Eleventh Annual Energy and Sustainability Moot Court Competition
West Virginia University College of Law

March 2021

UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

C.A. No. 20-11120

ORDER

State of Vandalia,	)	
Appellant,	)	
-v.-	)	D.C. No. 20-09876
Commonwealth Energy,	)	
Appellee	)	

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

This case involves an appeal to the United States Court of Appeals for the Twelfth Circuit from a decision in Case No. 20-09876 of the U.S. District Court of Vandalia. In its District Court action, Commonwealth Energy ("CE") and its subsidiaries Commonwealth Power & Light Company ("CPL") and Commonwealth Energy Solutions ("CES") claimed that the Clean Air Clean Jobs Act ("CACJA") enacted by the Vandalia state legislature in 2020 violated the dormant Commerce Clause of the U.S. Constitution, the Takings Clause of the Fifth Amendment to the U.S. Constitution, the Federal Power Act, and the Supremacy Clause of the U.S. Constitution.

In a decision issued November 15, 2020, Judge Megan A. Watt of the U.S. District Court granted summary judgment in favor of CE on all issues. Vandalia filed its timely appeal to this Court on December 15, 2020.

It is hereby ordered that the CE and Vandalia brief the following issues:

1) Whether the District Court erred in its determination that Vandalia violated the dormant Commerce Clause of the U.S. Constitution with respect to Title III of CACJA, which precluded solar projects located outside of the state of Vandalia from being eligible for solar renewable energy credits ("SRECs") under Vandalia's renewable energy standard.
2) Whether the District Court erred in its determination that Vandalia violated the Takings Clause of the Fifth Amendment to the U.S. Constitution (as applied to the states through the Fourteenth Amendment) with respect to Title V of CACJA, which required the premature retirement of existing coal-fired generating plants in Vandalia and included a legislative finding that limited the rate recovery of the

remaining investment in such coal plants to no more than fifty percent (50%) of the unamortized investment as of the date of their retirement (unless demonstrated to be contrary to the public interest).

3) Whether the District Court erred in its determination that Vandalia violated the Federal Power Act and the Supremacy Clause of the U.S. Constitution with respect to Title IV of CACJA, which instituted a retail net metering program within the state of Vandalia.

4) Whether the District Court erred in its determination that Vandalia violated the Federal Power Act and the Supremacy Clause of the U.S. Constitution with respect to Title VI of CACJA, which instituted a prohibition on aggregating distributed energy resources ("DERs") located within Vandalia for purposes of participating in the regional wholesale power markets.

SO ORDERED

Entered this 30th day of December, 2020

[NOTE: No decisions or documents dated after December 30, 2020 may be cited either in briefs or in oral arguments.]

Factual Background

A. Profile of the Energy Industry in Vandalia

The state of Vandalia is located in north central Appalachia, within the mid-Atlantic region of the U.S. During 2019, the three electric utilities serving retail customers within Vandalia produced 82% of their electricity from coal-fired generation, 12% from natural gas-fired generation, 3% from small-scale hydro, 2% from wind, and the remainder from utility-scale solar (0.4%), biomass (0.4%) and oil-fired generation (0.2%). During the 10 years preceding 2019, retail electricity prices in Vandalia increased by 6.1% per year on average, which was four times the national average of 1.4% annually. In fact, electricity prices increased in Vandalia over this period at a faster rate than any other state in the country. A study performed for the Vandalia State Energy Office in 2018 concluded that the primary cause of electricity price increases was the state's continued heavy reliance on coal-fired generation, which ceased to be an economical means of generating electricity given the availability of low-cost natural gas from the nearby Marcellus Shale play and the increasing cost-competitiveness of renewable energy resources, both wind and solar.

At the same time, a report released by the Vandalia University Bureau of Economic Research ("BER") in 2018 showed that the state was missing out on the significant growth in "clean energy" jobs that other states in the region were experiencing. According to the BER report, from 2010 through 2017, jobs in energy efficiency, wind, and solar were the fastest growing segment of job growth across the U.S. During that same time frame, jobs in the coal industry, on which Vandalia has traditionally relied, were declining precipitously. Coal mining jobs in Vandalia declined from about 22,000 jobs in 2010 to fewer than 14,000 jobs in 2018, causing a corresponding drop in the severance tax revenue that formerly comprised about 20% of Vandalia's state budget. Compounding the challenge, according to the BER study, was the inability of Vandalia to attract "new economy" jobs, given the state's carbon-heavy profile and the increasing number of large employers with corporate sustainability goals requiring a large percentage of their electricity supply to come from renewable energy sources. On this point, the Director of the Vandalia Department of Commerce was quoted in a January 2019 article in the SPRINGFIELD GAZETTE-MAIL as saying that the "number one issue" for potential large employers seeking to locate or expand their operations in Vandalia was the access to renewable energy, to facilitate compliance with company-wide corporate sustainability objectives.

Not surprisingly, energy issues played a prominent role in the 2019 gubernatorial race in Vandalia.[1] Environmental activist Bea Greene ran on a platform calling for a "clean energy revolution" in Vandalia, and was joined in the effort by a slate of legislative candidates under the "Vandalia Can't Wait" slogan that supported Greene's clean energy agenda. Greene prevailed in the November 2019 general election, and the slate of candidates under the "Vandalia Can't Wait" banner won enough legislative seats to take control of both houses of the Vandalia state legislature. Immediately upon the commencement of the 2020 legislative session in Springfield, both houses turned to consideration of the clean energy initiatives proposed by Governor-elect Greene's office.

[1] As in the case of the nearby states of Virginia and Kentucky, Vandalia elects its state officials and legislators in "off-year" elections.

B. The Clean Air Clean Jobs Act

Following her inauguration in January 2020, Governor Bea Greene released a slate of measures to decarbonize the state's electricity supply and to create incentives for the creation of "clean energy" jobs in Vandalia; the legislation was titled the "Vandalia Clean Air Clean Jobs Act," or CACJA. The press release issued by the Governor's Office in support of CACJA provided the following quote attributable to Governor Greene:

> "It's time for Vandalia to embrace the new energy economy, create new jobs, and reduce the heat-trapping gases that are contributing to climate change and the increasing frequency of extreme weather events that we are experiencing in Vandalia. Coal plants are the leading source of greenhouse gas emissions, and it's long overdue that our utilities cease generating electricity with an outdated technology that is neither environmentally acceptable nor cost-competitive with clean energy sources. The Clean Air Clean Jobs Act will usher in a new era of zero-carbon renewable electricity generation that will produce thousands of new clean energy jobs, cleaner air for our citizens, and lower electricity rates for the utility ratepayers in Vandalia."

After hearings in committees of both the Senate and the House, CACJA was passed by both chambers in early March 2020, and was signed into law by Governor Greene on April 3, 2020. It became effective sixty (60) days later, on June 2, 2020.

On October 1, 2020, Governor Greene convened a Special Session of the Vandalia legislature for purposes of amending CACJA, following the issuance of Order No. 2222 by the Federal Energy Regulatory Commission ("FERC") on September 17, 2020. During the one-day Special Session, CACJA was amended to include Title VI.

CACJA, as amended, has five primary elements:

- Title II adopts greenhouse gas ("GHG") reduction goals for Vandalia, and obligates the Department of Environmental Protection by July 1, 2021 to develop a plan whereby GHG emissions from stationary sources located within Vandalia will be reduced by eighty-five percent (85%) from 1990 levels by 2050, with an intermediate target of at least a forty percent (40%) reduction by 2030.
- Title III adopts a renewable energy standard that requires retail electric utilities operating within Vandalia to purchase fifteen percent (15%) of their electricity supply from renewable energy sources by 2025, increasing by periodic targets to fifty percent (50%) by 2040. The renewable energy standard creates a separate requirement for generation from solar photovoltaic ("PV") resources; retail electric utilities operating within Vandalia must purchase two-tenths of one percent (0.2%) of their electricity supply from solar PV sources located within the state of Vandalia by December 31, 2024, increasing to one percent (1.0%) by December 31, 2040.
- Title IV adopts a retail net metering program that requires an electric utility operating within the state of Vandalia to purchase the output of customer-sited renewable energy resource facilities at a price equivalent to the retail rate charged by such utility, subject to the limitations set forth in CACJA.

- Title V addresses the retirement of existing coal plants operating within Vandalia, and requires existing coal plants to be retired by July 1, 2021. Section 2 of Title V includes a legislative finding that, unless demonstrated to be contrary to the public interest, the rate recovery of the remaining investment in such coal plants is limited to no more than fifty percent (50%) of the unamortized investment as of the date of their retirement.
- Title VI addresses whether distributed energy resources ("DERs") located within Vandalia may be aggregated for purposes of participation in the regional wholesale markets.[2]

Appendix A sets forth the relevant portions of CACJA, as enacted in March 2020. Appendix B sets forth the amendment to CACJA enacted by the Vandalia legislature during its Special Session on October 1, 2020.

C. Commonwealth Energy

Commonwealth Energy "(CE") is an electric utility holding company with several wholly owned subsidiaries, two of which are involved in this appeal: Commonwealth Power & Light Company ("CPL") and Commonwealth Energy Solutions ("CES").

CPL is a vertically integrated electric utility founded in 1935 for the provision of electricity to residential, commercial and industrial customers within the state of Vandalia. CPL is incorporated in Vandalia and lists Springfield, Vandalia as its principal place of business. Today, CPL provides electric utility service to about 750,000 retail customers, all located within the state of Vandalia. In 2019, CPL generated about 91% of its electricity from coal, 6% from natural gas and 3% from renewables (including hydroelectric). CPL's owned generation assets include three supercritical coal-fired generating plants:

- Raven Power Station ("Raven"), which is a 1200-megawatt ("MW") plant built in 1975 in western Vandalia, on the banks of the Cedar River. The net book value of Raven as of July 1, 2021 will be $451 million.[3]
- Hunter Generating Plant ("Hunter"), which is a 1150-MW plant built in 1978 in central Vandalia, about 25 miles outside of Springfield. The net book value of Hunter as of July 1, 2021 will be $513 million.
- Fort Duquesne Energy Center ("Ft. Duquesne"), which is a 1300-MW plant built in 1982 in eastern Vandalia, on the banks of the Nodaway River. The net book value of Ft. Duquesne as of July 1, 2021 will be $596 million.

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[2] DERs are defined by the Federal Energy Regulatory Commission ("FERC") as "[S]mall scale power generation or storage technologies (typically from 1 kW to 10,000 kW) that can provide an alternative to or an enhancement of the traditional electric power system. These can be located on an electric utility's distribution system, a subsystem of the utility's distribution system [i.e., a 'microgrid'] or behind a customer's meter. They may include electric storage, intermittent generation, distributed generation, demand response, energy efficiency, thermal storage or electric vehicles and their charging equipment." FERC Fact Sheet, *FERC Order No. 2222: A New Day for Distributed Energy Resources*, (September 17, 2020), available at https://www.ferc.gov/media/ferc-order-no-2222-fact-sheet.

[3] The "net book value" is the amount shown on CPL's books for ratemaking purposes, which represents the plant's original cost (plus additional capital investments made at the plant over time to comply with, among other things, emissions requirements), less accumulated depreciation.

Each of these coal plants operated throughout 2019, with capacity factors ranging from 68% to 77%.[4]

CES is a competitive, unregulated subsidiary of CE that develops both stand-alone utility-scale solar projects and distributed solar projects installed on the premises of residential and commercial customers; its distributed solar projects are typically financed either through leases or power purchase agreements with the residential or commercial property owner. In order to avoid affiliate transactions with CPL that may potentially run afoul of the regulators in Vandalia, CES operates entirely outside of the state of Vandalia, in the adjacent states of Franklin and West Vandalia. As of July 1, 2020, CES had installed 787 distributed solar arrays with generating capacity of 7.2 MWs in Franklin and West Vandalia. The solar arrays installed by CES were interconnected with the retail electric utilities operating within Franklin and West Vandalia, respectively, and the output from such solar arrays were integrated into the electrical systems of such utilities. CES has also completed three utility-scale solar projects with a total nameplate generating capacity of 67 MWs, also located in Franklin and West Vandalia. The output from these solar projects is sold into the regional wholesale power market, operated by the PJM Interconnection ("PJM"). Notably, while both Franklin and West Vandalia have enacted renewable portfolio standards encouraging the development of renewable energy, neither has a "carve-out," or separate incentive, for solar projects, and thus neither has any market for solar renewable energy credits ("SRECs").[5]

Legal Background

A. The Dormant Commerce Clause

Article I, Section 8 of the Constitution, known as the Commerce Clause, provides Congress with the power to "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." From this authorization of Congressional power, Courts have inferred a restriction on State power known as the "dormant Commerce Clause." This doctrine prohibits a State from discriminating against or unduly burdening interstate commerce. According to the Supreme Court, this prohibition on interfering with interstate commerce was rooted in the Framers' concern that economic Balkanization had the potential to doom the new union between the States. *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979).

Under dormant Commerce Clause precedent, courts will typically strike down a State law if it expressly mandates differential treatment of in-state and out-of-state competing economic interests in a way that benefits the former and burdens the latter. *Granholm v.*

[4] A plant's capacity factor measures the percentage of time that the plant is actually operating; because CPL's coal plants are dispatched by the regional grid operator only if they are economical, they do not run 100% of the time.

[5] The price for SRECs is typically higher than for renewable energy credits (RECs) associated with state renewable portfolio standards, given that the "renewable" category includes solar plus additional forms of renewable energy such as wind, biomass, small-scale hydro and geothermal. In Maryland, for example, an SREC is valued at $79 per MWh, while a REC is worth only about $8 per MWh. Although CES may be precluded by CACJA from participating in Vandalia's SREC market, CES's solar projects would still be eligible to participate in the market for the lower-priced RECs in Franklin and West Vandalia.

Heald, 544 U.S. 460 (2005). Such laws are considered facially discriminatory, and courts subject them to strict scrutiny review. This exacting standard requires a State to demonstrate that the law has a non-protectionist purpose and that there is no less discriminatory means for achieving that purpose.

B. The Takings Clause of the Fifth Amendment to the U.S. Constitution

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment, in turn, prohibits States from "depriv[ing] any person of life, liberty, or property, without due process of law." These constitutional protections are extended to investor-owned utilities through the terms commonly used in ratemaking statutes place throughout the U.S. Specifically, utilities are generally required to charge "just and reasonable" rates for the utility services they offer to the public; in this regard, the rate-setting statute in Vandalia provides that:

> "All rates and charges made, demanded, or received by any public utility for or in connection with the provision of utility service subject to the jurisdiction of the [Vandalia Public Service] Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

66 Vandalia S.A. § 35.01 (2019). According to U.S. Supreme Court precedent, the "just and reasonable" standard under federal ratemaking statutes—specifically, the Natural Gas Act and the Federal Power Act—requires that investor-owned utilities be provided an opportunity to earn a reasonable return on the assets they devote to public service. This requirement of a reasonable return—the "just and reasonable" standard—incorporates the constitutional prohibition against a "taking" under the Fifth and Fourteenth Amendments, and generally requires regulators to balance the interests of utility ratepayers and shareholders in setting rates, thereby allowing the utility to maintain its financial integrity, assure confidence in the its financial soundness, and preserve its ability to raise capital on reasonable terms. *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923); *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591 (1944).

C. The Supremacy Clause of the U.S. Constitution

Article VI, Section 2 of the Constitution, known as the Supremacy Clause, establishes that the Constitution and the laws of the United States "shall be the Supreme law of the land." The Supremacy Clause empowers Congress to preempt or supersede State law. Congress can do so expressly with explicit statutory language or by implication when a Federal law occupies the same field as or conflicts with State law.

In evaluating whether a State law is preempted by a Federal statute or regulation, courts typically start with the assumption that State powers are not superseded by a Federal

act unless that is the clear purpose of Congress. *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947). When Congress has not expressly stated its intent, courts can infer Congress' intent to occupy a given field of regulation if it has legislated comprehensively, leaving no room for States to supplement. Similarly, courts can infer "field preemption" if Congress' act relates to a field where the Federal interest is so dominant that the Federal system can be assumed to preclude enforcement of State laws on the same subject. *English v. Gen. Elec. Co*., 496 U.S. 72, 79 (1990).

Courts can also infer "conflict preemption" when there is a conflict between a State law and a Federal statute or regulation. Courts can identify such a conflict when a State law "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives." *Freightliner Corp. Myrick*, 514 U.S. 280, 287 (1995). When a Court determines that there is a conflict, the relative importance of the State's interest is immaterial; State law must always yield to Federal interests.

D. The Federal Power Act and Interstate Electricity Markets

The Federal Power Act, enacted in 1935, granted Federal regulators (currently FERC) authority over "the transmission of electric energy in interstate commerce and [] the sale of electric energy at wholesale in interstate commerce," including both wholesale electricity rates and any rule or practice ''affecting'' such rates. 16 U.S.C., §§ 824(b), 824e(a). The Act constrained the reach of Federal authority "to extend only to those matters which are not subject to regulation by the States." States therefore retained authority over retail sales to end-use consumers, such as residents and local businesses. As noted in a recent U.S. Supreme Court decision, this statutory division under the Federal Power Act "generates a steady flow of jurisdictional disputes because—in point of fact if not of law—the wholesale and retail markets in electricity are inextricably linked."[6]

Wholesale markets are generally managed on a regional basis, subject to oversight and regulation by FERC. Of the seven regional markets in the U.S. operated by regional transmission organizations ("RTOs") or independent system operators ("ISOs"), the state of Vandalia is located within the region served by the PJM Interconnection. Acting as a neutral, independent party, PJM operates a competitive wholesale electricity market and manages the high-voltage electricity grid to ensure reliability for more than 61 million people. PJM operates its market in accordance with tariffs approved by FERC.

E. FERC's Order No. 2222

On September 17, 2020, FERC issued its Order No. 2222, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*. In commencing the process that ultimately resulted in the issuance of Order No. 2222, FERC made a finding that existing market rules of regional grid operators were unjust and unreasonable in light of barriers that they present to the

[6] *Federal Energy Regulatory Commission v. Electric Power Supply Association*, 136 S.Ct. 760, 766 (2016) (hereinafter "*FERC v. EPSA*").

participation of DERs, which tend to be too small to meet the minimum size requirements to participate in the RTO/ISO markets on a stand-alone basis, and may be unable to meet certain qualification and performance requirements because of their operational constraints as small resources. Order No. 2222 removes these barriers by enabling DERs to participate through aggregation (i.e., allowing several sources of distributed energy to aggregate in order to satisfy minimum size and performance requirements that each may not be able to meet individually). Order No. 2222 achieves this by requiring regional grid operators to revise their rules (through revisions to the applicable tariffs on file with FERC) to establish DERs as a category of market participant, and to allow aggregators to register their resources under one or more participation models that accommodate(s) the physical and operational characteristics of those resources.

Notably, for purposes of this proceeding, Order No. 2222 does not include an "opt-out" provision whereby states (typically acting through their regulators) would have the ability to either authorize or prohibit the participation of DERs or DER aggregators in the RTO/ISO markets. This approach differs from FERC's decision in Order No. 719, *Wholesale Competition in Regions with Organized Electric Markets*, which was issued in 2008;[7] that Order required (among other things) wholesale market operators to receive demand response[8] bids from aggregators of electricity consumers. Order No. 719 expressly provided state regulatory agencies overseeing those users' retail purchases with the authority to bar such demand response participation. In the case of Order No. 2222, FERC considered including a similar "opt-out" provision that would empower states to decide whether DER aggregators should be allowed to transact with retail customers, but concluded that the benefits of allowing DER aggregators broader access to the wholesale markets outweigh the policy considerations in favor of an opt-out.[9]

Procedural Background

A. District Court Proceeding

Following the passage of CACJA and its amendment in October 2020, Commonwealth Energy ("CE") and its subsidiaries Commonwealth Power & Light Company ("CPL") and Commonwealth Energy Solutions ("CES") filed an action in the U.S. District Court of Vandalia on October 12, 2020. CE claimed that CACJA violated the dormant Commerce Clause of the U.S. Constitution, the Takings Clause of the Fifth Amendment to the U.S. Constitution, the Federal Power Act, and the Supremacy Clause of the U.S. Constitution. There were no factual issues in dispute as a result of a Stipulation of Facts between CE and Vandalia setting forth their agreement on the facts necessary for the Court to resolve the issues of law. (The relevant portions of the Stipulation of Facts are included as Appendix C.) CE and Vandalia

[7] 125 FERC ¶ 61,071.
[8] Under demand response programs, the operators of wholesale markets pay electricity consumers for commitments *not* to use power at certain times. Demand response is more fully explained in *FERC v. EPSA*, 136 S.Ct. at 769-70.
[9] FERC Order No. 2222, p. 49.

each submitted cross-motions for summary judgment, which included arguments on each of the four issues raised by CE regarding CACJA, as follows.

(a) Dormant Commerce Clause. CE claimed that the separate requirement for generation from solar photovoltaic ("PV") resources contained in Title III of CACJA violates the dormant Commerce Clause of the U.S. Constitution inasmuch as Section 11 of Title III limits "qualified electric generation from a solar photovoltaic facility" to electricity that is directly delivered from either (a) "a solar photovoltaic facility to a retail customer of an Electric Utility *operating within Vandalia*," or (b) "a solar photovoltaic facility to the electric transmission system at a location that is *within the service territory of an Electric Utility operating within Vandalia*." (Emphasis added.) According to CE, limiting the eligibility for SRECs under Vandalia's renewable energy standard to the output of projects located within Vandalia imposes an impermissible burden on interstate commerce by precluding the participation of solar projects located outside of Vandalia, such as those installed by CES in the adjacent states of Franklin and West Vandalia. In response, the State of Vandalia claims that the purpose of the locational requirement for solar facilities was not to capture economic benefits for Vandalia, but rather to encourage the local development of solar projects that would produce environmental benefits, through displacement of heavily polluting coal-fired generation in Vandalia with carbon-free generating resources.

(b) Takings Claim. CE argued that the requirement under Title V of CACJA to prematurely retire its three coal-fired generating plants, and to limit CPL's rate recovery of its remaining investment in the generating plants to one-half of their net book value, represents an unconstitutional taking under the Fifth and Fourteenth Amendments to the U.S. Constitution. According to CE, forcing it to write off the remaining investment of $780 million in its generating facilities would impair its financial integrity and render it unable to raise capital on reasonable terms. CE submits that investment in the plants has never been demonstrated to be imprudent (as supported by their continued inclusion in CPS's resource portfolio in its most recent IRP), and that it is therefore entitled to recover the full net book value in rates. In response, Vandalia points out that Title V does not by its express terms require a write-off of the remaining investment, but rather includes the proviso that such ratemaking treatment would not apply if it "is *demonstrated to be contrary to the public interest*." Moreover, Vandalia submits that a utility is not guaranteed the right to recover its investment in generating plants, but merely to have an opportunity to earn a reasonable return on its assets. Circumstances change, according to Vandalia, and coal-fired generation ceases to be a cost-effective means of generating electricity.

(c) Federal Power Act, Supremacy Clause Claim Regarding Net Metering. CE claimed that the net metering program implemented by Title IV of CACJA violates the Federal Power Act, and thus is preempted under the Supremacy Clause of the U.S. Constitution. According to CE, FERC has exclusive jurisdiction over energy sales from rooftop solar facilities and other distributed generation located on the customer side of the retail meter whenever the output of such generators exceeds the customer's demand. CE submits that in those situations when a Customer-generator's retail meter is "running backwards" (i.e., the Customer-generator is producing more energy than it consumes and thus is delivering energy to, rather than receiving energy from, the interconnected Electric Utility), the Electric Utility accepts such "exports" into its system and effectively resells the energy to its other

customers. CE argued that such sales of "exports" by the Customer-generator, because they are sold to the Electric Utility for resale to its other customers, are wholesale transactions, subject to FERC's exclusive jurisdiction. Vandalia's net metering program, which sets the price for such transactions at the Electric Utility's "full retail rate," is inconsistent with the Federal Power Act and thus is preempted under the Supremacy Clause of the U.S. Constitution. In response, Vandalia submits that FERC has previously disclaimed jurisdiction over net metering programs such as those implemented under CACJA. Under this FERC precedent, the net flow over the retail meter aggregated over a full retail billing cycle determines jurisdiction, and the occasional "export" by a Customer-generator to the Electric Utility does not, standing alone, constitute a wholesale transaction over which FERC would have jurisdiction.[10]

(d) Federal Power Act, Supremacy Clause Claim Regarding DER Participation in Regional Wholesale Markets. CE argued that Section 2 of Article VI of CACJA, which prohibited DERs in Vandalia from being aggregated for purposes of participating in the regional wholesale markets, is contrary to the Federal Power Act as implemented by FERC, and thus is preempted by the Supremacy Clause of the U.S. Constitution. According to CE, FERC expressly granted DERs in Vandalia the right to participate, through aggregation, in the regional wholesale market serving Vandalia (PJM). FERC has exclusive jurisdiction over the wholesale markets and the criteria for participating in those markets—including the wholesale market rules for participation of resources connected at or below distribution-level voltage—and Vandalia is preempted from taking action to deprive the rights granted by FERC for DERs to be aggregated for purposes of participating in the wholesale markets. Vandalia, for its part, argued that whether or not DERs are permitted to participate in the wholesale markets is the exclusive province of the states, exercising their authority over retail electric service. According to Vandalia, the authority of state regulators over the terms and conditions of interconnection to the distribution system includes the authority to limit the manner in which a DER uses the distribution system. Vandalia also argued as a matter of policy that states are best positioned to decide whether to authorize third-party DER aggregators to transact with retail customers.

B. District Court Decision

In a bench ruling issued on November 15, 2020, Judge Megan A. Watt of the U.S. District Court granted summary judgment in favor of CE on all issues. Her ruling from the bench is included as Appendix D.

C. Appeal to the 12th Circuit Court of Appeals

Vandalia filed its timely appeal of the U.S. District Court decision to this Court on December 15, 2020.

[10] Vandalia cites *Sun Edison LLC*, 129 FERC ¶ 61,146 (2009); *MidAmerican Energy*, 94 FERC ¶ 61,340 (2001).

Appendix A

The Clean Air Clean Jobs Act (CACJA)

S. 6599 A. 8429

2020 Regular Sessions

SENATE - ASSEMBLY

March 18, 2020

Section 1. Legislative findings and declaration. The legislature hereby enacts the “Vandalia Clean Air Clean Jobs Act" and finds and declares that:

1. Climate change is adversely affecting economic well-being, public health, natural resources, and the environment of Vandalia. The adverse impacts of climate change include:
   a. an increase in the severity and frequency of extreme weather events, such as storms, flooding, and heat waves, which can cause direct injury or death, property damage, and ecological damage (e.g., through the release of hazardous substances into the environment);
   b. a decline in freshwater fish populations;
   c. increased average temperatures, which increase the demand for air conditioning and refrigeration among residents and businesses;
   d. exacerbation of air pollution; and
   e. an increase in the incidences of infectious diseases, asthma attacks, heart attacks, and other negative health outcomes.

   These impacts are having a detrimental effect on some of the largest segments of Vandalia's economy, including agriculture, forestry, tourism, and recreational fishing. These impacts also place additional strain on the physical infrastructure that delivers critical services to the citizens of Vandalia, including the state's energy, transportation, stormwater, and wastewater infrastructure.

2. a. The severity of current climate change and the threat of additional and more severe change will be affected by the actions undertaken by Vandalia and other jurisdictions to reduce greenhouse gas emissions. According to the U.S. Global Change Research Program (USGCRP) and the Intergovernmental Panel on Climate Change (IPCC), substantial reductions in greenhouse gas emissions will be required by mid-century in order to limit global warming to no more than 2°C and ideally 1.5°C, and thus minimize the risk of severe impacts from climate change. Specifically, industrialized countries must reduce their greenhouse gas emissions by at least eighty percent (80%) below 1990 levels by 2050 in order to stabilize carbon dioxide equivalent concentrations at 450 parts per million—the level required to stay within the 2°C target.

   b. On December 12, 2015, one hundred ninety-five countries at the 21st Conference of the parties of the United Nations Framework Convention on Climate Change adopted an agreement addressing greenhouse gas emissions mitigation, adaptation, and finance starting in the year 2020, known as the Paris Agreement. The Paris Agreement was adopted on November 4, 2016, and is the largest concerted global effort to combat climate change to date.

3. Action undertaken by Vandalia to reduce greenhouse emissions will have an impact on global greenhouse gas emissions and the rate of climate change. In addition, such action will encourage other jurisdictions to implement complementary greenhouse gas reduction strategies and provide an example of how such strategies can be implemented. It will also advance the development of green technologies and sustainable practices within the private sector, which can have far-reaching impacts such as a reduction in the cost of renewable energy resources, and the creation of jobs and tax revenues in Vandalia.

4. It shall therefore be a goal of the state of Vandalia to reduce greenhouse gas emissions from all anthropogenic sources eighty-five percent (85%) below 1990 levels by the year 2050, with an incremental target of at least a forty percent (40%) reduction in climate pollution by the year 2030.

5. Although substantial emissions reductions are necessary to avoid the most severe impacts of climate change, complementary adaptation measures will also be needed to address those risks that cannot be avoided. Some of the impacts of climate change are already observable in Vandalia and the mid-Atlantic region of the United States. Annual average temperatures are on the rise, winter snow cover is decreasing, and heat waves and precipitation are intensifying. Vandalia has also experienced an increasing number of extreme and unusual weather events, such as the flooding event in August 2016 as a result of 8 to 10 inches of rain falling over a period of 12 hours, which caused 23 deaths, and the derecho of June 2012 in which wind speeds reaching 60 to 80 mph knocked down trees and cut power to over 670,000 customers in Vandalia.

6. Vandalia should therefore minimize the risks associated with climate change through a combination of measures to reduce statewide greenhouse gas emissions and to improve the resilience of the state, particularly its energy supply, with respect to the impacts and risks of climate change that cannot be avoided.

7. To achieve the necessary reductions in greenhouse gas emissions, Vandalia needs to rapidly decarbonize its electricity supply. During 2019, Vandalia produced 82% of its electricity from coal-fired generation. Because of its continued dependence on coal, Vandalia is experiencing rate increases in the retail price of electricity at a much faster rate than the rest of the country.

8. Vandalia currently has no policies promoting clean energy development (i.e., investments in energy efficiency and wind and solar generation), and thus is missing out on the rapid growth in clean energy jobs that most other regions in the country are experiencing. During the preceding decade, jobs in energy efficiency, wind and solar were the fastest growing segment of job growth across the U.S. economy. Moreover, Vandalia is having a difficult time attracting large employers to the state given that many large corporations have renewable energy goals that cannot be fulfilled with Vandalia's carbon-heavy electricity supply.

9. Vandalia must quickly adopt policies to encourage a decarbonization of its electricity supply, by requiring the closure of its existing coal-fired generating plants and enacting policies that stimulate the growth of renewable energy resources within the state. This decarbonization will serve the state's objectives of reducing greenhouse gas emissions and, through the increased use of decentralized distributed energy resources (DERs), will increase the resilience of the grid in the face of increasing extreme weather events. Enacting policies that promote renewable energy and increased penetration of DERs will also result in lower retail electricity rates as well as stimulate job growth. Encouraging end-use customers to install their own DERs, such as through a net metering program, also provides benefits to Vandalia by giving its citizens the tools necessary to help control their energy costs.

10. Vandalia has also fallen behind the surrounding states with respect to the development of solar resources. Vandalia needs a solar-specific incentive as part of its renewable energy policy. To maximize the clean energy benefits of solar within Vandalia (e.g., reduction of greenhouse gas emissions and associated pollutants) and to ensure that the jobs associated with solar energy development are created within Vandalia, the incentives for solar should be designed to condition eligibility for such incentives upon location of the solar project within Vandalia.

11. By taking bold action on greenhouse gas mitigation and climate change adaptation, Vandalia will position its economy, technology centers, educational institutions, and businesses to benefit from national and international efforts to address climate change.

Section 2. Definitions.

(a) "Coal-Fired Generating Plant" means an electric generating plant using coal as its primary and exclusive fuel source.

(b) "Commission" means the Public Service Commission of Vandalia.

(c) "Customer-generator" means an electric retail customer who owns or leases and operates a customer-sited Renewable Energy Resource that has a nameplate capacity of not greater than 25 kilowatts if installed at a residential service locations, not greater than 500 kilowatts if installed at a commercial service locations, or not greater than 2 megawatts if installed at an industrial service

locations; and, the Renewable Energy Resource is designed and installed to operate in parallel with the electric utility distribution system without adversely affecting the operation of equipment and service of the Electric Utility and its customers and without presenting safety hazards to the elected utility and customers.

(d) “Department” means Vandalia Department of Environmental Protection.

(e) “Electric Retail Customer” means a direct purchaser of electric power whose service is billed by a utility based on meter reading.

(f) “Electric Utility” means an entity subject to the jurisdiction of the Commission that generates or procures energy to serve the electrical energy requirements of Electric Retail Customers in Vandalia.

(g) "Greenhouse Gas" means carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and any other substance emitted into the air that may be reasonably anticipated to cause or contribute to anthropogenic climate change.

(h) "Greenhouse Gas Emission Limit" means the maximum allowable level of statewide Greenhouse Gas emissions, in a specified year, expressed in tons of carbon dioxide equivalent, as determined by the Department pursuant to this article.

(i) “Net Book Value” means the original cost of an asset as recorded on the books of an Electric Utility, plus additional capital investments as approved by the Commission, less accumulated depreciation.

(j) "Net Metering" means measuring the difference between electricity supplied by an Electric Utility and electricity generated from a Renewable Energy System owned or leased and operated by a Customer Generator when any portion of the electricity generated by the Renewable Energy System is used to offset part or all of the Electric Retail Customer's requirements for electricity.

(k) “Recoverable Investment” means fifty percent (50%) of the Net Book Value of an asset as of the date of its retirement.

(l) “Renewable Energy Resource" means a facility that generates electricity or thermal energy through use of the following technologies: solar thermal, photovoltaics, on land and offshore wind, hydroelectric, geothermal electric, geothermal ground source heat, tidal energy, wave energy, ocean thermal, and fuel cells not utilizing a fossil fuel resource in the process of generating electricity.

(m) "Statewide Greenhouse Gas Emissions" means the total annual emissions of Greenhouse Gases produced within the state from anthropogenic sources and Greenhouse Gases produced outside of the state that are associated with the generation of electricity imported into the state and the extraction and transmission of fossil fuels imported into the state. Statewide emissions shall be expressed in tons of carbon dioxide equivalents.

(n) “Transition Plan” means a filing by an Electric Utility with the Commission that, among other things, (i) identifies the Coal-Fired Generating Plant(s) to be retired in accordance with this Act, (ii) provides an amortization schedule for the recovery in retail rates of the Recoverable Investment over the remaining useful life of such Plant(s), and (iii) provides for the replacement of the electrical output of such Plant(s) to ensure that the Electric Utility continues to fulfill its obligation to provide safe, adequate and reliable service to Electric Retail Customers within Vandalia.

TITLE II. GREENHOUSE GAS REDUCTION GOALS

1 No later than July 1, 2021, the Department shall, pursuant to rules and regulations promulgated after at least one public hearing, establish a Statewide Greenhouse Gas Emissions Limit as a percentage of 1990 emissions, as follows:

a. 2030: 60% of 1990 emissions.

b. 2050: 15% of 1990 emissions.

2. Greenhouse gas emission limits shall be measured in units of carbon dioxide equivalents and identified for each individual type of greenhouse gas.

3. In order to ensure the most accurate determination feasible, the Department shall utilize the best

available scientific, technological, and economic information on greenhouse gas emissions and consult with the council, stakeholders, and the public in order to ensure that all emissions are accurately reflected in its determination of 1990 emissions levels.

TITLE III. RENEWABLE ENERGY STANDARD

1. No later than July 1, 2021, the Commission shall establish a program to require electric utilities operating within Vandalia to procure the following minimum percentages of electrical energy from renewable energy systems:
   (a) Fifteen percent (15%) by December 31, 2025.
   (b) Twenty-five percent (25%) by December 31, 2030.
   (c) Thirty-five percent (35%) by December 31, 2035.
   (d) Fifty percent (50%) by December 31, 2040.
2. The Commission shall establish a renewable energy credits (RECs) program as needed to implement this act. The Commission shall approve an independent entity to serve as the REC program administrator to create and administer a REC certification, tracking and reporting program.
3. All qualifying renewable energy systems must include a qualifying meter to record the cumulative electric production to verify the REC value.
4. Each electric utility operating within Vandalia shall comply with the applicable requirements of this section by purchasing sufficient RECs and submitting documentation of compliance to the program administrator.
5. For purposes of this subsection, one REC shall represent one megawatt hour of qualified renewable electric generation, whether self-generated, purchased along with the electric commodity or separately through a tradable instrument and otherwise meeting the requirements of Commission regulations and the program administrator.
6. Not later than July 1, 2021, the Commission shall establish a program to require each Electric Utility operating within Vandalia to procure the following minimum percentages of electrical energy from solar photovoltaic technologies:
   (a) Two-tenths of one percent (0.2%) by December 31, 2025.
   (b) Four-tenths of one percent (0.4%) by December 31, 2030.
   (c) Seven-tenths of one percent (0.7%) by December 31, 2035.
   (d) One percent (1.0%) by December 31, 2040.
7. The Commission shall establish a solar renewable energy credits (SRECs) program as needed to implement this act. The Commission shall approve an independent entity to serve as the SREC program administrator to create and administer SREC certification, tracking and reporting program.
8. All qualifying solar renewable energy systems must include a qualifying meter to record the cumulative electric production to verify the SREC value.
9. Each electric utility operating within Vandalia shall comply with the applicable requirements of this section by purchasing sufficient SRECs and submitting documentation of compliance to the program administrator.
10. For purposes of this subsection, one SREC shall represent one megawatt hour of qualified electric generation from a solar photovoltaic facility, whether self-generated, purchased along with the electric commodity or separately through a tradable instrument and otherwise meeting the requirements of Commission regulations and the program administrator.
11. Qualified electric generation from a solar photovoltaic facility means one of the following:
    (a) Electricity directly delivered from a solar photovoltaic facility to a retail customer of an Electric Utility operating within Vandalia; or
    (b) Electricity directly delivered from a solar photovoltaic facility to the electric transmission system at

a location that is within the service territory of an Electric Utility operating within Vandalia.

TITLE IV. RETAIL NET METERING

1. An Electric Utility shall offer net metering to a Customer-generator that generates electricity on the Customer-generator side of the meter using Renewable Energy Resources, on a first-come, first-serve basis based on the date of application for interconnection and pursuant to a standard tariff; provided, however, that such obligation shall cease at such time as the total generation capacity installed by all Customer-generators is equal to or greater than three percent (3%) of the Electric Utility aggregate customer peak demand in the state during the previous year.
2. The measurement of net electrical energy supplied or generated will be calculated as follows:
    a. The Electric Utility shall credit a Customer-generator at the full retail rate for each kilowatt-hour (kWh) produced by a Renewable Energy Resource installed on the Customer-generator side of the electric meter and delivered to the Utility's electric distribution system through the Customer-generator's electric meter, up to the total amount of electricity delivered by the Utility to that Customer-generator during the billing period.
    b. If a Customer-generator supplies more electricity to the electric distribution system than the Electric Utility delivers to the Customer-generator in a given billing period, the excess kWhs shall be carried forward and credited against the Customer-generator usage in subsequent billing periods at the full retail rate.

TITLE V. RETIREMENT OF FOSSIL FUEL-FIRED GENERATING PLANTS

1. On or before January 1, 2021, each Electric Utility shall file a Transition Plan with the Commission. Such plan shall include the following elements:
    (a) A schedule for the retirement of each existing Coal-Fired Generating Plant owned and operated by such Electric Utility. Such schedule shall provide for the retirement of such Plant on or before July 1, 2021.
    (b) A calculation of the net book value of each existing Coal-Fired Generating Plant as of the date of the retirement specified in Section 1(a) of this Title.
    (c) A narrative statement of the Electric Utility's plans for replacing the electrical output of each existing Coal-Fired Generating Plant upon the date of its retirement, supplemented by supporting schedules as necessary.
2. Notwithstanding the net book value shown on the books of the Electric Utility at the time of the retirement of an existing Coal-Fired Generating Plant, the rate recovery of the remaining investment in such Plant is limited to the Recoverable Investment. Unless such rate treatment is demonstrated to be contrary to the public interest, the Commission shall not directly or indirectly (e.g., as an operating expense, through an enhanced rate of return or any other ratemaking practice) allow any recovery in retail electric rates greater than the Recoverable Investment with respect to such Coal-Fired Generating Plant.

Appendix B

Amendment to the Clean Air Clean Jobs Act (CACJA)

S. 7302 A. 9341

2020 Special Session

SENATE - ASSEMBLY

October 1, 2020

Section 1. Legislative findings and declaration.

1. On September 17, 2020, the Federal Energy Regulatory Commission (FERC) issued Order No. 2222 in Docket No. RM18-9-000, *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System Operators*.
2. FERC Order No. 2222, among other things, adopts reforms designed to remove barriers to the participation of distributed energy resources (DERs) in the Regional Transmission Organization (RTO) and Independent System Operator (ISO) markets.
3. The Legislature has determined it would be inconsistent with Vandalia's clean energy goals and with Vandalia's fundamental obligation to maintain the reliability of the distribution system if DERs located within Vandalia were allowed to be aggregated for purposes of participation in the ISO market serving Vandalia, the PJM Interconnection (PJM).
4. The Legislature hereby amends the Vandalia Clean Air Clean Jobs Act to specifically prohibit DERs that are located within Vandalia from being aggregated for purposes of participation in the ISO market operated by PJM.

The Vandalia Clean Air Clean Jobs Act is hereby amended by adding Title VI, as follows:

TITLE VI. PARTICIPATION OF DISTRIBUTED ENERGY RESOURCES IN REGIONAL WHOLESALE MARKETS

Section 1. Definitions.

a. "Distributed energy resource" or "DER" means a Renewable Energy Resource with a nameplate generating capacity of not more than 10,000 kW installed behind the meter on the premises of a Retail Customer served by an Electric Utility.

b. "PJM" means the PJM Interconnection, Inc. which is the Independent System Operator serving the region including Vandalia.

Section 2. Notwithstanding any applicable provisions of Order No. 2222 issued by the Federal Energy Regulatory Commission in September 2020, a distributed energy resource (DER) located within the state of Vandalia shall be prohibited from being aggregated for purposes of participation in the wholesale power market operated by PJM.

Appendix C

UNITED STATES DISTRICT COURT OF VANDALIA
D.C. No. 20-09876

Commonwealth Energy,	)	
Petitioner,	)	
-v.-	)	D.C. No. 20-09876
State of Vandalia,	)	
Respondent	)	

STIPULATION OF FACTS

[Relevant Excerpts]

1. The net book value of the Raven Power Station ("Raven") as of July 1, 2021 will be $451 million. If Raven is retired as of July 1, 2021 as required by CACJA, the recoverable investment is $225.5 million.

2. The net book value of the Hunter Generating Plant ("Hunter") as of July 1, 2021 will be $513 million. If Hunter is retired as of July 1, 2021 as required by CACJA, the recoverable investment is $256.5 million.

3. The net book value of the Fort Duquesne Energy Center "(Ft. Duquesne") as of July 1, 2021 will be $596 million. If Ft. Duquesne is retired as of July 1, 2021 as required by CACJA, the recoverable investment is $298 million.

4. Emissions from Raven during 2019 were 6,824,013 tons of carbon dioxide (CO_2), 13,252 tons of sulfur dioxide (SO_2), 14,078 tons of nitrogen oxides (NO_X), and 28.3 pounds of mercury.

5, Emissions from Hunter during 2019 were 4,288,100 tons of carbon dioxide (CO_2), 9,430 tons of sulfur dioxide (SO_2), 3,106 tons of nitrogen oxides (NO_X), and 32.5 pounds of mercury.

6. Emissions from Ft. Duquesne during 2019 were 8,443,639 tons of carbon dioxide (CO_2), 4,599 tons of sulfur dioxide (SO_2), 3,579 tons of nitrogen oxides (NO_X), and 23.8 pounds of mercury.

7. In its most recent retail rate proceeding, the Vandalia Public Service Commission ("Commission") allowed Commonwealth Power & Light Company ("CPL") a return on equity ("ROE") of 9.20%. The Commission approved a capital structure of 50% equity and 50% debt for ratemaking purposes, resulting in an overall weighted average cost of capital of 7.85%.

8. The impact of the premature retirement of Raven, Hunter and Ft. Duquesne, due to the operation of CACJA, will result in the nonrecovery in rates of $780 million that formerly was recorded as the unamortized investment in these coal-fired generating

units. Irrespective of any other changes in revenues, operating expenses or CPL's rate base for ratemaking purposes, this nonrecovery will result in a shortfall in the earned ROE for the calendar year beginning July 1, 2021 of 1.80% (i.e., CPL's earned ROE for such period would be 7.40% rather than the allowed ROE of 9.20%).

9. In its most recent integrated resource plan ("IRP") filed with the Commission by CPL on December 30, 2019, Raven, Hunter and Ft. Duquesne were included in CPL's portfolio of resources throughout the 10-year planning period from 2020 through 2029.

Appendix D

UNITED STATES DISTRICT COURT OF VANDALIA
D.C. No. 20-09876

Commonwealth Energy,	)	
Petitioner,	)	
-v.-	)	D.C. No. 20-09876
State of Vandalia,	)	
Respondent	)	

RULING ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

DECISION BY MEGAN A. WATT, District Court Judge:

At the outset, I want to provide some context for the rulings that I am making today. The State of Vandalia is clearly at a crossroads in its energy policies, and through enactment of the Clean Air Clean Jobs Act ("CACJA"), is taking bold moves to chart a different path for the State that will better position it to compete, if not flourish, in the clean energy economy to which the United States is quickly transitioning. Given the outcome of the November 2019 elections in Vandalia, there seems to be broad public support for the clean energy path articulated by Governor Bea Greene and the legislators elected under the "Vandalia Can't Wait" banner.

The State of Vandalia does not operate in isolation, however, and its laws—regardless of the underlying political support for them—must comply with the U.S. Constitution as well as the federal statutes that come into play when energy policies are at issue. The characteristics of electricity make the issues raised in this case particularly challenging; electrons produced by renewable energy facilities and distributed energy resources (DERs) flow according to the law of physics, without regard to state boundaries. When they move in interstate commerce and/or across state lines, then federal law as well as the U.S. Constitution come into play and potentially preempt state initiatives. With that background, I make the following findings with respect to the challenges made by Commonwealth Energy to CACJA.

First, I find that Title III of CACJA violates the dormant Commerce Clause of the U.S. Constitution. Section 11 of Title III precludes solar projects located outside of the state of Vandalia from being eligible for solar renewable energy credits ("SRECs") under Vandalia's renewable energy standard. The motivation for this preference for in-state solar projects—and, in turn, discrimination against out-of-state solar projects—is apparent from the title of the measure itself: Clean Air ***Clean Jobs*** Act. Vandalia is seeking to capture for itself the economic benefits associated with the development of solar generating projects, to the exclusion of nearby projects that deliver the same "green" electrons. This burden on interstate commerce is impermissible under the dormant Commerce Clause of the U.S. Constitution. While there are also environmental benefits associated with the development of solar projects within CACJA—the displacement of coal-fired generation, for example—the thrust of CACJA seems to be on the reduction of greenhouse gases, a global pollutant that does not respect state boundaries and thus fails to provide any support for an obviously discriminatory provision.

Second, I find that Title V of CACJA violates the Takings Clause of the Fifth Amendment to the U.S. Constitution. Section 2 of Title V requires the premature retirement of existing coal-fired generating plants in Vandalia as of July 1, 2021, and includes a legislative determination that, unless demonstrated to be contrary to the public interest, the rate recovery of the remaining investment in such coal plants is limited to no more than fifty percent (50%) of the unamortized investment as of this date. According to the Stipulated Facts, the effect of this provision in CACJA is to produce a write-off (i.e., the inability to recover its investment in retail rates) of $780 million for CPL which, in and of itself, will cause an erosion of 1.80% in the ROE earned by CPL during the 12-month period commencing on July 1, 2021. While I understand the desire of Governor Greene and the Vandalia state legislature to reduce the greenhouse gas emissions associated with electricity generation in Vandalia, that is a separate question from whether the utility should be presumptively precluded from recovering its prudently incurred investment in its coal-fired generating plants. It is true that CPL technically is not prohibited from recovering the full unamortized balance of its investment in Raven, Hunter and Ft. Duquesne—Section 2 provides that the limitation will not apply in the event it is "demonstrated to be contrary to the public interest."

But I find that this provision of CACJA interferes with the proper balancing of ratepayer and shareholder interests required by the Fifth Amendment in the setting of "just and reasonable" rates, by impermissibly putting a thumb on the ratepayer side of the scale when the regulator performs the balancing required by the U.S. Constitution.

The third claim raised by CE involves Title IV of CACJA, which institutes a retail net metering program within the state of Vandalia. CE argues that the net metering program, which constitutes what is known as "full retail net metering,"[1] violates the Federal Power Act and the Supremacy Clause of the U.S. Constitution. The allegations raised by CE mirror the claims alleged by the New England Ratepayers Association ("NERA") in a recent proceeding before the Federal Energy Regulatory Commission ("FERC"). In that proceeding, NERA sought a declaratory order that (1) FERC has exclusive jurisdiction over wholesale energy sales from generation sources located on the customer side of the retail meter, and (2) rates for such sales must be priced in accordance with the Federal Power Act ("FPA") or the Public Utility Regulatory Policies Act ("PURPA"), as applicable.[2] In an order issued on July 16, 2020, FERC dismissed the Petition, finding that "the issues presented in the Petition do not warrant a generic statement from the Commission at this time," given that the Petition "does not identify a specific controversy or harm that the Commission should address in a declaratory order to terminate a controversy or to remove uncertainty."[3]

In a concurring opinion issued by then-Commissioner and now-Chairman James Danly, he observed that:

> "[D]ismissing the petition on procedural grounds may well result in a patchwork quilt of conflicting decisions if the questions raised in the petition are instead presented to federal district courts across the country. While the federal courts are more than capable of adjudicating

[1] Under "full retail net metering" as provided under Title IV of CACJA, a Customer-generator produces electric energy from a Renewable Energy Resource (most likely solar panels) that is located on the same side of the retail meter as the Customer-generator's load. When the Customer-generator consumes more energy than it produces, the Electric Utility provides the difference, and the meter runs forward to measure the amount of retail service sold to the Customer-generator. When the Customer-generator produces more energy than it consumes, on the other hand, the Customer-generator is delivering energy to the Electric Utility, and the meter runs backwards. Under Section 2(a) of Title IV of CACJA, the amount of energy the Customer-generator produces is netted, on a monthly basis, against the amount of energy the Customer-generator consumers. This billing process results in the Customer-generator being compensated for all of the energy it produces behind the meter, including the energy it delivers to the Electric Utility for resale, at the full retail rate.
[2] *New England Ratepayer Association*, 172 FERC ¶ 61,042 (2020).
[3] *Id*., Order Dismissing Petition for Declaratory Order, pp. 17, 18.

> preemption claims, they are not steeped in the history of the Federal Power Act nor in matters of national energy policy. Confusion, delay and inconsistent rules—some of which will apply to individual states or parts of states—will be the inevitable result."[4]

Commissioner Danly was indeed prescient, for that is precisely where we are under CE's claim for relief in this case. While I cannot claim to be "steeped in the history of the Federal Power Act"—and it would be far preferable for FERC to resolve this issue in the context of a complaint under Section 206 of the FPA or in a rulemaking proceeding, as suggested in Commissioner Bernard McNamee's concurring opinion[5]—it seems to me that CE has the stronger argument on the merits of this issue. For its part, Vandalia correctly points out that FERC has previously disclaimed jurisdiction over full net metering regimes on a theory that the net flow over the retail meter aggregated over a full retail billing cycle—as contemplated in Section 2(a) of Title IV of CACJA—determines jurisdiction. But that rationale is very much in doubt in light of two decisions by the D.C. Circuit Court of Appeals that were issued long after FERC's earlier disclaimer of jurisdiction.[6] Those decisions suggest that whenever the amount of energy generated exceeds the retail load behind the meter—regardless of the duration of the excess—state law may not govern the rates for net energy sales and the price of energy must be determined in accordance with federal law. Thus, I agree with CE that Vandalia's net metering program under Title IV of CACJA is preempted by FERC's exclusive jurisdiction under the Federal Power Act and violates the Supremacy Clause of the U.S. Constitution.

The fourth issue, involving Title VI of CACJA and the prohibition of DERs located in Vandalia from being aggregated for purposes of participating in the regional wholesale markets, involves the complex question of where to draw the line between federal and state jurisdiction over the regulation of electricity transactions. The Supreme Court addressed similar jurisdictional issues (in the context of demand response programs) in *Federal Energy Regulatory Commission v. Electric Power Supply Association*, 136 S.Ct. 760 (2016). FERC's Order No. 719, issued in 2008, governed the aggregation of demand response providers for purposes of participating in the wholesale markets. In "recognition of the linkage between

[4] *Id*., Concurring Opinion of Commissioner Danly, p. 1.
[5] *Id*., Concurring Opinion of Commissioner McNamee, p. 2.
[6] *So. Cal. Edison v. FERC*, 603 F.3d 996 (D.C. Cir. 2010); *Calpine Corp. v. FERC*, 702 F.3d 41 (D.C. Cir. 2012).

wholesale and retail markets and the States' role in overseeing retail sales," FERC included an "opt-out" provision in Order No. 719 that granted state regulatory authorities the right to prohibit demand response providers from being aggregated for purposes of participating in wholesale demand response programs.[7] As described in *FERC v. EPSA*, this approach resulted in "a program of cooperative federalism, in which the States retain the last word."[8]

In its Order No. 2222, however, FERC declined to include a similar "opt-out" provision that would have allowed states to prohibit the aggregation of DERs for purposes of participating in the regional wholesale markets. Thus the "opt-out" that Vandalia is seeking to exercise through Section 2 of Title VI of CACJA simply does not exist under the terms of Order No. 2222. Rather, FERC concluded that it was not *required* to offer states with the ability to preclude aggregation of DERs for purposes of participation in the wholesale markets, and decided that the benefits of such broader participation outweighed the policy considerations favoring an opt-out. FERC went on to assert that "a relevant electric retail regulatory authority cannot broadly prohibit the participation in RTO/ISO markets of all distributed energy resources or of all distributed energy resource aggregators as doing so would interfere with the Commission's statutory obligation to ensure that wholesale electricity markets produce just and reasonable rates."[9] Notwithstanding Vandalia's legitimate interests in ensuring reliability of the distribution system within Vandalia and its exclusive responsibility over transactions with retail customers, FERC is asserting its exclusive jurisdiction over the wholesale markets, and has preempted Vandalia from taking an inconsistent position with respect to the aggregation of DERs for the purposes of participating in the wholesale markets.

[7] *FERC v. EPSA*, 136 S.Ct. at 779.
[8] *Id*. at 780.
[9] FERC Order No. 2222, p. 47.

I am unable to reconcile these competing positions, which seems to present a classic case of "conflict preemption" under Supremacy Clause jurisprudence. In this situation, the state law must give way to federal interests, and thus I conclude that Section 2 of Article VI of CACJA must fail under the Supremacy Clause of the U.S. Constitution.

DECISION and ORDER entered this 15th day of December, 2020.

/s/ Megan A. Watt
U.S. District Court Judge
District of Vandalia