C.A. No. 22-0682

IN THE
UNITED STATES COURT OF APPEALS
FOR THE TWELTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

v.

VANDALIA PUBLIC SERVICE COMMISSION,

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

Appellees

On Appeal from an Order of the
United States District Court for the Northern District of Vandalia

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BRIEF OF APPELLEES VANDALIA PUBLIC SERVICE COMMISSION

TEAM 39

Counsel for Appellees Vandalia Public Service Commission

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JURISDICTIONAL STATEMENT

This case involves an appeal from an order of the United States District Court for the Northern District of Vandalia. The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), this action having arisen under the Supremacy Clause, U.S. Const. art. VI, cl. 2, and the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, of the United States Constitution. In an order issued on August 15, 2022, the district court granted Defendants' (now Appellees') motions to dismiss regarding Plaintiff-Appellant ACES's challenges to the Vandalia PSC's Capacity Factor Order and the State of Vandalia's statutory right of first refusal. On August 29, 2022, ACES filed a timely appeal to the Twelfth Circuit. This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

I. Whether ACES has standing to challenge the Vandalia PSC's Capacity Factor Order;

II. Assuming ACES has standing, whether the Vandalia PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is preempted by the actions of the Federal Energy Regulatory Commission under the Federal Power Act;

III. Whether Vandalia's statutory Right of First Refusal violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000; and

IV. Whether Vandalia's statutory Right of First Refusal violates the dormant Commerce Clause of the U.S. Constitution.

STATEMENT OF THE CASE

Pursuant to the Federal Power Act ("the FPA"), 16 U.S.C. § 791 *et seq.*, the Federal Energy Regulatory Commission ("FERC") regulates, *inter alia*, interstate electricity transmission and wholesale electricity sales. Factual Background at 13. However, within the FPA's federalist framework, states retain jurisdiction over retail electricity sales and electricity in intrastate commerce. *Id.* The siting, routing, and permitting of in-state transmission facilities are also left to the jurisdiction of the states. *Id.* at 3. The Vandalia Public Service Commission ("the Vandalia PSC") is the state agency responsible for exercising these authorities over utilities subject to its jurisdiction. *Id.* at 6. In addition to its mandate to regulate public utilities to "provide . . . adequate, economical and reliable utility services," Vand. Code § 24-1-1(a)(2), the Vandalia PSC is also required by state law to "[e]ncourage the well-planned development of utility resources . . . consistent with state needs," Vand. Code § 24-1-1(a)(3).

In 2011, in a reversal of longstanding regulatory policy, FERC issued Order 1000, eliminating grants of a federal right of first refusal ("ROFR") from tariffs and other agreements within FERC's jurisdiction, including the tariff of PJM Interconnection ("PJM"), the regional transmission organization ("RTO") responsible for the transmission grid in Vandalia and the surrounding region. *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., 136 FERC 61051, ¶ 256 (2011) (Order 1000). Three years later, on May 3, 2014, Vandalia adopted the Native Transmission Protection Act ("the NTPA") in order to restore the regulatory *status quo ex ante*. Factual Background at 9. The NTPA granted a statutory ROFR to incumbent electric transmission owners, valid for eighteen months beginning upon PJM's approval of the electric transmission line in question. *Id.* At the conclusion of that period, the NTPA permits nonincumbent entities to build the electric transmission line instead. *Id.*

At the time of the NTPA's passage, there were only two incumbent electric transmission owners in Vandalia: LastEnergy and Mid-Atlantic Power Co. ("MAPCo"). *Id.* at 9. The same is true at present. *Id.* at 4. Both utilities are headquartered and incorporated outside of Vandalia, in Ohio, and both serve customers in several states in addition to Vandalia. *Id.* LastEnergy operates two coal-fired power plants in Vandalia, while MAPCo operates three. *Id.* Pursuant to the construction and maintenance of distribution and transmission power lines, both LastEnergy and MAPCO have obtained easement rights, or rights of way, from numerous local communities and property owners in Vandalia. *Id.* at 10-11.

On May 15, 2022, the Vandalia PSC issued a general order requiring both LastEnergy and MAPCo to "operate their coal-fired plants to achieve a capacity factor of not less than 75 percent." Capacity Factor Order at 7. The Vandalia PSC set the 75 percent capacity factor based on fact-finding demonstrating that operating each of the coal-fired plants at that capacity factor would be economical. Factual Background at 8. However, as a "fail-safe" to ensure cost recovery in exceptional or unforeseen circumstances, *see* Vandalia PSC, Generic Investigation of Coal Plant Capacity Factors and Electricity Rates, *Order Denying Reconsideration*, June 15, 2022, Separate Statement of Chairman Williamson at 5, the Capacity Factor Order also explicitly authorized LastEnergy and MAPCo to recover from retail customers any costs incurred at the 75 percent capacity factor in excess of the market-clearing PJM price, Factual Background at 8-9.

Global energy company Appalachian Clean Energy Solutions, Inc. ("ACES"), which is headquartered and incorporated in Vandalia, generates electricity exclusively for the wholesale market; it does not participate in the retail market. *Id.* at 4-5. In April 2020, ACES announced its intention to build the Rogersville Energy Center in Pennsylvania, along with an electric transmission line, the Mountaineer Express. *Id.* at 5. As proposed, the Mountaineer Express

begins in Pennsylvania, terminates in North Carolina, and requires the construction of intermediate transmission facilities within Vandalia. *Id.* at 6, 10. On April 1, 2022, ACES applied for a Certificate of Public Convenience and Necessity ("CPCN"), which is a prerequisite for commencing construction. *Id.* at 10. The application is still pending before the Vandalia PSC. *Id.* Having been approved by PJM in March 2022, the portions of the line within Vandalia are subject to the exercise of the statutory ROFR by either LastEnergy or MAPCo until September 2023. *Id.*

On December 13, 2022, the Vandalia PSC issued a Right of Way Order clarifying that, because ACES is not a public utility as defined under Vandalian law, ACES cannot use the rights of way presently owned by LastEnergy. *Id.* at 11. Construction of the Mountaineer Express by ACES would therefore require contentious bargaining with numerous landowners and the clearance of additional land in Vandalia. *Id.*

ACES filed suit against the Vandalia PSC on June 6, 2022, challenging both the Capacity Factor Order and the statutory ROFR. *Id.* at 2. In the complaint, ACES claimed that the FPA preempted the Capacity Factor Order. *Id.* at 14. ACES also argued that the FPA and Order 1000 preempted Vandalia's statutory ROFR and contended that the ROFR violated the "dormant" Commerce Clause. *Id.* at 15. On June 27, 2022, the Vandalia PSC moved to dismiss the action for failure to state a claim, arguing that (a) ACES lacked standing to challenge the Capacity Factor Order and (b) neither the Capacity Factor Order nor the statutory ROFR were unconstitutional. *Id.* at 14-16. In an order issued on August 15, 2022, the U.S. District Court of the Northern District of Vandalia granted the Vandalia PSC's motions to dismiss regarding each of ACES's challenges. *Id.* at 16. ACES filed a timely appeal of that order on August 29, 2022. *Id.*

SUMMARY OF THE ARGUMENT

ACES does not have standing to challenge the Vandalia PSC's Capacity Factor Order. ACES's alleged injuries are so intangible and speculative that there is no case or controversy to adjudicate and no potential for redress. Furthermore, the interests that ACES invokes lie beyond the zone of interests which the relevant statutory and constitutional provisions can reasonably be understood to protect.

ACES cannot prevail on either of its preemption claims. First, it cannot prevail on the claim that the Vandalia PSC's Capacity Factor Order is not preempted by the authority of FERC under the FPA. The Capacity Factor Order is not preempted because it does not effectively set an interstate wholesale rate in contravention of the FPA's division of authority between state and federal regulators. Nor does it cause clear damage to federal goals. The Capacity Factor Order also does not compel coal-burning utilities to sell their energy into PJM, as they are already required to do so through their FRR status.

Likewise, neither Order 1000 nor the FPA itself preempts Vandalia's statutory ROFR. Both the plain text and FERC's own avowed interpretation of Order 1000 explicitly indicate that Order 1000 does not preempt non-federal ROFRs. Indeed, FERC could not have acted otherwise, because the FPA allocates to the states significant authority over the regulatory matters at which Vandalia's statutory ROFR aims, including the construction of transmission facilities within the state. The statutory ROFR neither directly nor effectively seeks to interfere with matters squarely within FERC's jurisdiction, and although it may present a marginal obstacle to the construction of PJM-sanctioned transmission facilities, it by no means renders such construction impossible.

Finally, the statutory ROFR does not offend the "dormant" Commerce Clause and should not be invalidated based thereon. On its face, the NTPA is neutral and nondiscriminatory

with respect to in-state versus out-of-state economic interests. Its practical effect is the antithesis of the economic protectionism that drives dormant Commerce Clause doctrine: any differential treatment the NTPA engenders actually benefits out-of-state entities. If the statute does impose any cognizable burden on interstate commerce, that burden is certainly not excessive relative to the legitimate interests and local benefits which the statute promotes.

Accordingly, the district court's order granting Appellees' motions to dismiss Appellant's suit for failure to state a claim should be affirmed.

ARGUMENT

I. Standard of Review

The district court's dismissal of Appellant's complaint for lack of standing and for failure to state a claim, pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), respectively, is subject to this Court's de novo review. *See Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 94 (2d Cir. 2017) (citing *Klein & Co. Futures, Inc. v. Bd. of Trade*, 464 F.3d 255, 259 (2d Cir. 2006), and *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citations and internal quotation marks omitted). In turn, to qualify as facially plausible, a claim must entail "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* On de novo review, this Court may affirm the district court's order "on any basis that is supported by the record." *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 482 (2d Cir. 2014).

II. The District Court correctly ruled that ACES lacks standing to challenge the Vandalia PSC's Capacity Factor Order.

ACES lacks both constitutional and prudential standing to challenge Vandalia PCS's Capacity Factor Order. Its alleged injuries-in-fact are neither concrete nor actual, and the Supremacy Clause does not provide a right of action on which ACES can rely.

A. ACES fails the three-prong test for constitutional standing under Article III because its alleged injuries-in-fact are neither concrete nor actual.

The jurisdiction of the federal courts is limited to "[c]ases" and "[c]ontroversies." U.S. Const. art. III, § 2. For ACES to establish constitutional standing to challenge the Capacity

Factor Order in federal court, it must meet the requirements of Article III of the Constitution. These requirements have been elucidated in the three-factor standing tests established in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The first prong of the three-factor test requires plaintiffs to have suffered an "injury in fact," which is understood to mean "an invasion of a legally protected interest which is (a) concrete and particularized… and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" *Id.* at 560. The second prong requires that the injury in fact be "'fairly ... trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.'" *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42 (1976)). The final prong requires that it be "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (quoting *Simon,* 426 U.S. at 38 (1976)). To determine whether an injury is redressable, this Court must "examine whether each aspect of the relief requested…would redress its asserted injury." *Allco Fin. Ltd. v. Klee*, 805 F.3d 89, 93 (2d Cir. 2015), as amended (Dec. 1, 2015); *see, e.g., Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 105–09 (1998).

In this case, the District Court correctly determined that the Appellant lacked standing due to the hypothetical nature of its injuries—especially given PSC's finding of fact that operation of the jurisdictional coal-fired plants at a 75 percent capacity factor would be economical, and therefore the plants would be able to recover full cost of their energy production in the wholesale market. Vandalia PSC, Generic Investigation of Coal Plant Capacity Factors and Electricity Rates, *Order Denying Reconsideration*, June 15, 2022, Separate Statement of Chairman Williamson at 5. With no persuasive evidence showing that the wholesale clearing price will be adversely impacted by the required increased capacity of LastEnergy and MAPCo's coal-fired power plants and because ACES has not begun to operate, or even built, the

Rogersville Energy Center, the injury that ACES claims does not meet the requirements for establishing an injury-in-fact. The conjectural injury that ACES points to is neither actual nor imminent at the time of this case, and indeed, it may never become so.

Moreover, no potential redress to the conjectural injury that ACES puts forth to the economics of building and operating its Rogersville Energy Facility could be considered more than speculative, as the specific impacts of the wholesale clearing price on the economics of building and operating the Rogersville Energy Facility cannot be guaranteed before the building has even begun. Presumably, the injury that ACES seeks to prevent is an indirect lowering of the wholesale clearing price but invalidating the Capacity Factor Order alone fails to redress ACES's injuries as "they do not make it 'likely, as opposed to merely speculative,' that [ACES] will eventually receive [a satisfactorily high clearing price]." *Allco Fin. Ltd.*, 805 F.3d at 98 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167, 181 (2000)). There are simply too many other variables at play. There is no reasonable reading of the bare facts of the claims that ACES makes against the Vandalia PSC that would grant ACES constitutional standing.

B. ACES lacks "zone of interests" standing under the Supremacy Clause, which does not by itself confer rights, and the FPA, which should not be privately enforceable.

In addition to ACES's lack of constitutional standing, this court may also consider standing under the "zone of interests" test, which "requires [the court] to determine, using traditional tools of statutory interpretation, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Intern., Inc. v. Static Control Components, Inc*., 572 U.S. 118, 127 (2014). Under these statutory principles, ACES's claims must be "within the zone of interests to be protected or regulated by the statute or constitutional guarantee in

question." *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970). On this point, "[s]tatutory intent . . . is determinative," and "[w]ithout it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Alexander v. Sandoval*, 532 U.S. 275, 286-287 (2001).

Although some constitutional provisions, such as the Commerce Clause, are the "source of a right of action in those injured by regulations that exceed such limitations," *Dennis v. Higgins*, 498 U.S. 439, 450 (1991), the Supremacy Clause "is not a source of any federal rights," *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). *See also Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-325 (2015). Therefore, a private party cannot bring a case with statutory standing relying on the Supremacy Clause alone.

This court should also rule on the lack of private enforceability of the FPA. Although district courts have dismissed cases for lack of equity jurisdiction under the FPA, this issue has not been directly addressed at the appellate level. *See Coalition for Competitive Elec., Dynegy Inc. v. Zibelman*, 272 F. Supp. 3d 554, 565 (S.D.N.Y. 2017), *aff'd*, 906 F.3d 41 (2d Cir. 2018) ("The FPA tacitly forecloses private parties from invoking equity jurisdiction to challenge state laws enacted in alleged violation of the FPA because Congress implicitly provided a "sole remedy" in the FPA—specifically, enforcement by FERC. Similar to ANCA, the FPA grants FERC broad enforcement authority."); *see also Coalition for Competitive Elec., Dynergy Inc. v. Zibelman*, 906 F.3d 41, 49 (2d Cir. 2018) ("We need not consider the parties' disagreement regarding equity jurisdiction because we conclude (as did the Seventh Circuit) that federal law does not preempt the state statute—that is, since Plaintiffs' claims fail either on the merits or for lack of standing, the question regarding equity is obviated"); *Electric Power Supply Assn. v. Star*,

904 F.3d 518, 522 (7th Cir. 2018). However, as *Armstrong* demonstrated, there might be certain characteristics of a statute that "weigh against exercising courts' equitable jurisdiction." Matthew R. Christiansen, *The FPA and the Private Right to Preempt*, 84 Geo. Wash. L. Rev. Arguendo 130, 131 (2016). The characteristics that led the Court to rule against equitable jurisdiction in the Medicaid case—having a "comprehensive remedial scheme . . . a high degree of judgement and 'complexity associated with enforcing'"—run distinctly parallel in the FPA, where FERC is best positioned to manage the "sole remedy." *Id.* at 131, 139. Because the Supremacy Clause is not privately enforceable and because, while appellate courts have not yet ruled on equity jurisdiction arising from the FPA, there is a parallel case in *Armstrong* that should serve as precedent, this court should determine that a private actor such as ACES lacks zone of interest standing.

For reasons of both constitutional and statutory standing, the Twelfth Circuit should affirm the district court's determination to grant the Vandalia PCS's motion to dismiss on the grounds that ACES lacked standing to bring a claim against the Vandalia PSC's Capacity Factor Order under the Supremacy Clause.

III. The District Court correctly ruled that the Vandalia PSC's Capacity Factor Order is not preempted by the authority of FERC under the FPA.

A. Vandalia PSC's Capacity Factor Order is not preempted by FERC's authority to regulate wholesale energy markets.

The Court of Appeals in the Second Circuit has stated a guiding framework for approaching preemption that this Court should follow: there is a "'strong presumption against finding that the [State's] powers' are preempted by the FPA." *Coalition for Competitive Elec., Dynergy Inc.*, 906 F.3d at 50 (quoting *Niagara Mohawk Power Corp. v. Hudson River-Black*

River Regulating Dist., 673 F.3d 84, 94 (2d Cir. 2012)). The FPA is was "drawn with meticulous regard for the continued exercise of state power.'" *Rochester Gas & Elec. Corp. v. PSC of N.Y.*, 754 F.2d 99, 104 (2d Cir. 1985)).

There is an important interplay between the federal and state jurisdictions that work together. The FPA authorizes FERC to regulate "the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b)(1). This includes both wholesale electricity rates and rules or practices "affecting" such rates. 16 U.S.C. §§ 824d(a), 824e(a). But it places beyond FERC's power, leaving to the States alone, the regulation of "any other sale"—i.e., any retail sale—of electricity, as well as exclusive jurisdiction over "facilities used for the generation of electric energy," including production and retail sales. 16 U.S.C. § 824(b).

Despite these exclusive jurisdiction zones, the energy system is inextricably connected, and therefore the courts have recognized that "'[a] FERC regulation does not run afoul of § 824(b)'s proscription just because it affects—even substantially—the quantity or terms of retail sales . . . To the contrary, transactions that occur on the wholesale market have natural consequences at the retail level." *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 281 (2016), as revised (Jan. 28, 2016). The same must be true in the other direction; state regulations can substantially affect the wholesale market without impermissibly encroaching on FERC's exclusive jurisdiction.

Field preemption occurs under the FPA when "Congress has legislated comprehensively to occupy an entire field of regulation." *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509 (1989). Because the FPA has explicitly left energy facility regulation and production, as well as retail energy sales, in the hands of the state, this is a clear area where there is no field preemption. In *Hughes v. Talen Energy Marketing, LLC*, the Supreme Court set a relevant

standard when it ruled that the Maryland program in question in the case, establishing a contract-for-differences, "contravened the FPA's division of authority" and was "preempted because it disregard[ed] the interstate wholesale rate FERC require[ed]." 578 U.S. 150, 151 (2016). However, in a case decided just the year before, the Supreme Court articulated that for "a practice [that] affects nonjurisdictional as well as jurisdictional sales, pre-emption can be found only where a detailed examination convincingly demonstrates that a matter falls within the pre-empted field as defined by appellate precedents. Those precedents emphasize the importance of considering the target at which the state-law claims aim." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 374 (2015) (an antitrust dispute between natural gas pipelines and customers, governed by the Natural Gas Act (NGA) which divides jurisdiction in the same way as the FPA). *See, e.g.*, *Northern Natural Gas Co. v. State Corporation Comm'n*, 372 U.S. 84 (1963); *Nw. Cent. Pipeline*, 489 U.S. (1989). Understanding these cases together provides the court with a foundation for examining Vandalia PSC's Capacity Factor Order beyond its facial similarities with *Hughes*.

B. Vandalia PSC's Capacity Factor Order is not preempted because it does not effectively set an interstate wholesale rate in contravention of the FPA's division of authority between state and federal regulators.

There are certain parallels in the facts of the *Hughes* case and Vandalia PSC's Capacity Factor Order, including establishing a pricing structure that allows the utilities to recoup production costs from consumers within Vandalia if their production costs are not covered by PJM's market clearing rate. However, Vandalia PSC's Capacity Factor Order is firmly distinguished from a price-setting incentive structure "[]tethered to [the] generator's wholesale market participation." *Hughes*, 578 U.S. at 166. One critical difference is that whereas Maryland

required the participating load serving entities (LSEs) to enter a 20-year contract that created a set price that the LSEs would be guaranteed so long as their bid cleared in the PJM action market which effectively set the wholesale rate, *Hughes*, 578 U.S. at 159 (2016), the Vandalia PSC's Capacity Factor Order does not guarantee a set rate whatsoever. The rate that the utilities operating under the Capacity Factor Order will bid and receive is not set by Vandalia PSC, but instead by what is economical. How the utilities evaluate what is economical will, of course, be influenced by the cost-shifting option to consumers, but this option should be understood as one that is aimed at retail consumers under state jurisdiction, as opposed to one that is aimed at the PJM wholesale market. Moreover, the *Hughes* court determined that "[s]o long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable." *Id.* at 166. A prior case, *Rochester Gas and Elec. Corp. v. Pub. Serv. Commn. of State of N.Y.*, 754 F.2d 99 (2d Cir. 1985), has also been used by at least one appellate court to explain that "tying retail prices (which are under state jurisdiction) to estimates of wholesale revenues (which are under FERC's) is permissible because there is 'a distinction between' a state impermissibly 'regulating [wholesale] sales' and a state 'reflecting the profits from a reasonable estimate of those sales' when acting within its jurisdiction." *Competitive Elec.*, 906 F.3d at 51-52. The Vandalia PSC's Capacity Factor Order should be thought of in similar terms: the PSC is accounting for a cost-shifting policy that will impact intrastate sales, and there is a distinction between that and impermissibly regulating wholesale sales—especially because the sales from the utilities under the PSC's Capacity Factor Order are required to sell exclusively into the PJM market and can do so economically. Factual Background at 8.

C. The Capacity Factor Order does not compel coal-burning utilities to sell their energy into PJM, as they are already required to do so through their FRR status.

There is a nuance in the term "condition," because the utilities regulated by the Capacity Factor Order both have "Fixed Resource Requirement" (FRR) status with PJM, which requires them to sell exclusively into PJM. *Id*. Critical to the court's understanding of the lines between FERC and state jurisdictions, this means that the policy or agreement *conditioning* the sale of energy from coal-fired power plants is governed by FERC's FRR program, as opposed to the Vandalia PSC.

The *Hughes* ruling has since been nuanced by several cases delineating the extent to which states can support particular energy sectors under their jurisdiction. Specifically, affirmation of Vandalia PSC's authority to enact the Capacity Factor Order is established by the precedent developed to respond to state-specific zero-emissions credit (ZEC) programs. In the aftermath of *Hughes*, federal appellate courts have upheld ZEC programs in New York and Illinois, and in doing so, they have clarified the *Hughes* ruling by permitting state programs subsidize particular energy sectors—in these cases, nuclear—despite that sector-specific support having an indirect effect on the interstate wholesale energy markets. *See Competitive Elec.* at 52; *Electric Power Supply Association v. Star*, 904 F.3d 518 (7th Cir. 2018). *Competitive Elec.* clarified that the *Hughes*' tether is related to participation as opposed to price-setting, which underscores the importance of the FRR status underlying the energy sales into PJM. *Competitive Elec*., 906 F.3d at 51 (2018).

D. The Capacity Factor Order is not conflict-preempted because it does not contravene the FPA's stated goals.

The FPA makes FERC responsible for ensuring that "[a]ll 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. § 824d(a). Conflict preemption occurs "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok*, 135 S.Ct. at 1599 (2015). Therefore, the FERC's responsibility to ensure just and reasonable wholesale rates is the overarching framework that it must not be impossible to accomplish while simultaneously upholding PSC's Capacity Factor Order. It might also be considered in direct conflict with a federal law if the state law "interferes with the method by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). However, if a state chooses to "regulate production or other subjects of state jurisdiction," which Vandalia PSC has done in this case, and the "means chosen [are]…plausibly…related to matters of legitimate state concern," which they are here, given the disproportionate role that coal plays in Vandalia's economy, then there is no conflict preemption "unless clear damage to federal goals would result." *Nw. Central Pipeline, 489 U.S.* at 518, 522 (1989). Given the finding of fact that the Vandalia PSC made about the very low likelihood that the 75 percent capacity factor would not be economical, this court should find that the Capacity Factor Order faces no conflict preemption.

IV. Vandalia's statutory ROFR is not preempted by FERC Order 1000.

A. By its own terms, Order 1000 does not preempt Vandalia's statutory ROFR.

FERC Order 1000 requires "public utility transmission providers to remove . . . any provisions that grant a *federal* right of first refusal." Order 1000 at ¶ 7 (emphasis added). However, nothing in the plain language of the Order precludes *states* from "regulat[ing] within their assigned domain." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 151 (2016). Vandalia regulated within its assigned domain when it enacted its statutory ROFR, exercising its continuing authority over transmission. *See New York v. FERC*, 535 U.S. 1, 24 (2002) (adducing FERC's recognition that, "[a]mong other things, Congress left to the States authority to regulate generation and transmission siting"); *see also Piedmont Envt'l Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009) ("The states have traditionally assumed all jurisdiction to approve or deny permits for the siting and construction of electrical transmission facilities."). Duly applied to Order 1000, "the standard tools of interpretation," including, first and foremost, the regulation's text, lead ineluctably to the conclusion that the Order does not preempt state ROFRs. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

Furthermore, even if the text of Order 1000 were "genuinely ambiguous" with respect to preemption, FERC's own interpretation of the regulation, which explicitly forecloses Appellant's contrary interpretation, merits the Court's deference. *See id.* FERC makes clear that Order 1000 "purposely . . . addresses only rights of first refusal that are created by provisions in Commission-jurisdictional tariffs or agreements" and that nothing in the Order "limit[s], preempt[s], or otherwise affect[s] state or local laws or regulations with respect to construction of transmission facilities." Order No. 1000 at ¶ 253 n.231; *see also id.* at ¶ 287 (acknowledging "that there may be restrictions on the construction of transmission facilities by nonincumbent

transmission providers under rules or regulations enforced by other jurisdictions"); Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities, 139 FERC 61132, ¶ 415 (2012) (Order 1000-A) (affirming Order 1000's limited scope).

B. FERC could not have preempted Vandalia's statutory ROFR because it is aimed at a target within Vandalia's state jurisdiction.

FERC thereby emphasized that, in adopting the Order, it had no intention of transgressing the "bright line" between federal and state jurisdiction. *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964). The agency apparently understood, as this Court ought to affirm, that Order 1000 did and could not preempt a state law, such as Vandalia's NTPA, that "*aims*" only at ensuring stable and amenable in-state transmission service. *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 385 (2015). This is so because the FPA does not reserve the regulation of transmission exclusively to FERC's jurisdiction but instead empowers each state "to retain significant control over local matters" that were traditionally its prerogative, including but not limited to the siting and construction of transmission facilities within the state. *See New York v. FERC*, 535 U.S. at 22-24; *Piedmont Envt'l Council v. FERC*, 558 F.3d at 310; 16 U.S.C. § 824(b)(1).

To abrogate these "historic police powers" would require evidence that their supersession by the FPA was "the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)) (explaining the Supreme Court's presumption against preemption). Such evidence is unavailable here. On the contrary, by passing the Energy Policy Act of 2005, which empowered FERC "to issue permits for the construction or modification of transmission facilities" in a designated "national interest electric transmission corridor" under certain enumerated conditions, 16 U.S.C. § 824p(a), Congress "demonstrated . . . that it knew

how to provide for" FERC to exercise regulatory authority over transmission facilities. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485 (1996). Had Congress intended, at any point, to universally preempt states' traditional authority over such matters, it could and presumably would have done so explicitly via statute. *Cf. Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not . . . hide elephants in mouseholes.").

Appellant's insistence that the NTPA "affects—even substantially—the" construction of a PJM-solicited project "is of no legal consequence." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 281 (2016), *as revised* (Jan. 28, 2016). Because the realms of federal and state jurisdiction under the FPA "are not hermetically sealed from each other," the fact that regulation in one has "natural consequences" in the other is not sufficient grounds for invalidation. *Id.*

Given that the statutory ROFR extends for only eighteen months, it at most *delays*, rather than precludes, construction. Even assuming it is appropriate to characterize the outcome of a competitive solicitation as an exercise of FERC's jurisdiction necessitating "compliance," such inconvenience is a far cry from the actual impossibility that a finding of preemption would require here. *See Oneok*, 575 U.S. at 377 ("[C]onflict pre-emption exists where 'compliance with both state and federal law is impossible . . . .'" (quoting *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989))).

C. Vandalia's statutory ROFR survives the Supreme Court's prevailing preemption inquiry.

In short, Appellant's claim founders at each of the three steps comprising the Supreme Court's prevailing approach to questions of federal-state preemption in the energy market. *See* Matthew R. Christiansen & Joshua C. Macey, *Long Live the Federal Power Act's Bright Line*, 134 Harv. L. Rev. 1360, 1369-70 (2021) ("Under [the Court's] framework, every dispute

involving the FPA's jurisdictional line can be resolved by answering no more than three questions."). First, the NTPA is not "unambiguously *directed at*" a matter solely in FERC's jurisdiction, *Oneok*, 575 U.S. at 386 (quoting *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 514 (1989)). Nor does the NTPA "seek to achieve ends . . . through regulatory means that intrude on FERC's authority," *Hughes*, 578 U.S. at 164, thus passing the second step of the Court's inquiry. Instead, the NTPA's target is in fact the regulation of transmission facilities within the state, which the FPA left squarely in Vandalia's authority. *See* 16 U.S.C. § 824(b)(1). A judicial inquisition in search of some other, contrary legislative purpose that might yet warrant preemption would be a "misadventure[]" risking "significant federal intrusion into state sovereignty." *Virginia Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1905-06 (2019).

Thirdly and finally, the NTPA has not rendered compliance with FERC regulations actually impossible. *See Oneok*, 575 U.S. at 377; *see also Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 373-75 (1988) (holding that a state regulation was preempted because it irreconcilably contradicted an actual proper exercise of FERC jurisdiction). The NTPA therefore "is consistent with the FPA's allocation of jurisdiction" and its "dual federalist structure." Christiansen & Macey, *supra*, at 1370, 1412. Accordingly, the Court should affirm the District Court's dismissal of this preemption claim.

V. Vandalia's statutory ROFR does not violate the "dormant" Commerce Clause.

In addition to its preemption claim, Appellant also challenges Vandalia's statutory ROFR as a violation of the "dormant" Commerce Clause. According to this controversial doctrine, the Supreme Court's espousal of which has been subject to "vigorous and thoughtful critiques," *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019), the Commerce Clause is interpreted both to empower Congress to "regulate Commerce . . . among the several

States," U.S. Const. art. I, § 8, cl. 3, and to impose an "implicit restraint on state authority" to do the same, *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007). Typically, applications of this doctrine forbid states from either "discriminat[ing] against" or "impos[ing] undue burdens on interstate commerce." *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090-91 (2018). Because Vandalia's statutory ROFR contravenes neither of these "two primary principles," it is not susceptible to invalidation under the dormant Commerce Clause. *Id.*

A. A claim of discrimination sounding in the dormant Commerce Clause is inapposite because ACES and the incumbents are not similarly situated for the purposes thereof.

In *General Motors Corp. v. Tracy*, the Supreme Court clarified that "any notion of discrimination" under the dormant Commerce Clause "assumes a comparison of substantially similar entities." 519 U.S. 278 (1997). If the entities are differently situated from the outset, they may "continue to [be] so even if the supposedly discriminatory burden were removed," thereby ruling out any role the dormant Commerce Clause might otherwise have played. *Id.* at 298-99.

Here, as in *Tracy*, ACES and the incumbents "serve different markets" and are not "substantially similar entities . . . similarly situated for constitutional purposes." *Id.* Unlike the incumbents, ACES does not provide "public electricity services to the public for compensation in Vandalia" and is not a public utility. *See* Vandalia Pub. Serv. Comm'n, Right of Way Order 3 (Dec. 13, 2022). It therefore "entirely" serves the wholesale market, whereas the incumbents are also active in the retail market. *Id.* Furthermore, because ACES is not and will not be a public utility in Vandalia, ACES cannot use preexisting rights of way in the state. This reality, quite apart from the NTPA, practically forecloses the ability of ACES to build Mountaineer Express. Thus, "eliminating the" statutory ROFR "would not serve the dormant Commerce Clause's

fundamental objective." *Tracy*, 519 U.S. at 299. Appellant's claim of "discrimination under the Commerce Clause . . . must therefore fail." *Id.* at 310.

B. Vandalia's statutory ROFR is neither facially nor effectively discriminatory.

Regardless of the applicability of *Tracy*, it is clear that Vandalia's statutory ROFR is not "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, 338 (2008) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 273–274 (1988)). The statute grants the ROFR to incumbents without any regard to the state in which they are incorporated or in which they carry on the majority of their commercial activities. The NTPA is "applie[d] evenhandedly to all entities," based only on incumbency, "regardless of whether they are [Vandalia]-based entities or based elsewhere." *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1028 (8th Cir. 2020), *cert. denied*, 141 S.Ct. 1510 (2021). Thus, the NTPA is not discriminatory "on its face." *Wyoming v. Oklahoma*, 502 U.S. 437, 456 (1992).

Nor is the NTPA discriminatory "in practical effect." *Id.* Upon its adoption, the law granted the ROFR exclusively to two out-of-state entities, because those two entities were the only incumbents in Vandalia. Both LastEnergy and Mid-Atlantic Power Co., the incumbents, are incorporated and headquartered outside Vandalia, and both "own and operate facilities in states other than" Vandalia. *LSP Transmission Holdings, LLC*, 954 F.3d at 1028. Meanwhile, Appellant ACES is incorporated and headquartered in Vandalian. In effect, the NTPA benefits economic actors with "principal operations" *outside* Vandalia. *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980). Any burden the ROFR imposes is borne by nonincumbents equally, on the basis of nonincumbency alone, without reliance on the extent of a given entity's "contacts with the local economy." *Id.* Especially "since there are no local" (that is, no Vandalia-based)

incumbents at all, Appellant's "claims of disparate treatment between interstate and local commerce [are] meritless." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978).

It thus strains credulity to suggest that the NTPA effects "simple economic protectionism," *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978), or enacts "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter" *United Haulers Ass'n, Inc.*, 550 U.S. at 338 (quoting *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994)). Given that the NTPA is a non-protectionist, non-discriminatory exercise of "local autonomy" consistent with the Framers' federalism, *Dep't of Revenue of Ky. v. Davis*, 553 U.S. at 338, it cannot be deemed "*per se* invalid" under the dormant Commerce Clause. *Id.* (quoting *Oregon Waste Systems, Inc.*, 511 U.S. at 99).

C. Vandalia's statutory ROFR does not unduly burden interstate commerce.

It is profoundly uncertain when, if at all, a "genuinely nondiscriminatory" state law like the NTPA is nonetheless subjected to potential invalidation under the dormant Commerce Clause for unduly burdening interstate commerce. *See General Motors Corp. v. Tracy*, 519 U.S. at 298 n.12 (noting that the "line between these two strands of analysis" is so unclear that "several cases that have purported to apply the undue burden test . . . arguably turned in whole or in part on" discrimination). Setting aside the equivocal state of the doctrine, Vandalia's statutory ROFR must survive even if the Court deems it appropriate to subject the NTPA to "further inquiry" regarding the burden, if any, it imposes on interstate commerce. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). This is so because any cognizable burden the statutory ROFR may impose on interstate commerce cannot be characterized as

"clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970).

The Supreme Court has consistently applied this *Pike* balancing test in a deferential manner such that laws scrutinized thereunder "frequently survive." *Dep't of Revenue of Ky. v. Davis*, 553 U.S. at 339. Those that have been invalidated tend to entail burdens such as significant disruptions of existing instrumentalities of interstate commercial transport, *see, e.g.*, *S. Pac. Co. v. Arizona*, 325 U.S. 761, 770 (1945), or expansive assertions of regulatory authority over out-of-state actors, *see, e.g.*, *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).

Such burdens are both more substantial and more concrete than the uncertainty and inconvenience of which ACES complains here. The NTPA is a grant of a timebound right of first refusal to incumbents, not an indefinite prohibition on the construction of transmission facilities by nonincumbents. *Compare LSP Transmission Holdings, LLC*, 954 F.3d at 1023 (affirming the validity of the former) *with NextEra Energy Cap. Holdings, Inc. v. Lake*, 48 F.4th 306, 326 (2022) (characterizing the latter as violative of the dormant Commerce Clause, with emphasis on its permanence). The statute represents the narrowest and least burdensome means by which Vandalia could secure the local benefits at stake here; there is no manner in which Vandalia's local interests "could be promoted as well with a lesser impact on interstate activities." *Pike*, 397 U.S. at 142.

Even if the NTPA did plausibly impose a burden substantial enough to render a *Pike* claim colorable, it would be decisively outweighed by the "legitimate local purpose[s]" that the statute advances. *Pike*, 397 U.S. at 142. Those purposes include ensuring the safety and stability of transmission facilities within the state, reinforcing Vandalia's practical capacity to exercise its traditional regulatory authority over those facilities, and minimizing conflicts and costs

associated with right-of-way planning. *Cf. LSP Transmission Holdings, LLC*, 954 F.3d at 1031 (describing the preservation of "the historically-proven status quo for the construction and maintenance of electric transmission lines" as a "goal within the purview of a State's legitimate interest in regulating . . . transmission"); *Maine v. Taylor*, 477 U.S. 131, 151 (1986) ("As long as a State does not needlessly obstruct interstate trade . . . it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources.").

Vandalia is not alone in recognizing the legitimacy of these policy objectives. FERC itself acknowledged the salutary character of ROFRs in at least some contexts by making exceptions when it introduced the general revocation of *federal* ROFRs, including "not requir[ing] removal of a federal right of first refusal for a local transmission facility." Order 1000 at ¶ 258. Congress, for its part, "has never questioned the need for" some degree of state involvement in the energy sector, *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987), and accordingly has designed the applicable statutory framework so that the "federal-state relationship" in the field is "marked by interdependence." *Hughes*, 578 U.S. at 167 (Sotomayor, J., concurring).

The Court should "not second-guess [this] legislative judgment" by abrogating Vandalia's "power to regulate" here. *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981). Given that Vandalia's limited ROFR is nondiscriminatory and does not impose burdens that are "clearly excessive in relation to the putative local benefits," it does not violate the dormant Commerce Clause. *Pike*, 397 U.S. at 142.

CONCLUSION

For the foregoing reasons, the Vandalia PSC respectfully urges this Court to affirm the U.S. District Court order dismissing each of Appellant's claims.

CERTIFICATE OF SERVICE

Pursuant to *Official Rule* IV, *Team Members* representing Vandalia Public Service Commission 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. 39