C.A. No. 22-0682

UNITED STATES COURT OF APPEALS

FOR THE TWELFTH CIRCUIT

APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.,

Appellant,

v.

CHAIRMAN WILL WILLIAMSON, *in his official capacity*,

COMMISSIONER LONNIE LOGAN, *in his official capacity*, and

COMMISSIONER EVELYN ELKINS, *in her official capacity*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF VANDALIA

BRIEF OF APPELLANT
APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.

Team No. 2

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I. JURISDICTIONAL STATEMENT

On June 6, 2022, Appalachian Clean Energy Solutions, Inc. ("ACES") brought suit against three agents of the Vandalia Public Service Commission ("PSC") in the District Court for the Northern District of Vandalia. (*Record* (*"R"*) *at 14*). This court reviews federal questions under 32 U.S.C. § 1331 on appeal from final judgement of the District Court for the Northern District of Vandalia. The district court had jurisdiction to resolve federal issues of Article III Standing, State preemption by the Supremacy Clause of the Constitution, and State contravention of the Commerce Clause under the dormant Commerce Clause doctrine.

ACES appealed the district court's August 15, 2022 order granting two motions to dismiss brought by the PSC. (*R. 16*). This appeal was filed in a timely manner on August 29, 2022, within sixty days of the district court's order. (*R. 16*). The district court's order disposed of all claims between the parties. Therefore, this court has jurisdiction under 28 U.S.C. § 129.

II. STATEMENT OF ISSUES PRESENTED

1. Whether ACES has standing to challenge the Capacity Factor Order ("CFO"), under the competitor standing doctrine, where the scheme injects surplus electricity into PJM Interconnection's ("PJM") auctions where ACES competes as a seller.

2. Whether, under the Federal Power Act ("FPA"), the CFO's requirement that utilities bid into PJM is preempted by the Federal Energy Regulatory Commission's ("FERC's") exclusive jurisdiction over interstate electricity sales.

3. Whether, under the Supremacy Clause, the Native Transmission Protection Act ("NTPA") is preempted by FERC's Order 1000 when FERC has exclusive jurisdiction over interstate electricity transmission and where the NTPA frustrates FERC's purpose of setting "just and reasonable rates."

4. Whether the NTPA violates the dormant Commerce Clause when (1) it is discriminatory on its face and (2) its burden on interstate commerce - creating unjust and unreasonable rates - outweighs its benefit to Vandalia.

III. STATEMENT OF THE CASE

A. Summary of Consolidated Actions

On appeal, this court reviews the trial court's grant of two motions to dismiss brought by the PSC. (*R. 2*). The first motion regards the PSC's Capacity Factor Order ("CFO"), which requires coal-fired power plants to operate at seventy-five percent capacity, despite lower cost energy being available. (*R. 2, 8*). The second motion regards the NTPA passed by the Vandalia legislature, which granted a Right of First Refusal ("ROFR") for public utilities operating within Vandalia to construct transmission lines approved by PJM – the wholesale power pool in which Vandalia participates. (*R. 2, 9*).

The CFO threatens to depress prices in PJM and may threaten the viability of the Rogersville Energy Center ("REC"). While the NTPA stands to delay or altogether halt the construction of the Mountaineer Express – an integral addition to America's energy infrastructure. (*R. 11*). ACES, the company involved in the planning, permitting, and hopeful construction of the projects, brought these pending actions to strengthen its ability to provide affordable power to America's wholesale electricity market. (*R. 14-15*).

B. America's Wholesale and Retail Energy Markets

Promoting flexibility and market efficiency, FERC has overseen a shift in recent decades from antique vertically-integrated electric utility models toward competitive and dynamic interstate market pools that more efficiently distribute electricity. (*R. 3-4*). FERC derives its authority to regulate these interstate markets from the FPA, which reflects Congress's ambition

to govern interstate energy sales that states may not. (*R. 13-5*). The PJM is one of these market power pools, an ISO/RTO, that coordinates responsive interstate energy auctions, and (theoretically) connects sellers of the most efficient and affordable energy with the buyers who need it in real time, tomorrow, and in coming years. (*R. 3-4*). MAPCo and LastEnergy, the Vandalia retail utilities, both buy and sell into the PJM. (*R. 3*). ACES supports the PJM's market as a merchant producer, providing renewable, nuclear, gas, and coal electricity to PJM for utilities to resell to their individual customers. (*R. 5*).

C. The Rogersville Energy Center and the Mountaineer Express

ACES plans to achieve zero carbon emissions at its electricity generating facilities by 2050. (*R. 5*). To reach that goal, ACES plans to close the Franklin Generating Station ("FGS"), a 1,300 MW coal-fired power plant in Ohio. *Id.* In 2020 and 2021, the FGS ran at below fifty percent capacity and failed to clear auctions in PJM both years. *Id.* Further, the Environmental Protection Agency adopted new standards that would require the FGS to undertake environmental upgrades to the facility in order to operate past December 21, 2028. *Id.* Therefore, ACES concluded that it would be uneconomic for the FGS to continue operations. *Id.*

To replace the FGS, ACES intends to construct the REC, a 1,800 MW combined-cycle natural gas-fired power plant in southwestern Pennsylvania, a region that can capitalize on abundant natural gas supplied from the Marcellus Shale. *Id.* To take advantage of the expanded 45Q tax credit included in the Inflation Reduction Act, REC will include technology enabling it to capture seventy-five percent of carbon emissions from the facility for subsequent sequestration within the region. *Id.* In preparation for the construction of the REC, Pennsylvania has adopted rules regarding carbon sequestration within the state, making Pennsylvania the most viable site for the facility. *Id.* The cost of construction for the REC is approximately $3.1 billion. *Id.*

Given the REC's high-power output of 1,800 MW, ACES plans to construct a 500 kilovolt ("kV") transmission line to run from Rogersville, Pennsylvania to Raleigh, North Carolina, approximately 460 miles away. *Id.* This line, the "Mountaineer Express," is capable of sending up to 3,000 MW of power using two lines or up to 4,500 MW using one line from Pennsylvania (in the PJM Market) to North Carolina (in the South East Interconnection Market), passing through several other states, including Vandalia. (*R. 5-6*). The Mountaineer Express is intended to increase the capability of PJM to accommodate additional electrical output from the REC. (*R. 5*). The cost of construction for the Mountaineer Express is $1.7 billion. (*R. 6*).

The PSC's CFO and Vandalia's NTPA raises grave uncertainty as to when and if the REC and the Mountaineer Express will be constructed. (*R. 11*). This uncertainty motivated ACES to file suit against the PSC's agents. (*R. 14-15*).

D. Vandalia PSC's Capacity Factor Order

Hoping to protect Vandalia's historic coal industry and keep coal-plants in the state up and running, the Vandalia PSC issued a CFO on May 15, 2022, which requires every coal-plant in the state to operate nearly constantly, at a capacity factor of seventy-five percent. (*R. 7-8*). Both MAPCo and LastEnergy had regularly been unable to offer electricity at a low enough price to clear PJM's auctions – most of the time – for the past year (2021) and the plants were operating at only thirty-four to sixty-two percent in that year. (*R. 8 n.6*). Though the PSC hopes MAPCo and LastEnergy will be able to sell the surplus energy through PJM, the PSC afforded the utilities the authority to recover from ratepayers the costs of production, if – as often in the past year – the utilities cannot successfully clear the PJM market going forward. (*R. 7-8*). While the utilities' contract with PJM requires each to sell all the energy they produce into PJM, the

PCS designed the benefit such that the utilities may not avail themselves of the rate-recovery mechanism unless they first bid into PJM. (*R.9*).

E. Vandalia's Statutory Right of First Refusal

a. FERC Order 1000 and the Native Transmission Protection Act

ROFRs grant owners of existing transmission facilities in a State the exclusive right to construct new transmission facilities in their service areas. (*R. 9*). Many FERC-approved ISO tariffs included a federal ROFR until 2011; however, ROFRs were abandoned by FERC under Order 1000. *Id.* FERC took issue with the practice of incumbents exercising their ROFRs to construct transmission lines planned by nonincumbent utility companies under the old scheme. *Id.* Eliminating the federal ROFR, FERC sought to promote competition among transmission providers to advance FERC's purpose of creating competitive wholesale market energy prices. *Id.*

On May 3, 2014, as a direct response to FERC Order 1000, Vandalia signed into law the NTPA, granting "incumbent electric transmission owners" ("incumbent") a ROFR, or the exclusive right to construct transmission lines within Vandalia for a period of eighteen months. *Id.* After the eighteen-month period, other utility companies would be able to construct transmission lines within the state. *Id.* The NTPA is triggered if (1) a plan to construct a transmission line in Vandalia is approved by PJM and (2) if the proposed line connects to facilities owned by an incumbent wishing to exercise its ROFR. *Id.* Under the statute, an incumbent is:

> [A]ny public utility that owns, operates, and maintains an electric transmission line in this state; any generation and transmission cooperative electric association; any municipal power agency; any power district; any municipal utility; or any … entit[y] … engaged in the business of owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia.

Vand. Code § 24-12.2(d); (*R. 10*).

b. Applicability to the Mountaineer Express

Given that ACES does not own transmission facilities in Vandalia, it is not an incumbent and cannot exercise a ROFR to construct the Vandalia portions of the Mountaineer Express. *Id.* Nevertheless, ACES is the utility that spent time and money planning construction of the Mountaineer Express. (*R. 5*). PJM approved ACES's Mountaineer Express in its March 2022 Regional Transmission Expansion Plan ("RTEP"). (*R. 6*). LastEnergy and MAPCo have yet to invoke their ROFR, which would divest ACES of its initial investment in the Mountaineer Express and undermine PJM's approval of the project. (*R. 10*).

Even if LastEnergy and MAPCo do not exercise their ROFR, since a portion of the Mountaineer Express is to pass through Vandalia, ACES (or any other utility company) must obtain either land or right-of-way easements to construct the line through the state. (*R. 10-11*). LastEnergy currently owns right of ways that pass through a portion of the land vital to the construction of the Mountaineer Express. *Id.* Vand. Code § 24-8-2 provides that existing electric utility easements may be used by any "public utility" to distribute electricity through the state. (*R. 10*). However, Vand. Code § 24-8-1(d) defines a public utility as an entity "engaged in any business involving the provision of electricity, gas, water, or any other service or commodity furnished to the public for compensation . . .." *Id.*

LastEnergy, as an incumbent utility in Vandalia, has prohibited ACES from using its easements. (*R. 11*). Since ACES only sells electricity in wholesale markets rather than retail, the PSC took the position that ACES was not a public utility and could not force LastEnergy to allow ACES to use its existing easements. *Id.* To use eminent domain to obtain its own land or easements within Vandalia, ACES applied for a Certificate of Public Convenience and Necessity ("CPCN") from the PSC. (*R. 10*). ACES anticipates an unfavorable ruling on its application due to the PSC's apparent bias against nonincumbent utilities. (*R. 11*).

Without intervention, ACE's construction of the Mountaineer Express is jeopardized in three ways. First, if LastEnergy or MAPCo invoke their ROFR, ACES will have needlessly wasted years of time and resources towards the Mountaineer Express – discouraging ACES from making such an investment toward energy innovation in the future. (*R. 5*). Second, even if the incumbents do not exercise their ROFR, ACES must wait eighteen months before construction can begin on the Mountaineer Express. (*R. 10*). Lastly, even if the incumbents do not exercise their ROFR, ACES would likely be unable to obtain the easements necessary for the Mountaineer Express's construction because it cannot use LastEnergy's easements and cannot use eminent domain to purchase its own. (*R. 10-11*). In sum, with or without the incumbents' exercise of its ROFRs, the PSC has placed the construction of the Mountaineer Express at its mercy.

F. Procedural Posture

In its complaint brought on June 6, 2022, ACES brought three challenges before the district court. (*R. 14-15*). The first challenged the constitutionality of the CFO based on the Supremacy Clause. (*R. 14*). The second challenged the constitutionality of the NTPA based on the Supremacy Clause. (*R. 15*). The last challenged the constitutionality of the NTPA based on the dormant Commerce Clause. *Id.* The PSC filed a motion to dismiss all claims against the CFO and the NTPA on June 27, 2022 and the district court granted the motion to dismiss on August 15, 2022. (*R. 14-15*). ACES appealed to this court on August 29, 2022. (*R. 15*). This appeal is ripe for decision.

IV. SUMMARY OF THE ARGUMENT

Despite the complexity of energy sales and the transmission of electricity, ACES's action against the PSC revolves around two questions: who has authority to govern interstate energy

sales, and who has the authority to grant construction permits of interstate transmission lines? Under the FPA and Order 1000, the answer to each of these questions must be the federal government – FERC.

A. The Standard of Review is De Novo.

Regarding the PSC's CFO, this court must review legal questions decided by the district court involving standing and the Supremacy Clause de novo, viewing any facts in the light most favorable to ACES as the appealing party. Regarding the NTPA, this court must also review the legal questions decided by the district court involving the Supremacy Clause and the dormant Commerce Clause de novo.

B. ACES has standing to challenge the Capacity Factor Order.

ACES has standing because it is injured under the "competitor standing doctrine" since the CFO injects an unnecessary surplus of energy into PJM markets, driving down costs. ACES's injury is caused by the CFO because MAPCo and LastEnergy cannot avoid bidding into PJM, and vacatur of the CFO would redress ACES's injury.

C. The Capacity Factor Order violates the Supremacy Clause.

The CFO is preempted by the FPA because Vandalia has clearly taken aim at PJM – by attempting to dictate whether MAPCo and LastEnergy bid into PJM's wholesale markets – which is FERC's domain. Further, the CFO is preempted because it conditions a state benefit – rate recovery – on whether the utilities participate in PJM markets. It compels the utilities to bid more than they otherwise would and guarantees MAPCo and LastEnergy a return whether they successfully clear the PJM auctions or not.

D. The NTPA violates the Supremacy Clause.

The NTPA must be struck down as unconstitutional under the Supremacy Clause for three reasons. First, under Order 1000, FERC retains jurisdiction to grant construction permitting regarding the Mountaineer Express because it is a "Market Efficiency Project" that greatly benefits interstate commerce. Therefore, this court must infer "field preemption" over the NTPA because granting Vandalia incumbents a ROFR strips FERC of its congressional authority over interstate transmission lines such as the Mountaineer Express.

Second, this court must infer "conflict preemption" because if the NTPA is upheld, FERC will be unable to realize its congressional purpose to set just and reasonable electricity rates. Order 1000 removed federal ROFRs because they led to rates that were unjust and unreasonable. Vandalia must not be allowed to virtually undo Order 1000's revocation of ROFRs by setting their own because to do so would still lead to unjust and unreasonable rates.

E. The NTPA violates the dormant Commerce Clause.

The NTPA must be struck down as unconstitutional under the dormant Commerce Clause for three reasons. First, the NTPA is "facially discriminatory" because it discriminates against entities that do not have a presence within Vandalia. Under the NTPA, the only way a transmission provider could construct a transmission line within Vandalia for eighteen months is if it already had a transmission facility within Vandalia. Order 1000's assertion that it would be in the economic interest of incumbents to exercise their ROFRs demonstrate that the NTPA could permanently ban nonincumbents from constructing transmission lines.

Second, the NTPA likely has a discriminatory purpose.[1] The NTPA was passed in direct response to Order 1000, which eliminated federal ROFRs. Vandalia passed the NTPA to revive "federally recognized" ROFRs, which FERC expressly eliminated.

Lastly, the NTPA has a discriminatory effect and its burden on interstate commerce is clearly excessive in relation to its putative benefits. If every state passed a similar ROFR statute, it would (1) lead to unjust and unreasonable rates, (2) limit innovation and competition in the industry of electricity transmission, and (3) deprive FERC of its jurisdiction over interstate transmission lines. This burden clearly exceeds the anticipated local benefits of (1) transmission reliability and (2) propping up coal companies within Vandalia.[2]

V. ARGUMENT

A. Standard of Review

This federal appellate court reviews a district court's dismissal of a complaint for lack of standing pursuant to Federal Rule of Civil Procedure 12(b)(1) *de novo*, and for failure to state a claim pursuant to rule 12(b)(6) *de novo*. *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 94 (2d Cir. 2017). To determine standing, this court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 263 (2nd Cir. 2006). Concerning preemption and the dormant Commerce challenges, "[t]o survive a motion to dismiss," ACES need only provide "sufficient factual

[1] Without a chance for discovery, there is not enough evidence to prove the NTPA's purpose as discriminatory. On this contention alone, ACES asks this court to remand to the district court so that discovery can commence.

[2] FERC has expressly disaffirmed any notion that ROFRs promote reliability, stating that PJM has reliability requirements for all transmission providers. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 326 (5th Cir. 2022).

matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

B. ACES has standing to challenge the Capacity Factor Order because the regulation creates additional competition for ACES as a seller in PJM markets.

ACES has standing – injury, causation, and redress – to challenge the CFO because it will invariably create an energy surplus on PJM's wholesale markets, drive down prices, and increase competition for ACES as an energy seller.[3] Standing requires plaintiffs show (1) injury-in-fact, (2) causation, and (3) redressability. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

1. ACES suffers injury-in-fact because the CFO will increase competition in PJM.

A plaintiff satisfies "injury in fact" by showing that the injury is "actual or imminent" and "not conjectural or hypothetical." *Id.* at 560. "Injury in fact is a low threshold, which we have held 'need not be capable of sustaining a valid cause of action,' but 'may simply be the fear or anxiety of future harm.'" *Ross v. Bank of Am., N.A.*, 524 F.3d 217, 222 (2d Cir. 2008).

ACES is injured-in-fact under the "competitor standing doctrine," because Vandalia's CFO will unquestionably lead to an increase in competition for wholesale sales between ACES and both MAPCo and LastEnergy. *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 518 F. Supp. 3d 448, 459 (D.D.C. 2021); *see also Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 250, 262 (D.C. Cir. 2015) ("[I]ncreased competition almost surely injures a seller in one form or another . . .."); *MD Pharm., Inc. v. DEA*, 133 F.3d 8, 11 (D.C. Cir. 1998) ("[I]ncreased competition represents a cognizable Article III injury"); *Louisiana Energy &*

[3] At the outset, ACES need not show that it will prevail on the merits to assert standing. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) ("Our threshold inquiry into standing in no way depends on the merits of the plaintiff's claim.") (internal quotations omitted).

Power Auth. v. FERC, 141 F.3d 364, 367 (D.C. Cir. 1998) ("Parties suffer constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition."). "To establish competitor standing, a party in a particular market must show [1] an actual or imminent increase in competition in the relevant market and [2] demonstrate that it is a direct and current competitor . . .." *Washington All. of Tech Workers*, 518 F. Supp. 3d at 459 (internal quotations omitted).

ACES has competitor standing because as "a direct and current competitor," *id*, it generates electricity from solar, wind, gas, coal, and nuclear electricity generators exclusively for wholesale, and directly competes with MAPCo and LastEnergy as a seller in the PJM wholesale markets. (*R. 5*). The CFO presents an "imminent," *id*, increase in competition because it forces MAPCo and LastEnergy to dump a surge of supply into PJM wholesale markets, which will force ACES to lower prices to remain competitive or risk being forced from the market. *Washington All. of Tech Workers*, 518 F. Supp. 3d at 459.

As in any competitive market, when the market suffers from a surplus of supply, competing sellers will be forced to lower prices to remain competitive.[4] Going forward, the CFO requires MAPCo and LastEnergy to increase capacity at each of the utilities' coal-power plants in Vandalia up to seventy-five percent capacity at minimum.[5] (*R. 7*). Prior to the CFO, from

[4] *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 524 (7th Cir. 2008) ("A larger supply of electricity means a lower market-clearing price, holding demand constant."). *See also* Market Surpluses and Market Shortages, Experimental Economics Center, https://www.econport.org/content/handbook/Equilibrium/surplus-and-shortage.html (last visited January 25, 2022) ("A [m]arket [s]urplus occurs when there is excess supply – that is quantity supplied is greater than quantity demanded. In this situation, some producers won't be able to sell all their goods. This will induce them to lower their price to make their product more appealing. In order to stay competitive many firms will lower their prices thus lowering the market price for the product."

[5] A capacity factor is "how often a plant is running at maximum power." (*R. 5 n.4*).

2020 to 2021, each of the utilities' plants had been operating between 34.7 and 62.3 percent. (*R. 7*). The capacity factors of these plants would not increase, but for the CFO, because the utilities themselves "projected that capacity factors for their coal-fired power plants could be expected to remain at or below sixty percent going forward, given the availability of lower cost power from the wholesale market . . .." (*R. 7*).

Additionally, the relatively low-capacity factors of MAPCo and LastEnergy's Vandalia coal fleet "reflect that the prices bid by [MAPCo and LastEnergy] into the PJM energy market exceeded the market-clearing price most of the time, and thus the plants were 'out of the money' and not dispatched by PJM." (*R. 8 n.6*). As such, the PJM market shows no clear demand for the additional energy the CFO requires, showing that MAPCo and LastEnergy would not increase production but for the CFO. MAPCo and LastEnergy are certain to dump their excess electricity into PJM because both must sell all the electricity they produce into the PJM wholesale market. (*R. 3*). Because a party "suffer[s] constitutional injury in fact when agencies lift regulatory restrictions on their competitors or otherwise allow increased competition," ACES is injured in-fact by the CFO. *Louisiana Energy & Power Auth.*, 141 F.3d at 367.[6]

2. ACES's injury is caused by the Capacity Factor Order, even though ACES is not subject to the order.

ACES's injury is caused by the CFO because MAPCo and LastEnergy cannot comply with the CFO without surplus dumping electricity onto PJM markets. "[C]ausation," must amount to a "fairly traceable" connection between the asserted injury-in-fact and the alleged actions of the defendant. *Lujan*, 504 U.S. at 560. To satisfy causation, petitioners "must show

[6] It is of no consequence that ACES may not yet have suffered from depressed prices. *Delta*, 85 F. Supp. 3d at 262. ("[T]he injury-in-fact requirement may be satisfied at some point before an injury from increased competition actually occurs . . .. so long as a plaintiff can demonstrate an imminent increase in competition . . ..").

that the injury is causally linked or 'fairly traceable' to [the defendant's action] and not the result of independent choices by a party not before the Court." *Nw. Requirements Utilities v. FERC,* 798 F.3d 796, 806 (9th Cir. 2015) (internal quotations omitted). As such, MAPCo and LastEnergy – the regulated parties not before this Court – must not have the discretion to act in any way other than that which causes ACES's injury. *Lujan,* 504 U.S. at 562 (When plaintiffs allege injury because of the unlawful regulation of someone else, "causation . . . ordinarily hinge[s] on the response of the regulated . . . third party to the government action"). A plaintiff can nonetheless show causation when the regulated third party's decisions – which are part of the causal chain of injury – are not "'unfettered' in a way that breaks causation." *See Nw. Requirements Utilities,* 798 F.3d at 806 (citing *Lujan,* 504 U.S. at 562). However, "a causal chain does not fail simply because it has several links, provided those links . . . remain plausible." *Nw. Requirements Utilities,* 798 F.3d at 806 (internal quotations omitted).

The causal chain, here, flows from the CFO, through MAPCo and LastEnergy by requiring they produce more energy and sell it on the PJM wholesale markets, thereby driving down prices. While the conduct of MAPCo and LastEnergy is part of the causal chain of injury, the prime cause of ACES's injury is the CFO. MAPCo and LastEnergy have no "unfettered" discretion in a way that would avoid injury. *Id.* While, as here, "causation [would] ordinarily hinge on the response of the regulated . . . third party," *Lujan,* 504 U.S. at 562, the links in this case are guaranteed by the CFO, MAPCo and LastEnergy's contracts[7] with PJM. In other words,

[7] In the court below, the PSC challenged ACES's preemption claim by attributing any connection between MAPCo/LastEnergy and PJM to those companies' PJM contracts. (*R. 15-6*). But for purposes of standing "plausib[ility]" of the causal chain is all that matters. *Nw. Requirements Utilities,* 798 F.3d at 806.

the CFO is no less the cause of ACES's injury simply because it works through MAPCo and LastEnergy.

3. ACES's injury would be redressed by vacatur of the CFO

ACES can show redressability because, if the CFO were vacated, ACES would be relieved of the increased competition on the PJM wholesale market created by the CFO.

Redressability must amount to "the likely possibility of redress by a favorable decision." *Washington All. of Tech.* Workers, 518 F. Supp. 3d at 458 (citing *Lujan*, 504. U.S. at 560-61). Under the doctrine of competitor standing, vacatur of the governmental action that injuriously increases competition redresses the injury. *See e.g.*, *Washington All. of Tech Workers*, 518 F. Supp. 3d at 462 (finding redressability where federal agency program caused increase in number of immigrant-guestworkers who competed with certain domestic workers); *Louisiana EPA*, 141 F.3d at 367 (injury from "increased price competition . . . would be redressed by a favorable decision of this court vacating FERC's order."). Because the injury to ACES is simply the increased competition created by the CFO, vacatur of the CFO would redress the injury. *Louisiana EPA*, 141 F.3d at 367.

In sum, ACES can show each element of standing – injury-in-fact, causation, and redressability – because the CFO requires MAPCo and LastEnergy to injects unnecessary electricity supply into the PJM wholesale market, which will drive down the prices that ACES will have no choice but to compete with.

C. The Capacity Factor Order is field preempted because it takes aim at the FERC's jurisdiction and compels MAPCo and LastEnergy to sell additional electricity into PJM.

Because Congress has exhaustively regulated wholesale interstate sales of electricity, the PSC may not regulate in an attempt to force MAPCo and LastEnergy to participate in PJM's interstate markets more than they otherwise would.

Congress may implicitly preempt State law, the Supremacy Clause, Art. VI, cl. 2, and has so "field" preempted State regulation where "Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law." *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 163 (2016) (citation omitted). "In such situations, Congress has forbidden the State to take action in the *field* that the federal statute pre-empts." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 377 (2015). Congress's purpose is "the ultimate touchstone in every pre-emption case." *Hughes*, 578 at 163 (citing *Altria Group, Inc. v. Good,* 555 U.S. 70, 76 (2008)). The touchstone here, the FPA, "allocates to FERC exclusive jurisdiction over 'rates and charges . . . received . . . for or in connection with' interstate wholesale sales." *Id.* (quoting 16 U.S.C. § 824(d)(a)). When a federal statute is crafted "with meticulous regard for the continued exercise of state power," it is essential to consider whether the aim of the State law targets the area left to federal governance. *Oneok*, 575 U.S. at 385. In areas subject to dual regulation by FERC and states, "the significant distinction for purposes of pre-emption . . . is the distinction between measures *aimed directly at interstate purchasers and* wholesales for resale, and those aimed at' subjects left to the States to regulate." *Id.* (emphasis in original) (internal quotations omitted).

In the FPA, Congress has taken meticulous care in crafting the division between federal and state jurisdiction, leaving "no room either for direct state regulation of the prices of interstate wholesales of energy, or for state regulations which would indirectly achieve the same result." *Hughes,* 578 at *163.* The FPA leaves, however, certain regulation "beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale' – most notably, any retail sale – of electricity." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 265 (2016) (quoting 16 U.S.C. § 824(b)). "States, of course, may regulate within the domain Congress assigned to them even

when their laws incidentally affect areas within FERC's domain." *Hughes*, 578 U.S. at 164. Yet, "[S]tates may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates." *Id.*

1. The CFO is preempted because it takes aim at sales on PJM, which is FERC's exclusive domain.

Because the FPA lays out a clear jurisdictional divide between state and federal powers, it is proper – to discern preemption – to consider the target at which a State action aims. *Oneok,* 575 U.S. at 385. The CFO is field preempted because it clearly and improperly "aims" at PJM – FERC's jurisdictional turf – by compelling MAPCo and LastEnergy to sell more energy into PJM's interstate auctions than the utilities otherwise would, i.e., dictating what happens on the PJM markets. Only FERC may regulate "'rates and charges ... received ... for or in connection with' interstate wholesale sales." *Hughes*, 578 at 163 (quoting 16 U.S.C. § 824(d)(a)). The Vandalia PSC can have intended no other result. Vandalia's "legitimate" end is to promote the coal industries in Vandalia, (*R. 4, 7-9*), but it does so by trying to control what happens on PJM, which "intrude[s] on FERC's authority over interstate wholesale rates."

The CFO cannot be aimed at anything other than compelling MAPCo and LastEnergy to bid into PJM because those utilities receive nothing unless they bid, and the CFO does nothing to keep coal plants funded and running unless the utilities bid. Thus, the CFO is preempted because it takes aim at what happens on PJM's markets, which is exclusively FERC's domain. *See Oneok,* 575 U.S. at 385. Further, no matter whether the utilities were required to bid energy into by their contracts with PJM, they always would because the CFO guarantees them a return if – and only if – they bid.

II. The CFO is preempted because it compels MAPCo and LastEnergy to participate in PJM markets more than they otherwise would and compensates MAPCo and LastEnergy any time they bid into PJM.

While the FPA ostensibly provides a "bright line easily ascertained . . . between state and federal jurisdiction," *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964), three courts addressing similar state subsidies have articulated tests of whether a state has crossed this divide in subtly different ways. Vandalia's CFO fails all three.

First, in *Electric Power Supply Assoc. v. Star*, the court drew that line "between state laws whose effect depends on a utility's participation in an interstate auction (forbidden) and state laws that do not so depend but that may affect auctions (allowed)." 904 F.3d 518, 523 (7th Cir. 2018). Under the *Star* rule, the CFO is preempted because Vandalia conditions its benefit – the ability to recover losses from rate payers – on utilities' attempt to sell into PJM's wholesale auctions, which is "forbidden." *Id.*; (*R. 9*).

Second, in *Coal. for Competitive Elec., Dynergy Inc. v. Zibelman*, the court reiterated that what matters is whether a state program "compel[s] wholesale market participation." 906 F.3d 41, 52 (2d Cir. 2018); (relying on *Rochester Gas & Elec. Corp. v. Pub. Serv. Comm'n of State of N.Y.*, 754 F.2d 99, 102 (2d Cir. 1985) (finding similar state scheme not preempted because it did not compel wholesale market participation)). Under the *Zibelman* rule, the CFO is preempted because – as discussed – the CFO compels MAPCo and LastEnergy to sell into PJM because that is always the economical decision (even if the utilities were not so obliged by contract).

Third, the *Hughes* court articulated a different rule: a state law is not preempted "[s]o long as a State does not condition payment of funds on [bids] clearing the auction." 578 U.S. at 166. In *Hughes*, the preempted Maryland program guaranteed that selling utilities were compensated at a set rate any time they cleared the market interstate auction by awarding them a

set rate no matter the clearing price. While the Vandalia CFO does not condition the state benefit on MAPCo and Last Energy *clearing* the market price, it does guarantee that MAPCo and LastEnergy are compensated – win or lose a bid – so long as they *participate* in the market. Thus, the Vandalia CFO achieves the same result as the preempted Maryland program, which intruded on FERCs exclusive jurisdiction. Further, in *Hughes*, the court held that "States interfere with FERC's authority by disregarding interstate wholesale rates FERC has deemed just and reasonable, even when States exercise their traditional authority over retail rates or, as here, in-state generation." *Id*. That is exactly what Vandalia has done: compensating utilities any time they bid and, thereby "disregarding interstate wholesale rates FERC has deemed just and reasonable." *Id*. Thus, the CFO is field preempted under *Oneok* because it takes aim at PJM – FERC's jurisdiction – and because it fails each test courts have devised to show that a state subsidy program crosses the jurisdictional division that Congress envisioned in the FPA.

D. The NTPA violates the Supremacy Clause because it is preempted by FERC's Order 1000 since FERC has exclusive jurisdiction over interstate electricity transmission and since the NTPA frustrates FERC's purpose of setting "just and reasonable rates."

The NTPA frustrates the purpose of FERC's Order 1000 by intruding on FERC's exclusive jurisdiction over the interstate transmission of electricity and leading to unjust and unreasonable rates. The NTPA is preempted by FERC's Order 1000 for two reasons. First, "field preemption" must be inferred because the Mountaineer Express is a Market Efficiency Project, thereby giving FERC - rather than the PSC - jurisdiction over construction permitting for the project. Second, "conflict preemption" must be inferred because the NTPA disallows FERC from setting just and reasonable electricity rates.

The Supremacy Clause of the U.S. Constitution, found in Article VI § 2 states that the federal law "shall be the Supreme law of the land." Federal law that occupies the same field or

conflicts with State law may expressly or impliedly preempt such State law. However, State laws are not presumed to be preempted unless doing so was the clear purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Whenever Congress does not expressly preempt State law, preemption may be inferred by the court in three instances.

First, courts may infer "field preemption" when Congress assumes a field (such as interstate electricity transmission) where Federal interest is so dominant, that the Federal system is presumed to occupy the whole field – thereby precluding State laws in that field. *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990). Second, courts may infer "conflict preemption" when it is impossible to comply with both a Federal and State law. *Freightliner Corp. Myrick*, 514 U.S. 280, 287 (1995). Lastly, courts may likewise infer conflict preemption when State law "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives." *Id.*

1. FERC maintains jurisdiction over construction permitting for the Mountaineer Express and the PSC may not require ACES to obtain a CPCN to exercise eminent domain.

The issue regarding "field preemption" of the NTPA is guided by two central questions: (1) Which entity determines who constructs an interstate project and (2) which entity determines where that project is constructed? In this case, FERC maintains jurisdiction to decide which transmission provider will construct the Mountaineer Express while the PSC maintains jurisdiction to decide where (with notable limitations regarding eminent domain).

States retain the authority to regulate "facilities used for the generation of electric[ity,] . . . local distribution or only for the transmission of electric[ity] in intrastate commerce." (which would imply that ROFRs for intrastate transmission projects is acceptable). 16 U.S.C. § 824(b)(1). Nevertheless, Congress expressly gave FERC jurisdiction to regulate "all facilities for

such interstate transmission or sale of electric energy." 16 U.S.C. § 824(b)(1); see also *Nat'l Ass'n of Regul. Util. Comm'rs v. FERC*, 964 F.3d 1177, (D.C. Cir. 2020). FERC maintains authority over which transmission provider will construct "Market Efficiency Projects." *LSP Transmission Holdings II, LLC v. FERC*, 45 F.4th 979, 984 (D.C. Cir. 2022).

In *LSP Transmission Holdings II*, the D.C. Circuit Court of Appeals held that FERC had the authority to select which transmission providers would construct "Market Efficiency Projects" because they were "projects that, through congestion relief, provided widespread economic benefits." *Id.* at 985. To qualify as a Market Efficiency Project, a project had to be beneficial to the regional power grid, cost at least $5 million, and devote fifty percent or more of the project costs to facilities with voltages of at least 345 kV. *Id.*

Ordinarily, states may also regulate "the location and construction of electrical transmission lines" within their borders. *Ill. Com. Comm'n v. FERC*, 721 F.3d 764, 773 (7th Cir. 2013). However, Order 1000 emphasizes that it would be impermissible for a state to require a transmission developer to demonstrate that it has or can obtain a certificate to exercise the right to eminent domain within the state. *MISO Transmission Owners v. FERC*, 819 F.3d 329, 337 (7th Cir. 2016); *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Public Utilities, Order No. 1000-A, 139 FERC ¶ 61132 (hereinafter "Order No. 1000") at P 441, 77.

Here, the Mountaineer Express is a Market Efficiency Project. The transmission lines pass through multiple states in a National Interest Electricity Transmission Corridor, or an area FERC deems to have historically high rates of congestion. PJM benefits from the Mountaineer Express because the line will expand its output capacity in a manner that will reduce congestion in the region. The Mountaineer Express is predicted to cost $1.7 billion and will transmit 500

kV of electricity running from Pennsylvania to North Carolina. (*R. 6*). Therefore, the Mountaineer Express meets the required elements to be considered a Market Efficiency Project.

As a Market Efficiency Project, FERC retains jurisdiction to determine which transmission provider may construct the Mountaineer Express. Accordingly, PJM granted ACES - not another transmission provider - the right to construct the transmission line. (*R. 6*). Any interference with this permit, including the NTPA is preempted by Order 1000 because FERC (and by relation, PJM) maintains jurisdiction over the permitting of the Mountaineer Express.

The PSC does maintain its authority over the siting of the Mountaineer Express through its borders. Order 1000 expressly states that incumbents like LastEnergy and MAPCo need not allow ACES to use their existing rights-of-way that run adjacent to the proposed location of the Mountaineer Express. *See* Order No. 1000 at P 255, 98. However, Order 1000 also states that state agencies such as the PSC may not require ACES to obtain a CPCN to exercise powers of eminent domain. *MISO Transmission Owners,* 819 F.3d at 337; Order No. 1000 at P 441, 77.

If the NTPA is upheld, the PSC may arbitrarily deny ACES (or any nonincumbent) from ever constructing the Mountaineer Express. LastEnergy and MAPco would have eighteen months to divest ACES from its investment in planning the Mountaineer Express by preventing ACES from constructing it. Then, even if the incumbents chose not to exercise the ROFR, the PSC may deny ACES' CPCN – thereby controlling whether the Mountaineer Express is constructed at all. This unfettered discretion cannot go unchecked. The NTPA must be found unconstitutional under the Supremacy Clause.

2. The NTPA conflicts with FERC's and Order 1000's Congressional purpose.

Even if this Court does not find the NTPA unconstitutional through field preemption, it must do so through conflict preemption. The NTPA frustrates FERC's purpose to set just and reasonable electricity rates by granting ROFRs when Order 1000 expressly abolished them.

Congress has mandated that FERC must set "just and reasonable rates" and has chosen to do so by promoting competition that fosters innovative solutions to meet America's growing demand for power 16 U.S.C. § 824d(a); *Elec. Power*, 577 U.S. at 267. FERC's Order 1000 required RTO's to "produce a regional transmission plan to identify transmission alternatives that resolve the region's needs more efficiently or cost-effectively than would uncoordinated local utility proposals." *See Old Dominion Elec. Coop. v. FERC*, 898 F.3d 1254, 1258 (2018). Order 1000 also abolished ROFRs because they led to rates that were unjust and unreasonable. Order No. 1000; (*R. 9*).

FERC explained that it was not in the economic self-interest of incumbent facilities to allow nonincumbents to construct transmission lines within a state, even if doing so "would result in a more efficient or cost-effective solution . . ." to constructing such transmission lines. Order 1000; (*R. 9*). However, Order 1000 did not expressly prohibit states from passing ROFR statutes. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 312 (5th Cir. 2022).

Here, the NTPA will lead to the same negative effects that FERC considered when it eliminated federal ROFRs. It would not be in LastEnergy or MAPCo's economic self-interest to allow ACES to construct the Mountaineer Express – even though ACES is the entity that has put time and resources into planning the transmission line in an efficient way. As such, in any instance where a transmission line is being proposed in Vandalia, LastEnergy and MAPco will likely divest nonincumbents from their opportunity to construct vital projects to America's energy infrastructure merely to prevent creating any new incumbents in Vandalia.

As FERC has already identified in its elimination of federal ROFRs, this inefficient dynamic will lead to rates that are unjust and unreasonable. (*R. 9*). Therefore, the NTPA unconstitutional under the Supremacy Clause because it "stands as an obstacle to the accomplishment and execution of the [Congress'] full purposes and objectives[]" for FERC to set just and reasonable rates. *Freightliner Corp.*, at 287.

E. The NTPA violates the dormant Commerce Clause because (1) it is facially discriminatory, (2) it has a discriminatory purpose, and (3) it has a discriminatory effect – with its burden on interstate commerce outweighing its local putative benefits.

The NTPA is facially discriminatory, has a discriminatory purpose, and has a discriminatory effect. Furthermore, the NTPA's burden on interstate commerce far outweighs any putative benefits Vandalia may have received from its passage. Therefore, the NTPA is unconstitutional under the dormant Commerce Clause.

The Commerce Clause of the U.S. Constitution, found in Article I § 8 grants Congress the power "to regulate commerce . . . among the several states . . .." In interpreting the Commerce Clause, courts have inferred a restriction on state power known as the dormant Commerce Clause. Under the dormant Commerce Clause, a State is prohibited from (1) discriminating against or (2) unduly burdening interstate commerce.

In analyzing the dormant Commerce Clause, a court must apply strict scrutiny to a State law in two instances. First, a court may strike "facially discriminatory" State laws - or ones that expressly mandate differential treatment between in-state and out-of-state economic interests - are subject to strict scrutiny by a court. *Granholm v. Heald*, 544 U.S. 460, 466 (2005). Second, a court must apply strict scrutiny if a law controls commerce occurring wholly outside the boundaries of the State. *Id.*; *See Brown-Forman Distillers Corp. v. NY State Liquor Auth.*, 476 US 573, 579 (1986). For the law to be held valid under strict scrutiny, the State must

demonstrate that the law (1) has a non-protectionist purpose and (2) that there are no less discriminatory means to achieving that purpose. *Granholm* at 468.

A court may also hold a State law as unconstitutional under the dormant Commerce Clause if the effect or purpose of the law is to burden interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Some courts apply strict scrutiny in these instances, but in others, courts use a balancing test evaluating whether the burden on interstate commerce is "clearly excessive in relation to the putative local benefits." *Id.*

1. The NTPA is facially discriminatory because it discriminates against transmission providers that do not have a physical presence within Vandalia.

The NTPA is discriminatory because it favors incumbents like LastEnergy and MAPco, which have a physical presence in Vandalia, over nonincumbents like ACES which do not. Therefore, the NTPA should be struck down as unconstitutional under the dormant Commerce Clause. Most circuits have rejected the argument that an otherwise discriminatory law could survive a strict scrutiny analysis under the dormant Commerce Clause if discrimination was based on an entity's presence in a State rather than its incorporation within a State. *Lake*, 48 F.4th at 323. A law that "discriminates among affected business entities according to the extent of their contacts with the "local economy" may violate the Commerce Clause." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 42 (1980).

The U.S. Supreme Court has held that a State law requiring a physical presence in a State before doing business there was unconstitutional under the dormant Commerce Clause. *Granholm*, 544 U.S. at 475; *Lewis*, 447 U.S. at 42. Currently, only the Eighth Circuit challenges this rule. *LSP Transmission Holdings, LLC v. Sieben*, 954 F.3d 1018, 1028 (8th Cir. 2020) (holding that a physical presence requirement was acceptable if there was only a 90-day window before a transmission provider could construct a line in the State).

Almost parallel to the case at bar however is *NextEra Energy Capital Holdings, Inc. v. Lake*. In that case, Texas passed SB 1938, which gave incumbent transmission providers a ROFR to construct transmission lines in the state – the same as Vandalia's ROFR statute. *Lake* 48 F.4th at 310. The only difference was that SB 1938 did not include a time where an incumbent could no longer exercise its ROFR. *Id.* The Fifth Circuit held SB 1938 unconstitutional as discriminatory under the dormant Commerce Clause, holding that "limiting competition based on the existence or extent of a business's local foothold is the protectionism that the Commerce Clause guards against." *Id.* at 325.

Here, the NTPA is unconstitutional for the same reasons as SB 1938. The NTPA only allows transmission providers "owning, operating, maintaining, or controlling in this state equipment or facilities for furnishing electric transmission service in Vandalia" with the right to exercise a ROFR. (*R. 10*). The effect of the NTPA is to allow only transmission providers with a presence in the state the exclusive right to build transmission lines for a period of eighteen months. For the reasons FERC provided – that it would be uneconomical for incumbents to allow nonincumbents to construct lines within the state – it is almost certain that LastEnergy and MAPco will exercise their ROFR to avoid competition. *See* Order No. 1000; (*R. 9*).

The NTPA is exactly the kind of authoritative overreach courts have repeatedly struck down under the dormant Commerce Clause. Therefore, the NTPA is unconstitutional because it discriminates against entities that do not have a presence within Vandalia.

2. The purpose of the NTPA could burden interstate commerce.

Without opportunity for discovery, there is insufficient evidence to strike the NTPA as unconstitutional because its purpose was to burden interstate commerce. However, there is sufficient evidence to survive the PSC's motion to dismiss because the purpose of the NTPA

could plausibly be to burden interstate commerce. Vandalia passed the NTPA in direct response to Order 1000's elimination of federal ROFRs, knowing that the reasoning behind that Order 1000 was because ROFRs burdened interstate commerce. (*R. 9*).

Under *Pike*, a State law may be unconstitutional where its purpose is to burden interstate commerce. 397 U.S. at 142. However, this is a fact specific determination and not a matter of law that can be decided by an appellate court without a record before it. *Lake*, 48 F.4th at 327. However, all that is required for a party to survive a motion to dismiss and to proceed with discovery is for it to state a plausible scenario by which a law's purpose could have been to burden interstate commerce. *Id.*

In *C&A Carbone v. Town of Clarkstown*, the U.S. Supreme Court found that a local ordinance requiring citizens to dispose of trash at a specific waste facility in the town was likely unconstitutional. 511 U.S. 383, 387 (1994). While the Court found that the law was not discriminatory on its face, its purpose was to discriminate to the benefit of one particular waste facility. *Id.* Even though the Court did not have the record available to strike down the law, it remanded the case to the district court for discovery. *Id.*

Here, the NTPA was "a direct response to Order 1000 and its elimination of "a federally recognized [ROFR]." (*R. 9*). The NTPA's purpose was to revive ROFRs within the state where they were eliminated by FERC for a stated reason. Order 1000 expressly stated that the reasoning behind eliminating federal ROFRs was because it led to unjust and unreasonable rates caused by lack of competition and innovation in the construction of transmission lines. *See* Order No. 1000; (*R. 9*). Vandalia knew that passing the NTPA would lead to a lack of competition for incumbents – even when it would burden interstate commerce. Yet, Vandalia passed the NTPA anyway, with this discriminatory purpose in mind.

ACES does not ask this Court to strike down the NTPA for having a discriminatory purpose. Rather, on this contention alone, it asks the Court to remand to the district court to allow for proper discovery so that a record can be produced that will answer the question as to whether Vandalia had a discriminatory purpose when it passed the NTPA.

3. The NTPA has a discriminatory effect and its burden on interstate commerce clearly exceeds its local putative benefits.

The NTPA has a discriminatory effect on nonincumbents because they will no longer be able to construct transmission lines for eighteen months when they would otherwise be able to do so. Likewise, the cumulative effect of the NTPA and the precedent it sets clearly exceeds any local benefit Vandalia receives from its passage.

Under *Pike*, when a State law incidentally burdens interstate commerce, a court must balance that burden with the local putative benefits that result from the law. 397 U.S. at 142. In *Pike*, the U.S. Supreme Court struck down a non-discriminatory Arizona law requiring cantaloupes within the State to be packaged within the State. *Id.* at 146. In effect, the law would have required a company to build a $200,000 facility to continue selling its product within Arizona. *Id.* at 140. The *Pike* Court recognized the legitimate interest of having cantaloupes identified as coming from Arizona but determined that it was clearly outweighed by the excessive impact that it would have on interstate commerce. *Id.* at 142. Therefore, the law was held as unconstitutional under the dormant Commerce Clause. *Id.*

In *Lake*, the Fifth Circuit held SB 1938 (granting a permanent ROFR to incumbents in Texas) as having a discriminatory effect on interstate commerce. 48 F.4th 306, 327-28. The court recognized Texas's stated benefit that having incumbents construct transmission lines would promote reliability. *Id.* at 327. However, the court noted that FERC had previously rejected this argument, stating that all transmission providers had requirements regarding

reliability and that nonincumbents provided reliable service prior to the passage of SB 1938. *Id.* Therefore, the court held that the Appellant made a plausible case that SB 1938's burden on interstate commerce outweighed its local benefit. *Id.* at 328.

Here, the discriminatory effect would be the same as in *Lake*; nonincumbents will be unable to construct transmission lines – even if the ban is for only a period. Therefore, this Court must balance the NTPA's burden on interstate commerce with its benefit to Vandalia.

The NTPA burdens interstate commerce in three ways. First, the NTPA sets bad precedent that, if followed, will defeat the purpose of FERC's elimination of federal ROFRs. If every State passed statutes granting ROFRs to incumbents - which would be in every State's economic interest - then there would have been no reason for FERC to eliminate them in the first place. Second, the NTPA acts as a disincentive for nonincumbent transmission providers to consider innovative solutions to constructing transmission lines. ACES and other nonincumbents would therefore have no drive to continue organizing and planning solutions to transmit electricity in more efficient ways because any line they propose through Vandalia could be taken out from under them. Lastly, the NTPA, if upheld, limits FERC's jurisdiction to select transmission providers to construct interstate transmission lines. If Vandalia can assert its dominance over FERC by allowing its incumbents to have a ROFR over nonincumbents for interstate projects, nothing can stop Vandalia from doing the same for every interstate transmission line – even those that would have a great benefit to America's energy infrastructure.

ACES recognizes two putative benefits to the NTPA. First, the NTPA may promote reliability as to who is constructing lines within Vandalia.[8] Second, the NTPA could promote giving business to Vandalia's incumbents, which both operate coal fired power plants within the

[8] Though FERC has already dismissed this as a recognized benefit. *Lake*, 48 F.4th at 328.

Vandalia. Perhaps, by granting its incumbents ROFRs, Vandalia may preserve the coal industry within the state and create jobs – even though any such benefit would be speculative.

In assessing these burdens and benefits, the most logical conclusion is that the NTPA's burden to interstate commerce is extreme in comparison to the local benefits. Therefore, the NTPA is unconstitutional for having a discriminatory effect under the dormant Commerce Clause.

VI. CONCLUSION

Legitimate as Vandalia's protective ambitions may be, it may not prop up its coal industries or incumbent utilities by treading where only FERC may go. In the CFO, Vandalia hopes to preserve its coal industries by dictating what happens in PJM's markets, a regulatory domain Congress expressly left to FERC – and only FERC. By forcing MAPCo and LastEnergy to incur a cost and then offering them only one means of recouping – by bidding into PJM – the CFO improperly aims its regulatory powers at PJM, depresses prices, and harms every competing seller in PJM – including ACES.

Likewise, the NTPA seeks to trample on FERC's congressional authority to control the interstate transmission of electricity. The NTPA in relation with the PSC's requirement that transmission providers obtain a CPCN, may arbitrarily bar nonincumbents from ever constructing lines in Vandalia. FERC recognized the flaw in having such unfettered discretion when it removed federal ROFRs, so Vandalia should not be allowed to sidestep FERC and Order 1000 to revive what was rightfully abolished.

For these reasons, this court must reverse the lower court's dismissals and vacate the CFO and the NTPA because both are counterproductive to Congress's vision of energy and transmission governance.

VII. CERTIFICATE OF SERVICE

Pursuant to Official Rule IV, *Team Members* representing Appalachian Clean Energy Solutions, Inc. 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. 2