C.A. No. 22-0682

THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,
Petitioner,

v.

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

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

BRIEF FOR THE PETITIONER

Team 15

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

United States Court of Appeals

United States District Courts

U.S. Constitution

Statutes

Orders

Federal Rules

Books

JURISDICTIONAL STATEMENT

The U.S. District Court for the Northern District of Vandalia had subject matter jurisdiction of the case that is docketed as No. 22-0682 pursuant to 28 U.S.C § 1331. Plaintiff-appellant's suit against the defendant-appellee is based on alleged violations of Articles I and II of the U.S. Constitution. Plaintiff-appellant is a global corporation headquartered and incorporated in Vandalia.

The U.S. Court of Appeals for the Twelfth Circuit has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The final order that is being appealed from disposed of all issues in this cause and was entered on August 15, 2022. This is not an appeal from a decision of a magistrate judge and no motion that would have tolled the time to appeal was filed. Plaintiff-appellant filed a timely appeal of the final order within thirty days, on August 29, 2022.

STATEMENT OF THE ISSUES PRESENTED

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

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

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

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

STATEMENT OF THE CASE

I. Factual Background

As a global energy company and the largest independent electricity transmission company in the United States, Appalachian Clean Energy Solutions, Inc. ("ACES") maintains a diverse portfolio of electricity generating resources while also constructing electric transmission lines. R. at 4. Headquartered and incorporated in Springfield, Vandalia, ACES' resources include wind

facilities, solar facilities, coal-fired plants, natural gas fired plants, and three nuclear plants. R. at 4. Additionally, the company owns and operates an extensive system of transmission lines throughout the Eastern Interconnection of the United States. R. at 5. ACES generates electricity for resale in wholesale markets using either bilateral power purchase agreements or participation in numerous, competitive, regional wholesale markets. R. at 4. The plants that ACES owns have no retail customers, instead, ACES sells the output from the plants into the wholesale markets. R. at 5, n.5. As part of its goal to achieve zero carbon emissions by 2050, ACES has begun to close existing coal plants while adding more renewable and zero-carbon energy facilities. R. at 5. This includes the Franklin Generating Station. R. at 5. ACES had determined that, due to new Environmental Protection Agency ("EPA") standards, the necessary upgrades required for the plant to be in compliance would be uneconomical. R. at 5.

In April 2020, ACES announced its plans to construct a natural gas-fired generating plant ("Rogersville Energy Center) in Green County, located in southwestern Pennsylvania near Rogersville. R. at 5. The anticipated plant would utilize the resources from the nearby Marcellus Shale. R. at 5. In August 2022, President Biden signed the Inflation Reduction Act, which expanded the 45Q tax credit to incentivize sequestration in power generation as well as carbon capture. R. at 5. In addition, Pennsylvania's state legislature crafted a statutory scheme in 2022, which established rules for carbon sequestration. R. at 5. To take advantage of the federal tax credit and Pennsylvania's updated statutory scheme, ACES decided to modify the plant's original design to enable it to use both carbon capture and power sequestration technologies. R. at 5. Due to the electrical output of the Rogersville Energy Center, ACES planned to construct and maintain a 500 kilovolt (kv) transmission line (called the "Mountaineer Express") which would run from the

Rogersville substation to a Wake County substation outside of Raleigh, North Carolina. R. at 5, 6. The line is expected to cost approximately $1.7 billion dollars. R. at 6.

The PJM Interconnection is the regional transmission organization ("RTO") responsible for operating energy and capacity markets as well as maintaining and operating the transmission grid in Vandalia, the District of Columbia, and thirteen other states. R. at 3. PJM maintains the authority to approve the construction of any new transmission facilities that would serve the PJM grid. R. at 3. Therefore, owners must obtain approval from PJM to build new transmission facilities if they would operate within the PJM grid. States do, however, still retain authority over the siting, routing, and permitting of new transmission facilities. R. at 3. To encourage innovation and allow nonincumbent transmission developers to participate in the expansion and further development of the PJM bulk electric system, PJM initiated a competitive planning process. R. at 6. In March 2022, the Mountaineer Express was approved by the PJM Board of Managers for inclusion into the Regional Expansion Plan ("RTEP"). R. at 6. The Mountaineer Express would cross into portions of Vandalia; however, ACES currently owns no transmission facilities within Vandalia. R. at 10. On April 1, 2022, ACES applied for a Certificate of Public Convenience and Necessity ("CPCN") to construct the Vandalia portions of the line, as required by Vandalia law. R. at 10.

A. The Capacity Factor Order

Will Williamson, Lonnie Logan, and Evelyn Elkins are the current commissioners of the Vandalia Public Service Commission, the government agency in charge of regulating public utilities within Vandalia under Title 24 of the Vandalia Code. R. at 6. The state legislature also enacted express directives to the commission to ensure that coal remains the dominant source of energy in Vandalia. R. at 6. LastEnergy and the Mid Atlantic Power Company are the two retail utilities which serve Vandalia. R. at 4. In 2021 LastEnergy and MAPCo submitted filings to the

Vandalia PSC showing that the utilities, in order to reduce cost to consumers, utilized cheaper sources of energy from the wholesale market rather than the more expensive coal-fired energy generation. R. at 7. Both utilities also projected that going forward, the capacity factors for their coal-powered plants would likely remain below 60%. R. at. 7. The Vandalia PSC expressed concern about these projections and commenced investigative proceedings, which resulted in a May 15, 2022, general order ("Capacity Factor Order") affecting both utilities. R. at 7. The Capacity Factor Order directed both utilities to operate their coal fired plants at no less than 75% capacity. R. at 8. Additionally, the Order included a "finding of fact that the operation of the plants would be economical." R. at 8.

B. The Native Transmission Protection Act and Right of First Refusals

Until 2011, many FERC-approved ISO tariffs contained right-of-first-refusal provisions. R. at 9. In practice these provisions allow incumbents to wait for nonincumbents to identify promising opportunities for new transmission facilities and then exercise their right-of-first refusal to construct and operate those facilities without having to compete. R. at 9. FERC issued Order 1000—requiring elimination of right-of-first-refusal provisions. R. at 9. By regulating these competitive auctions, FERC ensures just and reasonable clearing prices. R. at 13. FERC Order 1000 also includes a savings clause. It states:

> Nothing in the rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the construction of transmission facilities, including but not limited to authority over siting or permitting of transmission facilities.

Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., 136 FERC 61051, 256 (2011) (Order 1000).

In response to Order 1000, Vandalia, in 2014, passed "The Native Transmission Protection Act" (referred herein as the "Act") R. at 9. The Act created a right of first refusal for electric

transmission lines that gives incumbent transmission owners in Vandalia the right-of-first-refusal. R. at 9. The exact same practice FERC Order 1000 wished to halt. R. at 9. *See Appendix A.*

ACES is also a non-incumbent under Vand. Code § 24-12.3 (f). R. at 9, 10. *See Appendix B.* The senator who introduced the bill described it as a direct response to Order 1000 and its elimination of a federally recognized right of first refusal. R. at 9 And representatives from LastEnergy and MAPCo, supported the Act, by claiming it was necessary to keep transmission lines in the hands of in-state incumbents and restore the "status quo." R. at 9.

II. Procedural History

To minimize the environmental impact of the Mountaineer Express's construction, ACES plans to cross the same rights of way used by LastEnergy in Vandalia. R. at 10, 11. However, LastEnergy refused to allow ACES' use of the right of way, arguing ACES is not a public utility as defined in Vandalia law, and as an 'incumbent utility,' LastEnergy was within its rights to prohibit ACES's use of the right of way. R. at 11. ACES attempted to obtain a ruling from the Vandalia Public Service Commission ("Vandalia PSC") that ACES met the qualifications of a public utility under Vandalia law. R. at 11. However, the Vandalia PSC issued an order on December 13, 2022 ("RWO") that ACES was not a public utility as defined by § 24-8-1(h) of the Vandalia code. R. at 11.

On June 6, 2022, ACES filed two complaints against the Vandalia PSC in the District Court for the Northern District of Vandalia. R. at 14. The first asserted that the commission's Capacity Factor Order violates the Supremacy Clause because it is preempted by the FPA. R. at 14. On June 27, 2022, the Vandalia PSC filed a motion to dismiss ACES' claim, arguing that ACES lacked standing, and the Capacity Factor Order was not preempted by the FPA. R. at 14. ACES' second complaint challenged Vandalia's ROFR, arguing that the FPA preempts the

ROFR and violates the dormant Commerce Clause because it discriminates against out-of-state entities. R. at 15. The Vandalia PSC moved to dismiss the claims, pointing to similar legislation enacted in other states while contending that the incumbency requirement does not discriminate against out-of-state entities. R. at 16.

On August 15, 2022, the district court granted the Vandalia PSC's motion to dismiss on all issues. R. at 16. The district court agreed with the Vandalia PSC that ACES lacked standing to bring its preemption claim and that the Capacity Factor Order did not violate the Supremacy Clause. R. at 14. In addition, the court held that FERC Order 1000 did not preempt the ROFR and the ROFR did not violate the dormant Commerce Clause. R. at 16. On August 29, 2022, ACES filed a timely appeal of the district court's order. R. at 16.

SUMMARY OF THE ARGUMENT

ACES maintains standing to pursue a preemption claim against the Vandalia PSC's Capacity Factor Order because the commission's interference with the wholesale rate market negatively impacts ACES' ability to build capacity in Vandalia. The Capacity Factor Order affects ACES' plan to build a high voltage transmission line to support its construction of a new natural gas fired electric generating plant. Given the transmission line has already been approved by the PJM, the Capacity Factor Order's interference causes both actual and imminent harm to ACES' economic interests. A declaration that the Capacity Factor Order is preempted by the FPA would remedy these economic harms.

The Capacity Factor Order is preempted by the FPA. FERC, through the FPA, comprehensively regulates wholesale rates and energy auctions. By substantially interfering in the PJM, the Vandalia PSC disregarded the wholesale rates set by FERC. Therefore, the Capacity Factor Order falls squarely within an area that Congress has exclusively occupied.

Vandalia's ROFR violates the Supremacy Clause of the U.S. Constitution because it is preempted by FERC Order 1000. Congress grants FERC broad authority to determine "just and reasonable" wholesale electricity rates in interstate commerce. As a result of FERC Order 1000, public utility transmission providers must engage in a competitive bidding process where each operator conducts an auction to set wholesale electricity prices. Because Vandalia's ROFR and FERC 1000 serve the same purpose, and because Vandalia's ROFR sidesteps FERC's competitive bidding process, state law must yield.

Vandalia's ROFR discriminates against interstate commerce on its face, effects, and purpose. Both on its face and effects this law gives special privileges in-state incumbents at the expense of non-incumbent competitors for the right to build instrumentalities of interstate commerce. Moreover, the record is clear: the law is protectionist in purpose.

ARGUMENT

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

An appellate court reviews *de novo* a district court granting a motion to dismiss based on lack of standing. Fed. R. Civ. P. 12(b)(1)**.** A *de novo* review requires an independent review of the trial court's decision without any deference to the trial court. *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir.1988).

The party invoking federal jurisdiction bears the burden of establishing the elements for standing. *Warth v. Seldin*, 422 U.S. 490, 508, 95 S. Ct. 2197, 2210, 45 L. Ed. 2d 343 (1975). *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized and b) actual or imminent. *Lujan*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). Second, there must be a causal connection between the

protested conduct and experienced injury. *Id.*, at 504 U.S. 555, 560–61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Id.*, at 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992). At the pleading stage, a plaintiff may assert general factual allegations of injury resulting from the defendant's conduct, because on a motion to dismiss a court may "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Id.*, at 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990). This requirement ensures that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party," *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974).

A. The Capacity Factor Order has caused ACES actual, concrete, and particularized economic harm

Through passing the Capacity Factor Order, Vandalia PSC caused both actual and imminent economic injury to ACES by interfering with the wholesale rate market. To establish standing, the injury suffered by a plaintiff must be "actual or imminent." *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 96 (2d Cir. 2017). "The 'injury in fact' test requires… that the party seeking review be himself among the injured." *Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S. Ct. 1361, 1366, 31 L. Ed. 2d 636 (1972). A plaintiff must also "allege specific, concrete facts demonstrating that the challenged practice[] harm[s] him." *Warth*, 422 U.S. at 508, 95 S. Ct. 2210. Additionally, the injury must be concrete enough to distinguish the interest of the plaintiff from the generalized stake every citizen has in good government practices. *Toll Bros. v. Twp. of Readington,* 555 F.3d 131, 138 (3d Cir. 2009); *see Lujan*, 504 U.S. at 573–74, 112 S.Ct. 2130, *Schlesinger*, 418 U.S. at 220–21, 94 S.Ct. 2925. There must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant,

and not ... th[e] result [of] the independent action of some third party not before the court." Lujan, 504 U.S. at 560–61, 112 S. Ct. 2136, *quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976).

In *Allco*, the Second Circuit concluded that the plaintiff solar power company had standing to sue Connecticut's state energy regulators over a program which allowed the state's energy regulator to solicit proposals from renewable energy generators, pick winning bids, and direct those utilities in Connecticut to enter into wholesale contracts with those generators. *Allco Fin. Ltd.*, 861 F.3d, at 86. The plaintiff asserted that defendants had violated the FPA in implementing this state program and that the program's restrictions impermissibly excluded the plaintiff from bidding. *Id*. The court determined that the injury to plaintiff resulting from the state's implementation of the program was actual and particularized enough to qualify for Article III standing. *Id*.

ACES has experienced an actual, concrete, and particularized economic injury both to its current economic prospects, given the Capacity Factor Order's impact on ACES' ability to build the Mountaineer Express line, and to its imminent economic prospects, given the reliance on the Mountaineer Express line to power the Rogersville Energy Center. Without the Capacity Factor Order, there is a substantial likelihood that MAPCo and LastEnergy would continue to operate coal plants at less than 60% capacity, given the efficiency and cost reduction to retail ratepayers. As a result, the two entities would continue to purchase cheaper sources of energy from the wholesale market, as they had done and were able to do prior to the Capacity Factor Order. The utilities' participation in the wholesale markets maintains an economic effect, notably, prices within these competitive wholesale auctions. As such, Vandalia PSC's interference has artificially affected the wholesale rate market. The Capacity Factor Order distorts price signals in the PJM

market influencing, and effectively setting, wholesale rates. ACES participates in and economically relies on the PJM market. Therefore, the Capacity Factor Order makes it much more difficult for any entity to build new capacity in the Vandalia. Specifically, ACES' ability to build new capacity has been hampered by the Capacity Factor Order. Not only does this resulting impact stymy ACES' economic growth, but it also impacts ACES' ability to construct the Mountaineer Express and subsequent infrastructure necessary to support the regional grid for the development of the Rogersville Energy Center. Without the Rogersville Energy Center, ACES is left with an imminently defunct Franklin Generating Station, which cannot operate without past December 2028 without expensive and uneconomic upgrades to comply with updated EPA regulations. As such, there are multiple actual and imminent economic impacts suffered by ACES due to Vandalia PSC's Capacity Factor Order.

B. The Court can remedy the economic injury to ACES by finding that the Capacity Factor Order is pre-empted by the FPA

Article III standing does not require a guarantee that a court's decision will redress the injury instead requiring that there is a "substantial likelihood" that the harm will be redressed by a favorable decision. *Allco Fin. Ltd.*, 861 F.3d at 96, *Utah v. Evans*, 536 U.S. 452, 460, 122 S.Ct. 2191, 153 L.Ed.2d 453 (2002).

In *Utah*, the Supreme Court found that Utah had standing to challenge a census report. *Utah* 536 U.S., at 463–64, 122 S.Ct. 2191. The court noted that a favorable decision could not directly fix the state's claim that it was underrepresented in the House of Representatives. *Id*. However, the Court also stated that a decision could ensure that officials in the future abided by census rules, "substantially resulting" in "a more favorable apportionment of representatives" for Utah. *Id*. This likelihood, the Court found, was enough to determine that Utah had standing. Meanwhile in *Allco*, the court concluded that plaintiff did not need to show a certainty that Connecticut would conduct

a future procurement without the issues negatively impacting plaintiff. *Allco Fin. Ltd.*, 861 F.3d, at 97. Rather, the fact that Connecticut officials had already expressed a desire for renewable energy, that two procurements had already been conducted, and a favorable decision by the court would not preclude future procurements was enough to show a "substantial likelihood" that granting the plaintiff relief would provide redress. *Id*.

In the present case, ACES requests a declaration that the Capacity Factor Order is preempted by the FPA. Should this relief be granted, the retail energy utilities in Vandalia would no longer be precluded from relying on non-coal lower cost power supplies. Like in both *Utah* and *Allco*, ACES is requesting a removal of restrictions. The harm experienced by ACES results directly from Vandalia PSC's interference in PJM and artificial distortion of market rates, which would be reversed with a favorable decision by the Court. A finding that that strikes down the Capacity Factor Order, therefore, is substantially likely to redress the injury to ACES.

C. Even if the Capacity Factor Order has not currently caused ACES harm, the application of the Order threatens imminent and concrete harm to the economic interests of ACES

Vandalia PSC incorrectly asserts that because ACES is not subject to the Capacity Factor Order, or a retail ratepayer in Vandalia, that ACES lacked standing. **"**To seek injunctive relief, a plaintiff must show that he is under threat of suffering **'**injury in fact**'** that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.**"** *Summers v. Earth Island Inst.*, 555 U.S. 488, 493, 129 S. Ct. 1142, 1149, 173 L. Ed. 2d 1 (2009) *citing Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

Here, Vandalia PSC's argument fails because the effects of the Capacity Factor Order directly, negatively, impact ACES' business interest. First, the Order's impact on ACES' ability to build and operate the Rogersville Energy Facility is concrete. PSC's argument incorrectly classifies an economic effect of facility building as speculative; however, the Order already makes it difficult for ACES to build new capacity in the region. Second, the Order's interference with the PJM artificially affects the PJM's auction price signals, which negatively impacts ACES' participation in the competitive wholesale market. By compelling coal plants to run 75 percent of the time, regardless of lower-cost energy supplies from the PJM, companies like ACES which exclusively operate in wholesale markets lose significant amounts of business. As such, by finding favorably for ACES, the Court can redress the economic injuries the Order has already caused ACES.

II. The PSC'S Capacity Factor Order violates the Supremacy Clause Constitution because it is preempted by the FPA.

Under the Supremacy Clause, Congress can preempt state law. U.S.C.A. Const. Art. 6, cl. 2. "[A]n agency's preemption regulations, promulgated pursuant to Congressional authority, have the same preemptive effect as statutes." *Meyer v. Conlon*, 162 F.3d 1264, 1268 (10th Cir.1998).

An appellate court reviews a district court finding of whether a federal law preempts a state law *de novo*. *Lawson-ross v. Great Lakes Higher Educ. Corp.*, 955 F.3d 908, 915 (11th Cir. 2020).

When a federal act includes clear and manifest congressional purpose to supersede state powers, then the federal law preempts state law. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 120 L.Ed.2d 407 (1992). *See Retail Clerks Int'l Ass'n, Local 1625 v. Schermerhorn,* 375 U.S. 96, 103, 84 S.Ct. 219, 11 L.Ed.2d 179 (1963)(finding that congressional intent is the "ultimate touchstone" of a preemption analysis). Even when Congress has not expressly stated its intent, courts can infer the intent of Congress to occupy a given field of regulation where the federal interest is so dominant that the federal act precludes state law in that same field of regulation.

Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 713, 105 S.Ct. 2371, 85 L.Ed.2d 714 (1985), *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U.S. 493, 509, 109 S.Ct. 1262, 103 L.Ed.2d 509 (1989). Additionally, when state law is in direct conflict to the execution of congressional intent in a federal law, then the federal law preempts the state law. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 162, 136 S. Ct. 1288, 1297, 194 L. Ed. 2d 414 (2016)("Put simply, federal law preempts contrary state law.").

A. The FPA impliedly preempts the PSC's Capacity Factor Order under both conflict and field preemption theories

Not only is the federal interest in electric regulation so dominant that the FPA precludes Vandalia PSC's enforcement of the Capacity Factor Order, but the Order stands as an obstacle to the congressional purpose of the FPA by intruding on FERC's authority. "Implied preemption exists when (1) state law regulates conduct in a field Congress intended the Federal Government to occupy exclusively, or (2) when state law actually conflicts with federal law." *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 795 (10th Cir. 2000) citing *English v. General Elec. Co.*, 496 U.S. 72, 79, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990). The Supreme Court has pointedly noted that only Congress can regulate wholesale sales of electricity across state lines. *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 102 (2d Cir. 1985), *Public Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89–90 (1927). Under the FPA, a wholesale sale is a "sale of electric energy to any person for resale." 16 U.S.C. § 824(d). FERC is charged by the FPA with the regulation of both interstate transmission of electricity as well as the wholesale sale of electricity across state lines. 16 U.S.C. § 824(b)(1). Pursuant to the FPA, FERC ensures that all rates and charges that fall within the Commission's jurisdiction are just and reasonable. 16 U.S.C. § 824(d)(a). To achieve this goal, FERC encourages robust competition through the "break down [of] regulatory and economic barriers that hinder a

free market in wholesale electricity." *Morgan Stanley Capital Group Inc. v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008). This includes the extensive regulation of competitive wholesale auctions to ensure that they "produce just and reasonable results." *Allco Fin. Ltd.*, 861 F.3d at 89.

The FPA, therefore, vests FERC with the exclusive jurisdiction over wholesale sales of electric

Energy. *See Hughes*, 136 S. Ct. at 1297. As such, when a state takes an action interfering with the competitive wholesale energy auctions operated by PJM, that action is preempted by the authority of the FPA. In *Hughes*, the Supreme Court found that the Maryland Public Service Commission's order directing Maryland utilities to enter into a pricing contract with a particular entity was preempted because it disregarded "the interstate wholesale rate FERC requires." *Hughes*, 136 S. Ct. at 1290. While the Court noted that states may incidentally affect areas where FERC regulates, states may not "intrude on FERC's authority over interstate wholesale rates." *Id*. at 1290-91. Because Maryland PSC's order resulted in the disregarding of interstate wholesale rates required by FERC, the Court determined that it was preempted by the FPA. *Id*. at 1291.

Meanwhile in *Allco*, the Second Circuit distinguished the fact pattern from that in *Hughes*. The plaintiff-appellant argued that the two Connecticut state laws were preempted by the FPA, in part, because the state compelled and forced utilities to enter into contracts with certain generators at specific rates. *Allco Fin. Ltd.*, 861 F.3d at 97. The court did not find that Connecticut's laws created the kind of compulsion that would result in preemption. *Id*. However, the holding indicated that the kind of compulsion could in fact sustain a claim of preemption. *Id*.

The Capacity Factor Order compels Vandalia utilities in a similar fashion to the utilities in *Hughes*. Vandalia disregards and interferes with wholesale sales of electric energy by compelling

its utilities to engage with the market in a particular way. Specifically, the Capacity Factor Order orders both LastEnergy and MAPCO to sell coal-burning energy into PJM.

Vandalia PSC incorrectly compares holdings from certain zero emission credits "ZEC" cases to the case at hand. *Coalition for Competitive Electricity v. Zibelman* 906 F.3d 41, 52 (2d Cir. 2018), *Electric Power Supply Association v. Star*, 904 F. 3d 518 (7th Cir. 2018). This argument fails because the Capacity Factor Order is tethered to LastEnergy and MAPCO's participation in PJM. This important distinction has been discussed in case like *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.* In *Rochester*, the court looked at whether the New York Public Service Commission's policy of including an estimate of a wholesale rate in a company's revenue lease "compelled" or "regulated" incidental sales. In the "ZEC" cases state programs which subsidized the operation of existing power plants through credits. However, the "ZEC" cases did not have a state policy require any bidding into wholesale market auctions. *Coal. for Competitive Elec., Dynergy Inc.* 906 F.3d at 53("Plaintiffs concede that the ZEC program 'does not expressly mandate that the plants receiving ZEC subsidies bid into the NYISO auctions.'"). Here, Vandalia PSC is forcing the operation of more expensive coal fired energy through the regulation of rates, which compels those utilities to sell coal energy into PJM. As such, the "ZEC" cases are not comparable to the case at hand and their holdings should hold no precedential value.

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

A district court's determination of federal preemption is reviewed de novo. *Matthews v. Centrus Energy Corp.*, 15 F.4th 714, 721 (6th Cir. 2021).

A. The Supremacy Clause applies.

Vandalia's Right of First Refusal (ROFR) subverts federal law and the Supremacy Clause; it must *yield.* The Supremacy Clause of the United States Constitution invalidates or preempts state laws that conflict with or interfere with federal law objectives. *Arizona v. United States*, 567 U.S. 2492, 2495 (2012).

It provides, in relevant part (emphasis added):

> This Constitution, and the Laws of the United States shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the *supreme Law of the Land* . . . .

U.S. Const. art. VI, cl. 2.

The Supremacy Clause is a simple reminder that "the power of the Constitution predominates." James Wilson, Comparisons of Constitutions, Collected Works of James Wilson 742–43 (1791). The scope of federal preemption stems from the Supremacy Clause. *Murphy v. Nat'l Collegiate Athletic Ass'n,* 138 U.S. 1461, 1479 (2018). And only one form of preemption is necessary. *Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 248 (1984). In this analysis, federal intent is paramount. *Schneidewind v. ANR Pipeline Co.,*485 U.S. 293, 299 (1988); *Altria Group, Inc. v. Good,* 555 U.S. 150, 163 (2008) ("[T]he purpose of Congress is the ultimate touchstone in every preemption case."); *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016).

Any state laws standing as an "obstacle to the accomplishment and execution of Congress' full purposes and objectives" are preempted. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 281 (1995); *California v. ARC Am. Corp*., 490 U.S. 93, 101, 109 (1989); *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 (1941); *Maryland v. Louisiana*, 451 U.S. 725, 748 (1981); *Nat'l Fuel Gas Supply Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 894 F.2d 571, 575 (2d Cir. 1990); *Schneidewind,* 485 U.S. at 108; *Am. Energy Corp. v. Texas E. Transmission, LP*, 701 F. Supp. 2d 921, 927 (S.D. Ohio 2010). Stated another way, state laws that interfere with federal goals must *yield. Eng. v. Gen.*

Elec. Co., 496 U.S. 72, 79 (1990); *Murphy,* 138 U.S. at 1479 ("[F]ederal law is supreme in case of a conflict with state law.").

Here, Vandalia's statutory ROFR stands as an obstacle to the purposes and objectives of FERC Order 1000. Thus, the breadth of the Supremacy Clause is at issue. Although Order 1000 is an *order* by FERC and not a statute, preemption principles are still in play. When Congress has conferred authority on an agency, preemption occurs "when and if it is acting within the scope of its congressionally delegated authority . . . ." *Louisiana Pub. Serv. Comm'n v. FCC,* 476 U.S. 355, 374 (1986). In considering this question, courts examine the nature and scope of the authority granted to the agency, but it does not immediately prevent the application of federal preemption principles. *New York v. FERC*, 535 U.S. 1, 18, (2002). The Supremacy Clause applies.

B. Because Vandalia's ROFR and FERC 1000 serve the same purpose, state law must *yield*.

1. FERC has exclusive authority to weed out discriminatory wholesale rates.

Because Congress grants FERC broad authority to determine "just and reasonable" wholesale electricity rates in interstate commerce, FERC Order 1000 preempts Vandalia's statutory ROFR. A purpose preemption analysis consists of a three-fold review, including (1) an examination of the federal statute at issue, (2) an analysis of the federal law's objective, and (3) an analysis of state law's purpose to determine whether a conflict is present. *Pacific Gas & Electric*, 461 U.S. at 205. At the end of the analysis, *any* state law interfering with federal power will result in one action – preemption. *Id.*

Almost a century ago, Congress enacted the Federal Power Act. 16 U.S.C. Ch. 12. The Act gives FERC broad jurisdiction to determine the sale of wholesale electricity in interstate commerce, including any practice "affecting" these rates. 16 U.S.C. § 824; *Coal for Health Concern v. LWD, Inc.*, 60 F.3d 1188, 1193 (6th Cir. 1995) ("[A] State may not differ from FERC's allocations of wholesale power by imposing its own judgment of what would be just and reasonable."); *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 277 (2016); *New York v. FERC*,

535 U.S. at 6. (quoting *Gulf States Util. Co. v. FPC*, 411 U.S. 747, 758 (1973)) (describing FERC's power over "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce.") *See Appendix C, D*.

2. FERC's competitive bidding process creates just and reasonable rates.

FERC 1000's bidding process creates just and reasonable rates. In 2011, the Commission released FERC Order 1000. Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils. 136 FERC 61051, 256 (2011) (Order 1000). The Commission removed federal ROFRs from commission-jurisdictional tariffs and agreements "to ensure that *rates for jurisdictional services* are just and reasonable." 136 FERC 61051, 249 (2011) (Order 1000). As a result of the order, public utility transmission providers must engage in a competitive bidding process where each operator conducts an auction to set wholesale electricity prices. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 760, 783 (2016). FERC regulates these auctions to ensure they are efficiently balanced and result in a just and reasonable clearing price. *Id.*

Because Vandalia's ROFR primarily concerns the adjustment of wholesale rates, FERC Order 1000 preempts it. In determining whether purpose preemption is present, the U.S. Supreme Court analyzes the objectives of the federal and state laws at issue. *Pacific Gas*, 461 U.S. at 205. This analysis includes a review of the state law's *actual effect* and not simply the legislature's stated purpose. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992). In fact, the U.S. Supreme Court has specifically rejected an analysis centered solely around the legislature's stated purpose, stating:

> [S]uch a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.... [A]ny state legislation

> which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause.

Perez v. Campbell, 402 U.S. 1704, 1712 (1971). In *Gade*, the Supreme Court preempted a broad Illinois law protecting safety workers from hazardous waste. *Gade,* 505 U.S. at 89. In that case, the state law had dual purposes: public safety and occupational safety. *Id.* Because of Congress's clear intent to have one central safety standard, federal law preempted the Illinois law. *Id. See also Attorneys' Liab. Assurance Soc'y, Inc. v. Fitzgerald*, 174 F. Supp. 2d 619, 635 (W.D. Mich. 2001) (finding preemption because "Michigan's fee serves a similar purpose" as the Liability Risk Retention Act.) In *Pacific Gas*, the state law also served two purposes. *Pacific Gas*, 461 U.S. at 191. Still, its primary purpose concerned a matter relating to the states – economics. *Id.* Therefore, federal law did not preempt it. *Id. See also* Oneok, *Inc. v. Learjet, Inc*., 575 U.S. 373, 385 (2015) (dismissing the preemption argument because the state law impacts "a matter firmly on the State's side of the [the] dividing line.")

Because the main effect of Vandalia's ROFR concerns the adjustment of wholesale rates, FERC Order 1000 preempts it. For decades, the Commission's goals have included breaking "down regulatory and economic barriers that hinder a free market in wholesale electricity." *Morgan,* 554 U.S. 527, 536 (2008). In 2011, the Commission released FERC Order 1000. FERC 61051, 256 (2011) (Order 1000). As a direct response to FERC Order 1000 and the federal end to ROFRs, the state of Vandalia passed the "Native Transmission Protection Act" ("the Act") on May 3, 2014.

The Act provides incumbents with the *exclusive* right to construct transmission lines within the state for eighteen months. R. at 9. It was introduced by a senator who described the bill as a direct response to FERC Order 1000 and its elimination of "a federally recognized right of first

refusal." *Id.* And representatives from LastEnergy and MAPCo, supported the Act by claiming it was necessary to keep transmission lines in the hands of in-state incumbents and restore the "status quo." *Id.* Since ACES is not an incumbent, it had to wait eighteen months to *potentially* build Mountaineer Express. R. at 6.

Because Vandalia's ROFR primarily concerns the adjustment of wholesale rates; it must *yield*. Here, the purpose of the Act is broad enough to impact the federal objective of nondiscriminatory wholesale rates. Although Vandalia's Act may have the dual purpose of (1) the construction of electric transmission lines and (2) control over the wholesale sales of electrical energy, FERC 1000's preemptive effect remains. *Gade,* 505 U.S. at 105. Although rates are not specifically listed in the Act, courts look at the effect of the legislation. *Id.*

As in *Gade*, the effect of Vandalia's statute creates a conflict with FERC Order 1000. *Id.* Vandalia's law revokes incumbent participation in the Order 1000 competitive solicitation process, which conflicts with the plain goal of regulating the transmission and sale of interstate wholesale electricity. In effect, the Act gives incumbent electric transmission owners an easy way out of their required participation in the competitive bidding process. It allows incumbent transmission providers to act in their economic self-interest instead of allowing FERC "to ensure that rates for jurisdictional services are just and reasonable." 16 U.S.C. § 824(e). Because Congress intended for FERC to control the transmission and sale of wholesale interstate electricity, Vandalia's statutory ROFR is preempted by FERC Order 1000.

C. FERC 1000's savings clause does not foreclose this analysis.

The savings clause in FERC Order 1000 does not change this analysis. In short, a savings clause "exempts from coverage something that would otherwise be included." *McCarthan v. Dir. of Goodwill Indus.-Suncoast, Inc.*, 851 F.3d 1076, 1082 (11th Cir. 2017). But the U.S. Supreme

Court has repeatedly **"**declined to give broad effect to saving clauses where doing so would upset the careful regulatory scheme established by federal law . . . ." *Geier v. Am. Honda Motor Co.*, 529 U.S. 1913, 1915 (2000). A savings clause does not limit the analysis of ordinary preemption principles or create a particular burden of any kind. *Id.* at 1920. ("Why, in any event, would Congress not have wanted ordinary preemption principles to apply where an actual conflict with a federal objective is at stake?").

The savings clause in FERC Order 1000 was not intended to subdue the power of the Commission to regulate and transmit the wholesale sale of electric energy in interstate commerce. In fact, the language of the savings clause still permits these actions because it does not specifically address the issue. The clause states (emphasis added):

> Nothing in the rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to the *construction of transmission facilities*, including but not limited to authority over siting or permitting of transmission facilities.

Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., 136 FERC 61051, 256 (2011) (Order 1000).

In short, this savings clause only bars regulations regarding the construction or building of transmission facilities. The Commission has broad authority to regulate "just and reasonable" wholesale electricity rates in interstate commerce as evidenced by statute. 16 U.S.C.§ 824. While opposing counsel may argue that this savings clause restricts our analysis, that is simply not so. The construction of a transmission facility is wholly distinct from the sale and transmission of wholesale electricity. Besides, Congress has already established the Commission's broad power in the area. *Id.* To reject established federal power over the sale and transmission of wholesale

electricity would upset the "careful regulatory scheme [already] established by federal law." *Geier,* 529 U.S. at 1915. The savings clause in FERC Order 1000 does not change this analysis.

IV. Vandalia's Right of First Refusal violates the dormant Commerce Clause of the U.S. Constitution because it discriminates against out-of-state utilities.

"We review a district court's judgment regarding the constitutionally of a statute de novo." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007).

The Constitution extends to Congress the "Power to regulate Commerce . . . among the several States." Art. I, § 8, cl. 3 The Supreme Court has inferred that because Congress can regulate interstate commerce, the states cannot stifle the free flow of that commerce. *See* Erwin Chemerinsky, *Constitutional Law*, § 5.3 (6th ed. 2019). Essentially, the Dormant Commerce Clause bars states from adopting protectionist measures and aims to preserve a national market for goods and services. *Id*.

When determining whether a statute violates the dormant Commerce Clause, the threshold question is whether the state or local affects interstate commerce. *See* Erwin Chemerinsky, *Constitutional Law*, § 5.3 (6th ed. 2019). But, at its core, dormant Commerce Clause analysis is a balancing test. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). A local law violates the dormant Commerce Clause when the benefits of the law do *not* outweigh its burdens on interstate commerce. *Id*. And if the local law discriminates against out-of-state entities or persons, then there is a strong presumption that the benefits do not outweigh the burdens. *Id.* (a law can be discriminatory on its face, effects, and/or purpose). A discriminatory law shifts the burden to the defendant to show that it is the only reasonable alternative available to protect a local interest. *See generally Maine v. Taylor*, 477 U.S. 131 (1986). So, the key question after determining the dormant Commerce Clause applies, is whether the law is discriminatory.

The district court erred when it granted Vandalia PSC's motion to dismiss ACES's dormant Commerce Clause claim. First, the dormant Commerce Clause applies in the current case because transmission lines are instrumentalities of interstate commerce. Second, the Native Transmission Protection Act is discriminatory on its face, effects, and purpose. Third, Vandalia has not shown a substantial local interest that is only achieved by the Native Transmission Protection Act. And finally, the burdens on interstate commerce outweigh any potential benefits.

A. The dormant Commerce Clause applies.

Transmission lines such as Mountaineer Express are instruments of interstate commerce in that they facilitate interstate commerce. The Court in *Fed. Power Comm'n v. Fla. Power & Light Co.*, 404 U.S. 453, 462–63 (1972) held that transmission lines using the interstate grid are subject to federal regulation as part of interstate commerce. *See also United States v. Lopez*, 514 U.S. 549, 559 (1995) (holding that the dormant Commerce Clause applies to interstate instrumentalities). And when a local law affects instruments of interstate commerce, it triggers dormant Commerce Clause analysis. *Id. T*he Act affects interstate commerce because it limits customers from getting low rates and reliable service.

B. Vandalia's ROFR discriminates against out-of-staters on its face, effects, and purpose.

A law can be discriminatory on its face, purpose, or effect. *Hughes v. Oklahom*a, 441 U.S. 332, 336 (1979). And the local law is discriminatory, if the plaintiff can "identify an in-state commercial interest that is favored directly or indirectly, by the challenged statute[s] at the expense of out-of-state competitors." *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 95 (2d. Cir. 2009) (quoting *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005)). Moreover, the Court in *Oregon Waste Systems v. Department of Environ. Quality*, 511 U.S. 93, 98

(1994) held that discrimination means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.

If a local law is discriminatory; it is almost always in violation of the dormant Commerce Clause. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) ("Discrimination against interstate commerce in favor of local business or investment is per se invalid. . . ."). The law will be subject to strict scrutiny with a presumption the law is unconstitutional, shifting the burden from the challenger to the defender. The state can defeat the presumption if the state can show it has no other means to advance the local interest. *Id.* (except "in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.") (citing *Maine v. Taylor*, 477 U.S. 131, 91 L. Ed. 2d 110, 106 S. Ct. 2440 (1986)).

Here, the in-state commercial interest is that incumbent transmission companies get first dibs to build a transmission line in Vandalia. And incumbents get eighteen months to refuse a non-incumbent—cutting out any competition who is not instate incumbents. See e.g., *Minnesota v. Clover Leaf Creamery*, 449 U.S. 456 (1981) (laws can be discriminatory against in-staters).

In the current case, the Native Transmission Protection Act is discriminatory on its face, effects, and purpose. While Vandalia has identified an in-state commercial interest, it is not the only reasonable alternative to defeat the presumption of unconstitutionality.

C. On its face the Native Transmission Protection Act discriminates.

On its face, the Native Transmission Protection Act is discriminatory because it gives incumbent electric transmission owners exclusive control over electric transmission lines at the expense of non-incumbents.

In *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2456–59 (2019) plaintiffs under the dormant Commerce Clause challenged a Tennessee statute that imposed residency requirements on all businesses seeking a liquor license. One provision required 2-years of residency for initial retail applicants. *Id.* The Court held that the 2-year residency requirement "discriminates on its face against nonresidents" while blatantly favoring in-state residents and violates the dormant Commerce Clause because the public health benefits did not outweigh the burdens of discrimination. *Id.*

Similarly, in *C & A Carbone v. Town of Clarkstown*, 511 U.S. 383, 385–88 (1994) the Supreme Court ruled a local ordinance that required all solid waste to be processed at a designated transfer station before leaving the municipality, unconstitutional. The Court reasoned that the statute deprived competitors, including out-of-state firms of access to a local market. Thus, the law violated the dormant Commerce Clause. *Id*. at 391–92.

Vandalia's statute like *C & A Carbone* and *Tenn. Wine* gives incumbent transmission companies the right to construct a transmission line, at the expense of non-incumbent competitors such as ACES. Similar to *Tenn. Wine*'s 2- year residency requirement, the Native Transmission Protection Act has an extended eighteen-month residency requirement, blatantly favoring in state incumbents over non-incumbent competitors. The Act, like the statute in the *C & A Carbone* deprives competitors to the local market by not allowing competitors to enter the market. The Native Transmission Protection Act deprives competitors by giving incumbents the right to refuse their potential projects. Therefore, Vandalia's statute is facially discriminatory like the statutes in *Tenn. Wine* and *C & A Carbone*.

Furthermore, the Court in *Buck v. Kuykendall* ruled a Washington law that prohibited "for-hire" common carriers from using highways without having obtained certification from the

Director of Public Works unconstitutional for violating the dormant Commerce Clause, because the legislature enacted the law solely to prohibit competition. *Buck v. Kuykendall*, 267 U.S. 307, 312, 315–17. The law only determined who could use the highways, which prohibit use to some persons, while permitting it to others for the same purpose and same manner. *Id.* Like the Washington law in Buck, Vandalia's law determines who can build, own, or operate new transmission projects, allowing only in-state incumbents. Moreover, like the statute in Buck, the Native Transmission Protection Act has little to no public benefits. Therefore, the Vandalia statute is facially discriminatory even though it is not regulating typical "articles of commerce."

1. Vandalia's argument that the Act does not discriminate against out-of-state entities is flawed.

Vandalia argued there is no discrimination against out-of-state entities, because ACES incorporated in West Virginia and LastEnergy and MAPCo are incorporated in Ohio. However, the Eleventh Circuit in *Fla. Transp. Servs. v. Miami-Dade Cty.*, decided a local law violated the dormant Commerce clause because it burdened interstate commerce, even though some of the incumbents incorporated in other states. *Fla. Transp. Servs. v. Miami-Dade*, 703 F.3d 1230, 1258 (11th Cir. 2012). The Court in *Fla Transp. Servs. v. Miami-Dade Cty.*, said, if "place of incorporation alone" were controlling, "then a state's dormant Commerce Clause liability would turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place." *Id*. at 1259–1260. Thus, the argument "place of incorporation controls" is incorrect and does not apply in this case. *See also NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 323–25 (5th Cir. 2022); *Granholm v. Heald*, 544 U.S. 460, 475 (2005).

The Native Transmission Protection Act is facially discriminatory, because it discriminates against interstate commerce when it gives in-state incumbents priority over out-of-state and non-

incumbent competition. And the Act is unconcerned with safety or public welfare; only regulating who can build, own, or operate new transmission lines. As other circuit courts hold: a statute can violate the dormant Commerce Clause even if it does not discriminate against out-of-state entities.

D. Even if the Native Transmission Protection Act is facially neutral, the effects and purpose of the Act discriminate against interstate commerce.

A local law violates the dormant Commerce Clause if it unduly burdens interstate commerce. A*merada Hess Corp v. Director*, 490 U.S. 66, 75 (1989). Besides increased costs on interstate commerce, courts must evaluate the "practical effect of the statute" by considering "what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst*. 491 U.S. 324, 336 (1989).

The Eleventh Circuit in *Fla. Transp. Servs. v. Miami-Dade Cty*. held that the Director of Miami Port violated the dormant Commerce Clause when the Director automatically denied dock working permits to all companies that did not hold permits in the previous year, while granting permits to all companies that held permits in the previous year. *Fla. Transp. Servs.,* at 1258–1260. The court found that the Port Director's practice burdened interstate commerce. *Id.* Because non-incumbents could provide better service, equipment, or lower prices than the incumbents. *Id.* Additionally, if other ports had the same practice, it could result in ports manned by incompetent and unsafe dock workers (slippery slope). *Id.* Therefore, the Port Director burdened interstate commerce by denying non-incumbents permits without cause. *Id.*

The Native Transmission Practices Act's effects on interstate commerce are not incidental. The Act is clear: it discriminates against non-incumbents of Vandalia. ACES owns no existing transmission facilities within Vandalia therefore, it does not qualify as an "incumbent electric transmission owner." Like the Port Director in *Fla. Transp. Servs*., Vandalia is denying companies who are not incumbents, even if these non-incumbents can provide better service and lower prices

than the incumbents. Importantly, if every State enacted legislation such as Vandalia it would cause no competition in the transmission market and take away the reliability and price benefits from FERC Order 1000. Therefore, the effects discriminate against interstate commerce.

Statutes enacted for economic protectionism are deemed discriminatory. *See C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994). Here, the Senator who introduced the bill described it as a direct response to Order 1000. Essentially, by passing the goals of FERC 1000 showing that the purpose of this Act is protectionist.

Also, representatives from LastEnergy and MAPCo testified in support of the Act. *See Planned Parenthood of Cent. N.C. v. Cansler*, 877 F. Supp. 2d 310, 322–23 (M.D.N.C. 2012) (holding that statements by bill supporters shows legislative intent if both have a common purpose). Last Energy testified that the Native Transmission Protection Act was necessary to keep transmission lines in the hands of more responsive in-state companies and to restore the "status quo." While MAPCo urged the Vandalia Senate Committee not "to encourage third-party transmission owners to buy and build transmission service in Vandalia." The Senator's purpose to overturn FERC 1000, and MAPCo and LastEnergy's statements taken together show that the Act has a protectionist purpose.

E. The burdens on interstate commerce outweigh any potential benefits.

First, procedurally, the district court's decision to grant the motion to dismiss was premature. *See NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 327–28 (5th Cir. 2022) ("claims that turn on intent and effects typically require factual development.") (citing *Healy*, 512 U.S. at 201); *Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 545 (4th Cir. 2013) (reversing the Rule 12 dismissal of dormant Commerce Clause claims because of "fact-intensive substantive injury."). This is precisely the case here.

Regardless of the procedural errors, the district court erred in dismissing the claim because the Native Transmission Protection Act fails the *Pike* test. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970) (to be constitutional, the burdens the local law imposes on out-of-state commerce cannot be excessive in comparison to the local benefits); *Lewis v. Bt. Inv. Managers*, 447 U.S. 27, 36 (1980) ("[W]here simple economic protection is effected by state legislation, a virtually per se rule of invalidity has been erected."). The Act fails the Pike test for three reasons:

First, the Act is discriminatory. Thus, there is a strong presumption that the Act is unconstitutional. Second, Vandalia has not met its burden. There are reasonable alternatives to ROFRs. *See Am. Bev. Ass'n v. Snyder*, 735 F.3d 362, 370 (6th Cir. 2013) ("a discriminatory law will survive only if it … cannot be adequately served by reasonable nondiscriminatory alternatives."). Vandalia PSC has the power to adopt other measures and programs that are short of burdening interstate commerce. Third, the statute places a significant burden on the regional transmission system. Consumers would benefit from Mountaineer Express because the design planned to give bulk electricity in a cost-effective and reliable electric system. The ROFR also harms other transmission companies, because it's depriving other companies from participating in the regional planning and expansion of the PJM bulk electricity system.

1. Eighteen months is a substantial amount of time.

Vandalia argued that eighteen months is not a total prohibition and not egregious. *Cf. NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306 (5th Cir. 2022); *see cf. LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020) (court upheld a ROFR statute similar to the current case but imposed a 90-day period). Eighteen months is egregious. Many companies such as ACES do not have the time to wait for an answer from the incumbent companies. Also, the eighteen months right of first refusal allows incumbent transmission owners

to investigate the proposed project non-incumbents propose and essentially free ride of their ideas. This is anti-competitive because companies will not propose transmission lines out of fear of getting ripped off. Adopting the lower court's view will make bad law and policy for four reasons. First, it will eviscerate dormant Commerce Clause precedent. Second, it will harm consumers. Third, it will harm the transmission system as a whole. And finally, most importantly, it will lead to an untenable environment if every state enacted legislation such as the one today.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully urges the Court to reverse the Northern District of Vandalia's order and deny both Defendants' Motion to Dismiss regarding ACE's challenge to the PSC's Capacity Factor Order under the Supremacy Clause and Defendants' Motion to Dismiss regarding ACE's challenge of the State's ROFR law under the dormant Commerce Clause and the Supremacy Clause.

Appendix A

updated 11/15/22

Pursuant to *Official Rule* III.C.9, Team 15 certifies that its brief contains 30 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. 15* , and the *Team Members* of *Team No*. 15 have not received any faculty or other assistance in the preparation of this brief.

Respectfully submitted,

Team No.

15

Appendix B

Pursuant to *Official Rule* IV, *Team Members* representing 15 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.

15

APPENDIX A.

An incumbent electric transmission owner has the right 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)

APPENDIX B.

Vand. Code § 24-12.3(f) defines an "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 . . . or any entity engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia

APPENDIX C.

16 U.S.C. § 824 states, in relevant part:

(a) **Federal regulation of transmission and sale of electric energy**

The business of *transmitting and selling electric energy* for ultimate distribution to the public is affected with a public interest, and that *Federal regulation* of matters relating to generation to the extent provided in this subchapter and subchapter III of this chapter and of that part of such business which consists of the *transmission of electric energy in interstate commerce and the sale of such energy at wholesale* in interstate commerce is necessary in the public interest.

(b) **Use or sale of electric energy in interstate commerce**

This subchapter shall apply to the transmission of electric energy in interstate commerce and to *the sale of electric energy* at wholesale in interstate commerce.

APPENDIX D.

16 U.S.C.§ 824e states (emphasis added):

Whenever the Commission…. shall find that any rule, regulation, practice, or contract affecting such rate, charge, or classification is *unjust, unreasonable*, *unduly discriminatory or preferential*, the Commission *shall determine the just and reasonable rate*, charge, classification, rule, regulation, practice, or contract to be