C.A. No. 22-0682
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

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

vs.

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

Defendant/Appellee

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

BRIEF FOR THE APPELLANT

Team #21

Attorney for Appalachian Clean Energy Solutions, Inc.

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is an action challenging the actions of Appellee as preempted and in conflict with the Supremacy and dormant Commerce Clauses of the United States Constitution. The District Court had subject matter jurisdiction under 28 U.S.C § 1331 (federal question jurisdiction). This Court has jurisdiction of this appeal under 28 U.S.C § 1291, as the appeal is from a final judgment that disposes of all parties' claims. Final judgment was entered by the district court on August 15, 2022. Appellant timely filed their appeal of that judgment on August 29, 2022.

STATEMENT OF ISSUES PRESENTED

I. Under federal law does ACES have standing to challenge PSC's Capacity Factor Order when they have pled an injury in fact to a legally protected interest, causation of which is fairly traceable to PSC, and this caused injury is redressable by a particular relief?

II. Under the Supremacy Clause is PSC's Capacity Factor Order and Right of First Refusal preempted because Congress and the FERC have occupied the field of wholesale electricity rates regulation and the Order effectively puts an obstacle in front of the FERC achieving their goal?

III. Under the dormant Commerce Clause is PSC's Right of First Refusal unconstitutional because it discriminated against an out-of-state entity and unduly burdened the interstate market?

STATEMENT OF THE CASE

This case involves a dispute between Appalachian Clean Energy Solutions, Inc. ("ACES") and the Vandalia Public Service Commission ("PSC") over the proposed rough of transmission lines across Vandalia. (R. at 1). ACES is a global energy company engaged in the construction and

operation of electric generating plants and interstate electric transmission lines. (R. at 1). ACES was seeking to construct a large natural gas-fired electric generating plant in Pennsylvania. (R. at 1). The plan was for the plant to help ACES to sell into the regional wholesale electricity market (PJM Interconnection). (R. at 1). The line was intended to run from Greene County, Pennsylvania, to Wake County, North Carolina. (R. at 1). However, ACES plan intended the line to also cross through Vandalia. (R. at 1). In opposition to this plan the Vandalia Public Service Commission adopted a policy known as a "Capacity Factor Order". (R. at 1). This Capacity Factor Order requires the coal plants in Vandalia to run 75 percent of the time regardless of the availability of lower-cost supplies in the region and from the PJM Interconnection. (R. at 1). ACES also faced a challenge from the enactment of a right of first refusal provisions for electric transmission lines by the PSC. (R. at 2). This provision provides incumbent transmission owners in Vandalia with an exclusive right to build new transmission facilities within the state. (R. at 2). They incumbent owners have a period of 18 months to determine whether or not they want to build, and if they decide not to build a nonincumbent utility would have the right to build their line. (R. at 2).

ACES then brought suit for the challenges brought by the Capacity Factor Order and ROFR provision to the U.S. District Court of the Northern District of Vandalia. (R. at 2). PSC requested a motion to dismiss regarding both claims made by ACES. (R. at 2). The District Court granted both Motions to Dismiss in favor of PSC, and ACES then filed this appeal. (R. at 2).

SUMMARY OF THE ARGUMENT

This case is about a state legislature overstepping the bounds of their authority and in turn violating both the Supremacy Clause and the dormant Commerce Clause.

Appellee first attempted to dispose of Appellant's valid claim by arguing that they do not have standing to bring these claims. This argument has no merit as Appellant easily meets the

requirements for standing. Appellant rightly pled an injury in fact that was traceable to the actions of the Appellee and redressability or a non-speculative likelihood that the injury can be remedied. Once Appellant met these three requirements the lack of standing argument by Appellee must be disposed of by this Court.

Appellee continued their erroneous argument by bringing the defense that even if Appellant has standing, they do, the actions of the PSC and their Capacity Factor Order are not preempted by the Supremacy Clause of the United States Constitution. Again, Appellee's argument falls flat. An overview reading of Congress's enactment of the FPA and the creation of the FERC unequivocally displays that Congress intended to occupy the given field of wholesale electricity. Because the PSC's Capacity Factor Order is an obstacle to the FERC and Congress in general from achieving their goals the Capacity Factor Order is preempted by federal law.

Appellee next argued that the right of first refusal claims should be disposed of because there is no preemption and many other states have enacted similar legislation without objection by the FERC. Again, for the same reasons listed above, this argument is not in accord with the law. The Right of First Refusal provision by Vandalia stepped into the exclusive field of the federal legislature therefore field preemption applies. Additionally, the Right of First Refusal provision is conflict preempted. The provision stands as a direct obstacle to achieving the intended purpose of the federal law therefore preemption applies.

Finally, Appellee argued that the dormant Commerce Clause does not apply because there is no discrimination against out-of-state entities. The reliance on specific out-of-state entities is misplaced and does not get to the merits or purpose of the dormant Commerce Clause. The dormant Commerce Clause does not solely apply to shield out-of-state entities from discrimination, but rather it stands to prohibit burdens on interstate commerce as a whole. The lack of out-of-state

discrimination is not dispositive of the dormant Commerce Claims because the Right of First Refusal does in fact discriminate against an out-of-state entity AND unduly burdens interstate commerce.

ARGUMENT

I. Standard of Review

The Court of Appeals reviews de novo a district court's grant of a defendant's motion to dismiss, accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor. *Muto v. CBS Corp.*, 668 F.3d 53, 56 (2d Cir. 2012). A FRCP 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted may only be granted where the complaint fails to allege facts in support of a claimed legal violation. *Whitehead v. Becton*, 1996 U.S. App. LEXIS 34422 (D.C. Cir. 1996).

II. Standing to challenge Capacity Factor Order

In order to have standing to challenge the Capacity Factor Order, ACES must satisfy three requirements. As stated in *Allco Fin., Ltd. v. Klee*, 861 F.3d 82, 95 (2d Cir. 2017), a plaintiff "…must demonstrate '(1) injury-in-fact, which is a concrete and particularized harm to a legally protected interest; (2) causation in the form of a 'fairly traceable' connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury can be remedied by the requested relief.'"

In determining an injury-in fact the court will look for, "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *PPL EnergyPlus, LLC v. Solomon*, Civil Action No. 11-745, 2011 U.S. Dist. LEXIS 120748 (D.N.J. Oct. 19, 2011). The injury-in-fact in this case would be the detriment to the operation and construction of the Rogersville Energy Plant. If the Capacity Factor Order were to

stand, ACES would have to not only dramatically increase their construction costs, but they may be prevented from even building and operating the plant at all. The Capacity Factor Order would cause ACES to potentially bargain with individual landowners and enter into private contracts, which would greatly hinder the construction and operation of their plant. The extent of the injury-in-fact is immaterial, but ACES need only show an "identifiable trifle" of harm. *Id*.

In looking at causation, it has been determined that this element requires "that the injury is fairly traceable to the plaintiffs' action and not the result of the independent action of a third party." *Id*. This element would also be satisfied in the case at bar through the direct relation of the injury to the Rogersville plant and the upholding of the Capacity Factor order. This order would directly result in the aforementioned injuries if upheld. By requiring the maximum output of the Coal plants, the Order would dramatically alter the construction of the facility. The order itself, would not be reasonable to uphold as there has been evidence presented of the maximum capacity being unreasonable, when compared to previous historical outputs. Therefore, the injury-in-fact would be fairly traceable to the actions of the Vandalia Government and would satisfy the element.

The third requirement of standing would also be satisfied through the removal of the Capacity Factor Order. In order "[t]o satisfy the redressability requirement of Article III standing, the plaintiff must show that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Allco Fin., Ltd. v. Klee*, 861 F.3d 96. In the case at bar if the Capacity Factor Order were to be upheld it would more likely than not delay or prevent the construction of the plant. This would cause ACES to face great financial loss and potentially the entire plant from even being constructed. This would be redressed through the overturning of the order in favor of ACES.

III. PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is both field and conflict preempted.

The second issue on appeal is whether the PSC's Capacity Factor Order violates the Supremacy Clause of the U.S. Constitution because it is preempted by the action of the Federal Energy Regulatory Commission ("FERC") under the FPA. It is the Appellant's position that the Supremacy Clause applies, and PSC's Capacity Factor Order is preempted. It is evident from the extensive briefing at the outset of this case and on this appeal that ACES can, and has, set out facts in support of their claim that would entitle them to relief, therefore the granting of PSC's Motion to Dismiss was in error. *Thermos Co. v. Igloo Prods. Corp.*, 1995 U.S. Dist. LEXIS 18382, 1995 WL 745832 (N.D. Ill. Dec 13, 1995).

The Supremacy Clause establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the "Supreme Law of the Land", and thus take priority over any conflicting state laws. U.S. Const., art. VI, § 2. Traditionally, preemption by federal law can come in different ways. Express preemption results from an express Congressional directive ousting state law. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 112 S. Ct. 2031 (1992). Implied preemption results from an inference that Congress intended to oust state law in order to achieve its objective. *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S. Ct. 399, 404 (1941). Most importantly for our case is field and conflict preemption. Field preemption results from a determination that Congress intended to remove an entire area from state regulatory authority. *Fidelity Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 & *Pacific Gas Elec. Co. v. State Energy Resources Conversation & Dev. Comm'n*, 461 U.S. 190, 203-04, 103 S. Ct. 1713, 1721-22. Conflict preemption results from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143, 83 S. Ct. 1210, 1218 (1963).

The FERC receives its powers from the Federal Power Act ("FPA"). The FPA charges the FERC with undertaking "effective federal regulation of the expanding business of transmitting and selling electric power in interstate commerce." *New York v. FERC*, 535 U.S. 1, 6 (2002). Simply, the FERC regulates interstate transmission of electricity and the sale of electricity at wholesale in interstate commerce. 16 U.S.C. § 824(b)(1). Notably, the FPA assigned the FERC with the responsibility of ensuring that all rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission shall be "just and reasonable." *Id.* § 824d(a). To achieve "just and reasonable" wholesale rates, the FERC works to enhance competition and attempts to break down regulatory and economic barriers that hinder a free market in wholesale electricity. *Morgan Stanley Capital Group Inc v. Public Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 536 (2008).

However, states have retained jurisdiction over the retail sale of electricity and the generation, transmission, and distribution of electricity in intrastate commerce. 16 U.S.C. § 824(b)(1). In this grant of authority to the states, Vandalia created The Public Service Commission's ("PSC"). The PSC receives its broad grant of authority to set "just and reasonable" rates for the utilities subject to its jurisdiction comes from Title 24 of the Vandalia Code. *Vand. Code* § 24-2-3. In its capacity as the PSC, the Commission has implemented the Capacity Factor Order on May 15, 2022, which in relevant part, provided that public interest would be better served if LastEnergy and MAPCo managed their power supply portfolio in a manner that maximizes generation from their owned coal-fired power plants. Therefore, the PSC directed the energy companies to operate their coal-fired plants to achieve the capacity factor of not less than 75 percent, as measured over a calendar year. *See* Capacity Factor Order, p. 7.

The Capacity Factor Order and the action of the PSC is preempted by actions of the FERC because FERC action displays that the Congress has intended for the FERC to occupy the area of regulation of the wholesale market of electricity therefore the PSC Capacity Factor Order is field preempted subject to the holdings in *Fidelity Fed. Savs. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 & *Pacific Gas Elec. Co. v. State Energy Resources Conversation & Dev. Comm'n*, 461 U.S. 190, 203-04, 103 S. Ct. 1713, 1721-22. Additionally, the Capacity Factor Order is conflict preempted because the Vandalia state law is in conflict with FERC provisions.

There can be no serious argument made by Appellee's that the federal government has not occupied the field of regulation of the interstate wholesale market for electricity for decades. Courts have continuously made the finding that the FPA left "no power in the states to regulate sales for resale in interstate commerce." *FPC v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964). Indeed, numerous courts have held that the given field of wholesale electricity rates has been occupied by the FERC through its grant from Congress. *Appalachian Power Co. v. Pub. Serv. Comm'n of W. Va.*, 812 F.2d 898, 902 (4th Cir. 1987); *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986); *Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009). At the heart of the field occupation is the FERC's ability to regulate wholesale rates, therefore it follows that any impediments or obstacles to achieving this goal implies preemption. The given occupation of the field of wholesale electrical rates sets the framework for the state law to be in conflict with the existing federal legislation.

When evaluating whether a State law is preempted by a Federal statute or regulation, courts start with the assumption that State powers are not superseded by a Federal act unless that is the clear purpose of Congress. Conflict preemption may arise in two circumstances: from a direct

conflict between state and federal law, such that compliance with both is impossible ("direct conflict") or because state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ("obstacle preemption"). *Hillsborough County, Fla v. Automated Med. Labs., Inc*, 471 U.S. 707, 712, 105 S. Ct. 2371, 85 L.Ed.2d 714 (1985); *Columbia Venture, LLC v. Dewberry & Davis*, LLC, 604 F.3d 824, 829 (4th Cir. 2010) quoting *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287, 115 S. Ct. 1483, 131 L. Ed. 2d 385 (1995). Defining what is a sufficient obstacle is a matter of judgment to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. A state law may pose as an obstacle to federal purposes by interfering with the accomplishment of Congress's actual objectives, or by interfering with the methods that Congress selected for meeting those legislative goals. *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467, 478 (4th Cir. 2014) quoting *College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 596 (4th Cir. 2005).

In this case, when looking at the acts of Congress in creating the FERC it is evident that the purpose of Congress was to take matters effecting the wholesale electricity market out of the purview of state legislation. As seen above, To achieve "just and reasonable" wholesale rates, the FERC works to enhance competition and attempts to break down regulatory and economic barriers that hinder a free market in wholesale electricity. *Morgan Stanley Capital Group Inc.*, 554 U.S. 527, 536 (2008). From a plain reading of the FERC's goal achieving mechanism, it is evident that by requiring the two Vandalia utility providers to operate their coal-fired plants at no less than 75 percent the PSC order stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in giving the FERC the ability to regulate the market through competition and removing other impediments.

An illustrative case in this area comes to us from the 4th Circuit Court of Appeals, *PPL EnergyPlus, LLC v. Nazarian*. In *PPL EnergyPlus*, *LLC*, a Maryland program planned to subsidize the participation of a new power plant in the federal wholesale energy market ("Generation Order"). *PPL EnergyPlus*, *LLC*, 753 F.3d 467 at 471. A group of energy firms competing with the subsidized power plants in the interstate market brought suit under the contention the Maryland program was preempted under the FPA because of the grant of exclusive authority over interstate rates to the FERC. *Id.* The court concluded that the Generation Order by Maryland sought to regulate a field that the FPA has occupied. The court's reasoning for the finding of conflict preemption boiled down to the notion that "impact of state regulation of production on matters within federal control is so extensive and disruptive of" the PJM markets that preemption was appropriate. *Id.* at 478. This portion of the opinion is most relevant to the facts of our case. In the case before us, PSC Capacity Factor Order stands to disrupt and distort price signals within the PJM market because by requiring the coal-fired plants to run at 75 percent capacity there is no room for the market mechanisms to efficiently balance the market.

The Appellee's use, and the district court's reliance, on the "tether" to the wholesale market displayed in *Hughes v. Talen Energy Mktg., LLC*, but not in our cause was in error and not in accordance with the overarching law of preemption and federal law trumping state law. In *Hughes v. Talen Energy Mktg., LLC*, the Supreme Court held that Maryland's regulatory program was preempted by the FPA. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150 (2016). The Court reasoned that Maryland's regulatory program guaranteed a rate distinct from the clearing price for its interstate capacity sales to the PJM contrary to what the FERC had approved. *Id.* at 151. Essentially the Court held that Maryland's program disregarded the interstate wholesale rate FERC required. *Id.* Whatever factual distinction the lower court in our case wanted to draw was unneeded

and did not get to the legal merits of our case. The factual distinction of a lack of a "tether" does not change the analysis or that courts in the past have held with consistency that when a state law enters into a field that Congress has occupied that law is preempted, and more specifically if the state law stands as an obstacle to achieving the federal law's goal than it is preempted. *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan.*, 489 U.S. 493, 509, 109 S. Ct. 1262, 103 L. Ed. 2d 509 and *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373, 120 S. Ct. 2288, 147 L. Ed. 2d 352. By simply using the overarching legal principle and holdings from *Hughes* instead of getting bogged down in factual differences, this Court will avoid missing the forest by looking at the trees. Simply put, *Hughes* is good law and should be followed in our case because it displays field preemption and outlines the way this Court should rule regarding the Capacity Factor Order.

Not only has the FERC occupied the given field of wholesale rates in the electricity market, but they have also established the mechanism for regulating this field. The mechanism's goal is to enhance competition and remove economic and other barriers from the marketplace. PSC's Capacity Factor Order establishes an obstacle to the FERC's full purposes and goals and therefore preemption must be found.

IV. ROFR violating the Supremacy Clause and being preempted by Order 1000

In the case at hand, the District Court's denial of preemption for Vandalia's "Native Transmission Protection Act" was in error. The Act was passed in response to the passing of Order 1000 by FERC. Prior to Order 1000, tariffs allowed incumbent public utility transmission providers to exercise a federal right of first refusal. Under the right of first refusal the incumbent provider would hold priority status to choose whether or not to construct new electric transmission lines in their respective service territories. R. at 13. In passing Order 1000, FERC was looking to

"specifically 'direct public utility transmission providers to remove their [Open Access Transmission Tariffs] or other Commission-jurisdictional tariffs and agreements any provisions that grant a federal right of first refusal to transmission facilities that are selected in a regional transmission plan for purposes of cost allocation.'" R. at 14. After the passing of the Order, Vandalia enacted the "Native Transmission Protection Act" which granted incumbent transmission owners the exclusive right for 18 months to construct their transmission lines in Vandalia. R. at 9.

According to the Supreme Court, "[t]he Supremacy Clause makes the laws of the United States 'the supreme Law of the Land…'" and any state laws in conflict with federal law would be preempted under this clause. *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 162-63 (2016). In analyzing a case for preemption courts must look "into the scope of a [federal] statute's pre-emptive effect" and inquire into the purpose Congress has for enacting the statute. *Id* at 162-63. The two types of preemption that would apply to the case at hand would be field and conflict preemption. Field preemption is where "[a] state law is preempted where 'congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the states to supplement federal law.'" *Id* at 163. In looking at field preemption, "[a]ctual conflict between a challenged state enactment and relevant federal law is unnecessary to a finding of field preemption; instead, it is the mere fact of intrusion that offends the Supremacy Clause." *PPL EnergyPlus, LLC v. Nazarian*, 753 F.3d 467 (4th Cir. 2014). Conflict preemption is "where, under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. In the context of our case, one of the functions of FERC is to regulate "… electricity sales at wholesale, ensuring 'rates and charges made, demanded, or received… for or in connection with' such sales are 'just and reasonable.'" *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41, 46 (2d Cir. 2018).

Under field preemption, the ROFR provision enacted by Vandalia would be preempted. In enacting this provision, the government of Vandalia was stepping into the exclusive field of the government. While States may "retain jurisdiction over the retail sale of electricity and the generation, transmission, and distribution of electricity in intrastate commerce", they do not have any jurisdiction in the interstate transmission and sale of electricity in interstate commerce. R. at 13. Therefore, when the ROFR provision was enacted, it was encroaching into the exclusive field of the government. This provision would not only encroach on the construction and operation of the facility but also the competitive auction process that the FERC hoped to engage in for transmission lines. Much like in *PPL EnergyPlus LLC.*, the provision here would cause collision between the state and federal regulation and would ultimately lead to a determination that it was preempted by Order 1000. *Id* at 477.

Under conflict preemption, the ROFR provision would also be preempted as being in direct conflict with Order 100. For conflict preemption the "analysis is not a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives, but a focused inquiry into whether there exists an irreconcilable conflict between the federal and state regulatory schemes." *Cty. of Butte v. Dep't of Water Res.*, 13 Cal. 5th 612, 296 Cal. Rptr. 3d 649, 514 P.3d 234 (2022). In looking at the area of federal and state law in conflict, "[t]he Court expressly left open the viability of other measures to develop energy generation, such as 'tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." *Coal. for Competitive Elec.*, 906 F.3d 51. However, in passing Order 1000 Congress had the direct intention of removing state ROFR provisions and keeping the competitive auction as the way for companies to get transition lines built. Vandalia was in direct conflict with the Order in establishing their own ROFR that impedes the process built in by the federal government. The order stands as

a direct obstacle to achieving the intended purpose of the federal law. If Vandalia's provision were to be upheld it would directly contradict the express provisions of Order 1000.

V. Vandalia's statutory Right of First Refusal violates the dormant Commerce Clause of the United States Constitution.

The fourth issue on review is whether Vandalia's statutory ROFR violates the dormant Commerce Clause of the U.S. Constitution. It is ACES contention that the ROFR instituted by Vandalia violates the dormant Commerce Clause and is therefore illegal. The Constitution extends to Congress the "Power to regulate Commerce among the several States." U.S. Const. art. I, § 8, cl. 3. It is well settled that because Congress can regulate interstate commerce, the states cannot erect barriers to the free flow of that commerce. The dormant commerce clause is the negative implication of the commerce clause; the dormant clause prohibits the states from enacting laws that discriminate against or that unduly burden interstate commerce. For dormant commerce clause purposes, "discrimination" means treating in-state and out-of-state economic interests differently be benefitting the former and burdening the latter. *PacifiCorp v. Wash. Utils. & Transp. Comm'n*, 194 Wn. App. 571, 376 P.3d 389 (2016) ¶ 65. A dormant Commerce Clause challenge can be based on the text of the law, its effect, or its intent. *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007).

Vandalia's ROFR is an attempt to limit competition for local concern and benefit. Since the enactment of the FPA advances of technology have resulted in transmission grids that are now largely interconnected which means that any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce. *N.J. Bd. Of Pub. Utils. v. FERC*, 744 F.3d 74, 81 (3rd Cir. 2014). Therefore, transmission of energy [and building of transmission lines] is an activity particularly likely to affect more than one State, and its effect

on interstate commerce is often significant enough that uncontrolled regulation by the States can patently interfere with broader national interests. *Buck v. Kuykendall*, 267 U.S. 307, 377 (1983). In that vein, the dormant Commerce Clause applies because the connection and building of interstate electricity grids effects more than just Vandalia, but rather any state connected to that same grid. Simply, Vandalia cannot connect to interstate grids and then limit competition for the transmission lines that serve that entire grid. *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983).

In *NextEra Energy Capital Holdings, Inc. v. Lake*, the 5th Circuit Court of Appeals examined a case with a dormant Commerce Clause claim very similar to the case at hand. In *NextEra Energy*, the Texas legislature had enacted a ban on new entrants to the marketplace for the building of transmission lines that were part of multistate electricity grids. *NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 309 (5th Cir. 2022). The *NextEra Energy* court held that Texas' law prevented those without a presence in the state from ever entering the portions of the interstate transmission market that cross into Texas. *Id.* at 324. The court stated that the limiting of competition based on a preexistence of a business's local foothold is the exact type of protectionism that the Commerce Clause guards against therefore the Texas law was unconstitutional under the dormant Commerce Clause. *Id.* at 326. Obviously, our case is significantly similar factually. In both cases the state law had the effect of keeping state competitors from the marketplace. The lower court in our case reasoned that the 18-month incumbency requirement in our case was a distinguishing factor for why the holding in *NextEra Energy* could not be followed. This is flawed and ignores the holding and reasoning that the state law on its face and in its effect discriminates against out of state entities like ACES. The law makes it nearly impossible for new entities to enter the marketplace because the 18-month period is so

long that it creates uncertainty and risk that essentially derails a non-incumbent builder quest to secure financing.

The Appellee's argument that there is no discrimination of out-of-state entities because LastEnergy and MAPCo are not incorporated in Vandalia is equally less persuasive. Many courts have rejected this reasoning that a law can survive Commerce Clause scrutiny if many of the favored interests are incorporated somewhere outside the state. For example, Eleventh Circuit courts have explained if "place of incorporation alone" were controlling, "then a states dormant Commerce Clause liability would turn on the empty formality of where a company's articles of incorporation were filed, rather than where the company's business takes place or where its political influence lies." *Fla. Transp. Servs., Inc. v. Miami-Dade Cnty.*, 703 F.3d 1230, 1259 (11th Cir. 2012); *Walgreen Co. v. Rullan*, 405 F.3d 50, 58 (1st Cir. 2005). The fact that the two entities that are benefitted from the ROFR are out-of-state entities is not dispositive. There pre-existing presence displays that even though they are incorporated outside of the state they are very much doing business within the state lines of Vandalia.

Even if we were to look at the dormant Commerce Clause claim using the less deferential balancing test displayed in *Pike* the ROFR still violates the clause. In *Pike v. Bruce Church*, the Supreme Court created the test for state laws that do not facially discriminate against out-of-state interests and only incidentally affect interstate commerce. The Court reasoned that a state law will be upheld unless the burden it imposes on interstate commerce is "clearly excessive in relation to the putative local benefits" of the law. *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). In our case, there is no discernable local benefit that can be found that would require the substantial burden to be placed on interstate commerce. Appellee's themselves have stated that incumbent transmission grid operators are from out of the state so therefore is there any local benefit being

achieved from the ROFR? The ROFR simply burdens interstate commerce too greatly while providing little if any local benefit therefore it fails under the *Pike* test.

In sum, the electricity transmission industry is intimately involved with interstate commerce and state regulation in this field can have far reaching consequences affecting more than just the state in which the regulation is enacted. As the court in NextEra Energy wisely held when a state bans new entrants from entering the market the dormant Commerce Clause must be invoked. The mere fact that there is an 18 month period in our case is not dispositive and does not change the showing that interstate commerce is deeply effected by the ROFR. Additionally, Appellee's should not be able to advance the argument that there is no out-of-state discrimination simply because some of the incumbent providers are from outside of Vandalia. As displayed by case law, the place of incorporation is not what determines an out-of-state entity, but rather it depends on where those entities are actually doing business. Finally, even under the *Pike* balancing test the dormant Commerce Clause should still be invoked. There is no local benefit that can be seen and even if there was it does not shift the balance enough to allow for substantially affect on interstate commerce to continue. The ROFR falls within the purpose of the dormant Commerce Clause therefore the law must be struck down.

CONCLUSION

For all the preceding reasons, the decision by the lower court dismissing Appellant's claims for preemption under the Supremacy Clause and unconstitutionality under the dormant Commerce Clause must be overturned for further proceedings.