C.A. No. 22-0682

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

v.

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

Appellees.

Appeal from the United States District Court
For the Northern District of Vandalia

BRIEF FOR APPELLEES

TEAM 9

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

CONSTITUTIONAL PROVISIONS

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction). This Court has appellate jurisdiction under 28 U.S.C. § 1291. ROA.3036-37 (August 15, 2022, order and final judgment); ROA.3038-39 (ACES's August 29, 2022, notice of appeal).

ISSUES PRESENTED

I. Under the standing requirements of the United States Constitution, which requires injury, causation, and redressability to exist at the lawsuit's outset and for each claim and form of relief sought, does ACES have standing when it failed to state an injury that is concrete and de facto, or even a risk of injury that is certainly impending and fairly traceable to the capacity factor order?

II. Under the Unites States Constitution's Supremacy Clause, do FERC's actions preempt Vandalia's Public Service Commission's Capacity Factor Order, even though FERC allows states to regulate laws that incidentally affect areas within the Federal Commission's domain?

III. Under the Unites States Constitution's Supremacy Clause, does FERC's Order 1000 preempt Vandalia's statutory rights of first refusal, when Order 1000 only prohibits regional Independent Service Operators from incorporating statutory rights of first refusal provisions, but expressly allows States to regulate their intrastate electricity utilities?

IV. Under the Unites States Constitution's dormant Commerce Clause, is Vandalia's statutory right of first refusal unconstitutional even though it does not discriminate against intrastate commerce facially, in purpose, or in effect?

STATEMENT OF THE CASE

I. State and Federal Regulation of Electricity Transmission

Electricity is produced and sold in three steps: generation, transmission, and distribution. This case involves the regulation of electricity in Vandalia.

State and federal regulation of electricity have different obligations. Under the Federal Power Act ("FPA"), the federal government regulates rates and services of interstate electricity transmission and wholesale electricity sales. 16. U.S.C. § 824(b)(1). "A wholesale sale is defined as a 'sale of electric energy to any person for resale.'" *Id*.

An independent agency, the Federal Energy Regulatory Commission ("FERC"), administers these responsibilities. 42 U.S.C. §§ 7134, 7171(a). For example, FERC's issuance of Order 888, "which required . . . transmission-owning utilities to provide open, fair, and non-discriminatory access to their transmission lines, thereby removing impediments to competition in the wholesale bulk power marketplace and enabling more efficient, lower-cost power to be delivered to electricity consumers." R. at 3. Thus, FERC suggested the creation of Independent System Operators ("ISOs") "as one way for existing power pools to satisfy the requirement of providing non-discriminatory access to transmission." *Id*. Each ISO provides a tariff that expresses the terms its members are to follow when building or operating transmission facilities for the national grid in the ISOs jurisdiction. *Id*.

Another example of its administrative duties is FERC's Order 2000, "which effectively required transmission-owning utilities to participate in a regional transmission organization ("RTO"). *Id*. "The RTO/ISO serving the mid-Atlantic region is the PJM Interconnection ("PJM")." *Id*. PJM is "responsible for maintaining and operating the transmission grid in Vandalia . . . thirteen other states, and the District of Columbia." *Id.* PJM, not the states, decides whether to "approve the construction of new transmission facilities within PJM . . . ." *Id*. Therefore, FERC's Orders

888 and 2000 "resulted in the creation of RTOs/ISOs to manage wholesale markets on a regional basis." R. at 13. Each RTO/ISO conduct competitive auctions "to set wholesale prices for electricity." *Id.* These competitive auctions are extensively regulated by FERC to ensure they produce a just and reasonable clearing price by efficiently balancing supply and demand. *Id*.

However, States retain authority over retail electricity sales, local distribution, and transmission of electric energy that occurs within its borders. 16 U.S.C. § 824(b)(1). Including "jurisdiction to approve or deny permits for the siting and construction of electric transmission facilities." *Piedmont Envtl. Council v. FERC*, 558 F.3d 304, 310 (4th Cir. 2009). Subsequently, this is why a project, like ACES's, can be approved by the regional PJM, but still denied by Vandalia's regulatory body. Because a core component of the States' police powers is States' regulation of its electric utilities. Ark. *Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

The state government agency, Vandalia Public Service Commission ("VPSC"), regulates its electric utilities retail rates and practices. R. at 6. Thus, VPSC performs one of "the most important . . . functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The VPSC has broad authority to set "just and reasonable rates" for the utilities subject to its jurisdiction. Additionally, "regulating the practices, services, and rates of public utilities to "provide the availability of adequate, economical and reliable utility services." *Vand. Code* § 24-1-1(a)(2).

II. Energy and Capacity Markets

PJM operates the energy and capacity markets in addition to its responsibilities for the transmission grid. R. at 3. Energy markets are essentially real-time markets in which PJM buys and sells "electricity to distributors for delivery within the next hour or [twenty-four] hours." *Id*.

Every electricity generator in Vandalia is connected to PJM. Due to Vandalia's generators' status and contracts with PJM, they must sell all their energy to PJM. *Id.*

Wholesale electricity prices are determined by auctions in which generating resources bid on the "price at which they can supply a specific number of megawatt-hours of power." *Id*. Hence, the name for the price of wholesale electricity is the "market-clearing price." *Id*. "If a resource submits a successful bid" for its generation to meet demand, "it is said to 'clear' the market." *Id*. Market clearing starts with the cheapest resource, followed by the next cheapest option, and so on. *Id*. A market is cleared when supply and demand are equal, and the last resource offered, plus market operation charges, is the wholesale power price. *Id*.

Furthermore, there is the capacity market, which "ensures that enough capacity is being built ahead of time to meet growing demand." *Id*. In the capacity market, PJM forecasts demand three years into the future and assigns a share to each load-serving entity in the region. *Id*. A capacity owner bids in the auction to sell electricity to PJM at the rate set by the seller. *Id*. PJM accepts bids until it has acquired enough capacity for its predicted demand. *Id.*

III. VPSC's Capacity Factor Order

In Vandalia, coal mining is "a way of life in many parts in the state." R. at 4. This is a product of Vandalia's massive reserves of coal deposits, which made coal mining its biggest industry. *Id*. Additionally, Vandalia only uses half of the electricity that it produces, thus it is "a net supplier of electricity to the regional grid . . . ." *Id*.

There are two retail utilities, LastEnergy and Mid-Atlantic Power Co. ("MAPCo") that serve Vandalia. Id. "LastEnergy is headquartered and incorporated in Akron, Ohio, and serves customers in" five states, on top of its Vandalia customers. *Id*. "MAPCo is headquartered and incorporated in Columbus, Ohio, and serves customers in" seven states, on top of its Vandalia customers. *Id.* Under previous VPSC orders, both LastEnergy and MAPCo file annual filings for

power cost adjustment ("PCA"). R. at 7. Power cost surcharges can be collected from retail customers by electric utilities under the PCA mechanism "based on actual power costs incurred by such utilities over a 12-month period." *Id*.

Accordingly, following disappointing PCA filings by LastEnergy and MAPCo, VPSC undertook a generic "proceeding . . . to investigate Coal Plant Capacity Factors and Electricity Rates. That process culminated in a general order ("Capacity Factor Order") applicable to both electric utilities . . . ." *Id*. at 7-8. VSPC's general order stated the following:

> We find that the capacity factors of the coal plants operated by the Vandalia jurisdictional electric utilities have been unacceptably low over the past several months, and it is unacceptable for this low plant utilization to continue into the future. The public interest is better served by LastEnergy and MAPCo managing their power supply portfolio in a manner that maximizes generation from their owned coal-fired power plants. Consistent with the statutory obligation of this Commission to encourage the operation of coal-fired plants "at maximum reasonable output and for the duration of the life of the plants," the Commission hereby directs that LastEnergy and MAPCo operate their coal-fired plants to achieve a capacity factor of not less than 75 percent, as measured over a calendar year. We expect higher capacity factors if more favorable market conditions occur in the future.We further direct both utilities to procure the necessary coal supplies to maintain a sufficient inventory on site for each of their coal plants to operate in a manner consistent with this order.

Capacity Factor Order, p 7; R. at 8.

The Capacity Factor Order ("CFO") included "a finding of fact that operation of the jurisdictional coal-fired plants at a [seventy-five] percent capacity factor would be economical." R. at 8. However, to ensure certainty for investors and to "allow Vandalia utilities to continue to be able to raise necessary capital at reasonable costs," the CFO "expressly authorizes cost recovery in LastEnergy's and MAPCo's retail rates." *Id.* Cost recovery would kick in for Vandalia's coal-fired plants complying with the seventy-five percent capacity factor when their expenses of production are greater than the market-clearing price in PJM. I*d*. In other words, through its CFO,

VSPC authorized Last Energy and MAPCo to recover costs directly from retail ratepayers if the cost of production in maintaining the seventy-five percent capacity factor is more than the market-clearing price. *Id*.

There are differences as to whether the CFO's seventy-five percent capacity factor is economical. R. at 9. However, VPSC "Chairman Williamson stated his expectation that the coal plants 'would almost always be able to run economically at the [seventy-five] percent capacity factor . . . .'" *Id*.

IV. FERC Order No. 1000.

Before 2011, "many FERC-approved ISO tariffs contained right of first refusal ("ROFR") provisions." *Id*. "These provisions gave owners of existing transmission facilities the exclusive right to construct new transmission facilities in their service areas." *Id*. Incumbent transmission owners were eligible for this federal ROFR regardless of whether a nonincumbent transmission owner proposed a new transmission facility to the ISO. *Id*. Further, even if the nonincumbent could build and maintain the new facility more efficiently. *Id*.

Accordingly, in 2011, FERC issued Order 1000, "which required ISOs to eliminate federal ROFR provisions for regional transmission facilities from their FERC-approved tariffs and agreements and ordered new transmission projects to be competitively and regionally planned by entities like PJM." *Id*. It should be noted, however, that state ROFRs were not altered by Order 1000. Specifically, Order 1000 states, "nothing in this Final Rule is intended to limit, *preempt*, or otherwise affect state or local laws or regulations for the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Order 1000, at ¶ 227 (emphasis added).

V. Vandalia's ROFR and ROW Laws.

Subsequently, the Vandalia Legislature passed the "Native Transmission Protection Act" ("NATA") in 2014. R. at 9. NATA granted incumbent transmission owners exclusive rights to construct transmission lines within the state for a prescribed period. *Id.* NATA is comparable to other state legislatures' laws that include ROFRs, and those laws have remained in place despite similar challenges like the ones alleged here.

Incorporated in Springfield, Vandalia, Appalachian Clean Energy Solutions, Inc. ("ACES") is a global energy company. R. at 4. ACES generates electricity for wholesale markets and does not own any retail electric utilities. *Id.* ACES wants to build a new transmission line between Pennsylvania and North Carolina called the Mountaineer Express. *Id.* at 5. Construction of Vandalia portions requires a Certificate of Public Convenience and Necessity ("CPCN") from VPSC. R. at 5, 10. However, VPSC has yet to act upon ACES's application for its CPCN due to the passing of NATA. R. at 10. Specifically, VPSC's inaction results from the eighteen-month period the incumbents have to act. *Id.*

In order to use, access, or transit a piece of property, a utility must acquire a right of way ("ROW"), which is a type of easement or agreement granted to the utility from the property owner. *Id*. Typically, ROWs are granted "to an electric utility for the purpose of constructing, operating, and maintaining power lines and other equipment." *Id*. Thus, after a utility determines the intended route for its power line, its next step is to acquire "easements from property owners along the selected route as necessary." *Id*. "Both LastEnergy and MAPCo have obtained easements and agreements with local communities and property owners that allow them to build and maintain their distribution and transmission power lines." *Id*.

VPSC's authority is establish under Title 24 of the Vandalia Code. Id. Title 24 "contains a section governing the use of such electric utility easements." *Id*. Specifically, section 24-8-2 of the

Vandalia Code "provides that electric utility easements may be used by any 'public utility' for the location and use of distribution and transmission facilities." *Id.* In conjunction, section 24-8-1(d) defines "public utility" as "any person or persons, or associations 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 . . . ." *Id.*

LastEnergy owns several segments of the line identified by ACES. *Id.* Thus, the Mountain Express Line would transverse the same ROW that Last Energy acquired from local property owners. *Id*. at 10-11. Due to its status as the incumbent owner, LastEnergy denied ACES access. *Id.* at 11. Additionally, under the Vandalia Code, ACES was not a public utility, according to LastEnergy. *Id.* ACES brought a proceeding to VPSC, seeking a declaratory judgment to rule ACES as a public utility. *Id*. Thus, granting ACES the right to utilize LastEnergy's ROW within Vandalia. *Id.* However, VPSC agreed with LastEngery's decision and ruled that ACES was not a "public utility" because it "is not an entity furnishing electricity to the 'public' for compensation in Vandalia." *Id.*

Furthermore, VPSC classifies ACES as a "merchant power plant operator" and a "merchant transmission line operator . . . [whose] services are rendered entirely in wholesale, rather than retail, markets." *Id.* VPSC's classification of ACES would not change even if it completed the Mountaineer Express line because that line does not provide utility services to the state of Vandalia. *Id.* VPSC's ruling prevents ACES from using LastEnergy's preexisting ROW in Vandalia. *Id.* Therefore, ACES foresaw a similar unfavorable outcome with its CPCN application. *Id.*

VI. The District Court Dismisses ACES's Preemption and Dormant Commerce Clause Claims.

First, ACES brought unsuccessful challenges against VPSC over its CFO, "arguing that it is preempted by the FPA pursuant to *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016)." R. at 14. ACES alleged without merit that VPSC's "program, in effect, sets an interstate wholesale rate, contravening the FPA's division of authority between state and federal regulators." *Id.* (internal citations omitted). The VPSC "commissioners were sued in their official capacity under *Ex Parte Young* because . . . [V]PSC is a state agency and thus has sovereign immunity. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002)." R. at 1.

Consequently, the district court correctly granted VPSC's motion to dismiss regarding ACES's CFO challenges. R. at 15. It held that "ACES lacked standing to bring its Supremacy Clause Claim." *Id.* Next, "it found that, even if ACES had standing, the [CFO] does not violate the Supremacy Clause when analyzed under the ZEC line of cases." *Id.*

In addition, ACES brought two more unsuccessful challenges against VPSC regarding Vandalia's ROFR. *Id.* First, ACES argues that the FPA preempts Vandalia's ROFR and infringes on FERC's authority, as established in Order 1000. *Id.* Second, ACES argues that the ROFR violates the dormant Commerce Clause because it discriminates against out-of-state actors like ACES. *Id.*

Again, the district court correctly granted PCS's motion to dismiss both claims. R. at 16. First, it found that the ROFR was not preempted by Order 1000. *Id.* Next, it "determined that Vandalia's ROFR does not violate the dormant Commerce Clause" because it "rejected the Fifth Circuit's approach and instead found that the place of incorporation controls." *Id.* Additionally, the district court "determined that, under the *Pike* balancing test, the burden imposed on interstate

commerce did not exceed the local benefits the Vandalia legislature intended to protect when enacting . . . NATA." The Court should Affirm. *Id.*

SUMMARY OF THE ARGUMENT

First, ACES do not meet the standing threshold because ACES did not assert concrete injuries or risks resulting from VSPV's CFO. ACES was not subject to the CFO, "nor is it a ratepayer that could be affected by the" CFO. R. at 15. The CFO theoretically could affect ACES's "economics of building and operating" its new facility. *Id.* However, this only equates to a hypothetical injury, which is speculative and does not satisfy the standing requirements. *Id.*

Second, and in the alternative, even if ACES had standing VPSC's CFO is not preempted under the Supremacy Clause because FERC allows states to regulate laws that incidentally affect areas within the FERC's domain. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 954 (2016).

Third and fourth, Vandalia ROFR is not preempted by Order 1000, nor does it violate the dormant Commerce Clause. Under the Supremacy Clause, Order 1000 does not preempt Vandalia's ROFR. For instance, Order 1000 expressly stated that it did not "preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities . . . ." 136 FERC ¶61,051 at PP 284, 313 (2011). Therefore, according to the express language of Order 1000, it does not preempt Vandalia's ROFR.

Likewise, out-of-state entities are not discriminated against under the dormant Commerce Clause. Vandalia is where ACES is incorporated, and Ohio is where LastEnergy and MAPCo are incorporated. R. at 4. Further, ACES can build the line in eighteen months, if LastEnergy declines to exercise its ROFR and the VPSC issues the CPCN. In sum, although there is an incumbency requirement, this ROFR is far less egregious than the one examined by the Fifth Circuit. *See*

NextEra Energy Capitol Holdings, Inc. v. Lake, 48 F.4th 306, 324 (5th Cir. 2022) (striking down Texas Law that was far more egregious than VPSC's).

In *General Motors Corp. v. Tracy*, the Supreme Court held that private businesses and local monopolies are not similarly situated. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). In light of this, the arguments made by private businesses claiming that a state law discriminates between them and local utilities concerning energy distribution fails. *Id.* Likewise, for the same reasons ACES claims fail.

Accordingly, ACES is not similarly situated to existing regulated transmission-line providers with ROFRs under the dormant Commerce Clause precedent in *General Motors Corp. v. Tracy*. *General Motors Corp. v. Tracy*, 519 U.S. 278 (1997). Therefore, VPSC does not have to worry about violating the dormant Commerce Clause by distinguishing between the two. *See Tracy*, 519 U.S. at 299.

Vandalia's ROFR does not discriminate against interstate commerce facially, through its intent, or in its effect. On its face, no in-state versus out-of-state distinction is made. Vandalia's ROFR differentiates based on incumbency rather than geography. To maintain Vandalia's critical transmission infrastructure, the ROFR allowed existing transmission providers to develop their services on a nondiscriminatory basis. R. at 9. The two favored incumbent transmission providers, LastEnergy and MAPco, are owned and controlled by out-of-state entities. R. at 16. Thus, there is no discriminatory effect on out-of-state entities. ACES, the disfavored transmission entity, is an in-state entity by virtue of incorporation in Vandalia. R. at 4. Therefore, VPSC's ROFR law is not protectionist.

Lastly, ACES's challenge also fails because the ROFR survives scrutiny. *See Pike v. Bruce Church, Inc*., 397 U.S. 137, 142 (1970) (applicable scrutiny is to apply the test of whether the law

is clearly excessive relative to the putative local benefits). The appropriate standard for a nondiscriminatory law is articulated in *Pike*, 397 U.S. at 142. Accordingly, if an incidental burden on interstate commerce does not outweigh the putative local benefits, the regulation prevails. *Id.* Here, the burden imposed on interstate commerce did not exceed the local benefits the Vandalia legislature intended to protect when enacting the NATA. Consequently, the district court's decision to grant PSC's motions to dismiss should be affirmed.

ARGUMENT

I. ACES Fails to State a Concrete Injury or Risk that is Certainly Impending and Fairly Traceable to the CFO.

Under Article III of the United States Constitution, a plaintiff seeking federal jurisdiction has the burden of establishing the "irreducible constitutional minimum" of standing by demonstrating an injury in fact, that is fairly traceable to the challenged conduct of the defendant, and is likely to be "redressed by a favorable judicial decision". *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560-561; *Spokeo, Inc. v. Robins*, 578 U.S. 330, 330. Under the injury-in-fact requirement, a plaintiff must show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, *supra,* at 560. Thus, an injury in fact must be both concrete and particularized. *See*, *e.g.*, *Susan B. Anthony List* v. *Driehaus*, 573 U. S. 149, 158. Concreteness is quite different from particularization and requires an injury to be "de facto," that is, to actually exist. *Id.*

Lujan v. Defenders of Wildlife, put into effect a new interpretation of the Endangered Species Act of 1973, which required consultation for "actions taken in the United States or on the high seas." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560-561. (1992). Several wildlife conservation organizations filed suit to restore the original interpretation of the act. *Id.* The

Supreme Court held that the wildlife organizations did not have standing because, "the burden of proof was not met regarding causation and redressability of respondents' injury. *Id.*

Here, ACES has failed to meet their burden of proof regarding how the VSPC's CFO has created a "concrete" injury, which is an injury in fact, that directly affects ACES in a "personal and individual way" that is "fairly traceable" and would likely be redressed upon a favorable judicial decision.

The first prong, an injury in fact, has not been met because ACES has failed to demonstrate how it is personally affected. ACES alleged that VPSC's decision to adopt its CFO, which requires coal plants to run at a minimum of seventy-five percent, would distort the price signals in the PJM market. R. at 1. Further, that the CFO would set the wholesale sale rates in violation of the FPA, and that the CFO makes it difficult for non-incumbent utilities to build adequate capacity in the region. R. at 15.

VPSC has the authority to assert that the state's public interest would be better served when its coal plants are operating at their maximum generation and therefore they directed the coal plants to achieve a capacity factor of no less than seventy-five percent throughout the calendar year. R. at 8. VPSC asserted a finding of fact that it can be economical for Vandalia's coal plants to produce at a seventy-five percent capacity. *Id.* Thus, ACES fails to state an injury because it only mentions that lower cost options are available, and it is uneconomical to force in-state coal producers to run at seventy-five percent capacity factor. *Id.* at 8-9. ACES's injury is therefore not personal or individualized to show how the CFO requirements would affect its wholesale transmission operations. ACES is not subject to the CFO, and it is not a ratepayer that could be affected by the CFO. As such, this Court should affirm the lower court.

ACES has not met the second prong, that the injury must be "fairly traceable" to the CFO, because ACES has not stated an injury that can be traced to the CFO. ACES asserts it intends to build a transmission line and build a new natural gas-fired generator. *Id.* at 1, 5. However, ACES never alleges how the CFO is preventing them from fulfilling these desires.

In Order 1000, FERC requires ISOs to eliminate ROFR. *Id*. at 9. VPSC's response to Order 1000 was the NATA, which grants incumbent transmission owners the exclusive right for a proscribed period of time to construct new lines within Vandalia. *Id*. Therefore, ACES's can either wait eighteen months or acquire an incumbent transmission owner already in Vandalia, which would give them the exclusive right to build a transmission line. *Id.*

In *Orangeburg v. FERC*, a city in South Carolina was trying to cut a better deal for wholesale power. *Orangeburg v. FERC*, 862 F.3d 1071, 1073 (2017). The city found a supplier in North Carolina but before the deal was finalized, the North Carolina Utilities Commission ("NCUC") stopped the deal. *Id.* at 1073. The FPA leaves regulatory authority of retail power sales to state agencies like the NCUC, while authority over interstate wholesale power sales is reserved for FERC. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 766 (2016). The city met the standing requirements to challenge FERC's approval because it demonstrated an "imminent loss of the opportunity" to purchase reliable and low-cost wholesale power. *Orangeburg v. FERC*, 862 F.3d 1071, 1073 (2017). Further that the city's injury was "fairly traceable" to FERC's approval of the agreement. *Id.*

In the instant case, ACES intends on expanding its energy generation capabilities by building a transmission line from Pennsylvania to North Carolina, crossing over Vandalia. R. at 1. ACES claims its new line will increase the capacity of the regional grid and will ensure that the grid can effectively take in the electrical output from ACES's proposed facility. *Id.* at 5. That being

said, even though ACES claims they would effectively help the national grid, ACES has failed to state an injury that is fairly traceable to the CFO. Therefore, this Court should affirm the lower court's decision.

The third prong, that ACES's injury would likely be redressed by a judicial decision in ACES favor has not been met. The injury ACES alludes to is merely theoretical or hypothetical because the VPSC has conflicting findings of fact that indicate it would be economical for its coal plants to operate at seventy-five percent. R. at 8. Therefore, it is only speculative that a favorable decision for ACES would redress its alleged injury.

In *City of Kennett v. EPA*, the Eighth Circuit found that the city of Kennett had standing to challenge the Environmental Protection Agency ("EPA"), regarding its claims that the EPA exceeded its authority. *City of Kennett v EPA*, F.3d 424, 432 (8th Cir. 2018). The EPA, in accordance with the Clean Water Act, required a permit for those who wished to discharge water containing a certain amount of chemicals. *Id.* at 427. The city believed it had the authority to issue permits for discharge into the local stream. *Id* at 428. However, The EPA denied the permit for the city. *Id.* at 429. Nonetheless, the city went ahead and issued its own permits, but was informed by the EPA that it would be costly to correct the issue of all the permits the city authorized under its own discretion. *Id.* at 428-429. The EPA was found to of acted "arbitrarily and capriciously" because the city established injury in fact as they would eventually have to dispense funds in connection with its obligations to the EPA. *Id.*at 429. The city established redressability because a decision in its favor would avoid or delay its burden of making plans and decisions primarily based on the TMDL's allocations of waste load. *Id.*

As noted in *Lujan*, the Supreme Court determined The Defenders of Wildlife did not have standing because they did not meet their burden of proof by establishing an "injury in fact" that

was “fairly traceable” to the challenged conduct of the defendant, and is likely to be “redressed by a favorable judicial decision”. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992). In the instant case, ACES has similarly not met its burden of proof. Therefore, we ask this Court to affirm the district court’s dismissal, because ACES does not have standing to challenge the CFO.

ACES’s claim fails under the standard scope of review as arbitrary and capricious because VPSC provided a rational explanation for its CFO. Under the Administrative Procedure Act, the scope of review is analyzed under the narrow standard of "arbitrary and capricious." Administrative Procedure Act, 5 U. S. C. §706(2)(A). A court must uphold a rule if the agency has examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made.” *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 268 (2016).

The CFO is neither arbitrary nor capricious because VPSC explained, in detail, that due to the legacy of coal production in Vandalia they believe it is imperative to keep that legacy alive. R. at 4. In 2021, Vandalia was third in the nation for coal production. *Id.* Vandalia’s total electricity net generation in 2021 was ninety-one percent from coal-fired plants. *Id.* VPSC found that it would be economical for the coal-fired plants to continue production at seventy-five percent capacity. R. at 8. Therefore, The VPSC has rationally explained the connection between the historical significance of maintaining the rich history of coal-fired energy production in Vandalia, and the choice made to implement its CFO. *Id.* Accordingly, this Court should affirm.

II. If ACES has Standing, VPSC’s CFO Does not Violate the Supremacy Clause Because Vandalia can Regulate Laws that Incidentally Affect FERC’s Jurisdiction.

The Supremacy Clause deems federal laws as the supreme law of the land. U. S. Const., Art. VI, cl. 2. In other words, federal law preempts contrary state law. "Our inquiry into the scope of a [federal] statute's pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone in every pre-emption case." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016). FERC has jurisdiction over the wholesale sales of electricity in the interstate market. *Hughes*, at 153. FERC implements an auction style market which is used to ensure "wholesale rates that are just and reasonable". *Id.*

In *Hughes v. Talen Energy Mktg., LLC*, Maryland implemented its own program requiring load servicing entities ("LSEs") to enter a twenty-year pricing contract because it was concerned that the PJM capacity auction was not encouraging enough new in-state energy generators. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 151 (2016). Maryland chose CPV Maryland to build a new energy plant and enter into a twenty-year price contract with the LSEs. *Id*. at 151. The contract stated that CPV would sell its capacity through the auction to PJM but would receive the contract price agreed to rather than the market clearing price. *Id.*

The Court held that Maryland's program was preempted because it completely disregarded the interstate wholesale rate the FERC required. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016). "FERC has approved PJM's capacity auction as the sole rate setting mechanism for capacity sales to PJM and has deemed the market clearing price *per se* just and reasonable." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 151 (2016). Because Maryland's program disregarded an interstate wholesale rate required by FERC it was rejected by the Court. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 151. "[A] State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that

the States do not interfere with this authority.'" *Miss. Power & Light Co. v. Miss.*, 487 U. S. 354, 373 (1988).

The case at bar is distinguishable from *Hughes* because states have the authority to control in-state facilities that are used for generation of electric energy, which include, the need for new power facilities, their economic feasibility, rates, services, and other areas that have been characteristically governed by the States. *Pacific Gas & Elec. Co.* v. *State Energy Resources Conservation and Development Comm'n*, 461 U. S. 190, 205 (1983).

Here, Vandalia's CFO requiring coal plants to maintain the seventy-five percent capacity factor, regardless of the availability of less expensive power supplies in the region, is not in violation of the Supremacy Clause of the United States Constitution, because under the FPA, it is within Vandalia's control and does not interfere with the authority vested in the FERC. R. at 8. ACES insinuates that requiring coal plants to operate when less expensive power supplies are available equates to the wholesale sale rates being set unjustly. *Id.* at 3. However, FERC has the authority to set wholesale sale rates and intervene any state program that directly interferes with those rates. However, VSPC's CFO does not directly affect those rates. *Miss. Power & Light Co. v. Miss.*, 487 U. S. 354, 373 (1988). VPSC's CFO may indirectly influence the rates by increasing energy capacity, but ACES do not currently operate within Vandalia, and they are not a current ratepayer. R. at 3, 14. Therefore, ACES lacks standing because it is not subject to VPSC's CFO.

In *Nantahala Power & Light Co. v. Thornburg*, an agreement was made to share energy production with FERC for a wholesale rate. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 954 (1986). The Utilities Commission of North Carolina ("UCNC") believed the wholesale rate was unfair and set its own rate. *Id.* at 954. The Supreme Court stated that quantity of power procured by a utility, even if unreasonably in excess with a lower cost option available, is not in

violation of the Supremacy Clause and does not interfere with the FERC's authority to set wholesale sale rates. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 954 (2016).

Similarly, the instant case is comparable to *Nantahala* because Vandalia's CFO requiring coal plants to maintain a seventy-five percent capacity factor, regardless of the availability of less expensive power supplies in the region, is not in violation of the Supremacy Clause. The CFO pertains to the quantity of power procured by a utility and Vandalia is not directly going over FERC to set its own rates for wholesale sales. R. at 8. Accordingly, the district court's decision should be affirmed.

III. NATA is not Preempted by FERC's Order 1000 Because the Order Expressly Mentions that States Have the Power to Regulate Intrastate Electricity Transmission.

The Supremacy Clause of the United States Constitution expressly states that the Constitution and the laws of the United States are the Supreme Law of the Land. U. S. Const., Art. VI, cl. 2. As a result of this clause, Congress may preempt or supersede State law either explicitly, by statutory language, or by implication whenever a federal law conflicts with State law or occupies a similar field. R. at 11.

When a court decides the issue of whether a federal statute or regulation preempts state law, courts "typically start with the assumption that state powers are not superseded by a Federal act unless that is the clear purpose of Congress." R. at 12. If the intent of Congress is not expressly stated, courts may "infer Congress' intent to occupy a given field of regulation if it has legislated comprehensively, leaving no room for [s]tates to supplement." *Id.* Likewise, courts may infer "field preemption" if Congress' act "relates to a field where the Federal interest is so dominant that the Federal system can be assumed to preclude enforcement of [s]tate laws on the same subject." *Id.* Finally, Courts may also infer "conflict preemption" when "a conflict between a [s]tate law and a [f]ederal statute or regulation" presents itself. *Id.* Typical examples include when

a state law "impedes the accomplishment and execution of the full purposes and objectives" of Congress. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Thus, state law must always yield to federal interests when a Court determines a conflict. R. at. 12.

Here, ACES argues that Vandalia's ROFR violates FERC's authority and is preempted by the FPA. R. at 15. ACES asserts that Order 1000 expressly prohibited ROFR, and state ROFR law, such as Vandalia's, directly targeted the construction of transmission projects selected in Order 1000 competitions. *Id.* Therefore, the alleged targeting nullifies the FERC-set rate, and thus it is preempted. *Id*. Although FERC objected to VPSC's legislation, VPSC successfully persuaded the district court that there was no preemption because many other states have enacted similar legislation. *Id.* at 16. Accordingly, this Court should affirm the district court.

PJM had to remove any federal ROFR from its tariffs after FERC issued Order 1000. *Id*. at 9. However, PJM could still have its tariffs include state created ROFRs. *Id.* at 15. Comparable to other state laws which FERC has subsequently approved of. *See LSP Transmission Holdings, LLC v. Sieben*, No. 18-2559, 2020 WL 1443533, at *4 (8th Cir. 2020) (dismissing dormant Commerce Clause challenge); *see also MISO Transmission Owners v. FERC*, 819 F.3d 329, 336 (7th Cir. 2016) (upholding FERC's approval of tariff including state right of first refusal); s*ee also Midwest Indep. Transmission Sys. Operator, Inc., et al.,* 147 FERC ¶ 61,127, para. 149 (May 15, 2014) (finding that FERC should not prohibit the regional RTO from following state and local laws and regulations as a threshold issue).

FERC's Order 1000 states, "nothing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations concerning the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities." Order 1000, at ¶ 227. Vandalia's ROFR is state created. R. at 13. As such, the district court

appropriately found that Vandalia's ROFR is not preempted because Order 1000 had a clear purpose for federal, not state, ROFRs. Also, FERC's scope did not include state-created ROFR. A field preemption argument by the Appellant would lead to the same result. Although the legal mechanism is the same, FERC expressly stated the prohibition of federal ROFR and nothing about state ROFR. *Id.* Thus, the state ROFR is different than the federal ROFR field and not at risk of Order 1000 noncompliance.

IV. ACES Fails to State a Claim Under the Dormant Commerce Clause.

The Commerce Clause asserts that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Alternatively, the Commerce Clause's "dormant" implication is that states cannot enact laws that discriminate against or unduly burden interstate commerce. *Tracy*, 519 U.S. at 287.

ACES's dormant Commerce Clause analysis fails because a state-issued ROFR is not "simple economic protectionism." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (plurality op.). Here, Vandalia's ROFR is challenged for discrimination against interstate commerce under the dormant Commerce Clause. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). It violates federal law for a state law to assert "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. If these entities are substantially similar, the Court will determine whether the statute discriminates against interstate commerce by purpose, by effect, or by facially. *Allstate*, 495 F.3d at 160 & n.22 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984)).

Next, the Court must apply the appropriate level of scrutiny. The law is upheld if it does not facially discriminate against interstate commerce unless the incidental burden "is excessive . . .

to the putative local benefits." *Pike*, 397 U.S. at 142. In contrast, if the law is found to discriminate against interstate commerce, it would be declared invalid per se. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008). That is unless it "advanced a legitimate local purpose" that reasonable, nondiscriminatory alternatives could not adequately serve." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 101 (1994)).

The Commerce Clause asserts that "Congress shall have Power ... [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. Alternatively, the Commerce Clause's "dormant" implication is that states cannot enact laws that discriminate against or unduly burden interstate commerce. *Tracy*, 519 U.S. at 287.

ACES's dormant Commerce Clause analysis fails because a state issued ROFR is not "simple economic protectionism." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343 (2007) (plurality op.). Here, Vandalia's ROFR is challenged for discrimination against interstate commerce under the dormant Commerce Clause. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007). It violates federal law for a state law to assert "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Granholm v. Heald*, 544 U.S. 460, 472 (2005). "Conceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities." *Tracy*, 519 U.S. at 298. If these entities are substantially similar, the Court will determine whether the statute discriminates against interstate commerce by purpose, by effect, or by facially. *Allstate*, 495 F.3d at 160 & n.22 (citing *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984)).

Next, the Court must apply the appropriate level of scrutiny. The law is upheld if it does not facially discriminate against interstate commerce unless the incidental burden "is excessive . . . to the putative local benefits." *Pike*, 397 U.S. at 142. In contrast, if the law is found to discriminate

against interstate commerce, it would be declared invalid per se. *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008). That is unless it "advanced a legitimate local purpose" that reasonable, nondiscriminatory alternatives could not adequately serve." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 101 (1994)).

Vandalia's ROFR does not discriminate against interstate commerce because there is no discrimination against interstate commerce in Vandalia's ROFR. The Eighth Circuit recently upheld a Minnesota ROFR that functions similarly to Vandalia's ROFR, withstanding a dormant Commerce Clause challenge. LSP Transmission Holdings, 2020 WL 1443533, at *1. Accordingly, this Court has two pathways to affirm the district court. First, it can hold, as a threshold matter, that ACES is not similarly situated to LastEnergy. Additionally, in the alternative, it can find that Vandalia's ROFR does not discriminate facially, in purpose, or in effect. See id. at *3-4 (ruling on this basis). The district court adequately considered both options and correctly rejected both options.

As a threshold matter, LastEnergy and ACES are not similarly situated. Using Tracy as a guide, Vandalia can distinguish between incumbent beneficiaries and ACES without violating the dormant Commerce Clause. *Tracy,* 519 U.S. at 299 A threshold question, according to *Tracy,* is whether "allegedly competing entities" are "similarly situated for constitutional purposes," which determines if differential treatment of those entities should be considered under the dormant Commerce Clause discrimination framework. *Id*. *Tracy* reviewed a dormant Commerce Clause challenge that involved Ohio's differential tax treatment of natural gas sales by regulated domestic utilities and interstate gas companies. *Id.* at 304. Monopolies regulated by Ohio were exempt from taxes, but independent marketers not regulated by the state were not. *Id.* The Supreme Court upheld the Ohio law. *Id.* at 312. Accordingly, Vandalia's electricity market is analogous, and

applying the *Tracy* analysis leads to the same conclusion of state law overcoming a dormant Commerce Clause challenge.

Although the domestic utilities and interstate gas companies sold natural gas in *Tracy*, the Court held that the entities sold different products. *Id.* at 297. The first was natural gas sold "bundled" with "services and protections" to ensure reliability and stable rates; the second was natural gas sold "unbundled." Id.

Accordingly, the products of LastEnergy and Mapco differ from those of ACES in the same way as in *Tracy*. In Vandalia's PJM region, LastEnergy and Mapco are highly regulated vertically integrated utilities that sell transmission services that are "bundled" with regulatory obligations and protections. R. at 4. These two services are distinguishable from the transmission service provided by ACES, which is a transmission-only entity, and thus would be "unbundled" from such obligations. As such, this Court should reject ACES's contention that these are identical products.

Next, the *Tracy* court stated that the "bundled" natural gas served a "captive" market. *Tracy,* 519 U.S. at 301. A captive market entails predominantly retail customers who cannot handle volatile rates from fluctuations in supply and demand. *Id.* On the other hand, the "unbundled" product was for the "noncaptive" market, which predominantly serves bulk buyers better suited for market fluctuations. *Id.* at 301-302. *Tracy* concluded that even if the alleged discrimination were severed, the entities would still "serve different markets." *Id.* at 299.

Like the captive market in *Tracy*, there is a captive market that the incumbent utilities serve in Vandalia. R. at 3-4. These utilities provide "fully bundled" service to captive end-use customers. *Id.* An ASCE assertion that the captive market should be ignored because not every favored incumbent has retail jurisdiction is inaccurate. Because an incumbent utility in Vandalia, like LastEnergy or MAPCo, is structured as a generation and transmission cooperative. *Id.* Since the

cooperative and its constituent members provide generation, transmission, and retail services to their respective service areas, Vandalia would consider the cooperative a captive market participant. *Id.*

Third, *Tracy* asks whether there is a market in which the entities compete. 519 U.S. at 303. ACES purports that Vandalia's ROFR targets FERC's process "by jeopardizing the construction of transmission projects selected in an Order 1000 competitive solicitation. R. at 15. Thus, because such targeting nullifies the FERC-set rate, it is preempted." *Id*. For PJM's selection, ACES competed with other transmission providers. *Id.* at 10. Nevertheless, selection by an ISO in a competitive bidding process does not equate to the right to build the line; the state still has the authority to do so. *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). ACES would only compete with Vandalia's incumbent utilities by obtaining regulatory approval from PJM rather than competing for customers on a market-based basis. *NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022). State created ROFR statutes for building transmission lines are not preempted by FERC's order 1000.

Fourth, courts determine whether or not to give controlling significance to a market. Tracy, 519 U.S. at 303-04. In *Tracy*, many "reasons support a decision to give the greater weight to the captive market and the local utilities' singular role in serving it, and hence to treat [independent] marketers and [utilities] as dissimilar for present purposes." *Id.* at 304. Applying the reasons given in *Tracy* to this case results in only one conclusion; that controlling significance should be given to the retail utility market in Vandalia, in which transmission-only entities like ACES do not compete with incumbent utilities for the sale of its products. *Id.*

Lastly, *Tracy* explained that courts were "institutionally unsuited to gather the facts upon which economic predictions can be made." 519 U.S. at 308-09 (expressing how courts were thus

"ill qualified to develop Commerce Clause doctrine dependent on ... predictive judgments" about economic consequences). Likewise, ACES's potential build-out of transmission, in this case, involves these kinds of speculating predictions, which courts are ill-qualified to do. Therefore, while ACES believes removing Vandalia's ROFR would benefit consumers, that is something that legislators and not the courts should decide.

Vandalia's "regulatory response to the needs of the local [electric] market has resulted in a non-competitive bundled product" that differentiates its regulated sellers from independent marketers. 519 U.S. at 310. Under the Commerce Clause and *Tracy*, LastEnergy and ACES are not similarly situated for purposes of ACES's facial discrimination claim.

Vandalia's ROFR does not discriminate against interstate commerce on its face. *See LSP Transmission Holdings*, 2020 WL 1443533, at *4 (rejecting a substantially similar facial discrimination claim). Vandalia's ROFR is as follows:

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

Vand. Code § 24-12.3(d). The statute defines "incumbent 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).

Vandalia's ROFR is comparable to the Minnesota law at issue in *LSP Transmission Holdings*. The Eighth Circuit upheld Minnesota's law finding that it "draws a neutral distinction

between existing electric transmission owners whose facilities will connect to a new line and all other entities, regardless of whether they are in-state or out-of-state." LSP Transmission Holdings, 2020 WL 1443533, at *5.

Vandalia's ROFR is unlike Tennessee's residency requirement in *Tennessee Wine*. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2457 (2019). Vandalia's ROFR does not impose a "blatant in-state presence requirement" like the law that was struck down in *Tennessee Wine*. *Id.* In that case, a Tennessee law placed a residency requirement as a condition to obtain or renew a license to operate a liquor store in the state. *Id.* However, an incumbency requirement is different from a residency requirement. Further, an "incumbency bias" within a state's law "does not a surrogate for" a negative impact on interstate commerce. *Colon Health Ctrs. of Am., LLC v. Hazel*, 813 F.3d 145, 154 (4th Cir. 2016).

CONCLUSION

ACES does not meet the standing threshold in filing suit against Vandalia PSC because ACES did not assert concrete injuries or risks resulting from Vandalia's PSC's Capacity Factor Order. ACES was not subject to the Capacity Factor Order, "nor is it a ratepayer that could be affected by the" Capacity Factor Order. R. at 15. Even if ACES had standing to challenge Vandalia PSC's Capacity Factor Order, it is not preempted under the Supremacy Clause because FERC allows states to regulate laws that incidentally affect areas within the FERC's domain. Additionally, Vandalia ROFR is not preempted by Order 1000 nor does it violate the dormant Commerce Clause because under the Supremacy Clause, Order 1000 expressly stated that it did not "preempt, or otherwise affect state or local laws or regulations with respect to construction of transmission facilities . . . ." 136 FERC ¶61,051 at PP 284, 313 (2011).

ACES's challenge also fails as the ROFR survives scrutiny under *Pike* because out-of-state entities are not discriminated against under the dormant Commerce Clause. Vandalia is where

ACES is incorporated and Ohio is where LastEnergy and MAPCo are incorporated. In addition, ACES can build the line in eighteen months if LastEnergy declines to exercise its ROFR and the Vandalia PSC issues the CPCN. Vandalia's ROFR does not discriminate against interstate commerce facially, through its intent, or in its effect. On its face, no in-state versus out-of-state distinction is made. Vandalia's ROFR differentiated based on incumbency rather than geography. To maintain Vandalia's critical transmission infrastructure, the ROFR allowed existing transmission providers to develop their services on a nondiscriminatory basis. LastEnergy and MAPco are owned and controlled by outside entities, the ROFR has no discriminatory effect on out-of-state entities. Vandalia's ROFR law is not protectionist as ACES is an in-state entity headquartered in Vandalia. As ACES has failed to meet its burden on all issues presented, the district court's decision to grant PSC's motions to dismiss should be affirmed.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 9