C.A. NO.: 22-0682

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,
Plaintiff-Appellant,

v.

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

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

BRIEF OF PLAINTIFF-APPELLANT, APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Team 28
Counsel for Appellant
February 1, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

United States Code

Minnesota Statutes

JURISDICTIONAL STATEMENT

Appalachian Clean Energy Solutions, Inc. ("ACES") brought a claim against Will Williamson, Lonnie Logan, and Evelyn Elkins in their official capacity as commissioners on the Vandalia Public Service Commission ("PSC") on June 6, 2022, under the Constitution of the United States. R. at 1. The U.S. District Court of Vandalia has federal question jurisdiction over these claims arising under the constitution. " 28 U.S.C. § 1331. The District Court filed summary judgement in favor of the Defendants on August 15th, 2022. R. at 16. On August 29, 2022, Plaintiff, ACES, filed a timely motion of appeal to the Twelfth Circuit Court to challenge the District Court's grant of the defendant's motion to dismiss. R. at 16. This Court has jurisdiction under 28 U.S.C. § 1291, which provides for review of all final decisions of district courts. 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

Issue 1: Does Appalachian Clean Energy Solutions have standing to bring a claim that they are harmed by the Capacity Factor Order when the only damages caused by that order consist of a lowered demand for coal power affecting the rate at which Appalachian Clean Energy Solutions can sell the power it produces?

Issue 2: Is Vandalia's Capacity Factor Order preempted by the Federal Power Act if it alters the wholesale price of energy, a power that was left expressly and solely to the Federal Energy Regulatory Commission?

Issue 3: Is Vandalia's Native Transmission Protection Act preempted under the Supremacy Clause because it frustrates the purpose of FERC Order 1000 by creating a barrier to the federal objective of encouraging competition in the construction of transmission lines?

Issue 4: Does Vandalia's Native Transmission Protection Act violate the dormant Commerce Clause by having a discriminatory purpose or affect in favoring utilities with a strong presence in state, while affectively alienating any out of state competition?

STATEMENT OF THE CASE

Appalachian Clean Energy Solutions (ACES) is suing individual members of the Vandalia Public Service Commission (PSC) for improperly affecting wholesale rates with their Capacity Factor Order (CFO) and interfering with the construction of the Mountaineer Express Line (MEL) via the Native Transmission Protection Act (NTPA) which provides a right of first refusal (ROFR) for incumbent electric utility owners. R. at 1-2, 4, 9.

ACES is incorporated and headquartered in Vandalia. R. at 3. ACES is a wholesaler of electricity vigorously working to become carbon neutral by 2050. R. at 5. ACES is currently seeking to close down one of its coal-fired plants, and open a new natural gas facility. R. at 5. In order to do so, ACES is also seeking to construct a new high voltage transmission line that will serve the new plant, connecting it to the Wake County substation outside Raleigh, traversing through Vandalia. R. at 5-6.

Vandalia has several laws in place that frustrate ACES plans, as well as the purpose and intent of Congress when designating the power of the Federal Energy Regulatory Commission (FERC). R. at 6, 9. First, the Vandalia PCA instituted a CFO requiring that coal plants within their jurisdiction to operate a capacity factor of 75%, and authorizes cost recovery if the cost of producing the increased coal power is greater than the market clearing price at wholesale with PJM Interconnection (PJM). R. at 3. Prior to the order, the coal producers had an output of 34.7% to 62.3% capacity factor for a twelve month stretch ending in July 2021. R. at 7. The coal producers declared they kept a low capacity because of cheaper energy sources. R. at 7. However, Vandalia

PCA representatives stated, "[w]e are concerned that MAPco . . . is reducing their operation in response to wholesale system sales opportunities." R. at 8. Vandalia's 75% capacity factor was declared economical without any government actor stating what economical means. R. at 8.

Second, Vandalia's legislature established a ROFR for incumbent electric utility owners. R. at 9. The NTPA allows incumbent electric utility owners eighteen months to decide if they would like to build transmission lines proposed by non-incumbents and approved by the federal government to be a part of the federal grid. R. at 9. This is despite the removal of similar provisions from federal tariffs in FERC Order 1000. R. at 9.

Vandalia is currently serviced by two retail Utilities, LastEnergy and Mid-Atlantic Power Company (MAPCo). R. at 3. These two retail facilities own five coal-fired plants located in Vandalia, despite being incorporated in other states. R. at 4. Vandalia's interest in coal is even more apparent when considering they are the third largest producer of coal in the state, and that coal-fired plants accounted for 91% of the energy produced in Vandalia in 2021.

SUMMARY OF THE ARGUMENT

This court should reverse the District Courts Order of Dismissal as all claims should proceed to trial, or be decided in favor of ACES prior to trial. Herein, four arguments are addressed: 1) ACES has standing to bring a claim challenging Vandalia's CFO because they will suffer economic damages as competing energy producers; 2) Vandalia's CFO violates the Supremacy Clause because any power to affect wholesale electricity sales was left to the FERC; 3) Vandalia's ROFR provision violates the Supremacy Clause for impermissibly affecting rates in a manner the FERC expressly attempted to thwart; and 4) Vandalia's ROFR violates the dormant Commerce Clause for essentially prohibiting all participation from non-incumbents in the federal wholesale transmission market in Vandalia.

First, ACES has standing to bring forward a claim in the District Court of Vandalia. ACES sells into a zone of interest affected by the CFO creating an injury by unauthorized manipulation of the wholesale market. When the CFO increases the production of coal regardless of the cost to produce that energy, the coal supply inflates and ACES is forced to sell energy for less. This loss suffered by ACES is certainly caused by the CFO.

Second, Vandalia's CFO is both field and conflict preempted. The FERC established a wholesale market and continues to monitor rates to ensure they remain just and reasonable. Vandalia also decided to set just and reasonable rates within the state by enacting the CFO forcing coal energy to be sold at a different rate than the wholesale market rate in defiance of the FERC. This regulation is preempted as Congress gave the FERC sole authority to regulate the wholesale rates. Further, the CFO is conflict preempted because the FERC intended the CFO to retain in state jobs rather at the detriment to just and reasonable rate set by the FERC.

Third, Vandalia's ROFR is both field and conflict preempted. The FERC established in Order 1000 it's clear intention to eliminate similar ROFRs from federal tariffs. Because the FERC did so to prevent unreasonable wholesale energy rates, and because Congress gave the FERC sole authority to regulate those rates, the statute is field preempted. Further, the ROFR is conflict preempted because the FERC intended to assure that non-incumbent transmission facilities could participate in the wholesale market, but Vandalia's ROFR effectively prohibits any of those parties from doing so by awarding incumbent facilities the rights to those projects, or requiring the non-incumbent to wait eighteen months before starting construction.

Last, facts within the record suggest Vandalia's ROFR has a discriminatory purpose/effect on commerce, and potentially causes on undue burden without serving a local interest deserving of further evaluation in discovery and at trial. The Vandalia statute was clearly instituted to give

Vandalia electric retailers, who own and operate several coal-fired plants in the state, the opportunity to participate in the federal wholesale transmission market first, further supporting their businesses. While they allege to some degree that in doing so they intend to assure the ongoing maintenance of their power grid, it appears the real purpose provided by the legislatures statements and actions is to prevent non-incumbents' from participating in and competing with those retailers. Further, because the statute gives only two retail facilities the power to prevent any competition in the area, the statute poses an incredible threat to interstate commerce that is not served by the illusory interest of maintaining a reliable power grid.

For the above reasons, the order granting summary judgement denying these claims must be reversed, and the case must proceed to trial.

ARGUMENT

All four issues on appeal in this case were decided as a matter of law pursuant to a motion to dismiss, thus this court reviews the decision of the District Court de novo, and is not required to give deference to the opinion of the lower court. *Carter v. HealthPort Tech., LLC*, 822 F.3d 47, 56–57 (2d Cir. 2016). De novo review of a motion to dismiss requires giving the benefit of the doubt to the allegations made by the plaintiff and "accepting as true all material factual allegations of the complaint". *Id.*

The court erred in granting summary judgement as to all four issues. Below, we brief the four issues certified for appeal in order: 1) ACES established standing in their claims related to the Vandalia capacity factor order; 2) ACES has alleged sufficient facts to proceed to trial on their claim that the Vandalia capacity factor order is preempted by the FPA; 3) the ROFR provision of the NTPA is preempted by FERC Order 1000, and therefore must be struck down; and 4) ACES has alleged sufficient facts to proceed to trial on whether the ROFR violates the dormant

Commerce Clause either by having a discriminatory purpose/effect, or by unduly burdening commerce among the states. These four issues will be evaluated below in that order. This case must be remanded for trial, as standing was established in relation to the capacity factor issue, and sufficient facts have been alleged to either continue with discovery, or render summary judgement in favor of ACES as to all others.

I. DISMISSAL WAS IMPROPER BECAUSE ACES HAS STANDING TO BRING A PREEMPTION CLAIM BECAUSE THEY ARE AFFECTED BY PSC'S CAPACITY FACTOR ORDER.

The Court should overturn the Northern District of Vandalia Court's dismissal as ACES established standing. As the Plaintiff in this case, ACES has the burden of proving standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Standing generally hinges upon three issues: 1) proof of an "injury in fact" that is both "concrete and particularized" as well as "actual or imminent, not 'conjectural' or 'hypothetical"; 2) whether the court is able to directly trace the responsibility of the creation of the injury to the accused; and 3) if it is "likely" the plaintiff will be able to be made whole by an action. *Id.* In regard to the third requirement, if it can be shown that ACES has sustained an injury, that injury was caused by the statute, and the statute is federally preempted, the court is capable of redress by striking down that statute. *Child.'s Health Def. v. Fed. Comm'ns Comm'n*, 25 F.4th 1045, 1049 (D.C. Cir. 2022). Thus, that element will not be evaluated further. The remaining two factors, that ACES has suffered an injury and that that injury was caused by the CPO, will be discussed below. The following section explains in order how all three of these requirements were present, thus ACES has standing to bring their claim.

C. Dismissal was improperly granted to PSC because ACES proves they suffered an injury through the imminent wholesale rate fluctuations in their zone of interest.

Dismissal was improper because ACES works within the electricity industry affected by Vandalia's actions. Standing generally requires proof of an injury in fact. *Id.* An injury must be "a

concrete and particularized, actual or imminent invasion of a legally protected interest." *Id.* A plaintiff does not have to prove the full extent of their injury, any injury is acceptable. *Consumer Data Indus. Ass. v. King*, 678 F.3d 898, 900 (10th Cir. 2012). Injuries must either affect the parties to the case or be within a "zone of interest" that affect the parties. *S. Glazer's Wine and Spirits, LLC v. Harrington*, 594 F.Supp.3d 1108, 1118 (D. Minn. 2022).

A plaintiff does not have to prove the full extent of their injury, any injury is acceptable. When Consumer Data Industry Association (CDIA) thought that a New Mexico law was preempted by the federal Fair Credit Reporting Act (FCRA) they did not wait for the state to take their customers data. *King*, 678 F.3d at 900. Plaintiffs had "an unenviable double-bind: submit to the preempted law and endure the costs of modifying otherwise uniform procedures, or violate the law and face the likelihood of lawsuits and penalties". *Id.* at 901. The Court delt with the injury element succinctly as future injury was probable. *Id.* at 902. The Court ordered the case remanded because the "plaintiff faces a 'credible threat'". *Id.* at 907.

Third parties are allowed to intercede on behalf of any regulation that is within their zone of interest. *Harrington*, 594 F.Supp.3d at 1118. In *Harrington*, Minnesota enacted the Coleman Act to prevent manufacturers not from Minnesota from making exclusive contracts with in-state wholesalers and a wholesaler brought an action to prevent the law from proceeding. *Id.* at 1115-17. The state law did not prevent wholesalers from entering the market, but did affect the deals wholesalers were allowed to enter. *Id.* at 1118. The court noted that the wholesalers were indirectly affected by the Coleman Act, stating: "cognizable injury is not restricted to those members of the affected class against whom states or their political subdivisions ultimately discriminate." *Id.* (quoting *S.D. Farm Bureau, Inc. v. Hazeltine*, 340 F.3d 583, 591–92 (8th Cir. 2003)). The court held wholesalers had an interest in contracting with producers despite not being directly regulated,

because they were within the "zone of interest", and found "that loss of business as a result of a challenged statute satisfied the injury-in-fact requirement". *Id.*

If there is "probability a future injury", then there is standing based on injury. *Id.* at 902. Identical to *Consumer Data Indus. Ass.*, where a future injury was present, here the state is willing to take away a consumer right to federal wholesale price monitoring. *Id.*; R. at 6. There is a "credible threat" of injury to ACES because the probability of future injury through lost sales counts is an imminent injury and preempted laws may be struck down prior to them wreaking the havoc they promise to wreak.

Our case is also similar to *Harrington*, where wholesalers not directly targeted by a law were in a "zone of interest" if businesses they collaborate with were directly affected. *Harrington*, 594 F.Supp.3d at 1118. ACES is a wholesaler not targeted by Vandalia's statute but are in a "zone of interest" regarding the undue influence on the federal price auction of energy. R. at 8-9. Just like *Harrington*, ACES has an injury in fact because of an overlapping "zone of interest" with the wholesale market of energy in Vandalia. *Harrington*, 594 F.Supp.3d at 1118; R. at 7. The likely loss energy sales, despite being a more cost-effective option, is an injury in fact. The Zone of interest ensures companies in different states, like ACES, may appeal policies that will affect them even when not directly mentioned in the law, like the capacity factor order. ACES will be prevented from selling into the wholesale market with their new facility if the capacity is met by the coal plants that can now bid into the market at minimal costs based on guaranteed price fixing, and thus suffers an injury.

Because ACES suffers an injury both as a ratepayer and because they will lose sales as an electric provider who will lose business as a result of the order, an injury in fact exists.

D. Dismissal was improperly granted to PSC because ACES can prove a direct link between the CFO and the ability of the federal government to gauge the needed capacity at a consistent rate.

The CFO has a causal effect on ACES business plans. The claimed detriment must be "fairly traceable" to the act. *Lujan*, 504 U.S. at 560–61. This shoestring line between the plaintiff's injury and the defendant's actions must be more than a vague attenuation. *Wash. Env'l Council v. Bellon*, 732 F.3d 1131, 1141 (9th Cir. 2013) (quoting *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (9th Cir. 2012)). "[W]hat matters is not the 'length of the chain of causation,' but rather the 'plausibility of the links that comprise the chain.'" *Mendia v. Garcia*, 768 F.3d 1009, 1013-14 (9th Cir. 2014) (quoting *Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 849 (9th Cir.2002)).

Causation need only be plausible. *Mendia*, 768 F.3d at 1013-14. In *Barnum Timber Co. v. U.S. Env't Prot. Agency*, a timber plot owner provided testimony and declarations from two different experts regarding why his plot decreased in value as a result of the EPA's declaration that a stream running through it was an impaired body of water. 633 F.3d 894, 899 (9th Cir. 2011). One of his experts stated public perception could affect land value. *Id.* at 898. The court held the timber plot owner proved causation by "alleg[ing] specific facts plausibly explaining causality and supported by competent declaration". *Id.* at 899. The court found economic impact statements to be sufficient evidence to show causation. *Id.*

ACES has proven the CPO is fairly traceable to wholesale rates. Similarly to *Barnum Timber Co.*, where an expert used public perception to provide a competent declaration regarding the effects of government declarations on the value of land, ACES's can mirror claims from a citizen group, stating wholesale rates, which ACES relies upon, are directly affected by the CFO. *Barnum Timber Co.*, 633 F.3d at 898; R. at 8-9. There is a "plausibility of the links that comprise

the chain." *Garcia*, 768 F.3d at 1013-14. Accrediting a plot devaluation to be based upon a declaration rather than acknowledging the land is worth less is less provable than ACES's claim that increased coal production, selling at a different price than all other electricity, will affect wholesale rates that are supposed to be set by the FERC. There is a clear line linking the loss of money to the appealed CFO, so causation is established.

Because there is a clear link between Vandalia forcing increased coal production and guaranteeing a rate of sale for the resulting power, the CPO will affect the FERC's wholesale rate, which affects the rates ACES can sell their own power at.

II. DISMISSAL IS IMPROPER BECAUSE THE FERC UNDER THE FPA HAS IMPLIED FIELD AND CONFLICT PREEMPTION TO PREVENT THE CFO FROM INTERFERING WITH THEIR WHOLESALE RATE.

The Court should overturn the lower court as the Capacity Factory Order is preempted by the FERC under the FPA. The Supremacy Clause of the U.S. Constitution ensures federal legislation is the supreme law of the land. U.S. Const. art. VI, cl. 2. States have no right to make laws contrary to federal policies created by Congress or an administrative agency. *See Id.* Though states monitoring utilities are not generally preempted, this assumption can be disproven when a state's action is detrimental to the federal regulation of wholesale electricity. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *Ark. Elec. Coop. Corp., v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). Congress must have had a "clear and manifest purpose" to preempt the state regulation. *Coal. Competitive Electricity v. Zibelman*, 906 F.3d 41, 50 (2d Cir. 2018).

The Federal regulation can directly state Congress's intention to prevent state interference or there are two ways federal regulation can imply state law is preempted. First, field preemption is shown to oust all state regulation based on federal occupation of an entire area of law. *Arizona v. United States*, 567 U.S. 387, 399 (2012). Second, conflict preemption is present if a state

regulation obstructs the desired goal of the federal regulation. *Hines v. Davidowitz*, 312 U.S. 52, 66–68 (1941). The FERC did not directly preempt Vandalia from regulating in-state electricity production, thus we focus upon the implied preemption. The following arguments will analyze field preemption, then conflict preemption.

C. Dismissal is improper because forced production beyond the needs of a wholesale market is detrimental to creating a self-regulating industry. The PSC should be field preempted from setting a wholesale market price.

ACES respectfully urges the Court to reverse the dismissal because the CFO inhibits a field of law the federal government completely regulates. When Congress's legislation occupies the entire arena for a regulation, the state has no room to add to the federal laws. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016). "Field preemption reflects a congressional decision to foreclose any state regulation in the area, even if it is parallel to federal standards." *Arizona*, 567 U.S. at 399. The court needs to look to the "structure and purpose" of the legislation. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992).

The structure and purpose of the legislative is a crucial element to review when determining a preemption issue. *Hughes*, 578 U.S. at 163. For instance, Maryland encouraged a new electricity generator to build in their state by guaranteeing a set rate for all sales that were made through the capacity clearing auction. *Id*. at 158-59. The court held Maryland was unable to mandate a fixed retail price after the electricity was sold into the wholesale market. *Id.* at 166. "States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable" *Id.* at 165. Justice Sotomayor's concurrence tightens the analysis to ensure courts focus upon when a state is intentionally interfering with a 'just and reasonable' rate. *Id.* at 168. The state's regulation undermined the FERC's wholesale rate. *Id.* "Such actions must be preempted." *Id.*

If a state tethers a product to a guaranteed rate being sold into the wholesale market, they are interfering with the FERC. New York offered zero emission credits to nuclear power generators to help make the production of nuclear power less expensive. *Zibelman*, 906 F.3d at 52. The power generators had the option to sell into the wholesale market or not. *Id.* The court differentiated this action from Hughes, stating that "[b]y guaranteeing a rate distinct from the auction clearing price, 'Maryland's program invade[d] FERC's regulatory turf'", but New York did not offer a set price different than the wholesale rate. *Id.* at 52 (quoting *Hughes*, 578 U.S. at 162). The court held rates could not be tethered to the wholesale price. *Id.*

The FERC completely regulates the wholesale market. *Hughes*, 578 U.S. at 165. Just like Maryland guaranteed a set rate to their natural gas plant, PSC has guaranteed a set rate to their coal plants. *Id.* at 166; R. at 8. Both states "invade[] FERC's regulatory turf". *Zibelman*, 906 F.3d at 52. Similar to Maryland ensuring a different rate for a select company from the wholesale market, PSC has ensured a different rate for coal companies to receive despite them having to sell into the wholesale market. This variation in price above the federally set rate interferes with the federal government's ability to set a "just and reasonable" rate. New York was allowed to offer a credit because the power plants were not tied into the wholesale participation; however, the PSC wrote their law with the knowledge that all the coal facilities in Vandalia were mandated to sell into the wholesale market. Thus, even though the CFO does not directly tie the rate to the wholesale market, Vandalia knew the CFO would in effect be tied to the wholesale market. Furthermore, Vandalia's Code requires the state to "set 'just and reasonable rates". R. at 6 (quoting Vand. Code § 24-2-3). This is parallel to the FERC's requirement for the federal government to set "just and reasonable" rates. *Hughes*, 578 U.S. at 168. Field preemption takes effect when state laws run

parallel to federal laws. Vandalia has ignored the structure and purpose of the FERC's wholesale market.

The Court should reverse the dismissal of the preemption claim. The PSC knew their coal plants were obligated to sell into the federal wholesale market. Thus, any order affecting their production is tied to the federal wholesale market. By interfering with the FERC's wholesale market, the PSC is preventing a "just and reasonable" rate. The court should reverse the dismissal of ACES claim for preemption and allow the case to proceed.

D. Dismissal of the preemption claim was improper because the PSC's Capacity Order only affects companies that are obligated to sell into the wholesale market in deliberate conflict with the wholesale setting ability of the FERC.

The Court should reverse the dismissal of ACES Supremacy Clause claim because the CFO conflicts with the FERC's ability to regulate wholesale electricity rates. If "[c]ongress made a deliberate choice" not to impose certain restrictions and the state did so anyways there can be conflict preemption. *Arizona v. United States*, 567 U.S. at 432. It must be clear the regulation will damage congresses goals. *Nw. Cent. Pipeline Corp. v. State Corp. Commission of Kan.*, 489 U.S. 493, 518 (1989). To make such a determination, legislative history should be reviewed, and state intentions should be laid out. *Zibelman*, 906 F.3d 41 at 52; U.S. Const. art. 6, cl. 2. There is a fine line preserving state rights and honoring federal regulation. *Northwest Central Pipeline Corp.*, 489 U.S. at 515. The state justifications for the laws need only be plausible. *Id.* at 518. However, if it is impossible for both the state and the federal regulations to be complied with fully, the state law is preempted. *Arizona*, 567 U.S. at 432 (2012).

The Supreme Court on multiple occasions has explained the purpose of the FERC and the intent of the legislature in granting the FERC it's regulatory power. By allowing bilateral contracts the FERC ensures capacity is met but not exceeded in the energy market. *Hughes*, 578 U.S. at 154-

55. The FERC's wholesale rate ensures just and reasonable rates through competition for bidding into the wholesale market. *Id.* The FERC was created with the intent of ousting energy production monopolies from certain states that interfered with consumers' rights. *Morgan Stanley Cap. Grp. Inc., v. Pub. Util. Dist. No. 1 of Snnohomish County et. al.*, 554 U.S. 527, 531 (2008). If a state is allowed to circumvent the wholesale market through guaranteed price points, ignoring how much energy is needed in a region and other less expensive versions of electricity, the wholesale market is affected. *Id.* at 163. "FERC clearly has exclusive jurisdiction over the rates to be charged [to] interstate wholesale customers." *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986). The *Thornburg* court held States may not determine the wholesale rates set by the FERC are unjust and cannot set their own rates in lieu of the federal rates. *Id.* at 966. "[The Court] may assume that a particular quantity of power procured by a utility from a particular source could be deemed unreasonably excessive if lower cost power is available elsewhere". *Id.* at 953(dicta). The FERC's clear purpose has been established.

Vandalia has made their goal of bypassing the FERC crystal clear through their actions and their strong language. R. at 6. The Vandalia legislature stated, "[i]t is imperative the State of Vandalia take immediate steps to reverse these undesirable trends [with respect to coal plant closures] to ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." R. at 6. The Vandalia PSC expressed their irritation at the two in state coal factories for their 34.7% to 62.3% production rate by stating the coal plant needs to maximize their production and not adjust according to "wholesale system sales opportunities". R. at 7-8. Even though the low production was a direct result of the two coal plants trying to "minimize[] the costs imposed on retail consumers". R. at 6. The Vandalia PSC focused on what they claim is underutilization of coal plants instead of the cost to retail consumers. R. at 6. They

determined 75% production rate to be economical. R. at 8. At no time did they state the 75% production rate was based on the ratepayers. R. at 8. They also acknowledged their wish to appease investors by promising to allow the two coal plants to charge the full cost of production to the retails rather than the wholesale price allocated for the region. R. at 8. Chairman Williamson's refusal to reconsider the Capacity Factor Order shows the commissions willingness to put in a "fail safe" on behalf of the investors but none on behalf of the retail consumers of electricity that the federal government is concerned about. R. at 9. Vandalia has clearly targeted the wholesale market.

Vandalia acknowledges the coal plants in Vandalia are required to sell into the wholesale market of PJM. R. at 15. This knowledge would have been held by the PSC prior to enacting the law, thus proving they knew their actions were tethered to the wholesale rate. While Vandalia's order does not force the coal powered energy into the wholesale market, Vandalia wrote the law with the knowledge of where the energy would have to be sold and the effect it would have on wholesale rates for consumers. R. at 15. They specifically found a way to promote their job retention interests at the cost of the wholesale pricing scheme.

When comparing the goals of the federal government to the goals of the state, we see glaring inaccuracies. The FERC dispelled monopolies, and yet the PSC is creating one. *Morgan Stanley Capital Group Inc.,* 554 U.S. at 531; R. at 8. The FERC ensures reasonable and just prices, the PSC ensures investors get repaid. *Hughes,* 578 U.S. at 154-55; R. at 8. The FERC's goal is protecting the people, the PSC's goal is protecting jobs. *Morgan Stanley Capital Group Inc.,* 554 U.S. at 531; R. at 6. While protecting citizens and protecting jobs should go hand in hand, Vandalia has impermissibly stepped over the line and is effectively taking over control of setting wholesale prices since the coal plants must sell to PJM. R. at 8 n.7. By mandating a 75% load capacity at all times from Vandalia's coal producers, the state is compelling the sale of coal energy that is

required, through a separate contract, to sell within the wholesale market. R. at 8. Vandalia has mandated their coal companies be paid back their cost of production, however the coal companies sell into the wholesale market and do not get to determine what state their product is sold into. *Id*. This is in clear contradiction to the goals of the FERC to maintain just and reasonable rates in the energy market. The goal of Vandalia to improve utilization of coal plants for the benefit of public interest is not plausible, the true goal of Vandalia is to prop up the dying coal industry. R. at 8. Vandalia is not offering a grant or stipend, they are setting a rate on top of the wholesale rate similarly to *Thornburg* where the state changed the retail rate. When the rate given is no longer linked to the amount determined adequate by the FERC, the state instead of the FERC is setting the wholesale price.

The PSC is conflict preempted from allowing the Capacity Factor Rate to continue based on its interference with the goals of the FERC to provide just and reasonable rates. The FERC was created to stop individual states from having a monopoly on the energy rates. Vandalia is attempting to ensure stable job retention in the coal industry by creating a monopoly energy producer despite the coal plants in question being mandated to sell into the FERC's PJM wholesale line. The two opposing goals are in direct conflict with each other, and the state law must give way to the FERC to maintain just and reasonable wholesale rates for the region. The dismissal of the preemption claim should be reversed.

III. VANDALIA'S NTPA IS FEDERALLY PREEMPTED BECAUSE THE FERC HAS SOLE AUTHORITY TO REGULATE THE RATES OF WHOLESALE ENERGY AND THE ACT FRUSTRATES THE PURPOSE OF FERC ORDER 1000.

Vandalia cannot enact the NTPA because the statute impermissibly affects wholesale electricity rates and transmission of electricity, fields left explicitly to the FERC within the FPA, and frustrates the purpose of FERC's Order 1000 banning similar rights of first refusal in federal ISO agreements. The Supremacy Clause of the United States Constitution provides that laws of

the federal government will preempt those of the states. U.S. Const. art. VI cl. 2. "Federal law may preempt state law under the Supremacy Clause in three ways—by 'express preemption,' by 'field preemption,' or by 'conflict preemption.'" *Anderson v. Sara Lee Corp.*, 508 F.3d 181, 191 (4th Cir. 2007). Because it is not literally impossible for ISO to eliminate a ROFR from federal tariffs. and for Vandalia to put their own into effect via state law, express preemption will not be discussed. We instead contend that 1) the NTPA is field preempted because it impermissibly seeks to regulate wholesale interstate transmission lines in such a manner that effects rates, powers that congress expressly gave to the FERC, and 2) that the NTPA is conflict preempted because it seeks to resurrect barriers that the FERC intended to knock down in instituting FERC Order 1000.

C. The NTPA is field preempted by the FPA because it impermissibly affects the rates and transmission of wholesale interstate electricity, a power left exclusively to the FERC.

Granting a ROFR to incumbent power stations in Vandalia impermissibly regulates both wholesale electricity rates and the transmission of interstate wholesale energy. The Supremacy Clause of the United States Constitution provides that laws of the federal government will preempt those of the states. U.S. Const. art. VI cl. 2. One way for a state law to be preempted by federal law is through field preemption. *Sara Lee Corp.*, 508 F.3d at 191. ''If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted.'' *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 474 (4th Cir. 2014) (quoting *Silkwood v. Kerr–McGee Corp.*, 464 U.S. 238, 248 (1984)). Congress explicitly gave sole regulatory power over the interstate transmission of wholesale electrical energy, and the rates that energy will be sold at to the FERC. 16 U.S.C. § 824 (a)-(b); *Hughes*, 578 U.S. at 153. This scheme leaves no room for the states to enact laws that even indirectly regulate wholesale electricity rates. *PPL Energy*, 753 F.3d at 475; *see also Hughes*, 578 U.S. at 153 (affirming the decision made in Hughes).

Congress's legislation leaves the states no room to legislate on the wholesale transmission of electrical energy. *See PPL Energy*, 753 F.3d at 474. In *PPL Energy*, a Maryland program planned to financially support a new power plant participating in the sale of wholesale electricity. *Id.* at 471. On appeal, the 4th Circuit agreed that the program was a violation of the supremacy clause of the United States constitution, because the regulation was field preempted. *Id.* at 476. The United States Supreme Court later agreed with this ruling in *Hughes*. *Hughes*, 578 U.S. at 153. The court paid specific attention to the federal governments interest in the regulation of wholesale energy, noting "[a] wealth of case law [that] confirms FERC's exclusive power to regulate wholesale sales of energy in interstate commerce . . .". *Id.* at 475. Specifically, the court noted congressional intent to clearly delineate federal and state jurisdiction: "[t]his was done in the FPA by making FERC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States." *Id.* (quoting *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215–16 (1964). The court ruled that the Maryland regulations impermissible affected wholesale energy rates because of their indirect effects on wholesale rates. *Id*.

Like the Maryland regulatory scheme in *PPL Energy* and *Hughes*, the NTPA impermissibly affects the regulation wholesale electricity rates. Where the Maryland regulations ignored the capacity auction, the institution of laws like the NTPA threaten to create unjust and unreasonable rates. *Id.* at 475; R. at 14; *see also S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 72 (D.C. Cir. 2014) (describing the purposes behind FERC Order 1000 as a response to concerns that a lack of incentives for non-incumbents to propose infrastructure will lead to a lack of competition and unlawful rates for customers). The purpose of FERC Order 1000 was to assure that competition from non-incumbents in the construction of transmission facilities would be possible, and lead to

lower wholesale rates. R. at 14. As noted in *PPL Energy* and *Hughes*, the grant of power to regulate wholesale rates in the FPA leaves no room for even indirect regulation of wholesale rates. *PPL Energy*, 753 F.3d at 475; *see also Hughes*, 578 U.S. at 153. The FERC unquestionably created a rate regulation by ordering ROFRs be eliminated from certain ISO agreement, and because Vandalia's NTPA re-asserts the same ROFR, they have enacted a law that affects wholesale energy rates and impedes upon a field of law that is the sole authority of the FERC, and the federal government, and therefore is field preempted.

The Court should reverse the lower court and grant summary judgment on behalf of ACES. The NPTA impermissibly impedes upon the regulation of wholesale rates, a power left explicitly to the FERC in the FPA, the statute must be declared unconstitutional and struck down.

D. The NTPA is conflict preempted because it frustrates the purpose of FERC Order 1000 creating a new ROFR that discourages non-incumbent competition leading to higher wholesale electricity rates.

In re-asserting ROFR, the NPTA frustrates the purpose of FERC Order 1000, and is therefore conflict preempted. The Supremacy Clause of the United States Constitution provides that laws of the federal government will preempt those of the states. U.S. Const. art. VI cl. 2. One way federal law preempts state law through conflict preemption. *Sara Lee Corp.*, 508 F.3d at 191. A state regulation is conflict preempted where compliance with both laws is impossible, or "where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Simmons v. Sabine River Auth. La.*, 732 F.3d 469, 477 (5th Cir. 2013). A state law is conflict preempted when that law obstructs the operational control of the FERC. *Id.* at 476-77.

State laws that obstruct the operational control of the FERC are conflict preempted. *Id*. In *Simmons*, the Fifth Circuit Court of Appeals considered "whether the Federal Power Act preempts property damage claims under state law where the claim alleges negligence for failing to act in a

manner FERC expressly declined to mandate while operating a FERC-licensed project.". *Id.* at 471. The court ultimately held that the standard of negligence was set by the FERC, and any other standard would be conflict preempted. *Id.* at 476. The court expressed concerns that allowing the state tort action to set a higher standard than the FERC would function the same as creating their own regulations, and would frustrate the purpose of instilling that power in the FERC. *Id.*

Similar to the standard of negligence applied by the Louisiana state court in *Simmons*, the NTPA also frustrates the purpose of a valid FERC order. Where in *Simmons* the FERC was responsible for setting the required standard of maintenance for a dam under the FPA in order to avoid a negligence claim, the FERC also instituted Order 1000 pursuant to their authority to regulate wholesale electricity rates. *Id.*; 16 U.S.C. § 824 (a)-(b); *S.C. Pub. Serv. Auth.*, 762 F.3d at 73 (deciding that the FERC had the authority to enact Order 1000 as a practice affecting rates). The Vandalia statute's clear purpose is to re-create a ROFR that existed prior to Order 1000. By providing for incumbent electricity facilities to have a ROFR for transmission lines, Vandalia resurrects the rights of ROFR the FERC sought to eliminate. Whether the ROFR's come from ISOs or individual states, they stand in the way of non-incumbents, discouraging any incumbent poaching of transmission lines. R. at 14. This purpose is further evidenced by speakers during the presentation of the NPTA as a bill. The senator introducing the NTPA referred to it as "a direct response to Order 1000". R. at 9. Also, a representative for LastEnergy referred to the NTPA as a restoration of the 'status quo' from before Order 1000. R. at 9. While intent to frustrate federal law is not necessary for conflict preemption, it is present in this case. The NTPA serves to do nothing other than re-create rights that were eliminated by the federal government to prevent unfair competition, and therefore it must be declared conflict pre-empted.

The Court should reverse the lower court's decision and issue summary judgment to preempt NTPA. Because the NTPA frustrates the purpose of FERC Order 1000 by re-creating an incumbent electricity facility ROFR, it must be declared conflict preempted.

IV. WHETHER THE NTPA VIOLATES THE DORMANT COMMERCE CLAUSE IS A FACT SPECIFIC INQUIRY, AND SUFFICIENT FACTS IN THE RECORD INDICATE A POTENTIAL DISCRIMINATORY PURPOSE OR AFFECT BY VANDALIA.

The motion to dismiss the claim that the NTPA violates the dormant Commerce Clause must be overturned and proceed to trial. The Commerce Clause gives the power to regulate commerce between the states to Congress. U.S. Const. art. I, § 8, cl. 3. Within the Commerce Clause is a dormant assumption preventing the individual states from regulating interstate commerce. *LSP Transmission Holdings, LLC v. Sieban*, 954 F.3d 1018, 1026 (8th Cir. 2020). The dormant Commerce Clause specifically prevents the states from discriminating against interstate commerce, or having an undue burden on interstate commerce. *Sieban,* 954 F.3d at 1026. For a statute, may discriminate against interstate commerce in one of three forms: 1) facial discrimination, 2) by having a discriminatory purpose; or 3) by having a discriminatory effect on commerce. *Sieben,* 954 F.3d at 1026. Even if a law does not discriminate against interstate commerce, it may regardless be stricken down if it's burden on interstate commerce is excessive in relation to the law's local benefits. *Id.*; *Pike v. Bruce Church*, 397 U.S. 137, 145 (1970). In asking the court to reverse summary judgement on the dormant Commerce Clause claims, we advance two arguments: 1) there are sufficient facts in the record to indicate a discriminatory purpose or effect on interstate commerce to proceed to trial; and 2) even if a discriminatory purpose or effect could not be determined, the interest of maintaining the local power grid is severely outweighed by the burden of preventing out of state transmission facilities from entering the Vandalia grid.

A. Legislative statements indicate the NTPA was designed with a discriminatory purpose and discriminatory affect, and these facts should be further evaluated at trial.

ACES made sufficient allegation related to their dormant Commerce Clause claim to proceed to discovery, so summary judgment must be reversed. The Commerce Clause gives the power to regulate commerce between the states to Congress. U.S. Const. art. I, § 8, cl. 3. Within the Commerce Clause is a dormant assumption preventing the individual states from regulating interstate commerce. *Sieban*, 954 F.3d at 1026. The dormant Commerce Clause prevents the states from discriminating against interstate commerce through either a discriminatory purpose or affect. *Id.* A discriminatory purpose might be shown through either direct or indirect evidence, including: 1) lawmaker's statements about the statute; 2) events prior to the adoption of the statute; 3) the ineffectiveness of the statute in promoting the legitimate interests of the state. *IESI AR Corp. v. Now. Ark. Reg'l Solid Waste Mgmt. Dist.*, 433 F.3d 600, 604 (8th Cir. 2006) (determining that waste management director's statements that a company excluded under their law was 'a big company from out of state' was insufficient to show a discriminatory purpose); *see also NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 327 (5th Cir. 2022). "A regulation discriminates in effect if it favors in-state economic interests over out-of-state interests." *IESA AR Corp*, 433 F.3d at 605. If a party can raise plausible allegations that lawmakers has a discriminatory purpose or effect, the case must proceed to discovery. *NextEra*, 46 F.4th at 327. Considering whether a law benefits parties incorporated outside of the state does not end the question of whether discrimination is present, courts should also look to whether a law protects interests of parties with a significant presence in the state. *Id.* at 324.

If a party can raise plausible allegations that a law has a discriminatory purpose or effect, the case must proceed to discovery. *Id.* at 327. In *NextEra*, the Fifth Circuit considered a ROFR provision that closely resembled ours, with the exception that it granted no time limitation for

energy providers to exercise that right. *Id.* at 310. The court determined the district court erred on several points. First, it discussed the district court's error in determining that the statute could not be discriminatory because it benefitted companies incorporated elsewhere. *Id.* at 321-26. The court stated that a statute could be just as discriminatory in favor of companies that already have a presence within the state, and that favoring companies within a state is just as much grounds for discrimination as favoring companies incorporated within the state. *Id.* at 323. Second, in regard to the discriminatory purpose and affects claims, the court evaluated very little evidence for remanding the case for further discovery. *Id.* at 327-28. On the discriminatory purpose claim, the court determined that whether a discriminatory purpose was present was a fact dependent inquiry, and the allegation that the Texas ROFR provision was instituted in response to NextEra's award of a contract to build a line in Texas was enough to proceed to discovery on the matter. *Id.* at 327. The court reiterated itself regarding the effects based claims, specifically that they are just as fact dependent, and NextEra's claim that any benefit of the statute was 'insignificant and illusory' was enough for the case to proceed. *Id.* at 327-8.

ACES made plausible allegations, and the record contains evidence supporting the conclusion that the NTPA was enacted with a discriminatory purpose. As provided by the court in *IESA* some of the factors relevant to whether a statute has a discriminatory purpose or affect include: 1) lawmaker's statements about the statute; 2) events prior to the adoption of the statute; 3) the ineffectiveness of the statute in promoting the legitimate interests of the state. *IESI AR Corp.*, 433 F.3d at 604. While the court in *IESA* only evaluated evidence related to the first factor, and determined a simple statement that a complaining corporation was 'large and out of state' was insufficient to show a discriminatory purpose, the facts here are more egregious, and touch more factors. *Id.* In our case, lawmakers devised the NTPA in response to FERC Order 1000. R. at 9.

During that hearing, Senators and energy representatives did not once mention a legitimate purpose for instituting the NTPA. The only real purpose assigned was noted by a representative for MAPCo who stated the purpose of the bill was to give "Vandalia utilities the first opportunity to invest in federal regionally planned transmission projects", and that Vandalia should not encourage third parties to build transmission lines in Vandalia. R. at 9. As it relates to the first *IESA* factor, these were statements made in front of lawmakers in support of NTPA heavily suggest the purpose of the statute is to support MAPCo and LastEnergy to the detriment of interstate commerce.

As it relates to the second factor, events prior to the adoption of the statute, we garner further clarity as to the purpose of the statute when considering Vandalia's history with coal power. *IESI AR Corp.*, 433 F.3d at 604. NTPA was passed only a few years after the passing of FERC Order 1000, and was drafted as a direct response to the order. R. at 9. Further, the statute was passed during the national decline of coal power plants, in a state that produced seven percent of U.S. coal in 2021 and over 90% of the power produced in Vandalia comes from coal plants. R. at 4. Taken together, it seems plausible, if not likely, that Vandalia passed the NTPA in order to support LastEnergy and MAPCo, the only two retail companies in Vandalia that happen to operate five coal-fired power plants within the state. R. at 4. The fact that these are the only two retail electric suppliers in the region, and the only two companies that benefit from the NTPA further casts light on the issue, and suggests a discriminatory purpose. R. at 4.

The third *IESA* factor also highlights issues regarding the true purpose of the NTPA. It is difficult to determine the legitimate purpose for establishing the NTPA, as the only purposes mentioned during the enactment of the law, do not appear legitimate, as they only offer Vandalia utilities a competitive advantage in the federal transmission market. R. at 9. Even if we were to assume that the statute was enacted to assure the ongoing reliability of Vandalia electric lines, this

would not be enough to grant summary judgement on these claims. The court in *NextEra* considered the same purpose, and determined the bare claim that the benefit of preserving the reliability of the local energy grid was not served by the statute was enough to proceed to discovery. *NextEra*, 48 F.4th at 327. Surely, this presumptive purpose is not enough to support the NTPA through a motion to dismiss.

These three factors taken together do more than present a plausible allegation that the NTPA has a discriminatory purpose, they create a formidable case that deserves to be heard in court. That legislatures heard improper purposes, that the facts surrounding the laws passing reflect a deep interest in coal and a need to protect the coal industry, and no evidence in the record supports a legitimate purpose for affecting the statute. A plausible allegation of a discriminatory purpose exists, and thus this case must proceed to trial.

Alternatively, the court may determine that the NTPA has a discriminatory effect on commerce. "A regulation discriminates in effect if it favors in-state economic interests over out-of-state interests." *IESA AR Corp*, 433 F.3d at 605. As discussed above, the in-state economic interests here include the consumption of coal produced within Vandalia, and the support of the only two companies that provide retail power to the state's residents. R. at 4. Further, both interests are served if Vandalia succeeds in preventing ACES from constructing the Mountaineer Express line. ACES's sole motivation for constructing the line is to service the new Rogersville Energy Center, a natural gas facility they seek to build to replace the Franklin Generating Station, a coal-fire facility. R. at 5-6. If the line cannot be constructed due to the NTPA, ACES will be incapable of utilizing a new form of energy, and forced to continue operating a coal plant that creates higher emissions, suffers from a lack of coal, and will likely be required to consume or continue to consume coal produced in Vandalia mines. Further, similar effects could easily be felt given that

LastEnergy and MAPCo can prevent nearly any federal transmission project that enters the region. These significant effects on interstate commerce clearly support the conclusion that the statute has a discriminatory affect, and the case should proceed to discovery and trial for a clearer record to be constructed and interpreted.

The Appellee may argue that the statute could not possibly be discriminatory because the NTPA benefits companies like LastEnergy and MAPCo that are incorporated out of state, while acting to the detriment of in state incorporations like ACES. R. at 4. While it does do this, the court in *NextEra* notes that a statute can be discriminatory despite benefiting out of state corporations. *Nextera*, 48 F.4th at 321-26. A statute that support companies with a physical presence in the state is just as discriminatory as one that supports those incorporated in the state if it deters competition from parties outside of the state in either sense. *Id.* As has already been discussed, LastEnergy and MAPCo are incredibly important to the state of Vandalia, both as providers of all of Vandalia's retail electricity, and as consumers of the coal that is mined within the state. R. at 4. Vandalia's illegitimate interests in providing these two companies with a competitive advantage in the federal transmission of electricity is clear, and served by NTPA.

Because ACES has made sufficient allegations to show that a discriminatory purpose or affect may have been present, and the court is obligated to consider Vandalia's interest in in-state companies, this case must be remanded for discovery and a subsequent trial.

B. <u>Even if a plausible allegation of a discriminatory purpose or affect has not been made, this case must proceed to discovery for a determination on whether a local purpose is served, and whether that purpose justifies prohibiting non-incumbent development.</u>

The Commerce Clause gives the power to regulate commerce between the states to Congress. U.S. Const. art. I, § 8, cl. 3. Within the Commerce Clause is a dormant assumption preventing the individual states from regulating interstate commerce. *Sieban*, 954 F.3d at 1026. Absent any form of discrimination, a state's law may regardless violate the dormant commerce

clause if it fails the Pike balancing test. *Id.* 1030; *Pike*, 397 U.S. at 142. The Pike balancing test "requires balancing a legitimate local public interest against its incidental burden on interstate commerce." *Sieban*, 954 F.3d at 1026 (quoting *S. Union Co. v. Mo. Pub. Serv. Comm'n*, 289 F.3d 503, 508 (8th Cir. 2002)). The preservation of a "status quo for the construction and maintenance of electric transmission lines" is one legitimate state interest that the court may consider. *Id.* at 1031. If the cumulative affect of a state's ROFR law would eliminate competition in the market completely, it's burden on commerce is too great. *See Id.*

While the construction and maintenance of electric lines is a legitimate state interest potentially served by an ROFR, if that ROFR eliminates competition in the market completely, it has too great a burden on commerce. *Id.* In *LSP Transmission Holdings*, the Eight Circuit considered a ROFR provision that allowed incumbent electric owners ninety days to exercise their right to build any transmission facility connecting to facilities they own. *Id.* at 1024. Considering a challenge from a transmission company wishing to build a forty mile line between two facilities located in Minnesota, the court affirmed the dismissal of any dormant Commerce Clause claims. In relation to the Pike balancing test, the court considered the purpose of the statute, the protection of Minnesota transmission lines, and balanced them against any potential burden on interstate commerce. *Id.* at 1031. The court noted that assuring the reliability of transmission lines in Minnesota was a legitimate state interest. *Id.* Further, perhaps noting the substantial number of incumbent facilities in Minnesota as well as the short period where a ROFR could be exercised, the court was unconvinced it unfairly prohibited competition in the transmission of electricity just because it prevented one company from building a single line. *Id.* at 1031.

The statute in our case, taken together with the circumstances surrounding Vandalia's electricity market, are far more restrictive than those in *LSP Transmission Holdings*. First, the

Minnesota statute only allows a ROFR to be exercised within ninety days of the line's approval. Minn. Stat. § 216B.246, subd. 3. The statute here allows Vandalia utilities a full year and a half to assert their right, a length of time that essentially outright prohibits ACES from constructing the Mountaineer Express due to concerns about raising funding, and the potential for an incumbent facility to exercise their right to build the line themselves. R. at 9; Vand. Code § 24-12.3(d). Second, the Minnesota statute appeared far more necessary to advance the interest of maintaining a reliable energy grid, as the Minnesota legislature considered other methods of assuring the same interest, and the court made note of sixteen incumbent operators already present within the state. *Sieban*, 954 F.3d at 1029. Vandalia's legislature on the other hand does not appear to have considered any other regulatory approach, and is home to only two incumbent facilities. R. at 4, 9. Having never considered an alternative, it seems very likely that Vandalia could accomplish the same goal of line maintenance with some other regulatory scheme or permit requirement rather than a constructive ban on non-incumbent transmission line construction. The discriminatory effect of the NTPA is also far more clear when considering the entire state is served by only two retail utilities. R. at 4. If both facilities were to establish a policy of allowing the eighteen months to run out, or exercising their right to build transmission lines whenever they arise, they will have affectively locked any non-incumbent from competing within Vandalia.

Because the NTPA places a potentially substantial burden on interstate commerce, giving two companies the power to ensure no other electric transmission company can own or construct facilities in the state of Vandalia, summary judgment must be remanded.

CONCLUSION

ACES is simply trying to reduce our impact on the planet by eliminating carbon emissions, and is prevented from doing so because of far reaching laws promoting the consumption of coal

from Vandalia mines that is quickly becoming cost-ineffective. While Vandalia may have good intentions behind preserving their interest in coal, reversing both the CFO and the NTPA will ultimately result in lower electricity costs for Vandalia residents.

For the Foregoing reasons, we ask that the district court vacate the summary judgment order dismissing all of ACES claims, and allow this case proceed to discovery and a subsequent trial. Put simply, more information is required before several of these issues can be resolved. ACES has standing as a competing electric company that suffered damage as a direct result of Vandalia's CFO reducing the demand for electricity in the wholesale market; the same CFO that is likely preempted by the FPA's designation of power in the FERC to regulate wholesale energy rates. Vandalia's ROFR provision is similarly preempted by FERC's order 1000, justifying summary judgement in favor of ACES on only that claim. Alternatively, even if the Supremacy clause claim failed, the fact that a discriminatory purpose, a discriminatory affect, a local benefit and a burden on commerce are all fact specific inquiries requires that the dormant Commerce Clause claim against Vandalia's NTPA proceed to trial.

Appendix 1

CERTIFICATE OF COMPLIANCE

Pursuant to Official Rule III.C.9, ACES certifies that its brief contains 29 pages in Times New Roman 12-point font.

We further certify that we have read and complied with the Official Rules of the National Energy Moot Court Competition at the West Virginia University College of Law. This brief is the product solely of the Team Members of Team No. 28, and the Team Members of Team No. have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

Team No. 28.

Appendix 2

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 28.