UNITED STATES COURT OF

APPEALS FOR THE TWELFTH

CIRCUIT

C.A. No. 22-0682

APPALACHIAN CLEAN ENERGY
SOLUTIONS, INC.,

Appellant,

-v.- C.A. No. 22-0682

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

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VANDALIA

BRIEF FOR APPELLEE-INTERVENOR

Team 12

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JURISDICTIONAL STATEMENT

I. District Court Jurisdiction

The United States District Court for the Northern District of Vandalia had jurisdiction of the case docketed as No. 22-0682 pursuant to 28 U.S.C. § 1331. The district court's federal question jurisdiction was based on the petitioner's claims of alleged violations of the Supremacy Clause of Article VI, Clause 2 of the United States Constitution and the Commerce Clause of Article I, Section 8, Clause 3 of the United States Constitution.

II. Court of Appeals Jurisdiction

The United States Court of Appeals for the Twelfth Circuit has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The district court issued a final judgment on the aforementioned claims in an order granting respondents' motion to dismiss all issues on August 15, 2022, and the petitioner filed a timely appeal to the order on August 29, 2022.

STATEMENT OF THE ISSUES PRESENTED

I. Whether ACES has standing, given that it did not suffer an injury in fact as it is not subject to the Capacity Factor Order and its anticipated injuries as a result of the CFO and ROFR are merely speculative.

II. Whether the PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution given that the FPA grants the states the right to regulate retail electricity sales and the PSC has included a mechanism to enable utilities to recover costs incurred by the order from retail ratepayers and offset potential impacts on the wholesale market.

III. Whether Vandalia's statutory ROFR violates the Supremacy Clause of the U.S. Constitution, given that FERC Order 1000 only requires the removal of a federal right of first removal from commission-approved tariffs and authorizes states to continue regulating the permitting and construction of transmission facilities.

IV. Whether Vandalia's statutory ROFR violates the dormant Commerce Clause of the U.S. Constitution, given that ACES is a Vandalia corporation that is therefore not vulnerable to protectionist discrimination and the Native Transmission Protection Act has the purpose of improving the efficiency of the electric transmission system by incentivizing more responsive, in-state companies.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

Appalachian Clean Energy Solutions ("ACES"), the largest independent transmission company in the United States wants to build the Mountaineer Express, a large transmission project within the PJM Interconnection ("PJM"), the regional transmission organization ("RTO") responsible for operating the transmission grid of 13 states (and the District of Columbia), including Vandalia. R. at 1. ACES claims it suffered injuries because of the actions of the Vandalia Public Service Commission ("PSC"). One theory ACES alleges relates to the Mountaineer Express project; it claims Vandalia's Native Transmission Protection Act ("NTPA"), which allows incumbent transmission facilities in Vandalia right of first refusal ("ROFR"), unconstitutionally burdens its ability to build the project in the state. R. at 9. It separately alleges that the PSC's May 15th Capacity Factor Order ("CFO"), a provision that requires Vandalia-based coal-fired facilities to operate at 75% capacity, unconstitutionally manipulates energy price markets, and causes signals in the market that damage its business. R. at 7.

ACES separately seeks to challenge the Vandalia NTPA as a violation of the dormant Commerce Clause. The NTPA establishes a ROFR for any Vandalia incumbent transmission project developer (a "public utility that currently owns, operates, and maintains transmission facilities within the state") to establish priority permitting authority over any non-incumbent developer within 18 months of their filing of permits. *Vand. Code § 24-12.3(d).* This effectively allows first access to projects for incumbent developers, should they choose to avail themselves of the permits within the window outlined in the statute. ACES argues this unfairly benefits in-state corporations over out-of-state bodies in violation of the dormant Commerce Clause.

The PSC argues that because ACES is incorporated in Vandalia, there is no protectionist bias against an out-of-state party in this particular matter. Furthermore, two factors alleviate any possible violation of the dormant Commerce Clause: any potential bias against non-incumbent developers is only applicable for a limited amount of time (the 18-month ROFR period), and there is a strong public benefit to allowing incumbent transmission facilities right of first access to projects, as incumbent companies are in the position to be more responsive to local concerns than those that are not already operating in-state.

In addition, the PSC has determined that ACES is not definitionally a "public utility" according to Vandalia statute (as it only provides wholesale power sales, not retail), and therefore is not able to utilize previous right of way access built and maintained by LastEnergy. This ruling has caused ACES to speculate it will not have access to any pre-existing right of way, or eminent domain authority, significantly increasing the cost of the Mountaineer Express project.

ACES also argues that the PSC's CFO violates the Supremacy Clause by subverting the Federal Power Act ("FPA"). The CFO was a response to declining coal power production in the state of Vandalia, and was specifically authorized by the state's legislature. Vandalia's identity as an energy exporter (as one of only five states that sends more energy into the grid than it used internally) relies on the continued use of its large coal reserves. Vandalia's middle class also relies on the jobs provided by the coal industry, making coal generation a salient issue for the welfare of Vandalia citizens. R. at 6.

Vandalia's energy market is internally served by two corporations, LastEnergy and the Mid-Atlantic Power Company ("MAPCo"), both headquartered in Ohio. The Capacity Factor Order requires LastEnergy and MAPCo to operate their coal-powered facilities within Vandalia at 75% capacity, which PSC fact-finding determined to be economical for both companies. R. at 8. Although the CFO may prevent these companies from maximizing their profits by requiring them to operate the coal plants, which are less efficient and thus more costly than their other energy generation sources, the PSC has permitted the companies to recover these disparities by imposing a power cost surcharge on retail customers.

ACES argues that this requirement effectively sets a wholesale rate for the entire PJM connected region, subverting FERC's regulation scheme aimed at achieving the FPA's goal of promoting transparent and competitive energy production in the regional marketplace. The CFO, according to ACES, is preempted by the FPA, and is thus a violation of the Supremacy Clause.

II. PROCEDURAL BACKGROUND

On June 6, 2022, ACES filed suit against the Vandalia PSC in the District Court for Vandalia, alleging two separate claims: first, that the PSC's Capacity Factor Order is preempted by the FPA because it has the potential to alter PJM price signals in a way that subverts FERC's method for regulating the wholesale energy market. Second, ACES alleges Vandalia's ROFR is invalid under the Supremacy Clause because it is preempted by FERC Order 1000, promulgated by the FPA, and the dormant Commerce Clause because it discriminates against out-of-state entities.

The PSC responded by moving to dismiss each complaint. The PSC argued that ACES had no standing to challenge the Capacity Factor Order, as it does not operate any facility subject to its control, and ACES is not a ratepayer affected by it. PSC alleges all injury suffered by ACES is purely hypothetical, especially in light of an economic study that shows coal plants subject to the Capacity Factor Order could still operate economically. The PSC also argued that, even if ACES could properly assert standing, the CFO includes no provision that requires MAPCo and LastEnergy to sell energy into PJM, and thus any obligations to sell into the market that could lead to distorted prices are controlled under private contracts between those energy producers and PJM.

The district court granted the PSC's motion to dismiss. As to the Capacity Factor Order, the court determined that ACES lacks standing, and goes on to explain that even if ACES did have standing, the Order does not violate the Supremacy Clause. The court also addressed the ROFR, stating that it is not preempted by Order 1000, and does not violate the dormant Commerce Clause. Instead of following the Fifth Circuit's doctrine laid out in *NextEra Energy Capitol Holdings, Inc. v. Lake,* 48 F. 4th 306, 324 (5th Cir. 2022), the court determined the place of incorporation controls. It also applied the *Pike* balancing test, and determined burdens on interstate commerce did not outweigh the local benefits intended by the Vandalia legislature.

SUMMARY OF THE ARGUMENT

This Court should affirm the decisions of the district court, holding that ACES does not have standing to challenge the CFO, that the CFO is not preempted by the FPA, that the ROFR is not preempted by the FPA, and that the NTPA does not violate the dormant Commerce Clause.

First, the district court appropriately held that ACES did not have standing to bring its claim because ACES is not subject to the CFO. Therefore, it will not be directly impacted by the CFO and is thus unable to allege an injury with any particularity. Without being able to allege a concrete injury, ACES is unable to meet the elements required for standing pursuant to Article III of the U.S. Constitution.

Second, even if ACES could successfully establish standing, the CFO is neither field preempted nor conflict preempted by the FPA. The FPA's primary purpose is to regulate the wholesale electricity market, therefore, absent evidence that the PSC's actions are frustrating that purpose, there is no evidence of conflict preemption. Because there are no provisions in the CFO that mandate conduct that will directly impact the wholesale market and because any potential impacts on the wholesale market will be incidental, the district court correctly held that the CFO is not preempted by the FPA. Furthermore, the CFO is intended to regulate the generation of electricity and Vandalia electricity's retail rates, both of which are within the regulatory purview of the states as authorized by FERC. By staying within its regulatory domain, the PSC's CFO is not field preempted by the FPA.

Third, Vandalia's ROFR provision in the NTPA is not preempted by FERC Order 1000 because Order 1000 only requires the removal of a federal ROFR from transmission tariffs. By specifying "federal" in this order, FERC did not foreclose the opportunity to enact state ROFR statutes. This conclusion is supported by the fact that FERC has authorized similar ROFR provisions in states other than Vandalia, and by the fact that Order 1000 asserts that the rule does not preclude states from regulating the construction and permitting processes for their transmission facilities.

Finally, the NTPA's ROFR provision does not violate the dormant Commerce Clause because it has a non-protectionist purpose that serves an important local interest. By prioritizing incumbent transmission facilities, the ROFR fulfills the purpose of maintaining an efficient electric grid by ensuring that its transmission lines are being managed by responsive companies that are already operating within Vandalia and are therefore familiar with its system. Passing the necessary regulation to attain this aim is within the police powers of the state, and its associated benefits outweigh any alleged burden on interstate commerce the ROFR could potentially impose. Furthermore, the ROFR does not impose an absolute restraint on non-incumbent transmission facilities, but rather allows incumbent facilities an 18-month window to decide whether or not to build the proposed transmission line.

ARGUMENT

I. The district court correctly held that ACES did not have standing to challenge the PSC's Capacity Factor Order.

In order for ACES to have standing to challenge the PSC's CFO, they must prove three elements: 1) an "injury in fact" that is both a) concrete and particularized, and b) actual or imminent, 2) a causal connection between the injury and the conduct complained of that is "fairly traceable" to the defendant in the action, and 3) it must be likely that the remedy offered by the court will provide redress to the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). These elements are pursuant to the "case or controversy" requirement of Article III, and ensure courts are only adjudicating cases in which they have proper authority. See, e. g., *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The district court correctly held that ACES failed to assert proper standing because it does not meet any element of the *Lujan* test. ACES did not suffer any direct or tangible injury, as it is not subject to the CFO and one can only speculate as to the impact the CFO will have on ACES at this time. Absent an allegation of concrete injury, ACES cannot establish the other two elements of the test, as there is no injury to which to connect a cause to the PSC's conduct and no injury that currently demands relief.

A. While ACES alleges an imminent injury, the allegation is merely speculative and thus not sufficiently particularized to have standing.

ACES's primary allegation of injury hinges on a speculative theory that the PSC's order will cause fluctuations in the prices of energy sold on the PJM interconnection, subverting the purpose of the FPA, which would trigger a preemption of the state law in favor of the federal rule. This alleged manipulation of price signals, ACES argues, has the potential to damage the stability of prices in the marketplace, needlessly increasing costs.

Lujan establishes that in order for an issue to have standing before a court, the alleged injury must have already happened, or must be anticipated to occur imminently. *Lujan*, 504 U.S. at 560. In ACES's case, this element is met: while the CFO is not yet active, it would likely meet the situation-specific timeline that would be recognized under precedent as imminent. *See Clapper v. Amnesty Int'l USA,* 568 U.S. 398, 432-33 (2013) (reasoning that to meet the imminence requirement, the alleged injury must not be temporally remote or unreasonably distant from the action, and must be nearly certain to take place). However, the allegedly imminent injury must also be concrete and particularized, and in its failure to allege an injury other than mere speculation that it will suffer economically, ACES does not meet this element.

Lujan, 504 U.S. 555 at 567. The PSC ordering third parties LastEnergy and MAPCo, which stand outside the legal action before the Court, to operate coal fired power plants at 75% capacity has no direct or concrete impact on ACES, which does not currently operate any plant in Vandalia subject to the CFO.

Additionally, the CFO does not include any provision that requires the entities subject to its capacity factor requirements to sell to PJM. Therefore, any alleged harm a company like ACES could theoretically experience would be the result of PJM's agreements with LastEnergy and MAPCo as a result of their Fixed Resource Requirement ("FRR") statuses. Through the FRRs, LastEnergy and MAPCo operate contractually with PJM, and are obligated to generate sufficient capacity to supply their respective service areas[1]. In this arrangement, the state of Vandalia imposes no obligation on LastEnergy and MAPCo to participate in the wholesale market with PJM. The PSC is unable to control the contractual obligation to PJM, and this intervening conduct between PJM and the entities subject to the CFO further weakens the causal link between the actions of the PSC and the injury that ACES alleges.

B. Even if there were a particularized injury, the connection between the CFO and the impact on energy market rates alleged by ACES is too tenuous to feasibly establish causality.

For there to be a causal connection between an injury and a defendant's conduct, there must first be an injury in fact. Therefore, the lack of a concrete injury, reasoned above, necessarily precludes a causal link to an action by the PSC for purposes of standing threshold. However, assuming the injury ACES alleges were sufficiently concrete, it would still suffer from an inability to prove that the injury was in fact caused by the CFO.

[1] Reliability Assurance Agreement Among Load Serving Entities in the PJM Region, PJM Interconnection, LLC, https://pjm.com/directory/merged-tariffs/raa.pdf

Energy markets are inherently unpredictable. Variables such as demand, weather, or even accidental damage to fuel delivery systems can influence the market clearing rate.[2] These confounding variables render the task of determining the exact cost that ACES may face as a result of the CFO implausible. Trends in the market are not determinative and market rates are volatile, as there are many factors and events that could potentially raise the rate of electricity production.[3] Assuming energy costs increase after the order takes effect, to assess the root cause of this increase would be an impossible effort of guesswork, leaving the court to try to distinguish potential market costs incurred by ACES related to the CFO from costs incurred by changes in weather, geopolitical circumstances, or supply chain issues, among other factors.

Beyond the speculative nature of a potential influence on the market rate of energy, the PSC conducted a finding of fact that concluded that entities subject to the CFO may operate economically within the bounds of the order, and in the event that they cannot do so, the PSC authorized access to cost recovery measures that would enable them to shift the disparity in costs to retail consumers. R. at 9.

C. Absent an allegation of concrete injury, ACES cannot establish that redress would provide relief.

ACES seeks an equitable remedy from the court, requesting the court to hold the CFO preempted by the FPA and thus prevent it from taking effect. Under ACES's theory, this redress would prevent any market interference, therefore enabling it to avert the alleged costs it will

[2] U.S. Energy Information Administration - EIA - independent statistics and analysis, Prices and factors affecting prices - U.S. Energy Information Administration (EIA) (2022), https://www.eia.gov/energyexplained/electricity/prices-and-factors-affecting-prices.php (last visited Jan 26, 2023).

[3] U.S. Energy Information Administration - What Is Price Volatility? U.S. Energy Information Administration (EIA), https://www.eia.gov/naturalgas/weekly/archivenew_ngwu/2003/10_23/Volatility%2010-22-03.htm

incur from the CFO. However, as reasoned above, the justification for this redress is grounded in a speculative injury with a tenuous causal connection. Without evidence of how the markets may react to the CFO, and with a cost recovery mechanism in place to mitigate any potential impacts, any alleged harm to ACES is unactualized and ambiguous. The Court preventing the CFO from taking effect would grant a remedy for an injury that has not been alleged with sufficient particularity, is uncertain to occur, and certainly does not yet exist.

II. Even if ACES had standing, the district court correctly held that the Capacity Factor Order is not preempted by the FPA.

Pursuant to the Supremacy Clause of the United States Constitution, any law passed by the federal government is necessarily supreme to any law passed by a state government, and thus federal laws take priority "when state and federal law clash." U.S. Const. art. VI, cl. 2; *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 325 (2015). In the event that Congress does not explicitly forbid the states from regulating in a particular arena, state laws can be invalidated by either conflict preemption or field preemption. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009). Field preemption occurs when Congress has legislated to the extent that its statutes "occupy an entire field of regulation, leaving no room for States to supplement federal law." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989). Conflict preemption exists either where it is impossible to adhere to both state and federal laws, or where the state law interferes with "the full purposes and objectives" of Congress. *California v. ARC America Corp.*, 490 U.S. 93, 100-01 (1989). Thus, in cases where there is no applicable federal law to govern the conduct or regulatory processes at issue and there is no finding of field preemption or conflict preemption, state legislatures have the authority to pass laws that fill the regulatory gap.

As this doctrine applies to the present case, the FPA delegates the regulation of the sales of wholesale electricity to FERC, assigning the Commission the responsibility to ensure that such sales are "just and reasonable." Section 205 (16 U.S.C. § 824c); R. at 13. On the other hand, FERC leaves to "the States alone, the regulation of [retail electricity sales]." *Hughes v. Talen Energy Mktg.*, 578 U.S. 150 (2016). Therefore, in the absence of evidence that the CFO directly impacts the wholesale electricity market, there is no evidence of field preemption in violation of the Supremacy Clause. With a finding that MAPCo and LastEnergy can comply with both state and federal regulations concurrently without impeding the objectives of the FPA, there is no evidence of conflict preemption.

A. The Capacity Factor Order has no direct impact on the wholesale market price, and is thus not conflict preempted by the FPA.

Conflict preemption jurisprudence assumes that the states' police powers ought not be preempted by federal laws unless doing so "was the clear and manifest purpose of Congress." *Wyeth*, 555 U.S. at 565. Therefore, unless it is impossible to adhere to both state and federal regulations, or the state regulation frustrates the express purpose of a federal act, there can be no finding of conflict preemption. Because it is possible for actors to adhere to the CFO and FERC Orders and because the CFO does not frustrate the FPA's purpose of providing a fair, competitive market for wholesale electricity, the court should hold that the PSC's CFO does not violate the Supremacy Clause. Section 206 (16 U.S.C. § 824e).

First, it is apparent that it is possible for MAPCo and LastEnergy to adhere to both federal and state regulations. FERC Order 888 was authorized to promote competition in the wholesale market "through open access non-discriminatory transmission services by public utilities." 75 F.E.R.C. ¶ 61,080 at 4. There are no terms in the CFO that will interfere with MAPCo and LastEnergy's ability to participate in this open access system. Rather than dictating to whom MAPCo and LastEnergy will sell their energy or for what price, which would in fact subvert FERC's goals by creating a discriminatory market, the CFO will merely require MAPCo and LastEnergy's coal-fired plants to operate at 75% capacity. This regulation is in keeping with the intent expressed in the Final Rule on Order 888: "We intend to be respectful of state objectives so long as they do not balkanize interstate transmission of power or conflict with our interstate open access policies."[4] With the CFO, the PSC's objective is to exercise the state's police powers to bolster the coal industry, which is essential to Vandalia's economy and thus the public welfare. This objective does not conflict with the open access policy.

Furthermore, it is evident that the federal and state regulations are not inherently contradictory because the cost recovery mechanism authorized by the PSC for additional costs that result from the CFO has precedent within FERC's regulatory scheme. FERC Order 888 allows public utilities to recover "verifiable stranded costs associated with providing open access." *Id*. at 5. Although this mechanism was initially conceived to offset certain costs associated with wholesale contracts in the midst of FERC's mandated restructuring process, its intended effect is analogous to the intent of the PSC's cost recovery mechanism. *Id*. at 451. The cost recovery mechanism authorized by FERC acknowledges that adherence to the federal regulations may result in costs that energy companies otherwise would not experience, and thus permits such entities to recover costs from FERC. *Id.* Similarly, the PSC acknowledges that, although the required capacity factor has been assessed to be economical, in the event that it results in additional costs, affected entities should be permitted to recover any disparity between

[4] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21542 (May 10, 1996)

the actual costs and the market clearing price from retail consumers. In both instances, there could feasibly be an incidental impact on the wholesale market, but not a direct impact.

Second, the CFO does not interfere with the purposes of the FPA. The FPA's objective is to regulate "the transmission of electric energy in interstate commerce and … the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824 (b). As asserted in *Coalition for Competitive Electricity, Dynergy Inc. v. Zibelman* 906 F.3d 41, 50 (2d Cir. 2018), FERC's rule-making authority is "limited to 'rules or practices that directly affect the [wholesale] rate' so that FERC's jurisdiction does not 'assum[e] near-infinite breadth.'" Thus, an interference with the FPA's purpose would manifest as a policy that would directly manipulate the wholesale market, such as setting mandatory price caps for state power generators' bids into the wholesale market.

By contrast, policies that have an incidental impact on the market are not only permitted, but expected, as there is "congressionally designed interplay between state and federal regulation." *Id*. at 50. Therefore, evidence of an incidental impact on a wholesale market would not result in a presumption of preemption, as FERC has authorized programs "... that increase capacity or affect wholesale market prices … including when that … 'allow[s] states to affect' the price.'" *Id*. at 56. Because increasing capacity is within the authority of the state to regulate power generation, a state regulation that impacts the market price "only by increasing the quantity of power available for sale is not preempted by federal law." *Electric Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2018).

Applied to the present case, the CFO lies within Vandalia's regulatory authority to increase the production of energy from MAPCo and LastEnergy's coal-fired plants. In doing so, it may incidentally impact the wholesale market price, but as the court asserted in *Hughes*, states are permitted to regulate within their domain "even when their laws incidentally affect areas within FERC's domain." *Hughes*, 578 U.S. at 151 (2016). In *Hughes*, the court held that Maryland's program requiring load serving entities (LSEs) to enter into long-term contracts with a new power plant, effectively offering subsidies conditioned on the power plant selling its capacity to the wholesale electricity market, was preempted by the FPA. *Id*. The crux of the problem with Maryland's program was not that the state was subsidizing in-state power generation, but rather that it was conditioning payments to the power plant on its participation in PJM's wholesale market. *Id*. at 165. This created an impermissible "tether" between the state's domain of regulating power generation and FERC's domain of setting reasonable prices for wholesale electricity, directly impacting the capacity market. *Id*. at 166.

By contrast, there is nothing within the CFO that mandates MAPCo and LastEnergy to sell the power from their increased capacity in the PJM capacity market. While these entities may be required to sell their capacity to PJM through the Fixed Resource Requirement (FRR) Alternative, this is a private agreement between the power plants and PJM. Under PJM's Reliability Assurance Agreement Schedule 8.1, FRR entities can be permitted to use the FRR Alternative for "only part of its load in the PJM Region."[5] Therefore, in the event that MAPCo and LastEnergy do not want to sell their additional capacity to PJM, they can address that with PJM directly. Such agreements are outside the realm of the PSC's control and are entirely distinct from the CFO, and should therefore not be considered when assessing whether there is a tether between the CFO and the wholesale market.

B. The Capacity Factor Order may have an impact on retail rates, a domain of regulation the FPA explicitly vests in the States, and is thus not field preempted by the FPA.

[5] Reliability Assurance Agreement Among Load Serving Entities in the PJM Region, PJM Interconnection, LLC, https://pjm.com/directory/merged-tariffs/raa.pdf

Field preemption occurs when Congress has regulated a domain to such an extent that there is no room for states to pass their own legislation directed at said domain. *Murphy v. National Collegiate Athletic Ass'n*, 138, S.Ct. 1461, 1480 (U.S. 2018). Therefore, in instances where a congressionally authorized entity like FERC has acknowledged a clear demarcation between federal and state regulatory domains, and state actions do not cross that demarcation line, there can be no finding of field preemption. As Justice O'Connor has asserted, alleging preemption is "particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc*. 489, U.S. 141, 166-67 (1989).

This phrase captures the essence of the dynamic between federal and state interests as authorized by the FPA, which grants FERC "exclusive jurisdiction over wholesale sales of electricity in the interstate market," while delegating the regulation of retail electricity sales to the states. *F.E.R.C. v. Electric Power Supply Ass'n*, 577 U.S. 260, 264-65 (2016). This regulatory balance reflects Congress's awareness of the cooperation between federal and state entities in promulgating the FPA's goals, and undermines any allegation of field preemption in which a state's regulation is rooted within its jurisdiction over the retail electricity market, such as the PSC's CFO.

Although the PSC conducted a finding of fact that concluded the CFO would be economical for MAPCo and LastEnergy, it concedes that there may be a disparity between the market clearing price and the actual costs MAPCo and LastEnergy will incur from adhering to the CFO's capacity factor requirements. Instead of directing MAPCo and LastEnergy to change their PJM bids to recover these costs, which would directly impact the wholesale market, the

PSC authorized them to recover any actual costs that stem from the CFO from retail ratepayers. R. at 8. Such an authorization is firmly within the purview of the states' regulatory domain, as the FPA grants the states exclusive jurisdiction over electric generation facilities, including retail sales. *Zibelman*, 906 F.3d at 46.

This cost recovery mechanism is analogous to the state subsidies enacted in the form of Zero Emissions Credits (ZECs) by the New York Public Service Commission (NYPSC), which were held not preempted in *Zibelman*. *Id*. at 55. In *Zibelman*, the court reasoned that the nuclear generators that stood to benefit from the ZECs were "price-takers": unable to change their energy output, they "sell their entire output at the market clearing price, even if the price is below the cost of production." *Id*. at 46-47. With the objective of prioritizing renewable energy, the NYPSC enacted the ZEC program to enable nuclear generators to afford to continue operating, offsetting the costs the plants were losing in the wholesale auction with subsidies. *Id*. at 47. The plaintiffs alleged that this program alters the prices of FERC's wholesale market and "distorts the market mechanism" for assessing when power plants should retire. *Id*. at 48. However, the court asserted that, unlike in *Hughes*, the ZEC program does not require plants to "participate in the wholesale market," the "fatal defect" that rendered Maryland's program in *Hughes* impermissible. *Id*. at 52. Emphasizing the fact that the *Hughes* holding was narrow, the court in *Zibelman* concluded that the ZEC program was not field preempted because the "downward pressure" on the wholesale market was incidental. *Id*. at 54; *see also Star*, 904 F.3d. at 523.

Similarly, with its CFO, the Vandalia PSC is encouraging the coal plants to become price-takers: they will not be able to reduce their output below the required capacity factor, and the market clearing price will likely be below their costs of production. In the same way that New York instituted its ZEC program for the welfare of its state by supporting renewable energy sources, the Vandalia PSC is using its police powers to support coal plants for the sustained vitality of the state's economy. The central distinction between *Zibelman* and the present case is that, rather than authorizing the coal plants to recoup these costs from state-sponsored subsidies, the PSC is permitting the plants to recover costs directly from retail customers. This approach has been authorized by FERC: "This Final Rule will not affect or encroach upon state authority … over utility generation and resource portfolios; and authority to impose non-bypassable distribution or retail stranded cost charges." 75 F.E.R.C. ¶ 61,080 at 544. Because the court in *Zibelman* held that the analogous ZEC program was not field preempted and because FERC has expressly permitted states to regulate utility generation and to impose stranded cost charges via retail prices, the court should also find that the CFO is not field preempted by the FPA.

III. The district court correctly held that the ROFR is not preempted by Order 1000.

As reasoned above, a state statute violates the Supremacy Clause when it regulates an area expressly prohibited by Congress, when it frustrates the aims of Congress, or when Congress has legislated the field to the extent that there is no space for state regulation to supplement. *Wyeth*, 555 U.S. at 565; *ARC America Corp*. 490 U.S. at 100-01; *Cent. Pipeline Corp.* 489 U.S. at 509. As applied to Vandalia's ROFR pursuant to the Native Transmission Protection Act, there is no evidence of preemption by the FPA because the intent of the Commission to limit the scope of its prohibition to federal ROFR provisions is rendered apparent through its use of the term "federal ROFR" and its express permission to allow states to continue regulating "the construction of transmission facilities, including … siting or permitting of transmission facilities." 136 FERC ¶ 61,051 (F.E.R.C. July 11, 2011) at ¶ 227. This provision indicates an acknowledgment from FERC that Order 1000 needs to strike a balance between the federal interest of incentivizing competition and the state interest of exercising its police powers to create a reliable and responsive electric grid. *LSP Transmission Holdings II, LLC v. Federal Energy Regulatory Commission*, 45 F.4th 979, 999 (D.C. 2022).

A. FERC has authorized similar state ROFR provisions, indicating that such provisions are not preempted by the FPA.

As the regulatory agency responsible for achieving the objectives of the FPA, FERC reviews state actions for violations of FERC Orders and has the authority to impose penalties in the event of non-compliance. 16 U.S.C. § 823(b). Implicit in FERC's approval of state actions is the notion that such actions are not invading FERC's regulatory domain. Therefore, when FERC has expressly approved of a state action, it would strain reason to assert that such state action is preempted by federal law.

Such is the case with the authority of states to enact ROFR statutes. In 2015, Midcontinent Independent System Operator ("MISO"), the transmission entity governing Minnesota, received FERC approval to include Minnesota's ROFR provision into its tariff. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1024 (8th Cir. 2020). Despite a challenge to this provision by a transmission company arguing that it was preempted, FERC ruled that MISO was entitled to include state laws in its transmission planning process. *Id*. This ruling was affirmed in *MISO Transmission Owners*, holding that Order 1000 only served to prohibit the federal ROFR, "not ROFR laws enacted by states." *Id*.; *MISO Transmission Owners v. F.E.R.C.*, 819 F.3d 329, 337 (7th Cir. 2016). The ROFR in *Sieben* is analogous to the ROFR authorized by Vandalia's NTPA, allowing an incumbent transmission facility to "construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan." *Sieben*, 954 F.3d at 1027-28. Because the ROFR in *Sieben* was approved by FERC and because FERC's decision to approve the ROFR was upheld by the

Seventh Circuit in *MISO Transmission Owners*, the court should find that Vandalia's ROFR is proper as well. *Id*. at 1024-25.

B. FERC Order 1000 prohibits a federal ROFR, indicating the intent to leave the door open for state ROFR provisions.

The balance between federal and state powers borne out of the courts' interpretation of the Tenth Amendment requires Congress to "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991). The anti-commandeering doctrine that stems from this interpretation asserts that Congress is not permitted to "commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *New York v. United States*, 505 U.S. 144, 161 (1992). Therefore, absent the manifestation of clear intention embodied in federal legislation, the court should respect the regulatory processes of the states.

Applied to the present case, FERC Order 1000 requires transmission providers to remove "a *federal* right of first refusal for a transmission facility" from their tariffs. 136 FERC ¶ 61,051 (F.E.R.C. July 11, 2011) at 12 ¶ 7 (emphasis added). The default presumption in interpreting federal statutory language is that "Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). In including the word "federal," FERC indicates that Order 1000 does not prohibit transmission providers from adhering to any ROFR, but simply requires it to remove the federal ROFR that had previously been commonplace. *Sieben*, 954 F.3d at 1023-1024. This approach does not constitute a clear intent to preempt state regulations; rather, it suggests the opposite: that FERC intentionally constrained the prohibition to federal ROFR provisions, leaving states the opportunity to enact their own ROFR statutes as they deem necessary.

C. FERC Order 1000 expressly grants states the authority to regulate the construction and permitting of transmission facilities.

Immediately following the requirement for transmission providers to remove federal ROFR provisions from their tariffs, FERC Order 1000 asserts the following disclaimer: "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." 136 FERC ¶ 61,051 (F.E.R.C. July 11, 2011) at 176 ¶ 227. Pursuant to this component of Order 1000, in a rehearing on PJM's compliance with FERC Orders in 2015, FERC expressly permitted PJM to designate incumbent transmission owners to build transmission projects, reasoning that such a provision "merely acknowledges state law and [does] not create a federal right of first refusal." Second Compliance Order, 147 FERC ¶ 61,128 at P 130. Thus, FERC concluded that "PJM may retain the provision that recognizes state or local laws or regulations as a threshold matter in the regional transmission planning process." *Id*. at P 133. It is therefore reasonable to presume that FERC would regard Vandalia's statutory ROFR in the same light, as it authorizes the state, through the NTPA, to regulate the transmission facilities' permitting process by choosing to withhold permits from non-incumbent transmission facilities until the 18-month ROFR period has expired. R. at 9. FERC's explicit authorization of PJM to abide by state regulations that prioritize incumbent transmission facilities demonstrates that the ROFR provision in the NTPA is not preempted by FERC Order 1000.

IV. The District Court correctly held that the NTPA does not violate the dormant Commerce Clause.

The U.S. Constitution allows Congress the authority to regulate commerce "among the several states." U.S. Const. Art. I, sec. 8, cl. 3. This power has been interpreted broadly;

Congress has vast authority to pass legislation that facilitates effective and free commerce between and within the states. *See Wickard v. Filburn,* 317 U.S. 111 (1942); *see also United States v. Darby,* 312 U.S. 100 (1941). Congressional authority over commerce has also been interpreted to include state behaviors covered under the dormant Commerce Clause, a doctrine that prohibits states from engaging in protectionist policies against one another, such as by establishing tariffs on out-of-state goods or enacting legislation that discriminates against out-of-state commerce explicitly. *See Hughes v. Oklahoma*, 441 U.S. 322 (1979). The purpose of the dormant Commerce Clause is to limit Balkanization (i.e. the economic disunity and isolation of related states) and ensure the continued efficiency of interstate commerce. *Id.* Therefore, facially discriminatory legislation that intentionally burdens interstate commerce is unconstitutional. *Id.*

However, in circumstances where the state legislation does not facially discriminate against out-of-state actors, but may have an incidental effect on interstate commerce, the legislation is subject to a balancing test to determine whether it violates the dormant Commerce Clause. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The *Pike* balancing test requires the court to inquire whether a "burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id*. In cases where the putative local benefits outweigh the burden imposed, the law is sustained. *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 103 (2d Cir. 2017). Therefore, in alleging that Vandalia's ROFR pursuant to the Native Transmission Protection Act violates the dormant Commerce Clause, ACES must demonstrate that the restriction imposed on commerce is "clearly excessive" compared to the benefit to be gained by the community. Because any burden is currently speculative, and because Vandalia has a clear and compelling interest to support its economy through the sustained production of coal, the balancing test weighs in favor of upholding the ROFR.

A. Vandalia's ROFR serves a compelling local interest that outweighs any alleged burden on interstate commerce.

Discussion during the Vandalia legislature's passage of the NTPA indicates that the ROFR provision was not established to further its economic interests, but rather to maintain the efficiency of its electric grid. In testimony in support of the Native Transmission Protection Act's passage, a representative of LastEnergy argued that the Act would enable "more responsive" incumbent facilities to maintain control of the transmission lines. R. at 9. This indicates a legitimate, non-protectionist rationale: because incumbent transmission owners are more familiar with in-state practices and can more feasibly be held accountable by their local consumers and residents, prioritizing incumbent owners has the foreseeable benefit of facilitating maintenance of facilities and rapid resolution of issues as they arise. Because reliable access to electricity is fundamental to modern life, enabling Vandalia citizens to eat, work, and enjoy recreational activities, ensuring the functionality of the electric grid by prioritizing more responsive, incumbent transmission owners serves a legitimate public interest. The only compelling limit on the state's legitimate interest is a prohibition on intruding on FERC's authority over interstate wholesale rates, which the PSC does not attempt to do. *Hughes,* 578 U.S. at 164.

B. Vandalia's ROFR does not authorize disparate treatment of in-state versus out-of-state entities.

The dormant Commerce Clause's purpose is to deter economic protectionism, defined as "regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274-74 (1988). Therefore, if the CFO were to violate the dormant Commerce Clause, it would treat in-state and out-of-state entities differently. However, the PSC does not make determinations on whether an actor may exercise a ROFR based on its statehood, but rather its incumbency status. An incumbent utility operator is defined as:

> "[A]ny public utility that owns, operates, and maintains an electric transmission line in this state; any generation and transmission cooperative electric association; any municipal power agency; any power district; any municipal utility; or any ... entit[y] ... engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia." R. at 10.

This definition makes no reference to the utilities' places of incorporation, principal places of business, or statehood; if the ROFR conferred benefits on businesses incorporated and headquartered in Vandalia, that would clearly indicate the intent to confer economic advantages to the state. Instead, the ROFR prioritizes any public utility that operates within Vandalia, regardless of their contacts or presence in other states. As such, the ROFR offers economic advantages to out-of-state entities such as LastEnergy, the largest incumbent transmission line owner operating in Vandalia, which is headquartered and incorporated in Ohio. Therefore, it is apparent that the ROFR does not burden out-of-state competitors like LastEnergy, but rather benefits them.

C. Even if the ROFR did authorize disparate treatment for in-state vs. out-of-state entities, ACES's corporate statehood is based in Vandalia and it is therefore not subject to protectionist discrimination.

ACES alleges a violation of the dormant Commerce Clause based on the premise that Vandalia is discriminating against out-of-state entities, yet ACES itself is a Vandalia company. A corporate entity's statehood can be determined by multiple factors. While the lower court found that the place of incorporation controlled, courts can also consider factors such as purposeful availment of state resources, as well as economic and political positioning. *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012).

The district court reasoned that place of incorporation alone determines statehood, making ACES a Vandalia corporation that is therefore not subject to protectionist discrimination. R. at 16. However, while this Court can certainly take the place of incorporation into account when determining statehood, there are other persuasive factors that weigh in favor of finding ACES to be a Vandalia corporation. In addition to place of incorporation, this Court's sister circuits have also relied on factors such as business activity and proximity to political influence in determinations of statehood, both of which lend themselves to the conclusion that ACES is a Vandalia corporation. *Id*. ACES is an energy transmission company positioned in one of the U.S.'s only energy exporting states. Therefore, in addition to being incorporated in Vandalia, ACES has also positioned itself in the state to take advantage of the political and economic proximity to Vandalia's energy industry. In purposefully availing itself of Vandalia's benefits and protections, ACES should be regarded as a Vandalia company.

Thus, ACES's claim under the dormant Commerce Clause contains a logical inconsistency: how can Vandalia be engaging in economic protectionism with the intent of benefiting in-state companies when its ROFR regulation benefits an out-of-state actor like LastEnergy while refusing to confer that benefit to Vandalia, an in-state company? These facts undermine any allegation of discriminatory intent.

D. The NTPA's ROFR is analogous to other states' FERC-approved ROFR laws and distinct from the ROFR law struck down in the Fifth Circuit.

ACES asserts that this court should follow the position taken by the Fifth Circuit in *NextEra,* which held that a Texas ROFR law violated the dormant Commerce Clause because of its strict prohibition on non-incumbent utility operators from building transmission projects in the state. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 314 (5th Cir. 2022).

However, the ROFR in *NextEra* is factually distinct from the ROFR at issue in Vandalia, and *NextEra*'s holding has been persuasively rebutted in holdings from other circuits.

In *NextEra*, the Fifth Circuit struck down the state's ROFR on the basis that it impermissibly burdened interstate commerce. However, Texas's law is significantly different from Vandalia's ROFR provision in a crucial respect: Texas essentially banned any non-incumbent transmission operator from ever servicing the state, whereas Vandalia's NTPA limits the opportunity for incumbent transmission facilities to exercise their ROFR to a more reasonable 18-month window, after which the ROFR expires and the development project is open to non-incumbent proposals. R. at 9. The Fifth Circuit also determined that place of incorporation was not a significant factor in determining statehood, but rather looked to the actions of the transmission operator within the state. *NextEra*, 48 F. 4th at 314. However, as reasoned above, ACES should be considered a Vandalia corporation due to being incorporated in Vandalia and due to its purposeful availment of the benefits to be gained through proximity to its energy industry.

Furthermore, while the Fifth Circuit took this approach in *NextEra*, there have been holdings out of other circuits that contradict the Fifth Circuit's reasoning. When Minnesota passed a law similar to Vandalia's NTPA establishing a ROFR, the Eighth Circuit found that it was not discriminatory, relying on reasoning analogous to our assertion that preference for incumbency does not translate to protectionist discrimination: "... Minnesota's ROFR applies equally to all incumbent electric transmission owners. Both in-state and out-of-state owners may use the ROFR and, thus, it does not discriminate for the former or against the latter." *Sieben*, 954 F.3d at 1025.

Furthermore, many states have passed FERC-approved ROFR laws that are more analogous to Vandalia's NTPA than the law at issue in *NextEra*. *See* Minn. Stat. § 216B.246, subdiv. 3; Neb. Rev. Stat. § 70-1028; Okla. Stat. tit. 17 § 292; S.D. Codified Laws § 49-32-20; N.D. Cent. Code § 49-03-02(2) (statutes allowing incumbent utility operators to exercise a ROFR in new transmission projects, similarly to Vandalia's NTPA). Each of these laws complies with FERC Order 1000, and provides rational justifications for the need to allow a ROFR. All but one also have time limitations (like Vandalia's 18-month window), allowing for non-incumbent operators to enter the market should the incumbent operators pass on the opportunity to construct the facility.

CONCLUSION

For the foregoing reasons we respectfully request this Court (1) affirm the district court's holding that ACES does not have standing to challenge the CFO, (2) that the CFO is not preempted by the FPA, (3) that the ROFR is not preempted by the FPA, and (4) that the NTPA does not violate the dormant Commerce Clause.

<u>CERTIFICATE OF SERVICE</u>

Pursuant to *Official Rule* IV, *Team Members* representing Chairman Will Williamson and Commissioners Lonnie Logan and Evelyn Elkins 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. 12