No. 22-0682

IN THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

v.

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

Appellee.

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

BRIEF FOR APPELLEE

TEAM 31

Counsel for Appellee

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JURISDICTIONAL STATEMENT

Appalachian Clean Energy Solutions, Inc. ("ACES") brought original action against the Vandalia Public Service Commission ("Vandalia PSC") asserting that the Vandalia PSC's Capacity Factor Order and the Right of First Refusal law is preempted by the Federal Power Act ("FPA"). The District Court had subject matter jurisdiction over this action pursuant to 28 U.S.C § 1331. Federal district courts "have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *See Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 818 (1986).

The U.S. District Court for the Northern District of Vandalia granted the Vandalia PSC's motion to dismiss on all issues on August 15, 2022. R. at 16. ACES filed a timely appeal to the Court on August 29, 2022. R. at 16. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. Federal Courts of Appeals have "jurisdiction of appeals from all final decisions of the district courts of the United States." *See Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 408 (2015).

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 Right of First Refusal (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

The Vandalia PSC is a government agency composed of three commissioners who have been appointed by the Governor of Vandalia to regulate the rates and practices of utilities providing services within the borders of Vandalia. R. at 3. Title 24 of the Vandalia Code creates broad authority for these commissioners to set "just and reasonable rates" for these utilities. *Id.* Recently, the Legislature has put into place regulations for Vandalia PSC to promote the use of coal in the state. *Id.*

The first regulation put in place was the Capacity Factor Order. R. at 7. Vandalia PSC was concerned because its two primary energy producers, LastEnergy and MAPCo, projected that capacity factors for their coal-fired plants would not exceed 60 percent. *Id.* This projection was based on the availability of cheaper power coming from the wholesale market and other energy suppliers in the surrounding region. *Id.* This availability of cheaper power created a situation in which the already existing coal plants were "out of money" and not dispatched. *Id.* The Vandalia PSC needed a solution to this troubling trend. The Vandalia PSC stated, "We conclude that the public interest is better served by MAPCo reversing that trend, and focusing on maximizing generation from its own power plants." R. at 8. It then conducted a series of proceedings to investigate Coal Plant Capacity Factor Orders and Electricity Rates. *Id.* That comprehensive process resulted in the Capacity Factor Order which the Vandalia PSC concluded was in the best interest of the public. *Id.* The Order required LastEnergy and MAPCo to operate their plants at a minimum of 75 percent which would maximize generation in an economical fashion. *Id.* The Order does, however, allow for actual costs to be recovered by the utilities if the cost to produce this level of energy becomes too much for the utility. *Id.* Although the Vandalia Citizen Action Group claimed that the plants could operate at a marginally lower rate, the Vandalia PSC reiterated its findings during its series of comprehensive proceedings. R. at 9. The proceedings revealed that 75 percent was the optimal goal for the Order. *Id.*

The second regulation the Vandalia PSC put in place was the right-of-first-refusal ("ROFR") regarding transmission lines. *Id.* Before 2011, utilities in Vandalia were allowed to exercise ROFRs on pieces of land that they intended to use for the construction of transmission lines. *Id.* This worked for the people of Vandalia, but FERC eliminated the ability for states to allow ROFRs in FERC Order 1000. *Id.* To return to the status quo, the Vandalia PSC passed the "Native Transmission Protection Act." *Id.* This Act allowed "incumbent electric transmission owners" to be the first to build transmission lines on a new tract of land. *Id.* A utility was an "incumbent electric transmission owner" if it "owns, operates, and maintains an electric transmission line in this state…" *Id.* For example, LastEnergy and MAPCo, both headquartered and incorporated in Ohio, would qualify as "incumbent electric transmission owners." R. at 4. The purpose of this Act was merely to return to normal and let previously established utilities continue to grow their responsive, responsible, and reliable services to the people of Vandalia. R. at 9. This Act was actually more fair for non-native utilities compared to the previous law because the ROFR would lapse after 18 months of the native utility not acting. *Id.*

ACES is an energy company with its headquarters in Vandalia. R. at 4. ACES is notoriously the largest independent electricity transmission company in the United States. R. at 5. Further, ACES does not currently provide electricity services to the people of Vandalia. R. at 11. Rather, ACES is a merchant power plant operator which means all its services go to the wholesale markets. *Id.* In April of 2020, ACES announced its plan to construct a plant in Pennsylvania. R. at 5. However, this plan changed when ACES realized it could obtain a tax credit through the

Inflation Reduction Act. *Id.* In 2022, ACES changed the design of this plant to qualify for the tax credit. *Id.*

On June 6, 2022, ACES sued Vandalia PSC over the Capacity Factor Order. R. at 14. ACES argued that the Order (1) was preempted by the FPA because it contravened state and federal regulators, (2) distorted the regional transmission organization's auction price signals, and (3) was preempted by the FPA because it compels coal-burning utilities to sell their energy into the regional transmission organization. *Id.* The Vandalia PSC moved to dismiss for failure to state a claim on June 27, 2022 for two reasons: (1) ACES lacked standing and (2) even if ACES did have standing, the Capacity Factor Order is not preempted. R. at 15. The district court granted the Vandalia PSC's motion to dismiss. *Id.* The court held that ACES lacked standing to bring its Supremacy Clause claim and even if ACES had standing, the Capacity Factor Order does not violate the Supremacy Clause. *Id.*

ACES also challenged the ROFR making two arguments: (1) the ROFR is preempted by the FPA and infringes on FERC's authority under Order 1000 and (2) the ROFR violates the dormant Commerce Clause by discriminating against out-of-state companies. *Id.* Vandalia PSC responded that (1) there is no preemption because FERC has not objected to similar laws passed by other states and (2) there is no discrimination against out-of-state litigants as ACES, LastEnergy, and MAPCo are all out-of-state companies. *Id.* The district Court ruled for Vandalia PSC on both issues. *Id.*

SUMMARY OF THE ARGUMENT

This Court should uphold the district court's decision in granting the Motion to Dismiss on all issues.

First, ACES lacks Article III standing to challenge Vandalia PSC's Capacity Factor Order because it is not subject to the Order nor is it a ratepayer. ACES contends that it is injured by Vandalia PSC's Capacity Factor Order because its incidental effect on wholesale market rates could prevent ACES from building and operating its Rogersville Energy Facility at the cost they desire. This injury, however, remains hypothetical given that there are factual findings that the energy generators subject to the Capacity Factor Order, MAPCo and LastEnergy, could still operate at a 75 percent capacity without the assistance of the price recovery provision in the Order. Consequently, given that ACES's injury is hypothetical, it is also unlikely that its injury is redressable.

Second, even assuming ACES has standing, the Capacity Factor Order does not violate the Supremacy Clause. The CFO is constitutional because the State of Vandalia is operating within the power granted to the states to regulate intrastate activities, and any impact on the interstate wholesale rate is incidental. Vandalia PSC did not intend to undermine the authority of FERC, but instead it intended to regulate energy generation facilities within Vandalia. Additionally, the price recovery provision within the Capacity Factor Order is permissible under *Hughes v. Talen Energy Mktg., LLC*, because it did not condition any participation into the capacity auction market. 578 U.S. 150 (2016). The price recovery provision is only intended to minimize economic loss to energy providers. Thus, the Capacity Factor Order does not run afoul of constitutional limitations.

Third, Vandalia's statutory Right of First Refusal law is not preempted by FERC Order 1000 because Order 1000 only abolished ROFR provisions in federal tariff agreements only.

Further, Order 1000 explicitly states that, by removing a federal right of first refusal, Order 1000 does not preempt or effect the authority of a state to regulate construction of power facilities. Thus, Vandalia's ROFR law does not violate the Supremacy Clause.

Fourth, Vandalia's ROFR law does not run afoul of the dormant Commerce Clause. In order to do so, the ROFR must facially discriminate between in-state and out-of-state entities. Here, however, the ROFR makes a distinction based off first arrival, not on whether a company is incorporated in-state versus out-of-state. Additionally, the ROFR does not contravene the *Pike* balancing test which dictates that the burdens imposed by the ROFR cannot substantially outweigh the local benefits. Here, there are environmental, economic, and national benefits that derive from Vandalia's ROFR law which is not substantially outweighed by ACES's burden on having to wait a little longer to build its new facility and transmission lines.

ARGUMENT

Standard of Review. The standard of review in evaluating the grant of a motion to dismiss is de novo. *Selevan v. New York Thruway Authority*, 584 F.3d 82, 88 (2d Cir. 2009). Under a de novo review, the court assumes "all well-pleaded factual allegations to be true, and determine[s] whether they plausibly give rise to an entitlement to relief." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009)). In reviewing the matter anew, the court should construe the facts in the light most favorable to the plaintiff. *Harry v. Marchant*, 237 F.3d 1315, 1317 (11th Cir. 2001).

I. THE DISTRICT COURT CORRECTLY DECIDED THAT ACES LACKED STANDING TO BRING ITS SUPREMACY CLAUSE CLAIM.

Article III of the Constitution confines the federal courts to adjudicating actual "cases" and "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). Consequently, this Article III doctrine requires a litigant to have "standing" in order for the court to decide the merits of the dispute or of particular issues. *Id.* at 750-51 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

Article III standing is comprised of three elements. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). First, the plaintiff must have suffered an "injury in fact," also seen as an invasion of a legally protected interest that is (a) concrete and particularized, and (b), "actual or imminent," not "conjectural or hypothetical." *Id.* Second, the injury must be "fairly traceable to the challenged action of the defendant, and not the result of independent action of some third party not before the court." *Id.* Third, there must be a likelihood that the injury will be redressed by a favorable decision, rather than merely "speculative." *Id.* The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). In this case, injury-in-fact and likelihood of redressability required for Article III standing are absent in ACES's claim to challenge the Capacity Factor Order.

A. ACES lacks cognizable injury.

An injury-in-fact must be an invasion of a legally protected interest which is concrete and particularized. 504 U.S. at 560. The injury suffered by plaintiff must also be actual or imminent and not conjectural or hypothetical. *Id.* In this case, ACES's alleged injury is hypothetical and thus cannot meet this element of standing.

State-created subsidies or incentive programs that support a specific type of energy production do not automatically result in a cognizable injury for other electricity generating companies that are left out of the program. In *Coalition for Competitive Elec. v. Zibelman*, the plaintiffs were challenging the New York's Zero Emissions Credit (ZEC) program, which subsidized qualifying in-state nuclear power plants whose energy production had zero-emission attributes through state-created and state-issued credits. 906 F.3d 41, 45 (2d Cir. 2018). Plaintiffs claimed that the Zero Emissions Credit program was preempted by federal law given its impermissible tether to wholesale market rates, thus affecting its ability to participate in the market without unfair interference. *Id.* The Court held that the ZEC program was not tethered to the wholesale market and thus not directly affecting plaintiffs market participation. *Id.* at 46. The Court reasoned that "even though the ZEC program exerts downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the FPA." *Id.* at 53.

The Capacity Factor Order operates as a price collar for several coal power plants in the state of Vandalia owned and operated by LastEnergy and MAPCo. The subsidy program resulting from the Capacity Factor Order does not create a justiciable Supremacy Clause claim for non-coal power plants within or outside of the state of Vandalia. Here, as in *Zibelman*, Vandalia is implementing a subsidy program through its Capacity Factor Order to encourage higher generation of energy from coal. The Vandalia PSC's Capacity Factor Order is not tethered to the wholesale market because its cost recovery provision is not intended to set wholesale rates, but instead, it is intended for the continued generation of electricity within the state. Because the *Zibelman* Court held that subsidy programs are not presumptively preempted by federal law and thus rejecting alleged injuries by outside energy generators, the Court should find that ACES cannot allege an injury-in-fact from the Capacity Factor Order because it incidentally affects their market participation.

In *Allco Fin., LTD. v. Klee*, Allco, a renewable energy company challenged legislation in Connecticut whose purpose was to diversify Connecticut's energy generation sources and to increase renewable energy generation in the state and adjacent states. 861 F.3d 82, 89 (2d Cir. 2017). Connecticut would implement its energy legislation by soliciting proposals for renewable energy, selecting winners of the solicitation, and directing Connecticut's utilities to enter into "bilateral contracts, called 'power purchase agreements,' with the chosen winners. *Id.* at 89. The Commission in charge of overseeing the bidding process did not select the energy company's projects. *Id*. Allco is a developer of various solar projects throughout the country who had submitted five solar projects to the State of Connecticut. *Id.* The energy company specifically alleged that the 2015 bidding program was violating federal law by excluding Allco's smaller facilities from the bidding process and imposing unlawful fees on bidders. *Id.* at 90. The Second Circuit Court held that the injury alleged by the energy company was sufficiently "concrete" and "particularized" and thus was an injury-in-fact. The Court reasoned that the bidding fees were a cognizable injury thus allowing for the energy company to gain Article III standing. *Id.* at 95.

Energy generators can establish a cognizable injury through imposed fees; however, this does not guarantee a favorable decision on the merits. Here, unlike in *Allco*, the Capacity Factor Order did not serve as a Request for Proposals program that any and all existing energy generators could partake in. Vandalia's CFO instead serves as a mechanism to encourage Vandalia's existing coal power plants within the state to operate at maximum reasonable output. ACES did not allege to having any operating coal power plants in Vandalia nor is it a public utility as defined in *Vand. Code §24-8-1(h)*. Further, unlike in *Allco*, ACES does not claim to be incurring unlawful fees for applying to be a public utility in the state. Because the Court in *Allco* held that bidding fees violating federal law constituted a concrete and particularized injury, the Court here should reject

ACES's claim that it is being injured as there are no unlawful fees being imposed on ACES through the Capacity Factor Order. ACES is not subject to the Capacity Factor Order and thus cannot be injured by its enactment.

B. <u>ACES has failed to demonstrate that its claimed injury is redressable.</u>

The third element of standing requires that the injury is likely to be redressed by a favorable decision as opposed to merely "speculative." 504 U.S. 555, 561 (1992). ACES alleged injury is not likely to be redressed because regardless of the Capacity Factor Order, it is economically possible for MapCo and LastEnergy to increase their operation capacity to 75 percent and thus still negatively impact the economics of ACES's project.

The elimination of a state's legislation will not automatically redress a plaintiff's injury when other circumstances exist that would still cause the same injury. In *Village of Old Mill Creek v. Star*, the Electric Power Supply Association and other various independent power producers that operate generators nationwide and provide wholesale electricity to utilities were Plaintiffs in the proceedings. No. 17 CV 1163, 2017 U.S. Dist. LEXIS 109368, at *11 (N.D. Ill. July 14, 2017). Illinois announced new legislation titled the Future Energy Jobs Act which included a zero-emission credit ("ZEC") program. *Id.* As a result of the new legislation, two existing nuclear power plants within the state confirmed that they would operate for another ten years. *Id.* Utilities must purchase all the ZEC's conferred on the selected zero-emission facilities in each delivery year. *Id.* at 12. The price for each ZEC is the Social Carbon Cost, but it may be reduced according to a "Price Adjustment." *Id.* The purpose of the price adjustment was "to ensure that the procurement remains affordable to retail customers in Illinois if electricity prices increase." *Id.*. The energy generator Plaintiffs argued that this price adjustment was preempted by Federal law because the state tethered its subsidies to auction prices and the price adjustment would insulate ZEC recipients from changes in wholesale market prices. *Id.* at 16. The Court held that the energy generator Plaintiffs did not have standing to challenge the ZEC program's price adjustment. *Id.* The Court reasoned that there would be no redressability by eliminating the price adjustment feature because a fixed ZEC price that is equal to the Social Cost of Carbon would still exist. *Id*. In actuality, this fixed ZEC price would create a larger subsidy for ZEC recipients, in turn harming the Plaintiffs even more. *Id.*

The elimination of the Capacity Factor Order will not redress ACES's alleged injury given that the CFO's price recovery provision is not tethered to the wholesale market. Here, as in *Star*, the purpose of the price recovery provision is "to ensure that no more coal-fired plants close, no additional jobs are lost, and long-term state prosperity is maintained." R. at 6. Further, as in *Star*, the CFO's price recovery provision is not tied or tethered to auction prices nor would it insulate MAPCo and LastEnergy from changes in wholesale market prices. The price recovery provision is not intended to set wholesale rates nor will it be activated instantly. The price recovery provision only acts "a fail-safe to ensure that the companies subject to the order would not run the risk of an under-recovery in the event the circumstances change." R. at 9. MAPCo and LastEnergy will still be subject to wholesale market changes even with the price recovery provision because it is not in MAPCo's and LastEnergy's interest to set the market clearing price high knowing that they must also keep electricity for the citizens of Vandalia at a reasonable and just cost. MAPCo and LastEnergy each have an interest to clear the most efficient market price on its own so it can ensure that electricity prices remain affordable for its retail customers. Because the Court in *Star* held that eliminating the price-adjustment provision of the ZEC credits will not redress the injuries alleged by the affected energy generators, the Court here should hold that the elimination of the price recovery provision will also not redress ACES's injury under its Supremacy Clause claim.

ACES lacks Article III standing because its injury is solely hypothetical since it has not begun to build or operate any plants in Vandalia, thus whether or not it has been injured economically is yet to materialize. ACES's hypothetical injury is unlikely to be redressed by a favorable decision on the merits given that it is economically possible for MAPCo and LastEnergy to maintain a healthy operation without Vandalia's Capacity Factor Order. Even if ACES is found to have Article III standing, the Capacity Factor Order is not tethered to the wholesale market thus it is within Vandalia's state powers to enact and implement the Order.

II. THE DISTRICT COURT CORRECTLY DECIDED THAT EVEN IF ACES HAD STANDING, THE CAPACITY FACTOR ORDER DOES NOT VIOLATE THE SUPREMACY CLAUSE BECAUSE IT IS NOT PREEMPTED UNDER THE DOCTRINE OF IMPLIED PREEMPTION.

The Federal Power Act (FPA), passed by Congress in 1920, is regarded as "the primary federal statute governing the wholesale transmission and sale of electric power, as well as the regulation of hydroelectric power."[1] The FPA created the Federal Power Commission, which later became the Federal Energy and Regulatory Commission (FERC), and it granted the Federal Power Commission regulatory power over the "transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). However, the Federal Power Commission was not granted power to regulate power generation facilities, "or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." *Id.* These powers were relegated to the States. *Id.* States were also granted jurisdiction over "facilities used in local distribution or only for the transmission of electric energy in intrastate commerce." 16 U.S.C. § 824(b)(1). This division of power highlights the interplay

[1] Adam Vann, *The Legal Framework of the Federal Power Act*, Congressional Research Service (2020), https://crsreports.congress.gov/product/pdf/IF/IF11411

between State and Federal power under the Federal Power Act, and the limited nature of preemption within this framework.

The Federal Energy Regulatory Commission (FERC) is an agency that was established in 1977, and replaced the Federal Power Commission.[2] The FERC, which operates within the Department of Energy, regulates the country's power sources, including the "natural gas industry, hydroelectric projects, oil pipelines, and wholesale rates for electricity." *Id.* FERC, as a federal agency, derives its power from the executive branch and Congress. *Id.* FERC's five sitting members are chosen by the President, and confirmed by the Senate. *Id.*

The Supreme Court has established two types of preemption: Express and implied. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). Express preemption occurs when Congress, within its constitutional power explicitly preempts state authority. *Id.* Implied preemption presents itself in two forms: field preemption and conflict preemption. *Id.* Field preemption occurs when the "scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* at 204 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Implied preemption may also occur where state law conflicts with federal law. *Id*. at 204. Conflict preemption occurs where "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quoting *Arizona v. United States*, 567 U. S. 387, 401 (2012)).

[2] *What is FERC?*, PBS (Jan. 22, 2023, 6:56 AM), *https://www.pbs.org/wgbh/pages/frontline/shows/blackout/regulation/ferc.html*

Ultimately, "preemption only inhibits state action when it poses an obstacle to federal law, i.e. scenarios in which the laws cannot coexist."[3] Here, it has been argued that Vandalia's Capacity Factor Order is preempted by the FPA and the FERC because it conflicts with federal law, and encroaches upon the field of power granted to the FERC by the FPA. However, the Capacity Factor Order is constitutional because the State of Vandalia is operating within the power granted to the states to regulate intrastate activities, and any impact on the interstate wholesale rate is incidental. Further, this type of direct subsidy is constitutionally permissible under *Hughes v. Talen Energy Mktg., LLC* because Vandalia did not intend to undermine the authority of the FERC. 578 U.S. 150 (2016).

A. Vandalia's Capacity Factor Order is Constitutional Under the Doctrine of Field Preemption Because the FERC Does Not Have the Power to Fully Occupy the Field of Power Regulation, and Vandalia's Regulation Does Not Impermissibly Target the Interstate Wholesale Market.

The Capacity Factor Order is constitutional because the State of Vandalia is operating within the power granted to the states to regulate intrastate activities, and any impact on the interstate wholesale rate is incidental. This conclusion is supported by *FERC v. Electric Power Supply Ass'n* and *Oneok, Inc. v. Learjet, Inc.*, which highlight the intertwined nature of the wholesale and retail markets, and which establish that the test to determine whether a state or FERC is operating within its limits under the FPA is to consider the target of the regulation, and not an alleged incidental effect on the market outside of its jurisdiction. Under this test, the Capacity Factor Order is not preempted by the FPA because the target of the State's action was not to undermine the authority of the FERC.

[3] Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 775 (1994)

1. FERC Does Not Have the Power to Fully Occupy the Field of Power Regulation.

Field preemption occurs where the "scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n* 461 U.S. 190, 204 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). However, under the FPA, the FERC's power was specifically limited to leave room for state regulation. These limitations are accentuated by the intertwined nature of retail intrastate sales and interstate wholesales, which was addressed by the Court in *Electric Power Supply Ass'n*. In that case, the Court analyzed the constitutionality of a FERC regulation which governed demand response bids. Demand response bids provide monetary incentives to consumers who agree to decrease their consumption of power during peak times, such as heatwaves. 577 U.S. 260, 270-71 (2016). The Court addressed whether, by enacting this rule, the FERC unconstitutionally intruded on the power specifically delegated to the states by the FPA.

Under the Federal Power Act, the FERC is only authorized "to regulate 'the sale of electric energy at wholesale in interstate commerce,' including both wholesale electricity rates and any rule or practice 'affecting' such rates." *Id.* at 264 (citing 16 U.S.C. §§ 824(b), 824e(a)). However, "the law places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale' — most notably, any retail sale — of electricity." *Id.* This includes the regulation of intrastate wholesale sales of energy. *Id.* at 279-80. The Court held that the regulation of demand response bids by the FERC was constitutional, and it did not exceed the FERC's delegated power for three reasons: (1) the practices that are regulated by the rule "directly affect wholesale rates," (2) the FERC had not "regulated retail sales," and (3) a contrary view would undermine the purpose of the FPA. *Id.* at 276-77.

First, the FERC's regulation in *Electric Power Supply Ass'n* was constitutional because the conduct that is regulated by the rule "directly affect[s] wholesale rates." *Id.* In comparison, the FPA grants the FERC power over matters "in connection with," the interstate wholesale market. *Id.* Therefore, the Court's language limits the plain language of the FPA, which would otherwise indicate that the FERC has jurisdiction over any matter that is remotely connected to the interstate wholesale market. *Id.* at 278. The Court held that the regulation implemented by the FERC was constitutional because it directly affects the wholesale rate of energy by regulating wholesale demand. *Id.* at 278-79.

Second, the Court addressed whether the regulation impermissibly regulated retail sales of electricity, which would directly infringe on the rights delegated to the states. *Id.* at 279-80. This direct infringement is not permitted, regardless of "how direct, or dramatic, its impact on wholesale rates." *Id.* However, the Court focuses on the justifications for the policy, noting that a policy cannot be declared unconstitutional because of an unintended effect on the retail market because the wholesale and retail market are irredeemably intertwined. *Id.* at 280-82. Under the Court's view, the policy enacted by the FERC is constitutional because it only addresses regulation of the wholesale market, regardless of the demand response that occurs on the retail market, and the justifications for this policy support this conclusion. *Id.* at 282-83.

Third, under the view of the Court, a contrary finding would create a regulatory gap in which neither the states nor the FERC could regulate the demand for power. *Id.* at 288-90. This outcome would undermine the purposes of the FPA: to ensure the successful transmission of electric power and to shield consumers from excessive prices. *Id.*

The opinion in *Electric Power Supply Ass'n* created a three-part test to determine whether the FERC had exceeded its jurisdictional limits under the FPA. This test has been articulated and implemented by courts as: "First, . . . whether the challenged practice at issue in the Orders — prohibition of State-imposed participation bans — 'directly affect[s] wholesale rates.' Second, . . . whether the Commission has regulated state-regulated facilities, and, lastly, we ensure that our determinations do not 'conflict with the Act's core purposes.'" *Nat'l Ass'n of Regulatory Util. Comm'Rs v. FERC*, 964 F.3d 1177, 1186 (2020) (quoting *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 276 (2016)). The "core purposes" of the FPA are to "[curb] prices and [enhance] reliability in the wholesale electricity market." *Id.* This three-part test highlights the limitations of the FERC's power in this field, and indicates that the FPA reserved space in this field for space supplementation. The primary limitation is that the state supplementation must not target the interstate wholesale market.

2. Vandalia's Regulation Does Not Impermissibly Target the Interstate Wholesale Market.

In *Oneok, Inc. v. Learjet, Inc.*, the Supreme Court addressed the constitutionality of a state statute, and the confines of field preemption under the Natural Gas Act (NGA). 575 U.S. 373, 376 (2015). The NGA, which governs "wholesale sales and transportation of natural gas in interstate commerce," was passed in 1938, and it was largely modeled after the FPA.[4] Due to the parallel nature of the FPA and the NGA, the Supreme Court "has routinely relied on NGA cases in determining the scope of the FPA, and vice versa." *Hughes*, 578 U.S. at 164 n.10. Therefore, the opinion in *Oneok* is applicable to this case.

Oneok addressed the constitutionality of an antitrust statute, and whether it was preempted by the NGA. 575 U.S. at 376. The NGA divides power over the regulation of natural gas between the state and FERC by delegating to FERC jurisdiction over the wholesale, interstate market for

[4] Joshua C. Macey & Matthew R. Christiansen, *Long Live The Federal Power Act's Bright Line*, 134 HARV. L. REV. 1360, 1386 (2021).

gas, while states regulate intrastate retail sales. *Id.* at 383-84. The Court addressed the intersectionality of the retail and wholesale markets, and the intent of Congress to draw a line between state and federal authority which granted power to FERC, but was also "drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Id.* at 385 (quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U. S. 507, 517-18 (1947)). Further, the Court was hesitant to find that a state regulation failed under the doctrine of field preemption, stating "we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents." *Id.* The Court acknowledged that the precedent case law "emphasize[d] the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted." *Id.*

The Court endorsed the view that the target at which the law aims determines its constitutionality. *Id.* Under this view, "measures aimed directly at interstate purchasers and wholesales for resale," are constitutionally valid when passed by the FERC, regardless of any impact on state retail rates. *Id.* at 385. Further, measures passed by the states are constitutional when the target of the measure is within the jurisdiction of the state. *Id.*

Vandalia's regulation is constitutional under *Oneok.* because, although the Capacity Factor Order may impact the interstate wholesale market, the target of this policy is intrastate supply and retail rates. The Court addressed the intersectionality of the retail and wholesale markets, and the intent of Congress to draw a line between state and federal authority which granted power to FERC, but was also "drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Id.* at 385 (quoting *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U. S. 507, 517-18 (1947)). This line considers the target of the policy to determine its constitutionality. The Vandalia PSC is responsible for "regulating the practices, services, and rates of public utilities," including electric power supply sources. R. at 6. The goal of these regulations is to "provide the availability of adequate, economical and reliable utility services." R. at 6. The goal of the regulation is to preserve the economy and access to power within the state of Vandalia– not to undermine the FERC's power by targeting the interstate wholesale market. Because the target of Vandalia's regulation is within the state's jurisdiction, the policy is not preempted by the FPA under the doctrine of field preemption.

The intent of the FERC was also used to determine the permissibility of the regulation in *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 276 (2016). The second prong of the *Electric Power Supply Ass'n* test highlighted the importance of the intent of the legislation while considering the confines of field preemption and the powers delegated to the states and the FERC under the FPA. *Id* at 277.

Vandalia's policy is comparable to the FERC's policy in *Electric Power Supply Ass'n*, because, although Vandalia's policy may impact supply and demand, it specifically targets intrastate retail rates and supply, not interstate wholesale rates. In *Electric Power Supply Ass'n*, the FERC's policy provided monetary incentives to consumers who were willing to decrease their energy uses during specific times. *Id.* at 299. The goal of the policy was to decrease the demand for power to lessen the burden on the interstate wholesale market. *Id.* The Court held that a policy passed by the FERC which targets interstate wholesale rates cannot be declared unconstitutional due to an unintended effect on the retail rate within the state because state retail rates and interstate wholesale prices are irredeemably intertwined. *Id.* at 291. Vandalia's program is similar to this policy because, although it may unintentionally affect the interstate wholesale rate, it is targeted to intrastate retail rates, and it is not preempted due to an unintended consequence within the interstate market.

Furthermore, the constitutionally permitted policy of the FERC was the regulation of supply and demand, and the primary impact of Vandalia's regulation on the interstate wholesale market would potentially be an increase in supply. The FERC's regulation was permitted because it was aimed at the regulation of interstate wholesale electricity, and any effect upon intrastate retail rates was incidental to this policy, and therefore, were constitutional. Vandalia's regulation should be permitted because the goal is to increase the intrastate supply of electricity within the retail market. Any incidental impact of this increase in supply is merely incidental to this purpose.

B. Vandalia's Regulation is Permissible under *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016) because Vandalia's Statute does not Intentionally Conflict with the FERC's Regulation of Interstate Wholesale Rates.

Conflict preemption occurs where "compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015) (quoting *Arizona v. United States*, 567 U. S. 387, 401 (2012)).

In *Hughes*, the Court established that conflict preemption under the FPA hinges on the target and the intent of the legislation– not on any incidental impacts on the interstate wholesale market. In *Hughes,* a Maryland regulation which compelled power suppliers to enter into a twenty-year pricing contract where the rate was determined by an independent power generator was declared to be unconstitutional because it conflicted with the specific power allocated to the federal government by the FPA, and was therefore preempted under the doctrine of conflict preemption. 578 U.S. 150, 153 (2016). Within this division of power, "exclusive jurisdiction over wholesale sales of electricity in the interstate market," is explicitly vested in the FERC. *Id.* at 153 (citing 16

U.S.C.S. § 824(b)(1)). Through state-mandated contracts, Maryland's policy provided subsidies to a new generator of electricity, on the condition that the generator would sell capacity into the wholesale auction. *Id.* The Court found that this regulation "impermissibly intrudes upon the wholesale electricity market," which is exclusively governed by the FERC. *Id.* at 153-54.

Interstate wholesale transactions occur in two scenarios articulated by the Court in *Hughes*: (1) bilateral contracting, (2) "RTOs and ISOs administer a number of competitive wholesale auctions." *Id.* at 155. Bilateral contracting occurs when load serving entities (LSEs) form contracts "with generators to purchase a certain amount of electricity at a certain rate over a certain period of time." *Id.* Load serving entities purchase power from generators, and deliver this power to retail customers. *Id.* The type of wholesale auction at issue in this case was a "capacity auction," which is designed "to ensure the availability of an adequate supply of power at some point far in the future." *Id.* The Fourth Circuit, affirmed by the Court, held that Maryland's statute, by providing subsidies which interfered with the capacity auction, functionally sets the rates for new generators, and essentially provides a "20-year price guarantee." *Id.* at 162. By intentionally interfering with the wholesale price of power, Maryland exceeded its jurisdiction; however, states "may regulate within the domain Congress assigned to them even when their laws incidentally affect areas within FERC's domain." *Id.* at 164 (citing *Oneok, Inc. v. Learjet, Inc*., 575 U. S. 373, 385 (2015)).

The holding in *Hughes* is expressly limited to the facts of the case, and Maryland's program would have been constitutional, but for the condition "payment of funds on capacity clearing the auction." *Id.* at 166. The Court emphasized this narrow holding by stating, "[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures untethered to a generator's wholesale market participation." *Id.* These measures may include "tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *Id.* However, the Fourth Circuit and the Supreme Court ultimately "held that Maryland's program impermissibly conflicts with FERC policies," because it intentionally undermines the power of the FERC. *Id.* at 162.

The policy that was struck down by the Court in *Hughes* is distinguishable from the policy adopted by the Vandalia PSC because the government subsidy in Vandalia exists to minimize economic loss to energy providers, with no intent to disrupt the interstate wholesale market, while the Maryland program was implemented and conditioned upon participation in the capacity auction. Maryland's program provided subsidies to a new generator of electricity, on the condition that the generator would sell capacity into a wholesale auction. The Court held that this program would have been constitutional if Maryland acted within its power, and implemented a policy that incidentally affected FERC's domain, but that Maryland acted outside its power by intentionally disrupting the capacity auction, thus conflicting with FERC's policies regarding the capacity factor auction and intentionally undermining the power of the FERC.

Distinguishably, the program implemented in Vandalia is a direct subsidy designed to limit economic harm to energy producers, and it does not intentionally conflict with FERC's policies. The goal of Vandalia's regulations is to "provide the availability of adequate, economical and reliable utility services." R. at 6. The goal of the regulation is to preserve the economy and access to power within the state of Vandalia– not to undermine the FERC's power by targeting the interstate wholesale market. This is the opposite of Maryland's intent in *Hughes*.

States are permitted to regulate the intrastate production of energy, provided that it does not infringe upon the power explicitly invested in the FERC. Here, Vandalia's policy does not infringe upon this power. Although the Capacity Factor Order may incidentally lower the wholesale price of energy by increasing the supply, this subsidy is not comparable to the intentional market interference that was struck down in *Hughes*. Furthermore, the Court explicitly acknowledged the power of state governments to establish direct subsidies, provided that these measures did not intentionally interfere with the regulation of the wholesale price of power. Therefore, the subsidy implemented by the Vandalia PSC is not preempted under *Hughes.*

III. THE DISTRICT COURT CORRECTLY DECIDED THAT THE ROFR WAS NOT PREEMPTED BECAUSE ORDER 1000 ABOLISHED ONLY FEDERAL ROFRS, AND IT EXPLICITLY DOES NOT INTERFERE WITH STATES'S ABILITY TO REGULATE CONSTRUCTION OF TRANSMISSION FACILITIES.

Vandalia's Right of First Refusal is not preempted by FERC Order 1000 because the Order explicitly left to the states power over the "construction of transmission facilities." Order No. 1000, at ¶287. The Supreme Court has established two types of preemption: Express and implied. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). Express preemption occurs when Congress, within its constitutional power, expressly and explicitly preempts state authority. *Id.* Implied preemption occurs when the "scheme of federal regulation . . . [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Id.* at 204 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Implied preemption may also occur where state law conflicts with federal law. *Id.* at 204.

Vandalia's Right of First Refusal is not preempted by FERC Order 1000. Order 1000 does not expressly preempt state authority– in fact, it expressly states that it does *not* preempt state authority in this instance. It is not usurped by implied preemption because of the division of power between state and federal authority in this realm, and because Order 1000 specifically left room for the States to supplement it. Further, Vandalia's Order does not conflict with federal law, as

Order 1000 removes *federal* rights of first refusal, and not state rights of first refusal with regard to the construction of transmission facilities, the regulation of which Order 1000 explicitly left to the states.

Order 1000 was passed by the FERC in 2011, and it amended the cost allocation and planning requirements of Order 890 "to ensure that Commission-jurisdictional services are provided at just and reasonable rates and on a basis that is just and reasonable and not unduly discriminatory or preferential."[5] This Order regulates public utility transmission providers and removes a federal right of first refusal. However, Order 1000 explicitly states that, by removing a federal right of first refusal, Order 1000 does not preempt or effect the authority of a state to regulate construction of power facilities.

The Order states that, "[n]othing in this Final Rule is intended to limit, preempt, or otherwise affect state or local laws or regulations with respect to *construction of transmission facilities*, including but not limited to authority over siting or permitting of transmission facilities." Order 1000 at ¶287 (emphasis added). Further, Order 1000 specifically refers to "federal rights of first refusal," because "its action in the Final Rule addresses only ROFRs that are created by provisions in Commission jurisdictional tariffs or agreements and does not require removal of references to such state or local laws or regulations from Commission-approved tariffs or agreements."[6]

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[5] *Transmission Planning and Cost Allocation by Transmission Owning and Operating Pub. Utils.*, Order No. 1000, 136 FERC 61051 at *1 (2011) (Order 1000)

[6] Rishi Garg, Esq., *What's Best for the States: A Federally Imposed Competitive Solicitation Model or a Preference for the Incumbent? State Adoption of Right of First Refusal Statutes in Response to FERC Order 1000 and the Dormant Commerce Clause*, National Regulatory Research Institute, n.32 (2013), https://pubs.naruc.org/pub/FA86B912-F8B8-74F6-AA34-4E7BCE42A234

Vandalia's right of first refusal policy specifically governs the construction of new facilities, as it "gives incumbent transmission owners in Vandalia an exclusive right to *build* new transmission facilities in the State." R. at 2. (emphasis added). The right of the state to establish a right of first refusal in construction is explicitly not preempted by Order 1000. Therefore, Vandalia's right of first refusal is not preempted.

IV. THE DISTRICT COURT CORRECTLY DECIDED THAT THE ROFR DOES NOT VIOLATE THE DORMANT COMMERCE CLAUSE.

The district court did not err in granting Vandalia PSC's motion to dismiss because Vandalia's ROFR did not violate the dormant Commerce Clause. Therefore, the Court should affirm the order granting Vandalia PSC's motion to suppress.

Article I, Section 8 of the United States Constitution, gives Congress the authority to regulate commerce among the states. The Supreme Court later inferred from the Commerce Clause a new doctrine called the "dormant Commerce Clause." *Dep't of Revenue v. Davis* 553 U.S. 328, 337 (2008). The dormant Commerce Clause mandates that a state may not facially discriminate against an out of state company nor may it implement a policy in which the burdens imposed on out of state companies are so unfairly burdensome that they exceed the local benefits of that law. *Granholm v. Heald*, 544 U.S. 460, 476 (2005).

The first step is to determine if the statute "regulates evenhandedly with only incidental effects on interstate commerce, or discriminates against interstate commerce either on its face or in a practical effect." *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). For this step, the burden to show discrimination must be met by the party challenging the statute. *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 353 (1977). Deference is usually given to the state lawmakers because they should have a better grasp on what is ideal for the "health, life, and safety of their citizens." *General Motors Corp v. Tracy*, 519 U.S. 278, 306 (1997).

If the statute does not facially discriminate against out of state individuals, then the Court asks if "the burden imposed on commerce is clearly excessive in relation to the putative local benefits." *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Deference should still be given to the powers of states to make their own laws. *Ark. Elec. Co-op Corp v. Ark PSC*, 461 U.S. 375, 377 (1983). Once again, lawmakers have a better grasp on what laws will impact its state than a judiciary would. *Tracy*, 519 U.S. 278, 306. Furthermore, Vandalia PSC's regulation of a utility within the public interest is fully within the police powers of the states; a power that states have exercised regularly for over a century. *Munn v. Illinois*, 94 U.S. 113, 126 (1876). The district court correctly dismissed the dormant Commerce Clause claim because the ROFR was not facially discriminatory nor did the burdens imposed exceedingly outweigh the local benefits.

A. <u>The ROFR did not facially discriminate against out of state companies.</u>

A law is not facially discriminatory if the two companies are not similarly situated. In *Tracy*, Ohio implemented a sales and use tax of five percent on natural gas purchases from all sellers regardless of whether they were incorporated in-state or out-of-state. *Id.* at 281-82. The only individuals excluded from the tax were regulated public utilities who fit the state's definition of a "natural gas company." *Id.* The Supreme Court held that this differential treatment between public utility companies did not violate the dormant Commerce Clause because the two types of companies were not similarly situated. *Id.* at 310.

A law is facially discriminatory if it treats in-state individuals differently than it treats out-of-state individuals. In *Wyoming v. Oklahoma*, 502 U.S. 437, 440 (1992), the Oklahoma legislature passed a statute requiring Oklahoma coal-fired electric generating plants producing power for sale in the state to use at least ten percent Oklahoma-mined coal. The purpose of this law was to keep ratepayer money in the state thus promoting economic development. *Id.* at 443. The Court held that this law violated the dormant Commerce Clause because it demanded a preference for in-state raw materials over out-of-state raw materials. *Id.* at 455.

Here, Vandalia's ROFR does not violate the dormant Commerce Clause because companies like ACES are not similarly situated to companies that had a preexisting presence in the state. Like in *Tracy,* Vandalia created a law that applied to companies, but the application of the law did not differ according to if the company was incorporated in-state or out-of-state. *Tracy*, 519 U.S. at 281-82. Rather, the application of the law differed according to a requirement imposed by the state. In *Tracy*, that requirement was to be a "natural gas company." *Id.* Likewise, here, the requirement was simply to build in that spot first. As a practical matter, the Court in *Tracy* notes numerous reasons as to why the judiciary should give deference to the state legislatures to make laws such as Vandalia's ROFR: (1) the judiciary must proceed carefully due to the possibility of upsetting the delivery of an essential product, (2) the judiciary lacks the expertise to predict the impacts of this policy, and (3) Congress has the resources and power to find a legislative solution if a problem exists. *Id.* at 304. Because ACES is not similarly situated to other companies, this Court, like the Court in *Tracy*, should find no facial discrimination. *Id.* at 310; *see also Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329, 339 (1951) (holding that, when the Michigan Public Service Commission required the pipeline to obtain a certificate of public convenience and necessity before building its pipeline, the dormant Commerce Clause was not violated); *Alaska v. Arctic Maid*, 366 U.S. 199, 205 (1961) (holding that, when the tax value on Salmon differed depending on the type of freezer used, the dormant Commerce Clause was not violated).

Here, Vandalia's ROFR does not violate the dormant Commerce Clause because the law's purpose nor impact furthers state protectionism. Unlike in *Wyoming*, Vandalia's ROFR does not mandate that purchasers use materials from its state. 502 U.S. 437, 440. Rather, the ROFR is applied neutrally. It is irrelevant whether a company is incorporated in Vandalia, Texas, or any other state. Since the law does not treat in-state companies differently than out-of-state companies, the Court should hold, unlike the Court in *Wyoming*, that the dormant Commerce Clause is not violated. *Id.* at 455; *see also West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 199 (1994) (holding that, when a company incorporated outside of the state is charged higher taxes than in-state companies, the dormant Commerce Clause is violated); *Or. Waste Sys., Inc. v. Dep't of Envt'l Quality*, 511 U.S. 93, 99 (1994) (holding that, when out-of-state companies are not charged higher fees, the dormant Commerce Clause is violated).

Because Vandalia's ROFR does not discriminate against in-state versus out-of-state companies, the law does not violate the dormant Commerce Clause.

B. <u>The burden imposed did not exceed the local benefits.</u>

The burden imposed by the ROFR did not substantially exceed the local benefits. the Court must apply the *Pike* balancing test. The most noticeable benefits include strong economic interests and fostering greater employment opportunities within the state. While economic interests alone may not be sufficient to establish that the burden does not exceed the local benefits, these interests certainly do weigh against the burden. Another benefit of the incumbency requirement is that it will ensure the transmission line builders and owners are responsible. These owners chose to be here long before anyone else; they did not merely decide to come to Vandalia now to build transmission lines simply because it became advantageous for them. Rewarding those who were first in time will ensure economic responsibility and environmental responsibility. The state already knows and regulates the emission levels of the incumbents. The state only knows what ACES is telling them about emissions; ACES may not be capable of following through on its claims. Lastly, Vandalia is a net positive energy state. It produces a large amount of energy to surrounding states. It is a great local and national risk to potentially disturb this production of energy by substantially altering the energy landscape of Vandalia.

The only burden that ACES is allegedly experiencing is not being able to build its project at the exact time that it desires. This is not a substantial burden. All ACES must do is wait 18 months. Other states, such as Minnesota and Texas, had ROFRs with no time limit. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018 (8th Cir. 2020); *NextEra Energy Capitol Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022). The waiting period is nothing more than a safeguard to ensure that ACES is serious about benefiting the people of Vandalia.

The economic, environmental, and national benefits of the ROFR are not exceedingly outweighed by the burden imposed on ACES. Therefore, the ROFR survives the *Pike* balancing test.

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that the Court uphold the orders entered by the District Court granting of Vandalia PSC's Motion to Dismiss (1) the Supremacy Clause claim relating to the Capacity Factor Order and (2) the Supremacy Clause claim and dormant Commerce Clause claim relating to the State's Right of First Refusal law.

CERTIFICATE OF SERVICE

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

Respectfully submitted,

Team No. 31