United States Court of Appeals
for the
Twelfth Circuit

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

v.

CHAIRMAN WILL WILLIAMSON,
COMMISSIONER LONNIE LOGAN, AND
COMMISSIONER EVELYN ELKINS, IN
THEIR OFFICIAL CAPACITIES,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF VANDALIA

BRIEF FOR PLAINTIFF-APPELLANT
APPALACHIAN CLEAN ENERGY SOLUTIONS, INC.

TEAM 10

Counsel for Plaintiff-Appellant

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INTRODUCTION

A successful and rapid clean energy transition is crucial to the fight against climate change. Companies like Appalachian Clean Energy Solutions, Inc. ("ACES") are at the forefront of this transition and are key actors in the U.S. effort to meet emissions reductions goals, build the necessary transmission infrastructure to connect new, cleaner energy sources to the broader electricity grid, and keep electricity prices low. Rather than join ACES in its efforts to push the clean energy transition forward, the Vandalia PSC is preventing progress in this transition by enacting and enforcing protectionist laws that slow the actions of developers like ACES and ultimately hurt the Vandalia economy.

The basic purpose of the Federal Power Act ("FPA") is to give the federal government exclusive authority to regulate the wholesale sale and transmission of power in interstate commerce. Meanwhile, Congress reserved oversight of retail electricity sales and distribution to regulation by the states. Commentators often describe the FPA as drawing a "bright line" between state and federal jurisdiction in this way. ACES operates in the competitive interstate tradition created by the FPA and refined by FERC Order 888 and 2000, both of which ultimately required transmission owning utilities to provide open, fair, and non-discriminatory access to transmission lines, thereby removing impediments to competition in the wholesale bulk power marketplace and enabling more efficient, lower-cost power to be delivered to electricity consumers. These orders also created the now well-known regional transmission organizations ("RTOs") and the independent system operators ("ISOs") that help make the competitive wholesale marketplace a reality.

The Vandalia PSC wants to have its cake and eat it too—it seeks to benefit from interstate commerce by allowing its utilities to sell and transport electricity into wholesale markets, while shielding those same utilities from the competition the FPA guarantees. Further, it is discriminating against out-of-state economic interests and infringing on FERC's federal authority. Energy law scholars argue that, "[a]s it stands, the FPA should catalyze the transition to the energy grid of the future, not impede it"—and that a wise and deep body of precedent already enables this outcome. Joshua Macey & Jackson Salovaara, *Long Live the Federal Power Act's Bright Line*, 134 Harv. L. Rev. 1360, 1365. By pursuing shortsighted protectionist policies that undercut both the FPA and core constitutional principles like the Supremacy Clause and the dormant Commerce Clause, the PSC forestalls the transition the law has put in motion. Upholding the district court's dismissal of this action would set a dangerous precedent, and this Court should reverse.

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331, which gives the United States District Courts "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." ACES's suit against the defendants is based on the Constitution and laws of the United States: in particular, it brings claims under the federal Constitution's Supremacy Clause, U.S. Const. art. IV, cl. 2; the Commerce Clause, U.S. Const. art. I, § 8, cl. 2; and the Federal Power Act, 16 U.S.C. §§ 791-825u.

This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1291, which gives the courts of appeals "jurisdiction of appeals from all final decisions of the district courts of the United States." The district court entered the order being appealed on August 15, 2022, and ACES timely filed its notice of appeal on August 29, 2022. The order below was final and disposed of all issues in the case by dismissing them.

ISSUES PRESENTED

1. Whether ACES, an independent electric power producer, has standing to challenge the State of Vandalia's Capacity Factor Order ("CFO"), which guarantees adjustable subsidies to ACES's direct competitors in wholesale auctions regulated by the federal government.

2. Whether Vandalia's Capacity Factor Order is preempted by the Federal Power Act, 16 U.S.C. §§ 791-825u, which reserves exclusive jurisdiction to regulate wholesale electricity rates to the federal government, when the order's subsidies operate exclusively through federally regulated auctions.

3. Whether a state law mandating that Vandalia's incumbent utilities can take over or delay an independent transmission provider's FERC-approved interstate transmission project is preempted by FERC Order 1000, which eliminated a federal version of the same "right" in an effort to spur competition in the interstate transmission markets pursuant to FERC's exclusive jurisdiction over interstate markets.

4. Whether the same state law providing Vandalia's incumbent utilities an eighteen-month period to take over or delay a FERC-approved interstate transmission project proposed by a non-incumbent company violates the dormant Commerce Clause of the U.S. Constitution.

STATEMENT OF THE CASE

I. Factual Background

ACES is a global energy company engaged in the construction and operation of electric generating plants and interstate electric transmission lines. ACES aims to build a large natural gas-fired electric generating plant in southwestern Pennsylvania, to sell into the regional wholesale electricity market, PJM Interconnection ("PJM"). It also intends to build a high-voltage transmission line (the "Mountaineer Express") from Greene County, Pennsylvania to

Wake County, North Carolina. The route of the proposed and FERC-approved transmission line crosses Vandalia.

ACES is facing two major roadblocks to achieving its goals. First, the Vandalia Public Service Commission ("PSC") has adopted a policy that requires coal plants within Vandalia to continue operating even if doing so may be uneconomical for ratepayers. This CFO requires coal plants to run 75 percent of the time, regardless of the availability of lower-cost power supplies in the region and from PJM. This decision effectively sets wholesale rates in violation of the FPA and distorts price signals in the PJM market, which makes it more difficult to build new capacity in the region. Second, the State of Vandalia has enacted a right of first refusal ("ROFR") for electric transmission lines that gives incumbent transmission owners in Vandalia an exclusive right to build new transmission facilities in the State. The exclusive right expires after eighteen months, after which a non-incumbent entity, like ACES, would have the right to build the transmission line. But under the State law as written, unless ACES acquires an existing incumbent transmission owner in Vandalia or waits eighteen months, it cannot build its proposed transmission line through Vandalia, which introduces enormous uncertainty into ACES's plans and likely makes the Mountaineer Express cost-prohibitive to build.

II. Procedural History

In light of these problems, ACES sued the PSC members in their official capacity in the U.S. District Court for the Northern District of Vandalia, seeking to invalidate the CFO and the statutory ROFR. The district court granted Defendants' motion to dismiss all of ACES's claims: its preemption challenge to the CFO under the Supremacy Clause, as well as its challenge of Vandalia's ROFR law under the dormant Commerce Clause and the Supremacy Clause.

SUMMARY OF THE ARGUMENT

First, ACES has standing to pursue its claim that the FPA preempts the Vandalia PSC's Capacity Factor Order. Standing doctrine is not intended to prevent courts from hearing claims that parties have been harmed by anti-competitive market measures. Here, the CFO's unlawful setting of wholesale electricity rates harms ACES's competitiveness, and vacating the order would redress ACES's injury.

Second, the FPA preempts the PSC's Capacity Factor Order. A suite of recent cases at both the Supreme Court and in the courts of appeals has addressed a number of scenarios featuring state regulations affecting the wholesale power market. Together, these cases clarify the line between lawful state regulation of power plants that merely *affect* the wholesale market and unlawful regulation that invades FERC's jurisdiction and sets wholesale rates. Because it requires generators to participate in FERC-regulated auctions to receive a state subsidy, the Capacity Factor Order runs afoul of Supreme Court precedent and crosses this line.

Third, Vandalia's NTPA creates a significant obstacle to FERC's implementation of Order 1000 and is therefore conflict preempted. Because FERC's explicit congressional purpose is to set just and reasonable rates in the electricity market and it selected the Mountaineer Express in a competitive bidding process to help it do so, the NTPA's eighteen-month ROFR undermines FERC's—and thereby Congress's—goals and is preempted.

Finally, the NTPA violates the dormant Commerce Clause because it discriminates against out of state actors, like ACES. Therefore, the NTPA is subject to strict scrutiny and the Vandalia PSC must demonstrate the law in question has a non-protectionist purpose and that there are no less discriminatory means for achieving that purpose, which it is unable to do. Even if the NTPA is not held to be discriminatory, the NTPA places an undue burden on interstate commerce that clearly exceeds the local putative benefits of the law. Therefore, the NTPA should be struck down as unconstitutional.

ARGUMENT

I. ACES has standing to challenge the Capacity Factor Order because it is concretely injured by PSC's preferential treatment of in-state coal plants in the wholesale market.

Standing doctrine works to avoid "an over-judicialization of the processes of self-governance" by preventing courts from weighing in before particularized conflicts arise on issues that should be handled by the legislative and executive branches. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881. The legislative and executive branches have already acted in this case, and a conflict has arisen. Because the Vandalia PSC has tilted the economic playing field away from its original balance and injured ACES's competitiveness in the PJM wholesale market, this Court can properly weigh in to review its actions and redress the harm done.

A. ACES has constitutional standing because the PSC's protectionist Capacity Factor Order injures its economic competitiveness in the PJM wholesale power market.

Standing under Article III of the Constitution requires injury-in-fact, causation, and redressability. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Appellate courts review dismissals for lack of standing *de novo*. *See, e.g.*, *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 95 (2d Cir. 2017). ACES's ability to compete in the PJM market, both for its existing power plants and its major planned investment in a new power plant, is severely and concretely threatened by the PSC's aggressive wholesale subsidy. By vacating the CFO, this Court can redress this harm.

First, ACES was injured-in-fact by the CFO because the rule harmed its economic competitiveness. An "injury-in-fact" requires a "concrete and particularized" harm that is "actual or imminent," not "hypothetical." *Lujan*, 504 U.S. at 560 (citations omitted). In a competitive economic context like the wholesale power market, it is "well-established" that injury-in-fact requires, first, a plausible allegation that an unlawful act provides the plaintiff's competitor with an economic advantage, and, second, that plaintiffs compete "in the same arena" as the party or parties unfairly advantaged. *See Citizens for Resp. and Ethics in Washington v. Trump*, 953 F.3d 178 (2d Cir. 2019) (quoting *In re U.S. Catholic Conference*, 885 F.2d 1020, 1029 (1989)). As a matter of economic logic, courts understand increased competition almost always to constitute an injury-in-fact to the party who must operate at a competitive disadvantage. *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010).

Here, the CFO injures ACES because it gives ACES's economic competitors a clear advantage in the same arena where the company competes directly. The CFO harms the competitiveness of both ACES's existing power generation in PJM and its proposed new investments. ACES owns generation assets throughout the Eastern Interconnect, including the 1,300-MW Franklin coal-fired power plant, which competes with the Vandalia coal plants subsidized by the CFO in PJM auctions. Problem at 5. Given that the bidding success of coal plants has been steadily declining for ACES's Franklin plant as well as the MAPCo and LastEnergy plants, and has resulted in a capacity factor below 63% for all these plants, Problem at 5-7, any auction into which the Vandalia plants are able to successfully bid may well come at ACES's direct economic expense by preventing the Franklin plant's bid from clearing the auction. That is a simple result of the competitive structure of the PJM energy auctions. And by requiring all five of Vandalia's coal plants to bid low enough, even if artificially, to underbid the market-clearing price 75% of the time—when, at cost, these plants only successfully bid on average around 50% of the time—the CFO substantially changes the competitive dynamics in the PJM region. Problem at 7.

ACES also has major new plans to build a new 1,800 MW gas-fired power plant within PJM that will substantially reduce its fleet's greenhouse gas emissions. Problem at 5. But this plant will cost $3.1 billion, an investment that will take many years of successful competitive operation to recoup. *Id*. ACES cannot predict the future to know how often the hugely subsidized Vandalia coal plants would underbid this new plant. As a result, the risk ACES assumes in constructing such a huge project in line with FERC's policy goal of opening the wholesale markets to competition increases massively. Because the CFO alters the competitive landscape in which ACES exists to compete, ACES has an injury in fact.

Second, the PSC's challenged conduct caused the injury to ACES because the unlawful feature of CFO—the fact that its subsidy is inextricable from FERC-regulated energy auctions—is exactly what alters the competitive dynamics ACES faces. Causation in the standing context requires that the alleged injury be "fairly traceable" to the challenged conduct. *Lujan*, 504 U.S. at 560. One could imagine a world in which ACES were only injured through a *lawful* state subsidy from the PSC to the coal plants. However, that is not possible here. As discussed in more detail in Section II of the Argument below, ACES challenges the CFO because it necessarily operates exclusively through the PJM energy auctions. Under the CFO, MAPCo's and LastEnergy's coal plants bid into these auctions at artificially low prices so they can clear the market 75% of the time, which their record shows they could not do at cost, and Vandalia ratepayers make up the difference between the plants' bid prices and their costs on a sliding scale. Problem at 7-9. But these plants can only sell wholesale power through the PJM auctions, necessarily injuring ACES's competitiveness as a merchant operator. *Id.* at 8. The PSC thus could not provide an adjustable subsidy to the Vandalia plants that would not create preemption problems by setting rates in the auction. Its unlawfulness under *Hughes v. Talen Energy Mktg.*, 578 U.S. 150 (2015), is exactly what makes the subsidy work to ACES's detriment. ACES's injury can thus be "fairly trace[d]" to the PSC's unlawful actions. *Lujan*, 504 U.S. at 560.

Third and finally, vacating the PSC's Capacity Factor Order would redress the injury it has caused to ACES by removing the unlawful competitive advantage the CFO confers on the Vandalia utilities. Redressability is simple in this case. For redressability to exist, each aspect of the relief requested must redress the injury alleged, and the likelihood that the remedy cures the harm must be "non-speculative." *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105-109 (1998). Here, the only aspect of relief sought would restore the competitive status quo ante envisioned by the FPA, curing the competitiveness injury ACES has sustained. And because ACES's injury-in-fact is the damage to its competitiveness itself—rather than some unsupported prediction that it will lose in specific future energy auctions to the subsidized coal plants—the relief sought is necessarily "non-speculative" because it will restore ACES's original competitive posture. *Id.*

B. The PSC's forward-looking findings of fact and ACES's lack of status as a ratepayer are irrelevant to the standing implied by the* Lujan *inquiry.

As courts have instructed on numerous occasions, standing requires only that the plaintiff allege facts supporting each element of the inquiry just discussed. Below, however, the PSC argued that its findings that Vandalia's coal plants would operate competitively 75% of the time under the CFO, as well as the fact that ACES is not a ratepayer funding the CFO's operation, somehow foreclose standing for ACES. Such arguments seem to be based on confident predictions of the future and a vague intuition that only in-state concerns are legally relevant.

These arguments fail because they stray far beyond the constitutional test for standing. The Constitution requires standing, *Lujan* describes what the Constitution demands, and *Lujan*'s progeny gloss this demand in different contexts. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154 (1997) (discussing statutory standing); *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016) (holding that a "bare procedural violation" without any concrete harm cannot confer standing). The PSC's forward-looking findings of fact are owed no deference, because standing is a "threshold" inquiry that depends only on what ACES alleges. *Lujan*, 504 U.S. at 568-69. (Indeed, if Vandalia's findings that its coal plants were economic at a sky-high 75% capacity-factor level were true, it would have little reason to promulgate the CFO at all). And, it almost goes without saying, the fact that ACES is not an in-state Vandalia ratepayer does not preclude it from being harmed by the PSC's anti-competitive actions in wholesale *interstate* commerce, which is what this case is about. These facts will persist, and the PSC can issue any findings of fact it wishes, but *Lujan* sets out the three requirements for constitutional standing and ACES meets them.

Courts have applied this principle in the wholesale power context numerous times to uphold standing for parties competitively injured by changed market structures. For example, in *Wabash Valley Power Ass'n v. FERC*, the agency predicted that a merger of two other power companies would not be unduly anti-competitive, but the plaintiff Wabash nonetheless had standing because its allegation that the merger harmed its own competitiveness constituted an injury-in-fact. 268 F.3d 1105 (D.C. Cir. 2001). As here, the defendant argued the injury was "speculative" because it had not yet materialized into specific financial losses, but the court found the competitive effects alleged were more than enough for standing. Similarly, in *La. Energy and Power Auth. v. FERC*, FERC contended that the wholesaler had not demonstrated that other firms *would* engage in predatory pricing due to the agency's action and raised its own allegations of fact pointing the other way. 141 F.3d 364 (D.C. Cir. 1998). The Court, through Judge Garland, held that the case must still proceed to the merits. In a complex and competitive wholesale power market, each party inevitably has a view of how the future will unfold. But where, as here, the *Lujan* elements are met and the market's competitive structure changed, the law does not allow a defendant's conclusory factual claims to close the courtroom door.

C. No prudential standing inquiry is necessary because ACES makes constitutional, not statutory, claims.

Beyond constitutional standing, courts sometimes require an additional measure of "prudential" or "statutory" standing to allow a plaintiff to proceed. *See, e.g.*, *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Such cases might raise a concern that, even though ACES has the "irreducible constitutional minimum" needed for standing, *Lujan*, 504 U.S. at 560, this Court must still apply an additional "zone of interests" test, *see Bennett v. Spear*, 520 U.S. 154 (1997), to determine whether ACES has sufficient standing. Even though ACES would easily pass any such test, any concerns that this Court must perform it all are unfounded because ACES makes constitutional, not statutory, claims.

Constitutional standing is all that is required here for the simple reason that ACES sues under the Constitution. *See* Problem at 2. The Supreme Court has made clear that "prudential" standing is an unnecessarily confusing label: the test has nothing to do with a court's prudence unrooted in any legal source. Instead, this form of standing applies only to "legislatively conferred cause[s] of action" and asks, using ordinary tools of statutory interpretation, whether the statute at issue means to allow plaintiffs to make claims like the one in question. *Lexmark*, 572 U.S. at 126 (citing *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 97 (1998). Such an inquiry is necessary in cases alleging direct violations of federal statutes like the Lanham Act, *Lexmark*, and the Federal Power Act, *see Nw. Requirements Utils. v. FERC*, 798 F.3d 786 (9th Cir. 2015).

The instant case, by contrast, features no claims that any federal statute was violated, and as a result only the constitutional-standing minimum is required. ACES claims only that the

PSC's actions violate the Constitution. *See* Problem at 2 (summarizing claims). And "prudential standing" concerns do not apply to constitutional claims; only constitutional standing does. Courts do not apply prudential-standing tests in preemption or dormant-commerce cases, and cases featuring prudential standing inquiries never exclusively feature constitutional claims. *Compare, e.g.*, *Allco Fin. Ltd v. Klee*, 861 F.3d 82 (2d. Cir. 2017) (analyzing only Article III standing in preemption case) and *Coal. for Competitive Elec., Inc. v. Zibelman*, 906 F.3d 41 (2d. Cir. 2018) (same), *with Bank of Am. Corp. v. City of Miami*, 581 U.S. 189 (2017) (applying prudential-standing test to Federal Housing Act claim) and *Bennett* (same for Endangered Species Act). As a result, ACES's passage of the *Lujan* test for constitutional standing is enough for standing, full stop.

II. The Federal Power Act preempts the PSC's Capacity Factor Order because the Order functions to set an interstate wholesale rate for electric power.

The Supreme Court minces no words on preemption under the FPA: "The FPA leaves no room either for direct state regulation of the prices of interstate [power] wholesales or for regulation that would indirectly achieve the same result." *FERC v. Electric Power Supply Association*, 136 S. Ct. 760, 780 (2016). States may regulate retail power sales, but they may not cross this "bright line" into control over the wholesale market. *Miss. Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 374 (1988). Because the Capacity Factor Order regulates wholesale prices by providing adjustable subsidies to Vandalia power plants so that their bids can always succeed in federally regulated wholesale auctions, it interferes in a field occupied by the FPA and must be struck down.

A. The PSC set a wholesale rate by conditioning subsidies to Vandalia's utilities on selling power into a FERC-regulated interstate auction.

The purpose of Congress is the "ultimate touchstone" in all preemption cases. *Altria*

Group, Inc. v. Good, 555 U.S. 70, 76 (2008). Thus, Congress's purpose in enacting the Federal Power Act governs this preemption case. Even as the energy market has transformed over time with technological and environmental changes, it has been well-settled for decades that Congress intended the FPA to reserve "plenary" and "exclusive" jurisdiction over wholesale sales of electricity in interstate commerce to FERC, while leaving local retail control to the states. *See, e.g.*, *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 956 (1986). FERC, for its part, must ensure just and reasonable rates in the interstate wholesale market, 16 U.S.C. § 824d(a), where "wholesale" means "sale of electric energy . . . for resale." 16 U.S.C. § 824(d).

In PJM's territory, FERC has determined that competitive energy auctions will result in just and reasonable rates. In these daily and hourly auctions, energy generators bid prices at which they can supply wholesale power; PJM then orders energy onto the grid from the lowest-cost set of generators that can match demand, which are all paid the market-clearing price. Problem at 3. FERC regulates these auctions extensively. *Id.* at 13. Because they constitute FERC's mechanism for setting just and reasonable wholesale rates, "[s]tates must not interfere with these auctions." *Elec. Power Supply Ass'n v. Star*, 904 F.3d 518, 518 (7th Cir. 2018) (citing *Hughes*). If they do, the FPA preempts them. *Id*.

The Supreme Court in *Hughes v. Talen Energy Mktg.*, 578 U.S. 150 (2015), recently provided the rule that governs this case amid the specifics of today's competitive wholesale market. In *Hughes*, Maryland attempted to encourage in-state wholesale generation by guaranteeing a pre-set rate to a new gas-fired power plant in the state. It guaranteed the rate indirectly through a state-mandated "contract for differences": the new plant would sell electric capacity into the wholesale market by bidding low in PJM auctions, and then Maryland forced its in-state utilities to pay the plant the difference between the eventual market-clearing price and the pre-set rate. However reasonable Maryland's policy goals in boosting in-state power plants, its method "invade[d] FERC's regulatory turf" by achieving a predetermined rate using the wholesale markets. *Id.* at 163. The Court held that any state power subsidy has a "fatal defect" that impermissibly "tether[s]" it to the wholesale market if it "condition[s] payment of funds" on a generator's bid successfully selling into a FERC-regulated auction. *Id.* at 166.

While Maryland's plant was new and Vandalia's are old, the PSC's Capacity Factor Order suffers from the "fatal defect" laid out in *Hughes* in every legally relevant respect and is therefore preempted by the FPA. Following the plain text in *Hughes*, the CFO "condition[s] payment of funds" on clearing a PJM auction in exactly the same way Maryland's scheme did: in both cases, a generator had to submit a bid clearing the auction in order to receive an adjustable, state-mandated subsidy. In Vandalia, all five coal plants subject to the CFO sell power exclusively in PJM auctions, and the CFO requires them to run at least 75% of the time. This mean they must also submit bids low enough to clear PJM auctions 75% of the time, even if those bids are lower than their cost of producing power—as the plants' past performance suggest they will often be. *See* Problem at 7. Then, if the market-clearing price is indeed lower than the plants' per-unit cost of production, Vandalia ratepayers will pay a subsidy to cover this difference and guarantee a rate at least as high as the production costs.

In short, both schemes unlawfully operate exclusively through the FERC-approved wholesale auction *to guarantee a rate that exists prior to the price set by the auction*, which is FERC's just and reasonable rate. *See* 16 U.S.C. 824(d). This is exactly "condition[ing] payment" to fulfill the pre-set rate on clearing the auction. In Maryland's case the price was a contractual constant while in Vandalia it is the cost of production at each coal plant, but in each case it is known to the parties involved before the auction occurs. Both schemes use a clear "if-then" conditional logic: *if* the generator bids low enough to clear the market, and *if* the market-clearing price is below the preexisting level, *then* the state will coerce a third party to reach a rate known before the auction. The FPA under *Hughes* preempts such rate-setting schemes. It makes no difference that this case features real-time energy markets while *Hughes* featured markets for future capacity. *Hughes*, 568 U.S. at 154. In each case, FERC uses identically structured auctions as the federal mechanism to set a just and reasonable rate, and in each case the state's scheme undermined FERC's rate.

B. The Capacity Factor Order is distinct in several key respects from state zero-emission subsidies that have been upheld under the FPA.

Despite *Hughes*, several cases have upheld state orders subsidizing legacy power plants in the face of FPA preemption challenges. *See Elec. Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018); *Coal. for Competitive Elec. v. Zibelman*, 906 F.3d 41 (2d Cir. 2018) (collectively, the "ZECs cases"). In *Star*, Illinois issued "zero emission certificates" (ZECs) to its legacy nuclear plants and required carbon-emitting plants to purchase these ZECs from the nuclear plants at a preset price. This price was based on the federal social cost of carbon, and could vary somewhat to keep power affordable if the wholesale price fluctuated. 904 F.3d at 520-24. In *Zibelman*, New York did the same thing. *See* 906 F.3d. 41-45. In each case, the court found the state ZECs schemes not to be preempted.

The PSC contends that, rather than being most closely analogous to the order struck down in *Hughes*, the Capacity Factor Order should be sustained because of its similarities with these acceptable state regulations. Problem at 15.

However, this argument fails, because the PSC's order bears several differences from the subsidies in the ZECs cases that go to the very heart of FPA preemption. The ZECs subsidies thus represent a couple of the "various other measures States might employ" permissibly under

Hughes to achieve their energy-regulatory goals without stepping into FERC's exclusive jurisdiction. The key differences are these: the schemes in the ZECs cases did not condition subsidies on participation in a FERC-regulated auction, were not adjustable to meet a pre-set rate, and—perhaps most tellingly—were later approved by FERC.

First, neither ZECs scheme mandated that generators participate in a FERC-regulated wholesale auction in order to receive a subsidy. Instead, the nuclear plants were free to either sell into auctions or seek out other private contracts under which to sell power. *See Star*, 904 F.3d 518, 523 ("To receive a credit, a firm must generate power, but how it sells that power is up to it. It can sell the power in an interstate auction but need not do so."). This is not true of MAPCo and LastEnergy in Vandalia. Per their "Fixed Resource Requirement" with PJM under the FERC-approved tariff, they must sell all power they produce in the FERC-approved auction. Problem at 8. They can only receive state subsidies to cover their costs when they do.

Second, neither ZECs subsidy was adjustable after the auction according to a price level set before the auction, as were both Maryland's and Vandalia's. *See Star*, 904 F.3d at 524. The ZEC subsidy amounts were by default prefixed. This was not true in *Hughes*, and it is not true in Vandalia: if a LastEnergy or MAPCo coal plant produces for $70/MWh and the PJM energy auction's market-clearing price is $50/MWh, the utility will get a $20/MWh subsidy. But if the clearing price is only $40, the subsidy will increase to $30. This matters because, by scaling its subsidy perfectly to ensure Vandalia's wholesale plants are always paid at least their predetermined costs of production, the PSC sidestepped FERC's method for wholesale rates and decided their own. *See Hughes*, 578 U.S. at 166 (describing how Maryland's program functioned to "disregard[] a wholesale rate required by FERC"). True, in the ZECs cases the fixed level of the ZEC could be periodically re-determined according to a range of factors, but not nearly as constantly or flexibly as the Vandalia subsidy. Sure enough, the ZECs courts rejected arguments that the ZECs subsidies were basically identical to the *Hughes* subsidy. *See Zibelman*, 906 F.3d at 51.

Lastly, and maybe most tellingly, FERC actually reviewed both the Illinois and New York schemes and decided that neither overstepped the state's authority. *See Star*, 904 F.3d at 522; *Zibelman*, 906 F.3d at 54. In both cases, FERC reviewed its authority and the state's and concluded the states were not acting to set wholesale power rates in the sense of the FPA, even if they might indirectly affect them through the interconnected economic nature of the power system. But FERC has said no such thing about the PSC's rule. And it would not, even if asked, because of how squarely that rule aligns with the forbidden practice in *Hughes.*

III. Vandalia's Native Transmission Protection Act ("NTPA") is preempted by federal law under the doctrine of conflict preemption because it poses an obstacle to Congress achieving its full purposes and objectives.

Vandalia's NTPA creates a significant obstacle to FERC's implementation of Order 1000, which is authorized by Congress. *See* 16 U.S.C. § 824e. The NTPA is therefore conflict preempted. Conflict preemption arises "where compliance with both state and federal law is impossible, or where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1599 (2015). There is no conflict preemption "unless clear damage to federal goals would result." *Id*.

In recent decades, [FERC] "has undertaken an ambitious program of market-based reforms" designed to promote a more efficient, cleaner power grid. *Morgan Stanley Capital Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008). Order 1000 is a key part of this still-unfolding program of reforms. One of the major purposes of Order 1000 was to eliminate the federal right of first refusal ("ROFR"), which allowed incumbent public utility transmission providers to hold priority status in choosing to construct new electric transmission lines in their respective service territories. Federal ROFRs were "leading to rates . . . that [were] unjust and unreasonable" in opposition to FERC's explicit congressional purpose to set just and reasonable rates in the electricity market. *See* Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils., 136 FERC 61051, ¶ 256 (2011) (Order 1000). In large part, this was because "it [was] not in the economic self-interest of incumbent[s] to permit new entrants to develop transmission facilities," even if those facilities "would result in a more efficient or cost-effective solution." *Id*. In cooperation with Order 1000, PJM removed any provisions from its Commission jurisdictional tariff that granted a federal ROFR to transmission facilities that are selected in a regional transmission plan for the purposes of cost allocation. Order 1000 at 3, ¶ 7.2.

Afterwards, PJM organized a competitive planning process for new transmission facilities to implement Order 1000, intending to provide non-incumbent transmission developers an opportunity to participate in the regional planning and expansion of the PJM bulk electric system. The Mountaineer Express was approved by PJM for inclusion in the Regional Transmission Expansion Plan, *see* Problem at 3, and thus a federal ROFR was forbidden. Since PJM's approval of the Mountaineer Express, however, the Vandalia PSC has not taken action to approve ACES's application for a Certificate of Public Convenience and Necessity for construction of the Vandalia portions of the Mountaineer Express. The PSC explains this refusal to act by citing the NTPA, saying the statute gives LastEnergy and MAPCo eighteen months to decide whether to exercise their statutory ROFR. Problem at 10.

This is a clear instance of a state law, the NTPA, standing in the way of Congress achieving its full purposes and objectives. By passing the FPA, Congress authorized FERC to set just and reasonable rates in the interstate transmission market, build cost-effective transmission lines, and promote competition in wholesale electricity markets through actions like Order 1000. True, the eighteen-month ROFR does not raise a problem of impossibility preemption, which applies when it is physically impossible to comply with both state and federal laws, because eventually, in theory, ACES or another non-incumbent party could build. However, forcing a third-party transmission provider to wait in uncertainty for eighteen months certainly damages the federal government's goal of increasing competition for the transmission line construction. Further, the Mountaineer Express was approved through PJM's competitive planning process authorized by FERC. The NTPA is preempted by federal law under the doctrine of conflict preemption.

IV. Vandalia's Native Transmission Protection Act ("NTPA") violates the dormant Commerce Clause of the U.S. Constitution because it discriminates against out of state actors, like ACES.

A law, like Vandalia's NTPA, violates the dormant Commerce Clause because it unconstitutionally mandates differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter. *Oregon Waste Sys., Inc. v. Dep't of Env't Quality of Oregon*, 511 U.S. 93, 99 (1994). The NTPA is facially discriminatory, has a discriminatory purpose, and has a discriminatory effect. Any one of these forms of discrimination is sufficient to show a dormant Commerce Clause violation and subject the NTPA to strict scrutiny. Under strict scrutiny, the State of Vandalia must demonstrate that the law in question has a non-protectionist purpose and that there are no less discriminatory means for achieving that purpose. Vandalia is unable to do so. Even if Vandalia succeeds in showing the NTPA is not discriminatory—which is unlikely—the NTPA places an undue burden on interstate commerce that clearly exceeds the local putative benefits of the law and is thus unconstitutional because it violates the dormant Commerce Clause of the U.S. Constitution. *See Pike v. Church*, 397 U.S. 137, 142 (1970).

A. Vandalia's Native Transmission Protection Act is facially discriminatory.

Vandalia's NTPA is facially discriminatory: the statutory language is discriminatory and favors Vandalia's economic interest over economic interests outside of Vandalia. *Oregon Waste Sys.,* 511 U.S. at 99. The law provides that "an incumbent electric transmission owner has the right to construct, own, and maintain an electric transmission line that has been approved for construction in a federally registered planning authority transmission plan and connects to facilities owned by that incumbent electric transmission owner." *Vand. Code* § 12-12.3(d). An incumbent utility is defined as "any public utility that owns, operates, and maintains an electric transmission line in [Vandalia] . . . or any . . . entit[y] engaged in the business of owning, operating, maintaining, or controlling . . . state equipment or facilities for furnishing electric transmission service in Vandalia." *Id*. at § 24.12.2(f). This language clearly favors Vandalia's economic interests at the expense of economic interests outside of Vandalia and is thus facially discriminatory in violation of the dormant Commerce Clause.

Like the Texas ROFR law that was recently struck down by the Fifth Circuit because it violated the dormant Commerce Clause, the Vandalia NTPA prevents entities without a presence in the state from entering portions of the interstate market that pass through Vandalia, which is plainly discriminatory. *See NextEra Energy Capital Holdings, Inc. v. Lake*, 48 F.4th 306, 324 (5th Cir. 2022). The Vandalia PSC tries to differentiate the NTPA from the Texas ROFR by noting that Vandalia's incumbent transmission owners only have eighteen months to exercise their right to build new transmission facilities in the state, while the Texas ROFR sets no time limit for when incumbent transmission owners must exercise their ROFR. While the Texas law is clearly more egregious in its discrimination than Vandalia's NTPA because it bars all non-Texas transmission competitors indefinitely, the eighteen-month time limit in Vandalia is so long that it essentially prevents any new entrants into the market because of the uncertainty and additional risk associated with a proposed transmission project. Because most transmission projects are massive infrastructure undertakings, such a delay hinders any potential developers' ability to secure the necessary financing for such construction, making it less likely the transmission project will be built. In the face of the climate crisis and the urgent need to build clean energy and the transmission lines to connect those energy sources to the grid, such cost increases and delays are unacceptable.

Though the Vandalia PSC will argue, as the Texas Commissioners did, that it is only regulating the construction and operation of transmission lines and facilities within Vandalia, this is plainly false because the Mountaineer Express passes through Pennsylvania and North Carolina, in addition to Vandalia, and will connect to PJM, a regional wholesale electricity market that is subject to FERC—read, federal—oversight. Thus, any regulation that impacts the Mountaineer Express necessarily impacts other states and interstate transmission of electricity—thus impacting interstate commerce. The Vandalia PSC will also attempt to argue that its law more closely resembles Minnesota's ROFR law, which was upheld by the Eighth Circuit. However, the state ROFR in Minnesota's law expires after 90 days, which is significantly less burdensome to non-incumbent actors than Vandalia's eighteen-month ban. Further, the challenge to Minnesota's ROFR revolved around a proposed intrastate—not interstate—transmission line that an out-of-state actor was attempting to develop. Consistent with FERC Order 1000, Minnesota may regulate facilities located wholly within its own service area without dormant Commerce Clause scrutiny. *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 73 (D.C. Cir. 2014).

These key differences—the length of the ROFR holdout and the interstate nature of ACES's challenge to Vandalia's law—mean the NTPA much more closely resembles the unconstitutional Texas ROFR. This Court should follow the Fifth Circuit in striking down the NTPA.

That the two main incumbent utilities in Vandalia, NextEnergy and MAPCo, are incorporated in Ohio rather than Vandalia does not save the NTPA. In finding dormant Commerce Clause violations, the Supreme Court never mentions the place of incorporation as a relevant or controlling fact. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 475 (2005); *Wyoming v. Oklahoma*, 502 U.S. 437, 457-59 (1992); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 352 (1951); *C&A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 387 (1994). Further, most circuits have rejected the idea that a law survives dormant Commerce Clause scrutiny if many of the favored interests are incorporated elsewhere. *NextEra*, 48 F.4th at 323. In analyzing the Texas ROFR, the Fifth Circuit held that the central requirement to being considered an "in-state" presence was a physical presence in the state. *Id.* at 324 (citing *Swedenburg v. Kelly*, 358 F.3d 223, 228 (2d Cir. 2004)). It then held that requiring boots on the ground in-state presence discriminates against interstate commerce. *NextEra*, 48 F.4th at 325. Like the Texas ROFR, the defining feature of the Vandalia NTPA is its local-presence requirement. Only companies that already have transmission lines in the state can build new ones for eighteen months—an eternity in the construction world. Vandalia's NTPA is facially discriminatory.

B. Vandalia's NTPA has a discriminatory purpose.

Like the Texas ROFR, Vandalia's NTPA also has a discriminatory purpose. To undertake a discriminatory purpose analysis, courts must analyze "the specific sequence of events leading up to the challenged decision." *Allstate Ins. Co. v. Abbott*, 495 F.2d 151, 160 (5th Cir. 2007). The senator who introduced the bill in 2014 described the NTPA as a direct response to FERC's

Order 1000 and the elimination of "a federally recognized right of first refusal." Problem at 9. LastEnergy, the largest incumbent transmission line owner in Vandalia, testified in support of the bill and argued it was necessary to keep transmission lines in the hands of allegedly more responsive in-state actors, even though the comparative responsiveness of in-state versus out-of-state actors is wholly unproven. Problem at 9. MAPCo, the other incumbent utility in Vandalia, is on record urging the Vandalia state legislature not "to encourage third-party transmission owners to buy and build transmission service in Vandalia." Problem at 9. Although, again, the evidence here is less egregious than that presented in the parallel Texas ROFR case—where the legislature suddenly enacted a law excluding new entrants after MISO selected NextEra's bid to build the transmission line in question there— there is sufficient evidence here to support a finding that the NTPA was enacted for a discriminatory purpose. At the very least, this legislative history implies the need for a factbound inquiry that should survive a motion to dismiss, suggesting the district court erred in granting Vandalia its motion to dismiss.

C. Vandalia's NTPA has a discriminatory effect.

The section of the Vandalia Code pertaining to the use of electric utility easements shows the discriminatory effect of the NTPA. Section 24-8-2 of the Code provides that electric utility easements may be used by any "public utility" for the location and use of distribution and transmission facilities. Section 24-8-1(d) defines "public utility" as "any person or persons, or associations of persons . . . engaged in any business involving the provision of electricity, gas, water, or any other service or commodity furnished to the public for compensation . . . ." By the plain language of the Code, ACES is a public utility because it is in the business of providing electricity to the public. That ACES is a wholesale provider of electricity rather than a retail provider should not matter for the purposes of this definition, because both wholesale and retail providers of electricity are inextricably connected in serving electricity to the public. PSC's refusal to classify ACES as a public utility—no matter how false or counterintuitive such a refusal is—serves Vandalia's protectionist agenda and should be considered an effect of the NTPA, which codifies Vandalia's illegal protectionism into law. Right of Way Order at 3.

"Incumbent utility," in turn—and consistent with the protectionist NTPA—is defined as "the entity that is the owner of the easement." Although ACES sited several segments of the line to traverse the same rights of way utilized by LastEnergy in Vandalia in an effort to minimize environmental impact of construction and maintenance, LastEnergy took the position that as the "incumbent utility," it had the right to prohibit ACES's use of its rights of way for the Mountaineer Express. They justified this by noting that ACES is not a "public utility" in Vandalia as that term is defined in the Vandalia Code. Like the uncertainty introduced by the eighteen-month ROFR granted under the NTPA, the cost increase and volatility this introduces in ACES's planning process is unacceptable. ACES's Mountaineer Express was approved by FERC as an interstate project and is being subjected to numerous discriminatory hurdles that make the cost of doing business prohibitive in clear violation of the dormant Commerce Clause.

Because the NTPA is discriminatory, it must survive strict scrutiny. While supporting incumbent utilities to boost the local economy may be classified as a legitimate state purpose, the NTPA—the Native Transmission *Protection* Act—has an impermissible protectionist purpose. Vandalia's goals may be achieved through less discriminatory means. For example, the State of Vandalia could help incumbent electricity providers compete more successfully on their own merits—rather than distort the market, as the NTPA currently does—by providing compelling incentives for top talent to join the workforces at these utilities or providing tax benefits to electric companies that embrace incorporation of new, cleaner energy into their transmission system. In its current form, the NTPA does not survive strict scrutiny and should be struck down.

D. Even if there is no discrimination, the NTPA's burden on interstate commerce exceeds the local putative benefits to Vandalia in violation of the dormant Commerce Clause.

Even if the NTPA manages to survive the numerous discriminatory challenges it faces, Vandalia still must show that the local putative benefits of the NTPA outweigh its burden on interstate commerce. *Pike*, 397 U.S. at 142. This is clearly not the case. The NTPA and related protectionist measures like the Right of Way Order are undoubtedly driven by Vandalia's interest in preserving in-state employment opportunities related to electricity production, construction, and transmission. However, the Supreme Court has long held that the Commerce Clause forbids a State to require work to be done within its jurisdiction to promote local employment. *See, e.g.*, *Toomer v. Witsell*, 334 U.S. 385 (1948). The burden of Vandalia's protectionist posture toward out-of-state competition drives up electricity costs for ratepayers in PJM while egregiously delaying the necessary building of cost-effective transmission lines that have been fairly selected by FERC's competitive bidding process. Beyond being competitively selected in a FERC-regulated interstate process, these transmission lines will serve the important goals of aiding the clean energy transition and combating climate change. The burden on interstate commerce is clear and unacceptable. The NTPA and related Right of Way Order must be held unconstitutional and struck down.

CONCLUSION

For the foregoing reasons, the order of the district court granting the Defendants' motion to dismiss should be reversed, and the Vandalia PSC's Capacity Factor Order and ROFR should be vacated and set aside.

<u>Certificate of Service</u>

Pursuant to Official Rule IV, Team Members representing Appalachian Clean Energy Services, 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. 10