C.A. NO. 22-0682

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

Appalachian Clean Energy Solutions, Inc.,

Appellant,

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

Chairman Will Williamson,
in his official capacity,
Commissioner Lonnie Logan,
in his official capacity, and
Commissioner Evelyn Elkins,
in her official capacity,

Appellees.

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

BRIEF FOR APPELLANTS

Team No. 29

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

UNITED STATES SUPREME COURT CASES:

UNITED STATES CIRCUIT COURT CASES:

STATE CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

FEDERAL RULES:

REGULATIONS:

LEGISLATIVE MATERIALS

JURISDICTIONAL STATEMENT

The United States District Court for the Northern District of Vandalia had valid subject matter jurisdiction pursuant to 28 U.S.C § 1331. Appalachian Clean Energy Solutions, Inc. timely filed an appeal on August 29, 2022, which this Court granted. R. at 2. This Court has valid jurisdiction pursuant to 28 U.S.C § 1291.

STATEMENT OF THE ISSUES PRESENTED

I. Whether ACES's future economic injury caused by the Vandalia PSC's Capacity Factor Order satisfies the constitutional minimum for standing.

II. Whether the CFO violates the Supremacy Clause by intruding upon the exclusive jurisdiction of the Federal Energy Regulatory Commission ("FERC") under the FPA.

III. Whether FERC Order No. 1000, which eliminates federally recognized rights of first refusal for incumbent electric transmission owners to build transmission lines that connect to their existing facilities, preempts Vandalia's ROFR law that grants this right at the state level.

IV. Whether Section 24, which grants incumbent electric transmission owners a right of first refusal to build transmission lines that connect to their existing facilities, violates the dormant Commerce Clause's prohibitions on state laws that discriminate against interstate commerce.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Appalachian Clean Energy Solutions, Inc. ("ACES") is an international energy company headquartered and incorporated in the State of Vandalia that constructs and operates electric generating plants and interstate electric transmission lines across multiple states. R. at 1. ACES boasts a diverse portfolio of electric generating resources, including coal-fired plants, natural gas-fired plants, three nuclear plants, and renewable facilities. R. at 4. The energy powerhouse generates electricity solely for resale in the wholesale markets, either through purchase agreements with retail electric utilities or by participation in the regional wholesale markets. R. at 4. To decrease its global carbon footprint, ACES has established a plan to gradually close its existing coal plants and replace them with renewable and zero-carbon energy facilities. R. at 5. ACES is committed to achieving zero carbon emissions by 2050. R. at 5.

As part of its decarbonization endeavors, ACES plans to construct a natural gas-fired generating plant (the "Rogersville Energy Center") in southwestern Pennsylvania. R. at 5. To increase the capability of the regional grid to accommodate the electrical output from the Rogersville Energy Center, ACES intends to build a high-voltage transmission line (the "Mountaineer Express") from Pennsylvania to North Carolina—crossing through the State of Vandalia. R. at 1.

ACES's projects face two obstacles from the Vandalia Public Service Commission ("Vandalia PSC"): (1) the Vandalia PSC's Capacity Factor Order ("CFO"), which will ultimately affect wholesale rates and ACES's ability to build new capacity in the region, and (2) the Vandalia PSC's statutory right of first refusal ("ROFR"), which will prevent nonincumbent transmission owners like ACES from building the proposed transmission line. R. at 2.

Federal Energy Regulatory Commission. In 1935, Congress passed The Federal Power Act ("FPA"), which effectively regulated the transmission and interstate sale of electric power. R. at 13. The Act charges the Federal Energy Regulatory Commission ("FERC") with regulating the interstate sale of energy for resale ("wholesale") as well as the interstate transmission of electricity. R. at 13.

Congress created FERC to ensure that energy wholesale rates are "just and reasonable." R. at 13. In accordance with this Congressional purpose, FERC adopted policies encouraging competition in the wholesale energy market. R. at 13. Two such policies, Orders 888 and 2000, resulted in the creation of Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs"). R. at 13. ISOs/RTOs exist to manage wholesale markets on a regional basis by providing generators with access to transmission lines and setting wholesale prices for electricity.

To further increase competition, cost-effectiveness, and timely solutions for regional electric systems, FERC issued Order No. 1000, which eliminated the federally recognized right of first refusal provisions for incumbent utilities. Essentially, Order No. 1000 provides nonincumbent transmission developers an opportunity to participate in the regional planning and expansion of an RTO's electric system. R. at 6.

PJM Interconnection. The PJM Interconnection ("PJM") is the ISO/RTO that serves the mid-Atlantic region, including the State of Vandalia. R. at 3. To accomplish FERC's goal of competitive energy markets, PJM operates two markets: the energy market and the capacity market. R. at 3.

The energy market enables PJM to buy and sell electricity to distributors and sets the wholesale energy rate, called the "market-clearing price," by conducting a wholesale auction. R. at 3. Generating utilities submit bids at which they can supply a specific number of megawatt-hours into the wholesale auction. R. at 3. PJM accepts the lowest bid first, then the next highest until it has purchased enough energy to meet demand. R. at 3. The last highest bid accepted is the "market-clearing price," which becomes the wholesale rate paid by all purchasers of wholesale energy in PJM. R. at 3.

In the capacity market, PJM ensures there is enough capacity being built to meet future demand by predicting energy demand three years into the future. R. at 3. PJM accepts bids from lowest to highest until it has purchased enough capacity to meet anticipated demand. R. at 3.

The State of Vandalia. Coal mining was the biggest industry in Vandalia for decades and continues to influence Vandalia's politics and economy. R. at 4. In 2021, Vandalia was the third-largest coal producer in the nation, and coal-fired energy accounted for 91 percent of Vandalia's total electricity net generation. R. at 4. Roughly half of the electricity generated in Vandalia is transferred out of state through PJM's grid, making it the fifth largest contributor of interstate electricity transfers. R. at 4.

Vandalia is served by two retail utilities: LastEnergy and Mid-Atlantic Power Co ("MAPCo"). R. at 4. Both companies operate five in-state coal-fired plants that sell power into PJM. R. at 4. LastEnergy and MAPCo are regulated by the Vandalia PSC, which has broad authority to set "just and reasonable" retail rates and regulate public utilities to provide adequate and reliable utility services. R. at 6. Notably, the PSC has a specific legislative directive to ensure coal's continued dominance in the state. R. at 4, 6.

Capacity Factor Order. On May 15, 2022, the PSC issued a Capacity Factor Order ("CFO") that requires both electric utilities to operate their in-state coal-fired plants at no less than 75 percent capacity. R. at 8. The CFO was a direct response to LastEnergy's and MAPCo's annual filings to the PSC in October 2021, which contained information regarding the capacity factors for their respective coal plants during the 12-month period ending June 30, 2021. R. at 7. Both utilities predicted that capacity factors for their coal-fired power plants – which ranged from 34.7 percent and 62.3 percent – could be expected to remain at or below 60 percent going forward. R. at 7.

LastEnergy and MAPCo explained that these low-capacity factors were due to the availability of cheaper energy fuels, which allowed the utilities to minimize the costs imposed on their retail customers. R. at 7.

The PSC argued that it was in the public interest for LastEnergy and MAPCo to increase the capacity of their coal-fired plants to no less than 75 percent going forward. R. at 8. A 75 percent capacity factor—the PSC reasoned—was economical. Further, if complying with this mandate increases production costs to greater than the market-clearing price, then the utilities may recover the cost by increasing the rates paid by retail customers. R. at 8. The Vandalia Citizens Action Group, representing residential customers, presented evidence (including the historical capacity factors) that the coal-fired plants could only run economically between 40 to 60 percent of the time. R. at 8–9. However, the PSC denied reconsideration, maintaining that a 75 percent capacity factor was economic. R. at 9.

Right of First Refusal. In direct response to FERC Order No. 1000 eliminating federally recognized ROFR provisions, the Vandalia Legislature passed the Native Transmission Protection Act ("NTPA"), which grants incumbent transmission owners in Vandalia the exclusive right to construct, own, and maintain transmission lines in the State that have been approved for inclusion in a federal transmission plan. R. at 9. Vandalia's statutory ROFR has an 18-month expiration date, after which a nonincumbent utility is eligible to build the lines. R. at 9. The NTPA is designed to give in-state utilities the first opportunity to invest in federal transmission projects over out-of-state utilities. R. at 9.

In April 2022, ACES submitted an application to Vandalia PSC for approval for the construction of the Vandalia portions of ACES's PJM-approved Mountain Express transmission line. R. at 10. Under the NTPA's ROFR provision, incumbent transmission owners LastEnergy and MAPCo have until September 2023 to exercise this statutory ROFR. R. at 10. ACES, a nonincumbent utility, is barred by Vandalia state law from building its proposed Mountain Express unless LastEnergy and MAPCo decline the project or until such time has expired. R. at 10.

II. NATURE OF PROCEEDINGS

Capacity Factor Order Litigation. On June 6, 2022, ACES filed suit against Vandalia PSC in the United States District Court for the Northern District of Vandalia, arguing the FPA preempted the CFO under the Supremacy Clause of the U.S. Constitution. R. at 15. Vandalia PSC moved to dismiss for lack of standing and further argued that—assuming ACES had standing—the FPA does not preempt the CFO. R. at 15. The district court granted Vandalia PSC's motion to dismiss, finding ACES lacked standing and, assuming ACES had standing, the CFO did not violate the Supremacy Clause. R. at 15.

Right of First Refusal Litigation. In the same Complaint as the CFO litigation, ACES brought suit against Vandalia PSC to challenge Vandalia's ROFR, arguing that the statutory ROFR infringes on FERC's authority and is thus preempted by the FPA, as set out in Order No. 1000. R. at 15. Further, ACES argues that the ROFR violates the dormant Commerce Clause because it discriminates against out-of-state actors like ACES. R. at 15. Vandalia PSC moved to dismiss ACES's ROFR claims, arguing that the ROFR was not preempted by the FPA and did violate the dormant Commerce Clause. R. at 16. The district court granted Vandalia PSC's motion to dismiss, finding that the statutory ROFR was not preempted by Order No. 1000. R. at 16. The district court further found that the ROFR does not violate the dormant Commerce Clause because the utility's place of incorporation controlled, and the local benefits to Vandalia outweighed the burdens imposed on interstate commerce. R. at 16.

The district court granted Vandalia PSC's motion to dismiss on all issues on August 15, 2022, and ACES filed a timely appeal on August 29, 2022. R. at 16.

SUMMARY OF THE ARGUMENT

The district court erred in granting Vandalia PSC's motions to dismiss. This Court should REVERSE the judgment of the United States District Court for the Northern District of Vandalia for the following reasons: (1) ACES has standing to challenge the CFO under the Supremacy Clause; (2) the FPA preempts the CFO; (3) the FPA preempts Vandalia's ROFR statute; and (4) Vandalia's ROFR statute violates the dormant Commerce Clause.

I.

The potential lost revenue ACES alleges it will suffer should the CFO be permitted to stand satisfies the constitutional minimum required to meet Article III standing. The lower court erroneously granted the PSC's motion to dismiss when it held that ACES lacked standing to bring its Supremacy Clause challenge. First, the economic loss ACES will likely suffer from the CFO implicitly requiring LastEnergy and MAPCo to chronically underbid in PJM's energy market sufficiently alleges an injury-in-fact that is both imminent and substantially likely to occur. Second, both LastEnergy or MAPCo would underbid and so lower the wholesale rate, causing ACES's economic loss if not compelled by the CFO's 75 percent capacity requirement, as evidenced by the historical and projected capacity factors of their coal-fired plants. Third, finding the CFO is preempted by FERC's purpose and regulations under the FPA frees LastEnergy and MAPCo from the pressure to underbid, thus relieving ACES' imminent substantial risk of future economic loss by ensuring a competitive wholesale energy market.

II.

The CFO invades FERC's exclusive jurisdiction over wholesale rates and undermines the competitive market chosen by FERC to ensure those rates are just and reasonable. In requiring LastEnergy and MAPCo's coal-fired plants to have no less than a 75 percent capacity factor, the CFO implicitly directs both utilities underbid in PJM's energy market. This sort of state direction indirectly sets the wholesale rate, which is an invasion of FERC's exclusive jurisdictional field. Additionally, by implicitly directing LastEnergy and MAPCo to underbid, the CFO undermines the competitiveness of PJM's energy market. Such undermining by a state regulation conflicts with FERC's chosen method to achieve just and reasonable wholesale rates. Because the CFO conflicts with FERC's method and purpose and invades FERC's exclusive jurisdiction over the wholesale of energy, the CFO is preempted by the FPA.

III.

Vandalia's ROFR statute is preempted by the FPA and infringes on FERC's authority, as set out in Order No. 1000 because the state ROFR law conflicts with FERC's effort to provide services at rates, terms, and conditions that are "just and reasonable." 16 U.S.C. § 824(a). Vandalia enacted Section 24 for a clear reason: to undermine the purpose of FERC Order No. 1000 by reinstating the rights of first refusal to build transmission lines in the regional electricity network. Vandalia's ROFR law is counterproductive to FERC's efforts to provide services at just and reasonable rates through increased competition. Competition breeds innovation, timely solutions, and lower prices for consumers. The limitation of the electric transmission market in Vandalia to existing incumbent utilities poses a significant barrier to entry to ACES and, ultimately, harms the residents of Vandalia. Thus, the FPA preempts Vandalia's ROFR law.

IV.

Vandalia's ROFR statute violates the dormant Commerce Clause. The state-level ROFR overtly discriminates against interstate commerce in the transmission market on its face, in its effect, and through its purpose. First, Section 24 discriminates on its face because it favors incumbent utilities. The incumbency requirement equates to a residency requirement. Moreover, an entity's business presence is more relevant to local influence, leading to protectionist legislation, than the place of incorporation. Second, Section 24 discriminates in its effect because it excludes all energy utilities not already operating in Vandalia and benefits only utilities with an in-state presence. Third, Section 24 discriminates through its purpose because the public record confirms that Vandalia enacted Section 24 with a discriminatory purpose—to protect local utilities and to preclude out-of-state entities from building transmission lines in Vandalia. Even apart from overt discrimination, Section 24 fails the *Pike* balancing test—that is, the Vandalia statute imposes a burden upon interstate commerce that is clearly excessive in relation to the alleged local benefits because Section 24 has no legitimate, non-protectionist purpose. Thus, Vandalia's ROFR law is unconstitutional under the dormant Commerce Clause doctrine.

ARGUMENT

Standard of Review. The United State District Court for the Northern District of Vandalia disposed of ACES's challenges to Vandalia's Capacity Factor Order and Vandalia's ROFR by granting Appellee the PSC's motion to dismiss. R. at 16. A motion to dismiss is proper when the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Appellate courts review a district court's motion to dismiss under Rule 12(b)(6) *de novo*, "construing the complaint liberally, accepting all factual allegations as true, and drawing all reasonable inferences in the plaintiff's favor." *Coalition for Competitive Electricity v. Zibelman*, 906 F.3d 41, 48-49 (2d Cir. 2018). A complaint is facially plausible when the plaintiff pleads facts that permit the Court to reasonably conclude the defendant is liable for the plaintiff's alleged injury. *Id.* at 49.

I. THE IMMINENT AND SUBSTANTIAL RISK POSED BY THE CFO TO ACES'S FUTURE REVENUE SATISFIES ARTICLE III'S REQUIREMENTS FOR STANDING.

ACES satisfies the constitutional minimum for standing to challenge the PSC's Capacity Factor Order ("CFO") under the Supremacy Clause because LastEnergy's and MAPCo's probable response to the CFO poses a substantial risk of economic injury which is relieved by finding the CFO is preempted by the FPA pursuant to the actions, goals, and policies of FERC. Article III standing requires the plaintiff suffer an injury-in-fact that is actual or imminent; the injury is causally linked to the defendant's actions; and the injury will likely be redressed by litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).[1] Pleading future injury is sufficient to satisfy standing when the injury is "impending, or there is a substantial risk that the harm will occur." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019). When future injury is caused by government regulation of a third party, the plaintiff must show that the third party will "likely react in predictable ways" that will cause the plaintiff's injury. *Id.* at 2566. Litigation successfully redresses the plaintiff's injuries if, when the government regulation is removed, the injuries cease to exist. *Zibelman*, 906 F.3d at 58.

The *McBurney* Court found that pleading injury in the form of past and future lost revenue caused by Virginia's prohibition against noncitizens requesting public records alleged sufficient injury to satisfy standing. *McBurney v. Cuccinelli*, 780 F.Supp.2d 439, 446 (E.D. Va. 2011). This was a redressable injury because finding Virginia's prohibition unconstitutional would enable the plaintiff to potentially earn revenue he was otherwise denied. *Id.*

[1] *See* U.S. CONST. art. III, § 2, cl. 1.

The plaintiff states of *Dep't of Commerce v. New York* also successfully alleged injury in the form of future economic loss caused by the response of third parties to government action. *Dep't of Commerce*, 139 S. Ct. at 2565. The states satisfied their burden of showing third parties will likely react in predictable ways to government action by showing noncitizen households were less likely to respond a government survey containing a citizenship question. *Id*. Furthermore, if noncitizens were undercounted by the census the states would lose federal funds distributed based on population, which the Court found was a "sufficiently concrete and imminent injury" to satisfy Article III standing. *Id*.

Similarly, Allco Finance Ltd. satisfied Article III standing's injury-in-fact requirement by alleging lost revenue caused by Connecticut's impermissible regulation of the interstate wholesale energy market. *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 91, 95 (2d Cir. 2017).[2] Allco requested a declaration that Connecticut's solicitation of wholesale energy generation proposals was preempted by the FPA and an injunction preventing further alleged impermissible regulation which the Court found was sufficient redressability for Allco's alleged injuries. *Id.* at 96.

The *Zibelman* Court, however, determined that, even if New York's ZEC program included out-of-state utilities, the plaintiff's alleged injury caused by ZEC recipients underbidding them in the wholesale market would continue to exist. *Zibelman*, 906 F.3d at 58. Additionally, the Court reasoned that the Plaintiff's alleged injuries were caused, not by the ZEC program's alleged discrimination against out-of-state utilities, but because they chose to use fuel New York disfavored. *Id.* Therefore, the plaintiffs failed to satisfy the redressability and causation requirements for Article III standing. *Id*.

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[2] A wholesale is a "sale of electric energy to any person for resale." 16 U.S.C. § 824(d).

Like the plaintiffs of *McBurney*, *Dep't of Commerce*, and *Allco*, ACES alleges lost revenue as its injury-in-fact. This lost revenue satisfies the requirement of Article III standing because, like the potentially lost federal funds in *Dep't of Commerce*, the injury is imminent and likely to occur. ACES' injury is imminent and likely to occur because, like the predictable response of noncitizens in *Dep't of Commerce*, the response to the CFO is predictable and probable. LastEnergy's and MAPCo's coal-fired plants generate power when dispatched by PJM. Their plants are dispatched when their bids into PJM's energy market either set or are below the market-clearing price. The CFO requires LastEnergy's and MAPCo's coal-fired plants run at no less than 75 percent capacity.

When running economically, these coal-fired plants have between a 62.3 percent and 34.7 percent capacity as shown by LastEnergy's and MAPCo's historic capacity factors. To ensure their coal-fired plants are dispatched by PJM with enough frequency to fulfill the CFO's 75 percent capacity requirement, LastEnergy and MAPCo must chronically underbid in PJM's wholesale energy market and so artificially lower the market-clearing price. Due to the significant contribution of Vandalia's in-state electricity generators to the regional grid, this consistent underbidding will significantly reduce the revenue ACES might otherwise earn from PJM's wholesale energy market. ACES's future economic loss caused by the reduction of the wholesale rate is therefore distinguished from that alleged by the *Zibelman* plaintiffs. Where the ZEC program only encouraged the complained of underbidding in the wholesale market and so was not causally linked to the plaintiff's injuries, the CFO implicitly *requires* underbidding and the resultant lowering of the market-clearing price to ensure compliance.

Additionally, declaring the CFO as preempted by the FPA under the Supremacy Clause would render it unenforceable, like finding the Virginia statute of *McBurney* was unconstitutional and so unenforceable. Finding the CFO unenforceable would prevent the PSC from indirectly regulating the wholesale rate and so ACES's injury of potential lost revenue would be redressed, just as the injuries of *Allco* would be redressed by preventing the Connecticut's alleged regulation of the wholesale rate. Therefore, ACES satisfies the requirements of Article III standing by showing LastEnergy's and MAPCo's probable response to the CFO will result in lost revenue not otherwise suffered but for the PSC's impermissible invasion of FERC's exclusive field of and ACES's potential loss is relieved by a finding the CFO is preempted by the FPA.

II. THE CFO IS PREEMPTED BY THE FPA BECAUSE IT IMPERMISSIBLY SETS AN INTERSTATE WHOLESALE RATE AND CONFLICTS WITH FERC'S PURPOSE BY DISTORTING PRICE SIGNALS AND PREVENTING A COMPETITIVE ENERGY MARKET.

The CFO is preempted by the purpose and regulations established by FERC under the FPA because it impermissibly directs the price of energy in the wholesale market. It is conflict preempted because it interferes with FERC's congressional purpose to provide efficient, economical, and competitive interstate energy markets. It is field preempted because it intrudes on FERC's broad and exclusive authority over the rules and practices that affect the wholesale market by indirectly setting the wholesale rate and implicitly compelling participation in PJM's energy market.

A. The CFO Invades FERC's Exclusive Jurisdiction by Indirectly Setting the Wholesale Rate and Implicitly Compelling Participation in PJM's Energy Market.

The CFO effectively sets the wholesale rate and so intrudes on FERC's exclusive jurisdiction by implicitly directing LastEnergy and MAPCo to underbid in the energy market to ensure their coal-fired plants are dispatched by PJM. The Supremacy Clause of the Constitution establishes that the laws of the United States "shall be the Supreme law of the land" and so preempt contradictory State law. U.S. CONST. art. VI, § 2. State law is field preempted when it intrudes upon a comprehensive and congressionally legislated field of regulation that leaves no room for supplemental state laws. *Zibelman*, 906 F.3d at 49. Under the FPA, FERC has broad authority to regulate wholesale electricity sales, ensuring wholesale rates are "just and reasonable" by extending its jurisdiction to the rules, regulations, and practices that affect wholesale rates. *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 277 (2016).[3] Because FERC has exclusive jurisdiction over this regulatory field, the States may not directly *or indirectly* control wholesale energy rates. *Zibelman*, 906 F.3d at 53 (emphasis added). *See also EPSA*, 577 U.S. at 288 ("The FPA leaves no room either for direct state regulation of the prices of interstate wholesales or for regulation that would indirectly achieve the same result.").

The *Zibelman* Court found that, although New York's ZEC program attributed to lower wholesale energy rates, this influence was incidental and so an insufficient "tether" to the wholesale market for field preemption. *Zibelman*, 906 F.3d at 46, 54. Rather, the ZEC program provided subsidies for nuclear plants regardless of the plants' connection to the wholesale market. *Id.* at 47. That the ZEC program increased the supply of electricity and so lowered the market-clearing price was an *incidental* result of New York's authority to regulate energy production. *Id.* at 57 (emphasis added).

Compelling wholesale market participation, however, is an intrusion on FERC's exclusive jurisdictional authority over the wholesale market. *Id.* at 52. The *Rochester* Court noted that R&G did not claim but for New York PSC's policy it would "engage in a lesser level of [wholesale] sales." *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 12 (2d Cir. 1985). Thus, the policy did not "compel" participation in the wholesale

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[3] FERC is responsible for ensuring "all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission . . . shall be just and reasonable." 16 U.S.C. § 824(a).

market. *Id.* at 103. Similarly, the *Allco* Court found Connecticut's DEEP Commissioner's authority to direct utilities to enter bilateral contracts with specific generators did not amount to compulsion because the utilities were not obligated to accept any bids and could exercise their discretion. *Allco,* 861 F.3d at 97–98.

The ZEC program of *Zibelman* was a subsidy that enabled, but did not require, nuclear power generators to submit lower bids to the wholesale market which coincidentally caused a lower market-clearing price. The CFO is not a subsidy. It is an order from Vandalia's PSC requiring LastEnergy and MAPCo operate their coal-fired power plants at 75 percent capacity. Due to contractual obligations, all the energy LastEnergy and MAPCo are compelled to generate under the CFO must then be sold into PJM.

To comply with the CFO's 75 percent capacity requirement, LastEnergy and MAPCo must ensure their in-state coal-fired plants are dispatched by PJM to meet interstate energy demands. This can only be accomplished by LastEnergy and MAPCo intentionally underbidding to ensure their bids clear the wholesale market, thus artificially lowering the wholesale rate in what was intended to be a competitive market. In this way, the CFO distinguishes itself from *Zibelman*'s ZEC program. A lower market-clearing price was a nonessential byproduct of New York acting within its authority to regulate energy production, the result of energy generators acting of their own free will while engaging in interstate commerce. The CFO, however, implicitly requires LastEnergy and MAPCo lower the wholesale rate to ensure compliance with the 75 percent capacity requirement.

Additionally, although the CFO does not explicitly require coal-fired utilities to sell energy into PJM, it does compel them to ensure their bids into PJM's wholesale market are accepted. This robs the CFO of the protections identified in *Rochester* and *Allco*. R&G did not allege it would make fewer wholesale energy sales but for New York's policy and the utilities in *Allco* retained their discretion to engage in wholesale transaction. LastEnergy and MAPCo, however, both projected future capacity factors of 60 percent or less in their PSC filings, clearly indicating that the CFO compels them to engage in the energy market beyond what they would do otherwise. Furthermore, in setting such a high capacity factor the CFO indirectly compels engagement with the wholesale market as that is the only feasible method to achieve the required 75 percent. Thus, the CFO regulates PJM's wholesale market by indirectly lowering the market-clearing price and compelling utility participation—both impermissible intrusions upon FERC's exclusive jurisdiction. Therefore, the CFO is field preempted under the FPA.

B. By Implicitly Setting Wholesale Rates and Distorting Price Signals in PJM's Market, the CFO Conflicts with FERC's Goal Of Promoting an Efficient Energy Market.

The CFO conflicts with FERC's goal under the FPA to effectively regulate an efficient energy market because it undermines the competitiveness of PJM's wholesale auction and distorts price signals that would otherwise indicate the need for more capacity. In establishing the laws of the United States as "the Supreme law of the land" the Supremacy Clause permits federal law to preempt conflicting state law. U.S. CONST. art. VI, § 2. Conflict preemption applies when a state law poses an obstacle to the purposes or objectives of Congress when enacting legislation. *Zibelman*, 906 F.3d at 50. The FPA's purpose, through FERC, is to promote efficiency and ensure just and reasonable rates for wholesale energy which it accomplishes through competitive wholesale markets. *Id.* at 55. *See also Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008) (FERC's competitive energy markets attempt to "break down [the] regulatory and economic barriers that hinder a free market"). Moreover, although regulating production is within a state's jurisdiction, it may only do so in a way that does not substantially interfere with or hinder FERC goals; or when the impact of state regulation on matters within federal control is incidental to achieving a proper state purpose. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 489 U.S. 493, 515–16 (1989).

FERC's energy markets are designed to achieve "just and reasonable" wholesale rates by conducting competitive auctions meant to balance supply and demand, thereby producing electricity prices that accurately reflect its value. *EPSA*, 577 U.S. at 267. High energy prices in the wholesale market signal the need for new capacity which in turn encourages new energy generators to enter the market. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 156 (2016). Seeing a need for more in-state generation, Maryland entered long-term bilateral contracts that impermissibly guaranteed a wholesale rate separate from the market-clearing price set by PJM's energy market. *Id*. This, the Court found, undermined the purpose of PJM's capacity auction which was designed to balance supply and demand to produce a "just and reasonable" clearing price. *Id.* at 157.

Conversely, although the ZEC program of *Zibelman* provided subsidies to natural gas plants that prevented them from closing and allowed them to underbid and so prevail in wholesale markets, this did not constitute a substantial conflict with federal goals. *Zibelman*, 906 F.3d at 48, 54, 56. Rather, the decreased wholesale rate and subsequent distortion of price signals was an incidental effect of New York regulating within its jurisdiction. *Id.* at 57-58. *See EPSA*, 577 U.S. at 283 (holding that states, acting within their jurisdiction, may set the retail rates and so insulate generators from fluctuations in the wholesale rate). Similarly, Kansas' redefinition of production rights was congruous with federal goals because it encouraged production of low-cost Hugoton gas while the state acted within its jurisdiction. *Kansas*, 489 U.S. at 518. However, such state regulation would conflict with FERC goals if the sole purpose was to influence the purchasing decisions of interstate pipelines. *Id*.

Like the Maryland program at issue in *Hughes*, the CFO is an intrusion upon FERC's exclusive jurisdiction over wholesale energy markets. The Maryland program directly invaded FERC's jurisdiction and undermined PJM's competitive energy market by setting a separate wholesale rate. The CFO also undermines the competitiveness of PJM's energy market by implicitly requiring underbidding to ensure LastEnergy's and MAPCo's coal-fired plants reach the required 75 percent capacity factor.

The lowered wholesale rate of *Zibelman* was a byproduct of New York acting within its jurisdiction, not a requirement of the ZEC program. The CFO, however, implicitly requires a lower wholesale rate. This regulation of production, unlike that in *Kansas* and *Zibelman*, is outside the state's jurisdiction. Furthermore, it clearly conflicts with the federal goals found in *EPSA*. Instead of accurately reflecting electricity prices, the CFO results in high-cost power being sold at an artificially lowered wholesale rate in the energy market. This, in turn, would distort the price signals noted in *Hughes*, preventing less expensive generators from entering the market and thereby hindering the efficiency of PJM's energy market. FERC strives to maintain an efficient energy market and, because the CFO conflicts with those goals by distorting the price signals and undermining the competitiveness of PJM's energy market, it is preempted by the FPA pursuant to the Supremacy Clause.

III. THE FPA PREEMPTS VANDALIA'S ROFR LAW BECAUSE THE STATUTE CONFLICTS WITH FERC'S PURPOSE TO PROVIDE SERVICES AT JUST AND REASONABLE RATES.

The district court erred in deciding that Federal Power Act ("FPA") does not preempt Vandalia's ROFR provision. Pursuant to its authority under Section 206 of the FPA, FERC issued Order No. 1000 to correct deficiencies in transmission planning and the allocation of costs. FERC designed Order No. 1000 to increase competitiveness by providing nonincumbent transmission developers an opportunity to participate in the regional planning and expansion of electric systems. *Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, 136 FERC 61051, 3 ¶ 7.2 (July 21, 2011) (hereinafter "Order No. 1000"). Vandalia's ROFR law is preempted by the FPA and infringes on FERC's authority, as set out in Order No. 1000, because the state ROFR law conflicts with FERC's effort to provide services at rates, terms, and conditions that are "just and reasonable." 16 U.S.C. § 824(a).

The Supremacy Clause establishes that the U.S. Constitution and the laws of the United States are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus, the Constitution provides "a rule of decision" for determining whether federal or state law applies and empowers Congress to preempt or supersede state law. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015). When a federal law "imposes restrictions" and "a state law confers rights . . . that conflict with the federal law, the federal law takes precedence and the state law is preempted." *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020).

A. Vandalia's ROFR Law Conflicts with FERC Order No. 1000's Effort to Increase Competition in Regional Energy Markets.

In evaluating whether a federal statute or regulation preempts a state law, courts typically start with the assumption that a federal act does not supersede State powers unless that is the clear intent of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Unless Congress clearly states its intent, courts will infer Congress' purpose to occupy a particular regulatory area if it enacts blanket legislation and leaves no room for states to amend it. Similarly, courts can infer "field preemption" if an act of Congress relates to an area where the federal government's interests are so dominant that the federal system is deemed to preclude enforcement of state law on the same area. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

Moreover, courts can infer "conflict preemption" when there is a conflict between a state law and a federal statute or regulation. Conflict preemption exists when a state law "stands as an obstacle to the accomplishment and execution of [Congress'] full purposes and objectives." *Freightliner Corp. Myrick*, 514 U.S. 280, 287 (1995). When a Court determines a conflict exists, the state's interest is insignificant—state law must always yield to federal interests.

Here, FERC issued Order No. 1000 for a clear purpose: to provide services at rates, terms, and conditions that are just and reasonable by increasing the competitiveness of the energy market. Vandalia's ROFR law, in turn, grants state-level ROFR provisions, which is counterproductive to FERC's efforts and stands as an obstacle to Congress' objectives. Vandalia lawmakers openly sought to insulate incumbent transmission owners from the competition introduced by Order No. 1000. Vandalia enacted Vand. Code § 24-12.3(d) in direct response to FERC Order No. 1000, which aimed to increase competition in the market for regional transmission lines. R. at 9.

Public record confirms that the Vandalia Legislature enacted Section 24 in direct response to FERC Order No. 1000 to reinstate rights of first refusal for transmission line projects, counteracting FERC's efforts to increase competition, innovation, and cost-effectiveness in regional energy markets.

B. Vandalia's ROFR Law Conflicts with FERC Order No. 1000's Goal Because Section 24 Includes Impermissible Barriers to Entry.

Although FERC Order No. 1000 removes federally recognized rights of first refusal for purposes of cost allocation, FERC stipulates that it does not intend "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." Order No. 1000, at ¶ 256.

The Order, however, requires RTOs to establish "qualification criteria for determining an entity's eligibility to propose a transmission project for selection in the regional transmission plan for purposes of cost allocation," and those "qualification criteria must not be unduly discriminatory or preferential . . . ." Order No. 1000, at ¶ 32,253. Therefore, one may reasonably conclude that the "qualification criteria" for designating cost allocation projects cannot approve a project subject to a state-authorized right of first refusal because it may appear as preferential or unduly discriminatory. Order No. 1000, at ¶ 32,253.

In support of this view, FERC Commissioner John Norris argued that favoring incumbents—either through federal or state-level ROFR provisions—impedes the innovation in transmission solutions that Order No. 1000 was meant to foster. Order No. 1000-A, 139 FERC ¶ 61,132 at p. 441 (2012). Commissioner Norris further argued that the plain text of Order No. 1000 states that it would be an "impermissible barrier to entry" to require a transmission developer to demonstrate that it has or can obtain state approvals necessary to be eligible to propose a transmission facility. *Id.*

Here, Vandalia's "public utility" and "right of eminent domain" provisions in Section 24 of the Vandalia Code, as applied, are impermissible barriers to entry. Vandalia law states that electric utility easements may be used by any "public utility" for the location & use of distribution and transmission facilities. Vand. Code § 24-8-2. The code further defines "public utility" as "any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business involving the provision of electricity, gas, water, or any other service or commodity furnished to the public for compensation, whether herein enumerated or not." Vand. Code § 24-8-1(d).

Moreover, Vandalia PSC ruled in a "Right of Way Order" that ACES was not a "public utility" because it is not an entity furnishing electricity to the "public" for compensation in Vandalia. R. at 11. This ruling seeks to protect incumbent utilities, LastEnergy and MAPCo—the legacy coal plants in Vandalia's coal-powered economy. R. at 11. This order bars ACES from using LastEnergy's preexisting rights of way in Vandalia and significantly increases ACES's cost to the Mountaineer Express transmission line. R. at 11.

Because Vandalia PSC's Right of Way Order creates grave uncertainty that ACES can build Mountaineer Express, Vandalia's "public utility" and "right of eminent domain" provisions in Section 24, as applied, are impermissible barriers to entry to the regional energy system.

IV. VANDALIA'S ROFR VIOLATES THE DORMANT COMMERCE CLAUSE BECAUSE IT DISCRIMINATES AGAINST INTERSTATE COMMERCE AND FAILS THE *PIKE* BALANCING TEST.

Vandalia's ROFR law violates the dormant Commerce Clause. The district court erred in deciding otherwise. The state-level ROFR overtly discriminates against interstate competitors in the transmission development market. Even apart from overt discrimination, the ROFR fails the *Pike* balancing test—that is, the Vandalia statute imposes a burden upon interstate commerce that is clearly excessive in relation to the alleged local benefits.

Dormant Commerce Clause doctrine derives from the U.S. Constitution's grant of power to Congress "[t]o regulate Commerce . . . among the several states." U.S. CONST. art I, § 8, cl. 3. This doctrine prohibits a state from discriminating against or unduly burdening interstate commerce. *Granholm v. Heald*, 544 U.S. 460, 474 (2005) (holding that New York statutes imposing additional burdens on out-of-state wineries seeking to ship wine directly to New York consumers discriminated against interstate commerce). Modern dormant Commerce Clause jurisprudence "is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.'" *Dep't. of*

Revenue of Ky. v. Davis, 553 U.S. 328, 337–38 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273 (1988)).

When analyzing claims that a state law violates the dormant Commerce Clause, courts will examine the state law for overt and non-overt discrimination. Courts will typically strike the state law if it overtly discriminates against interstate commerce unless the state can demonstrate, under strict scrutiny, that the law has a non-protectionist purpose and that there are no less discriminatory means for achieving that purpose. *Hampton Feedlot, Inc. v. Nixon*, 249 F.3d 814, 818 (8th Cir. 2001). State law may be overtly discriminatory in one of three ways: (1) on its face, (2) in its effects, or (3) through its purpose. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1026 (8th Cir. 2020). Even if a law does not overtly discriminate against interstate commerce in one of the three forms above, a court may still strike the law if the burden it imposes upon interstate commerce is "clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

A. Section 24 Discriminates Against Interstate Commerce on its Face, in its Effects, and Through its Purpose.

A state law overtly discriminates against interstate commerce if it is discriminatory on its face, in its effects, or through its purpose. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). "The burden to show discrimination rests on [ACES, who is] challenging the validity of" Vandalia's ROFR law. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979).

1. Section 24 facially discriminates against out-of-state utilities by its incumbency requirement and 18-month deferral requirement.

Vandalia's ROFR law states, "An incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner." Vand. Code § 24-12.3(d). This statute expressly grants energy utilities with an existing presence "in this state" a right of first refusal to build new transmission lines authorized by a "federally registered planning authority" to connect to the interstate energy transmission system. Section 24 further defines an "[i]ncumbent electric transmission owner" 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.

Vand. Code § 24-12.2(f). In other words, the Vandalia statute permits only those entities who own an existing utility facility *in the state* to build, own, or operate new transmission lines that directly interconnect the existing facility.

a. *Section 24's incumbency requirement draws a distinction between in-state and out-of-state entities*.

Section 24's incumbency requirement draws a distinction between in-state and out-of-state entities that is facially discriminatory. *See* Vand. Code § 24-12.3(d). The district court erred in deciding that the place of incorporation controls for purposes of in-state classification because an incumbent entity's place of incorporation and headquarters site are irrelevant to this Court's discrimination analysis.

The Supreme Court did not analyze—much less mention—the place of incorporation or headquarters site for the coal mines in Oklahoma, the wineries in New York, or the diaries in Wisconsin, which all received an unlawful benefit, in violation of the dormant Commerce Clause, due to their local presence "in the state." *Wyoming v. Oklahoma*, 502 U.S. 437, 457–59 (1992); *Granholm v. Heald*, 544 U.S. 460, 125 (2005); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 352 (1951) (holding unconstitutional an ordinance that discriminated on the basis of where milk pasteurization occurred, not the facility owner's state of incorporation). State laws protecting local incumbents against out-of-state competition is precisely what the dormant Commerce Clause prohibits. *See Dean Milk*, 340 U.S. at 356.

Conversely, in *LSP Transmission*, the Eighth Circuit Court concluded that the preference for incumbents was not discriminatory because it "applie[d] evenhandedly to all entities, regardless of whether they are Minnesota-based entities or based elsewhere." *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020). Most circuit courts, however, have rejected the idea that a state law survives Commerce Clause scrutiny if many favored interests are incorporated elsewhere. The Eleventh Circuit Court reasoned, if "place of incorporation alone" were controlling, "then a state['s] dormant Commerce Clause liability would turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies." *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 323 (5th Cir. 2022) (quoting *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012)); *see also Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005) (refusing to hold "that a favored group must be entirely in-state for a law to have a discriminatory effect on commerce"). Thus, local presence, rather than the place of incorporation, is relevant to the concern of in-state interests being able to obtain favorable treatment over out-of-state interests.

Here, the state ROFR law's in-state presence requirement equates to a residency requirement. In this context, incumbency is merely another way of expressing a preference for residents. Moreover, Section 24's defining feature is the local-presence requirement. Only energy utilities with existing transmission facilities may build new lines that connect to the existing lines—unless the 18-month expiration date passes or the incumbent owners reject their right to build the lines. Vand. Code § 24-12.3(d). The incumbent utilities in Vandalia—LastEnergy and MAPCo—are headquartered in Ohio and own and operate facilities in states other than Vandalia. R. at 4.

LastEnergy and MAPCo's influence is evident. Coal mining was the most significant industry in Vandalia for decades and continues to influence Vandalia's politics and economy. R. at 4. As Vandalia's only incumbent utilities, LastEnergy and MAPCo are regulated by the Vandalia PSC, which has broad authority to set "just and reasonable" retail rates and regulate public utilities to provide adequate, economical, and reliable utility services. R. at 6. Notably, the PSC has a specific legislative directive to ensure coal's continued dominance in the state. R. at 4.

Because of the underlying concern about local influence leading to protectionist legislation, a law can discriminate against interstate commerce even though most of the incumbent transmission-line providers that benefit from Section 24 are incorporated or headquartered outside Vandalia.

b. *Section 24's 18-month deferral requirement plainly favors in-state interests.*

Furthermore, Section 24's 18-month deferral requirement plainly favors in-state interests. Compare Vandalia's ROFR law to two similar state-level ROFRs enacted in the wake of FERC Order No. 10000. First, in *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020), the Eight Circuit Court upheld a Minnesota ROFR statute providing a right of first refusal that allows any entity to seek to enter the market if the incumbent does not exercise its rights to compete within 90 days. Second, in *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022), the Fifth Circuit struck down a Texas ROFR statute that provided utilities and other existing transmission owners a right of first refusal to build new power lines. The Texas ROFR does not expire.

The primary distinction between these two ROFR statutes is the expiration date. Minnesota's ROFR expires after 90 days; Texas's ROFR only terminates when an incumbent utility rejects the right and is thus indefinite. Vandalia's ROFR expires if the incumbent does not exercise its rights to compete within 18 months. Vand. Code § 24-12.3(d). The Supreme Court's most recent dormant Commerce Clause case concluded that a law requiring a 24-month durational-residency to own a liquor store "plainly" favored in-state interests. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2462 (2019). Like the 24-month durational-residency requirement in *Tenn. Wine*, Vandalia's 18-month deferral requirement "plainly" favors in-state interests.

Because Vandalia's 18-month deferral requirement "plainly" favors in-state interests, the ROFR discriminates against out-of-state utilities on its face.

2. Section 24 has a discriminatory effect because every utility that benefits from the statute maintains an in-state presence.

State laws are discriminatory in effect when they favor in-state economic interests over out-of-state interests. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564 (1997) (holding that state exemption statute, which singled out institutions that served mostly state residents for beneficial tax treatment and penalized those institutions that did principally interstate business, violated dormant commerce clause).

Here, Section 24 has the unconstitutional effect of excluding out-of-state energy utilities from building interstate transmission lines in Vandalia. By the statute's text, all favored entities under Section 24 have an existing in-state presence. Vand. Code § 24-12.2(f). Vandalia is served only by two retail utilities, LastEnergy and MAPCo. R. at 4. LastEnergy has two operating coal-fired power plants in Vandalia, serving 600,000 in-state customers. R. at 4. MAPCo has three operating coal-fired power plants in Vandalia, serving 450,000 in-state customers. R. at 4. Every utility that meets Section 24's "incumbent utility" definition has an in-state presence. Only Last Energy and MAPCo. meet this definition. Thus, the effect of the statute is discriminatory against out-of-state utilities.

In effect, Section 24 excludes all energy utilities that are not already operating in Vandalia, and every utility that benefits from the statute has an in-state presence; therefore, the Vandalia ROFR statute has the effect of discriminating against interstate commerce.

3. Public record confirms that Vandalia enacted Section 24 with a discriminatory purpose to protect its in-state utilities and exclude out-of-state utilities.

Discriminatory purpose is a fact question. *Wal-Mart Stores Inc. v. Tex. Alcoholic Bev. Comm'n*, 945 F.3d 206, 218 (5th Cir. 2019). ACES need only plead a "prima facie case," which it has pleaded. *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 289 (5th Cir. 2004); *see* R. at 2.

Courts consider direct and indirect evidence to determine whether a regulation has a discriminatory purpose. *IESI AR Corp. v. Nw. Arkansas Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600 (8th Cir. 2006). Evidence for consideration includes: "(1) statements by lawmakers; (2) the sequence of events preceding the [statute]'s adoption . . . ; [and] (3) the state's consistent pattern of discrimination against, or disparately impacting, a particular class of persons . . . ." *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1029 (8th Cir. 2020).

Here, based solely on the information available in public documents, an examination of these factors shows that Vandalia's ROFR statute purposefully discriminates against interstate commerce or, at the very least, creates a fact question that cannot be resolved on a motion to dismiss. First, the legislative history confirms that the state enacted the law to protect in-state entities from interstate competition. Vandalia enacted Section 24 in direct response to FERC

Order No. 1000, which aimed to increase competition in the market for regional transmission lines. R. at 9. Vandalia lawmakers openly sought to insulate incumbent transmission owners from the competition introduced by Order No. 1000. Testimony at a state legislative hearing confirms that supporters of the bill argued that a state ROFR law was necessary to keep transmission lines in the hands of "more responsive in-state companies" and to restore the "status quo" from before Order 1000. R. at 9; *see, e.g.*, *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 594 (8th Cir. 2003) (finding discriminatory purpose from statements such as "desperately needed profits will be skimmed out of local economies and into the pockets of distant corporations").

Public record confirms that Section 24 was motivated by a discriminatory purpose—to protect local utilities and preclude out-of-state utilities from building transmission lines in Vandalia. At the very least, ACES has stated a plausible claim that the statute has a discriminatory purpose and is entitled to proceed with discovery on that question. Accordingly, Section 24 has no legitimate, non-protectionist purpose and thus, the district court erred in granting Defendants' motion to dismiss on the third issue.

B. Section 24 Fails Under Pike Because the Purported Benefits of the Statute Outweighed its Burdens on Interstate Commerce.

Even apart from the statute's overt discrimination against out-of-state utilities, Section 24 violates the Commerce Clause because it cannot survive the *Pike* balancing test. A state law fails under the *Pike* balancing test when "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Courts look to three factors in a *Pike* balancing analysis: "(1) [T]he nature of the state's or municipality's interest in enacting the legislation, (2) the extent of the burden on interstate commerce created by the legislation, and (3) whether the interest in enacting the legislation could have been served by other legislation that does not impact interstate commerce as much." *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 561–62 & n. 34 (2007).

Here, this Court must analyze the benefits and burdens of Vandalia's ROFR law. First, Vandalia PSC argues that Section 24 survives *Pike* because it promotes reliability. R. at 9. However, at this stage, evidence of those benefits is lacking. This claim warrants the factual development that effects claims typically receive. Second, Section 24 burdens ACES by barring it from effectively competing for PJM-approved projects in Vandalia. A burden on even a single entity's interstate activities can be excessive under *Pike*. *See Pioneer Military Lending, Inc. v. Manning*, 2 F.3d 280, 283 (8th Cir. 1993). Third, Vandalia's purported interest is better served by enacting a ROFR with an expiration date of 90 days, similar to Minnesota's ROFR, which has a lesser impact on interstate commerce.

Section 24's burden on interstate commerce outweighs its purported local benefits; therefore, Vandalia's ROFR law fails the *Pike* balancing test and violates the dormant Commerce Clause. Accordingly, the district court misused the *Pike* test, disregarded that the statute unduly burdens interstate commerce, and prematurely concluded that the purported benefits of the statute outweighed its burdens on interstate commerce. Thus, the district court erred in granting the Defendants' motions to dismiss.

CONCLUSION

For the preceding reasons, this Court should REVERSE the United States District Court for the Northern District of Vandalia's order dismissing ACES's Complaint.

Respectfully submitted,

TEAM NO. 29

ATTORNEYS FOR APPELLANTS

<u>Certificate of Service</u>

Pursuant to *Official Rule* IV, *Team Members* representing Appalachian Clean Energy Solutions, Inc. ("ACES") 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. 29