party must do more than simply allege a nonobvious harm; they must explain how the elements of standing are met. *Id.* The party that invoked federal jurisdiction bears the burden of establishing these elements, and at the trial stage, the burdened party's arguments must be adequately supported by the evidence. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

a. ACES does not have constitutional standing because their asserted injury is not concrete.

Injury-in-fact. "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l. USA*, 568 U.S. 398, 409 (2013)(quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139 (2010)). An injury must be certainly impending to constitute an injury in fact; allegations of a possible future injury are insufficient. *Id.* To be concrete, an injury must actually exist. *Kansas Natural Res. Coal. v. United States Dep't. of the Interior*, 971 F.3d 1222, 1231 (10th Cir. 2020). At the trial stage, general factual allegations are insufficient; the burdened party must support their claims with evidence. *Id.*

In *Clapper*, the plaintiffs claimed they would suffer a future injury because an enacted statute provided an "objectively reasonable" likelihood that the government could listen to their future communications. *Clapper*, 568 U.S. at 401. Alternatively, the plaintiffs claimed that they suffered a present injury because the risk of future injury forced them to take costly, burdensome preventative measures. *Id.* at 402. Regarding the plaintiff's first claim, the Court held that the future injury was too speculative because the only way the injury would manifest was if several uncertain events would take place, including that the government would succeed in its goals and that the plaintiffs would be part of the group whose communications were intercepted. *Id.* at 410. Regarding the alternate claim, the Court held that the present injury did not confer standing, because the plaintiffs could not "manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416.

The reasoning in *Clapper* is applicable in the instant case. ACES claims the CFO will injure their ability to build future capacity in the region, but this injury may only occur if several uncertain events take place. ACES admits in their testimony that the Rogerville is being built in response to the projected retirement of the underperforming Franklin. From this testimony alone, three things would need to happen: (1) the Franklin Generating Station continues to perform poorly for the next five years, (2) The Franklin Generating Station retires, and (3) the Rogerville Energy Center opens. In reality, the Franklin is currently operational and Rogerville does not exist. Furthermore, this is not the end of the uncertain events that must occur for ACES' alleged future injury to occur. The state of Pennsylvania must authorize the construction of Rogerville, which ACES provides no evidence that it has. The Vandalia coal-fired plants would have to actually bid low enough to affect the PJM auction. The Vandalia coal-fired plants would need to clear the auction. Finally, Rogerville would need to be among the parties actually affected by the actions of the Vandalia coal-fired plants. None of these events are guaranteed to occur.

Furthermore, if ACES has taken any proactive measures, this self-manufactured harm is not the result of any certainly impending injury. Additionally, since we are at the trial stage, ACES must provide evidence of these proactive expenditures, which do not exist in the record. For these reasons, ACES has failed to allege an injury-in-fact and failed to meet the constitutional requirement for standing, therefore their CFO claim must be dismissed for lack of subject matter jurisdiction. However, this is not the end of the fatal flaws in ACES' claim.

Causation and Redressability. There must be a causal connection between an injury and the conduct complained about, and the injury must be fairly traceable to the challenged action of the defendant, not the result of the independent action of an absent third party. *Lujan*, 504 U.S. at 560. To whether an injury is redressable, the Court must examine whether each aspect of the requested relief would redress its asserted injury. A*llco Finance Ltd. v. Klee*, 805 F.3d 89, 93 (2nd. Cir. 2015). When a plaintiff is not itself the target of government action, standing is "substantially more difficult to establish," because "**<u>causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps others as well.</u>**" *Lujan*, 504 U.S. at 562 (emphasis added).

In the instant case, causation and redressability hinge on the response of two third parties: LastEnergy and MAPCo. Any injunctive or declaratory relief granted by this court would not prevent these independent parties from engaging in similar behavior. LastEnergy and MAPCo would still be free to independently increase capacity in their coal-fired plants or provide low bids to increase the odds they will clear the market for a different business reason. Additionally, multiple states participate in PJM wholesale auctions and those states are permitted to establish regulatory schemes, and those states would still be free to subsidize selected generators and implement substantially similar policies. A favorable decision from this court will not redress ACES' alleged injuries, therefore they do not have standing and their claim must be thrown out for lack of subject matter jurisdiction. However, even if this Court should disagree, ACES has additional hurdles to overcome to establish standing.

b. ACES does not have prudential standing.

The Supremacy Clause is not the source of any federal rights, nor does it create a cause of action. *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 324-25 (2015). The existence of Article III standing does not relieve a party from needing prudential standing. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997); *see also Village of Old Mill Creek v. Star*, 2017 WL 3008289 at *6 (N.D. Ill. Jul. 25, 2017). Prudential standing consists of the general prohibition on third party standing, the bar against generalized grievances, and the zone of interest test. *United States v. JP Morgan Chase Bank Account Number Ending 8215 in the Name of Ladislo v. Samaniega*, 835 F.3d 1159, 1167 (9th Cir. 2016). To establish prudential standing, a plaintiff must generally show that the interest they are seeking to protect is arguably within the zone of interest that the statute protects or regulated. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). Unlike the constitutional requirements of standing, these self-imposed judicial limits may be modified or abrogated by Congress. *Bennett*, 520 U.S. at 163. Prudential standing doctrine applies unless it is expressly negated. *Id.* at 163.

Prohibition against third party standing. Generally, a party is forbidden from claiming standing "to vindicate the constitutional rights of some third party." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976). When determining whether the prohibition should apply, the court should consider (1) the relationship between the litigant to the party whose right the litigant seeks to assert, and (2) the ability of the third party to assert his own right.

The language of the FPA only refers to FERC's authority and obligation to ensure that wholesale rates and the rules and regulations that affect them are just and reasonable. 16. U.S.C. § 824d; *Star*, at *6. The statute refers to FERC as the enforcer of the limitations on public utilities. 16 U.S.C. §824d(b)-(e); *Star*, at *6. The FPA also authorizes FERC to make findings of fact and hold hearings to determine whether a rate is unjust or preferential. 16 U.S.C. §824e. Based on this language, it is reasonable to infer that Congress intended for FERC to be the sole enforcer. ACES, also governed by FERC, has the opportunity to ask FERC to decide this matter. Additionally, FERC is able to assert their own rights in federal court. Therefore, ACES is not the proper party to challenge the CFO, and their claim should be barred.

Zone of Interest. Presumably, a statutory cause of action only extends to plaintiffs whose interests fall within the zone of interests protected by the invoked law. *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014). Any time a plaintiff's interests are so marginally related to or inconsistent with the implied purpose of a statute that it cannot reasonably be believed that Congress authorized that plaintiff to sue, the suit is foreclosed. *Id.* at 130. To decide whether a party is within the zone of interest, and therefore as statutory standing, courts use "traditional tools of statutory interpretation." *Bank of America Corp. v. City of Miami, Fla.*, 581 U.S. 189, 197 (2017). Courts look to the provision upon which the plaintiff relied, not the overall purpose of the legislation in question to determine if the plaintiff's interests lie within the statute's zone of interest. *Bennett*, 520 U.S. at 175-76.

The purposes of the FPA are to ensure that wholesale rates of electricity remain "just and reasonable," and that the dual regulatory scheme between the federal government and the States is respected. 16 U.S.C. §824(a)-(b). ACES seeks to limit the ability of Vandalia to exercise its right to operate within that dual regulatory scheme, which is outside of the zone of interest of this provision in the FPA. As such, ACES also fails the zone of interest test and does not have prudential standing. ACES' last opportunity would be equitable standing.

c. ACES does not have equitable standing.

This Court recognizes federal equity jurisdiction over declaratory and injunctive relief actions to prohibit the enforcement of state orders alleged to violate federal law. *Young* doctrine is a judge-made remedy and in a proper case, a plaintiff may receive "injunctive relief against state officers who are violating, or planning to violate, federal law." *Armstrong*, 575 U.S. at 326-27. However, when Congress has created a detailed remedial scheme for the enforcement of a statutorily created right against a State, federalism principles require judicial hesitation in permitting an action against a state officer pursuant to *Young*. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 64, 74 (1996). Additionally, it can be inferred that Congress intended to foreclose equitable relief when (1) Congress places the sole remedy for failure to comply with a statute with a federal agency and (2) the presence of a judicially unadministrable standard. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 272 F.Supp.3d 554, 564-65 (S.D.N.Y. Jul. 25, 2017).

The language of the FPA does not expressly exclude equitable actions. *See generally* 16 U.S.C. § 824; *see also Id.* at 564. However, the statute only provides for enforcement by FERC. Additionally, there is a judicially unadministrable standard because the court should defer to FERC's finding on what a just and reasonable rate is, but this finding is absent from the record. Therefore, ACES does not have standing, and Vandalia PSC respectfully requests this court dismiss ACES' claim against the CFO.

II. WHETHER THE CFO SOLELY REGULATES ELECTRICITY GENERATION AND RETAIL SALES, CONSISTENT WITH CONGRESSIONAL INTENT AS EVIDENCED BY THE LANGUAGE OF THE FPA.

a. The general rules of preemption doctrine.

States and the federal government share concurrent sovereignty, and state sovereignty is subject only to the limitations imposed by the Supremacy Clause of the U.S. Constitution. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *see generally* U.S. Const. art. VI, cl. 2. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. art. X. The Supremacy Clauses states that federal law preempts contrary state law and gives Congress the sole authority to preempt state authority. *Hughes v. Talen Energy Mktg., LLC,* 578 U.S. 150, 162 (2016); *Pacific Gas and Elec. Co. v. State Energy Res. Conservation & Dev. Com'n*, 461 U.S. 190, 203 (1983). However, preemption of a state's law constitutes a "serious intrusion into state sovereignty" as well as a judicial intrusion into the authority of Congress to define the preemptive effect of its laws. *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1904 (2019) (plurality). "[W]hen coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes, the case for federal pre-emption becomes a less persuasive one." *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

Preemption of state law requires "clear and manifest" congressional intent, and "the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020); *Puerto Rico Dept. of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495, 503 (1988). When the Court is determining whether a federal statute has preemptive effect, and if so the scope of that preemption, congressional purpose is the touchstone. *Hughes,* 578 U.S. at 163. Congressional intent is primarily discerned from the language of the preemption statute and the surrounding statutory framework; however, the structure and purpose of the statute as a whole is also relevant. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996). Additionally , it is important to consider the target at which the state law aims. *See Oneok, Inc. v. Learjet, Inc.*, 575 U,S, 373, 384-85 (2015). The federal statute in the instant case is the FPA. The relevant portion of the statute reads as follows:

> It is declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, <u>**such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States**</u>.
>
> The provisions of this subchapter shall apply. . . to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy. . . . <u>The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, **but shall not have jurisdiction. . . over facilities used for the generation of electric energy or over facilities used in local distribution. . . .**</u>
>
> 16 U.S.C. § 824(a).

Preemption can be either express or implied, and implied preemption includes two subcategories: field preemption and conflict preemption. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1480 (2018); *Stengel v. Medtronic, Inc.*, 704 F.3d 1224, 1230 (2013). If exclusive jurisdiction is neither express nor implied, then "State courts have concurrent jurisdiction whenever by their own constitution, they are competent to take it." *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). Express preemption exists when the language in a federal statute explicitly preempts state law. *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). The language of the FPA explicitly preempts state law regulating the sale of electric energy at <u>**wholesale**</u> in interstate commerce. 16 U.S.C. § 824(a)(emphasis added). The statute does not contain language regarding the sale of <u>**retail**</u> energy. *See generally Id.*; *see also FERC. v. Elec. Power Supply Ass'n*, 577 U.S. 260, 266 (2016) (interpreting the FPA to mean that State utility commissions continue to oversee retail sales of electricity). The statute contains a savings clause regarding the use or sale of electric energy in interstate commerce providing that generally: "[t]he commission shall not have jurisdiction. . . over facilities used for the generation of electric energy or over facilities used in local distribution. . . ." 16 U.S.C. § 824(b).

The CFO regulates generators and the sale of retail electricity. As such, the FPA does not explicitly preempt the CFO. Additionally, there is no dispute that Vandalia is competent to have concurrent jurisdiction. Therefore, the analysis in this section will focus on the subtypes of implied preemption: field preemption and conflict preemption. Additionally, since this analysis involves implied preemption only, there is generally a presumption against preemption. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 13 (2013); *see also Puerto Rico v. Franklin California Tax-Free Trust*, 579 U.S. 115, 125 (holding that there is no presumption against preemption when the federal statute expressly preempts state law).

b. The CFO is not field preempted because it regulates solely within the permissible field of retail energy sales and any effect on FERC controlled auctions is incidental.

Field preemption is found where there is a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," regardless of whether the state law is consistent or inconsistent with federal standards. *Pacific Gas*, 461 U.S. at 203-04; *Oneok*, 575 U.S. at 376-77. Yet, in the context of the FPA, states may regulate within their assigned field even when their laws incidentally affect areas that are exclusively regulated by FERC. *Hughes v. Talen Energy Marketing, LLC*, 578 U.S. 150, 164 (2016). The FPA grants FERC exclusive jurisdiction regarding wholesale energy sales in interstate commerce, and once FERC sets a rate, no State may "conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable." 16 U.S.C. § 824(a); *Hughes*, 578 U.S. at 165.

An example of the type of state regulatory scheme that concludes that FERC-approved wholesale rates was seen in this Court. In *Hughes*, this Court held that a state regulatory program was preempted by the FPA because it disregarded the interstate wholesale rate required by FERC. *Hughes*, 578 U.S. at 166. The state regulatory scheme required LSEs to enter a 20-year pricing "contract for differences" with an electricity generator. *Id.* at 158. The generator was permitted to name its price. *Id.* This contract did not transfer ownership of capacity from the generator to the LSE. *Id.* at 159. The state mandated contract itself required the generator to bid its capacity into a FERC regulated auction to receive the difference in price, between the contract conditioned payment on whether or not the generator cleared the auction. *Id.* This, in effect, guaranteed that no matter what the generator bid in the FERC regulated auction, that the generator would pay exactly the price it named for itself in the contract for differences. *See Id.* As such, the generator was incentivized to bid as low as possible in the FERC regulated auction. *Id.* The court found that this scheme constituted the state "doubting FERC's judgment" and indirectly intruding on FERC's authority over wholesale rates. *Id.* at 163-64. However, the Court only rejected the program because it disregarded an interstate wholesale rate that was required by FERC. *Id.* at 166. This Court emphasized that its holding was narrow, stating: "[s]o long as **<u>a State</u>** does not **<u>condition payment of funds on capacity clearing the auction</u>**, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id.* (emphasis added).

In the instant case, Vandalia PSC's regulatory scheme avoids the pitfall in *Hughes*. First, none of the generators are permitted to name their price, and there is no guaranteed final price. Second, receipt of the subsidy is not conditioned on any of the generators clearing the PJM auction. Instead, receipt of the subsidy is conditioned on the electricity actually being generated because the payment is for the difference between the actual cost of running the coal-fired generators at 75 percent capacity and the market-clearing price of the PJM auction. As such, the CFO avoids the fatal tether described in *Hughes*. Still, Appellant argues that the fact that the generators are participating in the PJM auction means the CFO should be preempted, but cases from the circuit courts illuminate why that is insufficient and Appellant should still lose.

Since *Hughes*, subsequent litigation has resulted in the circuit courts upholding state regulatory programs that seek to provide subsidies to generators. In a Second Circuit case, a state developed a program where selected nuclear plants received a subsidy, intending to prevent the nuclear generators from retiring. *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 47 (2018). The state selected which generators qualified for the subsidy based, among other things, their verifiable historic contribution, the degree to which projected wholesale revenues were insufficient to prevent retirement, and the public interest. *Id.* In determining the value of the subsidy, the state utilized the information derived from a FERC regulated wholesale auction by subtracting the expected wholesale price from the total value of each carbon-free megawatt of electricity. *Id.* Subsidized generators received the value of the subsidy in addition to what they earn in the wholesale market. *Id.* at 48.

The *Zibelman* plaintiffs alleged that this program was preempted under *Hughes*, but the court held that the program was permissible because the plaintiffs failed to point to language in the order that required the subsidized generators to participate in the FERC controlled wholesale market. *Id.* at 52. The court acknowledged that the subsidized generators were legally required to participate in the wholesale market due to their status as "Exempt Wholesale Generators," however this situation was distinguished from *Hughes* because the generators made the ultimate decision whether or not to sell into the wholesale market, and if they altered course and relinquished the status and contracts that required them to sell their energy into the wholesale market, that decision would not alter their ability to receive the state subsidy. *Id.* The court explained that "a generator's decision to sell power into the wholesale markets is a business decision that does not give rise to preemption concerns." *Id.*

Similarly, Vandalia PSC's regulatory scheme is distinguished from *Hughes* and the facts of the instant case are analogous to the facts in *Zibelman*. Vandalia PSC concedes that currently, LastEnergy and MAPCo must sell all of the energy they produce into the PJM energy market. However, as in *Zibelman*, this requirement is derived from the Fixed Resource Requirement status of the generators and their respective contracts with PJM, not the CFO. Furthermore, Vandalia PSC is merely using market-clearing price to determine the value of the state provided subsidy. Vandalia PSC's regulatory scheme avoids the pitfall of *Hughes* and regulates only in the permissible field of retail rates, therefore the CFO is not field preempted by the FPA.

Appellant's further argues that the CFO, in effect, sets an interstate wholesale rate, however, a Seventh Circuit case is instructive. In this case, a state enacted legislation applying to some of their nuclear generation plants to avoid the closure of those plants. *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 521 (7th Cir. 2018). The *Star* plaintiffs argued that the state program indirectly regulated the PJM auction by using the average auction prices as a component in the formula that affected a cost of a credit, but this argument failed. *See generally Id.* The court reasoned that if the generator does offer power to an interstate auction that the value of their subsidy does not depend on its bid. Additionally, the subsidy system could only have an indirect influence on the auction price, by keeping active a generator that might otherwise close and raising the costs of other generators to do business. *Id.* at 524. Finally, the court reasoned that FERC themselves reemphasized that state programs utilizing FERC data to provide subsidies was "a given," and that "[s]tates may continue to support their preferred types of resources in pursuit of state policy goals." *Id.* The court explained that when states exercise their power to regulate the generation and retail sale of energy, that exercise affects interstate sales. *Id.* However, there is a difference between affecting interstate sales and regulating interstate sales, and merely affecting interstate sales is an "inevitable consequence" of a system in which power is shared between state and national governments. *Id.*

In the instant case, it is possible that the CFO may occasionally have an effect on the PJM auctions, but any effect will be too miniscule to rise to the level of regulation. Like in *Star*, even if one of the regulated generators does offer power to an interstate auction, the amount of the subsidy is not related to the bid, but to the market clearing price. Additionally, the CFO would have an even smaller indirect influence than Star because there is no evidence that either LastEnergy nor MAPCo are in danger of failing, they are simply being tasked with using the preferred method of energy generation. Finally, Vandalia PSC's regulatory scheme works with the federal regulatory scheme, as it is designed to do. As recognized in *Star*, it is an inevitable consequence that the state regulatory program would have an incidental effect in prices.

Appellant will likely argue that the fact that Vandalia is the third largest coal producer in the nation and contributes seven percent of U.S. total coal production means that it has a greater influence on the PJM markets simply due to size, however this is only a piece of the puzzle. Vandalia coal-fired generators still must compete with nuclear and renewable energy, especially the regulatory schemes developed by other states to supplement this energy generation. The CFO would not be strong enough to counterbalance all of these other measures to regulate PJM pricing. Appellant may also argue that all state retail regulatory schemes, in the aggregate, serve to regulate FERC controlled PJM auctions. This inquiry is beyond the scope of today's case, and ultimately the Supremacy Clause leaves that question for Congress and not the judiciary. The CFO regulates the permissible field of retail sales, does not tether the availability of the subsidies to participation in PJM auctions, and has at most an incidental effect on auction prices. As such, the CFO is not field preempted.

c. The CFO is not conflict preempted by the FPA.

In cases where there is no express or field preemption, "state law is preempted to the extent that it actually conflicts with federal law." *Pacific Gas*, 461 U.S. at 204. When analyzing a dual regulatory scheme, the Court must apply conflict-preemption "sensitively" to avoid diminishing the role that Congress reserved to the states and also to preserve the federal role. *Northwest Central Pipeline Corp. v. State Corp. Com'n of Kansas*, 489 U.S. 493, 514-15 (1989). As long as a state is regulating a subject of state jurisdiction and the means are at least plausibly related to matters of legitimate state concern, then no conflict preemption exists unless "clear damage to federal goals would result." *Zibelman*, 906 F.3d at 55 (quoting *Northwest Central*, 489 U.S. at 518, 522. There are two types of conflict preemption: impossibility preemption and obstacle preemption. *Pacific Gas*, 461 U.S. at 204. Impossibility preemption exists when it is impossible to comply with both federal and state law. *Oneok*, 575 U.S. at 377. The parties do not dispute that it is possible to simultaneously comply with both the FPA and the CFO, therefore this analysis will focus on obstacle preemption.

Obstacle preemption exists when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," or "interferes with the method by which the federal statute was designed to reach this goal. *Id.*; *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000).

The FPA seeks to ensure that wholesale rates remain just and reasonable and that state authority to regulate generation facilities and retail sales is preserved. 16 U.S.C. § § 824d(a), 824(b). Appellant is likely to argue that Congress intended to promote competition among the most efficient generators, but there is analysis out of the Second Circuit that is instructive. In a case involving the FPA, plaintiff generators alleged that the defendant state commission's subsidy program was distorting capacity auction price signals. *Zibelman*, 906 F.3d at 56. They further argued that this distortion undermined FERC's goal of maintaining competition from more efficient generators, but the court rejected this argument. The court reasoned that FERC itself has sanctioned even state programs that increase capacity or affect wholesale prices, as long as the state was only regulating matters within their jurisdiction, and that states may grant loans, subsidies, or tax credits on environmental or policy grounds. *Id.* at 56 (quoting Cal. PUC, 133 FERC ¶ 61,059, P 31 n.62). Furthermore, the court goes on to note that FERC has stated that States are entitles to take any action in their role as regulators of electricity generation, even if it may affect the market clearing price. *Id.*

The reasoning and conclusion in *Zibelman* applies to the instant case. The CFO Order does increase capacity for five generators and may, inevitable, affect wholesale market prices. However, Vandalia PSC is only regulating retail prices within their jurisdiction. Additionally, Vandalia PSC is granting the subsidy based on state policy goals to protect their economy and promote democratic ideals. In Vandalia, coal is culture. The state has historically been an energy rich state with a proud legacy of coal mining. There are deep roots and families with generations of coal miners. Coal feeds families. It plays a prominent role in the Vandalia economy, and the state voters show up to support coal-mining decade after decade. The Vandalia legislature, who were elected by these voters, have tasked the Vandalia PSC with honoring the voice of their state voters. Appellant may point out that most of the post-Hughes cases are upholding state regulatory schemes intended to increase environmentally friendly forms of energy production. Those states have the right to promulgate regulations to further economic policy goals in the same way that Vandalia has the right to promulgate regulations based on economic policy goals. Both are appropriate under the FPA and Vandalia has the right to have policy goals that conflict with other states. The relevant policy goals are the ones found in the language of the FPA, which does not include environmental policy. Therefore, Vandalia's state policy goals do not conflict with Congress' purpose in the FPA and there is no conflict preemption.

Appellant's final remaining argument is that Congress has intended to prevent states from manipulating the energy market. *See* 16 U.S.C. § 824v(a). Again, Vandalia PSC's position is that the CFO does not manipulate the energy market, but even if this Court should disagree with that position further reading of this section dictates "[n]othing in this section shall be construed to create a private right of action." *Id.* at 824(v)(b). As such, it would be inappropriate for the judiciary to consider this argument, because any enforcement under this provision should come from FERC, not a private party. Therefore, all arguments that the CFO is preempted fail, and Vandalia PSC respectfully asks the court to rule in its favor.

III. VANDALIA'S STATUTORY ROFR, THE NTPA, DOES NOT VIOLATE THE SUPREMACY CLAUSE AND IS NOT PREEMPTED BY FERC ORDER 1000

Pursuant to its rulemaking authority granted by FPA, FERC issued Order 1000 in 2011. Order 1000 addressed FERC-approved tariffs from Independent System Operators (ISO) containing a right-of-first-refusal. R. at 9. Specifically, ORder 1000 mandated that transmission providers remove from their jurisdictional tariffs and agreements language establishing a federal right of first refusal to develop transmission facilities in a regional transmission plan. *S.C. Pub. Serv. Auth. v. FERC,* 762 F.3d 41, 48 (D.C. Cir. 2014). The FPA limits the scope of FERC's authority to "regulate the interstate wholesale market for electricity." *FERC v. Electric Power Supply Ass'n,* 577 U.S. 260 (2016). While this mandate sounds exceedingly broad, the D.C. Circuit and the Supreme Court have carefully defined the outer limits of this authority. Specifically, "whenever the Commission 'shall find that any rate [or] charge'—or 'any rule, regulation, practice, or contract affecting such rate [or] charge'—is 'unjust [or] unreasonable,' then the Commission 'shall determine the just and reasonable rate, charge[,] rule, regulation, practice or contract' and impose 'the same by order.'" *Electrical Power Supply* at 277 (citing FPA, 16 U.S.C.A. § 824e(a), concluding "That means FERC has the authority—and, indeed, the duty—to ensure that rules or practices 'affecting' wholesale rates are just and reasonable.") The D.C. Circuit established a "common-sense construction of the FPA's language, limiting FERC's "affecting" jurisdiction to rules or practices that "directly affect the [wholesale] rate." *Electrical Power Supply* at 278 (citing *California Independent System Operator Corp. v. FERC,* 372 F.3d 395, 403 (2004).) The Supreme Court has consistently maintained that FPA did not grant FERC broad, sweeping powers, stating "[a] major purpose of the whole [a]ct" was to protect customers from excessive prices." *Pennsylvania Water & Power Co. v. Fed. Power Commn*., 343 U.S. 414, 418 (1952).

In 2014, the state of Vandalia passed the "Native Transmission Protection Act" in direct response to FERC Order 1000. The law reads as follows:

> An incumbent 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 transmission owner fails to exercise that right within eighteen (18) months, another entity may build the electric transmission line.

R at 9. Vandalia passed this law to keep transmission lines in the hands of in-state companies, reasonably believing that such companies would be more responsive to the needs of Vandalia consumers. FERC's issuance of Order 1000, acting under Congressionally granted authority pursuant to the FPA, does not preempt Vandalia's ROFR law. Here, Vandalia's ROFR law does not infringe on the authority statutorily delegated to FERC. The law is not preempted under the theories of explicit, field, or conflict preemption. Accordingly, the decision of the Northern District of Vandlaia must remain undisturbed.

a. Vandalia's "Native Transmission Protection Act" is Not Expressly Preempted by Order 1000

Under the Supremacy Clause, federal law preempts conflicting state law. *Hughes* at 1297, citing to U.S. Const., Art. VI, cl. 2. *See also supra* Part II, sec. A. Turning to FERC, the FPA grants the federal agency specific authority to exercise authority over the interstate transmission of electric energy and its sale at wholesale in interstate commerce. 16 U.S.C. § 824(b)(1). The Supreme Court has noted that "a major purpose of the whole Act is to protect power consumers against excessive prices." *Pennsylvania Water & Power Co.* at 417. Pursuant to this Congressional mandate, FERC issued Order 1000 to address the problems caused by the federal ROFR, specifically unjust and unreasonable rates. *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils. 136 FERC 61051, ¶ 256 (2011) (Order 1000).

Here, there is no language in Order 1000 explicitly preempting a state ROFR law. Order 1000 eliminated the federal ROFR and does not explicitly address state ROFR. R. at 14. Order 1000 places the burden on public utility transmission providers to remove any agreement that grants a federal ROFR to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation. *Id.* When clarifying the scope of Order 1000, FERC repeatedly affirmed the validity of state ROFR laws. *See generally LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018) and *MISO Transmission Owners v. FERC*, 819 F.3d 329 (7th Cir. 2016). Because Order 1000 does not expressly preempt Vandalia's Native Transmission Protection Act, focus of the analysis must turn to the implicit forms of preemption: field and conflict preemption.

b. Vandalia's "Native Transmission Protection Act" is Not Field Preempted by Order 1000

Absent express preemption, state law may be preempted where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Hughes* at 1297 *See also supra* Part II, sec. B. Under the FPA, FERC has the authority "to ensure that rules or practices 'affecting' wholesale rates are just and reasonable." *Coalition for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 568 (S.D.N.Y. 2017), aff'd sub nom. *Coalition for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (citing *FERC v. Elec. Power Supply Ass'n* (hereafter, "*EPSA*"), 136 S.Ct. 760, 774 (2016). When distinguishing state actions that affect the wholesale price in some way compared to state actions that set the wholesale rate, the Supreme Court determined "that "[t]o set a retail electricity rate is ... to establish the amount of money a consumer will hand over in exchange for power." *Zibelman* at 571-72 (citing *EPSA*, at 777).

Regarding the removal of ROFR from FERC approved tariffs, Order 1000 clearly contemplates certain limits on the ban. Specifically, Order 1000 recognized that states could continue to regulate electric transmission lines. *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695 (D. Minn. 2018), aff'd sub nom. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020) (citing Order 1000 ¶ 107, "We acknowledge that there is longstanding state authority of certain matters that are relevant to transmission planning and expansion, such as matters relevant to siting, permitting, and construction. However, nothing in this Final Rule involves an exercise of siting, permitting, and construction authority."). FERC further clarified the preempting effect of Order 1000, stating "we note that nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." *Id.* (citing Order 1000 ¶ 227).

The D.C. Circuit addressed a challenge to FERC's authority to issue Order 1000 in response to petitioner claims that the agency had no authority to adopt the reforms enumerated in Order 1000. *S.C. Pub. Serv. Auth.,* 762 F.3d 41 (D.C. Cir. 2014). However, in affirming the validity of Order 1000, the court acknowledged that the relevant portion of the FPA, section 206, contained ambiguous language, noting "Not only does it say nothing about rights of first refusal, but it does not even tell us what constitutes a practice affecting rates." *Id.* at 74. FERC argued its authority to promulgate Order 1000 "rested its right of first refusal ban on competition theory, determining that rights of first refusal posed a barrier to entry that made the transmission market inefficient, that transmission facilities would therefore be developed at higher-than-necessary cost, and that those amplified costs would be passed on to transmission customers." *Id.* at 77. Petitioners contended that the relationship between ROFR bans and the rates is too attenuated to allow Order 1000 to stand. *Id.* at 74. The D.C. Circuit ultimately found that ROFR laws regarding transmission facilities and the rates were not too attenuated to implicate FERC's FPA mandate. *Id.* The court stated, "basic economic principles make clear that rights of first refusal are likely to have a direct effect on the costs of transmission facilities because they erect a barrier to entry: namely, non-incumbents are unlikely to participate in the transmission development market because they will rarely be able to enjoy the fruits of their efforts." *Id.*

Here, Vandalia's Native Transmission Protection Act is not field preempted. Congress intended for the FPA to govern FERC's ability to regulate the interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce. R. at 13. Under this grant of authority, FERC promulgated Order 1000, stating that the federal ROFR caused unjust and unreasonable rates as "it is not in the economic interests of incumbents to permit new entrants to develop transmission facilities." R. at 14. However, FERC recognized that states can continue to regulate electric transmission lines. *Id.*

Pursuant to the *S.C. Pub. Serv. Auth.* holding, PSC does not contest the validity behind Order 1000. However the facts of the current case are beyond the circumstances contemplated by the D.C. Circuit in affirming FERC's scope of authority to issue Order 1000. The South Carolina Public Service Authority court focused only on concerns regarding the market competition and the risk of the costs associated with a lack of competition passed on to the consumer. Vandalia's ROFR law does not implicate these concerns. The mere construction of the lines for the ACES Mountaineer Express, as a transmission line running through Vandalia, does not present an opportunity for the consumer to suffer the costs of a lack of competition. R. at 6 (noting that the line originates in Pennsylvania and terminates in North Carolina, merely passing through Vandalia). Unless petitioners demonstrate that construction of the transmission line at issue by an incumbent electric transmission owner will present an economic harm affecting the just and reasonable rates regulated by FERC, then Vandalia's state ROFR law is not field preempted by Order 1000 or FERC's statutory authority under FPA.

c. Vandalia's "Native Transmission Protection Act" is Not Conflict Preempted by Order 1000

Absent language indicating express preemption or evidence that the state law must be preempted due to Congressional entrenchment in a particular field of legislation, the final preemption analysis is conflict preemption. Conflict preemption arises when the state law at issue actually conflicts with federal law. *Pacific Gas*, 461 U.S. at 204. *See also supra* Part II, sec. C. In the context of compliance with FERC regulations, conflict preemption arises if the law "prevents attainment of FERC's goals; or if a state regulation's impact on matters within federal control is not an incident of efforts to achieve a proper state purpose." *N.W. C. Pipeline Corp. v. State Corp. Commn. of Kansas*, 489 U.S. 493, 515-516 (1989). However, courts acknowledge the delicate balance between state law and its impact on FERC's regulations. *Zibelman*, 272 F. Supp. 3d 554 at 576. To accommodate this balance, courts find that "when the State is legitimately regulating a matter of state concern, 'FERC's exercise of its authority must accommodate' that state regulation '[u]nless clear damage to federal goals would result.'" Id. (citing *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 518 (1989)).

This balance between state concerns and FERC's authority is demonstrated in Minnesota's response to Order 1000. Minnesota law allows monopolies to provide electricity. *LSP Transmission Holdings, LLC v. Lange*, 329 F. Supp. 3d 695, 7000 (D. Minn. 2018). Specifically, "each electric utility shall have the exclusive right to provide electric service at retail to each and every present and future customer in its assigned service area." Minn. Stat. § 216B.40 (2023). Midcontinent Independent System Operator ("MISO") serves as the regional transmission organization governing Minnesota. *LSP Transmission Holdings* 329 F. Supp. 3d 695, 701. In compliance with Order 1000, MISO removed the federal ROFR provisions from its FERC-approved tariff. *Id.* However, Minnesota then enacted its own state ROFR, requiring that any MISO-approved project in Minnesota must ensure that "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." *Id.* at 702 (citing Minn. Stat. Ann. § 216B.246 (West)). FERC elected to honor MISO's tariff and state ROFR laws. *Id.* In response to criticism, FERC stated, "even if a transmission project is subject to a state [ROFR], the regional transmission planning process still results in the selection for planning and cost allocation purposes of transmission projects that are more efficient or cost-effective than would have been developed but for such processes." *Id.* FERC's affirming stance on state ROFR laws emphasized the balance required between FERC regulations and state ROFRs, arguing that Order 1000 "struck an important balance between removing barriers to participation by potential transmission providers in the regional transmission planning process and ensuring the non incumbent transmission developer reforms do not result in the regulation of matters reserved to the states." The agency's recognition that its FPA mandate could continue in light of state ROFR withstood judicial review in the Seventh Circuit. *See MISO Transmission Owners v. FERC,* 819 F.3d 329 (7th Cir. 2016) (upholding FERC recognition of state ROFR).

Like the Minnesota ROFR, Vandalia's Native Transmission Protection Act is not conflict preempted by FERC Order 1000. First, the Minnesota ROFR does not include an expiration period for the ROFR, further limiting the ability for nonincumbents to participate in regional transmission planning. To avoid a similar issue, the Vandalia ROFR specifies an eighteen month period for incumbents to enact their ROFR. R. at 9. Once the eighteen month period expires, nonincumbents then have an opportunity to build the transmission line. *Id.* Not only is Vandalia's ROFR less restrictive than the Minnesota ROFR, the Seventh Circuit determined that

Order 1000 did not conflict preempt Minnesota's ROFR, acknowledging that FERC's purpose in enacting Order 1000 was not foiled by state ROFR. Accordingly, all arguments that Vandalia's Native Transmission Protection Act is preempted fail, and Vandalia PSC respectfully asks the court to rule in its favor.

IV. VANDALIA'S STATUTORY ROFR, THE NTPA, DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

a. The NTPA does not discriminate against interstate commerce because Vandalia retail utilities and ACES are not similarly situated.

The dormant Commerce Clause prohibits states from discriminating between "substantially similar entities," *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997), on the basis of some element of interstate commerce. *Comptroller of Treasury of Md. v Wynne*, 135 S. Ct. 1787, 1794 (2015). Entities are considered similarly situated if "actual or prospective competition [exists] between the supposedly favored and disfavored entities in a single market." *Id.* at 300.

In this case, the Vandalia utilities, LastEnergy and MAPCo, and ACES are not similarly situated for the purposes of dormant Commerce Clause analysis because the two entities serve entirely different markets. ACES owns and operates "merchant" plants, which generate electricity solely for resale in the wholesale markets. ACES concedes that it has no retail customers, nor does it own any retail electric utilities. In contrast, LastEnergy and MAPCo both operate as retail utilities, directly serving a combined over one million customers in Vandalia alone.

Significantly, the markets that ACES and Vandalia's retail utilities respectively serve have been termed differently, the former being a non-captive market, and the latter captive.

Moreover, the alleged discriminatory effect of the NATP that ACES alleges does not pertain to its electricity generation, but rather its business of building transmission lines. As the Court noted in *Tracy*, for entities to be substantially similar, there must be either actual or prospective competition in a single market. This element cannot be satisfied because the allegedly favored entities, incumbent public utilities such as LastEnergy and MAPCo, are not competing with ACES in the transmission line market. Because there is ultimately no competition between allegedly favored and disfavored entities in a single market, ACES and Vandalia retail utilities are not similarly situated, and therefore there is no discrimination under the dormant Commerce Clause.

b. Even if PSC and ACES are Similarly Situated, the ROFR Does not Discriminate in Favor of Vandalia-Based Facilities.

Even if this Court should find that the PSC and ACES are similarly situated, the NATP still survives because it does not discriminate against interstate commerce, either on its face or through its practical effects. A law is only clearly discriminatory if it discriminates on its face–for example, if it was enacted with a discriminatory purpose such as economic protectionism, *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984)–or if it is discriminatory through its effects. *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47-48 (2d Cir. 2007); *See also Colon Health Ctrs. of Am., LLC v. Hazel* ("Hazel II"), 813 F.3d 145, 152-156 (4th Cir. 2016).

A regulation is not automatically discriminatory if it affects in-state and out-of-state interests differently. *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1089 (9th Cir. 2013). Lastly, dormant Commerce Clause analysis should be primarily concerned with potential discrimination against *interstate commerce*–not just against the specific parties involved. *Id.* at 127. The inquiry into alleged discrimination should focus on the purpose and the practical operation of the statute, because the validity of state laws turns largely on their probable effects. *Just Puppies, Inc. v. Frosh*, 565 F. Supp. 3d 665, 716 (D. Md. 2021) (citing *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 37 (1980)).

Many courts are reluctant to deem state regulations discriminatory, even those that may have the effect of restricting local markets. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1028 (8th Cir. 2020) (holding that a Minnesota law granting preference to incumbent transmission facilities did not discriminate against interstate commerce because many incumbent entities were incorporated or headquartered outside of Minnesota); *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 107 (2d Cir. 2017) (holding that a Connecticut market scheme was not discriminatory despite its facial geographic restrictions). However, this presumption of validity for state regulations is not limitless, and states are not immune to judicial review if the effect on interstate commerce becomes unacceptable. *See NextEra Energy Capital Holdings Inc. v. Lake*, 48 F.4th 306, 314 (5th Cir. 2022) (holding that a Texas regulation favoring incumbent facilities violated the dormant Commerce Clause by discriminating against interstate commerce because it placed no time limit on an incumbent to exercise their right, and completely barred out-of-state entrants into the market).

In the instant case, the NATP does not discriminate against interstate commerce, either on its face or in its practical effect. The text of the NATP itself does not indicate a preference for in-state entities over out-of-state entities, as it clearly defines an incumbent electric transmission owner both as "any public utility that owns, operates, and maintains an electric transmission line in this state" *or*, "any…entit[y]...engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia." By incorporating the second option as a definition of an incumbent, the NATP communicates that the physical presence of an entity is irrelevant, so long as it is in the business of furnishing electric transmission service in Vandalia.

As in *LSP Transmission Holdings*, the place of incorporation or headquarters is significant to determining whether a regulation discriminates against interstate commerce. Both of the incumbent retail facilities in Vandalia are headquartered and incorporated in a state other than Vandalia, and both serve customers in several additional states as well as in Vandalia. Additionally, it is significant to note that ACES itself is incorporated in Vandalia. The Vandalia NATP can also be distinguished from similar statutory ROFRs which have been struck down, such as the one discussed in *NextEra Energy*. Unlike the regulation at issue in *NextEra*, the NATP places a time limit on an incumbent's right of first refusal. Further, the NATP does not attempt to place a complete prohibition on outside investment.

Next, the NATP is not discriminatory because a purpose other than economic protectionism is clearly identifiable. Because Vandalia still overwhelmingly relies on its coal production, the PSC was well-within their authority to enact the NATP for the purpose of revitalizing and maintaining the State's coal-fired power plants. If the NATP indicated a preference of any kind, it was for the *type* of incumbent facility, rather than the *owner* of said incumbent, a preference that does not discriminate against interstate commerce.

Lastly, ACES has not presented concrete evidence to show that the probable effects of the NATP will have a discriminatory effect on *interstate commerce*, rather than simply on itself as a participant in the electricity market. ACES urges this Court to make a sweeping ruling without providing any indication that the NATP is likely to have a discriminatory effect on interstate commerce as a whole. As the court in *Just Puppies, Inc.* reasoned, the validity of state laws should turn largely on their probable effects. ACES proposes that this Court make a sweeping assumption that the probable effects of the NATP are discriminatory in nature based solely off of the only currently known effects, those on ACES itself.

c. Because the NATP is not Discriminatory, it is Analyzed Under the Pike Balancing Framework. and its Benefits Outweigh its Incidental Burden on Interstate Commerce.

A law that regulates even-handedly to effectuate a legitimate local public interest, affecting interstate commerce only incidentally, it will be upheld unless the burden on interstate commerce is clearly excessive compared to the local benefits. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (citing *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 443 (1960). If a legitimate local purpose is found, the court should examine the extent of the burden on interstate commerce in relation to the nature of the local interest, and consider whether the interest could be promoted with a lesser impact on interstate commerce. *Pike*, 397 U.S. at 142. There is a strong presumption of validity under the *Pike* test, *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981), and the Supreme Court has rarely invoked it to invalidate a state regulation under the Dormant Commerce Clause. *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 509 (8th Cir. 2002). Rather, the *Pike* balancing framework is largely intended to differentiate between protectionist measures, from those that are rationally directed to legitimate local concerns. *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978); *See also Hazel II*, 813 F.3d at 152 (quoting *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (reasoning that "courts must be careful not to cripple the States' authority under their general police powers to regulate matters of legitimate local concern)).

In the instant case, the Vandalia NATP survives scrutiny under the *Pike* balancing framework, which is known to have "rarely been invoked to invalidate a state regulation under the dormant Commerce Clause. As previously discussed, the NATP furthers a legitimate local concern besides simply economic protectionism. The Vandalia PSC's interest is in promoting the State's well-being through the creation and preservation of jobs, and in the protection and use of its most abundant resource. The incidental burden on interstate commerce created by the NTPA cannot be said to be "clearly excessive" in relation to local benefits. Additionally, because the only incumbent facilities in Vandalia currently operate coal-fired power plants, there is no less restrictive alternative that could have been enforced to achieve the same local benefits.

CONCLUSION

For the aforementioned reasons, Appellee respectfully requests this court to affirm the District Court dismissal of all issues.

CERTIFICATE OF COMPLIANCE

Pursuant to Official Rule III.C.9, [Party Name] certifies that its brief contains [# of pages] pages in Times New Roman 12-point font.

We further certify that we have read and complied with the Official Rules of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the Team Members of Team No. 3, and the Team Members of Team No. have not received any faculty or other assistance in the preparation of this brief.

Respectfully Submitted,
Team No. 3

CERTIFICATE OF SERVICE

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

Respectfully Submitted,
Team No. 3