CASE NO. 22-0682

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.

Appeal from the

United States District Court for the District of Vandalia

Brief for the Appellee

Team No. 4
Attorney for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORTIES

Cases

Statutes

Constitution

Rules

JURISDICTIONAL STATEMENT

The United States District Court's jurisdiction over this matter rests on federal question jurisdiction under 28 U.S.C. § 1331 for resolution of questions related to the United States Constitution and the Federal Power Act ("FPA"). The United States District Court's jurisdiction over questions related to standing to challenge the Vandalia Public Service Commission's (PSC's) Capacity Factor Order rests on 28 U.S.C. § 1367(a).

The final judgment of the United States District Court of Vandalia granting PSC's motion to dismiss the claims against it was entered August 15, 2022. Appellant Appalachian Clean Energy Solutions, Inc. (ACES) filed its notice of appeal on August 29, 2021. The United States Court of Appeals has jurisdiction over the issues I, II, and IV in this case under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

I. Under Article III of the Constitution, does ACES have standing to challenge the Capacity Factor Order when they are not a ratepayer, or a coal company located within Vandalia?

II. If ACES does have standing, under the Supremacy Clause of the United States Constitution, is the Capacity Factor Order preempted by federal law when it requires coal-plants to run at 75 percent capacity?

III. Under the Supremacy Clause of the United States Constitution, is Vandalia's statute preempted by FERC Order 1000 when the statute creates a ROFR?

IV. Under the U.S. Constitution, does the Native Transmission Protection Act (NTPA) violate the dormant Commerce Clause when it gives a ROFR?

STATEMENT OF THE CASE

Vandalia is the third-largest coal producer in the United States. R. at 4. Since the early history of Vandalia, the state has relied heavily on coal for electricity and economic development. R. at 4. Ninety-one percent of Vandalia's total electricity generation comes from coal-fired electric power plants. R. at 4. Mid-Atlantic Power Co. ("MAPCo") and LastEnergy are the two retail utilities that serve Vandalia. R. at 4. LastEnergy has two coal-fired power plants in Vandalia and MAPCo has three coal-fired power plants in Vandalia. R. at 4. Based on their Fixed Resource Requirement ("FRR") status, the coal plants must sell their energy exclusively to the regional wholesale electricity market ("PJM"). R. at 7.

The Vandalia Public Service Commission ("PSC") regulates utilities within Vandalia and has broad authority to set "just and reasonable rates" for utilities within the state. R. at 6. Recently, the PSC made several changes to ensure that these coal power plants remain the largest contributor of energy within the state. R. at 6. The PSC enacted legislation to ensure none of the plants close, no more jobs are lost, and the state continues to thrive as a leader in the coal industry. R. at 6.

First, the PSC enacted the Capacity Factor Order. R. at 7. MAPCo and LastEnergy's annual filing showed a decrease in capacity factor rates for their coal plants over the course of a year. LastEnergy's two coal plants were running at 62.3 percent and 46.1 percent capacity. MAPCo's three coal plants were running at 34.7 percent, 49.6 percent and 57.3 percent capacity. R. at 7. The utilities explained that they were not producing at a high capacity because cheaper energy was available. R. at 7. After receiving these rates, the PSC decided that it was not in the state's best interest for the coal plants to be running at such a low capacity. R. at 8. Due to the negative effects this could have on Vandalia, the PSC created the Capacity Factor Order which required MAPCo and LastEnergy's coal-fired power plants to run at a minimum of 75 percent capacity. R. at 7.

The PSC found that running the coal-fired power plants at above 75 percent would be economically viable. R. at 7. However, if the coal plants do not run economically at that rate, the Order allows for cost recovery for the plants. R. at 7. The plants would recover the difference between the market clearing price and the actual cost of producing energy. R. at 7. The amount would be recovered in retail rates from retail ratepayers. R. at 7. This is simply to ensure the investors are comfortable investing their money and safeguards the coal-plants in the case that the economy drastically changes. R. at 8.

Additionally, in 1935, Congress passed the Federal Power Act ("FPA"), filling the "Attleboro gap" of power regulation across state lines. R. at 13. The FPA charged the predecessor of the Federal Energy Regulatory Commission ("FERC") with undertaking effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce. R. at 13. Until 2011, one tool that the FERC used in this endeavor was a federally insured right of first refusal ("ROFR") inserted into many of the interstate agreements and tariffs. R. at 13. However, FERC rescinded that federal ROFR in FERC Order 1000. R. at 14.

In response to the absence of a federally protected ROFR, Vandalia passed into law a new statute, the Native Transmission Protection Act ("NTPA"), giving a state protected ROFR to companies. R. at 14. The NTPA gives incumbent electric transmission owners an 18-month exclusive period to construct new transmission lines that have been approved by a federally registered planning authority transmission plan and connects to facilities owned by that incumbent owner. R. at 9.

A new transmission line, the Mountaineer Express, was approved by the local federally registered planning authority, and includes portions that would travel through Vandalia. R. at 6. Appalachian Clean Energy Solutions, Inc. ("ACES") initially proposed the plan to connect a new energy plant in Pennsylvania to the energy grid in Raleigh, North Carolina. R. at 5. However, Under Vandalia law, ACES does not qualify as an incumbent electric transmission owner. R. at 10. Therefore, due to the NTPA, incumbent electric owners have a period of 18 months, until September 30, 2023, to decide whether to exercise their ROFR. R. at 10.

ACES filed suit against the three commissioners of the PSC on June 6, 2022. R. at 14-15. ACES argued that: (1) the Capacity Factor Order was preempted by the FPA; (2) the ROFR is preempted by the FPA and infringes on FERC's authority, as set out in Order 1000; and (3) the ROFR violates the dormant Commerce Clause in that it discriminates against out-of-state actors like ACES. R. at 14-15.

On June 27, 2022, the PSC moved to dismiss the Capacity Factor claim, arguing that ACES lacked standing because ACES was not subject to the Capacity Factor Order. R. at 14. On the same day, the PSC moved to dismiss the ROFR claims because there is no preemption, as evidenced by the fact that many other states have passed similar legislation. R at 16. As to the dormant Commerce Clause claim, the PSC argued that there is no discrimination against out-of-state entities because ACES is an in-state entity. R. at 16.

The district court granted all of the motions to dismiss in an order dated August 15, 2022. In the order, it stated that in regards to the Capacity Factor claim, ACES lacked standing to bring the claim and that even if ACES had standing, the Capacity Factor Order did not violate the Supremacy Clause. R. at 15. The district court also found that the ROFR was not preempted by 1000, and that the ROFR does not violate the dormant Commerce Clause. R. at 16. In deciding, the district court endorsed the "Place of Incorporation" test instead of the Fifth Circuit's approach, and determined that under the *Pike* balancing test, the burden imposed on interstate commerce did not exceed the local benefits the Vandalia legislature intended to protect when enacting the NTPA. R. at 16. ACES filed a timely appeal on August 29, 2022. R. at 16.

SUMMARY OF THE ARGUMENT

The district court appropriately granted the Appellee's Motion to Dismiss. First, ACES does not have standing to bring the claim regarding the Capacity Factor Order. With regard to standing, ACES has failed to show they have suffered an injury-in-fact. Additionally, ACES has also failed to show that the issue is ripe for review because the potential injury that ACES says they will suffer is contingent on events that may not ever occur.

Second, the Capacity Factor Order is not preempted by field or conflict preemption. First, the Order is not conflict preempted because it is based on a legitimate state interest that does not stand in the way of the federal goals. The Order does not prevent FERC from establishing just and reasonable wholesale rates or interfere with their ability to maintain a competitive market. Additionally, the Order is not field preempted because the Order is not conditioning funds on participation in the wholesale market. The Order is regulating the production of energy within Vandalia, which the state has jurisdiction over. Therefore, the Order is not conflict or field preempted.

Next, Vandalia's statutory ROFR is not preempted by FERC Order 1000. When creating the Order, FERC identified the problems with federal ROFR, but expressly intended not to infringe upon state's rights to enact their own statutory schemes. This is congruent with the final language used in the Order and should be taken as a strong indication of their lack of intent to fully occupy the field. Even if fields are heavily regulated by federal agencies, if some room is left for state regulation, the field is left open and state regulations are not preempted.

Lastly, Vandalia's statutory ROFR does not violate the dormant commerce clause of the U.S. Constitution. This court should adopt the "Place of Incorporation" test and find that the statute is not facially discriminatory as applied to ACES. The dormant commerce clause is meant to protect out-of-state entities from discrimination and because ACES is an in-state entity, the claim that they are being discriminated against is not valid. The non-discriminatory test under *Pike*, allows the law so long as no undue burdens are placed by the statute. This application does not place any undue burdens on the entities especially when compared to the state's interest in ensuring that its citizens are taken care of. Therefore, the Appellee respectfully requests that this Court affirm the district court's dismissal of the claims.

ARGUMENT

I. The Plaintiff does not have standing to challenge the Capacity Factor Order and the issue is not ripe for review.

ACES has failed to show that they have standing to bring a claim regarding the Capacity Factor Order and that the issue is ripe for review. The federal court's jurisdiction is limited by the United States Constitution to only hear "cases" and "controversies." U.S. CONST. art. III § 2. In order for a plaintiff to meet this constitutional requirement, the plaintiff must show that they have standing to bring the claim and that the issues are ripe for review. *Montana Env't Info. Ctr. V. Stone-Manning*, 766 F.3d 1184, 1188 (9th Cir. 2014). Because both arise out of the same Article III limitation, ripeness and standing often arise together in the same inquiry. *Id.* at 1188-89.

In order to meet the constitutional requirement of standing, the plaintiff must prove three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). First, the plaintiff must suffer an injury-in-fact. *Id*. The injury-in-fact must be "concrete and particularized and actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* There must be a "realistic danger of sustaining a direct injury," and the "threatened injury must be certainly impending." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979); *Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 410 (2013). The threatened injury is not "certainly impending" if the harm lies at the end of a "highly attenuated chain of possibilities." *Clapper,* 568 U.S. at 410 (holding the plaintiff did not establish an injury-in-fact because too many uncertain events needed to occur for the injury to manifest). Second, the injury must be fairly traceable to the defendant's alleged illegal conduct. *Lujan*, 504 U.S. at 560. This element considers if it is probable that the defendant's actions caused the plaintiff's injury. *Id.* Lastly, the plaintiff has to show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000).

Next, if the injury has not actually occurred yet, the Court considers if the harm the plaintiff says they will suffer has reached a point where judicial intervention is necessary and appropriate. *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *Montana Env't Info. Ctr.,*766 F.3d at 1189 ("[I]n many cases, ripeness coincides squarely with standing's injury in fact prong."). Here, the court must "evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 149 (1967)(holding since the issue was a purely legal question, the case was fit for judicial decision). A case is not fit for judicial decision if further factual development is required and if the harm is dependent on "contingent events that may not occur as anticipated, or indeed may not occur at all." *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 580-581 (1985). The basic rationale of the ripeness doctrine is to prevent courts from involving themselves in abstract controversies until there is a clear showing of need for a judicial decision. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 200 (1983).

In the instant case, ACES has failed to satisfy the injury-in-fact prong of standing and show the issue is ripe for review. First, with regard to standing, ACES has not shown they have suffered an injury-in-fact because ACES would not have to follow the Order, nor would it be affected by the implementation of the Order. The Order only applies to coal plants within Vandalia. Therefore, ACES, who plans to build a natural gas generating plant in Pennsylvania, would not be subjected to the Order. R. at 5. Additionally, the Order calls for cost recovery to ensure the coal plants are able to continue to raise necessary capital if they do not run economically above 75 percent. R. at 8. This cost recovery would come directly from ratepayers. R. at 8. Since ACES is not a ratepayer, they would not be affected by this provision of the Order.

The only affect the Order could have on ACES is the wholesale rate could incidentally be affected by the Order. Similar to the claim in *Clapper,* this claim is too far attenuated from the chain of events and based on mere speculation that the coal plants would not run economically at this rate. Many events together must happen for ACES to suffer some harm. This includes (1) ACES follows through with their plans to build Rogersville Energy Center; (2) nothing else inhibits the building of the energy center; (3) the coal plants are unable to run economically at 75 percent capacity; (4) the coal plants must lower their bid at auction to ensure they clear the market; and (5) the bid lowers the clearing price at auction. Therefore, the injury is not "certainly impending" because it is based on a long chain of highly attenuated possibilities. Thus, ACES has failed to show they have suffered an injury-in-fact and therefore do not have standing to bring this claim.

Second, similar to the issue with the injury-in-fact, the issue is not ripe for review because the injury is contingent on future events that might never occur. Unlike the issue in *Abbott Lab'ys,* this is not a purely legal question because there is no knowing yet if the Order would even cause an injury to the plaintiff. The PSC has shown evidence that the coal plants would run economically at above 75 percent capacity. Therefore, it is merely hypothetical that this would cause a change in the wholesale rates. Even if they did not run economically above 75 percent, ACES has failed to introduce evidence that they would suffer actual harm from this. As of now, there is nothing to show that the wholesale rates would be affected at all, and more facts are required before judicial intervention would be appropriate. Therefore, ACES has failed to show they have standing and that the issue is ripe for review.

II. Even if the Plaintiff has standing, the Capacity Factor Order is not preempted because the Order does not conflict with the federal goals of the FPA nor is the Order tethered to participation in the wholesale market.

Even if the Plaintiff has standing, the PSC's Capacity Factor Order is not preempted by the FPA. The Supremacy Clause makes federal law "the supreme Law of the Land; …any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2. This creates constitutional limits unto which states can legislate. *See Hughes v. Talen Energy Mktg.,* LLC, 578 U.S. 150, 163 (2016). Congress may expressly preempt state law or implicitly preempt state law through conflict or field preemption. *Coalition for Competitive Elec. v. Zibelman*, 906 F.3d 41, 49 (2d Cir. 2018). In both conflict and field preemption cases, the Court should consider Congress's purpose in enacting the law. *Id*. There must be a "clear and manifest" conflict with federal law or congressional intent for a state law to be preempted. *Farina v. Nokia Inc*., 625 F.3d 97, 117 (3d Cir. 2010).

The FPA "vests in [FERC] exclusive jurisdiction over wholesale sales of electricity in the interstate market." *Hughes,* 578 U.S. at 153. FERC is to ensure that the rates of the sale of electric energy are "just and reasonable." 16 U.S.C. § 824(b)(1); *Zibelman,* 906 F.3d at 50. However, the role of FERC in this area is not indefinite, and their jurisdiction is limited to "rules or practices that '*directly* affect the [wholesale] rate.'" *FERC v. Elec. Power Supply Ass'n,* 577 U.S. 260, 278 (2016). The states have power over the production of energy, retail rates, and the local facilities used for the generation of electric energy. *Elec. Power Supply v. Star*, 904 F.3d 518, 522-23 (7th Cir. 2018). The distinction between state regulation and FERC's power can be difficult to distinguish since the power the states exercise over their facilities affects interstate commerce. *Id*. at 523. Similarly, FERC's decisions can affect the plants over which the state controls. *Id*. Therefore, courts must not confuse the "'congressionally designed interplay between state and regulation' for impermissible tension that requires pre-emption under the Supremacy Clause." *Hughes*, 578 U.S. at 167 (Sotomayor, J., concurring).

In the instant case, there is neither field preemption nor conflict preemption. First, the Order is not conflict preempted because the Order does not undermine the goals of the FPA. Second, there is no claim for field preemption because the Capacity Factor Order does not condition funds on sale into the wholesale market. Therefore, the Capacity Factor Order is not expressly or implicitly preempted by the FPA.

A. The Capacity Factor Order is not conflict preempted because it does not impede on the federal goals of the FPA.

Since the Capacity Factor Order does not impede on the federal goals of the FPA, it is not conflict preempted. 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.'" *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 377 (2015). To determine if the regulation stands as an obstacle to the federal goals, the court must examine "the federal statute as a whole and [identify] its purpose and intended effects." *Coal. for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 576 (S.D.N.Y. 2017), *aff'd sub nom. Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018). When state legislation is based on a legitimate state interest, it will not be conflict preempted "unless clear damage to federal goals would result. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 522 (1989). Thus, conflict preemption "must be applied sensitively…, so as to prevent the diminution of the role Congress reserved to the States while at the same time preserving the federal role." *Id*. at 515.

For state legislation to be preempted, the legislation would have to undermine the federal goals. *Zibelman*, 906 F.3d at 56. The goal of the FPA is to ensure that wholesale rates remain just and reasonable by maintaining a competitive energy market; their goal is not to limit the state's role in production of their own resources. *See Zibelman*, 906 F.3d at 55-56; *New England States Comm. On Elec. v. ISO New England Inc.,* 142 FERC ¶ 16, *11 (2013)("States have the unquestioned right to make policy choices through the subsidization of capacity."). States can "require retirement of existing generators" or "take any other action in their role as regulators of generation." *Zibelman*, 906 F.3d at 56. Therefore, regulating the production of energy does not result in conflict preemption in and of itself. *Id*. Furthermore, FERC has historically acquiesced to state programs that regulate matters the state has jurisdiction over even if they affect the wholesale market. *Id.* at 56. Therefore, only if "the impact of state regulation of production on matters within federal control is so extensive and disruptive of" the market, is preemption appropriate." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014).

A state regulation is not conflict preempted if it would only incidentally affect the wholesale rates. *Zibelman*, 906 F.3d at 56. [1] In *Zibelman,* the state created a zero-emissions-credit ("ZEC") program to ensure that their nuclear power plants were able to remain open. *Id*. at 45. The program subsidized nuclear power plants by issuing them credits for producing zero-emission energy. *Id*. at 47. Plaintiff claimed that the program altered prices in the wholesale market, wrongfully entering into FERC's territory. *Id*. at 46. The court held that the program did not impede on the goals of the FPA. *Id*. at 57. Because the program was based on a legitimate state concern, FERC should accommodate for the state program unless clear damage to the federal goals would result. *Id*. at 57. The court reasoned that there is a dual regulatory system between the states and the federal government to engage in public policies that will affect the wholesale auction and prices. *Id*. Therefore, the state regulation was not conflict preempted. *Id*.

Contrarily, a state program will be conflict preempted if it questions the rate of electricity to interstate energy distributors. *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 376 (1988). In *Mississippi Power & Light Co*., FERC ordered a Mississippi utility to purchase a certain amount of energy from a nuclear power plant. *Id*. at 356. FERC established a just and reasonable rate for the utility company to purchase the energy. *Id*. The state said they needed to review the prudence of the prices set by FERC. *Id*. The Court reasoned that this was conflict preempted because FERC has the exclusive control over just and reasonable wholesale rates for sale to interstate wholesale power distributors. *Id*. at 374. The state must accept FERC's rates to interstate distributors as just and reasonable when determining retail rates. *Id*.

[1] Incidental effects on wholesale prices should be considered under both field preemption and conflict preemption. *Zibelman*, 906 F.3d at n. 4.

In the instant case, the Order does not undermine the goals of FERC under the FPA to ensure just and reasonable rates and a competitive market. The Order is based on a legitimate state interest to ensure Vandalia's economy remains prosperous and no more jobs are lost. As permitted in *Zibelman*, the Order could possibly have an incidental effect on the interstate auction. However, FERC still has complete control over the auction and the wholesale rates. The PSC is merely regulating the production of energy within their state which falls squarely in the realm of state jurisdiction. Similar to *Zibelman*, there will likely be overlap due to the nature of the relationship between these entities and because, due to the coal fire plants FRR status, they must sell exclusively to the PJM. R. at n.7. However, this impact would not be "so extensive and disruptive" to FERC's goals to lead to preemption.

Unlike *Mississippi Power and Light Co.*, on the demand side, the PSC is not questioning the reasonableness of prices ordered by FERC. Here, if the coal plants are unable to run economically, the PSC would alter intrastate retail prices. R. at 8. The PSC is not altering retail prices already established by FERC or adjusting the retail rates to interstate distributors. Since this would not create an obstacle to the goal of just and reasonable wholesale rates, the Order is not conflict preempted.

B. The Capacity Factor Order is not field preempted because the Order is not tethered to sale into the wholesale auctions.

Since the Capacity Factor Order does not condition funds on participation in the wholesale auction, it is not field preempted by the FPA. Field preemption occurs when "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Nw. Cent. Pipeline Corp.*, 489 U.S. at 509. For a valid case of field preemption, there must be a "tether" between the state created program and wholesale market participation. *See Hughes*, 578 U.S. at 166. "'Indirect or tangential impacts on wholesale electricity rates'" do not suffice; otherwise, the FPA's grant of jurisdiction to FERC would 'assum[e] near-infinite breadth.'" *Coalition for Competitive Elec.,* 272 F. Supp. 3d at 568 (quoting *Elec. Power Supply Ass'n,* 577 U.S. at 278).

While it is impermissible for states to condition funds on clearing the auction, states can "regulate within its sphere of authority", even if it indirectly affects the wholesale market. *PPL Energyplus, LLC v.* Solomon, 776 F.3d at 255; *Hughes*, 578 U.S. at 166. ("So long as a state does not condition payment of funds on capacity clearing the auction, the State's program [does] not suffer from the fatal defect that renders [a] program unacceptable."). Therefore, if the incentive deals with the production of energy, an area regulated by the state, and not with the sale into the wholesale auction, it is not preempted by the FPA. *See Coalition for Competitive Elec.,* 272 F. Supp. 3d at 569. Additionally, if the energy must be sold to the RTO based on the generator's status, not the state program, the state program is not preempted by federal law. *Vill. of Old Mill Creek v. Star*, 2017 U.S. Dist. LEXIS 109368, *38 (July 14, 2017)(holding if the RTO requires participation in the auction, and not the state, the state is not conditioning benefits on participating in the wholesale market).

A state program will be preempted if it directly interferes with FERC's authority over interstate wholesale rates. *Hughes*, 578 U.S. at 166. In *Hughes*, the Court limited the role states could play in the regulation of interstate auctions. *Id*. at 163. Maryland selected a company to construct a new plant and entered into a long-term contract with the plant to encourage the development of in-state generation. *Id*. at 158-59. The contract required the new plant to bid in capacity auctions, but they were guaranteed to receive the contract price and not the clearing price determined at the auctions. *Id*. at 159. The plant was encouraged to bid as low as possible at the auctions because they would only receive the contract price if they cleared the auction. *Id*.

The court held that because Maryland was guaranteeing rates different from the clearing price determined at the auction, they were invading FERC's authority. *Id*. Additionally, the contracts differed from traditional bilateral contracts because they did not transfer ownership of capacity outside the auction but instead operated within the auction itself. *Id*. at 165. The Court emphasized, however, that its holding is narrow as it only rejects Maryland's program "because it disregards interstate wholesale rates required by FERC." *Id*. at 166.

However, if the legislation only has an indirect effect on the wholesale rate, it will not be preempted. *Star*, 904 F.3d at 524. In *Star*, the state began to subsidize nuclear generation facilities because they feared they would close. *Id.* at 521. The nuclear power plants received ZECs to guarantee the nuclear power plant energy could remain affordable. *Id*. at 522. Plaintiff sued based on the belief that the state was infringing on FERC's authority under the FPA and therefore, the legislation was preempted. *Id*. The court held that because the grant was for their production of energy and not their sale of that energy into the wholesale market, it was not preempted. *Id*. at 524. The regulation would only indirectly affect the auction price by keeping generation facilities open and therefore keeping them in the market. *Id*. Additionally, the generator would only receive the market clearing price, and not some other predetermined amount. *Id*. This action only affects the amount of power generated in the state, which is within the realm of state jurisdiction. *Id*.

In the instant case, the Capacity Factor Order is not field preempted because the Order does not create an impermissible "tether" to wholesale rates. Here, Vandalia is ordering coal plants to run at 75 percent capacity or higher. R. at 8. Similar to the state interest in *Star*, Vandalia feared that the coal plants might close because they were running at low-capacity levels and not producing high-levels of energy. R. at 8. Vandalia relies on coal not only for energy, but also for jobs and economic development. R. at 4, 6. Vandalia is the third largest coal producer in the nation but due to other cheaper methods to produce energy, coal generators stopped producing at a high capacity. R. at 4, 7. MAPCo and FirstEnergy were operating their coal generators in a manner that reduced price for retailers; however, this trend was not serving the public interest of the state. R. at 8. Similar to *Star*, the state is encouraging the use of a specific type of energy and the production of a certain amount of power generated by the state. This falls squarely within the jurisdiction of the state.

Distinct from *Hughes*, the Capacity Factor Order does not directly alter the wholesale rates. Vandalia was not conditioning the payment of funds on clearing the auction nor did they set predesignated rates if the coal plants cleared the auction. While certain it would be economical for the coal plants to run at 75 percent, the PSC authorized cost recovery if it was not. The plants would not receive subsidies from Vandalia for clearing the auction; they would only receive the difference if the market clearing price is below the actual costs of producing the energy which the PSC has shown to be unlikely. The cost recovery would come from ratepayers by increasing the intrastate retail rates. Again, intrastate retail rates are an area controlled by the states, not FERC. Therefore, the Order is not interfering with FERC's ability to ensure reasonable wholesale rates.

Furthermore, similar to *Village of Old Mill Creek*, Vandalia is not requiring the coal plants to sell the energy on the interstate market. Due to the coal plants FRR status, they must sell their energy into the PJM. R. at n.7. Therefore, in order for the coal plants to be profitable, they must sell their energy into the PJM, but that is not required by the Order. Thus, because funds are not conditioned on the coal plants clearing the market and the state is regulating within its sphere of authority, the Capacity Factor Order is not field preempted.

III. Vandalia's Right of First Refusal statute does not violate the Supremacy Clause of the United States Constitution because Congress has not stated a desire to occupy that field of law.

As explained more fully above, the Supremacy Clause of the United States Constitution establishes that federal laws, alongside the United States Constitution "shall be the Supreme law of the land." U.S. CONST. art. VI. This Clause has been routinely used to preempt state laws that conflict with federal law. The conflict can appear in multiple ways including express, purpose, literal, or field conflict, but is used primarily when the Federal Government has occupied the entire field and does not leave room for state regulation. *Silkwood v. Kerr-Mcgee Corp*., 464 U.S. 238, 249 (1984).

A. Congress has not chosen to fully regulate the field of power transmission.

Congress's interest in this field is not strong enough to imply field preemption against state action. Field preemption occurs when federal law occupies a field so completely and comprehensively that it leaves no room for state regulation of the same field. *Murphy v. NCAA*, 138 S.Ct. 1461, 1480 (2018). Courts look to the breadth of federal statutory framework when deciding whether a given field has been completely filled. *Arizona v. United States*, 567 U.S. 387, 401 (2012). Where federal statutory law provides a full set of standards for governance and regulation of a field, it is said to "occupy" the field and even state statutes in harmony with the federal framework are deemed impermissible. *Id*.

At times the distinction as to when Congress has fully occupied a field can be difficult to determine. *Id*. at 401. In *Arizona*, the Court was tasked with determining whether federal laws governing alien registration completely precluded Arizona from instituting a statute requiring an alien to carry a designated immigration document. *Id*. at 400.[2] This proposed statute would have created a separate state punishment for violating a federal law. *Id*. However, Congress's action creating the registration procedure completely precluded Arizona from creating the new cause of action. *Id*. at 401. The Court was careful to point out that the fact the statutes were in harmony with each other, and worked toward similar goals, did not matter in the event of field preemption. *Id*.

Conversely, fields highly regulated by federal law that may seem at first glance to be completely occupied by the federal framework, can still be open to state statutes. *Silkwood v. Kerr-McGee Corp*. 464 U.S. 238, 251 (1984). Such was the case in *Silkwood* which involved a claim for punitive damages under state law against a nuclear power plant. *Id*. at 243. By the time the case was considered by the Supreme Court, the chief issue was whether Congressional action so regulated the field as to bar the ability to sue under state tort law for punitive damages.[3] Despite the close regulation and oversight provided by the federal government for all nuclear-related actions, the Court determined that Congress had not meant to completely foreclose the ability of states to provide some regulation of their own. *Id*. at 251.

In June of 2010, FERC published a Notice of Proposed Rulemaking to develop what eventually became order 1000. FERC, NOTICE OF PROPOSED RULEMAKING, 131 FERC ¶ 61,253, Docket No. RM10-23-000. In the document outlining the goals of FERC in the order, 16 paragraphs are allocated to giving a glimpse into comments they had received concerning the

---

[2] The proposed Arizona statute made it a misdemeanor offense to engage in willful failure to complete or carry an alien registration document in violation of 8 U.S.C. § 1304(e) or § 1306(a). *Arizona v. United States*, 567 U.S. 387, 400 (2012).

[3] The federal regulations claimed to bar the use of state law were chiefly the Atomic Energy Act, which allowed private entry into the nuclear power marketplace and the Price-Anderson Act, which established an indemnification scheme for operators of nuclear facilities. *Silkwood*, at 249-51.

ROFR in Commission-approved tariffs and agreements. *Id*. at ¶¶ 71-86. As a result, even from that early draft, FERC understood the need to remove ROFRs. *Id*. at ¶93. Yet even at this stage, FERC intended the new guidance to affect only ROFR established in an agreement subject to the Commission's jurisdiction. *Id*. at ¶98. In fact, they explicitly stated that "[t]his proposed Rule does not address, propose to change, or seek to preempt any state or local laws or regulations." *Id*. This intent was unchanged through the final rule publication. FERC, Order No. 1000, 76 Fed.Reg. 49,851. Order 1000 specified that "providers must remove from *Commission-approved* tariffs and agreements a *federal* right of first refusal..." *Id*. (emphasis added). The finished rule also contains a comment making clear that "[n]othing in this requirement affects state or local laws or regulations regarding the construction of transmission facilities..." *Id*.

FERC made it clear that they did not intend to occupy the field when they passed Order 1000. It was focused on removing the ROFR that had been allowed in tariffs and agreements that were subject to the purview of the Federal Regulatory Commission. However, they also intended from the very beginning of the process to allow states to take action on ROFR if they so choose to. This is the very opposite of a preemptive intent from the federal government. Applying the test from *Murphy v. NCAA*, the court should find that Vandalia has not been preempted from passing the statutory ROFR by FERC Order 1000.

IV. Vandalia's Right of First Refusal Law does not violate the dormant Commerce Clause.

The Commerce Clause in the United States Constitution empowers Congress to regulate commerce among the several states. U.S. CONST. art. I, § 8, cl. 3. The corollary of that Clause is known as the dormant Commerce Clause and sets out boundaries of a state's authority to regulate commerce. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S.Ct. 2449, 2459 (2019). "First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate commerce." *South Dakota v. Wayfair*, 138 S.Ct. 2080, 2091 (2018). Vandalia has not discriminated against out of state commerce by using a ROFR, nor has it placed an undue burden on the commerce, therefore the ROFR in the NTPA does not violate the dormant Commerce Clause.

A. The regulation at hand does not discriminate against interstate commerce.

When courts are engaged in the determination of discriminatory actions against an allegedly out-of-state party, there are two main approaches that are used. One method is by examining the place of incorporation of the party, and comparing it to similarly situated parties. *See LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1028 (8th Cir. 2020). The other main method used involves the local presence of parties that allegedly receive preferential treatment over it. *See NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 323 (5th Cir. 2022). Neither the Twelfth Circuit nor the United States Supreme Court has squarely addressed which test is preferable, however, under either of these methods, the Vandalia ROFR is not discriminatory.

1. **This Court should adopt the "Place of Incorporation" test to determine whether allegedly discriminatory practices are being used against interstate commerce.**

Examining the location of incorporation of the allegedly discriminated against party, and comparing it to other similarly situated parties not subject to the same action, is the practice in the Eighth Circuit. *Sieben*, 954 F.3d at 1028. The *Sieben* case concerned a similar Minnesota ROFR law to the one at issue in this case, including the express grant of a ROFR to in-state entities, therefore giving them a preferential treatment. *Id*. at 1027. In that case, the various companies getting the preferential treatment were headquartered in four other states, in addition to Minnesota. *Id*. at 1028. Plaintiffs argued that the headquarters of a company should not matter, because they are still receiving preferential treatment from the state under a protectionist justification. *Id*.

However, the court could not overlook the fact that so many of the companies were from outside of the state. *Id*. at 1028. Minnesota was not illegally protecting Minnesota companies from having to compete without outside businesses. *Id*. They were protecting Minnesota consumers and citizens from parties that didn't have the facilities in place a free-market choice that the citizens of Minnesota were free to enact through their elected officials. *Id*. The Commerce Clause does not protect the particular structure or methods of operation in a market. *Exxon Corp. v. Governor of Md*., 437 U.S. 117, 127 (1978).

The *Sieben* case is almost identical to the current case. Like in *Sieben*, the state's ability to determine what is best for its citizens is up for debate. However, the present case gives even less protection to in-state companies. Both of the companies getting the preferential treatment are non-Vandalia based companies.[4] R. at 4. In fact, the only company involved that has a connection with Vandalia is ACES, which is headquartered in Springfield, Vandalia. R. at 4. ACES's claim that Vandalia is making it more difficult to build in the state is the very opposite of the dangers that the Commerce Clause is meant to protect against. They are already an in-state corporation. They have employees there, they have buildings there, they already pay taxes and can vote there. This is simply not the class of individuals meant to be protected from state discrimination. This Court should adopt the *Sieben* court's rule and also find that there is no discrimination against interstate commerce.

[4] LastEnergy is incorporated and headquartered in Akron, Ohio, and MAPCo is incorporated and headquartered in Columbus, Ohio. R. at 4.

2. If this Court adopts the "Local Presence" test, the law is still nondiscriminatory.

Some courts have adopted the "local presence" test to determine whether a party subject to an alleged act of discrimination is an out of state corporation. These courts are still concerned with whether in-state interests are able to obtain favorable treatment over out-of-state interests, but take a broader approach and attempt to identify and quantify "local presence." *NextEra Energy*, 48 F.4th at 323. Instead of determining whether a given company in "in-state" because of where it is incorporated, these courts adopt a definition based only on the company's presence within the state. *Id*. at 324.

A recent Fifth Circuit case involving ROFR of power line installation used the Local Presence test. *Id*. In that case, the Texas ROFR law placed no limitation on how long the right to refuse stayed open and therefore acted to completely bar new entrants in the state. *Id*. at 314. For all purposes, this meant that only the companies currently operating in the state would be able to build any new transmission lines, unless they chose to involve or invite new participants. *Id*. at 325. The court examined three Supreme Court Commerce Clause cases spanning a period of sixty-eight years and crafted a rule stating that "[r]equiring boots on the ground discriminates against interstate commerce." *Id*.

However, the Fifth Circuit court misapplied the Supreme Court case law in creating their rule. The first case the Fifth Circuit cites to involved the ability of states to ban the direct shipment of out-of-state wine unless the retailer opened an in-state location. *Granholm v. Heald*, 544 U.S. 460, 470 (2005). This involved, in Justice Kennedy's words, "straightforward attempts to discriminate in favor of local producers." *Id*. at 489.

The second case the Fifth Circuit cites involved a 2-year residency requirement imposed by Tennessee before a liquor license could be granted. *Tenn. Wine & Spirits Retailers Ass'n* , 139 S.Ct. at 2459. The Court found that the law was discriminatory and struck the law down. *Id*. at 2476.

By far the oldest case cited by the Fifth Circuit, the Supreme Court in 1951, discussed discrimination in milk regulatory practices. *Dean Milk Co. v. Madison*, 340 U.S. 349, 350 (1951). At issue in *Dean Milk* was a regulation requiring milk sold within the city of Madison, Wisconsin to have been processed and bottled at a plant within five miles from the center of Madison. *Id*. This regulation barred importers from other states from being able to sell milk in the city and was struck down by the Court for unfairly prioritizing in-state competition. *Id*. at 354.

Notably, the Fifth Circuit assumed that "[w]hat is true for alcohol and milk under the dormant Commerce Clause must be true for electricity transmission." *NextEra Ener*gy, 48 F.4th at 325. But this assumption is not necessarily in line with the nearly 100-year-long application of the Commerce Clause to the power industry. *See Elec. Power Supply Ass'n*, 577 U.S. 260. The milk and alcohol cases were all struck down because they required the selling party to move into the state and to have some sort of official location within the state and the state's legal jurisdiction. *See, e.g., Granholm*, 544 U.S. at 470.

In the present case, ACES already has that location. R. at 4. By already having a presence in the state, even if they don't do the amount of activity or have the reach of the other companies, they meet the principles originally laid out by the Supreme Court in their cases. Due to their headquarters in the state, even if this Court chooses to adopt the local presence test, the law should be found nondiscriminatory as applied to ACES.

B. Vandalia has not placed any undue burdens on ACES

The nondiscriminatory law passed by Vandalia also complies with the dormant commerce clause because the burden placed on ACES is rational in relation to the local benefits.

Non-discriminative laws can still violate the dormant Commerce Clause if 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). In comparison with incidental burdens on interstate commerce, the relative importance of ensuring clear and substantial public benefits to the local populace counsels courts to find that a law does not violate the dormant Commerce Clause. *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth*., 550 U.S. 330, 346 (2007).

Courts have recognized the importance of allowing states to give preference treatment to companies providing utility services. *GMC v. Tracy*, 519 U.S. 278, 304 (1997). In *GMC*, the Supreme Court analyzed a state statute allowing designated in-state monopoly companies to provide natural gas to consumers without the burden of a 5 percent tax paid by out-of-state companies providing the same service. *Id*. at 282. The Court understood that "the importance of traditional regulated service to the captive market makes a powerful case against any judicial treatment that might jeopardize [the monopoly's] continuing capacity to serve the captive market." *Id*. at 304. Multiple times through the opinion the Court makes reference to similar structures of regulation between the gas and electric markets and seems to suggest that what is true for gas regulation in state would also be true for regulation of electric lines and transmission cables. *Id*. at 289.

Any argument that the transmission lines should be treated differently than the in-home gas distribution in *GMC* fails in the face of the holding of *Arkansas Elec*. *Cooperative Corp. v. Arkansas Pub. Serv. Comm'n.* 461 U.S. 375, 376 (1983). In that case, the Supreme Court rejected a bright-line distinction between wholesale and retail sales and concluded that state regulation of wholesale sales of electricity transmitted in interstate commerce is not precluded under the Commerce Clause. *Id*. at 394-95.

Applying these standards to the current case leads one to believe that Vandalia should have an equal opportunity to regulate in-state utilities, just the same as the court showed in *GMC* and *Arkansas Elec*. The only burden that Appellant points to is the length of the ROFR statute. R. at 15-16. They compare the length of the ROFR at 18 months to the infinite length of the Texas ROFR statute struck down in the Fifth Circuit. R at 15. However, the Texas ROFR is a far different case than the Vandalia ROFR. Having no end at all to the ROFR means that a company is completely barred from entering unless one of the companies makes a choice to admit them. A timed ROFR simply means that if a location has been identified as necessary for power line construction, the companies best suited to build there and ensure consistent power distribution have the first option. If they delay to long or decline to build, then a new company may step in.

At least five other states employ the ROFR to ensure that in-state consumers are provided functioning power grids.[5] North Dakota continues to employ a ROFR with no time limit. N.D. CENT. CODE § 49-03-02(2). These laws were all passed by state legislatures standing for and showing the importance of ensuring that in-state consumers are able to rely on their electricity. The relative burden placed on ACES in small in comparison with that important undertaking. As a result, the statute, like the other state statutes passes the *Pike* balancing test and should be upheld by this Court.

CONCLUSION

The district court appropriately granted PSC's motion to dismiss on all issues. Appellee's respectfully request this Court affirm the district court's decision.

[5] The five states are Minnesota, MINN. STAT. § 216B.246, subdiv. 3; Nebraska, NEB. REV. STAT. § 70-1028; Oklahoma, OKLA. STAT. tit. 17 § 292; South Dakota, S.D. CODIFIED LAWS § 49-32-20; and North Dakota, N.D. CENT. CODE § 49-03-02(2).

CERTIFICATE OF SERVICE

Pursuant to *Official Rule IV*, *Team Members* representing Vandalia PSC 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. 4